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No. 24-588

IN THE

Supreme Court of the United States

CYRUS MARK SANAI,
Petitioner,
v.
MELANIE LAWRENCE, et. al.
Respondents,

CYRUS MARK SANAI,
Petitioner,
v.
LEONDRA KRUGER, et. al.
Respondents,

CYRUS MARK SANAI,
Petitioner,
v.
GEORGE CARDONA, et. al.
Respondents

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 21-15771 (*sub nom Roshan v. Lawrence*)

APPLICATION FOR TO RECALL MANDATE IN *SANAI V. LAWRENCE* AND *SANAI V. CARDONA* DIRECTED TO JUSTICE KAGAN

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

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On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT COURT OF APPEALS

INTRODUCTION

This is an application and motion to recall the mandate in *Sanai v. Lawrence* and *Sanai v. Cardona,* consolidated in 21-15771 and order the Court of Appeals to reconsider its unpublished disposition in light of case law from that Circuit issued after the disposition.. These are two of the four underlying actions that were the subject of a consolidated unpublished memorandum opinion.

In making this motion petitioner is presenting to this Court a novel procedural question: whether the Supreme Court's unquestionable power to order the mandate recalled and proceedings stayed also encompasses the power to order the mandate recalled and the Court of Appeals to reconsider its order based on new published authority arising last year.

Late last year the Ninth Circuit issued an opinion *Seattle Pacific University v. Ferguson,* 104 F.4th 50 (9th Cir. 2024) ("*SPU*"). *SPU* is notable for several reasons, some of which are discussed in a motion for injunction pending appeal submitted last week. This motion discusses a notation holding that a frequently-cited Ninth Circuit decision, *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose,* 546 F.3d 1087 (9th Cir. 2008), was "abrogated" by this Court's seminal decision of *Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69 (2013),

which cut back the application of *Younger* to cases falling into the "*NOPSI* categories." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350 (1989)("*NOPSI*"), This citation, when read in conjunction with the same notation in earlier District Court decisions, shows that there has been either new law or a change in law in published Ninth Circuit authority on the question of whether California administrative proceedings are judicial in nature and fall into one of the so-called *NOPSI* categories. The question of whether California State Bar Court proceedings are part of the *NOPSI* categories or are otherwise judicial in nature is the second question presented by petition in his petition, as follows:

> 2. Did the Ninth Circuit Court of Appeals err when it found that Younger abstention applied without addressing the additional requirement of determining whether the California attorney discipline proceedings fall into one of the *NOPSI* categories, given that after this Court of Appeals found that California State Bar attorney discipline proceedings meet the *Middlesex* factors in *Hirsh v. Justices of Supreme Ct. of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995) (per curiam) (*citing Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982)), and so are protected by *Younger* abstention, the California Supreme Court held that such proceedings are not civil enforcement proceedings nor criminal proceedings, thus avoiding the California Constitution's requirement that the California Supreme Court hear oral argument on all civil and criminal cases before it? *See In re Rose,* 22 Cal.4th 430, 440 (2000).

Pet. for Cert. at i.

Ninth Circuit authority provides that the power to recall the mandate includes the power to alter prior judgments and orders of the Ninth Circuit on the same basis as in Fed. R. Civ. P. Rule 60(b). *Yanow v. Weyerhaeuser Steamship Co.,*

274 F.2d 274, 278 (9th Cir. 1958). Ninth Circuit authority authored by Judge Tashima also holds that Fed. R. Civ. P. Rule 60(b)(6) allows vacatur of prior judgments affirmed on appeal based on change in law. *Henson v. Fidelity Nat'l Fin., Inc.,* 943 F.3d 434, 443-44 (9th Cir. 2019). *SPU* counts as a "change in law" under Ninth Circuit precedent.

The question, then, is whether this Court has the power to order the mandate recalled not only for the purpose of a stay, but to reconsider a judgment based on published decisional law of the circuit arising after the judgment of the Court of Appeals presented in a pending writ. Sanai urges this Court to find that this power exists, as it appropriate to address issues of timing in federal appellate proceedings that otherwise might result in a miscarriage of justice.

APPLICATION AND MOTION

Petitioner Cyrus Sanai applies to the Circuit Justice to order the Ninth Circuit to recall the mandate and reconsider its January 30, 2024 memorandum disposition in light of *Seattle Pacific University v. Ferguson,* 104 F.4th 50 (9th Cir. 2024).

BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued its decisions affirming the orders of dismissal of the District Courts on January 30, 2024. App. A. Timely Petitions for Rehearing and Rehearing en Banc were denied on April 17, 2024. App. G.

Petitioner invoked this Court's jurisdiction under 28 U.S.C. §1254(1), and a timely petition for certiorari in this docket is currently pending.

The power of the Supreme Court to recall the mandate arises from both the All Writs Act, 28 U.S.C. §1651 and from 28 U.S.C. § 2101(f)

The power to recall the mandate does not appear to have been used to in the past to require a Circuit Court of Appeals to reconsider an unpublished disposition in light of case law published in that Circuit after the unpublished disposition becomes final. This motion presents to this Court the question of whether it has the power to do so, and if so, when it should be exercised.

Sanai has filed a motion for the relief requested here that has not been addressed by the Court of Appeal on January 20, 2025. A copy of the motion is attached here to as Exhibit A. Appellant will inform this Court if action is taken.

STATEMENT OF THE CASE

Because a pending petition for certiorari has been distributed for Court conference, there necessarily exists one or two memoranda summarizing the petition and its contentions.

Appellants in their briefs directly presented this Court with the following question:

Is *Hirsh*, *supra*, still good law after *Sprint*, *supra*, held that only proceedings fitting under the so-called *NOPSI* categories are subject to *Younger* abstention, where

a. *Hirsh* did not hold that California attorney disciplinary proceedings fall into *NOPSI* categories;

b. The California Supreme Court held in *In Re Rose*, 22 Cal.4th 430, 436 (2000), that California State Bar Discipline proceedings are not judicial in character, and not civil or criminal proceedings, but rather sui generis?

See. e.g. Pet. for Rehearing in *Sanai v. Lawrence*.

The Ninth Circuit Court answered the question as no; but in so doing, it made no finding that California attorney discipline proceedings are "civil enforcement actions" or "civil enforcement proceedings", the only *NOPSI* categories, required for such a finding, into which they could be placed; nor did it hold that California attorney discipline proceedings are "judicial in nature", which is a prerequisite for them fall into any *NOPSI* category. (To be clear, the terms "civil enforcement actions" or "civil enforcement proceedings" mean the same things. In *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014), the Ninth Circuit referred to the two terms interchangeably. Compare *ReadyLink*, *supra*, at 759 and 760.)

In the *Sanai v. Lawrence* Petition for Rehearing, Appellants argued as follows:

> For half a century the federal courts expanded the scope of a long-existing rule of Anglo-American equity jurisprudence, that civil equity courts cannot enjoin criminal proceedings, into a ballooning bar against federal court enjoining proceedings in any state tribunal, whether in the

executive, legislative, or judicial branch. *See Sprint Commc'ns, LLC v. Jacobs,* 571 U.S. 69, 81 (2013); *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754, 758 (9th Cir. 2014); *Cook v. Harding,* 879 F.3d 1035, 1039 (9th Cir. 2018).

In *Sprint,* the United States Supreme Court ("SCOTUS") imposed "strict limitations on *Younger* abstention", to only three kinds of state *judicial* proceedings identified in *New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. 350, 367-68 (1989)*("NOPSI")*. "[T]hese three categories are known as the *NOPSI* categories." *Herrera v. City of Palmdale,* 918 F.3d 1037, 1044 (9th Cir 2019). As to *Younger* abstention SCOTUS "has never extended it to proceedings that are not "judicial in nature" and/or that where the initial proceedings are "legislative or executive action". *NOPSI* at 368-70. *Sprint* further limited the qualifying categories of judicial proceedings to criminal proceedings, civil enforcement proceedings, and civil court proceedings at the core of the state court's mechanism for enforcement of its operations. *Sprint* at 69-70.

The current test thus sets outs five requirements, starting out with falling into one of the *NOPSI* categories. "Each of these requirements must be 'strictly met.'" *Rynearson v. Ferguson,* 903 F.3d 920 (9th Cir. 2018) (citation omitted).

The District Court took none of this case law into account. He did not cite or discuss in any of the appealed orders, collected in Volume 1 of the SER the relevant authority of *Sprint, NOPSI, Readylink, Cook* or *Herrera, all supra.* Instead, he relied on *Hirsh v. Justices of Supreme Court of California,* 67 F.3d 708 (9th Cir.1995). *Hirsh* is wildly out of date and does not have any analysis as to whether the State Bar of California ("SBOC") Court proceedings are judicial in nature or a civil enforcement proceeding: instead, the *Hirsh* panel wrote that "Appellants point to no relevant distinction between this procedure and that held to be judicial in nature in *Middlesex...*". *Id.* at 712.

....

The California Supreme Court ("SCOCA") in contrast declares that SBOC exercises no judicial power whatsoever because SCOCA cannot delegate it. *In Re Rose,* 22 Cal.4th 430, 436 (2000) ("*Rose*"). They are repeatedly characterized as "quasi-judicial"[1] in nature at pages 439-444

[1] "This term "quasi" is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that

of *Rose; see also* AB 21 ("State Bar Disciplinary Proceeding Are Quasi-judicial Proceedings").

State Bar proceedings are also not "civil enforcement proceedings" because while they are enforcement proceedings, they are not **civil:**

> Just as the State Bar Court is unique, so are the disciplinary proceedings heard by the State Bar Court. "Proceedings before the State Bar are sui generis, **neither civil nor criminal in character**, and the ordinary criminal procedural safeguards do not apply.

Rose at 440 (bold emphasis added).

Hirsh's determination, made five years before *Rose* and nine years before *Sprint,* that proceedings before the SBOC Court are subject to *Younger* is wrong, and because *Rose* incorporates *Hirsh's* analysis on the sufficiency of SCOCA's procedures, *Rose* is necessarily unsound and out of date as to its substantive holdings of constitutional sufficiency.

The panel refused to acknowledge the updated law, and in particular the restriction that *Younger* only applies to civil litigation if the cases fall into the *NOPSI* categories.

....

The panel's analysis likewise solely quotes the *Middlesex* factors and does not recognize the strict limitations now placed upon *Younger.* The panel explicitly stated that the conditions which must be met are that the

> "state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims...."Middlesex factors . . . guide consideration of whether Younger extends to noncriminal proceedings"). In addition, "[t]he requested relief must seek to enjoin or have the practical effect of enjoining-ongoing state proceedings."... If each of these conditions is met, *Younger* abstention is appropriate unless "there is a 'showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'"

Mem Disp. at 4.

This definition extends *Younger* to "virtually all parallel state and federal proceedings", in direct rejection of *Sprint.*

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there are intrinsic and material differences between them." Black's Law Dict. (4th ed. 1968) at 1410.

> **SBOC proceedings are also not "civil enforcement proceedings" because they are not civil, but instead *sui generis*, neither civil no criminal in character. *Rose* at 440. Appellants believe that *NOPSI* requires a civil enforcement proceeding to meet minimal civil standards for *Younger* to apply, Circuit Judge Siler held it must meet minimal standards of criminal due process. *Doe v. Univ. of Kentucky,* 860 F.3d 365, 370 (6th Cir. 2017) ("while the proceeding may lack all the formalities found in a trial, it contains enough protections and similarities to qualify as "akin to criminal prosecutions" for purposes of *Younger* abstention.")**

Sanai v Lawrence Pet. for Rehearing at 7-1 (bold emphasis added).

The instant petition for certiorari includes the following question presented:

> 2. Did the Ninth Circuit Court of Appeals err when it found that Younger abstention applied without addressing the additional requirement of determining whether the California attorney discipline proceedings fall into one of the *NOPSI* categories, given that after this Court of Appeals found that California State Bar attorney discipline proceedings meet the *Middlesex* factors in *Hirsh v. Justices of Supreme Ct. of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995) (per curiam) (*citing Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982)), and so are protected by *Younger* abstention, the California Supreme Court held that such proceedings are not civil enforcement proceedings nor criminal proceedings, thus avoiding the California Constitution's requirement that the California Supreme Court hear oral argument on all civil and criminal cases before it? *See In re Rose,* 22 Cal.4th 430, 440 (2000).

Pet. for Cert. at i.

On June 7, 2024 the Ninth Circuit issued the opinion of *Seattle Pacific University v. Ferguson,* 104 F.4th 50, (9th Cir. 2024) ("*SPU*"), authored by Circuit Judge McKeown.

SPU is a lawsuit between a small Christian university, Seattle Pacific University ("SPU"), and the attorney general of Washington State, Defendant Ferguson. Ferguson announced an investigation of Seattle Pacific University's policies against faculty and most employees engaging in homosexual conduct as a potential violation of Washington State law. *SPU* at 56. The University mounted a pre-emptive lawsuit, just as occurred in the related case of *Sanai v. Cardona*, Ninth Circuit Case No. 23-15618.

The district court judgment dismissed on the case on *Younger* abstention and lack of redressability. *SPU* at 57.

Judge McKeown first addressed the issue of redressability, which is not at issue in the appeals. Next, she addressed *Younger* abstention.

> To begin, there is no state court proceeding here. Nor is there an administrative proceeding or other enforcement action. And clearly, a prosecuting or enforcing entity's investigation alone is neither a "quasi-criminal enforcement action[]" nor an enforcement action at all. *See Rynearson,* 903 F.3d at 924-25. The Attorney General has no independent authority to sanction SPU under the WLAD. Wash. Rev. Code §§ 49.60.240, 49.60.250, 49.60.340. As a result, the investigation "cannot be said to have been brought `to sanction the federal plaintiff ... for some wrongful act,' which is the quintessential feature of a *Younger*-eligible `civil enforcement action.'" *Applied Underwriters, Inc. v. Lara,* 37 F.4th 579, 589 (9th Cir. 2022) (*quoting Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013)).
>
> Faced with these obvious problems, the Attorney General attempts another route to *Younger* abstention—the district court properly abstained because the investigation is an extension of soon-to-be-initiated state court proceedings, even though no complaint has

yet been filed. Under this theory, however, the state court proceedings are not "ongoing."

The Attorney General's threat of enforcement in this case is sandwiched between pre-enforcement standing and the initiation of state proceedings. It has long been established that the mere threat of state enforcement is insufficient to justify federal court abstention. *See Steffel,* 415 U.S. at 454, 462, 94 S.Ct. 1209 (holding that Younger does not prevent federal declaratory relief "when a state prosecution has been threatened, but is not pending"). Indeed, if there were no daylight between the invocation of pre-enforcement standing and the start of *Younger* abstention, then litigants would have virtually no opportunity to seek federal review of state laws infringing on constitutional rights.

Prior to a threat of enforcement, no Article III standing exists. After state proceedings commence, *Younger* abstention prohibits federal court intervention for the duration of the proceedings. After state proceedings have concluded, the *Rooker-Feldman* doctrine would likely bar federal courts from reviewing the state court decision with narrow exceptions. *See Johnson v. De Grandy,* 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). And so, the question of what space exists between the start of pre-enforcement standing and the start of "ongoing" state proceedings may dictate many litigants' opportunity to seek a federal remedy at all. *See Telco Commc'ns, Inc. v. Carbaugh,* 885 F.2d 1225, 1229 (4th Cir. 1989) ("[T]he period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost.").

The Attorney General points to precedent establishing that state court proceedings can be "ongoing" in the investigation stage. True, but these cases are inapposite because proceedings were actually initiated. *See Partington v. Gedan,* 961 F.2d 852, 861 (9th Cir. 1992), as amended (July 2, 1992) ("[The claim] is based in part on the Rule 2 disciplinary investigation. In that regard, it clearly seeks relief with respect to a pending state proceeding."); ***see also San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) ("The state-initiated proceeding in this case—the Elections Commission's investigation of Plaintiffs' activities—is ongoing."), *abrogated***

> ***on other grounds by Sprint Commc'ns,* 571 U.S. 69, 134 S.Ct. 584, 187 L.Ed.2d 505.** A state supreme court disciplinary proceeding and an election commission investigation are exceptional and not comparable to a run-of-the-mill Attorney General investigation to determine if further action is warranted.
>
> More specifically, in those cases applying *Younger* abstention in the investigation stage, the investigative entity had independent authority to sanction or discipline the target. See *Partington,* 961 F.2d at 861; *San Jose Silicon Valley Chamber,* 546 F.3d at 1089. In other words, there was no need to file with a separate adjudicative body. **This understanding comports with the Supreme Court's guidance that the proceeding must be "judicial in nature."** *See Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) ("Because we found that the administrative proceedings in *Middlesex* were `judicial in nature' from the outset, it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case." (citation omitted)). An investigation alone is not enough, but when the entity is vested with enforcement or adjudicatory power, then the investigation may signal an ongoing quasi-judicial proceeding. Put differently, when the investigative entity and the adjudicative entity are separate, "ongoing" proceedings begin with the first filing with the adjudicative body; but when the adjudicative body also has investigatory responsibilities, a functional approach governs.
>
> The Attorney General, unlike the Washington State Human Rights Commission and Washington administrative law judges, cannot independently sanction SPU. Wash. Rev. Code §§ 46.60.240, 46.60.250, 46.60.340. Rather, the Attorney General must file a lawsuit in state court to enforce the WLAD, something he has yet to do. *See* Wash. Rev. Code § 49.60.350. This ends the *Younger* inquiry. The district court should not have abstained under *Younger.*

SPU, supra, at 64-65 (bold emphasis added).

SPU expressly acknowledges the state proceedings in question "must be 'judicial in nature'" for *Younger* to apply. In *Middlesex,* the proceedings were before a committee of special masters engaged by the New Jersey Supreme Court; the

proceedings from filings onwards were unitary proceedings in which the final decision was made by a charge by charge poll of New Jersey Supreme 7Court justices. In *Ohio Civil Rights Commission*, the proceedings were judicial in nature under state law, prosecuted by the Ohio Attorney General before an administrative judicial body, the Ohio Civil Rights Commission ("OCRC"). *See Wilson v. Semco, Inc.*, 152 Ohio App. 3d 75, 81, 786 N.E.2d 906 (Ohio Ct. App. 2002)(the "weight of authority in Ohio indicates that proceedings before the OCRC are generally held to be of such a judicial nature...")

The Ohio Commission falls under the same category as the Federal Trade Commission ("FTC") for purposes of which branch or branches it falls within under federal law; the FTC "was charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Executor v. United States,* 295 U.S. 602 (1935) . This Court added that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot be well doubted." *Id.* at 629. In *Ohio Civil Rights Commission,* this Court's majority clarified in a footnote that "[o]f course, if state law expressly indicates that the administrative proceedings are not even "judicial in nature," abstention may not be appropriate. *See Hawaii Housing Authority v. Midkiff,* 467 U. S. 229, 467 U. S. 237-239 (1984)." *Ohio C.R.*

Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 fn 2 (1986). State law in Ohio holds that the Commission is judicial in nature. *See Wilson, supra.*

In *San Jose,* the proceedings were not "judicial in nature" under California law, because no administrative proceedings are judicial in nature. But because *San Jose,* predated *Sprint,* this Court examined whether there were proceedings ongoing at all, not their nature.

Sprint changed this law. No longer were all state proceedings, including all administrative proceedings, subject to *Younger* abstention if the *Middlesex* factors were met. Instead, the proceedings must first be deemed to fall into one of the *NOPSI* categories, and all of the *NOPSI* categories involved proceedings that were judicial in nature.

In *Middlesex,* the "administrative proceedings" were part of an indivisible judicial proceeding culminating in a decision of the New Jersey Supreme Court. In the *Ohio Civil Rights Commission*, the administrative proceedings were themselves judicial in nature under state law, and as they are the subject of an election by the accused, who may either elect to proceed in front of the Commission, or have the suit heard in trial court in the first instance. *Transky v. Ohio Civil Rights Comm.*, 193 Ohio App.3d 354, 358 (Ohio Ct Appeals 2011) *citing* Ohio R.C. 4112.05. The administrative proceedings are fully adversarial, because they are prosecuted by the Ohio Attorney General. *Id.* If the accused opts for an administrative

proceeding and is unhappy with the result, there is a right to appeal to the trial court. Ohio R.C. 4112.06. This right of appeal is the same remedy for all administrative proceedings that are judicial or quasi-judicial in nature under Ohio law. *Thomas v. Beavercreek,* 105 Ohio App.3d 350, 354, 663 N.E.2d 1333 (2d Dist.1995).

> I agree with the Court that our prior cases extending *Younger* beyond criminal prosecutions to civil proceedings have limited its application to proceedings which are "judicial in nature,"....Nothing in the Court's opinion curtails our prior application of Younger to certain administrative proceedings which are "judicial in nature," *see Ohio Civil Rights Comm'n v. Dayton Christian Schools,* Inc., 477 U. S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Assn.,* 457 U. S. 423 (1982);

NOPSI, supra at 374 (Rehnquist, J, concur.).

In California, by contrast, there is an absolute division between administrative proceedings, which are never judicial in nature, under state constitutional law, and the subsequent judicial proceedings that review the outcome.

SPU holds that a frequently cited Ninth Circuit decision *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. V. City of San Jose,* 546 F.3d 1087 (9th Cir. 2008), was "abrogated" by this Court's seminal decision of *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013), which cut back the application of *Younger* to cases falling into the "*NOPSI* categories." Prior to this Court's decision in *Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69 (2013) any kind of governmental proceedings could be deemed subject to *Younger*. The *SPU* panel identified two cases where

matters in the investigation stage had been held to be subject to *Younger*. The first was "*Partington v. Gedan,* 961 F.2d 852 (9th Cir. 1992), *as amended* (July 2, 1992)", *id.* at 65, a case involving multiple Hawaii Bar proceedings ordered by the Hawaii Supreme Court. The second was "*San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008)... *abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69, 134 S.Ct. 584, 187 L.Ed.2d 505...." *Id.*

The note that *San Jose Silicon Valley* was abrogated by *Sprint* is a new determination by the Ninth Circuit, but not by judges in the District Court. Every single citation of *San Jose Silicon Valley* in Ninth Circuit case law prior to *SPU* treated it as good law. *See, e.g. Arevelo v. Hennessey,* 882 F.3d 763, 765 (9th Cir. 2018), the most recent published opinion to cite *San Jose Silicon Valley*. The first Court to figure out that *San Jose Silicon Valley* was no longer good law was Judge Pitts' in the Northern District:

> The Realmark Defendants *cite Evans v. Hepworth,* 433 F.Supp.3d 1171 (D. Idaho 2020) for the relevant standard, but Evans evaluated *Younger* abstention under the test laid out in *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). **That decision was subsequently abrogated by *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), and *ReadyLink Healthcare, Inc. v. State Compensation Insurance Fund*, 754 F.3d 754 (9th Cir. 2014).**

Serafin v. Realmark Holdings, LLC, 23-cv-03275-PCP (N.D. Cal. Oct. 26, 2023) slip. op. at 7 fn. 1 (bold emphasis added).

A week before *SPU* was published, the same judge who presided over *Sanai v. Kruger* acknowledged that *Sprint* and *ReadyLink* overturned *San Jose*:

> A fourth requirement has also been articulated by the Ninth Circuit: that "the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that *Younger* disapproves." *SJSVCCPAC v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008) (citing cases) *abrogated on other ground by Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69 (2013), *and ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754 (9th Cir. 2014).

Card v. Alameda Dist. Atty's Office, 24-CV-00444-AMO (PR) (N.D. Cal. Jul. 2, 2024) slip. op. at 6 fn. 7.

The only grounds for finding that *Sprint* abrogated *San Jose Silicon Valley* would be the recognition that the administrative proceedings at issue in *San Jose* did not meet *Sprint's* requirement that the state proceedings fall into one of the *NOPSI* categories, which is spelled out by Judges Pitts and Alguin. All of these categories require that the proceedings be "judicial in nature." However, in California, administrative proceedings are not judicial in nature as a matter of constitutional edict. Cal. Const. art. VI, §1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, and municipal courts."); and *In re Rose*, 22 Cal.4th 430, 441-42 (Cal. 2000) ("[T]he State Bar Court is not an article VI court"). This led to a separate but related conflict in Circuit law discussed in *San Jose Silicon Valley* as follows:

> We pause to note an important legal issue that we need not and do not reach. Under California law, an aggrieved party may challenge a final administrative action in state court by petitioning for a writ of mandate. Cal.Civ.Proc.Code § 1094.5. If a state administrative proceeding is final, and state-court judicial review is available but has not been invoked, is the state proceeding nevertheless "ongoing" for purposes of *Younger* abstention? In other words, must federal courts view the administrative proceeding and the possibility for state-court review as one unitary proceeding? The Supreme Court has stated that this is an open question. *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("NOPSI"), 491 U.S. 350, 370 n. 4, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also id. at* 374, 109 S.Ct. 2506 (Rehnquist, C.J., concurring in the judgment) (stating that he would hold that the proceedings are unitary); *id.* at 374-75, 109 S.Ct. 2506 (Blackmun, J., concurring in the judgment) (stating that he is "not entirely persuaded" that the question is open).
>
> Seven circuits have addressed this question. Four have held that the administrative proceeding and the possibility for state court review are to be viewed as one unitary proceeding, and three have held the opposite....
>
> Although we briefly joined the majority rule in 1993, that opinion was withdrawn, and we have not addressed the question since then. *See Nev. Entm't Indus., Inc. v. City of Henderson,* 8 F.3d 1348 (9th Cir.1993) (per curiam) (joining majority rule), *withdrawn by* 21 F.3d 895 (9th Cir.), on reh'g 26 F.3d 131 (9th Cir.1994) (unpublished disposition) (holding that the *Younger* abstention question was moot); *see also Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 393-94 (9th Cir.1995) (noting that the question is open in this circuit, but declining to reach it). Because, here, the administrative proceeding itself is ongoing, we do not reach the issue.

San Jose Silicon Valley, supra, at 1093-4.

The embedded conflict on the question of whether administrative proceedings are part of the same or different proceedings in California has been determined: they are separate. *Ogunaalu v. Sup. Ct. (Cal. Comm. on Teacher Credentialing),* 12

Cal.App.5th 107 (2017)(administrative proceeding is separate from administrative mandamus proceedings).

The impact of *SPU* is that this Court has confirmed that California administrative proceedings, whether regarding election law or any other matter, as not "judicial in nature." Because they are not "judicial in nature", they do not fall into the category of "civil enforcement proceedings" or any other *NOPSI* category.

The panel's memorandum opinion does not hold that California State Bar Court proceedings are judicial in nature, and it does not hold that they are civil enforcement proceedings. The memorandum opinion simply finds that the *Middlesex* factors are met. However, after *SPU*, it is Ninth Circuit published law that for *Younger* abstention to apply, the state proceedings "must be 'judicial in nature'", and *SPU* further holds that prior case law that California administrative proceedings are subject to *Younger* abstention has been "*abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69...." Since *Sprint's* holding is that only proceedings which fall into the *NOPSI* categories are subject to *Younger*, this means that the memorandum opinion is wrong as to three of the four actions.

STANDARD FOR RECALLING THE MANDATE

This Court has held that the Courts of Appeals have the power to recall the mandate and reconsider or correct decisions, but in "light of "the profound interests in repose" attaching to the mandate of a court of appeals, however, the power can be

exercised only in extraordinary circumstances... to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Because the restraint in recalling the mandate is dictated by the interest in finality, it does not apply where the court's decision is not final because the time for filing a petition for certiorari has not expired; in those unusual instances the "question of timing... favored equitable relief." *Carrington v. United States,* 503 F.3d 888, 892 (9th Cir. 2007), discussing *United States v. Crawford*, 422 F.3d 1145 (9th Cir. 2005). In *Crawford* "although the mandate had issued, Crawford's direct challenge to his conviction and sentence had not become "final" because the time for filing a petition for a writ of certiorari had not expired." *Carrington, supra* at 892.

Ninth Circuit case law holds that the grounds for vacating a judgment under Fed. R. Civ. Proc. 60(b) also form the basis for recalling the mandate. *Yanow v. Weyerhaeuser Steamship Co.,* 274 F.2d 274, 278 (9th Cir. 1958). Mistake in law is grounds for relief under Fed. R. Civ. Proc. 60(b)(1) within one year of the judgment , and change in law is grounds for relief under Fed. R. Civ. Proc. 60(b(6) at any time. This makes eminent sense: there is no good reason for forcing reconsideration of legal determinations made at the Court of Appeals level to be initiated at the District Court, particularly where the jurisdiction of the District Court to overturn the Court of Appeals is very limited.

In this case, Appellants are seeking recall of the mandate to account for new case law, *SPU*, that arose after the Ninth Circuit Court of Appeals denied rehearing. That the new law is utterly inconsistent with the Court of Appeal's analysis is precisely the kind of "grave unforeseen contingencies" meriting recall.

But there is another reason that the finality rule is inapplicable—the District Courts have issued no final judgment on the merits, but instead dismissed without prejudice. Where a federal court declines jurisdiction under an abstention doctrine where such jurisdiction otherwise clearly exists by statute, the finality interests at play are essentially zero, since nothing on the merits has been decided.

This is doubly true for a second reason. The Court of Appeal's determination involved three final judgments of dismissal without prejudice, plus a ruling on a preliminary injunction motion in *Sanai v. Cardona*, which is now before this Court, docket no. 24-6708. Sanai is well within the time frame to file an indicative Fed. R. Civ. Proc. Rule 60(b)(1) and Fed. R. Civ. Proc. Rule 60(b)(6) motion and then amend his notice of appeal to raise these issues.

Exercising the power to order the Court of Appeals to recall the mandate and reconsider its decision in light of new published authority the same Court has subsequently issued meets the same interests as exercise of the stay and recall powers in the past, which is to ensure that this Court retains and properly exercises its jurisdiction. However, the standard for exercising this power should be whether

the exercise of the power would meet the standards for recalling the mandate for change in law. Exercising this Court's power in this manner puts minimal strain on its resources while potentially erasing the creation of Circuit splits.

THE MANDATE SHOULD BE RECALLED TO ADDRESS THE NEW LAW.

California administrative proceedings are not judicial in nature, as recognized in *Card*, *Serafin*, and *SPU*. Relief is appropriate by recall of the mandate under Henson, supra.

Though Ninth Circuit case law acknowledges that Rule 60(b) relief can be obtained by a recall motion, the case law does not address whether the same factors employed under Rule 60(b) apply.

Rule 60(b)(1) allows relief from "mistake" including mistake of law. The only limitation is the time limit, one year from the "order or judgment." Here, the order for judgment from which relief is requested is the Memorandum Opinion, which was entered on January 30, 2024. Accordingly, if the time limit is one year from the memorandum opinion, then relief is timely.

However, since the new published case law arose after the memorandum opinion in this case, this can also be addressed as a change in law and not a mistake by the panel. In *Henson*, Judge Tashima laid out a six-factor test for determining whether relief should be granted. *Henson, supra*, at 446-53.

The first issue is whether the change in law altered a settled legal principle, or whether the law was unsettled. Here, the law regarding the application of *Younger* to California State Bar proceedings and California administrative proceedings was settled; the memorandum opinion holds that it was settled. Relief is therefore favored.

The second issue is diligence in pursuing relief. Here, Appellant has exercised every avenue available , including petitions for rehearing and a petition for certiorari that is pending.

The third is the reliance interest in the finality of the case. This strongly favors relief for two reasons. First, this is a case where the federal court declined to take jurisdiction, so the dismissal was without prejudice. Second, and more important, there is an ongoing appeal arising from one of the four actions addressed in the memorandum opinion. Rule 60(b)(1) and Rule 60(b)(6) relief are still available in time. It makes little sense for this Court to continue multi-level litigation instead of addressing this issue on the merits.

The fourth factor is the time between the judgment and the motion for relief. In *Henson*, Judge Tashima was clear that the measuring point is the termination of appellate proceedings. Those proceedings are still ongoing in the United States Supreme Court. Accordingly, relief is strongly favored.

The fifth factor "looks to the closeness of the relationship between the decision resulting in the original judgment and the subsequent decision that represents a change in the law." *Henson, supra.* Here the new law directly addresses the question presented in the appeal: whether the California administrative proceedings such as State Bar Court proceedings are "judicial in nature" and "civil enforcement proceedings." The answer, according to *SPU*, is that California administrative proceedings are not subject to *Younger*.

> "The sixth *Phelps* factor considers concerns of comity. *Jones*, 733 F.3d at 840 (citing *Phelps*, 569 F.3d at 1139). In *Phelps,* we ruled that this factor cut in favor of relief because the dismissal of *Phelps'* habeas petition had been on procedural grounds, which meant that granting relief from the dismissal would not upend the comity principle. *See Phelps*, 569 F.3d at 1139".

Henson, supra at 453.

The exact same circumstances obtain here. The sixth factor thus favors relief.

Finally, *Henson* recognizes that other factors can be relevant. The most important other factor is that *Sanai v. Cardona* action is currently pending before the Ninth Circuit and this Court via an appeal of the final judgment of dismissal in the Ninth Circuit and a petition for certiorari in this Court.

CONCLUSION

This Court should address the question of whether this Court's power to recall the mandate extends to ordering the Ninth Circuit to reconsider its decision in light

of its new published case law by that Circuit, and if it agrees it has such power, make that order.

Respectfully submitted this January 20, 2025

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EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 21-15771, consolidated with 22-56215, 23-14610 and 23-15618

PEYMAN ROSHAN,

Plaintiff and Appellant

vs.

MELANIE J. LAWRENCE, et. al, .

Defendants and Appellees

EMERGENCY MOTION TO RECALL MANDATE AND VACATE AND RECONSIDER PANEL MEMORANDUM DECISION OF JANUARY 30, 2024

ACTION REQUESTED BY JANUARY 22, 2025

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I. MOTION

This is an emergency motion to recall the mandate and vacate the January 30, 2024 memorandum opinion to allow Appellants to address a case published after this Court denied rehearing that Appellants became aware of last month, *Seattle Pacific University v. Ferguson,* 104 F.4th 50 (2024), ("*SPU*"), on the question of whether *Sprint Commc'n, LLC v. Jacobs*, 571 U.S. 69, 81 (2014) and *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund* , 754 F.3d 754 9th Cir. 2014, alter the holding of *Hirsh v. Justices of Supreme Court of California*, 67 F.3d 708 (9th Cir.1995), that State Bar of California ("SBOC") are protected by *Younger* abstention.

The critical context of this motion is that Justice Kagan extended the deadlines for filing petitions for certiorari to September 14, 2024 and the petitions for certiorari are still pending. Because of this extension, Appellants are within the timeliness zone where the policy against granting motions to recall the mandate flips to a policy favoring them because the Court of Appeals' decision is not final.

In addition, making the instant motion is required to exhaust remedies prior to filing a motion to vacate the judgment under Fed. R. Civ. Proc. 60(b)(6) and, in respect of the pending Supreme Court petitions for certiorari, to move for recalling the mandate at that level. *See Henson v. Fidelity Nat'l Fin., Inc.,* 943 F.3d 434, 443-44 (9th Cir. 2019).

Action is requested by Wednesday, January 22, 2025 due to the pending petitions for certiorari before the United States Supreme Court in these actions.

II. INTRODUCTION

Appellants in their briefs directly presented this Court with the following question:

Is *Hirsh*, *supra*, still good law after *Sprint*, *supra*, held that only proceedings fitting under the so-called *NOPSI* categories are subject to *Younger* abstention, where

(1) *Hirsh* did not hold that California attorney disciplinary proceedings fall into *NOPSI* categories;

(2) The California Supreme Court held in *In Re Rose*, 22 Cal.4th 430, 436 (2000), that California State Bar Discipline proceedings are not judicial in character, and not civil or criminal proceedings, but rather sui generis?

See. e.g. Pet. for Rehearing in *Sanai v. Lawrence*.

This Court answered the question as no; but in so doing, it made no finding that California attorney discipline proceedings are "civil enforcement actions" or "civil enforcement proceedings", the only *NOPSI* categories, required for such a finding, into which they could be placed; nor did it hold that California attorney discipline proceedings are "judicial in nature", which is a prerequisite for them fall into any *NOPSI* category. (To be clear, the terms "civil enforcement actions" or "civil enforcement proceedings" mean the same things. In *ReadyLink*, this Court referred to the two terms interchangeably. Compare *ReadyLink*, *supra*, at 759 and 760.)

In the *Sanai v. Lawrence* Petition for Rehearing, Appellants argued as follows:

> For half a century the federal courts expanded the scope of a long-existing rule of Anglo-American equity jurisprudence, that

civil equity courts cannot enjoin criminal proceedings, into a ballooning bar against federal court enjoining proceedings in any state tribunal, whether in the executive, legislative, or judicial branch. *See Sprint Commc'n, LLC v. Jacobs,* 571 U.S. 69, 81 (2014); *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754, 758 (9th Cir. 2014); *Cook v. Harding,* 879 F.3d 1035, 1039 (9th Cir. 2018).

In *Sprint,* the United States Supreme Court ("SCOTUS") imposed "strict limitations on *Younger* abstention", to only three kinds of state *judicial* proceedings identified in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989)*("NOPSI")*. "[T]hese three categories are known as the *NOPSI* categories." *Herrera v. City of Palmdale,* 918 F.3d 1037, 1044 (9th Cir 2019). As to *Younger* abstention SCOTUS "has never extended it to proceedings that are not "judicial in nature" and/or that where the initial proceedings are "legislative or executive action". *NOPSI* at 368-70. *Sprint* further limited the qualifying categories of judicial proceedings to criminal proceedings, civil enforcement proceedings, and civil court proceedings at the core of the state court's mechanism for enforcement of its operations. *Sprint* at 69-70.

The current test thus sets outs five requirements, starting out with falling into one of the *NOPSI* categories. "Each of these requirements must be 'strictly met.'" *Rynearson v. Ferguson,* 903 F.3d 920 (9th Cir. 2018) (citation omitted).

The District Court took none of this case law into account. He did not cite or discuss in any of the appealed orders, collected in Volume 1 of the SER the relevant authority of *Sprint, NOPSI, Readylink, Cook* or *Herrera, all supra.* Instead, he relied on *Hirsh v. Justices of Supreme Court of California,* 67 F.3d 708 (9th Cir.1995). *Hirsh* is wildly out of date and does not have any analysis as to whether the State Bar of California ("SBOC") Court proceedings are judicial in nature or a civil enforcement proceeding: instead, the *Hirsh* panel wrote that "Appellants point to no relevant distinction between this procedure and that held to be judicial in nature in *Middlesex...*". *Id.* at 712.

....

The California Supreme Court ("SCOCA") in contrast declares that SBOC exercises no judicial power whatsoever because SCOCA cannot delegate it. *In Re Rose*, 22 Cal.4th 430, 436 (2000) ("*Rose*"). They are repeatedly characterized as "quasi-judicial"[1] in nature at pages 439-444 of *Rose; see also* AB 21 ("State Bar Disciplinary Proceeding Are Quasi-judicial Proceedings").

State Bar proceedings are also not "civil enforcement proceedings" because while they are enforcement proceedings, they are not **civil:**

> Just as the State Bar Court is unique, so are the disciplinary proceedings heard by the State Bar Court. "Proceedings before the State Bar are sui generis, **neither civil nor criminal in character**, and the ordinary criminal procedural safeguards do not apply.

Rose at 440 (bold emphasis added).

Hirsh's determination, made five years before *Rose* and nine years before *Sprint,* that proceedings before the SBOC Court are subject to *Younger* is wrong, and because *Rose* incorporates *Hirsh's* analysis on the sufficiency of SCOCA's procedures, *Rose* is necessarily unsound and out of date as to its substantive holdings of constitutional sufficiency.

The panel refused to acknowledge the updated law, and in particular the restriction that *Younger* only applies to civil litigation if the cases fall into the *NOPSI* categories.

....

The panel's analysis likewise solely quotes the *Middlesex* factors and does not recognize the strict limitations now placed upon *Younger*. The panel explicitly stated that the conditions which must be met are that the

> "state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims...."Middlesex factors . . . guide consideration of whether Younger extends to

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[1] "This term "quasi" is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them." Black's Law Dict. (4th ed. 1968) at 1410.

> noncriminal proceedings"). In addition, "[t]he requested relief must seek to enjoin or have the practical effect of enjoining-ongoing state proceedings."…. If each of these conditions is met, *Younger* abstention is appropriate unless "there is a 'showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'"
>
> Mem Disp. at 4.
>
> This definition extends *Younger* to "virtually all parallel state and federal proceedings", in direct rejection of *Sprint.*
>
> **SBOC proceedings are also not "civil enforcement proceedings" because they are not civil, but instead *sui generis*, neither civil no criminal in character. *Rose* at 440. Appellants believe that *NOPSI* requires a civil enforcement proceeding to meet minimal civil standards for *Younger* to apply, Circuit Judge Siler held it must meet minimal standards of criminal due process. *Doe v. Univ. of Kentucky,* 860 F.3d 365, 370 (6th Cir. 2017)("while the proceeding may lack all the formalities found in a trial, it contains enough protections and similarities to qualify as "akin to criminal prosecutions" for purposes of *Younger* abstention.")**

Sanai v Lawrence Pet. for Rehearing at 7-1 (bold emphasis added).

Since the submission of the petitions for rehearing and their denial, the proceedings in State Bar Court addressed by the complaint in *Sanai v. Cardona* have shown that SBOC attorney discipline proceedings are not "civil enforcement actions". But more important for this motion, on June 7, 2024 this Court issued the opinion of *Seattle Pacific University v. Ferguson,* 104 F.4th 50, (9th Cir. 2024) ("*SPU*"), authored by Circuit Judge McKeown.

SPU is a lawsuit between a small Christian university, Seattle Pacific University ("SPU"), and the attorney general of Washington State, Defendant Ferguson. Ferguson announced an investigation of Seattle Pacific University's policies against faculty and most employees engaging in homosexual conduct

as a potential violation of Washington State law. *SPU* at 56. The University mounted a pre-emptive lawsuit, just as occurred in the related case of *Sanai v. Cardona*, Ninth Circuit Case No. 23-15618.

The district court judgment dismissed on the case on *Younger* abstention and lack of redressability. *SPU* at 57.

Judge McKeown first addressed the issue of redressability, which is not at issue in the appeals. Next, she addressed *Younger* abstention.

> To begin, there is no state court proceeding here. Nor is there an administrative proceeding or other enforcement action. And clearly, a prosecuting or enforcing entity's investigation alone is neither a "quasi-criminal enforcement action[]" nor an enforcement action at all. *See Rynearson,* 903 F.3d at 924-25. The Attorney General has no independent authority to sanction SPU under the WLAD. Wash. Rev. Code §§ 49.60.240, 49.60.250, 49.60.340. As a result, the investigation "cannot be said to have been brought `to sanction the federal plaintiff ... for some wrongful act,' which is the quintessential feature of a *Younger*-eligible `civil enforcement action.'" *Applied Underwriters, Inc. v. Lara,* 37 F.4th 579, 589 (9th Cir. 2022) (*quoting Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013)).
>
> Faced with these obvious problems, the Attorney General attempts another route to *Younger* abstention—the district court properly abstained because the investigation is an extension of soon-to-be-initiated state court proceedings, even though no complaint has yet been filed. Under this theory, however, the state court proceedings are not "ongoing."
>
> The Attorney General's threat of enforcement in this case is sandwiched between pre-enforcement standing and the initiation of state proceedings. It has long been established that the mere threat of state enforcement is insufficient to justify federal court abstention. *See Steffel,* 415 U.S. at 454, 462, 94 S.Ct. 1209 (holding that Younger does not prevent federal declaratory relief "when a state prosecution has been threatened, but is not pending"). Indeed, if there were no daylight between the

invocation of pre-enforcement standing and the start of *Younger* abstention, then litigants would have virtually no opportunity to seek federal review of state laws infringing on constitutional rights.

Prior to a threat of enforcement, no Article III standing exists. After state proceedings commence, *Younger* abstention prohibits federal court intervention for the duration of the proceedings. After state proceedings have concluded, the *Rooker-Feldman* doctrine would likely bar federal courts from reviewing the state court decision with narrow exceptions. *See Johnson v. De Grandy,* 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). And so, the question of what space exists between the start of pre-enforcement standing and the start of "ongoing" state proceedings may dictate many litigants' opportunity to seek a federal remedy at all. *See Telco Commc'ns, Inc. v. Carbaugh,* 885 F.2d 1225, 1229 (4th Cir. 1989) ("[T]he period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost.").

The Attorney General points to precedent establishing that state court proceedings can be "ongoing" in the investigation stage. True, but these cases are inapposite because proceedings were actually initiated. *See Partington v. Gedan,* 961 F.2d 852, 861 (9th Cir. 1992), as amended (July 2, 1992) ("[The claim] is based in part on the Rule 2 disciplinary investigation. In that regard, it clearly seeks relief with respect to a pending state proceeding."); ***see also San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) ("The state-initiated proceeding in this case—the Elections Commission's investigation of Plaintiffs' activities—is ongoing."), *abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69, 134 S.Ct. 584, 187 L.Ed.2d 505.** A state supreme court disciplinary proceeding and an election commission investigation are exceptional and not comparable to a run-of-the-mill Attorney General investigation to determine if further action is warranted.

> More specifically, in those cases applying *Younger* abstention in the investigation stage, the investigative entity had independent authority to sanction or discipline the target. See *Partington,* 961 F.2d at 861; *San Jose Silicon Valley Chamber,* 546 F.3d at 1089. In other words, there was no need to file with a separate adjudicative body. **This understanding comports with the Supreme Court's guidance that the proceeding must be "judicial in nature."** *See Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) ("Because we found that the administrative proceedings in *Middlesex* were `judicial in nature' from the outset, it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case." (citation omitted)). An investigation alone is not enough, but when the entity is vested with enforcement or adjudicatory power, then the investigation may signal an ongoing quasi-judicial proceeding. Put differently, when the investigative entity and the adjudicative entity are separate, "ongoing" proceedings begin with the first filing with the adjudicative body; but when the adjudicative body also has investigatory responsibilities, a functional approach governs.
>
> The Attorney General, unlike the Washington State Human Rights Commission and Washington administrative law judges, cannot independently sanction SPU. Wash. Rev. Code §§ 46.60.240, 46.60.250, 46.60.340. Rather, the Attorney General must file a lawsuit in state court to enforce the WLAD, something he has yet to do. *See* Wash. Rev. Code § 49.60.350. This ends the *Younger* inquiry. The district court should not have abstained under *Younger.*

SPU, *supra*, at 64-65 (bold emphasis added).

SPU expressly acknowledges the state proceedings in question "must be 'judicial in nature'" for *Younger* to apply. In *Middlesex,* the proceedings were before a committee of special masters engaged by the New Jersey Supreme Court; the proceedings from filings onwards were unitary proceedings in which the final decision was made by a charge by charge poll of New Jersey Supreme

Court justices. In *Ohio Civil Rights Commission*, the proceedings were judicial in nature under state law, prosecuted by the Ohio Attorney General before an administrative judicial body, the Ohio Civil Rights Commission ("OCRC"). *See Wilson v. Semco, Inc.,* 152 Ohio App. 3d 75, 81, 786 N.E.2d 906 (Ohio Ct. App. 2002)(the "weight of authority in Ohio indicates that proceedings before the OCRC are generally held to be of such a judicial nature…")

The Ohio Commission falls under the same category as the Federal Trade Commission ("FTC") for purposes of which branch or branches it falls within under federal law; the FTC "was charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Executor v. United States,* 295 U.S. 602 (1935) . The Court added that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot be well doubted." *Id.* at 629. In *Ohio Civil Rights Commission,* the Supreme Court majority clarified in a footnote that "Of course, if state law expressly indicates that the administrative proceedings are not even "judicial in nature," abstention may not be appropriate. *See Hawaii Housing Authority v. Midkiff,* 467 U. S. 229, 467 U. S. 237-239 (1984)." *Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627 fn 2. (1986). State law in Ohio holds the opposite. *See Wilson, supra.*

In *San Jose,* the proceedings were not "judicial in nature" under California law, because no administrative proceedings are judicial in nature. But because *San Jose,* predated *Sprint,* this Court examined whether there were proceedings ongoing at all, not their nature.

Sprint changed this law. No longer were all state proceedings, including all administrative proceedings, subject to *Younger* abstention if the *Middlesex* factors were met. Instead, the proceedings must first be deemed to fall into one of the *NOPSI* categories, and all of the *NOPSI* categories involved proceedings that were judicial in nature.

In *Middlesex,* the "administrative proceedings" were part of an indivisible judicial proceeding culminating in a decision of the New Jersey Supreme Court. In the *Ohio Civil Rights Commission*, the administrative proceedings were themselves judicial in nature under state law, and as they are the subject of an election by the accused, who may either elect to proceed in front of the Commission, or have the suit heard in trial court in the first instance. *Transky v. Ohio Civil Rights Comm.*, 193 Ohio App.3d 354, 358 (Ohio Ct Appeals 2011) citing Ohio R.C. 4112.05. The administrative proceedings are fully adversarial, because they are prosecuted by the Ohio Attorney General. *Id.* If the accused opts for an administrative proceeding and is unhappy with the result, there is a right to appeal to the trial court. Ohio R.C. 4112.06. This right of appeal is the same remedy for all administrative proceedings that are judicial or quasi-judicial in nature under Ohio law. *Thomas v. Beavercreek,* 105 Ohio App.3d 350, 354, 663 N.E.2d 1333 (2d Dist.1995).

> I agree with the Court that our prior cases extending *Younger* beyond criminal prosecutions to civil proceedings have limited its application to proceedings which are "judicial in nature,"....Nothing in the Court's opinion curtails our prior application of Younger to certain administrative proceedings which are "judicial in nature," *see Ohio Civil Rights Comm'n v. Dayton Christian Schools,* Inc., 477 U. S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Assn.,* 457 U. S. 423 (1982);

NOPSI, supra at 374 (Rehnquist, J, concur.).

In California, by contrast, there is an absolute division between administrative proceedings, which are never judicial in nature, under state constitutional law, and the subsequent judicial proceedings that review the outcome.

SPU holds that a frequently cited Ninth Circuit decision *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. V. City of San Jose*, 546 F.3d 1087 (9th Cir. 2008), was "abrogated" by this Court's seminal decision of *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013), which cut back the application of *Younger* to cases falling into the "*NOPSI* categories." Prior to this Court's decision in *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013) any kind of governmental proceedings could be deemed subject to *Younger*. The *SPU* panel identified two cases where matters in the investigation stage had been held to be subject to *Younger*. The first was "*Partington v. Gedan,* 961 F.2d 852 (9th Cir. 1992), *as amended* (July 2, 1992)", *id.* at 65, a case involving multiple Hawaii Bar proceedings ordered by the Hawaii Supreme Court. The second was "*San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008)… *abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69, 134 S.Ct. 584, 187 L.Ed.2d 505…." *Id.*

The note that *San Jose Silicon Valley* was abrogated by *Sprint* is a new determination by this Court. Every single citation of *San Jose Silicon Valley* in Ninth Circuit case law prior to *SPU* treated it as good law. *See, e.g. Arevelo v. Hennessey*, 882 F.3d 763, 765 (9th Cir. 2018), the most recent published opinion to cite *San Jose Silicon Valley.* The first Court to figure out that *San Jose Silicon Valley* was no longer good law was Judge Pitts' in the Northern

District:

> The Realmark Defendants *cite Evans v. Hepworth,* 433 F.Supp.3d 1171 (D. Idaho 2020) for the relevant standard, but Evans evaluated *Younger* abstention under the test laid out in *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). **That decision was subsequently abrogated by *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), and *ReadyLink Healthcare, Inc. v. State Compensation Insurance Fund*, 754 F.3d 754 (9th Cir. 2014).**

Serafin v. Realmark Holdings, LLC, 23-cv-03275-PCP (N.D. Cal. Oct. 26, 2023) slip. op. at 7 fn. 1 (bold emphasis added).

A week before *SPU* was published, the same judge who presided over *Sanai v. Kruger* acknowledged that *Sprint* and *ReadyLink* overturned *San Jose*:

> A fourth requirement has also been articulated by the Ninth Circuit: that "the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that *Younger* disapproves." *SJSVCCPAC v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008) (citing cases) *abrogated on other ground by Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69 (2013), *and ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754 (9th Cir. 2014).

Card v. Alameda Dist. Atty's Office, 24-CV-00444-AMO (PR) (N.D. Cal. Jul. 2, 2024) slip. op. at 6 fn. 7.

The only grounds for finding that *Sprint* abrogated *San Jose Silicon Valley* would be the recognition that the administrative proceedings at issue in *San Jose* did not meet *Sprint's* requirement that the state proceedings fall into one of the *NOPSI* categories, which is spelled out by Judges Pitts and Alguin.

All of these categories require that the proceedings be "judicial in nature." However, in California, administrative proceedings are not judicial in nature as a matter of constitutional edict. Cal. Const. art. VI, §1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, and municipal courts."); and *In re Rose*, 22 Cal.4th 430, 441-42 (Cal. 2000) ("[T]he State Bar Court is not an article VI court"). This led to a separate but related conflict in Circuit law discussed in *San Jose Silicon Valley* as follows:

> We pause to note an important legal issue that we need not and do not reach. Under California law, an aggrieved party may challenge a final administrative action in state court by petitioning for a writ of mandate. Cal.Civ.Proc.Code § 1094.5. If a state administrative proceeding is final, and state-court judicial review is available but has not been invoked, is the state proceeding nevertheless "ongoing" for purposes of *Younger* abstention? In other words, must federal courts view the administrative proceeding and the possibility for state-court review as one unitary proceeding? The Supreme Court has stated that this is an open question. *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("NOPSI"), 491 U.S. 350, 370 n. 4, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also id. at* 374, 109 S.Ct. 2506 (Rehnquist, C.J., concurring in the judgment) (stating that he would hold that the proceedings are unitary); *id.* at 374-75, 109 S.Ct. 2506 (Blackmun, J., concurring in the judgment) (stating that he is "not entirely persuaded" that the question is open).
>
> Seven circuits have addressed this question. Four have held that the administrative proceeding and the possibility for state court review are to be viewed as one unitary proceeding, and three have held the opposite....
>
> Although we briefly joined the majority rule in 1993, that opinion was withdrawn, and we have not addressed the question

> since then. *See Nev. Entm't Indus., Inc. v. City of Henderson,* 8 F.3d 1348 (9th Cir.1993) (per curiam) (joining majority rule), *withdrawn by* 21 F.3d 895 (9th Cir.), on reh'g 26 F.3d 131 (9th Cir.1994) (unpublished disposition) (holding that the *Younger* abstention question was moot); *see also Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 393-94 (9th Cir.1995) (noting that the question is open in this circuit, but declining to reach it). Because, here, the administrative proceeding itself is ongoing, we do not reach the issue.

San Jose Silicon Valley, *supra*, at 1093-4.

The embedded conflict on the question of whether administrative proceedings are part of the same or different proceedings in California has been determined: they are separate. *Ogunaalu v. Sup. Ct. (Cal. Comm. on Teacher Credentialing)*, 12 Cal.App.5th 107 (2017)(administrative proceeding is separate from administrative mandamus proceedings).

The impact of *SPU* is that this Court has confirmed that California administrative proceedings, whether regarding election law or any other matter, as not "judicial in nature." Because they are not "judicial in nature", they do not fall into the category of "civil enforcement proceedings" or any other *NOPSI* category.

The panel's memorandum opinion does not hold that California State Bar Court proceedings are judicial in nature, and it does not hold that they are civil enforcement proceedings. The memorandum opinion simply finds that the *Middlesex* factors are met. However, after *SPU*, it is Ninth Circuit published law that for *Younger* abstention to apply, the state proceedings "must be 'judicial in nature'", and *SPU* further holds that prior case law that California administrative proceedings are subject to *Younger* abstention has been

"*abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69…." Since *Sprint's* holding is that only proceedings which fall into the *NOPSI* categories are subject to *Younger*, this means that the memorandum opinion is wrong as to three of the four actions.

III. STANDARD FOR RECALLING THE MANDATE

The Supreme Court has held that the Courts of Appeals have the power to recall the mandate and reconsider or correct decisions, but in "light of "the profound interests in repose" attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances… to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Because the restraint in recalling the mandate is dictated by the interest in finality, it does not apply where the Court's decision is not final because the time for filing a petition for certiorari has not expired; in those unusual instances the "question of timing… favored equitable relief." *Carrington v. United States,* 503 F.3d 888 (9th Cir. 2007), discussing *United States v. Crawford*, 422 F.3d 1145 (9th Cir.2005). In *Crawford* "although the mandate had issued, Crawford's direct challenge to his conviction and sentence had not become "final" because the time for filing a petition for a writ of certiorari had not expired." *Carrington, supra* at 892.

Ninth Circuit case law holds that the grounds for vacating a judgment under Fed. R. Civ. Proc. 60(b) also form the basis for recalling the mandate. *Yanow v. Weyerhaeuser Steamship Co.,* 274 F.2d 274, 278 (9th Cir. 1958). Mistake in law is grounds for relief under Fed. R. Civ. Proc. 60(b)(1) within one year of the judgment , and change in law is grounds for relief under Fed. R. Civ. Proc. 60(b(6) at any time. This makes eminent sense: there is no good

reason for forcing reconsideration of legal determinations made at the Court of Appeals level to be initiated at the District Court, particularly where the jurisdiction of the District Court to overturn the Court of Appeals is very limited.

In this case, Appellants are seeking recall of the mandate to account for new case law, *SPU*, that arose after this Court denied rehearing. That the new law is utterly inconsistent with this Court's analysis is precisely the kind of "grave unforeseen contingencies" meriting recall. If the Court is unconvinced that *Younger* abstention no longer applies because SBOC attorney discipline proceedings are not "civil enforcement proceedings" or "judicial in nature", then recall is merited.

But there is another reason that the finality rule is inapplicable—the District Courts have issued no final judgment on the merits, but instead dismissed without prejudice. Where a federal court declines jurisdiction under an abstention doctrine where such jurisdiction otherwise clearly exists by statute, the finality interests at play are essentially zero, since nothing on the merits has been decided.

This is doubly true for a second reason. The Court's determination involved three final judgments of dismissal without prejudice, plus a ruling on a preliminary injunction motion in *Sanai v. Cardona*, which is now before this Court, docket no. 24-6708. Sanai is well within the time frame to file an indicative Fed. R. Civ. Pro. 60(b)(1) and Fed. R. Civ. Pro. 60(b)(6) motion and then amend his notice of appeal to raise these issues.

IV. MANDATE SHOULD BE RECALLED TO ADDRESS THE NEW LAW.

A. State Bar Court Proceedings Are Not Judicial in Nature.

California administrative proceedings are not judicial in nature, as recognized in *Card*, *Serafin*, and *SPU*. Relief is appropriate by recall of the mandate.

Though Ninth Circuit case law acknowledges that Rule 60(b) relief can be obtained by a recall motion, the case law does not address whether the same factors employed under Rule 60(b) apply.

Rule 60(b)(1) allows relief from "mistake" including mistake of law. The only limitation is the time limit, one year from the "order or judgment." Here, the order for judgment from which relief is requested is the Memorandum Opinion, which was entered on January 30, 2024. Accordingly, if the time limit is one year from the memorandum opinion, then relief is timely.

However, since the new published case law arose after the memorandum opinion in this case, this can also be addressed as a change in law and not a mistake by the panel. In *Henson*, Judge Tashima laid out a six-factor test for determining whether relief should be granted. *Henson*, *supra*, at 446-53.

The first issue is whether the change in law altered a settled legal principle, or whether the law was unsettled. Here, the law regarding the application of *Younger* to California State Bar proceedings and California administrative proceedings was settled; the memorandum opinion holds that it was settled. Relief is therefore favored.

The second issue is diligence in pursuing relief. Here, Appellant has exercised every avenue available , including petitions for rehearing and a

petition for certiorari that is pending.

The third is the reliance interest in the finality of the case. This strongly favors relief for two reasons. First, this is a case where the federal court declined to take jurisdiction, so the dismissal was without prejudice. Second, and more important, there is an ongoing appeal arising from one of the four actions addressed in the memorandum opinion. Rule 60(b)(1) and Rule 60(b)(6) relief are still available in time. It makes little sense for this Court to continue multi-level litigation instead of addressing this issue on the merits.

The fourth factor is the time between the judgment and the motion for relief. In *Henson*, Judge Tashima was clear that the measuring point is the termination of appellate proceedings. Those proceedings are still ongoing in the United States Supreme Court. Accordingly, relief is strongly favored.

The fifth factor "looks to the closeness of the relationship between the decision resulting in the original judgment and the subsequent decision that represents a change in the law." *Henson*, *supra*. Here the new law directly addresses the question presented in the appeal: whether the California administrative proceedings such as State Bar Court proceedings are "judicial in nature" and "civil enforcement proceedings." The answer, according to *SPU*, is that California administrative proceedings are not subject to *Younger*.

> "The sixth *Phelps* factor considers concerns of comity. *Jones*, 733 F.3d at 840 (citing *Phelps*, 569 F.3d at 1139). In *Phelps,* we ruled that this factor cut in favor of relief because the dismissal of *Phelps'* habeas petition had been on procedural grounds, which meant that granting relief from the dismissal would not upend the comity principle. *See Phelps*, 569 F.3d at 1139".

Henson, *supra* at 453.

The exact same circumstances obtain here. The sixth factor thus favors

relief.

Finally, *Henson* recognizes that other factors can be relevant. The most important other factor is that *Sanai v. Cardona* action is currently pending before this Court.

The Court should therefore recall the mandate, vacate and withdraw the January 30, 2024 memorandum disposition and order briefing on the issue presented here and in the prior motion for recall.

Dated: January 20, 2025

By:/s Cyrus Sanai and /s Peyman Roshan, Appellants

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion is double spaced (except for quotations in excess of 49 words from legal authorities and the record) and utilizes a proportionately spaced 14-point Schoolbook or, for headings, Goudy Old Style typeface or tables, 10 point Times New Romanor, for headings, Goudy Old Style typeface or tables, 10 point Times New Roman. The petition (excluding the Table of Contents, Table of Citations and Certificate of Compliance) comprises a total of 19 pages as calculated by the Microsoft Word word processing system, the means by which it was prepared.

Dated: January 20, 2025

By:/s Cyrus Sanai
CYRUS SANAI
APPELLANT

No 24-588

IN THE
Supreme Court of the United States

CYRUS MARK SANAI,

Petitioner,

v.

MELANIE LAWRENCE, et. al.

Respondents,

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I hereby certify that one copy of k the APPLICATION FOR TO RECALL MANDATE IN *SANAI V. LAWRENCE* AND *SANAI V. CARDONA* DIRECTED TO JUSTICE KAGAN

in Sanai v. Lawrence, et. al, were served via United States Postal Service to the respondent parties on January 20, 2025:

Kirsten Galler
State Bar of California
6th Floor
845 S Figueroa Street
Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct.

Cyrus Sanai

Date: January 20, 2025