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**RE: Recommendations Presented to the Court in the
Report of the Task Force on Transparency and
Privacy in Court Records**

Dear Mr. Pollack,

I'm writing on behalf of the New England First Amendment Coalition, a regional non-profit organization that advocates for freedom of the press and government transparency. Our coalition includes members of the media, First Amendment attorneys, academics and other proponents of the public's right to know.

NEFAC is concerned with recommendations that, if adopted, would limit online public access to judicial documents. Providing online access to only attorneys and litigants, as is being recommended, undermines the ability of all Maine residents to learn about their government and to keep its judicial system accountable. As we wrote to the Judicial Branch Transparency and Privacy Task Force on Sept. 27, "the public does not benefit from a secret court system, operating in obscurity, with meaningful access limited only to

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persons deemed worthy of finding out what’s going on. In the long run, secrecy is corrosive to the justice system.”¹

On behalf of our coalition, the Reporters Committee for Freedom of the Press will be submitting comments that further describe the legal underpinning of the public’s right to know. In those comments, we will explain why online access to Maine court documents should be granted to all members of the public. Sigmund Schutz, a Portland-based attorney and member of NEFAC’s Board of Directors, will also be submitting comments on behalf of the Maine Freedom of Information Coalition. He will address the open government principles at stake and the First Amendment implications of the recommendations you are now considering. We strongly encourage you to heed the suggestions made in both sets of comments as they provide valuable legal context to the proposals presented to you and your court.

Our focus in this letter is to help dispel the notion that broad online access to judicial records will necessarily lead to frequent and unreasonable invasions of privacy. There’s no evidence that this is the case and as David Ardia, a professor at the University of North Carolina School of Law, recently wrote, “courts have a variety of tools at their disposal to reduce the threats to privacy that come from electronic court records.”² In a comprehensive law review article exploring privacy and court records, Ardia concluded that:

“Existing approaches to resolving conflicts between court access and privacy often operate with the assumption that the two interests are irreconcilable. The belief

¹ “Maine Should Reconsider Proposed Policies, Expand Public Access to Online Judicial Records,” New England First Amendment Coalition (<http://nefac.org/news/maine-should-reconsider-proposed-policies-expand-public-access-to-online-judicial-records/>).

² “Privacy and Court Records: Online Access and the Loss of Practical Obscurity,” David S. Ardia, University of Illinois Law Review, Vol. 2017, No. 5, 2017, Page 1453 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013704).

that we have to choose between the right to observe the work of the courts and the right to privacy, however, is too simplistic and has led to shortsighted solutions for resolving conflicts between these important values.”³

We believe allowing only attorneys and litigants online access to court documents is one of those shortsighted solutions. Several court systems have successfully made the transition online without such limitation. They include Maine’s probate courts, the federal courts and other state courts. Though not perfect, we believe these examples are instructive and, as a whole, show that broad online access can be granted while still protecting legitimate privacy interests.

Many of Maine’s most sensitive cases — those involving estates, adoptions and guardianships of children, for example — occur in probate court. Yet despite the prevalence of privacy interests, probate courts in Maine make no distinction between records available in paper form at courthouses and those available electronically online.

Under Maine Rules of Probate Procedure, members of the general public including those not affiliated with a specific matter shall have remote access to all public records subject to redaction of private information.⁴ Redaction in this case is a tool used by the court to protect privacy interests. All information left unredacted can be accessed online as it would be obtained at the courthouse.

The federal court system operates under a similar philosophy, providing low-cost access to judicial documents through its PACER system. Access is available to every member of the public and documents can be obtained from each federal court, including

³ *Id.* at 1443.

⁴ Maine Rules of Probate Procedure Rule 92.10 “Remote Access to Electronic Case Files” (http://www.courts.maine.gov/rules_adminorders/rules/text/mr_prob_p_2016-7-25.pdf).

those in Maine. This system began in 2001 and has greatly increased transparency in the federal courts.

It's also important to note that without such a system, citizens would be burdened with the time and expense of visiting individual federal courthouses throughout the country to obtain documents. This is the type of burden being experienced by Maine residents who must now — and, under the recommendations presented to your court, would continue to — travel throughout the state to learn what's occurring in their own courtrooms.

Among state courts, New York is notable for its commitment to providing the same judicial records online as are available in its courthouses.⁵ New York's system for obtaining court records online is similar to PACER in that all filings are accessible⁶ to the public unless they fall under one of only a few specific categories, such as matrimonial cases.⁷ To address privacy concerns, the state excludes from the filings some personally identifiable information but does so from all filings, whether in paper or online.⁸ In this respect, there is no distinction made between public records available at the courthouse and those accessible online — what's determined to be public is public for all.

The national trend is to adopt these types of inclusive, broadly-accessible systems. According to a study earlier this year, “state court systems are, more and more

⁵ Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts, Page 7 (http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf).

⁶ *Id.*

⁷ New York Supreme Court Records On-Line Library (<http://iapps.courts.state.ny.us/iscroll/index.jsp>).

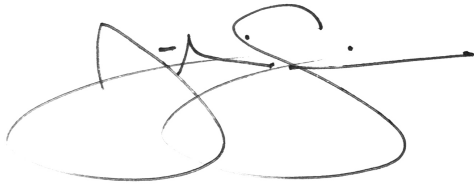
⁸ Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts, Page 19-20 (http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf).

frequently, providing PACER-like access to courthouse files” and “public access can be achieved with modest effort in any jurisdiction”.⁹

Maine has an opportunity to be one of those jurisdictions and set the standard among New England states, many of which are still wrestling with their own online record policies. We look forward to the state moving beyond shortsighted proposals and making strides toward real transparency.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Justin Silverman', with a long horizontal stroke extending to the right.

Justin Silverman
Executive Director

⁹ *Id.* at Page 8.