No. 10-15248

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

TANI CANTIL-SAKAUYE, 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; STEVEN W. WHITE, PRESIDING JUDGE OF THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

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

PETITION FOR REHEARING AND REHEARING EN BANC

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ER__:	For a cite to the Excerpt of Record, "ER __" is to the page of the Record

Plaintiffs respectfully petition this Court for rehearing or rehearing en banc under Rule 35 and 40 of the Federal Rule of Appellate Procedure.

RULE 35(b) STATEMENT

The panel's published decision raises questions of exceptional importance and conflicts with this Court's prior decisions. The ruling announces a new form of abstention under *O'Shea v. Littleton*, 414 U.S. 488 (1974), dramatically contracting federal jurisdiction over civil rights suits against state agencies:

(1) The panel's decision requires abstention solely when a "potential" federal remedy "might" "intrude" on state-court administration. For the first time, federal courts must abstain under *O'Shea* even without a finding that relief will require monitoring or supervision of state-court adjudicatory proceedings—in fact, even when a federal case would have *no impact at all* on state courts' ability to adjudicate cases independently—contrary to this Court decades-old decision in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), and contrary to *O'Shea* and every case decided under it.

(2) Read most *narrowly*, the panel's decision requires a federal court to abstain under *O'Shea* in every kind of civil rights suit that might "intrude upon the state's administration of its … court system." (Op. 17463.) This categorically ousts from federal court all § 1983 challenges to state policymaking relating to any

rule, practice, statute, or procedure that to some degree is implemented in state courtrooms.

(3) The panel's decision will, for the first time under any abstention doctrine bar an entire class of citizens— namely, foster children—from vindicating their federal rights in federal court.

Respectfully, full Court review is necessary to resolve these issues and conflicts.

BACKGROUND

A. Plaintiffs' Case

In this § 1983 action, Plaintiffs facially attack the average caseloads contractually imposed upon Sacramento County's dependency attorneys by two California administrative agencies: the Judicial Council of California and its Administrative Office of the Courts, administered by California's Chief Justice. Plaintiffs allege that average caseloads are as high as 395 child-clients per attorney. But Defendants, in their own study, found that dependency lawyers should have an average caseload *less than half* that to permit them to do the things legally required of them. (ER 327-330 ¶¶ 51, 55-58.)

Plaintiffs seek only prospective declaratory relief. (OBr. 2 n.1.) Plaintiffs do *not* seek federal court supervision of state court judges and *seek no* relief that would impair the ability of state court judges to make independent rulings in

current or future matters before them. The panel's decision does not say otherwise.

To prevail, Plaintiffs must show that the challenged average caseload of Sacramento County dependency lawyers is unlawful in every application.[1] *See Reno v. Flores*, 507 U.S. 292, 301 (1993). If Plaintiffs make that showing, a district court would declare the current averages unlawful. If enforcement became necessary, the court could order new averages be proposed by the Defendants, then approve them based on the evidence introduced at trial. This is how Judge Alsup recently dealt with a challenge to California reimbursement rates to foster families. *See Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *Cal. State Foster Parent Ass'n v. Wagner*, No. C 07-5068 WHA, 2010 WL 5209388 (N.D. Cal. Dec. 16, 2010) (ordering state to complete study re new reimbursement rates); *Cal State Foster Parent Ass'n v. Lightbourne*, No. C 07-5086 WHA, 2011 WL 2118564 (N.D. Cal. May 27, 2011) (approving state's new rate methodology and reimbursement amounts based on completed study). Judge Alsup's handling of this case demonstrates that federal court enforcement of a declaratory judgment need not entangle the court in state government administration, especially when (as

[1] The American Bar Association, a federal District Court (*Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362-63 (N.D. Ga. 2005)), and the National Association of Counsel for Children have all considered the same caseload question and all have been able to identify appropriate caseload averages based on evidence. The *Kenny A.* court was able to adjudicate the issue even though defendants there (unlike here) hadn't identified an ideal average of their own. (ER 191 n.10.)

here) Defendants have analysis that can serve as the basis for rulings.

Plaintiffs sued under § 1983, enacted to permit suits like this against state policymakers in federal court's neutral ground. *See Allen v. McCurry*, 449 U.S. 90, 98-99 (1980); *Bacon v. City of Los Angeles*, 843 F.2d 372 (9th Cir. 1988).

B. The Panel's Decision

Relying on *O'Shea*, the published decision affirmed the district court's abstention ruling. Recognizing that *O'Shea* abstention is motivated by concern for preserving state judicial independence (Op. 17465), the panel held that: (i) this action will "so intrude[] in the administration of the Sacramento County Dependency Court as to require abstention"; (ii) though Plaintiffs have facially challenged a state policy, resolution of the case "might involve examination of the administration of [a] substantial number of individual cases"; and (iii) Judge O'Scannlain's decision in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), was distinguishable from this case. (Op. 17463-64).

Critically, and despite recognizing that protecting the independence of state-court adjudications is the reason for *Younger-O'Shea* abstention, the panel's decision did not find that federal court jurisdiction here would limit the ability of any state court judge to rule on any matter before it, now or in the future. *See O'Shea,* 414 U.S. at 500.

REASONS FOR GRANTING REHEARING

The general rule is that federal courts have an "unflagging" duty to exercise federal jurisdiction, especially in § 1983 cases. *E.g.*, *New Orleans Pub. Serv., Inc. v. City Council*, 491 U.S. 350, 359 (1989); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1984). The panel's published decision creates a sea change in abstention jurisprudence and thus the "unflagging" duty to exercise federal jurisdiction. Full Court review is needed to address the following issues.

I. The Panel's Decision Conflicts With Longstanding Precedent Allowing Facial Challenges To State Policies And Practices In Federal Court.

The panel's decision throws into disarray what was settled abstention law involving federal challenges to state policy affecting judicial administration generally and average caseloads in the judicial context specifically. *See Eu*, 979 F.2d at 703-04.

A. The panel decision conflicts with this Court's prior decision in *Eu.*

In *Eu*, the Bar Association challenged under § 1983 the constitutionality of a California statute limiting the number of judges. Recognizing that the relief sought, as here, "would not directly require supervision of the state court system by federal judges [but], would inevitably require restructuring of that system," this Court found that the Bar Association's challenge was "in effect, a facial one, citing average court delays rather than the delay in any specific case as unconstitutional." *Eu*, 979 F.2d at 703-04. It therefore rejected the suggestion that the federal court

should abstain, holding that the Bar Association's "average times to resolution" claim was "proper … for the exercise of [its] declaratory jurisdiction." *Id.* at 704. The panel's decision conflicts with *Eu* in three essential ways.

First, in *Eu* this Court concluded that challenges to state administrative policy, even if resulting in a "restructuring" of a court "system," do not raise *O'Shea* concerns. Before the panel's decision here, it was clear that relief requiring some "restructuring" of the state-court system passed through abstention gate-keeping. The panel's decision here holds *the exact opposite*, that "intrud[ing] upon the state's administration of its … court system" requires abstention under *O'Shea*. (Op. 17463.)

Second, while acknowledging that "[t]his case involves average attorney caseloads," the panel found that "*potential* remediation *might* involve examination of the administration of substantial number of individual cases." (Op. 17464 (emphases added).) Yet the same was true in *Eu*: weighing the timeframes required for judges to adjudicate civil cases in Los Angeles County "potentially" "might" have turned on "whether some [judges] require more investigation or preparation, which types of those cases deserve more resources." (Op. 17463.) Thus, where the *Eu* Court chose "to examine the issue as it is presented to us by the Bar Association," 979 F.2d at 703, the panel here *did the exact opposite*, presuming that Plaintiffs could not litigate their claims as a facial challenge. And, unlike the

panel's decision, this reasoning in *Eu* is in line with other authority—namely, that facial challenges require showing that the policy is unlawful in every application, thereby obviating the need to do what the panel thought was inevitable: "examination of [a] substantial number of individual cases." (Op. 17464.)

If the caseloads were 1,000 child-clients per lawyer, Plaintiffs undoubtedly could litigate a facial challenge showing *that* average to be unlawful in every application without veering into "individual cases." This is where the panel's decision contradicts *Eu* at the core: at this 12(b)(6) stage of the case, the panel cannot determine whether average caseloads of 395 are, for dependency lawyers, the real-world equivalent of 1,000 or not; that is a question for the merits. But the panel's decision bars from federal court *all* facial cases because of the always-present chance that such challenges might fail on the merits by not actually being unlawful in every application.[2] In this, the panel's decision contradicts no less than *O'Shea* itself, which contrasted cases (like this one) that "seek to strike down a single state statute, either on its face or as applied" to those that raise *Younger*

[2] Since abstention is a "narrow exception," doubts should be resolved in favor of jurisdiction, especially in § 1983 cases. *Miofsky*, 703 F.2d at 338. The decision's dispositive emphasis on what "potentially" "might" occur is therefore inconsistent with all such precedent. The error is squared given that abstention can be raised at any time, *see H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000), even during what the panel calls "remediation," so that if an abstention-worthy event actually does occur, comity can be protected while also preserving federal-court jurisdiction at the threshold. *E.g.*, *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002) (raising abstention at consent-decree phase).

comity concerns. *O'Shea*, 414 U.S. at 500; *see Green v. City of Tuscon*, 255 F.3d 1086, 1098 (9th Cir. 2001) (en banc) ("Here, [unlike in *O'Shea*,] the federal court plaintiffs are doing nothing more than challenging the constitutionality of a … 'completed legislative action.'") (citing *New Orleans Pub. Serv.*, 491 U.S. at 372).

Third, the panel's decision conflicts with *Eu* on what constitutes abstention-worthy "intrusion." If, as *Eu* holds, Plaintiffs should be permitted to litigate their case as they have pleaded it—as one based on caseload averages—then "remediation" (Op. 17464) of declaratory relief here involves only one thing: *ordering a state bureaucracy to pay more money to a third-party vendor to increase the raw number of attorneys who handle dependency cases*. This remedy is less an "interference" into "administration of the judicial system" (Op. 17463) than in *Eu*, where a plaintiff victory would have required, according to this Court, a "restructuring of [the judicial] system" (979 F.2d at 703)—at minimum, hiring of more judges and support staff, and securing facilities for them. Even if the court here had to "consider a substantial number of individual cases" (Op. 17464), that would *still* constitute less "intrusion" into court administration than in *Eu*.

Moreover, , the panel's decision also contradicts *L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) ("the juveniles are not seeking to enjoin any state proceeding … . They are instead requesting an order that would require Arizona to spend more money to fund dispositional alternatives for juveniles in state

custody."). And every other *O'Shea* case relied on by the panel (Op. 17463) has required far more to justify abstention.

The panel's decision simply cannot be reconciled with this Court's prior decision in *Eu*. Rehearing is necessary to resolve this conflict.

B. *O'Shea* doesn't apply.

The panel's decision holds that abstention is required under *O'Shea*, but this case bears no similarities with *O'Shea*. The relief sought in *O'Shea* was of a wholly different character:

> [Plaintiffs seek] an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials ... This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that [*Younger*] and related cases sought to prevent.

414 U.S. at 500. To be subject to *O'Shea* abstention, then, a plaintiff must be seeking "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state … trials," which would require the federal court to monitor and supervise actual state-court proceedings. *Id.* at 500-01; *see also Eu*, 979 F.2d 703-04; *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1247 (9th Cir. 1980) ("plaintiffs in *O'Shea* … sought massive structural relief," asking federal courts, in effect, "to supervise the conduct of state officials and institutions over a long period of time"). Or a plaintiff must be seeking relief where "federal and state courts could well differ, issuing

conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate" *31 Foster Children v. Bush*, 329 F.3d 1255, 1278-79 (11th Cir. 2003).

Neither of these remedies, or anything similar, is sought by Plaintiffs and *the panel's decision does not say Plaintiffs seek them*. Instead, the panel's decision seems to reason that there is something about the very nature of Plaintiffs' facial challenge that will require "remediation" (Op. at 17464) that falls within *O'Shea*. But, as discussed above, that is not the case. As *Eu* and the other cases discussing facial challenges affirm, there is nothing about the nature Plaintiffs' facial challenge here that threatens the ability of state judicial officials from adjudicating cases independently, free from federal court restraint. As the *Kenny A.* example affirms, district courts can as a practical matter sensibly adjudicate average dependency attorney caseload claims. (*Supra* at 3 n.1.) As Judge Alsup's example affirms, there is nothing about Plaintiffs' case preordaining that enforcement will "intrude" into state administration. (*Supra* at 3-4.)

Most pointedly, if Plaintiffs *cannot* here demonstrate that the average caseloads they challenge are unlawful in every application, the result is they will lose on the merits, thereby rendering the panel's abstention concerns based upon "remediation" of declaratory relief groundless, *by definition.* This is why the mere "potential" that a plaintiff "might" (Op. 17464) not be able to prevail on their

facial challenge is not and *has never before* been grounds *alone* for losing at the threshold the ability to pursue a § 1983 case in federal court *when, as here, the plaintiffs otherwise seek no remedy that would offend either Younger* or *O'Shea*. Yet, this is what the panel's decision holds.

II. Narrowly Read, The Decision Exempts From Federal Jurisdiction Civil Rights Suits Challenging Policies That Are Implemented In State Courts.

After the panel's decision, the guiding *O'Shea* analysis in this Circuit is no longer whether "an injunction [is sought] aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state … trials" (*O'Shea,* 414 U.S. at 500). Instead, the abstention inquiry now turns on whether relief would "intrude" into the policies or administration governing all state courts. (Op. 17463.)

This is a sea change in federal court abstention principles. All § 1983 challenges (facial or not) to state-court rules, practices, statutes, and procedures would fall within this rubric: jury selection (including *Batson* challenges); sentencing; the right to or adequacy of counsel; hiring, firing, and promotion practices; Americans With Disabilities Act compliance; state criminal and civil procedure rules; First Amendment challenges; even the lawfulness of local rules and internal operating procedures. No case has been found holding that mere "intrusion" without more requires abstention under *O'Shea*. The panel's decision is therefore at odds with many cases involving federal court "intrusion" into policies

implemented in state courts: *E.g.*, *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-87 (1983) (federal court could adjudicate constitutional challenge to D.C. bar admission rule); *Polk County v. Dodson*, 454 U.S. 312, 326-27 (1981) (adjudicating alleged constitutionally suspect policy of county public defender's office, finding no violation); *Miranda v. Clark County, Nevada*, 319 F.3d 465, 469-71 (9th Cir. 2003) (declaring unconstitutional practice of county public defender who, acting administratively, instituted attorney- and resource-allocation policies based in part on results of client polygraph tests).

But the panel's decision may be read more broadly still. While the decision singles out court administration for special emphasis (Op. 17463), the holding does not appear to depend on the Defendants' status as administrators of the state judicial branch as opposed to other branches of state government. The decision thus may require abstention for all § 1983 civil rights suits that "intrude" into *any kind of state policymaking*.[3] And the decision does this without defining what type, scope, or extent of "intrusion" is offensive to federal court jurisdiction. This turns § 1983 upside down—for it was enacted to prevent federal citizens from having to bring their civil rights suits against state actors only in state court. *See supra* at 4.

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[3] This broader interpretation is reinforced by the panel's admonition that courts should avoid remedies involving intervention in program operations, budget "allocations," and establishment of program priorities. (Op. 17464.) This language directly conflicts with this Court's decision in *Jamieson*, 643 F.2d at 1354, quoted above at pages 8-9.

Further, the panel decision's emphasis on the ambiguous term "intrusion" harkens to the ambiguous "interference" that used to serve as the touchstone of *Younger* analysis in this Circuit, before this Court clarified it en banc in both *Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001), and *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004), and further in *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143 (9th Cir. 2007). A new series of en banc decisions will need to provide guidance as to what constitutes "intrusion."

III. The Decision Exempts From Federal Jurisdiction Civil Rights Suits By One Class Of Claimants: Abused And Neglected Foster Children.

After the panel's decision, no foster child in the Circuit will ever be able to use federal court to challenge state policies that control their lives. In dependency cases, state judges step into the role of parents for abused and neglected foster children, making every key decision about their lives. So any constitutional challenge to state administration of these courts, no matter how far removed from the actual courtroom—as here, *a purely bureaucratic decision on how much to spend to provide them representation*—would under the panel's decision "intrude" upon state court administration, requiring abstention.

The decision is a wholesale abandonment by the federal judiciary of this class of claimants. Court rules or policies that might discriminate against foster children of a particular race, disability, ethnicity, tribe, sexual orientation, or religion can no longer be litigated in federal court, after the panel's decision.

Parents too would be barred from bringing their dependency-related civil rights challenges to state policy in federal court.

Abstention is an equitable remedy; yet the decision weighs no equities at all, such that these Plaintiffs will have to try to litigate their federal claims before the very state judges whose operational superiors and supervisors imposed, enforced, and defended the attacked policy. A hypothetical illustrates the importance of the missing equities.

> **E.T.'s Attorney** [standing before the Sacramento juvenile court]: Your honor, I represent nearly 400 clients under the jurisdiction of this court. I cannot do what I am required to do as an attorney, nor offer E.T. representation that satisfies the constitution, nor comply with the federal statutes that require she have a *guardian ad litem*—laws that underlie over $1 billion of federal money into the state child welfare system you partially preside over. What am I do to?
>
> **Court:** I could remove you and appoint separate counsel for her.
>
> **E.T.'s Attorney**: But, I have nearly 400 other clients in the same position.
>
> **Court**: Well, what would it take for you to be able to meet constitutional and federal law standards applicable here?
>
> **E.T.'s Attorney**: You need to assign at least 200 of my clients elsewhere.
>
> **Court**: But don't your colleagues have similar caseloads? I can't raise their caseloads by reducing yours.
>
> **E.T.'s Attorney**: Then the only way is to order the AOC pay for more attorneys.
>
> **Court**: But I'm a dependency judge. We can't handle that kind of case in dependency court, and if you file individual challenges *en masse* in my courtroom, the only losers will be the kids whose

> placements and other key decisions are delayed while we sort that out. And even if you file in regular state court, do you really expect a state judge to take money from the judge down the hall and give it to your clients, contradicting the funding priorities of the Administrative Office run by the Supreme Court? In the real world, pretty unlikely, counsel. The best course is to bring a class action in federal court so we can do this in an organized, dispassionate manner.
>
> **E.T.'s Attorney**: Well, the Ninth Circuit says the federal courts must abstain because addressing caseloads under the AOC's contract would "intrude" into state court operations and would require a federal judge to look at each case individually.
>
> **Court**: I am a bit baffled. State court operations are now entirely beyond the reach of federal court challenge? And how can it be that you can't ever litigate a facial challenge to caseloads no matter how preposterously high the caseload is? If that is logically true in federal court, then it is logically true in state court too.
>
> **E.T.'s Attorney**: Which means I can only get relief for E.T. and my other clients by filing over 200 individual challenges on my clients' behalf in the very courts whose superiors are imposing the policy, and if I somehow win the caseloads of my colleagues will get even worse, hurting *their* child-clients even worse.
>
> **Court**: I suppose, yes.
>
> **E.T.'s Attorney**: How can I do that?
>
> **Court**: You can't while acting with the same ethics that prompted you to raise the issue in the first place. I don't see a remedy for your client. [Gavel] Next case.

CONCLUSION

For the reasons discussed above, it is respectfully imperative that the published panel decision be reheard. Whatever the merits of this particular case in the eyes of the panel, the unprecedented consequences of the panel's decision

dismissing it will be felt far beyond this lawsuit. Simple adherence to *Eu*, while admonishing the District Court that abstention can be raised at any stage in the case, should narrowly resolve this appeal.

Dated: October 4, 2011

Respectfully submitted,

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COMBINED CERTIFICATION OF COMPLIANCE AND CERTIFICATION OF SERVICE

I, Peter E. Perkowski, counsel for Appellants, certify:

1. That this brief complies with the type-volume limitation of Circuit Rule 40-1 and Fed. R. App. P. 32(a)(7)(B) because it contains 3,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word 2007 using the proportionally spaced typeface 14 point Times New Roman.

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

Date: October 4, 2011

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