21-3098-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT (BURLINGTON)

BRIEF FOR PLAINTIFFS-APPELLEES

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– v. –

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

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure, Rule 26.1(a), the undersigned certifies as follows:

1. Defendant-Appellee Courthouse News Service has no parent corporation and no publicly held corporation owns stock in the company.

2. Defendant-Appellee Vermont Press Association, Inc. has no parent corporation and no publicly held corporation owns stock in the company.

3. Defendant-Appellee New England First Amendment Coalition has no parent corporation and no publicly held corporation owns stock in the company.

4. Defendant-Appellee Gray Media Group, Inc. is wholly owned by Gray Television, Inc. No publicly held corporation owns 10% or more of Gray Television, Inc. stock.

5. Defendant-Appellee Gannett Vermont Publishing, Inc. is wholly owned by Gannett Co., Inc., which is a publicly traded company. Black Rock and Vanguard, Inc. are entitles with more than a 10% interest in Gannett Co., Inc.

6. Defendant-Appellee Sample News Group, LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

7. Defendant-Appellee Vermont Community Newspaper Group, LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

8. Defendant-Appellee Da Capo Publishing, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: July 5, 2022

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INTRODUCTION

This appeal follows a bench trial over Appellants' policy and practice that brought about news-crippling delays in public and press access to newly filed non-confidential civil complaints in the Superior Courts of Vermont, in violation of the First Amendment. Before they were enjoined, Appellants channeled such complaints into electronic review queues where they sat, sometimes for days, pending clerical review, and neither the public nor the press was permitted to see them. Appellants' principal justification for withholding those pleadings – that they needed to check for unredacted confidential information – ignored the fact that Vermont's rules already require filing parties to redact such information and provide a certification to that effect. And, as the District Court found, that filer requirement has been "overwhelmingly effective" in protecting personal identifiers. A542.

Members of the media challenged Appellants' policy and practice of withholding new complaints pending clerical review. In response, the District Court issued an injunction prohibiting Appellants from "delaying public access to electronically filed civil complaints until the Vermont Superior Courts' pre-access review process is complete." A546. Unable to show how the District Court erred in finding Appellants failed to carry their burden of justifying delays in access due to their pre-access review, Appellants ask this Court to essentially retry the case

under a distorted version of the well-settled First Amendment framework that applies here. To support that request, they depict an alternate universe of facts that exists outside the record.

Appellants falsely contend that Appellees sought "instantaneous" access to pleadings and, because Appellants assert that there is no First Amendment right to instantaneous access, they argue that the First Amendment could not have been violated. This Court should reject that illusory argument. Appellees do not seek a *per se* right of "instantaneous" access. Instead, they simply assert that where, as here, a First Amendment right of access applies, *any* delays in access to new complaints must be justified by application of constitutional scrutiny under the standard articulated by the Supreme Court in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press Enterprise II*"). Appellants failed that test. As a result, they were enjoined and as a result of that injunction, the press and public in Vermont now have contemporaneous access to newly filed non-confidential civil complaints, in keeping with the First Amendment.

This Court also should reject Appellants' arguments regarding mootness and abstention. As to mootness, Appellants did not establish, nor did they contend, that pre-access review ceased. And as to abstention, the District Court, like other federal courts in similar cases brought by Appellee Courthouse News Service ("CNS"), properly declined to abstain, holding that this case "does not fit within

traditional abstention categories" and "will neither result in piecemeal litigation, nor require continuing federal oversight of state court proceedings..." A536-37.

JURISDICTIONAL STATEMENT

Appellees' claims arise under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, Title 42 U.S.C. § 1983, *et seq*. The District Court had subject matter jurisdiction over this matter under 28 U.S.C. § 1331, because it involves federal questions, and 28 U.S.C. § 1343, because it involves civil rights claims.

Upon the filing of Appellants' Notice of Appeal on December 17, 2021 from the final order of the District Court dated November 19, 2021 disposing of all of the parties' claims, this Court obtained jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUES

1. Whether a First Amendment right of contemporaneous access applies to newly filed civil complaints upon their receipt for filing, as recognized by the District Court and several other federal district and circuit courts nationwide.

2. Whether the District Court correctly applied *Press Enterprise II* constitutional scrutiny to test Appellants' policy and practice of prohibiting public access to newly filed civil complaints until after they have completed their pre-access review process, which required Appellants to prove their policy and practice is essential to preserve higher values and is narrowly tailored to serve that interest.

3. Whether the District Court acted within its discretion in determining, on the basis of evidence presented at the bench trial, that Appellants did not satisfy their burden of proof under *Press Enterprise II* constitutional scrutiny to justify their policy and practice of prohibiting public access to newly filed civil complaints until after Appellants completed their pre-access review process.

4. Whether the District Court correctly exercised its discretion to enjoin Appellants from prohibiting public access to newly filed civil complaints until after Appellants completed their pre-access review process.

5. Whether the District Court correctly rejected Appellants' motion to dismiss this case as moot based on improved rates of providing access to newly filed civil complaints prior to trial given that Appellants had not ceased the practice causing access delays.

6. Whether the District Court correctly exercised its discretion in declining to abstain by applying the Supreme Court's instruction, followed by this Court, that federal courts exercise the jurisdiction granted if a case does not fall into any of the specific abstention doctrines, rather than general principles of comity, equity, and federalism.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

At the bench trial of this matter held on October 25, 2021, the parties agreed that the Court could make factual findings based on the record before it. Doc. No. 57 at 55:15-24; A517.

CNS is a nationwide news service, covering federal and state trial and appellate courts, typically via its daily "New Litigation Reports." A518, ¶¶ 2-4. Other Appellees, with the exception of the New England First Amendment Coalition, are media outlets ("Media Appellees") that report on court filings in Vermont in their various publications. A518, ¶ 1; A519, ¶ 6.

In the pre-electronic filing era, it had been a long-standing tradition for CNS reporters and the Media Appellees to visit their assigned courts across the country where they could review new paper-filed civil complaints for news. A518-19, ¶¶ 5-6. New complaints typically were made available when they crossed the intake counter and before clerical processing (then, called docketing). A77-78, ¶¶ 3, 7; A82-83, ¶¶ 19-23; *see also* A259-62, ¶¶ 3-4, 8. This practice ensures that interested members of the public learn about new cases in a contemporaneous manner. A519, ¶ 6.

Between April 20, 2017 and March 2020, before the transition to e-filing in Vermont, Appellees could review in the Vermont Superior Courts newly filed

paper complaints that had yet to be docketed. A519, ¶ 10. The transition in Vermont to e-filing began in March 2020 and was completed, with limited exceptions, in March 2021. A519-20, ¶¶ 11-13. After the transition to e-filing, public access to filings was only available after processing. A86, ¶ 33; 261; A525, ¶ 29. Post-processing access is available via designated display terminals at the courthouses during regular business hours, even though complaints can be filed 24 hours per day every day of the week. A520, ¶ 14. Access to new filings is not typically provided over the Internet. A520, ¶ 14.

Prior to the District Court's injunction, clerks in Vermont withheld access in order to perform clerical review of new e-filed civil complaints *before* making them public – checking for signatures, payment, case type, among other items, as well as ensuring that filing parties complied with Vermont's rules requiring redaction of personal identifying information. A523-25, ¶¶ 25-26, 29; *see also* A29, ¶ 17; A86, ¶ 33. The pre-access review process for new civil filings typically took approximately 20 minutes per case, A525, ¶ 30, but the filings sat in queues for varying lengths of time before that review process began. A525-28, ¶¶ 29, 34-37; A531; A533.

Thus, public access was often delayed by a day or longer, solely in the discretion of Appellants who were not subject to any temporal limitation or any consequence for access delays. A522, ¶ 21; A531; A526-28, ¶¶ 34-37. Appellants

withheld access until after clerical processing notwithstanding that the e-filing software used by Appellants "performs a verification process that duplicates the clerk's pre-access review except for the review for confidential information, which much be undertaken manually." A525-26, ¶ 30; *see also* A36-45, ¶¶ 35-48 (detailing e-filing steps such as entering party names, filing type/fees, and redaction notes). Pursuant to Vermont's filing rules, the responsibility for redacting confidential information and certifying that a filing is free of such information lies with the filer. A542 (citing VRPACR 7(a)(1)(A) and VRPACR 7(a)(1)(B). A523, ¶ 24.

Based on data provided in discovery by Appellants regarding the 4,156 new civil complaints filed between the inception of e-filing in March 2020 and August 6, 2021, on average, only 54.8% of new cases were made available to the public on the day of filing, 22.6% one day after, 4.6% two days after, 6.7% three days after, and 11.4% four or more days after filing. A526, ¶ 34. Moreover, on many days, Appellants withheld a much greater percentage of newly filed civil complaints than the average, often withholding new filings for several days. A32-33, ¶¶ 25-26; A58-61; A526-28, ¶¶ 36-37.[1] Delays differed significantly between court units and

[1] During the 16 months from the advent of e-filing through August 6, 2021, some of the Vermont Superior Courts, *e.g.*, Addison, Caledonia, Essex, Orleans, Orange, and Windsor Counties, have, respectively, made on average only 33.9%, 11.1%,

within each court unit, varying day by day, with no predictability. A528, ¶ 37; A227-30, ¶¶ 19-21; A237-50.

The delays were easily avoidable, as demonstrated by courts across the country that mandate e-filing of civil complaints and provide the public and press with access to those complaints upon receipt, before any processing by court staff. A83-86, ¶¶ 24-32. In the vast majority of federal and many state courts which utilize e-filing, new, non-confidential civil complaints flow automatically onto public access terminals and remotely online upon receipt, where they can be reviewed by the public and press prior to clerk review and acceptance. A84-85, ¶¶ 26, 27, 30. New York and Connecticut, the other two states along with Vermont that are part of this Circuit, provide access upon receipt and prior to administrative processing. A854, ¶ 30.[2]

As the District Court found, but for Appellants' pre-access review process there would have been "no delay" in access, and "newly filed complaints could [have been] made accessible to the public immediately upon filing." A526, ¶ 33; A540.

3.8%, 28.0%, 39.5%, and 37.8% of complaints on their day of filing. A227-28, ¶ 19; A526-27, ¶ 36.

[2] The Second Circuit also provides access to filings upon receipt and prior to clerical processing. *See* https://www.ca2.uscourts.gov/clerk/case_filing/electronic_filing/how_to_use_cmecf/reviewing_and_submit_filing_event.html.

B. PROCEDURAL BACKGROUND AND DISPOSITION BELOW

Appellees commenced this action for injunctive and declaratory relief on May 20, 2021. A516; *Gabel*, 21-cv-132, Doc. No. 1. On July 12, 2021, after filing an amended complaint, Appellees moved for a preliminary injunction enjoining Appellants from denying access to newly filed non-confidential civil complaints until after they were clerically processed. A517; *Gabel*, 21-cv-132, Doc. No. 26. On August 18, 2021, Appellants filed a motion to dismiss the action on mootness and abstention grounds and opposed Appellee's preliminary injunction motion. A517; *Gabel*, 21-cv-132, Doc. No. 43.

After the parties' respective motions were fully submitted, the District Court, pursuant to Fed. R. Civ. P. 65(a)(2), and with the parties' consent, consolidated the hearing on the preliminary injunction motion and motion to dismiss with a trial on the merits. A517. The consolidated hearing and bench trial were held on October 25, 2021, after which Appellants filed a supplemental submission and Appellees filed a response. A517; *Gabel*, 21-cv-132, Doc. Nos. 58, 61.

In its Opinion and Order dated November 19, 2021 ("Order"), the District Court denied Appellees' motion to dismiss and granted a permanent injunction prohibiting Appellees "from delaying public access to electronically filed civil

complaints until the Vermont Superior Courts' pre-access review process is complete." A546.[3]

The District Court determined that Appellants' practice of withholding civil complaints from public access pending administrative processing does not withstand constitutional scrutiny. A540-43. While Appellants asserted that Vermont's rules required them to review new filings before accepting and making them available to the public, the District Court concluded that none of the rules "clearly state that the public shall not have access to a newly filed complaint until a pre-access review is completed" and that the rules "impose no deadlines or other temporal restraints on how long the pre-access review process may take…." A522, ¶ 21. The District Court also noted that Appellants did not provide any evidence in opposition to Appellees' assertion that Vermont was the only state that purported to require clerks to review new filings before making them accessible to the public. A522, ¶ 22.

The District Court determined based on Appellants' data that delays in access to newly filed civil complaints have been "pervasive throughout the Vermont Superior Courts." A526, ¶ 34. The District Court observed:

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[3] In view of the issuance of the permanent injunction, the District Court denied Appellees' request for declaratory relief as serving "no purpose which the court's permanent injunction has not achieved." A545.

> Defendants purposefully withhold immediate access by placing newly filed complaints in a review queue where they may be reviewed in a matter of minutes, hours, or days with virtually no guarantee as to when they will become accessible to the public. The delay differs significantly among and within the fourteen Vermont Superior Courts, varies day by day, and occurs with no predictability. It is Defendants' placement of newly filed complaints in this queue which must be justified under the First Amendment.

A531.

In regard to Appellants' contention that they must review new filings before the public can see them because filing parties may include personal identifiers, the District Court found:

> As for protecting privacy interests, out of 4,156 electronically filed civil complaints, only three exhibits to two complaints were rejected during the pre-access review process because they contained confidential information. 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[.]" *Bernstein* [*v. Bernstein Litowitz Berger & Grossman LLP]*, 814 F.3d [132,] 144 [2d Cir. 2016]. Defendants cite no evidence that they experienced significant confidentiality breaches prior to the implementation of pre-access review, nor do they cite any court in the country that has found a similar process necessary.

A541.

The District Court thus concluded that Vermont's rule requiring that filing parties redact personal identifiers before submitting new complaints for filing was

"overwhelmingly effective" in accomplishing the goal of redacting personal identifiers from civil filings. A542.

The District Court also properly rejected Appellants' contention that Vermont provides faster access to new filings than a majority of courts CNS covers nationwide based on data provided by CNS in discovery concerning its coverage of filings in other courts ("CNS Publication Data"):

> Not only does this approach reflect a misallocation of the burden of proof, Defendants' evidence in support of this argument is unreliable. Many factors contribute to when Plaintiff CNS provides media coverage of a newly filed complaint. To measure delay by publication dates thus fails to yield an accurate determination of when a newly filed complaint becomes accessible to the public.

A529, ¶ 39.

The District Court correctly added that the issue was "not how fast Plaintiffs cover new filings or whether Defendants' delay is comparable to that of other courts, but whether Defendants' pre-access review process is necessary to protect a higher interest and is narrowly tailored to achieve it." A540. Moreover, the question is not how much delay is permissible, but rather whether *any* delay has "sufficient justification" to withstand constitutional scrutiny. A539 (citation omitted). And "when a governmental entity contends that the 'limited denial of access' is insubstantial, it 'begs the question of whether there was a sufficient factual basis for denying access at all.'" A539 (citation omitted).

As the District Court concluded, Appellants failed to "demonstrate that their pre-access review process is justified by higher interests and narrowly tailored to advance those interests..." A543.

SUMMARY OF ARGUMENT

The District Court properly held that Appellants violated Appellees' First Amendment rights by delaying access to newly filed civil complaints until after clerical review and processing, finding that the delays were entirely caused by Appellants' practice of channeling complaints into electronic review queues where they sat, sometimes for days, before they were accepted and released to the public. A525-28, ¶¶ 29, 34-37; A531, A533. In their brief ("App. Br."), Appellants fail to explain how the District Court clearly erred in making these and other factual findings, or in its conclusions that Appellants had failed to satisfy their burden of proof to demonstrate that the "pre-access review process is necessary to protect a higher interest and is narrowly tailored to achieve it." A540.

Appellants concede the access delays found by the District Court but claim the District Court erred in finding the policies that caused those delays were unconstitutional, based on several distortions of law and fact, including:

First, Appellants mischaracterize the relief Appellees sought. Appellees have never contended that there is a *per se* "instantaneous" or "immediate" right of access. To be sure, in an e-filing court, where the initial intake that was previously

performed by clerks is now performed by software, A526, ¶ 31; A541,[4] access prior to clerical review typically means access in minutes, but Appellees did not contend that there is a *per se* constitutional right to instantaneous access to newly filed complaints. Pursuant to the two-step analysis set forth in *Press-Enterprise II* and used by this Circuit, once a First Amendment right is found to apply, any access delays must be justified by applying constitutional scrutiny.

Appellants try to flip the burden of proof to justify their delay-causing policies by arguing that Appellees failed to satisfy the "experience and logic" test in the first part of the *Press Enterprise II* analysis. But their argument conflates the first part of the analysis, *i.e.*, the experience and logic test, with the second part of the analysis, which, after finding a right of access to a particular document, like a civil complaint, considers whether Appellants have met their burden of justifying delay based on the asserted harms and whether the policies and practices at issue are narrowly tailored. As the District Court correctly observed, "[i]n the Second Circuit, the 'experience and logic' approach merely determines 'whether the First Amendment right of access applies to *particular material* … it does not dictate the acceptable measure of delay." A539-40, n.7 (emphasis in original).

[4] *See also Courthouse News Serv. v. Schaefer* 440 F. Supp. 3d 532, 542 (E.D. Va. 2020), *aff'd,* 2 F.4th 318 (4th Cir. 2021).

This Court in *Bernstein* has already concluded that newly filed civil complaints meet the experience and logic test and are thus entitled to First Amendment protection. 814 F.3d at 136, 141. Relying on *Bernstein*, among other cases, the District Court properly held that the experience and logic test was satisfied. A530-31. In reaching that conclusion, the District Court also correctly held that the public's right of access to newly filed civil complaints attaches upon the court's receipt, *i.e.*, when those pleadings are electronically filed. A537. The burden therefore shifted to Appellants to justify their delays in access. Appellants did not carry that burden.

Second, Appellants claim that Vermont's rules require that Appellants review new complaints before making them public in order to confirm that a complaint is properly coded, has the correct filing fee, and to ferret out confidential information. However, as the District Court held, the plain language of the rules does not require pre-access review, and Appellants had already implemented less restrictive ways to accomplish these tasks by requiring filers to screen for confidential information, consistent with Vermont's rules and state courts nationwide. A522, ¶ 21; A523-25, ¶¶ 25-26; A541-42; *see also* A35, ¶¶ 31, 33, 34; A40, ¶ 42; A44, ¶ 47; A260, ¶ 4. As the District Court found, "placing the onus on filers has been overwhelmingly effective." A542. Appellants fail to explain how the District Court clearly erred in making this finding. And even if Vermont's

rules required pre-access review, the requirements of the First Amendment trump such review. A540-43.

Third, relying solely on CNS Publication Data, Appellants contend that Vermont's rates of access exceed those of other courts CNS covers and that a better-than-average result obviates a constitutional violation. But the District Court correctly determined CNS Publication Data is unreliable as a measure of access in other courts. Further, Appellants' comparison misstates the issue before the Court, which is "not how fast Plaintiffs cover new filings or whether Defendants' delay is comparable to that of other courts, but whether Defendants' pre-access review is necessary to protect a higher interest and is narrowly tailored to achieve it." A540.

Fourth, Appellants suggest that their rollout of e-filing during the pandemic and related staffing constraints should excuse their unconstitutional conduct. But the access delays addressed in this case were caused by Appellants' practice of reviewing filings before they are made public (A268) – not the effects of the pandemic.

Finally, the District Court also properly rejected Appellants' effort to dismiss this case on mootness and abstention grounds. On mootness, Appellants claim they are in the process of centralizing review of newly filed complaints and that centralization has already yielded improved review times. Yet, Appellants do

not claim pre-access delay has ceased, and make no commitment to provide contemporaneous access to newly filed non-confidential civil complaints in the future as a result of centralization.

The District Court properly held that abstention would be inappropriate given the weight of the First Amendment issues involved and the fact that this action "does not fit within traditional abstention categories" and "will neither result in piecemeal litigation, nor require continuing federal oversight of state court proceedings..." A536-37. As for Appellants' observation that CNS has brought a number of federal cases alleging similar First Amendment violations over the last 13 years, Appellants cannot seriously argue that the number of cases commenced – the vast majority in which CNS prevailed – constitutes a bar to the relief sought or compels abstention.

The Order should be affirmed.

ARGUMENT

Pursuant to Fed. R. Civ. P. 52(a)(6), findings of fact after a bench trial "must not be set aside unless clearly erroneous…." Based on the District Court's findings of fact after trial and its proper application of the relevant law, it correctly concluded that the press and public have a First Amendment right of access to new complaints that attaches upon the court's receipt for filing, and that Appellants failed to justify the access delays in the Vermont Superior Courts.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PUBLIC AND PRESS HAVE A FIRST AMENDMENT RIGHT OF CONTEMPORANEOUS ACCESS TO NEWLY FILED CIVIL COMPLAINTS

A. The First Amendment Guarantees a Right of Access to Newly Filed Civil Complaints

The District Court correctly held that there is a First Amendment right of access to newly filed civil complaints. A531. In *Bernstein*, this Court "easily conclude[d]" that the First Amendment provides the press and public with a presumptive right of access to civil complaints. 814 F.3d at 139, 141. *Bernstein* noted that a complaint "is the cornerstone of every case, the very architecture of the lawsuit. … It is the complaint that invokes the powers of the court, states the causes of action, and prays for relief." *Id.* at 140, 142 (internal citations omitted). *Bernstein* applied the experience and logic test established in *Press-Enterprise II*, which asks both "whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." *Bernstein*, 814 F.3d at 141 (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006)); *see also In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (quoting *Press-Enterprise II*, 478 U.S. at 9-10). *Bernstein* answered both questions – without resort to *any* factual data – in the affirmative:

> Complaints have historically been publicly accessible by default, *even when they contain arguably sensitive information*…. Logical considerations also support a

> presumption of public access. Public access to complaints allows the public to understand the activity of the federal courts, enhances the court system's accountability and legitimacy, and informs the public of matters of public concern. Conversely, a sealed complaint leaves the public unaware that a claim has been leveled and that state power has been invoked — and public resources spent — in an effort to resolve the dispute. These considerations indicate that public access to the complaint and other pleadings has a 'significant positive role,' *Lugosch*, 435 F.3d at 120 (internal quotation marks omitted), in the functioning of the judicial process.

Bernstein, 814 F.3d at 141 (emphasis added).

Every federal circuit court to have considered the question has agreed that newly filed civil complaints are subject to a presumption of access. *See* *Courthouse News Serv. v. Quinlan*, 32 F.4th 15, 20 & n.8 (1st Cir. 2022)[5]; *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 (9th Cir. 2020) ("*Planet III*").[6]

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[5] In the district court, *Quinlan* was titled *Courthouse News Serv. v. Glessner*, 549 F. Supp. 3d 169 (D. Me. 2021). The case was renamed *Courthouse News Serv. v. Quinlan* on appeal. 32 F.4th at 15 n.*. Appellants' reliance on *Glessner* is misguided given *Quinlan's* recent reversal of the dismissal of CNS' First Amendment claim. 32 F.4th at 21-22.

[6] District courts within the Second Circuit and elsewhere also agree that newly filed civil complaints are subject to a presumption of access. *See*, *e.g.*, *Courthouse News Serv. v. Tingling*, 2016 WL 8739010, A150 at 2:25-3:3, 49:1-5 (S.D.N.Y. Dec. 16, 2016); *Courthouse News Serv. v. Forman*, 2022 WL 2105910, at *5 (N.D. Fla. June 10, 2022); *Courthouse News Serv. v. Cozine*, 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022); *Courthouse News Serv. v. Brown*, 2018 WL 318485, at *6 (N.D. Ill. Jan. 8, 2018), *rev'd on other grounds*, 908 F.3d 1063 (7th Cir. 2018);

B. The District Court Correctly Found That the First Amendment Right of Access to Civil Complaints Attaches Upon Receipt

The District Court next determined that the First Amendment right of access to civil complaints attaches upon a court's receipt. A537. In so holding, the District Court was hardly breaking new ground. Every other court to consider the issue, except for one that was reversed,[7] has similarly found that the First Amendment right of access to complaints attaches on receipt. *See, e.g., Planet III*, 947 F.3d at 585; *Courthouse News Serv. v. N.M. Admin. Office of the Courts*, 566 F. Supp. 3d 1121, 1171 (D.N.M. 2021) ("*Pepin*") ("The qualified right 'attaches when the complaint is filed' in a traditional sense – when it is in the court's possession[.]"), *appeal filed*, No 21-2135 (10th Cir. Oct. 29, 2021) (quoting *Planet III*, 947 F.3d at 585); *Cozine*, 2022 WL 1000775, at *2 (same); *Forman*, 2022 WL 2105910, at *6 ("[F]irst Amendment right of access" to complaints attaches "the

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Courthouse News Serv. v. Jackson, 2009 WL 2163609, at *5 (S.D. Tex. July 20, 2009).

[7] *See Courthouse News Serv. v. Yamasaki*, 312 F. Supp. 3d 844, 862-63 (C.D. Cal. 2018), *vacated*, 950 F.3d 640 (9th Cir. 2020). *Yamasaki* was vacated and remanded on its merits "for further proceedings consistent with [*Planet III*]," 950 F.3d 640 (9th Cir. 2020), discussed *infra*. "[T]he Ninth Circuit's vacatur of a district court judgment nullifies and renders the judgment inoperative." Rutter Group Prac. Guide: Fed. Ninth Cir. Civ. App. Prac. Ch. 10-E § 10:260.

moment they are filed."); *Courthouse News Serv. v. Omundson*, 2022 WL 1125357, at *12 (D. Idaho Apr. 14, 2022) (same).[8]

The public's First Amendment interests are implicated when a litigant submits a complaint for filing, not when clerks have conducted time-consuming review, because a complaint instantaneously invokes a court's jurisdiction, *Schaefer*, 2 F.4th at 328, and carries significant implications for "the parties' substantive legal rights and duties," *e.g.*, triggering an obligation to preserve evidence and establishing a date of filing for statute of limitations purposes. *Bernstein*, 814 F.3d at 140. *See also Schaefer*, 2 F.4th at 327 (there are "immediate consequences precipitated by filing a complaint, consequences that the public must promptly understand if it is to help improve the quality of the judicial system by subjecting it to the cleansing effects of exposure and public accountability") (internal quotation marks and citations omitted).

Appellants do not explain why this Court should become the only court to hold that the First Amendment right of access does not attach when complaints are received, but at an indefinite later date when clerks have completed their review, whenever that might be. Instead, Appellants mischaracterize the nature of

[8] Vermont's own rules say a complaint is "filed" when submitted, consistent with other authorities establishing that "filing" is commonly understood as the date of submission. VREF 5(c)(1) ("*Filing Date*. An efiling is considered submitted on a date if it is submitted prior to midnight on that date").

Appellees' First Amendment claim, misconstrue the experience and logic test, and misread *Planet III*, *Schaefer* and other authority.

1. Appellants Mischaracterize the Access Appellees Seek as Instantaneous

Appellants incorrectly contend that Appellees have made an "instant access demand," App. Br., 6, and on that basis argue that Appellees have not satisfied the "experience and logic" test because (i) there is not "'an established and widespread tradition' 'throughout the United States'" of "instantaneous" access to civil complaints, App. Br., 4, 32, 35, 45, and (ii) Appellees have not shown that instantaneous access "would play a significant positive role in the functioning" of the civil litigation process. *Id*. at 31, 45.

As a preliminary matter, immediate access is not a dirty word. As stated by this Circuit in *Lugosch*, access under the First Amendment should be "immediate and contemporaneous" because "[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." 435 F.3d at 127 (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994)).[9] Where practicable – as here – there is no reason why immediate access should not be provided.

[9] Appellants attempt to minimize the import of *Lugosch* by focusing on the length of time it took the Second Circuit and district court on remand to render a decision

Most fundamentally, Appellees do not demand immediate or instantaneous access; nor do they contend there is a *per se* right to immediate access. A259-60, ¶¶ 2-4. Appellees request "contemporaneous" access to newly filed civil complaints, and prior to clerical processing. A5, ¶ 10; A18-22, ¶¶ 63, 68, 69, *ad damnum clause.* As *Omundson* recently explained:

> [T]his might be viewed as a distinction without a difference, but it is not. 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.

2022 WL 1125357, at *12.

In an e-filing court where software performs the initial intake on submission, *Schaefer* 440 F. Supp. 3d at 542, access before clerical processing is usually within minutes. A260, ¶ 4; A526, ¶¶ 30-31, A541. That is the natural result when access is not withheld for processing in an e-filing court.

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in that case, but this case does not concern the time it takes for courts to make decisions. Moreover, Appellants are mistaken in suggesting that the contemporaneous access requirement in *Grove Fresh*, 24 F.3d at 897, is no longer good law because the Seventh Circuit in *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018) subsequently reversed a district court decision that required contemporaneous access. *Id*. at 1066, 1075. *Brown*, which reversed the lower court decision on abstention grounds, did not state that *Grove Fresh* is not good law. To the contrary, it stressed that it "continues to provide helpful guidance on the qualified right of public access to court filings. *Brown*, 908 F.3d at 1070 n.5.

2. Appellants Misconstrue the Experience and Logic Test

Appellants improperly seek to shift the burden of proof to Appellees to show why access delays are improper by urging this Court to incorrectly apply the first step – the experience and logic test – of the *Press-Enterprise II* analysis. *Press-Enterprise II* and its progeny confirm that the experience and logic test is not "fact-specific," but rather a legal determination into whether particular documents (or proceedings) have traditionally been open to the press and public. *Id.*, 478 U.S. at 10-11 & n.3; *see also Bernstein*, 814 F.3d at 141; *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 301-02 (2d Cir. 2012); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1068 (3rd Cir. 1984). It is the second part of the *Press Enterprise II* analysis, conducted *after* a First Amendment access right is found, that *is* fact-specific and considers whether practices or policies that result in ongoing delays of *any length* are essential to preserve higher values and narrowly tailored to serve that interest. *See New York Civil Liberties Union,* 684 F.3d at 293, 304; *In re New York Times Co.*, 828 F.2d at 116.

Appellants contend the "experience" prong of the experience and logic test has not been satisfied because Appellees only identified courts in 10 states that provide instantaneous access to electronically filed complaints when they should have done a 50-state survey. To be clear, Appellees established a tradition of access upon the court's receipt and prior to docketing, not instantaneously. A77-

78; A82-83, ¶¶ 3, 7, 19-23; A259-62, ¶¶ 3-4, 8; A518-19, ¶¶ 5-6. But neither this Court in *Bernstein* nor CNS purported to base its observation that there was a tradition of access to civil complaints on a 50-state survey. Appellants mistakenly assume that one must put forth such proof every time constitutional access to civil complaints is litigated.

Bernstein's conclusion that the First Amendment right of access attaches to civil complaints was not limited to *sealed* complaints, despite Appellants' suggestion to the contrary. *Bernstein* held that a "[f]inding that a document is a `judicial document' triggers a presumption of public access, and requires a court to make specific, rigorous findings before sealing the document *or otherwise denying public access*." 814 F.3d at 141 (quoting *Newsday LLC v. Cty. of Nassau,* 730 F.3d 156, 167 n.15 (2d Cir. 2013)) (emphasis added).

Appellants also incorrectly contend that Appellees' tradition of access argument is contradicted because the "vast majority" of courts covered by CNS purportedly are not providing on receipt access prior to clerical processing. App. Br., 2, 3, 13. The "vast majority" quote is out of context: it was made in the context of courts' transitions to e-filing. As CNS' editor, William Girdner, stated: "with the advent of electronic filing in recent years, many courts have moved away in the last two decades from what had been traditional same-day access…." A263, ¶ 13. That some state courts lost sight of constitutional standards during the

transition to e-filing does not establish an inconsistency between the tradition of access to civil complaints acknowledged by this Court in *Bernstein* and whether all or most courts are currently meeting constitutional standards for providing access.[10]

Appellants' reliance on CNS Publication Data in an effort to show that there is no tradition of instantaneous access also should be rejected. Appellants use the CNS Publication Data to erroneously conclude that Appellants provide better same-day access on average, *i.e.*, 54.8%, than other courts across the county, *i.e.*, 49-51%. App. Br., 39. But as the District Court recognized, Appellants "exclude the federal courts from this analysis and use unreliable data…." A539-40. The District Court thus properly concluded that CNS publication dates are a misleading metric against which to compare Vermont's access rates. A529, ¶ 39.[11]

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[10] Mr. Girdner elaborated on this by noting that in paper-filing courts, including Vermont Superior Courts, newly filed complaints were traditionally available to the press and public after they crossed the intake counter, sometimes after clerks calculated the fee and noted the parties' names, but before docketing. A28, ¶ 13; A77-78, ¶¶ 3, 7; A82-83, ¶¶ 19-23; A259-62, ¶¶ 3-4, 8.

[11] CNS Publication Data does not accurately measure access delays because the date on which CNS first covers a complaint, even when CNS covers a court daily, is often different than the date the complaint is made available to the press and/or public. A230-34, ¶¶ 22-26; A265, ¶ 17. For example, though a CNS reporter may go to a particular courthouse on a daily basis, any cases filed and made available after a reporter leaves the courthouse are not covered until the next day. A265, ¶ 18. When daily coverage is based on remote electronic access, cases filed after 5:00 p.m. – which can account for 10% or more of a court's filings – typically are not covered until the next day. A266, ¶ 20. Also, CNS often covers a court based

Appellants' argument that they are providing better access than the District of Vermont also should be rejected. That court only accepts new complaints as paper filings and then must perform initial intake and scan them into electronic form before making them public. A267, ¶ 23. Even so, the District of Vermont still provides better access than Appellants, particularly when excluding immigration, sealed, and *pro se* cases, which are not e-filed in the Vermont Superior Courts, and thus not at issue in this case. A267, ¶ 23. Moreover, as to Supreme Court filings, they are typically not case initiating complaints, and Appellants ignore that the Second Circuit does provide access to filings upon receipt.

Appellants contend that Appellees have not met the logic prong of the experience and logic test because of the supposed harm that would result from instantaneous access to civil complaints, but Appellants overlook that purported harms are properly evaluated in the second part of the *Press-Enterprise II* analysis, in which Appellants, not Appellees, have the burden of proof. See Point II *infra*. The purpose of the "logic" prong is not to consider fact-specific harms that might

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on online docket information before complaints are made available, just reporting parties' names, case category, and court name. A266, ¶ 21. By "assuming that the date when CNS covers a civil complaint in its publication is the date access to the civil complaint is provided to the press and public, [Appellants' expert] misstate[d] delays in accessing civil complaints in non-Vermont courts for which he applies this methodology." A234, ¶ 26.

result from disclosure, but to distinguish between "government processes [that] operate best under scrutiny" and those that "would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 8-9. Like the docket sheets considered by this Court in *Hartford Courant*, complaints "do not constitute the kinds of government records that function properly only if kept secret, like grand jury proceedings." *Hartford Courant v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004).

Nor is there merit to Appellants' suggestion that the logic analysis changes because CNS commercially profits from its reporting on newly filed complaints. CNS, like any news organization, seeks to avoid insolvency, and that ordinary truth does negate a constitutional right. *See, e.g.*, *Lugosch*, 435 F.3d at 123 ("motive" is "generally … irrelevant" as "assessing the motives of journalists risks self-serving judicial decisions tipping in favor of secrecy.") (citation omitted); *accord Planet III*, 947 F.3d at 595, n.8 ("[T]o be clear: profit motive is entirely irrelevant to the determination of a news organization's First Amendment rights.").[12]

[12] CNS reports are not used merely to "solicit[] new business." App. Br., 50. They are used, for example, to alert clients they have been sued, watch for cases that may affect clients even if not parties, and monitor legal trends. A271-72, ¶¶ 35-36.

3. Appellants Misread *Planet III, Schaefer* and Other Cases

Questions about the constitutionality of policies and practices that cause ongoing delays past the point of receipt are not answered by looking at the length of delay, but by applying fact-specific constitutional scrutiny to determine whether those delays can be justified. Unable to show how the District Court clearly erred in reaching its conclusion that Appellants "fail[ed] to demonstrate a 'substantial probability' that the orderly administration of justice and privacy rights of litigants and third parties would be significantly impaired without their pre-access review," A542, Appellants instead claim the decision was wrong because neither *Planet III* nor *Schaefer* nor certain other cases require "instantaneous" or "immediate" access.

Planet III – Appellants say *Planet III* found that the "First Amendment does not require 'immediate, preprocessing access to newly filed complaints.'" App. Br., 29, 43. What *Planet III* actually said, however, is that there is no mandatory right of immediate access, but when a right of access attaches, "a presumption of access arises," which can be overcome only if defendants show, through the application of constitutional scrutiny, that the interests claimed to support process-first policies "would be impaired by immediate access." 947 F.3d at 594-96.

Appellants also point to the *Planet III* court's reversal of the district court's injunction of the scanning policy, App. Br., 60, but scanning paper complaints on

intake to make an electronic copy of them before further processing, is not comparable to the processing Appellants have imposed as a precondition to public access to e-filed complaints already in electronic form. Contrary to what Appellants say, the scanning policy did *not* restrict access to "between one-third and more than one half" of all complaints same day, App. Br., 60, but rather only to between "one-third and more than one-half" *of those filed after 3:00 p.m.* – which the clerk in that case said translated to 97% of complaints being available same-day. *Planet III*, 947 F.3d at 587. More importantly, Appellants overlook that the Ninth Circuit only found scanning was allowed after applying *Press-Enterprise II* scrutiny and finding it was satisfied under the facts of that particular case.

Schaefer – Similarly, in *Schaefer*, which concerned two predominantly paper-filing state courts where the clerks recorded information like party names, fees and case type and had to scan new filings into the system before making them public on the courts' public access terminals, the Fourth Circuit said "contemporaneous access" requires access "as expeditiously as possible," *i.e.*, the day of filing unless not practicable. 2 F4th at 327-28. Here, access before processing *is* practicable because e-filing software performs the tasks previously done by intake clerks in the paper world. The District Court found confidentiality review is "the only portion of the pre-access review process which is not

duplicated by Odyssey's software." A526, ¶ 31; *see also* A525-26, ¶ 30. And the federal courts (via PACER) and many state courts, including the Vermont Superior Courts subsequent to the Order, have demonstrated that public access contemporaneous with e-filing is eminently practicable, including state courts using the same e-filing software as Vermont. A83-86, ¶¶ 24-32; A261-62, ¶¶ 6, 8.

Other Cases – Appellants' reliance on *Sullo & Bobbitt, PLLC v. Milner*, 765 F.3d 388, 390 (5th Cir. 2014), *Barth v. City of Macedonia*, 187 F.3d 634 (6th Cir. 1999), and *Pepin*, 566 F. Supp. 3d at 1170-71, also is misguided. Although the Fifth Circuit in its unpublished decision in *Sullo* held that "the district court did not err in holding that the right to immediate access to [criminal misdemeanor citations and related court files] is not established throughout the United States," 765 F.3d at 394, the district court made clear that decision was "not precedent" and was limited to "the commercial speech context" because "[c]ourts generally recognize that the [press and public's] First Amendment right of access includes a timeliness aspect, since delaying access 'may have the same result as complete suppression.'" *Sullo & Bobbitt, PLLC v. Abbott*, 2013 WL 1949835, at *5 n.7 (N.D. Tex. May 13, 2013) (citation omitted). The *Sullo* district court further explained: "[T]he right of access in the commercial speech context is distinguishable from the press and public's right of access." 2013 WL 1949835, at *5, n.7.

Appellants' reliance on *Barth* also is misguided. *See* App. Br., 6-7, 29. *Barth* is an unpublished, uncited decision in which the court held that plaintiffs were not entitled to immediate access to an *entire* "court file" as opposed to "individual documents, such as citations, [which] *may be granted instantaneously without review*." *Id*., 187 F.3d at *1 (emphasis added).

And in *Pepin*, the court observed that the Tenth Circuit had not yet decided the issue of whether there is a constitutional right to access court documents, 566 F. Supp. 3d at 1169, and therefore applied the experience and logic test, finding that CNS met it. *Id*.[13]

Appellants would also have this Court ignore *Tingling* and *Jackson*, claiming, among other things, that the decisions in those cases were short or rendered expeditiously. However, those cases are directly on point. *Tingling* is the only case in the Second Circuit to previously address a "no access before

[13] Although the *Pepin* court correctly found a right of timely access that attaches on receipt, it went on to erroneously conclude timely access could be provided within five business hours of receipt. *See* 566 F. Supp. 3d at 1169. As CNS has explained in its motion for partial reconsideration and its brief in the pending Tenth Circuit appeal, *see* Case No. 1:21-cv-00710, Doc. Nos. 35, 36 & Appeal No. 21-2135, Doc. 010110663098 (10th Cir. Oct. 29, 2021), not only did this approach conflate the two steps of the *Press-Enterprise II* framework by interpreting factual evidence to establish a rule that allows withholding access for up to five business hours without requiring defendants to satisfy constitutional scrutiny, but this finding deviated from the record evidence by incorrectly concluding that the press historically received access *after* docketing. *See* Case No. 1:21-cv-00710, Doc. No. 35, at 5.

processing" policy like the one challenged here, and *Jackson*, 2009 WL 2163609, likewise required "immediate and contemporaneous" access and enjoined a clerk's practice of delaying access until after processing. *Id.* at *4.[14]

II. THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS FAILED TO CARRY THEIR BURDEN OF SHOWING THAT THEIR POLICY AND PRACTICE OF WITHHOLDING ACCESS TO NEWLY FILED CIVIL COMPLAINTS SURVIVES CONSTITUTIONAL SCRUTINY

Appellants concede that "[i]f a plaintiff shows that experience and logic do establish a particular access right, the burden shifts to the defendant to justify a challenged restriction on that benchmark access level." App. Br., 32. Thus, the only remaining question properly before the District Court was whether Appellants met their burden under *Press Enterprise II* to show that withholding access to complaints until after clerical processing is constitutionally justifiable.

Appellants contend that the District Court erred in applying *Press-Enterprise II* scrutiny rather than "time, place, and manner" ("TPM") scrutiny. Appellants are mistaken as a matter of law. However, even under TPM, as further explained below, Appellants fail to meet their constitutional burden, given the District Court's unchallenged finding that Appellants provided only "scant" evidence to justify the delays here. A539.

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14 Most recently, the District Court for the Northern District of Florida in *Forman* enjoined similar' "no-access-before-process" policies in the e-filing context. 2022 WL 2105910, at *20.

A. The District Court Properly Applied *Press-Enterprise* II Scrutiny

The District Court correctly applied *Press-Enterprise II* scrutiny, asking whether Appellants' actions are "narrowly tailored and 'essential to preserve higher values.'" A540 (quoting *Bernstein*, 814 F.3d at 144). The District Court stated:

> Once a First Amendment right of access to judicial documents is found, the documents may be removed from public access only if specific, on the record findings are made demonstrating that this restriction is essential to preserve higher values and is narrowly tailored to serve that interest. *United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014) (addressing document sealing) …(quoting *Lugosch*, 435 F.3d at 120; *see also Planet* [III], 947 F.3d at 596 ("Defendant 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.) *** Broad and general findings and conclusory assertions are insufficient to justify deprivation of public access to the record. *Bernstein,* 814 F.3d at 144-15….

A537-38 (internal quotations omitted).

Case after case in the Second Circuit that has examined a denial of access to court documents or proceedings has applied *Press-Enterprise II* scrutiny, *see Bernstein*, 814 F.3d at 144; *Hartford Courant*, 380 F.3d at 96; *Lugosch*, 435 F.3d at 124; *New York Civil Liberties Union*, 684 F.3d at 304; *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008); *Erie*, 763 F.3d at 239; *In re New York Times Co.*, 828

F.2d at 116. As the District Court correctly observed, that standard requires that *any* delay has "sufficient justification" to withstand scrutiny. A539 (quoting *Newsday*, 730 F.3d at 165 and citing *Planet III*, 947 F.3d at 596).

Appellants contend that the District Court should have applied TPM scrutiny based on their conclusory statement that delays in access to newly filed complaints "resemble time, place, and manner restrictions." App. Br., 8-9, 53-54 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 n.17 (1982)). However, the level of scrutiny is governed not by what Appellants' practices resemble but the fact that Appellants' practice of withholding civil complaints "is a total restraint on the public's first amendment right of access even though the restraint is limited in time." *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1147, 1149 (9th Cir. 1983) (emphasizing that it is "irrelevant that some…documents might only be under seal for, at a minimum, 48 hours); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (following *Associated Press* in holding that "even a one to two day delay impermissibly burdens the First Amendment.").[15]

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15 *Globe Newspaper* and *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007), cited by Appellants, are not to the contrary. In *Globe Newspaper*, the Court required the defendant to show that the denial of press and general public access to a criminal trial was necessitated by a compelling government interest and narrowly tailored to serve that interest. *Id.* at 607. The Court did acknowledge that restrictions on the right of access that resemble "time, place and manner" limitations on protected speech would be subject to a lower level of scrutiny, *id.* at 606-07 n.17, but the case to which *Globe Newspaper* cited, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), includes an example of "time, place, and

Appellants' practices were "effectively … access denial[s]" subject to *Press-Enterprise II* scrutiny. *Jackson*, 2009 WL 2163609, at *3-4; A537-38.

Appellants' suggestion that no appellate court has applied *Press-Enterprise II* scrutiny to access restrictions is incorrect. Not only has the Second Circuit consistently applied *Press-Enterprise II* scrutiny where a party restricts a First Amendment right of access, but so did the Ninth Circuit in *Planet III* (calling it "rigorous" scrutiny). 947 F.3d at 585, 596 (quoting *Press Enterprise II*, 478 U.S. at 14). *Cf. Quinlan,* 32 F.4th at 21 (reversing dismissal and deferring issue of whether strict or intermediate scrutiny applied).

But even under TPM scrutiny, Appellants have the burden of proving the constitutionality of their actions: Appellants must present evidence to demonstrate that their policies and practices of withholding complaints until after administrative processing are "narrowly tailored to serve a significant governmental interest" which "leave open ample alternative channels for communication of the information." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 (2d Cir. 2006) (citation omitted); *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006). "To

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manner" restrictions that provided access to some but "not every person who wishe[d] to attend" a court proceeding. *Id*. at 581 n.18. Here, in contrast, Appellants denied *everyone* access for a period of time. Similarly, in *Vincenty* – not a court access case – the challenged city code provision applied only to certain individuals, *i.e.*, young adults under 21 years of age. 476 F.3d at 77.

meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Given that Appellants produced "scant" evidence to justify their lengthy pre-access review, A539, their practice and policy is not narrowly tailored because "a substantial portion of the burden [on speech] does not serve to advance [the Government's] goals." A542 (citation omitted).

Appellants would fail the TPM test for an additional reason: their process-first practice and policy does not leave open ample alternative channels for communication of the information because after complaints are filed, they will not be seen until Appellants' manual review process is completed. A86; A520, ¶ 14; A525, ¶ 29. As the Ninth Circuit observed in *Planet III*, denying access for processing can never meet this test because "there is only one way [the press] can access new complaints: the court clerk's office." 947 F.3d at 596 n.9. Appellants' assertion that they adequately "'give the public and press access to newly filed complaints as soon as they are entered in the case file,'" which they say is "'timely enough,'" App. Br., 58, relies entirely on a district court decision that has now been reversed (*Glessner*, now *Quinlan*), and a portion of the concurrence in *Planet III* that the majority rejected, 947 F.3d at 596 n.9. Appellants' assertion also ignores the record evidence of the delays in this case, during which time "the

public cannot discuss the content of … complaints about which it has no information" because the press "cannot report on complaints the … [c]ourt withholds" for processing." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) ("*Planet I*"). The circular nature of Appellants' "alternative channels" argument – that delays satisfy the requirement because Appellants believe the delays are justified in the first place – only further serves to illustrate why trying to apply TPM analysis to policies that delay access to complaints is the wrong approach.

B. The District Court Properly Found That Appellants' Practice of Withholding Complaints for Processing Was Not Narrowly Tailored

Appellants seek to justify their practice by relying primarily on Vermont's public access and e-filing rules, including VRPACR 7(a)(3)-(4), as well as VREF 5(d)(1). A521, ¶ 19; A523-24, ¶ 25. But, as the District Court found, the rules do not explicitly require review before access, A522, ¶ 21, and even contemplate post-access review to allow the reviewing clerk, upon discovering an error in a filing, to either remove a non-compliant record from public access or redact it as appropriate. *See* VRPACR 7(a)(3) & (4); A523-24, ¶ 25; A542; A545. Also, Appellants' insistence that they must review for personal identifiers before making cases public ignores that they already implemented a less restrictive way to address their concern, by (i) placing the burden on the filer to redact confidential data

elements, *see* VRPACR 7(a)(1)(a), and (ii) requiring the filer to submit a certification that the filing protects from disclosure to the public any confidential data elements, *see* VRPACR 7(1)(1)(b). As the District Court properly found, "Defendants provide[d] no evidence that these safeguards, combined with post-access review, are insufficient. To the contrary, Defendants' own evidence reveal[ed] that placing the onus on filers has been overwhelmingly effective." A542.[16]

Appellants do not articulate how anyone would be harmed if the press or public saw the "minute fraction of the total complaints filed" that contained confidential information, *i.e.,* 2 out of 4,156 newly filed complaints, *i.e.*, *0.048%.* A541. As the District Court determined, Appellants "cite no evidence that they experienced significant confidentiality breaches prior to the implementation of pre-access review, nor do they cite any court in the country that has found a similar process necessary." A541.[17]

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[16] Contrary to Appellants' contention, the District Court did not "effectively" conduct a less restrictive alternative analysis, whereby it conceived of an imaginable alternative that would be less burdensome on free speech. App. Br., 64-65 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). The District Court focused on Vermont's rules that allowed for post-access review as an added check to the requirements imposed on filing parties the District Court deemed effective, not a hypothetical option.

[17] The practices of other jurisdictions providing timely, pre-processing access to newly e-filed civil complaints confirm that constitutional alternative exists. *See, e.g.*, A83-86, ¶¶ 24-32; A261-62, ¶¶ 6, 8.

Thus, any supposed harm that results from Appellants' practice of denying pre-processing access falls well short of what is necessary to survive scrutiny under *Press Enterprise II* or TPM and to override Appellees' constitutional right of contemporaneous access upon receipt.[18]

Appellants also claim they need to withhold complaints so they can "check[] for a signature, … and comments left by the filer, then confirm[] that the filer correctly designated a … complaint as public, confidential, or sealed, and selected the correct filing codes, filing fee and case type." App. Br., 38-39. Appellants offer nothing to explain why such a review is narrowly tailored to achieving an overriding government interest. When the government infringes protected rights, it must justify that infringement with more than conclusory words. *See Bernstein*, 814 F.3d at 145 ("Broad and general findings and conclusory assertions are

[18] Appellants' reliance on a Federal Judicial Center report, a Fox5 Atlanta article, and a South Dakota law review article referring to a 2003 indictment of seven co-conspirators for obtaining personal information from PACER to demonstrate that unredacted social security numbers displayed 16,811 times in one month alone in federal court, and that court records are a source of identity theft, is misplaced. App. Br., 47-48. The Federal Judicial Center report pertains not only to civil cases, but also bankruptcy and criminal cases, and explains that unredacted SSNs are most often included in motion papers, transcripts, and interrogatory responses – not complaints – while also noting that a large portion of SSNs appear in *pro se* filings, which do not need to be e-filed in Vermont. App. Br., 48; Vt. R. Elec. F. 3(b)(1). The Fox5 article discusses the risk of disclosure of SSNs in only criminal, not civil, cases. And the 2003 indictment referred to in the South Dakota law review article predated the redaction requirement. App. Br., 47.

insufficient to justify deprivation of public access to the record") (internal quotations and citations omitted).[19]

As the District Court held, Appellants did not show that "staff review of filing fees, filing codes and signatures is necessary for ensuring compliance with or to protect the orderly administration of justice," and, indeed, Appellants' e-filing software system performs these same tasks. A541. And because the software performs this initial review, Appellants' contention that Appellees insist on access "with no prior review by anyone of any kind for any purpose" is not accurate. App. Br., 28-29.

C. Appellants' Reliance on CNS Publication Data and on Pandemic-Related Staffing Issues Is Fundamentally Flawed

Appellants lean on CNS Publication Data to justify Appellants' withholding of complaints until after processing. As discussed in Point I.B.2 *supra*, the District Court properly concluded that CNS publication dates are a misleading metric against which to compare Vermont's access dates. A529, ¶ 39. The District Court also correctly concluded that the issue was "not how fast Plaintiffs cover new filings or whether Defendants' delay is comparable to that of other courts, but

[19] Even under TPM, "[t]hat the Government's asserted interests are important in the abstract" is not enough. *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 662, 664 (1994). The government must show a "significant" interest, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), that "the recited harms are real, not merely conjectural…." *Turner*, 512 U.S. at 664.

whether Defendants' pre-access review process is necessary to protect a higher interest and is narrowly tailored to achieve it." A540.

Appellants also suggest that their rollout of e-filing during the pandemic and related staffing constraints should excuse their unconstitutional conduct. But the delays in access addressed in this case are not caused by the effects of the pandemic. In fact, the relief Appellees obtained in this case relieves the clerks of any pandemic-related pressures they face. Illustrative of this fact is that the state courts of New York and Connecticut, which provide pre-processing access upon receipt without any clerical review, continue to provide timely access throughout the pandemic, A268, ¶ 26, as do many other state courts outside the Second Circuit. A85-86, ¶¶ 30-32.

Thus, the District Court correctly found that Appellants' proof in support of their stated interests in the administration of justice and confidentiality is "scant" and that Appellants' "pre-access review thwarts [the objectives of allowing the public to understand the activity of the courts, enhancing the court system's accountability and legitimacy, and informing the public of matters of public concern] in an inconsistent, unpredictable, and unjustifiable manner." A539; A543. The District Court properly concluded that Appellants "failed to sustain their burden to demonstrate that their pre-access review process is justified." A543.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN INJUNCTION

The District Court did not abuse its discretion in issuing an injunction.[20] As the District Court held, "Plaintiffs have established that Defendants are violating their First Amendment right of access to newly filed complaints through the Vermont Superior Courts' pre-access review process and that an 'injunction will prevent the feared deprivation.'" A544 (quoting *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 350 (2d Cir. 2003)). The District Court further explained that irreparable injury is ongoing:

> CNS's reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems.... [T]he public interest in obtaining news is an interest in obtaining contemporaneous news.... Thus, that 'old' news is not worthy of, and does not receive, much public attention has been widely recognized ... [and] the need for immediacy of reporting news 'is even more vital in the digital age,' where timeliness is measured in terms of minutes or seconds.

A544 (quoting *Planet III*, 947 F.3d at 594 (citations omitted)).

The District Court's findings are consistent with the law in this Circuit: "loss of First Amendment freedoms, for even minimal periods of time, normally constitutes irreparable injury." *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir.

[20] An order granting a permanent injunction is reviewed for abuse of discretion. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001).

2008); *see also Bery v. City of N.Y.*, 97 F.3d 689, 693 (2d Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Lugosch*, 435 F.3d at 126 ("'[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment'") (quoting *Grove Fresh.*, 24 F.3d at 897).[21]

Appellants argue that Appellees have not shown irreparable injury because they did not identify any complaint not covered because it was not available on the day of filing. Appellants misconstrue Appellees' fundamental purpose in covering civil litigation, *i.e.*, "CNS is committed to reporting on all newly filed civil cases that meet CNS' reporting criteria and does so whenever cases are made available." A272, ¶ 37.[22]

Appellants' claim that the balance of the equities weighs in their favor also lacks merit. Although the District Court acknowledged that the interest in

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[21] Appellants cherry-pick descriptions of two Vermont cases discussed in a single CNS "New Litigation Report" – one stating "Contract" and the other "Personal Injury" – to argue that CNS' reports are not robust enough to merit First Amendment protection. App. Br., 51. Appellants gloss over the fact that party names and filing lawyers are also included and other cases on the very same page are described in greater detail. A54.

[22] *See also* A93, ¶ 52 ("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."); *Schaefer* trial transcript, A438-39, 560:25-561:2 ("If you don't get [news] when it's fresh, it's like stale bread or stale anything else"); *Forman*, 2022 WL 2105910, at *3 ("[A]s [CNS] more colorfully put it, it's called 'news' not 'olds.' Thus, by the time [CNS] learns of many of the civil complaints filed …, their newsworthiness has already faded.") (internal citations omitted).

protecting privacy is important, it "'does not … trump the First Amendment right of access unless the pre-access review process is also narrowly tailored and essential to preserve higher values.'" A540 (quoting *Bernstein*, 814 F.3d at 144). As the District Court held:

> In this case, the balance of hardships tips in Plaintiffs' favor 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.' *NY. Progress & Prot. PAC [v. Walsh]*, 733 F.3d [483,] 488 [(2d Cir. 2013)]. Correspondingly, '[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.' *Agudath Israel of Am. [v. Cuomo]*, 983 F.3d [620,] 637 [(2d Cir. 2020)].

A544.[23]

Contrary to Appellants' claim, the District Court did not enjoin Vermont's rules. The injunction addressed "only the specifically challenged pre-access review process" and "le[ft] internal procedures to the Vermont Superior Courts…" A545. This type of injunction "in no way restricts or comments on the regulations

[23] Appellants allege that as a result of the District Court's injunction, "Vermont courts now have no way to proactively protect the privacy of parties and witnesses in newly filed civil complaints….." App. Br., 28. Not so. The requirement that filers redact confidential information is "overwhelmingly effective." A541-42. To the extent Appellants suggest there are documents besides complaints that include nonpublic information – 66 instances of nonpublic information "across all filing types" (App. Br., 63) – those documents are not the subject of this action or the Court's injunction.

that are in place for [Appellants] to review and accept for filing ... complaints when they are filed." A545 (quoting *Tingling*).

Finally, there is no merit to Appellants' contention that the public interest in maintaining its e-filing process and related rules, which Appellants and amicus contend were the result of an extensive deliberative process, weighs against an injunction. As the District Court emphasized, Appellants "may continue to restrict public access post-filing where a potential violation of their filing rules has been found." A545. Appellants and amicus claim that the District Court's injunction precludes Vermont from promulgating any rule regarding pre-access review, but the injunction does not preclude any such hypothetical rule, which would still be subject to constitutional scrutiny.[24]

[24] Amicus contend that the District Court's injunction has created implementation challenges by creating a two-track system, one for complaints and one for other filings, and has sometimes caused filers to be reassessed a $14 filing charge by the software company. These alleged facts post-date the Order, are not part of the record and should be disregarded. *See, e.g., U.S. v. Apple Inc.*, 787 F.3d 131, 135 n.1 (2d Cir. 2015) (declining to consider an alleged "development" that was "not in the record"). To the extent these new arguments could have been raised below, they should not be considered. *Spinelli v. Nat'l Football League*, 903 F.3d 185, 198-99 (2d Cir. 2018). Further, the "Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And it is inconceivable that Appellants' e-filing system cannot easily fix any software glitches or isolate the civil complaints that are subject to the injunction for public access prior to administrative review. *See, e.g., Forman*, 2022 WL 2105910, at *15 (noting that software can be adjusted to easily filter filings).

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLEES' CLAIM WAS NOT MOOT

The District Court properly exercised its discretion in rejecting Appellants' argument that it should have dismissed this case as moot. Appellants claim that at the time of ruling they were in the midst of centralizing the review process for civil filings as part of a "long-term plan" which purportedly will reduce review times, App. Br., 64, 67, but no commitment was, or has been, made to provide contemporaneous access to newly filed non-confidential civil complaints as a result of such centralization; new complaints will continue to be reviewed by clerks before being made available to the press and public. For this reason alone, Appellants' mootness argument fails.

Appellants allege that during the period July 26, 2021 through September 26, 2021 centralization began to yield improved average access times. But even considering slight access improvements, as the District Court found, "newly filed complaints still sit in electronic queues, sometimes for days, waiting to be reviewed and processed before being made public [internal citations omitted]." A533.[25] Significantly, "Defendants do not claim pre-access delay has ceased; they

[25] While Appellants contend that recent data showed a 95% access average within the "next business day," the "next business day" metric means that a Friday filing that is not available until Monday or Tuesday (after a holiday weekend), three or four days later, would qualify as same business day. Also, the 95% figure which represents an average does not reflect wide swings on given days and in the various courts.

merely assert they are working on the Odyssey rollout and a centralization process and should be afforded additional time to complete those tasks." A533.[26]

As the District Court acknowledged, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." A532 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). "Instead, 'a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" A532 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). *See also Fed. Defenders of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 126-27 (2d Cir. 2020) (quoting *Already, LLC*, 568 U.S. at 91). Appellants have not satisfied this burden.

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[26] *Cf. Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 375 (2d Cir 2004), cited by Appellants, in which the court declared a dispute moot as the result of a statutory amendment. No such amendment has occurred here. Although Appellants' brief notes that the Vermont Supreme Court issued an "emergency order" revising Rule 5(d) of the Vermont Rules of Electronic Filing to "cease[] pre-access review of civil complaints," Appellants admit that that emergency order will only be in place "so long as the district court's injunction is in place." App. Br., 27. The order likewise states that "these amendments will cease to be in effect if the injunction is terminated or modified." https://www.vermontjudiciary.org/sites/default/files/documents/EMERGENCYPROMULGATEDVREF5%28d%29--STAMPED%20%28003%29.pdf

In affirming the rejection of a mootness argument where defendants had improved access prior to trial, *Schaefer* made clear that "absent the relief Courthouse News sought, 'nothing bars [Appellants] from reverting' to the allegedly unconstitutional rates of access in the future." 2 F.4th at 323-34 (citation omitted); see also *Planet III*, 947 F.3d at 598, n.10. Thus, "[w]henever 'a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot.'" *Schaefer*, 2 F.4th at 323 (citation omitted).

V. THE DISTRICT COURT CORRECTLY DECLINED TO ABSTAIN

Invoking general principles of comity, equity, and federalism, Appellants insist that the District Court should have abstained, but they ignore more salient principles that (i) "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress[,]" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and therefore (ii) "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Dittmer v. Cnty of Suffolk*, 146 F.3d 113, 116 (2d Cir. 1998) (quoting *In re Jt. E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996)). Abstention is an "extraordinary" exception to the general rule that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *New*

Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 358 (1989) ("*NOPSI*") (citation omitted).

A. Appellants Cannot Fit This Case into *Younger* or *O'Shea*, and Misapprehend Second Circuit Jurisprudence Limiting Abstention to Exceptional Circumstances

Adhering to Supreme Court and Second Circuit guidance, the District Court correctly concluded that this case does not qualify for abstention because it "does not fit within traditional abstention categories," and "it will neither result in piecemeal litigation, nor require continuing federal oversight of state court proceedings…." A536. In reaching that conclusion, the District Court emphasized:

> [T]he Supreme Court has recognized some "carefully defined" situations in which courts may abstain. To ensure that abstention remains "the exception, not the rule," federal courts may abstain only if a case falls into one of these "specific doctrines[.]"

A534 (quoting *Schaefer*, 2 F.4th at 324 (affirming district court's rejection of abstention) (citations omitted)). *See also Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998) ("We have carefully defined . . . the areas in which such 'abstention' is permissible, and it remains 'the exception, not the rule.'") (quoting *NOPSI*, 491 U.S. at 355).

Appellants rely on *Younger v. Harris*, 401 U.S. 37 (1971), and its successor *O'Shea v.Littleton*, 414 U.S. 488 (1974), but fail to recognize that *NOPSI* held "concern[s] for comity and federalism" do not allow extension of *Younger* beyond

where there is a pending state "proceeding to which *Younger* applies" because "[s]uch a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." 491 U.S. at 367-68.

In *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013), the Supreme Court made clear that *Younger* and its progeny permit abstention only in three "exceptional" categories: ongoing state criminal prosecutions, certain civil enforcement proceedings, and pending "civil proceedings involving certain orders…uniquely in furtherance of the state courts' ability to perform their judicial functions." 571 U.S. at 73 (citation omitted). Here, it is undisputed that there is no pending state proceeding affected by the relief sought. Thus, "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Dittmer*, 146 F.3d at 116 (quoting *In re Jt. Eastern & Southern Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996)).

Two other circuits have rejected requests to abstain in similar cases: the Fourth Circuit in *Schaefer*, 2 F.4th at 324-25, and the Ninth Circuit in *Planet I*, 750 F.3d at 790-92. Moreover, the leading Second Circuit authority on abstention in First Amendment cases, *Hartford Courant*, 380 F.3d at 100, in which the plaintiffs asserted a First Amendment right to inspect state court docket sheets, found that none of the abstention doctrines applied because "the weight of the First

Amendment issues…counsels against abstaining," concluding that withholding access to docket sheets violated the right. *Id.* at 100-01. *See also Planet I*, 750 F.3d at 787 ("We disfavor abstention in First Amendment cases because of the 'risk . . . that the delay that results from abstention will itself chill the exercise of the rights that the plaintiffs seek to protect by suit'") (citing *Hartford Courant*, 380 F.3d at 100).

Unlike *O'Shea*, "[t]he relief sought … would not invade any state court proceedings, ongoing or future," would "not require continuous federal policing" and "would not excessively entangle a federal court in the states' own internal affairs." *Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196, 207 (E.D. Va. 2019), *aff'd*, 2 F.4th 318 (4th Cir. 2021). *See also Planet III*, 947 F.3d at 591 n.4; *Pepin*, 566 F. Supp. 3d at 1168; *Tingling*, 2016 WL 8739010 (A148-49); *Courthouse News Serv. v. Forman*, 2022 WL 1405907, at *10 (N.D. Fla. May 4, 2022); *Omundson*, 2022 WL 1125357, at *9; *Courthouse News Serv. v. Price*, 2021 WL 5567748, at *6 (W.D. Tx. Nov. 29, 2021).

The Second Circuit cases cited by Appellants are inapposite. The Second Circuit did find abstention appropriate in *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006), where the plaintiffs challenged the New York state judicial appellate panel assignment procedures and proposed that the federal court mandate a new system for panel assignments, because "any state court litigant dissatisfied with the

panel of judges assigned to his or her appeal – could raise compliance issues under the putative federal injunction [and that] [s]uch challenges would inevitably lead to precisely the kind of 'piecemeal interruptions of . . . state proceedings'" condemned in *O'Shea.* *Id*. at 87.

Disability Rights v. New York, 916 F.3d 129 (2d Cir. 2019) involved New York's Surrogate's Court Procedure Act and sought a declaration that the statute violated due process and equal protection, and an injunction requiring defendants, the State's Chief Judge and Chief Administrative Judge, to dictate specific actions in guardianship proceedings, such as providing notice, applying a certain burden of proof, and affording substantive and procedural rights. *Id.* This Court affirmed abstention because the intervention sought was akin to "'an ongoing federal audit'" of future state judicial proceedings, *id*. at 134 (quoting *O'Shea*, 414 at 500), stating that the injunction sought "would have federal courts conduct a preemptive review of state court procedure in guardianship proceedings, an area in which states have an especially strong interest." *Id*. at 136.

The District Court properly concluded:

> There is no risk of "case-by-case implementation[,]" *Kaufman*, 466 F.3d at 87, because the remedy here is "more akin to [a] bright-line finding . . . than [an] ongoing monitoring of the substance of state proceedings[,]" and because "[a]n injunction requiring the [state courts] to provide . . . access to filed . . . civil complaints poses little risk of an `ongoing federal audit' or `a major continuing intrusion of the equitable power of the federal courts into

> the daily conduct of state . . . proceedings.'" *Courthouse News Serv. v. Planet*, 750 F.3d 776, 791-92 (9th Cir. 2014) (quoting *O'Shea*, 414 U.S. at 500).

A536.

Moreover, unlike the instant case, *Kaufman* and *Disability Rights* did not involve First Amendment issues. Nor did *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975) or *Fishman v. Off. of Ct. Admin. New York State Courts*, 2021 WL 4434698 (2d Cir. 2021), also cited by Appellants. *Wallace* granted abstention because the relief sought and order granted would have required "continuous reporting on the [state court] judges' bail and sentencing actions…." 520 F.2d at 405-06. And this Court affirmed abstention in *Fishman* where plaintiff challenged New York Family Court's final child custody rulings and the rulings in pending matters, concluding that a federal court should not interfere with ongoing family court proceedings involving divorce, child visitation and related matters. 2021 WL 4434698, at *2.[27]

B. Appellants Misguidedly Rely on *Brown*

Appellants' brief reads as though the Seventh Circuit's decision in *Brown* represents the entire universe of relevant abstention law. But the District Court made clear it did not find *Brown* persuasive, noting that the Seventh Circuit

[27] The Second Circuit cases cited by amicus also are inapplicable. They either involved attempts to micromanage state court proceedings, which is not present here, or, in one case – *Bethpage Lutheran Serv., Inc. v. Weicker,* 965 F.2d 1239 (2d Cir. 1992) – application of the *Burford* abstention doctrine, not advanced by Appellants, to an effort to require the state to specify future funding levels under complex and extensive Medicaid regulations necessitating state expertise.

conceded that "none of the 'principal categories of abstention' were applicable but nonetheless found abstention 'avoid[s] the problems that federal oversight and intrusion . . . might cause.'" A534 (citing *Brown,* 908 F.3d at 1071). Indeed, *Brown* acknowledged that the case was "not a perfect fit" into any recognized abstention doctrine, 908 F.3d at 1071-72, but adopted the notion of free-form abstention based on general principles of comity and federalism, advocated by Appellants here.[28]

The District Court deemed *Brown* an "outlier," A535, because it did not involve an ongoing federal audit or interference with the adjudication of the merits of ongoing or future state court cases.[29] The District Court noted that *Disability Rights* cited *Brown* with approval, but concluded that *Disability Rights*

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[28] *Brown* did not even mention *Sprint*, which limited *Younger* and its progeny (such as *O'Shea*), and did not follow *NOPSI*, only mentioning that case as it was quoted in others. *Brown*, 908 F.3d at 1071, 1073. *Brown* also relied on *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010) to reach its decision, which *Brown* described as "not being a typical *Younger* scenario." 908 F.3d at 1072-73. But *SKS* was typical in the way that matters: it affirmed abstention under *Younger* where there *was* pending state court litigation, and thus adjudication in federal court while state court proceedings were pending would "run contrary to the 'vital' considerations of comity and federalism." 619 F.3d at 679

[29] The District Court also deemed an outlier *Courthouse News Serv. v. Gilmer*, 543 F. Supp. 3d 759, 769 (E.D. Mo. 2021), *appeal filed,* No. 21-2632 (8th Cir. July 23, 2021), where the Eastern District of Missouri followed *Brown*, neglecting to consider the factors under *Younger*, and abstained because it did not want to "dictate, oversee, or otherwise insert itself into the . . . operations and administration of its co-equal Missouri state courts." 543 F. Supp. 3d at 769.

"represented the same threat of 'ongoing, case-by-case oversight of stated courts' present in *Kaufman*," and that this case did not require "the piecemeal disruption to and intervention in state proceedings" contemplated in those cases. A536.

Other courts have concluded that *Brown* improperly relied on *O'Shea*, where "[t]he relief sought … would not invade any state court proceedings, ongoing or future," would "not require continuous federal policing" and "would not excessively entangle a federal court in the states' own internal affairs." *Schaeffer*, 429 F. Supp. 3d at 207, *aff'd*, 2 F.4th 318, 325 n.2 (4th Cir. 2021); *Planet III*, 947 F.3d at 591 n.4; *Omundson*, 2022 WL 1125357, at *7-8 (D. Idaho Apr. 14, 2021); *Pepin*, 566 F. Supp. 3d at 1168; *see also Planet I*, 750 F.3d at 790-92 ("district court erred by finding that [CNS'] requested relief would impose an ongoing federal audit of the Ventura County Superior Court") (internal quotation marks omitted); *Tingling*, 2016 WL 8739010 (A) (relief CNS seeks "does not present the level of intrusive relief sought in [the] cases cited by the clerk"). In each of those cases, after similar orders issued in CNS' favor, clerks provided timely access without any federal supervision, let alone a federal audit, and no further court action. A89-92, ¶¶ 41, 43-50.[30]

[30] Amicus' contention that this case is distinguishable from *Tingling, Schaefer, Planet III*, and *Hartford Courant* because it involves a "practice required by a rule promulgated pursuant to a state court's constitutional rulemaking authority" App.

Finally, there is no merit to Appellants' argument that the pressures of e-filing rollout and implementation compel abstention. App. Br., 25-26. The sole cause of the delay was Appellants' insistence on manual pre-access review. As the District Court recognized, "but for the pre-access review process, there would be no delay" and "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." A540 (citation omitted).

The District Court correctly declined to abstain. A537.

CONCLUSION

As this Court observed in *Lugosch*, news is fleeting, and delayed disclosure undermines public scrutiny and may have the same effect as total suppression. Appellants' practice of manually reviewing newly e-filed non-confidential civil complaints caused inordinate delays in access to those pleadings. The evidence presented at trial established that there was no good reason for these undisputed delays and that the onward march of technology need not, and should not, take public access backwards. Technology can and should be used to keep the proceedings in a critical institution of democratic governance open to the people. Accordingly, this Court should affirm the Order of the District Court.

Br., 19, n.12, ignores that this case "does not fit within traditional abstention categories." A536-37.

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