

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
3 Richmond Division

4 COURTHOUSE NEWS SERVICE }  
5 v. } Civil Action No.  
6 KARL R. HADE and } 3:21 CV 460  
7 JACQUELINE C. SMITH }

8  
9  
10 January 10, 2022

11  
12 COMPLETE TRANSCRIPT OF MOTIONS TO DISMISS  
13 AND INITIAL PRETRIAL CONFERENCE  
14 BEFORE THE HONORABLE HENRY E. HUDSON  
15 UNITED STATES DISTRICT COURT JUDGE

16 APPEARANCES:

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27  
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29 OFFICIAL COURT REPORTER  
30 UNITED STATES DISTRICT COURT

1 (The proceeding commenced at 11:07 a.m.)

2 THE COURT: Good morning.

3 MR. GINSBERG: Good morning, Your Honor.

4 MS. BLAEMIRE: Good morning.

5 MR. ALTMILLER: Good morning.

6 MR. McENTEE: All right, Ms. Pizzini, call our  
7 first case today.

8 THE CLERK: Case Number 3:21 CV 460. *Courthouse*  
9 *News Service v. Karl R. Hade and Jacqueline C. Smith.*

10 The plaintiff is represented by Mr. Jonathan  
11 Ginsberg and Ms. Jessica Blaemire.

12 Defendant Hade is represented by Mr. Robert  
13 McEntee III, and Ms. Erin McNeill.

14 Defendant Smith is represented by Mr. John  
15 Altmiller, Jr.

16 Are counsel ready to proceed?

17 MR. GINSBERG: Yes.

18 MR. McENTEE: Yes.

19 THE COURT: All right.

20 The matter is before the Court this morning for,  
21 first of all, an initial pretrial conference. And what we  
22 will do is that conference will be conducted at the end of  
23 the hearing on the motions to dismiss. I'll take those  
24 back in the jury room where we will set a date, and  
25 discuss the rules of engagement from here on.

1 But the matters before me this morning are  
2 motions to dismiss filed by all parties in the case, so  
3 let me start off with Courthouse News. Go right ahead.  
4 Or, actually, these are motions filed by the defendants.  
5 I'm sorry. Excuse me.

6 Which assistant attorney general represents  
7 Mr. Hade?

8 MR. McENTEE: That is me, Your Honor. Robert  
9 McEntee.

10 THE COURT: Okay. If you would come on up. I'm  
11 sorry.

12 Good morning, sir.

13 MR. McENTEE: Good morning, sir.

14 May it please the Court. My name is Robert  
15 McEntee, and I represent defendant Hade in this matter.

16 This case is about a commercial entity seeking  
17 remote access to civil filings which contain --

18 THE COURT: I have read these things  
19 exhaustively.

20 MR. McENTEE: Yes, sir.

21 THE COURT: I have reviewed every case that you  
22 have filed, plus many, many more.

23 MR. McENTEE: Yes, sir.

24 THE COURT: So I'm familiar with the factual  
25 setting here, but go right ahead.

1 MR. McENTEE: Yes, sir.

2 And I would like to give the Court a little more  
3 factual background as to the Executive Secretary.

4 THE COURT: Yes, sir. Go right ahead.

5 MR. McENTEE: The Executive Secretary works with  
6 circuit court clerks to provide them with administrative  
7 support, and a variety of attendant services. Among these  
8 services is information technology, which includes  
9 technical support for Internet, email, case management,  
10 and video technology.

11 OES has developed and maintained two relevant  
12 systems which are relevant to the proceeding today, which  
13 circuit courts may elect to use. Among these is the Case  
14 Imaging System. This is -- it provides circuit courts the  
15 ability to create and store electronic documents that are  
16 part of the case file. If a clerk has purchased the Case  
17 Imaging System, they may then elect to use the Officer of  
18 the Court Remote Access, which is the subject of this  
19 case. Those stored documents can then be accessed by the  
20 Court or the public at the courthouse or by OCRA.

21 THE COURT: O-C-R-A, correct?

22 MR. McENTEE: Yes, sir.

23 THE COURT: Go right ahead.

24 MR. McENTEE: OCRA has been available to circuit  
25 courts since 2011. This allows participating circuit

1 court clerks to grant officers of the court secure remote  
2 access to documents in the Case Imaging System. The users  
3 can view all documents for cases associated with that  
4 specific court for which they are registered, except for  
5 sealed, juvenile, adoption, and other confidential cases.

6 THE COURT: There doesn't seem to be any  
7 question here about access. The question is the cost of  
8 access in this case seems to be one of the pivotal issues.

9 MR. McENTEE: That's correct, sir.

10 THE COURT: Right. And how they came up with  
11 the \$1,200?

12 MR. McENTEE: That's correct. I will note for  
13 the Court that subscriber fees are assessed by the clerks  
14 in this case.

15 THE COURT: Right.

16 MR. McENTEE: They are assessed by the clerks,  
17 and every clerk is responsible for those specific OCRA  
18 subscriptions in their jurisdiction, and how they manage  
19 user subscriptions.

20 The OES does not mandate how a clerk should  
21 manage the subscriptions. Each circuit court clerk  
22 determines the subscription fee and exit -- for accessing  
23 its documents through OCRA. And those fees are --

24 THE COURT: So your evidence would show that the  
25 clerk of the court in Prince William County - and I'm sure

1 their lawyer will address me on that - is the one that  
2 decided it would be \$1,200, is that correct?

3 MR. McENTEE: That's correct, sir.

4 THE COURT: Okay. And Mr. Hade had no  
5 involvement in that decision?

6 MR. McENTEE: That's correct. They have no  
7 oversight over the subscription process. Those are  
8 submitted to OES for overall access, but the determination  
9 of that fee is made by the clerk. And those fees go to  
10 the clerk.

11 THE COURT: All right. Go right ahead.

12 MR. McENTEE: OES, thus, acts as a technology  
13 vendor. It provides the technology that a circuit court  
14 clerk needs to offer OCRA access.

15 Under Virginia law, as the Court is aware --

16 THE COURT: One of the issues here though is  
17 whether or not Mr. Hade had the authority or he had to  
18 approve Courthouse News Service in having access to the  
19 system. The question I have of you is are Mr. Hade's  
20 duties a statutory function, one of administering the  
21 system, or does he control access to the content?

22 MR. McENTEE: He does not control access to the  
23 contents, sir. He has never granted access to any court  
24 records viewable on OCRA to anyone. I believe his office  
25 enables court clerks to create accounts, but he does not

1 serve as the gatekeeper under Virginia law.

2           And that's really the test here under our  
3 12(b)(1) motion is what Virginia law enshrouds -- or what  
4 authority enshrouds Mr. Hade with.

5           And for that --

6           THE COURT: Now, they rely heavily on a comment  
7 made by one of the -- one of Mr. Hade's deputies during a  
8 deposition -

9           MR. McENTEE: Yes, sir.

10           THE COURT: - in which, I believe, he  
11 indicated -- well, I don't want to quote. You know what  
12 he said. I don't want to get it inaccurate here. But  
13 that's one of the things that they use as one of their  
14 primary arguments that Mr. Hade had authority over the  
15 content. Touch on that -- his assistant's deposition  
16 testimony.

17           MR. McENTEE: Yes, sir. That was Robert Smith.  
18 He is not an attorney.

19           And if you look at the full context of that  
20 deposition, I believe it will show what Mr. Smith meant  
21 when he said yes to that question. In the next paragraph  
22 he says it has always been OES's view that OCRA is limited  
23 to Virginia-licensed attorneys because that's what the  
24 bear text of the statute says.

25           But there's nothing -- evidence will not show

1 that OES mandates how a clerk offers OCRA access to  
2 anyone. That is determined solely by the clerk. And they  
3 are the gatekeepers of those records.

4 THE COURT: All right.

5 MR. McENTEE: And that was the reason why we  
6 cited to the *Daily Press, LLC* case. I'm sure the Court  
7 looked at that as well. But we believe that's  
8 particularly apt because it's a statement of Virginia law,  
9 and the authorities of the clerk, vis-a-vis, the Office of  
10 the Executive Secretary.

11 In that case, a Virginia newspaper sued OES  
12 under the Freedom of Information Act -- the Virginia  
13 Freedom of Information Act. They were seeking to access  
14 records contained in a database operated by OES in order  
15 to avoid the inconvenience of having to ask each  
16 jurisdiction circuit court clerk for those records.

17 In that case, as the defendant does here, the  
18 Executive Secretary took the position that the circuit  
19 court clerks were the custodians of the requested  
20 information, and that he could not provide the records  
21 that underlie the database that he maintained.

22 And the Supreme Court of Virginia found that the  
23 public records sought by the *Daily Press* contained in the  
24 online case information system database were not in the  
25 custody of OES, and therefore the circuit court clerk was

1 the proper custodian.

2           And the Court specifically agreed with an  
3 opinion of the Attorney General which stated that the  
4 circuit court clerk is responsible for the integrity of  
5 all records maintained by the Clerk's Office. That  
6 responsibility is not shared with any other court  
7 official, but rests exclusively with the elected clerk of  
8 the circuit court. Access to such a case management system  
9 lies within the sound discretion of the clerk.

10           So the parallels to this case cannot be ignored.  
11 CNS is now asking OES specifically for data viewable on  
12 OCRA, which is maintained by OES. But OES only maintains  
13 the system. It does not grant anyone access to those  
14 records.

15           For the same reason that *Daily Press* was  
16 dismissed as to OES, Courthouse News has to do the same  
17 thing. They have to ask each individual clerk. There's  
18 no statewide OCRA here. The clerks are the custodians of  
19 those records.

20           THE COURT: But the clerk of the court does have  
21 discretion under certain limitations in the statute to  
22 grant access, correct?

23           MR. McENTEE: My understanding of the statute is  
24 that the clerk controls who accesses it. Whether or not  
25 she has discretion to determine who is an officer of the

1 court, or not, I believe is a different question. And my  
2 reading of the statute is that she is mandated with  
3 preventing non-officers of the Court from accessing it.  
4 But that is the clerks' determination. So she is the one  
5 tasked with enforcing the statute, so to speak.

6 THE COURT: Let's unwind that a bit. Is it your  
7 view, and Mr. Hade's view, that the clerk of the court in  
8 Prince William County did not have the statutory authority  
9 to give Courthouse News access to the electronic system,  
10 the Internet system, under any circumstance?

11 MR. McENTEE: That's my view, Your Honor. And I  
12 believe the clerk is tasked with enforcing that  
13 limitation. Yes.

14 THE COURT: Pardon me?

15 MR. McENTEE: The clerk is tasked with enforcing  
16 that limitation to Virginia-licensed attorneys.

17 THE COURT: All right. Okay.

18 So your view is that the proposed agreement here  
19 was void ab initio? In other words, it's statutorily  
20 impermissible for her in the first place to give  
21 Courthouse News, even at \$1,200 a year, access to the  
22 system, is that correct?

23 MR. McENTEE: That's defendant Hade's view, Your  
24 Honor. It is not necessarily mandated on the clerks by  
25 defendant Hade. But, yes, that is our interpretation of

1 Virginia law.

2 THE COURT: The Attorney General's  
3 interpretation of the law?

4 MR. McENTEE: Yes, sir.

5 THE COURT: Go right ahead, sir. Go ahead.

6 MR. McENTEE: Just in conclusion, OES has never  
7 granted access to any records of any court, whether it be  
8 physical or whether they're stored on the premises, or  
9 otherwise.

10 *Ex parte Young*, as the Court knows, specifically  
11 requires a nexus between the challenged provision and an  
12 enforcement duty. There is simply none in Virginia law.  
13 And for this reason, he is an improper party to this case.

14 Should the Court find that defendant Hade is not  
15 entitled to sovereign immunity, CNS has, nevertheless,  
16 failed to state a claim that any of --

17 COURT REPORTER: Sir, --

18 THE COURT: You need to slow down just a little  
19 bit because this young lady has got to take it down, okay?

20 MR. McENTEE: Yes, sir. My apologies.

21 THE COURT: Okay.

22 MR. McENTEE: CNS has, nevertheless, failed to  
23 state a claim that any of its constitutional rights have  
24 been violated by defendant Hade.

25 First, they have not been denied access to any

1 filing. Courthouse News cites extensively to its prior  
2 litigation efforts, *Courthouse News v. Schaefer*. And in  
3 that case, the issue that was presented in that case was  
4 the immediate availability of complaints physically in the  
5 courthouse.

6 THE COURT: Well, if I'm correct, Courthouse  
7 News, like any other individual, can go to the counter and  
8 have access to this information, can they not?

9 MR. McENTEE: That's correct, sir.

10 THE COURT: So it is available?

11 MR. McENTEE: Yes.

12 THE COURT: Okay.

13 MR. McENTEE: Yes.

14 In that case, the trial court had found that in  
15 Norfolk, that circuit court had made only about 19 percent  
16 of complaints available, in that method, on the day of  
17 filing.

18 The Fourth Circuit affirmed the trial court's  
19 ruling that in order to satisfy the First Amendment access  
20 requirement, the clerks must make newly-filed civil  
21 complaints available on the same day, or filing when  
22 practicable.

23 THE COURT: That was Judge Morgan's case, I  
24 believe, correct?

25 MR. McENTEE: I believe so. I don't have it in

1 front of me, sir.

2 THE COURT: Yes, I think it was Judge Morgan's  
3 decision.

4 MR. McENTEE: But this case is inapposite to the  
5 issue presented in this case because the experience and  
6 logic test requires that there is a judicial proceeding or  
7 record at issue to which they have been denied. That is  
8 simply not the case here.

9 They have not been denied any access to any  
10 proceeding or record. They have been merely denied access  
11 be the clerk to a specific administrative module by which  
12 these documents can be viewed. Further, if the Court were  
13 to consider this a time restriction on speech, there's no  
14 action on the part of the clerk or OES which has caused a  
15 constitutional violation.

16 As plaintiff admits, any delay that it has  
17 caused is due to their unwillingness to actually travel to  
18 the courthouse and view these documents themselves. It is  
19 not an action on the clerk or OES that has caused that  
20 delay; therefore, there is no First Amendment right that  
21 has been violated.

22 And finally, Your Honor, the equal --

23 THE COURT: They have the same access as any  
24 other citizen, correct?

25 MR. McENTEE: I'm sorry, sir?

1 THE COURT: They have the same access as any  
2 other citizen, correct?

3 MR. McENTEE: That's correct, sir.

4 THE COURT: All right.

5 And once again, I want to make sure the record  
6 is clear on this: The agreement at issue here that the  
7 clerk of the court in Prince William County offered, the  
8 offer that was made to them, to Courthouse News, that for  
9 \$1,200 they could have access to the same records that  
10 would be produced at the counter. Mr. Hade's position is  
11 they have no authority to do so, correct?

12 MR. McENTEE: That's correct, sir.

13 THE COURT: Okay.

14 And that it was contrary to the statute?

15 MR. McENTEE: That is -- that is the Attorney  
16 General's understanding. Yes, sir.

17 THE COURT: Okay.

18 MR. McENTEE: Likewise, their equal protection  
19 claim fails because there is a rational basis for the  
20 restriction. Because they have not pleaded a fundamental  
21 right that has been violated or that they are a part of a  
22 suspect class, non-lawyers are not a suspect class under a  
23 First Amendment or equal protection litigation.

24 Legislation is presumed to be valid when the  
25 classification drawn by the statute is rationally related

1 to a legitimate state interest. And under such a review,  
2 the burden is on the one attacking the legislative  
3 arrangement to negative every conceivable basis which  
4 might support it.

5           In Virginia, there is no current law that  
6 burdens the attorneys or clerks or litigants to redact  
7 highly private sensitive information. The only -- the  
8 only burden then is to -- is on the clerk from posting it  
9 online. And the only exception to that -- well, there are  
10 a few other exceptions. But one exception to that is that  
11 it may be published on Officer of the Court Remote Access  
12 because attorneys can use that information for legitimate  
13 justice-related purposes. And we could go on all day  
14 about those possibilities.

15           But if OCRA today were opened up to the public,  
16 the clerk would have to manually review every document for  
17 sensitive information, and would be prevented from posting  
18 on OCRA any filing which reflected that private  
19 information.

20           Legislation in Virginia would have to be passed  
21 to ensure that the clerk redacted that information or that  
22 attorneys and litigants make separate filings with private  
23 information that could be posted online.

24           As we've stated in our briefing, limiting such  
25 information to attorney eyes significantly reduces the

1 risk that that information accessed will be used for  
2 improper illicit purposes because Virginia attorneys are  
3 subject to the rules of professional conduct, unlike  
4 commercial actors who are using, or might use, that  
5 information for commercial profit.

6           And with that, Your Honor, I am finished. Thank  
7 you.

8           THE COURT: All right, sir.

9           Mr. Altmiller.

10          MR. ALTMILLER: Yes, Your Honor.

11          THE COURT: Good morning, sir.

12          MR. ALTMILLER: Good morning.

13                 May it please the Court. John Altmiller on  
14 behalf of Jacqueline Smith.

15                 I do want to clarify one thing, which I hope  
16 will help the Court. It is true that the clerk at one  
17 point offered access to Courthouse News at the higher  
18 rate. This was prior to my involvement in the case. I  
19 believe it was prior to Mr. McEntee's written opinion  
20 whether or not that was permissible. It is our position  
21 that it is not permissible, and we are not offering access  
22 at any price to Courthouse News.

23                 THE COURT: Okay. Thank you for clarifying  
24 that. That kind of changes things quite a bit here in the  
25 analysis.

1 MR. ALTMILLER: Right.

2 And because I believe that -- again, this  
3 happened prior to my involvement in the case, but I will  
4 say to the Court that I agree with the Attorney General's  
5 Office. I agree with Mr. McEntee that the statute does  
6 prohibit the clerk from providing that access. And I do  
7 want to say a little bit more about that from a factual  
8 background, or at least from the background of --

9 THE COURT: Let me just stop you one second  
10 here.

11 I understand that no other clerk in the  
12 Commonwealth of Virginia has executed such a contract with  
13 any other news media, is that correct?

14 MR. ALTMILLER: That's my understanding. I'm  
15 not aware of anything like this. I agree.

16 THE COURT: All right. Go ahead, Mr. Altmiller.

17 MR. ALTMILLER: And so the statute -- our  
18 position is that the statute requires what the statute  
19 requires. And what's important, and the reason I set it  
20 out in our reply brief, is to really kind of suss it out  
21 because I really do think that there is a conflation  
22 between what is confidential and what is private.

23 So everyone agrees that certain information must  
24 be redacted when you file. You don't have social security  
25 numbers, you don't have certain account information, and

1 so on and so forth. These are very particular things.  
2 They need to be redacted whether I file them  
3 electronically or whether I file them in the Clerk's  
4 Office.

5           For example, I practice a lot in Fairfax County,  
6 where I know Your Honor sat as a circuit court judge.  
7 There is still no electronic filing in Fairfax. If you  
8 want to file something in Fairfax, you have to walk it  
9 into the Clerk's Office. So the rules that apply to  
10 redaction are the same everywhere. So that's the starting  
11 point.

12           What the -- what the statute at issue does, the  
13 17.1-293, is it sets forth a couple of rules. One rule is  
14 it says to the clerk you cannot post on the Internet  
15 social security numbers. Sure. But also maiden names,  
16 signatures. So if I sue on a note -- there is no  
17 requirement if I go and sue somebody on a contract, which  
18 I do often. I attach it as an exhibit. And in fact if I  
19 don't, I might face a motion craving over saying that I  
20 should do it. But there's no requirement --

21           THE COURT: All right. Can't you file it under  
22 seal?

23           MR. ALTMILLER: I could. But I'm not required  
24 to. So right now, as the law stands, I just go and I file  
25 it.

1           And, for example, maybe I have an estate case or  
2 I have a title case, which I do on occasion. I might  
3 indicate when somebody was born. I might indicate by  
4 implication, or outright, what somebody's maiden name was.  
5 This is information which I am not required to redact.

6           However, it is information that -- I will use  
7 the word "private." It is information that if -- for  
8 example, if I file a lawsuit and it has somebody's maiden  
9 name in it and it has a signature in it, I'm not required  
10 to redact it and Courthouse News, if they go down to the  
11 Clerk's Office, will be able to read that complaint and  
12 see that information. I don't need to redact it. The  
13 clerk doesn't need to redact it.

14           However, the legislature has --

15           THE COURT: And that's the same access any  
16 citizen would have, is that correct?

17           MR. ALTMILLER: That any citizen would have.

18           Now, what all the statute says is is it says  
19 you, Ms. Court Clerk or Mr. Court Clerk, what you can't  
20 do, is put that maiden name, signature, name and age of  
21 minor child, birth dates, you can't put those on the  
22 Internet. You're not allowed to put it on the Internet.  
23 So if you're going to put anything on the Internet, you  
24 can't put that on the Internet.

25           And then it says, But with one exception. And

1 the exception is you can give access to that to attorneys,  
2 officers of the court, so forth. That's the distinction  
3 that's being made.

4           And I want to be clear about that for a couple  
5 of reasons. One, I don't want to conflate confidential  
6 information with private information. Number two, I want  
7 to get past this argument that sometimes gets raised by a  
8 question, which is: Can't you just have the filers  
9 redact?

10           I suppose you could if a statute required that.  
11 It requires the redaction of what I'll call "confidential  
12 information." It does not require the redaction of what  
13 I'll call "private information."

14           THE COURT: Now, how would the information  
15 someone could harvest off the Internet, how would that  
16 differ from the information that would be available if he  
17 or she presented themselves at the counter in the Clerk's  
18 Office?

19           MR. ALTMILLER: The information would not  
20 differ. What would differ -- and I can't speak for the  
21 legislature about their intent with the statute. But I  
22 think it is, I would argue, quite manifest. Which is that  
23 if I have remote access, I can engage in data mining  
24 because I can see a lot of things very quickly. And -- in  
25 other words, I can go look at a lot of different filings.

1           And what's in there, maybe I -- I can have a  
2 program that allows me to do it. I don't -- I am not a  
3 technical guy, so I'm not going to tell the Court that I  
4 know that.

5           THE COURT: Understood. But they can get that  
6 same information at the counter if they wished.

7           MR. ALTMILLER: That's exactly right.

8           THE COURT: And there are people that go to the  
9 Clerk's Office every day to harvest that kind of  
10 information.

11          MR. ALTMILLER: I'm sure there are, Your Honor.  
12 And so that's -- and, again, I can't speak for that.

13          But I can say that the statute's intent on its  
14 face is to say, fine. That information, as a matter of  
15 First Amendment, is available, right? You can go to the  
16 courthouse and you can get it. But, they say, some  
17 information we just don't want you to put on the Internet  
18 unless it's going to an officer of the court who can have  
19 access to it.

20          THE COURT: But an officer of the court then can  
21 put it on the Internet if they wish to, correct?

22          MR. ALTMILLER: And subject themselves to  
23 perhaps not being able to practice law any longer.

24          THE COURT: Could be.

25          MR. ALTMILLER: Or be able to practice in a

1 court.

2 THE COURT: Could be.

3 MR. ALTMILLER: I've cited some cases on that, I  
4 think. And I know Your Honor has read the briefs very  
5 carefully, so I'm striving not to be repetitive but rather  
6 to give some flavor here.

7 THE COURT: I understand.

8 One of the things that concerns me here is that  
9 a person could go to the front counter and get the same  
10 information that is available on the Internet, and if they  
11 wish to publish it they could do so right on the front  
12 steps of the courthouse immediately.

13 MR. ALTMILLER: I agree, Your Honor. I agree.  
14 That's a true statement.

15 THE COURT: Okay. Go ahead.

16 MR. ALTMILLER: And so the reason why I wanted  
17 to outline the background in the statute, and that we do  
18 agree with what the statute requires of the court clerk,  
19 is to illustrate at least as an initial point for Your  
20 Honor is that we are following the statute. And unless  
21 the statute changes, or unless the OCRA system changes, my  
22 client has no control over either of those.

23 THE COURT: And that brings up a good point, and  
24 that is whether or not some of the relief being sought  
25 here by the plaintiff is legislative and requires action

1 by the General Assembly.

2 MR. ALTMILLER: Well, I would argue that it  
3 does, Your Honor. And I -- as I've argued in the brief,  
4 and I would certainly incorporate the arguments made by  
5 Mr. McEntee and the AG's Office in their brief, we believe  
6 actually that the statute is constitutional. That it does  
7 not restrict the First Amendment rights. And because it  
8 does not restrict the First Amendment rights, it only  
9 requires a rational basis.

10 THE COURT: Time, place and manner restriction.

11 MR. ALTMILLER: And I think Your Honor probably  
12 has a very good handle on that.

13 Certainly, if the Court has any question for me  
14 regarding that, I'm happy to answer them. But as I say,  
15 I'm striving not to be repetitive, but to say -- to create  
16 the context within which we're operating -

17 THE COURT: Sure.

18 MR. ALTMILLER: - and for all the reasons that  
19 we've stated in our brief.

20 THE COURT: Some of my concern is that the  
21 information is available over-the-counter, and can be  
22 published over-the-counter, but yet the same information  
23 on the Internet cannot be accessed.

24 MR. ALTMILLER: That's correct.

25 THE COURT: That really is the core issue here.

1 MR. ALTMILLER: I think it's the nub of the  
2 case, Your Honor. I think it is absolutely at the heart  
3 of it.

4 And one of the things that I'm sure the Court  
5 has seen is that there's not really, certainly as far as  
6 I, or I think as anyone, have been able to cite, a case on  
7 point that says this remote access which they seek is a  
8 First Amendment right. They have a right to that  
9 particular kind of access.

10 And what's interesting about the case, at least  
11 from my perspective, and I think everyone in the court has  
12 more experience on constitutional issues than I do, but  
13 what's interesting to me, at least, is that there's a sort  
14 of a chicken and an egg problem because you say we have a  
15 right to remote access. Well, you didn't have a right to  
16 remote access until there was remote access at all, the  
17 argument would be. And so they say, well, because there's  
18 remote access for one there must be remote access for all,  
19 effectively.

20 And I think that really is at the heart of the  
21 case. We would argue there is no First Amendment right in  
22 the first place; therefore, the fact that that remote  
23 access is given to officers of the court merely requires a  
24 rational basis test, which I think we passed quite --  
25 quite easily.

1 But it really is the statute, Your Honor. This  
2 is not Jacqueline Smith, clerk of the court, freelancing  
3 or making a decision outside of the scope. She sought  
4 guidance both from the AG's Office and ultimately from her  
5 counsel, and both of whom are saying to you today that we  
6 believe that the legislature has put restrictions on her.  
7 So if she were to provide this access, I think she would  
8 subject herself to all kinds of liability under the  
9 statute.

10 THE COURT: All right. So when the clerk of the  
11 court made this offer to Courthouse News that they could  
12 have access for \$1,200 a year, they ran that by the  
13 Attorney General's Office and got approval?

14 MR. ALTMILLER: I'm not -- I don't believe that  
15 they did, Your Honor. I -- I -- and I don't know the  
16 answer, which is why I'm not answering it.

17 THE COURT: I respect that.

18 MR. ALTMILLER: I can certainly tell Your Honor  
19 this: That it would have been contrary to my advice. And  
20 I do believe that that offer was contrary to the statute.

21 And, Your Honor, I don't even think it's close.  
22 I think it's -- again, we can debate the constitutionality  
23 of the statute. And I suspect that we will. But as  
24 lawyers, sometimes we get into cases and we wish we had a  
25 time machine and we could go back and change something.

1 In this case, I wish that offer had never been made  
2 because I think it's a red herring. And that's why I'm  
3 being so clear about the fact that I believe that any  
4 offer under the current system to provide access to  
5 Courthouse News would be contrary to the statute. And we  
6 do not intend to do so unless either the legislature tells  
7 us that we can, or unless the Court orders us to do so.

8 THE COURT: There does seem to be a reasonable  
9 legislative remedy here.

10 MR. ALTMILLER: I would not disagree with Your  
11 Honor on that issue.

12 THE COURT: All right. Thank you, sir.

13 MR. ALTMILLER: Thank you.

14 THE COURT: Good to have you in court.

15 All right, Mr. Ginsberg. I'm sorry for calling  
16 on you earlier. I just, I guess, had to get myself in  
17 gear.

18 MR. GINSBERG: That is quite all right, Your  
19 Honor.

20 THE COURT: I think you understand what my  
21 concerns are. And I know you will address them capably.  
22 But, again, one of the questions I have here is whether or  
23 not -- and it's a little bit astray here, that there's an  
24 easy legislative remedy here for your client. Has your  
25 client discussed this issue with any members of the

1 General Assembly?

2 MR. GINSBERG: They have not, Your Honor. And  
3 our position is that, you know, although the defendants'  
4 argue that the Virginia code prohibits remote access for  
5 non-attorneys, we believe that the plain language of the  
6 statute says no such thing. What it does do is prohibit  
7 clerks from posting on the Internet certain confidential  
8 information - what we've heard about today - namely  
9 personal identifiers such as a social security number,  
10 date of birth, financial account numbers, and minor's  
11 names; although, the Virginia code separately already  
12 places the burden of redacting most of this information on  
13 the filing party.

14 THE COURT: And what specific statute do you say  
15 gives the clerk of the court that authority, 17.1 dash  
16 what?

17 MR. GINSBERG: That gives the clerk of the court  
18 the authority to?

19 THE COURT: Give access to the system to  
20 non-attorneys.

21 MR. GINSBERG: Well, I -- I'm not sure that it  
22 is expressly permitted in the code. But the -- what I'm  
23 saying, Your Honor, is that the code does not expressly  
24 prohibit that access. So it's consistent with the  
25 Virginia code that the clerk can provide non-attorneys the

1 remote access that we seek here.

2           And the fact that the code already places the  
3 burden of redacting most of this information on the filing  
4 party, this means that the defendants' concern that  
5 sensitive information might be in a filing and released to  
6 the public is already addressed within the statutory  
7 framework.

8           And critically, as Your Honor has observed this  
9 morning --

10           THE COURT: Slow down just a little bit because  
11 this young lady has got to take it down, okay?

12           MR. GINSBERG: My apologies.

13           THE COURT: That's okay. Go ahead.

14           MR. GINSBERG: The documents available to  
15 attorneys on OCRA are not confidential. They're already  
16 available. They're the same nonconfidential public  
17 documents that are already available to the -- on public  
18 access terminals at the individual courthouse, regardless  
19 of whether one is a Virginia barred attorney or not. They  
20 are already publically available.

21           So to the extent there's any concern that  
22 confidential information or personal identifiers would be  
23 exposed, the cat is already out of the bag.

24           THE COURT: So does this distill down to the  
25 fact of being the clerk of the court's discretion in

1 deciding whether or not he or she is going to put this  
2 stuff on the Internet? I mean, there is no statute that  
3 requires them to do it.

4 MR. GINSBERG: Well, we -- we -- we contend,  
5 Your Honor, that the clerk is required to do that because  
6 the fact that remote access is only available to attorneys  
7 here is a violation of the First Amendment and the Equal  
8 Protection Clause. And I'll get into that. And I can  
9 jump into that right now, Your honor.

10 THE COURT: You go right ahead. Go right ahead  
11 with your presentation.

12 MR. GINSBERG: Okay. Because I want to focus on  
13 the code first before jumping into the constitutional  
14 issues here.

15 THE COURT: All right.

16 MR. GINSBERG: And I think it's important to  
17 point out that the section of the code that the defendants  
18 rely on here to justify the restriction of access, it does  
19 not prohibit remote access to filings that do not contain  
20 personal identifiers. So there's no dispute about that.

21 But, nonetheless, defendants restrict remote  
22 access to all civil filings to attorneys only regardless  
23 of whether they contain personal identifiers or not.

24 While we do acknowledge, Your Honor, that the  
25 Virginia code does permit a clerk to provide access -- the

1 remote access to Virginia barred attorneys. As I've  
2 mentioned, it does not expressly prohibit granting such  
3 access for others, such as the press, like Courthouse  
4 News, or the public. And I think that is a critical  
5 issue.

6           In fact, to the contrary, Your Honor, you know,  
7 there is actually another section of the Virginia code,  
8 and it's 17.1-225, which does expressly permit the clerk  
9 of each court to provide remote access to nonconfidential  
10 court records, such as the same ones that are available to  
11 attorneys on OCRA. And the Virginia Attorney General, I  
12 believe it was back in 2000, issued a formal opinion  
13 confirming as much. And that opinion is cited in our  
14 brief.

15           I should also add, Judge, as we allege in the  
16 amended complaint, the defendant clerk, Ms. Smith here, as  
17 you know, sent a non-attorney OCRA subscriber agreement to  
18 Courthouse News after several requests, albeit at six  
19 times the normal price. And she also testified in a  
20 deposition in the *Schaefer* case that she's used her  
21 discretion on occasion to provide non-attorneys with OCRA  
22 access.

23           So clearly the defendant believes that the code  
24 does indeed allow remote access to non-attorneys, but  
25 apparently that she may pick and choose who gets that

1 access. But that's not how this is supposed to work.

2           And, Your Honor, even if the Virginia code could  
3 be interpreted to require the defendants to restrict  
4 access or prohibit the dissemination of information  
5 gathered remotely, which we also challenge here, the  
6 requirements of the Constitution, as a matter of law,  
7 override the statute.

8           For starters, the parties do not dispute here  
9 that the Fourth Circuit in *Schaefer* held that the press  
10 and public enjoy a First Amendment right of access to  
11 newly-filed complaints.

12           THE COURT: They do. But I don't think anybody  
13 has said that that specifically applies to remote Internet  
14 access.

15           MR. GINSBERG: I -- I would agree that that is  
16 what the defendants' position here is. But the question  
17 in this case is not whether there is a First Amendment  
18 right --

19           THE COURT: Well, my research hadn't revealed  
20 any. Has yours?

21           MR. GINSBERG: No, this is -- I would -- the  
22 jurisprudence is not considered a remote access  
23 restriction prior to this case, as far as I am aware.

24           THE COURT: All right.

25           MR. GINSBERG: But the question in this case --

1 our position is that the question is not whether there is  
2 a First Amendment right to remote access, but whether the  
3 defendants -- whether violating the First Amendment by  
4 restricting access to OCRA, where the defendants have  
5 chosen to limit public access in a way that favors  
6 attorneys, that's the question whether that violates the  
7 First Amendment. The defendants have chosen here to offer  
8 OCRA access, but only to a special class of individuals,  
9 and that requires a constitutional analysis under the  
10 *Press Enterprise* framework.

11 So to determine --

12 THE COURT: But at best it's a time, place and  
13 manner analysis.

14 MR. GINSBERG: I -- I would not agree with that,  
15 Your Honor. The jurisprudence is clear that when a First  
16 Amendment access restriction is at issue, strict scrutiny  
17 traditionally applies.

18 Now, I do recognize that the *Schaefer* case in  
19 addressing the issues, specifically at issue in that case  
20 with the applied rig -- a more intermediate scrutiny  
21 standard, but the question is -- is still whether the  
22 defendants' restriction is narrowly tailored to serve the  
23 stated interest.

24 And to determine if the defendants are violating  
25 the First Amendment here, this Court must apply that *Press*

1 *Enterprise* test. And that test requires the Court to  
2 first determine whether there is a right of access to the  
3 particular documents at issue. Not the type of access at  
4 issue, like remote access here, but to determine if the  
5 particular documents are -- if there is a right of access  
6 to those documents by applying experience and logic.

7           And then, after going through that analysis, the  
8 Court is to perform a factual inquiry as to whether the  
9 defendants have met their burden of showing that the  
10 restricted -- any restrictions imposed on access, not just  
11 blanket denials, but whether those are justified under  
12 constitutional scrutiny.

13           And of course, Your Honor, that factual inquiry  
14 is not one that can be resolved on a motion to dismiss.  
15 But as a matter of law, *Schaefer* has definitively answered  
16 the first part of that test, finding that experience and  
17 logic dictate that there is a First Amendment right of  
18 access to new filings. And experience also shows that  
19 traditionally in Virginia, prior to the implementation of  
20 OCRA, both attorneys and non-attorneys alike, were  
21 provided the same type of access to nonconfidential court  
22 records at the courthouse.

23           And experience shows that courts across the  
24 country are providing remote access to new -- to new  
25 filings. Nearly all federal district courts, including

1 this one, as well as many state courts, provide remote  
2 access to the public. And this Court does so through  
3 PACER.

4 And as Mr. Girdner, Courthouse News' founder and  
5 editor, details in his declaration in opposition to the  
6 motions to dismiss in this case - which I should add that  
7 declaration was offered in support of the facts already  
8 alleged in the complaints, and we would argue is less  
9 integral to those allegations - courts in at least 37  
10 other states currently provide remote access, remote  
11 online access, to all civil filings.

12 Now, *Schaefer* -- before I move on from the  
13 *Schaefer* case, that case makes clear that access must be  
14 contemporaneous with filing as expeditiously as possible  
15 based on the facts and the context of the case. And that  
16 same day access is required insofar as practicable.

17 So in the context of a court, for instance like  
18 the Prince William court, where remote access is available  
19 and thus practicable for all, restricting access to new  
20 complaints, and other civil filings, to Virginia barred  
21 attorneys only, interferes with Courthouse News' right of  
22 contemporaneous access as expeditiously as possible.

23 Now, the defendants are essentially asking this  
24 Court to limit *Schaefer's* holding requiring access as  
25 expeditiously as possible, such that the holding should

1 apply to attorneys only. But the defendants can't take  
2 the First Amendment out of the picture and avoid its  
3 requirements simply because the jurisprudence has not  
4 previously considered a remote access restriction.

5           Rather, the case law is clear, Your Honor, that  
6 when there is a First Amendment right of access,  
7 defendants must meet their burden of justifying any access  
8 restrictions, including how that access is or is not  
9 provided.

10           So the Court's focus, Judge, must be on whether  
11 the defendants withholding of remote access, and the  
12 prohibition of disseminating information gathered  
13 remotely, is narrowly tailored to serve a compelling  
14 government interest because any restriction on the First  
15 Amendment right of access must have sufficient  
16 justification. The case law is very clear on that.

17           And the complaint, Your Honor, adequately  
18 alleges that the defendants do not meet that test.

19           Now, defendants, as we have discussed today, do  
20 seek to justify that --

21           THE COURT: One part of your argument that I  
22 guess I am going to have to do some additional research on  
23 is the word "access." Is it the access that's chosen, is  
24 it the most desirable access, or merely reasonable access?

25           Reasonable access seems to be the language used

1 in most of the cases that I have read, but there may be  
2 something more current.

3 MR. GINSBERG: Well, I think that what's making  
4 the inquiry a little bit more difficult to -- to wrap our  
5 heads around is that, as I've mentioned, there's a  
6 two-part test here. The first part of that test simply  
7 requires whether there is a right of access. Not whether  
8 there is a right of reasonable access. Not whether there  
9 is a right of access, you know, if the defendants, you  
10 know, choose to offer remote access to one party and not  
11 the others. Simply whether there is a right of access  
12 under the First Amendment to the documents at issue.

13 And then, as I've mentioned, Judge, and the case  
14 law in our briefs -- in our briefs spells this out, then  
15 the Court is to determine whether the access restriction  
16 imposed in this case, which is that remote access is not  
17 granted to non-attorneys where it is offered to attorneys,  
18 whether that is justified by stating that the interest is  
19 narrowly tailored.

20 THE COURT: Okay.

21 MR. GINSBERG: Now, defendants seek to justify  
22 their restriction by stating that there might be  
23 confidential information in a filing. But as I've noted,  
24 the documents -- and as you have observed, Your Honor, the  
25 documents available on OCRA are, by definition,

1 nonconfidential and they are already available at the  
2 courthouse. And case law is clear that a Court cannot  
3 rubber stamp a access restriction simply because a  
4 defendant says it is necessary.

5           It is the defendants who have the burden of  
6 demonstrating that more access is not better than less.  
7 And even if confidential information might be in a filing,  
8 there is a legal question here as to whether that is  
9 enough to satisfy constitutional scrutiny.

10           THE COURT: Well, here they contend that if it  
11 does have confidential information in it, that the oath  
12 taken by lawyers, and the ability to revoke their license  
13 to practice, are all sanctions and methods that allow them  
14 to make sure that it's not improperly disseminated and  
15 it's closely held. Does that -- that doesn't necessarily  
16 control your client, though.

17           MR. GINSBERG: Well, no, but I -- I -- no, it  
18 doesn't. I mean, my client is not an attorney.

19           But I should note that Courthouse News -- and I  
20 can't speak for other members of the press, but I can only  
21 assume this is similar. Courthouse News is bound by a  
22 similar code of ethics prohibiting the use and  
23 dissemination of the information defendants claim they  
24 need to protect.

25           THE COURT: I don't question the integrity of

1 Courthouse News. It's a fine organization.

2 MR. GINSBERG: No, I understand, Your Honor. I  
3 wasn't suggesting that you are.

4 THE COURT: It's not a personal attack at all.  
5 We were just discussing the application of the law.

6 MR. GINSBERG: Yes. Understood, Your Honor.

7 I -- what I should also note is that any  
8 non-attorney granted OCRA access would be subject to a  
9 subscriber agreement. And the Court issuing that  
10 subscriber agreement can, if they choose, build sanctions  
11 or conditions into that agreement. They could even  
12 presumably monitor that user's OCRA access.

13 Judge, we're discussing a lot here today whether  
14 confidential information -- the reason for the restriction  
15 here is that the defendants seek to protect confidential  
16 information. Whether that information, again, might be in  
17 a filing I believe is a factual inquiry that cannot be  
18 resolved on a motion to dismiss. Courthouse News Service  
19 is entitled to test that theory in discovery.

20 And in fact, generalized concerns, which are all  
21 that the defendants allege at this stage of the game, fall  
22 well short of what is required for defendants to meet  
23 their constitutional burden. And we allege that the  
24 defendants would be unable to do so for several reasons.

25 First, we've noted how the filing party is

1 already required to redact most of this information. So a  
2 less restrictive alternative is already in place.

3           Now, defendants claim that the redaction  
4 information -- the redaction rule does not apply to all of  
5 that information. For instance, minor's names and maiden  
6 names. But I believe this is a red herring. I think that  
7 those things are sometimes redacted by the filing party,  
8 even if they're not. But that's something that discovery  
9 can bear out.

10           But that aside, defendants must validate their  
11 concern by demonstrating with factual evidence that those  
12 types of names appear in filings, that they're unredacted,  
13 how often that occurs, that this just -- that this  
14 justifies the restriction here. And that an alternative  
15 less restrictive option is not available, like redacting  
16 that type of information.

17           Also, as we have noted, and I think -- and I'm  
18 repeating this because I think this is critical. The  
19 documents available on OCRA are nonconfidential. They're  
20 already available at the courthouse.

21           And these concerns are not unique to the courts  
22 of Virginia. They are shared by all courts, yet a  
23 significant number of them, like most federal courts,  
24 provide remote online access.

25           Now, instead of addressing the constitutional

1 question here, the Executive Secretary dodges the First  
2 Amendment question, and instead focuses on his supposed  
3 immunity because the circuit court clerk says, as he  
4 contends, are the custodian of records at issue. Even if  
5 that's true, Your Honor, I think that misses the point.

6           What matters is that the Executive Secretary's  
7 role is central to the merits of this dispute, and that's  
8 for several reasons, all of which are alleged in our  
9 amended complaint. And all that is required under the *Ex*  
10 *Parte Young* case, and its progeny, to overcome the  
11 immunity here is that Courthouse News alleged facts  
12 which -- and this is a quote from the case law.  
13 Courthouse News must allege facts which show some  
14 connection between the challenged violation of federal law  
15 and the Executive Secretary himself.

16           And here the amended complaint alleges that the  
17 Executive Secretary serves as the administrator of the  
18 circuit court system. The defendant does not dispute  
19 that. And that administration includes the operation and  
20 maintenance of OCRA. The complaint also alleges that the  
21 Executive Secretary maintains the system, provides --

22           THE COURT: But I don't know that the record is  
23 going to indicate that he has any authority at all with  
24 respect to the dissemination of the information within the  
25 system. And that is the core claim in this case.

1 MR. GINSBERG: Well, as -- as Your Honor  
2 observed, the complaint also alleges that an OES corporate  
3 designee in the *Schaefer* case testified that the  
4 restriction of OCRA access is an OES-imposed requirement.  
5 And that OES has always taken the stance, as they have  
6 here today, that OCRA access cannot be provided to anyone  
7 other than attorneys.

8 So according to those allegations, Your Honor,  
9 the restriction of access challenged here is the result of  
10 policies implemented by the Executive Secretary's office.

11 THE COURT: What specific policy are you  
12 referring to that he issued?

13 MR. GINSBERG: I don't -- I'm not aware at this  
14 stage that there is a written policy that could be born  
15 out in discovery. But based on the allegations in the  
16 complaints, specifically the testimony during a 30(b)(6)  
17 deposition, the policy is -- is that there is an  
18 OES-imposed requirement that OCRA access cannot be granted  
19 to anyone but attorneys.

20 THE COURT: All right.

21 MR. GINSBERG: Now, the complaint also alleges  
22 that Courthouse News requested access from the Executive  
23 Secretary, and that he denied that access. And in denying  
24 that access, admitted that his office host the records on  
25 which -- the platform on which records are viewable

1 through OCRA.

2 THE COURT: Now, in denying access, did he  
3 indicate that that was his decision, or did he indicate  
4 that that was the providence of the clerk of the court?

5 MR. GINSBERG: I believe what was said, Your  
6 Honor, -- and this is to my best recollection. But I  
7 believe what was said was that OES, in his view, did not  
8 have the authority to grant that request.

9 THE COURT: Okay. All right.

10 MR. GINSBERG: But based on these allegations,  
11 Your Honor, the complaint alleges that the Executive  
12 Secretary plays a central role in the challenged conduct  
13 here. And he's essential to obtaining the Courthouse  
14 News' ability to obtain the relief it seeks. Essentially,  
15 OES is pulling the strings, dictating the practice  
16 challenged, and they control the electronic records that  
17 facilitates the clerk's unconstitutional conduct.

18 Now, not only do defendants' policies and  
19 practices violate the First Amendment right of access, but  
20 they also violate -- they deprive Courthouse News, and  
21 other non-attorneys, from equal protection under the law.

22 Defendants, in fact, concede that Courthouse  
23 News has established that it's treated differently than  
24 those similarly situated. And Courthouse News has  
25 adequately pled that this unequal treatment is

1 intentional. And I don't believe that the defendants  
2 dispute this.

3 Courthouse News alleges, for instance -- for  
4 example, that Ms. Smith intentionally drafted this  
5 non-attorney subscriber agreement, increased the cost  
6 sixfold, and built other conditions in there that  
7 basically made the agreement useless. It -- it, I  
8 believe, even imposed some sort of penalty for  
9 distributing any of that information.

10 THE COURT: Well, I think she cited that it was  
11 illegal to distribute that information, did she not? Did  
12 she not incorporate that statute that said that it can't  
13 be disseminated?

14 MR. GINSBERG: I -- I believe that that was  
15 probably what the defendant was incorporating. I am not  
16 sure that the agreement actually cited to that statute.

17 THE COURT: All right.

18 MR. GINSBERG: But I'll note that an attorney  
19 subscriber agreement does include that information in it.

20 THE COURT: Okay. All right. Fair enough.

21 MR. GINSBERG: With respect to the Executive  
22 Secretary, OES's OCRA documentation specifically indicates  
23 it's for attorneys only. The name of the system itself,  
24 Officer of the Court Remote Access System, indicates the  
25 intention to exclude non-attorneys.

1           And these allegations are all that are -- are  
2 all that's required to sufficiently state a claim under  
3 the Equal Protection Clause. And when a defendant  
4 restricts a constitutional right, as here, that defendant  
5 must demonstrate that the preferential treatment  
6 challenged is narrowly tailored to serve a compelling  
7 government interest. It is not a rational basis review.

8           THE COURT: Of course you also do agree that the  
9 defendants are merely parroting what the legislature has  
10 directed by statute?

11           MR. GINSBERG: I believe that the defendants,  
12 Your Honor, are interpreting the -- the code in a way that  
13 is restricting access here. As I've noted, and argued  
14 here today, it's our position that that code does not  
15 necessarily prohibit the access we seek here.

16           THE COURT: Okay. Fair enough.

17           MR. GINSBERG: And I have also discussed here  
18 today, Judge, why we allege that defendants' purported  
19 justification regarding sensitive information is not  
20 narrowly tailored. And Courthouse News has also alleged  
21 that there is no valid basis for any distinction to be  
22 made between attorneys and non-attorneys. And the  
23 interest that attorneys have in that information is no  
24 more important than the interest of the press or the  
25 public.

1 Now, I just want to point out there were some  
2 cases in Ms. Smith's reply brief, a handful of cases, in  
3 which the Court concluded that there is justification for  
4 treating non-lawyers differently than lawyers. But that  
5 was based on specific factual circumstances of those  
6 cases. And none of those cases involved a restriction of  
7 a fundamental constitutional right which, as I've argued  
8 here today, requires a more exacting scrutiny analysis  
9 rather than rational basis review.

10 And the justifications present in those cases  
11 cited by the defendant, they don't exist here. And  
12 they -- they involve a factual inquiry that cannot be  
13 resolved on a motion to dismiss.

14 Now, the one thing I would like to leave the  
15 Court with today is to note that Virginia barred  
16 attorneys, they can view filings online 24/7 from their  
17 home, office, wherever they may be, from their phone,  
18 tablet, computer. Where, on the other hand, Courthouse  
19 News, whose specialty is reporting on civil litigation,  
20 and any other non-attorney, as the Court is aware, has to  
21 send an individual to each of the 120 circuit courts  
22 across Virginia, over 90 of which use OCRA, during court  
23 hours on a daily basis.

24 THE COURT: I recognize the burden is definitely  
25 there. I understand that.

1 MR. GINSBERG: Okay.

2 THE COURT: But that's not necessarily  
3 controlling in the case. A factor, but not controlling.

4 MR. GINSBERG: I understand your view, Your  
5 Honor.

6 THE COURT: Okay.

7 MR. GINSBERG: That practice, I just want to  
8 note, is not only impossible for a -- for anyone, even for  
9 an entity like Courthouse News. But I'll finish with this  
10 to bring my argument full circle. It's not mandated by  
11 the Virginia code, and it violates the First Amendment  
12 right of access and the equal -- the Fourteenth Amendment  
13 Equal Protection Clause.

14 Unless the Court has any other questions?

15 THE COURT: I don't. I understand your  
16 argument. You did an excellent job. Thank you.

17 MR. GINSBERG: Thank you, Your Honor.

18 THE COURT: Any rejoinder, Mr. McEntee?

19 MR. McENTEE: Very briefly.

20 THE COURT: Okay.

21 The statute under 17.1 does not prohibit the  
22 dissemination electronically of case information to  
23 private citizens.

24 MR. McENTEE: That's correct, sir. And that  
25 is -- well, I shouldn't say that is correct. That is his

1 interpretation of law.

2           However, with regards to the Officer of the  
3 Court Remote Access, one of the statutory rules of  
4 construction is that to expressly state one is to exclude  
5 another. And Virginia code, with regards to 17.1-293,  
6 explicitly permits lawyers to view on that specific system  
7 of access.

8           I believe there is another system -- I'm sorry.  
9 There's another Virginia code provision - I don't have it  
10 in front of me - which permits clerks to operate their own  
11 systems. I'm not sure -- I'm not sure at the moment what  
12 that is. But for Officer of the Court Remote Access, that  
13 is specifically limited to attorneys.

14           On a bullet, sir, I wanted to address just a  
15 couple of the Court's concerns that were raised during  
16 Mr. Ginsberg's argument. In fact, if there is a First  
17 Amendment question here, it is, at best, a time, place and  
18 manner restriction.

19           If a member of the public wants to see court  
20 records, they can -- they have to go to the courthouse  
21 during courthouse time, and it has to be assisted by the  
22 courthouse staff. But in making someone go to the  
23 courthouse, it's about two central things: Profitability  
24 and accountability. Accountability because if you have to  
25 go to the courthouse, you have to sign your name.

1 Typically, you have to show a driver's license. And the  
2 person is limited to usually viewing for what they are  
3 asking for a specific case number or a case.

4           The difference is someone sitting behind a desk  
5 can write an algorithm searching for any host of  
6 information based on case type. And that account can be  
7 shared with anyone. So it's an issue of accountability  
8 there.

9           THE COURT: If they can get it over-the-counter  
10 and share it with anyone, how is that different from  
11 getting it from a computer or an Internet system and  
12 sharing it with someone? What's the distinction there?

13           MR. McENTEE: The difference is, sir, is because  
14 an account can be shared with anyone. Specifically,  
15 people in foreign jurisdictions that Virginia has no  
16 control over or that can enforce against.

17           So, for example, a predatory lending company  
18 that operates out of China. If someone has a subscriber  
19 agreement with the Prince William Circuit Court, they  
20 might harvest that information and not be subject to any  
21 accountability whatsoever. Whereas someone who has to  
22 actually go to the courthouse, sign their name, show their  
23 driver's license, they might only ask for one case if they  
24 do.

25           And that's why it's intertwined with this issue

1 of profitability. As Courthouse News states, they bring  
2 this case because traditionally they have employed  
3 reporters to go to these courthouses. And they've never  
4 had a problem getting access except for, I suppose, in the  
5 *Courthouse News v. Schaefer* case.

6           It's much more profitable to be able to sit  
7 behind your desk and do this. And that's why it's much  
8 more subject to risk for, let's say, a commercial lender  
9 or a predatory lender. It's much more profitable for them  
10 to sit behind a desk and utilize financial information  
11 from highly sensitive vulnerable litigants. So preventing  
12 the mass dissemination is different from preventing access  
13 whatsoever.

14           THE COURT: What is the public interest in  
15 controlling the profit of someone using the information?

16           MR. McENTEE: It's about protecting the  
17 litigants, sir. It's about protecting the litigants who  
18 are entrusting the judicial system with their rights.  
19 That is what this --

20           THE COURT: Certainly with respect to how the  
21 information is used, yes.

22           MR. McENTEE: Yes, sir.

23           THE COURT: But is the profitability of a  
24 newspaper using information in publishing stories to the  
25 public, is that a protectable interest?

1 MR. McENTEE: Well, the Virginia General  
2 Assembly has no interest in -- this isn't about  
3 profitability in that sense, Your Honor. It is about why  
4 these persons are accessing it. I mean, I'm using it as  
5 an example to show why they're using it to access rather  
6 than showing it as a protected interest.

7 THE COURT: All right.

8 MR. McENTEE: And I'm just explaining to the  
9 Court the difference between the two methods.

10 THE COURT: All right.

11 MR. McENTEE: Mr. Ginsberg also refers to the  
12 Executive Secretary's 12(b)(1) motion. And he  
13 tangentially states that the Executive Secretary is  
14 central to the merits of the dispute. But this doesn't  
15 have any bearing on whether or not he has a specific  
16 enforcement nexus with the challenged statute. And that's  
17 what *Ex Parte Young* requires.

18 We don't need to look at any sort of speculation  
19 that's raised in the complaint about what OES policies has  
20 regarding this. We look to Virginia law. And what  
21 Virginia law says is that the Executive Secretary does not  
22 permit or grant access to anyone to any system of access.  
23 They merely maintain the database by which the circuit  
24 court clerks grant access to others.

25 For that reason, both of these motions should be

1 granted. Thank you.

2 THE COURT: All right. Very well.

3 All right, Mr. Altmiller.

4 MR. ALTMILLER: Your Honor, I will say that I  
5 think the counsel and the Court have covered most of the  
6 issues that I would probably want to stress. I mean, I do  
7 think it is -- and I -- with great respect to Courthouse  
8 News, they don't come to the Court and say we are the  
9 press, we are special. They say we should have access,  
10 everyone should have access. So I think when you look at  
11 the reasoning and the rationale behind --

12 THE COURT: But while they're not a protected  
13 class, I mean, they do have a public mission to inform the  
14 public of what is going on in the courts.

15 MR. ALTMILLER: And they having done so, as I  
16 understand it, with great success.

17 THE COURT: Very capably, yes.

18 MR. ALTMILLER: Yes. So I would suggest that  
19 historically they've done that, and they can continue to  
20 do that.

21 So that's -- it is not the job of the  
22 legislature or Ms. Smith as clerk to make their job  
23 easier. Or maybe I should put that differently. To make  
24 it more profitable for them so that they have to spend  
25 less money on reporters. But that -- again, Your Honor, I

1 think in some respect that misses the point, or at least  
2 the point as we see it, which is that first and foremost  
3 there's a statute by which we need to abide.

4           And I will -- following up on the Court's  
5 questions and following up on Mr. McEntee, I am not, nor  
6 do I think my client is aware of any restriction or  
7 direction from the Office of the Executive Secretary with  
8 regard to OCRA. Rather, we read the statute. And I will  
9 point out again, because I do think it bears pointing out,  
10 that sometimes there's this conflation between what is  
11 confidential and what is private. And, again, I use those  
12 terms of art to distinguish what 293(B) says you can't  
13 publish on the Internet.

14           And that's -- that information is not  
15 necessarily confidential information. It's  
16 nonconfidential information. And the problem is  
17 essentially what Mr. Ginsberg would have all the clerks in  
18 Virginia do is look at every filing, determine whether or  
19 not a certain piece of information that -- there's no  
20 obligation for the filing party to redact statutorily, or  
21 otherwise, and then do that just so it will be easier so  
22 it can go on OCRA so they can comply with the statute just  
23 to give Courthouse News, or anyone else, access. And I  
24 don't believe that there's any authority or precedent for  
25 that obligation being imposed upon --

1 THE COURT: That's why I mentioned earlier today  
2 that perhaps the most expedient remedy here is to go to  
3 the General Assembly and have them amend the statute.

4 MR. ALTMILLER: And speaking as somebody who  
5 occasionally converses with members of the General  
6 Assembly, I don't necessarily think that would be out of  
7 the question.

8 THE COURT: And I don't think they would get a  
9 cold reception.

10 MR. ALTMILLER: I don't think they would either,  
11 Your Honor.

12 THE COURT: No. It seems like a simple, less  
13 costly disposition of the case.

14 MR. ALTMILLER: Well, I would point out -- and  
15 hopefully this is not repetitive. But the notion that  
16 they're being denied or restricted access, what they are  
17 not getting is they are not getting instantaneous remote  
18 access. And that's classic time, place, and manner, Your  
19 Honor. How soon can they get it. Are they going to save  
20 30 minutes driving down to the courthouse, or wherever  
21 that would be. It's the place, you know, in their living  
22 room versus in the Clerk's Office. And it's the manner.

23 So, Your Honor, I think this is a classic time,  
24 place, manner. And the arguments have been made on that  
25 issues, and I won't repeat them.

1 I don't know if the Court has any further  
2 questions or concerns?

3 THE COURT: I don't. No.

4 I've thoroughly read everything, and I commend  
5 all of you for doing an excellent job. It's an  
6 interesting issue. One that has never been squarely, I  
7 think, addressed by a Court. But we'll do the best we  
8 can.

9 MR. ALTMILLER: I appreciate that, Your Honor.  
10 Thank you.

11 MR. GINSBERG: Your Honor, could I add one thing  
12 for 30 seconds with the Court's permission?

13 THE COURT: Sure. Yes, sir.

14 Why don't you come up to the podium so my court  
15 reporter can get it down.

16 MR. GINSBERG: Sure.

17 I just wanted to point out, Judge, which I  
18 neglected to mention previously, that defendant Hade had  
19 cited to the *Daily Press* case. I think it's crucial to  
20 point out to the Court that that case - and I'll take off  
21 my mask. I'm sorry - is of no relevance here for several  
22 reasons:

23 First, that case involved a FOIA request under  
24 state law for criminal docket information. It was not a  
25 First Amendment right of access case. In fact, the

1 Virginia FOIA statute specifically requires a FOIA record  
2 request to be made to the custodian of records. So the  
3 Court determined that a request to OES, or having OES in  
4 the case at all, did not comport with the statute.

5 And, second, it's alleged in this case that OES  
6 is specifically dictating the challenged procedure. And  
7 that issue did not exist in the *Daily Press* case.

8 I just wanted to add that for clarity to the  
9 Court.

10 THE COURT: I appreciate that.

11 MR. GINSBERG: And one more thing. We just  
12 heard from Mr. Altmiller. I'm sorry if I'm mispronouncing  
13 counsel's name. But it's not an issue of a 30-minute  
14 drive to the courthouse. These courts are spread over  
15 30,000 square miles.

16 THE COURT: I understand that. I've lived in  
17 Virginia all my life, sir.

18 MR. GINSBERG: Thank you, Judge.

19 THE COURT: All right. Very well.

20 I originally was going to have counsel come back  
21 to the jury room for our initial pretrial conference, but  
22 I believe we can perhaps do it easier here in the  
23 courtroom.

24 I am going to take about a four- or five-minute  
25 recess. You are welcome to leave the courtroom for a few

1 minutes, if you wish. We will come back and take up the  
2 pretrial conference.

3 I'll be back in about five minutes. We'll stand  
4 in recess until then.

5 MR. GINSBERG: Thank you, Your Honor.

6 (Recess taken.)

7 THE COURT: We generally begin our initial  
8 pretrial conference by counseling the lawyers on the  
9 importance of perhaps trying to sit down and resolve the  
10 case. And I realize this case is in a little bit  
11 different posture than many of them that I have, but I  
12 still believe -- and I've been around state government in  
13 Virginia all my life. I started out as a deputy sheriff  
14 the day I was 21 years old. You could find many people in  
15 the General Assembly who would be very, very receptive to  
16 a bill like this. They would have no problem being a  
17 patron on something like this. And I strongly encourage  
18 you to explore that possibility.

19 Have you had your Rule 26(f) conference?

20 MR. GINSBERG: We have, Your Honor.

21 THE COURT: All right. Have you come up with a  
22 discovery plan?

23 MR. GINSBERG: We -- we are, Your Honor, ready  
24 to adopt the Court's form order for discovery.

25 The only thing I would add is that the parties,

1 I believe, anticipate once this -- assuming this case  
2 makes it past the motion to dismiss stage, there is purely  
3 a legal issue here. The parties anticipate filing  
4 cross-motions for summary judgment, I believe, at some  
5 point down the road, of course, you know, giving the Court  
6 enough time prior to trial.

7 THE COURT: Yes. We will discuss all of that.  
8 That is definitely going to be in the cards here.

9 But you have put together a discovery plan,  
10 which we require you to do. There may not be any  
11 discovery required.

12 MR. GINSBERG: We -- we have had preliminary  
13 discussions as to, you know, the fact that discovery may  
14 be limited in this case.

15 THE COURT: Yes.

16 MR. GINSBERG: We haven't had any detailed  
17 discussions as to what that limited discovery might be.  
18 But I do believe that it could be limited in a way because  
19 there are legal issues here.

20 THE COURT: All right. Well, what I want you to  
21 do before you leave today, I want you to go out to the  
22 room out there, sit down, and talk about your discovery  
23 plan and have it in place before you leave here today.

24 How many witnesses do you think will be called  
25 in this case, Mr. Ginsberg?

1 MR. GINSBERG: Your Honor, I think there could  
2 be two at least for Courthouse News.

3 THE COURT: Well, Mr. McEntee, how many do you  
4 think -- how many witnesses are you going to have?

5 MR. McENTEE: Sir, because of the allegations  
6 specifically with regards to OES policies, we would have  
7 at least two Executive Secretary witnesses, and possibly  
8 an expert witnesses.

9 THE COURT: All right.

10 Mr. Altmiller, how many witnesses do you expect  
11 you are going to have, sir?

12 MR. ALTMILLER: As of right now, I don't know  
13 that there would be anyone outside of Ms. Smith.

14 THE COURT: All right.

15 MR. ALTMILLER: I can't swear to it, but I have  
16 trouble imagining it based on the case.

17 THE COURT: All right.

18 Well, this sounds like a case we can easily try  
19 in one day if it goes to trial. And Ms. Belcher has  
20 already set a date for July the 19th starting at 9:00 a.m.  
21 in the morning for trial.

22 You would agree it's a one-day trial?

23 MR. ALTMILLER: Yes, sir.

24 MR. GINSBERG: Yes, Your Honor.

25 THE COURT: Okay. Very good.

1 Motions for summary judgment, I want those filed  
2 at least 70 days prior to trial so I'll have a chance to  
3 resolve those.

4 I want your proposed findings of fact and  
5 conclusions of law at least 14 days before trial. And  
6 what I may very well do, I will probably have a conference  
7 call with you all in about 90 days to see how you are  
8 progressing. And if it looks as though there is some  
9 meetings of the minds, I will probably set it down for a  
10 settlement conference and I'll probably do that myself.  
11 We'll have a settlement conference and see if I can't help  
12 you resolve this case, if possible.

13 Ms. Pizzini, is there anything I have missed  
14 here?

15 THE CLERK: I don't believe so, Your Honor.

16 THE COURT: All right. Okay.

17 A one-day trial without a jury, July 19th,  
18 starting at 9:00 a.m.

19 Go back and spend a little while in the  
20 conference room talking about your discovery plan and who  
21 your witnesses are so you can have all of that worked out.

22 We'll probably have a conference call in about  
23 90 days so I can see how you're progressing.

24 And for the tenth time I will repeat, it would  
25 be in everybody's best interest to see whether or not the

1 General Assembly would amend this statute. It would  
2 resolve the entire case.

3 Have a good day.

4 Court will stand in recess.

5 MR. GINSBERG: Thank you, Your Honor.

6 (The proceeding concluded at 12:31 p.m.)

7 REPORTER'S CERTIFICATE

8 I, Krista Liscio Harding, OCR, RMR,  
9 Notary Public in and for the Commonwealth of  
10 Virginia at large, and whose commission expires  
11 March 31, 2024, Notary Registration Number 149462,  
do hereby certify that the pages contained herein  
accurately reflect the notes taken by me, to the  
best of my ability, in the above-styled action.

Given under my hand this 12th day of January, 2022.

12 /s/

13 Krista Liscio Harding, RMR  
14 Official Court Reporter  
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