No. 18-1230
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| Courthouse News Service,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>Dorothy Brown, in her official capacity as the Clerk of the Circuit Court of Cook County,<br><br>Defendant-Appellant. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>17 C 7933<br><br>The Honorable Judge Matthew F. Kennelly |

## DEFENDANT-APPELLANT'S MOTION TO STAY THE DISTRICT COURT'S JANUARY 8, 2018 PRELIMINARY INJUNCTION ORDER

Defendant-Appellee DOROTHY BROWN, Clerk of the Circuit Court of Cook County (the "Circuit Clerk"), by her attorney KIMBERLY M. FOXX, State's Attorney of Cook County, and through her Assistant State's Attorneys, PAUL A. CASTIGLIONE, MARGARETT S. ZILLIGEN and OSCAR KPOPTA, moves this Court pursuant to Rule 8 of the Federal Rules of Appellate Procedure, to stay the preliminary injunction that the district court entered on January 8, 2018 pending this Court's resolution of the Circuit Clerk's appeal of that injunction. In support of this motion, the Circuit Clerk states as follows:

## BACKGROUND FACTS

1. Courthouse News Service ("CNS" or "Plaintiff") filed 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.)

2. The district court granted the motion for preliminary injunction. *Courthouse News Service v. Brown*, 2018 U.S. Dist. LEXIS 2816, *22 (N.D. Ill. January 8, 2018). (R. 23.)

3. The district court issued an order (the "Preliminary Injunction order") requiring the Circuit Clerk to implement a system thirty days from January 8, 2018 "that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office." *Id.* The Circuit Clerk thereafter filed a motion for clarification regarding the preliminary injunction.

4. On January 17, 2018, the district court denied the motion for clarification as moot for the reasons stated in open court. (R. 23.)

5. On January 31, 2018, the Circuit Clerk filed a notice of appeal of the preliminary injunction order. (R. 30.)

6. On February 2, 2018, the Circuit Clerk filed a motion to stay the preliminary injunction order. (R. 35.)

7. On February 13, 2018, the district court denied the Circuit Clerk's motion to stay. (R. 44.)

8. As discussed below, the district court should never have entered the preliminary injunction order as it lacks subject matter jurisdiction over this lawsuit under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971).

9. The district court, however, improperly exercised subject matter jurisdiction and entered a preliminary injunction that is mandatory in nature. It directs the Circuit Clerk to provide Plaintiff with "timely, contemporaneous access to the complaints upon filing." *Courthouse News Service*, 2018 U.S. Dist. LEXIS 2816 at *2. In so doing, the Circuit Clerk would have to provide electronic access to newly submitted complaints before her staff had accepted or rejected the complaint for filing, as the Illinois Supreme Court and a standing order from the Chief Judge of the Circuit Court of Cook County (the "Chief Judge") require her to do.[2]

10. Beyond the fact that the district court lacked subject matter jurisdiction to issue this mandatory injunction, the preliminary injunction order puts the Circuit Clerk in the classic no-win situation: she must either violate the Illinois Supreme Court's Electronic Filing Standards and Principles and Order 2014-02 from the Circuit Court of Cook County or violate the preliminary injunction.

11. To seek relief from this situation, the Circuit Clerk asks this Honorable Court to stay the district court's January 8, 2018 preliminary injunction order until this Court has decided the Circuit Clerk's appeal of the preliminary injunction.

## APPLICABLE LEGAL STANDARD FOR THIS MOTION TO STAY

[2] *See* Electronic Filing Standards and Principles from the Illinois Supreme Court amended September 16, 2014 ("Electronic Filing Standards and Principles"). (R. 19-3.) *See also* General Administrative Order 2014-02 dated June 13, 2016 from the Circuit Court of Cook County ("Order 2014-02"). (R. 19-2.)

12. Both the United States Supreme Court and this Court have recognized that under Federal Rule of Civil Procedure 62(c) in the district court and under Federal Rule of Appellate Procedure 8(a) in this Court, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (same).

13. In this regard, this Court reviews the district court's legal conclusions *de novo*. *Kiel v. City of Kenosha*, 236 F.3d 814, 815 (7th Cir. 2000).

14. The Circuit Clerk meets all of the *Hilton* factors.

15. For the reasons set forth below, Defendants are likely to succeed on the merits of their claim that the district court lacked subject matter jurisdiction under the *Younger* abstention doctrine and that the First Amendment does not require immediate access in contravention of reasonable processing rules.

16. Without a stay, the Circuit Clerk will be irreparably injured in that she has been given conflicting directives from the State and federal courts regarding the processing of electronically filed complaints. A stay will provide time for this Court to decide this appeal and resolve the existing conflict through a proper application of *Younger*.

17. The issuance of a stay will not harm CNS or anyone else. The Circuit Clerk currently provides access to 90.9% of electronically filed complaints within one business day. This percentage is less than the number of electronic complaints processed in one business day in *Courthouse News Serv. v. Yamasaki*, 2017 U.S. Dist. LEXIS 132923 (C.D. Cal. August 7, 2017),[3] a case where the district court rejected CNS' claim that the First Amendment requires immediate access for 100% of complaints electronically filed, regardless of court filing rules.

18. Resolving the conflicting directives that the Circuit Clerk must follow would best serve the public interest.

## THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM ENTERING THE PRELIMINARY INJUNCTION ORDER

19. Pursuant to Illinois Supreme Court's Electronic Filing Standards and Principles and Order 2014-02, the Circuit Clerk's practice is to determine whether newly filed complaints contain documents that the Illinois courts have excluded before providing anyone with access to such documents. Following this practice, the Circuit Clerk provided Plaintiff with access to 90.9% of newly filed complaints within one business day of submission.[4] Despite this fast turnaround, Plaintiff filed

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[3] CNS filed a notice of appeal in Yamasaki to the Ninth Circuit. *See Courthouse News Service v. Yamasaki*, 17-56331. That appeal is currently pending.

[4] This calculation of 90.9% is based upon records that CNS attached to its own memorandum of law in support of its motion for preliminary injunction. (R. 7.) By way of comparison, the PACER search page on the federal district court website states that "[n]ewly filed cases will typically appear on this system within 24 hours. Check the Court Information page for data that is currently available on the PCL. The most recent data is available directly from the court." Under the preliminary injunction order, the Circuit Clerk is being held to a more rigorous standard than the one that the federal courts employ.

a complaint asking the district court to declare that the Circuit Clerk's practice of performing the "accept/reject function" violated the First Amendment. (R. 1.)

20. Significantly, CNS did not sue the Administrative Office of the Illinois Courts ("AOIC") or the Chief Judge and did not challenge the constitutionality of the "accept/reject requirement" in the Illinois Supreme Court's Electronic Filing Standards and Principles and Order 2014-02 even though the AOIC and the Chief Judge promulgated the rules at issue here.

21. Instead, CNS challenged the Circuit Clerk's practice of the following the "accept/reject requirement" that the Illinois courts require. Under the *Younger* abstention doctrine, the district court should not have exercised jurisdiction over Plaintiff's motion for preliminary injunction or any other motion in this case.

22. The Circuit Clerk is the highest non-judicial member of the State court judiciary in Illinois. *Drury v. County of McLean*, 89 Ill. 2d 417, 420 (1982). The Circuit Clerk is a State officer. *Id.* And as *Drury* shows, the Circuit Clerk is duty bound to follow the orders of the Illinois courts.

23. Here, the Illinois courts have ordered the Circuit Clerk to follow the practice of accepting or rejecting newly filed complaints before providing the press or anyone else with access to such complaints. (R. 19-2, ¶2(c); R. 19-3.) Under the *Younger* abstention doctrine, the district court should not have heard any First Amendment challenge to this practice.

24. The First Circuit has recognized that while the *Younger* abstention doctrine would not require abstention to a constitutional challenge to a state

statute, it would require a federal court to abstain from a constitutional challenge to ongoing state proceedings or practices. *Planned Parenthood League v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989).

25. The Circuit Clerk filed an answer and affirmative defenses where she raised lack of subject matter jurisdiction as an affirmative defense to this lawsuit. (R. 17.)

26. Here, CNS did not bring a constitutional challenge to a statute or a rule. Instead, CNS challenged the constitutionality of the practice of a State court officer processing the filing of complaints in civil cases pursuant to ongoing State court rules. Under *Younger*, the district court should have abstained from hearing this challenge and allowed an Illinois court to do so *See Welch v. Johnson*, 907 F.2d 714, 722, n. 8 (7th Cir. 1990), *citing Martinez v. California*, 444 U.S. 277, 283, n. 7 (1980) (recognizing that State courts have concurrent jurisdiction over Section 1983 claims).

27. In *Belotti,* the district court abstained from hearing a constitutional claim challenging a Massachusetts statute regulating abortion. The First Circuit noted that the district court:

> based its decision on the assumption that it was being asked to interfere directly with state court practices. . . . Thus, the district court erroneously relied on *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980). where the federal court was asked in effect to monitor "the manner in which state juvenile judges conducted contempt hearings in non-support cases," *id.* at 8, and on *O'Shea v. Littleton*, 414 U.S. 488 (1973), where the federal court was expected to see to it that a county magistrate and judge stopped their practices in setting bonds arbitrarily, imposing harsher than usual sentences, and requiring payment for jury trials for black plaintiffs. Under the defendants'

> characterization of the nature of this litigation, accepted by the court, these authorities might be applicable. But these cases were not statutory challenges, and thus the acceptable remedy of invalidating the statute was not available. *O'Shea*, 414 U.S. at 500; *Parker*, 626 F.2d at 6. The instant case challenges the statute as unconstitutional. This is therefore not a case threatening interference with ongoing state proceedings or practices.

*Bellotti*, 868 F.2d at 467.

28. Like the Plaintiff's challenge to the Circuit Clerk's practice of performing the "accept/reject requirement," the constitutional challenges in *O'Shea* and *Parker* were challenges to State court practices. In *O'Shea* and *Parker*, the United States Supreme Court and the Sixth Circuit abstained from hearing such constitutional challenges. The district court below should have done likewise. It did not.

29. The district court instead decided CNS' preliminary injunction motion and found that CNS was likely to succeed on the merits of its First Amendment challenge. *Courthouse News Service*, 2018 U.S. Dist. LEXIS 2816 at *16-*17. *See also Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978). In *Nixon*, the United States Supreme Court stated that "[i]t is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files." *Id.*

30. The Circuit Clerk submits that the First Amendment is not absolute and does not prohibit State courts from employing practices to ensure that exempt documents, such as those set forth in ¶2(c) of Order 2014-02, are not improperly filed.

31. The most recent case to consider whether the First Amendment confers an immediate right of access to electronically submitted complaints is *Yamasaki*, which rejected CNS' First Amendment claim to such immediate access.

32. In *Yamasaki*, as in the present case, CNS argued that it was entitled to immediate access to complaints submitted electronically before the Clerk of the Court in Orange County, California had an opportunity to review the filed submissions to ensure that they complied with California law. The record in *Yamasaki* shows that 89.2% of the complaints electronically submitted were available for review within one business day. 96.5% were available for review within two business days and 98.5% were available for review within three business days. The district court noted that these "minor delays . . . simply do not constitute a First Amendment violation." *Yamasaki*, 2017 U.S. Dist. LEXIS 132923 at *10. *Yamasaki* is on point and dispositive here.

33. The percentage of complaints made available within one, two and three business days in *Yamasaki* and the Circuit Clerk's office here are virtually identical: 89.2%, 96.5% and 98.5% respectively in *Yamasaki* and 90.9%, 94.7% and 96.8% respectively in the instant case. The Circuit Clerk submits that *Yamasaki* is persuasive authority that this Court should follow.

34. Nonetheless, in denying the motion to stay, the district court stated:

> What is actually afoot is a system, effectively created by Brown herself, in which *all* e-filed complaints are treated as having been filed under seal until Brown herself clears them for public access. Brown cannot end-run the First Amendment by creating a system in which hypothetical doubt regarding whether litigants comply with rules

> about redaction allow her to exclude the public from access to judicial proceedings until she is good and ready to provide it.

(R. 44 at p. 6.)

35. This finding wholly misses the mark. The district refers to the Circuit Clerk's practice of completing the "accept/reject function" before providing a newly filed complaint to the public, including the media. The district court claims that the Circuit Clerk created this system. She did not. The Illinois Supreme Court and the Chief Judge did.

36. And the Circuit Clerk has not and does not seek any "end-run" around the First Amendment. The Circuit Clerk acknowledges that First Amendment interests are in play. She also has raised federalism concerns which should have resulted in the courts of Illinois -- under *Younger* and *O'Shea*, the proper forum for constitutional challenges to State court sanctioned procedures for processing filings -- adjudicating CNS' First Amendment claims.

37. In any event, the district court should not have decided whether CNS would likely succeed on the merits of its First Amendment claim. It should not have heard the case at all. And by hearing the case, the district court not only disregarded *Younger* but also created a situation where federal and State courts advance conflicting directives to the Circuit Clerk.

## THE CIRCUIT CLERK'S DILEMMA

38. The computer system in the Circuit Clerk's office does not currently have a read function that allows users -- be they press or the general public -- to see filed images on the internet. In order for Plaintiff or other users to be able to

download complaints filed electronically, the Circuit Clerk's computer system will need a significant upgrade. The district court found that the Circuit Clerk waived this argument as she first raised it in her motion to stay in the district court. (R. 44 at p. 4.) This Court has "repeatedly held that a party waives an argument by failing to make it before the district court." *G&S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012), *citing Hayes v. City of Chicago*, 670 F.3d 810, 815 (7th Cir. 2012).

39. The district court makes a slightly different point: it found that the Circuit Clerk did not raise this issue fast enough. The fact that the Circuit Clerk's computer system needs an upgrade is possibly germane to CNS' motion for preliminary injunction. However, the Circuit Clerk's response to that motion focused on two points which have been repeated here: (1) under *Younger*, the district court lacked subject matter jurisdiction over the preliminary injunction motion and (2) the First Amendment right that CNS advanced was neither as broad or as absolute as CNS claimed.

40. The need to upgrade the Circuit Clerk's computer system is relevant to her motion to stay because she seeks to stay the preliminary injunction until this Court decides her appeal and the federal and State court directives are harmonious. As the district court should have abstained under *Younger*, the Illinois courts should decide CNS' First Amendment claim as a matter of law. In terms of administration of the Illinois court system, *Younger* also shows that the Illinois

Supreme Court and the Chief Judge should provide the Circuit Clerk with direction on how to administer the processing of electronically filed complaints.

41. Furthermore, in its denial of the motion to stay, the district court seems to qualify its preliminary injunction order to allow the Circuit Clerk to provide electronically filed documents at a carrel in her office, seeming to recognize the Illinois court rule in this regard.

42. In any event, it is undisputed that the district court directed the Circuit Clerk to provide Plaintiff and the public with "timely, contemporaneous access to the complaints upon filing." *Courthouse News Service*, 2018 U.S. Dist. LEXIS 2816 at *2.

43. With respect to implementing the district court's preliminary injunction order, the Circuit Clerk faces several practical problems. The primary problem is this: the contemporaneous requirement in the preliminary injunction cannot be reconciled with the rules of the Illinois Supreme Court and with the standing order of the Chief Judge.

44. Both State court orders require the Circuit Clerk to complete the "accept/reject function" before providing a newly filed complaint to the public, including the media.

45. In Illinois, the rules of statutory construction apply to the interpretation of Illinois Supreme Court Rules. *In re Estate of Rennick*, 181 Ill. 2d 395, 404 (1998). The goal is "to ascertain and give effect to the intention of the drafters of the rule." *Id.*, *citing Croissant v. Joliet Park Dist.*, 141 Ill. 2d 449, 455

(1990). As with statutes, the language of the rule is the "most reliable indicator of intent is the language used, which should be given its plain and ordinary meaning." *Rennick*, 181 Ill. 2d at 405.

46. Applying those principles here to the Electronic Filing Standards and Principles and Order 2014-02, complaints that are electronically submitted to the Circuit Clerk are not officially "filed" until the Circuit Clerk's office determines that they do not contain excluded documents. The Chief Judge's order, 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).) Pursuant to Illinois law, the Circuit Clerk must determine whether newly submitted complaints have attachments that are prohibited.

47. Another problem is this: 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. 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 has ordered the Circuit Clerk to devote all its available 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 accept/reject function. It is currently the accept/reject function that initiates the computer system to allow access to the electronically submitted document.

48. The district court found that the Circuit Clerk's reading of the Supreme Court's December 22, 2017 "order unsupportable." (R. 44 at p. 5.) In this regard, the district court stated that "the order does not say that Brown must devote *all* her resources to getting an e-filing system up and running; rather it says that she must commit all *necessary* resources to this." (*Id.*) (emphasis in the original).

49. The district court misses the point and, in so doing, shows just how far the district court litigation has strayed from the moorings of *Younger*. Under *Younger, O'Shea* and *Parker*, the district court should not have heard CNS' First Amendment challenge to state court filing procedures that the Illinois Supreme Court and the Chief Judge have directed.

50. Whether or not the district court has correctly interpreted the Illinois Supreme Court's December 22, 2017 order is not the issue. Under *Younger* and *O'Shea*, the district court should not have interpreted it at all.

51. The Circuit Clerk contends that the preliminary injunction should have been denied and now asks this Court to overturn that ruling. However, as this Court's preliminary injunction has full force and effect, the Circuit Clerk has filed a

petition with the Illinois Supreme Court and has sent the letter to the Chief Judge asking for permission to disobey their current rules to comply with this Court's preliminary injunction order.

52. 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. 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.

(R. 35-1.) [5]

53 Moreover, under the current design of the computer system in the Circuit Clerk's office, complaints that need to be sealed cannot be sealed until the "accept/reject function" is completed.

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[5] At the presentment of the motion to stay in the district court on February 6, 2018, Defendants' counsel misstated the date on which the Circuit Clerk petitioned the Illinois Supreme Court. Defendants' filed a motion to correct the record to reflect that the Circuit Clerk filed this petition on January 26, 2018. (R. 35-1; R. 38.) On February 13, 2018, the district court granted the motion to clarify the record. (R. 45.)

54. On January 29, 2018, the Circuit Clerk sent a letter to the Honorable Timothy Evans, the Chief Judge of the Circuit Court of Cook County. A copy of this letter is attached as Exhibit B. In this letter, the Circuit Clerk states, 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.

(R. 35-2.)

55. As things currently stand, the Circuit Clerk is subject to court orders from the district court, the Illinois Supreme Court and the Chief Judge that make contrary demands upon the Circuit Clerk. Obeying one will violate the other.

56. The Circuit Clerk could provide "timely, contemporaneous access" to electronically submitted complaints or she could perform the "accept/reject function" as set forth in the Electronic Filing Standards and Principles and Order 2014-02 before providing electronic access to newly submitted complaints. But she cannot comply with the orders from the district court and the Illinois courts at the same time.

57. The Circuit Clerk, therefore, seeks instruction from this Court, the Illinois Supreme Court and/or the Chief Judge regarding the provision of access to electronically submitted complaints. For the Circuit Clerk to comply with all orders from the federal and Illinois courts, such orders must be consistent. They currently are not.

58. The district court found that "the public's interest in maintaining its right of access to judicial proceedings counsels against the entry of a stay." (R. 44 at p. 7.) The Circuit Clerk currently provides access to 90.9% of newly filed complaints within one business day of submission. (R. 7.) The record is devoid of any evidence of harm to the public due to the 24 hour processing period. However, conflicting directives from the federal and State courts regarding the rules for processing the filing of complaints actually harms the public interest because it muddles the operation of the State court system.

59. Consequently, the Circuit Clerk respectfully asks this Honorable Court to stay the district court's preliminary injunction order of January 8, 2018 until this Court has had an opportunity to consider the Circuit Clerk's appeal.

WHEREFORE, Dorothy Brown, Clerk of the Circuit Court of Cook County, respectfully requests that this Honorable Court stay the district court's January 8, 2018 preliminary injunction order pending this Court's resolution of the Circuit Clerk's appeal.

Dated: February 13, 2018

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Paul A. Castiglione, Assistant State's Attorney, hereby certify that on February 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I also certify that I sent the forgoing via U.S. Mail by depositing it on February 13, 2018 at 500 Richard J. Daley Center, Chicago, Illinois 60602 prior to 5:00 p.m.

/s/ Paul A. Castiglione

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