UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

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

BEFORE:

THE HONORABLE CHRISTINA C. REISS,
District Judge

APPEARANCES:

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

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Monday, October 25, 2021

(The following was held in open court at 2:00 PM.)

COURTROOM DEPUTY: Your Honor, the matter before the Court is civil case number 21-CV-132, Courthouse News Service, *et al.* vs. Patricia Gabel, *et al.* Present for the plaintiff are William Hibsher, Jonathan Ginsberg, and Robert Hemley; present for the defendant are David Boyd and Eleanor Spottswood; and we are here for a motion for preliminary injunction and trial on the merits.

THE COURT: Good afternoon. With our COVID protocols, when you come up to the podium, you don't need to have your mask.

Let me first ask if we are going to have any live witnesses testifying.

MR. HIBSHER: We are not, your Honor.

MR. BOYD: No, we are not.

THE COURT: Okay. So I'm going to tell you some of the things that I am thinking about based on what you've filed. And they are not rulings. I call them musings. These are things that are bothering me. You should feel free to correct me, redirect me, and don't throw out your entire argument just because something's bothering me that's not bothering you.

One of the things that I am concerned about, and that's why I said was it my position that we didn't have live witnesses, is the Court does need to have factual findings if

it's going to grant or deny an injunction, and every time I kind of stumbled on a fact that I thought was stipulated, by the time I got to the reply, it wasn't, and some of the facts are in flux.

So I have a pragmatic concern in what are the facts and how are we going to get to them without an evidentiary hearing? That doesn't mean that I haven't done many injunctions without an evidentiary hearing, so it's a pragmatic concern but not insurmountable without live witnesses.

This case has been pending since May 20th of 2021, and that cuts both ways. It cuts against irreparable harm in that rather than schedule it immediately, the parties wanted to do some discovery; they had a briefing schedule. I went along with that. On the other hand, it also provided time to fix the problem. So the defendants were alerted this is the problem, this is what we're seeing, and not a significant amount of progress, at least from the plaintiffs' perspective, since that shot across the bow, which is a big one in that it's a motion for preliminary injunction, and where we are today.

I think it turned the inquiry completely on its head to say, "Well, plaintiffs can't point out any, you know, articles that they had to delay the publication of because they didn't get the complaint in time, and so they haven't proven that somehow this is impeding their access to filings." I don't see that any court has inquired, "When do you typically publish

your first article and how does that impact it?" and it seems to me a very backward way of looking at it. So I had a hard time seeing why the plaintiffs would have to show that by getting allegedly late access to a civil filing it delayed their coverage. It kind of is an automatic: If I get something on day one as opposed to day three, I can produce an article faster. I mean, it doesn't seem to me like an easily contested principle.

I think there is agreement that under Second Circuit precedent, *Bernstein* case, that we don't really have a dispute about the public right of access, and what we're talking about is how soon does that access have to be, what does it look like, and what can hold it up. And the defendants kind of have not just split the baby but created a conjoined twin in that they say, "Well, we want preprocessing access and we also want it to be not instantaneous but contemporaneous," and I would produce a single baby and say, "All you're entitled to is contemporaneous. How the defendants get there is none of your business. As long as you're getting contemporaneous, who cares whether they're processing it or not?" And maybe the plaintiffs agree with that and maybe they don't.

I would love to hear a better breakdown of where the time is spent. So I looked at the declarations, and it -- particularly on the defendants' side, it seemed to be kind of an amorphous description of where the time is taking place. So

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

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

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

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

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

Any thoughts on who goes first?

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

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

MR. BOYD: No objection.

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

MR. HIBSHER: Thank you.

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

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

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

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

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

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

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

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

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

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

So in regard to the merits, your Honor --

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

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

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

have a low, mumbly voice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HIBSHER: Sorry.

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

do any number of other things to address the concern.

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

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

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

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

And Courthouse News is joined in this case by the Vermont

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

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

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

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

But the numerosity of that solution happening is so tiny

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

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

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

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

THE COURT: Okay.

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

days later. That is not contemporaneous by any definition.

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

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

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

Let's hear from defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: So slow down.

MR. BOYD: Sorry.

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

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

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

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

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

MR. BOYD: Yes.

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

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

what is supposed to happen when a filing is first transmitted.

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

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

THE COURT: Tell me what provision of Rule 5.

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

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

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

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

MR. BOYD: Yes.

THE COURT: Okay.

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

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

And I had started talking about timing and the differences

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

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

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

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

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

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

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

In terms of where it stands now --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: And then what about the remainder?

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

doesn't seem a logical approach, either.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary while doing so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

Let's hear from plaintiffs on rebuttal.

MR. HIBSHER: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

MR. HIBSHER: Thank you, your Honor.

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

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

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

THE COURT: Okay. Thank you.

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

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

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

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

October 28, 2021

Johanna Masse

Digitally signed by Johanna Masse
Date: 2021.10.28 10:59:39 -04'00'

Johanna Massé, RMR, CRR

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