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

OPENING BRIEF OF APPELLANT COURTHOUSE NEWS SERVICE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Courthouse News Service hereby certifies that it is a privately held corporation with no parent corporation and that no publicly held corporation holds more than 10 percent of its stock.

DATED: May 29, 2012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES AND RULES

STATE STATUTES AND RULES

STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(a)(4) and Ninth Circuit Rule 28-2.2, Plaintiff-Appellant Courthouse News Service ("Courthouse News") submits the following statement of jurisdiction:

a. Courthouse News' claims arise under the First and Fourteenth Amendments to the United States Constitution, federal common law, and the Civil Rights Act, 42 U.S.C. § 1983 *et seq*. The district court thus had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief).

b. Courthouse News appeals the granting of the Motion to Dismiss and Abstain of Defendant-Appellee Michael Planet (the "Ventura Clerk") and resulting dismissal of its entire complaint. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

c. The District Court granted the Ventura Clerk's motion and dismissed Courthouse News' complaint on November 30, 2011. ER 1-2. Courthouse News filed its notice of appeal on December 15, 2011. ER 13-14. This appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).[1]

d. This appeal is from a final order that disposed of all parties' claims.

[1]Throughout this brief, citations to the record are to the consecutively paginated Excerpts of Record ("ER"), which include the pertinent portions of the Clerk's Record and the Reporter's Transcript of the hearing on the motion to dismiss.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In a case asserting a violation of the First Amendment right of access to civil complaints, did the district court err in dismissing Courthouse News' complaint pursuant to the abstention doctrine announced in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), given that the Supreme Court and this Circuit have held *Pullman* abstention is generally not appropriate in First Amendment cases, the first *Pullman* factor is almost never present in First Amendment cases, and the second and third factors cannot be satisfied where, as here, the California Supreme Court has made it clear that state law access provisions are co-extensive with the First Amendment right of access? ER 2, 8-9, 28.

2. In a case seeking declaratory and injunctive relief prohibiting a state court clerk from enforcing his policies that deny access to newly filed civil court complaints for days and weeks in violation of the First Amendment right of access, did the district court err in abstaining under the doctrine announced in *O'Shea v. Littleton*, 414 U.S. 488 (1974), a seldom-used and narrow application of *Younger v. Harris*, 401 U.S. 37 (1971), where the requested relief was no more than the access that is already provided by numerous other state and federal courts, has previously been granted by another federal district court in a recent case, and would neither intrude upon the operations of the state court nor interfere with the adjudication of the merits of any future state court proceeding? ER 2, 7-8, 28.

Pursuant to Ninth Circuit Rule 28-2.7, pertinent constitutional and statutory authority is included in the addendum bound with this brief.

INTRODUCTION

At issue in this appeal is the continued availability of a federal forum through 42 U.S.C. § 1983 to address systematic violations by a state court of the First Amendment right of access to public court records. Under the district court's reasoning, parties seeking to prevent or cure such violations cannot seek redress in federal court, but must instead be left to enforce their rights in the very state courts that are denying them. This result undermines the First Amendment right of access itself, a right this Court has consistently upheld and is critical to our system of open government, "a hallmark of our democracy since our nation's founding." *Leigh v. Salazar*, 2012 U.S. App. LEXIS 7731, *13 (9th Cir. April 16, 2012).

The specific records at issue here are state court civil complaints, "the means by which a plaintiff invokes the authority of the court." *In re NVIDIA Corp. Deriv. Litig.*, 2008 U.S. Dist. LEXIS 120077, *11 (N.D. Cal. April 23, 2008). The Ventura Clerk's policies deny access to most of these records for days and weeks on end, in violation of Courthouse News' First Amendment right of "immediate and contemporaneous" access to civil court records. *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). This injury is not cured by later disclosure; as this Court has recognized, even short delays are "a total restraint" on the First Amendment right of access. *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48-hour delay unconstitutional);

accord Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment").

This action advances a simple idea: that new civil complaints filed throughout the day should be available for public view by the end of the same day so journalists can report on them, thus informing interested persons of the fact that the court's powers have been invoked with respect to a new civil controversy. The access sought by Courthouse News is no more than the same timely access to newly filed civil complaints that other state and federal courts in California and across the nation already provide, and that has been traditionally provided to journalists who visit the courts every day.

When access barriers do arise, the media often can resolve them through cooperative discussions with court staff. Occasionally, however, litigation is necessary to enforce the federal constitutional right of timely access to state court records, and in those instances, 42 U.S.C. § 1983 and the federal courts serve a critical role. Indeed, just two years ago, a federal district court in Texas granted Courthouse News the very relief against a state court clerk that Courthouse News seeks here. *Courthouse News Service v. Jackson*, 2009 U.S. Dist. LEXIS 62300, *14-15 (S.D. Tex. July 20, 2009) (granting preliminary injunction requiring court clerk to cease delaying access to new civil petitions and requiring same-day access), 2010 U.S. Dist. LEXIS 74571, *3-6 (S.D. Tex. Feb. 26, 2010) (agreed

permanent injunction). And *Jackson* is hardly the only case involving systemic denials of the First Amendment right of access where federal courts ordered equitable relief against state courts, including cases in which the appellate courts refused to abstain. *See*, *e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311 (1st Cir. 1992).

Yet despite all this, the district court granted the Ventura Clerk's motion to dismiss Courthouse News' complaint through an unprecedented widening of two narrow abstention doctrines. But abstention under *Pullman* or *O'Shea* is not appropriate in this First Amendment access case, the former because, *inter alia*, "constitutional challenges based on the first amendment right of free expression are the kind of cases that federal courts are particularly well-suited to hear," *Porter*, 319 F.3d at 492 (quotation omitted), and the latter because enforcing the right of access is ancillary to and does not interfere with adjudication on the merits of state court cases. *See Los Angeles Cnty. Bar v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992).

More fundamentally, it simply cannot be that federal courts are unavailable to remedy ongoing denials of the First Amendment right of access to a critical class of public indisputably public records. The district court thus erred in abstaining, and its order of dismissal must be reversed to preserve the federal forum for enforcement of First Amendment rights of access and the Civil Rights Act, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The underlying case, filed on September 29, 2011, and brought under 42 U.S.C. § 1983, was based primarily on the First Amendment right of access to court records (the first cause of action in the complaint). ER 71. In addition, Courthouse News brought a second cause of action for denial of the common law right of access. ER 72.[2] Courthouse News sought straightforward relief: a declaratory judgment and injunction prohibiting the Ventura Clerk from continuing his intransigent policy of denying access to almost all newly filed complaints in unlimited jurisdiction cases on the same day they are filed – and, in most instances, for several days, if not weeks, after they are filed – even though, because they are newly filed, those public documents are right there in the intake area and would otherwise be available for viewing. ER 60-74.

As in the *Jackson* case, Courthouse News did not seek to require the Ventura court to subject each individual complaint filed with it to a case-by-case adjudication of when it should be made public, nor did it ask the district court to exercise continuing oversight over the Ventura Clerk or the Ventura County Superior Court. ER 60-74. It also did not seek an order requiring the Ventura Clerk to devote additional funds or staff to the task of processing new complaints

[2]Courthouse News consented to the dismissal of its third cause of action, for violation of California Rule of Court 2.550, after the Ventura Clerk invoked his Eleventh Amendment immunity. ER 2, 7, 20.

or providing timely access to them. ER 60-74, 116-17. To the contrary, Courthouse News sought to require the Ventura Clerk to ***cease*** his policy of prohibiting access to newly filed complaints until after they have been processed. ER 60-74, 113-17. And, as in *Jackson*, Courthouse News did not purport to dictate the particular procedures that the Ventura Clerk should use to ensure that journalists have timely access to new complaints even if processing was still underway, ER 60-74, 99, although it did provide numerous examples of courts in California and across the country that are doing just that. ER 63-65, 69, 75-92, 99-112, 116. Together with its complaint, Courthouse News filed a motion for a preliminary injunction and supporting declarations. ER 58-59, 123.

On October 20, 2011, the Ventura Clerk moved to dismiss and abstain. ER 27-29. In his motion, the Ventura Clerk acknowledged the existence of a First Amendment right of access to the civil complaints, and that such access must be timely. ER 25. Notwithstanding this, however, the Ventura Clerk contended that the matter should be left to the state courts on the basis of *Pullman* abstention because, as he claimed, there were at least two unsettled questions of state law that could "obviate the need for this action in its entirety." ER 24. As for *O'Shea* abstention, the Ventura Clerk argued that the requested relief sought "the restructuring" of the court and an order "dictating state or local budget priorities," ER 23, an argument contradicted by Courthouse News' complaint and exhibits

thereto, which showed that providing timely access does not require significant expenditures but rather is largely a matter of will. ER 63-65, 69, 76-92, 116-17. The Ventura Clerk also moved to dismiss on the grounds that the complaint failed to state a claim for which relief could be granted, arguing that the same-day access to new complaints provided in other courts was a mere "courtesy" and that there was no legal basis for the relief Courthouse News requested. ER 22, 28. On October 31, 2011, the Ventura Clerk filed his opposition to Courthouse News' preliminary injunction motion, together with supporting declarations. ER 126.

In a ruling from the bench on November 28, 2011, the district court granted the Ventura Clerk's motion on both abstention grounds. As to *Pullman* abstention, the district court concluded that the first of the three *Pullman* factors – whether the case touches on a sensitive area of social policy upon which the federal courts ought not to enter – had been satisfied, but did not mention the Supreme Court and the Ninth Circuit cases holding that the first *Pullman* factor is almost never present in First Amendment cases. ER 9. As to the second and third factors, the district court found these were satisfied because a state court might interpret a California statute providing that court records be made "reasonably accessible" – Government Code § 68150 – to require "same-day access." ER 8-9. However, the district court did not address the California Supreme Court authority holding that state law provisions governing access to court proceedings and records do not present an

issue of state law separate from the First Amendment question, but rather are co-extensive with it. ER 8-9.

As for *O'Shea*, the district court did not consider that the relief Courthouse News seeks would not interfere with the merits of any state court adjudicative proceeding. Instead, it adopted – on a motion to dismiss – the Ventura Clerk's factual assertions that the relief sought by Courthouse News would substantially interfere with the court's budget and operations. As the district court stated:

> Here, the relief [Courthouse News] seeks ... would interfere with the administration of the Ventura Superior Court's operations. The Ventura Clerk's office would be required to make all new complaints available on the same day they were filed. Failure to do so would require judicial proceedings to evaluate the constitutionality of each delay.
>
> This would be a potentially significant disruption of the court's operations, and could possibly lead to a significant reallocation of court services. This Court hesitates to dictate state and local budget priorities.

ER 8.

The district court thus abstained and dismissed the Complaint in its entirety. ER 2. It neither considered the merits of Courthouse News' preliminary injunction motion nor the Ventura Clerk's alternate basis for dismissal, for failure to state a claim for which relief could be granted. ER 2, 9. This appeal followed.

STATEMENT OF FACTS

Courthouse News is a nationwide legal news service that focuses on coverage of the civil court record, from newly filed complaints to rulings at the trial court level and decisions on appeal. ER 62, 65-67. Courthouse News' web site, www.courthousenews.com, features news reports and commentary about civil cases and appeals, and is updated throughout the day. ER 67. For the month of September 2011, when this case was filed, Courthouse News's web site had more than 1.1 million readers, and readership has grown steadily. ER 67.

In addition, Courthouse News publishes new litigation reports, which are e-mailed to subscribers and contain staff-written summaries of all significant new civil complaints filed in a particular court. ER 65-66. Although not all complaints are significant enough to merit coverage, these reports cover many more civil actions than is typically found in a daily newspaper. For larger courts, reports are e-mailed to subscribers each evening and cover new civil complaints filed earlier that same day. ER 65. In addition, Courthouse News offers alerts about new civil filings, which are delivered by e-mail. ER 66.

For its California subscribers, Courthouse News publishes 16 new litigation reports, which include daily coverage of all four of California's federal district courts together with 19 of the state's superior courts. ER 65-66. Nationwide, nearly 3,000 law firms subscribe to Courthouse News' new litigation reports, with

approximately 740 in California alone, including virtually every major firm in California. ER 66. In addition to law firms, Courthouse News' subscribers include well-known media outlets such as the *Los Angeles Times* and the *San Jose Mercury News*, as well as several universities and law libraries. ER 66.

To produce this level of coverage, Courthouse News employs a nationwide network of more than 100 reporters, each of whom covers one or more individual courts. ER 66. At larger courts, reporters visit their assigned court near the end of each court day. The reporter reviews complaints filed earlier that day and prepares a summary of each newsworthy complaint for inclusion in the report. ER 66. In California, Courthouse News only reports on "unlimited jurisdiction" civil complaints – that is, complaints where the amount in controversy usually exceeds $25,000. ER 66. Any delay in the reporter's ability to review a newly filed complaint necessarily creates a delay in Courthouse News' ability to inform interested persons of the allegations in those complaints, and is especially problematic when there is an intervening weekend and/or holiday, when a delay of even one court day results in actual delays of three or more calendar days. ER 66.

A. A Tradition Of Same-Day Access To New Civil Complaints

In recognition of the crucial role the media plays in informing interested persons about new civil litigation, it has been a longstanding tradition for courts to provide reporters who visit the court with access to that day's new civil

complaints at the end of the day on which they are filed. This same-day access ensures that interested members of the public learn about new cases while they are still newsworthy. Courts have traditionally and still do provide this same-day access, in many instances before the complaints have been fully processed. ER 63-65, 69, 76-92.

For example, at the Central District of California, the district court in the proceedings below, a room is set up directly off the docketing department with a set of pass-through boxes. At the end of each day, a staffer places all of the civil complaints filed that day in the pass-through boxes so the media can review them. These complaints are made available for review before they have been processed. Reporters who cover the courthouse on a daily basis have a key to the room where they review the complaints and then put them back in the pass-through boxes. ER 63-64. Same-day access to new civil complaints is also provided at all three of California's other federal district courts. ER 64, 91.

Similarly, at many California state courts, reporters are provided with same-day access to new civil filings. For example, at the San Francisco, Los Angeles, and Santa Clara county courts, new filings are available to reporters after initial intake tasks, but well before full processing. ER 64, 83, 90-91. The Alameda and Contra Costa county courts also provide same day access to the press, and while

such access is provided after a certain amount of additional processing has been completed, access is still provided on a same-day basis. ER 64, 85, 87.

B. The Ventura Clerk's Policy Of Denying Access Until After "Requisite Processing" And The Resulting Lengthy Delays In Access

In contrast, Ventura Superior does not provide same-day access to newly filed civil complaints. ER 68-69. To the contrary, the Ventura Clerk denies access until his staff has fully "processed" the complaints, the result of which is deprivations of access that last for days or weeks. ER 16-18, 69-70, 114.

Courthouse News began covering Ventura Superior on a daily basis in November 2010. ER 68. Shortly after it began daily coverage, Courthouse News attempted to work cooperatively with the clerk's office to come up with mutually workable procedures so that its reporter could have same-day access to the handful of new unlimited civil complaints filed each day. ER 68-69, 95-97. On June 20, 2011, Courthouse News, through counsel, wrote to the Ventura Clerk to request same-day access to new civil complaints, and provided examples of the methods other courts use to provide timely access to the press. ER 69, 94-112.

These efforts were rebuffed. In a July 11, 2011 letter to Courthouse News, the Ventura Clerk asserted, "While I appreciate the Courthouse News Services' interest in same-day access, the Court cannot prioritize that access above other priorities and mandates. Further, the Court must ensure the integrity of all filings, including new filings, and ***cannot make any filings available until the requisite***

processing is completed. We will continue to make every effort to make new filings available as early as is practicable given the demands on limited court resources." ER 69, 114 (emphasis added).[3]

Courthouse News' counsel responded by letter dated August 2, 2011, disputing the notion that access could not be provided until after "processing." As explained in that letter:

> [O]ur experience working with other courts shows that providing prompt media access to new civil complaints – fundamentally, the simple act of letting reporters ***see*** the new complaints that, because they are newly-filed, are already centrally located in the intake area – need not involve any extra expense or staff time beyond the *de minimis* effort of handing a stack of complaints to a reporter (and even that *de minimis* effort can be eliminated if a credentialed reporter is simply allowed to go behind the counter to pick up the stack, as reporters do at the federal district court in San Francisco, for example).
>
> Indeed, it has been our experience that providing prompt access is largely a matter of will on the part of the court and its leaders.
>
> * * * *
>
> At bottom, press access only results in increased costs where the court imposes the requirement of complete processing before providing access. But newly filed complaints become public records upon filing, and this status is not contingent on the court having first completed processing. We must therefore respectfully but firmly

[3]In declarations submitted in opposition to Courthouse News' motion for a preliminary injunction, the Ventura Clerk confirmed that his office as a matter of policy does not allow access to complaints until they have been fully processed by court processing assistants and then "approved for public viewing." ER 16-18. In addition, when processing is performed by "newly appointed" court processing assistants, the complaints are subject to a further quality control review by a supervisor before being approved for public viewing, a process that can take several days. ER 17-18.

> disagree with your assertion that providing timely access can only be accomplished at a monetary cost to the Court.

ER 69, 116-17. Courthouse News received no response to its letter. ER 69. Courthouse News then filed this action.

The Ventura Clerk's enforcement of its policy barring access until after complete "processing" has resulted in substantial access delays. For example, during the four-week period from August 8-September 2, 2011, Courthouse News reviewed 152 new unlimited jurisdiction complaints, an average of fewer than eight per court day. Of the 152 complaints reviewed during that four-week period, only nine (about 6%) were made available for review on the same court day they were filed. Twenty-eight complaints (about 18%) were available the court day after they were filed, and the remaining 115 – *more than 75% of those filed* – were not made available for review for two or more court days, with actual delays stretching up to 34 calendar days. ER 69-70.

SUMMARY OF THE ARGUMENT

The district court erred in its determination, on the basis of two heretofore narrow abstention doctrines, that the federal courts cannot redress a state court clerk's systematic violations of the First Amendment right of access to public court records – in this case, newly filed civil complaints.

The first of those doctrines, *Pullman* abstention, cautions restraint by federal courts in interpreting unsettled state laws in which the federal law claims are entangled. But it is "almost never ... appropriate in first amendment cases." *Sable Commc'ns of Cal., Inc. v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 191 (9th Cir. 1989) (citation omitted). This is because the first *Pullman* factor, which requires that the federal claims pertain to issues over which the states have a peculiar interest in setting local policy, is almost never present in First Amendment cases since the constitutional "guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). And the second and third factors – which require that constitutional adjudication can be avoided or altered by a definitive ruling on the state issue, and that the proper resolution of the state law issue be uncertain – also are not satisfied. The California Supreme Court has already ruled that state law provisions relating to access to court records and proceedings must be construed in a manner that is co-extensive with the First Amendment right of access. Thus, there is no

"uncertain" question of state law, and abstention under *Pullman* in this case would result in a federal court deferring to a state court's interpretation not of state law but federal constitutional law, exactly the opposite of what *Pullman* allows.

The second doctrine, *O'Shea*, has been almost exclusively confined to cases, typically class actions, seeking wide-ranging institutional reform of the judiciary that places the federal court in the position of overseeing and reviewing the state court's adjudication of cases on their merits. Prior to the district court's ruling, *O'Shea* had ***never*** even been mentioned in, let alone applied to, a federal court action that challenged a rule or policy relating to the First Amendment right of access to court records or proceedings. This case does not present any reason to vary from that precedent. The simple relief Courthouse News seeks – fundamentally, nothing more than the same timely access to new civil complaints that reporters commonly have in other courts – would have no effect on how the state court adjudicates the merits of any of the cases initiated by the complaints, and would not cause the federal court to monitor and review the decisions of the state court in individual cases. The federalism and comity concerns upon which *O'Shea* abstention is founded are plainly absent.

The federal court is the most appropriate forum for resolution of the First Amendment issues raised in Courthouse News' complaint. The district court's order refusing to consider those issues should be reversed.

I.

FEDERAL COURTS SHOULD RARELY ABSTAIN, ESPECIALLY IN SUITS BROUGHT UNDER 42 U.S.C. § 1983; *PULLMAN* ABSTENTION IS GENERALLY INAPPROPRIATE IN FIRST AMENDMENT CASES, AND THE DISTRICT COURT'S DECISION CANNOT SURVIVE UNDER ANY STANDARD OF REVIEW, LET ALONE THE TYPE OF EXACTING REVIEW ACCORDED ABSTENTIONS UNDER *PULLMAN* OR *O'SHEA*

"[A]bstention remains an extraordinary and narrow exception to the general rule that federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 882 (9th Cir. 2011) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358 (1989) ("*NOPSI*")). Because federal courts remain the primary and preferred forum for deciding questions of federal law, the right of a plaintiff to litigate federal law claims in a federal court should not generally be denied. *Steffel v. Thompson*, 415 U.S. 452, 472 (1974) (*Younger* abstention); *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964) (*Pullman* abstention).

The federal courts' "unflagging obligation" to exercise their jurisdiction "is particularly weighty when those seeking a hearing in federal court are asserting … their right to relief under 42 U.S.C. § 1983." *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983) (rejecting *Younger* abstention in case against a superior court) (quotation omitted). Moreover, in the context of *Pullman* abstention, this Court has recognized that "'constitutional challenges based on the first amendment

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 first amendment rights are at stake.'" *Porter*, 319 F.3d at 492 (quoting *J-R Distribs. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984), *overruled on other grounds by Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)).

Courts must thus apply abstention doctrines narrowly to avoid "mak[ing] a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368. When a defendant urges abstention, the court's task is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications' that can suffice ... to justify the *surrender* of that jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983). To ensure that abstention remains limited to its "carefully defined" boundaries, *NOPSI*, 491 U.S. at 359, an abstention doctrine should not be applied unless each of its requirements are strictly met; balancing the elements is not permitted. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

It follows that "unless certain exceptional circumstances are present, a district court has little or no discretion to abstain." *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987). For *Pullman* abstention, "[w]hether these

requirements [are] met is a mixed question of fact and law, that is more law than fact, and is therefore reviewed de novo." *Id*.; *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002) ("[W]e review de novo whether this case meets the requirements of the *Pullman* abstention doctrine. ... The district court has no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked."). Only then does the appellate court "review[] the district court's ultimate decision to abstain under *Pullman* for abuse of discretion." *Smelt v. Cnty of Orange*, 447 F.3d 673, 678 (9th Cir. 2006).[4]

The district court's abstention under *O'Shea* should also be reviewed de novo. It is settled that this Court "review[s] de novo the district court's decision to abstain under the *Younger* doctrine." *Potrero Hills*, 657 F.3d at 881 (citing *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc), *overruled in part on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir. 2004) (en banc)), and it is equally clear that abstention under *O'Shea* is a decision to abstain under a branch of the *Younger* doctrine. *See Pulliam v. Allen*, 466 U.S. 522, 539 n.20 (1984) (describing *O'Shea* as being decided on "*Younger v. Harris* grounds"); *Parker v. Turner*, 626 F.2d 1, 6-7 (6th Cir. 1980) (describing *O'Shea* as "an extension of *Younger*" and "clearly based on *Younger* principles"). Indeed, most courts analyze *O'Shea* and *Younger* as two facets of a single doctrine. *See, e.g.*,

[4]This has been characterized as a "modified abuse of discretion standard." *Almodovar*, 832 F.2d at 1140.

Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 701 (D.C. Cir. 1984). Thus, *O'Shea* abstention should be reviewed under the same standard as *Younger* abstention, particularly here, where the district court's order granting dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) must be reviewed *de novo*. *See, e.g., TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999).[5]

In this case, however, the Court "need not resolve" this issue because "whether [the Court] review[s] the district court's ruling de novo or for an abuse of discretion, [the Court's] conclusion remains the same." *E.T. v. Cantil-Sakauye*, 2012 U.S. App. LEXIS 5147, *5-6 n.3 (9th Cir. March 12, 2012) (per curiam). Under either standard of review, the district court should not have abstained, and its judgment of dismissal should be reversed.

[5]Although the Ventura Clerk did not specify the rule or statutory authority under which his motion was brought, because his motion asserted it was for "failure to state a claim," ER 26-29, it was apparently brought under FRCP 12(b)(6). On a Rule 12(b)(6) motion, all allegations of material fact in the plaintiff's complaint are taken as true and construed in the light most favorable to the non-moving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). This includes materials attached to the complaint. *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978). "[A]ll reasonable inferences" must be drawn in favor of the non-moving party. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (district court erred by "ignor[ing] reasonable inferences supported by the facts alleged" by plaintiff and by "[drawing] inferences in appellees' favor ... Each of these errors violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party.").

II.

THE DISTRICT COURT ERRED IN ABSTAINING UNDER *PULLMAN* IN THIS FIRST AMENDMENT CASE THAT INVOLVED NO UNCERTAIN STATE LAW QUESTION INDEPENDENT OF THE FIRST AMENDMENT

This Court's analysis of whether the district court erred in abstaining under *Pullman* "begin[s] with the settled proposition that 'a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the rule.'" *J-R Distribs.*, 725 F.2d at 487 (citation omitted). As the Supreme Court has shown by repeatedly reversing over-reaching applications of *Pullman*, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). While a decision to abstain may ultimately "involve[] a discretionary exercise of a court's equity powers," *id.*, that is only true in cases where, unlike here, "there exist[s] the 'special circumstances'" that the Supreme Court has held are "prerequisite to [*Pullman*'s] application." *Id.* (citation omitted). Moreover, a federal court has ***no discretion***, and "***abstention cannot be ordered***[,] simply to give the state courts the first opportunity to vindicate a federal claim." *Zwickler v. Koota*, 389 U.S. 241, 251 (1967) (emphasis added). [6]

These two limitations on a district court's discretion – each of which are

[6]This is consistent with the dual purposes of *Pullman* abstention, which are to determine whether resolution of the federal question can be avoided altogether and to eliminate the risk of a federal court's erroneous construction of state law. *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980); *Porter*, 319 F.3d at 492.

sufficient alone to preclude a court abstaining – both exist in First Amendment challenges to state statutes, policies or regulations. "'In a facial attack [on first amendment grounds] the special circumstances which have been held to justify abstention … are usually absent.'" *J-R Distribs.*, 725 F.2d at 488 (quoting *Hobbs v. Thompson*, 448 F.2d 456, 463 (5th Cir. 1971)) (brackets added by *J-R Distribs.*); *Porter*, 319 F.3d at 493 (abstention "'is inappropriate for cases … where … statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.'") (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965)).

The district court therefore had no discretion to abstain under *Pullman* in this case. The complaint alleges that the Ventura Clerk's policy of delaying access to civil complaints violates the First Amendment right of "'immediate and contemporaneous'" access to civil court records. *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *11 (quoting *Grove Fresh*, 24 F.3d at 897). In granting Courthouse News the very relief against a Texas state court clerk that Courthouse News seeks here, *Jackson* demonstrates that federal courts should decide this issue of federal constitutional law. That is because "'*Pullman* abstention would almost never be appropriate in first amendment cases because such cases involve strong federal interests and because abstention could result in the suppression of free speech.'" *Sable Commc'ns*, 890 F.2d at 191 (quoting *Playtime Theaters, Inc. v. City of*

Renton, 748 F.2d 527, 532 (9th Cir. 1984), *rev'd on other grounds*, 475 U.S. 41 (1986)).[7]

But even if *Pullman* abstention might otherwise be appropriate in First Amendment cases, the special circumstances required for application of that doctrine are not satisfied here. "In order to 'give due respect to a suitor's choice of a federal forum for the hearing and decision of [its] federal constitutional claims,'" *Pullman* abstention "should rarely be applied." *Porter*, 319 F.3d at 492 (quoting *Zwickler*, 389 U.S. at 248). Where it is permissible at all, it is only allowed if ***all*** of the following three circumstances are present: (1) The case touches on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) Constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy; and (3) The proper resolution of the possible determinative issue of

[7]"As the Supreme Court has emphasized, to abstain and thus 'force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.'" *J-R Distribs*., 725 F.2d at 488 (quoting *Zwickler*, 389 U.S. at 252). This is particularly true in cases involving the First Amendment right of access to court proceedings and/or records because the "delay" that results from abstention is "effectively a denial of any right to contemporaneous access." *Lugosch v. Pyramid Co*., 435 F.3d 110, 1267 (2d Cir. 2006) (district court violated First Amendment by holding in abeyance motion of news media to intervene and unseal civil court records). By refusing to rule on the merits of Courthouse News' motion for preliminary injunction, the district court's "abstention … result[ed] in the suppression of free speech that is meant to be protected by the Constitution." *J-R Distribs*., 725 F.2d at 488.

state law is uncertain. *Porter*, 319 F.3d at 492. "The absence of any one of these three factors is sufficient to prevent the application of *Pullman* abstention." *Id.* None were met here.

A. The First *Pullman* Factor Is Not Satisfied Because Federal Courts Are The Appropriate Forum To Hear First Amendment Cases

The first *Pullman* factor requires that the federal claims pertain to issues over which the states have a peculiar interest in setting local policy. The purpose of the first factor is to avoid "unnecessary interference with an important state program." *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985) (land use planning generally touches upon sensitive areas of social policy). This factor reflects the concern that federal courts not "stifle innovative state efforts to find solutions to complex social problems." *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976); *see Almodovar*, 832 F.2d at 1140 (first *Pullman* factor protects "state sovereignty over matters of local concern"). *Pullman* abstention is thus permitted where the case involves local issues that have been addressed by a recent "array of state constitutional provisions and statutes" that show the state is "grappling" with difficult problems "through new policies and new mechanisms of regulation." *Rancho Palos Verdes*, 547 F.2d at 1094-95; *see, e.g.*, *Smelt*, 447 F.3d at 680-81 & nn.18-21 (noting extensive treatment of marriage under state law).

"In First Amendment cases," however, "the first *Pullman* element 'will

almost never be present because the constitutional guarantee of free expression is always an area of particular federal concern.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (quoting *Ripplinger*, 868 F.2d at 1048). The First Amendment right of access to court records and proceedings at issue in this case is part and parcel of the right of free expression. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Rivera-Puig*, 983 F.2d at 322-23. Consequently, "[a]bstention was inappropriate because the first *Pullman* factor was not present here." *Porter*, 319 F.3d at 492. [8]

B. Even If This Were Not A First Amendment Case, The Second And Third Factors Are Not Satisfied Because There Is No Uncertain Issue Of State Law That Could Avoid Or Alter The Federal Question

"The paradigm of the 'special circumstances' that make abstention appropriate is 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." *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973). In its seminal decision discussing the three *Pullman* factors, this Circuit

[8]Even to the extent access to court records presents an issue of local concern for *Pullman* purposes, the state of California has opted not to grapple with it. As part of its efforts to ensure that California courts comply with the right of access to civil court records, last year, Courthouse News co-sponsored Senate Bill 326, which would have required the California Judicial Council to adopt a rule of court requiring courts to provide access to complaints by the end of the day they are filed, subject to certain exceptions. ER 35-38. The bill was opposed by the Judicial Council, a body chaired by the Chief Justice of the California Supreme Court. ER 46-48, 55-57. The bill was re-referred to committee on September 1, 2011, and no further action has been taken on it since. ER 53.

recognized that this circumstance merges the second and third factors: "With regard to elements (2) and (3), it is crucial that the uncertainty in the state law be such that construction of it by the state courts might obviate, or at least delimit, decision of the federal (constitutional) question." *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974), *overruled on other grounds, Heath v. Cleary*, 708 F.2d 1376, 1378-79 n.2 (9th Cir. 1985).

As this observation indicates, the second *Pullman* factor turns on whether the case may be determined on an issue of state law, separate and apart from the federal constitutional issue presented, and the third factor turns on whether that state law is uncertain to the extent that its resolution "would … eliminate []or materially change the constitutional issues presented." *J-R Distribs.*, 725 F.2d at 488 ("The second and third *Pullman* factors suggest that abstention is only proper when a federal constitutional issue may be avoided or presented differently once a state law issue is resolved or a state statute is construed.").

Neither factor is present here. The state law provisions relied upon by the district court and the Ventura Clerk are not separate from the First Amendment question, but rather are co-extensive with it. And their interpretation by a state court would hardly avoid or alter the First Amendment question because the state's highest court has held that state courts must apply the "relevant federal constitutional precedents in considering the proper interpretation" of state law

provisions governing access to court proceedings and records. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1197 (1999).

1. State Law Provisions That Mirror Federal Constitutional Standards Do Not Meet The Second *Pullman* Factor

Because the critical issue is whether the resolution of the federal question "depends on state law and the extent to which [the federal question] can be eliminated or simplified by state court proceedings," *Bank of America Nat'l Trust & Sav. Ass'n v. Summerland Cnty. Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985), the second *Pullman* factor is ***not*** satisfied if the state law is co-extensive with federal law and thus only provides an alternate, but functionally equivalent, basis for relief. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Pue v. Sillas*, 632 F.2d 74, 79-81 (9th Cir. 1980) (rejecting previous authority indicating otherwise). This Court has ***reversed*** *Pullman* abstention based on "mirror-image" provisions because "abstention [is] inappropriate where state and federal provisions simply 'mirror[]' one another." *Id.* at 79-81 (citing, *e.g.*, *Examining Bd.*, 426 U.S. at 597-98, and *Stephens v. Tielsch*, 502 F.2d 1360 (9th Cir. 1974)) (quotation omitted).

Indeed, requiring a plaintiff to seek relief by way of a state law remedy that is functionally equivalent to the stated federal bases for relief would defeat the very purpose of 42 U.S.C. § 1983 to provide a federal court remedy for a violation of federal law. *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963) (holding that a

federal court should not abstain simply to give a state court the first opportunity to vindicate federal rights); *id*. at 674 (holding that "such claims are entitled to be adjudicated in the federal courts"). "The [Supreme] Court has expressly held that state remedies supplement, but do not supplant, federal remedies under section 1983." *Pue*, 632 F.2d at 81 (citing *McNeese*, 373 U.S. at 674).

That is the situation here. In the proceedings below, the Ventura Clerk identified two provisions he claimed might render adjudication of the First Amendment claims unnecessary: Government Code § 68150, on which the district court relied, and Rule of Court 2.550, on which it did not. ER 9, 24-25. Both provide "mirror-image" relief to the First Amendment right of access – the latter expressly and the former under state case law mandating that such laws "must … be interpreted in a manner compatible with" the "constitutional standards" mandated by "the First Amendment … right of access." *NBC Subsidiary*, 20 Cal. 4th at 1212, 1208 n.25.

Government Code § 68150 provides that "Unless access is otherwise restricted by law, 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." It is to court records what the statute at issue in *NBC Subsidiary* – which provides that "[e]xcept as provided in ... any other provision of the law, the sittings of every court shall be open," Cal. Code Civ. Proc. § 124 – is to court

proceedings. In *NBC Subsidiary*, the California Supreme Court recognized that its interpretation of § 124 "must be guided ... by the relevant constitutional principles," and therefore held that § 124 was to be construed in a manner co-extensive with the First Amendment right of access. 20 Cal. 4th at 1191-92, 1216 ("The First Amendment cases discussed above inform our interpretation of Code of Civil Procedure section 124, which, of course, we must construe in a fashion that avoids rendering its application unconstitutional.") (citing, *e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*")); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-11 (1982). It follows that § 68150 "must" be interpreted the same way – in a manner co-extensive with the First Amendment right of access.

Rule 2.550 is even more explicitly co-extensive with federal law. It merely restates the First Amendment test for access incorporated into California law in *NBC Subsidiary*. *See* Advisory Comm. Comment, Cal. Rule of Court 2.550 ("This rule ... provide[s] a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary* ... [This rule applies] to civil and criminal cases. [It] recognize[s] the First Amendment right of access to documents used at trial or as a basis of adjudication."). In applying this rule, California courts therefore look to the First Amendment in deciding whether access to court records has been properly denied.

Although *Pue*, *Stephens* and the Supreme Court decisions on which they were based rejected *Pullman* abstention premised on state constitutional provisions that were mirror images of the federal constitutional provisions at issue, the reasoning underlying the result in those cases applies equally to other provisions of state law that expressly or by interpretation are co-extensive with federal law:

> By abstention, federal courts seek to avoid erroneous determinations of state law, which may cause unnecessary constitutional adjudication. When a state constitutional provision is inextricably related to the interpretation of state law, logic requires that the state constitutional provision be analyzed prior to reaching or framing any federal constitutional issues that depend upon the state law's meaning. A determination of state law is thus requisite, and abstention avoids the risk of error. In contrast, when the state constitutional provision merely mirrors the federal constitution, its interpretation neither logically precedes nor governs the federal question.

Pue, 632 F.3d at 81. Since "essentially the same constitutional claim" would be presented in state court, it would therefore "entail wasteful duplication of effort to send cases back for state adjudication in the circumstances present here." *Stephens*, 502 F.2d at 1362.

2. State Laws That Are Not Uncertain Because State Courts Have Held They Must Be Construed Pursuant To Federal Standards Do Not Satisfy The Third *Pullman* Factor

For *Pullman* abstention to be upheld, "[i]t is especially crucial that the third criterion [–] an uncertain issue of state law [–] be satisfied." *Pue*, 632 F.2d at 78. The district court apparently thought the third factor was satisfied because "the term 'reasonable access' [in Government Code § 68150] has not yet been defined

by either the state courts or the California legislature." ER 9. But "[t]hat is not a sufficient reason for abstaining." *Hillery v. Rushen*, 720 F.2d 1132, 1137 (9th Cir. 1983). "Federal courts need not abstain from deciding every issue of state law that the state's courts have not had occasion to decide. Because arguments can be presented in an infinite number of ways, a contrary holding would render abstention the rule rather than the 'extraordinary and narrow' exception that it is." *Id.* at 1137; *accord, e.g., Pue*, 632 F.2d at 79-80 (abstention improper although no California court had considered the California law).

The third *Pullman* factor does not turn, then, on whether an issue of state law is undecided, but rather "'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)).

In the very next sentence, the Court in *Babbitt* explained what it meant by "uncertain"; it is only when "the state statute at issue is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.'" *Id.* (quoting same); *accord Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1177 (9th Cir. 1983); *see Ellis v. City of La Mesa*, 990 F.2d 1518, 1522 (9th Cir. 1993) ("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.") (quotation omitted).[9]

In this case, the California Supreme Court has directed that interpretation of state law provisions governing access to civil court proceedings and records must "comply with the requirements of the First Amendment right of access." *NBC Subsidiary*, 20 Cal. 4th at 1226. The third *Pullman* factor therefore is not satisfied not only because there is recent interpretive case law by the state's highest court on the general contours of the issue, *Ellis*, 990 F.2d at 1522 (holding *Pullman* abstention not appropriate because the California Supreme Court had interpreted the state constitution's religion clauses on a similar, but not identical, point), but also because "state-court construction of the provisions governing [access to court records] would not obviate the need for decision of the constitutional issue or materially alter the question." *Babbitt*, 442 U.S. at 306. "[T]here is no fair construction of th[ese] provision[s] that would moot the federal issue of whether" the substantial delays in access at the hands of the Ventura Clerk violates the First Amendment. *Midkiff v. Tom*, 702 F.2d 788, 789 (9th Cir. 1983), *aff'd in rejecting abstention, rev'd on other grounds, Hawaii Housing Auth.*, 467 U.S. 229 (1984).

[9]In such a case, "abstention may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" *Babbitt*, 442 U.S. at 306 (quoting *Harman*, 380 U.S. at 534).

III.

O'SHEA DOES NOT APPLY BECAUSE THE TIMELY ACCESS TO COMPLAINTS THAT COURTHOUSE NEWS SEEKS IS NO MORE THAN WHAT OTHER COURTS ALREADY PROVIDE AND WHAT ANOTHER FEDERAL DISTRICT COURT HAS PREVIOUSLY ORDERED, AND WOULD NOT INTERFERE WITH THE STATE COURT'S ADJUDICATION OF FUTURE CASES ON THE MERITS

In abstaining under *O'Shea*, the district court expressed the concern that if it required the Ventura Clerk to make new complaints available on the same day they were filed, the failure of the clerk to do so would "require judicial proceedings to evaluate the constitutionality of each delay," and that this, in turn, would have the potential to disrupt the Ventura County Superior Court's operations and could lead to a reallocation of that court's resources. ER 8.

The district court's concern was misplaced. As noted above, *see supra* at 7-8, Courthouse News is not seeking to require the Ventura court to subject each individual complaint filed with it to a case-by-case adjudication of when it should be made public. To the contrary, Courthouse News' complaint sought to require the Ventura Clerk to cease his policy of prohibiting access to all newly filed complaints until after they have been processed, and thereby to stop denying Courthouse News access to new complaints on the day they are filed.

But even if the district court's concerns were consistent with Courthouse News' complaint, they would not be sufficient to justify *O'Shea* abstention. As the Supreme Court noted in *O'Shea* itself, that doctrine is designed to prevent the

"kind of interference that *Younger v. Harris* ... sought to prevent," 414 U.S. at 500, that is, interference with the adjudication of the merits of state court cases. Unlike the declaratory relief sought in *E.T.*, the ***only*** case in which this Court has ever upheld *O'Shea* abstention, the relief sought by Courthouse News will not require "the examination of the administration" on the merits "of a substantial number of individual cases" of the judges of the state court by the federal court. *E.T.*, 2012 U.S. App. LEXIS 5147 at *9. Rather, as *Jackson* demonstrates, it only requires the district court to enter a one-time injunction directing the Ventura Clerk to cease his policies of denying access to complaints on the day they are filed. Thus, the district court plainly erred in abstaining.

A. The *O'Shea* Doctrine Is Reserved For Cases Where The Relief Sought Would Involve A Major And Ongoing Intrusion By The Federal Courts Into Future State Court Adjudicative Proceedings

The error in the district court's unprecedented extension of *O'Shea* abstention to cases alleging a violation of the First Amendment right of access – which involves no consideration of the merits of any decision of any state court judge – is illustrated by the contrast to the facts of *O'Shea* itself.

In *O'Shea*, a class of African-American plaintiffs claimed a group of public officials, including a county magistrate and judge, denied them their civil rights by setting higher bonds, imposing harsher confinement conditions and bringing mere ordinance violations to trial in a racially discriminatory and retaliatory manner, and

sought to enjoin the magistrate and judge from engaging in such practices. *O'Shea*, 414 U.S. at 491-92. The Supreme Court reversed a Seventh Circuit ruling holding that, if plaintiffs' allegations were proven, the district court should enjoin the court officials from carrying out their judicial duties in a way that violated their constitutional rights and could require "periodic reports of various types of aggregate data on actions on bail and sentencing." *Id.* at 492-93 & n.1.

As one of its bases for reversal, the *O'Shea* court found the relief sought by the plaintiffs was "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials," and "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" by the class members, resulting in "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* ... and related cases sought to prevent." *Id.* at 500.[10] The "kind of interference that *Younger* ... sought to prevent," of

[10]In *Younger*, the plaintiff, a defendant in a state criminal prosecution, filed a federal court action to enjoin the district attorney from prosecuting him. 401 U.S. at 38-39. Several other parties then intervened in the action claiming that the prosecution would inhibit them from exercising their constitutional rights. The Court, relying on established principles of comity and federalism, found that it could not grant the injunction. *Id.* at 53. In this Court, *Younger* abstention is required in civil proceedings when: (1) there is an ongoing state court proceeding; (2) the state proceeding implicates important state interests; (3) the state proceeding provides an adequate opportunity to raise the federal questions; and (4) the federal court's action would enjoin or have the practical affect of enjoining the state court proceeding. *Potrero Hills*, 657 F.3d at 882.

course, was the interruption of the adjudication on the merits of state court cases. *Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *AmerisourceBergen*, 495 F.3d at 1149 (defining the "*Younger*-based reason to abstain" as a situation where "the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings"); *Gilbertson*, 381 F.3d at 976 ("There is no doubt that interference with state proceedings is at the core of the comity concern that animates *Younger*.").

Thus, while *Younger* counsels against interfering with the adjudication of ***pending*** state court proceedings, *O'Shea*'s focus was a concern about interference with the adjudication of ***future*** proceedings. As the high court explained, "An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*." *O'Shea*, 414 U.S. at 501.

The *O'Shea* court went on to explain what quantum of interference with future state court proceedings would be unacceptable: the injunction contemplated in that case, the court said, would be "a major continuing intrusion" because it would lead to "continuous or piecemeal interruptions" of future state court proceedings by "any of the members of the broadly defined class." *Id.* at 500.

Furthermore, it "would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners [a magistrate and a judge] in the course of future criminal trial proceedings involving any members of the respondents' broadly defined class," by way of the contemplated "periodic reporting system." *Id.* at 501. The Court found the contemplated injunction "unworkable" because of "inherent difficulties in defining the proper standards against which such claims might be measured, and the significant problems of proving noncompliance in individual cases." *Id.* at 501-02. And because the class of plaintiffs was so broad and the potential violations of law so varied and numerous, the federal court would need to continuously monitor and supervise the operation of the state court. *Id.* at 500.

Consistent with this guidance, the few instances in which courts have abstained under *O'Shea* have been confined to cases, typically class actions, that call for a major and ongoing intrusion by the federal courts into future state court adjudicative proceedings. *See E.T.*, 2012 U.S. App. LEXIS 5147, at *7-10; *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992). Conversely, where the potential interference does not seek to substantially interfere with the state court's adjudication of future state court cases on the merits, *O'Shea* abstention has been found to be improper. *See, e.g.*, *Los Angeles Cnty. Bar Ass'n*, 979 F.2d at 703; *Tarter v. Hury*, 646 F.2d 1010, 1013-14 (5th Cir. 1981).

For example, *E.T.* was a proposed class action involving 5,100 foster children who claimed that "crushing and unlawful caseloads" of the Sacramento County juvenile dependency court frustrated the court's ability to fairly hear cases and court-appointed attorneys' ability to provide effective assistance of counsel. Their complaint – brought against, *inter alia*, California's Chief Justice and the Presiding Judge of the Sacramento Superior Court – sought an order "'mandating that Defendants provide the additional resources required to comply with the Judicial Council of California and the National Association of Counsel for Children's recommended caseloads for each court-appointed attorney.'" *E.T.*, 2012 U.S. App. LEXIS 5147 at *2-3. In affirming abstention under *O'Shea*, this Court held that the requested equitable relief would inevitably lay the groundwork for the future "examination of the administration of a substantial number of individual cases" by a federal judge, amounting to "an ongoing federal audit of Sacramento County Dependency Court proceedings." *Id*. at *9.

Similarly, the cases on which *E.T.* relied would have required federal courts to inject themselves into and/or monitor ongoing state court proceedings. One was a lawsuit against the Chief Justice of New York's Court of Appeals and the Presiding Justice of the Appellate Division of that state's Supreme Court, in which the plaintiff alleged his due process rights were violated by the New York court system's procedures for assigning appellate judges. *Kaufman v. Kaye*, 466 F.3d

83, 86 (2d Cir. 2006). The Second Circuit abstained because declaring the assignment system unconstitutional would open the door to any appellant who did not like his or her assigned panel to delay the case by way of a federal enforcement action. "Such challenges would inevitably lead to precisely the kind of 'piecemeal interruptions of ... state proceedings' condemned in *O'Shea*." *Id.* at 87.

Another was a class action on behalf of "'all individuals who are or will in the future be adversely affected by the unconstitutional practices of the indigent defense system within Georgia.'" *Luckey*, 976 F.2d at 676. The case, brought against the governor of Georgia and the chief judges of two circuit courts, sought an order requiring the state court system to furnish indigent defendants with counsel at probable cause hearings and the speedy appointment of counsel at all critical stages, furnish adequate services and experts, and adequately compensate counsel. The class also asked the federal court to order the state court system to adopt uniform standards governing the representation of indigent defendants and asked the federal court to monitor the implementation of those standards. *Id.* The Eleventh Circuit abstained under *O'Shea* because the relief sought would inevitably involve the federal court in future enforcement actions that were more detailed and intrusive than the presently requested injunction. *Id*. at 679.

But *O'Shea* does not allow abstention where, as here, the required relief would not require continuous monitoring of the adjudication on the merits of future

state court proceedings, let alone seriously disrupt those proceedings. "[L]ocal judicial administration is not immune from attacks in federal court on the ground that some of its practices violate federal constitutional rights." *Family Div. Trial Lawyers*, 725 F.2d at 701.

The dividing line is between cases that would "require ... case-by-case evaluations of discretionary decisions," in which case *O'Shea* abstention is appropriate, and cases like this one that instead would simply involve "nondiscretionary procedural" safeguards against the violation of constitutional rights, in which case *O'Shea* abstention is not proper. *Tarter*, 646 F.2d at 1013. The line is perhaps best illustrated by *Tarter* because the Fifth Circuit abstained from considering a request to enjoin the judges from setting excessive bail – noting that such an injunction was identical to that rejected in *O'Shea* itself, *id.* at 1013 – but declined to abstain with respect to the propriety of the state court clerk's refusal to docket and the judges' refusal to consider pro se motions. *Id.* at 1013-14. As that court explained:

> The enforcement of an injunction requiring clerks to file all pro se motions would not require the same sort of interruption of state criminal processes that an injunction against excessive bail would entail. Because the amount of bail prescribed for each criminal defendant depends on the peculiar facts and circumstances of his case, the setting of bail requires ad hoc decisions committed to the discretion of judges. An injunction against excessive bail, no matter how carefully limited, would require a federal court to reevaluate de novo each challenged bail decision. By contrast, an injunction requiring that all pro se motions be docketed and considered by the

> court ... would not require such case-by-case evaluations of discretionary decisions. It would add a simple, nondiscretionary procedural safeguard to the criminal justice system.

Id. at 1013-14.

This Circuit has abided by that same dividing line in two cases. In the first, it declined to abstain under *O'Shea* even though the relief sought, a declaration that the Los Angeles court was constitutionally required to have more judges, would entail "heavy federal interference" in the administration of the state court by requiring "restructuring" of the court and would inevitably lead to subsequent federal actions "exploring the contours" of the constitutional right the court would announce. *Los Angeles Cnty. Bar*, 979 F.2d at 699, 703. In the second, this Court held that while *Los Angeles County Bar* involved only an increase in judges to alleviate delay, which did not require the court to monitor any adjudications on the merits and thus did not warrant abstention, the complaint before it also addressed the adequacy of representation, and would necessarily involve consideration of the conduct of numerous individual cases and decisions by the presiding judges, which supported abstention. *E.T.*, 2012 U.S. App. LEXIS 5147 at *6-10.

B. A Complaint Against A State Court Clerk Seeking To Prevent Him From Enforcing His Administrative Policies Resulting In Denials Of Access To Newly Filed Civil Complaints Is Not the Type Of Action To Which *O'Shea* Abstention May Be Properly Applied

Unlike every case in which *O'Shea* has been applied, the relief sought by Courthouse News will not interfere with, interrupt, delay, disrupt, or affect the

adjudication of the merits of any pending or future matter in Ventura Superior, or in any California state court, for that matter. To the contrary, the relief Courthouse News seeks is directed solely at the administrative policies of the Ventura Clerk's office – namely, his policy of prohibiting access to new civil complaints until after they have been fully processed, and the resulting denial of access on the day complaints are filed, and continuing for days or weeks after.

As the prior Texas litigation shows, it is a simple matter for a federal court, in the first instance, to craft an injunction requiring a state court clerk to cease his policies resulting in delayed access and to provide the same timely same-day access already being provided by other courts. *See Jackson*, 2009 U.S. Dist. LEXIS 62300 at *14-15, 2010 U.S. Dist. LEXIS 74571 at *3-6. No ongoing federal oversight is necessary, nor does Courthouse News seek it in its complaint.

And in any event, the adjudication of delays in access is ancillary and peripheral to the adjudication of the court proceedings of the merits to which those records pertain. When the federal action is merely peripheral in this way, the concerns regarding equity, comity and federalism that underlie both *Younger* and *O'Shea* "have little force." *Steffel*, 415 U.S. at 462. Indeed, the Supreme Court has noted that *Younger* abstention is not appropriate when a federal action seeks to require state courts to hold preliminary hearings because such hearings would be ancillary to and not "prejudice the conduct of the trial on the merits." *Gerstein v.*

Pugh, 420 U.S. 103, 108 n.9 (1975).

Applying *Gerstein*, this Court has declined to abstain under *Younger* when the federal action raised issues that were merely peripheral to the state court proceedings in which the issues arose. *Sable Commc'ns*, 890 F.2d at 190; *L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1980). Other circuits have applied *Gerstein* rather than *Younger* in similar situations. *See, e.g., Habich v. City of Dearborn*, 331 F.3d 524, 530 (6th Cir. 2003) (declining *Younger* abstention when federal lawsuit raised different substantive issues than state action).

Thus, in *Parker v. Turner*, the Sixth Circuit abstained under *O'Shea* only after distinguishing the case before it from *Gerstein*:

> First, *Gerstein* dealt with an issue which was collateral to a pending ... proceeding. Second, the question raised in *Gerstein* was whether the plaintiffs had a right to have a hearing. The very existence of a hearing right was at issue. Third, the hearing right issue could not be raised in any pending state court proceeding.

Parker, 626 F.2d at 8.[11]

Applying the same criteria, it is apparent that this case is governed by *Gerstein*, not *O'Shea*. First, as noted above, the question of whether denying access for days or weeks to newly filed complaints violates the First Amendment

[11]In *E.T.*, this Court quoted *Parker* as stating that "'[w]hen the state agency in question is a state court ... the equitable restraint considerations appear to be nearly absolute.'" 2012 U.S. App. LEXIS 5147 at * 9. However, the *Parker* court explained later, in the same decision, that the "near-absolute rule" it derived from *O'Shea* and *Younger* was limited "to situations in which the relief sought would interfere with the day-to-day conduct of state trials." *Parker*, 626 F.2d. at 8.

right of access is peripheral and ancillary to the substantive civil litigation initiated by the complaint. Second, as in *Gerstein*, and unlike *Parker*, Courthouse News is not "objecting to the manner in which" the judges of the Ventura Superior Court are adjudicating requests by the Ventura Clerk to delay access. Rather, it is the fact that the Ventura Clerk is denying access through his across-the-board policies even though such adjudication has ***not*** occurred that is at issue here, and this issue can be resolved by a one-time injunction that involves no intrusion into the adjudication of state court cases. Third, because Courthouse News is not a party to the actions initiated by the complaints to which it seeks timely access, it will not have the opportunity in the normal course of any of those actions to raise the issue of access delays.[12]

C. Federal Courts Have Not Abstained From Prior Actions Raising First Amendment Challenges To State Court Restrictions On Access

Given the foregoing, it is not surprising that the federalism and comity concerns that underlie both *Younger* and *O'Shea* have never previously prevented federal courts from considering First Amendment challenges to restrictions on access to state court records and proceedings. For example, in *Hartford Courant*, a

[12]This *Gerstein* factor – that the federal court plaintiff lack the opportunity to have the federal issue heard in the course of the state court proceeding in which it arises – is satisfied even if the federal plaintiff could have intervened in the state court proceeding. *Green*, 255 F.3d at 1102-04; *Bickham v. Lashof*, 620 F.2d 1238, 1244-45 (7th Cir. 1980). Nor is the federal plaintiff required to have filed a separate state court lawsuit to adjudicate the issue. *Habich*, 331 F.3d at 530.

case strongly analogous to the instant action, several media companies brought a § 1983 action challenging the practice of the Connecticut state court system of sealing the docket sheets of certain cases so that the public could not discover the existence of litigation. 380 F.3d at 85-86. In *Rivera-Puig*, a reporter challenged the constitutionality of a Puerto Rico court rule that closed all criminal preliminary hearings. 983 F.2d at 322. Despite the presence of federalism and comity concerns, derived chiefly from the fact that in each case similar actions had been filed in the state/commonwealth courts (a factor not present here), both courts rejected *Younger* abstention and held that federal court was an appropriate venue to challenge a statute, administrative policy or the unauthorized actions of court administrators that infringed the First Amendment right of court access. *Hartford Courant*, 380 F.3d at 101; *Rivera-Puig*, 983 F.2d at 319-20.

Indeed, federal courts routinely entertain challenges by the media to orders restricting media access to ongoing state court litigation over federalism and comity objections precisely because access issues are ancillary and peripheral to the state court proceedings in which they arise. As one federal court found in considering a challenge to a state court order barring the attorneys in the case from speaking to the media:

> [T]he Court cannot agree that the challenged gag order is so essential to the state court proceedings such that an injunction against the order would amount to an injunction of the criminal prosecution itself. Abstention under *Younger* is appropriate when a federal court acts to

> frustrate a pending state court proceeding, by injunction, declaratory judgment or similar mechanism, such that the proceedings are halted or mooted. ... An injunction issuing from this Court against the enforcement of the gag order in [the underlying case] would not prohibit in any way the pending prosecution itself from going forward. Any interference with the state proceedings would be minimal and therefore cannot justify the eschewal of the Court's jurisdiction to protect the federal constitutional rights of the plaintiff.

Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 41 (D. Conn. 1987) (citations omitted); *see also FOCUS v. Allegheny Cnty. Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996) (rejecting *Younger* abstention in federal court challenge to state court gag order); *In re Search Warrant*, 923 F.2d 324, 328 (4th Cir. 1991) (rejecting *Younger* abstention in federal court action to unseal search warrant affidavit pertinent to state criminal proceeding); *Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 382-83 (N.D. Ind. 1992) (rejecting *Younger* abstention in federal court challenge to state court protective order).

For all of these reasons, the district court's order of dismissal on *O'Shea* grounds must be reversed.

IV.

THE CASE SHOULD BE REMANDED FOR ADJUDICATION ON THE MERITS OF COURTHOUSE NEWS' WELL-PLED 42 U.S.C. § 1983 CLAIM FOR DENIAL OF ITS FIRST AMENDMENT RIGHT OF ACCESS

When it reverses a district court's decision to abstain, this Court typically remands the case for the district court to consider the merits in the first instance. *See, e.g., United States v. Morros*, 268 F.3d 695, 697 (9th Cir. 2001) ("We hold

that abstention was improper and remand for adjudication on the merits.").

But even if this Court were to reach the merits, dismissal could not be affirmed on that ground, as Courthouse News' complaint clearly alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As noted, the parties agree that Courthouse News has a First Amendment right of access to the unlimited civil complaints filed in Ventura Superior, and that such access must be timely. ER 25. What remains to be determined is whether the evidence contained in the declarations supporting and opposing Courthouse News' motion for preliminary injunction that the district court did not rule on shows the delays in access alleged in Courthouse News' complaint, caused by the Ventura Clerk's policies of denying access until after "full processing," ER 69-70, 114, can withstand First Amendment scrutiny.

Grounded in "common-law traditions predating the enactment of our Constitution, the right of access belong[s] to the press and the general public" and now "also has a First Amendment basis." *Grove Fresh*, 24 F.3d at 897 (citing *Globe Newspaper Co.*, 457 U.S. at 603). Recognized first with respect to criminal court proceedings,[13] the constitutional right of access has been extended to court

[13]Starting in 1980 with criminal trials, *Richmond Newspapers*, 448 U.S. at 573, the Supreme Court recognized a First Amendment right of access to a range of proceedings in criminal cases, including testimony, *Globe Newspaper Co.*, 457 U.S. at 606, voir dire, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509-13 (1984) ("*Press-Enterprise I*"), and preliminary hearings, *Press-Enterprise II*,

records in criminal cases, *see, e.g., Associated Press*, 705 F.2d at 1145 (finding "no reason to distinguish between pretrial proceedings and the documents filed in regard to them"), and "every lower court opinion of which we are aware that has addressed the issue of First Amendment access to ***civil*** trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal" proceedings and "to civil litigation documents filed in court as a basis for adjudication." *NBC Subsidiary*, 20 Cal. 4th at 1208-09 & n.25.[14]

The reason the First Amendment right of access has "'been extended to civil proceedings [is] because the contribution of publicity is just as important there.'" *Jackson*, 2009 U.S. Dist. LEXIS 62300 at *10 (quoting *Grove Fresh*, 24 F.3d at

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478 U.S. at 7-10; *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam).

[14]Although this Circuit has not specifically addressed the First Amendment right of access to civil records and proceedings, several others "have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records." *New York Civil Liberties Union v. New York City Transit Auth.*, 2011 U.S. App. LEXIS 26087, *28 (2d Cir. July 20, 2011); *accord, e.g., Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (recognizing First Amendment right of access to civil cases); *Rushford v. New Yorker Magazine, Inc.* 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case."); *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("First Amendment guarantees are implicated" when public scrutiny of civil court proceedings is restricted); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) (First Amendment right of access applies to documents filed in civil litigation because, *inter alia*, "[i]n either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."); *In re Cont'l Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (First Amendment right to documentary evidence in civil cases).

897). "'[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.'" *Leigh*, 2012 U.S. App. LEXIS 7731 at *21 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975)). But the press cannot inform the public that the powers of the judicial system have even been invoked if reporters cannot see the newly filed complaints. "The filing of the complaint is likely to be the first occasion that the public could become aware of the dispute," *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989), and denial of access to a complaint thus "prevents the public from learning anything about th[e] action – including its existence." *Standard Chartered Bank Int'l Ltd. v. Calvo*, 757 F. Supp. 2d 258, 260 (S.D.N.Y. 2010). Access to civil complaints, then, is essential to safeguard the public's "right to know" – once "a plaintiff invokes the Court's authority by filing a complaint" – "who is invoking it, and towards what purpose, and in what manner." *In re NVIDIA Corp.*, 2008 U.S. Dist. LEXIS 120077 at *11.

As this Circuit has recognized, a delay in access of even "48 hours" constitutes a denial of this constitutional right because "[t]he effect … is a total restraint on the public's first amendment right of access even though the restraint is limited in time." *Associated Press*, 705 F.2d at 1147. The reason for this rule – that even temporary delays implicate constitutional concerns – is clear. "The

newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897; *accord In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (even "a 'minimal delay' in access ... unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure").

Although the First Amendment right of access is not absolute, a denial of access is constitutional only if supported "'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 946-47 (9th Cir. 1998) (quoting *Press-Enterprise II*, 478 U.S. at 9-10). In *Phoenix Newspapers*, this Court reiterated the following three-part test for determining whether a countervailing interest authorizes the restriction on access:

(1) The existence of a right of comparable importance to the First Amendment that is threatened by public access to the court records;

(2) A substantial probability of irreparable damage to the asserted right will result if access is not withheld; and

(3) A substantial probability that alternatives to withholding access will not adequately protect the asserted right.

156 F.3d at 949; *accord, e.g., Associated Press*, 705 F.2d at 1145-46.

Of course, the findings mandated to justify any denial of access cannot be made at the pleading stage. Indeed, this Court recently emphasized the rule that "a court cannot rubber-stamp an access restriction simply because the government says it is necessary." *Leigh*, 2012 U.S. App. LEXIS 7731 at *20. Rather, courts must determine, based on the facts, whether restrictions on access are necessary to protect "a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 607.

The pleadings do not suggest, let alone support factual findings, that the denial of access for the periods alleged by Courthouse News are "narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exists." *Jackson*, 2009 U.S. Dist. LEXIS 62300 at *12-13. To the contrary, the complaint alleges facts demonstrating exactly the opposite to be true – that many courts can and do provide same-day access to new complaints even if they have not been fully processed. ER 63-65, 69, 75-92, 116. At the very least, then, Courthouse News' complaint alleged a plausible claim that "the delay in the availability of these documents is the 'functional equivalent' of an access denial and is … unconstitutional." *Jackson*, 2009 U.S. Dist. LEXIS 62300 at *10-11; *accord*, *e.g*., *Associated Press*, 705 F.2d at 1147; *In re Charlotte Observer*, 882 F.2d at 856; *Globe Newspaper Co*., 868 F.2d at 504.

CONCLUSION

Over and over, this Court and the Supreme Court have recognized the First Amendment right of access and imposed stringent procedural and substantive tests for overcoming that presumptive right. In enacting 42 U.S.C. § 1983, Congress provided a federal remedy for adjudicating violations of that right by state court officials. It would be ironic, to say the least, if Courthouse News could not invoke the federal court forum to adjudicate a deprivation of its First Amendment right of access under 42 U.S.C. § 1983. But that is exactly what will result if the district court's decision is allowed to stand.

For all of the foregoing reasons, Courthouse News respectfully requests that this Court reverse the district court's order abstaining and dismissing Courthouse News' complaint under the *Pullman* and *O'Shea* abstention doctrines, and that this Court issue an opinion clarifying that those abstention doctrines have no place in cases like this one alleging violations of the First Amendment right of access by state court officials.

DATED: May 29, 2012

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no known related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. This brief uses 14 point proportional type and contains 13,881 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 May 29, 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.

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/s/ Rachel Matteo-Boehm