CLOSING THE COURTHOUSE DOORS TO FIRST AMENDMENT CLAIMS SEEKING ACCESS TO STATE COURT RECORDS: IS ABSTENTION WARRANTED?

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ABSTRACT

Article III courts at all levels have consistently recognized the duty to adjudicate cases within their jurisdiction. Yet, federal courts have also fashioned doctrines of abstention, which allow federal courts to decline to adjudicate cases, even if jurisdiction exists. The tension between these two principles—on the one hand, the duty to adjudicate, and on the other hand, the ability to abstain—has recently manifested itself in First Amendment litigation raising an issue of timeless significance: public access to civil case filings in state courts. These filings include docket sheets and complaints, which contain basic information necessary to ensure transparency and the public's knowledge of civil judicial proceedings.

While federal courts agree the First Amendment provides at least some guarantee of public access to civil filings, federal courts disagree on the result when these First Amendment claims intersect with the doctrines of abstention. The U.S. Courts of Appeal for the Second and Ninth Circuits hold that abstention is unwarranted, thereby expeditiously resolving important First Amendment questions while furthering key principles and policies of federal jurisdiction. In contrast, the U.S. Court of Appeals for the Seventh Circuit holds that abstention is warranted, effectively closing the federal courthouse doors and leaving important First Amendment questions unsettled.

This Article suggests that abstention should be presumptively unwarranted in First Amendment injunctive suits seeking access to civil filings in state courts. This presumption appropriately calculates the importance of the First Amendment interests at stake and accurately accounts for legitimate state interests and functions. Finally, this presumption enhances, rather than undermines, key principles and policies of federal jurisdiction.

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I. INTRODUCTION

Nearly a century ago, the U.S. Supreme Court proclaimed, "It is most true that this Court will not take jurisdiction if it should not[,] but it is equally true, that it must take jurisdiction if it should."[1] Chief Justice John Marshall, writing for a unanimous Court, continued that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[2] The Court has consistently reaffirmed these cornerstone principles.[3] But the Court has also, nevertheless, instructed federal courts to abstain and to therefore decline to decide cases in certain

1. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).
2. *Id.*
3. *See, e.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976).

instances, even if there is jurisdiction.[4] The tension between these two principles—the command to decide cases versus the ability to abstain from doing so—is inescapable.[5]

In recent years, federal courts and litigants have confronted these seemingly incongruent principles in cases raising a constitutional issue of special importance: public access to civil case filings in state courts.[6] The basic, common aim of these suits is to obtain injunctive relief eliminating or minimizing barriers and delays associated with accessing and reviewing civil filings in state courts, including docket sheets and complaints.[7] These suits, brought by entities within the press seeking to report on civil litigation and acting as proxies of the public, assert rights to access state court filings under the First Amendment to the U.S. Constitution.[8]

Although the First Amendment does not expressly secure a right to access any type of court proceeding or filing, federal courts agree the First Amendment secures a right to access criminal and civil court proceedings and filings.[9] Federal courts disagree, however, on whether abstention should

4. *See infra* Part II. Although beyond the scope of this Article, it should be noted that: (1) "[i]t is not always clear whether abstention is discretionary or mandatory," James Bedell, Note, *Clearing the Judicial Fog: Codifying Abstention*, 68 CASE W. RES. L. REV. 943, 960 (2018); and (2) depending on the circumstances warranting abstention, the suit may be stayed or dismissed, *see* MARTIN A. SCHWARTZ, FED. JUD. CTR., SECTION 1983 LITIGATION 178–84 (Kris Markrian ed., 3d ed. 2014).

5. *See, e.g.*, Vulcan Chem. Techs., Inc. v. Barker, 297 F.3d 332, 341 (4th Cir. 2002) ("[W]hether to abstain necessarily requires resolving the tension between the federal court's obligation to exercise jurisdiction . . . ."); Law Enf't Ins. Co. v. Corcoran, 807 F.2d 38, 39 (2d Cir. 1986) (noting the "recurring tension" fostered by abstention versus the "fundamental obligation to adjudicate controversies"); *cf.* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of Judicial Function*, 94 YALE L. J. 71, 72–78 (1984) (viewing abstention as a "usurpation of legislative authority").

6. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1065 (7th Cir. 2018); Courthouse News Serv. v. Planet, 750 F.3d 776, 779 (9th Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 85–86 (2d Cir. 2004).

7. *See Brown*, 908 F.3d at 1065; *Planet*, 750 F.3d at 779; *Hartford Courant*, 380 F.3d at 85–86.

8. *See*, *e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 85 (1975) (writing that "the freedom of the press clause of the First Amendment" makes the press a proxy of the public when asserting First Amendment rights); *see also infra* notes 223–26 and accompanying text.

9. *Brown*, 908 F.3d at 1068–70; *Planet*, 750 F.3d at 785–86; *Hartford Courant*, 380 F.3d at 90 n.3, 90–96. While the Supreme Court has recognized a First Amendment right to access criminal proceedings, *e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576–78 (1980), and has not yet addressed whether a First Amendment right to access

be invoked when First Amendment claims seeking access to civil filings in state courts are at issue.[10] The U.S. Courts of Appeal for the Second and Ninth Circuits decline to abstain.[11] In the Second and Ninth Circuits, the federal court adheres to the command to decide cases and proceeds to the merits of the suit, ensuring expeditious resolution of important and unsettled First Amendment questions and furthering key policies of federal jurisdiction.[12] In contrast, the U.S. Court of Appeals for the Seventh Circuit invokes abstention.[13] In the Seventh Circuit, the federal court abstains, instructs the litigants to start anew in state court, and leaves important First Amendment questions unsettled.[14]

The circuit split over whether abstention is warranted in First Amendment injunctive suits seeking access to civil filings in state courts does not reflect nuanced distinctions in the operative facts of the cases, but rather, a larger, more fundamental disagreement over the appropriate role of federal courts in this context. The Second and Ninth Circuits' approach prioritizes the duty to decide cases raising important constitutional questions within federal courts' jurisdiction, even if doing so requires resolution of questions concerning, and perhaps ultimately enjoining, state courts' civil filing and docket management procedures.[15] But the Seventh Circuit's approach directs federal courts not to decide claims seeking to enjoin state courts' civil filing and docket-management procedures until state courts decide the claims in the first instance.[16] The Seventh Circuit's approach, in essence, closes the federal courthouse doors and tacitly requires the litigants to exhaust state court remedies before important First Amendment claims are deemed eligible for a federal forum.[17]

civil proceedings or filings exists, lower courts widely recognize a First Amendment right of access in the civil context. *See infra* Part IV.A.1.

10. *Compare Brown*, 908 F.3d at 1071–75, *with Planet*, 750 F.3d at 787–93, *and Hartford Courant*, 380 F.3d at 99–102.

11. *Planet*, 750 F.3d at 787–93; *Hartford Courant*, 380 F.3d at 99–102.

12. *See Planet*, 750 F.3d at 787–93; *Hartford Courant*, 380 F.3d at 99–102.

13. *Brown*, 908 F.3d at 1071–75, 1075 n.6 (observing that "this opinion creates a circuit conflict on the abstention issue").

14. *See id.* at 1001–75.

15. *See Planet*, 750 F.3d at 787–93; *Hartford Courant*, 380 F.3d at 86.

16. *See Brown*, 908 F.3d at 1071–75.

17. *See id.* at 1075 ("This temporal access dispute with a state court clerk should be heard first in the state courts."). The Supreme Court has consistently held that state remedies need not be exhausted before federal constitutional claims may be asserted in a federal forum. *See*, *e.g.*, Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982)

This Article suggests that abstention should be presumptively unwarranted in First Amendment injunctive suits seeking access to civil filings in state courts. For essential background, Part II of this Article traces the development of the key doctrines of abstention. Part III turns specifically to First Amendment injunctive suits seeking access to civil filings in state courts and discusses the Second and Ninth Circuits' split with the Seventh Circuit. Part IV then begins by striving to provide guidance to resolve the Second and Ninth Circuits' split with the Seventh Circuit. To that end, Part IV explores questions raised by the circuit split and demonstrates why a federal forum should be presumptively available. Part IV next explains why the relevant doctrines of abstention do not apply and ultimately recommends that federal courts should adopt a presumption against abstention in this context. Finally, Part V concludes by summarizing why this presumption against abstention is proper.

II. RELEVANT DOCTRINES OF ABSTENTION

The relevant doctrines of abstention are judicially created[18] and broadly premised on notoriously amorphous[19] notions of equity, comity, and federalism.[20] Distilled, equity suggests an injunction should not issue if an

("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978) ("[T]his Court has uniformly held that individuals . . . need not present their federal constitutional claims in state court before coming to a federal forum."); *see generally* Jessica O'Brien, Recent Development, *To Abstain, or Not to Abstain, That is the Question: The Seventh and Ninth Circuits' Divergent Approaches to* Younger *Abstention*, 98 N.C. L. REV. 191 (2019) (contending the Seventh Circuit's approach is correct); *see also infra* notes 188, 304.

18. PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 586 (4th ed. 1998); Redish, *supra* note 5, at 114 (noting that abstention signifies "judicial lawmaking of the most sweeping nature"). Congress has also established certain statutory bases of abstention, *e.g.*, the Anti-Injunction Act, 28 U.S.C. § 2283 (1948), but only the judicially-created doctrines of abstention are relevant to the scope of this Article.

19. James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1066 (1994) (positing that equity, comity, and federalism "form an amorphous, three-headed impediment to federal jurisdiction"); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 154 (1978) (noting the Court's "largely conclusory references" to equity, comity, and federalism, while observing that the Court "has not seriously attempted to articulate the norms or policies which shape its rules").

20. Because this Article addresses injunctive requests for access to state court filings, the relevant doctrines of abstention are analyzed with an exclusive focus on their

adequate alternative remedy exists.[21] Comity signifies that a proper respect must be shown to states and their governmental institutions.[22] Federalism, relatedly, is the principle that states and their governmental institutions should be free from unwarranted interference so as to smoothly and efficiently perform their legitimate functions.[23]

The Supreme Court has fashioned three main abstention doctrines relevant to First Amendment injunctive suits seeking access to civil filings in state courts: (1) abstention under *Pullman*; (2) abstention under *Burford*; and (3) abstention under *Younger* and its progeny.[24] Each abstention doctrine is explored in turn.

A. Pullman

In March 1941, the Court decided *Railroad Commission of Texas v. Pullman Co.*, which held that abstention is generally proper where federal constitutional issues can likely be avoided by resolving uncertain issues of state law.[25] *Pullman* arose from an administrative order of the Railroad Commission of Texas.[26] The order required that all sleeping cars on Texas

application to requests for injunctive relief, even though the relevant doctrines of abstention have differing applications to differing requests for relief. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 852–53, 880–90 (7th ed. 2016) [hereinafter FEDERAL JURISDICTION]; SCHWARTZ, *supra* note 4, at 180.

21. *See, e.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (quoting Younger v. Harris, 401 U.S. 37, 43–44 (1971)); FEDERAL JURISDICTION, *supra* note 20, at 876–77.

22. *See, e.g.*, *Jacobs*, 571 U.S. at 77 (quoting *Younger*, 401 U.S. at 44); FEDERAL JURISDICTION, *supra* note 20, at 878–79.

23. *See, e.g.*, *Younger*, 401 U.S. at 44; FEDERAL JURISDICTION, *supra* note 20, at 30–32, 867–68.

24. *See Younger*, 401 U.S. at 46–49; Burford v. Sun Oil Co., 319 U.S. 315, 331–34 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499–501 (1941). The Author notes that abstention under *Colorado River Water Conservation District v. United States* is not included for discussion here. *See* 424 U.S. 800 (1976). Under *Colorado River*, abstention is appropriate where parallel state and federal court litigation combines with sufficiently "exceptional" circumstances illustrating a need to avoid duplicative litigation. *Id.* at 816–20. *Colorado River* abstention reflects priorities of judicial economy, not equity, comity, and federalism. *Id.*; *see also* Rehnquist, *supra* note 19, at 1092–93. For that reason, *Colorado River* has been neither asserted nor analyzed in First Amendment injunctive suits seeking access to civil filings in state courts. *See infra* Part III. *Colorado River* is therefore beyond the scope of this Article.

25. *Pullman*, 312 U.S. at 499–501.

26. *Id.* at 497–98.

railroads be operated by a conductor.[27] The order conflicted with industry practice in places where Texas railroad travel was infrequent.[28] Specifically, where Texas railroad travel was infrequent, trains with sleeping cars were frequently "without a . . . conductor" and thus relied on porters to oversee the sleeping cars.[29] At that time in Texas, however, it was "well known" that porters were black and conductors were white.[30]

Interested railroads filed suit in federal district court to enjoin the order, contending the challenged order infringed the Fourteenth Amendment and violated Texas law.[31] Porters and conductors, on opposing sides, later intervened.[32] A three-judge panel in the district court enjoined the order, and the Railroad Commission of Texas appealed directly to the Supreme Court.[33]

In a unanimous decision authored by Justice Felix Frankfurter, the Court recognized the case "undoubtedly tendered a substantial constitutional issue" under the Fourteenth Amendment.[34] This constitutional issue should have been avoided by the three-judge panel unless there was "no alternative to its adjudication."[35] The Court reasoned that the constitutional issue could likely be avoided if *Pullman* were decided based on the pendent claim under Texas law, for if the Commission's order violated Texas law, "there [would be] an end of the litigation; the constitutional issue [would] not arise."[36] Although the three-judge panel had in fact decided the pendent claim under Texas law, the Court explained the final interpretation of Texas law belonged to the Supreme Court of Texas, not to the federal courts.[37]

27. *Id.*
28. *Id.*
29. *Id.* at 497.
30. *Id.*
31. *Id.* at 498.
32. *Id.*
33. *Id.* The relevant legislation in effect at the time of *Pullman* required that *Pullman* be decided first by a three-judge panel in the district court with an appeal taken, if any, as of right directly to the Supreme Court. Judiciary Act of 1925, ch. 229, 43 Stat. 936 (1926) (current version at 28 U.S.C. § 2284 (2018)); *see also* CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 50 (4th ed. 1980) (discussing the Judiciary Act and relevant amendments).
34. *Pullman*, 312 U.S. at 498.
35. *Id.*
36. *Id.* at 501.
37. *Id.* at 499–500.

The Court in *Pullman*, moreover, expressly highlighted that the relief sought (i.e., an injunction) was equitable.[38] When sitting in equity, as *Pullman* explained, federal courts have "wise discretion" to: (1) give appropriate "regard for public consequences" of issuing an injunction; (2) secure the "avoidance of needless friction with state policies"; and (3) "further[] the harmonious relation between state and federal authority without the need of rigorous congressional restriction."[39] While *Pullman* did not by name identify comity and federalism as underlying abstention in this context, the Court's analysis was undoubtedly tethered to these notions.[40] As the Court in *Pullman* elaborated:

> In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.[41]

Absent a showing that relief in Texas state courts was unavailable, the Court in *Pullman* concluded abstention was warranted.[42]

Pullman thus holds that abstention is warranted in cases raising two conditions: (1) an uncertain issue of state law; and (2) resolution of the uncertain issue of state law creates a reasonable possibility of avoiding a federal constitutional issue.[43] Where these conditions are present, *Pullman* abstention operates to "avoid unnecessary friction in federal[-]state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication."[44]

38. *Id.* at 501.

39. *Id.* at 500–01.

40. *See id.* at 500.

41. *Id.* (citation omitted).

42. *Id.* at 501–02.

43. *See id.* at 498–501; *see also* FEDERAL JURISDICTION, *supra* note 20, at 837 (citing Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Baggett v. Bullitt, 377 U.S. 360, 375 (1964)); LOW ET AL., *supra* note 18, at 772 ("In most *Pullman* cases, the debate is whether state law is sufficiently 'unclear' to justify abstention.").

44. Harman v. Forssenius, 380 U.S. 528, 534 (1965). Underlying *Pullman* abstention is the axiomatic principle that federal courts must avoid unnecessarily deciding constitutional issues. *See, e.g.*, FEDERAL JURISDICTION, *supra* note 20, at 835; *see also infra* note 260.

B. Burford

In May 1943, the Court decided *Burford v. Sun Oil Co.*, holding that abstention is generally proper where resolving a significant and complex issue of state law will interfere with important state functions.[45] Coincidentally, like *Pullman*, *Burford* arose from an administrative order of the Railroad Commission of Texas.[46] The order in *Burford* authorized the drilling of four oil wells in East Texas.[47] An oil company filed suit in federal district court to enjoin the order, contending the order infringed the Fourteenth Amendment and violated Texas law.[48] *Burford* arrived at the Court after the Fifth Circuit first affirmed the district court's dismissal of the suit and then, on rehearing, reversed the district court's dismissal of the suit.[49] The Court framed the issue for resolution as follows: "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"[50]

The Court, in an opinion authored by Justice Hugo Black, observed that the challenged order was the product of a complex regulatory scheme governing Texas oil and gas fields, which "must be regulated as a unit for conservation purposes."[51] The Court also observed that the suit implicated significant Texas interests of the oil and gas industry, the greater Texas economy, and Texas governmental revenue.[52] These significant interests, the Court proceeded, caused Texas to designate the Railroad Commission of Texas as the entity charged with regulating oil and gas in Texas.[53]

Moreover, the Court acknowledged that oil and gas litigation occurring in federal court—but involving Texas law—had "created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission."[54] This "constant task" was at odds with Texas legislation providing for state judicial review of orders of the Railroad Commission of Texas in a particular district court so as to ensure consistent adjudications by a court with

45. Burford v. Sun Oil Co., 319 U.S. 315, 331–34 (1943).
46. *Id.* at 316–17.
47. *Id.*
48. *Id.*
49. *See id.*
50. *Id.* at 317.
51. *Id.* at 319.
52. *Id.* at 320.
53. *Id.*
54. *Id.* at 329.

specialized knowledge.[55] As *Burford* further reasoned regarding equity, comity, and federalism:

> [F]ederal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.[56]
>
> . . . .
>
> . . . As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts. Delay, misunderstanding of local law, and needless federal conflict with the State policy, are the inevitable product of this double system of review. The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a State court as to State law.[57]

Given the significant Texas interests at stake, the Railroad Commission of Texas's broad authority, the specialized system of judicial review, and the need for consistency and centralization, the Court concluded the case "so clearly involve[d] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."[58] The Court therefore held that abstention was warranted.[59]

Though *Burford* abstention "has not been widely invoked,"[60] *Burford* abstention may nevertheless be proper if: (1) the suit involves complex and significant issues of state law;[61] and (2) deciding the state law issues would jeopardize the state's attempt to achieve "uniformity in the treatment of an 'essentially local problem.'"[62]

55. *Id.* at 325–26, 329.

56. *Id.* at 318 (quoting Pennsylvania v. Williams, 294 U.S. 176, 185 (1935)).

57. *Id.* at 327–28.

58. *Id.* at 332.

59. *Id.* at 333.

60. LOW ET AL., *supra* note 18, at 591.

61. FEDERAL JURISDICTION, *supra* note 20, at 848–54.

62. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 362 (1989) (quoting Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 347 (1951)); *see also* FEDERAL JURISDICTION, *supra* note 20, at 848–54.

C. Younger *and its Progeny*

In February 1971, the Court decided *Younger v. Harris* and held that abstention is generally proper where federal courts are asked to enjoin pending criminal prosecutions in state court.[63] *Younger* arose from a California indictment bringing charges under the California Criminal Syndicalism Act (CCSA).[64] After the indictment was returned, the indictee sued in federal district court to enjoin the district attorney from prosecuting the charges in state court, contending the CCSA and the prosecution infringed the First and Fourteenth Amendments.[65] A three-judge panel in the district court struck down the CCSA and enjoined the state prosecution.[66] The district attorney appealed that ruling directly to the Supreme Court.[67]

In a decision authored by Justice Black, the Court began its analysis by emphasizing how Congress and the judiciary have always, subject to certain carefully-drawn exceptions, sought to allow state courts to resolve their cases "free from interference by federal courts."[68] The reasons for this policy, as the Court advanced, are rooted in notions of equity, comity, and federalism:

> [C]ourts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . . [This] fundamental purpose of restraining equity jurisdiction within narrow limits [serves] . . . to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with

63. Younger v. Harris, 401 U.S. 37, 53–55 (1971).

64. *Id.* at 38. While the Court in *Younger* did not discuss the underlying facts in detail, the charges under the CCSA arose from the indictee allegedly distributing leaflets concerning a racially-motivated shooting committed by a police officer in Los Angeles, California. LOW ET AL., *supra* note 18, at 616. The leaflets specifically "referred to the shooting as a 'murder,' described Los Angeles as a 'concentration camp,' and stated that the members of the police department 'must all be wiped out before there is complete freedom.'" *Id.*

65. *Younger*, 401 U.S. at 39.

66. *Id.* at 40.

67. *Id.* Under 28 U.S.C. § 1253, *Younger* was required to be decided first by a three-judge panel in the district court with an appeal taken, if any, as of right directly to the Supreme Court. *See id.* (stating the appeal was taken under § 1253).

68. *Id.* at 43.

> criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[69]

Based on these considerations, the Court instructed that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."[70]

The Court then turned to the facts of *Younger*, noting that the pending state court action was in a forum in which the CCSA and the prosecution could both be challenged.[71] The Court further noted that there were no allegations of bad-faith prosecution or that underlying prosecution was just one of several.[72] And, although it was asserted that the CCSA was facially unconstitutional under the First Amendment, the Court clarified that the "existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action."[73] A state law's facial unconstitutionality thus generally does not by itself "justify an injunction against good-faith attempts to enforce it."[74] Absent "extraordinary circumstances," "unusual situations calling for federal intervention," or a showing of "bad faith and harassment," the Court concluded abstention was warranted and reversed the three-judge panel's decision striking down the CCSA and enjoining the state prosecution.[75]

69. *Id.* at 43–44.
70. *Id.* at 45.
71. *Id.* at 49.
72. *Id.*
73. *Id.* at 51.
74. *Id.* at 54.
75. *Id.* at 53–54.

Younger accordingly shows abstention is generally proper where federal courts are asked to enjoin pending state criminal prosecutions.[76] In addition, since *Younger*, the Court has clarified that *Younger* abstention applies in two other "exceptional" circumstances, namely where federal courts are asked to enjoin: (1) "civil enforcement proceedings"; and (2) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[77]

1. O'Shea

Three years after *Younger*, in January 1974, the Court decided *O'Shea v. Littleton* and abstained where granting relief would result in continuous federal intervention with—or, stated differently, an "ongoing federal audit" of—state proceedings, even though state proceedings were not currently pending.[78] *O'Shea* concerned alleged discrimination in Illinois's criminal justice system.[79] As the plaintiffs alleged, certain public officials had engaged in a pattern or practice of discriminatory enforcement of criminal laws and administration of criminal justice on the basis of race, First Amendment activity, and economic status.[80] The plaintiffs, who were not actually facing criminal prosecution, filed a class action suit in federal district court to enjoin the allegedly unconstitutional practices.[81] The district court granted the defendants' motion to dismiss, the Seventh Circuit reversed that dismissal, and the Supreme Court granted certiorari.[82]

In an opinion by Justice Byron White, the Court began with Article III's "case or controversy" requirement.[83] The Court in *O'Shea* concluded the case did not satisfy Article III's case or controversy requirement because the injury alleged was contingent on criminal prosecutions that had not been brought and was thus too speculative under the circumstances.[84]

76. *See id.*

77. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 73 (2013) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 367–68 (1989)); *see also* FEDERAL JURISDICTION, *supra* note 20, at 880–83, 891–96.

78. O'Shea v. Littleton, 414 U.S. 488, 500–04 (1974).

79. *Id.* at 490–91.

80. *Id.* at 491.

81. *Id.* at 491–92.

82. *Id.* at 492–93.

83. *Id.* at 493–94; *see also* U.S. CONST. art. III, § 2.

84. *O'Shea*, 414 U.S. at 494–99.

Although the Court's conclusion as to Article III's case or controversy requirement was alone sufficient to dispose of the case, the Court in *O'Shea* proceeded to analyze *Younger* abstention.[85] *O'Shea* reiterated *Younger*'s command "that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[86] *O'Shea* then instructed that achieving "a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws."[87] In these circumstances, notions of "equity, comity, and federalism . . . must restrain a federal court . . . asked to enjoin a state court proceeding."[88]

O'Shea then turned to the plaintiffs' requested relief. That relief was "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials."[89] Hence, granting that relief would generate an "ongoing federal audit" of state proceedings, which *Younger* seeks to prevent.[90] Were a federal court to grant the requested relief, *O'Shea* cautioned, it would result in "a major continuing intrusion . . . into the daily conduct of state criminal proceedings . . . in sharp conflict with the principles of equitable restraint."[91] *O'Shea* concluded this intrusion was unwarranted, emphasizing how alternative remedies were available in both state and federal courts if the plaintiffs were in fact ever prosecuted.[92] Those alternative remedies included: (1) a motion to recuse the judge or to change venue; (2) appellate and collateral review; (3) judicial disciplinary proceedings; and (4) suits under federal civil rights statutes.[93] *O'Shea* accordingly held that abstention was warranted.

Thus, *O'Shea* expanded *Younger* by demonstrating that abstention is warranted if granting relief in the federal suit would generate an ongoing

85. *See id.* at 504 (Blackmun, J., concurring in part) (writing that the Court's analysis surpassing Article III's case or controversy requirement "amounts to an advisory opinion that we are powerless to render").

86. *Id.* at 499 (quoting Younger v. Harris, 401 U.S. 37, 43–44 (1971)).

87. *Id.*

88. *Id.* (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)).

89. *Id.* at 500.

90. *Id.*

91. *Id.* at 502.

92. *Id.*

93. *Id.* at 503–04.

federal audit of state proceedings, even if state proceedings are not currently pending.[94]

2. Rizzo

Two years after *O'Shea*, in January 1976, the Court decided *Rizzo v. Goode* and abstained where a federal court was asked to enjoin conduct of police officials.[95] *Rizzo* arose from alleged racially-motivated police brutality committed by the Philadelphia Police Department.[96] The plaintiffs filed a class action suit in federal district court to enjoin the allegedly unconstitutional conduct.[97] The district court granted an injunction requiring police officials to submit for federal court approval a "comprehensive program for improving the handling of citizen complaints alleging police misconduct" and "to put into force a directive governing the manner by which citizens' complaints against police officers should henceforth be handled."[98] The Third Circuit affirmed, and the Supreme Court granted certiorari.[99]

Justice William Rehnquist authored the Court's opinion in *Rizzo* and began the analysis, as the Court did in *O'Shea*, with Article III's case or controversy requirement.[100] The Court concluded *Rizzo* did not satisfy Article III's case or controversy requirement because the injury alleged rested "upon what one of a small, unnamed minority of [defendants] might do to [the plaintiffs] in the future because of that unknown [defendant's] perception of . . . disciplinary procedures."[101]

As in *O'Shea*, the Court could have disposed of *Rizzo* based on the Article III analysis. But *Rizzo* proceeded to analyze abstention. *Rizzo* instructed equity counsels against granting an injunction "except in the most

94. *See id.* at 500–04. *O'Shea*'s expansion of *Younger* is not free of criticism. *See, e.g.*, FEDERAL JURISDICTION, *supra* note 20, at 903 (warning that "*O'Shea* raises troubling questions about the ability of federal courts to refuse to hear constitutional claims in their jurisdiction because of a desire to avoid interfering with state and local governments"); TRIBE, *supra* note 19, at 156 (referencing *O'Shea* and stating that, "it is quite clear that *Younger* was not relevant in this context").

95. Rizzo v. Goode, 423 U.S. 362, 380 (1976).

96. *Id.* at 365–66.

97. *Id.* at 367–70.

98. *Id.* at 365.

99. *Id.* at 365–66.

100. *Id.* at 371–72; *see also* U.S. CONST. art. III, § 2.

101. *Rizzo*, 423 U.S. at 372.

extraordinary circumstances."[102] *Rizzo* further instructed that where "the 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.'"[103] The Court reasoned that foundational notions of federalism are triggered by injunctive requests against not only state judiciaries, but also "those in charge of an executive branch of an agency of state or local governments."[104] Emphasizing that the district court had improperly "injected itself by injunctive decree into the internal disciplinary affairs of [a] state agency," the Court concluded abstention was warranted and reversed the injunction.[105]

Rizzo expands *Younger* and *O'Shea* by showing abstention may be warranted where a federal suit seeks to enjoin conduct of not only state judiciaries, but also state or local executive branches and their agencies and officials.[106]

III. DO FEDERAL COURTS ABSTAIN IN FIRST AMENDMENT INJUNCTIVE SUITS SEEKING ACCESS TO STATE COURT FILINGS?

Three U.S. Courts of Appeal have addressed whether the relevant abstention doctrines—and their underlying notions of equity, comity, and federalism—warrant invoking abstention in First Amendment injunctive suits seeking access to civil filings in state courts. The Second and Ninth Circuits hold that abstention is unwarranted.[107] The Seventh Circuit, in contrast, holds that abstention is warranted.[108] The relevant cases are analyzed in turn.

102. *Id.* at 379.

103. *Id.* at 378 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

104. *Id.* at 380.

105. *Id.*

106. Interestingly, the Court in *Rizzo* did not discuss or cite *Younger*. Nevertheless, Dean Erwin Chemerinsky and Professor Laurence Tribe construe *Rizzo* as an outgrowth of *Younger*. FEDERAL JURISDICTION, *supra* note 20, at 903–04; TRIBE, *supra* note 19, at 592–93 (explaining *Rizzo* "invoked the principles underlying *Younger*").

107. Courthouse New Serv. v. Planet, 750 F.3d 776, 787–93 (9th Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 99–102 (2d Cir. 2004).

108. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1071–75, 1075 n.6 (7th Cir. 2018) (observing that "this opinion creates a circuit conflict on the abstention issue").

A. *The Second and Ninth Circuits: Abstention is Unwarranted*

The Second and Ninth Circuits occupy one side of the circuit split, holding that abstention is unwarranted in First Amendment injunctive suits seeking access to civil filings in state courts.[109] The relevant cases of the Second and Ninth Circuits are discussed in turn.

1. *The Second Circuit*

In August 2004, in *Hartford Courant Co. v. Pellegrino*, the Second Circuit declined to abstain in a First Amendment injunctive suit seeking access to sealed docket sheets and filings in civil cases.[110] *Hartford Courant* arose from Connecticut state courts' practice of sealing docket sheets and case filings in certain civil cases.[111] Two Connecticut newspapers specifically alleged Connecticut state courts had adjudicated thousands of cases under practices prohibiting court personnel from allowing public access to filings and, with regard to certain cases, acknowledging existence of the cases altogether.[112] Some cases were sealed, the newspapers alleged, "simply at the behest of prominent individuals who were parties."[113] Other cases were allegedly sealed under statutory commands or court orders.[114] The newspapers asserted these sealing practices violated the First Amendment.[115] While the challenged practices were ultimately superseded by court rules aimed at increasing public access, the "protections afforded by these new rules . . . were not applied retroactively."[116]

The newspapers thus filed suit in federal district court against certain state court officials, seeking injunctive access to:

> [T]he docket sheet or such other document as will disclose (a) the names and status (e.g., Plaintiff or Defendant) of the parties; (b) the Judicial

109. *Planet*, 750 F.3d at 787; *Hartford Courant*, 380 F.3d at 99–102.

110. *Hartford Courant*, 380 F.3d. at 86.

111. *Id.* at 85.

112. *Id.* at 86.

113. *Id.* (citing Eric Rich & Dave Altimari, *Elite Enjoy "Secret File" Lawsuits*, HARTFORD COURANT (Feb. 9, 2003), https://www.courant.com/news/connecticut/hc-xpm-2003-02-09-0302090040-story.html [https://perma.cc/EV6W-3CYC]).

114. *Id.* Although it was alleged some cases were sealed under statutory commands or court orders, the "threadbare record" in *Hartford Courant* did not demonstrate any applicable statutory commands or court orders. *Id.* at 98.

115. *Id.* at 86.

116. *Id.* at 87; *see also infra* notes 253–57 and accompanying text.

> District and docket number of the case; (c) the nature of the case (e.g., marital dissolution, paternity, trade secret, contract); and (d) the nature and description of every document in the file of the case (e.g., complaint, answer, motion for alimony pendente lite).[117]

The defendants moved to dismiss the suit on the bases of abstention and the asserted failure to sue the proper parties.[118] The district court denied the defendants' motion to dismiss on the basis of abstention, but granted the motion to dismiss on the basis that the defendants were improper parties.[119] The newspapers appealed that dismissal to the Second Circuit.[120]

On appeal in *Hartford Courant*, the Second Circuit first clarified that civil docket sheets are protected by the First Amendment's right to access court proceedings and filings.[121] Docket sheets, *Hartford Courant* explained, "provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment."[122] The Second Circuit next determined the defendants were proper parties based on the procedural posture of the case.[123]

The Second Circuit then analyzed abstention under *Pullman*, *Burford*, and *Younger*.[124] *Pullman* abstention was unwarranted because no unsettled state law was at issue.[125] Further, as the Second Circuit underscored concerning *Pullman* abstention, "the weight of the First Amendment issues involved counsels against abstaining."[126] And *Burford* abstention was unwarranted because no "complex state regulatory scheme" was at issue.[127]

As to *Younger* abstention, the Second Circuit in *Hartford Courant* acknowledged a parallel state court appeal pending before the Connecticut Supreme Court.[128] That appeal arose from an application, filed by The New

117. *Hartford Courant*, 380 F.3d at 89.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 91–92.
122. *Id.* at 93.
123. *Id.* at 98.
124. *Id.* at 100–02.
125. *Id.* at 100.
126. *Id.*
127. *Id.* at 102.
128. *Id.* at 99–100 (citing Rosado v. Bridgeport Roman Catholic Diocesan Corp., 825

York Times and one of the newspapers from *Hartford Courant*, to intervene and to vacate sealing and protective orders entered in civil suits alleging sexual abuse by clergymen.[129] The underlying sexual abuse suits, however, had already been settled and withdrawn when the relevant application was filed.[130] Consequently, the appeal pending before the Connecticut Supreme Court was limited to the question of how a state statute governing the time to reinstate a case on the active docket should be construed.[131] Yet, the First Amendment claims in *Hartford Courant* did not concern that particular statute.[132] The Second Circuit therefore concluded *Younger* abstention was unwarranted, emphasizing how the parallel state court appeal did not afford the newspapers a meaningful opportunity to seek the relief requested in *Hartford Courant*.[133] Thus, the Second Circuit concluded abstention was unwarranted under *Pullman*, *Burford*, and *Younger*.[134]

2. *The Ninth Circuit*

In April 2014, in *Courthouse News Service v. Planet*, the Ninth Circuit aligned with the Second Circuit's decision in *Hartford Courant* and declined to abstain in a First Amendment injunctive suit seeking access to newly-filed civil complaints in state court.[135] *Planet* specifically arose from delays Courthouse News Service (CNS)[136] experienced when attempting to access civil complaints at the Superior Court of Ventura County, California.[137] Some delays lasted "up to thirty-four calendar days."[138] The delays were attributed to the alleged need to administratively process complaints before officially entering them on the docket so as to ensure the "integrity of all

A.2d 153 (Conn. App. Ct. 2003), *rev'd*, 884 A.2d 981 (Conn. 2005)).

129. *Id.* at 99 (citing *Rosado*, 825 A.2d at 156).

130. *Id.* (citing *Rosado*, 825 A.2d at 170).

131. *Id.* (citing *Rosado*, 832 A.2d at 171).

132. *Id.* at 101.

133. *Id.*

134. *Id.* at 100–02.

135. Courthouse News Serv. v. Planet, 750 F.3d 776, 787–93 (9th Cir. 2014).

136. CNS is "a nationwide news service for lawyers and the news media" covering "civil litigation, from the date of filing through the appellate level." *About Us*, COURTHOUSE NEWS SERV., https://www.courthousenews.com/about-us/ [https://perma.cc/5BXG-AGM4]. CNS publishes "original news content prepared by its staff of reporters and editors based across the country." *Id.* "All told, [CNS] provides coverage of more than 2,000 courts around the country, spanning all 50 states." *Id.*

137. *Planet*, 750 F.3d at 781–82.

138. *Id.* at 782.

filings."[139] CNS attempted several times to propose solutions aimed at eliminating or minimizing delays, but each attempt was denied.[140]

Asserting the delays violated the First Amendment, CNS filed suit in federal district court against the Clerk of the Superior Court of Ventura County to enjoin the delays.[141] In response, the Clerk moved the district court to abstain under *Pullman* and *O'Shea*.[142] The district court granted the Clerk's motion to abstain.[143]

The Ninth Circuit reversed the district court's decision to abstain when CNS appealed.[144] *Planet* first analyzed *Pullman* abstention.[145] As relevant to *Pullman*, *Planet* recognized that a California statute required that court records be "reasonably accessible to all members of the public."[146] The California statute's "reasonably accessible" standard was not statutorily defined and had never been judicially construed.[147] Construing the reasonably accessible standard indisputably created a reasonable likelihood of obviating the need to decide CNS's First Amendment claim, suggesting *Pullman* abstention was proper.[148] Even so, *Planet* instructed that *Pullman* abstention is generally unwarranted when First Amendment violations are alleged, explaining that "free expression is always an area of *particular* federal concern."[149] And, if abstention were invoked, the Ninth Circuit continued, CNS would face the "possibility that the official conduct it challenge[d] w[ould] prevent it from engaging in protected activity during the pendency of the state court litigation."[150] The Ninth Circuit therefore concluded *Pullman* abstention was improper.[151]

Planet next turned to *O'Shea*. Describing *O'Shea* as decided in reliance on *Younger*, the Ninth Circuit in *Planet* summarized that abstention under

139. *Id.*; *see also infra* note 299.
140. *Planet*, 750 F.3d at 781; *see also infra* notes 253–57 and accompanying text.
141. *Planet*, 750 F.3d at 782.
142. *Id.*
143. *Id.*
144. *Id.* at 783.
145. *Id.*
146. *Id.* at 784 n.6 (citing CAL. GOV'T CODE § 68150(l) (West 2014)).
147. *Id.*
148. *Id.*
149. *Id.* at 784 (quoting Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989) (emphasis added)).
150. *Id.* at 788.
151. *Id.* at 789.

O'Shea is unwarranted where granting the requested relief would not generate an "ongoing intrusion in the state's administration of justice."[152] Conversely, abstention under *O'Shea* is warranted where granting the requested relief would require federal courts to "monitor the substance of individual cases on an ongoing basis to administer its judgment."[153] The Ninth Circuit determined the facts of *Planet* fell within the former instance, reasoning as follows:

> To determine whether the Ventura County Superior Court is making complaints available on the day they are filed, a federal court would not need to engage in . . . [an] intensive, context-specific legal inquiry . . . . There is little risk that the federal courts would need to "examin[e] the administration of a substantial number of individual cases" to provide the requested relief.[154]
>
> . . . .
>
> . . . An injunction requiring the Ventura County Superior Court to provide same-day access to filed unlimited civil complaints poses little risk of an "ongoing federal audit" or "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state . . . proceedings."[155]

Underscoring that it took no position on the ultimate merits of the First Amendment questions raised, the Ninth Circuit in *Planet* reversed the district court's decision to abstain under both *Pullman* and *O'Shea* "so that the First Amendment issues . . . may be adjudicated on the merits in federal court, where they belong."[156]

152. *Id.* at 789–90.

153. *Id.* at 790.

154. *Id.* at 791 (quoting E.T. v. Cantil-Sakauye, 682 F.3d 1121, 1124 (9th Cir. 2012)).

155. *Id.* at 792 (quoting O'Shea v. Littleton, 414 U.S. 488, 500, 502 (1974)).

156. *Id.* at 793. The Author notes that the Ninth Circuit revisited *Planet* in January 2020. Courthouse News Serv. v. Planet, 947 F.3d 581, 581 (9th Cir. 2020) [hereinafter *Planet Revisited*]. *Planet Revisited* arrived at the Ninth Circuit after the Ninth Circuit in *Planet* reversed the district court's decision to abstain and remanded for the district court to reach the merits. *Id.* at 588–89. In *Planet Revisited*, the Ninth Circuit reviewed the district court's decision on the merits, concluding: (1) a qualified First Amendment right to access civil filings attaches once they are filed, not merely if and when they are the subject of judicial action; (2) the state court's practice of denying public access before full administrative processing of civil complaints violated the First Amendment; and (3) the state court's practice of denying public access before staff could "scan" civil complaints did not violate the First Amendment. *Id.* at 591–600. While the Author generally agrees with the result of *Planet Revisited*, a full discussion of whether *Planet Revisited* was correctly decided is beyond the scope of this Article.

B. *The Seventh Circuit: Abstention is Warranted*

In November 2018, in *Courthouse News Service v. Brown*, the Seventh Circuit departed from the Second and Ninth Circuits by holding that abstention was proper in a First Amendment injunctive suit seeking access to electronically-filed civil complaints in state court.[157] *Brown* arose from an administrative "accept/reject" process implemented by the Circuit Court of Cook County, Illinois, with respect to electronically-filed complaints.[158] Under the accept/reject process, first implemented in 2015, an electronically-filed complaint was deemed filed on the docket and available for public access once it was officially accepted by the Clerk of the Circuit Court of Cook County.[159] The Clerk alleged the accept/reject process was necessary to minimize unwarranted disclosure of confidential information.[160] The accept/reject process caused delays in public access to electronically-filed complaints.[161] According to CNS,[162] nearly 40 percent of electronically-filed complaints were inaccessible on the same day they were filed.[163] CNS made several attempts to propose solutions to eliminate or minimize delays, but "the Clerk pushed back" and denied each attempt.[164]

After the electronic-filing system became mandatory in July 2018, CNS filed suit in federal district court against the Clerk to enjoin the delays, contending the delays violated the First Amendment.[165] CNS moved for a preliminary injunction, and in response, the Clerk sought abstention under *Younger*.[166] The district court declined to abstain under *Younger* and granted the injunction.[167]

When the Clerk appealed, the Seventh Circuit disagreed with the district court's decision declining to abstain and reversed. The Seventh Circuit in *Brown* emphasized how state courts have important and legitimate interests in managing their filing and docket procedures.[168] Given these state

157. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074–75. (7th Cir. 2018).
158. *Id.* at 1066–68.
159. *Id.*
160. *Id.* at 1067; *see also infra* note 299.
161. *Brown*, 908 F.3d at 1066.
162. For background on CNS, *see supra* note 136.
163. *Brown*, 908 F.3d at 1066.
164. *Id.*; *see also infra* notes 253–57 and accompanying text.
165. *Brown*, 908 F.3d at 1066–67.
166. *Id.* at 1067.
167. *Id.* at 1067–68.
168. *Id.* at 1071.

interests, *Brown* stressed—without citing a particular abstention doctrine—that "state courts should be given the first opportunity to determine precisely what level of press access is required, appropriate, and feasible in a state court."[169]

Brown then turned to the primary abstention doctrines, citing *Pullman*, *Burford*, and *Younger*.[170] Of these doctrines, the Seventh Circuit in *Brown* reasoned that *Younger* and its progeny applied.[171] The Seventh Circuit clarified that *Younger* alone was not perfectly applicable, for CNS did not seek to enjoin parallel state proceedings.[172] The facts of *Brown* instead fit better into the "extension of the *Younger* principles in *O'Shea* and *Rizzo*," even though *Brown* did not "map exactly" with *O'Shea* and *Rizzo*.[173]

Unable to conclusively rely on the abstention doctrines fashioned by the Supreme Court, *Brown* turned to Seventh Circuit precedent to state as follows:

> In declining to exercise jurisdiction, we [have previously] explained that it is important for federal courts to have "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." We [have previously] concluded that it was not appropriate for the federal courts, in the face of these principles of equity, comity, and federalism, to undertake the requested supervision of state court operations.[174]

Brown then emphasized that these notions of equity, comity, and federalism demonstrate that state and federal courts are equally and fully capable of protecting the First Amendment, and federal courts should exercise special restraint when asked "to decide how state courts should conduct their business."[175] *Brown* thus concluded, "Initial adjudication of

169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 1071–73.
173. *Id.* at 1072–73.
174. *Id.* at 1073 (quoting SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 676, 682 (7th Cir. 2010)).
175. *Id.* at 1074.

this dispute in the federal court would run contrary to the considerations of equity, comity, and federalism."[176]

To be sure, *Brown* acknowledged that *Planet* presented a "case nearly identical" to *Brown*.[177] *Brown* further acknowledged that the Ninth Circuit in *Planet* determined "the First Amendment interests at stake outweighed what [*Planet*] thought would be minimal interference in the state's administration of its judicial system."[178] Nevertheless, the Seventh Circuit in *Brown* rejected *Planet* and concluded as follows:

> The Illinois courts are best positioned to interpret their own orders, which are at the center of this case, and to craft an informed and proper balance between the state courts' legitimate institutional needs and the public's and the media's substantial First Amendment interest in timely access to court filings. It is particularly appropriate for the federal courts to step back in the first instance as the state courts continue to transition to electronic filing and, like many courts around the country, are working through the associated implementation challenges and resource limitations. The claims here are not suitable for resolution in federal court at this time. CNS is free to pursue a remedy in the state courts.[179]
>
> . . . .
>
> . . . This temporal access dispute with a state court clerk should be heard first in the state courts.[180]

Given this reasoning, *Brown* departed from *Hartford Courant* and *Planet*, reversed the injunction granted by the district court, and held that abstention was proper under *Younger* and its progeny.[181]

IV. SHOULD FEDERAL COURTS ABSTAIN IN THIS CONTEXT?

The Second Circuit's decision in *Hartford Courant*, the Ninth Circuit's decision in *Planet*, and the Seventh Circuit's decision in *Brown* concern

176. *Id.*

177. *Id.* (citing Courthouse News Serv. v. Planet, 750 F.3d 776, 791–93 (9th Cir. 2014)).

178. *Id.* (citing *Planet*, 750 F.3d at 791–93).

179. *Id.*

180. *Id.* at 1075.

181. *Id.* at 1075 n.6 (observing that "this opinion creates a circuit conflict on the abstention issue").

"nearly identical" sets of operative facts.[182] Each case arose from private entities within the press, as proxies of the public,[183] challenging state courts' filing and docket-management procedures—as applied in civil cases—on First Amendment grounds.[184] The state courts' procedures in each case allegedly resulted in either outright denials of access to, or delays in accessing, civil filings.[185] And, in each case, abstention doctrines were asserted to contend federal court was not the appropriate forum for adjudication.[186] While *Hartford Courant* and *Planet* concluded abstention was unwarranted, *Brown* diverged by abstaining and requiring that the First Amendment claims be decided in the first instance by state courts.[187]

Brown's conflict with *Hartford Courant* and *Planet* raises the targeted question of whether *Brown* was correct to abstain and to thus deny access to a federal forum. This question, in turn, impels a more searching inquiry into the appropriate role of federal courts in this context. Resolving these questions requires analyses of the nature of the asserted First Amendment rights and the likely degree to which these suits interfere with legitimate state functions. These analyses and a recommendation that abstention should be presumptively unwarranted are set forth below.

A. *Ascertaining and Weighing the Interests*

Distilling *Brown*'s conflict with *Hartford Courant* and *Planet* unveils disagreement over whether appropriately weighing the asserted First Amendment rights and the likely degree of interference with legitimate state

182. *See id.* at 1074 (noting *Planet* was a "nearly identical" case); *compare supra* Part III.A, *with supra* Part III.B.

183. *See infra* notes 223–26 and accompanying text.

184. *See supra* Part III.

185. *See supra* Part III.

186. *See supra* Part III.

187. *Compare supra* Part III.A, *with supra* Part III.B.

functions demonstrates a federal forum should be presumptively available.[188] Accurately conducting this weighing analysis requires resolution of two primary questions:

- Do the asserted First Amendment rights weigh *in favor* of a federal forum?
- Does the likely degree of interference with legitimate state functions weigh *against* a federal forum?

Set forth below is an analysis of each question followed by a weighing of the relevant interests. Ultimately, as will be shown, resolving these questions and accurately weighing the relevant interests demonstrates that a federal forum should be presumptively available.

1. *The Asserted First Amendment Rights*

The first step in resolving *Brown*'s conflict with *Hartford Courant* and *Planet* is to ascertain whether the asserted First Amendment rights weigh in

188. *Compare supra* Part III.A, *with supra* Part III.B; *see also* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074 (7th Cir. 2018) ("[T]he Ninth Circuit concluded, the First Amendment interests at stake outweighed what it thought would be minimal interference in the state's administration of its judicial system. . . . [W]e respectfully disagree . . . ."); *cf.* James H. Kennedy, Note, *I Used to Love You but It's All over Now: Abstention and the Federal Courts' Retreat from Their Role as Guardians of First Amendment Freedoms*, 45 S. CAL. L. REV. 847, 866 (1972) ("[I]nterests for and against abstention are integrally related to the nature of the proceeding to be interrupted and to the kind of relief requested."). The Author thus views the core of *Brown*'s conflict with *Hartford Courant* and *Planet* as disagreement over whether the relevant interests weigh in favor of a federal forum. Nevertheless, it should be noted that *Brown* and *Planet*—though not *Hartford Courant*—have been distinguished on the asserted basis *Brown* effectuated notions of comity and federalism, whereas *Planet* failed to consider these notions. O'Brien, *supra* note 17, at 204. As that assertion goes, *Planet* "dismissed comity and federalism when it failed to abstain . . . revealing its failure to give proper respect to state functions." *Id.* The Author respectfully disagrees. Notions of comity and federalism underlie the doctrines of abstention; these notions do not erect a freestanding basis for abstention where no actual doctrine of abstention applies. The Supreme Court has repeatedly recognized the doctrines of abstention are narrow. *E.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 73 (2013) ("Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional.'" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 367–68 (1989)); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("[A]bstention . . . is an extraordinary and narrow exception . . . ." (quoting Cty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959)). Even if *Planet* did not sufficiently analyze these notions in express terms, *Planet*, unlike *Brown*, signifies an appropriate weighing of the relevant interests. *See infra* Parts IV.A.1–3.

favor of a federal forum. The First Amendment is indisputably one of the Constitution's most important and eternally relevant individual liberties.[189] As the Supreme Court has highlighted, the First Amendment is "essential to free government" and operates to guarantee "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion."[190] Stated more to the point, the First Amendment's protection of free speech "exists principally to protect discourse on public matters."[191]

The Court has accordingly instructed that the First Amendment should be construed to effectuate essential rights that, though not textually delineated, are "indispensable to the enjoyment of rights explicitly defined."[192] The Court has specifically elaborated as follows:

> [T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.[193]

Hence, notwithstanding the absence of a textually-conferred right to access any type of court proceeding or filing under the First Amendment, the Court has recognized the First Amendment secures a right to access many types of criminal proceedings.[194] The Court has yet to decide whether

189. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 970–74 (5th ed. 2015) [hereinafter PRINCIPLES AND POLICIES] (discussing how the First Amendment furthers self-governance, discovery of the truth, advancement of personhood and autonomy, and tolerance).

190. Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

191. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

192. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

193. Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 604 (1982).

194. *E.g.*, Press-Enter. Co. v. Superior Court for Riverside Cty., 478 U.S. 1, 10 (1986) (recognizing First Amendment right to access criminal preliminary hearings); Press-Enter. Co. v. Superior Court for Riverside Cty., 464 U.S. 501, 505–11 (1984) (recognizing First Amendment right to access criminal *voir dire* examinations); Richmond Newspapers, 448 U.S. at 580 (recognizing First Amendment right to access criminal trials).

the First Amendment secures a right to access civil proceedings and filings,[195] but recognition of this right is not controversial among lower courts.[196]

In fact, this right was recognized in *Hartford Courant*, *Planet*, and *Brown*. With respect to docket sheets, *Hartford Courant* instructed as follows:

> [T]he ability of the public and press to attend *civil* and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and

195. While the Supreme Court has only considered First Amendment access to criminal proceedings, in *Richmond Newspapers*, "six of the eight sitting Justices clearly implied that the right applies to civil cases as well as criminal ones." Huminski v. Corsones, 396 F.3d 53, 82 n.30 (2d Cir. 2005) (citing *Richmond Newspapers*, 448 U.S. at 580 n.17, 596, 599).

196. "Indeed, every circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings."*Planet Revisited*, *supra* note 156, at 590; *see, e.g.*, N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012) ("[W]e have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records."); Republic of Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991) ("[W]e have stated that the First Amendment . . . protects the public's right of access to the records of civil proceedings."); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (recognizing First Amendment right to access "documents submitted in connection with [a] summary judgment motion"); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (explaining that the reasons for granting First Amendment "access to criminal proceedings apply to civil cases as well"). It should be noted that common law further provides a right to access civil proceedings and filings. However, the common law

> > does not provide as much access to the press and public as does the First Amendment. Under the common law, the trial court's denial of access to documents is reviewed for abuse of discretion, but under the First Amendment, such denial is reviewed *de novo* and must be necessitated by a compelling government interest that is narrowly tailored to serve that interest.

In re State-Record Co., 917 F.2d 124, 127 (4th Cir. 1990); *accord In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002); United States v. Kaczynski, 154 F.3d 930, 932 (9th Cir. 1998); *see also infra* note 320. Because the common law right of access is less protective than the First Amendment, the common law right of access is not further discussed.

> press with the capacity to exercise their rights guaranteed by the First Amendment.[197]

As to CNS's claim seeking access to civil complaints, *Planet* instructed that the "news media's right of access to [*civil*] judicial proceedings is essential not only to its own free expression, but also to the public's."[198] Also with respect to CNS's claim seeking access to civil complaints, *Brown* acknowledged that the "right of access to *civil* proceedings and documents fits squarely within the First Amendment's protections."[199] Therefore, *Hartford Courant*, *Planet*, and *Brown* all agreed that the First Amendment secures a right to access civil proceedings and filings.

Yet, unlike *Hartford Courant* and *Planet*, *Brown* concluded the asserted First Amendment rights did not militate in favor of a federal forum.[200] As *Brown* specifically reasoned:

> State courts have a significant interest in running their own clerks' offices and setting their own filing procedures—especially in a court like the Circuit Court of Cook County, where more than one million cases are filed annually. When these procedures are challenged as they have been here, the state courts should be given the first opportunity to determine precisely what level of press access is required, appropriate, and feasible in a state court. CNS has not yet sought relief in the state courts here. . . . *Unless and until the state courts have proven unwilling to address an alleged First Amendment violation—which we are not yet convinced exists—the federal courts should not exercise jurisdiction over the matter*.[201]

Brown's initial premise (i.e., that state courts have a legitimate interest in their filing and docket-management procedures) is not disputed.[202] But *Brown* strays from that premise to effectively and incorrectly conclude state remedies must be exhausted before the asserted First Amendment rights are

197. Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004) (emphasis added).

198. Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014) (emphasis added).

199. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1069 (7th Cir. 2018) (emphasis added).

200. *Id.* at 1074–75.

201. *Id.* at 1071 (emphasis added).

202. *See infra* Part IV.A.2.

eligible for a federal forum. *Brown*'s conclusion in this regard is flawed in two principal ways.

First, the asserted First Amendment rights are attended by unsettled questions of access to state court filings that demand expeditious adjudication and should thus not be constrained by *Brown*'s tacit exhaustion requirement. First Amendment plaintiffs, the Court has recognized, "have a special interest in obtaining a prompt adjudication of their rights."[203] The Court has therefore been "particularly reluctant" to abstain where First Amendment claims are at issue.[204] *Brown* undermines the aim of expeditious adjudication by forcing the litigants to start anew in state court, impermissibly chilling First Amendment activity in the meantime. Granted, it is true that the Court invoked abstention in *Younger* when First Amendment claims were at issue and appeared to disclaim significance of a First Amendment chilling effect insofar as abstention is concerned.[205] *Younger* must, however, be understood in its appropriate and "exceptional" context.[206] *Younger* concerned whether pending state criminal proceedings should be enjoined on the basis that the state statute authorizing the criminal charges, the CCSA, was facially unconstitutional.[207] Unlike *Younger*, First Amendment injunctive suits seeking access to civil filings in state courts, at least as shown in *Hartford Courant*, *Planet*, and *Brown*, do not seek to enjoin

203. Sorrell v. IMS Health Inc., 564 U.S. 552, 563 (2011); *cf.* Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Neb. Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers) (noting that where a "prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment"); Int'l News Serv. v. Associated Press, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh[.]").

204. City of Hous. v. Hill, 482 U.S. 451, 467 (1987).

205. Younger v. Harris, 401 U.S. 37, 51–54 (1971). The Court also invoked abstention when First Amendment claims were at issue in *O'Shea*. O'Shea v. Littleton, 414 U.S. 488, 491, 500–04 (1974); *see also supra* Part II.C.1. However, *O'Shea* does not address, to any degree, the significance of a First Amendment chilling effect insofar as abstention is concerned and instead addresses interference with legitimate state functions. 414 U.S. at 500–04. Consequently, *O'Shea* is discussed with respect to the interference question. *See infra* Part IV.A.2.

206. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 73 (2013) ("Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional.'" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 367–68 (1989)).

207. *Younger*, 401 U.S. at 38–40.

pending or potential state proceedings.[208] *Younger* is therefore not analogous here.

More analogous are *City of Houston v. Hill* and *Zwickler v. Koota*, in both of which the Court addressed the intersection of the First Amendment and abstention in the absence of pending or potential state proceedings.[209] In both *Hill* and *Zwickler*, the Court declined to abstain and recognized that "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."[210] Like the First Amendment suits at issue here, neither *Hill* nor *Zwickler* involved a request to enjoin parallel litigation in state court.[211] Justice William Brennan's concurring opinion in *Younger* specifically noted that in *Zwickler*, unlike *Younger*, "no state proceeding was pending at the time jurisdiction attached in the federal court."[212]

The absence of a request to enjoin pending or potential state proceedings suffices to illustrate *Younger* does not condone a chilling effect in this context.[213] Indeed, abstaining and denying a federal forum for resolution of the important First Amendment questions at issue here until a state court decides the questions in the first instance creates unnecessary delay and precludes exercise of First Amendment activity pending a decision in the newly-filed state action.[214] As Professor James Kennedy has posited in

208. *Compare supra* Part III, *with supra* Part II.C; *see also* Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous."); Wooley v. Maynard, 430 U.S. 705, 711 (1977) (holding that *Younger* was inapplicable where no state proceedings were pending).

209. *Hill*, 482 U.S. at 467–70; Zwickler v. Koota, 389 U.S. 241, 252–55 (1967); *see also infra* note 217.

210. *Hill*, 482 U.S. at 467–68 (quoting *Zwickler*, 389 U.S. at 252); *see also infra* note 217.

211. *See Hill*, 482 U.S. at 467–70; *Zwickler*, 389 U.S. at 252–55.

212. *Younger*, 401 U.S. at 57 (1971) (Brennan, J., concurring). Because *Hill* was decided after *Younger*, *Hill* was not addressed in *Younger*.

213. *See id.*

214. Courthouse News Serv. v. Planet, 750 F.3d 776, 787–88 (9th Cir. 2014) ("CNS will be unable to access judicial records and report on newsworthy proceedings during 'the delay that comes from abstention . . . itself.'" (quoting Porter v. Jones, 319 F.3d 483, 492 (9th Cir. 2003))); *cf.* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 486 (1975) ("[A] failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt . . . ."); Reetz v. Bozanich, 397 U.S. 82, 86 (1970) ("Abstention certainly

this regard, "When freedom of expression is being impaired, state court inadequacy can be created merely by the fact that additional chill will result in the delay of sending the claim to the state court, where it presumably [will] then be vindicated."[215] Similar logic was validly advanced in *Planet*, where the Ninth Circuit explained as follows:

> [T]his case does involve expressive activity. As in virtually every other First Amendment case, abstention here risks stifling the expression of both the plaintiff and the public. . . . The purpose of CNS's effort to timely access filed unlimited civil complaints is to report on whatever newsworthy content they contain, and CNS cannot report on complaints the Ventura County Superior Court withholds.[216]
>
> . . . .
>
> . . . Like other First Amendment plaintiffs, CNS thus faces the possibility that the official conduct it challenges will prevent it from engaging in protected activity during the pendency of the state court litigation.
>
> Abstention also risks harming the public's First Amendment interests. The general public has the same right of access as does the media. Therefore, if the Ventura County Superior Court's policy of withholding filings violates CNS's First Amendment rights, it also violates the rights of anyone else who has tried to access a complaint—or was deterred from trying because he did not think it was possible. More important, if CNS's protected expression is delayed while the litigation proceeds in state court, then the expression of the newspapers, lawyers, libraries, and others who rely on CNS for information will also be stifled.[217]

involves duplication of effort and expense and an attendant delay."); *see also supra* note 203.

215. Kennedy, *supra* note 188, at 864 n.71.

216. *Planet*, 750 F.3d at 787–88.

217. *Id.* at 788 (citation omitted); *see also* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 100 (2d Cir. 2004) ("[T]he weight of the First Amendment issues involved counsels against abstaining."). While both *Planet* and *Hartford Courant* admonished against a First Amendment chilling effect with respect to *Pullman* abstention, there is no sound reason why these principles should be confined to *Pullman* abstention. For instance, in *Zwickler v. Koota*, the Court addressed whether abstention was warranted in a First Amendment suit seeking to enjoin enforcement of a New York criminal statute. 389 U.S. 241, 242–43 (1967). The Court clarified that *Pullman* abstention was not

This chilling effect demands special attention here. The expression at issue here does not fall within those categories of expression historically accorded a lesser degree of First Amendment protection, including, for instance, commercial speech, sexually-oriented speech, or government-employee speech.[218] The expression here, instead, concerns access to court filings and the informed public discussion of governmental affairs and judicial proceedings.[219] It is well established that a "major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs."[220] Offering this protection, the Framers believed, was essential to protect and encourage effective citizen participation in "our republican system of self-government."[221] This citizen participation must extend to the

applicable, for it was impossible to "avoid or modify the constitutional question" and the challenged New York statute was "both clear and precise." *Id.* at 249–50. Still, in declining to abstain, the Court emphasized that "to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Id.* at 252; *see also* City of Hous. v. Hill, 482 U.S. 451, 468 (1987) (reiterating *Zwickler*'s chilling effect concerns and declining to abstain where challenged state statute was "plain and . . . unambiguous"); *see also supra* notes 209–15 and accompanying text. Lower courts similarly prioritize avoiding a First Amendment chilling effect under abstention doctrines aside from *Pullman*. *See, e.g.*, For Your Eyes Alone, Inc. v. City of Columbus, 281 F.3d 1209, 1219 (11th Cir. 2002) (denying *Younger* abstention and emphasizing that "[u]ncertainty as to the constitutionality of the statute at issue, or as to the conduct of the state agents implementing the statute, can in itself chill future speech"); New Albany DVD, LLC v. City of New Albany, 350 F. Supp. 2d 789, 794 (S.D. Ind. 2004) (denying *Younger* abstention and remaining "mindful of the costs associated with duplication and delay caused by abstention in a suit where the plaintiff has brought a facial or as-applied challenge on First Amendment free speech grounds"). Finally, Professor Kennedy delineated similar principles with respect to *Younger* abstention. Kennedy, *supra* note 188, at 864 n.71.

218. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting) (noting that the First Amendment imposes "looser constraints when the government seeks to restrict, *e.g.,* commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program."); PRINCIPLES AND POLICIES, *supra* note 189, at 1036–37; EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 229, 565–67 (4th ed. 2011).

219. *See supra* Part III.

220. Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 604 (1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); *cf.* Roth v. United States, 354 U.S. 476, 484 (1957) (emphasizing that the First Amendment's core protections include "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

221. *Globe Newspaper*, 457 U.S. at 604.

courts, as Justice Brennan observed, for there is both a "special solicitude for the public character of judicial proceedings" and a "keen appreciation of the structural interest served in opening the judicial system to public inspection."[222]

Moreover, any chilling of First Amendment activity in this context occurs on an amplified scale and implicates the public at large. As shown above, the plaintiffs in *Hartford Courant*, *Planet*, and *Brown* were entities of the press.[223] The press "acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."[224] The press thus serves as an invaluable proxy of the public in the First Amendment context by asserting rights for the public's benefit. As Professor Alexander Bickel aptly put it, "The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press in behalf of the public."[225] Chilling core rights of the press therefore necessarily impairs core rights of the public.[226] Consequently, *Brown* undermines the vital aim to expeditiously resolve important First

222. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."); David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 900 (2017) ("Public access to the courts is essential if the public is to understand the contours and operation of their government.").

223. *See supra* Part III.

224. Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting); *see also Cohn*, 420 U.S. at 491 ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."); Ardia, *supra* note 222, at 916 ("Today, most people rely on surrogates, particularly the media, to inform them about the work of the courts."); Hon. Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 175 (2004) ("[The press] is a conduit for the free flow of information to the public.").

225. BICKEL, *supra* note 8, at 85; *cf.* Branzburg v. Hayes, 408 U.S. 665, 721 (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial . . . .").

226. Courthouse News Serv. v. Planet, 750 F.3d 776, 788 (9th Cir. 2014) ("[I]f CNS's protected expression is delayed while the litigation proceeds in state court, then the expression of the newspapers, lawyers, libraries, and others who rely on CNS for information will also be stifled.").

Amendment claims and, in doing so, jeopardizes core First Amendment rights of the public at large.

Second, requirements and policies germane to federal jurisdiction further illustrate *Brown*'s tacit exhaustion requirement should not apply to the asserted First Amendment rights.[227] For starters, the existence of federal jurisdiction is certain. First Amendment injunctive suits seeking access to civil filings in state courts, by their very nature, raise constitutional questions. Because these suits inherently arise under the Constitution, federal question jurisdiction exists under 28 U.S.C. § 1331.[228] The certain existence of federal jurisdiction brings with it "the virtually unflagging obligation of the federal courts to exercise th[at] jurisdiction."[229] Indeed, it is axiomatic that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[230]

Not only is the presence of federal jurisdiction both certain and attended by a clear obligation to exercise it, but fulfilling that obligation in this context furthers key policies of federal jurisdiction. A major purpose of federal jurisdiction is to ensure issues of federal law are efficiently and impartially resolved.[231] To that end, Dean Erwin Chemerinsky has argued that, where jurisdiction exists in cases involving individual liberties, the litigant seeking to vindicate the constitutional right should generally have the power to choose whether to sue in state or federal court.[232] Indeed, many jurisdictional principles already contemplate at least some concept of litigant

227. *See* Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978) ("[T]his Court has uniformly held that individuals . . . need not present their federal constitutional claims in state court before coming to a federal forum."); *see also supra* note 17 & *infra* notes 234, 270, 314, 326, and accompanying text.

228. 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

229. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

230. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that *Marbury* "declared the basic principle that the *federal judiciary* is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system" (emphasis added)); TRIBE, *supra* note 19, at 20–23 (underscoring *Marbury*'s focus on federal courts).

231. *See, e.g.*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 4, 162–68 (1969) [hereinafter ALI STUDY].

232. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 300–10 (1988) [hereinafter *Parity Reconsidered*] (writing that litigant choice maximizes constitutional rights, enhances litigant autonomy, and furthers federalism).

choice.[233] As the Court has instructed, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[234]

Surrounding the concept of litigant choice is the question of "parity," which asks "whether federal courts are more willing and able than state courts to protect constitutional rights."[235] The parity inquiry is longstanding. As Alexander Hamilton reasoned in 1788, state judges "holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."[236] Likewise, in the Supreme Court's 1816 decision of *Martin v. Hunter's Lessee*, Justice Joseph Story explained,"The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[237] And, in the 1821 decision of *Cohens v. Virginia*, Chief Justice Marshall cautioned:

> It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals.

233. *See generally* 28 U.S.C. § 1331 (2012) (permitting plaintiffs to sue in federal court in "cases arising under the Constitution, laws, or treaties of the United States"); *id.* § 1332 (permitting plaintiffs to sue in federal court where diversity of citizenship jurisdiction exists); *id.* § 1441 (permitting defendants to remove a case to federal court where the case could have originally been filed in federal court); *see also Parity Reconsidered*, *supra* note 232, at 311 ("[T]here is compelling evidence that the litigant choice principle was intended by Congress when it defined federal court jurisdiction."); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 847 (1984) ("[W]e have generally remained loyal to litigants' autonomy.").

234. Zwickler v. Koota, 389 U.S. 241, 248 (1967); *see also* England v. La. State Bd. of Med. Exam'r, 375 U.S. 411, 415 (1964) ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."); *see also supra* notes 17, 227 & *infra* notes 270, 314, 326 and accompanying text.

235. *Parity Reconsidered*, *supra* note 232, at 233. The parity debate traces its origins to Professor Burt Neuborne's famous article, *The Myth of Parity*. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

236. THE FEDERALIST NO. 81, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

237. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).

> In many States the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . .[238]

Scholars have articulated similar views. For instance, Professor Burt Neuborne has written:

> Constitutional adjudication inherently involves persuading a judicial forum to counter the will of the majority as expressed through its representatives. To the extent that the forum is itself subject to the political pressures which shaped the judgment it is asked to review, its capacity to provide sustained enforcement of countermajoritarian constitutional norms will be diminished.[239]

Professor Neuborne acknowledged that state judges, unlike federal judges with lifetime appointments, are generally elected for a fixed term and thus frequently concerned about their constituents' perceptions.[240] Considering this majoritarian accountability, Professor Neuborne continued, "[W]hen arguable grounds supporting the majoritarian position exist, state trial judges are far more likely to embrace them than are federal judges."[241]

Although parity surrounds—and may in some instances be determinative of—litigant choice, honoring litigant choice in this context does not seek to resolve the parity question. And for good reason. Dean Chemerinsky and Professor Larry Kramer conclude the parity question is simply unresolvable.[242] Professor Martin Redish views "the debate over the

238. Cohens v. Virginia, 19 U.S. (6. Wheat) 264, 386–87 (1821).

239. Neuborne, *supra* note 235, at 1127; *cf.* Bryce M. Baird, Comment, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 518 (1994) ("The Court, commentators, American Law Institute and Congresses separated by 110 years have all expressed that a federal forum is necessary to effectively vindicate federal rights.").

240. Neuborne, *supra* note 235, at 1127–28.

241. *Id.* at 1128.

242. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 79 (1990) ("The parity debate is ultimately unresolvable because parity is an empirical question and we lack a meaningful standard by which to judge decisions in competing judicial systems.").

relative competence of federal and state courts as enforcers of federal rights [as] logically irrelevant[.]"[243] Whatever is made of parity, it suffices here to resolve that state and federal courts share equally important roles in deciding critical constitutional questions. In this respect, Professor Paul Bator famously explained in a landmark article that state and federal courts will always be "partners in the task of defining and enforcing federal constitutional principles."[244] However, as Professor Bator continued, the "question remains as to where to draw the lines [between state and federal courts]; but line-drawing is the correct enterprise."[245] Professor Bator elaborated on this score as follows:

> [T]he state court will be allowed to adjudicate, and to do so dispositively, if—but only if—there was or will be a "full and fair opportunity" to litigate the constitutional question in the state court. *Per contra*, if it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim.[246]

> . . . [T]he "full and fair opportunity" formula leaves untouched the more subtle and invisible aspects of comparative competence. Indeed, it does not purport to be a technique for measuring the state judge's competence and sensitivity at all. . . . [M]uch will turn on the spirit in which the "full and fair opportunity" formula is interpreted in the various specific contexts to which it is relevant. Nevertheless, *it is a virtue of this formula that it asks a question about the hospitable nature of the state courts rather than starting with an adverse presumption about it*.[247]

Professor Bator's line-drawing approach is notable because it does not accept generalized, overbroad assumptions about the competence of state

243. Redish, *supra* note 5, at 77; *see also* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1496 (2005) ("[T]here are so many federal and state judges, adjudicating so many different federal claims in different contexts, that it is absurd to come to simplistic conclusions on the past and present scope of parity.").

244. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981); *see also* Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 237 n.19 (2014) (noting the significance of Professor Bator's article); Solimine, *supra* note 243, at 1495 ("Bator's words were near revolutionary two decades ago.").

245. Bator, *supra* note 244, at 622.

246. *Id.* at 626.

247. *Id.* at 626–27 (emphasis added) (footnotes omitted).

courts and their perceived willingness to safeguard constitutional rights.[248] Yet, Professor Bator's line-drawing approach still contemplates that, in certain instances, constitutional issues are best resolved in a federal forum.[249]

Drawing appropriate lines here demonstrates *Brown* improperly overlooked the need to ensure the availability of a litigant-selected federal forum. To be clear, state courts' jurisdiction and competence are not questioned.[250] But state courts' unquestioned jurisdiction and competence do not validate *Brown*'s conclusion that federal courts should abstain to allow state courts to decide these suits in the first instance. As shown by *Hartford Courant*, *Planet*, and *Brown*, the asserted First Amendment rights raise unique and novel questions inquiring into the conduct and practices of state court officials.[251] Denying litigant choice and mandating that state courts resolve novel First Amendment challenges against their own officials' conduct and practices before a federal court is permitted to do so instinctively inquires as to whether majoritarian interests and pressures would impede or obstruct impartial adjudication.[252] This concern is poignantly illustrated by *Hartford Courant*, *Planet*, and *Brown*, because, as noted,[253] before all three suits were filed, court officials (i.e., the officials speaking for the very entity *Brown* holds must adjudicate the suits in the first instance) signaled an unwillingness to provide relief.[254] Thus, drawing lines

248. *See id.*

249. *See id.* at 626.

250. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); Robb v. Connolly, 111 U.S. 624, 637 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States . . . .").

251. *See supra* Part III.

252. *Cf., e.g.*, Redish, *supra* note 5, at 92 ("[A] forum subject to external political pressures from the very political institutions whose conduct is challenged arguably fails to provide the independence required by due process.").

253. *See supra* notes 118, 141, 165, and accompanying text.

254. Courthouse News Serv. v. Brown, 908 F.3d 1063, at 1066–67 (7th Cir. 2018) ("CNS contacted [the Clerk] and proposed various options that would allow the press to obtain quicker access to electronically filed complaints. The Clerk pushed back . . . . The Clerk informed CNS that the policies and procedures would remain the same."); Courthouse News Serv. v. Planet, 750 F.3d 776, 781 (9th Cir. 2014) (discussing CNS's repeated, unsuccessful attempts to "reach agreement with court staff"); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 87 (2d Cir. 2004) (explaining that, despite state court's promulgation of rules to improve access, the "protections afforded by these new

here—and accounting for the plaintiffs' selection of federal forums,[255] the unique potential for majoritarian pressures and interests,[256] and the positions of the state court officials expressed before the commencement of litigation[257]—indicates the line should be drawn in favor of a federal forum when the litigants have so chosen.

Not only would drawing the line in this way honor litigant choice, but it would also foster unified First Amendment precedent. Establishing uniformity in the application and construction of federal law is a key aim of federal jurisdiction.[258] As discussed, there is no governing federal precedent on the significant questions of whether, and to what degree, the First Amendment requires access to civil filings in state courts. Although the Supreme Court's ultimate review may still be preserved if state courts decide the First Amendment questions at issue here, litigating "federal claims in

rules . . . were not applied retroactively"); *see also supra* notes 116, 140, 164, and accompanying text.

255. *See supra* Part III.

256. *See supra* notes 236–41, 252, and accompanying text. As noted, Professor Bator does not accept the generalized assumption that majoritarian pressures and interests impair or obstruct state courts' abilities to impartially adjudicate constitutional questions. Bator, *supra* note 244, at 626–27, 629–34. The Author does not intend to express an opinion on this generalized assumption or on Professor Bator's decision not to accept it. Instead, it is the Author's opinion that litigants should be able to reasonably consider and weigh what they deem relevant in selecting a forum, and when a federal forum with jurisdiction is selected, it should be presumptively available in this context.

257. *See supra* notes 116, 140, 164, 253–54, and accompanying text; *see also* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 793 (2010) ("[F]ederal courts should refuse to abstain in cases where it appears justice may be hard to find in state court.").

258. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part) (construing and applying federal law is a "means of serving a federal interest in uniformity"); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 383 (1996) (noting the value of precedential uniformity in the context of federal securities actions); Reed v. Farley, 512 U.S. 339, 348–49 (1994) (noting the importance of "nationally uniform interpretation" of federal law); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821) (acknowledging the "necessity of uniformity"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (recognizing that "public mischiefs that would attend" the absence of uniform constitutional precedent); ALI STUDY, *supra* note 231, at 165–68 (discussing the priority of uniformity that underlies federal jurisdiction); Chemerinsky & Kramer, *supra* note 242, at 83–84 (explaining that a key reason "for adding [federal question] jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law").

state court nonetheless poses a large problem of disuniformity that the Supreme Court simply cannot address."[259]

In sum, the asserted First Amendment rights are substantial and important, and abstaining jeopardizes core rights of the public at large. And, when the asserted First Amendment rights are viewed in light of key policies of federal jurisdiction, the necessity of ensuring the availability of a federal forum is decidedly apparent. This is not to say state courts should be *precluded* from resolving these suits. As stated, state courts have the unquestioned jurisdiction and competence to do so. But where litigant choice has brought the suit to federal court—whether by the plaintiff's initial filing or by the defendant's removal—the above analysis demonstrates that the asserted First Amendment rights militate in favor of a federal forum.[260]

2. *The Degree of Interference*

The second step in resolving *Brown*'s conflict with *Hartford Courant* and *Planet* is to ascertain whether the likely degree of interference with legitimate state functions weighs against a federal forum. However, before turning to the interference question, two initial clarifications are warranted. First, states do have a legitimate interest in their courts' filing and docket-management procedures. As the Supreme Court has explained, "Every

259. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1221–22 (2004); *cf.* City of Greenwood v. Peacock, 384 U.S. 808, 845 (1966) (Douglas, J., dissenting) ("[T]he gantlet of state court proceedings may entail destruction of a federal right through unsympathetic and adverse fact-findings that are in effect unreviewable."); Frost & Lindquist, *supra* note 257, at 790 ("A review of the Supreme Court's docket confirms that the Court engages in minimal oversight of the state judiciary.").

260. This conclusion is not to encourage unnecessary resolution of First Amendment questions. To the contrary, principles of judicial restraint and constitutional avoidance preclude federal courts from reaching constitutional questions if there is "some other ground upon which the case may be disposed of." Pearson v. Callahan, 555 U.S. 223, 241 (2009) (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Therefore, where the suit may indeed be disposed of on another ground, principles of judicial restraint and constitutional avoidance operate to preclude a decision on the First Amendment questions. Application of these principles is ultimately reserved for the merits and accordingly does not alter the conclusion that, in the abstention analysis, the asserted First Amendment rights militate in favor of a federal forum in this context.

court has supervisory power over its own records and files."[261] The prudence of this established principle is not in question.

The second clarification is that federal courts must avoid undue interference with legitimate state functions. This point is neither novel nor controversial. After all, the relevant doctrines of abstention are premised on bedrock notions of comity and federalism.[262] Although the Court has not precisely and conclusively defined the contours of comity and federalism with respect to the abstention doctrines,[263] the Court has cogently summarized comity in the abstention context as "a proper respect for state functions."[264] Federalism, similar to comity, was aptly summarized by the Court in the abstention context as a recognition "that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[265]

Notions of comity and federalism were decidedly apparent in *Pullman*, where the Court abstained from rendering a decision on an uncertain issue of state law that could have been "displaced tomorrow by a state adjudication."[266] These notions were also apparent in *Burford*, which abstained from deciding important and complex issues of state law so as to avoid jeopardizing the state's efforts to control "an 'essentially local problem.'"[267] Likewise, *Younger*, *O'Shea*, and *Rizzo* all held that abstention was warranted where federal courts were asked to enjoin pending or potential state court proceedings and the conduct of state officials so as to avoid undue interference with legitimate state functions.[268] In short, the need

261. Nixon v. Warner Commc'ns, 435 U.S. 589, 598 (1978); *see also Planet Revisited*, *supra* note 156 at 585 ("[C]ourts undeniably have an important administrative function that requires orderly processing of new filings . . . ."); Courthouse News Serv. v. Brown, 908 F.3d 1063, 1071 (7th Cir. 2018) ("State courts have a significant interest in running their own clerks' offices and setting their own filing procedures . . . .").

262. *See supra* Part II.

263. *See supra* notes 19–23 and accompanying text.

264. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)); *see also supra* note 19 and accompanying text.

265. *Younger*, 401 U.S. at 44; *see also supra* note 23 and accompanying text.

266. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); *see also supra* Part II.A.

267. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 362 (1989) (quoting Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 347 (1951)); Burford v. Sun Oil Co., 319 U.S. 315, 327–34 (1943); *see also supra* Part II.B.

268. Rizzo v. Goode, 423 U.S. 362, 378–80 (1976) (concluding lower court had improperly "injected itself by injunctive decree into the internal disciplinary affairs of

to avoid undue interference with legitimate state functions plainly derives from comity and federalism, notions germane to the relevant doctrines of abstention.

It is accordingly clear federal courts must avoid undue interference with legitimate state functions. Yet, this indisputable tenet should not engender blind, unwavering deference. The Court recognized as much in *Younger* by warning against "blind deference to 'States' Rights.'"[269] Blindly and absolutely avoiding any interference with state functions would risk undermining key federal civil rights statutes, including 42 U.S.C. § 1983, which expressly operates to remedy state actors' violations of "any rights, privileges, or immunities secured by the Constitution and laws."[270] Therefore, whether interference disfavors a federal forum must be determined by the *degree* of interference. Indeed, recall that *O'Shea* demonstrates the degree of interference cannot amount to an ongoing federal audit of legitimate state functions.[271] That degree of interference was present in *O'Shea*, where granting the requested relief would "control[] or prevent[] the occurrence of specific events that might take place in the course of future state criminal trials."[272]

In the context of First Amendment injunctive suits seeking access to civil filings in state courts, the scope of requested relief determines the degree of interference with legitimate state functions. As such, any attempt to ascertain the degree of interference must begin with the requested relief. Because the requested relief is tethered to the operative facts of the case and will necessarily vary in each case, the precise degree of interference is also likely to vary in each case. However, the core relief requested in these suits will almost always be the same. That is, ultimately, the plaintiff seeks access

th[e] state agency"); O'Shea v. Littleton, 414 U.S. 488, 500–04 (1974) (summarizing the request to monitor state proceedings as an "ongoing federal audit"); *Younger*, 401 U.S. at 50–54; *see also supra* Part II.C.

269. *Younger*, 401 U.S. at 44; *see also supra* Part II.C.

270. 42 U.S.C. § 1983 (1996); *cf.* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.") Allen v. McCurry, 449 U.S. 90, 101 (1980) (reviewing the legislative history of § 1983 and explaining that federal courts "step in where the state courts [a]re unable or unwilling to protect federal rights"); *Ex parte* Young, 209 U.S. 123, 160 (1908) (stripping state officials of Eleventh Amendment immunity where a plaintiff alleges violations of federal rights and seeks prospective relief); *see also supra* notes 17, 227, 234 & *infra* notes 314, 326, and accompanying text.

271. *O'Shea*, 414 U.S. at 500.

272. *Id.*

to civil filings in state courts.[273] It is therefore possible to ascertain whether the likely degree of interference will generally, but not always, be deemed to weigh against a federal forum.

Hartford Courant, *Planet*, and *Brown* assist in making this generally-applicable determination.[274] In *Hartford Courant*, the requested relief sought the unsealing of civil docket sheets so as to disclose the identities of the parties, the case style and docket number, the nature of the case, and the nature and description of all documents filed.[275] The newspaper plaintiffs in *Hartford Courant* alleged much of the sealing had occurred "simply at the behest of prominent individuals."[276] Though it was alleged at least some of the sealing occurred under statutory commands or court orders, no evidence supported that allegation.[277] But even assuming that allegation was supported by evidence, whether those statutory commands and court orders comport with the requirements of the First Amendment is a question bearing on the merits of the case and is thus analytically separate from the question of interference.[278] Regardless of whether the sealing in *Hartford Courant* occurred at the behest of prominent parties or under statutory commands and court orders, the injunctive remedy is the same (i.e., unseal the docket sheets). The ultimate act of unsealing is by its nature ministerial and easily performed without federal courts' continuous oversight or involvement.[279] Accordingly, granting the relief requested in *Hartford Courant* would not generate an ongoing federal audit in the words of *O'Shea*.

273. *See supra* Part III.

274. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074–75 (7th Cir. 2018); Courthouse News Serv. v. Planet, 750 F.3d 776, 787–93 (9th Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 99–102 (2d Cir. 2004).

275. *Hartford Courant*, 380 F.3d at 89.

276. *Id.* at 86.

277. *Id.* at 95–96.

278. *See* U.S. CONST. art. VI, cl. 2 (declaring that the Constitution is the "supreme Law of the Land"); *see also* Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606–10 (1982) (holding that state statute, as construed by state courts to mandate sealing in certain cases, violated the First Amendment); *Hartford Courant*, 380 F.3d at 96 (explaining that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them").

279. *See, e.g.*, Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (describing injunction requiring filing and docketing of *pro se* motions as mandating "simple, nondiscretionary" acts); Am. Civil Liberties Union v. Holder, 652 F. Supp. 2d 654, 671 (E.D. Va. 2009) (observing that sealing complaint was a "'ministerial' act"), *aff'd* 673 F.3d 245 (4th Cir. 2011).

In *Planet*, the requested relief sought injunctive access to civil complaints on the same day they were filed.[280] The Ninth Circuit in *Planet* correctly determined this relief could be granted by "a variety of simple measures" and without federal courts' continuous oversight or involvement.[281] As *Planet* cogently summarized, granting the requested relief would not generate an ongoing federal audit under *O'Shea* because the state court could simply

> give reporters a key to a room where new complaints are placed in boxes for review before being processed . . . . It could . . . place paper versions of new complaints in a secure area behind the counter where reporters are free to review them on the day of filing. Or it could . . . permit reporters to view the cover page of all newly filed complaints each afternoon and request the full text of any that seem newsworthy. To permit same-day access, the Ventura County Superior Court may not need to do anything more than allow a credentialed reporter . . . to go behind the counter and pick up a stack of papers that already exists.[282]

Like *Planet*, the requested relief in *Brown* sought injunctive access to civil complaints before the administrative accept/reject process.[283] The Seventh Circuit in *Brown* described *Planet* as a "case nearly identical to [*Brown*]."[284] While logic therefore suggests the above analysis from *Planet* should apply with equal force in *Brown*, *Brown* nonetheless departed from *Planet*.[285] As *Brown* specifically reasoned:

280. Courthouse News Serv. v. Planet, 750 F.3d 776, 782 (9th Cir. 2014). In *Planet*, the requested relief included a caveat that same-day access to civil complaints would not be required if found unwarranted by "the appropriate case-by-case adjudication." *Id.* The Ninth Circuit in *Planet* properly rejected contentions that this caveat elevated the degree of interference, as this caveat was in "reference to the judicial findings of fact *already required* by the California Rules of Court to permit a party to file a complaint under seal." *Id.* at 791 (emphasis added) (citing CAL. R. CT. 2.550(d), 2.551).

281. *Id.* Indeed, First Amendment injunctive suits seeking access to civil filings in state court are markedly dissimilar from cases requiring federal courts' continuous oversight. *Compare supra* Part III, *with, e.g.*, Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 439 (1968) ("[T]he court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."); Vera v. Bush, 980 F. Supp. 251, 254 (S.D. Tex. 1997) ("retain[ing] jurisdiction over the state's redistricting of its congressional districts").

282. *Planet*, 750 F.3d at 791.

283. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1067–68 (7th Cir. 2018).

284. *Id.* at 1074.

285. *Id.* at 1074–75.

> [W]e respectfully disagree with our colleagues in the Ninth Circuit. If the state court clerk refuses or fails to comply with the federal court's injunction or complies only partially, the federal court's involvement would certainly continue as it oversees the implementation of its order. Further, we have no doubt CNS would attempt to use a different decision in this case to force the hand of other state courts that do not provide immediate press access to court filings. This would likely lead to subsequent litigation in the federal courts. We want to avoid a situation in which the federal courts are dictating in the first instance how state court clerks manage their filing procedures and the timing of press access.[286]

Brown's reasoning on this score overstates the likely degree of interference in three fatal ways. First, *Brown* asserted continuous federal involvement would certainly result if injunctive relief were granted and "the state court clerk refuse[d] or fail[ed] to comply with the federal court's injunction or complie[d] only partially."[287] This assertion indicates *Brown* believed an order issued by a federal court would be fully or partially violated.[288] But there is no question a federal court has authority to validly enjoin unlawful conduct of state officials.[289] And, absent evidence to the contrary, courts widely presume their validly-issued orders will be fully honored.[290] Logic suggests, moreover, that this presumption should be

286. *Id.*

287. *Id.*

288. *See id.* at 1074 ("If the state court clerk refuses or fails to comply with the federal court's injunction or complies only partially, the federal court's involvement would certainly continue as it oversees the implementation of its order.").

289. *See supra* note 270 and accompanying text.

290. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 497 (1974) ("We assume that respondents will conduct their activities within the law . . . ."); Courthouse News Serv. v. Planet, 750 F.3d 776, 792 (9th Cir. 2014) ("We also trust that the Ventura County Superior Court would comply with any federal injunction . . . ."); United States v. Sepulveda, 15 F.3d 1161, 1177 (1st Cir. 1993) ("[W]itnesses, like all other persons subject to court orders, will follow the instructions they receive."); Glenn Family, Inc. v. Combex, Inc., No. 17-CV-1173-PP, 2018 WL 4265922, at *2 (E.D. Wis. Sept. 6, 2018) ("The court sees no need for such an order; it presumes that parties will follow the law until they demonstrate otherwise."); United States v. Taylor, 293 F. Supp. 2d 884, 902 (N.D. Ind. 2003) ("Furthermore, as noted earlier in this order, juries are presumed to follow limiting instructions."); Thai Pineapple Canning Indus. Corp. v. United States, 24 C.I.T. 284, 286 (C.I.T. 2000) ("The court will not presume that Commerce will fail to comply with this court's orders . . . ."); Safaris Unlimited, LLC v. Von Jones, 421 P.3d 205, 214 (Idaho 2018) ("This Court presumes the jury follows the district court's instructions . . . ."); Summers v. State, 148 P.3d 778, 783 (Nev. 2006) ("[T]his court

amplified in *Brown*, for the *Brown* defendant was a high-ranking official of the state court and should consequently be both familiar with and sensitive to complying with court orders.[291] *Brown*'s assertion of certain and continuous federal involvement is not a valid basis for finding an ongoing federal audit in the words of *O'Shea*.

Second, *Brown*'s position that an injunctive order requiring certain access to civil filings in one state court would be used "to force the hand of other state courts"[292] is speculative. Although *Brown* had "no doubt" an injunctive order would be used in that way, *Brown* did not reference any evidence or argument to support this position.[293] But even if this position were validly supported, *Brown* did not explain why—or how or to what degree—leveraging any precedential value of an injunctive order would interfere with legitimate state functions. *Brown* did indicate an injunctive order mandating certain access to civil filings may have potential to generate "subsequent litigation in federal courts," but subsequent federal litigation does not necessarily equate to interference with legitimate state functions.[294] At any rate, *Brown*'s supposition of generating additional federal litigation is yet another layer of speculation and, hence, does not militate toward finding an ongoing federal audit as required under *O'Shea*.

Third, although *Brown* noted *Planet* and explicitly disagreed with *Planet* on the interference question,[295] *Brown* did not address, to any degree, *Planet*'s sound conclusion that the relief requested could be granted by "a variety of simple measures."[296] *Brown* thus did not acknowledge the minimally-intrusive solutions explicitly and implicitly offered by *Planet*, including: (1) printing and placing hardcopy versions of complaints in boxes for public review before administrative processing; (2) printing and placing hardcopy versions of complaints in a secure area for review before

generally presumes that juries follow district court orders and instructions."); Ladner v. Siegel, 148 A. 699, 701 (Pa. 1930) ("[T]he decree calls for definite action, and the law presumes such action to follow the order."); *In re* Lee, 411 S.W.3d 445, 465 (Tex. 2013) ("As to the law, courts must presume parties will comply with their orders . . . ."); Greybull Valley Irr. Dist. v. Owen, 77 P.2d 617, 617 (Wyo. 1938) ("[W]e cannot presume that the commissioners will violate the orders of Judge Tidball.").

291. *Brown*, 908 F.3d at 1075.

292. *See id.*

293. *Id.* at 1074–75.

294. *Id.* at 1075.

295. *Id.* at 1074 (citing Courthouse News Serv. v. Planet, 750 F.3d 776, 791–93 (9th Cir. 2014)).

296. *Planet*, 750 F.3d at 791.

administrative processing; and (3) permitting reporters to view the cover page of newly-filed complaints and request the full text of select complaints appearing newsworthy.[297] Because *Brown* agreed *Planet* was "nearly identical[,]" basic reasoning suggests these minimally-intrusive solutions should apply in *Brown*.[298]

In sum, *Brown* overstates the likely degree of interference in this context and fails to validly show First Amendment injunctive suits seeking access to civil filings in state courts result in an ongoing federal audit of legitimate state functions under *O'Shea*. Using the above analysis of *Hartford Courant*, *Planet*, and *Brown* for illustrative purposes shows suits of this type are generally unlikely to result in an ongoing federal audit of legitimate state functions. Thus, as a generally-applicable conclusion, the likely degree of interference does not weigh against a federal forum.[299]

297. *Id.*

298. To be sure, *Brown* concerned electronically-filed complaints. *Brown*, 908 F.3d at 1066–67. *Planet* made no reference to electronically-filed complaints. However, the Seventh Circuit in *Brown* did not distinguish *Planet* on this basis, indicating this distinction is immaterial insofar as it relates to the interference question. *See id.* at 1066 (explaining that, from 2009 to 2015, the state court "would simply print out electronically filed complaints as they were received and allow reporters to view them along with the paper complaints"). This is not to say the electronic-filing aspect of *Brown* is irrelevant, but rather, this is only to say electronic filing does not automatically suggest any greater degree of interference than any minimal interference potentially present in *Planet*. In fact, the electronic-filing aspect of *Brown* could mitigate any potential interference by allowing for additional ways to increase and improve access to the requested filings. *See, e.g.*, David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1441 (2017) ("[C]ourts are free to decide whether to provide online access, and they may choose to make some, or all, of their records available online."); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 21 (2006) ("Online filing brings several conveniences to the court, such as saved space and easier document retrieval . . . .").

299. In addition to the reasons set forth in the text above, the Author further notes that facts unique to First Amendment injunctive suits seeking access to civil filings in state courts confirm that the likely degree of interference does not weigh against a federal forum. In these suits, a key legitimate interest of the state court is protecting litigants' privacy. *See Brown*, 908 F.3d at 1067 (acknowledging state court clerk's assertion of the need to protect against public disclosure of confidential information); *Planet*, 750 F.3d 782 (citing state court clerk's assertion of the need to "ensure the integrity of all filings"); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 98 (2d Cir. 2004) (noting that "the litigants in the underlying cases may have valid privacy interests"). However, many procedural rules already allocate at least some degree of responsibility of protecting litigants' privacy to the litigants themselves, even those proceeding *pro se*. *See, e.g.*, FED. R. CIV. P. 5.2(a) (requiring redaction of certain personal information);

3. *Weighing the Interests*

The final step in resolving *Brown*'s conflict with *Hartford Courant* and *Planet* is to weigh both the asserted First Amendment rights and the likely degree of interference. As shown, the asserted First Amendment rights are substantial and important, implicating high-value expression "essential to free government" and weighing in favor of a federal forum.[300] As further shown, First Amendment injunctive suits seeking access to civil filings in state courts are generally unlikely to generate an ongoing federal audit of legitimate state functions.[301] As a generally-applicable conclusion, the likely degree of interference therefore does not weigh against a federal forum.[302] The relevant interests, then, weigh in favor of a federal forum.

B. *Abstention Should Be Presumptively Unwarranted*

The analysis above shows the relevant interests at stake in First Amendment injunctive suits seeking access to civil filings in state courts weigh in favor of a federal forum.[303] Weighing the interests in this way resolves the core of *Brown*'s conflict with *Hartford Courant* and *Planet*, demonstrating *Brown* incorrectly abstained.[304] However, the question still

ALA. R. CIV. P. 5.1(a) (same); ARIZ. R. CIV. P. 5.1(e) (same); IDAHO R. CIV. P. 2.6(a) (same); ILL. R. S. CT. 364(a) (same); IOWA R. CIV. P. 1.422(a) (same); Ky. R. CIV. P. 7.03(1) (same); MONT. R. CIV. P. 5.2(a) (same); S.C. R. CIV. P. 41.2(a) (same). Many of these rules expressly clarify that the court "is not required to review documents filed with the court for compliance with this rule." FED. R. CIV. P. 5.2 advisory committee's note; *accord* ALA. R. CIV. P. 5.1(f) (same); ARIZ. R. CIV. P. 5.1(e)(2) (same); IDAHO R. CIV. P. 2.6(a) (same); ILL. R. S. CT. 364(e) (same); IOWA R. CIV. P. 1.422 (same); KY. R. CIV. P. 7.03(5) (same); S.C. R. CIV. P. 41.2(c) (same). Plus, litigants may move to seal filings or proceedings where appropriate. *See, e.g.*, ARIZ. R. CIV. P. 5.4 (setting forth sealing procedures); S.C. R. CIV. P. 41.1 (same); *cf.* United States v. Doe, 962 F.3d 139, 147 (4th Cir. 2020) (granting sealing request based on safety concerns); Courier-Journal, Inc. v. McDonald-Burkman, 298 S.W.3d 846, 850 (Ky. 2009) (affirming sealing of "inflammatory, graphic, and possibly irrelevant material"). As such, declining to abstain and proceeding to the merits of First Amendment claims seeking access to civil filings in state courts does not interfere with state courts' efforts to protect litigants' privacy, which can be, and in many instances already are, allocated to and shared with the litigants. *Cf.* Ardia, *supra* note 298, at 1445 (exploring how courts can "force the parties and their lawyers to limit the amount of sensitive information they put in court records").

300. *See* Thornhill v. State of Ala., 310 U.S. 88, 95 (1940); *see also supra* Part IV.A.1.

301. *See supra* Part IV.A.2.

302. *See supra* Part IV.A.2.

303. *See supra* Part IV.A.3.

304. *See supra* Part IV.A. For an analysis contending *Brown* was correctly decided, *see generally* O'Brien, *supra* note 17; *see also supra* note 188.

remains whether, in suits of this type that may arise in the future, federal courts should abstain. This question is admittedly advisory in nature and is undoubtedly subject to unique complexities that future cases, if any, may bring. This question, nevertheless, can be still be answered—not with categorical absolutes, but with a rebuttable presumption—because the above analysis of *Hartford Courant*, *Planet*, and *Brown* shows these suits have a unique propensity to be factually similar.[305] Thus, using *Hartford Courant*, *Planet*, and *Brown* as a benchmark illustrates abstention should be presumptively unwarranted in future cases for two primary reasons.

First, the relevant doctrines of abstention established by the Supreme Court are unlikely to apply and, in fact, are easily jettisoned. As to *Pullman* abstention, First Amendment injunctive suits seeking access to civil filings in state courts are not necessarily attended by uncertain issues of state law.[306] But even if uncertain issues of state law may be present, courts agree *Pullman* abstention is inapplicable when First Amendment claims are at issue.[307] As to *Burford* abstention, which has not been "widely invoked"[308] even outside this context, nothing in the reported caselaw suggests First Amendment injunctive suits seeking access to civil filings in state courts involve sufficiently complex issues of state law or states' attempts to achieve uniformity with local problems. *Hartford Courant* indicates just the opposite.[309]

As to abstention under *Younger*, First Amendment injunctive suits seeking access to civil filings in state courts have not presented a request to enjoin or otherwise interfere with pending or potential proceedings in state court.[310] And, even though *Younger* was expanded in both *O'Shea* and

305. *Compare supra* Part III.A, *with supra* Part III.B; Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074 (7th Cir. 2018) (noting *Planet* was a "nearly identical" case).

306. *See supra* Part III.

307. *See supra* Part III.A & note 217; *see also, e.g.*, Mangual v. Rotger-Sabat, 317 F.3d 45, 64 (1st Cir. 2003) (noting that *Pullman* abstention "is especially problematic where First Amendment rights are involved"); Nissan Motor Corp. in U.S.A. v. Harding, 739 F.2d 1005, 1011 (5th Cir. 1984) (noting that *Pullman* abstention is disfavored where "lengthy state proceedings will chill [F]irst [A]mendment rights"); NC RSOL v. Boone, 402 F. Supp. 3d 240, 257 (M.D.N.C. 2019) (finding that *Pullman* abstention is "generally inappropriate in a First Amendment" suit).

308. LOW ET AL., *supra* note 18, at 779.

309. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 102 (2d Cir. 2004) (concluding *Burford* was inapplicable); *supra* Part III.A.1.

310. *See supra* Parts III & IV.A.1; *see also supra* notes 208–12 and accompanying text.

Rizzo, the above reasoning shows, as a generally-applicable conclusion, the likely degree of interference here does not amount to an ongoing federal audit.[311] The relevant doctrines of abstention are therefore unlikely to apply. Even *Brown* conceded this point.[312]

Second, notions of equity, comity, and federalism are unlikely to favor abstention. Unless adequate, alternative remedies are available, equity will not favor abstention.[313] The fact that a state forum may merely be available is immaterial, for "[i]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it."[314] Moreover, as to comity and federalism,[315] the above analysis demonstrates, as a generally-applicable conclusion, that the likely degree of interference in this context does not amount to an ongoing federal audit and, further, that the relevant interests weigh in favor of a federal forum.[316] Even if notions of equity, comity, and federalism may in certain cases or in isolation appear to favor abstention, these notions must not be construed to authorize abstention where no actual doctrine of abstention applies.[317] Whatever notions of equity, comity, and federalism may appear to suggest in isolation, "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."[318] As such, it follows that equity, comity, and federalism are unlikely to favor abstention.

Accordingly, federal courts should adopt a presumption against abstention in First Amendment injunctive suits seeking access to civil filings in state courts. This presumption should automatically and categorically apply in these suits by operation of law. Stated otherwise, federal courts need not conduct the weighing analysis set forth above before this presumption should apply. This automatic, categorical presumption can be safely

311. *See supra* Part IV.A.2.

312. *See supra* Part III.B; *see also* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1072 (7th Cir. 2018).

313. *See supra* note 21 and accompanying text.

314. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–14 (1976) (quoting Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 347 (1951) (Frankfurter, J., concurring)); *see also supra* notes 17, 227, 234, 270 & *infra* note 326 and accompanying text.

315. *See supra* notes 22–23, 263–65, and accompanying text.

316. *See supra* Part IV.A.2.

317. *See supra* note 188.

318. Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978).

recommended because the above analysis of *Hartford Courant*, *Planet*, and *Brown* illustrates that these suits have the unique propensity to be factually similar.[319] And, using the facts of *Hartford Courant*, *Planet*, and *Brown* as a benchmark, the above analysis shows abstention in all three cases was unwarranted. This presumption, to be sure, should govern the narrow threshold question of abstention and would not implicate the merits of the substantive First Amendment questions.[320] And of course, this presumption should be rebuttable, and for the above analysis does not advocate for a conclusive preclusion of abstention.[321] While the basic, common nature of

319. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1065 (7th Cir. 2018); Courthouse News Serv. v. Planet, 750 F.3d 776, 779 (9th Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 85–86 (2d Cir. 2004).

320. For a brief overview of the merits analysis, the court first considers—under the "experience and logic test"—both whether: (1) the filing or proceeding "ha[s] historically been open to the press and general public"; and (2) "public access plays a significant positive role in the functioning of the . . . process in question." Press-Enter. Co. v. Superior Court for Riverside Cty., 478 U.S. 1, 8 (1986); *see also Planet Revisited*, *supra* note 156, at 590. Where both inquiries are satisfied, denials of access and limitations on access are subject to separate levels of scrutiny. A denial of access must satisfy strict scrutiny: the denial of access must be both "essential to preserve higher values and . . . narrowly tailored to serve those interests." *Press-Enter. Co.*, 478 U.S. at 13–14 (quoting Press-Enter. Co. v. Superior Court for Riverside Cty., 464 U.S. 501, 510 (1984)); *see also Planet Revisited*, *supra* note 156, at 595. A limitation on access, by contrast, is permissible where: (1) "there is a 'substantial probability" that [the state court's] interest in the fair and orderly administration of justice would be impaired by immediate access, and [(2)] no reasonable alternatives exist to 'adequately protect' that government interest." *Id.* at 596 (quoting *Press-Enter. Co.*, 478 U.S. at 14). *But cf. id.* at 600–06 (Smith, J., concurring in part) (writing that limitations on access are subject to a "time, place, and manner" standard); *see also supra* note 196. A full analysis of these merits principles is beyond the scope of this Article.

321. This presumption, as well as its character as automatic, categorical, and rebuttable, is consistent with the policies and rationales underlying presumptions generally. Presumptions reflect a "judicial estimate of the probabilities" (i.e., the most likely outcome) and considerations of convenience, efficiency, and fairness. 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVID. § 337 (8th ed. 2020); *see also* FED. R. EVID. 301 advisory committee's note (explaining "fairness, policy, and probability . . . underlie the creation of presumptions"); 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122.1 (2d ed. 2005) ("Presumptions rest on substantive policy as much as procedural probabilities."); Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 637 (1994) (discussing how "presumptions have been used to introduce substantive innovations in the law"). The recommended presumption aligns with a judicial estimate of the probabilities because the above analysis of *Hartford Courant*, *Planet*, and *Brown* demonstrates the most likely outcome is that abstention is unwarranted. *See supra* Part IV.A. Moreover, the recommended presumption enhances

these suits portends factual similarity with future cases, any future cases will inevitably arise from their own sets of facts. Those facts will ultimately determine whether this presumption is overcome.[322]

V. CONCLUSION

The tangible effect of invoking the judicially-created doctrines of abstention is to close the courthouse doors and to deny a federal forum, no matter the existence of jurisdiction over the claims asserted. Abstention may thus be viewed as reflecting the judiciary's calculation of what issues falling within federal courts' jurisdiction deserve a federal forum.[323] Hence, that obvious tension surrounds the application of the doctrines of abstention is no surprise. This tension is sharply represented in the First Amendment context by *Hartford Courant*, *Planet*, and *Brown*, all of which concern First Amendment access to civil filings in state courts.[324] These cases are significant. They bring to light core First Amendment activities that, although undoubtedly essential to our democracy, are vulnerable because courts have not precisely defined the scope of protection afforded to these activities under the First Amendment. By declining to abstain, *Hartford Courant* and *Planet* correctly ensured a federal forum is available for

convenience, efficiency, and fairness by ensuring the availability of a litigant-selected federal forum for resolution of important First Amendment questions. *See supra* notes 17, 227, 234, 270, 314 & *infra* note 326 and accompanying text.

322. The Author candidly views this presumption as unlikely to be overcome. In the Author's view, cases overcoming this presumption and showing abstention is warranted are likely to be extraordinary. The Author, nevertheless, recognizes this presumption may be overcome where clear, compelling evidence shows: (1) the state court has implemented a strategic plan calculated to eliminate or meaningfully minimize delays associated with accessing civil filings; and (2) the federal litigation unreasonably interferes with that plan's success. Alternatively, this presumption may be overcome where granting relief in the federal litigation would require the state court to regularly report to the federal court, and the federal court to actively monitor, the successes of the state court's efforts to eliminate or meaningfully minimize delays associated with accessing civil filings. Ultimately, the Author will not attempt to exhaustively contemplate every set of facts that may suffice to rebut the recommended presumption; that analysis is better left to federal courts if and when the question arises. It suffices here to emphasize that the facts of *Hartford Courant*, *Planet*, and *Brown*, when properly viewed, are insufficient to rebut the recommended presumption. *See supra* Part IV.A.

323. *See* Chemerinsky & Kramer, *supra* note 242, at 95 ("Curtailing federal jurisdiction must therefore begin with an analysis of the proper role of the federal courts. What matters are most deserving of federal judicial resources?"); *cf.* Redish, *supra* note 5, at 75–78, 114–15 (questioning the "institutional legitimacy" of abstention).

324. *See supra* Part III.

resolution of important and substantial First Amendment claims.[325] In contrast, by abstaining, *Brown* denied a federal forum and held that litigants who choose a federal forum with jurisdiction must nevertheless have their important First Amendment claims decided in the first instance by state courts.[326] *Brown* incorrectly undercalculated the importance of the asserted First Amendment rights and, moreover, overestimated the likely degree to which these suits interfere with legitimate state functions.[327] If the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"[328] is to mean anything, it must mean abstention should be presumptively unwarranted in this context.

325. *See supra* Part III.A.

326. *See supra* Part III.B. *But cf.* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415 (1964) ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."); *see also supra* notes 17, 227, 234, 270, 314, and accompanying text.

327. *See supra* Part IV.A.

328. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).