No. 21-1624

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COURTHOUSE NEWS SERVICE; MTM ACQUISITION, INC., d/b/a Portland Press Herald, d/b/a Maine Sunday Telegram, d/b/a Kennebec Journal, d/b/a Morning Sentinel; SJ ACQUISITION, INC., d/b/a Sun Journal,

Plaintiffs - Appellants,

BANGOR PUBLISHING CO., INC., d/b/a Bangor Daily News,

Plaintiff,

v.

JAMES T. GLESSNER, in his Official Capacity as State Court Administrator for the State of Maine Judicial Branch; PETER SCHLECK, in his Official Capacity as Clerk of the Penobscot County Superior Court,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Maine

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 28 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from all parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Amici are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), The Associated Press, Boston Globe Media Partners, LLC, The Center for Investigative Reporting (d/b/a Reveal), First Amendment Coalition, Gannett Co., Inc., Maine Association of Broadcasters, Maine Press Association, The Media Institute, MPA - The Association of Magazine Media, National Association of Broadcasters, National Freedom of Information Coalition, National Newspaper Association, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, NBCUniversal News Group, New England First Amendment Coalition, The New York Times Company, The News Leaders Association, News Media Alliance, Online News Association, The Philadelphia Inquirer, POLITICO LLC, Pulitzer Center on Crisis Reporting, Radio Television Digital News Association, Society of Environmental Journalists,

Society of Professional Journalists, and Tully Center for Free Speech. Lead amicus the Reporters Committee is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amici file this brief in support of Plaintiffs-Appellants (hereinafter, the "CNS Parties"). As members of the news media or organizations that advocate for the First Amendment and newsgathering rights of the news media, amici have a strong interest in ensuring that courts correctly interpret and apply the First Amendment right of access to court documents. Timely access to court documents, including civil complaints, is essential to reporting on the legal system and the judicial branch. Amici write to emphasize the public interest at stake in this case and to highlight the importance of contemporaneous access to newly filed civil complaints to members of the news media and the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

In December 2020, the Maine Supreme Judicial Court ("SJC") implemented amendments to its Rules of Electronic Court Systems ("RECS"). *Courthouse News Serv. v. Glessner*, No. 1:21-CV-00040-NT, 2021 WL 3024286, at *1 (D. Me. July 16, 2021). Under the December amendments to the RECS, public access to newly filed civil complaints would be unavailable "until three business days after the court clerk ha[s] accepted both the case-initiating documents and proof of service of process on at least one defendant." *Id.*

On February 3, 2021, the CNS Parties filed a complaint and motion for preliminary injunction in the U.S. District Court for the District of Maine (the "District Court"), challenging the amendments to the RECS as unconstitutional to the extent they violate the public's presumptive right to inspect court records under the First Amendment. *Id.* Thereafter, the SJC further amended the RECS, effective March 15, 2021 (the "March RECS"). *Id.* at *2. Under the March RECS, public access to newly filed civil complaints is delayed while the court clerk completes a multi-point administrative review to ensure compliance with the requirements of the Maine Rules of Civil Procedure and the RECS. *Id.* Upon completion of the administrative review, the complaint is then accepted and entered into the electronic case file. *Id.* Pending completion of the administrative review, the press and the public are unable to access the newly filed civil

complaint. The March RECS do not specify a time period for completion of the administrative review process and entry of the complaint into the electronic case file. *See* 2021 Me. Rules 02, https://perma.cc/5DFA-BXCS.

The CNS Parties amended their complaint on February 25, 2021, to address the constitutionality of the March RECS. *Glessner*, 2021 WL 3024286, at *3. On July 16, 2021, the District Court dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted, and denied the CNS Parties' motion for injunctive relief. *Id.* at *19.[1] Although the District Court recognized a qualified First Amendment right of public access to civil complaints, it concluded—based on evidence provided by Defendants in affidavits following oral argument on the CNS Parties' motion for a preliminary injunction—that many complaints were being made available within one day and that, under a time, place, and manner analysis, the March RECS do not deprive the public of contemporaneous access. *Id.* at *18 & n.26.

The First Amendment guarantees a qualified right of access to judicial proceedings and documents rooted in the recognition that the public's understanding and oversight of the judicial process are essential to our system of self-governance. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555,

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[1] All references herein to the "Federal Rules" or "Rules" are to the Federal Rules of Civil Procedure.

569, 575–77 (1980) (plurality opinion). Access to newly filed civil complaints, in particular, is important because a complaint is the litigation's foundational document; it sets a lawsuit in motion and triggers the judicial process.

Robust, accurate news reporting requires timely access to civil complaints. Because freshness and speed are key aspects of the news business, delays of even a day can result in a complete denial of meaningful access, both for reporters and for the members of the public who rely on the press for information. Prompt access to civil complaints ensures that the public learns about important cases while they are still newsworthy, promotes accuracy in reporting, and leads to more meaningful public debate about those cases.

Not only does timely access to newly filed civil complaints benefit the public, but also it is constitutionally required. As the District Court correctly held, applying the "experience and logic" framework of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986) ("*Press-Enterprise II*"), there is a qualified First Amendment right of access to civil complaints. *Glessner*, 2021 WL 3024286, at *15. And, as other federal courts of appeals have recognized, the right of access afforded by the First Amendment "should be immediate and contemporaneous." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). Indeed, as this Court has

recognized, "even a one to two day delay [of access to judicial records] impermissibly burdens the First Amendment." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("*Pokaski*").

Once the First Amendment right of access attaches, it can be overcome only by "an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9–10 (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*")); *see also Pokaski*, 868 F.2d at 502. Most courts have applied the *Press-Enterprise II* standard to denials of access to court records subject to the First Amendment right of access. A time, place, or manner analysis, on the other hand, is more appropriate for issues of courtroom decorum—not denials of access to court records. Regardless of which standard applies, however, the delays in access to newly filed civil complaints at issue in this case do not pass constitutional muster. Moreover, in dismissing the CNS Parties' amended complaint, the District Court failed to "accept the truth of all well-pleaded facts" and "draw all reasonable inferences" in the CNS Parties' favor, *García-Catalán v. United States*, 734 F.3d 100, 102 (1st Cir. 2013) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)), instead relying on Defendants' evidentiary submissions to conclude that the March RECS do not deprive the public of contemporaneous access.

For the reasons herein, amici urge the Court to reverse the District Court's order dismissing the CNS Parties' amended complaint for failure to state a claim.

ARGUMENT

I. Timely access to newly filed civil complaints benefits the public and the press.

News—by definition—is timely. News is not breaking unless it is contemporaneous. In the era of online publishing, especially, news is disseminated almost instantaneously, and the public expects up-to-the-second, accurate information from news outlets. For reporters who cover the courts, delivering the news thus requires timely access to newly filed civil complaints. The quintessential legal document, a complaint initiates litigation and frames the issues presented—providing the first picture of a case's who, what, when, where, and why. In short, reporters need timely access to complaints in order to inform the public about what is happening in court.

When news media organizations like the CNS Parties have contemporaneous access to civil complaints, it is the public that benefits. As the United States Court of Appeals for the Ninth Circuit explained in a similar case brought by Courthouse News Service, "[t]he news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("*Planet I*"). "The free press is the guardian of the public interest, and the independent judiciary is the

guardian of the free press." *Id.* (quoting *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.").

Access delayed is access denied, for both the press and the public. Timely access to civil complaints allows the press to report on new civil disputes at the moment they are most newsworthy, enhances the accuracy and completeness of news reports, and fosters public understanding and discussion of judicial affairs. These benefits of timely access to civil complaints flow, ultimately, to the public.

A. <u>Newsworthiness depends on timeliness.</u>

Timeliness is a critical component of news. As one journalism scholar stated succinctly: "It is, after all, called the 'news' business and not the 'olds' business." Janet Kolodzy, Convergence Journalism: Writing and Reporting Across the News Media 59 (2006); *see also* Fred Fedler et al., Reporting for the Media 123 (8th ed. 2005) (describing timeliness as one of the key characteristics of news). The Supreme Court and federal courts of appeals have repeatedly recognized timeliness as a fundamental feature of news. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not

unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (recognizing a quasi-property interest in "hot" news). As the Ninth Circuit recognized with respect to the right of access to judicial records, "[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (*Planet III*); *see also Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (recognizing that even a brief loss of First Amendment freedoms constitutes "irreparable injury").

"The peculiar value of news is in the spreading of it while it is fresh . . . ." *Int'l News Serv.*, 248 U.S. at 235. Today, with the advent of reporting through digital and social media platforms, the timeframe for what is considered "fresh" is shorter than ever. The websites of the *Los Angeles Times* and *The New York Times*, for example, measure the timeliness of news updates in minutes. Other news services, such as *Dow Jones Newswires*, and social media platforms like Twitter, mark new posts by the second. *See* Toni Locy, Covering America's Courts: A Clash of Rights 13 (2d ed. 2013) ("In the Internet age, a deadline passes every second."). And the public's voracious appetite for timely news has kept pace with the evolving technology. "By a large majority, nearly two-thirds of adults

now say they look at news at least several times a day. We are now a nation of serial news consumers." *How Americans describe their news consumption behaviors*, Am. Press Inst. (June 11, 2018), https://perma.cc/M3L2-84PB.

Reporters—including those in Maine—routinely rely on access to newly filed civil complaints to disseminate same-day news about matters of public concern. *See* Don Carrigan, *Lobstermen sue federal agencies over new whale rules*, News Center Maine (Sept. 27, 2021), https://perma.cc/WJ2L-SK9M (describing lawsuit filed the same day and linking to complaint); Kim Kalunian & Steph Machado, *'Cure is worse than the disease': Parents file suit over McKee's K-12 mask mandate*, WPRI (Sept. 16, 2021), https://perma.cc/9TY3-NKXC (reporting on lawsuit filed the same day); Adrian Ma, *Mass. AG's Office Sues Grubhub, Claims It Violated Cap On Restaurant Fees*, WBUR (July 29, 2021), https://perma.cc/74MP-ALGU (same). Indeed, when reporting on a newly filed lawsuit, a reporter may share a copy of the complaint on social media within minutes after it is filed. Within hours, articles are published about the lawsuit online. By the end of the day, the lawsuit may be part of the public discourse on social media, in person, and on the nightly news. For example, on the morning of August 26, 2021, seven U.S. Capitol police officers filed a complaint in the U.S. District Court for the District of Columbia, alleging that former President Donald Trump and others conspired to incite the violence on January 6, 2021 that

ultimately led to the attack on the U.S. Capitol. *See* Complaint, *Smith v. Trump*, No. 1:21-cv-02265 (D.D.C. Aug. 26, 2021), ECF No. 1. By 11:11 AM, *BuzzFeed News* legal reporter Zoe Tillman had tweeted a link to the complaint which was quickly re-shared by users more than one thousand times. *See* Zoe Tillman (@ZoeTillman), Twitter (Aug. 26, 2021, 11:11 AM), https://perma.cc/HK97-NAFG. Within the next two hours, Tillman and other reporters published articles reporting on the lawsuit in greater depth. *See, e.g.*, Zoe Tillman, *Seven Capitol Police Officers Suing Trump Shared The Violence And Racism They Experienced On Jan. 6*, BuzzFeed News (Aug. 26, 2021, 1:04 PM), https://perma.cc/CJ83-ZDEF; Josh Gerstein, *7 Capitol Police officers sue Trump, others over Capitol riot*, Politico (Aug. 26, 2021, 1:17 PM), https://perma.cc/MG3D-C54J. And, by that evening, MSNBC news anchor Chris Hayes had examined the lawsuit in detail during his 8:00 PM ET news broadcast. *See* MSNBC, *Capitol Police Officers Sue Trump Over Jan. 6 Role, Cite KKK Act Violation*, YouTube (Aug. 26, 2021), https://bit.ly/3I1rDD5. Without contemporaneous access to the complaint, however, this level of timely and robust reporting would not have been possible.

Delaying access by even one day may imperil the news media's ability to provide meaningful reporting on new lawsuits, as the next day's headlines can eclipse yesterday's news. Indeed, policies that delay access to judicial records—like the March RECS—can amount to a complete denial of meaningful access, as

"old news" does not receive the same level of public attention as timely news and may not be published at all. In contrast, timely access to civil complaints allows the news media to learn of new civil lawsuits as they are filed and to report about them to the public when their newsworthiness is at its apex.

B. Timely access to civil complaints facilitates accurate and complete news reporting.

Court records are the most valuable and direct sources of information for reporting on lawsuits. Journalists often look to court records, including civil complaints, to ensure that their reporting is fair, accurate, and complete. Reporters and their audiences benefit tremendously when news reports can reference, quote from, and hyperlink to court documents, including complaints. In a textbook on legal news reporting, professor and veteran journalist Toni Locy calls "reading" court documents "fundamental." *See* Locy, *supra*, at 61–67. Locy advises reporters not to rely solely on press releases and statements given by attorneys and to be aware of the potential for ulterior motives that lawyer-advocates may have when speaking with the press. *Id.* at 3–4. Instead, she instructs reporters to "review[] court filings or other public records" to determine whether and how a fact or allegation should be reported. *Id.* at 9.

Timely access to civil complaints also facilitates thorough and more complete reporting by the news media about newly filed civil lawsuits. Journalists rely on the information contained in civil complaints to report the "core dispute"

underlying new civil suits, including the factual and legal underpinnings of the claims. *See* Beth Winegarner, *6 tips for reporters tracking state legal cases*, Poynter (Sept. 27, 2013), https://perma.cc/64DQ-5WWX (recommending that reporters review court documents in newly filed cases "to find out what the core dispute is about—and what kind of legal remedies, including money, the plaintiffs are asking for"). In the current news environment, stories build upon each other and are updated regularly online. It is therefore important that the first news stories about a lawsuit be as accurate and complete as possible, and rely on information derived from official, primary sources. Journalism about newly filed cases is simply more authoritative and accurate if the complaints themselves are available for inspection, copying, and reference by members of the news media.

C. Timely access to civil complaints benefits the public by promoting understanding about judicial processes and matters occupying courts' dockets.

The American people rely on the news media for information about the workings of government, including the judicial system. As the Supreme Court has stated: "'[An] untrammeled press [is] a vital source of public information,' . . . and an informed public is the essence of working democracy." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (writing that "the

Founding Fathers gave the free press the protection . . . so that it could bare the secrets of government and inform the people”).

The public has a right to be informed about matters now pending before state courts that may demand court resources for years to come. Indeed, the public can engage in meaningful discussion and debate about pending lawsuits and can observe the operation of the judicial system only when it knows those lawsuits are underway and can access prejudgment records. *See Pokaski*, 868 F.2d at 502 (recognizing that “without access to [judicial] documents the public often would not have a full understanding of the proceeding and therefore would not always be in a position to serve as an effective check on the system” (citation and internal quotation marks omitted)); *Seattle Times Co. v. U.S. District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (finding that access to pretrial documents is “important to a full understanding of the way in which the judicial process and the government as a whole are functioning” (citation omitted)). For that reason, access to “complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems.” *Planet III*, 947 F.3d at 594 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)).

Timely access to newly filed civil complaints also permits individuals, through news reports, to learn about pending suits, which may inform them about

their own legal rights. By reading or hearing timely news reports about new civil suits, citizens may realize that they too may pursue civil remedies, or discover that they may be able to join an existing civil lawsuit. *See, e.g.*, Jesse Paul, *Planned Parenthood victims' lawsuit could be in limbo as holding pattern in criminal case drags on*, Denver Post (Nov. 21, 2016), https://perma.cc/57B4-UHHT (noting that two plaintiffs in a civil case against a healthcare provider joined the filing after reading news reports of the civil case). In other cases, it is possible that members of the public may discover they have personal knowledge about a pending lawsuit, enabling them to come forward as witnesses.

II. The First Amendment requires contemporaneous access to civil complaints.

A. The First Amendment right of access applies to civil complaints and requires that access be contemporaneous.

The First Amendment right to freedom of speech—a cornerstone of our constitutional system—"would lose much meaning" without the right of access to public proceedings. *Richmond Newspapers*, 448 U.S. at 576–77. As the Ninth Circuit has explained, the two are "inextricably intertwined" because, while the right to free speech protects vigorous debate of governmental activities, it is the right of access that guarantees it is an informed debate. *Planet I*, 750 F.3d at 785. Thus, the right of access is "an essential part of the First Amendment's purpose to 'ensure that the individual citizen can effectively participate in and contribute to

our republican system of self-government.'" *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 604).

In determining whether the First Amendment right of access applies to a judicial proceeding or judicial records, courts consider the two "complementary" and "related" considerations of "experience" and "logic." "Experience" considers the extent to which the judicial process at issue has "historically been open to the press and general public"; "logic" looks to "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8–10.

This Court has recognized that a qualified First Amendment right of access extends to criminal proceedings and records. *Pokaski*, 868 F.2d at 502 (citing *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984)). It has not yet addressed whether the First Amendment right of access applies to records in civil cases. However, as the District Court recognized in correctly finding a presumptive, constitutional right of access to civil complaints, other federal circuit courts applying the "experience" and "logic" framework have consistently held that it does. *See Glessner*, 2021 WL 3024286, at *11 (collecting federal circuit court cases recognizing a First Amendment right of access to civil proceedings and records); *see also Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (holding that the First Amendment presumption of

access applies to civil complaints); *Planet III*, 947 F.3d at 585 ("[T]he press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed.").

Where the First Amendment right of access applies, it is a right to *contemporaneous* access. *See Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014); *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). A delay of timely access to newly filed civil complaints irreparably harms the public's interest in learning about cases pending before the courts. *See Pub. Citizen*, 749 F.3d at 272 (recognizing that "the public benefits attendant with open proceedings are compromised by delayed disclosure"); *see also Elrod*, 427 U.S. at 373 (finding that a loss of First Amendment rights, "for even minimal periods of time, unquestionably constitutes irreparable injury" (citation omitted)). This is even more true in the modern news environment, where timeliness is critical. *See* Section I, *supra*.

B. When evaluating delays to the First Amendment right of access, the proper test is *Press-Enterprise II* scrutiny, rather than a time, place, and manner analysis.

Although the First Amendment right of contemporaneous access to civil complaints is qualified, the Supreme Court held in *Press-Enterprise II* that once the right attaches access may only be denied by "an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is

narrowly tailored to serve that interest." 478 U.S. at 9–10 (quoting *Press-Enterprise I*, 464 U.S. at 510) (hereinafter, "*Press-Enterprise II* scrutiny").

The Supreme Court, as well as this and other federal circuit courts of appeals, has made clear that *Press-Enterprise II* scrutiny is the applicable standard for determining whether the First Amendment right of access to judicial records has been overcome. *See id.* at 13–14; *In re Providence J. Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002) (applying *Press-Enterprise II* scrutiny when reviewing a district court's policy making legal memoranda filed in connection with certain criminal motions unavailable for public inspection); *see also Leigh*, 677 F.3d at 899 n.5 (collecting cases that apply *Press-Enterprise II* scrutiny when evaluating the right of access).

By contrast, a time, place, and manner analysis, which generally calls for intermediate scrutiny, does not properly apply in the context of the First Amendment right of access to court records and proceedings. The Ninth Circuit in *Planet III* observed that delays in access to civil complaints "resemble" time, place, and manner restrictions, but the court still applied what it called the "rigorous" standard from *Press-Enterprise II*. 947 F.3d at 595–96. The separate body of case law regarding reasonable time, place, or manner restrictions developed in the context of restrictions on the exercise of free speech rights. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make

clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . ."); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) (explaining that "the essence of time, place, or manner regulation" was recognizing the effect of "various methods of speech"). In contrast, as explained above, courts in First Amendment right of access cases have overwhelmingly followed the mandate of *Press-Enterprise II* and applied its rigorous standard.

A time, place, and manner analysis is conceptually incompatible with challenges to delayed access like the one here. In *Richmond Newspapers, Inc. v. Virginia*, a plurality of the Supreme Court suggested in dicta in a footnote that time, place, or manner restrictions may be appropriate to maintain the "quiet and orderly setting" of a courtroom. 448 U.S. at 581 n.18 (plurality opinion). The plurality went on to suggest that courts may prioritize seating for media representatives using time, place, or manner restrictions "when not every person who wishes to attend can be accommodated" because of the "limited capacity" of a courtroom. *Id.* But such issues of decorum or courtroom management do not prevent the public from accessing proceedings or documents in their entirety, as the delay in access to newly filed civil complaints does here. The delays in access to civil complaints at issue in this case impose a much greater and different kind of burden on the First Amendment right of access than rules necessary to maintain the

quiet and orderly setting of a courtroom. As with other denials of access to judicial records, they are therefore more appropriately scrutinized under *Press-Enterprise II*'s standard.

That the civil complaints at issue are eventually made available to the public does not make the *Press-Enterprise II* scrutiny standard inapplicable. A delay in accessing civil complaints amounts to a denial of access for the period of time they are withheld, and the delay is therefore subject to *Press-Enterprise II* scrutiny. Indeed, as this Court held in analyzing delays of access to criminal judicial records, "even a one to two day delay [of access] impermissibly burdens the First Amendment." *Pokaski*, 868 F.2d at 507. The Massachusetts statute at issue in *Pokaski* automatically sealed judicial records in criminal cases ending with an acquittal or a finding of no probable cause. Although members of the press and public could file an administrative or legal action to unseal the records, the Court recognized that requiring a motion to unseal would "delay[] access to news, and delay burdens the First Amendment." *Id*. The Court also noted that although "the delay in the past often has been minimal, at times as little as a day," the Massachusetts statute—like the March RECS at issue here— did not "require that all requests be processed within a certain time frame." Thus, the Court found the "burden on the First Amendment" to be "too great . . . to survive First Amendment scrutiny." *Id.*

The Ninth Circuit has similarly recognized that even when documents are "under seal for, at a minimum, 48 hours . . . [t]he effect . . . is a total restraint on the public's first amendment right of access even though the restraint is limited in time." *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983); *see also Courthouse News Serv. v. Jackson*, Civil Action No. H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (finding that a "24 to 72 hour delay in access is effectively an access denial"); *Courthouse News Serv. v. Tingling*, 16 Civ. 8742 (ER), 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016) (enjoining policy of withholding newly filed civil complaints until after processing). Thus, as this and other courts have held, delays in access to judicial records, including civil complaints, are effectively denials of the First Amendment right of access and are subject to *Press-Enterprise II* scrutiny.

C. The March RECS violate the First Amendment right of access under either *Press-Enterprise II* scrutiny or a time, place, and manner analysis.

Regardless of whether the appropriate standard for evaluating delayed access to civil complaints is *Press-Enterprise II* scrutiny or a time, place, and manner analysis, the March RECS violate the First Amendment's presumptive right of public access. To satisfy *Press-Enterprise II* scrutiny, the RECS must be narrowly tailored to serve a compelling government interest. *Press-Enterprise II*, 478 U.S. at 9–10; *Pokaski*, 868 F.2d at 505 (finding that to satisfy heightened scrutiny

"the objectives of the [policy] must be sufficiently important . . . and [the policy] must not infringe upon the First Amendment any more than is necessary to promote those objectives"). Under intermediate scrutiny, time, place, and manner restrictions on protected speech are permitted only when they are (1) "justified without reference to the content of the regulated speech," (2) "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citation omitted).

Here, the "government interests" asserted by Defendants consist of "minimizing the risk of harm to individuals and entities involved in court proceedings" and the "protection of privacy in court records." *Glessner*, 2021 WL 3024286, at *1 (quoting the RECS Preamble). Even assuming, *arguendo*, that these asserted interests are compelling government interests (under *Press-Enterprise II* scrutiny) or significant government interests (under a time, place, and manner analysis), the RECS are in no way narrowly tailored to serve those interests. As a preliminary matter, Defendants have made no showing to justify that restricting public access to civil complaints until after a clerk completes a multi-point administrative review in any way "minimiz[es] the risk of harm to individuals and entities involved in court proceedings." *See Planet III*, 947 F.3d at 595–96 (finding that Ventura County's "no-access-before-process policy" in

regards to newly filed complaints did not meet the "rigorous" balancing test under *Press-Enterprise II* because the county did not demonstrate a "substantial probability that its interest in the fair and orderly administration of justice would be impaired by immediate access" to civil complaints or that that there were "no reasonable alternatives . . . to adequately protect" that interest (citation and internal quotation marks omitted)); *Courthouse News Serv. v. Gabel*, No. 2:21-CV-000132, 2021 WL 5416650, at *15 (D. Vt. Nov. 19, 2021) (finding that the Vermont Superior Court's pre-access review process for newly filed complaints failed to satisfy the *Press-Enterprise* standard as there was "no evidence that staff review of signatures, filing fees, and filing codes is necessary to protect the orderly administration of justice").

Moreover, it is difficult to imagine that there are no less restrictive means available to advance Defendants' purported interests than to deny public access to civil complaints for an indefinite period of time—which could range from hours to weeks—while a court clerk completes an administrative review to ensure, *inter alia*, that the complaint is in PDF format, is accompanied by a filing fee and summary sheet, and states the filing attorney's Maine Bar Registration Number. *See* 2021 Me. Rules 02, https://perma.cc/5DFA-BXCS. Nor is this process "essential" to serve Defendants' purported privacy interests, as the RECS make the filing party, not the clerk, responsible for "ensur[ing] that sealed, impounded, or

nonpublic cases, court records, data, documents, and information are redacted before submission." *Id.* at 4.

Even if this Court were to apply a time, place, and manner analysis, it should still find that the CNS Parties have not only stated a valid claim for relief, but have also demonstrated a likelihood of success on the merits, as the March RECS have not left open "ample alternative channels" for access to information contained in the civil complaints. To the contrary, there are no alternative channels available for public access to newly filed civil complaints for the indefinite period of time that complaints are under administrative review; the press and the public have no access to newly filed civil complaints during that time. *See, e.g.*, *Planet I*, 750 F.3d at 787–88 ("CNS cannot report on complaints [the clerk] withholds.").

III. The District Court erred in granting Defendants' motion to dismiss for failure to state a claim.

Under the Federal Rules, a complaint must provide a "short and plain statement" explaining why the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). A complaint need not establish a prima facie case; it must merely plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). When evaluating whether a plaintiff has pleaded sufficient facts to survive a motion to dismiss under Rule 12(b)(6), a court must "accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *García-Catalán*, 734 F.3d at 102 (citation

omitted). In doing so, the court may rely on circumstantial evidence, experience, and common sense. *Id.*

Here, the District Court erred in granting Defendants' Rule 12(b)(6) motion to dismiss. In their amended complaint, the CNS Parties pleaded facts sufficient to establish that the December 20, 2020 amended RECS, "automatically denie[d] access to new civil complaints for a minimum of three business days after filing." R.A. 129, ¶ 31. The amended complaint further pleads that the March RECS

> do not provide any timeframe within which clerk review and "entry" must occur. However, under the electronic filing system as it exists today, filers of electronic documents automatically receive a message from the e-filing system stating that they should expect the clerk's office to take up to "24 business hours," which presumably means three business days, "for clerk office processing" of an e-filed document.

R.A. 130, ¶ 36.

Far from "accept[ing] the truth" of the CNS Parties' well-pleaded facts and "draw[ing] all reasonable inferences therefrom" in their favor," *García-Catalán*, 734 F.3d at 102, the District Court granted Defendants' motion to dismiss the CNS Parties' as-applied claim on the grounds that "[t]he Amended Complaint[] fail[s] to allege a single instance where access was delayed after March 15, 2021." *Glessner*, 2021 WL 3024286, at *19. However, the CNS Parties filed their amended complaint on February 25, 2021, ten calendar days prior to the date the amended RECS were set to go into effect on March 15, 2021. Thus, it was technically impossible for the CNS Parties to allege a specific instance of delayed

access *after* March 15. Moreover, in June 2021, in connection with their motion for preliminary injunction, the CNS Parties submitted evidence to the District Court of delays in access to newly filed civil complaints occurring after March 15, 2021. *Id.* at *19 n.27. The District Court refused to consider this evidence in deciding the motion to dismiss, however, quoting statements made in dicta in *Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 72 (1st Cir. 2014), that "courts [reviewing a Rule 12(b)(6) motion] usually consider only the complaint, documents attached to it, and documents expressly incorporated into it." *Id*. The District Court also concluded, however, based on Defendants' evidentiary submissions—made via affidavits submitted to the court following oral argument on the CNS Parties' motion for a preliminary injunction—that the March RECS "are presently being applied in a manner that has not violated the Plaintiffs' contemporaneous right of access." *Glessner*, 2021 WL 3024286, at *18 n.26.

The District Court's decision flips the Rule 12(b)(6) standard on its head—accepting all of *Defendants*' statements as true and making all reasonable inferences in favor of *Defendants*. Indeed, this Court's comments in *Foley* are a corollary of the fact that "plaintiffs are not required to submit evidence to defeat a Rule 12(b)(6) motion, but need only sufficiently allege in their complaint a plausible claim." *Foley*, 772 F.3d at 72. Here, taking all pleaded facts in the complaint as true, and drawing all reasonable inferences in the CNS Parties' favor,

the CNS Parties sufficiently alleged a constitutional claim of denial of access to newly filed civil complaints under the March RECS for up to 24 business hours or, potentially, for an indefinite period of time, and the District Court erred in holding otherwise. R.A. 130, ¶ 36.

CONCLUSION

For the foregoing reasons and the reasons stated in the CNS Parties' brief, amici urge the Court to reverse the District Court's order dismissing the CNS Parties' amended complaint.

Dated: December 15, 2021

Respectfully submitted,

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Case: 21-1624 Document: 28 Page: 39 Date Filed: 12/16/2021 Entry ID: 6473494

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Dated: December 15, 2021

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CERTIFICATE OF SERVICE

I, Bruce D. Brown, hereby certify that I have filed the foregoing Brief of Amici Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Roger Myers, Rachel Matteo-Boehm, Jonathan Simms Piper, Jeffrey J. Pyle, Sigmund D. Schutz, Bernard J. Kubetz, Jason David Anton, and Thomas Knowlton.

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