No. 18-1203

IN THE

Supreme Court of the United States

COURTHOUSE NEWS SERVICE,

Petitioner,

v.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IN HER OFFICIAL CAPACITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

CATHY MCNEIL STEIN
Assistant State's Attorney
Chief, Civil Actions Bureau

PAUL A. CASTIGLIONE*
PRATHIMA YEDDANAPUDI
Assistant State's Attorneys
paul.castiglione
@cookcountyil.gov

Of Counsel

KIMBERLY M. FOXX
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-2350

Counsel for Respondent

* *Counsel of Record*

288306

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the abstention doctrines of *Younger*, *O'Shea* and *Rizzo* preclude the exercise of subject matter jurisdiction over a federal lawsuit where the plaintiff asks the district court to direct the manner in which state courts process newly e-filed civil complaints and makes them available to the public and the press.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Background 3

A. The Relevant Facts and Applicable State Court Rules and Orders.....3

II. Proceedings Below 7

A. CNS's Motion for Preliminary Injunction.....7

B. The Circuit Clerk's Motion to Stay The Preliminary Injunction.....9

C. The Court of Appeals' Decision.....13

REASONS FOR DENYING THE PETITION 16

I. It Is Unclear Whether *Planet* Is The Law of The Ninth Circuit Regarding The Proper Application of *O'Shea* and *Rizzo* 18

Table of Contents

Page

II. The Second Circuit Recently Followed *Brown* 21

III. *Planet* Is an Outlier and Does Not Create a Sufficient Enough Split Among The Circuits to Warrant The Granting of CNS's Writ of Certiorari 23

IV. *Brown* Was Correctly Decided 26

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

CASES

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 14

Carlton v. United States,
135 S. Ct. 2399 (2015). 20

Colorado River Water Conservation District v. United States,
424 U.S. 800 (1976). 14

Courthouse News Service v. Brown,
908 F.3d 1063 (7th Cir. 2018). . . . . *passim*

Courthouse News Service v. Planet,
750 F.3d 776 (9th Cir. 2014). . . . . *passim*

Disability Rights New York v. New York,
916 F.3d 129 (2d Cir. 2019). . . . . *passim*

Drury v. County of McLean,
433 N.E.2d 666 (Ill. 1982) 26

E.T. v. Cantil-Sakauye,
682 F.3d 1121 (9th Cir. 2012). . . . . *passim*

Hartford Courant Co. v. Pellegrino,
380 F.3d 83 (2d Cir. 2004) 16, 17, 21

Cited Authorities

Page

Kaufman v. Kaye,
466 F.3d 83 (2d Cir. 2006) 23, 29

Miles v. Wesley,
801 F.3d 1060 (9th Cir. 2015). . . . . *passim*

New Orleans Public Service, Inc. v. Council of New Orleans,
491 U.S. 350 (1989) 13, 25, 26

Oglala Sioux Tribe v. Fleming,
904 F.3d 603 (8th Cir. 2018) 23

O'Shea v. Littleton,
414 U.S. 488 (1974) . . . . . *passim*

Parker v. Turner,
626 F.2d 1 (6th Cir. 1980). 23, 29

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) 14-15, 17, 18

Rizzo v. Goode,
423 U.S. 362 (1976) . . . . . *passim*

SKS & Associates, Inc. v. Dart,
619 U.S. 674 (7th Cir. 2010) 2, 13, 14

Sprint Communications, Inc. v. Jacobs,
571 U.S. 69 (2013) 25, 26

Page

In re Swan,
415 N.E.2d 1354 (Ill. App. Ct. 1981). 26

Younger v. Harris,
401 U.S. 37 (1971) . . . . . *passim*

STATUTES, RULES, AND ORDERS

410 ILCS 325/1 (2019) 28

410 ILCS 535/15.1 (2019) 28

705 ILCS 105/13 (2019) 26

750 ILCS 70/1 (2019) 28

General Administrative Order 2014-02 dated June 13, 2016 from the Circuit Court of Cook County . 3, 8, 28

Electronic Filing Standards and Principles from the Illinois Supreme Court amended September 16, 2014 . . . . . .3, 5, 8, 9

Cited Authorities

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 14, 18, 30

U.S. Const. amend. VI 30

U.S. Const. amend. VIII 30

U.S. Const. amend. XIII 30

U.S. Const. amend. XIV 30

STATEMENT OF THE CASE

Petitioner Courthouse News Service ("CNS" or "Petitioner") filed a complaint challenging the manner in which respondent Dorothy Brown, the Clerk of the Circuit Court of Cook County (the "Circuit Clerk" or "Respondent"), makes electronically submitted complaints available to CNS and the press. (R. 1.)[1] CNS alleged that the First Amendment mandates "[c]ontemporaneous access to new civil complaints" and that "the [Circuit] Clerk's policy and practice of withholding new e-filed complaints from press review until after the performance of administrative processing, including post-filing 'acceptance' of the complaint" violates the First Amendment. (*Id.* ¶¶ 1, 4, 7.)

While CNS challenged the Circuit Clerk's practice of accepting or rejecting newly filed complaints before

1. In this Brief in Opposition, Respondent will cite the following documents from the record: CNS's complaint (R. 1), its motion for preliminary injunction (R. 6), its memorandum in support of its motion for preliminary injunction (R. 7), the Circuit Clerk's memorandum in opposition to CNS's motion for preliminary injunction (R. 19), the Circuit Clerk's motion to clarify the district court's order of January 8, 2018 order granting CNS's motion for preliminary injunction (R. 24), the district court's order of January 27, 2018 (R. 27), the Circuit Clerk's notice of appeal (R. 30), the motion to stay the preliminary injunction order that the Circuit Clerk filed in the district court (R. 35.) and the district court's denial of the motion to stay (R. 44). Respondent will also cite the motion to stay the district court's preliminary injunction order (7th Cir. R. 3) and the stay order from the Seventh Circuit. (7th Cir. R.5.) As these documents are not attached to the appendix to CNS's petition for a writ of certiorari (the "Petition"), Respondent will cite to the above docket entries in the electronic district court and circuit court records.

making them available to CNS or the media, it did not challenge the applicable Illinois Supreme Court rule or the order from the Hon. Timothy Evans, the Chief Judge of the Circuit Court of Cook County (the "Chief Judge"), both of which directed her to follow this practice. (*Id.* ¶ 7.) Instead, CNS filed a federal lawsuit asking that the district court enter an order directing the Circuit Clerk to provide CNS with immediate and contemporaneous access to newly e-filed civil complaints. (*Id*. at 18, ¶ 1.)

On November 8, 2017, CNS moved for a motion for preliminary injunction against the Circuit Clerk directing her to provide it with immediate access to complaints submitted electronically to the Circuit Clerk's office but not yet accepted for filing. (R. 6.)

The district court entered a preliminary injunction directing the Circuit Clerk to provide immediate and contemporaneous access to such e-filed complaint. (Pet. App. 25-43.) The Circuit Clerk appealed. (R. 30.) The Seventh Circuit stayed the preliminary injunction during briefing. *Courthouse News Services v. Brown*, 908 F.3d 1063 (7th Cir. 2018). (7th Cir. R. 5). After briefing and oral argument, the Seventh Circuit concluded that "[t]his temporal access dispute with a state court clerk should be heard first in the state courts." *Brown*, 908 F.3d at 1075 (Pet. App. 23). Relying upon the abstention principles from *Younger v. Harris*, 401 U.S. 37 (1971), *O'Shea v. Littleton*, 414 U.S. 488 (1974), *Rizzo v. Goode*, 423 U.S. 362 (1976), and *SKS & Associates, Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010) ("*SKS*"), the Seventh Circuit reversed the district court's decision and remanded the case with instructions to dismiss the action without prejudice. *Id.* at 1071, 1075.

I. Background.

The parties below litigated CNS's motion for preliminary injunction based upon the attachments that CNS made to its motion for preliminary injunction, as well as the undisputed rules and orders from the Circuit Court of Cook County, Illinois that governed the Circuit Clerk's responsibilities with respect to the processing of e-filed complaints.

A. The Relevant Facts and Applicable State Court Rules and Orders.

In the district court, the parties submitted declarations with respect to CNS's motion for preliminary injunction. CNS attached two declarations to its motion for preliminary injunction, one from William Girdner and one from Adam Angione. (R. 7-2.; 7-4.) The Girdner declaration touches upon the operation of the Circuit Clerk's office but does not discuss the Circuit Clerk's practices and procedures for complying with the requirements of General Administrative Order 2014-02 dated June 13, 2016 from the Circuit Court of Cook County ("Order 2014-02") (R. 19-2) and Electronic Filing Standards and Principles from the Illinois Supreme Court amended September 16, 2014 (the "Standards") (R. 19-3). (*See generally* R. 7-2.)

The Angione declaration states that CNS has analyzed 2,414 complaints that were submitted electronically from June 1, 2017 to September 30, 2017 and that 85.5% of those complaints were available either the day they were submitted or the next day. (R.7-5, at 33.) Of the remaining 14.5%, many of the submitted complaints were filed the next *business* day. *Id.* CNS, for example, lists

154 complaints electronically filed between June 2, 2017 and October 2, 2017 as posted three days later. (*Id.* at 33-130.) Of the 154 complaints, 131 complaints were filed on a Friday and posted *one business* day later on the following Monday or in the case of Labor Day, the following Tuesday. (*Id.*; R. 19 at 3 n.4.)

CMS admits that 2063 electronically submitted complaints were posted on the same day or the next day within the June 2, 2017 to September 30, 2017 time period. (R. 7-5 at 33.) Of the 2,414 complaints submitted electronically within the June 2, 2017 to September 30, 2017 time period, 2194 (or 90.9%) were filed within one business day after submission. (*Id.* at 33-130.) 2287 (or 94.7%) were filed within two business days after submission. (*Id.*) 2337 (or 96.8%) were filed within three business days after submission. *Id.* [2] It is undisputed that the vast majority of electronically submitted complaints are made public, and viewable, within twenty-four business hours of filing. (R. 19-1, Decl. of Kelly Smeltzer, General Counsel of the Circuit Clerk's office, ¶ 7.)

The Circuit Clerk's office provides for electronic filing of pleadings in the Chancery, Child Support, Civil, Domestic Relations, Law and Probate Divisions of the

2. Ninety-three complaints were filed within two business days after electronic submission. (*Id.*) Fifty complaints were filed within three business days after electronic submission. (*Id.*) Twelve complaints were filed within four business days after electronic submission. (*Id.*) Seven complaints were filed within five business days after electronic submission. (*Id.*) Thirty-six complaints were filed within six business days after electronic submission. (*Id.*) And eighteen complaints were filed within seven business days after electronic submission. (*Id.*)

Circuit Court of Cook County. (*Id.* ¶ 3.) As of 2016, more than 300,000 e-filings had been processed, more than 50,000 e-filed motions had been spindled, and e-filing was available twenty-four hours a day and seven days a week to more than 30,000 registered users. (*Id.* ¶ 5.) During its business hours from 8:30 a.m. through 4:30 p.m., the Circuit Clerk's office reviews electronically submitted complaints as promptly as possible to ensure compliance with Order 2014-02 and the Standards. (*Id.* ¶ 9.)

The Circuit Clerk's office ensures that a majority of new civil complaints are viewable within approximately twenty-four business hours of submission. (*Id.* ¶ 11.) The exception is when a case is received after 4:30 pm on a Friday, and over the weekend, especially a long holiday weekend. (*Id.*) For instance, if a case is received on Friday after 4:30 pm, it is accessible on Monday, or the next court business day. (*Id.*)

In the Standards, the Illinois Supreme Court issued several orders to circuit clerks in Illinois, *inter alia*:

> No. 4 Electronic Access to Court Records
>
> . . . Electronic access and dissemination of court records shall be in accordance with the *Electronic Access Policy for Circuit Court Records of the Illinois Courts.*
>
> * * *

(R. 19-3, § 4.) This rule, therefore, incorporates the Electronic Access Policy for Circuit Court Records of the Illinois Courts (the "Electronic Access Policy"). (R. 24-1.)

The Electronic Access Policy for Circuit Court Records of the Illinois Courts states that it is "an official policy of the Administrative Office of the Illinois Courts." (*Id.* at i.)

Section 1.00 (c) of the Electronic Access Policy states that:

> Each circuit court that wishes to provide electronic access to the court records maintained by any clerk of court within its jurisdiction must adopt a local rule or administrative order consistent with this policy.

(R. 24-1, § 1.00(c).)

Section 2.00(c) of the Electronic Access Policy defines the word "public" to include media organizations. (R. 24-1, § 2.00(c).)

Section 4.30(b) of the Electronic Access Policy states, *inter alia*:

> The following information is excluded from public access in electronic form, unless access is provided at the office of the clerk of the court
>
> * * *
>
> Any documents filed or imaged, *i.e.* complaint, pleading order.

(R. 24-1, § 4.30(b).) Under the Standards and Order 2014-02, complaints that are electronically submitted to the Circuit Clerk are not actually "filed" until the Circuit

Clerk's office determines that they do not improperly include excluded documents. (R. 19-1, ¶¶ 11, 12.) In making this determination, the Circuit Clerk performs an "accept/reject" function.[3] (*Id.*)

Order 2014-02 sets forth thirteen categories of excluded documents, including documents containing confidential information and documents containing personal identity information. (R. 19-2, ¶ 2(c).) The Circuit Clerk needs time to determine whether newly submitted complaints have attachments that are prohibited by Order 2014-02.

II. Proceedings Below.

A. CNS's Motion for Preliminary Injunction.

On November 2, 2017, CNS filed its complaint for declaratory and injunctive relief against Brown, (R. 1), and on November 8, 2017, CNS moved for a preliminary injunction. (R. 6.)

The district court granted CNS's motion for preliminary injunction and directed the Circuit Clerk to provide Plaintiff and the public with "timely, contemporaneous access to the complaints upon filing." (Pet. App. 26.)

---

3. "The district court did not interpret these orders as mandating an 'accept/reject' process before release." *Brown*, 908 F.3d at 1066, n. 2. The Seventh Circuit, however, reached a different conclusion and stated that the "orders do require an 'accept/reject' process before release." *Id.* The Seventh Circuit further stated that "as we explain below regarding abstention, the Illinois state courts are best situated to interpret their own orders and to decide how important the 'accept/reject' process is to them." *Id.*

On January 10, 2018, the Circuit Clerk filed a motion to clarify the preliminary injunction order, based upon her concern that the preliminary injunction could not be reconciled with the commands in Sections 1.00(c), 2.00(c) and 4.30(b) of the Electronic Access Policy and Point Number 4 of the Standards. (R. 24, ¶ 12.)

Specifically, the Circuit Clerk expressed concern that the directive to provide the public with "timely, contemporaneous access to the complaints upon filing" cannot be reconciled with certain language from Order 2014-02. (R. 24, ¶ 13.) Section 13(b) of Order 2014-02 ("Section 13(b)") states that:

> Consistent with the Illinois Supreme Court's "Electronic Access Policy for Circuit Court Records of the Illinois Courts," the Clerk may permit public access to the electronic forms of images of electronically filed documents only through public access computer terminals located in the Clerk's office locations. These public access terminals do not permit the data, documents, images, or information to be downloaded or exported in electronic form.

(R. 19-2, ¶ 13(b).) The district court denied the motion to clarify as moot, on the grounds that the preliminary injunction order did not conflict with the requirement in Section 13(b) that electronic images showing court filings can only displayed at public access terminals in the Circuit Clerk's office within business hours. (R. 27.)

On January 31, 2018, the Circuit Clerk filed her notice of appeal. (R. 30.)

B. The Circuit Clerk's Motion to Stay The Preliminary Injunction.

On February 2, 2018, the Circuit Clerk filed a motion to stay the preliminary injunction order in the district court. (R. 35.) The motion sought a stay until the Seventh Circuit decided the appeal in the instant case. (*Id.* ¶ 22.) In this motion, the Circuit Clerk addressed several practical problems that implementing the preliminary injunction order would pose. (*Id.* ¶¶ 9, 11-14, 18-20.)

The Circuit Clerk noted that the computer system in the Circuit Clerk's office does not currently have a read function that allows users—be they the press or the general public—to see filed images on the internet. (*Id.*, ¶ 9.) In order for CNS or other users to be able to download complaints filed electronically, the Circuit Clerk's computer system will need a significant upgrade. (*Id.*)

The Circuit Clerk stated that her primary problem was that the contemporaneous requirement in the preliminary injunction cannot be reconciled with the rules of the Electronics Access Policy and the Standards. (*Id.* ¶ 11.) Both the rules of the Illinois Supreme Court and the order of the Chief Judge of the Circuit Court of Cook County "require the Circuit Clerk to complete the 'accept/reject function' before providing a newly filed complaint to the public, including the media." (*Id.*)

The Circuit Clerk also identified another problem: the Illinois Supreme Court issued an order in the matter styled, *In re: Mandatory Electronic Filing In Civil Cases*, M.R. 18368, dated December 22, 2017, that limits and

controls the resources that the Circuit Clerk may apply to the creation of an e-filing system. (*Id.*, ¶ 14.) Paragraph 4 of this order states:

> The Circuit Clerk's office shall commit all necessary resources to meet the extended timeline [of permissive e-filing for six months], including working with [computer provider] Tyler on thorough testing of the essential functionality that the Circuit Clerk has identified is necessary to maintain the integrity of its business processes.

(R. 35-3, ¶ 4.) In other words, the Illinois Supreme Court ordered the Circuit Clerk to devote all necessary resources to the creation of a mandatory e-filing system, which would certainly be affected by the re-direction of resources to a new computer related issue regarding contemporaneous access to newly submitted complaints prior to the office's completion of its mandated accept/reject function. It is currently the accept/reject function that initiates the computer system to allow access to an electronically submitted document. (R. 19-1, ¶ 9) Under the current design of the computer system in the Circuit Clerk's office, complaints that must be sealed cannot be sealed until the "accept/reject function" is completed. (R. 35-18.)

The Circuit Clerk noted that on January 26, 2018, in the matter styled *In re: Mandatory Electronic Filing In Civil Cases*, M.R. 18368, the Circuit Clerk filed a petition with the Illinois Supreme Court. (R. 35-1.) This petition contains the following prayer for relief:

> WHEREFORE, in an effort to comply with Judge Kennelly's January 8, 2018, order the undersigned respectfully requests that this Court grant permission to the office of the Clerk of the Circuit Court to allow access, to the press and the public, to images submitted electronically to the Clerk's office, prior to the completion of the accept/reject function, which have not been processed and officially accepted as a part of the basic record, during business hours on the Clerk's Office's terminals, which also means that the press and public will have access to documents that litigants file under seal. In addition, we request permission to engage our stand-alone e-Filing vendor as well as the Clerk's Office's programmers to add a new e-Filing transaction by February 7, 2018.

(*Id*. at 2.) On February 14, 2018, the Illinois Supreme Court entered an order denying this petition. Order, *In re: Mandatory Electronic Filing In Civil Cases*, M.R. 18368, (Ill. 2018).[4] The order stated:

> This cause coming to be heard on the petition of the Cook County Circuit Court Clerk for relief from certain orders of this court related to e-Filing on the grounds that such relief is necessary to permit her office to comply with the order entered by U.S. District Court Judge Matthew F. Kennelly in *Courthouse News Services* v. *Clerk of the Circuit Court of Cook*

4. Available at http://www.illinoiscourts.gov/SupremeCourt/Announce/2018/021418.pdf.

> *County,* 2018 U.S. Dist. Lexis 2816 (N.D. Ill. Jan. 8, 2018), and the Court being fully advised in the premises;
>
> IT IS ORDERED that the petition is denied.

Id.

On January 29, 2018, the Circuit Clerk sent a letter to the Chief Judge. (R. 35-2.) In this letter, the Circuit Clerk stated, in part:

> Since documents that are submitted to the Clerk's Office prior to the completion of the accept/reject function are not a part of the official court record and they do not become a part of the official court record until they are officially accepted or rejected by the Clerk's Office, we will need GAO 2014-02 to be amended to allow the Clerk's Office to provide access to the press and to the public to unofficial versions of electronically submitted documents.

(*Id.*)

The district court denied the Circuit Clerk's motion to stay. (R. 44.) On February 13, 2018, the Circuit Clerk then filed a motion to stay the preliminary injunction order in the Seventh Circuit. (7th Cir. R. 3.) On February 14, 2018, the Seventh Circuit granted the motion and stayed the preliminary injunction order "pending a decision by this court on the merits of the appeal." (7th Cir. R. 5.).

C. The Court of Appeals' Decision.

The Seventh Circuit reversed the preliminary injunction and remanded the case to the district court with instructions to dismiss. *Brown*, 908 F.3d at 1075. In reaching this conclusion, the Seventh Circuit noted that the fact pattern of the instant case "is quite similar to *SKS & Associates, Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010), where we applied the principles of *Younger* and declined to exercise jurisdiction over a Section 1983 action against the Chief Judge and the Sheriff of Cook County." *Id.* at 1073 (citing *SKS,* 619 F.3d at 676).

In *SKS*, the residential property manager plaintiff sought a federal injunction against the Sheriff to speed up the eviction processes in state court. The Seventh Circuit found that abstention precluded the exercise of federal jurisdiction over the property manager's claim and noted that federal courts should 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.

SKS, 619 F.3d at 678 (citing *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989), citing in turn, *Younger* 401 U.S. at 44). The Seventh Circuit recognized that "[u]nderlying *Younger* abstention is a deeper principle of comity: the assumption that state courts are co-equal to the federal courts and are fully

capable of respecting and protecting CNS's substantial First Amendment rights." *Brown*, 908 F.3d at 1074.

With respect to CNS's First Amendment claim, the Seventh Circuit found that

> [t]his principle of comity takes on special force when federal courts are asked to decide how state courts should conduct their business. The Illinois courts are best positioned to interpret their own orders, which are at the center of this case, and to craft an informed and proper balance between the state courts' legitimate institutional needs and the public's and the media's substantial First Amendment interest in timely access to court filings.

Id. As a result, the Seventh Circuit found that the district court should have abstained from exercising subject matter jurisdiction over CNS's complaint due to principles of equity, comity and federalism. *Id.* at 1071.

CNS contends that in reaching this conclusion, the Seventh Circuit primarily relied upon *SKS*. (Pet. 9.) The Seventh Circuit did rely upon *SKS* but it also relied upon the decisions of this Court in *O'Shea* and *Rizzo*. *Brown*, 908 F.3d at 1071-73.

The Seventh Circuit stated that this Court "has recognized four principal categories of abstention: *Pullman, Burford*, *Younger*, and *Colorado River.*" *Id.* at 1071; *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Younger*, 401 U.S. 37; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *R.R.*

Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). The Court noted that "[t]wo additional categories, *O'Shea* and *Rizzo*, can be considered extensions of *Younger*" and that "*Younger*, with its extension in *O'Shea* and *Rizzo*, is most closely applicable to the present case; however, it is not a perfect fit, and we ultimately base our decision on the more general principles of federalism that underlie all of the abstention doctrines." *Brown,* 908 F.3d at 1071.

O'Shea concluded "that comity and federalism 'preclude[d] equitable intervention' because the plaintiffs sought 'an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials.'" *Id.* at 1072 (citing *O'Shea*, 414 U.S. at 499-500). *Rizzo* "further extended the principles of *Younger* to limit federal court review of local executive actions." *Id.* (citing *Rizzo*, 423 U.S. at 366). In *Rizzo*, the plaintiff filed claims for injunctive relief alleging that the internal procedures of the Philadelphia police department led to the mistreatment of minority civilians in violation of the Constitution. *Rizzo*, 423 U.S. at 366-67. The district court required city officials to come up with a "comprehensive program" for dealing with civilian complaints pursuant to the court's detailed guidelines. *Id.* at 364-66, 369-70. This Court reversed. *Id.* at 366.

O'Shea and *Rizzo* abstention prohibit the exercise of federal subject matter jurisdiction where doing so would require the federal courts to oversee the operation of state courts and state executive offices. *See Brown*, 908 F.3d at 1072-73. As the Seventh Circuit noted:

> While the district court's order in the present case does not map exactly on the orders in

> *O'Shea* and *Rizzo*, it would also impose a significant limit on the state courts and their clerk in managing the state courts' own affairs. Against the backdrop of *Younger, O'Shea*, and *Rizzo,* we find that CNS's request for federal intrusion at this stage of the dispute between CNS and the [Circuit] Clerk calls for abstention.

Id. at 1073.

It is true, as the Seventh Circuit observed in *Brown*, that the Ninth Circuit reached the opposite conclusion on the application of *O'Shea* abstention in *Courthouse News Service v. Planet*, 750 F.3d 776 (9th Cir. 2014). *Id.* at 1074. *Planet*, however, is an outlier and does not provide a basis for granting CNS's petition for a writ of certiorari. While *Brown* and *Planet* reach opposite conclusions regarding the application of *O'Shea* and *Rizzo* abstention to a First Amendment claim for immediate access to newly filed complaints, CNS also claims that *Brown* conflicts with a Second Circuit decision, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2nd Cir. 2004). It does not.

REASONS FOR DENYING THE PETITION

The Petition should be denied for four reasons:

First, it is far from clear that *Planet* is the law of the Ninth Circuit with regard to the application of *O'Shea* and *Rizzo* abstention. While *Planet* attempted to distinguish an earlier Ninth Circuit case, *E.T. v. Cantil-Sakauye*, 682 F.3d 1121 (9th Cir. 2012), it did not do so persuasively. *See Planet*, 750 F.3d at 790. Beyond that, one year after *Planet*, the Ninth Circuit decided *Miles v. Wesley*, 801

F.3d 1060 (9th Cir. 2015). In *Miles*, the Ninth Circuit followed *E.T.* and, under *O'Shea,* abstained from enjoining the California Supreme Court from reducing the number of courthouses used for unlawful detainer actions. *Miles*, 801 F.3d at 1066. The tension within the Ninth Circuit's own jurisprudence weakens the alleged circuit split that CNS claims to exist.

Second, the Second Circuit case that CNS cites—*Hartford Courant* —neither considers nor discusses *O'Shea* or *Rizzo*. *See generally Hartford Courant*, 380 F.3d 83. *Planet* relied upon *Hartford Courant* with respect to the application of *Pullman* abstention, an issue that is not before the Court here. *Planet*, 750 F.3d at 789. In addition, the Second Circuit recently decided *Disability Rights New York v. New York*, 916 F.3d 129 (2nd Cir. 2019), a case that follows *Brown* with respect to the application of *O'Shea* abstention. CNS's claim that a circuit split exists between the Second and Seventh Circuits regarding *Brown* or *O'Shea* is meritless.

Third, the narrow issue before the Court is one of abstention, federalism and comity. The fact that the merits present a First Amendment question does not weigh any more in favor of this Court's review than any other federal question. Even if that were an appropriate consideration, the fact that the public may view the vast majority of complaints within a day of their filing cuts against CNS's attempt to magnify the importance of the merits of this case and the need for immediate review now.

Fourth, *Brown* was correctly decided. A contrary result violates comity and disrespects Illinois' authority to manage its own courts. Whether or not *Planet* is the law

of the Ninth Circuit, it is definitely an island unto itself. It is *Brown* that properly follows and applies *Younger*, *O'Shea* and *Rizzo*.

I. It Is Unclear Whether *Planet* Is The Law of The Ninth Circuit Regarding The Proper Application of *O'Shea* and *Rizzo*.

(Response to CNS's Petition at 10-12.)

CNS's Petition rests on the premise that *Planet* is the law of the Ninth Circuit. That premise is far from certain.

Pursuant to *O'Shea* and *Pullman*, the district court in *Planet* abstained from exercising subject matter jurisdiction over CNS's First Amendment lawsuit against Michael Planet, the Clerk of the Ventura County, California Superior Court. *Planet*, 750 F.3d at 782. On appeal, the panel reversed the district court's decision and held that CNS could bring a First Amendment claim in the district court alleging that the Ventura County Superior Court's purported failure to provide same day access to newly filed unlimited civil complaints violated CNS's right of access to public judicial proceedings under the First Amendment. *Id.* at 792. In reaching this conclusion, the panel in *Planet* rejected the application of both the *Pullman* and the *O'Shea/Rizzo* abstention doctrines. *Id.* at 783, 792. The Ninth Circuit panel in *E.T.* applied *O'Shea* and *Rizzo* in a far different manner than *Planet* did. *See E.T.*, 682 F.3d at 1125.

In *E.T.*, the plaintiffs were foster children who brought a putative class action against state and county judicial officials, alleging that the caseloads of the county dependency court and court-appointed attorneys were

so excessive as to violate the Due Process Clause and other federal law. *Id.* at 1122. The district court granted a motion to dismiss, finding that it was required to abstain under *O'Shea*. *Id.* at 1123. The Ninth Circuit affirmed. *Id*. at 1122.

Following *O'Shea* and *Rizzo*, the *E.T.* panel declined the plaintiffs' "invitation to consider in isolation their (now-narrowed) request for relief, as though reaching the merits of their declaratory judgment claims would end the matter. For 'even the limited decree' sought here 'would inevitably set up the precise basis for future intervention condemned in *O'Shea*.'" *Id.* at 1125. (emphasis omitted)

Perhaps recognizing its potential inconsistency with *E.T.*, *Planet* attempted to distinguish the differing application of *O'Shea* and *Rizzo* in the two Ninth Circuit cases. *Planet*, 750 F.3d at 790. Citing *E.T.*, *Planet* observed that "*O'Shea* compels abstention where the plaintiff seeks an "ongoing federal audit" of the state judiciary, whether in criminal proceedings or in other respects." *Id. Planet* then concluded—incorrectly—that CNS's lawsuit against the Ventura County Superior Court did not require an "ongoing federal audit" and, thus, *O'Shea* abstention did not apply. *Id*. at 791.

Just one year after *Planet*, the Ninth Circuit decided *Miles.* In *Miles*, the plaintiffs filed a class action challenge to the consolidation of unlawful detainer actions into hub courts. The district court dismissed the suit pursuant to *O'Shea* abstention and the Ninth Circuit affirmed, finding that the plaintiffs sought the precise type of federal interference with sensitive state activities such as the administration of the judicial system that *O'Shea* prohibited. *Miles*, 801 F.3d at 1064.

The underlying interest in preserving the balance between federal equitable relief and state administration of its own courts in *E.T., Miles* and *O'Shea* is the same interest in play in *Planet* and in this case as well. Ensuring compliance with a federally ordered deadline for publication of complaints would be akin to an "ongoing federal audit" of court operations, not a one-time intervention, because it would require hair-splitting as to the appropriate speed of publication, and ongoing monitoring to ensure the Circuit Clerk's compliance. *O'Shea*, 414 U.S. at 500. Granting certiorari based on an alleged split between the Seventh and Ninth Circuits would be imprudent if the law of Ninth Circuit was not settled.

With respect to the application of *O'Shea* and the determination of when federal oversight of the state judicial system becomes "an ongoing federal audit," *Planet*, *E.T.* and *Miles* are difficult if not impossible to reconcile. *O'Shea*, 414 U.S. at 500. The Ninth Circuit, to be sure, has not yet attempted to resolve these issues through an *en banc* hearing. As Justice Sotomayor has observed, "[w]hen that sort of internal division exists, the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement" and not for this Court to grant certiorari. *Carlton v. United States*, 135 S. Ct. 2399, 2401 (2015) (Sotomayor, J., respecting denial of the petition for writ of certiorari).

With the three Ninth Circuit precedents in conflict, the best approach would be "to allow the court of appeals the first opportunity to resolve the disagreement" and not for this Court to grant *certiorari*. *Id.*

II. The Second Circuit Recently Followed *Brown*. (Response to CNS's Petition at 9, 11, 16-20.)

CNS's claim that *Brown* conflicts with the law of the Second Circuit is doubly wrong: (1) on the issue of *O'Shea* abstention, *Hartford Courant* does not conflict with *Brown* and (2) a little over three months ago, the Second Circuit decided *Disability Rights New York*, a case where the Second Circuit followed *O'Shea* and *Brown*.

In contrast to *Disability Rights New York*, the Second Circuit opinion in *Hartford Courant* did not discuss *O'Shea* but rather *Pullman* abstention. *See Hartford Courant*, 380 F.3d at 100. In *Hartford Courant*, the Second Circuit held that *Pullman* abstention did not bar federal subject matter jurisdiction over a First Amendment claim challenging the Connecticut court system's longstanding practice of sealing docket sheets in certain civil cases. *Id.* The Second Circuit found that the *Pullman* doctrine did not apply for two reasons: "first, because there was 'no applicable state statute' construction of which would avoid the constitutional issues, and second, because 'the weight of the First Amendment issues involved counsels against abstaining.'" *Planet*, 750 F.3d at 787 (citing *Hartford Courant*, 380 F.3d at 100). Significantly, *Hartford Courant* did not discuss *O'Shea* or *Rizzo* abstention. *See generally Hartford Courant,* 380 F.3d 83.

In rejecting the application of *Pullman* abstention, *Planet* relied upon the Second Circuit's decision in *Hartford Courant*. *Planet*, 750 F.3d at 787-89. However, in declining to apply *O'Shea* abstention, *Planet* neither discussed nor relied on *Hartford Courant*. *Id.* at 789-92.

In contrast to *Hartford Courant*, *Disability Rights New York* discussed and applied *O'Shea* abstention to bar a claim against the State of New York, its court system, and its Chief Judge and Chief Administrative Judge regarding the manner in which guardianship proceedings are conducted. *Disability Rights New York*, 916 F.3d at 133-36. The district court and the Second Circuit both held that the exercise of federal jurisdiction would be "a continuing, impermissible 'audit' of New York Surrogate's Court proceedings" and thus fell within the ambit of *O'Shea* abstention. *Id.* at 133, 136.

Moreovoer, the Second Circuit found that the plaintiffs' lawsuit against New York, its court system, and its Chief Judge and Chief Administrative Judge was similar to CNS's lawsuit and the Circuit Clerk. *Id.* at 134. And just like the Second Circuit in *Disability Rights New York*, the Seventh Circuit in *Brown* followed *O'Shea* in order to prevent continuing federal oversight of the way Illinois courts process newly e-filed civil complaints. *Brown* held that CNS's requested relief:

> would likely lead to subsequent litigation in the federal courts. We want to avoid a situation in which the federal courts are dictating in the first instance how state court clerks manage their filing procedures and the timing of press access. We also want to avoid the problems that federal oversight and intrusion of this sort might cause.

Brown, 908 F.3d at 1075 (footnote omitted).

With respect to *Brown* and *O'Shea*, the Second and Seventh Circuits are in harmony.

III. *Planet* Is an Outlier and Does Not Create a Sufficient Enough Split Among The Circuits to Warrant The Granting of CNS's Writ of Certiorari.

(Response to CNS's Petition at 10-20, 27-32.)

The holdings in *Planet* and *Brown* are in conflict with each other but *Brown* is in harmony with *O'Shea* and *Rizzo,* as well as cases from the Second, Sixth, Eighth and Ninth Circuits. *See Disability Rights New York*, 916 F.3d at 131, 136; *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 612 (8th Cir. 2018) (abstaining under O'*Shea* from enjoining allegedly unconstitutional child custody proceedings because "[t]he relief requested would interfere with the state judicial proceedings by requiring the defendants to comply with numerous procedural requirements" and "failure to comply with the district court's injunction would subject state officials to potential sanctions"); *Miles*, 801 F.3d at 1066; *E.T.*, 682 F.3d at 1124; *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006) (abstaining under *O'Shea* from enjoining internal state court judicial assignment procedures); *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980) (holding that *Younger* abstention barred a federal claim which effectively asked the district court to monitor "the manner in which state juvenile judges conducted contempt hearings in non-support cases").

Planet read *O'Shea* too narrowly and was not faithful to the application of *Younger* abstention in *O'Shea*. *Planet* drew a distinction between federal intrusion into state court procedure and federal intrusion into state processing of the filing of civil complaints. *Planet*, 750 F.3d at 792. This is a distinction without a difference. In any event, *Planet's* narrow reading of *O'Shea* cannot be squared with precedent from this Court or other Circuits.

O'Shea concerns federal interference with state court practices based upon constitutional grounds. *O'Shea*, 414 U.S. at 491-92. In *O'Shea*, the plaintiffs sought to enjoin state judges from discriminating against African-Americans in certain criminal court proceedings. *Id.* In holding that the district court should have abstained from hearing the class claims, this Court recognized that abstention doctrines are not limited to federal lawsuits that interfere with ongoing state proceedings, as was the case in *Younger*. *Id.* at 501. *O'Shea* extended *Younger* to hold that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" amounted to "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* . . . sought to prevent." *Id.*at 500.

Importantly, *O'Shea* further held that abstention is appropriate to prevent federal courts from becoming monitors of state-court operations: "[m]onitoring of the operation of state court functions . . . is antipathetic to established principles of comity," and amounts to "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings," which would sharply conflict "with the principles of equitable restraint…." *Id.* at 501-02 (citation omitted); *accord Rizzo*, 423 U.S. at 378-80 (following *O'Shea* and holding that the district court should have abstained from deciding a motion for a motion for mandatory injunction to direct the Philadelphia police department to draft comprehensive internal procedures to address civilian complaints).

Under *O'Shea*, constitutional concerns about state court practices should be advanced in state court. As *O'Shea* observed:

> Respondents do not seek to strike down a single state statute, either on its face or as applied . . . What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials.

O'Shea, 414 U.S. at 500. Indeed, just as CNS's challenge to the Circuit Clerk's practice of performing the "accept/reject" function was a challenge to a state court practice, the constitutional challenges in *O'Shea* and its progeny have been challenges to state court practices.

CNS cites *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013) and *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989)—two cases that neither discuss nor apply *O'Shea* or *Rizzo* —in support of its argument that the Seventh Circuit improperly applied *O'Shea* and *Rizzo* abstention in *Brown*. (Pet. 21-23.) Neither *Sprint* nor *New Orleans Public Service* addressed the issue of whether abstention is required to prevent ongoing federal interference and oversight over state court practices and procedures.

In *Disability Rights New York*, the Second Circuit distinguished *Sprint* and *New Orleans Public Service*, as both cases addressed situations where the federal court was asked to enjoin ongoing state and federal proceedings. *Disability Rights New York*, 916 F.3d at 133-134. The Second Circuit noted that this Court "has also held that

even where no state proceedings are pending, federal courts must abstain where failure to do so would result in 'an ongoing federal audit of state criminal proceedings.'" *Id*. at 134 (citing *O'Shea*, 414 U.S. at 500). Indeed, the Second Circuit stated that "the considerations underlying *Younger* are still very much at play even when a suit is filed prior to the onset of state proceedings." *Id.*

Sprint and *New Orleans Public Service* are inapposite and do not support CNS's argument that *Brown* is contrary to established law.

IV. *Brown* Was Correctly Decided.

(Response to CNS's Petition at 10-12, 20-27.)

CNS argues that the decision below was wrong. (Pet 20.) Not so.

As an initial matter, when she followed the Standards and Order 2014-02, the Circuit Clerk simply discharged her duties.[5] Pursuant to ¶¶2(c) and 3 of Order 2014-02, the Circuit Clerk implements the State court's policy on electronic filing: *i.e.*, reviewing electronically submitted complaints before determining whether to reject or accept such complaints as properly filed. A review of Order 2014-

5. Circuit court clerks in Illinois are the highest non-judicial members of the state judiciary. *See Drury v. County of McLean*, 433 N.E.2d 666 (Ill. 1982). The Circuit Clerk's purpose is to keep an accurate and reliable record of county circuit court proceedings for the judiciary, litigants and the public, 705 ILCS 105/13 (2019), and to execute judicial orders. Failure to follow judicial orders would likely be contemptuous. *See In re Swan*, 415 N.E.2d 1354, 1361 (Ill. App. Ct. 1981) (affirming an order holding respondent in contempt for his refusal to obey a trial court order).

02 shows that it is highly germane to this appeal. ¶2(c) of Order 2014-02 sets forth a list of documents that may not be electronically filed:

- documents containing confidential information as specified in Supreme Court Rule 15;
- documents containing personal identity information as specified in Supreme Court Rule 138;
- documents containing the identity of individuals contained in reports made pursuant to the Communicable Disease Report Act, 745 ILCS 45/1;
- reports relating to an individual's disability pursuant to the Illinois Income Tax Act, 35 ILCS 5/917(a)(ii);
- confession of judgment;
- documents required by law, rule, or order to be filed and maintained in their original form;
- petition for marriage license by an underage petitioner;
- petition for an order of protection, no contact order, or stalking no contact order;
- registration of Illinois court judgment;
- registration of administrative judgment;

- discovery materials excluded pursuant to Illinois Supreme Court Rule 201; and

- any document when the individual document or the entire case is impounded or sealed by law, rule, or order.

(R. 19-2, ¶2(c).) Order 2014-02, ¶2(d) lists the types of cases for which parties may not make electronic filings: (1) adoption, (2) emancipation of a minor, (3) eminent domain, (4) fictitious vital records pursuant to the Vital Records Act, 410 ILCS 535/15.1 (2019), (5) juvenile court, (6) mental health, (7) ordinance violations, (8) proceedings pursuant to the Illinois Sexually Transmissible Disease Control Act, 410 ILCS 325/1 (2019), (9) petition for judicial waiver of notice under the Parental Notice of Abortion Act of 1995, 750 ILCS 70/1 (2019) and (10) any other type of case required to be impounded or sealed by law, rule, or order. (*Id.*, ¶2(d).)

Paragraph 3(c) of Order 2014-02 ("Paragraph 3(c)") states that "[a]ny document submitted electronically shall be considered filed with the [Circuit] Clerk's Office if not rejected by the Clerk's Office." (*Id.*, ¶3(c).) This paragraph shows that the Circuit Clerk is responsible for declining to accept documents that are improperly submitted electronically.

The Seventh Circuit found that Illinois required the Circuit Clerk to perform the accept/reject function before making a newly e-filed civil complaint available to the public. *Brown*, 908 F.3d at 1066, n. 2. But the Seventh Circuit also recognized that the Illinois courts are best equipped to answer that question. *Id*. In any event,

the Circuit Clerk could not perform the accept/reject function and comply with the district court's preliminary injunction. This posed a knotty legal problem, one that the Seventh Circuit solved by following and applying *O'Shea* and *Rizzo* abstention. As a result, the Seventh Circuit held that CNS's "temporal access dispute with a state court clerk" should be heard in an Illinois court where CNS could advance its constitutional claims and where the court could rule on the Circuit Clerk's duty to perform the accept/reject function. *Id.* at 1075.

Brown properly followed *O'Shea* and *Rizzo* and is consistent with the Second Circuit's decisions in *Disability Rights New York* and *Kaufman*, the Sixth Circuit's decision in *Parker*, the Seventh Circuit's decision in *SKS*, and the Ninth Circuit's decision in *E.T.* and *Miles*. *Planet* is an outlier. It is not necessary for this Court to review *Brown*.

Nonetheless, CNS argues at length that *Brown* did not follow the federal courts' "virtually unflagging" obligation to decide cases. (Pet. 24-25.) This argument, however, ignores the proverbial elephant in the room: federalism requires federal courts to abstain from exercising jurisdiction when doing so "would intrude upon the independence of the state courts." *Brown*, 908 F.3d at 1071 (citing *SKS*, 619 F.3d at 677).

CNS also argues that it has advanced a right of access claim under the First Amendment and, as a result, the application of *O'Shea* and *Rizzo* abstention is not appropriate. This Court, however, has never read a First Amendment exception into *Younger*, *O'Shea* or *Rizzo* abstention. The plaintiffs in *O'Shea* filed claims under

the First, Sixth, Eighth, Thirteenth and Fourteenth Amendments. *O'Shea*, 414 U.S. at 490. The nature of their claims did not factor into the propriety of applying *Younger* abstention and the nature of CNS's claim here is also of no moment.

Brown was correctly decided and CNS has failed to establish any need for immediate review of this decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CATHY MCNEIL STEIN
Assistant State's Attorney
Chief, Civil Actions Bureau

PAUL A. CASTIGLIONE*
PRATHIMA YEDDANAPUDI
Assistant State's Attorneys
paul.castiglione
@cookcountyil.gov

Of Counsel

* *Counsel of Record*

KIMBERLY M. FOXX
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-2350

Counsel for Respondent