STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. KEN-16-032

CONSERVATORSHIP OF EMMA

Reported Question from Kennebec County Probate Court

BRIEF OF APPELLEE
MAINE FREEDOM OF INFORMATION COALITION

Sigmund D. Schutz, Bar No. 8549
Preti, Flaherty, Beliveau & Pachios, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: 207-791-3000
sschutz@preti.com
Attorney for Appellee

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves a routine conservatorship proceeding of the sort that takes place throughout Maine probate courts, except that the Conservator[1] asked the probate court to seal certain information on the Kennebec County Probate Court's online electronic docket. The Conservator made clear to the Probate Court that the information he wanted sealed online should remain publicly available in paper copy at the courthouse.

In need of guidance on the important public access and First Amendment issues involved in the Conservator's request to seal information, but only to the extent that information is available to the public on the court's online electronic docket, the probate court (Mitchell, J.) reported questions to this Court concerning, generally, whether there is any lawful basis to distinguish between public access to information in probate court information contained in the online docket and that same information contained in paper copy at the courthouse.

That this proceeding is unexceptional (aside from the secrecy issue) in comparison to other conservatorship proceedings, does not mean that the rights adjudicated by the court in such proceedings are not weighty.

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[1] The Court entered an order that "Emma" is to refer to the ward and "Conservator" is to refer to her conservator. Order (Feb. 22, 2016) (Gorman, J.).

Because conservators have court-sanctioned authority to control a person's financial affairs, leaving the ward entirely dependent on the conservator for material support, Maine statutes require a substantial showing in order to approve the appointment of a conservator, particularly when the proposed ward has not consented. The court may appoint a guardian for an adult only upon a finding by "clear and convincing evidence" that the person for whom a guardian is sought is "unable" to manage her own affairs and that the person's property will be "wasted or dissipated" without proper management. 18-A M.R.S. § 5-401(2). Orders appointing conservators are public, as is the evidentiary basis for them.

After a conservator is appointed, the court exercises an oversight role with regard to the conservator's management of the ward's financial affairs. A conservator must file with the court for approval an inventory and periodic accounts. 18-A M.R.S. § 5-418 (inventories), 5-419 (accounts). The Court must, after review, approve of inventories and accounts and hold the conservator accountable for any lost or missing funds. *Id.* This oversight serves as a judicial check on whether conservators are fulfilling their duties and not exploiting the wards they are charged to protect.

This proceeding began in April 2014 with the filing of a petition with the Kennebec County Probate Court for the appointment of a conservator

for Emma. A. 1. The Court appointed the Conservator as temporary conservator a few days later. A. 1. At the same time the Conservator filed an inventory. *Id.*

A few months later, on October 6, 2014, the Court made the appointment of the Conservator permanent. A. 46. The order of appointment allowed the Conservator authority to provide to Emma unlimited access to up to $ per year without having "to account in detail for" that annual sum. A. 46. The order requires that the Conservator file a surety bond or provide other security in the amount of $. *Id.* The Court also ordered the Conservator to file an inventory within 90 days, followed thereafter by annual accounts due every July 1. *Id.* On October 22 the Conservator filed an amended inventory. A. 42-45.

The Conservator did not request that either the initial or amended inventory be sealed and did not, at the time the Court entered its order of appointment, request that the Court seal annual accounts.

In August 2015, at about the time the annual account was due, the Conservator moved to remove financial information from the public docket.[2] A. 7-8. "The docket for a case is a list of all documents contained in the case file." Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa

[2] The Conservator also filed a motion for accommodation under the Americans with Disabilities Act. A. 15-16. The Court reserved decision on that motion and has not reported any issue with respect to that motion. A. 6.

L.Rev. 481, 486 (2009). Beyond case information, the title of documents and the date of filing, the docket can contain additional detail, such as the full text of court orders and summaries of filed information. Here, the Conservator noticed that the public docket available online listed the amount of estate assets. He argued that putting this financial information on the public docket puts Emma at "increased risk for possible exploitation." A. 7.

The Court denied the Conservator's motion on September 14, 2015, by a two-word handwritten note, "motion denied." A. 8. Ten days later, on September 24, 2015, the Conservator filed his First Account. A. 2. He did not file this account under seal. It is a public record.

On September 29, the Conservator moved to reconsider the Court's order denying his motion to remove financial information. A. 11-12. In that motion, the Conservator stated that his motion was "misunderstood" and had only been intended to request that the Court remove "sensitive financial information (the specific dollar amounts)" from the Court's "website docket." A. 11. His concern was with the "public website without denying public access to the file." *Id.* He wrote, "The Petitioner understands that this information will remain available to the public upon request at the Probate Court." *Id.*

The Conservator gave two reasons why information should be removed from the docket on the probate court's website. First "most counties' websites" do not "commonly" display personal financial information contained in inventories and accounts of protected persons. Second, he argued that putting financial information on a public website puts Emma "at increased risk for possible exploitation." *Id.*

While this motion was pending, the Probate Clerk informed the Conservator that the First Account did not balance. A. 31. The numbers were $ off. *Id.* The Conservator responded by filing an Amended First Account. A. 19-27. The account balanced.

On January 11, 2016, the Court held argument on the motion to reconsider. A. 17. Two days later the Court issued an order reporting a question to the Law Court pursuant to M.R.Civ.P. 24(a). In that Order the Court described the background:

> As a policy, the Kennebec County Probate Court enters in the docket, which is available on the internet, the summary numbers on filed inventories and accounts of protected persons. . . . There is no question that the entire inventory and account is available routinely to anyone who comes to court to ask for it as a public record. This is apparently true in all Probate Courts. The question is whether Probate Courts, in the electronic age, should distinguish between public documents and public documents available on the internet.

A. 5. Only Kennebec and Penobscot County routinely publish numbers in inventories and accounts on the website docket; the other counties do not. *Id.* The Court described the issue as important, doubtful, and very likely to arise repeatedly. *Id.* The Court then reported the following question:

> When a conservator files an inventory and account for the ward, a. should the image of the documents be available on line; b. should the summary numbers from the documents be available on line while the document images remain as publicly available only in the court (current practice in Kennebec); c. should neither the image of the document nor any summary numbers be available on line (current practice in fourteen counties); or d. should the Probate Court adopt a policy different from a, b, or c above?

A. 6.

Because all of the parties involved in the conservatorship petition agreed to support the motion to seal information contained in the online docket, leaving the public's interest in access to judicial records unrepresented, and no party in a position to serve as appellee, the Law Court invited the Maine Freedom of Information Coalition[3] to serve as

[3] The Maine Freedom of Information Coalition is a tax exempt Maine non-profit corporation dedicated to educating Mainers about their rights and responsibilities as citizens in our democracy and enhancing knowledge and awareness of the First Amendment and laws aimed at ensuring transparency in government. The members of Coalition include the Maine Association of Broadcasters, the League of Women Voters of Maine, the Maine Library Association, the Maine Press Association, the Society of Professional Journalists, the Maine Real Estate Management Association, and a representative of academic/government interests. A member of the Coalition, the American Civil Liberties Union of Maine Foundation dissents from the positions taken in this appeal, and the Foundation's lawyer has appeared as co-counsel for Appellant.

Appellee. *See* Order (Feb. 4, 2016) (Gorman, J.). The Coalition accepted the Court's invitation.

ISSUES PRESENTED FOR REVIEW

1. Should the Law Court accept an important and novel reported question involving public access to online electronic probate court records?

2. Is there a lawful basis for the Kennebec County Probate Court to seal information on the Court's online electronic docket when that same information remains public in paper copy at the courthouse?

SUMMARY OF THE ARGUMENT

The Maine Rules of Probate Procedure support equal access to docket information, whether online or in paper, and no statute makes online probate court docket information confidential. Maine probate courts operate in the daylight. The public enjoys a presumption in favor of public access to both probate court proceedings and records of those proceedings. That presumption is grounded in the First Amendment and the common law. The standard for sealing probate court records, as is true for records of civil court proceedings generally, is the First Amendment's "strict scrutiny standard," which requires that a seal be granted only upon a showing that a seal is narrowly tailored to serve a compelling governmental interest.

A seal on information appearing on the Probate Court's electronic docket fails strict scrutiny review for several reasons, most obviously

because the seal requested by the Conservator is seriously under-inclusive in-so-far as all of the information subject to the proposed seal would remain public even if the seal were granted. That is because the seal the Conservator asked the Probate Court to enter would only apply to information available on the Court's online docket, leaving intact public access to that same information in paper copy at the courthouse.

The Court should encourage technological advances, such as the internet and electronic court records that broaden and enhance public access to information about the work of our judicial system, and reject argument by the Conservator that would have the perverse effect of justifying limitations on public access by the very technological innovations that significantly enhance public access. As is true with regard to public trials generally, sound experience and logic support the notion that openness and transparency enhances fairness, integrity, public confidence in and respect for the judicial process. Transparency gives the public the opportunity to uncover corruption and malfeasance and, perhaps as important, deters such behavior by the threat of exposure. A foundational principle of our judicial system, with roots stretching back hundreds of years, is that the system does not adjudicate rights in secret and that records of judicial proceedings are public.

Probate court proceedings are not unique in that they involve matters that raise privacy concerns. Such concerns can arise in criminal and ordinary civil proceedings. A criminal case may involve information about the criminal's background or medical condition, as well as the victim's. A civil case may involve a plaintiff's earnings, financial affairs, and personal medical information. The same constitutional and common law presumption of access applies in all of these proceedings. That presumption can be overcome when necessary to serve a compelling interest, but generic and unsubstantiated privacy concerns of the sort at issue here are not sufficient to justify a seal.

The Conservator's position on the reported question is unsupported in law or sound logic, and would be contrary to First Amendment and common law principles strongly favoring an open, public, and transparent justice system. The Court should answer the reported question by finding that the Kennebec County Probate Court may not seal information online when that same information remains public at the courthouse.

ARGUMENT

I. The Court should accept the reported question.

This case raises an important question about public access to court records, with widespread implications for the public interest, on which this Court has not yet spoken. In the absence of guidance from this Court the

issue is likely to recur. The various Maine probate courts have taken divergent approaches, with some sealing information contained in online court dockets, while others have not. A. 5. The parties agree that the Court should answer the reported question. *See* Blue Br. 9-12 (arguing that the Court should accept the reported question).

The reported question should also be accepted because it implicates constitutional rights to access court records. The federal courts have recognized that delay in affording access to public judicial records can violate the First Amendment. *See, e.g., Grove Fresh Distribs. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 867 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous."); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48-hour delay in unsealing judicial records improper because the effect of the delay acts as a "total restraint on the public's first amendment right of access" during that time).

II. The Court should decline to make online judicial records more secret than their paper counterparts absent some basis for doing so in the Maine Rules of Probate Procedure or Maine statutes.

The starting point in addressing the Conservator's request that the Court seal online probate court docket information while leaving that same

information public in paper at the courthouse is whether there is any textual basis for doing so in the Probate Rules or any statute. There is none. Just the opposite, both the Probate Rules and the Probate Code support public access to online electronic probate court records to the same extent that those records are available in paper copy at the courthouse.

A. The Maine Rules of Probate Procedure require equal access to case files regardless of whether they are electronic or paper.

The seal requested by the Conservator is contrary to the Maine Rules of Probate Procedure, which require equal public access to information whether online or at the courthouse.

The Probate Rule governing remote access to case files, 92.10, provides that the public is entitled to remote access to court records online to the same extent that the public is entitled to access paper records available at the courthouse. Under Rule 92.10(b), "Members of the general public and Registered Filers not affiliated with a matter *shall have remote access* to all Public Records in any matter, subject to the redaction of Private Information on Public Records pursuant to Rule 92.12." (emphasis added). The Advisory Committee explained:

> Everyone, including members of the general public and Registered Filers not affiliated with a matter, *will have remote access to all the Public Records*, subject to the redaction of Social Security numbers of living individuals and

> banking/brokerage account numbers on Public Records as outlined in Private Information in Rule 92.12.

M.R.Prob.P. 92.12 advisory committee's notes to 2011 amend., Nov. 2011. (emphasis added).[4]

The Rules also make plain that public access is the default principle. The term "Public Records" is defined in Rule 92.12(b) to mean "any record or document (electronic or nonelectronic) filed with the Probate Court which is not a Private Record and which is not otherwise restricted by the Probate Court." By referring to both "electronic or nonelectronic" records or documents in the definition the Rule makes clear that the public is to have the same access to records whether filed remotely or not.

The Rules also identify a few categories of non-public records and information. Rule 92.12(a) lists four types of "Private Records."[5] None of the records at issue in this case fall within these "narrowly defined" categories. M.R.Prob.P. 92.12 advisory committee's notes to 2011 amend., Nov. 2011. The Advisory Committee notes on this rule emphasize that, except for "Private Records," "[a]ll other documents are considered 'Public

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[4] The November 2011 advisory committee's notes can be found at 2012 Me. Rules 09 available at http://www.cleaves.org/sc-rules.htm (last visited June 9, 2016). The rules were effective on May 1, 2012. *Id.*

[5] "'Private Records' means (1) all records and documents (electronic or nonelectronic) relating to an adoption proceeding; (2) Certificates of Value (Probate Form DE-401A); (3) Physicians' and Psychologists' Reports (Probate Form PP-505); and (4) any record or document designated as a Private Record by the Probate Court." M.R.Prob.P. 92.12(a).

Records.'" *Id.* The Probate Rules also make confidential a few categories of information, labeled "Private Information," (1) Social Security numbers of living individuals; (2) banking/brokerage account numbers; and (3) any other information designated as Private Information by the Probate Court. M.R.Prob.P. 92.12(c). The burden of redacting this information falls on those responsible for making filings with the Court. The Conservator appears to have met that obligation in this case, and no such "Private Information" is at issue here.

B. The Probate Code makes clear that probate court records are open to the public and provides no basis for distinguishing between electronic and paper records.

The Maine Probate Code is consistent with the Maine Rules of Probate Procedure in providing for general public access to proceedings in probate court and records related to those proceedings.

The statute governing the records of the probate office obligates registers of probate to maintain a docket of all probate cases and to make that information public. "Registers of probate shall keep a docket of all probate cases and, under the appropriate heading of each case, make entries of each motion, order, decree and proceeding so that at all times the docket shows the exact condition of each case." 18-A M.R.S. § 1-503. The register is also empowered to audit accounts filed with the court when

requested by a probate judge. "Any register may act as an auditor of accounts when requested to do so by the judge . . . ." *Id.* All of these records are public. "The register shall maintain records and files and provides copies of documents . . . ." 18-A M.R.S. § 1-305. The register of probate is charged with making copies of "records of the court" and charging a fee for doing so. 18-A M.R.S. § 1-602(3). The statute allows any member of the public to request copies.

That the default rule is public access to probate court proceedings and records is highlighted by the few statutory exceptions to that access. Records of adoptions decreed on or after August 8, 1953 are generally confidential. 18-A M.R.S. § 9-310. Further, [t]he Probate Court shall keep records of those adoptions segregated from all other court records." *Id.* This segregation is necessary because other probate court records are public. Information obtained as part of a background check on prospective adoptive parents is also generally confidential. 18-A M.R.S. § 9-304(a-1)(vi). The court may seal the name of the petitioner and the adoptee in a decree containing the new name of the adoptee "[i]f the court determines that it is in the best interest of the child. . . ." 18-A M.R.S. § 9-308(c).

Certain wills filed with the court for safekeeping are also designated as confidential. 18-A M.R.S. § 2-901. A will deposited with the court in the

office of the register of probate before September 19, 1997 "may be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will." *Id.* Further, "[a] conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and left on deposit after the examination." *Id.*

The probate court may also seal records of proceedings related to petitions for a name change. 18-A M.R.S. § 1-701. The court may only do so to protect the personal safety of the person petitioning for a name change. *Id.* at 1-701(b), (c). "[T]he judge may seal the records of the name change" where the judge has found by a preponderance of the evidence that (1) the person is a victim of abuse; and (2) the person is currently in reasonable fear of the person's safety. *Id.*

The provisions of the Probate Code governing conservatorship proceedings and related records are notable for the absence of any authorization to seal such proceedings or records, except for one narrow subject. *See* 18-A M.R.S. §§ 5-401 – 5-432. The testimony of allegedly incapacitated persons may be sealed "[w]hen there has been an allegation of abuse, neglect or exploitation" of that person. 18-A M.R.S. § 5-407(e).

No other phase of conservatorship proceedings or related records may be sealed. Of particular relevance here given that the information of concern to the Conservator is contained in inventories or accounts, the Code does not provide for confidential treatment of any information contained in inventories or accounts filed with the court. *See* 18-A M.R.S. § 5-418 (describing requirements with respect to inventories); *id.* 5-419 (describing requirements with respect to accounts).

The Legislature has chosen not to make confidential the inventory and account information that the Conservator wants to have sealed.

III. A blanket seal on all financial information on electronic probate court dockets while making that same information public in paper copy at the courthouse would violate constitutional and common law rights of access to court records.

In the absence of Maine cases addressing in any detail the public's constitutional and common law rights of access to court records, the Court must look to federal cases and cases decided by other states. *See* Sigmund D. Schutz, Public Access to Judicial Proceedings and Records in Maine: Worth Protecting, 27 Me.B.J. 198, 202 (Fall 2012) (referring to Maine authority on access to judicial records and proceedings as "sparse," and observing that there are "few Maine cases and statutes on point"). The Court will find nearly unanimous support for a qualified constitutional and

common law right of access to probate court proceedings and related records.

A. The public has a qualified constitutional and common law right of access to probate court records.

The public has a qualified constitutional right to access records of civil judicial proceedings in addition to historic and well established common law access rights.

1. Public access to court records is a qualified constitutional right.

The federal courts have "widely" recognized a qualified federal constitutional right of access to court records in civil cases. *See Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeal have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents"). In holding that the public enjoys a First Amendment right to access civil complaints filed in state court, the Ninth Circuit in *Courthouse News*, cited decisions by the Second, Third, Sixth, and Seventh Circuit Courts of Appeal.[6] *Id.* This authority does not distinguish between the public's right to access court records based on the medium in which those

[6] The issue of access to court records has come before the First Circuit in the context of a criminal case. The court held that the First Amendment guarantees access to both criminal proceedings and records of those proceedings. *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir.2002) (holding that the District of Rhode Island's blanket policy of refusing to file memoranda of law that counsel were required to submit in connection with motions violated the First Amendment).

records are filed or maintained, either paper or electronic, or whether those records are made available online or at the courthouse. Such a distinction would be alien to federal courts which all operate using electronic records and the online Public Access to Court Electronic Records ("PACER") system. *See* https://www.pacer.gov/ (last visited June 10, 2016) ("[PACER] is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator."). The federal courts moved to PACER about twenty years ago.[7]

State courts have recognized both federal and state constitutional rights of access to court records. *See, e.g., Cincinnati Enquirer v. Winkler*, 101 Ohio.St.3d 382, 384 (2004) ("The right of access found in both the federal and state Constitutions includes records and transcripts that document [court] proceedings."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 86 Cal.Rptr.2d 778, 803 (1999) ("in general, the First Amendment right of access applies to civil proceedings as well as to criminal proceedings"). The New Hampshire Supreme Court held that the free speech clause of its state constitution provides a qualified right of access to judicial records. *Associated Press v. State*, 153 N.H. 120, 128

[7] "Since about 1997, PACER has made federal-court case files, including the dockets, publicly available over the internet." Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L.Rev. 481, 485 (2009).

(2005) ("Furthermore, just as the federal courts have recognized that the right of access to court proceedings and records is grounded in the First Amendment freedom of speech, we, too, have recognized that the public's right of access to court records and proceedings is grounded in Part I, Article 22 of the State Constitution."); N.H. Const. pt. I, art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.")

The Court should recognize a federal constitutional right to access court records of civil proceedings and find that such rights also arise under Maine's constitution. See *In re Letellier*, 578 A.2d 722, 727 (Me. 1990) ("the Maine Constitution does not make its protection of freedom of the press any more or less absolute or any more or less extensive than the constitutional protection accorded that freedom under the First Amendment"); Me. Const. art. I, § 4 ("Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; . . . .").

The particular records at issue here are docket sheets, which are a type of record to which the constitutional right of access attaches. The Second Circuit found that the public has a qualified First Amendment right

of access to docket sheets in civil cases. In *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), newspapers challenged the Connecticut court system's longstanding practice of sealing docket sheets in certain civil cases. *Id.* at 86-89. The Court held that the press and the public had a qualified First Amendment right of access to the docket sheets, reasoning that "docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* at 93. The Second Circuit also commented on longstanding traditions of access to docket sheets. "Since the first years of the Republic, state statutes have mandated that clerks maintain records of judicial proceedings in the form of docket books, which were presumed open either by common law or in accordance with particular legislation." *Id.* at 94. As mentioned above, in Maine registers of probate are required to maintain public docket sheets. 18-A M.R.S. § 1-503.

In recognizing a right of access to court proceedings and records in civil cases, the courts have extended the rationale given by the Supreme Court for recognizing a First Amendment right of access to criminal proceedings:[8]

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[8] The Law Court has also recognized a First Amendment right of access to criminal proceedings. *Roberts v. State*, 2014 ME 125, ¶ 18, 103 A. 3d 1031 (finding that

> The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen. . . . [I]n the context of trials[,] the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (plurality opinion) (citations omitted); *see also In re Bailey M.*, 2002 ME 12, ¶ 11, n.7, 788 A. 2d 590 (discussing *Richmond Newspapers* but not addressing First Amendment right of access because appellant lacked standing). In the context of criminal trials, the Supreme Court has explained that public scrutiny "enhances the quality and safeguards the integrity of the factfinding process . . . ." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). In addition, public access "fosters an appearance of fairness, thereby heightening public respect for the judicial

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"[d]ecisions whether to close court proceedings to the public frequently involve the balancing of . . . the First Amendment rights of the press and members of the public"); *In re. MaineToday Media, Inc.*, 2013 ME 12, ¶ 3, 59 A.3d 499 (recognizing First Amendment right to attend jury voir dire stage of criminal trials).

process." *Id.* The public serves as a "check upon the judicial process – an essential component of our structure of self-government." *Id.*

All of these principles apply with equal force to civil as well as criminal proceedings, as many courts have held:

> The explanation for and the importance of [the] public right of access to civil trials is that it is inherent in the nature of our democratic form of government. . . . "It is desirable that the trial of [civil] causes should take place under the public eye, . . . not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Publicker Indus., Inc. v. Cohen 733 1059, 1069 (3d Cir. 1984) (citations omitted) (*quoting Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)).

2. Public access to court records is well established at common law.

The common law has long recognized a public right of access to records of civil cases. The New Hampshire Supreme Court observed that "[t]he public right of access to court proceedings and records pre-dates the State and Federal Constitutions and is firmly grounded in the common law." *Associated Press v. State*, 153 N.H. 120, 125 (2005). "This appears to be the almost universal rule dating from the earliest times." *Id.* The right to access court records can be found in this land as early as the

Massachusetts Body of Liberties (1641),[9] art. 48, which provided, "Every inhabitant of the Country shall have free libertie to search and veewe any Rooles, Reocrds, or Regesters of any Court or office except the Counceil." The Supreme Court has also recognized a common law right of access to court records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents").

3. Probate court records are public to the same extent as are records of any other court proceeding

The Maine Probate Court Rules of Procedure and the Probate Code, as discussed above, make probate court records public in Maine.[10] The

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[9] The Law Court has cited the Body of Liberties of 1641 as a widely recognized early compilation of the common law. *Bell v. Town of Wells*, 557 A. 2d 168, 182 (1989).

[10] Probate court records are public in other states too. *See, e.g., Estate of Hearst*, 67 Cal. App. 3d 777, 782-84 (1977) (holding that "there can be no doubt that court records are public records" and that probate court records generally "will be open to public inspection"); *Copley Press, Inc. v. Superior Ct.*, 63 Cal. App. 4th 367, 376 (1998) ("[p]robate proceedings ... are not closed proceedings"); *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805, 817 (2006) (referring to probate proceedings as "presumptively open"); *Estate of Engelhardt*, 127 Ohio Misc.2d 12, 15 (2004) (probate court "case file and its contents are public records"); *State ex rel Kernells v. Ezell*, 291 Ala. 440, 442-43 (1973) (holding that records of the office of the probate judge are "public writings" and are "free for examination [by] all persons, whether interested in the same or not"); *In re. Estate of Zimmer*, 151 Wis.2d 122, 131 (Wis.Ct.App. 1989) (recognizing "the presumption that the public has a right to inspect" probate records, and "that any exceptions to the rule of disclosure must be narrowly construed, and that denial of access to the agreement is contrary to the public interest and will be tolerated only in the 'exceptional case.'"); *In re*

same reasons for public access to civil (and criminal) records generally apply with equal force to probate court records. *See Estate of Campbell*, 106 P.3d at 1105 (the reasons for public access to civil court records "are equally compelling" in the context of "probate proceedings"). In reaching the conclusion that the "public has a legitimate interest and right of general access" to probate court records, a California court observed, "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *Estate of Hearst*, 67 Cal. App. 3d at 784. The Court went on to say that "traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." *Id.* When parties "perceive advantages in obtaining continuing court supervision over their affairs" they must "take the good with the bad, knowing that with public protection comes public knowledge of the activities, assets, and beneficiaries" involved. *Id.*

Although not addressing probate court records as such, the New Hampshire Supreme Court considered whether the public has a right of access to financial records comparable to the docket information at issue here. *Associated Press v. State*, 153 N.H. 120 (2005). In that case, the

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Estate of Campbell, 106 P.3d 1096, 1106 (Haw. 2005) ("probate court records are 'public records'").

Court addressed whether financial affidavits filed in divorce cases are public records subject to a constitutional right of access. The Court concluded that they were. *Id.* at 134. "[F]inancial affidavits filed in domestic relations cases are subject to the constitutional right of access because they are important and relevant to a determination made by the court in its adjudicatory function in connection with a presumptively open proceeding." *Id.* at 134. The Court noted that "[d]omestic relations proceedings are a type of civil proceeding that has historically been open to the press and general public." *Id.* at 133. Although such matters involve children and families, the Court noted that this factor weighed in favor of public access, not against it. "The importance of matters regarding children and families only heightens the need for openness and public accountability in domestic relations proceedings." *Id.* at 133. Based on these principles, the New Hampshire Court held that a state statute purporting to render all financial affidavits confidential was unconstitutional. *Id.* at 139; *see also Burkle v. Burkle,* 37 Cal.Rptr.3d 805, 812 (2006) (holding unconstitutional California statute sealing presumptively open divorce records).

Because probate court records have always been public, and access to them would serve the same salutary principles served by access to civil (and criminal) judicial records generally, the Court should recognize a qualified

constitutional right of access to probate court records under the United States and Maine constitutions. The Court should also find that the public has a common law right of access to Probate Court records.

B. A seal on online docket information does not satisfy strict scrutiny review.

1. The standard for sealing court records is strict scrutiny.

The Law Court has not addressed the constitutional standard for sealing court records in civil cases, either in probate court or otherwise, but federal courts have held that restrictions on public access to judicial records should be allowed only upon a showing akin to the strict scrutiny.[11] "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984); *see also Roberts*, 2014 ME 25 ¶ 26 ("It is true that a 'presumption of openness' attaches to every stage of a criminal trial, including jury selection, and that the presumption may be overcome only by 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"). According to the New Hampshire Supreme Court, "even where a

[11] "The 'strict scrutiny' standard of review requires that the fee be narrowly tailored to achieve a compelling governmental objective." *Butler v. Supreme Judicial Court*, 611 A. 2d 987, 992 (1992).

sufficiently compelling interest is demonstrated, a court record may not be kept sealed unless no reasonable alternative to nondisclosure exists and the least restrictive means available is utilized to serve the interest that compels nondisclosure." *Associated Press*, 153 N.H. at 130 (quotation marks omitted). This standard requires an "individualized determination . . . on the facts of each case." *Id.* at 138.

This Court has addressed the common law standard for sealing court records in civil cases at least twice. In a reference that endorsed a standard that sounds very much like strict scrutiny, the Court wrote, "Although under appropriate circumstances a court may impound records when publication would impede the administration of justice, the power of impoundment should be exercised with extreme care and only upon the clearest showing of necessity." *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me. 1981) (citation omitted). More recently, the Law Court made clear that the relatively secrecy-tolerant "good cause" standard for imposing a protective order on materials exchanged in discovery in a civil case does not apply to records admitted into evidence in civil trials. *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 843-44 (Me. 1994). Instead, the Court cited with approval the First Circuit's holding in *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 553 (1st Cir. 1993) that "non-disclosure of

judicial records could be justified only by the most compelling reasons." *Bailey*, 651 A.2d at 844. In *Bailey* the Law Court affirmed the denial of a request to seal trial exhibits despite an affidavit from the defendant presenting a robust argument – an argument more specific and direct than what the Conservator has presented here – that the disclosure of the records admitted at trial would "result in a direct loss of revenue . . . and would spare our competitors the considerable burden of financing their own research and development." *Id.* at 844. More recent federal opinions have held that the common law standard for sealing court records is essentially the same as the constitutional standard for doing so. *See In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (finding that the common law standard is "not coterminous" with the constitutional standard, but that "courts have employed much the same type of screen in evaluating their applicability to particular claims").

Notably, the standard for sealing records does not itself require that any particular records or information be filed with the court in the first place. Nor does the standard suggest that court records must be placed online. But once records are filed with the court for purposes of adjudication, whether that filing is electronic and online or in paper, they

cannot be removed from public view on account of their content without satisfying strict scrutiny review.

2. The standard for sealing court records is the same whether records are available online in electronic format or in paper copy at the courthouse.

No court has ever found that a seal is warranted on judicial records available online while the same records remain open to the public at the courthouse. The only case on point appears to be an Ohio decision that comes out the opposite way.

In *Engelhardt*, an Ohio Probate Court framed the issue as, "[w]hether the Court [m]ay [r]emove [a]ccess to its [p]ublic [r]ecords via the [i]nternet where such [a]ccess is [a]vailable and where the [r]ecords have not been [s]ealed by the [C]ourt[.]" 127 Ohio Misc.2d at 16. The Court answered that question in the negative, observing that "[s]everal legal authorities suggest that once a court chooses to provide access to its public records through the Internet, it should treat the removal of those records from the Internet in the same manner that it would treat removal or sealing of those records from public access at the court." *Id.* The Court held: "this court must treat the public records it posts on the Internet in the same manner as it treats the public records maintained at the court. Therefore, the court has no discretion to remove from the Internet any public records that it

continues to make available publicly at the court." *Id.* at 19. The Court denied a request for an "order prohibiting the court from scanning for display on the Internet all records of this case and to remove all records of this case previously displayed on the Internet because such records contain sensitive financial information." *Id.* at 13. In *Engelhardt*, as here, the petitioner had agreed that the records and information should remain available at the courthouse.

The decision in *Engelhardt* is sensible. Courts everywhere are moving to electronic court records and docketing. The entire federal court system moved to online docketing and filing via the PACER system long ago. All of the recent federal decisions on sealing court records necessarily involve records available on PACER. There are no paper records in the federal system to seal.

Likewise, all state courts inexorably are moving in the direction of electronic online dockets. The "reasonably clear pattern" and "predominant view" is that "court files should be available online to the same extent that they are available at the courthouse." Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L.Rev. 481, 517 (2009).

It would be unwise to create a two tiered system for access to court records, one for paper court records and the other for electronic records, for

at least four reasons. First, doing so would be contrary to the Probate Rules and Maine statues, as argued above, and contrary to the First Amendment and the common law, as argued in the following section of this brief. Second, because paper court records will soon be a thing of the past, a more secrecy-prone standard for electronic court records online would end up being the only standard for access to court records. Third, a two-tiered standard providing greater access to court records in paper copy at the courthouse could easily be circumvented, as anyone interested in accessing the records could simply visit the courthouse, and nothing would stop any member of the public from copying the docket at the courthouse and then making that information available on the internet. Fourth, access to online court records is in the public interest for the reasons described below.

3. The Conservator has not shown that a seal on the online docket is narrowly tailored to serve a compelling interest.

The Conservator has not shown that a seal of the information at issue here on the Probate Court's online docket is narrowly tailored to serve a compelling interest.

a. A seal would not serve a compelling privacy interest.

The financial information the Conservator wants removed from the court's online docket merely reveals the amount of assets subject to the

Conservator's authority and a breakdown of those assets by broad category (real estate, tangible property, intangible property). R.2 (showing as "Removed" information next to the 10/22/14 docket entry at issue); Blue Br. 3 (screen shot of an electronic docket for a case at the Kennebec County Probate Court). There are no account numbers, social security numbers, or similar information, merely gross numbers revealing the amount of money the Conservator is charged with safeguarding for the benefit of Emma.

As the information on the Court's docket merely reveals the total amount subject to the Conservator's court-sanctioned authority (and oversight by the Probate Court), the Conservator's argument amounts to "a generalized concern for personal privacy" of the sort that is "insufficient" to demonstrate "the existence of a sufficiently compelling reason to prevent public access" to court records. *Associated Press*, 153 N.H. at 137 (financial affidavits filed in divorce case are public records). "A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file." *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001); *see also Doe v. New York Univ.*, 786 N.Y.S.2d 892, 902 (N.Y.Sup. 2004) ("embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records").

This law is consistent with the general principle that there is no constitutional or common law privacy interest in what transpires in public court rooms or in official records of those proceedings. This is a longstanding principle well established by the Supreme Court. *See, e.g., Craig v. Harney*, 331 U.S. 367, 374 (1947) ("What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt . . . . Those who see and hear what transpired can report it with impunity.").

The Conservator argues that publication of financial information contained in the Probate Court docket would constitute an invasion of privacy (Blue Br. 18-21), but the Supreme Court has made clear that publication of truthful information contained in public court records is absolutely privileged:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose

> sanctions on the publication of truthful information contained in official court records open to public inspection.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975). The official actions of judges in court proceedings and the records of those proceedings, including records that contain financial information, are matters of public record in which there is no constitutional right of privacy. *See, e.g., Paul v. Davis*, 424 U.S. 693, 713 (1976) (rejecting privacy claim based on "a claim that the State may not publicize a record of an official act such as an arrest" and finding that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner"); *Johnson v. Sawyer*, 47 F.3d 716, 736 (5th Cir. 1995) (no privacy cause of action "for giving publicity to even highly private facts that are a matter of public record"). It does not appear that there is any authority for the proposition that public access to court records containing information on the amount of assets subject to a Conservator's court-sanctioned authority (or anything similar to that) would violate constitutional or common law privacy rights.

The Conservator cites Maine cases addressing tortious invasion of privacy, but those cases have nothing to do with seals on court records. Blue Br. 19-20. As argued above, courts have applied strict scrutiny under the First Amendment to determine whether to make courtrooms and court

records secret, not standards drawn from tort law. Moreover, a tort claim for publicity given to private facts only arises where the publicity "would be highly offensive to a reasonable person"[12] on matters that are "not of legitimate concern to the public." *Nelson v. Maine Times*, 373 A.2d 1221, 1225 (Me. 1977). "Disclosure of private facts, to be actionable, requires more than a mere exposure to undesired publicity." *Loe v. Town of Thomaston*, 600 A.2d 1090, 1093 (Me. 1991). Disclosure of private facts is not actionable when the matter relates to the "public life of the plaintiff" or is a matter of "public concern." *Id.* In *Loe* the Law Court noted that disclosure of a $10,000 settlement the plaintiff had entered with a municipality was a matter of public concern, not a private matter in which the plaintiff could claim a protectable interest. *Id.*

The information on the Probate Court's electronic docket relevant here is not "highly offensive" or so private as to give rise to a protectable interest. Merely disclosing the amount of assets subject to the Conservator's authority is akin to information in a myriad of legal claims disclosing the amount in controversy, including the assets or income of people with business before the courts. The amount of marital assets, the amount recovered in a personal injury case, or the amount stolen in a

[12] In his brief, the Conservator is equivocal on the question whether disclosure of the information relevant here would be "highly offensive." Blue Br. at 20.

criminal case are all matters of public record, even though such information reveals who has how much money. A great deal of personal financial information is made public in bankruptcy proceedings. There has been no showing that the interests of Emma here are any different from the undifferentiated interests of any member of the public at large engaged in the legal system and preferring that their wealth (or, perhaps, lack thereof) remain private. Such information is also of "public concern" given that it is contained in official court records and sheds light on both the Conservator's obligations to the Court as well the Court's own actions taken in the course of overseeing the conservatorship.

b. A seal would not serve a compelling interest where it is underinclusive.

The Conservator's claim that removal of information on the amount of money he is required to safeguard for Emma serves a compelling interest is belied by the continued public availability of that very same information in paper records available at the courthouse. When a law is seriously underinclusive and burdens First Amendment rights, courts typically find that the law does not serve a compelling interest or is, at least, not narrowly tailored to serve that interest. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 , 104-105 (1979) (statute is insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not the

electronic media or other forms of publication, from identifying juvenile defendants); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (finding that the "underinclusiveness" of a statute abridging First Amendment rights "would seem largely to undermine" the claimed justification for it); *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted); *Republican Party of Minn. v. White*, 536 US 765, 780 (2002) (statute found to be unconstitutional where it was "woefully underinclusive"); *see also Bagley v. Raymond School Dept.*, 1999 ME 60, ¶ 80, 728 A. 2d 127 (Clifford, J, dissenting) ("Fundamentally, narrow tailoring analysis asks whether a program is overinclusive or underinclusive to serve the purposes of the specific compelling interest on which the program is based.").

The same principle holds true for seals on court records; a seal cannot be justified by an interest so insubstantial as to warrant only a patently incomplete and ineffective seal such as the seal the Conservator requests here.

c. A seal would not serve a compelling interest in avoiding identity theft.

The Conservator's related concern, the possibility of financial exploitation, cannot support a seal for the same reasons that generalized privacy considerations, discussed above, do not warrant a seal.

In addition, the record contains no evidence that identity theft using access to information in court records has ever taken place, that the particular information on the docket (amounts subject to the Conservator's authority) has ever been used to commit identity theft, or if identity theft has ever actually taken place using court records, that it so prevalent and unavoidable as to warrant a seal. *See Associated Press*, 153 N.H. at 137 (rejecting a claim that avoidance of identity theft was a compelling justification for sealing financial affidavits in divorce cases in absence of any "empirical evidence linking identity theft to court documents" or suggesting that seal would "decrease the incidence of identity theft").

A scholar who has studied public access to electronic court records suggests that risks of identity theft as a result of access to court records are unsubstantiated. "To my knowledge, no evidence exists that court records have been a significant source of information used in identity theft." Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L.Rev. 481, 522 (2009). That observation takes on particular importance when viewed through the

prism of what we know about the prevalence of identity theft and data breaches having nothing to do with court records. It has been widely reported that hackers have obtained massive quantities of detailed and sensitive financial information[13] – information much more sensitive than what is at stake here – by means having nothing to do with access to public court records. By contrast, we have no evidence in the record of anyone ever having been victimized by identity theft as a result of access to any public court record anywhere, much less the particular sort of relatively benign information at issue here. The information is benign because it takes a lot more than knowing that someone has assets in order to successfully steal those assets.

Nor does the record contain evidence that some incremental or partial confidentiality, such as what the Conservator requests here, would keep identity thieves at bay, particularly where the very same information remains public at courthouses. If such information were as useful to those bent on financial exploitation as the Conservator suggests, that information would be obtained from public paper records at the courthouse.

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[13] *See, e.g.,* Lorenzo Ligato, The 9 Biggest Data Breaches of All Time, The Huffington Post (Aug. 21, 2015), available at http://www.huffingtonpost.com/entry/biggest-worst-data-breaches-hacks_us_55d4b5a5e4b07addcb44fd9e (last visited June 10, 2016).

The Conservator suggests that identity thieves target people with assets (Blue Br. 15),[14] but evidence on that subject is not in the record.

d. A seal is not narrowly tailored.

The requested seal is not narrowly tailored to serve the interests on which the Conservator relies for two reasons. First, there are practical alternatives to a seal to protect Emma from financial exploitation. Those alternatives include all of the steps available to any person concerned about identity theft, including using complex passwords and changing them often, notifying financial institutions and restricting access to accounts, using multi-factor authentication, using credit monitoring or similar services, and placing security freezes or fraud alerts. The steps concerned people can take to minimize the risk of identity theft have been published widely and information is available from diverse and respected sources including, the Federal Trade Commission,[15] the Financial Industry Regulatory Authority,[16]

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[14] The source cited by the Conservator is not authoritative. See Blue Br. at 15 (citing "Why Some Older Adults Fall Victim to Financial Exploitation, U.S. Dept. of Justice," https://www.justice.gov/elderjustice/research/why-older-adults-are-financially-exploited.html (last visited, June 10, 2016). That source refers to "[m]any explanations" offered to explain why some adults fall victim to financial exploitation and then says that the "detail has yet to be tested" and offers a "list of possible explanations for financial exploitation." *Id.* The Conservator argues that individuals with assets are more likely to be victims of theft, but the source cited by him does not appear to support that proposition. Rather, the source indicates that "[s]tudies have not found an association between income and financial exploitation." *Id.*

[15] https://www.consumer.ftc.gov/topics/identity-theft (last visited June 2, 2016).

[16] http://www.finra.org/investors/protect-your-identity (last visited June 2 2016).

Consumer Reports,[17] and the Wall Street Journal.[18] None of these sources urge the public to file motions to seal otherwise public records as a best practice to avoid identity theft.

Many services are available at relatively modest cost for persons concerned about identity theft. For example, the AARP offers "Identity Theft Protection" for about $200 per year. See https://www.aarpidprotection.com (last visited June 2, 2016). The services associated with this protection include identity theft insurance and credit monitoring.

The Conservator has not addressed any of these alternative measures to deter and prevent identity theft or explained why they might fall short in reasonably safeguarding the assets at issue from identity theft.

Second, the seal requested is seriously underinclusive because, as mentioned above, all of the information subject to the requested seal would remain open to the public at the courthouse. Anyone can access any information concerning this conservatorship proceeding at the courthouse. The requested seal is not narrowly tailored.

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[17] http://www.consumerreports.org/cro/2010/07/protect-your-identity/index.htm (last visited June 2, 2016).
[18] http://guides.wsj.com/personal-finance/credit/how-to-protect-yourself-from-identity-theft/ (last visited June 2, 2016).

IV. Access to Online Court Information is in the Public Interest.

Many courts have written about the benefits of a transparent and accountable justice system. *See, e.g., Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) ("The Supreme Court has repeatedly held that access to public proceedings and records is an indispensable predicate to free expression about the workings of government."); *Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately . . . ."). But few have had the opportunity, so far, to comment on the particular benefits associated with online access to court records.

A. Online Access to Judicial Records Means More Equal Access.

Access to judicial records by internet equalizes access for persons with disabilities. *See Engelhardt*, 17 Ohio Misc.2d at 19 ("Removing case files from the Internet may implicate the [Americans with Disabilities Act] because such removal may preclude access to public records for those individuals whose disabilities prevent them from traveling to the court.") For persons unable to drive or travel getting to the courthouse is impossible or difficult. The consequences of removing online access to court records has been framed this way: "If this court were to remove public records from

the Internet on request, it would be actively taking measures to deny access to public records that certain disabled individuals would otherwise enjoy." *Id.* at 20.

Online access also makes it less expensive to access court records by avoiding what has been referred to as "data arbitrage," where commercial service companies go to the courthouse, get the data, and sell it online. Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L.Rev. 481, 525 (2009). The sale price reflects the difficulty of getting the data. *Id.* The result is that people interested in what is going on in court end up paying a third party for access to information that would, if the court allowed, be available at less expense (and, perhaps, with greater reliability) directly from the court. Here, anyone interested in any record associated with this proceeding and willing to bear the expense could, even if the seal requested by the Conservator on online docket information were granted, hire an investigator to simply go to the courthouse and copy the files. By removing online access, the court does not foreclose access to information, it just limits access to those willing to bear the expensive of buying it.

B. Online Access to Judicial Records Fosters Timely and Accurate News Reporting.

The news media, and by extension the public reading or watching the news, benefit by online access to complete court docket information. That

is so because quick and convenient access to court records and information – of the sort made possible when dockets and court records are available on the internet – promotes timely and accurate news reporting.

For the news media, timely access to court records is vital. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is the spreading of it while it is fresh . . . ."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897. The Kentucky Supreme Court put the point this way:

> In relative terms, in reporting the news, time is of the essence. News is news when it happens and the news media needs access while it is still news and not history. The value of investigative reporting as a tool to discovery of matters of public importance is directly proportional to the speed of access. This is true when investigating court records after the case is closed as well as with a case in progress.

Courier-Journal v. Peers, 747 SW 2d 125, 130 (Ky. 1988). Foreclosing access to judicial records or information online and making the same records or information available only in courthouses means that reporters

cannot get access to records as quickly. Instead of taking seconds or minutes, it may take hours or even days (if a story breaks on a weekend or vacation) before it is possible to access paper court records at the courthouse.

Delay has adverse consequences. Release of information days or even hours late may mean that the public never gets the best information. Someone who reads an initial report based on imperfect information may never read a more complete follow-up story. Or, even worse, "old news" may end up not even being reported at all.

Online access to judicial records and information makes reporting more accurate, fair, and complete by putting at reporters' fingertips reliable primary source information. The lack of access to original filings and official information does not necessarily mean that a story goes unreported, but it does mean that reports may rely on less reliable secondary sources. News organizations have limited resources, and having reporters spend hours driving to and from courthouses to access court records that could have been accessed online in seconds is not always possible.

Online access to court records makes it easier for the news media to do a better job of informing the public about what is taking place in court. This should be encouraged.

C. Online Access to the Same Information Available at the Courthouse Avoids Confusion.

The remedy sought by the Conservator runs the risk of confusing or misleading the public about what information is in fact available by forcing the probate court to create two versions of the docket: a complete docket publicly available at the courthouse, and a redacted electronic docket available online. Unless care is taken to make clear that the electronic docket has been redacted and that more information is available at the courthouse, the public may be confused, at best, or mislead, at worst, about exactly what information is in fact available and where it can be accessed. *Cf Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 683 (6th Cir. 2002) ("Selective information is misinformation."). And if clear notice is posted to the Court's website that more complete information is available at the courthouse, that notice would go far to defeat the very privacy the Conservator wants to achieve.

CONCLUSION

WHEREFORE, Appellee the Maine Freedom of Information Coalition respectfully requests that the Court accept the reported question and instruct the Probate Court: (A) that it may not seal information on the Court's online docket when that same information remains public in paper records or the paper docket maintained at the courthouse; (B) that it must

apply the same strict scrutiny standard to sealing electronic Probate Court information and records online as would be required to seal non-electronic court records available at the courthouse; and (C) that the seal requested by the Conservator should be denied.

Dated at Portland, Maine, this 14th day of June, 2016.

Respectfully Submitted,
Appellee Maine Freedom of
Information Coalition

By its Attorneys,
PRETI FLAHERTY BELIVEAU &
PACHIOS, LLP

Sigmund D. Schutz
Bar No. 8549

One City Center
P. O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
Facsimile: (207) 791-3111
E-Mail: sschutz@preti.com

CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for the Maine Freedom of Information Coalition certify that I have, this date, mailed two copies of the Brief of Appellee to the Attorneys listed below, by United States Mail, first-class, postage prepaid, addressed as follows:

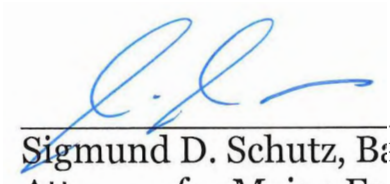
Patrice A. Putman
Levey, Wagley & Putman, P.A.
161 Maine Street, Suite 1-A
P.O. Box 7
Winthrop, ME 04364

Polly Rice Reeves, Esq.
Law Office of Polly Reeves
112 State Street
P.O. Box 5203
Augusta, ME 04332

Zachary L. Heiden
American Civil Liberties
Union of Maine Foundation
121 Middle Street, Suite 303
Portland, ME 04101

Daniel S. Petersen, Esq.
Bourassa & Petersen P.A.
116 State Street
Augusta, ME 04330

Dated: June 14, 2016



Sigmund D. Schutz, Bar No. 8549
Attorney for Maine Freedom of
Information Coalition

PRETI, FLAHERTY, BELIVEAU,
& PACHIOS, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: 207-791-3000
Fax: 207-791-3111