U.S. Court of Appeals Docket No. 21-2632

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff/Appellant,

vs.

JOAN M. GILMER, in her official capacity as Clerk of the Circuit Court of St. Louis County, Missouri; and KATHY S. LLOYD, in her official capacity as State Courts Administrator for the Missouri Office of State Courts Administrator,

Defendants/Appellees.

On Appeal from a Decision of the United States District Court
for the Eastern District of Missouri
Case No. 21-CV-00286-HEA
The Honorable Henry E. Autrey

BRIEF OF APPELLANT COURTHOUSE NEWS SERVICE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

As it has successfully in five other circuits, Plaintiff-Appellant Courthouse News Service sought declaratory and injunctive relief under 42 U.S.C. § 1983 against Missouri state court administrators for violating the First Amendment by denying access to new civil petitions for days and weeks. Based on one case going the other way, *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018), the district court dismissed on abstention grounds even though this case "do[es] not fit into the four abstention doctrines." Addendum ("Add.") 19. The next week, the Fourth Circuit joined the Ninth in rejecting *Brown* – and thus by extension the decision below – because "federal courts may abstain only if a case falls into one of these 'specific doctrines.'" *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324 & 325 n.2 (4th Cir. 2021); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 n.4 (9th Cir. 2020).

This appeal thus presents the crucial issue whether a federal court may refuse its "'virtually unflagging'" obligation to decide cases, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013), based on "'principles of federalism'" unmoored from abstention's prerequisites, and if it may do so where Courthouse News has repeatedly obtained relief without the "'federal oversight and intrusion'" required for abstention. Add. 16, 18 (quoting *Brown*, 908 F.3d at 1073, 1075). Given the importance of the constitutional issues and competing precedents, Courthouse News requests 30 minutes per side for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Courthouse News Service makes the following disclosures: Courthouse News Service is a privately held corporation with no parent company. No publicly held corporation holds more than 10% of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

Courthouse News Service's claim arises under the First and Fourteenth Amendments to the U.S. Constitution and the Civil Rights Act, 42 U.S.C. § 1983. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief). Courthouse News appeals the district court's order, entered June 15, 2021, granting defendants' motion to dismiss and thereby disposing of all parties' claims. Courthouse News timely filed its notice of appeal on July 14, 2021. On July 23, 2021, the district court issued an order of dismissal and entered a docket notice incorporating the order of dismissal into Courthouse News' notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291 (jurisdiction over a final judgment from a U.S. district court).

STATEMENT OF ISSUES

1. Did the district court err in abstaining where it admitted Courthouse News' case "do[es] not fit into the four abstention doctrines," Add. 19, and the Supreme Court has instructed that "federal courts may abstain only if a case falls into one of these 'specific doctrines,'" *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324 (4th Cir. 2021) (quoting *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007)) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*")?

a. In a case where "[t]he most closely applicable abstention doctrine … is the one established in *Younger,*" Add. 15, did the court err in abstaining because abstention under "*Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further," *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 82 (2013), and none exist here?

b. Did the court err in abstaining based on the "'principles of equity, comity, and federalism'" that "underlie[] the *Younger* abstention doctrine," Add. 18-19, when the "'Supreme Court has ***never*** allowed abstention to be a license for freeform ad hoc judicial balancing of the totality of state and federal interests in a case,'" *Schaefer*, 2 F.4th at 325 n.2 (emphasis in original)?

– *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013); *NOPSI*, 491 U.S. 350 (1989); *Courthouse News Service v. Schaefer*, 2 F.4th 318 (4th Cir. 2021); *Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020).

2. In a case seeking declaratory and injunctive relief prohibiting state court administrators from enforcing their policy of denying access to newly filed civil petitions for days and weeks until they are processed, which several courts have held to violate the First Amendment right of contemporaneous access, did the district court err in abstaining under the principles of *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976) – seldom-used applications of *Younger* whose narrow contours are "less-than-perfect fit[s]" here, Add. 16 – where the requested relief has been previously granted to Courthouse News by federal courts in five other circuits, and in none of those cases has the relief intruded on the operation of state court proceedings or required federal oversight, let alone the sort of "'ongoing federal audit'" required by *O'Shea* and *Rizzo*?
– *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030 (8th Cir. 2018); *Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014); *Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196 (E.D. Va. 2019), *aff'd*, 2 F.4th 318 (4th Cir. 2021).

STATEMENT OF THE CASE

This case presents the question of whether the federal courthouse doors in this Circuit will be shut to Plaintiff-Appellant Courthouse News Service to assert "the same fundamental First Amendment interests" and access right it has successfully asserted in five circuits – four of which rejected the abstention argument adopted below, *Courthouse News Serv. v. Planet*, 750 F.3d 776, 787 (9th Cir. 2014) ("*Planet I*"); *Courthouse News Serv. v. Schaefer*, 2 F.4th 318 (4th Cir. 2021); *Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020) ("*Planet III*"); *Courthouse News Serv. v. New Mexico Admin. Office of Courts*, 2021 WL 4710644 (D.N.M. Oct. 8, 2021); *Courthouse News Serv. v. Tingling*, 2016 WL 8505086 & 8739010 (S.D.N.Y. Dec. 16, 2016); *see also Courthouse News Serv. v. Jackson*, 2010 WL 11546125 (S.D. Tex. Mar. 2, 2010) – and from which two other circuit courts refused to abstain. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311 (1st Cir. 1992).

In this case, the district court shut the federal courthouse doors based on one prior decision that abstained despite acknowledging the case does "***not fit***" any of the "abstention doctrines," *Courthouse News Serv. v. Brown*, 908 F.2d 1063, 1071-72 (7th Cir. 2018).[1] Relying solely

[1] In this brief, all emphases are added, and both citations to internal quotations and parallel citations are omitted, unless otherwise noted.

on *Brown*, the court below held Courthouse News could seek to remedy the alleged violation of its federal constitutional rights by state court administrators only in state court, if at all. Add. 20.

Courthouse News now appeals to establish that in this Circuit, as in so many others, "the First Amendment issues presented by this case may be adjudicated on the merits in federal court, where they belong." *Planet I*, 750 F.3d at 793.

A. Like Courts Around The Country, St. Louis State Courts Long Provided Access To New Petitions Upon Receipt, But In Recent Years Have Denied Access Until After Processing

Courthouse News is a national "news service that reports on civil litigation in state and federal courts throughout the country." *Schaefer*, 2 F.4th at 322. It publishes news and commentary on its website, at www.courthousenews.com, which is read by 30,000 people each weekday, and several publications, to which it has more than 2,200 subscribers, including other media who rely on Courthouse News for information about new filings. Joint App'x ("JA") 13-14, ¶¶ 25-28. Among its publications are the *New Litigation Reports*, containing staff-written summaries of new non-confidential complaints – or petitions, in Missouri – emailed to subscribers each evening. JA 13, ¶ 25. Its *New Litigation Reports* in Kansas City and St. Louis cover civil complaints in federal court and new civil petitions throughout Missouri, focusing on cases against business or public entities. JA 14-15, ¶¶ 29-31.

Courthouse News has been reporting on new civil petitions filed in St. Louis courts since at least 2005. JA 15, ¶ 33. Until 2013 or 2014, reporters covering St. Louis County and City Circuit Courts could review new petitions the day they were filed, before they were docketed (or "processed") by court staff. *Id.*; JA 38, ¶ 34.[2] The same was true in federal district court in St. Louis, which had a wood box on the counter holding new complaints that reporters checked regularly. JA 21, ¶ 54.

The history of access in St. Louis mirrored the experience across the country. As Courthouse News' publisher William Girdner attested, "federal and state trial courts" in "every region of the United States" allowed access to "complaints as soon as they crossed the counter." JA 70, ¶ 5; *Courthouse News Serv. v. Planet*, 2016 WL 4157210, *12 (C.D. Cal. May 26, 2016) (citing evidence of "long history of courts making complaints available to the media and the public soon after they are received"), *aff'd in part, rev'd in part*, *Planet III*, 947 F.3d at 593-94 (citing "1953 nationwide study of court practices regarding access").

Courts have also held "'contemporaneous'" access to new complaints plays a "crucial" role, given "the immediate consequences precipitated by filing a complaint, consequences that the public must

[2] Traditionally, "docketing" involved entering basic case information, such as party and counsel names and addresses, into the court's intake system. When courts moved to electronic case management and e-filing, "docketing" began being referred to as "processing." JA 19, ¶ 45.

promptly understand" to "monitor[] the functioning of the courts" and "the integrity of the judiciary." *Schaefer*, 2 F.4th at 327. "A delay of even one day in obtaining access to new civil complaints means that news is delayed by at least a full news cycle, making it much less likely to be reported." JA 73-74, ¶ 15; *Planet III*, 947 F.3d at 585.

In St. Louis' state courts, contemporaneous access ended in 2013-14, when the County and City courts switched to e-filing and began denying access to new petitions until after processing. JA 16 & 38 ¶ 34.

This policy change resulted in significant delays in access to newly filed petitions. During 2020, the St. Louis County Court denied access to roughly ***55 percent*** of new non-confidential petitions for a ***week or more*** after they were e-filed, withheld access to another ***40 percent for one-to-four days***, and allowed access the day of e-filing to ***less than five percent***. JA 16-17, ¶ 36. The delays were not caused by the covid pandemic (delays in January and February 2020 were consistent with delays the rest of the year), and continue this year. JA 154, ¶¶ 11-12.[3]

[3] Access problems were exacerbated during the pandemic by Missouri's policy of permitting non-attorneys to view petitions only through public access terminals at the courthouses, while allowing attorneys to view petitions remotely online. JA 9, ¶¶ 8-9. However, in order to focus on delays attributable solely to the state courts' post-processing access policies, Courthouse News' access statistics do not reflect delays resulting from the inability to view petitions remotely when courthouses were closed during the pandemic. JA 16-17, ¶¶ 35-36. In reality, pandemic access was worse than the tracking statistics reflect.

B. Many E-Filing Courts Allow Access Before Processing, But Defendants Refused Courthouse News' Request To Do So

Nothing about e-filing requires delayed access. In fact, e-filing makes it easier to provide timely access upon filing, as information court staff previously input at the intake counter is now done by the filer through e-filing software. JA 21-22, ¶ 55. At both district courts in Missouri, like most federal district courts, new complaints are publicly available online as soon as they are filed. JA 22-23, ¶ 57. State courts throughout the country – including in Alabama, Connecticut, Hawaii, New York and Utah – follow this federal model. JA 23, ¶ 58.

Much of the delay in the St. Louis state courts results from new petitions sitting in an electronic queue waiting to be "reviewed … and accept[ed]," JA 165 – i.e., processed, JA 8, ¶ 5 – even though Missouri Court Operating Rule 2.02 requires filers to redact non-public information and provides that "[t]he clerk of the court is not required to review the case document to confirm that the party has omitted personal information and shall not refuse to accept or file the document on that basis." https://www.courts.mo.gov/page.jsp?id=169733.

Many e-filing courts – including Georgia, Nevada, parts of California, and some federal courts – that do not automatically accept complaints upon receipt provide contemporaneous access via a press queue. JA 21-23, ¶¶ 55-59. This press queue is an electronic version of the media box that held paper complaints for reporters, but now the

press can see e-filed complaints online while they await processing. *Id.*

In January 2021, Courthouse News' editor and publisher sent a letter requesting a press queue to Joan Gilmer, Circuit Clerk for the St. Louis County Circuit Court, and Kathy Lloyd, Missouri State Courts Administrator (collectively, "Defendants"). JA 28-29.

In March 2021, counsel for the State Courts Administrator denied the request, claiming courts could not provide access before "clerk acceptance" of a new petition, JA 31 – i.e., until after processing.[4]

C. The Decision To Abstain Did Not Address The Evidence Or Authorities Rejecting Abstention In This Circumstance

After the State Court Administrator's response, Courthouse News saw no viable option for restoring contemporaneous access but to sue for violation of the First Amendment under 42 U.S.C. § 1983, and move for a preliminary injunction. JA 46. Defendants then "move[d] to dismiss" on abstention grounds. JA 187-96.[5] Their motion rested on the Seventh Circuit's abstention in *Brown* even though Courthouse News' First Amendment claim did "not fit" any "abstention doctrines," 908 F.3d at 1071-72, and the theory that federalism mandates allowing state courts

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[4] Counsel's letter did say the rule on remote access had been modified to allow members of the press and public to view petitions online (after processing), but with no timetable for implementation. JA 31 (to be effective "upon [a] set by the [Missouri] Supreme Court").

[5] It was actually a motion for "[j]udgment on the pleadings," JA 191, because Defendants had already filed an answer. JA 32.

to decide whether their staffs' procedures violate federal constitutional rights, and ordering Defendants to refrain from denying access until after processing would require intrusive federal oversight. JA 192-96.

In response, Courthouse News cited evidence and cases showing *Brown*'s federalism "concerns … have been proven unfounded." JA 207. No prior case that granted Courthouse News the relief sought has required "federal oversight or intrusion into clerk practices," *id.*, in part because it is not difficult for e-filing systems that have complaints sitting in a queue to allow the press to view non-confidential filings while they await processing. JA 76-83, 204, 218-23. At a hearing on the motions, Courthouse News presented additional testimony to elaborate on and support this point. JA 255-60.

The district court did not address this evidence in denying the preliminary injunction, granting Defendants' motion and dismissing the case on abstention grounds. Add. 1-21.[6] It simply pitted *Planet I* against *Brown* and followed the latter, without discussing the rejection of *Brown* in subsequent cases, or the Supreme Court's most recent limitations on abstention. It preferred that state courts decide if their staffs' procedures satisfy federal constitutional requirements. Add. 20.

[6] The district court also failed to recognize Courthouse News had addressed – in its reply papers (JA 209-10 & n.4) and at the hearing (JA 295:16-298:7) – the inapt comparison between filing of new petitions in a trial court to start a new civil case and the filing of petitions for writ of certiorari in the Supreme Court. Add. 20-21; *see infra* Section III.

SUMMARY OF THE ARGUMENT

The district court did "not wish to dictate to, oversee, or otherwise insert itself into the [] operations and administration of its co-equal Missouri state courts." Add. 20. So it abstained, even though Courthouse News' First Amendment claim did "not fit" any of the "abstention doctrines" established by the Supreme Court. Add 19.

But federal courts "must take jurisdiction" where it exists. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). "Questions may occur which we would gladly avoid; but we cannot avoid them." *Id.* Federal courts thus may only abstain "'within [the] narrow limits'" of the abstention doctrines. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

This case does not fall within those narrow limits. "The most closely applicable abstention doctrine," the court below said, "is the one established in *Younger" v. Harris*, 401 U.S. 37 (1971), "as extended" in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Rizzo v. Goode*, 423 U.S. 362 (1976). Add. 15. But it did not address *Sprint*, which limited *Younger* "to three 'exceptional circumstances'" that do not exist here. 571 U.S. at 71. Nor did it address cases holding *O'Shea* and *Rizzo* do not allow abstention from Courthouse News' claim because requiring "access to filings more quickly" does "not invade any state court proceedings, ongoing or future" or "require continuous federal policing." *Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019), *aff'd*, 2 F.4th 318 (4th Cir. 2021); *Planet III*, 947 F.3d at 591 n.4.

I.

GIVEN SUPREME COURT AND CIRCUIT PRECEDENT "DEMAND[ING] A NARROW VIEW OF … ABSTENTION," DISMISSING A CASE THAT "DO[ES] NOT FIT INTO THE FOUR ABSTENTION DOCTRINES" WAS AN ERROR OF LAW AND THUS THE DISTRICT COURT ABUSED ITS DISCRETION

As this Circuit recently reiterated, "'federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress,"'" and "abstention is an "'extraordinary and narrow exception" to that duty.'" *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1093 (8th Cir. 2021). For this reason, the Supreme "Court ha[s] 'carefully defined … the areas in which … "abstention" is permissible,'" *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1505 (8th Cir. 1992) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*")), and reversed abstention where the facts did not fit one of its four abstention doctrines.[7] *Sprint*, 571 U.S. at 82 (reversing because case did not fit "the three 'exceptional circumstances' identified in *NOPSI*" for *Younger* abstention); *NOPSI*, 491 U.S. at 361-64 (reversing abstention under *Burford* as well as *Younger* where required element was missing).

[7] Those doctrines are *Pullman* abstention, named for *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Burford* abstention, named for *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Colorado River* abstention, named for *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976), and *Younger* abstention.

Since Supreme Court precedent "does not permit a broad view of abstention," *Melahn*, 965 F.2d at 1507 (citing *NOPSI* in reversing abstention), it is not surprising that this Circuit's "own precedent demands a narrow view of the abstention issue." *Id.* at 1505; *see also, e.g., In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 478 (8th Cir. 1995) (reversing where the "district court strayed beyond the narrow confines of proper abstention and therefore abused its discretion").[8]

The district court in this case took a broad, rather than narrow, view of abstention as appropriate under *Younger* and its progeny "even though the facts of the case do not fit into the four abstention doctrines." Add. 19. That was an error of law. "Whether *Younger* abstention is appropriate is a question of law," *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 551 (8th Cir. 2018), and questions of law are "review[ed] *de novo*." *Plouffe v. Ligon*, 606 F.3d 890, 895 (8th Cir. 2010) (Colloton, J., concurring).

Put another way, while this Circuit has also said it "review[s] the district court's decision to abstain under *Younger* for abuse of discretion," *Minnesota Living Assistance*, 899 F.3d at 551, the "district

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[8] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), "limited the holding[] of … *Burns & Wilcox* … on other grounds." *In re Otter Tail Power Co.*, 116 F.3d 12007, 1215 n.7 (8th Cir. 1997) ("The *Quackenbush* Court disagreed with the *In re Burns & Wilcox* court's conclusion that abstention-based remand orders are not immediately appealable").

court abuses its discretion when it makes an error of law." *Id.*[9]

Whether it was to dismiss or for judgment on the pleadings, this Court "review[s] the grant of [Defendants'] motion … de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the non-moving party." *Plouffe*, 606 F.3d at 893; *Partridge v. City of Benton, Ark.*, 929 F.3d 562, 564 (8th Cir. 2019). However, the district court was "not limited to Plaintiff's complaint when determining whether the *Younger* abstention doctrine deprives it of jurisdiction." *375 Slane Chapel Rd, LLC v. Stone Cty, Mo.*, 2021 WL 3023405, *3 (W.D. Mo. July 16, 2021) (citing *Backpage.com, LLC v. Hawley*, 2017 WL 5726868, *3 n.5 (E.D. Mo. Nov. 28, 2017)).

The district court thus also erred by following the Seventh Circuit's unsupported assumption that "the level of intrusion from the federal court sought by CNS was 'simply too high,'" Add. 18 (quoting *Brown*, 908 F.3d at 1074), as that failed to treat Courthouse News' allegations as true or consider the "undisputed facts in the record" it presented. *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir.1990).

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[9] This standard of review apparently applies to all decisions to abstain. *Burns & Wilcox*, 54 F.3d at 477 ("We must determine whether the district court properly exercised its discretion within the narrow confines of the particular abstention doctrine at issue."). The *Plouffe* concurrence called for the Circuit to clarify that abstention is reviewed de novo. 606 F.3d at 894-95 (Colloton, J., concurring). It need not do so here, however, because the district court had no discretion to abstain where essential elements were absent. *Burns & Wilcox*, 54 F.3d at 477.

II.

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT FAILED TO IDENTIFY OR FOLLOW GOVERNING PRECEDENT LIMITING ABSTENTION TO "EXCEPTIONAL CIRCUMSTANCES" THAT DO NOT EXIST HERE

The district court's decision to abstain based on free-floating "principles of equity, comity, and federalism" where the case did "not fit into the four abstention doctrines," Add. 19, is not just "in some tension with [the Supreme Court's] recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases with its jurisdiction 'is "virtually unflagging."' *Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint*, 571 U.S. at 77) (quoting *Colo. River*, 424 U.S. at 817). It clearly violates that principle.

In recent abstention cases, the Court has "affirmed that federal courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,'" and "'[t]he one or the other would be treason to the Constitution.'"" *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 478 (8th Cir. 1998) (quoting *NOPSI*, 491 U.S. at 358) (quoting *Cohens*, 19 U.S. at 404).[10] *Sprint* and *NOPSI* reversed, and *Quackenbush* affirmed the Ninth Circuit's reversal, of overly broad abstention, and thus "scaled back" the "reach" of *Younger*.

[10] Federal courts generally cannot decline jurisdiction "because 'Congress, and not the Judiciary, defines the scope of the federal jurisdiction within the constitutionally permissible bounds.'" *Night Clubs*, 163 F.3d at 478 (quoting *NOPSI*, 491 U.S. at 359).

ACRA Turf Club, LLC v. Zanzucchi, 748 F.3d 127, 135 (3d Cir. 2014).

The district court erred in failing to mention or follow *Sprint* or *NOPSI* (other than as *NOPSI* was mischaracterized in a pre-*Sprint* case cited in *Brown*). *Sprint* reversed broad application of *Younger* (resulting in a change to this Circuit's standard for applying the doctrine, which the court below did not apply). *NOPSI* held "concern[s] for comity and federalism" do ***not*** allow extension of *Younger* beyond where there is a pending state "proceeding to which *Younger* applies" because "[s]uch 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." 491 U.S. at 367-68.

The district court also erred in applying *O'Shea* and *Rizzo* here, where "[t]he relief sought … would not invade any state court proceedings, ongoing or future," would "not require continuous federal policing" and "would not excessively entangle a federal court in the states' own internal affairs." *Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019), *aff'd*, 2 F.4th 318 (4th Cir. 2021); *Planet III*, 947 F.3d at 591 n.4; *Planet I*, 750 F.3d at 790-92; *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37; *Tingling*, 2016 WL 8739010 (JA 140-41) (relief Courthouse News seeks "does not present the level of intrusive relief sought in the cases cited by the clerk").

A. The District Court Failed To Identify, Let Alone Apply, Any Of The Factors That Must Be Met To Justify Abstention

As this Court has held, a district court abuses its discretion where "it failed adequately to consider the factors involved in defining the 'exceptional circumstances' required" to abstain under the applicable "abstention doctrine." *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Cooperatives, Inc.*, 48 F.3d 294, 295 (8th Cir. 1995); *Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015) ("*Younger* abstention … inappropriate" where none of the "'exceptional' types of parallel … proceedings" that support abstention were "pending in state court").

The district court did not consider ***at all*** – let alone adequately – the factors required to abstain under *Younger*, *O'Shea* or *Rizzo*. Indeed, it apparently conducted no independent analysis, did not "identif[y] Eighth Circuit case law providing meaningful instruction in this case," and mistakenly thought "the parties" had also failed to do so. Add. 19.

In fact, Courthouse News cited the governing Supreme Court precedent, including *Sprint* – in which it reversed the "extraordinary breadth" with which the Eighth Circuit had applied *Younger*, 571 U.S. at 81 – and *NOPSI*, 491 U.S. at 368, which set the outer limit of *Younger*'s application. *Sprint*, 571 U.S. at 82. JA 234, 242.

Courthouse News also cited Eighth Circuit precedent holding that, after *NOPSI*, application of *Younger* is limited to where state court proceedings were "judicial" and "ongoing," *Night Clubs*, 163 F.3d at 480

(following *Wiener v. County of San Diego*, 23 F.3d 263 (9th Cir. 1994)); *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990)), and, after *Sprint*, proper *Younger* analysis requires consideration of "'additional factors,'" *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 553 (8th Cir. 2018), as well as cases refusing to apply *Younger*'s offshoots, *O'Shea* and *Rizzo*, in similar contexts. *See* JA 235-42 & n.4.

The district court cited ***none*** of these cases, did not recognize the limits on abstention imposed by the Supreme Court in *Sprint* and *NOPSI*, and did not articulate – let alone apply – the additional factors this Circuit has said must be considered in light of those decisions.

Rather, it simply "adopt[ed] the Seventh Circuit's approach as set forth in *Brown*" with little analysis, Add. 19, and did not acknowledge cases refusing to follow *Brown* in the same context, such as *Schaeffer*, 429 F. Supp. 3d at 206-07 and *Planet III*, 947 F.3d at 591 n.4. This approach was an error of law and thus an abuse of discretion.

1. The Court Erred By Following *Brown*, Which Did Not Apply Binding High Court And Eighth Circuit Precedent

In *Sprint Commc'ns Co. v. Jacobs*, 690 F.3d 864, 867 (8th Cir. 2012), this Circuit upheld *Younger* abstention on the ground that "[i]nterests of comity and federalism support federal abstention" even where a case does not fit the three *Younger* categories, as long as the circumstances meets the "factors outlined in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)."

Rejecting the "extraordinary breadth" of that application of *Younger*, the Supreme Court unanimously reversed. *Sprint*, 571 U.S. at 81. Allowing abstention whenever "the three *Middlesex* conditions" were met "would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest," a result "irreconcilable with [the Court's] dominant instruction" that "abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id.* at 81-82.

The Court thus "clarif[ied] and affirm[ed] that *Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further," and that the "three *Middlesex* conditions" are "not dispositive," but are, "instead, ***additional*** factors appropriately considered by the federal court before invoking *Younger*." *Id.* (emphasis in original).

Consequently, "whether *Younger* abstention is appropriate" is now governed by a "three-part" test that "emerges from" *Sprint*, *NOPSI* and *Middlesex*. *Minnesota Living*, 899 F.3d at 551-52. "First, does the underlying state proceeding fall within one of the three 'exceptional circumstances' where *Younger* abstention is appropriate?" *Id.* at 552 "Second, if the underlying proceeding fits within a *Younger* category, does the state proceeding satisfy what are known as the '*Middlesex*' factors?" *Id.* Finally, "even if the underlying state proceeding satisfies the first two inquiries, is abstention nevertheless inappropriate because an exception to abstention applies?" *Id.*

Given that "'a failure … to apply the proper legal standard constitutes … an abuse of discretion,'" *In re Bieter Co.*, 16 F.3d 929, 933 (8th Cir. 1994), it bears repeating the district court did not apply *Minnesota Living* or the test it mandates, and did not apply the *Sprint* circumstances or *Middlesex* factors, even though Courthouse News quoted *Minnesota Living* on the circumstances where *Younger* may apply and noted the first *Middlesex* factor was not met. JA 235 & n.4.

No doubt that is because *Brown* did not apply them, either, and all the court below did was follow *Brown* instead of *Planet I.* Picking between two out-of-circuit cases without regard to whether either – let alone the one it followed – comported with Supreme Court and Eighth Circuit precedent is an abuse of discretion of the sort "inevitably reversed." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-75 (11th Cir. 2000) (when district court "expressly applies the incorrect … standard or overlooks directly controlling precedent" it not only "likely constitutes an abuse of discretion" but will be "inevitably reversed").

Not surprisingly, the Seventh Circuit did not address this Circuit's *Younger* test. It also did not acknowledge *Sprint,* relying instead on a pre-*Sprint* case that did not apply the analysis *Sprint* requires.

Brown involved the Cook County Clerk's Office, which historically "allowed reporters to have same-day access to newly filed paper complaints," and continued for six years to allow access to complaints "as they were received" after e-filing began in 2009. 908 F.3d at 1066.

In 2015, the Clerk's Office began withholding complaints until after processing, resulting in access delays. *Id.*

The district court granted Courthouse News a preliminary injunction after refusing to apply *Younger* abstention "because there were 'no ongoing state judicial proceedings with which CNS's requested injunctive relief might interfere.'" *Id.* at 1067-68 (quoting *Courthouse News Serv. v. Brown*, 2018 WL 318485, *2 (N.D. Ill. Jan. 8, 2018) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)).

The Seventh Circuit reversed. Compelled to concede the district court was correct that this was "not a traditional *Younger* scenario" because the Supreme Court has held that "'[a]bsent any ***pending*** proceeding in state tribunals, … application by the lower courts of *Younger* abstention was clearly erroneous,'" *Brown*, 908 F.3d at 1072 (quoting *Ankenbrandt*, 504 U.S. at 705) (emphasis in original), the Seventh Circuit decided that this Supreme Court holding did not bar abstention because that circuit had previously abstained in a case "quite similar" despite also "not being a typical *Younger* scenario." *Id.* at 1073 (citing *SKS & Assocs. v. Dart*, 619 F.3d 674 (7th Cir. 2010)).[11]

[11] *Brown* also thought the case "fits better into the … extension of the *Younger* principles in *O'Shea* and *Rizzo*." 908 F.3d at 1072. But it subsequently conceded the case did "not map exactly … *O'Shea* and *Rizzo*," either. *Id.* at 1073. As explained in Section II.B below, *Brown*'s mistaken reliance on *O'Shea* and *Rizzo* does not support abstention here. *Schaefer*, 2 F.4th at 325 & n.2; *Planet III*, 947 F.3d at 591 n.4.

But *Brown* overlooked that not all *Younger* atypicality is created equal. In *SKS*, there ***were*** "pending state cases – petitions for residential eviction orders –" to which SKS was a party, and thus "th[e] case fit[] *Younger* to that extent." 619 F.3d at 677.[12] That was the analytic opposite of *Brown*, and *SKS* thus met this prerequisite for abstention, while *Brown* conceded it did not. This is not precedent the district court had discretion to follow over *Sprint* and *Minnesota Living*.

2. The Court Could Not Abstain Under *Younger* Because <u>There Is No Pending State Court Judicial Proceeding</u>

Like the Fourth Circuit in *Schaefer*, this Court can short-circuit the *Younger* analysis because the Supreme Court has clearly held that "*Younger* abstention is inapplicable in the absence of an ongoing state proceeding." *Burns & Wilcox*, 54 F.3d at 478. Defendants and the court below "have not pointed to any ongoing state proceeding with which this case would interfere." *Schaefer*, 2 F.4th at 324. For that reason alone, "reliance on *Younger* abstention is therefore misplaced." *Id.*; *Rivera-Puig*, 983 F.2d at 319 ("*Younger* abstention doctrine ***does not permit abstention***" in First Amendment challenge to court rule restricting access to preliminary hearings because holding rule unconstitutional

[12] The difference was "SKS is a plaintiff in state court, not a defendant, and it seeks to protect its federal constitutional rights by having the federal courts speed up the state court proceedings, not stop them." *SKS*, 619 F.3d at 677. That did not preclude *Younger* from applying.

would not interfere with any pending state proceeding).

Had the court below followed *Sprint* and *Minnesota Living*, it would have been obliged to admit neither the exceptional circumstances required for *Younger* abstention nor the *Middlesex* factors exist here.

Taking the former first, Courthouse News' effort to safeguard the public's First Amendment right of timely access to new civil petitions does not require "federal intrusion into ongoing state criminal prosecutions" or "'civil enforcement proceedings,'" *Sprint*, 571 U.S. at 78, let alone one "resembling a criminal prosecution." *Minnesota Living*, 899 F.3d at 552. Nor does it involve "a proceeding implicating a state's interest in enforcing the orders and judgments of its courts,'" *id.*, as access delays resulted not from an order or judgment of a judge, but from the "policies and practices" of an administrator and clerk. JA 6-7. Since "*Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further," *Sprint*, 571 U.S. at 82, and none exist here, *Younger* cannot apply.

Even if this case did implicate ongoing state court proceedings that constituted one of the "'exceptional circumstances' identified in *NOPSI*" – and, as shown, it did not – abstention in the name of *Younger* would still be improper because none of the *Middlesex* factors exist.

Middlesex requires, first, that the state proceeding "is judicial in nature," *Minnesota Living*, 899 F.3d at 553, and the policies and practices here requiring processing before access are not. *NOPSI*, 491

U.S. at 371 ("'making of a rule for the future … is an act legislative and not judicial in kind'"); *Lautenbaugh v. Nebraska State Bar Ass'n*, 2013 WL 12159090, *1 (D. Neb. Feb. 4, 2013) (refusing to abstain from First Amendment challenge to state bar "rules promulgated by the Nebraska Supreme Court" because state court's review of the rules was "not judicial in nature"); *see Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042, 1048 (8th Cir. 1997) (administrative determination not judicial in nature because the department "conducted no investigation, held no hearings, received no evidence, kept no record, and enforced no liabilities"); *Hartford Courant*, 380 F.3d at 87, 100-01 (rejecting abstention argument against First Amendment challenge to denial and delay of access to docket sheets pursuant to "procedures set forth in the … Memo or … actions of the court administrators").

Moreover, the policies and practices imposed for processing new petitions neither "implicate[] important state interests" nor "provide[] an adequate opportunity to raise constitutional challenges," as also required by *Middlesex*. *Minnesota Living*, 899 F.3d at 553.

While states may "have a significant interest in running their own clerks' offices and setting their own filing procedures," *Brown*, 908 F.3d at 1071, such "state court operations," Add. 20, only support abstention if "'in furtherance of the state courts' ability to perform its judicial function.'" *Schaeffer*, 429 F. Supp. 3d at 206 (quoting *Sprint*, 571 U.S. at 73). But "the rate at which local clerks release filings is not 'uniquely

in furtherance' of a court's judicial function," [13] and thus the relief Courthouse News seeks "does not implicate a core judicial function." *Id.* at 207; *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *35.[14]

The final *Middlesex* factor mandates that "absent an ongoing judicial proceeding in which there is an adequate opportunity for a party to raise federal constitutional challenges, *Younger* is inapplicable." 457 U.S. at 438 (Marshall, J., concurring). Even if adopting a policy denying access to new e-filed petitions until after processing could be called a state proceeding, Courthouse News "did ***not*** have an adequate opportunity to raise the constitutional challenge

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[13] That issue does not implicate filing procedures because the processing occurs ***after*** filing. JA 21, ¶ 52; *Planet III*, 947 F.3d at 596-97 (clerk could "not show[] a 'substantial probability' that more contemporaneous access to newly filed complaints would impair" an "interest in the orderly administration and processing of new complaints"). An order that clerks must lift a ban on pre-processing access would not implicate any valid interest in how their office is run– any more than would an order that they lift a ban on hiring staff of a particular race or gender – because "Clerks [can and have] significantly improved access" to new complaints "without changing any policies, hiring any new employees, or increasing employees' hours." *Schaefer*, 2 F.4th at 322, 329.

[14] Any administrative interest in denying access to new petitions until after processing pales in comparison to the sort of "vital state interests" the Supreme Court and this Circuit have held sufficient under *Younger*. *Middlesex*, 457 U.S. at 432-34 (federal challenge to state attorney disciplinary rules implicated "extremely important state interest in maintaining and assuring the professional conduct of the attorneys it licenses"); *Minnesota Living*, 899 F.3d at 554 ("Minnesota has an important interest in the application of its wage and hour laws").

before having [its access] revoked." *Guillemard Gionorio v. Contreras Gomez*, 301 F. Supp. 2d 122, 130 (D.P.R. 2004) (rejecting abstention) (emphasis in original), *appeal dismissed*, 161 Fed. App'x 24 (1st Cir. 2005); *Night Clubs*, 163 F.3d at 480 (test is whether plaintiff "could have raised" or "did raise" its constitutional claims in state proceeding).

While new petitions filed in state court may start new state court proceedings, those cases are limited to the claims and defenses raised by the allegations asserted in the petitions. Courthouse News is not "a party to any [of that] state court litigation," and thus "[t]he issues presented here … have no substantial relationship to any pending state court proceeding." *Lannan v. Maul*, 979 F.2d 627, 631 (8th Cir. 1992) (reversing abstention); *see Hartford Courant*, 380 F.3d at 101 (where memo by state court clerk restricting access was not at issue in state proceedings, the state case did "not provide a meaningful opportunity for review of the federal plaintiffs' constitutional claims").

B. The Court Failed To Realize *O'Shea* And *Rizzo* Do Not Allow Abstention Where Their Requirements Are Not Met

Beyond mistakenly thinking a Seventh Circuit decision that comported with *Younger* – because there ***were*** "pending state cases," *SKS*, 619 F.3d at 677 – supported abstention where that core criterion was missing because there was "'***no*** individual, ***ongoing state proceeding*** that plaintiffs seek to enjoin,'" Add. 15 (quoting *Brown*, 908 F.3d at 1072) – the court below and *Brown* thought that gap could be

filled by *O'Shea* and *Rizzo*. "[T]he Seventh Circuit found instructive the Supreme Court's holdings in *O'Shea* and *Rizzo*," *id.*, and it (and the district court) shrugged off the inconvenience of these cases also "not [being] perfect fits" by "ultimately rel[ying] on the abstention principles of equity, federalism and comity" underlying them. *Id.* at 15-17.

Neither *Brown* nor the court below cited any authority supporting this novel theory of filing gaps in one abstention doctrine by referring to other doctrines that are also "less than perfect fits" because a court believes the policies apply even if the essential elements do not. *Id.* The "decision to abstain, under *Younger* … and its progeny" must be reversed because, as "the Supreme Court noted," it "ha[s] 'never applied the notions of comity so critical to *Younger*'s "Our Federalism" when no state proceeding was pending.'" *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1232-33 (10th Cir. 2001) (quoting *Ankenbrandt*, 504 U.S. at 705).

1. The Court Below Conceded *O'Shea* And *Rizzo* Do Not Fit

The Seventh Circuit and district court were right about one thing: the *O'Shea* and *Rizzo* versions of *Younger* do not apply to Courthouse News' case any more than does *Younger* itself.

As *O'Shea* noted, the version of *Younger* abstention it recognized was designed to prevent the same "kind of interference that *Younger* … sought to prevent," 414 U.S. at 500 – i.e., "interruption of state proceedings to adjudicate assertions of noncompliance." *Id.* The difference was that the *O'Shea* plaintiffs did not seek to enjoin or

interfere with a pending state court proceeding, but rather sought "an injunction aimed at controlling or preventing the occurrence of specific events that might take place ***in the course of future state criminal trials***." *Id.* Consequently, state court criminal defendants who believed the injunction was not being followed would interrupt their cases to seek review in federal court, resulting in "nothing less than an ongoing federal audit of state criminal proceedings." *Id.*

Rizzo extended *O'Shea*'s principles to "where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments." 423 U.S. at 380. On its face, *Rizzo* does not apply to claims against officials in the judicial branch. And neither *O'Shea* nor *Rizzo* apply here, where the relief sought would not invade current or future state proceedings or "require continuous federal policing." *Schaeffer*, 429 F. Supp. 3d at 207; *accord, e.g., Planet III*, 947 F.3d at 591 n.4; *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37.

i. *O'Shea* Cannot Apply Because Requiring Timely Access To Petitions At Filing Does Not Impact Future State Court Proceedings, Let Alone Constitute The Major Ongoing Intrusion Required For Abstention

"*O'Shea* was a case of multiple plaintiffs alleging racial discrimination in the setting of state court bail and state court sentences." *Schaeffer*, 429 F. Supp. 3d at 205. Plaintiffs did "not seek to strike down a single state statute, either on its face or as applied;"

rather, they sought "an injunction aimed at controlling or preventing the occurrence of specific events that might take place ***in the course of*** future state criminal trials." *O'Shea*, 414 U.S. at 500. "The Court held that the claims were not yet ripe, because the plaintiffs sought relief for actions that could happen in future state court prosecutions." *Schaeffer*, 429 F. Supp. 3d at 205. "[I]n dicta," the Court went on to hold "abstention appropriate to avoid [an] 'on-going federal audit of state criminal proceedings,'" *Hunt v. Roth*, 648 F.2d 1148, 1154 n.7 (8th Cir. 1981) (quoting *O'Shea*, 414 U.S. at 500),[15] because the order plaintiffs sought "would contemplate ***interruption of state proceedings*** to adjudicate assertions of noncompliance." *O'Shea*, 414 U.S. at 500.

This Circuit has thus recognized *O'Shea* applies where the federal relief would constitute "'such a major continuing intrusion of the equitable power of the federal courts ***into the daily conduct of state … proceedings***'" it would be "'in sharp conflict with the principles of equitable restraint' that the Court recognized in *Younger*." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 611 (8th Cir. 2018); *Munson v. Gilliam*, 543 F.2d 48, 54-55 (8th Cir. 1976) ("'The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in federal courts(.)'").

[15] *Vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982).

Absent the likelihood that the relief sought would result in undue interference in pending or future state judicial proceedings on the merits, then, abstention under *Younger* and *O'Shea* is not allowed. One year after *O'Shea*, the Supreme Court held abstention did not bar a challenge to "the legality of pretrial detention without a judicial hearing" because an "order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975). Following *Gerstein*, this Circuit held abstention did not bar an action for "declaratory judgment that the State cannot decree per se that certain offenses are non-bailable before trial" because it would "not interfere with the state's orderly criminal prosecution" at trial. *Hunt*, 648 F.2d at 1154 & n.7.[16]

It necessarily follows that *O'Shea* does not allow abstention where, as several courts have held, the relief Courthouse News seeks would not require continuous monitoring of adjudication on the merits in future state court proceedings, let alone seriously disrupt them. *Planet III*, 947 F.3d at 591 n.4; *Planet I*, 750 F.3d at 790-92; *Schaeffer*, 429 F. Supp. 3d at 207; *New Mexico Admin. Office of Courts*, 2021 WL

[16] Proceedings in the underlying cases are not held until long after civil petitions are filed, and thus the right of contemporaneous access upon filing cannot be litigated in those proceedings (and forcing the public or press to follow such a piecemeal approach would not only violate the right of timely access but result in the very disruption *O'Shea* sought to avoid). *Schaefer*, 2 F.4th at 327-28; *Planet III*, 947 F.3d at 592-93.

4710644 at *37; *Tingling*, 2016 WL 8739010 (JA 140-41).

The dividing line – between cases that will "require … case-by-case evaluations of discretionary decisions" during state proceedings (to which *O'Shea* applies) and cases that, as here, seek "nondiscretionary safeguards" against violation of constitutional rights by court administrators before proceedings start (to which *O'Shea* does not apply) – is illustrated by *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981).

The *Tarter* court applied *O'Shea* abstention to a request to enjoin state court judges from setting excessive bail because, as in *O'Shea*, "enforcement of any remedial order granting the relief requested would require federal courts to interrupt state proceedings to adjudicate allegations of asserted non-compliance." *Id.* at 1013. But it found the "*O'Shea* rubric d[id] not apply" to a challenge to a state court clerk's refusal to docket, and judges' refusal to consider, pro se motions:

> The enforcement of an injunction requiring clerks to file all pro se motions would not require the same sort of interruption of state criminal processes that an injunction against excessive bail would entail. Because the amount of bail prescribed for each criminal defendant depends on the peculiar facts and circumstances of his case, the setting of bail requires ad hoc decisions committed to the discretion of judges. An injunction against excessive bail, no matter how carefully limited, would require a federal court to reevaluate de novo each challenged bail decision. By contrast, an ***injunction requiring that all pro se motions be docketed*** and considered ... would ***not require such case-by-case evaluations*** of discretionary decisions. It would add a ***simple, nondiscretionary procedural safeguard*** to the criminal justice system ….

Id. at 1013-14. This was consistent, the Fifth Circuit noted, with its prior decision holding abstention did not bar a claim over pretrial detention without a hearing, *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973), which was affirmed in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

It is clear beyond any doubt that Courthouse News' claim seeking to restore contemporaneous access to new petitions after they are received for e-filing is on the same side of the *O'Shea* line as claims seeking a judicial hearing for pretrial detentions in *Gerstein*, pretrial bail for previously non-bailable offenses in *Hunt*, and docketing of pro se motions in *Tarter* (as well as the unsealing of docket sheets in *Hartford Courant*). As shown in the cases where Courthouse News obtained that relief after abstention was rejected, "an order requiring Defendants to release state court filings faster" would "not invade any state court proceedings, ongoing or future" and "would not require continuous federal policing." *Schaeffer*, 429 F. Supp. 3d at 207; *Planet III*, 947 F.3d at 591 n.4 (Courthouse News' relief "neither presented a risk of an "'ongoing federal audit'" of a state's judicial system nor amounted to "'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state … proceedings'"") (quoting *Planet I*, 750 F.3d at 790-92) (quoting *O'Shea*, 414 U.S. at 500 & 502)); *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37; *Tingling*, 2016 WL 8739010 (JA 140-41).

That Courthouse News' claim would not result in the sort of undue interference and interruption of state proceedings required by *O'Shea* is established not only by the decisions in Courthouse News' prior cases but by the facts alleged in its complaint and the evidence presented below, both of which the district court erroneously ignored.

As the Ninth Circuit observed, a state court has "'available a variety of simple measures' that it could take to comply with an injunction requiring it to provide CNS timely access to newly filed complaints." *Planet III*, 947 F.3d at 591 n.4. To that point, Courthouse News noted in its complaint that state courts across the country have adopted various procedures to allow "pre-processing access" to new e-filed complaints without difficulty, JA 22-23, ¶¶ 57-59, and the relief it seeks would simply preclude Defendants from denying access until after processing, leaving the how and why to Defendants. JA 25-26.

Courthouse News presented evidence expanding on this point, and describing the prior orders it obtained requiring state clerks to stop denying access to new complaints until after processing, which "did not dictate the particular manner in which that access was required to be provided" and with which the clerks only needed to take "simple actions … to comply," resulting in no follow-up federal enforcement litigation or interference with the clerks' administrative tasks. JA 76-78, 80-83.

The district court could not ignore Courthouse News' allegations and evidence. In ruling on Defendants' motion for judgment on the

pleadings, it was required to "accept[] as true the facts in the complaint and draw[] all reasonable inferences in favor of the nonmoving party." *Partridge*, 929 F.3d at 564. And because they moved on abstention grounds, the district court was not limited to the four corners of the complaint. *375 Slane Chapel Rd*, 2021 WL 3023405 at *3.

The decision below to abstain – and deny a preliminary injunction – rested on the conclusion that an injunction would require the district court to intrude unduly and micro-manage state "'filing procedures.'" Add. 18 (quoting *Brown*, 908 F.3d at 1075). But that "conclusion does not accept the facts in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Partridge*, 929 F.3d at 566 (reversing dismissal). And the district court also erred in failing to consider the evidence submitted by Courthouse News buttressing and expanding on those allegations. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013) (reversing dismissal under Rule 12(b)(1) in light of undisputed facts submitted by plaintiff in opposition to the motion); *Younie v. City of Hartley, Iowa*, 97 F. Supp. 3d 1058, 1060 (N.D. Iowa 2015) (where defendant presents no evidence disputing complaint's pertinent allegations, district court considers allegation in "'the complaint supplemented by undisputed facts evidenced in the record'") (quoting *Osborn*, 918 F.2d at 730).

ii. To The Extent It Is Even An Abstention Case, *Rizzo* Cannot Apply Because Enjoining A Policy Restricting Access To Petitions Does Not Require Federal Courts To Supervise "Nearly Every Facet" Of The State Court

The district court's reliance on the Seventh Circuit's mistaken reliance on *Rizzo* need not long detain this Court. *Rizzo* involved a "federal lawsuit filed against Philadelphia city officials for insufficient handling of citizen complaints against the police." *Schaeffer*, 429 F. Supp. 3d at 205. The district court ordered defendants, including the Mayor and Police Commissioner, "'to submit … for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct,'" and approved "an all-encompassing 14-page document" that "significantly revis[ed]" police "internal disciplinary" procedures. *Rizzo*, 423 U.S. at 365 & n.2, 379-80.

The Third Circuit affirmed "'because [the order] appeared to have the potential for prevention of future police misconduct.'" *Id.* at 366. The Supreme Court reversed, but without mentioning abstention. Instead, it held "that there was not a sufficient case or controversy to trigger federal jurisdiction." *Schaeffer*, 429 F. Supp. 3d at 205. It then went on, in apparent dicta, to "rel[y] on the principles of *O'Shea*" not to abstain but "to hold that an injunction requiring the Philadelphia police department to draft comprehensive internal procedures to address civilian complaints was beyond the 'scope of federal equity power.'" *Planet I*, 750 F.3d at 789 (quoting *Rizzo*, 423 U.S. at 378).

On its face, *Rizzo* is inapplicable for two reasons. First, it was not an abstention case. *Battle v. Anderson*, 594 F.2d 786, 792 (10th Cir. 1979) ("'we do not read *Rizzo* as requiring total abstention'") (quoting *Campbell v. McGruder*, 580 F.2d 521, 526 (D.C. Cir. 1978)). Second, it applied "the principles of federalism" to limit "injunctive relief" when sought "not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments." *Rizzo*, 423 U.S. at 380; *Battle*, 594 F.2d at 792 (*Campbell* "rejected the contention that *Rizzo* … prohibits the intervention of the federal court," but said *Rizzo* holds "a federal court should refrain from assuming a comprehensive supervisory role via its injunctive powers over broad areas of local government for the purpose of preventing speculative and probably only sporadic future misconduct by local officials toward an imprecise class of potential victims.").

Even if the rule of *Rizzo* limiting the scope of injunctive relief against the executive branch could support abstention in a case against judicial administrators, it could not here. At most, *Rizzo* "extended the comity basis of nonintervention to certain state-level executive branch functions," but only "[u]nder quite narrow circumstances." *Chambers v. Marsh*, 675 F.2d 228, 232 (8th Cir. 1982).[17] As *Battle*, *Campbell* and

[17] The Supreme Court reversed on the merits without addressing abstention. *Marsh v. Chambers*, 463 U.S. 783 (1983).

Chambers show, and most courts hearing Courthouse News' cases held, the relief it seeks – "requiring State courts to make civil complaints available more quickly to the press" – does not come close to the sort of "'major continuing intrusion of the equitable power of the federal courts into the daily conduct of state ... proceedings'" required to invoke *O'Shea* or *Rizzo*. *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37; *Planet I*, 750 F.3d at 789-92 & n.8; *Planet III*, 947 F.3d at 591 n.4; *Schaeffer*, 429 F. Supp. 3d at 207 ("*Brown* was decided on principles of equity, comity, and federalism" – and, "to the extent that *Rizzo* can be read as an abstention case, it is one which depends heavily on such principles" – but "Federalism does not require federal courts to yield matters of constitutional concern when a federal order would not excessively entangle a federal court in the states' own internal affairs"); *see Chambers*, 675 F.2d at 231-32 & n.6 (*Rizzo* did not allow abstention from First Amendment challenge to state Legislature prayer policy).

A more recent decision rejecting the State of Missouri's reliance on *Rizzo* further illustrates why it is singularly inapplicable here. In *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030 (8th Cir. 2018), state defendants appealed certification of a class of inmates bringing an Eighth Amendment claim alleging inadequate medical screening and care of chronic Hepatitis C. *Id.* at 1033. Citing *Rizzo* and a prior case, *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006), defendants sought to reverse certification on the theory it "implicates principles of

federalism regarding the authority of a state to administer its own prisons." *Postawko*, 910 F.3d at 1040. In rejecting that argument, the Circuit recognized the line between where the "federalism interests" underlying *Rizzo* are implicated and where they are not. *Id.* They were implicated in *Elizabeth M.* because "the class action sought 'sweeping injunctive relief which, if granted, would require the district court to mandate and monitor detailed programs governing nearly every facet of the State's operation' of three residential facilities." *Id.* (quoting 458 F.3d at 783). They were not implicated in *Postawko* because the "injunctions sought … are not nearly so broad and relate only to a single policy regarding one particular illness." *Id.* That is equally true here.

2. Federal Courts Are Not Free To Abstain Whenever They Think Federalism Interests Are Implicated Except Where A Case Meets The Requirements For Abstention

That brings this Court back to the nub of the question: Does 0 + 0 + 0 = Abstention? Neither the district court nor *Brown* cited any Supreme Court or Eighth Circuit authority suggesting that this math adds up – and that a federal court may abstain where it concedes elements required to invoke the three doctrines it cites were not met – while the authority cited at the outset of Sections I-II shows it cannot.

As this Court reiterated earlier this year, "'federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress,'" abstention is an "'extraordinary and narrow exception" to

that duty,' and thus 'only the "clearest of justifications" will justify abstention.'" *Kitchin*, 3 F.4th at 1093. Those justifications must be found, if at all, within the four corners of the abstention doctrines as mapped by the Supreme Court. *Melahn*, 965 F.2d at 1505 ("*NOPSI* reiterated that the Court had 'carefully defined … the areas in which such "abstention" is permissible, and it remains "the exception, not the rule"'");[18] *see Sprint*, 571 U.S. at 78-82 (reversing *Younger* abstention where case did not fit "the three 'exceptional circumstances' identified in *NOPSI*" as required for abstention); *NOPSI*, 491 U.S. at 360-62 (reversing *Burford* abstention as "not justified" where required element of a "state-law claim" or "state-law" entanglement absent) and 367-72 (reversing *Younger* abstention where essential element – "interference with ongoing judicial proceedings against which *Younger* was directed" – absent); *Burns & Wilcox*, 54 F.3d at 477-78 ("district court strayed beyond the narrow confines of proper abstention" where "necessary prerequisite" of ongoing proceeding absent); *Postawko*, 910 F.3d at 1040 (*Rizzo* inapplicable where injunction sought against "only a single

[18] As *NOPSI* shows, when the Supreme Court said the "various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," it was not saying abstention could be invoked where an element essential was missing, but "merely note[d] that considerations similar to those that mandate [one form of] abstention" (there, *Pullman*) "are relevant to a court's decision whether to abstain under [another]" (there *Younger*). *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 n.9 (1987).

policy" of defendants); *Hunt*, 648 F.2d at 1154 & n.7 ("no reason for … abstention under *Younger*" or *O'Shea* where "declaratory judgment that the State cannot decree per se that certain offenses are non-bailable before trial" would not interfere with pending or future trials).

The district court thought the missing elements could be filled by "the principles of equity, comity, and federalism" underlying abstention. Add. 19. It cited no case so holding except *Brown*, and both overlooked that the Supreme Court has already taken "'principles of federalism and comity,'" as well as "equity," into account in crafting "the abstention doctrines," *Quackenbush*, 517 U.S. at 728, which it "'carefully defined,'" *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 408 (3d Cir. 2005), so "abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint*, 571 U.S. at 82.

This is no minor flaw in the district court's decision. If abstention may be unmoored from the elements the Supreme Court crafted as a way to limit application of the doctrines and ensure that "abstention [is] rarely … invoked," *Lannan v. Maul*, 979 F.2d 627, 632 (8th Cir. 1992) (citing *Ankenbrandt*, 504 U.S. at 705), there is nothing to prevent a federal court from invoking its own views of "federalism and comity" whenever it prefers not to hear a claim seeking to vindicate federal constitutional rights allegedly being violated under color of state law.

Just so, the court below did "not wish to dictate to, oversee, or otherwise insert itself into the [] operations and administration of its co-

equal Missouri state courts." Add. 20. To support this position, it cited *Brown*'s inversion of the Supreme Court's instructions – treating abstention as the rule, rather than the exception, *id.* ("'[A] federal court may, and often must, decline to exercise its jurisdiction where doing so would intrude upon the independence of the state courts.'") (quoting *Brown*, 908 F.3d at 1070-71) – and this Circuit's quotation of *Brown* that the "'principle of comity takes on special force when federal courts are asked to decide how state courts should conduct their business.'" *Id.* (quoting *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020)).

But in *Dixon*, this Circuit did "not decide … the district court should have abstained from hearing the case altogether." 950 F.3d at 1056. Rather, it held that the court should have considered the interest in comity before enjoining enforcement of the state courts' secured bail system in light of "the Missouri Supreme Court's attempt to police its own lower courts" by revising the rules pertaining to cash bail. *Id.*

Something similar happened in *Schaefer*, which found state court clerks had violated Courthouse News' First Amendment right of access, but declined to issue an injunction because the clerks – despite denying delays had occurred – had been "trying in good faith to comply with the demands of the First Amendment since this lawsuit was filed." *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 563 (4th Cir. 2020), *aff'd*, 2 F.4th 318 (4th Cir. 2021).

Rejecting *Brown*, however, the district court refused to abstain.

Schaeffer, 429 F. Supp. 3d at 205-07. Instead, it held the "[p]rinciples of federalism, efficiency, and comity weigh in favor of issuing a declaratory judgment" because "[s]tate officials … are not at liberty to deny rights guaranteed by the federal Constitution." *Schaefer*, 440 F. Supp. 3d at 562. "When state officials do so, deny that it occurred, and deny that the federal Constitution even protects a right, a federal court may, under appropriate circumstances present here, declare the rights of the parties. Such a declaration, when drawn appropriately, does not adversely impact the federal-state balance of sovereignty." *Id.*

The Fourth Circuit affirmed on all grounds. It rejected *Brown*'s reliance on "general principles of federalism" where "none of the 'principal categories of abstention' constituted 'a perfect fit'" because "'[t]he Supreme Court has ***never*** allowed abstention to be a license for freeform ad hoc judicial balancing of the totality of state and federal interests in a case.'" *Schaefer*, 2 F.4th at 325 n.2 (quoting *Martin*, 499 F.3d at 364) (citing *NOPSI*, 491 U.S. at 359) (emphasis in original).

The Fourth Circuit is hardly alone in finding the "principles of federalism do not weigh against jurisdiction" where a "case does not fit within the[] three categories" for *Younger* abstention. *Mitchell v. Sec. Am., Inc.*, 2014 WL 12833923, *3-4 (N.D. Tex. Apr. 15, 2014) (emphasis and capitalization deleted). Where, as here, there is no ongoing state proceeding, "the concern motivating abstention – namely, respecting the independence and autonomy of state courts – is eliminated." *Loertscher*

v. Schimel, 2015 WL 5749827, *1 (W.D. Wis. Sep 30, 2015); *Alsager v. Dist. Ct. of Polk Cty., Iowa (Juv. Div.)*, 518 F.2d 1160, 1166 (8th Cir. 1975) ("'relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding"'") (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)); *Deal v. Tugalo Gas Co.*, 991 F.3d 1313, 1327 (11th Cir. 2021) (reversing *Burford* abstention where affirming "would require us to elide the key ingredient that we and the Supreme Court seem to have demanded – the existence of an ongoing state … proceeding").[19] That is also true where, as here, relief will not "require federal courts to monitor the ***day-to-day*** operations of state judicial proceedings" in the future, as required by *O'Shea*. *Family Div. Trial Lawyers of Superior Ct.-D.C., Inc. v. Moultrie*, 725 F.2d 695, 703 (D.C. Cir. 1984) (emphasis in original); *Hunt*, 648 F.2d at 1154 & n.7.

In short, "principles of federalism" are not sufficient to shut the federal courthouse doors to plaintiffs asserting federal constitutional claims that do not fit the narrow contours of abstention. *Postawko*, 910

[19] In finding a district court abused its discretion in denying declaratory judgment against state court defendants because, *inter alia*, it "would increase friction in state-federal relations," this Circuit explained that "such a consideration" is "not … particularly persuasive here where there is no pending state proceeding and the state courts have not had occasion to pass on the constitutional issue." *Alsager*, 518 F.2d at 1166. "In these circumstances, there will be no 'duplicative legal proceedings' nor "disruption of the state criminal justice system"' and "[f]ederal intervention will not reflect "negatively upon the state court's ability to enforce constitutional principles."' *Id.* (quoting *Steffel*, 415 U.S. at 462).

F.3d at 1040. "'Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into'" a state function, such as "'prison administration,'" *id.* (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011)), or court administration. *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37 ("*Younger* does 'not mechanically require abstention,' even when State courts are involved."); *Tarter*, 646 F.2d at 1013 (abstention did not bar claim against court "clerks based on the refusal to docket pro se motions").

It is no answer to say, as did the court below, that Courthouse News' federal "claims regarding state court operations should be heard in state courts before this Court exercises its jurisdiction." Add. 20. "The mere fact that a case ***could*** be heard in state court is insufficient to justify *Younger* abstention." *Village of DePue, Ill. v. Exxon Mobile Corp.*, 537 F.3d 775, 783 (7th Cir. 2008) (emphasis in original); *Habich v. City of Dearborn*, 331 F.3d 524, 531-32 (6th Cir. 2003) ("[i]f that were the rule, *Younger* abstention would almost always be appropriate").

If this is true even in diversity cases, *Augustin v. Mughal*, 521 F.2d 1215, 1217 (8th Cir. 1975), it is all the more true in cases alleging ongoing violation of federal constitutional rights pursuant to § 1983, under which "the disputed constitutionality of a state [action] is generally meant to be tested in federal court without requiring a first resort to state courts." *Solomon v. Emanuelson*, 586 F. Supp. 280, 284 (D. Conn. 1984) (citing *Patsy v. Bd. of Regents of the St. of Florida*, 457

U.S. 496 (1982)); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 27-28 (1989) (Stevens, J., concurring) ("federal courts 'have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution' … and generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy");[20] *Family Div. Trial Lawyers*, 725 F.2d at 701 ("local judicial administration is not immune from attacks in federal court on the ground that some of its practices violate federal constitutional rights").

Abstaining in a case alleging systemic violation of the right of access to state filings would violate not only the limits on abstention, but also First Amendment interests. "Abstaining in this case portends particularly egregious damage to First Amendment rights" because "'the delay that results'" from compelling Courthouse News to refile in state court "'will itself chill the exercise of the rights that the plaintiff seeks to protect.'" *Planet I*, 750 F.3d at 787-88; *Hartford Courant*, 380 F.3d at 100 ("weight of the First Amendment issues involved counsels against abstaining"). Consequently, this Court should "decline[] to extend *Younger* far enough to risk concluding that, whenever a State court is involved, the only federal court that can determine the legality or constitutionality of the State's procedure is the Supreme Court." *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *37.

[20] Overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

III.

COMPARING CIVIL PETITIONS THAT START CASES IN STATE COURT WITH CERT PETITIONS IN THE SUPREME COURT MISAPPLIED BOTH ABSTENTION AND THE FIRST AMENDMENT RIGHT OF ACCESS

At the end of its decision, the district court made a parting remark about the merits of Courthouse News' First Amendment claim for access to civil petitions compared to Supreme Court procedures for access to petitions for writs of certiorari. Once again, it took this comparison from a portion of the Seventh Circuit's decision in *Brown*, which it (mistakenly) said Courthouse News failed to address, and which did not justify the refusal to hear Courthouse News' case.

The district court began its closing remark by citing the Seventh Circuit's assertion that "neither it nor the Supreme Court provide instant access to court filings" at the appellate level. Add. 20. Rather, the high court does not post new petitions for writs of certiorari on its website until after processing "'the paper version of the filing.'" *Id.* Asserting Courthouse News did "not address this argument," *id.* at 21, the district court concluded by asserting it would be "very strange, indeed," for it "to impose on a state court a practice which is not currently employed by the Supreme Court." *Id.*

The intended import of these remarks is not entirely clear. To the extent the court was uncomfortable enjoining state court administrators from employing a processing policy it thought resembles one used at the

Supreme Court – even though that Court's process has not been subject to constitutional scrutiny – discomfort is not a basis for a federal court to set aside its "'virtually unflagging'" "'"obligation" to hear and decide' cases within its jurisdiction." *Lexmark*, 572 U.S. at 126 (quoting *Sprint*, 571 U.S. at 77) (quoting *Colo. River*, 424 U.S. at 817).

"'Abdication of the obligation to decide cases can be justified under [the abstention] doctrine[s] only in the ***exceptional circumstances*** where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" *Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920, 926 (8th Cir. 2006) (reversing *Colorado River* abstention) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) (brackets and emphasis in original)). Sparing state court administrators federal judicial review of whether their policy of denying access to new petitions until after processing violates the First Amendment – and requiring Courthouse News to refile its claim in state court – because that review has not yet been applied to a policy concerning different pleadings filed in the Supreme Court does not qualify. *See George v. Parratt*, 602 F.2d 818, 820 (8th Cir. 1979) ("Federal courts have held abstention is particularly inappropriate with actions brought to protect fundamental rights, I.e., if delay or postponement by the federal courts will have a chilling effect on the exercise of first amendment rights."); *Planet I*, 750 F.3d at 787.

Moreover, there are significant differences between civil petitions filed at the St. Louis County Court and cert petitions filed in the Supreme Court.[21] One court's practices might satisfy constitutional scrutiny even if the other's does not.

Contrary to the district court's mistaken assertion that Courthouse News did "not address this argument," Add. 21, Courthouse News explained in its reply brief and at oral argument that a challenge to the Supreme Court's practice would be subject to the same legal analysis that applies here, which is fact-specific. JA 209-10 & n.4, 295:16-298:7. First, a court would consider whether the evidence demonstrates that "considerations of experience and logic" support a First Amendment right of access (in the case of the Supreme Court, to petitions for certiorari) and whether it attaches when those petitions are received. *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 9 (1986)

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[21] Unlike the St. Louis courts, the Supreme Court remains a paper-filing court. Supreme Court Rule 29(1) ("Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk in paper form."). Submission of electronic copies of filings through the Court's electronic filing system is "***in addition to*** the existing requirements concerning the paper filing of documents with the Court." *Guidelines For The Submission Of Documents To The Supreme Court's Electronic Filing System*, § 1, U.S. Supreme Court, updated Nov. 20, 2017, *available at* https://www.supremecourt.gov/filingandrules/ElectronicFilingGuidelines.pdf. That electronic copies of petitions are not "posted on the Court's website" until after processing, *id.*, § 10(a), does not mean the Court withholds access to paper copies.

("*Press-Enterprise II*"); *Schaefer*, 2 F.4th at 326 ("At trial, Courthouse News provided evidence of a nationwide tradition and practice of access to newly filed civil complaints.").[22] Second, if a right of access attaches and the challenged policies or practices restrict that right, does the evidence show the restrictions are "essential to preserve higher values and … narrowly tailored to serve" that "overriding interest"? *Press-Enterprise II*, 478 U.S. at 9, 13-14; *Planet III*, 947 F.3d at 588, 595.

The constitutionality of the St. Louis County Court's practices for making new civil petitions available cannot be determined as an abstract legal question, divorced from the allegations in Courthouse News' complaint and whatever facts Defendants might offer to justify the delays caused by their practices. *Courthouse News Serv. v. Planet*, 614 Fed. App'x 912, 914 (9th Cir. 2015) (*"Planet II"*) (reversing dismissal where district court, on remand from reversal of abstention, "erred by evaluating the question of same-day access as a purely legal question divorced from the [applicable] legal framework … and from the

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[22] Whatever the history of access may be to certiorari petitions, the logical considerations concerning the timing of access to those filings may also differ from "the immediate consequences precipitated by filing a complaint" that support a right of "reasonably contemporaneous access to civil complaints." *Schaefer*, 2 F.4th at 327-28. "For example, a complaint instantaneously invokes a court's jurisdiction" to hear the merits of the claims. *Id.* at 328. "Moreover, a complaint carries significant implications for 'the parties' substantive legal rights and duties,' by, among other things, triggering an obligation to preserve evidence and, in some cases, triggering a statute of limitations." *Id.*

allegations in CNS's complaint"). The same is true for the constitutionality of the Supreme Court's procedures for posting new petitions for certiorari on its website.

In short, speculation about what the Supreme Court's administrative practices are, how they might impact access to petitions for writs of certiorari, and how they would fare under an application of the *Press-Enterprise II* test if challenged does nothing to advance the determination of whether ***Defendants'*** policy can withstand constitutional scrutiny, let alone whether the district court may abstain from adjudicating Courthouse News' First Amendment claim.

To the extent administrative practices of federal courts are instructive on the merits of Courthouse News' claim, the closest analog to the St. Louis state courts is the district court itself. *See Planet I*, 750 F.3d at 780-81 (discussing access to complaints prior to processing in California's federal courts in case involving access in California state court). Yet the district court's decision does not mention that the District Courts for both the Eastern and Western Districts of Missouri make newly filed non-confidential civil complaints available to the press and public automatically on receipt, rather than withholding access until after processing. JA 22-23, ¶ 57; 253:5-11.

There may be another way to read the district court's concluding passage. It could believe that any access practice at the Supreme Court sets a de facto constitutional ceiling, and thus it would be "very strange"

to entertain a challenge to a supposedly similar state court practice, as such a claim would be doomed if it reached the high court. If that is what the district court intended, it is troubling on at least two levels.

First, it not only presupposes the Supreme Court staff's policy should govern all filings across-the-board – notwithstanding that the analysis may change with respect to different types of civil filings and the reasons asserted for the policy, *see Schaefer*, 2 F.4th at 326-27; *Planet III*, 947 F.3d at 595-600 – it presupposes the Court would simply defer to a policy its staff may have adopted without considering the implication of the Court's decisions in *Press-Enterprise II* (and its progeny extending the right of access to civil cases), when they adjusted filing policies to accommodate e-filing as well as paper copies.

Second, a district court's belief as to the ultimate futility of a plaintiff's claim is not a basis for abstention, which was the only the basis on which the district court dismissed Courthouse News' claim. It also bears noting that if the district court believes judges will necessarily reject constitutional challenges to administrative practices adopted by their own courts, its conclusion that Courthouse News must nevertheless ask the St. Louis County Circuit Court to adjudicate any challenge to the access policies of that court's administrators is all the more troubling.

CONCLUSION

Time and again, federal courts have held First Amendment claims alleging systemic denial of the right of access to state court filings or hearings should be decided "in federal court," and rejected abstention. *Planet I*, 750 F.3d at 793; *Schaefer*, 2 F.4th at 324-25 & n.2; *Planet III*, 947 F.3d at 591 n.4; *Hartford Courant*, 380 F.3d at 100-01; *Rivera-Puig*, 983 F.2d at 319; *New Mexico Admin. Office of Courts*, 2021 WL 4710644 at *35-37; *Tingling*, 2016 WL 8739010. The decision below requiring the same federal claims against state court officials to be heard in state court violated the policies and rules limiting abstention to "'exceptional circumstances,'" *Sprint*, 571 U.S. at 71, and should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that this Brief of Appellant was prepared using Microsoft Word 2010, in 14-point Century Schoolbook font, and it contains 12,741 words from the Jurisdictional Statement through the Conclusion, as determined by the Microsoft Word 2010 word-counting system.

I also certify, pursuant to Eighth Circuit Rule 28A(h)(2), that the electronic versions of this brief and the accompanying Addendum have been scanned for viruses and are virus-free.

/s/ *Roger Myers*

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, an electronic version of this Brief of Appellant was submitted to the Clerk of the United States Court of Appeals for the Eighth Circuit for filing by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that within five days after receipt of notice from the Clerk that this Brief had been filed, a paper copy this Brief of Appellant, including the accompanying Addendum, will be served by mail on counsel for all other parties in this case.

/s/ *Roger Myers*