Appeal No. 11-57187

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff-Appellant,

v.

MICHAEL PLANET, in his official capacity as Court Executive Officer/Clerk of the Ventura County Superior Court,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE MANUEL L. REAL
CASE NO. CV11-08083

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

California law gives the public a right of "reasonable access" to court records. Cal. Const. art. I, § 3(b); Cal. Gov't Code § 68150(l); Cal. Rs. Ct. 2.500 & 2.503. However, California's courts have not yet determined the nature or scope of this right.

Plaintiff Courthouse News Service ("CNS") sued defendant Michael Planet, the Executive Officer of the Superior Court of California, County of Ventura ("VSC"), claiming that VSC's clerks failed consistently to provide access to all unlimited civil complaints on the same day VSC receives them—that is, for failure to guarantee "same-day access." However, CNS did *not* sue in state court to determine whether the right to "reasonable access" requires VSC to guarantee "same-day access." Instead, CNS jumped the gun by filing this lawsuit in federal court; failing to refer to apposite California precedent; and then asking the district court to conclude that the First Amendment somehow creates a federal constitutional guarantee of "same-day access" to newly-filed civil complaints, even before a judge has reviewed, adjudicated or acted on them in any way—a right that has *not* been recognized by this Court or any other federal appellate court.

The district court recognized that a decision on this novel question of federal constitutional law could be avoided or narrowed if California's courts were first asked to decide whether the right of "reasonable access" creates a guarantee of

"same-day access" to newly-filed complaints. The district court further recognized that requiring state courts to guarantee "same-day access" would impermissibly entangle federal courts in the administration of the California judicial system. For these reasons, the district court abstained from deciding CNS's lawsuit pursuant to the established abstention doctrines developed in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *O'Shea v. Littleton*, 414 U.S. 488 (1974). The district court's decision should be affirmed.

STATEMENT OF FACTS

A. VSC's Clerks Process By Hand More Than 150,000 New Filings Per Year.

The Ventura County Superior Court ("VSC") receives and processes more than 150,000 separate filings every year. SER 47. Its Civil Department employs fourteen Court Processing Assistants ("CPAs") and one supervisor to process these filings. *Id*. Assuming there are 260 court days in a year—an overestimation that does not account for court holidays, mandatory closure days, and staff vacation days—VSC processes more than 575 filings every day.

None of these 150,000-plus documents can be filed electronically. Unlike federal courts, which have long since adopted PACER, or some of the larger state courts that have electronic filing capabilities, all filings in Ventura County must be processed by hand. SER 46-47. "[U]nlike the clerk's office in federal and other electronic filing courts, the clerk's office in the Ventura Superior Court *is* burdened

by the substantial additional administrative task imposed by the need to process by hand every document filed with the court." *Id.*

Many of the hundreds of filings processed every day, such as ex parte applications or motions of various types, demand more immediate attention than newly-filed complaints. Indeed, the litigation process typically requires little judicial action for some time after filing: "[M]ost new complaint files remain essentially inactive for approximately 65 days, until the summons and complaint are served, and the defendant(s) answers or take some other action." SER 53-54.

B. The State's Budget Crisis Affects VSC's Ability To Process Newly-Filed Unlimited Civil Complaints.

The shadow of California's well-publicized budget crisis looms large over VSC's operations. Between 2008 and 2011, VSC's budget shrunk by more than $13 million. SER 110. As a result, VSC's deficit is expected to exceed $12 million in 2012. SER 113. This budget shortfall affects VSC's operations in a substantial number of ways.

1. VSC Cannot Hire New Court Processing Assistants.

California's budget shortfalls have resulted in a four-year hiring freeze at the VSC and increased mandatory furlough days. As a result, VSC's administrative vacancy rate more than doubled between 2008 (22 vacancies) and 2011 (48 vacancies). SER 110-111. At least eight of the court's administrative vacancies are for positions in the civil processing unit and records departments, which impair

the court's ability to process *all* civil filings, including unlimited civil complaints. SER 50.

2. VSC Has Assumed Responsibility For Simi Valley Court Filings.

The burden on the court's CPAs has increased and will further increase, now that responsibilities for new case filings have been transferred from the Simi Valley Courthouse to the court's central Hall of Justice facility as a result of reduced staffing. SER 48-49. The CPAs at the Hall of Justice facility now are responsible for processing complaints filed in two different courthouses.

3. VSC Reduced Its Public Hours.

VSC also was required to reduce its public business hours from a closing time of 5:00 p.m. to 3:00 p.m. SER 111. Documents submitted for filing after 3:00 p.m. are deposited in a secure "drop box" and are retrieved for processing at 5:00 p.m. SER 51-52.

4. VSC Can No Longer Process Documents Immediately When Received.

Before June 2010, most new complaints were received by CPAs at public filing windows, where CPAs immediately processed and placed them in case files. SER 52. Due to the small number of open clerk windows, and the reduced numbers of CPAs available to staff them, VSC now requires most new complaints to be "dropped off" at the filing windows to be processed by a back-counter CPA. SER 52-53. This change has allowed the Civil Department's limited staff to deal

with other customers waiting in line at the civil filing windows and to prioritize ex parte applications and other time-sensitive matters. SER 53-54.

C. Despite These Constraints, VSC Strives To Provide Access To Newly-Filed Unlimited Civil Complaints The Day After Receipt.

VSC's established practice is to process newly-filed unlimited civil complaints; place them in official court files; and deposit these files in the Records Department Media Bin for public review for several days before the file is shelved. SER 33. In response to prior complaints from CNS (and *only* CNS), VSC now prioritizes the processing of newly-filed unlimited civil complaints over newly-filed complaints in other matters, such as limited civil and family matters. SER 58. VSC aims for a two-day turnaround so that most new complaints are filed and deposited in the Media Bin the day after they are received. SER 58. VSC does not and will not deny access to any document maintained in its public files—other than sealed or confidential files—and has not enacted a blanket policy against granting "same-day access" to newly-filed unlimited civil complaints. SER 64. It simply cannot *guarantee* same-day access. *Id*.

Based on an informal survey conducted by one of its reporters, CNS contends that of 152 complaints filed between August 8 and September 2, 2011, only 24% were made available to the public on a same or next day basis. ER 69-70. Those numbers conflict with the actual data provided to the district court in this matter.

VSC's records show that 147 new unlimited civil complaints were filed between August 8 and September 2, 2011. SER 34. Forty-seven of those new complaints were received, processed, and placed in the Media Bin all in the same day, *i.e.*, "same-day access." *Id.* Fifty-four of those new complaints were received on one day and processed and placed in the Media Bin the next day, and another eighteen were processed and placed in the Media Bin within two days of receipt. *Id.* Thus, 77% of new complaints were accessible within two days after receipt, with the bulk available the same or next day.

Of the remaining twenty-eight complaints, at least seventeen (or another 11%) were directed to a judicial officer for immediate attention or were transferred from a court in another county. SER 35, 60-61. Another seven complaints were not placed in the Media Bin due to inadvertent clerical error. SER 35. The remaining four new complaints that had delayed access all had unusual delays due to, among other things, an anomaly in processing. *Id.*

Notably, the record before the district court demonstrates that VSC fares somewhat better than other superior courts in California when it comes to providing access to newly-filed civil complaints. According to another CNS survey, only five courts—which, not coincidentally, maintain electronic files and/or have considerably more clerks than VSC—provided more immediate access

than VSC; the remaining 12 courts failed to achieve the level of "same-day access" provided in Ventura. SER 88-108.

D. Starting In November 2010, CNS Demanded "Same-Day Access" To Newly-Filed Unlimited Civil Complaints.

CNS is an information-gathering entity that sells information regarding civil lawsuits, primarily to lawyers and law firms. SER 78. In California, CNS collects and sells information only about "unlimited" civil actions (suits involving more than $25,000); so far, anyway, it chooses not to cover criminal, family, or limited civil actions. *Id.* As a practical matter, CNS's employee is the only "reporter" who asks to see VSC's new case files. SER 54.

Before November 2010, CNS never sought "same-day access" to VSC's newly-filed unlimited civil complaints. Rather, between 2001 and 2010, CNS's Ventura reporter visited only once or twice each week to identify and review complaints that likely would be of press interest. ER 67.

CNS changed its business model in November 2010 by asking its reporter to visit VSC every day. ER 68-69. Around that time, CNS instituted a campaign to obtain greater access to newly-filed complaints. At the state level, CNS sponsored a "same-day access" bill in the California Legislature that would obligate state superior courts to provide same-day access to case-initiating civil and criminal court records. SER 11-12. While CNS was lobbying the California Legislature to amend the State's access laws, CNS urged VSC in particular to "adjust" its

procedures to grant "same-day access" to unlimited civil complaints because courts in other jurisdictions allegedly have the ability to do so. ER 68-69.

In a June 20, 2011 demand letter, CNS insisted that its reporter "be allowed to see the day's new unlimited civil filings at the end of each court day." ER 99. VSC responded in a July 11, 2011 letter, by explaining that budget considerations made it "difficult to provide same-day access to new filings" and that VSC could not prioritize CNS's interest in "same-day access" "above other priorities and mandates." Nonetheless, VSC committed "to make new filings available as early as is practicable given the demands on limited court resources." ER 114.

CNS responded by letter that VSC could expedite review of new complaints by allowing CNS reporters "to go behind the counter to pick up the stack [of newly-filed complaints]" before they had been processed and placed in case files. ER 116-117. VSC declined to adopt this approach for a variety of reasons.

First, as the result of a shooting incident in Oxnard—which is located in Ventura County—VSC tightened its security procedures to prohibit members of the general public, including reporters, from accessing behind-the-counter processing desks where new civil complaints are maintained prior to processing. SER 62.

Second, allowing members of the public to review new civil complaints before they are processed and placed in the Media Bin risks violating litigant

privacy rights. SER 62. For example, litigants who want VSC to waive filing fees must submit written applications containing personal financial information at the time they file their complaints. The complaints and their accompanying fee waiver applications must be maintained together until after they are assigned to a judicial officer. CPAs remove confidential fee waiver applications and place new complaints in the Media Bin only *after* the applications have been approved or denied by a judicial officer. *Id.*

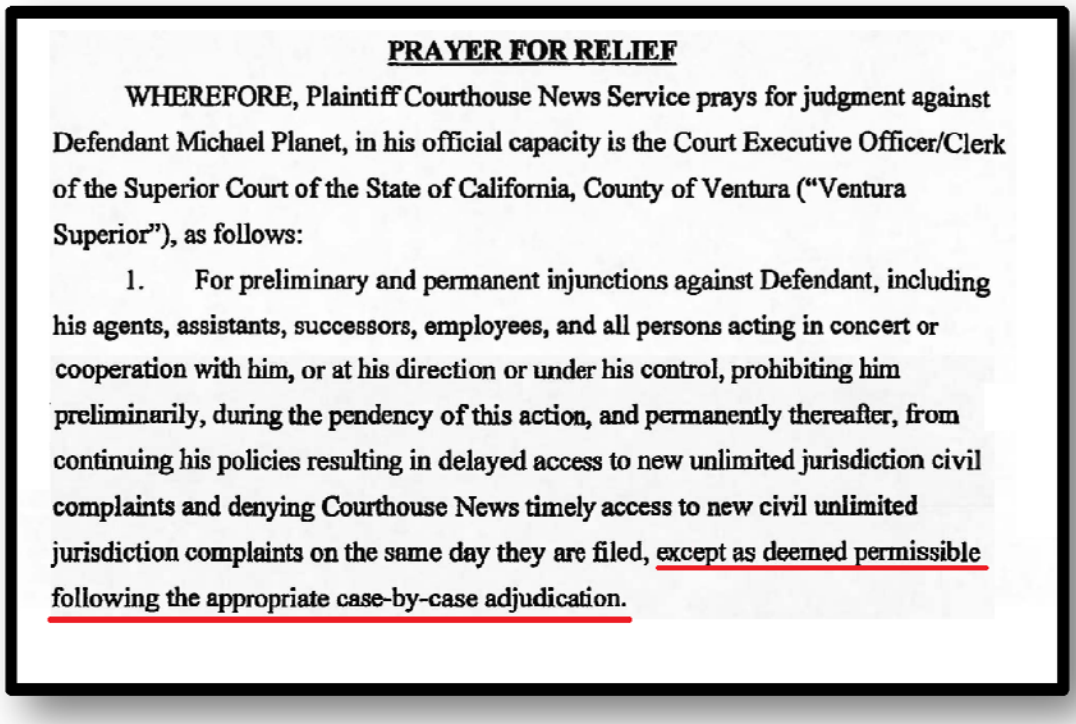
Third, CNS's proposed solution would hinder VSC's ability to ensure and promote public trust and confidence in the court and its filings. SER 63. Complaints that are processed by newly-appointed CPAs are subject to a quality control review, and are not ready for public review until a supervisor ensures the CPA has not, for example, processed an incomplete complaint that should be rejected, or improperly entered crucial case data that would prevent proper tracking and assignment, or improperly entered an attorney's contact information. SER 61-62.

STATEMENT OF THE CASE

Dissatisfied with VSC's responses, CNS filed this lawsuit for equitable relief on September 29, 2011. ER 60. CNS alleged that VSC's failure to guarantee "same-day access" to newly-filed unlimited civil complaints violated the First Amendment of the United States Constitution, federal common law, and California

Rule of Court 2.550. ER 71-73. CNS further alleged that VSC could withhold "same-day access" to these complaints *only* if it conducted an "adversarial adjudicative process" so that VSC judges—and *not* its CPAs—could "consider[] the propriety of the effective sealing of the record on a case-by-case basis." ER 71.

Contrary to its repeated claims on appeal, CNS sought considerably more than a simple injunction requiring VSC to grant "same-day access" to every newly-filed complaint. Instead, CNS's proposed injunction would have required VSC to obtain a "case-by-case" judicial evaluation on any occasion in which "same-day access" could not be provided:



PRAYER FOR RELIEF

WHEREFORE, Plaintiff Courthouse News Service prays for judgment against Defendant Michael Planet, in his official capacity is the Court Executive Officer/Clerk of the Superior Court of the State of California, County of Ventura ("Ventura Superior"), as follows:

1. For preliminary and permanent injunctions against Defendant, including his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him, or at his direction or under his control, prohibiting him preliminarily, during the pendency of this action, and permanently thereafter, from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints and denying Courthouse News timely access to new civil unlimited jurisdiction complaints on the same day they are filed, except as deemed permissible following the appropriate case-by-case adjudication.

ER 73-74 (emphasis added). Contemporaneous with filing its Complaint, CNS moved for a preliminary injunction. ER 58.

On October 20, 2011, VSC moved to dismiss the Complaint, opposed CNS's motion for preliminary injunction, and moved the district court to abstain from adjudicating CNS's claims under the doctrines enunciated in *Pullman* and *O'Shea*. ER 28.

CNS opposed the motion to abstain, but conceded in its Opposition that it really *did* want VSC judges to conduct "case-by-case" evaluations on each occasion in which "same-day access" could not be provided:

> As discussed above, *supra* at 3-4, the First Amendment requires that *the court that is seeking to seal its own records* perform the case-by-case adjudication to determine whether such closure is permissible. *See Globe Newspaper Co.*, 457 U.S. at 608. Courthouse News seeks no more than that here: that Defendant cease his policies preventing Courthouse News from accessing the new complaints at the end of the day on which they are filed, except where there is a determination *by the judges of his own court* that delay is necessary in accordance with First Amendment standards.

SER 138 (emphasis added).

The district court granted VSC's motion to abstain on November 28, 2011, finding that abstention was proper under both *Pullman* and *O'Shea,* and denied CNS's motion for preliminary injunction accordingly. ER 3, 7-9. CNS timely appealed under 28 U.S.C. § 1291. ER 14.

STANDARD OF REVIEW

The decision to abstain pursuant to *Pullman* is reviewed under a "modified abuse of discretion standard." *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987). Appellate courts review a district court's factual findings on abstention for abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1263 n.23 (9th Cir. 2009) (en banc). They review *de novo* whether the requirements for *Pullman* abstention have been met, *Martinez v. Newport Beach City*, 125 F.3d 777, 780 (9th Cir. 1997), and then review the ultimate decision to abstain for abuse of discretion. *Id.*; *see also Smelt v. County of Orange*, 447 F.3d 673, 678 (9th Cir. 2006).[1]

This Court uses a similar standard when evaluating equitable abstention pursuant to *O'Shea*. *Fresh Int'l Corp. v. Agric. Labor Relations Bd*., 805 F.2d 1353, 1356 n.2 (9th Cir. 1986). "When a case involves abstention on some ground other than *Younger* [*v. Harris*, 401 U.S. 37 (1971)], . . . the standard of review is one of abuse of discretion, with the discretion to be exercised within the narrow

[1] CNS assumes the district court dismissed its complaint pursuant to Rule 12(b)(6) and argues this Court must assume the truth of its allegations. (ECF No. 7 at 22 n. 5.) But it generally is recognized that abstention properly is raised through a Rule 12(b)(1) motion. Charles Alan Wright et al., 5B *Federal Practice & Procedure* § 1350 (3d ed. 2012). A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where, as here, the defendant maintains a factual attack by disputing the truth of the allegations, the court need not presume the truthfulness of the plaintiff's allegations and may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

and specific limits prescribed by the particular abstention doctrine involved." *World Famous Drinking Emporium, Inc. v.City of Tempe*, 820 F.2d 1079, 1081-82 (9th Cir. 1987) (internal citation omitted).[2]

SUMMARY OF ARGUMENT

The district court properly abstained from adjudicating CNS's complaint under the *Pullman* and *O'Shea* doctrines. In the appropriate case, abstention avoids the unnecessary adjudication of constitutional questions, promotes comity between the federal courts and state sovereignties, and avoids unseemly interference with a State's administration of its own law. All of those benefits are realized by abstention here, where CNS seeks resolution of a novel constitutional theory that both can be avoided by the adjudication of state law in state court and would result in clumsy federal interference with the administration of the California court system.

All three conditions for *Pullman* abstention are satisfied. *First*, CNS's Complaint concerns a sensitive issue of social policy: the internal workings of the California judicial system. California lawmakers presently are considering whether to compel state trial courts to provide same-day access to newly-filed civil

[2] Decisions to abstain under *O'Shea* are not reviewed *de novo*, as CNS suggests. (ECF No. 7 at 21-22.) Where "[t]he decision to abstain involves a discretionary exercise of a court's equity powers[,] . . . [t]he test we apply in reviewing district court abstention decisions is whether there has been an abuse of discretion." *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980) (internal quotations and citations omitted).

complaints. In an effort to short-circuit the deliberate legislative process, CNS requests an injunction that would impose substantial costs on the cash-strapped court system and effectively compel California courts to reallocate services and resources from other areas of priority. Under the circumstances, where the California court system is struggling to provide adequate access to the courts with an ever-decreasing budget, it is difficult to imagine a more sensitive area of state concern.

CNS argues that *Pullman*'s first prong cannot be satisfied in cases involving the First Amendment. But the United States Supreme Court itself has applied *Pullman* abstention in numerous cases involving core First Amendment claims. In any event, CNS relies on cases where abstention would "chill" the plaintiff's right to free expression. This case involves a purported right of "access to information," not the right of free expression. There is a fundamental difference between cases where the government prohibits a speaker from conveying information that it already possesses and cases, like the one here, where the government allegedly denies access to information in its own possession. In the latter case, the concept of "chilling" simply does not apply.

Second, CNS's novel constitutional claim could be limited or mooted by a definitive interpretation of California laws that require "reasonable access" to state court filings. California has enacted a web of constitutional provisions, statutes,

and rules of court that create "reasonable access" rights different from those recognized under the First Amendment. If the right to "reasonable access" is interpreted by a California court to mean "same-day access," then CNS's First Amendment claim would be narrowed or mooted.

Relying on inapposite authority involving "mirror image" constitutional provisions, CNS contends that California's access rules merely mirror the First Amendment. In fact, however, California's right of reasonable access is predicated on a constitutional provision, statute, and court rules that have no counterpart in the federal system.

Third, the meaning of California's reasonable access laws is unclear, as no California court yet has interpreted their reach. CNS contends the California Supreme Court already has outlined the general contours of the reasonable access right. Yet the opinion upon which CNS relies concerned an entirely different "open courtroom" statute, and preceded by years the enactment of most of California's reasonable access laws. With all three *Pullman* factors satisfied, the district court properly abstained from resolving CNS's claims.

The district court also properly invoked *O'Shea*'s doctrine of equitable abstention. Out of respect for federalism ideals, federal courts may and should abstain when the plaintiff requests injunctive relief that would intrude on sensitive state activities, such as the administration of its judicial system. Ordering

California courts to provide same-day access to unlimited civil complaints would result in a significant reallocation of state resources and would require the courts to invent a new hearing system designed to determine, on a case-by-case basis, whether court officials properly could deny same-day access to a particular complaint. If such an unwieldy and burdensome process is to be created at all, the California legislature should be the entity to establish it.

Moreover, CNS's injunction would require federal courts to engage in an ongoing federal audit of the California courts' access decisions. According to CNS, its injunction would require California court clerks to provide same-day access to *all* newly-filed, unlimited civil complaints unless a state judge conducts a hearing and excuses them from doing so. CNS then would be permitted to subject the state judge's discretionary analysis to review in federal court. Repeated and frequent challenges to the case-by-case determinations made by judges of the superior court results in precisely the kind of piecemeal interruption of state proceedings condemned in *O'Shea* and other equitable abstention jurisprudence.

CNS mischaracterizes the scope of equitable abstention in an effort to preclude its application. CNS contends that equitable abstention is available only when a federal lawsuit involves consideration of the merits of state court decisions. Yet the precedential value of *O'Shea* and its progeny stems, in no small part, from

its extension of *Younger* to cases where the plaintiff does *not* seek to interfere with ongoing state proceedings.

CNS and its amicus also miss the mark by arguing that equitable abstention is inappropriate in cases involving claims under the First Amendment. There is no bright-line rule precluding application of equitable abstention in First Amendment cases, as evidenced by the plentiful case law applying *O'Shea* and its progeny in that very circumstance. Whether a particular case involves claims under the First Amendment or not, the same standard controls the outcome: does the requested equitable relief threaten to indirectly interfere with a state's administration of its court system? Because CNS's requested relief would impose substantial burdens on the California court system and create a procedure for the ongoing audit of California decisions regarding the right of access, the standard is satisfied easily here.

ARGUMENT

I. CALIFORNIA LAW RECOGNIZES A UNIQUE RIGHT OF "REASONABLE ACCESS" TO DOCUMENTS FILED WITH A SUPERIOR COURT, INDEPENDENT OF THE FIRST AMENDMENT.

Contrary to CNS's claims, this action truly *is* an exceptional one: CNS seeks to create an entirely new and constitutionally-guaranteed right of "same-day access" to all newly-filed unlimited civil complaints. Such a guarantee has not

been recognized under the First Amendment or under California's "reasonable access" rules.

A. No Court Has Held That The First Amendment Guarantees A Right Of "Same-Day" Access To Newly-Filed Civil Complaints.

The United States Supreme Court has not recognized a general First Amendment guarantee of access to judicial records in civil cases. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *see also Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (declining to decide whether First Amendment right of public access applies to civil judicial records). Instead, the Court has recognized only a rebuttable *common law* right of access to judicial records, *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597 (1978)[3], and has affirmed that, "to the extent that courthouse [civil] records could serve as a

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[3] Notably, the federal common law right of access only attaches to "judicial documents," with most courts holding that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *see also Anderson v. Cryovac, Inc*., 805 F.2d 1, 13 (1st Cir. 1986). Before pleadings and documents become part of a dispositive motion, for example, the presumptive right of access does not apply. *See In re Midland Nat'l Life Ins. Co.*, --- F.3d ----, 2012 WL 3024192, at *2 (9th Cir. July 25, 2012).

In any event, the scope of the federal common-law right of access is immaterial in this appeal because CNS filed suit under 42 U.S.C. § 1983, which does not "incorporat[e] federal common law into its scope." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662-63 (9th Cir. 1989).

source of public information, access to that source customarily is subject to the control of the trial court." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984).

Most federal circuit courts recognize a limited or "qualified" First Amendment right of access to civil judicial documents, but that right "has been extended only to particular judicial records and documents." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004); *see also United States v. Bus. of the Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (distinguishing between the right to access judicial proceedings and the right to inspect and copy judicial records). To determine which documents are entitled to First Amendment protection, most courts use the "experience and logic" test articulated in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986), by asking (1) whether the document is one which has been historically open to inspection by the press and public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question. *Id.* at 8; *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012) (applying the *Press-Enterprise* test).

In applying this test, most federal appellate courts recognize "a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication," but *decline* to extend this right to "materials that are neither used at

trial nor submitted as a basis for adjudication." *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal.4th 1178, 1208 n.25 (1999) (summarizing federal cases). This is because "there is no right of public access to prejudgment records in civil cases." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1334 & 1336 (D.C. Cir. 1985) (Scalia, J.); 1342 n.3 (Wright, J., concurring in part and dissenting in part).[4]

As in the federal system, it similarly is unsettled whether California courts would recognize a First Amendment right of immediate access to civil judicial records. *See Alvarez v. Superior Court*, 154 Cal.App.4th 642, 654 (2007) ("Courts in this state are divided on the question."). So far, California courts have held that the First Amendment right of access applies only to documents that both are "filed in court" *and* "used at trial or submitted as a basis for adjudication." *Savaglio v. Wal-Mart Stores, Inc*., 149 Cal.App.4th 588, 596 (2007). Under this standard, it is dubious that a First Amendment right of access attaches to newly-filed complaints

[4] To support its argument that the district court "plainly erred" by abstaining from deciding the merits of its claims, CNS resorts to a Texas district court decision where it obtained the kind of preliminary injunctive relief it seeks here. *Courthouse News Serv. v. Jackson*, No. 09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009). However, the defendant in that case *agreed* with CNS's claim "that there is a [First Amendment] right of access to newly-filed petitions in civil cases," *id.* at *4, a concession that goes beyond the extant First Amendment case law. It is for this reason that another district court in Texas already has held that "*Courthouse News* does not establish that access to court records and documents is guaranteed under the First Amendment." *Sullo & Bobbitt, PLLC v. Abbott*, No. 11-1926, 2012 U.S. Dist. LEXIS 95223, at *47 (N.D. Tex. July 10, 2012).

that can remain inactive in a clerk's office for 65 days or perhaps longer. *See Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 89-90, 103 (2007) (despite "the importance of a complaint in framing the claims and issues presented in civil litigation," "pleadings, including complaints, are not typically evidentiary matters that are submitted to a jury in adjudicating a controversy").

B. California Law Recognizes A Right Of "Reasonable Access" To Court Documents Independent Of The First Amendment.

While federal and state courts grapple with the reach of the First Amendment, California lawmakers have stepped into the breach by creating a unique body of state law that requires "reasonable access" to civil documents filed with a state court.

1. California Government Code § 68150.

In 1994, the California Legislature enacted Government Code section 68150 ("Section 68150"), which authorized superior courts to maintain court records in electronic format. 1994 Cal. Legis. Serv. Ch. 1030, § 1. As most recently amended in 2010, Section 68150(*l*) recognizes a right of "reasonable access" to court records by providing that electronic court records "shall be made reasonably accessible to all members of the public for viewing and duplication as the paper records would have been accessible." Cal. Gov't Code § 68150(l) (emphasis added). The right of "reasonable access" created by Section 68150 extends to documents only after they have been "filed . . . in the case folder, but if no case

folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created." *Id.* § 68151(a)(1); *see also* Cal. Civ. Proc. Code § 1904 (defining "judicial record").

2. CNS Unsuccessfully Sponsored SB 326, A Bill To Amend The California Government Code To Require "Same-Day Access" To Newly-Filed Civil Complaints.

The California Legislature did not define the term "reasonable access" as used in Section 68150(*l*). CNS sought to fill this definitional gap in February 2011 by sponsoring a "same-day access" bill, known as Senate Bill 326. SER 11. The authors of SB 326 recognized that Section 68150 "provides the public with reasonable access to court records," but that the term "'reasonable access' is not defined under existing law." SER 12. Accordingly, the authors proposed to augment the Government Code by requiring the Judicial Council to adopt a Rule of Court requiring courts to provide "same-day access to case-initiating civil and criminal court records, at no cost to the requester, for viewing at the courthouse." SER 6-7, 8, 14 (emphasis omitted).

The Judicial Council of California vigorously opposed passage of SB 326, explaining to legislators that "same-day access" "would be completely unworkable for the courts." SER 26. Many courts are unable to meet the same-day standard "because they must complete basic case processing tasks before they release the records to the public in order to ensure that they do not release confidential

information, that the filing is valid …, and to have sufficient information such that the court can protect the accuracy and integrity of the record prior to its release." SER 27. The Judicial Council warned that to comply with a same-day standard, "courts would need to hire significantly more staff at a substantial cost." *Id.*

SB 326 has been held by the California Assembly Appropriations Committee since September 2011. It remains there today. SER 24.

3. California Rules Of Court 2.500(A) And 2.503(A).

In its 2010 amendments to Section 68150, the Legislature directed the Judicial Council to "adopt rules to establish the standards or guidelines for the creation, maintenance, reproduction, or preservation of court records . . . ." Cal. Gov't Code § 68150(c). The Judicial Council complied with this directive by adopting Title 2, Division 4 of the Rules of Court relating to maintenance of and access to trial court records. As relevant here, Rule of Court 2.400(a) provides that, "[u]nless otherwise provided by these rules or ordered by the court, court records may only be inspected by the public in the office of the clerk." Cal. R. Ct. 2.400(a). The Rules of Court further acknowledge that "[u]nless confidentiality is required by law, court records are presumed to be open," Cal. R. Ct. 2.550(c), and that the public has a right of "reasonable access" to them. Cal. Rs. Ct. 2.500(a), 2.503(a).

Like Section 68150, Rules 2.500 and 2.503 do not define the term "reasonable access." The Advisory Committee comments to these rules do not mention the First Amendment. The Committee notes explain that Rule 2.500 takes into account "the limited resources currently available in the trial courts;" balances the right of access against "the privacy of individuals involved in litigation"; and can "be modified to provide greater electronic access as the courts' technical capabilities improve and with the knowledge gained from the experience of the courts in providing electronic access under these rules." Cal. R. Ct. 2.500 advisory committee's cmt.[5]

4. Article I § 3(b) Of The California Constitution.

On November 3, 2004, the People of the State of California enacted Proposition 59, which enshrines in the California Constitution a right of access to government documents. Cal. Const. art I, § 3(b); *see generally Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal.4th 278, 288 (2007) (the right of "access to information concerning the conduct of the people's business" now is "enshrined in the state Constitution"). Article I section 3(b) governs any proceeding to determine the extent of "reasonable access" pursuant to Section 68150(*l*) and Rules 2.500 and 2.503. In particular, these provisions must be

[5] The Advisory Committee's notes speak of First Amendment standards only with respect to whether, and under what circumstances, a court record may be *sealed* by affirmative order of a superior court judge. *See* Cal. R. Ct. 2.550(a)(1); Cal. R. Ct. 2.550 advisory committee's cmt.

construed consistently with the constitutional right of "access to information concerning the conduct of the people's business," and the constitutional mandate that "the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, § 3(b)(1). Section 68150(*l*) and Rules 2.500 and 2.503 must also "be broadly construed" if they "further[] the people's right of access, and narrowly construed if [they limit] the right of access." *Id.* art. I, § 3(b)(2).

II. THE DISTRICT COURT PROPERLY ABSTAINED UNDER *PULLMAN*.

A. The *Pullman* Doctrine Promotes Comity And Avoids Unnecessary Constitutional Decision-Making.

Even though federal courts have "a virtually unflagging obligation" to exercise their subject matter jurisdiction, *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976), "'virtually' is not 'absolutely.'" *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003). Federal courts "may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

The oldest and most established of these "exceptional circumstances" arises under the *Pullman* doctrine, which takes its name from *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention recognizes that the "[p]roper exercise of federal jurisdiction requires that controversies involving

unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions." *City of Meridian v. S. Bell Tel. & Tel. Co*., 358 U.S. 639, 640 (1959). The doctrine honors principles of comity and federalism by permitting postponement of the exercise of federal jurisdiction when "a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law," *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 189 (1959), and by "avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." *Martin v. Creasy*, 360 U.S. 219, 224 (1959).

In the Ninth Circuit, abstention is appropriate under *Pullman* where three conditions are satisfied: (1) there are sensitive issues of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open, (2) constitutional adjudication could be avoided by a state ruling, and (3) resolution of the state law issue is uncertain. *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010). The district court correctly found all three conditions were satisfied.

B. CNS's Lawsuit Touches Upon Sensitive Areas Of State Sovereignty.

1. Lawsuits Challenging The Administrative Operations Of State Courts Implicate Important Social Policies Of State Concern.

Pullman's "'sensitive social policy' prong . . . recognizes that abstention protects state sovereignty over matters of local concern, out of considerations of federalism, and out of 'scrupulous regard for the rightful independence of state governments.'" *Almodovar*, 832 F.2d at 1140 (citation omitted). CNS's complaint satisfies this element for a number of independent reasons.

First, CNS's complaint threatens to interfere with the administration of court operations by mandating that VSC guarantee "same-day access" to *every* new unlimited civil complaint and that VSC judges conduct case-by-case hearings when same-day access cannot be achieved. This Court twice has concluded that administration of the California judicial system is a "sensitive state activit[y]." *E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1124 (9th Cir. 2012) (quoting *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992)). The other Courts of Appeals are in unanimous agreement that the internal working of a state court system is a sensitive area of state activity that raises heightened comity concerns where federal intermeddling is requested. *E.g.*, *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006); *Pompey v. Broward Cnty.*, 95 F.3d 1543, 1548-49 (11th Cir. 1996); *Ballard v.*

Wilson, 856 F.2d 1568, 1570 (5th Cir. 1988); *Ad Hoc Comm. on Jud. Admin. v. Mass.*, 488 F.2d 1241, 1245-46 (1st Cir. 1973).

Second, the activities of California's lawmakers demonstrate that the right of reasonable access to court documents is itself an issue of important state concern. As noted above, the California Legislature first recognized the right of "reasonable access" to court records in 1994, and has amended these provisions as recently as 2010. In addition, the Legislature currently is grappling with the precise issue presented by this case through its consideration of SB 326.[6] Moreover, the People of the State of California enacted Article I Section 3(b) in 2004, while the Judicial Council adopted new Rules of Court to govern the management of records in trial courts in 2010. *See* Cal. Rs. Ct. 10.850-10.856.

The State's active involvement with the issue of access to documents filed in state court supports the district court's determination that CNS's lawsuit touches on sensitive areas of state policy. *See Richardson v. Koshiba*, 693 F.2d 911, 916 (9th Cir. 1982) ("The fact that Hawaii amended its constitution to provide for a merit selection system less than four years ago further demonstrates that this is a matter of significant local concern."); *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978) (finding abstention in light of recent statutory enactments;

[6] The fact that SB 326 remains in committee does not, as CNS suggests, mean that the Legislature chooses not to grapple with the issue of same-day access. (ECF No. 7 at 27 n.8.) To the contrary, it means that the Legislature has yet to reach consensus as to whether providing "same-day access" is wise policy.

"California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation").

Third, CNS's insistence that VSC guarantee "same-day access" to new complaints must be viewed in the context of the larger budgetary crisis facing California's courts. VSC's budget alone has shrunk by more than $13 million over the past three years; its deficit should exceed $12 million in 2012; and its staffing levels and court business hours have been substantially reduced. SER 110-113. "[M]ost" California courts could not comply with a same-day access requirement "using current court resources without diverting staff from other mandated duties." Assembly Comm. On Appropriations, Comm. Report For 2011 California Senate Bill No. 326 (August 25, 2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0301-0350/sb_326_cfa_20110824_162046_asm_comm.html, last viewed July 24, 2012; SER 27.

"Federalism concerns are heightened when … a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Horne v. Flores*, 557 U.S. 433, 448 (2009); *see also Eu*, 979 F.2d at 710 ("The people of the State of California, through their [system of] elected representatives, are entitled in our system of federalism to decide how much of

their money to put into courts, as well as the other activities in which they choose to have their state government participate.") (Kleinfeld, J., concurring).

Fourth, CNS's lawsuit cannot be viewed in isolation as "just" affecting the operations of the VSC. As it has done with the opinion it procured in *Courthouse News Service v. Jackson*, 2009 WL 2163609, CNS undoubtedly seeks to use a ruling in this case to compel other superior courts also to guarantee "same-day access" to newly-filed civil complaints and to case-by-case hearings whenever a court clerk fails on that guarantee.[7] As the Third Circuit explained in analogous circumstances, the first *Pullman* factor's considerations of comity plainly are implicated where, as here, the plaintiff seeks federal interference in the internal operations of a state court. *Hughes v. Lipscher*, 906 F.2d 961, 967 (3d Cir. 1990). For at least these reasons, the district court properly found that CNS's lawsuit satisfied the first *Pullman* factor.

2. Cases Excusing Abstention In Freedom Of Expression Lawsuits Are Inapposite.

Citing *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003), *Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co.*, 890

[7] At present, CNS's request for same-day access is limited to unlimited civil complaints. Yet if a First Amendment right to unlimited civil complaints is established, it is difficult to imagine why that right would not extend to criminal indictments or informations (*see, e.g.*, *Sullo & Bobbitt*, 2012 U.S. Dist. LEXIS 95223 at *2), limited civil complaints, and other introductory pleadings. If anything, therefore, the anticipated disruption threatened by CNS's lawsuit is greater than contemplated in this brief.

F.2d 184, 191 (9th Cir. 1989), and related cases, CNS argues that *Pullman* abstention "is 'almost never appropriate in first amendment cases'" (ECF No. 7 at 17), because a refusal to rule on the merits of CNS's motion for preliminary injunction results "in the suppression of free speech that is meant to be protected by the Constitution." (*Id.* at 25 n.7.) But that general principle has no application here for several related reasons.

First, this is not a "free expression" case, but an "access to information" case, a distinction federal courts repeatedly recognize. *E.g.*, *Nixon*, 435 U.S. at 608-09 ("[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes . . . must be made available for copying."); *Levine v. U.S. Dist. Court*, 764 F.2d 590, 594 (9th Cir. 1985) (distinguishing between the media's right to gather information and the right of free expression).

This distinction is important because, contrary to CNS's assertion, an alleged restriction on access to information is *not* tantamount to suppression of free speech regarding that information, once it is obtained. For example, in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), the Supreme Court rejected the argument that a California statute prohibiting the release of an arrestee's information for commercial purposes

abridges the right to engage in speech about that information. It held that "the section in question is not an abridgment of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department." *Id.* at 40. The Court explained, "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.* Rather, the Court found, "what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment." *Id.*

More pertinent to the facts here, the court in *Sullo & Bobbitt*, 2012 U.S. Dist. LEXIS 95223, at *35, held that a plaintiff who sued under the First Amendment to enforce his purported right to access court documents failed to invoke the First Amendment's right to commercial free speech. As the court explained, there is a fundamental difference between the right to communicate information that has been obtained, on the one hand, and the right to access government information on demand, on the other. *Id.*

CNS cannot claim that VSC suppressed a right of free expression to report on new complaints merely because VSC may have delayed in providing access to them. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (government's refusal to validate passports to Cuba "render[ed] less than wholly free the flow of information

concerning that country," but did not violate the First Amendment because "[t]he right to speak and publish does not carry with it the unrestrained right to gather information"). CNS's reliance on cases refusing to abstain from deciding free expression claims fails accordingly.

Second, even if this was a First Amendment expression case, the preference against abstention is *not* applicable where the danger of chilling protected speech is absent. *Almodovar*, 832 F.2d at 1140 ("[T]here is no absolute rule against abstention in first amendment cases. The fears of chill that justify our preference against abstention in first amendment cases are not present in this instance.").

In First Amendment parlance, "chilling" occurs when a government actor takes "regulatory, proscriptive, or compulsory" action that punishes or threatens to punish protected speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In this case, VSC neither has punished nor sought to punish CNS for doing anything. To the contrary, VSC acknowledges that CNS has a right of reasonable access to the court's files, and has made the processing of newly-filed complaints its "highest priority." Because CNS has not identified "an inhibiting or constrictive impact on First Amendment activity" arising "from the present or future exercise, or threatened exercise, of coercive power," CNS is not entitled to complain about "chilling." *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1052 (D.C. Cir. 1978); *L.A. Police Dep't.*, 528 U.S. at 41-42 (the fact that a law is

"nothing but a restriction upon access to government information . . . eliminates any 'chill' upon speech that would allow a plaintiff to complain about the application of the statute") (Scalia, J., concurring); *Am. Family Ass'n Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1124 (9th Cir. 2002) ("[W]hen the challenged government action is neither regulatory, proscriptive or compulsory, alleging a subjective chilling effect on free exercise rights is not sufficient to constitute a substantial burden.").[8]

Third, this Court has applied the presumption against abstention only where the "First Amendment questions involved activities more clearly within the protections of the First Amendment than this issue." *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 867-68 (C.D. Cal. 2005), *aff'd in relevant part by* 447 F.3d 673 (9th Cir. 2006). In *Smelt*, a same-sex couple argued that their First Amendment free expression rights were violated by the federal Defense of Marriage Act. 374 F. Supp. 2d at 867. The district court abstained under *Pullman*, concluding that

[8] None of the cases cited by CNS suggest the same "chilling" considerations that warrant a presumption against abstention in free expression cases should apply here. In the two appellate cases CNS cites regarding press access to court proceedings, the courts declined to apply *Pullman* abstention because there was no unsettled issue of state law that could avoid a constitutional ruling. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) ("The most important difference between this case and one in which *Pullman* abstention would be appropriate is that … there is no applicable state statute."); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 322 (1st Cir. 1992) ("No uncertainty surrounds the meaning of Rule 23(c)'s closure provision."). As shown *infra* in Part II(D), the same cannot be said here.

marriage is a sensitive policy issue particularly within the province of a state and that, notwithstanding the plaintiffs' free expression claim, abstention was appropriate because "[i]t is not readily apparent obtaining a marriage license is protected First Amendment activity." *Id.* This Court affirmed, holding that "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves" than the area of marriage. *Smelt*, 447 F.3d at 681.

As in *Smelt*, it is far from clear that the First Amendment guarantees same-day access to unlimited civil complaints. Indeed, as shown *supra*, both federal and California courts have declined to apply First Amendment protection to civil documents that, like complaints, are not used at trial or submitted as a basis for adjudication.

Finally, and in any event, CNS grossly overstates the law by suggesting abstention always is inappropriate in cases involving the chilling of a plaintiff's free expression rights. Indeed, the Supreme Court frequently has applied *Pullman* abstention in cases involving free expression claims under the First Amendment.

For example, in *Babbitt v. United Farm Workers National Union*, 442 U. S. 289 (1979), the Supreme Court was asked to determine whether the criminal penalty provisions of Arizona's Agricultural Relations Act were unconstitutionally overbroad in violation of the First Amendment. The Court abstained from

deciding the question because the statute had not yet been construed by Arizona's courts, and could be narrowly interpreted to avoid First Amendment infirmities, explaining that "we think the Arizona courts should be 'afforded a reasonable opportunity to pass upon' the section under review." *Id.* at 308 (citation omitted).

Similarly, in *Harrison v. NAACP*, 360 U.S. 167 (1959), the Supreme Court was asked to decide whether a Virginia state statute violated the First Amendment rights of free speech and access to the courts by requiring supporters of racial integration to register with the Virginia Corporations Commission. *Id.* at 171-73. Citing to *Pullman* and other cases, the Court explained that "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Id.* at 176. The Court applied this principle to abstain from ruling on the subject statutes so that they could first be construed by the state courts. *Id.* at 178.

In short, *Babbitt, Harrison*, and analogous circuit court authority[9] support abstention here, even if VSC's alleged refusal to guarantee "same-day access" to

[9] *E.g.*, *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 657 (5th Cir. 2002) (abstaining under *Pullman* from deciding First Amendment challenge to Texas State Bar Act); *Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 328-31 (6th Cir. 1998) (abstaining under *Pullman* from deciding First Amendment challenge to a state injunction against abortion protesting); *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 963 (5th Cir. 1993) (district court should have abstained under *Pullman* from deciding whether "threatened investigation violated the church's First Amendment associational and religious freedoms").

newly-filed civil complaints somehow chills CNS's right to free expression. The right of access CNS invokes could be vindicated in a single state-court proceeding without even reaching the novel First Amendment access issues implicated in this case. *See* Cal. Civ. Proc. Code § 1085; Part III(C)(2), *infra.*

C. CNS's Claim Could Be Narrowed Or Mooted By An Interpretation Of California's "Reasonable Access" Laws.

The second *Pullman* factor asks whether the plaintiff's complaint poses a federal constitutional question that could be mooted or narrowed by a definitive ruling on an issue of state law. *Spoklie v. Mont.*, 411 F.3d 1051, 1055 (9th Cir. 2005). This aspect of *Pullman* recognizes that the "[p]roper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions." *Meridian*, 358 U.S. at 640-41. The state law question need not eliminate the need to decide the federal constitutional question. Instead, "it is enough that the state court determination may obviate, in whole or in part, or alter the nature of the federal constitutional questions." *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 379 (9th Cir. 1983).

1. Interpretation Of California's Right Of "Reasonable Access" Could Obviate Or Narrow CNS's First Amendment Access Claim.

The second *Pullman* factor is satisfied easily here: A ruling on CNS's claim, that the First Amendment somehow guarantees "same-day access" to newly-

filed civil complaints, could be obviated or at least narrowed by a state court ruling as to the scope of the right of "reasonable access" recognized in California law. *See Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 84-85 (1975) (*Pullman* abstention appropriate where state law issue turns on the "unsettled relationship between the state constitution and a statute"); *Reetz v. Bozanich*, 397 U. S. 82, 87 (1970) (*Pullman* abstention appropriate when the "the nub of the whole controversy may be the state constitution"). Indeed, abstention is "particularly appropriate" here because, as shown above, the relevant state provisions implicate a state constitutional provision and state statute that "differ[] significantly" from the First Amendment. *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 806 (9th Cir. 2001).

2. CNS's "Mirror Image" Argument Fails Because There Are No Federal Constitutional Counterparts To California's Specialized Access Provisions.

Citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984), *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976), and this Court's decision in *Pue v. Sillas*, 632 F.2d 74, 79-81 (9th Cir. 1980), CNS notes that the second *Pullman* factor cannot be satisfied when the state law provision in question mirrors federal law. (ECF No. 7 at 29-32.) CNS then invokes the California Supreme Court's decision in *NBC Subsidiary*, 20 Cal. 4th at 1208 n.25, to suggest

that Section 68150 and Rule of Court 2.550 "mirror" the First Amendment because they must be construed consistently with it. (ECF No. 7 at 30.)

Rule of Court 2.550, however, does not mention the right of "reasonable access" to court documents; it merely prescribes the findings judges must make before sealing judicial records. Moreover, CNS's argument fails to even mention Article I, section 3(b) or Rules of Court 2.500 and 2.503, let alone explain how these key provisions "mirror" the First Amendment. Put simply, this is not a "mirror image" case. The rule typically applies in due process and equal protection cases where the defendant invokes a state constitutional provision that is the same as—or "mirrors"—its federal counterpart; if *Pullman* applied in that circumstance "abstention would be necessary, or at least within the power of the district judge, in nearly every civil rights action." *Stephens v. Tielsch*, 502 F.2d 1360, 1362 (9th Cir. 1974).

Yet the rule does *not* apply, and abstention is appropriate, in cases requiring interpretation of a "specialized state constitutional provision," *Columbia Basin*, 268 F.3d at 806 (citation omitted), or "an integrated scheme of related [state] constitutional provisions, statutes, and regulations" that lacks a federal counterpart. *Moore*, 420 U.S. at 84 n.8.

This case requires interpretation of an integrated scheme of state-law provisions, including Article I section 3(b)—a specialized state constitutional

provision—as well as Section 68150 and Rules 2.500 and 2.503.[10] These provisions do not mirror *anything* in the federal Constitution, let alone the First Amendment.[11] *See Alvarez*, 154 Cal.App.4th at 656-57 (considering whether Article I, section 3(b) created a right of access to post-indictment grand jury transcripts only after determining the First Amendment right of access did not apply). CNS's "mirror argument" fails accordingly.

CNS' reliance on *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal.4th 1178 (1999), to support its "mirror image" argument (ECF No. 7 at 30), is equally misplaced for several reasons.

First, *NBC Subsidiary* held only that its interpretation of California's "open courtroom" statute (Cal. Civ. Proc. Code § 124)—a statute not at issue here—was "informed by" the First Amendment and must be construed "in a fashion that

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[10] For purposes of abstention, it is irrelevant that CNS neglected to predicate its Complaint on California's "reasonable access" laws. *See Pustell v. Lynn Pub. Schs.*, 18 F.3d 50, 53 n.5 (1st Cir. 1994) (holding a plaintiff "cannot avoid abstention by excluding crucial state law issues from their pleadings").

[11] A *different* section of the California Constitution recognizes the rights of free speech and free press. *See* Cal. Const. art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."). But even this provision would not qualify for "mirror image" treatment under *Pullman* because it is broader and more protective than the First Amendment free speech clause. *L.A. Alliance for Survival v. City of L.A.*, 22 Cal.4th 352, 366-67 (2000). When a state constitutional provision mirrors a federal counterpart, abstention is appropriate if the state provision provides greater protection than exists under the United States Constitution. *Fields v. Rockdale Cnty. Ga.*, 785 F.2d 1558, 1561 (11th Cir. 1986).

avoids rendering its application unconstitutional." 20 Cal.4th at 1216; *see also id.* at 1181. *NBC Subsidiary*'s holding regarding open courtrooms has *nothing* to do with state laws requiring "reasonable access" to court documents.

Second, the Supreme Court's 1999 opinion could not have interpreted Article I, section 3(b) or Rules 2.500 and 2.503, which were enacted five and nine years (respectively) *after* the Court decided *NBC Subsidiary*.

Third, CNS proves too much by arguing that *Pullman* abstention is inappropriate whenever state laws must be construed consistently with the federal Constitution. Indeed, CNS's argument would negate the *Pullman* doctrine in its entirety, inasmuch as the Supremacy Clause requires that *all* state laws are subordinate to, and must not violate, the federal Constitution. U.S. Const. art. VI, cl. 2.

The mere fact that state courts are obligated to construe state and local law in accordance with federal constitutional principles does not, by itself, warrant rejection of *Pullman* abstention. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972) ("We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act and the constraints of the United States Constitution. But we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly

modify the federal questions appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations that we have found compelling in prior decisions.").

Under analogous circumstances, this Court consistently has held that abstention is appropriate. For example, in *Manney v. Cabell*, 654 F.2d 1280 (9th Cir. 1980), the plaintiffs filed a class action under 42 U.S.C. § 1983, challenging the conditions of confinement at a juvenile detention facility under the Eighth Amendment's prohibition against cruel and unusual punishment. On appeal, the defendant argued for *Pullman* abstention, noting that state statutes required the state to provide a juvenile with custody and care "'nearly as possible equivalent to that which should have been given by his parents.'" *Id.* at 1283 (citing Cal. Welf. & Inst. Code §§ 202, 851). As in this case, there was no question that the state statutes had to be interpreted consistently with the Eighth Amendment. Critically, however, the standard expressed in the state law could "be interpreted to require that conditions at juvenile halls be more favorable to the juvenile than the minimum standards guaranteed by the federal constitution." *Id.* at 1284. The second *Pullman* factor therefore was satisfied because "[a] review by the California courts of the conditions of confinement at CJH under the statutory standards could well obviate the need for a constitutional adjudication of the conditions of confinement." *Id.*

As in *Manney*, there is no dispute that Article I section 3(b), Section 68150(*l*), and Rules 2.500 and 2.503 must be interpreted consistently with the First Amendment. Yet it is possible that a California court will interpret the statute to provide greater or different rights than the First Amendment. If a California court were to decide the state-law mandate of "reasonable access" created a guarantee of "same day access" to newly-filed civil complaints, CNS will obtain all the relief it seeks without a federal decision on its First Amendment claims. The second *Pullman* factor is, accordingly, satisfied.

D. The Proper Interpretation Of State Law Is In Doubt.

The third *Pullman* factor—that the state law issue must be in doubt—is met when the state law "is 'susceptible' of an interpretation that would avoid or modify the federal constitutional question." *Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1177 (9th Cir 1983) (citation omitted).

The district court correctly concluded that state law is uncertain. Article I section 3(b), Section 68150, and Rules of Court 2.500 and 2.503 are silent as to whether the right of "reasonable access" creates a guarantee of "same-day access" to newly-filed complaints. These authorities do not facially require same-day access, but do not expressly prohibit same-day access, either, which is why CNS argued for passage of SB 326. SER 12. "[I]f reasonable access were defined to mean 'same day access,' this would avoid the necessity of this Court deciding the

federal constitutional issues, a determination that may be premature at this time." ER 9.

CNS contends the third *Pullman* factor is not satisfied because the California Supreme Court provided the "general contours of the issue" in *NBC Subsidiary*. (ECF No. 7 at 34.) However, as previously explained, *NBC Subsidiary* did not mention or cite Article I section 3(b), Section 68150, or Rules 2.500 or 2.503. Similarly, *NBC Subsidiary* did not describe the "general contours" of a state-law right of "reasonable access" to court documents, let alone whether such a right might guarantee "same-day access" to newly-filed civil complaints.

In short, as the Sixth Circuit recognized in a slightly different context, just because "court clerks have denied [CNS] the relief it seeks does not mean that [California] law would not provide for such access were [CNS] to assert such a right in the [California] courts pursuant to the statutory provisions at issue, which it has not done." *Ky. Press Ass'n, Inc. v. Kentucky*, 454 F.3d 505, 509-10 (6th Cir. 2006). This Court should affirm the district court's abstention order accordingly.

III. THE DISTRICT COURT PROPERLY INVOKED THE DOCTRINE OF EQUITABLE ABSTENTION.

A. Federal Courts Have The Right And Obligation To Refrain From Exercising Equity Jurisdiction In Cases That Seek to Impose Ongoing Audits of State Courts.

The doctrine of equitable abstention derives from the inherent right of equity courts to "grant or deny relief upon performance of a condition which will

safeguard the public interest." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29 (1943); *see also New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) (finding the obligation to exercise federal jurisdiction does "not call into question the federal courts' discretion in determining whether to grant certain types of relief -- a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted").

Equitable abstention recognizes that "[a] federal court . . . is not the proper forum to press" general complaints about the way in which government goes about its business, *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983), because, "[u]nlike Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license and must always observe their limited judicial role." *Missouri v. Jenkins*, 515 U.S. 70, 112-13 (1995) (internal quotation marks and citations omitted) (O'Connor, J., concurring); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

In addition, the doctrine recognizes that when exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and

State administration of its own law." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Federal courts, which "subsist[] side by side with 50 state judicial, legislative, and executive branches," must give appropriate consideration "to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see also Allegheny Airlines, Inc. v. Pa. Pub. Util. Comm'n*, 465 F.2d 237, 243 (3d Cir. 1972) (noting the primary concern animating equitable abstention is the avoidance of "friction caused by interference with the orderly procedures and rules of state regulatory bodies") (emphasis omitted).

The doctrine of equitable abstention authorizes federal courts to abstain from exercising jurisdiction when the requested form of equitable relief "would *indirectly* accomplish the kind of interference that *Younger* and related cases sought to prevent," and when a federal lawsuit seeks "to impose an ongoing federal audit of state . . . proceedings." *E.T.*, 682 F.3d at 1123 (quotation marks and citations omitted). Hence, equitable abstention can be applied even when the interference does not "'target[] the conduct of a proceeding directly.'" *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 717 (5th Cir. 2012) (quoting *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002)).

For example, in *O'Shea v. Littleton*, 414 U.S. 488 (1974), the plaintiffs sought to enjoin state judges from discriminating against African Americans in

certain criminal court proceedings. *Id*. at 491-92. In holding that the district court should have abstained from hearing the class claims, the Supreme Court recognized that abstention doctrines are not limited to federal lawsuits that interfere with ongoing state proceedings, as was the case in *Younger v Harris*. The Court went beyond *Younger* to hold that "an injunction aimed at controlling or preventing the occurrence of specific events that *might* take place in the course of *future* state criminal trials" amounted to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." *Id.* at 500 (emphasis added). The Court further held abstention is appropriate to prevent federal courts from becoming monitors of state-court operations: "[M]onitoring of the operation of state court functions . . . is antipathetic to established principles of comity," and amounts to "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings," which would sharply conflict "with the principles of equitable restraint…." *Id.* at 501-02.

O'Shea's interference principles have been applied in other settings. In *Rizzo v. Goode*, for example, the Supreme Court held that a district court should have abstained from issuing an injunction requiring the City of Philadelphia's Police Department to "draft, for the court's approval, 'a comprehensive program for dealing adequately with civilian complaints,'" pursuant to court-mandated

"guidelines." *Id.* at 369-70. The Court explained that federalism principles apply to lawsuits against "the judicial branch of the state government" as well as against "those in charge of an executive branch of an agency of state or local governments," and held that "[w]hen it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts." *Id.* at 380; *see also Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976) ("the District Court was quite right in the first instance to have dismissed respondent's complaint. Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service").

The doctrine of equitable abstention as articulated in *O'Shea, Rizzo* and *Kelley* finds particular applicability when the requested relief "would entail heavy federal interference in such sensitive state activities as administration of the judicial system." *Eu*, 979 F.2d at 703. Indeed, "'[w]hen the state agency in question is a state court . . . the equitable restraint considerations appear to be nearly absolute.'" *E.T.*, 682 F.3d at 1125 (quoting *Parker v. Turner*, 626 F.2d 1, 7 (6th Cir. 1980)). In this context, the doctrine sustains "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law"; prevents issuance of injunctions "aimed at

controlling or preventing the occurrence of specific events that might take place in the course of future state" proceedings; and relieves federal courts from the obligation of enforcing injunctive relief orders through the continuous supervision of future state court proceedings, "a form of the monitoring of the operation of state court functions that is antipathetic to established principles of comity." *O'Shea*, 414 U.S. at 500-01.

B. CNS's Complaint Is Barred By The Doctrine Of Equitable Abstention.

The district court invoked the doctrine of equitable abstention because the relief sought by CNS impermissibly would interfere with court operations by requiring VSC to provide "same-day access" to all newly-filed civil complaints and by requiring VSC to conduct "judicial proceedings to evaluate the constitutionality of each delay." ER 7-8. The court further recognized that such an order could lead "to a significant reallocation of court services" that was "better left to elected representatives," rather than a district court. *Id.* The district court's decision should be affirmed for several reasons.

First, the remedy sought by CNS runs afoul of the "well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Rizzo*, 423 U.S. at 378-79. As the district court correctly found, ordering VSC to provide "same-day access" to unlimited civil complaints could lead "to a significant reallocation of court resources." ER 8.

VSC's Civil Clerk's Office operates under a heavy workload, with limited resources that continue to decrease as budgetary deficits increase. SER 50-52, 110-113. To satisfy an order compelling same-day access, VSC administrators would either be required to transfer CPAs from other departments to handle the workload, or find an additional source of funding. Such equitable relief, implicating the balance of budget priorities and state polices, is beyond the institutional competence of a federal court and constitutes an "abrasive and unmanageable intercession" in state court institutions. *O'Shea*, 414 U.S. at 504; *see also Ad Hoc Comm.*, 488 F.2d at 1246 ("While the state judiciary might appreciate additional resources, it would scarcely welcome the intermeddling with its administration which might follow.").

In addition and despite its claim to the contrary (ECF No. 7 at 35), CNS's proposed injunction would have required VSC's staff and judges to create a *new* hearing system—one that is not presently conducted in any court in the State of California—and to use the *substantive standards* enunciated in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982), to determine on a case-by-case basis whether its CPAs properly could deny "same-day access" to any particular newly-filed civil complaint. ER 73-74; *see also* ER 71 ¶ 33; SER 138.

It is for this reason that CNS's reliance (ECF No. 7 at 42), upon *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981), and the "dividing line" it supposedly

recognizes, is entirely misplaced. The Fifth Circuit in *Tarter* declined to abstain from those portions of a federal lawsuit seeking an "injunction requiring that all pro se motions be docketed and considered by the court." *Id.* at 1013-14. The order in *Tarter* did *not* attempt to prescribe the specific time at which those motions would be docketed, nor the standards by which such motions would be decided, and did not provide a basis for substantive review of that order in federal court.[12]

Apart from the fact that such a procedure would impose additional administrative burdens on already overworked CPAs, it surely will engender the precise type of access delays CNS claims to abhor. The district court properly abstained for this reason alone. *See Lawson v. Hill*, 368 F.3d 955, 960 (7th Cir. 2004) ("A particularly appealing case for withholding injunctive relief is … when an injunction is sought against the performance of public functions by the officials of another sovereign.").

Second, any failure by VSC's CPAs to provide same-day access to a particular newly-filed complaint, or by VSC's judges to conduct a "proper" access denial hearing, could subject VSC and its staff to contempt proceedings in federal

[12] In *E.T. v. Cantil-Sakauye*, this Court distinguished away CNS's other authority, *Los Angeles County Bar Association v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992), on similar grounds. *See* 682 F.3d at 1123-24 (noting *Eu* did *not* involve substantive review of any cases pending in Los Angeles Superior Court, but simply asked, on the basis of statistics, whether the number of judges in Los Angeles Superior Court should be increased).

court. This is the precise type of monitoring the equitable abstention doctrine was designed to prevent. *E.g.*, *O'Shea*, 414 U.S. at 501-02; *E.T.*, 682 F.3d at 1124; *McKusick v. City of Melbourne, Fla.*, 96 F.3d 478, 488 (11th Cir. 1996) (denying injunction that "would thrust the federal court into an unseemly, repetitive, quasi-systematic, supervisory role over administration of the state court injunction"); *31 Foster Children*, 329 F.3d at 1279 n.11 (noting "a case cannot be decided in a vacuum," and "potential enforcement difficulties" must be considered when deciding to abstain); *Wolfe*, 275 F.3d at 1268-69 (looking to interference occasioned by "enforcement" of decree); *Pompey*, 95 F.3d at 1550 ("If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt?"); *Hoover v. Wagner*, 47 F.3d 845, 851 (7th Cir. 1995) ("[W]ould that put the prosecutor, the judge, and, if there were a jury, the jury in contempt of the federal injunction?"); *Ballard*, 856 F.2d at 1570 (noting "a federal court ruling on the practices and procedures of the municipal court system . . . would require supervisory enforcement of the ruling by the federal courts" and "[t]his type of monitoring of state court procedures . . . offends principles of federalism").

CNS's legislative attempts to enact a "same-day access" statute underscore the propriety of the district court's abstention decision. The California Legislature, while still considering the issue, has not yet enacted a "same-day access" law in the

face of criticism from the Judicial Council of California that such a requirement would add $5-10 million in annual costs the Judicial Branch can ill afford. SER 27. The California Legislature is the appropriate body to determine how to pay for that additional cost, and whether the benefit of "same-day access" is worth it. The appropriate forum has not shifted to the federal courts merely because the CNS has not yet persuaded the Legislature of the righteousness of its business model.

C. CNS Has Not Demonstrated That The District Court Abused Its Discretion In Invoking Equitable Abstention.

CNS advances a number of arguments against equitable abstention in this case. None of them are persuasive.

1. Equitable Abstention Is Not Limited To Cases In Which The Federal Plaintiff Challenges The Merits Of State Court Proceedings.

CNS's first argument, that abstention is not available when a federal lawsuit "involves no consideration of the merits of any decision of any state court judge" (ECF No. 7 at 36-43), reflects a fundamental misunderstanding of the equitable abstention doctrine as applied by *O'Shea* and related cases. As explained above, the doctrine applies when litigants seek federal court injunctions to reform the institutions of state government. The doctrine is *not* limited to cases in which federal litigants only seek to affect the merits or outcome of present or future judicial proceedings. *E.g.*, *Rizzo*, 423 U.S. at 378-79 (policy regarding investigation of community complaints); *Kelley*, 425 U.S. at 247-48 (police hair

length regulation); *Lyons*, 461 U.S. at 112-13 (police policy regarding choke holds); *Kaufman*, 466 F.3d at 86 (practice of assigning cases to appellate panels).

In arguing otherwise, CNS directs the Court to cases in which federal courts declined to abstain pursuant to the *Younger v. Harris* branch of federal abstention. (*E.g.*, ECF No. 7 at 37-38, 48). But these cases are clearly inapposite.

Younger abstention is limited to cases where federal relief would interfere with ongoing state judicial proceedings and the federal plaintiff has an opportunity to raise the federal claims in the state proceedings. *E.g.*, *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007). The cases upon which CNS relies declined to abstain under *Younger* either because the federal lawsuit did *not* interfere with ongoing state proceedings or because the federal plaintiffs had not been permitted to intervene or participate in those proceedings. *See, e.g.*, *Rivera-Puig*, 983 F.2d at 319 ("The *Younger* abstention doctrine does not permit abstention in the present case because the district court's ruling did not enjoin or interfere with any state proceeding."); *Sable Commc'ns*, 890 F.2d at 190 (declining to abstain under *Younger* because a decision could not prejudice the conduct of the state proceeding).

Critically, however, the prudential limitations imposed upon *Younger* abstention simply do *not* apply in *O'Shea* equitable abstention cases. Indeed,

O'Shea's significance as a precedent stems from its holding that the equitable abstention doctrine is *not* limited to federal lawsuits that interfere with *ongoing* state proceedings, as was the case in *Younger*. The Court went beyond *Younger* to hold that, "an injunction aimed at controlling or preventing the occurrence of specific events that *might* take place in the course of *future* state criminal trials" amounted to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." 414 U.S. at 500 (emphasis added).

In short, CNS misstates the rule to avoid its consequences. For purposes of *O'Shea*, the issue is *not* whether a federal lawsuit interferes with "the merits of any decision of any state court judge," as CNS suggests. Instead, the issue is whether the remedy sought in a federal lawsuit amounts to "interference in such sensitive state activities as administration of the judicial system" and "would inevitably set up the precise basis for future intervention condemned in *O'Shea*." *E.T.*, 682 F.3d at 1124, 1125 (internal quotation marks, citations, and emphasis omitted). As explained above, CNS's proposed injunction suffers from both vices.

2. *Gerstein v. Pugh* Does Not Apply To This Case.

Citing *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), CNS also argues that abstention is unnecessary where federal courts are asked to audit issues ancillary to the merits of the state court action to which it was not a party. (ECF No. 7 at 44-

45.) CNS's reliance on *Gerstein* is misplaced. The Supreme Court declined to abstain in *Gerstein* because the federal plaintiffs did not have an adequate remedy in state court. *Id.* at 108 n.9. It is for this reason that the Supreme Court has repeatedly explained that *Gerstein*'s holding is limited to cases in which the federal plaintiff has *no* opportunity to press its claims in state court. *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 436 n.14; *Moore v. Sims*, 442 U.S. 415, 431-32 (1979); *Juidice v. Vail*, 430 U.S. 327, 336-37 (1977); *see also Wallace v. Kern*, 520 F.2d 400, 406-07 (2d Cir. 1975) ("[B]oth the majority and concurring opinions emphasized the unavailability of state remedies."); *Pompey*, 95 F.3d at 1550-51 ("*Gerstein* is distinguishable from this case. The permissibility of federal equitable relief in *Gerstein* was based upon the absence of an adequate state forum for raising the issue.").[13]

The same cannot be said here, because CNS can institute proceedings in state court to vindicate its claimed access rights. In particular, CNS has the right to file a petition for writ of mandate pursuant to California Code of Civil Procedure section 1085 to compel VSC to comply with the purported obligation to guarantee

[13] Plaintiffs' cited authorities prove the point, as the plaintiffs in those cases could not obtain a ruling in state court. *See FOCUS v. Allegheny Cnty. Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996); *Habich v. City of Dearborn*, 331 F.3d 524, 530 (6th Cir. 2003); *Pellegrino*, 380 F.3d at 101; *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 328 (4th Cir. 1991); *Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 383 (N.D. Ind. 1992); *Conn. Magazine v. Moraghan*, 676 F. Supp. 38, 41 (D. Conn. 1987).

"same-day access" to newly-filed unlimited civil complaints. *See generally De Garmo v. Superior Court*, 1 Cal.2d 83, 86 (1934); *TrafficSchoolOnline, Inc. v. Superior Court*, 89 Cal.App.4th 222, 235-37 (2001).

3. Equitable Abstention Has Been Invoked In First Amendment Cases.

CNS and its amicus also suggest that federal courts have declined to apply *O'Shea* abstention in First Amendment access cases and that application here would have dire consequences for future cases. (ECF No. 7 at 47-48; ECF No. 15 at 5-9.) CNS's and its amicus's analysis of prior case law, and their premonition of future ramifications, both are off the mark.

First, the fundamental premise of the argument is incorrect. Federal courts have invoked in both *Younger* and *O'Shea* abstention in First Amendment cases. *E.g.*, *Younger*, 401 U.S. at 53; *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 429; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599 (1975); *Samuels v. Mackell*, 401 U.S. 66, 67 (1971); *McKusick*, 96 F.3d at 480-90; *Hoover*, 47 F.3d at 850-51; *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1516 (11th Cir. 1991).

Second, CNS and its amicus cannot credibly argue that abstention results in an outright denial of a federal forum. Supreme Court review of federal questions is *always* available. *See Henkel v. Bradshaw*, 483 F.2d 1386, 1390 (9th Cir. 1973) ("Henkel's claim … can be fully vindicated in one state proceeding, with the right

of appeal through the state courts and with the right to petition the United States Supreme Court for review of any federal question.").

Third, and more fundamentally, the decision in this case is not governed by *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), or *Delaware Coalition for Open Government, Inc. v. The Delaware Court of Chancery*, No. 11-01015 (D. Del. filed Oct. 25, 2011), as amicus suggests. A federal court ruling invalidating blanket state-court sealing orders is nowhere near as intrusive as an injunction that first mandates disclosure of new complaints under unrealistic deadlines, and then requires state courts to convene special proceedings whenever a newly-filed complaint makes it to the Media Bin one day late. What is more, an order that merely precludes a state court from imposing a blanket sealing policy would not effectively dictate state or local budget priorities in any way, a fundamental reason why *O'Shea* abstention is appropriate here.

Federal law presumes that state courts can and will safeguard federal constitutional rights. *Pennzoil Co. v. Texaco Inc.,* 481 U.S. 1, 15 (1987); *Hirsch v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995). And while federal courts might "appreciate the vote of confidence," the plaintiff's desire to litigate in federal court is not, of itself, a sufficient reason to avoid abstention. *Baffert v. Cal. Horse Racing Bd*., 332 F.3d 613, 619 (9th Cir. 2003). The district court's equitable abstention order should be affirmed accordingly.

CONCLUSION

For the foregoing reasons, the district court's order granting VSC's motion to dismiss and abstain should be affirmed.[14]

Dated: July 30, 2012.

Respectfully submitted,

Jones Day

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[14] VSC concurs with CNS's observation that *if* this Court were to reverse the district court's abstention decisions, the proper remedy is to remand to the district court for a decision on the merits. (ECF No. 7 at 48.) To be clear, for the reasons outlined in Part I(A) above, VSC does *not* concede that the First Amendment creates a right of "same-day access" to newly-filed unlimited civil complaints.

STATEMENT OF RELATED CASES

Defendant-Appellee is aware of no related cases pending before the Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,967 words.

Dated: July 30, 2012.

By: s/ Robert A. Naeve
Robert A. Naeve

Attorneys for Defendant-Appellee
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ADDENDUM

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Pursuant to Ninth Circuit Rule 28-2.7, VSC provides verbatim text of pertinent state-law constitutional, statutory and regulatory authorities cited in this brief.

Cal. Const. Art. I, § 3. Right to instruct representatives, petition and assembly; right of access to government information

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees,

and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

Cal. Civ. Proc. Code § 1085. Writ of mandate

(a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.

(b) The appellate division of the superior court may grant a writ of mandate directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of mandate directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

Cal. Gov't Code § 68150. Creation, maintenance and preservation of trial court records; application; Judicial Council to adopt rules; indexing of records; certified copies; disposal, storage and review

(a) Trial court records may be created, maintained, and preserved in any form or forms of communication or representation, including paper, optical, electronic, magnetic, micrographic, or photographic media or other technology, if the form or forms of representation or communication satisfy the rules adopted by the Judicial Council pursuant to subdivision (c), once those rules have been adopted. Until those rules are adopted, the court may continue to create, maintain, and preserve records according to the minimum standards or guidelines for the preservation and reproduction of the medium adopted by the American National Standards Institute or the Association for Information and Image Management.

(b) This section shall not apply to court reporters' transcripts or to specifications for electronic recordings made as the official record of oral proceedings. These records shall be governed by the California Rules of Court.

(c) The Judicial Council shall adopt rules to establish the standards or guidelines for the creation, maintenance, reproduction, or preservation of court records, including records that must be preserved permanently. The standards or guidelines shall reflect industry standards for each medium used, if those standards exist. The standards or guidelines shall ensure that court records are created and maintained in a manner that ensures accuracy and preserves the integrity of the records throughout their maintenance. They shall also ensure that the records are stored and preserved in a manner that will protect them against loss and ensure preservation for the required period of time. Standards and guidelines for the electronic creation, maintenance, and preservation of court records shall ensure that the public can access and reproduce records with at least the same amount of convenience as paper records previously provided.

(d) No additions, deletions, or changes shall be made to the content of court records, except as authorized by statute or the California Rules of Court.

(e) Court records shall be indexed for convenient access.

(f) A copy of a court record created, maintained, preserved, or reproduced according to subdivisions (a) and (c) shall be deemed an original court record and may be certified as a correct copy of the original record.

(g) Any notice, order, judgment, decree, decision, ruling, opinion, memorandum, warrant, certificate of service, or similar document issued by a trial court or by a judicial officer of a trial court may be signed, subscribed, or verified using a computer or other technology in accordance with procedures, standards, and guidelines established by the Judicial Council pursuant to this section. Notwithstanding any other provision of law, all notices, orders, judgments, decrees, decisions, rulings, opinions, memoranda, warrants, certificates of service, or similar documents that are signed, subscribed, or verified by computer or other technological means pursuant to this subdivision shall have the same validity, and the same legal force and effect, as paper documents signed, subscribed, or verified by a trial court or a judicial officer of the court.

(h) A court record created, maintained, preserved, or reproduced in accordance with subdivisions (a) and (c) shall be stored in a manner and in a place that reasonably ensures its preservation against loss, theft, defacement, or destruction for the prescribed retention period under Section 68152.

(i) A court record that was created, maintained, preserved, or reproduced in accordance with subdivisions (a) and (c) may be disposed of in accordance with the procedure under Section 68153, unless it is either of the following:

(1) A comprehensive historical and sample superior court record preserved for research under the California Rules of Court.

(2) A court record that is required to be preserved permanently.

(j) Instructions for access to data stored on a medium other than paper shall be documented.

(k) Each court shall conduct a periodic review of the media in which the court records are stored to ensure that the storage medium is not obsolete and that current technology is capable of accessing and reproducing the records. The court shall reproduce records before the expiration of their estimated lifespan for the medium in which they are stored according to the standards or guidelines established by the Judicial Council.

(l) Unless access is otherwise restricted by law, court records created, maintained, preserved, or reproduced under subdivisions (a) and (c) shall be made reasonably accessible to all members of the public for viewing and duplication as the paper records would have been accessible. Unless access is otherwise

restricted by law, court records maintained in electronic form shall be viewable at the court, regardless of whether they are also accessible remotely. Reasonable provision shall be made for duplicating the records at cost. Cost shall consist of all costs associated with duplicating the records as determined by the court.

Cal. R. Ct. 2.500. Statement of purpose

(a) Intent

The rules in this chapter are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests.

(b) Benefits of electronic access

Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of court records maintained in electronic form. Providing public access to trial court records that are maintained in electronic form may save the courts and the public time, money, and effort and encourage courts to be more efficient in their operations. Improved access to trial court records may also foster in the public a more comprehensive understanding of the trial court system.

(c) No creation of rights

The rules in this chapter are not intended to give the public a right of access to any record that they are not otherwise entitled to access. The rules do not create any right of access to records that are sealed by court order or confidential as a matter of law.

Cal. R. Ct. 2.503. Public access

(a) General right of access

All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or made confidential by law.

(b) Electronic access required to extent feasible

A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so:

(1) Registers of actions (as defined in Gov. Code, § 69845), calendars, and indexes in all cases; and

(2) All records in civil cases, except those listed in (c)(1)-(9).

(c) Courthouse electronic access only

A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only to the records governed by (b):

(1) Records in a proceeding under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;

(2) Records in a juvenile court proceeding;

(3) Records in a guardianship or conservatorship proceeding;

(4) Records in a mental health proceeding;

(5) Records in a criminal proceeding;

(6) Records in a civil harassment proceeding under Code of Civil Procedure section 527.6;

(7) Records in a workplace violence prevention proceeding under Code of Civil Procedure section 527.8;

(8) Records in a private postsecondary school violence prevention proceeding under Code of Civil Procedure section 527.85;

(9) Records in an elder or dependent adult abuse prevention proceeding under Welfare and Institutions Code section 15657.03; and

(10) Records in proceedings to compromise the claims of a minor or a person with a disability.

(d) "Feasible" defined

As used in this rule, the requirement that a court provide electronic access to its electronic records "to the extent it is feasible to do so" means that a court is required to provide electronic access to the extent it determines it has the resources and technical capacity to do so.

(e) Remote electronic access allowed in extraordinary criminal cases

Notwithstanding (c)(5), the presiding judge of the court, or a judge assigned by the presiding judge, may exercise discretion, subject to (e)(1), to permit electronic access by the public to all or a portion of the public court records in an individual criminal case if (1) the number of requests for access to documents in the case is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. An individualized determination must be made in each case in which such remote electronic access is provided.

(1) In exercising discretion under (e), the judge should consider the relevant factors, such as:

(A) The privacy interests of parties, victims, witnesses, and court personnel, and the ability of the court to redact sensitive personal information;

(B) The benefits to and burdens on the parties in allowing remote electronic access, including possible impacts on jury selection; and

(C) The burdens on the court in responding to an extraordinarily high number of requests for access to documents.

(2) The court should, to the extent feasible, redact the following information from records to which it allows remote access under (e): driver license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access. This subdivision does not apply to any document in the original court file; it applies only to documents that are available by remote electronic access.

(3) Five days' notice must be provided to the parties and the public before the court makes a determination to provide remote electronic access under this rule. Notice to the public may be accomplished by posting notice on the court's Web site. Any person may file comments with the court for consideration, but no hearing is required.

(4) The court's order permitting remote electronic access must specify which court records will be available by remote electronic access and what categories of information are to be redacted. The court is not required to make findings of fact. The court's order must be posted on the court's Web site and a copy sent to the Judicial Council.

(f) Access only on a case-by-case basis

The court may only grant electronic access to an electronic record when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to the court's electronic records of a calendar, register of actions, or index.

(g) Bulk distribution

The court may provide bulk distribution of only its electronic records of a calendar, register of actions, and index. "Bulk distribution" means distribution of all, or a significant subset, of the court's electronic records.

(h) Records that become inaccessible

If an electronic record to which the court has provided electronic access is made inaccessible to the public by court order or by operation of law, the court is not required to take action with respect to any copy of the record that was made by the public before the record became inaccessible.

(i) Off-site access

Courts should encourage availability of electronic access to court records at public off-site locations.

9th Circuit Case Number(s) 11-57187

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