

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

DAVID B. BRIGGMAN,)
Plaintiff,) Civil Action No. 5:15cv00076
)
v.) REPORT & RECOMMENDATION
)
ELIZABETH KELLAS BURTON, *et al.*,)
Defendants.) By: Joel C. Hoppe
United States Magistrate Judge

Plaintiff David B. Briggman filed this action *pro se* against Elizabeth Kellas Burton, Kevin C. Black, and Hugh David O’Donnell (collectively, “Defendants”), all of whom are Judges of the Juvenile and Domestic Relations (“JDR”) Courts of the Commonwealth of Virginia’s 26th Judicial District.¹ Pending before the Court is Defendants’ motion to dismiss,² which they filed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 15.³ This motion is before me by referral for report and recommendation under 28 U.S.C. § 636(b)(1)(B). ECF No. 6. All parties have fully briefed the issues, the Court held oral argument, and the motions are ripe for decision. After considering the pleadings, the parties’ briefs and oral arguments, and the applicable law, I recommend that the presiding District Judge deny without prejudice Defendants’ motion to dismiss. In addition, I recommend that the Court abstain from moving forward with Briggman’s claims and stay the case until all potentially

¹ Briggman also brought suit against Bryan Hutcheson, Sheriff of Rockingham County and the City of Harrisonburg. Hutcheson was later dismissed from the case by stipulation of the parties. ECF No. 49.

² Briggman’s motions for preliminary and/or permanent injunction, ECF Nos. 2, 10, have been voluntarily withdrawn. ECF Nos. 41–42.

³ The Defendants purport to bring their claim of judicial immunity under Rule 12(b)(1), which is a challenge to the Court’s jurisdiction to hear the claims. Absolute judicial immunity, however, “is a non-jurisdictional bar to a ‘claim asserted against a . . . judge stemming from official judicial acts’ and is thus ‘subject to dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.’” *Smith v. Scalia*, 44 F. Supp. 3d 28, 40 n.10 (D.D.C. 2014) (quoting *Tsitrin v. Lettow*, 888 F. Supp. 2d 88, 91 (D.D.C. 2012)). Accordingly, the Court construes the Defendants’ defense as an argument that Briggman has failed to state a claim, rather than an attack on the Court’s jurisdiction.

dispositive issues of state law have been resolved by the courts of the Commonwealth of Virginia.

I. Allegations of Fact

When assessing factual allegations for a motion to dismiss, I must view all well-pled facts in the Amended Complaint, ECF No. 9, in the light most favorable to the plaintiff. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In recognition of Briggman's *pro se* status and my obligation to hold his pleadings to "less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), I will also consider facts presented in his brief in opposition. *Shomo v. Apple, Inc.*, No. 7:14cv40, 2015 WL 777620, at *2 (W.D. Va. Feb. 24, 2015) (considering "both the complaint and the factual allegations in Shomo's response to the motion to dismiss in determining whether his claims can survive dismissal"); *Christmas v. Arc of the Piedmont, Inc.*, No. 3:12cv8, 2012 WL 2905584, at *1 (W.D. Va. July 16, 2012) (accepting as true facts from a *pro se* plaintiff's complaint and brief in opposition to decide a motion to dismiss). Furthermore, in accordance with the Court's order of February 24, 2016, ECF No. 43, I will consider certain supplemental evidence submitted by the parties, ECF Nos. 40, 45–46.⁴ See *Goines v. Valley Cmty. Servs. Bd.*, --- F.3d ---, 2016 WL 2621262, at *3 (4th Cir. May 9, 2016) ("[W]e may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity.").

Briggman, a resident of Rockingham County, complains that Defendants have improperly barred him from entering courtrooms in the JDR Court to observe proceedings for child support

⁴ Any arguments in Briggman's letter of April 4, 2016, ECF No. 46, are construed as additional briefing in response to the motion to dismiss.

cases in which he was not a party. Am. Compl. ¶¶ 2–3, 10. He specifically complains of being excluded from a number of proceedings relating to enforcement actions brought by the Virginia Division of Child Support Enforcement (“DCSE”). *Id.* ¶¶ 15–20; ECF No. 45, at 1–2. In one case, DCSE filed a petition for support against Scott Allen Gill on behalf of the mother of Gill’s child, and the JDR Court entered an Order of Support against Gill. ECF No. 45, at 3–8. On October 15, 2012, Gill appeared before the JDR Court on a show cause initiated by DCSE and was adjudicated in violation of the Order of Support that had been entered against him. The JDR Court imposed a suspended twelve-month jail sentence, which it described as “coercive” such that its suspension was conditioned on Gill’s paying additional support. *Id.* at 9. Gill continued not to comply with the order, and at DCSE’s request the JDR Court issued a *caus* for his arrest pursuant to § 16.1-278.16 of the Code of Virginia. On August 31, 2015, Gill was sentenced to serve ninety days of the suspended term, but could purge his contempt by paying \$6,000 to DCSE. *Id.* at 10–15.

On October 8, 2015, Gill filed an “Emergency Motion and Review of Civil Contempt Sentence and Dismissal of Rule to Show Cause and/or for Alternative Relief of Personal Recognizance Bond,” arguing that he was uncertain whether his sentence was for civil or criminal contempt, and seeking review of the sentence because he was unable to pay DCSE. *Id.* at 16–20. On October 15, Gill filed another motion seeking temporary bond for bereavement. *Id.* at 21–22. On October 16, the JDR Court granted a release order and ordered Gill to post a personal recognizance bond with instructions that he return to the jail on October 23 to serve the remainder of his sentence. ECF No. 16-2, at 1. On November 2, the JDR Court held a review hearing and released Gill for the time he had served, finding that he had served a greater portion

of the ninety days that had been imposed and that there was no further coercive benefit to the sentence. *Id.* at 3–4.

Briggman claims that he was denied access to the October 16 and November 2 hearings. Am. Compl. ¶¶ 17, 20. He asserts that although Gill’s attorney requested that he be allowed to observe the October 16 hearing, Judge Black refused, without explanation, to allow him into the courtroom. *Id.* ¶ 17. At the November 2 hearing, a deputy informed Briggman that Judge O’Donnell had instructed her to close and lock the courtroom doors and stated that the courtroom was closed to nonparties. *Id.* ¶ 20. Briggman also claims that he sought and was denied entry to an October 26, 2015, contempt review proceeding for Gill, *id.* ¶ 19, but there is no other documentation in the record of a hearing on that date.

In the other case at issue, DCSE entered an administrative support order⁵ against Richard Allen Stoneberger. It is unclear whether the mother of Stoneberger’s child was involved in this process, although her name appears in the case style on the order and subsequent court documents. ECF No. 45, at 23–26. On May 28, 2014, DCSE moved for a show cause summons and requested that Stoneberger be sentenced pursuant to § 16.1-278.16 for failing to comply with the administrative order. *Id.* at 27. The JDR Court issued the summons on June 19, and it issued a *capias* on July 29. *Id.* at 28–29. On November 24, 2014, the JDR Court found Stoneberger in contempt and sentenced him to twelve months’ imprisonment. *Id.* at 30–31. Stoneberger could purge his sentence by paying \$2,000 to DCSE. *Id.*

On October 7, 2015, Stoneberger filed an “Emergency Motion for Review of Civil Contempt Sentence and Dismissal of Rule to Show Cause and/or for Alternative Relief of Personal Recognizance Bond.” Like Gill, Stoneberger argued that it was unclear whether his

⁵ DCSE is authorized by statute to issue an administrative order of support in the absence of a court order. Va. Code Ann. § 63.2-1903.

sentence was for civil or criminal contempt, and he sought review of the sentence because he was unable to pay DCSE. *Id.* at 32–36. DCSE informed the Clerk of the JDR Court by letter that it was unlikely that continued incarceration would result in Stoneberger’s payment of the purge amount. ECF No. 16-1, at 3. Stoneberger appeared before the JDR Court on October 19. The JDR Court, finding that there was no coercive value in requiring Stoneberger to serve the remainder of his sentence, released him and suspended the remainder of his sentence. *Id.* at 4–5. Briggman claims that Judge Black denied a request by Stoneberger’s counsel that Briggman be allowed access to the October 19 hearing. Am. Compl. ¶ 18. Again, Briggman alleges that Judge Black failed to give an explanation for the denial. *Id.*

II. Discussion

Briggman brings his claims against the Defendants in their official capacities. Am. Compl. ¶¶ 11–13. He alleges causes of action under 42 U.S.C. § 1983 for violations of the First, Sixth,⁶ and Fourteenth Amendments to the United States Constitution, *id.* ¶¶ 21–28, and for violations of Article I, § 8 of the Constitution of Virginia, *id.* ¶¶ 29–31. Briggman also alleges that the Defendants’ actions violated § 16.1-302(c) of the Code of Virginia, which governs the closure of courtrooms in JDR courts. Pl.’s Br. in Opp’n to Def.’s Mot. to Dismiss (“Pl.’s Opp’n Br.”) 2, 4–6, ECF No. 32. Having withdrawn his claim for injunctive relief, ECF Nos. 41–42,⁷ and having asserted no claim for damages against any Defendant remaining in this case, *see* Am.

⁶ Briggman has since conceded that he does not have standing to pursue a claim under the Sixth Amendment because he was not a criminal defendant in any of the proceedings at issue. ECF No. 33, at 3.

⁷ To the extent Briggman continues to assert any claim for an injunction after withdrawing his motion for preliminary or permanent injunction, such relief would not be available in this case because, under § 1983, “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983.

Compl. 12 (asserting a claim for damages only against Defendant Bryan Hutcheson), Briggman now seeks only declaratory relief and litigation costs. *Id.* at 11–12.

Because the parties’ arguments focused heavily on issues of state law, and because Briggman’s case concerns the operation of state courts, the Court perceived that abstention from decision on the merits of this case may be warranted. Accordingly, on April 19, 2016, the Court ordered the parties to submit additional briefing on the abstention doctrine set out by the Supreme Court in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1948). ECF No. 49. Having considered the additional briefing and the *Pullman* abstention doctrine, I now find that the Court should abstain from further decision in this matter, as set forth herein.

A. *The Pullman Doctrine*

The *Pullman* doctrine concerns cases that involve interconnected issues of state and federal law and requires that federal courts “abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.” *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). Abstaining under these circumstances allows the federal courts to “avoid both unnecessary adjudication of federal questions and ‘needless friction with state policies.’” *Id.* (quoting *Pullman*, 312 U.S. at 500). Abstention is not always appropriate, however, and should only be invoked when a case involves “(1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is ‘potentially dispositive.’” *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (quoting *Donohoe Constr. Co. v. Montgomery Cty. Council*, 567 F.2d 603, 607 (4th Cir. 1977)).

Courts have applied differing standards in defining how unclear the relevant state law must be in order to justify *Pullman* abstention. Of course, *Pullman* abstention is not warranted to clarify a state statute that is facially unambiguous, *see City of Houston v. Hill*, 482 U.S. 451, 468–69 (1987), or that has already been authoritatively interpreted by the state courts, *see Kasper v. Pontikes*, 414 U.S. 51, 55 (1973); *accord Shell Island Inv. v. Town of Wrightsville Beach*, 900 F.2d 255 (Table), 1990 WL 41050, at *3-4 (4th Cir. 1990). Even if a statute is susceptible to different interpretations, standards differ as to the *degree* of ambiguity necessary to warrant abstention. *Compare Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (finding it “sufficient that the statute is susceptible of the interpretation offered by appellants”), *and Reetz v. Bozanich*, 397 U.S. 82, 86–87 (1970) (finding abstention appropriate because a state court interpretation of state law “could conceivably avoid” the constitutional issue), *with Hill*, 482 U.S. at 468 (stating that abstention is not appropriate “[i]f the statute is not *obviously susceptible* of a limiting construction” (emphasis added)), *and Midkiff*, 467 U.S. at 237 (“[T]he relevant inquiry is not whether there is a bare, though unlikely possibility that state courts might render adjudication of the federal question unnecessary. Rather, ‘[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.’” (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967))). These standards—whether the state statute is possibly susceptible to limiting interpretation or whether the ambiguity must be more obvious—provide somewhat conflicting guidance.

Even if the disputed issue of state law is unsettled and potentially dispositive, the decision of whether to abstain or take another approach, such as certifying a question to the state courts, is one that falls within the federal court’s discretion. *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). One important factor the

federal court should take into consideration is the cost of requiring additional proceedings in state court, as well as any harm that may be caused by delaying resolution of the case. *Bellotti*, 428 U.S. at 150. Delay may be especially harmful where the exercise of constitutional rights is at stake, see *Zwickler*, 389 U.S. at 252; *Baggett*, 377 U.S. at 378–79, although this does not necessarily preclude abstention, see *Georgevich, v. Strauss*, 772 F.2d 1078, 1094 (3d Cir. 1985) (“[T]he possibility of delay alone should not serve as the basis for eschewing abstention when the plaintiffs could have pursued their remedies in state court in the first instance, and when resolution of the state law issue promises full and effective relief.”). The need to avoid unnecessary delay may make certification a better option than full abstention, *Bellotti*, 428 U.S. at 150–51, but other circumstances of the case can still tip the balance in favor of abstention, see, e.g., *Catlin v. Ambach*, 820 F.2d 588, 591 n.2 (2d Cir. 1987) (finding abstention preferable to certification “because the resolution of the state law issue might require factfinding in the state courts”). The federal court should also keep in mind the purposes of the doctrine and consider whether abstention or certification is required “in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.” *Harman v. Forssenius*, 380 U.S. 528, 534 (1965).

If a court finds that abstention is required, then the correct procedure is to stay the action and retain jurisdiction, rather than to dismiss the case with prejudice. *Nivens v. Gilchrist*, 444 F.3d 237, 245–46 (4th Cir. 2006) (citing *England v. Louisiana State Bd. of Med. Exam’rs*, 375 U.S. 411, 416 (2006)). While the case is stayed, the parties can initiate an action in state court to address the state law issues. There must be adequate means for them to bring the issue before the state courts. See *Hillsborough Twp. v. Cromwell*, 326 U.S. 620, 628 (1946) (finding that

abstention was not appropriate because there was not an adequate remedy available to the parties in state court); *see also Georgevich*, 772 F.2d at 1092 (“If state court review were in fact impossible to achieve, *Pullman* abstention would of course serve no purpose.”). The parties should make the relevant constitutional issues known to the state courts, so that those courts may interpret the state law in the proper context, but may also expressly reserve final adjudication of the constitutional issues for the pending action in federal court. *England*, 375 U.S. at 419–22.

B. *Constitutional Issues*

Briggman’s constitutional claim concerns his right, as a member of the public, to attend the kind of proceedings at issue here. The caselaw makes clear that there is a presumptive First Amendment right of public access to adult criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).⁸ The right also extends to other criminal proceedings, including *voir dire* and preliminary hearings. *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 10 (1986). This is a qualified right—closure is permissible in some circumstances, but only if “specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* at 13–14 (quoting *Press-Enter. Co. v. Superior Court (Press-Enter. I)*, 464 U.S. 501, 510 (1984)).

The Fourth Circuit has recognized a First Amendment right of access to documents in civil cases. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). In reaching this decision, the Fourth Circuit cited two courts of appeals decisions, which held that

⁸ Although Defendants argue that *Richmond Newspapers* and its progeny recognize a First Amendment right of courtroom access only for members of the press, Defs.’ Br. in Supp. of Defs.’ Mot. to Dismiss 11–12, ECF No. 16, they do not point to any authority that supports such a distinction between the press and the general public. *Cf. Richmond Newspapers*, 448 U.S. at 578 (“In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”), 581 (“Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”); *In re Washington Post*, 807 F.2d 383, 389 (4th Cir. 1986) (“The First Amendment clearly guarantees the right of the press and the public to attend criminal trials.”).

the First Amendment guaranteed the public right to access criminal and civil trials, *id.* at 254 (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067–71 (3d Cir. 1984); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984)), and cited a footnote in *Richmond Newspapers*, which recognized “that historically both civil and criminal trials have been presumptively open,” *id.* at n.4 (quoting *Richmond Newspapers*, 448 U.S. at 580 n.17 (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”)). Another circuit court of appeals has recognized a First Amendment right of the public to attend contempt hearings, holding that the same interests in safeguarding fairness and the integrity of the fact-finding process that give rise to a public right to attend criminal trials also give rise to the same right in civil cases. *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983). On the other hand, some state courts have also determined, under the reasoning of *Richmond Newspapers*, that there is *not* a First Amendment right of public access to proceedings involving juveniles. *E.g.*, *In re N. H. B.*, 769 P.2d 844, 846–49 (Utah Ct. App. 1989); *In re J. S.*, 438 A.2d 1125, 1127–28 (Vt. 1981).

C. *Relevant State Law*

Several provisions of Virginia state law are relevant to this case. The first of these, § 16.1-302 of the Code of Virginia, governs whether JDR court proceedings should be open or closed to the public:

C. The general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper. However, proceedings in cases involving an adult charged with a crime and hearings held on a petition or warrant alleging that a juvenile fourteen years of age or older committed an offense which would be a felony if committed by an adult shall be open. Subject to the provisions of subsection D for good cause shown, the court may, sua sponte or on motion of the accused or the attorney for the Commonwealth close the proceedings. If the proceedings are closed, the court shall state in writing its reasons and the statement shall be made a part of the public record.

D. In any hearing held for the purpose of adjudicating an alleged violation of any criminal law, or law defining a traffic infraction, the juvenile or adult so charged shall have a right to be present and shall have the right to a public hearing unless expressly waived by such person. . . .

Va. Code Ann. § 16.1-302. Thus, in order to claim that the hearings at issue should presumptively have been open under this statute, Briggman would need to show that they were “proceedings in cases involving an adult charged with a crime” under subsection C, or possibly that they were “hearing[s] held for the purpose of adjudicating an alleged violation of any criminal law” under subsection D. The statute does not explicitly address civil matters, but it appears to exclude the “general public” from all proceedings in juvenile court that do not fit an exception.

The enforcement actions at issue in this case were brought pursuant to § 16.1-278.16 of the Code of Virginia, which provides that in certain cases involving child support,

when the court finds that the respondent (i) has failed to perform or comply with . . . a court or administrative order concerning the support and maintenance of a child . . . or (ii) under existing circumstances, is under a duty to render support or additional support to a child . . . the court may order . . . the giving of a recognizance as provided in § 20-114 [(providing for giving of a recognizance for compliance with an order or decree in a divorce or a suit for maintenance)]. If the court finds that the respondent has failed to perform or comply with such order, . . . the court may issue a civil show cause summons or a capias pursuant to this section. The court also may order the commitment of the person as provided in § 20-115 or the court may, in its discretion, impose a sentence of up to 12 months in jail, notwithstanding the provisions of §§ 16.1-69.24 and 18.2-458 [limiting a district judge’s authority to summarily punish for contempt to ten days’ imprisonment], relating to punishment for contempt. . . .

Furthermore, Briggman asserts a claim under Article I, Section 8 of the Constitution of Virginia, which sets out the rights of criminal defendants, including the right to a public trial. Va. Const. art. I, § 8. This provision is analogous to the right to a public trial found in the Sixth Amendment of the Federal Constitution, which only protects the accused himself, rather than the public. *Richmond Newspapers, Inc. v. Commonwealth*, 281 S.E.2d 915, 920 (Va. 1981). Instead,

the public's right to access courtroom proceedings is found in Article I, Section 12 of the Constitution of Virginia, which embodies the same protections as are found in the First Amendment of the Federal Constitution. *Id.* at 922–23, 925.

D. Analysis

It is first necessary to consider whether resolution of the relevant issues of state law could obviate the need to address federal constitutional questions.⁹ Here, the relevant Virginia statutory provisions discussed *supra* may provide an alternate ground for disposition of this case that would render unnecessary any determination of the constitutional questions. Although Briggman has not asserted an independent claim for relief pursuant to Virginia Code §§ 16.1-278.16 and 16.1-302, *see generally* Am. Compl., the parties' arguments thus far have focused heavily on possible interpretations of these statutes, *see* Defs.' Br. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Br.") 6–10, ECF No. 16; Pl.'s Opp'n Br. 2–6. Furthermore, it is plainly apparent how a particular reading of these provisions could potentially dispose of the case. If Briggman can show that the hearings at issue, initiated pursuant to Virginia Code § 16.1-278.16, were "proceedings in cases involving an adult charged with a crime" under Virginia Code § 16.1-302 (C) (or possibly "hearing[s] held for the purpose of adjudicating an alleged violation of any criminal law" under § 16.1-302(D)), then he could argue that those hearings should have been presumptively open, regardless of any constitutional requirements.

Furthermore, it is not entirely clear whether § 16.1-278.16 should be regarded as a civil or criminal statute. In *Thompson v. Commonwealth*, Record No. 0390-01-2, 2003 WL 231609

⁹ In Count II, Briggman brings a claim for violation of the Virginia Constitution. This claim does not rely on federal law and thus necessarily invokes the Court's supplemental jurisdiction. As a pure state law claim, it is not the proper subject of *Pullman* abstention. Because the Court's authority to decide Count II depends on the existence of Count I, which purports to raise a federal question, the Court's adjudication of Count II should also be stayed pending the state court's consideration of the claims raised in Count I.

(Va. Ct. App. Feb. 4, 2003), Thompson argued that his civil contempt sentence to an indefinite period, subject to purge, amounted to a criminal penalty. The Court of Appeals of Virginia considered this issue and focused on the distinction between civil and criminal contempt, noting that “[i]t is axiomatic that, in a civil contempt proceeding, the contemnor must be in a position to purge himself of contempt.” *Id.* at *1 (citing *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441–42 (1911)). Thompson, citing *Shillitani v. United States*, 384 U.S. 364 (1966), argued that he did not have the means to purge his contempt because he was already in prison and could not work, and therefore he had “received a *de facto* criminal punishment for civil contempt.” *Thompson*, 2003 WL 231609, at *1. The court rejected Thompson’s argument because he had not provided evidence of his inability to pay his arrears, thus precluding a finding, “as a matter of law, that Thompson [would] be unable to purge his contempt.” *Id.* at *2. The court looked to the remedial, rather than punitive, nature of Thompson’s punishment, and based on the specific facts of his case, upheld the lower court’s sentence for civil contempt. *Id.* The court did not address whether it would have reached the same decision had Thompson presented evidence of his inability to pay.

Comparable statutes have been read as both civil and criminal in nature, or quasi-criminal. Virginia Code § 20-115, which provides the standard by which a JDR court may order commitment of a child support obligor under § 16.1-278.16, reads as follows:

[U]pon conviction of any party for contempt of court in (i) failing or refusing to comply with any order or decree for support and maintenance for a spouse or for a child or children . . . the court (i) may commit and sentence such party to a local correctional facility as provided for in § 20-61[;] . . . the assignment shall be for a fixed or indeterminate period or until the further order of the court. However, in no event shall commitment or work assignment be for more than twelve months.¹⁰

¹⁰ Section 20-61, which provides the standard for commitment and sentence used in § 20-115, “defines the crime of desertion and nonsupport, classifies it as a misdemeanor, and recites the punishments which may be imposed upon conviction. . . . This is a criminal statute which provides no civil relief.” *Jones v. Robinson*, 329 S.E.2d 794, 799 (Va. 1985).

These statutes are similar in effect. Both §§ 16.1-278.16 and 20-115 grant courts the discretion to sentence individuals who do not comply with child support orders to confinement for up to twelve months. In addition, neither of these statutes contains limiting language requiring the courts to allow contemnors the option to purge their contempt by paying off their arrears. Courts have reached mixed results in determining whether proceedings under § 20-115 were civil or criminal. *See, e.g., Gowen v. Wilkerson*, 364 F. Supp. 1043, 1044–45 (W.D. Va. 1973) (noting that hearing had both civil and criminal elements, and opining that it was “a matter of conjecture as to whether the petitioner was being tried civilly or criminally or in both forms at once”); *Kessler v. Commonwealth*, 441 S.E.2d 223, 224 (Va. Ct. App. 1994) (Moon, C.J.) (stating that contempt proceedings under § 20-115 were classified as civil or criminal based on the character and purpose of the punishment, and finding that the case at bar was one for criminal contempt because contemnor was not able to purge the contempt).

These decisions provide support for arguments on both sides and show that determining the civil or criminal nature of each support proceeding requires an individualized assessment of the manner in which the case was initiated and the terms of sentence imposed. This complicates the question of whether DCSE enforcement proceedings brought under § 16.1-278.16, including the proceedings at issue in this case, should be presumptively open or closed in accordance with § 16.1-302. Moreover, state courts in Virginia have not addressed whether child support contempt proceedings in JDR court should be open to the public under § 16.1-302(C).¹¹ The

¹¹ Virginia courts have discussed courtroom closures under § 16.1-302(C) and the public’s right of access to hearings in JDR courts, but not with regard to the type of proceedings at issue in this case. *See, e.g., In re Petition of Times-World Corp.*, 50 Va. Cir. 25 (1999) (vacating, through issuance of a writ of mandamus, JDR court’s decision to close a preliminary hearing for a juvenile charged with murder), *rev’d sub nom. Hertz v. Times-World Corp.*, 528 S.E.2d 458 (Va. 2000); *see also Hertz*, 528 S.E.2d at 464–67 (Koontz, J., dissenting) (discussing right of access and closure of hearings under § 16.1-302(C)).

distinction between civil and criminal proceedings is significant under § 16.1-302, but arguably not under the First Amendment.

In this case, the constitutional issue is presented as a corollary to the determination of public access to the court proceedings under § 16.1-302. Briggman's argument that the proceedings are criminal and thus should be open hinges on his belief that § 16.1-302 requires it. *See* Pl.'s Opp'n Br. 4 ("Virginia Code § 16.1-302 requires . . . open courtrooms"), 5. Under his argument, any purported constitutional violation appears derivative of a violation § 16.1-302, although Briggman does argue that the First Amendment also requires public court proceedings, Am. Compl. 8–10; Pl.'s Br. in Opp'n to Hutcheson's Mot. to Dismiss 3–4, ECF No. 33. He does not argue that § 16.1-302 itself violates the First Amendment, and he does not challenge its constitutionality. Conversely, the Defendants assert that child support proceedings are civil and their closure complied with § 16.1-302; therefore, they conclude that Briggman suffered no constitutional injury. Defs.' Br. 8–10.¹² Even if closing the hearings was proper under Virginia law, however, it does not necessarily follow that such closure was also permissible under the requirements of the First Amendment. *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 591 n.2 (10th Cir. 1999) ("[A] state statute does not and cannot define the scope of constitutional rights."). This line of argument from both sides suggests that this case may be resolved on state law grounds, or, at least, that a state court interpretation of state law will narrow the issues. Thus, *Pullman* abstention counsels that this Court allow the state court to address whether closure was proper under state law before addressing the constitutional issues.

Additionally, other factors present in this case counsel abstention. There is likely to be little harm that would come from delaying a decision in this Court. Briggman may bring suit in

¹² This argument seems to misapprehend § 1983, which is not a vehicle for vindicating deprivations of state-created rights. Instead it protects "rights secured by the Constitution and laws of the United States." *Snider Int'l. Corp. v. Town of Forest Heights*, 739 F.3d 140, 145 (4th Cir. 2014).

state court as he has done here or, if JDR court judges improperly close a future case, he may move to intervene in that case. *Hertz*, 528 S.E.2d at 463–64 (holding that the public may move to intervene in a JDR court case that was closed by the court under § 16.1-302). Furthermore, this is precisely the type of case in which the Court should be cognizant of the issues of federalism and comity that animate the abstention doctrine. The parties seek for this Court to rule on the propriety of state court practices, and primarily cite to state law to support their arguments. In such a case, the Court should hesitate to weigh in on these disputed practices unless doing so would be necessary to protect constitutional rights. Here, a state court’s limiting construction of the state statutes at issue could resolve this matter without resort to analysis of the constitutional issues, and therefore abstention is the proper course.

III. Conclusion

Briggman has asserted his claims pursuant to theories of state statutory law, as well as state and federal constitutional law. Interpretation of the state statutes at issue may be dispositive of this matter, making decision on the constitutional questions potentially unnecessary. In such a situation, interpretation of the state statutes in the first instance should be left to the courts of the Commonwealth of Virginia, not this Court. For the foregoing reasons, I recommend that Defendants’ motion to dismiss, ECF No. 15, be **DENIED WITHOUT PREJUDICE** while the case is stayed, and that the Court **STAY** this matter and abstain from further decision until all potentially dispositive questions of state law in this matter are resolved in the Virginia courts. Further, the parties should update the Court every six months as to the status of any state court proceedings.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, Chief United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: July 28, 2016

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, flowing style.

Joel C. Hoppe
United States Magistrate Judge