

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

COURTHOUSE NEWS SERVICE, et al., ) CIVIL ACTION NO.  
Plaintiffs, ) 2:21-cv-132  
)  
vs. )  
)  
PATRICIA GABEL, in her official )  
capacity as the State Court )  
Administrator of the Supreme Court )  
of the State of Vermont, et al., )  
Defendants. )

MOTION FOR PRELIMINARY INJUNCTION  
AND TRIAL ON THE MERITS  
Monday, October 25, 2021  
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA C. REISS,  
District Judge

APPEARANCES:

WILLIAM J. HIBSHER, ESQ., and JONATHAN E. GINSBERG, ESQ., Bryan  
Cave Leighton Paisner LLP, 1290 Avenue of the Americas,  
New York, NY 10104-3300, Counsel for the Plaintiffs

ROBERT B. HEMLEY, ESQ., Gravel and Shea, P.C., 76 St. Paul  
Street, P. O. Box 369, Burlington, VT 05402-0369, Counsel  
for the Plaintiffs

DAVID A. BOYD, ESQ., and ELEANOR L.P. SPOTTSWOOD, ESQ., Vermont  
Attorney General's Office, 109 State Street, Montpelier,  
VT 05609-1001, Counsel for the Defendants

Johanna Massé, RMR, CRR  
Official Court Reporter  
P. O. Box 5852  
Burlington, VT 05402  
802-951-8102 | 802transcripts@gmail.com

1 it's going to grant or deny an injunction, and every time I  
2 kind of stumbled on a fact that I thought was stipulated, by  
3 the time I got to the reply, it wasn't, and some of the facts  
4 are in flux.  
5 So I have a pragmatic concern in what are the facts and  
6 how are we going to get to them without an evidentiary hearing?  
7 That doesn't mean that I haven't done many injunctions without  
8 an evidentiary hearing, so it's a pragmatic concern but not  
9 insurmountable without live witnesses.  
10 This case has been pending since May 20th of 2021, and  
11 that cuts both ways. It cuts against irreparable harm in that  
12 rather than schedule it immediately, the parties wanted to do  
13 some discovery; they had a briefing schedule. I went along  
14 with that. On the other hand, it also provided time to fix the  
15 problem. So the defendants were alerted this is the problem,  
16 this is what we're seeing, and not a significant amount of  
17 progress, at least from the plaintiffs' perspective, since that  
18 shot across the bow, which is a big one in that it's a motion  
19 for preliminary injunction, and where we are today.  
20 I think it turned the inquiry completely on its head to  
21 say, "Well, plaintiffs can't point out any, you know, articles  
22 that they had to delay the publication of because they didn't  
23 get the complaint in time, and so they haven't proven that  
24 somehow this is impeding their access to filings." I don't see  
25 that any court has inquired, "When do you typically publish

1 Monday, October 25, 2021  
2 (The following was held in open court at 2:00 PM.)  
3 COURTROOM DEPUTY: Your Honor, the matter before the  
4 Court is civil case number 21-CV-132, Courthouse News Service,  
5 et al. vs. Patricia Gabel, et al. Present for the plaintiff  
6 are William Hibsher, Jonathan Ginsberg, and Robert Hemley;  
7 present for the defendant are David Boyd and Eleanor  
8 Spottswood; and we are here for a motion for preliminary  
9 injunction and trial on the merits.  
10 THE COURT: Good afternoon. With our COVID protocols,  
11 when you come up to the podium, you don't need to have your  
12 mask.  
13 Let me first ask if we are going to have any live  
14 witnesses testifying.  
15 MR. HIBSHER: We are not, your Honor.  
16 MR. BOYD: No, we are not.  
17 THE COURT: Okay. So I'm going to tell you some of  
18 the things that I am thinking about based on what you've filed.  
19 And they are not rulings. I call them musings. These are  
20 things that are bothering me. You should feel free to correct  
21 me, redirect me, and don't throw out your entire argument just  
22 because something's bothering me that's not bothering you.  
23 One of the things that I am concerned about, and that's  
24 why I said was it my position that we didn't have live  
25 witnesses, is the Court does need to have factual findings if

1 your first article and how does that impact it?" and it seems  
2 to me a very backward way of looking at it. So I had a hard  
3 time seeing why the plaintiffs would have to show that by  
4 getting allegedly late access to a civil filing it delayed  
5 their coverage. It kind of is an automatic: If I get  
6 something on day one as opposed to day three, I can produce an  
7 article faster. I mean, it doesn't seem to me like an easily  
8 contested principle.  
9 I think there is agreement that under Second Circuit  
10 precedent, *Bernstein* case, that we don't really have a dispute  
11 about the public right of access, and what we're talking about  
12 is how soon does that access have to be, what does it look  
13 like, and what can hold it up. And the defendants kind of have  
14 not just split the baby but created a conjoined twin in that  
15 they say, "Well, we want preprocessing access and we also want  
16 it to be not instantaneous but contemporaneous," and I would  
17 produce a single baby and say, "All you're entitled to is  
18 contemporaneous. How the defendants get there is none of your  
19 business. As long as you're getting contemporaneous, who cares  
20 whether they're processing it or not?" And maybe the  
21 plaintiffs agree with that and maybe they don't.  
22 I would love to hear a better breakdown of where the time  
23 is spent. So I looked at the declarations, and it --  
24 particularly on the defendants' side, it seemed to be kind of  
25 an amorphous description of where the time is taking place. So

1 it's -- the defendants say, "Well, it's not just reviewing for  
2 Social Security matters; it's" -- or Social Security numbers, I  
3 should say; "it's X, Y, and Z." And then, even though I would  
4 like that, I assume it varies considerably. So maybe the  
5 reason why the defendants did not provide a typical "this is  
6 where the time is" is because it depends on what happens on a  
7 particular day.

8 I don't think this is a *Younger* case. I'm not going to be  
9 telling the Vermont superior courts that they have to hire five  
10 more people and I want the benefit package to look like this  
11 and I want you to take somebody off of RFA duty and I want you  
12 to put them in the clerk's office. I haven't seen many cases  
13 in federal court who are looking at *Younger* abstention when  
14 it's just a public right of access. So I don't know how much  
15 traction the Court should give any kind of declaration that  
16 "We're having a hard time hiring people and we have other  
17 important activities to do." I don't really see courts  
18 balancing the financial responsibilities of a superior court.

19 I also agree with plaintiffs that -- the plaintiffs  
20 characterize it as a popularity contest. It's not the Court  
21 compares how the Vermont superior courts fare among like-sized  
22 courts in the country and say, "You seem to be doing okay or  
23 not okay." That doesn't seem to be really what the Court is  
24 examining. So I'm kind of wondering about how much weight the  
25 Court should put on those facts.

1 My understanding is that this electronic filing system has  
2 been operational in the Vermont Superior Court for over a year.  
3 So if I'm wrong about that, let me know, but this is not  
4 something -- we're not in the early days of the rollout.

5 So those are some of the things that I am thinking about.  
6 I'm going to hear everything that you have to say. We've got a  
7 pending motion to dismiss in addition to the motion for  
8 preliminary injunction. You can kind of handle it the way that  
9 you want to. I was going to start with the plaintiffs and then  
10 hear from the defendants, but if you have come up with your own  
11 way of arguing it that works for you, that's fine with me as  
12 well.

13 Any thoughts on who goes first?

14 MR. HIBSHER: Your Honor, my name is William Hibsher  
15 with the Bryan Cave Leighton Paisner firm. My colleague Jon  
16 Ginsberg and Robert Hemley of Gravel & Shea. We are the  
17 plaintiffs. This is the trial on the merits. We initially  
18 moved for a preliminary injunction motion, and I think it makes  
19 sense for us to have the first word.

20 THE COURT: All right. And maybe we don't have any  
21 objection about that.

22 MR. BOYD: No objection.

23 THE COURT: Go ahead. And if you want to be at the  
24 podium, you can take off your mask. However you want to  
25 proceed.

1 MR. HIBSHER: Thank you.

2 Your Honor, I was going to spend some time discussing why  
3 we think this court does have jurisdiction to hear this case,  
4 but given your Honor's comments about *Younger* abstention and  
5 this not being a fit with that or, I assume, the *O'Shea*  
6 abstention doctrine, I'm happy to move on and save those  
7 remarks for rebuttal.

8 THE COURT: However you want to do it. As I said,  
9 those aren't rulings. Those are just my observations. But  
10 however you want to do it.

11 MR. HIBSHER: Let me be brief on why we think this  
12 court has jurisdiction. The Supreme Court has never endorsed  
13 abstention based on the kind of free-form comity and federalism  
14 adopted by the Seventh Circuit's *Brown* decision, and nor has  
15 the Second Circuit.

16 The Second Circuit's *Hartford Courant* case, which  
17 challenged Connecticut's practice of withholding access to  
18 docket sheets, concluded that the relief sought did not  
19 properly intrude upon state matters and that none of the  
20 Supreme Court's abstention doctrines were implicated, and it  
21 affirmed the district court's denial of abstention. The court  
22 emphasized that the weight of the First Amendment issues  
23 presented by the case militates against abstention.

24 And one case defendants rely on is the Second Circuit's  
25 *Disability Rights* case, and they argue that *O'Shea* abstention

1 should be applied here too. But the Second Circuit affirmed  
2 abstention in *Disability Rights* because the relief sought would  
3 have forced the district court to inject itself into New York's  
4 guardianship proceedings, dictating procedures and burdens of  
5 proof on a case-by-case basis. That would have been an  
6 impermissible federal judicial audit of matters entrusted to a  
7 state, and the Court's reference to the *Brown* decision was part  
8 of a string cite of four other circuit court cases which had  
9 also applied *O'Shea*. Hardly a full-throated endorsement of the  
10 *Brown* reasoning.

11 THE COURT: So let me stop you there and ask you about  
12 my split baby, because if you are asking me for an injunction  
13 that says the state court can't review these complaints, they  
14 just -- this preaccess review is impermissible, that looks to  
15 me like more of an intrusion than saying, no, they need to be  
16 contemporaneous and this is what "contemporaneous" means  
17 according to the jurisprudence. But when I'm telling them you  
18 can't review these before you give them to the public or the  
19 media, that looks a little bit more like interfering with  
20 processes.

21 MR. HIBSHER: So, your Honor, there are five other  
22 district courts that have issued very simple orders in  
23 *Courthouse News* cases, one as far back as 2009. And in all of  
24 those instances the clerks have complied fully and there has  
25 not been any need for further judicial intervention, and the

1 orders of the court were pretty simple. It was: You may not  
2 do preprocessing accessing in a number of cases, particularly  
3 in e-filing courts that we think is the best example. So this  
4 is not an *O'Shea* situation where we're seeking an order that  
5 would require the intrusion of this court's power into ongoing  
6 criminal proceedings going forward, dictating all sorts of  
7 things. This case really asks for a simple directive and then  
8 to allow the clerks to fulfill that directive without  
9 micromanaging the clerks in any way.

10 And I would point out that two circuit courts have  
11 rejected the Seventh Circuit's *Brown* reasoning and have stated  
12 that the relief that Courthouse News was seeking in those cases  
13 did not pose a risk of an ongoing audit. One was *Planet* in the  
14 Ninth Circuit, and the other was *Schaefer* in the Fourth  
15 Circuit. These cases, *Schaefer* and *Planet*, are consistent with  
16 *Hartford Courant* that federal courts have an obligation to  
17 exercise jurisdiction once given, and we believe that's  
18 particularly true in a Section 1983 case which asserts a  
19 violation of the First Amendment.

20 So in regard to the merits, your Honor --

21 THE COURT: Well, one of the things that was filed is  
22 your supplemental filing with the --

23 MR. HIBSHER: Your Honor, I'm sorry. I'm having a  
24 little trouble hearing you.

25 THE COURT: Sure. That's probably a blessing, but I

1 have a low, mumbly voice.

2 MR. HIBSHER: I don't think it's a blessing at all.  
3 I'd very much like to hear what you're saying.

4 THE COURT: All right. I'm looking at the document  
5 number 32, which is the *New Mexico* decision that you filed,  
6 and -- as supplemental authority, and in that case the Court  
7 found that the plaintiffs were "not entitled to a preliminary  
8 injunction which gives them pre-processing, on-receipt, or  
9 immediate access to newly filed non-confidential civil  
10 complaints" and said instead "I'm going to give you five hours  
11 to do whatever you need to do, and you should get it." So it  
12 isn't kind of uniform that the courts are going with  
13 preprocessing access. It seems to me that the jurisprudence is  
14 coalescing around how much time.

15 MR. HIBSHER: I think the jurisprudence is coalescing  
16 in different directions, but we believe that the Supreme Court  
17 in *Press-Enterprise II* has set forth what the tests are, and  
18 step one of the *Press-Enterprise* test is for the Court to  
19 determine whether experience and logic has created a First  
20 Amendment entitlement regarding a particular document or  
21 process, and your Honor already observed that *Bernstein* has  
22 already concluded that First -- that the First Amendment  
23 applies to complaints.

24 So the second part of that test is a factual inquiry:  
25 Have the defendants met their burden of justifying the delay?

1 We do not think that it's the Court's inquiry to determine  
2 whether it's four or five hours but, rather, to determine  
3 whether the defendant has met its burden of justifying a  
4 four-hour delay or a five-hour delay or a one-hour delay, and  
5 there were no findings of that kind in the *New Mexico* decision.  
6 Clearly an injunction was issued in Courthouse News's behalf,  
7 and I think the judge said, "Well, they've been producing these  
8 complaints within eight business hours. I'm going to direct  
9 them to do it within five business hours."

10 Five business hours means that everything filed from about  
11 11:00 in the morning until the end of the court day will be  
12 held over until the next day. That is not contemporaneous  
13 access, and so we think that the issue is not so much for the  
14 Court to divine what the number of hours' delay that is  
15 acceptable but, rather, for the Court to ask the defendant:  
16 How do you justify any delay now that a presumption of access  
17 has arisen, because I have determined that complaints are  
18 entitled to a First Amendment right?

19 So we are not seeking instantaneous access as a  
20 constitutional right. We want the defendant to justify delay  
21 of any length. But to be sure --

22 THE COURT: So let's talk about the reality of that in  
23 that a lot of things get filed at 5 o'clock, five of 5:00.  
24 That's our busiest part of the day. And they are going to be  
25 held over. I mean, that's just a reality.

1 MR. HIBSHER: Well, that may be the reality in a court  
2 which does preaccess processing. So if we're in a paper court,  
3 you know, *Schaefer*-- *Courthouse News vs. Schaefer* was an  
4 all-paper court. The Court ruled that contemporaneous access  
5 in that all-paper court meant that at least 85 to 90 percent of  
6 cases must be available that day. The Court was mindful that  
7 filings in the last ten minutes of the day might be held over,  
8 but the Court was also mindful that in a paper court, the  
9 intake process that the clerk had to do at the filing window --  
10 you hand a complaint, the clerk has to stamp it, has to compute  
11 a receipt, it takes a minute or two, but that takes time, and  
12 so the Court did not order preaccess -- preprocessing access in  
13 that case and defined in that case "contemporaneous" to mean 85  
14 to 90 percent.

15 The Southern District of New York in the *Tingling* case  
16 against the New York County clerk where the evidence showed  
17 that the clerk was providing access to 66 percent of the cases  
18 before the case began, that too was an all e-filing court, and  
19 the district judge ruled that any preaccess processing was not  
20 permitted. Why? Because the clerk did not justify the reasons  
21 for the delay even to one third of the cases. The clerk  
22 generally said that issues of confidentiality prompted the need  
23 for review but put on absolutely no proof at all.

24 And the same is true in the *Brown* decision in the district  
25 court. Obviously that was reversed on abstention grounds by

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1 the Seventh Circuit, but the district judge in Cook County  
2 ruled that delays of any length needed to be justified by the  
3 defendant.

4 The *Planet* decision in the Ninth Circuit, as your Honor  
5 may know, there were three appellate decisions in that case,  
6 and in the last decision, the Ninth Circuit concluded that  
7 other than scanning of a paper complaint as it comes into the  
8 court, no further process would be allowed in that paper court.

9 Now, there is an oft-quoted line from that *Planet*  
10 decision - we call it *Planet III*, the most recent *Planet*  
11 decision - which suggests that filings at the end of the court  
12 day, in the last 90 minutes of the court day, would be  
13 acceptable, that delays in access to those filings in the last  
14 90 minutes would be acceptable. That's what the out-of-context  
15 quote typically says. But what the full quote said, even in  
16 *Planet*, even in a paper filing court, is that the clerks have  
17 "demonstrated that the overnight delay in access to complaints  
18 filed during the last ninety minutes of the court's public  
19 hours would be no greater than essential to manage necessary  
20 court operations under the circumstances existing at the time."

21 And what were those circumstances? This occurred several  
22 years before the summary judgment hearing that prompted the  
23 final decision in *Planet*, but there had been an injunction  
24 issued by the district court precluding that delay in the last  
25 90 minutes, and the Ninth Circuit said the circumstances were

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1 that Ventura County was having a severe budget crunch; they  
2 were short \$12 million; they had to lay off people in their  
3 records room. The record room opening times went from 5:00 to  
4 4:00 to 3:00 PM. All the while, people were allowed to file  
5 new complaints in another part of the courthouse until 4:30.  
6 So that's the 90-minute period concerning which the Ninth  
7 Circuit said because of the circumstances of that delay and the  
8 fact that the clerks have demonstrated those reasons, we're  
9 going to reverse that part of the injunction below. *Planet* was  
10 not a *per se* rule about delay at the end of the day.

11 THE COURT: Well, let me ask you if the Court should  
12 use that to credit the defendants' argument about difficulty  
13 hiring, budgetary constraints; and if the Court should, where  
14 am I going to get those facts from? Do I just accept one of  
15 the declarations? Or do you disagree that's something the  
16 Court should be considering?

17 MR. HIBSHER: We believe that difficulty in hiring  
18 illustrates why preaccess processing is untenable if we're  
19 going to achieve consistent contemporaneous access. The  
20 defendants take the position that they have to review every  
21 page of every complaint and every exhibit associated with it to  
22 determine whether there is any confidential information in  
23 those filings. But in discovery we asked defendants, "Okay.  
24 Tell us how many confidential filings you were able to identify  
25 in the last 14 months," and they came back and said there were

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1 three documents related to two complaints. It wasn't even two  
2 complaints. Three documents related to two complaints out of a  
3 total of 4,000 complaints. That's less than 1/20th of 1  
4 percent.

5 So if we look at that justification, they have clearly not  
6 met their burden. They say in their papers, understandably,  
7 that the pandemic has caused enormous problems in efficiency  
8 and in administering the court. But in Connecticut and  
9 New York, two states, both electronic filing, which provide  
10 preprocessing access to all of the filings, access during the  
11 pandemic was contemporaneous. It was almost immediate. And --

12 THE COURT: So let me take you back to my question --

13 MR. HIBSHER: Sorry.

14 THE COURT: -- which you neatly elided, is whether or  
15 not I should be finding facts about this is why the delay is  
16 occurring, they're having trouble hiring, they have trouble  
17 with employee retention, and we got on this topic because you  
18 were telling me about Ventura County and what was going on  
19 there and *Planet III* was directing its attention to those facts  
20 in the broader scope of the quote that you mentioned is oft  
21 used.

22 MR. HIBSHER: So let me respond to that. Your Honor,  
23 you began your remarks by really addressing this concern about  
24 findings of fact. We are here on largely undisputed material  
25 facts, and the facts that are key to our case are, one, that

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1 the defendants concede that their preprocessing of newly filed  
2 complaints to determine whether there are personal identifiers  
3 in those complaints is what causes the delay. Now, they're  
4 doing a couple of other things in the course of preprocessing,  
5 but they concede that that's what causes the delay, and they  
6 don't --

7 THE COURT: So I just read their reply, and I don't  
8 think they concede that. Your reply says there's lots of facts  
9 that are uncontested, and their reply said, "We did not concede  
10 that point because there's other things going on with that  
11 process that is not reviewing for confidentiality."

12 MR. HIBSHER: That's correct, your Honor. And the  
13 other things that are going on is they're looking for a  
14 signature; they're looking for proper filing in courts; they're  
15 looking for all the things that the filing party in an  
16 electronic court has entered into the system. There are many  
17 drop-down boxes, and you have to include all of that  
18 information.

19 What's taking them time and the reason why there is the  
20 kind of delays that we've seen here is because they're also  
21 reviewing every page of every complaint for confidential  
22 information. Vermont is the only state in the entire country  
23 that has its clerks reviewing the complaint for confidential  
24 information. And they point to the rules and they say, "Well,  
25 we can't accept a new filing until we've done this."

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1 Well, there's nothing in the public access rules that  
 2 speak about accepting a new filing. We believe that the review  
 3 that the clerks are presently doing can happen after the  
 4 complaints become public. That is the way it is in virtually  
 5 every federal court in this country and in a growing number of  
 6 state courts. And the rules provide that if in this postaccess  
 7 review they find that there is, you know, a personal  
 8 identifier, let us say, even though the data shows that only  
 9 1/20th of 1 percent slip through with personal identifiers, the  
 10 rules provide that they can temporarily restrict access to that  
 11 document. They could redact the document. There are lots of  
 12 things they can do afterwards. And --

13 THE COURT: So let me stop you, and I'm sorry I am  
 14 interrupting. I'm a master interrupter. I have pulled and set  
 15 aside the court rules and the statute that the State of Vermont  
 16 is relying on. So I have Rule 6, Rule 7, and 9 VSA Section  
 17 2480m. And if I'm hearing you right, you are saying that not  
 18 one of those documents or statutes or rules provides that you  
 19 can withhold the filing of the complaint for this review.

20 MR. HIBSHER: I'm not saying that exactly, your Honor.

21 THE COURT: Okay.

22 MR. HIBSHER: What I'm saying is the rules do not  
 23 expressly require that the clerks do a preaccess process before  
 24 they accept the document. This is the clerk's interpretation  
 25 of the rules, and we don't think that the rules really say

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1 that.

2 THE COURT: Well, let me take you up on it and say I  
 3 don't think that the rules say that this occurs before it's  
 4 accessible. I guess it's -- I don't see that they say that you  
 5 can affirmatively withhold the document until the processing  
 6 has occurred. And maybe I haven't studied it for that, but I  
 7 think the closest that it gets to it is Rule 7(a)(1).

8 MR. HIBSHER: 7(a)(3) and 4.

9 THE COURT: Yes. And I just don't see it as  
 10 affirmatively saying you can do that. Let's see. So I guess  
 11 I'm more concerned that the whole process of "we can withhold  
 12 it until we complete this process and it shall not be deemed  
 13 filed until the process is complete," that's the kind of  
 14 language I would be looking for, and I don't see that anywhere.

15 MR. HIBSHER: And we would submit that if that  
 16 language is there and crystal clear, that would be  
 17 challengeable language. We had a case before your Honor five  
 18 years ago in which the Vermont rules said you can't provide  
 19 access to a complaint until all the defendants are served. We  
 20 challenged that rule, and the Supreme Court rescinded that rule  
 21 because they understood that would not survive a constitutional  
 22 challenge.

23 There is no state in the union besides Vermont that has  
 24 any suggestions that clerks have to review filings at any time.  
 25 The only other state that had such a rule was Florida, and they

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1 repealed it in July, and the reason they repealed it was  
 2 because of the incredible delays that that rule was causing to  
 3 access to what are otherwise public documents.

4 So I don't see that spelled out in the rule, and if it  
 5 was, I would say that the importance of the First Amendment  
 6 outweighs that kind of processing rule. The First Amendment  
 7 says you must justify any delay once the presumption attaches.

8 Well, we've asked them in discovery, as I said, and 1/20th  
 9 of 1 percent of the filings -- complaint filing contained a  
 10 personal identifier. That can't be the kind of justification  
 11 that overcomes the First Amendment right of access. It is  
 12 certainly not the kind of justification that prompted the Ninth  
 13 Circuit to say during the last 90 minutes during an extreme  
 14 budget crunch in a paper court we're not going to affirm the  
 15 district court's injunction in that regard and then went on to  
 16 issue an injunction saying in a paper court, other than  
 17 scanning, no further processing will be permitted.

18 Now, in their reply papers, defendants say, "Well, there  
 19 are 66 other documents relating to other filings that contained  
 20 personal identifiers." They don't tell us how many other  
 21 filings there were, but in discovery they informed us that  
 22 13,400 filings in total. So 66 out of 13,000 is also a tiny  
 23 number, but those are subsequent filings. Those aren't  
 24 lawsuit-initiating documents like a complaint, which are  
 25 entitled to First Amendment protection. We're not taking the

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1 position that subsequent filings are entitled to a First  
 2 Amendment protection. And so the number of filings that they  
 3 find in that search and subsequent filings we believe is not  
 4 germane to the issue before this court.

5 Again, the *Press-Enterprise* test is clear. Once a First  
 6 Amendment right of access is determined, the defendant must  
 7 justify any delay. Whether it's one hour, four hours, eight  
 8 hours, whatever it is, they have to justify, no matter how  
 9 short it is. And the issue for the Court is not to sort of  
 10 say, as the *New Mexico* judge said, "Well, five business hours  
 11 seems like a good number to me." That's not the way the press  
 12 operates. That's not the way the First Amendment operates.  
 13 The rules are clear, and the Second Circuit --

14 THE COURT: Well, I've got to stand up for my fellow  
 15 judge. That may have been an attempt to define what does  
 16 "contemporaneous" mean. So there isn't necessarily a uniform  
 17 definition of "contemporaneous," and that might have been,  
 18 "Look, if you're within a five-hour window, I'm going to  
 19 consider that contemporaneous."

20 MR. HIBSHER: I think that's right. I mean, Judge  
 21 Morgan in the *Schaefer* case began his discussion of what is  
 22 "contemporaneous" by reciting the Black's Law Dictionary  
 23 definition, and "contemporaneous" means "at the same time."  
 24 That's what "contemporaneous access" means. And Judge Morgan  
 25 said, "Well, the clerks are justified in some minor delay,

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1 maybe 10 percent, at most 15 percent, because they have to do  
2 intake in this paper court." But in an electronic filing  
3 court, the filing party does all of that work for the Court.  
4 The filing party inputs all of the data in neat little boxes,  
5 lots of drop-downs, court locations, *et cetera*. The filing  
6 party electronically files the complaint, so the clerks don't  
7 even have to do a scan of the complaint. It's already in the  
8 system.

9 All that initial intake is done by the software that  
10 defendants have in place. And so our position is not that we  
11 are entitled in the abstract to an instantaneous right of  
12 access. We don't believe that. But in an e-filing court, we  
13 believe that access should be pretty close to immediate unless  
14 the defendant can come forward and meet its *Press-Enterprise II*  
15 burden of justifying the delay.

16 And so the facts that are not in dispute are the delays.  
17 It may be that it's not just reviewing for privacy concerns  
18 that's causing the delay. There are a couple of minor  
19 ministerial steps, but the clerks have said that there's a  
20 second round of review that happens after a case is made  
21 public.

22 We believe that the entire review process should happen  
23 after the First Amendment attaches and the case is made public,  
24 and in the rare instance that there's a mistake or there's a  
25 personal identifier, they can temporarily restrict access and

22

1 do any number of other things to address the concern.

2 And Courthouse News has said that, consistent with other  
3 journalists, it does not publish personal identifiers. In some  
4 courts where Courthouse News has been given a press queue, an  
5 access to press filings remotely, Courthouse News has been  
6 asked to sign an agreement that it will use best efforts not to  
7 publish personal identifiers.

8 But the most important fact here is that defendants have  
9 only found three documents relating to two complaints out of  
10 more than 4,000. This is not meeting the defendants' burden  
11 under the *Press-Enterprise II* case.

12 So, you know, in regard to delays and what is allowable,  
13 the Second Circuit in *Lugosch* said that the denial of a First  
14 Amendment right, even for minimal periods, causes irreparable  
15 harm. And the Ninth Circuit in its 2020 decision said that old  
16 news does not receive much attention, that the need for  
17 immediacy in news reporting is more vital in the digital age  
18 where timeliness is measured in seconds. And even in 1918, the  
19 United States Supreme Court stated that "The peculiar value of  
20 news is in the spreading of it while it is fresh."

21 It's not a question of a day or two later. The news cycle  
22 goes much faster these days, and if defendants can't justify a  
23 delay of one hour or four hours or whatever the length of that  
24 delay is, that is irreparable harm to the First Amendment.

25 And Courthouse News is joined in this case by the Vermont

23

1 Press Association, the New England First Amendment Coalition  
2 because the issues before your Honor are important to the press  
3 and they are important to the First Amendment.

4 With the Court's permission, I'd like to reserve a few  
5 minutes for rebuttal, and I am happy to answer additional  
6 questions that your Honor has now.

7 THE COURT: So going back to something that I asked  
8 you about and you had a good answer that if in fact the rule  
9 said a complaint shall not be filed until the following review  
10 has taken place, you would be challenging that. My point,  
11 which is kind of making your case, is I just don't see anything  
12 in these rules that even authorizes that delay.

13 MR. HIBSHER: We agree, your Honor. We don't think  
14 the rule requires the plaintiff [*sic*] to do this preaccess  
15 review. There's nothing in the rules that said that the clerks  
16 are entitled to accept new complaints and can perform whatever  
17 review they deem necessary until they accept new complaints,  
18 but the rules, the 7(a)(3) that we spoke about a couple of  
19 minutes ago, clearly give the clerks some weapons to use in the  
20 event that a complaint comes through with a mistake. Maybe  
21 it's a personal identifier. Maybe the lawyer didn't sign the  
22 complaint. So what do you do? You call the lawyer and say,  
23 "Come in and sign it," "there's a personal identifier." The  
24 rule expressly says redact it or temporarily restrict access.

25 But the numerosity of that solution happening is so tiny

24

1 based on the facts of this case, and that's why we don't think  
2 there are material facts in dispute. They're so tiny that  
3 there's just no justification for doing a preaccess review.

4 THE COURT: So looking at, and obviously these are  
5 more questions for the defendant, Rule 7 and looking at  
6 subsection 3, it says, "If a court staff person or judicial  
7 officer discovers that a case record that is publicly  
8 accessible," so it has to already have hit the system, "may be  
9 in that status in violation of these rules, the staff or  
10 officer must act to temporarily restrict public access to the  
11 record and notify the Court Administrator." And that means  
12 that the document is already out in the public.

13 I'm just not seeing anything that authorizes the delay.  
14 So I know you agree --

15 MR. HIBSHER: We're not seeing it, either, your Honor.

16 THE COURT: Okay.

17 MR. HIBSHER: And we think that to the extent there's  
18 ambiguity, part of the rule that your Honor just read makes  
19 clear that this intervention can happen after a document  
20 becomes public. So the damage to the First Amendment of  
21 reviewing every page of every complaint and every exhibit so  
22 that cases are held over to the next day, the current data  
23 doesn't tell us how long the delay is in one and two days'  
24 worth, but our tracking makes clear that even today, 25 percent  
25 of the cases are not made available until the next day or two

25

1 days later. That is not contemporaneous by any definition.

2 THE COURT: What about their argument of you've got  
3 the burden of proof and you have to show irreparable harm if  
4 you want injunctive relief and you can't identify a single  
5 article that you would have published if you had gotten it  
6 sooner?

7 MR. HIBSHER: Your Honor, I think -- I think you spoke  
8 to that at the beginning of this case. We don't think that  
9 it's our burden to come in and point to a major story that we  
10 were not able to cover on the day of filing because they didn't  
11 process it soon enough. This is a First Amendment case.  
12 Irreparable harm is assumed. *Lugosch* said even minimal delays  
13 in access in a First Amendment context constitutes irreparable  
14 harm. We think the irreparable harm is here as a matter of  
15 law.

16 THE COURT: All right. Thank you. I'll definitely  
17 let you have time for rebuttal.

18 Let's hear from defendants.

19 MR. BOYD: So I thought I would start by addressing  
20 the Court's musings from the beginning and then move into a  
21 more structured outline, unless the Court has any questions as  
22 I go.

23 The first issue I think the Court raised was how long the  
24 motion has been pending and whether there has been -- whether  
25 that cuts against irreparable harm - I think it does - and

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1 whether there's been progress made from the plaintiffs'  
2 perspective. And I think there, there has been real progress  
3 made. The administrator is in the process of centralizing the  
4 review of civil filings. They've hired five permanent  
5 positions statewide to do that. And they're recruiting five  
6 more now.

7 And in terms of timing, the result of that has been a  
8 shift from the 54 percent that plaintiffs were alleging at the  
9 beginning of this case of complaints made available same day up  
10 to 67 percent since the second week of July. And that's  
11 through taking the specific concrete steps in the Gabel  
12 declaration which are designed to make the process as efficient  
13 as possible.

14 The Court had also asked on a related note what goes on in  
15 timing and why timing varies kind of from day to day. There  
16 are a couple of reasons there. One of them is there's pretty  
17 substantial filing volume fluctuations on any given day in  
18 civil filings as well as in other kinds of filings. You can  
19 see that in the Angione declaration, Exhibit 4. They count  
20 between zero and 94 complaints filed on any given day, and  
21 there's also significant fluctuations in other types of filings  
22 that the -- that staff are reviewing.

23 THE COURT: So let me ask you about that, because  
24 there would be no delay in an e-filing system. There could be  
25 1,000 complaints; there could be 100,000 complaints. There's

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1 no delay. The only delay that's going to show up in e-filing  
2 is when you insert a staff member into it to do something else.  
3 Right? Because they're loading it up with all of the document  
4 information that they need, and it's hitting the docket, and  
5 there isn't any step in between there by staff. Correct?

6 MR. BOYD: If -- yes. That's the PACER model. If  
7 it's just immediately e-filing, it goes on, later rejected or  
8 not, yes.

9 THE COURT: Okay. So that, by definition, means that  
10 the delay is in this review process. So you told me, "Hey,  
11 some days we get a lot of complaints; some days we don't," and  
12 I'm pushing back on you that it doesn't sound to me with an  
13 e-filing system that that accounts for any delay unless we  
14 factor in this review status.

15 MR. BOYD: Yes. Although there I would say that is  
16 where Courthouse News has not cited an appellate ruling finding  
17 that you cannot have initial intake-type work. I think they  
18 concede that was done in paper filing courts. You could see  
19 that in Mr. Girdner's testimony in *Schaefer*, and I think the  
20 plaintiffs really overstate the differences between what used  
21 to happen on intake in a paper court and what happens in  
22 Vermont in the electronic filing context.

23 In a paper court, a filer would be waiting in line some of  
24 the time. Filings would be sitting in a box of mail.  
25 Courthouse News couldn't come behind the counter, open the

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1 court's mail. They can't take documents out of the hands of  
2 people in line. That's the electronic review queue. When a  
3 clerk gets to the mail, opens the mail, that's when they might  
4 put the complaint in a press box after they've done their  
5 intake or not. Before that time, Courthouse News did not have  
6 access to it. That's the functional equivalent of the  
7 electronic review queue.

8 And then once a clerk is opening a document in Vermont's  
9 queue, it's very similar to the intake process in a paper  
10 filing court. In a paper filing court, the clerk would leaf  
11 through the complaint, as Mr. Girdner said in *Schaefer* at  
12 trial; they would engage in some stamping; they would generate  
13 a receipt; they would check that the filing fee was right; and  
14 they would either give out a stamped copy to the filer or a  
15 receipt if it was accepted, and if it wasn't, they would reject  
16 it and hand it back.

17 In the electronic equivalent, the clerk, when they open a  
18 document, they are looking at the complaint; they are checking  
19 for a signature; they're checking that the right case type and  
20 filing type were selected, which determines the filing fee, and  
21 that the filing fee is correct.

22 So the primary differences are that they're looking for a  
23 signature, which Mr. Girdner didn't address in *Schaefer*, and  
24 that they are looking for unredacted information exempt from  
25 disclosure. That's really the only difference at that stage.

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1 Either way, a person is looking at the document before it's  
2 going into the press box, and it's going in after.

3 THE COURT: So let me ask you where I left off with  
4 opposing counsel. I just don't see any affirmative  
5 authorization for this review process. I don't see it in the  
6 rules, and I don't see it in the statute, and if it did say "No  
7 complaint shall be deemed filed until the court has completed  
8 the review for confidential information set forth in, you know,  
9 X rule or this statute," that would be one thing. Where is  
10 that affirmative authorization that says that the clerks can  
11 hold the document and it doesn't become publicly accessible  
12 until that process is completed?

13 MR. BOYD: So I think that's inverting the framework  
14 the rules contemplate, which is that there is not public access  
15 to information that is exempt from disclosure, and that starts  
16 with 6(b)(1) -- or 6(b): "The public does not have access to  
17 the following judicial-branch records." 6(b)(1) exempts  
18 information --

19 THE COURT: So slow down.

20 MR. BOYD: Sorry.

21 THE COURT: I've got 6(b)(1). I don't see anything  
22 that says a complaint that hasn't been reviewed --

23 MR. BOYD: Sure. So a complaint that hasn't been  
24 reviewed might or might not have confidential information in  
25 it, information that's exempt from disclosure that the clerks

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1 cannot provide to the public under 6(b). The public does not  
2 have access to that type of information.

3 And 6(b)(1) lists some of the types of records,  
4 information that's designated confidential, and 14 calls out  
5 personally identifying data elements in particular. So the  
6 public does not have access to that information, and the only  
7 way to know whether that information is in a new filing is to  
8 look whether that information's in a new filing.

9 THE COURT: Okay. So at best, you would agree with  
10 me, I'm sure, that this would not allow the public to have no  
11 access to the record but only those portions of the record that  
12 contain that information.

13 MR. BOYD: Yes.

14 THE COURT: Okay. So where does it say -- is this  
15 where you're looking at that authorizes this review process  
16 before it's publicly accessible? And if that is so, why would  
17 you have Rule 7 and this section in 3 that says, "Look, once  
18 it's publicly accessible and if you see something that  
19 shouldn't be there, the judge or the staff member has to  
20 restrict access temporarily and notify the court  
21 administrator"? That might have issues of its own, but that is  
22 referring to a publicly accessible document. So it's already  
23 hit the docket.

24 MR. BOYD: So I think Rule 7 covers both what happens  
25 if there's a mistake and something gets all the way through and

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1 what is supposed to happen when a filing is first transmitted.  
2 THE COURT: Okay. Show me where it says -- that's  
3 what I'm interested in. Where is the authorization for when a  
4 filing is first transmitted?

5 MR. BOYD: Sure. So reading two rules together, it's  
6 Rule 5 of the Rules of Electronic Filing and Rule 7 of the  
7 Rules of Public Access. Those are really the two rules  
8 together that I think cover the framework here.

9 THE COURT: Tell me what provision of Rule 5.

10 MR. BOYD: Sure. It's Rule 5(d), "Court Staff  
11 Processing." And specifically 5(d)(1). It's called "Court  
12 Staff Review": "Court staff will review all electronic filings  
13 for compliance with these rules and Rule 7(a)(1) of the Rules  
14 for Public Access to Court Records." Then (d)(2) is "Accepting  
15 or Rejecting a Filing": "Court staff will electronically  
16 notify the efiler either that the efilings has been accepted or  
17 that it cannot be accepted until specific actions required  
18 under these rules have been taken."

19 So a proposed filing is submitted. Staff need to review  
20 it and either accept it or reject it. And what they're looking  
21 for is compliance with the rules and compliance with Rule 7(a)  
22 in particular. And then if you turn to Rule 7(a), 7(a)(3) is  
23 responsibility of court staff when document is filed, not after  
24 document is accepted, and then (a)(4) talks about actions when  
25 a filing is noncompliant.

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1 A staff person who reviews the filing may change the  
2 public access status or redact or reject the filing. It's not  
3 possible to reject the filing once it's been accepted. The way  
4 the queue works is a document comes into the queue; staff  
5 either rejects it, in which case it never is made public, or  
6 they accept it, in which case it is made public within a few  
7 minutes electronically automatically. So the combined effect  
8 of those rules is when a filing is transmitted, filers are  
9 looking at it under Rule 5(d) and 7(a)(3) and they're either  
10 changing the status if there's exempt information or they're  
11 redacting it or they're rejecting it. Those are the only three  
12 options that 7(a)(4) gives staff.

13 THE COURT: Okay. So nothing says a complaint shall  
14 not be public until the filing process and the confidentiality  
15 review have been completed; that's just how we get to that  
16 point by combining rules?

17 MR. BOYD: Yes.

18 THE COURT: Okay.

19 MR. BOYD: Yes. It's the negative implication of the  
20 public shall not have access and filers -- and staff will  
21 review when they're made.

22 The Court had mentioned that it does not seem like there's  
23 a dispute about whether complaints are accessible and the  
24 question is really timing. I agree with that framing.

25 And I had started talking about timing and the differences

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1 between intake and electronic filing, and I am not sure whether  
2 I finished that thought or not. I think I'd walked through the  
3 similarities there in what's actually happening.

4 The other issues that are relevant to timing in addition  
5 to filing volumes fluctuating, when the process originally  
6 started, it was decentralized. So you could have some smaller  
7 clerk's offices where a clerk is working on something else and  
8 that causes a bottleneck. Centralization eases that. That's  
9 one of the reasons that a centralized process is more  
10 efficient, and that's why the administrator's working towards  
11 that.

12 If you have a centralized team that is focused on  
13 reviewing all filings of all kinds and you have a uniform  
14 process, they can switch from filing type to filing type based  
15 on volume and kind of smooth out some of the filing volume  
16 fluctuations, and you also won't have in a smaller court one  
17 clerk being tied up and that leading to delays, which you can  
18 see in, for example, Essex was the slowest of all of the units  
19 identified by the plaintiffs. It's also the smallest clerk's  
20 office.

21 THE COURT: So let me ask you about that. And also  
22 back to my concern about what are the facts that the Court is  
23 going to find? This has been going on for a while. This is  
24 not a brand-new system. And centralization is in flux. It has  
25 occurred. It's occurred since the motion was filed. It seems

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1 to me like it's still a work in progress, and we're talking  
2 about a system that came on over a year ago.

3 MR. BOYD: In terms of timing, the plan from the  
4 beginning of the rollout was to centralize. They started with  
5 the criminal filings because those are the most time-sensitive.  
6 When individuals are lodged, you need counsel assigned; you  
7 need a variety of things to happen so that they can immediately  
8 be -- have their initial appearances. And that was why the  
9 administrator began with criminal as opposed to civil.

10 And you can't immediately go to a centralized process when  
11 you're understaffed because what you're doing is you're taking  
12 people essentially from a clerk's office and you're creating  
13 bottlenecks where you're doing that.

14 In terms of where it stands now --

15 THE COURT: So let me push back on "can't." You  
16 could. You could say, "You know, we're not going to roll out  
17 our electronic filing system until we have a centralized  
18 processing component to it because we've looked at this and we  
19 know there's going to be unnecessary and unconstitutional  
20 delays, so we're just not going to do it that way." I mean,  
21 it's not a question of can't. It's just how it rolled out.

22 MR. BOYD: So two thoughts in response to that.  
23 First, if you are not rolling out e-filing, what you're looking  
24 at in most state courts is 42 to 46 percent of complaints being  
25 made available same day historically. That's what Courthouse

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1 News's data shows. Vermont has always been faster than that.  
2 From the very beginning of this case, it has made complaints  
3 available faster than most state courts do, paper filing or  
4 e-filing. So if you're comparing what was before and what was  
5 after, Vermont has always been faster than what was before.

6 THE COURT: So not my question. My question was:  
7 It's not a matter of can't. Whether it was the fastest system  
8 or the slowest system, you said, you know, this is the way it  
9 rolled out and you can't have a centralized system because  
10 you're taking a clerk away from whatever they were doing and  
11 now they're doing this. And I push back on that. You could  
12 have rolled it out with the centralized system similar to you  
13 can roll out things with a call center component. It just  
14 didn't happen that way.

15 MR. BOYD: Yes. The judiciary could have delayed the  
16 rollout, in which case the access levels would have been  
17 slower, which I don't think plaintiffs would have suggested was  
18 preferable, but that would have -- that's what would have  
19 happened in practice and what has happened elsewhere.

20 I think that does get into the resource question that the  
21 Court had, which is: Are you seeing balancing of kind of  
22 administrative difficulties, costs, access against timing, and  
23 I think the answer is yes in every appellate ruling in a  
24 Courthouse News case.

25 I mean, you see that in *Planet* where the Ninth Circuit

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1 said, "The First Amendment does not require courts, public  
2 entities with limited resources, to set aside their judicial  
3 operational needs to satisfy the immediate demands of the  
4 press."

5 I think you can see that in the *Schaefer* case where  
6 they're talking about access as a "flexible standard" with  
7 access being same day where practicable and the standard not  
8 being violated where access is not practicable.

9 And I think both of those cases were decided in a vacuum  
10 about what is and is not practicable because there was no  
11 comparative data about what other courts do and what courts  
12 generally can do.

13 I think the starting point in terms of looking at what's  
14 practicable is what can most state courts do, and the answer  
15 there historically has been 42 to 46 percent of complaints are  
16 available same day to Courthouse News in the course of business  
17 every day. That's what most state courts have historically  
18 traditionally found practicable.

19 Vermont has been able to move faster than that since the  
20 beginning of e-filing, and it's accelerated the process over  
21 time through centralization. But I think whether the Court is  
22 looking at the merits or the abstention question, resource  
23 constraints are a legitimate interest. The -- and in terms of  
24 considering their impact and what is reasonable, I think the  
25 comparative data about what other courts nationwide have done

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1 is helpful for understanding what is practicable and what is a  
2 reasonable time, place, and manner -- in the time, place, and  
3 manner analysis if the Court does reach the merits rather than  
4 abstaining.

5 In terms of the Court mentioning that the jurisprudence  
6 seems to be coalescing around timing with the only issue being  
7 how "timing" is defined, I think if you are serving the  
8 existing cases there, in practical terms the third *Planet* case  
9 upheld a process that Courthouse News alleged resulted in  
10 between one third and more than one half of complaints not  
11 being available same day. I think that is the takeaway in  
12 terms of the Ninth Circuit ruling.

13 *Schaefer* looked at same-day availability where  
14 practicable, and it did that in a vacuum. The defendants there  
15 did not present any information about what other courts were  
16 doing or what courts could do. They just went from making  
17 about 15 percent of complaints available to making 90 percent  
18 over the course of the case with no explanation. So the court  
19 was essentially looking at, "Well, you can do it. You've told  
20 me you didn't change any policies, didn't change any practices,  
21 didn't hire anyone. What's practicable must be what you're  
22 doing now."

23 Here the court administrator has explained the specific  
24 steps that Vermont is taking to be as -- to make complaints  
25 available as quickly as practicable. It's centralizing the

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1 filings to make the process as efficiently as possible; it's  
2 cross-training staff to address different kinds of filings so  
3 they can switch. If on one day there's 100 civil filings and  
4 500 criminal, they can focus on criminal. If that flips on the  
5 other day, they can focus the other way. And that's yielded  
6 results through the specific concrete steps they've taken.

7 THE COURT: So as you sit here today, what do  
8 defendants contend is the breakdown on how long -- what  
9 percentage of complaints are available same day?

10 MR. BOYD: 67 percent since the second week of July.  
11 Sorry. Since the last week of July.

12 THE COURT: And then what about the remainder?

13 MR. BOYD: I don't know that I have a breakdown of  
14 when other complaints -- of when the remaining ones are  
15 available. I know the initial allegation was 54 percent same  
16 day and 75 percent within a day.

17 THE COURT: 54 and 75 would be more than 100 percent.

18 MR. BOYD: Oh, I'm sorry. So 54 percent same day.

19 THE COURT: Okay.

20 MR. BOYD: And within one business day, 75 percent was  
21 the original. So that's -- that's basically next day. And I  
22 guess I shouldn't say "business days" because I don't think the  
23 plaintiffs are framing anything in terms of business days. I  
24 think it's 54 percent same day and 75 percent next day is  
25 plaintiffs' initial allegation, and that's accelerated to 67

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1 percent same day through the centralization process. And while  
2 I don't know --

3 THE COURT: So let me ask you a little bit more about  
4 this argument about resources, because, of course, the Court  
5 needs to find facts, and when we're talking about the First  
6 Amendment, the idea that the Court would say, "Well, you know,  
7 the judiciary in Ohio is not well funded and they've had a hard  
8 time keeping people in courts and Columbus had -- you know,  
9 Ohio had that big flood and that caused a delay," I just don't  
10 see courts doing that.

11 I think they talk about this is a right of access, it  
12 needs to be contemporaneous, but when we mean  
13 "contemporaneous," we're not talking about Black's Law  
14 Dictionary "at the same time" but we're using that as a  
15 benchmark, and we are not going to say, "Okay, Ohio. You're  
16 having a hard time. Work out your own problems, and if there's  
17 still a problem, the press can come back to us after you've had  
18 a fair time to fix your problems." I just don't see that in  
19 the cases.

20 MR. BOYD: So I think that's present in *Planet* and in  
21 *Schaefer*. I think they talk about administrative efficiency  
22 interests in -- in *Planet*. It's on 596. "Even in the era of  
23 electronic filing systems, instantaneous public access . . .  
24 could impair the orderly filing and processing of cases."

25 THE COURT: So I agree with you that that's the

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1 difference between "instantaneous" and "contemporaneous" and  
2 that all the courts say of course it's not going to be  
3 instantaneous because things have to be done. I think that  
4 you're asking for more than that and saying, "Look, we've got  
5 the system. We're centralizing it. It's taking some time. We  
6 could have delayed the whole thing, and it would have actually  
7 been slower," and I don't see -- other than the footnote that  
8 opposing counsel directed the Court's attention to in  
9 *Planet III*, I just don't see that ingrained view of financial and  
10 pragmatic considerations, and that would actually make me worry  
11 more about *Younger*, because I would be basically telling the  
12 State of Vermont how to allocate its resources, run its staff,  
13 process its clerk's office, and that's certainly not what a  
14 federal court's supposed to be doing.

15 MR. BOYD: I think that was exactly the Seventh  
16 Circuit's concern in *Brown* is that that is -- that is the  
17 practical result. If the Court were to direct a particular  
18 standard, the administrator would be required by the public  
19 access rules to take resources away from other sources to  
20 comply with those rules.

21 THE COURT: Okay. But then we get back to my other  
22 question: It can't be in the area of the First Amendment that  
23 the federal court just says, "Well, you know, you've got these  
24 problems and you need to have time to work them out, and so if  
25 I give you 180 days, will that be enough?" I mean, that

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1 doesn't seem a logical approach, either.

2 So tell me what you think -- aside from abstention, which  
3 I anticipate I'll hear more about, tell me what you think this  
4 court should be saying, if anything, to the Vermont Superior  
5 Courts. And maybe it's nothing.

6 MR. BOYD: I think the answer is nothing. I think the  
7 answer is nothing because the starting point of  
8 *Press-Enterprises* is, "Is there a nationwide tradition of the  
9 types of access that plaintiffs are asking for?" And here, at  
10 most, there's a nationwide tradition of state courts making 42  
11 to 46 percent of complaints available. And even that is not  
12 really a nationwide tradition because you're looking for a  
13 uniform tradition, so you'd really be more significantly below  
14 the 42 to 46 percent range because that's an average overall.  
15 So there's not a basic demonstration of the type of access  
16 plaintiffs are asking for having been available historically.

17 And I think that's true whether the tradition contention  
18 is framed as one of same-day access, access upon receipt, or  
19 access within minutes, because 42 to 46 percent is not uniform  
20 same-day access. And if the tradition is simply framed as one  
21 of timely access, then Vermont was timely from the beginning of  
22 this case, when it was making 54 percent of complaints  
23 available, which is faster than most state courts have  
24 nationwide historically, traditionally, according to Courthouse  
25 News's data. It's 8 to 12 percent more complaints than

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1 Courthouse News has historically had, and at the current 67  
2 percent, it's 21 to 25 percent more complaints.

3 And I think it's also relevant if the Court is to move  
4 beyond the experience and logic framework and look at the  
5 practice's time, place, and manner restrictions, because there  
6 the question is whether the process is a reasonable time,  
7 place, and manner restriction and whether it is narrowly  
8 tailored to state interests.

9 And I think you see from *Glessner* and *Planet* that privacy  
10 interests and the administration of justice are substantial  
11 state interests and that the Vermont practices are sufficiently  
12 tailored to those interests.

13 THE COURT: Do you agree with the plaintiffs that  
14 there isn't another court in the country that allows or, in my  
15 view, through a combination of rules without explicitly  
16 granting permission, has this review for confidential  
17 information, not just Social Security numbers but minor  
18 victims' names, and do you agree with plaintiffs that there  
19 isn't another court in the country that does this?

20 MR. BOYD: No. And I think you can see that in a  
21 couple of different places. That's -- it's discussed privacy  
22 as an interest in the *Glessner* case in Maine. It's not a  
23 rule-based review. The plaintiffs may be correct that this is  
24 the only state where a rule expressly requires it. But the  
25 defendants in some past cases have indicated that privacy is an

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1 interest that they are attempting to protect and that they are  
2 reviewing filings in part for that reason.

3 I think you saw it probably most directly in the *Yamasaki*  
4 district court case, which was eventually vacated by the *Planet*  
5 ruling, but there the clerks advanced privacies in interest.  
6 The court found that a legitimate interest, as I think *Seattle*  
7 *Times* did at the Supreme Court level. And I think you can also  
8 see among the declarations that Courthouse News submitted in  
9 the *Yamasaki* case that many courts review complaints before  
10 making them available.

11 In the -- in that case Courthouse News submitted  
12 declarations that were essentially addressing 25 of the fastest  
13 state courts they could find, and even within that universe  
14 they submitted at least four declarations indicating the  
15 complaints were processed before they were made available. So  
16 the statement that there is not a rule that requires privacy  
17 review in most states, that is probably true, but the  
18 suggestion that most courts are not processing complaints  
19 before making them available I don't think Courthouse News has  
20 supported, either traditionally or in past cases.

21 THE COURT: So in *Schaefer* the Court said 85 to 90  
22 percent of the new civil filings accessible to the public and  
23 press on the date of filing is sufficient, and Vermont is not  
24 at that benchmark. And that benchmark is not controlling, but  
25 that's what they were talking about.

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1 I suggested to opposing counsel that you don't really care  
2 what they're doing as long as you get it in a timely fashion,  
3 contemporaneous, whatever that is determined to mean. So  
4 whether they're reviewing it or they're checking for a  
5 signature, as long as you're getting it in a timely fashion,  
6 who cares what they're doing? I don't think I got any bites on  
7 that one.

8 Do you think it matters, or do you think it's -- what  
9 you're doing with your time matters, or is it purely a question  
10 of timing? Because if Vermont is the only state in the country  
11 that has a rule, and I'll say assuming *arguendo* has a rule,  
12 that allows you to refrain from having a civil complaint be  
13 publicly accessible while you complete this review, then  
14 it's -- am I looking at the importance of the review; am I then  
15 looking at how long the review takes and there's no real  
16 breakdown from the declarations as to how much it takes?

17 I might find those privacy concerns are easily addressed  
18 by imposing heavy sanctions on anybody who files the  
19 information. I might find that your rule that allows a judge  
20 or a staff member to pluck it out of public access temporarily  
21 and have the court administrator intervene is sufficient.

22 How much does it matter what you are spending your time  
23 on, and do you agree that as long as they're produced in a  
24 particularly contemporaneous fashion, what you're doing with  
25 your time is not a focus, or is what you're doing with the time

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1 something the Court should be looking at? And I'm sure that's  
2 very convoluted, but I hope you got my point.

3 MR. BOYD: So I think it depends on where you are in  
4 the legal framework. I think if "contemporaneous" is defined  
5 as "slower than what you are doing," what you are doing does  
6 not matter.

7 THE COURT: No. "Contemporaneous" would never be  
8 defined as "slower than what you are doing." I mean, that's  
9 not a logical definition of "contemporaneous."

10 MR. BOYD: So I'm sorry. I mean, if the Court were to  
11 say contemporaneous access is making at least 42 percent of  
12 complaints available because that is what there's a nationwide  
13 tradition of courts doing, then I don't think it matters what  
14 Vermont is doing when it's making 54 percent of complaints  
15 available, because it is providing contemporaneous access.

16 If the Court is saying "contemporaneous" is something  
17 other than that, if the Court were to say "contemporaneous" is  
18 75 percent, which a very small percentage of state courts  
19 currently do, that would basically be a complete change from  
20 what has traditionally happened nationwide. But if the Court  
21 were to set that standard, then I think you'd be looking at:  
22 Is what Vermont is doing a reasonable time, place, and manner  
23 restriction? And there what you're doing matters, because it  
24 needs to be narrowly tailored, it needs to be addressing the  
25 interests, and it needs to not be burdening more speech than

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1 necessary while doing so.

2 So I think that's where you look at what specific factors  
3 the review process is serving. But I think if the definition  
4 of "contemporaneous" is consistent with what there's a  
5 nationwide tradition of, the Court does not need to look at all  
6 at what Vermont is doing because it is providing  
7 contemporaneous access.

8 THE COURT: So imagine a plain language definition of  
9 "contemporaneous" that says we're going to take a snapshot on a  
10 given day and see what's happening in the rest of the country,  
11 which is going to change significantly over time, and that's  
12 how we're defining "contemporaneous." That's an unmanageable  
13 definition. It would have vitality for a split second. And I  
14 haven't seen courts defining "contemporaneous" as "what is  
15 everybody else doing." Practicable, maybe, what can you  
16 actually do in this time frame, what can be reasonably  
17 expected, but I haven't seen any court say "contemporaneous"  
18 is -- requires the federal court to survey all of the  
19 jurisdictions, and maybe there's going to be some qualifier for  
20 the size of the jurisdiction and the taxpayer base, and take a  
21 snapshot and see whether you're doing better or worse. So  
22 where would that come from?

23 MR. BOYD: So I think that comes from the first step  
24 of the *Press-Enterprise* framework, which is: Has there been a  
25 nationwide tradition of the type of access that's requested?

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1 And here the type of access that's requested is same day or  
2 faster. And has there been a nationwide tradition of that, and  
3 the answer is no, there has not.

4 THE COURT: I thought -- I would say that  
5 *Press-Enterprises* establishes, and I don't think there's any  
6 dispute, that this is a publicly accessible document that the  
7 public should have access to, and I don't believe  
8 *Press-Enterprises* looks at what other courts are doing in terms  
9 of timeliness. Do you think that there was an analysis of that  
10 in that case?

11 MR. BOYD: I don't think *Press-Enterprise* addressed  
12 timing. I think that's kind of the open question that's raised  
13 by this case. I think what *Press-Enterprises* was looking at  
14 was basically the binary: Is this open or not? And it was  
15 looking at a nationwide tradition of is this open or not?

16 THE COURT: But we know that these are going to --  
17 there's a right of public access, right? There's no dispute  
18 about that.

19 MR. BOYD: Yes. Although if you look to the past  
20 *Courthouse News* cases around the country, Courthouse News has  
21 consistently acknowledged its obligation to plead and prove a  
22 nationwide tradition of same-day access or faster. We can see  
23 that in the factual allegations in the *Planet* case, the  
24 *Yamasaki* case, the *Brown* case, and here. Those are all in the  
25 factual allegation portions of the complaint. They're all

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1 framed in terms of step one of the *Press-Enterprise* test. They  
2 asserted that there was a nationwide tradition of same-day  
3 access as a material fact in both *Planet* and *Yamasaki*. Mr.  
4 Girdner testified that there was a nationwide tradition of  
5 same-day access in *Schaefer*.

6 All of those rulings depend on that basic premise that  
7 there is a nationwide tradition of same-day access, and this is  
8 the first case, I believe, where anyone has actually looked to  
9 see if that is accurate, and it is not. There has not been a  
10 nationwide tradition of same-day access or faster. What has  
11 traditionally been available on average is 42 to 46 percent  
12 between 2016 and 2021 in the data they have produced.

13 So if you're looking at what is a uniform nationwide  
14 tradition, you're probably looking at something like the 20th  
15 percentile court, and you could come to the conclusion that  
16 contemporaneous access is 25 percent or more of complaints same  
17 day. That's what has traditionally been available. Or  
18 alternatively, if the Court were to look at it from the  
19 perspective of a time, place, and manner framework and you're  
20 considering whether Vermont's review is narrowly tailored to  
21 interests, the Court could conclude that it is because it's  
22 making complaints available faster than other state courts  
23 while serving the interests and doing so, therefore, without --  
24 while leaving open ample alternative channels for communication  
25 and without burdening more speech than is necessary.

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1 So either way I think the context matters in the same way  
2 that it matters that *Lugosch*, when it used the word  
3 "immediate," was talking about a district court not ruling on a  
4 motion to seal for 17 months, not the difference between one  
5 business day and two business days or access within minutes or  
6 instantaneously.

7 The Court did ask for a timing breakdown. I think that is  
8 in the initial Gabel declaration. The review process typically  
9 takes less than 20 minutes from when a document is opened. It  
10 can take as little as a few minutes for simpler filings. It  
11 can take longer for a more complicated envelope that includes,  
12 say, a complaint, a PI motion, four affidavits, a couple of  
13 declarations. That would all be in one envelope when it first  
14 came in, and that would take longer than a two-page complaint  
15 would, which would be relatively quick, towards the few minutes  
16 end of that spectrum.

17 So I think if the Court is pegging where the time is --  
18 where most of the time is, it's the equivalent of Courthouse  
19 News either coming behind the counter and opening the mail or  
20 getting into the electronic review queue. It's not how long it  
21 takes a staff member to look at a filing when they look at a  
22 filing. That's relatively quick. It's just a question of how  
23 much volume comes in and how quickly staff can turn it over.

24 THE COURT: So it's e-filed. It could be immediately  
25 accessible the moment the filing is completed. And then the

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1 delay, alleged delay, the time, is all some process of  
2 verification that the court staff's doing.

3 MR. BOYD: Yes. And to complete the historical  
4 analogy, Courthouse News is asking the paper court to just have  
5 its mail delivered to Courthouse News. They can open it. They  
6 can look at it. They can do that instantaneously. As soon as  
7 the post office delivers the mail, as soon as somebody steps in  
8 line, Courthouse News can look at it. That's never been how it  
9 worked.

10 THE COURT: No. I think that's -- that's overstating  
11 it. They're saying, "Look, once the clerk has got the filing  
12 fee, stamped it in, seen that it has a signature, done. If you  
13 want to then go forward and make sure that there's no Social  
14 Security numbers and no minors identified by anything other  
15 than initials, that's on your process, and maybe you do  
16 something to redact it afterwards. But that's time that  
17 shouldn't be counted against us. That's not the least  
18 restrictive way of dealing with that. You can have stiff fines  
19 for people who file things with that information in it."

20 If it's e-filed, there isn't even the process of stamping  
21 it in, checking the filing fee, and checking the signature, but  
22 my understanding is those functions are automated now - are  
23 they not automated? - and that it wouldn't even get filed  
24 without that stuff.

25 MR. BOYD: So they are automated to the same extent

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1 that paper filers would always file in the right court, always  
2 pay the right fee, always do what they need to to actually have  
3 a filing be accepted. They are not automated in the sense that  
4 filers screw those things up and filings get rejected just as  
5 they were in paper courts. So I think the comparison is to the  
6 person standing in line and the review queue, because if the  
7 filing is rejected, there's never been access to it before.

8 THE COURT: Right.

9 MR. BOYD: So a filer doesn't pay the fee, it gets  
10 rejected. It never is accepted. And that's the same whether  
11 you have someone clicking a box or putting in a paper check.  
12 They either get it right or they get it wrong. It's either  
13 accepted or it's rejected. What the filer says is not always  
14 right. That's the basic problem with relying on filers all the  
15 time.

16 And I think in terms of sanctions, I think PACER shows  
17 that sanctions are not an effective way of preventing filings  
18 from including confidential information. I think the larger  
19 study that was done was one out of every 380 district court  
20 filings has a Social Security number in it, so filers are  
21 regularly checking that box in federal court that they're not  
22 including information exempt from disclosure and then filing  
23 information exempt from disclosure.

24 And I think that's also confirmed by the number of filings  
25 that Vermont staff have rejected for that reason. And there

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1 it's, I think, a mistake to focus too narrowly on civil  
2 complaints for a variety of reasons, both from a policy and  
3 from a First Amendment perspective.

4 From a policy perspective, what you want to be designing  
5 is an efficient process that is as uniform as possible so that  
6 it can move as quickly as possible with staff being able to go  
7 from filing type to filing type to filing type. The more  
8 uniform, the better there.

9 From a First Amendment perspective, First Amendment cases  
10 tend to be disapproving of drawing distinctions based on  
11 content or of favoring particular parties or groups, like  
12 Courthouse News here. And then also from a First Amendment  
13 perspective, looking at the *Bernstein* factors, the appearance  
14 of potentially prioritizing an attorney advertising interest,  
15 which is what's driving the business model here, over the risk  
16 of mitigating a public harm could damage the accountability and  
17 legitimacy of Vermont courts, and you can see that in some of  
18 the press coverage that we've cited in our filings talking  
19 about individuals who had their identities stolen based on  
20 court filings. That is a legitimate concern that Vermont is  
21 reasonably mitigating while making complaints available faster  
22 than most courts do nationwide at the beginning of this case  
23 and much faster than most courts do nationwide now.

24 I also don't think there is any basis for distinguishing  
25 one judicial record from another. Courthouse News has said

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1 they're only asking for complaints, but from a design  
2 perspective, favoring one group or one type of content is  
3 disfavored as a matter of First Amendment law, and it also  
4 makes designing an actual system that staff can implement more  
5 difficult because, again, as uniform as you can make it, it's  
6 going to move faster and allow people to handle a broader range  
7 of filings.

8 I think, although I've gotten distracted a few times, that  
9 I've addressed all of the Court's musings. Are there any that  
10 I've missed that come to mind?

11 THE COURT: The only thing that I'm concerned about is  
12 the absence of a factual stipulation, and I actually think  
13 there are some issues that are stipulated, but I didn't see  
14 anything that looked like it in the filings, and I think there  
15 are issues that you have a very different view of than  
16 plaintiffs.

17 For example, I don't think they're of the opinion that  
18 Vermont has been particularly at the forefront of fast filing  
19 and making things publicly accessible. I also think they  
20 probably disagree that Vermont is at the forefront of  
21 protecting confidentiality and that there is a -- this is a  
22 trend that we're going to be expecting to see around the  
23 country because of identity theft.

24 So that may be -- the latter may be a factor that doesn't  
25 need to be decided by the Court, but you are very emphatic that

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1 what the Court should be doing is comparing Vermont's  
2 performance against the performance of other courts, and that  
3 would be nice to have a stipulated fact about that, because I  
4 think they view it quite differently.

5 MR. BOYD: So on that front, certainly a stipulation  
6 would be easier. I understand the logic. But I don't think --  
7 if the Court were to just be drawing fact findings based on  
8 what's been submitted, which I think would be within the scope  
9 of the parties' agreement, I don't think Mr. Girdner could  
10 contradict more than a million data points about what other  
11 courts have actually done by saying "I remember it being  
12 faster." I think that would be an easy finding for the Court  
13 to look at what other courts are doing.

14 What other courts are doing is what Courthouse News is  
15 seeing every day. They produced information about more than a  
16 million complaints over ten years, and the answer there is, on  
17 average, state courts are making 42 to 46 percent of complaints  
18 available, in courts Courthouse News visits every day, and if  
19 you look specifically at what Mr. Girdner has said about a  
20 nationwide tradition, that's very difficult to reconcile. I'm  
21 not sure the basis for it.

22 And if you look at the reframed tradition suggestion that  
23 there used to be a tradition of same-day access that courts  
24 have moved away from, if that was true, Courthouse News would  
25 have historically been covering in the neighborhood of 85

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1 percent of complaints same day, because every complaint filed  
2 during business hours would be available on receipt. They  
3 would be covering it. So only after-hours complaints would be  
4 unavailable to it. It's been covering about half of that. And  
5 if courts had been moving away from that high rate, you would  
6 see its access rates decline over time as courts transition to  
7 e-filing. They haven't done that, either. They've fluctuated  
8 in a narrow range between 46 percent in 2016 and 46 percent in  
9 2021. There's no supporting allegations for the conclusions  
10 that Mr. Girdner's offering.

11 THE COURT: So do I do it based on my view of the  
12 credibility? Do I weigh the evidence? Do I credit your  
13 version of the facts, or do I credit their version of the  
14 facts? How does the Court resolve that?

15 MR. BOYD: I think the parties' agreement to  
16 consolidate without live witnesses means the Court can reach  
17 the factual findings it thinks is appropriate based on the  
18 record before it, which is the data points versus the  
19 declaration. To the extent there's a conflict there, I think  
20 the Court can decide which is right based on the record and the  
21 same way it would, and I think the agreement of the parties is  
22 basically that you can do that without looking Mr. Girdner in  
23 the eye. You can compare the declaration to what he's saying  
24 and you can see.

25 And I think if the Court is doing that, again, if there

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1 was a uniform tradition of same-day access, you would see that  
2 at least in the courts he identifies in his initial and reply  
3 declarations as fast paper courts. But you don't see it there,  
4 either. In those courts, before they transitioned to  
5 electronic filing, 54 percent was more complaints than  
6 Courthouse News covered same day before they transitioned to  
7 mandatory e-filing in most of the courts he specifically  
8 discusses. I don't think there's any factual support for the  
9 suggestion that state courts elsewhere are making complaints  
10 available faster than the 42 to 46 percent that Courthouse  
11 News's data shows.

12 And I think I probably don't need to restate anything in  
13 our papers unless the Court has further questions based on the  
14 volume of briefing we already have put in.

15 THE COURT: Thank you.

16 Let's hear from plaintiffs on rebuttal.

17 MR. HIBSHER: Thank you, your Honor.

18 We've heard a good deal about this 46 percent figure,  
19 which is defendants' calculation of same-day access in other  
20 courts that Courthouse News covers. However, as we said in our  
21 papers, the data which we produced does not pretend to  
22 articulate delays in access. The data we produced simply  
23 reports the date of filing and the date that Courthouse News  
24 first covered that case, covered by 250 human beings who are  
25 covering many courts in their jurisdiction.

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1 The data that we present does not purport to be delays in  
2 access. The only data in this case that measures delays in  
3 access is the data that defendants put in about the delays in  
4 access in the Vermont courts, because that is an electronic  
5 snapshot of when a case is filed and when the case became  
6 available. The Courthouse News data is totally idiosyncratic  
7 to when Courthouse News first covers a case, and there are  
8 many --

9 THE COURT: So I heard Mr. Boyd tell me many times  
10 that your data shows when a court has same-day access -- I mean  
11 when a court allows same-day access to a complaint, and you  
12 disagree that's what it's showing.

13 MR. HIBSHER: That is not what it's showing. What our  
14 data shows is when we cover a court on a daily basis, and  
15 that's the data that his expert examined, and only over the  
16 last six years. But just because we cover a court on a daily  
17 basis does not mean that our first coverage date of a case  
18 constitutes delay in access. The case could be filed at  
19 5 o'clock in the afternoon and our reporter has already gone  
20 home and missed that case. It's covered the next day. That  
21 doesn't mean that the access delay was a full day. The court  
22 managed to cover it right away.

23 There are reporters who have several courts which they  
24 cover on a daily basis. They go to one at 3 o'clock, one at  
25 5 o'clock in suburban areas where they're driving from court to

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1 court. They certainly don't cover -- when they publish a story  
2 on a case, that does not mean that that is the delay in access  
3 from the Court's perspective. That is Courthouse News's  
4 reporter's human first publication date, and that can vary  
5 enormously.

6 THE COURT: I would assume that it would vary based on  
7 we've got something more important we want you to do and we'll  
8 cover that later this week.

9 MR. HIBSHER: Traffic jams, all sorts of things. But,  
10 your Honor, even assuming *arguendo* that Vermont, at its 54  
11 percent, is slightly better than what Mr. Boyd calls 46  
12 percent -- and he leaves out the federal courts. Factor in the  
13 federal courts, which are doing much better than state courts,  
14 the number is really 51 percent. Even if Vermont was doing  
15 slightly better than the average, this case is not about a  
16 survey of courts to see where Vermont stacks up.

17 THE COURT: I just don't understand how that would be  
18 useful, because it would be a snapshot that would have import  
19 for the moment of the snapshot and no validity thereafter. I  
20 mean, I would assume that courts are jockeying for positions  
21 all the time and one is getting faster and one is getting  
22 slower and it really wouldn't be anything I could base -- use  
23 as a kind of benchmark.

24 MR. HIBSHER: Yeah. This factual disagreement is  
25 really irrelevant. I started my argument by saying

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1 *Press-Enterprise II* sets forth the framework. It's -- you  
2 know, step one is tradition and logic, and the tradition as  
3 articulated by *Press-Enterprises* and by other cases, including  
4 *Bernstein*, which found that complaints have historically been  
5 made available, that's all *Bernstein* needed to say about the  
6 tradition. Mr. Boyd is trying to morph that into a contention  
7 that we are saying that there is a tradition of same-day access  
8 or there is a tradition of instantaneous access.

9 That's not at all what we are saying. Mr. Girdner's  
10 declaration makes clear that for decades he covered courts, his  
11 reporters covered courts, walked into a courthouse, they asked  
12 to see the complaints filings, whether it was at 1 o'clock,  
13 3 o'clock, or at 5 o'clock, and if the clerk had already  
14 stamped it and done what really is a cursory one-minute review  
15 of the document and put it in the file behind the clerk, then  
16 the reporter was invited to take a look at it. That's the  
17 tradition of access.

18 The issue of timing has to do with defendants'  
19 justification for delay. Once the Court rules that there's a  
20 First Amendment right of access to a complaint and once we  
21 establish through -- I think it's undisputed that there have  
22 been delays of at least 54 percent, then the defendants must  
23 justify it.

24 Now, we appreciate that they've put a lot of effort into  
25 the centralization process and that their numbers have gotten

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1 somewhat better, but that's really not the point. Even in  
2 their improved numbers, we see weeks when access is as low as  
3 34 percent, not their average of 67 percent. And I believe  
4 your Honor asked Mr. Boyd whether he had data on one-day and  
5 two-day delays. He did not include that, and the reason for  
6 that, I believe, is that our tracking shows that there are  
7 substantial one-day and two-day delays, and that is not  
8 contemporaneous access.

9 So while the efforts to centralize and to do their review  
10 of all filings -- and he concedes that it shouldn't be limited  
11 to complaints. All filings deserve the same attention in the  
12 centralized system. It would be much more efficient to do all  
13 filings at one time; we completely agree with that. This  
14 process is ready to do a postaccess review. Clerks in Vermont  
15 would not have the time pressures of meeting an 85 or 90  
16 percent order.

17 THE COURT: But even if there was 90 percent of the  
18 complaints were available the first day and 10 percent were  
19 available after a week and there wasn't a legitimate basis  
20 other than resources as to why the 10 percent wasn't available  
21 for a week, there would still be a problem.

22 MR. HIBSHER: The problem would be that they need to  
23 justify that 10 percent delay. Courthouse News has never  
24 brought a case where there is 90 percent availability and 10  
25 percent delay.

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1 And in the *Planet* case we saw -- and Mr. Boyd made  
2 reference to the one third to one half of the complaints are  
3 delayed, but we saw the reason why the court excused that.  
4 There were extraordinary resource issues. There was evidence  
5 put in in the course of the many documents that were filed in  
6 that ten-year litigation that laid out what the budget crisis  
7 was, and it only lasted for two or three years, and at the time  
8 that the summary judgment motions were fully briefed, after the  
9 court had said no further processing other than scanning, the  
10 court was making 97 percent of the cases available at that  
11 time.

12 So if it's just 10 percent and if someone challenged that,  
13 the clerks would put in their evidence to show why there is a  
14 10 percent shortfall. But in an e-filing court, there's no  
15 reason for any delay. That initial screening that the clerk  
16 does at the intake counter in a paper court is done by the  
17 computer software. The filing party puts in all the  
18 information. Can there be mistakes? Of course there can be  
19 mistakes. But if there are mistakes, as we believe the rule  
20 makes clear, that document can be temporarily restricted and  
21 the clerk can redact an improper filing.

22 This case is really about checking for personal  
23 identifiers, and the evidence makes clear that it's just 1/20th  
24 of 1 percent that gets through Vermont's very effective  
25 redaction policy, which requires the filing party to redact and

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1 to certify by checking a box before it is submitted that the  
2 filing party has in fact redacted, and that is working. So all  
3 of the processing that we're hearing about can very effectively  
4 come after the complaint is made public. The State would not  
5 be burdened by personnel problems and difficulties in hiring up  
6 staff, as we see in Defendant Gabel's declaration. Originally  
7 it was supposed to happen in July and then in September, and  
8 now she's saying in November. None of that would impact the  
9 First Amendment because this public document would be made  
10 available on access, and if there are problems in the filing,  
11 they would be able to check it afterwards.

12 Now, I want to point out that even in *Schaefer*, a paper  
13 filing court, where after evidence of the kind of intake  
14 processing that the clerks had to perform was presented in the  
15 record and Judge Morgan ruled that 85 to 90 percent, where  
16 practicable -- he allowed for the possibility that they would  
17 prove in some farfetched contempt motion that they were only  
18 at, you know, 84 percent or even 74 percent, so he included  
19 that, but that figure was based on the testimony in the record  
20 that in the paper filing court, they had to do some initial  
21 processing. That is the justification proof, and here we don't  
22 have any justification proof. The personal identifier issue  
23 has turned out to be a red herring.

24 *Tingling*, the closest case to this one, in the Southern  
25 District of New York, Second Circuit, where the clerk was

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1 achieving 66, two thirds, percent every day, *Tingling* said no.  
2 The clerk suggested that they had to review for  
3 confidentiality, but there was no proof. They didn't put on --  
4 they didn't demonstrate, in *Planet's* words, that they had a  
5 reason for reviewing it, and *Tingling* said, "No preaccess  
6 processing. You're going to have to make them available  
7 without doing any preaccess processing, and it's going to have  
8 to be done contemporaneously," and the clerks met that  
9 challenge within weeks.

10 Courthouse News received access electronically the way it  
11 is done in federal court via PACER. New York has its own  
12 home-grown system, but very similar to PACER. Within weeks we  
13 were seeing virtually all of the filings pretty much on filing,  
14 and that was New York County. And today every single county in  
15 the state of New York is doing the same thing. It's happening  
16 easily. The press has access, and that kind of access really  
17 serves the public discourse about newly filed complaints, which  
18 are important documents in our system.

19 Your Honor, I think we've discussed the rules. We only  
20 heard about 6(b)(1) during Mr. Boyd's argument. I think that  
21 rule really refers to confidential filings, not the personal  
22 identifiers in a filing.

23 THE COURT: Well, he cited Rule 5 as well.

24 MR. HIBSHER: Yes. I'm sorry. And if you read that  
25 rule, it's the types of documents that are addressed, and we

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1 think there is a category of documents called confidential  
2 documents, and in the electronic filing process, the filing  
3 party has to designate a confidential document, and that  
4 document is not made public once the filing party designates  
5 it. Is it possible that a filing party has made a mistake and  
6 has failed to designate a confidential document? Well, where  
7 is their proof?

8 Once the First Amendment right attaches, the burden shifts  
9 to the defendant to justify delays. All of that review that  
10 we've heard about today can and should happen after public  
11 access to these documents, and if there are mistakes, we know  
12 what to do about it, and they have a system in place that  
13 apparently is becoming more efficient and is getting better,  
14 and that system would not be subject to personnel issues and  
15 weather and even a pandemic, if it were to happen again or this  
16 one continues, because the First Amendment interests that this  
17 case is about will have been served by access prior to  
18 administrative review, as it is done in New York and  
19 Connecticut.

20 THE COURT: Thank you.

21 MR. HIBSHER: Thank you, your Honor.

22 THE COURT: Anything further before the Court takes  
23 the matters under advisement? I will get you a written  
24 decision.

25 MR. BOYD: The only thing I'm not sure I made clear,

1 there doesn't need to be a privacy review at all. I think you  
2 can see that from *New Mexico* and *Glessner* and *Planet*. None of  
3 those cases involved a rule-based privacy review. I just  
4 wanted to make that clear. I may have overemphasized that  
5 point. That's not -- it's not necessary that the review be for  
6 privacy in particular as opposed to anything else associated  
7 with the administration of justice.

8 THE COURT: Okay. Thank you.

9 You did a nice job on both sides briefing it, and I will  
10 give your arguments careful consideration.

11 (Court was in recess at 3:44 PM.)

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14 C E R T I F I C A T I O N

15 I certify that the foregoing is a correct transcript from  
16 the record of proceedings in the above-entitled matter.

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19 October 28, 2021

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Johanna Massé, RMR, CRR

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