

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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COURTHOUSE NEWS SERVICE,))	
MTM ACQUISITION, INC. d/b/a))	
<i>Portland Press Herald, Maine Sunday</i>))	
<i>Telegram, Kennebec Journal, and</i>))	
<i>Morning Sentinel,</i>))	
and SJ ACQUISITION, INC. d/b/a))	
<i>Sun Journal,</i>))	
))	
Plaintiffs,))	
))	
v.))	Civil No. 1:21-cv-00040-NT
))	
JAMES T. GLESSNER, in his Official))	
Capacity as State Court Administrator))	
for the State of Maine Judicial Branch, and))	
PETER SCHLECK, in his Official))	
Capacity as Clerk of the))	
Penobscot County Superior Court,))	
))	
Defendants.))	
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FIRST AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs Courthouse News Service, a national news organization covering civil litigation; MTM Acquisition, Inc., publisher of the *Portland Press Herald*, the *Maine Sunday Telegram*, the *Kennebec Journal* and the *Morning Sentinel* newspapers; and SJ Acquisition, Inc., publisher of the *Sun Journal* newspaper, bring this action for declaratory and injunctive relief from a policy of the Maine court system that unconstitutionally impairs Plaintiffs’ First Amendment right to access civil complaints and other court records.

2. The courts of this nation have long recognized a First Amendment right of access to civil court records. To serve as the eyes and ears of the public and advance the essential

democratic values of transparency and accountability, journalists must be able to review and copy court records. Given the importance of these values and the time-sensitive nature of news reporting, the right of access has been held to attach at the moment the court receives a judicial record; access cannot be delayed until the document becomes yesterday's news. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay” in access to court records “impermissibly burdens the First Amendment”); *see also Courthouse News Service v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) (striking down policy delaying public access to electronically filed court records until after clerk processing).

3. In December 2020, the State of Maine Judicial Branch enacted a rule requiring court clerks to deny press and public access to electronically filed civil complaints and associated judicial records until three business days after the court receives and accepts proof that a defendant had been served with process, a step that can occur up to 90 days after the filing of a complaint. The policy has operated to delay access to electronic filings for days, and in some cases weeks. This mandatory delay serves no legitimate state interest, and it violates the First Amendment right of contemporaneous access to court records.

4. The Maine courts are adopting mandatory electronic filing on a court-by-court basis. The Penobscot County Superior Court is one of the first to require electronic filing. In late January, the clerk's office of that court informed Plaintiff Courthouse News that, contrary to past practice, it would not disclose any newly filed civil complaints until three business days after a return of service is docketed.

5. Plaintiffs filed this lawsuit on February 3, 2021. On February 22, 2021, the Judicial Branch announced a revision to its rule, which will be effective on March 15, 2021. The revised rule eliminates the prohibition on access until three days after the filing of a proof of

service of process. However, the new rule delays access to any court record until after a court clerk's "entry" of a document into the "electronic case file," which only occurs after the clerk "ensure[s] that the document is in proper electronic format, that it has been signed, that it is accompanied by any legally required elements, including but not limited to a filing fee, appeal fee, registry recording fee, or summary sheet, and that, if the document is filed by an attorney, the document lists the attorney's Maine Bar Registration Number." This "no-access-before-process" rule, in other words, suspends the First Amendment right of access to court records until a clerk finds the time to review, approve, and docket the new filing.

6. As federal district and appellate courts around the country have held, the First Amendment right of access to court records attaches on receipt of a document by the court. The Ninth Circuit, in a case brought by Plaintiff Courthouse News, struck down a similar no-access-before-process policy because it was not justified by an overriding public interest nor was it narrowly tailored. In addition to the Ninth Circuit, district courts within the Second, Fourth and Fifth Circuits have overturned policies that delayed access to newly filed actions while they were being processed into a court's docket. Maine's new rule is likewise unconstitutional.

7. The new rule soon to be enforced in Penobscot County Superior Court is part of a suite of e-filing rules that are expected to be enforced by the rest of Maine's courts as they switch from paper filing to e-filing over the course of the next few months. These rules are creating, and will continue to create, delays that impair the First Amendment rights of the Plaintiffs. Such harm is deemed irreparable as a matter of law. Meanwhile, the current rule delaying access until after service of process remains in effect, and continues to impair Plaintiffs' right of access to court records. Plaintiffs therefore seek a declaration that the current rule and the new rule that

will replace it violate their First Amendment right of access to judicial records, and seek appropriate injunctive relief.

JURISDICTION AND VENUE

8. Plaintiffs' claims arise under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1983-1988. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) and 2201 (declaratory relief). Defendants are subject to personal jurisdiction in this judicial district.

9. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because Defendants reside in Maine. Both Defendants are employed in this district, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

PARTIES

10. Courthouse News Service ("Courthouse News") is a California corporation with its principal place of business in Pasadena, California. Courthouse News was founded almost 30 years ago because a great deal of news about civil litigation was going unreported by traditional news media, a trend that has only increased in the last decade. Courthouse News now employs approximately 240 people, most of them editors and reporters, covering state and federal trial and appellate courts in nearly all states.

11. MTM Acquisition, Inc. is a Maine corporation with a principal place of business in South Portland, Maine. It publishes the *Portland Press Herald*, *Maine Sunday Telegram*, *Kennebec Journal*, and *Morning Sentinel* newspapers.

12. SJ Acquisition, Inc. is a Maine corporation with a principal place of business in Lewiston, Maine. It publishes the *Sun Journal* newspaper.

13. MTM Acquisition, Inc. and SJ Acquisition, Inc. will be referred to collectively herein as the "Maine Newspaper Plaintiffs."

14. Defendant James T. Glessner is the State Court Administrator of the State of Maine Judicial Branch. On information and belief, Glessner oversees all court operations for the Judicial Branch, including the provision of access to court records.

15. Acting in his official capacity, Glessner, along with those acting under his direction and supervision, have implemented the policy of the State of Maine Judicial Branch that unconstitutionally delays access to electronically filed civil court records until three business days after docketing of proof of service on a defendant. He is also responsible for implementing the revised rule that goes into effect on March 15, which will delay access to court records until after clerk processing.

16. Glessner's acts and omissions, as alleged in this Complaint, are under the color of Maine law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. On information and belief, Glessner's primary place of employment is in Cumberland County, Maine.

17. Glessner is sued in his official capacity only. Plaintiffs seek declaratory and injunctive relief against Glessner and his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him or at his direction or under his control.

18. Defendant Peter Schleck is the Clerk of the Penobscot County Superior Court in Bangor, Maine. Schleck is responsible for the administration of court records of the Penobscot County Superior Court.

19. Acting in his official capacity, Schleck, along with those acting under his direction and supervision, have implemented a policy of the State of Maine Judicial Branch that unconstitutionally delays access to electronically filed civil court records until three business days after docketing of proof of service on a defendant. He is also responsible for implementing

the revised rule that goes into effect on March 15, which will delay access to court records until after clerk processing.

20. Schleck's acts and omissions, as alleged in this Complaint, are under the color of Maine law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. On information and belief, Schleck's primary place of employment is in Penobscot County, Maine.

FACTUAL ALLEGATIONS

21. Plaintiffs are news organizations that have covered the Maine courts for decades.

22. Courthouse News Service offers its readers a variety of publications. Its New Litigation Reports, sent by email to subscribers each evening, contain original, staff-written summaries of significant new civil petitions or complaints.

23. Other Courthouse News publications include a monthly newsletter, the *Entertainment Law Digest*, as well as the *Daily Brief*, which covers appellate rulings nationwide, including all U.S. Supreme Court and federal circuit decisions, state supreme court and appellate court decisions, as well as significant rulings from the federal district courts. Courthouse News also publishes a freely available website, www.courthousenews.com, featuring news reports and commentary, which is read by roughly 30,000 people every weekday. The website functions much like a daily newspaper, featuring staff-written articles from across the nation that are posted throughout the day and rotated on and off the page on a 24-hour news cycle.

24. Courthouse News has been credited as the original source of reporting on numerous topics by a wide range of publications, including: *The Mercury News*, *ABA Journal*, *ABC News*, *The Atlantic*, *Austin American Statesman*, Black Christian News Network, *California Bar Journal*, *CBS News*, *The Christian Science Monitor*, *The Daily Beast*, *The Dallas Morning News*, *Forbes*, *Fox News*, *The Guardian*, *The Hill*, *Houston Chronicle*, *The Huffington*

Post, *Long Island Press*, *Los Angeles Times*, *Mother Jones*, National Public Radio (NPR); NBC News, *New York Daily News*, *New York Magazine*, *The New York Times*, *The Orange County Register*, Politico, *Rolling Stone*, *Salt Lake City Tribune*, *San Antonio Express-News*, Slate, *The Telegraph* (UK), *The Wall Street Journal*, *The Washington Post*, *The Washington Times*, *Women's Health Policy Report*, United Press International (UPI), *USA Today*, *U.S. News and World Report* and the YouTube news channel. American, Canadian, and New Zealand radio shows have interviewed Courthouse News reporters.

25. Courthouse News has more than 2,200 subscribers nationwide, including law firms, law schools, government offices, and news outlets such as The Associated Press, *Austin American-Statesman*, *The Atlanta Journal Constitution*, *The Boston Globe*, BuzzFeed, CNN, *The Dallas Morning News*, *Detroit Free Press*, International Consortium of Investigative Journalists, Fox Entertainment Group, *Honolulu Civil Beat*, *Las Vegas Review Journal*, *Los Angeles Business Journal*, *Los Angeles Times*, North Jersey Media Group, *Pacific Coast Business Times*, *Portland Business Journal*, *St. Paul Business Journal*, *The Salt Lake Tribune*, *The San Jose Mercury News*, *San Antonio Express News*, *Tampa Bay Business Journal*, *The Wall Street Journal*, Variety, Walt Disney Company and Warner Bros. Among academic institutions, subscribers to Courthouse News' New Litigation Reports include Boston College Law School, Boston University, Case Western Reserve University, Harvard Law School, Loyola Law School, MIT Sloan School of Management, Southern Illinois University School of Law, UC Hastings College of Law, and UCLA School of Law. A majority of the nation's large and mid-sized law firms also subscribe to one or more Courthouse News publications. Other businesses, including large publicly traded companies, government entities, and non-profit organizations, also subscribe to Courthouse News publications.

26. Courthouse News does not seek to review or report on the small fraction of new civil complaints that are statutorily confidential or accompanied by a motion to seal.

27. To prepare the New Litigation Reports and identify new cases that may warrant a website article, Courthouse News' reporters traditionally visit their assigned court on a regular basis to review all new complaints filed with the court and determine which ones may be of interest to Courthouse News' readers. Given the time-sensitive nature of news, any delay in the ability of a reporter to obtain and review new complaints necessarily diminishes the value of the journalism Courthouse News can provide.

28. Reporters for the Maine Newspaper Plaintiffs also review new civil complaints to identify cases that may be of interest to their readers.

29. Effective December 15, 2020, the Maine Supreme Judicial Court amended Rule 4 of the Maine Rules of Electronic Court Systems. The rule, as of the date of this first amended complaint, provides that clerks must withhold press and public access to electronically filed civil documents until three business days after the court receives and accepts a proof of service demonstrating that at least one defendant has been served with process in the case. Specifically, Rule 4(A) of the Maine Rules of Electronic Court Systems provides, "No court record will be accessible by the public until three business days after the court clerk has accepted the submissions of both the case initiating documents and proof of service of process of those documents on at least one defendant."

30. "Accept," under the rules now in effect (the December 15, 2020, rules), is defined as "approval by the court clerk of an electronic document submitted to the electronic filing system." (Maine Rules of Electronic Court Systems, Rule 2). The definition does not state a

timeframe within which a court clerk must “accept” a filed electronic document. A document is filed—and the First Amendment right of access attaches—when the court receives it.

31. The current rule automatically denies access to new civil complaints for a minimum of three business days after filing. The actual delay will often be, and has been, much longer, both because there is usually a delay between the date of filing and the date of service, and because under the Maine Rules of Civil Procedure a plaintiff has a full 90 days after filing a complaint to submit a proof of service. Me. R. Civ. P. 3.

32. Before the e-filing rules went into effect, Courthouse News’ reporter covering the Penobscot County Superior Court could review and report on newly filed civil complaints by reviewing them in paper form and copying them at the courthouse. Since the adoption of electronic filing, however, the reporter’s review of new complaints has been substantially delayed.

33. Plaintiffs filed this action on February 3, 2021, challenging the current rule, effective since December 15, 2020, that delays public access until three days after entry of proof of service on one defendant. On February 22, 2021, the Maine Supreme Judicial Court revised that rule, with the revisions to be effective March 15, 2021.

34. The new rule replaces one First Amendment violation with another. The new rule eliminates the requirement that a return of service be filed before records of a newly filed case are made available, but replaces it with a provision that conditions the First Amendment right of access on the “entry” of the document into the “electronic filing system” by a clerk—i.e., processing or docketing of the complaint. The new rule is, in other words, a “no-access-before-process” policy.

35. Specifically, under the new rules, a court record is public upon its “acceptance” into the “electronic case file.” The rules state that “accept” or “acceptance” “indicates entry of an electronic document submitted to the electronic filing system.” The “entry” of a new, electronically filed complaint is conditioned on a court clerk’s determination that it complies with M.R. Civ. P. 5(f) and Rule 34 of the Maine Rules of Electronic Court Systems, which include a list of administrative requirements such as signing the complaint and providing a bar number. According to e-filing rule 35(E), if those clerical or administrative requirements are not met, the complaint is still considered timely filed so long as ministerial mistakes are fixed within four days. In other words, the Defendants are holding up First Amendment access in order to check for possible clerical errors that can readily be corrected.

36. The revised rules do not provide any timeframe within which clerk review and “entry” must occur. However, under the electronic filing system as it exists today, filers of electronic documents automatically receive a message from the e-filing system stating that they should expect the clerk’s office to take up to “24 business hours,” which presumably means three business days, “for clerk office processing” of an e-filed document. The following is an example of such a notice in a recent case filed in the Penobscot County Superior Court:

The filing below has been submitted to the clerk's office for review. Please allow up to 24 business hours for clerk office processing.

Filing Details	
Court	Penobscot County
Date/Time Submitted:	12/21/2020 3:48 PM EST
Filing Type:	Motion - Motion for Entry of Final Judgment - Filed
Activity Requested:	EFile

37. “Clerk office processing” of a document must mean “entry” of a record into the “electronic case file” as contemplated by the new version of the rule.

38. A practice that involves a “processing” delay of up to 24 business hours, or three business days, would constitute an outright denial of the public’s right of contemporaneous access to court records. For example, a record filed at noon on a Friday could remain unavailable until noon the following Wednesday. A record filed at noon on a Friday before a three-day weekend would be unavailable until the following Thursday. Numerous courts have struck down e-filing regimes that involved much less delay as intolerable under the First Amendment.

39. The justification for the new rule rests on the thinnest of reeds: some unspecified concern about the small fraction of filings where a lawyer has not followed basic instructions on electronic filing. To catch those few cases, and to avoid whatever problem it is that defendants imagine would be created by making them public, the court system seeks to deny timely press and public access to the great majority of cases where lawyers have signed their pleadings, paid the filing fees, and included their bar numbers. The new rule denies press and public access for an undefined period of time, which will vary depending on human resource allocations within different clerk’s offices and whether a filing is made after hours or on a weekend or vacation day. It does so without any explanation as to why that is necessary.

40. Similar “no-access-before-process” policies have been deemed unconstitutional in a series of cases brought by Courthouse News. In January 2021, for example, the U.S. District Court for the Central District of California entered final judgment striking down just such a policy. Similarly, in 2016, the U.S. District Court for the Southern District of New York enjoined a policy denying press and public access while new filings were being “reviewed and logged.” In 2009, the U.S. District Court for the Southern District of Texas struck down a policy delaying access to new paper and e-filed complaints in the Harris County courts until docketing. And in January 2020, the U.S. District Court for the Eastern District of Virginia struck down a policy in

Norfolk and Prince William counties that delayed access to new paper filings for one to three days so that the court could first docket and scan them.

41. Maine has contracted with Texas-based Tyler Technologies for roughly \$16 million over 10 years to install and modify its “Odyssey” e-filing software suite. In three other states—Georgia, Nevada and California—where courts have also contracted with Tyler Technologies, the company has put in place a “Press Review Queue” that provides access to filings in public case categories on receipt. The company has put the queue in place based on a clerk’s support request, or “ticket,” without a separate charge. That request is made by filling out a short form provided by the software vendor.

42. Instead of taking advantage of the opportunity e-filing presents to speed up and automate access to judicial records, the Maine Judicial Branch has denied access to new complaints for prolonged periods, in violation of the First Amendment.

43. The State of Maine, on information and belief, has articulated no justification for its current rule of denying access to court records until after acceptance of a proof of service. Indeed, by amending its rule to eliminate this requirement, the Judicial Branch has implicitly acknowledged that the rule is unnecessary. Yet, for unexplained reasons, it has delayed the revocation of this requirement until March 15, 2021.

44. The explanation for continuing to categorically seal all new civil complaints in Penobscot County through mid-March cannot be that time is required to reprogram the system because the public can only access new filings by physically requesting paper copies of them at the clerk’s window in the Penobscot County Courthouse. The clerks could immediately provide all new civil case filings to Plaintiffs if the Judicial Branch decided to allow it now.

45. Since the filing of the initial complaint, Courthouse News has sent its reporter, Brenda Herrling, to the Penobscot County Superior Court nearly every business day. During those visits, she has asked the clerk's office for any new complaints that have become available since her last visit. The clerk's office regularly informs her that there are no additional complaints for her to see, due to the continued applicability of the current rule delaying access until after service of process. As of February 24, 20 civil complaints have been filed in that court in the year 2021, but the clerk's office has permitted Ms. Herrling to review only eight of them—and all of those after a delay of several days to two weeks. The current rule denying access until after service of process is causing ongoing harm to Plaintiffs' First Amendment rights—a harm that is irreparable as a matter of law.

46. Defendants have articulated no reasoning to support the current rule delaying access to new electronic filings for a period of up to 90 days, nor have they articulated reasons for conditioning First Amendment access on the avoidance of clerical errors that are made in only a small number of filings and which can be easily fixed by the filer. On information and belief, no justification exists.

47. There is no practical impediment to providing immediate, pre-service access to electronically filed, non-confidential civil complaints. Courts in other states provide such access, before processing by court staff has been completed, using an electronic review queue that allows credentialed members of the press to access new e-filed complaints as soon as they are received by the court. They do this through a variety of e-filing software platforms developed internally or licensed from different vendors. Courts that do this include e-filing state courts in Alabama, California, Connecticut, Georgia, Hawaii, Nevada, New York, and Utah.

48. In California, the Superior Courts in Fresno, Kern, Monterey, Santa Barbara and Santa Clara counties use the same e-filing and case management platform as the Maine Judicial Branch, based on software developed and leased by Tyler Technologies. The same is true in the metro courts around Atlanta and the Superior Court in Las Vegas, Nevada, all using the same Tyler Technologies software. These courts provide timely access through a “Press Review Queue” feature that allows the press to view new complaints without waiting for court staff to process them first.

49. Courthouse News has requested, but has not been granted, access to a press review queue in Maine.

50. Defendants’ failure to provide on-receipt access to non-confidential, electronically filed civil complaints violates the First Amendment right of access to court records.

COUNT ONE
Violation of U.S. Const. Amend. I and 42 U.S.C. § 1983

51. Plaintiffs incorporate by reference the allegations in the preceding paragraphs.

52. Defendants’ actions and policies under color of state law, including without limitation the current policy of withholding all electronically filed civil complaints from press and public view until three business days after the court has accepted a return of service on a defendant, and the revised policy of withholding all electronically filed civil complaints from press and public view until after clerk processing, and the resulting denial of timely access to judicial records upon receipt, deprive Plaintiffs, and by extension their readers and subscribers, of the right of access to public court records secured by the First Amendment to the U.S. Constitution.

53. The right of access to judicial records arises when the records are received by the court. Access to court filings may be restricted only if the restrictions are essential to preserve higher values and are narrowly tailored to serve those interests. To satisfy this rigorous standard, Defendants must demonstrate that there is a substantial probability that the court system's asserted overriding interests would be impaired by immediate access, and that no reasonable alternatives exist to adequately protect those interests. Defendants cannot satisfy this test.

54. Plaintiffs have no adequate remedy at law to prevent or redress Defendants' unconstitutional acts and policies, and will suffer irreparable harm as a result of the violation of their First Amendment rights. Plaintiffs are therefore entitled to a declaratory judgment and a permanent injunction to prevent further deprivation of their First Amendment rights and the rights of their readers and subscribers.

PRAYER FOR RELIEF

WHEREFORE, Courthouse News Service, MTM Acquisition, Inc., and SJ Acquisition, Inc., respectfully request judgment against Defendants as follows:

1. A declaratory judgment pursuant to 28 U.S.C. § 2201 that there is a First Amendment right of access to civil complaints and other civil judicial records;
2. A declaratory judgment 28 U.S.C. § 2201 that the First Amendment right of access to civil complaints and other civil judicial records attaches upon receipt of such records by the court;
3. A declaratory judgment pursuant to 28 U.S.C. § 2201 that the Maine Rules of Electronic Court Systems violate the Plaintiffs' First Amendment right of contemporaneous access to court records;

4. A permanent injunction against Defendants, including their agents, assistants, successors, employees, and all persons acting in concert or cooperation with them, or at their direction or under their control, prohibiting Defendants from continuing their policy of denying immediate access to civil complaints and associated court records.

5. An award of costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

6. All other relief the Court deems just and proper.

Dated at Portland, Maine this 25th day of February, 2021.

Respectfully submitted,

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

By their Attorneys,

/s/ Sigmund D. Schutz

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