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

REPLY BRIEF OF APPELLANT COURTHOUSE NEWS SERVICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Rules

Other Authorities

INTRODUCTION

Unable to explain how abstention was appropriate under *Sprint Commc'ns v. Jacobs*, 571 U.S. 69 (2013), which "limited applicability of [the] *Younger* abstention doctrine," *Johnson v. Weber*, 549 F. App'x 597, 598 (8th Cir. 2014), Defendants' Answering Brief ("AB"), like the court below, does not mention it. Without facts or law to support abstention, they rely on policy, but fail to address decisions rejecting "abstention on the grounds of comity, equity, and federalism" when a "case does not fit within traditional abstention categories." *Courthouse News Serv. v. Gabel*, 2021 WL 5416650, *13 (D. Vt. Nov. 19, 2021); *Courthouse News Serv. v. Price*, 2021 WL 5567748 (W.D. Tex. Nov. 29, 2021), *report and recommendation adopted*, 2021 WL 6276311 (W.D. Tex. Dec. 15, 2021).

With their abstention exit closed, Defendants contend for the first time the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), "does not extend to state court clerks." AB 26. But the case they cite recognizes *Young* ***does*** apply when clerks "enforce" laws said to be unconstitutional. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). And they fail to address authority applying *Young* to "clerk[s] of court" with "supervisory and administrative duties related to" a challenged rule or policy, *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1131-32 (8th Cir. 2019), such as court staff who enforce policies restricting access to complaints or petitions. *Courthouse News Serv. v. Hade*, 2022 WL 141532 (E.D. Va. Jan. 14, 2022).

In a final attempt to avoid reversal, Defendants ask this Court to decide another issue not raised in their motion below and "rule out any First Amendment right to access civil petitions ***before*** they have been processed." AB 56 (emphasis in original). But the Court cannot do so on appeal from dismissal on the pleadings where, as here, Courthouse News alleges facts establishing the "right of timely access to newly filed complaints arises ***when a complaint is received*** by a court, ***rather than after it is 'processed***.'" *Courthouse News Serv. v. Planet*, 2016 WL 4157210, *13 (C.D. Cal. May 26, 2016), *aff'd in pertinent part, rev'd in part on other grounds*, 947 F.3d 581 (9th Cir. 2020) ("*Planet III*");[1] *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 327-28 (4th Cir. 2021).

Defendants err in relying on a case where this showing was not made, *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n.* (8th Cir. 2013), and courts since then have found an "important interest" in contemporaneous access even to complaints quickly "withdrawn" or "settle[d]." *Schaefer*, 2 F.4th at 328. This does not mandate immediate access, only that Defendants must justify withholding it. *Id.*; *Planet III*, 947 F.3d at 594-96. The dismissal should be reversed and the case remanded so Defendants can attempt to do so.

[1] As before all emphases are added, and citations to internal quotations and parallel citations omitted, unless otherwise noted.

I.

DEFENDANTS' LATE INVOKING OF SOVEREIGN IMMUNITY CANNOT SAVE THE DISMISSAL, AS CLERKS ARE NOT EXEMPT FROM *EX PARTE YOUNG*

The abstention ruling cannot survive scrutiny under precedent it did not address, so Defendants now seek to invoke sovereign immunity.

Even if they did not waive this belated argument, "[D]efendants' eleventh amendment claim [is] without merit." *MacBride v. Exon*, 558 F.2d 443, 447 (8th Cir. 1977).[2] An action against a "clerk of court" with "administrative authority" over allegedly unconstitutional acts "falls squarely with the *Ex parte Young* doctrine and is not barred by … sovereign immunity." *Kodiak Oil*, 932 F.3d at 1131-32; *Hade*, 2022 WL

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[2] Sovereign immunity "'need not be raised in the trial court,'" AB 28 (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)), but that is not the full story. "[T]he question remains whether, by appearing and litigating the merits of the controversy without objection, the state has waived its Eleventh Amendment immunity." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 762 (9th Cir.), *amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999); *In re SDDS, Inc.*, 225 F.3d 970, 973 (8th Cir. 2000); *Union Elec. Co. v. Missouri Dep't of Conservation*, 366 F.3d 655, 660 (8th Cir. 2004) (Missouri Attorney General may waive); *Hankins v. Finnel*, 964 F.2d 853, 858 (8th Cir. 1992) (Missouri waived).

The question is whether Defendants "assert[ed] [their] Eleventh Amendment sovereign immunity defense in a timely manner." *U.S. v. Metro. St. Louis Sewer Dist.*, 578 F.3d 722, 725 (8th Cir. 2009). Other than "[i]n their answer," which is insufficient, *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975), Defendants did not assert it below, defending on the merits and other grounds. The Supreme Court has said that, "if … within the power" of Indiana's Attorney General to waive, he would "have done so" by not raising sovereign immunity until that Court. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 466-67 (1945).

141532 at*2-4 (denying motion to dismiss because Executive Secretary of the Office of the Executive of the state Supreme Court within *Ex parte Young*); *Kentucky Press Ass'n v. Kentucky*, 355 F. Supp. 2d 853, 856, 861 (E.D. Ky. 2005) (action against "Clerk of the Franklin District and Circuit Courts" for violating First Amendment by denying access to "proceedings and records" ***not*** barred by Eleventh Amendment).

A. Clerks May Be, And Often Are, Sued Under *Ex parte Young*

As shown, courts may and do hold claims against a "Clerk" for "prospective injunctive relief … in her official capacity … would not be not barred by the Eleventh Amendment." *Udoh v. Clerk of Minn. App. Cts.*, 2021 WL 2010778, *2 (D. Minn. May 20, 2021); *Bostic v. Schaefer*, 760 F.3d 352, 371 & n.3 (4th Cir. 2014) ("Clerk for the Circuit Court" a "proper defendant under *Ex parte Young*" because he "bears the requisite connection to the enforcement" of challenged law).[3]

"The *Ex parte Young* doctrine rests on the premise 'that when a federal court commands a state official to do nothing more than refrain from violating federal law, [s]he is not the State for sovereign-immunity

[3] Thus chastened, Clerk Schaefer did not attempt to invoke sovereign immunity in *Courthouse News Serv. v. Schaefer*, 2 F.4th 318 (4th Cir. 2021). Other recent cases rejecting court clerks' Eleventh Amendment defenses include *Ward v. City of Norwalk*, 640 F. App'x 462, 467 (6th Cir. 2016); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1274 (N.D. Okla.), *aff'd on other grounds sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); and *Rothermel v. Dauphin Cty.*, 2018 WL 4680093, *11 (M.D. Pa. Sept. 28, 2018).

purposes.'" *Kodiak Oil*, 932 F.3d at 1131 (quoting *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). That is the "'precise situation'" to which the *Young* "'doctrine is limited.'" AB 31 (quoting the next sentence of *Virginia Office*, 563 U.S. at 255).

"'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court ***need only*** conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."'" *McDaniel v. Precythe*, 897 F.3d 946, 951-52 (8th Cir. 2018) (rejecting argument that journalist's lawsuit over denial of access to witness executions barred by Eleventh Amendment).

As in another recent case, "CNS has adequately alleged" facts "to fit within" *Young*'s "expansive exception to sovereign immunity." *Hade*, 2022 WL 141532 at *3-4. Courthouse News alleges an ongoing violation of the First Amendment right of access to more than half of new civil petitions in St. Louis County for at least ***one week***. JA 7-8; R. Doc. 1 at 2-3; *Schaefer*, 2 F.4th at 322, 326-29 (courts denying access to 22% and 41.5% of complaints "until two or more court days after filing" violated First Amendment). To remedy this violation, Courthouse News seeks declaratory and injunctive relief, which is clearly "'prospective.'" *Hade*, 2022 WL 141432 at *3. This case thus "falls squarely within *Ex parte Young*." *Kodiak Oil*, 932 F.3d at 1131.

B. *Whole Woman's Health* Did Not Change The Law On Clerks

Overlooking all the cases allowing actions against "court officials," such as a "clerk of court," *id.* at 1131-32, Defendants offer an alternate reality in which *Ex parte Young* does not apply to any claims against "state court clerks." AB 26, 33. Defendants cite no case so holding, and rest instead on an overly broad reading of *Whole Woman's Health*.

Whole Woman's Health did not purport to alter the law: "[A]s *Ex parte Young* explained, [its] traditional exception [to sovereign immunity] does not ***normally*** permit federal courts to issue injunctions against state-court judges or clerks. ***Usually***, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties." 142 S. Ct. at 532.

The emphasized terms are important. They demarcate a line between judges and clerks in their judicial roles resolving disputes, where *Ex parte Young* may not apply, and their administrative roles implementing a law, rule or policy alleged to be "contrary to federal law," where it does apply. *Id.*; *Kodiak Oil*, 932 F.3d at 1131-32.

The emphasized terms are also essential to portray accurately what "*Ex parte Young* explained." Noting the "difference between the power to enjoin an individual from doing certain things" and "the power to enjoin courts ***from proceeding in their own way to exercise jurisdiction***," *Young* held the former does "not include the power to restrain a court from acting in any case brought before it." 209 U.S. at

163. This is the adjudicatory context in which "an injunction against a state court" against hearing a case – or "to prevent any investigation or action by a grand jury," part "of the machinery of a criminal court" – "would be a violation of the whole scheme of our government." *Id.*

Defendants thus err in asserting categorically that "*Ex parte Young* does not apply to state courts, their clerks, and the 'machinery' of state courts." AB 36. *Whole Woman's Health* illustrates the point, as the majority and dissent disputed on which side of the line relief falls that would enjoin clerks from docketing cases under a law alleged to violate *Roe v. Wade*, 410 U.S. 113 (1973). The dissenters said injunctive relief was appropriate because, while "[c]ourt clerks … do not 'usually' enforce a State's laws," this law was designed for them do so through docketing the private actions it authorized. 142 S. Ct. at 544 (Roberts, C.J., concurring in judgment in part and dissenting in part).

There is no real dispute here over which side Courthouse News' claim falls. That is likely why Defendants are forced to assert a categorical exemption that cannot be squared with the cases they cite or those they ignore allowing actions against clerks under *Ex parte Young*.

Courthouse News does not seek to "enjoin courts from exercising jurisdiction over cases" initiated by new petitions, nor "enjoin state court proceedings," nor bar Defendants from docketing them. Rather, it seeks an order that Defendants refrain from withholding access for days and weeks while petitions await acceptance. JA 7; R. Doc. 1 at 2.

Citing the opinion of a single justice, Defendants contend "'[a] plaintiff may bring an action under *Ex parte Young* ***only*** when the defendant "threaten[s] and [is] about to commence proceedings."'" AB 35 (quoting *Whole Woman's Health*, 142 S. Ct. at 542) (Thomas, J., concurring in part) (quoting 209 U.S. at 156). But *Young* is not limited to enforcement "proceedings"; what matters for *Young* is that plaintiffs sued "to enjoin state officials to ***conform their conduct*** to requirements of federal law." *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). If they engage in, or threaten, allegedly unconstitutional action, *Young* applies. *Papasan v. Allain*, 478 U.S. 265, 276 (1986) (*Young* was "based on a determination that an unconstitutional state enactment is void and that ***any action*** by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity").

Papasan held "the ***unequal distribution*** … of the benefits of the State's school lands … is ***precisely the type of continuing violation*** for which a remedy may permissibly be fashioned under *Young*." *Id.* at 282. No separate proceeding was required. And in the same-sex marriage cases, "'enforcement' of [the] challenged provision" was the denial of "marriage licenses [by] the Clerk's offices." *Kitchen v. Herbert*, 755 F.3d 1193, 1201-02 (10th Cir. 2014); *Bostic*, 760 F.3d at 371 n.3.

First Amendment cases reach the same result. *Olson v. New Mexico*, 2013 WL 12329123 (D.N.M. Oct. 10, 2013), held plaintiff could "sue … the clerk of the court – or the clerk's office employee who is

refusing to permit him access" to court files – under *Young*. *Id.* at *2. *Kentucky Press Ass'n* declined to dismiss "because the amended complaint allege[d]" the clerk "enforce[d] the allegedly unconstitutional provisions" by denying access to "juvenile proceedings and records." 355 F. Supp. 3d at 856, 861. And *Hade* rejected the notion that a court executive "never acted or threatened to enforce" restrictions on access to complaints because Courthouse News offered "many factual allegations to the contrary," including that "when CNS asked OES for access …, OES sent a letter denying CNS access." 2022 WL 141532 at *3.

That holding applies equally here. Courthouse News alleges Lloyd's office "developed and maintains Missouri's eFiling System," JA 7-8; R. Doc. 1 at 2-3; Gilmer, "as Clerk, is responsible for … the administration of and access to … new civil petitions," *id.* at 11; R. Doc. 1 at 6; and "both … play critical roles in the development and execution of the policies and practices concerning and affecting press and public access to court records in Missouri, including … [those] resulting in delayed access to new e-filed civil petitions." *Id.* at 12-13; R. Doc. 1 at 7-8. As in *Hade*, Lloyd sent a letter, on behalf of herself and Gilmer, JA 35-36; R. Doc. 16 at 4-5, denying pre-processing access. JA 31; R. Doc. 1-2 at 1. Defendants are clearly enforcing procedures alleged to violate the First Amendment.

II.

DEFENDANTS CANNOT AVOID ABSTENTION'S LIMITS BY IGNORING *SPRINT*, AND CANNOT FIT THIS CASE INTO *SPRINT* OR *O'SHEA*

Defendants' argument in support of abstention helps explain why they turned to sovereign immunity for the first time on appeal.

Like the district court, Defendants do not mention the Supreme Court's most recent decision limiting *Younger* to "three 'exceptional' categories" that do not exist here. *Sprint Commc'ns*, 571 U.S. at 78. And unable to meet the "*Middlesex* factors," Defendants do not even articulate – let alone address – them, despite acknowledging all three must be "satisfied" even where "'exceptional circumstances'" exists. AB 41 (citing *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 551 (8th Cir. 2018)) (applying *Sprint* and *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423 (1982)).

Instead, Defendants apparently contend the filing of a petition is itself a state proceeding of the sort required for *Sprint*'s limitation of *Younger* and its progeny, such as *O'Shea v. Littleton*, 414 U.S. 488 (1974). AB 41-42. They cite no authority to support this theory, which has been roundly rejected and which cannot satisfy *Middlesex* or *O'Shea*, either. They thus are forced to fall back on policy arguments that misstate precedent and this case, and cannot in any event substitute for the missing requirements.

A. Filing A Petition Is Not A Proceeding For *Sprint* Or *O'Shea*

Defendants admit that to affirm abstention this Court must find the relief Courthouse News seeks would cause "'undue interference with state proceedings,'" AB 40 (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971), that are "presently ongoing,'" *id.* at 41 (quoting *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018), or "'will … occur.'" *Id.* at 42 (quoting same) & 45 (citing *O'Shea*, 414 U.S. at 501, and *Rizzo v. Goode*, 423 U.S. 362 (1976)).

But this presents Defendants with an insurmountable problem. As the court below and the Seventh Circuit conceded, in Courthouse News' cases "'there is no … state proceeding that plaintiffs seek to enjoin.'" Add. 15; JA 620; R. Doc. 47 at 15 (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1072 (7th Cir. 2018)).

While the district court and *Brown* abstained anyway on the theory that comity and federalism alone support abstention even where elements required by *Younger* and *O'Shea* do not, they did not mention *Sprint* or address its requirements (or *Middlesex*). Defendants do not mention *Sprint*, either, but they cannot escape its requirements because, in *Sprint*, which was decided long after "both its decisions in *O'Shea* and *Rizzo*, the Supreme Court clarified that *Younger* applies ***only*** to … three carefully defined categories of cases …, 'but no further,'" and all three require an underlying "'proceeding.'" *Price*, 2021 WL 5567748 at *7.

Defendants therefore came up with a new theory for this appeal that the requirement of an underlying state proceeding is satisfied in Courthouse News' cases by the submission of the new petitions to which it seeks timely access. AB 41-43.[4]

Defendants cite no case holding the mere filing of a pleading like a petition constitutes a proceeding for *Sprint* and *O'Shea*. That is no doubt because – while filing a complaint is "a significant matter of record," *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 140 (2d Cir. 2016), and "contemporaneous" access at filing is "important" – complaints are often "withdrawn or cause the parties to settle before any judicial action is taken" or proceedings are held. *Schaefer*, 2 F.4th at 328; *Planet III*, 947 F.3d at 591 (some "complaints ***never*** come up for judicial evaluation") (emphasis in original); *Bernstein*, 814 F.3d at 140 (case settled 13 days after filing).

It is therefore not surprising that in every similar case, except *Brown* and the court below, when abstention was raised it was quickly

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[4] Defendants do not explain their theory. They claim this case seeks to "compel the State to take action in ***every*** state court proceeding," AB 42 (emphasis in original), but a one-time policy change requires no further action, let alone in any proceeding. They contend petitions are "pending proceedings" while awaiting acceptance, citing *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and future proceedings under *Oglala Sioux* because new ones will be filed. AB 42-43. But neither suggest access to petitions involves proceedings, "ongoing or future," let alone would interfere with them. *Courthouse News Serv. v. Schaefer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019), *aff'd*, 2 F.4th 318 (4th Cir. 2021).

rejected because "'there is no state court proceeding" and a lawsuit seeking only timely access to new complaints "'is not within the three 'exceptional' cases warranting *Younger* abstention.'" *Price*, 2021 WL 5567748 at *8 (quoting *Schaefer*, 429 F. Supp. 3d at 206); *Planet III*, 947 F.3d at 591 n.4 (citing *Courthouse News Serv. v. Planet*, 750 F.3d 776, 790-92 (9th Cir. 2014) (rejecting *O'Shea*) ("*Planet I*")); *Gabel*, 2021 WL 5416650 at *12-13; *Courthouse News Serv. v. N.M. Admin. Off. of Courts*, 2021 WL 4710644, *36 (D.N.M. Oct. 8, 2021) (rejecting abstention because "the requested injunction would not interfere with an ongoing state judicial proceeding"); *Courthouse News Serv. v. Tingling*, 2016 WL 8739010, 47-48 (S.D.N.Y. Dec. 16, 2016) (pdf pagination) (citing *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 101 (2d Cir. 2004) (rejecting abstention where newspaper sought access under First Amendment to state court docket sheets because there was no state proceeding in which that constitutional issue could be raised)).[5]

Even if filing of (or access to) a petition could be considered a proceeding, it would not fall within any of the "three 'carefully defined'" proceedings in which "*Younger* abstention is appropriate." *Price*, 2021 WL 5567748 at *6 (quoting *New Orleans Pub. Serv., Inc. v. Council of*

[5] *See also Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 319 (1st Cir. 1992) (rejecting *Younger* abstention where journalist sought First Amendment access to "future preliminary hearings of third-person criminal defendants," not involving plaintiff or his associates).

City of New Orleans, 491 U.S. 350, 359 (1989) ("*NOPSI*")). With respect to the first two, the mere filing of a civil petition is neither an "ongoing state criminal prosecution[,]" nor a "civil enforcement proceeding," *id.*, of the sort "'akin to a criminal prosecution.'" *Sprint*, 571 U.S. at 80.

Filing a petition also does not constitute a "pending civil proceeding 'involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Price*, 2021 WL 5567748 at *6 (quoting *Sprint*, 571 U.S. at 78). Defendants do not dispute this, AB 43, and even say "Clerks serve ***ministerial*** purposes" – not a judicial function – when they "accept" and "'file cases as they arrive.'" AB 34 (quoting *Whole Woman's Health*, 142 S. Ct. at 532); *N.M. Admin. Off. of Courts*, 2021 WL 4710644 at *35 (access to complaints implicates "operating procedures of clerks," not "courts' ability to perform judicial functions"). As "the rate at which local clerks release filings is not … 'uniquely in furtherance' of a court's judicial function," the "requested relief would not inhibit a court from resolving cases or enforcing its orders." *Schaeffer*, 429 F. Supp. 3d at 207.

As that holding illustrates, filing a petition does not meet the *Middlesex* factors, either. *Middlesex* requires that "the state proceeding (1) is judicial in nature, (2) implicates important state interests, and (3) provides an adequate opportunity to raise constitutional challenges" of the sort asserted in this case. *Minnesota Living*, 899 F.3d at 553 (citing *Middlesex*, 457 U.S. at 432). Defendants do not identify or address the

first and third, and their argument with respect to the second is both inaccurate[6] and irrelevant because abstention is only appropriate if "all three of the *Middlesex* criteria are met." *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1047 (8th Cir. 1997).

The administrative task of processing petitions, AB 34, and Courthouse News' request for a change, is "not 'judicial in nature.'" *Planned Parenthood*, 126 F.3d at 1048; *N.M. Admin. Off. of Courts*, 2021 WL 4710644 at *35 ("Because Courthouse News does not seek to interfere with the substance of even a single state court proceeding, an injunction affecting only the speed of the State's processing of civil complaints would not 'interfere with an ongoing state judicial proceeding.'"); *Lautenbaugh v. Nebraska State Bar Ass'n*, 2013 WL 12159090, *3 (D. Neb. Feb. 4, 2013) ("The Nebraska Supreme Court's consideration of the plaintiff's petition for a rule change is in the nature of a legislative inquiry, not a judicial one."). And e-filing a petition provides no opportunity for Courthouse News "'to raise the federal constitutional claim advanced in [this] … lawsuit,'" *Schaeffer*, 429 F. Supp. 3d at 205, as its claim for access must be decided ***before*** a petition is submitted and withheld.

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[6] "[M]aking certain that confidential information remains confidential" may be "one of the highest state interests," AB 43, but is ***not*** implicated here. Mo. S. Ct. Op. R 2.02 ("clerk … 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").

B. Defendants' Concerns Are Not Implicated Or Sufficient

Unable to explain how access to petitions promptly after receipt, and long before any proceedings in the underlying case are held, could fall within any of the "exceptional circumstances" identified in *Sprint* ***and*** all three *Middlesex* factors, Defendants spend two-thirds of their abstention argument contending the federalism and comity concerns underlying *Younger*, *O'Shea* and *Rizzo* support dismissal. AB 44-54.

This argument proves both too little and too much.

It proves too little because *O'Shea* and *Rizzo* are also a "less-than-perfect fit." Add. 16; J.A. 621; R. Doc. 47 at 16. *O'Shea* extended *Younger* to where plaintiffs "seek 'an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials.'" *Oglala Sioux*, 904 F.3d at 611 (quoting 414 U.S. at 500). *Rizzo* extended *O'Shea*'s "principles of federalism" to "a state civil proceeding." 423 U.S. at 365, 380 (rewriting procedures for "'handling of citizen complaints'" against police).

O'Shea and *Rizzo* therefore do not apply for the same reason as *Younger*: an order allowing access to petitions promptly after filing, "would not invade any state court proceedings, ongoing or future." *Schaeffer*, 429 F. Supp. 3d at 207, *aff'd*, 2 F.4th at 324-25 & n.2; *Planet III*, 947 F.3d at 591 n.4; *Planet I*, 750 F.3d at 790-92; *Price*, 2021 WL 5567748 at *8; *Gabel*, 2021 WL 5416650 at *12; *N.M. Admin. Off. of Courts*, 2021 WL 4710644 at *37; *Tingling*, 2016 WL 8739010 at 47.

As this case "'does not fit'" the requirements to abstain under *Younger*, *O'Shea* or *Rizzo*, Add. 15; J.A. 620; R. Doc. 47 at 15, policy concerns alone cannot support abstention. Decisions "to abstain 'must fit within the specific limits prescribed by the particular abstention doctrine invoked,' and … a court 'necessarily abuses its discretion when it abstains outside of the doctrine's structures.'" *Price*, 2021 WL 5567748 at *7 (quoting *Webb v. B.C. Rogers Poultry*, 174 F.3d 697, 701 (5th Cir. 1999)); *Schaefer*, 2 F.4th at 325 n.2; *Rocky Mtn. Gun Owners v. Williams*, 671 F. App'x 1021, 1024 (10th Cir. 2016) ("'principles of equity, comity, and federalism have little force in the absence of a pending state court proceeding'") (quoting *Steffel v. Thompson,* 415 U.S. 452, 462 (1974)); *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983); *Gabel*, 2021 WL 5416650 at *13 (citing *Bethphage Lutheran Serv. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992)); *see Melahn v. Pennock, Inc.* 965 F.2d 1497, 1505 (8th Cir. 1992) ("the Court ha[s] 'carefully defined … the areas in which such "abstention" is permissible, and it remains "the exception, not the rule"'").

Defendants' reliance on the policies supporting abstention also proves too much because those concerns are not implicated where, as here, the case does not fit the requirements for abstention.

The concerns Defendants hypothesize would not "interfere with the day-to-day conduct of state trials." *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980). But "monitoring of the manner in which the state …

judges conduct[] … hearings," *id.*, is necessary to create the "'federal interference'" warranting abstention, *Oglala Sioux*, 904 F.3d at 612 (quoting *Parker*, 616 F.2d at 8), by "'"unduly inhibit[ing] the legitimate functioning of the individual state's judicial system."'" AB 46 (quoting *Oglala Sioux*, 904 F.3d at 612); *Family Div. Trial Laws. v. Moultrie*, 725 F.2d 695, 703 (D.C. Cir. 1984) ("day-to-day" monitoring).

Defendants claim a ruling for Courthouse News would "interfere[] with the Missouri Supreme Court's 'supervisory authority over all courts,'" and the presiding circuit judge's "'general administrative authority.'" AB 46-47. But that is neither relevant nor likely.

Proper analysis of *O'Shea* and *Rizzo* focuses on the relief sought. *Planet I*, 750 F.3d at 790 ("*O'Shea* abstention is inappropriate where the requested relief may be achieved without an ongoing intrusion into the state's administration of justice, but is appropriate where the relief sought would require the federal court to monitor the ***substance of individual cases*** on an ongoing basis to administer its judgment").

Courthouse News seeks a declaration that Defendants' "policies and practices that knowingly affect delays" violate the First Amendment, and an injunction against them. JA 25-26; R. Doc. 1 at 20-21. This "remedy" is "'akin to [a] bright-line finding'" that does not implicate *O'Shea* and *Rizzo* because it "does not require the piecemeal disruption to and intervention in state proceedings." *Gabel*, 2021 WL 5416650 at *12 (quoting *Planet I*, 750 F.3d at 791).

Nor would this remedy interfere with the Missouri Supreme Court or presiding circuit judge's administration of the courts, at least not in any way Missouri's Constitution and Rules do not contemplate. They say the Supreme Court may appoint a state courts administrator – who operates the state court automation system, Mo. S. Ct. Op. R. 1.03 – and that the "rules relating to practice, procedure and pleading" shall "not change substantive rights." Mo. Const. Art. V, §§ 4(2) & 5.

The rule Defendants cite says "'[w]hen a court accepts an electronic document for filing[], the electronic document is the official court record.'" AB 18 (quoting Mo. S. Ct. R. 103.03(a)). Defendants purport to enforce that rule by denying access until after processing, but courts can and do allow access before documents are processed and accepted as official. *Planet I*, 750 F.3d at 781 (citing examples); *Gabel*, 2021 WL 5416650 at *18 (enjoining denial of access until clerk "complete[s] a pre-access review process"). And Defendants can accept petitions before processing them, as the rules do not require clerks to ensure "confidential information remains confidential." AB 43. Indeed, they say the opposite: clerks are "not required to review" to "confirm that the party has omitted personal information," and "shall not refuse to accept or file the document on that basis." Mo. S. Ct. Op. R. 2.02.

The "'simple measures'" available to provide relief are thus ***not*** limited to "paper" complaints. AB 48; *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 560-61 (E.D. Va. 2020) (clerks improved

access to paper and e-filed complaints), *aff'd*, 2 F.4th 318 (4th Cir. 2021); *Gabel*, 2021 WL 5416650 at *15 (e-filing); *Tingling*, 2016 WL 8739010 at 46-47 (same). For example, Defendants "could adopt the policy and practice followed by the vast majority of federal courts and many state courts, which set up their e-filing portals to automatically release non-confidential civil petitions to the press or public when they are received." *Price*, 2021 WL 5567748 at *2. Or they could "simply print[] out new e-filed complaints as they c[o]me in." *Courthouse News Serv. v. Brown*, 2018 WL 318485, *1 (N.D. Ill. Jan. 8, 2018).[7]

It is inconceivable such relief would "add[] practical and logistical compliance issues" to any serious degree. AB 47. Even if it did, those concerns do not intrude on proceedings cognizable in the abstention analysis. *Planet I*, 750 F.3d at 790-91 (action alleging "'average court delays'" violated speedy trial right and seeking more judges did not justify *O'Shea* abstention "even though it would 'inevitably require restructuring' of the superior court" because it would not intrude on hearings) (describing *L.A. Cty. Bar Ass'n v. Eu,* 979 F.2d 697 (9th Cir. 1992)); *Tarter v. Hury*, 646 F.2d 1010, 1013-14 (5th Cir. 1981) ("*O'Shea* rubric does not apply" because "enforcement of an injunction requiring clerks to file all pro se motions would not require … interruption of state criminal processes"); *Price*, 2021 WL 5567748 at *7 ("notions of

[7] Reversed on abstention grounds, 908 F.3d 1063 (7th Cir. 2018).

federalism and comity derived from … *Younger*, *O'Shea* and *Rizzo*" inapplicable because "'compliance with the district court's order can be fully accomplished and evaluated before any actual proceedings'") (quoting *Ciudadanos Unidos De San Juan v. Hidalgo Cty. Grand Jury Comm'rs*, 622 F.2d 807, 830 n.49 (5th Cir. 1980)).

In sum, Defendants rely on comity and federalism concerns unlinked to any interference in actual proceedings, or to the ability of Courthouse News to raise its First Amendment right in a case initiated by the petitions to which it seeks access. That is not enough. *Walker v. Wegner*, 624 F.2d 60, 62 (8th Cir. 1980) ("Since the Federal action herein challenges the First Amendment validity of the very statute that authorizes the administrative proceeding in the first place, appellees would not be afforded an adequate opportunity to adjudicate their claims if forced to proceed through the State administrative process. Therefore, even were we to concede that the administrative action here is a 'pending state proceeding' under *Younger*, which we do not, the available 'remedy' is not an adequate remedy at law."); *supra* at 17.

Moreover, Defendants presented ***no evidence*** for their assertions. Courthouse News alleged, and provided evidence showing, a remedy can be and has been provided without undue interference. *See* AOB 33-34.[8]

[8] While the Facts and Background section in the decision below may have "recit[ed] allegations" in the complaint, AB 38 n.7, the Discussion section failed to address them, let alone "'accept [them] as true." AB 38.

But neither it nor this Court can assess Defendants' concerns over remedies until discovery. That is why "it is generally error in cases like these to order dismissal on the pleadings because the court could not from the outset define an appropriate remedy." *Ciudadanos Unidos*, 622 F.2d at 827. Just so, concerns over whether an injunction would disrespect "state courts['] … prerogative to manage their own affairs," AB 49, did not support abstention in the very case Defendants cite.

The *Schaefer* court issued declaratory relief, but found federalism concerns weighed against an injunction. 440 F. Supp. 3d at 561. That was only after it found those concerns did not justify abstention, 429 F. Supp. 3d at 206-07, and the clerks then "produced dramatic improvements in access" that "substantially complied" with the First Amendment. 440 F. Supp. 3d at 550, 564.

There was no evidence the clerks would have complied unless compelled by the lawsuit, *id.* at 562, or had the court agreed that "*O'Shea*, *Rizzo*, and *Brown* … require abstention." 429 F. Supp. 3d at 207. But that court correctly concluded "[f]ederalism 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," *id.*, and the Fourth Circuit affirmed. 2 F.4th at 324-25 & n.2. This Court should reach the same conclusion.

III.

DEFENDANTS' FINAL ARGUMENT ALSO FAILS, AS THE COMPLAINT ALLEGES FACTS SHOWING, AND COURTS HAVE FOUND, THE FIRST AMENDMENT RIGHT OF ACCESS ATTACHES ON PETITION' RECEIPT

Defendants start with a red herring, as this case does not ask whether "courts violate the Constitution unless they provide the press with access to [petitions] before a clerk accepts the filing." AB 2. Rather, it asks whether court clerks violate the Constitution by denying access to half of all new civil petitions for a week or longer after receipt, without a compelling justification for doing so and despite the existence of readily available alternatives. JA 7-8, 20-24; R. Doc. 1 at 2-3, 15-19.

The court below avoided this question by abstaining. Defendants invite this Court to avoid it on a different ground by deciding that, as a matter of law, the First Amendment does not apply to civil petitions at all, or, alternatively, only applies after court staff process and accept them. AB 54-59. Defendants barely referenced this argument below, JA 167, 172; R. Doc. 28 at 3, 8, and the district court did not address it. Because this appeal arises from judgment on the pleadings, Defendants "ha[ve] the burden of 'clearly establish[ing] that there are no material issues of fact and that [they are] entitled to judgment as a matter of law.'" *Levitt v. Merck & Co.*, 914 F.3d 1169, 1171 (8th Cir. 2019). This Court "view[s] all facts pleaded by [plaintiff] as true and grant[s it] all reasonable inferences." *Id.*

This Circuit "has not decided whether there is a First Amendment right of public access to the court file in civil proceedings," but has held the existence of that right "depend[s] upon two prerequisites: '(1) a historical tradition of accessibility, and (2) a significant positive role for public access in the functioning of the judicial process in question.'" *Flynt v. Lombardi*, 885 F.3d 508, 512 (8th Cir. 2018) (quoting *IDT*, 709 F.3d at 1224 n.* (citing *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*")).[9] Or, as it is called, the "experience and logic" test. *Press-Enterprise II*, 478 U.S. at 9.

Courthouse News has alleged facts showing both a tradition of accessibility to complaints when received by the court and that access plays a significant positive role. JA 7, 15-23; R. Doc. 1 at 2, 10-18. For this reason, "each federal court to reach this question ha[s] found that the First Amendment applies" to "newly-filed civil complaints." *Schaefer*, 440 F. Supp. 3d at 555. That includes the Second, Fourth and

[9] In *IDT*, this Circuit vacated the denial of a motion to unseal a complaint based on the common-law right of access, 709 F.3d at 1224, and declined to adopt the "alternative contention" that a First Amendment right of access applied. *Id.* at 1224 n.*. It did so because, unlike Courthouse News, the party seeking access "ha[d] not established" – indeed, had not even mentioned – the *Press-Enterprise II* experience and logic test. That party devoted two sentences to the First Amendment in its opening brief, Intervenor-Appellant's Opening Brief, *IDT Corp. v. eBay*, 2011 WL 5357197, *11-12 (8th Cir. Oct. 26, 2011), and did not mention it in its reply. Intervenor-Appellant's Reply Brief, *IDT Corp. v. eBay*, 2011 WL 6779156 (8th Cir. Dec. 13, 2011).

Ninth Circuits, *Bernstein*, 814 F.3d at 141; *Schaefer*, 2 F.4th at 326-27; *Planet III*, 947 F.3d at 591, and district courts in three others. *N.M. Admin. Off. of Courts*, 2021 WL 4710644 at *38; *Brown*, 2018 WL 318485 at *4; *Courthouse News Serv. v. Jackson*, 2010 WL 11546125 (S.D. Tex. Mar. 2, 2010); *see also, e.g., Gabel*, 2021 WL 5416650 at *10.

Courthouse News' allegations and the foregoing authorities thus preclude judgment on the pleadings premised on a supposed lack of a First Amendment right to civil petitions, before processing or otherwise.

Defendants try in vain to avoid this result by contending a history of press access does not support public access. They agree Courthouse News alleged (and, on its preliminary injunction motion, proved) the St. Louis Circuit Court historically allowed reporters to see petitions after submission and before processing, AB 20, 56-57, but suggest, without support, that does not show historical access for the public. AB 57.

Defendants are mistaken. As they note elsewhere, AB 55, First Amendment law does not distinguish between the press and public, except to acknowledge "people now acquire" information about courts "chiefly through the print and electronic media," and thus the press "function[] as surrogates for the public." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) ("While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard."); *accord Nixon v. Warner*

Commc'ns, 435 U.S. 589, 609 (1978) ("press serves as the information-gathering agent of the public"). Simply put, "[t]he general public has the same right of access as does the media." *Planet I*, 750 F.3d at 788.

Defendants also err in suggesting the right of access excludes petitions e-filed but not yet "accepted." AB 57-58. Several courts have rejected this theory. *Planet III*, 947 F.3d at 588, 594 (affirming ruling that "right to timely access attaches at the moment of filing, i.e., when the complaint is received by the court"); *Courthouse News Serv. v. Cozine*, 2022 WL 593603, *5-7 (D. Or. Feb. 14, 2022) (denying summary judgment premised on argument that First Amendment does not attach until complaint "accepted"); *Gabel*, 2021 WL 5416650 at *13.

Moreover, Courthouse News alleged facts showing both experience and logic in access to petitions received by the court, regardless of what clerical processing might later occur. *See, e.g.*, JA 15-16; R. Doc. 1 at 10-11 ("Courthouse News could see new petitions filed each day … before they were processed or docketed."); JA 19-20; R. Doc. 1 at 14-15 ("When a petition is withheld from the public, it leaves the public unaware that a claim has been leveled and that state power has been invoked."); JA 21-22; R. Doc. 1 at 16-17. At the pleading stage, at least, Defendants' argument cannot save the dismissal.

Defendants are also wrong in supposing petitions processed and "accepted" are somehow categorically different from those e-filed but sitting in an electronic queue awaiting clerical attention. In Missouri,

"[a] civil action is commenced by filing a petition with the court." Mo. S. Ct. R. 53.01. "A pleading is deemed filed ***when it is received*** by the clerk," and "the clerk receives an electronic document when the filing is received by the electronic filing system." *State ex rel. Isselhard v. Dolan*, 465 S.W.3d 496, 499 (Mo. Ct. App. 2015) (citing *Vogl v. State of Missouri*, 437 S.W.3d 218 (Mo. 2014)). *Isselhard* wrote "to provide guidance upon the recurrence of this and similar issues with electronic filing," *id.* at 498, and its conclusion was based on the very rule – Mo. S. Ct. R. 103.06(e)-(f) – Defendants cite for their assertion that a document is not "considered filed" until it is accepted, AB 18-19.

Nor does Mo. Sup. Ct. R. 103.03 support the theory that a petition awaiting "acceptance" has not been "filed." This rule, which predates *Isselhard*, concerns document preservation. Subsection (b) says if courts digitize "a document that is filed in paper," the electronic version is "the official court record." That does not mean the paper version was not filed; it means "[t]he court may then destroy the paper document."[10]

Absent some "clear prohibition," which Defendants do not cite, a clerk is "obligated to accept the filing" once received. *State of Missouri v. Ess*, 453 S.W.3d 196, 201 (Mo. 2015) (en banc); *Isselhard*, 465 S.W.3d

[10] Even absent controlling state law, "the labels and terminology a state court employs to identify different parts of the filing process cannot have a determinative effect on ***when*** the First Amendment right of access attaches." *Cozine*, 2022 WL 593603 at *7 (emphasis in original).

at 499 (clerk erred in rejecting filing for failure to properly complete e-filing form). Defendants are thus left with the unsupported notion that an e-filer might withdraw a petition before a clerk accepts it. AB 58. But they do not explain how that unlikely possibility could justify withholding access to all petitions, the vast majority of which are presumably accepted once court staff has time to process them.[11]

To the extent the "Fourth Circuit disagreed," AB 57, it was with Defendants' position. The Fourth Circuit agreed experience and logic supports a right of "contemporaneous" access – ""'the same day on which the complaint is filed, insofar as is practicable;" and when not practicable, on the next court date.'" *Schaefer*, 2 F.4th at 327-28. It also agreed the reasons for contemporaneous access are "especially true given that ***some complaints are withdrawn***." *Id.* at 328.

In Defendants' view, a petition filed for settlement leverage should remain forever secret from the public as long as the tactic succeeds and the petition is withdrawn in the days or weeks before clerks process it. The law is to the contrary: "'When a complaint is filed, and the authority of the people … is thereby invoked, even if only as a threat to induce settlement, the American people have a right to know that the

[11] The percentage of petitions accepted is among the facts Courthouse News should be allowed to develop. *Gabel*, 2021 WL 5416650 at *15 ("minute fraction" of rejected complaints "demonstrates that the pre-access review process [was] not 'essential to preserve higher values'").

plaintiff has invoked their power to achieve his personal ends." *Planet III*, 947 F.3d at 592–93 (quoting *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 2016 WL 1071107, *9 (S.D.N.Y. Mar. 18, 2016), *aff'd*, 814 F.3d 132 (2d Cir. 2016)). Indeed, the withdrawal or rejection of a filing might itself be a matter of controversy and public interest. *See Vogl*, 437 S.W.3d at 225-226; *Isselhard*, 465 S.W.3d at 497-99.

Finally, Defendants misconstrue the observation in *Planet III* that "[t]he First Amendment does not require courts … to set aside their judicial operational needs to satisfy" the press. 947 F.3d at 596. This passage introduces the ***second*** stage of the *Press-Enterprise II* analysis, which asks whether there is "a 'substantial probability' that [defendant's] interest in the fair and orderly administration of justice would be impaired by immediate access, and … that no reasonable alternatives exist to 'adequately protect' that government interest." *Id.* (quoting 478 U.S. at 14). This second stage embodies the "qualified" nature of the First Amendment right: defendants may sometimes show that, as a factual matter, access restrictions are necessary.

Despite its "substantial interest in the orderly administration and processing of new complaints," the *Planet* defendant's policy of denying access until after processing failed this second stage of *Press-Enterprise II*. *Id.* at 596-98. Courthouse News alleges Defendants can easily allow timely access, as do other courts across the country. JA 7, 21-23; R. Doc. 1 at 2, 16-18. On remand, Defendants will have the opportunity to

prove they are uniquely incapable of providing contemporaneous access without sacrificing the orderly administration of justice, but that question cannot be resolved on the pleadings.

CONCLUSION

In the end, Defendants ask this Court to hold the federal Constitution has no say whatsoever in when state courts make case-initiating documents available, even if that takes days or weeks. But as case after case has held, it is not difficult for clerks to satisfy the First Amendment right of access; they simply need to stop withholding access, which impacts no actual proceedings in state court. The dismissal to the contrary should be reversed and the case remanded.

Respectfully submitted,

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March 10, 2022

CERTIFICATE OF COMPLIANCE

On March 1, 2022, the Court granted in part Appellant's motion to file this Reply Brief in excess of the limits set forth in Federal Rule of Appellate Procedure 32(a)(A) and (B) and ordered that this Reply Brief could contain 7,500 words. I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that this Reply Brief of Appellant was prepared using Microsoft Word 2010, in 14-point Century Schoolbook font, and that it contains 7,494 words, as determined by the Microsoft Word 2010 word-counting system.

I also certify, pursuant to Eighth Circuit Rule 28A(h)(2), that the electronic version of this brief has been scanned for viruses and is virus-free.

/s/ *Roger Myers*

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2022, I submitted an electronic version of this Reply Brief of Appellant 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 that this Reply Brief has been accepted, one paper copy of this Reply Brief will be served on counsel for all other parties in this case.

/s/ *Roger Myers*