No. _____

In The
Supreme Court of the United States

COURTHOUSE NEWS SERVICE,

Petitioner,

v.

DOROTHY BROWN, in her official capacity as Clerk of the Circuit Court of Cook County, Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RACHEL E. MATTEO-BOEHM
BRYAN CAVE LEIGHTON PAISNER LLP
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111
(415) 675-3400

K. LEE MARSHALL
Counsel of Record
BARBARA A. SMITH
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
klmarshall@bclplaw.com

Counsel for Petitioner

March 13, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner, a news service that reports on civil litigation in the federal and state courts nationwide, sought timely access to public civil complaints filed in Cook County, Illinois. After the Clerk of the Court for Cook County declined to provide such access, Petitioner filed suit pursuant to 42 U.S.C. § 1983 to redress this First Amendment harm.

Creating an acknowledged and irreconcilable split with the United States Court of Appeals for the Ninth Circuit, and also splitting with the Second Circuit, both of which have held that federal courts should not abstain from hearing First Amendment challenges seeking access to public court filings, the Seventh Circuit held that federal courts should abstain from hearing First Amendment claims of this type pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. The Seventh Circuit's decision was grounded not in any clearly defined category of *Younger* cases in which this Court has stated abstention is appropriate, but rather in general principles of "equity, comity, and federalism."

The question presented is thus:

Whether *Younger* and its progeny permit federal courts to abstain, on the basis of general principles of comity and federalism, from hearing First Amendment challenges that seek access to state court filings.

PARTIES AND RULE 29.6 STATEMENT

Petitioner, Courthouse News Service, is a privately held corporation with no parent corporation. No publicly held corporation holds more than ten percent of its stock.

Respondent, an individual, is the Clerk of the Circuit Court of Cook County, Illinois, and was sued in her official capacity.

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Federal courts bear responsibility to resolve cases and controversies over which they have jurisdiction and should abstain from hearing such cases only in the narrowest of circumstances. Thus, when a federal court decides to abstain on the basis of this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), it may do so only pursuant to three limited exceptions, which preclude federal intrusion into (1) ongoing state criminal proceedings; (2) certain civil enforcement proceedings; and (3) pending civil proceedings involving certain orders uniquely in furtherance of a state court's ability to perform its judicial functions. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

Comity, and a respect for the concurrent role of state courts in our constitutional system, is the chief *rationale* for these narrow exceptions, but is not itself an independent reason to abstain. The decision below—which holds that federal courts should abstain from hearing First Amendment claims brought against state court clerks denying the press timely access to public filings—turns this Court's abstention jurisprudence on its head. It calls on federal courts to abstain from hearing claims that *could* be brought in state court, regardless of whether any of the three narrow *Younger* exceptions to federal jurisdiction apply, and notwithstanding that any delay in reviewing the constitutional claim at issue eviscerates the very right the claim seeks to vindicate. Each additional day that the Clerk delays press access to new complaints makes reporting on those complaints less newsworthy, and that

delay necessarily undermines the First Amendment interest in play.

The decision below is wrong, and acknowledges that it creates a square split of authority with the Ninth Circuit. It also splits with the Second Circuit. A split of authority over a question of federal jurisdiction merits this Court's prompt review. The fact that the underlying merits of this claim implicate an important constitutional interest only magnifies the importance of resolving this question now.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 908 F.3d 1063 and reproduced at Pet.App.1–24. The memorandum opinion and order of the United States District Court for the Northern District of Illinois is available at 2018 WL 318485 and reproduced at Pet.App.25–43.

JURISDICTION

The Court of Appeals entered judgment on November 13, 2018. On January 25, 2019, Justice Kavanaugh extended the time for filing this petition to March 13, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 42 U.S.C. § 1983 are reprinted in the Appendix at Pet.App.46.

STATEMENT OF THE CASE

A. Background.

Courthouse News Service ("CNS") reports on civil litigation, from the opening complaint to final appeal. Its subscribers include other media outlets—newspapers, television news, and online news publications—as well as lawyers, law firms, law schools, and others. CNS publishes its reporting on its website and through print and email distribution. Pet.App.26. One example of CNS's reporting is its circulation of written summaries of newsworthy new civil complaints via its "New Litigation Reports," which are sent to subscribers nightly. *Id.*

CNS reporters cover more than 2,500 state and federal courts across the country. *Id.* CNS reporters physically visit their assigned courts to review new complaints in person or, where possible, access newly-filed complaints electronically over the Internet. *Id.* They then write original summaries of newsworthy new civil litigation.

CNS's media coverage of the Circuit Court of Cook County, Illinois began in 1997. At that time, reporters would visit the Cook County Clerk's office to review newly-filed complaints in person on the day they were

filed. *Id.* The Clerk permitted members of the press, including CNS reporters, to retrieve copies of newly-filed complaints that were housed in a tray behind the Clerk's intake counter. *Id.*

As Cook County adopted optional electronic filing in 2009, access remained largely the same: the Clerk printed e-filed complaints as they came in and added them to the pile of complaints available for review by the press from the intake tray. Pet.App.27. But in January 2015, the Clerk's Office abruptly stopped printing newly-filed electronic complaints for review by members of the press in a timely fashion, and instead began making them available on a delayed basis. *Id.* The result of this new system is that "reporters cannot view electronically filed complaints until they are processed and posted online[,]" which "leads to delays in access." Pet.App.3.

In advance of the date on which optional electronic filing would become mandatory, CNS contacted the Clerk's Office to discuss the delays in access to electronically filed complaints. But the Clerk rejected the alternative access options used by other courts that CNS proposed and refused to change its policies and procedures. Pet.App.28.

B. The District Court Enjoins The Clerk's Actions.

In November 2017, pursuant to 42 U.S.C. § 1983, CNS filed suit against Dorothy Brown, in her official capacity as Clerk of the Circuit Court of Cook County, seeking declaratory and injunctive relief on the

basis that the Clerk's actions in delaying access to newly-filed complaints violated the First Amendment. Pet.App.25. CNS also moved for a preliminary injunction restraining the Clerk "from denying CNS's constitutional right of contemporaneous access to newly electronically filed complaints," and "requiring her to provide access to new complaints contemporaneously with their receipt by the Circuit Court Clerk." *See* Pl.'s Mot. for Prelim. Inj., No. 1:17-cv-07933, Dkt. 6 (N.D. Ill. Nov. 8, 2017).

Although the Clerk opposed the motion for a preliminary injunction, she did not dispute that the First Amendment, which includes a presumption of access to documents filed in court, applies to civil complaints. Pet.App.6. Instead, she argued, *inter alia*, that the federal court should abstain from hearing this First Amendment claim on the basis of *Younger v. Harris*, 401 U.S. 37 (1971).

The District Court (Kennelly, J.) flatly rejected this argument holding, *inter alia*, that because "there are simply no ongoing state judicial proceedings with which CNS's requested injunctive relief might interfere . . . *Younger* abstention is not appropriate." Pet.App.30–31; *see id.* at 31 ("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous.") (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)).

The District Court first noted that the First Amendment "right of access to court proceedings and documents is well-established." Pet.App.32 (quoting

Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994)). The Court then proceeded to evaluate the merits of injunctive relief, concluding that CNS was likely to succeed on its claim because "a policy of delaying access to e-filed complaints until after they are officially accepted or rejected or otherwise processed by the Clerk violates the First Amendment right of timely access to those complaints, unless the Clerk can demonstrate that the policy is narrowly tailored and necessary to preserve higher values." Pet.App.39. The Court also noted that the Clerk "made no effort to explain how her policy of withholding all access to e-filed complaints until acceptance is narrowly tailored" and "has made no effort to explain why it is not feasible for her to adopt any one of the various methods that numerous other state and federal courts currently use to provide public access to e-filed complaints before they have been fully processed." Pet.App.40.

The District Court determined that the other preliminary injunction factors were also met. On the public interest prong, "injunctions protecting First Amendment freedoms are always in the public interest." Pet.App.41 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). Moreover, "[t]here is an important public interest in ensuring that the press and the public have timely access to new civil complaints." Pet.App.41. The deprivation to CNS of its First Amendment rights constituted irreparable harm. Pet.App.42–43.

Likewise, the balance of the equities favored injunctive relief because "[i]n the absence of an injunction, CNS will continue to be deprived of its First Amendment right of timely . . . access to e-filed complaints," and the Clerk failed to "explain[] why she cannot implement any of the measures other state and federal courts have taken to provide access to e-filed complaints prior to official acceptance and other processing." Pet.App.42.

The injunction gave the Clerk "thirty days . . . to implement a system that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office." *See* Pet.App.43.

C. The Court Of Appeals' Decision.

The United States Court of Appeals for the Seventh Circuit granted a stay of the preliminary injunction pending appeal, and ultimately reversed and remanded the case with instructions to dismiss the action. Pet.App.1–24.

The Seventh Circuit held that it was required to "[a]dher[e] to the principles of equity, comity, and federalism," and concluded as a matter of law that "the district court should have abstained from exercising jurisdiction" to hear the First Amendment claim that CNS raised. Pet.App.2. The Court acknowledged that "[t]his action falls within the terms of 42 U.S.C. § 1983," and that "CNS claims that its federal constitutional rights are being violated by a person acting under color of state law." Pet.App.13. But the District

Court should have declined to exercise jurisdiction over those claims anyway because they "affect[ ] the administration of the state courts" and, as an "equitable" matter "[s]tate courts have a significant interest in running their own clerks' offices and setting their own filing procedures—especially in a court like the Circuit Court of Cook County, where more than one million cases are filed annually." Pet.App.13, 14.

The Court of Appeals noted that "[t]he situation here is not a traditional *Younger* scenario: there is no individual, ongoing state proceeding that plaintiffs seek to enjoin." Pet.App.16. Moreover, the Court noted that the order under review "does not map exactly on the orders in *O'Shea* and *Rizzo*," Pet.App.19, cases which extended the scope of *Younger* to other contexts. In other words, the Court held, neither *Younger*, nor *O'Shea v. Littleton*, 414 U.S. 488 (1974) or *Rizzo v. Goode*, 423 U.S. 362 (1976), which extend *Younger*, squarely applied.

Instead, the Seventh Circuit grounded its rationale for abstaining in "a deeper principle of comity," namely, "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." Pet.App.21. Because CNS could have adjudicated its federal constitutional claim in state court, the Court held, the principles underlying *Younger* and its progeny *required* it to do so.

The chief legal authorities on which the Seventh Circuit relied to require abstention in this context were "the principles of equity, comity, and federalism."

Pet.App.2, 13. The primary case that led the Court to this result was not a decision of this Court, but rather the Seventh Circuit's own circuit precedent, *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010) (Hamilton, J.). *See* Pet.App.23 ("Initial adjudication of this dispute in the federal court would run contrary to the considerations of equity, comity, and federalism as detailed in *SKS & Associates* and the Supreme Court abstention decisions on which *SKS & Associates* was based.").

The Court of Appeals acknowledged that its abstention decision on the scope of federal jurisdiction created a square split with a "nearly identical" case from the Ninth Circuit. *See* Pet.App.22 ("We acknowledge that the Ninth Circuit in . . . a case nearly identical to this one[] came to the opposite conclusion regarding abstention.") (citing *Courthouse News Serv. v. Planet*, 750 F.3d 776, 793 (9th Cir. 2014)) ("*Planet*"); *see also* Pet.App.23 n.6 ("Because this opinion creates a circuit conflict on the abstention issue, we circulated it to all judges in active service.").

The Seventh Circuit's decision also conflicts with a decision from the Second Circuit. The Second Circuit has held that courts should not abstain from cases that raise First Amendment right of access claims. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) ("*Hartford Courant*").

REASONS FOR GRANTING THE PETITION

The decision below acknowledges and creates a circuit split on a question of exceptional importance regarding whether certain constitutional claims may be heard in federal court. The Seventh Circuit's decision broke with decisions of the Second and Ninth Circuits by holding that federal courts should abstain from hearing First Amendment claims asking a court clerk to make public court filings available in a timely manner. The decision to abstain in this context is wrong and—because it closes the federal courthouse doors to important constitutional claims—merits immediate review.

The Seventh Circuit acknowledged, in part, the clean split of authority its decision created. On facts "nearly identical" to those presented below, the Ninth Circuit reached precisely the opposite conclusion on the question whether federal courts should abstain from hearing First Amendment claims of this type. *See* Pet.App.22 (acknowledging the split with *Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014)). In both the Seventh Circuit and Ninth Circuit cases, CNS sought to continue timely access to newly-filed civil complaints, but faced resistance from local court clerks who did not want to provide that access. In both cases, CNS filed suit seeking declaratory and injunctive relief under the First Amendment. In both cases, the appellate court evaluated whether *Younger* and its progeny required federal courts to abstain from hearing CNS's claims on the basis that injunctive relief would be too

intrusive. Now, such claims may be brought in the Ninth Circuit but not in the Seventh Circuit.

The split runs even deeper. When the Ninth Circuit decided in *Planet* that federal courts need not abstain from claims of this type, it expressly "join[ed] the Second Circuit in reaching this conclusion." *See Planet*, 750 F.3d at 787 (citing *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004)). The Seventh Circuit's decision thus pits it against decisions from two other courts of appeals.

Without a doubt, the question whether federal courthouse doors are closed to First Amendment claims of this type is exceptionally important. This Court has repeatedly emphasized the virtually unflagging obligation of federal courts to hear and decide cases when they have jurisdiction to do so. Exercising that jurisdiction is nowhere more important than in deciding the scope and breadth of fundamental First Amendment rights.

The decision below wrongly evinces a crabbed view of the scope of federal jurisdiction and closes those courthouse doors to important constitutional claims. The basis of the Seventh Circuit's decision was a standardless deference to "comity" and "respect" for the ability of state courts to hear claims of this type even when no such state case is pending. But exercising federal jurisdiction is an obligation, not a choice. Worse still, this standardless rationale could be read to preclude the adjudication in federal court of other important constitutional interests. If First Amendment

claims cannot be adjudicated in federal court simply because they touch on state court interests and they could be brought in state court, then nothing stops federal courts in the Seventh Circuit from refusing to hear other important cases over which federal courts unquestionably have jurisdiction—cases raising Fourth Amendment challenges to the actions of state judicial security officers, cases alleging employment discrimination in state court hiring practices, establishment clause challenges to displays at state courthouses, and cases raising other important interests that touch on the state courts.

I. The Courts of Appeals Are Divided Over Whether Federal Courts Should Abstain From Hearing First Amendment Claims Of This Type.

The decision below creates a split of authority with prior decisions from the Ninth and Second Circuits. Before the decision below, every court of appeals to address the question had held that federal courts should not abstain from hearing constitutional challenges seeking access to public court documents. The Seventh Circuit's decision cannot be reconciled with these other cases.

A. The Decision Below Conflicts With Decisions From The Second And Ninth Circuits.

1. As the Seventh Circuit acknowledged, its decision created a square split of authority with the Ninth Circuit. *See* Pet.App.22, 23 n.6. Given the overlap in parties, facts, and legal issues, there is no way to reconcile the split the decision below creates.

In *Planet*, CNS filed suit for declaratory and injunctive relief against the Clerk of Ventura County Superior Court, who was "withholding complaints until after they had been fully processed" and, as a result, made "review of new civil complaints less timely and more difficult." 750 F.3d at 781. As a result of the clerk's withholding of new complaints, when they were finally available to the press they were significantly less newsworthy. The District Court granted the clerk's motion to dismiss the case on the basis of *O'Shea* and *Pullman* abstention. *See id.* at 782 (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)). But the Ninth Circuit reversed, squarely rebutting the abstention holding reached by the trial court there.

The *Planet* decision noted that "*Pullman* abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy." *Id.* at 783 (internal quotation marks omitted). And while it exists to ensure "the rightful independence of the state governments and for the smooth working of the federal judiciary," it "is generally inappropriate when First Amendment rights are at stake." *Id.* at 784 (citation omitted). Given the significance of the First

Amendment rights at stake, the court in *Planet* held that *Pullman* abstention was inappropriate. *Id.* at 786–87.

The Ninth Circuit then carefully walked through other prior abstention cases to conclude abstention was not warranted. In particular, with respect to *O'Shea*, the court concluded that *O'Shea* stands for the "general proposition that [courts] should be very reluctant to grant relief that would entail heavy federal interference in such sensitive state activities as administration of the judicial system." *Id.* at 789–90 (internal quotation marks omitted). In other words, "*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.* at 790 (citation omitted).

Abstention was not warranted, the court in *Planet* held, because "[a]n injunction requiring the Ventura County Superior Court to provide same-day access to filed unlimited civil complaints poses little risk of an 'ongoing federal audit' or 'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state . . . proceedings.'" *Id.* at 792 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500, 502 (1974)).

That was so because an injunction would amount to a "bright-line finding" and not "ongoing monitoring of the substance of state proceedings." *Id.* at 791. The federal courts could "provide the requested relief" without an "intensive, context-specific legal inquiry."

Id. Moreover, the state court clerk "has available a variety of simple measures to comply with an injunction granting CNS all or part of the relief requested[.]" *Id.* And, as a matter of fact, when an injunction was issued on remand after the *Planet* decision, the clerk there adopted simple measures that consistently provided timely access without raising the specter of excessive interference in the state judiciary.

Planet stands for the proposition that federal courts should not abstain from hearing constitutional challenges seeking to adjudicate questions about access to state court records. Thus, the *Planet* court held, these cases can and should be heard in federal court, and federal courts may issue injunctive relief to further those meritorious claims without micro-managing state court administrative procedures.

There is no way to square the Ninth Circuit's holding in *Planet* with the Seventh Circuit's decision below. The decision below relies on the "general principles upon which all of the abstention doctrines are based" to conclude that "[t]he level of intrusion CNS seeks from the federal court into the state court's operations is simply too high, at least before the state courts have had a chance to consider the constitutional issue." Pet.App.21.

The rationale for the Seventh Circuit's decision was that "it was not appropriate for the federal courts, in the face of these principles of equity, comity, and federalism, to undertake the requested supervision of state court operations." Pet.App.20.

The Ninth Circuit reached the opposite conclusion in the face of a nearly identical request for injunctive relief. In *Planet*, the plaintiff sought "an injunction prohibiting Planet from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints" and denying "timely access to new civil unlimited jurisdiction complaints on the same day they are filed, except as deemed permissible following the appropriate case-by-case adjudication." *See Planet*, 750 F.3d at 782 (internal quotation marks omitted). That language maps directly onto the relief requested (and granted) in this case, which required the Clerk here "to implement a system that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office." *See* Pet.App.43.

In short—faced with the same legal question, the same parties, and the same requested relief—the Seventh Circuit held that federal courts should abstain from exercising jurisdiction to hear constitutional challenges to a state's decision to withhold public court filings. In precisely the same context, the Ninth Circuit previously came to the opposite conclusion.

2. The Ninth Circuit's *Planet* decision expressly rested on a prior decision of the Second Circuit, which also has addressed this question. In *Planet*, the Ninth Circuit acknowledged that its decision aligned with *Hartford Courant*, 380 F.3d at 100. *See Planet*, 750 F.3d at 787 ("We join the Second Circuit in reaching this conclusion.").

In *Hartford Courant*, the Second Circuit was asked "to decide whether the public and press have a qualified First Amendment right to inspect docket sheets and, if so, the appropriate remedy for its violation by state courts." *Hartford Courant*, 380 F.3d at 85. There, Connecticut state court clerks routinely sealed entire docket sheets, pursuant to a policy outlined by the Civil Court manager, that resulted in thousands of cases being sealed. *Id.* at 87. *The Hartford Courant*, a local newspaper, filed suit pursuant to, *inter alia*, 42 U.S.C. § 1983, seeking injunctive relief and claiming that a policy which resulted in the widespread sealing of court documents violated the press's First Amendment right to access judicial proceedings and documents. *Id.* at 85, 89. As described by the Second Circuit, "the gravamen of the federal plaintiffs' complaint" was a challenge to "the procedures set forth in the [Civil Court manager's policy memo] or the unauthorized actions of the court administrators" in sealing otherwise public court docket sheets. *Id.* at 101.

In response, the defendants—the Chief Court Administrator and the Chief Justice of the Connecticut Supreme Court in their administrative capacities—moved to dismiss by claiming that the federal court should abstain under, *inter alia*, *Pullman* and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Id.* at 100–02. After the District Court granted the motion to dismiss, the Second Circuit reversed. The Second Circuit held that there was no reason to abstain from adjudicating the constitutional question. *See id.* at 86 ("[A]fter reviewing the abstention doctrines that the

defendants have raised, we hold that none applies in this case.").

In so holding, the Second Circuit rejected the argument that a challenge to the Connecticut courts' procedures for sealing court documents affected "a central sovereign function" over which state courts had "an inherent power." *See* Br. of Defs.-Appellees, No. 03-9141, 2004 WL 5822413, at *39 (2d Cir. Feb. 24, 2004). Indeed, the appellees in *Hartford Courant* expressly argued that the sealing procedures "pose state and federal constitutional issues that Connecticut courts ought first to have the opportunity to review." *Id.* at *33. The Second Circuit disagreed.

Hartford Courant therefore squarely conflicts with the Seventh Circuit's decision below that the underlying "temporal access dispute with a state court clerk should be heard first in the state courts." Pet.App.23.

This conflict is rendered even more stark by the motivation for the decision of each court. The Seventh Circuit's decision, grounded in "comity," was motivated by a special concern that federal courts not interfere with state court clerks' oversight of their own procedures for public access to court filings. *See* Pet.App.21–22 ("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."). By contrast,

the Second Circuit held that "the weight of the First Amendment issues involved counsels against abstaining." *Hartford Courant*, 380 F.3d at 100. There is no way to reconcile these competing decisions.

Nor can the decision below be distinguished on the basis that the filing procedures at issue are in a time of transition (from paper to electronic filing), which was another reason offered by the Seventh Circuit to abstain. *See* Pet.App.22 ("It 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 around the country, are working through the associated implementation challenges and resource limitations. The claims here are not suitable for resolution in federal court at this time.").

The suggestion that the move from paper to electronic filing counsels in favor of abstention is wrong for two reasons. First, the notion that a policy challenged as unconstitutional is in flux is not a recognized basis for abstention. Here, the transition from paper to electronic filing is a simple shift in the form a document is delivered, not a substantive change in the filing that should affect the First Amendment rights that attach to it. Second, this rationale, such as it is, highlights a further conflict with the Second Circuit. That is because the clerk's policy memo at the heart of the *Hartford Courant* case was itself no longer the operative document governing the sealing of court records when that case was adjudicated. Rather, a new policy had subsequently been enacted that made court documents

available on a timely basis (but did not apply retroactively). *See Hartford Courant*, 380 F.3d at 87. Thus, the policy at issue in that case, like the underlying policy here, was in flux and facing a time of transition. Yet the Second Circuit, unlike the Seventh Circuit, declined to abstain from hearing challenges to the court-sealing policy on the basis that the state should take a first crack at evaluating the new change.

II. The Decision Below Is Wrong.

The Seventh Circuit's decision is wrong in at least two respects. First, it runs directly counter to this Court's clear direction that *Younger* abstention applies only in limited and clearly defined circumstances. Second, the decision below upends the presumption that federal courts adjudicate claims over which they have jurisdiction.

A. The Decision Below Expands The Circumstances In Which A Federal Court Should Abstain Beyond The Narrow Exceptions This Court Has Articulated.

This Court has carved out narrow categories of cases in which federal courts have jurisdiction to review claims brought before them but should nonetheless abstain from hearing such cases. The doctrine of abstention "is an extraordinary and narrow exception" to the general obligation of federal courts to "adjudicate . . . controvers[ies] properly before [them]." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185,

188–89 (1959) (FRANKFURTER, J., concurring). Abstention is therefore justified "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Id.*; *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.").

Younger abstention, which traces its roots to *Younger v. Harris*, 401 U.S. 37 (1971), forbids federal courts from enjoining pending state criminal proceedings. Since its inception, federal courts have struggled to understand the scope of *Younger*'s applicability. That confusion is nowhere more obvious than in the decision below.

But recently, this Court has made clear that *Younger* abstention is "confined" to "three exceptional circumstances." *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). Federal courts may abstain under *Younger* only to prevent them from enjoining: (1) "ongoing state criminal prosecutions;" (2) "certain civil enforcement proceedings;" and (3) "pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (internal quotation marks and alteration omitted). In *Sprint*, the Court made clear that these narrow exceptions constituted the entire universe of *Younger*. *See id.* ("We have not applied *Younger* outside these three 'exceptional' categories, and today hold, in accord with *NOPSI*, that they define *Younger*'s scope."); *see also New Orleans Pub. Serv., Inc. v. Council*

of City of New Orleans, 491 U.S. 350, 369–70 (1989) ("*NOPSI*") ("While [the Court has] expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, [it has] never extended it to proceedings that are not 'judicial in nature.'").

The Court has also applied *Younger* abstention to preclude courts from hearing cases where there is no concurrent pending state proceeding, in order to prevent federal courts from engaging in an "ongoing federal audit of state [court] proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent." *O'Shea*, 414 U.S. at 500 (federal courts should abstain from enjoining future conduct); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (broadly applying *Younger* principles to limit federal court review of local executive branch actions).

Although *O'Shea* and *Rizzo* are based on *Younger*—and the decision below plainly contemplates they are direct extensions of *Younger*—the Court has not had occasion to make clear that the limits of *Younger*, as expressed in *Sprint*, also apply to *O'Shea* and *Rizzo*. This case makes clear why the Court should do so now.

Assuming *O'Shea* and *Rizzo* are limited by the scope of *Younger* (on which they rely), then the only argument for abstention in this case would be that the contemplated injunction involves "certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns*,

571 U.S. at 78 (internal quotation marks omitted). No such problem exists here: the contemplated injunction would apply to an established policy and enjoining that policy would involve simple compliance with a simple, one-time injunction, not an "ongoing federal audit of state criminal proceedings." *O'Shea*, 414 U.S. at 500. The terms of the District Court's order make this clear, because the order requires simply that the Clerk craft a new, constitutionally compliant policy that ensures timely access to new complaints, while leaving the details related to compliance up to the Clerk herself. Rather than requiring the Clerk to make one precise change or another, the order allows the Clerk broad authority to craft a compliant policy. *See* Pet.App.43 ("Brown is given thirty days . . . to implement a system that will provide access[.]").

If *Younger* itself is narrowly limited, then the cases expanding its scope should likewise be so confined. Either *O'Shea* and *Rizzo* are extensions of *Younger*—as the decision below believed them to be—or they are not. If they are extensions of *Younger*, then the limitations of *Younger* that this Court has carefully staked out apply. If they are not extensions of *Younger*, and instead fall into some other, nebulous line of cases about the scope of federal courts' equity power to issue injunctive relief against state actors, then that too is patently unclear to lower federal courts and that question merits this Court's intervention.

Further—and however these cases are described—the decision below does not grapple seriously with why the issuance of an injunction here would lead

to the result the opinion fears, unnecessary interference with state courts. The decision below also ignores that the District Court held no such interference would occur, and that the Clerk herself put forth no evidence or argument at all—aside from the same barebones assertion on which the Seventh Circuit relied—why an injunction would cause excessive interference. The decision thus guts the careful line-drawing this Court has done to delineate the narrow scope of abstention's reach. "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colorado River*, 424 U.S. at 813–14 (quoting *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 361 (1951)).

Yet that is precisely what the Seventh Circuit did here: abstaining from resolving an important constitutional question not on the basis of any clear mandate from this Court to abstain, but rather on broad and standardless equitable principles.

B. The Decision Below Turns On Its Head The Presumption That Courts Must Exercise Jurisdiction When They Have It.

Chief Justice Marshall famously articulated the presumption that federal courts hear cases over which they otherwise have jurisdiction in *Cohens v. Virginia*, stating that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. 264, 404 (1821).

To do otherwise, the Court held, "would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Id.*

Since then, this Court has reiterated that, where jurisdiction lies, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns*, 571 U.S. at 77 (quoting *Colorado River*, 424 U.S. at 817). The exceptions to this general rule, as explained above, are "extraordinary and narrow." *Colorado River*, 424 U.S. at 813 (quoting *County of Allegheny*, 360 U.S. at 188–89). Thus, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.*

The rationale the Seventh Circuit applied to justify abstention in this case could apply to any challenge to state court action. The implication of the decision below is that abstention is warranted when questions are uncomfortable and interference with state court operations is *possible*, regardless of whether excessive interference would actually result from the entry of an injunction. Rather than presuming the federal courts remain open to hear constitutional challenges—even those raising questions the court might "gladly avoid"—the decision below jumps to the conclusion that the court should *not* hear a case that could instead be litigated in state court.

The decision below evinces no concern for the obligation of federal courts to hear those cases that they can, and instead voices a compulsive hesitancy to wade into a constitutional controversy simply because it

involves a sister state court. The Seventh Circuit's rationale relies heavily—almost exclusively—on the "abstention principles" of "equity, comity, and federalism," *see* Pet.App.20, but wholly ignores that these principles operate only to serve "narrow exceptions," *see supra* at 19–23, and do so within the overarching presumption that federal constitutional claims should be litigated in federal court whenever possible.

The Seventh Circuit's logic simply cannot be squared with the Court's abstention cases. It is not enough that a complaint filed in federal court implicates "federalism and comity" concerns: All § 1983 actions challenging the conduct of state officials, by their very nature, do. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 101 (1980) (Section 1983 ensures that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights."); *McNeese v. Board of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963) (It would "defeat [the] purposes" of 42 U.S.C. § 1983 "if [the Court] held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."). Nor is it dispositive that the official alleged to have violated the First Amendment works in the state judiciary. *See, e.g.*, *Glassroth v. Roy Moore*, 229 F. Supp. 2d 1290, 1293 (M.D. Ala. 2002) ("Based on the evidence presented during a week-long trial and for the reasons that follow, this court holds that the evidence is overwhelming and the law is clear that the Chief Justice [of the Alabama Supreme Court] violated the Establishment Clause.").

The decision below, by contrast, would broadly require abstention whenever a federal constitutional challenge touches a state court judicial function. "Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368. Worse still, such an approach would close the federal courthouse doors to the litigants who may most need a neutral federal forum: those seeking to challenge the practices and procedures of state courts.

III. The Question Presented Is Important And Should Be Decided In This Case.

The question presented in this case is important and merits the Court's immediate review. The split is clear, the issue important, and the question unlikely to be resolved through further percolation.

1. First, the question presented is important because it goes to the heart of the federal courts' power to hear and decide cases. Whether First Amendment claims against state court clerks can and should be heard in federal court—and whether injunctive relief is available to remedy alleged constitutional harms—is extraordinarily important.

When the Courts of Appeals split on a question touching questions of federal jurisdiction, only this Court can resolve the conflict. Whether and when federal claims may be brought in federal court is a question of the highest order, and improperly preventing

these claims from being adjudicated in federal court compounds the underlying harm the lawsuits seek to redress.

Review of this question is important now because the split of authority that the decision below creates cannot be reconciled and so will not benefit from further development. The Seventh Circuit's erroneous decision below may well spread to other jurisdictions, further blurring the boundaries of abstention, which will harm, not help, this Court's eventual review of it.

There is no way to reconcile the Seventh Circuit's decision with the prior decisions of the Ninth and Second Circuits. Federal courts are either open to hearing claims of this type, or they are not. The split may become deeper—as other courts of appeals weigh in to evaluate this question over time—but the issue is not likely to become clearer. Delaying review only ensures that the doors of the federal courts will remain open in some places, but shuttered in others. This question is ripe for review now and, given its importance, should be evaluated by this Court sooner rather than later.

Indeed, the Seventh Circuit itself recognized the importance of this decision to other courts. The decision below transparently notes that "no doubt CNS would attempt to use a different decision in this case to force the hand of other state courts" to provide timely access to court filings. *See* Pet.App.23. The court opined that it "would likely lead to subsequent litigation in the federal courts" which, the Seventh Circuit claims, it "want[ed] to avoid." *Id*. But, of course, the

inverse of this statement is also true: The Seventh Circuit's decision will "no doubt" be used by state court clerks in some of the thousands of other jurisdictions around the country to limit press access to public filings. The only difference now is that those actions will be protected from any review by a neutral federal court under the cloak of the decision below.

Worse still, the Seventh Circuit's rationale could be used as a basis for abstention in the context of other federal claims. There is nothing unique about the Seventh Circuit's rationale that limits it only to claims against state court clerks, or to First Amendment claims seeking access to state court documents. The principles of "equity, comity, and federalism" apply with equal force to federal suits that would seek to litigate Fourth Amendment claims (*e.g.*, against court security officers) or employment discrimination claims (*e.g.*, against court administrative officers), or establishment clause claims (*e.g.*, against state Supreme Court Justices) to take just three examples. The federal courthouse doors should not be closed to such suits. On the contrary, where state actors are alleged to violate federal constitutional rights or federal statutory privileges, federal courts should hear those claims.

2. Second, while the underlying merits of the First Amendment claim are not at issue in this petition—because abstention does not rise or fall on the merits of the underlying claim—the fact that this case raises First Amendment questions magnifies its importance.

Although the Courts of Appeals may disagree on the scope of the First Amendment right at issue, they agree that the right of the press to access public court documents is protected by the constitution. *Planet*, 750 F.3d at 785 ("The Supreme Court has repeatedly held that access to public proceedings and records is an indispensable predicate to free expression about the workings of government."); *Hartford Courant*, 380 F.3d at 91 ("[T]he public possess a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings."); Pet.App.11 ("[T]he federal courts of appeals have widely agreed that the First Amendment right of access extends to civil proceedings and associated records and documents.").

The appellate courts' concern in protecting the press's right to access public court documents flows directly from the decisions of this Court. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."); *Globe Newspaper Co. v. Superior Court for Cty. of Norfolk*, 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs[.]'") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("[T]he courts

of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

Federal courts can and should continue to adjudicate the scope and breadth of that right particularly where, as here, declining to exercise jurisdiction eviscerates the very constitutional right that CNS seeks to protect. CNS seeks to litigate its right to *timely access* to court documents. By abstaining from hearing these claims, federal courts ensure that CNS cannot exercise that right—and fulfill its duties as a member of the press to provide news coverage—in a timely way.

When a First Amendment claim seeks access to information for purposes of reporting on newsworthy events in a timely way, denial of that access compounds the constitutional harm. For that reason, Justice Blackmun, granting a stay of a lower court order prohibiting the news media from reporting on a pending case, stated that "each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (BLACKMUN, J., in chambers). When the full Court ultimately reviewed the merits of the First Amendment claim raised in *Stuart*, it underscored the point: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

The Ninth Circuit in *Planet* echoed this "concern that a delay in litigation will itself chill speech." *Planet*,

750 F.3d at 787. The Court noted that "[e]ven though it is not subject to prosecution, CNS will be unable to access judicial records and report on newsworthy proceedings during 'the delay that comes from abstention itself.'" *Planet*, 750 F.3d at 788 (citation and alteration omitted).

The decision below merits immediate review to keep open federal courthouse doors to First Amendment claims of this type.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

RACHEL E. MATTEO-BOEHM
BRYAN CAVE LEIGHTON PAISNER LLP
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111
(415) 675-3400

K. LEE MARSHALL
Counsel of Record
BARBARA A. SMITH
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
klmarshall@bclplaw.com
Counsel for Petitioner

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