IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

COURTHOUSE NEWS SERVICE, Plaintiff v. PAMELA Q. HARRIS, in her official capacity as the State Court Administrator of the Administrative Office of the Courts of Maryland, *et al*., Defendants	)	Case No. 1:22-cv-00548-ELH

PLAINTIFF COURTHOUSE NEWS SERVICE'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Courthouse News Service ("CNS") challenges Defendants' policies and practices of withholding access to newly electronically filed non-confidential civil complaints until after the completion of clerical review and docketing in violation of the First Amendment. These practices result in delayed public and press access to new complaints, sometimes for days. Since time beyond memory, in courts across the nation the press has reviewed new civil complaints right after they crossed the intake counter – on the day of filing and prior to docketing. Most federal courts and many state courts uphold the tradition of access upon receipt in the modern era of electronic filing, but some state courts, like the Maryland Circuit Courts that mandate e-filing, have taken the opportunity of the shift to electronic filing to ensure that the press and public are pushed behind the clerical process of docketing (now often called processing), giving rise to unconstitutional delays.

The Fourth Circuit has made clear that the First Amendment provides the press and public with a presumptive right of access to newly filed civil complaints contemporaneous with the filing of the complaint. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021). Other federal circuit and district courts across the country agree, emphasizing that the First Amendment right of access to civil complaints attaches upon receipt of those documents by the court, before any review or docketing by court staff. *See* Point A.2, *infra*. And once the First Amendment right of access attaches, it is Defendants' burden to justify *any* delay. *See* Point A.3, *infra*. To delay disclosure undermines the benefit of public scrutiny and effectively results in suppression, particularly in an era of digital news coverage, where there is a 24/7 news cycle and, like fresh bread, news quickly grows stale. In an e-filing system, where electronic software takes the place of the human intake clerk, justifying any delay is unlikely.

In Defendants' courts, despite a conversion from paper to electronic filing that began in October 2014, newly filed non-confidential civil complaints are not made available in a contemporaneous manner. Instead, Defendants withhold access to such complaints, while they sit in electronic queues waiting to be reviewed and docketed before being made public.

Defendants appear to rely on Maryland Rule ("MR") 16-904(b), as well as MR 20-203(a)(2), in an attempt to justify their process, asserting incorrectly that those Rules require court staff to review a newly filed complaint prior to docketing. This practice is not dictated by the language of the Rules and, in any event, the requirements of the First Amendment trump those Rules. Defendants must justify the access restrictions under constitutional scrutiny. And they cannot. There is simply no compelling or significant interest sufficient to justify Defendants' practice of withholding complaints until after clerical review and docketing and, even if there were, Defendants' conduct is not narrowly tailored to serve any such interest.

Similar "no access before processing" policies and practices that blocked access to newly filed complaints while they were being processed into a court's docket have repeatedly been found unconstitutional in violation of the First Amendment in a series of cases brought by CNS in recent years. And not only do such practices violate the First Amendment, they are also easily avoidable. Courts across the country that utilize electronic filing of civil complaints, including the vast majority of federal courts and many state courts, including those that use the same e-filing software as the Maryland Circuit Courts, provide pre-docketing access upon receipt, and most do so remotely through the Internet. Defendants can, but have declined to, provide such access here.

Plaintiffs thus seek a preliminary injunction precluding Defendants from withholding newly e-filed non-confidential civil complaints until after they have been reviewed and docketed

by court staff and thus requiring Defendants to provide contemporaneous access to such complaints upon receipt.

STATEMENT OF FACTS AND RELEVANT COURT RULES

A. About CNS

CNS is a nationwide news service founded in 1990 out of a belief that news about civil litigation went unreported because the traditional news media failed to cover much of the important business of the courts. *See* Declaration of William Girdner, dated April 15, 2022 ("Girdner Decl."), ¶¶ 7-8. CNS currently employs approximately 240 people, most of them editors and reporters, covering civil lawsuits in state and federal courts in all 50 states from the inception of new cases through appellate rulings. *Id.*, ¶ 8. It now has more than 2,750 subscribers nationwide, with many in Maryland, including the University of Maryland and several of the nation's largest law firms. *Id.*, ¶ 10. Many media entities are subscribers, putting CNS in the position of being a pool reporter for other media outlets. *Id.*, ¶ 11. CNS subscribers also include law schools, law libraries, government offices, judges, public entities, Fortune 500 Companies, and entertainment and watchdog groups nationwide, as well as all but a very few of the nation's large and mid-sized law firms. *Id.*, ¶¶ 11-12. CNS' reporting has been credited as the original source for stories by a range of publications and news outlets, including *The Baltimore Sun*, *The Washington Post, The Washington Times*, *The New York Times*, *The Wall Street Journal*, *USA Today*, *U.S. News and World Report*, *The Daily Beast*, ABC News, and CBS News. *Id.*, ¶¶ 13-14, .

CNS offers a variety of publications. Its publicly-available website (www.courthousenews.com) functions much like a daily print newspaper, featuring staff-written articles from throughout the nation that are posted and then rotate off the page in a 24-hour cycle, and is read by roughly 70,000 readers each weekday. *Id.*, ¶ 21. Subscriber publications include CNS' "New Litigation Reports," which contain original, staff-written summaries of significant

new civil complaints and are broken up by region or court. *Id.*, ¶ 15; *see also* Declaration of Ryan Abbott, dated April 14, 2022 ("Abbott Decl."), ¶ 8. CNS publishes two New Litigation Reports for courts in Maryland – the *Baltimore Report*, which includes coverage of the District of Maryland, Baltimore County Circuit Court and Baltimore City Circuit Court, and the *Greater Maryland Report*, which covers every other Maryland Circuit Court. *Id.*, ¶ 9; Girdner Decl., ¶ 16.

The New Litigation Reports focus on general jurisdiction civil complaints against business institutions, public entities, prominent individuals, or other civil actions of interest to CNS subscribers. *Id.*, ¶ 15; Abbott Decl., ¶ 8. New Litigation Reports do not cover criminal, juvenile, or family law matters, nor do they include name changes, probate filings, or most residential foreclosures. *Id.*; Girdner Decl., ¶ 15. Moreover, CNS does not report on the small number of newly filed complaints that are statutorily confidential or accompanied by a motion to seal. *Id.*; Abbott Decl., ¶ 8.

To prepare New Litigation Reports and identify cases that may warrant a website article, in most large and mid-size cities, CNS reporters have traditionally visited their assigned courthouse on a daily basis to review newly filed civil actions. *Id.*, ¶ 10; Girdner Decl., ¶ 18. In Maryland, for example, prior to e-filing, a CNS reporter traditionally visited the courthouse for the Circuit Court in Baltimore County once a day, before closing, to report on newly filed civil complaints. Abbott Dec.., ¶ 10. In smaller cities and more rural areas, CNS reporters visit the courthouse less frequently, with visits ranging from once or twice a week to once or twice a month. *Id.*, ¶ 11; Girdner Decl., ¶ 18. As the federal courts and an increasing number of state courts have made court records available online, CNS also covers courts remotely through the Internet. *Id.*, ¶ 19; Abbott Decl., ¶ 11.

B. Traditional Access to Newly Filed Complaints Prior to the Advent of Electronic Filing

It has been a long-standing tradition in courts across the country for the press to review new civil complaints on the day of filing soon after they crossed the intake counter and went through initial intake – where the clerk recorded the filer's check, noted the parties' names, sometimes assigned a case number, and then handed the filer a receipt – but before docketing. Girdner Decl., ¶ 25; Abbott Decl., ¶ 13; *see also* Declaration of Adam Angione, dated April 14, 2022 ("Angione Decl."), ¶ 3. After a new complaint was filed, it was set aside for press and public view in a bin or box near the intake window, where it waited to be gathered by a docketing clerk, usually the next day, to be entered into the court's case management system. Girdner Decl., ¶ 26; Abbott Decl., ¶ 13. Thus, new complaints could be viewed *before* they were docketed or processed. *Id.*; Girdner Decl., ¶¶ 26-27. In Maryland, for example, for several years, prior to the advent of electronic filing, the Circuit Court for Anne Arundel County provided such traditional access to paper filings within minutes of receipt, as did the Circuit Courts in Baltimore City and Prince George's County. Abbott Decl., ¶¶ 15-23.

This practice ensures that interested members of the public learn about new cases in a contemporaneous manner, while the news is still fresh. Girdner Decl., ¶ 25; *see also* Abbott Decl., ¶ 40. Given the fast-moving nature of news, any delay in the ability of a reporter to review new complaints necessarily holds up the reporting on those actions for subscribers and readers. Girdner Decl., ¶ 22. A delay of even a single day means that news is delayed by a full news cycle. *Id.*, ¶ 23. Especially in today's digital age, the newsworthiness of new civil actions deteriorates quickly with time. *Id.* Civil actions not reported when they are received by a court are effectively suppressed, less likely to receive prompt news coverage, and thus less likely to come to the public's attention as the days pass. *Id.*, ¶ 24; *see also infra* at Point B.

C. Maryland's Transition to Mandatory Electronic Filing and the Resulting Delays in Access to Electronically Filed Civil Complaints

Beginning with Anne Arundel County in the fall of 2014, the Maryland Circuit Courts, on a county by county basis, started transitioning to mandatory electronic filing through their adoption of a software suite provided by a third-party vendor named Tyler Technologies, Inc. ("Tyler"), branded for the Maryland Circuit Courts as MDEC. Abbott Decl., ¶¶ 6, 24; *see also* Girdner Decl., ¶ 47; Angione Decl., ¶ 5. MDEC consists of Tyler's case management system called Odyssey and its e-filing portal called Odyssey File and Serve. Abbott Decl., ¶¶ 6, 25; Girdner Decl., ¶ 47, Angione Decl., ¶ 5. As of October 25, 2021, 22 out of 24 of Maryland's Circuit Courts have implemented mandatory electronic filing via the MDEC system. Abbott Decl., ¶ 27; Girdner Decl., ¶ 47.

Despite the conversion, newly filed non-confidential civil complaints in those MDEC courts have not been made available to the press and public in a contemporaneous manner. Abbott Decl., ¶¶ 30-32; Girdner Decl., ¶ 48. Instead, Defendants – state and county clerks responsible for the administration of court records and implementing the policies and practices challenged herein – withhold access to non-confidential civil complaints after filing, while they sit in electronic queues waiting to be reviewed, docketed, and "accepted" by court staff before being made public. *Id.*; Abbott Decl., ¶ 30; Angione Decl., ¶ 7. Defendants withhold access until after clerical review and docketing, notwithstanding that basic intake work that was previously done by clerks at the intake counter – such as accepting payment and noting the party names and court location – is now done automatically by the e-filing software. Abbott Decl., ¶¶ 15-17; Girdner Decl., ¶ 48. Filers in Maryland use the MDEC e-filing software to enter case information, upload documents, provide a method of payment for filing fees, and certify that the filing protects from disclosure any confidential data elements. Abbott Decl., ¶ 42.

For cases filed between October 11, 2021 through April 8, 2022, CNS' tracking demonstrates that Defendants cumulatively made on average only ***46.9***% of newly filed civil complaints available to the press and public on the day of filing, withholding ***28.3***% until the next day and ***24.8***% for two days or more. Angione Decl., ¶¶ 13, 16; Abbott Decl., ¶ 32.[1] Moreover, on many days and during several weeks, Defendants cumulatively have withheld an even greater percentage of newly filed civil complaints than the average delays tracked by CNS. Angione Decl., ¶¶ 13-14, Exs. 1-2.

CNS' tracking does not account for additional delays that result from Defendants' practice of denying the press and general public remote online access to court records through MDEC's case management system, Odyssey. Abbott Decl., ¶ 26. Reporters are required to physically travel to the courthouses during business hours to review new filings on public access terminals, even though complaints can be filed 24 hours per day every day of the week. *Id.*, ¶¶ 26-29; *see also* MR 20-109(g)(2).[2] In Maryland, contrary to the practice of many state courts and the vast majority of federal courts which provide remote access to all filings (including the District of Maryland), only individuals who are party to a case and their counsel may access case filings remotely through the MDEC system. Abbott Decl., ¶ 26; *see also* MR 20-109(b).

[1] Many of the Defendants have withheld an even greater percentage of newly filed civil complaints on the day of filing and for days thereafter. For example, in Anne Arundel County, more than ***74***% of newly filed civil complaints were withheld for at least one day; in Montgomery County, more than ***71***% were withheld for at least one day; in Talbot County, more than ***55***% were withheld for at least one day; in Washington County, more than ***58***% were withheld for at least one day; and in Worcester County, more than ***56***% were withheld for at least one day. Angione Decl., ¶ 16.

[2] New filings in any MDEC action can be accessed from a computer terminal or kiosk in any MDEC courthouse, regardless of where the action was filed or is pending. Abbott Decl., ¶ 29.

D. Defendants' Purported Justification For Withholding Access

Defendants' insistence on withholding newly filed complaints until after clerical review and docketing is based, at least in part, on their interpretation of MR 16-904(b) and MR 20-203(a)(2). MR 16-904(b) states:

> (b) Protection of Records
>
> To protect judicial records and prevent unnecessary interference with the official business and duties of the custodian and other judicial personnel, a clerk is not required to permit public inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed.

MR 20-203(a)(2), which pertains to clerk review in an MDEC court, states:

> (a) Time and Scope of Review.
>
> * * *
>
> (2) *Review by Clerk.*
>
> As soon as practicable, the clerk shall review a submission for compliance with Rule 20-201(g) [*i.e.*, certificate of service] and the published policies and procedures for acceptance established by the State Court Administrator.[3] If the clerk determines the filer has used an incorrect case number for the submission, and the error is not readily susceptible to correction pursuant to subsection (b)(1) of this Rule, the clerk shall reject the submission and promptly notify the filer. Unless otherwise ordered by the court for good cause show, a refiled submission shall relate back to the filing of the rejected submission.

Thus, the plain language of MR 16-904(b) and MR 20-203(a)(2) does not require Defendants to review or docket newly filed complaints *before* they are made public.[4]

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[3] The MDEC Policies and Procedures established by the State Court Administrator are available at https://www.mdcourts.gov/sites/default/files/import/mdec/pdfs/manualh5.pdf. They state that "Rule 20-203(a)(2) requires the clerk to review a submission prior to docketing," Abbott Decl., Ex. 3, at 4, but the Rule says no such thing.

[4] Maryland is the only state to have a Rule that purports to grant clerks the right to docket filings before making them public. Abbott Decl., ¶ 38.

Other provisions of the Maryland Rules underscore that pre-access review is not authorized. According to MR 20-109(a), "access to judicial records in an MDEC action is governed by the Rules in Title 16, Chapter 900." MR 16-902 states that the "intent of this Chapter [*i.e.,* 'Access to Judicial Records'] is to…maintain the traditional openness of judicial records, *subject only to such shielding or sealing that is necessary to protect supervening rights of privacy, safety, and security*…" (emphasis added). But in Maryland, like all other states, the primary responsibility for protecting confidential or otherwise private portions of a filing lies with the *filer*:

> (a) Duty of Person Filing Record
>
> (1) A person who files or authorizes the filing of a case record shall inform the custodian [i.e., the clerk of the court in which the record was filed], in writing, whether, in the person's judgment, the case record, or any part of the case record, or any information contained in the case record is confidential and not subject to inspection under the Rules in this Chapter.
>
> * * *
>
> (3) …[A] custodian may rely on a person's failure to advise that a case record, part of a case record, or information contained in a case record is not subject to inspection and, in default of such advice, the custodian is not liable for permitting inspection of the case record, part of the case record, or information, even if the case record, part of the case record, or information in the case record is not subject to inspection under the Rules in this Chapter.
>
> (b) Duty of Clerk
>
> (1) The clerk shall make a reasonable effort, promptly upon the filing or creation of a case record, to shield any information that is not subject to inspection under the Rules in this Chapter *and that has been called to the attention of the custodian by the person filing or authorizing the filing of the case record.*

MR 16-916(a)(1)-(3), (b)(1) (emphasis added); *see also* MR 16-918(b)(1) ("A custodian shall take reasonable steps to prevent access to restricted information, as defined in Rule 20-101(s), *that the custodian* is *on notice is included in an electronic judicial record*") (emphasis added).

The Rules further clarify that for any document filed in an MDEC action that contains restricted information, *the filer* must take several steps to ensure the privacy of the information, *i.e.*, "state prominently on the first page that it contains restricted information;" include "a completed Notice Regarding Restricted Information on a form approved by the State Court Administrator;" and "file both an unredacted version of the submission, noting prominently in the title of the version that the version is 'unredacted – to be shielded,' and a redacted version of the submission that excludes the restriction information, noting prominently in the title of the version that the version is 'redacted.'" MR 20-201.1(a)(1), (c).

Following the submission of a document by the filing party, the Rules mandate that "[t]he clerk shall promptly correct errors of non-compliance that apply to the form and language of the proposed docket entry for the submission" and that "[t]he docket entry as described by the filer and corrected by the clerk shall become the official docket entry for the submission." MR 20-203(b)(1). The Rules also mandate that "the clerk shall issue a deficiency notice" if the filing "is found to contain any restricted information," or any other filing errors, requiring the filer to address these issues within 14 days and that the clerk "shall shield the submission from public access until the deficiency is corrected." MR 203 (d)(1)-(2), (e)(1).[5] Nothing in the Rules requires pre-access review by Defendants or in any way suggests that public access to newly filed complaints should be withheld until after clerk review and docketing. Instead, following the submission of a document by the filing party, the Rules allow the clerk, upon discovering a filing error, to change the public access status.

[5] Moreover, the clerk may strike a filing for failure to comply with certificate of service requirements, *see* MR 20-203(c), but a complaint, unlike other filings, is not required to be served at the time of filing.

E. Easily Avoidable Delays in Electronic Filing Courts Like Maryland

Not only do the practices and policies leading to delays in Defendants' courts violate the First Amendment, they are also easily avoidable, as demonstrated by courts across the country that utilize electronic filing of civil complaints and provide the press with access upon receipt, before any docketing by court staff has occurred. Girdner Decl., ¶¶ 30, 32-37, 39, 41-42, 44, 45, 51. The vast majority of federal district courts that utilize electronic filing for new complaints, like the District of Maryland, make those filings remotely available upon receipt by the court via the PACER public access system. *Id.*, ¶ 33. State courts provide pre-docketing online access to newly filed non-confidential civil complaints upon receipt using a variety of electronic filing and case management systems, some developed in-house and others supplied by vendors, such as Tyler, Maryland's vendor. *Id.*, ¶¶ 34-37, 39-42, 44.[6]

Tyler provides courts that use its Odyssey software suite with several options for making newly e-filed complaints available to the press and public. Girdner Decl., ¶¶ 35, 40. One option is to modify the e-filing system to operate like the federal district courts, in other words, accept new e-filings automatically rather than having a clerk first manually review them. *Id.*, ¶ 35. The Vermont state courts, as well as Nevada's Eighth Judicial District in Las Vegas, which use the Tyler Odyssey system, currently operate in this manner. *Id.*, ¶ 37.[7] Tyler has also developed a solution that allows credentialed users to view complaints as soon as they are received by the court, which Tyler calls a "press review queue." *Id.*, ¶ 40. Courts in California and Georgia use this

[6] The fact that remote access in Maryland is already available for parties to a case and their counsel illustrates that Defendants also have the ability to provide CNS with access to new e-filed complaints upon receipt and prior to docketing on a remote basis. Abbott Decl., ¶ 27; Girdner Decl., ¶ 47.

[7] Other "auto-accept" state courts that make newly e-filed civil complaints available upon receipt include those in Alabama, Connecticut, Hawaii, Utah, and Washington. Girdner Decl., ¶ 39.

feature with their Tyler e-filing systems as a means of providing timely access to new civil complaints. *Id.*, ¶¶ 41-42.[8]

Despite the availability of these options in the MDEC system, Defendants withhold access to newly filed non-confidential civil complaints until after clerical review and docketing. These practices prevent CNS and other members of the press and public from reviewing new complaints in a contemporaneous manner, and constitute an effective denial of the right of access to those documents in violation of the First Amendment and 42 U.S.C. § 1983.

ARGUMENT

A PRELIMINARY INJUNCTION IS NECESSARY TO CURTAIL DEFENDANTS' UNLAWFUL DEPRIVATION OF CNS' FIRST AMENDMENT RIGHT OF ACCESS TO NEWLY FILED NON-CONFIDENTIAL CIVIL COMPLAINTS

To obtain a preliminary injunction, the moving party must demonstrate: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-21 (2008); *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013). While a plaintiff must make a "clear showing" that it has a likelihood of success on the merits, it "need not show a certainty of success." *Id.* at 321. Moreover, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As such, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on

[8] Other state courts using different e-filing systems provide their own versions of the press review queue, including courts using homegrown software (*e.g.*, Orange County, California and statewide in New York) and courts using software provided by other third party vendors, such as Granicus (statewide in Arizona) and others (Alameda, Los Angeles, Placer, and Riverside counties, California). *Id.*, ¶¶ 41, 44.

the merits of plaintiff's First Amendment claim." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190-191 (4th Cir. 2013) (citation omitted). Similarly, "the balance of the equities favors preliminary relief" when an injunction "prevents the state from enforcing restrictions likely to be found unconstitutional." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021).

A. CNS Is Likely To Succeed On the Merits

The question in this case – whether Defendants' policies and practices of withholding access to newly e-filed non-confidential civil complaints until after the completion of clerical review and docketing violates the First Amendment – is answered by applying the two-step analysis articulated by the Supreme Court in *Press-Enterprise Co. v. Superior Court of California for Riverside Cnty.,* 478 U.S. 1 (1986) ("*Press-Enterprise II*"). The analysis first asks whether a particular document or proceeding has historically been open to the press and public, *i.e.*, the "experience and logic" test, and then, after finding a right of access, considers whether Defendants have met their burden of justifying *any* access restrictions by application of the requisite level of constitutional scrutiny. *Id.* at 8-10; *see also Doe v. Public Citizen*, 749 F.3d 246, 266 (4th Cir. 2014).

In the Fourth Circuit, it is settled that "the press and public enjoy a First Amendment right of access to newly filed civil complaints" contemporaneous with the filing of the complaint. *Schaefer*, 2 F.4th at 328; *see also Doe*, 749 F.3d at 272 ("the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"). Thus, the burden passes to Defendants to justify delays in access of any length. *See, e.g., Virginia Dep't. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) ("The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position") (citing *Press-Enterprise II*, 478 U.S.

at 15); *Courthouse News Serv. v. Gabel*, No. 2:21-CV-000132, 2021 WL 5416650, at *14 (D. Vt. Nov. 19, 2021) ("the focus must be on whether *any* delay is appropriate"), *appeal filed*, No. 21-3098 (2d Cir. Dec. 17, 2021).[9]

Defendants' policies and practices challenged herein, which result in access delays, are unconstitutional unless Defendants can demonstrate that their conduct is justified by an "overriding interest based on findings" that withholding new complaints is "essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise II*, 478 U.S. at 9; *see also Doe*, 749 F.3d at 266. Defendants cannot meet their heavy burden.

As this Circuit has already found, contemporaneous access upon filing is required "as expeditiously as possible" based on the facts "in the context of this case." *Schaefer*, 2 F.4th at 328. In the context of an e-filing court, like those of Defendants, "as expeditiously as possible" requires access to non-confidential complaints upon receipt on the day they are filed because any clerical review, *unless justified by factual evidence*, violates the First Amendment. *See Gabel*, 2021 WL 5416650, at *14-15, 17-18 (enjoining pre-access review in e-filing courts, where 54.8% of new complaints were made available on the day of filing); *Courthouse News Serv. v. Tingling*, No. 16 CIV. 8742, 2016 WL 8739010, Tr. at 49:12-13, 52:18-23 (S.D.N.Y. Dec. 16, 2016) (enjoining pre-access processing in an e-filing court, where 66% were made available on the day of filing)[10]; *Courthouse News Serv. v. Brown*, 2018 WL 318485, at *6 (N.D. Ill. Jan. 8, 2018)

[9] As explained *infra* at 19-20, 26, in *Gabel*, based on an almost identical set of facts where the Vermont Superior Courts – using the same e-filing software as Defendants here – were withholding complaints prior to review and docketing, the district court enjoined defendants "from prohibiting public access to newly filed civil complaints which have not been designated confidential by the filer until the Vermont Superior Court has completed a pre-access review process." *Id.* at *18.

[10] Because this Westlaw document is not paginated, a true and correct copy of the original transcript is attached as Exhibit 4 to the Girdner Declaration.

(same, emphasizing that "the exact length of the delays are immaterial"), *rev'd and remanded on other grounds*, 908 F.3d 1063 (7th Cir. 2018).[11]

1. The First Amendment Creates a Presumptive Right of Contemporaneous Access to Newly Filed Civil Complaints

Applying the "experience" and "logic" test set forth in *Press Enterprise II*, the Fourth Circuit in *Schaefer* conclusively determined that a First Amendment right of access attaches to civil complaints. *Id.* at 328. Indeed, "each federal court to reach this question ha[s] found that the First Amendment applies," *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 555 (E.D. Va. 2020), *aff'd* 2 F.4th 318 (4th Cir. 2021), including the Second and Ninth Circuits, *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 (9th Cir. 2020) ("*Planet III*"), and district courts in three others, *Courthouse News Serv. v. New Mexico Admin. Office of Courts*, No. Civ 21-0710 JB/LF, 2021 WL 4710644, at *37-38 (D. N.M. Oct. 8, 2021), in the Tenth Circuit; *Brown*, 2018 WL 318485, at *4, in the Seventh Circuit; and *Courthouse News Serv. v. Jackson*, No. Civ A H-09-1844, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009), in the Fifth Circuit. *Accord Gabel*, 2021 WL 5416650, at *10; *Tingling*, 2016 WL 8739010.[12]

[11] The reversal in *Brown* was based on the doctrine of abstention, though the Seventh Circuit acknowledged a First Amendment right of access to complaints. 908 F.3d at 1069-70. Other federal courts, including the Fourth Circuit, have rejected abstention in similar cases because "the Clerks have not pointed to any ongoing state proceeding with which this case would interfere" and further noting that the Seventh Circuit's approach in *Brown*, which relied "on the more general principles of federalism," is "inconsistent with our precedent and Supreme Court guidance." *Schaefer*, 2 F.4th at 325 & n.2; *see also, e.g., Planet III*, 947 F.3d at 591 n.4; *Gabel*, 2021 WL 5416650, at *11-12; *Tingling*, 2016 WL 8739010, Tr. at 47:5-48:11; *contra Courthouse News Serv. v. Gilmer*, 543 F.Supp. 3d 759, 768 (E.D. Mo. June 15, 2021) (finding that principles of equity, comity, and federalism warranted abstention where Eighth Circuit case law did not provide "meaningful instruction"), *appeal filed*, No. 21-2632 (8th Cir. July 23, 2021).

[12] The presumptive right of access to newly filed civil complaints is derived from a series of cases decided in the 1980s, in which the Supreme Court initially recognized the First Amendment right of access in the context of criminal proceedings. *See*, *e.g.*, *Press-Enterprise II*,

In *Schaefer*, the Fourth Circuit made clear that "the experience prong supports a First Amendment right of access to civil complaints, *even before any judicial action in the case*." *Id.* at 327 (emphasis added). Indeed, "'[t]here is no dispute that, historically, courts have openly provided the press and general public with access to civil complaints.'" *Id.* at 326 (quoting district court decision); *see also Bernstein*, 814 F.3d at 139, 141 ("easily conclud[ing]" that the First Amendment right of access extends to civil complaints because they "have historically been publicly accessible by default, *even when they contain arguably sensitive information*") (emphasis added).[13]

Schaefer also had "no trouble concluding that public access to complaints logically plays a positive role in the functioning of the judicial process." *Id.* at 327. "A complaint, which initiates judicial proceedings, is the cornerstone of every case, the very architecture of the lawsuit" and it "instantaneously invokes a court's jurisdiction." *Id.* at 327-28. There are "immediate consequences precipitated by filing a complaint, consequences that the public must promptly understand if it is to help 'improve the quality of [the judicial] system by subjecting it to the

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478 U.S. at 13 (right of access to preliminary hearings); *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 509-13 (1984) (right of access to transcripts of *voir dire* proceedings); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 605-606 (1982) (right of access to witness testimony); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (the right to attend criminal trials is "implicit in the guarantees of the First Amendment"). The First Amendment right of access was then extended by the federal circuit courts, including the Fourth Circuit, not only to civil proceedings, but to records filed in those proceedings. *See Doe*, 749 F.3d at 268-69 (right of access to judicial opinions and civil docket sheets); *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to summary judgment documents).

[13] While courts look to "experience . . . throughout the United States," not locally, complete uniformity is not required to establish a tradition of access. *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993); *see also Press-Enterprise II*, 478 U.S. at 10-11 & n. 3-4 (finding tradition of access even though "several [s]tates … allowed preliminary hearings to be closed on the motion of the accused").

cleansing effects of exposure and public accountability.'" *Id.* at 327 (internal citation omitted and alteration in original); *see also Bernstein*, 814 F.3d at 140-42. "The press and public thus have an important interest in reasonably contemporaneous access to civil complaints." *Schaefer*, 2 F.4th at 328; *see also Rothman v. Snyder*, No. CV 20-3290(PJM), 2020 WL 7395488, at *3 (D. Md. Dec. 17, 2020) ("both 'experience and logic,' as well as precedent, mandate that the First Amendment right of access attaches to the complaint").

Other cases in the Fourth Circuit, as well as those in other circuits, have similarly found that delays in access to court documents are effectively access denials that implicate the First Amendment and thus "contemporaneous" and "immediate" access is required – before they become yesterday's news. *Doe*, 749 F.3d at 272 ("Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we … emphasize that the public and press generally have a contemporaneous right of access to court documents … when the right applies"); *In re Charlotte Observer (Div. of Knight Pub Co.)*, 882 F.2d 850, 856 (4th Cir. 1989) (delaying access "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access … is denied, whatever provision is made for later public disclosure"); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) ("emphasiz[ing] the importance of immediate access where a right to access is found"); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access to court filing, even for "as little as a day," "delays access to news" and "impermissibly burdens the First Amendment"). "Each passing day may constitute a separate and cognizable

infringement of the First Amendment." *Doe*, 749 F.3d at 272 (quoting *Grove Fresh*, 24 F.3d at 897); *see also Tingling*, 2016 WL 8739010, Tr. 49:13-20 ("The 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").

2. The First Amendment's Contemporaneous Right of Access Attaches Upon the Court's Receipt of a Complaint for Filing, Thus Any Delays Must Be Justified

Consistent with the foregoing legal principles, federal courts across the country have held that the First Amendment right of access attaches to new complaints upon their receipt by the court. *See Planet III*, 947 F.3d at 594 ("the qualified right of access to nonconfidential civil complaints arises when they are filed with the court"); *New Mexico Admin. Off. of the Courts*, 2021 WL 4710644, at *39 ("The qualified right 'attaches when the complaint is filed' in a traditional sense – when it is in the court's possession") (quoting *Planet III*, 947 F.3d at 585); *see also Courthouse News Serv. v. Cozine*, No. 3:21-CV-00680-YY, 2022 WL 593603, at *5-6 (D. Or. Feb. 14, 2022), *report and recommendation adopted,* 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022) ("the right of access to civil complaints attaches when they are submitted to the court"). Thus, in an e-filing court, like those of Defendants, the "qualified First Amendment right of access attaches *when a complaint is electronically filed*." *Gabel*, 2021 WL 5416650, at *13 (emphasis added).

Although *Schaefer* concerned two largely paper filing courts – where clerks, unlike in an e-filing court, must manually record initial filing information like party names and case type and then scan new filings into the system – Judge Henry Coke Morgan Jr. of the Eastern District of Virginia, after a four-day bench trial, held that the press and public still enjoy a right of access to newly filed civil complaints "contemporaneous with the filing of the complaint," concluding, in the context of a paper court, that 85-90% same day access was required, the remainder the next

day. 440 F.Supp.3d at 562. Applying the *Press Enterprise II* framework, Judge Morgan found that the clerks' "no access before processing" policies that withheld access to new civil complaints until they were "fully indexed and docketed" violated the First Amendment because the clerks "failed to prove that their practices and customs that lead to the substantial delays . . . were narrowly tailored to serve . . . government interests." *Schaefer*, 440 F. Supp. 3d at 532, 560. The Fourth Circuit agreed with Judge Morgan's conclusion, emphasizing that "contemporaneous" access *in a paper court* means "the same day on which the complaint is filed, insofar as is practicable," to account for clerks' manual intake procedures related to paper filings as well as "extraordinary circumstances" that can impact manual intake like inclement weather and unusual staffing constraints. 2 F.4th at 328; *see also Schaefer*, 440 F. Supp. 3d at 552, 563. In other words, the First Amendment "right [of access] requires courts to make newly filed civil complaints available as expeditiously as possible" based on the facts "in the context of th[e] case." 2 F.4th at 329.

In the context of an e-filing system, federal courts have enjoined clerks from conducting *any* review prior to making newly filed civil complaints available to the press and public. In *Gabel*, 2021 WL 5416650, where the Vermont Superior Court clerks, like those in the Maryland Circuit Courts that mandate e-filing, were withholding access "by placing newly filed complaints in a review queue where they may be reviewed in a matter of minutes, hours, or days with virtually no guarantee as to when they will become accessible to the public," *id.* at *9, Judge Christina Reiss explained:

> [B]ut for the pre-access review process, there would be no delay…in an e-filing system. There could be 1,000 complaints; there could be 100,000 complaints. There's no delay. The only delay that's going to show up in e-filing is when you insert a staff member into it to do something else. Right? Because [efilers are filing] with all of the document information that they need, and it's hitting the

> docket, and there isn't any step in between there by staff…So that, by definition, means that the delay is in this review process.

Id. at *14-15 (alterations in original) (citation omitted).

As a result of Vermont's pre-access review, on average 54.8% of newly e-filed complaints were made available on the day of filing, 22.6% one day after filing, and 22.7% two days or more after filing – with the "delay differ[ing] significantly among and within the fourteen Vermont Superior Courts, var[ying] day by day, and occur[ing] with no predictability." *Id.* at *7, 9. Thus, the district court enjoined the defendants "from delaying public access to electronically filed civil complaints until the Vermont Superior Courts' pre-access review process is complete." *Id.* at *18. In doing so, Judge Reiss found that "Defendants have failed to sustain their burden to demonstrate that their pre-access review process is justified by higher interests and narrowly tailored to advance those interests." *Id.* at *16. Within three weeks after the court's decision, newly non-confidential e-filed complaints in the Vermont Superior Courts were made available to the public and press immediately upon receipt for filing without prior review, docketing, and acceptance by court staff. Girdner Decl., ¶ 68.

In a similar case brought by CNS in the Southern District of New York, *Tingling*, No. 1:16-cv-08742-ER, where the New York County clerk's practice of denying public and press access to electronically filed complaints until after docketing resulted in approximately one-third of newly filed complaints being withheld from public access for a day or more, Judge Edgardo Ramos enjoined the clerk "from denying access to newly filed civil complaints until after clerical processing," 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016), finding "that the clerk [ ] failed to meet its burden of demonstrating that its policy of refusing to provide the public and press with access to newly filed complaints until after they are reviewed and logged is either essential to preserve higher values or is narrowly tailored to serve that interest." *Tingling*, 2016 WL 8739010;

see also Tr. 52:18-23. Judge Ramos held that "access should be immediate and contemporaneous" and thus provided "in a timely manner upon receipt." Tr. 49:12-13; 2016 WL 8505086, at *1. As a result, the New York County Clerk, along with every other county clerk in New York, now provides pre-processing remote online access to newly e-filed civil complaints upon their receipt for filing. Girdner Decl., ¶ 66.

Gabel and *Tingling* are not the only federal courts to have deemed policies and practices that withheld access to newly filed complaints for even a short time while they were being processed into a court's docket as unconstitutional. In 2009, Judge Melinda Harmon of the Southern District of Texas granted CNS a preliminary injunction where a Houston court clerk's practice delayed access to newly filed civil petitions, in both paper and electronic form, until after the completion of clerical processing because such was "effectively an access denial and is, therefore, unconstitutional." *Jackson*, 2009 WL 2163609, at *4.

In 2018, Judge Matthew Kennelly of the Northern District of Illinois in *Courthouse News Serv. v. Brown* likewise held, in regard to an electronic filing court in Cook County, "that a policy of delaying access to e-filed complaints until after they are officially accepted or rejected or otherwise processed by the Clerk violates the First Amendment right of timely access to those complaints, unless the Clerk can demonstrate that the policy is narrowly tailored and necessary to preserve higher values." 2018 WL 318485, at *5. In reaching its decision, the court emphasized that "the exact length of the delays are immaterial to the Court's assessment of CNS' likelihood of success on the merits." *Id.*, *1, n.1. Judge Kennelly issued a preliminary injunction requiring the clerk "to implement a system that will provide access to newly e-filed civil complaints contemporaneously with their receipt by her office," *id*. *6-7, though was reversed by the Seventh Circuit on abstention grounds. *See supra*, n.11.

In January 2020, the Ninth Circuit in *Planet III*, after nearly a decade of litigation and multiple appeals, held, like *Schaefer*, that "[t]he First Amendment secures a right of timely access to publicly available civil complaints that arises before any judicial action upon them." 947 F.3d at 600. Accordingly, although the court did find that a Ventura County, California clerk's post-lawsuit scanning policy, which required court staff to scan paper-filed complaints to make an electronic record *before* reviewing or docketing them, was constitutionally permitted, *id.* at 598-600, the Ninth Circuit affirmed the district court's finding that the clerk's "no access before processing policy" did not survive constitutional scrutiny (even though the clerk already "provided same-day access to approximately 97% of filings," *id.* at 587) because the clerk had failed to "demonstrate…that there is a 'substantial probability' that its [asserted] interest" to support withholding access to new civil complaints until after administrative processing "would be impaired by immediate access, and that no reasonable alternatives exist to 'adequately protect' that government interest." *Id.* at 596 (quoting *Press Enterprise II*, 478 U.S. at 14).

Following remand from the Ninth Circuit in *Planet III*, Judge Dolly M. Gee of the Central District of California declared that "[t]here is a qualified First Amendment right of timely access to newly filed civil complaints" that "attaches when new complaints are received by a court, rather than after they are 'processed' – i.e., rather than after the performance of administrative tasks that follow the court's receipt of a new complaint," and "[t]his qualified right of timely access attaches on receipt regardless of whether courts use paper filing or e-filing systems." *Courthouse News Serv. v. Planet*, No. CV118083(DMGGGMX), 2021 WL 1605216, at *1 (C.D. Cal. Jan. 26, 2021). Thus, the court permanently enjoined the clerk from "refusing … to make newly filed … civil

complaints and their associated exhibits available to the public and press until after such complaints and associated exhibits are 'processed.'" *Id.*[14]

3. Defendants' Practices Resulting in Delays Do Not Pass Constitutional Scrutiny Because They are Not Supported By a Compelling Government Interest Nor Are They Narrowly Tailored

To overcome the presumption of access upon receipt, Defendants must show that their policy and practice of withholding access to newly filed complaints until after clerical review and docketing "is 'necessitated by a compelling government interest' and the denial of access is 'narrowly tailored to serve that interest.'" *Doe*, 749 F.3d at 266 (quoting *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986)). *Accord Va. Dept. of State Police*, 386 F.3d at 575 ("[w]hen the First Amendment provides a right of access," strict scrutiny is required); *Stone v. Univ. of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (same); *Rushford*, 846 F.2d at 253 (same).

[14] Other recent access cases do not dictate a different result. In *Courthouse News Serv. v. Glessner*, 549 F.Supp.3d 169 (D. Maine 2021), *appeal filed*, No. 21-1624 (1st Cir. Aug. 16, 2021), CNS has appealed a district court order granting a motion to dismiss on the ground that CNS had not asserted a plausible claim for violation of the First Amendment right of contemporaneous access; this conclusion is foreclosed by other jurisprudence including controlling Fourth Circuit precedent, *i.e.*, *Schaefer*, and in *Glessner*, unlike here, the defendants amended the e-filing rules at issue after CNS filed its complaint and thus there was "indeterminate delay," *i.e.*, only 26 complaints were filed between the period following the rule change and the parties' post-oral argument evidentiary submissions. *Id.*, at 193, n.26. Here, on the other hand, CNS presents evidence of access delays for a total of 9,279 complaints filed between October 11, 2021 and April 8, 2022. *See* Angione Decl., ¶ 16. In *Courthouse News Serv. v. Omundson*, No. 1:21-cv-00305-DCN, ECF Doc No. 40 (D. Idaho Apr. 14, 2022), the court denied Defendants' motion to dismiss, but also denied CNS' preliminary injunction motion, finding that although the First Amendment right of access attaches when a complaint is submitted to the court's e-filing system, *id.* at 24-25, "the Court is unwilling to move to the second step of the *Press Enterprise II* analysis *on the current record*." *Id.* at 13 (emphasis added); *see also id.* at 14 ("In reviewing decisions from other courts, it appears most did, in fact, reach the relevant second question"). Here, CNS has proposed that the parties engage in early discovery to streamline the factual issues but Defendants have declined to do so at this juncture of the case. Ginsberg Decl., ¶ 5.

The decision to overcome the presumption of access shall "not be made lightly," *Stone*, 855 F.2d at 182, and "may be abrogated only in unusual circumstances." *Doe*, 749 F.3d at 266 (quoting *Stone*). The proponent of withholding access, like Defendants here, bears the burden of proof to make this showing with "specific reasons in support of its position." *See Va. Dep't of State Police*, 386 F.3d at 575. Conclusory assertions are insufficient to justify the deprivation of public access. *Id.* (quoting *Press Enterprise II*, 478 U.S. at 15).

In *Schaefer*, the district court emphasized that "[c]lear Fourth Circuit precedent requires the application of strict scrutiny to this case." 440 F.Supp.3d at 559 (citing *Doe*, 749 F.3d at 266 and *Press Enterprise II*, 478 U.S. at 10); *see also Gabel*, 2021 WL 5416650, at *13 (applying strict scrutiny); *Tingling*, 2016 WL 8739010, Tr., at 52:18-23 (same). The Fourth Circuit, in affirming the district court's ruling in *Schaefer*, agreed that "[o]rdinarily, we apply strict scrutiny to examine an asserted infringement of a First Amendment right of access," but concluded that the clerks' practices in the context of a paper filing court required intermediate "time, place, and manner" scrutiny. *Schaefer*, 2 F.4th at 328. Defendants' practices in the instant case are not a "time, place, and manner restriction" because "[t]he effect…is a total restraint on the [entire] public's first amendment right of access even though the restraint is limited in time." *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1147, 1149 (9th Cir. 1983) (emphasizing that it is "irrelevant that some…documents might only be under seal for, at a minimum, 48 hours").

But even under intermediate scrutiny, Defendants bear the burden of proving their actions are "narrowly tailored to serve a significant government interest," *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (citation omitted), and that "no reasonable alternatives exist to 'adequately protect' that government interest." *Planet III*, 947 F.3d at 603 (emphasizing that the appropriate level of intermediate review is "rigorous" scrutiny) (quoting *Press Enterprise II*, 478 U.S. at 14).

"[B]oth standards of review require Defendants to come forward with evidence, not mere argument, to show that the delays are narrowly tailored to some higher governmental interest." *Schaefer*, 440 F.Supp.3d at 560; *see also Schaefer*, 2 F.4th at 329 ("argument unsupported by the evidence will not suffice to carry the government's burden") (internal citation omitted). Thus, no matter what level of scrutiny, Defendants' practices do not pass muster.

"It is Defendants' placement of newly filed complaints in [a review] queue which must be justified under the First Amendment." *Gabel*, 2021 WL 5416650, at *9. "[T]he focus must be on whether *any* delay is appropriate because any restriction on the First Amendment right of access must have 'sufficient justification.'" *Id.*, at *14 (emphasis in original) (citing *Planet III*, 947 F.3d at 596).

To excuse their practice of withholding complaints until after clerical review, Defendants appear to rely on MR 16-904(b) and MR 20-203(a)(2), but nothing in those Rules *mandates* court staff to withhold access to newly filed complaints until those filings are reviewed and docketed, nor does the First Amendment permit court staff to do so. Docketing can occur after newly filed complaints are made available to the press and public. Nonetheless, Defendants have suggested that pre-access review is necessary to prevent incorrect or corrupted filings from being accepted into the case management system, but fail to identify any particular harm that would result from access to complaints that contain a filing error. Declaration of Jonathan E. Ginsberg, dated April 18, 2022 ("Ginsberg Decl."), ¶ 4.[15] And in the rare event that a filing error must be corrected, that error can be addressed after a filing is made public, as is done in the vast majority of federal courts utilizing electronic filing. *See* Girdner Decl., ¶ 50.

[15] Defendants' position was articulated in correspondence with CNS' counsel. *Id.*

To the extent Defendants assert that they must conduct a pre-access review to ensure that newly filed complaints do not contain any confidential or sensitive information, in Maryland, as in virtually every other state, the filer is responsible for appropriately redacting any such information. *See* MR 20-201.1. Indeed, in order to proceed with the filing of a newly filed complaint through the MDEC system, the filer must check a "submission agreement" box certifying that the filing does not contain any confidential information or, if it does, that the filer has provided a redacted version of the submission that excludes the restricted information from public view. Abbott Decl., ¶ 52. Thereafter, the filer has an opportunity to review the accuracy of all information entered and, if satisfied, clicks "submit" to successfully file the electronic filing with the court. *Id.*, ¶ 53. Upon submission, the document, whether a complaint or otherwise, is deemed filed by the court. MR 20-202.[16]

Nonetheless, Defendants withhold access to newly filed non-confidential civil complaints until after they have been reviewed, docketed, and accepted by court staff into the MDEC system. But because the filing party is required to both redact, and then certify the redaction of, any confidential information before submission, a less restrictive alternative to protect the privacy of litigants is already in place. Thus, even if Defendants are able to establish a compelling or significant interest sufficient to justify the challenged conduct by introducing factual data, *e.g.*, the frequency with which clerks find confidential data in new complaints, Defendants cannot establish that their policies and practices, and application of the Maryland Rules, are narrowly tailored. *See Schaefer*, 440 F.Supp.3d at 560 (rejecting clerks' argument that "their interest in the orderly administration of their office and protecting confidential information outweigh the public's First

[16] At least 47 states, including Maryland, as well as the federal courts, require filing parties to redact confidential information prior to filing new complaints. *See* Abbott Decl., ¶ 39; Fed. R. Civ. P. 5.2.

Amendment right to contemporaneous access" where "filer is responsible for redacting confidential information"), *aff'd* 2 F. 4th at 328 (agreeing that clerks violated First Amendment because withholding complaints until after docketing was not "narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice") (quoting *Planet III*, 947 F.3d at 585).

In *Gabel*, defendants contended that the Vermont court rules authorized them to review newly e-filed complaints for confidential information (even though filers there, like Maryland, are responsible for redacting such information), as well as signatures, filings fees, and filing codes before accepting complaints and making them publicly available, but "Defendants' own evidence reveal[ed] that placing the onus on filers has been overwhelmingly effective" and there was "no evidence that staff review…is necessary to protect the orderly administration of justice," particularly where the court's "Odyssey software system performs [basic intake] functions" without "human intervention." 2021 WL 5416650, at *15-16. Accordingly, the District of Vermont concluded that "[b]ecause Defendants fail[ed] to demonstrate a 'substantial probability' that the orderly administration of justice and privacy rights of litigants and third parties would be significantly impaired without their pre-access review, that practice cannot withstand constitutional scrutiny." *Id.*, at *16 (quoting *Press Enterprise II*, 478 U.S. at 14); *see also Tingling*, Tr., at 50:13 – 52:23 (rejecting argument that pre-access review was necessary to "review the proposed filing for [compliance] with venue, caption, case type, as well as the attorney's signature certification required by court rule" and "to ascertain whether they may contain materials that, by operation of law, may not be made available to the general public").

In a diversionary effort to justify the access delays, Defendants also suggest that the pandemic should excuse their unconstitutional conduct. Ginsberg Decl., ¶ 4. But the delays in

access addressed in this case are caused by Defendants' practice of reviewing and docketing filings before they are made public – not the effects of the pandemic. In fact, the relief CNS seeks in this case – access to newly e-filed complaints before clerical review and docketing – would relieve the clerks of any pressures they face. And illustrative of the fact that timely access upon receipt can be provided during the pandemic (or any other unusual circumstance) is that courts across the nation provide pre-docketing access to newly e-filed complaints upon receipt for filing. *See* Girdner Decl., ¶¶ 30, 32-37, 39, 41-42, 44, 45, 51. In the vast majority of federal district courts and many state courts which utilize electronic filing, unlike Maryland, new, non-confidential civil complaints flow automatically onto public access terminals and remotely online upon receipt, where they can be viewed by the public and press prior to clerk review and acceptance and within minutes of filing. *Id.*, ¶¶ 33, 34-37, 39-42, 44. That is the natural result when an e-filing court does not withhold complaints for clerical review or docketing.

State courts that provide online access upon receipt include those in Alabama, Arizona, California, Connecticut, Georgia, Hawaii, New York, Nevada, Utah, Vermont and Washington. *Id.*, ¶ 34. Those courts provide access to newly filed civil complaints upon receipt, before docketing by court staff has been completed, through means readily available to Defendants. In California and Georgia, for example, courts which use the same electronic filing and case management system as Defendants and their staff, based on software developed by Tyler, have provided timely access to CNS, and others, through a press review queue feature that allows CNS, *at no cost to the court*, to view newly filed complaints online as soon as they are received by the court and without waiting for court staff to process them. *Id.*, ¶¶ 40-43. And in Vermont, as well as Nevada's Eight Judicial District in Las Vegas, where the trial courts likewise use electronic

filing software developed by Tyler, newly filed complaints now automatically flow onto the public docket upon their receipt for filing. *Id.*, ¶¶ 37-38.

Defendants thus can easily, and in a less restrictive way, provide pre-docketing access to newly filed civil complaints through a similar auto accept option or through a press review queue. The fact that parties to a case and their counsel may currently access case filings remotely (post-docketing) through Maryland's case management system, Odyssey, illustrates the ease of these accommodations. *See* Abbott Decl., ¶ 26. These solutions are less restrictive on access because they do not withhold new civil complaints from press or public view until after court clerks manually review and "accept" them. But Defendants choose to do neither.

B. CNS, Its Subscribers, and the Public Will Be Irreparably Harmed Without Injunctive Relief

CNS will continue to suffer irreparable harm without injunctive relief. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club*, 637 F.3d at 301, quoting *Elrod,* 427 U.S. at 373. And this court agrees: "The irreparable harm factor is satisfied if there is a likely constitutional violation." *St. Michael's Media, Inc. v. Mayor and City Council of Baltimore*, 2021 WL 4772927, at *15 (D. Md. Oct. 12, 2021) (citing *Leaders of a Beautiful Struggle*, 2 F.4th at 346).

As *Planet III* explained:

> CNS' reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful discussion regarding the functioning of our nation's court systems…[T]he public interest in obtaining news is an interest in obtaining contemporaneous news…Thus, that 'old' news is not worthy of, and does not receive, much public attention has been widely recognized…[and] the need for immediacy of reporting news 'is even more vital in the digital age,' where timeliness is measured in terms of minutes or seconds.

947 F.3d at 594 (citation omitted); *see also Cozine*, 2022 WL 593603, at *6 ("[*Planet III*] reinforces the importance of [the First Amendment] right [of access] as society continues to

digitize: the Ninth Circuit recognized…the need for immediacy of reporting news"); *Schaefer*, Trial Tr., 560:25-561:2 ("If you don't get [news] when it's fresh, it's like stale bread or stale anything else"); Girdner Decl., ¶¶ 22-24 (explaining the importance of timely access).[17]

C. The Balance of Equities Favor CNS and Injunctive Relief Serves the Public Interest

Fourth Circuit "precedent counsels that 'a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'" *Centro Tepeyac*, 722 F.3d at 191 (internal citation omitted). In contrast to the irreparable harm CNS will face without injunctive relief, Defendants would suffer little to no inconvenience as a result of a preliminary injunction, as demonstrated by the practices of other jurisdictions providing timely, pre-docketing access to newly e-filed civil complaints. *See, e.g.*, Girdner Decl. ¶¶ 30, 32-37, 39, 41-42, 44, 45, 51. As the district court found in *Gabel*, the "balance of hardships tips in [CNS'] favor because the public interest is served by timely reporting on the operations of the courts and because 'securing First Amendment rights is in the public interest.'" 2021 WL 5416650, at *17; *see also Tingling*, 2016 WL 8739010, Tr. at 53:5-9 ("the balance of hardships tips in CNS' favor" because "CNS will be denied its First Amendment right of access to new case-initiating documents unless the Court issues this preliminary injunction while the clerk has alternative constitutional ways to address" its concerns). *Accord Jackson*, 2009 WL 2163609, at *5; *Brown*, 2018 WL 318485, at *6.

Correspondingly, "it is always in the public interest to protect First Amendment liberties." *Legend Night Club*, 637 F.3d at 303; *see also Leaders of a Beautiful Struggle*, 2 F.4th at 346; *Centro Tepeyac*, 722 F.3d at 191. And "[t]here is, of course, an important First Amendment

[17] Relevant excerpts of the *Schaefer* trial transcript are attached to the Girdner Decl. as Exhibit 1.

interest in providing timely access to new case-initiating documents." *Tingling*, Tr. at 53:15-17. "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of the government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations … a public benefit is performed by the reporting of the true contents of [public court records] by the media." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 495 (1975). *Accord Richmond Newspapers, Inc.*, *v. Virginia,* 448 U.S. 555, 572-73 (1980) (explaining that the media "function[s] as surrogates for the public").

D. Bond Should Be Waived or Set at a Nominal Amount

Although a district court may typically issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper," Fed. R. Civ. P. 65(c), the Court "retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 331-32. Where an enjoined party is unlikely to suffer monetary damages or harm, it is within the court's discretion to fix a "nominal bond" or a "bond amount at zero." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999); *see also Maryland Dept. of Human Resources v. U.S. Dep't. of Agriculture*, 976 F.2d 1462, 1483 n.23 (4th Cir. 1992) ("recognizing a district court's discretion to set a bond amount of zero where the enjoined or restrained party faces no likelihood of material harm"); *Coreas v. Bounds*, 457 F.Supp.3d 460, 464 (D. Md. 2020) ("the Court will not require a bond in this case"). Here, CNS is simply asking to see new complaints contemporaneously as they are received for filing. *Tingling* required only a $5,000 bond, 2016 WL 8505086, at *1, and *Jackson* "a nominal bond of $1,000," 2009 WL 2163609, at *5. This Court should waive a bond or, alternatively, set a nominal bond.

CONCLUSION

Fourth Circuit precedent leaves no question that a First Amendment right of access attaches to newly filed civil complaints upon their receipt by the court rather than after review and

docketing by court staff. In the e-filing context, this standard requires Defendants to do what the vast majority of federal courts and a growing number of state courts already do: provide pre-docketing access to e-filed complaints upon their receipt by the court. Although there are easy, less restrictive alternatives available to Defendants' "no access before processing" policies and practices, Defendants continue to damage the openness and public nature of the courts and thus impede coverage of new filings before they become yesterday's news. Technology should illuminate the halls of government, not darken them.

Accordingly, this Court should preliminarily enjoin Defendants from continuing their policies and practices of withholding newly e-filed non-confidential civil complaints from press and public view until after clerical review and docketing and direct Defendants to provide CNS with contemporaneous access to all such complaints upon their receipt for filing.

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Respectfully submitted,

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