UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2492

SMITH & WESSON BRANDS, INC., *et al.*,
Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF NEW JERSEY, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY (NO. 2:20-CV-19047)

BRIEF FOR DEFENDANTS-APPELLEES

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INTRODUCTION

Appellant Smith & Wesson seeks to turn a state subpoena enforcement action into a federal case. But there is already an ongoing suit in New Jersey state court, where multiple trial and appellate judges have adjudicated the same constitutional objections Appellant makes here. Because that action is the proper forum to decide these claims, and because federal courts do not provide a do-over for unsuccessful state court litigants, the district court was correct to abstain in this case.

In October 2020, the New Jersey Division of Consumer Affairs—the State's primary consumer protection agency—sent a subpoena to Smith & Wesson, seeking to determine whether the company's advertisements and marketing available to New Jersey customers violated (and may continue to violate) the New Jersey Consumer Fraud Act ("CFA"). That approach is routine. Like consumer agencies across the nation, the Division investigates and issues subpoenas regarding advertising claims about the safety, effectiveness, and benefits of all manner of goods and services to protect consumers from misleading business practices. If an entity refuses to produce documents, the CFA permits the Attorney General to file an action in the New Jersey Superior Court to enforce the subpoena. And the CFA also tasks that state court with the responsibility to compel compliance, including through contempt of court.

Smith & Wesson, however, rushed to federal court the very day after it refused to comply with the Subpoena, alleging that the Subpoena contravened a smorgasbord

of federal constitutional provisions. In Appellant's telling, the simple act of looking into whether its advertisements misled consumers violated the First, Second, Fourth, and Fourteenth Amendments, the Dormant Commerce Clause, and a federal statute. In other words, Appellant sought to leverage the federal courts as a sword to prevent state officials from enforcing a subpoena in state court, and to bar the state courts from adjudicating that action. And Appellant continued to make the same demand that federal courts superintend the ongoing state court proceeding even after the state court thoroughly rejected its constitutional arguments.

This is precisely the scenario for which *Younger v. Harris*, 401 U.S. 37 (1971), exists—to stop a state court defendant from turning to the federal courts as plaintiff to seek their interference. For decades, *Younger* has required federal courts to abstain in the face of ongoing state civil enforcement proceedings initiated by state agencies to sanction wrongful conduct, and to abstain when a federal suit implicates a State's interest in enforcing the orders and judgments of its courts. This abstention doctrine "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). And for good reason: abstention ensures that federal courts accord state courts due respect, and it recognizes that state courts are entirely capable of resolving questions of federal law. The district court thus appropriately concluded that it must abstain and allow New

Jersey's courts—which have now ruled on multiple motions by Appellant raising these same constitutional arguments—to continue adjudicating this case.

Appellant seeks to evade these fatal flaws in its federal suit by impugning the adequacy of New Jersey's state courts, but its efforts fail. The company was allowed to file a motion to quash the Subpoena. After the motion was denied, Appellant was also allowed to seek a stay of production. In those applications, Appellant presented essentially the same arguments—and exhibits—advanced in federal court. Far from declining to consider them, the trial court carefully reviewed Appellant's positions and found its theories wanting. That court's decision to require compliance with the Subpoena because the objections fell short—a decision that the Appellate Division and New Jersey Supreme Court declined to stay—means that Appellant *lost*, not that it failed to get a fair shake. That hardly warrants an exception to *Younger*.

Appellant's other rationale for federal interference relies upon impugning the integrity of New Jersey's former Attorney General. But this argument fares no better. The burden to override *Younger* based on bad faith is extraordinarily high, and the Supreme Court unsurprisingly has never declined abstention on this basis. This is an especially weak case for such a finding: the state courts already reviewed the same claims of bad faith and rejected them as speculative and insufficient. Like the district court, this Court should respect the role of state courts in our federalist system and decline Smith & Wesson's demand for a second chance in this forum.

COUNTERSTATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court properly abstained under *Younger v. Harris* from resolving this federal case.

RELATED CASES AND PROCEEDINGS

The action to enforce the Division's subpoena, *Bruck v. Smith & Wesson Sales Co, Inc.*, is pending in the New Jersey Superior Court, Chancery Division, at Docket No. ESX-C-25-51, as well as in the New Jersey Superior Court, Appellate Division, at Docket No. A-3292-20. Ja56, Ja577.[1]

COUNTERSTATEMENT OF THE CASE

A. The New Jersey Consumer Fraud Act

The CFA protects vulnerable consumers from fraudulent and unconscionable practices. Enacted in 1960 and amended in 1971, the CFA is "one of the strongest consumer protection laws in the nation," making unlawful every "unconscionable commercial practice." *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 460 (N.J. 1994). Its scope is sweeping, protecting against nearly all consumer fraud and abuses in the

[1] "Ja" refers to the joint appendix filed alongside Appellant's brief. "Sa" refers to the Supplemental Appendix submitted with this brief.

marketing and sale of products. It bars deceptive advertising, whether accomplished by intentional misrepresentation, or even knowing omission, or through a statement that unintentionally has the capacity to mislead a consumer. N.J. Stat. Ann. § 56:8-2; *see also Fenwick v. Kay Am. Jeep. Inc.*, 371 A.2d 13, 16 (N.J. 1977). Using this broad authority, the State recently successfully investigated and resolved a range of actions, including settlements with: (1) an auto manufacturer for failure to disclose dangers related to airbags, (2) businesses for the marketing of opioids that caused countless deaths in the State, (3) a manufacturer, for failure to disclose safety risks associated with a medical device, and (4) sellers of unlawful firearm magazines who concealed the product's illegal nature.[2] In short, the CFA reaches across practices and industries, and the State's extensive history of consumer protection enforcement across industries confirms its broad scope.

The power that the CFA assigns to the Attorney General and the Division is equally broad. The CFA is "intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public." *Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971). That power includes the ability to investigate potential

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[2] Press releases available at:
https://www.njconsumeraffairs.gov/News/Pages/08252020.aspx (Aug. 25, 2020); https://www.njconsumeraffairs.gov/News/Pages/02042021B.aspx (Feb. 4, 2021); https://www.njconsumeraffairs.gov/News/Pages/03232021.aspx (Mar. 31, 2021); https://www.njconsumeraffairs.gov/News/Pages/01112021.aspx (Jan. 11, 2021).

consumer protection violations, promulgate rules that have the force of law, issue cease-and-desist orders, and impose penalties for violations. N.J. Stat. Ann. §§ 56:8-3, -4, -18. It also includes the subpoena power, inextricably tied to that investigatory authority: when the Attorney General "believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in" conduct proscribed by the CFA, he may issue a subpoena. N.J. Stat. Ann. § 56:8-3; *see also id.* § 56:8-4 ("[T]he Attorney General ... may issue subpoenas to any person ... which shall have the force of law."). If any person "shall fail or refuse to ... obey any subpoena issued by the Attorney General," the Attorney General is also empowered to enforce it by filing suit in the New Jersey Superior Court. N.J. Stat. Ann. § 56:8-6. The CFA provides that court can not only issue an order compelling compliance with a subpoena's terms but also issue a range of sanctions, including "[a]djudging such person in contempt of court"; "restraining the sale or advertisement of any merchandise by such persons" who refuse to obey; and "vacating, annulling, or suspending [their] corporate charter." *Id.*

The Division and the Attorney General have routinely filed CFA enforcement actions in state court to compel compliance with subpoenas and, in doing so, sought the above-listed relief against a variety of entities. *See, e.g.*, *Grewal v. Morris Invest, LLC*, ESX-C-16-20 (N.J. Sup. Ct. Ch. Div. 2020) (summary proceeding seeking to enforce subpoena and seeking relief under CFA for failure to comply with subpoena

to investigate potential fraud in connection with real-estate sales) (Sa17); *Grewal v. RD Legal Funding*, ESX-C-108-20 (N.J. Sup. Ct. Ch. Div. 2020) (same, relating to provision of cash advances to plaintiffs in personal-injury suits) (Sa23); *Grewal v. N.Y. Dig. Prod.*, ESX-C-132-19 (N.J. Sup. Ct. Ch. Div. 2019) (same, relating to sale of and product warranties for electronics) (Sa52); *Porrino v. Autoeastern Paramus*, BER-C-204-17 (N.J. Sup. Ct. Ch. Div. 2017) (same, relating to automobile sales) (Sa147); *Hoffman v. Safety Alert USA*, MON-C-131-15 (N.J. Sup. Ct. Ch. Div. 2015) (same, relating to medical-alert device sales) (Sa168).

B. The Subpoena

On October 13, 2020, the Division served a subpoena on Appellant. Ja14. Like many CFA subpoenas, this one requests documents that would allow the Division to investigate whether the company has violated New Jersey's consumer protection laws by making any misstatements or knowing omissions to state consumers about the safety, benefits, effectiveness, and legality of its products. The Subpoena seeks advertisements available to state consumers relating to the safety benefits of owning a firearm and related marketing strategies, communications, and contracts. Ja25. The Subpoena also requests documents evaluating the veracity of various claims made in advertisements and marketing available to New Jersey consumers, and documents demonstrating efforts by Appellant to determine whether its practices comport with New Jersey law. *See id*. (seeking "Documents Concerning any test, study, analysis,

or evaluation considered or undertaken ... which relates to, addresses, evaluates, proves, disproves, or substantiates any Claim made" in such advertisements). And the Subpoena likewise demands "[a]ll Documents, Including Policies, reports, and findings, Concerning any efforts by" Appellant to determine if its advertisements "compl[y] with New Jersey law." *Id*. Finally, the Subpoena requests documentation pertaining to Appellant's sales in the State. *Id*.

C. The State And Federal Litigations

After receiving the Subpoena, Appellant requested and received a thirty-day extension through December 14, 2020, to respond. Ja28. On that day, however, it did not produce a single document in response or make any effort to meet and confer. Instead, on December 14, Appellant stated in a letter to the Division that it would categorically refuse to comply. Ja32. On the very next day, Appellant filed suit in federal court, asserting that the State's effort to investigate whether the company violated New Jersey consumer protection laws is barred by the First Amendment, Second Amendment, Fourth Amendment, Equal Protection Clause, Due Process Clause, and Dormant Commerce Clause, and the Protection of Lawful Commerce in Arms Act. Ja56-80. Appellant did not move for temporary or preliminary relief, so the parties filed no substantive briefing in federal court.

Because the CFA tasks the New Jersey state courts with the responsibility to enforce CFA subpoenas, on February 12, 2021, the Attorney General and Division

commenced a subpoena enforcement action in the New Jersey Superior Court. Ja56. Like other state enforcement actions against non-compliant subpoena subjects, that action asked the state trial court to compel production of the subpoenaed documents and issue any other appropriate relief under the CFA, including both contempt and sanctions under N.J. Stat. Ann. § 56:8-6. Ja56. The state trial court issued an order to show cause on February 22, 2021, asking "why judgment should not be entered," among other things, "directing the Defendant to respond fully to the Subpoena" and "adjudging the Defendant to be held in contempt of Court for failing or refusing to obey the Administrative Subpoena Duces Tecum." DNJ Dkt. 18-2, Ex. 4. On March 11, 2021, the company filed a response and a cross-motion to quash, reiterating its challenges to the Subpoena and to the related enforcement action. Ja138.

On February 22, 2021, the State moved to dismiss the federal litigation. DNJ Dkt. 14. In response, Appellant filed an Amended Complaint on March 10, 2021. Ja81. Appellant repeated almost all the claims from the initial Complaint and added new First Amendment claims, including claims that the state court action was filed as "retaliation" for the federal suit. Ja114. Appellant simultaneously moved for a preliminary injunction against the state court action. After a preliminary conference during which the federal court expressed skepticism about Appellant's motion, *see* Ja540, Appellant withdrew it. Ja186. No further action occurred in federal court until the State filed its motion to dismiss on April 26, 2021. Ja187.

In the meantime, Appellant continued to unsuccessfully attack the Subpoena in the state trial court. On June 30, 2021, that court issued a comprehensive decision rejecting Appellant's arguments and compelling compliance with the Subpoena. Ja315. The court held that the Subpoena seeks documents that "go to the very core of whether Smith & Wesson may have violated the [CFA]." Ja325. The court also explicitly "reject[ed] the argument that the [S]ubpoena itself violates constitutional rights," including First Amendment rights. Ja327. For one, the Subpoena "neither bans speech nor does it directly regulate the content, time, place, or manner of expression." *Id.* (citation omitted). For another, the Subpoena did not inquire into "puffery/opinion" statements but instead was trained on "statements which have the capacity to mislead or which address product attributes and are measurable by research," a permissible inquiry that "is not arguably different from" the State's prior investigations into "products from other industries." *Id.* Finally, "[t]his is merely an investigation," and "[t]he Attorney General and the Division have not made any determinations regarding CFA violations." Ja328. The cases that Smith & Wesson identified were inapposite; they barred enforcement of a subpoena that interfered with an organization's "right to freely associate," but the instant requests sought "only information relating to representations [Appellant] made about [its] products to the public" and did not warrant similar scrutiny. Ja324-25.

The state court likewise "reject[ed] the argument … that this [S]ubpoena must be quashed as a result of an 'improper motive' by the Attorney General." Ja328. As the Court laid out, "[t]he theory of improper motive set forth by Smith & Wesson"—namely, that a previous Attorney General was working with activists to discriminate against gun companies—"is speculative and fails to demonstrate that the Attorney General lacks a valid basis to believe that Smith & Wesson may have committed fraud." Ja329. While that Attorney General had made comments about promoting firearm safety, "[p]ublic officials, including the Attorney General, frequently make statements of public concern," but it does not prevent them from issuing Subpoenas that are otherwise "valid on [their] face." *Id.* Furthermore, the "Attorney General has not impugned Smith & Wesson nor suggested that he has concluded that it should be charged with violations of the Consumer Fraud Act." *Id.*

Finally, the court noted that the filing of the federal lawsuit prior to the state enforcement action did not require it to forestall consideration of the Subpoena. *See* Ja322-25. The court instead observed that New Jersey "[s]tate courts routinely hear claims relating to state consumer protection laws and enforcement actions for related subpoenas." Ja324. As a result, it would be expected for "the Attorney General and the Division of Consumer Affairs—the natural plaintiffs in this case—to bring an action to enforce the Subpoena," and for Smith & Wesson to move to quash it. Ja323. While it was true Smith & Wesson had filed the federal suit before the Division "had

the opportunity to initiate a subpoena enforcement action," that was of no moment: the filing of a federal suit "appears, at worst, to have been a tactical maneuver, or at best an action that would create confusion and unnecessary lawsuits." Ja324.

Appellant moved for stays of the trial court's production order in that court, the Appellate Division, and the New Jersey Supreme Court. Ja555-57. The trial court reiterated that it considered, and was again rejecting, the company's constitutional claims. CA3 Dkt. 11 (Ex. H at 17:24 to 21:10). On July 29, the Appellate Division agreed, finding the trial "court did not abuse its discretion in granting enforcement of the [S]ubpoena based on the finding that the information requested was relevant and should not be quashed as unconstitutional. Moreover, there is no indication that the [S]ubpoena was oppressive or unreasonable." Ja559. The Appellate Division added that "[w]ith respect to the federal matter, the trial court properly determined this litigation should not be stayed under the first-filed rule as set forth in the trial court's comprehensive written decision." *Id.* Eleven days later, the Supreme Court likewise rejected the application for a stay. *See* Order, *Grewal v. Smith & Wesson Sales Co.*, No. 086096 (N.J. Aug. 9, 2021), CA3 Dkt. 11, Ex. M.

Given its lack of success in state court, on July 30, 2021, Appellant renewed its application for a temporary restraining order and preliminary injunction with the federal district court. Ja344. At a hearing on August 2, the district court denied the request for injunctive relief and granted the motion to dismiss on *Younger* grounds.

Ja392 (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013); *Juidice v. Vail*, 430 U.S. 327 (1977)). The district court acknowledged that *Younger* abstention governed in only three circumstances, but determined that at least one of those three circumstances applied. Ja11. It reasoned that "this federal action would improperly interfere with 'civil proceedings involving certain orders uniquely in furtherance of the state court's ability to perform their judicial function,'" which meant that "an 'exceptional circumstance' exists to justify this Court's decision to exercise *Younger* abstention." *Id.* In other words, a "federal injunction in this case would not only interfere with the execution of the state's judgment, but also interfere with the very process by which that judgment was obtained." *Id*. The court also emphasized the state court afforded an adequate opportunity for Appellant to raise its constitutional claims, just as Appellant had already done. *See* Ja12 (finding "nothing that precludes [Appellant] from raising their constitutional concerns in the New Jersey state courts, as evidenced by their multiple state court filings before the New Jersey Superior Court, Appellate Division and Supreme Court").

This appeal followed. Ja1. On August 10, 2021, this Court denied Appellant's emergency motion for a temporary stay but allowed Appellant to file a motion for an injunction pending appeal. CA3 Dkt. 9. Appellant filed that motion the same day, which the State opposed. CA3 Dkt. 10, 11. On August 23, a motions panel referred the motion to the merits panel without granting relief. CA3 Dkt. 14.

D. Status Of Document Production

After the state court document production deadline of August 9, 2021, passed, on August 20, 2021, Appellant began producing non-public documents—having previously referred state officials to publicly-available materials—pursuant to the state court's document production order. CA3 Dkt. 13. State officials are currently assessing the produced documents. Further, the parties agreed as to the terms of a Confidentiality Agreement and Stipulated Protective Order ("Protective Order"), which the state court entered as an order on August 31, 2021. CA3 Dkt. 30, Ex. A. The State agreed, except as provided in the Protective Order, not to use documents designated confidential in any other litigation or make them available to the public or media. *Id.* In addition, should the Subpoena ultimately be determined unlawful, the Division has agreed to either destroy or return the documents. *Id.*

SUMMARY OF ARGUMENT

I. *Younger* abstention has long represented a "far-from-novel" exception to the jurisdiction of the federal courts. *Sprint*, 571 U.S. at 77. The doctrine promotes principles of federalism and comity, and restrains equity jurisdiction, by instructing federal courts to decline cases in which certain ongoing state proceedings provide adequate legal remedies for the same claims.

A. Two distinct categories of abstention apply: abstention in favor of state civil enforcement proceedings, and abstention in favor of civil proceedings

involving orders in furtherance of the state courts' judicial function. As to the former, where a state agency is leveraging the sovereign power against a wrongdoer in state court, comity and equity prevent the federal courts from interfering—as much when that sovereign power is leveraged in a civil enforcement proceeding as in a criminal one. This is exactly such a case. Both the Subpoena and related enforcement action in state court were commenced by the State in its sovereign capacity. The action was initiated to sanction the nonresponsive party for its noncompliance and includes in its prayer for relief sanctions such as contempt, as provided by the CFA itself. And the action charges Appellant—the state court defendant—with violating the CFA's explicit subpoena compliance requirements.

As to the latter, the district court rightly concluded that the state court action to enforce the CFA subpoena is a proceeding involving orders in furtherance of the state courts' judicial function. The paradigmatic example of such a proceeding is one in which the state court is issuing—or deciding whether to issue—a sanction such as contempt for noncompliance with a subpoena. *See Juidice*, 430 U.S. at 335-36. As the Supreme Court reasoned, federal interference in such cases is especially onerous as it would stymie state courts' ability to perform their judicial function and suggest skepticism that state courts can handle federal constitutional claims. Those concerns apply here, where New Jersey law assigns to state courts the unique task of enforcing

CFA subpoenas, including by contempt of court, and where the state court issued an order to show cause regarding whether it should do so.

B. The remaining considerations for abstention are easily satisfied: there is an ongoing state court proceeding in which Appellant's many constitutional arguments can be, and have been, adequately raised. Although Appellant claims that abstention in favor of the state proceeding is unwarranted because the federal lawsuit was filed first, Appellant ignores that a state court action is ongoing under *Younger* so long as it was initiated "before any proceedings of substance on the merits ha[d] taken place in federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). For good reason: a first-to-file rule would allow for gamesmanship and incentivize parties like Appellant to rush to federal court and deprive a State of its natural forum. And here, the State filed suit in state court before *any* proceedings in federal court.

Moreover, the state proceeding offers an adequate forum in which Appellant can raise its federal constitutional arguments. As the district court found, the record conclusively shows that Appellant both could and did present the same constitutional objections its pressed here to every level of the New Jersey court system through a motion to quash and motions for a stay of the production. The state court considered Appellant's objections, including ones relating to the First Amendment, and rejected them on the merits. That Appellant failed to prevail on its claims does not establish the requisite lack of adequate opportunity to press its case.

C. Finally, Appellant's argument about the State's alleged bad faith lacks merit. Appellant's reference to statements by a prior Attorney General in favor of gun safety comes nowhere close to plausibly alleging that the Subpoena exists for the purpose of harassment and "without hope" that it might yield information about state law violations. Perhaps most notably, state courts already reviewed and rejected the same "bad faith" arguments, and their authorization indicates that no meritorious claim of "bad faith and harassment were made out." *Hicks*, 422 U.S. at 351.

II. Even if this Court were to disagree on abstention, it should nevertheless deny Appellant's request for a mandatory injunction. In addition to the reasons given in the injunction-pending-appeal papers, subsequent developments only confirm that the aim of preserving the status quo cuts against Appellant's application. Document production is already underway, and a Protective Order ensures the confidentiality of such documents and provides for their return or destruction should the Subpoena eventually be found unlawful. Preliminary relief remains unwarranted.

COUNTERSTATEMENT OF STANDARD OF REVIEW

This Court exercises plenary review over a district court's decision to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *See Free Speech Coal., Inc. v. Att'y Gen. of U.S.*, 677 F.3d 519, 530 (3d Cir. 2012). This Court's review of whether *Younger*'s requirements have been met is de novo. *See Hamilton v. Bromley*, 862 F.3d 329, 333 (3d Cir. 2017). In addition, this Court may affirm "on

any ground apparent from the record, even if the district court did not reach it." *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 761 (3d Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ABSTAINED PURSUANT TO *YOUNGER V. HARRIS*.

For half a century, *Younger* abstention has been recognized as one "far-from-novel" exception to federal courts' jurisdiction. *Sprint*, 571 U.S. at 77. That doctrine requires the federal courts to "abstain from exercising jurisdiction over a particular claim where resolution of that claim in federal court would offend principles of comity by interfering with an ongoing state proceeding." *Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010). *Younger* advances two important "dual-purpose[s]": (1) "to promote comity, 'a proper respect for state functions,' by restricting federal courts from interfering with ongoing state judicial proceedings and (2) to restrain equity jurisdiction from operating when state courts provide adequate legal remedies for constitutional claims and there is no risk of irreparable harm." *PDX N. Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 882 (3d Cir. 2020) (quoting *Sprint*, 571 U.S. at 77). In other words, adherence to *Younger* abstention is linked to Our Federalism: "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States

and their institutions are left free to perform their separate functions in their separate ways." *Middlesex*, 457 U.S. at 431 (quoting *Younger*, 401 U.S. at 44).

There are two steps involved in any *Younger* analysis. First, the court assesses whether the state proceeding is the type to which abstention can apply. As this Court explained in *PDX*, abstention is appropriate whenever the parallel state proceeding fits within any of three categories: "(1) criminal prosecutions, (2) civil enforcement proceedings, and (3) 'civil proceedings involving orders in furtherance of the state courts' judicial function.'" 978 F.3d at 882 (quoting *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014)). Second, assuming at least one of the categories is satisfied, the court considers the non-dispositive *Middlesex* factors: (1) whether there are ongoing state judicial proceedings; (2) whether those proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceeding to raise constitutional challenges. 457 U.S. at 432. The State bears the burden of showing that abstention is warranted, *Sprint*, 571 U.S. at 81-82, and it met that burden here. The district court therefore correctly found Appellant's claims belong in state court, where they are already being litigated.

A. Two Forms Of *Younger* Abstention Apply To The CFA Subpoena Enforcement Action.

The pending state court subpoena enforcement action qualifies for *Younger* abstention under both the second and third *Sprint* categories: it is a civil enforcement

proceeding that is "akin to criminal prosecution" in "important respects," and a civil proceeding "involving orders in furtherance of the state courts' judicial function." *Sprint*, 571 U.S. at 79-80. This brief addresses each category in turn.

1. *The Second Abstention Category Applies Because The Ongoing State Action Is A Qualifying Civil Enforcement Proceeding*.

The State's CFA subpoena enforcement action falls neatly in the class of civil enforcements for which abstention is required. *Younger* mandates abstention where a federal suit interferes with a state court civil enforcement action that is "akin to a criminal prosecution" in "important respects." *Sprint*, 571 U.S. at 79-80. Evaluation of whether a state civil action falls into this category includes several considerations: "whether (1) the action was commenced by the state in its sovereign capacity, (2) the proceeding was initiated to sanction the federal plaintiff for some wrongful act; and (3) there are other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges." *PDX*, 978 F.3d at 883 (quoting *ACRA Turf*, 748 F.3d at 138). The Supreme Court has thus held that abstention can be triggered by a wide array of state-initiated proceedings, like those to "enforce state civil rights laws," to "gain custody of children allegedly abused by their parents," to "recover welfare payments," or to "enforce obscenity laws." *Sprint*, 571 U.S. at 80-81 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*,

431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)). In other words, where a state agency is leveraging the sovereign power against a wrongdoer in state court, comity and equity prevent the federal courts from interfering—as much when that sovereign power is leveraged in a civil enforcement proceeding as in a criminal one. *See, e.g.*, *Kovacs v. State of N.J. Dep't of Lab. & Workforce Dev.*, 841 F. App'x 435, 435-36 (3d Cir. 2021) ("If the target of a state enforcement action thinks the action violates federal law, ordinarily he must make that point [in the state action]—not to a federal court."). That approach dictates the result in this case.

Indeed, all three factors demonstrate that *Younger* applies to the still-ongoing state civil enforcement proceeding.[3] First, as Appellant acknowledges, Br. 33, the Subpoena and the related enforcement action were commenced by the State in its sovereign capacity, acting through the Attorney General and the Division, pursuant to their authority under the CFA. *See* N.J. Stat. Ann. § 56:8-6 (empowering Attorney General to enforce subpoena in state court if subject "fail[s] or refuse[s] to … obey"); *Sprint*, 571 U.S. at 79 (noting "state actor is routinely a party to the state proceeding and often initiates [state] action"); *Bristol-Myers Squibb v. Connors*, 979 F.3d 732,

[3] To be clear, a state court proceeding need not meet all of these factors for abstention to apply. *See PDX*, 978 F.3d at 883, n.12 (evaluation of third factor not necessary where it is "sufficiently clear from the other factors that this is a civil enforcement action that is quasi-criminal in nature"); *Cutler v. Green*, 754 F. App'x 96, 100 (3d Cir. 2018) (noting analysis asks whether state court proceeding has "one or more of the following characteristics"). But they are all satisfied here.

738 (9th Cir. 2020) (abstaining when "under [state] law, only the Attorney General or another state official may bring" the action); *Kovacs*, 841 F. App'x at 436 (holding "federal courts should not interfere with state enforcement proceedings").

Second, the sovereign enforcement action was initiated to sanction Appellant for its refusal to comply with the subpoena—a wrongful act. *Sprint*, 571 U.S. at 79; *Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014) (explaining that, for purposes of *Younger*, federal courts merely ask whether the proceeding is "designed to sanction (or punish) [defendant] for conduct the State deemed contemptible"). The CFA establishes that such subpoenas possess the "force of law," N.J. Stat. Ann. § 56:8-4, and that failure to obey is a wrongful act that can justify orders "[a]djudging such person in contempt of court"; "vacating, annulling, or suspending [a] corporate charter"; or "restraining the sale or advertisement of any merchandise by such persons" who refuse. *Id.* § 56:8-6. Even Appellant repeatedly characterizes such remedies as "sanctions." Br. 11, 45; Ja94, Ja117, Ja120-21, Ja146, Ja161-63, Ja162, Ja163, Ja242-43. And the State sought these penalties in this very case, listing the available remedies and contending they could be warranted in light of Appellant's outright refusal to comply. *See* Ja62 (prayer for relief). Because such statutory "[p]enalties are, by their very nature ... a sanction for wrongful conduct," *PDX*, 978 F.3d at 884, this proceeding is one to sanction Appellant for its wrongful

acts. *See ACRA Turf*, 748 F.3d at 140 ("Sanctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act.'").

Other features of this enforcement action make it "akin to" a criminal action in "important respects" by leveraging the sovereign investigatory and enforcement power against wrongdoing. Indeed, although this enforcement action did not require especially difficult investigations regarding whether Appellant complied with the Subpoena—because Appellant sent a letter explicitly refusing to comply, and turned over zero documents—the action did "culminate[] with the filing of formal charges." *PDX*, 978 F.3d at 883. The State's complaint discussed the Subpoena, the obligation to comply, and the evidence (like Appellant's letter) that Appellant did not do so; it charged Appellant with a violation of N.J. Stat. Ann. § 56:8-6; and it demanded both injunctive relief and penalties for this wrongdoing. *See* Ja62. Especially when taken together, these considerations establish that the state court action, in which a State is leveraging sovereign investigatory and enforcement authority in its own state courts to sanction an actor for impermissible noncompliance with a Subpoena, is more than sufficient to mandate abstention. *See, e.g.*, *Backpage.com, LLC v. Hawley*, No. 17-1951, 2017 WL 5726868, at *6-7 (E.D. Mo. Nov. 28, 2017) (abstaining in favor of state agency's subpoena enforcement action in state court).

Appellant's responses are puzzling. As a threshold matter, Appellant resists the conclusion that this action seeks to "sanction" the company for failure to comply

with a CFA subpoena. But Appellant's quip that the ongoing state court suit cannot be to "sanction" misconduct because the State admitted the suit is part of a "routine ... investigation," Br. 33, ignores that an action can be both. This case offers a perfect example: it is unfortunately routine that the State has to file a subpoena enforcement action because a party refuses to comply, but that action is still designed to punish misconduct, which is why state law attaches significant penalties to noncompliance. And while Appellant argues that its conduct might not warrant monetary penalties under N.J. Stat. Ann. § 56:8-3, *see* Br. 34 n.2 (citing single unpublished decision for this claim), Appellant ignores that refusal to comply plainly justifies sanctions under another provision of that same statute. N.J. Stat. Ann. § 56:8-6 (sanctions including "contempt of court"; "restraining the sale or advertisement of any merchandise"; and "vacating, annulling, or suspending the corporate charter").

Appellant's claim that this is not a proceeding to "sanction" because the state court did not *yet* impose those penalties is weaker still. The entire point of *Younger* is that abstention is needed to avoid interfering with a qualifying *proceeding*, not a final judgment. That is why, in any *Younger* abstention case, courts look not to the ultimate outcome of the proceedings but rather who "commenced" it, whether it was "initiated" to sanction, and whether there are other "similarities" in the "preliminary" steps that make it akin to a criminal action. *PDX*, 978 F.3d at 883; *see also Gonzalez*, 755 F.3d at 183 (affirming decision to abstain even though, at time of district court

decision, state court hearing had not occurred). Appellant's approach would render *Younger* nugatory: if the State must have *already* prevailed in its civil enforcement action to trigger *Younger*, then state court defendants can always run to federal court to thwart active state court proceedings.

Appellant points to a recent decision in *Online Merchants Guild v. Cameron*, 468 F. Supp. 3d 883 (E.D. Ky. 2020), *vacated on other grounds*, 995 F.3d 540 (6th Cir. 2021), but that decision is far afield. There, a trade association sued Kentucky's Attorney General, challenging the constitutionality of state price-gouging statutes. Unlike here, however, the federal plaintiff was not party to a state court proceeding; in other words, the State had not enforced price-gouging law against the association at all. *Id.* at 890 n.4; *see also id.* at 898 ("*Younger* abstention does not apply to [a] party that 'is a stranger to the state proceeding.'"). Instead, officials had issued civil investigative demands against *individual companies*, and the state agreed there was "no enforcement proceeding" in state court. *Id.* at 898-99. That is why state officials did not even raise abstention in the first instance. *Id.* at 898. Here, by contrast, there is unquestionably a state court proceeding involving Appellant.

Appellant similarly misses the mark when it claims that the State has not yet charged the company with violating the CFA's core consumer protections. Br. 35-36. Appellant overlooks that there is an ongoing state civil enforcement proceeding for refusing to comply with a subpoena, an independent CFA requirement, and that

this noncompliance alone justifies sanctions. *See* N.J. Stat. Ann. §§ 56:8-4, -6. That lawsuit itself provides a state court forum in which to raise Appellant's objections, precisely as Appellant has done. *See infra* at 39-44. That this Subpoena was issued as part of the State's broader investigation into the company's potential consumer protection violations certainly underscores the importance of the State's interests, *see* N.J. Stat. Ann. § 56:8-13 (making violators "liable to a penalty of not more than $10,000 for the first offense and not more than $20,000 for the second"), but by no means does it indicate that abstention can be warranted only when that investigation is complete and if an additional state enforcement action is then initiated. *See, e.g.*, *Backpage.com*, 2017 WL 5726868, at *9 (abstaining for subpoena enforcement suit even though State had not yet pursued substantive state law charges).

Finally, Appellant asserts that there is no parallel criminal statute to this civil enforcement proceeding, but that likewise runs into a series of problems. For one, an analogue in the criminal law does exist. While the CFA establishes civil remedies for refusal to comply with the legal duty to turn over documents, similar violations support criminal penalties in a range of contexts. *See, e.g.*, N.J. Stat. Ann. § 2C:29-9 (providing party may be guilty of contempt if it "hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a Court … or *investigative entity*") (emphasis added). That the State has chosen civil enforcement rather than criminal penalties in this scenario is

irrelevant, since the "question is not whether the current action is criminal or whether criminal charges are warranted" but rather whether the State can "vindicate[] similar interests by enforcing its criminal ... statute[s]." *PDX*, 978 F.3d at 884. Otherwise, *Younger* could essentially never apply to civil enforcement.

But the problem is actually more fundamental: there need not be a criminal analogue for abstention to apply. *Sprint* does not discuss this factor, and the Supreme Court has abstained under *Younger* without identifying an analogue. For example, *Middlesex* applied abstention to a state bar ethics proceeding without a criminal-law analogue to ethical violations regarding intemperate and racially insensitive remarks. 457 U.S. at 428. And in *Ohio Civil Rights Commission*, the Court found abstention required when a state civil-rights proceeding involved sex discrimination, despite no suggestion that such conduct—termination of a pregnant employee—could warrant criminal penalties. 477 U.S. at 627-28. Thus, even "though the availability of parallel criminal sanctions may be a relevant datum ... it is not a necessary element when the state proceeding otherwise sufficiently resembles a criminal prosecution." *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 194 (1st Cir. 2015). After all, the fulcrum of the *Younger* inquiry is whether a state actor is leveraging sovereign power against a wrongdoer in state court "akin to" what it does in a criminal action, not whether the specific misconduct is criminal. This state action amply qualifies.

2. *The Third Abstention Category Applies Because The Ongoing Proceeding Involves Orders In Furtherance Of The State Courts' Judicial Functions*.

This Court should affirm the district court's conclusion that this suit to enjoin the subpoena enforcement action in state court implicates the third *PDX* category, "certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." Ja10-11. Because Appellant seeks to obstruct the New Jersey courts from performing their judicial functions under state law to enforce CFA subpoenas, and because a state court already issued an order to show cause as to whether a contempt citation should issue, abstention is required. In other words, not only does Appellant explicitly endeavor to frustrate the enforcement efforts of a state attorney general in state court, but it also unabashedly attempts to enjoin those courts from exercising their statutorily-assigned contempt powers.

As *Sprint* recently reaffirmed, the seminal case elucidating the contours of this kind of abstention is *Juidice*. *See Sprint*, 571 U.S. at 72-73. *Juidice* involved private-judgment creditors who served deposition subpoenas on private-judgment debtors. *See* 430 U.S. at 329 n.2 (noting subpoenas were issued by private attorneys acting as "officer of the court"). The debtors did not respond. *Id.* The state court then exercised its power under state law to issue orders to show cause to those debtors. *Id.* A class of debtors—"persons who have been, or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law"—

filed suit in federal court to enjoin the state proceedings. *Id.* at 331. The Supreme Court held *Younger* abstention was required because the "federal-court interference with the State's contempt process is 'an offense to the State's interest ... likely to be every bit as great as it would be were this a criminal proceeding.'" *Id.* at 335-36 (quoting *Huffman*, 420 U.S. at 604); *see also id.* (adding federal court involvement "unduly interfere[s] with the legitimate activities of the [State], … [and] reflect[s] negatively upon the state courts' ability to enforce constitutional principles").

Juidice illustrates why Appellant's federal lawsuit similarly "implicate[s] a State's interest in enforcing the orders and judgments of its courts" and requires abstention. *Sprint*, 571 U.S. at 70. Like in *Juidice*, there is a state proceeding to enforce a subpoena issued pursuant to state law. *See* N.J. Stat. Ann. § 56:8-4. Like the federal plaintiffs in *Juidice*, Appellant here refused to comply with that state law subpoena. Like the statute in *Juidice*, the New Jersey CFA tasks state courts with the responsibility of enforcing subpoenas and imposing sanctions such as contempt. *See* N.J. Stat. Ann. § 56:8-6 (assigning to New Jersey courts power of "[a]djudging" a noncompliant party "in contempt of court"). Again like the state court did in *Juidice*, the state court here specifically ordered Appellant to show cause why the company should not be found in violation of the Subpoena and sanctioned for noncompliance, including through "contempt of court." *See supra* at 10 (discussing order).

That proves fatal to Appellant's position. After all, just as the creditors did in *Juidice*, Appellant filed a complaint in federal court seeking to enjoin the entirety of the state proceeding. *See* Ja130 (asking federal court to "[e]njoin any proceedings in the state courts of New Jersey to enforce the Subpoena"). Like the *Juidice* plaintiffs, Appellant is trying to interfere with the state court's own process that could include holding the defendant in contempt of court. In that way, Appellant's approach would "interfere[] with the contempt process" of the New Jersey judiciary and "can readily" (if not only) "be interpreted 'as reflecting negatively upon the state courts' ability to enforce constitutional principles.'" *Juidice*, 430 U.S. at 336; *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (such interference constitutes impermissible mistrust of "ability of state courts to resolve federal questions presented in" contexts that most directly implicate their judicial functions). And it makes sense that States would link contempt with subpoena enforcement, as the latter is critical to ensuring parties have necessary information to properly present their judicial cases. It thus is eminently logical that, with respect to such proceedings, *Younger* "mandates that the federal court stay its hand." *Pennzoil*, 481 U.S. at 14.

Not surprisingly, courts faced with similar suits that interfere with state court enforcement of state administrative subpoenas have abstained. To take one example, in *Backpage.com*, a state attorney general issued civil investigative demands (CIDs), and the noncompliant recipient sued in federal court, asserting various constitutional

arguments. 2017 WL 5726868, at *5-6. The attorney general then moved to enforce his CIDs, issued pursuant to his state law, in state court. The federal court concluded that it was required to abstain based on *Younger*, finding that "comity and federalism require[] abstention because '[t]he contempt power'"—the very scheme by which that state subpoena was to be enforced—"lies at the core of the administration of a State's judicial system and such interference with the contempt process … unduly interfere(s) with the legitimate activities of the Stat(e)." *Id.* (citations omitted); *see also Lupin Pharm. v. Richards*, No. 15-1281, 2015 WL 4068818, at *1-2, 4 (D. Md. July 2, 2015) (reaching same conclusion, and rejecting effort to distinguish between subpoenas issued in civil litigation between private parties, as in *Juidice*, and ones issued by State, as here, as "distinction without a difference"). Simply put, this sort of frontal attack on state courts' ability to enforce a subpoena via contempt of court, especially in a proceeding initiated by a state agency, is forbidden.

Appellant's insistence that *Younger* can only apply *after* a contempt order has been imposed ignores that *Younger* restrains federal courts "from interfering with pending [state court] 'civil *proceedings*,'" *Sprint,* 571 U.S. at 88 (emphasis added), not just when contempt citations were already imposed. *See, e.g.*, *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002) ("*Younger* governs whenever the requested relief would interfere with the state court's ability to conduct proceedings."); *Aaron v. O'Connor*, 914 F.3d 1010, 1018 (6th Cir. 2019) (rejecting

position that abstention requires an existing court judgment, and noting that "[i]n *Pennzoil*, Texaco filed its federal suit before the Texas court entered judgment for Pennzoil" but abstention was still required) (emphasis omitted). And Appellant gets the facts wrong in *Juidice*, which implicated a class of debtors who "are *presently subject* to the civil contempt proceedings," 430 U.S. at 331 (emphasis added), not just those who had already had "existing contempt orders," Br. 27, 31. In fact, one of *Juidice*'s lead plaintiffs was facing only an order to show cause; he had not been held in contempt. 430 U.S. at 332. Appellant's federal challenge is likewise to a state court proceeding itself, in which the court ordered it to show cause why "contempt of court" should not issue for subpoena noncompliance, and so this federal lawsuit constitutes the same attack on the state court's judicial function.

Moreover, Appellant's argument that *Younger* can apply only to proceedings that pertain to a state court's functions and not the "output of those functions" misses the point. Here, Appellant's challenge *is* an affront to a state court's unique function of enforcing subpoenas and holding noncompliant parties in contempt. It is not a challenge to a particular decision made by the court, such as a family court's decision to levy a litigant's bank account in *Malhan v. Secretary, U.S. Department of State*, 938 F.3d 453, 463 (3d Cir. 2019),[4] or the landlord-tenant court's ruling in an ordinary

[4] Appellant incorrectly characterizes the Court's holding in *Malhan* as concluding that abstention was not warranted for the federal court challenge to "garnishment

eviction action in *Parr v. Colantonio*, 844 F. App'x 476, 479 n.3 (3d Cir. 2021). In fact, Appellant's attempt to enjoin the proceeding—to deprive the state court of any ability to enforce the Subpoena—goes beyond even those cases holding abstention is proper where the relief sought would interfere with an *aspect* of the state court's function. *See Falco v. Justs. of the Matrimonial Parts of Supreme Ct. of Suffolk Cty.*, 805 F.3d 425, 428 (2d Cir. 2015) (holding "challenges [to] the State court's order that [the parent] pay half the fees of the attorney appointed to represent his children in the divorce proceeding" "clearly fall within *Sprint*'s third category").

Finally, Appellant inaccurately cites *Google, Inc. v. Hood*, 822 F.3d 212, 224 (5th Cir. 2016), to claim that "'[t]he issuance of a non-self-executing administrative subpoena' does not satisfy *Younger*'s third exception." Br. 29. The key distinction Appellant ignores is that *Hood* did not involve any state court proceeding at all, and so by definition could not implicate judicial functions. *See* 822 F.3d at 223 ("Hood has not moved to enforce the administrative subpoena in any state court, nor has any

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proceedings ... because they did not 'ensure that the family court can perform their functions—they are merely the output of those functions.'" Br. 28 (quoting *Malhan*, 938 F.3d at 463). That line was not in reference to the family court's garnishment proceedings, but rather to the state court's decisions not to permit counterclaims and offsets to the particular debt at issue. *See Malhan*, 938 F.3d at 463-64 (distinguishing between Count 5 and Count 6). While it makes sense that a challenge to a court's decision to disallow specific counterclaims is not an attack on the overall judicial function, the panel did not reach that view as to garnishment orders. *Id.* Instead, the panel declined to abstain as to the count challenging the garnishment orders because there were no relevant pending proceedings at all. *Id.*

judicial or quasi-judicial tribunal begun proceedings"); *see also Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1321 (N.D. Fla. 2001) ("[A]bstention is not required when no state proceeding is pending at all."). But once the state court's unique function of enforcing subpoenas (particularly through contempt of court) is implicated, challenges to enjoin that proceeding do qualify for abstention, and any contrary conclusion would "reflect[] negatively upon [a] state court's ability to enforce constitutional principles." *Hood*, 822 F.3d at 223 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462, (1974)); *see Major League Baseball*, 181 F. Supp. 2d at 1321 n.2 (noting that abstention is not implicated for state subpoena "[u]nless and *until* someone files a proceeding in court" to enforce it (emphasis added)).

Appellant's suit to bar a state court from exercising the core judicial functions of enforcing subpoenas and sanctioning noncompliance with contempt specifically assigned to them by the CFA represents a blatant "offense to the State's interest." *Juidice*, 430 U.S. at 336. Following *Juidice*, courts faced with analogous subpoena enforcement actions and related state court orders to show cause have consistently abstained. This Court should affirm the dismissal on this basis too.[5]

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[5] The State believes that both categories of *Younger* fit this case hand-in-glove. But it bears noting that the federalism implications of this action also establish abstention is required. *See J.B. v. Woodard*, 997 F.3d 714, 722-23 (7th Cir. 2021) (emphasizing need to abstain beyond literal contours of prior cases where litigant's claim "risks a serious federalism infringement"); *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018) (same). Appellant is seeking to enjoin a production that every

B. There Is An Ongoing State Proceeding In Which Appellant Can—And Has—Raised The Same Constitutional Arguments.

Although the above analysis demonstrates clearly that abstention is warranted, the "additional" and "non-dispositive" factors laid out in *Middlesex* point in the same direction. *Sprint*, 571 U.S. at 81. In short, there is an ongoing state court proceeding that offers an adequate forum for the federal plaintiff—the state defendant—to raise the same arguments. Here, the state courts have even reviewed them.

1. *The State Court Action Is "Ongoing" Under* Younger.

Appellant first urges this Court to simply ignore the months-long litigation in which the State and Appellant have been enmeshed in the New Jersey courts because it was not "ongoing" on the day the federal action was filed. *See* Br. 37-39. That flies in the face of precedents and first principles.

Begin with the precedents. The Supreme Court has held, in no uncertain terms, that *Younger* applies with "full force" "where state ... proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court." *Hicks*, 422 U.S. at 349; *see also, e.g.*, *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 328 (1984) (same). This

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level of the state judiciary authorized, "akin to" impermissibly claiming that these judicial decisions violated Appellant's rights. *Woodard*, 997 F.3d at 723. This Court should accordingly refuse to grant Appellant "an offensive tool to take to state court to challenge that judge's orders" and instead "stay on the sidelines." *Id.*

Court and others are in accord. *See Tucker v. Ann Klein Forensic Ctr.*, 174 F. App'x 695, 697 (3d Cir. 2006) (agreeing state court litigation "need not predate the federal action for *Younger* abstention to apply" where "federal litigation [is] in an embryonic stage and no contested matter [has] been decided") (quoting *Doran v. Salem Inn*, 422 U.S. 922, 929 (1975)); *M&A Gabaee v. Cmty. Redevelopment Agency of L.A.*, 419 F.3d 1036, 1039 (9th Cir. 2005) ("*Hicks* teaches that it is not the filing date of the federal action that matters, but the date when substantive proceedings begin."); *JMM Corp. v. Dist. of Colum.*, 378 F.3d 1117, 1126 (D.C. Cir. 2004) (same); *Fairfield Cmty. Clean-Up Crew, Inc. v. Hale*, 735 F. App'x 602, 605 (11th Cir. 2018) (finding abstention proper where state court action was filed before "any substantive filings" and hearings took place in federal court).

That *Younger* does not turn on a rigid "first-to-file" rule makes sense, because a first-to-file rule permits, and even incentivizes, the very forum shopping abstention seeks to prevent—encouraging entities who receive warning letters or subpoenas to rush to federal court to thwart abstention. *See generally EEOC v. Univ. of Pa.*, 850 F.2d 969, 978 (3d Cir. 1988) ("Because the first-filed rule is based on principles of comity and equity, it should not apply when at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action."); *NYLife Distrib. v. Adherence Grp.*, 72 F.3d 371, 383 (3d Cir. 1995) (instructing court in abstention case "to ensure ... forum shopping or gamesmanship is not rewarded").

Thus, when confronted with a scenario where a subpoena recipient rushes to federal court and the State then moves to enforce, courts have uniformly abstained. *See, e.g.*, *Backpage.com*, 2017 WL 5726868, at *8 (noting no support "for the proposition that either a race to the courthouse or allegedly disingenuous legal maneuvering defeats *Younger*"); *Lupin*, 2015 WL 4068818, at *5; *Cuomo v. Dreamland Amusements, Inc.*, No. 08-6321, 2008 WL 4369270, at *10 (S.D.N.Y. Sept. 22, 2008); *Temple of the Lost Sheep v. Abrams*, 761 F. Supp. 237, 242 (E.D.N.Y. 1989).

These precedents and principles are in full force here, where Appellant does not (and cannot) dispute that as of February 12, 2021, when the State initiated the enforcement action, no federal proceedings had occurred. No answer or dispositive motion had been filed, no hearing had been held, and Appellant had not yet filed for preliminary relief. *See, e.g.*, *M&A Gabaee*, 419 F.3d at 1039 (abstaining in favor of state court suit filed before federal court took substantive action); *Monster Beverage Corp. v. Herrera*, 650 F. App'x 344, 346 (9th Cir. 2016) (applying *Younger* when "[t]here was an ongoing state proceeding when the district court considered the motion to dismiss at issue"); *JMM Corp.*, 378 F.3d at 1126 (abstaining where "the District [of Columbia] did not file its Superior Court action … until two months after [the plaintiff] filed its federal complaint" and the federal court had denied a TRO). Indeed, the *Hicks* rule applies particularly well here, where a state court determined Appellant's decision to rush to federal court just one day after its deadline to comply

with the Subpoena "appears, at worst, to have been a tactical maneuver, or at best an action that would create confusion and unnecessary lawsuits." Ja323. Appropriately, a consistent body of law forecloses such efforts to deprive a "natural plaintiff" of its forum even before substantive federal court proceedings occur.

While Appellant acknowledges the rule set forth in *Hicks*, it claims that case is limited to scenarios where state court criminal actions are filed before proceedings of substance occur in the federal court. *See* Br. 38 & n.5. That is wrong: the Supreme Court has more than once applied this same approach to civil actions. *See Midkiff*, 467 U.S. at 328 (eminent domain); *Middlesex,* 457 U.S. at 436-37 (bar discipline). And a wealth of circuit and district court cases agree. *See M&A Gabaee*, 419 F.3d at 1039; *JMM Corp.*, 378 F.3d at 1126; *Fairfield Cmty. Clean-Up Crew, Inc.*, 735 F. App'x at 605. Although Appellant suggests that *Sprint* was meant to rein in this approach, *see* Br. 38 n.5, that case spoke to which categories can trigger abstention, not to when a state action must be "ongoing." There is simply no evidence that *Sprint* overruled *Midkiff sub silentio*. (Similarly, Appellant claims *PDX* somehow endorsed such a first-to-file approach, but takes a stray line out of context. *See* Br. 38 n.5. The *PDX* parties did not raise, and this Court did not address, the timing issues implicated here.) And Appellant's position is illogical, suggesting that different rules apply for when a state action counts as "ongoing" based on which *Younger* category applies.

Not so: if any of *Younger*'s three categories are satisfied, the subsequent "ongoing" test is consistent and clear. Appellant cannot meet it.

2. *New Jersey Courts Provide An Adequate Forum In Which To Adjudicate Appellant's Claims—And In Fact Already Have.*

Because the state court action is so clearly ongoing, Appellant switches gears and makes the bold assertion that New Jersey courts provide an inadequate forum in which to raise its constitutional challenges. Appellant is wrong.

Initially, Appellant bears a tremendously difficult burden in challenging the adequacy of the New Jersey courts. In determining whether a state proceeding offers an "adequate opportunity in the state proceeding to raise constitutional challenges," *Middlesex*, 457 U.S. at 432, "a federal court should assume that state procedures will afford an adequate remedy," *Pennzoil*, 481 U.S. at 15, and "the burden ... rests on the federal plaintiff" to prove the contrary, *id.* at 14. The plaintiff must establish that "state law *clearly bars* the interposition of the constitutional claims." *Gonzalez*, 755 F.3d at 184 (quoting *Moore*, 442 U.S. at 425-26). That requires the plaintiff to show "procedural barriers to the presentation of the federal challenges" to state law claims, *id.*, not whether it is satisfied with how the court addressed them. *See Forty One News v. Cty. of Lake*, 491 F.3d 662, 667 (7th Cir. 2007) (noting that dissatisfaction with state court decisions "carr[ies] no weight under *Younger*").

As the district court correctly found, Appellant cannot satisfy this burden. *See* Ja12 (finding "nothing that precludes [Appellant] from raising their constitutional concerns in the New Jersey state courts"). Appellant never contests that it is able to assert First Amendment arguments—or any other constitutional arguments—in state court. Indeed, the state court issued an order to show cause why Appellant should not be required to comply with the Subpoena, and Appellant filed a motion to quash. Those proceedings allowed Appellant to make any argument it saw fit. Appellant knows this because it *did* assert its challenges at length in the state court. *See* Ja154-69, Ja180. And after that trial court enforced the Subpoena, Appellant reiterated—at length again—its constitutional claims in three stay motions. *See* CA3 Dkt. 11 (Ex. H at 6:21 to 9:12). Those motions, filed in the trial court, Appellate Division, and Supreme Court, included arguments and evidence analogous to those in Appellant's federal preliminary injunction motions. Far from identifying a state law that "*clearly bars* the interposition of the constitutional claims," the record shows Appellant was able to press its constitutional case to the state tribunals.

Appellant then tries to move the goalposts by arguing that the state court gave insufficient attention to its claims and enforced the Subpoena without "substantively consider[ing] any of Smith & Wesson's specific First Amendment theories," Br. 40, but that falls short for two independent reasons. First, it is simply untrue; the record establishes that the court gave significant attention to Appellant's First Amendment

theories and disagreed with them. As recounted above, *see supra* at 10, the trial court explicitly "reject[ed] the argument that the [S]ubpoena itself violates constitutional rights;" found "the Subpoena neither bans speech nor does it directly regulate the content, time, place, or manner of expression;" disagreed with Appellant that the Subpoena targeted "puffery/opinion;" and refuted the claim that "this [S]ubpoena must be quashed as a result of an 'improper motive' by the Attorney General" or his alleged desire to suppress viewpoints. Ja327. The trial court reiterated its conclusion that the claims fell short at the stay-pending-appeal posture, CA3 Dkt. 11, Ex. H at 17:24-21:10), and the Appellate Division also concluded it is reasonable to find "the information requested was relevant and should not be quashed as unconstitutional," Ja559. That Appellant must have an adequate opportunity to *raise* its constitutional arguments by no means obligates the state court to have *adopted* them.

Second, even if the trial court refused to consider Appellant's constitutional contentions (and it did not), this would not demonstrate *Younger*'s inapplicability. After all, that would simply show error by one trial judge, which could be corrected in the state appellate courts. Indeed, in *Gonzalez*, the Court held that a litigant had an "adequate opportunity" to raise constitutional claims even if a state administrative law judge explicitly "refused to consider" them, because that litigant was "permitted to ... raise[] his federal claims in his appeal to the New Jersey Superior Court, Appellate Division." 755 F.3d at 183-84; *see also, e.g.*, *Kovacs*, 841 F. App'x at 436

("Even if the agency refused to hear his argument, he could always seek review in the New Jersey courts."). So too here: Appellant can argue in its state court appeal that the trial court gave insufficient attention to its First Amendment arguments. In fact, Appellant did so during the stay-pending-appeal stage and is doing so again in its state merits appeal. Appellant should surely lose that appeal, which relies upon the same misunderstanding of the trial court's analysis, but that path for state court review undermines any need for federal court interference.

Appellant's potpourri of responses is unavailing. First, Appellant accuses the State of arguing that state courts may "not consider Smith & Wesson's constitutional objections to his Subpoena at all, and instead 'simply compel compliance,'" Br. 40, but that misstates the State's position. The paragraph above shows that the State was referring to Appellant's argument that its statements do not support liability because they were mere opinion, which could not "be meaningfully evaluated by the Court" since it turned on "what any hypothetical documents might show." Ja588-89. And while the State certainly did argue that the constitutional framework applicable to a subpoena challenge differs markedly from that applicable to an enforcement action, its brief also dedicated 15 pages to rebutting Appellant's merits arguments. Ja595-609; *see also* Ja614 (agreeing that "New Jersey state courts can and routinely do resolve objections based on federal constitutional issues, and there is no reason why

this Court cannot do so"). And because the court did consider and reject the claims on the merits, what the State allegedly argued hardly matters anyway.

Second, there is no merit in Appellant's suggestion that it could not adequately raise its arguments in state court because that court could only render a decision on whether to enjoin the enforcement of the Subpoena, and could not issue a decision regarding its requests for "injunctive relief as to the investigation." Br. 22, 46-47. That defies logic, given that Appellant's only concrete challenge in either forum *is* to the Subpoena, and the Subpoena is necessary to the state investigation. Moreover, Appellant fails to provide a single citation for the proposition that a party may secure a federal court injunction that, in the abstract, bars an "investigation." Investigations can be conducted only by a limited set of mechanisms (like subpoenas), and a party can seek redress when a particular mechanism violates its rights. But the notion that Appellant can preclude an "investigation" writ large is illogical and unworkable. No court—federal or state—indefinitely precludes state agencies from conducting an investigation, especially where uncontroverted information confirms advertisements contain either false or misleading statements. And strikingly, Appellant's approach would forever prevent the application of *Younger* to subpoena enforcement actions, as federal plaintiffs could simply initiate claims referring to "investigations" rather than "subpoenas" to achieve the same federal interference.

Finally, Appellant again mischaracterizes the state court proceedings with its suggestion that it was barred from "developing any factual record." Br. 41. In fact, the motion to quash introduced a whole catalog of factual materials in an attempt to bolster Appellant's arguments, attaching internet sources and email correspondence as exhibits. Ja155-158. And Appellant had every right to amplify that record when it filed its motion to stay, and New Jersey practice allows a party seeking a stay to introduce all the same evidence Appellant introduced in its federal court motion for preliminary injunction—a fact Appellant does not and cannot deny. *See, e.g.*, *Crowe v. De Gioia*, 447 A.2d 173, 177 (N.J. 1982) (discussing need for record to show entitlement to injunctive relief). And even were there nuanced differences between whether and how evidence is introduced in the New Jersey and federal courts' stay proceedings—and Appellant has identified none—its burden is to establish a "state law [that] *clearly bars* the interposition of the constitutional claims," *Gonzalez*, 755 F.3d at 184, not mere procedural distinctions.

C. As The New Jersey State Courts Already Concluded, Appellant's Baseless Allegations Of Bad Faith Do Not Justify Interference With The Ongoing Subpoena Enforcement Action.

Appellant's assertion that the Attorney General's alleged "bad faith" provides a basis for disregarding *Younger* is wholly misguided. To start, Appellant confronts a high burden of proof: "A prosecution or proceeding is conducted in 'bad faith" for abstention purposes when it is brought 'without hope' of success." *Getson v. New*

Jersey, 352 F. App'x 749, 753 (3d Cir. 2009) (quoting *Perez v. Ledesma*, 401 U.S. 82, 85 (1971)); *see also, e.g.*, *Juidice*, 430 U.S. at 338 (same); *Jaffrey v. Atl. Cty. Prosecutor's Off.*, 695 F. App'x 38, 41 (3d Cir. 2017) (same). A federal plaintiff's "challenges" to the merits of a State's theory do not "establish that the [] proceeding was brought in bad faith." *Getson*, 352 F. App'x at 753-74; *see also Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 339 F. App'x 232, 239 (3d Cir. 2009) (rejecting claim of bad faith where federal plaintiff "has not demonstrated that the [state agency] has conducted itself in a manner that shows any disrespect or disregard for federal or state laws"). Appellant has not identified a case, let alone an analogous case, in which either the Supreme Court or this Court declined abstention on these grounds. And Appellant gives this Court no reason to do so here.

The first fatal problem with Appellant's argument is that the state trial court already blessed the Subpoena and its enforcement, rejecting the very bad faith theory Appellant advances here. As the Supreme Court explained in *Hicks*, where the state officials' actions were "authorized by judicial … order," and without any basis to impugn the judiciary's own authorization of the Subpoena, "we cannot agree that bad faith and harassment were made out." 422 U.S. at 351. That is eminently logical. After all, if a state court agrees that a subpoena is valid and enforceable, it strains credulity to claim the subpoena was the product of ill motive "without a reasonable expectation of" success. For example, although Appellant says the State's bad faith

is obvious because it is inquiring into "classic examples of non-actionable opinion," Br. 44, the state court disagreed and held that the Subpoena was not inquiring into "puffery/opinion" but was trained on "statements which have the capacity to mislead … and are measurable by research." Ja327. This establishes that a good-faith actor could find this Subpoena valid. And even worse for Appellant, the trial court and the Appellate Division rejected the view that the Subpoena was issued for unlawful purposes. *See* Ja326, Ja559. If those courts concluded that the State acted in good faith, it is not clear why federal court interference is necessary or proper.

The second fatal problem is that Appellant does not even allege the Subpoena was initiated "without hope of obtaining a valid" eventual judgment as to any CFA violation, *Perez*, 401 U.S. at 85, nor can it answer the state court's conclusion that this Subpoena "is not arguably different from" the State's previous investigations into "products from other industries." Ja327; *see supra* at 5, 7 (listing certain recent investigations into variety of other products and services unrelated to firearms). No facts plausibly suggest that the State lacked independent justification for issuing the Subpoena. Indeed, New Jersey law provides that justification is met if an Attorney General "believes it to be in the public interest that an investigation should be made" to determine if there is a violation. N.J. Stat. Ann. § 56:8-3; *UMDNJ v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (noting State can act "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). That

other governments pursued similar claims against Appellant further undergirds the Attorney General's basis for at least *initiating* an investigation to determine if similar violations have taken place in New Jersey. *See, e.g.*, *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 830 (Ind. Ct. App. 2019) (city filed action alleging Appellant employed false and deceptive advertising regarding safety and effectiveness of handguns). Appellant's self-serving assertion that it has not violated the law does not eliminate these justifications and is not entitled to any weight.

Moreover, the district court was not required to "accept as true" the hyperbolic and conclusory accusation that the Subpoena was punishment for Appellants' views on the Second Amendment, Br. 43, and was part of a coordinated effort to hold Appellant accountable for conduct "for which [it is] not responsible," Br. 44. Here, again, the state court found that Appellant's allegations do not plausibly support this conclusion. Relying on *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 705 (S.D.N.Y. 2018), the state court explained that although a previous Attorney General had publicly promoted gun safety, "public officials, including the Attorney General, frequently make statements of public concern," and that does not prevent them from issuing Subpoenas that are "valid on [their] face." Ja329. Were the rule otherwise, Attorneys General who spoke out about the harms of opioids and the role of prescribers would never be able to investigate manufacturers for wrongdoing. *See Exxon*, 316 F. Supp. 3d at 707 ("The fact that [an official] believes climate change

is real … does not mean the [official] does not also have reason to believe that Exxon may have committed fraud."); *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern.").

And alleging that a state official worked closely with firearm safety advocates gets Appellant no further, as it represents "circumstantial evidence" that "fails to tie the AGs to any improper motive, if it exists, harbored by activists." *Exxon*, 316 F. Supp. 3d at 712. That Appellant relies exclusively on generic statements or meetings involving the *former* Attorney General makes its circumstantial allegations even less compelling, especially where the current Attorney General decided to move forward with the enforcement action. Appellant has not done nearly enough to justify federal interference with the state court's holding that "[t]he theory of improper motive set forth by Smith & Wesson is speculative" and insufficient to bar production. Ja329. It certainly has not cleared the extraordinarily high bar needed to justify the rarely-employed "bad faith" exception to *Younger*.

Finally, *Hood* does not support Appellants. For one, in that case, an Attorney General "made statements, on multiple occasions, which purport to show his intent to take legal action against Google for Google's perceived violations," 96 F. Supp. 3d 584, 595 (S.D. Miss. 2015), even before having necessary evidentiary support. Here, Smith & Wesson has not demonstrated that the Attorney General had intent to

take action against it; to the contrary, the State stressed it was not predetermining the outcome of its investigation, and only filed this action after Appellant's tactical decision to not comply with the Subpoena. *See* Ja329 (state court finding the prior "Attorney General has not impugned Smith & Wesson nor suggested that he has concluded that it should be charged with violations of the Consumer Fraud Act"). And in any event, the Fifth Circuit did not endorse that part of the district court's opinion; it had no occasion to do so after vacating and remanding on other grounds. *See Hood*, 822 F.3d at 228 ("We express no opinion on the reasonableness of the subpoena or on whether the conduct discussed in the parties' briefs could be held actionable consistent with federal law.").[6]

II. APPELLANT HAS NOT JUSTIFIED MANDATORY PRELIMINARY RELIEF PENDING A MERITS HEARING.

Even were this Court to disagree with the district court's abstention holding, no preliminary injunction should issue. As this Court has repeatedly recognized, the grant of injunctive relief "is an extraordinary remedy … which should be granted only in limited circumstances." *Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100,

[6] Finally, Appellant does not and cannot contest that the state proceeding implicates an important state interest. *See Middlesex*, 457 U.S. at 432 (listing this as a relevant factor). After all, this proceeding furthers the State's interest in protecting consumers and its authority to conduct investigations via subpoena. *See Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 623-24 (2003) (recognizing the compelling state interest in "vigorously enforc[ing] its antifraud laws"); *Kovacs*, 841 F. App'x at 436 ("New Jersey has an important interest in enforcing its laws.").

102 (3d Cir. 1998); *see also Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (adding the "dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat"). Although the injunction-pending-appeal briefing amply discusses why Appellant is not entitled to this relief, intervening developments warrant brief comment.

First, Appellant's demand for a preliminary injunction has become even more plainly inconsistent with the status quo. As this Court has repeatedly explained, the primary aim of preliminary relief is to maintain the status quo until the case can be heard on the merits. *See, e.g.*, *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994) (emphasizing heavy burden on party seeking preliminary injunction that alters status quo). That is the case here: document production is underway, as required by all levels of the New Jersey judiciary. Appellant essentially demands that this Court overrule the judgment of these New Jersey courts, which uniformly found a stay of production unwarranted, and order certain documents destroyed even before the federal lawsuit comes to an end. This Court should not do so.

Second, Appellant's claim of harm has grown even weaker—undermining its claim that it needs the destruction or return of documents it already produced to the State. *See, e.g.*, *Kos Pharm. Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (noting plaintiff is entitled to preliminary relief only where it "will suffer irreparable harm if the injunction is denied"). The State and Appellant subsequently entered into

a Protective Order that, *inter alia*, both ensures the confidentiality of documents and provides for their return or destruction should the Subpoena later be found unlawful. It is thus even less clear now how Appellant would suffer any irreparable injury if this Court fails to overrule the determinations of the state judiciary and declines to enjoin the Subpoena at this preliminary stage.

Finally, Appellant's discussion of this issue in its merits brief is simply wrong. To press its need for an injunction, Appellant relies solely on *Helfant v. Kugler*, 484 F.2d 1277, 1283 (3d Cir. 1973). *See* Br. 47-48. But Appellant fails to point out that the Supreme Court vacated and remanded this Court's judgment in that case and held that dismissal and denial of preliminary relief on *Younger* grounds was proper. *Kugler v. Helfant*, 421 U.S. 117, 131 (1975). In the process, the Supreme Court held "the basic policy against federal interference with pending state prosecutions would be frustrated as much by the declaratory judgment procedure ordered by the Court of Appeals as it would be by the permanent injunction originally sought by Helfant." *Id.* That applies equally here, because any temporary injunction would "frustrate" state court orders specifically denying a stay of the production order. In short, even beyond the need for abstention and the lack of any merit to Appellant's claims, the equities continue to strongly compel denial of injunctive relief.

CONCLUSION

This Court should affirm the dismissal of the Amended Complaint.

Respectfully submitted,

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By: /s/ Robert J. McGuire
Robert J. McGuire
Deputy Attorney General

DATED: September 24, 2021

CERTIFICATION OF BAR MEMBERSHIP

I, Robert J. McGuire, counsel for Defendants-Appellees, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

By: /s/ Robert J. McGuire
Robert J. McGuire
Deputy Attorney General

DATED: September 24, 2021

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 12,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Times New Roman that is at least 14 points.

3. The text of the brief filed with the Court by electronic filing is identical to the text of the paper copies.

4. This brief complies with L.A.R. 31.1(c) in that prior to being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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By: /s/ Robert J. McGuire
Robert J. McGuire
Deputy Attorney General

DATED: September 24, 2021

CERTIFICATION OF SERVICE

I hereby certify that on this day, I caused the Brief for Defendants-Appellees to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing and by causing an original and six paper copies of the brief and supplemental appendix to be sent via overnight mail. Counsel of record will receive service via the Court's electronic filing system and will receive a paper copy via overnight mail.

/s/ Robert J. McGuire
Robert J. McGuire
Deputy Attorney General

Dated: September 24, 2021