Docket No. 10-15248

In the

United States Court of Appeals

for the

Ninth Circuit

E.T., K.R., C.B. and G.S., by their next friend, Frank Dougherty, on their behalf and on behalf of all those similarly situated,

Plaintiffs-Appellants

v.

RONALD M. GEORGE, Chair of the Judicial Council of California, in his official capacity; WILLIAM C. VICKREY, Administrative Director of the Administrative Office of the Courts of the Judicial Council, in his official capacity; and JAMES M. MIZE, Presiding Judge of the Superior Court of the County of Sacramento, in his official capacity,

Defendants-Appellees

Appeal from an Amended Order of the United States District Court for the Eastern District of California, No. 09-cv-01950, entered January 11, 2010 by Judge Frank C. Damrell, Jr.

BRIEF OF AMICUS CURIAE CHILDREN'S RIGHTS IN SUPPORT OF APPELLANTS

MARCIA ROBINSON LOWRY
MELISSA ANN COHEN
Children's Rights
330 Seventh Avenue, 4th Floor
New York, NY 10001
(212) 683-2210

Counsel for Amicus

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), counsel for amicus certify that (1) amicus does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amicus.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. REMAND IS REQUIRED BECAUSE THE DISTRICT COURT DISMISSED WITHOUT SEPARATELY CONSIDERING PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF REGARDING ATTORNEY CASELOADS 6

II. EVEN IF THE MERITS OF PLAINTIFFS' APPEAL ARE CONSIDERED, ON DE NOVO REVIEW THIS COURT SHOULD FIND THAT ABSTENTION IS UNWARRANTED 9

A. Declaratory Relief Regarding Attorney Caseloads Does Not Require Abstention Under *O'Shea* 10

1. Under Ninth Circuit Precedent, Abstention Under *O'Shea* is Unwarranted Where Declaratory Relief Concerning Systemic Issues is Sought 10

2. *O'Shea* is Inapplicable Because Plaintiffs Seek No Intrusion into State Proceedings 11

B. A Claim for Declaratory Relief Regarding Attorney Caseloads Does Not Require Abstention Under *Younger* 14

1. In Analogizing This Case to Cases Challenging Executive Agency Child

Welfare Systems, the District Court Ignored the Weight of Authority in Those Cases 15

2. The District Court Overlooked That This Case Does Not Challenge Purely Executive Agency Action, But Rather Challenges An Administrative Function Within the Judicial Branch of Government 18

3. *Younger* Abstention is not Required Under the Test Outlined in *AmerisourceBergen* 20

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

CASES **Page(s)**

AmerisourceBergen Corp. v. Roden,
495 F.3d 1143 (9th Cir. 2007) 15, 20-21, 23

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975)..... 8-9

Family Div. Trial Lawyers of Superior Court - D.C., Inc. v. Moultrie
725 F.2d 695 (D.C. Cir. 1984).....13

Gardner v. Luckey,
500 F.2d 712 (5th Cir. 1974) 14 n.1

Hirsh v. Justices of Supreme Court of State of Cal.,
67 F.3d 708 (9th Cir. 1995) 21

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975).....15

In re Edward S.,
92 Cal. Rptr. 3d 725 (Cal. Ct. App. 2009).....21

L.A. County Bar Ass'n v. Eu,
979 F.2d 697 (9th Cir. 1992) 3-4, 8, 10-12

Luckey v. Miller,
976 F.2d 673 (11th Cir. 1992) 14 n.1

Molsbergen v. U.S.,
757 F.2d 1016 (9th Cir. 1985) 8-9

CASES (continued) **Page(s)**

New Orleans Public Service, Inc.(NOPSI) v. Council of City of New Orleans,
491 U.S. 350 (1989)..... 18-19 and n.5

O'Shea v. Littleton,
414 U.S. 488 (1974).....3-4, 7-13, 14 n. 1, 23

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987).....20

Prentis v. Atl. Coast Line Co.,
211 U.S. 210 (1908).....18 n. 4, 19

Rizzo v. Goode,
423 U.S. 362 (1976).....14 n.1

San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose,
546 F.3d 1087 (9th Cir. 2008) 15

Younger v. Harris,
401 U.S. 37 (1971)..... *passim*

STATE STATUTES AND REGULATIONS

Cal. Fam. Code § 6710 (West 2010).....22 n.6

California Rules of Professional Conduct
§ 3-310 (January 1, 2010)..... 5, 21-22

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 8 8

INTEREST OF AMICUS CURIAE

Children's Rights is a national watchdog organization advocating on behalf of abused and neglected children in the United States. Since 1995, the organization has used legal action and policy initiatives to create lasting improvements in child protection, foster care and adoption.

Children's Rights has brought approximately 20 federal class action child welfare reform lawsuits against state and local child welfare agencies around the country, and has won landmark legal victories and improved the child welfare systems in those cases. Children's Rights' cases in six jurisdictions successfully exited court oversight after those child welfare systems met court-ordered settlement agreements. Children's Rights is currently involved in monitoring and enforcing court-ordered settlements it negotiated in eight jurisdictions and is litigating pending class action lawsuits in three additional states.

Among the accomplishments of Children's Rights was the result in *Kenny A. v. Perdue*, a case removed to federal court, in which the district court found a state constitutional right to counsel for children in abuse and neglect proceedings. That case has resulted in sweeping reforms to the systems of child representation in Fulton and DeKalb Counties, Georgia.

The issue raised in this appeal concerns California's administration of a system for appointing counsel to abused and neglected children who have open

child welfare cases. Children's Rights has wide-ranging expertise in federal class action child welfare litigation issues, including abstention questions concerning the interaction between federal court litigation seeking systemic reform and state child welfare cases. Furthermore, it has been one of the few organizations around the country focusing on children's right to counsel in dependency proceedings.

Children's Rights finds this case to be of significant concern because the district court ruled that abstention was warranted on all of Plaintiffs' claims—including claims relating to purely administrative decisions affecting the caseloads of attorneys representing children in dependency proceedings. While the district court relied on systemic child welfare cases to make its ruling, the ruling in fact goes against the overwhelming weight of authority in those cases. The district court's decision therefore creates dangerous precedent that could negatively impact future efforts on behalf of abused and neglected children to address state executive branch violations of their constitutional rights in the federal courts. Children's Rights submits this brief to request that this Court either remand the case to the district court for separate consideration of the limited claim on appeal, namely, the claim for declaratory relief concerning attorney caseloads; or alternatively, on de novo review, find that abstention on this issue is unwarranted, reverse the district court decision on this claim, and remand for further proceedings consistent with its decision.

SUMMARY OF ARGUMENT

As a threshold matter, this Court should not determine the merits of Plaintiffs-Appellants' appeal. Instead, remand is required because the district court never separately addressed Plaintiffs' request for a declaratory judgment that the aggregate caseloads of attorneys representing children in the Sacramento County dependency courts violate children's constitutional and statutory rights to adequate and effective assistance of counsel. Plaintiffs originally brought requests for both declaratory and injunctive relief concerning both aggregate caseloads of attorneys and also the caseloads, case management processes and resources of judges in dependency proceedings. The district court granted Defendants' motion to dismiss, concluding that abstention as to the whole case was required under the principles articulated by the Supreme Court in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Younger v. Harris*, 401 U.S. 37 (1971). Plaintiffs appeal only their request for declaratory relief as to attorney caseloads, and this Court should remand for consideration whether abstention from adjudication of only that claim is appropriate.

Even if the merits of Plaintiffs-Appellants' appeal are considered, on de novo review this Court should find that abstention is unwarranted. Specifically, abstention is inapplicable under *O'Shea* because, as the Ninth Circuit held in *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), the federalism concerns in

O'Shea do not apply to cases solely involving claims for declaratory relief. Additionally, *O'Shea* required abstention on claims that would trigger "interference in the state . . . process by means of continuous or piecemeal interruptions of the state proceedings." 414 U.S. at 500. Here, Plaintiffs' sole claim on appeal seeks declaratory relief regarding an essentially facial challenge to the *aggregate* caseloads of attorneys representing children in dependency proceedings. Because adjudicating Plaintiffs' claim concerning attorney caseloads does not entail any intrusion into state proceedings, no *O'Shea* concerns are raised by this case on appeal.

Additionally, the claim on appeal does not satisfy the abstention test in *Younger*, as applied by the Ninth Circuit. As an initial matter, the district court relied upon certain cases in which courts abstained from adjudicating systemic challenges to executive agency child welfare systems. The clear weight of authority holds that such challenges do not trigger abstention concerns because the relief sought would not interfere with any dependency proceedings. Here, the fact that Defendants are in the judicial branch may raise an initial question of whether Plaintiffs' claim challenges a judicial rather than executive function. Plaintiffs do not challenge a judicial function, however, because Defendants have purely administrative responsibility for the aggregate caseloads of attorneys, and no

power or responsibility in that capacity to affect any individual dependency proceedings.

In any event, *Younger* abstention is unwarranted. While the requirement of an ongoing state judicial proceeding may be satisfied, none of the other requirements are met. The proceedings at issue do not involve an exclusive area of state interest. California, like all states, voluntarily participates in the federal Title IV-E program, under which the state receives considerable federal funding for its child welfare system in exchange for complying with a detailed scheme of federal requirements. This is a system of "cooperative federalism," not the kind of purely state interest that triggers *Younger* concerns.

Additionally, children do not have an adequate opportunity to raise this claim—an essentially facial right to counsel claim—in their ongoing dependency proceedings. The attorneys who could raise this claim in the juvenile court are the very same overburdened appointed counsel who have a professional stake in any adjudication of ineffective assistance. Under the California Rules of Professional Conduct, this is an inherent conflict, one that a child client cannot waive as a matter of law. Since a minor child also cannot retain new counsel to bring her ineffective assistance claim, the presentation of that claim in an individual child's dependency case is barred.

Finally, and most importantly, the attorney caseload claim for declaratory relief at issue in this appeal would not interfere with any individual dependency proceedings or even have the indirect effect of such interference. Plaintiffs' sole claim on appeal seeks a finding that high aggregate attorney caseloads violate children's right to adequate and effective assistance of counsel in their dependency proceedings. Plaintiffs do not ask the federal court to enjoin, alter, or even review any individual child's proceedings. Neither the Named Plaintiffs nor the putative plaintiff class seek relief that would allow any enforcement on an individual basis in federal court of a declaratory judgment concerning aggregate caseloads. No interference exists under *Younger*.

In sum, for the reasons set forth fully below, this Court should remand this matter to the district court for consideration of whether the sole claim and relief presented on appeal require abstention. In the alternative, this Court should find that abstention is unwarranted, reverse the district court's decision on this claim, and remand for further proceedings consistent with its decision.

ARGUMENT

I. REMAND IS REQUIRED BECAUSE THE DISTRICT COURT DISMISSED WITHOUT SEPARATELY CONSIDERING PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF REGARDING ATTORNEY CASELOADS

This case should be remanded. Although the Complaint asserts facts and claims regarding attorney caseloads as well as judicial caseloads, judicial case

management and judicial resources, and separately seeks declaratory and injunctive relief, the district court did not separately consider or rule on the issue on appeal: whether abstention was required with respect to the request for declaratory relief regarding attorney caseloads. Thus, the issue on appeal is not ripe for review.

The Complaint asserted independent and separate claims alleging that (1) high attorney caseloads violate Plaintiffs' right to adequate and effective counsel or guardians ad litem under the U.S. Constitution, the California Constitution, and various federal and state statutes (Compl. ¶¶ 78-81, Counts I.A, I.B, III, V, VI, and VII), and (2) high judicial caseloads violate Plaintiffs' due process rights (*id.* ¶¶ 82-84, Count I.C). Further, Plaintiffs sought both declaratory and injunctive relief as to each claim (*id.*, "Prayer for Relief" ¶ 3-4, at 28-29). The district court was particularly concerned about the impact of injunctive relief with respect to judicial caseloads, stating:

> [I]n order to enforce any method of injunctive relief, the court would be required to act as a receiver for the Sacramento dependency court system, ensuring that judges were giving adequate time to each individualized case . . . . Such involvement in any state institutional system is daunting, but the problems accompanying plaintiffs' requested relief is increased exponentially when applied to a state judicial system.

(Op. at 22, citing *O'Shea*, 414 U.S. at 501 (stating that "monitoring" of "state court functions" would be "antipathetic to established principles of comity").)

The district court did not separately consider plaintiffs' claim for declaratory relief as to attorney caseloads, the single claim and form of relief at issue in this appeal. In particular, in abstaining under *O'Shea*, the district court distinguished and declined to apply the holding of *L.A. County*, where this Court explicitly rejected abstention based on the fact that plaintiffs there "*sought only declaratory, not injunctive relief*." (Op. at 25 (emphasis added).) Despite this precedent, the district court disregarded the separate claim for declaratory relief here simply because Plaintiffs sought injunctive relief "in addition to declaratory relief." *Id*. Since *L.A. County* is the law of the Court as to claims seeking only declaratory relief, this was a critical omission.

Similarly, in abstaining under *Younger*, the district court failed to make separate findings, as required, as to the distinct claims regarding attorney caseloads and judicial caseloads (Op. at 43-44). *See Molsbergen v. U.S.*, 757 F.2d 1016, 1018-19 (9th Cir. 1985) (remanding case for further proceedings on a count the district court dismissed without separately considering).

Plaintiffs have been deprived of their entitlement to the district court's separate consideration of alternative claims as well as alternative forms of relief. *See* Fed. R. Civ. P. 8(d)(3) (party may "state as many separate claims or defenses as it has, regardless of consistency"); Fed. R. Civ. P. 8(a)(3) (demand for relief may "include relief in the alternative or different types of relief"); *see also Doran*

v. Salem Inn, Inc., 422 U.S. 922, 928 (1975) (affirming a party's right to have alternative claims for relief considered). Accordingly, this Court should remand the case for consideration of whether abstention is warranted as to Plaintiffs' request for declaratory relief concerning attorney caseloads. *See Molsbergen*, 757 F.2d at 1025.

II. EVEN IF THE MERITS OF PLAINTIFFS' APPEAL ARE CONSIDERED, ON DE NOVO REVIEW THIS COURT SHOULD FIND THAT ABSTENTION IS UNWARRANTED

If this Court considers the merits of the narrow claim raised on this appeal, it should find that abstention is not warranted under either *O'Shea* or *Younger*. The district court's decision to abstain was predicated upon an undifferentiated evaluation of all claims and relief sought in the Complaint, rather than on separate consideration of (a) injunctive versus declaratory relief and (b) the claim concerning court-appointed attorney caseloads versus the claims concerning judicial caseloads, judicial case management and judicial resources. However, Plaintiff Children's request for a declaration that attorney caseloads exceeding well-defined standards deprive them of their right to adequate assistance of counsel in dependency proceedings triggers neither the concerns regarding federal court intrusion into state functions that were at issue in *O'Shea* nor the concerns over federal court interference with ongoing state proceedings in *Younger*.

A. Declaratory Relief Regarding Attorney Caseloads Does Not Require Abstention Under *O'Shea*

The federalism and comity concerns underlying the *O'Shea* decision are inapplicable here. In *O'Shea*, the Supreme Court ruled that district courts should abstain from hearing cases that would result in the "issuance of injunctions against state officers engaged in the administration of the State's criminal laws." 414 U.S. at 499. Since the respondents in *O'Shea* did not seek "to strike down a single state statute, either on its face or as applied," but rather sought to "control[] or prevent[] the occurrence of specific events that might take place in the course of future state criminal trials," the case implicated a type of "intervention" that would "constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id*. at 500-01.

The claim in this case on appeal is easily distinguishable from the claims in *O'Shea* and its progeny because (1) it involves only declaratory relief, and (2) the relief sought would not impact "specific events in the course of" future dependency proceedings.

1. Under Ninth Circuit Precedent, Abstention Under *O'Shea* is Unwarranted Where Declaratory Relief Concerning Systemic Issues is Sought

Under this Court's precedent in *L.A. County*, the claim here for declaratory relief clearly does not warrant abstention. In *L.A. County*, plaintiffs sought a declaration that a statute setting the number of Los Angeles County Superior Court

judges violated plaintiffs' constitutional rights because it resulted in a 59-month median time to resolution of civil cases. 979 F.2d at 700. The Court held that abstention under *O'Shea* did not apply because the declaratory relief requested would "resolve a substantial and important question currently dividing the parties." *Id*. at 703-04.

The claim and requested relief regarding attorney caseloads at issue in this appeal are squarely analogous to the claim made in *L.A. County*. As in *L.A. County*, the central factual claim here concerns caseloads (in that case, judicial rather than attorney caseloads). (Compl. ¶ 51.) In *L.A. County*, the high judicial caseloads allegedly caused unconstitutional delays in resolving most or all civil cases; here high attorney caseloads allegedly prevent attorneys from providing the adequate and effective assistance of counsel to which Plaintiffs are entitled under the Constitution and various state and federal statutes. *Id.* Thus here, as in *L.A. County*, a declaration concerning the constitutionally and/or statutorily-permissible level of attorney caseloads—the only relief at issue on this appeal—would resolve a "substantial and important question dividing the parties."

2. O'Shea is Inapplicable Because Plaintiffs Seek No Intrusion into State Proceedings

O'Shea is also inapplicable here because an order capping attorney caseloads would not require "intrusive follow-up into state court proceedings." (Op. at 16). Thus, this relief would not require, as the district court conjectured,

case-by-case consideration of "whether some types of cases require more investigation or preparation, which types of those cases deserve more resources, and how much time or attention is constitutionally and/or statutorily permissible." (Op. at 23.)

L.A. County found that where a plaintiff alleges due process violations arising *per se* from high caseloads, the concerns expressed by the Supreme Court in *O'Shea* are not present. In *L.A. County*, this Court recognized that different types of cases required different judicial treatment. 979 F.2d at 700 (noting priority accorded certain types of cases). But because the issue raised concerned *average* caseloads rather than the conduct of individual cases, the court concluded that it was unproblematic from an abstention standpoint for a district court to establish a standard. *Id.* at 703 (noting that although "it would be very difficult for courts to determine how much delay was constitutionally acceptable in any given case," the issue of the "*average* time" is appropriate for adjudication (emphasis in original)). A declaratory judgment here would, as in *L.A. County*, impact only the aggregate attorney time and attention available to clients and not trigger any inquiry or relief respecting the conduct of individual cases. Indeed, Plaintiffs have pled the existence of neutral, published standards for attorney caseloads in dependency proceedings. (*See* Compl. ¶¶ 41, 51 (citing standard of 188 cases per

attorney established by Judicial Council and standard of 100 cases established by the National Association of Counsel for Children).)

Furthermore, a challenge to administrative decisions affecting all cases, like that at issue on appeal, is not subject to abstention under *O'Shea*. In *Family Div. Trial Lawyers of Superior Court - D.C., Inc. v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), a case exactly on point, the D.C. Circuit held that *O'Shea* abstention was inappropriate because a challenged system for assigning counsel to parents in neglect proceedings was "a custom or a usage known to all participants in the system" rather than "a decision left to the local judiciary's discretion to be exercised on a case-by-case basis." 725 F.2d at 703-04. Therefore, "relief can be effected by requiring the superior court to adopt another 'rule' which more equitably divides the financial burdens attendant to provision of counsel for indigent parents in neglect proceedings" and "[t]here is no foreseeable need for any 'monitoring' of its day-to-day operations." *Id*. at 704. Here, too, the declaratory relief Plaintiffs seek would compel the Judicial Council and the Administrative Office of the Courts to "adopt another rule" that provides for aggregate caseload ceilings for attorneys representing children in the juvenile courts. The facts as alleged here are easily distinguishable from cases in which abstention under *O'Shea* has been applied, where typically plaintiffs sought to enjoin, or put in place federal court oversight of, the individual, discretionary decisions made by judges,

attorneys and/or law-enforcement personnel in individual cases, or to impose a detailed regulatory framework on state officials.[1]

Under the narrow claim on appeal, Plaintiffs have not sought any relief concerning individual cases; rather, they seek systemic declaratory relief concerning attorney caseloads.

B. A Claim for Declaratory Relief Regarding Attorney Caseloads Does Not Require Abstention Under *Younger*

The doctrine of *Younger* abstention is founded on the principle of federal-state comity; that is, the principle that federal courts should not interfere with legitimate activities of the States. *Younger*, 401 U.S. at 43-44. In *Younger*, the Supreme Court protected the integrity of state court criminal proceedings by

[1] *See, e.g., O'Shea*, 414 U.S. at 500-01 (challenging allegedly discriminatory practices in setting of bond and sentencing); *Rizzo v. Goode*, 423 U.S. 362, 362, 379 (1976) (injunction requiring "a comprehensive program for dealing adequately with civilian complaints" and placing "a sharp limitation on the department's latitude in the dispatch of its own internal affairs" (internal quotations omitted)). Where *O'Shea* has been applied in cases alleging inadequate representation of counsel, plaintiffs sought to impose detailed requirements concerning the conduct of attorneys in individual cases. *See Gardner v. Luckey*, 500 F.2d 712, 713, 715 (5th Cir. 1974) (where plaintiffs sought case-specific requirements including, *inter alia*, consultation with each client within 48 hours of the client's arrest and exploration by attorney of all possible defenses, enforcement would require "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials"); *Luckey v. Miller*, 976 F.2d 673, 676, 678 (11th Cir. 1992) (where plaintiffs sought order compelling appointment of counsel at probable cause determinations, "speedy appointment of counsel" at "critical stages," "adequate services and experts," and "adequate compensation for counsel" monitoring would involve "review [of] ongoing state proceedings").

preventing a criminal defendant from seeking a federal court *injunction* of his pending state criminal case. *Younger* has since been extended to prevent federal courts from enjoining state civil enforcement proceedings, since the same comity concerns are present there. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-07 (1975).

However, "[a]s virtually all cases discussing [*Younger* abstention] emphasize, the limited circumstances in which abstention by federal courts is appropriate remain the exception rather than the rule." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) (quoting *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007). District courts must exercise jurisdiction except where each of an abstention doctrine's requirements are strictly met. *AmerisourceBergen*, 495 F.3d at 1148.

1. In Analogizing This Case to Cases Challenging Executive Agency Child Welfare Systems, the District Court Ignored the Weight of Authority in Those Cases

In reaching its decision to abstain under *Younger*, the district court incorrectly relied on a few cases in which federal courts abstained from adjudicating challenges to state executive agency child welfare systems. In doing

so, it ignored the overwhelming weight of authority in similar cases throughout the country, which have held that such cases do not warrant *Younger* abstention.[2]

[2] *See LaShawn A. v. Kelly*, 990 F.2d 1319, 1322–24 (D.C. Cir. 1993) (rejecting application of *Younger* abstention despite family court neglect proceedings, review hearings, and termination proceedings); *L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (finding *Younger* abstention unwarranted where abused and neglected minor plaintiffs were not seeking to enjoin plaintiffs' dependency proceedings or prohibit state officials from enforcing any state law); *D.G. et al. v. Henry et al.*, 4:08-cv-00074-GKF-FHM, Dkt. No. 205 (N.D. Okla. Jan. 5. 2009) (denying motion to dismiss under *Younger*); *Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 1140920, at *5-*7 (E.D. Mich. April 17, 2007) (rejecting *Younger* abstention in challenge to administration of Michigan's child welfare system where relief "will not require ongoing federal court interference with the daily operation of Michigan's juvenile courts."); *Olivia Y. v. Barbour*, No. 3:04CV251LN, 2006 WL 5187653, at *1 (S.D. Miss. Aug. 29, 2006) (denying renewed motion for *Younger* abstention where district court was "not persuaded" that all possible relief it might enter would "necessarily" interfere with Mississippi youth court proceedings) (Exhibit 7); *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 570 (S.D. Miss. 2004) (rejecting motion for *Younger* abstention where court was "hard-pressed to conclude" that any relief sought by plaintiff children would necessarily interfere with ongoing youth court proceedings); *Kenny A. v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003) (finding *Younger* abstention improper because relief sought was directed solely at executive branch officials and would not necessarily interfere with juvenile court review hearings); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 957 (M.D. Tenn. 2000) (refusing to abstain under *Younger* where "nothing about this litigation seeks to interfere with or enjoin" "ongoing and pending state proceedings concerning individual [plaintiff] foster children"); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 514 (D.N.J. 2000) (refusing to apply *Younger* to class challenge of New Jersey's child welfare system); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 688-89 (S.D.N.Y. 1996) (finding *Younger* abstention inapplicable where "defendants do not refer this Court to any pending state proceeding in which plaintiffs will have the opportunity to present the[ir] federal claims"); *Baby Neal v. Casey*, 821 F. Supp. 320, 332-33 (E.D. Pa. 1993) (same), rev'd on other grounds, 43 F.3d 48 (3d Cir. 1994). Despite the fact that abstention can be asserted at any time, none of the subsequent consent decrees entered in the above-mentioned cases has ever been challenged as having

In this long line of cases, courts have found that abstention is not warranted in cases challenging executive agency child welfare systems because defendants are state executive officials and the actions challenged are clearly executive in nature. Federal courts facing challenges to purely executive agency functions and systems have a relatively straightforward task before them, since the challenged actions do not touch on the judicial function whatsoever, and it is clear in those cases that the relief requested will not affect the substance of any state dependency court proceedings.[3]

(Cont.)

---

interfered with state court actions because they have been crafted in a way to not interfere.

[3] Furthermore, the specific executive agency cases relied upon by the district court are inapposite. In *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), class certification was denied, *id.* at 1290, raising the problem that the relief ordered on behalf of the named plaintiffs in the federal court and the relief granted by the juvenile courts in the children's individual cases might conflict. This case remains a putative class action in which Plaintiffs do not seek federal relief addressing the substance of any individual dependency proceedings, including those of the Named Plaintiffs. *31 Foster Children v. Bush* is distinguishable because plaintiffs there sought to "have the District Court appoint a panel and give it authority to implement a system-wide plan to revamp and reform dependency proceedings in Florida," 329 F.3d 1255, 1279 (11th Cir. 2003), while here Plaintiff Children seek no relief that would require a federal court to oversee, reform, or even review any state dependency proceedings. Additionally, the court below erroneously interpreted the Tenth Circuit's decision in *Joseph A. v. Ingram*, 275 F.3d 1253 (10th Cir. 2002). The district court relied on the incorrect proposition that the Tenth Circuit found that federal enforcement of some provisions of the *Joseph A.* consent decree, before the court on a contempt motion related to defendants' noncompliance, would violate *Younger*. In fact, the Tenth Circuit's queries in this regard were dicta, and on remand, after a section-by-section review of consent

2. The District Court Overlooked That This Case Does Not Challenge Purely Executive Agency Action, But Rather Challenges An Administrative Function Within the Judicial Branch of Government

Cases challenging executive agency child welfare systems are wholly inapposite and on an entirely different footing than this case for *Younger* purposes. The district court misapplied these cases in a way that set dangerous legal precedent. In this case, while the policies and actions challenged are entirely administrative in nature,[4] the decision-makers happen to be housed within the judicial branch of California's government, unlike those in challenges to purely executive actions. Because the Defendants in this case are judicial officials, there is an added threshold question as to whether the challenged actions taken by those officials are judicial or administrative in nature.[5]

The Supreme Court in *New Orleans Public Service, Inc.(NOPSI) v. Council of City of New Orleans*, 491 U.S. 350 (1989) noted, "[w]hile we have expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, we

(Cont.)

---

decree provisions, the district court found that *Younger* abstention was not warranted.

[4] For *Younger* purposes, administrative decision-making such as that at issue here is regarded the same as legislative and executive decision-making, and abstention is not appropriate in federal challenges to those actions. *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908).

[5] Of course, if the challenged actions in this case were determined to be judicial in nature, *Younger* abstention would be appropriate. *NOPSI*, 491 U.S. at 369-70.

have never extended it to proceedings that are not 'judicial in nature.'" *Id.* at 369-70. The Court then recalled its decision in *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210 (1908), a challenge to railroad rate-setting in which defendant commission "was invested with both legislative and judicial powers," *NOPSI*, 491 U.S. at 370. The *Prentis* court explained the difference between judicial and non-judicial proceedings:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind . . .

Prentis, 211 U.S. at 226. As in *Prentis*, the Defendants in this case are both judicial and legislative/administrative actors, so a similar analysis is necessary here to determine whether the federal court should abstain from deciding Plaintiffs' challenge to the particular actions at issue in this case. Here, the challenged actions of Defendants are not "judicial" as the Supreme Court defined that term in *Prentis*, as they have nothing to do with judges "investigat[ing], declar[ing] and enforce[ing] liabilities. . .under laws supposed already to exist." *Prentis*, 211 U.S. at 226. Instead, the challenged actions of the Defendants in this case fall under the Supreme Court's definition of "legislation" in *Prentis*, since administrative decisions

regarding attorney caseload levels "look[] to the future and change[] existing conditions by making a new rule." *Id.*

3. *Younger* Abstention is not Required Under the Test Outlined in *AmerisourceBergen*

The Ninth Circuit has set out four requirements that must be met for a court to abstain under *Younger*: (1) there must be ongoing state judicial proceedings; (2) the proceedings must implicate important state interests; (3) the state proceedings must provide the plaintiff with an adequate opportunity to raise federal claims; and (4) the federal court proceeding would enjoin the state court proceeding or would have the practical effect of doing so. *AmerisourceBergen*, 495 F.3d at 1149. In this case, *AmerisourceBergen* requirement (1) may be met, but (2), (3), and (4) are not.

a. Plaintiff Children's Claims Do Not Intrude Upon Any Exclusive Area of Important State Interest

The second *Younger* requirement is met when "'the State's interests in the [ongoing] proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.'" *AmerisourceBergen*, 495 F.3d at 1149 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987)). Only if the state proceeding involves *uniquely* state interests is this requirement satisfied. *Id.* at 1150.

The parties in this case do not dispute that California has an important interest in the welfare of children living within its borders. However, California voluntarily participates in the federal Title IV-E program, thereby obtaining federal funding for a substantial portion of the costs of its child welfare system. In return, California agrees to administer its child welfare system in accordance with detailed federal regulations relating to virtually every aspect of that system. This scheme indicates that child welfare is not an area of exclusive state interest, but rather is an interest universally held by both the federal and state governments. It therefore is "not the type of important state interest that animates the *Younger* abstention doctrine." *AmerisourceBergen*, 495 F.3d at 1150.

b. Plaintiff Children Do Not Have an Adequate Opportunity to Present their Federal Claims in Their Family Court Proceedings

Plaintiffs do not have an adequate opportunity to raise their federal claims in the context of their dependency proceedings. This *Younger* requirement is satisfied unless "state procedural law *bars* presentation of the federal claims" in the ongoing state proceedings. *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (emphasis in original). While California courts have held that juvenile courts can hear constitutional claims related to deficient attorney performance, *In re Edward S.*, 92 Cal. Rptr. 3d 725, 740-44 (Cal. Ct. App. 2009), the California Rules of Professional Conduct operate to bar such claims. Those

rules state that an attorney "shall not accept or continue representation of a client without providing written disclosure to the client where . . . [the attorney] has . . . [a] professional interest in the subject matter of representation." California Rules of Professional Conduct (January 1, 2010), *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf, § 3-310(B)(4). Because those same rules require an attorney to perform legal services with competence (*id.* § 3-110(A)), an attorney would have a professional stake in any claim he brought on behalf of his client alleging the attorney's own deficient performance. A child client is not competent as a matter of law to waive this conflict, and a minor child cannot retain new counsel to bring her ineffective assistance claim.[6] As a result, the California Rules of Professional Conduct bar the presentation of the claims brought in this federal case in an individual child's dependency case.

c. Plaintiff Children's Claims Would Not Enjoin Any Family Court Proceedings or Have the Practical Effect of Doing So

The declaratory relief regarding attorney caseloads requested in this case would not interfere with ongoing state dependency proceedings. This *Younger*

[6] California law presumes that minors are incompetent to protect their own interests and thus gives them the right to disaffirm contracts they enter into without parental consent. Cal. Fam. Code § 6710 (West 2010). Of course, children in the custody of the State of California due to abuse or neglect by their biological parents do not have the option to seek parental consent in order to waive their attorney's conflict or to obtain new counsel.

requirement is met only "in the narrow category of circumstances in which the federal court action would actually enjoin the [ongoing state] proceeding, or have the practical effect of doing so." *AmerisourceBergen*, 495 F.3d at 1151 (internal quotation omitted).

Federal court adjudication of Plaintiffs' claims would not enjoin or indirectly interfere with state dependency proceedings, since Plaintiff Children do not seek any relief that could subsequently be used in federal court to enjoin any individual state court actions. Plaintiffs seek only a declaratory judgment that *in the aggregate* attorney caseloads are unconstitutionally high; they do not seek a finding that any individual child is receiving ineffective assistance of counsel, nor any other finding regarding individual children's state court cases. The *systemic* relief requested by Plaintiffs can only be enforced at a *systemic* level, and not as to any individual child, thus the relief sought in the federal action does not threaten interference with any state proceedings.

Furthermore, the district court was obligated to consider fashioning a remedy to the essential problem raised by Plaintiffs—high attorney caseloads—tailored to avoid the broader intervention it believed Plaintiffs sought. *See Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 466 (1st Cir. 1989) (reversing a decision to abstain under *O'Shea* because the court "gave insufficient weight to its obligation to assess the essential nature of the litigation to see whether

its proper objectives could be attained without" such intrusion).[7] In this case, the district court could easily limit the declaratory judgment sought by Plaintiffs to the actions of Defendants in setting caseloads and assigning attorneys to cases, expressly foreclosing any individual relief in federal court for individual class members in connection with their individual representation. Crafting the remedy in this way would avoid any potential interference under *Younger*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of the Plaintiffs-Appellants, amicus curiae respectfully requests that this Court remand this matter to the district court for consideration of whether the sole appealed claim requires abstention, or, in the alternative, find that abstention is unwarranted, reverse the district court's decision on this claim, and remand for further proceedings consistent with its decision.

[7] *See also Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 301-02 (5th Cir. 1979) (holding that *Younger* abstention not required, in part because "[t]he district court carefully limited its relief to preserving . . . plaintiffs . . . from certain irreparable injury . . . while not interfering with the normal progress of the state court case"); *Kenny A.*, 218 F.R.D. at 286 n.5 (finding *Younger* abstention unnecessary because "specific relief can be crafted that will not interfere with state court proceedings").

Dated: June 10, 2010

Respectfully Submitted,

By: *s/ Marcia Robinson Lowry*
MARCIA ROBINSON LOWRY
MELISSA ANN COHEN
Children's Rights
330 Seventh Avenue, 4th Floor
New York, NY 10001
(212) 683-2210

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 9th Cir. Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points in Times New Roman font and contains 6,962 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by Microsoft Word 2007.

Dated: June 10, 2010

Respectfully Submitted,

By: *s/ Marcia Robinson Lowry*

MARCIA ROBINSON LOWRY
MELISSA ANN COHEN
Children's Rights
330 Seventh Avenue, 4th Floor
New York, NY 10001
(212) 683-2210

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2010, 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.

Dated: June 10, 2010

Respectfully Submitted,

By: *s/ Marcia Robinson Lowry*
MARCIA ROBINSON LOWRY
MELISSA ANN COHEN
Children's Rights
330 Seventh Avenue, 4th Floor
New York, NY 10001
(212) 683-2210

Counsel for Amicus Curiae