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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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COURTHOUSE NEWS SERVICE,  
Appellant,

v.

Case No.

JOAN M. GILMER, IN HER OFFICIAL  
CAPACITY AS THE CLERK OF THE  
CIRCUIT COURT OF ST. LOUIS  
COUNTY, MISSOURI AND KATHY  
LLOYD, IN HER OFFICIAL CAPACITY  
AS STATE COURTS ADMINISTRATOR  
FOR THE MISSOURI OFFICE  
OF STATE COURTS ADMINISTRATOR,  
Appellees.

21-2632

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ORAL ARGUMENT

DATE: Thursday, April 14, 2022  
BEFORE: Honorable Bobby Shepherd  
Honorable Ralph Erickson  
Honorable David Stras



1           JUDGE Shepherd: All right. Just a moment,  
2 counsel. All right, Ms. Smith, you may proceed.

3           MS. SMITH: Thank you, Your Honor. Good morning.  
4 And may it please the court, Barbara Smith, for Appellant,  
5 Courthouse News.

6           The appellees in this case have managed to touch  
7 on the constitutional buzzwords of federalism, comity,  
8 abstention, and the Supreme Court's recent abortion  
9 jurisprudence. But what each of those arguments ignores is  
10 the constitutional right actually at issue in this case,  
11 which is to say the First Amendment, and I'm sure we'll  
12 spend some time this morning clearing through the smoke  
13 raised by these other arguments, but I do hope the court  
14 will also address the constitutional fire in the room.

15           Starting as the appellee does for the first time  
16 on appeal with the sovereign immunity argument. I think  
17 we're squarely within the confines of *Ex parte Young*,  
18 particularly as this court has described that inquiry in  
19 cases like *McDaniel*, where it said this is a  
20 straightforward inquiry, and the only thing the court is  
21 asking is whether the allegations in the complaint allege  
22 an ongoing violation of federal rights, and, two, whether

1 the remedy sought is prospective rather than backward  
2 looking. We meet both of those requirements here, and so I  
3 think there's no question sovereign immunity doesn't apply.

4           Nothing about the Supreme Court's recent  
5 emergency decision in *Whole Woman's Health* changes that,  
6 and I don't think the Court was purporting to limit the  
7 scope of *Ex parte Young* to categorically exclude from that  
8 doctrine, court clerks. If that's what it were doing, it  
9 would have said so. And there are numerous other cases in  
10 which court clerks and court personnel are properly named  
11 as defendants when they're exercising roles that are that  
12 are not judicial in nature, that are administrative or  
13 enforcing policies that violate constitutional rights in  
14 other ways.

15           So, I think the *Ex parte Young* argument is a bit  
16 of a red herring. And moving to the core of the court's  
17 decision below, which is whether the federal District Court  
18 should abstain from cases like this, I think the Supreme  
19 Court's most recent description of the abstention doctrines  
20 in *Sprint* makes clear that federal courts have an  
21 unflagging obligation to exercise federal jurisdiction  
22 where it lies.

1           Every 1983 case that alleges a violation of  
2 federal constitutional law under color of state action is  
3 going in some respects to interfere with state processes.  
4 But that doesn't mean that federal courts have an  
5 obligation or even an option to abstain in those  
6 circumstances, unless one of the narrowly construed buckets  
7 of *Younger* or one of the other narrowly construed  
8 abstention doctrines is met.

9           JUDGE STRAS: On the *Sprint* question. There is  
10 some broad language in that Supreme Court opinion, but  
11 having sat on a state supreme court for a number of years,  
12 this goes to the very heart of what state supreme courts  
13 do. We make decisions, we made decisions, like what the e-  
14 filing system would look like, what the procedural rules  
15 would be. And so, in effect, perhaps, we would be telling  
16 the state supreme court because you did -- there was a  
17 request me to the State Court Administrator which works for  
18 the state Supreme Court, it'd be telling a state Supreme  
19 Court what procedural rules they need to have within their  
20 court system. And that seems to me, even if it's not  
21 technically covered under *Younger* and some of the others,  
22 to go to the very heart of some of the concerns in those

1 cases.

2 MS. SMITH: Respectfully, Your Honor, that's not  
3 the type of relief we're seeking in this case. We're  
4 seeking a simple declaration that the procedure that the  
5 state court has opted to adopt violates federal  
6 constitutional law, and a simple injunction saying comply  
7 with federal constitutional law. The processes, the  
8 procedures, the rules, that the court clerk opts to utilize  
9 to comply with that injunction are totally within her  
10 power. So, there's nothing about the injunctive relief  
11 here that would lead to any sort of intrusion on state  
12 sovereignty or any ongoing audit --

13 JUDGE STRAS: I'm not sure that's right. I mean,  
14 I only have experience in Minnesota, maybe Missouri is  
15 different. But when questions like this arose, we all sat  
16 around the table and talked about these questions, said  
17 here's how we're going to have the e-filing system, here  
18 we're going to require the court clerk to accept it. So,  
19 these are all decisions made at the highest level of the  
20 State Judiciary, and so I just don't, I don't think your  
21 description of what's happening is actually correct, unless  
22 you tell me Missouri is different.

1 MS. SMITH: Well, respectfully, Your Honor, I  
2 think we could talk about hypothetically what the  
3 injunctive relief in this case could look like. Or the  
4 court could look to the other cases that have raised this  
5 question, including against state courts with their own  
6 homegrown e-filing systems. And in none of those cases in  
7 which injunctions have been entered, has there been any  
8 allegation that there's an ongoing federal audit of state  
9 courts.

10 In fact, I think federal district court judges  
11 have been particularly cognizant of the federalism concerns  
12 encompassed within, you know, introducing injunctive relief  
13 in cases like this. And so, they take into account how  
14 state court clerks are trying to comply with the First  
15 Amendment when they --

16 JUDGE STRAS: Well, let's change it a little bit.  
17 So, let me give you a hypothetical. Suppose that a state  
18 court rule said we're not going to hear -- you can file a  
19 complaint and then it sits there for a year and we don't  
20 require any answer for a year or 2 years or whatever and  
21 you bring a procedural due process claim and you ask for an  
22 injunction, which I think is somewhat similar here to this

1 case, we would then be telling the state court, "No, you  
2 have to require an answer within a month, so that the  
3 plaintiff gets procedural due process." Do you think that  
4 that would infringe on state sovereignty and the state  
5 court system?

6 MS. SMITH: Well, let me just make clear the  
7 scope of the constitutional right I think is at issue here.  
8 I represent a media company who is not seeking to litigate  
9 any of these cases in state court and doesn't have a dog in  
10 the fight on the question how long a litigant should take  
11 to respond to a complaint. The only argument they're  
12 making is that when these complaints are filed, their  
13 public judicial records entitled to First Amendment access  
14 --

15 JUDGE STRAS: You're not answering my question.

16 MS. SMITH: Well, respectfully, Your Honor. I  
17 think it's important that what we're seeking here isn't an  
18 injunction against any particular state court rule in terms  
19 of timing or procedure. We're just asking for access to  
20 the complaints.

21 JUDGE STRAS: Okay. So, I'm going to press you  
22 because you're still not answering my question, which is,



1 suppose there were a state court rule that said civil  
2 actions cannot be released to the public, it's actually in  
3 a rulebook.

4 MS. SMITH: Okay.

5 JUDGE STRAS: Cannot be civil -- until a clerk  
6 has looked over the document and figured out whether it  
7 complies with the filing rules. And you would be  
8 challenging -- so that's in a written rule, same outcome or  
9 different outcome?

10 MS. SMITH: Well, so, I want to make sure I'm  
11 answering your question because I'm not trying to avoid it.  
12 The First Amendment allegation we're making here is, does  
13 withholding that complaint for processing violate the First  
14 Amendment. That's a merits question that I think a court  
15 would have to adjudicate after discovery and at summary  
16 judgment or trial, but in this posture, at the motion to  
17 dismiss stage, I think all we're required to do is allege a  
18 plausible claim. And I think it is a plausible First  
19 Amendment claim to say there's a process in this case of  
20 withholding until processing. In your example, there would  
21 be a written rule that mandated withholding.

22 And so, the First Amendment constitutional

1 question in that hypothetical case would be does that  
2 violate the First Amendment, does it meet the *Press-*  
3 *Enterprise II* scrutiny the Supreme Court has said applies  
4 when publicly filed judicial documents are withheld from  
5 the press. But that's not a question the court has to  
6 answer in this posture in this case.

7 JUDGE STRAS: Well, but that's what you're asking  
8 us to answer, which is, can that be adjudicated. And what  
9 you're telling us is if this was in a formal rule of court  
10 of a state court, this claim could still go forward under  
11 the First Amendment. Now you might be right about that.  
12 But I want you to understand that that is an exceptional  
13 thing for us to do to potentially have in a like case to  
14 enjoin a state procedural rule.

15 MS. SMITH: Respectfully, Your Honor. I think  
16 the injunction runs in this case against the court clerk  
17 who has a policy of withholding documents that are  
18 otherwise protected by the First Amendment. That's the  
19 plausible claim we've alleged. And there's nothing about  
20 entering that very simple injunction that infringes on any  
21 work of the state court.

22 JUDGE STRAS: Well, that's what the -- go ahead.

1           JUDGE ERICKSON: Let's step back for a moment  
2 because it sounds to me that this hypothetical has  
3 introduced this rule into this discussion. And the rule is  
4 different, you know, in the sense that, you know -- and I  
5 think there's a factual distinction that maybe you can make  
6 and maybe it's just not being made plainly. The problem I  
7 have with, if we have this hypothetical rule, and obviously  
8 what happens to the court is that we are directing a state  
9 Supreme Court to somehow modify its rules, and that would  
10 be an exceptional thing for us to do.

11           Now, if it's merely a policy, and a policy is  
12 kicking around inside a, you know, county or district  
13 clerk's office, right, it's a different animal factually.  
14 And the risk that you run is that by having this  
15 conversation that Judge Stras is having, you could run a  
16 risk that you've moved into this place where, well, what  
17 we're really doing is some sort of ad hoc balancing of the  
18 federal interests at play, and that ad hoc balancing really  
19 is not consistent with the abstention doctrine and it's --  
20 and *Younger* and its progeny, perhaps.

21           MS. SMITH: That's right.

22           JUDGE ERICKSON: Right. That's what you're

1 argument would be, right? You know.

2 MS. SMITH: That would be true in this case. And  
3 in, I think, Judge Stras' hypothetical.

4 JUDGE ERICKSON: Well, do you really think so?  
5 Because in Judge Stras' hypothetical, I think we're clearly  
6 saying at that point, that we've got a rule and we're going  
7 to try and mess with this rule and we're going to go and  
8 direct somebody to modify a rule, and that somebody is a  
9 state Supreme Court and there's a different balancing  
10 between what state Supreme Courts can do under their  
11 constitution. And listen, they're constitutionally  
12 empowered to have all the rules of procedure they want,  
13 smart ones, wise ones, dumb ones, they just can't have  
14 unconstitutional ones.

15 MS. SMITH: That's right.

16 JUDGE ERICKSON: Right? And so, that's kind of  
17 the way that works. And I think that -- I think it's a  
18 very -- it may be a very different animal. On the other  
19 hand, once we're down in here, and we're kind of mucking  
20 around with the way that the courts are operating, aren't  
21 we left with really just the First Amendment question to  
22 deal with right, because if we go into anything else, then,

1 I'll just preface this with that I am the most reversed man  
2 on *Younger* abstention cases in America. You can look it  
3 up.

4           But, you know, I just don't -- I don't see -- I  
5 think it really all is going to turn on what is on the  
6 weights at some point on the merit. And the question is,  
7 if we have it alive, what are we messing with here? You  
8 know, because we have some things we know that are clear,  
9 right? And forgive me for just musing. But on the  
10 outside, we know that, for example, if in fact we are  
11 directing a state trial court to do something directly in  
12 the -- on the merits with a pending case, that's a problem,  
13 right?

14           MS. SMITH: Because the state court is exercising  
15 a judicial function.

16           JUDGE ERICKSON: Exactly, right. But here what  
17 we're really doing, we're messing with the state court by  
18 telling them that, well, you have to have some procedure in  
19 place. And so, are we micromanaging that court in a way  
20 that is appropriate or not?

21           MS. SMITH: I absolutely think that District  
22 Court would not be micromanaging the state court clerk in

1 this case if a simple injunction or declaratory relief were  
2 entered. I think, as I suggested, the other cases that  
3 have litigated this question make that clear. Sometimes  
4 through the course of litigation, you know, rules change  
5 and processes change and when court clerks adapt their  
6 processes to conform with the First Amendment, District  
7 Court judges rightly take that into account. So, I hear  
8 the hypothetical that you're raising Judge Stras, and your  
9 thoughts, Judge Erickson, as well, as going to a concern  
10 about ongoing federalism and comity concerns as this case  
11 develops.

12           And I think, Judge Erickson, your decisions in  
13 cases like *Dixon* and *Postawko* make clear that when you get  
14 to the point of a District Court entering injunctive  
15 relief, the District Court judge still has to be cognizant  
16 of those concerns. And in some cases, injunctive relief  
17 may not be appropriate because a court clerk is actively  
18 trying to comply with the requirements of the First  
19 Amendment.

20           JUDGE STRAS: Well, let me -- you know, I'm going  
21 to press a little bit more because, you know -- and you may  
22 be right legally, you may be absolutely right that

1 abstention is different. But let me tell you, having -  
2 having—and I'm going to say this again, having sat on a  
3 state Supreme Court, interfering with a single state court  
4 proceeding is maybe a three on a scale of being annoyed  
5 that the federal courts are micromanaging the state courts.  
6 Interfering with the way we administer the state court  
7 system, you know, I don't do that anymore, is an 11, I  
8 mean, on a scale of 1 to 10, it's 11. So, if they're  
9 telling me what to do, given that we have an equal  
10 obligation to enforce the constitution, and maybe you'll  
11 tell me that doesn't matter, because *Younger* doesn't cover  
12 the situation. That's fine. You might be right under  
13 *Sprint*, but I got to tell you from a federalism and comity  
14 perspective, this is a -- this is asking for a huge  
15 infringement upon the state court system.

16 MS. SMITH: Respectfully, I don't think it's a  
17 huge infringement, and I would be sensitive to that if it  
18 were the case. Again, all we're asking for here is for the  
19 clerk herself to figure out how to comply with the  
20 constitution, if they want to adopt to this e-filing.

21 JUDGE STRAS: Is this statewide though? I mean,  
22 is this something that's happening only in St. Louis

1 County? You keep saying it's just this clerk, but it  
2 actually isn't just this clerk, it's the court systems that  
3 are making these decisions. Now maybe you'll tell me that  
4 that's not true, and it's only St. Louis County, but if  
5 it's a State Court Administrator, who is -- you asked  
6 whether you could have it early -- earlier, then you're  
7 talking about the entire state court system, you're talking  
8 about the Missouri Supreme Court.

9 MS. SMITH: The e-filing system is statewide. I  
10 think that the injunctive relief being sought here is  
11 sufficiently narrow, that it's a one-time fix. There's an  
12 order that says this violates the constitution, you've  
13 possibly alleged a constitutional right. And then through  
14 discovery and trial you proved that that is in fact a  
15 violation. I'm declaring that to be - I the district court  
16 judge declare that to be so, and I order the court clerk to  
17 comply with the constitution.

18 JUDGE STRAS: Single clerk or every clerk in  
19 Missouri?

20 MS. SMITH: Well in this case, it is the  
21 administrator of the courts. So, it's both -- it is both -

22 -



1           JUDGE STRAS: That's my point. If you're asking  
2 for the -- you're asking for it state-wide, the State Court  
3 Administrator works for the Supreme Court, the Supreme  
4 Court directs the State Court Administrator [what] to do,  
5 so you're not really just asking for injunctive relief for  
6 a single court employee.

7           MS. SMITH: Well we are asking for a one-time  
8 injunction that will fix the constitutional problem and  
9 therefore lead to no further meddling. It won't come up  
10 again and again and again, because there will be a simple  
11 fix to the way in which these documents are made available  
12 to the press and public as they're required --

13          JUDGE STRAS: Suppose. And I'm going to press you on  
14 that too, it's because suppose that you do get the  
15 declaration and the injunction. And instead of 2 weeks  
16 now, it takes a week, you're not going to run back to court  
17 and say, well, that's not good enough, it needs to be done  
18 within 1 or 2 days or 6 hours or 5 hours. Are we really  
19 talking about a structural injunction if the relief doesn't  
20 get you past the constitution, what in your view is a  
21 constitutional violation?

22          MS. SMITH: So, I think the length of the delay,

1 which here is extremely long, more than 50 percent of  
2 complaints are not available, even after a week, I think  
3 addressing that problem to shorten the delay is what *Press-*  
4 *Enterprise II* requires the court to do when after we get  
5 through the motion to dismiss its addressing discovery and  
6 the merits of the claim itself.

7           The government will have an opportunity to say we  
8 can't comply with anything that would require us to release  
9 these documents faster than X, Y or Z for these reasons,  
10 and if they can meet the strict scrutiny that *Press-*  
11 *Enterprise II* requires, the District Court has the  
12 opportunity to decide, you know, who wins this case, it  
13 comes up on appeal, and then this court can decide sort of  
14 whether the lengths of the delay are constitutional.

15           That's not a question you have to answer right  
16 now. All you have to answer right now is that we've  
17 plausibly alleged there could be a constitutional violation  
18 and can seek relief for that, because there is no clear box  
19 in *Younger* in which this case fits. The court can't  
20 abstain. And abstaining on the basis of federalism and  
21 comity writ large without tying it to one of the Supreme  
22 Court's clear abstention doctrines, I think makes a mess of

1 the unanimous decision in *Sprint*.

2 JUDGE STRAS: You might be right, and that's why  
3 I started out my question by talking about *Sprint*. My only  
4 point was, I don't think you can say honestly that this  
5 case is over with a simple injunction because if the  
6 injunction doesn't require it to be 1 day, 2 days, 3 days,  
7 and Missouri doesn't comply, we're going to be right back  
8 where we were. I mean, do you agree with that?

9 MS. SMITH: So, to the extent that what you're  
10 really concerned about is the injunctive relief as opposed  
11 to the declaratory relief, I'd encourage the court to look  
12 at the District Court's lengthy order in the *Schaefer* case,  
13 which ultimately decided in light of the federalism and  
14 comity concerns here, I don't need to abstain, but an  
15 injunction is not appropriate. Declaratory relief will  
16 redress the constitutional violation.

17 I think District Court judges can be careful  
18 about this and can be respectful of federalism and comity  
19 in the relief they impose based on the facts and  
20 circumstances of the case before them. Sometimes  
21 injunctions might be required, in this case, maybe one  
22 won't be. The question whether that injunction goes too

1 far is a question you can answer on appeal. It's not one  
2 you need to answer hypothetically now. And it certainly  
3 isn't one that should be the basis for abstaining from  
4 hearing the constitutional claim entirely.

5           Respectfully, it's not often I get to quote Chief  
6 Justice John Marshall in oral argument, but he said it  
7 would be akin to treason for a federal court to decline to  
8 hear a case over which it had jurisdiction. That is a  
9 long-standing and deeply rooted proposition of the very  
10 nature of federal courts. When you raise constitutional  
11 claims as we have here, federal courts have an obligation  
12 to decide them, and a free floating respect for comity or  
13 federalism cannot overcome that. I think that's what the  
14 Supreme Court has made clear in cases like *Sprint* and *NOPSI*  
15 and all of the other recent abstention cases it's decided.  
16 If the court will allow me, I'd like to reserve some time.

17           JUDGE SHEPHERD: Well, I've got a question, and  
18 this will be the easiest question posed to you this morning  
19 because it's a factual question. And it's about this  
20 Missouri Case.net service. Is it true that subscribers to  
21 the Missouri Case.net service have access to these  
22 pleadings immediately?

1 MS. SMITH: So, there is an allegation in the  
2 complaint that there's access provided to attorneys, but  
3 not provided to the press or the public. That's one aspect  
4 of the allegations of our -- in our complaint.

5 JUDGE SHEPHERD: Okay. But that's not the  
6 question. The question is, do subscribers to Missouri  
7 Case.net have access to the pleadings immediately?

8 MS. SMITH: I believe that's right, Your Honor.  
9 Although I --

10 JUDGE SHEPHERD: Okay. So, if your client was a  
11 subscriber to Missouri Case.net, would you be here? Would  
12 this lawsuit had been filed?

13 MS. SMITH: Well, respectfully, I think that the  
14 question goes to the point of how easy it would be to  
15 resolve this constitutional claim if the state chose to do  
16 so. It can make filings contemporaneously available, and  
17 it has chosen not to make them contemporaneously available  
18 to the public and the press, even though attorneys who are  
19 members of the bar do have access to those complaints. So,  
20 if we could solve that problem, I don't think we would be  
21 here.

22 JUDGE SHEPHERD: Okay. The second question is,

1 you know, there was a time when -- and some in this room  
2 may remember it, when you took a pleading to the courthouse  
3 and the clerk stamped it physically and it went into  
4 different bins and it was available immediately.

5 MS. SMITH: Yes.

6 JUDGE SHEPHERD: Now, in this day and time,  
7 apparently there's a processing period, at least that's the  
8 allegation, that there's a processing period. And so, this  
9 gets to why do you -- why does your client need access or  
10 why does anybody need access to these pleadings before the  
11 end of the processing period, which as I understand it,  
12 nothing is happening in the case, the pleading is being  
13 examined by the clerk. So, what -- what's the importance  
14 of having it the instant it reaches the clerk's office as  
15 opposed to the end of the processing period?

16 MS. SMITH: When a lawyer came in, in times past,  
17 to physically deliver a complaint and now electronically  
18 submit one -- submits one online, it is invoking the power  
19 of the state courts to file a lawsuit to further a right it  
20 alleges has been wronged. And the public and the press  
21 have a right to know about that. And to the extent that  
22 that complaint is withheld from the public and the press,

1 that's a violation of the First Amendment. I think it's as  
2 simple as that, Your Honor.

3           And the government has to justify any delay in  
4 keeping that complaint from the public and the press. That  
5 is the *Press-Enterprise II* inquiry the Supreme Court laid  
6 out. You ask first whether this is the kind of document  
7 that historically has been available to the public, civil  
8 complaints are those kinds of documents. And then the  
9 government has to justify withholding that document under a  
10 strict or rigorous scrutiny standard. So, I think *Press-*  
11 *Enterprise II* answers that question. Thank you.

12           JUDGE Shepherd: Mr. Johnson, you may proceed.

13           MR. JOHNSON: Thank you. And may it please the  
14 court. Jeff Johnson for Ms. Gilmer and Ms. Lloyd, who are  
15 state judicial officers for the state of Missouri. This is  
16 an extraordinary moment for public access to courts as I  
17 think everyone here in the room will recognize. Whether  
18 it's streaming court proceedings, holding Zoom trials, or  
19 providing access to public records, there are numerous  
20 challenges. And the Missouri judiciary has risen to the  
21 challenge to do so. And for years, for years, has allowed  
22 for public access to the official court record for all

1 citizens and for the press, and that continues to be the  
2 case today and it has been the case for years.

3           The issues here are really whether or not the  
4 District Court -- well, I think the core issue that we've  
5 been battling around is at its core, does the First  
6 Amendment require uniformity in how state courts process  
7 their dockets, and proceed to provide justice to litigants  
8 of their home states or to the federal judiciary in that  
9 case, because the First Amendment applies to all of us in  
10 this case.

11           In here, I think the First Amendment doesn't  
12 necessarily say that private litigants get to become  
13 management consultants for the state judiciaries,  
14 justifying filing a 1983 action in state court. And the  
15 district court -- and federal courts have long been wary  
16 about interfering into the internal machinations or the  
17 machinery of the courts as recognized in *Ex parte Young*.

18           JUDGE STRAS: But here's the problem I'm having,  
19 the First Amendment right, you know, at least other courts  
20 have recognized, we're getting into the merits here, but  
21 what do you make of the fact that these things are  
22 immediately available for users of the e-filing system



1 lawyers, but they're not immediately available for the  
2 court or for the press and other people?

3 MR. JOHNSON: So, I think we should clear up a  
4 couple of different things, and I do want to address the  
5 Judge Shepherd's question about subscribers to Case.net.  
6 As with all court systems, I think in the United States,  
7 where the judiciaries have gone through multiple iterations  
8 of how they use technology to provide access to courts and  
9 to litigants, there are three court sort of systems. The  
10 first is Case.net, which is essentially the equivalent to  
11 PACER. And then there's the e-filing system, which is how  
12 the -- how attorneys interact with courts and put pleadings  
13 and other motions before the courts. And then there is a  
14 little bit of a hybrid uniform court access system behind  
15 the scenes that's being transitioned toward. But the --  
16 so, to answer the question, if there's a --

17 JUDGE STRAS: Yes, please do..

18 MR. JOHNSON: To answer the question to the Judge  
19 Shepherd's question about do people on Case.net from their  
20 homes, are they able to see the pleadings immediately? The  
21 answer to that is I don't believe so. From my  
22 understanding, for public access for Case.net for members

1 of the public is that they go on and it's a court rule, I  
2 think 4.24 that says what public information for cases is  
3 immediately available once the filing has been made for  
4 public, and that's a list of the lawyers, the actual  
5 pleadings, all court proceedings and schedules are also  
6 there. If you want the actual pleadings, what the Missouri  
7 judiciary has done is they said, "Come to our courts and  
8 the public access terminals, which St. Louis County," this  
9 isn't in the record, but just for context, St. Louis County  
10 has -- it five public access terminals that are open. And  
11 when you go to those terminals, you can see the pleadings,  
12 you can download the pleadings, and I believe you can also  
13 print them off in that way. You can also ask the courts --  
14 the clerk's office and they will also provide access to the  
15 records that you're looking for.

16 JUDGE STRAS: But that's not immediate, correct?  
17 I mean, that could take a little while as alleged in this  
18 complaint.

19 MR. JOHNSON: So, one of the issues here is like,  
20 is it filed or is it not filed or is it pre-filed, once it  
21 has been accepted by the courts, and the clerk, which here  
22 that is the delay that the Courthouse News is, you know,

1 says that it's injured by, is just merely the timing of  
2 when this is available to everyone is when it's been, once  
3 it's been accepted by the circuit court clerk. Then you  
4 can go to the court and you can get it, you know, through  
5 the public access terminals or through the clerk's office,  
6 if that answers the question on this one.

7 JUDGE STRAS: It does. I got the sense from the  
8 briefs though, that people who are doing the e-filing and  
9 lawyers can access it even, I mean, that's the core of the  
10 complaint is they can access it earlier. And sometimes  
11 because during this pre-filing until the clerk actually  
12 approves it, it can be up to 2 weeks, but 50 percent of  
13 them take more than a week. Whereas in the olden days they  
14 could get them out of the bin at the clerk's office. So,  
15 I'm really just asking, is that right?

16 MR. JOHNSON: Sorry. And to follow on to your  
17 question, the answer to that is that is incorrect. As  
18 noted in the depositions that were supported against their  
19 motion for the preliminary injunction, the only person who  
20 has access to the pleading until it has been accepted by a  
21 circuit court clerk is the, excuse me, is the clerk's  
22 office and the attorney that actually filed the complaint

1 because until it has been accepted, it can still be  
2 withdrawn within that time period. Or when it does not  
3 meet form requirements, the objective form requirements  
4 that are laid out, and multiple Supreme Court of Missouri  
5 rules on their court operating rules, the courts can return  
6 those filings to the attorneys for them to like fix it and  
7 then refile it again.

8 JUDGE ERICKSON: Can I ask a *Sprint* question,  
9 just kind of change up a little bit here where, you know,  
10 the Supreme Court did say specifically that the *Younger*  
11 abstention doctrine is only applicable where the proceeding  
12 falls into one of three categories. And those three  
13 categories is, one, that it interferes with a criminal  
14 prosecution. Two, that it's a civil enforcement proceeding  
15 that looks like a criminal prosecution, you know, that's  
16 like regulatory things.

17 And then the third is that it somehow implicates  
18 the state interest in enforcing its own orders and  
19 judgments of court, none of which seems to be covering this  
20 broad administration area that we're trying to protect  
21 here, which seems to get us closer and closer to dancing  
22 into this sort of ad hoc balancing of federal interests and

1 comity. And so, why is it wrong to just say, yeah, under  
2 *Sprint*, you got to fall into these three categories,  
3 doesn't fall into these three categories. We're not  
4 interfering with any proceeding that exists in the courts,  
5 we're just saying produce the document.

6           And at this stage we're only saying, hey, hold  
7 one of them there discovery sessions, do what you got to do  
8 and then get to where we're going to make motion for  
9 summary judgment, and the records develop, so it survives  
10 the pleading stage." Why is that wrong?

11           MR. JOHNSON: So, to answer your question, I  
12 think the Supreme Court over the decades has been fairly  
13 muddy in how they have applied abstention or approved or  
14 disapproved abstention. In *Sprint*, it has come forward and  
15 given those three clear -- three sort of like clear  
16 categories. However, at the same time, it didn't..

17           JUDGE ERICKSON: Yeah, but it did say *Younger*,  
18 you would say *Younger* is applicable only where, that seems  
19 to be like an attempt to clarify anything that came before  
20 it, doesn't it?

21           MR. JOHNSON: It certainly is an attempt to  
22 clarify anything that came before it, but at the same time

1 it did not say that the abstention that they approved in  
2 *Rizzo*, and that they also approved in *O'Shea v. Littleton*  
3 was wrong. So, that means that those two forms of  
4 abstention do fall into one of those three categories until  
5 the Supreme Court tells us otherwise, right?

6 Like the Supreme Court has said these are our  
7 three -- these are our three categories, you know, and all  
8 of our cases, you know, fit within these categories, and  
9 therefore, you know, this is what we have. To your  
10 question, I think the best fit for this case is in the  
11 third one where it talks about the -- or talks about the  
12 substantial interference with state court proceedings.

13 JUDGE ERICKSON: Yeah, but what proceedings are  
14 we actually messing with here? I mean, you're not actually  
15 doing anything to any of the proceedings at all. What  
16 we're saying is that, oh, for about 230 years, you can walk  
17 into a Missouri Courthouse into the clerk's office and say,  
18 "Hey, can I see what's been filed today?" And now all of a  
19 sudden you can't, right?

20 MR. JOHNSON: So, I would quibble with your  
21 premise that you can't walk into the Missouri Courthouse  
22 and ask for those things, right. The question is whether

1 or not they're sort of electronically available in that...

2 JUDGE ERICKSON: So, you can still walk into a  
3 Missouri -- like Courthouse News Service could hire a  
4 runner, walk into the courthouse today and say, show me the  
5 papers, please, and they'd be produced.

6 MR. JOHNSON: So, there are no papers unless they  
7 are pro se filers.

8 JUDGE ERICKSON: Right...

9 MR. JOHNSON: In which case they're scanned  
10 there.

11 JUDGE ERICKSON: And they push a button and print  
12 it.

13 MR. JOHNSON: I'm uncertain as to whether they  
14 could push a button and print it.

15 JUDGE ERICKSON: Oh, yeah, come on now. Do you  
16 really think there's an e-filing system where you can't  
17 pull up a document and print a PDF of it? Do you think  
18 that exists anywhere in America?

19 MR. JOHNSON: I agree with you that you can print  
20 the documents...

21 JUDGE ERICKSON: Anyhow that doesn't matter-- my  
22 real question is --

1 MR. JOHNSON: Yes.

2 JUDGE ERICKSON: -- can you walk into the  
3 courthouse and say, can I see this document?

4 MR. JOHNSON: If you know what the document is,  
5 you can definitely come in and say, "You know, may, I see  
6 this document." I think the issue here is that potentially  
7 when they have not been accepted for filing yet, the  
8 clerk's office, you know, has them in the order that they  
9 come in, and it's just processing them through.

10 Getting to your point as to whether or not we're  
11 interfering with judicial proceedings, the court in *Sprint*,  
12 when it cited this, it was citing to *Pennzoil* and it also  
13 cited to the *Juidice* case, which is about civil contempt.  
14 The *Pennzoil* case was about the -- it was about the court  
15 process, about in Texas -- whether or not Texaco would have  
16 had -- pay the entire bond, the 13-plus billion dollar bond  
17 to go forward. And they said -- they went into a federal  
18 court and said, "No, you know, you should really say that,  
19 you know, having to put up the entire amount of the of the  
20 bond violates due process." And the court said that the  
21 courts of appeals should not have -- and the district court  
22 should not have gone into that territory.



1           JUDGE Stras: Counsel, I want to ask you. So, I  
2 gave opposing counsel a hard time, I'm going to give you an  
3 equally hard time, which is you have a lot of -- I can  
4 think of a lot of hypotheticals that will cause problems  
5 for the state. Suppose -- and we'll keep it in the filing  
6 rule realm, suppose that the state court enacted a filing  
7 rule that says, "No women can file complaints." Terrible  
8 rule, awful rule. Would we have to abstain and let that go  
9 to state court? Would we not be able to say that that's  
10 unconstitutional under the equal protection clause?

11           MR. JOHNSON: Well, I think what Your Honor is  
12 asking is what like avenue of relief. And I think if you  
13 have something like that that violates a clearly  
14 established rule, you have personal liability under 42  
15 U.S.C. 1983. They didn't bring individual capacity suits  
16 here, they only brought the official capacity suit. And  
17 the official capacity suit is, you know, talks about this,  
18 let me get this straight, this evidently secret policy of  
19 withholding court documents when the Missouri procedures  
20 are all laid out in the court, court operating rules and in  
21 the Supreme Court rules. There is no secret policy to  
22 withhold documents from anyone.

1           JUDGE STRAS: Well, I suppose there is. I mean,  
2 obviously what's ended up happening is it's -- these are  
3 lasting sometimes more than a week, 2 weeks, whatever.  
4 It's not as available as it used to be. My only point is,  
5 it seems to me like we have to be able to adjudicate cases  
6 in federal court that involves -- involve violation of the  
7 constitution. This one's tough because of what you --  
8 tougher because of what you say, but there can't be a  
9 blanket rule that we can't touch that awful policy I just  
10 talked about.

11           MR. JOHNSON: I think there might be a blanket  
12 rule, because as we know, sovereign immunity is the general  
13 rule, that the lower federal courts cannot get involved in  
14 certain aspects of the state sovereignty and this goes to  
15 that core aspect of sovereignty. And as to the avenue of  
16 relief as what we have seen in the SB8 litigation, what the  
17 Supreme Court said was, oh, take this to Texas, those cases  
18 will filter up to us and we will exercise our jurisdiction  
19 from the state Supreme Court like we would otherwise.

20           JUDGE STRAS: But here's the problem. So, when  
21 you're talking about individual liability, individual  
22 liability doesn't necessarily get you at enjoining the

1 policy, right? So, that awful policy I just talked about,  
2 you really have to go after the -- you have to go after  
3 folks under their official capacity, right? And again, I  
4 asked could we possibly allow that type of policy to go  
5 forward without allowing a lawsuit in federal court for,  
6 you know, an official capacity claim?

7 MR. JOHNSON: I think it's difficult, but I think  
8 that in the official capacity, probably not. I think that  
9 it's in the -- within the sovereign immunity of the states.  
10 And as *Ex parte Young* states, and as *Virginia Office for*  
11 *Protection & Advocacy v. Stewart*, the Supreme Court says  
12 that the exception, which is what *Ex parte Young* is, the  
13 exception to sovereign immunity is limited to those narrow  
14 -- sorry.

15 JUDGE ERICKSON: No, I'm just -- I'm slow, right,  
16 so, it's hard for me sometimes, but am I hearing you to  
17 argue that sovereign immunity protects against a suit to  
18 enforce a federal constitutional right, so that the -- like  
19 courts of the United States may not say that your -- your  
20 system is entirely unconstitutional, just like Judge Stras'  
21 example. Like, you know, we're not letting women file, you  
22 know, how is it possible that that's not something that

1 federal courts can say we have one of these things called  
2 the constitution and we don't care who you are, you're not  
3 immune to violate the constitution that you ratified  
4 because you didn't get forced into this here union just  
5 because you, you know, you were forced into it, right? I  
6 mean, I don't get that. Am I wrong?

7 MR. JOHNSON: So, potentially we could be talking  
8 about a free-floating power of the federal judiciary to go  
9 into these things. But the issue here is they brought a  
10 suit under 42 U.S.C 1983, which says that you can bring  
11 actions against persons, right? And the state is not a  
12 person that's well established. And to the extent that we  
13 have concerns about persons using their -- acting under  
14 color of state law to prevent women from filing entirely or  
15 any other or any other scenario where, you know, there  
16 would be clear violations of federal rights, those are  
17 provided for by 42 U.S.C 1983 against people in their  
18 individual capacity. And I think that has to be the answer  
19 here for that.

20 JUDGE Stras: So, you have to walk -- sorry,  
21 little bit of feedback.

22 MR. JOHNSON: That a little bit -- I think that's

1 me.

2 JUDGE Stras: You have to walk into state court  
3 then and -- for the injunction. The only -- under your  
4 view, the only way we can enjoin an unconstitutional policy  
5 is through the injunction, or through state court, excuse  
6 me.

7 MR. JOHNSON: So, first off, for this particular  
8 issue, in this particular case, there are a couple of  
9 different issues that have sort of not been raised because  
10 we were sort of not at that point here. But as noted in  
11 the documents attached to their motion to dismiss where the  
12 CEO of Courthouse News sent a letter to the Office of the  
13 State Court Administrator and also to the St. Louis County  
14 Circuit Clerk, he said, hey, we want this immediate online  
15 press queue where we can view things remotely, download  
16 them all the time. And, you know, and that this is  
17 required by the First Amendment because that right  
18 attaches, as soon as they're submitted to the court,  
19 without the court even really knowing what they are, right.

20 In that -- in the response to that, which is at  
21 Docket 1, 2, the State Court Administrator says, well, one,  
22 we're working to provide public access for casesnet Judge

1 Shepherd's sort of envisions which is when you can go  
2 online and have remote access to all the pleadings. And  
3 then two, it also says that at the moment we can't do this,  
4 but if you want this change, you should ask the Missouri  
5 court automation committee, right for this change, but they  
6 elected not to do so and instead filed suit in federal  
7 court.

8 JUDGE Stras: Well, my understanding of the  
9 record is that they actually asked the State Court  
10 Administrator whether they -- whether the State Court  
11 Administrator would do something about it, and the State  
12 Court Administrator said no. So, they went through the  
13 proper administrative channels, didn't they?

14 MR. JOHNSON: No, I don't think they did because  
15 they didn't submit it to the Missouri court automation  
16 committee, which is what they were required to do. The  
17 response from the court administrator, which was Ms. Lloyd  
18 here, said, you know, this is what you need to do in order  
19 for the committee, which includes the Supreme Court  
20 justices, several judges, the commissioner, other private,  
21 you know, private attorneys and members of the bar to  
22 decide, you know, these rules and how the e-filing and the

1 acceptance process works. And that if you want, you know,  
2 sort of the press queue to be built from Missouri's  
3 homegrown system, and that's who you have to ask for the  
4 changes. So, respectfully, in that sense, I don't think  
5 they really have in that sense. But moving back to sort of  
6 like abstention, and in *Whole Woman's Health v. Jackson*,  
7 kind of issues, I think the real key here and what the  
8 District Court should get credit for is that in every  
9 abstention decision, and, well, in almost every abstention  
10 decision by the Supreme Court, this court and other  
11 District Courts, they've all talked about how, what the  
12 limits of the federal equitable power are, right? And  
13 that's actually where this is not a smokescreen, as to  
14 whether or not a *Whole Woman's Health* applies in this case.  
15 We have five members of the Supreme Court who said that,  
16 you know, sovereign immunity is a real issue as to  
17 providing preliminary relief for the *Whole Woman's Health*.

18 JUDGE STRAS: Well, let me ask you this. So, --  
19 and you heard opposing counsel bring us up, although it was  
20 -- and I asked a series of remedial questions. Suppose we  
21 were to say the case goes forward, no abstention, no state  
22 sovereign immunity problem, I do have serious doubts about

1 whether we can enjoin state court's functions. But what's  
2 wrong with the declaration? What's wrong with declaring  
3 the current system is no good, you got to fix it and then  
4 leaving it to the State Court Administrator, the automation  
5 committee, the state Supreme Court to figure out what the  
6 fix is?

7 MR. JOHNSON: So, Your Honor asked a good  
8 question. I'm sorry; I'm not trying to be -- I'm not  
9 trying to obfuscate here. The problem there is that as the  
10 Fourth Circuit said, in, you know, one of the many  
11 *Schaefer*s, which when you asked when, you know, when the  
12 opposing counsel came up here and said, oh, well that's,  
13 you know, lengthy District Court opinion in *Schaefer* said,  
14 you know, they could comply with this. Well, my question  
15 to that is, which lengthy District Court opinion in  
16 *Schaefer*. We have at least two *Schaefer* district court  
17 opinions on this issue of the immediate access. We get two  
18 Fourth Circuit questions on this, we have -- I think it's  
19 like warped, like, you know, Courthouse *Planet*, like four  
20 or five in the Ninth Circuit. So, the question is, like,  
21 are we going -- are our federal courts going to be continue  
22 to meddle in the state courts, you know, prerogatives into,



1 you know, giving justice, giving a forum for justice to the  
2 litigants of their state.

3           Their answer is that there's lots of meddling.  
4 And this isn't the end because as noted in the reply brief,  
5 when they talk about -- I think it's page 4, note 3 of the  
6 reply brief, they talk about their follow-up litigation to  
7 the *Schaefer*, which is that Virginia courts have a rule  
8 that says you can't basically commercialize or like data  
9 dredge their court -- their online public access court  
10 system.

11           And they have brought a challenge to that in the  
12 Eastern District of Virginia. And they say, you know, thus  
13 chastened, because we've already beat them several times in  
14 the Fourth Circuit, that, you know, sovereign immunity  
15 doesn't even apply to them. And so, here, I think the  
16 issue is that -- I think the issue here is that she says,  
17 go back and look at the District Court opinions as to  
18 whether or not -- I sorry, may I proceed?

19           JUDGE SHEPHERD: Yes...

20           MR. JOHNSON: Thank you.

21           She says go back to the District Court opinions  
22 and see -- and that she says that this is just simple

1 injunction -- this is just a simple declaration, you know,  
2 and this is how it's going to go and, you know, we just  
3 have to tell them to go and fix it and everything will be  
4 fine. But the real question is, when you look at those  
5 District Court opinions, you see that, you know, there's  
6 expert testimony going forward about, you know, the  
7 specific metrics that the circuit courts of Virginia had to  
8 meet in order to be considered sort of like satisfactory  
9 toward Courthouse News' decision of what good governance is  
10 for filing, you know, for processing the filing of their  
11 petitions and other things like that.

12           And the issue here, it goes to the same thing, is  
13 that the reason why sovereign immunity protects this is  
14 because this is the internal processes of the courts to  
15 provide justice, and this -- will be a sweeping in an very  
16 invasive litigation to go through and have metrics for the  
17 St. Louis Circuit Court of like, oh, well all these  
18 petitions are filed on this day, you know, they get  
19 processed, well, why weren't they processed on time? Were  
20 they not in the clerk's staff in the office? Did the  
21 judges have -- I'm sorry.

22           JUDGE SHEPHERD: You probably should wrap up.

1           MR. JOHNSON: Thank you. So, in conclusion, we  
2 would just note that whether or not this is considered into  
3 the abstention doctrines as to *Sprint*, we would say it used  
4 to be the third -- the third exception is probably the most  
5 -- is probably the best. *Sprint* did not overrule *Rizzo* or  
6 *O'Shea v. Littleton*, and that the talk about the federalism  
7 concerns of comity as to the federal equitable power should  
8 be affirmed, and that's what the District Court found.  
9 Thank you.

10           JUDGE SHEPHERD: Thank you. All right, Ms.  
11 Smith. I think is her time expired?

12           UNIDENTIFIED SPEAKER: Yes.

13           JUDGE SHEPHERD: It's an important case and the  
14 panel has had a lot of questions. Take 3 minutes for  
15 rebuttal.

16           MS. SMITH: I appreciate that. Thank you, Your  
17 Honor. I'd like to start by answering the simple question,  
18 what *Schaefer* decision should you look to, and it is the  
19 one that decides the case on the merits after discovery and  
20 dispositive motions. And I think that that is instructive  
21 because it addresses a number of the concerns that have  
22 been raised here. The District Court judge after hearing

1 evidence, after carefully looking at the record considering  
2 the concerns raised by the clerk in that case said I think  
3 a -- as you suggested, Judge Stras, I think a declaration  
4 is appropriate here, but injunctive relief is not.

5           And Judge Erickson, I think that's precisely what  
6 your prior opinions that address *Rizzo* and the scope of the  
7 federal court's equitable authority say courts should do.  
8 When you get to the point where a district court is  
9 entering an injunction and touching on those important  
10 questions of federalism and comity, the court of course has  
11 to be very careful that it's respectful of those important  
12 concerns. And to the extent the injunction is overbroad,  
13 to the extent that, you know, there's something that does  
14 cross the line, whatever it is, the court will have the  
15 opportunity to review that when it is entered after trial  
16 or summary judgment.

17           But at this stage in the case, at the dispositive  
18 motion stage, I think this is a pretty easy case to  
19 resolve. All you have to do, as Judge Erickson suggested,  
20 is say we're not within one of the three buckets of  
21 *Younger*. Even if we would prefer to avoid this difficult  
22 constitutional question, we, federal courts, have an

1 obligation to adjudicate it just as you would have an  
2 obligation to adjudicate a facially unconstitutional ban on  
3 women filing civil complaints in county court.

4           You cannot abstain from that just because it  
5 touches on important questions of state procedure, you have  
6 to adjudicate that. That's what *Cohens v. Virginia* says,  
7 you know, back at the time of Chief Justice Marshall up  
8 through Justice Scalia in *NOPSI* and for the unanimous court  
9 in *Sprint*. There's no question we're not in *Younger* land.  
10 There's no reason to abstain. There's also not a sovereign  
11 immunity problem here because when court clerks and  
12 personnel -- court personnel exercise functions that are  
13 not judicial in nature, they can and are sued. That was  
14 the case in *Kitchin*, that was the case in the Tenth  
15 Circuit, that was the case in *Tarter* in the Fifth Circuit,  
16 and it was the case in *Kodiak Oil* in this circuit.

17           There's no question that court clerks can be  
18 proper defendants to suit. And here because they're not  
19 exercising a judicial power, they are the proper defendants  
20 to suit. I think once you decide that, we can't abstain,  
21 we may not abstain, not we shouldn't, but we may not  
22 abstain, and there's not a sovereign immunity problem.

1 This goes back on remand and it goes through discovery to  
2 dispositive motions and trial. And the court need not, if  
3 it chooses not to do so, say anything about the merits of  
4 the constitutional claim at this point.

5 All you have to say is that we have plausibly  
6 alleged a violation of the First Amendment and the fact  
7 that multiple other federal courts of appeal have  
8 recognized that First Amendment right, including in the  
9 Fourth, the Second and the Ninth Circuit means that it's a  
10 plausible claim.

11 JUDGE STRAS: We also have -- we would be  
12 entering into a circuit split land, I think, but tell me if  
13 I'm wrong because of the Seventh Circuit opinion by Judge  
14 Hamilton. With that, if we agree with the Second, Fourth  
15 and Ninth, would we be necessarily disagreeing with the  
16 Seventh?

17 MS. SMITH: I don't think that that's necessarily  
18 the case for this reason. I think the Seventh Circuit is  
19 an outlier in the abstention decision, in deciding to  
20 abstain, but it didn't go on to address the merits question  
21 whether there is a First Amendment right here. So, you can  
22 resolve this case without addressing *Brown*, except to say

1 that you think it's wrong on the question of abstention. I  
2 don't think you need to get into the merits of the First  
3 Amendment issue unless you choose to. And on the First  
4 Amendment issue, the courts of appeal that have addressed  
5 it are unanimous. There is a First Amendment right here.  
6 Thank you.

7 JUDGE ERICKSON: Can I ask just a question about  
8 *O'Shea* and *Rizzo*? It looks like *O'Shea* and *Rizzo* really  
9 are talking about that somehow alongside just the general  
10 *Younger* abstention cases, there's this classic cases where  
11 their -- the proposed relief will actually interfere with  
12 the procedures of a state entity and dictate to them  
13 procedures. And so, what you end up with are the federal  
14 courts sort of directing state employees to do certain  
15 things, right? And that seems to be sort of a narrow  
16 carve-out for *Rizzo* and *O'Shea*, right? Is that right,  
17 wrong? Do you disagree?

18 MS. SMITH: I question whether *O'Shea* and *Rizzo*  
19 survive in a post *Sprint* world as --

20 JUDGE ERICKSON: Fair enough.

21 MS. SMITH: -- as *Younger* abstention cases. I  
22 think *O'Shea* maybe is an easier question because *Younger*

1 lays out these three boxes of ongoing state proceedings.  
2 Maybe *O'Shea* says if there's an imminent contemplated  
3 future proceeding that falls into one of those three boxes  
4 --

5 JUDGE ERICKSON: That's possible.

6 MS. SMITH: -- that's fine. So, really, I think  
7 the more difficult case possibly is *Rizzo*, which isn't an  
8 abstention case, it's a standing case. To the extent it  
9 teaches us anything about abstention, I think it just talks  
10 about the scope of federal court's equitable power, which  
11 is the very basis of what we're talking about in the, you  
12 know, in the sovereign immunity and abstention context.  
13 That is my point about whether an injunction or declaratory  
14 relief is appropriate and how far an injunction can go.  
15 Maybe *Rizzo* is instructive on those questions. And when we  
16 have an injunction in this case, the court can address  
17 whether the District Court has gone too far.

18 JUDGE ERICKSON: Thank you. I appreciate your  
19 answer.

20 MS. SMITH: Thank you.

21 JUDGE SHEPHERD: Thank you, counsel. The case  
22 has been well-argued, and it is submitted. And the court



1 will render a decision as soon as possible. And counsel,  
2 with that you may stand aside.

3 (Whereupon, the proceeding was concluded.)

4

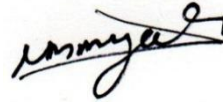
5 CERTIFICATE OF TRANSCRIBER

6 I, Jimmy Jacob, do hereby certify that, to the  
7 best of my knowledge and belief, the attached  
8 transcript regarding the oral testimony in case  
9 Courthouse News Service v. Joan M. Gilmer, in her  
10 official capacity as the Clerk of the Circuit Court of  
11 St. Louis County, Missouri and Kathy Lloyd, in her  
12 official capacity as State Courts Administrator for  
13 the Missouri Office of State Courts Administrator is a  
14 true and accurate transcription of the indicated video  
15 recordings.

16 I further certify that I am neither attorney nor  
17 counsel for nor related nor employed by any of the  
18 parties to the action; further, that I am not a  
19 relative or employee of any attorney or counsel  
20 employed by the parties hereto or financially  
21 interested in this action.

22

1 April 18, 2022



2

3 DATE

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Jimmy Jacob

4

TRANSCRIBER