

No. 21-3098

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

COURTHOUSE NEWS SERVICE, VERMONT PRESS ASSOCIATION, INC.,
NEW ENGLAND FIRST AMENDMENT COALITION, GRAY MEDIA
GROUP, INC, DBA WCAX-TV, GANNETT VERMONT PUBLISHING, INC.,
DBA Burlington Free Press, SAMPLE NEWS GROUP, LLC, DBA Barre-
Montpelier Times Argus, DBA Rutland Herald, VERMONT JOURNALISM
TRUST, LTD., VTDIGGER, a project of other VTDigger, DA CAPO
PUBLISHING, INC., DBA Seven Days, VERMONT COMMUNITY
NEWSPAPER GROUP, LLC, DBA Stowe Reporter, DBA News & Citizen, DBA
South Burlington Other Paper, DBA Shelburne News, DBA The Citizen,

Plaintiffs-Appellees,

v.

(caption continued inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT, No. 2:21-cv-000132

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 28 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFFS-APPELLEES SEEKING AFFIRMANCE**

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PATRICIA GABEL, In her official capacity as the State Court Administrator of the Supreme Court of the State of Vermont, AMANDA STITES, in her official capacity as Clerk of Court for Addison, Bennington, and Rutland Counties, MARGARET VILLENEUVE, in her official capacity as Clerk of Court for Caledonia, Essex, Orleans, and Washington Counties, CHRISTINE BROCK, in her official capacity as Clerk of Court for Chittenden County, GAYE PAQUETTE, in her official capacity as Clerk of Court for Franklin, Grand Isle, and Lamoille Counties, ANNE DAMONE, in her official capacity as Clerk of Court for Orange, Windham, and Windsor Counties,

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Boston Globe Media Partners, LLC, is a privately held company. No publicly held corporation owns 10% or more of its stock.

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The Center for Investigative Reporting (d/b/a Reveal) is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

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The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Newsday LLC is a Delaware limited liability company whose members are Tillandsia Media Holdings LLC and Newsday Holdings LLC. Newsday Holdings LLC is an indirect subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is (a) directly owned by Altice USA, Inc., a Delaware corporation which is publicly traded on the New York Stock Exchange and (b) indirectly owned by Altice N.V., a Netherlands public company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Pro Publica, Inc. (“ProPublica”) is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Pulitzer Center on Crisis Reporting is a non-profit organization with no parent corporation and no stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (“Reporters Committee”), The Associated Press, Boston Globe Media Partners, LLC, BuzzFeed, The Center for Investigative Reporting (d/b/a Reveal), First Amendment Coalition, First Look Institute, Inc., Hearst Corporation, Inter American Press Association, Media Law Resource Center, Mother Jones, National Association of Black Journalists, National Association of Broadcasters, National Freedom of Information Coalition, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, News Media Alliance, Newsday LLC, Online News Association, POLITICO LLC, Pro Publica, Inc., Pulitzer Center on Crisis Reporting, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, and Student Press Law Center.¹

Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), amici declare that (1) no party’s counsel authored the brief in whole or in part; (2) no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and (3) no person, other than amici, their members, or their counsel, contributed money intended to fund preparing or submitting the brief.

nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. A supplemental statement of identity and interest of the other amici is included below as Appendix A.

Amici file this brief in support of Plaintiffs-Appellees (hereinafter, the "CNS Parties"). As members of the news media or organizations that advocate for the First Amendment and newsgathering rights of the news media, amici have a strong interest in ensuring that court documents are made available to the press and public as required by the First Amendment. Timely access to court documents, including civil complaints, is essential to accurate and thorough reporting about the legal system and the judicial branch. Amici write to emphasize the public interest at stake in this case and to highlight the importance of contemporaneous access to newly filed civil complaints to members of the news media and the public.

SOURCE OF AUTHORITY TO FILE

Plaintiffs-Appellees and Defendants-Appellants consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment guarantees a qualified right of access to judicial proceedings and documents rooted in the recognition that the public’s understanding and oversight of the judicial process are essential to our system of self-governance. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 575–77 (1980) (plurality opinion); *see also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (“[T]he First Amendment guarantees a qualified right of access . . . to civil trials and to their related proceedings and records.”). Access to civil complaints is particularly important. A complaint “initiates judicial proceedings, is the cornerstone of every case, [and] the very architecture of the lawsuit.” *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016) (quoting *Fed. Trade Comm’n v. Abbie Prods. LLC*, 713 F.3d 54, 62 (11th Cir. 2013)). For these reasons, this Court has specifically recognized a qualified First Amendment right of access to civil complaints. *Id.*

For that access to be meaningful, however, it must be timely. Robust, accurate news reporting requires timely access to civil complaints. Because freshness and speed are key features of the news business, a delay of even a day can result in a complete denial of meaningful access, both for reporters and for the members of the public who rely on the press for information. Prompt access to

civil complaints ensures that the public learns about important cases while they are still newsworthy, promotes accuracy in reporting, and leads to more meaningful public debate about individual cases and the justice system as a whole.

Not only does timely access to civil complaints benefit the public, but, as this Court has recognized, it is also constitutionally required. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006). Once the First Amendment right of access attaches, it can be overcome only by “an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 9–10 (1986) (“*Press-Enterprise II*”) (citing *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”)); see also *Lugosch*, 435 F.3d at 125.

Applying that precedent, the District Court below correctly found that Defendants-Appellants “failed to sustain their burden to demonstrate that their pre-access review process is justified by higher interests and narrowly tailored to advance those interests.” *Courthouse News Serv. v. Gabel*, No. 2:21-CV-000132, 2021 WL 5416650, at *16 (D. Vt. Nov. 19, 2021) (hereinafter, “*Gabel*”). Amici agree with the CNS Parties that the District Court did not err in applying the *Press-Enterprise II* standard and that, contrary to Defendants-Appellants’ arguments, a time, place or manner analysis is not appropriate when considering the constitutionality of a denial of access to judicial records. Plaintiffs-Appellees’ Br.

33. Regardless of what analysis is applied, however, the delays in public access to newly filed civil complaints at issue in this case do not pass constitutional muster.

For the reasons herein, amici urge the Court to affirm the District Court's order enjoining Defendants-Appellants from delaying public access to electronically filed civil complaints until the Vermont Superior Courts' pre-access review process is complete.

ARGUMENT

I. Timely access to newly filed civil complaints benefits the news media and the public.

News—by definition—is timely. News is not breaking unless it is contemporaneous. In the era of online publishing, especially, news is disseminated almost instantaneously, and the public expects up-to-the-second, accurate information from news outlets. For reporters who cover the courts, delivering the news thus requires prompt access to newly filed civil complaints. The in some ways quintessential legal document, a complaint, initiates litigation and frames the issues presented—providing the first picture of a case's who, what, when, where, and why. In short, reporters need timely access to complaints in order to inform the public about what is happening in court.

When news media organizations like the CNS Parties have contemporaneous access to civil complaints, it is the public that benefits. As the Ninth Circuit

explained in a similar case brought by Courthouse News Service, “[t]he news media’s right of access to judicial proceedings is essential not only to its own free expression, but also to the public’s.” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“*Planet P*”). “The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Id.* (quoting *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012)); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”). Timely access to newly filed civil complaints allows the press to report on new civil disputes at the moment they are most newsworthy, enhances the accuracy and completeness of news reports, and fosters public understanding and discussion of judicial affairs. These benefits of timely access to civil complaints flow, ultimately, to the public.

A. Newsworthiness depends on timeliness.

Timeliness is a defining characteristic of news. As one journalism scholar stated succinctly: “It is, after all, called the ‘news’ business and not the ‘olds’ business.” Janet Kolodzy, *Convergence Journalism: Writing and Reporting Across the News Media* 59 (2006); *see also* Fred Fedler et al., *Reporting for the Media* 123 (8th ed. 2005) (describing timeliness as one of the key characteristics of news).

Indeed, “[t]he peculiar value of news is in the spreading of it while it is fresh” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). And both the Supreme Court and this Court have recognized timeliness as a critical component of newsworthiness. *See, e.g., Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”); *Int’l News Serv.*, 248 U.S. at 235 (recognizing a quasi-property interest in “hot” news); *Lugosch*, 435 F.3d at 127 (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”) (quoting *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (internal quotation marks omitted)).

Today, with the public’s ever-growing reliance on obtaining news through digital and social media platforms, the timeframe for what is considered “fresh” is shorter than ever. The websites of the *Los Angeles Times* and *The New York Times*, for example, measure the timeliness of news updates in minutes. Other news services, such as Dow Jones Newswires, and social media platforms like Twitter, mark new posts by the second. *See* Toni Locy, *Covering America’s Courts: A Clash of Rights* 13 (2d ed. 2013) (“In the Internet age, a deadline passes every second.”). And the public’s voracious appetite for timely news has kept pace

with technology. “By a large majority, nearly two-thirds of adults now say they look at news at least several times a day. We are now a nation of serial news consumers.” *How Americans describe their news consumption behaviors*, Am. Press Inst. (June 11, 2018), <https://perma.cc/M3L2-84PB>.

Reporters and news outlets—including those reporting about matters in Vermont—routinely rely on access to newly filed civil complaints to disseminate same-day news about matters of public concern. *See Vermont AG Sues Illegal Robocall Carrier TCA VOIP*, Vermont Business Magazine, (Mar. 18, 2022), <https://perma.cc/FL9V-YEUQ> (describing lawsuit filed the same day and linking to complaint); Joseph Choi, *Vermont Claims in New Lawsuit Oil Companies Mised Public on Climate Change*, The Hill, (Sept. 14, 2021), <https://perma.cc/EA6R-MDZA> (describing lawsuit filed the same day featuring tweet that linked to complaint); Mike Donoghue, *Vermont Youths that Claim Abuse by 22 DCF Employees at Woodside Juvenile Center*, Bennington Banner, (Dec. 13, 2021), <https://perma.cc/58ZQ-MA9A> (describing lawsuit filed the same day including key factual allegations made in the complaint).

Indeed, when reporting on a newly filed lawsuit, a reporter may share a copy of the complaint on social media within minutes after it is filed. Within hours, articles are published about the lawsuit online. By the end of the day, the lawsuit may be part of the public discourse on social media, in person, and on the nightly

news. For example, on the morning of August 26, 2021, seven U.S. Capitol police officers filed a complaint in the U.S. District Court for the District of Columbia, alleging that former President Donald Trump and others conspired to incite the violent attack on the U.S. Capitol on January 6, 2021. *See* Complaint, *Smith v. Trump*, No. 1:21-cv-02265 (D.D.C. Aug. 26, 2021), ECF No. 1. By 11:11 AM, *BuzzFeedNews* legal reporter Zoe Tillman tweeted a link to the complaint which was quickly re-shared by users more than one thousand times. *See* Zoe Tillman (@ZoeTillman), Twitter (Aug. 26, 2021, 11:11 AM), <https://perma.cc/HK97-NAFG>. Within the next two hours, Tillman and other reporters published articles reporting on the lawsuit in greater depth. *See, e.g.,* Zoe Tillman, *Seven Capitol Police Officers Suing Trump Shared The Violence And Racism They Experienced On Jan. 6*, *BuzzFeed News* (Aug. 26, 2021, 1:04 PM), <https://perma.cc/CJ83-ZDEF>; Josh Gerstein, *7 Capitol Police Officers Sue Trump, Others over Capitol Riot*, *Politico* (Aug. 26, 2021, 1:17 PM), <https://perma.cc/MG3D-C54J>. And, that evening, MSNBC news anchor Chris Hayes examined the lawsuit in detail during his 8:00 PM ET news broadcast. *See* MSNBC, *Capitol Police Officers Sue Trump Over Jan. 6 Role, Cite KKK Act Violation*, YouTube (Aug. 26, 2021), <https://bit.ly/3I1rDD5>. Without contemporaneous access to the complaint, this level of timely reporting and robust discussion would not have been possible.

B. Timely access to civil complaints facilitates accurate and complete news reporting.

Court records are the most valuable and direct sources of information for reporting on lawsuits. Journalists often look to court records, including civil complaints, to ensure that their reporting is fair, accurate, and complete. Reporters and their audiences benefit tremendously when news reports can reference, quote from, and hyperlink to court documents, including complaints. In a textbook on legal news reporting, professor and veteran journalist Toni Locy calls reading court documents “fundamental.” *See* Locy, *supra*, at 61–67. Locy advises reporters not to rely solely on press releases and statements given by attorneys and to be aware of the potential for ulterior motives that lawyer advocates may have when speaking with the press. *Id.* at 3–4. She instructs reporters to “review[] court filings or other public records” to determine whether and how a fact or allegation should be reported. *Id.* at 9.

Timely access to civil complaints also facilitates thorough and more complete reporting by the news media about newly filed civil lawsuits. Journalists rely on the information contained in civil complaints to report the “core dispute” underlying civil litigation, including the factual and legal underpinnings of the claims. *See* Beth Winegarner, *6 Tips for Reporters Tracking State Legal Cases*, Poynter (Sept. 27, 2013), <https://perma.cc/64DQ-5WWX> (recommending that

reporters review court documents in newly filed cases “to find out what the core dispute is about—and what kind of legal remedies, including money, the plaintiffs are asking for.”). In the current news environment, stories build upon each other and are updated regularly online. It is therefore important that the first news stories about a lawsuit be as accurate and complete as possible, and rely on information derived from official, primary sources. Journalism about newly filed cases is simply more authoritative and accurate if the complaints themselves are available for inspection, copying, and reference by members of the news media.

C. Timely access to civil complaints benefits the public by promoting understanding about judicial processes and matters occupying courts’ dockets.

The public relies on the news media for information about the workings of government, including the judicial system. As the Supreme Court has stated: “[An] untrammelled press [is] a vital source of public information,’ . . . and an informed public is the essence of working democracy.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (writing that “the Founding Fathers gave the free press the protection . . . so that it could bare the secrets of government and inform the people”).

The public has a right to be informed about matters pending before state courts that may demand court resources for years to come. And, as this Court has recognized, public access to civil complaints plays a “significant positive role in the functioning of the judicial process.” *Bernstein*, 814 F.3d at 141 (internal quotation omitted). The public can engage in meaningful discussion and debate about pending lawsuits and can observe the operation of the judicial system only when it knows those lawsuits are underway and can review court records filed in those cases. *See id.* at 140 ([T]he fact of filing a complaint, whatever its veracity, is a significant matter of record”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (recognizing that “without access to [judicial] documents the public often would not have a full understanding of the proceeding and therefore would not always be in a position to serve as an effective check on the system” (citation and internal quotation marks omitted)); *Seattle Times Co. v. U.S. District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (finding that access to pretrial documents is “important to a full understanding of the way in which the judicial process and the government as a whole are functioning” (citation omitted)). For that reason, access to “complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems.” *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th

Cir. 2020) (“*Planet III*”) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)).

Enabling individuals, through news reports, to promptly learn about newly filed civil lawsuits also may inform them about their own legal rights. By reading or hearing timely news reports about new litigation, citizens may realize that they too may pursue civil remedies, or discover that they may be able to join an existing civil lawsuit. *See, e.g.,* Jesse Paul, *Planned Parenthood Victims’ Lawsuit Could Be in Limbo as Holding Pattern in Criminal Case Drags on*, *Denver Post* (Nov. 21, 2016), <https://perma.cc/57B4-UHHT> (noting that two plaintiffs in a civil case against a healthcare provider joined the filing after reading news reports of the civil case). And, in other cases, members of the public may discover they have personal knowledge about a pending lawsuit, enabling them to come forward as witnesses.

II. The First Amendment requires contemporaneous access to civil complaints.

A. The First Amendment right of access applies to civil complaints and requires that access be contemporaneous.

The First Amendment’s free speech guarantee—a cornerstone of our constitutional system—“would lose much meaning” without a constitutional right of access to public proceedings. *Richmond Newspapers*, 448 U.S. at 576–77. The two are “inextricably intertwined” because, while the First Amendment’s protection for free speech fosters vigorous debate of governmental activities, it is

the right of access that guarantees such debate is informed. *Planet I*, 750 F.3d at 785. Simply put, the right of access to official records and proceedings is “an essential part of the First Amendment’s purpose to ‘ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.’” *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 604).

In determining whether the First Amendment right of access applies to particular judicial documents, this Court applies two approaches. The first looks to “experience” and “logic” to assess “whether the documents ‘have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question.’” *Lugosch*, 435 F.3d at 120 (quoting *Press-Enterprise II*, 478 U.S. at 8–10). The second looks to whether access to the document is “a necessary corollary of the capacity to attend the relevant proceedings.” *Id.* (quoting *Hartford Courant Co.*, 380 F.3d at 93).

This Court has held that both experience and logic support a qualified First Amendment right of access to civil complaints. *Bernstein*, 814 F.3d at 141 (finding that complaints “have historically been publicly accessible by default, even when they contain arguably sensitive information” and that “[p]ublic access to complaints allows the public to understand the activity of the federal courts, enhances the court system’s accountability and legitimacy, and informs the public

of matters of public concern.”).² Thus, as “written documents submitted in connection with judicial proceedings that themselves implicate the right of access,” *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987), civil complaints are subject to a qualified First Amendment right of public access.

Where, as here, the First Amendment right of access applies to a judicial document, it is a right to *contemporaneous* access. *See Lugosch*, 435 F.3d at 126. Delaying access to newly filed civil complaints irreparably harms the public’s interest in learning about cases pending before the courts. *Id.* at 127; *see also Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (finding that a loss of First Amendment rights, “for even minimal periods of time, unquestionably constitutes irreparable injury” (citation omitted)); *Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (recognizing that “the public benefits attendant with open proceedings are compromised by delayed disclosure”); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (finding that that denying access to judicial records for 48 hours “is a total restraint on the public’s first amendment right of access even though the restraint is limited in time.”); *Courthouse News Serv. v.*

² The Court also has found a presumption of public access to civil complaints under the common law. *Bernstein*, 814 F.3d at 144. And, although the First Amendment right of access to civil complaints “is best evaluated under the experience and logic approach,” *id.* (internal quotations omitted), the “necessary corollary” approach produces the same result.

Jackson, Civil Action No. H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (finding that a “24 to 72 hour delay in access is effectively an access denial”); *Courthouse News Serv. v. Tingling*, 16 Civ. 8742 (ER), 2016 WL 8505086, at *1 (S.D.N.Y. Dec. 16, 2016) (enjoining policy of withholding newly filed civil complaints until after processing).

B. When evaluating the constitutionality of a denial of the First Amendment right of access to judicial records, *Press-Enterprise II* controls.

Although the First Amendment right of contemporaneous access to civil complaints is a qualified right, once it attaches, access may be denied only if, and only to the extent, required by “an overriding [governmental] interest.” *Press-Enterprise II*, 478 U.S. at 9–10 (quoting *Press-Enterprise I*, 464 U.S. at 510) (explaining that closure must be “essential to preserve higher values” and “narrowly tailored to serve that interest”).

The District Court correctly applied this standard from to find that Vermont’s pre-access review process did not pass constitutional muster. *Gabel*, 2021 WL 5416650, at *16. This approach is consistent with Supreme Court precedent, as well as the precedent of this Court and of other federal circuit courts of appeals, which have made clear that *Press-Enterprise II* sets forth the correct constitutional standard for determining whether the First Amendment right of access to judicial records has been overcome. *See id.* at 13–14; *Lugosch*, 435 F.3d

at 125 (finding, in the context of unsealing judicial records, that denying access to judicial documents “may be justified only with specific, on-the-record findings that [denying access] is necessary to preserve higher values and . . . narrowly tailored to achieve that aim”); *see also Leigh*, 677 F.3d at 899 n.5 (collecting cases that apply *Press-Enterprise II* in the context of denials of the First Amendment right of access to judicial records and proceedings).

By contrast, an analysis for a time, place, and manner restriction—which has generally been interpreted as requiring intermediate scrutiny—does not apply in the context of denials of the First Amendment right of access to court records and proceedings. Indeed, while the Ninth Circuit in *Planet III* observed that delays in access to civil complaints “resemble” time, place, and manner restrictions, that court still applied what it called the “rigorous” standard from *Press-Enterprise II*. 947 F.3d at 595–96. The separate body of case law regarding reasonable time, place, or manner restrictions developed in the context of restrictions on the exercise of free speech rights. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech”); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980) (explaining that “the essence of time, place, or manner regulation” was recognizing the effect of “various methods of speech”). As explained above,

courts in First Amendment right of access cases have overwhelmingly followed the mandate of *Press-Enterprise II* and applied its rigorous standard.

Indeed, a time, place, and manner analysis is logically inapplicable to delays in access to judicial records like those challenged here. In *Richmond Newspapers, Inc. v. Virginia*, a plurality of the Supreme Court suggested in dicta in a footnote that reasonable time, place, or manner restrictions may be appropriate to maintain the “quiet and orderly setting” of a courtroom. 448 U.S. at 581 n.18 (plurality opinion). And the plurality went on to suggest that courts may prioritize seating for media representatives as reasonable time, place, or manner restrictions “when not every person who wishes to attend can be accommodated” because of the “limited capacity” of a courtroom. *Id.* But such issues of decorum or courtroom management do not deny the public access to proceedings or documents in their entirety, as the delays in access to newly filed civil complaints do here. Delays and other denials of access to civil complaints impose a much greater and different kind of burden on the First Amendment right of access than the application of rules necessary to maintain the quiet and orderly setting of a courtroom. As with other denials of access to judicial records, such delays are more appropriately scrutinized under *Press-Enterprise II*'s well-established standard.

C. The Vermont Electronic Filing system violates the First Amendment whether Press-Enterprise II or a time, place, and manner analysis applies.

The appropriate standard for evaluating delayed access to civil complaints is found in *Press-Enterprise II*. But even if a time, place, and manner analysis were appropriate here, Vermont's pre-access review process violates the First Amendment. Under *Press-Enterprise II*, the restrictions on public access created by Vermont's pre-access review process must be narrowly tailored to serve a compelling government interest. *Press-Enterprise II*, 478 U.S. at 9–10; *Bernstein*, 814 F.3d at 144. Time, place, and manner restrictions on protected speech are permitted only when they are (1) “justified without reference to the content of the regulated speech,” (2) “narrowly tailored to serve a significant governmental interest,” and (3) “leave open ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791 (citation omitted). Vermont's pre-access review process satisfies neither standard.

Defendants-Appellants argue that denying public access to civil complaints during the pre-access review process is necessary to protect confidentiality and the administration of justice. *Gabel*, 2021 WL 5416650, at *14. Even assuming, *arguendo*, that these are compelling government interests under *Press-Enterprise II*, or significant government interests for purposes of a time, place, and manner

analysis, Vermont’s pre-access review process is in no way narrowly tailored to serve those interests.

The rules implementing the pre-access review process “impose no deadlines or other temporal restraints on how long the pre-access review process may take, how it is staffed, or impose any consequences if the pre-access review process is unduly delayed.” *Gabel*, 2021 WL 5416650, at *5. As the District Court found, Defendants-Appellants have made no showing to justify that restricting public access to civil complaints until a clerk completes a multi-point administrative review is “necessary to protect the orderly administration of justice.” *Id.* at *15. Moreover, it is difficult to imagine that there are no less restrictive means available to advance Defendants-Appellants’ purported interest than to deny public access to civil complaints for an indefinite period of time—which could range from hours to weeks—while a court clerk completes an administrative review. *See Planet III*, 947 F.3d at 595–96 (finding that Ventura County’s “no-access-before-process policy” in regards to newly filed complaints did not meet the “rigorous” balancing test under *Press-Enterprise II* because the county did not demonstrate a “substantial probability that its interest in the fair and orderly administration of justice would be impaired by immediate access” to civil complaints or that that there were “no reasonable alternatives . . . to adequately protect” that interest (citation and internal quotation marks omitted).

Nor is the pre-access review process “essential” to serve Defendants-Appellants’ purported interest in confidentiality, as Vermont’s rules make the filing party—not the clerk—responsible for designating whether all or part of a record being filed contains confidential information—a process that evidence “reveals . . . has been overwhelmingly effective.” *Gabel*, 2021 WL 5416650, at *16. Moreover, the District Court found that only “a minute fraction of the total complaints filed” since implementing the pre-access review process were rejected because they contained confidential information, thus demonstrating “that the pre-access review process is not ‘essential to preserve higher values[.]’” *Id.* at 15 (quoting *Bernstein*, 814 F.3d at 144). And, as this Court has recognized, complaints “have historically been publicly accessible by default, even when they contain arguably sensitive information.” *Bernstein*, 814 F.3d at 141. Thus, the District Court did not err in finding that the pre-access review process is not narrowly tailored to serve a compelling government interest and, therefore, cannot survive *Press-Enterprise II* scrutiny. *Gabel*, 2021 WL 5416650, at 16. And this lack of narrow tailoring would doom Vermont’s pre-access review process under a time, place, and manner analysis as well. *See Ward*, 491 U.S. at 791.

Moreover, if this Court were to apply a time, place, and manner analysis, it also should hold in favor of the CNS Parties because Vermont’s pre-access review process does not leave open “ample alternative channels” for access to information

contained in the civil complaints. Indeed, there are no alternative channels available for public access to newly filed civil complaints for the indefinite period of time that complaints are under administrative review; the press and the public simply have no access to newly filed civil complaints during that time. *See, e.g., Planet I*, 750 F.3d at 787–88 (“CNS cannot report on complaints [the clerk] withholds.”).

D. Profit motive is irrelevant.

Finally, Defendants-Appellants assert that providing contemporaneous access to complaints may reduce the court system’s legitimacy and accountability to the public by “appearing to prioritize lucrative private interests over mitigating the risk of the public harms.” *See* Defendants-Appellants’ Br. 49. However, whether or not any of the CNS Parties have a commercial interest in access to newly filed civil complaints is irrelevant to determining whether Vermont’s pre-access review process passes constitutional muster.

As a preliminary matter, courts do not examine the commercial or nonprofit status of a news organization when safeguarding its constitutional rights. *See Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”); *Pittsburgh Press Co. v. Pittsburgh*

Com. on Human Relations, 413 U.S. 376, 385 (1973) (“If a newspaper [or website]’s profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales,” and “[s]uch a basis for regulation clearly would be incompatible with the First Amendment”). Indeed, individuals or entities with a profit motive, like many news organizations, may be among the likeliest to file suit to vindicate the public’s right of access.³

The First Amendment guarantees the *public* a presumptive right of access to judicial records. A single media organization’s commercial model cannot overcome a constitutional right of access held by the public at large. Despite Defendants-Appellants’ incorrect argument that the District Court’s order is

³ Unfortunately, contrary to Defendants-Appellants arguments, news outlets are increasingly less likely to pursue legal action to seek access to court records—especially smaller, local news outlets that lack the necessary resources to invest in access battles. *See In Defense of the First Amendment*, The Knight Foundation, 13, (Apr. 21, 2016), <https://perma.cc/2SJB-BXWD> (“The loss of journalist jobs and publishers’ declining profits mean there’s less opportunity to pursue difficult stories and sue for access to information.”). According to a survey of news editors from across the country, nearly two-thirds of editors, or 65%, stated that the news industry’s ability to pursue legal activity related to First Amendment issues had weakened over the last decade and a majority, 53%, agreed that news organizations are not prepared to go to court to preserve First Amendment freedoms. *Id.* at 5. Of those that said that their news organizations were less able to pursue legal activity, 89% cited the financial cost of bringing these actions as the primary deterrent. *Id.* at 3. Moreover, as one editor noted, “Government agencies are well aware that we do not have the money to fight. More and more, their first response to our records request is ‘Sue us if you want to get the records.’” *Id.* at 27.

preferential to Plaintiffs-Appellees, *see* Defendants-Appellants’ Br. 63, it applies equally to all members of the public—not just a news organization’s paid subscribers. All members of the public benefit from timely access to newly filed civil complaints, and all members of the public—including for-profit news media organizations—have a First Amendment right to inspect those civil complaints. *See Richmond Newspapers*, 448 U.S. at 586 n.2 (stating that “the media’s right of access is at least equal to that of the general public”).

CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the District Court’s order enjoining Defendants-Appellants from denying public access to electronically filed civil complaints during the Vermont Superior Courts’ pre-access review process.

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Washington, D.C.

Respectfully submitted,

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APPENDIX A
SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

BuzzFeed, Inc. is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

First Amendment Coalition (FAC) is a nonprofit public interest organization dedicated to defending free speech, free press and open government

rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. FAC advances this purpose by working to improve governmental compliance with state and federal open government laws. FAC's activities include free legal consultations on access to public records and First Amendment issues, educational programs, legislative oversight of California bills affecting access to government records and free speech, and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, activists, and ordinary citizens.

First Look Institute, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Institute operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of

magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press

and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

The National Association of Black Journalists (NABJ) is an organization of journalists, students and media-related professionals that provides quality programs and services to and advocates on behalf of black journalists worldwide. Founded by 44 men and women on December 12, 1975 in Washington, D.C., NABJ is the largest organization of journalists of color in the nation.

The National Association of Broadcasters (NAB) is a nonprofit incorporated trade association that serves and represents radio and television stations and broadcast networks. NAB's members cover, produce and broadcast local and national news and other programming to viewers and listeners across the country. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still

photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among

journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Pro Publica, Inc. ("ProPublica") is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

Pulitzer Center on Crisis Reporting, based in Washington, DC, was founded in 2006 as a non-profit journalism center dedicated to supporting in-depth engagement with underreported global affairs through sponsorship of quality international journalism across all media platforms and a unique program of outreach and education to schools and universities. The Center supports over 150 international reporting projects each year, working in tandem with major international news outlets.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing brief of amici curiae:

- 1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,527 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Katie Townsend

Katie Townsend

Counsel of Record

THE REPORTERS COMMITTEE FOR
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Dated: July 12, 2022
Washington, D.C.