IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2492

SMITH & WESSON BRANDS, INC.; SMITH & WESSON SALES COMPANY; and SMITH & WESSON INC.,

***Plaintiffs-Appellants*,**

v.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; NEW JERSEY DIVISION OF CONSUMER AFFAIRS,

***Defendants-Appellees*.**

APPELLANTS' OPENING BRIEF

On Appeal from the United States District Court for the District of New Jersey, No. 20-CV-19047

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September 8, 2021

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STATEMENT OF JURISDICTION

On August 2, 2021, the District Court dismissed this case without prejudice, abstaining under *Younger v. Harris*, 401 U.S. 37, 43 (1971). JA2. Appellants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson Inc. (collectively, "Smith & Wesson") filed a timely notice of appeal on August 9, 2021. JA1. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 because this case arose under 42 U.S.C. § 1983. This Court has appellate jurisdiction under 28 U.S.C. § 1291. *See Lui v. Comm'n, Adult Ent., Del.*, 369 F.3d 319, 325 (3d Cir. 2004) (holding that "a district court's *Younger* abstention order constitutes a final, appealable order under 28 U.S.C. § 1291 because . . . the effect of such an order is to surrender jurisdiction of the federal action to a state court"); *see also Sixth Angel Shepherd Rescue, Inc. v. Schiliro*, 596 F. App'x 175, 177 (3d Cir. 2015) (exercising jurisdiction over *Younger* dismissal that was without prejudice).

STATEMENT OF THE ISSUE

Did the District Court err by dismissing this case on *Younger* abstention grounds where (1) the state court administrative subpoena proceeding was not a civil proceeding involving certain orders uniquely in furtherance of the state court's judicial functions and was not akin to a criminal proceeding; (2) the state court proceeding was initiated two months after Smith & Wesson's lawsuit was filed and did not resolve Smith & Wesson's constitutional claims; and (3) equitable considerations (which the District Court failed to address) militated against abstention, including bad faith by the Attorney General and the lack of an adequate remedy in state court?

INTRODUCTION

This case raises the question of whether a federal court should prevent a state Attorney General's Office from using subpoena and investigatory powers to suppress disfavored opinion. This Court has long answered the question in the affirmative: "if a subpoena is issued for an improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process." *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166–67 (3d Cir. 1986). Smith & Wesson's federal suit challenges exactly such a subpoena, one which attacks viewpoints and violates the Fourth Amendment.

Smith & Wesson's 51-page Amended Complaint contains extensive factual pleadings, which allege that the administrative subpoena (the "Subpoena") in question here was issued because, and only because, Smith & Wesson advocates for a different viewpoint on Second Amendment issues than that held by the Attorney General's Office. As alleged in the Amended Complaint, the Attorney General's Office frequently expressed hostility to Second Amendment rights generally, and Smith & Wesson in particular, such as vowing to "turn up the heat" on Smith & Wesson and publicly (and falsely) associating Smith & Wesson with "gun crimes." The Office of the Attorney General has also teamed up with anti-Second Amendment groups and hired private law firms (a self-anointed "Firearms Accountability Counsel Taskforce"), on a contingency basis no less, to target

firearms manufacturers like Smith & Wesson with "impact litigation." All of this was directed by the Attorney General's Office because of Smith & Wesson's opinion and for the purpose of reducing Smith & Wesson's participation in the public square.

The issuance of the Subpoena at issue here was only the latest step in this campaign to silence the opposing viewpoint. As explained in the Amended Complaint, Smith & Wesson is a strong advocate for the Second Amendment. It has adopted its Principles for Responsible Engagement, which contain the express statements that Smith & Wesson "recognizes its responsibility to its shareholders, its employees, and its customers to defend the Second Amendment" and that it commits to "support only those regulatory proposals that are consistent with the Second Amendment and that deliver demonstrable societal benefits." JA391.

It is precisely because of these opinions that the Amended Complaint alleges the Subpoena was issued and the investigation was undertaken. The Subpoena focuses on opinions concerning issues of Second Amendment debate, such as lifestyle choices, safety, self-defense, and constitutional carry. This focus on opinion and the targeting of Smith & Wesson constitute classic viewpoint discrimination, which the Constitution expressly forbids. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The factual issues critical to Smith & Wesson's allegations have not yet been properly considered by any court. The District Court's decision to abstain and the

state court's summary proceeding and decision to compel compliance with the Subpoena stripped Smith & Wesson of fundamental due process. That is because the state court proceeding was summary in nature, foreclosed any discovery, and truncated the entire process to one requiring Smith & Wesson to prove its case without the benefit of the typical civil process that would have been afforded in federal court.

What the truncated show-cause process established without a doubt is that *Younger*/*Sprint* abstention was not appropriate because it did not provide a forum in which Smith & Wesson's claims could be heard. Indeed, the Attorney General expressly asked the state court to compel production pursuant to the Subpoena "irrespective of the merits" of the federal court action. JA73. The state court followed that suggestion and, in doing so, essentially sidestepped Smith & Wesson's constitutional arguments and ignored the detailed allegations in the Amended Complaint, including allegations of bad faith to which the Attorney General offered no evidence in response. The state court did exactly what the Supreme Court has held cannot be done — *i.e.*, compelled production pursuant to a Subpoena without first resolving threshold issues of constitutionality, and therefore, enforceability. *See NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958).

Through 42 U.S.C. § 1983, Congress directed the federal courts to interpose themselves between the people and the State where, like here, it is necessary "to

protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). The District Court's failure to do so was clear error because, by the Attorney General's own argument and admission, the case before the state court was nothing more than a "quotidian subpoena dispute." JA199. Such a garden-variety action, proceeding by way of summary adjudication no less, does not even come close to meeting the "exceptional circumstances" required by the Supreme Court for a federal court to abstain under *Younger*. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

But the District Court's error was not limited to classifying this garden-variety subpoena dispute as an "exceptional circumstance" under *Younger* and *Sprint.* The District Court compounded this error by (1) improperly placing the burden on Smith & Wesson to prove that abstention was unwarranted; (2) failing to consider the factual allegations in the Amended Complaint, let alone afford the presumption of truthfulness to which they were entitled; (3) failing to properly evaluate the factors required by *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), which preclude abstention here because there was no ongoing state court proceeding when Smith & Wesson filed its suit, and which did not properly consider Smith & Wesson's constitutional arguments; and (4) failed to evaluate the equitable

considerations of the Attorney General's bad faith and the lack of an adequate remedy in state court, both of which bar abstention.

Smith & Wesson has the right to have its allegations considered and its claims heard in federal court. The District Court's erroneous abstention decision must be reversed.

STATEMENT OF THE CASE

I. Statement of the Facts

A. The Attorney General Targets Smith & Wesson Because of the Company's Viewpoint.

The Office of the New Jersey Attorney General has engaged in a pattern of conduct that directly targets Smith & Wesson because of its viewpoint on the Second Amendment and related issues. The allegations in the Amended Complaint detail Smith & Wesson's outspoken public advocacy of Second Amendment rights.

Smith & Wesson's views are consolidated and summarized in its "Principles for Responsible Engagement" ("Principles"). JA391. In the Principles, Smith & Wesson states that, "[a]s a manufacturer of firearms for the lawful use by citizens," Smith & Wesson "recognizes its responsibility to its shareholders, its employees, and its customers to defend the Second Amendment." JA391. Smith & Wesson commits to "support only those regulatory proposals that are consistent with the Second Amendment and that deliver demonstrable societal benefits." JA391.

In the Principles, Smith & Wesson also commits to "engag[ing] in advocacy through education, communication, and public affairs efforts on behalf of its shareholders, employees, and customers" who oppose "the imposition of onerous and unnecessary regulations adversely impacting citizens' Second Amendment rights." JA391. It takes a firm position that the Supreme Court's 2008 ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "confirm[ed] the broad rights of citizens to possess firearms" and is "settled law." JA391.

The Principles articulate positions that are directly at odds with the Office of the Attorney General's advocacy for gun control. While serving as Attorney General, Gurbir Grewal (who opened the investigation and issued the Subpoena) announced that the lawful carrying of firearms should not be allowed because "[p]ublic carrying of firearms is dangerous to our residents and to law enforcement." JA446. Further, he publicly vowed to "turn[] up the heat" on Smith & Wesson. JA483. In pursuit of that goal, he issued facially flawed "reports" that falsely sought to place responsibility for "gun crimes" committed by third parties on Smith & Wesson — despite the fact that Smith & Wesson had no culpability. JA440, 483, 487. The current Attorney General has stepped into former Attorney General Grewal's shoes and "has continued moving forward with this investigation." JA523.

The Attorney General's investigation also is tainted by his partnership with, and the improper influence of, groups with an anti-Second Amendment agenda such

as the Giffords Law Center. JA446. In the words of that group, the Attorney General has paired "the investigative and enforcement powers of the State" with the efforts of anti-Second Amendment activists to advance their political interests. JA103, 448. As part of that effort, the Attorney General has hired as "Special Firearms Counsel" the same lawyers who have formally partnered with the activists in the Firearms Accountability Counsel Taskforce. JA105, 435. Compounding the bias, the Attorney General pays these firms on a contingency basis, creating a bounty system that incentivizes the targeting of Smith & Wesson and other manufacturers, rather than the impartial administration of justice that the Attorney General is duty-bound to pursue. JA104–105, 463.

B. The Attorney General Serves the Subpoena on Smith & Wesson and Later Retaliates with an Enforcement Proceeding After Smith & Wesson Files Its Federal Complaint.

The Attorney General's Office issued the Subpoena in October 2020, following a series of public acts and statements targeting Smith & Wesson. JA15. The Subpoena, issued under the New Jersey Consumer Fraud Act ("CFA"), purports to investigate as-yet-undefined "fraudulent" conduct directed at consumers.

The reality of the Subpoena is otherwise, as is evident on its face. It seeks documents relating primarily to opinions or value judgments (which cannot, by virtue of being opinion, constitute fraud) on matters of current public debate — in other words, speech protected under the First Amendment. These opinion topics

include: (1) whether firearms enhance safety; (2) whether the concealed carrying of firearms enhances one's "lifestyle"; (3) whether "novice, untrained [c]onsumers" can effectively use a Smith & Wesson firearm for personal or home defense; and (4) whether Smith & Wesson firearms can be legally carried and concealed. JA25.

Smith & Wesson responded by serving timely, detailed objections and by contemporaneously filing a Complaint in the U.S. District Court for the District of New Jersey. Through its Complaint, Smith & Wesson asserted constitutional and other claims because the Attorney General expressly targeted, through use of the Subpoena, protected opinion speech with the goal of suppressing that speech in the public square. JA81–82. Smith & Wesson's federal lawsuit sought declaratory and injunctive relief under 42 U.S.C. § 1983, the primary method by which federal courts protect citizens against oppressive and unconstitutional state action.

Two months after that filing and after seeking and receiving two extensions in federal court, the Attorney General moved to sidestep the District Court action (and the threshold constitutional issues it raised) by filing a summary proceeding in the New Jersey Superior Court seeking to enforce the Subpoena. In doing so, the Attorney General asked the state court to enforce the Subpoena and compel production, "irrespective of the merits" of the federal suit, which the state court ultimately did. JA73.

Both the relief sought and the timing of the state court action demonstrated the Attorney General's Office's bad faith. For example, he requested draconian sanctions such as a total ban on Smith & Wesson's advertisement and sale of merchandise in New Jersey, even though such sanctions could not be had at that stage as a matter of New Jersey law. JA62. In other words, the Attorney General's Office asked the state court, in a "summary" proceeding, to both prohibit Smith & Wesson from speaking *and* doing business in the state of New Jersey because Smith & Wesson filed the federal court action. Notably, no circumstances had changed since the issuance of the Subpoena, yet the Attorney General's Office requested summary and expedited relief, all while obtaining extensions of the schedule in federal court. The ten years of "advertising" information requested did not suddenly become more relevant or pressing. The Attorney General's Office identified no imminent threat of harm. The *only* thing that had changed in the interim was that Smith & Wesson filed suit in federal court to vindicate its constitutional rights.

Shortly after filing the state court action, the Attorney General moved to dismiss the federal case, arguing that the District Court should abstain under *Younger*. JA198. Given the obviously retaliatory nature of the state court action and the relief requested, Smith & Wesson later amended its Complaint to add claims for retaliation arising from the Attorney General's enforcement proceeding in state court. JA83.

Meanwhile, the state court proceedings demonstrated that no valid reason existed to issue the Subpoena in the first instance. Tellingly, during a May 27, 2021, hearing, when pressed by the court to explain the basis underlying the issuance of the Subpoena, counsel for the Attorney General all but admitted there was none, and was further unable to articulate any factual statement made by Smith & Wesson that he suspected was false or fraudulent. Specifically, when asked to articulate an "anchor" to justify the Subpoena requests — *i.e.*, "specific statements" or "specific products" that may have violated the CFA — the Assistant Attorney General essentially explained that the entire investigation was and remains grounded in speculation and hypotheticals. JA298. He stated that a factual basis for the Subpoena was "not appropriate to disclose here, because (a) it's our investigative thinking and our strategy, and (b) we don't have all of the arguments yet." JA298. At no time did the Assistant Attorney General even attempt to meet his Fourth Amendment burden to show that the Subpoena was reasonably related to a legitimate purpose by articulating any basis to believe that any Smith & Wesson advertisement allegedly deceived consumers. The Fourth Amendment prohibits such "fishing expeditions" when they are "premised solely upon *legal* activity" *Major League Baseball v. Crist*, 331 F.3d 1177, 1182, 1187 (11th Cir. 2003).

When asked to clarify, the Attorney General simply stated that "we have *concerns* that there might be a violation of the regulation. We haven't conclusively

determined that yet, nor have we conclusively determined that there's a statutory violation." JA299 (emphasis added). Indeed, the Attorney General did not "yet know what advertisements will be at issue, let alone which specific statements might violate the CFA," JA272, even though these advertisements are public by their very nature.

C. The State Court's Production Order

On June 30, 2021, the state court declined to stay the enforcement action, denied the motion to quash or dismiss, and ordered Smith & Wesson to fully comply with the Subpoena. JA315, 329. The court erred in several ways. First, it ignored almost all of Smith & Wesson's constitutional objections, in contravention of the Supreme Court's ruling in *NAACP v. Alabama*, which requires that threshold constitutional issues must be resolved before any production of documents can be compelled. 357 U.S. 449, 460–61 (1958). The state court completely failed to address the "chilling effect" of the Attorney General's conduct on Smith & Wesson's First and Second Amendment rights, along with other constitutional objections. *See* JA254.

Beyond these deficiencies, the state court also improperly rejected Smith & Wesson's argument that the Subpoena targets constitutionally protected opinion-based statements, which by law cannot be fraudulent. JA251; *see infra* at 44. By holding that opinion-based statements focusing on "lifestyle" and "safety" constitute

statements that are "measurable by research" and therefore potentially fraudulent, the state court essentially eliminated any category of opinion-based speech from First Amendment protection. JA326. By this standard, every "opinion" would be susceptible to "measurement," and therefore, every opinion could be investigated as somehow "fraudulent." This is not the law.

The state court similarly failed to address the constitutional invalidity of New Jersey's Hazardous Products Regulation, which the Attorney General claimed requires Smith & Wesson to disclose New Jersey law in its advertisements to consumers. Such a requirement would unconstitutionally compel speech by forcing Smith & Wesson to make affirmative statements conveying the government's message, without any showing that this requirement is the least burdensome means to do so (which it was not), as required by the First Amendment.

Finally, the state court held that New Jersey's "first-to-file" rule, which requires that a subsequently filed action be stayed when it involves the same or similar issues as an earlier-filed action, did not require a stay of the state court proceedings. *See, e.g.*, *Sensient Colors Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 387 (2008). The state court justified its ruling on this issue by labeling Smith & Wesson's federal suit as a "tactical maneuver." JA323. The state court never explained how a well-pleaded complaint in federal court was a "tactical maneuver" — especially given that 42 U.S.C. § 1983, the statute under which Smith & Wesson

sued, specifically gives plaintiffs the right to challenge state government actors' deprivation of constitutional rights. Smith & Wesson is currently appealing the state court's decision to the New Jersey Appellate Division. The opening brief is due on September 20, 2021.

After granting an interim administrative stay of the June 30 production order, the New Jersey Appellate Division refused to stay the enforcement proceedings, *see* Order on Emergent Motion, *Grewal v. Smith & Wesson Sales Co.*, A-003292-20T2 (N.J. Super. Ct. App. Div. July 29, 2021), as did the New Jersey Supreme Court. *See* Order, *Grewal v. Smith & Wesson Sales Co.*, No. 086096 (N.J. Sup. Aug. 9, 2021). Because there is no stay of the production order in effect, Smith & Wesson has since made two document productions to the Attorney General pursuant to the Subpoena.[1]

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[1] The Attorney General's August 23, 2021 letter to this Court (Dkt No. 13) implies — but does not argue — that these productions somehow moot this case. That is obviously not true where (among other things) the Attorney General has agreed through a protective order entered into by the parties that the subpoenaed documents will be returned if Smith & Wesson prevails on appeal. *See Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001). Moreover, the Attorney General knew at the time he filed his response to Smith & Wesson's emergency motion that the parties were finalizing the protective order and that Smith & Wesson would make a document production if it did not receive court-ordered relief. The Attorney General's purported "update" to the Court is of no consequence for either the motion or the merits appeal that are pending here.

II. Procedural History

A. Proceedings in the District Court

Smith & Wesson amended its Complaint in the District Court action on March 10, 2021, to include retaliation claims arising from the Attorney General's state court summary Subpoena proceeding. JA81. Smith & Wesson contemporaneously sought a temporary restraining order and preliminary injunction to stay proceedings before the Superior Court. On March 25, 2021, Smith & Wesson withdrew its motion because the Superior Court set a briefing and hearing schedule that eliminated the exigency the company faced. JA186.

On April 26, 2021, the Attorney General filed a motion to dismiss the Amended Complaint on *Younger* grounds as well as on the merits of Smith & Wesson's claims, which Smith & Wesson opposed. After that motion was fully briefed, the New Jersey Supreme Court denied Smith & Wesson's request to stay the state court's June 30, 2021 production order.

In light of the New Jersey Supreme Court's refusal to stay the production order so that Smith & Wesson's appeal could be considered before its rights were violated, Smith & Wesson renewed its application for a temporary restraining order and preliminary injunction in federal court. At the August 2, 2021, hearing on the application, the District Court granted the Attorney General's motion to dismiss on *Younger* grounds and abstained from exercising jurisdiction. JA424–25. The

District Court found that the state court proceeding was a civil proceeding "involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions," notwithstanding that the Attorney General had characterized the state court proceeding as nothing but a mere "quotidian subpoena dispute." JA199.

The District Court also held that the Attorney General had satisfied the *Middlesex* factors, which are likewise required for a federal court to abstain. JA12 (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)). Specifically, the District Court held that the state court proceeding was ongoing and that Smith & Wesson was not precluded from raising its constitutional claims in that proceeding. JA11. The District Court did not address Smith & Wesson's arguments regarding equitable considerations — namely, that the Subpoena was motivated by the Attorney General's bad faith and that there was a lack of an adequate remedy in state court. Had the District Court properly evaluated those considerations, it would have been prohibited from abstaining.

The District Court did not address the merits of Smith & Wesson's requested injunctive relief and confined its analysis to *Younger* abstention. Consequently, it denied Smith & Wesson's requests for a temporary restraining order and preliminary injunction. JA2, 4. Today, approximately eleven months after the Attorney General's Office served the Subpoena, no court has fully analyzed the constitutionality of the unconstitutional Subpoena and investigation.

B. Proceedings in This Court

Smith & Wesson filed a Notice of Appeal on August 9, 2021. JA1. This Court denied Smith & Wesson's request for an emergency temporary stay on August 10, 2021. Dkt. No. 9. That same day, Smith & Wesson filed an emergency motion for an injunction pending appeal, which was referred to the merits panel. Dkt. Nos. 10 & 14. That motion remains pending and Smith & Wesson respectfully asks that this Court grant that relief.

STATEMENT OF RELATED PROCEEDINGS

After Smith & Wesson filed this lawsuit, the New Jersey Attorney General moved in state court, on February 12, 2021, to enforce compliance with the administrative Subpoena in a summary proceeding. *See* JA56. That case is currently on appeal in the New Jersey Appellate Division, Dkt. A-003292-20. Smith & Wesson's opening brief is due on September 20, 2021. The Attorney General's response brief is due on October 20, 2021. Smith & Wesson's reply brief is due on November 1, 2021.

SUMMARY OF THE ARGUMENT

The District Court erred by abstaining under *Younger* and failing to adjudicate Smith & Wesson's federal constitutional claims. Federal courts have a "virtually unflagging obligation" to hear cases over which they have jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In *Sprint Commc'ns, Inc. v. Jacobs*, the Supreme Court reined in *Younger* by making it clear that *only* three "exceptional circumstances" can ever justify *Younger* abstention. Even in those cases, abstention is permissible only if the state action was "ongoing" at the time of federal filing, and only if it affords the federal plaintiff adequate opportunity to assert his federal defenses. 571 U.S. at 75–76 (citing *Middlesex*, 457 U.S. at 432)). Finally, abstention is never appropriate if the state action was brought in bad faith or if the state court cannot remedy the federal plaintiff's injuries. *Jaffery v. Atl. Cnty. Prosecutor's Off.*, 695 F. App'x 38, 41 (3d Cir. 2017); *Younger*, 401 U.S. at 43.

The District Court's decision to abstain was flawed because it ignored or misapplied these basic principles. *First*, the District Court wrongly placed the burden on Smith & Wesson to demonstrate that abstention should not apply. That runs counter to the Supreme Court's holding in *Sprint* that the party seeking abstention — here, the Attorney General — bears the burden of showing that abstention is warranted. *Sprint*, 571 U.S. at 81–82.

Second, abstention was inappropriate because the state court action does not qualify as one of *Sprint*'s "exceptional circumstances" — it does not involve "civil proceedings involving certain orders uniquely in furtherance of the state court's ability to perform its judicial functions" (as the district court incorrectly held) and it is not a "quasi-criminal" proceeding (as the Attorney General alternatively argued). It is nothing but a "quotidian subpoena dispute," as the Attorney General himself admits. JA199. Failure to satisfy an exceptional circumstance ends the analysis, because "*Younger* extends . . . no further." *Sprint*, 571 U.S. at 82.

The District Court's analysis of the "uniquely in furtherance" exception, which analysis focused on mere "interference" with the state court proceeding, expands that exception so broadly as to nullify *Sprint*'s careful restraint of *Younger*'s scope. It would justify abstention in virtually any federal court challenge to a state-issued subpoena. Put another way, the District Court effectively held that no litigant may ever avail itself of the federal civil rights statutes in federal court when a state-issued subpoena is involved, because the state need only move to enforce the subpoena in state court to deprive the federal courts of jurisdiction. That cannot be the law.

Third, abstention also was inappropriate because the state court action does not satisfy the mandatory *Middlesex* factors, as it was not "ongoing" when Smith & Wesson filed its federal suit (as this Court requires). Nor did the state court show-

cause proceeding provide Smith & Wesson an adequate opportunity to have its constitutional objections fully litigated. It did not afford Smith & Wesson the benefit of having its allegations accepted as true for purposes of evaluating its constitutional objections. Nor did it provide for discovery, which the federal lawsuit would have done — thus preventing Smith & Wesson from developing its case before production was ordered. In any event, the state court did not consider or rule on almost all of Smith & Wesson's constitutional objections. Any of these fundamental flaws, on their own, mandate against abstention and require reversal, even if an exceptional circumstance is present (which is not the case).

Fourth, abstention was unwarranted because the District Court ignored the equitable considerations raised by Smith & Wesson — specifically, the evidence of prosecutorial bad faith (as demonstrated by the allegations in the Amended Complaint, which the District Court was required to consider, but did not) and the fact that, under New Jersey law, the state action could not adequately remedy Smith & Wesson's injuries because injunctive relief as to the investigation was not available in the Subpoena enforcement proceeding. The presence of either of these considerations, independently, was sufficient to require the District Court to exercise its jurisdiction over Smith & Wesson's constitutional claims. For all these reasons, the District Court's decision to abstain under *Younger* was error.

Finally, given that the District Court's decision to abstain was in error, this Court should prevent further harm to Smith & Wesson by ordering the District Court to temporarily enjoin the state court proceedings so that a merits hearing on Smith & Wesson's application for a preliminary injunction can take place. Such temporary relief is warranted for the reasons already set forth by Smith & Wesson in its Emergency Motion for an Injunction Pending Appeal (Dkt. No. 10 at 9-22).

STANDARD OF REVIEW

This Court exercises plenary review in "its determination of whether *Younger* abstention is proper." *Hamilton v. Bromley*, 862 F.3d 329, 333 (3d Cir. 2017). Accordingly, it "applie[s] a de novo standard" in evaluating a District Court's decision to abstain. *PDX N., Inc. v. Comm'r N.J. Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 881 n.11 (3d Cir. 2020) (citing *Sprint*, 571 U.S. at 72).

ARGUMENT

I. The District Court Erred by Abstaining Under *Younger*.

The District Court erred by abstaining under *Younger* and refusing to adjudicate Smith & Wesson's federal constitutional claims. None of the exceptional circumstances required for *Younger* abstention — as set forth in *Sprint* — are implicated here. Nor did the state court action satisfy the *Middlesex* factors, which was required even if an exceptional circumstance was at issue. Finally, equitable considerations raised by Smith & Wesson and ignored by the District Court — *i.e.*,

the Attorney General's bad faith (as pled in the allegations in the Amended Complaint, which the District Court was required to consider and accept as true, but did not) and the lack of an adequate remedy in state court — precluded abstention. For those reasons, the District Court's decision to abstain should be reversed.

A. *Sprint* Places the Burden on the Attorney General to Demonstrate that Abstention Should Apply.

As a preliminary matter, the District Court erred by placing the burden on Smith & Wesson to demonstrate that abstention should not apply. JA8. In its ruling, the District Court construed the Attorney General's argument as "a factual challenge to jurisdiction" and that consequently, "the plaintiff bears the burden of establishing jurisdiction." JA8 (citing *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176–77 (3d Cir. 2000)).

In *Sprint*, the Supreme Court held that the party seeking abstention — here, the Attorney General — bears the burden of showing that abstention is warranted. *Sprint*, 571 U.S. at 81–82. Even the characterization of the issue as a jurisdictional one is error, because this Court and the Supreme Court have held repeatedly that *Younger* abstention is not a jurisdictional question; it is a decision to abstain from jurisdiction that unquestionably exists. *Hamilton v. Bromley*, 862 F.3d 329, 334 (3d Cir. 2017); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358–359 (1989). It is a burden that the Attorney General did not satisfy.

B. *Sprint* Precluded Abstention Because No "Exceptional Circumstance" Was Implicated.

Under *Sprint*, abstention is proper only where there are (1) "ongoing state criminal prosecutions," (2) "quasi-criminal" "civil enforcement proceedings," or (3) pending civil proceedings involving certain orders "uniquely in furtherance of the state courts' ability to perform their judicial functions." 571 U.S. at 78, 81. "*Younger* extends . . . no further." *Id.* at 82. It is undisputed that there was no ongoing state criminal prosecution against Smith & Wesson by the Attorney General.

Nor are either of the other two exceptional circumstances present here. In the District Court proceedings, the Attorney General argued that merely by moving to enforce the Subpoena in state court (in his words, "a quotidian subpoena dispute,"), he hatched either a quasi-criminal "enforcement proceeding" or a proceeding involving certain orders uniquely in furtherance of the state courts' judicial function. JA199, 208. The District Court found that *Sprint*'s third exception applied. That was reversible error. Additionally, the District Court's decision to abstain cannot be rescued alternatively by the "quasi-criminal" exception, which clearly does not apply here.

1. The District Court Erred in Holding that the State Court Proceeding Involved Orders "Uniquely in Furtherance of the State Court's Ability to Perform Its Judicial Functions."

The District Court decision to abstain rested solely on *Sprint*'s third category — *i.e.*, "proceedings involving certain orders . . . *uniquely* in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78 (emphasis added). In so holding, the District Court expressed concern regarding the federal suit's interference with the state court action, which it likened to a contempt proceeding. That was error.

This Court has recognized that orders relating to a court's ability to perform its judicial functions "are *very much 'unique.'*" *Malhan v. Sec'y, U.S. Dep't of State*, 938 F.3d 453, 463 (3d Cir. 2019) (emphasis added). They typically involve orders that "ensure that . . . courts can perform their functions" and not orders that "are merely the output of those functions." *Id.* Further reflecting the uniqueness of such orders, *Sprint* cited just two: an enforcement of a court contempt order where contempt had *already* been found and an order to post bond. *Id*. at 78 (citing *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987)).

Cases make clear that the animating purpose behind this exceptional circumstance is to avoid interfering with the inner workings of a peer state court judiciary. *Juidice*, 430 U.S. at 334. As such, the exception only applies to

proceedings that implicate issues that interfere with the functioning of the state court system, not the adjudication of legal issues which have *some* impact on *any* proceeding in state court. Indeed, if it were the case that *any* overlap with state court proceedings justified abstention, then statutes such as the Anti-Injunction Act would be completely unnecessary.

A review of the case law demonstrates the level of interference with the state court's authority that is necessary for a federal court to abstain. For example, in *Juidice*, the issue was the enforcement of an *existing* contempt by a state court. 430 U.S. at 335–36. Another class of cases uniquely within the state court's purview were the bar disciplinary proceedings in *Middlesex*, which involved the "important state obligation to regulate persons who are authorized to practice law" and therefore implicated the New Jersey Supreme Court's authority to "fix standards, regulate admission to the bar, and enforce professional discipline among members of the bar." 457 U.S. at 433–434. *See also Silver v. Court of Common Pleas of Allegheny Cnty.*, 802 F. App'x 55, 58 (3d Cir. 2020) (involving state court orders governing "the post-judgment conduct of attorneys and litigants").

Other cases invoking *Younger*'s third exception address issues pertaining to case management and docketing, which a federal court has no role in overseeing. *See, e.g.*, *Disability Rights N.Y. v. New York*, 916 F.3d 129, 134 (2d Cir. 2019) (process for appointing legal guardians); *Aaron v. O'Connor*, 914 F.3d 1010, 1017

(6th Cir. 2019) (ability of state courts "to determine when recusal of a judge or justice is appropriate"); *Macleod v. Bexley*, 730 F. App'x 845, 848 (11th Cir. 2018) (order prohibiting *pro se* appearances and filings); *Dandar v. Church of Scientology Flag Serv. Org., Inc.*, 619 F. App'x 945, 948 (11th Cir. 2015) ("state proceeding involving enforcement of a settlement agreement entered into in a state court"); *Falco v. Justs. of the Matrim. Parts of Sup. Ct. of Suffolk Cnty.*, 805 F.3d 425, 428 (2d Cir. 2015) ("Orders relating to the selection and compensation of court-appointed counsel for children"); *Kaufman v. Kaye*, 466 F.3d 83, 87 (2d Cir. 2006) (state court procedures for assigning cases to certain judges).

Ordinary state court civil proceedings do not qualify for abstention. For example, in *Malhan*, abstention was not warranted for garnishment proceedings arising from a family court judgment because they did not "ensure that family courts can perform their functions — they are merely the output of those functions." 938 F.3d at 465. Similarly, in *Parr v. Colantonio*, this Court held that an ordinary eviction action did not merit abstention because it did not "lie[ ] at the core of the administration of a State's judicial system." 844 F. App'x 476, 479 n.3 (3d Cir. 2021) (quoting *Juidice*, 430 U.S. at 335). *See also Barone v. Wells Fargo Bank, N.A.*, 709 F. App'x 943, 949 (11th Cir. 2017) (no abstention as to mortgagor's pending fraud suit in state court against mortgagee); *Jones v. Cnty. of Westchester*, 678 F. App'x 48, 50 (2d Cir. 2017) (suit for money damages); *Jones v. Prescott*, 702

F. App'x 205, 208–209 (5th Cir. 2017) (defamation proceeding); *FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 290 (6th Cir. 2018) (administrative proceeding); *Cook v. Harding*, 879 F.3d 1035, 1041 (9th Cir. 2018) (constitutional challenge to state legislation).

The Attorney General himself admitted that the state court action was nothing more than a "quotidian subpoena dispute," JA199, and those proceedings to date have focused solely on whether production is required under the Subpoena — nothing more. "The issuance of a non-self-executing administrative subpoena" does not satisfy *Younger*'s third exception. *Google, Inc. v. Hood*, 822 F.3d 212, 224 (5th Cir. 2016). In the words of this Court in *Malhan*, the state court's production order is "merely the output" of an ordinary state court civil proceeding to determine the validity of a subpoena. *Malhan*, 938 F.3d at 463. A federal court's adjudication of constitutional issues does not interfere with a state court's ability to perform its functions in any way contemplated by *Younger*.

Malhan is instructive on this issue. In that case, this Court held that abstention was not appropriate as to a federal claim arising from debt from child support and spousal support judicial orders. The Court held that those orders were akin to judgments, and therefore were "merely the output" of the state court's functions. The orders in question did "not ensure that family courts can perform their functions." *Malhan*, 938 F.3d at 463. That is the case with the production order by

the state court; it was merely the *output* of the state court's normal functions in conducting the show cause hearing and issuing a ruling on the enforceability of the Subpoena.

The District Court attempted to shoehorn this case into the abstention doctrine by alluding to potential interference with the state court's judgment and "the very process by which that judgment was obtained." JA11. But mere "interference" is not enough to demonstrate an exception under *Younger*. The state court proceeding must *independently* satisfy the characteristics of at least one of the *Younger* exceptions. That is because, as this Court held in *ACRA Turf Club, LLC v. Zanzuccki*, *Sprint* provided "a forceful reminder of the longstanding principle that federal courts have a 'virtually unflagging' obligation to hear and decide cases within their jurisdiction.'" 748 F.3d 127, 138 (3d Cir. 2014) (quoting *Sprint*, 571 U.S. at 77). Thus, "[a]bstention under the *Younger* line of cases overcomes this principle *only* when federal litigation threatens to interfere" with a case that satisfies one of the exceptions. 758 F.3d at 138 (citing *Sprint*, 571 U.S. at 77) (emphasis added). In short, the "interference" described by the District Court (to the extent such interference exists), on its own, is not a sufficient reason to abstain, because none of *Younger*'s exceptional circumstances are otherwise satisfied.

The only specific justification that the District Court provided was that "the state litigation involves a challenge to the state's contempt process." JA12. That is

incorrect. As of the date of this brief (and throughout the litigation), there has been no state court "contempt process," much less an actual finding of contempt, or anything approaching enforcement of such an order.

In support of its ruling, the District Court cited the Supreme Court's decision in *Juidice v. Vail*. JA10. But *Juidice* involved a quintessential interference with the court's ability to perform a central function — obtaining obedience to its orders — because the federal plaintiff sought injunctive relief as to enforcement of existing contempt orders. At issue in *Juidice* was the federal plaintiff's *past* "disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court." 430 U.S. at 335. Nothing of the sort has happened here. Smith & Wesson has not disobeyed a court order, nor has any contempt proceeding been initiated — much less any enforcement of an existing contempt order. Rather, the entire dispute involved whether a production order may properly issue.

Left with no actual conflict, the District Court created a conflict that did not exist, one focused on whether contempt is *possible*. The error is manifest in the District Court's holding that "[t]he CFA authorizes the New Jersey Superior Court to compel compliance with a subpoena issued by the Attorney General and adjudge persons in contempt of court." JA10–11. In other words, following the District Court's logic, if there is a *possibility* of contempt in a court proceeding, then abstention is required. But *Sprint* is clear: it *requires* that only civil proceedings

that "involve[e] certain *orders* that are uniquely in furtherance of the state courts' ability to perform their judicial functions" can satisfy this exceptional circumstance under *Younger*. *Sprint*, 571 U.S. at 73 (emphasis added).

The District Court's holding ultimately would make the entire *Younger* analysis irrelevant. Every judicial proceeding carries with it the *possibility* of a contempt finding. *See, e.g.*, *Weston Capital Advisors, Inc. v. PT Bank Mutiara, Tbk*, 738 F. App'x 19, 21 (2d Cir. 2018). Nowhere did *Sprint* contemplate that state court proceedings with the mere potential for contempt could satisfy *Younger*; only enforcement of an existing contempt order can satisfy that prong. In this respect, the District Court here did precisely what the lower courts wrongly did in *Sprint*, and that the Supreme Court reversed. The only difference is that while the lower courts in *Sprint* simply ignored the *Younger* analysis, the District Court here eviscerated it.

Allowing the "uniquely in furtherance" exception to sweep in virtually *any* state court proceeding, rather than only the narrow category of state court proceedings involving certain orders uniquely in furtherance of the state court's ability to perform its judicial functions, would write out of existence *Sprint*'s precise cabining of the abstention doctrine. It would also disregard federal courts' "virtually unflagging obligation" to hear cases over which they have jurisdiction. In short, the District Court's reasoning was in error and it would render *Younger* abstention virtually boundless.

2. The New Jersey Action Is Not Akin to a Criminal Prosecution.

Although not reached by the District Court, the Attorney General argued that the state court proceeding *was* quasi-criminal in nature. The state court action — which the Attorney General labeled a "quotidian subpoena dispute," JA199 — is not an "enforcement proceeding" "'akin to a criminal prosecution' in 'important respects.'" *Sprint*, 571 U.S. at 78–79 (citation omitted). It therefore does not satisfy the second *Younger* exception and this Court may not affirm on this alternative ground that the Attorney General will no doubt urge.

To determine whether an action is quasi-criminal, courts consider 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, (3) there are other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges, and (4) the State could have alternatively sought to enforce a parallel criminal statute. *See ACRA Turf Club*, 748 F.3d 127, 138 (3d Cir. 2014). Other than the Attorney General initiating the state action, none of these factors applies.

First, the Attorney General has admitted that the state court action was not initiated to "sanction" Smith & Wesson for a wrongful act. JA 547–549; JA210. Rather, he claimed that he was enforcing the Subpoena as part of a "routine" "investigation." JA197. No CFA charges have been filed, so any CFA prosecution

is (in his words) "hypothetical." JA575, 587. Indeed, the Attorney General told the District Court that "[t]here has been no determination that anything Smith & Wesson said in its advertisements did in fact violate the CFA[.]" JA225–226.

Nor is any order of contempt at issue, as already discussed above. In New Jersey, "[n]o question of contempt may arise [in a motion-to-compel action] until all issues are determined adversely to a party *and that party has refused to obey a final order of the court*." *Silverman v. Berkson*, 141 N.J. 412, 426–27 (1995) (emphasis added).[2] At the time of the District Court's decision, there was no question of contempt or order of contempt at all — only an order to compel. And since that time, Smith & Wesson produced documents and is complying with the June 30, 2021 production order. There is nothing for a court to sanction.

This case is similar to *Online Merchants Guild v. Cameron*, which specifically found that an action merely to enforce a civil investigative demand is not a quasi-criminal proceeding. 468 F. Supp. 3d 883 (E.D. Ky. 2020), *rev'd on other grounds*, 995 F.3d 540 (6th Cir. 2021). In that case, a state attorney general served the CID on merchants under Kentucky's consumer protection law. Some of the merchants

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[2] The substantive sanctions permitted for CFA violations (*see* N.J.S.A. § 56:8-13) are irrelevant. The New Jersey Superior Court recently made clear that flouting a CFA subpoena — even, in that case, a *court-ordered* one — is not itself a violation of the CFA. *See Grewal v. 22Mods4All, Inc.*, No. ESX-C-244-19, slip op. at *16 (N.J. Super. Ct. Ch. Div. May 24, 2021).

moved to quash in state court, while their trade association sought injunctive relief in federal court. The federal court declined to abstain because "[t]he purpose of the [state court] proceeding is simply to determine whether [a merchant] must comply with the CID," and "[a]ny consequence stemming from an unfavorable decision will not result in liability but, instead, [the merchant] will simply have to provide the requested information. *Such a result is a far cry from any criminal sanction*."[3] 468 F. Supp. 3d at 898 (emphasis added).

Second, there exists no preliminary investigation that has *culminated* with the filing of formal charges. *Sprint*, 571 U.S. at 79–80. Indeed, Smith & Wesson has not been charged with *anything*. Although the Attorney General has speculated that he might theoretically bring a CFA claim based on facts revealed by his investigation, JA298, 589, he has also admitted that such a claim is "hypothetical." JA575, 587.

Such a hypothetical claim does not qualify as a quasi-criminal proceeding. "The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention." *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 817 (7th Cir. 2014). Notably, as this Court

[3] On appeal, the Sixth Circuit reversed the district court on the merits but left its *Younger* analysis untouched. *See* 995 F.3d at 547–559. That the Sixth Circuit reached the merits is evidence that it, too, did not view an ordinary motion to compel as implicating criminal sanctions.

observed in *ACRA Turf Club*, in every case where the Supreme Court has found a quasi-criminal action under *Younger*, the state had *already* "commenced . . . proceedings by filing some type of formal complaint or charges." 748 F.3d at 140. In short, the Attorney General's reading would stretch *Sprint* to encompass *any* state action that could possibly lead to a future enforcement action.[4] That simply is not the law.

Third, there is no parallel criminal statute under which the Attorney General could have charged Smith & Wesson. In the post-*Sprint* cases where the Third Circuit has found a "quasi-criminal" civil action, the state could have pursued criminal liability on the same facts alleged in the state court proceedings. *See Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014) (lying under oath); *PDX N.*, 978 F.3d at 884 (tax evasion). Here, by contrast, while there may be criminal analogs to parts of the CFA relating to fraud, Smith & Wesson has not been accused of violating that statute. The only allegation in state court is that Smith & Wesson objected to a non-self-executing Subpoena. Under no circumstances is that a crime. And as noted above, the Attorney General continues

[4] *Backpage.com v. Hawley*, the unpublished decision cited by the Attorney General below, yields no binding support for his position. That case's holding that a subpoena enforcement action was "quasi-criminal" because it had "the *potential* to culminate in the filing of a formal complaint or charges," 2017 WL 5726868, at *6 (E.D. Mo. Nov. 28, 2017) (emphasis added), is at odds with this Court's ruling in *ACRA Turf Club*, 748 F.3d at 138, as explained above.

to insist that he is merely investigating and has not yet made any determinations as to "fraud," calling any future fraud action "hypothetical." JA575.

In summary, there is simply nothing about this case that is "more akin to a criminal prosecution than are most civil cases." *ACRA Turf Club,* 748 F.3d at 132. Accordingly, none of *Younger*'s exceptional circumstances are implicated, which renders abstention inappropriate and requires reversal.

C. The *Middlesex* Factors Precluded Abstention.

The District Court further erred by holding that the *Middlesex* factors were satisfied. Even where a *Younger* exception exists, each of the *Middlesex* factors must be satisfied before a federal court may abstain. Those factors are (1) whether there is an ongoing judicial proceeding; (2) whether an important state interest is implicated in the state proceeding; and (3) whether the state proceedings provide an adequate opportunity to present constitutional arguments. *PDX N*, 978 F.3d at 879 (citing *Middlesex,* 457 U.S. at 432). Because there is not "an ongoing state judicial proceeding" that offers "an adequate opportunity to raise [federal] challenges," the District Court should not have abstained. *Sprint*, 571 U.S. at 75.

1. There Was No Ongoing Judicial Proceeding When the Federal Lawsuit Was Filed.

The District Court held that the Subpoena enforcement action was "ongoing" because "it is still being litigated in New Jersey State Courts." JA12. That is not the rule. As this Court has held, "state proceedings are ongoing for *Younger*

abstention purposes . . . if the state proceeding was pending at the time [the plaintiff] filed its initial complaint in federal court."[5] *PDX N.*, 978 F.3d at 884–85 (internal quotation marks omitted) (citing *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 408-409 (3d Cir. 2005)). *See also id.* at 882 ("*Younger* abstention is an exception to that rule that applies when certain types of state proceedings are ongoing at the time a federal case is commenced."); *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004) ("The critical date for purposes of deciding whether abstention principles apply is the date the federal action is filed."). As this Court held in *PDX N*, "[i]f a judicial proceeding is only *imminent*, *Younger* abstention is inappropriate because that proceeding is not pending or ongoing." 978 F.3d at 886 (emphasis in original).

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[5] *Hicks v. Miranda*, 422 U.S. 332, 349 (1975), relied on by the Attorney General below, is not to the contrary under the circumstances here. There, the Supreme Court held that abstention is allowable "where state criminal 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 the federal court." *Middlesex* extended this principle to "[a]n analogous situation" — *i.e.*, state bar disciplinary proceedings that were punitive in nature. *Middlesex,* 457 U.S. at 436–37. Here, there is nothing punitive about the "quotidian subpoena dispute" in state court. JA199. Moreover, as this Court has recognized, it was *Middlesex*'s liberal approach to abstention — seeming to permit it in any case, no matter its posture, if the federal plaintiff would not be unduly prejudiced — that *Sprint* reined in. *ACRA Turf Club*, 748 F.3d at 135-36. *See also Sprint*, 571 U.S. at 81 (criticizing the Eighth Circuit and the state agency opposing abstention for "attribut[ing] to this Court's decision in *Middlesex* extraordinary breadth.")

Here, no "judicial in nature" proceeding was even close to "imminent" when Smith & Wesson's federal suit was filed. All that had occurred was the issuance of the Subpoena by the Attorney General. Indeed, the state court action was not filed until *nearly two months after* Smith & Wesson filed its initial Complaint.[6] *See supra* at 10–11. (A strategic tactic no doubt to attempt to avoid facing the scrutiny of the federal court action.) Thus, at the time of federal filing, there was no "ongoing state judicial proceeding" to disturb. That ends the analysis and precludes abstention standing alone, because under *Sprint*, the party seeking abstention must satisfy all three *Middlesex* factors. 571 U.S. at 81.

2. The State Court Proceedings Precluded Smith & Wesson from Obtaining an Adjudication of its Constitutional Claims.

Abstention is permissible only if the "constitutional *claims* of respondents can be determined in the state proceedings." *Middlesex*, 457 U.S. at 435 (emphasis added). In its ruling, the District Court stated that "[t]here is nothing that precludes Smith and Wesson from raising [its] 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." JA12. But that misses the point. To date, several of Smith & Wesson's constitutional arguments have yet to

[6] Moreover, Smith & Wesson brought this suit at an "appropriate time" in the life of the state investigation — *i.e.*, "the period between the threat of enforcement and the onset of formal enforcement proceedings." *La. Debating & Literary Ass'n v. City of N.O.*, 42 F.3d 1483, 1490-91 (5th Cir. 1995) (citation omitted).

be ruled upon by the New Jersey state courts. And the show cause proceeding in state court could not constitute a full airing of Smith & Wesson's constitutional *claims* contrary to Supreme Court precedent.

To date, Smith & Wesson has been unable to obtain an adjudication on almost all of its constitutional objections in New Jersey state court. The Attorney General specifically encouraged this result, insisting that the state court should not consider Smith & Wesson's constitutional objections to his Subpoena at all, and instead "simply compel compliance[.]" JA581. The state court heeded that request by holding (incorrectly) that the Supreme Court's ruling in *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) — which held that threshold constitutional issues must be resolved before any production of documents can be compelled — did not apply. JA323–324 . Further, because the state court held that the Subpoena did not regulate speech and implicated potentially fraudulent statements, it did not substantively consider any of Smith & Wesson's specific First Amendment theories, including retaliation, viewpoint discrimination, compelled speech, prior restraint, and improper restriction of commercial speech.[7] Nor did it substantively address Smith

[7] Had the state court considered the allegations in the Amended Complaint, it would have readily known that the allegations are not that the Subpoena, standing alone. regulates speech, but rather that the facts and circumstances alleged therein show that the Attorney General is attempting to suppress speech and that the Subpoena is just the latest tool used by the Attorney General to accomplish this unconstitutional objective.

& Wesson's Second Amendment or Equal Protection arguments. As a direct result of that failure, Smith & Wesson has been forced to produce documents in violation of its constitutional rights.

The District Court's refusal to hear the case under these circumstances resulted in a violation of Smith & Wesson's due process rights. The state court, contrary to *NAACP*, enforced the Subpoena without first resolving threshold enforceability issues and did so in a manner that completely stripped Smith & Wesson of its ability to make its case and challenge fact issues raised by the Attorney General. And the District Court accepted that as adequate process, while inappropriately shifting the burden to Smith & Wesson.

The Amended Complaint sets forth many claims against the Attorney General including, by way of example, viewpoint discrimination, bad faith and retaliatory conduct, and that the Subpoena constitutes an unlawful "fishing expedition" because there was no constitutionally legitimate basis for its issuance (a fact essentially admitted by the Attorney General in open court). All of these claims are plausibly alleged, contested by the Attorney General, and therefore create fact issues that require resolution before the Subpoena may be enforced.

Here, to the extent the state court addressed Smith & Wesson's claims at all, it did so by resolving factual issues in a summary manner without developing any factual record. Indeed, discovery was not even permitted in the "summary" state

court proceeding. Such discovery was possible only in federal court and was necessary for a full adjudication of the constitutional issues raised in the Amended Complaint. Instead, the state court substituted the text of the Subpoena for the allegations in the Amended Complaint and then, without any factual record, resolved issues of fact based merely on the Attorney General's denials and its own characterization of its actions.

Smith & Wesson brought its suit in federal court to vindicate its constitutional rights. It has the right to develop its case and raise its arguments in that forum. By abstaining, the District Court foreclosed that possibility.

Because the Attorney General failed to meet his burden to satisfy the *Middlesex* factors, the District Court's ruling should be reversed.

D. Equitable Considerations Precluded Abstention.

Finally, the equitable considerations that (1) the Attorney General's prosecution is motivated by bad faith; and (2) the state court proceedings do not provide Smith & Wesson an adequate remedy precluded abstention. Either of these considerations was sufficient to require the District Court to exercise its jurisdiction here and require reversal. The District Court failed to even address them.

1. The Attorney General's Bad Faith Precludes Abstention.

The District Court did not address the equitable consideration of the Attorney General's bad faith. Abstention is always inappropriate when "state proceedings are

being undertaken in bad faith or for purposes of harassment." *Lazaridis v. Wehmer*, 591 F.3d 666, 670 n.4 (3d Cir. 2010). As an initial matter, for purposes of *Younger*, at the motion to dismiss stage, "the Court must accept as true plaintiff's allegations in the complaint." *Monaghan v. Deakins*, 798 F.2d 632, 635 (3d Cir. 1986), *aff'd in part, vacated in part*, 484 U.S. 193 (1988). The District Court held that it need not accept the factual allegations in the Amended Complaint because, it stated, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." JA8 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). That was error because, as noted above, *Younger* abstention is not a jurisdictional question. *See supra* at 24.

In weighing whether bad faith prohibits abstention, this Court considers whether an investigation (1) "was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was [brought] . . . in retaliation of the defendant's exercise of constitutional rights; and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions." *Jaffery*, 695 F. App'x at 41 (internal quotation marks omitted).

The Amended Complaint plausibly alleges each of the three factors, and evidence from the public record supports them as well. At a bare minimum, Smith

& Wesson should have been permitted to take discovery on these issues. *See, e.g.*, *Cobb v. Sup. Jud. Ct. of Mass.*, 334 F. Supp. 2d 50, 54 (D. Mass. 2004). Instead, the District Court wholly ignored these considerations and abstained.

First, the Subpoena seeks information that could not support a case for fraud under the CFA. Under New Jersey law, the types of statements contemplated by the Subpoena constitute "classic examples of non-actionable opinion." *See Tatum v. Chrysler Grp. LLC.*, No. 10-4269, 2011 WL 1253847, at *4 (D.N.J. Mar. 28, 2011). Nor is puffery actionable as fraud under New Jersey law. *Ponzio v. Mercedes-Benz USA, LLC*, 447 F. Supp. 3d 194, 234–35 (D.N.J. 2020). And "vague and ill-defined opinions" cannot be construed as a misrepresentation. *Bubbles N' Bows LLC v. Fey Pub. Co.*, No. 06-5391, 2007 WL 2406980, at *9 (D.N.J. Aug. 20, 2007). Moreover, the Attorney General's total inability to articulate a basis for his Subpoena, despite repeated requests from the state court, compels the conclusion that his investigation lacks any "objective hope of success" and was brought in bad faith. *Jaffrey*, 695 F. App'x at 41.

Second, the Office of the Attorney General is intent on discouraging the exercise of constitutional rights it disfavors. When Smith & Wesson sought to vindicate its rights in federal court, the Office of the Attorney General initiated the state court enforcement action and requested that the state court shut down *all* of Smith & Wesson's business and protected speech in the State of New Jersey, even

though such sanctions were not available under New Jersey law until contempt is found (which it had not and has not been). JA62; *see supra* at 33–34. Additionally, retaliation was the genesis of the Subpoena itself. Smith & Wesson is not only an advocate of Second Amendment rights, but has publicly committed to opposing the views espoused by the Attorney General's Office. JA96–97; JA391. The Attorney General Office's disfavor for Smith & Wesson's views is evident from public statements, the ongoing campaign, and the "naming and shaming" of Smith & Wesson and "turning the heat up" on it. JA86, 101, 111; JA483. And the Office seeks to curb Smith & Wesson's speech by labeling opinions as "fraud," to chill Smith & Wesson's (and others') speech going forward. JA99.

Third, as the Amended Complaint explains, the issuance of the Subpoena was also part of a coordinated effort by certain Attorneys General, supported by outside counsel, to hold firearms manufacturers like Smith & Wesson legally accountable for gun-related criminality for which they are not responsible. JA89–93, 101–107, 446. Evidence of bad faith can be shown by pointing to "something akin to a series of prosecutions." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1022 n.14 (3d Cir. 1981). A nationwide effort to target the firearms industry is exactly that.

In *Google, Inc. v. Hood*, bad faith was found on similar facts. 96 F. Supp. 3d 584, 595 (S.D. Miss. 2015), *vacated on other grounds*, 822 F.3d 212 (5th Cir. 2016). There, Google alleged that an alliance of state Attorneys General was working with

outside interests to harass companies in its industry. And it alleged that the Mississippi Attorney General's "investigation and issuance of [a] subpoena represented an effort to coerce Google to comply with his requests regarding content removal." *Id*. at 595. This was "significant evidence of bad faith" and so precluded abstention.[8] *Id.* Here, Smith & Wesson's case is even stronger: New Jersey's Attorney General has not only subpoenaed the company's records but retaliated against it as well through the state court proceedings. This bad faith precluded abstention and requires reversal.

2. Smith & Wesson Does Not Have an Adequate Remedy in State Court.

When the state court cannot "afford adequate protection" or provide an "adequate remedy" to the federal plaintiff, abstention is inappropriate. *Younger*, 401 U.S. at 45, 43. Two months before the Attorney General's state filing, Smith & Wesson asked this Court to enjoin the enforcement of his Subpoena and declare his broader investigation unlawful. JA130–131. In contrast to this broad relief, the state court action is strictly limited to the issue of compulsion under the Subpoena. N.J.S.A. § 56:8-6; N.J.R. Civ. P. 1:9-6(a)–(b). By law, the state court cannot enjoin the Attorney General Office's unlawful campaign against Smith & Wesson on a

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[8] On review, the Fifth Circuit did not disturb the lower court's "bad faith" finding, so it remains good law. *See* 822 F.3d 212, 223 (5th Cir. 2016) (affirming the district court on alternative grounds).

motion-to-compel proceeding. In other words, the state court could decide only the *Subpoena's* lawfulness, not the *investigation's*. It did not have jurisdiction to enjoin the Attorney General Office's ongoing efforts to chill Smith & Wesson's First Amendment rights.

Whether a different state court could provide such relief is irrelevant: *Younger* asks whether the "[p]arallel state-court proceedings," the ones that are actually "ongoing," are adequate. *Sprint*, 571 U.S. at 77, 78. Because the remedies available in the current state action are limited, the state court cannot "adequate[ly] remedy" that properly alleged constitutional injury. *Younger*, 401 U.S. at 43.

In short, equitable considerations required the District Court to exercise jurisdiction, and this Court should reverse the District Court's decision to abstain and its dismissal of the Amended Complaint.

II. This Court Should Order the District Court to Temporarily Enjoin the State Court Proceedings and Remand to the District for Merits Proceedings on Smith & Wesson's Motion for a Preliminary Injunction.

Should this Court reverse the District Court's decision to abstain, the path forward is clear. As articulated in the motion papers, the production and investigation continue to violate Smith & Wesson's constitutional rights and require an injunction. This Court therefore should prevent further harm to Smith & Wesson by ordering the District Court to temporarily enjoin the state court proceedings so that a merits hearing on Smith & Wesson's application for a preliminary injunction

can take place. This Court has previously ordered such relief after reversal of a District Court's decision to abstain under *Younger* and decline a preliminary injunction without reaching the merits. *See Helfant v. Kugler*, 484 F.2d 1277, 1283 (3d Cir. 1973) (reversing order of dismissal, vacating denial of preliminary injunction, and remanding to district court for entry of an order temporarily enjoining state court criminal trial until hearing and ruling on merits of preliminary injunction). Such temporary relief is warranted for the reasons already set forth by Smith & Wesson in its Emergency Motion for an Injunction Pending Appeal (Dkt. No. 10 at 9-22).

CONCLUSION

For the reasons set forth above, the decision of the District Court to abstain under *Younger v. Harris* should be reversed, and the case should be remanded to the District Court to enter an order temporarily enjoining the state court proceedings and to conduct proceedings on the merits of Smith & Wesson's motion for a preliminary injunction.

Dated: September 8, 2021

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CERTIFICATION OF COMPLIANCE

I, Courtney G. Saleski, certify:

Bar Membership. Edward Scheideman, Christopher M. Strongosky, and I are members in good standing of the Bar of this Court.

Word Count. This brief complies with Federal Rule of Appellate Procedure 32(a)(7) and contains 11,005 words, as counted by Microsoft Office word-processing software.

Typeface. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Electronic Filing. I prepared the electronic version of this brief in portable document format; it is identical to the paper version of the brief filed with the Court. I ran a virus scan on the electronic version of this brief using Cisco Threat Grid software, which has no version number, and no virus was detected.

/s/ Courtney G. Saleski
Courtney G. Saleski

September 8, 2021

CERTIFICATE OF SERVICE

I, Courtney G. Saleski, hereby certify that on September 8, 2021, I caused Appellants' Opening Brief and accompanying Joint Appendix to be served on all counsel of record listed on the CM/ECF Service List.

/s/ Courtney G. Saleski
Courtney G. Saleski

September 8, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2492

Smith & Wesson Brands, Inc.; Smith & Wesson Sales Company;
and Smith & Wesson Inc.,

***Plaintiffs-Appellants*,**

v.

Attorney General of the State of New Jersey;
New Jersey Division of Consumer Affairs,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Jersey, No. 20-CV-19047

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September 8, 2021

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SMITH & WESSON BRANDS, INC., SMITH & WESSON SALES COMPANY, and SMITH & WESSON INC., **Plaintiffs,** **v.** **GURBIR S. GREWAL,** ***in his official capacity as Attorney General of the State of New Jersey*** **and NEW JERSEY DIVISION OF CONSUMER AFFAIRS,** **Defendants.**	**CIVIL ACTION** **CASE NO. 2:20-CV-19047-JXN-ESK**

NOTICE OF APPEAL

Plaintiffs Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson Inc. hereby appeal to the United States Court of Appeals for the Third Circuit from the district court's August 2, 2021 order (1) dismissing the complaint, and (2) denying the motion for a preliminary injunction and temporary restraining order. *See* Dkt. No. 46 (opinion); 47 (order).

Respectfully submitted,

Dated: August 9, 2021

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SMITH & WESSON BRANDS, INC., et al, Plaintiffs,	:	**Civil Action No. 20-19047 (JXN) (ESK)**
v.	:	**ORDER**
GURBIR S. GREWAL, et al Defendants.	:	

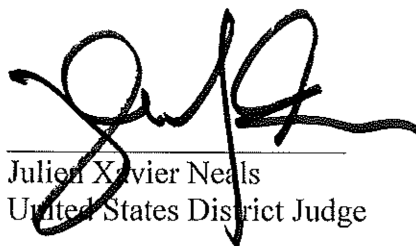
NEALS, District Judge:

THIS MATTER comes before the Court on two motions: (1) a motion by Defendants Gurbir S. Grewal ("Attorney General") and New Jersey Division of Consumer Affairs (collectively, "Defendants") to dismiss the Amended Complaint [ECF No. 17] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and based upon the abstention principles set forth by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), and subsequent cases; and (2) a motion for an order to show cause for a temporary restraining order and preliminary injunction by Plaintiffs Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson Inc. (collectively, "Plaintiffs" or "Smith & Wesson"), [ECF No. 41]; and the Court having heard oral argument and in consideration of the parties' submissions; and for the reasons expressed on the record and in the Opinion issued on this date;

IT IS on this 2nd day of August, 2021

ORDERED that Defendants' Motion to Dismiss [ECF No. 29] is **GRANTED**. Plaintiffs' Amended Complaint [ECF No. 17] is **DISMISSED WITHOUT PREJUDICE.** Plaintiffs' Motion for an Order to Show Cause for a temporary restraining order and preliminary injunction

[ECF No. 41] is **DENIED**. Plaintiffs' request to stay the Court's Order pending an appeal is **DENIED.**



Julien Xavier Neals
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SMITH & WESSON BRANDS, INC., et al, Plaintiffs, v. GURBIR S. GREWAL, et al Defendants.	:	**Civil Action No. 20-19047 (JXN) (ESK)** **OPINION**

NEALS, District Judge:

THIS MATTER comes before the Court on two motions: (1) a motion by Defendants Gurbir S. Grewal ("Attorney General") and New Jersey Division of Consumer Affairs (collectively, "Defendants") to dismiss the Amended Complaint [ECF No. 17] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and based upon the abstention principles set forth by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), and subsequent cases; and (2) a motion for an order to show cause for a temporary restraining order and preliminary injunction by Plaintiffs Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson Inc. (collectively, "Plaintiffs" or "Smith & Wesson"), [ECF No. 41]. Having heard oral argument and in consideration of the parties' submissions, for the reasons set forth below and, on the record, Defendants' Motion to Dismiss [ECF No. 29] is **GRANTED** and Plaintiffs' Motion for an Order to Show Cause for a temporary restraining order and preliminary injunction [ECF No. 41] is **DENIED**.

I. BACKGROUND

The Court writes primarily for the parties who are familiar with the factual and procedural history in this case.[1] On October 13, 2020, the New Jersey Attorney General, Gurbir S. Grewal, served a subpoena *duces tecum* on Defendants Smith & Wesson. Amended Complaint ("Am. Compl."), ECF No. 17 ¶ 65. The subpoena requests, among other things, copies of all [a]dvertisements for [Smith & Wesson] [m]erchandise that are or were available or accessible in New Jersey [c]oncerning home safety, concealed carry, personal protection, personal defense, personal safety, or home defense benefits of a [f]iream." Am. Compl., ¶ 74. The subpoena also seeks documents relating to tests conducted regarding claims of advertisement. *Id.*

The subpoena had a November 13, 2020 return date, which Defendants extended to December 14, 2020, at Smith & Wesson's request. Am. Compl., Ex. 1 at 54, Ex. 2 at 72. On December 14, 2020, in lieu of document production, Smith & Wesson responded in writing to Defendants, raising various constitutional objections to the document demands. *Id.* The following day, on December 15, 2020, Smith & Wesson initiated this lawsuit, wherein they similarly asserted constitutional objections to the subpoena. Complaint, ECF No. 1.

On February 12, 2021, Defendants commenced a summary action to enforce the subpoena in New Jersey Superior Court, asking the state court to direct production of the subpoenaed documents and to issue any other appropriate relief under the New Jersey Consumer Fraud Act ("CFA" or "Act"). Am. Compl., ¶ 127. Plaintiffs filed a response and cross-motion, again asserting constitutional challenges to the subpoena and the enforcement action. Scheideman Decl., Ex. 6, ECF No. 41-8.

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[1] For a fuller recitation of the facts and procedural history, please see the Honorable Jodi Lee Alper, J.S.C. Opinion and Order filed on June 30, 2021, ECF No. 41-13.

On March 10, 2021, Smith & Wesson filed their Amended Complaint that reasserted substantially all the claims from the initial Complaint, added First Amendment claims and included claims that the subpoena enforcement action was filed in state court as "retaliation" for the filing of this federal case. Am. Compl., ¶ 133. Shortly thereafter, on April 26, 2021, Defendants moved to dismiss this federal action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and based upon the abstention principles set forth by the United States Supreme Court in *Younger*, 401 U.S. at 91. Brief on Behalf of Defendants' Motion to Dismiss ("Defs.' Br."), ECF No. 29-1.

On May 27, 2021, the parties appeared for oral argument in the Superior Court action before the Honorable Jodi Lee Alper, J.S.C. On June 30, 2021, Judge Alper issued an opinion and order granting Defendants' motion to enforce the subpoena and denying Smith & Wesson's motions to dismiss, stay or quash the subpoena. *See* Jodi Lee Alper, J.S.C, Opinion and Order ("Superior Court Op."), ECF No. 41-13.[2] In rejecting Smith & Wesson's constitutional arguments, Judge Alper explained that the subpoena was valid on its face and "neither bans speech nor does it 'directly regulate the content, time, place, or manner of expression.'" *Id.* at 14, 15 (citation omitted). In the court's order, Judge Alper directed Smith & Wesson to respond fully to the subpoena within thirty days. *Id.* at 2.

Following the entry of Judge Alper's order, Smith & Wesson filed a motion with the Superior Court to stay the state trial court's June 30, 2021 order pending Plaintiffs' appeal of the order. Following a hearing on the matter, Smith & Wesson's motion was denied. *See* Scheideman Decl., Ex. 14, ECF No. 41-16. On July 22, 2021, Smith & Wesson filed an application with the New Jersey Appellate Division to file an emergent motion to stay the June 30, 2021 Order pending

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[2] For the sake of clarity, when citing to the Superior Court Opinion, the Court cites to the page numbers listed in the ECF header.

an appeal. Scheideman Decl., Ex. 16, ECF No. 41-18. The Appellate Division granted the application, set a briefing schedule, and issued an interim stay the same day. Scheideman Decl., Ex. 17, ECF No. 41-19. On July 29, 2021, the Appellate Division denied Plaintiffs' motion to stay execution of the state trial court's June 30, 2021 Order. Scheideman Decl., Ex. 30, ECF No. 41-32.

On July 30, 2021, Smith & Wesson, by way of an order to show cause, filed a motion for a temporary restraining order and preliminary injunction in the instant action. ECF No. 41. Smith & Wesson's current motion requests that this Court stay enforcement of the New Jersey Superior Court of Defendants' October 13, 2020 administrative subpoena until the threshold questions of its constitutionality are resolved by this Court. *Id.* at 1. Smith & Wesson argues that Plaintiffs will suffer irreparable harm by having its fundamental constitutional rights violated if production proceeds. *Id.*

II. LEGAL STANDARD

Defendants move to dismiss Plaintiffs' Amended Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). "When a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot." *Dickerson v. Bank of Am.*, N.A., CIV. No. 12-03922 (RBK), 2013 WL 1163483, at *1 (D.N.J. Mar. 19, 2013) (citing *In re Corestates Trust Fee Litig.*, 837 F. Supp. 104, 105 (E.D. Pa. 1993)). Because the Court finds that *Younger* abstention applies and requires dismissal, it will not recite the Rule 12(b)(6) standard.

A district court may treat a party's motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) as either a facial or factual challenge to the court's jurisdiction. *Gould Elecs.,*

Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* (citing *PBGC v. White*, 998 F.2d 1192, 1196 (3d Cir. 1993)). "In reviewing a factual attack, the court may consider evidence outside the pleadings." *Id.* (citing *Gotha v. United States*, 115 F.3d 176, 178–79 (3d Cir. 1997)); *see United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). A district court has "substantial authority" to "weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

Although courts generally treat a pre-answer motion under Rule 12(b)(1) as a facial challenge, *see Cardio–Med. Assoc., Ltd. v. Crozer–Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983), a "factual challenge under Rule 12(b)(1) may be made prior to service of an answer" if the defendant contests the plaintiff's allegations. *Knauss v. United States DOJ*, No. 10–26–36, 2010 U.S. Dist. LEXIS 108603, at *6 (E.D. Pa. Oct. 7, 2010) (citing *Berardi v. Swanson Mem'l Lodge No. 48 of Fraternal Order of Police*, 920 F.2d 198, 200 (3d Cir. 1990)). When a defendant raises a factual challenge to jurisdiction, the plaintiff bears the burden of establishing jurisdiction. *Gould Elecs. Inc.*, 220 F.3d at 176–77.

III. DISCUSSION

A. Younger Abstention

Smith & Wesson seeks entry of a temporary restraining order and a preliminary injunction staying the execution of the New Jersey Superior Court's July 30, 2021 Order. Pls. Br., ECF No.

41-1. Defendants argue that this Court should abstain from exercising jurisdiction in this action under *Younger* for multiple reasons, including that the subpoena-enforcement action involves orders in the furtherance of state court judicial function. Defs.' Br., ECF No. 29-1 at 12-13, 16. The Court agrees and will dismiss Plaintiffs' Amended Complaint.

The *Younger* abstention doctrine gives a federal court the "discretion to abstain from exercising jurisdiction over a particular claim where resolution of that claim in federal court would offend the principles of comity by interfering with an ongoing state proceeding." *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 408 (3d Cir. 2005) (citing *Younger v. Harris*, 401 U.S. 37 (1971)). "[A]bstention rarely should be invoked," *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992), however, and is only appropriate "in a few carefully defined situations." *Gwynedd Properties, Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1199 (3d Cir. 1992). *Younger* abstention is only appropriate where the following three requirements are satisfied: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims. *Id.* at 1200 (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Schall v. Joyce*, 885 F.2d 101, 106 (3d Cir. 1989)).

In *Sprint Comms., Inc. v. Jacobs*, 571 U.S. 69 (2013), the Supreme Court "narrowed *Younger's* domain." *Malhan v. Sec'y of U.S. Dep't of State*, 938 F.3d 453, 462 (3d Cir. 2019). Consequently, a court must first determine whether the parallel state action falls within one of "three exceptional categories": (1) criminal prosecutions, (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78.

To determine whether the *Younger* abstention applies, the Court will first analyze Defendants' contentions to determine whether the parties' state court action falls into one of the three exceptional categories described in *Sprint*. Then the Court will assess whether Defendants meet the *Middlesex* factors.

Civil Proceedings Involving Certain Orders Uniquely in Furtherance of the State Courts' Ability to Perform their Judicial Functions

Defendants contend that "this Court should find the subpoena-enforcement action in New Jersey Superior Court involves 'certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions'—in particular, the ability to enforce state subpoenas." Defs.' Br. at 16 (citation omitted). Defendants further contend that "[b]ecause the State and its courts have critical interests in ensuring subpoena compliance, the State's motion in state court to enforce a subpoena 'requires [the court] to abstain under the third category of the *Younger* Doctrine[.]'" *Id.* at 17 (citations omitted). In opposition, Smith & Wesson argues that *Younger* abstention does not apply because "no . . . 'unique' order has issued in this case, let alone an order on the motion to compel." Pls.' Br. at 9, ECF No. 30.

As an initial matter, following the filing of the parties' submissions in connection with the Motion to Dismiss, the New Jersey Superior Court and Appellate Division have issued multiple opinions and orders in the subpoena-enforcement action. *See* Superior Court Op., ECF No. 41-13; *see also* Scheideman Decl., Ex. 30, ECF No. 41-32. Thus, Smith & Wesson's argument regarding this step of the *Younger* abstention analysis is moot.

This Court must determine whether ruling on Plaintiffs' application for a preliminary injunction and temporary restraining order would improperly interfere with the state court's "contempt process," and that "court's ability to perform its judicial functions." *Sprint*, 571 U.S. at 78; *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977). The CFA authorizes

the New Jersey Superior Court to compel compliance with a subpoena issued by the Attorney General and adjudge persons in contempt of court. *See* N.J. Stat. Ann. § 56:8-6. Following full briefing and oral argument on the parties' disputes raised in the subpoena-enforcement action, which included Smith and Wesson's constitutional arguments, the Superior Court exercised its authority under the CFA and issued an order denying Smith and Wesson's motions and directing Smith & Wesson to comply with the Attorney General's subpoena. Superior Court Op., ECF No. 41-13 at 2; 41-14 at 2.[3] Smith & Wesson now calls on this Court to enjoin the ongoing state court litigation. ECF No. 41. A federal injunction in this case would not only interfere with the execution of the state court's judgment, but also interfere with the very process by which that judgment was obtained. Because this federal action would improperly interfere with "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial function," the Court finds that an "exceptional circumstance" exists to justify this Court's decision to exercise *Younger* abstention.[4] *Sprint*, 571 U.S. at 78; *see also Juidice*, 430 U.S. 327 (holding that a federal court should have abstained from adjudicating a challenge to a state's contempt process).

Middlesex Factors

Having determined that the state court proceeding is exceptional, the Court will now assess whether the *Middlesex* factors are met. *See Greco v. Grewal*, Civ. No. 3:19-19145 (BRM) (TJB), 2020 WL 7334194, at *7 (D.N.J. Dec. 11, 2020); *see also Middlesex Cnty. Ethics Comm. v. Garden*

[3] Plaintiffs subsequently appealed that order to the New Jersey Appellate Division which was denied on July 29, 2021. *See* Scheideman Decl., Ex. 30, ECF No. 41-32.

[4] Because the Court finds that an exceptional circumstance exists to abstain from exercising jurisdiction under category three of *Younger*, the Court need not address Defendants' contention that the subpoena-enforcement action is a qualifying civil enforcement proceeding. *See* Defs.' Br. at 13.

State Bar Ass'n, 457 U.S. 423, 432 (1982). These factors require this Court to consider the following: (1) whether there is an ongoing judicial proceeding; (2) whether an important state interest is implicated in the state proceeding; and (3) whether the state proceedings provide an adequate opportunity to present constitutional arguments. *PDX N., Inc. v. Comm'r New Jersey Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 879 (3d Cir. 2020) (citing *Middlesex*, 457 U.S. at 432).

Here, all three factors are met. First, the subpoena-enforcement action is "ongoing" as it is still being litigated in New Jersey State Courts. *See* ECF No. 41-1 at 12 ("Smith & Wesson is applying to the New Jersey Supreme Court for a stay"). Second, the state litigation involves a challenge to the state's contempt process, which authorizes courts to adjudge persons in contempt of court who fail to comply with a subpoena issued by the state's Attorney General. *See* Superior Court Op., ECF No. 41-13 at 10 ("This case *involves state interests* that overcome the consideration of comity raised by the first-filed rule.") (emphasis added). Third, there is nothing that precludes Smith and Wesson 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. *See* Scheideman Decl., Ex. 6, ECF No. 41-8; *Id.*, Ex. 16, ECF No. 41-18; *see also* Pls.' Br. at 12 ("Smith & Wesson is applying to the New Jersey Supreme Court for a stay"). This Court is confident that the state court can "fairly and fully adjudicat[e] the federal issues before it." *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975). Therefore, this Court must follow the dictates of *Younger* and its progeny and abstain from reaching the merits of Plaintiffs' claims.

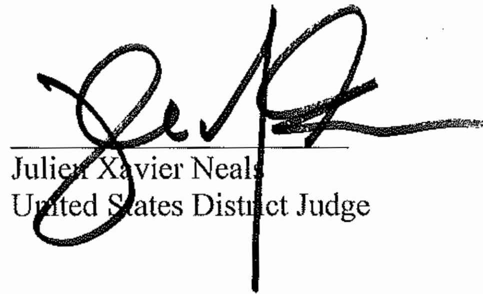
Motion for an Order to Show Cause

Because the Court abstains from exercising jurisdiction based on *Younger*, Smith & Wesson's motion for an order to show cause for a temporary restraining order and preliminary injunction is denied. The Court declines to consider the merits of Smith & Wesson's motion. *See, e.g.*, *Luellen v. Luellen*, Civ. No. 12-496, 2013 WL 1182958, at *5 n.9 (W.D. Pa. Mar. 21, 2013) (denying motion for preliminary injunction where complaint is dismissed in its entirety).

IV. CONCLUSION

For the reasons discussed herein, Defendants' Motion to Dismiss [ECF No. 29] is **GRANTED**. Plaintiffs' Amended Complaint [ECF No. 17] is **DISMISSED WITHOUT PREJUDICE.**[5] Plaintiffs' Motion for an Order to Show Cause for a temporary restraining order and preliminary injunction [ECF No. 41] is **DENIED**. Plaintiffs' request to stay the Court's Order pending an appeal is **DENIED**. An Appropriate order will follow.

DATED: August 2, 2021



Julien Xavier Neals
United States District Judge

[5] The Third Circuit has clarified when there is no merits-based decision, dismissal of a federal case "does not implicate claim preclusion or otherwise prevent [a plaintiff] from returning to federal court if [their] ongoing state prosecution concludes without a resolution of [their] federal claims." *Eldakroury v. Attorney Gen. of New Jersey*, 601 F. App'x 156, 158 (3d Cir. 2015). "Such a non-merits dismissal is by definition without prejudice." *Id.* (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505–06 (2001)). As the Court has not made a merits-based decision here, it will dismiss Plaintiffs' Complaint without prejudice. *See Zahl v. Warhaftig*, 655 F. App'x 66, 70-71 (3d Cir. 2016) (stating District Court's finding that *Younger* abstention operated as a dismissal with prejudice was "incorrect" and an "overly broad reading of our *Younger* abstention precedent").

CERTIFICATE OF SERVICE

I, Courtney G. Saleski, hereby certify that on September 8, 2021, I caused Appellants' Opening Brief and accompanying Joint Appendix to be served on all counsel of record listed on the CM/ECF Service List.

/s/ Courtney G. Saleski
Courtney G. Saleski

September 8, 2021