

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

COURTHOUSE NEWS SERVICE,)	
)	
Plaintiff,)	Case No: 4:22cv106
)	
v.)	Tallahassee, Florida
)	May 12, 2022
BRENDA D. FORMAN, in her)	
official capacity as the)	
Broward County Clerk,)	
FLORIDA E-FILING AUTHORITY, and)	
KAREN E. RUSHING, in her)	
official capacity as chair of)	
the Florida E-filing Authority,)	
)	9:05 AM
Defendants.)	
_____)	

**DAILY TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1 through 109)**

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P R O C E E D I N G S

1
2 (Call to Order of the Court at 9:05 AM on Thursday, May 12,
3 2022.)

4 THE COURT: Please take your seats.

5 We are here in Case No. 4:22cv106 for a hearing on a
6 motion for preliminary injunction. If -- I have people starred,
7 so that indicates to me who may be speaking today as lead
8 counsel.

9 But if whoever is going to primarily speak for the
10 plaintiff will identify yourself.

11 MS. LOCICERO: Yes, Your Honor. Carol LoCicero.

12 THE COURT: Welcome, Ms. LoCicero.

13 How about for Defendant Forman?

14 MR. CALLOWAY: Good morning, Judge. Sidney Calloway
15 on behalf of the Broward County Clerk of Court, Mr. Forman.

16 THE COURT: And for -- I'm sorry. I've also got
17 general counsel for the Broward County with you; correct?

18 MR. CALLOWAY: Yes, Your Honor.

19 THE COURT: Welcome.

20 That's Ms. Churly-Davis?

21 MR. CALLOWAY: Yes, Judge.

22 THE COURT: Welcome.

23 And then -- I'm sorry.

24 MR. STEWART: Your Honor, Greg Stewart with Nabors
25 Biglin & Nickerson representing Chairman Rushing of the E-filing

1 Authority, and I'm here with Elizabeth Ellis.

2 THE COURT: Welcome. Thank you.

3 My apologies that we're getting started five minutes
4 late. I was handling a matter as chief judge on the phone.
5 Unfortunately, I spend an inordinate amount of time dealing with
6 administrative matters.

7 It's my understanding from my clerk, meaning the
8 courtroom deputy, that the parties have indicated that they're
9 relying on their papers and what's been filed so far, and that
10 there will only be argument today. I just wanted to verify
11 that.

12 Is that correct, Ms. LoCicero?

13 MS. LOCICERO: Yes, Your Honor.

14 THE COURT: Mr. Calloway?

15 MR. CALLOWAY: Yes, Judge.

16 THE COURT: Mr. Stewart?

17 MR. STEWART: Yes, Your Honor.

18 THE COURT: All right.

19 Ms. LoCicero, how much time are you requesting for
20 this morning? I'm just -- for planning purpose.

21 MS. LOCICERO: Your Honor, I'd be surprised if I took
22 more than an hour for rebuttal, questions and argument.

23 THE COURT: Mr. Calloway?

24 MR. CALLOWAY: Your Honor, I think 45 minutes.

25 THE COURT: Mr. Stewart?

1 MR. STEWART: Much shorter. I believe 15 to 20
2 minutes, Your Honor.

3 THE COURT: Thank you.

4 Ms. LoCicero, it's your motion. I'm going to call on
5 your first.

6 I can wait, I guess, but what I do want to find out
7 from you is what the state of the record is as it relates to, A,
8 what specifically are you asking for to be done, as a practical
9 matter, how it works, and, B -- when I say what you're asking
10 for, what relief.

11 I mean, I know through your paper there's a suggestion
12 that, Well, Judge, we're asking for the electronic equivalent of
13 what used to be done as it relates to hard-copy filing, where
14 the hard copy would come in of the complaint, together with a
15 check, and that the complaints would be stuck in a box and that
16 the press would have access to them. That was described in the
17 papers that you filed.

18 In any event, I then understand you to be arguing,
19 Judge, based on the chart which we submitted giving an example
20 of the six-month period ending in February of 2022 of the
21 8,831 -- give me one second.

22 Can somebody turn down the volume?

23 (Pause in the proceedings.)

24 THE COURT: You know, Judge, while there -- there was
25 zero delay for 13 percent and one day for 44 percent, more than

1 half the cases were two days or three days plus, which for
2 purposes of the press, that information is then stale. And
3 based on our right of access to the information, you know, that
4 chart demonstrates the problem we're confronted with.

5 So help me, again, to understand exactly -- Judge,
6 this is what we are asking you to do, and this is what we
7 believe the record reflects as it relates to the possibility of
8 doing that. That is why it's a reasonable alternative.

9 And in framing the question that way, I'm not
10 suggesting who bears what burden and so forth, but I just want
11 you to focus on that for me.

12 MS. LOCICERO: I understand with respect to the remedy
13 really. What we are asking the Court to do is find that there's
14 a qualified First Amendment right of access that attaches upon
15 receipt, which means submission of the filing by the e-filer
16 through the portal. We believe that the qualified right
17 attaches at that point, and that the delays for no -- for no
18 access before processing violate the First Amendment of the
19 United States Constitution.

20 So we're really asking the Court to do --

21 THE COURT: So the remedy is -- you're saying -- the
22 nub of it is, Judge, I'm suggesting that our access has to be
23 instantaneous?

24 MS. LOCICERO: Not instantaneous, Your Honor, but it's
25 an e-filing system, so it's quick. What we're asking is that

1 the Court do what Judge Reiss did in Vermont and say, We are
2 enjoining the defendants from prohibiting access until all their
3 processing activities occur. So there's --

4 THE COURT: That's why I'm asking, because I'm a
5 practical kind of guy.

6 MS. LOCICERO: Sure.

7 THE COURT: There is a big difference between saying
8 you can't delay it until you've done everything you intend to do
9 and instantaneous. You've already said, Judge, we are not
10 asking instantaneous. It seems to me we are still talking
11 about, however you slice it, a continuum, instantaneous versus
12 until the defendants feel like it, when they've done whatever
13 they are going to do. I mean, that's the continuum.

14 And I'm not, by the way, suggesting that the defense
15 has said, Judge, we get to do it whenever we feel like it. I'm
16 just suggesting that that would be the extreme end of the
17 continuum.

18 So does Judge Reiss just say, Do it faster, which
19 seems to me to be an odd injunction, or does she specify when it
20 has to be done?

21 MS. LOCICERO: She says -- no, she does not specify
22 when it has to be done. To do it right -- but she specified --
23 Judge Reiss says you can't withhold access for processing.

24 And I just want to make it clear what happens in the
25 e-filing environment, that there's a submission by the filer who

1 has filled in all kinds of information, selected a county and
2 submitted their complaint. Then if we're talking about what
3 happened in the traditional sort of paper environment, there's
4 an automated intake that occurs that used to be done by a human
5 being.

6 From the Authority's own declaration by Ms. Weber, we
7 know that even at the highest processing time that automated
8 intake takes a maximum of about five minutes. It often takes
9 seconds. And we've submitted, actually, file-stamped complaints
10 that our firm filed with the Nichole Parsons affidavit showing
11 how fast all that happens. That's the point at which we're
12 asking for access to the complaint. We're not saying that we
13 get to do it before the automated intake process has occurred.

14 So if we equate it to the traditional paper system,
15 the complaint at that point flows into a bin, and that's how,
16 traditionally, complaints were made. That's the point at which
17 we want it. Then Clerk Forman's office, or the Authority, or
18 anyone who needs to do any processing activities related to that
19 complaint can do it. There are already multiple queues at the
20 portal, 67 for all the counties in Florida, a correction queue.
21 Ms. Weber's declaration describes different queues.

22 One less restrictive alternative, which we're not
23 asking the Court to order as a specific remedy, would be to have
24 a public review queue, like Arizona, that permits statewide
25 access after that automated intake has occurred. That's how

1 Arizona handled public access.

2 THE COURT: All right. Let me ask about that again as
3 a -- in terms of what's before me and what I know and what I
4 don't know.

5 Do we know what would be involved to create that
6 additional queue before it goes to the review queues?

7 MS. LOCICERO: We do somewhat. I mean, Bill Girdner's
8 declaration talks about Arizona. Arizona is run by software
9 from a company called Granicus. Granicus is also the e-filing
10 software that the Florida portal runs from. So Arizona, in a
11 negotiated fashion, without litigation, agreed to provide a
12 public review queue. Because the cost of litigation would have
13 dwarfed the expenses of paying for the review queue, Courthouse
14 News actually paid for the review queue, and it was \$12,500 in
15 Arizona.

16 So we know that there's a reasonable, less restrictive
17 alternative available for minimal costs. I mean, frankly, we --
18 there's been more spent by all the parties in this litigation
19 than a public review queue would cost.

20 THE COURT: That's what it cost to create a public
21 review queue in Arizona. Understanding that the same company
22 that provided their software provides this software, how do I
23 know that the software being used by the defendants in this case
24 can be manipulated in the same way with the same ease?

25 MS. LOCICERO: Well, I would say a couple things to

1 that, Your Honor.

2 First of all, it's the same software in both states,
3 and second of all, when you get to analyzing those questions,
4 part of that is going to come in under whose burden it is to
5 justify what.

6 THE COURT: And that's why I started --

7 MS. LOCICERO: Sure.

8 THE COURT: -- with that qualification.

9 MS. LOCICERO: I understand.

10 And what you'll see in the declaration from Ms. Weber,
11 who is the portal program manager, is that she talks about
12 unknowns. But we also know and have submitted to the Court with
13 the Nichole Parsons declaration that there are public records
14 out there showing that there was communication between Ms. Weber
15 and her counterparts in Arizona about Granicus and what -- I'm
16 sorry. She communicated with Granicus about what was going on
17 in Arizona and, in a way, just stopped there.

18 So, you know, our argument would be -- and I know you
19 don't really want to get to the burdens yet, but that's
20 justified delay. They had to do more than just sort of, like,
21 say, Well, we don't know. You know, you know how to know the
22 answer. You haven't gotten the answer. We know what a
23 comparable system costs, and we've put that into the record for
24 the Court.

25 THE COURT: You specifically identify what you're

1 asking for and how it works generally in your underlying
2 explanation for that. So why don't you -- now would be a good
3 time to turn to, Judge, we think we met our burden under the
4 appropriate analytical framework, and we believe that its up to
5 the defense then to identify why that's not a reasonable
6 alternative.

7 I assume you're relying on, for example, the test that
8 was applied in *Schaefer* and *Planet*; correct?

9 MS. LOCICERO: We are relying on the *Press-Enterprise*
10 *II* test, Your Honor.

11 THE COURT: But I meant that's as applied in *Planet*
12 and *Schaefer*.

13 MS. LOCICERO: In *Schaefer*, you are right, Your Honor,
14 and multiple cases, actually, that CNS has brought.

15 So our argument today is that the United States
16 Supreme Court in *Press-Enterprise II* set up the test. We accept
17 the fact that we have the burden of proving that there is a
18 qualified First Amendment right that attaches to circuit civil
19 complaints, and the way that the test works under
20 *Press-Enterprise II*, as applied by multiple courts, is the Court
21 looks to, well, is there an experience, meaning a history, and
22 logic associated with access to circuit civil complaints.

23 And so, Your Honor, I think there are probably a bunch
24 of ways you can get to the experience and the history. We've
25 submitted declarations from CNS journalists Mr. Girdner,

1 Mr. Abbott and Mr. Angione that talk about their personal
2 experience as journalists being able to get traditional access
3 to paper complaints, and the bin, and how that worked. And that
4 was right after those quick initial -- that initial intake
5 transaction: Here's my fee; here's my complaint. Stamp it.
6 Here's your receipt.

7 THE COURT: And, hence, your argument is, Judge, what
8 we propose is the digital equivalent of that?

9 MS. LOCICERO: We do propose the digital equivalent of
10 that. And I think the Court can also look to the case law
11 that's been decided concerning civil complaints, case law that
12 CNS has brought and case law that CNS hasn't brought.

13 The *Bernstein* case in the Second Circuit talks about
14 when did the federal system make complaints available. Well,
15 civil complaints have been available in the federal system since
16 1938, according to *Bernstein*, so decades of experience in the
17 federal system. And multiple courts -- *Planet III*, *Schaefer*,
18 *Omundson*, the *Gabel* case in Vermont -- have found that in this
19 very context, where Courthouse News has also sued, that there is
20 that history and experience.

21 And if you look to the Eleventh Circuit, Your Honor --
22 and you cited the case law in your order denying the motions to
23 dismiss. While, granted, there is no decision in the
24 Eleventh Circuit saying specifically the First Amendment applies
25 to circuit civil complaints, the experience and the logic within

1 our circuit also supports the application of the
2 *Press-Enterprise II* test.

3 So based on the declarations and the evidence that
4 we've put in, the prior case law, the Eleventh Circuit history
5 that goes back to *Newman versus Graddick* in the early '80s at
6 least, when the court was dealing with the -- the
7 Eleventh Circuit was dealing with a civil proceeding, we believe
8 that there is a clear foundation for the Court finding that the
9 experience prong of the *Press-Enterprise II* is satisfied.

10 THE COURT: And I was jumping ahead of myself, because
11 what I was actually talking about was the substantial
12 probability that the government's interest would be impaired,
13 and there is no reasonable alternative, which, of course, that
14 would put the cart before the horse, Judge, because we've got to
15 do what I just -- you were just arguing before we get to that
16 portion. So I understand.

17 MS. LOCICERO: I just want to make sure I carry my
18 burden.

19 THE COURT: I understand.

20 MS. LOCICERO: Okay. So I won't belabor the logic
21 portion of the test. *Abbvie* lays out the logic very clearly
22 from the Eleventh Circuit, and that's very similar to other
23 courts who have looked at the question of access to complaints.

24 At that point the right attaches -- it attaches on
25 receipt. And our argument is then that the burden shifts under

1 *Press-Enterprise II* to the defendants to justify any delay.

2 So what's happening is the -- the closest that the
3 declarations get to providing a justification is Ms. Weber's
4 affidavit. Clerk Forman has submitted no declarations
5 concerning the case, much less justifying a delay. And the --
6 Chair Rushing has submitted two declarations. The Allman
7 declaration doesn't address justifications at all. And it's
8 very briefly addressed in the Weber affidavit -- the Weber
9 declaration. And what the Weber declaration says is,
10 essentially, Well, we get to check for the clerks -- not we, but
11 the clerks check for sort of formatting stuff and for
12 confidentiality.

13 Those are the only two justifications that we could
14 sort of derive from the papers. What we have to say to that is
15 two things.

16 First of all, from the standpoint of the formatting
17 and the checking for the procedural things, there -- there's no
18 justification for holding up the complaints at the level that's
19 happening for those kinds of ministerial clerk activities.
20 We're not saying the processing can't occur, but it doesn't need
21 to be put ahead of access.

22 With respect to confidentiality, it's very clear that
23 the clerks -- neither the clerks nor the Authority have the
24 obligation. It's a filer-only obligation, just like federal
25 court. It used to be a dual obligation on clerks and filers to

1 review pleadings or other filings for certain categories of
2 confidential information that are laid out and listed in the
3 relevant Florida court rule, which is 2.420.

4 What happened last year, effective July 1st of 2021,
5 is because the Florida Supreme Court was concerned about delays,
6 the court said, Look, for circuit civil complaints for most case
7 types, it's filer-only responsibility going forward.

8 We've cited the Florida Supreme Court decision in our
9 papers saying that's what the rule change means, and the court
10 changed the language in 2.420, I believe it's subsection D, to
11 reflect that change.

12 So I want to make it clear to the Court what we're
13 asking for. We are asking for nonconfidential e-filed circuit
14 civil complaints.

15 THE COURT: So you're not suggesting if somebody
16 files, say, a qui tam complaint under seal that it's going to be
17 in the public queue?

18 MS. LOCICERO: No. And it doesn't happen under PACER
19 in the federal system, so we don't get access to qui tam --

20 THE COURT: Do I know how that --

21 MS. LOCICERO: Right.

22 THE COURT: I'm just using that as a quick example.

23 MS. LOCICERO: Sure.

24 THE COURT: But do I know how that works in the
25 software that you are suggesting is being used as it related in

1 Arizona, because I've got to acknowledge that when I was
2 practicing in state court, we were still filing hard copies, and
3 they were transitioning into electronic filings as I was leaving
4 as a state court judge to come here.

5 So if you file, does it -- do you -- like with the qui
6 tam, do you check a box that would route it to a different queue
7 or something? How does that work?

8 MS. LOCICERO: That's right, Your Honor. What
9 happens -- and Mr. Angione's affidavit actually -- I mean,
10 declaration actually lays out with screenshots, if the Court
11 wants to get to that granular level of detail, what the filer
12 sees and what the filer checks.

13 But currently there are only three categories of cases
14 that the clerk still has to review. Those are medical
15 malpractice cases, Jimmy Ryce Act -- involuntary commitment for
16 sexual predator cases, a very limited number of those -- and
17 civil sexual abuse cases, so like a case against the Catholic
18 church for priest abuse, again, pretty rare cases.

19 Different things happen, but the filer, I'm calling
20 it, tags those three types of cases when they're filing in
21 different ways. With the sex abuse civil cases, it's actually a
22 query as part of the civil cover sheet, where you have to answer
23 yes or no. And if you don't answer, yes, this is the sexual
24 abuse case or, no, it's not, you can't proceed past that screen.
25 So we've shown that in Mr. Angione's affidavit how that works

1 and what the filer sees.

2 THE COURT: What do you say to the clerk's office --
3 and this may not be their position. But people sometimes check
4 the wrong box, and we don't want to out a child rape victim,
5 which is one of the reasons why we are going through a process
6 of double-checking.

7 MS. LOCICERO: Well, the clerk could still do that,
8 but what the cases have found dealing with circuit civil -- a
9 lot of time they're called general jurisdiction, but it's the
10 same thing, circuit civil complaints -- is that these privacy
11 justifications that are afforded -- when the clerk doesn't have
12 the responsibility for analyzing those types of cases, they
13 don't rise to the level of justifying that *Press-Enterprise II*
14 burden that they have.

15 So what's going to happen here is that the filer is
16 going to check things, and they are going to be shunted into
17 certain boxes. If the filer doesn't do what the filer is
18 supposed to do, Rule 2.420 has a sanctions provision. The filer
19 can be sanctioned, and the clerk, if they notice it, you know,
20 can deal with it post-processing. It's not like it can never be
21 dealt with again.

22 When you get to the other types of cases, there are
23 different -- the Angione declaration shows this, but there are
24 different ways using drop-down menus and subcategories that
25 Jimmy Ryce Act and medical malpractice cases are identified and

1 tagged. The same thing happens if a filer files a notice of
2 confidentiality that there is a minor victim's name that needs
3 to be redacted on page 5. There's a drop-down menu for the
4 filer to tag that a notice of confidentiality is being filed,
5 and if a motion is required, there's another --

6 THE COURT: So bottom line, Judge, is there are
7 safeguards in place if you're properly using the system, and
8 under Rule 2.420, if you don't avail yourself of that, that's
9 the filer's fault. But in any event, there is a process whereby
10 you can remedy that after the fact.

11 MS. LOCICERO: You can.

12 THE COURT: All right.

13 MS. LOCICERO: I mean, it could happen.

14 But, Your Honor, you know, what has to happen here is
15 that the defendants have to come forward and say, There's
16 evidence showing that these confidentiality issues rise to some
17 level of justification for delays.

18 You know, in Vermont, there was actually some
19 evidence. The Court said it was a minute fraction, but there
20 was some evidence that there had been three out of -- I can't
21 remember -- several thousand filings where the filer had not
22 handled the information properly. But the Court said a minute
23 fraction like that does not rise to the level of overcoming that
24 *Press-Enterprise* test.

25 THE COURT: I understand.

1 And I started off by asking you to talk about exactly
2 what you were asking for and the burden, and I interrupted
3 your --

4 MS. LOCICERO: That's okay.

5 THE COURT: -- presentation, so you certainly can move
6 on from there.

7 MS. LOCICERO: Your Honor, that's the gist of our --
8 you know, I want to make sure that the Court is comfortable that
9 we've provided the -- you know, we understand that out -- it's
10 our burden to establish that the First Amendment right of access
11 attaches. We acknowledge that it's --

12 THE COURT: I understand. That's going to be my first
13 question to defendants is whether or not -- I mean, I understand
14 they're arguing abstention, indispensable party, and reasserting
15 the arguments that were addressed in the order on the motion to
16 dismiss, but my first question to them, quite frankly, is going
17 to be whether or not they are suggesting that the -- you did not
18 meet the threshold burden and if not, why. So that's my first
19 question to them.

20 MS. LOCICERO: Sure, Your Honor. And it's certainly
21 not in their opposition papers.

22 THE COURT: That's why I was going to ask.

23 And in fairness to them, also it wasn't crystal clear
24 to me exactly what the -- and maybe I need some remedial reading
25 classes, but I didn't -- your presentation of your requested

1 remedy was far clearer to me today during the oral presentation
2 than it was in your papers. So that's why I asked the question
3 that I asked of you.

4 MS. LOCICERO: And, I think, Your Honor, that that
5 often happens in these cases, that the remedy question and the
6 discussion about a public review queue or an auto accept option,
7 which is how PACER works -- and Mr. Girdner described those two
8 options in his declaration -- those are less restrictive
9 alternatives that are available, and so that's why it gets a
10 little bit confusing because you -- you know, you spend time
11 explaining that these options are out there.

12 THE COURT: And also, Judge, it's not our burden, and
13 we're not saying it has to be done one particular way. I
14 understand.

15 MS. LOCICERO: That's exactly right. We're not asking
16 for a particular means. That really is up to the defendants,
17 and that is how it is worked in other CNS litigations where
18 injunctions have been entered.

19 THE COURT: All right. Thank you.

20 MS. LOCICERO: Thank you.

21 THE COURT: Mr. Calloway.

22 MR. CALLOWAY: Judge, good morning.

23 May I approach, Your Honor?

24 THE COURT: You may.

25 MR. CALLOWAY: Your Honor, noting the Court's central

1 question to the defendants, the Broward Clerk of Court is not
2 here to suggest that there is no First Amendment right of access
3 to nonconfidential circuit civil complaints.

4 We are here, Your Honor, however, on the question that
5 plaintiff has framed the discussion as suggesting in her
6 complaint that the right of access attaches to new
7 nonconfidential circuit civil complaints that are filed even to
8 Broward County when those complaints are received at the portal.
9 The plaintiff is saying that the right of access attaches at the
10 time that a filing is filed at the portal. The plaintiff
11 concedes -- and this Court has seen the documents that make it
12 clear -- that the portal is controlled exclusively by the
13 Authority. The Authority has jurisdiction over any
14 modifications or developments or maintenance or upgrades to the
15 portal.

16 Exclusive jurisdiction in its plain meaning to the
17 Broward clerk, the clerk has no ability, no power to enter into
18 any discussions with plaintiff or other parties or to force or
19 to coordinate or to influence any change relative to those
20 changes that plaintiff is seeking here today at the portal.

21 The Broward Clerk of Court does have a local case
22 management system, but as it relates to the portal, the clerk --
23 not having any responsibility or influence, the clerk of
24 Broward County has the same level of control as the other 66
25 circuits civil clerks in the entire state of Florida.

1 It's also important to recognize that the allegations
2 in the complaint suggest that the Broward County Clerk of Court
3 has engaged in a system of customs and practices that result in
4 this denial.

5 I suggest to the Court that the plaintiff cannot have
6 it both ways. If the right of access attaches at the time that
7 it's received at the portal, it cannot be necessarily that the
8 Broward clerk has responsibility for what happens there, unless
9 the plaintiff, who's had an opportunity to demonstrate to this
10 Court that the Broward Clerk of Court is intimately involved or
11 authorized or empowered to suggest changes at the point where
12 that right of access attaches. We simply do not on behalf of
13 the Broward clerk.

14 Relative, Judge, to the --

15 THE COURT: So under that theory, the Broward County
16 Clerk of Court, Judge, we don't have any say, so we could
17 permanently block anybody from the public or any member of the
18 press from access ad infinitum to any complaint; correct?

19 MR. CALLOWAY: I missed the first part of your
20 comment, Your Honor.

21 THE COURT: Judge, we have nothing to do with this.
22 So as it relates to the Broward County Clerk of Court and the
23 portal, the press and the public could be denied access
24 permanently to complaints because we have nothing to say about
25 it. We don't think that's a good idea, but we have nothing to

1 do with it.

2 MR. CALLOWAY: Your Honor, I wouldn't say that we
3 don't have -- that it's not a good idea or that we don't have
4 anything to do with the public's access to court-related
5 documents such as nonconfidential circuit civil complaints that
6 are the subject of this --

7 THE COURT: So when does the folks that -- you're
8 saying the E-filing Authority is responsible. When does their
9 responsibility to turn it over end and yours begin, meaning the
10 Broward County clerk's office?

11 MR. CALLOWAY: In fact, as the plaintiff has already
12 alluded to it and we don't necessarily disagree, the portal has
13 roughly 66 or 67 queues that includes the Broward Clerk of
14 Court, and that's when those documents do come to the Broward
15 clerk after they've been filed and received and stamped by the
16 portal. So we do have some responsibilities after those
17 documents are forwarded from the portal.

18 THE COURT: So once get it goes through the process of
19 review, whether it takes one day or a thousand days, then and
20 only then do we have any responsibility because then it's been
21 passed off to us.

22 MR. CALLOWAY: Well, the responsibility for the
23 Broward Clerk of Court and the other circuit clerks of this
24 statewide system, their responsibility is to follow the mandates
25 that are prescribed under Section 28-35 of Florida Statutes that

1 pertains to how the courts of the state are handling their
2 workloads and the workload -- the standards that are associated
3 with those workloads.

4 The Florida legislature has created an entity called
5 the Florida Clerks of Court Operations Corporation. That entity
6 was established for one primary goal, and that is to provide a
7 budget procedure for all of the clerks of the statewide system
8 here in Florida. That budget procedure is outlined in Section
9 28-36 of the Florida Statutes that specifically outlines what
10 those responsibilities are.

11 And so the extent to which Mr. Abbott's declaration,
12 as this Court, I'm sure, has seen, that summarizes what they
13 believe are delays, what Mr. Abbott is describing is the
14 statutory prescription for all of the clerks, including the
15 Broward Clerk, that tells them how they should perform and gives
16 them the standards by which all of the clerks, including the
17 Broward Clerk, will be measured on the basis of those workload
18 measures that are identified by the Florida Clerks of Court
19 Operations Corporation and the standards that are prescribed
20 under Chapter 28 there.

21 So there is responsibility, but the responsibilities
22 that the plaintiff suggest are customs and practices of the
23 Broward clerk are actually not customs and practices of the
24 Broward clerk. In fact, they are the statutory mandated duties
25 and standards that all of the clerks, including the Broward

1 clerks, are required to perform.

2 Judge, on the likelihood of success on the merits,
3 Your Honor, you've got the Broward Clerk's memorandum in
4 opposition, and for purposes of this discussion today, I would
5 incorporate all of the arguments and citations in our memorandum
6 of law for the Court's approval.

7 At the same time we would -- respectfully, again,
8 believe that the plaintiff can't meet the burden.

9 THE COURT: Counsel let me ask you a question.

10 MR. CALLOWAY: Yes, Judge.

11 THE COURT: A couple of times you said 28-6 -- 36. Is
12 it 28.36?

13 MR. CALLOWAY: 28.35 and 28.36.

14 THE COURT: And I know that. Just for purposes of any
15 reviewing court that's not in Florida, they may think our
16 statutes have dashes, and it's actually 28.36.

17 MR. CALLOWAY: Yes, Judge.

18 THE COURT: Not a big deal. I knew what you meant.

19 MR. CALLOWAY: It's important, Your Honor. I
20 understand.

21 THE COURT: Go ahead.

22 MR. CALLOWAY: But we don't believe that the plaintiff
23 has met or can meet the burden of the likelihood of success on
24 the merits because they have not stated a claim under Section
25 1983. And, again, we understand the Court has ruled on our

1 motion to dismiss, but we do believe, for purposes of appellate
2 preservation of the issues, that the arguments that are outlined
3 in our memorandum in opposition to this motion from the
4 plaintiff today, as well as the motion to dismiss, we believe
5 are applicable.

6 We also believe, Judge, that the question of
7 abstention is certainly at play here because in the Court's
8 ruling on the motions to dismiss, there was a question as to
9 whether or not there were orders at play. And here we are
10 saying, Judge, that the Florida Rules of General Practice and
11 Judicial Administration 2.420(a) governs public access to and
12 the protection of records of the judicial branch of government.
13 That rule also provides that access to all electronic and other
14 court records shall be governed by the standards for access to
15 electronic court records and access to security matrix as
16 adopted by the Supreme Court in Administrative Order AOSC14-19
17 or the then-current standards for access. That order, Judge --

18 THE COURT: Counsel, if I were going to accept your
19 view of what it is as a judicial officer and a judicial act,
20 wouldn't that encompass everything that's been done without
21 limits? I mean, it just seems to me that that would take it way
22 beyond what any other court has ever held.

23 MR. CALLOWAY: Judge, I think there are cases that
24 we've cited in the case that the clerk often performs in many
25 instances as a -- quasi judicial actions, and the Court made a

1 distinction that in some of those other cases they were dealing
2 with specific filings. And we're saying, Judge, we believe in
3 this case as well every circuit civil complaint that is filed is
4 a distinct filing, and to the extent that those documents are
5 filed, they are documents that we believe that constitute
6 activity by the clerk in a quasi judicial capacity.

7 We also, believe, Judge, that the filings there are
8 further supported as judicial functions, and one of the reasons
9 I would say that, Your Honor, is, again, in -- we were asked in
10 interrogatories what actions do the clerk look at with these
11 filings and, Judge, you've just had a part of that conversation
12 with plaintiff's counsel as well.

13 One of the filing's functions that the Broward Clerk,
14 and all of the other courts as well, that they do engage in that
15 is hard to describe as an administrative function -- we believe,
16 in fact that it is a judicial function -- that is where if --
17 excuse me, Your Honor. If in the instance a filer provides in
18 their filing a motion to determine confidentiality, then the
19 clerk's responsibility then is to confirm whether any
20 information in that filing is exempt under Florida Statutes,
21 under a Florida rule of General Practice and Judicial
22 Administration, or some other court order. That's not simply an
23 administrative function. That is the clerk performing a quasi
24 judicial function, and so --

25 THE COURT: So let me make this -- I want to make sure

1 I understand the logic of this. So if a case may fall within
2 that category that -- assuming, arguendo, that's a judicial
3 function -- that means every -- the filing and the review of
4 every complaint that have no such review would be -- is still a
5 judicial act; right?

6 MR. CALLOWAY: Judge, our general proposition --

7 THE COURT: So the one exception brings in the
8 thousands of other complaints?

9 MR. CALLOWAY: I wouldn't say that specifically,
10 Judge, but I would say that our argument and the proposition
11 that we're making is that -- and, again it's in our response --
12 or opposition memorandum to this motion. We are saying that we
13 differ with the Court on characterizing the clerk's functions as
14 administrative, as opposed to the clerk performing a judicial --

15 THE COURT: Does it matter if it's administrative in
16 99 percent of the cases and not in 1 percent? Does that matter?

17 MR. CALLOWAY: We believe it matters in this case,
18 Judge, to the extent that the Court is ruling that the clerk is
19 not a judicial officer but, in fact, is performing an
20 administrative function. So we believe it does matter in this
21 case, Judge.

22 THE COURT: I understand you want me to define
23 "judicial officer" and "judicial act" as broadly as possible in
24 both -- both hurdles. I get that.

25 What I'm asking is, in going through that analysis,

1 does the Court rely on the exception for purposes of determining
2 whether it is or is not, A, a judicial officer or, B, a judicial
3 act?

4 MR. CALLOWAY: Judge, I would not describe it as an
5 exception because there are many cases that we've cited where
6 the clerk's responsibilities have been described and
7 characterized by other courts here as a judicial function.

8 THE COURT: Are those cases where they are talking
9 about specific cases where somebody is doing something per a
10 directive of a specific judge, as opposed to just general
11 categories?

12 MR. CALLOWAY: As you noted in your motion to dismiss,
13 Judge, you made the distinction that in those other cases they
14 were specific filings. We are saying here, Judge -- and, again,
15 I --

16 THE COURT: What I'm trying to figure out is -- my
17 clerk's office performs all kinds of functions here, but it
18 seems to me there is a world of difference if I enter an order
19 directing the clerk to do X in a particular case as a judicial
20 officer versus my clerk's office carrying out their
21 run-of-the-mill daily duties and doing what they are doing with
22 every case.

23 As I understand your argument, there's no distinction
24 between those two things. Anything that involves a case is
25 linked -- which is true. Anything that happens in any filings

1 in any case ultimately is connected to me because they're my
2 cases and assigned to me, but I don't know that any of the cases
3 you cited cast the net that broadly; that simply because you've
4 got a case assigned to a judge and he, conceivably, could enter
5 an order and you are expected to follow his orders, that means
6 any action taken on the file, no matter what the clerk is doing
7 on the file, automatically is a judicial act as opposed to an
8 administrative act. That's -- that's what I'm having a hard
9 time -- that I'm grappling with.

10 And the other thing I would ask is -- I had asked you
11 the question earlier, and I want to make sure I understand sort
12 of the timing of this. Judge, we don't have anything to do with
13 this until we get it through the portal, so we are not the ones
14 that are doing -- it doesn't matter whether it's a judicial act
15 or administrative act. Broward County Clerk of Court disavows s
16 any connection to anything that's done before it passes through
17 the portal, like the other 66 other queues for the other clerks
18 of court, is how I understood your argument.

19 So is -- what you're describing now, is that done in
20 the initial review, or is this something that's done once you
21 get it? I think I know the answer, but I want to make sure I
22 understand.

23 MR. CALLOWAY: Judge, I'm not sure I understand your
24 question in terms of what I'm describing now.

25 THE COURT: Right. What you're describing now, is

1 this something that's done by the Broward County Clerk of Court,
2 or is this something after you get it from the centralized -- it
3 passes, as you described earlier, back to you from the
4 centralized authority that, Judge, we can't control, or is this
5 done as part of that initial process?

6 MR. CALLOWAY: When a -- and I believe the plaintiff's
7 counsel described this well. When a filing is filed at the
8 portal, that portal has a software solution that syphons off the
9 filing into the 66 or 67 queues established for the statewide
10 system of circuit court clerks.

11 THE COURT: That's all it does? It divides it up to
12 the 67? I thought I understood there to be other things that
13 were done as well.

14 MR. CALLOWAY: That could be true as well, Judge, but
15 we do know that all of the clerks in the statewide system here
16 get documents directly from the portal after they've been
17 stamped and received by the portal.

18 THE COURT: I understand. What I'm -- all -- and I'm
19 sorry. It's been a long few weeks, and I've had a bunch of
20 trials, but -- and we finished a trial yesterday -- all I'm
21 trying to find out is what you were just describing before as it
22 relates to making sure that there is a motion that's attached to
23 the complaint, that's something, Judge, we, in fact, do, not
24 something that's done once it's released to us from the port.
25 Is that --

1 MR. CALLOWAY: That activity that I described, Judge,
2 occurs after it -- the filing comes from the portal to the
3 clerk.

4 THE COURT: I've got it. Because what I'm trying to
5 figure out is the delay process here. So it's not just that,
6 Judge, we don't have anything to do with what they're doing at
7 the portal, but we're -- once we get it from -- along with the
8 other 66 counties. Once it is routed from the State back to us,
9 then I'm describing the functions we go through before we can
10 then make it public.

11 MR. CALLOWAY: That is true, Judge.

12 THE COURT: Okay. All right.

13 So maybe I misapprehended what plaintiff's counsel
14 said earlier. What does the record reflect about how long
15 that -- the initial process -- I file a complaint. It goes to
16 this central portal, and then is disseminated to the 67 county
17 clerks. Do we know how long that process takes?

18 MR. CALLOWAY: I believe the record might reflect,
19 Your Honor -- and, again, I'm not certain on this point, but
20 what I can say is that there appears to be -- a filing goes to
21 the portal, and there appears to be some almost immediate flow
22 of the filing from the portal to the other circuits, and that
23 time period could be milliseconds between the time that the
24 portal gets it and the time that the software solution, again,
25 pushes it out to the other clerks.

1 THE COURT: I didn't misapprehend, so that's why --
2 I'm asking these questions for a reason.

3 You started your argument by saying, Judge, we have no
4 control over the portal sending it to us. But I'm now -- given
5 your explanation, I'm confused. How is there any delay
6 attributable to the central authority that's disseminating it to
7 the 67 county clerks of court? It sounds like the review
8 process and the actual delay is because of what you're doing
9 once you get it from the central portal. That's what was --
10 seemed to me to be circular from the beginning of your comments
11 to where we are at now. So help me to understand what I'm
12 missing in that regard.

13 MR. CALLOWAY: Well, two things, Your Honor. First is
14 the plaintiff is saying the delay attaches at the time that it's
15 received by the portal.

16 THE COURT: Well, help me to understand the legal
17 principle. If that's their argument, why am I bound by that?
18 Why -- if --

19 MR. CALLOWAY: Well --

20 THE COURT: Couldn't this Court view it just as easily
21 as it attaches at the time and almost instantaneously at the
22 time the filing ends up with the Broward County Clerk of Court?

23 I mean, it seems like everybody is kind of chasing
24 their tail right now. What I'm trying to figure out is -- based
25 on your own explanation, it sounds like there isn't a delay at

1 the central portal. The delay is once it's disseminated from
2 the central portal to the individual county clerks of court
3 because they are going through that review process.

4 That doesn't mean you lose. It just means -- it just
5 seems to me that my -- what I'm talking about doesn't deal with
6 it at the front end when it's initially filed and then
7 disseminated to the 67 because that's done quickly. It's once
8 you get it that there's a delay. That's what I don't get.

9 MR. CALLOWAY: Here's why we are here, Judge,
10 because -- and, again, this is framed by the complaint. We are
11 here because the plaintiff is saying that that right of access
12 attaches at the portal because the plaintiff apparently wants
13 all of the clerks in the entire statewide system of circuit
14 court clerks to comply with whatever their First Amendment claim
15 here that they are suggesting are the delays.

16 THE COURT: Is that part of the requested relief, that
17 I enjoin all 67?

18 MR. CALLOWAY: Well, that's part of why the Broward
19 clerk would believe that the injury to the public is outweighed
20 by the gain to --

21 THE COURT: How would that work with the
22 Eleventh Circuit, the current jurisprudence of this circuit,
23 that they sue one clerk of court, and then I'm going to issue an
24 injunction that binds all 67?

25 MR. CALLOWAY: It, perhaps, wouldn't bind all 67 at

1 the time, Judge, but we could certainly foresee the same lawsuit
2 against the Broward Clerk of Court relative to other types of
3 claims.

4 THE COURT: What would require any other district
5 judge in the state of Florida to follow my ruling?

6 MR. CALLOWAY: Precedence, the authoritative --

7 THE COURT: Believe me, I wish it was precedence,
8 because if it was precedence, that would mean that people of
9 color in this state could actually vote, but as the
10 Eleventh Circuit has explained time and again, my decisions
11 aren't precedence, and they can readily set aside my rulings,
12 such as it is.

13 MR. CALLOWAY: When I say "precedence," Judge, I do
14 mean there is some authoritative influence that a Court's
15 opinion would have in this case, much like we've cited some of
16 the other circuit court cases.

17 THE COURT: I understand your argument.

18 I'm sorry. Go ahead.

19 MR. CALLOWAY: Judge, the point that I was making
20 relative to the -- number one, if I could just take a step back
21 on the irreparable harm, the plaintiff contends that the harm to
22 the First Amendment rights for even a minimal period of time
23 constitutes irreparable injury.

24 We believe that the plaintiff has ignored the case law
25 on -- that holds that a First Amendment violation doesn't

1 automatically require a finding of irreparable injury. However,
2 when the injury flowing from the violation constitutes direct
3 penalization, as opposed to an incidental inhibition of First
4 Amendment rights, the injuries cannot be remedied absent a
5 injunction. And that case we've cited, the *Gale Force Roofing &*
6 *Restoration versus Brown* at 548 Southern F.2d -- supplement.
7 Excuse me. And there the plaintiff regularly advertised to
8 homeowners that -- that was directly penalized by a challenged
9 law that could result in 10,000 fines per occurrence.

10 We've also cited --

11 THE COURT: I'm familiar with the prior case. A very
12 wise judge wrote that.

13 Go ahead.

14 MR. CALLOWAY: -- for the same proposition, that the
15 injury in that case constituted a direct penalization, as
16 opposed to an incidental inhibition of First Amendment rights
17 that couldn't be remedied absent an injunction. Here, in this
18 case, we don't have a direct penalization as opposed to an
19 incidental inhibition of First Amendment rights.

20 And so, Judge, we believe that there are numerous
21 cases, including the *Siegel versus Lepore* case,
22 Eleventh Circuit, 2000 case, that, again, certain First
23 Amendment claims establishing an imminent likelihood that pure
24 speech will be chilled or prevented altogether.

25 Judge, there's --

1 THE COURT: Counsel, you're going to have to help me
2 out with this because I'm trying to figure out -- it would seem
3 to me that if the press or others are trying to get access to
4 information so they can disseminate that information to the
5 public in general would be at the very core of the First
6 Amendment. So help me to understand how this is simply an
7 incidental impact on the First Amendment.

8 MR. CALLOWAY: Well, what we're saying in the
9 argument, Judge --

10 THE COURT: Because you're surely not saying, unless
11 there's a statute that says you're going to be fined or
12 imprisoned, there's no irreparable harm in a First Amendment
13 case. What case says that?

14 MR. CALLOWAY: That's not the case that I'm citing,
15 Judge. What I am saying is there are multiple cases that make a
16 distinction between First Amendment violations that result in a
17 direct penalization versus first amendment violations that have
18 only an incidental inhibition of the rights.

19 THE COURT: How is incidental defined, or how have
20 courts cast or applied the concept of being incidental?
21 Anything that doesn't result in you being punished in some way?

22 MR. CALLOWAY: Well, I would say, Judge, what I would
23 focus more on is the direct penalization of the free speech
24 claim. In this case, plaintiff is not being directly penalized
25 like the other cases that speak to that particular subject more

1 specifically. Their amendment is not being chilled as they are
2 in cases where there's a penalty for the speech. In this
3 case --

4 THE COURT: How can they speak at all if they don't
5 have access to the information? That seems to me to be the
6 ultimate chill. If you bar me from access to the information
7 that I want to communicate -- I'm not following that reasoning,
8 but help me to understand.

9 MR. CALLOWAY: And, again, Judge, we've outlined the
10 legal precedent for this proposition, including cases, again,
11 that are cited in the Eleventh Circuit that -- there is a case
12 involving *FF Cosmetics Florida, Inc. versus City of Miami Beach*,
13 that case, including that targeting commercial speech, which was
14 an antisolicitation ordinance prohibiting the use of greeters to
15 solicit in front of stores in a city's pedestrian-only historic
16 district, was not narrowly tailored. And, again, because the
17 overbreadth challenge had -- relating to the chilling effect of
18 that statute.

19 The cases that plaintiff has cited, again, are not
20 cases where there's an -- an incidental inhibition of a First
21 Amendment right, but they are citing cases that are, in fact,
22 direct penalization. And the facts here do not represent a case
23 where there is a direct penalization of plaintiff for exercising
24 a free speech claim.

25 THE COURT: I understand your argument.

1 MR. CALLOWAY: And, again, Your Honor, we are also
2 saying that -- as I pointed out, that the clerks -- the
3 plaintiff's injury doesn't outweigh the injury to the clerk, and
4 they're asserting that this is --

5 THE COURT: What is the injury to the clerk?

6 MR. CALLOWAY: The injury to the clerk, Judge, is
7 underscored by the fact that the clerk could be ordered to
8 modify its system, to provide greater access, however this Court
9 might concede that to be. It would result in budgetary
10 expenditures of precious statewide resources, resources that are
11 prescribed and are outlined, again, under Section 28.35, as I
12 described earlier.

13 THE COURT: Does it matter whether it's \$10 or a
14 billion dollars for purpose of this Court's analysis in
15 balancing the harms?

16 MR. CALLOWAY: I believe it does, Judge, because --

17 THE COURT: And what is before me? What do I know, if
18 anything, about what it would or would not cost and what impact
19 it would have on the county?

20 Because I certainly, certainly understand that it's
21 not -- and with all due respect to the plaintiff, if they said
22 tomorrow, You've got to go completely redo your computer system,
23 your software, acquire the equivalent of PACER in the federal
24 system, and completely redo everything, I'd have some serious
25 questions for the plaintiff's counsel of how that's a reasonable

1 alternative and how the -- as it relates to this factor, which
2 is a separate issue, but the factors under a preliminary
3 injunction. Why such grave cost and disruption to the county
4 wouldn't outweigh the delay of them getting access to the
5 complaints.

6 But what do I know, if anything, about what a limited
7 change, such as requiring there to be a public queue while you
8 go through your process, if that's the requested relief -- and
9 that's one alternative -- what, if anything, do I know about how
10 that would burden the county?

11 MR. CALLOWAY: What it means, Your Honor, is that it
12 would definitely disrupt the intricate balance between the clerk
13 of courts, particularly the Broward Clerk in this instance,
14 relating to the budgets that are approved by the --

15 THE COURT: Well, that would mean I could never
16 make -- order any change, no matter how incidental the cost and
17 no matter how great the limit on the First Amendment. I mean, I
18 just -- I get that there's -- I mean, that would be true if it
19 was \$10 and it was absolutely, you know, keeping somebody from
20 exercising a First Amendment right.

21 So I don't -- again, it seems to me I've got to rely
22 on what's on the record before me. And perhaps it's, Judge, you
23 don't know, so you can't make an analysis along those lines, or
24 Judge, you do, and here's what I would point you to in the
25 record that would permit you to do that, or Judge, that's not my

1 problem. That's Ms. LoCicero's problem. I'm -- in terms of who
2 bears the burden.

3 I mean, there's going to be different answers. I'm
4 just trying to figure out what the answer is.

5 MR. CALLOWAY: Well -- and, again, perhaps not so
6 eloquently, what I am trying to say, Judge, is there is an
7 intricate balancing of precious state resources that are
8 prescribed by statute that are part of the legislative branch's,
9 as well as the Florida Supreme Court's branch, responsibility as
10 it relates to court-related functions. The extent to which this
11 Court could order the Broward Clerk of Court to provide some
12 resource or solution that would be suggestive of accommodating
13 plaintiff's claim, that is going to mean that those resources
14 would have to go from the public that has already encountered a
15 budget to be accommodated on a mandated solution from this
16 Court.

17 THE COURT: So if I accept that argument, then if the
18 solution to create a public queue would cost \$1 or -- well,
19 because if it cost nothing, it wouldn't implicate the budget.
20 So let's say it's going to cost \$1. Then I would deny it based
21 on the burden to the government, because it's \$1 and it
22 implicates both the state and the local budget?

23 MR. CALLOWAY: Well, we know, in fact, Judge, it's not
24 \$1. We know that the clerk of courts are funded through
25 budgetary measures that are prescribed by state law. We know

1 that any expenditures outside of that prescribed budgetary
2 format is a disruptive work on the actions and the functions of
3 the clerk. They have functions that they have to perform, and
4 they have a budget that allows them to perform those functions.

5 THE COURT: So the answer is, Yes, Judge, no matter
6 what the cost, you always would balance the fact that there
7 would be any financial burden. Given the fact there is limited
8 budgets and limited resources, it would always -- any
9 expenditure of funds would always outweigh the First Amendment
10 rights.

11 MR. CALLOWAY: We believe the expenditure of funds, as
12 it pertains to the statutory prescriptions that are at play that
13 do affect the Broward Clerk of Court, make that potential
14 decision by this Court -- it does suggest to us, Judge, that the
15 injury to the public is outweighed by the injury to the
16 plaintiff.

17 THE COURT: In the affidavit regarding the Arizona
18 system, does it tell us that the change was made for 12 --
19 approximately \$12,000?

20 MR. CALLOWAY: Yes, it does, Judge.

21 And, in fact, we filed a notice of filing yesterday --
22 that's ECF Document 48 -- that reflects that, in fact, the cost
23 that plaintiff alluded to was not just \$12,000, but it was also
24 an additional 8 for a cost of \$20,500.

25 THE COURT: All right. And I know you did your notice

1 of filing yesterday, and that document --

2 MR. CALLOWAY: I can publish it, Judge, if --

3 THE COURT: Sure, if you'll publish it.

4 MR. CALLOWAY: -- if that would help.

5 MR. STEWART: Your Honor, may I step out of the
6 courtroom for just a minute?

7 THE COURT: We can take a comfort break if everybody
8 needs it. Fair enough.

9 Folks, let me apologize. And I just did this in a
10 trial. We'll go for four hours, and I'll remember we haven't
11 had a break. Let's -- and it's good for the court reporter too.
12 It's been an hour and ten minutes.

13 Let me also apologize -- this could have been a little
14 bit more targeted this morning, but, again, I didn't realize
15 that trial was going to run through late yesterday, and so --
16 you know, again, we'll take all the time we need, but let's take
17 a ten-minute break.

18 When we come back, Mr. Calloway, you can finish.

19 MR. CALLOWAY: Thank you, judge.

20 THE COURT: Court is in recess for ten minutes.

21 (Recess taken at 10:12 AM.)

22 (Resumed at 10:27 AM.)

23 THE COURT: We are back on the record.

24 And, Mr. Calloway, you were talking about -- and I
25 could have -- should have pulled it up on my computer as well --

1 the documents that y'all filed yesterday. You have before me a
2 bill which shows initial setup fees as well as annual
3 maintenance.

4 And so as I understand it, Judge, as the documents
5 reflect that we filed yesterday, it's more complicated than
6 simply saying there's a one-time fee of 12,500. There will be
7 additional costs associated with that. And as reflected in
8 this, it would imply that it would be a reoccurring cost as
9 well.

10 MR. CALLOWAY: That is correct, Judge.

11 And I do want to be clear that this invoice is
12 relating to the cost that plaintiff suggests that the Authority,
13 or through Defendant Rushing, can do in the same manner as it
14 was done in the state of Arizona.

15 THE COURT: Well, let me ask you that. Other than an
16 affidavit saying they are -- it is the same software, is there
17 any suggestion that -- anything before me that would be
18 suggesting we are mixing apples to oranges as it relates to the
19 two systems?

20 MR. CALLOWAY: In terms of the cost or the --

21 THE COURT: No, no, the systems themselves. Such
22 that, Judge, you can't fairly extrapolate this is an accurate
23 summary of the general costs because we're mixing apples and
24 oranges. There's a reason why you can either know or reasonably
25 infer from the record that these are different animals.

1 MR. CALLOWAY: And, Your Honor, my response to that
2 would be it's probably a question better posed to Defendant
3 Rushing, because, again, this is relating to a system that
4 plaintiff suggests should provide a statewide access portal or
5 review queue, whereas here --

6 THE COURT: Your point is, Judge, creating the public
7 queue is done at the state level, as it was disseminated to the
8 67 -- I don't have the number of counties in Arizona --
9 disseminated to counties in Arizona. It's not put on the
10 software at the local level. It's done at the state level.

11 MR. CALLOWAY: That is correct, Judge.

12 And the other thing I would say, Your Honor --

13 THE COURT: For any reviewing court, this is an
14 exhibit, ECF Document 48, which Mr. Calloway filed yesterday.
15 My computer was down earlier, which is why I didn't -- I could
16 have saved you the trouble of pulling it up. And, specifically,
17 this is Exhibit 4 to ECF Document 48 that I'm looking at the
18 screen now.

19 Mr. Calloway, you and I know that, but if we don't do
20 that, no reviewing court is going to know where to find it, so
21 that's why.

22 MR. CALLOWAY: That's perfect, Judge.

23 The other point that I would make on this subject,
24 Your Honor, is the Broward Clerk -- if the Court determines it
25 should issue an injunction as to the Broward Clerk of Court, I

1 think it's important to remind yourselves that the Broward Clerk
2 of Court is also a member of the association of clerks across
3 the state and, therefore, should be entitled to the benefit of
4 the Association's statewide access system, including any
5 potential upgrades or modifications as may be ordered by this
6 Court.

7 And, again, going to the question of injury to the
8 clerk's office here, we believe, again, that if the judge -- if
9 you were to require the Broward Clerk to invoke a local
10 solution, and then at the same time perhaps order a solution
11 statewide through Defendant Rushing and the Authority, Broward
12 now is being penalized for not having the benefit that it is
13 entitled to as a member of the other -- as -- like the other
14 circuit courts of the state, Judge.

15 THE COURT: Let me ask you this, Mr. Calloway, because
16 I -- and I'm going to have to ask Ms. LoCicero. We were talking
17 about the order from the Vermont judge, and maybe I didn't --
18 I'm having a bad morning. Maybe I didn't phrase this well. But
19 I'm pretty sure -- and I could go back and look at the
20 transcript, and maybe this is what Ms. LoCicero said. I'm
21 pretty sure the judge in Vermont just found that when the right
22 attached and said, You can't wait until you do the whole review,
23 but did not provide a more specific directive, that is, left it
24 up to the parties, recognizing there are a range of options on
25 how to fix it.

1 So, one, I want to find out if I've got Judge Reiss'
2 ruling correct, and, number two -- and I understand, Judge,
3 there are a variety of reasons why you shouldn't get there to
4 begin with, and, Judge, we are certainly not suggesting you
5 should enter an injunction.

6 But kind of like you were just arguing, if I were to
7 do that, is it problematic from a legal standpoint, assuming the
8 plaintiffs get over all the other hurdles, for this Court to
9 enter what I would consider a more generic injunction by saying,
10 You can't wait until the full review. You've got to do it
11 sooner but not specify.

12 From some people's standpoint, that may -- maybe they
13 argue that's the right way to do an injunction. Others would
14 say, No, Judge, there's a problem with doing it that way, and
15 here's why. So either you need to do it or not do it, but doing
16 it by not specifying is problematic, and here's why.

17 So I just want to give both sides a chance to be
18 heard. And I'm not telegraphing to anybody what I'm going to
19 do. I just want to get there.

20 MR. CALLOWAY: Your Honor, on behalf of the Broward
21 Clerk, I think it is problematic, because it is certainly going
22 to -- if you have to do it within X days or X hours, as some of
23 the courts I've seen, that it should be done in five business
24 hours or within a business day, what it's going to do, Judge, is
25 directly interfere with the statutory mandates, as I have

1 suggested, again, under Section 28.35, that that is what all of
2 the clerks are required by law to follow.

3 If this Court were to say, You have to do this
4 relative to nonconfidential circuit civil filings within a
5 business day, then it almost immediately, again, is going to,
6 like -- as I've just said, number one, tell the clerk, as it
7 relates to only circuit civil filings, that you've got to move
8 away from those standards that are prescribed by law under
9 Chapter 28 and move to this court-induced or court-ordered
10 standard to do something else, forgetting about the other
11 functions of the same Broward Clerk who has administrative
12 responsibilities and judicial responsibilities to other court
13 records as well.

14 THE COURT: Let me tell you -- because my concern,
15 though, with not specifying a remedy, is I'm not quite sure how
16 a court can legitimately go through the exercise of balancing
17 competing interests if -- in some sort of feigned sense of
18 judicial modesty, if the Court says, Well, I'm not going to tell
19 you how to do it. You just need to do something different.

20 I'm -- I'm finding it hard to process how I can
21 discharge my duty in balancing the interests and so forth if I
22 do that, but that's my concern.

23 But related to that, and I guess my question to you
24 is, if the remedy ordered was there has to be a public portal,
25 doesn't that eliminate the very concerns that you're raising,

1 because it doesn't divert resources at the local level? That
2 means it comes through a public queue that's generated at the
3 state level that goes to the Broward County Clerk of Court.
4 Does it -- if it -- I'm not suggesting that is. I'm not
5 telegraphing what I'm going to do.

6 MR. CALLOWAY: Sure.

7 THE COURT: But if that were -- there was a specific
8 remedy trying to balance the competing interest, as that relates
9 to your client, wouldn't that eliminate the concerns of you
10 suddenly are not doing something mandated, because you still
11 follow all those prescriptions, you still review everything?
12 There is just something to view through this public queue.

13 MR. CALLOWAY: Yes, Judge, is the short answer.

14 The other part of the answer, in addition to -- again,
15 if the Court were just to prescribe a -- or mandate a solution
16 at the local level here in Broward County, the other piece to
17 that -- and even so, Judge, to your latter point, as -- if I
18 just prescribed it at the portal level -- and I think we've
19 established this in our opposition memorandum to this motion --
20 it's still going to -- and the Court earlier -- I'm not sure
21 that this has a whole lot to do with the Florida Supreme Court.
22 I'm summarizing the Court's comments, and probably not
23 accurately. But it will, Judge, I believe, require a change to
24 the portal, which will require an administrative order or an
25 amendment to the agreement that relates to the Authority and the

1 Florida Association of Court Clerks.

2 I know, Judge, in ruling on the motion to dismiss, as
3 it relates to our proposition that the Florida Association of
4 Court Clerks is an indispensable party -- of course, you haven't
5 actually shown us why that agreement means so much. The point
6 would be, Judge, you could order the Authority to do something
7 different, upgrade the portal to require this solution. But
8 unless the Florida Association of Court Clerks are in this suit,
9 the Court doesn't have any way to enforce that to happen. You
10 can tell the Authority to do it, but we know that the record
11 tells us that that contract between the Authority and the
12 Florida Association of Court Clerks says if there is any
13 changes -- number one, the initial scope of that agreement does
14 not include a modification for a public review queue as is
15 requested in this case. And so to have that change take place
16 would require some modification of the agreement between the
17 Authority and the Florida Association of Court Clerks.

18 That is our principal reason why we are saying it is
19 indispensable that the Florida Association of Court Clerks
20 should be a party to this lawsuit in order to grant the relief
21 that the Court is at least framing for part of this discussion.
22 That would be entirely necessary, from our perspective.

23 The other party --

24 THE COURT: Would that be true if I was ordering
25 relief at the local level?

1 MR. CALLOWAY: If you are ordering relief at the local
2 level, Judge, you are telling -- the Broward Clerk, I'm
3 assuming, is --

4 THE COURT: Right. If I'm telling the Broward Clerk,
5 why then is the association -- and if that's the relief -- and
6 I'm not -- this is -- I'm not holding this. I'm just asking,
7 does it -- whether or not they are or are not indispensable
8 based, on your reasoning, does it depend on the relief that this
9 Court grants?

10 MR. CALLOWAY: If, again, you order the Broward Clerk
11 to do something, then the Clerk can engage and will be forced to
12 spend moneys to contract with --

13 THE COURT: Oh, there are other problems. I get that.
14 I'm only asking a very narrow question about whether or not the
15 Association is or is not indispensable. Would that turn on what
16 relief? In other words, if I was not ordering something to be
17 done at the portal level, then is there some other argument that
18 would suggest the Association is still otherwise an
19 indispensable party? Because if that's not the relief, you were
20 tying their indispensability to that nature of relief, so that's
21 my question.

22 MR. CALLOWAY: Yes, Judge.

23 So the point of my argument, again, would be that the
24 Florida Association of Court Clerks would be an indispensable
25 party if this Court were to order that the portal be modified or

1 upgraded.

2 THE COURT: What I'm asking is the converse. Is it
3 true that if they are not --

4 MR. CALLOWAY: If not, Judge, again, I think that
5 might be a better question for the Authority, but I would assume
6 so.

7 THE COURT: Fair enough. I got it.

8 MR. CALLOWAY: And Judge, I -- one other comment, and
9 then I'll conclude.

10 For almost the same reasons, Judge, we are saying that
11 we do believe that the clerk of the Florida Supreme Court is an
12 indispensable party, again, primarily because of the court's
13 overall function. The interlocal agreement is between the
14 various clerks of court of the state and the clerk of the
15 Florida Supreme Court as the designee of the Chief Judge of the
16 Florida Supreme Court.

17 We believe that the documents are clear that changes
18 to the portal are of a magnitude related to the court-related
19 functions that would require the approval of the Florida Supreme
20 Court.

21 And, Judge, again, part of the notice of filings from
22 yesterday in ECF Document 48 --

23 THE COURT: I've got it. If you'll just tell me the
24 exhibit number, I've got it. I have CM/ECF pulled up.

25 MR. CALLOWAY: I'm sorry. Judge, I want to refer to

1 the -- one of the Composite Exhibit 5 of --

2 THE COURT: Oh.

3 MR. CALLOWAY: -- ECF 45. Excuse me, Judge.

4 THE COURT: ECF 45?

5 MR. CALLOWAY: Yes.

6 THE COURT: That's my order.

7 MR. CALLOWAY: 44. Excuse me, Judge.

8 THE COURT: All right.

9 MR. CALLOWAY: I apologize.

10 THE COURT: No problem.

11 ECF 44, Composite Exhibit 5, which is a
12 36-page document, I've got it up, yes, sir.

13 MR. CALLOWAY: My overall point on this, Judge, is
14 that there has been a significant level of discussion and
15 communication between plaintiff's counsel and the clerk of the
16 Supreme Court, such to suggest, again, and I believe to
17 underscore the fact, that discussions relating to modifying the
18 portal are such that they would require some interaction between
19 the Defendant Rushing and the Authority and the Florida Supreme
20 Court.

21 I want to publish if I could, Judge, Document 44-5.

22 THE COURT: Certainly.

23 MR. CALLOWAY: And this is page 28 of 36.

24 This is correspondence from the clerk of the Supreme
25 Court of Florida addressing discussions between plaintiff's

1 counsel, the Florida Association of Court Clerks, and the
2 Florida -- the clerk of the Florida Supreme Court. I'm sure,
3 Judge, it goes back at least to 2019.

4 The second page of this correspondence, Your Honor, is
5 the -- Mr. Tomasino's bullet points as to what a solution would
6 be. And you'll see, Judge, in the third bullet point the
7 solution that Mr. Tomasino is describing. "As soon as the filer
8 answers the screening questions in the negative, a copy of the
9 complaint and the civil cover sheet (along with some of the data
10 entered by the filer, such as case style) is copied and
11 presented to the public on the portal under a section/queue
12 clearly labeled as such."

13 THE COURT: Well, can I -- let me -- if you'll leave
14 that up, though.

15 MR. CALLOWAY: Sure, Judge.

16 THE COURT: It says, "Amend rule 2.420 to state that
17 the clerks 'shall not' review civil filings when the filer has
18 answered no to both screening questions."

19 This is a letter dated from February of 2021. Earlier
20 counsel was talking about changes to the rule that went into
21 effect last summer.

22 Is that, in fact, the -- are we -- I believe we are
23 talking about the same thing; correct?

24 MR. CALLOWAY: Well, we are talking about the same
25 thing, Judge, to the extent that the subject of providing and --

1 again, the subject of the Florida Supreme Court's intimate
2 concern with ensuring that there's greater access to the public
3 for electronically filed documents. That is the subject, and
4 part of that which resulted in an amendment to Rule 2.4 --

5 THE COURT: 2.420.

6 MR. CALLOWAY: I knew I was going to mess that up.

7 But that was part of the solution that, again, took
8 away some of the redacting.

9 THE COURT: Right. And this isn't necessarily
10 determinative, but it just seems to me that -- because I asked
11 these questions to plaintiff's counsel earlier, what about
12 things that you want to be private? And so my questions were
13 consistent, it seems to me, with the very dialogue that the
14 Clerk of Court was having a couple of years ago about, we've got
15 to balance the ability to get access to this information with
16 making sure that we maintain, where appropriate,
17 confidentiality. And that that balance was struck by saying,
18 You've got the option when you file to make sure you don't
19 inadvertently disclose confidential information, but if you do,
20 then that's your problem now that the rule has been modified.

21 And that's a change in the law that reflects that the
22 court, through the modification of the rule, has already
23 balanced -- made the balance and ascertained that we are going
24 to shift the concern about waiver to the party that doesn't file
25 properly and doesn't check the right boxes. And if you check

1 negative both times, that's your problem, not ours.

2 And so -- I'm not suggesting this is determinative,
3 but I was -- I'm asking because it seems to me, when I'm
4 balancing the competing interests and so forth, hasn't the
5 Florida Supreme Court, by virtue of amending -- having that rule
6 amended, haven't they taken part of the -- removed part of the
7 equation for purpose of this Court's analysis that -- and if
8 not, to what extent should I put any weight on the fact that in
9 balancing the competing interests, that the Florida Supreme
10 Court, as reflected through the modification of Rule 2.420, has
11 decided, We've given you a way to fix it, but we've already
12 balanced and we've already arrived at and made the determination
13 that when giving ready access to public documents we've given
14 people a way to fix it, and if they don't, that's their problem,
15 and we've already balanced those competing interests?

16 Why should I not look at it that way?

17 MR. CALLOWAY: Judge, I believe what -- it more
18 accurately reflects that the premise is the court's concern with
19 public access. And the court has taken one step, by virtue of
20 Your Honor's comments, relating to the modification to
21 Rule 2.420. That is one step, but as this document points out,
22 from the clerk of the Florida Supreme Court --

23 THE COURT: This goes to abstention, Judge. You
24 should let them fix the next step. I've got that.

25 MR. CALLOWAY: And the next step is why we're here, is

1 on questions relating to --

2 THE COURT: That the abstention question. Can I fix
3 it or do I have to defer? I've got it.

4 MR. CALLOWAY: That's where we are at on that, Judge.
5 We believe, again, Judge, that part of the injury question, and
6 to the public as well, is that now you've got the statewide
7 system of e-filing disrupted by a mandate that the Florida
8 Supreme Court has on its radar, clearly, and should be the
9 primary focal point for a solution, along with the parties that,
10 again, plaintiff's counsel and --

11 THE COURT: Well, it doesn't seem like anybody is
12 moving with much alacrity, does it?

13 MR. CALLOWAY: Well -- and, you know, Judge --

14 THE COURT: And to what extent then does the federal
15 court get involved? Somebody has got to help me to understand,
16 from the defense standpoint -- for the life of me, I don't
17 understand -- it seems to me that it's not some -- it's not
18 hyperbole to talk about the critical nature of the Fourth
19 Estate, not only in this country, but in any healthy democracy,
20 as evidenced by the decline in Hungary and Poland and other
21 countries around the world.

22 So the dissemination of information -- accurate
23 information in a timely way is a critical function of those
24 reporting, whether it's an entity that reports on courts, a
25 subset, or it's a news organization that covers all manner of

1 news.

2 So it just strikes me as odd that the Court would find
3 that somebody else could fix it. They may fix it. It's been on
4 their radar, by your last statement, since 2019. It took them
5 two years to address the first stage of the problem.

6 I mean, how long -- in terms of the First Amendment
7 and the dissemination of public information, how long is too
8 long when we start balancing those concerns and competing
9 interests?

10 MR. CALLOWAY: Your Honor, I understand the Court's
11 concern precisely.

12 But what I'm also saying is that concern is -- and
13 this discussion, in fact, as between plaintiff's counsel and the
14 other parties, the Broward Clerk of Court only got wind of this
15 issue when it received a February 23rd piece of correspondence
16 from plaintiff's counsel. And we know that they've said, Well,
17 Mr. Girdner sent a letter in October of 2021. But if you look
18 at that document, Judge -- and it is part of the record --
19 there's no reference to a suite number. There's -- if you look
20 at that document, it should not be hard to conclude that it is
21 likewise or likely that the Broward Clerk of Court did not get
22 it, as we've said.

23 It is also, I think, apparent that when we got the
24 February 23rd correspondence -- February 23rd correspondence of
25 this year, it went by email from plaintiff's counsel to the

1 Broward Clerk. We received it.

2 And the point that I'm making to you, Judge, is as
3 soon as that communication was received by the clerk, her
4 general counsel and myself have engaged on this issue. We've
5 been having discussions with Ms. LoCicero from that point.

6 But in all of the documents going back to 2019, you're
7 not going to see, Your Honor, if you were to look, nor do I
8 believe can you hear plaintiff's counsel tell you that they
9 engaged us on this issue.

10 THE COURT: Is this a problem peculiar to
11 Broward County, or are you simply, tag, you're it, and you
12 happen to be the clerk of court's office that was hauled into
13 court?

14 MR. CALLOWAY: We happen to be one of the larger
15 jurisdictions in the state.

16 THE COURT: I get why they are more interested in
17 looking at y'all's filings than, say, Jackson County. No
18 offense to Jackson County. I'm sure there are all manner of
19 interesting claims filed there. I get that.

20 I guess what I'm asking is, these same -- the portal
21 works the same way. There is still a review. While the delay
22 times may be different and they may be smaller, and maybe some
23 jurisdictions are small enough they can do it all in the same
24 day --

25 MR. CALLOWAY: Yes.

1 THE COURT: -- the fact of the matter is it's --
2 you're here because you're a large county that people care about
3 what's filed in your county, but it's not -- the issue with
4 there being a delay because there's a review process after you
5 get it from portal is not something that's unique to
6 Broward County. There is --

7 MR. CALLOWAY: And, frankly, Your Honor, it's hard to
8 call it a delay. I understand from the Court's perspective or
9 from plaintiff's counsel they would describe it as a delay, but
10 the Broward Clerk of Court, as I would suppose the other clerks
11 of this state, would say we're required to process documents in
12 a way that is consistent with the mandate that we have under
13 Chapter 28, Section 28.35, that establishes --

14 THE COURT: In an age where we are governed by Twitter
15 and everything is instantaneous, is it really fair to suggest
16 that a 48-hour delay in getting a copy of a lawsuit which is
17 major public news is really not much of a delay? I understand
18 that the answer would have been different, potentially, you
19 know, 30 years ago, but I --

20 MR. CALLOWAY: If --

21 THE COURT: If you're an organization reporting on
22 something, 48 hours in a news cycle is a lifetime, isn't it?

23 MR. CALLOWAY: Your Honor, conceivably, if you are
24 asking plaintiff, they are going to say yes automatically.

25 THE COURT: Well, I say that because the average

1 consumer of news in the U.S. has the attention span of a gnat.
2 I mean, we move from topic to topic.

3 I mean -- I don't want to pick on a network, but I
4 want to, like, bounce my head against the wall every time Wolf
5 Blitzer says, Breaking news. It used to be breaking news was,
6 you know, one country invaded another country. Now there's 15
7 breaking news statements every evening and all day long, 24/7,
8 365 days a year.

9 It seems to me that if you're -- if you have the right
10 to the information and access to it, and your point of getting
11 it is to disseminate it, can I really so glibly say there's not
12 much of a delay because -- when half the complaints potentially
13 we don't get for two days or more?

14 MR. CALLOWAY: Judge, my response to that would be
15 that is a -- certainly a deliberate call this Court can make.
16 But the answer from the clerks of the state -- of this statewide
17 court is going to be same. It sounds like the answer is a
18 legislative or a prescription that can come -- or more likely
19 should come from the Florida Supreme Court through the work here
20 with the Authority, and perhaps even plaintiff's counsel, since
21 we do know they have been, again, intimately involved in the
22 conversations between the clerk of the Supreme Court.

23 But certainly the delay is not created by
24 Broward County Clerk of Courts, if you want to call it a delay,
25 again, in the same sense the Clerk in Broward County is

1 following a standard that all of the state court clerks are
2 following.

3 And to the extent that the Court considers a mandate
4 for the Broward Clerk to do something different, not only is it
5 going to be requiring it to do something beyond what the statute
6 is saying it should do, but it's also going to require the clerk
7 to do something within its own internal functions related to
8 other civil filings. They may not be civil circuit. Maybe
9 they're county or other documents that would come before the
10 clerk that the clerk is responsible for.

11 And so, you know, where I'm -- for those we are still
12 prescribed by Section 28.35, and we still --

13 THE COURT: We still can agree -- can't we agree that
14 there's some limits? I mean, surely neither the clerks'
15 association, in cooperation with the clerk of the Supreme Court,
16 or the Florida legislature get to define the contours of the
17 First Amendment without limitation.

18 MR. CALLOWAY: I believe this Court has a role in what
19 the First Amendment requires.

20 THE COURT: I understand. Just we haven't gotten
21 there, Judge, and you shouldn't be involved in this for the
22 reasons we've articulated. I understand.

23 MR. CALLOWAY: Judge, the last thing I would say,
24 again, relative to the merits of this motion, we do believe a
25 bond should be required, to the extent that the Court believes

1 it -- and we know that the Court has discretion, but to the
2 extent to which the plaintiff has alluded to a Granicus
3 contract -- and perhaps even the Authority may have something
4 different to say about what the actual costs are -- we think a
5 bond should be at least in the amount of that which they've
6 described in this invoice.

7 But, again, I would still say that the Authority or
8 the Defendant Rushing, having full weight of responsibility for
9 all of the clerks and the portal itself, whatever amount that
10 the -- if they have one, we believe a bond should be consistent
11 with the cost that the portal would incur.

12 Thank you, very much, Judge.

13 THE COURT: I appreciate it. Thank you for your
14 thoughtful presentation, Mr. Calloway.

15 Let me, before I turn to you, Mr. Stewart, find out --
16 sometimes it's hard to go back and forth, back and forth. What
17 I thought I might do is have Ms. LoCicero respond to -- or reply
18 to Mr. Calloway's comments, then let you add on, and then have
19 her respond to you. Although I'll defer to y'all if you think
20 there is a more organized way to do it. It just seems to me
21 that it's easier to break it up so we have argument, response,
22 as opposed to --

23 MR. STEWART: Whatever is your preference, Your Honor.

24 THE COURT: Okay. Why don't we do that, Ms. LoCicero.
25 It just seems to me that it's more efficient to have you

1 immediately reply to Mr. Calloway, and then we'll hear from
2 Mr. Stewart.

3 MS. LOCICERO: Thank you, Your Honor.

4 I want to clear up a couple of points. If the Court
5 looks at 28.35 and 28.36 of the Florida Statutes, the provisions
6 that Mr. Calloway has referred to about what he perceives as the
7 state standards for providing public access, you'll see that
8 what that does is it sets up a corporation that can put together
9 rules for efficiency related to making budget requests for the
10 court system. There's no mandate in the statute, and if there
11 were a mandate in the statute that conflicted with the First
12 Amendment, the First Amendment, of course, would trump it.

13 So the sort of efficiency in processing standards that
14 keep being brought up in this case come from rules from a
15 statutory body, and really have a lot to do, I guess, with
16 budgeting and processing and efficiency on that end of things,
17 but have zero to do with public access.

18 From another factual standpoint, the -- it's 48 --

19 THE COURT: Let me ask you --

20 MS. LOCICERO: Yes.

21 THE COURT: -- Ms. LoCicero, to the extent, though,
22 those rules deal with protecting privacy, confidentiality,
23 making sure that things are docketed, that documents aren't
24 missed or lost and so forth -- I mean, when considering
25 reasonable alternatives and the government's interest in this

1 case, it's not completely divorced from those considerations;
2 right?

3 MS. LOCICERO: What I would say, Your Honor, is that
4 there's a problem with the narrowly tailored aspect of that
5 analysis. The -- of course, the clerk needs to docket things,
6 but if we look at the traditional access equation, there was the
7 intake, and then there was access, and then there was
8 processing, docketing, whatever you want to call it, that was
9 time-consuming and came afterwards.

10 THE COURT: Oh, I understand. Judge, they were able
11 do it manually, and the fact we are doing it online shouldn't
12 suddenly mean you should have less access. If anything, putting
13 stuff online should have expedited access, not delayed it.

14 MS. LOCICERO: In theory, yeah.

15 THE COURT: I understand. I just -- just like I said
16 to Mr. Calloway, I didn't think we should be so glib about a
17 48-hour delay and public access to information.

18 Just so the record was clear, I wasn't being -- I also
19 didn't want to be completely dismissive of the way things are
20 filed and structured and the need to do things accurately and
21 maintain a record and so forth. I wasn't suggesting that was or
22 wasn't dispositive ultimately of the issue before this Court,
23 but simply that -- you know, all that information -- all that
24 information in context is relevant to the task that this Court
25 has to perform in analyzing the factors under *Press-Enterprise*

1 *II*; right?

2 MS. LOCICERO: It's -- Your Honor, we understand that
3 clerks are involved in helping the court administer justice, and
4 that's not the issue. What's relevant under *Press-Enterprise II*
5 is whether the interests that they afford are -- are served in a
6 way that's narrowly tailored. And if there are less restrictive
7 alternatives, then it's not narrowly tailored, and there are
8 less restrictive alternatives here.

9 THE COURT: But to go through that analysis, I have to
10 know what it is they are trying to do, why they are doing it the
11 way they are doing it.

12 MS. LOCICERO: Sure. I agree.

13 THE COURT: That's a rather unremarkable statement.

14 MS. LOCICERO: It's very unremarkable.

15 THE COURT: That's all that I was saying when you were
16 saying, Judge, those are just the rules, and I was saying --

17 MS. LOCICERO: Oh. Okay.

18 THE COURT: All I was suggesting was that's all part
19 of the mix.

20 MS. LOCICERO: Correct.

21 THE COURT: I -- because I understand how this works
22 on review, that when I say things like, for example, that, you
23 know, 200 years of history is one of the factors under *Arlington*
24 *Heights*. I have to look at it, but I'm not putting any great
25 weight on it. I'm then told that that's all I considered.

1 So I just want to be careful that I'm in no way being
2 dismissive of the interests of the county, the state, the
3 Supreme Court, or the rules that are in place. I understand
4 it's part of the mix. It's just how I apply that, given the
5 standard of narrowly tailored and what the interests are. That
6 was the only reason why I was recognizing it.

7 MS. LOCICERO: And I don't mean to belabor that, and I
8 read with much sadness --

9 THE COURT: Well, I wasn't -- I wasn't asking for
10 that.

11 MS. LOCICERO: I know you're not, but it bears
12 saying --

13 THE COURT: I'm conscious of if I don't say things
14 explicitly, I didn't consider it.

15 MS. LOCICERO: I understand.

16 Yes, those interests are out there. And I think we,
17 you know, explained how they factor into the equation. And I
18 don't mean to be dismissive of them, but what I was trying to
19 point out was that the rules of the CCOC deal with efficiency
20 and processing and not with public access to documents anyway.

21 With respect to the amount, Your Honor, of the cost in
22 Arizona, if you look at the Document 48-3, that is a contract
23 with -- between the Arizona court system and Courthouse News
24 Service. And you will see at paragraphs 4 and 5 that this is
25 essentially -- the \$8,000 is, essentially, a profit center for

1 the court system. That is not something that was paid to
2 Granicus.

3 And you'll see that in paragraph 5 they can, in fact,
4 charge a subscription fee to other entities who want to access
5 the public review queue there. That was not part of a court
6 order, because there was an agreement that was worked out
7 without the need for litigation between the State. But to
8 factor in that \$8,000 as an additional cost for setting up a
9 public review queue as a way to justify not doing that in
10 Florida is not accurate. And the Court has the agreement.

11 THE COURT: I'm sorry, Counsel. You lost me. I was
12 trying to read the document while you were saying that. I'm at
13 paragraph 4.

14 MS. LOCICERO: 4.

15 THE COURT: Why is the \$8,000 not connected to the
16 amount to change it to the -- a public queue was created?

17 MS. LOCICERO: Well, you see that the twelve five is
18 the set-up amount.

19 THE COURT: Right.

20 MS. LOCICERO: Then the \$8,000 they call a maintenance
21 fee. But if you read paragraphs 4 and 5, it becomes clear that
22 that's really a subscriber fee that can be charged to anyone who
23 wants access to the portal review queue.

24 THE COURT: I understand. So it's not that they paid
25 20,000 --

1 MS. LOCICERO: No, Your Honor --

2 THE COURT: I've got it.

3 MS. LOCICERO: -- they don't.

4 We're not seeking a bright-line ruling from the Court
5 about timing. And I know that the Court brought that up in
6 questions to Mr. Calloway.

7 What the Court has here, which is probably unique, I
8 would think, in many of the cases that the Court deals with, is
9 a lot of case law involving the very specific issues that this
10 Court is dealing with in this case.

11 In Vermont, there was an order entered without a
12 bright-line rule, and within three weeks -- we explained that in
13 our declaration -- there was a portal review queue set up -- I'm
14 sorry -- an auto acceptance option set up in Vermont. But there
15 was public access set up within three weeks with a technological
16 solution of their choosing without being told that it has to
17 work in very specific ways, or that one option over another was
18 what they had to do. Nor was there any timing aspect, except
19 that the right attaches on receipt and you have to provide the
20 civil complaints preprocessing.

21 And that was what happened in the *Tingling* case in
22 New York and the *Jackson* case in Texas.

23 THE COURT: Counsel, help me. What's the difference
24 between saying it attaches at the time it hits the portal or it
25 attaches at the time the portal sends it to the individual

1 clerks of court?

2 MS. LOCICERO: Well, Your Honor, the way it works is
3 that filing happens upon that submission to the portal. It's
4 defined in the case law. And the way that the court rules and
5 the standards that -- for electronic filing are set up in
6 Florida -- and it has to be that way for statute of limitations
7 purposes, among other things -- that filing happens upon
8 submission.

9 THE COURT: Because otherwise, Judge, if there was
10 some delay or some snafu and you moved the date, while
11 ordinarily it may be close in time -- if you chose the date when
12 it actually made its way to the clerk, if there was some delay,
13 or the computer was broken down, then, Judge, that would
14 substantially affect the rights of the individual parties that
15 were filing lawsuits. So you have to have the -- for example,
16 for statute of limitations purposes, the right way to attach is
17 at the time it's filed, because if you treat any other time, it
18 would be inconsistent with the way we treat filing of the
19 document; right?

20 MS. LOCICERO: Well, that would be true for statute of
21 limitations purposes, but it's also important for the First
22 Amendment right and when it attaches. It can't be sort of
23 free-floating out there. The portal receives documents and --

24 THE COURT: No, I meant it was -- you are arguing it's
25 consistent with the logic --

1 MS. LOCICERO: The law on --

2 THE COURT: -- and the law on it.

3 MS. LOCICERO: Yes.

4 THE COURT: That when you file something, there's many
5 reasons why --

6 MS. LOCICERO: That's right.

7 THE COURT: -- the point at which it files matters. I
8 wasn't saying --

9 MS. LOCICERO: Okay.

10 THE COURT: -- that the statute of limitations and the
11 First Amendment were either different or one and the same.

12 MS. LOCICERO: All right. I'll being a little dense.
13 Okay.

14 THE COURT: No worries.

15 Did I get that right? That's why you're saying,
16 Judge, that's why that's so critical, because that's when all
17 kinds of rights attach, and that's --

18 MS. LOCICERO: That's exactly correct.

19 THE COURT: -- the critical moment is the actual
20 filing.

21 MS. LOCICERO: Is the actual filing which occurs on
22 submission by the filer. There's actually -- you can see in the
23 Angione -- there's a "submit" button that you hit. That's when
24 everything goes in, in the Angione declaration.

25 Yes, Your Honor, that's what we are arguing, that

1 filing has been defined, and it applies for all kinds of
2 purposes, including the First Amendment, as when the complaint
3 is received, when it's submitted by the filer.

4 With respect to the Clerk of Court's arguments that,
5 like, We can't do anything; it's -- the Authority is the only
6 people who can control Granicus in a public review portal, and
7 we are not responsible for delays -- this is the issue from our
8 perspective, Your Honor, is -- we sit, obviously, outside the
9 system looking in on the system. We know this much about the
10 system, that there is a single mandatory point of e-filing for
11 attorneys in Florida -- and attorneys are the vast majority of
12 the filers in the state -- and that is the portal, and our
13 documents go there. The portal tells us, Carol LoCicero, your
14 filing was received. And it's normally within seconds. And
15 we've included that in the Parsons declaration to show you.

16 They then go to work queues. Well, the truth is,
17 Your Honor, while the declarations want to talk about who has
18 exclusive control at this point and who exclusively processes,
19 they both have control of the documents that the public deserves
20 to see. And we're concerned about that interaction, that
21 intertwining between the Authority and the various clerks, here
22 specifically the clerk of Broward County, and being able to get
23 not only a technological commonsense, feasible solution, but to
24 make sure that there's no gap here.

25 So we are asking the Court, you know, if -- if, as the

1 clerk argues, you know, Granicus is a solution, well, that's an
2 Authority issue. We're, again, not asking you to order a
3 specific remedy.

4 THE COURT: Judge, we don't care whether
5 Broward County does it or the Authority does it by creating a
6 public queue like Arizona at the state portal level, but either
7 way it attaches at the time of filing, and you should direct
8 them not to go through the entire review process but to -- and
9 help me to understand. In Vermont, Judge Reiss said it should
10 be done when? She recognized --

11 MS. LOCICERO: I'm going to read it to you to get it
12 exactly right. And this is at -- well, it's the last page of
13 the opinion.

14 "Defendants are hereby enjoined from prohibiting
15 public access to newly filed civil complaints which have not
16 been designated confidential by the filer until the Vermont
17 Superior Court has completed a preaccess review process."

18 And so in addition to the remedy that you fashion,
19 Your Honor, we think it has to apply to both defendants, because
20 they are intertwined here with receiving civil court records. A
21 right attaches probably first at the portal. Within a very
22 short period of time it may go into a work queue. Again --

23 THE COURT: If that was the order, though, that you
24 can't wait until the preaccess review process is done, what
25 would -- if that were the language that I would -- cut and paste

1 that language and I put it in my order, how does that keep the
2 portal from doing exactly what they're doing and Broward County
3 to say, We are not waiting till the review -- the review is
4 done? How does this require them to make it available at any
5 particular point?

6 MS. LOCICERO: Well, obviously this sentence I read is
7 not divorced from an order. It's part of an order --

8 THE COURT: Right.

9 MS. LOCICERO: -- that made it clear that the right
10 attached on receipt, and that what -- that the delays came from
11 the human intervention. And the order did result in very quick
12 access to complaints.

13 THE COURT: Here's my concern, though. If I issue an
14 injunction, I've got to be able to enforce it.

15 MS. LOCICERO: Uh-huh.

16 THE COURT: And so -- and I also think the case law is
17 pretty clear that I've got to give the party that I'm issuing
18 the injunction to fair notice and guidance as to what it is
19 that's expected of them.

20 So that's why I circle back to where I started with
21 you, the relief requested. You are not requiring -- for
22 example, you are not saying that I have to tell the defendants
23 the only way to fix this is for the statewide portal to have a
24 public queue remedy just like Arizona did. That's a way to do
25 it, but you don't have to do it that way.

1 But I'm just -- for the life of me, I don't
2 understand -- if I'm on the receiving end of this order, I know
3 I can't wait until we do everything we've done; I know I have to
4 change my ways; I know I don't have to do it in any particular
5 way. I don't have to have a public queue using the same
6 technology you're using in Arizona. So I don't have to do it
7 that way, and I can't keep doing what I'm currently doing.

8 But, again, on a spectrum, those are two different
9 things. I'm trying to figure out what exactly -- if I use this
10 language, am I telling, for example -- I'm telling these two
11 defendants, You get together. You come up with a solution,
12 because you can't delay the way you're doing it. But I'm not
13 sure what guidance I've really given them.

14 MS. LOCICERO: Well, what they can do is mimic the
15 paper formulation that the right would attach on receipt. They
16 can do the intaking that we know doesn't take more than five
17 minutes, and at that point, when it's sent to a work queue for
18 Broward County, it needs to be sent to a filtered review queue
19 for the public.

20 THE COURT: So, Judge, my point is, it needs to go to
21 a public queue. What we're suggesting to you is -- we're not
22 saying it has to be done at the state level or the local level.
23 They have multiple ways they could do that. But the fact of the
24 matter is, once they get it and go through that limited process,
25 it needs to be sent to a public queue. Whether it's done at the

1 statewide level through the portal or it's done by some other
2 means, there needs to be an electronic public queue.

3 All we're saying is, we're not suggesting you have to
4 mandate it, follow the Arizona model, or that you use particular
5 software or a particular modification, or even that it be done
6 at the state level, because it could be done, since we've sued
7 Broward County, potentially at the Broward County level. Maybe
8 it can't; maybe it can. But that's why we're not suggesting
9 that you have to specifically tell them mechanically how do it.

10 Do I have that right?

11 MS. LOCICERO: That's exactly right. So it's just
12 that intake transaction.

13 And the reality is that -- you know, we can talk about
14 the fact that you don't have to order a particular remedy, but
15 as a -- from a practical, commonsense standpoint, we know how it
16 works in Arizona with the same software. It's very easy, and
17 we're talking about seconds to max of five minutes before they
18 can make public access available. And then they can do their
19 processing activities, just like they used to do in the old days
20 with a docketing clerk behind the intake counter.

21 That's what we're asking the Court to do, and not let
22 them delay it now and move access back behind the processing,
23 which is what happens now.

24 THE COURT: I'm interested terms of how that worked.
25 You send over a runner with the filing fee -- I'm talking about

1 mechanically -- filing fee, the cover sheet, the complaint.
2 They stamp it received.

3 And then what was done with the complaint?

4 MS. LOCICERO: It was put in a bin. They stamp it
5 received. And don't forget, they take their money.

6 THE COURT: Right.

7 MS. LOCICERO: And then they put it in a bin.

8 THE COURT: Only one copy, though; right?

9 MS. LOCICERO: One copy.

10 And different courts do different things. I mean,
11 we've said that in the different declarations that we've filed.
12 Some courts required multiple copies to be filed. And, of
13 course, in an e-filing environment, you can replicate it.

14 THE COURT: I was interested -- as a practical
15 matter, a member of the press is forgetful and walks off with
16 the copy of the complaint, and there's only one copy and it
17 hasn't been -- it's been stamped, but it hasn't been inputted in
18 the system yet, and it hasn't been put in the file. There's not
19 a second copy.

20 How did that -- is that really how it worked?

21 MS. LOCICERO: Often. The press was sort of behind
22 the counter, so it's like the walking away part really didn't
23 happen because they are in the office.

24 THE COURT: That's what I was trying to get at. This
25 is not that there was a box on the counter where anybody could

1 walk up and rifle through it and walk away with it.

2 MS. LOCICERO: No, you couldn't pick up and take off
3 with the box. That's right.

4 THE COURT: Okay.

5 MS. LOCICERO: And in an e-filing environment --

6 THE COURT: That's not an issue.

7 MS. LOCICERO: -- that's not an issue.

8 THE COURT: I understand.

9 MS. LOCICERO: Right. There's no box, obviously, to
10 walk away with. The --

11 THE COURT: But the point is, Judge, there was a
12 physical way to view complaints before they were fully
13 processed. Here we're talking about a virtual way to publicly
14 view the document before it's fully processed, and that's why
15 there's a parallel between the two.

16 MS. LOCICERO: That's exactly right. And if you,
17 again -- I know I keep citing Judge Reiss' order, but if you
18 look at that order, she basically says the only reason there are
19 delays is for human intervention, not for, you know, reasons
20 that, you know, create an issue with respect to access. So --
21 because it's an e-filing environment. So it's kind of, you
22 know, not -- she used the term "nonsensical" to think of it as a
23 mailbox or any other sort of analogy.

24 Your Honor, I don't want to get off that point if the
25 Court has anymore questions, because I think it's central. But

1 in discussing the administrative versus the judicial action sort
2 of in an immunity context, the example that was used was a
3 motion to seal was filed. The clerk can't rule on a motion to
4 seal, that has to go to a judge, obviously. That's the reason
5 it's being filed in the first place, is to ask for judicial
6 intervention.

7 So there's really not even a limited set of
8 circumstances in which the clerk is providing -- you know,
9 there's no -- not even an exception really to which the clerk is
10 acting in a judicial capacity. It's a small point, but I just
11 wanted to make it clear that the motions are not decided by the
12 clerks, obviously.

13 The -- I --

14 THE COURT: Well, I thought you said, to the extent
15 that there used to be reviews that were done prior to any court
16 review, that that was changed by the change to the rule that you
17 mentioned earlier; correct?

18 MS. LOCICERO: That's right. So there is no review
19 process required, and there's certainly not a ruling on a
20 motion.

21 THE COURT: So, Judge, we don't need to get there, but
22 while that may have been some quasi judicial function -- we are
23 not saying it is or isn't. But assuming, arguendo, it was, that
24 function has been eliminated effective last summer.

25 MS. LOCICERO: Correct, July 1st.

1 The --

2 THE COURT: Go ahead and quickly help me to
3 understand -- for the life of me, it seems to me that, you know,
4 just as -- let me use a preemption example. It's either express
5 or implied, although, I guess, there is an argument that implied
6 preemption is -- may go away with the dodo bird or something,
7 but we'll stick with express preemption, that the -- it's got to
8 fall -- either truly be express preemption, or it has to fall
9 within a very narrow set of circumstances for implied
10 preemption. Here's all the boxes you've got to check to get
11 there.

12 It seems to me to be the same thing -- and this is
13 probably a question better asked of the defense. But it seems
14 to me the same thing holds true with abstention. I'm supposed
15 to exercise jurisdiction unless there is a clear directive that
16 I abstain.

17 And when I reviewed the cases -- and, again, I want to
18 hear from defense counsel if they have any -- it seems to me
19 I've got, like, the Ninth explaining why there isn't abstention.
20 And the one court that found abstention, it seemed to me, didn't
21 really identify a doctrine, didn't really fit it within a
22 doctrine. It was almost like the -- this just doesn't feel
23 right for us to get involved, which seems to me to be the exact
24 opposite way the court, that is, the Eleventh Circuit, has
25 directed me to apply doctrines. You start off with assumption I

1 have jurisdiction, and you have got to establish under one of
2 these narrow abstention doctrines that, in fact, I should
3 abstain.

4 Do I have that wrong or -- and I'll hear from the
5 defense. Again, it's probably better asked for them.

6 But it seems to me if I was going to write an order
7 talking about abstention, I would have to say, this is *Pullman*,
8 this is *Younger*, this is *X*, and I just -- the one circuit that
9 said, We are going to abstain --

10 MS. LOCICERO: The Seventh.

11 THE COURT: -- I don't really see that they did that.

12 Like I said -- that's the *Brown* case, right, from the
13 Seventh?

14 MS. LOCICERO: Yes, Your Honor. You're 100 percent
15 right. They didn't. It was a loosey-goosey sort of feeling
16 thing.

17 And then if you look -- you know, of course, stuff has
18 happened since *Brown*. And if you look in the Vermont order by
19 Judge Reiss again, she goes through all that and calls *Brown*
20 basically an outlier, because courts have not generally
21 abstained and, you know -- I know it sounds silly for me,
22 because we wanted it to go that way, but the court's analysis
23 was dead on --

24 THE COURT: All right.

25 MS. LOCICERO: -- on the abstention issue.

1 THE COURT: I understand. It sounds like Judge Reiss
2 is precedence and Judge Walker is not. But go ahead.

3 MS. LOCICERO: No, Judge Walker -- you know, good
4 company, let's say. You're in good company.

5 THE COURT: I interject some humor to tone the volume
6 down.

7 MS. LOCICERO: But she does go through the various
8 decisions, the *CNS* decisions.

9 On irreparable harm, again, I don't think the Court is
10 struggling with that issue, but under the Clerk Forman's theory,
11 only a prior restraint, I guess, would constitute irreparable
12 harm, and we can't inform the public without complaints. We
13 don't even know they exist for days. So the issues here are
14 very real from a standpoint of our covering the courts
15 contemporaneously.

16 THE COURT: And you don't understand the case law
17 applying irreparable harm and the First Amendment to be cabined
18 in the way that Mr. Calloway suggested.

19 MS. LOCICERO: I do not, and I think it would be
20 dangerous, frankly.

21 The -- I suspect we'll get into this more, but if
22 Granicus ends up being -- when the Authority argues -- but if
23 Granicus ends up being the method that the -- that is the
24 feasible method to comply with an injunction in this case, it is
25 the contractor for the portal. It's -- I can't deny that that

1 is where the contractual interaction is with Granicus. The
2 Authority controls that, ultimately.

3 And then the -- I'm not sure where all this stuff is
4 going with the Association. Clearly, from the inner local
5 agreements, every clerk in Florida is a member of the Authority.
6 I'm presuming they are a member of the Clerk's Association, but
7 it's the clerks basically running the Authority, contracting
8 with themselves as the Association, contracting with themselves
9 in a for-profit entity that's known as Civitech, and then
10 contracting with Granicus.

11 So, you know, the Court knows that you cannot
12 contractually structure something so that you can't comply with
13 a court order. And if the Court says to the defendants, Access
14 attaches on receipt, you cannot delay it for processing, then,
15 you know, they have to deal with it and all the structural stuff
16 doesn't matter. It's really all the clerks everywhere you look.

17 So, Your Honor, those are -- those are the points that
18 I had to respond to from Clerk Forman's counsel's argument. And
19 I'm certainly happy to answer any other questions you have
20 related to it.

21 THE COURT: No, we'll hear from Mr. Stewart then next.

22 MR. STEWART: Thank you, Your Honor.

23 The -- from the Authority's perspective, the one issue
24 that obviously everybody acknowledges is that the Authority --
25 the e-filing portal right now does not accommodate a public

1 access point. And so the relief that's being sought by the
2 plaintiffs is really not to maintain the status quo of a
3 preliminary injunction, but rather to create a system that does
4 not exist and has never existed in the Florida system.

5 Now, plaintiffs seek to require a modification of the
6 state portal, but what really is the issue is that they're
7 concerned about the delays. But the delays are not the issue of
8 the E-filing Authority.

9 What is in the record that --

10 THE COURT: Counsel, you don't disagree with my
11 questions directed to Mr. Calloway; namely, that when we talk
12 about the review process, that's done once they get it from
13 y'all?

14 MR. STEWART: That is absolutely correct, Your Honor.

15 THE COURT: Okay.

16 MR. STEWART: And, in fact, the record before you, we
17 have submitted the timesheets.

18 THE COURT: Wouldn't that be true, Mr. Stewart, even
19 if this Court found and declared -- because I know they seek
20 declaratory relief as well as injunctive relief -- that the
21 right attaches with the filing? Since the delay is not at the
22 statewide portal level, even if that was where the right
23 attaches, that still doesn't implicate y'all since you weren't
24 the folks that are delaying the process?

25 MR. STEWART: I believe that's correct.

1 And one point -- thing I would point out in the Rules
2 of Judicial Administration, that a document that is filed does
3 not become a court record, as defined by Judicial Rules of
4 Administration, until it is actually accepted within the court
5 file by the clerk. So that -- even though, for the purpose of
6 deadlines that you went through, in terms of statute of
7 limitation --

8 THE COURT: You are saying that is different?

9 MR. STEWART: I think it is different, Your Honor.

10 I think that the rules recognize that the point of
11 access is once it hits that court file. And at that point --

12 THE COURT: Which begs the question, when does it --
13 when we are talking about electronically, when does it hit the
14 court file?

15 MR. STEWART: Well, where it is in the process is
16 probably a different question than it is now deemed to be a
17 court record. Because clearly the Rules of Judicial
18 Administration do not consider electronic filing a formal court
19 record until it does enter -- it's probably in the case
20 management system by the clerk.

21 But the issue, though, in terms of the delay and where
22 the delay is occurring, we have submitted documentation that
23 shows, as Ms. LoCicero said, that upon the filing we put a
24 notice of electronic filing, to date and timestamp it, and it is
25 transmitted to the clerk for review, either through their local

1 portal, such as Broward, or if they can view it in the portal.
2 And at that point, that is the last activity of the Authority.
3 It's done. It's -- it is sent, and then what they wait for --

4 THE COURT: Is it fair to suggest that this record
5 suggests that what you do as it relates to Broward -- because
6 I'm not interested in the other 67 counties. As it relates to
7 Broward, is there anything in the record to suggest it's
8 anything other than almost instantaneous that it hits y'all and
9 then goes to them?

10 MR. STEWART: I believe that is correct. I mean, it
11 is -- the only delays are the circumstances where, being a
12 lawyer, is we file at 5 o'clock, so there is a backlog, and so
13 it may take five minutes to transmit.

14 THE COURT: The idea being, Judge, just like any
15 computer system, if you are overloaded, there could be a delay.
16 But absent everybody trying to get on at the same time, it's
17 very, very quick.

18 MR. STEWART: Exactly.

19 And the issue, though, in terms of the record before
20 you is that the Authority has absolutely no control after it
21 transmits to the clerk. We cannot tell the clerk how to review
22 it, what manpower to dedicate towards it. That is unique, their
23 determination exclusively. And so we are fulfilling the role
24 that we were created to perform.

25 If there is a delay in the process, it is in the

1 administration of the review of these files.

2 THE COURT: The fact that -- why should it -- for
3 purpose of what's before me, the fact that you can -- could
4 provide relief by allowing for a public queue at that level -- I
5 think I know the answer to this question. Just because you
6 could provide relief doesn't mean that this Court should direct
7 you, if you are not the source of the delay; is that the --

8 MR. STEWART: Well, and there's another -- there's a
9 common sense reason why that's not the best remedy or the
10 appropriate remedy.

11 Yes, a public access portal can be created. We agree
12 with that. However, there still is a review process that needs
13 to be conducted before that newly filed complaint is put in that
14 public access. That is now being done at the local level by the
15 clerks. However, it will still need to be done at the state
16 level to basically weed out the confidential type matters. We
17 are not doing that at this point in time.

18 THE COURT: Help me to understand, if a rule was
19 passed that said you have to check it's confidential, which
20 throws it in a different place, and if you don't, that's your
21 problem, for the life of me, I don't understand, if that's the
22 rule, then what's the requirement to go behind the rule that
23 says, if you don't check "negative" twice, it goes with all the
24 other complaints?

25 MR. STEWART: Well, I think certainly, from the intent

1 of the Florida Supreme Court, that was to basically free up the
2 clerk from individual liability by taking that responsibility
3 off their back and placing the responsibility on the filer of
4 that complaint, that they have to check that box.

5 I don't know what goes on in Broward Clerk's Office.
6 I don't know about the other 66 counties. But the intent of
7 that rule, I believe, was to avoid that need to go through all
8 of the other files and say, Oh, well, we have to look at these
9 to see if they made a mistake to try to assure that there's no
10 confidential material contained in those that was not checked.
11 I don't think that's the intent of the rule. I think the rule
12 was to free the clerk from that obligation. If that is being
13 done, that will be additional delay, obviously.

14 But I think the Supreme Court's solution was, in fact,
15 to take that burden off the clerk's back.

16 THE COURT: By "burden" you mean liability, potential
17 liability?

18 MR. STEWART: Correct. Or even the burden of manpower
19 having to go through complaints to check and see if there's
20 confidential information but not noted by the filer.

21 THE COURT: But if they don't have to do it anymore,
22 then why are we doing it and causing a delay in the process?

23 MR. STEWART: We're -- from the Authority's
24 perspective, they don't need to do it, and should not delay the
25 process by doing it.

1 THE COURT: I understand.

2 MR. STEWART: Now -- but going to the point about this
3 segregation of confidential, I mean, this is a determination
4 that's not made at the state level. You really would end up
5 creating a duplicate system where you have the state now doing
6 this segregation. Granted, it may be done electronically, but
7 it's also still the responsibility of the clerks to make that
8 differentiation at the local level under the rules currently.

9 So you create a repetitious step in the process by
10 putting that burden on the state when, really, the Supreme Court
11 has stepped in. The Supreme Court has provided guidance. It
12 should be clearing that time lag by just not having to go
13 through anything if they -- as long as those boxes are checked,
14 they should be able to move everything else to the pulpit.

15 THE COURT: And I think I know the answer to this
16 question based on the state of the record, but as I understand
17 it, when you -- those boxes are checked. When they go -- when
18 Broward gets the information, then -- help me to understand --
19 they just get it all together, or are they segregated into two
20 different groups, those where the boxes had been checked and
21 they need to treat them differently and those that haven't, or
22 do they just all get them and they have to manually put them in
23 two different --

24 MR. STEWART: My understanding is that the complaints
25 are filed, the notice of electronic filing, and then it is sent

1 to the clerk at that point. It's not segregated at the state
2 level.

3 THE COURT: But there is nothing you do, where you put
4 it -- you send all Broward County complaints to Broward County.
5 You don't do anything separate. They may be marked, but they
6 are not segregated.

7 MR. STEWART: My understanding is that is correct,
8 that we do not make that -- we have certain queues or lists.
9 You know, obviously there's 67, one for each of the counties,
10 and whether they go to the local or --

11 THE COURT: I think that was clear, but there's not --
12 subqueues do not exist when they go from the state portal down
13 to the individual counties?

14 MR. STEWART: That is correct. That's my
15 understanding.

16 Now, the -- in talking a little bit about -- there was
17 some discussion concerning if, in fact, the Court is looking to
18 require or suggest that the State should create the public
19 access portal, there's several factors there. We do agree that
20 there can be a development of a software. Arizona did create
21 that.

22 There is a difference in the record, though, between
23 Arizona and Florida. In Ms. Weber's declaration she indicates
24 that Florida, first of all, is a unique system of the electronic
25 filings around the country. That's in paragraph 11.

1 Additionally, in terms of -- it may be a matter of
2 judicial notice, but there is only 15 counties in Arizona and
3 there's 67. So there are greater complexities. How that
4 translates to costs of software, I really can't say, but we do
5 agree with that.

6 But even if the Court was to suggest that was the
7 relief that should be given, the declaration of Mr. Girdner --
8 Girdner -- he indicated that Arizona did it, and it took six
9 months to create the public access portal. This is a
10 preliminary injunction. We are set for trial in January. So
11 it's not -- the implementation and the relief would not be able
12 to be really realistically achieved by ordering the State to
13 develop that process.

14 One little note, I know we've had -- I know you want
15 to go back to Ms. LoCicero, but I did want to note that in the
16 Vermont order, Judge Reiss, the next sentence in that, after
17 what was read, indicated that defendants still are able to
18 restrict where there has been a violation of the filing rules.
19 So even that decision recognized that there was some review that
20 could hold back complaints from being put into a public portal
21 or access.

22 Thank you, Your Honor.

23 THE COURT: Thank you. I understand.

24 Ms. LoCicero, I want to make sure I understand the
25 mechanics. And I think I do, but I want to make sure I

1 understand this.

2 Let's assume, for sake of argument, that it's not
3 done, that is, a public queue is not created at the state level.
4 I'm trying to figure out mechanically how it's done. And what
5 is in the record before me as it relates to -- Broward County
6 gets all the complaints, they review them based on the
7 documentation that you provided to the Court, the six-month
8 period ending in February 28, 2022. You've given me examples of
9 a snapshot in time of a certain number of cases and how long it
10 took to make them public.

11 Mechanically, what happens at the user end -- not the
12 State end, the user end -- to switch them from Broward's eyes
13 only to public view? I'm assuming that what's happening, is
14 each complaint is looked at and they are having to check a box.
15 And once they check a box on the computer, then it suddenly is
16 part of the docket that can be viewed online.

17 Is that not how it works?

18 MS. LOCICERO: That's roughly how it works.

19 What's happening is, you know, the filer submits, it
20 goes into the work queues, then the processing occurs. And when
21 the processing is finished, there is an accept button that the
22 clerk clicks. And the data supports the fact that when they
23 click that accept button is when it also populates the public
24 website and we can see the complaint.

25 THE COURT: Do I know anything about -- and I want

1 to -- and I may be using, you know, bad language to describe
2 this, but I'm talking about Broward County being the user, when
3 they get it.

4 Do we know, is it -- is there anything in the record
5 to know whether it's possible at the user end to make it public
6 once they make sure -- anything on the user end when you check
7 "no" twice it goes into one pot and everything else
8 automatically goes into the public view?

9 Do we know if it's possible to do it on the user end?

10 MS. LOCICERO: Well, I'm comfortable saying this,
11 Your Honor, is that, if you are talking about the user being the
12 person submitting the filing?

13 THE COURT: No, no. I'm talking about the user being
14 Broward, the user of the portal --

15 MS. LOCICERO: Of the portal.

16 THE COURT: -- that the state has.

17 MS. LOCICERO: Okay.

18 THE COURT: What's why I kept saying "Broward County."

19 MS. LOCICERO: Okay.

20 THE COURT: I get that you said in Arizona.

21 As I understand it at the state level, it would be the
22 master of the portal that creates the public queue at the state
23 level, not -- what I'm referring to is the user end, which would
24 be the county level; is that correct?

25 MS. LOCICERO: Yes. In Arizona it's at the state

1 level.

2 THE COURT: Right. And what I'm trying to find out
3 is, what is in the record that lets me know whether or not at
4 the Broward County level you can implement a change that would
5 throw everything into the public sphere automatically except
6 those where the parties have checked "no" twice consistent with
7 that rule?

8 MS. LOCICERO: There's not a lot in the record that
9 would let you know who has the capability of doing what. I
10 think there is an assertion by the defendants that the Authority
11 currently doesn't do sorting, but that the clerk does at the
12 local level.

13 THE COURT: Does this come down to, Judge, that's not
14 my problem, not my burden, and they haven't met their burden to
15 the extent it's going to be fixed at the local level? Judge, I
16 don't know what to tell you. If you -- if you rule having found
17 that we've met our burden, it's up to them to say and establish
18 not only can we not get it done at the state level, we can't do
19 it at the local level. You don't have that in front of you and
20 not really my problem, Judge.

21 Is that the --

22 MS. LOCICERO: Well, I wouldn't be that sassy, but
23 it's close.

24 And I think it's important for the Court to understand
25 that all this tagging that occurs that would permit a filter

1 review queue that takes out the five little areas that we talked
2 earlier with the Jimmy Ryce Act and the notices of confidential
3 and sex abuse cases, all that checking is done at the portal.
4 What I see as an outsider --

5 THE COURT: Yeah, but somebody -- and, again, I'm not
6 a computer guy. Let me start off by saying, I'm a luddite. I'd
7 just as soon have books, pads and paper and no computers. Not
8 that I'm going to go out and destroy the printing press and
9 computers and so forth.

10 I understand you're checking those boxes when they are
11 filed. But it's either got -- I'm going to refer to it, because
12 I'm simple, as a filter.

13 MS. LOCICERO: That's right.

14 THE COURT: You either got to filter it at the state
15 level as you are sending it out or you got to filter it at, what
16 I'm going to call, the local level, the county level. And based
17 on what I've got in front of me with Arizona, there's record
18 evidence that it can be filtered at the state level, which is
19 what they do; correct?

20 MS. LOCICERO: That's right.

21 THE COURT: All right. So the question becomes, is it
22 possible to filter at the local level? And do we have any
23 idea -- is there anything in the record that suggests you can?

24 MS. LOCICERO: What I would say -- I don't know what
25 the technological capability is, but I don't believe that we see

1 confidential complaints on the Broward Clerk's website. So
2 filtering is going on somewhere. But the problem here,
3 Your Honor, is that that's all a bureaucratic choice about who
4 is doing what, where, at what level.

5 You know, when the right attaches on receipt, and the
6 Authority chooses to send it in a certain way, the way this was
7 structured was not structured to take in the pillar of -- we
8 have to make sure that we are continuing to serve public access
9 rights.

10 THE COURT: I understand that, counsel, but I've still
11 got to consider whether reasonable alternatives exist consistent
12 with the government interest and the administration of justice.

13 So if you can't do it at the -- I mean, if you've got
14 to rework the entire system locally, and it's going to be some
15 unknown burden or amount of money or manpower, how do I balance
16 that?

17 I guess your point is, Judge, well, there is an
18 alternative where you can order it at the state level. So, if
19 it's not, then you know there is at least at the state level so
20 it's enough?

21 MS. LOCICERO: Well, I think what we are saying,
22 Your Honor, is that we know there is a less restrictive
23 alternative because we, from a practical standpoint, have the
24 same software at issue in Arizona.

25 THE COURT: But less restrictive at the state level,

1 but we don't really know less restrictive at the local level; do
2 we?

3 MS. LOCICERO: Well, the problem at the local level is
4 not the filtering issue. The problem at the local level is the
5 processing issue. So the -- we're not seeing --

6 THE COURT: Well, no. Again, I'm just looking at
7 the -- and, again, maybe I'm just misapprehending this.

8 MS. LOCICERO: No, I don't want to miss what you are
9 asking.

10 THE COURT: The State is sending it to Broward County,
11 the boxes have been checked, but it's all going in one pot.
12 We've got -- you've got four different critters: You got dogs,
13 cats, bears and flamingos. They all go together. But what you
14 want is, Judge, we get that flamingos aren't supposed to travel
15 with the other three.

16 MS. LOCICERO: Right.

17 THE COURT: And, Judge, we know from Arizona that
18 Mr. Stewart over here and his client can keep the flamingos out,
19 and can send them separately to Broward County and only put the
20 cats, the dogs, and the bears -- I think that was the three
21 critters -- together.

22 MS. LOCICERO: Right.

23 THE COURT: We don't know, though -- right now all I
24 know that Broward County can do is -- because they get this data
25 in mass from Mr. Stewart's clients. In order to get them on the

1 public record, they've got to affirmatively in each case check a
2 box, at least one box on the computer; correct?

3 MS. LOCICERO: That's what's happen now, that's right.

4 THE COURT: So it's manually. And we don't know
5 whether they can override that manually and do it en masse.
6 Maybe they can, maybe they can't.

7 MS. LOCICERO: They haven't said that they cannot.

8 THE COURT: Hence my question --

9 MS. LOCICERO: Yeah.

10 THE COURT: -- to you before. And you said you
11 wouldn't be that sassy, but that would come down --

12 MS. LOCICERO: It's not my problem.

13 THE COURT: That could come down to, Judge, it's their
14 burden, because we've met our burden to show --

15 MS. LOCICERO: Clearly.

16 THE COURT: -- that we can't do it. And if the record
17 is devoid of anything to show they can't, then, Judge, we should
18 win under the burden shifting.

19 MS. LOCICERO: That's right.

20 And under the burden shifting you don't -- on the
21 other side you don't have much.

22 THE COURT: With respect to, though, Mr. Stewart as a
23 party -- I mean, not him, but his client.

24 MS. LOCICERO: Right, Chair Rushing.

25 THE COURT: If they're not causing the delay, and it's

1 automatically the complaints are being processed as fast as
2 computers can process them, and there's no showing that unless
3 it's overloaded it's taking more than a few minutes, how is --
4 how are Mr. Stewart's clients causing the constitutional
5 violation such that I can order them to do anything?

6 MS. LOCICERO: Well --

7 THE COURT: I understand why they could be part of the
8 solution. But just because -- say I don't want Mr. Calloway's
9 client to do what he's doing, and the easiest way to fix that is
10 to order Mr. Stewart's client to do something, doesn't
11 Mr. Stewart's client have to be violating the constitutional
12 rights for me to be ordering him to do something?

13 I understand as a practical matter why it's helpful,
14 and it's the best way to get Mr. Calloway's client in
15 compliance, but how do I order Mr. Stewart's -- and, again, this
16 is nothing original. I think this was part of Mr. Stewart's
17 argument. And maybe I'm inartfully paraphrasing it, but I do
18 want you to address that.

19 So how do I get there?

20 MS. LOCICERO: You get there in a couple of ways.
21 The --

22 THE COURT: Because even -- by the way, even under
23 Judge Reiss' order, it doesn't have to be instantaneous. I
24 mean, I believe even under her order she would recognize that if
25 what the -- Mr. Stewart's clients are doing, it's only limited

1 by overcapacity on computer lines, and only take as couple of
2 minutes, that the time that it takes for a computer's system --
3 all by definition have some limited capacity -- it takes them to
4 do it. Now, they can't use an old TRS-80 computer that takes
5 six days to do it.

6 But assuming it's within a couple of minutes, how
7 would that be a violation of the First Amendment what it is
8 Mr. Stewart's client is doing?

9 I understand he can be part of the solution, but I
10 don't -- I'm still having a hard time with grappling why
11 Mr. Stewart's client is the problem.

12 MS. LOCICERO: Sure. They are both custodians of
13 records -- of court records in the state. There is no question
14 about that.

15 THE COURT: Judge, we are getting them -- we are
16 getting them where they can be accessed publicly in five minutes
17 or less, and we agree with Ms. LoCicero, they don't have to
18 review them. The new rule says that you can immediately process
19 them. If they don't check the two boxes in the negative, they
20 can do that. We are not requiring them to do it that way.

21 MS. LOCICERO: But there are two things at play here.
22 You know, you've got two entities or groups -- actually you have
23 68, I guess, if you include all the counties. But you have
24 clerks and you have the Authority. The Authority is the initial
25 reception point for a complaint. It exists there. The

1 Authority provides zero access to anything.

2 So I think that's one problem, is that you have a
3 custodian of records that has a system set up that provides no
4 access to court records. And then you have the Authority as the
5 entity that's sending the complaints to purgatory to be
6 processed and made available whenever that accept button is hit.

7 So, you know, the idea that the Authority is just
8 like, Look, we are just an efficient e-filing body. You drop it
9 in; we are a mailbox. We are not much of anything beyond. That
10 is not the reality of what's going on here.

11 They are the mandatory point. They have to
12 acknowledge it. They have to receive the submission. They --
13 they are the ones that send it into the queues, and they do not
14 provide any kind of access to records.

15 THE COURT: Isn't another way of looking at this,
16 Counsel, is, Judge, here's the reason why they are part of the
17 problem is because of the way they send it. They chose to send
18 it en masse to the end user of the county. And by sending it
19 that way, and forcing them to check a box -- even if
20 Mr. Calloway says, Judge, you ordered it, we are going to do
21 what you ordered, we still -- because of what Mr. Stewart's
22 clients are doing, we still have to physically go in and check a
23 box on every individual filing. And so while we may be able to
24 do that faster, there's still going to be a delay, Judge,
25 because you can't -- you've got to take cognizance of reality.

1 It's not heads, you win -- heads, you lose; tails, you lose,
2 Mr. Calloway.

3 If his people, the clerks, have to check a box because
4 of the way he gets it, there's going to be, by definition, a
5 delay. It may be less, but there is still going to be a delay,
6 because you still have to process all of those complaints by
7 each one checking a box, and somebody dedicated to do that while
8 performing all the other functions that those deputy clerks have
9 to fulfill.

10 And so is that the reason why it's not so simple to
11 say that Mr. Stewart's client is not doing anything that causes
12 the delay, because the way they turn the information over is
13 what creates the delay where Mr. Calloway couldn't do what I'm
14 telling him to do, which is, get in a public queue immediately
15 so the delay is, in fact, caused by the very structure and
16 nature of the system that's handed out on high for Mr. Stewart's
17 clients; is that --

18 MS. LOCICERO: That's -- that's -- yes. That all
19 plays into what's going on. That's what I mean when it's a
20 bureaucracy. When you look at it, you cannot separate out who
21 is doing what and have one comply with an injunction without the
22 other.

23 THE COURT: All right. I asked you a lot of
24 questions. Anything --

25 MS. LOCICERO: That's okay.

1 THE COURT: Anything further you want to --

2 MS. LOCICERO: I just want to correct a factual
3 question. There's -- it's -- there's nothing cited to support
4 that acceptance doesn't -- that it's not a judicial document
5 until it's accepted. And if there were something in the Florida
6 Rules that say that it's not a judicial document until the point
7 that the clerk processes it and accepts is, that argument has
8 been rejected and multiple courts that have considered these
9 issues. And we've talked about all the reasons before when the
10 filing is received.

11 And so, you know, *Cozine* in Oregon recently dealt with
12 exactly that issue with a real court rule that said it wasn't
13 filed until it was accepted. And we don't -- we don't have that
14 in the state of Florida.

15 And, I guess, you know, to sum up, sort of,
16 Your Honor, what is at the heart of this for us is that one of
17 the biggest impositions and burdens on the news media covering
18 government really comes down to delays. We see it in the
19 executive branch, we see it in the state court system, and we
20 see it in the legislative records, too. The fact that you have
21 to repeatedly come into court, even though you have established
22 precedence --

23 THE COURT: But if you don't turn it over, you can't
24 be subject to scrutiny.

25 MS. LOCICERO: Well, there you go. Maybe I should

1 just stop there.

2 Thank you, Your Honor. It's true, it's an important
3 issue for CNS, and it's a matter of practical concern as well as
4 principle. So we appreciate the time that the Court has devoted
5 to the issues.

6 THE COURT: Thank you.

7 Let me ask the parties: I'm going to get the
8 transcript, so that's going to take -- you don't get it unless
9 you order it and pay for it. I'm going to get a rough draft for
10 my purposes to go review.

11 And I've got other court matters in the next 24 hours,
12 but I plan on working on this order next week. Sometimes
13 something comes up in an argument -- I want to make plain, I'm
14 not dragging this out. I think I set this on a pretty fast
15 clip, so I'm not -- and I think I do a pretty good job. Whether
16 the conclusion is right or wrong I guess is subject to debate.
17 But I do a pretty good job of moving my cases and my docket,
18 particularly when they are preliminary injunctions.

19 Even when I'm -- the last preliminary injunction I
20 had -- and I'm not telegraphing anything to anybody -- I denied.
21 That dealt with student survey cases, but it was within just a
22 couple of weeks that I got it to everybody. So whether I'm
23 granting or denying preliminary injunctions, I try to do it
24 quickly.

25 But something may have come up today where y'all want

1 to circle back or you want to cite a case. And I'm not going to
2 give you a bunch of time -- since I work most weekends, I'm not
3 overly sympathetic to lawyers working on the weekends. But I'm
4 happy if somebody wants an opportunity to file anything
5 additional based on the questions I asked or the comments made
6 by the other side, you know, on Monday or something. I'm not
7 requiring it.

8 Judge, we just think that's going to unnecessarily
9 delay things, that's a fine answer, too. But I do always like
10 to give folks some opportunity if they believe they need to
11 supplement the record and anything in writing. Because I want
12 to make sure everybody has a full and fair opportunity to
13 present their arguments.

14 So let me start with Ms. LoCicero. I'm not requiring
15 it. I'm not -- and all I was doing was qualifying it by saying
16 it's going to be a very short timeline, because I'm not going to
17 drag the case out by offering this.

18 MS. LOCICERO: I don't think we need it, Your Honor.

19 THE COURT: Okay.

20 MS. LOCICERO: But I'm not going to say to the Court,
21 you know, no, if you think it's important.

22 THE COURT: Fair enough.

23 And I haven't asked y'all to brief anything specific.
24 Sometimes I do. In that case I would be ordering everybody to
25 address a particular follow-up.

1 MS. LOCICERO: Sure.

2 THE COURT: Mr. Calloway, what says you on behalf of
3 the Broward County Clerk of the Court?

4 MR. CALLOWAY: Judge, we would accept the Court's
5 opportunity to do that. Obviously we would need to consult, but
6 if the Court were willing to make some opportunity available, we
7 certainly would like to have that.

8 THE COURT: Mr. Stewart?

9 MR. STEWART: Your Honor, the same. I don't
10 anticipate right now, but if the opportunity presents itself.

11 One thing I would like, if I could put on the record,
12 because Ms. LoCicero had questioned my judicial rule reference
13 concerning defining court --

14 THE COURT: That's one of the things I was thinking
15 about that she could address and you could --

16 MR. STEWART: Yeah.

17 THE COURT: -- add in a brief if you wanted to.
18 That's just one example. There were a few others that I -- but
19 go ahead.

20 MR. STEWART: Yeah, under Rules of Judicial
21 Administration 2.420 and 2.430, Rules of Judicial Administration
22 both define court records as I represented to the Court.

23 THE COURT: Why don't we do this: Monday -- I'm
24 certainly going to be working on my order, I can promise you, in
25 the interim. Today is Thursday. I can either do it Monday by

1 5 p.m. or Tuesday by 5 p.m. I'm certainly going to be working
2 on an order between now and then.

3 But let me find out -- look, 24 hours, one way or the
4 other, I don't think is diminishing the importance to either
5 side. But I'm -- again, I don't -- as evidenced by the short
6 timeline I'm suggesting, I'm not trying to delay these
7 proceedings or kick the can down the road. I want to give you a
8 meaningful opportunity -- and I understand you have to fly home
9 and all that kind of stuff, so that's why I was sort of adding
10 Tuesday by 5 p.m. if you want it.

11 But what says the plaintiff?

12 MS. LOCICERO: We'd rather have Monday by 5, but, you
13 know --

14 THE COURT: Let me guess, Mr. Calloway...

15 MR. CALLOWAY: Judge, we certainly would accept
16 Tuesday by 5 p.m. if the Court made it available.

17 THE COURT: Look, the fact of the matter is, if I
18 thought that I was going to be able to get the full order out
19 and could get it -- was going to get it done -- but it's
20 probably going to take me a few days because, as hopefully y'all
21 can appreciate, this is not the only case on the docket. So I'm
22 not going to sit on this case for 90 days, but I'm not going to
23 probably get it out on Tuesday.

24 So I'll give you until Tuesday at 5 p.m.

25 And as y'all can appreciate, there's all kinds of

1 things that -- regardless of what the outcome of the order is --
2 that I've got to create the framework, the facts, you know, the
3 procedural history, the standards, and all that kind of stuff.
4 So it's going to take me awhile just to get the framework set up
5 anyway, regardless of the analysis and the ultimate conclusion.

6 So you don't have to file anything, but the parties
7 are -- can file -- now, we are not supplementing the record, I
8 want to make plain, with any documents or any exhibits, because
9 otherwise we could go back and forth ad infinitum. But this is
10 an opportunity to respond to the discussions and issues raised
11 here and supplement the record with written argument and case
12 cites; okay?

13 And I should add, it's also fair if either side
14 believes, Judge, you asked some questions about what the record
15 reflected, and so we are going to go through in specific detail
16 and say, Look here, here, and here for what we were referring
17 to. That's fine, too.

18 So it's just, we are not going to add exhibits and we
19 need to stick to the legal arguments that are raised. Let me
20 also add that. We are not going to create a whole new rabbit
21 trail, either side, for me to chase down. So it's
22 supplementing -- it's truly supplementing the record in light of
23 the discussions had today.

24 I thank y'all for your hard work and professionalism.
25 We probably could have gotten through this faster than three

1 hours had I been a bit more organized. I thank you for your
2 patience.

3 And court is in recess.

4 (Proceedings concluded at 12:12 PM on Thursday, May 12,
5 2022.)

6 * * * * *

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.
9 Any redaction of personal data identifiers pursuant to the
10 Judicial Conference Policy on Privacy is noted within the
11 transcript.

11 /s/ Megan A. Hague

5/13/2022

12 Megan A. Hague, RPR, FCRR, CSR
13 Official U.S. Court Reporter

Date

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