IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

COURTHOUSE NEWS SERVICE, MTM ACQUISITION, INC. d/b/a *Portland Press Herald, Maine Sunday Telegram*, *Kennebec Journal*, and *Morning Sentinel*, and SJ ACQUISITION, INC. d/b/a *Sun Journal*, Plaintiffs, v. JAMES T. GLESSNER, in his Official Capacity as State Court Administrator for the State of Maine Judicial Branch, and PETER SCHLECK, in his Official Capacity as Clerk of the Penobscot County Superior Court, Defendants.	Civil No. _____

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

Sigmund D. Schutz
Jonathan S. Piper
Preti, Flaherty, Beliveau & Pachios, LLP
One City Center
Portland, ME 04101
(207) 791-3000
sschutz@preti.com
jpiper@preti.com

Jeffrey J. Pyle, *Pro hac vice* pending
Prince Lobel Tye LLP
One International Place, Suite 3700
Boston, MA 02110
T: 617-456-8000
F: 617-456-8100
jpyle@princelobel.com

Counsel for Plaintiffs

Plaintiffs move for the entry of a preliminary injunction, pursuant to Fed. R. Civ. P. 65(a), enjoining Defendants from enforcing Rule 4 of the recently adopted Maine Rules of Electronic Court Systems to the extent that it denies the press and the public access to electronically filed court records until three days after the court has received and accepted proof of service on a defendant, on the ground that the rule violates the First Amendment. The Court should not let Maine use its new e-filing system to shield civil complaints from public view. It should instead order, in keeping with decades of First Amendment jurisprudence, that immediate public access to judicial proceedings in state courts be restored.

INTRODUCTION

The First Amendment to the U.S. Constitution guarantees the press and public the right to review and copy court records, including civil complaints. *Bernstein v. Bernstein, Litowitz Berger & Grossman LLP*, 814 F.3d 132, 140-41 (2d Cir. 2016). This right "is an indispensable predicate to free expression about the workings of government." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785, 787 (9th Cir. 2014) ("*Planet I*"). The First Amendment requires courts to provide the press and the public access to judicial records as soon as they are filed; "even a one to two day delay impermissibly burdens the First Amendment." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989); *see also Courthouse News Service v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) ("*Planet III*"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (noting "the importance of immediate access where a right to access is found"); *Courthouse News Service v. Planet*, No. 11-cv-8083, Amended Judgment for Declaratory Relief and Permanent Injunction, Doc. No. 270, p. 1 (C.D. Cal., Jan. 26, 2021) ("[T]he press and public … enjoy a qualified right of access to newly-filed civil complaints contemporaneous with the filing of the complaint.")

The State of Maine recently began implementing electronic filing in certain state trial courts. In doing so, the state has enacted a rule requiring clerks to withhold all electronically filed civil court records from the press and the public until three business days after the plaintiff files, and the clerk accepts, a proof of service on at least one defendant. (Maine Rules of Electronic Court Systems, Rule 4). The first Maine court of general jurisdiction to implement electronic filing, the Penobscot County Superior Court, now seals the entire record of all new civil cases until three business days after the filing of a proof of service—a period of secrecy that can last for weeks or months. Prompted by the technological advance of e-filing, the rule introduces a mandatory delay in access to new complaints where none existed under paper filing.

As far as plaintiffs can determine, Maine is currently alone among the states in having a rule of this nature. The rule is supported by no legitimate governmental interest, let alone the kind of compelling interest that would be required to overcome the First Amendment right of access. Nor is the rule narrowly tailored; indeed, it is not even clear what objective it is designed to accomplish. Accordingly, the rule violates the First Amendment on its face and as applied.

By their motion, plaintiffs Courthouse News Service, MTM Acquisition, Inc., and SJ Acquisition, Inc. respectfully request an order enjoining Rule 4 of the Maine Rules of Electronic Court Systems to the extent that it denies access to court records until three business days after acceptance of a proof of service. Plaintiffs are news organizations that report extensively on civil filings for the benefit of their readers and the public. They will suffer irreparable harm absent injunctive relief, whereas neither Defendants nor the general public will suffer any harm if relief is granted. Plaintiffs therefore ask this Court to enter a preliminary injunction enjoining Defendants from enforcing the no-access-until-three-business-days-after-service rule, and requiring them to provide immediate public access to newly filed civil actions.

Technology should be used to shed light on the court system, not to shield historically open court records from public view. This Court should restore timely public access to judicial proceedings in Maine state courts pending the resolution of this action on the merits.

STATEMENT OF FACTS

Courthouse News Service ("Courthouse News" or "CNS") is a nationwide news organization that reports on civil court proceedings. (Declaration of William Girdner ("Girdner Dec."), ¶ 2-3.) CNS's 240 reporters and editors cover state and federal courts nationwide. (*Id*., ¶¶ 2, 4.) Among Courthouse News's more than 2,200 subscribers are law schools, law libraries, lawyers and law firms, many of them in New England. (*Id.*, ¶ 9.) Other media also subscribe, from the *Los Angeles Times* in the West to the *Boston Globe* in the East. (*Id*.)

Among CNS's publications are its New Litigation Reports, which feature original, staff-written reports of newsworthy new civil complaints within a particular jurisdiction, e-mailed to subscribers nightly. (Girdner Dec., ¶ 5.) CNS's website is updated daily with staff-written articles and columns, and has hundreds of thousands of readers per month. (*Id.,* ¶ 7.) CNS's reporting has been credited as the source for stories by a wide range of news outlets, including daily newspapers (e.g., *The New York Times*, *The Wall Street Journal*, and *The Boston Globe*); magazines (e.g., *New York* Magazine, *Forbes*, *U.S. News and World Report*); television news (e.g., ABC News, Fox News); online-only publications (e.g., The Daily Beast, Politico); and radio (e.g., NPR). (*Id*., ¶ 8.) For its reporting, CNS's reporters regularly review new civil complaints and other case-initiating documents filed in state courts. (Girdner Dec., ¶ 11.)

Plaintiff MTM Acquisition, Inc. does business as the *Portland Press Herald, Maine Sunday Telegram, Kennebec Journal* and *Morning Sentinel* newspapers. Plaintiff SJ Acquisition, Inc. does business as the *Sun Journal* newspaper. The reporters for these newspapers review new

civil complaints to identify cases that may be of interest to their readers. These parties will be collectively referred to as the "Maine Newspaper Plaintiffs."

On November 30, 2020, the State of Maine court system began implementing electronic filing in certain state courts, including the Penobscot County Superior Court. (*See generally,* https://efilemaine.gov/activeCourt.html). On the same date, the Maine Supreme Judicial Court enacted amendments to the Maine Rules of Electronic Court Systems, to be effective December 15, 2020. A copy of the amended rules is attached hereto as **Exhibit A.**

As revised, Rule 4 of the Maine Rules of Electronic Court Systems reads: "No court record will be accessible by the public until three business days after the court clerk has accepted the submissions of both the case initiating documents and proof of service of process of those documents on at least one defendant." (Rule 4, Maine Rules of Electronic Court Systems). "Accept," for purposes of the rule, is defined as "approval by the court clerk of an electronic document submitted to the electronic filing system." (*Id.*, Rule 2).

Courthouse News has sent a reporter to the Penobscot County Superior Court on a regular basis for years. In the past, when CNS's reporter has visited the Bangor court, she has been able to request the files of new civil cases, and if the case appears to be of interest, obtain a copy of the associated complaint. (Declaration of Brenda Herrling ("Herrling Dec."), ¶ 3.)

On January 22, 2021, Courthouse News's reporter, Brenda Herrling, asked the Penobscot County Superior Court clerk's office for copies of four recently filed civil complaints. (Herrling Dec., ¶ 6.) The assistant clerk denied Ms. Herrling access to the complaints, explaining that they were not public because the clerk's office had not received a proof of service. (*Id.* ¶ 7.) The four complaints Ms. Herrling requested had been filed two to eight days previously, between January 14 and January 20, 2021. (*Id.* and Ex. 1.)

Four days later, on January 26, 2021, Ms. Herrling returned to the Penobscot County Superior Court and reviewed docket sheets for all new cases filed since her last visit. (*Id.*, ¶ 8.) The clerk told her that no new complaints were public, due to lack of a proof of service. (*Id.*, ¶ 8.) She also told Ms. Herrling that the four complaints requested earlier were still not available because they had not yet been served. When asked how long it might take for the complaints to be served, the clerk responded that service could take up to 90 days after filing, and the complaints would be unavailable until then. (*Id.,* ¶ 9.)

The Maine rule imposes mandatory delay in all cases, even when delay creates an absurd result. For example, on January 28, the company that owns the *Bangor Daily News* filed suit in the Penobscot County Superior Court against the Maine State Police, seeking full disclosure of police disciplinary records under the Freedom of Access Act, 1 M.R.S. § 400 *et seq*. (Girdner Dec, ¶ 15). The newspaper publicly announced the lawsuit the next day. (*Id.*) Notwithstanding the transparency purpose of the lawsuit, and the fact that it is against the State of Maine, Plaintiff Courthouse News was unable to review the complaint at the courthouse on the day after it was filed—or even three days later, on February 1, 2021—because of the rule at issue.

Over decades of covering courts across the country, CNS has become aware of the public access practices of hundreds of state and federal courts. (Girdner Dec., ¶ 12). Of these, the state court system of Maine is the only one of which CNS is aware that currently withholds all documents relating to newly filed civil actions until after a defendant is served. (*Id.,* ¶ 17.) The only other state to have previously imposed such a rule, Vermont, rescinded it shortly after a legal challenge by CNS.[1] (*Id.*; *Courthouse News Service v. Gabel,* 2:17-cv-00043 (D. Vt.)).

[1] See "Order Promulgating Emergency Amendments to Rule 77(e) of the Vermont Rules of Civil Procedure and Rule 6(b) of the Rules for Public Access to Court Records," April 20, 2017, available at:

The new Maine rule applies not only to complaints, but to any records filed with a complaint, such as motions for temporary restraining orders, preliminary injunctions, attachment, and trustee process, and affidavits filed in support of such motions. (Maine Rules of Electronic Court Systems, Rule 4, "*No court record* will be accessible by the public until three business days after the court clerk has accepted the submissions of both the case initiating documents and proof of service of process of those documents on at least one defendant.")(emphasis supplied). The rule even applies to requests for approval of alternative methods of service, such as a request for service by publication, and court orders granting such motions. *See* Me. R. Civ. P. 4(g).

All these materials are automatically sealed without judicial review until three business days after proof of service has been filed, which, under the Maine Rules of Civil Procedure, need not occur until 90 days after filing of the complaint. Me. R. Civ. P. 3. Moreover, once a proof of service is filed, the rule does not set forth any time within which the clerk must "accept" a filed proof of service, the triggering event for public access under the rule. (Maine Rules of Electronic Court Systems, Rule 2(A)(1) (defining "accept"); Rule 3 ("Timing of access to court records accessible under these rules is determined by date of acceptance as defined in Rule (2)(A)(1).")) Thus, notwithstanding that a qualified right of access under the First Amendment attaches upon receipt of new e-filed complaints, the rule unconstitutionally withholds them from the press and the public for a prolonged period of time.

ARGUMENT

To obtain a preliminary injunction, the moving party must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary

---

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDemergencyorderVRCP77%28e%29%20and%20VRPACR6%28b%29.pdf

relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-21 (2008). This analysis is simplified in First Amendment cases, because "irreparable injury is presumed upon a determination that the movants are likely to prevail on [a] First Amendment claim." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012). This presumption flows from the well-established rule that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). As such, "[a] plaintiff who has shown a likelihood of success on the merits of a First Amendment claim has satisfied the irreparable injury component of the preliminary injunction analysis as well, given the loss of First Amendment freedoms." *Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F. Supp. 3d 228, 250 (D. Me. 2019); *Courthouse News Serv. v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (applying presumption of irreparable harm and enjoining conduct resulting in 24- to 72-hour delay in access to newly filed complaints). Moreover, "once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc*., 452 U.S. 640, 658 (1981).

Plaintiffs have a clear likelihood of success. The Maine rule operates in blanket fashion to seal, automatically and for an extended period, documents to which there is a First Amendment right of access. The defendants cannot meet the stringent test for overcoming the fundamental right of access to court records. Accordingly, this Court should enjoin the defendants from continuing to enforce the rule pending final judgment.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The press and the public have a fundamental First Amendment right of access to court records. That right can only be overcome with a showing of a compelling governmental interest in closure, and narrow tailoring of any closure to address the concern the state has identified. Because Defendants can satisfy neither requirement, plaintiffs have a strong likelihood of success on the merits of their claims.

A. There is a Fundamental First Amendment Right of Access to Civil Proceedings and Records, Including Civil Complaints.

The First Amendment to the U.S. Constitution, made applicable to the states via the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 604 (1982) (citations omitted), quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Consistent with this purpose, in a series of seminal cases beginning with *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 555 (1980), the Supreme Court held that the First Amendment requires courts to provide the public and the press access to their proceedings and records. "Free speech carries with it some freedom to listen," and freedom of speech and freedom of the press "would lose much meaning if access to . . . the trial could . . . be foreclosed arbitrarily." *Id.* at 576–577.

In its landmark 1982 decision in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-08 (1982), the Supreme Court held that a Massachusetts state statute requiring trial courts to exclude the public from criminal proceedings during a particular type of testimony was unconstitutional. Noting the constitutional right to attend criminal trials recognized two years earlier in *Richmond Newspapers*, the court found that while a compelling interest might exist to

justify closure in some cases, such determinations must be made on a "case-by-case basis" in accordance with the strict scrutiny test compelled by the First Amendment. *Id*. at 606-08. The high court confirmed this principle in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), when it found that the First Amendment right of access applied to preliminary hearings, and went on to invalidate California Penal Code § 868 because it permitted the closure of preliminary hearings on a showing of a "reasonable probability" of harm, rather than the more demanding "'substantial probability' test which we hold is called for by the First Amendment." *Id*. at 13-14.

Press access to court proceedings, the courts have held, is particularly important. "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press," which "bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). "The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Thus, courts have a duty to conduct a thorough and searching review of any attempt to restrict public access." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

The First Amendment right of access requires courts to make their records available immediately, before they become yesterday's news. In *Globe Newspaper Co v. Pokaski,* 868 F.2d 497 (1989), the First Circuit struck down a Massachusetts statute that automatically sealed records of criminal cases ending with acquittal or finding of no probable cause. In assessing the statute's constitutionality under the First Amendment, the court held that the government was required to satisfy the "compelling interest/least restrictive means test," which required showing first "that the objectives of the statute [are] sufficiently important; second, the means chosen by

the state . . . effectively promote the statute's objectives; and third, the statute [does] not infringe upon the First Amendment any more than is necessary to promote those objectives." *Id.* at 505. The Court held it was immaterial that the press could "initiate an administrative or legal action to obtain the records of closed cases," because requiring a motion to unseal "delays access to news, and delay burdens the First Amendment." Even though "the delay in the past often has been minimal, at times as little as a day," the Massachusetts statute "does not require that all requests be processed within a certain time frame," and in any event "even a one to two day delay impermissibly burdens the First Amendment." *Pokaski*, 868 F.2d at 507.

The Supreme Court initially recognized the First Amendment right of access in the context of criminal proceedings, *see, e.g., Richmond Newspapers*, 448 U.S. 555, and it has not yet had occasion to decide whether it extends to civil proceedings. However, "every circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings." *Planet III*, 947 F.3d at 590, citing *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part and concurring in the judgment) (collecting cases). *See, e.g., In re Continental Illinois Sec. Litig*., 732 F.2d 1302, 1308 (7th Cir. 1984) (finding right of access by press to litigation committee reports in shareholder derivative suits); *New York Civil Liberties Union v. New York City Transit Auth*., 684 F.3d 286, 305 (2d Cir. 2012) (finding right of access to administrative civil infraction hearings); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006) (summary judgment papers subject to the "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents."); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) ("We hold that the First Amendment does secure a right of access to civil proceedings."); *Brown & Williamson Tobacco*

Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1177 (6th Cir. 1983) (First Amendment limits judicial discretion to seal documents in civil case).

In determining whether a First Amendment right of access attaches to a particular record or proceeding, "courts should consider two complementary considerations: 'whether [they] have historically been open to the press and general public' (the 'experience' prong), and 'whether public access plays a significant positive role in the functioning of the particular process in question' (the 'logic' prong)." *United States v. Kravetz*, 706 F.3d 47, 53–54 (1st Cir. 2013), quoting *Press-Enterprise II*, 478 U.S. at 8–9. Applying this test, courts have held that the First Amendment right extends to civil complaints because they have been historically open and they activate the court's jurisdiction and define the relevant dispute. *Planet III*, 947 F.3d at 591 ("a qualified First Amendment right of access extends to timely access to newly filed civil complaints."); *Courthouse News Service v. Planet*, No. 11-cv-8083, Amended Judgment for Declaratory Relief and Permanent Injunction, Doc. No. 270, p. 1 (C.D. Cal., Jan. 26, 2021) (striking down clerk's no-access-before-process policy) (copy attached as **Exhibit B**) ("There is a qualified First Amendment right of timely access to newly filed civil complaints, including their associated exhibits," and "[t]his qualified right of timely access attaches when new complaints are received by a court, rather than after they are "processed" – i.e., rather than after the performance of administrative tasks that follow the court's receipt of a new complaint."); *Courthouse News v. Schaefer*, No. 18-cv-391, Opinion and Order, Doc. No. 102 (E.D. Va., February 21, 2020) ("[T]he press and public … enjoy a qualified right of access to newly-filed civil complaints contemporaneous with the filing of the complaint.") (**Exhibit C**).

A complaint "is the cornerstone of every case, the very architecture of the lawsuit. . . . It is the complaint that invokes the powers of the court, states the causes of action, and prays for

relief." *Bernstein*, 814 F.3d at 140, 142. *Accord, e.g., Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 2016 WL 1071107, *8 (S.D.N.Y. Mar. 18, 2016), *aff'd*, 814 F.3d 132 (2d Cir. 2016) ("A complaint is the quintessential judicial document. A complaint is the invocation of the power of one branch of government to resolve an otherwise-private dispute."). Conversely, when a complaint is withheld, it "leaves the public unaware that a claim has been leveled and that state power has been invoked – and public resources spent – in an effort to resolve the dispute." *Bernstein*, 814 F.3d at 141; *accord Bernstein*, 2016 WL 1071107 at *9 ("When a complaint is filed, and the authority of [the government] is thereby invoked, even if only as a threat to induce settlement, the American people have a right to know that the plaintiff has involved their power to achieve [the plaintiff's] personal ends."). Nor is a judicial ruling required for the right to attach. "The First Amendment secures a right of timely access to publicly available civil complaints that arises before any judicial action upon them." *Planet III*, 947 F.3d at 600.

B. The First Amendment Requires Public Access to Be Provided Immediately Upon Receipt of a Record by the Court.

Where the First Amendment applies, even a temporary denial of access implicates constitutional rights. *Pokaski*, 868 F.2d at 507 (delaying access to court filings, even for "as little as a day" improperly "burdens the First Amendment."); *Doe v. Public Citizen,* 749 F.3d 246, 272 (4th Cir. 2014) ("Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we … emphasize that the public and press generally have a contemporaneous right of access to court documents … when the right applies"); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (withholding new filings for 48 hours was "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (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"); *Courthouse News Service v. Planet*, No. 11-cv-8083, Amended Judgment, Doc. No. 270, p. 1 (C.D. Cal., Jan. 26, 2021) (Exhibit B) (qualified First Amendment right of access to newly filed complaint "on receipt.")

Access must be contemporaneous, the courts reason, because it is only while cases are still "current news that the public's attention can be commanded." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975); *accord Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 561 (1976) ("the element of time is not unimportant" in news reporting); *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (delaying access "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access … is denied, whatever provision is made for later public disclosure."). Prohibiting a person from giving "public expression to . . . views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive," is the functional equivalent of "a deliberate statutory scheme of censorship." *Bridges v. State of Cal.*, 314 U.S. 252, 269 (1941), quoted in *Planet III*, 947 F.3d at 594. An access right that stems from the right to "free discussion of governmental affairs" would mean little if it were to permit discussion only of old, stale issues. *Globe Newspaper Co.*, 457 U.S. at 604.

Accordingly, in a number of cases brought by Courthouse News, federal courts have issued injunctions precluding court clerks from withholding civil complaints from public and press review, even for a short time following the clerks' receipt of those complaints for filing. *Courthouse News Serv. v. Tingling*, Civil Action No. 1:16-cv-08742-ER, 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016), and Preliminary Injunction Hearing & Order Reporter's Transcript ("Tingling Order"), pp. 49-53 (**Exhibit D**) (granting CNS preliminary injunction where one-third

of complaints were withheld from public access for a day or more, observing that "there is of course, an important First Amendment interest in providing timely access to new case-initiating documents."); *Courthouse News Serv. v. Jackson*, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (granting preliminary injunction where Houston court clerk's practice of delaying access to new civil petitions until after the completion of clerical duties resulted in a 24-to-72 hour delay in access, which was "effectively an access denial and is therefore, unconstitutional."). *Courthouse News Service v. Planet*, No. 11-cv-8083, Amended Judgment, Doc. No. 270, p. 1 (Exhibit B) (C.D. Cal., Jan. 26, 2021) (amending judgment for declaratory and injunctive relief, declaring a qualified First Amendment access to new complaints "on receipt," and enjoining the clerk from refusing access to new complaints until after they are processed, regardless of whether the complaints are filed in paper or electronic form).

The Defendants' policy of denying the press access to complaints and other judicial records until three business days after acceptance of a proof of service by the court clerk—which need not happen until 90 days after the filing of the complaint—is the sort of "blanket prohibition on the disclosure of records" that "implicates the First Amendment," even though, in most cases, "the sealing is not permanent."[2] *Pokaski*, 868 F.2d at 505-06. The rule is unconstitutional on its face and as applied unless the defendants satisfy the stringent test for overcoming the First Amendment right of access.

C. The Maine Rule Does Not Pass Strict Scrutiny Because, at a Minimum, It Is Not Narrowly Tailored.

To overcome the "presumption … of immediate public access," *Lugosch*, 435 F.3d at 126, the Defendants must show "that the objectives of the [rule are] sufficiently important;

[2] In some cases sealing may in fact be permanent, because it appears that under the rule, if a complaint is never served, the case file never becomes publicly available.

second, the means chosen by the state . . . effectively promote the statute's objectives; and third, the statute [does] not infringe upon the First Amendment any more than is necessary to promote those objectives." *Pokaski,* 868 F.2d at 505. Any "justification in denying access must be a weighty one," and denials "must be rare and only for cause shown." *New York Civil Lib. Union*, 684 F.3d at 304. The proponent of withholding access bears the burden to make this showing. *Bernstein*, 814 F.3d at 144; *Lugosch*, 435 F.3d at 126.

The Maine court system has provided no public justification at all for the rule. To the extent Defendants contend that withholding records of general jurisdiction civil cases prior to service is needed to protect defendants' privacy or reputational interests, those interests are not sufficiently important to justify blanket closure. While an interest sufficient to justify the sealing of some portions of some records might exist under special circumstances, this is not true in the vast majority of general jurisdiction civil actions. *See, e.g., Bernstein*, 814 F.3d at 143 (noting that "[c]omplaints can – and frequently do – contain allegations that range from exaggerated to wholly fabricated," but rejecting defendants' contention that the complaint should be sealed because allegations in it are untrue; "[f]ollowing defendants' logic to its conclusion … would create an untenable result – the sealing of all complaints in actions in which plaintiff does not prevail"); *Doe*, 749 F.3d at 269 (rejecting contention that "preserving [corporate] reputational and fiscal health" justified sealing).[3] Simply put: "Records cannot be sealed on the basis of general reputation and privacy interests." *Pokaski,* 868 F.2d at 507, n.18.

[3] Indeed, like the unconstitutional Massachusetts state statute at issue in *Globe Newspaper v. Pokaski*, because the Maine rule does not attempt to "permanently close[] off access to the records of all cases," the state "implicitly concedes that permanent sealing is not justified, and should not occur, in every case." 868 F.2d at 506.

Nor can the rule be deemed "essential" to preserving any privacy or reputational interest that may exist, because the policy does not prevent any such alleged harm from occurring. Electronically filed case records are automatically made public when at least one defendant has been served and a proof of service has been accepted—so what protection the rule affords is temporary at best. And it may not even offer temporary protection, as nothing in the rule prevents a plaintiff, without the consent of any defendant, from making records of the new civil action public in a manner of their choosing on the day of filing or even earlier.[4]

Another possible purpose of the rule might be to ensure that defendants have notice of complaints filed against them before they are made public, which may be a courtesy but has not been recognized as a compelling governmental interest. But if that is the objective the rule is poorly crafted to achieve it, as it only requires service on one defendant before a complaint is made public.

While it is unclear what interest the rule is designed to advance, or how it advances any such interest, it is evident that the rule is not narrowly tailored to achieve any service-related objective, because it ties secrecy, not to actual service on a defendant, but to the filing of a notice of service with the Court—which (if a complaint is served on the day it is filed) may happen three months (90 days) after service is actually made. *See* M. R. Civ. P. 3. The restriction on First Amendment rights is therefore overbroad.

Indeed, it is not even clear that the rule achieves anything for defendants. The reason plaintiffs are required to serve their complaints on defendants is that a defendant needs to know that a complaint has been filed against them. If the news media report on a complaint that has

[4] Any such rule would violate the First Amendment. *See, e.g., The Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

been filed before a defendant has been served, that may actually be helpful to the defendant, who would learn about the complaint sooner than if they had to wait—again, up to 90 days—for the plaintiff to serve it.

Yet another problem is that the rule applies only to electronically filed cases—paper complaints and related filings in other counties where e-filing has yet to be implemented continue to be released prior to the filing of a return of service. (Girdner Dec., ¶ 16.) As such, even if a theoretical defendant's privacy or reputation amounted to an interest of sufficient importance to justify closure—which it will not in the vast majority of cases—there is no logical connection between the interest asserted and the closure imposed. Therefore, Defendants cannot show that blanket "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13–14 (internal quotation omitted).

It follows that the rule fails strict scrutiny analysis. As in other cases where courts have struck down blanket prohibitions on access, the rule is not narrowly tailored. *E.g., Pokaski,* 868 F.2d at 505-07 (statutory "blanket prohibition on the disclosure of public records" where defendant was found not guilty was unconstitutional even if withholding was "not permanent"; even assuming there are "at least some instances in which defendants will be able to show their privacy interests outweigh the public's right of access," state could "achieve its objective by less restrictive means"); *Matter of New York Times Co.,* 828 F.2d 110, 116 (2d Cir. 1987) (rejecting the "wholesale sealing" of motion papers to protect the privacy rights of defendants and third parties and remanding the case to determine whether "limited redaction" was appropriate in accordance with First Amendment requirements); *Globe Newspaper Co*., 457 U.S. at 607-09 (while interests in protecting minor victims and encouraging testimony were compelling, they "did not justify a mandatory closure rule, for it is clear that the circumstances of the particular

case may affect the significance of the interest") (emphasis in original); *Associated Press*, 705 F.2d at 1146 (district court's order presumptively sealing documents in Abscam criminal case for first 48 hours after filing to protect Sixth Amendment rights was unconstitutional because, among other reasons, it was not narrowly tailored).

II. PLAINTIFFS, THEIR READERS, AND THE PUBLIC WILL BE IRREPARABLY HARMED ABSENT INJUNCTIVE RELIEF.

"The necessary concomitant of irreparable harm is the inadequacy of traditional legal remedies." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989). The First Circuit has held that "irreparable injury is presumed upon a determination that the movants are likely to prevail on [a] First Amendment claim." *Sindicato Puertorriqueno de Trabajadores*, 699 F.3d at 11, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod,* 427 U.S. at 373; *Comcast of Maine/New Hampshire, Inc.*, 435 F. Supp. 3d at 250 ("[a] plaintiff who has shown a likelihood of success on the merits of a First Amendment claim has satisfied the irreparable injury component of the preliminary injunction analysis as well, given the loss of First Amendment freedoms."). Irreparable injury should therefore be presumed here.

In addition, Plaintiffs have shown that they will in fact suffer irreparable injury absent injunctive relief, because the enforcement of the rule diminishes the value of CNS's reports to its subscribers, as well as its reputation as a news provider, (Girdner Dec. ¶ 13), leading to a loss of goodwill. *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990) (finding risk of irreparable harm to media's reputation and goodwill if unable to publish photograph); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) ("injunctive relief is appropriate where it would be 'very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate

amount of business in years to come'"). As for the Maine Newspaper Plaintiffs, the Rule necessarily blocks their ability find out about new court filings and promptly inform the public about them. The injury is irreparable.

III. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS.

In contrast to the irreparable injury Plaintiffs would suffer if injunctive relief is denied, Defendants would suffer no harm or inconvenience as a result of a preliminary injunction. Plaintiffs are aware of no other jurisdiction that bars public access to records of newly filed civil actions until after service, and issuing an injunction in this case would simply require Maine courts to provide timely access to records as constitutionally required. Indeed, the requested injunction would only require Maine courts to treat electronically filed complaints in the same manner as they currently do paper complaints: public upon receipt. As the Southern District of New York found in *Tingling*, "the balance of hardships tips in CNS's favor" because "CNS will be denied its First Amendment right of access to new case-initiating documents unless the Court issues this preliminary injunction while the clerk has alternative constitutional ways to address" its concerns. (Exhibit D, *Tingling Order*, p. 53.) The Southern District of Texas ruled similarly in *Jackson*, 2009 WL 2163609 at *5. Moreover, judicial direction would provide clarity and guidance to Defendants. Thus, the balance of equities tips in favor of injunctive relief.

IV. INJUNCTIVE RELIEF WOULD SERVE THE PUBLIC INTEREST.

Here, as in *Tingling, Jackson,* and *Planet*, injunctive relief serves the public interest" because "[t]here is, of course, an important First Amendment interest in providing timely access to new case-initiating documents." (Exhibit D, Tingling Order 53; *accord Jackson*, 2009 WL 2163609, at *5.) "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of the government, he relies necessarily upon the

press to bring to him in convenient form the facts of those operations," and "a public benefit is performed by the reporting of the true contents of [public court records] by the media." *Cox Broad. Corp.,* 420 U.S. at 491, 495. "If CNS' [and the Maine Newspaper Plaintiffs'] protected expression [about new litigation] is delayed … then the expression of the newspapers, lawyers, libraries and others who rely on [them] for information will also be stifled." *Planet I*, 750 F.3d at 788. Technology should illuminate the halls of government, not darken them.

CONCLUSION

"Litigation is a public exercise; it consumes public resources. It follows that in all but the most extraordinary cases—perhaps those involving weighty matters of national security—complaints must be public." *Levenstein v. Salafsky*, 164 F.3d 345, 348 (7th Cir. 1998). A state rule that delays public access to complaints and other new civil litigation records for 90 days or longer is clearly unconstitutional.

Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction and enjoin Defendants from enforcing so much of Rule 4 of the Maine Rules of Electronic Court Systems as denies press and public access to electronically filed court records until three business days after court acceptance of a proof of service, and further enjoining the Defendants and anyone working at their behest from restricting public access to records of new civil actions, including but not limited to newly filed civil complaints, except in those instances where a court has ordered the sealing of a complaint, and requiring Defendants to make records relating to new civil actions available to the public upon their receipt.

Dated: February 3, 2021

Respectfully submitted,

COURTHOUSE NEWS SERVICE,
MTM ACQUISITION, INC., and
SJ ACQUISITION, INC.,

By their attorneys,

/s/ Sigmund D Schutz

Sigmund D. Schutz
Jonathan S. Piper
Preti, Flaherty, Beliveau & Pachios, Chartered, LLP
One City Center
Portland, ME 04101
T: 207-791-3000
F: 207-791-3111
sschutz@preti.com
jpiper@preti.com

Of counsel:

Jeffrey J. Pyle *Pro hac vice* pending
Mass. BBO # 647438
jpyle@princelobel.com
PRINCE LOBEL TYE LLP
One International Place, Suite 3700
Boston, MA 02110
T: 617-456-8000
F: 617-456-8100