U.S. Court of Appeals Docket No. 11-57187

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

On Appeal from a Decision of the United States District Court
for the Central District of California
Case No. CV11-08083 R
The Honorable Manuel Real

REPLY BRIEF OF APPELLANT COURTHOUSE NEWS SERVICE

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INTRODUCTION

In an appeal from an order abstaining from addressing the merits of the First Amendment issue, it is telling that Ventura Clerk Michael Planet devotes much of his Answering Brief ("AB") to misconstruing the merits of the First Amendment issue, the record and the relief Appellant Courthouse News seeks. In doing so, the Answering Brief confirms that under a proper reading of the law, record and relief sought, abstention under *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941) was "'inappropriate [because] First Amendment rights are at stake,'" *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (citation omitted), and there is no uncertain question of state law, while abstention under *O'Shea v. Littleton*, 414 U.S. 488 (1974), was also inappropriate because the relief sought would cause no "disruption" of any court proceedings. *Id.* at 501.

For these reasons, the Answering Brief seeks virtually unlimited discretion for a district court to abstain, unchecked by the confines of the doctrines it invokes or the limitations on consideration and construction of evidence on a motion under Federal Rule of Civil Procedure 12(b)(6) or, for that matter, 12(b)(1). But this ploy must fail. "Because there is no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked" – or where appropriate procedural rules are not followed – "the district court erred in abstaining." *Fireman's Fund Ins. v. Lodi*, 302 F.3d 928, 939 (9th Cir. 2002).

I.

THE ANSWERING BRIEF CANNOT BAR REVERSAL BY MISSTATING THE STANDARD OF REVIEW, RELIEF SOUGHT OR RECORD BELOW

In an attempt to save the ruling below, the Answering Brief points to the same evidence on which the district court erroneously relied, which was not filed in support of abstention and cannot be used to dispute the allegations in the complaint. Moreover, its mischaracterizations of the relief Courthouse News seeks here – and purported burdens it would impose – cannot be squared with the complaint itself, the language of the proposed injunction, or the unobtrusive relief Courthouse News obtained in the *Jackson* case (which the Answering Brief all but ignores). At bottom, the complaint seeks nothing more than what is already provided by a host of state and federal courts: access to a handful of new complaints at the end of the day they are filed. Under any standard of review, the ruling below must be reversed.

A. *O'Shea* Is A Form Of *Younger* Abstention, Which Is Reviewed De Novo

The Answering Brief cites no *O'Shea* cases to support its claim the standard of review is abuse of discretion. AB 12-13. That is because "the abuse of discretion standard is inappropriate" to "application of the *Younger* abstention doctrine," *Fresh Int'l Corp. v. Agric. Labor Rel. Bd.*, 805 F.2d 1353, 1356 n.2 (9th Cir. 1986), and *O'Shea* "applied … that abstention doctrine." *Pompey v. Broward County*, 95 F.3d 1543, 1547 (11th Cir. 1996); *accord, e.g.*, *Pulliam v. Allen*, 466

U.S. 522, 539 n.20 (1984) (*O'Shea* decided on "*Younger v. Harris* grounds").

It follows that this Circuit, which reviews de novo "[w]hether *Younger* abstention applies," *Fresh Int'l*, 805 F.2d at 1356, should review de novo whether the *O'Shea* form of *Younger* applies. *Joseph A. v. Ingram*, 275 F.3d 1253, 1266, 1271 (10th Cir. 2002) ("review[ing] de novo … application of the *Younger* abstention doctrine" based on *O'Shea*).[1]

B. Abstention Dismissals Are For Failure To State A Claim, And The Ventura Clerk's Evidence Must Be Disregarded

Appeals from abstention-based dismissals are "from a dismissal for failure to state a claim." *Kaufman v. Kaye*, 466 F.3d 83, 84 (2d Cir. 2006); *accord, e.g.*, *E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1122 n.1 (9th Cir. 2012).

It was thus "reversible error" for the court below to "consider matters outside the complaint" in dismissing. *Costen v. Pauline's Sportswear*, 391 F.2d 81, 84-85 (9th Cir. 1968) (quotation omitted). That is true under any standard of review. "An abuse of discretion occurs if the judge fails to apply the proper legal standard or ***to follow proper procedures*** in making the determination." *Boyes v.*

[1] The circuits "that apply an abuse of discretion standard have done so with little explanation." *Green v. Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc), *overruled on other grounds*, *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (en banc). Even in those circuits, a "'court necessarily abuses its discretion when it abstains outside the doctrine's strictures.'" *Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004) (citation omitted).

Shell Oil Prods., 199 F.3d 1260, 1265 (11th Cir. 2000) (reversing abstention).[2]

This Court also must disregard the declarations in the Supplemental Excerpts of Record ("SER") "disputing the truth of the allegations" in Courthouse News' complaint. AB 12 n.1. It must "take the factual allegations in [Courthouse News'] complaint as true," *E.T.*, 682 F.3d at 1122 n.1, "disregard[ing] facts that are not alleged on the face of the complaint or contained in documents attached to the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Rule 12(b)(1) does not change this (AB 12 n.1). Rule 12(b)(1) motions "may be facial or factual," *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), but the Ventura Clerk's October 20, 2011 motion to dismiss did not rely "'on extrinsic evidence'" but rather asserted a facial argument "'solely on the basis of the pleadings.'" *Id*. (citation omitted); Further Excerpts of Record ("FER") 45-76. His ***only*** declarations were filed October 31, 2011, "in support" of his opposition to the preliminary injunction motion, ER 125; SER 29, 45, 88, 109; FER 15-44, *cf.* AB 11, and neither he nor the district court advised Courthouse News of any intent to rely on them in support of the motion to dismiss. And even had there been declarations "in connection with the motion to dismiss," since "no evidentiary hearing was held we must accept [plaintiff's] version of events as true." *Rhoades v. Avon Prods.*, 504 F.3d 1151, 1160 (9th Cir. 2007).

[2] All emphases are added unless otherwise noted.

Moreover, Rule 12(b)(1) involves subject matter jurisdiction and "abstention is ***not*** jurisdictional, but reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses." *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) (emph. in original); *see Columbia Basin Apt. Ass'n v. Pasco*, 268 F.3d 791, 799 (9th Cir. 2001). Since "the district court had subject-matter jurisdiction," *Benavidez*, 34 F.3d at 829, "dismissal on *Younger* grounds had the same effect as a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.'" *Ins. Fed. v. Supreme Court*, 669 F.2d 112, 114 (3d Cir. 1982); *accord Heritage Farms v. Solebury*, 671 F.2d 743, 745 (3d Cir. 1982) (same under *Pullman*). *O'Shea* illustrates the point: "because the Court was dealing with a complaint which had been dismissed under … 12(b)(6)," abstention could only be affirmed if "[t]he Court concluded that under no circumstances could the federal court provide the relief asked." *Parker v. Turner*, 626 F.2d 1, 7 (6th Cir. 1980).[3]

C. <u>The Relief Requested Is Not As The Answering Brief Portrays</u>

The injunction sought here simply prohibits the Ventura Clerk "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." ER 74. In *Courthouse*

[3] The Ventura Clerk cites only 5B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1350 (3d ed. 2012), which notes cases in which abstention was addressed under 12(b)(1) but never discusses whether that was proper.

News Serv. v. Jackson, 2009 U.S. Dist. LEXIS 62300 (S.D. Tex. 2009) (preliminary injunction, 2010 U.S. Dist. LEXIS 74571 (S.D. Tex. 2010) (permanent injunction), the same relief resulted in ***no*** interference with state court proceedings, and ***no*** reallocation of resources, money or staff. It would only require the Ventura Clerk to stop denying access until complaints are "processed" – i.e., entered into a computer system, checked, and "approved for public viewing." AB 9, ER 114, SER 45-63.

Since the proposed injunction does not support abstention, the Ventura Clerk distorts the relief sought and the record on which it is based.

Seizing on a single clause of the prayer for injunctive relief, the Answering Brief asserts the "proposed injunction would have required [the Clerk] to obtain 'case-by-case' judicial evaluation" whenever "'same-day'" access was not provided, AB 10 (quoting ER 74), which would then supposedly be subject "to review in federal court." *Id.* at 16. This is ***not an accurate description of the proposed injunction***, ER 59, which gave detail to the prayer for relief by exempting from same-day access complaints "where the filing party is seeking a TRO or other immediate relief or has ***properly filed the pleading under seal***" – the latter of which ***California law*** (and ***not*** the proposed injunction) dictates must be performed on a case-by-case basis pursuant to Cal. R. Ct. 2.550-2.551. No "federal audit" of those decisions is required.

The Answering Brief also depends on evidence that, as noted, is not properly

part of the record, and is also disputed by Courthouse News' declarations, FER 1-14, 77-295, and contradicted by its complaint, which must be taken as true. *E.T.*, 682 F.3d at 1122 n.1. While too numerous to list in full, examples include:

- The contention, throughout the Answering Brief, that the proposed injunction would impose substantial costs and require a reallocation of services and resources, all of which is based on the faulty premise – at the heart of the ***merits*** – that "processing" must precede access.[4]
- The claim (AB 5-6), based on a flawed after-the-fact analysis, that the access delays are not as bad as they really are. ER 69-70; FER 2-5, 293-95.
- The focus (AB 2-3) on the large number of total records processed, while ***fewer than 10*** unlimited civil complaints are filed each day. SER 52, 84.
- The suggestion (AB 2, 6-7) that only a few e-filing courts provide same-day access, when it is in fact common, including at courts with no or limited e-filing. ER 63-65, 76-92; FER 12-13, 79-80, 134-35.

Even under Rule 12(b)(1), these "conflicts between the facts contained in declarations ... must be resolved in the plaintiff's favor" and cannot support the ruling below. *Rhoades*, 504 F.3d at 1160 (quotation omitted).

[4] Timely access does ***not*** increase costs, but making processing a prerequisite to access does. ER 116-17. The public status of complaints is not contingent on processing, *id.*, and the Ventura Clerk's disputed assertions for why he cannot provide access prior to processing (AB 8-9), i.e., his justifications for the access denials, go to the merits of the injunctive relief sought and cannot be a basis for dismissal under either 12(b)(6) or 12(b)(1). *Safe Air*, 373 F.3d at 1039-40.

II.

BY PORTRAYING "CLEAR" LAW AS UNSETTLED, THE ANSWERING BRIEF CONFIRMS *PULLMAN* ABSTENTION WAS IMPROPER

Because "*Pullman* abstention 'is an extraordinary and narrow exception to the duty of a [d]istrict [c]ourt to adjudicate a controversy,'" *Wolfson*, 616 F.3d at 1066 (citation omitted), the Answering Brief resorts to contorting the law to try to fit that narrow exception. Among the most egregious examples, it asserts:

- This is not a First Amendment case, despite Supreme and Circuit Court decisions recognizing a First Amendment right to court information grounded in the right of free expression;
- *Pullman* abstention is "frequently" allowed in First Amendment cases, despite Supreme and other precedent to the contrary;
- California law on access to court records is unclear, despite cases describing as "clear" the state high court's application of First Amendment law.

For these and other reasons, this case met none of the three mandatory prerequisites for *Pullman* abstention, let alone all of them, and "abstention was inappropriate." *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003).

A. The Answering Brief Cannot Meet The First *Pullman* Factor By Asserting This Is Not A Free Expression Case And Abstention Is "Frequently" Allowed In Such Cases, As Clear Law Is To The Contrary

The Answering Brief contends that Courthouse News' First Amendment claim involves "sensitive issues of social policy … the federal courts ought not"

enter and thus meets the first *Pullman* factor. AB 26 (citing *Wolfson*, 616 F.3d at 1066). But it cites no case in which state interests in court administration trumped the "particular federal concern" in First Amendment cases, *id.* at 1066 (quotation omitted), and overlooks that *Wolfson* and other authority is to the contrary.

1. Court Access Is Protected By The First Amendment Right Of Free Expression, And This Right Applies To Civil Complaints

Because "abstention … is inappropriate" in "free expression" cases, *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965), the Answering Brief claims "this is not a 'free expression' case, but an 'access to information case.'" AB 18, 31 (citing, *e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978)). At best, this argument reveals a profound misunderstanding of First Amendment law.

In a series of cases starting with *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Supreme Court found a First Amendment right to criminal case information grounded in free expression. "[W]hether … describe[d] … as a 'right of access' … or a 'right to gather information,'" the right "to attend … hear, see, and communicate observations" is protected by First Amendment "freedoms … of speech and press." *Id.* at 575-76. A majority of justices adopted the *Houchins* dissent's view that "'[an] official … policy of concealing … knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press.'" *Id.* at 583 (Stevens, J., concurring) (quoting *Houchins*, 438 U.S. at 38 (Stevens, J., dissenting)).

Finding "no … support" for the theory "that civil proceedings present considerations different than those in criminal" cases, *EEOC v. Erection Co.*, 900 F.2d 168, 169 (9th Cir. 1990) (applying common law), "all the other circuits that have considered the issue" after *Richmond Newspapers* extend the First Amendment access right to civil court records, *N.Y. Civil Liberties Union v. N.Y. City Transit Auth*., 652 F.3d 247, 258 (2d Cir. 2011), including complaints. *Vassiliades v. Israely*, 714 F. Supp. 604, 605-06 (D. Conn. 1989); *Jackson*, 2009 U.S. Dist. LEXIS 62300 at *10 (Texas court officials conceded the point).[5]

[5] Having previously conceded there is a constitutional right of timely access to court records, ER 25, the Ventura Clerk now suggests this right does not apply to newly-filed complaints and that these documents do not become presumptively public until some indeterminate time after they are acted on – for "65 days or perhaps longer." AB 1, 18-21. This is an extraordinary assertion, and it is plainly wrong. Under the test for constitutional access, *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012), experience shows "a long-standing public policy in open access to complaints," *U.S. ex rel. Dahlman v. Emergency Physicians*, 2004 U.S. Dist. LEXIS 31304, *3-4 (D. Minn. 2004), and logic shows timely access to complaints is critical because "a ***complaint*** – which forms the basis of a civil action" – is "***essential*** to the ***Court's adjudication*** of the matter as well as the ***public's interest in monitoring the ... courts***," *In re Eastman Kodak*, 2010 WL 2490982, *1 (S.D.N.Y. 2010). The presumptive right of access applies regardless of whether action has been taken. *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 1208 n.25 (1999) ("Numerous reviewing courts ... have found a First Amendment right of access to civil litigation documents ***filed in court as a basis for adjudication***."); *Leucadia v. Applied Ext. Techs.*, 998 F.2d 157, 164 (3d Cir. 1993) ("'by ***submitting pleadings*** and motions to the court for decision, one ... exposes oneself [to] public scrutiny'") (citation omitted).

2. A Limited Exception To The Rule Against Abstention In First Amendment Cases Is Inapplicable Here

Alternatively, the Answering Brief contends the Supreme Court "frequently has applied *Pullman* abstention in cases involving free expression claims." AB 35. But the two cases it cites involved an exception to the general rule: *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959), which allowed abstention only because defendants agreed not to enforce state laws while they were being interpreted by state courts, and *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 312 n.8 (1979), which said the district court should consider, under *Harrison*, whether to protect First Amendment rights "against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts."

The Supreme Court has identified *Babbitt* as an outlier, contrary to the rule that "'abstention … is inappropriate'" where defendants are allegedly "'abridging free expression.'" *Houston v. Hill*, 482 U.S. 451, 467 & n.17 (1987) (quoting *Dombrowski*, 380 U.S. at 489-90). And since the disputed policy at issue here continues to be enforced, the exceptions in *Harrison* and *Babbitt* are inapplicable.

3. First Amendment Cases Raise Federal Concerns That Do Not Meet The First *Pullman* Factor

Finally, the Answering Brief contends the rule that *Pullman* is inappropriate in First Amendment cases applies only if "the danger of chilling protected speech" exists. AB 33. But this overlooks what *Wolfson* recently reaffirmed:

> In First Amendment cases, the first *Pullman* element "will almost never be present because the guarantee of free expression is always an area of ***particular federal concern***." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). "'Indeed, ***constitutional challenges based on the [F]irst [A]mendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear***. ***That is why abstention is generally inappropriate when [F]irst [A]mendment rights are at stake***.'" *Porter*, 319 F.3d at 492-93.

616 F.3d at 1066 (additional citations omitted).[6] As this shows, the rule against abstention is justified only "in part" by fear of chilling. *Porter*, 319 F.3d at 492. In any event, this case fits the very definition of "chilling" cited at AB 33. The "challenged exercise of governmental power was regulatory, proscriptive, or compulsory" – it imposes a compulsory proscription against access until complaints are processed and, in the Ventura Clerk's sole discretion, deemed suitable for public viewing, ER 59, 69, 74, 114; SER 59-64 – "and [Courthouse News is] presently … subject to the regulations, proscriptions, or compulsions that [it is] challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Indeed, "the delay that is particularly pernicious in First Amendment cases," *Porter*, 319 F.3d at 494, exists not only where the press is prohibited from

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[6] Like the district court reversed in *Porter*, the Answering Brief "relied on *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987), for the proposition that there is no absolute rule against abstention in First Amendment cases." 319 F.3d at 493. But *Almodovar*, "the only First Amendment case in which [this Circuit has] found that *Pullman* abstention was appropriate[,] ... involved an unusual procedural setting" because the "issue in question was already before the state supreme court." *Id.* at 493-94. As "[t]hat unique circumstance is absent" here, "the first factor required for *Pullman* abstention was not satisfied." *Id.* at 494.

reporting information, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), but also where it is prohibited from "immediate and contemporaneous" access to court records to obtain information to report. *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (following *Stuart*, 427 U.S. 539). "[A]bstention [is] inappropriate ... where delay would prejudice constitutional rights," *Baggett v. Bullitt*, 377 U.S. 360, 378 n.11 (1964), because "'[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'" *Grove Fresh*, 24 F.3d at 897 (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice, 1975)).[7]

B. The Second And Third *Pullman* Factors Cannot Be Met By Overlooking "Clear" Law That State Rules On Access To Court Records Are Co-Extensive With The First Amendment Right Of Access

This case is not "'[t]he paradigm of the 'special circumstances' that make abstention appropriate,'" because it is not "'a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question.'" *Pue v. Sillas*,

[7] *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (AB 31-34), involved no chilling effect because it found no First Amendment right of access to police arrest records. *Id.* at 40. Similarly, *Sullo & Bobbitt, PLLC v. Abbott*, 2012 U.S. Dist. LEXIS 95223 (N.D. Tex. 2012) (AB 20), rejected an attempt to access police citations for commercial purposes. *Id.* at *34-35. Not only did those cases involve police records as opposed to court records, the Answering Brief's intimation that Courthouse News is engaged in commercial speech because it "collects and sells information," AB 7, has been rejected by the Supreme Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

632 F.2d 74, 78 (9th Cir. 1980) (quoting *Babbitt*, 442 U.S. at 306). The Answering Brief's attempt to stretch the paradigm fails to meet the other *Pullman* factors.

1. It Is "Clear" California Recognizes A First Amendment Right Of Access To Substantive Civil Court Records

Aware the third *Pullman* factor requires "an uncertain issue of state law," *Pue*, 632 F.2d at 78, the Answering Brief says it is "unsettled" whether the First Amendment right of access would apply to the complaints at issue here. AB 20.

This is demonstrably untrue. "Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law," *Pearl Inv. Co. v. San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985), and "[i]t is clear … [the state] high court [in *NBC Subsidiary*] enunciated ... a rule under which a certain class of court-filed ***documents*** is subject to a presumptive First Amendment right of public access." *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 84 (2007).[8] Any deprivations of that right, ***including delays***, must satisfy First Amendment standards. *NBC Subsidiary*, 20 Cal. 4th at 1217-18, 1219 n.42 (rejecting argument

[8] As *NBC Subsidiary* explains, the cases cited at AB 18-20 are inapposite. For example, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) held "the First Amendment does not compel public access to ***discovery materials*** that are neither used at trial nor submitted as a basis for adjudication," 20 Cal. 4th at 1208 n.25, and "***subsequent decisions have declined to follow*** the reasoning and approach of the *Reporters Committee* decision" that "'[c]ontemporaneity of access to written material does not significantly' enhance the public's ability to ensure proper functioning of the courts.'" *Id.* at 1220 n.43 (quoting *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 n.9 (D.C. Cir. 1985)).

that "'[d]elaying media access ... is not' ... subject to "'exacting First Amendment scrutiny'").

The Answering Brief also contends "*NBC Subsidiary*'s holding regarding open courtrooms has ***nothing*** to do with state laws requiring 'reasonable access' to court documents." AB 41. But the rules on denials of access to court records were "derived" from *NBC Subsidiary*. Cal. R. Ct. 2.550 Advisory Comm. comment. As for the rules providing for "reasonable access to trial court records that are maintained in electronic form" – which do not even apply here, *see* AB 2 – they were "not intended to give the public a right of access to any record that they are not otherwise entitled to access" under Cal. R. Ct. 2.500(c).[9]

"In short, no basis exists for concluding that court records should be differentiated from courtroom proceedings for purposes of First Amendment access rights." *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1062 (2006).

2. Under *NBC Subsidiary*, First Amendment Precedent Controls Construction of California Rules On Access To Court Records

The notion that California courts might interpret rules based on the First Amendment (or Government Code § 68150) in a manner that avoids the First

[9] Cal. R. Ct. 10.850-10.856 (AB 28) govern access to ***non-adjudicative, administrative*** court records, and are also inapplicable. And contrary to the Answering Brief, state lawmakers are not "actively" and "currently grappling" with the issue of reasonable access through SB 326. AB 13-14, 28. As the Ventura Clerk well knows, SB 326 has not been acted on in 2012 and is dead. *See* Courthouse News' Request For Judicial Notice ("RJN") (items 1-3 & Exh. A).

Amendment question – as required by the second *Pullman* factor – flies in the face of *NBC Subsidiary*'s holding that courts "***must*** construe" laws concerning court access consistent with "federal constitutional precedents." 20 Cal. 4th at 1197, 1216. As state courts recognize, this ***requires*** that they follow First Amendment precedent in interpreting access to court records. *H.B. Fuller Co. v. Does*, 151 Cal. App. 4th 879, 893 (2007) (Rule 2.550 cannot be read to exempt all "'discovery motions and records'" from the right of access "without in some cases offending [*NBC Subsidiary*'s] constitutional underpinnings"); *Burkle*, 135 Cal. App. 4th at 1060 (*NBC Subsidiary* analysis "was necessitated by its conclusion that the First Amendment provides a right of access …, thus requiring [Civil Procedure Code] section 124 to be construed in accordance with First Amendment requirements. … Precisely the same analysis necessarily applies to [Family Code] section 2024.6.").

The Answering Brief also mischaracterizes Article I, § 3(b) of the California Constitution (Proposition 59) as a "specialized state constitutional provision" concerning access to court records. AB 39. "Proposition 59 is simply a constitutionalization of the CPRA," *Sutter's Place Inc. v. Superior Court*, 161 Cal. App. 4th 1370, 1382 (2008), and California's Public Records Act is "inapplicable to the records of the judicial branch." *Mercury Interactive*, 158 Cal. App. 4th at 77. While Article I, § 3(b) requires laws to be construed "in a manner favoring a right of access," rules on access to court records are "not altered by" it, but are

construed "consistently with language in the rules' progenitor, *NBC Subsidiary*," *id*. at 77, 101, which followed federal constitutional standards because "[p]ast California decisions have not interpreted the state Constitution as providing an equally extensive right of public access." 20 Cal. 4th at 1197 n.13.

California precedent is thus clear that California courts treat state rules on access to court records not as provisions "that lack[] a federal counterpart," AB 39, but as mirroring the federal test. "In such situations":

> [T]he state courts would simply be deciding a federal constitutional issue within the framework of construing state law. A primary motive for abstaining – avoidance of constitutional issues – is not served. The issue is simply referred to another forum. The state courts, however, possess no special institutional competence to decide such issues. Since the federal courts are at least as adequate a forum, no real purpose would be served by denying a litigant his choice of a federal forum.

Hobbs v. Thompson, 448 F.2d 456, 463 (5th Cir. 1971).[10] "Abstention is [therefore] inappropriate." *Id.*

III.

THE ANSWERING BRIEF ALSO CONFIRMS ABSTENTION WAS NOT APPROPRIATE BY SEEKING TO UNTIE IT FROM *O'SHEA*'S LIMITS

Although the court below abstained under *O'Shea*, the Answering Brief shifts focus by referring generally to the "doctrine of equitable abstention." But

[10] As *Hobbs* shows, reversal does ***not*** "negate the *Pullman* doctrine in its entirety." AB 41. The paradigm case for *Pullman* abstention remains unaffected, as do cases where state provisions may exceed federal standards. *Manney v. Cabell*, 654 F.2d 1280 (9th Cir. 1980) (AB 42).

abstention is not an amorphous concept to be applied whenever a plaintiff seeks relief touching on the state courts. As this Court has said, federal courts may "abstain only in those cases falling within the 'carefully defined' boundaries of federal abstention doctrines." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

The Answering Brief also errs in insisting *Younger*'s limitations do not apply when a district court abstains under *O'Shea*, a form of *Younger* abstention. And its claim that *Gerstein v. Pugh*, 420 U.S. 103 (1975) – which holds abstention is inappropriate when the plaintiff raises only ancillary issues that "could not prejudice the conduct of the trial on the merits," *id*. at 108 n.9 – is "limited to cases in which the federal plaintiff has ***no*** opportunity to press its claims in state court," AB 56 (emph. in original), has been rejected by this and other circuits. *See*, *e.g.*, *Green*, 255 F.3d at 1100-02.

The Answering Brief thus has no alternative but to exaggerate the relief sought to try to fit this case within *O'Shea*. But as explained in Section I(C), these distortions cannot be credited and thus *O'Shea* cannot be upheld.

A. "Equitable Abstention" Is Not A Defined Doctrine And Provides No Basis Outside Of *O'Shea* For Affirming Abstention In This Case

"Equitable abstention" is not itself a defined doctrine. Rather, the term is used to describe abstention doctrines generally, all of which – including *Pullman* and *Younger* – are equitable. Each abstention doctrine has its own defined limits,

and as this Circuit has instructed, those limits must be observed:

> As virtually all cases discussing these doctrines emphasize, the "limited circumstances" in which … abstention by federal courts is appropriate … "'remain the exception rather than the rule,'" … and, thus, when each of an abstention doctrine's requirements are not strictly met, the doctrine should not be applied.

AmerisourceBergen, 495 F.3d at 1148 (quoting *Green*, 255 F.3d at 1089) (quoting *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 359 (1989)); *see Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007) ("[T]he Supreme Court has ***never*** allowed abstention to be a license for free-form *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases.").

Although the various abstention doctrines "are not 'rigid pigeonholes into which federal courts must try to fit cases,' … the categories do matter: they are 'carefully defined,' … and the general rule, unless a case falls into one of those exceptions, is that federal courts have a 'virtually unflagging obligation … to exercise the jurisdiction given them.'" *Rio Grande Cmty. Health Ctr. v. Rullan*, 397 F.3d 56, 68 (1st Cir. 2005) (citations omitted).[11]

Ignoring this command, the Answering Brief cobbles together a variety of

[11] If 40 years ago "equitable abstention ha[d] not produced clearly defined rules," *Allegheny Airlines v. Pennsylvania PUC*, 465 F.2d 237, 243 (3d Cir. 1972) (AB 46), that is no longer true. *AmerisourceBergen*, 495 F.3d at 1148. *Allegheny* is now read as an application of *Burford* abstention rather than a free-form equitable doctrine. *Grode v. Mut. Fire, Marine & Inland Ins.*, 8 F.3d 953 (3d Cir. 1993).

equitable principles to transform *O'Shea*, and the *Younger* principles underlying it, from a "circumscribed exception to mandatory federal jurisdiction" into a "broad swath through the fabric of federal jurisdiction, relegating parties to state court whenever state court litigation could resolve a federal question." *Green*, 255 F.3d at 1099. Most of the citations offered to support this free-form equitable abstention doctrine are selectively excerpted from *Younger* cases which adhere to *Younger*'s prudential limitations. Others do not involve abstention at all.[12]

The Answering Brief's reliance on *Rizzo v. Goode*, 423 U.S. 362 (1976), which "unlike *O'Shea* ... did not arise on the pleadings," *id.* at 373, is misplaced. *Rizzo* involved an injunction ordered after two trials, and found the relief – an "all-encompassing 14-page" manual governing police conduct – exceeded the "scope of federal equity power" where the misconduct was not caused by departmental policy, but by a few officers. *Id*. at 371, 378-79. *Rizzo* is "a narrow opinion," *Parker*, 626 F.2d at 6, which courts "do not read … as requiring total abstention":

> [T]he teaching of *Rizzo* is not so broad. That case actually holds that a federal court should refrain from assuming a comprehensive supervisory role via its injunctive powers over broad areas of local government for the purpose of preventing speculative and probably only sporadic future misconduct by local officials toward an imprecise class of potential victims, especially when that misconduct is not part

[12] *See Lewis v. Casey*, 518 U.S. 343 (1996) (standing, not abstention); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (same); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (no irreparable injury); *Kelley v. Johnson*, 425 U.S. 238 (1976) (decision on the merits); *Stefanelli v. Minard*, 342 U.S. 117 (1951) (pre-*Younger* case applying "maxim that equity will not enjoin a criminal prosecution").

of a pattern of persistent and deliberate official policy.

Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1978).

Moreover, even where *Rizzo* concerns may apply, this Circuit has found them satisfied when a federal court "allowed defendants an opportunity jointly to develop the remedial plan needed to implement the injunction. No further deference was required; the order itself required only that defendants supply the services that the court found to be required under federal law." *Katie A. v. Los Angeles Cnty.*, 481 F.3d 1150, 1157 (9th Cir. 2007).[13]

In contrast to *Rizzo*, there is little doubt the constitutional violation alleged here is attributable not to the "unauthorized actions of a few individual[s]" in the clerk's office, but to the Ventura Clerk's policies. ER 69, 114, 116-17; SER 55, 62. And contrary to the impression left by the Answering Brief's out-of-context quote, AB 8, Courthouse News is ***not*** demanding behind-the-counter access, nor attempting to dictate the manner in which the Ventura Clerk should provide the relief sought. ER 60-74, 99, 116-17; *Jackson*, 2009 U.S. Dist. LEXIS 62300 at *14-15 (one-sentence injunction requiring same-day access without dictating

[13] Permitting the state agency to craft the specific method in which it will comply with the federal court's order can address the federalism and comity concerns of *Younger/O'Shea*. *Fernandez v. Trias Monge*, 586 F.2d 848, 851 n.2 (1st Cir. 1978) (*O'Shea* concerns addressed where order "would outline only the minimum due process standard, leaving the choice of procedures and operational details to the Commonwealth"). In contrast, in *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975) (AB 56), "the federal court ... directed its own procedures for state hearings in considerable detail." *Id.* at 408.

manner in which access is provided); *Jackson*, 2010 U.S. Dist. LEXIS 74571 at *3-6 (permanent injunction with carve-outs in appropriate circumstances and not dictating manner in which same-day access must be provided).

B. The Answering Brief Cannot Rely On *Younger*'s Equitable Principles Without Satisfying The Limitations That Accompany Them

Unable to meet "the prudential limitations imposed upon *Younger* abstention," the Answering Brief contends they "do not apply [to] *O'Shea*." AB 54. No authority is offered for this theory, and it is wrong for three reasons.

First, the Answering Brief cannot dispute the comity concern upon which *O'Shea* is based – interference with state court proceedings – is the same concern underlying *Younger* and the basis of its prudential limitations; the only difference is *O'Shea* addressed future proceedings. *See, e.g.*, *Pompey*, 95 F.3d at 1548 n.6.

Second, most *O'Shea* cases, including several cited in the Answering Brief, treat *O'Shea* as simply an extension of *Younger*. *See, e.g.*, *Kaufman*, 466 F.3d at 86-88 & n.1; *Ballard v. Wilson*, 856 F.2d 1568, 1570-71 (5th Cir. 1988); *Parker*, 626 F.2d at 7-8. Indeed, in *Pompey*, the majority ***rejected*** the view of a concurring judge that *O'Shea* was an independent abstention doctrine. 95 F.3d at 1548 n.6, 1553-55.

Third, as illustrated by *O'Shea*, decisions that do not explicitly discuss the interrelationship between *Younger* and *O'Shea* implicitly recognize it by abstaining only where the relief sought required major and ongoing intrusion by federal courts

into the ***substance*** of future state court proceedings. AOB 36-43. The Answering Brief concedes the point by noting *E.T.* distinguished *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), which rejected *O'Shea* abstention, because "*Eu* did not involve substantive review of any cases." AB 51 n.12. While it may not have recited *Younger*'s elements, *E.T.* clearly addressed its prudential limitations.[14]

C. Because The Relief Sought By Courthouse News Is Ancillary To State Court Proceedings, This Case Is Governed By *Gerstein*, Not *O'Shea*

The Answering Brief also errs in claiming *Gerstein* – which precludes abstention where the relief is ancillary to proceedings on the merits in state court, 420 U.S. at 108 n.9 – does not apply here because Courthouse News "can institute proceedings in state court to vindicate its claimed access rights." AB 56.[15]

Gerstein applies even if the federal plaintiff could have filed suit in state court to adjudicate its federal issues. *Bickham v. Lashof*, 620 F.2d 1238, 1244-45 (7th Cir. 1980). As the Sixth Circuit explained:

> [W]hether the federal plaintiff has an "opportunity" to have the issue addressed in state court for *Younger* purposes does not turn on whether the plaintiff could file a new complaint in state court. ... Such

[14] The Answering Brief also quotes *Bice v. Louisiana Pub. Defender Board*, 677 F.3d 712 (5th Cir. 2012), for the theory "equitable abstention can be applied even when the interference does not '***target***[] the conduct of a proceeding directly.'" *Id.* at 717 (AB 46). However, *Bice* found the "prerequisite for *Younger* abstention is satisfied" because granting relief "would likely result in interference," whether targeted or indirect, with plaintiff's state "court proceeding." *Id.* at 717-18.

[15] The Answering Brief does not dispute that *Gerstein* applies to *O'Shea* abstention, perhaps because the *O'Shea* cases on which it relies found it necessary to distinguish *Gerstein*. *See Pompey*, 95 F.3d at 1551; *Parker*, 626 F.2d at 8.

> a rule would not only extend *Younger* abstention far beyond its purpose of preventing "federal intervention in state judicial processes," but it would be contrary to *Gerstein* and its progeny. We are aware of no case in which a federal plaintiff is deemed to have the "opportunity" to have his or her federal claim heard in a state proceeding solely because the plaintiff could have amended an existing complaint or filed a new complaint in state court. If that were the rule, *Younger* abstention would almost always be appropriate ….

Habich v. Dearborn, 331 F.3d 524, 531 (6th Cir. 2003) (citation omitted). The same rule holds true for intervention. *FOCUS v. Allegheny Cnty. Court of Common Pleas*, 75 F.3d 834, 844 (3d Cir. 1996) (in court access case, plaintiff had no duty under *Younger* to intervene in state court); *accord Fernandez*, 586 F.2d at 852-53 (that "plaintiff could have sought an injunction ... in a … separate Commonwealth court proceeding … is of no consequence").[16]

This rule applies equally in this Circuit. Because "absent extraordinary circumstances, each plaintiff is entitled to his own day in court," *Green* rejected the "notion that a federal plaintiff automatically loses his right to proceed in federal court if there is any state court case pending in which he could intervene to adjudicate his federal law issue." 255 F.3d at 1100-01. Neither is there a requirement to initiate a new state court action. "There is no principled difference,

[16] Acknowledging it "generally applies to parties to the criminal prosecution," *News Journal Corp. v. Foxman*, 939 F.2d 1499 (11th Cir. 1991) (AB 57) nevertheless found *Younger* abstention appropriate only because the injunction would "restrict the ability of the trial court to impanel an impartial jury, and thereby interfere with the court's ability and duty to conduct a fair criminal trial." *Id.* at 1511. Importantly, the plaintiff had unsuccessfully intervened in the state court action, and its appeal in state court was pending when it filed a federal action.

with regard to the comity principles underlying *Younger*, between requiring a plaintiff to begin his or her own state court or administrative proceedings … and requiring [intervention] in someone else's ... suit." *Id.* at 1102.

D. The Answering Brief's Argument For *O'Shea* Abstention Rests On Misstatements Of The Relief Sought And The Related Factual Record

Since this case does not fit within the confines of *O'Shea*, the only way the Answering Brief can attempt to argue that the relief sought by Courthouse News falls within those confines is to distort the true nature of that relief.

As shown in Section I(C), Courthouse News seeks a one-time injunction prohibiting the Ventura Clerk from "imposing a blanket sealing policy" (i.e., his across-the-board prohibition on viewing new complaints until after they are processed), exactly the kind of prohibition the Answering Brief itself acknowledges "would not ... dictate state or local budget priorities in any way." *See* AB 58. With this prohibition eliminated, there would be no barrier to same-day access to the handful of new complaints filed each day. The injunction would not require the Ventura Clerk to process complaints faster, and would ***not*** mandate "a significant reallocation of court services." AB 49. It is ancillary to substantive proceedings, and, as *Jackson* shows, does ***not*** require "a new hearing system" subject to monitoring by the federal court in which superior court judges would determine when each new complaint would become public, and would ***not*** subject

judges to any risk of contempt. *Cf.* AB 10-11, 16, 50-51.[17]

CONCLUSION

As evidenced by the many courts that already provide it, ensuring journalists have access at the end of each court day to the day's new civil complaints is fundamentally a matter of will. This lawsuit was only necessary because of the Ventura Clerk's stubborn refusal to budge from his policy of not allowing access until after full processing. This is not a proper a case for either *Pullman* or *O'Shea* abstention, and the district court's order should be reversed.

DATED: September 12, 2012

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[17] In the unlikely event ***any*** future hearings were necessary, they would be rare and limited to where the Ventura Clerk withheld complaints except as allowed by the injunction. *Jackson*, 2010 U.S. Dist. LEXIS at *5-6 (listing exceptions to same-day access). That would raise no more comity concerns than a case in which a court clerk failed to comply with an injunction against employment discrimination, and in any event, the comity concerns of *Younger* and *O'Shea* are not implicated by injunctive relief requiring a hearing – a "simple, nondiscretionary procedural safeguard." *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. This brief uses 14 point proportional type and contains 6,998 words, excluding the portions exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rachel Matteo-Boehm