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**VIA FEDEX**

Hon. Leigh I. Saufley, Chief Justice  
Maine Supreme Judicial Court  
205 Newbury Street, Room 139  
Portland, Maine 04101-4125

**Re: Transparency and Privacy in Court Records**

Your Honor:

We represent Courthouse News Service (“CNS”), a news wire service that reports on new civil litigation in federal and state courts across the country, from the trial level through appellate decisions. We are in receipt of the September 30, 2017 report of the Transparency and Privacy in Court Records Task Force (“Report”).

As Maine transitions to electronic filing of court documents, CNS’ experience with similar transitions around the country may be of use to you and your colleagues. CNS is particularly concerned with prompt and efficient access to court documents, particularly to case-initiating civil litigation filings, which we believe are required to be made publicly available in a timely manner pursuant to the First Amendment, as applied by a string of decisions. In CNS’ experience, e-filing -- counterintuitively -- often delays access to new cases, because administrative processing occurs before cases are made public.

For several years, CNS has litigated First Amendment issues related to delayed access to court documents. *See, e.g., Courthouse News Serv. v. Tingling*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016); *Courthouse News Serv. v. Planet*, 2016 WL 4157210 \*12 (C.D. Cal. May 26, 2016); *Courthouse News Serv. v. Jackson*, 2009 WL 2163609 at \*4 (S.D. Tex. July 20, 2009).

In *Courthouse News Serv. v. Tingling*, the U.S. District Court for the Southern District of New York recently issued a preliminary injunction on CNS’s behalf, concluding that the New York County Clerk “may not prevent the press from accessing newly filed documents because of its review and

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logging procedures.” *Courthouse News Serv. v. Tingling*, Civil Action No. 1:16-cv-08742 (E.R), 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) at 15:

In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression. Each passing day may constitute a separate and cognizable infringement of the First Amendment.

*Id.* at 16. In so ruling, the court relied on the Second Circuit’s decisions in *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140-41 (2d Cir. 2016) (First Amendment provides a presumptive right of access to civil court records, including complaints) and *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir 2006) (presumption is that prompt public access applies whenever a right to access is found).

Following the granting of the injunction, New York County modified the right of access to newly filed civil complaints on the New York Supreme Court Electronic Filing (“NYSCIEF”) website so that immediate electronic access is provided to new filings regardless of the time of day filed and prior to any clerical processing or assignment of an index number. Thereafter, the other counties in New York City followed suit. As of this writing, twenty-two of the twenty-four counties in the State of New York that are on NYSCIEF provide immediate access to new filings, and the other two counties are likely to provide such access in the near future. This level of access is comparable to that provided by most federal courts, where immediate online access to new filings is available.

The law in the First Circuit also recognizes a First Amendment and common law right of access to judicial documents. *Nat’l Org. for Marriage v. McKee*, Civil No. 09-538-B-H, 2010 WL 3364448, \* 2-3 (D. Me. Aug. 24, 2010) (finding that “[t]here is a longstanding presumption that judicial records are public” and “conclud[ing] that there is a First Amendment right of access to the trial record.”), *aff’d*, in relevant part, 649 F.3d 34 (1st Cir. 2011); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409, 412-13 (1st Cir. 1987) (“The presumption that the public has a right to see and copy judicial records attaches to those documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication. That presumption, so basic to the maintenance of a fair and open judicial system and to fulfilling the public’s right to know, cannot be easily overcome.”). The First Circuit has also recognized that “even a one or two day delay impermissibly burdens the First Amendment.” *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502, 507(1st Cir. 1989).

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The press' need for prompt access to electronic filings is increased by the fact that most electronic filing systems allow filing parties to commence actions after court hours, including on weekends. Filing parties typically receive the benefit of the statute of limitations toll upon filing. These after-hours filings often give rise to several-day delays in access, particularly where administrative processing precedes access. However, there are many ways to provide timely access to late-filed cases that do not require online access. For example, press rooms in courthouses can often be accessed after the court closes for the day, and cross court access can be provided via computer terminals set up in those press rooms.

We encourage the Maine Judicial Branch to follow the course of action taken by New York and other states, as well as the vast majority of federal courts (including the U.S. District Court for the District of Maine), by providing prompt access to newly e-filed cases as they are received and making them available to be viewed by the press and public without delay.

My CNS colleagues and I would be pleased to meet with you and your colleagues to discuss a variety of approaches to these and other issues. We met recently with the administrative head of the Vermont court system, also transitioning to a Tyler product, and believe that exchange was constructive and expect it to be ongoing as Vermont transitions. Please let us know if we can schedule such a meeting at your convenience.

Sincerely,

A handwritten signature in black ink that reads "William Hibsher". The signature is written in a cursive, flowing style.

William Hibsher

cc: Courthouse News Service