

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

COURTHOUSE NEWS SERVICE, )

Plaintiff, )

v. )

NEW MEXICO ADMINISTRATIVE )

OFFICE OF THE COURTS; )

ADMINISTRATIVE OFFICE DIRECTOR )

ARTHUR W. PEPIN; NEW MEXICO )

FIRST JUDICIAL DISTRICT COURT )

CLERK'S OFFICE; and the FIRST )

JUDICIAL DISTRICT COURT CLERK )

KATHLEEN VIGIL )

Defendants. )

Civil Action No. \_\_\_\_\_

**DECLARATION OF WILLIAM GIRDNER IN SUPPORT OF  
PLAINTIFF COURTHOUSE NEWS SERVICE'S  
MOTION FOR PRELIMINARY INJUNCTION**

I, William Girdner, declare and state as follows:

I am the publisher of Courthouse News Service ("Courthouse News"), the plaintiff in the above-captioned action. I make this declaration in support of Courthouse News' *Motion for Preliminary Injunction*. I have personal knowledge of the following facts and would and could testify to them if called as a witness.

**I. Introduction**

1. Since time beyond memory in America courts, the press has reviewed new civil complaints when they crossed the clerk's intake counter. This was true as well throughout the Southwest. In the transition from paper to electronic filing, federal courts and many state courts continued that tradition of access. But another group of court clerks took it away when they switched. They began withholding access to the new e-filed complaints (or petitions) until after

they were docketed by court staff, which often took days or even weeks, thereby impeding news coverage of the courts. For more than a decade, Courthouse News has fought against those access take-aways. The objective of that campaign is simply stated: “Please return the access you took away.” This is the precise relief sought by this action.

## **II. Courthouse News Publications and Subscribers**

2. Courthouse News is now a nationwide news service with a network of reporters based across the nation. Courthouse News currently employs approximately 240 people, most of them editors and reporters, covering state and federal trial and appellate courts in all 50 states in the United States. We provide reports on appellate rulings, legislation, and new civil cases from federal and state courts around the country. We also cover news from courts in the European Union and general news that ranges from politics to the environment and science and just about any topic that might interest readers.

3. I began Courthouse News in 1990 out of a belief that the traditional news media failed to cover much of the important business of the courts. At the time, I was working in the press room at the federal court in Los Angeles. Towards the end of the workday, journalists working in the press room trooped down to the clerk’s office and looked through a stack of new complaints handed to us by the longtime intake clerk. We were looking for news.

4. As Courthouse News expanded beyond California, I handled all the initial scouting of access and the hiring of local reporters. I found the same tradition in all the courts I visited. The clerks gave journalists access to the new paper complaints filed that day, in a box of some kind, wood, plastic or cardboard. This remained true as our coverage expanded to every region of the United States, including Seattle, Portland, Phoenix, Albuquerque, Houston, Dallas, St. Louis,

Minneapolis, Indianapolis, Chicago, Cleveland, Cincinnati, Boston, New York, Atlanta, Miami, New Orleans and courts in between.

5. Courthouse News now publishes an open, public website for daily news – *courthousenews.com* – as well as subscription-based reports on new appellate and some trial court rulings, and subscription-based reports on new civil litigation through its *New Litigation Reports*. The *New Litigation Reports* feature original, staff-written summaries of newsworthy civil actions filed in federal and state courts within a jurisdiction such as New Mexico, primarily those against business and public entities, and they are sent to subscribers every weeknight. The reports do not cover criminal, domestic or probate matters. Around the nation, Courthouse News publishes 127 new litigation reports. In New Mexico courts, reporter Victoria Prieskop writes articles for the Courthouse News website and also writes a daily New Litigation report that covers civil actions filed in the U.S. District Court of New Mexico and 13 state judicial districts covering 33 county courts in New Mexico. The *New Mexico Report* counts 42 subscribing institutions.

6. Courthouse News has more than 2,300 subscribers, including law firms, law schools, libraries, nonprofits, government entities and businesses. A substantial number of news and entertainment outlets are also subscribers, including The Associated Press, *The Boston Globe*, BuzzFeed, *Chicago Tribune*, CNN, Fox Corporation, *Los Angeles Times*, *The Wall Street Journal*, and Warner Bros. Within the nation’s press corps, Courthouse News has been credited as the original source of reporting by many news outlets, such as *The New York Times*, *The Wall Street Journal*, New York Magazine, U.S. News and World Report, ABC News, Fox News, The Daily Beast, Politico and NPR.

7. The Courthouse News’ website ([www.courthousenews.com](http://www.courthousenews.com)) features news reports and commentary read by hundreds of thousands of readers each month. The website functions

much like a daily print newspaper, posting staff-written articles from throughout the nation that are published and rotate off the page in a 24-hour cycle. It regularly includes articles written by Ms. Prieskop, our New Mexico reporter.

**III. The Importance of Contemporaneous Access**

8. From my experience covering civil litigation for more than three decades, my own in-person visits to many state and federal courts, discussions with court officials, as well as the supervision of Courthouse News' reporters and bureau chiefs around the country, I have developed extensive personal knowledge of the procedures used by courts to give press access to new complaints. I have also developed extensive personal knowledge of how delays in access to new complaints affect news coverage. This knowledge is based on my experience as the editor of Courthouse News as well as my personal observations of competing media coverage.

9. A new civil complaint is "the gong of war," as I put it, announcing a legal conflict. The ensuing battle can be one of great public interest, concerning civil rights, free speech, dangerous products, financial manipulation, environmental harm, development projects, horrific accidents and natural cataclysms. Obtaining complaints directly from the court is the only way for reporters to provide the public with consistent and reliable information about new civil actions at the court. There is no alternative unless the filing party issues a press release, which happens only once in a great while.

10. The creation and consumption of news operates in a daily cycle where events happen, reporters report on them, people see or read the stories, and then everybody goes to sleep. The cycle then starts all over again the next morning. A delay of even one day in obtaining access to new civil complaints means that news is delayed by at least a full news cycle, making it much less likely to be reported. News is comparable to bread, fresh on the day it's made, stale the next.

11. In order to prepare new litigation reports, Courthouse News reporters visit their courts, or court websites, and check for the latest civil complaints, including a final check made just before reports are published usually between 6:00 and 7:00 P.M. local times. They write summaries of the newsworthy complaints and include them in their daily report. Given the nature of the coverage in the *New Litigation Reports* and its other news publications, any delay in the ability of a reporter to obtain and review new petitions necessarily holds up the reporting on the new actions for subscribers and readers. A delay of even a single day means that news is delayed by at least one full news cycle. Especially in today's digital age, the newsworthiness of new civil actions declines with time. Civil actions not reported on when they are received by a court are effectively suppressed, less likely to prompt news coverage, and thus less likely to come to the public's attention as the days pass.

#### **IV. Advent of E-Filing in New Mexico**

12. Courthouse News has reported on new complaints filed in New Mexico courts since 2005. Until approximately 2011, the Courthouse News reporter was allowed behind the counter to review new civil complaints on the day they were filed in Bernalillo, Santa Fe, Sandoval and Valencia counties, before docketing was completed. That was the tradition, and the New Mexico courts were strong examples of traditional press access to paper filings.

13. Around 2012, the New Mexico courts began switching from paper to electronic filing, using a single vendor for all its district courts, Texas-based software giant Tyler Technologies. Access began to deteriorate some time after that, and in 2015, I wrote to officials in Albuquerque, asking for a return to the previous status quo and suggesting an inbox similar to what the court in Las Vegas was providing, using the same Tyler software used by New Mexico. No change resulted. In response to another request from me for a press review queue, Defendant

Pepin prepared a memorandum dated Nov. 30, 2018 addressed to members of the New Mexico Supreme Court. He wrote, “I confirmed that Nevada, Georgia and California have had Tyler install at no cost to the courts a press queue as Mr. Girdner requests of New Mexico.” *See* Exhibit A-1 (attached hereto and incorporated by reference).

14. In that same memorandum, Defendant Pepin attached an email from the Tyler representative for New Mexico, Colleen Reilly, in which she said, “The Court would tell us the location and case types that would be made accessible, and we do the configuration.” *See id.* at Attachment F (p. 47 of PDF). Defendant Pepin then presented an administrative choice: “Two options for responding to the CNS letter are to have Tyler install the press queue or deny the request and await litigation in federal court.” *See* Exhibit A-1 at p. 3.

15. Following that memorandum, Courthouse News was directed to make its bid for a press queue by proceeding within the byzantine committee system of the Administrative Office of the Courts, which it did by letter dated October 9, 2019 to Supreme Court Clerk Joey Moya. Exhibit A-2 (attached hereto and incorporated by reference). That bid resulted in nothing more than a letter dated May 29, 2020, from Clerk of Court Joey Moya, who said his referral of Courthouse News to the Online Access Subcommittee was “in error.” *See* Exhibit A-3 (attached hereto and incorporated by reference). In fact, as his letter informed, the decision to deny the Courthouse News request had been made some time earlier.

16. I subsequently wrote a letter to former Chief Justice Judith Nakamura dated July 6, 2020, explaining the capricious nature of the committee process and the complete lack of reasoning for the denial of our request, a letter which has not been answered. *See* Exhibit A-4 (attached hereto and incorporated herein by reference). Subsequently, on July 1, 2021, I wrote to Kathleen Vigil, District Court Clerk of the New Mexico First Judicial District Court, requesting pre-

processing access to new complaints. *See Exhibit A-5* (attached hereto and incorporated herein by reference). No response was received by the date of this filing. These responses (or non-responses), left me with the second option set out in Defendant Pepin’s memorandum – litigation in federal court.

**V. Ten Different E-Filing Systems Provide On-Receipt Access**

17. In 2010, Clark County District Court in Las Vegas, Nevada, switched to e-filing, using software by a small company called Wiznet. Reporters covering the court had long had access to copies of new paper complaints when they crossed the counter. Within roughly a year after the court moved to e-filing, an icon appeared on the public access terminals titled “Court Daily.” Through the Court Daily, reporters saw new complaints as they were electronically received, before clerical processing. That timing matched the traditional access reporters previously had to paper complaints in Clark County Superior. The new complaints in the “Court Daily” queue did not have permanent case numbers, only electronic transaction numbers. This was the first state court example of what is now called a “press queue.”

18. Wiznet was bought around 2012 by software giant Tyler Technologies, the company that now leases e-filing software to New Mexico. Tyler thus inherited the Las Vegas “Court Daily.” Since then, at the request of local court officials, Tyler has set up press queues in six courts in Georgia and five in California, including the superior courts for the counties of Fresno, Kern, Santa Clara, Monterey and Santa Barbara. Three more California courts, relying on Tyler software, have recently agreed to settle litigation by installing Tyler press queues in San Mateo, Sonoma and Santa Cruz superior courts.

19. But Tyler is far from the only system that provides the press with access at the time a new civil complaint is received. At least 10 state court e-filing software systems now

provide the press or press and public with access on receipt. Those 10 include e-file systems that are vendor-provided and home-grown. Los Angeles Superior (which handles the greatest volume of cases of any court in the nation) provides on receipt access through its Media Access Portal programmed by Journal Technologies. San Francisco Superior owns its own E-file Manager, or EFM, and provides on-receipt access through File & ServeXpress. Orange County Superior uses a home-grown e-filing system, called CCMS, and has promised on-receipt access through an “Electronic Media Inbox” within roughly two months.

20. Using different home-grown systems, Hawaii, Connecticut and New York provide statewide access on-receipt. In Washington, courts in Seattle and Tacoma also give on-receipt access through home-grown systems. Arizona has promised the same through its vendor Granicus. Utah relies on vendor Tybera to give on-receipt access. Alabama uses Online Information Services to give on-receipt access. Finally, on the federal side, PACER was developed by the federal government and it also provides on-receipt access.

21. Those e-file systems provide on-receipt access through two basic methods. Some of them provide on-receipt access through a press or public queue before a permanent case number is assigned by a human clerk – generally referred to as a press queue system. Others automatically assign a permanent case number and send the new filing into the public docket – generally called an auto-accept system. The U.S. District of New Mexico uses the latter system, automatically assigning a case number and sending the new complaint into the public docket whenever it is filed, including after hours and on weekends. That is the method used by most federal courts, but a few use a press queue equivalent by automatically assigning a temporary number and allowing searches on that temporary number.



22. The number and variety of e-filing systems that provide access on receipt illustrate the simple truth that it is highly practicable to give reporters access to new e-filed civil action as they are received, just as it was with paper filings. Defendants have alternatives through which they can provide traditional, on-receipt access in the electronic environment. Most federal courts and many state courts provide press and public with on-receipt access through at least ten different e-file systems. One of them is the e-filing system leased by New Mexico state courts from Texas-based Tyler Technologies. Other courts using Tyler's e-file system, in California, Nevada and Georgia, give on-receipt access through Tyler's "press review queue." But New Mexico has refused to direct Tyler to put a press queue in place or provide on-receipt access by any other alternative.

#### **VI. Common Components to an E-Filing System**

1. E-filing systems use the following common components: (i) an e-file service provider (essentially an attorney service) presents an interface to the e-filer that requires the filer to enter information such as court, document type, case type and more, before the filer attaches a document and presses "submit"; (ii) the main engine of the e-file system, the e-file manager or EFM, catches the submission and sends it to a clerk work queue; (iii) the filings sit in that work queue until the clerk's staff does its clerical work and pushes the new filing into the "case management system," (CMS) or docket. The amount of time the new filing sits in the queue is estimated by the New Mexico courts to be "24 – 48 hours for clerk office processing" in an email sent to filers after a complaint is filed.

2. Intake work that was previously done by a clerk sitting at the counter is now done by the software screens that require the e-filer to complete information. Those screens, including those used by filers in New Mexico, require that the e-filer designate the type of case being filed

by choosing from a drop-down menu.. Based on the case type designation, the EFM automatically sorts the non-confidential complaints into a press review queue. That queue, with all its different names, Media Access Portal, Electronic Media Inbox and Press Review Queue, serves the same function as the physical box that sat at the physical counter and held the just-filed paper complaints. That is the electronic access New Mexico will *not* allow.

## **VII. The Necessity for Injunctive Relief**

3. In the decade-long campaign to take back the access that was taken away, I have observed that it is common for state courts to speed up the clerical tasks associated with docketing after being served with a First Amendment complaint based on a no-access-before-process policy. The defending clerks use that defensive tactic to undercut the claim of First Amendment harm. The tactic is generally used only so long as the wolf of litigation is at the clerk's door. For example, prior to the complaint against the clerk in Orange County, California, in *Courthouse News v. Yamasaki*, 8:17-cv-00126 AG, the delays in access were running between one and two days. After the complaint was filed, the delays dropped dramatically to one day or less. But once the clerk obtained a favorable ruling, which was later reversed, the delays reverted to the previous levels and were often greater, as much as three or four days behind filing. I testified to this phenomenon before U.S. Judge Henry Coke Morgan Jr. during a trial in early 2020 on a similar policy holding up access until scanning and indexing enforced by two court clerks in Virginia. Judge Morgan ultimately issued a declaratory judgment finding that on-receipt access was required, and his decision was recently affirmed on June 24, 2021 by the Fourth Circuit Court of Appeals. *See Courthouse News Service v. Schaefer*, No. 20-1290, 2021 WL 2583389 (4<sup>th</sup> Cir. June 24, 2021 (affirming declaratory relief and rejecting abstention defense).

4. That common tactic of temporarily speeding up clerical work in response to a First Amendment action demonstrates why a court order in the form of an injunction is needed to return to the former, longtime status quo of traditional, contemporaneous access to new civil complaints when they cross the counter.

### **VIII. Prior Cases and Injunctions**

5. The conversion from paper to electronic filings has taken place in sporadic fashion among state courts over roughly the last two decades, starting first with scanning programs, then voluntary e-filing, then mandatory e-filing. In some states, such as New Mexico, the changeover was centrally directed and in others, such as California, it was locally directed by courts using an assortment of different vendors and home-grown systems.

6. In that process, many states voluntarily provided electronic access on receipt just as they had to paper. Hawaii, for example, had a long tradition in each island court of putting the new, paper-filed civil complaints out for public view in the clerk's office as soon as they crossed the counter, a public policy I witnessed in each island's courthouse. When Hawaii moved to e-filing in 2019, the courts provided public, on-receipt access to the new e-filings, just as it had with paper filings, in all seven island courts. Utah also gave public, on-receipt access to new e-filings on its own initiative. And the federal courts, in the switch to e-filing, also provided public, on-receipt access voluntarily, on their own initiative.

7. Another group of state courts have provided press review queues based on a simple request from the press. The original press queue court in Las Vegas, the behemoth superior court in Los Angeles, the courts around Atlanta -- all put press queues in place based on a request. New Mexico's neighbor, Arizona, has also promised to install a statewide press queue shortly, based simply on a letter requesting it.

8. A third group of state courts have promptly agreed to provide on-receipt access at the outset of litigation. They include four courts in California, in the counties of Santa Clara, Sonoma, San Mateo and Santa Cruz.

9. But a large cohort of state court clerks have fought First Amendment access with every tactic at their disposal, including, in Virginia, repeatedly denying the existence of evidence of delay until it was revealed during a deposition of the IT director for Virginia's Office of the Executive Secretary, the equivalent of state court administrative offices in other states. In California, the ten-year war of litigation between opposing law firms representing this news service and the Judicial Council demonstrates the ferocity of the opposition by some clerks to access on-receipt.

**IX. Time-Line of Litigation Against Hard-Core Clerks**

10. As a result of those die-hard positions, Courthouse News has filed a series of First Amendment complaints against state court clerks, but only when it became absolutely necessary. The first complaint was filed in 2009 in federal court in Houston, *Courthouse News v. Jackson*, Case No. 09-cv-1844. After a tradition of behind-the-counter, on-receipt access to new paper complaints, that I witnessed myself in establishing our Houston coverage, a new clerk came into office with the slogan, "Get online, not in line." Clerk Loren Jackson promptly kicked all reporters out from behind the counter and required that they wait to see new complaints until they were scanned and docketed. After a half-day hearing before U.S. District Court Judge Melinda Harmon, where I testified, the judge enjoined the clerk's policy in *Courthouse News v. Jackson*, 2009 WL 2163609 (S.D. Tex. July 20, 2009). The case was then settled with the clerk agreeing to provide access to all new complaints filed before the clerk's office closed. That settlement came before I realized that an electronic press queue, first seen in Las Vegas two years later, was feasible.

11. Following on that win, Courthouse News in 2011 filed a First Amendment action against the clerk in Ventura Superior Court in California, Michael Planet. The tradition of access had long existed in that court where a plastic, white, media bin still stood on the counter. But the media bin had been rendered useless by the clerk's policy of holding back new complaints until they were docketed, with the result that a seemingly random assortment of new complaints ended up in the media bin long after they had been filed. That litigation resulted in a summary judgment decision on May 26, 2016 by U.S. District Court Judge James Otero in *Courthouse News v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016). He found that the right of access attaches upon receipt and enjoined the clerk's no-access-before-process policy.

12. Not long after that win, Courthouse News filed an action in November 2016 in the Southern District of New York against Manhattan's state court clerk in *Courthouse News Service v. Milton Tingling*, 1:16-cv-08742-ER. I had established coverage in that trial court, New York County Supreme Court, where the press was allowed behind the counter to check the new paper complaints. We could stay after the filing window closed in order to see every last complaint filed that day. A new clerk was elected and moved the court to mandatory e-filing, while imposing a no-access-before-process policy. Major cases were then missed on the day of filing, such as then-candidate Donald Trump's 2015 complaint over Latin network Univision's cancellation of his beauty pageant because of his anti-Mexican remarks. I watched a segment about the complaint that evening on BBC but we could not see the case at the courthouse because it had not been processed. U.S. District Court Judge Edgardo Ramos enjoined the clerk's policy in *Courthouse News v. Tingling*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016). Within six weeks New York's court administration had put in place a public queue to see new civil complaints on receipt, which now gives access to 60 e-filing courts in New York.

13. A year later, in December 2017, Courthouse News filed a First Amendment action against the clerk in Chicago's Cook County Circuit Court, Dorothy Brown. I had established coverage in that court where journalists worked in a press room one floor below the clerk's office. We would go upstairs towards the end of the day and, based on recognition, push through a wood gate into the area behind the clerk's counter. We reviewed the new paper complaints placed in a black, plastic tray next to the intake clerk's window, made copies on the court's photocopy machine, and could stay until the last supervisor left. As she switched over to voluntary e-filing, the clerk delayed access to new complaints until after processing. U.S. District Court Judge Matthew Kennelly enjoined that policy, writing: "Brown has made no effort to explain why it is not feasible for her to adopt any one of the various methods that numerous other state and federal courts currently use to provide public access to e-filed complaints before they have been fully processed." *Courthouse News Serv. v. Brown*, 2018 WL 318485, at \*6 (N.D. Ill. Jan. 8, 2018). But the clerk successfully appealed to the Seventh Circuit. *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7<sup>th</sup> Cir. 2018), *cert. denied*, 140 S. Ct. 384 (2019) (mem.). I attended the argument in person and watched as a brand-new appointee to the court, Judge Michael Scudder, sat on the bench nodding vigorously in apparent agreement with arguments against abstention, and then joined in the decision to abstain.

14. That same year, 2018, Courthouse News filed a First Amendment action against two Virginia court clerks who, in paper courts, had adopted no-access-before-scan-and-index policies. U.S. District Court Judge Henry Coke Morgan Jr. rejected the Seventh Circuit's *Brown* abstention ruling. *Courthouse News Service v. Schaeffer*, 2019 WL 8062550, \*9-10 (E.D. Va. Mar. 18, 2019). Then, two events unfolded in quick sequence. In January 2020, the Ninth Circuit ruled in *Planet III*, rejecting *Brown*'s abstention holding and finding the right of access attached

on receipt. Judge Morgan then presided over a four-day trial in February 2020, which culminated in his declaratory order in *Courthouse News Service v. Schaefer*, 440 F. Supp.3d 532 (E.D. Va. 2020), where he found the press and public enjoyed a qualified right of access to newly-filed civil complaints “contemporaneous with the filing of the complaint.” *Id.* at 559. The court clerks appealed, but the Fourth Circuit recently rejected the appeal on June 24, 2021, holding that declaratory relief was proper and rejecting the abstention argument advanced by the clerks. *See Courthouse News Service v. Schaefer*, No. 20-1290, 2021 WL 2583389 (4<sup>th</sup> Cir. June 24, 2021).

15. In early 2021, the merits portion of the decade of litigation between Courthouse News and the California Judicial Council came to an end, *Courthouse News v. Planet*, No. 11-cv-8083, 2021 WL 1605216 (C.D. Cal., Jan 26, 2021) (Amended Judgment). U.S. District Court Judge Dorothy Gee again enjoined Ventura clerk Planet’s no-access-before-process-policy, ruling unequivocally that the right of access attaches on receipt, before processing. *Id.* at \*1.

16. I have pursued these cases over the years, at great expense and as a last resort, driven by a fundamental conviction that our nation’s founding principles form the core of a democratic ideal that is worth fighting for, and should be fought for. The public officials I have challenged have used their public position and the public’s power and assets to diminish, chip away at, and undermine those founding principles, and the traditions kept under their aegis. Because it is not their money, but instead the public’s money, those public officials have been willing to risk a multi-million dollar sanction in the form of attorney fees in order to force their claim on public documents over that of the public itself and the journalists who act as the people’s surrogates, their ambassadors. Showing the depth of their intransigence and the strength of their sinecures, court clerks and administrators, clothed in the mantle of the people, have defied the string of federal rulings that directly address and prohibit no-access-before-process policies, even

within the Ninth Circuit, and continue to brazenly enforce such policies in violation of the First Amendment. That is why I have authorized the prosecution of these cases and spent a great share of our news service's income in defending the tradition of open courts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Pasadena, California on this 22<sup>nd</sup> day of July, 2021.

A handwritten signature in black ink, appearing to read "William Girdner", written in a cursive style. The signature is positioned above a horizontal line.

William Girdner