

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

COURTHOUSE NEWS SERVICE,
30 N. Raymond, Third Floor
Pasadena, CA 91103

Plaintiff,

v.

**MARYELLEN O'SHAUGHNESSY, in her
official capacity as Clerk of the Franklin
County Court of Common Pleas,**
Franklin County Clerk of Courts
373 South High Street
Columbus, OH 43215

Defendant.

CIVIL ACTION NO. _____

JUDGE: _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff Courthouse News Service (“Courthouse News”), by and through its undersigned attorneys, alleges the following in support of its Complaint for Injunctive and Declaratory Relief against Defendant Maryellen O’Shaughnessy (“Defendant”), in her official capacity as Clerk of the Franklin County Court of Common Pleas (“FCCCCP”).

INTRODUCTION

1. Since time beyond memory, state and federal courts across the country have provided timely access to new, non-confidential, civil complaints (“new complaints”), which was when the clerk of court received the new filing. Ohio’s federal and state courts shared in that tradition of timely on-receipt access.

2. Traditional on-receipt access meant that the press and public could review new complaints when they were filed, when the paper filing crossed the intake counter in the clerk of court’s office and was received by an intake clerk. Press and public were not forced to wait until

after docketing, which was when the docketing clerk entered new case information into the docket. In other words, press and public access was on receipt.

3. In the transition from paper filing to electronic filing (“e-filing”), the federal courts and many state courts kept the tradition of on-receipt access in place. FCCCP did not.

4. When Defendant first implemented e-filing at FCCCP, she pushed press and public access behind docketing, now commonly called “processing,” thereby failing to maintain the tradition of timely, on-receipt access. She has since refused to reinstate it.

5. The First Amendment to the United States Constitution provides the press and public with a qualified right of access to new complaints. Once this qualified right of access attaches, any restriction of access is a restriction of the press’s and public’s First Amendment rights, unless constitutional scrutiny is satisfied.

6. Whether new civil complaints are paper-filed or e-filed, this right of access attaches *on receipt*, which is when a new filing is delivered to, or deposited with, the clerk. In other words, the press and public have a constitutional right to access new complaints when the clerk receives them. Any delay in access thereafter that results from Defendant’s processing policy is an unconstitutional restriction of the press’s and public’s First Amendment rights, unless the Defendant can show that such policy satisfies constitutional scrutiny.

7. Courthouse News has a First Amendment right of access to new complaints filed with Defendant at FCCCP. Such access is fundamental and essential to accurate and fair news reporting of civil court actions, and, thus, vital to the public’s ability to monitor the activities of the judicial branch of government. Any unjustifiable delays in access result in unconstitutional restrictions of the press’s and public’s performance of that important role.

8. When a complaint is withheld, the news it contains grows stale. The public is left

unaware that a civil action has commenced and has invoked the power of the judicial branch of government.

9. Many state courts and most federal courts throughout the country provide the press and public with on-receipt access to newly e-filed complaints. E-Filing software does the job of the paper-era intake clerk, so access at the time of receipt mirrors the traditional point of access in the paper filing days (i.e. placing access between intake and docketing).

10. Defendant, however, enforces a policy of withholding access to newly received civil complaints until after processing is completed.

11. Defendant has adopted and implemented a “no-access-before-process” policy that delays access to newly e-filed, non-confidential complaints. Section II (C) and (E) of the Eighth Amended Administrative E-Filing Order (hereinafter “E-Filing Order”), adopted by Defendant on March 1, 2021, requires **all** e-filed documents to be withheld as “confidential” until Defendant has completed “clerk review.” *See In re: Electronic Filing of Court Documents, Amended Eighth Administrative Order, **Exhibit A** at 2.*¹

12. By its definition, Defendant’s “clerk review” equates to processing. *Id.* Defendant is withholding access to newly e-filed complaints to review the new case information entered into Defendant’s e-filing system by the filer. By withholding, or sealing, all new complaints as “confidential” until after processing is completed, Defendant is effectuating a no-access-before-process policy. *Id.*

13. These delays are unnecessary, as demonstrated by the federal and state courts across the country that provide access to new complaints on receipt and before processing. But for

¹ Defendant’s webpage provides e-Filing Resources, one of which is a link to FCCCP’s current E-Filing Order. *See Civil e-Filing Guidelines (Current as of March 1, 2021)*, e-Filing Resources, Civil Division, Franklin County Clerk of Courts, Maryellen O’Shaughnessy, <https://clerk.franklincountyohio.gov/efiling/efilingResources>.

Defendant's no-access-before-process policy, there would be no delay. Defendant is capable of providing on-receipt access; she has just chosen not to.

14. Since August 17, 2021, Courthouse News has attempted to correspond with Defendant in hopes of resolving these delays in access. However, timely on-receipt access is not forthcoming, as Defendant rejected Courthouse News' request that Defendant stop enforcing her no-access-before-process policy that withholds access to new civil complaints until after processing – i.e., what Defendant calls her “clerk review” and “acceptance” process – thereby resulting in continued and significant delays in access to new civil complaints e-filed at FCCCP.

15. Courthouse News brings this action to end the pervasive and ongoing deprivations of the First Amendment right of access, seeking both declaratory and injunctive relief.

JURISDICTION AND VENUE

16. Courthouse News' claims arise under the First and Fourteenth Amendments to the U.S. Constitution and the Civil Rights Act, Title 42 U.S.C. §§ 1983, *et seq.* This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief). Defendant is subject to personal jurisdiction in this District.

17. Venue is appropriate in this district under 28 U.S.C. § 1391(b) and (c) because a substantial part of the events or omissions giving rise to Courthouse News' claims occurred in this district, specifically at FCCCP, and because Defendant is a public official who is employed in, performs her duties in, and resides in Franklin County, Ohio.

THE PARTIES

18. Courthouse News is a nationwide news service that was founded almost 30 years ago out of a belief that a great deal of civil litigation news went unreported by traditional news media. Courthouse News has over 2,200 subscribers nationwide and approximately 240

employees. Most of its employees are editors and reporters responsible for covering trial and appellate courts at the state and federal level in all 50 U.S. states.

19. Defendant Maryellen O’Shaughnessy, as the Clerk of Courts for FCCCP, is being sued in her official capacity as the Clerk. The Clerk is responsible for, among other things, the administration of court records at FCCCP.

20. Defendant is sued in her official capacity only. Courthouse News seeks relief against Defendant as well as her agents, assistants, successors, employees, and all persons acting in concert or cooperation with her or at her direction or under her control.²

21. Defendant and the clerks acting under her direction and supervision are directly involved with and/or responsible for the delayed access to new complaints experienced by Courthouse News and other members of the press. Such acts reflect the official policy and practice of Defendant’s office and FCCCP as a whole.

22. Defendant’s actions, as alleged in this Complaint, are under the color of Ohio law and constitute state action for purposes of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

23. On August 17, 2021, Courthouse News sent a letter to Defendant in an attempt to request timely, pre-processing access to new non-confidential civil complaints. In this letter, Courthouse News explained how e-filing systems can be configured to solve delays in access caused by Defendant’s policy of processing complaints before providing access.

24. On September 1, 2021, Defendant’s staff member, Sharlene I. Chance, responded to Courthouse News and acknowledged Defendant’s receipt of the letter. Although Defendant

² The Franklin County Court’s “e-Filing System is... appointed the agent of the Clerk for purposes of electronic filing, receipt, service and retrieval of electronic documents.” *See* Ex. A at 9.

indicated her plan to review the letter and “meet internally with the Clerk’s Team,” Courthouse News did not hear anything further from Defendant. *Id.*

25. On October 4, 2021, Courthouse News again reached out to Ms. Chance regarding Defendant’s response. On October 5, 2021, Ms. Chance responded and indicated that Courthouse News would receive Defendant’s response within two weeks. However, Courthouse News did not receive a response or any further correspondence over the next six weeks.

26. On November 19, 2021, Courthouse News contacted Defendant to check on the status of her response one last time.

27. On November 22, 2021, Defendant finally responded to Courthouse News and refused to cease enforcing her policy of denying access until her so-called “clerk review” process is complete. Defendant also conceded that her “review” of new complaints takes, on average, 8 business hours, which would mean that most cases are withheld for at least one day.

Courthouse News’ Reporting Activities

28. Courthouse News publishes a variety of news publications, including its “New Litigation Reports,” which contain original, staff-written summaries of significant new civil complaints. In Ohio, Courthouse News publishes four *New Litigation Reports*: the *Cincinnati Report*, the *Central Ohio Report*, the *Cleveland State Report*, and *Cleveland Federal Report*. The *Central Ohio Report* provides coverage of new litigation throughout roughly the central third of Ohio, which includes Franklin County.

29. *New Litigation Reports* do not cover criminal or family law matters, nor do they include residential foreclosures or probate filings. Moreover, CNS does not seek to review or report on the small number of newly filed civil complaints that are statutorily confidential or accompanied by a motion to seal.

30. Courthouse News also publishes the *Daily Brief*, which covers published appellate rulings in state and federal courts, including the appellate courts in Ohio, the U.S. Supreme Court and federal circuit courts, as well as significant rulings from the federal district courts. Courthouse News also publishes a freely available website, www.courthousenews.com, featuring news reports and commentary, which is read by roughly 30,000 people every weekday. The website functions much like a print daily newspaper, featuring staff-written articles from across the nation that are posted throughout each day, and rotated on and off the page on a 24-hour news cycle.

31. Courthouse News has been credited as the original source of reporting on various topics by a wide range of publications, including: *ABA Journal*, *ABC News*, *The Atlantic*, *Austin American Statesman*, Black Christian News Network, *California Bar Journal*, CBS News, *The Dallas Morning News*, Fox News, *Houston Chronicle*, *Los Angeles Times*, National Public Radio; NBC News, *The New York Times*, Politico, *Rolling Stone*, *Salt Lake City Tribune*, *The Wall Street Journal*, *The Washington Post*, *USA Today*, *U.S. News and World Report*.

32. Courthouse News has more than 2,300 subscribers nationwide, including law firms, law schools, government offices and other news and publishing outlets such as: The Associated Press, *Austin American-Statesman*, *The Atlanta Journal Constitution*, *The Boston Globe*, CNN, *The Dallas Morning News*, *Detroit Free Press*, *Honolulu Civil Beat*, *Las Vegas Review Journal*, *Los Angeles Times*, *Portland Business Journal*, *St. Paul Business Journal*, *The Salt Lake Tribune*, *The San Jose Mercury News*, *Tampa Bay Business Journal*, Variety, Walt Disney Company and Warner Bros.

33. In Ohio and other states, the *New Litigation Reports* cover civil complaints, focusing on those against business institutions and public entities. Courthouse News reporters do not cover family law matters, name changes, probate filings, most mortgage foreclosures, or

collection actions against individuals, unless the individual is famous or notorious.

34. Courthouse News covers the larger Ohio state courts, like FCCCP, daily and emails reports to its subscribers nightly.

35. To prepare the *New Litigation Reports* and identify new cases that may warrant a website article, Courthouse News' reporters review new non-confidential civil complaints filed with the court that day. Courthouse News does not seek to review or report on the fraction of new civil complaints that are confidential or filed under seal.

36. Given the nature of news coverage and the Courthouse News publications, any delay in the ability of a reporter to obtain and review new complaints necessarily impedes the reporting on factual and legal controversies for subscribers and readers.

The Evolution of Filing Procedures & a Tradition of Access to Civil Complaints

37. In the paper era, both state and federal courts around the country gave the press timely access to new complaints on receipt, which was right after the complaints crossed the intake counter in the clerk's office and were received by an intake clerk, before docketing.

38. Courthouse News began its coverage of new civil complaints, trials, and rulings in 1990. It initially focused on the U.S. District Court for the Central District of California, where Courthouse News reporters and other journalists could look through stacks of complaints handed to them directly from the intake clerk.

39. As Courthouse News expanded to large courts throughout the United States, its reporters found a common tradition. In those courts, Courthouse News arrived to find existing procedures under which the clerks were providing the press corps with access to new civil complaints when they were received by the intake clerk, before docketing.

40. As Courthouse News continued to grow, its coverage extended to state and federal

courts in every region of the United States, starting with major metropolitan areas, then gradually into less populous areas. Courthouse News now has reporters and editors covering state and federal trial and appellate courts across all 50 states. In every corner of the country Courthouse News turned, courts had existing procedures in place that provided the press with access to newly filed paper complaints when they were received by the intake clerk, before docketing.

41. When Courthouse News began covering Ohio courts in 2003, it experienced this nationwide tradition of timely access, including at the Northern and Southern Districts of Ohio, and such access continued through and after 2005 when Courthouse News began coverage at FCCCP. Until 2011, FCCCP's Clerk of Courts gave the press access to new paper-filed complaints when they were received by an intake clerk, which was right after intake and before docketing.

42. In those paper days, filers brought new filings to the intake counter at the clerk's office. When a new paper complaint crossed the intake counter, the intake clerk would stamp the complaint with the date and time of receipt, and then sort its copies for various clerical tasks.

43. At FCCCP, the Clerk of Courts placed one of these filed copies in a stack of new complaints on the desk of The Daily Reporter newspaper, where the new complaints could be reviewed by the press when they were received by the clerk, after intake and before docketing.³ Until 2011, this stack of new filings was accessible by both The Daily Reporter and by other members of the press corps, including Courthouse News.

Delays in Access to E-Filed Civil Complaints at FCCCP

44. After switching to e-filing in 2011, Defendant abandoned this tradition and pushed

³ The Daily Reporter is the official newspaper for all courts of record of Franklin County, Ohio. According to its website, The Daily Reporter claims to be "Central Ohio's *only daily* business and legal newspaper," providing it with "the unique opportunity of providing readers with *timely* news and information[.]" See *About the Daily Report*, The Daily Reporter, <https://www.thedailyreporteronline.com/about/> (emphasis added).

press access behind processing, or what Defendant calls “clerk review.” *See* Ex. A, 2.

45. Today, nearly all federal district courts and many state courts provide access to newly e-filed complaints on receipt and before processing.

46. When using FCCCP’s e-filing system, a document is submitted when the filer clicks the “Submit the Filing” button, which appears on the “Review and Approve Filing” page. This page also allows filers to “Cancel (Delete)” or “Move to Draft.” *See* Civil e-Filing Guideline, Exhibit B at 29.⁴ When the filer clicks the “Submit the Filing” button, the document has been submitted to and received by the Defendant. Therefore, an action is “filed” when the new complaint is submitted to and received by the clerk—not after it is processed..

47. Defendant is capable of providing on-receipt access to new complaints, yet she does not. Instead, Defendant has adopted and implemented an e-filing policy that pushes access behind processing.

48. Defendant’s no-access-before-process policy requires that all new complaints (and all other e-filings) be withheld until after Defendant’s staff members have completed their clerical tasks involved with processing such complaints. As a direct result, Courthouse News, along with other members of the press and the public, consistently experience access blackouts at FCCCP.

49. Prior to commencing this action, Courthouse News compiled access data for new non-confidential civil complaints e-filed at FCCCP, noting delays between when each complaint was submitted to and received by the Defendant and when Defendant made each complaint available to the public. The following chart shows the delays by calendar days for the three-month period, starting on January 1, 2022, and ending on May 31, 2022:

⁴ Defendant’s e-Filing Resources webpage also provides a link to FCCCP’s “Civil e-Filing Guide,” which is a PowerPoint deck of step-by-step instructions for and screenshots of Defendant’s e-filing software system. *See* Civil e-Filing Guide, e-Filing Resources, Civil Division, Franklin County Clerk of Courts, Maryellen O’Shaughnessy. <https://clerk.franklincountyohio.gov/efiling/efilingResources>.

Total Cases (All Cases)		
Category	# of cases	Percent of Total
Zero Delay	171	5.76% zero delay
One Day Delay	1038	34.98% one day delay
Two Days Delay	548	18.47% two day delay
Three Days Delay	377	12.71% three day delay
Four Days Delay	435	14.66% four day delay
Five to Ten Days Delay	391	13.18% five to ten day delay
More Than Ten Days Delay	7	0.24% more than ten days delay
Total Cases	2967	

See Mem. in Support of Pl.'s Mot. for Preliminary Inj., Decl. of Adam Angione, Ex. 2, 114.

50. For the past three months, Defendant cumulatively has made on average **5.76%** of all new complaints available to the press and public on the day of filing, with **34.98%** withheld until the next day, **18.47%** withheld for two days, and **40.79%** withheld for *three days or more*. Looking at these numbers another way, Defendant delayed access to 2,796 complaints containing fresh news in just three months, allowing each story to grow old and stale.

51. Defendant's no-access-before-process policy is laid out in Section II, Subsections (C) and (E) of the E-Filing Order, which governs all e-filing policies and procedures at FCCCP:

(E) Confidentiality or Confidential. All documents submitted for e-Filing shall be confidential until accepted by the Clerk.

(C) Clerk Review. A preliminary review of electronically submitted documents by the Clerk in accordance with Court rules, policies, procedures and practices. Court clerks will preliminarily review the data and documents to ensure their compliance with Court rules, policies and procedures prior to accepting the documents and sending them to the Case Management System and Document Management System. If the submitted documents comply with the applicable Court rules, policies and procedures, they will be accepted by the Clerk for e-filing. If the submitted documents do not comply with the applicable Court rules, policies and procedures, they will not be accepted for e-Filing and the Clerk shall notify the filer of the deficiency or problem with the submission.

Ex. A at 2.

52. Notably, Defendant’s policy of making all complaints (and all other e-filings) “confidential” until after processing is directly at odds with other provisions in the E-Filing Order and it ignores longstanding precedent.⁵

53. Prior to restricting press and public access to court documents, a judge – not a clerk of courts – must “state findings or conclusions which justify nondisclosure to the public.” *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176 (6th Cir. 1983). At FCCCP, the E-Filing Order reiterates this longstanding precedent, requiring that “[d]ocuments shall be filed under seal *only with prior Court order*” and “*only after* [that] order sealing the documents has been signed and journalized.” Ex. 2, 14, Section XI(A) (emphasis added).

54. Defendant is not permitted to make judicial decisions, rulings, or findings and is, therefore, not capable of making new complaints confidential, or sealing them. By marking new complaints as “confidential” and restricting access thereto, Defendant is thus sealing a document from public viewing without prior court order.

55. Nevertheless, the E-Filing Order requires that documents to be filed under seal “*shall* be filed conventionally, unless expressly required to be filed electronically by the Court.” *Id.* at 14 (emphasis added). In other words, a filer who wishes to seal or make confidential certain documents must file them the old-fashioned way – via paper filing over the intake counter in Defendant’s office at FCCCP. Thus, Defendant already has mechanisms in place to protect confidential filings from public viewing as they await court order sealing the documents.

56. With Defendant’s no-access-before-process policy restricting access to all e-filings and the E-Filing Order’s conventional filing requirements for sealing confidential documents, it

⁵ FCCCP’s Local Rules of Practice, General Division, state that “[t]he Administrative Order Regarding Electronic Filing of Court Documents, as amended from time to time, governs practice and procedures to be followed regarding the filing of court documents in all civil and criminal cases in the General Division of this Court.” Loc. R. 110.01.

necessarily follows that newly e-filed, *non-confidential*, civil complaints are withheld from press and public access without a motion by the filing party, without prior court order, and without sufficient justification to satisfy constitutional scrutiny.

57. Processing, or what Defendant calls “clerk review,” takes time. And Defendant’s no-access-before-process policy relegates new complaints to sit in a computer queue, where they await a clerk to process them. All the while, time continues to quickly pass by. As a result, new court matters are restricted from press and public access until after their news value has diminished.

58. Because Defendant already has mechanisms in place to protect confidential filings from public viewing (*See* Ex. A at Section XI(A)), Defendant’s no-access-before-process policy unjustifiably restricts Courthouse News’ First Amendment right of access to new non-confidential complaints in such a way that it cannot survive constitutional scrutiny.

59. Moreover, Defendant is capable of providing on-receipt access to new complaints immediately after they are received by Defendant.

60. Defendant operates FCCCP’s e-filing system, which is provided by Tybera, Inc.’s (“Tybera”) e-filing software called “eFlex.”⁶ Tybera’s eFlex shares basic characteristics common to all e-filing systems. Before the filer can electronically submit a complaint to a clerk of court, the filer must enter basic case information and complete any other submission requirements the court specifies. Accordingly, the Tybera eFlex software, as with most e-filing software systems, does the job of the intake clerk. There is, thus, no reason that new complaints need to be withheld from public view while they sit in a computer queue waiting for a clerk to complete the post-filing “clerk review” and “acceptance” process.

⁶ Defendant’s Civil e-Filing Guide (*See* Ex. B) provides step-by-step instructions for e-filing at FCCCP. The Guide uses screenshots of each online page, or step, of Defendant’s e-filing process. At the bottom of each page, Defendant includes a hyperlink to learn more information about Tybera and its e-filing software system.

Qualified First Amendment Right of Access Attaches to New Civil Complaints

61. A qualified First Amendment right of access claim involves a two-part test: (1) whether a right of access attaches, and (2) if the right attaches, whether suppression of that right serves an overriding interest and is narrowly tailored. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705 (6th Cir. 2002); *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press Enterprise II*”); *U.S. v. Miami Univ.*, 294 F.3d 797, 821 (6th Cir. 2002).

62. The Free Speech and Free Press Clauses of the First Amendment to the United States Constitution create a qualified right of public access where (1) the information sought has “historically been open to the public,” and (2) “public access plays a significant positive role” in the functioning of the particular process in question. *See Press-Enterprise II*, 478 U.S. 1; *see also Miami Univ.*, 294 F.3d at 821.

63. A right of access “is implicit in the guarantees of the First Amendment[.]” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S. Ct. 2814, 2829, 65 L. Ed. 2d 973 (1980). It is also “well established that the public and the press have a ‘qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.’” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (citing *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir.2004)); *see also Brown & Williamson*, 710 F.2d at 1177 (The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.)

64. Historically, “courts have openly provided the press and general public with access

to civil complaints.” *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 596 (9th Cir. 2020) (“*Planet III*”).

65. New complaints are a traditional source of news providing the first piece of information about legal battles, therefore, serving as a “significant positive role” in our legal system. The right to review new civil complaints “is an indispensable predicate to free expression about the workings of government.” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785, 787 (9th Cir. 2014) (“*Planet I*”); accord *Courthouse News Service v. Schaefer*, 2 F.4th 318, 326 (4th Cir. 2021) (citing *Press-Enterprise II*, 478 U.S. at 8-10); *Courthouse News Serv. v. Gabel*, No. 2:21-CV-000132, 2021 WL 5416650, at *9 (D. Vt. Nov. 19, 2021) (recognizing “the need for federal courts to have a measure of accountability and for the public to have confidence in the administration of justice”) (appeal filed) (citations omitted) (internal quotation marks omitted); *Courthouse News Serv. v. New Mexico Admin. Off. of the Cts.*, No. CIV 21-0710 JB/LF, 2021 WL 4710644, at *31 (D.N.M. Oct. 8, 2021) (quoting *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, 606, 102 S. Ct. 2613, 2619, 73 L. Ed. 2d 248 (1982)) (recognizing that public access “plays a particularly significant role in the functioning of the judicial process and the government as a whole.”)

66. When the clerk receives a complaint, the public is entitled to know who has invoked the judicial branch’s jurisdiction and authority and to what end. When the clerk withholds a new complaint, even temporarily, the public has no way of knowing that a new civil case was initiated. Even if the public learns of the case directly from the named parties or through docket information, without access to the complaint itself, there is no other more reliable and accurate means to ascertain the factual and legal claims in the new civil action. By inserting Defendant’s staff

members before the press's and public's direct access to the information in newly filed complaints, Defendant is inviting room for error.⁷

Defendant's No-Access-Before-Process Policy Cannot Survive Constitutional Scrutiny.

67. Because the qualified First Amendment right of access attaches to new complaints on receipt, a presumption of openness arises at that time.

68. Any delays in access due to Defendant's no-access-before-process policy must serve an overriding interest based on findings that "closure is essential to preserve higher values and is narrowly tailored to serve those interests." *Ashcroft*, 303 F.3d at 709 (citing *Press-Enterprise II*, 478 U.S. at 13); accord *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016) (citing as an example *Press-Enterprise Co. v. Sup. Ct.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*")); *Planet III*, 947 F.3d at 596; *Bernstein*, 814 F.3d at 144; *Schaefer*, 440 F. Supp. 3d at 559-60.

69. Defendant has adopted and implemented the no-access-before-process policy outlined in FCCCP's E-Filing Order. *See* Ex. A, 1. Her "confidentiality" policy requires that "all documents submitted for e-filing shall be confidential until accepted by the [Defendant]." *Id.* at 2. The policy attempts to distinguish between "submitted" and "accepted" documents by placing an ambiguous hold of undetermined time between intake and processing, during which time Defendant's staff conducts a "preliminary review of electronically submitted documents[.]" *Id.*

70. Regardless of how Defendant chooses to label or classify an e-filed complaint, the qualified First Amendment right of access attaches on-receipt – when the new complaint is submitted to and received by Defendant. Any delay thereafter is subject to constitutional scrutiny.

⁷ The *Gabel* Court notes that "there would be no delay in an e-filing system" because the "efilers are filing with all of the document information they need, and it's hitting the docket, and there isn't any step in between there by staff." No. 2:21-CV-000132, 2021 WL 5416650, at *9.

71. In her November 22, 2021 letter to Courthouse News, Defendant attempts to justify her no-access-before-process policy: “My Office’s main objective is to provide accurate information to the media and the public. If my Office were to provide access to media outlets, including Courthouse News Service, prior to review and acceptance, it could create a scenario in which the media is reporting inaccurate information, potentially causing irrevocable harm.”

72. Courthouse News only seeks to publish truthful information. The New Litigation Reports publish a list of new civil complaints filed each day in certain courthouses. The new complaints listed in these Reports represent truthful information reported by Courthouse News – a complaint *was submitted* by a filer and *was received* by a clerk of courts. Even if the complaint is later rejected by the clerk, for whatever reason, the fact that the complaint was submitted and received for filing remains accurate. By reporting a truthful event in real time, there is no danger, therefore, that Courthouse News will publish “inaccurate information.”

73. Moreover, news reports about complaints benefit from the news reporters ability to read the filed complaint, rather than relying on a press release.

74. FCCCP’s E-Filing Order and Defendant’s policy and practice do not advance an overriding interest and are not narrowly tailored to serve the government interest and do not override Courthouse News’ qualified First Amendment right of access.

75. FCCCP’s E-Filing Order and Defendant’s no-access-before-process policy – which prohibits access to *all* electronically submitted documents until after Defendant’s clerical review process is complete – is the sort of “blanket prohibition on the disclosure of records” that “implicates the First Amendment.” *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir.

1989). “A ban on reporting news just at the time the audience would be most receptive would be effectively equivalent to a deliberate statutory scheme of censorship.” *Planet III*, 947 F.3d at 594.

76. Defendant’s confidentiality policy, which extends to all e-filed documents, is overbroad and not narrowly tailored because it removes access to non-confidential documents.

77. Defendant’s stated objective for her no-access-before-process policy is to provide “accurate information to the media and public” in order to prevent “irrevocable harm.” However, this is not a designated statutory duty of state court clerks, and Defendant faces no consequences for inaccurate information in filings. The responsibility for including accurate information in filings, or omitting sensitive information, rests solely with the filer. *See e.g.* Sup. R. 45 (D)(3) (The responsibility for omitting personal identifiers from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule shall rest solely with the party. The court or clerk is ***not required*** to review the case document to confirm that the party has omitted personal identifiers, and ***shall not refuse to accept or file*** the document on that basis.) (emphasis added).

78. The only state statute or rule of law allowing Defendant to reject e-filings for some sort of error is Civ. R. 5(E)(3), where the e-filer submits a document without paying a filing fee. Because FCCCP’s e-filing system requires payment ***before*** submitting a new filing (*See* Ex. B, 30), Defendant need not withhold access to confirm payment. Defendant’s e-filing system automatically rejects new filings without payments.

79. Even FCCCP’s E-Filing Order provides only the following examples of e-filing errors the Defendant may reject: “...entering a wrong case number, attaching an incorrect PDF file to an electronic submission, or where the electronic file is corrupt or unreadable[.]” Ex. A, 17. Even if a new filing is submitted with a form of payment that later reveals insufficient funds or it includes

the errors identified in the E-Filing Order, reporting on the filing in no way causes “irrevocable harm,” as Defendant suggests.

80. The vast majority of federal courts, including the U.S. District Courts for the Northern and Southern Districts of Ohio, and many state courts have configured their e-filing systems to automatically accept and release public, or non-confidential, civil complaints to the press – or the press and public – as soon as the court receives them. Because this release is automatic, the public can view these documents on weekdays or weekends, during the day or at night, and either remotely online or in person at the courthouse.

81. These courts have e-filing systems that provide access to documents on their receipt. The e-filing systems have customizable features that either allow access to newly e-filed complaints that are sitting in the clerk’s review queue or automatically assign a case number and place the new complaint into the docket. These state courts continue the longstanding practice of providing access to new complaints when they are received by the intake clerk, before processing.

82. While there are variations in how the federal and state courts provide these electronic access points, the result is always the same. The timing of access is *on receipt*, when the news contained in these new filings is fresh. The press can report on new complaints immediately after they are submitted through the e-filing software and received by the clerk, without interfering with clerk processing.

83. This Court provides public access on receipt, as do nearly all federal courts.

84. A great number of state courts also provide on-receipt access. Courthouse News has statewide on-receipt access to newly e-filed complaints in the state courts in Utah, Vermont, Connecticut, New York, Arizona, and Hawaii. Courthouse News also has such access to e-filed complaints in certain Georgia, California, and Washington state courts, and the Clark County

Courthouse in Las Vegas, Nevada.

85. Los Angeles Superior Court, the largest court in the nation, provides a “Media Access Portal,” allowing press to review new e-filings, including new complaints, on receipt and before processing. New York’s Supreme Courts provide access to new complaints through a “new cases” tab on a statewide e-filing portal before processing. Certain Georgia and California state courts give access to new civil complaints through a “Press Review Queue”⁸ on receipt, before processing. In Hawaii, registered reporters receive on-receipt access to new complaints at “eCourts Kokua,” meaning “help” in Hawaiian.

86. E-filing was designed to make the filing process more efficient and, naturally, the inner workings of the court would become more transparent. E-filing should not take transparency and efficiency backwards.

87. Courts with e-filing systems set up websites, typically run by the clerk of courts, where filers can e-file online. The e-filing software allows the filer to replace the intake clerk. Where the intake clerk would review the newly submitted document for general filing information, these administrative steps are now completed online by the filer prior to submission.

88. E-filing systems are configured to require the filer to follow a step-by-step e-filing process before moving from one step to the next. Courts can configure these e-filing systems to require filers to follow state and local e-filing rules before submitting their e-filings to the court. Instead of sitting in a stack of paper filings in the clerk’s office, new complaints now sit in an electronic processing queue, where they can be timely reviewed on-receipt by members of the media – unless clerks withhold them for processing.

⁸ Queues are typically labeled based on the user, or the individuals and organizations who actually use these queues. These “press” and “media” queues are labeled to indicate press and media use, but they need not be restricted to the press and media. The press or media does not have greater access than the public. In other words, press and media queues do not necessarily provide access to e-filings different from those accessible via “public” queues.

89. Defendant operates Tybera’s eFlex e-filing system at FCCCP. Tybera’s eFlex is a “stand-alone e-filing solution that can be integrated to any existing homegrown or vendor supported case and document management system” that “can be configured to automatically assign submissions... based on certain criteria,” and it can “[c]reate *unlimited* work/shared queues.”⁹ Thus, Defendant’s e-filing system can allow press access to new filings on their submission via a “shared press queue.”

90. Alternatively, Defendant can use Tybera’s software to set up an “auto-accept” system. An auto-accept system automatically assigns a permanent case number to new complaints and automatically places them into the docket, or case management system, where they can be viewed by the public on receipt.

91. Most of the federal courts around the country, including this U.S. District Court for the Southern District of Ohio, have auto-accept systems, as do the state courts of Utah, Vermont, Alabama, and Connecticut. Utah’s state courts, like FCCCP, use Tybera’s eFlex e-filing system. However, Utah’s clerks of courts, unlike Defendant, use eFlex to provide statewide on-receipt access to new complaints.

92. Defendant’s no-access-before-process policy results in unnecessary and easily avoidable delays in access at FCCCP. Defendant is capable of providing the press and public with on-receipt access to new complaints shortly after they are received by Defendant through FCCCP’s e-filing system. Thus, Defendant’s policy is not narrowly tailored.

93. Defendant cannot maintain her no-access-before-process policy in the face of easily available alternatives without violating Courthouse News’ qualified First Amendment right of access.

⁹ See *eFlex eFiling System: The Clerk & Judge Experience*, Tybera, Inc., <https://www.tybera.com/eflex/#fully-integrated-e-filing> (emphasis added).

94. Despite Courthouse News' repeated attempts to correspond with Defendant and explain how other courts throughout the country provide on-receipt access before processing, Defendant continues to impose her no-access-before-process policy, thereby restricting Courthouse News' qualified First Amendment right of access to new complaints.

95. Injunctive relief will not require this Court's ongoing enforcement or any "major continuing intrusion... into the daily conduct of state proceedings," as has been demonstrated by the Vermont state court administrator in *Gabel* and the New York county clerk in *Tingling* after injunctive orders required them to cease enforcing their no-access-before-process policies.

COUNT ONE

Violations of Amendments 1 and 14 of the U.S. Constitution, and 42 U.S.C. § 1983.

96. Courthouse News incorporates herein the allegations of Paragraphs 1-95 above.

97. Courthouse News has a qualified First Amendment right of access to new, non-confidential, civil complaints because such filings have historically been open to the press and public, and access to such complaints plays a significant role in ensuring that the public is aware that a civil dispute has arisen and the state power has been invoked.

98. The presumption of access to new complaints arises when they are received by the Defendant.

99. Defendant's no-access-before-process policy withholds new complaints until after processing is complete, thereby restricting access after the right of access has already attached. Thus, Defendant's policy restricts Courthouse News' access to new complaints in violation of its First Amendment right of access.

100. Defendant must show "that denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Detroit Free Press*, 303 F.3d

at 705 (quoting *Globe Newspaper*, 457 U.S. at 607, 102 S. Ct. at 2620, 73 L. Ed. 2d 248).

101. Defendant cannot satisfy this level of constitutional scrutiny. There exists no compelling reason to justify delaying on-receipt access to new complaints, as federal and state courts throughout the country do not impose such delays on access, and Defendant is capable of providing on-receipt access to newly e-filed complaints.

102. Courthouse News has no adequate and speedy remedy at law to prevent or redress Defendant's unconstitutional actions, and will continue to suffer irreparable harm as a result of Defendant's violation of its First Amendment rights. Courthouse News is therefore entitled to a permanent injunction, and declaratory judgment, to prevent further deprivation of its constitutional rights and, consequently, the rights of its subscribers.

PRAYER FOR RELIEF

WHEREFORE, Courthouse News prays for judgment against Defendant as follows:

A. A declaration that Courthouse News has a qualified First Amendment right of access to new, electronically submitted, non-confidential civil complaints;

B. A declaration that Sections II (C) and (E) of the E-Filing Order, as Defendant adopted on March 1, 2021, and has continued to enforce, are unconstitutional on their face under the First and Fourteenth Amendments to the United States Constitution;

C. A declaration that Defendant's policy and practice of withholding access to new, electronically submitted, non-confidential civil complaints until after processing – or “clerk review” and “acceptance,” as referred to by Defendant – violates the First and Fourteenth Amendments to the United States Constitution;

D. A preliminary and permanent injunction restraining the enforcement of Sections II (C) and (E) of the E-Filing Order and Defendant's policy and practice of withholding access to

new, electronically submitted, non-confidential civil complaints until after processing;

- E. An award of costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- F. All other relief the Court deems just and proper.

Dated: June 13, 2022

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Respectfully Submitted,

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