

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

COURTHOUSE NEWS SERVICE,)

Plaintiff,)

v.)

Civil Action No.:
2:18cv391

GEORGE E. SCHAEFER, in his)
Official Capacity as Clerk of)
the Circuit Court for Norfolk,)
Virginia,)

JACQUELINE C. SMITH in her)
Official Capacity as Clerk of)
the Circuit Court for Prince)
William County, Virginia,)

Defendants.)

TRANSCRIPT OF PROCEEDINGS

(Bench Trial)

Volume 4

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Norfolk, Virginia

February 5, 2020

BEFORE: THE HONORABLE HENRY C. MORGAN
United States District Judge

1 Appearances:

2 BRIAN CAVE LEIGHTON PAISNER LLP

3 By: WILLIAM HIBSHER

4 HEATHER GOLDMAN

5 BRYAN HARRISON

6 **-- and --**

7 WILLCOX & SAVAGE

8 By: CONRAD M. SHUMADINE, ESQUIRE

9 Counsel for Plaintiff

10 THOMPSON McMULLAN PC

11 By: WILLIAM DANIEL PRINCE, IV

12 MICHAEL GORDON MATHESON

13 Counsel for Defendants

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P R O C E E D I N G S

(Proceedings commenced at 10:04 a.m. as follows:)

COURTROOM DEPUTY CLERK: Civil Action No. 2:18cv391,
Plaintiff Courthouse News Service v. George E. Schaefer, et al.

For the plaintiffs, Mr. Hibsher, Ms. Goldman, Mr.
Harrison and Mr. Shumadine, are you ready to proceed?

MR. SHUMADINE: We're ready.

COURTROOM DEPUTY CLERK: For defendants, Mr. Matheson
and Mr. Prince, are you ready to proceed?

MR. PRINCE: Good morning. We're ready.

THE COURT: All right. I'll hear first from counsel
for the plaintiff. I believe the plaintiff indicated you wanted
to be notified when you reached 10 minutes remaining?

MS. GOLDMAN: Correct, Your Honor.

THE COURT: Josh, have you got that?

LAW CLERK: Yes Judge.

MS. GOLDMAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. GOLDMAN: This case is about a fundamental
Constitutional right, the First Amendment, and the right of the
press and the public to contemporaneously access new civil
complaints, a right that was violated in this case by
defendants' policies and practices of insisting on complete

1 administrative processing -- intake, indexing and scanning --
2 before making them available on the public access terminal,
3 policies and practices that caused systemic and pervasive delays
4 in access.

5 I want to underscore an important point that was made
6 by both Bill Girdner, Courthouse News Service's publisher and
7 founder, and Ryan Abbott, CNS's southeast bureau chief:
8 Courthouse News is not seeking immediate access, it is not
9 seeking instantaneous access, it is not seeking special access,
10 and is not seeking perfect access. But the evidence has shown
11 that, during the relevant period, access at the Norfolk and
12 Prince William Circuit Courts was not contemporaneous by any
13 definition.

14 Now, Courthouse News has not asserted, it is not
15 asserting, that the clerks cannot do phase one of administrative
16 processing, also known as intake, before access. We heard
17 testimony that this intake process, which involves receiving the
18 complaint, date-stamping the complaint, doing a confidentiality
19 review, and entering the initial data, which we heard was first
20 name plaintiff, first name defendant, nature of the case, et
21 cetera, into the computer system, accepting the filing fee and
22 issuing a receipt takes minutes, if that. It is the second and
23 longer part of administrative processing, also known as
24 indexing, which other courts have enjoined in situations where
25 the phase has given rise to delays. The scanning of the

1 complaint and the posting of the complaint on the public access
2 terminals occurs after this second phase of indexing. And Your
3 Honor, it is this second phase of processing that we believe
4 should be precluded before access if same-day access cannot be
5 provided. Of course if the clerks can accomplish the entire
6 administrative process, intake, indexing, scanning and posting
7 to the public access terminals, and still provide same-day
8 access, Courthouse News has no quarrel with that, and that's
9 what the clerks have recently been doing.

10 We heard from Bill Girdner about the tradition of
11 access in courts across the country. He testified regarding the
12 press's ability to review newly filed complaints on the day they
13 were filed and before indexing and scanning. And in Mr.
14 Girdner's words, he found a tradition that was nearly universal.
15 There was a wood box or a metal tray that was kept on the
16 counter or behind the counter that contained newly filed
17 complaints, and the reporters covering the court could review
18 those complaints at the end of the day of filing.

19 We also heard from Ryan Abbott, the bureau chief in
20 charge of coverage of Norfolk and Prince William circuit courts,
21 and he testified when he first started working for Courthouse
22 News in the early 2000s, he covered the Prince William Circuit
23 Court and he could see newly filed civil complaints on the day
24 of filing and before indexing, and that he had traditional
25 access via a wire basket.

1 The civil supervisory clerk for Prince William, Brenda
2 Elford, we read her deposition testimony into the record,
3 confirmed that access.

4 Defendants themselves have recently shown that there
5 are ways to provide traditional access on the day of filing,
6 access they have been providing in recent months; whereas for
7 the relevant period at issue in this lawsuit, January through
8 June of 2018, in the time that we allege the wrongdoing
9 occurred, Courthouse News Service was only able to see newly
10 filed complaints on the public access terminals after intake,
11 indexing and scanning.

12 Both Mr. Girdner and Mr. Abbott testified that after
13 Courthouse News filed that lawsuit, something changed. Clerks
14 offices began indexing and scanning complaints more quickly and
15 they allowed Courthouse News Service's reporters to see new
16 complaints after intake, but before indexing and scanning.

17 THE COURT: Well, they did that in Norfolk but not in
18 Prince William, right?

19 MS. GOLDMAN: Well, in Prince William too they would
20 provide the Courthouse News reporter after this lawsuit was
21 filed if she goes up to the counter, she can get access to the
22 complaints if they have not yet been scanned.

23 While the clerks have argued --

24 THE COURT: But they don't let them come behind the
25 counter.

1 MS. GOLDMAN: Well, she can't go -- yes. In Prince
2 William she cannot go behind the counter. Only in Norfolk.

3 THE COURT: All right.

4 MS. GOLDMAN: While the clerks have argued that
5 Courthouse News Service could have requested access before
6 processing prior to filing suit, the evidence has shown that
7 such access was requested and that such access was denied in
8 Norfolk.

9 THE COURT: Now, you went to both clerk offices -- I
10 mean, we've got to be careful, because the two clerks didn't
11 handle things exactly the same way, and neither did the
12 plaintiff. The plaintiff representatives went to both clerk
13 offices and asked for some form of access which was denied. In
14 the Norfolk clerk's office they actually had a meeting with the
15 clerk and the chief deputy of all the clerks as well as the
16 chief deputy of the civil division. I don't recall for certain
17 who initiated that conference, whether -- I think it was the
18 clerk in Norfolk who initiated that and invited them to come and
19 meet. Now, in Prince William, they did go there and ask for
20 access and they were denied it. But I don't recall that there
21 was a meeting with the Prince William clerk or deputies.

22 MS. GOLDMAN: There was not, Your Honor. And the
23 meeting that happened in Norfolk happened several months after
24 the lawsuit was filed, not before the lawsuit was filed.

25 THE COURT: Well, I know it wasn't before. I know it

1 was after. It seems to me it was maybe two months after or
2 something.

3 MS. GOLDMAN: Yeah. The lawsuit was filed in July and
4 the meeting was in September, the end of September.

5 THE COURT: All right. I don't know when in July it
6 was filed.

7 Go ahead. That's not relevant.

8 MS. GOLDMAN: So to talk a little bit those denials,
9 in Norfolk, Sonya Turner, a clerk who was summoned to the front
10 counter --

11 THE COURT: I remember all of that. You don't have to
12 tell me what the testimony was. I remember.

13 MS. GOLDMAN: Okay. And so in Norfolk access was
14 denied by Sonya Turner, and in Prince William, Ms. Elford told
15 Ms. Abbott that she had spoken to the chief deputy clerk, and
16 this was after one day Mr. Abbott was given access to complaints
17 before processing before the indexing phase. The very next day,
18 Ms. Elford told him that she'd spoken to the chief deputy clerk
19 and that they, that Courthouse News could not have access before
20 the full administrative processing. And in both courts they
21 were told that they would have to wait to see complaints until
22 they were available on the public access terminals. And in both
23 courts, Your Honor, CNS was faced with signs that we heard about
24 during testimony indicating that access was not a priority and
25 that press access was not available. In Norfolk the sign on the

1 door says Officers of the Courts Only. In Prince William, the
2 sign says that documents will be scanned in 10 days. And that
3 sign does not indicate that it's limited to motions or
4 subsequent filings. And as Your Honor pointed out, the clerk's
5 exceptions to their written policies are something that nobody
6 knows about unless you ask the right question of the right
7 person, and they're also contrary to what's posted in the actual
8 clerk's office.

9 THE COURT: Well, your investigation of the -- your
10 company's investigation at Prince William would have
11 demonstrated that they didn't wait 10 days for newly filed
12 complaints.

13 MS. GOLDMAN: But they also weren't making them
14 available on the same day, and there were delays that
15 stretched --

16 THE COURT: They weren't waiting 10 days either. So
17 you know, I think they made it clear that that 10 days applied,
18 why they did it. It had to do with attorneys not filing replies
19 in time for the judges to review them before the hearing, which
20 is a problem that all of us have.

21 MS. GOLDMAN: Your Honor, the sign didn't say that.
22 As Ms. Smith testified, that sign isn't that big to indicate
23 what it exactly applies to, and --

24 THE COURT: Go ahead. I don't think that that sign has much
25 relevance.

1 MS. GOLDMAN: So turning to the delays, Your Honor,
2 Courthouse News Service did not make up the delays alleged in
3 this litigation. As Mr. Girdner testified, litigation is
4 expensive, and it blasts a hole in the company's bottom line.
5 Courthouse News Service filed this lawsuit to obtain
6 contemporaneous access to newly filed civil complaints, access
7 that had traditionally been provided to the press for decades,
8 and that was not being provided in these two courts.

9 The delays in this case have been shown not only by
10 the testimony of CNS's expert, Amita Kancherla, but they have
11 also been established by the testimony of Mr. Girdner and
12 Mr. Abbott and by the CNS tracking data which was compiled by
13 the CNS reporters covering the Norfolk and Prince William
14 circuit courts every day.

15 Bill Girdner testified that he monitors access in the
16 courts CNS covers and that he knew these courts had significant
17 delays by looking at the New Litigation Reports for the northern
18 part of Virginia and the southern part of Virginia and seeing
19 when the reported cases were filed.

20 Ryan Abbott, by reviewing his reporters' daily
21 filings, observed that there were delays in access, often of
22 several days. And in Norfolk, Ms. Turner informed him that a
23 two-day delay or more was just the nature of a busy court.

24 The CNS tracking data for Norfolk and Prince William
25 which was admitted into evidence confirmed the existence of the

1 pervasive delays that Mr. Girdner and Mr. Abbott observed.

2 THE COURT: Let me ask you a question about the
3 tracking data to make sure I've got that straight. The tracking
4 data that your employee, the reporter, compiled was based upon
5 the cases in which you were interested. In other words, it was
6 focused on cases against companies, cases against the
7 government, and other cases that case had some notoriety. You
8 were interested in contract cases, tort cases, products cases.
9 I suppose you would be interested in condemnation cases. So the
10 data she examined was not all the cases. In other words, she
11 didn't examine the divorce cases or the gun cases. She examined
12 the cases in which you were interested. Is that accurate?

13 MS. GOLDMAN: She examined civil complaints. And the
14 tracking --

15 THE COURT: Well, civil complaints is a difficult term
16 to define.

17 MS. GOLDMAN: If I may, Your Honor?

18 THE COURT: What she tracked were the ones that I
19 reviewed with you just now. And she didn't track name
20 changes -- well, she wouldn't have tracked gun permits because
21 they weren't filed in the civil section.

22 MS. GOLDMAN: And they're confidential.

23 THE COURT: Well, that's not the issue. The issue is
24 they weren't filed on the civil side in Norfolk, they were filed
25 on the criminal side.

1 MS. GOLDMAN: Correct.

2 THE COURT: Whereas in Prince William they were filed
3 on the civil side. That was the evidence yesterday. So, but I
4 understand. She tracked tort cases, contract cases, cases in
5 which the government was a party or in which the company or
6 corporation was a party. Now as I understand it, of course,
7 you're not interested in all of those cases, she has to look at
8 them to see if she wants to report them. But she looks at all
9 cases in those categories to see if she's interested, right?

10 MS. GOLDMAN: Correct.

11 THE COURT: That's the way she did it?

12 MS. GOLDMAN: Hmm-hmm. And so Your Honor --

13 THE COURT: Okay. So when you get to your bar charts,
14 it's difficult for me to believe that only five percent of the
15 cases that she looked at in Norfolk were processed on the same
16 day when she first started in January. I mean, we figured that
17 maybe 10 or 12 cases, civil cases of the type in which you're
18 interested would be filed, and that means that only, if there
19 were 10, that it ought to be half of one that was processed in
20 one day. That does not seem reasonable? How did she come up
21 with that?

22 MS. GOLDMAN: By looking at the data. We agree,
23 five percent is not reasonable. It's --

24 THE COURT: Well, five percent is obviously not
25 reasonable, I mean --

1 MS. GOLDMAN: It's a shocking number. I agree, Your
2 Honor. But by the looking at the data and by using the proper
3 columns in the data set, the date filed, which she corrected for
4 the date stamp on the complaint, and the column titled Date/Time
5 Documents Available to Public, by using those columns, that's
6 what the data showed.

7 THE COURT: All right. Now she says that she used as
8 her starting point either the date stamped on the complaint or
9 when it was first made public on the, those machines, whichever
10 was later, right?

11 MS. GOLDMAN: For her start point?

12 THE COURT: Yes.

13 MS. GOLDMAN: She used the date stamped on the
14 complaint for her start point.

15 THE COURT: All right. So she used the date stamp on
16 her starting point --

17 MS. GOLDMAN: Yes.

18 THE COURT: -- not when it was first on the public
19 access terminal?

20 MS. GOLDMAN: No. That was her endpoint, when the
21 documents were first made available on the public access
22 terminal.

23 THE COURT: Well, first made available in text form.
24 I mean, there were two columns. One time when the fact of
25 filing was first entered, and then another column, 13, is when

1 they put the financial information in, and 14 is when the text
2 of the document --

3 MS. GOLDMAN: Yes.

4 THE COURT: So she used the date stamp?

5 MS. GOLDMAN: Correct, Your Honor. Which we heard
6 testimony from the clerks were unanimous on this. We heard from
7 Mr. Schaefer, we heard from Mr. Larson, Ms. Elford, we heard
8 from Ms. Porter yesterday and Ms. Elford as well that a
9 complaint is considered filed when it receives a date stamp and
10 comes into the office, and that's when the statute of
11 limitations is tolled, and that's when the complaint becomes a
12 public record, when it is handed in the over the counter and
13 receives a date stamp.

14 THE COURT: Well, no, she said it doesn't become filed
15 for purposes of statute of limitations until it's date-stamped
16 and financial, and the financial data is verified. So if they
17 file it without a check, it's not filed, as I understand their
18 testimony. The fact that they date-stamp it but it's not
19 considered filed until they have verified that the money's been
20 paid, so if they pay the wrong amount of money or no money, it's
21 not filed for purposes of the statute of limitations. If I'm
22 wrong on that, then your associates can find in the transcripts
23 where somebody said otherwise. That's the way I understood it.

24 MS. GOLDMAN: We can look for that, Your Honor.

25 THE COURT: So she -- we have no data to track the

1 quantity of filings in which you're interested which were
2 date-stamped with no money or the wrong money. We don't have
3 any data on that, which would mean that they wouldn't be entered
4 on the electronic records until the money was straightened out.

5 MS. GOLDMAN: Which could have been the same day, Your
6 Honor, if people are filing it right with the --

7 THE COURT: It could be.

8 MS. GOLDMAN: -- counter person.

9 THE COURT: That's where we are on that, I think.

10 Okay. Go ahead.

11 MS. GOLDMAN: So I want to focus again on what Ms.
12 Kancherla chose as her endpoint, which is the 14th column of
13 Joint Exhibits 1D and 1E which we spent a lot of time on in this
14 trial. And --

15 LAW CLERK: Ten minutes is remaining.

16 MS. GOLDMAN: Thank you.

17 THE COURT: What?

18 LAW CLERK: Ten minutes is remaining.

19 THE COURT: I'm going to give her an extra five
20 minutes because of my questions.

21 MS. GOLDMAN: Thank you, Your Honor.

22 Which is aptly titled Date/Time Document Available to
23 the Public. That's the last step of the administrative
24 processing when the complaints are scanned into CIS and the
25 documents are available on the public access terminals. And Ms.

1 Kancherla gave the clerks the benefit of the doubt. If the CNS
2 reporters may have been able to see the complaint before they
3 were made available on the public access terminals, Ms.
4 Kancherla gave them the benefit of the doubt there. And
5 defendants' expert testified that he chose as his end date the
6 date that the cashier received the payment fee, which he
7 admitted is the very first process and it's the very first phase
8 of administrative processing and is followed by the many steps
9 we heard about that constitute docketing and indexing. And
10 defendants' expert rejected the 14th column, the scan date,
11 because of the possibility that complaints could be rescanned on
12 a date later than the original scan date. But he has no data
13 about rescanning, and he ignored the consistent deposition
14 testimony that if the rescan needs to happen, it happens right
15 away.

16 THE COURT: Well, the rescanning would affect the
17 beginning date not the ending date.

18 Go ahead.

19 MS. GOLDMAN: So if rescanning occurred on a day --
20 and Mr. Larson testified that if rescanning occurred on a day
21 after the original scan date, he hadn't had that happen in three
22 or four years. So that last column is the accurate date for the
23 date available.

24 So as we talked about a little bit, Ms. Kancherla
25 focused her analysis on civil complaints, which was the focus of

1 the lawsuit and which are entitled to First Amendment
2 contemporaneous access. Defendants' expert claims that civil
3 litigations, the universe of filings that Courthouse News
4 focused on, is too subjective a category of filing to analyze.
5 But Ms. Kancherla was easily able to isolate the data set by
6 examining the civil cover sheet, which the Court was shown
7 yesterday, which defendants' expert testified that he never
8 reviewed. And Ms. Kancherla testified that the cases Courthouse
9 News tracked represented 81 percent of civil complaints in
10 Norfolk and 71 percent of civil complaints in Prince William,
11 and as an expert and a data analyst, she testified that
12 81 percent and 71 percent are a robust sample.

13 So based on Ms. Kancherla's analysis of the data from
14 OES, accessed gradually improved during the five-month period
15 after this lawsuit was filed. Plaintiff's Exhibits 8 and 9,
16 which have been admitted into evidence and are now being shown
17 on your screen, Your Honor, establish this gradual improvement.
18 And as Your Honor has noted in this case, it's obvious:
19 Something's being done differently. As Mr. Abbott stated,
20 defendants are indexing and scanning cases more efficiently and
21 are allowing CNS to see the few cases not yet indexed and
22 scanned before, by the end of the day they are filed.

23 And as these charts show, we heard that the Prince
24 William clerk's office in 2019 was able to provide same-day
25 access to 95 percent or more of civil complaints. And while the

1 data isn't as consistent in Norfolk, Norfolk was able to reach
2 same-day access up to 90 percent of civil complaints.

3 Your Honor, you've stated that there is a First
4 Amendment right of access to civil complaints, and the evidence
5 in this case establishes that the defendants' policies and
6 practices caused delays in access to civil complaints. Under
7 settled law in this circuit, defendants have the burden to
8 provide a Constitutionally valid justification for their
9 policies and practices. Instead, since this lawsuit was filed,
10 defendants have denied that there are any delays and have
11 litigated this case aggressively, filing motion after motion.
12 While defendants have raised confidentiality review as a
13 justification, they also testified that that review occurs
14 during the first phase of processing and takes 60 seconds.

15 And while defendants deny that these delays exist at
16 all, Mr. Schaefer admitted in court on Monday that things stack
17 up terribly and sometimes carry over to the next day.

18 To the extent -- and also Mr. Schaefer and Mr. Larson
19 both testified that the Norfolk clerk's office did not have to
20 hire a single employee in order to reach the access they're now
21 providing.

22 To the extent access has improved because the clerk's
23 offices are doing intake, indexing and scanning more quickly,
24 those efforts can be relaxed due to human nature. And to the
25 extent the clerk's offices have allowed access before indexing

1 and scanning, those *ad hoc* exceptions can be taken away once
2 this lawsuit is over. And Your Honor, that is our fear.

3 We have offered suggested declaratory and injunctive
4 relief language that incorporates the "unless where practicable
5 language" Your Honor has articulated and that we believe
6 achieves the requisite specificity without any undue
7 interference on the clerk's office's processes. This proposed
8 language can be found in our proposed conclusions of law and
9 would provide an exception for situations where circumstances
10 make it impracticable to provide access on the day of filing,
11 and we would ask that the Court's judgment expressly retain
12 jurisdiction, as Your Honor indicated on Monday, to grant such
13 further relief as may be necessary and proper for the purposes
14 of enforcing any relief granted.

15 Your Honor, I'll just close and end by saying
16 Courthouse News Service is a surrogate for the public and for
17 the media when it comes to coverage of the courts. News is
18 fleeting. In the words of Bill Girdner, the new cycle follows
19 the basic cycle of life. News happens during the day, it's
20 reported during the day, it's read during the day, and discussed
21 that day. Courthouse News Service seeks a declaration that the
22 defendants' policies and practices violated the First Amendment
23 during the relevant period addressed by the complaint, January
24 through June, 2018, when same-day access to new filings was
25 five percent in Norfolk and 38 percent in Prince William

1 according to the data. A declaration requiring defendants to
2 provide contemporaneous access by the end of the day of filing
3 where practicable would be the next-best protection for
4 Courthouse News Service, and Courthouse News Service is at least
5 entitled to that relief under the law and the facts presented.

6 Your Honor, this is an important First Amendment case,
7 and the result of Courthouse News Service v. Schaefer will be an
8 important precedent going forward.

9 MR. PRINCE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. PRINCE: First off, I just, a quick comment,
12 listening to opposing counsel's argument. I think a comment was
13 made we've aggressively litigated this case. I don't apologize
14 for defending my client. So I wear that as badge of honor. And
15 I think my clients deserve that.

16 THE COURT: I think that brings up an important point.
17 This case got continued in segments. It's like going to the
18 airport and they tell you there's going to be a 10-minute delay,
19 then a 30-minute delay and 40 minutes. So you guys went through
20 that. And I think counsel and both parties are to be commended
21 for hanging in there and trying the case. Because a lot of
22 people would have taken advantage of the situation to get a
23 continuance, which a lot of people try to do. And nobody tried
24 to do that in this case. Which is good. It's very helpful to
25 the Court. So I think that the fact that the parties hung in

1 there and made the necessary adjustments to be ready for trial
2 as soon as the court was ready is, I wish we had more people who
3 did it that way instead of wanting to postpone things, as we
4 take great pride in trying to move cases along. But the more
5 help we get from the attorneys, the better we can do it.

6 MR. PRINCE: That's life in the Eastern District of
7 Virginia.

8 THE COURT: Both parties should be commented for that.

9 MR. PRINCE: Thank Your Honor.

10 We've listened to Your Honor's comments throughout the
11 course of this trial and at the summary judgment hearing we had
12 a couple weeks ago. You've made a couple things clear. You
13 think that this is a First Amendment case. You believe the
14 First Amendment right of access applies to newly filed civil
15 complaints. As Your Honor knows, we disagree with that. Our
16 position is the right of access under the First Amendment does
17 not apply to newly filed civil complaint. There's a common law
18 right of access. But I'm not going to belabor that point
19 because you've been clear that you believe that there is a First
20 Amendment right here.

21 THE COURT: I haven't been persuaded otherwise, unless
22 you can do so. I think that the point the plaintiff's making is
23 that it has its news value as soon as it happens. We're all
24 going through that. Anybody who's looked at the current
25 situation in Iowa illustrates what that means. If you don't get

1 it when it's fresh, it's like stale bread or stale anything
2 else. So I think the plaintiff's point on that is well-taken.

3 MR. PRINCE: And I think that my clients would more or
4 less agree with that. They are public servants. They believe
5 in transparency. They believe in open government. They operate
6 their clerk's offices that way. And it goes without saying,
7 they are, they recognize the importance of the First Amendment,
8 which is what's made this case very difficult for them. Because
9 as public servants and the custodians of a large volume of
10 public records, they're the custodians of all civil and criminal
11 court records filed in the circuit courts in their
12 jurisdictions.

13 THE COURT: Well, it's a very important job. And I
14 think that the dispute here is really very narrow. I think
15 we're talking about the difference between same-day and one
16 court day. And that's the difference.

17 MR. PRINCE: So Your Honor, you know, I don't want to
18 spend my time on the First Amendment issue. We've made our
19 arguments in our papers --

20 THE COURT: I'm not suggesting that you do.

21 MR. PRINCE: -- but I do want to say this: That
22 assuming without conceding that there is a First Amendment right
23 here --

24 THE COURT: I understand.

25 MR. PRINCE: -- the Fourth Circuit has been clear that

1 it's a qualified right of access. And the word qualified
2 implies an element of reasonableness here. It's not absolute.
3 It's a qualified right of access. And that's really what I
4 think this case is about. No one is withholding access. No one
5 is keeping them -- no one is keeping records from them and
6 saying you don't get them. This case is about timing and when
7 they get access to these records. You know, what is reasonable?

8 THE COURT: Right. I agree with you.

9 MR. PRINCE: Is same-day reasonable? Is
10 contemporaneous reasonable? Whatever that word means. Is next
11 day reasonable?

12 THE COURT: Well, I think the problem has been that
13 there hasn't been a definition, consensus definition of what
14 contemporaneous means. And I've tried to define as best I can
15 best I can what contemporaneous means.

16 MR. PRINCE: So Your Honor, I showed you the statute
17 the very first time I spoke to you last Friday at 17.1-208.
18 This is the Code section that specifically deals with access to
19 court records. It's the section that provides that court
20 records are public records and they are open to inspection by
21 the public. Period.

22 THE COURT: I know. And they talk about copying them.

23 MR. PRINCE: Well...

24 THE COURT: "Shall be open for inspection. No person
25 shall be permitted to use the clerk's office for the purpose of

1 making copies in such manner or of such extent as will, in the
2 determination of the clerk, interfere with the business." They
3 don't say that about open to inspection, they say that about
4 copying.

5 MR. PRINCE: I think it's a distinction without a
6 difference. I think what the Section --

7 THE COURT: Well, I don't think that's the way you
8 interpret statutes. It says two things. Open to inspection and
9 copying. And then it refers only open to inspection. They
10 could have said no person shall be permitted to use the clerk's
11 office for the purpose of inspecting the documents or copying
12 them if that's what they meant to say, and they didn't. So
13 that's not the way the Court interprets the statute.

14 MR. PRINCE: You've also made clear that you're not
15 going to hold policies that CNS did not know about against CNS.
16 And we understand that. The evidence has been that CNS did not
17 know at the time they filed this lawsuit that they could go
18 behind the counter and look at records in the Norfolk Circuit
19 Court. But the evidence is also clear that they're currently
20 not experiencing delays. Their access is good. I believe
21 Mr. Abbott testified that the access in CNS is pretty good when
22 I asked him that question on the stand. So it's uncontroverted
23 that there's no actual live controversy right now between the
24 parties and that they're getting the access that they feel is
25 appropriate.

1 We've argued that this case is moot because there's no
2 ongoing case --

3 THE COURT: Well, I think the Fourth Circuit disagrees
4 with that.

5 MR. PRINCE: Well, and I understand that, and Your
6 Honor has made clear that you do not think it's moot.

7 THE COURT: Look at 382 Fd. 334. It's an unpublished
8 decision.

9 MR. PRINCE: But even if the case is not moot --

10 THE COURT: Well, it says -- well, the evidence
11 doesn't indicate the case isn't moot. Because your evidence has
12 been that the degree -- they simply don't believe what Mister --
13 what the statistician and Mister -- the local regional director?
14 What was his name?

15 MR. PRINCE: Mr. Abbott.

16 THE COURT: -- Mr. Abbott says. Mr. Larson says
17 that's not correct; that they're not doing that.

18 MR. PRINCE: Well, if --

19 THE COURT: So your own evidence is that they're not
20 performing to the level that Mr. Abbott and the statistician
21 says they're performing.

22 Now, your statistician on the other hand says that
23 they are performing to the level that Mr. Abbott says that
24 they're performing except for the fact that he doesn't break it
25 down between one and two days, which makes his testimony that

1 much less valuable or persuasive. He just used the one court
2 day instead of the day of filing. And the Court -- before he
3 testified, the Court had already -- or actually at summary
4 judgment the Court advised you what it thought contemporaneous
5 meant, and he still didn't present the Court with evidence of
6 one versus two days. He just used the court day. At summary
7 judgment we talked about the court day and how to define it, so
8 the defendants were on notice that the Court needed to know the
9 difference between same-day and next day, and he didn't give it
10 to us.

11 MR. PRINCE: Well, Your Honor, he did when he
12 performed --

13 THE COURT: He did what he was asked to do. But the
14 Court put you on notice in advance of the trial of the
15 distinction it thought was made between contemporaneous and one
16 court day as you argued at summary judgment. So his testimony
17 is diminished by the fact that he didn't make that distinction.
18 It's diminished in other ways too, but that's one of them.

19 MR. PRINCE: Your Honor, but they have asked for
20 injunctive and declaratory relief here, and --

21 THE COURT: Well, they haven't asked for perfection.
22 I know you keep asking the question, I mean, you and your
23 partner, you want 100 percent. Well, Mr. Regional Director
24 said --

25 MR. PRINCE: Mr. Abbott.

1 THE COURT: Yes, they strive for 100 percent, but they
2 realize that's probably not attainable, and I don't think it is
3 attainable. So I don't view what they're saying as asking for
4 100 percent access on the date of filing. I don't think that
5 can be done. So the question is, as I say, the difference
6 between the Court's definition of contemporaneous and his one
7 court day. That's where we are.

8 MR. PRINCE: Your Honor, and I agree with you that
9 there is not any precedent or authority that defines what
10 contemporaneous access to new civil filings is. And there's
11 nothing in the Fourth Circuit, certainly, that requires a court
12 to provide same-day access, however you define contemporaneous:
13 Immediate, same-day, next day.

14 THE COURT: Well, somebody's got to define
15 contemporaneous. Maybe it's the Supreme Court. But I think we
16 have to have a definition for contemporaneous, and the Court's
17 definition is just what I said it was.

18 MR. PRINCE: Well, Your Honor, Your Honor heard
19 evidence that there are things that happen that can cause a
20 complaint that comes in on a Day X to be processed and made
21 available the next business day.

22 THE COURT: I know. I have hear evidence. And that's
23 why the Court didn't say that you have to have all of them
24 available the same day.

25 MR. PRINCE: One of the problems with the same --

1 THE COURT: But the trouble is, again, your
2 statistician didn't break it down. And not only that, he can't
3 quantify these problems with when there were financial problems,
4 when there was rescanning. He relies on those, but he doesn't
5 quantify them.

6 MR. PRINCE: But --

7 THE COURT: I mean, I think that the -- quite frankly,
8 I think the testimony I've heard -- and it's really far more
9 consistent than it is inconsistent -- bears out the Court's
10 view. The question is how we define what the Court's obligation
11 is. I think the court's First Amendment obligation is to make
12 it available contemporaneously, and I've told you what
13 contemporaneously meant. And it doesn't mean the same day in
14 every case. I've already said it didn't.

15 MR. PRINCE: Well, I think that we have conflicting
16 evidence -- we have conflicting expert testimony here on during
17 that six-month period of time when complaints were being made
18 available. And Your Honor --

19 THE COURT: I don't think the evidence is conflicting
20 that much, frankly. I think it's more consistent than it is
21 conflicting.

22 MR. PRINCE: Well, Your Honor --

23 THE COURT: I mean, the testimony is from the 80s to
24 the 90s from your expert are available in both clerk's offices
25 on the same day. Same court day. Now, when your clerk

1 describes -- both clerks describe how it's done, it's clear to
2 the Court that they're saying that the overwhelming number of
3 civil complaints are available on the date of filing, which is
4 consistent with the testimony of both statisticians. Now, the
5 statistician's basis for the first year is different, markedly,
6 than what it is now. But what it is now is very consistent.

7 MR. PRINCE: Well, the clerks do the best they can,
8 and they're not perfect, and they're people. And you saw one of
9 them yesterday. And I think you -- I think the Court got a
10 little bit of the emotion that this lawsuit has brought on.

11 THE COURT: I did, and I can understand it. I've been
12 sued myself, you know? If I find somebody guilty, they sue me.

13 MR. PRINCE: Well --

14 THE COURT: So it's not comfortable being sued. I
15 understand that.

16 MR. PRINCE: Well, I --

17 THE COURT: And you know, I think the clerks are doing
18 a good job myself. That's not the issue.

19 MR. PRINCE: Your Honor, Your Honor has asked about
20 the expert testimony, and I want to revisit the, you know, the
21 example that you asked Ms. Goldman earlier: Their expert has
22 testified that only five percent were being made available the
23 same day in Norfolk.

24 THE COURT: I find that hard to believe.

25 MR. PRINCE: It's hard to believe. I mean, if there

1 was --

2 THE COURT: I agree with you.

3 MR. PRINCE: And --

4 THE COURT: I think it's hard to believe. In fact, my
5 other clerk is going through the original documents as we speak.
6 In fact, he started yesterday. I want to see what the documents
7 from OES show. Because I think the five percent doesn't sound
8 accurate to me.

9 MR. PRINCE: Well, and the testimony and what we
10 wanted to show Your Honor yesterday was that, you know, speaking
11 from the people who are boots-on-the-ground, who are doing this,
12 they don't believe it either. And I can think of --

13 THE COURT: I know, but they didn't believe your
14 expert either. Mr. Larson doesn't.

15 MR. PRINCE: Mr. Larson doesn't believe our expert?

16 THE COURT: Your expert.

17 MR. PRINCE: In that... I'm not sure I follow, Your
18 Honor.

19 THE COURT: Well, he said you're not anywhere near the
20 level that the plaintiff's expert said. And according to your
21 expert, you're above that level.

22 MR. PRINCE: I know Your Honor has been confused about
23 the positions of the parties here, and let me see if I can try
24 to add some clarity.

25 We don't -- I don't think it's in dispute that the,

1 that CNS is not suffering delays now. The issue is whether they
2 were suffering delays during this six-month period. And that's
3 what our clients dispute. And that's what we've tried to show
4 through Mr. Harless and through the testimony of our fact
5 witnesses. And the testimony you heard yesterday from
6 Ms. Porter is that nothing's changed. They're doing the same --

7 THE COURT: Well, I don't believe nothing's changed
8 from the evidence. But I'm going to verify that or as best I
9 can by looking at the original documents.

10 MR. PRINCE: That's fair.

11 THE COURT: I believe that it vastly improved. But
12 I'm having a hard time believing that it started at five percent
13 in Norfolk. That just -- I don't know. Unless the records show
14 that.

15 MR. PRINCE: Your Honor, I want to --

16 THE COURT: And I looked at some of the records
17 myself, but I don't have time to go through every one of them
18 myself. So I'm having my clerk do it.

19 MR. PRINCE: It's voluminous, and I apologize for
20 that. And that --

21 THE COURT: It can't be helped.

22 MR. PRINCE: It can't be helped because there's a lot
23 going on in these courts. The OES data contains every civil
24 filing that was filed during not just that six-month period, but
25 actually goes from January through December.

1 THE COURT: Right.

2 MR. PRINCE: And that -- and you know, that includes
3 personal injury actions, it includes divorces --

4 THE COURT: I know. But it's not hard to go through
5 it, because I tried it myself. It's not hard to go through it
6 and figure what they need. The important factor is here that
7 the testimony has been that they treat all filings the same,
8 okay? So if the reporter from the plaintiff tested only the
9 cases in which she's interested, that should be a robust and
10 representative example, because the testimony is they're all
11 treated the same. So there's no reason to think a tort
12 complaint's treated any different than a gun complaint. They're
13 treated the same. So if they are treated the same, she knows
14 what she looks at, and now some of your people are trying to say
15 that they have got to go through and pick out what the plaintiff
16 finds interesting. That's not true. And it diminishes their
17 testimony when they try to argue that. They know what they're
18 interested in. They go through all the civil complaints and
19 decide what they're interested in. The clerk doesn't have to do
20 that. And Mr. Larson went on some time about how they would
21 have to go through and try to figure out what was interesting to
22 them. You don't have to do that at all. That definitely
23 weakened Mr. Larson's testimony. And Mr. Larson and Miss -- the
24 young woman you had yesterday --

25 MR. PRINCE: Ms. Porter.

1 THE COURT: -- were inconsistent in any number of
2 ways. So there are inconsistencies all over the place. That's
3 why we're trying to go through the records ourselves.

4 But your expert didn't quantify what he was talking
5 about. Quite frankly, his evidence is not very helpful at all
6 to the Court. And the plaintiff's evidence suffers from that
7 five percent, which, as I say, I'm -- I can't believe that's
8 true. I mean, unless these records tell me it's true, I'm not
9 persuaded it is. I don't think it's going to prove to be true.

10 MR. PRINCE: I think you heard yesterday that the
11 people that are actually doing the work are -- I believe you
12 heard yesterday that the people that are doing the work are
13 working. And that's what's so --

14 THE COURT: I know.

15 MR. PRINCE: -- challenging about this lawsuit.

16 THE COURT: I know. But the trouble is the clerks
17 can't give people a raise based on how many complaints are
18 processed per day. You can't do that in the public sector. You
19 can in the private sector. That doesn't mean they do, but they
20 can. Public sector they can't do that. So if the clerk prods
21 them a little bit they would do a little better, which is what I
22 think they did, based on the evidence.

23 MR. PRINCE: Your Honor, I want -- I do want to touch
24 on the sufficiency of the evidence.

25 THE COURT: Well, I've interrupted you quite a bit, so

1 I'm going to give you some extra time.

2 MR. PRINCE: The burden here is on CNS. And I think
3 that any time a plaintiff comes into federal court and asks for
4 an injunction or asks for declaratory relief, the burden is
5 on -- it's an extraordinary --

6 THE COURT: The Fourth Circuit says right here that we
7 can give an injunction. "A federal court may enjoin a state
8 officer from engaging in future conduct in violation of federal
9 law."

10 MR. PRINCE: Your Honor --

11 THE COURT: It says that. But that doesn't mean that
12 I'm going to do it or want to do it.

13 MR. PRINCE: But there has to be an ongoing violation
14 of law.

15 THE COURT: Fourth Circuit says "*Ex Parte Young*
16 exception applies. A court need only conduct a straightforward
17 inquiry into whether the complaint alleges -- whether the
18 complaint alleges an ongoing violation of federal law and seeks
19 relief properly characterized as prospective. However, to fall
20 within the *Ex Parte Young* exception it is sufficient for
21 plaintiff's suit to allege an going violation of federal law.
22 Actually proving such an ongoing violation is unnecessary."

23 In other words, it's the point made by the owner of
24 the plaintiff company: If there's a history of a violation, the
25 fact that the violation stops at any particular point does not

1 moot the plaintiff's opportunity for relief from the previous
2 ongoing violation. So the question is, was there a violation at
3 any particular point in time? And they have focused on January
4 to June --

5 MR. PRINCE: 2018.

6 THE COURT: -- of '18. So have they proven there was
7 a violation at that period of time? I mean, actually the
8 violations, according to their evidence, continued, but it
9 diminished during '18. It was ongoing. On the other hand, the
10 evidence in your case from your own witnesses would indicate
11 it's still ongoing because they're saying that the statistics
12 from both sides are wrong.

13 MR. PRINCE: Your Honor, if I could just respond to
14 the issue that you raised about whether or not there's a
15 potential for CNS to suffer delays after this lawsuit is over,
16 and I would suggest that there has been no evidence, none, that
17 the defendants are acting in anything but good faith here and
18 that there is going to be -- I believe opposing counsel used the
19 terminology at the summary judgment hearing -- revert to their
20 old ways. These are public officials.

21 THE COURT: Mr. Larson's testimony completely belies
22 that.

23 MR. PRINCE: In what...

24 THE COURT: That argument.

25 MR. PRINCE: I'm not sure which testimony, Your Honor.

1 THE COURT: His testimony that they're not coming
2 anywhere near complying with what the plaintiff described as
3 good and the percentages he gave. And that's what he said.
4 I've got it right in his transcript if you want to hear it.

5 MR. PRINCE: I, I don't recall him saying that. But I
6 think what Mr. Larson's point was is that CNS is happy with the
7 level of access that they're getting, and he believes they were
8 getting it before the lawsuit was filed. So during the
9 six-month period and beyond, nothing's changed. There have been
10 no policy changes. And that's been consistent. The clerks have
11 consistently testified to that.

12 And you know, I understand Your Honor's concern that
13 maybe something was done consistently and maybe someone prodded
14 the clerks to work faster or work harder, but you know, simply
15 put, there isn't anything in the record to support that. And
16 I'll listen to -- if you have something from Mr. Larson I'd be
17 happen to listen to that. I was...

18 THE COURT: Here it is. I should have known it.

19 "Mr. Larson, do you believe that CNS's allegations
20 regarding access delays in Norfolk are accurate?

21 "No, I do not.

22 "Why do you think they're inaccurate?

23 "We work every day to be one of the most efficient
24 organizations in the Commonwealth. We are constantly reviewing
25 our procedures to make them more efficient. To be faster. And

1 I don't believe we're anywhere near where CNS has said we are."

2 MR. PRINCE: And that is for the six-month period at
3 issue in the complaint?

4 THE COURT: No, that's not for the six-month issue in
5 the complaint, that's for the situation now. He said where we
6 are now. N-o-w.

7 MR. PRINCE: Okay.

8 Well, I've got about two minutes, Your Honor, and --

9 THE COURT: You've got more than that. I'm sure I
10 should give you more time because I've interrupted you far more
11 than I interrupted the plaintiff.

12 MR. PRINCE: We've tried to show Your Honor the
13 process of receiving a new complaint and putting it into the
14 system.

15 THE COURT: I think you've done that.

16 MR. PRINCE: And we've tried to show you why it's
17 important. And we've tried to show you that, you know, they
18 make all these complaints available in the public access
19 terminals, and that's a result of technology. You know, gone
20 are the days when somebody comes in and files a complaint, it's
21 in paper and there are all these paper files behind the clerk's
22 counter, and there's a basket and people can look through all
23 the complaints that have been filed. The fact of the matter is,
24 they've got to scan everything as it comes in, and then the
25 paper complaints go into a box, and in these two cases, after a

1 period of time they're destroyed --

2 THE COURT: Well.

3 MR. PRINCE: -- or they go to archives.

4 THE COURT: Quite frankly, I think that technology is
5 going to overtake the problem in this case. But I don't know
6 when that's going to happen. And the clerks themselves can't
7 make it happen, only the State can. The OES.

8 In other words, we have all electronic filing now in
9 this court, and they sort of took us, dragged us screaming into
10 the situation. But we're in it. And eventually so will the
11 State. But the clerk's can't do it. They have to rely on the
12 State, which is one of the reasons why the Court is thinking
13 it's not appropriate to try to enter an injunction going into
14 detail and describing what they're doing. If they're doing what
15 you're statistician says they're doing and what the plaintiff's,
16 Mr. Regional Manager says they're doing, they're doing pretty
17 good. I agree with you.

18 MR. PRINCE: Well, I do want to revisit the issue of
19 what is reasonable here in terms of access. And I want to be
20 very careful and put a disclaimer on my point: That I think
21 that this Court makes newly filed complaints available in a
22 timely manner, in a reasonable manner. But it's --

23 THE COURT: I think they're doing that now.

24 MR. PRINCE: They are now, but --

25 THE COURT: Pretty much everybody seems to agree on

1 that. That's not really the point. The point is, were they
2 doing it in the past?

3 Now, I can't say that there's no reason to give the
4 plaintiff any relief, because there's considerable evidence that
5 any public official in the place that the clerks are in may
6 lapse into what they were doing before. And your chief deputy
7 clerk has testified that they can't possibly do what they're
8 being asked to do, even though most of the evidence indicates
9 that they're doing it. So that's where we are.

10 I think the plaintiff is entitled to some relief, but
11 I'm very reluctant to grant injunctive relief, because that
12 suggests -- to me injunctive relief suggests you're giving --
13 you're enjoining somebody when they're really doing something
14 intentionally wrong or have a, I suppose a blasé attitude about
15 it, which I am not persuaded is the case here.

16 MR. PRINCE: Well, and the Eleventh Circuit in that
17 Brown decision, the CNS v. Brown decision, was very concerned
18 about that as well, and not telling a clerk's office how to run
19 their operations. Not telling a clerk's office how to manage
20 their records.

21 THE COURT: I don't think it's up to the clerk's
22 office to say that the gun permits ought to be filed in the
23 civil division or the criminal division, or they ought to do the
24 steps in the process differently or all that sort of thing.
25 They have got their own reasons to do things their way and they

1 have the experience in running the office or practicing in the
2 office.

3 MR. PRINCE: Your Honor, I want to close here and make
4 the point that this lawsuit is going to affect a lot more than
5 just these two clerks.

6 THE COURT: Well, it should.

7 MR. PRINCE: And it will.

8 THE COURT: Well, it should.

9 MR. PRINCE: Because -- and they didn't testify to
10 this explicitly, but I think it was very clear from my questions
11 to Mr. Girdner and Mr. Abbott, that every clerk in Virginia is
12 going to know about your decision. And every clerk's office is
13 different. Prince William is different from Norfolk. You heard
14 about some of those differences yesterday. Prince William
15 cannot process payments after 4:30. Mr. Schaefer's office can.

16 THE COURT: That's why the Court is not attempting to
17 rule that contemporaneous means it must be filed in every case
18 on the same day.

19 MR. PRINCE: Resources are different. I grew up in
20 Martinsville, Virginia and I can tell you that the resources of
21 the Martinsville clerk's office are the lot different than the
22 resources of Mr. Schaefer's. The point being, there's
23 no-one-size-fits-all here. The clerks do the best they can with
24 what they have.

25 THE COURT: Mr. Prince, there's nothing in what the

1 Court said to you at the summary judgment hearing where the
2 Court gave you its viewpoint on the situation that suggests the
3 Court was imposing something that resulted in one-size-fits-all.

4 MR. PRINCE: Respectfully, Your Honor, I would
5 disagree. Because if declaratory relief were to be issued in
6 this case, that would apply to every clerk's office, not just
7 these two clerks offices. And Mr. Girdner testified to this. I
8 asked the question, Do you believe that every clerk's office
9 throughout Virginia should comply with whatever this court
10 decides if you were to prevail? And he said absolutely.

11 THE COURT: I think he said I hope so.

12 MR. PRINCE: Or I hope so.

13 THE COURT: I don't know exactly what he said, but so
14 do I. I hope so too.

15 MR. PRINCE: I want to close and I want to go back to
16 what CNS is asking this Court to do. It's asking you to issue
17 injunctive or declaratory relief against these two clerks. No
18 one is disputing that these are public records. No one is
19 disputing that they're open to inspection by the public.
20 Transparency is important. My clients believe in it. The
21 question is whether it's reasonable to require circuit court
22 clerks to make new civil filings, whether it be newly filed
23 complaints that CNS cares about or all civil filings, available
24 within a certain period of time. Are you going to impose a
25 timeliness requirement on clerks to make their filings publicly

1 available? The Fourth Circuit has never done that. They do the
2 best they can with what they have. And I would suggest to the
3 Court and ask the Court respectfully, don't set the clerks up to
4 fail. Don't set them up to fail. If you impose a timing
5 restriction on them, now what happens when they don't meet it?
6 What happens when they've got people out? What happens when
7 they have a staff shortage? I don't -- Your Honor, it's --

8 THE COURT: What I suggested to you in no way imposes
9 a strict time limit on any clerk. Mr. Prince, you're arguing
10 something that the Court said it wasn't going to do. You're
11 telling me not to do something which I've already said I wasn't
12 going to do. You just don't want a judgment against the clerks
13 of any sort. So what you're doing is you're setting up a straw
14 man and then knocking him down. Your straw man is saying
15 everything has to be made available the first day in 100 percent
16 of the cases in all courts under all circumstances. And you're
17 then you're setting that up and then knocking it down. That's
18 not what I said. I didn't set that straw man up, you did. And
19 Mr. Larson.

20 MR. PRINCE: Respectfully, Your Honor, I'm not that
21 clever. You give me way too much credit to set something up
22 like that.

23 THE COURT: Well, I didn't say you did it on purpose.
24 But I do think you're clever enough to do it.

25 MR. PRINCE: I guess I should say thank you.

1 A declaratory judgment is intended to clarify the
2 legal rights and obligations of the parties, it's not supposed
3 to be an advisory opinion. It's not supposed to be speculative.
4 There has to be a live controversy between the parties. And our
5 position, which we have explained in our proposed conclusions of
6 law that we filed with this Court, is that declaratory relief is
7 not appropriate here. And even if the Court feels that the
8 declaratory relief can issue, it shouldn't issue based on the
9 facts of this case and based on the evidence. There's
10 conflicting expert testimony --

11 THE COURT: It's not so conflicting as you say. As I
12 said, your expert had so many flaws in analysis that it's not
13 very persuasive. So...

14 MR. PRINCE: One of the things our expert testified to
15 was that the data set is not perfect and that no expert, neither
16 he nor Ms. Kancherla, are able to say exactly what the
17 processing times are.

18 THE COURT: No statistic is going to be 100 percent
19 accurate. I disagree with your expert when he says there isn't
20 enough data to give a very good statistical analysis. I think
21 that date was gathered so that they could give an accurate
22 statistical analysis, and I think that the data does precisely
23 that. And for him to say it's impossible for anybody to do
24 that, I don't believe that. I believe they can do it. I'm not
25 sure the plaintiff has done it 100 percent accurately, but the

1 data is there.

2 MR. PRINCE: Unless Your Honor --

3 THE COURT: And I think that they can -- that a
4 statistician ought to be able to give a very close analysis of
5 how long it takes. Particularly when that analysis is coupled
6 with the testimony that we have. The testimony we've had
7 suggests to me that the overwhelming majority of civil
8 complaints in general and those in particular in which the
9 plaintiff is interested, are made available on the day they were
10 filed. And it's only exceptional circumstances that prevent
11 that from happening. In normal operations where there's no snow
12 days and nobody's home sick, they can do almost every one of
13 them per day. But there are inevitably going to be
14 interventions which prevent that. And the Court has to
15 recognize that, and I think the plaintiff has recognized that.

16 MR. PRINCE: Unless Your Honor has additional
17 questions for me, I will sit down. But I just wanted to thank
18 Your Honor for hearing us and for hearing my clients out, and we
19 appreciate Your Honor's patience.

20 THE COURT: Well, I don't think that I've -- I think
21 that the case has been tried efficiently, myself. I wish all
22 cases were tried this efficiently.

23 MR. PRINCE: Thank you, Your Honor.

24 THE COURT: All right.

25 MS. GOLDMAN: Your Honor, I think I have a few minutes

1 left. I just have a couple points I want to make.

2 LAW CLERK: Clerk eight minutes.

3 MS. GOLDMAN: Thank you.

4 I just want to point out that the delays that our
5 expert, her analysis, is confirmed by the delays indicated by
6 the CNS tracking data. And I just want to make clear that their
7 expert had her report in March, and they have not criticized Ms.
8 Kancherla's calculations other than saying that Ms. Kancherla
9 chose the wrong endpoint because of rescanning, which all the
10 testimony has indicated happens rarely.

11 And I just want to point out a few --

12 THE COURT: Well, I think they accused your reporter
13 of analyzing data with the thought in mind of making it come out
14 the way she wanted it to. I don't find that she did that. I
15 don't think she did. I don't think the evidence supports the
16 fact that she did that. So I don't think the defendants' expert
17 was correct in discounting her data on that basis. Nor do I
18 think he was correct in discounting her data because she only
19 looked at the cases in which he was interested. Because the
20 evidence says that all cases are treated the same. So there's
21 no reason to believe that her universe of cases in which he was
22 interested were treated any different than any other case. Nor
23 is the plaintiff asking that they be.

24 So I think for your expert to say that her data was
25 not robust and it was misrepresented to achieve her end result

1 and that she purposely tried to make it come out to support a
2 lawsuit is entirely unsupported by the evidence. And that of
3 course weakens his credibility.

4 MS. GOLDMAN: Thank you, Your Honor.

5 And since you have a clerk in the back going through
6 all the data, I just want to sort of make clear two things. I
7 want to just clarify that if you look at Joint Exhibits 1D and
8 1E, which I assume your clerk in the back is looking at --

9 THE COURT: Well, he's.

10 MS. GOLDMAN: The numbers on the top of the chart.

11 THE COURT: If they took in 20 civil cases in which
12 you were interested in one day, and only five of them, only
13 five percent of them were put on the public record the same day,
14 that would be one out of the 20. The evidence simply doesn't
15 support that. And the evidence that -- insofar as I've seen it
16 in the data -- doesn't support that either. I don't know where
17 that came from. What we're looking at it for is to see if it
18 supports an improvement that she testified to. And that's what
19 I'm trying to verify at this point.

20 MS. GOLDMAN: I just wanted to clarify that the scan
21 date, the 14th column on those charts, that 14th column is the
22 scan date and is the date -- is the end date, the date that the
23 documents are made available to the public that our expert used.

24 And then, Your Honor, you had also -- we were talking
25 about the file date and when a document is considered filed.

1 And I will reference you to our proposed findings of fact and
2 conclusions of law, and in Paragraph 18 we cited a case
3 Alexander Redevelopment and Housing Authority v. Walker 772 S.E.
4 2d. 297, Virginia, 2015. And that case, and I'll quote, under
5 Virginia law, "A pleading is filed when it is physically
6 delivered to the Clerk of the Court." So we were talking about
7 that earlier and you said if we had anything on that, so I
8 wanted to provide that to Your Honor.

9 THE COURT: Well, that's not what the evidence was.
10 They don't consider it filed if the money's not paid. I don't
11 know, does it say anything in that case about the money being
12 paid? If they sent in a complaint with no payment?

13 MS. GOLDMAN: I would have to re-look at the case,
14 Your Honor.

15 THE COURT: I doubt the case gets to that point. I
16 mean, the clerks say you've got to have the money to file it.
17 Which you do. So is it considered filed when they just drop it
18 off and don't pay the filing fee? The clerks say not.

19 MS. GOLDMAN: I would take the position when the case
20 is dropped off and it receives a date stamp that says Filed on
21 it, it is now a public, it's now a public record that is in
22 the --

23 THE COURT: Well, that's why I asked him if they
24 verified the financial information before they put the file
25 stamp on it. They said no, they put the file stamp on first.

1 MS. GOLDMAN: So Your Honor, I will just close by
2 saying a declaration requiring the defendants to provide
3 contemporaneous access by the end of the day of filing where
4 practicable is the next-best protection for Courthouse News.
5 Courthouse News is at least entitled to that under the facts and
6 the law.

7 Thank you, Your Honor.

8 THE COURT: All right. We'll be in recess until 1:00.

9 (Recess taken from 11:25 a.m. to 1:02 p.m.)

10 THE COURT: Traditionally, court documents have been
11 available to the public in the absence of special provisions of
12 them being sealed. So there's been a common law right to court
13 documents. And these several cases which have come up lately
14 have all dealt with whether the common law was expanded to
15 include the First Amendment as to newly filed civil complaints.

16 The Court finds that news has a rapidly diminishing
17 shelf life, and therefore access delayed is access denied. And
18 accordingly the Court finds that the First Amendment guarantees
19 a qualified right of access to newly filed court documents.

20 The First Amendment requires that such documents be
21 made available contemporaneously with their filing.
22 Contemporaneously means the same day unless that's not
23 practicable. The Court believes, based on the evidence in the
24 case and the statistics which it has reviewed together with one
25 of my law clerks -- or both of them actually -- that

1 currently -- I shouldn't say currently. But I think it's the
2 same currently. But at the end of -- at the period where the
3 figures were available, that in Norfolk, well-over 90 percent of
4 the documents were made available on the day they were filed,
5 and in Prince William, while the figure was slightly less, it
6 was still well-over 90 percent, I believe. But I've got to
7 verify that. But it looks like it's well-over 90 percent.

8 Actually, I found only one filing in November in Norfolk that
9 was not made available the same day it was filed. The
10 statistics ended the 4th of December.

11 The Court finds that the statistics do not actually
12 support either of the statisticians. I could find no basis for
13 the five percent figure. In reviewing the statistics from
14 January 1st through June 30th in Norfolk, it appears to the
15 Court that somewhere in the vicinity of 60 to 65 percent of the
16 civil filings that are at issue in this case -- and those are
17 the civil filings that were examined by the reporter from the
18 plaintiff as potentially of interest. Now, the fact that you
19 didn't examine every civil filing is really immaterial, because
20 the evidence is that the civil filings were all handled the
21 same.

22 And I can't say that I have made an exhaustive review,
23 but it appears to me that the civil filings in Norfolk for the
24 period of January 1st through June 30th, that somewhere in the
25 vicinity of 60 to 65 percent of those filings were not made

1 available to the public on the date they were filed. Starting
2 when the suit was filed there might be a slight change in that.
3 It might be closer to 50/50 after suit was filed, although,
4 again, it's hard to quantify them to that degree. However,
5 there was a dramatic increase in the suits that were made
6 available on the same day following the meeting that was held in
7 the office of the clerk in Norfolk. As I say, in September and
8 October I would say that probably a good 90 percent of them were
9 filed -- in excess of 90 percent of them were filed on the same
10 day. I think the figures are very robust and meaningful. I
11 think that that establishes that there was a custom or practice
12 in the Norfolk Circuit Court not to file or make the filings
13 available on the same date they were filed.

14 Now, I did not break down how many were filed within
15 one court day. I haven't had a chance to do that. I think
16 certainly a large percentage of those not filed or not made
17 available on the date filed were made available the next day.
18 But it's quite obvious that when Mr. Schaefer prodded them, that
19 the number increased dramatically, as the statistician said, but
20 not in the same manner. The dramatic improvement did not really
21 start when suit was filed, it started after Mr. Schaefer had the
22 meeting with the representatives of the plaintiff.

23 In Prince William, it appears to the Court that
24 approximately 60 percent of the cases, new filings, were made
25 available on the same day. Everybody must have taken a holiday

1 on the 4th of July, because if you look at July, early July
2 filings, a lot of them were late. But overall, there seemed to
3 be a change, dramatic change -- not as dramatic as in Norfolk --
4 but a dramatic change in early September. And I think in
5 November there were a total of six complaints filed, or maybe
6 eight, that were not filed on the -- not made available the same
7 date they were filed. Which is quite an improvement over what
8 it was earlier. And that was fairly consistent from September
9 through the 4th of December when the statistics stop.

10 So again, it appears that there was a practice or
11 custom not to file them on the same day, which the Court
12 believes the Constitution requires. But the Court has made it
13 clear that not all of them can be filed on the first day for a
14 variety of reasons.

15 So in considering what type of relief the plaintiff is
16 entitled to for the Constitutional violation, we first of all
17 have to define the term contemporaneous, which we've done. But
18 then we have to say what percentage of filings being made public
19 on the same day would meet Constitutional muster? And I have to
20 base that percentage on what I have seen in the original
21 documents.

22 Now, the statistics that plaintiff submitted were of
23 some benefit. The statistics submitted by the defendants were
24 of little benefit. So the Court believes that approximately 85
25 to 90 percent of the new civil filings should be made available

1 on the same day as filed, based upon the evidence in this case,
2 which includes the number of cases filed, the size of the
3 respective staffs of the court. Obviously some courts may be
4 able to file higher percentage than others, but I think 85 to
5 90 percent is a range that the evidence supports can be filed
6 with current staffing and levels of filing. But if someone
7 attempted to apply that percentage to another court, they would
8 have to look at the number of filings and the staff available to
9 file them.

10 Now, contemporaneously is defined in Webster's in
11 various forms, including "at or near". So what happens to that
12 percentage of cases that are not made available? Well, they
13 must be made available at or near the date of filing, which the
14 Court believes should be the next court day.

15 Now, clearly you have holidays, snow days, weekends
16 and so forth that come in. So it's the next court day after the
17 filing that those not filed on the date of filing should be
18 filed.

19 Now, that of course is in the absence of extraordinary
20 circumstances. That's out of the control of the clerk. I'll
21 attempt, when I write an opinion, to define examples of what I
22 mean by extraordinary circumstances, but a lot of them have been
23 mentioned here. Some of them which don't appear to be relevant
24 are the financial miscalculations which are built into the
25 statistics which I examined, or that scanning issue which

1 appears to be a red herring. It does not appear to have any
2 substantial effect on filing, rescanning, because as far as the
3 statistics I looked at are concerned, if it's rescanned, the
4 rescan date is the filing date, in what I looked at, according
5 to the testimony in the case. Not the date of original filing.
6 Maybe the statistician for the plaintiff looked at the date of
7 the file stamp. I looked at the date on the data, which is the
8 date that it was filed in accordance with their standards, which
9 include financial and rescanning. So they don't really have any
10 effect.

11 Now, there hasn't been any evidence that anybody has
12 been denied access, but, the access that the clerks are owed is
13 not limited to the press, it's to the public. And I don't
14 believe that the Court is required to grant better access to the
15 public. But I see no fault in the policy of the clerk to allow
16 the media to come in and examine the new civil filings in the
17 manner which apparently has been the custom in Norfolk. I don't
18 see anything wrong with that custom.

19 On the other hand, I don't think that custom is
20 required. And it's not followed in Prince William County. I
21 don't know if that accounts for Norfolk having one late filing
22 and Prince William maybe having six. I don't think it does.
23 But again, I don't think that there's a requirement on the part
24 of the clerk, as long as the clerk is making 85 to 90 percent of
25 the current level of filings made available on the date of

1 filing.

2 Now, I think I have to say in the opinion that there
3 are circumstances in which the public, and conceivably the
4 press, although I'm hard-pressed to think of an example why the
5 press would have it -- but there's certainly circumstances where
6 the public would have a right to immediate access to a filing if
7 it affects them. If they're a party, or there's other, some
8 other basis in law for the, for a member of the public to have
9 access. I think you're entitled to immediate access under such
10 circumstances. But I haven't heard of that ever happening in
11 the evidence in this case, and I don't know how often, if ever,
12 that's come up.

13 The Court is, of course, going to draft a written
14 opinion explaining the reasons for its findings in more detail.
15 The Court is not going to grant an injunction for the reasons
16 that the Court has mentioned off and on throughout the trial.
17 The Court's findings are based on the evidence in this case,
18 which is, in turn, based on the level of filings and the staff
19 levels in the two courts involved. So a court which has
20 significantly different levels of filing or staffing may be able
21 to do better or unable to do as well as what the Court has
22 ordered in this case, depending on what their particular
23 circumstances are.

24 Counsel has argued that this case will have an effect
25 on other courts. The court cannot tailor its opinion in this

1 case to try to encompass other courts. I can only deal with
2 what is before me and what's in evidence in this case. I don't
3 think that courts should go around imposing broad injunctions
4 beyond the evidence that they hear. So the Court certainly
5 doesn't feel it has the jurisdiction, or even if it did, it
6 wouldn't exercise it to impose it's findings in this Court on
7 any other court in the Commonwealth or elsewhere.

8 Since this Court is not imposing an injunction, that
9 of course affects the extent to which the plaintiff has
10 prevailed in this case, because the plaintiff sought an
11 injunction. I say that because the plaintiff is entitled to
12 attorney's fees, and one of the factors is the extent to which
13 the plaintiff has prevailed. And under the statute, the
14 plaintiff is entitled to attorney's fees if they prevail in the
15 case. And I think if they have prevailed in the sense that they
16 have proved a Constitutional violation in the custom and
17 practice of the defendants, the Court does not find that there's
18 any Constitutional policy that has been violated. The Court's
19 finding are based on the statistics which show what actually
20 happened and which appear to the Court to be related to what was
21 the custom or practice, not to any written or unwritten policy.
22 So there's no declaration of a violation of any policy.

23 If the defendant wants attorney's fees, the defendant
24 should -- and costs -- it should file for same within 14 days of
25 today. And the plaintiff will have five business days within

1 which to respond.

2 By coincidence, the law clerk who has been working on
3 this case's term expires the middle of the month. He's already
4 extended it for a week, even though he's got a job waiting for
5 him. So we've got -- it's rather incredible the numbers of
6 opinions we've had come in at the end of his term. Seems like a
7 bit of luck of the draw he's gotten all the cases that required
8 opinions. Or almost all of them. So we're really struggling to
9 keep up with the opinions, but we're going to get a written
10 opinion out as soon as possible. However, the Court's ruling is
11 effective today.

12 So I believe all the Court's ruling requires is that
13 the defendants' keep on doing what they're currently doing. The
14 issue of a continuing violation I don't believe applies. But
15 there has been evidence that would support a finding that it
16 would not be appropriate in this case for the Court to end the
17 case with a declaration that's announced today or the
18 declaratory relief today. So the Court will retain jurisdiction
19 of the case. The plaintiff is instructed that if either of the
20 defendants appears to have violated the declaration, the burden
21 is upon them to bring it to the Court's attention. We seem to
22 have been working in six-month increments in this case, so I
23 want the parties to report any problems or irregularities with
24 compliance with the Court's declaratory relief no later than six
25 months from today.

1 That has a caveat as well. I think you were present
2 when I told the people the incentives that I'm not going to be
3 here six months from today. I don't know whether I'll have any
4 authority to act in any case at that point or not, because there
5 are all kinds of complications when it comes to retirement which
6 I've never done before. But I certainly will not be sitting
7 except in special circumstances after about the middle of April.
8 So I won't be sitting regularly when the six months comes up.
9 And I'm not saying that to encourage you to make complaints
10 ahead of that date, but I just want you to know where you stand.

11 All right. Are there any questions that counsel have?

12 THE DEFENDANT: Good afternoon, and may it please the
13 Court.

14 So -- and I understand and appreciate the Court's
15 comments. Just so that I understand the nature of the relief
16 that's going to be entered by the Court, is the Court going to
17 enter a final decree and then just retain jurisdiction over the
18 matter for enforcement purposes?

19 THE COURT: I'm going to enter declaratory relief. It
20 won't be a final judgment. Although I suppose it may be a final
21 judgment for purposes of appeal, if that's what you're thinking
22 about.

23 THE DEFENDANT: Well, in the event that my clients
24 choose to seek judicial review of the opinion, if possible, if
25 it's not going to be a final judgment, we would ask the Court to

1 consider a Rule 54(b) certification, because I think that it
2 would -- I mean, this Court has noted that this is an important
3 legal issue, First Amendment legal issue, and if they're seeking
4 judicial review, then we could, you know, perhaps resolve some
5 of these issues --

6 THE COURT: I'm sure if you ask -- any sort of
7 certification that the Court can make, sometimes the Court
8 doesn't have the power to do that.

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Insofar as the Court has the power to
11 certify the case for judicial review while it's retaining
12 jurisdiction, I will do it.

13 THE DEFENDANT: Okay. Thank you, Your Honor.

14 The other -- so this is a bench trial, not a jury
15 trial, obviously. There's nothing for the Court to set aside,
16 and I probably don't need to do this, but if you would just
17 indulge me, I just want to renew a judgment as a matter of law
18 for the same reasons stated in our summary judgment motion, all
19 of the reasons we've talked about, including the applicability
20 of the First Amendment, the sufficient immediacy element of
21 declaratory relief under 28 U.S.C. 2201, and the sufficiency of
22 the evidence, particularly the evidence of delays that were
23 educed at trial. And I understand the Court's ruling, I
24 appreciate your comments, I just wanted to belt and suspenders,
25 I just want to make sure that we're covered there.

1 THE COURT: No, I mean, the Court's not going to
2 entertain any motion to set aside its verdict. As the Court
3 said, it's inviting both parties to report to the Court if
4 there's a problem with the Court's declared relief. And that
5 doesn't mean that only the plaintiff can complain. But I think
6 you have a good idea that it wouldn't do the defendants any good
7 to complain about everything it's already complained about.

8 But the statistics, in the Court's view, to say that
9 these statistics are insufficient to reach an informed
10 conclusion is beyond the pale. These are very thorough and
11 useful statistics, and the Court has no problem whatsoever in
12 applying them to this case. They give the Court the information
13 it needs, very clearly and substantially. So any complaint on
14 that account would be unavailing. But I can't foresee of what
15 extraordinary things happen. Like for example, if we had one of
16 these snows that closed the court for a week, I don't think the
17 court would -- the clerk would be able to file between 85 and
18 90 percent -- or between 85 and 90 percent of their filings
19 available on the day they were filed or on the next court day,
20 depending on the backup of how many were filed on the next court
21 day. But that is already contemplated in the Court's
22 declaration where we say that extraordinary -- in extraordinary
23 circumstances the Court -- the clerks cannot comply. That's one
24 example of an extraordinary circumstance. It might be snow in
25 Prince William and hurricanes in Norfolk. I don't know.

1 Is there anything further from Counsel? Is there any
2 questions about what the clerks are supposed to do?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: All right. Then we'll be adjourned.

5 (Whereupon, proceedings concluded at 1:35 p.m.)

6

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7

8 *CERTIFICATION*

9

10 *I certify that the foregoing is a true, complete and*
11 *correct transcript of Volume 4 of the proceedings held in the*
12 *above-entitled matter.*

13

14

Paul L. McManus, RMR, FCRR

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Date

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