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.

RONALD M. GEORGE, JUDGE, CHAIR OF THE JUDICIAL COUNCIL OF CALIFORNIA, IN HIS OFFICIAL CAPACITY; WILLIAM C. VICKREY, ADMINISTRATIVE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURT OF THE JUDICIAL COUNCIL, IN HIS OFFICIAL CAPACITY; JAMES M. MIZE, 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.

APPELLANTS' EXCERPTS OF RECORD
Volume 1 of 2
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APPELLANTS' EXCERPTS OF RECORD

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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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,

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.
_____/

2:09-cv-01950 FCD DAD

AMENDED MEMORANDUM AND ORDER

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This matter is before the court on defendants Ronald M. George, William C. Vickrey, and James M. Mize's (collectively "defendants") motion to abstain and to dismiss the complaint.

Plaintiffs E.T., K.R., C.B., and G.S., by their next friend, Frank Dougherty, (collectively "plaintiffs") oppose the motions. On November 6, 2009, the court heard oral argument on defendants' arguments relating to justiciability. For the reasons set forth below, defendants' motion to dismiss is GRANTED.

BACKGROUND

This case arises out of plaintiffs' allegations that the caseloads in dependency courts in Sacramento County are so excessive that they violate federal and state constitutional and statutory provisions. Specifically, plaintiffs contend that the overburdened dependency court system frustrates both the ability of the courts to adjudicate and provide children with a meaningful opportunity to be heard and the effective, adequate, and competent assistance of counsel. (Compl., filed July 16, 2009.)

A. Dependency Court Proceedings

Dependency proceedings are conducted to protect the safety and well-being of an abused or neglected child whose parents or guardians cannot or will not do so or who themselves pose a threat to the child. (Compl. ¶ 28.) They commence with an initial hearing, which is held to determine whether a child falls within one of ten jurisdictional bases of the juvenile court. Cal. Welf. & Inst. Code §§ 300, 305, 306, 311, 325 & 332. Dependency courts ultimately conduct an evidentiary hearing regarding the proper disposition of the child. Id. §§ 319, 352, 355 & 358. In most cases, at the disposition hearing, dependency courts "determine what services the child and the family need to be reunited and free of court supervision." Bridget A. v.

Superior Court, 148 Cal. App. 4th 285, 302-03 (2d Dist. 2007). However, the courts have a variety of options, from reuniting the family and child to removing the child from parental custody and placing the child in foster care. See generally id. (outlining court options at disposition hearings). After a child is placed under court supervision, subsequent court proceedings and reviews are required every six months. Id.; see Cal. Welf. & Inst. Code §§ 364, 366.21, 366.22.

California Welfare & Institutions Code § 317 requires that counsel be appointed for children in almost all dependency cases. (Compl. ¶ 34.) Specifically, § 317(c) provides that "[i]f a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel." This finding must be made on the record. Id. Pursuant to a Standing Order of the Superior Court of the County of Sacramento, third party, court-appointed attorneys are automatically appointed to represent each child who is the subject of dependency proceedings in the county; these attorneys are also appointed as the child's guardian ad litem. (Compl. ¶ 50.)

B. Functions and Funding within the Dependency Court System

The Judicial Council of California is the body responsible for overseeing the statewide administration of justice in the California courts. (Compl. ¶ 9.) As Chair of the Judicial Council, the Honorable Ronald M. George,[1] defendant, is responsible for the allocation of the judicial branch budget,

[1] The Honorable Ronald M. George is the Chief Justice of the California Supreme Court.

including the allocation of relevant funds for courts and court-appointed child representation in dependency court proceedings. (Id.) The Administrative Office of the Courts (the "AOC") is the staff agency of the judicial council and is responsible for California's Dependency Representation, Administration, Funding, and Training ("DRAFT") program. (Compl. ¶ 10.) DRAFT was established in July 2004 by the Judicial Council of California to centralize the administration of court-appointed counsel services within the AOC. (Compl. ¶ 55.) As Administrative Director, defendant William C. Vickrey is responsible for the administration of the AOC. (Compl. ¶ 10.) Finally, the Presiding Judge of the Superior Court, the Honorable James M. Mize, defendant, is responsible for allocating resources within the Sacramento County Superior Court in a manner that promotes the implementation of state and local budget priorities and that ensures equal access to justice and the ability of the court to carry out its functions effectively. (Compl. ¶ 11.) The Presiding Judge also has the authority to assign judges to departments, such as Sacramento County Superior Court's dependency courts. (Id.)

The Superior Court of Sacramento previously paid for the court-appointed attorneys' services pursuant to a Memorandum of Understanding. (Compl. ¶ 55.) In 2008, however, the Superior Court of Sacramento agreed to participate in the DRAFT program. When Sacramento County joined the DRAFT program, the AOC became responsible for paying for the court-appointed attorneys' services. (Id.)

Plaintiffs allege that the staff attorneys for the non-profit agency, who serve as court appointed counsel for the approximately 5,100 children subject to dependency proceedings in the County of Sacramento, carry as many as 395 cases at a time. (Compl. ¶ 51.) Plaintiffs assert this is more than double the 188 caseload standard established by the Judicial Council and nearly four times the number promulgated by the National Association of Counsel for Children. As a consequence, plaintiffs allege that the appointed lawyers are unable to adequately perform even the minimum tasks required under the law and in accordance with the American Bar Association's ("ABA") standards. Specifically, these lawyers rarely meet with their child clients in their foster care placements, rely on brief telephone contact or courtroom exchanges to communicate, cannot conduct complete case investigations or child-specific legal analysis, virtually never file extraordinary writs or pursue appeals, and rely on overworked county social workers without conducting an informed review of Child Protective Services' ("CPS") placement decisions. (Id.) Further, plaintiffs allege that the high caseload and inadequate salaries of these lawyers lead to high attorney turnover, which exacerbates the problems associated with adequate representation. (Compl. ¶ 52.) Plaintiffs contend that the court-appointed attorneys' unlawful caseloads are due to inadequate funding and assert that if the AOC had followed its own guidelines for DRAFT in funding the court-appointed attorneys, counsel could have met the recommended Judicial Council caseload standards. (Compl. ¶ 56.)

Plaintiffs allege that the County of Sacramento has only five judicial referees, who preside over dependency proceedings, responsible for approximately 5,100 active dependency cases. (Compl. ¶ 29.) Plaintiffs allege that this affords referees roughly two minutes of courtroom time per case. (Id.) Therefore, plaintiffs contend that a foster child appearing in a Sacramento County dependency court with ineffective counsel cannot reasonably expect the judicial referee to serve as a "backstop" and look out for his or her best interests. (Id.)

C. Named Plaintiffs

Plaintiff E.T. is a fourteen-year-old girl who is in her third foster care placement in less than one year. She is a special education student who has been diagnosed with depression. She was assigned a court-appointed attorney in October 2008 and has had two attorneys since then. (Compl. ¶ 59.) Although E.T. has had fourteen court hearings, her attorneys have met with her briefly only three times and have visited her at only one placement. (Compl. ¶¶ 60-61.) They have been unable to stabilize her foster care placements. (Compl. ¶ 61.) Further, they have been unable to investigate her mental health issues to notify the dependency court of any problems. (Compl. ¶ 62.)

Plaintiff K.R. is a thirteen-year-old girl who is in her fifth foster care placement. She suffers from severe behavioral problems, including oppositional defiance disorder. She was assigned a court-appointed attorney in early 1996. When her case was reopened in September 2005, she was again assigned a court-appointed legal representative. K.R. has had six attorneys since then. (Compl. ¶ 63.) However, although her case has had

seventeen court hearings since September 2005, K.R.'s attorneys have not visited any of her foster care placements or had any contact with school personnel. (Compl. ¶ 64.) K.R. has been interviewed only once outside of court, by a social worker, and virtually nothing has been done to investigate K.R.'s interests beyond the scope of the dependency court proceedings. K.R.'s attorneys have been unable to file pleadings, motions, responses, or objections as necessary to protect her interests. Further, they have been unable to stabilize her foster care placements, determine whether she requires public services, or secure a proper educational placement. (Compl. ¶ 65.)

Plaintiff C.B. is a seventeen-year-old, developmentally disabled girl, who is in her tenth foster care placement. She was assigned a court-appointed attorney on February 17, 1999, and she has had ten attorneys over the last ten years. (Compl. ¶ 67.) Her attorneys have not visited her in at least seven of her ten placements. She has had five court and administrative hearings, but her lawyers did not meet with her before the majority of those hearings. (Compl. ¶ 68.) C.B.'s attorneys have been unable to file pleadings, motions, responses or objections as necessary to protect her interests. They have done little to investigate C.B.'s needs and emotional health beyond the scope of the juvenile proceedings or to ensure that she is in a stable foster care placement. (Compl. ¶ 68.) Further, they have failed to ensure compliance with an agreement that C.B. be able to see her sibling, who has been adopted, or to make any effort to meet up with her other adult sibling. (Compl. ¶ 69.) They have also been unable to investigate her educational

interests to assess whether her interests need to be protected by the institution or other administrative or judicial proceedings. (Compl. ¶ 70.) C.B. will "age out" of the foster case system when she turns 18; her attorneys have not had time to assess whether her psychological or developmental issues require that she be allowed to remain in the system until she is 21. (Compl. ¶ 71.)

G.S. is an eighteen-year-old, emotionally disturbed boy in his tenth foster case placement. He has had eleven attorneys since he first entered the dependency system on May 3, 2001. (Compl. ¶ 72.) G.S. has had 28 court and administrative hearings, but his lawyers did not meet him before the majority of those hearings, including the original detention hearing. (Compl. ¶ 73.) G.S.'s attorneys have been unable to file pleadings, motions, responses or objections as necessary to protect his interests. They have done little to investigate G.S.'s needs and emotional health beyond the scope of the juvenile proceedings or to ensure that he is in a stable foster placement, including failing to visit him in nine of his ten placements. (Compl. ¶ 74.) They have also failed to ensure compliance with court orders, including one that allows him to visit his siblings. (Compl. ¶ 75.) Further, his attorneys have not had time to assess whether his psychological issues require that he be allowed to remain in the system until he is 21 or make efforts relating to his potential imminent transition to life outside the foster care system. (Compl. ¶ 76.)

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D. The Litigation

On July 16, 2009, plaintiffs filed suit in this case, by their next friend Frank Dougherty, on behalf of themselves and all others similarly situated, specifically,

> All children currently and hereafter represented by court-appointed counsel in juvenile dependency proceedings in the Sacramento County Superior Court.

(Compl. ¶ 12.) They assert federal claims under 42 U.S.C. § 1983 arising out of alleged (1) procedural due process violations from excessive attorney caseloads; (2) substantive due process violations from excessive attorney caseloads; (3) procedural due process violations from excessive judicial caseloads; (4) deprivation of rights under the Federal Child Welfare Act ("FCWA"); and (5) deprivation of rights under the Child Abuse Prevention and Treatment and Adoption Reform Act ("CAPTA"). Plaintiffs also assert state law claims arising out of alleged (1) violation of the inalienable right to pursue and obtain safety set forth in Article I, § 1 of the California Constitution for failure to provide fair and adequate tribunals and effective legal counsel; (2) violation of due process as guaranteed in Article I, § 7 of the California Constitution for failure to provide adequate and effective legal representation in dependency proceedings; (3) violation of Welfare and Institutions Code § 317(c); and (4) violation of Welfare and Institutions Code § 317.5(b).

Through this action, plaintiffs seek a declaratory judgment that defendants have violated, continue to violate, and/or will violate plaintiffs' rights as guaranteed by the above constitutions and statutes. Plaintiffs also seek injunctive

relief, restraining future violations of these rights, and an order "mandating that [d]efendants 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." (Prayer for Relief.)

STANDARD

Under Federal Rule of Civil Procedure 8(a), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949.

Nevertheless, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at 1950 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570 (2007)). Only where a plaintiff has failed to "nudge [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. Id. at 1952. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." Id. at 1949. This plausibility

inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

ANALYSIS

Plaintiffs' claims describe critical dependency court system failures, which adversely affect the lives of thousands of children. The complaint depicts a court system in which the voices of these children are not heard and their stories are not told while important decisions affecting their health and welfare are being made.

While acknowledging the gravity of these issues, defendants assert that such claims are nonjusticiable. Specifically, defendants assert that "the complaint impermissibly attempts to embroil this court in administration and funding of the dependency courts in the Superior Court of Sacramento County." (Defs.' Mot. to Dismiss, filed Sept. 18, 2009, at 15.) Defendants contend that plaintiffs' claims implicate duties involving state judicial processes that cannot be properly determined by a federal court and plaintiffs seek remedies that cannot be molded without violating established principles of equity, comity, and federalism.

"The judicial power of the United States defined by Art[icle] III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." Valley Forge Christian Coll. v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Rather, Article III limits "the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" Id. at 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)); Steel Co. v. Citizens For A Better Env't, 523 U.S. 83, 102 (1998).

Cases are thus nonjusticiable when the subject matter of the litigation is inappropriate for federal judicial consideration. Baker v. Carr, 369 U.S. 186, 198 (1962). In determining whether a case is justiciable, "consideration of the cause is not wholly and immediately foreclosed; rather, the [c]ourt's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Id. "It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. Lewis v. Casey, 518 U.S. 343, 349 (1996). These basic concerns are heightened when a lawsuit challenges core activities of *state* responsibility. Rizzo v. Goode, 423 U.S. 362, 378-79 (1976).

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Younger v. Harris, 401 U.S. 37, 43 (1971). This desire is premised upon the fundamental and vital role of comity in the formation of this country's government and "perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'" Id. at 44. Our Federalism demonstrates "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." Id. It represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Id.

It is within the context of this foundational concept of comity, which strikes at the heart of the country's governing principles, that the court must view plaintiffs' serious claims. The court is cognizant of the potential hardships inflicted upon one of society's most vulnerable populations if plaintiff's claims are true. The court is equally cognizant of the profound consequential principles of federalism implicated by this case. Accordingly, it is with careful attention to these two

significant but conflicting interests that the court undertakes its analysis of justiciability pursuant to its equitable discretion and under the principles set forth by Younger v. Harris and its progeny.[2]

1. Equitable Abstention[3]

Principles of equity, comity, and federalism preclude equitable intervention when a federal court is asked to enjoin a state court proceeding. O'Shea v. Littleton, 414 U.S. 488, 499-500 (1974). The doctrine of equity jurisprudence provides that a "court of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Id. at 499.

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[2] Defendants also contend that plaintiffs lack standing to bring their claims. Defendants' arguments relating to abstention and standing relate to whether plaintiffs' claims are properly before the court and within the confines of the judicial authority conferred by Article III. Indeed, assuming that plaintiffs have sufficiently alleged injury in fact and causation, the court's conclusions relating to its ability to redress such injury, as set forth *infra*, "obviously shade into those determining whether the complaint" sufficiently presents a real case or controversy for purposes of standing. O'Shea v. Littleton, 414 U.S. 488, 499 (1974).

[3] While a majority of decisions have applied equitable abstention in the context of cases involving injunctions in criminal cases, the Court has noted that the doctrine "has not been limited to that situation or indeed to a criminal proceeding itself." Rizzo v. Goode, 423 U.S. 362, 380 (1976). Rather, the same principles apply to civil proceedings and to cases where injunctive relief is sought against those in charge of an executive branch of an agency of state or local governments. Id.

The court also notes that while there is significant cross-over between the fundamental principles and factors considered in the doctrines of equitable abstention and Younger abstention, the Supreme Court and Circuit decisions addressing equitable abstention reflect differences that justify separate treatment of these two doctrines.

The purpose of the doctrine of equitable abstention is to sustain "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (quotation omitted). If the equitable relief requested requires intrusive follow-up into state court proceedings, it constitutes "a form of the monitoring of the operation of state court functions that is antipathetic to established principles of comity." Id. Indeed, the Supreme Court has recently noted that "institutional reform injunctions often raise sensitive federal concerns." Horne v. Flores, 129 S. Ct. 2579, 2593 (2009) (holding that Court of Appeals should have inquired into whether changed conditions satisfied statutory violations that the continuing structural reform injunction was directed to address). These "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." Horne, 129 S. Ct. at 2593-94.

"When the relief sought would require restructuring of state governmental institutions, federal courts will intervene only upon finding a clear constitutional violation, and even then only to the extent necessary to remedy that violation." Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992). Both the First and Fifth Circuits have adjudicated cases relating to overburdened court systems and the substantial delays occasioned by these serious resource allocation problems, and both Circuits

have held that the doctrine of equitable abstention barred consideration of the merits of such claims. In Ad Hoc Committee on Judicial Administration v. Massachusetts, the plaintiffs brought suit against the state, the state legislature, and the governor of Massachusetts to compel the furnishing of additional court facilities. 488 F.2d 1241 (1st Cir. 1973). The First Circuit noted that the Supreme Court has never found *per se* unconstitutional delay in a civil case; rather, "whether delay is a violation of due process depends on the individual case." Id. at 1244. Therefore, the First Circuit held the case was not justiciable because, in order to define the constitutional duty, the court would have to reduce due process into formulae and timetables establishing the maximum permissible delay, which would replace a context specific inquiry into the effect of the delay on the parties, their diligence, the nature of the case, and the interests at stake. Id. Similarly, to determine whether that duty was violated, the court would have to extrapolate from statistics, as opposed to considering factors such as discovery, negotiation, investigation, strategy, counsel's engagement on other matters, and even procrastination. Id. at 1245.

Further, the Ad Hoc Committee court recognized that the relief sought would be unmanageable and outside the scope of the federal judiciary. Specifically, the First Circuit noted

> a federal judge faced with the awesome task of ordering measures to cut down the waiting period in a state's judiciary could hardly consider merely the augmentation of resources. He would also have to inquire into the administration of the system, its utilization of personnel, the advisability of requiring adoption of techniques such as pre-trial conferences, different calendar arrangements, split trials, and the like, and countless other administrative matters about which

> books have been written and courses taught, and as to the relative value of which there remains much dispute.

Id. In essence, the relief requested by the plaintiff would require the court to sit as a receiver over the state court system. Id. at 1246 (noting that "[w]hile the state judiciary might appreciate additional resources, it would scarcely welcome the intermeddling with its administration which might follow."). Moreover, the court recognized that financing and organization of the federal and state judiciary have been historically "left to the people, through their legislature." Id. While, in certain circumstances, courts have ordered a state to furnish certain levels of medical or psychiatric care to those under the states' control, in such cases, the alternative, either explicitly or implicitly, was the closure of noncompliant institutions. Id. at 1246. Any such implied threat to close down a state court system "would amount to little more than a quixotic and unwarranted intrusion into an entire branch of government." Id. Accordingly, the court concluded "it would be both unprecedented and unseemly for a federal judge to attempt a reordering of state priorities" as required by the plaintiff's requested injunctive relief. Id. at 1245-46. While "[t]he dictates of a federal court might seem to promise easy relief, . . . they would more likely frustrate and delay meaningful reform which, in a system so complex, cannot be dictated from outside but must develop democratically from within the state." Id. at 1246.

Similarly, in Gardner v. Luckey, the Fifth Circuit held that the claims brought by plaintiff "contemplate[d] exactly the sort of intrusive and unworkable supervision of state judicial

processes condemned [by the Supreme Court]." 500 F.2d 712, 715 (5th Cir. 1974). The plaintiffs filed a class action against Florida Public Defender Offices, alleging ineffective assistance of counsel arising out of inadequate funding and excessive caseloads. Id. at 713. The plaintiffs asked the court to declare the Offices' caseloads excessive, to specify how excessive they were, and to enjoin acceptance of overload cases. Id. at 713. The court held that equitable abstention barred suit because the relief requested would require an ongoing audit of state criminal proceedings. Id. at 715. Further, the court noted that plaintiffs could file habeas actions to challenge their custody. Id.

The Ninth Circuit, however, has held that equitable abstention did not bar federal jurisdiction in a case for declaratory relief arising out of delays in the Los Angeles County Superior Court. Los Angeles County Bar Ass'n, 979 F.2d at 703-04. In Los Angeles County Bar Ass'n, the plaintiff alleged constitutional violations of its rights to access the courts and equal protection arising out a statute that prescribed the number of judges on the court. The Ninth Circuit distinguished the First Circuit's decision in Ad Hoc Committee and held that equitable abstention did not apply to bar federal court jurisdiction. First, the plaintiff alleged that the *average* time to resolution of civil cases in the Los Angeles County Superior Court was unconstitutional. Id. at 703. The Ninth Circuit noted that this was a less difficult question than that before the First Circuit, whether a delay was constitutionally acceptable in any given case. Id. Second, *the plaintiff sought only*

declaratory, not injunctive relief. As such, the Ninth Circuit noted that any order would not directly require supervision of the state court system by federal judges. Therefore, the Ninth Circuit concluded, "although not without some trepidation," that the claims for declaratory relief were appropriately before it. Id. at 704.

Judge Kleinfeld, concurring in the decision, which ultimately dismissed the plaintiff's claims on the merits, disagreed with the majority's decision regarding equitable abstention. Id. at 708-11. In noting that declaratory judgments are discretionary, he asserted that a federal court cannot properly declare a state legislative action regarding the allocation of judges to be wrong, "where there are no legal standards to say what number is right." Id. at 709-10. Further, because it would be impossible to derive a standard without considering (1) "methods of judicial administration within the state court system," (2) "the receptiveness of the state court system to various types of claims," (3) "undesirability of delay in litigation relative to benefits of allocating resources to other uses," and (4) "many other subtle matters of state policy which are none of our business," Judge Kleinfeld noted that the challenge lacked "judicially discoverable and manageable standards" and required relief based upon resolution of "policy determinations of a kind clearly for nonjudicial discretion." Id. at 710. In short, Judge Kleinfeld asserted that the Ninth Circuit lacked the power to adjudicate the case and noted,

> The people of the State of California, through their system of elected representatives, are entitled in our system of federalism to decide how much of their money

> to put into courts, as well as other activities in which they choose to have their state government participate. The process of deciding how much money to take away from people and transfer to the government, and how to allocate it among the departments of government, is traditionally resolved by political struggle and compromise, not by some theoretical legal principle.

Id.

In this case, plaintiffs' challenges to the juvenile dependency court system necessarily require the court to intrude upon the state's administration of its government, and more specifically, its court system. First, plaintiffs claim that the "crushing and unlawful caseloads" frustrate the ability of the dependency courts to adjudicate cases and "provide children with a meaningful opportunity to be heard." (Compl. ¶ 22) As such, plaintiffs allege that children subject to dependency proceedings in Sacramento County are denied a fair and adequate tribunal in violation of state and federal law. (Id. ¶ 27.) At their core, all of plaintiffs' federal and state law claims arising out of these allegations assert that the current judicial caseload is insufficient for the dependency court judges or referees to "consider carefully what has been provided" or to "serve as a backstop and look out for [the child's] best interest." In order to declare the current caseloads unconstitutional or unlawful, the court would necessarily have to consider, among a host of judicially unmanageable standards, how many cases are constitutionally and/or statutorily permissible, whether each type of case should be weighed evenly, which cases deserve more time or attention, and how much time or attention is constitutionally and/or statutorily permissible. See Los Angeles

County Bar Ass'n, 979 F.2d at 710 (Kleinfeld, concurring). In order to attempt to mold an appropriate injunctive remedy to address the excess caseloads, the court cannot consider only an augmentation of the dependency court's resources. Rather, the court would also have to consider a myriad of administrative matters that affect the efficiency of the system. Further, in 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 pursuant to the constitutional and/or statutory dictates established through this proceeding. 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. See O'Shea, 414 U.S. at 501 (noting that "periodic reporting" of state judicial officers to a federal court "would constitute a form of monitoring of state court functions that is antipathetic to established principles of comity"); see also Ad Hoc Committee, 488 F.2d at 1244-46.

Second, plaintiffs claim that these overwhelming caseloads prevent children from receiving "the effective, adequate and competent assistance of counsel" in violation of state and federal law. (Compl. ¶¶ 22, 26.) Specifically, plaintiffs allege that the 395 caseload carried by court-appointed counsel in dependency proceedings render them "unable to adequately perform even the minimum tasks required of such counsel under law and in accordance with the American Bar Association's ("ABA") standards." (Compl. ¶ 51.) Similar to plaintiffs' claims

regarding excess caseloads in the courts, in order to declare the current attorney caseloads unconstitutional or unlawful, the court would necessarily have to consider through a generalized inquiry how many cases are constitutionally and/or statutorily permissible, 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. Further, in order to mold a remedy to the injury alleged, the court cannot consider only an increased budget for court appointed dependency counsel. Rather, the court must consider whether that money should be directed solely at hiring more attorneys, whether more resources need to be directed to support staff or non-legal resources, the need for larger facilities to house more attorneys or staff, and the quality of the staff or attorneys hired. Finally, in order to enforce injunctive relief that is carefully directed to the problems alleged, the court would have to act as an administrative manager of court-appointed dependency counsel to ensure that any additional resources were being implemented appropriately and that counsel was complying with the constitutional and/or statutory guidelines set forth by the court. See Gardner, 500 F.2d at 714-15.

The facts before the court in this case are readily distinguishable from the facts before the Ninth Circuit in Los Angeles County Bar Ass'n and weigh heavily in favor of finding this case nonjusticiable. In Los Angeles County Bar Ass'n, the Ninth Circuit acknowledged that it would be very difficult for courts to determine how much delay was constitutionally

permissible in any given case, but concluded that the question presented by the plaintiff was whether the *average* time to resolution in a case violated its rights. 979 F.2d at 703. However, in this case, plaintiffs do not allege an *average* amount of time spent on cases by judges or court appointed attorneys to which they object. Rather, they allege that their constitutional rights have been violated based upon their specific, individual circumstances. (See Compl. ¶¶ 59-76.) As such, the case before the Los Angeles County Bar Ass'n court was substantially more manageable than that before the court in this case.

Similarly, in Los Angeles County Bar Ass'n, the plaintiff was a single party challenging the facial constitutionality of a statute due to its alleged harmful effect on the plaintiff's litigation. Accordingly, the court could undertake a "case-by-case examination" of the merits of the claim by evaluating whether the average delay deprived it of its ability to vindicate important rights. 979 F.2d at 707. In this case, however, plaintiffs bring claims challenging the practices of a state institution and its officers on behalf of a putative class comprised of all children represented by court-appointed counsel in Sacramento County juvenile dependency proceedings. An ongoing "case-by-case examination" of such a claim would not be just daunting, but virtually impossible. Indeed, to fit within the teachings of Los Angeles County Bar Ass'n, the court would have to analyze each of the 5100 juvenile dependency court cases in order to determine whether the lack of time or attention by counsel or the dependency court deprived the minor of the ability

to vindicate her rights under the specific circumstances of the case.

Finally, the Los Angeles County Bar Ass'n court placed great emphasis on the nature of the relief sought by the plaintiff; it sought only declaratory, not injunctive relief. While the court noted that it was "not without some trepidation" in exercising declaratory jurisdiction, it stressed that *the relief sought would not directly require supervision of the state court system by federal judges*. However, in this case, in addition to declaratory relief, plaintiffs seek injunctive relief that would require the court to act as an administrator and receiver of the Sacramento County dependency court system. As such, the holding of Los Angeles County Bar Ass'n is inapplicable to the facts before the court in this case.

In sum, the claims asserted by plaintiffs and the relief requested strike at the very heart of federalism and the institutional competence of the judiciary to adjudicate state budgetary and policy matters. Plaintiffs' claims require the court to set constitutional parameters regarding the function of both state judicial officers and state court appointed attorneys. The adjudication of these claims, which seek to evaluate the relationship between caseloads and fair access to justice for children in a variety of situations, requires the implementation of standards that no court has yet to address. See Los Angeles County Bar Ass'n, 979 F.2d at 706 ("Notwithstanding the fundamental rights of access to the courts, [the plaintiff] does not cite, nor has our independent research revealed, any decision recognizing a right to judicial determination of a civil claim

within a prescribed period of time."); Ad Hoc Committee, 488 F.2d at 1245 ("To extrapolate from court statistics a picture of those cases where inability to obtain a trial has reached due process is difficult."); cf. Caswell v. Califano, 583 F.2d 9, 16-17 (1st Cir. 1978) (holding that where the plaintiffs had a statutory right to hearing within a reasonable time after the request, the district's court imposition of a 90 day period was not an abuse of discretion). Moreover, in adjudicating whether the Sacramento County dependency courts meet sufficient constitutional standards, there is an implicit threat that the failure to provide constitutionally adequate services would result either in a forced reduction of the number of cases brought on behalf of children or the closure of the court itself. See Coleman v. Schwarzenegger, No. Civ 90-0520, No. C01-1351, 2009 WL 2430820 (E.D. Cal., N.D. Cal. Aug. 4, 2009) (concluding that the only proper relief for prolonged "woefully and unconstitutionally inadequate" medical and mental healthcare in the California prison system was reduction in the overall prisoner population through prisoner release). However, any such implied threat "would amount to little more than a quixotic and unwarranted intrusion into an entire branch of state government." Ad Hoc Committee, 488 F.2d at 1246.

The implementation of any injunctive remedy would require an inquiry into the administration of Sacramento County's dependency court system and the court-appointed attorneys with whom it contracts. It would also require this court to impose it views on the budgeting priorities of the California legislature generally, and specifically on the Judicial Council of California

and the Sacramento Superior Court.[4] The process of allocating state resources lends itself to the legislative process where people have an opportunity to petition the government regarding how their money should be spent and remove from office those political officials who act contrary to the wishes of the majority. "The judicial process does not share these democratic virtues." Los Angeles County Bar Ass'n, 979 F.2d at 710 (Kleinfeld, concurring). If the court granted plaintiffs' request, it would result in a command to the state to take money from its citizens, in the form of taxes, or from other governmental functions, in order to put more money in the Sacramento County juvenile dependency court system.[5] While numerous parties, including the dependency courts would likely appreciate the influx of resources, such an award, implicating the balance of budget priorities and state polices, is beyond the institutional competence of a federal court. Rather, such injunctive relief constitutes an "abrasive and unmanageable

[4] Indeed, plaintiffs argue that "[d]efendants spend hundreds of millions for other priorities even as they assert poverty when it comes to addressing the caseload-caused anguish their own meticulous study certifies and decries." (Pls.'s Supp. Brief [Docket #35], filed Nov. 20, 2009.) At oral argument, plaintiff's counsel asserted the AOC spent approximately a billion and a half dollars on a new management system and has contracted to build new courthouses, implying that money to fund relief in this case could be reallocated from those or similar projects. (Tr. at 29.)

[5] Moreover, unless the Superior Court of California were awarded more judges overall, this court's order would necessarily implicate state policy decisions regarding how many judges to appoint in particular departments.

intercession" in state court institutions.[6] See O'Shea, 414 U.S. at 504.

Therefore, the court concludes that principles of equity, comity, and federalism require the court to equitably abstain from adjudicating plaintiffs' claims.

2. *Younger* Abstention

Generally, the Supreme Court's decision in Younger and its progeny direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. Younger v. Harris, 401 U.S. 37, 40-41 (1971); Samuels v. Mackell, 401 U.S. 66, 73 (1971) (holding that "where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well"). The Younger doctrine "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate injury to the federal plaintiff." Moore v. Sims, 442 U.S. 415, 423 (1979). When federal courts disrupt a state court's opportunity to "intelligently mediate federal constitutional concerns and state interests" and interject themselves into such disputes, "they prevent the informed evolution of state policy by state tribunals." Moore, 442 U.S. at 429-30.

While the doctrine was first articulated in the context of pending state criminal proceedings, the Supreme Court has applied it to civil proceedings in which important state interests are

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[6] Further, the court notes, as set forth, *infra*, in the court's discussion of Younger abstention, plaintiffs have an alternative, available avenue of relief.

involved. Id.; see Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). "The seriousness of federal judicial interference with state civil functions has long been recognized by the Court. [It has] consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." Huffman, 420 U.S. at 603.

Therefore, in the absence of "extraordinary circumstances,"[7] abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); see San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008) (noting that where these standards are met, a district court "may not exercise jurisdiction" and that "there is no discretion in the district courts to do otherwise"). "Where Younger abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, Younger abstention requires *dismissal* of the federal action." Beltran v.

[7] In Moore, the Supreme Court held that dependency proceedings do not, without more, constitute such an extraordinary circumstance. 442 U.S. at 434 ("Unless we were to hold that every attachment issued to protect a child creates great, immediate, and irreparable harm warranting federal-court intervention, we are hard pressed to conclude that . . . federal intervention was warranted.").

State of Cal, 871 F.2d 777, 782 (9th Cir. 1988) (emphasis in original).

The Supreme Court has held that Younger abstention is appropriately applied to broad challenges to state dependency proceedings. Moore, 442 U.S. 415. In Moore, the appellees, husband and wife and their three minor children, sought a declaration that parts of the Texas Family Code unconstitutionally infringed upon family integrity after a juvenile court judge entered an emergency *ex parte* order that gave temporary custody of the children to the State Department of Public Welfare. Id. at 419-20. The appellees moved to terminate the temporary custody. Id. at 420. However, instead of moving to expedite the hearing in the county court, requesting an early hearing from state trial or appellate courts, or appealing the temporary order, appellees filed an action challenging the constitutionality of the relevant state statutes in federal court. Id. at 421. The Court first concluded that there were ongoing state proceedings, even though not all of the appellee's claims directly related to the custody determination. Specifically, the Court held that the appellee's challenge to the State's computerized collection and dissemination of child-abuse information could be raised in the state court proceedings. Id. at 424-25. That the appellee's challenges constituted a "multifaceted" and broad challenge to a state statutory scheme "militated in *favor* of abstention, not *against* it." Id. at 427. Second, the Court concluded that challenges to the state juvenile dependency system implicated an important state concern. Id. at 435 ("Family relations are a traditional area of state

concern."). Finally, the Court held that because state procedural law did not bar presentation of the constitutional claims in the dependancy court proceedings, the appellees had an adequate state court avenue for relief. In conclusion, the Court noted that it was "unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation." Id. at 435.

a. Interference with Ongoing State Proceedings

Plaintiffs first contend that there are no ongoing state proceedings where plaintiffs' or class members' claims are currently being adjudicated. Specifically, plaintiffs assert that none of the constitutional claims asserted in this action have been asserted in the underlying dependency court cases upon which they are based. Further, plaintiffs contend that the constitutional and statutory claims alleged in this litigation will not interfere with ongoing state proceedings for the purposes of the Younger analysis.

Courts have concluded that continuing state dependency proceedings, which involve the plaintiffs in a federal action that challenges the constitutionality of the services and process received, are "ongoing state proceedings" for purposes of Younger abstention. See 31 Foster Children v. Bush, 329 F.3d 1225, 1275 (11th Cir. 2003); H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 603 (9th Cir. 2000) (holding that the ongoing proceeding element was satisfied because the plaintiffs' complaint sought "an order requiring procedural due process to be observed in the future course of litigation" of the plaintiffs' pending state custody

proceedings); J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999); Laurie Q. v. Contra Costa County, 304 F. Supp. 2d 1185, 1203 (N.D. Cal. 2004) (holding that challenge to county's foster care system implicated ongoing dependency court proceedings); see also Moore, 442 U.S. at 425-27; cf. Lake v. Speziale, 580 F. Supp. 1318, 1329 (D. Conn. 1984) (holding that Younger abstention did not apply in the absence of any pending state court proceeding); Johnson v. Solomon, 484 F. Supp. 278, 295-97 (D. Md. 1979) (same). However, Younger abstention is only implicated "when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings." Green v. City of Tucson, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) *receded from on other grounds by* Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004). "The mere potential for conflict in the results of adjudications is not the kind of interference that merits federal court abstention." Id. (internal quotations and citation omitted). Rather, the system of dual sovereigns inherently contemplates the possibility of a "race to judgment." Id. "In order to decide whether the federal proceeding would interfere with the state proceeding, [courts] look to the relief requested and the effect it would have on the state proceedings." 31 Foster Children, 329 F.3d at 1276; see also O'Shea, 414 U.S. at 500 (holding that abstention was proper where the proposed injunction would indirectly accomplish the same kind of interference that Younger and subsequent cases sought to prevent).

The Eleventh Circuit has held that an action for declaratory and injunctive relief arising out of challenges to Florida's

foster care system would interfere extensively with the ongoing dependency cases of each plaintiff. 31 Foster Children, 329 F.3d at 1279. In 31 Foster Children, the plaintiffs alleged that the defendants' practices denied and threatened their rights, *inter alia*, to (1) substantive due process for "safe care that meet their basic needs, prompt placements with permanent families, and services extended after their eighteenth birthdays"; (2) "procedural due process in determining the services they will receive"; (3) familial association with their siblings; and (4) prompt placement with permanent families and information provided pursuant to the Adoption Assistance and Child Welfare Act. Id. at 1261. The plaintiffs requested that the court declare the defendants' practices unconstitutional and unlawful and grant injunctive relief that would prevent future violations and ensure compliance. Id. The Eleventh Circuit held that the declaratory judgment and injunction requested would interfere with the pending state proceedings in numerous ways, including potential conflicting orders regarding what is best for a particular plaintiff, whether a particular placement is safe or appropriate, whether sufficient efforts are being made to find an adoptive family, or whether an amendment needs to be made to a child's plan. Id. at 1278. The court concluded that the broad implication of the relief sought was to take the responsibility away from state courts and put it under control of the federal court. Id. at 1279. Such action "constitute[d] federal court oversight of state court operations, even if not framed as direct review of state court judgments that is problematic, calling for Younger abstention." Id.

Similarly, the Tenth Circuit has held that declaratory and injunctive relief directed at state institutions involving dependant children warranted abstention because the requested relief would require a supervisory role over the entire state program. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280; see Joseph A. v. Ingram, 275 F.3d 1253 (10th Cir. 2002). In J.B., the plaintiffs, mentally or developmentally disabled children in the custody of New Mexico, alleged constitutional and statutory violations arising out of the failure to provide them with services, benefits, and protections in custody determinations and treatment plans. 186 F.3d at 1282-85. The court held that the federal action would fundamentally change the dispositions and oversight of the children because, by ruling on the lawfulness of the defendant's action, the requested declaratory and injunctive relief would place the federal court in the role of making dispositional decisions in the plaintiff's individual cases that were reserved to the New Mexico Children's Court. Id. at 1292-93. Therefore, the court concluded that, for purposes of Younger abstention, the federal court interfered with the ongoing state court proceedings.

In Joseph A., the Tenth Circuit likewise concluded that Younger abstention was implicated by the broad relief implicated by a consent decree relating to the procedures to be accorded children in the state's custody. 275 F.3d 1253. The plaintiffs, children in New Mexico's custody due to abuse or neglect, and the New Mexico Department of Human Services had entered into a federal court consent decree, and the plaintiffs subsequently moved the court to hold the Department in contempt for allegedly

violating that consent decree. Id. at 1257. The court held that enforcement of the consent decree would require "interference with the operations of the Children's Court in an insidious way," in that the consent decree operated like that of an injunction or declaratory judgment that precluded the presentation of certain options to the Children's Court. Id. at 1268-69. Further, the consent decree's restrictions were ongoing, impacting the conduct of the proceedings themselves, not just the body charged with initiating the proceedings. Id. at 1269. Accordingly, the court concluded that "Younger governs whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of whether the relief targets the conduct of the proceeding directly." Id. at 1272.

In this case, plaintiffs seek a declaration that the judicial and attorney caseloads are so excessive that they constitute a violation of constitutional and statutory rights. In their complaint, plaintiffs request that defendants be enjoined from currently and continually violating their constitutional and statutory rights and that defendants provide additional resources to reach recommended caseloads for attorneys. At oral argument, plaintiffs clarified that they also sought the appointment of more judges in order to ease judicial caseloads. (Tr. at 31.)

Plaintiffs contend that at this stage of the litigation, the court need not contemplate the precise remedy available to plaintiffs if they prevail on the merits; rather the court should presume that it is possible to "issue an order that avoids Younger and conforms to the Court's sound discretion and proof at

trial." (Pls.' Opp'n at 23.) However, this contention runs counter to the Court's explanation of the appropriate inquiry regarding justiciability as set forth in O'Shea:

> [T]he question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed. Presumably any member of respondent's class who appeared . . . before petitioners could allege and have adjudicated a claim that petitioner's were in contempt of the federal court's injunction order, with a review of an adverse decision in the Court of Appeals and, perhaps in [the Supreme Court].

414 U.S. at 501-02. Further, in evaluating whether Younger abstention applied to the plaintiffs' challenges to the adequacy of Georgia's indigent court system, the Eleventh Circuit looked to the Supreme Court's analysis in O'Shea, and reasoned that consideration of the remedies available is necessary at the outset of the litigation because "[i]t would certainly create an awkward moment if, at the end of protracted litigation, a compliance problem arose which would force abstention on the same ground that existed prior to trial." Luckey v. Miller, 976 F.2d 673, 679 (11th Cir. 1991). The court agrees.

The relief requested by plaintiffs in this case would necessarily interfere with their ongoing dependency court cases and those of the putative class. The requested declaratory relief calls into question the validity of every decision made in pending and future dependency court cases before the resolution of this litigation. Specifically, plaintiffs seek a finding that the number of lawyers currently provided are insufficient to perform the enumerated duties that they are required to perform under both state and federal law. Plaintiffs similarly seek a finding that they have not been granted meaningful access to the

courts or appropriate consideration of their matters due to judicial caseloads. While plaintiffs contend that each individual plaintiff would still have to demonstrate prejudice in order to invalidate the decision rendered in each pending case,[8] the court cannot overlook the practical impact of the proposed declaratory relief on the *5,100 active dependency court cases*; this court's order would substantiate a finding of a constitutional or statutory violation in every one of those active cases. Even if not determinative in every instance, this finding would impact each of the putative class member's cases. See Luckey, 976 F.2d at 679 ("[L]aying the groundwork for a future request for more detailed relief which would violate the comity principles expressed in Younger and O'Shea is the precise exercise forbidden under the abstention doctrine."); Gardner, 500 F.2d at 714 (noting that abstention was applicable to the plaintiffs' challenges to operation of the Florida state public defender offices "to the extent the complaint alleged present and continuing constitutional deprivations due to the representation appellants were receiving in pending state appeals proceedings"); see also Kaufman v. Kaye, 466 F.3d 83, 86-87 (2d Cir. 2006) (holding that requested declaratory relief in challenged assignment procedures in New York court system interfered with ongoing administration of the court system because the court

[8] The court notes that plaintiffs' contention is incongruous with their allegations and arguments relating to injury. The named minor plaintiffs allege that the excessive judicial and attorney caseloads prevented them from receiving services or process. A finding in favor of the named plaintiffs would directly affect the proceedings of those plaintiffs.

could not resolve the issues raised without resolving the same issues as to the subsequent remedy chosen by the state).

Further, the broad and ill-defined injunctive relief requested by plaintiffs would impact the conduct of the proceeding themselves, not just the body charged with initiating the proceedings. See Joseph A., 275 F.3d at 1269. If the court finds constitutional or statutory violations based upon the amount of time or resources spent on juvenile dependency court cases, an injunction directed to remedying those violations would require the court to ensure that in each case the child was receiving certain services or procedures that the court has declared constitutional. Enforcement could not simply end with a policy directive to the Judicial Council, the AOC, or the Sacramento Superior Court, but would require monitoring of its administration.

Indeed, plaintiff contemplates such relief, as illustrated by their submission of a consent decree in a Northern District of Georgia case, Kenny A. v. Perdue, which they contend demonstrates a "straightforward, easily enforceable" remedy. (Pls.' Supplemental Opp'n, filed Nov. 22, 2009, at 4.) Specifically, the proffered consent decree requires that defendants ensure that Child Advocate Attorneys have a maximum caseload and that the County will hire a specified number of additional attorneys within certain time periods. (Ex. A. to Decl. of Jonathan M. Cohen ("Consent Decree"), filed Nov. 20, 2009, at 3-4.) The decree also requires that defendants provide documents and information to a "Compliance Agent" regarding the caseload and number of attorneys, training and CLE records for those

attorneys, performance reviews and evaluations for those attorneys, and complaints of inadequate and ineffective legal representation. (Id. at 4-5.) The appointed "Compliance Agent" is then responsible for undertaking an independent fact-finding review of the parties' obligations, issuing a "Compliance Report," and reviewing or reporting any curative plans. (Id. at 6.) The Compliance Report must then be filed in federal court. (Id. at 7.) Pursuant to certain requirements, the parties could challenge non-compliance and seek enforcement of the decree in federal court. (Id. at 8-9.)

The court disagrees with plaintiffs' characterization that such a decree is straightfoward and easily enforceable. First, the court has grave concerns about both the effectiveness and the enforceability of the relief accorded. In this case, plaintiffs allege violations arising from excessive caseloads of both attorneys and judicial officers/judges and request injunctive relief aimed at both of these problems. An order providing for the allocation of more attorneys and judges to the dependency court system and maximum caseloads presumes that such measures would redress the problems of inadequate representation as alleged in the complaint, which ignores other issues of administrative efficiencies, resource management, and possible physical contraints that are implicated by plaintiffs' claims. However, *assuming arguendo*, that plaintiffs could support this presumption through proof, the question remains how the court would enforce such an order. Should the court order that court-appointed representation cannot be granted if attorney caseloads exceed the mandated maximum? Should the court suspend dependency

court proceedings until defendants are able to hire adequately trained attorneys to represent children in these proceedings? Should the court order that dependency court judicial officers/judges simply should decline to hear cases that would require them to exceed their maximum caseload? If state courts refuse to comply with the court's maximum caseload requirements, should the federal court impose sanctions on the state court judge or officials for contempt? Would the court hold the Chair of the Judicial Council or the Presiding Judge of the Superior Court of Sacramento County in contempt for noncompliance due to state budgetary limitations?[9] These questions necessarily implicate the importance of the state's interest in adjudicating these matters and the ability of the court to enforce its own orders without violating well-established principles of federalism and comity. See Joseph A., 275 F.3d at 1267-72 (holding that litigation to enforce consent decree raised Younger abstention issues); see also Laurie Q., 304 F. Supp. 2d at 1204-05 (holding that in order to cure the juvenile court's alleged failure to review case plans in a timely fashion, the court would be compelled "to either spur the Juvenile court by injunction, or even take the matter completely out of its hands" and thus, engage in the type of interference criticized by the Ninth Circuit in City of Tucson, 255 F.3d 965).

Second, the proffered periodic reporting requirements, standing alone, "constitute a form of monitoring of the operation

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[9] See Luckey, 976 F.2d at 679 ("Avoidance of this unseemly conflict between state and federal judges is one reason for O'Shea and Younger.")

of state court functions that is antipathetic to established principles of comity." O'Shea, 414 U.S. at 501. The Supreme Court has explicitly disapproved of an injunction aimed at controlling or preventing the occurrence of specific events in future state proceedings because it would require "the continuous supervision by the federal court over the conduct [of defendants] in the course of future . . . proceedings involving any members of the . . . broadly defined class." Id. While the reporting requirements may not impose an undue burden in their creation, the underlying question is whether a federal court should order such reports at all. See Luckey, 976 F.2d at 678 n.4; see also Anthony v. Council, 316 F.3d 412, 421 (3d Cir. 2003) (abstaining under Younger where federal relief would disrupt the New Jersey court system and lead to federal monitoring). The principles underlying both O'Shea and Younger persuade the court that it should not.

Further, the court finds plaintiffs' reliance on the reasoning of Kenny A. unpersuasive. See 218 F.R.D. 277. As an initial matter, the facts considered by the Kenny A. court relating to interference with ongoing state proceeding are different from the facts that must be considered by the court in this case. In Kenny A., nine foster children in the custody of the Georgia Department of Human Resources filed a putative class action in state court against the Governor of Georgia, the Georgia Department of Human Resources and its Commissioner, the counties' Department of Family and Children Services and their Directors, and the counties. 218 F.R.D. at 283-84. Defendants removed the case to federal court, where they asserted that the

court should refrain from exercising jurisdiction pursuant to Younger. Id. at 284-85. The court held that defendants waived their right to raise Younger abstention by removing the case to federal court; accordingly, the court's cursory analysis of the applicability of Younger abstention is merely dicta. Id. at 285. However, the court reasoned that the federal action would not interfere with the juvenile proceedings because the declaratory and injunctive relief was not directed at the plaintiffs' review hearings, at Georgia's juvenile courts, juvenile court judges, or juvenile court personnel. Id. at 286. Rather, the court emphasized that plaintiffs' alleged violations arose out of the (1) excessive numbers of cases assigned to inadequately trained and poorly supervised case workers (not lawyers); (2) failure to identify and develop a sufficient number of foster homes; (3) failure to identify adult relatives who could care for plaintiffs; (4) failure to provide relevant information and support services to foster parents; (5) failure to develop administrative controls; (6) failure to provide timely and appropriate permanency planning; (7) placement in dangerous, unsanitary, and inappropriate homes; (8) failure to provide appropriate mental health, medical, and educational services; and (9) separation of teenage mothers in foster care from their own children. Id. The court held that remedying these failures would not interfere in any way with ongoing juvenile court proceedings. Id.

Conversely, in this case, plaintiffs' claims are directed at the fairness and efficacy of the dependency courts and counsel arising out of excessive caseloads. As such, unlike the court's

characterization of the claims in Kenny A., plaintiffs' requested declaratory and injunctive relief is directed at the plaintiffs' review hearings, Sacramento County's juvenile courts, juvenile court judges, and juvenile court personnel. See Joseph A., 275 F.3d at 1272 (noting that injunctive relief directed at attorneys, rather than at the court directly, does not preclude Younger's application because the same underlying principles apply to officers of the court).

Moreover, the court notes that the Kenny A. court's analysis failed to address issues that the Supreme Court and other Circuit courts have found important to the applicability of the first element of Younger abstention. Specifically, while the Kenny A. court noted that plaintiffs challenged excessive caseloads in its analysis of whether there was an adequate opportunity to raise federal claims, the court notably omitted this allegation from its analysis of potential interference with state court proceedings. See id. at 286-89. The court's focus on non-lawyers and non-judicial actors in the determination of whether the federal court would interfere with on-going state proceedings avoided a pivotal issue of whether an analysis of the constitutionality and lawfulness of allegedly excessive caseloads would interfere with ongoing state court proceedings. See Luckey, 976 F.2d at 679.

In sum, the court concludes that the declaratory and injunctive relief requested by plaintiffs severely interferes with the operation of state court proceedings. Any declaratory relief necessarily implicates the validity of pending dependency court proceedings, even if such findings are not wholly

determinative. Further, the requested injunctive relief would be impossible to enforce without violation of established principles of federalism and comity. Accordingly, the first element of Younger abstention is present in this case.

b. Important State Interests

The parties do not dispute that this litigation implicates important state interests in the care, placement, and welfare of children in the Sacramento County dependency court system. Indeed, the law is clear that "[f]amily relations are a traditional area of state concern." Moore, 442 U.S. at 435. Further, "[p]roceedings necessary for the vindication of important state policies or for the functioning of the state judicial system . . . evidence the state's substantial interest in the litigation." Middlesex County Ethics Comm., 457 U.S. at 432. Accordingly, the second element of Younger abstention is present in this case.

c. Adequate Opportunity to Present Federal Claims

Plaintiffs contend that there is no adequate opportunity to present their federal claims in the pending state court dependency proceedings. Specifically, plaintiffs contend that they "would be unable to get a fair hearing in state court because the [d]efendants employ the state court judges." (Pls.' Opp'n at 21). Plaintiffs also contend that, as a practical matter, they cannot press their constitutional claims in dependency court because the system is overburdened.

"Minimal respect for state processes, of course, precludes any *presumption* that the state court will not safeguard federal constitutional rights." Middlesex County Ethics Comm., 457 U.S.

at 431. Rather, a federal court "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987). As such, a plaintiff opposing abstention bears the burden of establishing that the pending state proceedings do not provide an adequate remedy for their federal claims. 31 Foster Children, 329 F.3d at 1279.

"Where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" Middlesex County Ethics Comm., 457 U.S. at 423 (quoting Moore, 442 U.S. at 423); Hirsh v. Justices of Supreme Court of Cal., 67 F.3d 708, 713 (9th Cir. 1995) ("Judicial review is inadequate *only* when state procedural law *bars* presentation of the federal claims."). "The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." Id. (internal quotations omitted). A federal court "should not exert jurisdiction if the plaintiffs 'had an *opportunity* to present their federal claims in the state proceedings.'" Id. at 425 (quoting Juidice v. Vail, 430 U.S. 327, 337 (1977)) (emphasis in original). The fact that judicial review is discretionary or that the claims may be raised only in state court review of administrative proceedings does not amount to a procedural bar. Hirsh, 67 F.3d at 713 (discretionary judicial review of the Bar Court's decision provided adequate opportunity for judicial review); Beltran, 871 F.2d at 783 (state appellate court review of the Agricultural Labor Relations Board's decision provided adequate opportunity to raise constitutional claim).

California courts have explicitly held that juvenile courts can hear constitutional claims relating to the deficient representation of counsel arising out of the unavailability of adequate time and resources to represent a minor. In re. Edward S., 173 Cal. App. 4th 387, 407-10 (1st Dist. 2009); see In re Darlice C., 105 Cal. App. 4th 459, 463 (3d Dist. 2003) ("Where, as here, the juvenile court has ordered parental rights terminated, a parent has the right to seek review of claims of incompetent assistance of counsel."); Laurie Q., 304 F. Supp. 2d at 1206 ("California law has conferred upon the Juvenile Court the sweeping power to address nearly any type of deficiency in the care of a minor and order nearly any type of relief."). Indeed, at least one California court has noted, that it is the "paramount responsibility of a judicial officer to assure the provision of a fair trial" and that a continuance of pending proceedings or other adequate relief is justified where there is "an adequate showing that an [attorney's] excessive caseload and the limited resources [available to him] made it impossible . . . to adequately represent" his client. Id.; see also 31 Foster Children, 329 F.3d at 1279 (holding that available remedies were adequate because the juvenile court can act to protect children within its jurisdiction); J.B., 186 F.3d at 1292-93 (holding that because the juvenile court was a court of general jurisdiction under state law, the plaintiffs had not provided "unambiguous authority" that state courts could not provide an adequate remedy); Joseph A., 275 F.3d at 1274 (holding that dismissal of a federal claim in dicta from a state court opinion was

insufficient to overcome the presumption that state relief was available).

In this case, plaintiffs have failed to overcome the presumption that their pending state court proceedings provide an adequate opportunity for judicial review of their federal claims. Rather, California law explicitly provides recourse through the state court system for the federal claims raised in this litigation. At oral argument, plaintiffs conceded that the state dependency courts can entertain the type of federal claims brought in this litigation. (Tr. of Nov. 6, 2009 Hr'g ("Tr.") at 43.) Further, under California law, one of the paramount responsibilities of state judicial officers is the assurance that parties are provided with a fair trial. Therefore, plaintiffs have an alternative adequate opportunity to press their federal claims.

Plaintiff's reliance on the D.C. Circuit's decision in LaShawn A. v. Kelly, is misplaced. 990 F.2d 1319 (D.C. Cir. 1993.) In LaShawn A., the plaintiffs brought a child welfare class action against the defendants based upon alleged constitutional and statutory violations arising from "ineptness and indifference, inordinate caseloads, and insufficient funds." Id. at 1320. In rejecting the applicability of Younger abstention, the court noted that the District of Columbia Family Division had "explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law." Id. at 1323. Accordingly, there was no alternative avenue for relief for the plaintiffs. However, as set forth above, in this case it is undisputed that state courts

can entertain the type of federal claims brought in this litigation. As such, there is no procedural bar as was before the LaShawn A. court.[10]

Accordingly, the third element of Younger abstention is met in this case.

d. Exceptions to Abstention

Finally, plaintiffs contend that abstention is unwarranted because the judicial state officer or other state judge responsible for deciding their claims "would be placed in the position of having to rule against either the Honorable Presiding Judge in their own County or against the remaining [d]efendants . . . who establish policy governing their jobs. (Pls.' Opp'n at 28.)

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[10] Plaintiffs' reliance on Kenny A. is similarly misplaced as the Northern District of Georgia explicitly found that the juvenile court lacked the power to grant the relief requested by the plaintiffs. 218 F.R.D. at 287. Further, the Kenny A. court's alternative rationale, that the plaintiffs "are dependent upon an allegedly overburdened and inadequate system of legal representation, which prevents them from raising their claims in the juvenile court," is contrary to Ninth Circuit precedent, which, as set forth above, provides that judicial review is inadequate "*only* where there is a procedural *bar* to the presentation of federal claims. See Hirsh, 67 F.3d at 713.

The court is not dispassionate regarding the obstacles facing plaintiffs. However, their arguments regarding the practical impediments to judicial review run counter to explicit Supreme Court and Ninth Circuit authority on this issue. See Pennzoil, 481 U.S. at 15 ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."); Hirsh, 67 F.3d at 713. Neither the Supreme Court nor the Ninth Circuit has held that practical impediments may amount to a procedural bar for purposes of Younger abstention; nor did the Kenny A. court cite any legal authority for its novel rationale. 218 F.R.D. at 287.

"Although a federal court is normally required to abstain if the three prongs of the Younger test are satisfied, abstention is inappropriate in the 'extraordinary circumstance' that the state tribunal is incompetent by reason of bias." Hirsh, 67 F. 3d at 713 (citing Gibson v. Berryhill, 411 U.S. 564, 577-79 (1973)). "Bias exists were a court has prejudged, or reasonably appears to have prejudged, an issue." Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992).

The party alleging bias "must overcome a presumption of honesty and integrity in those serving as adjudicators." Hirsh, 67 F.3d at 714. (internal quotations and citations omitted). Where there is an absence of any personal or financial stake in the outcome sufficient to create a conflict of interest and where there is a lack of personal animosity towards the parties in the proceedings, the presumption is not overcome. Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 779-80 n.10 (9th Cir. 1982). The Supreme Court has held that a plaintiff did not sufficiently demonstrate bias when a state medical board adjudicated the merits of a disciplinary action in which the board itself investigated and filed charges. Withrow v. Larken, 421 U.S. 35, 47 (1975). The Court has also concluded that a state board's prior involvement in a labor dispute with striking teachers did not prevent it from deciding whether those teachers should be dismissed as a result of that unlawful strike. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 497 (1976); see also Vanelli, 667 F.3d at 779-80 (holding that a school board reviewing its own prior decision was not impermissibly biased). Similarly the Ninth Circuit has held

that judges are not incompetent to review findings of judicial officers whom they participate in appointing. Hirsch, 67 F.3d at 714. The Ninth Circuit has also held that fines imposed by a disciplinary board, which are paid to the same entity that pays the salaries of the disciplinary board, is insufficient to establish bias. Id.

Plaintiffs' conclusory and astonishing assertions that *all* state court judges are biased in this matter is unsupported by law or facts. Plaintiffs have not submitted any allegations or argument that all state court judges and judicial officers have a personal or financial stake in the litigation. Nor have plaintiffs proffered any allegations or arguments relating to any judge's personal animosity against them. While plaintiffs contend, without any legal authority for support, that defendants control policy decisions that may impact state judges, such a broad and ambiguous contention does not come close to surpassing the factual circumstances in which the Ninth Circuit has held the presumption of bias was not overcome. As such, plaintiffs' conclusory assertions are insufficient to demonstrate extraordinary circumstances.

Therefore, because plaintiffs' claims would interfere with ongoing state dependency court proceedings that implicate important state interests, plaintiffs have an adequate opportunity to pursue their federal claims in those proceedings, and they have failed to overcome the presumption of honesty and integrity in those serving as adjudicators, the court must abstain from adjudicating these claims pursuant to Younger v. Harris.

CONCLUSION

In conclusion, the court again acknowledges that plaintiffs' claims present a troubling depiction of the state of Sacramento County's dependency court system. The facts alleged relative to the named minor plaintiffs demonstrate a serious lack of responsiveness by the state's current system to the needs of children. However, to remedy these wrongs, this court must reallocate state financial resources, reorder state legislative priorities, and revise state judicial policies. This proposed federal judicial takeover of these functions of state government not only strikes at the core principles of federalism and comity, but assumes an institutional competence that a federal district court simply does not possess.

Therefore, for the foregoing reasons, defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.

DATED: January 11, 2010

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

E. T., ET AL.,

CASE NO: **2:09−CV−01950−FCD−DAD**

V.

RONALD M. GEORGE, ET AL.,

XX −− **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 1/7/2010

Victoria C. Minor
Clerk of Court

ENTERED: **January 7, 2010**

by: /s/ K. Engbretson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BEFORE THE HONORABLE FRANK C. DAMRELL, JR., JUDGE

---oOo---

E.T. et al., Plaintiffs,	)	
vs.	)	No. CIV S-09-1950 FCD
RONALD GEORGE, et al., Defendants.	)	

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REPORTER'S TRANSCRIPT

DEFENDANT'S MOTION TO ABSTAIN AND DISMISS

FRIDAY, NOVEMBER 6, 2009

---oOo---

Reported by: MICHELLE L. BABBITT, CSR #6357

APPEARANCES

For the Plaintiff:

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BY: ROBERT NAEVE
Attorney at Law

SACRAMENTO, CALIFORNIA

FRIDAY, NOVEMBER 6, 2009; MORNING SESSION

---O0O---

THE CLERK: Calling case 09-1950, E.T., et al., versus Ronald George, et al.

THE COURT: Appearance of counsel.

MR. NAEVE: Robert Naeve on behalf of the defendants.

MR. COHEN: John Cohen on behalf of plaintiffs.

THE COURT: Counsel -- you're going to have to find a seat. I can't have anybody standing in the courtroom.

What I would like to do, I have to conclude -- I have to be in a meeting in Monterey County, our Eastern District conference, this afternoon. Argument is going to be concluded by the noon hour, which may not be sufficient time, and I understand that, in which event, if we don't have enough time to fully cover these issues, we'll have to continue this to another date to complete your argument.

What I would like to take up is justiciability initially. Before I get into that, I would like to have some discussion about how this system operates, how it works. It's not crystal clear to me.

Maybe you could help me understand it a little better; in other words, how the dependency court operates and how it's funded. I know these are particular circumstances

because you have special funding. Let me ask you this:

First of all, in dependency court proceedings, in the assumption that the child has counsel, the parents also may have counsel; is that correct?

MR. NAEVE: That's correct in most cases.

THE COURT: Most cases they have counsel and the child may well have counsel?

MR. NAEVE: Yes.

THE COURT: It's not in the nature of an adversary proceeding or could it be?

MR. NAEVE: It would be in some circumstances with respect to the parent, but because the court and the District Attorney or whoever is representing Child Protective Services is there representing the child and looking out for the best interest of the child and the case law so says.

THE COURT: How does it work in Sacramento County? Do you have a represent ive of the County Counsel's Office there or the DA's Office? Is there a court presenter of some type?

MR. COHEN: There will be a GAL appointed who is an attorney who will represent the child through the process.

MR. NAEVE: It might help if you back up a step. How do these cases start? They start with a social worker or policeman or someone who has the authority who gets a report that there may be something going on in a home, and a social worker or someone goes out to investigate.

At that point, someone can make a determination -- I think it's 12 factors and Welfare and Institutions Code 300 might apply. If there is a danger to the child, that officer has the authority to remove the child from the home right then and there. That does not always happen.

It starts off as a bifurcated proceeding. You could decide if you're the officer either that there is something that requires immediate removal or decide if there is still something that we should be worrying about with respect to Section 300, but there is no immediate danger to the child.

In either case, you have a proceeding. The first level of the proceeding is the dependency petition where the representative of the state, the social services, has to establish that there is sufficient reason to believe by a preponderance of the evidence that one of those factors or elements set out in Section 300 applies.

THE COURT: This is guardian ad litem? Who is making this presentation?

MR. NAEVE: This presentation is made on behalf of the county, essentially the people of the county who made the decision in the first place.

THE COURT: Made the decision to remove the child?

MR. NAEVE: Right.

THE COURT: The parents will probably have an attorney and the child would have someone representing the child;

right?

MR. COHEN: Correct.

MR. NAEVE: At that point in the proceeding it's not clear because they have to be appointed if they're indigent. That can happen at the first hearing.

MR. COHEN: And does within Sacramento County, is my understanding.

THE COURT: I assume this is a referee as opposed to a superior court judge or superior court judge sitting --

MR. NAEVE: It could be either. In Sacramento they are referees, but they are judicial officers.

THE COURT: How many of those judicial officers serve in the dependency court here?

MR. NAEVE: I believe there are five.

THE COURT: How many lawyers represent -- there's an organization here, child advocates. They are funded by the administrative office; correct?

MR. COHEN: Through the draft program.

THE COURT: That's just a general comment. I know you could have private counsel. Are there any other agencies that provide legal services for children aside from the child advocates?

MR. NAEVE: Yes. There could be conflict counsel as well.

THE COURT: There's no other agency that provides

appointed counsel for children?

MR. NAEVE: That's correct.

THE COURT: But there's an agency that provides appointed counsel for parents; right?

MR. COHEN: Yes.

MR. NAEVE: It's a law firm and it's different from the law firm that provides counsel for the children.

THE COURT: Who funds those folks?

MR. NAEVE: Also funded by the judicial --

THE COURT: Administrative office?

MR. COHEN: Yes.

THE COURT: How many lawyers are in the child advocates? How many lawyers here in Sacramento?

MR. COHEN: There are 17.

THE COURT: And how many in the parent's advocates? How many lawyers serve for parents as counsel?

MR. NAEVE: I don't know.

MR. COHEN: I have somebody in the audience who is actually involved in the process. If you'd like an answer, I'd be happy to get it for you.

There are 21 parent's counsel working within the Sacramento County dependency courts. They come from two different sources.

THE COURT: But they are both funded by the administrative office?

MR. COHEN: I believe so.

THE COURT: You said 17 work for child advocates?

MR. COHEN: Correct.

MR. NAEVE: Could I put a footnote that if there is something that we got wrong or if I got wrong, we'll let you know, just to make sure we get the facts right for you.

THE COURT: What is the role of the advocate on behalf of the child in this proceeding?

MR. COHEN: They have two different roles. The first one is essentially the best interest of the child. That's been spelled out in the briefing on both sides.

Then after we get past the question of whether or not they belong in a separate setting from their parents or whatever else, there are certain activities where they do become client driven. There is a mixed role there for a child advocate.

THE COURT: This organization that advocates on behalf of the children, do they have their own investigators or case workers of any kind or just lawyers?

MR. COHEN: Just lawyers.

MR. NAEVE: I'm not sure that's correct.

THE COURT: Let's find that out.

MR. WILSON: Robert Wilson. There are seven social workers on the staff with Sacramento.

THE COURT: Seven social workers, 17 lawyers; what

about administrative staff?

MR. WILSON: I believe our staff is up to eight.

THE COURT: 15 non-lawyers, 17 lawyers, 35 employees?

MR. NAEVE: There may be in addition investigators to the extent --

THE COURT: How about investigators?

MR. WILSON: We have no investigators on staff.

THE COURT: Thank you, sir.

Let's talk about the court itself. I take it the administrative office funds the entire superior court budget; right?

MR. NAEVE: The administrative office of the court is the operational arm of the judicial arm of California.

THE COURT: The Judicial Council funds it?

MR. NAEVE: Judicial branch gets money from the legislature. There's a budget. The judicial branch through the Judicial Council administers the budget. Some goes to Sacramento, Los Angeles, the rest of the counties.

THE COURT: Is the administrative office -- is that the mechanism by which the Judicial Council funds the courts?

MR. NAEVE: My confusion is what you mean by "fund." They administer the funds, but are not necessarily the folks who actually divide up the money.

THE COURT: So the superior court gets a budget? They get so much money and it comes from the state; right?

MR. NAEVE: Again, so we're clear, if we're talking now about funding for the --

THE COURT: Superior court, everything. Where does the money come to operate the superior court?

MR. NAEVE: Comes through the Judicial Council.

THE COURT: Not necessarily through the administrative office?

MR. NAEVE: The administrative office of the courts is how that's administered.

THE COURT: The court gets X dollars. Are those funds earmarked in any fashion?

MR. NAEVE: Not sure. I would have to check. I assume they are.

THE COURT: Is one of those earmarked for child advocates or is that a separate fund?

MR. NAEVE: That's separate.

THE COURT: How many counties are funded by the Administrative Office for Child Advocacy?

MR. NAEVE: That's the draft program that's in the pleading and also in --

THE COURT: 20 counties?

MR. NAEVE: I believe so.

THE COURT: What about the rest of the counties?

MR. NAEVE: They contract directly with the service providers.

THE COURT: It comes out of the court's budget; right?

MR. NAEVE: I'd have to check that too, Your Honor, but if the costs are invoiced through the judicial branch of the AOC.

THE COURT: What I'm trying to find out is how courts are funded, and I assume legislature has a budget to give the money to the judicial branch?

MR. NAEVE: Yes.

THE COURT: The judicial branch disburses that money on some allocated basis based on their own allocations, their priorities? Los Angeles County gets X and Sacramento County gets Y and so forth and then in 20 of those counties, they have a special funding for the draft, which is a method of funding the child advocates; correct?

MR. COHEN: Correct.

THE COURT: That money goes to the court, doesn't it?

MR. COHEN: Straight to child advocates.

MR. NAEVE: That's the purpose of the draft program, to take the local court out of that.

MS. WILSON: I'm here with the administrative office of the court, but it might be helpful if I can answer some of the funding questions.

MR. NAEVE: I'd be delighted, Your Honor.

THE COURT: Give us your name for the record.

MS. WILSON: Leah Wilson, L-E-A-H, W-I-L-S-O-N.

THE COURT: Spell your last name again.

MS. WILSON: W-I-L-S-O-N.

THE COURT: I don't know if you're on the pleadings, but you're co-counsel with Mr. Naeve?

MR. NAEVE: She's one of my clients.

THE COURT: Are you an attorney?

MS. WILSON: Yes, I am.

THE COURT: You heard the colloquy between counsel and the court?

MS. WILSON: Yes.

THE COURT: Anything you want to add with respect to funding of the dependency court in the state of California other than what I've heard?

I understand the draft has special funding to child advocates in 20 counties; is that right?

MS. WILSON: Right. The draft program is a program by which the administrative office of the courts directly contracts for dependency counsel services for both minors and parents in 20 court systems statewide. For the other 38 court systems, the court is allocated a lump sum budget for all court operations, advocates for both children and counsel.

It's at local court discretion how much of that funding they're using for court-appointed counsel services for both children and parents. There's no separate

allocation structure for minor's counsel.

THE COURT: You don't specify any allocation when you send money to the court that is not a member of the draft?

MS. WILSON: Let me step back.

We specify an allocation and the courts must show that they've spent the money on court-appointed counsel, but no court is precluded from spending more than what we allocate out to them on court-appointed counsel services --

THE COURT: Explain that to me. Back up. I'm talking about the non-draft counties. You send them a check, money for the budget for the coming year; right? You fund their budget for the year?

MS. WILSON: Right.

THE COURT: Then do you indicate how any of that money is to be allocated?

MS. WILSON: Yes. I'm sorry I'm not being clear. There are line items within the large lump sum trial court allocation for court staff for many functions within the courts.

The court-appointed counsel budgeting process has evolved over time. It used to be that there was no stipulation of how much had to be spent on court-appointed counsel services. So what has happened in this system, there is an allocation and it has become more stringent. So what has happened for the 38 courts in the draft is that there is

an allocation identified at the beginning of the year.

That typically has been based on historical expenditure levels: County A spent $150,000 on the services on one fiscal year, so the initial starting budget for the subsequent fiscal year would be $150,000.

The court would then contract for services or hire hourly rate attorneys, make whatever decisions it made regarding counsel and then submit back to the AOC proof of expenditures on court-appointed counsel services.

The AOC would then reimburse the local courts for those expenditures up to that $150,000, the expenditure from the prior year. So that's the way it works.

THE COURT: What is the purpose of draft? You have some doubt how money is being allocated for child advocacy?

MS. WILSON: The purpose of draft was myriad, one of which --

THE COURT: Just give me the main reason.

MS. WILSON: The main reason was to make sure that all funding that we as a branch thought was being allocated for court-appoint counsel services was actually going to be spent on court-appointed counsel services.

THE COURT: Was there some question in your mind that the courts were spending money on advocacy?

MS. WILSON: There was factual. We learned several years ago some courts were not.

THE COURT: Those are the 20 courts that have been designated as draft courts?

MS. WILSON: No. This is a purely voluntarily program. It just so happens that some of the courts that there were some concerns about decided to join the program, but it was purely voluntarily.

THE COURT: What about in Judicial Council? You get your budget from the legislature. You have a macro number for child advocacy.

MS. WILSON: No, but for court-appointed counsel for parents and children.

THE COURT: For that number?

MS. WILSON: Yes.

THE COURT: That's a defined budget item?

MS. WILSON: Yes.

THE COURT: That's disbursed to the courts directly or through draft; is that right?

MS. WILSON: To the providers directly.

THE COURT: Does the legislature have any say in that or is this something Judicial Council has devised?

MS. WILSON: You mean the individual allocation between the court systems?

THE COURT: No. That's a good question, but I'm more interested in parent and child advocacy. Is that line item designated by the legislature in any fashion?

MS. WILSON: Yes. Our state appropriation is $103 million.

THE COURT: The legislature says you have to spend that on child and parent advocacy?

MS. WILSON: Court-appointed counsel services for parent and children.

THE COURT: Excuse me. That's 103 million?

MS. WILSON: Uh-huh.

THE COURT: Then you allocate that to various courts as you've described?

MS. WILSON: Yes.

THE COURT: With respect to this county, the money goods directly to the -- the allocation for this county goes directly to child advocates?

MS. WILSON: The AOC is nonprofit, and we contract directly with the nonprofit law firm that represents parents, the law offices of Dale Wilson.

THE COURT: How do you divide that up? What goes to what and what goes to the others?

MS. WILSON: As a bit of background, prior to that time, what the Sacramento court decided to do was to take their allocation from the administrative office of the courts and split it 50/50 between these two entities.

Part of draft is trying to achieve a workload-based funding methodology for vendors. You look at the total

number of clients served by each organization and base your contract levels on that.

So when Sacramento joined draft, one of the things we wanted to do was move away from the 50/50 split because the children's office necessarily has more clients than the parent's office.

So how we achieved -- what we did there, we gave the Sacramento Child Advocates Program a seven percent increase in their funding as compared to what they had gotten under their contract with the court. We gave the law offices of Dale Wilson a two percent increase. Both got an increase, but both were underfunded, but we increased Sacramento Child Advocates more than the parent's firm to get away from that arbitrary 50/50 split.

THE COURT: The 2008-2009 budget?

MS. WILSON: Yes.

THE COURT: Give me the real dollars.

MS. WILSON: I don't have that.

THE COURT: Give me the approximate number.

MR. NAEVE: I could make a suggestion that because this is obviously something that is -- we could provide the information.

THE COURT: Provide it to me. I want it under seal, in camera, whatever. I want to know what the numbers are.

MR. NAEVE: We can provide that, Your Honor.

MR. COHEN: Since I have SCA's administrator here, I can get a number for you if you would like it.

THE COURT: If there's some confidentiality issues -- I want to know what the number is. You can do it under seal or --

MR. WILSON: It's public record. I'm happy to provide the information.

THE COURT: What's the number?

MR. WILSON: $2.3 million in '08-'09. '09-'10, it was $2.5 million. Rough numbers.

THE COURT: How about the parent's appointed counsel?

MS. WILSON: I don't know that number.

THE COURT: Roughly a little bit less than that?

MS. WILSON: It should be less than that by about five and seven percent.

THE COURT: That's fine. Thank you.

The legislature says you've got $103 million to spend on appointed counsel services; correct?

MS. WILSON: Correct.

THE COURT: What happens if you don't spend that amount or spend more than that amount? What happens to your budget?

MS. WILSON: We have historically spent more than that. Each year for the last five years we've spend more than our state appropriation. '08'-'09 we have spend 113

million on the services.

THE COURT: What's the consequences of exceeding your budget?

MS. WILSON: We have to go and seek additional funding for the program, which they have been able to find by pulling funds from surplus funding and other program areas -- state operation program areas. We were put on notice in '08-'09 that none of that would be available because of the cuts incurred by the entire judicial branch.

THE COURT: By whom?

MS. WILSON: By the Judicial Council, by our finance division, that none of that funding we have been able to rely on for the past four to five years would be available moving forward because of the significant cuts the branch has realized.

What's really important here for you to understand is that the $2.3 million figure that SCA is citing for their contract, that in and of itself which is being argued to be insufficient is based on this $113 million level of expenditures which is in and of itself ten million more than our state appropriations.

THE COURT: Any other contracting agencies seeking more funds?

MS. WILSON: Yes.

THE COURT: The answer is no?

MS. WILSON: Yes.

THE COURT: How many?

MS. WILSON: All of our providers are seeking additional funding. I think the reality is that many, many of our providers in the state are underfunded. There are --

THE COURT: Anyone file any lawsuits such as this?

MS. WILSON: Not at this time.

THE COURT: They all want more money?

MS. WILSON: Right. Some are them funded less than SCA.

THE COURT: In terms of the allocation, this is based on -- some historical budgets in the past so you come up with this 2.3 million. You did not pull that out of the air. Obviously, you have some reason for 2.3 million; next near 2.5 million.

How does that happen?

MS. WILSON: It goes back to the transition from county to state funding of the trial courts. When we transitioned to state funding of the court systems, each court got a court-appointed counsel budget that essentially was a rollover of whatever their local county Board of Supervisors had been spending on court-appointed counsel services.

This is, in fact, the way most court program operation budgets were decided in the transition to state funding.

With court-appointed counsel services in juvenile dependency proceedings, the Judicial Council has been trying to move away from that historical expenditure based funding and certainly within the draft program to start looking at allocations based on workload.

THE COURT: When you go to the legislature for your budget and you're going to get -- got $103 million, and you're asking that for these appointed counsel services for parents and children, is that the number you ask for?

MS. WILSON: No. We don't go every year and ask for our baseline budget essentially of 103 million. The state has implemented a funding policy with the entire judicial branch where any increases that were afforded are based on formula.

It's some combination of the consumer price income and the cost of living adjustment. So there has been just an annual percentage increase applied to the programs for the last several years until last year when in fact the entire judicial branch was cut.

So we have not had to go forward and ask for that 103 million. That has been a baseline budget that in prior years has been adjusted by two or three percent annually through the state CPI adjustment.

THE COURT: What percentage of any of these monies are federal funds?

MS. WILSON: None of the monies that fund court-appointed counsel services in California are federal funds.

THE COURT: Now let's talk about child advocates. How is that money spent? Lawyers? Overhead? What percentage of that goes to lawyers?

MR. WILSON: 93 percent of that goes to fund basically the staff of the agency.

THE COURT: Let's talk about lawyers.

MR. WILSON: I would say -- I don't have it broken down specifically. I can tell you we have starting lawyers start at around $40,000 a year.

THE COURT: Can you give me a percentage?

MR. WILSON: I would say the overall attorney budget is probably close to 80 percent of the budget.

THE COURT: The salaries?

MR. WILSON: The salaries are 93 percent of the budget.

THE COURT: 93 percent are lawyers' salaries?

MR. WILSON: Everybody's salaries.

THE COURT: This is about paying lawyers more money. I want to get an idea what lawyers get. What percent of your budget goes to lawyers' salaries?

MR. WILSON: At least 80 percent of the budget. I will verify that and let the court know.

THE COURT: That would be helpful to know. If you get 35 employees and 17 of them are lawyers, they're getting 80 percent of the money in salary?

MR. WILSON: Right.

THE COURT: What if you double the number of lawyers? What will that do? How about space?

MR. WILSON: That's the other issue. Space is always a big issue.

THE COURT: If you double the lawyers, will you be satisfied with the space you have now with the personnel running child advocates?

MR. WILSON: I think there's ways we can do it out of cubicles, but we do need additional space.

THE COURT: What about other personnel?

MR. WILSON: You're going to need support staff. As part of the draft project, they came up with a fabulous study outlining what it takes to run an office based on the number of children that are represented in the county.

Based on that, our staffing numbers and salary numbers would require a budget of 5.6 million dollars. That's based on their reports. We're operating on a 2.3 million budget. Last year we ran a $100,000 deficit.

THE COURT: What you're asking for is double at least? I don't know what you're asking for here. Enough to get the job done; is that what it is?

MR. COHEN: We're falling into something we need to clarify a little bit. The classes named are the kids. SCA is a service provider.

THE COURT: But the services you want to have provided have to come out of the administrative office, and that's going to take money. I want to know where the money is going.

MR. COHEN: Where the money is going is to SCA or whoever that happens to be to then advocate on behalf of the children.

THE COURT: You're asking for more lawyers. I don't know if you're asking for more secretaries or assistants or case workers or what.

MR. COHEN: We don't know what that entails.

THE COURT: I have to decide that.

MR. COHEN: I understand that. What we're getting into is a whole bunch of numbers that give good background.

THE COURT: This is a serious matter and you're asking me to do it and I want to understand what I'm getting into.

MR. COHEN: We don't have enough of a record yet to be able to crunch those numbers.

THE COURT: I'm not asking for exact numbers. I want to know in general terms. I get percentages and I understand you can't say how many lawyers that will take. I will have to decide that; is that what you're asking me to do to get

the job done?

MR. COHEN: What we want you to do -- the AOC has come up with their recommendation of how many kids should be served by any one lawyer. The constitutional claims goes one step even less specific, which is we want to make sure that they can do what they need do under 317 and everything else. So where we are is to say, Your Honor, what we know is what is being given isn't enough.

THE COURT: Let me ask you this so I'm clear: Suppose this injunction says: Well, the advocate's budget should be doubled. They need more lawyers, case workers, this and that. What about the children in Santa Clara County? What are they going to say?

MR. COHEN: They may say the same thing --

THE COURT: What is the legislature going to say? Aren't I getting into the very problem that's raised by abstention; in other words, you're asking me to pick out one county. This is a very deserving county based on what I've read. This is a real problem and I appreciate that totally. This is in some ways outrageous.

But the question is: What about the rest of the children in the State of California? Los Angeles County is going to be at the door. The legislature says you can only spend $103 million. What is going to happen?

MR. COHEN: The legislature doesn't say that.

THE COURT: The point is that whether they say or don't say, this money is coming from somewhere and it's coming from somewhere and coming to Sacramento County. What about Santa Clara County or Los Angeles County or Santa Barbara County or whatever? Those kids are just as deserving and they're in the same mess you're in.

MR. COHEN: Well, you're also facing the parity question. Let's take the draft. We're talking about 20 counties --

THE COURT: 20 counties including Los Angeles County and Alameda County and Santa Clara County; what about those kids?

MR. COHEN: Let's start there. Let's go first with what is the comparison between Alameda County and --

THE COURT: How do I know that? Come on. I'm trying to find out how it might impact other children around the State of California and other counties in draft.

MR. NAEVE: If I could insert one thing. The draft program, it's not just the children. If there's more funding that goes to the kids in a particular county, counsel for the parents are going to look over --

THE COURT: I suspect they're looking for more money too. It's the domino effect. I'm going to focus -- this money has to come out of someone's pocket, and I presume it will come out of some other kid's pocket in some other

county.

MR. COHEN: Not necessarily.

THE COURT: How do I know that? I'm just going to say I want $2 million dollars for Sacramento County? I mean, that's going to be my order. You don't think Judge Fogel or Judge Snyder in Los Angeles County is going to get the same thing going? They are going to get a case filed. You're going to have federal judges running amuck in all these budgets, and it makes no sense.

This strikes me as a very difficult disconnect that I get between budgets around the State of California and each draft county and me. I'm the one that's saying Sacramento gets more money. I'm just trying to get my arms around this and see what effect that has on people beyond my jurisdiction.

MR. COHEN: I understand that concern. Let me see if I can address it. Let me raise another couple concerns.

The first one is that what you have in front of you is a dispute relating to kids within Sacramento County not getting their Constitutional Rights.

THE COURT: Right.

MR. COHEN: That's what's before you.

Now, your question is: What happens if I give money here or what happens down the road in terms of the domino effect and so forth?

That doesn't stop you from turning around and saying: There is a constitutional issue. I don't like to get in the middle of the budgets.

I'm not asking you to get in the middle of budgets. What I'm telling you is: Look. What we are seeking in terms of relief is not that you get in the middle of the budget. What we would like you to say to the AOC is: Look. You've take taken on the responsibility for this program. They administer the draft. They have a budget. They have funds coming from different places going to different things.

One of the responsibilities is to make sure that the constitutional Rights of these kids are protected. If that's raising funding, great. If it has to come from somewhere else, it has to come from somewhere else. That's their responsibility.

THE COURT: That's a little shortsighted. Let's go back to kids in other counties, draft counties. I'm sure the folks in Los Angeles County would make the same case you're making. Let's assume that's the case. Maybe it's worse in Sacramento County.

By the way: Is this the worst county or are there other counties worse than this?

MS. WILSON: Your Honor, there are other counties worse than Sacramento.

THE COURT: Doesn't that strike you as being somewhat

anomalous? You're asking me to do something that may affect the lives of other children in other counties that may not get enough money and have a worse problem there in terms of constitutional deficiencies than we have here.

Should I care about that?

MR. COHEN: Yes, you should. But what you should be looking at, once again, that's a factual dispute as to whether Sacramento --

THE COURT: It's a matter of abstention. I'm getting into something here that involves budget --

Go ahead. You want to argue?

MR. HOWARD: Ed Howard with the Children's Advocacy Institute.

THE COURT: This does get to the heart of abstention. I am getting into budget disputes. I'll be dealing with a budget of this agency that has to fund all the counties, whether in draft or not, and, specifically, draft counties.

I'm concerned -- as a super judge, I'm taking money from this agency to give to Sacramento County which is very needy, maybe not the neediest county, and turn my back on children in other counties that may be in worse shape than they are here.

That troubles me. Should it trouble me or should I not care?

MR. HOWARD: It should trouble you. There are two

elements that you should be troubled about. The first is, of course, that as my colleague mentioned, you have plaintiffs with individual claims before you in this case.

That while what may happen in other counties is certainly of issue for the Children's Advocacy Institute and Your Honor and anybody who cares about those kids, you do have a case at bar.

But, more importantly, there is an assumption built into Your Honor's question, which I'm not sure is correct and the legislature is not correct. The assumption appears to be you're going to have to rob Peter to pay Paul, i.e., there are insufficient funds under the current control of the AOC, both from the legislative appropriations, but also from the fund that derives from other court fees and income.

The assumption of your question appears to be that there is some limited funds, but the question of how and what priorities the administrative office of the courts and the Judicial Council deploy in funding the things under their agency is something that is in question as we speak in the building with the big dome down the street.

THE COURT: Maybe we should defer to the big dome?

MR. HOWARD: We certainly should not.

THE COURT: You said a mouthful. I want to remember that. You're telling me this whole issue is being examined by the state legislature?

MR. HOWARD: No.

THE COURT: Tell me what you're referring to, "this is under the big dome." What is under the big dome?

MR. HOWARD: The question of whether or not -- the administrative office of the courts has spent approximately a billion and a half dollars on a new management system. It has contacted to build new courthouses while it can't --

THE COURT: What does that got to do with me?

MR. HOWARD: The reason that's relevant is that the assumption of your question is that if the AOC and the Judicial Council currently does not have the money to make all of those --

THE COURT: My assumption is that I should be very careful getting my nose into a budget battle on what the AOC spends and to say that I'm going to decide what they're going to spend here, despite the fact there's great question what they're spending in their entire budget.

You're telling me the State Capitol, the legislature, is taking a hard look at what is going on?

MR. HOWARD: No. Nobody precisely knows precisely how much money the AOC has and what it's spending it on.

THE COURT: That's an assumption I'm making; right? I don't know what they're spending.

MR. HOWARD: You don't at the current complaint stage.

THE COURT: I understand that. Look. We may be

getting ahead of the story. This does go to the heart of the issue of abstention.

MR. HOWARD: It does not. Every single case, whether in medical, ADA against the courthouse, every single case against the state as it relates to state programs invariably involves the expenditure of state funds; every single one. Your Honor, I'm certain, has heard cases like this in the past.

The question before the court is whether or not the defendants have broken the law. There may be financial consequences to that down the road, but the financial consequences to that, whether they are limited to the children in Sacramento or 58 counties or --

THE COURT: There's a lot of federal law and most of it doesn't break in your favor. There's a great deal of concern about the institutional reform cases and getting into federal judges, you know, running aspects of state government, particularly as it applies to the courts. This is about getting involved in the court system. I believe it is that.

That does not mean I'm not going to do it. I think this clearly involves the courts in Sacramento County and eventually the courts throughout the state in California. But in any event, I want to peel this onion a little more. I understand what your argument is.

Now I'm talking about if I make this decision or any judge makes this decision to increase the budget, for example, Sacramento County, what about the parents? Shouldn't they be entitled -- they are having the same problems the kids are.

MR. COHEN: We don't know that issue either.

THE COURT: I don't either. I'm in the dark about that. What about the courts? You want more judges? I can speak with exquisite knowledge that we have the heaviest case load in the United States. We would love more judges. More lawyers doesn't help us at all.

We would like more judges, but the bottom line is: I can't see how if I get into this, if I find there's a constitutional violation here, an affirmative that has to be corrected by more lawyers, it's going to have to have more judges to make this thing work.

You can't have twice the number of lawyers and only a few minutes of a hearing because there's so little time; you've got to increase the number of judges. You want more judges; right?

MR. COHEN: Correct.

THE COURT: Whose budget is that going to gouge?

MR. COHEN: Same budget.

THE COURT: I'm going to tell the Judicial Council how many judges Sacramento should have?

MR. COHEN: What we are asking for is not a specific funding amount --

THE COURT: But you want more judges; right?

MR. COHEN: We want the ability, whether it's more full-time judges, more part-time judges --

THE COURT: That's up for me to decide; right? I'm making that decision?

MR. COHEN: No, you're not. What you're saying to Sacramento County and to the AOC is: Look. You need to have enough personnel to guarantee the rights of these individuals who have participated in the process --

MR. NAEVE: Could I at least --

THE COURT: Finish your argument, then you can object.

MR. COHEN: -- and whether that is one more judge, two more judges or three more judges and how much has to be paid to them or anything else is not something we're asking you to do. What we're asking you to do --

THE COURT: How can I not help but do that? You're asking me to declare that there are constitutional deficiencies in the dependency hearings; right?

Why it is unconstitutional is because there's not enough judges, not enough lawyers, not enough resources being spent on these kids and their problems. I understand that. You tell me I'm just going to say -- you want declaratory relief or injunctive relief?

Would you stop at declaratory relief?

MR. HOWARD: I think what the confusion is we are not asking for a particular load star at this juncture, as in the Marasol case and the Kenny A case and the other cases, the question is as to the number of judges and lawyers required in order to comply with the federal and state law --

THE COURT: Who will decide if it complies? It's my decision. I make that decision. I'm auditing the Sacramento courts to determine whether or not they comply with the Constitution.

That's what you're asking me to do; right?

MR. HOWARD: Conforming to evidence and proof at trial.

MR. NAEVE: Your Honor --

THE COURT: You want to interject something?

MR. NAEVE: The only thing the complaint says is: Pay more money. But in terms of evaluating abstention and evaluating there's a claim for relief, the standard is very clear that you need to be looking not at just what the complaint is alleging, if it's just alleging conclusions as it is here, but instead, you have to ask now: What the practical effect of the complaint will be?

We've given you the Lucky case where the court observes that if you don't do that and accept the blinders that the plaintiffs gives you, you move down the case and

then you find out later: Oh, by the way, we want ten judges, and if you don't give me ten judges, I guess you're going to hold the Presiding Judge of Sacramento in contempt.

At that point you realize: I have abstention problem. That's why at the beginning of the case you're doing exactly what the courts need you to do, which is look at the practical implications of what the complaint is alleging and then evaluate whether that is inextricably and intertwining you in the system, which it is.

THE COURT: There is no way I can provide injunctive relief here without essentially running the juvenile court dependency court. I have to measure whether it's complying with my order, elect a special master -- how do I not monitor whether or not that court is obeying my order?

How does that happen?

MR. HOWARD: Quite easily, and without Your Honor having to assume an overseeing role in the dependency court here in Sacramento. Two specific reasons. We have pled a complaint that seeks two things which can be monitored with precision and ease, and that is --

THE COURT: You're telling me that?

MR. HOWARD: Yes.

THE COURT: I've heard that before. You've been on this side of the bench?

MR. HOWARD: Just the moment I've lost the will to

live.

The two questions presented to you are going to be resolved by -- just as they were in the Kenny A case --

THE COURT: I'm familiar with that case.

MR. HOWARD: The Kenny A case says you have to have this number. In the Los Angeles Bar Association case where the plaintiffs lost on the merits, the questions of justiciability, according to the Ninth Circuit, as to the number of appropriate judges in civil cases in Los Angeles --

THE COURT: The Kenny A case had nothing to do with the judicial system. The judge was very clear about that. The second case, yes; first case, no. He was talking about child protective cases and how they function in Georgia.

In the Los Angeles case, it was whether or not the statute was constitutional or not. There was no funding, no oversight, none of that. Those are apples and oranges, in my opinion.

Let's talk about funding and whether funding is adequate to comply with the constitutional mandate. That's a totally different injunction than either of those cases, in my view.

MR. HOWARD: That ungenerously reads the complaint in this stage. The complaint asks for an injunction, not that it's 188, not for a particular line item amount, but an injunction conforming to --

THE COURT: That's what's insidious about this thing and that what makes it so difficult for the court to engage with state courts. It's amorphous. I've got to decide what is necessary. I've got to decide what is compliant. I've got to decide, whether it's money, lawyers, judges, that's my decision to make. If I decide not enough judges, gotta get more judges; not enough lawyers, gotta get more lawyers; not enough case workers, get more.

That's the problem here. That's where I feel I am being asking to essentially administer the Child Advocacy Program in Sacramento County. I'm thinking about other judges around this state are going to be asked to do the same task, and then you're going to see chaos in terms of state budget and the courts in terms of how the courts are run.

Let's talk about declaratory relief. You want me to declare that there is a -- if I can find your complaint. Essentially, you're asking the court to declare that defendants actions or inactions, defendants and each of them, violated or continue to violate or will violate plaintiff and class member's rights, and it cites a series of statutes and the State and Federal Constitution.

If I declare that the Superior Court of Sacramento has violated the Constitution as to all these class members and the plaintiffs, am I not going to unwind the case of the parents? They are going to say: Wait a minute. I lost my

child and this was an unconstitutional proceeding.

What is going to happen? What is the effect of my declaration that: Look. Everything over there is unconstitutional? What do you think parents are going to say who lost their child in a serious, highly-disputed hearing, and the judge only had ten minutes -- that's exactly your case -- or the lawyer only had 15 minutes to talk to them?

What is going to happen to those cases?

MR. HOWARD: There are two answers. The first is that, to be very clear, our complaint asks that nothing happen to those cases. Every single case involving Younger abstention specifically involves a situation where a federal court was asking to intervene in an ongoing case. It's important at the threshold to say that.

THE COURT: I'm trying to find out from you as a practical consequence of my finding of what's going on in the superior court as to dependency is unconstitutional, the ramifications of that with 5,100 children affected and I don't know how many thousands of cases involved is going to be unwound and you're going to find parents and children who feel they have been deprived of their rights coming back into court and it's going to be chaotic, isn't it?

MR. HOWARD: Respectfully, no.

THE COURT: Why not?

MR. HOWARD: Because the nature of the order that we

are asking for does not in any way, shape, or form affect any particular proceeding?

Your Honor is using the word "proceeding." If we had a proposed order in front of you now --

THE COURT: Look. Wait a minute. You're a lawyer and you're saying: I declare that due to the actions or inactions of these defendants that the members of this class, their rights have been violated under the Constitution; right?

MR. HOWARD: What we are asking for is prospective relief.

THE COURT: No. It says "violated," past tense. It says the declaratory judgement due plaintiff's actions or inactions, the defendants and each of them violated, continue to violate and will violate the constitutional Rights, statutory rights of all the class.

Now, what do you think is going to happen? You may say: Well, I wouldn't do anything about that. The judge said my hearing didn't violate the Constitution. He's going to say: Well, that's a nice thing to hear from a federal judge. Let me go back and visit that judge again that just gave me a bad deal.

Why wouldn't he? Why wouldn't you do that?

If you got this order and you had a dependent child that didn't have a chance to talk to his attorney long enough

to be represented, you wouldn't go back and revisit that case?

MR. HOWARD: We wouldn't do that for precisely the same reason the defendants say we wouldn't do it in their moving papers. This case -- the order, whether it's the declaratory relief or the injunctive relief, would simply say that the case loads being imposed on dependency judges and upon dependancy counsel are too large.

THE COURT: Were too large?

MR. HOWARD: Were too large and will be too large.

The question of whether or not any individual proceeding was wrongly decided as a consequence of that involves -- it's an entirely different case involving an entirely different step of showing that there was individual prejudice in that particular case.

THE COURT: You're telling me there's not individual prejudice among these class members?

MR. HOWARD: Depends on how you talk about prejudice.

THE COURT: Let's not parse. I mean, come on. You're telling me that these kids have not had enough adequate representation because there are not enough lawyers.

MR. HOWARD: They have been injured undisputedly. That is different than arguing -- then seeking to overturn the decisions in any particular matter.

THE COURT: If, in fact, I make this declaration --

I'm asking you again: Are you telling me that lawyers representing these children or the parents that feel they did not have sufficient time to present their case are not going to be filing writs left and right?

If I say that what has gone on here is unconstitutional, you're telling me there will be no consequence at all? Not at all? No lawyer is going to say: Well, Gee, that doesn't bother me. Just because my client is upset because the kids are living now in a foster home, that client is not going to be upset when I issue that order?

I'm asking you: Would a lawyer take action in that case?

MR. HOWARD: The lawyer would only be able in good faith to take action if the lawyer could also argue if the result in the particular matter --

THE COURT: I understand that, but the bottom line is you're arguing this is happening constantly; that there's not enough lawyers, not enough judges. These children are not being treated fairly under the Constitution under federal and state statutes.

I mean, I can't imagine you're saying: Well, Mr. Lawyer, that was just a general comment, does not apply to you specifically. Every lawyer's case is personal and specific, just like all politics is local. It's their case. It speaks of that lawyer as clearly and loudly as you could.

A federal judge saying that, I can you assure you -- maybe you don't think so -- but this will unleash the floodgate of litigation as a result of that.

MR. HOWARD: I respectfully disagree. Here's the point that drove us to court. Even assuming all of these speculations are precisely accurate, then it provides these plaintiffs with no forum whatsoever to vindicate their legal rights, whether they be constitutional, whether they be federal, state, statutory, because every single one of your arguments -- even if we went back to state court --

THE COURT: Why? Because the lawyers are too busy? Your argument is that they don't have the time; right?

MR. HOWARD: The argument isn't just that they don't have the time --

THE COURT: Why don't you take one of these cases up in state court where the state judge can look at this? You have the time. They have no avenue of redress.

I haven't given counsel a chance to comment.

MR. COHEN: He's going to let us keep going.

THE COURT: The lawyers are overburdened. I think the facts are the facts. But why can't counsel of somebody take this through an appeal? There is certainly recourse to the superior court; right? There's recourse to the appellate courts? If this is, in fact, the case, why can't you take a case and take it up to the appellate court?

MR. HOWARD: First recognize if we were to do that on an individual test case basis involving one plaintiff, all of the speculative parade of horribles that you identified would still happen. Even to the extent that they are true, whether it's a test case individually or a test case the way we have cited it and brought it to Your Honor, all of those consequences are going to happen either which way.

So the question is whether or not the individual dependency counsel are able to bring such an action? The complaint, which is assumably true, alleges they can't even meet their client. They can't even file the writs in order to get sibling visitation right now.

Even aside from that, dependency court itself is simply not designed to sit here and have a lengthy colloquy on Younger abstention.

THE COURT: Look. You can take that -- that's not the court of last resort. That's the court of first resort. You have an opportunity to make that decision, don't you, based upon the kind of things you're arguing?

You have no federalism issue at all. You have a clear shot of all the questions you're raising, don't you?

MR. HOWARD: A court of first resort when we have federal claims is federal court.

THE COURT: State court can certainly entertain federal claims; right?

MR. HOWARD: Yes. State court can certainly entertain federal claims, but the federal court can also entertain federal claims, and we're allowed to have our choice of forum, not withstanding --

THE COURT: Well, look. I'm not so sure you have a choice of forum under these circumstances where you have serious federalism issues and serious institutional reform litigation. Look. The courts have been very cherry about that, very worried about getting into running a state court system, which I'm going to have to do if I issue this injunction. There's a big difference here.

MR. HOWARD: In a myriad of circumstances, every court, whether it's federal court or state court that has to adjudicate the advocacy of Medi-Cal rates, it's a daunting task.

THE COURT: That doesn't bother me. It's not daunting at all. You just have to do the work. This is about engaging in dealing with the courts of the state. This is federal court.

MR. HOWARD: Respectfully, I disagree. This is about looking at case loads, looking at what the law requires those lawyers to do and figuring out whether or not those lawyers can do the things that state statute, federal law and federal constitutional provisions allow them to do.

If the answer is that the number of lawyers currently

being provided under the draft program are insufficient to do the very clear listed things that lawyers are required to do by state and federal law, then that is our case.

MR. NAEVE: You still come back to an issue of enforcement. In terms of just your point, whether you look at the complaint or take the complaint as true, I'll refer you -- it's the Lucky versus Harris case out of the Eleventh Circuit 972 F.2d at 673 is the first page.

The main page is at the back. I'm trying to find an internal page cite. What they are asked to address in this case -- I'll read a little bit of it. You can read the rest of it.

> "Plaintiffs contend that the court should not anticipate at this stage of the litigation that it would be forced to enter relief which would offend principles set forth in O'Shea."

The court then goes to quote from O'Shea and says:

> "The question rises: How can compliance be entered if the beneficiaries of the injunction were to charge that it had been disobeyed? Presumably, any member of respondent class who appeared as an accused before petitioners could allege and then have adjudicated a claim that the

petitioners were in contempt of the federal court's injunction order with review of an adverse decision in the Court of Appeal."

It goes on to say with respect to reviewing courts:

"If the state judge does not obey a district court's injunction, are we willing to jail the state court judge for contempt? Avoidance of this unseemly conflict between state and federal judges is one of the reasons for O'Shea and Younger."

The court then goes on to say:

"We're constrained therefore to focus on the likely results of an attempt to enforce an order of the nature sought here. It would certainly create an awkward moment at the end of the protracted litigation, a compliance problem arose which would force abstention on the same grounds that existed prior to trial."

I think the concern that you were addressing, the complaint is written in a way to try to avoid this issue, but as we suggested in our papers, you really can't.

THE COURT: Let me ask this. Let's talk about judges. I don't know who is going to appoint these judges. But I'm going to say: Judge Mize, I want five more judges. Where

does that come from? I as a federal judge has the power to do that?

MR. NAEVE: Could I ask even how you get there?

THE COURT: I'm leapfrogging a lot of issues, but I want to get to that one. How do I force Judge Mize or the Governor or anyone to say: You've got to appoint -- you're not asking me to do that, are you?

MR. COHEN: No.

THE COURT: When you say you want more judges, what are you asking me to do?

MR. COHEN: What we're saying is the court makes an allocation of judges just as much, criminal, civil, juvenile, probate, whatever else. We're saying there needs to be additional --

THE COURT: You're telling me that I would tell Judge Mize: I want you to reshuffle the deck and I want more judges in dependency court and fewer in criminal court?

Is that what you're telling me?

MR. COHEN: Fewer in federal court?

THE COURT: Excuse me. Allocate more judges to the dependency court and take some out of the criminal courts. Wherever you want to get them, but I want more judges in the dependency court; right?

MR. COHEN: Correct.

THE COURT: I tell him to do that?

MR. COHEN: I believe you have the ability to ensure the rights of those children --

THE COURT: Counsel, this is not in a vacuum here. You're telling me I've got to tell Judge Mize, who I'm sure is underfunded and overburdened, and all those problems -- there's criminal defendants and civil litigants, the whole court system, and I'm going to tell him: Reshuffle the deck. I, Judge Damrell, want you to take five judges from your court and put them in the dependency court and you worry about where you get them.

Is that what you're telling me to do? I think it is, isn't it?

MR. COHEN: It is.

THE COURT: You find that to be a little daunting? I could think of at least six cases that would be very persuasive in the other direction. You give me a case where the judge has done that, has required the state court to appoint either more judges or tell the state court judge to put more judges in some area that he happens to be concerned about.

Tell me where you find that kind of case law. Do you have any cases? Have you ever heard of that before?

MR. COHEN: Well, but what we do have is New York State saying that the amount paid indigent attorneys is not sufficient.

THE COURT: Look. Let's talk about judges. You're telling me to tell the state court judge, presiding judge to take -- I want you to put five more judges in dependency court?

MR. COHEN: Why is that any different than a speedy trial right for a criminal defendant which has been challenged by habeas --

THE COURT: Don't compare habeas to what we're doing here. This is a civil action and you're speaking of an injunctive relief that requires me to order a state court how to run their court. I think that is a tough one for me to understand how I would possibly have authority to do that.

You're telling me I do though?

MR. COHEN: I believe you do --

THE COURT: Show me a case where that's ever happened in the history of this country. Have you got one?

MR. HOWARD: I will certainly look for one. What we have presented the court, this cause of action was modeled on the Ninth Circuit Los Angeles case. In that case the court --

THE COURT: The Eu case?

MR. HOWARD: I'm sorry. The Bar Association case.

THE COURT: That's the Eu case.

MR. HOWARD: The bottom line is this, Your Honor, with the judge's claim. If at trial it's demonstrated to Your

Honor -- if the evidence shows that there is a Fifth and Fourteen Amendment violation or a violation of federal law because what is and is not going on, if based on the evidence that's what it shows, regardless of how unseemly or difficult it might be, these are abused and neglected children that have rights that need to be vindicated somewhere.

And if it happens to be the policy decision of the Judicial Council that is violating their rights, that is more or less cognizant under the Constitution or federal law than it is on the other coordinate branches of the government. That has to be the --

THE COURT: The Eu case did not involve any injunctive relief; right? That was declaratory relief?

MR. HOWARD: I don't recall that.

THE COURT: The Ninth Circuit did not enjoin nor did the District Court enjoin anybody. They asked for a declaration. Let me ask you this: What about a declaration? You want more than a declaration; you want an injunction; right?

MR. HOWARD: We prayed for an injunction. One of the things that happens with abstention, specifically Younger abstention, is that the cases we cited in our brief illustrate precisely the stuff you're struggling with.

If there is a possibility that the court can fashion a remedy that avoids the questions of comity to an ongoing

judicial proceeding that are at the core of Younger, the court is obliged to do that, but it doesn't have to be nor should it do that here at the ultimate threshold of the case before there is a single piece of evidence before Your Honor.

One of in cases we provided -- Kenny A -- I've got too many Kennys -- John A. The court goes remedy by remedy finding such things as changing the computer system, as not being running afoul of Younger and other more invasive remedies than simply the thing we're asking for here which is --

THE COURT: More lawyers.

MR. HOWARD: Here's what they have to do by statute. Here is the number of people you've got. Here's the evidence. If it doesn't work --

THE COURT: Counsel, I think you're just skirting around the elephant in the room here. You want me to declare what is going on in the superior court is unconstitutional and has been unconstitutional.

To remedy that, you want me to get more money into this program, which is understandable, meaning more lawyers, and also to tell the judges to either order new judges appointed or I will tell Judge Mize that he has to shift his judicial resources where I want them.

MR. HOWARD: The elephant is outside.

THE COURT: It is? Why do I get the haunting feeling

I'm looking at it?

MR. HOWARD: I hope that refers to the case and not the lawyer arguing it.

The reason it's not in the room, Your Honor, is precisely this: We're not playing around with the proceedings. This is not a question about the constitutionality of everything going on in dependency court. It is precisely the Kenny A case. It is similar to the Marasol case. It's similar to a zillion cases we quoted in footnote 22 of our brief. These are cases where Constitutional Rights in dependency proceedings are at stake.

In this particular instance, you have a federal statute that says guardian ad litems have to be able to do X, Y and Z. You have a complaint that says they can't. If I hear your argument, that is not a violation that is addressable anywhere because of the practical problems of figuring out how to do it.

The same is true with the Rule of Court or Section 317 or at bottom, of course, the requirements of the Fifth and Fourteenth Amendment. If, in fact, they require counsel to be able to do X, Y and Z, and counsel cannot, according to proof, do X, Y and Z, there will be a remedy. It may be a remedy in light of Your Honor's concerns that falls short than what we would otherwise hope for, but there must be a remedy.

THE COURT: Well, I'm not the remedy Santa Claus. I'd like to have remedies for everything, but it's not always possible. You understand that as a lawyer. You're well aware of that. There are many cases that are impinging on your argument, the Supreme Court, the Ninth Circuit and even the Eu case is not entirely helpful.

Be that as it may, let's talk about standing. I'm thinking about causation and redressability. In terms of causation, your view is that all we really need here, I guess, is more lawyers or more money, which would result in more lawyers and more judges; right?

Is that basically the program? That's what I'm hearing. That's what you wrote about. That's what I'm assuming you want.

MR. COHEN: You switched gears on me.

THE COURT: I want to know what the cause of the problem is and I want to find out if the lack of lawyers and lack of judges is the problem; is that right?

MR. COHEN: Correct.

THE COURT: No other causes out there that need to be dealt with? What about the competency of the lawyers? I don't want to impugn the lawyers, but sometimes lawyers come into this courtroom who are not entirely ready to try a case. Sometimes good lawyers versus not so good lawyers; efficient judges not so efficient judges.

MR. COHEN: If that's something that wants to be tested by way of discovery in trial, that's fine. We pled the complaint stating these lawyers are competent. They've done a good job. They've done everything they can, but they just can't do it all.

THE COURT: I guess the point here what you're really talking about, I'm not going to be able to test these lawyers that you're going to hire. I'm just going to say: Here's the money; go hire the lawyers?

MR. COHEN: Correct.

THE COURT: What about that?

MR. NAEVE: There's two issues here. The first issue has to do with the main plaintiff --

THE COURT: I understand that.

MR. NAEVE: They have to show that the money that is going to be paid to someone is going to make a difference. We don't have those parties here. The lawyers are not party to the lawsuit.

The second is that there's no guarantee that if you give the plaintiff money, that that will result in any better representation than there is now. There's no guarantee that the money won't go for more administrative funds or to a different building or, for that matter, hiring lawyers who are not as competent as the lawyers already there.

In terms of saying: We just need money, it seems to

me that by itself is there's still a causal gap that they can't bridge.

THE COURT: You concede the lawyers are overburdened?

MR. NAEVE: I do.

Let me back off. I have to because the complaint says it. There is a difference between saying overburdened on the one hand and injury, which is the whole point of standing, on the other. The cases are pretty clear. You heard counsel when we were talking about how to challenge the Court's order, he got up to say: Well, those people who are going to appeal, they're only going to appeal if, and the "if" was going to be, if there has been some type of ineffective assistance of counsel.

In the absence of proof of any ineffective assistance of counsel, for that matter, in a complaint, allegation of ineffective assistant of counsel, there is no injury.

Assume for the moment, though, that we're talking about incompetency. Causation then asks: Here's the money. Does it fix it?

You don't have the lawyer here, so who knows. You're not going to be able to control that process. But, number two, as the courts have said, and we've cited those cases, it is incredibly speculative to say that just paying money necessarily means that you're going to get a better result.

Case load isn't the issue. If it were just case

loads, they might have something to talk about. We only care about case loads because the argument is -- there's another elephant in the room -- the argument is we care about case loads because the kids aren't getting the representation that they need.

That is the missing link. They don't allege that. What they allege in general terms is: Case loads are bad. Then there's a line, and we talk about the individual plaintiff's claims, and what you get in the individual plaintiff's claim are: My lawyer hasn't spoken to me.

I don't want to minimize those allegations. On the judicial branch, we take those incredibly seriously. It's really hard to make these arguments sometimes. But what connects those things that they allege with case loads? Nothing. You have to assume it.

On the causation and the standing case, it's the same thing. One assumes if you give them more money, something will get better. If I pay a lawyer more, does that mean he's going to meet with his clients more?

THE COURT: Well, your argument is judicial and lawyer resources. That's what they're asking for. You augment those resources, the problem is going to go away. That's the argument.

MR. COHEN: But the argument is supported by their own draft program. The whole idea of draft was to try to get

some regularity around the number of counsel to the number of kids.

THE COURT: Why did you have those numbers, 188?

MS. WILSON: Right.

THE COURT: What prompted that and why did you select that number?

MS. WILSON: The legislature directed Judicial Council to establish a case load standard. The Judicial Council undertook a case load study and a standard which we knew we couldn't fund for both parents and minors' counsel. So we really need to be clear here that the case load standard is for parents and children's attorneys. There's no arbitrary division of those clients types here.

We comply with the legislative directive. We established --

THE COURT: Does the parent case load -- is that 300, 400 cases? What is that?

MS. WILSON: The parent case load in Sacramento County -- I'm not sure what the number is.

THE COURT: I'd like to know what that is. What about that, counsel? We don't know -- I guess it doesn't matter what the case load is like. The idea is you want to get this number down for judges and lawyers?

MR. HOWARD: Correct. During the study that led up to the 188 aspirational standard, the administrative office of

the court did an excellent job. They gave you part of the exhibit. In that study, it demonstrates that, one, the case loads are too high.

Two, that there is a causal connection in those studies between the case loads being too high and dependency lawyers not being able to do things, specifically the kind of things alleged in our complaint.

The question posed by counsel for the defendants as to what injury needs to be shown would be entirely correct had we brought a case that seeks to overturn the decisions in dependency court. We have not. They are moving to dismiss a case we have not brought.

Every single one of the cases that they cite for this proposition of needing not just injury, that the attorneys can't do stuff that state law requires them to do, but, additionally, that the decision rendered in a particular matter was wrongly decided. Every case they cite for that proposition is a case not surprisingly where the plaintiff sought to challenge that decision, whereas we have provided cases to Your Honor, the Lucky versus Harris case, which specifically and commonsensibly says: Look. You don't have to plead injury for which you are not seeking redress.

We are not seeking to overturn any particular decision here. In fact, you can see that most clearly, Your Honor, by examining not the constitutional claims but our CAPTA claim.

Our CAPTA claim based on federal law says that guardians ad litem, who are the lawyers in this case, need to be able to do certain things.

That statutory entitlement unmistakably benefiting foster children, that exists regardless of whether the decision was rightly or wrongly decided at the end of the day.

MR. NAEVE: Your Honor --

MR. HOWARD: Almost.

The same is true with our pendant state claim under 317. The same is true, at least we think so, for our constitutional claim.

Now, it is true that what the defendants have, I think, very intelligently done, is taken the allegations of past harm from the named plaintiffs, which there are many, and specifically spelled out as counsel rightly concedes, they have taken that and says: Ah ha. This looks and feels a whole lot like the habeas cases and other traditional ineffective assistance of counsel cases that challenge the ruling at the end of the day. It feels and looks like that so it must be like that, except that we don't ask for it.

In the Lucky versus Harris case and New York case, which we will provide counsel and the court, that case does not require --

THE COURT: I'm familiar with that case.

Let me hear from counsel.

MR. NAEVE: We're putting Article III standing way behind the injunctive release horse. The point of the Lucky case is this: If you have standing, if named plaintiffs have standing, they can show an injury that would include the standards that we've given you; then if you're seeking injunctive relief, in addition to showing injury, what do you have to show to get injunctive relief on behalf of the class?

We're not talking about classes here. We're dialing back and asking: In the first instance, the individuals in front of you, do they have standing? Have they alleged injury?

And the answer is no.

I'm not conceding that they've alleged injury. I'm conceding they allege they haven't met with their lawyers, as regrettable as that is. They have not alleged causation. That is, they can't say the cause of this problem necessarily rests with us, and for the same reason, they haven't addressed redressability; that is, if you give them money, it's gonna fix it.

It's missing that entire matrix. The reason you have standing is to make sure you have a real live controversy that can be addressed. It comes down to this: How many times do you have to meet with your client?

It is an entirely rhetorical question. The only way

you get to that issue is if you say you did not meet with the client first, and, second, because of that, some type of demonstrable harm occurred that can be remedied, and the remedy is the ineffective assistance of counsel claim.

In the absence of that, you can talk about injunctive relief, but you don't get there because you don't have standing in the first instance.

MR. HOWARD: Much of that is correct. What it fails is it fails the threshold. If you accept their premise that in order to plead the CAPTA claim or the 317 claim or a constitutional claim regarding the -- if you accept that, you have to show that the decision was wrongly decided at the end of the day. Then that entire chain of reasoning is correct.

We have not alleged that any particular decision at the end of the day is incorrect nor that we think to upturn it, and that is precisely the Lucky versus Harris case. It is precisely the case that we will provide counsel and Your Honor, the New York case, and it resonates completely with commonsense.

With the Lucky versus Harris case, it is of course what you have to show is inevitably tethered to what you seek. If we do not seek to have any particular case upturned, then how do we possibly ever plead a violation of CAPTA or a violation of 317 without showing something for which we're not challenging?

MR. NAEVE: Your Honor --

MR. HOWARD: Almost done.

The prejudice that they to seek to infuse into this case is precisely not this case. If this were a habeas case where we were challenging a particular outcome, they would be right, but we are not. Our complaint and our case must respectfully be brought within the four corners of the way we have drafted it.

MR. NAEVE: Drafted it without an injury. Let's --

THE COURT: I think I understand your argument. Just a few more minutes. I'm running out of time.

MR. NAEVE: All of these arguments assume that there's a private right of action --

THE COURT: I understand.

MR. NAEVE: So I don't want by my silence to imply that somehow or another we agree with that proposition, but the answer is the same. They talk about wrongs in the air. I think this is what we're talking about here. They have this idea that there's a case load standard and we're not meeting it.

Because we're not meeting it, there's a judicial remedy. All of the Article III cases, all the federalism cases -- the O'Connor opinion I just recommend because it's a well written opinion -- it talks about this idea to have to have more than just a hypothetical harm to go to federal

court.

She makes a point of explaining it about ten different ways. The idea is just because something hasn't happened, even if there's been a constitutional violation, by itself is not enough to invoke limited jurisdiction of the federal court. You have to have the injury.

You'll recall the case if you see it. She talks about it in terms of whether it's standing or whether it's ripeness or all these doctrines that all sort of circle around Article III. They all share that common theme: You have to have more than just a violation.

That's precisely what our motion is addressing, and they're conceding that's what they don't have.

MR. HOWARD: We don't concede that in one iota. Every single allocation around the named plaintiffs isn't just that they can't talk to their lawyers. It's that they don't get to go home and see mom and dad. It's that they can't meet with their siblings.

It means they don't have a lawyer to investigate whether or not a psychotropic drug should be properly administered to them. We have a special needs kid that is not getting those special needs met.

In every single one of those allegations an injury is specifically pled in this complaint. The only reason it doesn't meet the litanies put forward by defense is because

they insert an additional element that requires us to plead an injury for which we are not seeking a remedy.

But if not being able to see your siblings and not going home to a dangerous setting is not an injury and all the other things that are specifically pled relating to the named plaintiff, this is not in the air. These are four named plaintiffs who are not getting specific things that the law entitles them to.

THE COURT: And more money and more lawyers would help that situation?

MR. HOWARD: Yes, Your Honor.

THE COURT: I engaged in some discussion here with counsel about Younger abstention. I don't know if you addressed that, but it had to do with the effect that this would have some impact on current cases.

I want to give you a chance to respond.

Anything you want to add on Younger abstention?

MR. NAEVE: We have it in our brief, Your Honor.

THE COURT: Anything you want to add?

Let me make a suggestion. Do you think -- We have disability at this point. Obviously that's a threshold question I have.

Anything you want to add, any cases -- you indicated you looked for a case. I want to give you that opportunity. I want to get this issue resolved. Would you like -- five

pages. I'm not talking about anything more than that. Anything you want to add to your briefing?

MR. NAEVE: The only thing we could add is the explanation we've given orally as part of the record, but if plaintiffs want to give us a case, we would like to respond to a couple of pages.

THE COURT: Anything you want to add? Five pages? Ten days?

MR. COHEN: That's fine.

THE COURT: Five days to respond?

MR. HOWARD: Specifically Younger abstention?

THE COURT: I'll give you some latitude. You and I were discussing Younger and I didn't know anybody had any thoughts about it. Apparently they don't, which is fine. There was some case you mentioned, Johnny A?

MR. HOWARD: John A, I believe.

THE COURT: Look. Five pages, ten days, five days to respond.

Why don't we set this -- I want to get this resolved soon, get a date for further argument. Obviously, justiciability is going to be the threshold issue, step one. If step two is required, we'll have a hearing on further argument with respect to the merits.

MR. NAEVE: If it's in the afternoon, it's easier to fly up.

MR. HOWARD: Convenience of counsel.

MR. NAEVE: I'm easy.

THE COURT: Do you have a date handy? Do we have a date in December, if possible?

Thursday the 10th?

How about January? Would January be easier, mid-January?

THE CLERK: January 22nd, which is a Friday.

MR. NAEVE: That's fine.

THE CLERK: In the morning at 10 o'clock.

MR. COHEN: I do have the New York case that I think might help you. I have the New York case.

Number two, if we are going out to January, can we buy two weeks on the brief rather than ten days?

THE COURT: How much time do you need?

MR. COHEN: 14 days would be great.

THE COURT: 14 days and seven days for the response if need be.

MR. NAEVE: I'm not sure I understand.

THE COURT: Counsel is going to provide a supplemental brief within 14 days and you will have seven days to respond.

MR. NAEVE: Does it make a difference? Frankly, we were cranking. If they've got 14, we would like 14.

THE COURT: 14, 14. I'll make it easy.

Very engaging arguments. I appreciate it.

(Whereupon, proceedings concluded at 11:44 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

MICHELLE L. BABBITT, CSR 6357