IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1624

COURTHOUSE NEWS SERVICE; MTM ACQUISITION, INC., d/b/a Portland Press Herald, d/b/a Maine Sunday Telegram, d/b/a Kennebec Journal, d/b/a Morning Sentinel; SJ ACQUISITION, INC., d/b/a Sun Journal,
Plaintiffs - Appellants,

BANGOR PUBLISHING CO., INC., d/b/a Bangor Daily News,
Plaintiff,

v.

JAMES T. GLESSNER, in his Official Capacity as State Court Administrator for the State of Maine Judicial Branch; PETER SCHLECK, in his Official Capacity as Clerk of the Penobscot County Superior Court,
Defendants - Appellees.

No. 21-1642

BANGOR PUBLISHING CO., INC., d/b/a Bangor Daily News,
Plaintiff - Appellant,

COURTHOUSE NEWS SERVICE; MTM ACQUISITION, INC., d/b/a Portland Press Herald, d/b/a Maine Sunday Telegram, d/b/a Kennebec Journal, d/b/a Morning Sentinel; SJ ACQUISITION, INC., d/b/a Sun Journal,
Plaintiffs,

v.

JAMES T. GLESSNER, in his Official Capacity as State Court Administrator for the State of Maine Judicial Branch; PETER SCHLECK, in his Official Capacity as Clerk of the Penobscot County Superior Court,
Defendants - Appellees.

On Appeal from a Decision of the United States District Court for the District of Maine, Case No. 1:21-cv-00040-NT

BRIEF OF AMICUS CURIAE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF APPELLEES

Counsel Listed on Inside Cover

Peter J. Guffin, Bar No. 1201696
Joshua D. Dunlap, Bar No. 1146098
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorneys for Amicus Curiae Conference of Chief Justices

Laura M. O'Hanlon, Bar No. 1051213
c/o Peter J. Guffin
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-318-5748

Special Counsel for Amicus Curiae Conference of Chief Justices

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IDENTITY AND INTERESTS OF *AMICUS CURIAE* [1]

CCJ was founded in 1949 to provide an opportunity for the highest judicial officers of each State and U.S. Territory to address matters of importance in improving the administration of justice, rules and methods of procedure, and operation of state courts and judicial systems. As part of its mission, CCJ supports the efforts of state courts in administering efficient and impartial systems of justice that serve the public interest, protect individual rights, and instill respect for the law.

CCJ has a strong interest in the subject matter of this proceeding. CCJ has consistently defended principles of federalism to protect state judicial independence and promote comity between state and federal courts—principles that are vital to our judicial system. CCJ has also long encouraged state courts to craft policies regarding public access to court records that balance individual privacy concerns, the need for transparency of governmental operations, and the integrity of the judicial system.[2] CCJ respectfully proposes that its perspective on the issues of federalism and public access

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[1] Pursuant to Fed. R. App. P. 29(a)(2), CCJ states that all parties have consented to the filing of this brief. Further, pursuant to Fed. R. App. P. 29(a)(4)(E), CCJ states that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amicus* or its counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] In 2002, CCJ endorsed *Public Access to Court Records: Guidelines for Policy Development by State Courts*. *See* Martha Wade Steketee & Alan Carson, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* xi (2002), available at https://www.jmijustice.org/wp-content/uploads/2014/04/CCJ-COSCA-Access-18Oct2002FinalReport.pdf.

to court records may be beneficial to this Court, as CCJ is intimately familiar with the role of state courts and the practical realities confronted by those courts in introducing electronic filing rules.

This *amicus* brief is being filed pursuant to a policy unanimously approved by CCJ's Board of Directors. That policy authorizes the filing of a brief only where critical interests of state courts are at stake, as they are in this case. Pursuant to CCJ's policy, this brief has been reviewed by members of a special committee of CCJ chaired by the Chief Justice of Kentucky and composed of the current or former Chief Justices of Delaware, Indiana, Kentucky, Missouri, North Dakota, and Texas. The committee has unanimously approved the brief for filing.

CCJ supports the position of Defendant-Appellee James Glessner, and urges affirmance of Judge Torresen's decision based on the doctrine of abstention.

SUMMARY OF THE ARGUMENT[3]

Proper application of the principles of comity, federalism, and equity calls for federal court abstention in a challenge to court record rules promulgated by a state's highest court, which has the exclusive authority to establish court rules and oversee a co-equal, centralized judicial system. In Maine, the Supreme Judicial Court ("SJC") has exercised its inherent, constitutional, and statutory powers to manage the state judicial

[3] Record references to filings in this matter are abbreviated as follows: Record Appendix ("R.A.___"); Plaintiff-Appellants Courthouse News Service, MTM Acquisition, Inc., & SJ Acquisition, Inc.'s Brief ("Aplt. Br.____"); Addendum ("Add.____").

system by adopting rules and regulations governing electronic filing—the Maine Rules of Electronic Court Systems ("RECS").[4] Plaintiffs-Appellants Courthouse News Service *et al.* (collectively "CNS") now seek to have federal courts oversee the SJC's policy determinations embodied in RECS by entering an injunction requiring instant access to civil complaints filed in state courts. The exercise of federal jurisdiction in this case runs counter to principles of comity, because it would involve federal courts in supervising Maine's judicial system. Maine courts should have, in the first instance, the opportunity to address CNS's constitutional claims. To hold otherwise would fail to recognize that state courts are capable of guaranteeing federal rights and improperly inject the federal courts into state policy determinations regarding judicial administration, rulemaking, and processing of judicial records. This Court should invoke abstention and affirm the dismissal of CNS's complaint.

ARGUMENT

I. Courthouse News Service's Challenge Invites Federal Courts to Oversee Administration of the State of Maine's Judicial Branch, Which Is a Power Vested in Maine's Supreme Judicial Court.

Seeking to establish new rights for the media under the First Amendment,[5] CNS is asking this Court to mandate how Maine's highest court, the SJC, manages its clerks'

[4] *See generally* Me. R. Elec. Ct. Sys. (adopted and effective August 21, 2020, including amendments effective March 15, 2021), available at https://www.courts.maine.gov/rules/text/mrecs_2021-03-15.pdf; Add. 43-95; R.A. 171-74, 177.

[5] Neither the United States Supreme Court nor this Court has found that a First Amendment right of access extends to civil complaints, and this Court has expressed

offices, case management system, and court records during the rollout of its new electronic filing system. CNS is seeking to invalidate "on its face" and "as applied" a temporal access rule applicable to all civil complaints filed during a pilot of the electronic filing system. Further, CNS is asking a federal court to take this step before Maine courts have had an opportunity to address the merits of CNS's claims. The relief CNS seeks—dictating to the SJC how it must run the state court system—is extraordinary.

As the Supreme Court has recognized, "[e]very court has supervisory power over its own records and files." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978). Thus, how state courts review, process, and accept or reject pleadings is "an area traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), specifically, state courts. Under the Maine Constitution, oversight of the judicial branch is vested in the SJC. Me. Const. art. VI, § 1 ("The judicial power of this State shall be vested in a Supreme Judicial Court . . . ."); *see In re Dunleavy*, 2003 ME 124, ¶ 7, 838 A.2d 338. This constitutional power includes the inherent power to manage judicial records. *See State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453, 454 (1912). Recognizing this constitutional and inherent judicial administrative power, the Maine State Legislature has codified the SJC's exclusive authority to control court documents and records, and to promulgate

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reluctance to expand the right of access beyond the criminal justice system. *El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 495 (1st Cir. 1992).

all court rules. *See, e.g.*, Me. Stat. tit. 4, §§ 1, 7-9-A, 156, 198, 555, 651-A. CNS's lawsuit directly implicates this traditional state judicial power.

In this case, the rule challenged "on its face" and "as applied" was established by the SJC—not by central administrative office policy nor by local clerk procedure. The SJC promulgated RECS, a comprehensive set of rules governing the rollout of Maine's new electronic filing and case management systems, under its constitutional, inherent, and statutory authority to run the Maine Judicial Branch, establish court rules, and control court records.[6] Add. 2-5. In adopting the RECS, the SJC was acting as the sole entity vested with "general administrative and supervisory authority over the judicial branch and … [to] make and promulgate rules, regulations and orders governing the administration of the judicial branch." Me. Stat. tit. 4, § 1. Because the SJC promulgates court rules, neither the State Court Administrator ("SCA") for the centralized statewide court system nor the judicially appointed clerk of the Penobscot County Superior Court has the professional discretion to ignore the RECS or to implement methods that depart from those rules. Despite their status as the sole defendants in the case below, neither the SCA nor the clerk has any authority to enact or modify Maine court rules. *See e.g.,*

[6] Maine's legislature recently reinforced the SJC's authority regarding the same type of rules at issue in this case by clarifying "the Rule-Making Authority of the Supreme Judicial Court Concerning Electronic Records and Filing," and adopting a statute providing that "[a]fter the effective date of the rules as adopted or amended, all laws in conflict with the rules are of no further effect." Me. Stat. tit. 4, § 8-C(1), *as amended by* P.L. 2021, ch. 343, § 1 (effective October 18, 2021).

id. § 17 (SCA duties); *id.* §§ 551, 568 (clerk duties). CNS is therefore challenging the SJC's exercise of its authority and discretion to administer the state court system.[7]

The SJC's exercise of its authority and discretion involves substantial policy determinations. As observed by that court, while record access

> is important, and addresses significant matters of interest to the public, it is truly a question of policy, with long-ranging and far-reaching implications. The issues raised [regarding records access] . . . do not lend themselves to an adjudicatory response. Rather, they should be answered through rulemaking where the myriad questions regarding the treatment of digital records can be addressed together in an open forum.

Conservatorship of Emma, 2017 ME 1, ¶ 10, 153 A.3d 102 (access to records in county probate courts). Federal courts should not lightly engage in review of the policy determinations of state courts such as those made by the SJC. Federal court resolution of challenges to RECS without giving the Maine courts the opportunity to weigh in on the merits in the first instance would inject the federal judiciary into state policy-making and short-circuit the SJC's formal rules oversight and rulemaking processes.[8]

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[7] Because the SJC was not a named party to this litigation, any successful facial challenge would only be effective if the SJC voluntarily complied with a federal court's order out of respect for that forum. *See In re Justices of Supreme Court of Puerto Rico,* 695 F.2d 17, 23 (1st Cir. 1982).

[8] These processes are documented in an SJC Administrative Order. *See* Rules Oversight and Rulemaking Processes, Me. Admin. Order JB-05-27 (as amended by A. 2-16) (effective Feb. 8, 2016), available at https://www.courts.maine.gov/adminorders/jb-05-27.pdf. It also would bypass the Standing Committee on Media and the Courts designated by the SJC to improve communication between the judiciary and the media and enhance the accuracy and flow of information made available to the public concerning Maine courts. *See* State of Maine Judicial Branch, *Committee on Media and the Courts* (last updated March 27, 2017), https://www.courts.maine.gov/about/committees/media-courts.html.

In sum, exercise of federal jurisdiction in this case, without giving Maine judges an opportunity to address CNS's claims, would intrude on the operations of the Maine court system in disregard of the SJC's vested powers. It would be an affront to the important state interests underlying the SJC's authority to supervise the state courts and control court records, and it would distort federal-state court relations. As set forth in Part II *infra*, therefore, exercise of federal jurisdiction would offend principles of equity, comity, and federalism.

II. Because Courthouse News Service's Challenge Invites Federal Courts to Oversee Administration of the State of Maine's Judicial Branch, Federal Courts Should Abstain from Resolving the Challenge.

A. This Court should reach the abstention issues presented here.

As an initial matter, there is no bar to consideration of abstention. Rather, the importance of comity compels consideration of abstention in this case.

In her decision below, Judge Torresen recognized abstention as an issue. Observing that courts had declined to resolve similar challenges in *Courthouse News Service v. Brown*, 908 F.3d 1063 (7th Cir. 2018), and *Courthouse News Service v. Gilmer*, No. 4:21CV286 HEA, 2021 WL 2438914 (E.D. Mo. June 15, 2021),[9] based on abstention, Judge Torresen noted that she found "the reasoning of these courts somewhat persuasive," Add. 16, n.14. Nevertheless, rather than fully considering abstention, she resolved the case on the merits because "Defendants did not raise abstention and

[9] These cases are discussed further in Part II.B, *infra*.

affirmatively indicated at oral argument that they . . . decided not to seek abstention." *Id.*

Even though abstention was not asserted as a defense below, this Court has the power to consider abstention on its own initiative. *See Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 517-18 (1st Cir. 2009) ("whether or not defendants failed to preserve their abstention arguments for appeal, or even had they declined to request abstention entirely, it would not deprive us of authority to consider the issue" given "the important interests underlying the abstention doctrines").[10] Because the important interests in this case directly affect not only policy-based administration of the Maine state court system but also those of Massachusetts, New Hampshire, Puerto Rico, and Rhode Island, CCJ respectfully urges this Court to exercise its discretion to consider abstention as an alternative ground for dismissal.[11]

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[10] *See also Zell v. Ricci,* 957 F.3d 1, 16-17 (1st Cir. 2020) (considering abstention principles and stating: "[U]nlike other issues we normally would not review (except, perhaps, for plain error) when the parties fail to argue them, the parties generally do not have an incentive to argue for or against enforcement of those independent, system-focused comity interests. Truth be told, it wouldn't make sense to rely on them to do so since it isn't an element that directly or necessarily involves a personal interest."); *Cruz v. Melecio*, 204 F.3d 14, 22 n.7 (1st Cir. 2000) (ordering abstention *sua sponte* "[n]otwithstanding that the parties did not raise the [abstention] issues" below or on appeal).

[11] Similar claims in other states are likely as CNS continues to file state electronic court record access cases in federal courts exclusively. In this past year alone, CNS filed twelve such cases, including this matter; three cases currently on appeal, *see Gilmer*, 2021 WL 2438914; *Courthouse News Serv. v. New Mexico Admin. Off. of the Cts.*, No. 1:21-cv-00710, 2021 WL 4710644 (D. N.M. Oct. 8, 2021); *Courthouse News Serv. v. Gabel*, No. 2:21-cv-000132, 2021 WL 5416650 (D. Vt. Nov. 19, 2021); six cases under consideration by federal district courts, *see Courthouse News Serv. v. Toste,* No. 1:21-cv-01114 (E.D. Cal.); *Courthouse News Serv. v. Omundson*, No. 1:21-cv-00305-DCN

B. Exercise of federal jurisdiction in judicial records access cases runs counter to the considerations of equity, comity, and federalism underlying abstention doctrines.

1. Respect for co-equal state courts require abstention.

Although abstention is the exception rather than the rule, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quotation marks omitted); *see Pustell v. Lynn Pub. Sch.*, 18 F.3d 50, 53 (1st Cir. 1994) ("exceptional circumstances" can justify abstention). Among these interests are "considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration." *Quackenbush*, 517 U.S. at 716 (quotation marks omitted). Of particular importance here are federalism considerations. "Cooperation and comity, not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) (quotation marks omitted). As the Court has recognized, Maine courts are co-equal to

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(D. Idaho); *Courthouse News Serv. v. Hade*, No. 3:21-cv-00460-HEH (E.D. Va.); *Courthouse News Serv. v. Cozine*, No. 3:21-cv-00680 (D. Ore.); *Courthouse News Serv. v. Hamilton Cty. Clerk of Cts.,* No. 1:21-cv-00197 (S.D. Ohio); *Courthouse News Serv. v. Price*, No. 1:20-cv-1260-LY, 2021 WL 5567748 (W.D. Tex.), report and recommendation adopted, 2021 WL 6276311; and two cases that have been resolved, *Courthouse News Serv. v. Calvo*, No. 3:21-cv-00822 (N.D. Cal.); *Courthouse News Serv. v. Taniguchi*, No. 4:21-cv-00414-HSG (N.D. Cal.).

and "as capable as their federal counterparts of guaranteeing federal rights." *Bettencourt v. Bd. of Registration in Med. of Com. of Mass.,* 904 F.2d 772, 776 (1st Cir. 1990).

Because abstention is based on the existence of "exceptional circumstances" and "countervailing interests" to the exercise of federal jurisdiction, traditional abstention doctrines "are not rigid pigeonholes into which federal courts must try to fit cases." *Pennzoil Co. v. Texaco Inc.,* 481 U.S. 1, 11 n.9 (1987). Overlapping rationales underlie the various abstention doctrines, and, as a result, considerations that support abstaining under one will often support abstaining under another. *See id.* This Court has recognized that "the various strains of abstention-related doctrines are not Procrustean taxonomies, but, rather, concepts that reflect 'a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.'" *Cruz*, 204 F.3d at 23 (quoting *Pennzoil Co.*, 481 U.S. at 11 n.9). "Thus, considerations of 'wise judicial administration' alone may sometimes warrant dismissal of a federal court proceeding." *Id.* (citing *Colorado River*, 424 U.S. at 818). In short, abstention requires flexible consideration of "compelling interests of fairness, comity, and sound judicial administration," *id.* at 25, whether or not the case fits within the formal categories of abstention, *Bacardi Int'l Ltd. v. V. Suarez & Co.,* 719 F.3d 1, 14 (1st Cir. 2013) (finding stay appropriate "whether or not [the] case fits within the formal strictures" of abstention doctrines); *Casiano-Montanez v. State Ins. Fund Corp.*, 707 F.3d

124, 128-29 (1st Cir. 2013) (staying proceeding under the *Pullman* abstention doctrine as well as general principles of federalism, comity, and sound judicial administration).[12]

Both "countervailing interests" and "exceptional circumstances" justifying abstention exist in this case. Countervailing interests to federal jurisdiction are directly implicated here, where federal court intervention would intrude upon the independence of state courts. *See SKS & Assocs. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010) ("a federal court may, and often must, decline to exercise its jurisdiction where doing so would intrude upon the independence of the state courts"). Courts have rightly recognized that the "principle of comity takes on special force when federal courts are asked to decide how state courts should conduct their business." *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020) (quotation marks omitted). Moreover, as explained in Part II.C *infra*, exceptional circumstances requiring abstention exist in this case because state courts have a significant interest in managing their clerks' offices, case management systems, and court records. In this case, the challenged court record access rule promulgated by the SJC reflects a long-standing requirement of clerk review

[12] Accordingly, in the First Circuit, considerations of comity alone are sufficient bases for abstention. Although the Supreme Court has limited certain abstention doctrines to specific circumstances, *see Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013) (limiting *Younger* abstention to "three types of proceedings"), this Court need not determine whether the circumstances of this case precisely fit abstention doctrines in *Colorado River*, 424 U.S. 800, *Younger v. Harris*, 401 U.S. 37 (1971), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

of incoming complaints.[13] This rule, woven into the fabric of the RECS and designed to protect the integrity of judicial case files, is, and always has been, a critical component of Maine's complaint intake process. Especially in the nascent stages of modernizing and improving public service through new technology, the state courts should be given the first opportunity to determine precisely what level of public access is required, appropriate, and feasible in Maine.[14]

2. Well-reasoned persuasive precedent supports abstention in judicial records access cases.

The conclusion that abstention is appropriate finds strong support from *Courthouse News Service v. Brown*. In that case, the Seventh Circuit determined that it was required—based on principles of federalism and comity—to abstain from resolving a challenge regarding access to complaints filed in state courts because the dispute over the state court clerk policy, governed by Illinois Supreme Court standards and a county court order, should be heard first in state court. 908 F.3d at 1065-66, 1075.

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[13] R.A. 171-172, 327 ¶¶ 6-7; Me. R. Elec. Ct. Sys. (2)(A)(1) advisory note to March 2021 amend.; Me. R. Civ. P. 5(f) and advisory notes to May 2000 & 2004 amends., available at https://www.courts.maine.gov/rules/rules-civil.html.

[14] The transition from paper to electronic records raises a host of new policy concerns and requires careful re-evaluation of the rules that govern access to paper court records to ensure public trust and confidence in the judiciary is maintained. Electronic records are qualitatively different from paper-based records, and the implications of digital technology are seismic, both positive and negative. *See generally Report of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records* (2017), available at http://lldc.mainelegislature.org/Open/Rpts/kf8733_j23_2017.pdf.

In *Brown*, after examining the four principal categories of abstention, the Seventh Circuit found that the *Younger* abstention doctrine, as extended in *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976), "is most closely applicable" to lawsuits over access to newly filed complaints. 908 F.3d at 1071. As the Seventh Circuit noted, *Younger* requires federal courts to refrain from exercising jurisdiction over constitutional claims that would interfere with ongoing state operations. *Id.* In *O'Shea*, the Supreme Court applied *Younger* principles to conclude that comity and federalism preclude granting federal relief governing future state criminal trials that would entail "an ongoing federal audit" of state courts. *Id.* at 1072 (citing *O'Shea*, 414 U.S. at 500). Then, in *Rizzo*, the Supreme Court further extended *Younger* to limit federal court review of a local executive department's oversight of its internal affairs. *Id.* at 1073 (citing *Rizzo*, 423 U.S. at 379). While recognizing that *Younger* and its progeny were "not a perfect fit," *id.* at 1071, the Seventh Circuit concluded that the principles in these cases counseled for abstention because the First Amendment right of access claim would involve continuing oversight of state courts, *id.* at 1074, and "impose a significant limit on the state courts . . . in managing the state courts' own affairs" through rules and procedures, *id.* at 1073.

Although it considered the *Younger* abstention doctrine, the Seventh Circuit "ultimately base[d its] decision on the more general principles of federalism that

underlie all of the abstention doctrines." *Id.* at 1071.[15] The court noted that "it is important for federal courts to have 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *Id.* at 1073 (quoting *SKS & Assocs.*, 619 F.3d at 676). It found this "principle of comity," namely, "the assumption that state courts are co-equal to the federal courts and are fully capable of respecting and protecting . . . First Amendment rights," to be determinative. *Id.* at 1074. The Seventh Circuit therefore held that "[i]nitial adjudication of this dispute in the federal court would run contrary to . . . considerations of equity, comity and federalism." *Id.* at 1075.[16]

As the Seventh Circuit concluded in *Brown*, abstention is appropriate in the present case. Injunctive relief in this case would necessarily involve federal oversight of Maine courts – particularly given CNS's "as applied" challenge to court-established procedural rules. As the rollout of RECS is implemented in the other 95% of Maine

[15] It is therefore clear that the Seventh Circuit's holding did not depend upon *Rizzo* and *O'Shea*, but instead general principles of comity. CNS's argument that *Brown* is infirm because it extended *Younger* beyond the strictures described in *Sprint Communications*, Aplt. Br. at 23 n.9, misses the mark. First Circuit law is consistent with the Seventh Circuit's reliance on general principles of comity. *See Cruz*, 204 F.3d at 23.

[16] The U.S. District Court for the Eastern District of Missouri has adopted the Seventh Circuit's reasoning. *Gilmer*, 2021 WL 2438914, at *8-9. The court concluded that abstention was appropriate because it did "not wish to dictate to, oversee, or otherwise insert itself into the operations and administration of its co-equal Missouri state courts" by adjudicating claims regarding access to complaints. *Id.* at *9.

courts (many of them with far fewer resources than the pilot courts)[17] or whenever one of over 250 court clerks applies the RECS, CNS could enlist the federal courts again to make sure that those clerks adhere to standards for access established by federal court orders. Such continuing oversight raises substantial comity concerns. *See Brown*, 908 F.3d at 1074-75. Moreover, the foundational principles of comity suggest that federal courts should not "dictat[e] in the first instance how state court clerks manage their filing procedures and the timing of press access." *Id.* at 1075.[18]

3. Other courts considering abstention in court record access cases have failed to consider the countervailing systemic interests and have addressed distinguishable facts.

The Seventh Circuit is not the only appellate court to have considered this issue; two other courts of appeals have addressed abstention in cases involving challenges to policies requiring court staff to review newly filed civil complaints prior to allowing public access. *See Courthouse News Serv. v. Schaefer*, 2 F.4th 318 (4th Cir. 2021); *Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014) ("*Planet I*").[19] In both cases, the courts

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[17] Maine has 45 trial courts, one appellate court, and a single statewide Business and Consumer ("BCD") court. The e-filing pilot project at issue is limited to Penobscot County Superior Court, Bangor District Court, and the BCD. *See Maine Caseload Statistics,* cited *infra* note 28*; see also Maine Judicial Branch 2020 Annual Report*, available at https://www.courts.maine.gov/about/reports/ar2020.pdf; R.A. 166-67 ¶ 6.

[18] *See also Bronx Defs. v. Off. of Ct. Admin.*, 475 F. Supp. 3d 278, 289 (S.D.N.Y. 2020) (abstaining from challenge to internal procedures of state courts relating to in-person appearances and citing *Disability Rights N.Y. v. New York*, 916 F.3d 129, 134–37 (2d Cir. 2019)); *Kaufman v. Kaye*, 466 F.3d 83, 86-88 (2d Cir. 2006) (abstaining from request to require state courts to establish a new system for assigning appeals).

[19] Other appellate courts are likely to weigh in soon, given the pending appeals and other cases identified in note 11, *supra*, all of which involve similar issues.

found abstention not warranted, reasoning that the requested relief imposed "bright-line" rules and "simple measures" that would not lead to continuous oversight of state courts by federal courts. *See Planet I*, 750 F.3d at 791; *Schaefer*, 2 F.4th at 324. The Fourth and Ninth Circuits in those cases improperly downplayed the significance of federal court interference in state court operations, underestimated the complexity of setting policy for and managing state courts, and failed to recognize the potential for ongoing federal court supervision of state courts.[20] Moreover, both cases are distinguishable because they involved challenges to local clerk or administrator policies, not a rule promulgated by the highest state court in the exercise of its inherent power to oversee the state judicial system. *See Schaefer*, 2 F.4th at 322; *Planet I*, 750 F.3d at 781. *Brown* presents this Court with the most analogous facts and most persuasive abstention analysis. *See Gilmer*, 2021 WL 2438914, at *5-9 (analyzing *Brown* and *Planet I*, and adopting *Brown*'s reasoning).

[20] The Ninth Circuit's more-than-a-decade odyssey managing ongoing litigation in the *Planet* case aptly illustrates intrusion may be enduring. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 587-89 (9th Cir. 2020) ("*Planet III*") (summarizing procedural developments in judicial saga); *see also Courthouse News Serv. v. Planet*, No. CV-11-8083-DMG (FFMx), 2021 WL 1605218 (C.D. Cal. Jan. 26, 2021), *judgment entered*, No. CV-11-8083-DMG (FFMx), 2021 WL 1605216 (C.D. Cal. Jan. 26, 2021).

C. The principle of comity has special force in this case, where the federal court has been asked to replace the court rules established by the Maine SJC through a comprehensive rule making process with rules created through federal court litigation.

The tenets of sound judicial administration, appropriate federal-state relations, and state court independence strongly counsel for the exercise of judicial restraint. As noted in *Brown,* "[i]t is particularly appropriate for the federal courts to step back in the first instance as the state courts continue to transition to electronic filing and, like many courts across the country, are working through the associated implementation challenges and resource limitations." 908 F.3d at 1074. This is true for Maine's efforts.

The SJC's transition from paper to electronic records is a major, complex undertaking requiring careful consideration of myriad, interwoven policy issues.[21] The SJC took into consideration numerous issues in issuing RECS, including Maine-specific litigants' needs, caseloads, court resources, funding, government relations, and other practical issues involved in running the Maine state court system.[22]

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[21] In her 2019 annual State of the Judiciary Address, Chief Justice Leigh I. Saufley described the e-filing/digital case management system initiative as "one of the most complex projects [she has] ever been involved with in government." House Journal and Legislative Record H-172 (129th Legis. 2019), available at http://lldc.mainelegislature.org/Open/LegRec/129/House/LegRec_2019-02-26_HD_pH0165-0178.pdf.

[22] The traditional level of access to court records prior to e-filing also was a consideration. Historically, the state courts *endeavored* to provide access to paper court records pursuant to a timetable, but due to the nature of paper processing, chronic understaffing, and changing work priorities, the SJC has never prescribed a firm deadline for production. *See* Public Information and Confidentiality, Me. Admin. Order JB-05-20 (as amended by A. 4-21) (effective Apr. 22, 2021), III.A.1 & Historical Derivation, available at https://www.courts.maine.gov/adminorders/jb-05-20.pdf; *see*

To prepare for the transition to electronic court filing, the SJC applied many internal and external resources to the issues for more than fifteen years. It undertook its own research; convened two major stakeholder groups;[23] hosted two public comment periods in 2017; held a public hearing in 2018; solicited additional public comments in January, March, and May 2019; established, in 2021, a RECS working group to review and propose revisions to the rules; and continues to meet with stakeholders and solicit feedback from users during the e-filing pilot.[24] The stakeholder groups explored policy issues relating to public access to court records and made recommendations to the SJC "for the promulgation of rules, orders, statutes, or policies that will have the effect of allowing the broadest of public access to court records that can be achieved while balancing the competing goals of public safety, personal privacy, and the integrity of the court system."[25]

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also State of Maine Judicial Branch, *Record Search Request Instructions and Information* (rev. Oct. 2015), available at https://www.courts.maine.gov/forms/pdf/misc/request-records-search.pdf (*e.g.,* requests for 1 to 5 records should be processed within 5 working days).

[23] The records created and legislative facts compiled by the stakeholder groups, as well as the comments submitted by the public, are public records and voluminous. The Task Force Reports can be found online. *Task Force on Electronic Court Record Access Final Report to the Justices of the Maine Supreme Judicial Court* (Sept. 26, 2005), available at https://lldc.mainelegislature.org/Open/Rpts/kf8733_m34_2005.pdf; and *Report of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records, supra* note 14. Public comments and submissions are on file with the Executive Clerk of the SJC.

[24] *See* R.A. 166-67 ¶ 6; State of Maine Judicial Branch, *Maine Rules of Electronic Courts Systems (RECS) Working Group* (Nov. 22, 2021), https://www.courts.maine.gov/about/committees/me-recs-comm.html.

[25] *Report of the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records*, *supra* note 14.

It was in this context that the SJC promulgated RECS in the exercise of its regulatory function after weighing important state interests.[26] The transition to electronic records also raised unique state policy issues, about which the federal court's experience with the Public Access to Court Electronic Records system ("PACER") offers little guidance, since PACER is different from Maine's new electronic system, and, more importantly, federal and state courts are different.[27] Federal and state court case types, case volumes, and resource availability are not comparable. Maine state courts receive more than one hundred thousand new cases and traffic infractions each year.[28] Thousands of those cases, including those involving divorce, parental rights, parentage, juveniles, and sexual abuse, require the collection of sensitive personal

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[26] Given the issuance of RECS by the SJC in the exercise of its oversight authority, abstention is consistent with precedent concluding that absolute (legislative) immunity applies where the highest court of a state exercises its direct constitutional authority to promulgate rules governing state court practices. *See Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 773-77 (3d Cir. 2000); *see also Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980); *In re Justices of Supreme Court of Puerto Rico,* 695 F.2d at 23.

[27] Notably, this Court's ECF Filing procedures require clerk's office review of briefs before they are accepted for filing and do *not* prescribe a firm timetable for providing public access. First Circuit L.R. 25. In addition, the Supreme Court's rules provide: "Filings that initiate a new case at the Supreme Court will be posted on the Court's website only after the Clerk's Office has received and reviewed the paper version of the filing, determined that it should be accepted for filing, and assigned a case number." *Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System* 4 (effective Nov. 13, 2017), available at https://www.supremecourt.gov/filingandrules/ElectronicFilingGuidelines.pdf.

[28] *Compare* State of Maine Judicial Branch, *Maine Caseload Statistics*, available at https://www.courts.maine.gov/about/stats/statewide.pdf, *with* U.S. District Courts, *Statistical Tables for the Federal Judiciary*, available at https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2021/06/30.

information.[29] In addition to processing a greater volume of cases affecting private matters, the state courts service unrepresented litigants at rates far above those in the federal courts.[30]

A federal judge considering invalidating a SJC court rule would be in the untenable position of making state policy. Even when issuing clear "bright-line" findings or prescribing "simple measures," the judge would be substituting his or her judgment for that of the SJC, without the experience of reconciling the interconnected policy issues involved in running the Maine state court system. Furthermore, weighing underdeveloped, uninformed, or self-serving litigant proposals would be a misallocation of scarce federal court resources, especially when such evaluations require a detailed knowledge of state court operations and extensive evidentiary hearings.

More troublesome, however, is the fact that such an approach empowers adverse parties and federal courts to impose operational and budgetary mandates upon the state courts without the benefit of understanding the unique circumstances of the specific court system or addressing "the myriad questions regarding the treatment of digital records." *Conservatorship of Emma,* 2017 ME 1, ¶ 10, 153 A.3d 102. This problem is

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[29] State of Maine Judicial Branch, *Maine Caseload Statistics*, cited *supra* note 28.

[30] "[I]n the 1970s approximately 10 percent of litigants in family law cases proceeded without counsel, today between 75 and 90 percent of these litigants are unrepresented. The same general trend applies across other types of civil cases in both urban and rural settings, and (unsurprisingly) disproportionately impacts low-income litigants who cannot afford to hire an attorney." Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. Colo. L. Rev. 167, 180–81 (2019) (footnotes omitted).

illustrated in the discussion of one such "simple measure" in this case. As it has done in other cases, CNS proposed that Maine courts grant priority access to "credentialed press."[31] In response, long-serving SCA Glessner stated that the limited-to-certain-members-of-the-media solution would cost "tens to hundreds of thousands" of dollars. R.A. 168-169 ¶ 16. A CNS editor countered, pointing to the experience of *other* state court systems, and relying upon his own reading of the Judicial Branch's contracts with the same vendor used by *other* courts to reach the conclusion that costs to Maine's judiciary would not be significant. *See* R.A. 212-15 ¶¶ 16-25, 349-50 ¶¶ 5-6.

This colloquy is missing the type of multi-variable analysis and background that such a decision requires, and generates more questions than answers. For example: How will the Maine Judicial Branch secure *any* additional legislatively authorized funding for an already expensive multimillion dollar project?[32] How does priority media access enhance the public's trust in the court system or promote impartiality, when only some members of the media would have early access, while the public and other

[31] *See also* R.A. 16 ¶¶ 32-33 (CNS "has requested, but has not been granted, access to a press review queue in Maine.")); *Gilmer*, 2021 WL 2438914, at *4 n.4 (discussing request to secure advanced-priority access for the credentialed press).

[32] Costs and resource allocations are relevant and appropriate considerations in deciding how and where to provide access. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.,* 489 U.S. 189, 196 (1989) (government has no obligation to fund the exercise of Fourteenth Amendment rights); *see also Barber v. Conradi*, 51 F. Supp. 2d 1257, 1267–68 (N.D. Ala. 1999) (limiting plaintiff's access to court documents to two hours per week "is not substantially broader than necessary to advance a legitimate governmental interest in the efficient administration of the clerk's office").

putative defendants must wait?[33] What court priorities would have to be delayed or replaced by this initiative?[34] Specifically, would implementing the queue delay the replacement of the courts' antiquated COBOL-based case management system in some judicial regions or statewide?

Given its constitutional and statutory obligations, and knowledge of state court operations, the SJC is in the best position to consider CNS's constitutional claim in its appropriate context, to exercise its legislative function to ensure orderly processing of cases, and to exercise its judicial power to administer the Maine judicial system. *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 433 (1982) (abstention appropriate in part because challenged state procedures for discipline of attorneys are "judicial in nature"); *Juidice v. Vail,* 430 U.S. 327, 335 (1977) (abstention appropriate because challenged state contempt procedures are process "through which [the state] vindicates the regular operation of its judicial system").

CONCLUSION

Abstention is appropriate and necessary in this case. As the Supreme Court underscored in *Younger*, the Constitution established

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and

[33] "The First Amendment generally grants the press no right to information . . . superior to that of the general public." *Nixon*, 435 U.S. at 609.

[34] "The First Amendment does not require courts, public entities with limited resources, to set aside their judicial operational needs to satisfy the immediate demands of the press." *Planet III*, 947 F.3d at 596.

> federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44. While the media seeks to establish a new right of access to civil complaints under the First Amendment, the federal courts are facing a wave of state court record access litigation. Such challenges to state judiciaries' efforts to establish e-filing rules that maintain the integrity of the case management process underlying an efficient and impartial system of civil dispute resolution must be resolved in the first instance in the state courts, in conformity with the principles of equity, comity and federalism. Accordingly, for the reasons stated above, CCJ respectfully urges the Court to dismiss Appellants' claims on the alternative ground of abstention.

Dated: February 4, 2022

/s/ Joshua D. Dunlap
Peter J. Guffin, Bar No. 1201696
Joshua D. Dunlap, Bar No. 1146098
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100
Attorneys for Amicus Curiae Conference of Chief Justices

Laura M. O'Hanlon, Bar No. 1051213
c/o Peter J. Guffin
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-318-5748
Special Counsel for Amicus Curiae Conference of Chief Justices

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 6,448 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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Dated: February 4, 2022

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 1146098
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100

CERTIFICATE OF SERVICE

I certify that the within brief has been electronically filed with the Clerk of the Court on February 4, 2022. All attorneys listed below are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing:

Jason David Anton
Thomas A. Knowlton
Bernard J. Kubetz
Rachel Matteo-Boehm
Roger Myers
Sigmund D. Schutz
Jonathan Simms Piper
Jeffrey J. Pyle
Christopher T. Uphouse

Dated: February 4, 2022

/s/ Joshua D. Dunlap

Joshua D. Dunlap, Bar No. 1146098
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100