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' OPENING BRIEF

Robert C. Fellmeth
Edward Howard
Christina McClurg Riehl
CHILDREN'S ADVOCACY INSTITUTE
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcala Park
San Diego, California 92110
Telephone: (619) 260-4806

Peter Perkowski
Robyn Callahan
WINSTON & STRAWN LLP
101 California Street, 39th Floor
San Francisco, California 94111
Telephone: (415) 591-1000

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This 42 U.S.C. § 1983 ("Section 1983") action challenges a generally applicable policy that Defendants and Appellees (Judicial Council of California and its Administrative Office of the Courts, or "AOC") impose through a contract with a Sacramento County-based vendor. Plaintiffs and Appellants are foster children represented by attorneys in Sacramento County dependency court. Defendants impose caseloads on Plaintiffs' attorneys that prevent them from performing even basic attorney tasks, violating several of Plaintiffs' constitutional and federal rights in proceedings that, to Plaintiffs, are of life-altering importance.

Section 1983 was enacted to permit suits like this one against state policymakers in federal court. The general rule is that federal courts have an unflagging duty to exercise federal jurisdiction, especially in Section 1983 cases. Nevertheless, citing *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), the court below erroneously decided that it should abstain from adjudicating this dispute, wrongly concluding that this action will enjoin Plaintiffs' individual dependency court proceedings.

This action is not an appeal from any state court decision, nor does it seek to halt any currently ongoing state lawsuit. The Defendants are not defendants in a dependency or state court proceeding involving these Plaintiffs. The Defendants here do not adjudicate such cases; indeed, in their capacity as members of the

Judicial Council and the AOC, they are administrators and executors, powerless to disturb any ruling of Sacramento County's dependency court judges. Further, Plaintiffs seeks prospective declaratory relief— namely that the attorney caseloads that the Defendants impose in their contract violate Plaintiffs' rights.[1] Should that relief be granted, the discretion of every dependency court judge to issue decisions based on the law and facts will remain unchanged.

To abstain under these circumstances, the District Court had to expand *Younger* in unprecedented ways, transforming it from an "exception" that is "carefully defined" and that applies only in "limited circumstance[s]" into a doctrine that will, for the first time, categorically bar from federal court Section 1983 cases against court administrators and policymakers. If affirmed, the decision will be cited throughout this Circuit and beyond for the proposition that abused and neglected foster children—involuntarily and blamelessly haled into state dependency courts; cleaved from their brothers, sisters, grandparents, friends, and schools; and thrown into a system that the Little Hoover Commission has

[1] To narrow the issues, Plaintiffs appeal from the District Court's judgment only insofar as it dismissed Plaintiffs' attorney caseload claims and the related request for declaratory relief. More specifically, Plaintiffs appeal the District Court's dismissal of their First Claim, A, and B; Second and Third Claims; Fourth Claim (attorney caseloads only); and Fifth through Seventh Claims, insofar as those claims seek declaratory relief only. (Excerpts of Record ("ER") 311-339.)

dubbed to be a sometimes deadly "heartless limbo"[2]—must always be neglected by the courts that otherwise have an unflagging duty to adjudicate the federal claims of everyone else. This is not the law, nor should it be.

STATEMENT OF JURISDICTION

This is a civil rights action under Section 1983. The District Court's jurisdiction therefore was founded on 28 U.S.C. §§ 1331 and 1343. Pendent state claims arose from the same operative facts as the federal claims, thereby invoking supplemental jurisdiction under 28 U.S.C. § 1367(a).

The District Court entered final judgment of dismissal, disposing of all claims, on January 7, 2010. (ER 52.) Appellants timely filed a Notice of Appeal on February 2, 2010. (ER 122.) *See* Fed. R. App. P. 4. Appellate jurisdiction exists under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

Defendants administer a program that provides for the appointment of attorneys to represent abused and neglected foster children in dependency court in

[2] "Children in foster care are routinely denied adequate education, and mental and physical health care. For approximately one out of four children who enter the system each year, foster care is not temporary at all, but a heartless limbo – childhoods squandered by an unaccountable bureaucracy. For a significant number of children, foster care is not healing at all, but inflicts additional trauma on young hearts and minds. In the most severe cases, children are hurt, threatened and even killed while in the State's care." Little Hoover Commission, *Still in Our Hands*, (2003), available at http://www.lhc.ca.gov/lhcdir/report168.html.

Sacramento County. Plaintiffs allege that implementation of the program results in untenably high average attorney caseloads, violating Plaintiffs' rights under federal and state law. Plaintiffs sought relief under 42 U.S.C. § 1983 that would neither enjoin any adjudication nor require a different ruling in any case. Did the District Court err in abstaining from adjudicating the challenge?

This Court reviews de novo a district court's decision granting a motion to dismiss under Rule 12(b)(6). *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). In reviewing the complaint, all factual allegations "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

This Court also reviews de novo whether the District Court properly abstained under *Younger*. This is because district courts have no flexibility in applying these principles.

> [D]istrict courts must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are met; there is no discretion vested in the district courts to do otherwise.

Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc), *overruled on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004); *see also San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008).

The same de novo standard of review applies to the District Court's decision

to abstain under *O'Shea,* which is a "branch" of *Younger* abstention that applies when requested federal relief would require day-to-day federal court supervision of state adjudications. *See* 1B Martin A. Schwartz, *Section 1983 Litigation* §14.03[H], at 14-43 to -44 (4th ed. 2009) (twice referring to *O'Shea* as a "branch" of *Younger*); *see also Lyons v. City of Los Angeles*, 615 F.2d 1243, 1247 (9th Cir. 1980) (*O'Shea* "represented the evolution of the court's concerns about 'our federalism' first noted in [*Younger*]"); 17B Wright & Miller, *Federal Practice & Procedure* § 4252 (3d ed. 2007) (analyzing *O'Shea* as a part of *Younger* abstention). As an application of *Younger*, *O'Shea*-type abstention is reviewed under the same de novo standard.

STATEMENT OF THE CASE

A. Nature of the Case

An abused or neglected child does not choose to be placed under the supervision of the state dependency court system as a plaintiff elects to file a state lawsuit. Nor, unlike in a criminal proceeding, does the child engage in any voluntary behavior that causes a state dependency-adjudicatory proceeding to be invoked. These children are subject to dependency court proceedings only because of the reprehensible actions of others—their parents. In these respects, when it comes to invoking a state judicial process, dependency court is unique in our jurisprudence.

In California, every major decision about a foster child's life will at some juncture be determined in dependency court by a judge or judicial officer: where the child will live (group institution or foster family); whether the child will maintain relationships with brothers, sisters, grandparents; whether the child will take psychotropic drugs against his wishes; how the child will be educated; how a juvenile's baby will be raised; and the like. (ER 318-320.) All of these decisions and more will be made in court in an adversarial setting based on the argument and evidence presented by dependency guardians ad litem who, by state statute, must be lawyers.

Defendants are responsible for ensuring that Sacramento County's dependent foster children are represented by effective and adequate counsel. Their contract with a third-party agency imposes caseloads on Plaintiffs' attorneys that are up to twice the maximum that Defendants themselves have, after careful analysis, identified as the tenable maximum. Plaintiffs challenge an administrative and policy-making act of the Defendants', and sue them in their capacities as court administrators and policymakers, alleging that the average caseloads they impose violate rights under federal and state law.

B. Course of Proceedings

On July 16, 2009, Plaintiffs—minor foster care children in Sacramento County—sued on behalf of themselves and a proposed class of the County's foster

children. (ER 311-339.) The suit asserted a claim under Section 1983, as well as pendant state law claims, based on alleged constitutional and statutory violations arising from unduly high average caseloads of Plaintiffs' dependency attorneys and dependency court judicial officers. Plaintiffs sought injunctive and declaratory relief to remedy these violations.

Defendants moved to dismiss the Complaint on September 18, 2009. (ER 343, Dk. 15.) The Eastern District of California, Judge Damrell presiding, heard argument on November 6, 2009. (ER 53-121.) At the conclusion of the hearing, the District Court set a further hearing for January 22, 2010, and invited each party to submit supplemental briefing, which was filed in accordance with the court's instructions.

C. The District Court Opinion

On January 7, 2010, before the scheduled hearing, the District Court granted Defendants' motion, issuing a Memorandum and Order dismissing the action (ER 346, Dk. 39) and entering judgment in accordance with the opinion (ER 52). Four days later, the court issued an Amended Memorandum and Order. (ER 1-51.) The opinion expressed two main reasons for its decision.

First, the court concluded that "principles of equity, comity, and federalism require the court to equitably abstain from adjudicating plaintiffs' claims." (ER 28.) The court's reasoning was based primarily on the Supreme Court's *O'Shea*

decision, which the court acknowledged applies when the federal relief requested would require "intrusive follow-up" and ongoing "monitoring" of state court proceedings. (ER 16.) Disregarding that Defendants' own research has established an appropriate average caseload for dependency counsel and the court's own broad discretion to tailor appropriate relief, the District Court speculated about what it would "necessarily have to consider" (ER 21-23) to resolve the claims and to craft (and enforce) relief. (ER 26-27.) In arriving at these conclusions, the court relied on two cases from outside this Circuit and discounted a factually similar decision from this Court. (ER 16-26.)

Second, the District Court concluded that the Supreme Court's *Younger* decision also required abstention. (ER 28-50.) Ignoring the purely prospective nature of the relief that Plaintiffs sought, the court decided that such relief would "call[] into question the validity of every decision made in pending and future dependency court cases before the resolution of this litigation." (ER 36.) The court also determined that granting relief would "impact the conduct of" (ER 38) and—without specifying precisely how—"interfere[] with" (ER 36), ongoing dependency court proceedings. Discounting or disregarding the real, practical, and uncontested obstacles to Plaintiffs' opportunity to present these claims in dependency court, the District Court further decided that such opportunity abstractly existed. (ER 44-48.) Finding the other *Younger* factors met, and no

exceptions were presented, the District Court therefore abstained.

STATEMENT OF FACTS[3]

A. Background of the DRAFT Program

The Judicial Council is the policymaking body of the California courts. It "is responsible for ensuring the consistent, independent, impartial, and accessible administration of Justice. The [AOC] serves as the council's staff agency." (Judicial Council of California, Fact Sheet (2009);[4] *see also* Cal. Const. Art. 6, sec. 6(d).) All members of the Judicial Council are appointed by the Chief Justice and, of them, fourteen are California superior court or appellate court judges.[5] (*Id.*) The Judicial Council and the AOC approve every court budget. (*Id.* at 18.)

In 2004, the Judicial Council established the Dependency Representation, Administration, Funding, and Training ("DRAFT") program to centralize the administration of court-appointed counsel services within the AOC. (ER 329-330 at ¶ 55.) Through DRAFT, the AOC contracts directly with local providers of dependency counsel services in participating counties. (ER 313 at ¶ 10.)

---

[3] Except where otherwise stated, the facts in this statement are taken from the allegations of the Complaint, which—because this appeal arises from a motion to dismiss—must be taken as true. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1340 (9th Cir.1995).

[4] http://www.courtinfo.ca.gov/reference/documents/factsheets/Judicial_Council_of_California.pdf. "Courtinfo" website citations are to the official website of the California Judicial Council.

[5] Profile of the Judicial Council, at 17-18 (4th ed.) (available at http://www.courtinfo.ca.gov/jc/documents/profilejc.pdf

The DRAFT program grew out of 2002 caseload study, conducted for the Judicial Council, that examined "trial-level court-appointed dependency counsel based on an assessment of the duties required as part of representation and the amount of time needed to perform those duties." (ER 179-250 at 190.)[6] Meant "to identify maximum per-attorney caseloads" for dependency counsel "based on quantifiable standards of practice," the results showed an "optimal practice standard" maximum caseload of 77 cases per dependency attorney, and a "basic practice standard" maximum of 141 cases. (ER 190.) California law also requires that dependency attorneys "shall have a caseload … that ensures adequate representation of the child" and requires the Judicial Council to promulgate a court rule establishing such standards. Cal. Welfare & Institutions Code § 317 (c).

Eventually, AOC staff raised the standard identified in the 2002 study to the now current standard of no more than 188 clients per full-time dependency attorney. (ER 194; *see also* ER 327-328 at ¶ 51.)

Rather than immediately enforce a caseload standard based on these results, the Judicial Council "directed staff to pilot a best-practice standard, or caseload reduction" as part of the DRAFT program. (ER 191.) Under the program,

---

[6] Defendants included a partial excerpt with their Request for Judicial Notice filed in support of their Motion to Dismiss the Complaint. (ER 344, Dk. 18, Ex. B.) The entire document is available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/DependencyCounselCaseloadStandards2008.pdf

"[a]ttorney caseload … standards [are] implemented through direct contracting." (ER 310.)

Sacramento County agreed to participate in the DRAFT program in 2008. (ER 19-20 at ¶ 55.) Consistent with the above, the AOC arranges for court-appointed dependency counsel services for the County by contracting with a third-party agency. Because of the AOC's failure to adequately fund the program, however, the average caseloads for dependency counsel in the County far exceed the ceiling of 188 set forth by the Defendants, averaging up to 395 cases (meaning child clients) per attorney. (ER 327-330 at ¶¶ 51, 55-58).

B. Effect of the Program on Children Under Dependency Court Supervision

State and federal statutes and constitutions vest children in dependency proceedings with a right to counsel. (ER Tab 4, ¶¶ 22-27.) As with any right to counsel, the child has a right to counsel that is effective, competent, and adequate. Nevertheless, the staff attorneys for the non-profit vendor with which Defendants have contracted for dependency attorney services in Sacramento County are required by that contract to carry as many as 395 cases at a time—more than double the 188 caseload standard established by the Defendants themselves, and nearly four times the ceiling established by the National Association of Counsel for Children. (ER 327-328 at ¶¶ 50-51.)

Consequently, Sacramento County dependency lawyers must rely on brief

telephone contact or courtroom exchanges to assess the needs of their child clients. The lawyers have no time to conduct complete investigations or client-specific legal analysis. They routinely are unable to contact social workers and other professionals associated with their clients' cases, greatly hindering their abilities to develop those cases or identify inappropriate—perhaps dangerous—placements. (ER 328-329 at ¶ 53.) Critical pleadings, motions, responses, and objections often are neglected. Without an attorney to file motions to enforce the court orders, a child may go without, for example, mandated visits with family members. The delay of court-ordered visitation can then lead to a delay of family reunification and permanence—the goal of the dependency system. (*See, e.g.*, ER 328-329 at ¶¶ 53-54, 331 at ¶ 65, and 332 at ¶¶ 68-69).

In the last four years, Sacramento County dependency attorneys have themselves taken only one extraordinary writ appealing a dependency court decision. (ER 329 at ¶ 54.) This means that hundreds of children have been forced to remain in possibly illegal placements or live under possibly unlawful visitation plans simply because there was no attorney available to take the next legal step in their case.

SUMMARY OF ARGUMENT

The court below applied *Younger* abstention to a lawsuit that, if successful, will neither (i) halt any ongoing state adjudication, (ii) overturn any state court

existing decision on any pending matter, nor (iii) require a state court to rule differently on any matter that will come before it. The District Court has transformed the abstention doctrine—which, at bottom, requires that the federal action actually have the effect of enjoining ongoing state proceedings—into one that, in its own words, depends whether there is an "impact" on state proceedings (*see, e.g.,* ER 37-38). That decision ignores the "vital and indispensible" touchstone of *Younger* abstention in this Circuit.

The District Court decision errs in several ways. First, it is inconsistent with the courts' unflagging obligation to exercise federal jurisdiction in Section 1983 cases, except in rare circumstances not present here. Without taking evidence, and engaging in pure speculation, the court postulated the most invasive kind of discretionary relief imaginable as "necessarily" inevitable, and weighed the motion to dismiss based on such postulates. In this fashion, the barrier the District Court erected to federal jurisdiction was illogically and unlawfully insurmountable, the operative equivalent of a conclusive presumption against federal jurisdiction, even though the Court itself can, through the shape and staging of its own orders, definitively prevent the result it forecast.

Second, the decision is inconsistent with Supreme Court and Ninth Circuit authority, including authority holding that lawsuits challenging generally applicable policies do not risk enjoining state court adjudications.

Third, the decision fails to obey cases teaching that courts must weigh abstention in cases such as this one on a claim-by-claim, request-for-relief-by-request-for-relief basis. In this way, the District Court erroneously failed to adjudicate abstention based upon the facets of the Complaint least likely to require abstention.

Fourth, the District Court gave no weight to these Plaintiffs' uniquely compelling interests, the permanently life-altering harms alleged, the policies behind the federal laws allegedly being violated, the federal interest in ensuring its money is spent consistent with its intent, or the interests of the federal branch in enacting federal jurisdiction or Section 1983. The District Court's decision acknowledges or weighs none of these factors.

Fifth, according to the District Court, it is a "takeover" of the state courts by the federal courts if, as a consequence of the federal court's ruling, the state judiciary must expend funds it would otherwise spend on other priorities. Yet, every federal court precedent remediating state court activity made illegal under federal law has required the state courts to spend funds in some fashion.

Finally, the District Court did not meaningfully confront the impractical awkwardness of litigating this case in state court. If litigated in state court, this lawsuit will assuredly end up in the appellate and California Supreme Court. Plaintiffs will therefore have to litigate their federal claims swimming upstream,

potentially before the very state judges who have themselves participated in imposing, enforcing, or approving the acts being challenged (*e.g.*, controlling the defense of this lawsuit); whose colleagues participated in imposing, enforcing, and defending the policy; or whose operational superiors and supervisors on the Council and the AOC participated in imposing, enforcing, and defending the policy. Serial, high-level recusals could be the result (two Council members sit on the California Supreme Court). Moreover, a state trial court judge will have to determine the legality of a policy crafted by the very entities that govern his or her court funding and operations.

Taking all of these mistakes together, the District Court's reasoning stands for the proposition that the policymaking and administrative arms of state judiciaries acting in a purely policymaking or administrative capacity are entirely immune from Section 1983 suit in federal court for violations of federal law if the lawsuit might have an impact on state court operations which, by definition, they would.

Likewise, because every facet of a foster child's life will eventually be steered by a dependency court judge, because every federal claim a foster child has standing to bring will in some way alter their lives as a judge-supervised dependent, and because every federal lawsuit having an impact on dependency court requires abstention according to the District Court, there is no pathway under

the District Court's expansive reasoning for such children ever to file any federal claim for which they would have standing in federal court.

The District Court's decision therefore represents an expansion of abstention doctrine in a way that would, for the first time, bar from federal courts a class of children challenging a species of state policymaking even when, as here, they are indisputably not seeking to overturn any state court ruling or to enjoin any state court adjudication. The District Court's abstention decision casts a shadow on the ability of a whole class of children ever to seek redress in federal court for violations of their federal rights. According to the District Court, if a foster child seeks to challenge the lawfulness of statutes, operations, or policies of dependency courts, the state government's decision to separate them involuntarily from their parents has another unhappy consequence beyond their placement in the "heartless limbo" of state foster care: such claims can now never be heard in federal district court, no matter how egregiously the generally applicable policy is violating their collective federal rights.

ARGUMENT

Section 1983 creates a federal claim for relief against state officials who, "under color of any statute, ordinance, regulation, custom, or usage" of the State, cause "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The purpose of Section 1983 is two-

fold. The first is substantive: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *see also Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (statute was designed "to interpose the federal courts between the States and the people, as guardians of the people's federal rights"); *McNeese v. Bd. of Educ. for Community Unit School Dist. 187*, 373 U.S. 668, 672 (1963) (Section 1983 intended to "override certain kinds of state laws, to provide a remedy where state law was inadequate, to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice") (internal quotation marks and citations omitted).

The second purpose is procedural: to provide a receptive forum for the resolution of claims alleging that state policies violate federal rights. A "strong motive" behind enacting Section 1983 "was congressional concern that the state courts had been deficient in protecting federal rights." *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980); *accord Bacon v. City of Los Angeles*, 843 F.2d 372 (9th Cir. 1988). Because of this, courts have "emphasized that the federal courts have an obligation to exercise their jurisdiction [and] that the obligation is particularly weighty when the relief is sought under [Section] 1983." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *see also New Orleans Pub.*

Serv., Inc. v. City Council, 491 U.S. 350, 359 (1989) ("the federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging'") (quoting *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)); *see also Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976).

"[T]here are limited circumstances in which … abstention by federal courts is appropriate, [and] those circumstances are carefully defined and remain the exception, not the rule." *Green*, 255 F.3d at 1089 (internal quotation marks omitted). This case does not present the "limited circumstances" justifying departure "from the basic principle that federal court jurisdiction is mandatory and must be exercised." *Id.*

I. *Younger* Abstention Is Inapplicable Here.

The District Court erred by abstaining under *Younger*. In this Circuit, three "threshold elements" must be satisfied before a federal court may invoke *Younger* abstention: "(1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) the state proceedings provide the plaintiff with an adequate opportunity to raise federal claims." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007).

Even if these elements are present, though, "the court does not automatically abstain, but abstains only if there is a *Younger*-based reason to abstain—*i.e.*, if the

court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings." *Id.* This is "a vital and indispensable" fourth requirement, by which this Court reinforces that abstention is not the rule but the exception, to be employed only when "the policies behind the *Younger* doctrine [are] implicated by the actions requested of the federal court." *Id.*; *see also San Jose Silicon Valley Chamber of Commerce*, 546 F.3d at 1092 (recognizing this fourth requirement); *We Are America/Somos Am., Coalition of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1107 (D. Ariz. 2009) (same); *Barra v. City of Kerman*, 2009 WL 1706451, at *5 (E.D. Cal. June 9, 2009) (same); *Crayton v. Rochester Med. Corp.*, 2010 WL 1241014, at *2 (E.D. Cal. Mar. 26, 2010) (same); *Griffith v. Corcoran Dist. Hosp.*, 2010 WL 1239086, at *4 (E.D. Mar. 25, Cal. 2010) (same).

Defendants fail to satisfy at least two of the three "threshold elements," as well as the overarching fourth requirement. Because the fourth requirement is "vital and indispensible" to invoke abstention, Plaintiffs address it first.

A. The Requested Relief Does Not Have The Effect Of Enjoining Ongoing Dependency Proceedings.

1. This suit challenges policy and administrative actions, not adjudications.

The fourth element of *Younger* abstention is absent here, as Defendants have not shown and cannot show that the requested relief will enjoin, or have the effect

of enjoining, ongoing proceedings in state dependency court.

Plaintiffs here challenge a policy and administrative act of the AOC and the Judicial Council to impose certain caseloads on a private vendor through a contract. The parties are not currently engaged in any litigation against each other in state court—whether involving these claims or any other—and this lawsuit does not seek to enjoin any currently pending state adjudication, in whole or in part. The relief sought would not overturn any state court ruling, as it relates to Plaintiffs or anyone else; and Defendants, in any event, cannot now or in the future disturb such rulings. Nor do Plaintiffs seek to challenge any statute or Rule of Court controlling adjudicatory outcomes, such as what evidence may be presented or what rulings on placements are required. Rather, Plaintiffs seek prospective declaratory relief against court administrators and policymakers as applied to a contract with a vendor.

If Plaintiffs are successful and obtain a declaration that the attorney caseloads that Defendants impose upon the Sacramento County vendor are prospectively infirm, every dependency court judge in Sacramento County will retain exactly the same discretion to issue decisions based on state law and the facts as existed before such declaration. Under these facts, the "vital and indispensible" fourth element is not satisfied in this case. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (*Younger* did not bar jurisdiction where "relief

sought is wholly prospective" and not "designed to annul the results of a state trial"); *accord Wiener v. County of San Diego*, 23 F.3d 263, 267 (9th Cir. 1994) ("[a]ctions for prospective relief do not trigger abstention because the abstention doctrine 'is propelled by concerns of federalism and comity … . Those concerns are not present where ... federal proceedings do not unduly interfere with the legitimate activities of the States.'") (quoting *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988)).

The decision in *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003), is instructive. There, plaintiffs did not challenge the dependency court's adjudications concerning placement or care of specific foster children. Instead, plaintiffs asked the court to remedy administrative failures of the child welfare system—including, as here, reducing caseworker caseloads "to a reasonable level"—that did not require the court to inject itself into case management and adjudicatory details. *Id.* at 286. The court ruled abstention was inappropriate:

> Although plaintiffs all have periodic reviews before the state juvenile courts, the declaratory and injunctive relief plaintiffs seek is not directed at their review hearings, or at Georgia's juvenile courts, juvenile court judges, or juvenile court personnel. Rather, plaintiffs seek relief directed solely at *executive* branch defendants … . Far from interfering with juvenile court proceedings, such relief would actually enable the juvenile court to do its job better by providing it with more accurate and complete information about the children whose lives may be profoundly affected by its decisions. *Id.* at 286-87.

This action is on all fours with *Kenny A.* Plaintiffs here seek the same relief and, as in *Kenny A.*, it "is not directed at their review hearings, or at [Sacramento's] juvenile courts." *Id.* at 286. In addition, a dependency counsel caseload consistent with Defendants' own identified maximum would likewise "enable the juvenile court to do its job better by providing it with more accurate and complete information about the children whose lives may be profoundly affected by its decisions." *Id.* at 287. As it exists now, "[o]verwhelming caseloads … mean that the best of judges and attorneys struggle to meet the needs of each child and parent who come before the bench. Because of these challenges … we [the dependency court judges] are often not able to meet our federal and state mandates for timely hearings." (ER 274, *quoting* Retired California Superior Court Judge Leonard P. Edwards.) "Dependency Court attorneys … suffer from similar time and caseload pressures. These systemic problems inhibit the courts' ability to meet their statutory requirements, as well as their obligation to ensure that all participants in the hearings understand their rights and responsibilities and the decisions made in court." *Id*. As in *Kenny A.*, relief under Section 1983 would help rectify these deficiencies.

None of the cases relied upon by the District Court (ER 31-33) require a result different from *Kenny A.* In *Laurie Q v. Contra Costa County,* 304 F. Supp. 2d 1185, 1204 (N.D. Cal. 2004), plaintiffs asked the federal court to compel the

county to remedy a long list of failures concerning the management of their case plans, which were approved by the Juvenile Court. The relief would have forced the federal court to "pass judgment upon the Juvenile Court's approval (or disapproval) of certain case plans, potentially invalidating that Court's sanction of 'inadequate' modifications." *Id*. at 1205. Because that relief would have actually overturned or enjoined specific rulings of the Juvenile Court, the *Laurie Q* court held abstention was required.

In *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), plaintiffs sought "to have the district court appoint a panel and give it authority to implement a system-wide plan to revamp and reform dependency proceedings in Florida, as well as the appointment of a permanent children's advocate to oversee that plan." *Id.* at 1279. That relief raised the specter that "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 or whether sufficient efforts are being made to find an adoptive family." *Id*. at 1278 (emphases added).

This action bears no relationship to these two cases. The relief that Plaintiffs seek would not overturn or enjoin any particular dependency court ruling and would not involve the federal court in decisions in particular cases regarding, for example, what placement is best for any particular plaintiff. Accordingly, both *Laurie Q* and *31 Foster Children* are inapposite because this action would not have

the effect of enjoining ongoing proceedings in state dependency court. Indeed, the court below acknowledged as much when it recognized that Plaintiffs do not seek relief more invasive than "a declaration that the … attorney caseloads are so excessive that they constitute a violation of constitutional and statutory rights." (ER 35.) Rather than concluding that such relief would not have the effect of enjoining state court proceedings, the court held that prospectively reducing the caseloads imposed on the Sacramento County vendor would "interfere with [Plaintiffs'] ongoing dependency court cases and those of the putative class" (ER 36) and therefore "would impact each of the putative class member's cases" (ER 37).

But mere "impact" on ongoing state court proceedings falls far short of the Ninth Circuit's requirement that the federal relief effectively enjoin the state court proceeding. As this Court stated in *Roden*, if the requested action "does not enjoin or 'have the practical effect of' enjoining the ongoing state proceedings … then abstention is not warranted." *Roden*, 495 F.3d at 1152. Whether imposed by executive branch agencies, as in *Kenny A.*, or executive offices of the courts, as here, state court operations and policies exist to facilitate and govern the overall conduct of state court adjudications. Therefore, every federal court ruling altering generally applicable state court policies will have an "impact" upon proceedings within state courts. The District Court wrongly conflated such "impact" with an

effective injunction against a particular, ongoing state court adjudication under *Younger*. *See Montclair Parkowners Ass'n v. City of Montclair*, 264 F.3d 829, 831 (9th Cir. 2001) ("interference is not present merely because a plaintiff chooses to instigate parallel affirmative litigation in both state and federal court") (emphasis omitted). If upheld, the District Court's decision will ensure that lawsuits challenging generally applicable policies or procedures that govern state court operations could never be litigated in federal court.

For these reasons, the District Court's ruling is not a "carefully defined" exception to the otherwise "unflagging" "obligation" of federal courts to hear and adjudicate federal claims, especially Section 1983 claims. Extending *Younger* on these facts would not be out of respect for a state judiciary acting as the adjudicator of disputes, and thus would not serve a "*Younger*-based reason to abstain." Doing so would be inconsistent with the numerous cases holding that violations of federal rights by state policymaking officials may be corrected by federal courts. *See generally, e.g., Gerstein v. Pugh*, 420 U.S. 103 (1975) (abstention not required in action seeking prospective relief against state authorities, including state courts, that did not intervene in underlying cases); *Ball v. Rodgers*, 492 F.3d 1094 (9th Cir. 2007) (action against State and state officials regarding management of Medicaid program); *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) (action against state prison officials regarding regulations barring public

viewing of lethal injection procedures); *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997) (action against state prison officials for violations of Americans With Disabilities Act).

2. The decision below is contrary to controlling decisions holding that abstention is inapplicable in actions challenging generally applicable policies.

Younger abstention is grounded entirely in comity to the state's judicial branch, where judges are acting as adjudicators of disputes (not, as here, where judges are executors of policy). For this reason, "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. City Council,* 491 U.S. 350, 368 (1989). As the Supreme Court explained:

> As a challenge to completed legislative action, NOPSI's suit represents neither the interference with ongoing judicial proceedings against which *Younger* was directed, nor the interference with an ongoing legislative process … . It is, insofar as our policies of federal comity are concerned, no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance—which we would assuredly not require to be brought in state courts. *Id.* at 372.

The Supreme Court has likewise articulated the difference between judicial and "completed" administrative and policymaking acts, such as the ones

challenged here. "A judicial inquiry *investigates, declares, and enforces liabilities* as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." *Prentise v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908) (Holmes, J.) (emphasis added). Furthermore, it makes no difference that it is the executive and administrative arms of the California courts that are challenged here because it is the act—*not the actor*—that controls whether a challenged action is judicial in character:

> Proceedings legislative in nature are not proceedings in a court … *no matter what may be the general or dominant character of the body in which they may take place.* … That question depends *not upon the character of the body, but upon the character of the proceedings*.

Id. at 226 (emphasis added).

The District Court in its lengthy decision found no space to acknowledge these distinctions. Yet under these cases the deliberations and policy decisions of the Judicial Council are not judicial proceedings under *Younger*. Nor are the operational administrative acts of the AOC. Defendants' imposition of contractual caseloads in excess of their own ceiling in Sacramento County is operational and policymaking, not adjudicative in "character" and, thus, *Younger* is inapplicable. The acts challenged in this case alter no dependency court party's "liabilities." The decision to impose caseloads in a contract did not arise from litigation; is *res judicata* on no one; is subject to no lawsuit in state court, and is being enforced not

by a judge hearing evidence and deciding the rights of parties but by the Judicial Council and the AOC. The Defendants here are policymakers and administrators, sued in those capacities, and are as powerless to enjoin any dependency proceeding or overturn any past or future dependency court ruling as is an executive branch agency. *Compare Kenny A.*, 218 F.R.D. at 286.

Indeed, abstention doctrines are not applicable to federal lawsuits challenging the myriad of decisions made by a state judiciary outside of its adjudicatory function because there is no danger that the federal proceeding will effectively enjoin an ongoing state proceeding. For example, state judiciaries can clearly be sued in their role as employers;[7] as public entities allegedly violating the Americans with Disabilities Act;[8] and as governmental entities whose policies violate the First Amendment.[9] Relief provided in each of these cases would have an "impact" (ER 37) on state court adjudications, either in terms of court access to certain parties, or increase in court construction costs and diversion of money from other priorities, or operational changes that might alter to some degree the conduct of state adjudications.

---

[7] *See Duprey v. Twelfth Judicial District Court*, 2009 WL 2105955 (D.N.M. June 22, 2009); *Larsen v. Senate of the Commonwealth of Pa.*, 965 F. Supp. 607 (M.D. Pa. 1997).

[8] *See Marks v. Tennessee*, 554 F.3d 619, 622-23 (6th Cir. 2009); *Gregory v. Admin. Office of the Courts*, 168 F. Supp. 2d 319, 322 (D.N.J. 2001).

[9] *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996); *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

According to the District Court, however, if a federal challenge might alter a state policy as it relates to judicial operations, it might also alter state judicial processes, which might also alter the contours of a particular adjudication, which therefore is an injunction of an unspecified proceeding involving hypothetical future parties. (*E.g*., ER 18.)

This reasoning travels too far from the reasons behind *Younger*. Under the District Court's landmark decision, state policies enacted by a legislature or adopted by the executive or the policymaking branches of the courts in this Circuit are entirely immune from challenge in federal court if they have an "impact" on state judicial processes writ large. Almost no federal challenges to any rule of civil or criminal procedure could be heard in federal court under such reasoning. That the general policymaking challenged in a lawsuit may have an "impact" on judicial proceedings overall does not change the lawsuit's essential character into one that seeks to enjoin a particular proceeding, properly invoking the adjudicatory comity concerns at the heart of *Younger*:

> [R]espondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, [*Younger*]. The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Gerstein, 420 U.S. at 108 n.9 (citations omitted); *cf. Conover v. Montemuro*, 477

F.2d 1073, 1088 (3d Cir. 1972) ("as the cases make clear, abstention is not justified solely to afford the state courts an opportunity to pass upon the federal constitutional question presented").

The District Court ignored all of these distinctions, at Defendants' invitation. Defendants argued that because "dependency proceedings are inherently 'judicial,'" this challenge to Defendants' generally applicable policy pertaining to caseloads in such proceedings should be transformed into a lawsuit challenging individual state adjudications, thus (according to Defendants) making *New Orleans Pub. Serv., Inc.* inapposite. (ER 316, Dk. 37, p.2, n.1.) Of course dependency proceedings are inherently judicial, but the generally applicable policy imposed by the Defendants in their vendor contract is not "inherently judicial." *See Washington v. County of Rockland*, 373 F.3d 310, 319 (2d Cir. 2004) ("[h]ere, however, the claims raised in federal court are of a wholly different character from the charges raised in the administrative disciplinary proceedings").

The cases that the District Court relied on (ER 28-30, 32, and 44-45) do not support categorically barring suits that challenge state court policies or operations in federal court, especially under Section 1983. In *Moore v. Sims*, 442 U.S. 415 (1979), the defendants (unlike here) were parties to ongoing state proceedings and, when their state court case was transferred to another county, they simply elected to file a federal lawsuit instead. (*Id*. at 421.) Unlike here, the federal lawsuit in

Moore thus involved a direct effort to enjoin pending state adjudication involving the same defendants. And *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), involved an ongoing state disciplinary proceeding where "the New Jersey Supreme Court [had] heard oral arguments." (*Id.* at 431.) And in *Green*, 255 F.3d at 1088, while "litigation concerning the constitutionality of a state statute was pending in state court, four individual plaintiffs filed this federal court challenge to the same statute, alleging similar constitutional defects to those alleged by the state court litigants."

Because Defendants cannot meet this "vital and indispensible" element of abstention, the District Court's decision should be reversed on this ground alone.

B. Dependency Court Proceedings Are Not Relevant "Ongoing State Proceedings" For The Purposes Of *Younger* Abstention.

Defendants likewise have not established the first element of *Younger* abstention. For abstention purposes, the "ongoing state proceedings" element is satisfied only if the federal action challenges some outcome of a state adjudication, or if the federal case involves the same issues being adjudicated in state court. *See Mullins v. Oregon*, 57 F.3d 789, 793 n.4 (9th Cir. 1995) (*Younger* abstention inappropriate when "there [were] no ongoing state proceedings relating to this case"); *see also Gilbert v. Ferry*, 401 F.3d 411, 415-16 (6th Cir. 2005) (*Younger* abstention involved only question of "whether there were ongoing state proceedings *involving the same legal and factual issues as those presented in this*

case") (emphasis added).

That is not the case here. This action challenges a policy embraced in a contract that relates to the administration of Sacramento County dependency counsel, a wholly different issue than what is considered and decided in dependency proceedings themselves. There are therefore no relevant "ongoing state court proceedings" for the purposes of *Younger*. *See, e.g.*, *Zimmerman v. Nolker*, 2008 WL 5432286, at *6 (W.D. Mo. Dec. 31, 2008) (declining *Younger* abstention when "the ongoing state proceedings do not address the same issues as those addressed here"); *cf. Wiener v. County of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) ("identity of legal issues" is necessary, but not necessarily sufficient, to invoke *Younger* abstention).

The District Court held that this element of *Younger* abstention was met, relying on *Laurie Q* and the cases cited in it. (ER 31.) But this case is not analogous with *Laurie Q*, where plaintiffs asked the federal court to intervene in reviewing juvenile court rulings concerning placements. This is a "significantly different footing" (*id.* at 1204) from this case, where Plaintiffs seek a prospective declaration related solely to Defendants' generally applicable policy—relief that, unlike here, would not necessarily alter the outcome of a single state court

decision.[10]

Because none of the Plaintiffs is litigating in dependency court the issues raised here, and as the law in this Circuit holds that the mere existence of a parallel state proceeding is not enough by itself to warrant *Younger* abstention (*City of Montclair*, 264 F.3d at 831), the dispositive significance that the District Court placed on the dependency court's jurisdiction over Plaintiffs was error.

At best, under the District Court's reasoning, the very fact of the children's involuntary dependent status, combined with the possibility that their lawsuit might "impact" state court operations writ large, would require abused and neglected children—alone among all classes of potential federal litigants—to exhaust state court remedies before filing a Section 1983 claim, in violation of *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), and its unbroken progeny.[11]

---

[10] The cases cited in *Laurie Q* similarly involved relief that would have required direct federal intervention in specific dependency court adjudications. *See 31 Foster Children*, 329 F.3d at 1278 (discussed above); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291-92 (10th Cir. 1999) (relief would have "place[d] the federal court in the role of making dispositional decisions such as whether to return the child to his parents in conjunction with state assistance or whether to modify a treatment plan").

[11] Further underscoring the breadth of the District Court's decision is the fact that, in adjudicating *Younger* abstention, courts look to when the state action was initiated. *See, e.g.*, *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987) (critical question is whether state proceedings were "underway" before federal action was initiated). Here, if the date a child is involuntarily forced into the

C. Plaintiffs Have Not Had An Adequate Opportunity To Raise Their Federal Issues In The Dependency Court.

Defendants have not established the third element of *Younger* abstention either: whether Plaintiffs have an "adequate" opportunity to litigate their federal claims. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007). This Circuit has specifically warned against an application of *Younger* abstention that relies on form over substance. *See Green*, 255 F.3d at 1089 ("[w]e are not alone in recognizing that multi-factor tests are prone to 'mechanical application' that overlooks or underemphasizes the most important features of the … inquiry"). But the District Court did exactly that, wrongly confining this element to consideration of whether Plaintiffs are technically barred from raising their federal claims in dependency court. (ER 44-48.) That confinement effectively reads "adequate" out of the analysis.

Prior decisions bear out the District Court's error. In *Meredith v. Oregon*, 321 F.3d 807 (9th Cir. 2003), this Court found that the plaintiff was effectively barred from bringing his federal claim in the state court proceeding because, as a practical matter, he could not have his claim heard by a state court before he was forced to comply with the challenged order. *Id.* at 819-20. Similarly, in *Riley v.*

---

dependency system is mechanically deemed to be the date the ongoing state proceeding begins for *Younger* purposes, then a foster child's dependency status will foreclose federal courts to the child.

Nevada Supreme Court, 763 F. Supp. 446 (D. Nev. 1991), the court considered the plaintiff's allegations (made on behalf of a class) and his specific factual status in determining whether he had an adequate opportunity to raise his federal claims, noting that "a court should not abstain unless a plaintiff's constitutional claims can be 'timely decided by a competent state tribunal.'" *Id*. at 450-51 (citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)). After considering all of the facts, the court concluded that plaintiff "raised a serious question as to whether state proceedings provide an adequate opportunity to raise federal questions, and whether a competent state tribunal timely can decide the issues." *Id*. Finally, the court considered the fact that the plaintiff's legal status (as a death penalty defendant) meant that he may not have an adequate opportunity to present his federal claims to the state courts. *Id*.

Other courts have likewise applied a practical, non-formalistic approach to analyzing whether an adequate state court opportunity to raise federal issues exists. In *Family Division Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), the D.C. Circuit rejected the argument that *Younger* abstention should be extended to "all constitutional claims that *might* be adjudicated in state as well as federal courts." *Id.* at 702. Instead of focusing on whether plaintiffs were absolutely procedurally barred from bringing their federal claims in the family courts, the court considered whether they were "parties to any

pending suit in the local courts in which their constitutional challenges could naturally be resolved." *Id.*; *see also LaShawn A. v. Kelly*, 990 F.2d 1319, 1322-24 (D.C. Cir. 1993) (finding that the dependency courts did not provide plaintiffs with an adequate opportunity to raise their federal claims).

A finding that state proceedings are *not* adequate is especially appropriate when those proceedings are taking place in dependency court. In *Laurie Q*, the District Court for the Northern District of California reviewed *LaShawn A.* and concluded that it presented a "clear illustration of the type of action (unlike the one at issue [in *Laurie Q*]) that cannot properly be litigated before a local family court and thus would defeat a request for abstention." 304 F.Supp.2d at 1206. Significantly, the allegations in *LaShawn A.* challenged the inordinate caseloads and insufficient funds of the child welfare system—the same issues being presented here—and the proceedings available in dependency court in *LaShawn A.* are the same (or similar) to those available to foster children in California. *Id*. The *Laurie Q* court cited with approval the *LaShawn A.* court's conclusion that "these individualized proceedings did not provide an adequate opportunity for plaintiff to litigate her much broader, systemic claims." *Id.* This Court should do the same.

Similarly, in *Lahey v. Contra Costa County Department of Children & Family Services*, 2004 WL 2055716 (N.D. Cal. Sept. 12, 2004), the court found that the family and juvenile courts were "not equipped to rule on claims arising

from constitutional due process considerations." *Id.* at *11. Accordingly, because those courts were not "designed nor equipped to hear cases of constitutional dimension," they were not an "appropriate forum for adjudication of these rights, and *Younger* abstention [did] not apply." *Id*. at *12. And even if dependency courts could theoretically adjudicate a case like this one, in Sacramento County they cannot for the reasons alleged (and assumed true) in the Complaint, echoed in *Kenny A.*:

> [E]ven if the juvenile court could afford plaintiffs the relief they seek, plaintiffs do not have full access to such relief because they are dependent upon an allegedly overburdened and inadequate system of legal representation, which prevents them from raising their claims in the juvenile court. Although plaintiffs receive representation through a child advocate attorney, they have alleged that each such advocate has a caseload of approximately 500 children, which makes it impossible for the children to have their voices heard and their claims raised in juvenile court. Furthermore, since they are children, plaintiffs must rely on adult advocates to speak for them. *Kenny A.*, 218 F.R.D. at 287.

The same is true here. While the Sacramento County dependency courts may have the purely theoretical *power* to adjudicate complex federal issues, *no one in this case has so far argued or ruled* that such courts have the real-world *practical capacity* to do so without an infusion of far more resources and a radical change in their day-to-day operations. To the extent that the District Court's decision will be interpreted as funneling into dependency courts federal lawsuits as

ambitiously and vigorously contested as this one, the decision is potentially far more disruptive to dependency court daily operations throughout the Circuit than this lawsuit.

Moreover, foster child dependents like the Plaintiffs here are subject to repeated dependency court proceedings because of the constitutional rights at stake, both theirs and their parents'. (*See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), *LaShawn A. v. Kelly*, 990 F.2d 1319, 1322-24 (D.C. Cir. 1993)). If these constitutionally required proceedings are deemed to be relevant "ongoing state proceedings" for all *Younger* purposes when foster children try to enforce their federal rights in federal court, then the dependency proceedings required to comply with Due Process will paradoxically work to thwart Section 1983—a statute enacted to protect such rights. Worse, under such reasoning, because almost everything about a foster child's life is, or could be, at issue in a future dependency proceeding, foster children alone will have very little chance of vindicating their federal rights in federal court. This will be the case not because of anything they have done, but because the reprehensible acts of their parents have caused them to become dependents of the State. Even convicted criminals whose post-conviction placements, for example, are not subject to repeated Court adjudication will have an easier time bringing a Section 1983 case in federal court.

II. The District Court Misapplied So-Called *O'Shea* Abstention Principles.

The District Court's separate decision to abstain under *O'Shea* was also in error. The court made at least two mistakes in reaching this conclusion. First, it distinguished this Court's decision in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992). But as shown below, this action is a mirror image of *Eu*. Second, the District Court improperly relied on two out-of-Circuit decisions that are themselves distinguishable on their facts.

A. The Court Erred in Refusing To Follow *Los Angeles County Bar Ass'n v. Eu*.

Nothing reveals the District Court's erroneous reliance on *O'Shea* more starkly than its ruling that the attorney caseload relief sought here is distinguishable from the relief sought and upheld as justiciable by this Court in *Eu*. In striving to distinguish *Eu*, the court ignored the facts of the Complaint, postulated the most invasive kind of state court interference imaginable, relied on a case rejected in this Circuit, and formalistically disregarded both Plaintiffs' and federal interests.

Plaintiffs' attorney caseload claim here is deliberately modeled after *Eu*. There, relying on overall average caseload judicial statistics, the Los Angeles County Bar Association challenged under Section 1983 the constitutionality of a California statute limiting the number of judges in the County. The Ninth Circuit rejected the suggestion that the federal courts should abstain, holding that the Bar

Association's "average times to resolution" claim was "proper for the exercise of [its] declaratory jurisdiction" and that a declaration "would resolve a substantial and important question currently dividing the parties"—namely, whether such court delays were constitutional. *Id.* at 703-04. While the Court eventually ruled against plaintiffs based on a full record (*id.* at 707), the Court pointedly left the door open to caseload-related claims such as the one here. *Id.* ("we do not discount the possibility that litigation delays in certain circumstances could effectively deprive individual litigants of the ability to vindicate fundamental rights. Such delay might violate due process.").

Instead of evaluating Plaintiffs' average caseload allegations guided by *Eu*, the District Court held that Plaintiffs' case could not be adjudicated based upon averages. The court ruled that it would "necessarily" have to consider "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." (ER 23.) Not only is this untrue—the American Bar Association, the *Kenny A.* court, and the National Association of Counsel for Children have all considered the same caseload question and have identified appropriate caseload averages (ER 191, n. 10)—it fails to "examine the issue as it is presented" (970 F.2d at 703), and one this Court has already held to be "susceptible to judicial determination" (*id.*).

Moreover, the District Court's efforts to distinguish *Eu* were based on a reading of the Complaint that is either unfair or incorrect (or both). The court framed Plaintiffs' case as based not on an objection to attorneys' average caseloads but as "based upon [Plaintiffs'] specific, individual circumstances." (ER 24; *see also* ER 330-333 at ¶¶ 59-76.) The Complaint actually states the opposite. Framed as a class action, the Complaint had to and did press statutory and constitutional claims as common and typical to all the class members. (*E.g.*, ER 314-317 at ¶¶ 14-15.) The Complaint identifies average caseloads of Sacramento dependency lawyers as being the cause of Plaintiffs' harms, complains that the averages are far in excess of other averages, and alleges that, "these attorneys could have met the recommended judicial caseload standards." (ER 327-328 at ¶¶ 51, 52, and ER 330 at ¶ 56.) And for relief, Plaintiffs specifically sought compliance with average caseload standards. (ER 339) ("[f]or an order mandating that Defendants provide the additional resources required to comply with the Judicial Council … recommended caseloads"). The District Court, however, pointed to the allegations of individual injury (ER 7-8)—required for standing[12]—and then ignored allegations that those injuries *were caused* by comprehensive, class-wide average

[12] Had the Plaintiffs not alleged individualized injuries, the District Court would have dismissed the case for lack of standing. (ER 110-117.) But because Plaintiffs did so, the court used it against them and distinguished *Eu* on that basis. This places Plaintiffs between the rock place of abstention and the hard place of standing.

caseloads that far exceed any reasoned or defended measure (ER 37, n.8). If averages in and of themselves cannot cause harm, as the District Court held, then this Court's ruling in *Eu* is impossible.

In addition, the District Court's focus on *Eu*'s "average time to resolution" versus Plaintiffs' "average caseload" (ER 19-24) is a distinction without a difference, and certainly not one that would justify departing from *Eu*. It is clear that the delay in the resolution of civil cases in *Eu* resulted from too few judges—that is, existing judges had too many cases, just another way of expressing caseload. Similarly here, average caseloads are only meaningful to Plaintiffs insofar as they equate to too little time for dependency lawyers to do the work that is legally required of them. Lower caseloads—the relief that Plaintiffs expressly seek—translates to more time for dependency lawyers to represent their child clients. (ER 314-316 at ¶ 14, and ER 327-329 at ¶¶ 51, 53-54.) In short, there is no basis to conclude that abstention is not required in a federal lawsuit challenging average case delays but is, somehow, required in a similar lawsuit challenging average caseloads.

Indeed, this action raises *fewer* concerns about the uncertainty of the inquiry and invading state prerogatives than *Eu*. Here, unlike in *Eu*, Defendants have already identified—conceded—an appropriate and workable average. In addition, a judicial declaration that more dependency attorneys are required is unlikely to

lead to wholesale County construction projects, or a federal court "takeover" (ER 51), when compared to what would have been required had the Bar Association prevailed in *Eu*. All of the District Court's many conjectures about the "impact" of this case on dependency courts are at least matched by the potential impact on the courts of Los Angeles County in *Eu*.

Beyond that, however, the District Court postulated a parade of speculative horribles as an inevitable side effect of granting even prospective, declaratory relief in this case. At this stage of the proceeding, for example, the District Court did not know whether granting the relief sought would have required any "larger facilities" from the Sacramento Courts. (ER 75-76.) Yet, the District Court depended on this and other baseless speculations as grounds for denying federal jurisdiction in a Section 1983 case.[13] (ER 22-23.) The court gave no weight or consideration to other readily available options, such as declining to order remedies it considered too invasive. The District Court could have avoided all of this relief-centered speculation simply by declining to issue any injunctive relief

[13] By contrast to the harms that the Court speculated might result from granting relief, there was no discussion of the harm that could befall children in dependency proceedings and that reinforces the federal interest here: without adequate counsel, Plaintiffs may be returned to (or not removed from) life-threatening placements. They may be sexually molested, wrongly given psychotropic drugs, denied visitation from their families, denied educational opportunities, or placed in settings too restrictive or not restrictive enough. Nor did the court consider whether there could be a widespread disruption of dependency court business if those courts become the forum of only resort for litigating complex federal claims.

and instead, as in *Eu*, taking up solely the request for declaratory relief. *Henry v. First Nat'l Bank*, 595 F.2d 291, 301-02 (5th Cir. 1979) ("[t]he Court is confident that, if plaintiffs prevail on their claims, specific relief can be crafted that will not interfere with state court proceedings").

The result of the District Court's abstention is that these Plaintiffs will have to litigate their federal claims either before the very state judges who have themselves participated in imposing, enforcing, and defending the challenged policy (*e.g.*, the Defendants in this lawsuit); or whose colleagues participated in imposing, enforcing, and defending the policy; or whose operational superiors and supervisors on the Council and its Committees participated in imposing, enforcing, and defending the policy. This would no doubt result in recusals. *Christie v. City of El Centro*, 135 Cal. App. 4th 767 (2006) (upholding the disqualification of a prior judge in the matter even where the allegations of actual bias were unsupported because a person aware of the facts might reasonably think the judge was partial). While these practical factors are not dispositive, a District Court engaged in even-handed consideration should have done more than erroneously dub them to be synonymous with cries of "bias" (something Plaintiffs never argued). (ER 49-50.)

B. *O'Shea* and *Ad Hoc* Are Inapplicable.

Instead of following the factually similar *Eu*, the District Court relied on two

distinguishable cases: *O'Shea*, and *Ad Hoc Committee on Judicial Administration v. Massachusetts*, 488 F.2d 1241 (1st Cir. 1973). The court should not have relied on either case.

This action bears no similarity to *O'Shea*. Plaintiffs in *O'Shea* challenged in part the individual rulings of county magistrates and judges, alleging they had (i) an "unofficial bond schedule" that set bonds "without regard to the facts of a case or circumstances of an individual defendant"; (ii) imposed higher sentences on African-Americans than Caucasions; and (iii) imposed fine payment requirements that violated the right to jury trial. *O'Shea*, 414 U.S. at 492. The Court characterized the relief sought as "day-to-day supervision of [state] judicial officers" (*id.* at 501):

> What [plaintiffs sought was] 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.

Id. at 500.

Here, unlike in *O'Shea*, Plaintiffs press a challenge to a state policy based upon the average impact of that policy. Here, unlike in *O'Shea*, Plaintiffs seek a prospective judicial statement that such a generally applicable policy as uniformly applied to the Plaintiffs is legally deficient. Unlike here, the *O'Shea* plaintiffs

sought to have the federal courts serially intervene to regulate the individual consequences of state policies as they were implemented individually *in each state criminal adjudication*.

In sum, the *O'Shea* plaintiffs sought direct federal court intervention in ongoing state court (albeit future) proceedings—relief from which courts *must* abstain under *Younger*. *See Lyons*, 615 F.2d at 1247 ("[t]he plaintiffs in *O'Shea* … sought massive structural relief. … Because of the broad charges and the sweeping relief sought in both cases, the plaintiffs were asking the federal courts, in effect, to supervise the conduct of state officials and institutions over a long period of time"). Had Plaintiffs here asked the federal court to overturn individual decisions of dependency court judges as they were adjudicated on such day-to-day matters as placement, parental re-unification, and schooling, *O'Shea* would be analogous and the District Court would have been correct to invoke it. But no such relief is requested here and, in fact, any relief granted would be directed to the Judicial Council and the AOC, not to state judges.[14] *O'Shea* simply does not apply.

The District Court's heavy reliance on *Ad Hoc* is also erroneous (ER 17-26; *see especially* ER 17-18), particularly given that this Court has expressly declined

[14] Even if Plaintiffs were still seeking injunctive relief, such relief as applied to the attorney vendor contract of the Judicial Council and the AOC—neither of which hear or adjudicate cases—cannot fairly be said to raise the same or similar concerns that prompted the Supreme Court in *O'Shea* to require abstention.

to follow *Ad Hoc*. *See Eu*, 979 F.2d at 703 ("we decline to follow the First Circuit, which reached a contrary conclusion in *Ad Hoc*"). Acknowledging that it would be "tempting" to "avoid confronting the merits" of the Bar's lawsuit in *Eu*, this Court distinguished *Ad Hoc* because, as here, the cases present different issues:

> Our [First Circuit] colleagues correctly noted that it would be very difficult for courts to determine how much delay was constitutionally acceptable in any given case. We choose, however, to examine the issue as it is presented by the Bar Association: does the *average* time to resolution of civil cases in Los Angeles Superior Court violate the rights asserted by the Bar Association? As so framed, we believe the issue is susceptible of judicial determination.

Id. (citation omitted). As discussed above, Plaintiffs' claims here are modeled on *Eu*, and so the same distinction from *Ad Hoc* applies: the *Ad Hoc* plaintiffs sought "intrusive injunctive relief including continuing federal judicial supervision of the state court system"—*the entire system*. *Id.* No such relief is requested here.

Surely, this Court was logically correct in *Eu* to refuse a holding that would have placed the adjudication of claims based on average caseloads or delays categorically beyond the reach of federal courts. If the Defendants here hypothetically mandated that only two attorneys be available to all of Sacramento County's dependent foster children, surely *that* average caseload would present constitutional questions that a federal court could resolve prospectively with a declaration, without running afoul of abstention values. And, in fact, Defendants

themselves have studied dependency caseloads in California and have arrived at an average maximum that would allow attorneys to serve children in the system, reinforcing the justiciability of Plaintiffs' claims under *Eu*.

III. The District Court Erred By Treating Plaintiffs' Discrete Claims And Claims For Relief As An Indivisible Whole.

Courts are required to apply abstention principles narrowly. The District Court here should have adjudicated abstention claim-by-claim, request-for-relief-by-request-for-relief, because not every claim and not every request will necessarily present the same comity challenges. *See, e.g.*, *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3d Cir. 1972) ("[e]ven if a state prosecution is pending … [t]he award of either declaratory or injunctive relief may not present any problem of the comity").

Practical guidance regarding how important such a meticulous analysis is in the abstention analysis can be found in *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002), relied on by the District Court. (ER 34, 38, 40, 43 and 46.) In *Joseph A.*, the court properly analyzed *Younger* abstention with precision, remedy-by-remedy. Some proposed remedies required the federal court to abstain. Others did not, including remedies *more invasive than the relief requested here*. *See id.* at 1273 ("[e]nforcement of the provisions governing training of social workers … , the development of a computerized management information system … , and qualifications for social workers … do not appear to risk interference with

state court proceedings").

As originally postured, this action challenged only two facets of dependency court proceedings in Sacramento County: attorney caseloads and judicial caseloads. As demonstrated by the discrete way these two facets of the case were briefed below, the evidence and legal arguments to prove each of these claims were entirely different. Resolution of one claim would not have had an impact on the other, and vice versa. Nevertheless, the District Court inexplicably decided Defendants' motion by combining all of the discrete claims and requests for relief into an indivisible whole. (ER 50-51.) No authority found instructs that federal jurisdiction in cases such as this one should be decided that way.

By doing so, the District Court essentially amended Plaintiffs' Complaint to create a single, overarching claim that had to be either upheld or dismissed in its entirety. By loading the abstention deck in this fashion, the District Court erred several times over: It departed from authority requiring courts to treat abstention as an exception, not the rule, and that requires abstention to be adjudicated more meticulously. The decision also departed from authority instructing the District Court considering a motion to dismiss to take the complaint as it lies and to read the allegations in plaintiffs' favor. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir.1996). In this way, and contrary to binding precedent, the District Court also failed to construe the Complaint in favor of federal jurisdiction,

especially in Section 1983 cases, and in favor of Plaintiffs' choice of forum. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466 (9th Cir. 1984). Instead, all doubts were erroneously resolved in favor of avoiding jurisdiction.

IV. The District Court Erroneously Converted Defendants' Section 12(b)(6) Motion Into A Motion For Summary Judgment.

Although presented with a motion to dismiss under Rule 12, the court below considered far more than what is permitted in deciding such a motion. The solicitation of matter outside of the pleadings, thus transforming the motion into one for summary judgment, is reversible error. *Erlich v. Glasner*, 374 F.2d 681, 683 (9th Cir. 1967).

Unlike a motion to dismiss, which judges the sufficiency of *allegations*, a summary judgment motion judges the sufficiency of facts. While the former assumes pleaded facts as true, the latter requires production of sufficient evidence to show that facts are in dispute. Accordingly, plaintiffs must be allowed to conduct discovery *before* being required to respond to a summary judgment motion. *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) ("unexpected conversion to summary judgment … denies the surprised party sufficient opportunity to discover and bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal, context"). Conversion to summary judgment is generally disfavored when, as here, a defendant's motion comes quickly after the complaint was filed

and thus early in discovery. *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 475 (1st Cir. 2000).

Although the court below recognized that it is permitted to consider only "the complaint, any exhibits thereto, and matters which may be judicially noticed" (ER 12), it nonetheless solicited matters outside the pleadings, then weighed those "facts." (*See, e.g.*, ER 23.) For example, the court solicited and considered informal, unsubstantiated, and unsworn "testimony" from members of the gallery on matters that were hotly contested. (ER 63-77.) This "testimony" was not subject to cross-examination, yet it self-evidently influenced the District Court's many unsubstantiated conjectures about whether and to what extent Plaintiffs' case might disrupt state court operations in the process of indisputably improving them. (ER 23-27.) To the extent that the true evidence might have supported abstention, the District Court erroneously failed to postpone its decision until it was confirmed in discovery and properly submitted as evidence. This error alone is sufficient to require reversal.

CONCLUSION

Defendants' own proclamations establish where their priorities should be:

> In order to meet the needs of children and families in the Foster Care System, the Judicial Council … should give priority to children and their families in the child welfare system in the allocation and administration of resources, including public funding. (ER 283.)

Plaintiffs—uniformly abused and neglected, haled involuntarily into a "heartless limbo"—allege that these Defendants in their contract with a Sacramento County vendor violate this pronouncement as well as their own standards for attorney caseloads, with harms painstakingly documented by the Defendants themselves. The District Court agreed that the allegations in the Complaint 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." (ER 51.) In consequence, however (not intent), the District Court's decision demonstrates the same "lack of responsiveness." If upheld, it will bar abused and neglected children from seeking redress in federal court for federal claims related to their status as dependents of the State. Instead, the decision categorically forces abused and neglected children to try and vindicate their federal rights in the same "troubling" system that allegedly "demonstrate[s] a serious lack of responsiveness" to their needs. It does so by fashioning an unprecedented new form of abstention, analogous to neither *Younger* nor *O'Shea*.

For the reasons discussed, the District Court's decision is legally unsupported and should be reversed.

DATED: June 3, 2010

Respectfully submitted,

By: s/ Edward Howard
Edward Howard

Robert C. Fellmeth (SBN 49897)
Edward Howard (SBN 151936)
Christina Riehl (SBN 216565)
CHILDREN'S ADVOCACY INSTITUTE
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcala Park
San Diego, California 92110
Telephone: (619) 260-4806

By: s/ Peter E. Perkowski
Peter E. Perkowski

Peter Perkowski (SBN: 199491)
Robyn Callahan (SBN: 225472)
WINSTON & STRAWN, LLP
101 California Street, 39th Floor
San Francisco, CA 94111-5894
Telephone: (415) 591-1000

STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, Appellants state that there are no known cases pending in this Court that are related to this action as defined under that Rule.

COMBINED CERTIFICATION OF COMPLIANCE AND CERTIFICATION OF SERVICE

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,349 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 June 3, 2010, and that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

3. That under Circuit Rule 30-1.3, I caused four (4) copies of the Excerpts of Record accompanying this brief to be sent via FedEx on June 3, 2010, to the following address:

Clerk, United States Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

and one (1) copy of the Excerpts of Record to be sent via FedEx to:

Robert A. Naeve
JONES DAY
Suite 800
3161 Michelson Drive
Irvine, CA 92612

Date: June 3, 2010

/s/ Peter E. Perkowski

Peter E. Perkowski (CA Bar #199491)
WINSTON & STRAWN, LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90034
Telephone: 213-615-1700