**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 21-1035

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DAVID M. GRECO,
*Plaintiff-Appellant*,

v.

GURBIR GREWAL, ET AL,
*Defendants-Appellees*,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 3:19-cv-19145-BRM-TJB

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# Brief of Defendants-Appellees

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# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes and Constitutional Provisions**

**Rules**

## INTRODUCTION

To protect public safety, New Jersey—like sixteen other states—has empowered law enforcement officers to temporarily remove deadly weapons from those who pose an immediate and present danger of harming themselves or others. Under the State's Extreme Risk Protective Order Act of 2018 ("ERPO Act" or the "Act"), law enforcement officers, as well as family or household members, can seek a court order temporarily preventing a dangerous person from possessing a firearm. To balance the needs of public safety and individual rights, the Act sets out important substantive and procedural protections. For one, a state court can issue a temporary order on an emergency *ex parte* basis only if it concludes that a person "poses an *immediate and present danger* of causing bodily injury to [himself] or others" if he possesses a firearm. N.J. Stat. Ann. § 2C:58-23(e) (emphasis added). For another, if a temporary order issues, the statute requires a subsequent hearing be held within ten days. *Id.* § 2C:38-24(a). At that hearing, the respondent is afforded a panoply of rights, including to testify, examine witnesses, and introduce evidence. If the hearing results in a final order, a respondent can appeal that order as of right, N.J. Ct. R. 2:2-3(a)(1), as well as seek termination of the court's order in state trial court at any time, N.J. Stat. Ann. § 2C:58-25.

Here, following a law-enforcement investigation that revealed Appellant David Greco posed a dangerous threat to others—and, in particular, members of the

Jewish community—the New Jersey Office of Homeland Security and Preparedness ("OHSP") sought an emergency temporary order against Greco in state court under the Act. Based on the evidence, the court issued a temporary order and search warrant authorizing the seizure of Greco's firearms, determining that "probable cause exists to believe that … [Greco] poses an immediate and present danger of bodily injury to self or others." Greco Appendix ("Pa") 120. In turn, and consistent with the ERPO Act, the court scheduled a follow-on hearing where Greco would have the opportunity to contest the order and press any legal challenges just five days later. But before any hearing in state court took place, Greco initiated this federal action as a collateral attack on the ongoing state-court enforcement action.

In the decision below, the district court correctly determined that this federal suit must be dismissed under *Younger v. Harris*, 401 U.S. 37 (1971), which requires courts to abstain in the face of certain ongoing state enforcement proceedings. That doctrine, which has been repeatedly applied by this Court and the Supreme Court, "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cnty. Ethics Comm'n. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). A straightforward application of *Younger* commands abstention here, where the State has initiated an emergency enforcement proceeding to separate a dangerous person from firearms,

while affording that same individual robust opportunities to challenge both the order, and the constitutionality of the ERPO Act itself, in state court.

Because the district court properly dismissed this action under *Younger*, this Court need not review Greco's other claims: that the district court erred in denying his motions for a preliminary injunction and for class certification. But if the Court does reach those issues, it should affirm the district court. The district court correctly denied Greco's demand for preliminary injunctive relief because the premise of his claim—that he was injured by a search warrant supported by insufficient cause—is directly contradicted by the record. As for Greco's motion for class certification, the district court appropriately held that a class encompassing every person who has been subject to a temporary order under the ERPO Act would require complex individualized scrutiny of the factual circumstances of each state proceeding.

## STATEMENT OF JURISDICTION

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court has appellate under 28 U.S.C. § 1291 to review the district court's *Younger* abstention decision, *PDX N., Inc. v. Comm'r N.J. Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 877 & n.1 (3d Cir. 2020), as well as those prior interlocutory orders that "merge" with the district court's final judgment, *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 244-245 (3d Cir. 2013).

## COUNTERSTATEMENT OF ISSUES

I. Whether the district court properly dismissed Greco's suit based on *Younger* abstention in light of ongoing enforcement proceedings in state court.

II. Whether the district court properly denied Greco's application for a preliminary injunction because he cannot demonstrate irreparable harm.

III. Whether the district court properly denied Greco's request for class certification for lack of commonality.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

On September 6, 2019, the Superior Court of New Jersey entered a temporary extreme risk protective order dispossessing Greco of his Firearms ID Card, rifle, and ammunition. Pa117-121. That court scheduled a final extreme risk protective order hearing for September 11, 2019. Pa180 n.13. That state-court hearing was later continued until December 9, 2019. *Id*. With those state proceedings ongoing, Greco initiated this action in federal court on October 21, 2019. Pa7. In the wake of Greco's federal filing, state proceedings were held in abeyance, and they continue to be held in abeyance while this matter is on appeal.

## STATEMENT OF THE CASE

A. The Extreme Risk Protective Order Act of 2018

On June 13, 2018, New Jersey enacted the ERPO Act. *See* N.J. Stat. Ann. §§ 2C:58-20 to -32. Derived from the framework and procedures for domestic-

violence prevention orders, the ERPO Act allows law enforcement officers or an individual's family or household members to seek a state court order to temporarily prevent a specific and dangerous person from, *inter alia*, possessing a firearm. N.J. Stat. Ann. § 2C:58-23. The power to issue such orders is circumscribed. A court may issue a *temporary* risk protective order only if the officer or family member has shown that this person "poses an *immediate and present danger* of causing bodily injury" to himself or others by having custody over a firearm. *Id.* (emphasis added). And the court may convert that into a *final* extreme risk protective order only if—after holding a hearing within ten days of issuance of the temporary order, at which the respondent has a right to be present, testify, present witnesses, submit information, and cross-examine witnesses—the court finds that the individual "poses a *significant* danger of bodily injury to self or others by owning, possessing, purchasing, or receiving a firearm." N.J. Stat. Ann. § 2C:58-24(a)(emphasis added); *see also* Pa82.

The procedures governing applications for an order under the ERPO Act are tailored to the goal of removing guns from dangerous situations. Given the need to act swiftly to address the potential threat to safety—just like the need that exists in the domestic-violence context—a law enforcement officer or family member may file an application for a temporary order on an *ex parte* basis, and the court must resolve it "in an expedited manner." N.J. Stat. Ann. § 2C:58-23. In that proceeding,

a court takes evidence regarding the threat the individual presents, may examine under oath the petitioner and any witnesses, and reviews information produced by the county prosecutor's office. N.J. Stat Ann. § 2C:58-23(d), (f). The court must determine whether the individual poses such an "immediate and present danger" of causing bodily injury to himself and/or to others, and, in conducting that analysis, must consider whether the individual (who is identified in the ERPO Act as the "respondent"):

> (1) has any history of threats or acts of violence by the respondent directed toward self or others;
>
> (2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;
>
> (3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c. 261 (C.2C:25-17 et seq.);
>
> (4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the "Sexual Assault Survivor Protection Act of 2015," P.L.2015, c. 147 (C.2C:14-13 et al.);
>
> (5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of P.L.1992, c. 209 (C.2C:12-10), or domestic violence offense enumerated in section 3 of P.L.1991, c. 261 (C.2C:25-19);
>
> (6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

> (7) has any history of drug or alcohol abuse and recovery from this abuse; or
>
> (8) has recently acquired a firearm, ammunition, or other deadly weapon.

*Id*. § 2C:58-23(f)(1)-(8). A temporary order "prohibit[s] the respondent from having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition, and from securing or holding a firearms purchaser identification card or permit to purchase a handgun" while the order is in effect. *Id.* § 2C:58-23(g). The issuance of a temporary order is made on a showing of good cause. *Id.* § 2C:58-23(e). The state court will also issue a search warrant if the temporary order indicates that "the respondent owns or possesses any firearms or ammunition." *Id.* § 2C:58-26(b). In those situations, respondents are directed to surrender their firearms "in a safe manner" to law enforcement. *Id.*

The temporary order, however, is just the first step in an ongoing process. If the court issues a temporary order, the court must immediately schedule a hearing where it will decide whether to vacate the temporary order or to convert it into a final order within 10 days. N.J. Stat. Ann. § 2C:58-24. The respondent has extensive rights to participate in that hearing, including to testify, present witnesses, submit documents, cross-examine witnesses who appear, and present information. *See id.*; Pa82 (court-issued guidelines governing ERPO proceedings); Pa98 (Attorney General Law Enforcement Directive No 2019-2). The court will grant a final order

only when it finds, by a preponderance of evidence, that the respondent "poses a significant danger of bodily injury to self or others" by having a firearm. N.J. Stat. Ann. § 2C:58-24. In reaching that conclusion, the court must consider all the same factors considered during the temporary-order hearing.

Ultimately, even if the court grants a final order, that is not the end of the enforcement action: the respondent has the right not only to appeal that decision within 45 days pursuant to N.J. Ct. R. 2:2-3(a)(1), but also to seek termination of the final order at any time following its issuance, *see* N.J. Stat. Ann. § 2C:58-25; Pa71. Under the ERPO Act, respondents can have a final order terminated whenever they can show, by a preponderance of the evidence, that they no longer pose a significant danger of causing bodily injury to themselves or others. N.J. Stat. Ann. § 2C:58-25. On successful termination of a final order, the respondent may petition the agency to return the seized firearms or ammunition. *Id.* § 2C:58-26(d).

Before the ERPO Act went into effect on September 1, 2019, the New Jersey Administrative Office of the Courts ("AOC") and Attorney General's Office ("AG's Office") both issued directives to govern the implementation of the Act. Pa61, Pa90. Although the text of the ERPO Act states that temporary orders and final orders may issue whenever "good cause" exists to believe a person poses a threat of self-harm or harm to others—the language used for similar domestic violence orders under the state's Prevention of Domestic Violence Act ("PDVA")—the AOC and the AG's

Office both made clear that good cause is not sufficient to support a search warrant under the Act. As a result, no law enforcement officer could seek—and no court could issue—a search warrant under the Act except by a showing of *probable cause*.

There was a good reason for that change. Although the PDVA uses the same "good cause" language, the New Jersey Supreme Court had recently held—after passage of the ERPO Act, but before it took effect— that search warrants issued and executed under the PDVA still had to be supported by probable cause in order to comply with the U.S. and state constitutions. *See State v. Hemenway*, 216 A.3d 118, 121 (N.J. 2019). Notably, the New Jersey Supreme Court did not rule that the entire PDVA was unenforceable or that warrants could not thereafter be issued under the PDVA; rather, it held that warrants could continue being issued so long as the "probable cause" standard was satisfied. *Id.*

In light of *Hemenway*, the AOC and Attorney General made clear that any search warrants under the ERPO Act "for any firearms and ammunition [a person] possesses or owns" can be sought by officers and issued by courts only if "the court determines that *probable cause* exists to believe that: (1) the respondent owns or possesses any firearms or ammunition, (2) the respondent poses an immediate and present danger of bodily injury to self or others by owning or possessing any such firearms or ammunition, and (3) such firearms or ammunition are presently at a specifically described location." Pa81. (emphasis added); *see also* Pa95 ("law

enforcement and prosecutors *shall* establish and request that the search warrant associated with the ERPO application be issued by the court under the standard of *probable cause*") (emphasis added).[1] Both the AOC's and the AG's directives have the binding force of law. *See* N.J. Stat. Ann. § 2C:58-31 (authorizing the state court to "promulgate Rules of Court to effectuate the purposes of the" ERPO Act); *id.* § 2C:58-32 (authorizing the Attorney General to promulgate "rules and regulations necessary to implement the provisions of the" ERPO Act); Pa232-33 at nn.3-4 (citing state law authorities for the proposition that AOC Directives "have the force of law," and that Directives from the New Jersey Attorney General are likewise "binding and enforceable on local law enforcement agencies").

B. The State's Ongoing State Court Civil-Enforcement Proceedings

On September 5, 2019, days after the Act became effective, a law enforcement officer with OHSP filed a petition under the ERPO Act for a temporary order against Greco in the Superior Court of New Jersey, Camden Vicinage, Criminal Part. Pa113. OHSP's Petition made clear that it was the result of a law enforcement investigation into the threat Greco posed to others, in particular to Jewish people:

> Information was recently obtained, through [Federal Bureau of Investigation] contacts, that David Greco is involved in online anti-

[1] The Attorney General's Directive clarifies that in situations when law enforcement has only good cause—but not probable cause—to believe that a respondent "poses an immediate and present danger of causing bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm," they may seek a temporary order, but *not* a search warrant. Pa95.

> Semitism. Greco was found to be in contact with the Pittsburgh synagogue shooter, before the mass shooting took place in October 2018. After the recent August 2019 mass shootings in both Ohio and El Paso, precautions were taken and contact was made with Greco. In coordination with the FBI, officers reached out to Greco in regards to recent posts on the social media site Gab.com. All previous social media accounts were blocked due to the nature of the content. While talking to Greco, he appeared extremely intelligent to officers and did not mention acting on any violent behavior towards Jews. His behavior was methodical and focused on facts, specifically from Nazi Germany. Greco believes that force or violence is necessary to realign society. Greco frequently mentioned his disdained [sic] for the Jewish Talmud and how he believes that Jews are raping our women and children.

Pa114. The Petition included information about Greco's "prior arrests, pending charges, or convictions for a violent indictable offense or disorderly persons offense"—namely, a violation of a New Jersey law that criminalizes the carrying a prohibited weapon, N.J. Stat. Ann § 2C:39-3, and several drug-related offenses. *Id.* The Petition also included video recorded by law enforcement during an interview of Greco on August 5, 2019, along with reports from the FBI and the Gloucester Township Police Department ("GTPD") regarding the threat Greco posed. Pa117-18.

The following day, Judge Edward McBride of the state superior court held a hearing on the Petition and issued a temporary order under the Act. *Id.* In rendering his ruling, Judge McBride considered testimony from an OHSP agent, reports from the FBI and GTPD, and Greco's "history of threats or acts of violence … directed toward self or others." *Id.* The court found that Greco has "threatened, advocated,

and celebrated the killing of Jewish people and has celebrated the mass shooting in Pittsburgh and New Zealand"; highlighted Greco's "attempts to avoid contact with law enforcement" and "glorification of extreme violence against Jewish people even after encounter with investigators"; described how Greco "refused to answer the door when law enforcement officers went to the home to speak with respondent, and the officers were able to speak [to him] only after his parents arrived at the home and allowed the officers inside and summoned the respondent upstairs"; noted Greco "was extremely agitated and angry during the encounter with law enforcement"; emphasized instances in which Greco showed his "hostile demeanor"; and added that there is "credible evidence, through both records checks and confirmation with a member of respondent's household, that respondent possess [sic] firearms at his residence, consisting of at least one handgun and one rifle." *Id.*

At the same time, the court issued a search warrant for Greco's home on an express finding of "probable cause" that "(1) [Greco] owns or possesses firearms or ammunition as described below, (2) [Greco] poses an immediate and present danger of bodily injury to self or others by owning or possessing any such firearms or ammunition, and (3) such firearms or ammunition are presently at the location described below." Pa118. The court order and related search warrant were served on Greco on September 6, 2019. Pa120. Pursuant to the warrant, law enforcement seized a rifle, rifle ammunition, and Greco's Firearms Purchaser ID card. Pa39. The

warrant advised Greco of a final-order hearing on September 11, 2019, five days away. *Id.* That hearing was later continued until December 9, 2018, and, ultimately, held in abeyance pending the outcome of this federal action. Pa180.

C. Greco's Federal Action

In response to the pending state court enforcement proceeding, Greco initiated this federal action on October 21, 2019, alleging that the ERPO Act violates the First, Second, Fourth, and Fourteenth Amendments of the U.S. Constitution, and seeking class certification, injunctive relief, and monetary damages. Pa7.

Greco moved for preliminary injunctive relief, which the district court denied on February 21, 2020. Pa166, 189. Specifically, the district court concluded that Greco had failed to demonstrate a likelihood of irreparable injury if the court did not issue an injunction. Pa179-84. The district court recognized that Greco's primary claim of irreparable harm was that he had been subjected to a search warrant for his firearms that was based only on a determination of "good cause." But, the district court found, Greco was wrong as a matter of fact: the warrant issued for seizure of his weapons had actually been issued upon a finding of probable cause, as the record confirmed. And the district court identified an array of other reasons why Greco's claim of irreparable harm fell short, including that: (1) the ERPO Act provided Greco an opportunity to raise constitutional arguments against a seizure in a hearing to be held within ten days of the filing of the ERPO petition, which he did not take; (2)

counsel for Greco expressly stated in briefing and at argument that he did not object to the continued seizure of Greco's weapons and ammunition during the pendency of the federal litigation; (3) there is no special presumption of irreparable harm when a plaintiff alleges a Fourth Amendment violation; and (4) Greco failed to establish a First Amendment violation because he did not show that the state court order punished him for expressing opinions (rather than a law enforcement response to Greco's prior conduct and his express threats of acts of violence). *Id*. The district court therefore deemed it unnecessary to address the other requirements for injunctive relief in light of the absence of any irreparable injury.

On September 29, 2020, the district court issued an opinion and order denying Greco's separate request for class certification on the grounds that the proposed class action did not satisfy the "commonality" requirement in Rule 23. *See* Pa230, 243; Fed. R. Civ. P. 23(a)(2). The court noted that any resolution of Greco's claims would require a fact-intensive review of the circumstances related to issuance of the search warrant in his case, as well as an examination of the particular search warrant itself. Pa241-42. And, the district court explained, commonality did not exist as to other potential class plaintiffs because the same individualized review would be needed to consider every other proposed class member's suit. Pa242. Given the absence of commonality, the district court found it unnecessary to analyze whether the other requirements for class certification had been satisfied. Pa243.

On December 11, 2020, the district court issued an opinion and order granting Defendants' motion to dismiss on the grounds that abstention was warranted under *Younger*. Pa245, 262. The court observed that the state proceedings at issue here constitute the kind of civil-enforcement proceeding in which *Younger* abstention is warranted under *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), and that the additional factors federal courts consider in deciding when to abstain under *Younger* were satisfied, *see* Pa251-58 (citing *Middlesex*, 457 U.S. at 432). The district court emphasized that Greco "has an adequate opportunity to raise his federal claims though the state proceedings," Pa258, and that principles of comity thus require that Greco do so. This appeal followed.

## SUMMARY OF ARGUMENT

I. The district court properly granted Defendants' motion to dismiss under *Younger*. As a threshold matter, the ongoing enforcement proceeding in New Jersey state court is a quintessential example of a "quasi-criminal" civil-enforcement action to which federal courts must defer. Law enforcement regularly initiates ERPO Act proceedings, and both law-enforcement agencies and state prosecutors are involved at each step of the process as a petition proceeds in the state court. The Act imposes a "sanction"—a temporary restraint on the possession of firearms—in response to a respondent's dangerous conduct. And civil enforcement proceedings pursuant to the

ERPO Act share other similarities to state criminal actions, including a preliminary investigation that culminates in the filing of a formal petition.

The three *Middlesex* factors, which courts also assess in determining whether to abstain under *Younger*, likewise weigh in favor of abstention. When Greco filed the instant federal action, there was an ongoing state judicial proceeding—one that remains pending to this day. Not only that, but state court ERPO Act proceedings implicate critical state interests, including the State's duty to protect its citizens from immediate and present dangers. And these ongoing state proceedings offer Greco a ready opportunity to raise any constitutional objections—an invitation he has so far declined in favor of litigating this improper federal action.

Greco's counterarguments fail. Because the district court never decided the question of abstention prior to the opinion and order on review, the "law of the case" doctrine did not tie the district court's hands and prevent it from determining that abstention was appropriate. And in any event, even if the law-of-the-case doctrine somehow circumscribed the *district court's* discretion with respect to *Younger*, this *appellate court* is not bound by the district court's conclusions. Nor does this case fall within the narrow hypothetical exception to *Younger* for claims against statutes that are "flagrantly and patently violative" of the U.S. Constitution. That is all this Court must hold to dispose of the entirety of Greco's appeal; if the case was properly dismissed, neither preliminarily relief nor class certification can be warranted.

II. If this Court reaches the preliminary-injunction issue, the district court should be affirmed. Greco's claim of irreparable injury is premised on the idea that he was subjected to a search warrant based on a showing of something *less* than the constitutionally-necessary probable cause. That claim is untenable. Consistent with a Directive from the AOC, the search warrant in Greco's case *did* issue on a finding of probable cause—confirming that Greco suffered no harm at all as a matter of fact. Moreover, Greco can hardly complain of *irreparable* injury given his own years-long delay in availing himself of the state court procedures that could vindicate his constitutional claims. This case is thus a perfect example of why alleged violations of the Fourth Amendment do not constitute *per se* irreparable harm.

III. If this Court reaches Greco's demand for class certification, there was again no error in the district court's ruling. As the district court explained, a class that included every person who has been the subject of a temporary order under the Act would not satisfy the "commonality" requirement for class certification because it would necessitate a fact-intensive analysis of the state-court records in each putative class member's case. Instead, each affected individual can and will have a full and fair opportunity to litigate individual issues relating to the Act in state court.

## STANDARD OF REVIEW

A "'trial court's . . . determination of whether *Younger* abstention is proper'" is reviewed de novo. *PDX*, 978 F.3d at 881 n.11 (citation omitted). In reviewing

the grant or denial of a preliminary injunction, this Court uses a "'tripartite standard of review': findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Del. Strong Families v. Atty. Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015) (citation omitted). And finally, this Court reviews a class-certification decision for abuse of discretion, "which occurs if the district court's decision 'rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008) (citation omitted).

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY DISMISSED THIS FEDERAL ACTION BASED ON *YOUNGER* ABSTENTION

Black letter principles of abstention dispose of this appeal. Under the doctrine known as *Younger* abstention (named for its progenitor, *Younger v. Harris*), federal courts "abstain from exercising jurisdiction over a particular claim where resolution of that claim in federal court would offend principles of comity by interfering with an ongoing state proceeding." *Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010). As the Supreme Court has explained, "*Younger* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex*, 457 U.S. at 431.

The Supreme Court and this Court have laid out a clear test for when *Younger* abstention is warranted. Under *Younger*, federal courts abstain in the face of three types of ongoing state proceedings: (1) "state criminal prosecutions," (2) "certain 'civil enforcement proceedings,'" and (3) "'civil proceedings involving certain orders . . . uniquely in furtherance of state courts' ability to perform their judicial function.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989)); *PDX*, 978 F.3d at 882 (same). Where a federal suit risks interference with an ongoing state civil-enforcement proceeding, courts ask whether the civil-enforcement proceeding is "'akin to criminal prosecution'" in "'important respects.'" *Sprint*, 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). If a civil proceeding is quasi-criminal, such that abstention could be proper, courts then consider the three so-called "*Middlesex* factors: (1) whether there are 'ongoing judicial proceeding[s]'; (2) whether those 'proceedings implicate important state interests'; and (3) whether there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *PDX*, 987 F.3d at 883 (quoting *Middlesex*, 457 U.S. at 432).

Applying this framework, the district court correctly found that the ongoing state proceeding at issue here is in the "class of cases" covered by *Younger*, meaning that "federal-court abstention is required." *Sprint*, 571 U.S. at 72; *see also PDX*, 978 F.3d at 881 n.11. Before the district court, Greco "d[id] not raise any

counterarguments in response to Defendants' arguments about the threshold factors or *Middlesex* factors," Pa252, and before this Court he addresses only one *Middlesex* factor. Because Greco has not contested these determinations here or below, this Court need not revisit them. *See, e.g., Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 137 (3d Cir. 2017) ("Because of the important interests underlying the preservation doctrine, we will not reach a forfeited issue in civil cases absent truly 'exceptional circumstances.'") (quoting *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2001)). Nevertheless, for the sake of completeness, the State addresses each element of the *Younger* analysis in turn.

A. The Ongoing State Civil Enforcement Action Is Quasi-Criminal

Greco does not and cannot meaningfully dispute that this state proceeding is a civil-enforcement action that shares "important" qualities with criminal actions.[2] The Supreme Court and this Court have explained "that quasi-criminal proceedings of this ilk share several distinguishing features"—*i.e.*, that "a state actor is routinely a party to the state proceeding and often initiates the action," that such cases "often begin with internal investigations that 'culminat[e] in the filing of a formal complaint

[2] Although Greco's opening brief asserts in conclusory fashion that he "disputes" (at 38) whether the ongoing state action is the kind of quasi-criminal proceeding entitled to *Younger* abstention, the brief offers no argument whatsoever on that score. This Court should thus simply hold that he has waived any response on the merits. *See Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (holding an argument is not preserved "unless a party raises it in its opening brief"); Fed. R. App. P. 28(a); Third Circuit Local App. R. 28.1.

or charges,'" and that these civil-enforcement actions "are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." *Gonzalez*, 755 F.3d at 181 (quoting *Sprint*, 571 U.S. at 79). The Supreme Court has held that abstention can be triggered by a wide array of "state-initiated administrative proceedings," like enforcement actions seeking to "enforce state civil rights laws," "gain custody of children allegedly abused by their parents," "recover welfare payments," and "enforce obscenity laws." *Sprint*, 571 U.S. at 80-81 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)). This Court has even abstained in light of pending disciplinary proceedings by a waterfront commission against its employee. *See Gonzalez*, 755 F.3d at 185.

The civil-enforcement proceeding at issue here bears all the "hallmarks" of a "quasi-criminal action[]" to which federal courts defer under *Younger*. *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014). *First*, under the Act "a state actor [will] routinely [be] a party to the state proceeding and often initiates the action." *Sprint*, 571 U.S. at 79. The Act establishes that petitions will regularly be filed by law enforcement officers, *see* N.J. Stat. Ann. §§ 2C:58-21, -23(a), which is what happened here: "the proceeding against Greco was initiated by the New Jersey Department of Homeland Security, a state actor," Pa253. And while the Act permits

other parties to initiate an action—specifically, a "family or household member," N.J. Stat Ann. § 2C:58-23(a)—the district court correctly explained that "state actors are readily involved at each stage" of a temporary-order proceeding irrespective of who initiates it, Pa252. The law permits the submission of a family or household member's petition to a court *or a law enforcement agency*. N.J. Stat. Ann. § 2C:58-23(a)(emphasis added). The Act also directs "law enforcement agenc[ies]" to "advise" petitioners about the procedures for filling out a petition and sets forth that they "may assist" petitioners in "preparing or filing the petition." *Id.* And the Act clarifies that such "assistance" can include "joining in the petition, referring the matter to another law enforcement agency for additional assistance, or filing the officer's own petition with the court." *Id.*

Indeed, pursuant to his authority to issue rules regulations implementing the Act, *id.* § 2C:58-32, the Attorney General has directed law enforcement to "take over" a petition, and become the sole petitioner, any time law enforcement concludes there is probable cause to believe a respondent poses an immediate and present danger, or if there is any other reason that it "would be best" for law enforcement to file the petition. Pa96. What's more, even if no law enforcement officer is party to the proceeding, the prosecutor must act as a "friend of the court" and produce, on an expedited basis, all available evidence pertinent to the state court's consideration of whether an order is warranted. N.J. Stat. Ann. § 2C:58-23(f); Pa100. The

prosecutor's obligation to participate in the ERPO proceedings extends not only to a temporary-order hearing, *id.*, but also to a final-order hearing. N.J. Stat. Ann. § 2C:58-24(b). And, of course, beyond the judicial proceedings themselves, law enforcement officers are the ones who execute any search warrants issued. In short, it is impossible to separate the role of state actors from the ERPO process.

*Second*, the Act imposes sanctions, within the meaning of *Younger*, on individuals for committing a wrongful act. *Sprint*, 571 U.S. at 79. The statute requires a court—after hearing from officers and reviewing information provided by a prosecutor—to decide whether that person poses a threat of "immediate and present danger of causing bodily injury" to himself or others. N.J. Stat. Ann. § 2C:58-23(e). That determination is explicitly based on a respondent's prior dangerous conduct: including whether he has made "threats" or committed "acts of violence"; whether he has previously used or threatened physical force against others; and whether he has violated a restraining order related to domestic violence or sexual assault. N.J. Stat. Ann. § 2C-58-23(f). In response to that threat, the court prohibits that individual from "having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition," and requires him to "surrender firearms and ammunition in the respondent's custody or control," until the threat has abated. *See* N.J. Stat. Ann. § 2C:58-23(g). Just as the Supreme Court has held that *Younger* applies to a proceeding designed to gain temporary custody and thus protect

children allegedly abused by their parents, *Moore*, 442 U.S. at 419-20, so too does it apply to proceedings to temporarily remove firearms from an individual who has been found by a court to pose a threat to those around them. Said another way, this is a classic case in which the court inquires into wrongful conduct (including acts of violence and the violation of prior court orders) and then issues an order to address it (temporarily separating firearms from the danger).[3]

*Third*, there are "other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges." *PDX*, 978 F.3d at 882-83. As the district court explained, an ERPO Act proceeding begins with the filing of a formal petition, which must include an "affidavit setting forth the facts tending to establish the grounds of the petition"—that is, why the respondent poses an immediate and present danger, based on prior acts, threats, and the like—as well as knowledge about the "number, types, and locations of any firearms and ammunition currently believed by the petitioner to be controlled or possessed by the

[3] To be clear, the ERPO Act does not impose criminal sanctions, nor need it impose criminal sanctions in order for *Younger* to apply. For purposes of *Younger*, courts merely ask whether a state proceeding responds to "conduct the State deem[s] contemptible." *Gonzalez*, 755 F.3d at 182. This characteristic is present even where, as here, the consequence of a civil-enforcement action is not punitive, but prophylactic, as in the temporary child-custody proceedings at issue in *Moore*, 442 U.S. at 419-20. And, in any event, as the Supreme Court has explained, not every "sanction" is "punitive," and even civil sanctions may have a punitive purpose or effect without constituting criminal punishment. *See, generally, Hudson v. United States*, 522 U.S. 93, 101-02 (1997).

respondent." N.J. Stat. Ann. § 2C:58-23(a)-(b). The Act also requires the prosecutor to produce available evidence related to the respondent, including any "history of threats or acts of violence," "history of use, attempted use, or threatened use of physical force," and "prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense[,] or domestic violence offense," as well as to identify whether the individual "has recently acquired a firearm, ammunition, or other deadly weapon." N.J. Stat. Ann. § 2C:58-23(f). That kind of information is plainly gleaned from an investigation, and the ultimate result of that investigation is the filing of a formal complaint. *See Sprint*, 571 U.S. at 79-80.

Indeed, this case illustrates the investigation that typically precedes the filing of a petition. As the district court explained, here "law enforcement monitored Greco's social media posts for months, received evidence from a member of Greco's household that he possessed a firearm at home, and interviewed Greco at his home as part of their investigation." Pa256. Indeed, during the temporary hearing in state court, law enforcement officers introduced an extensive investigative record regarding Greco's threats to both himself and others, including Greco's communications with the perpetrator of a mass shooting at a synagogue prior to that attack, his belief that "force of violence is necessary to realign society," and "how he believes that Jews are raping our women and children." *Id.* (citation omitted);

*see also* Pa114 (OHSP Petition discussing this evidence); Pa117-18 (additional reports from law enforcement agencies).

Federal courts can also consider whether a civil-enforcement action is "in aid of and closely related to criminal statutes," another consideration that points in favor of abstention. *Huffman*, 420 U.S. at 604; *see ACRA*, 748 F.3d at 138 (considering "whether the State could have alternatively sought to enforce a parallel criminal statute"). For one, the ERPO Act is part of New Jersey's Criminal Code and it is criminal prosecutors who play the critical role in an ERPO proceeding of providing the court with evidence in support of a temporary order. N.J. Stat. Ann. § 2C: 58-23(f). For another, New Jersey law makes the knowing violation of an ERPO Act order a criminal offense. *Id.* § 2C:29-9(e). And although there is no precise "parallel criminal statute" to the ERPO Act because the Act "created a procedure that had not existed prior to its enactment," Pa256, it bears noting that the Act closely adheres to the PDVA's process for temporary restraining orders in the domestic violence context, N.J. Stat. Ann § 2C:25-28, which itself is housed in New Jersey's Criminal Code too. Still more, the same interests served by the ERPO Act are served by New Jersey's longstanding criminal prohibition on the possession of a firearm without a permit, which is denied wherever "issuance would not be in the interest of the public health, safety, or welfare." *Id.* § 2C:58-3(c)(5); *see also, e.g.*, § 2C:39-5 (making knowing possession of a handgun without having obtained a lawful permit a crime

of the second degree); *cf. Moore*, 442 U.S. at 423 (holding that the "temporary removal of a child in a child-abuse context is . . . 'in aid of and closely related to criminal statutes'") (quoting *Huffman*, 420 U.S. at 604).[4]

Under the ERPO Act, law enforcement officers engage in an investigation to determine whether an individual presents an immediate risk to self or others. The culmination of their investigation in the filing of a formal proceeding in state court. And that proceeding seeks to sanction wrongful conduct by temporarily removing firearms from an immediate and present danger. Perhaps even more than other civil-enforcement actions to which federal courts have applied *Younger*, this is the classic state enforcement proceeding for which abstention is warranted.

B. All Three *Middlesex* Factors Are Satisfied

Because ERPO Act proceedings are quasi-criminal under *Younger*, the district court proceeded to consider whether the "additional" *Middlesex* factors also counsel in favor of abstention. *Sprint*, 571 U.S. at 81 (explaining these considerations "[ar]e not dispositive" but are "additional factors appropriately considered by the federal

[4] Regardless, the district court correctly concluded that the presence (or absence) of a precise "criminal analog" is not dispositive. Pa256. Even "though the availability of parallel criminal sanctions may be a relevant datum . . . it is not a necessary element when the state proceeding otherwise sufficiently resembles a criminal prosecution." *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 194 (1st Cir. 2015); *see also Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737-38 (9th Cir. 2020) (explaining that not every one of the *Sprint* factors must be satisfied to warrant abstention, and that a civil action to sanction deceptive acts in commerce "fit[] comfortably within the class of cases described in *Sprint*").

court before invoking *Younger*"). These factors are "(1) whether there are 'ongoing judicial proceeding[s]'; (2) whether those 'proceedings implicate important state interests'; and (3) whether there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *PDX*, 987 F.3d at 883 (citation omitted).

On the first factor, there is no dispute that since Greco filed this federal action there has at all times been an "ongoing state proceeding that [is] judicial in nature." *Gonzalez*, 755 F.3d at 182-83.[5] OHSP initiated its temporary-order petition in the state court on September 5, 2019. Pa113. A final hearing was scheduled in the same court for September 11, 2019, five days after the temporary order was issued, but was later moved to December 9, 2019. Pa180 n.13. In the intervening period, on October 21, 2019, Greco commenced this federal suit as a collateral attack on the ongoing state court proceeding. Pa7. And while the state proceedings have since been stayed while this federal appeal is pending, "'state proceedings are ongoing for *Younger* abstention purposes, notwithstanding a state court's stay of proceedings' if the state proceeding 'was pending at the time the plaintiff filed its initial complaint in federal court.'" *PDX*, 978 F.3d at 885 (citation omitted).

*Second*, ERPO Act "proceedings implicate an important state interest," which Greco once more does not contest. *PDX*, 978 F.3d at 885. After all, the Act seeks

[5] Indeed, Greco's brief to this Court nowhere disputes that the first two *Middlesex* factors are satisfied. *See* Pb. at 39-40. Although a challenge to the application of these factors is thus waived, the State addresses them for completeness.

to protect the State's residents from the threat of injury at the hands of a person that poses an immediate and present danger. *See* N.J. Stat. Ann. § 2C:58-23(e); *see also, e.g.*, *Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2014) (confirming that "New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety"); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (agreeing that the "primary concern of every government" is "concern for the safety and indeed the lives of its citizens"). The district court agreed. *See* Pa245. ("Because the Act furthers the state's interest in its citizens' safety, the Court finds the Act's proceedings implicate important state interests.").

*Third*, the state proceedings offer Greco an "adequate opportunity . . . to raise constitutional challenges." *Middlesex*, 457 U.S. at 432. As the court explained, 'the ERPO Act allows [Greco] to seek the return of his property at a [final order] hearing where he would be permitted to raise constitutional arguments.'" Pa258. *State v. Hemenway*, 216 A.3d 118 (N.J. 2019), proves the point. There, a state court defendant challenged the sufficiency of a warrant issued pursuant to the PDVA from the trial court up through the New Jersey Supreme Court. And ultimately, the Supreme Court agreed with the defendant that search warrants issued pursuant to the PDVA can only be issued upon a finding of probable cause (while declining to strike down the law in its entirety). *Id.* at 130. Greco will have every opportunity to proceed similarly in challenging the ERPO Act.

According to Greco, this opportunity to raise federal constitutional objections is insufficient because the ERPO Act does not provide Greco an opportunity to raise constitutional challenges *prior* to issuance of a temporary order. Pb at 38-39.[6] But the fact that the ERPO Act allows a warrant to be issued at an *ex parte* hearing is hardly unusual: "*ex parte* proceedings are the normal means by which warrants are obtained in both criminal and administrative actions." *Nat'l-Standard Co. v. Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989). In any event, Greco's argument is foreclosed by precedent. In *Dayton*, the Supreme Court held that a state proceeding need not allow for constitutional claims to be raised at the very first hearing so long as they may be raised in subsequent state-court judicial review. *See* 477 U.S. at 629 ("[I]t is sufficient under *Middlesex*, that constitutional claims may be raised in state-court judicial review of the administrative proceeding.").

The Supreme Court's decision in *Moore v. Sims* is particularly instructive. There, a state court civil proceeding resulting in an "emergency *ex parte* order which gave temporary custody of . . . children" to the State. 442 U.S. at 415. Rather than appealing that temporary order through appropriate state channels, the plaintiffs filed an action in federal court. *Id.* at 421-22. And although the initial state hearing was

[6] As a threshold matter, this argument is rather strange on these facts. Greco did not challenge the ERPO Act in federal district court until *after* the date of his originally scheduled final-order hearing in state court. So if Greco's concern is that too much time (five days) passed before he could raise his constitutional claims in state court, that hardly merits in favor of allowing him to proceed even later in federal court.

an *ex parte* hearing that resulted in an emergency order, the Court determined that the plaintiffs' "challenge can be raised in the pending state proceedings," meaning "abstention [wa]s appropriate." *Id.* at 425-26. That is precisely the situation this Court confronts: an *ex parte* hearing followed quickly by a pending proceeding at which the same constitutional challenges can be raised. *Younger* still applies.

Ultimately, for *Younger* to apply, all that is necessary is that a plaintiff have an "opportunity to *raise* and have *timely decided* by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). The ERPO Act provides that if a court issues a temporary order, it must immediately schedule a hearing where it will decide whether to vacate the temporary order or convert it into a final order within 10 days of the filing of a petition, N.J. Stat. Ann § 2C:58-24(a), and it grants the respondent the right to participate in that hearing, *id.*, as well as to petition the Court "at any time" thereafter to terminate a final order, *id.* § 2C:58-25. These procedures are more than sufficient to give Greco, and others, the opportunity to raise constitutional objections to the Act.[7]

[7] Greco will thus have every opportunity to argue in state court that the warrant issued in this case was constitutionally deficient, and that the Second Amendment precludes emergency orders directing the seizure of firearms from dangerous persons. Indeed, other parties have challenged similar laws in state court. *See Hope v. State*, 133 A.3d 519, 521, 524-25 (Conn. App. Ct. 2016) (upholding state law permitting seizure of firearms for up to one year from individuals deemed to pose "a risk of imminent personal injury to self or others" as not implicating Second Amendment right of "law abiding, responsible citizens to use arms in defense of their homes."); *Redington v. State*, 992 N.E.2d 823, 829-35 (Ind. App. 2013)

C. Greco's Remaining Arguments Fail

Aside from his erroneous contention that the third *Middlesex* factor is not satisfied here, Greco offers only two reasons for this Court to decline to abstain under *Younger*. As the district court held, both arguments fall short.

*First*, Greco wrongly contends that the district court's decision to abstain ran afoul of the "law of the case" doctrine. According to Greco, when the district court denied his motions for a preliminary injunction and for class certification without addressing *Younger* abstention, it implicitly "decided that it would not abstain under *Younger*," such that its later decision to dismiss Greco's action under *Younger* was improper. Pb at 31. The district court sensibly rejected this argument. Pa259-60. "Under the law-of-the-case doctrine, 'when a court *decides upon a rule of law*, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008)

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(upholding state law permitting the seizure of firearms from individuals found to "present an imminent risk of personal injury to the individual or to another"); *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494, 1500 (Cal. Ct. App. 2014) (upholding state law permitting "the seizure and possible forfeiture of weapons belonging to persons" detained for mental health evaluations as "traditional limitation[] on the right to bear arms"); *Davis v. Gilchrist Cnty. Sheriff's Office*, 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019) (upholding "red flag" law permitting the seizure of firearms from those "who pose a significant danger to themselves or others"); *Anonymous Detective at Westchester Cnty. Police v. A.A.*, No. 365/20, 2021 WL 956142, *7 (N.Y. Sup. Ct., Feb. 10, 2021) (rejecting Second Amendment challenge to state Extreme Risk Protection Act); *Draego v. Brackney*, No. 3:20-cv-00037, 2020 WL 6692987, *4-6 (W.D. Va. November 13, 2020) (dismissing challenge to Virginia's ERPO Act for lack of Article III standing).

(quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)) (emphasis added). Here, however, Greco cannot point to any order of the district court passing upon the question of *Younger* abstention prior to the decision dismissing Greco's lawsuit. And because the district court did not "decide" the *Younger* issue at any earlier stage of the proceeding, it plainly was not bound by a (nonexistent) earlier determination with respect to *Younger*.[8]

In any event, on appeal, Greco's law-of-the-case argument is irrelevant. It is obvious that an earlier determination by the district court does not bind this Court. After all, "[a]n appellate court's function *is* to revisit matters decided in the trial court" and is "not bound by district court rulings under the law-of-the-case doctrine." *Musacchio v. United States*, 577 U.S. 237, 245 (2016); *see also, e.g., Christianson*, 486 U.S. at 817 ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review."). Thus, even if Greco were right that law-of-the-case

[8] Moreover, as the district court observed, this Court has rejected the same argument in its unpublished decision in *Ocean Grove Camp Meeting Association of United Methodist Church v. Vespa-Papaleo*, 339 F. App'x 232, 240 (3d Cir. 2009). There, a plaintiff argued that a district court could not "apply *Younger* after electing to rule on the [plaintiff's] preliminary injunction motion." *Id.* This Court "disagree[d]," explaining that a "denial of a preliminary injunction motion was not a proceeding of substance on the merits." *Id.* And while Greco cites *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 (3d Cir. 1997), Pb at 33-35, that case is not to the contrary. There, the Court explained that findings at the preliminary relief stage should have binding effect only if "circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again." *Hawksbill*, 126 F.3d at 474 n.11. Here, the district court made no findings as to *Younger* abstention prior to its decision dismissing Greco's suit.

doctrine somehow precluded the district court from abstaining under *Younger* (and he is not), this Court can still affirm the district court's judgment dismissing the case based on its own determination that *Younger* abstention is appropriate.

*Second*, Greco argues (Pb at 40-41) that this case falls within a "'conceivable'" exception to *Younger*, the possibility of which was discussed in *Younger* itself, for a statute "'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). According to Greco, this potential exception applies here because the "literal text" of the ERPO Act "is facially unconstitutional" in that it states that a warrant may be issued for "good cause." Pb at 41. But as the Supreme Court explained in *Younger*, "the possible unconstitutionality of a statute 'on its face' does not in itself" implicate this exceedingly narrow and hypothetical exception. 401 U.S. at 54; *see also, e.g.*, *Huffman*, 420 U.S. at 602 (confirming that, in *Younger*, the Court "unequivocally held that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings"). Greco's claim is especially weak here, where the warrant to search Greco's home was by its plain terms issued on a finding of *probable cause*, Pa120, and where various directives from the State establish that no search warrant under the ERPO Act will issue on

anything less, *see, supra,* at 8-9 (discussing the AOC Directive, Attorney General Directive, and *Hemenway*). A facial claim that a single sentence of the ERPO Act adopts an improper warrant standard—especially a claim that has been addressed through binding regulations by the State—is a far cry from the hypothesized exception for a state statute that has "flagrant[] and patent[]" violations of federal law in "every clause, sentence and paragraph."

* * *

Because the underlying civil enforcement proceeding bears all the hallmarks of a quasi-criminal action, and because all of the *Middlesex* factors favor abstention, this Court should affirm the district court's decision to abstain under *Younger*. That is all this Court needs to hold to dispose of the entirety of this appeal.[9]

## II. THE DISTRICT COURT PROPERLY REJECTED A PRELIMINARY INJUNCTION ON GRECO'S FOURTH AMENDMENT CLAIM

If the Court reaches the preliminary-injunction question presented in Greco's appeal—and it need not do so—then it should affirm the district court. A preliminary injunction "is an extraordinary remedy which should be granted only in limited

[9] If this Court affirms the district court's abstention decision, it need not address Greco's contention that the district court improperly denied his motion for a preliminary injunction because "any decision on the preliminary injunction appeal[] would … be[] merely advisory." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 731 (9th Cir. 2017). So too for the class certification argument: if this case was properly dismissed, obviously no class can be certified.

circumstances." *Truck Ctr., Inc. v. Gen'l Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1998). To qualify for preliminary relief, the moving party must demonstrate:

> (1) A likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.

*Kos Pharms. Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). This is no small burden: a plaintiff must produce "evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) (citations omitted). And a plaintiff's failure to satisfy any of the four factors renders a preliminary injunction inappropriate. *See NutraSweet Co. v. Vit-Mar Enterprise, Inc.*, 176 F.3d 151, 153 (3d. Cir. 1999).[10]

The easiest way to dispose of Greco's demand for preliminary relief is the one on which the district court relied—Greco's inability to demonstrate irreparable harm to justify such an injunction. Greco's primary argument on appeal is that the district court erred in declining to hold that the Fourth Amendment violation he alleged is "*per se*" irreparable harm, such that he need not make any factual showing. *See* Pb at 19-23. Greco's contends that because the Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably

[10] Contrary to Greco's suggestion (Pb at 23), Defendants argued below that Greco does not meet *any* of the preliminary-injunction factors. *See* Br. in Opp'n to Pl.'s Mot. for a Preliminary Inj., *Greco v. Grewal*, No. 19-19145, Dkt. 32 (Nov. 8, 2019).

constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), this Court should find the same true Fourth Amendment actions, *see* Pb at 21-23. There are three problems with this claim, any one of which proves fatal.

*First*, the premise of Greco's argument is wrong—as a matter of fact, Greco did not lose his Fourth Amendment freedoms for even minimal periods of time. The premise of Greco's claim of injury is that the search warrant in his case did not issue under the constitutionally compelled probable-cause standard. After all, the Fourth Amendment does not preclude issuance and executions of warrants, but precludes their issuance and execution *absent probable cause*. The district court, however, reviewed the record and determined that the "plain text of the search warrant," which Greco "attached [to his] own Complaint, indicates the [state] court found '*probable cause* to believe … respondent poses an immediate and present danger of bodily injury to self or others.'" Pa179 (quoting Pa120)). Not only can that dispositive finding be reversed only if clearly erroneous, *see Del. Strong*, 793 F.3d at 308, but there is no error in the finding at all. The state court indeed issued a warrant on an express finding of "probable cause," Pa118, 120, which is consistent with an AOC Directive, an Attorney General Directive, and a state Supreme Court decision insisting on a probable-cause determination, *see* Pa61, 90; *Hemenway*, 216 A.3d at

121.[11] Because there is no basis to find an irreparable injury from misconduct that never happened as a matter of fact, this case provides the Court no occasion to decide whether *Elrod* should extend to the Fourth Amendment.

*Second*, Greco's proposed extension of *Elrod* to Fourth Amendment cases is simply incorrect. As the district court noted, Greco cannot identify "cases in this Circuit or District where courts have applied [a] *per se* rule to violations of the Fourth Amendment." Pa179; *see also id.* (adding Greco did not "advance any substantive arguments" as to *why* the rule that First Amendment injuries are *per se* irreparable would extend here). For good reason: because "the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests and the countervailing government interests at stake," *Graham v. Connor*, 490 U.S. 386, 396 (1989), no such categorical presumption of irreparable injury is appropriate. Said another way, and as a number of other courts have held, while there of course "'may be cases where Fourth Amendment violations give rise to findings of irreparable injury,'" not every Fourth Amendment violation rises to the level of irreparable harm. Pa180 (quoting *Rodriguez v. Heitman Properties of New Mexico, Ltd.*, No. 98-1545, 1999 WL 35808391, at *4 (D.N.M. 1999)).

[11] The district court also noted that Greco resisted efforts to admit records from the temporary-order hearing in state court, "effectively preventing" the federal district court "from analyzing [Greco's] own claim that a standard lesser than probable cause was used." Pa179. This both undermines Greco's claims of irreparable injury and provides yet another reason why his claim is best evaluated by the state court.

Before this Court, Greco argues that the district court erred in light of *Ramirez v. Webb*, No. 85-1102, 1986 WL 16752, *2 (6th Cir. Mar. 3, 1986)—an unpublished, out-of-circuit opinion that has never been relied on by this Court, any district court within this circuit, or any other circuit. *Ramirez* asserted, with little reasoning, that *Elrod*'s presumption of irreparable injury is "applicable when Fourth Amendment rights are at stake." *Id.* at *2. But its own limited analysis underscored that not all Fourth Amendment violations impose equal harms. *Id.* (noting Fourth Amendment violations "premised on race and alienage" are "particularly" harmful). And in any event, this Court has been far more judicious when considering whether Elrod's *per se* approach applies to contexts beyond the First Amendment. *See Constr. Assoc. of W. Pa. v. Kreps*, 573 F.2d 811, 820 n.33 (3d Cir. 1978) (declining to extend Elrod's presumption to the equal protection context because violations "may be more or less serious depending on the injuries which accompany such deprivation").

*Third*, even were a presumption to apply, Greco's litigation conduct—which makes clear that he is not being irreparably harmed—would rebut it. As the district court noted, "the ERPO Act allows [Greco] to seek the return of his property at a [final order] hearing where he would be permitted to raise constitutional arguments," which had to occur no later than 10 days from the imposition of the temporary order. Pa180 (citing N.J. Stat. Ann § 2C:58-24). (In practice, the state court set the final-order hearing in this case to happen five days after issuing the warrant.) As a general

matter, because the Act provides Greco with a prompt opportunity to seek removal of any EPRO Act restraint and the return of his firearms, no harm caused by the temporary proceeding could be *irreparable*. But that is especially true as applied to this case. By the time the district court considered Greco's motion for a preliminary injunction, Greco's final-order hearing had been deferred for months—a sign Greco was not only suffering no irreparable harm, but was prolonging any harm he had allegedly suffered. Indeed, the district court recounted, Greco's counsel represented during the preliminary-injunction process that the temporary order issued in state court against Greco could "remain in effect" through "the Court's *ultimate resolution* of the matter" and need not be set aside preliminarily. Pa184-85 (quoting representations from counsel in briefing and argument). As the district court put the point, Greco's "apparent consent to the continuation of" that order "vitiates the idea that a failure to enter an injunction would result in irreparable harm." *Id.* Greco does not address, let alone contest, the district court's findings on this score.

Separately and finally, the district court did not err in rejecting Greco's request for preliminary relief with respect to Greco's First Amendment claim. Pa186-88. While Greco baldly asserts, without argument, that the temporary order amounted to punishment for the exercise of his First Amendment rights, the district court found to the contrary, holding as a matter of fact that "the record before the Court has not established that [Greco's] rifle and ammunition were seized because of the *opinions*

he expressed" but rather his "history of threats or acts of violence directed towards self of others." Pa187. Once again, that factual finding was correct, and was not clear error: the state court opinion explaining its decision to grant a temporary order described a range of evidence provided by law enforcement to substantiate the threat Greco posed to others. *See* Pa187. And because Greco opposed Defendants' effort to admit additional records from the temporary-order hearing as evidence in this action, Greco deprived the district court of evidence necessary to further assess Greco's as-applied First Amendment claim. Pa187-88; *see Adams v. Freedom Forge Corp.*, 204 F.3d 475, 488 (3d Cir. 2000) (denying preliminary relief where "irreparable harm [was] speculative given the evidence presented").[12]

Given the district court's fact finding regarding the lack of irreparable harm, its denial of Greco's motion for a preliminary injunction should be affirmed.

## III. THE DISTRICT COURT PROPERLY DENIED GRECO'S MOTION FOR CLASS CERIFICATION

If this Court reaches this issue, it can easily conclude that the district court did not abuse its discretion in denying class-certification. To justify class certification,

[12] Greco observes that the district court found no irreparable injury as to Greco's Second and Fourteenth Amendment claims, *see* Pa181-86, but offers no grounds to disturb the district court's determination. Pb at 23. That is no surprise: the district court explained that Greco's own litigation conduct—namely, his "apparent consent to the continuation of the [temporary order] and the retention of his property during the pendency of this litigation"—"vitiates the idea that a failure to enter an injunction would result in irreparable harm." Pa184-85.

the movant must establish that each element of Rule 23 is satisfied. *See Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 304 (3d Cir. 2016). Under Rule 23(a), this requires a movant to first demonstrate that: "'the class is so numerous that joinder of all members is impracticable' (numerosity); that 'there are questions of law or fact common to the class' (commonality); that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class' (typicality); and that 'the representative parties will fairly and adequately protect the interests of the class' (adequacy)." *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297, 308-09 (3d Cir. 2016). A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Under that "rigorous analysis" standard, "'[a]ctual, not presumed, conformance with Rule 23(a) remains indispensable.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Falcon*, 457 U.S. at 160). As relevant here, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* (quoting *Falcon*, 457 U.S. at 157). The class must share a "common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (citation omitted).

Here, the district court correctly determined that Greco failed to satisfy the

"commonality" requirement. Pa239-43.[13] Greco contends that he satisfied this requirement because the ERPO Act is unconstitutional, such that any person who has been subject to a temporary order under the Act has suffered a common injury capable of class-wide resolution. Pb at 26-28. But as the district court appropriately explained, commonality requires more than the "bald assertion" that class members "'have all suffered a violation of the same provision of law.'" *Id.* (quoting *Wal-mart*, 564 U.S. at 350). And here, "the individualized factual circumstances of each potential class member vitiates the feasibility of class certification," as "the unique circumstances described in Plaintiff's own complaint aptly demonstrate." Pa241. While Greco's Fourth Amendment claim argues that warrants may not issue under "good cause," preliminary review of the record in Greco's own state proceedings demonstrates that his warrant was issued pursuant to probable cause, such that he suffered no violation at all. *Id.* To determine whether other members of Greco's class were similarly situated, a district court would need to perform the same "highly individualized" analysis "for all putative members of the proposed class." Pa242. Greco's successful effort to deprive the district court of the ability to review records from his state proceeding—by opposing introduction of those records into evidence in this action—underscores the difficulty of performing individualized review of

[13] The district court did not reach whether Greco had satisfied the other requirements for class certification. On appeal, Greco offers no argument with respect to these other requirements.

hundreds of state-court records in one federal action. Pa241-42.

In any event, while the premise of Greco's argument is that facial challenges are particularly suitable to class resolution, the opposite is true. As courts have explained, "[c]lass certification is particular unnecessary where, as here, 'the suit is attacking a statute or regulation as being facially unconstitutional.'" *Mills v. Dist. of Columbia*, 266 F.R.D. 20, 22 (D.D.C. 2010) (quoting *Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977)); *see Phelps v. Powers*, 295 F.R.D. 349, 356-57 (S.D. Iowa 2013) (collecting cases). After all, in such circumstances "there would appear to be little need for the suit to proceed as a class action," because "it can be assumed that if the court declares the statute or regulation unconstitutional, then the responsible government officials will discontinue the [law's] enforcement." *Alliance*, 565 F.2d at 980. Rule 23(b) requires that "a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." But if a party mounts a facial challenge that will afford relief to those similarly situated irrespective of a class certification, class procedure is hardly the most "efficient[]" mode of resolving the controversy. *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) ("[A]n action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality.").

Accordingly, this Court should affirm the denial of class certification.

## CONCLUSION

For the foregoing reasons, the district court's decision dismissing the instant federal action under *Younger* should be affirmed. If the Court finds that abstention was not appropriate, it should affirm both the district court's denial of a preliminary injunction and its denial of class certification.

Respectfully submitted,

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Date: May 26, 2021

## CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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Deputy Attorney General

Dated: May 26, 2021

## CERTIFICATION OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 11,594 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 13,000-word limit.

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

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

> Company: McAfee, Inc.
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/s/ Robert J. McGuire
Robert J. McGuire (NJ ID # 046361992)
Deputy Attorney General

Dated: May 26, 2021

**CERTIFICATION OF SERVICE**

I hereby certify that on May 26, 2021, I caused the Brief for Defendants to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing. Counsel of record will receive service via the Court's electronic filing system.

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Dated: May 26, 2021