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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CALVARY CHAPEL SAN JOSE, a California Non-Profit Corporation; **PASTOR MIKE MCCLURE**, an individual; **SOUTHRIDGE BAPTIST CHURCH OF SAN JOSE CALIFORNIA dba SOUTHRIDGE CHURCH**, a California Non-Profit Corporation; **PASTOR MICAIAH IRMLER**, an individual;

Plaintiffs,

vs.

GAVIN NEWSOM, in his official capacity as the Governor of California, **TOMAS ARAGON. M.D.,** in her official capacity as the Acting California Public Health Officer; **SANTA CLARA COUNTY; SARA H. CODY, M.D.**, in her official capacity as Santa Clara County Public Health Officer; **MIKE WASSERMAN**, in his official capacity as a Santa Clara County Supervisor; **CINDY CHAVEZ**, in her official capacity as a Santa Clara County Supervisor; **DAVE CORTESE**, in his official capacity as a Santa Clara County Supervisor; **SUSAN ELLENBERG**, in her official capacity as a Santa Clara County Supervisor; **JOE SIMITIAN**, in his official capacity as a Santa Clara County Supervisor; and **THE SANTA CLARA COUNTY BOARD OF SUPERVISORS**;

Defendants.

Case No. 20-cv-03794-BLF

PLAINTIFFS' OPPOSITION TO THE COUNTY'S MOTION TO DISMISS AND MOTION TO STAY PLAINTIFFS' CLAIMS

Date: January 26, 2023
Time: 9:00 a.m.
Crtrm: 3
Judge: Hon. Beth Labson Freeman

Courtroom: 3

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I. INTRODUCTION

This case was filed over two years ago, months before Santa Clara County (the "County") began fining the Plaintiffs for violating its COVID-19 public health orders. The parties have litigated the case aggressively since then. They did so even after the County filed a case in the Santa Clara County Superior Court in October 2021. Factual discovery is complete, and the Plaintiffs have filed a motion for summary judgment, which is set for a hearing on January 26, 2023. This Court recently denied the County's recent attempts to dismiss and stay this case. The County has now filed another belated motion to dismiss and motion to stay pursuant to the *Younger* abstention doctrine. The motion should be denied for the following reasons.

First, *Younger* abstention is a jurisprudential issue, not a jurisdictional issue. The County's attempt to dismiss this case on jurisdictional grounds is procedurally improper.

Second, the County's motion to stay is improper, both procedurally and substantively. This Court has already held that a stay of proceedings is inappropriate in this case.

Third, the County has waived *Younger* abstention through untimely filing. Courts, not defendants, may raise *Younger* abstention at any stage of litigation. The County has litigated this case on the merits for two and half years and had numerous opportunities to raise *Younger*. Their delay is inexcusable.

Fourth, even if the Court is inclined to address *Younger*, the facts of this case do not satisfy the threshold factors necessary to warrant *Younger* abstention. The parallel state case was not ongoing when Plaintiffs filed this Action. The parallel state proceeding does not implicate an important state interest. Plaintiffs cannot litigate their damages claim in state court, and the federal action does not enjoin the state court proceeding.

Fifth, even if the Court is inclined to find that *Younger* applies, the Plaintiffs satisfy an exception because the County acted in bad faith, and the Plaintiffs will suffer great and immediate irreparable injury to their federal rights.

Accordingly, this Court should deny the current motion.

II. FACTS AND PROCEDURAL BACKGROUND

Given the Court's familiarity with the case, the Plaintiffs are not including a detailed summary of the factual allegations in the Fourth Amended Complaint ("4AC"). Everybody knows what this case is about. This is the County's sixth motion to dismiss and third motion to stay. ECF Nos. 20, 70, 135, 170, 179, 224. The Court partially denied the County's last motion to dismiss (ECF No. 222) and denied their last motion to stay, specifically highlighting the late stage of litigation and the County's inexcusable delay (ECF No. 178 at 6). This motion followed.

III. LEGAL STANDARD

Jurisdictional dismissals in cases premised on federal question jurisdiction are "exceptional, and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678 (1946)." *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 140 (9th Cir.1983). Jurisdictional dismissals, under the Federal Rules of Civil Procedure (FRCP) 12(b)(1) are warranted "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682–83.

The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an "extraordinary and narrow exception" to the duty of a district court to adjudicate a controversy properly before it. *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (quoting *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017)). "[A] federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Communic'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). There exists a "strong presumption against abstention," making abstention only permissible in extraordinary or "exceptional circumstances" of a few carefully defined situations with set requirements. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983)); *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004) (establishing situations in which *Younger* abstention is appropriate). Abstention is not appropriate simply because a pending state court proceeding involves the same subject matter. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989).

IV. ARGUMENT

The Court should deny the County's motion to dismiss and motion to stay because the County has inappropriately and untimely raised *Younger* abstention. Even assuming arguendo that *Younger* is at issue, this case does not satisfy the threshold factors for *Younger* abstention, and Plaintiffs have an exception to *Younger* application.

A. The County's Motion To Dismiss For Lack Of Subject Matter Jurisdiction Is Inappropriate Because *Younger* Is Not A Jurisdictional Issue

The County's attempt to dismiss this case pursuant to Rule 12(h)(3) of the FRCP for lack of jurisdiction is inappropriate because "*Younger* abstention is not jurisdictional; it is a prudential limitation designed to preserve comity between state and federal courts." *Adibi v. California State Bd. of Pharmacy*, 461 F.Supp.2d 1103, 1111 (N.D. Cal. 2006); *See also Younger v. Harris*, 401 U.S. 37, 43–49 (1971) (discussing the jurisprudential background of abstention); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 626 (1986) (stating that *Younger* abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced"); *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001) ("Whether it is labeled comity, federalism, or some other term, the policy objective behind *Younger* abstention is to avoid unnecessary conflict between state and federal governments."); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 394 n. 3 (9th Cir. 1995) ("Younger abstention is a jurisprudential rather than a jurisdictional question.").

The Constitution clearly establishes that federal courts have subject matter jurisdiction only when there is a federal question or diversity of citizenship. *Chase Manhattan Bank (Nat. Ass'n) v. S. Acres Dev. Co.*, 434 U.S. 236, 238 (1978) (The "Constitution itself distinguishes between these two types of jurisdictions."). *Younger* abstention is explicitly distinct from subject matter jurisdiction. *Nelson*, 48 F.3d at 394 n. 3. Unlike subject matter jurisdiction, *Younger* abstention is a common law creation that does not go to a federal court's power to entertain a dispute and, in fact, is discretionary. *Ohio Bureau of Emp. Servs v. Hodory*, 431 U.S. 471, 480 (1977) ("It may not be argued, however, that a federal court is compelled to abstain in every such situation."); *Younger*, 401 U.S. at 43–44

(illuminating that the *Younger* abstention doctrine was born out of the flexible resources of equitable discretion.). Hence, it is an error to treat subject matter jurisdiction and abstention alike and to address abstention under a 12(h)(3) or 12(b)(1) motion, as the County attempts to do here.

While the County cites to cases in which this Court dismissed a case for lack of subject matter jurisdiction pursuant to *Younger*, the Supreme Court and Ninth Circuit have made explicitly clear that *Younger* is not a jurisdictional issue, so dismissal on jurisdictional grounds was inappropriate in those cases. County's Br. at 2 (citing *Herships v. Cantil-Sakauye*, No. 17-cv-00473-YGR, 2017 WL 2311394, at *1, *5-6 (N.D. Cal. May 26, 2017); *Ambat v. City & County of San Francisco*, No. C 07-3622 SI, 2007 WL 3101323, at *2 (N.D. Cal. Oct. 22, 2007)). Notably, most parties seeking abstention have done so pursuant to a motion for abstention, or alternatively, a 12(b)(6) motion. *See, e.g., Herrera v. City of Palmdale,* 918 F.3d 1037, 1043-50 (9th Cir. 2019); *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 75, 134 S. Ct. 584, 590 (2013); *Burris v. Cnty. of Placer*, No. 2:09CV-03299JAMDAD, 2010 WL 2553457, at *1 (E.D. Cal. June 18, 2010).

Indeed, in *Herrera*, the case the County primarily relies upon, the defendants filed a motion for abstention and motion to dismiss pursuant to Rule 12(b)(6) of the FRCP. *Herrera v. City of Palmdale*, No. CV1609453MWFFFMX, 2017 WL 6017350, at *1 (C.D. Cal. May 16, 2017). This case illustrates that a motion for abstention or motion to dismiss pursuant to Rule 12(b)(6) is the procedurally correct way to raise abstention issues. Thus, the County's motion to dismiss for lack of subject matter jurisdiction is procedurally improper, and this Court should refrain from dismissing this case on jurisdictional grounds.

B. The County's Motion To Stay Is Procedurally Improper, And This Court Has Already Ruled A Stay Is Inappropriate In This Case

The Court should also deny the County's motion to stay as the motion is improper, procedurally and substantively, and this Court has already ruled a stay is not warranted. The County argues that the Court should stay a finding on damages pursuant to *Younger* until the state court action is complete. County's Br. at 2. However, as discussed above and evidenced by *Herrera*, federal courts generally do not address abstention under a motion to stay. Specifically, in *Herrera*, the defendants filed a motion for abstention, not a motion to stay, at the outset of the litigation. WL 6017350, at *1. The court stayed

the damages claims only because abstention was warranted as to the claims for prospective relief. *Id.* at *7. There is no basis for this Court to stay the damages claim because *Younger* abstention does not apply here.

Furthermore, even if *Younger* applied, courts can decline to stay claims for damages if such a stay would be "lengthy and indefinite," as to create "a danger of denying justice by delay." *Herrera*, 918 F.3d at 1043 (citing *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007)). Granting a stay would unnecessarily protract this litigation. Plaintiffs' request for nominal damages has no bearing on the state enforcement action. The state court has not set a trial date, and the parties have not finalized discovery. Gondeiro Decl. ¶ 9. As this Court already held, "any stay pending resolution of the state court case would be indefinite." ECF No. 178 at 5.

Finally, as briefed extensively by the parties and ruled upon by the Court, the correct standard for deciding a motion to stay is found in *Landis v. N. American Co.* 299 U.S. 248, 254 (1936)). The Court already found the *Landis* factors supported the Plaintiffs because the balance of hardships tipped in their favor, and a stay would interrupt the orderly course of justice. ECF No. 178 at 5-7. It is unnecessary and improper for the County to file another motion to stay. This Court should once again decline to stay this proceeding.

C. The County Waived *Younger* Abstention

The County is precluded from applying *Younger* abstention, as the County waived abstention through untimely filing. The County disingenuously contends that they may raise *Younger* abstention "at any stage of the litigation." County Br. at 3 (quoting *Citizens for Free Speech, LLC v. County of Alameda*, 953 F.3d 655, 658 (9th Cir. 2020)). However, they exclude the Ninth Circuit's entire statement, which reads, "[t]he court may raise abstention *of its own accord* at any stage of the litigation." *Id*. (emphasis added); *see also Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 757 (9th Cir. 1999) (noting abstention may be raised sua sponte); *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976) ("Indeed, it would appear that abstention may be raised by the court [s]ua sponte."). The Court has not seen fit, now, or ever, to raise abstention on its own accord, and thus, the Court may still find that the County waived raising *Younger*.

The County also erroneously suggests that a "state may waive *Younger* only by express statement…." County Br. at 4 (quoting *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992)). The County improperly relies on *Boardman*, a distinguishable Ninth Circuit case that involved the *Teague* defense in a habeas corpus proceeding. *Id.* at 1534-35. The Ninth Circuit and Supreme Court have held that a party may waive *Younger* abstention. *See, e.g., Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 n. 9 (1984); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977); *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102, 1106–07 (9th Cir.1988).

Indeed, this Court has held that because *Younger* is not a jurisdictional issue, it may be waived. *Abidi*, 461 F. Supp. 2d at 1111 (citing cases). A party may waive or forfeit the right to *Younger* abstention because of a "failure to timely raise *Younger*." *Id.*; *see also Kendall–Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 997 (7th Cir. 2000) (concluding a state forfeited application of the abstention doctrine by declining to appeal); *Walnut Properties, Inc.,* 861 F.2d at 1106–07 (precluding the city from raising the abstention doctrine after it failed to do so on first two appeals); *but cf Herrera*, 918 F.3d at 1042 (granting abstention on the first motion to dismiss).

"To the extent courts have some discretion in deciding whether to abstain when the issue of abstention comes up late in the litigation… courts generally consider competing fairness considerations." *Adibi*, 461 F. Supp. 2d at 1111–12 (cleaned up). The Ninth Circuit has reasoned that permitting a defendant to "litigate the case on the merits, and then belatedly claim [*Younger* abstention] to avoid an adverse result, would work a virtual fraud on the federal court and opposing litigants." *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir.1999) (citation omitted).

The County's delay is inexcusable. Indeed, this Court recently held "it is baffling…as to why [the County] did not raise the *Younger* abstention issue it raises in its latest motion to dismiss in its prior motion." ECF No. 230 at 1. Plaintiffs agree. It is "baffling" that the County waited until the close of discovery to assert *Younger*. This is not the "first instance of this litigation" during which the County could have asserted *Younger*. County's Br. at 3. The County filed its state enforcement action on October 27, 2020. Gondeiro Decl. ¶ 3. Last summer, the County amended its complaint to seek enforcement of $2.87 million in fines levied against Plaintiffs. *Id.* ¶ 4. The County continued to litigate this case and filed five motions to dismiss before belatedly raising *Younger* as a means of hedging a bet

on the merits. Now that the Court has rejected its prior motions and has set a hearing on a partial motion for summary judgment, the County raises *Younger* to avoid an impending adverse judgment. Fairness requires this case to continue because allowing the County to avoid an adverse judgment at this late stage would "work a virtual fraud on the federal court and [the Plaintiffs]." *Hill*, 179 F.3d at 748. Accordingly, this Court should find that the County waived abstention by belatedly raising *Younger*.

D. This Case Does Not Satisfy The Threshold Factors To Warrant Abstention

Even assuming arguendo that the County has not waived or inappropriately brought a motion under *Younger*, this case still does not meet the factors required for *Younger* application. *Younger* abstention only applies if the four *Middlesex* factors are met: (1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) "the federal court action would enjoin the proceeding or have the practical effect of doing so, [as to] interfere with the state proceeding in a way that *Younger* disapproves." *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004). Abstention is only proper "if all four *Younger* requirements [are] strictly satisfied." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007).

1. Ongoing.

In assessing whether *Younger* abstention applies, courts first ask whether there is an ongoing state proceeding. *Id.* Under this Court's precedent, a state proceeding is considered "ongoing" for *Younger* purposes in two circumstances. First, a state proceeding is "ongoing" if it was pending at the time the federal suit was filed. *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1196 (9th Cir. 2008). Second, even if a state proceeding began after the filing of a federal suit, the state proceeding is still "ongoing" if "the state [proceeding] commenced before any proceedings of substance on the merits have taken place in the federal court," *Hicks v. Miranda*, 422 U.S. 332, 349 (1975), or if "the federal litigation [is] in an embryonic stage and no contested matter [has] been decided." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975).

What constitutes a "proceeding of substance on the merits" or the "embryonic stage" remains a murky question still being fleshed out by the lower courts. Often when courts find a state action ongoing, the state lawsuit was either filed first or filed in virtual unison with the federal action. *See, e.g., Hicks*,

422 U.S. at 349 (state proceedings commenced one day after service of the federal complaint); *Doran*, 422 U.S. at 925 (state prosecution commenced one day after the filing of the federal complaint); *Herrera v. City of Palmdale,* 918 F.3d 1037, 1043-50 (9th Cir. 2019) (Defendants filed their state claim "almost simultaneously" after Plaintiffs filed their federal claim). In *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, the Ninth Circuit held that even though months had passed, the case was still in its embryonic stage because "[n]o discovery took place, no hearings were held, and no motions were filed." 805 F.2d 1353, 1358 n.5 (9th Cir. 1986).

Conversely, in *Hoye v. City of Oakland*, the Ninth Circuit held that proceedings of substance on the merits had occurred considering six months had transpired, and the district court denied Hoye's motion for TRO, held four status conferences and hearings in the case, and expressed skepticism regarding the constitutionality of the city's statute. 653 F.3d 835, 844 (2011). The Ninth Circuit has also held that even if a case is still in its "embryonic stage," it will still consider the amount of time the federal case had been pending. *Nationwide Biweekly Admin. V. Owen,* 873 F.3d 716, 730 (9th Cir. 2017) (quoting *Forty One News, Inc. v. Cty. Of Lake*, 491 F.3d 662, 666 (7th Cir. 2007). Further, even if the federal court has not issued a substantive ruling, but the court or parties have taken substantial steps in anticipation of that ruling, the court may find the subsequently filed state proceeding not "ongoing." *Costello v. Wainwright*, 525 F.2d 1239, 1246 (5th Cir. 1976), vacated in part on other grounds, 539 F.2d 547 (5th Cir. 1976) (en banc) (denial of abstention affirmed where federal court had appointed a special master and special master had prepared a report before the state action was filed).

This federal lawsuit is no longer in its embryonic stage because like *Hoye*, Plaintiffs have addressed numerous motions to dismiss and motions to stay, and this Court has signaled that the County's COVID-19 public health orders violated the First Amendment. The parties have also finalized factual discovery and conducted a settlement conference where the merits of the case were discussed. Gondeiro Decl. ¶ 6. Over the past two years, the Supreme Court has also held that California's public health orders violated the First Amendment. *See, e.g., S. Bay Pentecostal Church vs. Newsom*, 141 S. Ct. 716 (2021) ("South Bay"). The Supreme Court decisions are dispositive in this case.

The County's delay in raising *Younger* also militates strongly against abstention. Plaintiffs filed their lawsuit on June 9, 2020. ECF No. 1. On October 27, 2020, the County filed their lawsuit against

Plaintiffs for injunctive relief but did not seek to collect fines from Plaintiffs until July 2021, thirteen months after Plaintiffs' initial lawsuit. Gondeiro Decl. ¶¶ 3-4; *see Hoye*, 653 F.3d at 844 (holding that abstention was inappropriate in part because six months elapsed between the filing of the federal case and the filing of the state case). Plaintiffs amended their complaint four times, and the County therefore had numerous opportunities to raise *Younger* by raising it in a motion to dismiss. Thus, the County does not satisfy the first factor.

2. Important State Interest.

The second element of *Younger* abstention requires that the state proceeding implicate important state interests. *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004). The key to determining whether comity concerns are implicated in an ongoing state proceeding – and thus whether the second *Younger* requirement is met – is to "ask whether federal court adjudication would interfere with the state's ability to carry out its basic executive, judicial, or legislative functions." *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 883 (9th Cir. 2011). Unless interests "vital to the operation of state government" are at stake, federal district courts must fulfill their "unflagging obligation" to exercise the jurisdiction given them. *Miofsky v. Superior Court of the State of Cal.*, 703 F.2d 332, 337-38 (9th Cir. 1983); *accord Polykoff, IAS, Inc. v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987).

While the County does have an interest in enforcing health and safety provisions, its interest in protecting the public from COVID-19 is now a moot issue. In fact, this Court dismissed Plaintiffs' claims for injunctive relief on mootness grounds. ECF No. 156. The County's claims for injunctive relief are likewise moot because COVID-19 no longer poses a significant risk of transmission, so the state court has no basis to enjoin Plaintiffs' church gatherings. The County now primarily seeks to collect unconstitutional fines from Plaintiffs, as evidenced by its motion for summary adjudication. Gondeiro Decl. ¶ 8. The County does not have a legitimate interest in collecting unconstitutional fines predicated upon unconstitutional public health orders.

The County's reliance on *Herrera* is once again misplaced. County's Br. at 6. In *Herrera,* the Court found that the state action seeking to "enforce health and safety provisions…implicate[d] important state interests." 918 F.3d at 1045. However, in that case, the public health orders at issue pertained to the health and habitability of a decaying motel under the undoubtedly constitutional

California Building Standard Codes and the California Health and Safety Code. *Id*. at 1041. Although the Herreras filed a federal lawsuit alleging numerous constitutional violations, they do so based upon the defendants' *conduct*, such as their unlawful investigations. *Id*. at 1041, 1048-49. The Supreme Court and Ninth Circuit have refrained from abstaining in cases involving facial challenges based on the First Amendment. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965) ([A]bstention…is inappropriate for cases [where]…statutes are justifiably attached on their face as abridging free expression."); *Playtime Theaters, Inv. v. City of Renton*, 748 F.2d 527, 532 (9th Cir. 1984) ("*Pullman* abstention would almost never be appropriate in first amendment cases because such cases involve strong federal interests and because abstention could result in the suppression of free speech").

Here, Plaintiffs have alleged numerous facial challenges to the COVID-19 public health orders under the First Amendment. 4AC, ¶¶ 95-109. Specifically, Plaintiffs alleged the face-mask mandate, capacity restrictions, and singing ban violated the Free Exercise Clause. The Supreme Court has vindicated Plaintiffs' position numerous times over the past two years. *See, e.g., South Bay*, 141 S. Ct. 716. The County does not have an interest in collecting fines predicated upon clearly unconstitutional orders. Indeed, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, the second *Younger* factor is not satisfied, and this Court must fulfill its "unflagging obligation" to exercise the jurisdiction given them. *Miofsky*, 703 F.2d at 338.

3. Opportunity to Raise Federal Claims.

The County claims Plaintiffs can raise their federal claims in the state court and erroneously rely on *Herrera* to support its position. County Br. at 6. In *Herrera*, the defendants raised abstention early in the case, on their first motion to dismiss. 918 F.3d at 1042. Thus, the defendants had an opportunity to defend their position in state court by bringing a cross-complaint. *Id.* at 1046.

Here, the federal case has reached the end of discovery, and the parties have filed motions for summary judgment in both the state and federal court. The hearing for the County's motion for summary adjudication in state court is set for January 17, 2023. Gondeiro Decl. ¶ 8. Plaintiffs do not have an adequate opportunity to file a cross-complaint in state court and reach a decision on the merits before

the state court rules on the County's motion. This case will be disposed of long before any cross-complaint is adjudicated. Thus, the third factor is not satisfied.

4. Enjoining of State Action.

Plaintiffs' federal case does not enjoin the parallel state proceedings. The fourth element of *Younger* abstention requires that the federal action enjoin, or have the practical effect of enjoining, the ongoing state court proceeding. *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004). This element is "vital and indispensable" when determining the applicability of *Younger* abstention. *Roden*, 495 F.3d at 1149. *Younger* abstention does not apply simply because a pending state court proceeding involves the same subject matter as the federal suit. *Montclair Parkowners Ass'n v. City of Montclair*, 264 F.3d 829, 831 (9th Cir. 2001). Under this element, "the mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction, much less abdicating it entirely." *Roden*, 495 F.3d at 1151-1152 (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 816, (1976)). Although a federal court ruling might influence state court through claim or issue preclusion, this is insufficient to trigger *Younger* abstention. *Montclair Parkowners Ass'n*, 264 F.3d at 831. If a judgment is entered in one court, the parallel court is to determine the effect of the first judgment based on principles of claim or issue preclusion by the court in which the action is still pending through "orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of a case." *Roden*, 495 F.3d at 1151-1152 (citing *Kline*, 260 U.S. at 230).

Here, Plaintiff do not ask the Court to enjoin the state proceedings. Should this Court enter a judgment as to the constitutionality of the fines, the County would be free to continue to "proceed in its own way and in its own time…." *Id.* at 1151. The County would simply be bound by the rulings of this Court under issue and claim preclusion. *Id.* at 1152. Thus, "concurrent consideration, not abstention, is the solution." *Id*. The County fails to satisfy the *Younger* abstention factors.

E. Even If The Court Finds That The *Younger* Factors Are Satisfied, This Case Implicates A *Younger* Exception For Bad Faith, Extraordinary Circumstances, Or Irreparable Injury

Even if the Court finds that *Younger* abstention is appropriate in this case, the Court may nevertheless exercise jurisdiction where there is a showing of bad faith or harassment, extraordinary

circumstances, or great and immediate irreparable injury. *See Younger*, 401 U.S. at 47-49; *Ohio C.R. Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986) ("Dayton") (discussing exception to *Younger* where threat of "great and immediate irreparable injury" exists). Bad faith and harassment can "take many forms," including litigation where there is "no reasonable hope" of obtaining a judgment. *Perez v. Ledesma*, 401 U.S. 82, 118 n.11 (1971) (Brennan, J., concurring). "Extraordinary circumstances have not been cataloged fully," but such bad faith and extraordinary circumstances might arise in cases involving "repeated harassment by enforcement authorities with no intention of securing a conclusive resolution." *Partington v. Gedan*, 961 F.2d 852, 861–62 (9th Cir. 1992).

In instances where "an injunction is necessary to prevent great and immediate irreparable injury" to the federal interests asserted, application of *Younger* is also not warranted. *Dayton*, 477 U.S. at 626 (interpreting *Younger* to prevent injunctions against state proceedings "except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury"); *see e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (If "a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights."); *Harman v. Forssenius,* 380 U.S. 528, 537 (1965) (stating that the district court properly refused to abstain "[g]iven the importance and immediacy of the problem, and the delay inherent" in awaiting guidance from state courts).

Here, the County has acted in bad faith. In asserting *Younger* at this stage, the County is attempting to forum shop and avoid an adverse decision by this Court. In doing so, the County is trying to deprive Plaintiffs of their opportunity to vindicate their federal rights in federal court. *Zwickler v. Koota*, 389 U.S. 241 (1967) ("Duty of federal judiciary to give due respect to [Plaintiffs'] choice of federal forum for hearing and decision of federal constitutional claims may not be escaped merely because state courts also have solemn responsibility, equally with federal courts, to guard, enforce, and protect every right granted or secured by the federal Constitution."); *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964) ("State courts should respect a litigant's reservation…of his federal claims for decision by federal courts…").

Additionally, in the typical *Younger* abstention case, the state court proceeding is filed before or around the same time as the federal action, and the federal court would necessarily have the effect of

interfering with state court matters. This case poses the exact opposite factual scenario. Plaintiffs pursued a federal action seeking to prevent "great and immediate irreparable injury" to their federal right to free exercise of their religion. *Dayton*, 477 U.S. at 626. Four months later, the County filed its state action. After the close of factual discovery, the County now claims that *Younger* abstention is necessary as a last attempt to avoid an adverse judgment by this Court. This is a clear abuse of the abstention doctrine.

While Plaintiffs were preparing for settlement conferences urged by this Court, the County filed several belated motions, including its most recent motion to dismiss and motion to stay. The County has acted with no intention of securing a conclusive resolution in this case and is attempting to preclude Plaintiffs from resorting to a federal forum to seek redress for deprivation of their federal rights. *See Partington*, 961 F.2d at 862; *Wooley*, 430 U.S. at 710. This alone is sufficient to overcome an otherwise proper exercise of abstention. Accordingly, the Court should find that even if the *Younger* factors are satisfied, the County has acted in bad faith, and Plaintiffs will suffer irreparable injury if the Court does not continue to exercise its jurisdiction.

V. CONCLUSION

Accordingly, this Court should deny the County's improper and belated motion to dismiss and motion to stay.

Respectfully submitted,

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