United States Court of Appeals
For the First Circuit

No. 21-1624

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.

No. 21-1642

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

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,

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
Case No. 1:21-cv-00040-NT

BRIEF OF DEFENDANTS-APPELLEES JAMES T. GLESSNER AND PETER SCHLECK

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INTRODUCTION

Two federal courts of appeals have held that access to newly filed civil complaints need not be instantaneous. This Court should reject Appellants' request that it diverge from that consistent reasoning.

In November 2020, the Maine Supreme Judicial Court ("SJC") implemented a limited e-filing and electronic court records pilot program in a few select courts in Maine. By design, it has been the subject of ongoing evaluation, modification, and improvement, reflected in part by a series of changes made to the Maine Rules of Electronic Court Systems ("RECS") since those rules were first adopted in August 2020. One such change to the RECS, promulgated on February 22, 2021, and effective as of March 15, 2021, modified the SJC's rules governing public access to electronically filed documents and eliminated the provision originally challenged by plaintiffs Courthouse News Service, MTM Acquisition, Inc., and SJ Acquisition, Inc. ("CNS Plaintiffs"), and by intervenor-plaintiff Bangor Publishing Company ("Bangor Publishing") (collectively, "Plaintiffs") in this action.

After the RECS were amended, but before they went into effect, Plaintiffs filed First Amended Complaints alleging that the abrogated and Amended RECS violated their First Amendment right of access to court records. The central premise of Plaintiffs' amended pleadings is that the Amended RECS's failure to provide "on-

receipt" access to electronically filed civil complaints violates the First Amendment. Plaintiffs also filed motions for preliminary injunctions ("PI").

Defendants moved to dismiss both First Amended Complaints pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and opposed the PI motions. As the District Court (Torresen, J.) ruled, the Amended RECS are content-neutral and, on their face, are "silent as to the amount of time that will elapse between receipt and entry into the publicly accessible electronic case file." Addendum ("Add.") 39. In their First Amended Complaints, Plaintiffs failed to allege any instance where, after the effective date of the Amended RECS, access to newly filed civil complaints was delayed. Moreover, the evidence that Plaintiffs submitted in June 2021 in support of their second PI motions established that, during the first three months of operation of the Amended RECS, electronically filed civil complaints in the Penobscot County Superior Court were made available to the public within four business hours of their receipt by the court.

The District Court carefully reviewed the well-pleaded factual allegations in Plaintiffs' First Amended Complaints, drew all reasonable inferences in their favor, and held that Plaintiffs had failed to state a plausible claim to relief. The court therefore dismissed the First Amended Complaints under Rule 12(b)(6) and denied the second PI motions as moot.

Plaintiffs have not identified a single appellate court decision that endorses what they seek: a First Amendment right to instantaneous, "on-receipt" access to civil complaints that have been tendered to a court but not filed. The Fourth and Ninth Circuits have expressly rejected Plaintiffs' expansive view of what they contend the First Amendment requires. This Court should do the same and affirm the District Court's ruling.

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court properly dismissed Plaintiffs' First Amended Complaints where (A) the content-neutral Amended RECS at issue provide that "[u]nless prohibited by law or by court order, a court record in a civil case is accessible by the public upon entry into the electronic case file," and (B) Plaintiffs at best speculate about an indeterminate delay under the Amended RECS and failed to identify any instance where access to newly filed civil complaints was delayed after the effective date of the Amended RECS.

II. Whether, assuming a qualified First Amendment right of access is implicated by the Amended RECS, the District Court properly determined that an intermediate level of scrutiny applied to Plaintiffs' First Amendment claims, rather than strict or rigorous scrutiny, because the Amended RECS resemble time, place, and manner restrictions on access.

III. Whether the District Court properly considered Plaintiffs' facial and as-applied First Amendment challenges to the Amended RECS separately, where Plaintiffs expressly told the court, on two occasions, that they were pressing both types of First Amendment challenges.

STATEMENT OF THE CASE

SJC initiated e-filing and electronic court records pilot project. The SJC initiated an e-filing and electronic court records pilot project in late 2020 in the

Penobscot County Superior Court, the Bangor District Court, and the Business and Consumer Court.[1] Add. 43; Appendix ("A.") 122 (CNS Plaintiffs' First Amended Complaint ("FAC") ¶ 4); https://www.courts.maine.gov/ecourts/index.html (last visited Jan. 18, 2022). The pilot project utilizes software systems that were developed by an outside vendor for the Maine courts: the efileMaine e-filing portal, the Odyssey case management system, and the Odyssey Portal. A. 132 (FAC ¶ 41); https://www.courts.maine.gov/ ecourts/index.html.

The SJC also issued a series of rules – the RECS – that govern the new electronic filing system. The RECS are intended to support and promote public access, while balancing privacy concerns and the court's interests in orderly and efficient administration. *See* Add. 43 (Preamble to RECS). As pertinent here, effective December 14, 2020, the SJC adopted a rule that provided, in relevant part, that "[n]o court record will be accessible by the public until three business days after the court clerk has accepted ... proof of service of process of those documents on at least one Defendant." RECS 4(A)(1) (Dec. 14, 2020); *see* Add. 2-3.

CNS Plaintiffs filed suit. On February 3, 2021, the CNS Plaintiffs filed a complaint in which they contended that Rule 4(A)(1) delayed public access to

[1] The well-pleaded factual allegations in Plaintiffs' First Amended Complaints are taken as true solely for purposes of the SJC's Motions to Dismiss under Rule 12(b)(6). *See Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018).

judicial records in violation of the First Amendment. A. 8-19. The CNS Plaintiffs sought injunctive and declaratory relief. They also filed a PI motion. A. 20-41.

The Complaint named two defendants: James T. Glessner, in his official capacity as State Court Administrator for the State of Maine Judicial Branch, and Peter Schleck, in his official capacity as Clerk of the Penobscot County Superior Court. A. 11-12. Because Plaintiffs' claims are directed against two State of Maine Judicial Branch officials in their official capacities, this brief will refer to defendants collectively as "the SJC."

SJC amended the RECS. On February 22, 2021, the SJC promulgated amended versions of RECS 2(A)(1) and RECS 4(A)(1) that were effective March 15, 2021. The amended version of Rule 4(A)(1) abrogated the version of the rule challenged in the CNS Plaintiffs' original complaint and replaced it with the following: "[u]nless prohibited by law or by court order, a court record in a civil case is accessible by the public upon entry into the electronic case file." Add. 54, 57-58.[2]

Amended Rule 2(A)(1), in turn, provides that entry "occurs after a court clerk has determined that the submission complies with M.R. Civ. P. 5(f) and Rule 34 of these rules." Add. 44-45. The requirements set forth in those rules include payment of a filing fee, listing of an attorney's Maine Bar Registration number, and formatting specifications. M.R. Civ. P. 5(f); Add. 45. Examination for compliance

[2] The District Court's Order referred to the Amended RECS as the "March RECS."

with these rules is "ministerial," Add. 86, and analogous to the process that occurs when paper documents are submitted in other Maine courts, Add. 52-53.[3]

After a court clerk confirms that a submitted document complies with M.R. Civ. P. 5(f) and RECS 34, the document is added to the Odyssey case management system and becomes accessible to the public through the Odyssey Portal. Add. 54, 57. When a submitted document does not comply with the RECS, however, it is rejected, just as the clerk would reject a noncompliant paper document that is proffered for filing. Add. 86. When such a tendered document – which has not become a part of the electronic case file – is rejected, the submitting party may either resubmit a document on efileMaine that complies with the RECS, or abandon the filing. Add. 86-87. The SJC does not consider a document to be "filed" – whether or not the document later is assigned a file date that relates back to its original

[3] As set forth in a declaration submitted by defendant James T. Glessner in March 2021 in support of the SJC's Motions to Dismiss and in opposition to Plaintiffs' PI motions, the SJC expected that, in all but extraordinary cases, the examination process contemplated by Amended Rule 2(A)(1) would be completed within four business hours of a document's submission to efileMaine. A. 167-68.

submission date under RECS 35(B) – until the review and entry process is complete. Add. 86-87.[4]

The SJC set the effective date for the Amended RECS as March 15, 2021, "to allow time for technical programming necessary to implement the change." *See* Press Release, "Maine Judicial Branch seeks feedback and suggestions on ways to improve the Maine eCourts and Case Management System," Feb. 22, 2021.[5] Simultaneous with its adoption of the Amended RECS, the SJC announced the creation of the Maine eCourts Stakeholders and Users Input Portal to facilitate further improvements to the efileMaine and Odyssey systems. *See id*.

Between February 22, 2021, and March 14, 2021, the abrogated version of Rule 4(A)(1) was still in place. During that time, the SJC authorized clerks to provide paper copies of submitted electronic documents upon request even where

[4] RECS 35(B) sets the day of submission to the court's e-filing portal as the file date of the document. Add. 86. This is a rule of reason; a document is not deemed untimely if it is filed at 3:59 p.m. on its deadline but not entered into the Odyssey efiling system until the next morning. RECS 35(B) is thus an accounting procedure, not a description of past events. The file date of a document for purposes of determining deadlines does not describe when the act of filing occurred. *Cf.* Add. 86-87 (describing automatic relation back of first attempt to resubmit documents to original submission date). Were it otherwise, documents that were rejected upon clerk review and never re-submitted to the court would still be considered "filed" under the Amended RECS.

[5] Available online at https://www.courts.maine.gov/news/article.html?id=4185399 (last visited Jan. 19, 2022).

the requirements of the abrogated (but still-applicable) version of Rule 4(A)(1) had not been satisfied. A. 177 (Temporary Standing Order (Mar. 1, 2021)).

Plaintiffs quickly filed amended complaint. On February 25, 2021, the CNS Plaintiffs filed a First Amended Complaint that challenged both the abrogated and amended versions of Rule 4(A)(1) as violative of the First Amendment. A. 121-36. The CNS Plaintiffs alleged that the Amended RECS's "failure to provide *on-receipt* access to non-confidential electronically filed civil complaints violates the First Amendment right of access to court records." A. 134 (FAC ¶ 50) (emphasis added).

As Plaintiffs pointed out, the Amended RECS are silent as to the amount of time that will elapse between the court's receipt of a new civil complaint and its entry into the publicly accessible electronic case file. A. 131 (FAC ¶ 39) (delay for "undefined period of time"). Plaintiffs did not, however, allege any instance where access to an electronically filed civil complaint was delayed after March 15, 2021. Instead, citing a notice that was issued by the electronic filing system in December 2020 under the abrogated version of Rule 4(A)(1), Plaintiffs alleged that under abrogated Rule 4(A)(1), the court anticipated an access delay of "up to 24 business hours for clerk office processing." A. 130 (FAC ¶ 36). The CNS Plaintiffs also complained that the SJC had not purchased and provided them with a "press review

queue," through which CNS and other members of the media would get specialized access to judicial records. A. 132-34 (FAC ¶¶ 41, 47-49).

On March 1, 2021, the SJC filed a motion to dismiss the CNS Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). A. 150-72. On March 10, 2021, the SJC filed a motion to dismiss Bangor Publishing's First Amended Complaint on the same grounds.[6] A. 179. In support of the Rule 12(b)(1) aspects of their motions to dismiss, the SJC submitted a declaration from defendant James T. Glessner. A. 166-74.

CNS Plaintiffs filed Second PI Motion. The CNS Plaintiffs withdrew their first PI motion on March 4, 2021. A. 175-76. They thereafter filed a second PI motion on March 17, 2021, two days after the Amended RECS went into effect. A. 185-206. Bangor Publishing filed a PI motion on March 23, 2021, largely adopting the CNS Plaintiffs' second PI motion. A. 4 (ECF 25). The SJC opposed both PI motions. In support of their opposition, the SJC submitted a second declaration from defendant Glessner. A. 326-28.

Oral argument on pending motions. The District Court held oral argument on Plaintiffs' second PI motions and the SJC's Motions to Dismiss on June 9, 2021.

[6] Bangor Publishing filed a motion to intervene on February 19, 2021, along with a proposed complaint. A. 105-20. Bangor Publishing's motion to intervene was granted on March 8, 2021. A. 4. The court treated a First Amended Complaint that Bangor Publishing had filed on March 1, 2021, as the operative pleading for Bangor Publishing. *Id*.

A. 363-416. In response to a question from Judge Torresen, counsel for the CNS Plaintiffs confirmed that they were bringing both facial and as-applied challenges to Amended Rule 4(A). A. 372-73. Plaintiffs also conceded that Amended Rule 4(A) was content-neutral. A. 377.

CNS Plaintiffs filed Notice of As-Applied Challenge. On June 15, 2021, the CNS Plaintiffs filed a notice in which they affirmed, again, that "they are pursuing an as-applied challenge to the RECS in addition to a claim that the court system's policy violates the First Amendment on its face." A. 417. In that notice, Plaintiffs alleged "that the implementation of the current RECS policy by the Defendants has resulted, as a factual matter, in delays in access to a substantial percentage of newly-filed complaints until after the date of filing." A. 417-18.

The evidence that Plaintiffs submitted in support of their second PI motions consisted of declarations concerning alleged delays in public access to civil complaints that had been electronically filed in the Penobscot County Superior Court between March 15, 2021, and June 8, 2021. A. 419-22. The SJC also provided evidence regarding the timing of public access to those filings – the third declaration of defendant Glessner. A. 423-26.

The evidence submitted on the second PI motions collectively showed that all of the twenty-five electronically filed civil complaints that Plaintiffs identified were made publicly available within four business hours after they were submitted to the

court's efileMaine e-filing portal. A. 420-21, 424-26. Nineteen of those twenty-five complaints were available on the same day that they were received by the court. *Id*. Although six of those twenty-five complaints were not available to the public until the court day after they were received, each was submitted either after the court's business hours or within the last business hour, such that all six were made publicly available within three business hours. *Id*. As to the twenty-sixth complaint referenced by the CNS Plaintiffs – the one complaint that Plaintiffs claimed took two days to be made publicly available through the court's electronic system, A. 420 – it was neither e-filed nor a newly filed civil complaint. Instead, it had been filed in Cumberland County Superior Court in paper form in February 2021, where it had been publicly available, and then in April 2021 it was transferred in paper form to Penobscot County Superior Court. A. 425. The case, including each docket entry, had to be manually entered into the Odyssey system. *Id*.

District Court dismissed First Amended Complaints. By Order dated July 16, 2021, the District Court ruled that Plaintiffs' facial and as-applied First Amendment challenges were ripe and granted the SJC's Motions to Dismiss both First Amended Complaints pursuant to Rule 12(b)(6). Add. 9-16, 41. The court denied Plaintiffs' second PI motions as moot. Add. 41.

To determine the scope of Plaintiffs' First Amendment right, the District Court applied the Supreme Court's "experience and logic test." Add. 20, 30-33; *see*

Press-Enterprise Co. v. Superior Ct. of Cal., 478 U.S. 1, 8-9 (1986) ("*Press-Enterprise II*"); *accord In re Boston Herald, Inc.*, 321 F.3d 174, 182 (1st Cir. 2003). Applying that test, the court held that "there is a qualified First Amendment right of public access to civil complaints," Add. 33, but rejected the gravamen of Plaintiffs' First Amended Complaints: that anything short of immediate, "on-receipt" access violates their First Amendment rights.[7] Add. 37.

The court observed that the Ninth Circuit in *Courthouse News Service v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) ("*Planet III*"), expressly held that a right to "timely access" to "filed complaints" does not entitle the public or the press to "immediate, pre-processing access to newly filed complaints." Add. 37; *see also Planet III,* 947 F.3d at 599-600 (holding that overnight delay in providing access to complaints filed during the last ninety minutes of the court's public hours did not violate plaintiff CNS's First Amendment rights). Accordingly, the court reasoned, "there is no right of *instantaneous* access upon the court's receipt of new civil complaints." Add. 39.

The District Court also rejected Plaintiffs' argument that strict scrutiny applied to the Amended RECS, observing that "strict scrutiny has been applied to

[7] Plaintiffs appear to be backpedaling from what they pled in their First Amended Complaints and argued below – they concede now that "there may be 'no right of **instantaneous** access' per se." Appellants' Opening Brief 36 (emphasis in original). But what matters for purposes of Rule 12(b)(6) is what Plaintiffs alleged in their First Amended Complaints and argued below.

denials of the right of access to judicial records or proceedings." Add. 33-35 (emphasis in original). Citing the Supreme Court's decision in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n.17 (1982), the court determined that "*limitations* on the right of access that resemble time, place, and manner restrictions on protected speech would not be subjected to strict scrutiny." Add. 34 (emphasis in original).

The District Court instead applied "an intermediate standard," ruling that a content-neutral restriction on the timing of access to electronically filed court records is constitutional when it (A) is "narrowly tailored to serve a significant governmental interest," and (B) "leaves open ample alternative channels for communication of the information." Add. 36 (quoting *March v. Mills*, 867 F.3d 46, 54 (1st Cir. 2017)).

Turning to Plaintiffs' facial challenge, the District Court explained that to succeed, Plaintiffs needed to allege (and ultimately establish) that (1) "no set of circumstances exists" under which the Amended RECS would be valid, or (2) the Amended RECS are overbroad by showing that "a substantial number of [their] applications are unconstitutional, judged in relation to the [Amended RECS]'s plainly legitimate sweep." *See United States v. Stevens*, 559 U.S. 460, 472-73 (2010) (internal quotations omitted). Add. 39.

The court ruled that "Plaintiffs' pleadings fall short of these standards." Add. 39. First, the court observed that Plaintiffs had not alleged or shown that there was no set of circumstances under which the Amended RECS would be valid. Given that under the Amended RECS the public is granted access when the clerk enters the document in the electronic case file, the Amended RECS could provide timely access to electronically filed civil complaints that does not offend the First Amendment. Add. 39. Second, the court concluded that Plaintiffs had not alleged or shown that the Amended RECS "lack any plainly legitimate sweep." Add. 40. "To the contrary," the court ruled, "the state court's new rules are designed to support and promote public access, while balancing privacy concerns and the court's interests in orderly and efficient administration." Add. 40. Ultimately, because Plaintiffs "alleged nothing more than an indeterminate delay between the receipt of a complaint and the time it becomes accessible to the public," the court held that they had failed to state a plausible facial challenge to the Amended RECS. Add. 40.

With respect to Plaintiffs' as-applied First Amendment challenge, the court observed that Plaintiffs "failed to allege a single instance where access was delayed after March 15, 2021." Add. 40. Instead, the court noted, "the allegations [regarding delays in access] all refer[red] back to the period before the [Amended] RECS went into effect." Add. 40. Therefore, taking all of Plaintiffs' well-pleaded factual allegations as true, and drawing all reasonable inferences in their favor, the court

concluded that Plaintiffs had failed to state a plausible as-applied First Amendment challenge to the Amended RECS. Add. 41.

In granting the SJC's Motion, the District Court expressly stated that it did not rely on the evidence submitted by the parties in June 2021 "in [its] analysis under Rule 12(b)(6)," but instead considered only the complaints and other material permitted by this Court's rulings. *See* Add. 40 n.27. The court considered that evidence only when analyzing whether Plaintiffs' claims were ripe, as expressly permitted by this Court's decisions. Add. 15 n.13 (citing *Groden v. N&D Transp. Co.*, 866 F.3d 22, 24 (1st Cir. 2017)).

Plaintiffs timely appealed to this Court.

SUMMARY OF ARGUMENT

The District Court properly held that there is no First Amendment right to "instantaneous access upon the court's receipt of new civil complaints." Add. 39. Plaintiffs' claim that there is a First Amendment right to "on-receipt" access to documents that have been tendered to a court but not filed does not pass muster under the Supreme Court's "experience and logic" test and conflicts with what other courts of appeals have concluded is required by the First Amendment.

That said, even if a qualified First Amendment right is implicated by the Amended RECS, the District Court properly dismissed Plaintiffs' claims. There is no dispute that the Amended RECS are content-neutral and do not mandate that a

certain amount of time elapse between submission of a document for filing and entry into the publicly accessible electronic case file. Add. 39. The District Court therefore correctly applied intermediate scrutiny to Plaintiffs' First Amendment claims, rather than strict or rigorous scrutiny, because the Amended RECS resemble time, place, and manner restrictions on access.

It is also undisputed that Plaintiffs failed to allege a single instance where access to electronically filed civil complaints was delayed after the effective date of the Amended RECS. And the District Court properly did not infer that the Amended RECS had delayed access to electronically filed civil complaints for "days and weeks," given that Plaintiffs had made no such allegation in their pleadings.

The circuit courts' decisions in *Planet III* and *Schaefer* support the District Court's ruling. In *Planet III*, the Ninth Circuit held that, although there is a right to "timely" access to newly filed civil complaints, such a right does not entitle the press to "immediate, pre-processing access to newly filed complaints." 947 F.3d at 594. In fact, the Ninth Circuit expressly held that some "processing" of newly filed civil complaints by clerks was permitted under the First Amendment. *Id*. at 594, 598-600. Under the several-day "processing" procedure that the Ninth Circuit held was constitutionally deficient, however, "over half of the filed complaints took two or more court days to become publicly available." *Id*. at 586-87.

Similarly, in *Schaefer*, the Fourth Circuit applied intermediate scrutiny and approved a "flexible standard" that did not require "instantaneous access." 2 F.4th at 328. The delays in *Schaefer* that were held to violate the First Amendment included, in one court, only 19% of newly filed civil complaints being made available on the day they were filed, and in another court, 41.5% of newly filed civil complaints not being available until two or more court days after they were filed. *Id*. at 322.

Here, Plaintiffs made no such allegations, and indeed failed to identify any delays under the Amended RECS. Further, the record developed on Plaintiffs' second PI motions confirmed that, unlike in *Schaefer*, timely access has been provided under the Amended RECS. A. 420-21, 423-26. All of the twenty-five civil complaints identified by Plaintiffs as having been filed electronically in the Penobscot County Superior Court between March 15, 2021, and June 8, 2021, were available within four business hours of their submission to the court. A. 423-26.

The District Court also did not err in separately considering Plaintiffs' facial and as-applied challenges. Plaintiffs expressly told the court that "they are pursuing an as-applied challenge to the RECS in addition to a claim that the court system's policy violates the First Amendment on its face," A. 417-18, and facial challenges are analyzed differently than as-applied challenges. *See City of Los Angeles v. Patel*,

576 U.S. 409, 415-16 (2013) (distinguishing facial challenge from as-applied challenge); *Gaspee Project v. Mederos*, 13 F.4th 79, 92-93 (1st Cir. 2021) (same).

This Court should accordingly affirm the District Court judgment.

STANDARD OF APPELLATE REVIEW

This Court reviews de novo the District Court's dismissal of a complaint under Rule 12(b)(6). In ruling on a Rule 12(b)(6) motion to dismiss, the District Court may consider the well-pleaded factual allegations in the complaint, documents referred to or attached to the complaint, documents integral to the complaint, and any relevant matter that can be judicially noticed, such as public records. *Briedling v. Eversource Energy*, 939 F.3d 47, 49 (1st Cir. 2019); *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 321 (1st Cir. 2008).

To survive a Rule 12(b)(6) motion, Plaintiffs must state a plausible claim to relief, based on the complaint and other materials that may be considered in ruling on a Rule 12(b)(6) motion. *Alston v. Spiegel*, 988 F.3d 564, 571 (1st Cir. 2021). A complaint will survive a motion to dismiss only when it alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Thus, Plaintiffs' allegations, if true, must state more than a merely conceivable claim for relief. *See id*.

ARGUMENT

The District Court properly dismissed Plaintiffs' First Amended Complaints where (A) the content-neutral Amended RECS at issue provide that "[u]nless prohibited by law or by court order, a court record in a civil case is accessible by the public upon entry into the electronic case file," and (B) Plaintiffs at best speculate about an indeterminate delay under the Amended RECS and failed to identify any instance where access to newly filed civil complaints was delayed after the effective date of the Amended RECS.

A. Any claim regarding abrogated RECS 4(A)(1) is moot.

As an initial matter, much of Plaintiffs' opening brief focuses on access to civil complaints that were filed under the former version of RECS 4(A)(1), which was abrogated effective March 15, 2021. *E.g.*, Appellants' Opening Brief ("Br.") at 7, 11, 13, 18-19, 54-55.[8] Any delays in access to judicial records that took place prior to March 15, 2021, are of no relevance to Plaintiffs' claim that Amended RECS 4(A)(1), which is significantly different than abrogated RECS 4(A)(1), violates their First Amendment rights.

In their second PI motions, and in oral argument before Judge Torresen in June 2021, Plaintiffs did not press any First Amendment claims regarding abrogated Rule 4(A)(1). To the extent that Plaintiffs now seek to resurrect such claims, the

[8] Because appellant Bangor Publishing has joined the CNS Plaintiffs' opening brief in its entirety, this brief will cite to the CNS Plaintiffs' brief.

Court should not consider them because they have been waived. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (reiterating the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

In any event, any belated argument by Plaintiffs that they are entitled to equitable relief from an abrogated rule would be moot. *See Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1020 (1st Cir. 1989) ("Defects in . . . superseded earlier orders [are] not grounds for injunctive relief absent any imminent threat to reinstate them."); *accord Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631-34 (1979). A government defendant's "repeal of a challenged statute – or other similar pronouncement – is ordinarily one of those events that makes it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Keohane v. Fla. Dep't of Corrs. Sec'y*, 952 F.3d 1257, 1268 (11th Cir. 2020) (cleaned up); *accord Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004).

Plaintiffs have not even suggested that there is a risk that the abrogated version of Rule 4(A)(1) will be reinstated. Therefore, Plaintiffs' claims are moot to the extent brought against the abrogated RECS. *See Keohane*, 952 F.3d at 1262, 1268-69 (rescission of policy governing medical treatment for transgender inmates mooted

claim given plaintiff did not offer "substantial evidence" that the challenged policy would be reinstated); *LaFortune v. City of Biddeford*, 142 F. App'x 471, 472-73 (1st Cir. 2005) (per curiam) (affirming that city council's rescission of rules barring rebroadcast of television program and suspending access to public television facilities mooted Plaintiff's claim); *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 54-55 (1st Cir. 1999) (affirming mootness of claim brought against superseded town zoning ordinances).

B. The District Court properly ruled that there is no First Amendment "right of instantaneous access upon the court's receipt of new civil complaints."

1. There is no First Amendment right of access to documents merely tendered to a court for filing under the "experience and logic" test.

Whether a qualified right of access to a document exists in a given circumstance hinges on the Supreme Court's "experience and logic" test. *See Press-Enterprise II*, 478 U.S. at 9. The test asks whether "the place and process have historically been open to the press and general public," and whether "public access plays a significant positive role in the functioning of the particular process in question." *Id*. at 8; *accord In re Boston Herald*, 321 F.3d at 182.

This Court has never ruled that a qualified right of access attaches to newly filed civil complaints. That said, even assuming such a qualified right of access attaches at some point after a civil complaint is filed with a court, neither "experience" nor "logic" suggests that any right of access extends to the

circumstances at issue here – civil complaints that have been tendered to the court for filing but not yet filed, the equivalent of unopened mail.

As to the experience prong of the test, there is no allegation in any pleading, and no record evidence, that clerks in Maine or anywhere ever provided anyone with access to civil complaints before the complaints were docketed and filed. Plaintiffs' assertion that they alleged in their First Amended Complaints that "[j]ournalists have long had the ability" in Maine to review civil complaints "the day they are submitted to court clerks, regardless of whether clerks have docketed or processed them," Br. 5, is unsupported and false.[9]

As to the logic prong of the test, Amended RECS 4(A)(1) limits the availability of electronic documents until after they are entered as court records, i.e., until after documents that are tendered to the court are confirmed to comply with basic filing rules and added to the electronic case file. If the filing fee is not paid, or the required summary sheet is not included, for example, the proffered document is rejected, which is the equivalent of the clerk handing a paper submission back to the person who brought it in. *See* M.R. Civ. P. 5(f). In that circumstance, the person

[9] Similarly, Plaintiffs' assertion that "there is a long history of courts making complaints available to the media and the public soon after they are received," Br. 31, is unsupported. Their First Amended Complaints do not contain any such allegations. Plaintiffs' citation to factual findings in other decisions involving other courts' rules, based on evidence submitted at trials or on PI motions in those other cases, obviously has no bearing on the Rule 12(b)(6) decision at issue here.

may choose to re-submit the document later in compliance with the rules, but also may choose never to file the rejected document at all.

Plaintiffs thus claim an entitlement to access greater than that available to the judiciary itself. They allege a right to review documents regardless of whether those documents are ultimately filed with the court. Plaintiffs have not cited any appellate court's decision that has held that a qualified First Amendment right of access attaches when a potential litigant arrives in the courthouse, or hands a document to a clerk for examination.[10] To the contrary, as this Court has held, "[t]here is no general constitutional right of access to information in the government's possession." *In re Boston Herald*, 321 F.3d at 180. Nor have Plaintiffs explained why providing them with access to documents before those documents are accepted for filing by a court – and regardless of whether the documents are ever in fact filed with a court – would improve the functioning of the judicial system.

Plaintiffs claim, in effect, that the First Amendment requires a media checkpoint on the way to the clerk's office window. But the First Amendment does

[10] The district court decisions on which Plaintiffs rely, Br. 24-25, 30-31, read too much into the holding in *Planet III*, where the Ninth Circuit held that the qualified right attaches "when the complaint is filed," rather than when a judge acts on the filing. 947 F.3d at 585, 591-92. And *Planet III* holds that access to newly filed complaints must be "timely" (but not "immediate" or "instantaneous") for reporting to be "newsworthy" and "to allow for ample and meaningful discussion regarding the functioning of our nation's court systems." *Id*. at 594. Providing access to complaints that are tendered to a court but never filed would serve neither interest.

not mandate that the courts provide the press and public with immediate access to a new civil complaint that a litigant has handed to a clerk for examination. To the contrary, "[t]here is no general constitutional right of access to information in the government's possession." *In re Boston Herald*, 321 F.3d at 180.

In sum, Plaintiffs have neither established a "strong historical tradition" of access to documents before they are filed (i.e., accepted for filing), *see IDT Corp v. eBay*, 709 F.3d 1220, 1224 n.* (8th Cir. 2013); *see also Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 393-94 (5th Cir. 2014) (affirming district court's ruling that information sought by plaintiffs – criminal citations filed with the court and the automated court case file – did not meet experience test because plaintiffs had failed to establish nationwide practice of access to this information within one business day), nor explained how providing access to documents before they are filed would "play[] a significant positive role in the functioning" of the judicial system, *Press-Enterprise II*, 478 U.S. at 8. Therefore, under the *Press-Enterprise* test, there is no qualified right of access to complaints submitted to the court for filing.

2. When there is a qualified right to access a document, all the First Amendment requires is timely access.

Even if a qualified right of access has attached, the First Amendment does not require court clerks to provide *immediate* access to civil complaints that have been tendered for filing. Rather, when there is a qualified right of access to a document, all the First Amendment requires is timely access. As the District Court properly

held, "there is no right of *instantaneous* access upon the court's receipt of new civil complaints." Add. 39 (emphasis in original).

The Ninth Circuit agreed, holding in *Planet III* that "[t]he First Amendment does not require courts, public entities with limited resources, to set aside their judicial operational needs to satisfy the immediate demands of the press." 947 F.3d at 596. Indeed, the *Planet III* court made explicit that the press's qualified right of access to newly filed civil complaints does not "demand[] immediate, *pre-processing* access to newly filed complaints," but rather requires only "timely access." *Id*. at 594 (emphasis added). The Ninth Circuit, in part on this basis, rejected plaintiff Courthouse News Service's First Amendment challenge to the clerk's practice of "scanning" newly filed civil complaints before making them available to the public, a process that took up to a full day. *Id*. at 598-600.

The Fourth Circuit ruled similarly in *Schaefer*. It held that the First Amendment qualified right of access was a "flexible standard" that did not mandate "instantaneous access" to newly filed civil complaints. 2 F.4th at 328. Rather, it found that only "contemporaneous" access was required, a standard that is met by access on the next court day and that fully exempts "inconsequential delays and those caused by extraordinary circumstances." *Id.*; *see also Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 559, 562 (E.D. Va. 2020) (setting forth this standard), *aff'd*, 2 F.4th 318.

This understanding of the First Amendment makes good sense: a delay of a few business hours poses no threat to Plaintiffs' interest in the newsworthiness of papers filed in court or, more importantly, to the public's ability to oversee the operations of the judicial system. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-79 (1980) (explaining justifications for the qualified right of access); *In re Reporters Cmte. For Freedom of the Press*, 773 F.2d 1325, 1337 n.9 (D.C. Cir. 1985) ("[T]he focus is upon the public's ability to assure proper functioning of the courts."); c*f. Planet III*, 947 F.3d at 597 (noting that delays of "up to two weeks ... compromised the newsworthiness of reporting on complaints and deprived the public of information without any administrative justification"). Consistent with that principle, decisions invalidating processing delays on constitutional grounds concern delays of multiple business days. *See, e.g., Planet III*, 947 F.3d at 597; *Schaefer*, 440 F. Supp. 3d at 545 (substantial number of complaints unavailable until two or three "court days" after filing).[11]

[11] In *Planet III*, the Ninth Circuit described the "processing" procedure that it deemed constitutionally problematic, where over 50% of filed complaints took two or more court days to become publicly available, as follows:

Here, Plaintiffs did not allege in their amended pleadings, and had no basis to allege, that Amended RECS 4(A)(1) would result in any more than an inconsequential delay in access to newly filed civil complaints. *See* A. 131 (FAC ¶ 39) (delay is "undefined period of time"). In fact, the evidence submitted on Plaintiffs' second PI motions showed that the Amended RECS afforded timely and contemporaneous access to civil complaints filed in the Penobscot County Superior Court between March 15, 2021, and June 8, 2021. A. 420-21, 423-26. *See Schaefer*, 2 F.4th at 328; *see also Planet III*, 947 F.3d at 598-600 (rejecting plaintiff Courthouse News Service's First Amendment challenge to state court's practice of

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> "First, a [court processing assistant] reviews the documents to determine that the complaint is being filed in the correct court and the documents necessary to initiate the case are presented with the correct filing fee or fee waiver. Second, the [court processing assistant] enters all the required case information to "create" a new case in CCMS. Third, all accompanying instruments, for example checks, are entered and the receipt is generated. Fourth, any summons required are issued. Fifth, the documents are stamped as "Filed." Sixth, the labels generated from CCMS are placed on the physical case file, along with the filing date, courtroom assignment, and case destruction stamp. Finally, the documents are placed in a physical case file."
>
> After court processing assistants completed these steps, supervisors performed an additional layer of quality control review, a process which took several additional days to complete. Only after *both* processes were completed would the clerk designate newly filed civil complaints as "located to the media bin" for public access.

Planet III, 947 F.3d at 586 (alterations in original).

"scanning" newly filed civil complaints before making them available to the public, a process that took up to a full day).

There is accordingly no qualified First Amendment right of access that Amended RECS 4(A)(1) impedes. The District Court therefore correctly dismissed Plaintiffs' claims under Rule 12(b)(6), and this Court may affirm an order of dismissal on any ground supported by the record. *Alston*, 988 F.3d at 571.

C. Assuming a qualified First Amendment right is implicated by the Amended RECS, the District Court properly applied intermediate scrutiny and dismissed Plaintiffs' claim that the Amended RECS's "failure to provide on-receipt access to non-confidential electronically filed civil complaints violates the First Amendment right of access to court records."

The District Court held that "there is a qualified First Amendment right of public access to civil complaints," i.e., to "a filed lawsuit," Add. 32-33, but that "there is no right of *instantaneous* access upon the court's receipt of new civil complaints," Add. 39 (emphasis in original). Contrary to Plaintiffs' contention, Br. 25, 28, the District Court was not required to decide precisely when that qualified right attaches in order to dispose of Plaintiffs' claims under Rule 12(b)(6) because Plaintiffs did not allege sufficient facts to state a plausible claim to relief. Indeed, even assuming there is a qualified First Amendment right of access to a document that attaches upon the court's receipt of that document, the District Court properly held that the Amended RECS satisfy intermediate scrutiny and dismissed Plaintiffs' claim that the Amended RECS's "failure to provide *on-receipt* access to non-

confidential electronically filed civil complaints violates the First Amendment right of access to court records." A. 134 (FAC ¶ 50) (emphasis added).

1. Intermediate scrutiny applies to the Amended RECS.

The District Court correctly rejected Plaintiffs' argument below that strict scrutiny applied to the Amended RECS.[12] Instead, the court correctly held that the Amended RECS were content neutral and "most resemble time, place, and manner restrictions on the public right of access to newly filed civil complaints." Add. 36.[13] For the same reasons, the Fourth Circuit also applied intermediate scrutiny in *Schaefer*, 2 F. 4th at 328.

This Court's decision in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), supports the application of intermediate scrutiny here. In *Pokaski*, this Court held that a "blanket prohibition on the disclosure" of court records triggers

[12] On appeal, Plaintiffs variously argue that the Amended RECS must pass "constitutional scrutiny," "*Press-Enterprise II* scrutiny," "rigorous scrutiny," and "heightened scrutiny." *E.g.*, Br. 4, 14, 20, 22, 24, 28, 29, 30, 32, 33, 34, 35, 38, 43, 59.

[13] In its briefing to the District Court, the SJC cited the concurrence in *Planet III* and pointed out that, although it did not concede that rigorous scrutiny was "the correct test to apply to a reasonable time, place, and manner restriction like that at issue in this case," A. 320, the Amended RECS satisfied rigorous scrutiny in any event. At oral argument before the District Court, the SJC argued that intermediate scrutiny should apply. A. 391-93.

"heightened scrutiny." *Id.* at 505.[14] The Court emphasized that the challenged Massachusetts statute, which automatically sealed the files of criminal cases that ended without a conviction, was "not a time, place, or manner restriction, which need only be reasonable to survive First Amendment scrutiny." *Id.* In other words, when a statute or rule resembles a reasonable time, place, or manner restriction, heightened scrutiny does not apply. *See id.* The nature of the statute at issue in *Pokaski* determined the type of scrutiny, not the number of days that a document was or could be sealed before being made publicly available.

2. The District Court correctly determined that the Amended RECS passed intermediate scrutiny.

Facial challenge. The District Court properly rejected Plaintiffs' facial First Amendment challenge to the Amended RECS pursuant to Rule 12(b)(6). Where a qualified right of access exists, and given that Plaintiffs conceded below that the Amended RECS are content-neutral, restrictions on such access survive intermediate scrutiny when they (A) are narrowly tailored to serve a significant governmental interest and (B) leave open ample alternative channels for communication of the information. Add. 36; *Planet III*, 947 F.3d at 605-06 (Smith, J., concurring); *see March*, 867 F.3d at 54.

[14] Similarly, and unlike the Amended RECS, *In re Providence Journal Co.*, 293 F.3d 1, 5-7 (1st Cir. 2002), involved the district court's "blanket nonfiling policy" that totally prohibited access to certain filings in a criminal case.

The Amended RECS are narrowly tailored to serve the SJC's interest in "the fair and orderly administration of justice." Add. 36; *see also Planet III*, 947 F.3d at 596. As the SJC implements its new electronic case management and filing system, it has a strong interest in ensuring compliance with court rules, minimizing the risk of harm to those involved in court proceedings, and protecting privacy in court records.[15] Add. 36. *See Planet III*, 947 F.3d at 585 ("[C]ourts undeniably have an important administrative function that requires orderly processing of new filings, and this results in incidental delays to access by the press and public."). The Amended RECS are narrowly tailored to this interest because they expressly provide for public access to civil complaints when, following a ministerial compliance review that is similar to what paper filings are subjected at a clerk's office window, Add. 36, the complaints are entered in the case file, *see* RECS 2(A)(1) & RECS 2(A)(1) Advisory Note (Mar. 2021); RECS 4(A)(1).

[15] Contrary to Plaintiffs' contention, Br. at 46-48, that the Amended RECS seek to minimize the risk of harm to those involved in court proceedings and to protect privacy in court records does not mean that there is a "content-based" review. Permitting public access to documents that have been submitted to the court for filing – but that may not ultimately be filed with the court – risks public confusion, undermines the SJC's ability to effectively manage its case files, and threatens privacy rights. That does not mean that clerks engage in a "content-based" review to determine whether a filing "contains disfavored speech," Br. 47. Counsel for Plaintiffs admitted as much at oral argument before Judge Torresen. A. 377.

Moreover, the Amended RECS leave open ample alternative channels for communication. Add. 37. They do not "deny or unwarrantedly abridge the opportunities for the communication of thought," *see Planet III*, 947 F.3d at 605-06 (Smith, J., concurring), because they expressly give the public and press access to electronically filed complaints once they are entered in the case file. The media is "still able to get the complaints in a timely enough manner to report on newsworthy issues," *id*., because, as the court ruled, communication is abridged only during the ministerial review and entry process.[16] Add. 37; *see also Press-Enterprise Co. v. Superior Court of Cal.* ("*Press-Enterprise I*"), 464 U.S. 501, 512 (1984) ("[T]he constitutional values sought to be protected . . . may be satisfied later by making a transcript of the closed proceedings available within a reasonable time.").[17]

[16] Further, the fact that the public can access civil complaints only through the courts does not undermine this conclusion. *See* Br. 52-53. When a document is submitted to a court, it is unavoidable that there be a short period during which there is no public access. Yet even such an inconsequential delay would fail intermediate scrutiny under Plaintiffs' wooden interpretation of the test.

[17] The Court should not consider a new argument that Plaintiffs make, in a single sentence, for the first time on appeal, that "Rule 4 is . . . 'facially invalid because it does not prescribe adequate standards' to govern when clerks must process complaints," Br. 55 (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)). *See Sierra Club v. Wagner*, 555 F.3d 21, 26 (1st Cir. 2009) (arguments not made by an appellant in the district court may not be raised for the first time on appeal). Moreover, that one sentence is not sufficient to develop this new argument. *Zannino*, 895 F.2d at 17 (reiterating the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

Plaintiffs' pleadings and other material properly considered under Rule 12(b)(6) do not identify a single instance in which the above reasoning does not hold, never mind establish that the rule at issue is unconstitutional in all of its applications, as Plaintiffs are required to show to prevail on a facial challenge. *Stevens*, 559 U.S. at 472-73. They allege only "an indeterminate delay between the receipt of a complaint and the time it becomes accessible to the public." Add. 40. But expedited review, even assuming it results in a turnaround time of a few business hours (which, again, Plaintiffs did not even allege), is entirely consistent with the SJC's important interests. Add. 43 (Preamble to RECS). As the Ninth Circuit ruled, "[e]ven in this era of electronic filing systems, instantaneous public access to court filings ... could impact the orderly filing and processing of cases with which clerk's offices are charged." *Planet III*, 947 F.3d at 596, 599-600.

Plaintiffs have likewise failed to allege or show that the Amended RECS "lack any plainly legitimate sweep." Add. 40. *See Gaspee Project*, 13 F.4th at 92-93, 95-96 (affirming dismissal of plaintiffs' facial First Amendment claims under Rule 12(b)(6) where Court held that it was not "evident on this record that a substantial number of the [the Act's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotations omitted). As the District Court observed, "the state court's new rules are designed to support and promote

public access, while balancing privacy concerns and the court's interests in orderly and efficient administration." Add. 40; *see* Add. 43-44.

The District Court therefore properly held that Plaintiffs failed to state a plausible claim to relief and dismissed their facial First Amendment challenge under Rule 12(b)(6). *See Gaspee Project*, 13 F.4th at 92-93, 95-96 (affirming dismissal of plaintiffs' facial First Amendment claims under Rule 12(b)(6)).[18]

As-applied challenge. In evaluating Plaintiffs' as-applied challenge, the District Court reviewed the First Amended Complaints and correctly observed that Plaintiffs had "failed to allege a single instance where access was delayed after March 15, 2021." Add. 40. Instead, the court noted, the "allegations [regarding delays in access] all refer back to the period before the [Amended] RECS went into effect." Add. 40.

The content of Plaintiffs' allegations is a direct result of their litigation strategy. Although Plaintiffs criticize the District Court for carefully scrutinizing their pleadings, Br. 16 n.5, 55 & n.26 & 56, Plaintiffs are sophisticated, experienced

[18] Plaintiffs' contention that the District Court's analysis of the ripeness inquiry was inconsistent with its Rule 12(b)(6) analysis misses the mark. Br. 15, 17. The court concluded that Plaintiffs' facial challenges were ripe because they had alleged that the Amended RECS delayed "press access to complaints until after entry by the clerk." Add. 14. The court determined that Plaintiffs' facial challenges did not state a claim that was plausible on its face because, among other reasons, the Amended RECS were content-neutral and Plaintiffs alleged only an indeterminate delay. There was no inconsistency in the court's rulings.

litigants that opted to file First Amended Complaints challenging the Amended RECS before those rules went into effect, and to file a second PI motion only two days after the Amended RECS took effect.

Further, the evidence that Plaintiffs provided in June 2021 in support of their second PI motions shows that, during the first three months of operation of the Amended RECS, electronically filed civil complaints at the Penobscot County Superior Court were publicly available within four business hours of receipt. If Plaintiffs had waited until mid-June 2021 to file their First Amended Complaints, all they could have fairly alleged is what they provided in support of their second PI Motions, which shows that the Plaintiffs were receiving timely, contemporaneous access to electronically filed civil complaints at the Penobscot County Superior Court. Plaintiffs cannot escape dismissal under Rule 12(b)(6) by filing amended pleadings before the Amended RECS went into effect and making no allegations in their amended pleadings about the extent of any delays under the Amended RECS.

Plaintiffs nonetheless contend that the District Court was obligated to credit the CNS Plaintiffs' allegations that the abrogated version of Rule 4(A) delayed access "for days and weeks." Br. 11 (citing FAC ¶ 36); *see* Br. 5, 15-16 & n.5, 18-19, 33, 36 n.15, 54-55. But Plaintiffs' First Amendment challenge is to Amended Rule 4(A), which went into effect on March 15, 2021, such that it makes no sense for the District Court to credit allegations about delays that occurred during the

operation of abrogated Rule 4(A), including allegations about a notice issued by the court system on December 20, 2020, nearly three months before Amended Rule 4(A) went into effect.

Plaintiffs further contend that the District Court should have drawn what they allege was the "reasonable inference" that delays alleged under abrogated Rule 4(A) would be the same under Amended Rule 4(A). Br. 15-16 & n.5, 36 n.15. But that would have been an unreasonable and illogical inference for the court to draw, given the stark differences between the two Rules. The fact that the District Court declined to draw such an unreasonable inference does not suggest that "it treated as true Defendant Glessner's testimony," Br. 15-16, but rather demonstrates that the court carefully reviewed the two Rules and Plaintiffs' First Amended Complaints.

Absent any allegations in the First Amended Complaints about delays under Amended Rule 4(A), the applicable level of scrutiny does not matter when evaluating Plaintiffs' as-applied challenge, as Plaintiffs did not identify an instance where any qualified First Amendment right of access in fact was, or would be, infringed by the Amended RECS. The court, therefore, taking all of Plaintiffs' well-pleaded factual allegations as true and drawing all reasonable inferences in their favor, properly dismissed their as-applied challenge under Rule 12(b)(6) because the First Amended Complaints failed to state plausible claims for relief. Add. 40-41. *See Alston*, 988 F.3d at 578-79 (affirming dismissal under Rule 12(b)(6) because there were "no facts

pleaded in the [Second Amended Complaint] sufficient to ground a reasonable inference that Spiegel is liable to Alston for any of the wrongs alleged").

3. The Rule 12(b)(6) record amply supported the District Court's dismissal of the First Amended Complaints.

Contrary to Plaintiffs' contention, the District Court did not need to apply a special "fact-intensive" test before dismissing their First Amended Complaints under Rule 12(b)(6). Br. 43-56. The applicable test under Rule 12(b)(6) is the one set forth by this Court in *Alston*, 988 F.3d at 571. Specifically, a complaint will survive a Rule 12(b)(6) motion to dismiss only when it alleges "enough facts to state a claim to relief that is plausible on its face." *Id*. (quoting *Twombly*, 550 U.S. at 570).

Plaintiffs contend that the court erred in dismissing their First Amendment claims under Rule 12(b)(6) because the SJC allegedly was required to produce "evidence" relative to the intermediate scrutiny inquiry. This contention should be rejected because it misapplies this Court's (and other courts of appeals') Rule 12(b)(6) decisions.

Under Plaintiffs' interpretation of Rule 12(b)(6), complaints alleging a violation of the First Amendment – and every complaint alleging a constitutional claim that triggers intermediate, rigorous, or heightened scrutiny – would never be subject to dismissal under Rule 12(b)(6), regardless of whether they alleged enough facts to state a claim to relief that is plausible on its face. Yet even a brief review of recently reported federal court decisions – including those from this Court – reveals

numerous complaints alleging First Amendment violations that, after application of the appropriate scrutiny level, have been dismissed under Rule 12(b)(6). *See, e.g., Gaspee Project*, 13 F.4th at 85-96 (applying exacting scrutiny and affirming dismissal of plaintiffs' First Amendment claims under Rule 12(b)(6)); *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286, 1291-99 (9th Cir. 2015) (applying intermediate scrutiny of time, place, and manner restriction and affirming dismissal of plaintiffs' First Amendment claims under Rule 12(b)(6)); *Mazo v. Way*, Civil Action No. 20-08174 (FLW), 2021 WL 3260856, at *12-*17 (D.N.J. July 30, 2021) (applying sliding-scale *Anderson-Burdick* test and dismissing plaintiffs' First Amendment claims under Rule 12(b)(6)); *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 290-93 (W.D. Va. 2020) (applying intermediate scrutiny and dismissing plaintiffs' First Amendment claims).[19]

Plaintiffs' reliance on *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Echevarria-Vargas*, 385 F.3d 81 (1st Cir. 2004), Br. 33, 45-46, is misplaced. In that decision, applying a standard often used before *Twombly* and *Iqbal*, this Court indicated that "dismissal on the pleadings will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims which would

[19] Plaintiffs rely on *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994), Br. at 49, which bears no resemblance to this case. The Supreme Court held in that case that there were "genuine issues of material fact" generated by the summary judgment record that precluded the entry of summary judgment. *Id*. at 668.

entitle it to relief." 385 F.3d at 85. Holding that the District Court erred in concluding that the plaintiff could prove "no set of facts" in support of its claims that would entitle it to relief, the Court reversed and remanded the case for factual development. *Id*. at 87-88.

But as this Court is well aware, *Iqbal* and *Twombly* changed the applicable standard under Rule 12(b)(6). Those cases "officially put to rest" the outdated "no set of facts" test. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 9 (1st Cir. 2011).

Under *Iqbal* and *Twombly*, Plaintiffs' allegations, taken as true, must state more than a merely *conceivable* claim to relief. The ultimate merits inquiry under the First Amendment may be fact-sensitive (as are most merits inquiries), but Plaintiffs failed to allege sufficient facts "to nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

There was accordingly sufficient information available to the District Court, including the Amended RECS themselves, for the court to conclude that the Amended RECS pass intermediate scrutiny, i.e., that they are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. The SJC was not obligated to proffer a witness to testify as to what the rules, themselves, provide or what is self-evident: that Rule 4(A)(1) furthers the SJC's important interest in the fair and orderly

administration of justice, and that it is narrowly tailored to that interest because it expressly provides for public access to civil complaints upon entry into the case file.

Plaintiffs' contention that the Amended RECS are nonetheless not narrowly tailored is unsupported, based on inaccurate allegations that are not in the record, and meritless. Br. 50-51. Plaintiffs' assertion in their appellate brief that they had alleged in their pleadings that, "with paper filings, this [review] process took a matter of moments and copies of complaints were available before or soon after [the review process]," Br. 50, is unsupported and false. In particular, there is no allegation in any pleading, or any record evidence, that clerks in Maine or anywhere provided paper copies of civil complaints to the press before they were accepted for filing.

D. The Amended RECS also satisfy "rigorous" or "heightened" scrutiny under *Press-Enterprise II*.

Even assuming solely for argument's sake that, in ruling on the SJC's Rule 12(b)(6) motions, the District Court should have applied the *Press-Enterprise II* test– "rigorous" or "heightened" scrutiny – the result would be the same. This Court may affirm an order of dismissal on any ground supported by the record. *Alston*, 988 F.3d at 571.

Under this test, access to newly filed court records may be restricted when the restriction is (A) essential to preserve higher values and (B) narrowly tailored to serve those interests. *See Press-Enterprise II*, 478 U.S. at 13-14; *Planet III*, 946 F.3d at 595. When such a value – e.g., the "fair and orderly administration of

justice," *Planet III*, 946 F.3d at 596 – is identified, the operative inquiries are whether there is a "substantial probability" that the interest would be impaired by more immediate access, and whether there are reasonable alternatives that adequately protect the interest at issue, *Press-Enterprise II*, 478 U.S. at 14; *accord In re Boston Herald*, 321 F.3d at 181-82.

Here, as discussed above, Amended Rule 4(A)(1) plainly furthers the SJC's important interest in the "fair and orderly administration of justice." *Planet III*, 946 F.3d at 596. Permitting public access to documents that have been submitted to the court for filing – but that may not ultimately be filed with the court – risks public confusion and undermines the SJC's ability to effectively manage its case files. *See id*. at 599-600 (Ninth Circuit held that an overnight delay in providing access to complaints filed during the last 90 minutes of the court's public hours did not violate the First Amendment because the delay "was no greater than essential to manage court operations"). The SJC's interest in the "fair and orderly administration of justice" certainly also extends to avoiding the judiciary's own disclosure of documents that have not yet been filed and may never be filed. *See* Add. 43 (Preamble to RECS). As the Ninth Circuit recognized, "[e]ven in this era of electronic filing systems, instantaneous public access to court filings ... could impact the orderly filing and processing of cases with which clerk's offices are charged." *Planet III*, 947 F.3d at 596, 599-600.

There is no reasonable alternative that would adequately protect these important interests. The Amended RECS provide for a ministerial review to be followed to ensure that the tendered document is in proper electronic format, has been signed, lists the attorney's Maine bar number, and is accompanied by any legally required elements, such as a filing fee, registry recording fee, or summary sheet. *See* RECS 2(A)(1) Advisory Note (Mar. 2021). This type of cursory review is comparable to what occurs when a litigant submits a paper complaint to a clerk for filing.[20]

Plaintiffs' allegation that the SJC has not granted their request to purchase a "press review queue," by which the press alone would be permitted access to newly filed civil complaints while they were being reviewed by the court, is a red herring. Br. 44 n.21; A. 132, 133, 134 (FAC ¶¶ 41, 47-49). Putting aside the fact that the press is entitled to no greater access than the general public, Plaintiffs have not alleged or shown that implementation of a press review queue is either common among courts nationwide or an affordable way for the SJC, a resource-limited branch of state government, to make documents available. *See Planet III*, 947 F.3d at 600

[20] Plaintiffs' assertion, based on the Glessner Declarations, that the court clerks have a "17-point" review process exaggerates the record and, in any event, should not be part of the Court's Rule 12(b)(6) analysis. Br. 9-10, 12. Further, what matters is the length of any delayed access to a document protected by the First Amendment, not the number of items that a clerk reviews before entering a document in Odyssey.

(First Amendment does "not require [the court] to second guess the careful deliberations [of] the state court ... in deciding how to manage scarce resources").

E. The other circuit court decisions cited by Plaintiffs support the District Court's conclusion; and the district court decisions from other circuits on which Plaintiffs rely are materially distinguishable from this case.

The circuit courts' decisions in *Planet III* and *Schaefer* support the District Court's conclusion here. In *Planet III*, the Ninth Circuit held that there was a right to "timely" access to newly filed civil complaints, but that such a right does not entitle the press to "immediate, pre-processing access to newly filed complaints." 947 F.3d at 594. In fact, the Ninth Circuit expressly held that some "processing" of newly filed civil complaints by clerks was permitted under the First Amendment. *Id*. at 594, 598-600. The several-day process that the Ninth Circuit deemed constitutionally deficient, by contrast, resulted in "over half of the filed complaints [taking] two or more court days to become publicly available." *Id*. at 587.

Similarly, in *Schaefer*, the Fourth Circuit approved a "flexible standard" that expressly did not require "instantaneous access." 2 F.4th at 328.[21] The court of appeals held that "the public and press generally have a *contemporaneous* right of access to court documents when the right applies." *Id*. (emphasis in original). (quotations omitted). According to the Fourth Circuit, "contemporaneous in this

[21] Contrary to Plaintiffs' assertion, *Schaefer* did not hold that "denying access until after processing violated the First Amendment." Br. 19.

context means the same day on which the complaint is filed, insofar as practicable"; and "when not practicable, on the next court date." *Id*. (cleaned up). The court of appeals likewise cautioned that "inconsequential delays and those caused by extraordinary circumstances" were exempt from that general rule. *Id*. The delayed access in *Schaefer* that was held to violate the First Amendment included, in one court, only 19% of newly filed civil complaints being made available on the day they were filed, and in another court, 41.5% of newly filed complaints not being available until two or more court days after they were filed. *Id*. at 322.

In their First Amended Complaints, Plaintiffs failed to allege that the Amended RECS did not (or would not) provide them with "timely" or "contemporaneous" access as those terms are used in *Planet III* and *Schaefer*. The factual record that was generated on Plaintiffs' second PI motions confirms that access to electronically filed complaints at the Penobscot County Superior Court has been timely and contemporaneous.

The district court decisions from other circuits on which Plaintiffs rely heavily, Br. 22-25, 30-32, involving rules adopted by other state courts, are meaningfully distinguishable from this case. The most salient difference is that those district court decisions involve different types of processing that resulted in far longer delays than (A) Plaintiffs alleged in their First Amended Complaints, and (B) the record developed on Plaintiffs' second PI motions establishes here.

F. The District Court correctly analyzed Plaintiffs' facial and as-applied First Amendment challenges to the Amended RECS separately.

The District Court reviewed Plaintiffs' pleadings and concluded that they appeared to be asserting both facial and as-applied First Amendment challenges. The court therefore queried Plaintiffs' counsel on this point during oral argument on June 9, 2021, and counsel for the CNS Plaintiffs confirmed that the CNS Plaintiffs were bringing both facial and as-applied challenges to Amended Rule 4(A). A. 372-73. In response to the court's invitation, a few days after oral argument, the CNS Plaintiffs filed a formal Notice in which they confirmed that "they are pursuing an as-applied challenge to the RECS in addition to a claim that the court system's policy violates the First Amendment on its face." A. 417-18.

Facial challenges are analyzed differently than as-applied challenges. *Compare Stevens*, 559 U.S. at 472-73 (facial challenge) *with City of Los Angeles*, 576 U.S. at 415-16 (discussing difference between facial and as-applied challenges). This Court recently acknowledged the difference in affirming the dismissal under Rule 12(b)(6) of plaintiffs' facial First Amendment claims. *Gaspee Project*, 13 F.4th at 92-93. Thus, the District Court did not improperly "divide the Media's claim in two," as Plaintiffs claim, Br. 54, but rather separately considered each challenge that the Plaintiffs expressly told the court that they were bringing.

In any event, Plaintiffs failed to articulate any harm occasioned by the court's separate treatment of their facial and as-applied challenges. The same allegations

were available to support both challenges, and in both instances the court correctly determined that the Plaintiffs' allegations were legally insufficient.

G. The Court may not consider the parties' declarations in ruling on a motion to dismiss under Rule 12(b)(6).

It is black-letter law that, in ruling on a motion to dismiss made under Rule 12(b)(6), the court is limited to considering the well-pleaded factual allegations in the complaint, documents referred to or attached to the complaint, documents integral to the complaint, and relevant matter that can be judicially noticed, such as public records. *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 52-53 (1st Cir. 2013); *Trans-Spec Truck Serv.,* 524 F.3d at 321.

Plaintiffs cited *Rodriguez-Reyes* for that settled proposition in their opening brief. Br. 21. Plaintiffs also argued that, in its Order dismissing Plaintiffs' claims under Rule 12(b)(6), the District Court committed reversible error by ignoring that black-letter rule and relying on such materials as the parties' declarations. Br. 12 n.3, 15-16, 21-22, 59. As the District Court expressly stated, however, it did not rely on the evidence submitted by the parties in June 2021 "in [its] analysis under Rule 12(b)(6)," but considered only the complaints and other material permitted by this Court's Rule 12(b)(6) decisions. Add. 40 n.27.

Further, at the same time, Plaintiffs throughout their opening brief make arguments based on the same material that they contend may not be considered by the Court, including the Glessner Declarations, Br. 5, 9, 10, 12, 13, 14, 19, 54, 55,

56, 57, their own declarations, Br. 54, 55, and the evidence that the CNS Plaintiffs submitted in June 2021 in support of their second PI motions, Br. 14, 19, 55, 56, 57. The Court should not consider that material in reviewing the District Court's ruling under Rule 12(b)(6). *See Rodriguez-Reyes*, 711 F.3d at 52-53; *Trans-Spec Truck Serv., Inc.*, 524 F.3d at 321.

Contrary to Plaintiffs' argument, Br. 10 n. 2, the Court may not take judicial notice of declarations under Fed. R. Evid. 201(b)(2). Under Rule 201(b)(2), the "court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Declarations are not the fodder for judicial notice, and Plaintiffs cite no case supporting their judicial notice argument. Likewise, the Court should not consider the facts contained in those declarations to be "judicial admissions." Br. 10 n.2. The one case on which Plaintiffs rely is materially distinguishable.

That said, if the Court were to consider the Glessner Declarations in reviewing the District Court's ruling under Rule 12(b)(6), then it should consider all three Declarations in their entirety, not just the snippets on which Plaintiffs seek to rely.

The Glessner Declarations confirm the correctness of the District Court's decision to dismiss Plaintiffs' First Amendment Complaints.[22]

CONCLUSION

For the reasons stated above, the District Court's judgment should be affirmed.

Respectfully submitted,

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Dated: February 2, 2022

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[22] Plaintiffs have not fairly characterized the evidence. Contrary to Plaintiffs' assertions, no electronically filed civil complaint was "withheld at least one day." Br. 14, 19, 55-56. As shown above, all twenty-five electronically filed civil complaints referenced by Plaintiffs were publicly available within four business hours after they were received by the court. A. 423-26. Although six of those complaints were not publicly available until the next court day after they were received, they were not "withheld" from anyone; those six complaints were submitted after the court's business hours or within the last business hour, and all six were publicly available within three business hours of receipt. A. 423-26.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief contains 11,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point typeface and Times New Roman type style.

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CERTIFICATE OF SERVICE FORM FOR ELECTRONIC FILING

I, Thomas A. Knowlton, hereby certify that on February 2, 2022, I electronically filed the above document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notification of such filing to all registered participants as identified in the CM/ECF electronic filing system for this matter.

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