No. 16-35422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHY ARMSTRONG, individual; JERRY ARMSTRONG, individual;
ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL,
a non-governmental organization,

Plaintiffs - Appellants,

v.

MIKE KADAS,
in his official capacity as Director of the Montana Department of Revenue,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Montana, Helena Division
Honorable Sam E. Haddon, District Judge

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Kathy Armstrong, an individual, Jerry Armstrong, an individual, and Association of Christian Schools International, a non-governmental organization, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION AND STATEMENT OF THE CASE

On May 8, 2015, the Montana legislature passed Senate Bill 410, which authorized income tax credits for donations to Student Scholarship Organizations (SSOs).[1] SSOs provide scholarships for K-12 students to attend a private school of their choice. The Montana Department of Revenue (Department), however, restricted student choices by promulgating regulations prohibiting any of the money donated to SSOs under the program from being used at religiously affiliated schools.[2]

Appellants Kathy and Jerry Armstrong and the Association of Christian Schools International (Armstrongs) challenged the Department's regulations under the First and Fourteenth Amendments to the United States Constitution and the Montana Administrative Procedure Act. The Armstrongs principally contend that the regulations violate the Free Exercise Clause and the Establishment Clause because they discriminate against religious schools. The parties in this case have fully briefed the Armstrongs' motion for a preliminary injunction and the Department's motion to dismiss.

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[1] When the governor took no action on the bill for ten days after its passage, it became law. Mont. Const. art. VI, § 10.

[2] The Department's justification for the regulations was the Montana Constitution's Blaine Amendment, which prohibits government units from appropriating any public funds to religious institutions. Mont. Const. art. X, § 6.

Around the time that the Armstrongs filed suit, different plaintiffs filed an action in Montana state court challenging the legality of the regulations under the United States and Montana Constitutions as well as the Montana Administrative Procedure Act. *See Espinoza v. Montana Dep't of Rev.*, No. DV 15-1152A (Mont. Dist. Ct. filed Dec. 16, 2015) (*Espinoza*). Unlike the Armstrongs, the *Espinoza* plaintiffs directly challenged Montana's Blaine Amendment under the United States Constitution's Free Exercise, Establishment, and Equal Protection Clauses. On March 31, 2016, the Montana trial court issued a preliminary injunction in *Espinoza*. The final outcome of that case is still pending in the state trial court.

On April 15, 2016, the Department moved the district court to abstain from deciding the Armstrongs' federal action in light of *Espinoza*. The Department argued that the doctrines of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), weighed in favor of abstention. On April 20, 2016, without waiting for the Armstrongs' response to that motion, the district court *sua sponte* dismissed the Armstrongs' case. It held that the criteria for *Pullman* abstention were met because this case "requests resolution of a sensitive question of federal constitutional law," that issue "could be mooted by a definitive ruling on the state law issues," and the status of the regulations is "uncertain" because the Montana Supreme Court has yet to rule on their application. (Doc. 30 at 3.)

The district court was wrong to dismiss the Armstrongs' federal constitutional claims. Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction Congress confers upon them. *Colorado River*, 424 U.S. at 818. Any balancing should be "heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). This is true particularly in First Amendment cases; this Court has only once affirmed a district court's decision to abstain under *Pullman* in a First Amendment case, while frequently holding abstention improper. The district court abused its discretion when it failed to give adequate weight to these considerations. This Court should vacate the order and remand for a determination of the Armstrongs' claims on the merits.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Armstrongs' claims brought through 42 U.S.C. § 1983 for violations of the Free Exercise and Establishment Clauses of the United States Constitution. It had supplemental jurisdiction under 28 U.S.C. § 1367(a) over the Armstrongs' state law claim.

The district court dismissed the Armstrongs' case in its entirety on April 20, 2016. The order is therefore appealable under 28 U.S.C. § 1291. The district court

denied the Armstrongs' motion for leave to file a motion for reconsideration on May 18, 2016. This Court has jurisdiction over the appeal according to 28 U.S.C. § 1291.

Appellants filed a timely notice of appeal on May 19, 2016. (Doc. 33.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in dismissing Appellants' federal constitutional challenge on grounds of *Pullman* abstention.

2. Whether abstention is proper under the narrower *Colorado River* doctrine.

STANDARD OF REVIEW

This Court reviews a district court's decision to abstain for abuse of discretion. *Coats v. Woods*, 819 F.2d 236, 237 (9th Cir. 1987).

ARGUMENT

I

PULLMAN ABSTENTION IS INAPPROPRIATE IN THIS CASE

"*Pullman* abstention 'is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy' that is properly before it." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (quoting *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974)). In *Pullman*, the plaintiff company

brought a federal challenge to an order of the Texas Railroad Commission that it claimed was racially discriminatory. 312 U.S. at 497-98. Although the Supreme Court recognized that the complaint "undoubtedly tendered a substantial constitutional issue" under the Fourteenth Amendment, *id.* at 498, it nevertheless declined to exercise jurisdiction. Because the Commission's order was based upon its reading of a Texas statute that had not been interpreted by the state courts, the district court should have "exercise[d] its wise discretion by staying its hands." *Id.* at 501. Otherwise, "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." *Id.* at 500. Thus, abstention is appropriate in the narrow circumstances where "the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996).

Under this Court's precedent, *Pullman* abstention is appropriate where:

> (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain.

Courthouse News Service v. Planet, 750 F.3d 776, 783-84 (9th Cir. 2014) (quoting *Porter*, 319 F.3d at 492). Because abstention is the exception rather than the rule, all

three factors *must* be present before district courts may decline to exercise jurisdiction properly given to them. *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993). Despite the standard of review, district courts lack the discretion to abstain unless all the factors are met. *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

Here, application of the first factor forecloses abstention. This Court has said that the first *Pullman* factor "is 'almost never' satisfied in First Amendment cases 'because the guarantee of free expression is always an area of particular federal concern.'" *Planet*, 750 F.3d at 784 (quoting *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989)). "Indeed, constitutional challenges based on the [F]irst [A]mendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear." *Porter*, 319 F.3d at 492 (quoting *J-R Distribs., Inc. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984)); *see also Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (challenge to speech restrictions in judicial code of conduct); *Porter*, 319 F.3d at 492-93 (rejecting abstention in First Amendment challenge to prohibition of "vote-swapping" marketplaces, noting that "the delay that comes from abstention may itself chill the First Amendment rights at issue"); *Sable Commc'ns of Cal. Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 190 (9th Cir. 1989) (in a First Amendment challenge to a policy authorizing disconnecting telephone service for those who transmit explicit messages, noting that "[t]he district court correctly

rejected *Pullman* abstention as 'inappropriate where First Amendment rights are implicated'").

This Court has only permitted abstention in a First Amendment case once. That case, *Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987), "was procedurally aberrational." *Planet*, 750 F.3d at 784. The plaintiffs alleged that applying California's pandering and prostitution statutes to the production of pornographic films violated the First Amendment and the analogous provision of the California Constitution. *Almodovar*, 832 F.3d at 1139. This Court held that *Pullman* abstention was appropriate because the statutes at issue were "susceptible to a limiting construction" and a case interpreting them was then pending before the California Supreme Court. *Id.* As a result, the federal litigants in *Almodovar* did not have to "undergo the expense or delay of a full state court litigation." *Id.* Instead, the potential limiting construction issue would be "adjudicated in a single state court proceeding." *Id.* That posture significantly lessened the threat that the delay in federal adjudication would chill the exercise of First Amendment rights.

As this Court has said both then and now, *Almodovar* was an exceptional case. *See id.* (noting that "courts have avoided abstention in first amendment challenges"); *Planet*, 850 F.3d at 784 (characterizing considerations leading to abstention in *Almodovar* as "exceptional factors"). None of the factors in *Almodovar* that counsel in favor of abstention are present here. The *Espinoza* case is a long way from

reaching the Montana Supreme Court; the state trial court has yet to issue a final decision. Moreover, the regulations at issue are not ambiguous or subject to a limiting construction: all parties agree that they exclude religious schools from the tax credit program. If this Court affirms the district court's abstention order, the Armstrongs may have to wait years to obtain federal adjudication on a federal constitutional claim. *See Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (noting that "forc[ing] 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"). This is precisely why courts almost never abstain in First Amendment cases.[3]

Because the protection of First Amendment rights is "always an area of particular federal concern," *Ripplinger*, 868 F.2d at 1049, such cases are not matters

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[3] This presumption against abstention in First Amendment cases applies equally to the Free Exercise and Establishment Clauses. "[P]rivate religious expression receives preferential treatment under the Free Exercise Clause" even with respect to other First Amendment rights. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality opinion) (emphasis deleted). Exercise of religion is a form of expression just like political speech. *See* Douglas Laycock, *Equal Access & Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 13 (1986) ("Like political speech, religious speech is at the core of the constitutional right to free expression."); Cedric Merlin Powell, *The Scope of National Power & The Centrality of Religion*, 38 Brandeis L.J. 643, 678 (2000) ("Since religious expression is a distinct form of First Amendment 'super speech' (doubly protected as free exercise of religion and free speech), it is, like free speech, at the very core of the First Amendment." (footnote omitted)). Therefore, the heavy presumption against abstention should apply in this case.

of sensitive state social policy from which federal court abstention is appropriate. Therefore, even if the remaining factors are satisfied, abstention is inappropriate. The district court's decision to the contrary was an abuse of discretion. The dismissal order should be vacated and the case remanded to the district court.

II

COLORADO RIVER ABSTENTION IS INAPPROPRIATE IN THIS CASE

The Department also argued that the district court could have abstained under the doctrine of *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Colorado River* arose from a complex water rights dispute in which the federal government brought suit in federal court to establish its rights to the waters of certain rivers and tributaries within a particular Colorado water district. *Id.* at 805. But when the United States sued, a pending action in state court regarding the relevant water rights had already begun. *Id.* One of the defendants in the federal suit then filed an application in state court to make the United States a party in the state court dispute. *Id.* at 806. The question then arose whether the federal court could abstain given the concurrent state proceeding. *Id.*

While the Supreme Court recognized that the *Colorado River* situation did not neatly fit into any of the recognized abstention categories, such as *Pullman*, *Younger v. Harris*, 401 U.S. 37 (1971), and *Louisiana Power & Light Co. v. City of*

Thibodaux, 360 U.S. 25 (1959), it nonetheless affirmed the district court's decision to abstain. *Colorado River*, 424 U.S. at 819-21. But the Court cautioned that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* at 817-18. Federal courts may abstain only under "exceptional circumstances." *Id.* at 813. As such, *Colorado River* is a much narrower doctrine than *Pullman* or other well-known abstention doctrines. *See, e.g.*, *Midkiff v. Tom*, 702 F.2d 788, 801 (9th Cir. 1983), *rev'd on other grounds sub nom. Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (calling *Colorado River* "prudential abstention"); *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coops., Inc.*, 48 F.3d 294, 298 n.4 (8th Cir. 1995) ("Because the policy underlying *Colorado River* abstention is judicial efficiency, this doctrine is substantially narrower than are the doctrines of *Pullman*, *Younger*, and *Burford* abstention, which are based on 'weightier' constitutional concerns." (quoting *Colorado River*, 424 U.S. at 817)); *see also* Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. Chi. L. Rev. 1517, 1547 (2007) (describing *Colorado River* abstention as "much narrower" than other abstention doctrines).

This Court considers four factors when reviewing a district court's decision to abstain under *Colorado River*: "(1) whether either the state or federal court has exercised jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the

desirability of avoiding piecemeal litigation; and (4) the order in which the forums obtained jurisdiction." *Sexton v. NDEX West, LLC*, 713 F.3d 533, 538 (9th Cir. 2013) (citations omitted). Also relevant is whether "federal law provides the rule of decision on the merits." *Moses H. Cone*, 460 U.S. at 23. But before considering any of the factors, the Court "must first determine whether the state and federal proceedings are parallel." *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994).

The district court cannot abstain under *Colorado River* here because this proceeding is not "parallel" with *Espinoza*. Where the claims or the parties in two suits are different, the federal and state proceedings are not parallel, or "truly duplicative," under *Colorado River*. *See, e.g.*, *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37, 40 (3d Cir. 1980) ("It is important, however, that only truly duplicative proceedings be avoided. When the claims, parties, or requested relief differ, deference may not be appropriate."); *Sheerbonnet, Ltd. v. Am. Express Bank Ltd.*, 17 F.3d 46, 49-50 (2d Cir. 1994) (finding that suits involving different parties and different claims were not "truly duplicative," obviating the need for the multifactor analysis); *Fox*, 16 F.3d at 1081 ("Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." (quoting *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991)). First, the Armstrongs' claims do not mirror the claims in *Espinoza*; the Armstrongs bring a Federal Establishment Clause claim that is

distinct from any claim the *Espinoza* plaintiffs allege, while the *Espinoza* plaintiffs have state constitutional claims not pressed by the Armstrongs. But more importantly, the *parties* are different, so the cases cannot be truly duplicative. The pendency of a state-court action involving different plaintiffs does not strip the Armstrongs of their right to a federal forum for their constitutional claims under 42 U.S.C. § 1983.

Moreover, this Court has indicated that *Colorado River* abstention is highly disfavored—and perhaps entirely inapplicable—in federal constitutional actions brought under Section 1983. In *Tovar v. Billmeyer*, this Court reversed a district court's decision to abstain from deciding a First Amendment challenge to the denial of a permit to operate an adult bookstore. 609 F.2d 1291, 1293 (9th Cir. 1979). The Court recognized that its obligation to decide a federal constitutional challenge is "particularly weighty." *Id.* at 1293. And "[u]nder such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures." *Id.* In short, the federal remedy secured by Section 1983 outweighs the narrow *Colorado River* abstention doctrine. *See Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997), *overruled on other grounds by Green v. City of Tucson*, 255 F.3d 1086 (9th Cir. 2001) (en banc) (noting that "significant policy interests, *as well as clear circuit precedent*, weigh against abstention from federal jurisdiction where the

pending state and federal proceedings are § 1983 causes of action" (emphasis added)).

Because of the lack of true duplicity and the primacy of Section 1983, this Court should not abstain under *Colorado River*. No "extraordinary circumstances" justify requiring the Armstrongs to wait an indeterminate amount of time while the state-court action involving different parties plays out before they can bring a federal suit to protect their First Amendment rights. The Armstrongs have a right to a federal forum; the dismissal order should be vacated.

III

EVEN IF ABSTENTION WERE PROPER, DISMISSAL WAS INAPPROPRIATE

Even if the district court's decision to abstain was not an abuse of discretion, dismissal of the Armstrongs' federal claims was inappropriate. "A district court abstaining under *Pullman* must dismiss the state law claim and stay its proceedings on the constitutional question until a state court resolved the state issue." *Cedar Shake*, 997 F.2d at 622; *see also Courtney v. Goltz*, 736 F.3d 1152, 1164 (9th Cir. 2013) (vacating a dismissal order while noting that "[w]e have generally considered dismissal inappropriate following *Pullman* abstention"). Therefore, at the very least, this Court should vacate the dismissal order and remand with instructions that the district court retain jurisdiction.

CONCLUSION

The district court incorrectly dismissed Appellants' federal constitutional claims on its own motion. This Court should vacate the dismissal order because neither abstention doctrine advanced by the Department below is applicable in this case. Because the Armstrongs have a right to a federal forum to bring their Section 1983 claims, this Court should remand this case and allow it to proceed on the merits.

DATED: August 29, 2016.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

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s/ Ethan W. Blevins
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 29, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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