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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 MOTION FOR SUMMARY JUDGMENT** Oral Argument Requested

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LOCAL RULE 7-1 CERTIFICATION

In compliance with Local Rule 7-1, Counsel for plaintiff Courthouse News Service ("Courthouse News") certifies that the parties made a good faith effort through conferral to resolve the subject of this motion and have been unable to do so.

MOTION

Courthouse News moves for summary judgment on its complaint against defendant Nancy Cozine, in her official capacity as Oregon State Court Administrator, pursuant to Federal Rule of Civil Procedure 56. Courthouse News supports this motion with the accompanying memorandum of law, the declarations of Karina Brown, Jonathan Fetterly, William Girdner, Katherine Keating, Eric Lansverk, and James Shimabukuro, on all other papers and evidence filed and/or presented in support of this motion, and any oral argument as the Court may permit.

MEMORANDUM OF LAW

I. INTRODUCTION

Earlier this year, the Court confirmed that the First Amendment right to access a nonconfidential e-filed civil complaint attaches when the filer submits the complaint to the court. Defendant's own records show that Oregon's circuit courts withhold a substantial percentage of newly filed civil complaints from the press and public each day. These delays result from Defendant's policy of withholding access until court staff have processed and "accepted" each new complaint. The only question for the Court is whether Defendant can carry her burden of demonstrating a substantial probability that important government interests would be impaired if she were to permit access to new complaints before they are "accepted." As both her own records and the experience of other courts demonstrate, she cannot.

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II. FACTUAL HISTORY

A. About Courthouse News Service

Courthouse News is a nationwide news service founded more than 30 years ago to cover civil litigation. Girdner Decl., ¶ 5. It now employs about 240 people, most of them editors and reporters, covering state and federal trial and appellate courts in all 50 states. *Id*.

Courthouse News publishes a news website, www.courthousenews.com, which is free to the public and read daily by roughly 30,000 people. *Id.,* ¶ 9. Courthouse News' subscriber publications include its New Litigation Reports, which contain original, staff-written reports on new civil litigation in a particular geographic region. The New Litigation Reports are e-mailed to subscribers in the early evening on every court day. *Id.*, ¶ 6. Among Courthouse News' approximately 2,300 subscribers are law firms, news media, libraries, non-profit organizations, government entities, and businesses. *Id*.,¶ 8. Oregon subscribers include the *Portland Business Journal*, Oregon Farm Bureau, the Oregon School Boards Association, and Nike. *Id*.

Courthouse News functions as a pool reporter for news about civil litigation. It has many subscribing media outlets, including Twitter, *The Los Angeles Times*, *San Jose Mercury News*, *The Wall Street Journal*, *The Boston Globe*, *The Denver Post*, *Las Vegas Review Journal*, *The Salt Lake Tribune*, *The Dallas Morning News*, *St. Paul Business Journal*, and CNN. *Id*., ¶ 8. Courthouse News reporting is frequently credited as the source for news stories, including by newspapers (*e.g.*, *The New York Times*, *The Wall Street Journal*), magazines (*e.g.*, *New York Magazine*, *U.S. News and World Report*), television news *(e.g.*, ABC News, Fox News), online-only publications (*e.g*., *The Daily Beast*, *Politico*), and radio (*e.g.*, NPR). *Id*., ¶ 10.

To prepare the New Litigation Reports and identify new cases that may warrant a website

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article, Courthouse News' reporters have traditionally visited their assigned court towards the end of the court day and reviewed the new complaints filed that day. Girdner Decl., ¶ 14. The review was traditionally done by making a trip to the physical courthouse, but it now often takes place in the electronic courthouse, online. *Id.*

Courthouse News' New Litigation Report in Oregon is the *Oregon Report*, which covers civil actions filed in the U.S. District Court for the District of Oregon and in each of Oregon's circuit courts. Declaration of Karina Brown ("Brown Decl."), ¶ 2 & Exh. 1; Girdner Decl., ¶ 6. In Oregon, as in other states, Courthouse News does not cover family law matters, name changes, probate filings, most mortgage foreclosures, or collection actions. Girdner Decl., ¶ 12. Courthouse News also does not review or report on the tiny percentage of complaints that are statutorily confidential or accompanied by a motion to seal. *Id*.

B. Deterioration of Press Access to New Civil Complaints

In the age of paper records, state and federal courts around the country made new non-confidential civil complaints available to reporters shortly after they were received by the court, allowing reporters to see new complaints by the end of the day they were filed. *Id.*, ¶¶ 17, 20. This allowed the press to report on new civil actions while they were still newsworthy and likely to capture the public's attention. *Id*. Multnomah County Circuit Court ("Multnomah County") and the U.S. District Court for the District of Oregon were no exception.

When Courthouse News' Portland-based reporter began covering the Multnomah County in 2006, she – together with reporters from *The Oregonian*, *Willamette Week* and the *Portland Mercury* – was admitted into the work area of the clerk's office each weekday afternoon to review the day's newly filed civil complaints until the last complaint had been filed. Brown

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Decl., ¶ 4. She and the other reporters thus saw – and could report on – virtually all nonconfidential civil complaints on the day they were filed. *Id*., ¶ 5. The same was true in this Court. Girdner Decl., ¶ 45.

As state courts have made the transition to electronic records and, more recently, required e-filing, they have not always been mindful of how these changes impact the ability of the press to cover the courts. *Id*., ¶ 19. Some courts began pushing press access behind administrative tasks, such as scanning paper complaints or clerical processing of new e-filed complaints. *Id*. Most courts struggle to complete these clerical tasks for all of the day's complaints on the day the complaint is filed, which means that post-processing access policies nearly always prevent the press from learning about a substantial percentage of new civil actions until at least the day after filing, at which point the public has already moved on to the next day's news. *Id*.

When the Multnomah County implemented mandatory e-filing for civil cases in 2014, it stopped allowing reporters to see new complaints as they were received and instead began making them wait until after court staff had completed administrative processing. Brown Decl., ¶¶ 7-11. Whether Courthouse News' reporter reviews new complaints through public terminals at the courthouse or through Courthouse News' paid online subscription from the OJD, access is delayed until after court staff has completed processing. *Id*., ¶¶ 10-11; Girdner Decl., ¶ 24.

This post-processing access has resulted in pervasive delays. From January 1, 2019 through April 30, 2022, OJD's own data reflects that the Oregon circuit courts withheld ***39%*** of all new nonconfidential civil complaints for at least one day. Declaration of Jim Shimabukuro ("Shimabukuro Decl."), ¶12 & Exh. 1. Of those withheld, approximately ***14%*** were withheld for two days or longer. *Id*. These percentages translate into approximately 52,000 new complaints

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withheld for at least one day, and often longer. *Id*. While the statewide average over this forty-month period shows 39% of all nonconfidential civil complaints were delayed for at least one day, individual delays during that period were regularly worse, varying in degree from court-to-court, and from month-to-month, and week-to-week. *Id.,* at ¶¶ 12-14, Exhs. 2-15; Fetterly Declaration ¶¶ 28-31, Exhs. 26-33.

E-mail notices Oregon circuit courts send to e-filers upon receipt of a new e-filed document acknowledge that the delays are caused by processing. The notices state: "The filing below has been submitted to the clerk's office for review. ***Please allow 24-48 business hours for clerk office processing***." Girdner Decl., ¶ 63 & Exh. 18 (emph. added).

C. How Courts Have Preserved or Restored Timely Press Access

Unlike Oregon's circuit courts, the vast majority of federal district courts – including this Court – preserved timely access to new e-filed complaints by making them available to the press and public contemporaneously with their submission to the court. Most district courts "accept" complaints on receipt, automatically filtering out confidential filings based on filer designations in the e-filing interface and allowing anyone with a PACER account to view non-confidential complaints. Such systems are often called "auto-accept" systems. Girdner Decl., ¶ 34.

Many state courts – including in Hawaii, California, Washington, Nevada, Utah, Alabama, Georgia, New York, Connecticut, Vermont, and Arizona – have also preserved or restored timely access to new civil complaints. Girdner Decl., ¶¶ 32, 33, 37, 38, 41, 50, 51. Some use software developed in-house (*e.g.*, Hawaii, New York); others use software owned by one of numerous e-filing software vendors (*e.g.*, Granicus in Arizona; Journal Technologies in Los Angeles; OLIS in Alabama). *Id*., ¶¶ 33, 41, 51. Some push nonconfidential complaints

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automatically onto the public docket in an auto-accept system (*e.g.*, Utah, Hawaii, Connecticut, and Alabama). *Id.*, ¶ 41. Others make complaints available to credentialed users when the complaints are received by the court, prior to processing or "acceptance," in what is often called a "press review queue." All of them allow new, nonconfidential complaints to be read and reported on the day the complaint is submitted to the court, when the new action is still newsworthy and capable of commanding public attention. *Id.*, ¶ 25.

Prominent among vendor-provided e-filing software is Tyler Technologies' "File & Serve" system, used by Oregon's circuit courts, as well as courts in California, Utah, Nevada, Vermont, Georgia, and elsewhere. Courts using File & Serve have several options for making new e-filed civil complaints available:

Withhold for Processing. First is the default configuration, which withholds new e-filed civil complaints from the press and public until after court clerks manually process and "accept" them. Girdner Decl., ¶ 23, 24. Oregon's circuit courts use this configuration. *Id.*, ¶ 57.

Press Review Queue. As delays caused by the default configuration arose at different courts using File & Serve, Tyler developed a second configuration: a press review queue that allows credentialed users to view complaints as they are submitted to the court. *Id.*, ¶ 25. According to Tyler, the press review queue "allow[s] registered electronic filing users with a pre-designated press reviewer role to access court documents via a designated web page as soon as the documents are electronically filed." *Id.*, ¶ 29 & Exh. 4. Newly e-filed documents in the press review queue can be viewed even though they have not yet been processed and "accepted" by court staff. *Id.* As more courts chose to configure File & Serve with the press review queue, Tyler began marketing it as an optional feature. *Id.*, ¶ 25, 29 & Exh. 4. Although Tyler

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materials refer to the press review queue as "available for purchase," Tyler has implemented this functionality at courts for free. *Id*., ¶ 32 & Exh. 7. Courts in California (including Superior Courts in, Fresno, Kern, Monterey, Napa, Placer, Santa Cruz, Sonoma, and Stanislaus County) and Georgia (including in Cobb, DeKalb, Fulton, and Gwinnett County) use Tyler's press review queue to prove timely press access to new civil complaints.[1] As an alternative to having Tyler host the press review queue, Tyler will deliver the application programming interfaces ("APIs") for the press review queue tool to the court, at no cost, so that the court can provide the queue directly. Fetterly Decl., Exhs. 1 (99:6-12), 6 (RFAs 14-17), and 10.

Auto-Accept. The third File & Serve configuration is an auto-accept system, like that used by federal district courts. Girdner Decl.., ¶¶ 25, 34-41 & Exhs. 8-11. Nevada state courts transitioned to this auto-accept configuration of File & Serve after first offering a press review queue. *Id*., ¶ 37. Like new complaints e-filed with this Court, new e-filed complaints filed in the Nevada state courts are automatically "accepted" and made available to the public moments after they are filed. *See id*. Texas – another user of Tyler's File & Serve system – recently confirmed the availability of auto-accept functionality. Girdner Decl., ¶ 35 & Exh. 8.

Despite the availability of the press review queue and auto-accept configurations of File & Serve, Defendant uses the default configuration, resulting in pervasive delays in access to new e-filed civil complaints.

[1] Other courts using different e-filing systems provide their own versions of press review queues, including courts using homegrown software (New York) and courts using software provided by third party vendors, such as Granicus (Arizona) and Journal Technologies (L.A. and Riverside, California). Girdner Decl., ¶ 33.

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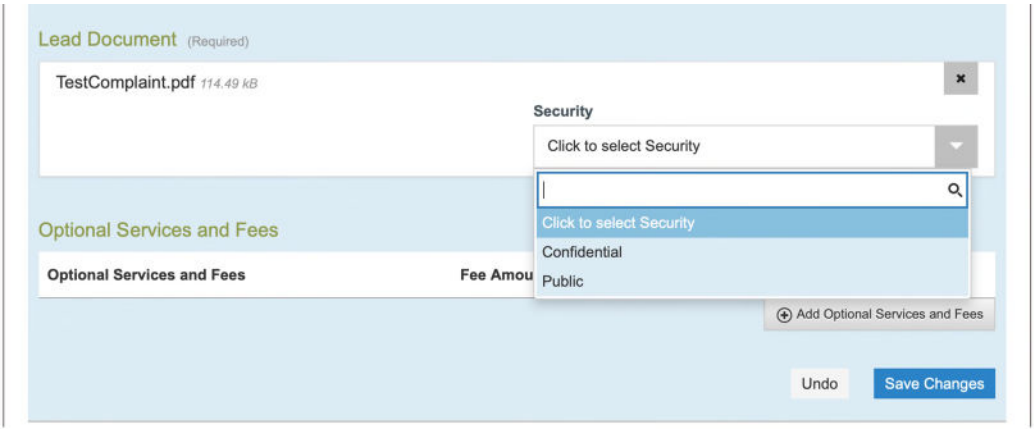
D. Mechanics of E-Filing in Oregon Circuit Courts and OJD's Rejection Standards

In most circumstances, e-filing is mandatory for litigants in civil cases in Oregon. UTCR 21.140(1).[2] E-filers must register for access to the e-filing system and must comply with the registration conditions when using the e-filing system. UTCR 21.030(2)(a)-(b). In particular, e-filers must agree that "[i]t is [their] responsibility to ensure compliance with all filing and service statutes, rules, and policies, including but not limited to the Uniform Trial Court Rules (UTCRs), particularly UTCR Chapter 21," and that "[they] are responsible for checking the Uniform Trial Court Rules for any updates." Fetterly Decl., ¶ 10, Exh. 11 at 12.

E-Filing Mechanics. To file, an e-filer logs on to the File & Serve system, selects the appropriate court, case category (*e.g.*, civil), and case type (*e.g.*, contract), and enters party names. *See* Fetterly Decl., ¶ 11, Exhs. 1 (29:24-32:2; 39:14-44:5), 12 at 2-7, and 13. For each document in the filing, the e-filer then selects a "Filing Code" (*i.e.*, document type). *Id.*, Exhs. 1 (36:19-24; 44:7-46:6; 48:12-18), 12 at 9-10, and 14. As the e-filer uploads the document, he or she is prompted to select a security level (either "Confidential" or "Public") for the document:



[2] Paper (or "conventional") filing is permitted for pro se litigants and required for certain civil filings. UTCR 21.010(1), 21.070(3), 21.140(1).

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Id., Exh. 12 at 12. The OJD, however, does not currently require e-filers to select a security level. *Id*., Exh. 5 (RFAs 7 & 8).

After the filer enters payment information and hits the "submit" button, the filing is electronically delivered to the clerk's inbox, or queue. *Id*., Exhs. 12 at 13-15 & 15 at 14.

Clerk Processing. Once submitted to the court, a new e-filed complaint sits in the clerk's inbox, or queue, until a clerk logs into the File and Serve system, accesses the courts' clerk review queue, selects one of the many complaints siting in the queue awaiting processing, opens it, reviews it, and either "accepts" or "rejects" it. A "rejected" filing is "returned by electronic notice to the e-filer to cure the problem(s) and resubmit to the court." Fetterly Decl., Exh. 16 at 3; *see also id*., Exhs. 17 & 18. Once the clerk "accepts" a complaint, a case number is assigned, the case appears on the public docket, and the public may view the complaint through a public access terminal at the courthouse or online through a paid subscription provided by OJD. *Id*., Exh. 15 at 14; Brown Decl., ¶¶ 10-11; Girdner Decl., ¶ 57.

Oregon clerks' ability to reject filings is tightly constrained. "The Oregon Circuit Courts ***shall accept*** filings electronically submitted through the OJD eFiling system (File and Serve) unless such filing fails to comply with" the OJD Policy and Standards for Acceptance of Electronic Filings in the Oregon Circuit Courts ("eFiling Standards"). Fetterly Decl., Exh. 16 at 3 (emph. added); *see also* CJO No. 15-026 (same). The eFiling Standards provide that:

> eFilings shall only be returned (rejected) to a filer for failure to comply with any one of three broad categories:
>
> 1) The filing fails to comply with an OJD eFiling process requirement;
>
> 2) The filing fails to comply with a UTCR requirement or ORCP 9E; or
>
> 3) The filing includes or has encountered a technical error.

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Fetterly Decl., Exh. 16 at 5.

The eFiling Standards identify twenty-seven "detailed reasons the circuit courts will reject a filing in each of the three broad categories." *Id*. These reasons include formatting and other technical errors, such as "wrong case type selected," "parties entered incorrect," a .pdf document "is not text searchable," and "document submitted with one or more upside-down or sideways pages." *Id*. at 5-9. The most common reason civil complaints are rejected is that party names are entered incorrectly, often because they are entered in all capital letters. Declaration of Katherine Keating ("Keating Decl."), ¶ 13 & Exh. 2. The next most common reason for rejection is failure to pay the correct filing fee. *Id*., ¶ 14 & Exh. 2. Virtually all rejections are based on deficiencies of an equally technical nature. *See id*., Exh. 2; Declaration of Eric Lansverk ("Lanksverk Decl."), Exh. 1 (complaint data spreadsheet produced by Defendant); Fetterly Decl., ¶ 26.

E. Courthouse News Requests a Press Review Queue, and OJD Confirms Its Availability

With Tyler's press review queue implemented successfully in an ever-increasing number of courts, it was an obvious choice to solve the pervasive delays in Oregon's circuit courts. Accordingly, in November 2019, CNS's reporter, Karina Brown, met with Oregon Deputy State Court Administrator Phillip Lemman and asked that the OJD make a press review queue available. Brown Decl., ¶ 18. Brown informed Lemman that Oregon's circuit courts were making only about 50%-60% of new civil complaints available on the day of filing. *Id*., ¶ 19 & Exh, 11. She explained that courts using Tyler's File & Serve press review queue made virtually 100% of nonconfidential civil complaints available the day of filing. She also provided

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information about other courts that provide access on receipt, including Tyler courts in California, Nevada, and Georgia, and relayed contact information for officials at two California courts using Tyler press review queues. *Id.*, ¶ 20.

Within several days, the OJD had confirmed the availability of the press review queue. Fetterly Decl., Exh. 20 at 2, 4. As a Tyler representative explained to the OJD's chief information officer:

> Yes California, Georgia, Nevada have this. Basically it gives press access to eFile to be able to see the Filings before accepted.
>
> Example:
> https://georgia.tylerhost.net/secure/PressReview.aspx
>
> We create the site but then the courts can give the username and password to whom they feel should have access.
>
> I am gathering details on what you need to do in order to get the site created.

Id., Exh. 20 at 4. The representative also informed the OJD that "there is no fee for our eSolutions Team to setup the site. You would just need to reach out to [Tyler representative Jackie Groves] if you are interested in pursuing this and she can have it set up." *Id.*, Exh. 20 at 5; *see also id.*, Exh. 20 at 7.

In August 2020, the Chief Justice of the Oregon Supreme Court "approved moving forward [with] examining [the] functionality" of the "press review queue," and Lemman instructed OJD's chief information officer to "notify Tyler that we would like to put into a test environment and learn more about it." *Id.*, Exh. 20 at 24-25. The following month, Lemman informed Brown that "[w]e are requesting Tyler to give us the press queue product in a test environment, so we can work w[ith] it and see what questions or issues come up." *Id.*, Exh. 20 at 28. Tyler provided the OJD a timeframe of "3-5 business days" for setting up the press review

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queue "once [they] get everything back" that they need from the OJD. *Id*., Exh. 20 at 29. The OJD, however, "never actually tested" the queue. *Id*., Exh. 1 (78:13-25; 79:12-14).

F. The OJD Explores But Cannot Substantiate Concerns Raised by Trial Court Administrators

Instead, the OJD solicited comments from two Oregon Trial Court Administrators ("TCAs"). One, from Clackamas County, responded: "This idea initially makes me uncomfortable and I am opposed to it." Fetterly Decl., Exh. 20 at 8. She noted that "[i]t sounds like it is working in other jurisdictions, but I'm curious how they handle confidential filings, and the issue of filings that are rejected." *Id*. Her primary concern seemed to be that the press might report on confidential information that had been inadvertently made available in the press review queue. *Id*. The other TCA, from Lane County, responded that she was "absolutely opposed" because "[a] document submitted in eFile is not filed or accepted into the court record." *Id.* at 14. "[A] document isn't a record of the court (for release to anyone including the media) until it is accepted by the court." *Id*. at 13. Both TCAs professed a belief that Oregon circuit courts already make civil complaints available quickly enough. *Id*. at 8, 13.

OJD staff then turned to courts that provide pre-processing access to new civil complaints to assess the validity of the TCA's concerns. *See, e.g.,* Fetterly Decl., Exh. 21 (notes from internal meeting: "Tyler/Courthouse News Press Queue pros and cons? … I will contact other states (confidential, rejected, regrets, advice)."). OJD Public Information Officer Todd Sprague wrote to a contact in the Nevada state court system, telling him that Courthouse News had been "pestering" the OJD with requests for access to civil complaints "before they have even been officially processed into our system." *Id*., Exh. 20 at 22. Sprague asked if it was true that Nevada's Eighth Judicial District Court provided pre-processing access and:

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> If so, has it caused any grief? Our courts are a little hesitant to give reporters access to cases that haven't been seen/processed by court staff (e.g., they might contain private or other sensitive information).

Id. A Nevada court representative explained that the Eighth Judicial District Court had moved to an auto-accept system and that "[t]he media and everyone else has access through Portal." *Id*. at 20. Sprague pressed further: "And your clerks and filing folks didn't have any heartburn about sharing the auto-accepted filings (e.g., they were ok with whatever automated filters were able to use to secure confidential case info, etc.)?" *Id*. The Nevada representative explained that "[i]f a document needs to be sealed it has a different filing protocol." *Id*.[3]

Months later, Sprague contacted an official from Arizona's state courts, which were working with their e-filing vendor to provide a statewide press review queue. *Id*. at 66-67. Sprague explained that the OJD was "high-centered on the notion that some filings may need (and receive) review/redaction before being officially accepted and posted into our system," and that even though Nevada court officials had confirmed "no problems" with their auto-accept system and Courthouse News had provided materials "that address that topic," confidentiality issues were "still a point of discussion here." *Id*. at 67.

The Arizona official explained that "requests to initiate a civil case under seal have to be filed on paper using procedures in AZ's court rules, ***so there is low risk of anything confidential or sealed being in the queue***." *Id*. at 66 (emph. added).[4] Arizona's press review queue went live in September 2021. Girdner Decl., ¶ 50.

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[3] This is also true in Oregon. UTCR 21.070(3)(g) (documents filed under seal or subject to in camera inspection "must be filed conventionally").

[4] Again, Oregon circuit courts also require paper filing for such documents. UTCR 21.070(3)(g).

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OJD's due diligence efforts – including communications with California courts that had implemented Tyler press review courts, Fetterly Decl., Exh. 20 at 68-80 – failed to turn up ***any*** information substantiating the Oregon TCA's intuitive reaction that pre-processing access would be problematic. No personnel from other courts – or, for that matter, anyone else – relayed to OJD ***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).

Moreover, OJD confirmed that it could designate the types of cases and documents added to or excluded from the press review queue, including filtering out documents according to case type, document type (aka "filing code"), and the filer's selection of "confidential" rather than "public" in the security drop-down menu that appears when an e-filer uploads a document for filing. *See* Fetterly Decl., Exh. 1 (37:1-38:12), Exh. 12 at 12, Exh. 20 at 38 ("[W]e have a lot of materials that answer the questions folks will raise about confidential cases, information, etc. Courthouse [N]ews (and their successful lawsuits) argue that the 'acceptance' process does not actually review the filings for confidential information to a great degree (if any).").

G. Defendant's Refusal

Despite the internal approval to set up and test the press review queue and evidence that it was working well in other courts, its implementation in Oregon was derailed. Conversation within the OJD surrounding the press queue shifted away from testing a pre-acceptance press review queue that would eliminate delays to searching for a legal justification for continuing Defendant's policy of withholding new civil complaints for processing. *See, e.g.*, Fetterly Decl., Exh. 20 at 53.

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The position expressed by the TCAs early in OJD's investigation that "a document isn't a record of the court (for release to anyone including the media) until it is accepted by the court," *id*. at 13, apparently ran deep within the ranks of the OJD. One attorney erroneously compared pre-acceptance access to "someone waiting in line for the counter and providing the press with the opportunity to review those documents before the person makes it to the front counter." *Id*. at 44.[5] Another wrote, "I would be shocked if … we were legally complied [sic] to provide [access], when we are not yet the custodian (that's how I'd frame it anyway). They are not our records until they are accepted/filed." *Id*. at 59. She also said, "I wouldn't even take this to the courts, I'd stop it before it gets there." *Id*. at 41.

The entrenched view within the OJD that e-filed complaints should not be made available to the press until after they are "accepted" led OJD staff to consider a ***post***-acceptance press review queue, *id*. at 44-45, 48, something OJD staff knew would not improve delays or otherwise materially change the status quo. *Id*. at 71.[6] Lemman reminded his colleagues that "[t]he request here was specifically for pre-acceptance access." *Id*. at 53. He continued:

> That being said, I think the next step should be a legal review to determine whether we are legally compelled (or advised) to provide pre-acceptance access. If we are, then we will need to figure out how to make this work. If we are not, then it's a different discussion.

Id.

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[5] Courthouse News explained the fallacy of this metaphor in its opposition to Defendant's unsuccessful motion for summary judgment. CNS Opp. to Def. MSJ at 11 (ECF 16). A person standing in line at the filing counter has not yet submitted the complaint to the court.

[6] Post-acceptance (delayed) access is already available through OJD's paid online access system, known as OECI or OJCIN, to which Courthouse News and 26 other media entities – including the Associated Press, CBS News, NBC Universal, Oregon Public Broadcasting, *Salem Reporter*, and *The Portland Business Journal* – already subscribe. Fetterly Decl., Exh. 20 at 34, 37; *see* Oregon Judicial Department: OJCIN OnLine, https://www.courts.oregon.gov/services/online/pages/ojcin.aspx.

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Of course, little was needed "to figure out how to make this work" because Tyler had already explained what was required to set up the press queue, and that it could be done in 3-5 business days without any additional cost. *Id*. at 6, 29. In reality, the OJD had decided against any solution that involved pre-acceptance access. Fetterly Decl., Exh. 1 (80:25-81:18) ("[A]t the point we recognized that the only configuration Courthouse News was interested in was a pre-acceptance configuration, we realized we were at an impasse … [b]ecause we have in Oregon a URCR, Oregon law, that indicates that … documents submitted are not court records … until they have been reviewed and accepted."); (99:2-12) ("[E]ven if we were to develop [a press review queue] ourselves, if Courthouse News was only interested in a pre-review or pre-acceptance model, it wasn't really worth exploring.").

H. Courthouse News Is Forced to Bring This Action

For nearly a year and a half, Courthouse News waited for Oregon to make a decision. Throughout that period, Brown regularly checked in with Lemman. Brown Decl., ¶¶ 19-35, Exhs. 9-22. After several inquiries, Lemman told her in August 2020 that he would ask Tyler to turn on a press review queue internally so that OJD officials could test it to ensure confidential case types were excluded. *Id*., ¶ 23. Two months later, he told her that "Tyler has provided the queue, and staff is looking at it." *Id*., ¶ 26 & Exh. 12. However, by this time the OJD had already begun steering the project away from a pre-acceptance review queue that would eliminate delays towards a post-acceptance review queue that would maintain the status quo. *See, e.g.,* Fetterly Decl., Exh. 20 at 33.[7]

[7] The OJD opted to maintain the status quo despite Brown informing Lemman of five-day delays in Multnomah County in October of 2020. *See* Brown Decl., ¶¶ 24-26, & Exh. 12; *accord*

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With no meaningful development since the initial request more than a year earlier, Courthouse News' publisher and editor William Girdner wrote to Lemman on March 9, 2021, noting that "[l]ast October, the Court, with your help, seemed well on its way to giving the press on-receipt access through a press review queue" and that "[i]n our experience … the queue can be tested in a matter of a couple days." Brown Decl., ¶ 31 & Exh. 18. "So after four months between when we understood the press queue was in place and now, we are trying to figure out if there is a hang up and what it is – and see what we can do to break the logjam." *Id*. Lemman responded in an e-mail raising "the possibility of documents that are intended to be filed confidentially inadvertently be[ing] made available to the public" and noting that Oregon "rejects between 5-10% of filings." *Id*., ¶ 33 & Exh. 20. In response, Girdner explained that Tyler's press review queue automatically sorts out confidential cases based on case designation (something Lemman already knew from OJD's own investigation) and referred to the many courts in which Tyler currently provides on-receipt access to new e-filed complaints through a press review queue. Girdner concluded:

> Because we have waited about 16 months since our first request for a press queue was made, I would kindly ask that you give me or Karina a yea or nay within two weeks. We have waited well over a year patiently, and I think it is fair to now expect an answer to our request.

Id., ¶ 34 & Exh. 21.

Lemman's brief response on March 29, 2021 was not encouraging: "I can't promise you a final response in two weeks, but would be glad to give you or Karina a status report and will

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Fetterly Decl., ¶¶ 29, 31 & Exhs. 26, 30 (***78%*** of new civil complaints were delayed for at least one day in October 2020, with ***58%*** of them delayed 2 days or longer, and ***22%*** of them delayed 5 days or longer).

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keep this on the front burner." *Id*., ¶ 35 & Exh. 22. Five weeks passed without further response or update from Lemman. *Id*., ¶ 35. Courthouse News commenced this action on May 4, 2021.

I. Defendant's Unsuccessful Motion for Summary Judgment

Early in this lawsuit, Defendant tested its legal theory that there is no First Amendment right to access a filing that court staff have not yet reviewed and "accepted." Defendant's Motion for Summary Judgment (ECF 13) at 2-3. This Court rejected that theory. *Courthouse News Serv. v. Cozine*, 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022) ("[A]s *Planet* makes clear, the right of access to civil complaints attaches when they are submitted to the court."). Despite the Court's repudiation of Defendant's position, Defendant's belief that the public has no right to see a court filing until it has been reviewed continues to loom large over this case. *See, e.g.*, Fetterly Decl., Exh. 1 (80:25-81:18).

J. The OJD's Eleventh-Hour Issuance of "Time-to-Review" Standards

On July 13, 2022, the evening before Defendant's 30(b)(6) deposition and just two days before the close of discovery, Defendant informed Courthouse News of "Electronic Filing Time-to-Review Standards for Civil Case Initiating Documents" ("Time-to-Review Standards") that had become effective that day. Fetterly Decl., Exhs. 1 (134:10-24) & 22. Under the Time-to-Review Standards, "[a]bsent exceptional circumstances," e-filed complaints and petitions in a discrete set of non-confidential civil case types: "must be reviewed and either accepted or rejected within the [following] timeframes": "90% within four business hours" and "100% within one business day" (*i.e.*, within "nine business hours"). *Id*. As discussed below, the Time-to-Review Standards will not solve access delays at Oregon's circuit courts. They simply put new wrapping paper around the status quo.

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III. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *Walsh v. Enge*, 154 F. Supp. 3d 1113, 1119-20 (D. Or. 2015) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). Thereafter, the non-moving party bears the burden of designating "specific facts demonstrating the existence of genuine issues for trial." *Id*. "This burden is not a light one." *Id.* The Supreme Court has directed that in such a situation, the non-moving party must do more than raise a "metaphysical doubt" as to the material facts at issue. *Id*. (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)).

IV. ARGUMENT

Based on the leading Supreme Court authority on court record access, *Press-Enterprise II,* the Ninth Circuit has established a two-step framework for evaluating claims based on delayed access to civil complaints. *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (*"Press-Enterprise II").* The first question is whether there is a First Amendment right to the documents at issue "and, relatedly, at what point in time that right attaches." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) ("*Planet III*"). Once a First Amendment right of access is established, the second step entails an examination of the delays and the interests offered to justify them. *Id.* at 594-95.

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The first step of the *Press-Enterprise II* test is not at issue. As this Court concluded in denying Defendant's motion for summary judgment, Ninth Circuit authority "makes clear" that "the right of access to civil complaints attaches when they are submitted to the court." *Cozine*, 2022 WL 1000775, at *2. The question before the Court is whether Defendant has met her burden to justify the no-access-before-acceptance policy under the second step of the *Press-Enterprise II* test. As shown below, she has not.

A. Defendant Cannot Carry Her Burden to Show a Substantial Probability that Compelling Interests Would Be Impaired Without Her Delay-Causing Policy

To survive the second step of *Press-Enterprise II*, Defendant "must demonstrate first that there is a 'substantial probability' that [her asserted] interest … 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). Defendant bears the burden of satisfying this "fact-intensive" test, *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012), which requires more than generalized assertions or speculation. *New York C.L. Union v. New York City Transit Auth.*, 684 F.3d 286, 303 (2d Cir. 2012) ("[W]e do not believe speculation should form the basis for ... a ... restriction of the public's First Amendment rights.") (citation omitted); *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*") ("The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.")

The undisputed evidence shows that Defendant's policy of restricting access to new e-filed civil complaints until after they are processed and "accepted" by court staff results in ongoing and persistent delays. From January 1, 2019 to April 30, 2022, access to approximately 39% was delayed by one day or longer, with approximately 14% delayed by two days or longer.

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Shimabukuro Decl., ¶ 12 & Exh. 1. Delayed cases totaled more than 52,000 in number and included many that were especially newsworthy. *Id*.; *see also* Brown Decl., ¶¶ 12-13, 24, Exhs. 3-8.

Contrary to Defendant's assertions, Fetterly Decl., Exh. 1 (81:20-25), Courthouse News does not insist on immediate access. But access contemporaneous with the court's receipt of a complaint is the natural result of an e-filing system that does not withhold access for processing. As in a recent case addressing ***the same review policy*** at issue here in a court using ***the same Tyler e-filing system*** used in Oregon, "the delay is in the review process."

> [T]here would be no delay in an e-filing system. There could be 1,000 complaints; there could be 100,000 complaints. There's no delay. The only delay that's going to show up in e-filing is when you insert a staff member into it to do something else. … Because [efilers are filing] with all of the document information that they need, and it's hitting the docket, and there isn't any step in between there by staff.... So that, by definition, means that the delay is in this review process.

Courthouse News Serv. v. Gabel, 2021 WL 5416650, at *7, 14-15, 18 (D. Vt. Nov. 19, 2021) (permanently enjoining administrator "from delaying public access to electronically filed civil complaints until the Vermont Superior Courts' pre-access review process is complete," where the review policy resulted in about 45% of new civil complaints being withheld and delayed for at least one day).

In other words, while the qualified right of access to nonconfidential civil complaints does not "demand[]" immediate, pre-processing access to newly filed complaints, *Planet III*, 947 F.3d at 594, it may be restricted only if "'closure is essential to preserve higher values and is narrowly tailored to serve those interests.'" *Id.* at 595. As Judge Nye of the District of Idaho recently put it: "*Planet III* does not mandate CNS get 'immediate' access to court filings. [But] CNS is not

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actually asking for immediate access; it is asking for un-delayed access. Thus, the relevant question is whether any delay is occurring … and, if so, whether that delay is justifiable." *Courthouse News Serv. v. Omundson*, 2022 WL 1125357, at *6 (D. Idaho Apr. 14, 2022).

B. The Interests Defendant Cites as Justifying Her Delay-Causing Policy

Here, Defendant claims that three interests justify the delays caused by her no-access-before-acceptance policy: (1) confidentiality; (2) "courthouse security;" and (3) administrative efficiency interests, including "potential accounting protocol issues" and ensuring "filings meet basic filing requirements." Fetterly Decl., Exhs. 2 (Interrogatory 3) & 3 (Interrogatories 11-15).[8] As in *Gabel*, Defendant's "proof in support of these stated interests is scant," to say the least. 2021 WL 5416650, at *14.

Defendant cannot demonstrate a "substantial probability" that any of these asserted governmental interests would be impaired if new e-filed civil complaints were made available to the press and public prior to "acceptance," or that no less restrictive alternatives are available to "adequately protect" them. *Planet III*, 947 F.3d at 595. Though Defendant "strongly denounce[s] a public review queue," the fact-intensive scrutiny required under *Press-Enterprise II* reveals that her "concerns … are not grounded in protecting court operations, and instead resemble general anxiety about changing the status quo." *Courthouse News Serv. v. Forman*, 2022 WL 2105910, at *14, 16 (N.D. Fla. June 10, 2022) (granting preliminary injunction where "credible evidence … show[ed] that providing access to complaints before process through a public review queue is a workable alternative that would expedite access, protect the integrity of

[8] Defendant uses the phrase "fair and orderly administration of justice" as an umbrella term encompassing confidentiality, courthouse security, and administrative concerns. Fetterly Decl., Exh. 3 (Interrogatory No. 11).

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Defendants' court operations, and likely improve the efficiency of such operations").

1. Confidential Filings

Defendant contends that its no-access-before-acceptance policy is necessary to protect "the privacy interests of litigants and third parties in civil litigation." Fetterly Decl., Exhs. 2 (Interrogatory 3) & 3 (Interrogatories 11 and 14). In reality, the exceedingly small number of confidential e-filed case-initiating documents can be automatically filtered out and segregated from the public record. The record does not support Defendant's speculation that clerk review protects against the release of confidential civil complaints in any meaningful way.

Oregon's Rules and Procedures on Confidential Records and Information. In Oregon, as elsewhere, there is a strong presumption that court records are open and public. *See, e.g., Center for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016); *Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990). A few narrow exceptions exist. Within the general categories of cases (civil, criminal, family, juvenile, etc.), *see* Fetterly Decl., Exh. 13, certain case types are confidential by rule or statute (*e.g.*, juvenile dependency).[9] Certain document types are also confidential by rule or statute (*e.g.*, motions for involuntary medication in criminal cases). *See id.*, Exh. 23. In Oregon civil cases, documents may also be sealed, but only by order of the court upon a motion pursuant to UTCR 5.160. Such motions, and the documents to be filed under seal, must be filed conventionally (*i.e.*, in paper). They may not be e-filed. UTCR 21.070(3)(g).

In addition, Oregon's trial court rules allow filers to request that "protected personal

[9] Courthouse News is not aware of any confidential case types within the civil case category in Oregon.

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information" contained in a court filing be "kept from inspection by the general public." UTCR 2.100(1)(a). Unless the information is shielded by "existing court orders" or other "specific law," it qualifies as "protected personal information" only if it is "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." UTCR 2.100(b)(i)-(iv); ORS 192.355(2)(a). "Protected personal information" does ***not*** include names, telephone numbers, e-mail addresses, personal addresses, "or similar facts that make it possible for another to contact a person who is named in a document." UTCR 2.100(2)(d). The court has ***no obligation*** to look for or segregate protected personal information absent a specific request made under UTCR 2.100, even if a request was made and granted for the same information earlier in the case. UTCR 2.100(5)(a).

Automatic Filtering by Case Type, Document Type, and Filer Designation. Oregon's e-filing system automatically filters and protects e-filed documents by case type, document type, or the filer's own designation as confidential. Fetterly Decl., Exh. 1 (29:10-34:8; 36:19-39:5; 48:6-49:4). In other words, an e-filed document will be automatically secured from public view – without any action by filer or clerk – if (1) the document is confidential by rule or statute; (2) the document is filed in a case that is confidential by rule or statute; or (3) the filer designates the document as confidential. *Id*. The filer designates a document as confidential by choosing "confidential" rather than "public" in the drop-down menu that appears when he or she uploads a document for filing. *See supra* at 9; Fetterly Decl., Exh. 12 at 12.

Defendant does not dispute that Oregon's e-filing system automatically filters out

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confidential documents. She insists, however, that withholding all civil complaints until after clerks have reviewed them is necessary because filers might select the wrong case or document type or might intentionally include confidential information for nefarious purposes. Fetterly Decl., Exh. 1 (84:8-85:9; 85:14-86:1). Both the record in this case and the experience of the many state and federal courts that do not withhold access for processing preclude Defendant from carrying her burden to demonstrate a substantial probability that pre-processing access would impair any confidentiality interest.

a. Defendant's Records Contradict Her Assertion that Filer Error Would Cause Disclosure of Confidential Filings

As to filer error, Defendant's view is based on "anecdotal information about the frequency of documents being misfiled." *Id*. (109:3-111:19). Defendant's own records, however, demonstrate that instances in which confidential filings were kept confidential only because of clerk review are exceedingly rare. Defendant produced "acceptance" and "rejection" data for non-confidential civil complaints submitted to the Oregon Circuit Courts over a span of more than three years, from January 1, 2019 through April 30, 2022. Lansverk Decl., Exh. 1; Fetterly Decl., ¶ 26. Of a total of 144,244 filings reflected in this data, only a tiny handful even potentially implicate confidentiality issues.

Only one of the 27 available reasons for rejections is related to confidentiality, allowing for rejection if a confidential and nonconfidential document have been combined into a single .pdf file. Keating Decl., ¶ 17. Only ***nine*** out of 144,244 filings was rejected on this basis, representing ***0.006%*** (less than one hundredth of one percent) of the universe of filings. *Id*., ¶ 17 & Exh. 4. As for Defendant's assertion that confidential filings would be disclosed without clerk review because filers often mistakenly file confidential documents under a non-confidential case

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or document type, the data reflects otherwise. The overwhelming majority of mistakes in selecting a case or document type represent instances of selecting one nonconfidential case type instead of a different nonconfidential case type. *Id*., ¶¶ 21-23, 24-26, 33 & Exhs. 5 and 7. Of the fewer than 200 filings rejected for incorrect case or document type, it is not clear that ***any*** should have been filed with a confidential case or document type. *Id*., ¶¶ 23, 26. While Defendant testified that rejection data shows "that it's not uncommon for domestic relations filings to be submitted as civil filings," Fetterly Decl., Exh. 1 (86:2-11), she is mistaken. Only ***eight*** out of 144,244 filings (***0.005%***, ***less than one hundredth of one percent***) appear to have been rejected because the reviewing clerk thought they should be filed as a family or domestic relations case. Keating Decl., ¶¶ 23(a), (c), (e), 27, 34-35 & Exhs. 5-7, 10-11. Finally, only ***nine*** out of 144,244 filings (***0.006%***) were rejected for containing protected personal information. *Id*., ¶¶ 31-32 & Exh. 9. Accordingly, Defendant's records show that ***at most***, clerk review resulted in confidential handling for 26 filings (***0.018%***, ***less than two hundredths of one percent***) over the course of more than three years

According to Defendant, clerks will sometimes change an incorrect case or document type instead of rejecting the filing, without creating a record of such a change. Fetterly Decl., Exh. 1 (52:19-54:22). Such authority is not reflected in any policies, manuals, or other documents produced in this case, but even if true, it does not change the analysis. Given how incredibly rare it is for clerks to identify and reject filings mistakenly filed with a non-confidential instead of confidential case or document type, it is unreasonable to suppose that clerks change filers' case and document type instead of rejecting so much more frequently than rejecting outright as to amount to more than a "minute fraction" of complaints. *Gabel*, 2021 WL

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5416650, at *15.

Oregon's rules put the responsibility on the ***filer*** to request confidential handling of qualifying "protected personal information" and confidential documents. UTCR 2.100(1)(a), 21.070(6)(c). If Oregon clerks "do[] more review than necessary under" the rules, that "does not insulate [Defendant's policy] from constitutional scrutiny. Rather, this superfluous review further animates how unnecessary the … delays are." *Forman*, 2022 WL 2105910, at *13.[10]

Thus, as in Vermont, Oregon's approach of "placing the onus on filers" to protect confidential filings and protected personal information "has been overwhelmingly effective." *Gabel*, 2021 WL 5416650, at *15-16 (three out of 4,156 documents "rejected during the pre-access review process because they contained confidential information" was a "minute fraction of the total complaints filed and demonstrates that the pre-access review process is not 'essential to preserve higher values[.]'") (citation omitted).[11]

b. Defendant Cannot Substantiate the Notion that Filers Are Likely to Use Civil Court Filings to Intentionally Disclose Third-Party Information

Defendant also claims that clerk review is necessary so that clerks can determine whether the filer has intentionally disclosed someone else's confidential information. Fetterly Decl., Exh. 1 (85:14-86:1). This concern appears to be based on a series of documents submitted to

[10] Moreover, the possibility of public access to inadvertently released confidential information already exists in Oregon's current ***post***-acceptance, paid online access system (OJCIN). The OJD acknowledges this in the OJCIN Terms of Use, which expressly contemplate the possibility of "improper access to or disclosure of confidential information, including mistaken access and inadvertent disclosure." Girdner Decl., ¶ 57 & Exh. 16 at 3.

[11] In the unlikely event a Courthouse News reporter were to encounter an inadvertently disclosed confidential complaint, he or she would be prohibited by Courthouse News' policy from reporting on it. Girdner Decl., ¶ 12 & Exh. 1.

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Washington County Circuit Court in 2022 by an individual calling himself "Gunholster." Fetterly Decl., Exhs. 1 (88:1-17) & 24. Defendant characterized the filings as an "attempt[] to misuse the system" but could not identify any harm that would result from the press or public learning about such attempts. *Id*., Exh. 1 (88:1-17). Indeed, there would seem to be a strong public interest in letting the public know about misuse of the judicial system.

Instead, Defendant explained that the harm prevented by keeping the "Gunholster" filings from the public is preventing the disclosure of another person's confidential information. *Id*. (89:1-11). However, while the content of the "Gunholster" filings might be unpleasant, the documents do not identify any third person or otherwise contain any "protected personal information," under UTCR 2.100.[12] While it might have been entirely appropriate for the court to reject these filings for non-compliance with basic procedural rules, it is not at all clear that it could have done so based on any confidentiality concerns. In other words, the "Gunholster" filings represent filings that might have been properly rejected. But they do not represent filings that should have been kept from public view.

Furthermore, even if there were a public interest in keeping the "Gunholster" filings secret, Defendant cannot justify her policy of withholding access to all civil complaints so that clerks might find one such filing out of 144,244. Defendant's records of more than three years of civil case-initiating filings do not reflect any other examples of rejection on the ground of "inappropriate filing," Keating Decl., ¶ 38-39, Exh. 13, and Defendant has pointed to no others.

[12] Defendant properly produced these documents in discovery without any kind of confidential designation. *See* Fetterly Decl., Exh. 24.

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2. Defendant's Far-Fetched "Courthouse Security" Theory Cannot Justify Delays

Defendant also contends that making a new e-filed civil complaint available before "acceptance" could impair "courthouse security." Fetterly Decl., Exhs. 2 (Interrogatory 3), 3 (Interrogatory 13). This concern refers to a hypothetical scenario in which a non-confidential civil complaint is so "sensational or controversial" that court staff must prepare themselves to address the "public disturbances" that result once the public learns about the complaint. *Id*., Exhs. 1 (122:9-123:7-124:18), 3 (Interrogatory 13). Defendant theorizes that if the courts are not permitted to withhold new civil complaints until after a clerk has reviewed and "accepted" the hypothetical sensational complaint, the press and public might learn about it before court staff does, and "the court … could be at risk of public disturbances that the courthouse is unprepared to address." *Id*., Exh. 3 (Interrogatory 13). Defendant has no record of instances where the filing of a civil complaint raised security issues and was unable to provide any examples. *Id*., Exhs. 1 (125:9-18). Speculation as to this improbable scenario cannot satisfy Defendant's burden to justify delays. *See, e.g.*, *New York C.L. Union* , 684 F.3d at 303; *Press-Enterprise I.*, 464 U.S. at 510.

3. Defendant Cannot Articulate a Plausible Scenario in Which Pre-Processing Access Would Impact the Operations of Oregon Courts, Let Alone a Substantial Probability That It Would Impair Them

Defendant's third justification for her no-access-before-acceptance policy is rooted in administrative concerns. Defendant cites an "[a]dministrative efficiency interest … in being able to process a newly submitted civil complaint to determine whether that complaint will, or will

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not, satisfy the basic requirements of submission, including payment of filing fees and legibility, to become a court record." Fetterly Decl., Exhs. 1 (116:4-121:7) & 3 (Interrogatory 11).[13]

Defendant has failed to identify any way in which pre-processing access would impair the ability of Oregon circuit courts to determine whether complaints satisfy basic submission requirements. With respect to filing fees, Defendant points out that Oregon law requires filing fees for new complaints, and Oregon circuit courts will not "accept" a new complaint until the correct fee has been paid. *Id*., Exh. 1 (116:4-25). And she observes that if a complaint is not withheld until a clerk "accepts" it, it could "go out into the public sphere" whether a filing fee has been paid or not. *Id*. But she has not shown why this would matter. *See Gabel*, 2021 WL 5416650, at *15 ("Defendants offer no evidence that staff review of signatures, filing fees, and filing codes is necessary to protect the orderly administration of justice."); *Forman*, 2022 WL 2105910, at *14 ("Defendants have presented no evidence that denying access before clerical processing somehow protects or furthers quality control and efficient court administration.").

Defendant also contends that "if the Oregon courts prioritized non-time sensitive civil cases …, it would take resources away from processing more time critical cases involving the public health and safety, such as protective and criminal proceedings." Fetterly Decl., Exh. 3 (Interrogatory 11). This is a curious assertion given that with a press review queue or auto-accept system, there would be no need to "prioritize" the processing of civil complaints. Clerks

[13] While Courthouse News disagrees that a rule providing that an accepted document "constitutes ***the*** court's record of the document," UTCR 21.060(1)(b) (emph. added), means that a document waiting for acceptance is not ***a*** court record, no quibbling on this point is necessary. The Court has already ruled that the First Amendment access right attaches to complaints "when they are submitted to the court." *Cozine*, 2022 WL 1000775, at *2.

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would be free to focus on whatever filings they consider "time critical." Her theory is that if Oregon circuit courts were to implement a press review queue, there would be "instantaneous significant interest from a broader public in having access to" a new civil complaint that has "still not been reviewed and accepted by the court." *Id*., Exh. 1 (127:21-130:7). According to Defendant, this would cause "incredible pressure to review and accept that document." *Id*. The assertion that public interest based on reports of new civil complaints is likely to disrupt court operations is based entirely on speculation. *Id*. (131:8-132:14).

Significantly, despite Defendant's hypothesizing that press reporting on a new civil complaint would generate "a wave of interest" such that the court might experience disruptive "foot traffic, maybe phone calls," she insists that the complaint would not be "newsworthy … because it wouldn't have been reviewed or accepted yet." *Id*. (130:10-131:7). This myopic view cannot be reconciled with the principle that "[t]he First Amendment right of access exists … to enable free and informed discussion about important issues of the day and governmental affairs." *Planet III*, 947 F.3d at 589. The possibility that news of a civil complaint could generate Defendant's hypothetical swell of public interest underscores the importance of ***not*** withholding it while court staff check on whether the filing fee was properly calculated or the parties' names are written with initial capital letters. *See, e.g.,* Keating Decl., ¶¶ 13-15 & Exh. 3 (most common reasons for rejection).

C. Defendant Cannot Square Her Asserted Concerns with the Reality that the Sky Has Not Fallen at Other Pre-Processing Access Courts

All e-filing courts – state and federal – share the interests Defendant claims require her to maintain her policy of withholding access to new civil complaints until they have been "accepted." All e-filing courts receive documents that require confidential handling, all value

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courthouse security, and all must administer court operations in an orderly manner. The many state and federal courts – like this one – that provide pre-processing access are no exception. It was thus sensible for the OJD to ask those courts whether pre-processing access had created problems. *See, e.g.*, Fetterly Decl., Exh. 20 at 20-22, 66-67. ***Not one*** of these courts relayed any problems, negative experiences, or bad outcomes arising from their transition to pre-processing access. *Id*., Exhs. 5 (RFA 4) & 3 (Interrogatories 8-10).

Defendant has testified that she does not "think that the experience of other states is necessarily relevant because I have no idea what their structures, protocols, procedures, laws are and whether or not they're analogous." *Id*., Exh. 1 (118:14-17). She thus has no basis for dismissing the experience of other courts. Defendant's inability to explain why solutions that have worked well in other courts would not work in Oregon's circuit courts is fatal to her ability to justify access delays. *See, e.g., Gabel*, 2021 WL 5416650, at *15 (noting defendant's failure to "cite any court in the country that has found a similar [review] process necessary" to "protect[] privacy interests").

D. <u>The OJD's New Time-to-Review Standards Will Not Solve Delays</u>

The new Time-to-Review Standards issued on July 13, 2022 – just two days before the close of discovery and less than three weeks before the dispositive motion deadline – call for circuit courts to accept or reject 90% of certain civil complaints within "four business hours" and 100% of them within "one business day" (*i.e.*, within "nine business hours), "[a]bsent exceptional circumstances." Fetterly Decl., Exh. 22. The standards define "business hours" as the hours between 8:00 a.m. and 5:00 p.m. on weekday. *Id*. The standards do not fix the delay problem.

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As an initial matter, a significant number of civil complaints are filed after 1:00 p.m. (5:00 p.m. less four business hours) each day. From January 1, 2019 through April 30, 2022, 74,166 civil complaints (55.48% of all complaints) were filed after 1:00 p.m. Shimabukuro Decl., ¶ 14 & Exh. 11. The Review Standards allow circuit courts to withhold ***all*** of these complaints until at least the following business day. They also allow circuit courts to withhold at least 10% of complaints that are filed ***before*** 1:00 p.m. until the following business day. In the time period noted above, 10% of the 59,516 civil complaints filed before 1:00 pm. each day means 5,951 complaints (4.45% of all complaints). *See id*. Thus, from January 1, 2019 through April 30, 2022, the Time-to-Review Standards would have allowed the Court to withhold ***at least 60%*** of complaints – more than ***80,000*** – until the following business day.

The "at least" qualifier is necessary for two reasons. First, although the complaints that are rejected and corrected with a request for relation-back will have been considered filed on the day of their original submission, UTCR 21.080(5), the press and public will not know about them until court staff finally "accept" them, however long that takes. Second, the "exceptional circumstances" carve-out allowing circuit courts to withhold complaints for an indefinite amount of time swallows the rule. Defendant testified that COVID-related "staffing levels" and disruptions related to fires and protests had led "acceptances further outside of the normal" and represented "the types of exceptional circumstances where we understand we just might not be able to do what we normally are able to do." Fetterly Decl., Exh. 1 (138:17-139:23). Unfortunately, there is no reason to believe that COVID, climate-related disruption, and public protests are a thing of the past. Moreover, it would not be surprising for a circuit court experiencing other staffing issues (*e.g.*, parental leave, non-COVID illness, vacant positions) to

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consider those as "exceptional circumstances" that excuse longer delays. These are precisely the sorts of day-to-day realities that typically lead to access delays when courts withhold complaints for processing. *See* Girdner Decl., ¶ 19.

Accordingly, even if courts comply with the Time-to-Review Standards, access will not improve and might well become worse.

CONCLUSION

Defendant cannot justify allowing continued delays in accessing new civil complaints in Oregon's circuit courts when "there is a reasonable alternative permitting pre-review access—a public review queue made possible by screening for non-confidential … civil complaints. This alternative would greatly expedite access, fully comply with [confidentiality obligations], and likely enhance the efficiency of court operations." *Forman*, 2022 WL 2105910, at *14.

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

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