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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

COURTHOUSE NEWS SERVICE, Plaintiff, v. SARA OMUNDSON, in her official capacity as Administrative Director of Idaho Courts, Defendant.	Case No: 1:21-cv-00305-DCN **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF COURTHOUSE NEWS SERVICE'S MOTION FOR PRELIMINARY INJUNCTION**

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MEMORANDUM OF LAW

I. INTRODUCTION

The commencement of a civil action is a matter of public record and interest. *Hauschulz v. State Dep't of Corr.*, 143 Idaho 462, 466 (Ct. App. 2006) ("The theory of [IRCP] Rule 3 is that a lawsuit is a matter of public record"); *Courthouse News Serv. ("CNS") v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) ("*Planet III*") ("The First Amendment right of access exists [ ] to enable free and informed discussion about important issues of the day and governmental affairs.").

The information contained in civil complaints is critical to "informed public discussion of ongoing judicial proceedings." *CNS v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) ("*Planet I*"). "A complaint, which initiates judicial proceedings, is the cornerstone of every case." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016). But news about complaints has a short shelf life. Indeed, the first line of the Ninth Circuit's controlling opinion in this case, *Planet III*, states: "The peculiar value of news is in the spreading of it while it is fresh." 947 F.3d at 585 (quoting *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918)).

Traditionally, reporters covering the courts visited state and federal courthouses throughout America to view and report on the days' newsworthy civil complaints. To facilitate this reporting, clerks offices traditionally placed newly-filed civil complaints into a media box, bin or cart shortly after they were received at the intake counter, thereby allowing reporters to see new complaints on the day they were filed.

With the shift from paper to e-filing that has been taking place for more than a decade, many courts continued the tradition of providing timely, contemporaneous access to new complaints that existed in the paper environment by providing access to new e-filed complaints when they are received by the court (*i.e.,* when the complaints cross the electronic equivalent of the traditional intake counter). The vast majority of federal district courts – including this Court –

maintain that tradition by making new e-filed civil complaints available to the public shortly after they are received, thereby allowing the press to report on them on the day they are filed.

The District Courts for the State of Idaho ("Idaho Courts") took a different approach when they converted to e-filing. The Idaho Courts receive new e-filed civil complaints into an e-filing system in the same manner as other e-filing courts, but unlike other courts that make them available to the press upon receipt the Idaho Courts withhold access to new complaints until after court clerks process and "accept" them. While awaiting clerical processing – which can take days – new civil complaints are concealed from the public and effectively sealed, despite the fact that a new action of public interest has been commenced.

Consequently, delays in access to new civil complaints at the Idaho Courts are ongoing and systemic. Most recently, during the months of September and October 2021, Courthouse News was able to access only approximately ***42%*** of the new e-filed complaints on the day they were filed, with access to approximately ***43%*** of the complaints delayed by one court day, and access to approximately ***15%*** of them delayed by two court days or longer.

These delays are unnecessary and easily be avoided. Defendant's office (Idaho's Administrative Office of the Courts, or "AOC") oversees and maintains the Idaho Courts' statewide e-filing system. The Idaho Courts lease e-filing software from Tyler Technologies, Inc. ("Tyler"), which figured out years ago how to provide press access to new e-filed complaints while they sit in a queue awaiting attention from court staff. Tyler has implemented this simple access functionality – which it calls a "press review queue" – for numerous other court clients across the nation. Defendant could use the press review queue to provide timely access to new e-filed civil complaints at the Idaho Courts, but she chooses not to. Instead, she enforces a "'no-

access-before-process' policy" in spite of the pervasive access delays it causes. Hence this First Amendment and 42 U.S.C. § 1983 action.

Defendant has, at her fingertips, a solution to the current access problems. This alone prevents Defendant from meeting her burden of justifying her policy under constitutional scrutiny, and Courthouse News can thus show a likelihood of success on the merits of its claim. The other factors courts consider when evaluating preliminary injunctions, in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), also favor preliminary injunctive relief here.

II. FACTUAL BACKGROUND

A. About Courthouse News Service

Plaintiff Courthouse News Service ("Courthouse News") is a nationwide news service founded more than 30 years ago out of a belief that a great deal of news about civil litigation went unreported by traditional news media, a trend that has only increased in the last decade. Declaration of William Girdner ("Girdner Decl."), ¶ 4. Courthouse News currently employs approximately 240 people, most of them editors and reporters, covering state and federal trial and appellate courts in all 50 states in the United States. *Id*.

Courthouse News offers a variety of publications. Its subscriber publications include its New Litigation Reports, which contain original, staff-written reports on general civil litigation in a geographic region that are e-mailed to subscribers in the early evening on every court day. *Id.* ¶ 5. Courthouse News also offers a news website, courthousenews.com, which is free to the public and read daily by roughly 30,000 people. *Id.* ¶ 8.

Courthouse News has more than 2,300 subscribers nationwide, including lawyers, law firms, other media, law schools, libraries, nonprofits, government entities, and businesses. *Id*. ¶ 7. Regional subscribers include the City of Boise – Office of City Attorney, *Salt Lake Tribune*, and Weber State University. *Id*. It has many subscribing media outlets, from the West (e.g.,

Twitter, *The Los Angeles Times*, *The San Jose Mercury News*), to the East (e.g., *The Wall Street Journal*, *The Boston Globe*), and in between (e.g., *Las Vegas Review Journal*, *Portland Business Journal, The Dallas Morning News*, *St. Paul Business Journal*, CNN), *id*., putting Courthouse News in the position of a pool reporter for news about civil litigation. Courthouse News' reporting has been credited as the source for stories by many news outlets, including newspapers (e.g., *The New York Times*, *The Wall Street Journal*); magazines (e.g., *New York Magazine*, *U.S. News and World Report*); television news (e.g., ABC News, Fox News); online-only publications (e.g., The Daily Beast, Politico); and radio (e.g., NPR). *Id*. ¶ 9.

The *New Litigation Report* published by Courthouse News that covers the Idaho courts is titled *The Big Sky Report,* written by Boise-based reporter Cathy Valenti. *Id*. ¶¶ 5, 10. The *Big Sky Report* covers civil complaints filed in Idaho, Montana and Wyoming, focusing on actions involving businesses and public entities. *Id.* ¶ 10. Courthouse News does not cover family and probate filings (among others), and does not review or report on civil complaints that are statutorily confidential or accompanied by a motion to seal. *Id*.

To prepare the New Litigation Reports and identify new cases that may warrant a website article, Courthouse News' reporters have traditionally visited their assigned court towards the end of the court day and reviewed the new complaints filed that day. *Id.* ¶ 13. Traditionally, with paper complaints, there was a two-step process in which new civil complaints were first received and filed by a clerk at the intake counter, and then subsequently processed or docketed behind the counter. *Id*. ¶ 15. The press could traditionally access new civil complaints after court clerks received them at the intake counter, and before they were subsequently processed or docketed, thus allowing the press to see new civil complaints on the day they were filed. *Id*.

Given the fast-moving nature of news, any delay in the ability of a reporter to review new complaints necessarily holds up the reporting on those actions for subscribers and readers. A delay of even a single day means that news is delayed by at least one full news cycle. Especially in today's digital age, the newsworthiness of new civil actions deteriorates quickly with time. Civil actions not reported when they are received by a court are effectively suppressed, less likely to prompt news coverage, and thus less likely to come to the public's attention as the days pass. Girdner Decl. ¶¶ 11, 12.

B. The Idaho Courts' Adoption of the Tyler Odyssey e-Filing Software Suite

The Idaho Courts began moving to e-filing in 2015 through their adoption of the Tyler Odyssey software suite, branded for the Idaho Courts as "iCourt." *Id.* at ¶¶ 19-20. The iCourt website states "the proven case management software known as Odyssey by Tyler Technologies was selected as the most capable and cost effective system" following "an extensive RFP system" and touts Tyler as "a proven software company with 10 statewide court implementations and over 500 county court implementations across the country." *Id.* ¶ 23, Ex. 2. It identifies the "specific benefits" offered by "the iCourt solution" as including the ability to "[a]utomatically file documents into the electronic court case record" and "provid[ing] 24/7 access to Court records for the public, attorneys, commercial entities and judicial partners." *Id.* ¶ 24, Ex. 2. The Idaho Courts completed the statewide implementation of Tyler Odyssey (aka iCourt) in 2018. *Id.*

Like the e-filing systems used by the federal district courts and other state courts, the Tyler Odyssey system "[e]nable[s] parties to submit electronic documents to Idaho's Courts, 24/7/365 from anywhere." *Id.* The initial intake tasks that were once handled by court clerks at the intake counter, such as verifying the correct court location and accepting payment, are now handled automatically by the e-filing software. *Id.*; *see also* Girdner Decl. at ¶¶ 26, 42.

Additionally, much of the data entry historically performed by court clerks as part of post-filing docketing in paper courts is now entered by the filer before he or she submits the e-filing. *Id.*

C. Press Access to New E-Filed Civil Complaints at Courts Using Tyler Odyssey

Tyler provides courts using its Odyssey software suite with several options for making new e-filed civil complaints available to the press and public. Girdner Decl. ¶ 27. The default configuration for the Tyler Odyssey system withholds new e-filed civil complaints from the press and public until after court clerks manually process and "accept" them. *Id.*, Ex. 4. Unfortunately, delays that impede news coverage inevitably result when clerks withhold access to new filings until after they complete administrative tasks, such as processing and "acceptance." *Id.* at ¶¶ 17, 27. These delays between when the court receives a new complaint and when it is processed and "accepted" are the subject of this lawsuit. *Id.* ¶ 17.

As delays caused by the default configuration cropped up at different courts using the Odyssey system, Tyler developed a solution that allows credentialed users to view complaints as they are submitted to the court – the press review queue. *Id.* ¶ 29. According to Tyler, the press review queue "allow[s] registered electronic filing users with a pre-designated press reviewer role to access court documents via a designated web page as soon as the documents are electronically filed." *Id.* ¶ 33, Ex. 6. Newly e-filed documents in the press review queue can be viewed even though they have not yet been processed and "accepted" or "rejected" by court staff. *Id.* As more courts chose to configure Odyssey with this press review queue, Tyler began marketing the functionality as an optional Odyssey feature. *Id.* ¶¶ 33, Ex. 7. Although Tyler materials refer to the press review queue as "available for purchase," Tyler has implemented this functionality at courts for free. *Id.* ¶ 36, Ex. 10. Numerous courts in California and Georgia use

the press review queue with their Tyler Odyssey e-filing systems as a means of providing timely press access to new civil complaints.[1] Girdner Decl. ¶ 31.

Alternatively, the Tyler Odyssey e-filing systems can be modified to operate like the federal district courts, i.e., the Odyssey system accepts new e-filings automatically rather than having a clerk manually process and "accept" them. *Id*. ¶¶ 29, 39-40, Exs. 11 & 12. The Nevada state courts, which use the Tyler Odyssey system, operate in this manner. *Id*. Like new complaints e-filed with this Court, new e-filed complaints filed in the Nevada state courts are automatically "accepted" and made available to the public moments after they are filed.[2] *See id*.

Despite the availability of the press review queue or auto-accept configurations of Odyssey, Defendant and the AOC have retained the default Odyssey configuration, resulting in pervasive delays in access to new e-filed civil complaints.

D. Delays In Access to New E-Filed Civil Complaints At The Idaho Courts

In Idaho currently, Courthouse News' reporter, Ms. Valenti, reviews new e-filed civil complaints, after they are processed, via computer terminals located at the Ada County courthouse, from where she reports each day until she is required to leave at 5:00 p.m. Declaration of Cathy Valenti ("Valenti Decl.") ¶¶ 3-4. After she leaves the courthouse Ms. Valenti continues looking for new cases remotely online via the https://mycourts.idaho.gov website. However, only docket information (e.g., case name, case number, filing date) is available remotely online. *Id*. There currently is no way for Ms. Valenti to see new complaints as

[1] Other courts using different e-filing systems provide their own versions of press review queues, including courts using homegrown software (e.g. statewide in New York) and courts using software provided by third party vendors, such as Granicus (statewide in Arizona) and Journal Technologies (Los Angeles and Riverside counties, California). Girdner Decl. ¶ 37.

[2] Other "auto-accept" courts that make new e-filed complaints available upon receipt include most federal district courts using the PACER/ECF system, and statewide court systems in Utah, Hawaii, Connecticut, and Alabama. Girdner Decl. ¶ 47.

they are received by the Idaho Courts, and without the delays resulting from processing, either online or in person at courthouses. Valenti Decl. ¶¶ 3-4.

Courthouse News tracked and compiled access data for approximately 977 new civil complaints e-filed with the Idaho Courts during September and October 2021, noting delays between when new complaints were received by the Court for filing and when Courthouse News' reporter was able to see them. *Id.* ¶¶ 7-8. Courthouse News was able to access only approximately ***42%*** of the new e-filed complaints on the day they were filed, with access to approximately ***43%*** of the complaints delayed by one court day, and access to approximately ***15%*** of them delayed by two court days or longer. *Id*. ¶ 8, Ex. 1.

Notable examples of newsworthy complaints for which access was delayed over the course of this year include an action by a high school graduate working as a page in the Idaho State Legislature alleging sexual assault by a 39-year-old legislator (Ada District Court, CV01-21-13641, delayed by one calendar day), an action by a bitcoin operator against the Idaho Department of Finance challenging financial regulations (Ada District Court, CV01-21-13391, delayed by four calendar days), an action arising from a fatal collision of two planes above Lake Coeur d'Alene (Kootenai District Court, CV28-21-4157, delayed by one week), and an action by boaters challenging a county no-wake zone on Spokane River (Kootenai County, CV28-21-4053, delayed more than two weeks). *Id*. ¶ 9, Exs. 2-5.

These delays are not surprising. Busy clerks are not always able to manually process and "accept" complaints as quickly as they would like, and vacations and illness can lead to staffing fluctuations that further affect processing time. Girdner Decl., ¶ 17. Meanwhile, complaints sit in an electronic queue awaiting manual docket entry by court staff. On the other hand, courts using Tyler press review queues are capable of providing timely access without exception. *Id*. at ¶ 32.

E. Attempts By Courthouse News To Resolve This Matter Without Litigation

In 2016, when the Idaho Courts were moving to e-filing, Courthouse News asked then Ada County District Clerk, Christopher Rich, to preserve traditional access to new complaints via a press review queue. Girdner Decl. ¶ 44. In response, Mr. Rich wrote to Interim Administrative Director of Idaho Courts, Justice Linda Copple Trout, explaining that the Ada County court provided Courthouse News with "same day access to the paper record," and that Courthouse News "is [now] seeking same day access to the digital records […] via a public terminal that would have access to a queue specifically designed for this purpose." *Id.* ¶ 45. Mr. Rich concluded by referring Courthouse News' request to the office of the Administrative Director of Courts, stating: "As Clerk, I am not in a position to assist [Courthouse News]. Hence this introduction to the parties that can resolve the matter." *Id.* Subsequent communications did not result in a clear "yes" or "no" to Courthouse News' request. *Id.*

Courthouse News renewed its request for contemporaneous access to new e-filed civil complaints through a Press Review Queue in June 2021. *Id*. ¶ 46. In response, Defendant did not dispute that there were delays between when new complaints were received by the court and when they were "accepted" by court clerks, but she claimed that her review of court records "did not find a statewide or Ada county delay that was currently ongoing and persistent." *Id.* ¶ 47. She concluded by stating: "I do not intend to request the addition of a public access system for documents that have been submitted to Tyler's File and Serve system, but have not yet been accepted for filing by the court clerks' offices."[3] *Id*.

[3] Defendant has argued to this Court that she "does not have the authority or control alleged by CNS in its Complaint." Dkt. 7-1 at 6. However, the Ada County clerk took the view that she did, Girdner Decl. ¶ 45, and Defendant took the position with Courthouse News that she "do[es] not intend" to request a solution from Tyler. *Id*. at ¶ 47.

III. ARGUMENT

A. Courthouse News Can Show A Probability Of Success On The Merits And The Other *Winter* Factors Favor Injunctive Relief In This First Amendment Case

"To warrant injunctive relief, a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). But because this is a First Amendment case, principles of First Amendment law must also guide this Court's analysis, and first among these is that "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc) (reversing district court denial of preliminary injunction where City failed to show restriction on speech was narrowly tailored).

Consequently, "[w]hile [plaintiff] has the general burden of establishing the elements necessary to obtain injunctive relief, the [government] has the burden of justifying the restriction on speech." *Klein*, 584 F.3d at 1201. This is no less true in this "free expression case," *Planet III*, 947 F.3d at 587, which is evaluated according to the framework articulated by the Supreme Court in *Press-Enterprise Co. v. Sup. Ct.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). *Id*. at 590-596; *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012) (on motion for preliminary injunction in First Amendment right of access case, burden of proof was on government to show, pursuant to *Press-Enterprise II*, an "overriding interest in the viewing restrictions" and that the "restrictions are narrowly tailored to serve that interest").

Thus, the threshold question here is whether Defendant can overcome "the presumption of access [that] arises under *Press-Enterprise II*," which may be restricted "only if 'closure is

essential to preserve higher values and is narrowly tailored to serve those interests.'" *Planet III*, 947 F.3d at 595. If Defendant cannot meet that burden of proof, then Courthouse News has shown a likelihood of success on the merits. As the other *Winter* factors similarly favor injunctive relief, and Ninth Circuit "caselaw clearly favors granting preliminary injunctions to a plaintiff … who is likely to succeed on the merits of his First Amendment claim," *Klein*, 584 F.3d at 1208, a preliminary injunction should issue.

1. *Planet III* Establishes the Two-Step Analysis This Court Must Apply to the Access Delays at the Idaho Courts

Based on the leading Supreme Court authority on court record access, *Press-Enterprise II*, the Ninth Circuit has established the two-step framework for evaluating claims based on delayed access to civil complaints. The first question is whether there is a First Amendment right to the documents at issue "and, relatedly, at what point in time that right attaches." *Planet III*, 947 F.3d at 590. Once a First Amendment right of access is established, the second step is an examination of the delays and the interests offered to justify them. *Id*. at 594-95 ("Once we have determined that a qualified First Amendment right of access to newly filed nonconfidential civil complaints exists, a presumption of access arises under *Press-Enterprise II* that may be restricted only if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests'") (quoting *Press-Enterprise II*, 478 U.S. at 13–14).

a. *Planet III* Conclusively Resolved the First Part of the *Press-Enterprise II* Test By Holding A First Amendment Right of Access Attaches To New Complaints When They Are Received By The Court

In *Planet III*, the Ninth Circuit found that *Press-Enterprise II* framework applied to a California court clerk's policy and practice of withholding access to civil complaints until after administrative processing, resulting in access delays. *Planet III*, 947 F.3d at 591-92, 595-96.

Planet III was an appeal of a summary judgment decision that considered whether the

First Amendment right attaches "when the complaint is received by the court, or instead after a complaint has been sufficiently 'processed.'" *CNS v. Planet*, 2016 WL 4157210, *12 (C.D. Cal. May 26, 2016) ("*Planet MSJ Order*"). The district court concluded that "the qualified right of timely access must arise the moment a complaint is received by the court, rather than after 'processing' is completed." *Id*. at 13. After all, "it would make little sense to restrict the media's ability to monitor until after court personnel have had an opportunity to delay providing access to the requested complaints." *Id.*

The Ninth Circuit framed Courthouse News' position as "urg[ing] us to affirm the district court's conclusion that the First Amendment creates a right of access that arises upon the court's receipt of the complaint." *Planet III*, 947 F.3d at 591. It characterized the district court's holding as "the right to timely access attaches at the moment of filing, i.e., when the complaint is received by the court," *Planet III*, 947 F.3d at 588, and agreed with it: "[W]e conclude, as did the district court, that the qualified right of access to nonconfidential civil complaints arises when they are filed with the court …." *Id*. at 594.

Moving on to the second stage of the *Press-Enterprise II* framework, the court measured delays from the moment of receipt, *see id*. at 597-98, and concluded that defendant's policy of delaying access until after court staff completed processing complaints failed to satisfy the requisite rigorous First Amendment scrutiny. *Id*. at 596-98. On remand, the district court issued an amended judgment declaring that the "qualified right of timely access attaches when new complaints are received by a court, rather than after they are 'processed' – *i.e*., rather than after the performance of administrative tasks that follow the court's receipt of a new complaint," and enjoining the defendant from "refusing … to make [newly filed civil] complaints and exhibits

accessible to the public and press in a timely manner from the moment they are received by the court ….” *CNS v. Planet*, 2021 WL 1605216, *1 (C.D. Cal. Jan. 26, 2021).

Planet III thus provides the definitive analysis and conclusive authority for the first step of the *Press-Enterprise II* test: there is a qualified First Amendment right to access new civil complaints, and it “attaches at the moment of filing, i.e., when the complaint is received by the court.” [4] *Planet III*, 947 F.3d at 588.

Defendant has nevertheless taken the position that the Ninth Circuit meant something other than “receipt” when it held the First Amendment right of access attaches when they are filed with the court. Dkt. 12 at 6. If the right of access did not attach on receipt then new complaints would be beyond the reach of the First Amendment until some later, unfixed times, such as after court staff have completed clerical processing and “accepted” them, no matter how long that takes. Not only does this position ignore the plain language of *Planet III*, but allowing clerks to avoid constitutional scrutiny until after they have already withheld access to new complaints for manual processing and “acceptance” is antithetical to the principles underlying the right of access protected by the First Amendment. *See, e.g., Planet III*, 947 F.3d at 590-594 (discussing reasons why “experience” and “logic” prongs of *Press-Enterprise II* test support right of access to new civil complaints).[5]

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[4] The Ninth Circuit’s statement that the qualified First Amendment right of access “does not entitle the press to immediate access” to new complaints,” *Planet III*, 947 F.3d at 585, does not change the conclusion that the right of access attaches when new complaints are received by the court. Rather, it underscores the ***qualified*** nature of the right. While there may not be a *per se* right of access that automatically entitles the press to access to new complaints when they are received, a ***qualified*** right of access attaches that may be overcome only if courts satisfy the test set forth in *Planet III*. Id. at 594-95. Defendant has the burden of demonstrating how its interests “would be impaired by immediate access.” *Id*. at 596.

[5] The Ninth Circuit’s synonymous use of “filed” and “received” comports with Idaho law. *See In re Dunn’s Estate*, 45 Idaho 23 (1927) (“The filing of a document [] consist[s] in placing it in the proper official custody by the party charged with the duty of filing it, and the

b. Defendant Cannot Meet Her Burden of Justifying Delays In Access to Civil Complaints Under the Second Part of the *Press-Enterprise II* Test

The presumption of access that arises under *Press-Enterprise II* may be restricted "only if 'closure is essential to preserve higher values and is narrowly tailored to serve those interests.'" *Planet III*, 947 F.3d at 595. Defendant cannot satisfy this burden.

Planet III determined that the California clerk's "no-access-before-process policy," *id*. at 587, did not survive constitutional scrutiny because the clerk failed to "demonstrate … that there is a 'substantial probability' that its [asserted] interest[s]" to support withholding access to new civil complaints until after administrative processing "would be impaired by immediate access, and … that no reasonable alternatives exist to 'adequately protect' that government interest." *Id*. at 596-600 (citing and quoting *Press-Enterprise II*, 478 U.S. at 14). Defendant similarly cannot justify her policy of withholding access to new civil complaints filed in the Idaho Courts until after they are processed and "accepted."

Prior to commencing this action, Courthouse News wrote to Defendant to address the ongoing and persistent delays in access to new civil complaint. Girdner Decl. ¶ 46. In response, Defendant did not deny the existence of delays resulting from clerical processing and "acceptance," nor did she attempt to justify them. *Id.* ¶ 47, Ex. 16. Instead, Defendant denied the delays were ongoing and persistent, and claimed that for ***all*** court documents (not just complaints) the average statewide time from submission to processing and "acceptance" was 14 hours. *Id*. Putting aside Defendant's failure to justify the delays she acknowledged, she evidently failed to investigate the extent of access delays for civil complaints – the documents at issue in

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receiving of it by the officer, to be kept on file."); *accord, e.g., Stull v. Hoke*, 326 Or. 72, 78-79 (1997) ("filing of a document 'occur[s] when [the] document is given to a clerk with the intention that it be filed.'"); *M-11 Ltd. P'ship v. Gommard,* 235 Ariz. 166, 168 (Ct. App. 2014) (documents delivered by mail are considered filed as of date of receipt).

this case. Courthouse News has done so: during the two months immediately preceding the filing of this motion, approximately ***43%*** of new civil complaints were delayed by one court day, and approximately ***15%*** were delayed ***by two court days or longer***.

Defendant cannot meet her burden of justifying these delays because the Tyler Odyssey e-filing software suite used by the Idaho Courts offers at least two solutions for eliminating the delays in access: (1) the press review queue feature, which is used by numerous courts across the country; and (2) the auto-accept configuration used by the Nevada state courts. *See* Girdner Decl. at ¶¶ 29-43. These solutions are less restrictive on access because they do not withhold new civil complaints from the press or public until after court clerks manually process and "accept" them. *Id*. They are also readily available to Defendant because they are existing features of the Tyler Odyssey software suite used by the Idaho Courts, and their efficacy is already proven by the numerous courts already using them with their Tyler Odyssey systems.[6] *Id*.

Defendant need only ask Tyler to implement one of these solutions, both of which provide timely, constitutional access to new civil complaints. Instead, Defendant adheres to the version of Odyssey that results in unconstitutional delays. Defendant cannot satisfy her burden of justifying her current practice under constitutional scrutiny while refusing less restrictive and readily available alternatives.

2. Federal Case Law Leaves No Doubt That Defendant's No-Access-Before-Process Policy Cannot Survive Constitutional Scrutiny

Although *Planet III* is the controlling case here, it was not the first to rule that a state court administrative official could not delay access to new complaints for processing. In fact, the

[6] Curiously, Defendant claims "CNS seemingly asks the Court to direct Idaho to make a contracting decision with a for profit business entity for CNS's benefit." Dkt. 7-1 at 7. The Idaho Courts already made that decision when they entered into their "partnership" with Tyler to use the Odyssey software suite. Girdner Decl. at ¶ 23, Ex. 2. Courthouse News wants Defendant to cease using version that results in unconstitutional delays in access.

Ninth Circuit's final word in the decade-long *Planet* case followed a string of rulings issued by federal judges dating back to 2009. Along the way, each judge looked back to the earlier rulings before striking down a no-access-before-process rule of a state court official. *See CNS v. Jackson*, 2009 WL 2163609, at *5 (S.D. Tex. July 20, 2009) (order of preliminary injunction); *Planet MSJ Order*, 2016 WL 4157354, *19, *aff'd in part* in *Planet III*;[7] *CNS v. Tingling,* 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) (hearing on motion for preliminary injunction) and 2016 WL 8505086 (S.D.N.Y. Dec. 16, 2016) (order of preliminary injunction); *CNS v. Brown*, 2018 WL 318485, *6 (N.D. Ill. Jan. 8, 2018) (order on preliminary injunction), *rev'd on other grounds*, 908 F.3d 1063 (7th Cir. 2018); *CNS v. Schaefer*, 440 F.Supp.3d 532, 562 (E.D. Va. 2020), aff'd, 2 F.4th 318 (4th Cir. 2021) (affirming declaratory judgment that clerks' policies violated CNS' "qualified right of access to newly-filed civil complaints contemporaneous with the filing of the complaint").

It started with the *Jackson* case in Texas, after a newly elected Harris County clerk came into office on the slogan, "Get on line and not in line." *Jackson*, 2009 WL 2163609, *2 n.1. Once in office, the clerk required that reporters review new civil complaints after the "indexing and verification process" had been completed. *Id.* *2. The first federal judge to examine a court clerk's no-access-before-process policy applied to new complaints, Judge Melinda Harmon followed the analytical steps of *Press Enterprise II* and, in 2009, enjoined the clerk, finding that he failed to demonstrate his administrative policies were narrowly tailored. *Id*. at *3-4.

Two years later in 2011, after unsuccessfully trying to convince the clerk at the Ventura County Superior Court in California to abandon his similar no-access-until-processing policy,

[7] The Ninth Circuit found that a separate scanning policy passed constitutional muster, but the circumstances of the decision were limited to a paper-filing court scanning documents during a fiscal crisis. *Planet III*, 947 F.3d at 598-99.

Courthouse News filed the *Planet* case in the Central District of California. In 2016, after the Ninth Circuit twice reversed the initially-assigned judge's dismissals of that case, *Planet I*, 750 F.3d at 793 (reversing dismissal on federal abstention grounds), *CNS v. Planet*, 614 Fed. Appx. 912, 915 (9th Cir. 2015) ("*Planet II*") (reversing dismissal for failure to state a claim, with instructions to the clerk to reassign case to new judge), Courthouse News moved for summary judgment. Judge S. James Otero's summary judgment order followed *Press-Enterprise II*'s analytical framework, noting Judge Harmon's prior decision in *Jackson.*

Later that same year, in December 2016, Judge Edgardo Ramos from the Southern District of New York looked to the district court decisions in both *Jackson* and *Planet* before enjoining the Manhattan's state court clerk's no-access-before-process policy. *Tingling*, 2016 WL 8739010 (ruling that "[a]s in *Planet* and *Jackson*, this Court finds that the clerk has failed to meet its burden of demonstrating that its policy of refusing to provide the public and press with access to newly filed complaints until after they are reviewed and logged is either essential to preserve higher values or is narrowly tailored to serve that interest); 2016 WL 8505086 *1 (order in *Tingling* granting motion to preliminarily "enjoin Defendant from denying access to newly filed civil complaints until after clerical processing and to require Defendant to provide Plaintiff access to those documents in a timely manner upon receipt"); *see also Girdner Decl.* ¶ 51.

In 2018, Judge Matthew Kennelly of the Northern District of Illinois issued a preliminary injunction ruling against the Chicago clerk in *Brown*.[8] After discussing the previous *Jackson*, *Planet*, and *Tingling* decisions, Judge Kennelly "conclude[d] that even the supposedly 'minor' delays in access… cannot be so easily dismissed" and that "[c]onsistent with the approach taken

[8] Judge Kennelly was later reversed by the Seventh Circuit, 908 F.3d 1063 (2018), but that decision was based on federal abstention, not on the merits. The Ninth Circuit rejected abstention in *Planet I*, and confirmed its "disagree[ment] with the Seventh Circuit's decision to abstain" in *Planet III*. 947 F.3d at 591 n.4; *accord CNS v. Schaefer*, 2 F.4th 318, 324-25 (4th Cir. 2021).

by the courts in *Planet* and *Tingling*, the Court concludes that a policy of delaying access to e-filed complaints until after they are officially accepted or rejected or otherwise processed by the Clerk violates the First Amendment right of timely access to those complaints, unless the Clerk can demonstrate that the policy is narrowly tailored and necessary to preserve higher values." *Brown*, 2018 WL 318485, *5. Judge Kennelly went on to find that the Chicago clerk "made no effort to explain why it is not feasible for her to adopt any one of the various methods that numerous other state and federal courts currently use to provide public access to e-filed complaints before they have been fully processed," *id*. *6, and issued a preliminary injunction against the Chicago clerk, giving her 30 days "to implement a system that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office." *Id*. *7.

In 2018, Courthouse News filed the *Schaefer* case in the Eastern District of Virginia. Two years later, following a four-day bench trial, Judge Henry Coke Morgan Jr. cited *Jackson, Tingling*, *Brown* and *Planet III* before entering a judgment against two Virginia clerks who were delaying access to new complaints until after they were "fully indexed and docketed." *Schaefer*, 440 F. Supp. 3d 532, 560. Like the federal judges before him, Judge Morgan followed *Press-Enterprise II* and found that "[d]efendants have failed to prove that their practices and customs that lead to the substantial delays in this case were narrowly tailored to serve those government interests." *Id.* The Fourth Circuit agreed and affirmed. *Schaefer*, 2 F. 4th at 328-329.[9]

[9] Other recent access cases do not dictate a different result. In *CNS v. Gilmer*, Courthouse News has appealed an order dismissal the case on abstention grounds that merely followed *Brown*. 2021 WL 243914, *8 (E.D. Mo. June 15, 2021). In *CNS v. New Mexico AOC*, the defendants have appealed a district court order granting Courthouse News' motion for preliminary injunction, and rejecting their abstention argument and argument that the right of access does not attach until complaints are "accepted." 2021 WL 4710644 (D.N.M. Oct. 8, 2021). In *CNS v. Glessner*, Courthouse News has appealed a district court order granting a motion to dismiss on grounds that were erroneous in that case and foreclosed in this case by controlling Ninth Circuit precedent (*Planet III*). 2021 WL 3024286 (D. Maine July 16, 2021).

B. The Other *Winter* Factors Favor Injunctive Relief

Not only has Courthouse News shown a likelihood of success on the merits of its action, but the other *Winter* factors also favor the granting of injunctive relief.

The Ninth Circuit "follow[s] a long line of precedent establishing that '[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury,'" *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011), and that rule is fully applicable here. Defendant cannot meaningfully dispute that, "'[t]he peculiar value of news is in the spreading of its while it is fresh,'" *Planet III*, 947 F.3d at 585 (quoting *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918)), and that "the public cannot discuss the content of … complaints about which it has no information." *Planet I*, 750 F.3d at 788. Withholding "timely access to newly filed complaints" thus "stifles the 'free discussion of governmental affairs' that the First Amendment exists to protect." *Planet I*, 750 F.3d at 787-88; *and Planet II* 614 Fed. App'x at 914; *accord Jacobsen v. U.S. Postal Service*, 812 F.3d 1151, 1154 (9th Cir. 1987) ("Where the First Amendment right of freedom of the press is at issue, the prevention of access to a public forum is, each day, an irreparable injury: the ephemeral opportunity to present one's paper to an interested audience is lost and the next day's opportunity is different.").

The balance of equities and public interest also favor an injunction. The solutions offered by Tyler to avoid delayed access to new civil complaints already exist for the e-filing system used by the Idaho Courts. Allowing access through one of these solutions would merely put the Idaho Courts on par with other courts using Tyler press review queues or equivalent solutions. On the other side of the scale, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *A.P. v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012). The values underlying First Amendment access rights "hold especially true where, as here, the impetus for CNS's efforts to obtain newly filed

complaints is its interest in timely reporting on their contents." *Planet III*, 947 F.3d at 590.

C. Any Injunction Bond Should Be Nominal or Waived

As for the bond under Federal Rule of Civil Procedure 65(c), where the enjoined party is unlikely to suffer monetary damages or harm, it is well within the Court's discretion not to impose a bond, or set it for a nominal amount. *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2013) (the rule "invests the district court 'with discretion as to the amount of security provided, if any'"). The requested injunction will require Defendant to do nothing more than provide access through a pre-existing solution offered by its e-filing partner, Tyler. In *Jackson*, the court ordered only "a nominal bond of $1,000," 2009 WL 2163609, at *5, and in *Tingling* the court set the bond "in the amount of $5,000." Girdner Dec. ¶ 51, Ex. 17 at 53. The Court should exercise its discretion not to impose a bond, or set a nominal bond. *See Tradition Club Assocs. v. Tradition Golf Club*, 2008 WL 5352927 *6 (C.D. Cal. 2008) ("district court may dispense with the filing of a bond when [] there is no realistic likelihood of harm to the defendant").

IV. CONCLUSION

The Tyler Odyssey e-filing system used by the Idaho Courts can provide timely access to new civil complaints. Defendant nevertheless adheres to the practice of withholding access until after clerical processing, resulting in persistent delays. Technology should illuminate the halls of government, not darken them, and Defendant should not be allowed to maintain her practice of withholding access to new complaints until after processing given the existence of less restrictive alternatives. The Court should grant the preliminary injunction.

DATED this 15th day of November, 2021.

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