IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

COURTHOUSE NEWS SERVICE,

Plaintiff,

vs.

SARA OMUNDSON, in her official capacity As Administrative Director of Idaho Courts,

Defendant.

Case No. 1:21-CV-305-DCN

Boise, Idaho
February 18, 2022
9:59 a.m.

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

BEFORE THE HONORABLE DAVID C. NYE
CHIEF UNITED STATES DISTRICT COURT JUDGE

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I N D E X

(Proceedings commenced at 9:59 a.m., February 18, 2022.)

THE LAW CLERK: The Court will now hear the motion hearing in Case Number 1:21-CV-305-DCN, Courthouse News Service versus Omundson.

THE COURT: Good morning, Counsel. I'm going to ask each of you, if you would, starting with the plaintiffs, just identify yourself and tell me who's going to argue from your side.

MS. GRASHAM: Good morning, Your Honor. It's Deb Grasham from Givens Pursley. I am local counsel, and Jon Fetterly is here as well, and he will be arguing this morning.

THE COURT: All right.

MR. FETTERLY: Good morning, Your Honor. This is Jon Fetterly. I'll be arguing. Thank you.

MS. DUKE: Good morning, Your Honor. Keely Duke and Annie Henderson on behalf of Ms. Omundson, and I will be arguing.

THE COURT: Okay. Thank you. I'm also going to just say, because she won't listen to me, Patti's on here, but she has COVID. I can't get her to get off the hearing. That's why I had Bennett call the case. She doesn't have much of a voice right now.

All right. We're here today on two motions, a motion to dismiss by the defense and a motion for preliminary injunction by the plaintiffs. I think we ought to take up the

motion to dismiss first. So, Ms. Duke, that would be you. You may go ahead.

MS. DUKE: Thank you, Your Honor. And may it please the Court.

Patti, I'm sorry you're dealing with COVID. Hopefully it all goes just fine.

THE COURT: I probably just violated all kinds of federal laws telling you that.

MS. DUKE: Unless you're a doctor, I think you're okay. So, Your Honor, thank you very much. Do you mind if I share my screen?

THE COURT: No. Go ahead.

MS. DUKE: Thank you, sir. Your Honor, first and foremost, we are asking that this Court exercise the doctrine of abstention and abstain from ruling related to this case and dismissing it for state proceedings. Certainly it's well established in the *Quackenbush* case -- which is, quite frankly, similar to this case in that, as I'll discuss in a few minutes, the entire recordkeeping court process for the state of Idaho if CNS gets what it asks this Court to do will have to be changed; and that change will be dictated and mandated by a federal court, not by the Idaho legislature, not by the Idaho Supreme Court.

And so while abstention is the exception rather than the rule, federal courts may decline to exercise their

jurisdiction in otherwise exceptional circumstances where denying a federal forum would clearly serve an important countervailing interest.

We turn next to the *Colorado River Water Conservation* case, a United States Supreme Court case in which it was noted that considerations of wide judicial administration alone may sometimes warrant dismissal of a federal court proceeding.

And next we look to the guidelines provided by *Hart v. Massanari* in the Ninth Circuit, where the Ninth Circuit has specifically instructed that using the techniques developed at common law, a court confronted with apparent controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.

That's exactly where we come to here with this *Planet III* and *Planet I* decision. Abstention in this case is appropriate because the requests for relief are sufficiently distinctive from those in the *Planet* case to warrant this Court's independent consideration of whether abstention is appropriate or not. And that's directly within the Ninth Circuit purview of indicating that we need to look at the facts of the case to determine whether its precedent will in

fact guide.

When you look to this case, CNS demands instantaneous preprocessing access to nonconfidential complaints. This -- in order to do that, CNS relies on the time it takes from a complaint being submitted -- which I'll discuss here in a moment -- to actually being filed and then part of the court record. To then attempt to further justify an incredible overexpansion of *Planet III*, CNS then misuses the 24 hours in a day, seven days a week, 365 days a year ability for someone who wants to submit a document for filing to submit that document.

So let's look at the distinguishing factors between *Planet I* and this case. First and foremost, in *Planet I*, when the court decided it would abstain, the question of access -- so the First Amendment question -- had not yet been decided. In Idaho we already have the benefit of the court's decision. You'll see in *Planet I* here on page 789 one of the important factors that *Planet I* used in choosing to not abstain was that this was a question of first impression and a matter of particular federal concern that removes this case from the realm of sensitive state issues that federal courts should hesitate to address.

That's not the plain view that we have here today. We have the answer in *Planet,* and that is that in applying *Press-Enterprise*, *Planet III* later subsequently held that, "We

conclude that the press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed."

Now, we're going to talk a lot about the "however" later, but I thought it was important to highlight that first distinction for you, Your Honor, that we're not dealing with a case of first impression. We already know what the Ninth Circuit in *Planet III* has said related to access of filed civil complaints.

Now, if we turn next to the next significant difference between *Planet I* and this case, *Planet I* California is not what we do here in Idaho. In the *Planet I* case, the Ventura County clerk failed to raise the very issue that we've raised for you, Your Honor, at the Ninth Circuit level, and that is this whole submitted versus filed issue.

And let me show you. As we've submitted, submitted versus filed in Idaho is very different. If you look here at the first bubble, submission through public side of File & Serve. This is the Tyler side; this is not the State of Idaho's case management system. So this is different than when you were an Idaho state district judge, Your Honor. The system has changed a bit.

So the Tyler side of things is File & Serve, not part of the court record. The complaint is then received on the private side of File & Serve -- again, maintained and run by

Tyler -- to the ministerial clerk review and private side of File & Serve. And once that ministerial review is done, then you hop to this blue bubble, which says "official court record." None of this was addressed before the *Planet III* court.

And this is where you need to get into the actual rules that the State of Idaho uses. Electronic filing in Idaho is not a submitted document. If you look at Rule 11 that the Idaho Supreme Court has promulgated and adopted and has used by our 44 county clerks across the state of Idaho, electronic filing means a document is filed when the document has been electronically submitted.

So that's the first part of what CNS is trying to do. CNS is trying to have you say, "Oh, I'm a federal judge. I'm going to tell Idaho, 'Nope, electronic filing needs to end there.'" Delete part 2 of this definition that the Idaho Supreme Court has come up with, because that part 2 is exactly the difference between our case and *Planet III*. And that is the submission has been acknowledged and the document accepted for filing. None of this was brought to the *Planet III* court because the Ventura County clerk waived that argument and failed to raise it.

Second, of course, Rule 11 in Idaho was certainly not addressed, because every state has their own procedure and process. In Idaho it's the -- it's the courts that define the

rules related to filings. It is not the Idaho legislature.

So if you turn next, then, this is -- this is where I think things get a little hazy in CNS's briefing and in their complaint. You'll see that to emphasize to you, Your Honor, they will cite the Ninth Circuit decision in *Planet III*, but then they intertwine a District Court decision that was never ruled upon by the District -- by the Circuit Court.

And that's a very important distinction here, because the entire crux of their argument, trying to have you exercise federal power over a state court and its system related to how it handles its filings. They tried to jump to a conclusion that is not anywhere contained within *Planet III's* Circuit Court decision that e-filed complaints are exactly the same thing. And therefore, because the District Court ruled that regardless of whether courts use paper filing or e-filing systems, that submission is effectively when this should occur.

That's not a Ninth Circuit decision. That is from the district judge, and the district judge notes there that Ventura County abandoned its objection to this language by not raising it on appeal, and this Court cannot now revisit its already final determination on the issue. That is by no means the Ninth Circuit saying that this court said a submitted e-filing equals a filing and, therefore, has the constitutional protections that *Planet III* provided.

THE COURT: Ms. Duke, if I can interrupt for just a minute.

MS. DUKE: Sure, Your Honor.

THE COURT: Tell me how it works if a plaintiff's lawyer on Friday afternoon files a complaint -- well, submits a complaint under your argument, and that's the last day of the statute of limitations, but the case isn't actually filed until Monday when it's reviewed. Have they lost their statute of limitations argument?

MS. DUKE: No. I don't believe anything in the rules provides that, Your Honor.

THE COURT: So it is filed when it's submitted?

MS. DUKE: Well, it's been provided to the court, and we have the specific provision that indicates that it's effectively accepted with a three-day window for corrections to be made.

THE COURT: And then that's a Idaho Supreme Court --

MS. DUKE: The correction does not impact --

THE COURT: What rule is that?

MS. DUKE: Well, let me -- I will get it to Your Honor --

THE COURT: Is it 12?

MS. DUKE: -- in one moment. I think it is 12, but let me -- let me get that to Your Honor.

THE COURT: I guess my real question is, is that so

for some purposes, the complaint is deemed filed when it is submitted to the court? But for other purposes, including today's argument, you're saying it's not filed until it's been reviewed and accepted?

MS. DUKE: Well, and that's why I think the rules have addressed that issue, and that is mistakes happen. And in the old days of filing with -- you know, where we had a runner run over -- and that's how I started my legal career. I was a runner who would run to the courthouse. I would take the documents, and they would stamp them. Or my heart would skip a beat, and the clerk would say, "Sorry, you're missing this," and I would have to sprint back to the office to have it filed.

And it is Rule 12 that you're referencing. And what it -- what it envisions is that we get -- in the electronic world, given that you're able to file these in the middle of the night, on Christmas Day, you know, whenever it is, we don't want a litigant to be prejudiced if there's some ministerial issue with their -- with their filing, and therefore we provide a grace period of three days for a correction to be made so that it can revert back to the original date of submission.

And that's the practical impact of -- it's not Keely walking it up to the clerk's office and having my heart skip a beat and realize that we didn't have a signature or a filing

fee and, therefore, at 4:58 having to leave the courthouse, run back, and not make my time. That's because the Idaho Supreme Court has recognized, "We need to have you litigants have an opportunity on a ministerial issue to correct that so you are not prejudiced."

THE COURT: Okay.

MS. DUKE: So next you look to *Planet*, and you look at the process that was used. And this is very different. The initial seven-step process was not that different, although, please remember, in *Planet* -- again, California, not Idaho -- this was paper files. We're dealing with electronic files. Nothing in *Planet III* dealt with this is the rule for electronic files.

Items 8 and 9 are the real kicker for *Planet I*, and that is the supervisor, once -- it was already approved by a clerk. So in Idaho, once that happens, it's immediately transferred from the Tyler system to Idaho's court management system, and that document immediately becomes available to the judge and to the public at the same time. The judge does not have first access. It all becomes available for the first time to the judge and the public at the same time.

And as Your Honor may be aware or remember from your days on the state court bench, "press" is not defined in Idaho like it is in California. There is no credentialed press in Idaho. Press is the public. That is the way it's been

handled, and it's never been defined differently.

So what's very different between *Planet I* and Idaho is that the supervisor, after it was already approved, would review, and then maybe it was put into a media event. That's not the case here. Once it's submitted and goes through its administrative checks, it is then deemed filed, transferred from the Tyler system to the court's file management system, and then at the same time becomes immediately available to the public and to the judge.

If you look to -- I'll move forward because I know I'm limited on time. This is the case, *State v. Salisbury* that indicates that the press or media is defined differently. Unlike Idaho, Idaho does not have -- or unlike California, Idaho does not have a press shield in which the press or the media is defined differently than the general public.

Obviously, we can talk about this during the preliminary injunction phase, but, Your Honor, when you look to the rules, you look to Idaho Rule 32, which provides, you know, the court's indication of how they're going to control access to court records -- and it's recognized in the Public Records Act, which the Idaho legislature enacted. It accepted the court records and said, "You courts, you're in charge of your records."

So what did we do? We promulgated Idaho Rule 32. The Supreme Court then also built in a response to requests.

So within three working days from receipt of a request, the custodian shall disclose the records requested. Now, notably, we can do far better than that, which is what we do with our filed complaints. Filed complaints in the state of Idaho are immediately available to the public by CNS and anyone who wants to look and at the same time to the judge. So -- but it needs to happen within those three working days.

The custodians of the records are the clerks. That's well lined out. And the official court record for a case file maintained in accordance with these rules is the electronic case file maintained by the court as well as any paper filings. So again, these are the accepted filings, not that, hey, I'm a runner standing at the clerk, handing you my document. It's once it has had that ministerial review done.

Now, notably, when we talk about abstention, Your Honor, something that is very different as well is the impact. The *Planet I* case concluded that this is not a big policy changing, policy sweeping decision if we, as the Ninth Circuit, determine that we're going to evaluate whether or not the Ventura County Superior Court was violating the First Amendment. It's noted there's little risk that the federal courts would need to examine the administration of the substantial number of individual cases to provide the requested relief.

Very different than this case, where we have the

entire Supreme Court process, where the Idaho legislature has indicated, "You courts decide what you're going to do with your records," and the very rules promulgated by the Idaho Supreme Court to do so. It's not this ministerial interest where this is not a challenging thing for Ventura County Superior Court to address and deal with.

And, Your Honor, I do want to reserve a couple minutes for being able to rebut the plaintiffs. But the biggest issue here, Your Honor, is, you know, you're going to hear a lot from Mr. Fetterly of *Planet I*, *Planet I*, they abstained. Well, you have a Ninth Circuit precedent that says when you have a very factually distinguishable case, the right to abstention is something that this Court -- or the doctrine of abstention is something that this Court could look to exercise. And we're asking that this Court do so based upon the fact that the issue is not ripe as to what really is going to be protected when it comes to a filing by a court related to a complaint. That's been answered. That wasn't answered in *Planet I*.

So, Your Honor, unless you have some questions on that point, I would like to reserve a couple minutes.

THE COURT: I do not have any questions, and you're welcome to reserve some time.

MS. DUKE: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Fetterly.

MR. FETTERLY: Thank you, Your Honor, and good morning.

THE COURT: Good morning.

MR. FETTERLY: So we've heard a lot there about abstention. However, counsel's argument really, in my view, goes quite far beyond abstention and really starts to go into what should be the second part of the *Press-Enterprise II* test, which is the defendant's burden to justify her policy and practice. So we'll get to that in a minute, but I'll tackle the abstention piece first. And then I will follow that by talking a little bit about what Courthouse News's claim actually is and how it should actually be analyzed by this Court under the *Press-Enterprise II* test, which is a factual inquiry which really isn't -- I believe it does not implicate abstention.

But counsel's correct. You are going to hear me talk about the Ninth Circuit and *Planet*, because the Ninth Circuit has spoken. It has addressed this issue. The -- it rejected an abstention challenge in the *Planet* case in *Planet I*. And then in *Planet III* the Ninth Circuit, in footnote 4, expressly disagreed with the decision in *Courthouse News Service v. Brown*, which counsel cites in her papers. She doesn't mention it here.

But it really goes to this idea that there's some

principled basis in, you know, comity that would allow this Court to abstain from exercising its jurisdiction over a First Amendment claim. And the Ninth Circuit did agree with that, citing back to its original opinion. So the Ninth Circuit has addressed this issue and all of these grounds on which counsel attempts to distinguish *Planet*. Again, we'll talk about them in connection with the *Press-Enterprise II* test and specifically defendant's burden under the second part of that test.

But none of those are real material distinctions here, because this case involves the same claim that was asserted in the *Planet* case, and Courthouse News here is seeking the same relief that was sought in the *Planet* case and which was affirmed by the Ninth Circuit in *Planet III*. So we have got a pretty clear statement from the Ninth Circuit on abstention.

Now, if we were to just take a bigger step back and say what would the Supreme Court say about this, because we already have counsel talking about *Quackenbush* and other cases. She cites a number of older cases that predate the more recent and controlling Supreme Court authority that has made it very clear that abstention should only be used in the most exceptional circumstances. And these most recent Supreme Court cases have significantly limited the scope and reach of abstention, and specifically the *New Orleans Public Service*

Inc., and the *Sprint Communications* cases. Both of those are cited in our opposition to the motion to dismiss, and both of those cases significantly restrict the reach of *Younger* abstention and its progeny, which is really what counsel is asking for, the application of *Younger* and its progeny under *O'Shea*.

So if we read *Sprint Communications* and the three very narrow and limited categories in which the Court can potentially abstain, they simply don't apply here. And the Court doesn't need to take my word for it. There are -- there's a growing list of Federal District Court cases that have considered this exact issue. It's the same claim brought by Courthouse News, the same relief sought by Courthouse News. And some of these cases even involve the same Tyler File & Serve system used by the Idaho courts, and these courts have considered and rejected the same argument counsel makes about the distinction between submission and acceptance. You know, the law is pretty clear, and there's a growing line of authority that has considered *Planet* and this new e-filing environment and agreed with it when rejecting abstention challenges.

So to quickly walk through the line of cases so that the Court has them -- and admittedly at least one of them is not in our papers, because some of this is very fresh -- we first have the Fourth Circuit agreeing with Courthouse News.

Admittedly, the Fourth Circuit in the *Schaefer* case was also a paper case, so, you know, it doesn't reach the e-filing issue. But again, same claim, same relief sought.

Courthouse News v. Tingling, this is the Southern District of New York, and we attached a transcript as Exhibit 17 to the Girdner declaration in support of the preliminary injunction motion. And there Judge Ramos rejected an abstention challenge in a case that involved e-filing. That was the e-filing system in New York. So some of the same arguments you've heard, the grounds upon which the defendant is trying to distinguish *Planet,* didn't hold up when Judge Ramos in *Tingling* rejected the abstention challenge.

Most recently now we have three cases in District Courts that are perhaps the most persuasive because they involve the same Tyler File & Serve system. So the attempts to distinguish *Planet* simply fall away if we look to these other District Court cases that have rejected abstention.

We have the *Courthouse News Service v. Gabel* case in Vermont, and we attached that ruling in our supplemental authority. That's Docket 12 [sic] in this court, and it's also a Westlaw cite, which is 2021 WL 5416650. Judge Reiss considered the abstention argument, many of the same things Your Honor just heard, and she rejected abstention and looked at the merits of the case when applying the *Press-Enterprise II* test.

In New Mexico, same result. We have Judge Browning -- and we also cite this in our reply brief in support of the motion for preliminary injunction. And again, these were issued after the briefing closed on the motion to dismiss. But the Westlaw cite there is 2021 WL 4710644. Judge Browning also considered the abstention issue freshly unconstrained by the Ninth Circuit, but he agreed with it, and he rejected abstention in a case that involved the same Tyler system and all of the grounds upon which counsel just tried to distinguish *Planet*.

And then we also have *CNS v. Price*. This case does not appear in our papers, admittedly. It's another pretty new case. At the end of November, November 29, Magistrate Judge Hightower in the Western District of Texas, she issued a report and recommendation rejecting an abstention challenge on the same grounds, considering all of the relevant federal authorities. And Judge Yeakel in the Western District of Texas, he agreed. And the Magistrate Judge in -- his report and recommendation is 2021 WL 5567748.

So when you look at the body of law, we have a pretty clear trend against abstention. And these are cases that are not in the Ninth Circuit. So here, Your Honor, in the Ninth Circuit I think the case should be even clearer and stronger. But where we do have two cases that admittedly have abstained, they're clearly not going to be persuasive in the Ninth

Circuit. The one Seventh Circuit opinion, *Courthouse News Service v. Brown,* I've discussed that. The Ninth Circuit disagreed with it.

The only other case that has abstained was the *Gilmer* case in the Eastern District of Missouri, and in that case Judge Autrey framed the issue as a choice between the Seventh Circuit decision in *Brown* and the Ninth Circuit decision in *Planet*. And he chose to follow the Seventh Circuit. Well, we believe this Court should, naturally, follow the Ninth.

So again, the body of abstention law I think is quite clear and really brings us back to this point that counsel keeps making about, well, somehow *Planet* is distinguishable. And quite frankly, I refer the Court to the other District Court cases that have considered this issue in the e-filing context with Tyler e-filing services and have found that abstention was inappropriate and have agreed with the Ninth Circuit on that point.

Now, I do want to address some of the grounds on which counsel tries to distinguish *Planet* here, because, again, I don't think those necessarily support an abstention argument. But in her papers at least she frames them as grounds upon which Courthouse News is -- has failed to state a claim. That's the argument in the papers. And she begins the factual distinction discussion by talking about a single line in the *Planet III* opinion where the Ninth Circuit says, you

know, the First Amendment does not demand immediate preprocessing access to newly filed civil clients -- or excuse me -- new civil complaints. E-filing admittedly was not in *Planet*.

But the defendant's focus on that statement, however, completely misses the mark for a claim of abstention or whichever other purpose she's trying to advance that line, because that is not the claim here, and that is not the test that this Court must apply to that claim. So what, then, is the claim, and what is the test? I'm going to spend the rest of my time talking about this, because it really lays the foundation for both motions and how this Court needs to apply the *Press-Enterprise II* test.

So the claim here is a 42 U.S.C. Section 1983 claim based on delays in access to new e-filings of complaints filed with the Idaho State District Courts. And we allege that the delays at issue are the result of the Idaho courts' practice of withholding access to new civil complaints until after court staff review them. We just heard counsel talk about that. I don't think that's really in dispute here. There's admittedly a delay, a lapse of time between when the court receives the complaint and when court staff get around to viewing it, conducting the ministerial review, and then accepting it. And that delay, that lapse of time, that's the delay at issue.

And the Ninth Circuit in *Planet III* has given us the test that we must apply to those delays to determine whether they are in fact constitutional under the First Amendment or whether the policy and practice that's causing those delays can withstand constitutional scrutiny.

And the test that the Ninth Circuit announced in *Planet III* comes from the U.S. Supreme Court case *Press-Enterprise Company v. Superior Court*, or *Press-Enterprise II.* Or if I say *Press-Enterprise,* I'm referring to *Press-Enterprise II*. The first part of that test is for the Court to determine whether experience and logic create an entitlement under the First Amendment to a particular document or process. The Ninth Circuit has addressed that issue. That's -- that's *Planet III*. The Ninth Circuit made it very clear. There is a First Amendment right of access to new civil complaints that attaches when they are received by the court.

Now, counsel argues that the right of access does not attach until after Idaho courts accept and process the complaint, which is the way that the Idaho courts deem them, quote, filed for administrative recordkeeping purposes. However, this argument ignores the plain language in *Planet III*, which uses the terms "filed" and "received" interchangeably. *Planet III* agrees with the District Court that the right of access attaches upon receipt, and the Ninth

Circuit affirmed that ruling. And it also ignores the plain -- the definition of "filed" in the judicial context, which means submitted to or received by the court.

Now, the parties have thoroughly briefed this issue, and I don't want to repeat all of what is in our papers. I trust the Court has enough paper in front of it. But I will, however, point out that Magistrate Judge You's recent report and recommendation in the Courthouse News v. Cozine case, which is currently pending in the District of Oregon, addresses this issue directly. And we submitted that earlier this week as a notice of supplemental authority. I believe that's Docket Number 32. And this is very fresh. Magistrate Judge You just issued this report and recommendation on Monday of this week.

So in the Cozine case, we have a statewide court administrator, just like Defendant Omundson. The Oregon courts use File & Serve, just like Idaho. That's the Tyler product. Counsel referenced Idaho Rule 11. Well, Oregon has Trial Court Rule 20.060. That's basically the same thing. And Magistrate Judge You walked through this entire argument about when the right attaches. Does it attach upon receipt? Does it attach upon acceptance?

And after thoroughly analyzing the *Planet* cases and after thoroughly considering all of the arguments counsel just made, she rejected the argument that the right of access

attaches upon acceptance, which would be after the delays at issue have already occurred. So I would just point the Court to that report and recommendation. It's currently going to Judge Simon in the District of Oregon. But just as this Court is free to make its own decision, I think Magistrate Judge You's report and recommendation lays out a pretty clear and convincing roadmap and path for this Court we would ask that you follow.

So with the Ninth Circuit then, having already applied the first part of the *Press-Enterprise II* test and having already established that there's a qualified First Amendment right of access to civil complaints that attaches when they are received by the court, we then turn to the second part of the *Press-Enterprise II* test. And that's, I think, really where most of what counsel has argued should be addressed, because what counsel is saying is we have all of these processes in Oregon and they're different. Well, what she's saying is these are all the processes that we need, and, well, under constitutional scrutiny they have to be examined under the second part of the test.

And it is a factual inquiry that asks whether the defendant has met its burden of justifying the delays in access under constitutional scrutiny. And that burden is twofold. As the *Planet III* opinion explains, the defendant must first demonstrate that a compelling governmental interest

would be impaired by providing more immediate access; and second, that no readily available alternatives exist to adequately address that governmental interest. And that's what the Ninth Circuit calls rigorous scrutiny. So again, it is defendant's burden of justifying the delays in access alleged in the complaint under rigorous scrutiny.

So again, we're under a Rule 12 motion for this part of our morning, and the question then is, has Courthouse News stated a claim? And the short answer is yes. We've alleged delays in access. We've alleged defendant cannot met her burden of justifying the delays in access under rigorous scrutiny. We also allege that defendant is -- in her capacity as a state court administrator is responsible for the statewide e-filing system in Idaho and public access to records through those systems and thus responsible for the delays at issue. That's paragraphs 12 and 13 of the complaint.

So the Court must accept these allegations as true at this stage. And if, as alleged, defendant cannot satisfy her burden of justifying the access delays at issue under the second part of the *Press-Enterprise II* test, or rigorous scrutiny, then the policy or practice causing those delays violates the constitution. And that is Courthouse News's claim, and that is the test this Court must apply to evaluate it.

And the complaint here, again, it seeks the same -- it asserts the same claim asserted in *Planet*. It seeks the same relief that was affirmed in *Planet*, and that is a declaration that defendant's practice of withholding access until after clerical processing violates the First Amendment and a permanent injunction prohibiting that -- prohibiting that practice.

So that right there should be the end of the analysis on the state of claim. And again, on the abstention issue, everything the Court has heard about the reasons why *Planet* is supposedly different, I just refer back to the many District Court cases that have found those arguments unpersuasive and rejected them.

I'll conclude my comments here, Your Honor, with one final point. And I think it's significant, because we've already heard counsel begin part of her argument with this idea that Courthouse News is demanding immediate access or that, you know, the First Amendment does not demand immediate preprocessing access. And as I just discussed, that is not the claim, and that is not the test, and quite simply, it doesn't support a motion to dismiss.

I want to address it because I think we're going to hear more of that today, because we see that throughout the papers. And that sentence from the Ninth Circuit in *Planet* is significant to the extent it simply underscores the qualified

nature of the right of access. The First Amendment right of access to new civil complaints is qualified because defendant has the opportunity to try to justify the delays and access under rigorous scrutiny.

However, rather than address that burden under the second part of the test, which we did not hear about during counsel's presentation. And to be candid, she can't address it at this stage because it's a fact-intensive inquiry that's beyond the scope of a pleading motion. So instead of addressing that test, defendant instead intends to avoid constitutional scrutiny altogether by reframing and mischaracterizing Courthouse News's claim as one demanding immediate access. But again, that's not the test, and that's not the claim.

So, you know, I'd point the Court to the *Planet II* decision, because it's pretty instructive on this point. Defendant's attempt to recast Courthouse News's claim as one demanding immediate access so she can avoid rigorous scrutiny, it's reminiscent of the motion to dismiss that the defendant in *Planet* filed that led to the *Planet II* decision. In that case the defendant moved to dismiss Courthouse News's complaint on the ground that the First Amendment does not demand same-day access to civil complaints. It didn't say immediate; it says same day. That was their shorthand in the *Planet* case.

And the District Court took the bait, and it granted the motion to dismiss. Well, Courthouse News appealed. In *Planet II* -- and in *Planet II* the Ninth Circuit reversed that dismissal, finding that the District Court erred by narrowing the legal question to one divorced from the proper legal framework. That's the *Press-Enterprise II* that we discussed, and we'll discuss more later today.

So whenever we hear defendant say Courthouse News is seeking immediate access or that Courthouse News has not stated a claim because the First Amendment does not demand immediate access, that should be a cue that Defendant Omundson, just like the *Planet* defendant, is attempting to sidestep rigorous scrutiny by incorrectly reframing and narrowing the legal question to one that is divorced from the applicable *Press-Enterprise II* test.

So for the purposes of this motion to dismiss, Your Honor, I think if we simply follow the *Press-Enterprise II* test as set forth in *Planet III* and if we follow *Planet* and the growing list of other federal court cases that have rejected abstention, it's pretty clear that Courthouse News has in fact stated a claim for relief, because we've alleged delays in access to new civil complaints, and we have alleged that defendant cannot meet her burden under the applicable *Press-Enterprise II* test.

So I'll stop there. And if Your Honor has any

questions, I'll be happy to answer them.

THE COURT: I do not have any questions. Thank you.

Ms. Duke, you have about five minutes for rebuttal.

MS. DUKE: Thank you, Your Honor. So first and foremost, let's deal with the first allegation. This is a very different proceeding than California. Mr. Fetterly would like to have this be California, not Idaho. And fortunately, that's not the case here for many reasons. But under the Idaho constitution, oversight of the judicial branch falls to the Idaho Supreme Court. It's Article V of our constitution. That power includes the inherent power to manage judicial records, which the Idaho Supreme Court has done, and the legislature has authorized it to do or directed it to do under Idaho Code Section 74-104, with the Idaho Supreme Court doing so in its rules that we've gone through with you.

In this case the rules that have actually been challenged by CNS's request for immediate access or press review are the Idaho Supreme Court rules. These are not, like they were in California, some clerk policy, some local procedure. These are rules that the Idaho Supreme Court in its constitutionally granted power enacted. As we noted in our opening filing on the motion to dismiss, Ms. Omundson does not have the independent power to or the authority to enact or modify those rules. It is the Idaho Supreme Court that must. That's point one.

Point two, Your Honor, if you actually look at the complaint, I truly do not understand how CNS can argue that they're not looking for immediate access. They don't use that word, but if you look at paragraph 2 of their complaint, if you look at paragraph 3 of their complaint, if you look at paragraph 32 of their complaint, they are telling you, Your Honor, that to do your job, to federally tell the State of Idaho's court system how to handle its documents. They're saying you go get a press review queue. And we'll talk about that in the preliminary injunction.

What that means and what that all means in paragraph 3 -- and they say it right there -- is that if you install it, CNS is going to get the complaints at the very same time the court does. So there's two issues with that. One, whether they say instantaneous or not, that's exactly what that means, is that the press review queue would provide CNS with instantaneous access.

You then look to paragraph 32, and this is where they get cute and they try to rely on a district judge whose opinion was not challenged by the Ventura County court clerk, which is, what does it really mean to be filed? What does it mean to be processed or not? And what they're trying to do is have the courts across the country -- and it is stunning when you read these decisions, Your Honor. And I look at them, and I highly encourage you to read through *Planet III* again,

because when you read through *Planet III*, it talks about receipt twice. And that's just in the context of talking about the filings. Look at every single time that it talks about filed, when it talks about judicial proceedings, all of those things. In the state of California, it's not defined like it is in the state of Idaho. The Idaho Supreme Court has exercised its authority to say something is deemed filed when it has been approved for filing.

Now, the other point that I'll make, Your Honor, with respect to our motion to dismiss for failure to state a claim is when you listen to the arguments by CNS -- I'll just go here -- they essentially -- you have to ignore number two. You ignore the second point. The Ninth Circuit has said that you're -- the public's interest is going to be weighed with the state's administrative interest in the fair and orderly processing of the filing.

In the complaint I just showed you and in the very arguments that Mr. Fetterly's going to make on the preliminary injunction, take that and put a big red X through it, because they are demanding that you enjoin Idaho from not providing immediate access to submitted complaints before a clerk can ever touch them. That's exactly what they're doing.

And if we look at Judge Smith in his concurrence, obviously a much beloved jurist from our state who hits the nail on the head in his concurrence. Timeliness and news

worthiness are not the focus of the First Amendment analysis. Rather, the First Amendment analysis focuses on the significant government interest and whether the restriction is narrowly tailored to meet that interest. Absent either an unreasonable burden on the right of access or the access restrictions that also operate as limitations on publishing information previously obtained, ample alternatives for communication are left open.

Under CNS's claim, which is not supported by *Planet III*, you would not do the weighing of the balances. *Planet III* -- and again, I highly encourage the Court and your staff to read back through *Planet III* after this argument to really see what it says about the importance that a document be filed and then being provided to the public and press. And in the state of Idaho, that instantaneously happens -- even though it's not required to instantaneously happen, that instantaneously happens once that clerk exercises number two here, that CNS wants to ignore. Once that clerk does a fair and orderly processing of the filing, it is instantaneous access.

That is why we're asking this Court to abstain, because the Ninth Circuit itself has said when you can significantly factually distinguish a case from its precedent, then you do not need to follow that precedent. And by no means did *Planet I* address this very issue.

So, Your Honor, we request that the motion be dismissed on two grounds: First, that the Court abstain; and second, that CNS has failed to state a claim. *Planet III* does not get CNS to the words of its complaint that it, itself, chose to author and how they included them in the state of Idaho complaint, where they are effectively demanding if the clerk gets it, so does the public. And that would ignore the very bounds and tests that *Planet III* itself indicated in the Ninth Circuit needs to be followed. It ignores the fair and orderly processing of filing.

THE COURT: Ms. Duke, I do have one question for you, and it's kind of a step back, overall question.

MS. DUKE: Sure.

THE COURT: If the -- if these are Idaho Supreme Court rules and not some clerk's policy, as you said, and if the Idaho constitution authorizes the Supreme Court to make these rules, then who oversees the constitutionality of the rules? We can't let the Idaho Supreme Court review their own rules, can we, for constitutionality?

MS. DUKE: Why not? I mean, that's -- that's the purview of what they're able to do.

THE COURT: Well, I'm having a hard time with that. But I can guarantee you that my staff and I will read all of the *Planet* cases again, and we'll set out the decision when we get to it.

Let's turn to the preliminary injunction, and, Mr. Fetterly, that's your motion. You can go first on it.

MR. FETTERLY: Thank you, Your Honor. I'll -- for my presentation I will focus on the tests that this Court must apply when ruling on the motion, starting briefly with the test for evaluating preliminary injunctions followed by, once again, the test this Court must apply to Courthouse News's claim, and that is the *Press-Enterprise II* test. And I'll conclude by discussing how we apply the second part of that *Press-Enterprise II* test, which is the fact-intensive inquiry that looks at whether the defendant has met her burden under rigorous scrutiny. We just heard counsel say in connection with the other motion that the Court should disregard that, but that is the test. It's the Ninth Circuit test in which the Ninth Circuit is applying the Supreme Court's test in *Press-Enterprise*.

So let me first start with the preliminary injunction test, and only very briefly. You know, the factors this Court must consider when evaluating preliminary injunctions are set forth in the Supreme Court case *Winter v. Natural Resources Defense Council*. Now, because this is a First Amendment case, I will focus my argument on the likelihood of success element, because, you know, the loss of a First Amendment freedom even for minimal periods of time constitutes irreparable harm as a matter of law. And the balance of equities weighs in favor of

protecting First Amendment rights. That's pretty black-letter law we've cited in our papers.

So focusing on the likelihood of success element, we have to determine whether Courthouse News has established a likelihood of success on the merits of its claim. And to do so we look again to the *Press-Enterprise II* test as applied by the Ninth Circuit in *Planet III*. And once again, this is a two-part test. The first part considers whether there's a First Amendment right of access to documents or proceedings and, relatedly, when it attaches. And the second part is the fact-intensive inquiry that asks whether the defendant has carried her burden of justifying the access delays under rigorous scrutiny.

So as to the first part, I'll be pretty brief because we just discussed it in connection with the other motion. I will note that the District Court ruling in *Planet*, where the amended judgment speaks to e-filing, well, yes, that was not part of the judgment that was affirmed by the Ninth Circuit, and I concede that e-filing was not before the Ninth Circuit.

But it does not change the fact that the right of access attaches upon receipt, and the Ninth Circuit precedent in *Planet III* makes that quite clear. The underlying District Court order that was affirmed by *Planet III* makes that quite clear, and the growing list of federal court cases that I've cited and already discussed here this morning also make that

quite clear. And I think the Court need not look further than Magistrate Judge You's findings and recommendations in the Cozine case that issued just earlier this week, in which she thoroughly analyzed and rejected the same arguments counsel just made in a case that also involves a statewide administrator and also involves the same Tyler File & Serve system.

So again, with the first part of this *Press-Enterprise II* test already established by *Planet III* and the growing list of federal authorities that have applied it, we turn to the second part of the test to analyze the delays and to determine whether Courthouse News has shown a likelihood of success on the merits.

Now, before we turn to that second part of the test and apply it, I want to briefly discuss the actual delays themselves, because they form the basis of the claim. And as we discussed earlier in connection with the motion to dismiss, the delays are the lapse of time between when the Idaho courts receive newly filed complaints and when they make them available to the press and public.

And defendant acknowledges in her papers that newly filed complaints, once received by the court, they sit in an electronic queue, where they wait until court staff are able to conduct what the defendant calls ministerial review, which is checking for clerical and other administrative things.

It's basically a form of quality control, as we hear counsel talk about it, because they're checking for clerical and administrative errors.

So the defendant does not actually see that Courthouse News is experiencing these delays in access as a result of the Idaho courts' practice of withholding access until after clerical review. The delays between submission by the filer and review by the court, those are at issue, and defendant acknowledges they exist. So, you know, defendant is asking -- instead of saying there are no delays, she's simply asking the Court to review them differently in terms of business hours so they just look less severe than how Courthouse News experiences them in kind of real life and realtime based upon the actual passage of time.

And this distinction -- I'll be very brief here -- it's immaterial because defendant's business hour formulation actually confirms the delays experienced by Courthouse News. Defendant claims that on average, it takes four or five business hours for court staff to get to the complaints in the queue and conduct their ministerial review. Well, an average delay of four or five business hours means that new complaints received on or after noon on any given day would be delayed until the next court day. And of course, we're speaking in averages here. Courthouse News's moving papers cite to provide specific examples of newsworthy civil complaints that

were delayed for much longer.

So those are the delays at issue. That's the basis of the claim. And we now need to apply the second part of the *Press-Enterprise II* test in order to see whether or not Courthouse News is entitled to relief based on the likelihood of success on the merits.

And again, the second part of the test is defendant's burden. Defendant carries the burden of justifying these delays under rigorous scrutiny, and to do so she must establish that there's a substantial probability that a compelling governmental interest would be impaired by immediate access. And counsel asserts the fair and orderly administration of justice as that interest, and we'll talk about that. And that's the same interest that the *Planet* defendants asserted. And then, second, that no reasonable alternatives exist to adequately protect that governmental interest.

So again, I don't want to belabor the point any more than I have already done so, but this is the same test that the growing list of Federal District Courts have already applied. We have the Vermont case in *Gabel*. We have *Tingling* in New York. These cases have applied the same test. And specifically, I keep coming back to the *Gabel* case in Vermont, because in that case Judge Reiss applied the second part of the *Press-Enterprise II* test that this Court must now apply,

and she did so and concluded that the reasons for withholding access to new e-files or complaints until after clerical review did not survive constitutional scrutiny. And that's the same e-filing system as the Idaho courts on a statewide level. So there's nothing terribly controversial or unique about that. We have to apply the test, and that's all we're asking this Court to do.

So I want to spend the balance of my opening remarks here just kind of walking through a few examples of how we apply that test, because I think it's really important to understand how we do so.

Again, at page 19 of her opposition brief, defendant identifies the overriding governmental interest at stake as the general interest in the fair and orderly administration of justice. So we're going to have to, you know, unpack that box a little bit and actually scratch the surface of what that means and what that looks like.

And I'll do that in a minute, but before I do, I just want to point out all courts, state and federal, share that interest, including the many courts that provide access to new e-filed complaints upon receipt and without delaying access until after clerical review of the process. And the press and the courts have worked side by side for as long as we've had courts that have free press. And in this new electronic age, they have found ways to do so, and there are many of them.

There are many alternatives. We heard counsel talk about press review queue. Well, yes. For instance, some courts in California, Arizona, and Georgia, they provide access to new e-filed complaints without delaying access for clerical review by making them available through Press Review Queues.

Now, we addressed this in more detail in our papers, but all this is is a way to let the press or the public review the complaint while it's sitting in the queue after the court has received it so we don't have the delay of time from when it's received to when it's accepted.

And many of the courts that provide access in this manner, they do so using the same File & Serve system used by the Idaho courts, but that's not the only way. There's the auto accept option as well. And just to be clear, auto accept, what I'm referring to there is the system that the federal courts use, this court and many state courts, whereby cases -- new e-filings, new civil complaints, upon receipt they're automatically assigned a case number, and they're automatically made available on the court's public docket. State courts in Nevada, Hawaii, Utah, and how Vermont provide on-receipt access in this manner. Again, this court provides access to new e-filed complaints in that manner, as do the vast majority of federal courts using the PACER system. So, you know, the list of courts that provide timely, on-receipt access to new e-files goes on and on. We identify them in the

papers. I don't want to illustrate every single one right now.

The point is that all of these courts share defendant's interest in the fair and orderly administration of justice. So that vague assertion cannot by itself constitute a compelling governmental interest that warrants withholding access to newly filed complaints until after clerical review for processing. Additionally, the ability of these other courts to provide that access further demonstrates the availability of less restrictive alternatives to the Idaho courts' current practice. So again, we're just following the test. That's the two-part test.

So as we apply the second part of the *Press-Enterprise II* test in this case, we cannot blindly accept defendant's assertion that the practice of withholding access to new e-filed complaints under ministerial review and until after acceptance is necessary to protect the fair and orderly administration of justice. We know from experience in these other courts that is not necessary. So the rigorous scrutiny that this Court must apply to the reasons by defendant for Idaho's current practice require that we scratch the surface and closely scrutinize those reasons. As the Ninth Circuit said in *Klein v. San Clemente*, this Court cannot rubber stamp an access restriction simply because the government claims it is necessary.

So I'll spend the remaining part of my time --

(Reporter interruption.)

THE COURT: I know you're worried about the time, but don't. We're doing okay.

MR. FETTERLY: Thank you both. I appreciate the reminder, and I will slow it down. I'll spend the balance of my time simply illustrating a few examples of how we apply that rigorous scrutiny test to the issues that the defendant has raised in her papers. So let's take a look at what that actually looks like here. And I'm not going to address everything in the papers. It's in them. These are a few examples.

So as the first example, defendant claims that providing pre-review access to new e-filed complaints could result in the disclosure of sensitive and confidential information. But she does not establish that the current practice of delaying access for ministerial review actually protects against the hypothetical risk.

Under the Idaho Rules of Civil Procedure 2.6(a) and under the Idaho Rules of E-Filing and Service 15(a), (b), and (f), sensitive information must be redacted by the filers, not the clerks. 15(a) explicitly states clerks will not review e-filing for sensitive information. Under the rules, documents accompanied by a motion to seal must be filed in paper, IRS 5(h). It's also posted on the frequently asked

questions portion of the iCourt website.

So there's simply no nexus between defendant's current practice and the hypothetical harm she claims could result if the Idaho courts applied one of the available less restrictive alternatives. And of course, courts handle confidential filings, documents, and sensitive information all the time. That's the nature of the business. And that includes courts that provide access without delaying it for clerical review. So there are less restrictive alternatives.

Defendant also points to cost as the reason why the Idaho courts supposedly cannot provide access to complaints through a press queue. She claims that Tyler, the e-filing vendor, has quoted a price tag of $108,000 annually -- annually -- to provide access through the review future that already exists. And we know from experience it does not cost that amount or any amount. Numerous courts using Tyler software have confirmed that Tyler did not charge them for their press queues. This is in the opening and the supplemental record declarations.

In New Mexico, Judge Browning found, based on a preponderance of the evidence, that there would be no charge for a press queue even though the defendant in that case cited -- or quoted the same price tag from Tyler. And in Arizona, the state court administrator arranged for its vendor to create a press queue from scratch for a onetime charge of

$12,500.

So, you know, perhaps most troubling here is that this quoted price tag of $108,000 appears to represent an attempt by Tyler, a third-party vendor, to create an annual revenue stream and profit off the public record. And we're not talking about a onetime installation or setup fee, like we saw in Arizona. This is six figures annually. And I'm sorry, but it simply cannot be the case that a vendor can attempt to create a revenue stream and profit from the public record and can constitute a legitimate and compelling governmental interest that justifies an access restriction.

So then, finally, the opposition papers describe Idaho's current administrative practices in rather great detail, implying that providing more timely access may require them to change one or more of their practices. They talk about filing fees, letting court clerks review documents, all manner of things that all courts deal with, including those that provide timely access without delays.

And the point I want to emphasize here is that, yes indeed, some internal administrative procedures may need to change. That is the inevitable result of a policy or practice is found to violate the constitution. And although defendant does not come right out and say this in her opposition papers, the rather clear implication is that preservation of the status quo is itself an overriding interest for which there

are no readily available alternatives. However, as we explained in our reply brief, the status quo simply cannot be used to justify the status quo. Otherwise, virtually no Section 1983 action could succeed.

And as I conclude my opening remarks here, I once again direct the Court to Judge Reiss's recent order and findings in the *Gabel* case in the District of Vermont. Again, same e-filing system, same arguments, same issues. And within three weeks of Judge Reiss entering a permanent injunction prohibiting the defendant's practice of withholding access until after clerical review, the Vermont courts implemented an auto-accept system that now provides the press and the public with timely, on-receipt access to new e-filed civil complaints, just like this Court did -- or this Court does, just like the vast majority of federal courts do. And we talk about this in the supplemental Girdner declaration.

And as far as we know, none of the parade of horribles that defendant cites in her opposition papers has in fact come to pass by simply providing access in the same manner that the vast majority of federal courts do and many other states' courts do, including other courts using the Tyler e-filing system.

So just as the defendant in the Vermont case failed to justify her burden under the second part of the *Press-Enterprise II* test, we believe here as well that if this

Court simply scratches the surface of defendant's justification and properly scrutinizes them by applying the second part of the *Press-Enterprise II* test, as it must -- because it is a Supreme Court and Ninth Circuit authority -- we find that defendant simply has failed to meet her burden of justifying the access delays.

One last thing I also want to point out, and then I'll reserve the balance of my time for reply. I'll note there have now been four or five different cases in which the federal courts have granted injunctive relief on this same issue, prohibiting a policy or practice that withholds access until after receipt. None of those orders have dictated to the state courts how to do their job or what to do. None of those orders have specified a particular manner or method of access. They have simply said the practice of withholding access until after clerical review fails the constitutional test because the defendants have failed to survive rigorous scrutiny or constitutional scrutiny.

And so, yes, it may be that the inevitable result there is something that closely resembles immediate or preprocessing access, but the federal court is not dictating the courts what to do. These courts are simply choosing one of the many alternatives that is available to them, one of the many less restrictive, available alternatives. And in any of those cases, and all of them, where the courts have complied

with the injunction by implementing one of the available alternatives, at no point has Courthouse News ever had to go back to the court to seek enforcement, and at no point has the court ever had to step in and intervene. There's been no ongoing federal audit to invoke an extension term. There's been nothing of the sort.

So we simply ask this Court to apply the test, and we believe if it does so, it would conclude that defendant has failed to meet her burden under rigorous scrutiny. Thank you, Your Honor.

THE COURT: Counsel, I do have one question before you end. You mentioned that there were four or five cases out there that have reached the level of a preliminary injunction and granted it. Are you aware -- I'm not, but are you aware of any cases out there where the court got to the preliminary injunction stage and denied a preliminary injunction?

MR. FETTERLY: No, Your Honor, I am not either. I believe that the two cases where Courthouse News has been on the wrong end of a ruling have been on that abstention ground that we discussed earlier. That's *Brown* in the Seventh Circuit and then, you know, the *Gilmer* case in the Eastern District. And I will note in the Seventh Circuit the underlying District Court opinion applied the test and found the defendant failed to meet her burden. So that was an appeal from an order granting the preliminary injunction. The

Seventh Circuit ended up dismissing the case on abstention grounds.

But to Your Honor's point and to the question, no, I'm not aware of any case where the District Court applied the test and found that the defendant satisfied it. I suppose, in full candor here, that in the *Planet* opinion, we do have kind of a split on the scanning policy. But that's a little bit different. And in the e-filing context, the answer is, no, I'm not aware of any court that considered an e-filing scenario like we have here, applied the test, and found that the defendant met their burden, and then on that basis declined to grant the injunction.

THE COURT: Okay. Thank you.

Ms. Duke, you may go ahead. And if you have a different answer on my question, you're welcome to give it. Otherwise, you can just go ahead.

MS. DUKE: Sure, Your Honor. Thank you. I'm not aware of -- certainly not every court has issued a preliminary injunction. I don't think that Mr. Fetterly can say that, whether they just haven't gotten to that decision yet, whether that wasn't what was precisely requested.

But in this instance, Your Honor, I think the big question -- you know, one of them for Mr. Fetterly is, under the automatic -- we all get it. If it's, you know, submitted through the electronic court record, we all get the complaint.

Under that, how is the second significant balancing scale in the *Planet III* case addressed? We know *Planet III* said you've got a qualified right of timely access to newly filed, nonconfidential complaints.

But it went on to say, however, this right does not entitle the press to immediate access to those complaints. Some reasonable restrictions resembling time, place, and manner regulations that result in incidental delays and access are constitutionally permitted where they are content neutral, narrowly tailored, and necessary to preserve the court's important interest in the fair and orderly administration of justice.

How does CNS's request to this Court related to an injunction give any recognition, any weight at all to that other important balance that *Planet III* has defined as the law of our circuit? It doesn't. If you were to grant the injunction that they have sought, then when a complaint is submitted through the Tyler filing system, that means it's automatically within our court record, which it is not. It's still on the Tyler side of the filing. But even if it was immediately on our side of the filing, then there's no administrative review that Mr. Fetterly and CNS are indicating to you will occur or should occur.

That completely ignores the holding of *Planet III*, and it obliterates that important scale that I mentioned in

our opening remarks on the motion to dismiss, Your Honor. The State -- it is acknowledged that the State has an administrative interest in the fair and orderly processing of filings. If we grant CNS what they want, which is to have a submission automatically provided to CNS, how are we -- how are we handling that administrative interest? We're not.

And why other courts in our circuit have not looked at that, have not seen that that's an important part of *Planet III*, I don't know. But I never like the argument that CNS is making of, "Well, Judge, just because all of these other courts are doing it, you would be crazy not to." We have a Ninth Circuit case that specifically states here's your balancing that you're going to do. The public interest and contemporaneous filings with the court and the State's administrative interest in the fair and orderly processing of complaints.

THE COURT: Am I splitting the hairs too much to say that there's a difference between providing it immediately and not delaying access? Could I view those as two separate things?

MS. DUKE: Of not providing it immediately and of delaying access?

THE COURT: Not delaying access. Is there a difference between immediate access and not-delayed access?

MS. DUKE: Well, I think in Idaho's context there is,

and that is there is no delay in access. Because once it is accepted and filed, unlike *Planet III*, where the clerk even after that step had a supervisory review and then couldn't say that the complaints made it into the bin, in Idaho, once our -- once our clerks perform that very crucial balancing test that CNS wants ignored, that administrative interest in making sure that we're maintaining our court records, once they say, "Boom, yes, I've got the check, I've got the signature," it's now accepted as a file -- or a filing, it's immediate.

And so, Your Honor, I hope I'm answering your question. I don't know that I fully understood it, but I can tell you this is a very different circumstance than anything else presented, and that is that even though the State of Idaho does not have to provide immediate access once a document is filed, it is. So what's the harm to CNS? How is it not newsworthy for them to say, "Today filed in the state of Idaho: Huge case against the State of Idaho for environmental claims"? That is the newsworthy point.

CNS is saying that they are somehow not having their First Amendment right satisfied because they can't say to the public, "Hey, there's going to be a filing. We know it because there was a submission to this -- to the Idaho courts. They're looking at it to get it now officially filed."

Where is -- where is this great harm that they're

referencing? It's an immediate access, an access that, Judge, I didn't even appreciate until I worked with my clients on this. Once the clerks say, yes, this is filed, that's the first time even the judge knows about the case.

THE COURT: Right.

MS. DUKE: CNS wants to know about the case before anybody. They want to know about it at the very same time that the runner is literally leaving my office to walk to the courthouse to file the complaint and to stop my runner and say, you know, "Hey there, Ally, do you mind? I need to see that real quick before you hand that to the clerk, because I need to now take that and run and get an advantage on other news organizations."

That's not what the First Amendment's for. The First Amendment is for the timely access without unreasonable restrictions to -- we admit, to court filings. And that's why this concept of filings is so crucial and why it's so ignored in CNS's papers.

Judge, did I hit your question and answer it?

THE COURT: Yeah.

MS. DUKE: I really want to.

THE COURT: I think you did. Go ahead with your argument.

MS. DUKE: Okay. Thank you, Your Honor.

So when you look to the preliminary injunction

standard, I mean, this is an extremely high burden that CNS has. This is not the situation where we don't have immediate access to a filed complaint. We have that in Idaho. Mr. Fetterly has to admit that.

So there is no way that they can show that there's some irreparable harm in that they're not receiving immediately filed complaints. Instead, again, they want you to not let the clerks do exactly what the Idaho Supreme Court has instructed them to do, and that is to review the complaints, take care of the administration portion, and then let them be a part of the official court record.

I don't see how the second balance is in any way factored in if any news organization, including CNS, gets the prefiled submissions by a party, again, stopping my runner on their way to the courthouse. And I suspect their argument's going to be, yeah, but in this new-fangled, you know, e-filing world, we can file in the middle of the night or file on Christmas Day or submit on Christmas Day or submit on a weekend. A court clerk has still not had the opportunity to do their job, and that is to make sure that the processes are being filed -- or followed.

And so it really is a distinction that is glaring when you read through *Planet III* and what CNS is asking this Court to do. And again, I -- I'm puzzled by how other courts have not followed that second scale, but they haven't. It's

as if there's just one scale in CNS's argument.

Your Honor, quite frankly, for CNS to prevail, you're going to need to ignore a lot of things. You're going to need to ignore those limitations that are specifically outlined in *Planet II*. As you know, in your review of *Planet III*, at page 596 that, *Planet III* itself acknowledged even in this era of electronic filing systems, instantaneous public access to court filings, especially complaints, could impair the orderly filing and processing of cases with which clerks' offices are charged. After all, litigants are not uploading their complaints to the Internet. They are filing them with the court, making them subject to judicial administration.

How is a complaint in Idaho subject to judicial administration if this Court orders that every nonconfidential complaint filed in the state of Idaho be immediately available pre-administrative processing? We submit to you that that can't be done.

The *Planet* case went on to emphasize that the 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. Now, that's why, I'm sure, CNS argues that the State of Idaho needs to implement -- which likely -- you know, who knows, but likely when we're talking implementation, read through those declarations that CNS has submitted. They're talking about

implementation. They're not talking about licensing. Licensing is a very different beast than implementation. A company can come and say, "We'll implement this. We'll get your programming running. We'll get it up. But by the way, to use it, for the next year it's going to be $108,000. And to use it the year after, it's going to be $108,000, until we contract again."

And there is nothing that Mr. Fetterly has provided from anyone to dispute what Ms. Omundson submitted to you: that the State of Idaho -- if you are to rule that they are now enjoined from following their court rules and from doing their process, the State of Idaho is now going to need to go and get legislative approval to add to its budget to then implement this system. All of this is in contradiction to *Planet III*, all of it. Where is the judicial administration that they have the ability to do?

Now, in their submissions that they provided to you, you know, those green and yellow and red spreadsheets, those spreadsheets start with date filed. And I should at least just show this, Your Honor. So let me just pop that up here. So if you look here, and it's a little hard to see, but you'll see the red and then you'll see their little column. It says "date filed." That is -- that's the very start of them trying to show you that 44 counties of elected clerks and all of their staff are failing to do their job. And they're basing

it on an absolute, in my view, misconception and trying to, I think, hide the ball on what "filed" means. It's not filing. What it should say there, Your Honor, if they were going to be genuine in their report of data, is it should say "date submitted." Then there should be a "date filed."

And what did we do to contradict and counter that? We worked hard to show you, Judge, that if you actually take the data and if you actually do a few things that comply with Idaho's rules, that our Idaho clerks -- and if you look here, this is at Docket 20-3. Our Idaho clerks are, in this time period of 9/1/2021 to 10/31/2021 -- which is a time period that CNS cleverly chose, because it knew that the State of Idaho had Tyler, who was changing one of the platforms. That caused some delays by our clerks. That had nothing to do with our clerks and their administrative processing with but instead a switchover to Amazon. They cleverly chose this time period.

And what they also did is they did a 24/7/365 analysis, failing to factor in courthouse hours. Now, let's think about that, because courthouse hours were at issue in the *Planet III* case. And what was the *Planet III* clerk doing with courthouse hours? The *Planet III* clerk had adjusted them to deal with, you know, we're open until 4:00 or 4:30, but we're not going to let you have access to these filed complaints after 3:00 because we got to get some stuff done.

That's not what the state of Idaho's doing. The state of Idaho has access during court hours to all of the administratively reviewed, accepted, filed complaints. And if you factor in 24/7/365, they are doing that in this time period at an average time of 5.07 hours to review, approve, and have it filed. How is that not timely for CNS to then be able to report a newly filed complaint today, stating blank?

I'll also note that all of this is done through the lens of what we've all been experiencing together, something that the entire world, humanity has all experienced all together, and that is COVID. And you look at -- when we have a search in, for instance, Ada County and we have our hospitals on crisis standards of care in this very time period, what are our court clerks doing? They're doing their job. They are doing the administrative task that *Planet III* charged them with and said they could do, and they're doing it and they're doing it timely.

CNS wants everybody to ignore those clerks, to ignore what they do, and to ignore the important function of their job. They want records automatically included in the court's file so that they can see them, in complete contradiction to what the Idaho Supreme Court has identified as its process for forming the necessary administrative review of complaints.

You'll also note that in the supplemental filing -- and I don't have a slide on this one, but in the supplemental

filing, they then also chose to take January and February of this year, which we responded to. And we unfortunately all know -- and as Patti's going through now and as my entire family and myself went through two days before Christmas for the next two weeks, we, as we call it, got omicron, as did the great majority of the state of Idaho from mid-December through about three weeks ago. We've all watched the curves.

And the data that we submitted to you, Your Honor, is that our court clerks were still doing exactly what they're allowed and permitted to do under *Planet III*, and that is timely review submitted complaints and mark them accepted. And once they're accepted, they are immediately available.

And this concept -- I guess I would love to know how the First Amendment -- of why it gets to ignore business hours. And as Justice Smith noted in his concurrence, you still need to have the reasonable access to review these administrative filings. And as *Planet II* indicated -- let me get there -- again, the First Amendment does not require courts, public entities with limited resources, to set aside their judicial operation to meet the immediate demands of the press.

CNS here has required -- or is requesting you to order that immediately the entire state, 44 counties with their elected clerks and all of their staff, process and evaluate complaints to make sure that they can be included in

the judicial record. That is not something that should be done at this preliminary injunction stage.

And if this Court is not going to dismiss the case, is not going to abstain, then we request, Your Honor, that a trial occur so that the Court can understand and hear testimony as to the great implication of what it is CNS is trying to do, which includes erasing part of *Planet III's* very holding, which, as you know, Your Honor, is this portion here: However, this right does not entitle the press to immediate access to those complaints. Some reasonable restrictions resembling time, place, and manner regulations that result in incidental delays in access are constitutionally permitted where they are content neutral, narrowly tailored, and necessary to preserve the court's important interest in the fair and orderly administration of justice.

We have provided to you, Your Honor, affidavits and whatnot for you to review so that you have an appreciation of what the evidence will be in the event the case is not dismissed and we head to a motion for permanent injunction. And when you look to what we've submitted to you, Your Honor, the balance of the equity very much tips in favor of the Idaho courts. The Idaho courts, if an injunction issues, will be forced to rebuild their entire system for new filings. The Idaho Supreme Court will be forced to implement, revise, and upgrade new court administrative rules.

And I understand Mr. Fetterly's going to say, you know what? When states are behaving badly, you've got to step in, and you've got to deal with these things. And there should not be an issue with the State of Idaho having to revamp its entire process because all these other states where judges have ignored the second important balancing act have been able to do it. Well, that is not what *Planet III* says.

In addition, there will be a change to court rules. They're going to necessitate training 44 county clerks, all of their staff, and all of the staff in Ms. Omundson's office to handle this new system. A change to auto-accept will necessitate training Idaho's state court judges regarding the new policy, because what do they do when someone files -- like you asked me at the start of the hearing, Judge, when someone is auto-accept, here's what happens, and here's why Rule 12 protects against this and in the balance of a litigant's interests, in my view, should happen with electronic court submissions.

Under the Idaho system, if you goof and you didn't provide the proper filing fee, guess what happens? That filing's rejected. And guess what defense lawyers like myself are going to do for our insurance claims? You better bet I'm going to come in and say, "I'm sorry. It was rejected. It wasn't filed on time. Yeah, it was auto-accepted, but a Court has since dismissed it because the filing fee was not paid."

And you can bet that we're going to argue that the statute of limitation was not met.

Is that right? Is that fair? Is that just? That does not occur under the court system now. Under the court system now, that litigant has three days to correct the issue under Rule 12. That litigant has three days to be able to say, "Oh, I didn't get you my filing fee? Here you go." How is that so damaging to the First Amendment access to a complaint versus all of the perils that could exist on the other side of it?

You also are going to have to educate the attorneys -- which I often say managing attorneys is like herding cats -- about the new system. They're going to have to know that there's no more three-day grace period. And as we submitted to you with the Ada County clerk's declaration, gone is the enforcement ability of the clerks to be able to have the rule to say, "You know what? You didn't file it correctly, Ms. Duke. You've got to get your affidavit with a signature." Right now, if I don't do that in three days, it will not be accepted for filing as of the date it was submitted. It will be late.

There will be no power under this auto-accept feature for a county clerk to go and have the actual record itself be complete and be what it's supposed to be so that a district judge or magistrate judge can make a decision. This is why

Planet III very wisely included the second scale, the scale that CNS ignores. And that is the scale of we need to make sure from an administrative standpoint our court records are accurate and complete.

In addition, the press review queue -- here's where we come to a unique Idaho issue that CNS ignores. That again, Your Honor, is that case I cited to you earlier, where "press" is not defined in the state of Idaho like it is in California and other states. The Supreme Court has declined to do so. The press is the public under Idaho law, period. CNS has no greater right than my grandmother, than my kids to go access something. They don't have a greater right. They're asking you to have something special that no one else will have. The public is the press in the state of Idaho. That's not like California; that's here.

And again. I mentioned the $108,000. Mr. Fetterly can unsupportedly and without foundation make lots of assertions as to Tyler, and he can also say, "Oh, I can't believe a company would charge for something like that, and that's not right." Well, guess what? That's what Ms. Omundson was told: "If you have the press review queue, you -- we will implement it, but you're going to have $108,000 a year as an estimate to have this benefit of a press review queue."

There is nothing in *Planet III* -- and in fact

Planet III itself -- again on that quote that I've shown you before many times that is ignored by CNS -- does not require courts, or a public entity with limited resources, to set aside their judicial operational needs to satisfy the immediate demands of the press.

How is 5.07 hours -- business hours -- to review a complaint impeding CNS's right to timely review? We submit, Your Honor, that it's not. And under *Planet III* there is no -- there is no harm to them, because we're doing exactly what *Planet III* said we could do, and we're doing it in a timely fashion.

We even have our Supreme Court saying -- they rule that it can take up to three days. That's not even what's happening. It's happening much sooner than that, unless you want to manipulate the data and ignore when clerks actually work. Under CNS's theory, we as a state should now staff our clerks' offices 24/7/365 if we want to be able to not have a press review queue, if we want to be able to do some sort of orderly administration of justice. And that's not at all what any of the precedence says.

You know, Your Honor, one last point I'd like to make. You had asked me at the conclusion of our last argument, What do we use? And in that tax case, in *Schaefer*, there was a note that the U.S. Supreme Court can also handle those types of things when there is something that a state

court is doing that has been challenged. And so when you look to that precedent as well, that's at least an avenue.

Your Honor, do you have any questions for me, or is there anything I can hit? Because I want to make sure that I've answered anything you have to your satisfaction.

THE COURT: I do not have any further questions. Thank you.

MS. DUKE: All right. Thank you, Your Honor. We would request, then, that the preliminary injunction be denied.

THE COURT: All right. Mr. Fetterly, you may have about five minutes for rebuttal.

MR. FETTERLY: Thank you, Your Honor. I want to first start by addressing this issue about kind of the immediate access again that counsel keeps referring to and this notion that *Planet III* somehow has this alternative test -- the other scale, if you will -- that isn't reflected in the opinion, quite frankly. And I think the reason why counsel hasn't seen any other court apply the so-called additional scale is because it's not the actual test. We have the *Press-Enterprise II* test, and that is the test.

You know, Your Honor, you posed the question, is there a distinction between immediate access and enjoining a policy or practice that results in delays, and if enjoined may in fact result in more immediate access?

Yes, I think there is a distinction, and the distinction again hinges on the qualified First Amendment right of access. I think counsel perhaps, you know -- well, I think part of the confusion in *Planet II* is that there are three phrases, like entitlement, demanding, and these words. I think if we read *Planet III* clearly, it comes out that what the court is saying is that there is no immediate right of access in the sense that if there is a delay, Courthouse News cannot say, "My First Amendment rights have been violated" per se because there was a delay. It's a qualified right.

Defendant has the opportunity under the *Press-Enterprise II* test, the second part of it, to justify the delay. And that's why we have the immediate right and that's why we have all of this language throughout *Planet III* that says there's no entitlement.

However, immediate access is not off the table just because the defendant has to justify her burden under *Press-Enterprise II*. And I'd point the Court -- this is the response to the surreply, but it's in *Planet III*, and I quote -- and I just point to this document because it's recent, and it's a one-page document. I quote from *Planet III:* The defendant's burden is to first -- quote, Demonstrate that first there is a substantial probability that its interest in the fair and orderly administration of justice would be impaired by immediate access and, second, that no

reasonable alternatives exist to adequately protect that government interest.

So the Ninth Circuit is even using immediate access in the test. And we're not demanding it as a matter of right because the First Amendment entitles us to do it. What we are saying is that under this test, defendant has failed and will fail at trial to show that there is in fact a substantial probability that its interest in the fair and orderly administration of justice would be impaired by immediate access.

And so if the Court applies this test and if the Court finds that defendant has failed to meet her burden, the policy and practice that results in the delays in access can be enjoined. And if we enjoin that practice, yes, it may in fact be that there is immediate access, but that's not because the First Amendment demands it. It's because defendant failed to meet her burden under constitutional scrutiny of justifying the practice. So that, I believe, is the distinction. And again, that's why I just keep coming back to the idea that this is a test, and we ask the Court to apply it.

Now, very briefly, a few other points. Counsel has made various arguments based upon the court rules. There is no conflict between the court rules and the First Amendment. There's not a single court rule that I'm aware of -- and I don't think counsel has pointed to one -- that says that

access cannot be provided to the public or the press until -- and to be clear, we're not suggesting that Courthouse News has any greater rights than the public. But as *Planet III* talks about, the press is the public. It is an extension of the public. There's nothing in the rules that says that access must be withheld or restricted until after clerical review and acceptance. So there's no tension. There's no conflict.

And we are not saying that the court clerks cannot do their jobs. What we're saying is that they cannot withhold or restrict access while they do them. And that really is the crux of what Judge Reiss talks about at length in her ruling and order out of Vermont. In the -- in the electronic world, you don't have some of the same considerations you have in the paper world, which the *Planet* court had to deal with. We aren't talking about a singular physical object only one person at a time can hold. We're talking about an electronic document that eliminates those barriers, eliminates those issues. Judge Reiss talks about that. And in the electronic world, there is simply no compelling or governmental interest to withholding access to that document while the court staff do their job.

And, yes, there has been a pandemic. Yes, there is hardship. There will always be circumstances that make life hard, and Courthouse News is not unsympathetic to that. We're not asking anybody to not do their job, and we're not looking

past the realities of life.

But what we are saying is that these circumstances really illustrate the problem with inserting, you know, human physical review of documents and withholding access while the courts do their jobs. If you simply remove the policy or practice of withholding access until after review and processing, all of these other issues simply fall by the wayside. They're not real issues anymore, and they need not be issues, as we see in the vast majority of federal courts that provide this level of access and the numerous state courts that do so as well.

So, you know, again, we've talked a little bit about -- counsel talked about filed versus received. You know, there's no sleight of hand here. We believe filed and received are synonymous and interchangeable as the Ninth Circuit uses them. I suppose there is a difference between the clerical and administrative use of that word as defendant uses it versus when the First Amendment right attaches, which is upon receipt.

But as we talked about in our papers, you know, clerical definitions simply cannot define the First Amendment, and the First Amendment does not bend to local court rules. That's -- that's just the opposite. Supreme Court rule establishes that local court rules must comply with the substantive law. And what we're saying here is, you know, the

First Amendment trumps.

But once again, there is no conflict, because these rules do not actually prohibit access. Counsel invokes the three hours [sic] that is allowed under the Public Records Act in Idaho, which I think, as we all commonly know, is simply used for archival research and such things. Yes, some period of time is allowed for clerks to do their job in responding to those requests, but that does not preclude more timely access under the First Amendment standard than applies to civil complaints. And I guess if there were a conflict -- and to be clear, there is not -- I don't think there would be any more question that the First Amendment prevails and must trump the local court rule or statute.

So when we start talking about the delays, counsel spent a fair amount of time talking about the number of hours. And, you know, again, this kind of just points or makes a distinction between working hours and the real-life passage of time. However you look at it, there is no actual dispute -- I don't believe that there are delays in access. The only way that delays are eliminated is if you start the clock on the First Amendment once the document has been accepted, which is after the delay at issue has already occurred.

So if we're talking about the length of time between receipt by the Court or submission by the filer on the one hand and clerk review and acceptance on the other, what

counsel's papers show is that, you know, during that period in November, it was -- 5.8 average hours lapsed in between, and in the surreply it was 4.81 average hours that lapsed in between. Again, these are averages. It doesn't account for the longer delays that exist that we address in our papers.

And I guess the important point that I want to just land with here is that it's not this Court's job to divine the number of hours that constitutes timely access. This Court's job, as set forth in *Planet III,* is to apply the constitutional test to those delays and closely scrutinize whether the defendant's justifications for the current practice of withholding access until after processing and acceptance satisfies rigorous scrutiny. And we believe that if the Court does that, as we've explained, that we'll find that the defendant has failed to meet that test, just as the clerks in the other cases that we've discussed have failed to meet that test.

And to put a slightly finer point on it, I think the problem here is that if the Court starts talking about four hours is okay, five hours is okay, six hours is okay, whatever the number may be, we've now created a First Amendment dead zone. There's a period of time in which complaints can be withheld from the press or the public for any reason or no reason at all, and that is squarely at odds with the *Press-Enterprise II* test as set forth in *Planet III*.

The defendant must demonstrate that, you know, more immediate access would be impaired -- or governmental interest would be impaired by more immediate access. That is the test. This Court must apply that test. And that's what we ask the Court to do, and we respectfully request that if the Court applies that test, it will conclude that the defendant has failed to meet her burden and that the motion for preliminary injunction should be granted.

Unless the Court has questions, I have nothing further, Your Honor.

THE COURT: No, I do not have any further questions.

I will say -- and I suspect that all of you hear this quite frequently, and I mean that as a compliment. It's very refreshing to get briefs and arguments as coherent and as well done as has been done in this case, and I appreciate that. The issues are clearly defined. The positions have been well enunciated. Unfortunately, the hard part is coming to an answer.

But I will take this under advisement. I will get a decision out as quickly as I can. I'm not going to say it's going to be immediate and I'm not going to say it's going to be without delay, but I will get it out as soon as I can. So thank you. Unless there's anything else, I think we're done for today.

MS. DUKE: Your Honor, thank you for your comments.

Appreciate your time.

And, Patti, please get better.

MR. FETTERLY: Thank you, Your Honor.

THE COURT: Thank you, court's in recess.

(Proceedings concluded at 11:51 a.m., February 18, 2022.)

C E R T I F I C A T E

I, ANNE BOWLINE, a Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing 73 pages constitute a full, true and correct transcript.

Dated this 28th day of February, 2022.

/s/ Anne Bowline

ANNE BOWLINE
Registered Merit Reporter
Certified Realtime Reporter