1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
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4 COURTHOUSE NEWS SERVICE,
5 Plaintiff,
6 VS. NO. CV 21-0710 JB/LF
7 NEW MEXICO ADMINISTRATIVE
OFFICE OF THE COURTS, et al.,
8
Defendants.
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Transcript of Motion Proceedings before
12 The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
13 New Mexico, commencing on December 1, 2021.
14
For the Plaintiff: Mr. Greg Williams; Mr. John
15 Edwards; Mr. Patrick Rogers
16 For the Defendants: Ms. Erin Lecocq; Mr. Nicholas
McDonald; Mr. Nicholas Sydow
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1 THE COURT: All right. Good morning
2 everyone. I appreciate everybody making themselves
3 available to me this morning.
4 The Court will call Courthouse News Service
5 versus New Mexico Administrative Office of the
6 Courts, et al., Civil Matter No. 21-CV-0710 JB/LF.
7 If counsel will enter their appearances for
8 the plaintiff.
9 MR. WILLIAMS: Good morning, Your Honor.
10 Greg Williams for the plaintiff. And here with me
11 today is co-counsel John Edwards. And representing
12 Courthouse News is Bill Girdner.
13 THE COURT: All right. Mr. Williams, Mr.
14 Edwards, good morning to you. Mr. Girdner, good
15 morning to you.
16 MR. GIRDNER: Good morning, Your Honor.
17 THE COURT: All right. And for the
18 defendants.
19 MR. McDONALD: Yes, Your Honor. Nicholas
20 McDonald for the State of New Mexico. With me is
21 Nick Sydow and Erin Lecocq.
22 THE COURT: All right. Mr. McDonald, Mr.
23 Sydow, and Ms. Lecocq, good morning to you.
24 All right. We're here on two motions. I
25 think the first one filed is the motion of the

1 plaintiff to reconsider the Court's memorandum and
2 opinion. So unless y'all wanted to do it some other
3 way, I'll turn it over to you, Mr. Edwards, to argue
4 your motion.
5 MR. EDWARDS: Thank you, Your Honor. Good
6 morning.
7 THE COURT: Mr. Edwards. I guess the first
8 thing is, tell me precisely what you want. You know,
9 my opinion had findings of fact, conclusions of law,
10 the sort of traditional things in an opinion, and
11 then it had an order. And I tried to be precise as
12 to what the order was. Are you asking that I touch
13 the order portion of that at all?
14 MR. EDWARDS: Your Honor, if you're
15 referring to the five-hour business rule --
16 THE COURT: Well, I'm talking about the
17 opinion says: "It Is Ordered."
18 MR. EDWARDS: Yes.
19 THE COURT: And that's the thing that I
20 think the State has appealed. And I guess I'm
21 concerned with that being up there, I can't really
22 touch that. So what are you asking the Court to do?
23 If you're asking me to change that order after the
24 State's appealed it, I guess I'm concerned that I
25 don't have jurisdiction to do that. If you're asking

1 for: Well, make some more findings, maybe change
2 your conclusions, and tell the Tenth Circuit that if
3 they were to send it back, this is what I would do
4 now, I guess something like that can be done. But I
5 guess I'm concerned about touching in any way the
6 order section, with the State having appealed it.
7 MR. EDWARDS: Right. And Your Honor,
8 having that section in front of me, we are not asking
9 you to reconsider what is ordered.
10 THE COURT: Okay. So the order is off the
11 table. All that really you're wanting me to do is
12 maybe make some more findings, and then maybe some
13 more conclusions, and tell the Tenth that if I were
14 doing it all over again, this is what I would do.
15 MR. EDWARDS: That is correct, Your Honor.
16 And let me just clarify. What we're asking
17 the Court to do is to modify the certain foundational
18 facts that go to traditional access. And we point
19 those out in our motion, specifically the page
20 numbers of your order, in which you discuss
21 traditional access, which is under the first step of
22 the Press Enterprise 2 case, the Court has to
23 determine whether there is a First Amendment right of
24 access and when it attaches.
25 And in your opinion, you correctly, in our

1 view, identify that the right arises upon submission
2 of the complaint to the clerk or court, and the right
3 attaches at that point.
4 It is our position that step two of Press
5 Enterprise 2 requires then, at that point, for the
6 defendants to meet the burden of establishing a
7 higher interest or value and a narrowly tailored
8 means to achieve that interest or protect that
9 interest before any delays can be permitted under the
10 First Amendment after the right attaches.
11 THE COURT: Well, you're asking the Court
12 to go a little bit the way the Vermont judge did;
13 correct?
14 MR. EDWARDS: I think, ultimately --
15 THE COURT: That's kind of what she did.
16 But it seemed to me that she did not -- and I know we
17 sort of diverge on this -- she didn't seem to dwell
18 at length, as I tried to do, as to what the
19 historical tradition had been. I read her opinion,
20 and I also read most of the transcript that she had
21 before she issued her opinion, and she didn't seem to
22 spend as much time on the historical tradition.
23 Would you agree that that's probably one of the big
24 differences?
25 MR. EDWARDS: I think that is a difference,

1 Your Honor, that traditional access wasn't truly in
2 dispute in that case.
3 But I think it's important to note that she
4 did make the same findings that you did about when
5 the right arises, and when the right of access
6 attaches. And I think that is the critical first
7 step.
8 THE COURT: Well, she quoted us.
9 MR. EDWARDS: Exactly.
10 THE COURT: And she relied on it there.
11 MR. EDWARDS: But I do think the Gabel
12 case --
13 THE COURT: She seemed to go, and you can
14 tell me if I'm wrong, she went with the traditional
15 First Amendment analysis: Here's the right. To
16 overrule the right, you have to have a narrowly
17 tailored exception or compelling state interest, and
18 then you have to have -- and she just didn't find
19 either one of those. Reading the transcript and
20 reading her opinion, she was extremely skeptical of
21 the State doing all this screening, and things like
22 that. She didn't put much value in that. And I
23 think that's partly the problem that federal judges
24 are having with these states, they're just not quite
25 sure why they're doing this. But then, not only did

1 she have that scepticism, she just didn't see it was
2 narrowly tailored. And so she just went off, it
3 seemed to me, with a traditional First Amendment
4 analysis rather than the one that we see in this
5 court access area. She didn't spend a lot of time
6 with whatever the traditional right was.
7 MR. EDWARDS: Well, I think the Gabel
8 decision is a good roadmap, Your Honor, because it
9 does emphasize the Press Enterprise 2 test. And I
10 think it is a proper application of that test in the
11 court records access arena, and I think it's not just
12 Judge Reiss that has used it. Other courts have used
13 it as well, including Tingling, including Jackson,
14 decisions we've cited to you before where the exact
15 same issue is being presented in there. The same
16 analysis under Press Enterprise 2 applies.
17 So when you ask what we'd like you to do
18 with respect to your opinion, it is simply to examine
19 again the foundational factual basis for concluding
20 that traditional access was after what was called
21 processing.
22 And in your order you do make reference to
23 that point. You say that -- at page 79 of your
24 order, you state that "traditional access was after
25 reviewed, stamped, and processed." And it is our

1 position, Your Honor, that what occurred in the paper
2 filing world before e-filing was that the intake
3 clerk would receive the complaint, thumb through it
4 for completeness, which is in the record, and then
5 within minutes it would be file stamped, and then
6 placed in a stack and made available for review by
7 Courthouse News.
8 Now, at some point during the day, when the
9 reporter is there, there may be a stack of docketed
10 and there may be a stack that has not yet been
11 docketed. And the record is clear that the reporter
12 saw both stacks.
13 So traditional access was before docketing.
14 And I think there is a little bit of a terminology
15 problem here. Because the defendants use
16 "processing" to mean anything done once the complaint
17 crosses the intake counter. Where we make a clear
18 distinction, where other courts have made the same
19 distinction, including the Gabel case, with Judge
20 Reiss, that the intake clerk is only doing a review
21 of the document for completeness and a checklist of
22 certain items.
23 That exact function, Your Honor, is being
24 performed today by the electronic filing system. The
25 electronic filing system is performing the intake

1 steps that were done traditionally by the intake
2 clerk. Docketing comes later. And that's what the
3 defendants want to wait -- they want to wait until
4 docketing is complete before access is provided.
5 Where we say traditionally that was not the case. We
6 saw the pleadings before docketing. So I think we
7 have to draw a distinction between intake review,
8 which is a checklist which Judge Reiss called it a
9 quick audit checklist versus full administrative
10 docketing.
11 And I think that's where we think the
12 opinion does not draw the distinction based on the
13 record that traditional access was within minutes of
14 receipt of the document and a quick thumb-through by
15 the clerk, which is exactly what the software does
16 today.
17 And so we're asking for a reconsideration
18 of those portions of the opinion.
19 THE COURT: But the reality was the press
20 was not there, standing there 24 hours a day or eight
21 hours a day looking for the next complaint. The
22 reality was somebody came around at the end of the
23 day and went through the stacks that were there. So
24 whether the access was -- could have been earlier,
25 the press really wasn't standing around eight hours a

1 day looking at these things within two to three
2 minutes of the clerk taking them into his or her
3 hands.
4 MR. EDWARDS: It's true they were not
5 standing there 24 hours a day. But they were there
6 more than just at the end of the day. And what's
7 important is what Ms. Prieskop testified in this
8 court at the injunction hearing was that when she was
9 there she witnessed the process; she watched the
10 filer approach the intake counter, saw the clerk
11 thumb through it, signature there, looks complete.
12 THE COURT: But that's typically she was
13 there at the end of the day.
14 MR. EDWARDS: Not always. I mean --
15 THE COURT: She wasn't there at 8:00 in the
16 morning, 9:00, noon. She made her rounds at the end
17 of the day.
18 MR. EDWARDS: No, not necessarily the end
19 of the day. There were rounds she had to make, but
20 she would be there at different times of the day;
21 wasn't always at the end of the day.
22 But the point is, Your Honor, what she
23 witnessed was the process I described.
24 THE COURT: Well, I don't dispute that.
25 But if we're talking about traditional access, the

1 access is, I think on most days, reporters are coming
2 by toward the end of day, going through the stacks,
3 getting their stuff ready to write their stories at
4 night for the morning paper. That's the traditional
5 access.
6 MR. EDWARDS: Well, I don't think the
7 record supports that finding.
8 THE COURT: Just because something was
9 maybe available early in the day doesn't mean that
10 they were taking advantage of it. So I think you're
11 creating a situation or a scenario that really isn't
12 what was going on.
13 MR. EDWARDS: Well, I don't think -- I
14 don't know where in the record it's established that
15 she only visited at the end of the day. I think
16 there were different times of the day where she would
17 visit based on what her schedule permitted.
18 THE COURT: Well, that brings up an
19 interesting point. I mean, is the historical
20 tradition going to be different in New Mexico than it
21 is in Vermont? Are we going to have a First
22 Amendment that is different in Vermont than it is in
23 New Mexico, or --
24 MR. EDWARDS: Well, no. Our point is that
25 the problem with each state defining when the right

1 arises and when it attaches, it creates this problem.
2 THE COURT: Well, that's not the problem,
3 is it? The problem is what is the historical
4 tradition? If the historical tradition is different
5 in Burlington than it is in Santa Fe, I mean, isn't
6 that -- we've got to decide, are we going to have a
7 different right in Burlington, are we going to have a
8 different right in New Mexico, or are we going to try
9 to have one?
10 MR. EDWARDS: Well, I think that the --
11 each state has, through the course of Courthouse
12 News' experience, has been substantially similar in
13 the way they provide traditional access. It's after
14 the document crossed the counter, before docketing.
15 I think that has been a consistent finding. And Mr.
16 Girdner has testified to that in his declaration,
17 that that has been a consistent tradition throughout
18 the jurisdictions they operate in. It doesn't vary.
19 THE COURT: But isn't what you're trying to
20 do is force the state to make the complaints
21 contemporaneous within that two or three minutes,
22 which then forces them to get the software rather
23 than using people? And it seems to me that, then,
24 creates another problem, is that your right sort of
25 depends upon electronic filings. So we're creating

1 an electronic filing. If all the electronic filing
2 went down for a day or for a week or a month or a
3 year, where then is the right?
4 MR. EDWARDS: Well, I don't think we're
5 demanding what defendants claim is instantaneous
6 access. What we're simply saying is --
7 THE COURT: Well, three minutes is pretty
8 close.
9 MR. EDWARDS: What we're saying, to be
10 clear, Your Honor, is that the right attaches --
11 arises and attaches at submission, at filing with the
12 Clerk of the Court. That's the right, and that's
13 when it attaches.
14 THE COURT: And I've agreed with that.
15 MR. EDWARDS: And delays in access need to
16 be justified under Press Enterprise 2, is our view.
17 THE COURT: Well, but that's not the test.
18 I mean, you're skipping over the historical analysis,
19 the historical tradition, to get there. That's what
20 it seems to me the judge in Vermont did, is she went
21 to narrowly tailored justifications. And I agree
22 with you, this would not -- I don't think what the
23 State is doing can be called narrowly tailored. That
24 doesn't seem to me to be the test for the access
25 cases.

1 MR. EDWARDS: With all due respect, I think
2 the Court is still conflating step one and step two
3 of Press Enterprise 2. Step one examines traditional
4 access to determine when the right attaches. We've
5 already established, and you have already ordered,
6 the right establishes at submission. That's what is
7 based on traditional access.
8 When you get to step 2, that is when it's
9 the defendants' burden to establish why should there
10 be delays in access, and have to provide a higher
11 value or interest and narrowly tailored means. And
12 all we're simply saying, Your Honor, is to ensure
13 that there is not prejudice going forward in this
14 case, that the findings regarding traditional access
15 be modified to take into account what the record
16 establishes is, that traditional access occurs prior
17 to docketing; that Ms. Prieskop saw documents, saw
18 complaints, before they were docketed. That was the
19 tradition of access.
20 So now defendants need to just establish,
21 going forward in the case -- and we're not trying to
22 affect your five-hour business rule here, your
23 order -- but going forward in the case, we want to
24 make clear that it is their burden going forward to
25 justify delays.

1 And as in Gabel, you know, they couldn't do
2 it. And it's the same --
3 THE COURT: It seems to me that that
4 analysis sucks the language of "qualified" right out.
5 It just puts it back into traditional First Amendment
6 analysis, and doesn't really recognize that this is a
7 qualified right.
8 MR. EDWARDS: Well, no, that's exactly why
9 it's qualified, because they have the opportunity to
10 rebut the presumption. The presumption is that the
11 right of access -- and access should be provided at
12 the point of submission. The reason it's qualified
13 is because under step two, they can come forward and
14 rebut that presumption with justifications for delay.
15 And as Judge Reiss said, examining very
16 similar factual pattern as here, with respect to this
17 claim of: We have to review for confidentiality; we
18 have to ensure the integrity of the court record.
19 Judge Reiss very carefully went through that, and
20 said that is not higher value or interest, and you
21 certainly are not using a narrowly tailored means to
22 achieve it without creating additional burdens.
23 I think, ultimately, the remedy we seek is
24 what Judge Reiss, the remedy she provided.
25 Now, right today, we're not asking you to

1 go to that extent, because we understand this was an
2 preliminary injunction order, and the Court has
3 interests concerning maintaining the status quo and
4 not causing the defendants to have to do a lot at
5 this early stage of the case. But with all due
6 consideration to the status quo, we think the record
7 should be clear about traditional access being
8 predocketing. And I think the way --
9 THE COURT: Well, but let's go back to what
10 I think is a broader right if we're talking about the
11 historical tradition. Mr. Girdner testified in
12 another case, Schaefer, that he did the rounds at
13 4:30 p.m., and testified that traditionally -- and
14 I'm quoting here from Schaefer -- "Traditionally
15 members of the press covered new litigation in
16 metropolitan areas around the country by sending
17 reporters to the courthouse towards the end of each
18 day." That's what he said in Schaefer. So I think
19 that makes sense. You know, I hung around a lot, as
20 a younger associate, around courthouses, because I
21 was there at the filing, and I would see what was
22 happening at the end of the day, because that's the
23 way they did it in the old days, send the young
24 associates to all the courthouses to get to know
25 everybody. So I stood right there and watched

1 exactly what Mr. Girdner was talking about. But if
2 that's the case, doesn't that have to be built into
3 the right as well? Yes, the court clerk would thumb
4 through it, turn around and throw it in a pile. But
5 the reality is nobody is really looking at that pile
6 until close to closing.
7 MR. EDWARDS: I think the key point is --
8 THE COURT: I have to build that in. I
9 did. I could be wrong, but I built it in. And
10 you're taking it out. It seems to me that's part of
11 the historical access to say: What was going on?
12 How was the press getting it? I built it in; you're
13 taking it out. Isn't that the big difference?
14 MR. EDWARDS: Well, no, because I think the
15 key point is still, it's not the frequency by which
16 the reporter goes to the courthouse, it's what they
17 saw when they got there.
18 THE COURT: But see, you and I are
19 disagreeing. I'm saying: Here's the history; here's
20 the access; here's what the press was getting, and I
21 built it into what I thought right was. You're
22 saying, Oh, no, we're just going to look at this
23 little bitty thing about they handed it to them,
24 thumbed through it, threw it in a stack; bingo,
25 there's the historical access. I think that's too

1 narrow.
2 MR. EDWARDS: But the historical access was
3 clear there was not a delay based on docketing. And
4 now there is. And that's the point we're raising, is
5 that now, with e-filing, where it should be even
6 simpler and faster than ever to provide the access --
7 THE COURT: Well, but that's your point,
8 you want the modern technology to overtake the
9 historical right.
10 MR. EDWARDS: That's not true, Your Honor.
11 We want exactly what existed then that has been taken
12 away, which was predocketing access.
13 THE COURT: Well, but you're really wanting
14 the reporters to sit in their offices and see it at
15 1:00, 10:00, 9:00, rather than going over to the
16 courthouse and going through a stack.
17 MR. EDWARDS: And the defendants need to
18 justify why that's not practical.
19 THE COURT: But I'm not sure they have to
20 get there until you -- until the right is defined. I
21 mean, I think you're going, just as the Vermont
22 judge -- and y'all both may be right -- but I think
23 you're going to a traditional First Amendment
24 analysis rather than this special analysis we have
25 for access cases. Probably, if this is a traditional

1 First Amendment case, you win. It's going to be hard
2 for them to justify this as narrowly tailored, and
3 whatever they're doing with these complaints as being
4 a compelling state interest.
5 But if we go the access case route, I think
6 it's a little more nuanced.
7 MR. EDWARDS: I don't see the distinction
8 the Court is raising between access cases and other
9 First Amendment access cases. The court cases in
10 Schaefer and the other courts have looked at -- now,
11 Schaefer applied a different level of scrutiny, but
12 it still required narrowly tailored. So I think the
13 courts are still using and cited Press Enterprise 2
14 as the standard. I don't see a distinction between
15 court records cases and other traditional First
16 Amendment access cases.
17 THE COURT: Well, let's say you're right
18 and I need to change my opinion. Why do it now?
19 It's up on the Tenth. What is the benefit to you or
20 to me or the State or the Tenth Circuit to do the
21 exercise you want right at the moment?
22 MR. EDWARDS: I think it's important for
23 purposes of precedent in this case going forward that
24 there not be any confusion about what the traditional
25 access was, predocketing.

1 THE COURT: Well, but the chances are we're
2 not going to do a lot in this case until the Tenth
3 Circuit makes a ruling; right?
4 MR. EDWARDS: Well, if the Court's -- well,
5 depends on how the Court rules on the stay motion.
6 But the motion to stay is only directed at your
7 order, not at the case in general.
8 THE COURT: Well, you don't want the stay,
9 so tell me what the case looks like without the stay.
10 MR. EDWARDS: Well, the case would -- we'd
11 proceed with discovery, and --
12 THE COURT: And how does me changing the
13 findings change anything?
14 MR. EDWARDS: Well, it makes clear, I
15 think, that the traditional access has been defined
16 factually as --
17 THE COURT: Well, that's true. I mean, it
18 would be more in line with what you want. But as far
19 as just going forward in this case, with the Tenth
20 Circuit having a chunk of it now, how does it change
21 what we do if I don't grant the stay?
22 MR. EDWARDS: Well --
23 THE COURT: You're going to go do
24 discovery. You're going to plan that I'm wrong, and
25 you're going to plan on proving that at trial; right?

1 MR. EDWARDS: Well, we're going to try and
2 establish that the traditional access was
3 predocketing, which we think we have in the record
4 today. And that's why we'd like -- the opinion
5 states that processing occurred first. And it's
6 just -- we just believe that that's inconsistent with
7 the record. And that is ripe for confusion going
8 forward and potential prejudice, because if the case
9 is being prosecuted and being defended under a
10 traditional access definition that is
11 post-processing, that's a different case; it's a
12 slightly different case than if you define it as
13 predocketing. Because we're going to have to do
14 discovery about what predocketing meant, and what
15 intake counter people did. It opens up a realm of
16 discovery that would be unnecessary if we simply
17 recognize that access was predocketing. That's how
18 it would change the case, Your Honor.
19 THE COURT: All right. Anything else you
20 want to say in support of your motion?
21 MR. EDWARDS: No, Your Honor, I think
22 that's it for now.
23 THE COURT: All right. Thank you, Mr.
24 Edwards.
25 MR. EDWARDS: Thank you, Your Honor.

1 THE COURT: All right. Mr. McDonald, are
2 you going to argue in response to the plaintiff's
3 motion?
4 MR. McDONALD: Yes, Your Honor. Thank you.
5 THE COURT: Mr. McDonald.
6 MR. McDONALD: Thank you, Your Honor. I
7 think that the first thing to address here is that if
8 we're not touching the order itself, there is really
9 no relief that can be granted today. And so I'm not
10 entirely --
11 THE COURT: Well, I guess what I'm
12 understanding Mr. Edwards saying is we're not
13 touching the order, that seems to be off the table.
14 But would you agree I could go back in and, you know,
15 make more findings or conclusions; basically tell
16 everybody I was wrong? And I'm not sure how that
17 necessarily helps the plaintiff right now, because
18 you're going to tell them -- you're going to tell the
19 Tenth Circuit I was wrong, and now I'm going to be
20 telling the Tenth Circuit, Yeah, I was wrong. So I'm
21 not sure how that helps the plaintiff. But they get
22 to make their own call on that.
23 Do you agree I've got the power to do that?
24 I don't touch the order, I've got the power,
25 jurisdiction to muse on the record some more findings

1 of fact and conclusions of law?
2 MR. McDONALD: Well, without touching on
3 the Court's power to do so in this case, I think
4 it's --
5 THE COURT: Well, let's start there. Do
6 you agree I've got the power to do that?
7 MR. McDONALD: I would imagine so, Your
8 Honor, you would have the power --
9 THE COURT: And you're about to tell me why
10 I shouldn't do that; right?
11 MR. McDONALD: Indeed. The defense
12 believes that this is -- what plaintiffs have asked
13 for is better briefed on summary judgment down the
14 line, subject to discovery. There are certainly
15 factual issues that need to get nailed down here,
16 that will --
17 THE COURT: Well, if I change my findings
18 and conclusions and say I'm wrong, doesn't that kind
19 of help you at the Tenth Circuit? You say: Even the
20 judge is beginning to have second thoughts about what
21 he did down there.
22 MR. McDONALD: Well, our -- I think our
23 position is that we're helped best by having the
24 order stay as it is on appeal, just so the Court can
25 actually look at it in its entirety.

1 Once again, as the Judge, you are free to
2 make any determinations that you wish there. But we
3 think that it presents a cleaner scenario for the
4 circuit court if it stays as it is right now.
5 THE COURT: Well, tell me why Mr. Edwards
6 is wrong, tell me why I'm going to -- if you can, if
7 you can tell me why I'm right, go ahead. And if you
8 can at least tell Mr. Edwards why he's wrong, tell me
9 why on the merits these portions shouldn't be
10 changed.
11 MR. McDONALD: Well, I believe -- so if
12 you're asking me to address the --
13 THE COURT: I mean, it sounds like nobody
14 is going to defend this portion of the opinion.
15 MR. McDONALD: Well, I'll grant that, Your
16 Honor, you are in the unenviable position of having
17 two parties who don't particularly like one portion
18 of the order. But I think our position here is this
19 is not the point to address that. That's something
20 that's better raised down the line, either in a
21 hearing on a permanent injunction or on appeal,
22 summary judgment, something of that nature. Right
23 now, that's not something the Court should be
24 touching on a motion to reconsider. It would upset
25 the status quo of the case moving forward.

1 I think Your Honor did address the
2 importance of this, of the delay period, on page 90,
3 I think of the order, discussing the duty that state
4 court clerks have to perform ministerial checks, and
5 the reliance that the New Mexico legal community
6 places on that activity that they do.
7 So I do think that you should not touch any
8 portion of this moving forward, just because it would
9 upset the status quo of the case and would throw a
10 wrench into the appellate proceedings. But I think
11 that would be my answer as to why the plaintiffs are
12 incorrect to ask you to take any action right now.
13 THE COURT: All right. Anything else you
14 want to say in opposition to the motion, Mr.
15 McDonald?
16 MR. McDONALD: Well, the briefing that we
17 prepared was in anticipation of them requesting, like
18 more substantial change than I think I heard on oral
19 argument here. So if they --
20 THE COURT: You were worried about them
21 wanting me to change the order portion?
22 MR. McDONALD: Yes. And if that's off the
23 table, then I think what we're left with is a request
24 to with no real relief that the Court can grant right
25 now. So I think that we're willing to leave it at

1 that.
2 THE COURT: Okay. All right. Thank you,
3 Mr. McDonald.
4 Mr. Edwards, I'll give you the last word on
5 your motion.
6 MR. EDWARDS: Just briefly, Your Honor. I
7 want to address two points. First being what was
8 just mentioned about the status quo being affected
9 and throwing a wrench into the appellate proceedings.
10 I think that would not be the case since we're not
11 touching the order. We're simply touching certain
12 findings and conclusions. And I don't think that
13 would affect the status quo or affect appellate
14 review.
15 The second point is, Your Honor mentioned
16 historical access was more accurately described as
17 being at the end of the day. Now, even if it was the
18 practice for reporters to go to the courthouse near
19 the end of the day, certainly schedules would not
20 permit them to be at each courthouse at the end of
21 the day, they'd have to stagger it. But be that as
22 it may --
23 THE COURT: They could skip the federal
24 courthouse. That's pretty much what happens around
25 here anyway, isn't it?

1 MR. McDONALD: That's right. But the point
2 is they were available all day. If the reporter
3 chose to show up at 9:00 a.m. or noon, they would see
4 the same things they saw at the end of the day. They
5 were available for review. And if the end of the day
6 is the historical standard, if Your Honor is correct,
7 if it's just the end of the day and not throughout
8 the day, this Court should make sure there is access
9 by the end of the day. And the five-hour business
10 rule doesn't do that. By our numbers, approximately
11 60 percent of filings between noon and 5:00 that
12 occur on a given day are now allowed to be pushed to
13 the next day. That's not traditional access, Your
14 Honor, is our position.
15 And we'd like to have the opinion modified
16 with respect to its findings and conclusions that
17 traditional access was predocketing. That's the
18 extent of our request today, Your Honor.
19 THE COURT: All right. Thank you, Mr.
20 Edwards.
21 MR. EDWARDS: Thank you.
22 THE COURT: Well, given that we're not
23 going to be touching the order, I may -- I'm probably
24 going to deal with this motion to stay first. I
25 think that's going to be the more burning issue. So

1 I'll probably pick this up -- I don't mind
2 reconsidering findings of fact and conclusions of law
3 while this is on appeal. So I will take a look at
4 it. But I probably will deal first with the State's
5 motion to stay, and then I'll circle back to this. I
6 don't know how I'll come out. I'll certainly take
7 all the arguments into account and see if I change or
8 modify anything.
9 But, you know, I've had situations where
10 the Tenth Circuit will say -- there is actually a
11 procedure in the Federal Rules of Civil Procedure --
12 it may be the Federal Appellate Procedure -- where
13 they can say: What would you do, district court, if
14 you were to have this case back? So it's a little
15 bit like that. It's kind of like, if I were doing it
16 over again, in a little bit more leisurely way,
17 rather than the compressed time it takes to get a
18 preliminary injunction opinion out, would I have done
19 something different?
20 So I'll take a look at it. I won't shy
21 away from getting something out. But I probably will
22 concentrate more on the motion to dismiss. And I
23 don't have any sort of inclination right at the
24 moment about whether anything should be modified or
25 not. I do know I spent a lot of time on this, worked

1 hard on it, so I'm not sitting here thinking I got
2 anything wrong. But I'll take a look at it. So I'll
3 take that one under advisement.
4 Let's take up the motion to stay. Mr.
5 Sydow, are you going to argue this motion?
6 MR. SYDOW: I am, Your Honor.
7 THE COURT: All right. Mr. Sydow.
8 MR. SYDOW: Good morning, and may it please
9 the Court.
10 THE COURT: Mr. Sydow.
11 MR. SYDOW: If I may just briefly address
12 your last comments on the motion for reconsideration.
13 I would, I guess, only raise my concern that any
14 modification of the preliminary injunction order
15 risks, I think, changing the issues that are up on
16 the Tenth on appeal. And so, even if the order
17 itself is not changed, if the underlying conclusions
18 of law or findings of fact that support that order
19 are being changed, suddenly what we're briefing and
20 challenging in the Tenth changes, too. And I think
21 there is a real danger there.
22 I also don't know what the practical
23 benefit of kind of providing these updates to the
24 preliminary injunction opinion as we go along,
25 whether there is going to be discovery, when there is

1 going to be summary judgment briefing on the same
2 issues achieves. But I'm really here to talk about
3 the motion to stay.
4 THE COURT: Well, I know it's a little
5 treacherous to get into something that's at the
6 Tenth. So I have a little bit of dog in that fight
7 too, so I'll -- your comments are well taken, and
8 I'll be careful about anything I say with an eye
9 toward the Tenth Circuit looking at it.
10 MR. SYDOW: Thank you, Your Honor.
11 As you know, the motion to stay is guided
12 by the four factor test. And I don't know how to
13 pronounce this. I think the N is silent, Nken versus
14 Holder, that case, which is laid out well in the
15 parties' briefs. I don't want to try to rehash those
16 factors too much, but I wanted to emphasize a couple
17 of things, because I recognize that motions to stay,
18 these motions are often denied in the district court
19 because the factors overlap with the factors for
20 preliminary injunction. So the Court is saying,
21 Look, we looked at these same factors on preliminary
22 injunction, and here, I -- at least in part --
23 granted the preliminary injunction. And that in
24 part --
25 THE COURT: And that raises a question, a

1 lot of times people come to me for a stay and it's
2 pro forma; they just need an order denying it, so
3 they can go to the Tenth Circuit and get the stay.
4 Is that kind of where we are? You just need me to
5 give you an order so you can go to the Tenth? I know
6 you have to ask here first.
7 MR. SYDOW: No, Your Honor. And I realize
8 that under Federal Rule of Appellate Procedure 8(a)
9 (1) (C), we are required to come here first. But I
10 want to make my pitch why this isn't the ordinary
11 case, and encourage the Court to exercise the
12 discretion that you do have under Rule of Civil
13 Procedure 62(d) to stay the preliminary injunction
14 pending appeal.
15 First, I wanted to talk about the merits of
16 the state court's appeal, and why we are more likely
17 to succeed in this case than the ordinary case on the
18 appeal.
19 And second, I wanted to address some of the
20 unique equities that are at stake here. Here, you
21 have an unusual admission by Courthouse News Service
22 that the preliminary injunction is not substantially
23 affecting its access to court records. And so
24 staying that preliminary injunction would not
25 substantially affect them either.

1 So on that first issue, the likelihood of
2 success on the merits, you have -- to begin, I think
3 in the usual case there isn't a circuit split without
4 a Tenth Circuit ruling. And here, on this abstention
5 issue, in particular, there is a circuit split. And
6 the existence of that circuit split, I think, makes
7 it at least reasonably likely that the state court
8 will prevail on appeal.
9 THE COURT: Well, you're talking about the
10 abstention issue, the Younger issue?
11 MR. SYDOW: Yes -- well, I wouldn't call it
12 a Younger issue. I think it's more of an O'Shea
13 abstention issue. But the abstention issue -- and I
14 do think you have to, when you're looking at
15 likelihood of success on the merits, which is one of
16 the major considerations under the Nken versus Holder
17 test, you have to, I think, add together the
18 different possibilities of a reversal or vacation of
19 a preliminary injunction.
20 THE COURT: Isn't the reality that other
21 than the Missouri District Court case and the Seventh
22 Circuit, nobody is buying into abstentions? The
23 trend is just everybody is looking at it; they're
24 taking the Seventh Circuit seriously, as we have to,
25 but to say it's really a split, it's not much of a

1 split. It's one court. And what it requires is the
2 district court in New Mexico, the Tenth Circuit, and
3 the Supreme Court to basically create a new
4 abstention doctrine. Nobody is really getting into
5 this -- well, let's do all this comity, Federalism,
6 and all that state court, all that sort of stuff.
7 The Younger abstention is much more narrow than what
8 the Seventh Circuit did.
9 And so, as a district judge, I think it
10 would be hard to criticize -- the Tenth Circuit to
11 criticize me. They can. I mean, they're always free
12 to do what they want. But I mean, the law in this
13 circuit is not that sort of free-wheeling abstention
14 doctrine we see out of the Seventh Circuit. That may
15 become the law.
16 MR. SYDOW: So --
17 THE COURT: But I kind of doubt it, don't
18 you? I mean, I don't think this Supreme Court is
19 going to give up federal question jurisdiction that
20 easily.
21 MR. SYDOW: Well, I think the Supreme Court
22 is reasonably solicitous to states' rights. But that
23 aside, I think there are two reasons why I would
24 disagree with that reasoning.
25 The first is that I don't think Brown, the

1 Seventh Circuit case, is as much of an outlier as the
2 plaintiff contends. You don't really have a lot of
3 circuit court rulings on this abstention question.
4 You've got certainly the Ninth Circuit's opinion in
5 Planet. You've got the Fourth Circuit's opinion in
6 Schaefer, which said there wasn't a preliminary
7 injunction -- or there wasn't an injunction being
8 issued, and so the court didn't need to reach the
9 question of whether abstention would prevent the
10 issuance of an injunction. And you've got the
11 Seventh Circuit opinion in Brown. And you've got
12 some district court cases. But there is not that
13 much there.
14 The second thing that I would say --
15 THE COURT: But other than the Missouri
16 case, no district court has gone the direction of the
17 Seventh; am I correct?
18 MR. SYDOW: That's my understanding. But
19 you know, there aren't a number of district courts
20 from outside --
21 THE COURT: I guess my opinion, though, is
22 it falls right into the heartland of what the Court's
23 are doing as far as abstention. You have to go the
24 Seventh Circuit route, which just doesn't seem to
25 have the same Tenth Circuit law to get there.

1 And so, if we're a betting man, woman, on
2 this stuff, we're -- it seems to me, we kind of have
3 to predict that the Tenth Circuit is not going to
4 change its law and go with the Seventh Circuit.
5 MR. SYDOW: So that leads me to the second
6 thing I wanted to say, which was that I don't think
7 the Tenth Circuit needs to change its law, because I
8 don't think this is really a Younger abstention
9 question. I think it's more of an O'Shea abstention
10 question.
11 THE COURT: Explain what the distinction
12 you're trying to make there is.
13 MR. SYDOW: Right. So -- and this is how
14 the Second Circuit interpreted Brown in Disability
15 Rights New York, a 2019 case, that we cite in our
16 briefing. And there the Second Circuit said what
17 Brown is really -- is holding is not that Younger
18 applies, because Younger doesn't apply under Sprint
19 Communications; it's limited to these particular
20 circumstances.
21 But under the Supreme Court case O'Shea,
22 that case said that "Federal courts should abstain
23 where their order would result in the federal
24 oversight of, and interference with, state court
25 operations." And the Tenth Circuit has recognized

1 O'Shea abstentions. And I think they might well do
2 so here, particularly given the terms and the facts
3 of the preliminary injunction.
4 First of all, just the nature of it being a
5 preliminary injunction means that the injunctive
6 terms are likely to change. They could be modified
7 or vacated on appeal; they can be changed as the
8 Court proceeds under the Court's continuing
9 jurisdiction to be able to modify preliminary
10 injunctions, as indeed the plaintiff is asking you to
11 do today.
12 THE COURT: But hasn't every district court
13 that's looked at this issue and issued an injunction
14 done pretty much the same thing? They basically tell
15 the State: Here's the constitutional right; here's
16 the problem; here's the eliminations; fix it. I
17 mean, that to me takes it out of the O'Shea
18 situation, because the management oversight is pretty
19 minimal. You can go get software; you can hire more
20 clerks; you can just make the stuff available; quit
21 doing the screening.
22 It really -- mean, I do consent decrees --
23 maybe that's a little bit more management -- of MDC
24 or Albuquerque Police Department, or something like
25 that. But this is pretty low maintenance, wouldn't

1 you think?
2 MR. SYDOW: And those consent decrees
3 aren't over courts, so they don't run into O'Shea.
4 But I think, first of all, it's a
5 preliminary injunction, right, so a lot of those
6 cases they --
7 THE COURT: Are you saying O'Shea is
8 limited to courts?
9 MR. SYDOW: At least primarily. I think
10 there may be some cases extending it to other types
11 of governmental operations. But O'Shea itself is
12 about court operations. And a number of the cases
13 applying O'Shea in that Disability Rights Second
14 Circuit case I mentioned, there is a string cite to a
15 number of cases applying O'Shea in the civil court
16 context.
17 But anyway, to respond -- I don't want to
18 get off topic -- to respond directly to your
19 question, so in those other district court cases --
20 first of all, you don't usually have preliminary
21 injunction that may change, and so have successive
22 federal court orders. But second, the preliminary
23 injunction itself, because it has kind of this strict
24 bright line five-hour standard, requires 100%
25 compliance. And that distinguishes the order from

1 like the order in Schaefer, where the Court simply
2 required substantial compliance, in most cases, to
3 provide court records quickly. And in Schaefer, the
4 court specifically recognized that there is less of
5 an intrusion on state court operations when you have
6 kind of a substantial compliance standard that --
7 THE COURT: But isn't that putting the cart
8 before the horse? You're saying because I issued
9 this kind of injunction, I should have abstained. I
10 mean, the question is whether I should abstain; not
11 after I didn't abstain what kind of relief I gave. I
12 mean, don't we have to determine abstention of the
13 jurisdiction of the Court first? I don't know what
14 I'm going to do. So it seems to me that's putting
15 the cart before the horse.
16 The Tenth Circuit can say, you know, the
17 district court got it right; it shouldn't abstain,
18 but that crazy five-hour rule, we don't buy that.
19 They could go that direction, but it still doesn't
20 mean that they're going to go back and say I should
21 abstain because of the relief I gave. Isn't that
22 putting it backwards?
23 MR. SYDOW: Partly. The question to keep
24 in mind --
25 THE COURT: If I had done what Schaefer

1 did, where would your argument be?
2 MR. SYDOW: Well, if you -- I mean, I think
3 some of these --
4 THE COURT: Don't I solve your abstention
5 problem by changing the order to be like Schaefer?
6 MR. SYDOW: In part, right, it would avoid
7 the issue of 100% compliance. It would still be a
8 preliminary injunction that could continue to change.
9 It would also still operate across an entire court
10 system in 33 counties, which distinguishes it from
11 some of these orders that are just setting standards
12 for particular individual courts.
13 But it's important to keep in mind that the
14 question here that is being considered on a motion to
15 stay is the likelihood that the Tenth Circuit is
16 going to reverse or vacate the preliminary injunction
17 order. And so it's not simply whether you were
18 correct in the first instance to abstain from issuing
19 a preliminary -- from hearing the case, but whether
20 the preliminary injunction should issue while the
21 case is pending, and whether abstention is a basis
22 for not issuing that preliminary injunction.
23 And I understand that, then, at that point,
24 the factor of success on the merits abstention
25 question starts kind of bleeding into the equities

1 question of impositions on state sovereignty and the
2 State's interest in not having this kind of pending
3 order that requires different administration of court
4 processes while the case is pending, and then maybe
5 changed as the case goes along.
6 So I mean, I do want to talk briefly about
7 that equities question. And I mean, I think there
8 are some other merits issues that we raise in the
9 motion to stay. This question of when a document is
10 considered filed, and becomes a court record to which
11 a right attaches, whether that includes the --
12 whether that means when the person tries to submit
13 the document, when the clerk opens it, when the clerk
14 reviews it for confidential information, you know,
15 which of those points. That's an issue on appeal, as
16 is this kind of 100% standard.
17 THE COURT: Well, but let's talk about
18 that. Putting aside Brown in the Seventh Circuit,
19 which didn't get to these issues because they
20 abstained, hasn't everyone said the same on this
21 issue?
22 MR. SYDOW: Well --
23 THE COURT: I mean, when they define the
24 right, hasn't every district court and every circuit
25 court held that it's the moment that the state gets

1 the document that the right attaches?
2 MR. SYDOW: So Planet 2 -- the Ninth
3 Circuit in Planet 2 held that the right of access
4 depends on the existence of a court record. And
5 under New Mexico Court rules, a court record -- you
6 have a court record once it has been accepted for
7 filing. If a document is rejected for filing, right,
8 if you took a document to the clerk's office --
9 THE COURT: Well, I know that's what the
10 state thinks and does and defines, and those things.
11 But as far as federal district courts and circuit
12 courts, haven't they been unanimous in the sense that
13 the right attaches when the state becomes in
14 possession of the document?
15 MR. SYDOW: Well, as I said --
16 THE COURT: They just haven't been
17 interested in all these nuances in the state about
18 docketing and those sort of things. It seems to
19 me -- and correct me if I'm wrong -- every district
20 court judge, every circuit judge that's got over the
21 abstention has said: When you get the document,
22 that's when the right attaches.
23 MR. SYDOW: Well -- and I know plaintiff's
24 argument is that there is a conflation of, you know,
25 filing and docketing. And you can -- and I analogize

1 this to the times when I filed things by hand in
2 state court. I'd wait in line, right, the submission
3 process included going to the clerk's office, waiting
4 in line, getting to the window, handing the clerk my
5 submission, and having the clerk review it, and
6 either accept it and stamp it, or reject it and tell
7 me to fix something and come back.
8 And, you know, none of those things is the
9 docketing of the pleading, of the document. All of
10 those are the submission, you know, and the
11 submission process used to include that waiting in
12 line, the opening of the document by the clerk, that
13 initial review to either accept or reject. And then
14 there is a docketing down the line. But I think
15 the -- so I agree that there is not authority out
16 there from other cases that says there has to be an
17 ultimate docketing, and like, establishing of the
18 case file.
19 THE COURT: So aren't you going to face an
20 uphill battle, at least on this issue? If the Tenth
21 Circuit decides not to abstain, it's a pretty uphill
22 battle to say that the right doesn't attach when you
23 come into possession of the document.
24 MR. SYDOW: Well, I think we can --
25 THE COURT: I mean, you're going to be

1 swimming upstream against every federal court that's
2 looked at that issue; right?
3 MR. SYDOW: Well, I think it's important to
4 drill down to the underlying right. And the Ninth
5 Circuit, in Planet 2, held that the right depends on
6 there being an existence of a court record. So we'll
7 litigate this question of when something becomes a
8 court record. And I think it's not upon an attempt
9 to submit it. It's upon the receipt and opening of
10 the document, at least, if not the review of the
11 document. And that's --
12 THE COURT: Well, but isn't -- in the old
13 days -- I mean, I guess a clerk could sit there and
14 go: I am not taking that document. And that
15 probably doesn't come into possession. They could
16 probably say: I'm not taking it. But those days are
17 kind of gone, right?
18 MR. SYDOW: But if you're --
19 THE COURT: Once somebody over at the
20 Peifer Law Firm files something electronically, you
21 got it.
22 MR. SYDOW: Well, I'm not perfect --
23 THE COURT: You can't get it out of there.
24 It's there.
25 MR. SYDOW: No, I'm not perfect with my

1 filing, and I've had filings rejected by the court.
2 THE COURT: That's a different issue. But
3 you got possession of it at that time.
4 MR. SYDOW: But if it's rejected, it's
5 not --
6 THE COURT: If somebody files something
7 over here on CM/ECF, it's there, it's ours. It's --
8 we've got to deal with it.
9 MR. SYDOW: Right. And you know, unless
10 someone files --
11 THE COURT: But isn't that where everybody
12 says the right attaches?
13 MR. SYDOW: Well, the -- if the document is
14 rejected by the clerk's office -- and this would be
15 the same, you know, equivalent of that clerk handing
16 it back on paper to me saying: You made a mistake;
17 you filed a confidential -- you know, you attached
18 someone's confidential medical records to your
19 complaint, fix this and bring it back. If that gets
20 rejected, it doesn't become a court record, and I
21 have to resubmit it.
22 Now, for statute of limitations purposes
23 the court considers that initial attempt at filing
24 as, you know, the filing as of that date, but it
25 doesn't become a court record, only the corrected

1 submission and filing.
2 THE COURT: Doesn't that just really
3 undercut your argument that the State of New Mexico,
4 for statute of limitations purposes, considers it
5 filed?
6 MR. SYDOW: Well, I don't think so. I
7 don't really understand why there can't be a
8 difference in terms of considering a deadline for
9 statute of limitation purposes that gives litigants
10 the grace of -- you know, understanding that they
11 made an attempt to file something, but that what they
12 filed wasn't proper and needs to be corrected before
13 it becomes kind of the initiating document for a
14 lawsuit. And that seems fair to me.
15 But I mean, I think that this is an issue
16 that we'll raise on appeal: Where the specific right
17 attaches. Is it the attempt to submit? Is it the
18 opening of the file? Is it the acceptance of the
19 file by the court clerk? And that adds to the
20 possibility that this preliminary injunction will be
21 vacated or modified on appeal. And then there is
22 also that 100 percent compliance question, where --
23 I'm not aware of any district court opinion that
24 really says in every single case you need to meet
25 this strict deadline. And regardless of any

1 disruptions to the operations of the clerk's office,
2 if, you know, you don't provide access within five
3 hours, you violate the First Amendment.
4 The second thing I wanted to talk about was
5 this equities question, and why this isn't the
6 ordinary, you know, pro forma, as you put it, motion
7 to stay a preliminary injunction pending appeal,
8 because in most cases the party that obtained at
9 least a preliminary injunction in part does not
10 allege that the preliminary injunction does almost
11 nothing for them. Whereas, here that's true. So if
12 that same preliminary injunction is stayed by the
13 Court, there is very little difference to the
14 plaintiff. And the equities are all on the state
15 side in not having potentially unnecessary
16 administration of the state's courts by a federal
17 order. And that sovereign injury would be prevented
18 by staying the preliminary injunction while the case
19 is on appeal.
20 THE COURT: Maybe I just missed it in the
21 submissions, but what is the State doing to comply
22 with the court order?
23 MR. SYDOW: So -- and I might have to
24 consult with my colleagues on this.
25 THE COURT: If they're saying: Oh, boy,

1 the order didn't help us out any, I get that. But
2 the State is not really saying that they're doing
3 anything different about the court order either. It
4 seems to me that it's: Hey, it might be preserving
5 the status quo, I don't know.
6 MR. SYDOW: So, we do say in the motion to
7 stay -- and I know this much -- that we've met with
8 State Supreme Court to determine how to comply with
9 this order in these kind of edge cases where there
10 might be a complaint that's not available within five
11 hours.
12 Now, we agree that in the vast majority of
13 cases we're already in compliance with this
14 preliminary injunction. But to obtain 100%
15 compliance with the preliminary injunction, and to
16 ensure that district court clerks are not releasing
17 confidential documents, in violation of State Supreme
18 Court orders, we have needed to meet with the State
19 Supreme Court and initiate a process where the
20 Administrative Office of the Courts is working with
21 individual clerk's offices to see what they can do to
22 obtain 100% compliance, and you know, provide for
23 things like cover when a clerk is unavailable in a
24 smaller court, to obtain faster review of those
25 complaints. And I mean, I don't know if it will

1 ultimately require modifying court rules to provide
2 for -- to permit access to confidential documents, if
3 the clerks can't screen them in time. I mean,
4 Courthouse News Service, I know in their response to
5 our motion to stay --
6 THE COURT: Isn't the bottom line the
7 State's done nothing?
8 MR. SYDOW: No.
9 THE COURT: It talked about it, but it
10 hasn't done anything.
11 MR. SYDOW: I'll let my colleagues correct
12 me --
13 THE COURT: We've got an injunction out and
14 one side is saying it's not doing them any good, and
15 the other side, to my knowledge, is saying: We
16 talked about it, but we haven't done anything about
17 it.
18 MR. SYDOW: Well --
19 THE COURT: So it doesn't seem like it's
20 being terribly disruptive to anything.
21 MR. SYDOW: So we certainly -- it's not
22 true that we've not done anything about the
23 preliminary injunction order. And meeting with the
24 Supreme Court --
25 THE COURT: Well, give me one change that

1 the State has made.

2 MR. SYDOW: I don't know. Ms. Lecocq is

3 more familiar with these operational processes than I

4 am, but I know that we've begun this process by

5 meeting with the State Supreme Court.

6 THE COURT: Yeah, but give me one change

7 the State's made in the way it does things.

8 MS. LECOCQ: Good morning, Your Honor. I

9 think that the point that Mr. Sydow is trying to make

10 is that it is impossible for New Mexico courts to

11 make a change immediately; that everything has to go

12 through the Supreme Court.

13 THE COURT: Well, but -- I understand that,

14 but you can't give me one change it's made, right?

15 MS. LECOCQ: Well, we've met with the

16 Supreme Court, and the Supreme Court --

17 THE COURT: I understand.

18 MS. LECOCQ: -- is looking at financing.

19 THE COURT: I understand. Give me one

20 change.

21 MS. LECOCQ: Well, it's impossible at this

22 point to make a change.

23 THE COURT: All right.

24 MS. LECOCQ: But the point is that we have

25 to -- we've instigated the process, which is the

1 first step in order to make any change. So we have
2 started that process.
3 Is there anything else factually I can help
4 you with before I turn this over to Mr. Sydow?
5 THE COURT: No, that's fine. Thank you,
6 Ms. Lecocq.
7 MR. SYDOW: Thank you.
8 And I do want to emphasize that -- and I
9 know Courthouse News Service criticizes our motion to
10 stay for kind of the lack of specificity to the
11 sovereign injury. But the point is that this
12 preliminary injunction order precipitates a cascade
13 of actions by the State Supreme Court. So, yes, the
14 State Supreme Court has met with us. And to change
15 its rules, the State Supreme Court needs to undertake
16 a formal rule making process, where -- I'm on some of
17 the Supreme Court rules committees where the
18 committee has to meet and propose draft language, and
19 propose a change, just as with the federal rules
20 committees, a change to the rules, and submit it for
21 public comment, and ultimately finalize that rule.
22 And so you're asking -- the preliminary
23 injunction order directs the State Supreme Court to
24 initiate that rule making process. And you know,
25 simply the directive itself from the federal court to

1 the state courts saying: You must comply with this
2 order, including the State Supreme Court, that the
3 state system as a set of democratically elected
4 representatives of the people has to comply with the
5 Supreme Court, that's a sovereign injury to the
6 State. That's what the U.S. Supreme Court held in
7 Maryland versus King, that anytime you have a federal
8 court kind of directing state officials, that's a
9 sovereign injury that weighs in the State's favor in
10 this kind of equitable balancing, because it's an
11 injunction of the actions of the people's
12 representatives here, the State Supreme Court.
13 The last factor is the public interest.
14 Courthouse News Service argued that we did not
15 address the public interest in the motion to stay. I
16 think that's just not right. Our point is that when
17 the government is a party, that fourth factor aligns
18 with the governmental interest, and that's in Nken
19 versus Holder itself.
20 And here because, according to plaintiffs'
21 own allegation, the preliminary injunction order
22 doesn't change court access almost at all, any public
23 interest in court access is similarly minimal. But
24 the sovereign injury and the interruption of the
25 direction of the State -- of the public's

1 representatives in the State Supreme Court is also an
2 injury to the public interest, and those interests
3 align on equities.
4 So those are the reasons that I
5 respectfully request the Court grant a motion to
6 stay, exercising its discretion under Rule 62(d), and
7 not begin this process where the Supreme Court has to
8 direct courts and change court operations multiple
9 times throughout this litigation. And if a sovereign
10 injury on the State is going to be imposed, it only
11 be done at the end of litigation, once these
12 abstention issues are heard by the Tenth Circuit,
13 once the merits are entirely briefed, and we have a
14 clear directive that can be complied with once, if at
15 all.
16 THE COURT: All right. Thank you, Mr.
17 Sydow.
18 MR. SYDOW: Thank you, Your Honor.
19 THE COURT: Mr. Edwards, are you going to
20 respond to the motion to stay?
21 MR. EDWARDS: Your Honor, I would like to
22 first start with Nken versus Holder, and just the
23 fundamental proposition that the movant here bears a
24 heavy burden. And this Court hold in Gen Protech
25 Group, it's an extraordinary remedy, we don't think

1 they've shown that the first two factors under Nken,
2 which are the most critical, that they've established
3 a likelihood of success or irreparable injury.
4 First, to talk about abstention, I think
5 Brown is an outlier. Judge Reiss clearly found it to
6 be an outlier, used that specific term.
7 THE COURT: Well, it seemed to me that what
8 the State was doing is sliding away from Younger and
9 beginning to focus more on O'Shea. And I'm not sure
10 that when we were here together we were talking a lot
11 about O'Shea. I think we were looking at Younger.
12 What do you think about O'Shea?
13 MR. EDWARDS: And there is a reason why
14 O'Shea wasn't brought up earlier. Because if you
15 look at O'Shea precedent, it involves federal
16 oversight and federal audits. And if you look at the
17 case law, it typically involves the federal
18 government in an extended period of time, sometimes
19 10, 20 years of oversight, to ensure constitutional
20 actions are --
21 THE COURT: Well, what do you do with my
22 sort of problem is you don't know what the remedy is
23 going to be when you're trying to decide the
24 abstention issue? I mean, a lot of times you look at
25 the morass that you got yourself into when you go

1 ahead and don't abstain, but you don't know that at
2 the beginning.
3 MR. EDWARDS: And I agree completely with
4 that thought, Your Honor. Abstention should be
5 addressed at the beginning of the case as to whether
6 or not jurisdiction should be declined based on the
7 traditional standards of Younger, O'Shea, and Rizzo.
8 And it shouldn't be based on what theoretical remedy
9 the Court may construct at some future point. So I
10 think that's another reason.
11 But O'Shea -- going back to your
12 question -- does not apply, because we've not asked
13 for anything that would require federal oversight or
14 a federal audit along the lines of the precedent
15 under O'Shea. And so I don't think it applies.
16 I would also call the Court's attention to
17 the fact that just on Monday of this week, Magistrate
18 Judge Susan Hightower in Western District of Texas
19 issued a report and recommendation on an abstention
20 motion involving Courthouse News, and she denied it,
21 rejected it, again under Younger. And that report
22 will be made to the District Court Judge Lee Yeakel
23 for consideration.
24 But again, this is just another example.
25 The opinions that are coming out are consistently in

1 opposition to Brown in the Seventh Circuit.
2 THE COURT: Yeakel is where?
3 MR. EDWARDS: Western District of Texas, in
4 Austin, Travis County.
5 THE COURT: Austin. Hightower is there as
6 well?
7 MR. EDWARDS: Yes, she's a magistrate judge
8 working with Judge Yeakel. So that opinion was
9 issued on Monday. We haven't filed it with the
10 Court. It's just a report and recommendation at this
11 point. Again, it's a very well-reasoned opinion that
12 rejects abstention.
13 So moving on from abstention, the right of
14 access issue, you know, we keep talking about what's
15 a court record, when it's defined. If you adopt the
16 defendants' logic, then any state can define for
17 itself when something becomes a court record and
18 therefore define when the First Amendment analysis
19 even begins. That cannot be the law. The right of
20 access has to be established independently of how a
21 state may define it through its intricate rules and
22 regulation, codes, and statutes. So I think that's
23 not a viable argument.
24 And Judge Reiss, again in the Gabel
25 decision, specifically said in response to the

1 argument that, as defendants have said here, you
2 know, Courthouse News is asking to go behind the
3 clerk's desk, and open an envelope that hasn't been
4 opened by the clerk, and all this kind of stuff. And
5 Judge Reiss, at page 17 of her order rejected that
6 and said: This comparison is nonsensical in the
7 context of an electronic filing system. And it is.
8 The court -- the document is submitted and filed when
9 the submitter hits the "submit" button. And the
10 electronic software is performing intake functions.
11 It will reject it if you don't complete it. If you
12 don't fill in what's required to be filled in
13 electronically, it's rejected then. It never gets to
14 the clerk.
15 So I think this continuing conflation of
16 docketing and intake just creates confusion. And
17 you're right, the precedent is pretty universal in
18 establishing that the right attaches when it's
19 submitted to the clerk or the court. It can't depend
20 on when they open it. They could let it sit there a
21 week or a month. Whether it happens in practice or
22 not is irrelevant. It's clear, if that were the
23 standard, they could hold it for as long as they
24 wanted, and insulate that from First Amendment
25 review.

1 Moving on to your questions about what has
2 the State actually done to effectuate compliance with
3 this order. And I think the answer has been nothing.
4 There may have been some discussions about it,
5 meetings about it. But they haven't done anything.
6 And I think the reality is the Supreme
7 Court is not being ordered by this Court to do
8 anything. It has not been shown through any argument
9 or evidence -- particularly evidence -- that the
10 Administrative Office of the Courts can't implement a
11 simple policy change to effectuate this Court's
12 order. I have not seen any evidence or argument that
13 the Supreme Court has to do anything in a rule making
14 capacity to ensure that clerks are reviewing things
15 in a timely manner. Seems to me that Director Pepin
16 could just simply say do it faster, or do it in this
17 timeframe. But apparently he hasn't even done that.
18 So I don't think the State is being injured
19 in any sovereign fashion, or otherwise, by your
20 Court's order.
21 Finally, I'd like to say, Your Honor, that
22 to the extent they are in some ways being affected
23 negatively, Your Honor in your order found that the
24 Press Review Queue is available at no cost. This is
25 a readily available remedy. If they're

1 complaining -- if they ever complain in this case:
2 Hey, we've got to hire more staff; this requires more
3 resources; it's creating all these problems, well,
4 all of those things can be solved by simply having
5 the will to implement a queue that would allow review
6 of these complaints upon receipt when the right
7 attaches. And we don't think they will ever be able
8 to justify not doing so.
9 THE COURT: Well, wasn't that the point of
10 the Vermont judge? She said: It's not a question of
11 can't, it's a question of how. And right now this
12 Court is giving total discretion to the State as to
13 how to implement it. I've just done the best I can
14 to determine the right, and saying the right is not
15 being complied with, and it's being violated in
16 certain aspects. And so we've got to bring the State
17 into compliance. But the how is largely theirs.
18 It's not a matter of cannot.
19 MR. EDWARDS: Yeah. And Judge Reiss,
20 specifically her injunction was simply: You cannot
21 delay until processing. And she didn't tell them how
22 to do it. There are many tools available, I'm sure,
23 to the State of Vermont that could accomplish that
24 objective. So the court is not instructing them how
25 to do it. And we're not asking this Court to

1 instruct defendants how to do it either. We're just
2 simply noting that there is a tool available that
3 would remedy any so-called irreparable harm or damage
4 or excessive cost or resources, staffing or
5 otherwise. None of that would be necessary if they
6 simply used the tool that is available. But we're
7 not asking this Court to require that tool, simply to
8 require that they make complaints available
9 preprocessing.
10 And I think, Your Honor -- so I think the
11 first two critical factors of Nken: strong showing of
12 likelihood of success and irreparable injury are not
13 shown.
14 Now, it comes to the final two elements of
15 injury to us, you know, any constitutional violation
16 is an irreparable injury per se. It's presumed.
17 Now, you know, would we prefer a different rule than
18 the five-hour business rule? Well, of course. We've
19 stated what our preferred remedy would be, and it's
20 preprocessing.
21 And I think the public interest is this
22 Court and many courts have made clear is significant
23 when it comes to press and public access to court
24 records. It, in fact, ensures the integrity of the
25 judiciary.

1 And this idea, finally, Your Honor, about:
2 Hey, there is going to be serial reworkings because
3 you may enter a subsequent order that's different,
4 requires different things, not only is that true in
5 every injunction case, but I don't think there is
6 anything unique about this case. The State would
7 have to simply comply with what this Court orders.
8 And if it's based on a violation of the Constitution,
9 that's proper. It's not commandeering the State's
10 judicial machinery or otherwise. So anyway, I think
11 the public interest lies in press and public access,
12 and shine light on the judiciary. That's where the
13 public interests lie.
14 THE COURT: All right. Thank you, Mr.
15 Edwards.
16 Mr. Sydow, I'll give you the last word on
17 your motion to stay.
18 MR. SYDOW: Thank you, Your Honor.
19 THE COURT: Mr. Sydow.
20 MR. SYDOW: Just a few things in response
21 to your colloquy with Mr. Edwards.
22 First, this kind of recurring issue of
23 whether abstention needs to come first as a question.
24 I think there is an open -- I think it's an open
25 question. I know that in several of the press access

1 cases there are footnotes that it's undetermined
2 whether an abstention motion should be brought under
3 12(b)(1) or 12(b)(6). And so whether it's
4 jurisdictional and must come first, or whether it's
5 an evaluation of why a particular claim and the
6 relief sought in that claim is obtained.
7 THE COURT: Well, let me ask my law clerk
8 to look. I think I have ruled on that, so it may be
9 an issue somewhere else. But take a look. I think I
10 have determined it's a 12(b)(1) situation.
11 Otherwise, if you make it a 12(b)(6), you're stuck
12 with the pleadings. And I think that an abstention,
13 it's pretty wide ranging as to what I can consider.
14 So I think I have decided that. I could be wrong.
15 Go ahead.
16 MR. SYDOW: I apologize. I don't know
17 if --
18 THE COURT: That could be another thing I'm
19 wrong on, but I think I have spent some time on that
20 issue before. Go ahead.
21 MR. SYDOW: I just know it's an open
22 question in certain circuits, so I wanted to raise
23 that first.
24 THE COURT: I'll help them close it.
25 MR. SYDOW: That's why we take appeals,

1 right, to create law and help answer questions.
2 Mr. Edwards also argued that, you know, if
3 you took our argument based on Planet 2, that the
4 right attaches when a court record exists, the State
5 could define what a court record is and abuse the
6 process.
7 But I think it's important keeping in mind
8 that the right here is public access to judicial
9 proceedings, the courthouse doors being open and
10 seeing what's happening in a lawsuit.
11 But if a complaint is rejected, that
12 lawsuit isn't initiated -- and not refiled, that
13 lawsuit is never initiated, and there is no court
14 proceeding that a right of access attaches to. I
15 think the definition of what a court record is --
16 makes sense for it to be a touchstone in Planet 2.
17 They next argued that electronic software
18 kind of permits the same kind of review that a
19 physical clerk's office review was conducting. I
20 think that's just not right with respect to
21 confidential documents, which is a primary concern of
22 the state courts. The court software does not
23 determine if a confidential document is erroneously
24 filed, so it can't provide the same sort of check
25 that a physical court clerk can check.

1 They next argued that the State Supreme
2 Court is not ordered to do anything in this case.
3 That's, I think, set forth pretty well in the
4 briefings. But I wanted to specifically point to
5 Rule of Civil Procedure 79(c), I believe is the
6 subsection, which --
7 THE COURT: This is the state rule?
8 MR. SYDOW: The state rules, yeah, 1-079 C,
9 that defines certain documents as confidential.
10 That's a State Supreme Court order that clerk's
11 offices are required to follow, that would need to be
12 modified by the State Supreme Court. There is also a
13 2017 State Supreme Court order that we attached that
14 prohibits -- or defines the types of documents that
15 state court clerks can provide to the press, and
16 excludes confidential documents from that kind of
17 permitted access from the clerk's office. That would
18 also need to change.
19 And you know, I think it's important
20 keeping in mind, again, that this is a court order
21 that applies to 33 counties, 13 judicial districts
22 across the state. And so you need -- you can't just
23 have a change in operations in one place. The
24 Supreme Court has to order directives across all of
25 those courts.

1 Now, I did get confirmation from my client
2 that the Administrative Office of the Courts is
3 meeting with the CEOs of those individual districts
4 tomorrow, and telling them to move as fast as you
5 can, do everything you can to comply with the Court's
6 preliminary injunction. But without more money, or
7 without an order from the State Supreme Court that
8 changes what county clerk's offices are permitted to
9 disclose, they can't do more. So they are acting, we
10 are acting in response to the Court's order. But
11 this really does require a change in court rules
12 across the 13 judicial districts around the state.
13 And that's what we're saying should await the appeal,
14 and any changes to the preliminary injunction as a
15 result of that appeal.
16 The last thing that they argue -- and they
17 argue this in their brief, too, and we responded to
18 it in our reply -- is that any First Amendment injury
19 is irreparable. And you know -- but the existence of
20 any irreparable injury is not a factor for
21 consideration under Nken versus Holder. The third
22 factor is whether the stay movement, or whether there
23 will be a substantial injury to other parties as a
24 result of granting the stay. And so the Court -- it
25 is proper for the Court to consider not just whether

1 there is an irreparable injury, but the extent of
2 that injury, how substantial it is, what percent of
3 cases will be affected -- the access to what percent
4 of cases will be affected if the Court stays the
5 preliminary injunction.
6 And here, Courthouse News Services
7 themselves says that the preliminary injunction
8 allows nearly all the current delays to stay in
9 place. So if staying that preliminary injunction
10 will allow nearly all of the same access they have
11 now, it will not cause a substantial injury to
12 Courthouse News Service. But it will impose the
13 sovereign injury on the State of New Mexico, its
14 state courts, its elected officials. And for that
15 reason we request that the Court grant the motion to
16 stay.
17 THE COURT: All right. Thank you, Mr.
18 Sydow.
19 MR. SYDOW: Thank you.
20 THE COURT: Let me ask the State on this.
21 It's kind of what I did for the plaintiff when I was
22 doing the preliminary injunction. I'm inclined to
23 deny the motion to stay here. So if you need an
24 answer this moment, today, I'll have to go that
25 direction. You put a lot of effort into this motion

1 to stay, and I'd like to spend some time with it.
2 But it's really your call. If you want to put a
3 deadline on me to say: Here's when we want an order
4 because we need to go to the Tenth Circuit and get a
5 stay, I'll give it to you when you want it. But I
6 would like to look at it, and I've kind of cleared
7 the deck to work on it immediately. So you tell me.
8 But I'm trying to be upfront with you, I'm
9 probably going to deny it, but I'd like to look at
10 some of the stuff you have and put together an
11 opinion and order. Do you have a thought as to when
12 you want an order from me one way or another?
13 MR. SYDOW: We would appreciate your full
14 consideration of the motion, and so no. Whatever
15 time you need to prepare that order is fine.
16 THE COURT: Okay. No deadline?
17 MR. SYDOW: No deadline, unless something
18 changes in the case.
19 THE COURT: Okay. If something changes,
20 you call me, okay, or call my courtroom deputy, and
21 say: Hey, we need to get to the Tenth Circuit and
22 file our motion there. So you can make that call
23 anytime. You can make it after this hearing if you
24 want it. But otherwise, I'll give you a full opinion
25 on it.

1 MR. SYDOW: Thank you, Your Honor.
2 THE COURT: If you change your mind, let me
3 know. But I think it's kind of in your ballpark as
4 to when I get you an opinion out.
5 All right. Is there anything else we need
6 to discuss while we're together? Anything else I can
7 do for you, Mr. Edwards?
8 MR. EDWARDS: No, Your Honor. Thank you.
9 THE COURT: All right. How about from the
10 State, Ms. Lecocq?
11 MS. LECOCQ: No, Your Honor.
12 THE COURT: All right. I appreciate
13 y'all's presentations, people traveling in.
14 Everybody be safe. And I'll try to get these
15 opinions out to you as soon as possible.
16 All right. Y'all have a good afternoon.
17 (The Court stood in recess.)
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1 C-E-R-T-I-F-I-C-A-T-E

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3 UNITED STATES OF AMERICA

4 DISTRICT OF NEW MEXICO

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7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,

8 Official Court Reporter for the State of New Mexico,

9 do hereby certify that the foregoing pages constitute

10 a true transcript of proceedings had before the said

11 Court, held in the District of New Mexico, in the

12 matter therein stated.

13 In testimony whereof, I have hereunto set my

14 hand on December 2, 2021.

15

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18 ________________________________

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