

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

COURTHOUSE NEWS SERVICE,	)	
	)	
<i>Plaintiff,</i>	)	Civil Action No.3:21-cv-00460-HEH
v.	)	
	)	
KARL R. HADE, <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	
	)	

**DECLARATION OF WILLIAM GIRDNER  
IN OPPOSITION TO DEFENDANTS’ MOTIONS TO DISMISS**

I, William Girdner, declare and state as follows:

1. I am the founder and editor of Courthouse News Service (“CNS”), a nationwide news service and the plaintiff in the above-captioned action. I make this declaration in support of CNS’ Omnibus Opposition to the Motions to Dismiss filed by Defendant Karl R. Hade, in his official capacity as Executive Secretary (the “Executive Secretary”) of the Office of Executive Secretary of the Supreme Court of Virginia (“OES”), and Defendant Jacqueline C. Smith, in her official capacity as Clerk of the Circuit Court for Prince William County, Virginia (“Prince William Clerk,” and with the Executive Secretary, the “Defendants”). I have personal knowledge of the following facts, except where otherwise stated, and would and could testify to them if called as a witness.

2. This case seeks to address Defendants’ discriminatory treatment of the public and press in precluding them from remotely accessing new civil filings in the Virginia courts on a statewide basis, access that Defendants do provide to a special class of its citizens – Virginia-barred attorneys, their staff, and officers of the court. Remote access through the Internet is the

only practical means for covering new civil filings throughout the state because going every day to visit each of the 120 circuit courts across the state is not practicable for any news entity.

3. Based on my many years as a journalist covering courts throughout this country and my personal experience overseeing CNS, I have developed a comprehensive understanding of how various courts' case management systems operate and how courts provide remote access to newly filed civil complaints and the court record as a whole.

4. I have also observed that access to newly filed civil complaints and the subsequent court record is essential to robust and accurate news reporting about the courts of our nation, a critical branch of government and one of the foundation stones of our democratic republic. Readers are interested in the course of legal events and in order to accurately report on those events, and to let the public know that a legal case has been filed, it is fundamental to have access to newly filed civil complaints. In order to follow the course of those new cases, it is also fundamental to have access to the court record as it is developed. But that is not possible in the Virginia circuit court system, where the press and public have been pushed behind one segment of the public – Virginia-licensed attorneys – who are given remote electronic access to newly filed civil complaints, and other filings, on a statewide basis, including in cases in which they are not attorneys of record.

5. The effect is that the practical ability of the press to report on new civil lawsuits on a statewide basis in a timely fashion is impaired. It is simply not possible for a news service to send reporters on a daily basis, if at all, to the 120 courts throughout the Virginia circuit court system. This means that the ability of the general public to learn about and comment on events in an important institution is impeded or eliminated altogether, all while one subclass of the public can view new filings remotely on a daily basis, wreaking havoc on the traditional press corps.

### **CNS Publications and Subscribers**

6. CNS is a nationwide legal news service focusing on new civil litigation with a network of reporters based across the nation. We provide reports on appellate rulings, legislation, and new civil cases from federal and state courts around the country, as well as coverage of Congressional hearings and Supreme Court arguments.

7. I began CNS in 1990 out of a belief that news about civil litigation went unreported because the traditional news media failed to cover much of the important business of the courts. CNS is similar to other news services, such as the Associated Press, except that CNS specializes in reporting about civil lawsuits, from the inception of new cases and on to appellate rulings.

8. CNS' coverage of rulings, trials, and new civil complaints initially focused on the United States District Court for the Central District of California where journalists trooped down to the clerk's office every afternoon and gathered a stack of new complaints from the intake clerk to look over for news stories. By 1997, CNS' regional coverage in California included the major metropolitan state and federal courts in Los Angeles, Orange County, California, and San Francisco. By 2001, CNS was also covering state and federal courts in Houston, New York, and Chicago. CNS continued expanding its coverage of trial courts over the years, first in major metropolitan areas and then gradually extending into less populous areas. Today, CNS employs approximately 240 people, most of them editors and reporters, covering state and federal trial and appellate courts across all 50 states.

9. The result of CNS' nation-wide coverage by its reporters is a variety of publications offered to subscribers, reporting on all stages of civil litigation, from the initial complaint or petition to subsequent filings, hearings, and rulings, through final appeal in federal and state courts around the nation, including the U.S. Supreme Court.

10. One category of publications is CNS' New Litigation Reports, which contain original, staff-written summaries of significant and newsworthy new civil complaints. These reports are sent to subscribers via e-mail each evening. The New Litigation Reports focus on general jurisdiction complaints against business and government entities, as well as any other civil action that might be of interest to CNS' subscribers. The reports do not cover criminal, domestic relations, or probate matters. Nor does CNS seek to report on any filings that are statutorily confidential or accompanied by a motion to seal.

11. As of the date of this declaration, CNS offers 120 New Litigation Reports. CNS currently publishes two New Litigation Reports providing daily coverage of new Virginia litigation, including new civil actions filed in both federal district courts as well as daily coverage of new actions in the Virginia circuit courts, including the Circuit Court for Prince William County, Virginia. The *Virginia Report* provides coverage of new litigation filed in 29 courts, including the Prince William Circuit Court, and the *Southern Virginia State Report* provides coverage of new litigation filed in 92 courts.

12. To prepare the New Litigation Reports and identify new cases that may warrant a broader website article, CNS reporters have traditionally visited their assigned courts, so that they can review all the complaints to determine which ones are newsworthy. CNS reporters often visit courts daily, usually at the end of the day, to review the day's filings, but sometimes less frequently, especially in remote areas, where CNS is forced to base its reports on any docket information (*i.e.*, party names, case type, and court name) made available online.. As the federal courts and an increasing number of state courts are making court records, including newly filed complaints, available online, CNS also covers courts remotely through the Internet. To report on the onset of new litigation, a reporter must have access to the newly filed civil complaints.

13. Among CNS' other publications are its monthly newsletter, the *Entertainment Law Digest*, as well as the *Daily Brief*, which covers published, nationwide appellate rulings, including all U.S. Supreme Court and federal circuit decisions, as well as significant rulings from a growing number of federal district courts, including the federal district courts in Virginia. It also includes state supreme court and appellate court decisions.

14. CNS also publishes a publicly-available website ([www.courthousenews.com](http://www.courthousenews.com)) featuring news reports and commentary, which is read by an average of 265,000 unique readers each month. The website functions much like a daily print newspaper, featuring staff-written articles from throughout the nation that are posted and then rotate off the page in a 24-hour cycle. Many of the stories written by CNS staff writers focus on ongoing court cases and rulings in the state court as well as the federal courts.

15. CNS has more than 2,300 subscribers nationwide. All but a very few of the nation's large and mid-sized law firms subscribe to one or more of CNS' publications, and make them available to attorneys and others at the firm. CNS subscribers also include law schools, law libraries, government offices, judges, news organizations, public entities, Fortune 500 Companies, and entertainment and watchdog groups nationwide.

16. A substantial number of news and entertainment outlets are CNS subscribers, including but not limited to, *The Atlanta Journal Constitution*, *The Boston Globe*, BuzzFeed, *The Dallas Morning News*, *Detroit Free Press*, Fox Entertainment Group, *Los Angeles Times*, North Jersey Media Group, *The Salt Lake Tribune*, *San Antonio Express News*, *San Jose Mercury News*, *Tampa Bay Business Journal*, *The Wall Street Journal*, Warner Bros., and many broadcast stations. The Washington-based Center for Public Integrity also subscribes.

17. Among academic institutions, subscribers to CNS' New Litigation Reports include Boston College Law School, Boston University, Case Western Reserve University, MIT Sloan

School of Management, Southern Illinois University School of Law, UC Hastings College of Law, and UCLA School of Law, among many others.

18. CNS' news media subscribers rely on CNS to provide them with timely information about civil litigation, our specialty, so they can provide information about those cases to their readers and viewers. I have found that as resources for mainstream media have diminished, media outlets are increasingly relying on CNS for prompt information about court filings. CNS has been credited as the original source of reporting by a range of publications, including: *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*, *The Mercury News*, *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. In addition, American, Canadian, and New Zealand radio shows have interviewed CNS reporters.

19. In Virginia, CNS has been credited as the original source of reporting by WTKR News 3 (wtkr.com) and *The Virginia-Pilot* (PilotOnline.com). And, *The Washington Post* has credited CNS as the original source of reporting in articles it published on its website concerning new complaints filed in Fairfax County and in the United States District Court for the Eastern District of Virginia (Alexandria Division).

### **The Tradition of Access to New Complaints**

20. It has been a long-standing tradition for the press to review new civil complaints in courts across the country on the day of filing. This practice ensures that interested members of the public learn about new cases in a contemporaneous manner, while the news is still fresh. As CNS expanded, I regularly visited federal and state trial courts to start our reporting on those courts. Each court, state and federal – whether in Los Angeles, Orange County, San Francisco, or San Jose – provided journalists with access to the new paper complaints filed that day. The complaints were usually in a stack in a bin of some kind, either wood, wire mesh, or cardboard. The same was true as our coverage expanded to the Midwest and East Coast, in Chicago, New York, and Washington D.C. The pattern also held true through the South, in Dallas and Houston; in the Southeast in Miami; and in the Southwest in Phoenix and Albuquerque. Those courts provided the press with access to the new complaints on the day of filing, with clerks allowing reporters to regularly check the stack of newly filed civil complaints. The reporters were looking for news, and the review of the new complaints that had just come across the counter was a standard and daily task for a reporter on the court beat.

21. In addition to seeing the new cases at the counter, as was the case in clerks' offices throughout Virginia, including at the Prince William County Circuit Court, journalists covering a courthouse traditionally had access to the records room, where they could review new civil complaints and subsequent filings, including motions and rulings, and check and research the record. As electronic technology and the Internet began to dominate the area of communication and record-keeping, the records room moved online in court after court. The common and nearly universal practice when courts were first starting to move things online was to first scan paper documents and electronically store the scans, often discarding the paper records. This was, and still is, the case in the Prince William Circuit Court, among other courts in Virginia. The next step

courts have taken is to require that the filers provide scans or electronic versions of their documents as part of electronic filing, with those records also being stored electronically.

22. Virginia's technological transition is halted between these two phases. The overwhelming number of new civil complaints are still filed in paper form but they are scanned by court staff and stored in electronic form. In individual courts, such as the Prince William Circuit Court and others, the records room is electronic and journalists and members of the public seeking to review records are directed to an electronic terminal in the clerks' office where they look at scans of paper records.

23. The overwhelming number of states and courts that have engaged in the technological transition have given access to their records online, via the Internet, through a court website. Even Ventura County Superior Court in California, a fully paper court and the focus of ten years of litigation over access, scans its paper records and puts them online through the court's website, for review by the press and public.

24. The list of states providing online access to the press is long. It includes, either on a statewide basis or through individual courts within the state: California, Louisiana, Massachusetts, Oklahoma, Tennessee, and Washington – in which several of the courts are predominantly paper-filing courts – as well as courts within Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North and South Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

25. In addition, all federal courts in the nation, including this Court, give journalists and the public online access to public court records via PACER.

26. What all these state and federal courts permit, while carrying on the tradition of access in today's modern technological age, is a review of the new civil actions and subsequent filings, whether in a major urban area or rural area. They provide this access to journalists and often to the public as well. Virginia, by contrast, allows this access only to a special class of its citizens, those with a law degree and Virginia bar number, while excluding the press and public. The access allowed to attorneys cannot, in practical terms, be matched by the press or public. No press organization can afford to send a reporter on a daily basis to each circuit court using the statewide Officer of the Court Remote Access system ("OCRA"). The system covers most of the Virginia circuit courts, *i.e.*, 93 out of 120, in an area of 30,600 square miles with 6 million residents. I directed the staff of CNS to prepare a map coloring in the counties covered by OCRA and, for ease of reference, attach that map hereto as Exhibit 1. No private news organization can cover that area on a daily basis. Such a task would require a small army of reporters and is, in practical terms, impossible.

#### **Access to New Complaints in Virginia**

27. I learned a lot about the Virginia circuit court system and the policies, practices, and customs of the Prince William Clerk's office during the *Courthouse News Serv. v. Schaefer* litigation, in which CNS challenged a policy that withheld access to newly filed civil complaints from the press and public until those complaints were docketed and scanned, a policy that regularly delayed access. In February 2020, after a four-day bench trial, Judge Henry Coke Morgan Jr. of the Eastern District of Virginia, Norfolk Division, issued a declaratory judgment finding the press and public enjoy a First Amendment right of access to newly filed civil complaints "contemporaneous with the filing of the complaint." *Id.*, 440 F. Supp. 3d 532 (E.D. Va. 2020). On June 24, 2021, the Fourth Circuit affirmed, emphasizing that contemporaneous access means

that newly filed complaints must be made available “as expeditiously as possible.” 2 F.4th 318, 328 (4th Cir. 2021).

28. Court filings at the Prince William Circuit Court go through several stages before they are available for viewing on public access terminals at the courthouse or remotely through the Internet via OCRA: (1) initial intake; (2) data entry into the Circuit Court Case Management System; and (3) scanning into the Case Imaging System. Subsequent filings are also made in paper form and must be scanned into the court record.

29. During the *Schaefer* litigation, I learned that once a complaint is scanned, it can be viewed on the courthouse public access terminals almost immediately and on OCRA shortly thereafter, generally within five minutes. The same is true for later filings.

30. I understand that OES is the administrator of the Virginia circuit court system, which includes OCRA.

31. CNS currently employs three reporters who are based in Prince William County, Norfolk, and Richmond and who cover the state and federal trial and appellate courts of Virginia, and who are supervised by CNS’ Southeast Bureau Chief, Ryan Abbott.

32. Of the 120 Virginia circuit courts, CNS is only able to send reporters to five of them on a daily basis. Thirteen other circuit courts are covered intermittently by sending one of the Virginia-based reporters to the court on a less than daily basis.

33. Due to the remote location of many of the remaining 102 courts and the expense of hiring numerous additional reporters to cover each of those courts, it is not possible to visit these courts at all, and most certainly not on a daily basis. I am thus resigned to having those remaining courts covered with docket information only. This is less than ideal because, without access to the actual complaint, CNS cannot fully inform its subscribers and the public regarding who has been hauled into the courts and why. This, in turn, suppresses the ability of lawyers, professors, law

students, news reporters, and readers of our New Litigation Reports and website to know about and freely discuss a new legal contest pending in a public court of law.

34. Having access to OCRA would assist my reporters in covering the courts in a timely manner. If CNS had access to OCRA, I would have the three Virginia reporters cover the 93 circuit courts that use OCRA on a daily basis by having them review the complaints filed in those courts and posted on OCRA. Our reporters could also follow newsworthy cases in remote regions of Virginia as they progress through their courts.

35. For example, the CNS reporter covering the Prince William Circuit Court in person on a daily basis could instead cover that court via OCRA to allow her to visit other courts daily that do not utilize OCRA. Currently, that reporter visits the Prince William Clerk's office on a daily basis to review all newly filed civil complaints made available since her visit the previous day. She then reports on newsworthy complaints by preparing original summaries for inclusion in the *Virginia Report*. In addition to covering the Prince William Circuit Court, she also covers the Fairfax County Circuit Court on a daily basis, and the circuit courts in Alexandria, Arlington, Fauquier, and Loudoun on a weekly basis.

36. I used to have a different reporter covering these courts, but due to staffing constraints, those courts are now covered by the Prince William reporter. If she had access to OCRA, she could visit the courts in Fairfax, Alexandria and Arlington (which don't utilize OCRA) in person on a daily basis, while also covering the Prince William Circuit Court on a daily basis via OCRA, ensuring the timely delivery of news in each of these courts.

### **Requests for OCRA Access**

37. In 2016, I instructed Mr. Abbott (CNS' Southeast Bureau Chief) to request OCRA access from circuit courts that used OCRA. Mr. Abbott requested such access from almost fifty Virginia circuit court clerks. Of those clerks who responded, they either denied OCRA subscriber

access outright or offered subscriber access on the condition that the person subscribing was a Virginia-barred attorney.

38. During her deposition in the *Schaefer* litigation, the Prince William Clerk testified that she was willing to provide OCRA access to CNS. Hearing that offer, I instructed Mr. Abbott and CNS' outside counsel at Bryan Cave Leighton Paisner to follow-up and request such access from the Prince William Clerk.

39. Upon my instruction, Mr. Abbott filled out an OCRA Subscriber Agreement and sent it to the Prince William Clerk. His application for access was rejected, however, because he did not include a Virginia Bar license number. *See* Complaint, Ex. 2. That number was not included because Mr. Abbott is not an attorney, and thus not a member of the Virginia bar, let alone any bar association.

40. I again instructed Mr. Abbott and CNS' outside counsel to follow-up regarding access to OCRA. In response, the Prince William Clerk created an OCRA Subscriber Agreement for non-attorneys. This Non-Attorney Subscriber Agreement increased the cost of OCRA from \$200 per year to \$1,200 per year, and imposed a variety of prohibitions on dissemination and publication of filings gathered via OCRA. *Compare* Complaint Ex. 1 *with* Complaint Ex. 4. It is my understanding that the prohibition on dissemination may be based on language in the Virginia Code, and it is my belief that a restriction on the dissemination of a public court filing, which this is, violates the First Amendment and is unconstitutional.

41. While I would be willing to have CNS pay \$200 per year for access to Prince William Circuit Court filings via OCRA, because the Prince William Clerk increased the subscription cost sixfold and restricted public dissemination of any reporting based on that access, I instructed Mr. Abbott and CNS' outside counsel to not complete the Non-Attorney Subscriber agreement.

42. I also instructed CNS' outside counsel to request OCRA access from OES. *See* Complaint Ex. 5. That request was denied. *See id.* Ex. 6.

**CNS is Not Seeking Access to Confidential Documents**

43. It is my understanding that the documents available on OCRA are not confidential. By the time the documents are available on OCRA, they have already gone through the three stages of processing – (1) intake; (2) data entry; and (3) scanning – and are also already available for public viewing at the courthouse.

44. To the extent that Defendants argue that limiting remote access to Virginia barred attorneys, their staff, and officers of the court protects private and confidential information, I can say that in my decades of reporting on millions of court cases, it is extremely rare that such information has appeared in published complaints. Most importantly, as pointed out by Judge Morgan during the *Schaefer* trial, the duty to keep personal identifiers out of filings is the filer's responsibility based on Virginia's court rules.

45. And, to the extent that Defendants argue that Virginia-barred attorneys can have access because they are governed by a Code of Ethics, I note that CNS reporters abide by ethical proscriptions precluding inclusion of such data in original news stories. The CNS manual makes clear that if confidential information is inadvertently released, CNS is not to disclose such information, and in training, reporters are instructed that the rule applies to personal identifiers. The ethical prescripts that CNS follows are universal among journalists.

46. And, as is the practice in the vast majority of courts that utilize electronic filing, if confidential information is improperly included by the filing party, a court clerk can subsequently remove the filing from public access based on a motion to seal or otherwise. In fact, on rare occasion, a case may be sealed by the court *after* filing, and upon request, we remove that case from our database.

**Importance of Remote Access**

47. A new civil filing is a regular source of news, and can involve a contest of great public interest. Obtaining access to those filings on a statewide basis through a remote access system is critical to public knowledge and understanding of the courts and the events and controversies that are resolved within them. The only way for reporters to provide the public with consistent and reliable information about new civil actions at the court is to have access to the court record.

48. The breadth and completeness of our news reports is a fundamental part of their value to subscribers and to readers of our website.

49. Cutting off access to new filings on a statewide basis effectively suppresses reporting on court matters, and turns them into secret tribunals where only those directly involved – and members of the bar – know of the events taking place and the documents filed in association with those events.

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

Executed in Pasadena, California on this 16th day of November 2021.



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William Girdner