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. _____**

PLAINTIFF COURTHOUSE NEWS SERVICE'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PLAINTIFF COURTHOUSE NEWS SERVICE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiff Courthouse News Service ("Courthouse News"), by and through its undersigned attorneys, and files this *Memorandum of Law in Support of Motion for Preliminary Injunction*, under the First Amendment of the United States Constitution, 42 U.S.C. § 1983 *et seq.*, federal common law, and the New Mexico Constitution, and would show the Court as follows.

I. INTRODUCTION

1. Courts across the nation recognize that the First Amendment to the U.S. Constitution guarantees the press and public a qualified right of access to civil court petitions. This right "is an indispensable predicate to free expression about the workings of government," *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) ("*Planet III*"), and public access cases across the circuit courts recognize the importance of contemporaneous access where a right of access is found. *E.g.*, *Lugosch v. Pyramid Co. Of Onondaga*, 435 F.3d 110, 126-127 (2nd Cir. 2006) (collecting cases); *Courthouse News Serv. v. Schaefer*, 440 F.Supp.3d 532, 559 (E.D. Va. 2020) (where it applies, First Amendment right of access generally requires contemporaneous access), *aff'd*, No. 20-1290, 2021 WL 2583389 (4th Cir. June 24, 2021). Each passing day may constitute a separate and cognizable infringement of the First Amendment. *Lugosch*, 435 F.3d at 126.

2. In recognition of these principles, since time beyond memory, news reporters in state and federal courts throughout America have reviewed new civil complaints when they cross the clerk's counter. In paper form, before electronic filing ("e-filing"), new complaints were held in a box, tray or stack, either on or behind the counter. It was that way in the federal and state courts in New Mexico too. At the courthouses in Santa Fe, Albuquerque and Las Lunas, journalists were permitted behind the counter to review stacks of new complaints after they were received,

before the docketing process was completed. In the federal courthouse in Albuquerque, journalists also saw copies of the new complaints when they were received, in blank folders handed to reporters for review just outside the counter. Busy clerks completed their clerical tasks – now often referred to as "processing" – as their schedules allowed, while reporters reported on the news while it was fresh.

3. In the seismic shift to e-filing that has been taking place over the last decade, the great majority of federal courts and many state courts continued this tradition by giving access to new e-filed complaints as soon as they crossed the virtual counter. They set up an electronic equivalent to the paper stack that grew as new cases crossed the physical counter. But some state court administrators took the opportunity of the electronic revolution to go backwards on access. Defendants joined them and they now enforce a no-access-before-process policy, flipping around the timing of traditional access by holding back access to new complaints until the clerical work of processing is done.

4. The result of that policy and practice is that over the last four months, **30**% of the new civil complaints filed in New Mexico state courts were withheld for one or more days, representing a total of **2,342** complaints withheld. Since the beginning of 2021, **59**% of the new civil complaints filed in the Santa Fe County District Court were withheld for one or more days, representing a total of **506** new complaints withheld. Exh. 2, Declaration of Victoria Prieskop ("Prieskop Decl."), at ¶¶ 15-16.

5. Defendants have alternatives that would avoid those delays and provide the electronic equivalent to the paper stack behind the counter. Specifically, a number of courts using the same e-filing software as New Mexico have installed a "press review queue" that gives on-receipt access to new complaints. Exh. 1, Declaration of Bill Girdner ("Girdner Decl."), at ¶¶ 17-

22. Defendant Pepin issued a lengthy report in 2018 that demonstrated a press review queue was an alternative available to New Mexico courts. *See id*. at ¶¶ 14-15 & Exh. A-1 thereto. The report included as "Exhibit F" an email message from New Mexico's e-filing software representative from Tyler Technologies, stating, "The court would tell us the location and case types that would be made accessible and we do the configuration." *See* Exh. A-1 at Exhibit F.

6. Courthouse News has repeatedly and unsuccessfully petitioned state court officials in New Mexico to provide such a press queue or its functional equivalent. Letters requesting a press review queue have been sent to Joey Moya, Chief Clerk of the New Mexico Supreme Court, on October 9, 2019, former Supreme Court Chief Justice Judith Nakamura on July 6, 2020, and Defendant Vigil on July 1, 2021. *See* Exh. 1, Girdner Decl. at ¶¶ 15-16 & Exhs. A-2, A-3, A-4, & A-5 attached thereto. Mr. Moya responded but rejected further consideration of the request, and neither Justice Nakamura or Ms. Vigil ever responded. *See id*. at ¶¶ 15-16.

7. Courthouse News thus brings this action pursuant to the First Amendment to the U.S. Constitution and 42 U.S.C. § 1983 to obtain pre-processing access to nonconfidential newly-filed civil complaints in the First District Court. Courthouse News seeks a preliminary injunction based on its motion, filed contemporaneously herewith, in reliance on this memorandum and the attached declarations, to preclude Defendants from withholding access to such complaints until after administrative processing is complete.

II. STATEMENT OF FACTS

A. About Courthouse News

8. Courthouse News 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 the news media. Exh. 1, Girdner Decl. at ¶¶ 2-3. 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. *Id.* at ¶ 2. Media subscribers include The Associated Press, CNN and *The Wall Street Journal*, putting Courthouse News in the position of a pool reporter for news about civil litigation. *Id*. at ¶ 6.

9. Courthouse News earns its income from subscriptions paid by roughly 2,300 subscribers, including lawyers, law firms, law schools, libraries, nonprofits, government entities, and businesses. *Id*.. Its reporting has been credited as the source for stories by many news outlets, including newspapers (e.g., *The New York Times*, *The Wall Street Journal*); magazines (e.g., New York Magazine, U.S. News and World Report); television news (e.g., ABC News, Fox News); online-only publications (e.g., The Daily Beast, Politico); and radio (e.g., NPR). *Id*.

10. Courthouse News publishes news through its *New Litigation Reports* and its website at *courthousenews.com*. *Id.* at ¶¶ 5-7. 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. *Id.* at ¶ 5. 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. *Id.* The *New Mexico Report* counts 42 subscribing institutions. *Id.*

11. To prepare the *New Litigation Reports* and identify new cases that may warrant an article on Courthouse News' website (www.courthousenews.com), Courthouse News' reporters visit their assigned court at the end of each court day to review all the petitions filed with the court that day and determine which are of interest to Courthouse News' readers. *Id.* at ¶¶ 10-11. 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. *Id*. A delay of even a single day means that news is delayed by at least one full news cycle. *Id.* Especially in today's digital age, the newsworthiness of new civil actions declines with time. *Id*. 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. *Id*.

12. Defendants' no-access-before-process policy – because it requires clerical work ahead of access – necessarily creates delay in reporting the news to subscribers and the public. As a result, news is pushed outside the daily news cycle and, like bread, goes stale.

B. Access Delays in New Mexico District Courts

13. The Santa Fe County District Court operates under the administrative aegis of the First Judicial District, which also includes the Rio Arriba County District Court and the Los Alamos County District Court. Defendant Vigil is the District Court Clerk for all three county courts. In turn, Defendant Pepin is the Administrative Office Director for all the New Mexico District Courts.

14. Access delays are regular and ongoing in the Santa Fe County District Court in the First Judicial District and in all the New Mexico District Courts as the result of Defendants' no-access-before-process policy and practice. The delays prevent Courthouse News and its readers from obtaining timely information about newsworthy civil lawsuit on a wide range of issues, including environmental policy and civil rights. Reporter Prieskop started tracking access delays in New Mexico on a statewide basis Feb. 23, 2021. Exh. 2, Prieskop Decl., at ¶¶ 15-17. Since then and up through June 30, 2021, her tracking shows over the last four months, **30**% of the new civil complaints filed in New Mexico state courts were withheld for one or more days, representing a total of **2,342** complaints withheld. *Id*. Since the beginning of 2021, **59**% of the new civil complaints filed in the Santa Fe District Court in the First Judicial District were withheld for one

or more days, representing a total of **506** new complaints withheld. The withheld complaints included a highly newsworthy action filed by the New Mexico Department of Energy against Los Alamos National Laboratory over delays in environmental clean up, and an action by a reporter who was threatened by sheriff's deputies and cut off from access to news briefings after writing about the police shooting of a special education student. *Id.* at ¶ 17.

15. These delays result from Defendants' no-access-before-process policy and practice.

C. Alternative Ways Other Courts Provide Access Without Delays

16. 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. Exh. 1, Girdner Decl. at ¶22. 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." *Id.* But New Mexico has refused to direct Tyler to put a press queue in place or provide on-receipt access by any other alternative.

17. Courthouse News has asked New Mexico officials repeatedly for a return of the access taken away in the transition to e-filing. Exh. 1, Girdner Decl. at ¶¶ 15-16. Those requests have been repeatedly ignored or denied. *Id.* Most recently, on July 1, 2021, Courthouse News wrote to Defendant Vigil and asked that she make new e-filed petitions available to the press through a press queue, but at the time of filing that letter has not been answered. *Id.* at ¶16 & Exh. A-5 thereto.

III. STANDARD OF REVIEW

18. A party seeking a preliminary injunction must show: (1) substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the

injunction, if issued, will not adversely affect the public interest. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003) (quoting *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). The Tenth Circuit has adopted the Second Circuit's definition of probability of success which states that where the other three factors tip decidedly in favor of the moving party, the probability of success requirement is somewhat relaxed. *See Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (noting that erotic dancers have alternate means of expression).

19. In a First Amendment case, the pivotal factor is the likelihood of success because, if established, irreparable injury is presumed: "The Supreme Court has made clear that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,'" *Heideman*, 348 F.3d at 1190 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)); *see also Courthouse News Serv. v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (applying presumption of irreparable harm and enjoining no-access-before-process policy identical to policy challenged here); *Courthouse News v. Planet*, 2:11-cv-08083-SJO-FFM, 2016 WL 4157210 (C.D. Cal. May 26, 2016) (applying four-prong test for an injunction and enjoining no-access-before-process policy); *Courthouse News v. Tingling*, CA No. 1:16-cv-08742-DR, 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016) (applying injunction standard followed by Tenth and Second Circuits and enjoining Manhattan state court clerk's no-access-before-process policy).

IV. ARGUMENT AND AUTHORITIES

A. Plaintiff Likely to Succeed on Merits

20. The press and public hold a First Amendment right of access to public court records, including civil complaints, that attaches when they are filed with a court. That right can only be overcome by an overriding governmental interest in closure, and that closure must be narrowly

tailored to the concern the state has identified. Defendants can satisfy neither requirement. Plaintiff therefore has a strong likelihood of success on the merits of its claims. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Alabama*, 384 U.S. 214, 218 (1966).

1. Courthouse News Can Show a Probability of Success

21. The path of analysis in a First Amendment right of access case was cleared by the seminal U.S. Supreme Court decision in *Press-Enterprise II v. Sup. Ct.*, 478 U.S. 1 (1986) ("*Press Enterprise II*"), which considered a newspaper's claim for access to a preliminary hearing in a murder case where a nurse had killed elderly patients using massive doses of a heart drug. The newspaper was required to first show that a right of access existed based on "experience" and "logic." Once the right of access was established, the state could deny access only if it has an "overriding interest" and the denial was "narrowly tailored." *Press Enterprise II*, 478 U.S. at 9; *see also United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998) (applying logic test of *Press Enterprise II* to analysis of access to sealed documents); *United States v. Apperson*, 642 Fed. Appx. 892, 898 (10th Cir. 2016) ("At bottom, the government bears the burden of demonstrating some significant interest that outweighs the presumption' in favor of public access"). New Mexico's own rule on public access, N.M. R. Civ. P. Dist. Ct. 1-079, by its terms, adopts the *Press Enterprise II* requirements of overriding interest and narrow tailoring before court records can be sealed.

22. Following that same path, every federal circuit to consider the First Amendment right of access, as well as trial court rulings considering no-access-before-process policies, have concluded that the right of access to judicial records extends to both civil and criminal proceedings. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2nd Cir. 2012) ("Most relevant for the present case, we have concluded that the First Amendment guarantees a qualified

right of access not only to criminal but also to civil trials and to their related proceedings and records"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 113 (2nd Cir. 2006) ("[P]resumption of immediate public access attaches" to summary judgement papers); *Courthouse News v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) ("*Planet III*") ("Applying …*Press-Enterprise II* … we conclude that the press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253–54 (4th Cir. 1988) ("denial of access [to summary judgment papers] must be necessitated by a compelling government interest and narrowly tailored to serve that interest."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3rd Cir. 1984) (First Amendment guarantees right of access to criminal and civil trials); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("[T]here is a tradition of openness in this country that cannot be taken lightly."); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (First Amendment right of access applies to contempt proceedings which are "a hybrid containing both civil and criminal characteristics"); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (presumption in favor of access to judicial records applied to list of prisoners least deserving of incarceration); *Schaefer*, 440 F. Supp. 3d 532, 558 (E.D. Va. 2020) ("While summary judgment is a substantive resolution of the dispute; in the same vein, the complaint itself is the dispute."), *aff'd*, No. 20-1290, 2021 WL 2583389 (4th Cir. June 24, 2021).

23. Courts have consistently held that where, as here, the First Amendment right of access applies, it attaches upon receipt. *See, e.g.*, *Planet III*, 947 F.3d at 588, 591 (holding the qualified right of timely access to newly-filed civil complaints attaches when the lawsuit is filed, *i.e.*, when it is received by the court); *Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of contemporaneous access where a right to access

is found"); *In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) ("[T]he values that animate the presumption in favor of access require that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous'"); *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) ("a 'minimal delay'" implicates the First Amendment"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("[E]ven a one to two day delay impermissibly burdens the First Amendment.").

24. Consistent with this, in a number of cases brought by Courthouse News, federal courts have issued injunctions precluding clerks from withholding newly-filed civil petitions from public and press review following receipt of the documents. *Courthouse News v. Jackson*, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (granting preliminary injunction where court clerk's practice of delaying access to new civil petitions until after processing resulted in 24-to-72 business hour delay in access); *Courthouse News v. Tingling*, Civil Action No. 1:16-cv-08742-DR, 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016) (injunction entered after recognition that one-third of complaints were withheld from public access for a day or more); *Courthouse News v. Planet*, No. 11-cv-8083, 2021 WL 1605216, *1 (C.D. Cal., Jan 26, 2021) (Amended Judgment) (right of access attaches "when new complaints are received by a court, rather than after they are 'processed' -- i.e., rather than after the performance of administrative tasks that follow the court's receipt of a new complaint.").

(a) <u>"Experience" Requires Timely Public Access to Civil Petitions</u>

25. This action by Courthouse News seeks to defend a longstanding tradition of access to new civil complaints when they cross the clerk's counter, so that journalists can report on the news at the courthouse. "There is no dispute that, historically, courts have openly provided the press and general public with access to civil complaints," *Schaefer*, 440 F. Supp.3d at 557 (E.D. Va. 2020); *see also Courthouse News v. Jackson*, 2009 WL 2163609, at *4 (S.D. Tex. July 20,

2009) ("*Jackson*") ("[T]the parties in the instant case agree that there is a right of access to newly filed petitions in civil cases."); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2nd Cir. 2016) ("Complaints have historically been publicly accessible by default"); *Planet III*, 947 F.3d at 591 ("Both sides before us agree that experience and logic support a public right of access to newly filed civil complaints."); *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 36 (Tenn. 1956) ("It is common knowledge that [ ] the press has for time out of mind published the contents of a pleading filed in Court.").

26. These decisions are consistent with Courthouse News' experience covering courts across the nation. Exh. 1, Girdner Decl. at ¶¶ 33-40. They are also consistent with the federal and state courts in New Mexico, where the state courts allowed reporters behind the counter to reporters to review new paper-filed civil complaints before the completion of docketing and where the federal court provided access to new paper-filed civil complaints in blank folders prior to the completion of processing. Exh. 2, Prieskop Decl. at ¶¶ 4-14.

(b) "Logic" Requires Public Access to Civil Petitions

27. The federal courts have consistently held that access to court records is vital to an open, democratic government and an informed citizenry. "Logical considerations also support a presumption of public access." *Bernstein*, 814 F.3d at 141. The logic of access to new complaints has been demonstrated in a series of U.S. District Court rulings that one after another enjoined no-access-before-process policies identical to the policy at issue here.

In the first District Court case to consider the no-access-before-process policy, U.S. Judge Melinda Harmon ruled in *Jackson* in 2009, "Public access serves important interests, such as `to promote trustworthiness of the judicial process … and to provide the public with a more complete understanding of the judicial system." *Courthouse News v. Jackson*, 2009 WL 2163609, at *3

(S.D. Tex. July 20, 2009) (quoting *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849-50 (5th Cir. 1993)).

28. Following the Texas ruling, in 2011, a decade of litigation began between Courthouse News and Ventura Superior Court Clerk Michael Planet in California. Roughly midway through the litigation, in 2016, U.S. Judge James Otero issued a lengthy summary judgment ruling, finding that the right of access attaches "upon receipt by the clerk." *Planet,* 2016 WL 4157210, at *12 (C.D. Calif. May 26, 2016). He concluded that, "[B]oth 'experience' and 'logic' dictate such a result." *See id*.

29. Shortly after that ruling, in late 2016, U.S. Judge Edgardo Ramos in the Southern District of New York ruled in *Tingling*: "[P]ublic access to complaints allows the public to understand the activity of the courts, enhances the court system's accountability and legitimacy, and informs the public of matters of public concern." *Courthouse News Service v. Tingling*, Case No. 17 C 7933, 2016 WL 8739010, at p. 18 (S.D.N.Y. Dec. 16, 2016) (preliminary injunction hearing transcript) (Trial Transcript) (citing *Bernstein, Jackson* and Judge Otero's May 2016 ruling in *Planet*).

30. Those decisions were followed in 2018 by a decision from U.S. District Court Judge Matthew Kennelly in the Northern District of Illinois, who like all three previous federal judges to consider no-access-before-process policies, found that the elements of experience and logic were satisfied. *Courthouse News Serv. v. Brown*, Case No. 17 C 7933, 2018 WL 318485, at *2 (N.D. Ill. Jan. 8, 2018)) ("[T]he First Amendment provides a presumption that there is a right of access to proceedings and documents which have historically been open to the public and where the disclosure of which would serve a significant role in the functioning of the process in question,").[1]

[1] While the Seventh Circuit reversed, it did so solely on grounds of abstention, an outlier decision contrary to Supreme Court guidance and conflicting with the Fourth and Ninth Circuit decisions in *Courthouse News Service v. Schaefer*,

31. After a four-day trial in 2020 Judge Henry Coke Morgan Jr. in the Eastern District of Virginia issued a declaratory judgment finding ample evidence that clerks violated the constitutionally protected right of timely access under a policy and practice of denying access until scanning and indexing. *Courthouse News v. Schaefer*, 440 F. Supp.3d 352, 558 (E.D. Va. 2020) ("*Schaefer*"). Judge Morgan cited to the previous decisions in *Jackson*, *Planet* (2016 summary judgment ruling), *Tingling*, *Brown* and *Planet III* (the final appellate ruling in the Planet saga decided shortly before trial). He concluded in a 45-page ruling: "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 unless particular filings are entitled to confidentiality by law." *Schaefer*, 440 F. Supp.3d at 558. The Fourth Circuit recently affirmed, upholding declaratory relief. *Schaefer*, No. 20-1290, 2021 WL 2583389 (4th Cir. June 24, 2021).

32. The Ninth Circuit in *Planet III* found that the logic of access to new civil complaints was amplified by the need to report on them: "These values hold especially true where, as here, the impetus for CNS's efforts to obtain newly filed complaints is its interest in timely reporting on their contents." *Planet III*, 947 F.3d at 590; *cf. Richmond Newspapers v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring in judgment) ("[A] special solicitude for the public character of judicial proceedings is evident in the Court's rulings upholding the right to report about the administration of justice.").

33. The right of access to new complaints at the time of receipt satisfies the logic test.

No. 20-1290, 2021 WL 2583389 (4th Cir. June 24, 2021) and *Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014).

(c) No Overriding Interest

34. Once the right of access is established, based on experience and logic, the state must show an "overriding interest" in any restriction of the right as well as "narrow tailoring" of that restriction. *See Press Enterprise II,* 478 U.S. at 9. Here, Defendants are giving priority to clerical processing over the First Amendment right of access. The state's interest in clerical processing does not, and cannot, override the First Amendment. *See, e.g.*, *Jackson*, 2009 WL 2163609, at *4-5 ("The Court is unpersuaded by Defendants' argument and finds that the delay in access to the newly-filed petitions in this case is not a reasonable limitation on access."); *Courthouse News Service v. Planet*, Case No. CV 11-08083, 2016 WL 4157210, at *17 (C.D. Cal. May 26, 2016) ("*Planet III*"), *aff'd in part, rev'd in part by* 947 F.3d 581 (9th Cir. 2020) ("Planet has not met his burden of proving that delays brought on by VSC's processing of newly filed complaints and their associated documents prior to making such complaints available to the public and press … is the result of 'overriding [governmental] interest' or that such delays are 'essential to preserve higher values.'"); *Tingling*, 2016 WL 8739010, at p. 20 ("As in *Planet* and *Jackson*, this Court finds that the clerk has failed to meet its burden of demonstrating that its policy of refusing to provide the public and press access to newly filed complaints until after they are reviewed and logged is either essential to preserve higher values or is narrowly tailored to serve that interest."); *Planet*, 2021 WL 1605216, *1 (C.D. Calif. 2021) (Amended Order and Judgment*)* ("[R]equiring that newly filed complaints … be 'processed' prior to providing the press and public with access to those complaints violates CNS's qualified First Amendment right of timely access to newly filed complaints.").

35. The clerical work of Defendants, while important to the orderly administration of justice, is not an interest that overrides the First Amendment right of timely access.

2. No-Access-Before-Process Policy Not Narrowly Tailored

36. In order to pass the constitutional test of *Press Enterprise II*, Defendants' elevation of clerical duties above and ahead of the First Amendment right of access must not only serve an overriding governmental interest, it must also be narrowly tailored. *Press Enterprise II*, 478 U.S. at 9. Even if the imperative to do clerical work was considered overriding, it need not interfere with constitutional access, as this Court and many state and federal courts demonstrate every day. The clerical work tied to placing a new filing in the court's docket can be accomplished after providing access, as was done in years past in the paper era, and as is done now in the electronic era, in courts all around the nation. *See Jackson*, 2009 WL 2163609, at *4-5 ("Defendants have alternative, constitutional ways to achieve their goals and address their administrative concerns."); *Planet III*, 947 F.3d at 598 ("The ready availability of alternative 'simple measures' to improve access to newly filed complaints, *Planet I*, 750 F.3d at 791, further strengthens our conclusion that the no-access-before-process policy fails the second prong of *Press-Enterprise II*.").

37. No court that has invalidated a no-access-before-process policy has mandated a particular alternative for providing access, but Defendants hold one alternative in the palm of their administrative hands. As many other courts have done and are in the process of doing, Defendants can direct their e-file vendor to install the same press review queue installed in other courts. *See* Exh. 1, Girdner Decl. at ¶ 22. The extreme feasibility of this alternative is demonstrated by the Defendants' own report on the Courthouse News request for access on receipt. *Id*. at ¶¶ 13-14 & Exh. A-1 thereto. As the final exhibit to that report, labeled Exhibit F therein, Defendant Pepin includes an email message from New Mexico's Tyler representative Colleen Reilly, stating: "We did build a configuration in Clark County, Nevada to see filings before they are accepted by the court. Since that time, there 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. The Court would tell us the location and case types that would be made available and we do the configuration." *Id*. at Exh. A-1, Exhibit F thereto.

38. The simplicity of this solution demonstrates the willfulness of Defendant's refusal to provide contemporaneous access to new complaints. Defendants have additional alternatives for providing access, including the automatic assignment of a case number to new complaints and attendant automatic placement in the public docket, in a manner similar to other state courts and many federal courts. In all, at least ten e-file systems, including the PACER system, provide the press or press and public with access on receipt. *See id*. at ¶¶ 21-22.

39. Those e-file systems are developed in-house or leased from vendors. *Id.* at ¶ 19. The in-house systems include statewide e-file systems in Hawaii, New York and Connecticut, as well as individual, home-grown e-file programs in California (Orange County and San Francisco) and Washington (Seattle and Tacoma). *Id*. ¶¶ 19-20. Other courts use vendors to provide First Amendment access on receipt, in Utah (Tybera), Alabama (OLIS), Los Angeles Superior (Journal Technologies), and shortly Arizona (Granicus). *Id*. With all those e-file systems, new public complaints flow automatically into view when received. *Id*. Likewise, new complaints filed in this Court are made available to the press and public when they are received, including after hours and on weekends, while administrative tasks are handled afterwards. *Id*. Although these courts use different e-filing systems, they share a common characteristic: they provide access to new civil complaints upon receipt, before administrative processing. *Id*. They demonstrate the availability of less restrictive alternatives.

3. Defenses Regularly Advanced Do Not Justify No-Access-Before-Process Policy

40. State clerks typically raise the same arguments to defend their policies and practices denying timely access to new complaints, each of which is addressed below.

(a) Abstention

41. Abstention is the hoped-for silver bullet often shot by clerks and administrators at the outset of litigation challenging no-access-before-process policies. In the early cases over those withholding policies, abstention was considered and rejected. Judge Ramos in the *Tingling* case said at the outset of his bench ruling: "Let me first talk about abstention. I did consider this issue very seriously, and I find that abstention not required." *Courthouse News Service v. Tingling*, Case No. 17 C 7933, 2016 WL 8739010, at p. 18 (S.D.N.Y. Dec. 16, 2016) (preliminary injunction hearing transcript). His ruling looked to the Ninth Circuit's *Planet I* ruling in 2014 that reversed a lower court order of abstention: "We reverse the judgment below and remand so that the First Amendment issues presented by this case may be adjudicated on the merits in federal court, where they belong." *Planet I*, 750 F.3d 776, 790-92; *see also Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 319-20 (1st Cir. 1992) ("Abstention, under any of its multiple doctrines, was inappropriate in this case" involving access to a preliminary hearing); *Hartford Courant v. Pellegrino*, 380 F.3d 83 (2nd Cir. 2004) ("Review of various abstention doctrines does not, however, lead us to believe that any are particularly applicable in this case," where newspapers sued the Connecticut's chief court administrator over access to docket sheets that were sealed).

42. Based on this precedent, Judge Ramos concluded: "As in Planet, this Court finds that the remedy sought by CNS poses little risk of an ongoing federal audit or a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state proceedings." *Tingling*, 2016 WL 8739010, at p. 18. Within six weeks, New York court administrators had set up an online queue that gave on-receipt to new e-filed complaints which remains in place today. Exh. 1, Girdner Decl. at ¶ 34.

43. Two years later, in 2018, U.S. District Court Judge Matthew Kennelly in the Northern District of Illinois enjoined Cook County Circuit Court Clerk Dorothy Brown, who in

the transition to e-filing had also abrogated decades of tradition in that court and imposed a no-access-before-process policy. *Courthouse News Serv. v. Brown,* Case No. 17 C 7933, 2018 WL 318485, at *2 (N.D. Ill. Jan. 8, 2018) ("(T)here are simply no ongoing state judicial proceedings with which CNS's requested injunctive relief might interfere."). The injunction by Judge Kennelly was overturned by the Seventh Circuit in *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018) ("*Brown*") based on an ad-hoc balancing of interests in equity, comity, and federalism.

44. The portion of the *Brown* opinion finding that the First Amendment right of access applies to the Chicago clerk's policy was cited with approval by the Ninth Circuit in *Planet III*. In a footnote, however, the panel rejected *Brown*'s abstention holding:

45. We disagree, however, with the Seventh Circuit's decision to abstain from resolving the dispute about when the right attaches and when delays are so long as to be tantamount to a denial of the right. *See Brown*, 908 F.3d at 1070–75; *see also Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974). In *Planet I*, we concluded that the injunctive relief CNS then sought neither presented a risk of an 'ongoing federal audit' of a state's judicial system nor amounted to 'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state . . . proceedings.' 750 F.3d at 790–92 (quoting *O'Shea*, 414 U.S. at 500, 502). We pointed out that Ventura County would have 'available a variety of simple measures' that it could take to comply with an injunction requiring it to provide CNS timely access to newly filed complaints. *See Planet III*, 947 F.3d at 591 n.4.

46. Likewise, Judge Henry Coke Morgan, Jr. rejected the defending clerks' *Brown*-based motion to abstain in *Schaefer*: "Principles of federalism, efficiency, and comity weigh in favor of issuing a declaratory judgment. State officials … are not at liberty to deny rights guaranteed by the federal Constitution. When state officials do so, deny that it occurred, and deny

that the federal Constitution even protects a right, a federal court may, under appropriate circumstances present here, declare the rights of the parties." *Courthouse News Service v. Schaefer*, 429 F. Supp.3d 196, 207 (E.D. Va. 2020). The Fourth Circuit recently affirmed. *Schaefer*, No. 20-1290, 2021 WL 2583389 (4th Cir. June 24, 2021).

47. Defendants here have an extremely simple alternative for providing access on receipt that has been implemented by state courts using at least ten different e-file systems, which is to provide access to the new public complaints as they are received, in an electronic equivalent to traditional access at the counter. Exh. 1, Girdner Decl. at ¶¶ 27-30. As a result, the relief sought does not require entanglement in New Mexico's internal affairs or require an ongoing federal audit.

48. This Court should exercise its jurisdiction.

(b) Confidentiality

49. The second defense used by clerks to defend no-access-before-process policies is "confidentiality," a broad rubric that refers generally to potential private information included in filings by the filer and a concern over confidential or sealed documents. In New Mexico, as in every state in the nation with the exception of Vermont, the responsibility to redact e-filings is placed solely and entirely on the filer. *See* N.M. Dist. Ct. R. Civ. Proc. 1-079(D) ("The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.").

50. On the question of confidential filings, the e-filing interface used by filers in New Mexico requires that filers designate the type of case they are filing. Exh. 1, Girdner Decl. at ¶ 24. Experience shows that courts all around the nation, including this Court, are able to screen for non-public filings while making the public filings available at the time of receipt.

51. Thus, the argument that confidentiality concerns preclude on-receipt access is meritless and cannot explain or justify a no-access-before-process policy and practice.

(c) Confusion

52. A third argument made by clerks is that a filing might be rejected until clerical entries are corrected, and that access to such filings would cause "confusion." *Courthouse News Service v. Tingling*, Case No. 17 C 7933, 2016 WL 8739010, at p. 19 (S.D.N.Y. Dec. 16, 2016) (preliminary injunction hearing transcript) ("The clerk argues that the review process procedures are prescribed to prevent a narrow category of errant pleadings at the outset in order to prevent confusion and waste."); *Brown*, 2018 WL 318485, at *2, 6 (N.D. Ill. Jan. 8, 2018) (rejecting Brown's argument that access would lead to "mass confusion"). State courts that provide access on receipt, and the great majority of federal courts that provide the same access also fix clerical errors. Based on the many courts that provide access to new complaints upon receipt, access can be provided while some cases are clerically corrected.

53. Simply put, the rejection of some cases for clerical reasons is not a barrier to timely access.

B. The Other Factors Support a Preliminary Injunction

54. Having established a probability of success on the merits, it follows that Courthouse News will continue to suffer irreparable harm without injunctive relief. The U.S. Supreme Court has made clear that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373); *see also Utah Licensed Beverage*, 256 F.3d at 1076 (10th Cir. 2001) (noting presumption when infringement of First Amendment rights is alleged); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 at n. 2 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1380 (10th Cir. 1981); *see also Jackson*, 2009 WL 2163609,

at *8 ("A denial of First Amendment freedoms, even for a short period of time, constitutes irreparable injury.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

55. Here, as in *Tingling, Jackson,* and *Planet,* injunctive relief would serve the public interest because there is "an important First Amendment interest in providing timely access to new case-initiating documents." *Tingling, ,* 2016 WL 8739010, at p. 20; *accord Jackson*, 2009 WL 2163609, at *4-5; *see also Planet,* 2016 WL 4157210, at *13 ("[I]t would make little sense to restrict the media's ability to monitor until after court personnel have had an opportunity to delay providing access to the requested complaints."); *see also Planet I,* 750 F.3d at 786, ("It is thus well-established that the right of access to public records and proceedings is "necessary to the enjoyment" of the right to free speech") (citing *Globe Newspaper Co.*, 457 U.S. at 604. *See generally* Erwin Chemerinsky, Constitutional Law: Principles and Policies § 11.6.3 (4th ed. 2011) ("[W]ithout a right of access to government papers and places the people will be denied information that is crucial in monitoring government and holding it accountable. The press obviously plays a crucial role in this regard.").

V. CONCLUSION

56. The tradition that stood in place during paper filing days served a constitutional role in an open government, allowing journalists to observe the new controversies coming into the courts and report on them to their readers. That tradition should be kept in place in the electronic era when the speed of reporting has increased and the importance of the controversies entering American courts has surged. Technology should not be the pretext for taking the tradition of access away. Indeed, it should increase timely access and transparency. It should and can be used, as so many state and federal courts have shown, to continue the tradition of access under the First Amendment.

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Respectfully submitted,

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Pro Hac Vice Forthcoming

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

/s/ Patrick J. Rogers