

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03–407

JOHN F. KOWALSKI, JUDGE, 26TH JUDICIAL CIR-
CUIT COURT OF MICHIGAN, ET AL., PETI-
TIONERS *v.* JOHN C. TESMER ET AL.

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

[December 13, 2004]

JUSTICE GINSBURG, with whom JUSTICE STEVENS and
JUSTICE SOUTER join, dissenting.

Plaintiffs-respondents Arthur M. Fitzgerald and Michael D. Vogler are Michigan attorneys who have routinely received appointments to represent defendants in state-court criminal appeals, including appeals from plea-based convictions. They assert third-party standing to challenge a state law limiting an indigent’s right to counsel: As codified in Mich. Comp. Laws Ann. §770.3a(1) (West 2000), the challenged law prescribes that most indigents

“who plea[d] guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant’s conviction or sentence.”

The attorneys before us emphasize that indigent defendants generally are unable to navigate the appellate process *pro se*. In view of that reality, the attorneys brought this action under 42 U. S. C. §1983, to advance indigent defendants’ constitutional right to counsel’s aid in pursuing appeals from plea-based convictions.

“Ordinarily,” attorneys Fitzgerald and Vogler acknowledge, “one may not claim standing . . . to vindicate the constitutional rights of [a] third party.” *Barrows v. Jack-*

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son, 346 U. S. 249, 255 (1953). The Court has recognized exceptions to the general rule, however, when certain circumstances combine: (1) “The litigant [has] suffered an ‘injury in fact,’ . . . giving him or her a ‘sufficiently concrete interest’ in the outcome of the issue in dispute”; (2) “the litigant [has] a close relation to the third party”; and (3) “there [exists] some hindrance to the third party’s ability to protect his or her own interests.” *Powers v. Ohio*, 499 U. S. 400, 411 (1991) (quoting *Singleton v. Wulff*, 428 U. S. 106, 112 (1976)). The first requirement is of a different order than the second and third, for whether a litigant meets the constitutional prescription of injury in fact determines whether his suit is “a case or controversy subject to a federal court’s Art. III jurisdiction.” *Ibid.* By contrast, the close relation and hindrance criteria are “prudential considerations,” *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U. S. 947, 955 (1984), “judge made rule[s] . . . fashion[ed] for our own governance,” *id.*, at 972 (STEVENS, J., concurring). Our precedent leaves scant room for doubt that attorneys Fitzgerald and Vogler have shown both injury in fact, and the requisite close relation to indigent defendants who seek the assistance of counsel to appeal from plea-based convictions. I conclude, as well, that those attorneys have demonstrated a formidable hindrance to the indigents’ ability to proceed without the aid of counsel.

As to injury in fact, attorneys Fitzgerald and Vogler alleged in their complaint that Mich. Comp. Laws Ann. §770.3a would cause them direct economic loss because it will “reduc[e] the number of cases in which they could be appointed and paid as assigned appellate counsel.” App. 16a. This allegation is hardly debatable. The Michigan system for assigning appellate attorneys to indigent defendants operates on a strict rotation. With fewer cases to be assigned under the new statute, the pace of the rotation would slow, and Fitzgerald and Vogler, who are on the

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rosters for assignment, would earn less for representation of indigent appellants than they earned in years prior to the cutback on state-funded appeals.¹

In *Singleton v. Wulff*, 428 U. S. 106, two physicians challenged state restrictions imposed on funding for abortions. Eight Members of this Court determined that the physicians had adequately alleged concrete injury: “If the physicians prevail[ed] in their suit . . . they [would] then receive payment [and t]he State (and Federal Government) [would] be out of pocket by the amount of the payments.” *Id.*, at 113; see *id.*, at 122–123 (Powell, J., concurring as to injury in fact). Inescapably, the same reasoning applies to attorneys Fitzgerald and Vogler. They have alleged their past, state-paid representation of indigent defendants in appeals from plea-based convictions, and their aim to continue such representation in the future. As in *Singleton*, they will suffer injury “concrete and particularized[,] . . . actual or imminent, not conjectural or hypothetical,” *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180 (2000), if Michigan’s statute holds sway. See generally R. Fallon, D. Meltzer, & D. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 177–178, and n. 5 (5th ed. 2003).

Nor, under our precedent, should attorneys Fitzgerald and Vogler encounter a “close relation” shoal. Our prior decisions do not warrant the distinction between an “*existing*” relationship and a “*hypothetical*” relationship that the

¹True, in several cases in which third-party standing was upheld on the basis of economic injury, the law in question proscribed conduct in which the challenger sought to engage. See, e.g., *Craig v. Boren*, 429 U. S. 190, 192–194 (1976) (beer vendor prohibited from selling 3.2% beer to males aged 18–21). Our decisions confirm, however, that a plaintiff’s exposure to an enforcement action is not essential to an injury-in-fact determination. See *Singleton v. Wulff*, 428 U. S. 106 (1976); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

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Court advances today. *Ante*, at 5. See, e.g., *Carey v. Population Services Int'l*, 431 U. S. 678, 683 (1977) (corporate distributor of contraceptives could challenge state law limiting sale of its products, “not only in its own right but also on behalf of its *potential* customers” (emphasis added)); *Griswold v. Connecticut*, 381 U. S. 479, 481 (1965) (noting that in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), “the owners of private schools were entitled to assert the rights of *potential* pupils and their parents,” and in *Barrows*, “a white defendant . . . was allowed to raise . . . the rights of *prospective* Negro purchasers” (emphases added)).

Without suggesting that the timing of a relationship is key, the Court’s decisions have focused on the character of the relationship between the litigant and the rightholder. See *Munson*, 467 U. S., at 973 (STEVENS, J., concurring) (propriety of third-party standing depends on “the nature of the relationship”). *Singleton*, for example, acknowledged the significant bond between physician and patient. See 428 U. S., at 117 (plurality opinion) (“[T]he physician is uniquely qualified to litigate the constitutionality of the State’s interference with, or discrimination against, [the abortion] decision.”).² Similarly, this Court has twice recognized, in the third-party standing context, that the attorney-client relationship is of “special consequence.” See *Caplin & Drysdale, Chartered v. United States*, 491 U. S. 617, 623–624, n. 3 (1989); *Department of Labor v. Triplett*, 494 U. S. 715, 720 (1990).³ Moreover, the Court has found an adequate “relation” between litigants alleg-

²There can be little doubt that the plurality in *Singleton* would have recognized third-party standing even if the physicians had just opened their clinic at the time they commenced suit.

³*Conn v. Gabbert*, 526 U. S. 286 (1999), see *ante*, at 4, is not instructive. There, the plaintiff-attorney failed to assert his own injury in fact, 526 U. S., at 289–292, and thus, *a fortiori*, could not assert third-party standing, *id.*, at 292–293.

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ing third-party standing and those whose rights they seek to assert when nothing more than a buyer-seller connection was at stake. See *Carey*, 431 U. S., at 683; *Craig v. Boren*, 429 U. S. 190, 195 (1976).

Thus, as I see it, this case turns on the last of the three third-party standing inquiries, here, the existence of an impediment to the indigent defendants' effective assertion of their own rights through litigation. I note first that the Court has approached this requirement with a degree of elasticity. See *id.*, at 216 (Burger, C. J., dissenting) (males between the ages of 18 and 21 who sought to purchase 3.2% beer faced no serious obstacle to asserting their own rights). The hindrance faced by a rightholder need only be "genuine," not "insurmountable." *Singleton*, 428 U. S., at 116–117 (plurality opinion); see also *Munson*, 467 U. S., at 956 ("Where practical obstacles prevent a party from asserting rights on behalf of itself . . . the Court has recognized [third-party standing]"). Even assuming a requirement with more starch than the Court has insisted upon in prior decisions, this case satisfies the "impediment" test.

To determine whether the indigent defendants are impeded from asserting their own rights, one must recognize the incapacities under which these defendants labor and the complexity of the issues their cases may entail. According to the Department of Justice, approximately eight out of ten state felony defendants use court-appointed lawyers. U. S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Defense Counsel in Criminal Cases 1, 5 (Nov. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (all Internet materials as visited Dec. 8, 2004, and available in Clerk of Court's case file). Approximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those convicted are incarcerated. *Id.*, at 6, (Tables 10–11). It is likely that many of these indigent defen-

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dants, in common with 68% of the state prison population, did not complete high school, U. S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Education and Correctional Populations 1 (Jan. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>, and many lack the most basic literacy skills, U. S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Prison Walls xviii, 10, 17 (Oct. 1994) (NCES 1994–102), available at <http://nces.ed.gov/pubs94/94102.pdf>. A Department of Education study found that about seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article. *Id.*, at 10, app. A (Interpreting the Literacy Scales). An inmate so handicapped surely does not possess the skill necessary to pursue a competent *pro se* appeal.

These indigent and poorly educated defendants face appeals from guilty pleas often no less complex than other appeals. An indigent defendant who pleads guilty may still raise on appeal

“constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel.” *People v. Bulger*, 462 Mich. 495, 561, 614 N. W. 2d 103, 133–134 (2000) (Cavanagh, J., dissenting) (citations omitted).

The indigent defendant pursuing his own appeal must

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also navigate Michigan's procedures for seeking leave to appeal after sentencing on a guilty plea. Michigan's stated Rule requires a defendant to file an application for appeal within 21 days after entry of the judgment. Mich. Rule App. Proc. 7.205(A) (2004). The defendant must submit five copies of the application "stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument . . . in support of the appellant's position on each issue." Rule 7.205(B)(1). The State Court Administrative Office has furnished a three-page form application accompanied by two pages of instructions for defendants seeking leave to appeal after sentencing on a guilty plea. But this form is unlikely to provide adequate aid to an indigent and poorly educated defendant. The form requires entry of such information as "charge code(s), MCL citation/PACC Code," asks the applicant to state the issues and facts relevant to the appeal, and then requires the applicant to "state the law that supports your position and explain how the law applies to the facts of your case." Application for Leave to Appeal After Sentencing on Plea of Guilty or Nolo Contendere, <http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf> (rev. Oct. 2003). This last task would not be onerous for an applicant familiar with law school examinations, but it is a tall order for a defendant of marginal literacy.⁴

The Court, agreeing with Judge Rogers' dissent from the en banc Sixth Circuit decision, writes that recognizing third-party standing here would allow lawyers generally

⁴The rare case of an unusually effective *pro se* defendant is the exception that proves the rule: The Court identifies three Michigan defendants who pursued right-to-counsel claims *pro se*. *Ante*, at 6. The fact that a handful of *pro se* defendants has brought claims shows neither that the run-of-the-mine defendant can successfully navigate state procedures nor that he can effectively represent himself on the merits.

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to assert standing to champion their potential clients' rights. *Ante*, at 8, n. 5. For example, a medical malpractice attorney could challenge a tort reform statute on behalf of a future client or a Social Security lawyer could challenge new regulations. *Ibid.*; *Tesmer v. Granholm*, 333 F. 3d 683, 709–710 (CA6 2003) (en banc). In such cases, however, in marked contrast to the instant case, the persons directly affected—malpractice plaintiffs or benefits claimants—would face no unusual obstacle in securing the aid of counsel to attack the disadvantageous statutory or regulatory change. There is no cause, therefore, to allow an attorney to challenge the benefit- or award-reducing provision in a suit brought in the attorney's name. The party whose interests the provision directly impacts can instead mount the challenge with the aid of counsel.

This case is “unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel.” Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 17. The challenged statute leaves indigent criminal defendants without the aid needed to gain access to the appellate forum and thus without a viable means to protect their rights. Cf. *Evitts v. Lucey*, 469 U. S. 387, 393 (1985) (“[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.”).

The Court is “unpersuaded by the attorneys’ ‘hindrance’ argument,” *ante*, at 7, in the main, because it sees a clear path for Fitzgerald and Vogler: They could have “attend[ed] state court and assist[ed] [indigent defendants.]” *Ibid.* Had the attorneys taken this course, hundreds, perhaps thousands, of criminal defendants would have gone uncounseled while the attorneys afforded assistance to a few individuals. In order to protect the rights of *all* indigent defendants, the attorneys sought prospective

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classwide relief to prevent the statute from taking effect. See Tr. of Oral Arg. 41 (“The problem was we had to file this litigation before the statute went into effect because once the statute went into effect, thousands of Michigan indigents would be denied the right to counsel every year and would suffer probably irreparable damage to their right to appeal.”).

This case implicates none of the concerns underlying the Court’s prudential criteria. The general prohibition against third-party standing “‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,’ and it assures the court that the issues before it will be concrete and sharply presented.” *Munson*, 467 U. S., at 955 (citation omitted) (quoting *United States v. Raines*, 362 U. S. 17, 22 (1960)). Attorneys Fitzgerald and Vogler have “properly . . . frame[d] the issues and present[ed] them with the necessary adversarial zeal,” 467 U. S., at 956, and whether the indigent defendants whose rights they assert are entitled to counsel is a question fully ripe for resolution.⁵

The Court concludes that the principle of *Younger v. Harris*, 401 U. S. 37 (1971), “is an additional reason to deny the attorneys third-party standing.” *Ante*, at 8. Whether a federal court should abstain under *Younger* is, of course, distinct from whether a party has standing to sue. See 401 U. S., at 41–42 (dismissing three appellees on standing grounds before addressing the abstention question). *Younger* “[has] little force in the absence of a pending state proceeding.” *Steffel v. Thompson*, 415 U. S. 452, 462 (1974) (quoting *Lake Carriers’ Assn. v. MacMillan*, 406 U. S. 498, 509 (1972)). “When no state criminal

⁵ Considerations of economy—the parties have fully briefed and argued this case—also favor reaching the merits.

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proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." 415 U. S., at 462; accord *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 930 (1975). Attorneys Fitzgerald and Vogler filed this suit before the Michigan statute took effect. At that time, *no* state criminal proceeding governed by the statute existed with which this suit could interfere.⁶

In sum, this case presents an unusual if not unique case of defendants facing near-insurmountable practical obstacles to protecting their rights in the state forum: First, it is the deprivation of counsel itself that prevents indigent defendants, many of whom are likely to be unsophisticated and poorly educated, from protecting their rights; second, the substantive issues that such defendants could raise in an appeal are myriad and often complicated; and third, the procedural requirements for an appeal after a guilty plea are not altogether indigent-user friendly. The exposure of impecunious defendants to these access-to-appeal blockages in state court makes the need for this suit all the more compelling.

* * *

For the reasons stated, I would affirm the en banc Sixth Circuit decision that attorneys Fitzgerald and Vogler have standing to maintain the instant action and would proceed to the merits of the controversy.

⁶I agree with the Court that *Younger* would force the *indigent defendants* to pursue their claims in state court, as *Younger* has a stricter impediment requirement than the third-party standing doctrine. *Younger v. Harris*, 401 U. S. 37, 53 (1971) (requiring "extraordinary circumstances" before allowing federal intervention).