No. 08-177

IN THE

Supreme Court of the United States

WILLIAM M. O'NEILL,

Petitioner,

v.

JONATHAN COUGHLAN
OHIO DISCIPLINARY COUNSEL,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit properly followed Ohio law in determining that Ohio's disciplinary proceedings for state court judges and judicial candidates are commenced upon the filing of a grievance with Ohio's Disciplinary Counsel, Jonathan Coughlan.

II. Whether the United States Court of Appeals for the Sixth Circuit properly followed long-standing Supreme Court precedent in determining that *Younger* abstention cannot be waived by a state defendant unless it makes a clear and explicit statement that it does not want the federal courts to apply *Younger* abstention and force the case back into the state judicial system.

III. Whether this case presents the kind of "exceptional circumstances" necessary to warrant an exception to *Younger* abstention, where, as here, Ohio's judicial process affords an adequate opportunity to raise constitutional claims, and may permit the State of Ohio to resolve the alleged grievance on other grounds and thereby avoid an unnecessary constitutional confrontation.

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INTRODUCTION

Petitioner William O'Neill ("Petitioner" or "O'Neill") has presented no "compelling reasons" for why his Petition for Writ of Certiorari ("Petition") should be granted under Sup. Ct. R. 10. The decision by the United States Court of Appeals for the Sixth Circuit does not conflict with any decision of the United States Supreme Court or any other court of appeals. Rather, it merely follows existing precedent to hold that *Younger* abstention applies fully to Ohio's judicial disciplinary proceedings and was not waived by Ohio's Disciplinary Counsel during the course of the trial court proceedings. *O'Neill v. Coughlan*, 511 F.3d 638 (6th Cir. 2008). Indeed, it is now well-settled that *Younger* abstention applies to state disciplinary proceedings that are commenced against lawyers and judges for alleged violations of ethical canons and disciplinary rules.[1] By so doing, *Younger* honors the State's sovereign right to process judicial grievances without undue federal interference and avoids unwarranted determinations of federal constitutional questions. Thus, the Sixth Circuit's decision is consistent with existing precedent and does not warrant further review.

In his Petition, O'Neill does not cite a single case, which has ever held that *Younger* abstention should *not*

[1] *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Spargo v. N.Y. State Comm. on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725 (7th Cir.), *cert. denied*, 528 U.S. 871 (1999); *Berger v. Cuyahoga Cty. Bar Ass'n*, 983 F.2d 718, 720 (6th Cir.), *cert. denied*, 508 U.S. 940 (1993).

be applied to state disciplinary proceedings. While he argues that the Sixth Circuit's decision conflicts with other appellate decisions relating to whether administrative proceedings are "ongoing" for purposes of *Younger* abstention, none of these cases actually involves state disciplinary proceedings against judges or attorneys and thus none are relevant to the question of when Ohio's disciplinary proceedings commence under Ohio law. As this Court has held, the question of whether state disciplinary proceedings are "ongoing" for purposes of *Younger* abstention is a question controlled by *state* law, not federal law. *Middlesex Cty. Ethics Comm.*, 457 U.S. at 433. Thus, the Sixth Circuit correctly examined Ohio state law in determining that Ohio's disciplinary proceedings were commenced by the filing of a grievance against Judge O'Neill. (Pet. App. 12-13) (citing *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585, 588 (1993)). Accordingly, contrary to Petitioner's suggestion, the Sixth Circuit's decision does not create any circuit conflict at all.

Similarly, the Petition has failed to present compelling reasons for why the Court should review whether *Younger* abstention was waived by Respondent during the trial court proceedings. Contrary to the Petitioner's suggestions, this waiver issue does not present an "unsettled" question of federal law that has never been decided by this Court. Rather, the Sixth Circuit's opinion is based upon a faithful application of existing Supreme Court precedent, which has repeatedly held that a state defendant cannot waive *Younger* abstention unless it clearly and explicitly *urges* the federal court not to abstain, but to retain jurisdiction in order to honor the State's request for an immediate

resolution of a disputed constitutional issue. *See, e.g., Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 500, n. 9 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477-480 (1977); *Sosna v. Iowa*, 419 U.S. 393, 396, n. 3 (1975). As the Sixth Circuit observed and as Petition itself concedes, this Court has held that *Younger* abstention may be raised *sua sponte* on appeal. (Pet. App. 8-9) (citing *Sosna* and *Hodory*). Thus, both this Court and the Sixth Circuit have held that *Younger* can be raised at any time, even after the court of appeals or the district court has decided the merits of the case. *See, e.g., Louisville Country Club v. Watts*, 1999 WL 232683 (6th Cir.), *cert. denied*, 528 U.S. 1061 (1999) (citing *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976)). Accordingly, the Sixth Circuit's resolution of this "waiver" issue is consistent with existing Supreme Court precedent and does not raise a compelling reason for granting the Petition.

Finally, the Court should reject the Petitioner's argument that this case presents the kind of "extraordinary circumstances" that warrant an exception to *Younger* abstention. This argument was not raised during the district court proceedings and thus was not addressed by the court of appeals or the district court in their opinions. (Pet. App. 11-12, 40-41). Indeed, contrary to Petitioner's suggestions, this Court has already rejected the argument that an alleged "chilling effect" upon First Amendment rights can be a sufficient basis for not applying *Younger* abstention. *Younger*, 401 U.S. at 51 ("[A] 'chilling effect, even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state

action"). Thus, even in the face of alleged First Amendment claims, the federal courts have consistently applied *Younger* to state disciplinary proceedings. *See, e.g., Middlesex*, 457 U.S. at 432-433; *Spargo*, 351 F.3d at 81; *Crenshaw*, 170 F.3d at 729; *Berger*, 983 F.2d at 720; *Harper v. Office of Disciplinary Counsel, Supreme Court of Ohio*, 113 F.3d 1234, 1997 WL 225899, *2 (6th Cir. 1997). Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

A. Ohio's Judicial Grievance Process

This case arises out of a grievance that was filed with Ohio's Disciplinary Counsel, Respondent Jonathan Coughlan ("Respondent" or "Coughlan"), against a member of Ohio's state judiciary: Judge William O'Neill of Ohio's Eleventh District Court of Appeals. Under Rule II of the Ohio Supreme Court's Rules for the Government of the Judiciary ("Gov. Jud. R.") and Rule V of the Ohio Supreme Court's Rules for the Government of the Bar ("Gov. Bar. R."), the filing of a grievance with the Office of Disciplinary Counsel alleging misconduct of a state court judge or judicial candidate initiates a disciplinary process that must be "brought, conducted, and disposed of" in accordance with the above-referenced rules and procedures. Ohio's disciplinary process for judicial grievances is accurately described in another published opinion, *Squire v. Coughlan*, 469 F.3d 551, 553-554 (6th Cir. 2006), that was decided in 2006. As set forth in *Squire*, "a disciplinary proceeding against a judge ordinarily is commenced by the filing of a grievance with the Ohio Disciplinary Counsel."

Squire, 469 F.3d at 553. "Upon the filing of a grievance or other information that comes to its attention relating to the alleged misconduct of a judge, the Disciplinary Counsel has a mandatory duty to commence an investigation." *Id.* (Gov. Bar R. V, § 4(C)). Among other things, "Gov. Bar V, § 4(I) requires that the judge who is the subject of a grievance or investigation be given 'notice of each allegation and the opportunity to respond to each allegation' before the investigation is completed." *Id.*

Once the investigation is completed, the Disciplinary Counsel then determines whether there is substantial evidence of a violation. *Squire*, 469 F.3d at 553. If the evidence is insufficient, the investigation is dismissed and remains confidential. *Id.* If the evidence is sufficient, then the Disciplinary Counsel files a complaint with the Board of Commissioners on Grievances and Discipline (the "Board"). *Id.*, 469 F.3d at 553-554. Once the complaint is filed, a three-member panel of the Board determines, upon an independent review of the investigation materials, whether there is probable cause to certify a formal complaint. *Id.* at 554. A certified complaint against a judge is then referred to a separate panel of Board members for an evidentiary hearing. *Id.* The respondent judge has the opportunity to answer the complaint and to engage in discovery, including depositions, interrogatories and document requests. *Id.* Under Gov. Bar R. V, Section 6(G), (H), or (K), the Hearing Panel and/or the entire Board have the authority to dismiss the complaint and/or to find no violation at any time. Moreover, if a violation is found and any sanctions are recommended, the Ohio Supreme Court will conduct a judicial review of the administrative proceedings under Gov. Bar R. V, Section 8.

As explained in *Squire*, there are no provisions of Gov. Bar. R. V or Gov. Jud. R. II that explicitly prohibit a judge or judicial candidate from raising constitutional issues during the state disciplinary process. *Squire*, 469 F.3d at 557. Indeed, upon judicial review of the disciplinary proceedings, the Ohio Supreme Court has the authority to construe the canons narrowly, if necessary, and to rule upon the constitutionality of any judicial canons or rules. Moreover, if the Ohio Supreme Court adopts a construction of the judicial canons that violates the First Amendment, the affected party would have the opportunity to seek federal court review of the Ohio Supreme Court's decision via a timely petition for writ of certiorari with the U.S. Supreme Court. Thus, as the Sixth Circuit held in *Squire*, a judge accused of misconduct would have the right to raise any constitutional issues, if necessary, in the state judicial system. *Id.* at 557.

B. Summary Of Proceedings.

1. The District Court Proceedings

In this case, it is undisputed that a federal court action was commenced on August 12, 2004, in order to halt the Ohio Disciplinary Counsel's processing of a grievance that was filed under Gov. Bar. R. V and Gov. Jud. R. II. In particular, the disciplinary process was commenced on July 19, 2004, when the Office of Disciplinary Counsel received a grievance against Judge O'Neill from James Trakas, Chairman of the Cuyahoga County Republican Party. (Pet. App. 3). As required by the disciplinary rules, the Disciplinary Counsel responded to the Trakas Grievance by sending a letter

to Judge O'Neill to inform him of the grievance and the commencement of a mandatory investigation under Gov. Bar. R. V. (Pet. App. 4). In particular, the letter stated:

> Please be advised that the enclosed grievance has been filed against you by James Trakas. Pursuant to Gov. Bar R. V, as referenced in Gov. Jud. R. II, the Disciplinary Counsel is required to investigate any matter filed with him or that comes to his attention. Accordingly, this office must obtain a response to such grievances, regardless of the form or ultimate sufficiency thereof. In accordance with Gov. Bar R. V, this investigation will be confidential.
>
> Please provide your written response on or before August 4, 2004. A copy of your reply will be sent to the grievant unless you request in writing that it not be so furnished [see, Gov. Bar R. V(11)(E)(3)].

(*Id.*)

Rather than respond to the Trakas Grievance in accordance with the procedures established by Ohio law, Judge O'Neill filed a complaint in federal court that sought to enjoin the entire disciplinary process by prohibiting the Disciplinary Counsel from "continuing to investigate" the grievance or "taking any other action against Plaintiff for alleged violation of certain provisions of Ohio's Code of Judicial Conduct." Both the Complaint and TRO Motion were filed on August 12,

2004, after the filing of the Trakas Grievance and the commencement of a mandatory investigation by the Disciplinary Counsel.

In a position statement and at hearing held on August 16, 2004, counsel for Respondent expressly urged the district court to dismiss the complaint for lack of jurisdiction because the case was not ripe for review and because Coughlan was not the proper party. After the district court entered a TRO, Coughlan filed a combined Motion to Dismiss and Opposition to Plaintiff's Motion for Preliminary Injunction that again urged the district court to *dismiss* the complaint and *not* decide the merits of the case. Although the original motion did not expressly cite *Younger*, it argued that O'Neill's claims were not ripe for adjudication because the Disciplinary Counsel had not yet completed his investigation of the grievance under Gov. Bar R. V. As such, Respondent argued that the complaint should be dismissed for lack of jurisdiction because the canons had not yet been applied by the proper state authorities against Judge O'Neill. (*Id.*)

In moving and explicitly urging the district court to dismiss the complaint, Respondent also defended against the preliminary injunction by arguing, in the alternative, that Judge O'Neill had failed to demonstrate the relevant factors for a preliminary injunction, including a likelihood of success on the merits. In addressing the merits of the constitutional claims, however, Respondent did not "expressly urge" the district court *to retain* jurisdiction in order to decide the constitutionality of any judicial canon in the first instance. Rather, Respondent expressly urged the

district court *to dismiss* the complaint, so that Ohio's disciplinary process could continue in accordance with the rules and procedures established by the Ohio Supreme Court.

On September 14, 2004, the district court issued a Preliminary Injunction that enjoined the Disciplinary Counsel "from enforcing, threatening to enforce, or recommending enforcement" of the disputed judicial canons *and* from investigating, threatening to investigate, or recommending investigation of possible violations thereof." (Pet. App. 70-71). Although the district court again rejected the ripeness argument, it did not expressly deny Respondent's Motion to Dismiss, which remained pending. (Pet. App. 5).

On October 6, 2004, Respondent filed a "supplement" to its pending Motion to Dismiss, which argued that the district court also should dismiss the complaint based upon *Younger* abstention. (Pet. App. 5, 28). The district court did not rule upon the Motion to Dismiss, however, nor address the impact of *Younger* abstention at that time. Rather, after Respondent further supplemented its *Younger* arguments and moved to vacate and dissolve the preliminary injunction, the district court issued a second Memorandum and Order on June 16, 2006, which agreed that *Younger* was fully applicable to this case, but concluded that the issue had been "waived" by the Disciplinary Counsel in the course of briefing the Plaintiff's motion for a preliminary injunction. *O'Neill v. Coughlan*, 436 F. Supp.2d 906 (N.D. Ohio 2006) (Pet. App. 36-44). Thereafter, the district court converted its Preliminary Injunction into a Permanent Injunction, and Respondent filed a timely

notice of appeal from the district court's final judgment to the United States Court of Appeals for the Sixth Circuit. (Pet. App. 25-35).

2. The Court of Appeals' Opinion

On appeal, O'Neill did not dispute that *Younger* abstention applied to ongoing disciplinary proceedings that were commenced against state court judges and judicial candidates under Ohio law. (Pet. App. 12, fn. 2). Although O'Neill argued that the filing of a grievance did not commence a disciplinary proceeding against Judge O'Neill, the Sixth Circuit flatly rejected this argument, as the district court did, "because the Ohio Supreme Court has held that the filing of a grievance is the beginning of the judicial process" under Ohio law. (Pet. App. 12) (citing *Hecht v. Levin*, 613 N.E.2d 585, 588 (Ohio 1993)). In *Hecht*, the Ohio Supreme Court was asked to decide whether the filing of a grievance is part of a "judicial proceeding" under state law for purposes of determining whether the grievance was subject to an absolute privilege from defamation. Although O'Neill vainly sought to distinguish *Hecht* on the facts, the Sixth Circuit rejected this argument, concluding that *Hecht* provided a "clear statement that judicial proceedings begin with the filing of a grievance" and "we are not persuaded that the different context requires us to disregard Hecht's unambiguous holding." (Pet. App. 13). Accordingly, the court of appeals rejected O'Neill's argument and held that *Younger* abstention was fully applicable to this case. (*Id.*).

In this regard, the court of appeals also concluded that *Younger* abstention had not been waived by

Respondent during the trial court proceedings. (Pet. App. 7-11). Citing and following Supreme Court precedent, the Sixth Circuit held that *Younger* abstention was not waived merely because the State of Ohio did not raise this issue "either in the state's first responsive pleading or before the state addressed the merits" in opposing the motion for preliminary injunction. (Pet. App. 9). Rather, the Sixth Circuit followed Supreme Court precedent to conclude that *Younger* may be raised *sua sponte* on appeal and should not be disregarded unless a state defendant makes a "clear and explicit statement that it did not want the Court to apply *Younger*." (*Id.*). Accordingly, the court held that the failure to raise *Younger* in the original motion to dismiss "did not constitute a waiver of the right to seek dismissal of the complaint on the grounds of *Younger* abstention." (*Id.*)

REASONS FOR DENYING THE PETITION

Petitioner has not presented compelling reasons to grant a petition for writ of certiorari under S. Ct. R. 10. The Sixth Circuit's decision does not conflict with a decision of this Court or any court of appeals nor does it raise an important federal question that has not been settled by this Court. Rather, the opinion merely follows existing Supreme Court precedent to hold that *Younger* abstention applies fully to Ohio's judicial disciplinary proceedings and was not waived by the Ohio Disciplinary Counsel merely because it was not initially raised in the original motion to dismiss. The decision is based upon a proper application of existing precedent to the particular facts of this case and does not warrant further review. *See* S. Ct. R. 10 ("a petition for writ of certiorari is rarely

granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). Accordingly, the Court should deny the Petition.

I. THE SIXTH CIRCUIT PROPERLY APPLIED STATE LAW IN DETERMINING THAT OHIO'S DISCIPLINARY PROCEEDINGS ARE COMMENCED BY THE FILING OF A GRIEVANCE WITH THE OHIO DISCIPLINARY COUNSEL.

A. The Issue Of Whether Ohio's Disciplinary Proceedings Commenced Upon The Filing Of A Grievance Presents A Question Of State Law That Does Not Require Further Review.

The Petition's first argument seeks to challenge the Sixth Circuit's interpretation of state law relating to when a judicial disciplinary proceeding is "commenced" under the Ohio Supreme Court's Rules for the Government of the Bar ("Gov. Bar R.") and the Government of the Judiciary ("Gov. Jud. R."). This first argument therefore is governed by *state* law and does not present an important *federal* question that might warrant Supreme Court review. As this Court has held, the question of whether state disciplinary proceedings are "ongoing" for purposes of *Younger* abstention is controlled by state law, not federal law. *Middlesex Cty. Ethics Comm.*, 457 U.S. at 433 (examining New Jersey law in determining that disciplinary proceedings were "ongoing" under *Younger*). Here, as the Sixth Circuit properly concluded, the Supreme Court of Ohio has held that the "filing of a grievance" under Gov. Bar R. V (which applies to judges under Gov. Jud. R. II) is an

action that "initiates" disciplinary proceedings under Ohio law. Thus, the Sixth Circuit's decision is consistent with Ohio law and does not present an important question of federal law that might warrant Supreme Court review.

In his Petition, O'Neill argues that *Hecht* is not applicable to this case because it merely addressed whether the absolute privilege against defamation applies to statements made in a written grievance filed under Gov. Bar. R. V. As the Sixth Circuit explained, however, *Hecht* is not distinguishable on these grounds. Rather, *Hecht* applies to this case because it constitutes an unambiguous determination by the Ohio Supreme Court about when Ohio's disciplinary process begins under Ohio law. In deciding whether absolute immunity applied to the filing of a grievance with the Ohio Disciplinary Counsel, the Ohio Supreme Court was required to decide whether the filing of a grievance is part of a "judicial proceeding." — *i.e.*, the purely judicial "disciplinary process" set forth in Gov. Bar R. V. That is the entire point of the *Hecht* case and why it so clearly and unambiguously establishes that a disciplinary proceeding *commences* upon the filing of a grievance under Gov. Bar R. V, which, as the Petition concedes, sets forth the rules and procedures for handling any grievance filed against lawyers *and* against judges and judicial candidates under Gov. Jud. R. II. (Pet. 10-13, n. 9) (conceding that the state rules and procedures set forth in Gov. Bar. R. V applies in the same manner to "judges, judicial candidates and lawyers"). Accordingly, the court of appeals properly followed *Hecht* in deciding whether the filing of a grievance commenced a "judicial proceeding" under Ohio law.

O'Neill also seeks to distinguish *Hecht* because it allegedly failed to analyze "the role of a citizen's written grievance in the context of balancing state versus federal jurisdictional interests" under *Younger*. (Pet. 25, n. 30). This argument is meritless and was properly rejected by the lower courts. *Hecht* is relevant because it defines what initiates and constitutes "judicial proceedings" under Ohio law. In *Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725 (7th Cir. 1999), for example, the Seventh Circuit also was asked to determine when Indiana's disciplinary proceedings were commenced for purposes of *Younger* abstention. To answer this question, the Seventh Circuit examined Indiana's disciplinary rules and concluded that disciplinary proceedings were commenced upon the docketing of a grievance and the initiation of an investigation. *Id.* Accordingly, as in *Crenshaw*, the Sixth Circuit properly examined state law in deciding that, like Indiana's disciplinary proceedings, Ohio's disciplinary proceedings were commenced upon the filing of a grievance and the initiation of an investigation by the Disciplinary Counsel.

Indeed, this is not the first time that the Sixth Circuit has examined this particular issue under Ohio law. Rather, since this Court's 1983 decision in *Middlesex Cty.*, the Sixth Circuit has consistently held that *Younger* abstention applies to Ohio's disciplinary proceedings and therefore has refused to enjoin an ongoing investigation that was commenced against a judge or an attorney by the Ohio Disciplinary Counsel or a local bar association under Gov. Bar. R. V. *See, e.g., Squire*, 469 F.3d at 553 ("a disciplinary proceeding against a judge ordinarily is commenced by the filing of

a grievance with the Ohio Disciplinary Counsel"); *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 720 (6th Cir.), *cert. denied*, 508 U.S. 940 (1993) (applying *Younger*, even though the alleged grievance against the attorney was still "in the midst of the investigation"). Accordingly, the Court should reject the Petition's argument and conclude that this question of state law was properly decided by the Sixth Circuit and does not warrant Supreme Court review.

B. The Sixth Circuit's Interpretation Of Ohio Law Does Not Conflict With The Decisions Of Any Other Federal Court.

In an effort to manufacture a circuit conflict that might warrant Supreme Court review, the Petition also argues that the Sixth Circuit's opinion conflicts with the Fourth Circuit's opinion in *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), the Fifth Circuit's opinion in *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995), and the Eighth Circuit's decision in *Planned Parenthood v. Atchison*, 126 F.3d 1042 (8th Cir. 1997). This is not correct. None of these decisions involve disciplinary proceedings against a lawyer or judge. Rather, they all involve *other* types of administrative matters that were based upon *other* types of state laws. Thus, none of the decisions have anything to do with determining when disciplinary proceedings are commenced under Ohio law.

In fact, with respect to question of when disciplinary proceedings are commenced against state court judges and attorneys under state law, the Sixth Circuit's analysis is actually consistent with the analysis of other

circuit courts on this issue. *See Crenshaw*, 170 F.3d at 728 & fn. 1 (observing that its analysis of Indiana's disciplinary proceedings was consistent with other circuits that have recognized that disciplinary proceedings "are progressive, incremental processes" and that "the federalism concerns that *Younger* and *Middlesex* protect are implicated when an attorney is subject to a formal investigative procedure") (citing *Hirsh v. Justices of the Supreme Court of California*, 67 F.3d 708, 712 (9th Cir. 1995); *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718 (6th Cir.), *cert. denied*, 508 U.S. 940 (1993); *Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512 (2d Cir.), *cert. denied*, 497 U.S. 1025 (1990); *Hensler v. District Four Grievance Comm.*, 790 F.2d 290 (5th Cir. 1986)). Accordingly, the Court should conclude that the Sixth Circuit's decision does not create a circuit conflict that might warrant further review under S. Ct. R. 10.

II. THE SIXTH CIRCUIT'S WAIVER RULING IS BASED UPON A PROPER APPLICATION OF EXISTING SUPREME COURT PRECEDENT TO THE FACTUAL CIRCUMSTANCES PRESENTED.

The Sixth Circuit's decision re: the alleged waiver of *Younger* abstention also does not create a circuit conflict nor present an important federal question that has not been settled by this Court. To the contrary, the decision is based upon a proper application of existing Supreme Court precedent, which has consistently held that a waiver can arise only if the State clearly and explicitly states that it does not want the federal courts to apply *Younger* because it *prefers* to obtain an

immediate federal adjudication of a disputed constitutional claim. By so doing, this Court has not sought to penalize states for failing to raise *Younger* abstention, but only sought to advance the principle of comity and federalism underlying *Younger* by *honoring* a state's *request* to retain jurisdiction and not force the case back into the state judicial system against the state's will. Accordingly, the Sixth Circuit's decision is consistent with Supreme Court precedent and does not present an unsettled question of federal law that might warrant further review.

Indeed, a review of this Court's precedent confirms that the Sixth Circuit's resolution of the waiver issue was properly decided. The issue of *Younger* waiver was first discussed by this Court in *Sosna v. Iowa*, 419 U.S. 393, 396, n. 3 (1975). In *Sosna*, the plaintiff sought to challenge the constitutionality of a state statute that required a petitioner in a divorce action to be a resident of the state for at least one year. After a three-judge panel upheld the constitutionality of the state law, this Court raised *Younger* abstention *sua sponte*, specifically asking the parties to discuss "whether the United States District Court should have proceeded to the merits of the constitutional issue presented in light of [*Younger*]." *Id.*, 419 U.S. at 396. In this regard, there was no suggestion by this Court or by the plaintiff that Iowa had "waived" *Younger* abstention merely because it defended the merits of the state law in the district court. Rather, the issue of waiver only arose because the State of Iowa responded to the Court's inquiry by explicitly urging the Court not to apply *Younger*, but to reverse the lower court's decision on the merits. *Id.*, n. 3. Accordingly, this Court honored the State's request and did not apply *Younger* in that case. *Id.*

Similarly, in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477-480 (1977), the issue was whether this Court should apply *Younger* and/or *Pullman* abstention to a dispute relating to the constitutionality of an Ohio statute disqualifying certain workers for unemployment compensation benefits if their unemployment was due to a strike or labor dispute. In the lower court proceedings, a three-judge panel heard arguments on the merits and overturned the state law as unconstitutional. The State of Ohio then appealed to the U.S. Supreme Court, but did not argue *Younger* abstention, but a reversal on the merits. Upon review, this Court again raised the issue of *Younger* abstention *sua sponte*, specifically asking the State of Ohio whether it wanted the Court to vacate the lower court decision based upon *Younger* abstention. *Id.* at 479. Once again, the State "resisted this suggestion," expressly urging this Court to retain jurisdiction in order to overrule the lower court's decision on the merits. *Id.*

The question in *Hodory*, therefore, was not whether Ohio had waived *Younger* abstention by failing to raise the issue or by defending the constitutionality of a state law. Rather, an explicit waiver was *permitted* by this Court because this Court determined that it was more consistent with the principles of comity and federalism underlying *Younger* to honor the State of Ohio's request to *not* apply Younger abstention and not "force the case back into the State's own system" against the State's will:

> *Younger* and these cases express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal.
>
> It may be argued, however, that a federal court is compelled to abstain in every such situation. ***If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system***. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under the circumstances *Younger* principles of equity and comity do not require this Court ***to refuse Ohio the immediate adjudication it seeks***.

Id. at 479-480 (emphasis added).

This Court applied this same reasoning in *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984). In *Brown*, the issue was whether to enjoin a state statute that required the registration of unions representing casino employees. The State of New Jersey initially moved to dismiss based upon *Pullman*, *Younger*, and *Burford* abstention, but the district court rejected the abstention arguments and elected to deny an injunction on the merits. *Id.* at 499 & n. 6. On appeal, the Third Circuit reversed, concluding that Appellants were likely to prevail on the

merits and were entitled to a preliminary injunction. *Id.* at 499 & n. 8. New Jersey then petitioned for a writ of certiorari and clearly and explicitly stated in its brief that it did not intend to press *Younger* abstention, but was voluntarily electing to "submit to the jurisdiction of this Court in order to obtain a more expeditious and final resolution of the merits of the constitutional issue." *Id.* at 500, n. 9. This Court therefore honored New Jersey's request, noting that the State had expressly "agreed to our adjudication of the controversy." *Id.*

In all three of the above-referenced cases, therefore, the issue of waiver only arose because the State clearly and explicitly advised the Supreme Court that it did not want the Court to apply *Younger* abstention, but preferred to submit the pending constitutional question to the Supreme Court for immediate resolution. The choice was clearly presented to the state defendant, and the waiver was voluntary, intentional, unequivocal and explicit. It did not arise through mistake, inadvertence, or omission or merely because the State had defended the constitutionality of a state law. Rather, it arose only because this Court wanted to *honor the state's request* to decide a constitutional issue in the first instance, rather than to force the matter back into the state judicial system against the state's will.

Indeed, in agreeing to honor the state's request to not apply *Younger* abstention in *Brown*, *Hodory*, and *Sosna*, this Court did not remotely suggest that a state defendant can be penalized for failing to raise *Younger* abstention in a motion to dismiss or by defending against a preliminary injunction on the merits. To the contrary, this Court has held that *Younger* can be raised

sua sponte on appeal, *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976), and in fact has twice raised *Younger* abstention well after the merits of a constitutional dispute had been decided. *Sosna*, 419 U.S. at 396-397, *Hodory*, 431 U.S. at 479. Thus, in *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 U.S. 619 (1986), the Court flatly rejected the argument that the State of Ohio had somehow "waived" *Younger* abstention in that case merely because it had stipulated to federal court jurisdiction and defended the underlying action "on the merits." *Id.* at 625. Thus, even though both the district court and the court of appeals in *Ohio Civil Rights Comm.* had decided the merits of the constitutional claims, this Court nevertheless held that *Younger* abstention fully applied, holding that a waiver can occur only if the State "voluntarily submits" to federal court jurisdiction and foregoes a tenable claim to *Younger* abstention by "expressly" requesting that the Court or the district court not abstain, but "proceed to an adjudication of the constitutional merits." *Id.* at 627.

For these reasons, therefore, this Court should reject the Petition's suggestion that the Sixth Circuit's interpretation of existing Supreme Court precedent presents an "important question of federal law that has not been, but should be, settled by this Court." (*See* S. Ct. R. 10(c)). As discussed above, this Court has already addressed the waiver issue in at least four cases and has already established a rule of law that was properly applied in this case. Accordingly, under S. Ct. R. 10, the Court should deny the Petition.

In his Petition, O'Neill vainly tries to create the impression that the waiver issue remains "unsettled" by citing a number of other appellate decisions that have allegedly "grappled" with whether a state defendant had waived *Younger* abstention. (Pet. 36-37). A review of the Petitioner's cases, however, confirms that they all were merely following the established rule of law, either by concluding that *Younger* abstention can be raised *sua sponte*, or by finding that *Younger* was not waived by a state defendant through omission. (*See* Pet. 37) (citing *Morrow v. Winslow*, 94 F.3d 1386, 1390, 1398 (10th Cir. 1996) (applying *Younger sua sponte*); *H.C. ex rel. Gordon v. Koppell*, 203 F.3d 610, 613 (9th Cir. 2003) (applying *Younger sua sponte*); *Columbia Basin Apt. Ass'n v. City of Pasco*, 268 F.3d 791, 800 (9th Cir. 2001) (*Younger* can be waived only by "express statement" on the record that the State does not want *Younger* applied to a given case); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992) ("[a] state may waive *Younger* only by express statement, not through failure to raise the issue").[2] Thus, if anything, the Petitioner's cases provide

[2] We note that the Petition cites one Ninth Circuit case, as allegedly standing for the proposition that *Younger* abstention can be waived if it is raised "for the first time on appeal." *See Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 393-394 (9th Cir. 1995). This case is distinguishable, however, because Coughlan in fact raised *Younger* abstention in the district court and thus did not raise *Younger* "for the first time on appeal." In any event, the fact remains that the Ninth Circuit decision in *Kleenwell* is an anomaly that should be disregarded. As another federal court has observed, subsequent Ninth Circuit precedent expressly affirms the long-standing rule "that *Younger* abstention can be raised *sua sponte* by the [district] court *and on appeal*."
(Cont'd)

only further proof that the Sixth Circuit properly applied the applicable rule of law in this case. Accordingly, the Court should deny the Petition.

III. THE PETITION DOES NOT PRESENT COMPELLING REASONS FOR WHY THIS COURT SHOULD DECIDE WHETHER THE "EXCEPTIONAL CIRCUMSTANCES" EXIST TO WARRANT AN EXCEPTION TO *YOUNGER* ABSTENTION.

The Petition's third argument requests this Court to consider in the first instance whether "extraordinary circumstances" exist to permit the district court to disregard *Younger* abstention and enjoin Ohio's disciplinary proceedings. This Court should not consider this issue because O'Neill never made any argument in the district court that the narrow exception for "extraordinary circumstances" should be applied. *See O'Neill v. Coughlan*, 436 F. Supp.2d 905, 907-08 (N.D. Ohio 2006) (App. 40-41). Consequently, the applicability of this limited exception was not fully considered by the district court or by the court of appeals and is not properly before this Court. (Pet. App. 12, fn. 2) (Pet. App. 40-41).

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Communications Telesystems Int'l v. California Public Utilities Comm., 14 F. Supp.2d 1165, 1169 (N.D. Cal. 1998) (emphasis added); *see San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1103-1104 & n. 5 (9th Cir. 1998) (affirming a federal court's power to raise *Younger* abstention *sua sponte*) (citing *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996)).

Indeed, contrary to the Petitioners' suggestions, the applicability of any exceptions to *Younger* for state disciplinary proceedings is not an "unsettled" question that has never been decided by the federal courts. This Court in fact already has rejected the argument that an alleged "chilling effect" upon First Amendment rights can be a sufficient basis for enjoining state action. *Younger*, 401 U.S. at 51 ("[A] 'chilling effect, even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action"). Thus, since *Younger*, the federal courts have consistently rejected the argument that *Younger* abstention should not be applied to state disciplinary proceedings if First Amendment issues are raised. *Spargo*, 351 F.3d at 81 (holding that First Amendment interests "do not justify an exception to ordinary *Younger* principles" because "an alleged 'chilling effect' is not a 'sufficient basis, in and of itself, for prohibiting state action'"); *Crenshaw*, 170 F.3d at 729 ("a 'chilling effect' on the exercise of constitutional rights is an insufficient basis to avoid the holding in *Younger*"); *Harper*, 1997 WL 225899, **3 (an alleged "chilling effect" did not justify federal intervention into Ohio's judicial disciplinary proceedings).

In this regard, this Court has also rejected the Petitioner's argument that "state agencies and supreme courts are inadequate to the task of adjudicating First Amendment questions." (Pet. 46). In *Middlesex County Ethics Comm.*, similar arguments were raised about the adequacy of New Jersey's disciplinary process, but they were flatly rejected by this Court because there was no showing that New Jersey would refuse to consider a constitutional claim or would fail to provide an adequate

opportunity for judicial review. *Middlesex,* 475 U.S. at 435-437, 102 S. Ct. 2515; *Spargo*, 351 F.3d at 78-80. Thus, in *Ohio Civil Rights Comm'n*, this Court reiterated that state administrative proceedings are adequate to trigger *Younger* abstention if "constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* 477 U.S. at 629; *Spargo*, 351 F.3d at 78-79 ("ability to raise constitutional claims in subsequent 'state-court judicial review of [an] administrative proceeding' is sufficient to provide plaintiffs with a meaningful opportunity to seek effective relief through state proceedings"); *see also Amanatullah v. Colorado Bd. of Medical Examiners*, 187 F.3d 1160 (10th Cir. 1999) (judicial review of administrative proceedings is sufficient to trigger *Younger*).

Petitioner's arguments about the adequacy of Ohio's disciplinary process, therefore, are not new and have already been rejected by the federal courts. Since *Middlesex Cty.*, this Court has repeatedly held that the federal courts must *assume* that state judicial process provides an "adequate remedy" for constitutional claims unless the plaintiff can clearly and unambiguously prove that the state will *refuse* to consider constitutional issues and completely *bar* the interposition of constitutional claims.[3] This is clearly not the case. Thus, based upon

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[3] *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S.Ct. 1519 (1987) ("federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary"); *Ohio Civil Rights Comm'n*, 477 U.S. at 629, 106 S.Ct. 2718 (holding that abstention was mandatory where plaintiff could cite no state authority preventing judicial (Cont'd)

this Supreme Court precedent, it is now well-settled that Ohio's disciplinary process provides an adequate opportunity to raise constitutional issues, and that it therefore is mandatory to apply *Younger* abstention. *Squire*, 469 F.3d at 557 (plaintiff failed to prove that Ohio's disciplinary proceedings barred the consideration of constitutional issues); *Harper*, 1997 WL 225899, **3 (holding that judicial candidate had an adequate opportunity to raise First Amendment claims in Ohio's disciplinary proceedings and upon review by the Ohio Supreme Court); *Berger*, 983 F.2d at 723 (holding that there is adequate opportunity to raise First Amendment claims in Ohio's disciplinary proceedings).

Indeed, contrary to the Petition's suggestions, there are some very good reasons for why the federal courts have consistently applied *Younger* to disciplinary proceedings. *Younger* not only protects the integrity of the state disciplinary process, but also serves the interest of avoiding "unwarranted determination of constitutional questions" by providing the state with the opportunity to eliminate or remedy any alleged constitutional problems. As the Second Circuit has explained:

> "[A]n 'important reason for [*Younger*] abstention is to avoid unwarranted determination of federal constitutional questions' where it is possible that state courts may resolve the case on state law grounds 'without reaching the federal constitutional questions.' * * * '[*Younger*] abstention in situations like this 'offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.' * * * Thus, the argument that Spargo's disciplinary proceeding could be resolved on alternative grounds, without deciding the constitutional issues raised in the federal court, actually weighs in favor of, and not against, the exercise of abstention.

Spargo, 351 F.3d at 79-80 (citing *Pennzoil*, 481 U.S. at 11-12); *see also Yamaha Motor Corp. U.S.A. v. Stroud*, 179 F.3d 598, 603 (8th Cir. 1999).

Here, by allowing the disciplinary proceedings to continue in the ordinary course, the Sixth Circuit has provided Ohio's disciplinary process with the opportunity to respond to the alleged grievance in the first instance and to eliminate the need for federal intervention. Upon investigation and review of the grievance, the Disciplinary Counsel and/or the Board of Commissioners on Grievance and Discipline may have elected to dismiss the grievance and not to prosecute any of the alleged charges at all. Moreover, if a violation had been found, the Supreme Court of Ohio may have elected to construe the judicial canons more narrowly to avoid any constitutional confrontation. *See Harper*,

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review of his constitutional claims); *Middlesex Cty. Ethics Comm.*, 457 U.S. at 432, 102 S.Ct. 2515 ("a federal court must abstain "unless state law clearly bars the interposition of the constitutional claims"); *Tesmer v. Granholm*, 333 F.3d 683, 688 (6th Cir. 2003) (following Supreme Court precedent to require the plaintiff to prove that "state procedural law barred presentation of [his constitutional] claims"), *rev'd on other grounds, Kowalski v. Tesmer*, 543 U.S. 125 (2004).

1997 WL 225899, **3 (discussing how the Ohio Supreme Court has construed the judicial canons narrowly to allow for truthful free speech). Thus, by allowing the disciplinary proceedings to continue in the ordinary course, the Sixth Circuit not only upheld the integrity of the state judicial process, but may have avoided the unwarranted adjudication of a constitutional issue and eliminated the need for federal court intervention altogether. *Spargo*, 351 F.3d at 79-80 (explaining that abstention was warranted, in part, because "Spargo's disciplinary charges may be dismissed on other grounds, such as lack of substantial evidence, or by the fact that the [New York] Court of Appeals may choose to narrowly construe the judicial conduct rules to avoid as potential constitutional confrontation"). Accordingly, for this additional reason, the Court should deny the Petition.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. The Sixth Circuit's decision does not create a circuit conflict nor raise an important question of federal law that should be decided by this Court. Accordingly, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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