Eric D. Lansverk (OSB 144700)
Eric.lansverk@hcmp.com
HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Ave., Suite 4600
Seattle, WA 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Katherine Keating (admitted *pro hac vice*)
katherine.keating@bclplaw.com
Jonathan G. Fetterly (admitted *pro hac vice*)
jon.fetterly@bclplaw.com
BRYAN CAVE LEIGHTON PAISNER LLP
3 Embarcadero Center, 7th Floor
San Francisco, CA 94111
Telephone: 415-675-3400
Facsimile: 415-675-3434

Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COURTHOUSE NEWS SERVICE, Plaintiff, v. **NANCY COZINE**, in her official capacity as Oregon State Court Administrator, Defendant.	Case No. 3:21-cv-00680-YY **PLAINTIFF COURTHOUSE NEWS SERVICE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

Page

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

TABLE OF AUTHORITIES

Page(s)

Cases

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Statutes

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Other Authorities

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

INTRODUCTION

This Court has already confirmed that the First Amendment right to access a new civil complaint attaches when the filer submits the complaint to the court. *Courthouse News Serv. v. Cozine*, 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022). While the parties use different units of measurement, there is no real dispute as to the existence and length of access delays. *See* Section I, *infra*. Accordingly, what remains is to examine Defendant's justifications to determine whether she has met her burden under "the fact-intensive *Press-Enterprise II* test." *Id*.

To survive summary judgment, she must demonstrate genuine disputes of material fact as to whether "first that there is a 'substantial probability' that [the courts'] interest in the fair and orderly administration of justice would be impaired by immediate access, and second, that no reasonable alternatives exist to 'adequately protect' that government interest." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 596 (9th Cir. 2020) (quoting *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 14 (1986) ("*Press-Enterprise II*")); *see also* Fed. R. Civ. P. 56. Defendant failed to meet this burden, and failed to set out "specific facts showing there is a genuine issue for trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (addressing burden where the nonmoving party bears the burden of proof at trial on a dispositive issue).

Defendant contends that various interests can only be protected by withholding new complaints until clerical processing has been completed and that alternatives used by other courts to protect those interests are unavailable to Oregon's circuit courts, but she offers only vague and general assertions to support her claim. She offers no specific facts and has failed to present "sufficient probative evidence," *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995), establishing that questions of material fact preclude judgment for Courthouse News.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Specifically, Defendant asserts that "many material questions of fact exist that preclude summary judgment," but identifies only four: (1) the existence and length of delays; (2) whether there is a substantial probability that "privacy interests" would be impaired if Oregon's circuit courts did not withhold all new e-filed civil complaints until after administrative processing has been completed; (3) the availability of alternatives that would remedy access delays in Oregon's circuit courts;[1] and (4) differences between historical and current access. Defendant's Response to Motion for Summary Judgment ("Response") at 2 (ECF 57). Bearing in mind that a party "cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact," *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993), Defendant has failed to show genuine factual disputes as to any of these.

Existence of Delays. Defendant does not genuinely dispute the existence or length of delays, though she prefers measuring them in "business hours," which makes them look less severe. *See* Section I, *infra*. However, it is undisputed that Defendant's "no-access-before-acceptance" policy resulted in significant access delays during the relevant period of January 1, 2010 through April 30, 2022, and that this policy continued to result in delayed access after the discovery cut-off date in this case under Defendant's newly-adopted "time-to-review" standard. To be clear, this is ***not*** a case where more than one policy is at issue because the delay-causing policy—*i.e.*, the "no-access-before-acceptance" policy—has been in place at all times.

Privacy Interests. After claiming that Oregon circuit courts' own data would show court clerks reject filings because filers fail to designate them correctly, supposedly warranting pre-

[1] Defendant's list of purported factual disputes has six items, but three of them (Nos. 3, 4, and 6) are effectively the same thing: the availability of alternatives. Response at 2.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

access review, Defendant has now been forced to concede that this is not so. Three and a half years of detailed data on how often and why clerks rejected new e-filed civil complaints shows that such filings are almost never rejected because they contain confidential information (fewer than 0.018% filings out of 144,244). *See* Section II(A), *infra*. Defendant falls back on generalized, conclusory statements from trial court administrators, devoid of specific facts, that do not—and cannot—establish any genuinely disputed material fact. *See* Section II(B), *infra*. And unable to deny that Defendant's own inquiries into other state courts' experiences with providing pre-processing access failed to substantiate any confidentiality or privacy concerns, Defendant resorts to citing as evidence the commentary of a U.S. Senator about U.S. Judicial Conference reports that actually support Courthouse News' position. *See* Section II(D), *infra*.

Availability of Alternatives. Nor does Defendant genuinely dispute that the various alternatives used by other state courts to protect important interests without restricting access to new nonconfidential civil complaints until after "acceptance" are equally available to Oregon's circuit courts. Rather, she merely points out that one of these methods is not free, one has (unsurprisingly) not yet been tried by Oregon, and a third might be problematic under a strained reading of a statute that requires courts to collect filing fees. *See* Section III, *infra*. She does not state the Oregon Circuit Courts could not adopt one or more of the available alternatives, or offer any evidence establishing their adoption is not feasible.

Historical v. Current Access. Defendant's view that the press should prefer the current delayed access to historic access is nonsensical but also irrelevant to the questions before the Court. *See* Section IV, *infra*.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Because Defendant has failed to meet her burden of demonstrating a substantial probability that important government interests "would be impaired by immediate access" and "no reasonable alternatives exist to 'adequately protect' that government interest," *Planet III*, 947 F.3d at 596 (quoting *Press-Enterprise II*, 478 U.S. at 14), Courthouse News is entitled to a declaration that the her policy of withholding all new civil complaints for administrative processing violates Courthouse News' qualified First Amendment right of access, and an order permanently enjoining that policy. Defendant's eleventh-hour adoption of a "time-to-review" standard has no bearing on Courthouse News' entitlement to injunctive relief because the delay-causing "no-access-before-acceptance" policy remains in place, and it continues to—and will continue to—result in significant delays in access to nonconfidential civil complaints.

ARGUMENT

I. The Parties Do Not Genuinely Dispute the Existence or Length of Delays, and Defendant's Evidence Confirms That Delays Are Inevitable Under a Process-First Policy

Contrary to Defendant's assertion, there is no genuine dispute as to "the length of time between e-Filing and public access," including during the seven weeks preceding Defendant's Response under the so-called "time-to-review" standard. Response at 2. Though the parties' numbers look quite different, that is only because Defendant uses a different unit of measurement ("business hours"), stopping the clock whenever the courthouse is closed. This difference accounts for the first four of Defendant's five criticisms as to Courthouse News' supposed "mischaracterization" of the Oregon Judicial Department's data on complaint availability from January 2019 through April 2022. Response at 12-13; *see also* Declaration of L. Samuel Dupree (ECF 59) ("Dupree Decl.") ¶¶ 19-22.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Defendant's only dispute as to the accuracy of the delay statistics Courthouse News presented – the percentage of complaints filed fewer than four hours before closing time – is not a material one. Both parties agree that under the eleventh-hour "time-to-review" standard announced two days before the close of discovery, Oregon's circuit courts could have withheld ***more than half*** of all new civil complaints that were filed from January 2019 through April 2022. *See* Plaintiff's Motion for Summary Judgment ("Motion") at 33; Declaration of Jimmy Shimabukuro (ECF 42) ("Shimabukuro Decl."), ¶ 14 & Exh. 11; Response at 13-14; Dupree Decl., ¶ 23. Nor does Courthouse News dispute that most of the reasons Defendant gives for not having been able to process civil complaints on the day they were filed were not within the courts' control. What is within the court's control is whether to withhold new civil complaints from the press and public until after administrative processing, despite the delays such a practice inevitably causes.

A. Measuring Delays in "Business Hours" Does Not Make Them Less Problematic

To be clear, both parties used the same set of data to calculate access delays from January 2019 to April 2022. Shimabukuro Decl., ¶¶ 6, 8; Declaration of Eric Lansverk (ECF 50), Exh. 1 (Excel spreadsheet on flash drive); Dupree Decl., ¶ 15 & Exh. 6 (Excel spreadsheet on flash drive). Courthouse News measured delays in terms of the number of days that elapse between the complaint's filing and its availability to press and public. From January 2019 to April 2022, Oregon circuit courts withheld ***39%*** of all new nonconfidential e-filed civil complaints for at least one calendar day. Shimabukuro Decl., ¶ 12 & Exh. 1 (ECF 42-1). Of these, ***14%*** were withheld for two calendar days or longer. *Id*.

In contrast, Defendant measures delays in terms of "business hours," stopping the clock

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

whenever the courthouse is closed. According to Defendant, from January 2019 to April 2022, Oregon circuit courts withheld 24% of new e-filed civil complaints for more than four "business hours," and withheld 11% for more than nine "business hours." Response at 27; Dupree Decl., ¶ 15 & Exh. 6. Defendant's assertion that Courthouse News' "39% withheld for at least one calendar day" could also be expressed as "24% withheld for at least four business hours" is true, but it is not a disputed fact. Rather, it is like saying a distance might be nine feet but is only three yards.

For First Amendment purposes, what matters is the passage of time as people actually experience it. With each passing day, the public is less likely to spare attention for a new complaint. *See* Declaration of William Girdner (ECF 39) ("Girdner Decl.") ¶ 13. The public does not know or care how many "business hours" elapsed before its release. If the courthouse closes at 5:00 p.m., every complaint filed after 1:00 p.m. could be withheld until the following day and still have been released within four "business hours."

As to Defendant's related quibbles on delay statistics, she is correct that Courthouse News' calendar-day calculation treats a complaint as filed on the day it is submitted, even if that day is a weekend, holiday, or furlough day. Response at 12-13; Dupree Decl., ¶¶ 19-22. Courthouse News does so because Oregon circuit courts treat a complaint as filed on the day it is submitted, even if that day is a weekend, holiday, or furlough day. UTCR 21.080(3) ("The court considers a document submitted for an electronic filing when the electronic filing system receives the document."); UTCR 21.080(4) ("If the court accepts the document for filing, the date and time of filing entered in the register relate back to the date and time the electronic filing system received the document."). Moreover, as Defendant acknowledges, Response at 13,

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Courthouse News also provided a delay calculation measured in court days, which treats complaints filed on weekends and holidays as filed on the following court day and stops the clock on weekends and holidays. Shimabukuro Decl., ¶¶ 11, 13 & Exhs. 6-10 (right-hand column shows delays in court days). These calculations show that measuring delays in court days instead of calendar days is not materially different, as Oregon circuit courts still withheld ***35%*** of all new civil complaints for at least one court day. *See* Shimabukuro Decl., ¶¶ 11, 13 & Exh. 6 (right-hand column shows delays from January 2019 to April 2022 in court days (100% - 65% = 35%)).[2]

Defendant is also correct that Courthouse News' calculations treat a complaint filed after 5:00 p.m. on a court day as withheld until at least the following day. Response at 13. That is because the press and public were unable to learn about the complaint until at least the following day. If Oregon's circuit courts did not withhold complaints until after administrative processing is complete, these delays would not exist.

Defendant also levels the puzzling criticism that Courthouse News does not count as delayed those complaints that were rejected and not made public. Response at 12; Dupree Decl., ¶ 19. This, of course, is not a tactical choice but rather a logical necessity. It is impossible to measure how long it took the court to release a complaint that the court never released. Moreover, Defendant's efforts to factor rejected complaints into its calculations prove that any

[2] Defendant also points out that Courthouse News' "court day" calculations failed to account for three furlough days when Oregon's circuit courts were closed. Response at 13. The 226 complaints filed on these furlough days, *id*., represent 0.15% of the 144,244 civil complaints filed from January 2019 through April 2022. Defendant cannot seriously contend that this difference is material.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

difference is inconsequential, accounting for about one tenth of one percent. Response at 11 (chart); Dupree Decl., ¶ 13.

B. There is No Dispute as to Delays under Defendant's Eleventh-Hour "Time-to-Review" Standard

Two days before the close of discovery and less than three weeks before the deadline for dispositive motions, Defendant announced a "standard" calling for circuit courts to accept or reject 90% of certain civil complaints within "four business hours" and 100% within "nine business hours," "[a]bsent exceptional circumstances." Declaration of Jonathan Fetterly (ECF 45) ("Fetterly Decl."), Exh. 22. This standard allows all complaints filed less than four hours before the court closes to be withheld until the following day (in addition to 10% of complaints filed earlier in the day). Jimmy Shimabukuro of Courthouse News determined a "cutoff time" based on the closing time of each court and calculated that from January 2019 through April 2022, 74,166 complaints (55.48% of all complaints) were filed after the cutoff time and could therefore have been withheld until the following day under the "time-to-review" standard. Shimabukuro Decl., ¶ 14 & Exh. 11.

This calculation accounts for the fact that the Multnomah Circuit Court closes at 4:00 p.m. rather than 5:00 p.m. and that complaints filed on weekends and holidays would not be available until the next court day, at the earliest. Defendant points out that if you instead treat Multnomah Circuit Court as closing at 5:00 p.m. instead of 4:00 p.m. and treat documents filed on weekends and holidays as having been filed before 1:00 p.m. on the next court day, then 68,823 complaints (51.48%) of complaints were filed after the cutoff time (1:00 p.m.) and could have been withheld until the next court day under the "time-to-review" standard. Response at 13; Dupree Decl., ¶ 23. There is no need to debate which calculation is more appropriate

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

because even with Defendant's calculation, the "time-to-review" standard would have allowed ***more than half*** of new civil complaints to be withheld until the following court day. *Id*.

With her Response, Defendant provides data as to the availability of new civil complaints from July 13, 2022 through August 31, 2022. Dupree Decl., ¶ 13 & Exh. 5. Again relying on the "business hours" unit of measurement, Defendant says that 95% of new civil complaints were released within four "business hours" and 99% within nine "business hours." *Id*. The delays could also be expressed as 26% withheld for at least one calendar day, with 5% withheld two or more calendar days. Declaration of Adam Angione ("Angione Decl."), ¶ 6 & Exh. A. Whether measured in business hours or calendar days, the existence of these delays remains undisputed.

More than half of this seven-week period elapsed while Courthouse News' motion for summary judgment was pending, when clerks were no doubt urged to prioritize the processing of new civil complaints. It is not a reliable indicator of what access is likely to look like in the future. *See, e.g.*, Girdner Decl., ¶ 62 ("[T]he most common tactic used by clerks fighting against undelayed access is to speed up processing of new complaints, an acceleration that lasts only as long as the wolf of litigation stands outside the clerk's door."). Moreover, as Defendant's own argument emphasizes, outside events inevitably interfere with even the best-intentioned efforts to process quickly. Response at 14-15. The bottom line is that Oregon circuit courts on their best behavior, in an effort to avoid any Court-imposed constraint on their future ability to delay access to new civil complaints, ***still withheld 26% of all new civil complaints*** until at least the next day after filing.

Sowing further confusion, Defendant falsely implies that the access in this best-behavior

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

period satisfies Courthouse News' own standard for "timely" access. As stated in an interrogatory response, "Courthouse News typically defines 'timely' access to new civil complaints to mean access ***by the end of the day on which the complaint is filed***." Declaration of Carla Scott, Exh. 1 (emph. added). Defendant alters this statement in the Response, telling the Court that Courthouse News "considers access to be 'timely' if provided ***within the same day*** as filing," and that the "time-to-review" standard calls for complaints to be released "within one business day." Response at 1 & n.1 (emph. added). This sleight of hand is disingenuous at best. Learning about a complaint on the day it is filed, before the day's news cycle has ended, is qualitatively different than learning about it the next day (or after a few days have passed if the complaint is filed the day before a weekend or holiday). *See, e.g.*, Girdner Decl., ¶ 13 ("News runs on a daily cycle where events occur during the day and are reported that afternoon and evening. Newsmakers and reporters then sleep, and the whole cycle starts all over again the next day."). Defendant's view ignores the reality that for the press and public, a complaint that was filed nine "business hours" ago is quite literally yesterday's news. As Courthouse News' editor and publisher William Girdner explains:

> Especially in today's digital age, where news is delayed until the next day or longer, it is devalued by the delay. A day late is generally too late because the news in a day-old complaint has already been overtaken by events in the current news cycle. Civil actions not reported when they are received by a court are thus effectively suppressed, less likely to prompt news coverage, and thus less likely to come to the public's attention as the days pass.

Id.

C. Defendant's Excuses for Delays Illustrate the Vulnerability Inherent in a Process-First System

Unable to actually dispute the delays experienced by Courthouse News, Defendant devotes much of her Response to explaining that delays have been "the result of circumstances

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

beyond the control of the state courts, such as the worldwide pandemic, other natural disasters, and budget constraints," as if Courthouse News were accusing Oregon's circuit courts of some moral failure in not processing more quickly. To the contrary, Courthouse News understands perfectly well that "delays that impede news coverage inevitably result when new complaints sit in a processing queue while journalists wait for the completion of clerical work that ebbs and flows in its efficiency depending on sickness, staffing, training, holidays and even parades." Girdner Decl., ¶ 19. Courthouse News has seen this in court after court. Just as it has seen that access in courts that do not withhold for processing becomes virtually perfect. *Id*., ¶¶ 19-22, 26, 28, 41, 46-47, 49-52.

This is why even with the motivation of a lawsuit hanging over the heads, Oregon circuit courts still withheld more than a quarter of all new civil complaints filed in the seven weeks after the "time-to-review" standard was issued. Angione Decl., ¶ 6 & Exh. A. And it is why there is no reason to hope that delays will not increase as efforts inevitably wane or the next circumstance beyond the courts' control comes to pass.

II. Defendant Has Failed to Create a Genuine Dispute of Material Fact as to Her Failure to Justify Her Process-First Policy

The record shows that the primary reason Defendant rebuffed Courthouse News' requests to change the policy of withholding access for processing was a proprietary view among Oregon Judicial Department ("OJD") personnel that e-filed civil complaints are not "a record of the court" until court staff has time to review and "accept" them. *See* Motion at 14-16. Intuitive reactions that pre-processing access to new civil complaints would result in the release of confidential information were not borne out in conversations with courts that already provide pre-processing access. *See* Motion at 12-14.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

It is thus not surprising that the OJD's comprehensive records of all civil complaints submitted to Oregon circuit courts over more than three years reveal that only a microscopic percentage of those filings (0.018%) were rejected because a clerk thought they contained confidential information. *See* Motion at 25-27. Her staff having now analyzed the same set of data for themselves, Defendant is forced to concede the point. *See* Section I(A), *infra*. Trial court administrators parroting vague, conclusory statements that court staff correct e-filer mistakes with confidential filings (though not necessarily with the civil complaint filings at issue in this case), see Section II(B), *infra*, falls well short of the "detailed facts and … supporting evidence" necessary to establish a genuinely disputed material fact. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

An interest in confidentiality interest is the ***only*** interest Defendant seriously advances in support of her no-access-before-acceptance policy. While the Response is sprinkled with references to other vague administrative buzzwords ("the integrity of the court [record] filing system"; "public trust"), *e.g.*, Response at 29, Defendant makes no attempt to explain what she means by them, let alone make any showing that withholding access is necessary to protect them. *See* Section I(C), *infra*. Nor does Defendant dispute that numerous other state courts – including courts in California, Georgia, Nevada, and Vermont that use the same e-filing system Oregon uses – successfully offer pre-processing access without encountering any problems. Instead, Defendant quotes a politician's commentary on Judicial Conference reports about federal e-filing, but that commentary is not evidence of anything. Invoking it is also a curious choice given that the reports confirm that making filers responsible for redacting social security numbers – as is also the policy in Oregon, UTCR 2.100 – is a sound approach that has proven

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

effective. *See* Section I(D), *infra*.

Lacking any basis for showing a substantial probability that withholding access to all new civil complaints is necessary, Defendant finally claims that despite the plain language of controlling Ninth Circuit authority, she need not justify her withholding policy at all if the solution for remedying delays would result in immediate access. *See* Section I(E), *infra*. This attempt to avoid having to justify delays is based on a slightly different ground than her prior attempt, *Cozine*, 2022 WL 1000775, at *2, but it is equally ill-founded. Defendant has thus failed to carry her burden to show a genuine issue of material fact as to the probability that any important interest would be impaired if Oregon's circuit courts did not withhold all new civil complaints until court staff have completed administrative processing.

A. Defendant Concedes that – Contrary to Her Prior Assertions – the Courts' Rejection Data Does *Not* Reflect that Clerk Review of New Civil Complaints Protects Confidential Filings

There is no dispute concerning the manner in which filers designate and submit new e-filed complaints, thus allowing Oregon's circuit courts to automatically filter and safeguard confidential filings. The parties agree that the e-filing process in Oregon's circuit courts requires filers to select a case category (*e.g.*, civil, family, criminal, mental health/probate), case type (*e.g.*, contract), and document type (aka "filing code"), and that filers can also select a security level for each document submitted, either "Confidential" or "Public." Mot. at 8-9; Response at 3-4; Fetterly Decl., Exh. 12 (screen captures of e-filing interface).

Defendant's evidence also confirms that ***no case types within the civil case category are confidential***. Dupree Decl., Exh. 2 (confidential case types highlighted). Confidential case types exist only within the family, juvenile dependency, and probate/mental health case

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

categories. *Id*. Moreover, of the nearly 100 different document types that can be e-filed when initiating a case within the civil case category, only two are confidential (death certificates and fee waiver applications). *Compare* Dupree Decl., Exh. 3 (list of confidential document types) *with* Fetterly Decl., Exh. 14 at 2-4 (list of document types available in civil case-initiating e-filings). If a filer seeks to keep any other filing in a civil case confidential, he or she must file a motion to seal. UTCR 5.160; UTCR 21.070(3)(g). Both the motion and the documents for which sealing is sought must be filed in paper, not e-filed. UTCR 21.070(3)(g).

Defendant does not dispute that the software of Oregon's e-filing vendor can automatically filter out confidential filings based on what case type, document type, and security level the filer selects, Fetterly Decl., Exh. 1 at 11 (Cozine Depo. 37:1-38:12). Defendant nevertheless contends her "no-access-before-acceptance" policy is warranted, arguing that such automatic filtering does not adequately protect confidential records because filers fail to select confidential case types or confidential document types. Response at 23. Defendant explained in deposition that her office "looked into user error" by "look[ing] at our own records, our own rejection records." Fetterly Decl., Exh. 1 at 23 (Cozine Depo. 86:2-87:3). She said that the rejection data would show, for example, that "it's not uncommon for domestic relations filings to be submitted as civil filings." *Id*. (Cozine Depo. 86:24-87:3).

However, the undisputed evidence refutes this claim. As Courthouse News demonstrated in its moving papers, the circuit courts' rejection data shows that failure to properly designate confidential civil documents as confidential is extremely rare. Analyzing data reflecting new civil complaints submitted from January 2019 through April 2022, Courthouse News identified ***only 26 filings*** out of 144,244 for which clerk review might have resulted in confidential

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

handling (***or 0.018% – less than two hundredths of one percent***). *See* Motion at 25-26; Declaration of Katherine Keating ("Keating Decl."), ¶¶ 17, 23, 27, 31-32, 34-35 & Exhs. 4, 5-7, 10-11 (ECF 38).

Analyzing the same set of data, Defendant's identified only one additional confidential filing she contends was kept confidential because of human review, for a total of 27 filings, or 0.019% of the 144,244 civil complaints filed over a more than three-year span. Dupree Decl., ¶ 30 & Exh. 17 (rejection directing filer to refile in juvenile department).[3] In other words, the parties agree that the rejection data reflects that the number of complaints e-filed in the civil case category for which human review was necessary to keep confidential information confidential is at most ***less than two hundredths of one percent***. "This is a minute fraction of the total complaints filed and demonstrates that the pre-access review process is not 'essential to preserve higher values.'" *Courthouse News Serv. v. Gabel*, 2021 WL 5416650 at *15 (D. Vt. Nov. 19, 2021) (citation and brackets omitted).

Despite – or perhaps because of – this clear and undisputed evidence, Defendant tries to muddy the waters by representing that Courthouse News "undercount[s] the matters that are confidential." Response at 22. This is a red herring, as Defendant's own analysis of rejection data comports with Courthouse News' analysis. It is also misleading. She cites non-civil case

[3] Defendant mistakenly believes that Courthouse News did not count seven particular rejections in its grand total of 26. Dupree Decl., ¶¶ 31-33. While Courthouse News ***did*** question whether each of these seven represented an instance when human review kept a confidential document confidential, Keating Decl., ¶¶ 19, 23(a), 23(c), 23(e), and 35, all seven rejections were included in Courthouse News' grand total of 26 filings that might have been rejected for reasons related to confidentiality. Mot. at 25-26; Keating Decl., ¶ 17 & Exh. 4 (nine rejections) + ¶¶ 23(a), (c), (e) & Exh. 5 (three rejections) + ¶ 27 & Exh. 7 (one rejection) + ¶ 34 & Exh. 10 (four rejections) + ¶ 32 & Exh. 9 (nine rejections) = 26 rejections.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

types (*e.g.*, juvenile dependency and civil commitment)[4] and mistakenly represents that the federal Violence Against Women Act "makes certain cases and records confidential, including protective order and stalking cases." Response at 22.[5] She cites statutes making certain child welfare records and "fingerprints, photographs, records and reports" compiled for law enforcement purposes confidential, ORS 409.225(1); ORS 181A.220, without explaining that if it were necessary to file such records with a civil complaint, these statutes would provide a basis for requesting that the relevant documents be filed under seal rather than triggering automatic confidential handling. UTCR 5.160; UTCR 21.070(3)(g). A request for sealing – and the documents to be sealed – must be filed in paper, not e-filed. UTCR 21.070(3)(g). Also misleading is Defendant's representation that "[i]ndividual health information is protected." Response at 23. If Defendant were correct, virtually every medical malpractice and personal injury case would be filed under seal.[6]

Finally, Defendant cites ORS 646A.620(1)(c) for the proposition that "[s]ocial security

[4] A "civil commitment" proceeding is a type of probate/mental health proceeding, not a civil proceeding. Dupree Decl., Exh. 2 at 3.

[5] As Defendant recognizes elsewhere in the Response, VAWA only prohibits states from making certain documents "available publicly ***on the internet***" and only if "publication would be likely to publicly reveal the identity or location of the party protected under such order." 18 U.S.C. § 2265(d)(3) (emph. added). In any event, filings that implicate VAWA are not civil filings in Oregon. *See* Dupree Decl., Exh. 2.

[6] The statute Defendant cites, ORS 192.553, is Oregon's version of HIPAA, which covers certain information maintained by insurers, health care providers, and other "covered entit[ies]." ORS 192.553(1)(a); ORS 192.556(11). Front-line court clerks are in no position to evaluate information in civil filings for compliance with Oregon's HIPAA laws. Cozine Declaration, Exh. 4 at 1 (Policy and Standards for Acceptance of Electronic Filings in the Oregon Circuit Courts: "Reasons for acceptance and return should remove legal decision making from front line court staff.").

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

numbers are confidential and must not be publicly posted." Response at 23. Part of the Oregon Consumer Information Protected Act, the requirements of this statute are explicitly subordinated to not only state and federal laws but also court rules. ORS 646A.620(3). As Defendant knows, the relevant guidance for social security numbers in court filings is UTCR 2.100, which permits, ***but does not require***, filers to request segregation of "protected personal information" in court filings. *See* UTCR 2.100(1), (2)(b)(i).[7] Despite the clear authority of UTCR 2.100 as to the court's handling of personal protected information, *see* Mot. at 23-24, the Response refers to that rule only once, in a cryptic footnote characterizing the rule as absolving courts of liability for release of personal information but not "satisf[ying] the privacy interests." Response at 23 n.6. Moreover, there is no dispute that over the course of more than three years, only ***nine*** of 144,244 civil complaint filings (0.006%) were rejected for containing protected personal information. Keating Decl., ¶¶ 21-32 & Exh. 9. Thus, Defendant's "own evidence reveals that placing the onus on filers has been overwhelmingly effective." *Gabel*, 2021 WL 5416650, at *16.

B. Administrators' Vague and Conclusory Statements Lack the Specific Facts and Supporting Evidence Required to Create a Genuine Dispute as to Whether Pre-Access Clerk Review Is Necessary to Protect Confidential Civil Complaints

Unable to support her claim that the courts' "own rejection data" would show the need for human review of new civil complaints, Fetterly Decl., Exh. 1 at 23 (Cozine Depo. 86:2-87:3), Defendant now concedes that "the data show that rejections on the basis of confidentiality are infrequent." Response at 24. Undeterred in her quest to find a justification for her review-first policy, Defendant falls back to arguing that "[t]he lack [of] comprehensive quantitative data …

[7] Oregon imposes an affirmative requirement that filers segregate social security numbers from documents filed with the court only in marital annulment, dissolution, or separation proceedings under ORS 107.085 and 107.485. UTCR 2.100(3)(a).

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

does not mean … that misfiling of confidential information does not regularly occur," and urging the Court to rely on "the routine experience of Trial Court Administrators whose staff routinely corrects incorrectly designated documents and cases," leaving no record of having done so. *Id*. Three trial court administrators offer virtually identical declaration testimony on this point:

> It has been the experience at the Lane County Circuit Court that filers regularly make mistakes and fail to designate confidential information as required by the UTCRs. In my role as TCA, I receive consistent reports from my supervisor team about e-Filing issues that arise. One ongoing issue is that filers fail to designate confidential documents as confidential in File & Serve.

Declaration of Elizabeth Rambo ("Rambo Decl."), ¶ 8 (ECF 62); *see also* Declaration of Barbara Marcille ("Marcille Decl."), ¶ 8 (ECF 63); Declaration of Amy Bonkosky ("Bonkosky Decl."), ¶ 9 (ECF 64). Each of them also says that "mistakes such as not designating a document as confidential can be corrected by staff, and staff regularly makes such corrections." Rambo Decl., ¶ 12; Marcille Decl., ¶ 12; Bonkosky Decl., ¶ 13 (minor variation in wording). But "[w]hen the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993); *see also Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1239 (W.D. Wash. 2019) ("Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed."), *aff'd*, 978 F.3d 1092 (9th Cir. 2020).

The vague, conclusory and boilerplate statements from the administrators are insufficient to meet Defendant's burden of opposing summary judgment—and satisfying rigorous scrutiny—because they do not say how often filers "fail to designate confidential information," let alone how often – if ever – such failures occur in case-initiating documents filed within the civil case category. Nor do they say how often staff "correct" such failures (*i.e.*, change the filer's

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

selection of case type or document type), let alone how often – if ever – they do so for ***case-initiating*** documents filed within the ***civil*** case category. The administrators do not offer up a single example of a confidential case-initiating document filed in the civil case category that would have been released as public absent court staff changing a filer designation.[8]

If the trial court administrators could have offered more specific facts – *i.e.*, that (1) over a particular period of time court staff identified a particular volume (even if approximated) of confidential complaints e-filed in the civil case category with a non-confidential case or document type and without the "confidential" security option selected, such that the filings would not have been automatically segregated from the public record, and (2) staff changed the case type or document type to a confidential type rather than returning the filing for correction – they surely would have done so. These "missing facts [cannot] be presumed." *Boardman*, 354 F. Supp. 3d at 1239.

Put simply, Defendant asks the Court to accept the generalized assertion that "[t]he important state interest of protecting privacy interests of both litigants and third parties can ***only*** be served by human review," Response at 24, without offering ***any specific facts*** establishing that this is so. This is not enough to carry Defendant's burden to show a genuine dispute of

[8] Given that ***zero*** civil case types and ***only two*** civil case-initiating document types (out of nearly 100) are confidential as a matter of law, the undisputed evidence suggests that the "failures" the administrators reference are happening within the criminal, family, juvenile dependency, or probate/mental health case categories where the vast majority of confidential case-initiating documents are filed. *See* Dupree Decl., Exhs. 2 (case categories and case types available for e-filing, with confidential case types highlighted) and 3 (list of confidential document types); Fetterly Decl., Exh. 14 (list document types available in civil case-initiating e-filings vs. subsequent e-filings in civil cases and e-filings in criminal, contempt, family, juvenile dependency, and probate/mental health cases).

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

material fact or her ultimate burden to show a substantial probability that an important government interest will be impaired if Oregon courts do not withhold access to all new civil complaints. "[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

C. Defendant Abandons Other Justifications for Withholding Civil Complaints

In its opening papers, Courthouse News showed that the other reasons Defendant claimed made it necessary for Oregon circuit courts to withhold all civil complaints (malicious disclosure of third-party information, courthouse security, and administrative efficiency) did not bear up under any kind of scrutiny. Motion at 27-31. Forced to substantiate these justifications, Defendant now abandons them.

Defendant does not dispute that she has no reason to believe that any filer has ever intentionally disclosed confidential third-party information in an Oregon circuit court filing for malicious purposes. Response at 24. She nevertheless posits that if someone were to do so, that person would be shielded from tort liability, and that the "courts need not wait for a disaster to strike before taking sensible precautions to prevent it." *Id*. The Court need not decide how Oregon's litigation privilege might apply in this hypothetical situation or whether the potential lack of a tort remedy would qualify as a disaster. It is manifestly clear that Defendant cannot establish a substantial probability that this scenario is likely to unfold. Moreover, if Oregon had an overriding interest in permitting tort recovery for the malicious disclosure of confidential third-party information in civil court filings, it could address that issue most effectively by enacting legislation, not by withholding all nonconfidential civil complaints.

Defendant makes no effort to defend courthouse security or administrative efficiency as

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

viable justifications for withholding civil complaints for processing. *See e.g.*, Response at 20-21. She mentions "ensuring compliance with court rules" without explaining why rule compliance depends on keeping new complaints away from the press and public. *Id*. She mentions "public trust" and the "integrity" of "court records" and of the "court filing system" throughout the brief, Response at 1, 21, 22, 23, 26, 29, but never explains what these purported interests actually entail or how withholding access for administrative processing serves them (let alone is critical to protecting them, as *Press-Enterprise II* requires). She also fails to explain how the alternatives to access offered by Oregon's e-filing vendor – which are used by numerous other state courts across the nation – fail to adequately address these purported interests.

Other than supposedly protecting confidential information, the only virtues of "human review" touted in the Response are that it "allows county court clerks to correct errors, … contact the filer to resolve outstanding questions about the filing, and ensure the proper filing fees were paid, all before a submitted complaint becomes a record of the court." *Id*. at 22. What the Response does not say, however, is why it is important to do these things ***before*** allowing the press and public to see a complaint. There is no reason to keep nonconfidential civil complaints secret while court staff call the filer with questions, check the amount of filing fees, or confirm that party names were properly capitalized in the e-filing submission. *See* Keating Decl., Exh. 2.

The Ninth Circuit agreed when it affirmed summary judgment enjoining the *Planet* clerk's "no-access-before-processing" policy, which required clerks to complete a "seven-step procedure" before new complaints were made available. *See Planet III*, 947 F.3d at 586. As this Court previously observed, "Ventura County's seven-step acceptance process and quality control review … mirror[s] Oregon's after-submission review." *Cozine*, 2022 WL 1000775, at *2. Like

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Planet before her, Defendant has failed to meet her burden of justifying Oregon's "no-access-before-acceptance" policy.

D. Defendant Ignores the Successful Implementation of Pre-Processing Access in State Courts and Mischaracterizes Reports About Federal Judicial Records

Defendant does not dispute that the Oregon Judicial Department contacted other state courts that provide pre-processing access to new civil complaints to gather information about "pros and cons," "confidential, rejected, regrets, advice." Fetterly Decl., Exhs. 20, 21; *see* Motion at 12-14, 31-32. Nor does she dispute that no personnel from other courts relayed ***any*** problems, negative experiences, or bad outcomes arising from a press review queue or other method of pre-processing access to new civil complaints. Fetterly Decl., Exhs. 5 (RFA 4) and 3 (Interrogatories 8-10); Girdner Decl., ¶¶ 44-52; *see* Motion at 14, 32.

Unable to reconcile the experience of other state courts that successfully provide pre-processing access – including in Alabama, Arizona, California, Connecticut, Georgia, Nevada, New York, Vermont, Washington, and now Florida (Girdner Decl., ¶¶ 32, 33, 37, 38, 41, 50, 51; Reply Declaration of Jonathan Fetterly ("Fetterly Reply Decl."), Exh. 36) – with her assertions that Oregon circuit courts could not do so without sacrificing overriding government interests, Defendant ignores this reality altogether.

Instead, she quotes a letter from Senator Ron Wyden to Chief Justice Roberts, conveying Senator Wyden's thoughts on reports from the Judicial Conference of the United States as to the adequacy of various rules related to personal identifier information in federal court filings. Response at 1, 9, 23, 26; Defendant's Request for Judicial Notice ("RJN") & Exh. 1 (ECF 61 & 61-1). As an initial matter, Senator Wyden's letter is not evidence that "'each year tens of thousands of Americans are exposed to needless privacy violations,'" Response at 1 (quoting

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

RJN, Exh. 1), or of any other fact. *See* Response to Request for Judicial Notice at 3. He does not appear to possess any particular qualifications, knowledge, or experience that could render him an authority on any issue in this case. He is simply an individual expressing his views on the Judicial Conference reports.

Moreover, both Senator Wyden's letter and Defendant's Response mischaracterize what the Judicial Conference reports actually say. The 2009 Judicial Conference report acknowledges that the federal rules "put the responsibility for redacting personal identifiers in court filings on the litigants and lawyers who generate and file the documents," RJN Exh. 61-2 at 5, just as Oregon rules do. UTCR 2.100. "The litigants and lawyers are in the best position to know if such information is in the filings and, if so, where." RJN Exh. 61-2 at 5.

The 2011 Judicial Conference report states that a review of "extensive surveys conducted by the Administrative Office and the Federal Judicial Center … found ***only a small number of instances*** in which unredacted social security numbers were accessible online and that ***such mistakes were rare***." RJN Exh. 3 (ECF 61-3) at 3 (emph. added); *see also id*. at 9-10 ("[V]ery few cases (relative to the large number of court filings) in fact revealed unredacted social-security numbers."); RJN Exh. 4 at 6 (no amendments to privacy rules appropriate where "5,437 (or less than 0.14 percent of the documents) included one or more unredacted SSNs"). That Defendant's only "evidence" of issues in courts that provide pre-processing access is the Senator Wyden letter confirms her inability to carry her burden under the *Press-Enterprise II* test.

E. Defendant Cannot Avoid Her Burden to Justify Delays by Mis-Reading *Planet III*

Despite acknowledging that she must establish a substantial probability that withholding access for completion of administrative review is necessary to protect overriding government

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

interests, Response at 18, Defendant also asserts that Courthouse News' "effective demand for instant access to electronically submitted complaints must be rejected as a matter of law." Response at 20. She does not cite any authority upholding an access restriction where no justification was demonstrated, and *Press-Enterprise II* clearly forecloses such a result.

When the Ninth Circuit said that the qualified right to access nonconfidential civil complaints does not "***demand***[] immediate, pre-processing access to newly filed complaints," *Planet III*, 947 F.3d at 594 (emph. added), it did so as an introduction to its application of the *Press-Enterprise II* test in the section of the opinion that immediately followed, which concludes:

> To survive *Press-Enterprise II*'s two-prong balancing test, Ventura County must demonstrate first that there is a 'substantial probability' that its interest in the fair and orderly administration of justice would be impaired by ***immediate access***, and second, that no reasonable alternatives exist to 'adequately protect' that government interest.

Id. at 596 (quoting *Press-Enterprise II*, 478 U.S. at 14) (emph. added). The Ninth Circuit's articulation of the *Press-Enterprise II* test expressly contemplates the possibility of immediate access if the challenged access restriction does not hold up under rigorous scrutiny.[9] Defendant's assertion that "[s]ome amount of access delay is plainly constitutionally permissible," Response at 18, thus requires an addendum: " … only if it has been justified under the *Press-Enterprise II* test."

In *Planet III*, for example, the Ninth Circuit did uphold a scanning policy that resulted in

[9] As Chief Judge Nye (D. Idaho) recently observed: "As CNS notes—and in accordance with *Planet III*—it never sought 'immediate' access to court records (in this case or any others). It simply contends that the current schema in Idaho, with its associated delays, cannot be justified." *Courthouse News Serv. v. Omundson*, --F. Supp. 3d--, 2022 WL 1125357 at *12 (D. Idaho Apr. 14, 2022).

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

some complaints being delayed until the following day, but only after finding that the clerk in that paper-filing court had "demonstrated" that because of staffing issues created by a "statewide budget crisis," the only way it could avoid delay was to make the public's filing deadline earlier in the day such that "the overnight delay in access to complaints filed during the last ninety minutes of the court's public hours was ***no greater than essential*** to manage necessary court operations under the circumstances existing at the time." 947 F.3d at 599-600 (emphasis added). Because the court in *Planet* was not an e-filing court, it did not have the options available to e-filing courts, which allow for undelayed access without stress on staffing resources.

Courthouse News Service v. Schaefer – which allowed for a minimal amount (10 to 15%) of complaints to be delayed until the following day when same-day access is "not practicable" – was also decided in the context of a paper-filing court. 440 F. Supp. 3d 532, 562 (E.D. Va. 2020) , *aff'd*, 2 F.4th 318 (4th Cir. 2021). This is significant because in an e-filing court, it is ***always*** practicable to provide access to all nonconfidential complaints filed that day.

Defendant's reliance on *Courthouse News Serv. v. New Mexico Admin. Off. of the Courts*, 566 F. Supp. 3d 1121 (D.N.M. 2021) for the broad proposition that some amount of delay is *per se* allowed is also misplaced. That case involves a preliminary injunction order in Courthouse News' favor that is currently on appeal to the 10th Circuit, while a motion for reconsideration of the order remains pending in the district court. Fetterly Reply Decl., ¶¶ 6-11. A central issue on appeal (and in the pending reconsideration motion) is the district court's preliminary ruling articulating a bright-line rule requiring access to new complaints within five hours of receipt. The district court derived its five-hour rule by rewriting the Ninth Circuit's rigorous scrutiny test. *Id.* The parties in that case all agree that the district court erred by creating a bright-line "five

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

hour" rule, and they agree the Ninth Circuit's unmodified rigorous scrutiny test applies to the access delays in that case. *Id*. Regardless of how the Tenth Circuit rules, or how the New Mexico district court may handle its preliminary findings on remand, this Court must faithfully apply the Ninth Circuit's rigorous scrutiny test, without modification.

Finally, the decision in *Courthouse News v. Forman*, 2022 WL 3147675 (N.D. Fla. Aug. 5, 2022), was promptly followed by the Florida courts' agreement to "'implement a statewide public access system … in the E-Filing Portal for non-confidential circuit court civil complaints to be publicly accessible upon receipt, but in no circumstances to exceed five minutes,'" Fetterly Reply Decl., ¶¶ 3-4 & Exhs. 36, 37, yet another example of a state court recognizing the viability of pre-processing access.

III. Defendant Has Failed to Create a Genuine Dispute of Material Fact as to the Availability of Alternatives

Defendant bears the burden of establishing that "no reasonable alternatives exist to 'adequately protect'" whatever interest she contends justifies her delay-causing policy of withholding new complaints for processing. *Planet III*, 947 F.3d at 596 (quoting *Press-Enterprise II*, 478 U.S. at 14)).[10] There is no dispute that the e-filing vendor selected by the OJD, Tyler Technologies ("Tyler"), offers at least three ways for Oregon circuit courts to solve access delays through pre-processing access: (1) a press review queue hosted by Tyler; (2) a press review queue provided by OJD using application programming interfaces ("API's")

[10] Though she correctly sets out the applicable test throughout most of the Response, Defendant invokes the more lenient time, place, and manner test at pages 25-26. In *Planet III*, the Ninth Circuit said that the defendant's policies "resemble time, place, and manner restrictions," but when it embraced the "rigorous" scrutiny embodied by the *Press-Enterprise II* test, it explicitly declined to apply the time, place, and manner test. *Planet III*, 947 F.3d at 595-96 & n.9.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

supplied by Tyler at no cost; or (3) configuring the system to auto-accept new civil complaints. *See* Motion at 6-7. Nor is there any genuine dispute as to the efficacy of these solutions in providing timely access while appropriately handling confidential filings. *See* Motion at 5-7, 12-14. Unable to dispute this evidence, Defendant once again relies on vague witness statements devoid of any specific facts that might give rise to a genuine issue of material fact concerning the availability or efficacy of these alternatives.

Tyler-hosted press review queue. Defendant's only real complaint as to availability is that it "is not a free service." Response at 26. Though the queue would have been free when the OJD first explored it, Fetterly Decl., Ex. 20 at 5, 7, Tyler has evidently now quoted the OJD an annual fee of $108,000 to host the press review queue, with increases in subsequent years. Dupree Decl., ¶ 26. However, Defendant has not asserted, let alone demonstrated, that cost would be a substantial burden or that it otherwise renders this alternative not viable. *See Boardman,* 354 F. Supp. 3d at 1239 ("missing facts will not be presumed").

To begin with, this figure should be understood in the context of the OJD's revenue streams and what it already pays Tyler. Under Oregon's statewide e-filing agreement, the OJD pays Tyler $2,779,500 each year. Fetterly Reply Decl., Exh. 35. Meanwhile, the OJD generates substantial revenue from providing access to court records through its subscription-based OJCIN service. During 2017-2019, user fee revenues from OJCIN subscriptions were $5.9 million. Oregon Judicial Department Chief Justice's Recommended Budget: 2021-2023 Biennium at 188-189, *available at* https://www.courts.oregon.gov/about/Documents/2021-23CJBudget.pdf. Moreover, Defendant concedes that it has not asked Tyler to provide the press review queue at no cost, as Tyler had been prepared to do in 2019, or otherwise attempted to negotiate the

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

amount of Tyler's quote. Fetterly Decl., Exhs. 1 at 24-25 (Cozine Depo. at 92:24-96:23), 6 at 4 (RFAs 12, 13).

OJD-provided press review queue (APIs). Defendant's stated concerns about the cost of a Tyler-hosted press review queue are likely a moot point because Tyler will give the OJD free API's that would enable the OJD to host the press review queue itself, with no annual fee or other costs. Fetterly Decl., Exhs. 1 at 26 (Cozine Depo. at 99:6-12), 6 at 5 (RFAs 15-17), and 10 at 2. The Response itself ignores the API solution entirely, and the Dupree declaration says only that it "would require OJD building and maintaining its own press review site, which is not something OJD has done in the past and would require even more staff time to develop and maintain the site" than a Tyler-hosted would require. Dupree Decl., ¶ 27.

The fact that the OJD has not built or maintained a press review site in the past is not surprising and does not mean that the OJD could not do it now. In fact, the OJD has an Enterprise Technology Services Division, which "provides electronic access to state court systems for OJD… and the public," "provides technology support to OJD administration and the courts," "supports software and hardware components," "develops and delivers software training," "provides in-house developed software," "maintains OJD's website," "ensures public access to online information and eServices, including efiling ePay," and "develops technology-related business processes for the courts and OSCA divisions." Fetterly Decl., Exh. 6 at 3-4 (RFA 11). Mr. Dupree does not state, and provides no reason to believe, that the OJD's Enterprise Technology Services Division would not be able to the build and maintain the queue using the free APIs provided by Tyler. In deposition, Defendant testified that there would be a "cost for the development" of an OJD-hosted press review queue, but she admitted that the OJD

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

had not explored the potential scope of work that an OJD-hosted press review site would require. Fetterly Decl., Exh. 1 at 26 (Cozine Depo. 99:6-23). Indeed, the only "cost" of an OJD-hosted site is likely the labor of individuals already employed by the OJD's Enterprise Technology Services Division. In any event, Defendant offers no evidence establishing what any potential "costs" might be, let alone evidence establishing they would be problematic, let alone prohibitive.

Auto-accepting new complaints. The Response does not mention the third obvious alternative: configuring the e-filing system to automatically accept new civil complaints. *See* Motion at 7. In his declaration, however, Mr. Dupree asserts that "[t]his cannot be done," Dupree Decl., ¶ 28, because of an Oregon statute which provides that "[a] pleading or other document may be filed by the circuit court only if the filing fee required by law is paid by the person filing the document or a request for a fee waiver or deferral is granted by the court." ORS 21.100. The filing fee amount evidently depends on the amount sought in the complaint, which, according to Mr. Dupree, means that "the documents must be reviewed individually by staff to ensure the correct fee is paid." Dupree Decl., ¶ 28.

Mr. Dupree does not say, however, that an auto-accept system cannot be configured to properly calculate and verify the filing fee on submission of e-filed civil complaints. This is likely because other state courts with similar statutes demonstrate it ***can*** be done. A number of states with auto-accept systems have both filing fees that vary based on the filing and statutes that call for payment of a fee upon filing, including Nevada ("Except as otherwise provided by specific statute, all fees prescribed in this chapter must be paid in advance, if demanded," NRS 19.060), Utah ("Except as provided in this section, all fees shall be paid at the time the clerk

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

accepts the pleading for filing or performs the requested service," Utah Code Ann. § 78A-2-301), Alabama ("There shall be a consolidated civil filing fee, known as a docket fee, collected from a plaintiff at the time a complaint is filed in circuit court or in district court," Code of Alabama § 12-19-70(a)), and Vermont ("Except as provided in subdivisions (2)-(7) of this subsection, prior to the entry of any cause in the Superior Court, there shall be paid to the clerk of the court for the benefit of the State a fee of $295.00 in lieu of all other fees not otherwise set forth in this section," 32 V.S.A. § 1431(b)(1)). *See also* Girdner Decl., ¶¶ 36-41 (discussing state courts that automatically accept new complaints). Moreover, the Vermont courts recently demonstrated how quickly auto-accept can be implemented, requiring ***only three weeks*** to implement Tyler's auto-accept feature following entry of the permanent injunction in *Courthouse News Serv. v. Gabel*. *Id*. at ¶ 38.

IV. Even If the Parties Disputed Characteristics of Current vs. Historic Access, that Dispute Would Not Be Material to Any Questions Before the Court

In a final attempt to identify a genuine dispute of a material fact, Defendant points to "differences between historical, paper access and that provided in connection now with e-Filing." Response at 1, 16-17. Defendant does not explain, however, how any differences between current and historic access could be relevant to whether she can establish a substantial probability that an important government interest would be impaired by immediate access or that no reasonable alternatives would protect that interest. Whether or not the circuit courts in Crook and Jefferson Counties provided pre-processing access to paper-filed complaints, Response at 16-17, has no bearing on the issues before the Court.

Even more puzzling is Defendant's account of historical access in Multnomah County Circuit Court, *id*. at 16; Cozine Decl., ¶ 6, given that it differs in no material way from

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Courthouse News' own account. Motion at 3-4; Declaration of Karina Brown, ¶¶ 4-5. In both accounts, reporters were able to see all or virtually all complaints that had been filed on the day of filing. *Id*. In contrast, there is no dispute that the access Defendant now suggests is superior to prior access has entailed delays for ***more than a quarter of all new civil complaints***. *See supra* at 9; Angione Decl., ¶ 6 & Exh. A.

V. The "Time-to-Review" Standard Does Not Affect Courthouse News' Entitlement to Relief

It is undisputed that Defendant's "no-access-before-acceptance" policy results in delayed access to newly filed complaints. Defendant failed to meet her burden of justifying those delays under rigorous scrutiny. Courthouse News is therefore entitled to a permanent injunction prohibiting Defendant from refusing to make newly filed complaints available until after the completion of administrative processing – or "acceptance" – because Courthouse News has shown (1) success on the merits; (2) irreparable harm in the absence of injunctive relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.[11]

[11] Access delays constitute irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 127 (2d Cir. 2006) (quoting *e.g*., *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009)). The balance of equities also supports an injunction because "the public interest is served by timely reporting on the operations of the courts and because securing First Amendment rights is in the public interest." *Gabel*, 2021 WL 5416650, at *17 (citations and quotations omitted); *see also Courthouse News Serv. v. Jackson*, 2009 WL 2163609 at *5 (S.D. Tex. July 20, 2009) ("[Courthouse News] will be denied its First Amendment right of access to new case-initiating documents unless the Court issues this… injunction, while Defendants have alternative, constitutional ways to achieve their goals and address their administrative concerns."). Finally, the Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles," to protect not only "the free expression interests of [plaintiffs], but also the interests of other[s]," such as the "would-be recipients" of Courthouse News' reports. *Klein*, 584 F.3d at 1208.

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

The Response invites potential confusion as to the relief sought by Courthouse News when it refers to both "current and previous policy and practices" satisfying constitutional scrutiny. Response at 20. However, the delay-causing policy—*i.e*., the "no-access-before-acceptance" policy—has been in place at all relevant times. Defendant's new "time-to-review" standard is not a new or different "policy" or "practice" because it does not rescind or alter the "no-access-before-acceptance" policy. Rather, it keeps that policy in place while merely encouraging court clerks to process and "accept" complaints more quickly, still allowing for delays and potentially long delays depending on circumstances.

Even if Defendant had replaced the "no-access-before-acceptance" policy with a new policy that ceased access delays (and she did not), Courthouse News would nevertheless be entitled to its requested relief. The *Planet* case is once again instructive. The district court in *Planet* permanently enjoined Ventura County's "no-access-before-process" policy even though Planet, less than two years earlier, had replaced that policy with a new scanning policy. Rejecting Planet's mootness defense, the district court found, among other things, "Planet does not contend [the new policy], which was not enacted pursuant to any statute or regulation, cannot 'easily be abandoned or altered in the future,'" and "the ***suspicious timing*** of VSC's adoption of the Scanning Policy—i.e., ***after receiving an adverse ruling*** from the Ninth Circuit in *Planet I*—undercuts the likelihood that Planet can show that it is absolutely clear that [he] could not reasonably be expected to revoke the exception." *Planet* MSJ Order*,* 2016 WL 4157210 at *15 (C.D. Cal. May 26, 2016) (internal citations and quotations omitted) (emphasis added). The

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

Ninth Circuit affirmed, observing "nothing other than the injunction in this litigation prevents Ventura County from returning to its pre-2014 policy." *Planet III*, 947 F.3d. at 599 and n.10.

On remand following *Planet III*, Ventura County issued a public notice – "***the day before filing its Objections*"** to CNS's proposed amended judgment – affirmatively stating it would not revert to its pre-2014 policy. *Courthouse News Service v. Planet*, 2021 WL 1605218, at *3, n.4 (C.D. Cal. Jan 26, 2021) ("*Planet* Amended Judgment Order"). Judge Gee concluded the laws of mandate did not allow Planet to re-litigate the injunction, but she also observed that Planet's "self-serving statement does not materially alter any of the facts or analysis that Judge Otero and the Ninth Circuit addressed" and, "in any event, if VSC truly would never consider returning to the processing policy, then it would have no reason to vociferously object to an injunction against such policy." *Id.*

Here, Defendant took a page from the Planet playbook by issuing a self-serving statement ***after receiving an adverse ruling*** on its motion for summary judgment, ***the day before its deposition***, and ***two days before the close of discovery***. Unlike Planet, however, Defendant did not actually change her policy—the "no-access-before-acceptance" policy remains in place and access delays continue. Defendant nevertheless attempts to brush aside roughly three and a half years of even longer access delays during the period of January 2010 to April 2022, by focusing on a self-serving statement that promises shorter delays (when circumstances allow) and a newly-created record of shorter delays during a "best behavior" period.

Defendant's tactics do not materially alter any of the facts or analysis demonstrating Defendant's failure to justify the access delays resulting from the "no-access-before-acceptance" policy, including the delays occurring under the "time-to-review" standard, which allowed more

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

than a quarter of all new civil complaints to be withheld for at least one calendar day. *See supra* at 9. Moreover, nothing prevents Defendant from rescinding the new standard or simply refusing to enforce it. Put simply, "nothing other than [an] injunction in this litigation" will prevent the delays in access resulting from Defendant's "no-access-before-acceptance" policy. *Planet III*, 947 F.3d. at 599 & n.10; *Courthouse News Serv. v. Jackson*, 2009 WL 4927549, at *1 (S.D. Tex. Dec. 18, 2009) ("Without declaratory and permanent injunctive relief, Plaintiff would have no protection from future access delays because they might occur not simply from an outright change in policy, but surreptitiously from a mere relaxation of effort by court personnel and the piling up of newly filed petitions."); *see also, e.g., Courthouse News Serv. v. Tingling,* 2016 WL 8739010 at 46-53 (S.D.N.Y. 2016) (granting preliminary injunction against no-access-before-processing policy) (pagination from .pdf version downloadable from Westlaw).

CONCLUSION

Because Defendant has not carried her burden of demonstrating genuine disputes of material fact as to whether she can establish "a 'substantial probability'" that important government "would be impaired by immediate access," and "that no reasonable alternatives exist to 'adequately protect' that government interest," *Planet III*, 496 F.3d at 596 (quoting *Press-Enterprise II*, 478 U.S. at 14), Courthouse News is entitled to summary judgment and:

(1) A declaration that Defendant's policies and practices that knowingly affect delays in access to newly filed civil unlimited complaints, including her policy and practice of denying access to complaints until after administrative processing, are unconstitutional because they constitute a denial of the qualified First Amendment right of access to new civil complaints; and

HILLIS CLARK MARTIN & PETERSON P.S.
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

(2) A permanent injunction against Defendant "prohibiting her from continuing her policies and practices that deny Courthouse News timely access to new nonconfidential civil complaints, including, *inter alia*, her policy and practice of denying access to complaints until after administrative processing." Complaint at 17 (ECF 1) (prayer). This declaratory and injunctive relief is virtually identical to that sought and obtained by Courthouse News in the *Planet* case. *See* Fetterly Reply Decl. ¶ 5, Ex. 38 at 13 (*Planet* Amend. Compl.)

For the foregoing reasons, the Court should grant summary judgment in favor of Courthouse News.

Dated: October 21, 2022

HILLIS CLARK MARTIN & PETERSON P.S.

By *s/ Eric D. Lansverk*
Eric D. Lansverk, OSB #144700
999 Third Avenue, Suite 4600
Seattle, Washington 98104
Telephone: (206) 623-1745
Facsimile: (206) 623-7789
eric.lansverk@hcmp.com

BRYAN CAVE LEIGHTON PAISNER LLP

By *s/ Jonathan G. Fetterly*
Jonathan G. Fetterly (admitted *pro hac vice*)
Katherine Keating (admitted *pro hac vice*)
3 Embarcadero Center, 7th Floor
San Francisco, CA 94111
Telephone: 415-675-3400
Facsimile: 415-675-3434
jon.fetterly@bclplaw.com
katherine.keating@bclplaw.com

Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE