

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

COURTHOUSE NEWS SERVICE,)	
)	
Plaintiff,)	
)	
v.)	
)	
VELVA L. PRICE, in her official capacity as)	
Travis County District Clerk,)	Civil Action No. 20-1260
)	
Defendant.)	
)	

**ORIGINAL COMPLAINT FOR
PERMANENT INJUNCTIVE AND DECLARATORY RELIEF**

COMES NOW Plaintiff Courthouse News Service (“Courthouse News”), by and through its undersigned attorneys, and for its *Original Complaint for Permanent Injunctive and Declaratory Relief*, would show the Court as follows:

I. INTRODUCTION & BACKGROUND

1. Plaintiff Courthouse News brings this action seeking injunctive and declaratory relief against the above-named defendant, in her official capacity, to restrain the deprivation under color of state law of Courthouse News’ rights, privileges, and immunities under 42 U.S.C. § 1983 *et seq.*, the United States Constitution, federal common law, and the Texas Constitution.

2. Courthouse News challenges Defendant’s policy and practice of withholding public and press access to new civil petitions electronically filed (“e-filed”) with the Travis County District Clerk (“District Clerk”), which represent public filings with the Travis County District Courts, until after administrative processing by District Clerk staff. This policy and practice results in regular and pervasive delays in the ability of Courthouse News and others to see, read, and report on those petitions, including many recent weeks in which the District Clerk

withheld access to 75% or more of new e-filed civil petitions for one to three days or more. These delays are unnecessary and easily avoidable, as demonstrated by the timely access provided by federal and many state courts across the country, which allow review of new petitions upon receipt through means readily available to the District Clerk.

A. First Principles of Court Records Access

3. The U.S. Supreme Court has long recognized that the media function as “surrogates for the public,” which today acquires information about court proceedings “chiefly through the print and electronic media.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Recognizing the unique role of the media, the U.S. Supreme Court has noted, for example, in the context of courtroom proceedings, that although “media representatives enjoy the same rights of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.” *Id.* at 573. For the same reason, it is entirely appropriate to provide members of the news media who visit the court every day with procedures for obtaining timely access to new filings for dissemination to the general public, so that the media may publish information of public interest and concern to interested persons.

4. The Second Circuit has held that complaints (federal counterpart to petitions in Texas) are judicial records that are subject to a presumption of public access under the First Amendment. *Bernstein v. Bernstein Litowitz & Grossman LLP*, 814 F.3d 132, 141–43 (2d Cir. 2016). In *Bernstein*, the Second Circuit stated that public access to complaints “allows the public to understand the activity of the federal courts, enhances the court system’s accountability and legitimacy, and informs the public of matters of public concern.” *Id.* at 141. Similarly, the Southern District of New York stated: “In light of the values which the presumption of access

endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression. Each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Courthouse News Serv. v. Tingling*, No. 16-cv-08742, 2016 WL 8739010, at *19 (S.D.N.Y. Dec. 16, 2016) (granting injunctive relief from bench); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2nd Cir. 2006) (“Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.”); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (where a First Amendment right of access is found, such access should be “immediate and contemporaneous”).

5. Accordingly, the First Amendment provides the press and public with a presumptive right of timely access to newly-filed civil petitions that attaches when the petition is filed. *Courthouse News Service v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) (“*Planet III*”). In *Planet III*, the Ninth Circuit recognized that the right of access attaches upon receipt, and timely access to new civil filings is essential to ensure that news of civil disputes reaches the public “while it is fresh[,]” when it is most likely to become the subject of public discussion. *Id.* It is also essential “to accurate and fair news reporting of civil disputes, and is thus vital to the public’s ability to discuss what is happening in an important branch of government.” *Id.* (citations and quotations omitted). Delayed access inhibits that discussion, and is tantamount to a denial of access.

6. Judge Melinda Harmon of the Southern District of Texas recognized the injury to First Amendment rights by delaying access to newly filed petitions for 24-72 hours in an

injunction entered against the Harris County District Clerk. *See Courthouse News Serv. v. Jackson*, C.A. No. H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009). In enjoining delays in access to new petitions, Judge Harmon made several findings relevant to this action: (1) a 24 to 72 hour delay in access “is effectively an access denial and is, therefore, unconstitutional” (*Jackson*, 2009 WL 2163609, at *4); (2) with respect to the interest in processing petitions before access, “the Court finds that [Defendants] have failed to demonstrate that the 24 to 72 hour delay in access is narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exists” (*id.*); and (3) “It is clearly in the public interest to enjoin Defendants’ conduct. There is an important First Amendment interest in providing timely access to new case-initiating documents.” (*Id.* at *5).

B. Historical Access to New Petitions

7. News coverage operates in a daily cycle where news events, including newly filed petitions, occur during the day and are reported that afternoon and evening, after which newsmakers and reporters sleep, only to start the cycle again the next day. Where news is delayed until the next day or longer, it is devalued by the delay – just as day-old bread is less likely to be consumed, the news in day-old petitions is less likely to be reported and read, because it is “old news.”

8. Traditionally, at courts across the country, new court petitions were made available by the end of the day so they could be reviewed by journalists who visited the courthouse to report on the day’s news. The petitions were then filed in paper form, and intake clerks would set them aside for press review as they came across the intake counter. This was true at the District Clerk’s Office in 2003, when Courthouse News first started covering the Travis County District Courts. At that time, the District Clerk kept a bin behind the counter in

which the intake clerk placed fresh petitions for review by the reporters who covered the courthouse. Members of the press, including the Courthouse News reporter, could thus review new civil petitions by the end of the day on which they were filed. Subsequent technological innovations adopted by the District Clerk caused access to slide backwards, with same day access to new petitions yo-yoing between lows around 30% and highs around 70% on a given day.

9. On January 1, 2014, the State of Texas implemented mandatory e-filing for all new civil petitions, with minor exceptions. Since then, instead of improved access, inordinate delays in access at the District Clerk's Office have been regular and pervasive, including periods over those years in which the District Clerk withheld access to at least three quarters of the new petitions for one day, with a substantial portion withheld for two or more days, *i.e.* 24-72 hours. These delays in access are primarily the result of the District Court's policy and practice of withholding access to new e-filed petitions until after administrative processing by clerk staff. This unnecessarily delays access because new petitions are deemed filed when electronically submitted through the e-filing system, and instead of providing access when received by the District Clerk, the petitions sit in an electronic queue where they are withheld from public view until they are docketed by the District Clerk's staff. Docketing, a set of administrative tasks, is sometimes called "processing" or "acceptance."

10. The delays in access experienced by Courthouse News at the District Clerk's Office are both unnecessary and easily avoidable. Federal courts and many state courts throughout the nation provide the press and public with timely access to new e-filed petitions through means readily available to the District Clerk. Indeed, the vast majority of federal courts and many state courts set up their e-filing portals to automatically release non-confidential civil

petitions to the press or public when they are received, through PACER in the federal system or through varied software systems in the state courts.

11. A growing number of state courts – including those in Alabama, California, Connecticut, Georgia, Hawaii, Nevada, New York, and Utah – provide the same on-receipt access as the federal system, either on a statewide basis or in the larger courts. They provide on-receipt access by three means. One way is to push the new public petitions automatically into the docket. The second is to send all the new public petitions into a public queue before docketing. The third is to send all the new public petitions into a press queue before docketing. Through any of those methods, the courts continue the tradition of providing access to new petitions after they have crossed the clerk’s intake counter, before docketing.

12. Notably, the District Clerk uses e-filing software provided by Tyler Technologies (“Tyler”). Many other state courts use the same Tyler e-filing software to provide timely, on-receipt access to new civil petitions through two of the methods discussed earlier: by automatically pushing new petitions into the court docket (*e.g.*, Clark County Superior Court in Las Vegas), or by sending them into a press review queue (*e.g.*, certain courts in Georgia and California). Tyler has touted this capacity in an early user manual, stating that its software includes a “press reviewer role.” The District Clerk could likewise provide timely, pre-processing access to new civil petitions through a press review queue, as demonstrated by its sister courts, or through other practicable alternatives used by other state and federal courts. However, the District Clerk has refused to do so, and delays in access to new petitions are now regular and pervasive due to the policy and practice of withholding access to new e-filed petitions until after administrative processing, which can take days.

13. A common argument from court clerks fighting against access upon receipt, for example in California's Orange County and in Houston, is to profess a concern with privacy. However, in practice, the District Clerk does not list privacy on her website as a reason why a new filing might be returned. And by law, Texas places the sole responsibility for redacting confidential or sensitive information upon the e-filer, not the District Clerk.

14. A central theme in this First Amendment story is the use of the public record by court clerks to generate revenue. District clerks have sold copies of paper records since time out of mind, generating income that is outside the yearly budget and thus discretionary. With the switch to digital records and the creation of websites by the district clerks, the ability to extract income from the public record grew substantially, allowing them to sell records online and charge for copies and certifications. But the flow of income to the District Clerk's office is not limited to direct sales from her website.

15. Public court records in Travis County District Courts are also sold through two private companies. One is a longstanding seller of court documents, called "iDocket," and the second is a relative newcomer to the field of online court record sales, Tyler. The Texas Office of Court Administration ("OCA") first entered into a five-year contract with Tyler in 2013 to set up an e-filing portal that would allow for mandatory e-filing on a statewide basis. The contract was initially funded through user fees and soon thereafter through multi-million dollar payments from taxpayer money. Selling the public record was not part of the deal.

16. But in 2016, it became part of the deal. OCA and Tyler agreed to set up a statewide system for sale of Texas court records with all the income from copies going to the district clerks and all the money for searches going to Tyler. This deal caused a powerful reaction from the district clerks who, it can be concluded from their legislative proposal,

jealously guarded their right to sell the public record. They put forward legislation prohibiting any entity from selling local court records online without written permission from the court clerks – a prohibition that, by the terms of the proposed legislation, could not be overcome by any rule of the Texas Supreme Court. The legislation was fought by the OCA and ultimately defeated. Since then, both the OCA and individual clerks have frantically opposed pre-processing, press queue access by journalists.

C. Analyzing the Right of Access to New Petitions

17. The analysis of a claim alleging a violation of the First Amendment right of access typically involves a two-step process. The first step is to determine whether, as a general matter, there is a First Amendment right of access to civil petitions. If the answer to that question is “yes,” the court proceeds to the second step, which is to determine if the restrictions on access – in this case, the District Clerk’s policies and practices that lead to delays in access – satisfy “rigorous” scrutiny. *See Planet III*, 947 F.3d at 589-97 (discussing and applying two-step process established by *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1 (1986)).

18. In *Planet III*, the Ninth Circuit applied this two-step process to the Ventura Superior Court clerk’s policy and practice of withholding access to new civil complaints until after administrative processing – also called a “no-access-before-process” policy. Applying the “experience” and “logic” test of *Press-Enterprise II*, the Ninth Circuit addressed and conclusively resolved the first step by holding that the press has a qualified right of timely access to newly-filed civil complaints that attaches when the complaint is filed, *i.e.*, when the complaint is received by the court. *Id.* at 585, 588, 591. The same is true with respect to “petitions,” the new case-initiating document in Texas, which corresponds to “complaints” in the federal courts

and many state courts.

19. Turning to the second step, *Planet III* determined that the clerk had failed to “demonstrate ... that there is a ‘substantial probability’ that its [asserted] interest[s]” in withholding access to new civil complaints until after administrative processing “would be impaired by immediate access,” and further to show that “no reasonable alternatives exist to ‘adequately protect’ that government interest.” *Id.* at 596 (citing and quoting *Press-Enterprise II*, 478 U.S. at 14). The Ventura Superior Court clerk’s policy of withholding access to new civil complaints until after administrative processing thus failed both prongs of the *Press-Enterprise II* test and violated Courthouse News’ First Amendment right of timely access to new civil complaints. *See id.* at 596-600.

20. Shortly after the Ninth Circuit issued *Planet III*, the Eastern District of Virginia ruled, following a four-day bench trial, that under the First Amendment, the public and press generally have a “contemporaneous right of access” to newly-filed civil complaints, and that “contemporaneous” means “on the same day as filing, insofar as practicable.” *Courthouse News Service v. Schaefer*, 440 F. Supp. 3d 532, 559 (E.D. Va. 2020).

21. As noted previously, Judge Melinda Harmon of the Southern District of Texas enjoined access delays by the Harris County District Clerk of 24 to 72 hours because it was effectively an access denial and, thus, unconstitutional. *See Courthouse News Serv. v. Jackson*, C.A. No. H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009). In addressing whether administrative processing before access was narrowly tailored and, thus, justifiable, Judge Harmon found that the defendants had failed to demonstrate that the 24 to 72 hour delay in access was narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exist. *Id.* at *4.

22. While the *Planet* litigation was underway, and in reliance in part on the *Jackson* case, the Southern District of New York in 2016 enjoined Manhattan state court Clerk Milton Tingling from withholding new e-filed petitions until they were processed, finding access should be “immediate and contemporaneous.” *Courthouse News Service v. Tingling*, No. 16-cv-08742, 2016 WL 8739010, at *19 (S.D.N.Y. Dec. 16, 2016) (transcript of bench ruling). The bench ruling cited *Jackson* in finding that Tingling had failed to show his no-access-before-process policy was “essential to preserve higher values” or “narrowly tailored to serve that interest.” *Id.* The administrative office of the New York courts then put in place a pre-processing review site available to the press and public for all e-filings statewide.

23. The District Clerk has alternative and easily available means to provide the constitutionally required level of access, and does not have any overriding interest in denying that access. The policy and practice of delaying access to new civil petitions despite available less restrictive alternatives violates Courthouse News’ First Amendment right of timely access, just as the policies and practices of the court clerks in *Jackson*, *Tingling*, *Planet III*, and *Schaefer* did. Courthouse News seeks declaratory relief and an injunction prohibiting that policy and practice.

24. In the wake of the COVID-19 pandemic, these are challenging times for the courts. However, the unique circumstances have also magnified the difference between those courts that are willing to use readily available technology to demonstrate their commitment to timely access, and the District Clerk, who has not. Despite emergency orders and court closures, courts using any of the means for providing access to new court filings upon receipt – automatic docketing of new petitions, or public review queue or press review queue – saw no disruption in public access to new civil petitions and subsequent civil filings even at the height of the

pandemic. As Courthouse News recently argued to the Ninth Circuit, technology should illuminate the halls of government, not darken them.

II. JURISDICTION AND VENUE

25. Courthouse News' claims arise, in part, under the First and Fourteenth Amendments to the United States Constitution, the federal common law, and the Civil Rights Act, 42 U.S.C. § 1983 *et seq.* This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief). Jurisdiction for declaratory relief is proper under 28 U.S.C. § 2201. The Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the state law claim brought pursuant to Article 1, Section 8 of the Texas Constitution. Defendant is subject to personal jurisdiction in this judicial district at the time this action is commenced.

26. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because, on information and belief, Defendant resides in Texas, resides in this district, and because a substantial part of the events or omissions giving rise to Courthouse News' claims occurred in this district.

III. PARTIES

27. Courthouse News, a California corporation with its principal place of business located in Pasadena, California, is a nationwide news service founded almost 30 years ago out of a belief that a great deal of news about civil litigation went unreported by 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 all 50 states in the United States.

28. Defendant Velva L. Price is the elected Travis County District Clerk and manages the Travis County District Clerk's Office, and is sued in that official capacity only. The District Clerk's Office is responsible for, among other things, the custodial care and administration of court records, and establishing the policies and practices of the District Clerk's Office to fulfill its obligations under applicable law, including the provision of timely press and public access to court records. Acting in her official capacity, Defendant, and those acting under her direction and supervision, is directly involved with and/or responsible for the delays in access to new petitions experienced by Courthouse News and other members of the press, which acts reflect the official policy and practice of the District Clerk's office as a whole. Defendant's actions, as alleged in this Complaint, are under color of Texas law and constitute state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

29. On information and belief, Defendant Price resides in Travis County, Texas, and her primary office is located within Travis County, Texas. Absent an executed waiver of service, Defendant Price may be served with process and summons at the principal place of business for the Travis County District Clerk, located at 1000 Guadalupe Street, Suite 103, Austin, Travis County, Texas 78701, or wherever else she may be found.

IV. FACTS COMMON TO ALL COUNTS

A. News Reporting Activities of Courthouse News

30. Courthouse News offers its readers a variety of publications. Its New Litigation Reports contain original, staff-written summaries of significant new civil petitions or complaints, and are sent to subscribers via e-mail each evening. For its Texas subscribers, Courthouse News publishes an "Austin State" report, which provides daily coverage of new civil petitions filed in the Travis County District Courts, and an "Austin Federal" report, which provides daily live

reports on new civil complaints filed in the Austin Division of the Western District of Texas. Additional reports provide coverage of other state and federal courts throughout Texas, including courts in Dallas, Houston, San Antonio, Beaumont, and Fort Worth.

31. Among Courthouse News' other publications is a 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 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 print daily newspaper, featuring staff-written articles from across the nation that are posted throughout each day, and rotated on and off the page on a 24-hour news cycle.

32. Courthouse News has been credited as the original source of reporting on various 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 also interviewed Courthouse News reporters.

33. 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.

34. In Texas, the Courthouse News litigation reports cover newly filed civil petitions, focusing on those against business institutions and public entities. There are 7 television stations that subscribe to Courthouse News publications, including KTRK-TV (Houston), KEYE-TV (Austin), KVUE-TV (Austin), KXAN News (Austin), WFAA-TV (Dallas), NBC5 (Dallas/Ft. Worth), KTVT 11 (Fort Worth). Three major Texas newspapers are also subscribers, including *The American-Statesman*, *Dallas Morning News*, and *San Antonio Express News*. In addition, the State Bar of Texas subscribes as well as the Dallas City Attorney. Texas-based corporate subscribers include Hunt Oil Co., Atmos Energy, Energy Transfer, Amegy Bank of Texas, and the Austin headquarters of Whole Foods. For larger courts, such as the Travis County District Courts, reports are emailed to subscribers each evening. Courthouse News reporters do not cover family law matters, name changes, probate filings, most mortgage foreclosures, or any action against individuals unless the individual is famous, notorious, or otherwise newsworthy.

35. 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 of Courthouse News' publications. Non-law firm business entities, including large publicly-traded companies, government entities, and non-profit organizations, also subscribe to Courthouse News' publications.

36. 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 each workday so they can review all the petitions filed with the court that day to determine which are of interest to Courthouse News' readers. However, as the vast majority of federal courts and an increasing number of state courts are putting court records online via PACER and court web sites, Courthouse News also covers courts remotely through the internet. Given the nature of the New Litigation Reports and its other news publications, any delay in the ability of a reporter to review newly-filed civil petitions necessarily creates a delay in the ability of Courthouse News to inform subscribers and the public of the factual and legal allegations in new civil lawsuits.

37. Courthouse News does not seek to review or report on the tiny fraction of new civil petitions that are filed with a motion to seal, nor the small number of case types that are confidential by statute. Readily available software exists within Tyler's e-filing platform that automatically segregates filings by case type, allowing the District Clerk to provide for review by journalists of only the public case types. The contract between Tyler and Texas specifically calls for the software capacity to "assign electronic filings by court, filing type, filing status, new suits/additional filing to defined review queues." The same contract allows the district clerks to request changes to their review queues from Tyler, as part of the contract's "statement of work,"

and district clerks regularly make such service requests.

B. A First Amendment Right of Access Attaches To Civil Petitions When Filed

38. In *Planet III*, the Ninth Circuit held there is a qualified First Amendment right of timely access to newly-filed civil complaints that arises when the complaints are “filed with the court.” *Planet III*, 947 F.3d at 594.

39. In reaching this holding, the Ninth Circuit observed that it had “long presumed a First Amendment ‘right of access to court proceedings and documents’” and that this right:

... exists...to enable free and informed discussion about important issues of the day and governmental affairs. Thus, “[t]he news media’s right of access to judicial proceedings is essential not only to its own free expression, but also to the public’s.” ... ‘The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.’ These values hold especially true where, as here, the impetus for CNS’s efforts to obtain newly filed complaints is its interest in timely reporting on their contents.

Id. at 589-90 (internal citation and quotations omitted).

40. In rejecting Clerk Planet’s argument that the First Amendment right of access does not attach until after judicial action, the Ninth Circuit recognized:

CNS’s reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems. ... [A] ban on reporting news ‘just at the time [the] audience would be most receptive’ would be effectively equivalent to ‘a deliberate statutory scheme of censorship.’ In other words, the public interest in obtaining news is an interest in obtaining contemporaneous news. ... ‘The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.’ ... [T]hat ‘old’ news is not worthy of, and does not receive, much public attention has been widely recognized. ... [T]he need for immediacy of reporting news is ‘even more vital in the digital age,’ where timeliness is measured in terms of minutes or seconds.

Id. at 594 (citations and quotations omitted).

41. As *Planet III* also recognized, limitations on access to newly-filed civil complaints are subject to rigorous scrutiny. *Id.* at 595-96. That is, access “may be restricted only if closure is essential to preserve higher values and is narrowly tailored to serve those interests.”

Id. at 595 (quotations omitted). While “[s]ome reasonable restrictions resembling time, place,

and manner regulations that result in incidental delays in access are constitutionally permitted,” such delay-causing restrictions are *only* permitted “where they are content-neutral, narrowly tailored and necessary to preserve the court’s important interests in the fair and orderly administration of justice.” *Id.* at 585 (emphasis added).¹

42. In Texas, a petition is deemed filed when it is transmitted to the e-filing service provider, which automatically delivers it to the clerk of each court. *See* Tex. R. Civ. P. 21(f)(5) (“An electronically filed document is deemed filed when transmitted to the filing party’s electronic filing service provider”); *see also Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993) (“In a long line of cases, this court has held that a document is “filed” when it is tendered to the clerk, or otherwise put under the custody or control of the clerk”); *Biederman v. Brown*, 563 S.W.3d 291, 303 (Tex. App.—Houston [1st Dist.] 2018, no pet) (same). Thus, the right of access attaches at the time of *filing*, not after administrative processing.

C. Delays in Access to New Civil Petitions in Travis County

43. By 2005, new filings were still in paper form, but the District Clerk implemented a scanning program in the summer of 2005 and accompanied that innovation with a no-access-before-scan policy, such that access to new petitions was delayed for one to two days after filing. Later in 2005, a Courthouse News bureau chief and her counsel met with then-clerk Amalia Rodriguez-Mendoza to discuss access procedures. As a result of that meeting, the clerk abandoned her no-access-before-scan policy and access improved to a point where the great

¹ *See also Bernstein v. Bernstein Litowitz & Grossman LLP*, 814 F.3d 132, 141–43 (2d Cir. 2016) (recognizing that “a complaint is among the most likely to affect judicial proceedings” because it “invokes the powers of the court” such that the presumption of access should be greater due to “the utility of the complaint to those who monitor the work of the federal courts”); *Courthouse News Service v. Tingling*, No. 16 Civ. 8742 (ER), 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) (recognizing that the Second Circuit found a First Amendment right in *Berstein*, and thus issuing a preliminary injunction under the First Amendment right and rejecting process-first policy), Transcript Proceeding, Order Reported at 16 Civ. 8742, 2016 WL 8505086 (S.D.N.Y. Dec. 16, 2016); *see also Courthouse News Service v. Brown*, Case No. 17 C 7933, 2018 WL 318485 (N.D. Ill. Jan. 8, 2018), *rev’d on other grounds by* 908 F.3d 1063 (7th Cir. 2018); *Courthouse News Service v. Yamasaki*, 312 F. Supp. 3d 844, 860 (C.D. Cal. 2018).

majority of new petitions could be reviewed on the day they were filed. However, shortly thereafter, the Travis County District Courts transitioned to permissive e-filing, and a no-access-before-process policy was re-imposed, with the result that a majority of new petitions were not available until, at the earliest, the next day after filing.

44. Courthouse News met again with Ms. Rodriguez-Mendoza in December 2010, after which her office devised a system of providing a report each day, referred to as “Billy’s list,” which allowed reporters to ask the lead clerk named Billy for new petitions, both paper and e-filed, that had not yet been scanned or fully processed. Once again, access improved to the point where a great majority of new petitions could be reviewed on the day of filing.

45. In January 2014, the State of Texas implemented mandatory state-wide e-filing, with few exceptions, and access at the Travis County District Courts once again plummeted. Courthouse News met again with Ms. Rodriguez-Mendoza on several occasions in 2014. No policy change emerged from those meetings. For the following year, access fluctuated up and down as the clerk’s office docketed more or less quickly, based on the meetings and occasional nagging.

46. The current District Clerk then took office in 2015. In an attempt to address delays, the Courthouse News bureau chief or the reporter covering the courthouse met with Ms. Price on several occasions. As in the past, the no-access-before-process policy resulted in a fluctuating level of access, and in 2019 and 2020 the delays became pervasive. Unlike most federal district courts and many state courts, the District Clerk does not make newly-filed petitions available upon e-filing. Instead, the District Clerk withholds the petitions until after court staff have docketed them. As a direct result, there are regular delays of one to three days or

more between the time when a new petition is e-filed and the time a journalist or any member of the public can see it, which turns the petition into old news.

47. Courthouse News has engaged the District Clerk numerous times since 2015, including transmission of a recent letter in an attempt to resolve access issues, but those efforts have been unsuccessful. The District Clerk's policy and practice of withholding petitions until after docketing or "processing" remains in effect to this day, with resulting delays that could easily be avoided.

48. Prior to commencing this action, Courthouse News tracked and compiled access data for new civil petitions e-filed with the District Clerk, noting delays between when each petition was received by the clerk for filing and when the clerk first made each petition available to the public. During 2019 and 2020, delays in access have been regular and pervasive, including numerous occasions in which the District Clerk withheld access to 75% or more of new e-filed civil petitions for at least one court day, with a substantial portion withheld for two and three days, in other words, for 24-72 hours, and sometimes longer. These delays are the direct result of the no-access-before-process policy. Throughout this period, the District Clerk has had the option of putting a press review queue in place by making a service request to Tyler, an option she has not exercised.

D. The District Clerk's Policies and Practices Are Not Narrowly Tailored

49. Historically, before e-filing, reporters covering the courts could review and report on newly filed, paper civil petitions on the day of filing by looking them over at the courthouse. This access generally occurred via a media bin or box or stack – at the District Clerk's office, the bin behind the intake counter – where new petitions were reviewed on the day of filing, generally at the end of the day.

50. Now, with e-filing, it is the experience of Courthouse News at many state and federal courts across the nation that timely access to new e-filed civil petitions is practicable. Indeed, e-filing makes it even easier for courts to provide timely access to new petitions. Instead of basic intake work being done by clerks at an intake window, that work is now done by e-filing software generally called an “e-file manager.” Filers must enter case and payment information before submitting their e-filings through the e-file portal to the e-file manager. Based on the case type designated by the filer, the e-file manager can automatically sort the new, non-confidential petitions into a review queue that serves the same function as the physical bin where the intake clerk used to place new paper petitions for press review. However, instead of sitting in a physical bin next to an intake window, as they did in the past, new e-filed petitions now sit in an electronic queue. In those courts that either automatically docket new cases or automatically send new petitions into a review queue, the end result is that the press can report on new petitions when they are filed, with busy clerks attending to their administrative tasks as their schedules allow.

51. Federal district courts were among the first to move to e-filing, and the vast majority have taken the paper tradition of timely access and brought it forward into the electronic world. The largest group of federal courts, including the Western District of Texas and all the other federal district courts in Texas, provide access by automatically pushing the new filings into the docket with a permanent case number, causing them to become public immediately, at all hours of the day and on all days of the week. Other federal courts, such as the Eastern District of California, automatically assign a temporary case number that allows the press and public to review the new complaints on receipt. Still others, such as the Districts of Delaware and West Virginia, send new cases into an electronic queue with only a common, generic number assigned,

also allowing them to be reviewed upon receipt. Under all these systems, new petitions are available contemporaneously to the public and press without requiring that a clerk first process or docket the new petitions.

52. Many state courts have also moved to e-filing, using a variety of electronic filing and docketing, or “case management” platforms – some developed in-house and others supplied by vendors. Some have set up their e-filing and public access systems following the federal district court model, including, Alabama, Connecticut, Hawaii and Utah on a statewide basis, along with the largest court in Nevada, Clark County Superior Court. That is, new e-filed petitions flow automatically into the docket and into public view upon receipt. The e-filing courts in New York all provide access upon receipt through a second method, which is to send new public filings into a public queue with only transaction numbers, before they go into the docket. Yet another group of state courts provide access upon receipt through a third method, which sends new filings of designated case types into a press review queue, where they can be reported while they sit in the clerk’s queue waiting to be docketed (a set of administrative tasks also called “processing” or “acceptance”). This third group includes individual courts in Georgia, such as the superior courts in Fulton, DeKalb, and Gwinnett counties, and in California, such as the superior courts in Fresno, Kern, Los Angeles, Monterey, Santa Barbara and Santa Clara.

53. Contrary to recent claims by Texas court officials, none of those courts have been charged an additional fee by the vendor for putting a press review queue into effect. And none of those courts have been required by the vendor to sign a pledge of indemnity in order to put a press review queue into effect. And none of those court clerks have claimed a duty to read through new filings to check for privacy violations, contrary to court rules placing that duty on the filer. Nor have the federal courts, in giving press and public access upon receipt, claimed to

have a duty that does not exist, nor have they asked for indemnity from anyone, nor have they demanded large cash payments in order to provide constitutionally mandated access.

54. The District Clerk has practicable means for providing timely access to the new e-filed petitions, and there is no sufficient governmental interest that warrants impeding First Amendment required access. The District Clerk's policy and practice of delaying public and press access until after administrative processing is not narrowly tailored to serve an important governmental interest. In addition to the *Planet III* case, Judge Harmon previously rejected any policy or practice of the Harris County District Clerk resulting in 24-72 hour (1-3 day) access delays:

While Defendants admit that Plaintiff has a right of access to newly-filed petitions, they maintain that the new method by which the Clerk's Office is processing case initiating documents is a reasonable time, place, or manner restriction and, as such, survives First Amendment scrutiny.

....

The Court is unpersuaded by Defendants' argument and finds that the delay in access to the newly-filed petitions in this case is not a reasonable limitation on access. . . . Assuming, arguendo, that Defendants have an overriding interest, the Court finds that they have failed to demonstrate that the 24 to 72 hour delay in access is narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exists.

See Courthouse News Serv. v. Jackson, C.A. No. H-09-1844, 2009 WL 2163609, at *4-5 (S.D. Tex. July 20, 2009).

V. COUNT ONE

(Violation of U.S. Const. Amend. I and 42 U.S.C. § 1983)

55. Courthouse News incorporates the allegations of Paragraphs 1-54 herein.

56. Defendant's actions under color of state law, including without limitation the denial of timely access to new civil court petitions and Defendant's elevation of herself above the news media to a favored position with respect to the publication of public court records, in

order to extract income from them, deprive members of the press, including Courthouse News and by extension its subscribers, of their right of access to public court records secured by the First Amendment to the U.S. Constitution.

57. The presumption of access to new civil petitions, which arises when those petitions are filed, 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 594-95 (citing *Press-Enterprise II*). For Defendant’s no-access-before-process-and-review policy to “survive *Press-Enterprise II*’s two-prong balancing test” (*i.e.*, “rigorous” scrutiny), Defendant “must demonstrate that there is a ‘substantial probability’ that its [asserted] interest[s]... would be impaired by immediate access, and second, that no reasonable alternatives exist to ‘adequately protect’ that government interest.” *Planet III*, 947 F.3d at 596. Defendant cannot satisfy this test, consistent with Judge Harmon’s previous findings. *Courthouse News Serv. v. Jackson*, C.A. No. H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009).

58. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendant’s unconstitutional actions, and will suffer irreparable harm as a result of Defendant’s violation of its First Amendment rights. Courthouse News is therefore entitled to a declaratory judgment and a permanent injunction to prevent further deprivation of the First Amendment rights guaranteed to it and its subscribers.

VI. COUNT TWO

(Violation of Federal Common Law and 42 U.S.C. § 1983)

59. Courthouse News incorporates the allegations of Paragraphs 1-58.

60. Defendant’s actions under color of state law, including without limitation their denial of timely access to new civil court petitions and Defendant’s elevation of herself above

the news media to a favored position with respect to the publication of public court records, in order to extract income from them, deprive members of the press, including Courthouse News and by extension its subscribers, of their right of access to public court records guaranteed by federal common law.

61. There is no legitimate justification for withholding new petitions that is sufficient to overcome the common law right of Courthouse News and its subscribers to be able to timely review new case-initiating documents.

62. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendant's unconstitutional actions, and will suffer irreparable harm as a result of Defendant's violation of its common law right of access. This is so, in part, because delays in access not only diminish the value of Courthouse News' reports to its subscribers, but are also likely to result in a loss of subscribers or, at the very least, a perception among subscribers that Courthouse News' news reporting products are less useful and valuable than they have been in the past, leading to a loss of goodwill. Courthouse News is therefore entitled to declaratory and permanent injunctive relief to prevent further deprivation of the rights guaranteed to it and its subscribers under the common law.

VII. COUNT THREE

(Violation of Texas Const. Art. I, Sec. 8)

63. Courthouse News incorporates the allegations of Paragraphs 1-62 herein.

64. Defendant's actions under color of state law, including without limitation the denial of timely access to new civil court petitions and Defendant's elevation of herself above the news media to a favored position with respect to the publication of public court records, in order to extract income from them, deprive members of the press, including Courthouse News

and by extension its subscribers, of their right of access to public court records secured by the free press provision of Article I, Section 8 of the Texas Constitution.

65. There is no compelling or overriding interest or other justification sufficient to overcome Defendant's actions in violation of the Texas Constitution. And even if an overriding interest did exist, there are less restrictive means of achieving any such interest, and the procedures implemented by Defendant are not narrowly tailored to serve any overriding interest.

66. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendant's unconstitutional actions, and will suffer irreparable harm as a result of Defendant's violation of its rights under Article I, Section 8 of the Texas Constitution. Courthouse News is therefore entitled to declaratory and permanent injunctive relief to prevent further deprivation of the rights guaranteed to it and its subscribers under the Texas Constitution.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Courthouse News Service prays for judgment against Defendant as follows:

- A. For a permanent injunction against Defendant, including her agents, assistants, successors, employees, and all persons acting in concert or cooperation with them, or at their direction or under their control, prohibiting them from denying Courthouse News access to new civil court, case-initiating petitions until after administrative processing.
- B. For a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring the denial of access to new civil court, case-initiating petitions until after administrative processing as unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Texas Constitution, for

the reason that it constitutes an effective denial of access to court records.

- C. For an award of costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- D. For all other relief the Court deems just and proper.

Dated: December 31, 2020

Respectfully submitted,

JACKSON WALKER L.L.P.

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ATTORNEYS FOR PLAINTIFF
COURTHOUSE NEWS SERVICE

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Courthouse News Service

(b) County of Residence of First Listed Plaintiff Los Angeles County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) John K. Edwards, Jackson Walker, LLP 1401 McKinney St., ste. 1900, Houston, TX 77010 713-752-4200

DEFENDANTS

Velva L. Price, in official capacity as Travis County District Clerk

County of Residence of First Listed Defendant Travis County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, HABEAS CORPUS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): U.S. Const. Amend. 1 and 42 U.S.C. sec.. 1983

Brief description of cause: Violation of US Const. Amend 1 & 42 U.S.C. 1983, Violation of Federal Common Law; Violation of Texas Const. Art. 1, sec. 8

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/31/2020 SIGNATURE OF ATTORNEY OF RECORD John K. Edwards

Digitally signed by John K. Edwards Date: 2020.12.30 16:28:16 -0600

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.