No. 20-___

IN THE

Supreme Court of the United States

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.; *et al.*,

Petitioners,

v.

SHARATH CHANDRA, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA; *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sua sponte decision-making marks a departure from the normal adversarial process. For that reason, this Court has limited the federal courts' discretion to resurrect unraised, nonjurisdictional defenses. Ordinarily, the courts have no power to raise such defenses on their own motion. But when a defense implicates comity interests, the courts have a measure of discretion. They can raise a comity-based defense *sua sponte*—but only if the defense was "'inadverten[tly]' overlooked" and, even then, only "when extraordinary circumstances so warrant." *Wood* v. *Milyard*, 566 U.S. 463, 471 (2012).

Like the defenses the Court canvassed in *Wood*, *Younger* abstention is a comity-based, nonjurisdictional doctrine.

The question presented is: whether any standard should guide the courts of appeals' discretion to raise *Younger* abstention *sua sponte*.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; Marcus & Millichap Real Estate Investment Services, Inc.; Alvin Najib Mansour; Gordon Allred; Kevin Najib Mansour; Perry White; and Nenad Zivkovic.

The parent corporation of Petitioner Marcus & Millichap Real Estate Investment Services, Inc. is Marcus & Millichap, Inc. Marcus & Millichap, Inc. is a publicly held company and owns all issued and outstanding shares of stock in petitioner Marcus & Millichap Real Estate Investment Services, Inc.

Petitioner Marcus & Millichap Real Estate Investment Services of Nevada, Inc. is a wholly owned subsidiary of petitioner Marcus & Millichap Real Estate Investment Services, Inc. and an indirect subsidiary of publicly held company Marcus & Millichap, Inc.

Respondents are Sharath Chandra, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada; Devin J. Reiss, in his official capacity as Commissioner of the Nevada Real Estate Commission; Darrel Plummer, in his official capacity as Commissioner of the Nevada Real Estate Commission; Lee R. Gurr, in his official capacity as Commissioner of the Nevada Real Estate Commission; Lee K. Barrett, in his official capacity as Commissioner of the Nevada Real Estate Commission; and Spiridon Filios, in his official capacity as Commissioner of the Nevada Real Estate Commission.*

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* Some previously serving officers were defendants in their official capacity in the lower courts. Wayne Capurro, Neil Schwartz, Sherrie Cartinella, and Norma Jean Opatik each served as Commissioners of the Nevada Real Estate Commission. Joseph Decker served as Administrator of the Nevada Real Estate Division.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States District Court (D. Nev.):

Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; et al. v. *Chandra; et al.*, No. 2:16-cv-01299-RFB-GWF (July 9, 2019)

United States Court of Appeals (9th Cir.):

Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; et al. v. *Chandra; et al.*, No. 17-17423 (Jan. 26, 2018) (order noting voluntary dismissal of appeal from order denying preliminary injunction)

Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; et al. v. *Chandra; et al.*, No. 19-16446 (Aug. 7, 2020)

Other proceedings that are not directly related to this petition but that involve many of the same parties are:

United States District Court (D. Nev.):

Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; et al. v. *Reiss; et al.*, No. 2:18-cv-02409-RFB-VCF (Oct. 11, 2020) (order noting stipulation of dismissal)

Nevada District Court (First Judicial District for Carson City):

Alvin Mansour; et al. v. *State of Nevada ex rel. Nevada Real Estate Comm'n; et al.*, No. 18OC000411B (consolidated)

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Petitioners Marcus & Millichap Real Estate Investment Services of Nevada, Inc.; Marcus & Millichap Real Estate Investment Services, Inc.; Alvin Najib Mansour; Gordon Allred; Kevin Najib Mansour; Perry White; and Nenad Zivkovic respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is unpublished, but the decision is available at 822 F. App'x 597. The opinion of the district court (App. 11a-32a) is reported at 400 F. Supp. 3d 1074.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2020. A petition for rehearing was denied on September 21, 2020. App. 33a-34a. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying a timely petition for rehearing. Under that order, the deadline for filing a petition for a writ of certiorari is February 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This appeal involves the court of appeals' *sua sponte* invocation of the *Younger* abstention doctrine. *See Younger* v. *Harris*, 401 U.S. 37 (1971). It involves no constitutional provisions, statutes, or regulations.

INTRODUCTION

This case presents a straightforward but important question: should any standard govern the courts of appeals' discretion to raise *Younger* abstention *sua sponte*? The answer is yes. *Younger* abstention is a comity-based, nonjurisdictional defense. And—as the Court has held in similar contexts—the federal courts "do[] not have *carte blanche*" to raise comity-based, nonjurisdictional defenses *sua sponte*. *Wood* v. *Milyard*, 566 U.S. 463, 472 (2012). Rather, the courts may resurrect such a defense only when "'inadverten[tly]' overlooked" by the party to be benefited—and even then, only "when extraordinary circumstances so warrant." *Id.* at 471 (citation omitted). If the federal courts are to depart from the principle of party presentation, in other words, they must have a compelling reason for doing so.

This standard extends logically to the courts' discretion to introduce *Younger* abstention. In practice, however, the courts of appeals apply no standard at all; when opting to raise *Younger* abstention *sua sponte*, the courts exercise unconstrained and unexplained discretion. In this case, for example, the government (Nevada's real-estate regulatory agency) showed itself aware of the *Younger* doctrine throughout three years of district-court litigation. Having won on the merits, though, the government ignored *Younger* on appeal. It did not cross-appeal the district court's decision not to abstain. It did not mention *Younger* in its brief. And when pressed at oral argument, it suggested that the omission was deliberate: "I think that we just decided that we had a winning case."

Even so, the court of appeals "prompted" the government to argue for *Younger* abstention (App. 6a) and disposed of the case on that ground. In doing so, the court offered no reason for its decision to raise *Younger sua sponte*. It did not ask whether "extraordinary circumstances" justified its doing so. *Wood*, 566 U.S. at 471. It gave no sign that its exercise of discretion was guided by any principles at all. Rather, the court claimed the power to "raise the issue of *Younger* abstention sua sponte on appeal," and it deployed that power without further inquiry.

In this way, the decision below exemplifies a broader phenomenon: courts of appeals' exercising unguided discretion in raising *Younger* abstention on their own motion. The result is arbitrariness made manifest. "[L]imiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). Across several circuits, however, a subset of plaintiffs find themselves ejected from federal court on *Younger* grounds—*sua sponte* and seemingly at random. In all these cases, the federal courts have Article III jurisdiction. With *Younger* unargued, the federal courts can properly exercise that jurisdiction. Yet appellate panels invoke *Younger* unilaterally, leaving litigants unable to proceed in federal court. Typically, the courts exercising this extraordinary power give no reason for doing so; for the litigants before them, access to the federal courts depends on luck of the draw.

This Court's intervention is needed. The Court's "interest in supervising the administration of the judicial system" is "significant." *Hollingsworth* v. *Perry*, 558 U.S. 183, 196 (2010) (per curiam). And few questions are more

demanding of uniformity than whether and when an Article III court can *sua sponte* abdicate its duty to decide cases properly before it. This is thus the rare case that warrants the Court's review even absent a visible circuit conflict; worse than conflicting standards are no standards at all. Indeed, it is precisely because the courts of appeals have taken to exercising standardless, unexplained discretion that a visible circuit split is unlikely to ripen. The petition should be granted so that this Court can clarify that the lower courts' discretion to raise *Younger* abstention *sua sponte* is not "*carte blanche* to depart from the principle of party presentation." *Wood*, 566 U.S. at 472.

STATEMENT

1. Petitioner Marcus & Millichap Real Estate Investment Services, Inc. is one of the largest commercial real-estate brokerage companies in the nation. Its work is inherently national, with the company catering to clients with complex, interstate brokerage needs.

Some States' brokerage-license laws accommodate this sort of practice. But Nevada—where this case arises—presents challenges. Out-of-state brokers can apply for a Nevada license, for example, but they must maintain a physical presence within Nevada's borders. Nev. Rev. Stat. § 645.550(1), (3). An alternative in some States is for out-of-staters to "cooperate" with local brokers. In Nevada, though, the cooperative-brokering law is similarly hostile to outsiders. The Nevada legislature has long authorized the State's real-estate regulators "to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada brokers." *Id.* § 645.605. But as administered, cooperative brokering is legal only for a narrow slice of

work. *See* Nev. Admin. Code § 645.185(11). The goal—one state official wrote in 2014—is to prevent out-of-staters from "taking business away from our Nevada licensees." Pet. C.A. E.R. 690.

In April and May 2016, an investigator for the Nevada Real Estate Division sent letters to the individual petitioners (all agents of Marcus & Millichap). The letters advised that the agency had opened investigations into their listing properties for sale in Nevada. Soon after, the agency ordered three of the individual petitioners to cease and desist activities that "require[] a license . . . from the State of Nevada Real Estate Division."

2. In June 2016, the individual petitioners—along with Marcus & Millichap Real Estate Investment Services, Inc., and its Nevada subsidiary—filed this case in federal court. They asserted, among other claims, that Nevada's restrictions on cooperative brokering violate the Dormant Commerce Clause and the First Amendment.

In the motion to dismiss that followed, the government invoked *Younger* abstention. The government acknowledged that it had yet to "fil[e] a formal complaint" against any of petitioners. But it contended that the district court should abstain nonetheless. Mot. to Dismiss, D. Ct. Doc. 19, at 6 (Aug. 12, 2016).

The government waited nearly another year before launching formal administrative proceedings against petitioners. (The government's first administrative complaint was filed in late April 2017; the rest were filed that July.) By then, petitioners' federal case had been active for over ten months. The parties had briefed a motion to dismiss.

The district court had held argument on that motion. The court had denied the government's request for *Younger* abstention. Mar. 22, 2017 Tr., D. Ct. Doc. 156, at 34 ("The Court finds that currently based upon the record before me at the motion to dismiss stage that there is no ongoing proceeding where a federal issue could be adjudicated."). The court had dismissed petitioners' First Amendment claim on the merits. The court had held that petitioners "stated a plausible claim under the Dormant Commerce Clause." *Id.* at 35. And discovery was underway.

District-court litigation proceeded for another two years. Throughout, the government showed itself aware of the *Younger* doctrine. The government's summary-judgment motion, for example, urged the district court to "revisit the arguments in the Defendants' Motion to Dismiss . . . and apply *Younger* Abstention here." Defs.' Mot. Summ. J., D. Ct. Doc. 72, at 18 (Aug. 25, 2017). Later, the government purported to incorporate that argument in a renewed motion. Defs.' Renewed Mot. Summ. J., D. Ct. Doc. 135, at 7 (Mar. 6, 2018).

Ultimately, the district court did not abstain under *Younger*; it ruled for the government on the merits. The court held that the individual plaintiffs (though not the entities) had standing to challenge at least some of Nevada's licensure and cooperative-broker laws. App. 24a-26a. But the court concluded that "the Nevada licensing scheme as applied to out-of-state brokers does not violate the Dormant Commerce Clause." App. 30a.

3. Petitioners appealed, contesting the district court's conclusions on standing and its judgment against them on the merits. With a victory in hand, the government no longer argued for *Younger* abstention. The government

did not cross-appeal the district court's decision not to abstain. Nor did the government raise *Younger* abstention in its brief; it asked instead that the district court's judgment be affirmed. *See* Resp. C.A. Br. 58-59.

Two days before oral argument, the court of appeals directed the parties to "be prepared to discuss at oral argument the applicability of *Younger* abstention." App. 10a. And at argument, the government suggested that its choice to forgo *Younger* on appeal had been a conscious one:

> [Court]: Why didn't you cross-appeal . . . ?
>
> [Government]: Well, I was not on the case at that time, but I think that we just decided that we had a winning case. That's the best I can answer.

Oral Arg. 24:04-24:18 (June 3, 2020), https://tinyurl.com/yxmyrqg8.

Even so, the court of appeals ordered supplemental briefing on *Younger*. App. 8a-9a. It then disposed of the appeal on that ground. The court reasoned that it "may raise the issue of *Younger* abstention sua sponte on appeal." App. 4a; *see also* App. 4a ("[T]he court may raise abstention of its own accord at any stage of the litigation." (quoting *Citizens for Free Speech, LLC* v. *County of Alameda*, 953 F.3d 655, 658 (9th Cir. 2020))). The court acknowledged no constraint on its discretion to introduce *Younger*. The court also was "unpersuaded" that the government had "abandoned" *Younger*, observing that the government had advocated for it "when prompted" at oral argument and in its later supplemental brief. App. 5a-6a.

Turning to the substance of the *Younger* inquiry, the court reasoned that the government's "formal administrative complaints" triggered abstention. App. 5a. Ordinarily, the court acknowledged, a state enforcement proceeding can justify *Younger* abstention only if initiated "before the federal case ha[s] 'moved beyond an "embryonic stage."'" App. 5a; *see generally Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). And here, Nevada's administrative complaints trailed petitioners' federal case by nearly a year. Still, the court of appeals held, abstention was warranted. App. 5a ("Nevada filed formal administrative complaints against the Individual Plaintiffs before the district court ruled on any discovery motions and before Plaintiffs had even filed their motion for a preliminary injunction."). The court thus "decline[d] to address the merits," vacated the district-court judgment, and remanded for the lower court to dismiss the case. App. 7a.

4. Petitioners filed a petition for rehearing, which the court denied. App. 33a-34a.

REASONS FOR GRANTING THE PETITION

Few questions are more demanding of uniform, transparent resolution than whether and when the federal courts can *sua sponte* abdicate their jurisdiction. Yet the decision below is the latest example of a court of appeals' exercising unconstrained discretion to raise *Younger* abstention *sua sponte* and deny litigants access to a federal forum. Such an extraordinary step demands an extraordinary justification; the federal courts need a good reason to raise defenses on their own motion, and that is doubly true when a court intends to opt out of a case over which it properly has jurisdiction. In decisions

like the one below, however, the courts of appeals invoke *Younger* seemingly at random, giving no reasons and acknowledging no standard to guide their discretion. The resulting patchwork of decisions contravenes this Court's precedent and "the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

The Court's intervention is warranted to address this recurring problem; no litigant's access to federal court should depend on chance. This case is an excellent vehicle for addressing the question whether any standard constrains the courts' discretion to raise *Younger* abstention *sua sponte*, and the petition for a writ of certiorari should be granted.

A. The Ninth Circuit's practice of raising *Younger* abstention *sua sponte* conflicts with this Court's precedent.

The decision below adds to a line of circuit precedent in which the courts of appeals have claimed a blank check to raise *Younger* abstention *sua sponte*. In almost every such case, the courts of appeals recognize no standards guiding their exercise of discretion. The result—arbitrary, unprompted decision-making—is at odds with the rule that the federal courts "do[] not have *carte blanche* to depart from the principle of party presentation," but can justify doing so only in narrow, "exceptional" cases. *Wood* v. *Milyard*, 566 U.S. 463, 471, 472 (2012).

1. Under this Court's precedent, the federal courts enjoy limited discretion to raise comity-based defenses sua sponte.

Our nation's "adversarial system of adjudication" rests on "the principle of party presentation." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Simply, the federal courts "rely on the parties to frame the issues for decision," with judges assigned "the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008). More than "just a prudential rule of convenience," this principle "distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment). It aids the courts' truth-seeking function. And by establishing the courts as "essentially passive instruments of government," it sets judges apart as impartial, detached decisionmakers. *Sineneng-Smith*, 140 S. Ct. at 1579 (citation omitted); *see also* Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* 2 (1988) ("Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society at large that the judicial system is trustworthy.").

Given these considerations, this Court has carefully defined the circumstances in which the federal courts may "depart from the principle of party presentation" and decide issues the parties have failed to raise or preserve. *Wood*, 566 U.S. at 472. Besides subject-matter jurisdiction—which the courts have a duty to interrogate—the courts have limited power to resurrect defenses on a party's behalf. In fact, the general rule is that the courts

have no discretion at all to raise nonjurisdictional defenses on their own motion. *See id.* at 470.

At the same time, there is a "modest exception" for defenses "founded on concerns broader than those of the parties"—for example, ones implicating "comity interest[s]." *Id.* at 470, 471. The federal courts have a measure of discretion to raise these defenses *sua sponte*. But that discretion is limited. The courts cannot, for instance, resurrect even a comity-based defense if the party to be benefited has "intentional[ly] relinquish[ed]" it. *Id.* at 474 (citation omitted). Rather, the courts have discretion to raise such a defense only when a litigant has merely "'inadverten[tly]' overlooked" it. *See id.* at 471 (quoting *Granberry* v. *Greer*, 481 U.S. 129, 134 (1987)). Even then, the courts do not have "*carte blanche*" (*id.* at 472); they may raise the forfeited defense *sua sponte* only "when extraordinary circumstances so warrant." *See id.* at 471 (citing *Day* v. *McDonough*, 547 U.S. 198, 201 (2006)).

Appeals courts, moreover, should be especially circumspect. For "[w]hen a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court's labor is discounted . . . ." *Id.* at 474. Thus, "[a]lthough a court of appeals has discretion to address, *sua sponte*," certain comity-based defenses, this Court has admonished that they "should reserve that authority for use in exceptional cases." *Id.* at 473.

2. The courts of appeals exercise unconstrained discretion in raising Younger *abstention* sua sponte.

a. When it comes to raising *Younger* abstention *sua sponte*, the courts of appeals do not apply anything resembling the principles set forth above. Here, for example, the court of appeals did not ask whether the government had intentionally relinquished *Younger* on appeal. Nor did the court inquire whether extraordinary circumstances entitled it to raise *Younger* on its own motion. Rather, the court exercised its discretion to raise *Younger* with no sign that it viewed that discretion as subject to any constraint.

That was error; the principles synthesized in *Wood* apply with equal force to *sua sponte Younger* abstention. Much like the habeas defenses canvassed in *Wood*, the *Younger* doctrine "rest[s] primarily on . . . comity." *See New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 364 (1989). It counsels that the federal courts should abstain from exercising their jurisdiction when doing so would interfere with an ongoing state criminal or quasi-criminal case. *See Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 78, 81 (2013); *see also id.* at 78 (cataloguing other proceedings that can implicate *Younger*). And—again like the doctrines in *Wood*—*Younger* abstention is not jurisdictional. *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986). Rather, it is "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Ohio Bureau of Emp. Servs.* v. *Hodory*, 431 U.S. 471, 479-80 (1977). So, once more like the doctrines in *Wood*, *Younger* abstention can be waived, if the government intentionally

abandons it. *See id.* Or it can be forfeited, if the government simply fails to raise it. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 381 n.1 (1992).

Given these similarities between *Younger* and other comity-based defenses, the principles set out in *Wood* logically extend to the courts' power to raise *Younger sua sponte.* Because *Younger* abstention implicates comity values, the courts of appeals certainly have discretion to consider raising the doctrine when the government has "'inadverten[tly]' overlooked" it. *See Wood*, 566 U.S. at 471. But "in a system of laws discretion is rarely without limits." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016) (citation omitted). And for all the reasons expressed in *Wood*, the courts' power to raise *Younger sua sponte* is far from a blank check; it is "reserve[d] . . . for use in exceptional cases." 566 U.S. at 473.

If anything, that constraint applies with special force when it comes to *Younger.* For when the government "has not argued for abstention," the Court has counseled that "the federal-state comity considerations underlying *Younger* are . . . not implicated" at all. *Morales*, 504 U.S. at 381 n.1; *cf. Kendall-Jackson Winery, Ltd.* v. *Branson*, 212 F.3d 995, 997 (7th Cir. 2000) (Easterbrook, J.) ("Abstention is designed for the states' benefit, and if a state is content with the outcome of federal litigation . . . then abstention serves no point."). In opting to raise *Younger* on its own motion—without exercising its discretion in any considered way—the court below thus did precisely what this Court warned against in *Wood*: it claimed "*carte blanche* to depart from the principle of party presentation." *See* 566 U.S. at 472.

b. As it has in earlier cases, the Ninth Circuit traced its blank-check approach to this Court's decision in *Bellotti* v. *Baird*, 428 U.S. 132 (1976). *See* App. 4a. At footnote 10 of *Bellotti*, the Court remarked that "it would appear that abstention may be raised by the court *sua sponte*." 428 U.S. at 143 n.10. And the courts of appeals have long seized on that sentence as blessing unconstrained discretion to introduce *Younger* on the government's behalf. *See generally* E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims for Monetary Damages and Raising* Younger *Abstention Sua Sponte on Appeal*, 81 N.D. L. Rev. 475, 490 (2005) ("In almost all instances, their support for this proposition can be traced to one primary source, a footnote in *Bellotti* v. *Baird* . . . .").

That reliance is misplaced. Far from sanctioning unchecked discretion to raise *Younger* abstention, *Bellotti* did not involve *Younger* abstention at all. Rather, it involved *Pullman* abstention, and the difference is a material one. *Younger* abstention rests on "the notion of 'comity,' that is, a proper respect for state functions." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). The *Pullman* doctrine, by contrast, exists "for the protection of the federal courts themselves." *Sequoia Books, Inc.* v. *McDonald*, 725 F.2d 1091, 1095 (7th Cir.), *cert. denied*, 469 U.S. 817 (1984). Simplifying slightly, it lets the federal courts temporarily stay proceedings while state courts resolve questions of state law, much like modern-day certification. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-76 (1997). In this way, *Pullman* (and the courts' power to invoke it) differs fundamentally from *Younger* abstention—a defense that "contemplates the outright dismissal of the federal suit." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

The lower courts' freewheeling approach to raising *Younger* abstention violates this Court's precedent on *sua sponte* decision-making and the precept that "discretion must be exercised under the relevant standard[s] prescribed by this Court." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). The Court should thus grant review to make clear that the principles synthesized in *Wood* v. *Milyard* apply equally to the courts' discretion to raise *Younger* abstention.

B. The prevailing approach in the courts of appeals has led to a variety of conflicting outcomes and presents an important question of federal law.

The Ninth Circuit is not unique in exercising unconstrained discretion to raise *Younger sua sponte*. Across the nation, the decision whether and when to introduce *Younger* is guided by no principles and justified by no reasoning. Materially identical litigants experience vastly different treatment based on no more than the make-up of their appellate panels. This lack of reasoned decision-making—and on a matter as important as access to the federal courts—warrants this Court's review.

1. The courts of appeals' practice of raising Younger *abstention* sua sponte *leads to arbitrary results.*

The decision below exemplifies a broader trend: courts of appeals' exercising unexplained and unguided discretion in raising *Younger* abstention on their own motion. The result is arbitrariness on a national scale.

In cases materially identical to this one, courts of appeals have looked past unraised *Younger* arguments and proceeded to the merits. In a recent Fifth Circuit case, for example, the government raised *Younger* in the district court but "did not include, as an issue on appeal, anything regarding *Younger*." *Seals* v. *McBee*, 907 F.3d 885, 886 n.* (2018) (per curiam). The panel thus remarked that the "issue is not properly before us, and we do not address it." *Id.*; *see also id.* at 890 n.7 (Jones, J., dissenting from denial of reh'g en banc) (objecting that the government had not "expressly" waived *Younger*). In a similar First Circuit case, the government raised *Younger* abstention at the district-court level but failed to "press[] the abstention question" on appeal. *Shannon* v. *Telco Commc'ns, Inc.*, 824 F.2d 150, 151 (1987) (Breyer, J.). Here, too, the court of appeals "proceed[ed] to the merits." *Id.* at 152.

Likewise in the Third Circuit, where government defendants raised *Younger* abstention in the district court, won on the merits, and (as here) lost interest in abstention in the ensuing appeal. *Winston ex rel. Winston* v. *Children & Youth Servs. of Delaware County*, 948 F.2d 1380, 1385 (1991), *cert. denied*, 504 U.S. 956 (1992). Given that posture, the court declined to resurrect *Younger* on its own motion. "[B]ecause the [district] court had decided the relevant issues favorably to defendants," the court observed, "it is perfectly understandable why they would not have challenged the federal court's right to maintain the action." *Id.* But the Third Circuit's "request that the parties address the issue in supplemental briefs and the defendants' belated attempt to claim abstention without offering any reason for failure to preserve the issue cannot excuse the defendants from the effect of their failure to preserve the issue." *Id.* The court thus saw "no reason

to deviate from the rule that an issue that has not been preserved in the briefs will not be addressed, particularly when the district court has decided the issues on the merits after a full trial." *Id.*; *see generally id.* at 1397-98 (Garth, J., dissenting) (reasoning that the court had the power to raise *Younger* and concluding, without elaboration, that the court should have exercised that power).

Other cases turn out similarly.[1] Others—on materially identical facts—turn out differently. The Ninth Circuit, of course, raises *Younger* abstention *sua sponte*, and in doing so (as here), the court typically offers no reasons behind its exercise of discretion. App. 4a.[2] The Sixth Circuit has proceeded similarly, *Louisville Country Club* v. *Watts*, 178 F.3d 1295 (table), *cert. denied*, 528 U.S. 1061 (1999), as has

1. *E.g.*, *Word of Faith World Outreach Ctr. Church, Inc.* v. *Morales*, 986 F.2d 962, 967 (5th Cir.) ("The Attorney General does not appeal the district court's refusal to abstain on *Younger* grounds, and accordingly we are foreclosed from reviewing it."), *cert. denied*, 510 U.S. 823 (1993); *Kyricopoulos* v. *Town of Orleans*, 967 F.2d 14, 16 (1st Cir. 1992) (per curiam) (noting "we need not address the issue" of *Younger* because the government failed to raise it); *Universal Amusement Co.* v. *Vance*, 587 F.2d 159, 163 & n.6 (5th Cir. 1978) (en banc) (noting that the district court denied *Younger* abstention, the government "did not raise the question" on appeal, and "th[e] issue, being nonjurisdictional, is thus not before this court"), *aff'd*, 445 U.S. 308 (1980) (per curiam).

2. *See also Hoye* v. *City of Oakland*, 653 F.3d 835, 843 n.5 (9th Cir. 2011); *Wasson* v. *Riverside County*, 234 F. App'x 529, 530 (9th Cir. 2007); *Perry* v. *Clark County Child Protective Servs.*, 84 F. App'x 947, 948 (9th Cir. 2003); *Columbia Basin Apartment Ass'n* v. *City of Pasco*, 268 F.3d 791, 799-800 (9th Cir. 2001); *H.C. ex rel. Gordon* v. *Koppel*, 203 F.3d 610, 613 (9th Cir. 2000); *Tamberella* v. *Nev. Empl. Sec. Div.*, 210 F.3d 385 (9th Cir.) (table), *cert. denied*, 531 U.S. 880 (2000).

the Tenth, *Morrow* v. *Winslow*, 94 F.3d 1386, 1391 (1996), *cert. denied*, 520 U.S. 1143 (1997); *see also Kingston* v. *Utah County*, 161 F.3d 17 (10th Cir. 1998) (table) (stating that the "general rule" disfavoring resurrecting forfeited arguments "does not apply here . . . because courts may address application of the *Younger* doctrine *sua sponte*").

So, too, have the Third Circuit and the Fifth. As noted above (pp. 15-17), those courts have at times explicitly declined to raise *Younger sua sponte*. Other times, however, they do the opposite—with no explanation for why resurrecting *Younger* is warranted in some cases but not others. *O'Neill* v. *City of Phila.*, 32 F.3d 785, 786 n.1 (3d Cir. 1994) (Garth, J.) ("Even though the question of *Younger* abstention was not raised by the parties on appeal, we may consider it *sua sponte*."), *cert. denied*, 514 U.S. 1015 (1995); *see also Lawrence* v. *McCarthy*, 344 F.3d 467, 470 (5th Cir. 2003).

Granted, discretion means that courts might come out differently when faced with similar circumstances. *Cf. United States* v. *Arvizu*, 534 U.S. 266, 275 (2002). But "[d]iscretion is not whim." *Martin*, 546 U.S. at 139. And when it comes to *sua sponte Younger* abstention, the patchwork of appellate decisions signals not discretion, but caprice. In none of the cases detailed above, for example, did the courts of appeals identify "extraordinary circumstances" justifying their raising *Younger* on the government's behalf. *See Wood*, 566 U.S. at 471; *see also Granberry*, 481 U.S. at 134-35. Nor did the courts acknowledge "the trial court's processes and time investment"—a consideration this Court has singled out as one "appellate courts should not overlook." *Wood*, 566 U.S. at 473. Nor did the courts acknowledge that "federal-state comity

considerations" are at their nadir when the government "has not argued for abstention." *Morales*, 504 U.S. at 381 n.1. Nor did the courts acknowledge the countervailing interests on the plaintiffs' side of the caption. In short, the prevailing view among the courts of appeals appears to be that their power to raise *Younger sua sponte* is guided by no principles at all.

2. On questions of access to the federal courts, uniformity and transparency are essential.

The record of decisions above confirms that the question presented is of peculiarly national importance. Access to the federal courts is a matter of nationwide significance, and few questions are more demanding of uniformity than whether and when an Article III tribunal can abdicate its "virtually unflagging" duty "to hear and decide cases within its jurisdiction." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc'ns, Inc.*, 571 U.S. at 77) (internal quotation marks omitted). That is why this Court has long stressed the "strict duty" of the federal courts "to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). That is also why the Court has taken such pains to "carefully define[]" when *Younger* abstention may apply. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359. On this front, it is essential that standards be clear and be impartially applied.

The *sua sponte* decision-making on display in cases like this one thus raises concerns of the highest order. As matters stand, a seemingly random subset of plaintiffs find themselves ejected from federal court. The courts have

jurisdiction over their cases. With *Younger* unargued, this Court's precedent confirms that the courts can properly exercise that jurisdiction. *See Morales*, 504 U.S. at 381 n.1. Yet—with the predictability of a roulette wheel—appellate panels in the Ninth Circuit and elsewhere *sua sponte* opt out. If petitioners here had appeared before the Fifth Circuit panel from *Seals*, for example, or the Third Circuit panel from *Winston* or the First Circuit panel from *Shannon*, their appeal would have been decided on the merits. Through luck of the draw, it was dismissed instead. That exercise of "unconstrained discretion" (*Kirtsaeng*, 136 S. Ct. at 1986) is not unique to the Ninth Circuit, and it calls for correction.

3. The question presented should be decided now.

Further percolation would not aid the decisional process.

First, many courts of appeals to have embraced a blank-check approach to raising *Younger* abstention have done so on the strength of *Bellotti*'s footnote 10. In this case, for example, the Ninth Circuit traced its power directly to *Bellotti*. App. 4a. Other courts have done so as well. *See supra* p. 14; *see also Louisville Country Club*, 178 F.3d at 1295; *Morrow*, 94 F.3d at 1391; *O'Neill*, 32 F.3d at 786 n.1. Because many courts of appeals view *Bellotti* as having already blessed their exercising unchecked discretion, only this Court can correct that misconception.

Second, the courts of appeals' practice of exercising unconstrained discretion means a mature, visible circuit split is unlikely to develop. Panels that identify—but opt

not to raise—unnoticed *Younger* defenses will rarely have cause to explain why they chose to ignore an issue no one briefed. And as discussed, those panels that do raise *Younger sua sponte* apply no articulated standard and give no explanation. *See generally* Estrada, *supra*, at 490 ("The court of appeals decisions stating that sua sponte implementation of *Younger* on appeal is permissible generally do so with little discussion."). Indeed, it is precisely for that reason that this Court's intervention is warranted. Worse than conflicting standards is no standard at all, and no plaintiff's access to an Article III court should turn on "'whim' or predilection." *See Kirtsaeng*, 136 S. Ct. at 1986.

C. This case is an appropriate vehicle for addressing the question presented.

This case cleanly presents the question whether courts of appeals' power to raise *Younger* abstention *sua sponte* is subject to constraints; consistent with Ninth Circuit precedent, the court of appeals exercised unconstrained discretion in disposing of the case on *Younger* grounds. App. 4a. This case also highlights the problems with the freewheeling approach the lower courts have favored. Had the court of appeals exercised considered discretion, it would not have discerned a basis for resurrecting the *Younger* doctrine.

First, the record suggests that the government's initial choice to forgo *Younger* "did not stem from an 'inadvertent error.'" *Wood*, 566 U.S. at 474. The government cited *Younger* abstention throughout three years of district-court proceedings. Having won in that forum, though, it opted to defend its victory rather than reas-

sert *Younger* on appeal; when pressed at oral argument, in fact, the government suggested just that. *See supra* p. 7 ("I think that we just decided that we had a winning case."). And the government had good reasons to jettison *Younger*. Not only had the government won below, but one of its standing arguments in the district court had conflicted with *Younger*.[3] On top of that, *Younger* almost certainly did not apply. The doctrine is implicated only if a state enforcement proceeding begins "before any proceedings of substance on the merits have taken place in the federal court." *Nationwide Biweekly Admin., Inc.* v. *Owen*, 873 F.3d 716, 728 (9th Cir. 2017) (quoting *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975)), *cert. denied*, 138 S. Ct. 1698 (2018). And here, Nevada filed its first administrative complaint against petitioners after nearly a year of active federal litigation. *See supra* pp. 5-6.

Second—and even if the government's actions had not amounted to outright waiver—the court of appeals would have been hard pressed to identify "extraordinary circumstances" warranting its raising *Younger sua sponte*. *See Wood*, 566 U.S. at 471. As it was, the court did not even try. The court did not consider that the district court had devoted three years of resources to deciding petitioners' claims on the merits. The court did not consider that the trial judge had held seven hearings and, over the course of the litigation, had reviewed scores of docket entries and hundreds of pages of briefing. *See id.* at 474 ("When

3. *Compare* Defs.' Mot. Summ. J., D. Ct. Doc. 72, at 7 (Aug. 25, 2017) (contending that a judgment for petitioners "will not affect the administrative complaints" against them), *with Gilbertson* v. *Albright*, 381 F.3d 965, 976 (9th Cir. 2004) (en banc) ("[I]nterference with state proceedings is at the core of the comity concern that animates *Younger*.").

a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court's labor is discounted . . . ."); *accord Hill* v. *Snyder*, 878 F.3d 193, 206 (6th Cir. 2017) ("To jump ship now would be to exhibit a callous disregard for the meaningful litigation that has already occurred in the federal court system."). The court did not consider that the government's failure to argue for abstention diluted (or even eliminated) "the federal-state comity considerations underlying *Younger*." *See Morales*, 504 U.S. at 381 n.1. In sum, the court of appeals did precisely what this Court has counseled against.

Third, a thoughtful exercise of discretion would have accounted for the broader costs of withdrawing the federal courts from a controversy over which Congress has vested them with jurisdiction. When meritorious, Section 1983 actions benefit not just the plaintiffs, but "society at large." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989). So when the government itself has not raised *Younger*, the federalism concerns animating the doctrine may often disfavor its application. Federalism, after all, is a two-way street. It is "more than an exercise in setting the boundary between different institutions of government for their own integrity"; it exists to "secure[] the freedom of the individual." *Bond* v. *United States*, 564 U.S. 211, 221 (2011); *cf. Younger*, 401 U.S. at 44 ("The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts.").

At base, the availability of discretion is not reason enough to exercise it. Rather, "[a]s is always the case when an issue is committed to judicial discretion, [a] judge's

decision must be supported by a circumstance that has relevance to the issue at hand." *Martin*, 546 U.S. at 141 (citation omitted). When it comes to *Younger* abstention, many courts of appeals have lost sight of that principle and exercise unconstrained discretion to renounce their jurisdiction *sua sponte*. This Court should grant review and correct this recurring error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 18, 2021

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-16446

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.; *et al.*,

Plaintiffs-Appellants,

v.

SHARATH CHANDRA, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada; *et al.*,

Defendants-Appellees.

D.C. No. 2:16-cv-01299-RFB-GWF
Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted June 3, 2020
Seattle, Washington

MEMORANDUM*
Filed Aug. 7, 2020

Before: GOULD, BEA, and MURGUIA, Circuit Judges.

Marcus & Millichap Real Estate Investment Services of Nevada, Inc. and Marcus & Millichap Real Estate Investment Services, Inc. (together, "M&M"), as well as individual real estate brokers affiliated with M&M (the "Individual Plaintiffs"), (collectively, "Plaintiffs") appeal the district court's order granting summary judgement in favor of the Administrator of the Nevada Real Estate Division and individual Commissioners of the Nevada Real Estate Commission (collectively, "State Defendants" or "Nevada"). We have jurisdiction under 28 U.S.C. § 1291, and we reverse, vacate, and remand with instructions to dismiss.

Because the parties are familiar with the facts, we recite them briefly and only as necessary to resolve the issues on appeal. Nevada initiated disciplinary proceedings against the Individual Plaintiffs for conducting or assisting others in conducting real estate business in the State without the required real estate license or certificate. Plaintiffs in turn sued the State Defendants under 42 U.S.C. § 1983, alleging that certain Nevada statutes and regulations governing real estate licenses and cooperative certificates violate the Dormant Commerce Clause of the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

United States Constitution. Plaintiffs sought declaratory and injunctive relief, including a request that the district court enjoin the state disciplinary proceedings and their resulting penalties.

At various stages of this litigation, Nevada argued that the district court should abstain pursuant to *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny. Ultimately, the district court did not abstain and it granted summary judgment in favor of Nevada, concluding that: (1) the Individual Plaintiffs have standing to challenge section 645.185(11) of the Nevada Administrative Code; (2) none of the Plaintiffs have standing to challenge section 645.550 of the Nevada Revised Statutes; and (3) section 645.185(11) of the Nevada Administrative Code does not violate the Dormant Commerce Clause. Plaintiffs timely appealed.

On appeal, Nevada noted in its briefing that the disciplinary proceedings were pending before the state court on a petition for judicial review. We therefore instructed the parties to address the applicability of *Younger* abstention during oral argument. Following argument, we then ordered supplemental briefing on whether *Younger* abstention is merited in this case. At oral argument and in their supplemental briefing, the parties took opposing positions regarding abstention, with Nevada arguing that the elements of *Younger* abstention are met.

Under *Younger,* federal courts "must abstain in deference to state civil enforcement proceedings that: '(1) are ongoing, (2) are quasi-criminal enforcement actions

or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges.'" *Nationwide Biweekly Admin., Inc. v. Owen,* 873 F.3d 716, 727-28 (9th Cir. 2017) (quoting *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754, 759 (9th Cir. 2014)). "We review de novo a district court's determination as to whether *Younger* abstention is warranted," *Vasquez v. Rackauckas,* 734 F.3d 1025, 1035 (9th Cir. 2013), and may raise the issue of *Younger* abstention sua sponte on appeal, *see Citizens for Free Speech, LLC v. Cnty. of Alameda,* 953 F.3d 655, 658 (9th Cir. 2020) ("[T]he court may raise abstention of its own accord at any stage of the litigation." (citing *Bellotti v. Baird,* 428 U.S. 132, 143 n.10 (1976))); *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 799 (9th Cir. 2001) ("The *Younger* doctrine may be raised sua sponte at any time in the appellate process." (citing *H.C. ex rel. Gordon v. Koppel,* 203 F.3d 610, 613 (9th Cir. 2000))).

Here, Plaintiffs do not dispute that the third and fourth elements of *Younger* abstention—that an important state interest is implicated and that Plaintiffs may raise the federal claim in the state proceeding—are met. Indeed, the state proceedings implicate Nevada's important interest in the regulation of real estate brokers in the State, and Plaintiffs are able to raise, and in fact have already raised, the exact same constitutional claim at issue here in those state proceedings.

Nevada has also met the two remaining elements of *Younger.* First, the state proceedings—which implicate

disciplinary investigations, formal complaints, notices to appear for a hearing, and the imposition of hefty monetary fines—are quasi-criminal enforcement actions. *See Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69, 79-80 (2013) (collecting cases); *Citizens for Free Speech, LLC,* 953 F.3d at 657.

Second, the state proceedings are "ongoing" because Nevada initiated them before the federal case had "moved beyond an 'embryonic stage.'" *Owen,* 873 F.3d at 728 (first quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); and then quoting *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011)); *see also San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092-94 (9th Cir. 2008) (holding that abstaining under *Younger* is proper where administrative proceeding is ongoing, irrespective of whether state-court review has been invoked). Nevada filed formal administrative complaints against the Individual Plaintiffs before the district court ruled on any discovery motions and before Plaintiffs had even filed their motion for a preliminary injunction. By the time the district court held a hearing on the motions for summary judgment and Nevada's renewed *Younger* abstention arguments, the State had already held hearings, entered findings, and ordered all the Individual Plaintiffs to pay fines. Indeed, in their supplemental briefing, the parties notified this court that the proceedings remain ongoing. Thus, this element of *Younger* abstention is also readily met here.

We are unpersuaded by Plaintiffs' claim that Nevada has abandoned its claim of abstention. While Nevada

did not raise abstention in its answering brief on appeal or cross-appeal the district court's ruling on *Younger* abstention, it argued in favor of abstention when prompted at oral argument and in its supplemental briefing. Moreover, the State raised *Younger* abstention at the motion to dismiss and summary judgment stages of the litigation below. This conduct does not amount to waiver. *Compare, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625-26 (1986) (finding that the defendant did not waive its abstention claim where the defendant raised abstention in the district court and at oral argument on appeal), *with Ohio Bureau of Emp't Servs. v. Hodory,* 431 U.S. 471, 479-80 (1977) (declining to abstain where defendants did not raise *Younger* abstention on appeal and "resisted" the invitation to argue abstention when prompted during oral argument), *and Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391, 394 (9th Cir. 1995) (declining to abstain where the defendants did not raise the issue before the district court and the state administrative proceedings had been terminated).

We are also unpersuaded by Plaintiffs' remaining arguments that abstention is inappropriate because it will result in irreparable harm and that, even if *Younger* abstention applies, the court should adjudicate M&M's claims because only the Individual Plaintiffs are parties in the state court proceedings. *See Vasquez,* 734 F.3d at 1035 (noting that *Younger* abstention applies to plaintiffs who are not parties in the state litigation if those plaintiffs' interests are "so intertwined with those of the state court party that . . . interference with the state court

proceeding is inevitable" (quoting *Green v. City of Tucson,* 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc), *overruled on other grounds by Gilbertson v. Albright,* 381 F.3d 965 (9th Cir. 2004))); *City of San Jose,* 546 F.3d at 1096 (noting that where *Younger* elements are met, the court must abstain absent evidence of "bad faith, harassment, or an extraordinary circumstance," regardless of "the importance of the [constitutional] interest asserted by a federal plaintiff").

In sum, principles of comity and federalism caution against interfering with Nevada's ongoing state proceedings, which Plaintiffs seek to enjoin in this federal case and which implicate the same constitutional claim at issue here. Dismissal based on *Younger* abstention is therefore warranted, *see Gilbertson,* 381 F.3d at 981; *City of San Jose,* 546 F.3d at 1096, and we decline to address the merits.

REVERSED, VACATED, and REMANDED with instructions to dismiss the case. The parties shall bear their own costs.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-16446

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.; *et al.*,

Plaintiffs-Appellants,

v.

SHARATH CHANDRA, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada; *et al.*,

Defendants-Appellees.

D.C. No. 2:16-cv-01299-RFB-GWF
District of Nevada, Las Vegas

ORDER
Filed June 8, 2020

Before: GOULD, BEA, and MURGUIA, Circuit Judges.

The parties are directed to file supplemental briefs addressing whether the court should invoke *Younger* abstention in this appeal. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017) (citing *Younger v. Harris*, 401 U.S. 37, 43–45 (1971)). The parties' briefs should address:

1. The status of the state proceedings;

2. Whether the court may raise *Younger* abstention sua sponte in this appeal;

3. Whether the Appellees have forfeited or waived the issue;

4. Whether *Younger* abstention is applicable under the circumstances; and

5. Any other arguments the parties believe will aid the court in determining whether the *Younger* abstention doctrine should apply.

Both parties' briefs are due by 6:00 p.m. Pacific Daylight Time on June 24, 2020. The briefs are not to exceed 3,000 words.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-16446

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.; *et al.*,

Plaintiffs-Appellants,

v.

SHARATH CHANDRA, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada; *et al.*,

Defendants-Appellees.

D.C. No. 2:16-cv-01299-RFB-GWF
District of Nevada, Las Vegas

ORDER
Filed June 1, 2020

Before: GOULD, BEA, and MURGUIA, Circuit Judges.

Counsel should be prepared to discuss at oral argument the applicability of *Younger* abstention. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017) (citing *Younger v. Harris*, 401 U.S. 37, 43–45 (1971)).

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:16-cv-01299-RFB-GWF

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC., MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC., GORDON ALLRED, ALVIN NAJIB MANSOUR, KEVIN NAJIB MANSOUR, PERRY WHITE, and NENAD ZIVKOVIC,

Plaintiffs,

v.

JOSEPH DECKER, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada, and NORMA JEAN OPATIK, NEIL SCHWARTZ, SHERRIE CARTINELLA, DEVIN REISS, and LEE K. BARRETT, in their official capacities as Commissioners of the Nevada Real Estate Commission,

Defendants.

ORDER
Filed July 8, 2019

Before the Court is Defendants' Renewed Motion for Summary Judgment (ECF No. 135), Plaintiffs' Motion for Summary Judgment (ECF No. 136), Plaintiffs' Supplemental Summary Judgment Brief (ECF No. 159), Defendants' Motion to Strike Portions of Amended Complaint (ECF No. 178), Plaintiffs' Motion for a Hearing (ECF No. 188), and Plaintiffs' Motion for Leave to File Plaintiffs' Supplemental Summary Judgment Brief (ECF No. 190). For the reasons stated below, summary judgment is granted in favor of Defendants, Defendants' Motion to Strike is denied, and Plaintiffs' Motion for a Hearing and Motion for Lave to File are denied.

I. PROCEDURAL HISTORY

On June 10, 2016, Plaintiffs Gordon Allred, Alvin Najib Mansour, Kevin Najib Mansour, Perry White, and Nenad Zivkovic (collectively, "Individual Plaintiffs"), Marcus & Millichap Real Estate Investment Services of Nevada, Inc. ("M&M"), and Marcus & Millichap Real Estate Investment Services, Inc. ("M&M National") filed a Complaint and Request for Declaratory and Injunctive Relief against Defendants, officials of the Nevada Real Estate Division ("NRED") and Nevada Real Estate Commission ("NREC"). (ECF No. 1). Plaintiffs assert two Section 1983 claims, alleging that a NREC real estate regulation 1) violates the Commerce Clause, and 2) violates the First Amendment. Plaintiffs additionally seek declaratory and injunctive relief.

On July 12, 2017, Plaintiffs filed a Motion for Preliminary Injunction. (ECF No. 47). Defendants filed

a Response on July 25, 2017. (ECF No. 58). The Court held a hearing on the Motion on July 26, 2017 and denied the Motion without prejudice with leave to refile, as the administrative hearings which Plaintiffs sought to enjoin were continued from August to December. (ECF No. 63).

On August 25, 2017, Plaintiffs and Defendants filed Cross-Motions for Summary Judgment. (ECF Nos. 71-72). The same day, Plaintiffs also filed a Statement of Material Facts regarding their Motion for Summary Judgment. (ECF No. 74). The parties filed Responses on September 15, 2017. (ECF Nos. 84-85). Replies were filed on September 29, 2017. (ECF Nos. 92, 93). The International Council of Shopping Centers, The Commercial Real Estate Development Association, and National Multifamily Housing Council (collectively, "Interested Parties") filed a Motion for Leave to File Amicus Brief in Support of Plaintiffs on November 10, 2017. (ECF No. 96). The proposed amicus brief is attached to the Motion. (ECF No. 96-1).

On November 14, 2017, Individual Plaintiffs filed Emergency Renewal of Motion for a Temporary Injunction. (ECF No. 100). M&M filed a Joinder on November 15, 2017. (ECF No. 103). Defendants filed a Response to the Motion for Leave to File Amicus Brief on November 16, 2017. (ECF No. 108). Defendants filed a Response to the Emergency Renewal of Motion on November 20, 2017. (ECF No. 111). Plaintiffs filed a Supplemental Brief in Support of the Motion for a Temporary Injunction on December 1, 2017. (ECF No. 113). The Court denied the Emergency Renewal of Motion on December 3, 2017. (ECF No. 115).

On December 4, 2017, Plaintiffs appealed the Court's denial of injunctive relief to the Ninth Circuit. (ECF No. 115). On December 5, 2017, the Ninth Circuit denied Plaintiffs' emergency motion for an injunction pending the appeal of this Court's denial of a motion for preliminary injunction. (ECF No. 119). Plaintiffs voluntarily dismissed their appeal. (ECF No. 120).

On February 6, 2018, the Court held a hearing on the parties' cross-motions for summary judgment. (ECF No. 129). The Court denied each parties' motion without prejudice.

On February 26, 2018, Plaintiffs filed a Motion for Leave to File an Amended Complaint. (ECF No. 131). Defendants responded (ECF No. 138) and Plaintiffs replied (ECF No. 141).

On March 6, 2018, Defendants filed the instant Renewed Motion for Summary Judgment (ECF No. 135) and Plaintiffs filed the instant Motion for Summary Judgment (ECF No. 136). Each party filed a response (ECF Nos. 139, 140) and a reply (ECF Nos. 143, 144).

On June 27, 2018, Plaintiffs filed the instant Supplemental Summary Judgment Brief (ECF No. 159) and a Motion for Leave to File Plaintiffs' Supplemental Summary Judgment Brief (ECF No. 160). On September 20, 2018, the Court granted the Motion for Leave to File and set a hearing regarding the motions for summary judgment. (ECF No. 168). The Court denied Plaintiffs' Motion for Leave to File an Amended Compliant without

prejudice, such that Plaintiffs could refile the motion after the Court ruled on the pending summary judgment motions.

The Court held a hearing on October 10, 2018. (ECF No. 173). The Court permitted supplementation of the record regarding the legislative history of S.B. 69 and took the summary judgment motions under consideration. The Court also granted Plaintiffs' oral motion for reconsideration of its order denying leave to file an amended complaint. The Clerk of Court filed Plaintiffs' amended complaint on October 26, 2018. (ECF No. 175).

On November 15, 2018, Defendants filed the instant Motion to Strike Portions of Amended Complaint. (ECF No. 178). Plaintiffs responded on November 21, 2018 (ECF No. 180) and Defendants replied on November 29, 2018 (ECF No. 181).

On April 24, 2019, the Court held a status conference regarding the status of the case and related case 2:18-cv-02409-RFB-VCF. (ECF No. 187). On July 2, 2019, Plaintiffs filed a Motion for Leave To File. (ECF No. 190).

II. FACTUAL FINDINGS

The Court finds the following facts to be undisputed.

M&M is a subsidiary of M&M National. M&M is headquartered in Calabasas, California and has offices in Las Vegas, Nevada and Reno, Nevada. M&M National is also headquartered in Calabasas, California and it

has other subsidiaries throughout the United States. M&M and M&M National service commercial real estate investment needs for clients across the United States.

Plaintiff Gordon Allred is First Vice President of Investments with M&M National. Allred holds a California broker's license and works out of a Millichap office in Ontario, California. He resides in California.

Plaintiff Alvin Najib Mansour is Executive Vice President of Investments with M&M National. He is also president for the Manour Group, which is an entity affiliated with M&M National. Alvin Mansour holds a California broker's license and a Texas broker's license. He works out of a Millichap office in San Diego, California. He resides in California.

Plaintiff Kevin Najib Mansour is Managing Partner for the Mansour Group, which is an entity affiliated with M&M National. Kevin Mansour holds a California salesperson's license and works out of the Mansour Group's San Diego, California office. He resides in California.

Plaintiff Perry White is a Vice President of Investments with M&M National or M&M. White holds a Nevada broker's license and works out of the M&M office in Las Vegas, Nevada. He resides in Nevada.

Plaintiff Nenad Zivkovic is an Associate with M&M National. He is also a Senior Associate for the Mansour Group, which is an entity affiliated with M&M National. Zivkovic holds a Nevada salesperson's license. He works out of Millichap's San Diego, California office. He resides in California.

Defendant Sharath Chandra is the NRED Administrator and has held that position since at least 2016. He was preceded by Joseph Decker, who held that position at the time of the original Complaint's filing.

Defendant Norma Jean Opatik is an NREC Commissioner and has held that position since at least 2015. She holds a Nevada real estate license.

Defendant Neil Schwartz is an NREC Commissioner and has held that position since at least 2013. He holds a Nevada license.

Defendant Wayne Capurro is an NREC Commissioner and has held that position since at least 2016. He was preceded in that position by Sherrie Cartinella, who held that position at the time of the filing of the original complaint. He holds a Nevada license.

Defendant Devin Reiss is an NREC Commissioner and has held that position since at least 2014. He holds a Nevada license.

Defendant Lee K. Barrett is an NREC Commissioner and has held that position since at least 2015. He holds a Nevada license.

Commercial real estate is a national marketplace in which buyers and sellers of real estate often have their offices or company headquarters in states other than where the commercial property is located. Buyers and sellers of commercial property are predominantly sophisticated private and institutional investors.

Commercial brokerage firms, like M&M National, often have offices in multiple states, if not throughout the country. M&M National has offices or subsidiaries or affiliates in most major U.S. cities, with more than 1,600 affiliated commercial real estate agents across the country.

M&M National and M&M ensure that transactions involving Nevada real estate are overseen by a licensed Nevada broker, even where the buyer and seller are not Nevada residents and never enter the state.

The Nevada Real Estate Division ("NRED") is a Nevada state administrative agency. Nev. Rev. Stat. § 645.001. It is managed by a single appointed Administrator. The Nevada Real Estate Commission ("NREC") is a Nevada state administrative commission. At the time of appointment, each NREC Commissioner must have been a Nevada resident for no less than five years and must have been actively engaged in business either as a Nevada real estate broker for three years or as a Nevada broker-salesperson for five years. Nev. Rev. Stat. §645.090. The NREC acts in an advisory capacity to the NRED, adopts regulations and conducts hearings on matters of enforcement. Nev. Rev. Stat. §645.050.

Under Nevada law, an individual may not conduct business as a commercial real estate broker or broker-salesperson in Nevada unless they obtain a Nevada license. Nev. Rev. Stat. § 645.230. Nevada law permits out-of-state licensed real estate brokers cooperating with Nevada brokers to engage in real estate transactions.

Nev. Rev. Stat. § 645.605. Pursuant to this statute, "[t]he Administrator [of the Real Estate Division] shall have authority to issue certificates authorizing out-of-state licensed brokers to cooperate with Nevada brokers, and the [Nevada Real Estate] Commission shall have authority to promulgate rules and regulations establishing the conditions under which such certificates shall be issued and canceled . . . ."[1] Id. Nevada Administrative Code ("NAC") Section 645.185 contains the rule for how cooperative certificates may operate. Subsection 11, the provision at issue, provides: "An out-of-state broker may not use a cooperating broker's certificate as authority to sell or attempt to sell real estate in Nevada to a resident of Nevada. Such a certificate may be used only for the purpose of allowing the out-of-state broker or salesman to offer real estate in Nevada for sale to a person other than a resident of Nevada." Cooperative certificates are not available to unlicensed Nevada residents seeking to conduct real estate business in Nevada. Id.

Under Nevada law, a real estate broker with a Nevada license "shall have and maintain a definite place of business within the State, which must be a room or rooms used for the transaction of real estate business, or such business and any allied businesses, and which must serve as the office for the transaction of business under the authority of the license, and where the license must be prominently displayed." Nev. Rev. Stat. § 645.550.

No Plaintiff or M&M agent or broker has ever been

1. These certificates are referred to by the parties as "cooperative certificates." The Court adopts such language in this Order.

disciplined or subject to discipline for violating the requirement to have an office in Nevada to hang their license. No Plaintiff or M&M agent or broker has sought or requested from NRED a broker's license that did not require an in-state presence but where the broker could hang her or his license with a local cooperating broker. NRED initiated and pursued disciplinary action against Plaintiff Allred for violating Sections 645.230 and 645.235 for engaging in commercial real estate business conduct without having a Nevada license as a real estate broker, broker-salesperson or salesperson and without having a cooperative certificate from NRED. Plaintiff Allred was ultimately found by NREC to have violated Nevada law and was ordered to pay $301,639.89 in fines and fees.

NRED initiated and pursued two disciplinary actions against Plaintiff White. The first was initiated for violating Section 645.235 by assisting another person in engaging business activity that requires a license, permit, certificate or registration under Chapter 645 even though the person did not have a license, permit, certificate or registration and for violating Section 645.252 by not exercising reasonable skill and care regarding a real estate transaction. Plaintiff White was ultimately found by the NREC to have violated Nevada law and was ordered to pay $16,624.33 in fines and fees. NRED pursued a second disciplinary action against Plaintiff White for violating Section 645.235 by assisting another person in engaging business activity that requires a license, permit, certificate or registration under Chapter 645 even though the person did not have a license, permit, certificate or registration. Plaintiff White was ultimately found by the

NREC to have violated Nevada law and was ordered to pay $5,811.79 for this second violation.

NRED initiated and pursued disciplinary action against Plaintiff Alvin Mansour for violating Sections 645.230 and 645.235 for engaging in commercial real estate business conduct without having a Nevada license as a real estate broker, broker-salesperson or salesperson and without having a cooperative certificate from NRED. Plaintiff Alvin Mansour was ultimately found by NREC to have violated Nevada law and was ordered to pay $30,811.79 in fines and fees.

NRED initiated and pursued disciplinary action against Plaintiff Kevin Mansour for violating Sections 645.230 and 645.235 for engaging in commercial real estate business conduct without having a Nevada license as a real estate broker, broker-salesperson or salesperson and without having a cooperative certificate from NRED. Plaintiff Kevin Mansour was ultimately found by NREC to have violated Nevada law and was ordered to pay $5,811.79 in fines and fees.

NRED initiated and pursued disciplinary action against Plaintiff Zivkovic for violating Section 645.235 by assisting another person in engaging business activity that requires a license, permit, certificate or registration under Chapter 645. Plaintiff Zivkovic was ultimately found by NREC to have violated Nevada law and was ordered to pay $30,811.79 in fines and fees.

There is no disputed or undisputed evidence indicating that any Plaintiff in this case has been charged with or had

action taken against them for violating the requirement for a licensed Nevada broker to have a room or office in Nevada in which their license hangs.

III. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the propriety of summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014). If the movant has carried its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts…. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks omitted). It is improper for the Court to resolve genuine factual disputes or make credibility determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th Cir. 2017) (citations omitted).

A litigant must have "standing" in order to "maintain a lawsuit in federal court to seek redress for a legal wrong." Spokeo, Inc. v. Robins, 135 S.Ct. 1540, 1547 (2016). Standing consists of three elements. Id. "The plaintiff

must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id.

The injury in fact element is the "first and foremost" of the standing elements. Id. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To establish redressability, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561. However, a plaintiff's burden to demonstrate redressability is "relatively modest." M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018) (internal citations omitted).

IV. DISCUSSION

a. Motions for Summary Judgment

Plaintiffs have asserted a few arguments in support of their motion and in response to Defendants' motion. First, Plaintiffs have averred that Nevada's requirement that out-of-state real estate brokers obtain a Nevada license and/or a cooperative certificate to assist out-of-state clients with purchases of property in Nevada violates the Dormant Commerce Clause. Second, Plaintiffs have asserted that Nevada's requirement that brokers with a Nevada license maintain an office in Nevada violates the Dormant Commerce Clause.

Defendants have asserted opposing arguments in support of their motion and in response to Plaintiffs' motion. First, the Defendants argue that Plaintiffs do not have standing to challenge the Nevada statutes regarding the cooperative certificate and the requirement that Nevada brokers maintain a Nevada office. Second, Defendants argue that Nevada does not unlawfully burden out-of-state residents or brokers in violation of the Dormant Commerce Clause.

i. Individual Plaintiffs Have Standing To Challenge Nevada Licensing Statutes Only

The Court finds that Individual Plaintiffs have standing to challenge only Nevada's licensing statutes as they apply to out-of-state brokers seeking to conduct real estate business within the state. The undisputed facts establish that Individual Plaintiffs are all engaged in commercial real transactions involving clients conducting interstate business and seeking to purchase property in Nevada. Individual Plaintiffs have suffered an injury in fact. All Individual Plaintiffs have had enforcement proceedings brought against them and judgments entered against them for violating Nevada law regarding out-of-state residents or brokers engaging commercial real estate transactions in Nevada without a Nevada license or cooperative certificate. These enforcement actions and judgments can be traced directly back to the challenged conduct – the inability of out-of-state brokers to practice in Nevada without a Nevada license or cooperative certificate. Finally, if the Court were to find that Nevada's requirement for a real estate broker to obtain a Nevada

license before engaging in interstate commercial real estate transactions in Nevada was unconstitutional, it would result in this Court enjoining enforcement of the state agency's judgments against Individual Plaintiffs. See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 644 n.3 (2002) (noting lack of jurisdictional bar to a federal court's review of determinations made by a state administrative agency). Thus, the Court finds that a favorable decision for Individual Plaintiffs would redress their injury from the enforcement judgments entered against them. The Court therefore finds that Individual Plaintiffs have standing to challenge Nevada's statutes regarding broker licensing and cooperative certificates.

The Court finds that M&M and M&M National lack standing to change the licensing statutes. M&M and M&M National can establish no injury traceable to the statutes, which regulates the licensure of individuals. No enforcement judgments have been or could be entered against these entities. Nor can M&M and M&M National exert associational standing on behalf of affected brokers, as such standing is reserved for unions and similar organizations whose "purpose is the protection and promotion" of a population or industry. See Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343–45 (1977).

The Court also finds that none of Plaintiffs have standing to challenge Nevada Revised Statutes ("N.R.S.") Section 645.550. None of Plaintiffs have established an injury in fact related to this particular statute. Only one of Individual Plaintiffs, Mr. White, has a Nevada broker's

license, but he has asserted no threatened or actual injury in relation to this statute. White actually works out of Las Vegas. None of Plaintiffs have sought relief from this statute, nor established a possible threat of legal action against them for violation of this statute. M&M and M&M National have offices in Nevada, so this statute has not been at issue in the record in this case. None of Plaintiffs have had enforcement actions initiated against them for violation of this statute's requirements. Thus, none of Plaintiffs can establish an injury in fact that is traceable to N.R.S. Section 645.550.

Moreover, the Court finds that a favorable decision on the constitutionality of this statute would not redress the primary injury of Plaintiffs. Plaintiffs' essential argument is that out-of-state licensed brokers should be able to practice and conduct real estate transactions in Nevada for out-of-state clients without obtaining a Nevada broker license or a cooperative certificate. Plaintiffs have not offered disputed or undisputed facts establishing the burden placed upon out-of-state brokers with a Nevada broker's license of having to maintain an office or room in Nevada. Thus, even if the Court were to find that the requirement was unconstitutional, this finding would not result in a favorable outcome for Plaintiffs, since the injury Individual Plaintiffs have suffered derives from their failure to have a Nevada broker's license or cooperative certificate and not from their failure to maintain an office in Nevada as a Nevada-licensed real estate broker. The Court therefore finds that Plaintiffs do not have standing to challenge N.R.S. § 645.550.

ii. Nevada's Licensing Requirements Do Not Violate The Dormant Commerce Clause.

The Court finds that Nevada's statutes requiring a Nevada broker's license or a cooperative certificate to engage in commercial real estate transactions in Nevada do not violate the Dormant Commerce Clause.

There are two potential analytic standards that may apply in dormant Commerce Clause analysis. First, if a statute or law discriminates against out-of-state economic interests on its face, it is "virtually *per se* invalid" and "will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) (citations omitted). Absent facial or purposeful discrimination, however, the Pike balancing test applies, and "the law 'will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 338–39 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

The Court first addresses the appropriate standard to apply to its analysis of this issue and finds that the Pike balancing test is the applicable standard. It is undisputed that, under Nevada law, an out-of-state individual can obtain a Nevada broker's license which grants that individual all of the same professional authority to operate as an individual who is in state and licensed. Nev. Rev. Stat. §§ 645.330(1), (4). Moreover, and importantly, the statute describing eligibility for a Nevada broker's license

imposes identical requirements on both non-residents and residents. See Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Berch, 773 F.3d 1037, 1049 (9th Cir. 2014) ("Arizona requires the same of its citizens as it does citizens of other states."); Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 525 (9th Cir. 2009) ("California treats out-of-state opticians . . . the same as in-state opticians."). The law therefore does not facially exclude out-of-state brokers and the Pike balancing test applies to the Court's inquiry regarding Nevada's statutory licensing requirement for real estate brokers.

Applying the Pike balancing test, the Court first finds that Nevada's statutory scheme regarding the licensing of real estate brokers reflects the state's legitimate concern and authority to regulate professional practices and licensure within its borders. See, e.g., Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 736 (9th Cir. 2017) ("Anyone acting as a prorater in California must first obtain a prorater license from California. . . . On its own, the requirement of state licensure is legitimate[.]"); cf. Nat'l Ass'n for the Advancement of Multijurisdiction Practice, 773 F.3d at 1045 (noting the extreme deference given to a state's regulation of its licensed professionals). The state's limitation on the activities of non-Nevada licensed real estate professionals is consistent with the state's legitimate interest in establishing standards for and monitoring the activities of real estate professionals who operate in Nevada in relation to Nevada property law. The state's interest is particularly strong in the instant professional context, as states are uniquely vested with

establishing laws regarding the buying and selling of a state's real property. Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."). Thus, the Court finds that the burden imposed on interstate commerce is not clearly excessive in relation to local benefits. The regulatory system ensures that brokers listing, advertising, marketing, and selling real property in Nevada are knowledgeable of the applicable state law and subject to professional standards that help prevent fraud and ensure minimum competence. Out-of-state residents are subject to the same licensing requirements as in-state residents. Neither in-state or out-of-state residents may conduct real estate business without obtaining the proper licenses and permissions under Nevada law.

Additionally, the Court finds that the burden is not excessive as any professional who would seek to competently and adequately represent a client involved in a real estate transaction in Nevada would necessarily need to know and understand Nevada real estate or property law. Plaintiffs have not established—nor could they—that a real estate professional would not need to be knowledgeable of and professionally conversant in Nevada real estate law to adequately facilitate real estate transactions that were consistent with Nevada law. Plaintiffs have not established—nor could they—that property law in Nevada (or any other state) was so generic and common that knowledge of another state's law by licensure would make one fully knowledgeable of all the essentials and nuances of Nevada property law. Cf. State Box Co. v. United States, 321 F.2d 640, 641 (9th Cir. 1963) (referencing the lack of uniformity across states' real property laws).

Finally, the Court rejects Plaintiffs' singular focus on the cooperative certificate without consideration of the entire statutory scheme as a basis for establishing a constitutional violation. The fact that Nevada, in its discretion, permits out-of-state licensed brokers to conduct real estate business in limited circumstances does not *ipso facto* create a constitutional basis or requirement for the state to grant out-of-state licensed brokers the same authority to Nevada-licensed brokers. This exercise of discretion does not curtail or alter the state's ability to regulate real estate professionals whether residents or not who engage in real estate business in Nevada subject to Nevada's property law.

Pursuant to the Pike test, the Court finds that the Nevada licensing scheme as applied to out-of-state brokers does not violate the Dormant Commerce Clause. Therefore, the Court grants summary judgment in favor of Defendants and against Plaintiffs.

b. Motion to Strike

Defendants argue that certain portions of Plaintiffs' Amended Complaint, filed with leave of Court on October 26, 2018, exceed the scope of the Court's leave to amend. Defendants invoke Rule 12 of the Federal Rules of Civil Procedure, which empowers this Court to strike from the pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

The Court granted Plaintiffs leave to amend in order to raise the issue of N.R.S. Section 645.550 and its relationship to the cooperative certificate. The Court specifically stated that it would "allow for amendment as it relates to adding a

challenge to Section 555" and that it would not consider the addition of "other types of challenges." (ECF No. 179 at 12). The Court did not approve the addition of unrelated facts and a renewed First Amendment claim in the Amended Complaint. The Court therefore grants Defendants' Motion to Strike Portions of Amended Complaint in regard to the First Amendment claim.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Renewed Motion for Summary Judgment (ECF No. 135) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (ECF No. 136) and Plaintiffs' Supplemental Summary Judgment Brief (ECF No. 159) are DENIED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Potions of Amended Complaint (ECF No. 178) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for a Hearing (ECF No. 188) is DENIED as moot.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Plaintiffs' Supplemental Summary Judgment Brief (ECF No. 190) is DENIED for lack of good cause. LR 7-2(g).[2]

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2. Even if the Court permitted Plaintiffs to file their Supplemental Summary Judgment Brief, the Court finds that

IT IS FURTHER ORDERED that judgment be entered in favor of Defendants. The Clerk of Court is instructed to close this case.

DATED: July 8, 2019.

/s/
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

Tennessee Wine & Spirits Retailers 14 Association v. Thomas, No. 18-96, 2019 WL 2605555 (U.S. June 26, 2019), is inapplicable to the analysis in this case. In Tennessee Wine, the Supreme Court evaluated the constitutionality of a statute that facially discriminates against out-of-state residents and was therefore subject to strict scrutiny. Id. at *7. As discussed above, Nevada's licensing scheme imposes identical requirements on both non-residents and residents and is therefore subject to the less stringent Pike balancing test.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-16446

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES OF NEVADA, INC.; MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC.; ALVIN NAJIB MANSOUR; GORDON ALLRED; KEVIN NAJIB MANSOUR; PERRY WHITE; NENAD ZIVKOVIC,

Plaintiffs-Appellants,

v.

SHARATH CHANDRA, in his official capacity as Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada; NORMA JEAN OPATIK, in her official capacity as Commissioner of the Nevada Real Estate Commission; NEIL SCHWARTZ, in his official capacity as Commissioner of the Nevada Real Estate Commission; WAYNE CAPURRO, in his official capacity as Commissioner of the Nevada Real Estate Commission; DEVIN REISS, in his official capacity as Commissioner of the Nevada Real Estate Commission; LEE K. BARRETT, in his official capacity as Commissioner of the Nevada Real Estate Commission,

Defendants-Appellees.

D.C. No. 2:16-cv-01299-RFB-GWF
District of Nevada, Las Vegas

ORDER
Filed Sept. 21, 2020

Before: GOULD, BEA, and MURGUIA, Circuit Judges.

Judges Gould and Murguia vote to deny the petition for rehearing en banc and Judge Bea so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED (Doc. 67).