No. 10-15248

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.T.; K.R.; C.B.; G.S.; FRANK DOUGHERTY, ON BEHALF OF E.T., K.R., C.B. AND G.S.,

Plaintiffs-Appellants,

v.

TANI CANTIL-SAKAUYE, CHAIR OF THE JUDICIAL COUNCIL OF CALIFORNIA, IN HER OFFICIAL CAPACITY; WILLIAM C. VICKREY, ADMINISTRATIVE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURT OF THE JUDICIAL COUNCIL, IN HIS OFFICIAL CAPACITY; STEVEN W. WHITE, PRESIDING JUDGE OF THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

On Appeal From the United States District Court
For The Eastern District of California, Sacramento
Case No. 2:09-cv-01950-FCD-DAD,
The Honorable Frank C. Damrell, Jr.

BRIEF OF AMICI CURIAE DEAN ERWIN CHEMERINSKY ET AL. SUPPORTING PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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The undersigned, Dean Erwin Chemerinsky of the University of California, Irvine, School of Law, Professors Allan Ides and Karl Manheim of Loyola Law School of Los Angeles, The American Civil Liberties Union of Southern California, and the Western Center on Law and Poverty, respectfully urge rehearing of the published decision *E.T. v. Cantil-Sakauye*, No. 10-15248, 9th Cir., 2011 U.S. Dist. LEXIS 18867 ("*E.T.*") or, in the alternative, rehearing *en banc*.

This Court affirmed the District Court's dismissal of the complaint on the basis of *O'Shea v. Littleton*, 414 U.S. 488 (1974), a form of abstention under *Younger v. Harris*, 401 U.S. 37 (1971). We believe the Court erred in holding *O'Shea* applicable to this case and are concerned that under the reasoning adopted by the Court, a wide array of constitutional cases could be barred from federal court.

ARGUMENT

Younger established the principle that a federal court, sitting in equity, will not enjoin an ongoing state criminal proceeding, at least where adequate relief is available in state court and no irreparable injury is shown. Later cases have extended *Younger* to civil cases in which the state is a party or has an important interest at stake. Admittedly, important state interests are at stake in this case – the

administration of dependency proceedings involving the removal of children from their families and their designation as wards of the state.

Nonetheless, *Younger* and *O'Shea* involve principles of equity and comity arising from "our Federalism," rather than Article III limits on the jurisdiction of federal courts. As a result, close inquiry into the equities of a case and the "carefully defined" boundaries of abstention is necessary before a federal forum is denied. *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 359 (1989). As we demonstrate below, the instant case is a far cry from typical *Younger* or *O'Shea* cases. Indeed, the Court's decision creates a new category of abstention with far-reaching effect.

Younger is inapposite to this case since plaintiffs do not seek to enjoin, or otherwise interfere with, particular ongoing state proceedings. *O'Shea* extended *Younger* to cases seeking systemic relief where the same type of ongoing federal supervision of state trials would be necessary. However, *O'Shea* is not a separate abstention doctrine. 414 U.S. at 500. Nor does it establish a blanket rule of abstention for federal cases challenging a state's administration of justice. Instead, only when the relief sought would require "continuing intrusion [by] federal courts into the daily conduct of state … proceedings" do *Younger* and *O'Shea* require equitable restraint. *Id*. at 502. This Court has noted as much in prior cases. *See, e.g., AmerisourceBergen v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007) (abstention

warranted "only if there is a *Younger*-based *reason* to abstain--i.e., if the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings"); *Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004).

Plaintiffs' lawsuit contends that policies of California *administrative agencies*, not the adjudications of *courts*, violate their due process rights. It is true that the consequences of the due process violations are not felt until dependency court assumes jurisdiction, but the deprivation itself is antecedent to and apart from the particulars of any state case. For purposes of 42 U.S.C. § 1983, an established state policy is treated the same as a statute. If California law were to affirmatively deny counsel to children in dependency proceedings, thereby violating *In re Gault*, 387 U.S. 1 (1967), a federal challenge to such a law would not be seen as interfering with ongoing judicial proceedings. *Family Division of Trial Lawyer Services v. Moultree*, 725 F.2d 695, 701 (D.C.Cir. 1984) ("… local judicial administration is not immune from attacks in federal court on the ground that some of its practices violate federal constitutional rights."). Nor should a challenge to a law (such as we have in respondents' policy) that sets caseloads at unconstitutional levels (more than twice the defendants' own identified maximum caseload). That a state court is involved at some step of the due process deprivation is insufficient, without more, to require abstention under either *Younger* or *O'Shea*.

Since plaintiffs challenge a state law embodied in administrative policy, rather than practices of adjudicatory bodies, *O'Shea* is inapposite and its extension in this case creates a new form of abstention. Indeed, the Supreme Court in *O'Shea* identified cases, such as this one, that "seek to strike down a single state statute, either on its face or as applied" as not raising the types of concerns that motivated *Younger*. *Id*. at 500. *Accord, Green v. City of Tuscon*, 255 F.3d 1086, 1098 (9th Cir. 2001)(*en banc*) ("Here, the federal court plaintiffs are doing nothing more than challenging the constitutionality of a state statute, that is, 'challeng[ing] completed legislative action.' [citing, *New Orleans Pub. Serv., Inc. v. City Council,* 491 U.S. 350, 372 (1989)] … We therefore conclude that the district court erred in dismissing this case on *Younger* grounds").

This important distinction is highlighted by this Court's decision in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992). That case also involved a challenge to a state law and sought relief against non-judicial state officials. Also, as here, the requested relief impacted the administration of justice. But, as Judge O'Scannlain correctly observed for the Court, a declaration that average state court delays were unconstitutional did not require federal courts to interfere with particular cases or decide any issues in those cases.

The same is true here. Plaintiffs do not ask this Court to supervise or even advise on the merits adjudication of any case in dependency court. *Los Angeles*

County Bar stands for the commonsense notion that constitutional inquiry into case levels is conceptually and practically distinct from interference with the particulars of a pending case – which was precisely the federalism problem in *Younger* and *O'Shea*. This Court's attempt to distingu*ish Los Angeles County Bar* (unlawful court delays caused by average judge caseloads versus unlawful representation caused by average attorney caseloads) is problematic and will sow confusion in lower courts.[1]

Furthermore, the Court's concern that any remedy granted here "might involve examination of the administration of substantial number of individual cases" (Slip Op. at 8) misapprehends the nature of plaintiff's facial challenge to a generally applicable state policy. No federal judicial inquiry into how state policy is applied in individual state cases has been sought or will occur. Rather, because this is a facial case, plaintiffs shoulder the heavy burden of having to prove that there is *no* application of the caseload policy to *anyone* that is legal. That is the way they have framed and pleaded their case. If they are unable to meet that burden, or need to get into the specifics of individual cases, the District Court should rule against them on the merits. It should not abstain on the basis of

[1] Adding to the confusion is that had the plaintiffs prevailed in *Los Angeles County Bar Association*, the county courts would have been required to hire more judicial employees (i.e., judges), related staff, and secure facilities for them. This would have had more of an impact on "local budget priorities" (Slip. Op. at 7) than this case, where the attorneys are not judicial employees but hired and paid by a third party vendor.

Younger-O'Shea in deference to unidentified state court proceedings that will not be enjoined.

If the E.T. plaintiffs prevail, all the District Court need do is declare that an average caseload for court-appointed dependency lawyers as high as 395 child clients deprives those children of due process of law and that the State's own prescribed standard (188 clients per lawyer) is the constitutional maximum. Any ongoing supervision required of the District Court would be into administrative compliance only, not the conduct of individual dependency trials. In short, because the particular facts or proceedings in any given dependency case is immaterial to the constitutional claims raised by E.T., there is no occasion for a federal court to review or superintend a state court – the gravamen of both *Younger* and *O'Shea.*

Because this Court's opinion rested entirely on *O'Shea*, *amici* have prepared a table (see Appendix) comparing salient features of the two cases. As the comparison demonstrates, there is very little in common between *O'Shea* and this case, other than that constitutional violations would become manifest in the course of state judicial proceedings. But, of course, that's true in a variety of cases involving challenges to state law. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975) (order directing state court to conduct a probable cause hearing did not enjoin pending state prosecution); *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3 (1972)

(challenge to state prejudgment seizures procedures did not seek an injunction against any pending or future court proceedings).

The key determinant for *Younger-O'Shea* is whether actions of state courts in adjudicating state cases would be interrupted, second-guessed or reviewed by the federal court, thereby denigrating the quality or competence of state courts in our federal system. Certainly, some systemic remedies would require that federal courts inquire into the merits of specific state cases, thereby implicating *Younger*. *See, e.g., 31 Foster Children v. Bush,* 329 F.3d 1255 (11th Cir. 2003) (system-wide plan sought to revamp and reform dependency proceedings in Florida, resulting in conflicting state and federal rulings). But absent interference, abstention is inappropriate. *See, e.g., LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (rejecting application of *Younger* abstention despite family court neglect proceedings, review hearings, and termination proceedings). This Circuit has repeatedly emphasized this point in decisions such as *Green v. City of Tuscon*, 255 F.3d 1086, 1098 (9th Cir. 2001) ("here, the federal court action did not seek to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings"), and *AmerisourceBergen v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007) (calling this the "vital and indispensible fourth element" of *Younger* abstention)

This case is similar to *L.H. v. Jamieson*, 643 F2.d 1351 (9th Cir. 1981), where this Court declined to apply *Younger* abstention in a challenge to inadequate funding of foster care facilities under Arizona law. A nominal distinction between *L.H.* and *E.T.* is that the former involved children already committed to state custody, whereas the instant class includes children awaiting adjudication as well as those already under supervision. But such a distinction is immaterial under *L.H.* since the children there were under the continuing jurisdiction of Arizona courts. Rather, abstention was denied because:

> "the juveniles are not seeking to enjoin any state proceeding, nor are they seeking to enjoin state officials from enforcing any state law. They are instead requesting an order that would require Arizona to spend more money to fund dispositional alternatives for juveniles in state custody. This relief may enrich the variety of dispositional alternatives available to a juvenile court judge, and, to this extent, affect pending and ongoing state juvenile proceedings. It does not, however, have the wholly disruptive consequences associated with enjoining a state judicial proceeding or enjoining further enforcement of a state statute."

Id., 643 F.2d at 1354.

Similarly, here, there is no scenario by which the District Court would need to enjoin or disrupt ongoing state cases, or inquire into individual merits, nor did the panel opinion identify any such cases. Rather, the opinion merely assumes that possibility – that it "might involve [inquiry into a] substantial number of individual

[dependency] cases." But to reach that conclusion, the opinion had to first treat plaintiffs' facial challenge as if it were an as-applied challenge to individual applications of the state's caseload policy. That is not this case.[2]

CONCLUSION

In conclusion, rehearing in this case is necessary because of the far-reach of the published panel opinion and its conflict with *L.H.* and *Los Angeles County Bar*. Of greatest concern to *amici* and civil rights claimants generally is the opinion's suggestion that federal courts must abstain whenever an unconstitutional state policy touches upon a state's judicial process. That is neither the *Younger* nor *O'Shea* doctrines, but a new and broader form of abstention. For the foregoing reasons, this Court should grant the petition for rehearing or rehearing en banc and reverse the decision of the district court.

Dated: October 4, 2011

Respectfully submitted,

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[2] To the extent that statistical analysis of case proceedings and outcomes is relevant to the constitutional question (whether child plaintiffs are deprived of their constitutional right to adequate representation), that analysis would be undertaken of past cases rather than pending or future ones. Those closed cases would be used for analytical purposes only, not for purposes of collateral review.

APPENDIX - COMPARISON OF *O'SHEA* AND *E.T.*

	O'Shea	***E.T.***
Plaintiffs	Class of persons who, on account of race, income or exercise of 1st Amd rights may be subjected to discriminatory criminal justice	Class of foster children in dependency proceedings or who are wards of the state
Defendants	Judicial Officials	Administrative Officials[3]
Claims	1st Amd (speech); 6th Amd (fair trial); 8th Amd (excessive bail, sentencing); 14th Amd (racial bias)	14th Amd (lack of adequate counsel); federal statutory claims
Type of claims	As-applied	Facial
Injury alleged	Future judicial adjudicatory practices may deprive constitutional rights	Existing administrative policy deprives constitutional rights
Imminence of harm	Speculative, future	Current and ongoing
Relief Sought	Injunctive & declaratory	Declaratory
Availability of alternate remedies	Direct appeal; habeas; criminal sanction (18 U.S.C. § 242)	None, as a practical matter[4]

[3] While the Honorable Tani Cantil-Sakauye, Chief Justice of California, and the Honorable Steven W. White, Presiding Judge of the Sacramento Superior Court, are named as defendants, they are sued only in their administrative capacities.

[4] Theoretically, individual child parties could raise ineffective assistance of counsel claims, but through the same attorneys whose caseloads are already at twice the State-prescribed limit. In any event, dependency proceedings are incapable of litigating such complex claims.

Compliance required of State officials	Periodic reports to federal court on bail, trial and sentencing practices in state court proceedings	Reduction by court administrators of attorney caseloads to level already identified by defendants
Standard for compliance review	Federal judicial assessment of bail, trial and sentencing results in individual criminal cases	Arithmetic determination of average caseloads
Nature of Federal Court Supervision	"Ongoing federal audit of state criminal proceedings" and "continuous or piecemeal interruptions of state" criminal trials	No review or inquiry into individual dependency cases required
How judgment would be enforced	Through "continuous supervision by the federal court over the conduct of … criminal trial proceedings"	Against administrative officers if caseloads remained at unconstitutional levels

COMBINED CERTIFICATION OF COMPLIANCE AND CERTIFICATION OF SERVICE

I, Karl Manheim, certify:

1. That this brief complies with the length limitation of Circuit Rule 40-1 and Fed. R. App. P. 32(a)(7)(B) because it contains 2,446 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word 2007 using the proportionally spaced typeface 14 point Times New Roman.

2. That I caused this brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 4, 2011, and that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 4, 2011 /s/ Karl Manheim