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January 20, 2023

VIA OVERNIGHT MAIL

Hon. Valerie Stanfill, Chief Justice  
Maine Supreme Judicial Court  
Capital Judicial Center  
1 Court Street, Suite 40  
Augusta, ME 04330

Amy Quinlan, Esq.  
State Court Administrator  
Maine Judicial Branch  
125 Presumpscot Street  
Portland, ME 04103

Re. Maine Judicial Branch Fees to Inspect or Copy Electronically Filed Records

Dear Chief Justice Stanfill and Ms. Quinlan:

I am writing on behalf of the Portland Press Herald/Maine Sunday Telegram, Sun Journal, Kennebec Journal, Morning Sentinel, Times Record, Courthouse News Service, the Maine Association of Broadcasters, the Maine Press Association, ACLU of Maine, the Maine Freedom of Information Coalition<sup>1</sup> and the New England First Amendment Coalition to object to the practice of the Maine Judicial Branch of charging the public a fee of \$2 for the first page, and \$1 for each subsequent page, to view documents that have been filed electronically in Maine civil cases, including cases in the Business & Consumer Docket. See ADMINISTRATIVE ORDER JB-05-26 (A. 6-22), Revised Court Fees Schedule and Document Management Procedures, June 1, 2022, p. 12.

These fees are excessive on their face in relation to the actual incremental cost of providing public access to documents that are already available over the internet to litigants, and they impair the ability of journalists to report on matters of public concern. The fees violate Rule 14 of the Maine Rules of Electronic Court Systems ("RECS"), which requires that fees for public access be reasonable, and the United States Constitution, which prohibits the government from turning a profit by imposing fees as a condition to the exercise of First Amendment rights. See, e.g., *Courthouse News Serv. v. Quinlan*, 32 F.4th 15,

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<sup>1</sup> The Maine Freedom of Information Coalition is a non-profit corporation consisting of representatives of several of the above-listed entities and representatives of the Maine Library Association, the League of Women Voters, the Maine Writers and Publishers Alliance, former public employees, and private individuals.

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20 (1st Cir. 2022). These fees would likely be struck down by a court. We respectfully ask that they be promptly rescinded.

At a minimum, the fees should be suspended until the Judicial Branch makes available public access terminals. Under the RECS, members of the public are entitled to free access to electronic court records at a public terminal. *See* Rule 9(B)(1) (“Members of the public may access a public access computer during regular courthouse business hours . . . There is no fee to use the public access computer.”). No such public terminal has been made available. Until there is a free public terminal as the rules require, online access should be at no charge.

In addition to providing free public terminals, any fees charged for the far less cumbersome form of public access that electronic dockets make possible—access over the internet—must be reasonable in relation to the actual incremental cost of providing such access. Under Rule 14 of the RECS, “[t]he court may charge *reasonable* fees for providing access to court records . . . .” The current fee of \$2 for the first page, and \$1 for each subsequent page, is obviously disproportionate to the actual cost of providing online public access to electronic records that are already available and accessible in that form to litigants. It is therefore not reasonable.

A good point of reference here is the Freedom of Access Act (“FOAA”), 1 M.R.S. § 408-A(8)(A), which sets a “reasonable fee to cover the cost of copying” paper documents at 10 cents per page. Under the FOAA, “[a] per-page copy fee may not be charged for records provided electronically.” *Id.* If 10 cents per page is a “reasonable” fee for copying paper documents, and no per-page copy fee may be charged under the FOAA for records provided electronically, it is hard to see how it could be reasonable for the judiciary to charge more than ten times as much for providing electronic access to its records where doing so would impose nominal additional cost. What Maine is charging for access to electronic court records is also more than ten times what the federal courts charge for access via the PACER system—and even the far lower PACER fee has been found to be excessive by a federal appeals court.

In addition to Rule 14, the First Amendment is implicated by these extraordinary fees. The U.S. Court of Appeals for the Federal Circuit declared, in a recent decision holding that the fee of 10 cents per page charged for electronic access to federal court documents via PACER is excessive, that “the First Amendment stakes” in the reasonableness of fees charged for access to judicial records “are high.” *Nat’l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1357 (Fed. Cir. 2020). The Court explained that “[i]f large swaths of the public cannot afford the fees required to access court records, it will diminish the public’s ability ‘to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.’” *Id.* (citing *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982)).

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It violates the First Amendment for the government to “profit from imposing licensing or permit fees on the exercise of a First Amendment right.” *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1993)). Instead, “[o]nly fees that cover the administrative expenses of the permit or license are permissible.” *Id.*; see also *Eastern Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (“Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose.”). If the First Amendment bars the government from profiting on “licensing or permit” fees imposed on the exercise of First Amendment rights, it must necessarily also bar the government from profiting on fees imposed on public access to court documents that no one could reasonably dispute the public is entitled to access. Because the fees being charged for access to electronic court records are disproportionate to the actual incremental cost of providing such access, the fees cannot be reconciled with the First Amendment.

These excessive fees constitute a real impediment to journalists trying to report on cases being litigated in the Business Court in particular, where all filings are electronic and where high-profile cases of public interest are often litigated. Judicial dockets often feature hundreds or even thousands of pages of documents that an investigative reporter, or a curious member of the public, must read to understand what is happening in the case. These fees are untenable for journalists who need to conduct careful reviews of case files, for researchers and academics, or for concerned citizens.

The fees are inconsistent with the RECS, violate the First Amendment, and seriously impede the free flow of information about the Judicial Branch is up to. We therefore respectfully request that the Judicial Branch fees to inspect or copy electronically filed court records be rescinded as soon as possible.

Very truly yours,



Sigmund D. Schutz

SDS:jac

cc: Portland Press Herald/Maine Sunday Telegram, Sun Journal, Kennebec Journal, Morning Sentinel, Times Record, Courthouse News Service, the Maine Association of Broadcasters, the Maine Press Association, ACLU of Maine, the Maine Freedom of Information Coalition, New England First Amendment Coalition