

**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. )  
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Civil Action No. \_\_\_\_\_

**ORIGINAL COMPLAINT FOR PRELIMINARY AND  
PERMANENT INJUNCTIVE AND DECLARATORY RELIEF**

COMES NOW Plaintiff Courthouse News Service (“Courthouse News”), by and through its undersigned attorneys, and for its *Original Complaint for Preliminary and Permanent Injunctive and Declaratory Relief*, under the First Amendment of the United States Constitution, 42 U.S.C. § 1983 *et seq.* of the United States Constitution, federal common law, and the New Mexico Constitution, would show the Court as follows:

**I. INTRODUCTION AND BACKGROUND**

1. Since time beyond memory, the press has reviewed new civil complaints when they crossed the intake counter in American courts. That was true throughout the nation and it was true in New Mexico. During the transition from paper to electronic court records, federal courts and many state courts kept that tradition in place. But a group of state court clerks abandoned the tradition. They withheld new electronically filed (“e-filed”) complaints until they

were entered into the docket, delaying access and damaging the news. That group includes Defendants. Courthouse News has been asking New Mexico court officials since 2014 to return the traditional access they took away, but to no avail.

2. The means for providing traditional access in an electronic environment is kept in the palm of Defendants' hand. New Mexico leases e-filing software from a software vendor that has installed a "press review queue" for other court clients. The press review queue provides news reporters, and through them the public, with traditional access to new e-filed complaints when they are received, while they sit in a queue waiting for manual docket entry. It works very much like the box behind the clerk's counter holding the just-filed paper complaints.

3. Even so, Defendants have refused to put in place a press review queue or its functional equivalent. They continue to enforce a no-access-before-process policy and practice that delays the news. Defendants have not given a substantive reason for their policy and practice, relying instead on their governmental power to simply deny access. The result of that policy and practice is that over a recent four-month period, **30%** of the new civil complaints filed in New Mexico state courts were withheld for one or more days, representing a total of **2,341** complaints withheld. Since the beginning of 2021, **59%** of the new civil complaints filed in the First Judicial District were withheld for one or more days, representing a total of **506** new complaints withheld, including a highly newsworthy action against Los Alamos National Laboratory.

4. Courthouse News now challenges Defendants' policy and practice of withholding public and press access to new civil complaints e-filed with the New Mexico First District Court Clerk's Office ("Clerk's Office") and other district courts under the supervision of New Mexico's Administrative Office of the Courts ("AOC") (collectively, the "New Mexico Courts")

under the First Amendment of the U.S. Constitution, 42 U.S.C. § 1983, federal common law, and the New Mexico Constitution.

## **II. JURISDICTION AND VENUE**

5. Courthouse News' claims arise under the First Amendment to the United States Constitution, the federal common law, the Civil Rights Act, 42 U.S.C. § 1983 *et seq.*, and the New Mexico Constitution, Art. 2, Sec. 17.

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief). Jurisdiction for declaratory relief is proper under 28 U.S.C. § 2201. The Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the state law claim brought pursuant to Article 2, Section 17 of the New Mexico Constitution. Defendants are subject to personal jurisdiction in this judicial district at the time this action is commenced.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because, on information and belief, Defendants reside in New Mexico, reside in this district, and because a substantial part of the events or omissions giving rise to Courthouse News' claims occurred in this district.

## **III. PARTIES**

8. Courthouse News, a California corporation with its principal place of business located in Pasadena, California, is a nationwide news service founded almost 30 years ago out of a belief that a great deal of news about civil litigation went unreported by traditional news media, a trend that has only increased in the last decade. Courthouse News now 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.

9. Defendant Arthur Pepin is the AOC Director. According to its website, the AOC fulfills its purpose in part by “[e]nsuring that the courts have and use current technology” and “[d]eveloping and implementing improved court processes ....” Acting in his official capacity, Mr. Pepin and those acting under his direction and supervision are directly involved with and are responsible for the delays in access to new complaints experienced by Courthouse News and other members of the public and press, which acts reflect the official policy and practice of the AOC’s office as a whole.

10. Defendant AOC’s actions, as alleged in this Complaint, are under color of New Mexico law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Defendant AOC is a resident of Santa Fe, New Mexico and this District, and AOC’s primary office is located within Santa Fe, New Mexico and this District. Absent an executed waiver of service, Defendant AOC may be served with process and summons at the principal place of business for Mr. Pepin and the AOC, located at 237 Don Gaspar, Santa Fe, New Mexico 87501, or wherever else he may be found. The AOC may also be served with process through the New Mexico Attorney General, Hector Balderas, at 408 Galisteo Street, Villagra Building, Santa Fe, New Mexico 87501.

11. Defendant New Mexico First Judicial District Court Clerk’s Office, according to its website, “is the processing center through which virtually all the court and case documents flow.” The Clerk’s Office professes efficiency on its website, touting that “[t]he efficiency of the Clerk’s office is maintained to ensure that documents are processed accurately and on a timely basis.” The District Court Clerk is Kathleen Vigil, and acting in her official capacity, she is directly involved with and responsible for the delays in access to new complaints experienced by Courthouse News and other members of the public and press, which acts reflect the official

policy and practice of the Clerk's Office as a whole. Defendant Clerk's Office's actions, as alleged in this Complaint, are under color of New Mexico law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Defendant Clerk's Office is a resident of Santa Fe, New Mexico and this District. Absent an executed waiver of service, Defendant Clerk's Office may be served with process and summons at the principal place of business for Ms. Vigil and the Clerk's Office, located at 225 Montezuma Avenue, Santa Fe, New Mexico 87501, or wherever else she may be found. The Clerk's Office may also be served with process through the New Mexico Attorney General, Hector Balderas, at 408 Galisteo Street, Villagra Building, Santa Fe, New Mexico 87501.

#### **IV. FACTS COMMON TO ALL COUNTS**

##### **A. News Reporting Activities of Courthouse News**

12. Courthouse News publishes a free public website, featuring news reports and commentary, which is read by roughly 30,000 people every weekday at *courthousenews.com*. The website functions much like a print daily newspaper, featuring staff-written articles from across the nation that are posted throughout each day, and rotated on and off the page on a 24-hour news cycle.

13. Courthouse News publishes a subscription-based report on appellate rulings and select trial court rulings throughout the nation called the "Daily Brief." It also publishes subscription-based reports on new civil actions called "new litigation reports." Those reports contain original, staff-written summaries of significant new civil complaints, and are sent to subscribers via e-mail each evening. The new litigation report for New Mexico is called the "New Mexico Report" and covers civil complaints filed in the U.S. District Court of New Mexico in addition to civil complaints filed in the county district courts of New Mexico.

14. Courthouse News has been credited as the original source of reporting by: *ABA Journal*, ABC News, *The Atlantic*, Black Christian News Network, *California Bar Journal*, CBS News, *The Christian Science Monitor*, Forbes, Fox News, *Los Angeles Times*, National Public Radio (NPR); NBC News, *The New York Times*, Politico, *Rolling Stone*, *The Wall Street Journal*, *The Washington Post*, *USA Today* and *U.S. News and World Report*.

15. Courthouse News has more than 2300 subscribers nationwide, including law firms, law schools, government offices and news outlets such as: The Associated Press, *Austin American-Statesman*, *The Atlanta Journal Constitution*, *The Boston Globe*, CNN, *The Dallas Morning News*, *Detroit Free Press*, Fox Entertainment Group, *Honolulu Civil Beat*, *Las Vegas Review Journal*, *Los Angeles Times*, North Jersey Media Group, *Portland Business Journal*, *St. Paul Business Journal*, *The Salt Lake Tribune*, *The San Jose Mercury News*, *San Antonio Express News*, *Tampa Bay Business Journal*, *The Wall Street Journal*, Variety, Walt Disney Company and Warner Bros.

16. Among academic institutions, subscribers to Courthouse News' New Litigation Reports, with access to New Mexico reporting, include Boston College Law School, Boston University, Case Western Reserve University, Harvard Law School, Loyola Law School, MIT Sloan School of Management, Southern Illinois University School of Law, UC Hastings College of Law, and UCLA School of Law. A majority of the nation's large and mid-sized law firms also subscribe to one or more of Courthouse News' publications.

17. The new litigation reports, including the "New Mexico Report," primarily cover new civil complaints filed against business institutions and public entities. They do not cover family law, probate or criminal matters. Courthouse News does not seek to review the tiny fraction of complaints that are sealed, nor those that filed in non-public categories. To write new

litigation reports and website stories, Courthouse News' reporters look through the new civil complaints filed each day. In the paper era, they and other reporters on the court beat did so by going to the clerk's office and looking through a stack of just-filed civil complaints. That was true in the state courts of New Mexico and the federal court in New Mexico. Now, in the electronic era, reporters still go to courthouses but they also cover many courts online.

18. Courthouse News has reported on new civil complaints filed in New Mexico since 2005, when it began covering the U. S. District Court in New Mexico and the state district courts in Santa Fe and Albuquerque with a reporter going in person to those courts and reviewing new paper complaints. The paper-era coverage later expanded to include the state courts in Bernalillo and Los Lunas. During those years before e-filing, Courthouse News' reporters could review new civil complaints filed in the state and federal courts after they crossed the intake counter, before docketing was completed.

19. The ability of news reporters to timely report on the day's news thus depended on their ability to see the new complaints after they crossed the intake counter, prior to docketing. Otherwise, the press and public would not know about the new complaints until after docketing was completed and new cases were placed in the court's records room, which involved clerical work that regularly took one day or two, up to a week at times, to complete.

20. New Mexico's courts moved over to e-filing between 2012 and 2015. Since then, it is no longer possible for the press and public to see new civil complaints when they are received. Instead, members of the press and public are required to wait until the new e-filed complaints are docketed or "processed." Images of those complaints can then be seen on computer terminals located within the state courthouses or remotely online.

21. Courthouse News now reports on all the state district courts in New Mexico. Before filing this action, Courthouse News tracked and compiled access data for new civil complaints filed throughout New Mexico's district courts, noting delays between the date each complaint was received and the time it was first available to press and public.

22. For the period February 23, 2021 until June 30, 2021, Courthouse News tracked new non-confidential civil complaints e-filed at each of the New Mexico district courts. This tracking shows that as a whole the New Mexico district courts withheld access to about **30%** of new non-confidential civil complaints for one day or more, representing a total of **2,342** new e-filed complaints withheld as a result of Defendants' no-access-before-process policy. Focusing on Santa Fe District Court, the clerk withheld 59% of new non-confidential civil complaints during the same period, representing **506** new e-filed complaints where access was delayed as a result of the no-access-before-process policy. They included a highly newsworthy complaint against Los Alamos National Laboratory over environmental cleanup.

**B. Historical Access to New Complaints**

23. News coverage operates in a daily cycle where news events, such as New Mexico filing a complaint against Los Alamos National Laboratory, happen during the day and are reported that afternoon and evening, after which newsmakers and reporters sleep, only to start the cycle again the next day. Where news is delayed until the next day or longer, it is devalued by the delay. Just as day-old bread is less likely to be consumed, the news in day-old complaints is less likely to be reported and read, because it is "old news."

24. Traditionally, at courts across the country, reporters could ask for the new complaints at the clerk's counter and see the cases that had just been filed. The complaints were in the past filed in paper form, and intake clerks would set them aside for press review as they



came across the counter. When paper was the filing medium in New Mexico courts, news reporters were allowed behind the counter in Santa Fe, Albuquerque, Los Lunas and Bernalillo where they reviewed new civil complaints after they were received and before docketing was completed, in the experience of Courthouse News Reporter Victoria Prieskop.

25. When she began covering the New Mexico courts in 2008, Ms. Prieskop would go to the Santa Fe County District Court on Montezuma Avenue and proceed to the clerk's office, where a member of the clerk's staff opened the door to the area behind the counter. Behind the counter, the reporter made her way to a metal file cabinet on top of which stood a shallow cardboard container, like the top of a box of paper. That container held complaints from that day, prior to their entry into the docket.

26. Ms. Prieskop followed a similar procedure in Albuquerque where the staff opened a door to the area behind the clerk's counter. Behind the counter, she proceeded to a small work carrol where a stack of new, undocketed complaints were placed. She then reviewed the complaints in that stack on the day they were filed, prior to docketing. She also had behind-the-counter access in Los Lunas and Bernalillo.

27. The access was similar in U.S. District Court in New Mexico where Ms. Prieskop visited the clerk's office, identified herself as a journalist and was handed a stack of complaints in blank folders filed that day. She reviewed them at a small table in the public area of the clerk's office.

### **C. The Switch to E-Filing**

28. The State of New Mexico on July 1, 2015 mandated e-filing for new civil actions statewide, although some courts had started e-filing as early as 2012. An e-filed complaint is deemed filed in New Mexico when it is transmitted to the e-filing service provider, no matter

what time of day or day of the week. *See* N.M.R. Civ. P. 1-005.2.G (“If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court.”).

29. In that switch, New Mexico’s courts broke with the age-old tradition of access. They began withholding new complaints until they were entered into the docket. The resulting delays in access vary widely among the New Mexico courts, with individual courts regularly withholding access to more than 50% of the day’s new complaints. In Santa Fe’s First Judicial District, since the beginning of the year, **59%** of the new civil complaints have been withheld for one or more days. Overall, the state courts of New Mexico, over the last four months, withheld roughly **30%** of the new civil complaints for one or more days, representing a total of **2,342** new complaints.

30. The e-filing process mimics the paper-filing process and is based on a set of common, basic elements: (1) a filer submits a new complaint through an e-file service provider (like a court runner) after filling out a set of required screens that include designating the case type and whether the case is public or non-public; (2) an electronic file manager or EFM catches the new filing (like an intake clerk); (3) the EFM automatically routes the new complaint into each court’s clerk review queue (like a stack of new complaints); and (4) a human docketing clerk enters new complaints into the docket as time permits (like always).

31. Traditional access occurred when the new complaint crossed the counter, before it was entered into the docket, analogous to step 3 in the e-filing context. That timing – access upon receipt – has been carried forward into the new electronic world by many state courts, either individually or statewide, in Alabama, California, Connecticut, Georgia, Hawaii, Nevada, New York, Utah, Washington, and soon in Arizona. They give traditional access to new e-filed

complaints two ways. One is they push the new complaints automatically into the docket with a permanent case number, so they immediately become public. Two is they send the new non-confidential complaints into a queue where journalists review them before they are entered into the docket, like the stack of paper complaints on top of the metal cabinet in Santa Fe.

32. The federal courts use the same two basic methods. Through the CM/ECF filing system, the great majority of federal courts push new civil complaints automatically into the docket where they can be viewed upon receipt through PACER. That is the method used by the U.S. District Court in New Mexico. Another smaller group of federal courts use method number two, providing access upon receipt, before the complaints are processed into the docket. They do this by assigning a generic number on receipt and then allowing a PACER search on that generic number.

**D. New Mexico Has Alternatives to Provide On-Receipt Access**

33. As with all those courts, the means for providing access on receipt are readily available to Defendants. The e-filing software used by the New Mexico courts is leased from Texas-based Tyler Technologies (“Tyler”). The multi-billion-dollar software company is the largest private provider of e-filing software for state courts. The Tyler representative in New Mexico conceded in a report prepared by Defendant Pepin that Tyler has developed a press review queue that can be put in place as soon as the administrators indicate which case designations are public.

34. Such press queues have been implemented by Tyler in a host of courts in California and around Atlanta, providing access upon receipt prior to the clerical tasks tied to processing. Clark County Superior Court in Nevada also maintained a Tyler press queue for roughly eight years before moving from the press queue system to automatic assignment of a

permanent case number.

35. A common argument from clerks fighting against on-receipt access is to profess a concern with privacy. However, by law, as in those other jurisdictions, New Mexico places the sole responsibility for redacting confidential or sensitive information on the e-filer, not the court clerk. A second common argument by clerks fighting a press queue is to claim it would cost an arm and a leg. But a Tyler representative has already reported to New Mexico court officials that the press queue would be “no cost.”

36. New Mexico court officials have made neither of those arguments. Nor have they articulated any reason for denying timely access. They have simply relied on the weight of their governmental power to refuse the return of what was taken away, despite vigorous and repeated requests for reinstatement of traditional access.

**E. Harm Caused by No-Access-Before-Process Policy**

37. Because news operates in a daily cycle, news that is held out of the day’s news cycle becomes stale and is less likely to be reported. “If you don’t get it when it’s fresh, it’s like stale bread. So I think the plaintiff’s point on that is well-taken.” U.S. District Court Judge Henry Coke Morgan Jr., Eastern District of Virginia, from the bench at the conclusion of a four-day trial last year over the issue of withholding access for processing.

38. In New Mexico, delays are the result of access depending on the completion of clerical tasks by court workers who have many duties. And while a clerk will often attempt to speed up clerical work in the face of a First Amendment suit, the inevitable tendency of busy workers is to return to their earlier pace of activity after a period of time.

39. Santa Fe County District Court and the New Mexico courts overall enforce a no-access-before-process that inevitably results in the withholding of new complaints outside the daily news cycle. During the period February 23, 2021 until June 30, 2021, Santa Fe County

District Court has withheld **59%** of the new complaints for one or more days, representing a total of **506** new complaints withheld past the day of filing, based on tracking by Ms. Prieskop. Statewide. During that same period, New Mexico district courts as a whole withheld **30%** of the new complaints for one or more days, representing a total of **2,342** new complaints.

40. Illustrating the effect of delayed access, a highly newsworthy complaint was filed at 3.32 P.M. on February 24, 2021 by the New Mexico Environment Department against the U.S. Department of Energy over delays in environmental cleanup at the Los Alamos National Laboratory. Ms. Prieskop heard about the filing through the Associated Press and checked the First District Court docket. She checked on Feb. 24<sup>th</sup> multiple times and continued to check on Feb. 25<sup>th</sup>. She checked at 2:21 p.m. on Feb. 25<sup>th</sup> and it was still not there. The complaint showed up on her next check at 4:45 p.m. on Feb. 25<sup>th</sup>. Thus, a nationally newsworthy complaint was held outside the news cycle, something that would not have occurred with traditional access in the paper filing era.

## V. Roadmap to the Right of Contemporaneous Access

### A. History and Logic Test

41. The road to the right of access is marked by signposts written in caselaw. The first signpost points to “history” and “logic” as requirements for a right of access in a criminal proceeding. The next leg of the journey arrives at the same right to documents in civil proceedings. A caselaw marker then points to the requirement of contemporaneous access, and, from there, the road to the right of access, in a sense, runs downhill. In order to deny contemporaneous access, the government must show an “overriding interest,” and denial of the right must be “narrowly tailored.”

42. The path of analysis starts at the seminal First Amendment opinion *Press-*

*Enterprise Co. v. Superior Court*), (1986) (“*Press-Enterprise II*”), a case over a reporter’s right of access to a preliminary hearing in a notorious murder case. In deciding that a right of access attached, the Supreme Court opinion said, “First, there has been a tradition of accessibility ...,” *Press Enterprise II*, 478 U.S. 1, 10. See also *United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998) (discussing two-step analysis of *Press Enterprise II*.) The tradition of access to new civil complaints was in place throughout the nation’s courts and specifically in New Mexico’s courts during the era of paper filing. The tradition continues in the modern electronic era in federal courts, including this Court, and a host of state courts including two New Mexico neighbors, Utah and within the year in Arizona. “There is no dispute that, historically, courts have openly provided the press and general public with access to civil complaints.” *Courthouse News Service v. Schaefer*, 440 F. Supp. 3d 532, 559 (E.D. Va. 2020), *aff’d*, No. 20-1290, 2021 WL 2583389 (4<sup>th</sup> Cir. June 24, 2021).

43. “The second question is whether public access ... plays a particularly significant positive role in the actual functioning of the process,” *Press Enterprise II*, 478 U.S. 1, 11. The new civil complaint serves as the opening attack in a legal battle, just as this complaint does. The ability to be informed about those contests serves a significant positive role in understanding the work of the courts. “Logical considerations also support a presumption of public access,” *Bernstein v. Bernstein Litowitz & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016.) The right to review new civil complaints “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*”); accord, *Courthouse News Service v. Schaefer*, 440 F. Supp. 3d 532, 557-559 (E.D. Va. 2020) (“Thus, the Court FINDS that the logic prong is met. Accordingly, the Court FINDS that the experience and logic test is satisfied and FINDS that the public and press enjoy a

qualified First Amendment right of access to newly-filed civil complaints....”). That ruling was recently affirmed by the Fourth Circuit in *Courthouse News Service v. Schaefer*, No. 20-1290, 2021 WL 2583389 (4<sup>th</sup> Cir. June 24, 2021).

44. The first federal judge to consider the precise issue of a no-access-before-process policy, identical to the policy challenged here, was U.S. District Court Judge Melinda Harmon in the Southern District of Texas in 2009. “The First Amendment to the United States Constitution prohibits any law ‘abridging the freedom of . . . the press.’ It requires a presumption of openness of both the courtroom and court files.... Thus, there is a presumption in favor of public access to judicial records.” *Courthouse News Serv. v. Jackson*, C.A. No. H-09-1844, 2009 WL 2163609, at \*4-5 (S.D. Tex. July 20, 2009) (citations omitted). *See also Planet III*, 947 F.3d at 581, 589. (“We have long presumed a First Amendment ‘right of access to court proceedings and documents.’”).

#### **B. Right of Access Attaches on Receipt**

45. Moving to the next stop on the right of access roadmap, a broad range of federal courts have said that once the right of access attaches, it must be contemporaneous. “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.” *Doe v. Public Citizen*, 749 F.3d 246, 272. (4<sup>th</sup> Cir. 2014). A series of decisions addressing no-access-before-process policies define contemporaneous as the time of the time of filing. *Planet III*, 947 F.3d at 594, which is also the time of receipt. (Qualified First Amendment right of access to civil complaints arises when the complaints are “filed with the court.”)

46. In a 2021 decision, applying this precedent to the precise policy challenged here,

U.S. District Court Judge Dolly Gee wrote: “There is a qualified First Amendment right of timely access to newly filed civil complaints” that “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 Service v. Planet*, No. 11-cv-8083, 2021 WL 1605216, Amd. Judgment for Dec. Relief and Perm. Injunction, Doc. No. 270, p. 1 (C.D. Cal., Jan. 26, 2021).

47. Examining the same no-access-before-process policy in Manhattan’s state court, U.S. District Court Judge Edgardo Ramos wrote, “Accordingly, the court entered an order prohibiting the clerk from refusing to make complaints available until after they were processed and directing the clerk to make such complaints accessible to the public and the press in a timely manner from the moment they are received by the Court,” *Courthouse News Service v. Tingling*, No. 16 Civ. 8742 (ER), 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016), Transcript Proceeding, Order Reported at 16 Civ. 8742, 2016 WL 8505086 (S.D.N.Y. Dec. 16, 2016). Within six weeks of that ruling, New York courts began providing on-receipt access to new e-filed civil complaints through a public website.

**D. No-Access-Before-Process Policy and Practice Neither Based on Overriding Interest Nor Narrowly Tailored**

48. Once the right of access attaches, denial of the right must serve an “overriding interest” and be “narrowly tailored.” *Press Enterprise II*. In that guiding decision, the competing interest was the right to a fair trial. Here, the competing interest is clerical work. That interest does not override the First Amendment. And because the clerks of New Mexico have ample alternate means for providing access upon receipt, denial of the right of contemporaneous access is not narrowly tailored.

49. A line of federal judges, examining the identical policy at issue here, have



concluded that it violates the First Amendment. Faced with Houston court clerk Loren Jackson's no-access-before-process policy, Judge Melinda Harmon wrote: "The Court finds that they have failed to demonstrate that the 24 to 72 hour delay in access is narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exists." *See Courthouse News Serv. v. Jackson*, C.A. No. H-09-1844, 2009 WL 2163609, at \*4-5 (S.D. Tex. July 20, 2009). She enjoined Jackson from withholding access to the new civil complaints.

50. Faced with a no-access-before-process policy in Manhattan's state court, Judge Ramos wrote, "The court concluded that the clerk failed to meet its burden of demonstrating that its policy of refusing to provide public and press access to newly filed complaints until they are processed is either essential to preserve higher values or is narrowly tailored to serve a substantial government interest." *Courthouse News Service v. Tingling*, No. 16-cv-08742, 2016 WL 8739010, at \*19 (S.D.N.Y. Dec. 16, 2016) (transcript of bench ruling).

51. Considering the same policy enforced by Virginia clerks in a paper context, U.S. District Court Judge Henry Coke Morgan Jr. wrote: "Defendants have failed to prove that their practices and customs that lead to the substantial delays in this case were narrowly tailored to serve those government interests." *Courthouse News Service v. Schaefer*, 440 F. Supp. 3d 532, 559 (E.D. Va. 2020). The Fourth Circuit recently affirmed, concluding at p. 12 of the opinion: "The press and public enjoy a First Amendment right of access to newly filed civil complaints. This right requires courts to make newly filed civil complaints available as expeditiously as possible." *Courthouse News Service v. Schaefer*, No. 20-1290, 2021 WL 2583389, at \*8 (4<sup>th</sup> Cir. June 24, 2021).

52. The Ninth Circuit panel in *Planet III* wrote, "This case pits the urgency of reporting on, and the public interest in obtaining, contemporaneous news about filings in our

courts against administrative interests in the fair and orderly processing of those filings.... Ventura County has not shown a ‘substantial probability’ that more contemporaneous access to the newly filed complaints would impair its interest in orderly administration.” *Planet III*, 947 F.3d at 585.

**E. Alternatives for Access Allow Clerk to Continue Clerical Work**

53. It is highly practicable to provide the same access under an e-filing system as existed under a paper filing system, as demonstrated by the many different courts using a multiplicity of e-filing systems that provide access on receipt. Instead of basic intake work being done by clerks at an intake window, that work is now done by e-filing software that requires the filer to complete entries identifying court, case type, payment, and much more. Based on the case type designated by the filer, the e-file manager automatically sorts the new, non-confidential complaints into a review queue that serves the same function as the stack of new complaints on top of the cabinet behind the clerk’s counter. That way the press can report on new complaints when they are filed as busy clerks complete their clerical duties when time permits.

54. In a 2018 email from Tyler Technologies executive Colleen Reilly, attached to a report by Defendant Pepin on the feasibility of a press queue, she wrote: “We did build a configuration for Las Vegas, Nevada to see filings before they are accepted by the Court. Since that time, there are a few counties in Georgia who are using the same approach. The configuration is in our database, so it is something Tyler would need to do. There is no cost associated with this work.” Defendant Pepin is thus aware that the current denial of contemporary access to new civil complaints filed in New Mexico’s courts is not narrowly tailored.

55. Courthouse News seeks declaratory relief and an injunction prohibiting the

Defendants' current no-access-before-process policy and practice.

**VI. COUNT ONE**

**(Violation of U.S. Const. Amend. I and 42 U.S.C. § 1983)**

56. Courthouse News incorporates the allegations of Paragraphs 1-55 herein.

48. Defendants' actions under color of state law, including without limitation their policy and practice of withholding newly filed civil complaints from press and public view until after administrative processing, and the resulting denial of timely access to new civil complaints upon receipt for filing, deprives Courthouse News, and by extension its subscribers, of their right of timely access to public court records secured by the First Amendment to the U.S. Constitution.

57. The presumption of access to new civil complaints, which arises when those complaints are filed in New Mexico's state district courts may be restricted only if closure is essential to preserve higher values and is narrowly tailored to serve those interests. *Press-Enterprise II*). Defendants cannot satisfy this test.

58. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendant's unconstitutional actions, and will suffer irreparable harm as a result of Defendant's violation of its First Amendment rights. Courthouse News is therefore entitled to a declaratory judgment and a preliminary and permanent injunction to prevent further deprivation of the First Amendment rights guaranteed to it and its subscribers.

**VI. COUNT TWO**

**(Violation of Federal Common Law and 42 U.S.C. § 1983)**

59. Courthouse News incorporates the allegations of Paragraphs 1-58.

60. Defendants' actions under color of state law, including without limitation their denial of timely access to new civil court complaints deprive members of the press, including

Courthouse News and by extension its subscribers, of their right of access to public court records guaranteed by federal common law.

61. There is no legitimate justification for withholding new complaints that is sufficient to overcome the common law right of Courthouse News and its subscribers to be able to timely review new case-initiating documents.

62. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendants' unconstitutional actions, and will suffer irreparable First Amendment harm as a result of Defendants' violation of its common law right of access. Courthouse News is therefore entitled to declaratory and permanent injunctive relief to prevent further deprivation of the rights guaranteed to it and its subscribers under the common law.

## **VII. COUNT THREE**

### **(Violation of New Mexico Const. Art. 2, Sec. 17)**

63. Courthouse News incorporates the allegations of Paragraphs 1-62 herein.

64. Defendants' actions under color of state law, including without limitation the denial of timely access to new civil court complaints and Defendants' elevation of themselves above the news media to a favored position with respect to the publication of public court records, in order to extract income from them, deprive members of the press, including Courthouse News and by extension its subscribers, of their right of access to public court records secured by the free press provision of Article 2, Section 17 of the New Mexico Constitution.

65. There is no compelling or overriding interest or other justification sufficient to overcome Defendants actions in violation of the New Mexico Constitution. And even if an overriding interest did exist, there are less restrictive means of achieving any such interest, and the procedures implemented by Defendants are not narrowly tailored to serve any overriding

interest.

66. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendants' unconstitutional actions, and will suffer irreparable harm as a result of Defendants' violation of its rights under Article 2, Section 17 of the New Mexico Constitution. Courthouse News is therefore entitled to declaratory and permanent injunctive relief to prevent further deprivation of the rights guaranteed to it and its subscribers under the New Mexico Constitution.

**X. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Courthouse News Service prays for judgment against Defendants as follows:

- A. For preliminary and permanent injunctions against Defendants, including their agents, assistants, successors, employees, and all persons acting in concert or cooperation with them, or at their direction or under their control, prohibiting them from denying Courthouse News access to new civil court, case-initiating complaints until after administrative processing.
- B. For a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring the denial of access to new civil court, case-initiating complaints until after administrative processing as unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 2, Section 17 of the New Mexico Constitution, for the reason that it constitutes an effective denial of timely access to court records.

- C. For an award of costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- D. For all other relief the Court deems just and proper.

Dated: July 30, 2021

Respectfully submitted,

**PATRICK J. ROGERS, LLC**

/s/ Patrick J. Rogers  
20 First Plaza Center NW, Suite 725  
Albuquerque, NM 87102  
(505) 938-3335  
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*and*

**JACKSON WALKER L.L.P.**

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***Pro Hac Vice Forthcoming***

ATTORNEYS FOR PLAINTIFF  
COURTHOUSE NEWS SERVICE

I certify that the foregoing was electronically filed through the Court's filing system this 30<sup>th</sup> day of July, 2021.

/s/ Patrick J. Rogers

# EXHIBIT A

**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).

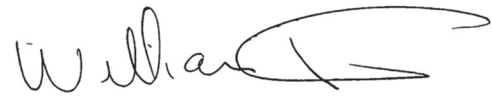
15. In early 2021, the merits portion of the decade of litigation between Courthouse News and the California Judicial Council came to an end, *Courthouse News v. Planet*, No. 11-cv-8083, 2021 WL 1605216 (C.D. Cal., Jan 26, 2021) (Amended Judgment). U.S. District Court Judge Dorothy Gee again enjoined 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.

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William Girdner