No. 21-2632

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COURTHOUSE NEWS SERVICE,
Plaintiff-Appellant,

v.

JOAN M. GILMER, IN HER OFFICIAL CAPACITY AS CLERK OF THE CIRCUIT COURT OF ST. LOUIS, COUNTY MISSOURI, AND KATHY S. LLOYD IN HER OFFICIAL CAPACITY AS STATE COURTS ADMINISTRATOR FOR THE MISSOURI OFFICE OF STATE COURTS ADMINISTRATOR *et al*.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, The Honorable Henry E. Autrey

BRIEF OF APPELLEES GILMER AND LLOYD

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SUMMARY OF THE CASE

Do courts violate the Constitution unless they provide the press with access to case initiation documents before a clerk accepts the filing? Of course not. The district court properly abstained from exercising jurisdiction over a § 1983 suit by a California corporation alleging that Appellees Gilmer and Lloyd (Missouri court officials) have violated its First Amendment right to access civil pleadings. This Court has counseled against using the federal equitable power to interfere and supervise day-to-day operations of state courts, and the Court should join the Seventh Circuit by finding that abstention is proper.

Even if this were not enough, the Supreme Court validated this Court's guidance by holding that *Ex Parte Young* cannot be used to "supervise 'the operations of government' and reimagine from the ground up the job description of [Missouri] state-court clerks." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). As a result, the doctrine of sovereign immunity bars this suit. Moreover, this Court has never recognized a "First Amendment right of public access to the court file in civil proceedings" and should not now. *Flynt v. Lombardi*, 885 F.3d 508, 513 (8th Cir. 2018). Appellees request 20 minutes for argument.

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JURISDICTIONAL STATEMENT

This case involves Courthouse News Service, Inc., a California corporation, and two Missouri government officials, in their official capacities. As a result, it is a suit between a citizen of California and the State of Missouri. The Eleventh Amendment provides in relevant part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. CONST. AMD. 11. The Supreme Court has clarified the sovereign immunity bars suits against state court clerks acting in their official capacities. *Whole Woman's Health*, 142 S. Ct. at 532 (2021). Because the district court lacked jurisdiction, this Court lacks jurisdiction.

INTRODUCTION

States and their courts have long occupied a special place in the constitutional order. In 1793, the Supreme Court of the United States held that two South Carolina citizens (as executors of a British creditor) could sue the State of Georgia. *Chisholm v. Georgia*, 2 Dallas (2 U.S.) 419, 420 (1793). This affront to State sovereignty "literally shocked the Nation" and "five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams" ending such practices. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974). Even after the Fourteenth Amendment and section 1983 were enacted (provisions aimed at providing federal forums to vindicate federal rights), sovereign immunity is still the rule. Even though injunctions against state executive officers would lie, "an injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. 123, 163 (1908) (emphasis in original). A few weeks ago, the Supreme Court reaffirmed that "a pre-enforcement action for injunctive relief against state-court clerks" does not lie. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021).

Courthouse News essentially asks federal courts to superintend how Missouri effects a uniquely sovereign interest—providing a forum to resolve its citizens' disputes. Missouri courts built their own information technology systems that ensure the orderly processing of cases, from submission to judgment, via electronic means. Once a petition is accepted by the clerk's office, the public and press have equal access to the official court record through Case.net and public access terminals in local courthouses. But that is not good enough for plaintiff. Courthouse News has requested an "online press queue" to view submitted petitions remotely and on receipt—before those petitions have even been processed (*e.g.*, assigning a case number). JA 28, R. Doc. 1-1.

As two state officials are sued in their official capacities only, this is a suit against Missouri over the very machinery enabling the orderly administration of Missouri's courts—a duty solemnly entrusted to the Supreme Court of Missouri. MO. CONST. ART. V, § 4. Thus the doctrine of sovereign immunity applies, and the federal equitable power does not extend to enjoin state courts from proceeding in their own way to exercise jurisdiction. *Ex parte Young*, 209 U.S. at 163. It is easy to see why here.

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Despite assertions that Missouri courts have a practice of withholding access or a no access policy, JA 609, R. Doc. 47, at 4, the electronic receipt and processing of petitions to initiate a case is governed by a host of Missouri Supreme Court rules, Court Operating Rules, and state law that ensure both order and access. Intuitively, a received petition does not initiate a case or begin the official court record until a clerk has processed and accepted it. And once filed, the public and press have immediate access to the official court record. So the harms that Courthouse News claims, delayed access, necessarily show that, if successful, a federal district court would ultimately be charged with determining how, where, and when access to petitions will occur and how *adequately* the State performed those goals. If deemed insufficient, what would stop the federal court from ordering the purchase of new equipment, hiring more staff, or upgrading to cloud computing? Nothing.

The district court correctly saw that the alleged constitutional violation, failing to provide "[c]ontemporaneous access to new civil petitions," JA 7, R. Doc. 1 at 7, and the requested relief, to end Missouri court "policies and practices of denying access to petitions until after administrative processing," JA 25, R. Doc. 1 at 25, implicate important

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principles of "equity, comity, and federalism," Add. 20, JA 625, R. Doc. 47 at 19. The court also correctly surmised that any relief would require "dictat[ing] to, oversee[ing], or otherwise insert[ing] itself into the [] operations and administration of its co-equal Missouri state courts." *Id.* Recognizing comity's "special force" when constitutional issues implicate "how state courts should conduct their business," the district court properly abstained and dismissed the case. Add. 21, JA 626, R. Doc. 47 at 20 (quoting *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020), *as corrected* (Mar. 23, 2020) (citing *Courthouse News Ser. v. Brown*, 908 F.3d 1063, 1074 (7th Cir. 2018))).

Even if allowed to proceed, this suit is futile because the Constitution does not require instant access at the taxpayers' expense. Courthouse News has not shown that there is a history of providing the public access to unfiled petitions and providing public access on receipt does not further the function of processing the petition. *See IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n. (8th Cir. 2013). Instantaneous public access to court filings, especially complaints, could impair the orderly filing and processing of cases with which clerk's offices are charged. Holding otherwise would transform interruptions in service or an errant,

unreadable file from nuisances to constitutional violations. This Court should affirm the district court and refuse to hand public administration of Missouri's case filing and docketing systems over to a private news organization.

STATEMENT OF THE ISSUES

1. Whether a complaint that requests prospective, injunctive relief against the machinery of Missouri's judiciary, without the threat of commencing an unconstitutional enforcement action against Courthouse News Service, is within the judicial power of the United States?

- *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021)
- *Ex parte Young*, 209 U.S. 123 (1908)
- *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)

2. Whether the district court properly abstained from exercising jurisdiction based on the "principles of equity, comity, and federalism" that this Court has explained has "special force" when the case involves the administration and functioning of Missouri's courts?

- *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018)
- *Courthouse News Ser. v. Brown*, 908 F.3d 1063 (7th Cir. 2018)

- *Courthouse News Serv. v. Planet*, 750 F.3d 776, 781 (9th Cir. 2014)
- *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 563 (E.D. Va. 2020)

3. Whether the First Amendment's qualified right to open criminal proceedings requires Missouri to give the press worldwide, instantaneous access to newly filed civil petitions that have not been accepted by Missouri's courts?

- *Flynt v. Lombardi*, 885 F.3d 508 (8th Cir. 2018)
- *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n. (8th Cir. 2013)
- *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371 (8th Cir. 1990)
- *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 327 (4th Cir. 2021)

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STATEMENT OF THE CASE[1]

A. Missouri courts provide public access to filed documents.

In 1998, Missouri launched a web-based public access portal, Case.net, as part of its statewide Justice Information System. JA 182, R. Doc. 28-1, at 2. Over the past twenty years, Missouri courts have created a separate eFiling application and developed a replacement for the Justice Information System. *Id.* The Missouri Supreme Court and the Missouri Court Automation Committee have guided and implemented this wave of modernization.

The Missouri Supreme Court "shall have general superintending control over all courts and tribunals," including a "[s]upervisory authority over all courts." MO. CONST. ART. V, § 4. It "may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." MO. CONST. ART. V, § 5. Using this rule making authority, Court Operating Rule (COR) 4 requires the use of the statewide court

[1] On review of a motion for judgment on the pleadings, the factual allegations are viewed in the light most favorable to the nonmoving party, Courthouse News, and do not constitute admissions of fact. Additional facts not pleaded in the complaint (*e.g.*, citations to Missouri rules and law) provide context.

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automation system as the "uniform record keeping system for the circuit court and is mandatory as to the form, style, and maintenance of records dealing with" case records. It also sets forth express requirements of filing, docketing, and indexing cases. COR 4. COR 4.24 states that "[c]onfidential records shall be maintained so as to be inaccessible to the general public," and designates filing information sheets (the documents that determine the case type and security level) as confidential. COR 2 specifically addresses Public Access to Records of the Judicial Department. The general policy reflects that "[r]ecords of all courts are presumed to be open to any member of the public . . . during the regular business hours of the court having custody of the records." COR. 2.02. The rule expressly states what indices and information related to case records are available and that this information is available at public access terminals at each courthouse or possibly remotely. COR 2.04. It also provides for the orderly review of information requests and the review of an access denial request. CORs 2.08 & 2.09.

COR 27.01 and the General Assembly empower the Missouri Court Automation Committee to "develop and implement a plan for a statewide court automation system." Mo. Rev. Stat. § 476.055.3 The Committee's

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members include 10 judges (including the chief justice of the Missouri Supreme Court), four legislators, four court employees, the commissioner of administration,[2] and four attorneys. Mo. Rev. Stat. § 476.055.2. Section 476.055 funds the Committee, provides for the use of those funds, requires progress reports to the General Assembly, and mandates that the court automation system to be "implemented, operated and maintained in accordance with strict standards for the security and privacy of confidential judicial records." Knowingly releasing confidential information or judicial records are criminal offenses. Mo. Rev. Stat. § 476.055.5.

Supreme Court Rule 103 provides authorization for electronic filing, requires attorneys to use the electronic filing system, and sets out how certain procedures will be achieved through electronic means, like issuing the summons. *See* Mo. S. Ct. R. 103.10. It also makes clear that "[w]hen a court accepts an electronic document for filings, the electronic document is the official court record." Mo. S. Ct. R. 103.03(a). Rule 103.06 (e) &(f) also spell out that a "document is submitted for filing when

[2] This is an executive officer appointed by the Governor, Mo. Rev. Stat. § 37.010, and not Administrator Lloyd.

the electronic filing system receives the document and sends a confirmation receipt to the filer," and that this submission must still be accepted by the clerk to be considered filed at the "date and time the electronic filing system received the document." COR 27 sets forth who may register for electronic filing privileges—currently only attorneys may eFile.

Thus the Supreme Court of Missouri is responsible for the rules and policies that govern electronic filing and access to case records and the Missouri Court Automation Committee implements and devises the automation systems to adhere to those rules. Together, the three main systems (Case.net, eFiling, and the uniform records keeping system) provide the information technology that enable Missouri Courts to fulfill their constitutional duties and provide access to public case records.

B. Courthouse News files suit for instant access to unfiled petitions on receipt.

Courthouse News is a California corporation[3] that provides nationwide news on civil litigation. JA 11, R. Doc. 1, at 11. It initially

[3] The California Secretary of State's office shows that Courthouse News is a domestic stock corporation under California law. Cal. Sec. of State, Business Search-Entity Detail (visited Jan. 10, 2021), available at

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focused on the U.S. District Court for the Central District of California, but as it grew, it expanded its coverage throughout California and gradually to include civil litigation in all 50 states. JA 69–70. Courthouse News began reporting on St. Louis County Circuit Court around 2005. JA 15, R. Doc. 1, at 15. At that time, the intake counter in the Clerk's Office permitted reporters to review paper petitions that were in a bin waiting to be reviewed and docketed by the clerks. *Id.* Courthouse News could report on cases of interest that were filed each day as desired and refers to the paper-bin intake procedure "traditional press access to paper filings." JA 15–16, R. Doc. 1, at 15-16.

When St. Louis County Circuit Court switched to eFiling, in 2013 or 2014, reporters had to wait until the clerk processed the electronic document to access the petition. Br. 7. According to Courthouse News, this change results in delayed access because new petitions sit in an electronic queue waiting to be reviewed, assigned a docket number, and accepted (collectively "processed") by clerks. Br. 8. On appeal, Courthouse News does not allege any unconstitutional access delays after

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https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=01909963-4632387. The Court may judicially notice state records maintained on a state government website.

processing. The California corporation represents that this policy of "withholding petitions" until processing means that only 5% of petitions filed in 2020 were available the same day, 40% of petitions were available within four days, and the rest were delayed by at least a week. Br. 7.

On January 8, 2021, Courthouse News contacted Clerk Gilmer and Administrator Lloyd requesting an online "press queue in order to review and report on filings." JA 28, R. Doc. 1-1. The letter noted that "it is highly practicable to provide the press corps with access to new public court filings when they are received which is when they are filed and when the First Amendment right of access attaches." *Id.* Courthouse News noted that it would resolve "two outstanding First Amendment issues," the first being the "no-access-before-process policy" and the second being that once processed, attorneys may view the actual filings online but reporters must do so at a public access terminal in a courthouse.[4] JA 28, R. Doc. 1-1.

On March 3, 2021, Administrator Lloyd's office responded that Missouri courts do not have the "ability in our current system to give access to new cases filed prior to clerk acceptance." JA 31, R. Doc. 1-2.

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[4] Courthouse News does not appear to have raised this second claim here.

The response explained that the electronic filing system was built by Missouri and that the newly filed cases "are not available to anyone until after a clerk has accepted the petition" and that the clerk assigns case security (determining whether the petition is confidential) at acceptance. *Id.* The office further noted that "requests for changes to the electronic filing system must be submitted and approved by the Missouri Court Automation Committee." *Id.* Courthouse News did not avail itself of that opportunity. JA 264, Tr. 21:9–10.

Two days later, Courthouse News filed suit under 42 U.S.C. § 1983 alleging that St. Louis County Circuit Court denying access to electronic petitions until administrative processing results a deprivation of its "right of access to public court records secured by the First Amendment to the U.S. Constitution." JA 24, R. Doc. 1, at 24. It sued St. Louis County Circuit Court Clerk Gilmer and Administrator Lloyd of the Missouri Office of State Courts in their official capacities. JA 11–12, R. Doc. 1, at 11–12. The complaint alleged that these defendants "are directly involved with and/or responsible for the delays in access to new petitions experience by Courthouse News." JA 12, R. Doc. 1, at 12. The one-count

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complaint requested only prospective declaratory and injunctive relief. JA 20, R. Doc. 1, at 20.

Administrator Lloyd's office is provided for in article V, § 4 of the Missouri Constitution and empowered by Supreme Court Rule 82.03. "Under the authority and supervision of this Court," she "[p]romulgate[s] and administer[s] the administrative methods and systems adopted by this Court for use in the office of the clerks of the various state and municipal courts." Mo. S. Ct. R. 82.03(a)(1). Her other duties (prepare budgets, develop judicial education, and administer payments for the maintenance and operation of the courts) show her position is essential to Missouri courts' daily functioning. *Id.* at 82.03(a).

Clerk Gilmer's office is created by Missouri statute, and given all powers by Missouri law and the exercise of St. Louis County's charter powers.[5] Mo. Rev. Stat. § 483.015.2 & § 483.015.3; St. Louis Cnty. Charter art. IV, § 4.440. The officer is appointed by the circuit and associate circuit judges, St. Louis Cnty. Charter art. IV, § 4.430, and her office is integral to carrying out the business of the circuit courts,

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[5] Charter powers are the "vesting and exercise of [state] legislative power pertaining to any and all services and functions of any municipality or political subdivision." MO. CONST. ART. VI, § 18(c).

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including supervising all matters relating to the clerical and administrative personnel of the circuit court, *id.* at § 4.440.

After answering, Missouri moved to dismiss the suit under Rule 12(c) alleging that Courthouse News had failed to state a claim and that the district court should abstain from exercising jurisdiction. JA 187, R. Doc. 29. Missouri argued that the requested relief would violate principles of comity and federalism by "interject[ing] the federal courts into the day-to-day operation of the Missouri state courts." JA 193, R. Doc. 30, at 5. It explained that like the Seventh Circuit in *Courthouse News Service v. Brown*, 908 F.3d 1063 (7th Cir. 2018), the district court should abstain from exercising jurisdiction. *Id.* Courthouse News opposed and moved for a preliminary injunction[6] claiming that they had decidedly shown that the delay in administrative processing electronic petitions violated the "experience and logic" test used to evaluate First Amendment violations. JA 46, 60, & 224, R. Docs. 17; 17-1, at 8; 42.

The district court granted Missouri's Rule 12 motion and abstained from exercising jurisdiction. JA 626, R. Doc. 47, at 21. In its opinion, the

[6] Courthouse News has not argued for a preliminary injunction on appeal and has abandoned that relief on appeal.

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court primarily addressed two similar *Courthouse News* suits that resulted in conflicting decisions, a Ninth Circuit opinion holding that a federal district court cannot abstain and a Seventh Circuit opinion holding that a federal district court must abstain. *Compare Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014) (*Planet I*), *with Brown*, 908 F.3d 1075. In the end, the court sided with the Seventh Circuit's analysis, applying "the principles of equity, comity, and federalism," JA 624, Add. 19, R. Doc. 47, at 19. , that this Court has found have "special force when federal courts are asked to decide how state courts should conduct their business," JA 625, Add. 20, R. Doc. 47, at 20 (quoting *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020)). It also noted that the Supreme Court of the United States' electronic filing system does not provide instant access to court filings and refused to hold Missouri court clerks to a higher standard. JA 625, Add. 20, R. Doc. 47 at 20.

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SUMMARY OF ARGUMENT

After the district court's decision, the Supreme Court clarified that the federal equitable judicial power does not extend to state court clerks in their official capacities. *Whole Woman's Health*, 142 S. Ct. at 532. Without *Ex Parte Young*'s equitable exception, sovereign immunity bars suit. That makes sense here. The suit is not about these two state officials formulating policy that allegedly violates the First Amendment. These two state officials do not generally make policy decisions—they are administrators that implement the Missouri Supreme Court's rules and operating rules for Missouri courts. The real alleged dispute is between Courthouse News and Missouri's judiciary. The Eleventh Amendment makes clear that the "judicial power" does not extend to these suits. Or as recently explained, Article III does not "confer on federal judges some 'amorphous' power to supervise 'the operations of government' and reimagine from the ground up the job description of [Missouri] state-court clerks." *Whole Woman's Health*, 142 S. Ct. at 532 (quoting *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

This clarification also supports that the district court properly found that it must abstain from this suit between a California corporation

and the State of Missouri—for the right reason: exercising jurisdiction violated principles of equity, comity, and federalism. By agreeing with the Seventh Circuit, the district court did not forsake this Court's precedents. It heeded this Court's guidance that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Dixon*, 950 F.3d at 1056. A federal court ordering a state court to engineer and add new digital applications to the state court's filing system intrudes on State's sovereign prerogative to order its internal operations.

This Court may also affirm the district court because the First Amendment does not require instant access to unfiled Missouri petitions. This Court has never held that a qualified right of access to "certain criminal proceedings, preliminary hearings, criminal trials, voir dire, and search warrant application[s]," *Flynt v. Lombardi*, 885 F.3d 508, 513 (8th Cir. 2018), applies equally to the docketing of civil petitions. Indeed, this Court has "rejected [a] plaintiff's arguments for a right of access based on the First Amendment, noting, '[t]his circuit has not decided whether there is a First Amendment right of public access to the court file in civil proceedings.'" *Id.* at 512 (quoting *IDT Corp. v. eBay*, 709 F.3d 1220, 1224

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n. (8th Cir. 2013)). Courthouse News has failed to allege that the public has historically had access to unfiled petitions and such public access serves no positive role and impairs the obvious judicial function—orderly filing and processing of cases.

ARGUMENT

I. Sovereign immunity bars Courthouse News's suit against Missouri.

Standard of review: The State pleaded that the "claims against Defendants are barred by the Eleventh Amendment and the doctrine of sovereign immunity." JA 43, R. Doc. 16, at 12. An "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman*, 415 U.S. at 678 (1974). Whether the Eleventh Amendment bars suit is a legal question decided de novo. *Div. of Emp. Sec., Missouri v. Bd. of Police Commissioners*, 864 F.3d 974, 978 (8th Cir. 2017).

A. Missouri is the real party in interest in this suit because it seeks to interfere with public administration and compel Missouri to change its court filing system.

States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715, (1999). Though

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explicitly referenced by the Eleventh Amendment, "States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed" before the Constitution and enjoy today. *Id.* The Eleventh Amendment also bars a suit against state officials when "the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

Here, the Court need look no further than the text of the Eleventh Amendment because this is a suit between a California corporation and two state court officials in their official capacities. JA 11–12, R. Doc. 1, at 11–12. And it can hardly be disputed that Missouri is the real party in interest. The complaint seeks for "Defendants to take advantage of the review queue technology and to cease the practice of denying access to new e-filed petitions until after they have been processed by court staff." JA 23, R. Doc. 1, at 23. Courthouse News does not allege that Appellees Gilmer and Lloyd have violated Missouri policy, rather that

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their acts "reflect the official policies and practices of the Defendants' offices." JA 12, R. Doc. 1, at 12.

These policies are set by the Missouri Supreme Court and the Missouri Court Automation Committee (largely made up of Missouri judges and court staff). By following these policies, the eFiling system is not engineered to permit the public (or anyone but court staff or the attorney filing the papers) to view newly submitted petitions that have not been processed by the clerks. *See* Mo. S. Ct. R. 103.03(a) (an accepted ""electronic document is the official court record."). So when the separate public access web-portal (Case.net) queries the eFiling application, newly filed petitions do not show up until the filing is accepted, the moment when data, such as the case number, can be reported. JA 182–184, R. Doc. 28-1, at 3-5 ("The identifying information such as case number and style of case does not exist in the [transit] queue. The docket codes identifying the type of documents are also assigned at acceptance."). Requiring Missouri courts to engineer (or purchase) new applications for its existing technology systems to accommodate Courthouse News's access request rejects the autonomy embedded in State sovereignty and interferes with the public administration of Missouri courts.

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B. The Court lacks jurisdiction because Section 1983 actions against Missouri state court clerks and the machinery of Missouri courts do not fall within the *Ex Parte Young* exception.

For States, sovereign immunity is the general rule. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). The Supreme Court has recognized a "narrow exception grounded in traditional equity practice" that allows "certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health*, 142 S. Ct. at 532 (citing *Ex parte Young*, 209 U.S. at 159–160 (1908)). "The doctrine is limited to that precise situation," *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011), and *Ex parte Young* expressly rejected that the federal equity power extended to proceedings against state courts, 209 U.S. at 163 ("an injunction against a state court would be a violation of the whole scheme of our government."). Thus the *Ex parte Young* exception to sovereign immunity does not apply here.

In *Ex parte Young*, a federal court enjoined the Minnesota Attorney General from enforcing a new Minnesota railroad rate statute that would "reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate

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return upon the property invested." 209 U.S. at 133. The next day, Attorney General Young violated the federal injunction by filing a mandamus action against the Northern Pacific Railway Company. *Id.* The federal court issued a show cause order and later held him in contempt. *Id.*

The Supreme Court explained that the case presented "an unconstitutional act of the state legislature and an intention by the attorney general of the state to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself." *Id.* at 149. In those circumstances, the Court asked whether those parties could seek a remedy from a federal court in equity to "obtain freedom from suits, civil or criminal." *Id.* In answering yes, the Court explained that when a state executive official seeks to enforce an unconstitutional law, that officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159–160. This "is simply an illegal act upon the part of a state official in attempting, by the use of

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the name of the state, to enforce a legislative enactment which is void because [it is] unconstitutional." *Id.* at 159.

Still, the Court stressed that the federal equitable power does not extend to certain suits. Specifically, "the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case before it, either of a civil or criminal nature." 209 U.S. at 163. The Court explained that an injunction will not issue against a grand jury, "part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government." *Id.* There is a "difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction," and federal courts must respect that difference. *Id.*

The Supreme Court recently reaffirmed this limitation on the federal equity power over state court clerks and judges. Abortion providers brought a pre-enforcement suit to enjoin "all [Texas] state-court clerks from docketing S. B. 8 cases and all [Texas] state-court judges from hearing them." *Whole Woman's Health,* 142 S. Ct. at 532.

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The Supreme Court explained that "traditional exception [to sovereign immunity] does not normally permit federal courts to issue injunctions against state-court judges or clerks." *Id.* In that case, no entry of an *ex ante* injunction preventing a state court from hearing cases should issue because an "an injunction against a state court or its machinery would be a violation of the whole scheme of our Government." *Id.* (quotations omitted).

During its discussion on the judicial power, the Court highlighted that "Article III [does not] confer on federal judges some 'amorphous' power to supervise 'the operations of government' and reimagine from the ground up the job description of Texas state-court clerks." *Whole Woman's Health*, 142 S. Ct. at 532. Clerks serve ministerial purposes, *i.e.*, they "serve to file cases as they arrive." *Id.* Like Missouri law, Texas law "directs state-court clerks to accept complaints and record case numbers." *Id.* Clerks have no power to refuse to file a complaint based on the merits of the claims. *Id.* The Court expressed concern that if federal courts could "prohibit[] state courts and clerks from hearing and docketing disputes between private parties" under particular laws then what would stop federal courts from enjoining other ministerial agents

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"like the postal carrier who delivers complaints to the courthouse?" *Id.* at 533.

These principles show that this action meets none of the circumstances that justify exercising federal equitable power. "[A] plaintiff may bring an action under Ex parte Young only when the defendant 'threaten[s] and [is] about to commence proceedings.'" *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 542 (2021) (Thomas, J., concurring) (quoting *Ex parte Young*, 209 U.S. at 156). Courthouse News did not sue because Missouri threatened to enforce an unconstitutional statute and compel it to defend against legal proceedings. The suit identifies no unconstitutional statute, claiming only that after moving to mandatory e-filing there was "a policy and practice of withholding access to new civil petitions until after they had been processed, or docketed, by court staff." JA 609, Add. 4, R. Doc. 47, at 4. Courthouse News did not initiate this suit to "obtain freedom from suits, civil or criminal." *Ex parte Young*, 209 U.S. at 163. Instead, the suit seeks to force Missouri courts to take jurisdiction and publish newly filed petitions on a timetable that meets Courthouse News's business demands. *See* JA 28, R. Doc. 1-1 ("The news in court filings is not unlike bread in that it is best consumed fresh,

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and after a day or two or three, it is stale indeed."). Courthouse News does not attempt to assert a defense that a statute is unconstitutional and that it cannot be subject to such an unlawful enforcement suit.

From the beginning, the Supreme Court has made clear that *Ex parte Young* does not apply to state courts, their clerks, and the "machinery" of state courts. The Court expressly characterizes the proper parties as "state executive officials." *Whole Woman's Health*, 142 S. Ct. at 532. Neither Clerk Gilmer nor Administrator Lloyd are "state executive officials"; they are both judicial administrative officers selected by and acting under the judiciary's authority. *See* Mo. S. Ct. R. 82.03. They both follow Missouri court rules, state law, and judicial directions in performing their duties. Although their various duties may at times involve discretion, that discretion does not involve enforcing state law against Courthouse News.

Although *Whole Woman's Health* involved whether state court clerks could be sued to contest the constitutionality of a legislative act, the Court's concern that the federal equitable power would unduly interfere with the administration of state courts carries more force here. *See* 142 S. Ct. at 533. Courthouse News seeks an injunction compelling

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Missouri courts to change how they handle the intake and processing of new petitions. This effects the procedures for determining whether a petition should be confidential, JA 183, R. Doc. 28-1, at 4, and Missouri's vital interests in maintaining the confidentiality of these filings, *see* Mo. Rev. Stat. § 476.055.6. An injunction requiring that Missouri either build or purchase a "press queue" for the press to view petitions before processing invades the State's prerogative to govern its courts. If Courthouse News succeeds, would a federal court order Missouri courts to require paper filings, again? Or hire more clerks to process petitions more quickly? This kind of interference walks headlong into the Supreme Court's warning that federal courts may not "reimagine" clerical duties in state courts. *Whole Women's Health*, 142 S. Ct. at 533.

Courthouse News's requested relief to compel the actual machinery of Missouri state courts is far from the "precise situation" where *Ex parte Young* applies. *Virginia Off. for Prot. & Advoc.,* 563 U.S. at 255. Indeed, such "an injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. at 163. This Court should follow the Supreme Court's guidance in *Whole Women's Health* and find that sovereign immunity bars this suit.

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II. The Court should affirm the district court's decision to abstain from exercising jurisdiction.

Standard of review: A district court's decision to abstain is reviewed for an abuse of discretion, and "the district court abuses its discretion when it makes an error of law." *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 551 (8th Cir. 2018). As the State's motion to dismiss under Rule 12 was granted, the Court must "accept the [factual] allegations in the complaint as true and construing them in the light most favorable to the non-moving party." *Norwood v. Dickey*, 409 F.3d 901, 903 (8th Cir. 2005).[7]

When asked to order Missouri court clerks to change the State's eFiling system and the public access portal so that the press could access submitted but unfiled petitions, the district court properly recognized

[7] Courthouse News contends that the district court was "not limited to Plaintiff's complaint when determining whether the *Younger* abstention doctrine deprives it of jurisdiction," Br. 14, but appears to only cite an affidavit discussing previous cases, Br. 33–34. It does not point to any precedent stating it was error if, in fact, the court ignored the affidavit as it was not part of the complaint. It also claims the court erred by failing to treat Courthouse News's factual allegations as true. Br. 14. Courthouse News does not complain that the district court's eight pages reciting allegations are inaccurate, JA 607–614, Add.2–9, R. Doc. 47, at 2–9, and the allegations in paragraphs 57–59, Br. 33, can largely be found on page 8 of the opinion, JA 613, Add. 8, R. Doc. 47, at 8.

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that vital State interests in managing its internal affairs were at stake and that principles of federalism, equity, and especially comity warranted abstention. JA 624, Add. 19, R. Doc. 47, at 19. After reviewing the arguments and relevant law, giving special attention to two courts of appeals decisions reaching opposite results in near identical suits, the district court agreed with the opinion counseling abstention noting this Court had quoted it approving. JA 625, Add. 20, R. Doc. 47, at 20 (citing *Dixon*, 950 F.3d at 1056). The district court agreed that avoiding needless friction with state policies is an important equitable interest, especially when federal courts are asked to decide how state courts should conduct their business. *Id.* This comports with principles of *Younger* abstention, and both the district court and Seventh Circuit got it right.

Courthouse News faults the district court for failing to expressly identify each of the many factors and tests involved in abstention decisions and insists the decision has no merit. To the contrary, the court's decision satisfies *Younger* and recognizes "[t]he seriousness of federal judicial interference with state civil functions has long been

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recognized" by federal courts. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975).

A. This Court's precedents favor declining to exercise jurisdiction over how Missouri courts manage their filing system.

Despite Courthouse News's dissatisfaction with the district court's geometric proofs, this Court's precedents approve abstention in these circumstances.

"Although federal courts have a virtually unflagging obligation to exercise the jurisdiction given them, exceptions to this obligation exist in limited circumstances." *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 551 (8th Cir. 2018) (cleaned up). This general rule does not "call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Thus, "there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). This doctrine

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"reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018).

"The *Younger* line of cases counsels federal-court abstention when there is a pending state proceeding of a certain type." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018). Over the years, "the Supreme Court has issued a series of decisions that have clarified and expanded the *Younger* abstention doctrine." *Minnesota Living*, 899 F.3d at 551. To determine whether abstention is proper, a court asks whether (1) an "underlying state proceeding fall[s] within one of the three 'exceptional circumstances' where *Younger* abstention is appropriate," (2) the *Middlesex* factors have been satisfied, and (3) if an exception to *Younger* applies. *Id.*

Courthouse News objects that *Younger* abstention cannot apply because there is no pending state court judicial proceeding that satisfies the "exceptional circumstances" and *Middlesex* factors. Br. 22–26. As noted in *Brown*, it is true that this is not a "traditional *Younger* scenario," 908 F.3d at 1072, because the federal suit does not seek to enjoin any

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particular state court proceeding. Instead, the federal suit will compel the State to take action in ***every*** state court proceeding. The State does not dispute that Courthouse News has framed its relief as "contemporaneous access to new petitions after they are received for e-filing." Br. 32. But the State does not have separate queues for as-yet unfiled civil and criminal petitions—they all go in the same clerk import queue. JA 183, R. Doc. 28-1, at 4. As a result, there is no absence of pending proceedings in state tribunals, *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992), and by granting relief, the federal court order will interpose in every case filed in Missouri.

The Eighth Circuit also permits abstention when state court proceedings are not presently ongoing but "will continue to occur during the pendency of th[e] litigation." *Oglala Sioux*, 904 F.3d at 610. There, plaintiffs sought to require South Dakota to grant them certain procedures (e.g., adequate notice, witness testimony) for 48-hour proceedings relating to child custody. *Id.* at 608–609. The Court rejected the plaintiffs' claim that there were no ongoing proceedings because they "sought only prospective relief aimed at future 48-hour proceedings." *Id.* at 610–611. The Court reasoned that as some children were in temporary

state custody, and thus proceeding would occur in the future. *Id.* So, too here, as there is no question that litigants have ceased or will cease filing petitions.

Courthouse News also faults the district court for failing to identify the state judicial proceedings that implicate important state interests. It claims that the rate in which clerks accept petitions "does not implicate a core judicial function." Br. 24–25. Clerks have many responsibilities in assisting judges, and only one of them is filing cases. As one district court noted, a federal court injunction requiring contemporaneous filing may put clerks "in a position of disproportionately endeavoring to comply with this Court's order, rather than responding to the many demands of their office." *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 563 (E.D. Va. 2020). Although Courthouse News blithely notes that the administrative interest in denying access to new petitions "pales in comparison" to recognized vital state interests, Br. 25 n.14, making certain that confidential information remains confidential is one of the highest state interests. Mo. Rev. Stat. § 476.055.5. Even the Ninth Circuit recognized that "litigants are not uploading their complaints to the internet; they are filing them with a court, making them subject to

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judicial administration." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 596 (9th Cir. 2020) (*Planet III*).

Requiring Missouri clerks to have federally ordered filing procedures and 24 hour deadlines to accept filings will needless interfere with Missouri's courts at the expense of the litigants and public alike.

B. Abstention is warranted to avoid federal courts "auditing" the procedures and performance of state court clerks docketing cases.

The concerns that animated the Supreme Court to approve abstention in *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362, 379 (1976), apply with more force here. As in these cases, Courthouse News does not seek to strike down a single state statute, it seeks an injunction to control how and how soon Missouri courts provide access to as yet filed documents to the press in future proceedings. Br. 28–29.

In *O'Shea*, the federal plaintiffs sought to stop a municipal court system from intentionally discriminating on the basis of race in bail and sentences. 414 U.S. at 491–492. The Supreme Court reversed the Seventh Circuit holding that "the "principles of *Younger* should lead the federal courts to abstain" and that the injunctive relief would "necessarily

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impose continuing obligations of compliance," leading to a "major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings." *Id.* at 501–502. The injunctive relief there required periodic monitoring and the "continuous supervision by the federal court over the conduct of the petitioners in future trial proceedings involving any" plaintiff. *Id.* at 501.

The Court's decision in *Rizzo* extended these principles of equity from the local judiciary to local executive agencies.[8] 423 U.S. at 380. When faced with a "staggering amount of evidence" showing officers violating the constitutional rights of complaining citizens, the district court ordered a "comprehensive program" with detailed guidelines to bring the police force into compliance with "generally recognized minimum standards." *Id.* at 369–370. The Supreme Court explained that the district court erred by failing to give due weight to "principles of federalism in determining the availability and scope of equitable relief."

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[8] Courthouse News takes a tortured view of *Rizzo* disclaiming it as "not an abstention case" and inapplicable to state courts. Br. 36. *Rizzo* applies federalism and comity concerns that arose from *Younger* to limit the federal equitable power under § 1983. 423 U.S. at 379 (citing *Mitchum v. Foster*, 407 U.S. 225 (1972). Further, *Rizzo* explained that the principles of federalism afforded the greatest weight in seeking to enjoin a state criminal proceeding also apply to the executive branch. *Id.*

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Id. It reaffirmed the rule in *O'Shea* that "principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances" even without seeking to enjoin the criminal proceeding. *Id.*

Courthouse News seeks to dismiss these cases as dicta, Br. 29, or because the requested relief does "not require continuous monitoring of adjudication on the merits," Br. 30. Yet, this Court is "bound by the Supreme Court's considered dicta," *Jones v. St. Paul Companies, Inc.*, 495 F.3d 888, 893 (8th Cir. 2007), especially where Courthouse News concedes that "[t]his Circuit has thus recognized *O'Shea* applies . . . ." Br. 29 (citing *Oglala Sioux*, 904 F.3d at 611). So this dispute comes down to whether federal court "interference unduly inhibits the legitimate functioning of the individual state's judicial system." *Oglala Sioux*, 904 F.3d at 612 (quoting *Bonner v. Circuit Ct. of City of St. Louis,* 526 F.2d 1331, 1336 (8th Cir. 1975) (en banc)). It does.

At least five state court rules (promulgated by the Missouri Supreme Court with the force of law) would have to yield to Courthouse News's relief. *See* Mo. S. Ct. R. 103.03(a), 103.06(e), COR. 2.02, COR 4, COR 27. As a result, the relief interferes with the Missouri Supreme

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Court's "[s]upervisory authority over all courts," MO. CONST. ART. V, § 4, including its appointed Administrator, Mo. S. Ct. R 82.03(a). Ordering relief against Clerk Gilmer also places the presiding judge of the circuit's "general administrative authority over all judicial personnel and court officials in the circuit" in second place to the federal court. Mo. Rev. Stat. § 487.240; *Allsberry v. Flynn*, 628 S.W.3d 392, 396 (Mo. banc 2021) ("'judicial personnel' and 'court official' plainly encompass all the people who are employed by the court or act in an official capacity for the court, including the [] circuit clerk.'").

The requested relief also adds practical and logistical compliance issues for busy state courts. Institute for the Advancement of the American Legal System, *FAQs: Judges in the United States*, at 3 ("More than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial court.") [9] Entirely new digital applications and features would need to be built (or purchased), tested, and taught throughout Missouri. New procedures would need to be promulgated to handle confidential court filings and ensure security.

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[9] *Available at* https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf.

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More clerks might be needed as well. Inevitably the computer infrastructure would have to be expanded to handle more traffic, and functionality for all users, including judges, may suffer.

Courthouse News extolls that "a state court has 'available a variety of simple measures'" to comply with federal court edicts. Br. 33. But they do not explain that in the Ventura County, California case, that court dealt in paper copies of new complaints. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 781 (9th Cir. 2014) (*Planet I)*, *Planet III*, 947 F.3d at 586 ("Ventura County neither requires nor allows electronic filing."). That court needed only "give reporters a key to a room where new complaints are placed in boxes for review," or let a credentialed reporter "go behind the counter and pick up a stack of papers that already exists." *Id.* at 791. Similarly, although efiling existed, the "heart of the Complaint" involved the Clerk's office failing to "provid[e] access to paper complaints before they are scanned or processed to be viewed at the public access terminal." *Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196, 200 (E.D. Va. 2019) (*Schaeffer I).* And in the one case that they cite where the state courts use electronic filing, the vendor the state courts contracted with offered to provide the "press review queue" at no cost—at least at that

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moment. *Courthouse News Serv. v. New Mexico Admin. Off. of the Cts.*, No. CIV 21-0710 JB/LF, 2021 WL 4710644, at *11 (D.N.M. Oct. 8, 2021). These experiences of providing in person access or adding a "free" tool to an existing contract do not compare to the numerous changes in law and procedures Missouri would have to contemplate.

Even still, the state courts lose the respective of their federal counterparts and the prerogative to manage their own affairs. The federal court in Virginia declined, to issue an injunction because "Clerks may be put in a position of disproportionately endeavoring to comply with this Court's order, rather than responding to the many demands of their office." *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 563 (E.D. Va. 2020), *aff'd*, 2 F.4th 318 (4th Cir. 2021). The federal court reviewed performance data and testimony, essentially grading the state court clerks, noting bumps in the road around holidays to achieving the contemporaneous access ordered. *Id.* at 546–551. It then held that the pre-judgment "delays in access discussed herein are the result of Defendants' practices and customs, but not due to their formal policies." *Id.* at 551. In other words, Virginia court clerks needed only proper motivation to become examples of good governance. And during the post-

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judgment monitoring period (coinciding with the beginning of the COVID-19 pandemic), the Courthouse News reporter was granted special access at the Norfolk Circuit Court Clerk's Office—she was the "only non-employee permitted access to the Clerk's Office for the duration of the closure." Joint Status Report, *Courthouse News Service v. Schaeffer*, No. 2:18-cv-391, Doc. 120 at 7 (Aug. 14, 2020).

Here, the district court took the Seventh Circuit's warning to heart: "ongoing federal involvement in the state court's affairs would 'certainly continue' if the state court clerk failed to fully comply with the injunction." Add. 18, JA 623, R. Doc. 47, at 18 (quoting *Brown*, 908 F.3d at 1074). Courthouse News claims that this statement shows the court improperly failed to accept its facts as true and consider the additional evidence submitted. Br. 34. But the court considered it all and determined that comity required abstention. Add. 20, JA 625, R. Doc. 47, at 20.

C. The principles of comity weigh decidedly in favor of abstention.

Courthouse News does not understand why the district court, and the Seventh Circuit, would be concerned about imposing instantaneous access requirements on state courts when the U.S. Supreme Court does

not follow the same rules: it is a concern borne out of the dignity and high regard the judiciaries owe each other.

"The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 421 (2010) (fiscal operations of state governments). It reflects "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 separate ways." *Younger*, 401 U.S. at 44–45. The "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 45.

"[F]ederal and state courts are complementary systems for administering justice in our Nation." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). And "when the section 1983 action seeks to impose federal supervision on state court proceedings, the federal courts must [generally] defer to the state's sovereignty over the management of

its courts." *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 682 (7th Cir. 2010). Failing to do so violates "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs." *Rizzo*, 423 U.S. at 378–379. Declining jurisdiction "balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining 'uniformity in the treatment of an essentially local problem." *Brown*, 908 F.3d at 1071.

The chief justice of the United States has explained that "[c]ourts are simply different in important respects when it comes to adopting technology, including information technology." 2014 Year-End Report on the Federal Judiciary at 3 (Dec. 31, 2014).[10] Courts "have proceeded cautiously when it comes to adopting new technologies in certain aspects of their own operations." *Id.* He noted that some obstacles to adoption arise from courts' "distinct responsibilities and obligations." He cited "equal access to justice" for technology whizzes and the "tech-intimidated" and "procedural fairness" so that its systems are

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[10] Available at https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf.

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"compatible with a broad range of consumer hardware and software." He also warned about "important security concerns that must be satisfied before new systems go live and continuously throughout their operational life" including keeping hackers from "fishing for secrets," "discrediting the government," or "impairing court operations." *Id.* at 10. Of course with any large organization courts face "implementation challenges in light of its conscious decision to maintain a decentralized system of organization." *Id.*

Most if not all of these concerns apply here, and it is Missouri's sovereign prerogative to choose what considerations best enable it deliver justice to the litigants in its courts. Those choices implicate vital State interests and carry hefty consequences. Admin. Office of the Courts, *Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records* (Jan. 6, 2021) (An apparent compromise of the confidentiality of the CM/ECF system due to these discovered vulnerabilities currently is under investigation.").[11] But Missouri "courts are best positioned to interpret their own orders, which are at the center

[11] Available at https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

of this case, and to craft an informed and proper balance between the state courts' legitimate institutional needs" and the public's informational interest in court filings. *Brown*, 908 F.3d at 1074.

III. The district court should be affirmed because there is no First Amendment right to immediate access of unfiled petitions.

Standard of review: The State pleaded that the "First Amendment nor any other law confers a duty upon Defendants to provide Plaintiff with immediate access to e-filed civil petitions before they are reviews and accepted by court staff" and that it "did not violate the United States Constitution or any statutory right." JA 43, R. Doc. 16, at 12. This Court may "affirm on any ground supported by the record even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below." *Brown v. St. Louis Police Dep't of City of St. Louis*, 691 F.2d 393, 396 (8th Cir. 1982).

This Court may also affirm the district court because the First Amendment does not require instant access to as-yet unfiled Missouri petitions. Neither this Court nor the Supreme Court has extended the qualified right to access some criminal proceedings to civil litigation—let alone civil petitions waiting to be processed. *Flynt*, 885 F.3d at 512;

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Dhiab v. Trump, 852 F.3d 1087, 1098 (D.C. Cir. 2017) (Rogers, J., concurring). And generally, "the First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Commc'ns*, *Inc.*, 435 U.S. 589, 609 (1978).

To establish that First Amendment right of access for the civil court file requested, there must be a "1) a historical tradition of accessibility, and (2) a significant positive role for public access in the functioning of the judicial process in question." *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n. (8th Cir. 2013). So in *IDT*, this Court rejected that plaintiff had not established "a strong historical tradition of public access to complaints in civil cases that are settled without adjudication on the merits." *Id.* Further, it determined that "public access to the complaint would add little if any value to the judicial process where, as here, the court's only action was to seal the complaint and sign a stipulated dismissal." *Id.*

So, too, in *Zink v. Lombardi*, where prisoners argued "the First Amendment entitles them to information regarding the source of the drug to be used in their execution." 783 F.3d 1089, 1112 (8th Cir. 2015) (en banc). The prisoners failed to allege a history of openness, but the Court focused on the second prong. "The complaint provides no basis to

conclude public access to detailed information about execution protocols plays a significant positive role in the functioning of the process in question, given that the practical effect of public disclosure would likely be frustration of the State's ability to carry out lawful sentences." *Id.* at 1113. Again it focuses on judicial process, and not the kind of document.

Applying that test here, the Court can rule out any First Amendment right to access civil petitions *before* they have been processed. First, the allegations in the complaint and the affidavits only establish that members of the press accessed paper petitions waiting to be processed. *E.g.*, JA 10, R. Doc. 1, at 10 ("reporters were able to review new civil petitions …. The result was that Courthouse News could see new petitions filed each day and by the end of the day on which they were [submitted], before they were processed or docketed."); JA 303, R. Doc. 17-2 ("the press has reviewed new civil complaints, or petitions as they are sometimes called when they crossed the clerk's intake counter."); JA 304, R. Doc. 17-2 ("The federal and state trial courts provided the press with access to new complaints as soon as they crossed the counter"); JA 307("I have developed extensive personal knowledge of the procedures

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used by courts to give press access to new complaints."). This does not establish that clerks allowed the public the same access.

Second, the judicial process in question is deciding whether to file or return the petition. Public access to filed petitions is not the issue here. The cases previously cited by Courthouse News simply do not distinguish between "newly filed complaints" and "complaints waiting to be processed." *Shiver v. Valdosta Press*, 61 S.E.2d 221, 226 (Ga. App. Ct. 1950) ("suit became a matter of public record the moment it was marked filed in the clerk's office, regardless of whether it had been served or not."); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 398, 287 S.W.2d 32, 36 (1956) ("for time out of mind published the contents of a pleading filed in Court, though no further action has been taken thereon"); *Newell v. Field Enterprises, Inc.*, 415 N.E.2d 434, 443 (1980) ("the common law privilege to report on judicial proceedings attaches not at the point of judicial action, but rather when the complaint is filed.").

The Fourth Circuit disagreed. The Clerks claimed that focusing on when access to the complaint is required, the logic prong does not require contemporaneous access. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 327 (4th Cir. 2021). The Court noted that the complaint invokes the

court's jurisdiction, possibly triggers an obligation to preserve evidence, and triggers the statute of limitations. *Id.* Of course, none of that matters if the complaint is withdrawn—which may happen before the petition is accepted. But even courts that accept that there is a right of access to a complaint, most reject Courthouse News's position "that anything short of immediate, on-receipt access violates their First Amendment rights." *Courthouse News Serv. v. Glessner*, 2021 WL 3024286, at *17 (D. Me. July 16, 2021); *Planet III*, 947 F.3d at 596 ("The First Amendment does not require courts, public entities with limited resources, to set aside their judicial operational needs to satisfy the immediate demands of the press.").

Missouri does not dispute that once a petition has been accepted, and therefore filed, both COR 2.02 and a common law public right of access attaches. COR 2.02 ("[r]ecords of all courts are presumed to be open to any member of the public . . . during the regular business hours of the court having custody of the records."); *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990). But Courthouse News did not move under a common law right because it desires access to petitions that have been submitted to the court but not filed under

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Missouri's Rules. Mo. S. Ct. R. 103.03(a) (only accepted electronic documents are the official record). Thus, it wants privileged access to non-public documents, which is disfavored under the First Amendment.

Courthouse News's complaint does not and cannot show that a tradition of public access and a positive role that public access would have intake procedures. As a result the complaint fails.

CONCLUSION

This Court should affirm the district court's decision.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 27, 28, and 32, that it is written in Times New Roman 14-point font, and that it contains 10,389 words as determined by the word-count feature of Microsoft Word. Both the brief and addendum have been scanned for viruses and are virus free.

/s/ Jeff P. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system.

/s/ Jeff P. Johnson