No. 12-56

IN THE

Supreme Court of the United States

E.T. ET AL.,

Petitioners,

v.

TANI CANTIL-SAKAUYE, CHAIR OF THE JUDICIAL COUNCIL OF CALIFORNIA, IN HER OFFICIAL CAPACITY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

ROBERT A. NAEVE
(Counsel of Record)
PETER E. DAVIDS
JONES DAY
3161 Michelson Drive
Suite 800
Irvine, CA 92612.4408
Telephone: +1.949.851.3939
Facsimile: +1.949.553.7539
rnaeve@jonesday.com

Counsel for Respondents

QUESTION PRESENTED

Petitioners alleged in their complaint that inadequate funding and concomitant heavy caseloads prevent court-appointed dependency lawyers in Sacramento County from effectively representing their clients in violation of federal and state law. Petitioners made identical "ineffective assistance of counsel" claims in the charging allegations of each of their seven claims for relief. And Petitioners' prayer for declaratory relief asked for a declaration that heavy dependency attorney caseloads "violated, continue to violate and/or will violate" the constitutional and statutory rights of all children represented by court-appointed dependency counsel in Sacramento.

Given that a declaration of this type would interfere with the administration of Sacramento Superior Court by (a) calling into question all rulings issued by all dependency courts while dependent children were represented by ineffective counsel; (b) requiring the removal of current, and reassignment of new, attorneys in current and future dependency cases; (c) impairing the dependency courts' ability to hear cases on a going-forward basis until attorney caseloads achieve a judicially established level; and (d) subjecting the dependency courts to the ongoing supervision and contempt powers of a federal court, did the Court of Appeals correctly conclude that *O'Shea v. Littleton*, 414 U.S. 488 (1974) requires federal abstention?

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INTRODUCTION

The petition for certiorari does not raise any question that merits review by this Court. The petition rests on three major factual and legal premises: (1) that the relief Petitioners seek in their complaint would not intrude onto state dependency proceedings; (2) that abstention under *O'Shea v. Littleton*, 414 U.S. 488 (1974) is available only when relief would direct specific events in state-court proceedings; and (3) that a "deep" and "mature" conflict among the circuits exists. As each of these premises is demonstrably incorrect, the petition should be denied.

The Court of Appeals properly abstained under *O'Shea* because Petitioners' ineffective assistance of counsel claims would have required the district court to examine, on a case-by-case basis, whether children in dependency proceedings in Sacramento Superior Court were receiving adequate representation, whether they were prejudiced, and whether shifting funds from other parts of the state's budget would redress the alleged constitutional violations. Moreover, as the Court of Appeals noted, a grant of the requested relief would inevitably lead to future federal court intervention to enforce the decree.

Petitioners contend that abstention under *O'Shea* is available *only* when a requested remedy would directly control events in state-court proceedings, but this contention does not raise an important issue of federal law. *O'Shea's* significance as a precedent stems from its holding that the equitable abstention doctrine is not limited to federal lawsuits that interfere with ongoing state proceedings, as was the case in *Younger v. Harris*, 401 U.S. 37 (1971). Nor is

O'Shea limited to claims for injunctive relief, as "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).

There is no substantial conflict between the Court of Appeals' decision in this case and the decision of any other circuit. Petitioners attempt to manufacture a conflict by theorizing that the Second, Fifth, Sixth, Ninth, and Tenth Circuits apply *O'Shea* broadly whereas the First, Fourth, Eleventh, and District of Columbia Circuits apply *O'Shea* narrowly. This theory does not withstand scrutiny. The courts of appeals have consistently abstained under *O'Shea* when the relief plaintiffs seek would result in major intrusion and have declined to abstain when any intrusion would be minor. These fact-based decisions do not create a conflict that warrants review by this Court.

Finally, even if the issue presented in the Petition *did* merit review—which it does not—this case is not a good candidate for addressing the scope of *O'Shea*. Indeed, the sheer magnitude of the intrusion into state-court operations sought by Petitioners here is more egregious than the interference *O'Shea* and its progeny condemn.

COUNTERSTATEMENT OF THE CASE

A. Petitioners Alleged That Heavy Caseloads Prevent Dependency Attorneys From Providing Effective Representation.

In seeking to persuade this Court to grant certiorari, Petitioners misstate the record by claiming

that their lawsuit only challenged the "funding and resource-allocation" policies of Respondents, and that it did "not implicate the procedures, rulings, or decisions of any particular court or judicial officer." Pet. 2. To the contrary, Petitioners' complaint sought to invalidate all current and future cases pending before the Sacramento Superior Court's dependency courts. Hence, we begin by correcting Petitioners' incomplete statement of the record. *See* S. Ct. R. 15.2.

Petitioners alleged in their complaint that inadequate state funding and concomitant heavy caseloads prevent court-appointed lawyers from effectively representing dependent children in the 5,100 active cases pending in the Sacramento Superior Court dependency courts, in violation of federal and state constitutional and statutory law. ER 314-33.

Petitioners *did not* allege that heavy caseloads are unlawful merely because they exceed someone's aspirational standard. Instead, Petitioners alleged that heavy caseloads are unlawful *because they prevent court-appointed dependency lawyers from providing "adequate and effective" representation in dependency cases. See, e.g.*, ER 318, ¶ 22 ("In Sacramento County, crushing and unlawful caseloads are illegally frustrating . . . the effective, adequate, and competent assistance of counsel . . . ."); ER 319, ¶ 26 ("[C]aseloads currently carried by counsel for children in dependency proceedings in the County of Sacramento are so large that such counsel are not able to effectively, adequately, or competently represent their clients . . . ."), ER 319, ¶ 27 ("[C]hildren subject to dependency proceedings in the

County of Sacramento . . . are denied their guaranteed rights under state and federal law to effective, adequate, and competent assistance of counsel . . . .").

Petitioners made identical "ineffective assistance of counsel" claims in the charging allegations of each of their seven claims for relief. ER 333-38. And Petitioners' prayer for declaratory relief asked for a declaration that heavy dependency attorney caseloads "violated, continue to violate and/or will violate" the constitutional and statutory rights of all children represented by court-appointed dependency counsel in Sacramento. ER 338-39.

B. The Court of Appeals Concluded that the District Court Properly Abstained from Hearing Petitioners' Complaint Under *O'Shea v. Littleton.*

Respondents moved the district court to abstain[1] from hearing this action, primarily because Petitioners' "'complaint impermissibly attempts to embroil [the] court in administration and funding of the dependency courts'" and because "plaintiffs seek remedies that cannot be molded without violating established principles of equity, comity, and federalism." *See* Pet. App. 22a-23a.

In response to Respondents' motion to dismiss, the district court abstained from hearing Petitioners' complaint pursuant to *Younger*, 401 U.S. 37, and *O'Shea*, 414 U.S. 488. Pet. App. 11a-63a. Petitioners appealed the district court's decision to abstain from

[1] Respondents also moved to dismiss Plaintiffs' complaint for lack of standing, failure to state a claim and failure to join an indispensible party. *See* ER 343-44 (docket entries). The district court did not reach any of these substantive issues.

hearing their claims for declaratory relief. The Ninth Circuit affirmed, finding that abstention was proper under *O'Shea* because the relief Petitioners sought "would entail heavy federal interference in such sensitive state activities as administration of the judicial system." Pet. App. 1a-10a.

In particular, the Ninth Circuit recognized that allegedly excessive caseloads are unconstitutional or unlawful only to the extent they prevent court-appointed lawyers from providing "adequate and effective" representation of their dependent clients. The Ninth Circuit acknowledged that the district court could not make such a finding without first conducting an intrusive audit of the operations of the Sacramento Superior Court's dependency courts, the precise type of intrusive inquiry for which *O'Shea* requires abstention. Pet. App. 7a-8a. The Ninth Circuit further explained that a federal court declaration that dependency court caseloads are unconstitutional or unlawful would lay the groundwork for future federal court challenges regarding the Respondents' compliance with the remedy and its effect in individual cases. Pet. App. 9a.[2] The Ninth Circuit denied Petitioners' petition for rehearing and rehearing en banc.

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[2] Petitioners aver that Sacramento County participates in the DRAFT program and suggest this case involves county dependency proceedings. *See, e.g.*, Pet. 7, 11. To be clear, Sacramento *Superior Court* participates in the program and this case concerns *Superior Court* dependency proceedings. Petitioners also assert that Respondents "supervise and administer" the dependency courts. Pet. 5. Neither the Judicial Council nor the Administrative Office of the Courts supervises and administers the superior courts. Instead, there is decentralized management of the superior courts on a countywide basis. *See* Cal. R. Ct. 10.601.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for three basic reasons.

First, the Court of Appeals correctly applied the principles of *O'Shea* to prevent a major intrusion into, and ongoing monitoring of, dependency court proceedings in Sacramento Superior Court. *Second*, beyond the facts of this case, Petitioners are incorrect that abstention under *O'Shea* is appropriate only when a plaintiff seeks an injunction to control specific events in future state-court proceedings. *Third*, the Ninth Circuit's decision does not conflict with the decisions of any other Circuit. Finally, contrary to Petitioners' contention, this case presents a poor vehicle for reviewing the scope of *O'Shea* abstention.

I. THE NINTH CIRCUIT CORRECTLY APPLIED *O'SHEA* TO PREVENT A MAJOR FEDERAL INTRUSION INTO STATE DEPENDENCY PROCEEDINGS.

1. The doctrine of equitable abstention derives from the inherent right of equity courts to "grant or deny relief upon performance of a condition which will safeguard the public interest." *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29 (1943); *see also New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*") (finding the obligation to exercise federal jurisdiction does "not call into question the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted").

Equitable abstention recognizes that "[a] federal court . . . is not the proper forum to press" general

complaints about the way in which government goes about its business, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983), because, "[u]nlike Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license and must always observe their limited judicial role." *Missouri v. Jenkins*, 515 U.S. 70, 112-13 (1995) (internal quotation marks and citations omitted) (O'Connor, J., concurring); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

In addition, the doctrine recognizes that when exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Federal courts, which "subsist[] side by side with 50 state judicial, legislative, and executive branches," must give appropriate consideration "to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see also Allegheny Airlines, Inc. v. Pa. Pub. Util. Comm'n*, 465 F.2d 237, 243 (3d Cir. 1972) (noting the primary concern animating equitable abstention is the avoidance of "friction caused by interference with the orderly procedures and rules of state regulatory bodies") (emphasis omitted).

The doctrine of equitable abstention authorizes federal courts to abstain from exercising jurisdiction when the requested form of equitable relief "would *indirectly* accomplish the kind of interference that *Younger* and related cases sought to prevent," and when a federal lawsuit seeks to impose "an ongoing federal audit of state . . . proceedings." *O'Shea*, 414 U.S. at 500. Hence, equitable abstention can be applied even when the interference does not "'target[] the conduct of a proceeding directly.'" *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 717 (5th Cir. 2012) (quoting *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002)).

In *O'Shea*, the plaintiffs sought to enjoin state judges from discriminating against African Americans in certain criminal court proceedings. 414 U.S. at 491-92. In holding that the district court should have abstained from hearing the class claims, this Court recognized that abstention doctrines are not limited to federal lawsuits that interfere with ongoing state proceedings, as was the case in *Younger*. The Court went beyond *Younger* to hold that "an injunction aimed at controlling or preventing the occurrence of specific events that *might* take place in the course of *future* state criminal trials" amounted to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." *Id.* at 500 (emphasis added). The Court further held abstention is appropriate to prevent federal courts from becoming monitors of state-court operations: "[M]onitoring of the operation of state court functions . . . is antipathetic to established principles of comity," and amounts to "a major continuing intrusion of the

equitable power of the federal courts into the daily conduct of state criminal proceedings," which would sharply conflict "with the principles of equitable restraint…." *Id.* at 501-02.

O'Shea's interference principles have been applied in other settings. In *Rizzo v. Goode*, for example, this Court held that a district court should have abstained from issuing an injunction requiring the City of Philadelphia's Police Department to "draft, for the court's approval, 'a comprehensive program for dealing adequately with civilian complaints,'" pursuant to court-mandated "guidelines." 423 U.S. at 369-70. The Court explained that federalism principles apply to lawsuits against "the judicial branch of the state government" as well as against "those in charge of an executive branch of an agency of state or local governments," and held that "[w]hen it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts." *Id.* at 380; *see also Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976) ("the District Court was quite right in the first instance to have dismissed respondent's complaint. Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service").

The doctrine of equitable abstention as articulated in *O'Shea, Rizzo* and *Kelley* finds particular applicability when the requested relief "would entail heavy federal interference in such sensitive state activities as administration of the judicial system." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th

Cir. 1992). In this context, the doctrine sustains "'the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *O'Shea*, 414 U.S. at 500 (quoting *Stefanelli*, 342 U.S. at 120).

2. The Court of Appeals' *per curiam* opinion in this case is entirely consistent with *O'Shea*. In particular, the Court of Appeals correctly explained that, under *O'Shea*, "[f]ederal courts may not entertain actions that seek to impose 'an ongoing federal audit of state . . . proceedings,'" Pet. App. 6a (quoting *O'Shea*, 414 U.S. at 500), and that federal courts "'should be very reluctant to grant relief that would entail heavy federal interference in such sensitive state activities as administration of the judicial system,'" Pet. App. 7a (quoting *Eu*, 979 F.2d at 703).

The Court of Appeals then applied settled abstention law to the facts of this case. Critically, the court recognized that allegedly excessive caseloads are unlawful only to the extent they prevent court-appointed lawyers from providing "adequate and effective" representation of their dependent clients.[3] The Court of Appeals acknowledged that the district court could *not* make such a finding without first

[3] Petitioners argue illogically that, "[i]n the four years before the filing of the complaint, Sacramento County dependency attorneys had themselves taken only one extraordinary writ appealing a dependency court decision" and "[t]his means that hundreds of children have been forced to remain in possibly illegal placements or live under possibly unlawful visitation plans simply because there was no attorney available to take the next step in their cases." Pet. 9. One cannot rationally conclude from an *absence* of extraordinary writs—*with no other facts alleged*—that courts are failing to comply with the law in hundreds of cases.

conducting an intrusive audit of the operations of the Sacramento Superior Court's dependency courts:

> [I]n order to declare the current attorney caseloads unconstitutional or unlawful, the court would necessarily have to consider through a generalized inquiry how many cases are constitutionally and/or statutorily permissible, whether some types of cases require more investigation or preparation, which types of those cases deserve more resources, and how much time or attention is constitutionally and/or statutorily permissible.

Pet. App. 7a (quoting the district court's opinion at Pet. App. 34a).[4] The Court of Appeals then held that this was the precise type of intrusive inquiry for which equitable abstention was required pursuant to *O'Shea*:

> Because the question is one of adequacy of representation, potential remediation might involve examination of the administration of a substantial number of individual cases. Thus, we conclude that the declaratory relief sought by Plaintiffs would amount to an ongoing federal audit of Sacramento County Dependency Court proceedings, requiring abstention under *O'Shea*.

Pet. App. 8a.[5]

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[4] Petitioners suggest the Court of Appeals "found 'intrusion' based solely on the evidence that Petitioners would need to gather to prove their case." Pet. 15. For a district court to declare that children in Sacramento Superior Court's dependency proceedings have been prejudiced by inadequate representation would present an intrusion into state proceedings that goes well beyond evidence gathering.

[5] Petitioners suggest it is significant that this Court of Appeals' decision used words like "potential" and "might" to describe the

Next, the Court of Appeals considered whether Petitioners' complaint sought to "control[]or prevent[] the occurrence of specific events that *might* take place in the course of *future* state" proceedings so as to require abstention pursuant to *O'Shea*, 414 U.S. at 500 (emphasis added). In this regard, the panel followed the teachings of *O'Shea* by explaining that:

> [E]ven the limited decree sought here would inevitably set up the precise basis for *future intervention* condemned in *O'Shea*. In other words, were we to declare the current Dependency Court attorney caseloads unconstitutional or unlawful, the Defendants' compliance with that remedy and its effect in individual cases could be subject to further challenges in federal district court. Laying the groundwork for a future request for more detailed relief which would violate the comity principles expressed in *Younger* and *O'Shea* is the precise exercise forbidden under the abstention doctrine.

Pet. App. 9a (quotations and citations omitted).

In short, the Court of Appeals correctly applied *O'Shea* to the facts of this case. *See also Rizzo*, 423 U.S. at 379-80; *Kaufman v. Kaye*, 466 F.3d 83, 86-87 (2d Cir. 2006) (*O'Shea* abstention proper where

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(continued…)

level of intrusion their lawsuit engenders. Pet. 11, 15. However, *O'Shea* compels abstention when a federal lawsuit seeks to prevent or control specific events that "*might* take place in the course of *future* state" trials. *O'Shea*, 414 U.S. at 500 (emphasis added); *see also Samuels*, 401 U.S. at 72; *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992) ("This Court is constrained, therefore, to focus on the likely result of an attempt to enforce an order of the nature sought here").

the plaintiff sought a declaratory judgment that appellate case assignment procedures violated due process and equal protection); *Luckey v. Miller*, 976 F.2d at 677-79 (federal order revamping the state's indigent defense system would inevitably interfere with state criminal proceedings); *Parker v. Turner*, 626 F.2d 1, 6 (6th Cir. 1980) (abstaining from lawsuit seeking to require juvenile courts to inform indigent fathers of their right to counsel in contempt proceedings); *Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1336-37 (8th Cir. 1975).[6]

II. *O'SHEA* ABSTENTION IS NOT LIMITED TO SITUATIONS IN WHICH THE FEDERAL PLAINTIFF SEEKS TO CONTROL SPECIFIC EVENTS IN STATE-COURT PROCEEDINGS.

The argument of Petitioners and their amici that abstention is available *only* when a federal plaintiff seeks relief aimed at controlling specific events that might take place during state-court cases reflects a

[6] Petitioners assert that *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003), involved similar claims to those here and "was litigated to completion without the disruptions that the Ninth Circuit anticipated here." Pet. 23. In *Kenny A.*, however, the defendants *waived* the right to seek abstention by removing the case from state to federal court. *Kenny A.*, 218 F.R.D. at 285. Moreover, at the time the district court considered abstention, the plaintiffs sought declaratory and injunctive relief "directed solely at *executive* branch defendants" and not "Georgia's juvenile courts, juvenile court judges, or juvenile court personnel." *Id.* at 286. Plaintiffs later broadened their claims to challenge attorney caseloads, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1356-57 (N.D. Ga. 2005), but defendants did not ask the district court to reconsider its earlier refusal to abstain. And the district court below explained at length why the type of consent decree entered in *Kenny A.* would indeed result in disruption and monitoring. Pet. App. 49a-55a.

fundamental misunderstanding of the equitable abstention doctrine as applied by *O'Shea* and related cases. *See* Pet. 22; Chemerinsky Br. 5. As explained above, the doctrine applies when litigants seek federal court relief to reform the institutions of state government. The doctrine is *not* limited to cases in which federal litigants only seek to affect the merits or outcome of present or future judicial proceedings. *E.g.*, *Rizzo*, 423 U.S. at 378-79 (policy regarding investigation of community complaints); *Kelley*, 425 U.S. at 247-48 (police hair length regulation); *Lyons*, 461 U.S. at 112-13 (police policy regarding choke holds); *Kaufman*, 466 F.3d at 86 (practice of assigning cases to appellate panels).

Indeed, *O'Shea*'s significance as a precedent stems from its holding that the equitable abstention doctrine is *not* limited to federal lawsuits that interfere with *ongoing* state proceedings, as was the case in *Younger*. The Court went beyond *Younger* to hold that, "an injunction aimed at controlling or preventing the occurrence of specific events that *might* take place in the course of *future* state criminal trials" amounted to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger . . .* sought to prevent." 414 U.S. at 500 (emphasis added).

Nor are Petitioners correct that *O'Shea* applies only to claims for injunctive relief. As this Court has explained, "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Samuels*, 401 U.S. at 72. Even some of the decisions

Petitioners point to as purportedly reflecting a "stricter" application of *O'Shea* dismiss declaratory relief claims along with claims for injunctive relief. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003); *Pompey v. Broward County*, 95 F.3d 1543, 1546-49 (11th Cir. 1996).

In short, for purposes of *O'Shea*, the issue is *not* whether a federal lawsuit would "direct[] specific events in state court or require[] otherwise discretionary rulings or outcomes" as Petitioners suggest. Pet. 2-3. Instead, the issue is whether the remedy sought in a federal lawsuit amounts to "interference in such sensitive state activities as administration of the judicial system" and "would inevitably set up the precise basis for future intervention condemned in *O'Shea*." *Luckey v. Miller*, 976 F.2d at 679. As explained above, the relief Petitioners' seek suffers from both vices.

Petitioners make several arguments to the contrary but all are misplaced. Citing *NOPSI*, Petitioners suggest that abstention is unnecessary where federal courts are asked to audit issues ancillary to the merits of the state court action. Pet. 19-20; *see also* Chemerinsky Br. 7-8. *NOPSI* held that state utility ratemaking approval proceedings were "legislative" and not "judicial," 491 U.S. at 371, and that *Younger* only requires federal courts to abstain when the underlying state proceeding is "judicial" and not "legislative" in nature. *Id.* at 368. Here, the dependency proceedings at issue are inherently judicial.

Petitioners also cite *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) as an example of this Court declining to abstain even though state judges were

named as defendants. Pet. 20. However, this Court has repeatedly explained that *Gerstein*'s holding is limited to cases in which the federal plaintiff has *no* opportunity to press its claims in state court. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 n.14 (1982); *Moore v. Sims*, 442 U.S. 415, 431-32 (1979); *Juidice v. Vail*, 430 U.S. 327, 336-37 (1977). The same cannot be said here, because Petitioners can institute proceedings in state court to vindicate their rights. *See, e.g.*, *In re Edward S.*, 173 Cal. App. 4th 387, 412-13 (2009); *In re Darlice C.*, 105 Cal. App. 4th 459, 463 (2003); Cal. Welf. & Insts. Code §§ 317(c) & 317.5(a). Indeed, four of Petitioners' seven claims for relief in this case arise under state law. It strains credulity to suggest that federal courts can hear and consider state-law claims while state courts themselves cannot.

Amici Erwin Chemerinsky et al. argue that no *O'Shea* concerns arise because respondents are sued in their administrative rather than judicial capacities. Chemerinsky Br. 7. However, the obligation to abstain does *not* turn on the job title of the defendant. Instead, the obligation to abstain turns on whether the relief requested impermissibly interferes with administration of state courts. Abstention is proper where, as here, the relief Petitioners seek would inevitably interfere with the conduct of proceedings in, and administration of, a state court system. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 470 (9th Cir. 1984) (the abstention inquiry focuses on the state proceedings, not the federal proceedings); *see also, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13, 14 (1987) (interference with state court powers regarding execution of judgments); *Kaufman*, 466 F.3d at 86

(interference with state court practice regarding random assignment of judges); *Luckey v. Miller*, 976 F.2d at 677 (interference with system for appointing counsel in criminal cases).

III. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT.

Petitioners attempt to manufacture a circuit split where none exists.

In particular, Petitioners argue that, like the Ninth Circuit's decision below, the Second, Fifth, Sixth, and Tenth Circuits take an expansive view of *O'Shea* abstention that strays from its guiding principles. Pet. 15-18 (citing *Kaufman*, 466 F.3d at 86; *Joseph A. v. Ingram*, 275 F.3d 1253, 1270-71 (10th Cir. 2002); *Parker*, 626 F.2d at 6-7; *Gardner v. Luckey*, 500 F.2d 712, 713, 715 (5th Cir. 1974)). Petitioners assert that the First, Fourth, Eleventh, and District of Columbia Circuits "maintain a substantially stricter abstention standard that is consistent with *O'Shea*." Pet. 18-21 (citing *31 Foster Children*, 329 F.3d at 1278; *Pompey*, 95 F.3d at 1549-50; *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 465, 467 (1st Cir. 1989); *Suggs v. Brannon*, 804 F.2d 274, 278-79 (4th Cir. 1986); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 702-704 & n.8 (D.C. Cir. 1984)). According to Petitioners, the split "is wide, extensive, and mature." Pet. 29.

Petitioners correctly note that the decisions of the Second, Fifth, Sixth, and Tenth Circuits are consistent with the Ninth Circuit's decision in this case. Each of these circuits has concluded that abstention under *O'Shea* is available where a federal plaintiff seeks relief that would result in intrusion

into and monitoring of state court operations. *Kaufman*, 466 F.3d at 86-87 ("[T]he relief now sought by Kaufman would be so intrusive in the administration of the New York court system that we must, based on applicable precedent, abstain."); *Joseph A.*, 275 F.3d at 1270-71 ("The reasoning of *O'Shea* and its progeny suggests that federal court oversight of state court operations, even if not framed as direct review of state court judgments, may nevertheless be problematic for *Younger* purposes."); *Parker*, 626 F.2d at 7 ("When the state agency in question is a state court . . . the equitable restraint considerations appear to be nearly absolute"); *Gardner v. Luckey*, 500 F.2d at 715 ("It is clear from the face of their complaint that our appellants contemplate exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in *O'Shea*.").

Petitioners are incorrect, however, that decisions of four other circuits conflict with the Court of Appeals' decision. Petitioners rely primarily on *Moultrie*, in which court-appointed dependency attorneys claimed that forced assignment to defend dependent litigants without pay amounted to involuntary servitude. 725 F.2d at 697. However, the attorneys claimed only that they should be paid for their work; they did *not* claim that they had provided ineffective assistance to their juvenile clients, or that their clients suffered prejudice in any way. *Id.* at 703. Under these circumstances, the District of Columbia Circuit properly found that it could adjudicate the attorneys' claims *without evaluating or intruding into any state-court proceedings*, and that there was "no potential for duplicative litigation, nor for irreverence toward the local courts, and no necessity

that the relief need interfere with the day-to-day operations of the superior court." *Id.* at 704.

The same could not be said here. The district court could not enter a judgment declaring an "average caseload" standard in this case without first finding that excessive caseloads caused a cognizable constitutional or statutory injury—namely, that inadequate funding and concomitant heavy caseloads prevent court-appointed lawyers from effectively representing dependent children in violation of federal and state law. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 113 (1981). The district court could not make such a finding based upon statistics alone, because attorneys are "ineffective" only when their deficient performance prejudices the outcome of their clients' case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 875 (9th Cir. 2003) (en banc) (establishing a due process violation always requires a showing of prejudice). Hence, the district court of necessity would be required to conduct a "not . . . just daunting but virtually impossible" evaluation of juvenile dependency proceedings in Sacramento (Pet. App. 35a), first to determine if children were, in fact, deprived of effective representation, and then to establish appropriate caseload standards. Pet. App. 36a-37a; *see also* Pet. App. 33a-34a. As the facts of *Moultrie* are poles apart from those presented here, any conflict is attenuated at best.[7]

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[7] Amici Chemerisky et al. suggest (Br. 7) that the Court of Appeals' decision conflicts with *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), a case that addresses abstention under *Younger*, not *O'Shea*. *Id.* at 1322-24. Moreover, the court declined to abstain under *Younger* because, unlike here, the

The First Circuit's decision in *Bellotti* presents even less of a conflict. There, the plaintiffs challenged the *constitutionality of a state statute* regulating abortions. *Bellotti*, 868 F.2d at 462 (plaintiffs sought only to enjoin enforcement of the statute); *compare O'Shea*, 414 U.S. at 500 ("Respondents do not seek to strike down a single state statute, either on its face or as applied."). The First Circuit concluded that abstention was unnecessary because the relief the plaintiffs sought would neither intrude in state proceedings nor require monitoring: "what [plaintiffs] seek here is not for the federal court to tinker with Massachusetts' scheme for regulating minors' abortions but for the court to dismantle it." *Bellotti*, 868 F.2d at 466. The First Circuit specifically distinguished the Sixth Circuit's decision in *Parker* as having involved challenges to state-court practices, concluding "[t]he instant case challenges the statute as unconstitutional. This is therefore not a case threatening interference with ongoing state proceedings or practices." *Id.* at 467.

Unlike in *Bellotti*, Petitioners' claims here would have required the district court to delve into state court proceedings and practices, determining the optimal number of cases dependency lawyers should handle, the office space and support staff these lawyers would need, and even how many additional

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plaintiffs were *barred* from raising their claims in state court. *Id.* at 1323 ("The Family Division has explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law").

judges would be necessary to hear the claims. *See* ER 75, 84, 104.

Finally, decisions from the Fourth and Eleventh Circuits present no conflict at all. These circuits concluded that *O'Shea* abstention was *appropriate* under the facts presented in particular cases and have given no indication a "stricter rule" applies than in the Second, Fifth, Sixth, Ninth, and Tenth Circuits. Indeed, the Eleventh Circuit's decision in *31 Foster Children* relies extensively on the Tenth Circuit's decision in *Joseph A.* in affirming the dismissal of injunctive and declaratory relief claims relating to the operation of the Florida foster care system. *See 31 Foster Children*, 329 F.3d at 1276-79. Likewise, the Eleventh Circuit in *Pompey* relies on the Sixth Circuit's decision in *Parker* to abstain from hearing claims for injunctive and declaratory relief where plaintiffs sought to require state judges to appoint counsel for indigent parents in dependency cases. *Pompey*, 95 F.3d at 1547-48 (noting that the claims in *Parker* were "almost identical to the present ones"). And in *Suggs*, the Fourth Circuit applied *O'Shea* in declining to entertain plaintiffs' claims that state judges had a policy of setting excessive bail in obscenity cases, without even suggesting this was the outer limit of equitable abstention. *See Suggs*, 804 F.2d at 279.

In sum, no actual conflict exists between the Court of Appeals' decision in this case and the decisions of any other circuit. Indeed, it is noteworthy that in petitioning for Ninth Circuit rehearing en banc, Petitioners raised no claim that the decision conflicted with that of any other circuit. *See* Fed. R. App. P. 35(b)(1)(B) ("a petition may assert that a

proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"). To the extent any conflict does exist, it plainly is not "mature and deep" let alone "wide, extensive, and mature" as Petitioners assert. Pet. 12, 29.

Amici further argue that the decision in this case is "at odds" with the Ninth Circuit's own precedent. Chemerinsky Br. 8-9, citing *Eu*, 979 F.2d 697 and *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981). No conflict exists.

In *Eu*, the Los Angeles County Bar Association claimed that the maximum number of judges that could be appointed to the Los Angeles Superior Court was too low, and that the shortage of judges unconstitutionally delayed hearings in civil litigation and denied access to the courts. 979 F.2d at 699. The bar association did not allege that excessive delays affected the outcome of any pending case. Noting that the facts were undisputed and that the parties litigated the case on the basis of statistics detailing the "average times to resolution in civil cases," the Ninth Circuit concluded, "although not without some trepidation," that it could exercise declaratory jurisdiction to deny the bar association's claims. *Id.* at 704.

The Ninth Circuit found *Eu* "distinguishable from the case at bar," because the declaratory judgment sought in *Eu* was nowhere near as intrusive as the relief sought by Petitioners here. Pet. App. 8a. Indeed, the complaint in *Eu* required the federal court only to evaluate how long a state court could

take to decide a civil case; the federal court was not required to evaluate the substance or the outcome in any particular case; nor could its ruling have affected the outcome of those cases for this reason.

Dependent children in *Jamieson* claimed that executive branch officials unlawfully failed "to reimburse a private, residential child-caring agency for the agency's cost of care for children placed in that agency . . . ." 643 F.2d at 1355. *Younger* abstention was not required because the plaintiffs did not challenge or seek to interfere with ongoing dependency cases. Indeed, the plaintiffs' claims arose "after a court has committed a juvenile to the state's custody;" after "the state court has completed its work once it has made its initial placement decision;" and were not sufficiently "disruptive or intrusive" to warrant abstention. *Id.* at 1354. The minimal "interference" considered by *Jamieson* does not hold a candle to the wholesale attack Petitioners launch against their attorneys and dependency court proceedings here.

IV. THE OTHER ARGUMENTS OF PETITIONERS AND THEIR AMICI LACK MERIT.

Petitioners assert that the Court of Appeals erroneously interpreted *O'Shea* to apply to their declaratory relief claims, because 42 U.S.C. § 1983 only bars certain claims for *injunctive* relief against judicial officers. Pet. 21-22. This argument does not make sense. If § 1983 barred the declaratory relief Petitioners seek, there would be no need to resort to abstention doctrines. Yet as this Court held in a § 1983 case decided the same day as *Younger*, "ordinarily a declaratory judgment will result in precisely the same interference with and disruption

of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Samuels*, 401 U.S. at 72. Indeed, the text of § 1983 contemplates that actions for injunctive relief may follow actions for declaratory relief. *See* 42 U.S.C. § 1983 (providing that "injunctive relief shall not be granted [against a judicial officer] unless a declaratory decree was violated").

Next, Petitioners note that federal courts have a "'virtually unflagging'" obligation to exercise their subject matter jurisdiction. Pet. 24 (quoting *NOPSI*, 491 U.S. at 359). However, "'virtually' is not 'absolutely' . . . ." *31 Foster Children*, 329 F.3d at 1274. Hence, this Court has held that abstention may be required "in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest . . . ." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (internal quotation marks and citation omitted). One such "exceptional circumstance" arises under the equitable abstention doctrine as recognized and applied in *O'Shea*.[8]

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[8] Plaintiffs' and their amici's reliance on *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-87 (1983), *Polk County v. Dodson*, 454 U.S. 312, 326-27 (1981), and *Miranda v. Clark County, Nevada*, 319 F.3d 465, 469-71 (9th Cir. 2003) (Pet. 26; Chemerinsky Br. 7) also is misplaced. These decisions cannot conflict with the panel's decision, because they do not address abstention. *See Ohio Bureau of Empl. Servs. v. Hodory*, 431 U.S. 471, 479-80 (1977) (states can waive abstention challenges). Also, neither of the decisions presents anywhere near the level of intrusion considered by the panel here. *See Feldman*, 460 U.S. at 487 (challenge to a state bar admission rule that "do[es] not require review of a judicial decision in a particular case"); *Polk County*, 454 U.S. at 326 (challenge to public defender's policy of declining to prosecute frivolous

Given the importance to our federal system of the equitable abstention doctrine as articulated in *O'Shea,* as well as in *Rizzo* and *Kelley*, Petitioners are misguided in their assertion that the Court must "rein in" the doctrine as it did with the "probate" and "domestic relations" exceptions to federal jurisdiction, which were of questionable provenance. Pet. 25; *see Marshall v. Marshall*, 547 U.S. 293, 299 (2006) ("Both [exceptions to federal jurisdiction] are judicially created doctrines stemming in large measure from misty understandings of English legal history"). Indeed, this Court has more recently reaffirmed that comity and federalism counsel restraint from hearing federal lawsuits designed to reform institutions of state government, especially state courts. *Horne v. Flores*, 557 U.S. 433, 448 (2009) (noting "sensitive federalism concerns" raised by litigation seeking "institutional reform"). In these cases, "federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Rizzo*, 423 U.S. at 378 (internal quotation omitted).

Nor is there plausibility to Petitioner's claims that the Court of Appeals' opinion in this case—based on the intrusion and monitoring that Petitioners' claims will necessitate—could bar *any* § 1983 claim challenging state-court "rules, practices, statutes, and procedures." Pet. 25-26; *see also* Chemerinsky Br. 6. Indeed, as noted above, the opinion expressly

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appeals); *Miranda*, 319 F.3d at 469-71 (challenge to public defender's allocation of resources based on clients' polygraph test results).

distinguishes *Eu*, 979 F.2d 697, a decision in which the Ninth Circuit declined to abstain where the plaintiff claimed that the maximum number of judges that could be appointed to the Los Angeles Superior Court was too low and the shortage of judges unconstitutionally delayed hearings in civil litigation and denied access to the courts. *Id.* at 699. Nor is there any indication of a "sea change" in the Second, Fifth, Sixth, or Tenth Circuits despite the assertion that these circuits' interpretations of *O'Shea* are equally "sweeping." To the contrary, Petitioners cite district court cases from these same circuits to demonstrate that courts need not always abstain from hearing lawsuits challenging to child welfare agency practices and related court orders. *See* Pet. 27 n.2.

Equally baseless is Petitioners' claim that the Court of Appeals' decision prevents foster children from "ever" using federal court to challenge state policies fares no better for two reasons. First, Petitioners' argument ignores a basic premise of federalism that "state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil,* 481 U.S. at 15; *see also Middlesex County Ethics Comm.,* 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights"). Second, abstention here does not close the door to federal court in any event. When the relief sought involves continuing intrusion into the administration of dependency court proceedings, federal courts will generally abstain. *E.g.*, *Laurie Q. v. Contra Costa County*, 304 F. Supp. 2d 1185, 1205 (N.D. Cal. 2004). Absent such intrusion, federal

courts will generally hear these claims. *E.g.*, *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 982 (9th Cir. 2010); *Jamieson*, 643 F.2d at 1354. The Court of Appeals' decision changes none of this.

Amici First Star et al. argue a straw man by complaining dependency courts cannot provide an adequate remedy because dependent children will not "recognize and assert their rights to adequate legal representation." First Star Br. 19. Dependency attorneys—and *not* their clients—have the statutory and ethical duty not to accept too many cases and to seek relief if caseloads prevent them from providing adequate representation. *In re Edward S.*, 173 Cal. App. 4th at 412-13; Cal. R. Ct. 5.660(c)(2)(D). Dependency court judges also have the obligation to "take whatever appropriate action is necessary to fully protect the interests of the child," Cal. Welf. & Insts. Code § 317(c) and can relieve counsel *sua sponte* if they were to conclude that counsel's representation was inadequate. *See People v. Jones*, 186 Cal. App. 4th 216, 241 (2010).

First Star's additional complaint that dependency courts aren't "regular" superior courts and are not equipped to handle cases like this, First Star Br. 20, must also be rejected for two reasons. First, Petitioners have no basis to complain about the adequacy of dependency courts because they never attempted to assert their claims in that forum. When plaintiffs fail to asset their claims in state court, the adequacy of state remedies is presumed "in the absence of unambiguous authority to the contrary." *Pennzoil,* 481 U.S. at 15. Second, "California courts have explicitly held that juvenile courts can hear

constitutional claims relating to the deficient representation of counsel arising out of the unavailability of adequate time and resources to represent a minor." Pet. App. 57a (citing cases). Hence, the district court properly abstained here, so that individual class members *and their lawyers* could press their claims in state proceedings. *O'Shea*, 414 U.S. at 503; *Chapman v. Oklahoma*, 472 F.3d 747, 750 (10th Cir. 2006) ("*Younger* abstention cannot be avoided by purported class as long as individual relief can be provided by state court"); *31 Foster Children*, 329 F.3d at 1280 (same).

Finally, First Star's concerns about the willingness of state judges to pass on the wisdom or constitutionality of policies set by the Judicial Council are misplaced: Petitioners cannot defeat the "presumption of honesty and integrity in those serving as adjudicators." *Hirsch v. Justices of the Supreme Court*, 67 F.3d 708, 714 (9th Cir. 1995); *cf. Gibson v. Berryhill*, 411 U.S. 564, 570-71, 576-79 (1973) (state administrative judges who also acted to prosecute the federal plaintiffs and who have a financial stake in the outcome of plaintiffs' federal claims are biased). First Star offers nothing to support its assertion that "there is no constitutionally impartial jurist in California who can decide this lawsuit." First Star Br. 20-21. California's judges can and frequently do strike down or soberly criticize acts of the Judicial Council and the Administrative Office of the Courts. *E.g., California Court Reporters Ass'n v. Judicial Council of California*, 59 Cal. App. 4th 959, 963-64 (1997) (invalidating Judicial Council-adopted rule of court regarding electric recording of trial proceedings); *County of Sonoma v. Workers Comp. Appeals Bd.*, 222 Cal. App. 3d 1133, 1144

(1990) (noting "disagreement" with Judicial Council's position on constitutionality of statute).

V. THE PETITION IS A POOR VEHICLE FOR REVIEWING THE SCOPE OF *O'SHEA*.

We close by briefly noting that the sheer magnitude of the intrusion into and monitoring of state-court operations that Petitioners' claims would necessitate make this case an unlikely vehicle for defining the precise contours of equitable abstention under *O'Shea.*

As noted above, Petitioners seek a declaration that heavy dependency attorney caseloads "violated, continue to violate and/or will violate" the constitutional and statutory rights of all children represented by court-appointed dependency counsel in Sacramento. A declaration of this type would interfere with the administration of Sacramento Superior Court's dependency courts by, among other things: (a) calling into question all rulings issued by all dependency courts while dependent children were represented by ineffective counsel; (b) requiring the removal of current, and reassignment of new, attorneys in current and future dependency cases; (c) impairing the dependency courts' ability to hear cases on a going-forward basis until attorney caseloads achieve a judicially established level; and (d) subjecting the dependency courts to the ongoing supervision and contempt powers of a federal court.

Under these circumstances, the Court of Appeals' opinion simply does not dramatically contract subject matter jurisdiction or work a "sea change" in abstention law as Petitioners suggest. Pet. 1-2, 25. If anything, the interference with state court operations here is more egregious than the interference *O'Shea*

and its progeny condemn. Hence, a decision on the facts and claims alleged here would do little more than repeat and apply *O'Shea*'s original holding, making this case a poor candidate for further review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ROBERT A. NAEVE
(Counsel of Record)
PETER E. DAVIDS
JONES DAY
3161 Michelson Drive
Suite 800
Irvine, CA 92612.4408
Telephone: 1.949.851.3939
Facsimile: 1.949.553.7539

Counsel for Respondents

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