No. 18-1203

In The
# Supreme Court of the United States

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COURTHOUSE NEWS SERVICE,

*Petitioner,*

v.

DOROTHY BROWN, in her official capacity as Clerk of the Circuit Court of Cook County, Illinois,

*Respondent.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF

Respondent claims *Planet*, which squarely conflicts with the decision below, "is an outlier" and "does not provide a basis" for granting the petition because the Ninth Circuit allegedly did not really mean what it said in that case. *See* BIO.16. But that court has not walked back *Planet*, and the cases Respondent cites actually affirm its rationale in their careful focus on the relief sought by those litigants, which was different in kind and scope.

The same is true of Respondent's attempt to minimize (and indeed flagrantly ignore) the Second Circuit's holding in *Hartford Courant* that *Younger* abstention did not preclude federal court review of press access to state court files. That is precisely the opposite answer to the same question decided below, and no subsequent Second Circuit decision displaces that holding.

A square split exists, and the decision below falls on the wrong side of it.

Finally, Respondent argues that the issue presented by the petition is unimportant and the decision below is correct. But few decisions are more perilous to our constitutional structure than those that would allow federal courts to abstain from federal constitutional challenges in reliance on a standardless rationale. The decision below is both important and wrong, and it merits this Court's review.

## I. Respondent's Attempts To Minimize A Clear Circuit Split Are Unpersuasive.

Respondent argues against granting certiorari by attempting to minimize and mischaracterize a square split of authority that exists on an important question of federal jurisdiction. She does so by relying on cases very different from those identified in the petition—cases that directly interfered with the judicial functions of state court judges. This case, which seeks only *administrative* relief from a state court *clerk*, is not that.

There is no doubt that the Seventh Circuit knew it was creating a square split when it issued the decision below. The decision "acknowledge[s] that the Ninth Circuit in [*Planet*], a case nearly identical to this one, came to the opposite conclusion regarding abstention." Pet.App.22; *see also* Pet.App.23 n.6. Regardless of what Respondent argues in opposing certiorari, the federal courts believe a square split exists on the question whether federal courts must abstain from hearing First Amendment challenges seeking access to state court filings.

Seeking to distract from this, Respondent claims that the Ninth Circuit's decision in *Planet* is an outlier in that Circuit (a view apparently ignored by both the Ninth and Seventh Circuits and discovered only for the first time in opposing certiorari). The opposite is true: The Ninth Circuit cases cited by Respondent are consistent.

Both of the Ninth Circuit cases to which Respondent points underscore the coherence of the Ninth Circuit's *Younger* abstention jurisprudence: In deciding whether to abstain, the Ninth Circuit "examine[s] the circumstances of each case[.]" *Miles v. Wesley*, 801 F.3d 1060, 1063 (9th Cir. 2015). When the relief a litigant seeks targets state court judges by imposing ongoing substantive or procedural requirements on their adjudication of cases, federal courts should abstain. On the other hand, when litigants seek only one-time administrative relief not related to the adjudication of any state court proceeding, abstention does not bar federal court review. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 790 (9th Cir. 2014) (noting that "where the requested relief may be achieved without an ongoing intrusion into the state's administration of justice," abstention is not required, and distinguishing *E.T.*).

Respondent first argues that *Planet* conflicts with *E.T. v. Cantil-Sakauye*, a case decided before *Planet* that raised constitutional challenges to the adequacy of state representation of foster children. 682 F.3d 1121 (9th Cir. 2012). As the *Planet* decision itself explains, the litigants in *E.T.* sought relief different from that below in scope and substance. The relief in *E.T.* was broad, invasive, and directed at the adjudication of state court proceedings, including "'examination of the administration of a substantial number of individual [foster] cases,'" which amounted to "an 'ongoing federal audit' of the dependency court for Sacramento County." *Planet*, 750 F.3d at 790.

The same is true of *Miles v. Wesley*, 801 F.3d 1060 (9th Cir. 2015). In *Miles*, as in *E.T.*, the plaintiffs sought intrusive ongoing relief targeting state court judicial proceedings: a class action injunction preventing Los Angeles Superior Court from consolidating unlawful detainer actions into a few courts and requiring the Court to retain jurisdiction indefinitely to enforce its order. *Id.* at 1064. Given this "unprecedented" request for relief, the Ninth Circuit held that abstention was proper—and the Court "need look no further than the breadth of Plaintiffs' requested relief," which directly impacted state court proceedings on an ongoing basis, in so holding. *Id.*

*E.T.* and *Miles*, which would have required excessive interference in state court procedural and substantive decision-making, stand in sharp contrast to *Planet*, which required only a straight-forward, single-shot order directing the court clerk to enact administrative changes pertaining to *access* to public court records. In *Planet*, unlike *Miles* and *E.T.*, "[t]he remedy that CNS seeks is more akin to [a] bright-line finding . . . than the ongoing monitoring of the substance of state proceedings that we rejected in *E.T.*" *Planet*, 750 F.3d at 791. Abstention was inappropriate in *Planet* because *unlike the relief sought in E.T. and Miles*, "a federal court would not need to engage in the sort of intensive, context-specific legal inquiry that would be necessary to determine whether counsel's performance was constitutionally adequate." *Id.* Where relief was targeted and administrative in nature, abstention was

not appropriate, but where the relief sought was invasive and judicial in nature, it was.

The three Ninth Circuit decisions are consistent, as the Ninth Circuit noted in *Planet* by distinguishing the very different circumstances presented in *E.T*. If the Ninth Circuit had believed that *E.T.* was inconsistent with *Planet*, the *Planet* decision would have acknowledged as much when it discussed *E.T.* at length. *Miles* likewise acknowledged *Planet* and saw no need to distinguish it. *See Miles*, 801 F.3d at 1064. Had these panels disagreed with one another, they would have said so. *Cf. Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (It is an "unassailable" proposition that, absent intervening Supreme Court authority, "a three-judge panel may not overrule a prior decision of the court."); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) ("We are bound by the holdings of prior three-judge panels so long as those holdings and their reasoning have not been superseded by later or intervening authority.").

In short, Respondent's reliance on *E.T.* and *Miles* to gin up an intra-circuit disagreement fails. The Ninth Circuit has applied *Younger* and its progeny in each of these cases, and reached different results only because the relief sought was drastically different in type and degree.

Respondent's attempts to brush aside the Second Circuit's decision in *Hartford Courant* fail for similar reasons. Notwithstanding Respondent's focus

on *Pullman* abstention, the Court in *Hartford Courant* evaluated *Younger* and declined to abstain from hearing First Amendment challenges to state court decisions not to provide access to court documents. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100–01 (2d Cir. 2004). The appellees in *Hartford Courant* presented precisely the question considered by the Seventh Circuit below: whether state court procedures regarding access to state court filings "pose state and federal constitutional issues that [state] courts ought first to have the opportunity to review." *See* Br. of Defs.-Appellees, No. 03-9141, 2004 WL 5822413, at *33 (2d Cir. Feb. 24, 2004). The Second Circuit held that *Younger* presented no bar to such challenges in the federal courts. In the decision below, the Seventh Circuit reached the opposite conclusion—based on the principles of *Younger* and its progeny, abstention was required. *See* Pet.App.23 (The "temporal access dispute with a state court clerk should be heard first in the state courts."). The Second and Seventh Circuits are not "in harmony" on the question presented, *see* BIO.22. They are diametrically opposed: abstention did not bar relief in the Second Circuit. It did here.

Nothing in the Second Circuit's more recent *Disability Rights New York* decision changes that. *See Disability Rights New York v. New York*, 916 F.3d 129 (2d Cir. 2019). As in *Miller* and *E.T.*, the litigants in *Disability Rights* sought sweeping and ongoing injunctive relief targeting substantive and procedural rules for state court judges, including asking the federal court to alter the manner in which guardianship proceedings

are conducted, *e.g.*, to "provid[e] notice, apply[] a certain burden of proof, and provid[e] substantive and procedural rights[.]" *Id.* at 132. Thus, the "requested relief would effect a continuing, impermissible 'audit' of New York Surrogate's Court proceedings" and abstention was appropriate. *Id.* at 136.

Distinguishing these cases actually underscores why this petition presents a clear and clean split for this Court's review. In *Planet*, *Hartford Courant*, and the decision below, the question presented and scope and type of relief sought were the same. Yet the Courts reached opposite conclusions. This clean break on nearly identical facts considered by sister circuits merits this Court's review.

The same dichotomy applies to other cases cited by Respondent, *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), *petition for cert. filed*, No. 18-1245 (U.S. Mar. 26, 2019) and *Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006). In both cases, the relief sought would have imposed particular intrusive requirements on state court proceedings and mandated ongoing federal court review to ensure compliance. *Oglala Sioux Tribe*, 904 F.3d at 612 (injunctive relief would impose "numerous procedural requirements" and ongoing federal court review); *Kaufman*, 466 F.3d at 85 (relief sought a new system for assigning cases among panels of state appellate judges including possible vacatur of previously issued decisions). Not so here. The relief requested below does not touch state court judicial proceedings—it merely requires that public documents filed by parties in state court proceedings be made

available to the public and press forthwith by state court *clerks*.

In sum, three Courts of Appeals have considered the nearly identical question whether, consistent with *Younger* and its progeny, the press may bring First Amendment challenges in federal court to state court administrative practices that restrict access to state court filings. Two of those courts—the Ninth Circuit and the Second Circuit—allow such challenges, reasoning that federal courts may (notwithstanding *Younger* and its progeny) order relief for alleged constitutional violations without unduly interfering in state court proceedings. A third, the Seventh Circuit in its decision below, reached the opposite conclusion, holding that *Younger* and its progeny bar review and require federal courts to abstain from hearing such challenges.

A clear split of authority on the scope of federal jurisdiction to hear constitutional challenges in federal court exists, and that split merits this Court's review.

## II. No Vehicle Problems Prevent Review.

Respondent spends several pages recounting the Clerk's motion to stay the preliminary injunction, the Clerk's motion to clarify the scope of the injunction, and the Clerk's parallel state court petition purporting to ask permission to comply with the injunction. *See* BIO.9–12. None of this extended discussion of the Clerk's post-injunction procedural maneuvering is relevant to the legal question presented by this petition. Respondent's interlocutory machinations—before and

while Seventh Circuit review of the order remained pending—have nothing to do with the merits of the decision below that is under review.

Moreover, to the extent Respondent's discussion is meant to suggest that the Court should deny review because compliance with a federal court order would be difficult for the Clerk, that suggestion has no basis in fact (which is perhaps why Respondent provided no facts to support it). In reality, the Clerk's suggestion that she may not comply with a federal court injunction—for whatever reason—only heightens the need for federal courts to remain open to hear these claims. Section 1983 exists to ensure that federal courts serve as a bulwark against state actors' intransigence to constitutional violations. *See, e.g.*, *Glassroth v. Roy Moore*, 229 F. Supp. 2d 1290, 1293 (M.D. Ala. 2002). Federal review is necessary and it can be accomplished without *any* interference in state court proceedings.

## III. The Decision Below Is Wrong And Review Is Important.

Respondent contends that "[t]he fact that the merits present a First Amendment question does not weigh any more in favor of this Court's review than any other federal question." BIO.17. This is wrong. There are few questions more important than whether a federal court can hear federal challenges to state court actions that violate federal constitutional rights. The federal jurisdictional question presented by this petition is important on its own. But the question is

made more important because of the underlying merits, which run to the heart of the First Amendment's guarantees that a free press may have meaningful and timely access to judicial proceedings. Particularly in light of the fact that, in modern litigation, fewer and fewer cases go to trial—and most are decided on the papers—access to court documents is exceedingly important.

Any decision that prevents the press from litigating constitutional challenges in federal court merits this Court's careful consideration precisely because the scope of federal jurisdiction is important independent of the underlying merits of a constitutional claim. But the underlying merits do matter, and here the First Amendment harms alleged amplify the need for review: If Petitioner's view of the scope of the media's right to access public court filings is correct, then litigation over abstention compounds the constitutional harm Petitioner suffers. *See Planet*, 750 F.3d at 787 ("the delay" in litigation "that results from abstention will itself" "chill speech"). The scope of the press's right to access state court complaints is an important constitutional question that federal courts can and should consider. Channeling review of this alleged First Amendment harm only to state courts (who may have a particular interest in the outcome of a dispute related to the clerks who oversee their own court documents) risks compounding the underlying constitutional violation.

On the merits of the *Younger* question, the Seventh Circuit's standardless deference to "comity" and

"respect" for state courts cannot be a basis for abstention under this Court's precedents. Federal courts have a "virtually unflagging" obligation to hear cases over which they otherwise have jurisdiction. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). This Court countenances only specific "exceptional circumstances" that allow for exceptions to this rule, *see id.* at 78, and none apply here.

Allowing the decision below to stand would open the floodgates for federal courts to abstain from hearing challenges to other thorny federal questions. "Comity" and "respect" as a basis for abstention could prove a dangerously viral rationale for overworked federal court judges to abstain. But abstention is not a vehicle to side-step difficult decisions. Federal courts presumptively must hear questions they can hear. The decision below is wrong and should be reversed.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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