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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

3 COURTHOUSE NEWS SERVICE,
4 Plaintiff,

5 v. 16 Civ. 8742 (ER)

6 MILTON TINGLING,
7 Defendant.
8 -----x

Argument

9 New York, N.Y.
10 December 16, 2016
11 3:00 p.m.

12 Before:

13 HON. EDGARDO RAMOS
14 District Judge

15 APPEARANCES

16 BRYAN CAVE LLP
17 Attorneys for Plaintiff
18 BY: WILLIAM J. HIBSHER
19 JACQUELYN N. SCHELL
20 DANIEL H. LEWKOWICZ

21 LEE A. ADLERSTEIN
22 Attorney for Defendant

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1 (Case called)

2 THE COURT: Good afternoon. Everyone can be seated.

3 This matter is on for a show cause hearing for
4 preliminary injunction brought by Courthouse News Service
5 seeking to enjoin the clerk of the court of the New York State
6 Supreme Court, New York County, from essentially withholding
7 newly filed complaints while certain administrative tasks are
8 conducted.

9 We will begin with you, Mr. Hibsher. You can remain
10 seated if you wish. If you have a microphone, speak directly
11 into the microphone. Or you can stand, as you wish.

12 MR. HIBSHER: Thank you, your Honor. Your Honor,
13 Courthouse News Service reports on civil cases filed in federal
14 and state courts throughout the country. With the Court's
15 permission, I would like to reserve some rebuttal time for
16 after my adversary speaks.

17 THE COURT: Sure.

18 MR. HIBSHER: Thank you.

19 Until the advent of electronic filing in the New York
20 State courts, CNS had access to nearly all civil complaints by
21 the end of each day on which they were filed. But with
22 e-filing, perhaps counterintuitively, there are now substantial
23 delays in access to newly filed cases in New York supreme. New
24 York supreme is one of the country's most prolific and most
25 important courts. On average, CNS sees less than two-thirds of

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1 the cases filed. One out of three cases filed each day are
2 withheld from CNS and from the public. Often the delay is
3 greater than one day.

4 THE COURT: Is it ever greater than one day if it's a
5 regular workday, not a weekend or a holiday?

6 MR. HIBSHER: Yes, your Honor. The sampling that we
7 provided in both the complaint and in the Angione affidavits
8 lists the numbers of complaints that are produced on the same
9 day. Then there is a second column in paragraph 24 of the
10 Angione affidavit which says one-day delay, and then a third
11 column which says third-day delay.

12 For example, on January 12th, 2016, which was a
13 Tuesday, 58 percent of the cases were made available to the
14 public and the press on the same day but 42 percent of those
15 Tuesday cases were not. The sampling that we provided shows a
16 number of instances in which weekday filings were not made
17 available on the same day.

18 THE COURT: I asked whether it took more than a day.
19 Using that example that you just provided, were there any cases
20 that were withheld until the Thursday, say?

21 MR. HIBSHER: I think the several-day delays occurred
22 on weekends and/or holidays joined by weekends. Usually, it's
23 a next-day filing. As you know, this is a sampling. We did
24 not go through every single filing comprehensively. Here we
25 are on January 22nd. 69 cases were filed. That must have been

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1 a Friday, your Honor.

2 I can go through the data and supplement my remarks
3 with a response to that question, but as I stand here, I don't
4 know for sure whether the delays in filings on nonweekend and
5 holiday days were greater than one day.

6 THE COURT: That is my understanding. If that is the
7 case, you're getting every complaint within 24 hours, say?

8 MR. HIBSHER: Cases are filed in the morning. I think
9 it would be better to say that we are getting cases filed on
10 non-Friday weekdays that do not precede a holiday by the end of
11 business the next day. It may not be 24 hours. It may be 30
12 hours or more. I'm splitting hairs, but I want to be clear
13 about what the delay is.

14 The delay is important. It may not seem like a major
15 delay, but access to judicial documents is essential to public
16 understanding the court process. This is a concept that has
17 been developed by a number of cases, beginning in 1980 with the
18 Supreme Court's Richmond News and culminating with the
19 Bernstein decision in the Second Circuit this year, which made
20 clear that complaints are entitled to constitutional access
21 under the First Amendment.

22 Despite the nature of the delay, it is well known that
23 news quickly goes stale. It is the function of the press to
24 report on news promptly largely because the news worthiness of
25 a story is often fleeting. The loss of a First Amendment right

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1 of access to court documents, which we think Bernstein clearly
2 establishes here, even for minimal periods, constitutes
3 irreparable injury under the First Amendment.

4 Those lines are not just my words. Those lines are
5 taken from the Supreme Court and the Second Circuit cases,
6 which we cited in our brief.

7 THE COURT: Is there authority within the Second
8 Circuit that defines how quickly access has to be provided?

9 MR. HIBSHER: Lugosch in the Second Circuit referred
10 to immediate access. Bernstein quotes Lugosch and says once a
11 First Amendment right of access attaches, the access must be
12 immediate. The Supreme Court uses the word "immediate." Fresh
13 Grove in the Seventh Circuit, one of the leading cases in this
14 area, uses the words "immediate" and "contemporaneous."

15 There are no cases in the Second Circuit which parse
16 this particular factual issue, but Bernstein makes clear that a
17 complaint is entitled to First Amendment protection. All of
18 the cases dealing with First Amendment access, whether they
19 arise in connection with sealing or with limited access to
20 certain kinds of judicial proceedings, all talk about the First
21 Amendment right of access being one that is immediate.

22 When we are talking about the media and the fleeting
23 nature of the news, and particularly when we are in a setting
24 like New York City, which is the media capital, and a court
25 like the supreme court in New York County, where so many of the

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1 cases are of incredible importance, a delay of one day is
2 really a news cycle.

3 We put into our moving papers three newsworthy
4 examples of cases which were filed on one day. Trump v.
5 Univision was one. The filing attorney received a received
6 stamp from the system that receives electronically filed
7 documents, and within an hour or two a page 6 online New York
8 Post had a story of Trump suing Univision for its cancellation
9 of the of the Miss Universe pageant. The Courthouse News
10 Service and the public did not see that case for 22 hours.

11 THE COURT: You just said the New York Post ran the
12 story.

13 MR. HIBSHER: It did.

14 THE COURT: So the public therefore had access to the
15 story.

16 MR. HIBSHER: The public that reads New York Post had
17 it. But the single media outlet was fed that unprocessed and
18 unofficial copy of the complaint. We have copies of it in our
19 reply declarations which show the copy that the lawyer who
20 filed it received on the day it was filed as well as the
21 official copy 22 hours later the next day.

22 The lawyer who filed that complaint undoubtedly fed
23 that complaint to the media outlet of his or her choice. Did
24 it become public after the lawyer did that? Perhaps. But
25 Courthouse News Service, which has hundreds of subscribers,

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1 many of which are media outlets, did not have that case
2 available and was questioned by many of its subscribers as to
3 why it did not.

4 THE COURT: Why is that of First Amendment
5 significance? I understand that if the complaint had not been
6 made available at all. But the fact that a newspaper had it
7 and made it available immediately, doesn't that assuage the
8 concern that the public not have access to it?

9 MR. HIBSHER: On the contrary. The fact that a
10 litigant or a lawyer can feed a filed complaint, which is a
11 judicial document and to which he has received a received
12 stamped from the court, can feed that document to a media
13 outlet of choice is a kind of unevenhandedness that I believe
14 the First Amendment seeks to eliminate.

15 THE COURT: Do you think that the First Amendment
16 seeks to create a level playing field for newspapers, radio
17 stations, news outlets, etc.?

18 MR. HIBSHER: I think the law considers the press to
19 be a surrogate for the public. It doesn't discriminate. It
20 considers the press in general to be a surrogate for the
21 public, and I think there is an assumption that the press will
22 be treated evenhandedly. I have not seen a case which parses
23 this particular issue out.

24 THE COURT: I asked the series of questions because
25 you appear to base your argument at least in part on the fact

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1 that Courthouse News Service is being harmed. But it will
2 always be the case that a litigant will or may favor one media
3 outlet or another. There is certainly nothing that courts can
4 do about that, whether you are getting immediate access or not.
5 For example, a litigant can give a draft of a complaint that is
6 going to be filed to a favored reporter.

7 MR. HIBSHER: This is true. The difference, however,
8 is this when a litigant gives a draft of a complaint, whether
9 it is to encourage settlement or for any other reason, that
10 litigant is giving an unofficial copy of the complaint. The
11 litigant does not have the protection of the privilege that one
12 gets when one has filed information in a publicly filed
13 complaint. The recipient has no certainty that the complaint
14 will ever be filed. And that is a process that we have seen
15 since litigation began. Drafts of complaints are exchanged for
16 all sorts of reasons.

17 When it is an official court document -- Bernstein
18 makes this very clear -- a First Amendment right attaches at
19 the moment that it becomes an official court document. Cases
20 that we cite in our brief are really eloquent in talking about
21 the press's role in informing the public and particularly
22 informing the public on the institution of the judiciary.

23 The news cycle is fleeting. When there is a delay of
24 one day or when a litigant is allowed to provide a copy of an
25 official court document that he has received a stamp on but the

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1 public has not yet seen to a particular news outlet, we believe
2 that creates a First Amendment violation.

3 THE COURT: Why are you here alone? Why is CNS here
4 alone?

5 MR. HIBSHER: Your Honor, we have litigated this issue
6 in several federal courts around the country. We talked in our
7 papers about the Central District of California case called
8 Planet, a Southern District of Texas case as well. In some of
9 those cases amici have come in that have been representatives
10 of the press. The Planet case went to the Ninth Circuit two
11 times. And there were numerous representatives of news
12 organizations that joined those cases.

13 At this stage, particularly in the preliminary stage,
14 we did not reach out to news organizations to try to solicit
15 that interest. We were hopeful that the issues that we
16 articulate in this case would be resolved amicably. We talk
17 about our efforts to do that in our papers, and we continue to
18 be hopeful that that is a possibility.

19 THE COURT: You say preliminary. Certainly it is
20 preliminary at least at the stage of this litigation. But the
21 papers that you submitted indicate that you have been trying to
22 get the clerk to provide you with this access going back to at
23 least I think it was July of last year.

24 MR. HIBSHER: Correct.

25 THE COURT: Were any efforts made to bring in fellow

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1 newspaper --

2 MR. HIBSHER: No, your Honor, we have not made an
3 effort in this jurisdiction toward that end. It is possible,
4 if this case continues, that this will be an issue that we will
5 certainly make other media aware of. That may follow. But we
6 have not made that effort, we have not been turned down. That
7 is the status on that one.

8 THE COURT: You provide in your papers comparisons of
9 what other courts do, including this court and other states
10 around the country. Can you give me a rundown, one or two, of
11 what the other New York City counties do.

12 MR. HIBSHER: All the counties in New York City follow
13 the processing rules that are followed here. By "here" I mean
14 New York supreme. This is a statewide issue. The numerosity
15 of filings and the importance of filings in New York County far
16 outweigh any of the other counties in New York State.

17 THE COURT: If I issue the injunction that you
18 request, who will it affect? What courts will it affect?

19 MR. HIBSHER: It will affect New York supreme court,
20 your Honor, and it will affect the clerk of New York County.

21 THE COURT: All right.

22 MR. HIBSHER: Your Honor, the defendant in their
23 responding papers does not deny that his administrative
24 processing causes delays, nor does he take issue with the
25 sampling data that we included in our moving papers, though he

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1 characterizes it as misleading.

2 THE COURT: And exaggerated.

3 MR. HIBSHER: And exaggerated. He talks about the
4 numbers of weekend filings that are included in our sampling.
5 We believe that once the court allows electronic filings after
6 hours and on weekends and once the filings that occur during
7 those times become official court records, as they do
8 instantaneously when they receive a received stamp and the
9 statute of limitations is tolled under the law, that we have a
10 right to see those documents. In the end, relatively few cases
11 are filed on the weekend. I think weekends and holidays only
12 constitute about 3 percent of all of the cases filed.

13 THE COURT: If I read the papers correctly, the New
14 York supreme court closes at 5:00.

15 MR. HIBSHER: Correct.

16 THE COURT: But you may still file complaints
17 electronically after 5 o'clock.

18 MR. HIBSHER: 24-7, your Honor.

19 THE COURT: Including weekends?

20 MR. HIBSHER: Including weekends and holidays.

21 THE COURT: As I understand it, if you file
22 electronically after 5:00 p.m. on a particular day, the
23 complaint is deemed filed as of the following business day. Am
24 I correct about that?

25 MR. HIBSHER: No, your Honor. It is deemed filed as

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1 of the moment that you electronically file it.

2 THE COURT: What access do you want? If something is
3 filed at 8 o'clock in the evening or on a Sunday morning, what
4 are you looking for with respect to those filings?

5 MR. HIBSHER: We would like to see those complaints as
6 we do in this courthouse and in the vast majority of federal
7 courts where the complaints go on to PACER for the entire world
8 to see.

9 The defendant is concerned about revealing complaints
10 that may not have been processed because some of those
11 complaints may have incorrect venues or they may be matrimonial
12 actions that are filed in New York supreme improperly. Our
13 response to that is that there are safeguards in place when you
14 file electronically that alert the filer and there are laws in
15 place that place the burden on the filer to redact personal
16 information and to make certain that a matrimonial action is
17 not filed.

18 What we are asking for here is not Internet
19 instantaneous access. What we are asking for is timely access
20 upon filing. Traditionally, the press room at New York supreme
21 stays open long after the courthouse closes. There is a
22 terminal in that press room. It is the very same terminal onto
23 which cases, after they are processed, flow.

24 What we are asking the defendant to do is to make
25 cases that are filed with the Court and are official court

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1 documents available to the press and public upon receipt in a
2 timely way. That is the injunction that the district court in
3 Planet in the Central District of California issued.

4 In the Jackson case in the Southern District of Texas
5 the court issued an injunction requiring the clerk to provide
6 same-day access. In Planet the judge issued an injunction that
7 required the court to provide timely access but precluded
8 administrative processing before access and effectively
9 provided same-day access. That is what we are seeking here.

10 THE COURT: I'm just trying to see what an injunction
11 would look like. If something is filed on a Sunday morning --
12 I know this building is open 24-7.

13 MR. HIBSHER: The press room in this building is open
14 24-7.

15 THE COURT: What is the story across the street? Does
16 the building shut down?

17 MR. HIBSHER: The building shuts down at 5:30, when
18 the last security guard leaves. But people are allowed to
19 remain in the supreme court building, and there is an exit
20 which people who stay late use, including members of the press
21 who are in the building before the closes and who stay late.

22 THE COURT: For a Sunday morning filing, Sunday
23 morning electronic filing, are you requesting that the building
24 be open for the press or remain open for the press?

25 MR. HIBSHER: Not necessarily. That filing can be

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1 made available electronically, and it could be made available
2 just to credentialed reporters.

3 THE COURT: Off-site, remotely?

4 MR. HIBSHER: Off-site. It could be done on-site.
5 But we are not asking the court to open its doors at 8 o'clock
6 on Sunday.

7 THE COURT: Do you have that access now, remote
8 access?

9 MR. HIBSHER: We have remote access to the official
10 filings now on the New York State website where cases flow, and
11 we have access in the press room to cases that are processed.
12 What we would ask for is either on-site or remote access. It
13 doesn't have to be made available to the public until the clerk
14 of the court has an opportunity to do whatever processing it
15 deems necessary, and those cases which have been filed with the
16 court and are judicial documents would be made available to the
17 press in that manner.

18 It is not exactly what you have in the Southern
19 District, where cases flow immediately onto PACER for the world
20 to see 24-7. We would be very content with something sub-
21 stantially less than that. Our issue here is not that we put
22 these cases on the Internet for the world to see.

23 The kinds of data that the clerk says in his papers he
24 is concerned about catching, like improper venue cases stamped
25 Kings County supreme and somehow the lawyer files it in New

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1 York supreme, we would get to see that under the injunction
2 that I propose, and the clerk of the court would have an
3 opportunity after it goes public to do whatever the clerk of
4 the court needs to do to claw that back or to inform the filer
5 that it was a Kings County document improperly filed.

6 THE COURT: I take it, and I think you made a
7 reference to it in your papers, that New York State laws, court
8 rules, applicable regulations put the onus on the litigants to
9 make sure that that type of information -- Social Security
10 numbers, identities of minor sexual abuse victims, for
11 example -- that type of information is not put in filings or,
12 if it is, it is put in some redacted fashion, correct?

13 MR. HIBSHER: Correct. The same sort of rules exist
14 in the federal system, which put the burden on the filer to
15 redact privacy information. When one files in the state
16 system, in New York supreme, one is repeatedly reminded about
17 the redaction rules. One has to check a box saying that I have
18 read the redaction rules and I have complied with those rules.

19 THE COURT: If you want to file electronically a
20 matrimonial matter, could you?

21 MR. HIBSHER: We appended to the reply affidavit
22 screenshots of what the filer sees. The categories do not
23 include matrimonial. I asked my colleagues, who do this all
24 the time, that very question: could you file a matrimonial
25 action if you really wanted to? The answer is perhaps. You

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1 might check off tort and file a matrimonial action as a tort.
2 Under the proposal that I am asking your Honor to order, that
3 is a matrimonial action that would then be made available to
4 the press.

5 However, this is a First Amendment case. There is a
6 First Amendment right of access that has attached. The law is
7 very clear that once that occurs, the burden shifts to the
8 defendant to show that he has an overriding interest, that that
9 interest is essential to preserve higher values, and that is
10 narrowly tailored to preserve that interest.

11 The defendant has to come forward with facts to
12 illustrate the harm that he has hypothesized in his papers. He
13 is the filer. Presumably he has the data on the errant filings
14 that he describes in his complaint. He has the numbers on the
15 matrimonial actions that have erroneously been filed, e-filed,
16 in state supreme court and would, had the clerks of his
17 department not caught them, have been made public in violation
18 of the law.

19 THE COURT: How many are there, do you know? Do you
20 have a sense of how many actions are picked up by this review
21 process that the clerk goes through?

22 MR. HIBSHER: I do not have a sense because the
23 defendant's papers are completely silent on any data at all.
24 The cases which we cite make very clear that the harm that they
25 allege in support of a process that prevents access under the

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1 First Amendment has to be provided, has to be illustrated with
2 empirical evidence. There is no data whatsoever in their
3 papers. They have not met a key element of their burden to
4 show what this harm is.

5 THE COURT: Even assuming for the sake of argument
6 that filing something improvidently because of venue would
7 equal the value of allowing the press prompt access, assuming
8 those two values -- poor venue, First Amendment access -- are
9 essentially equal, for the sake of argument we don't have a
10 sense as to whether or not people are filing in the wrong venue
11 so often that it begins to trump the First Amendment right?

12 MR. HIBSHER: I do not have any sense of numerosity.
13 Having gone through the filing instructions several times now,
14 I would be very surprised if very many matrimonial actions are
15 filed as tort actions or real estate actions or any other
16 actions in New York supreme.

17 THE COURT: What about the situation where the
18 administrative review picks up a Social Security number, say?

19 MR. HIBSHER: Good example. There is a specific law
20 in New York that puts the burden on the filer to redact that
21 information, which we cite in on you papers. The e-filing
22 prompts make very clear that Social Security numbers and other
23 private information has to be redacted and reminds the filer --
24 who is typically an attorney who has an account with the court
25 system; when he presses that submit button, he has to have an

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1 account -- reminds the attorney that he has to comply with
2 those redaction rules.

3 As I read the defendant's declaration in this case, I
4 must say I do not see a declarative statement that the
5 defendant's office reviews the pages of a complaint to find out
6 if they contain Social Security numbers or other private
7 information. They certainly suggest that they review papers
8 for venue and for attorney's signature and for proper captions
9 so the captions don't say "et al."

10 Attorney's signatures are taken care of in the
11 e-filing system because when you press submit, you are effect-
12 ively signing the document. In the old days the cashier
13 collected your fee for the index number. The electronic system
14 is accomplishing that task as well.

15 The kind of thing that the statute which he cites
16 might require him to review, something like improper venue, is
17 the sort of thing that we believe could not possibly override
18 the First Amendment entitlement that we have.

19 THE COURT: I think they either said this or suggested
20 this in this their papers, and I will ask them the same thing.
21 Part of your argument is that before e-filing, CNS and other
22 news organizations had same-day access to all of the complaints
23 that were filed on a particular day prior to the type of
24 processing they are doing now and not letting you see until
25 they process?

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1 MR. HIBSHER: Let me clarify. The defendant took
2 issue with a certain part of that contention in our moving
3 papers. What we are saying is that prior to e-filing we saw
4 virtually 100 percent of all the filings on the same day. The
5 system was that if you were a lawyer, if you were a clerk at a
6 law firm, you went up to the cashier's office, you paid your
7 money, you handed that cashier your papers.

8 The cashier might have done a quick, cursory review,
9 might have looked at venue, for example, and said, counselor,
10 this says Kings County, go across the river, collected your
11 money. They might have looked for an attorney's signature.
12 But that was it.

13 We are not suggesting that there was absolutely zero
14 quick processing that occurred in the pre-electronic filing
15 era. What we are saying is we had 100 percent access during
16 that time. When e-filing came into being, the commission,
17 which really studied the process, made very clear that the kind
18 of access that existed prior to e-filing, access to court
19 documents -- they were very specific before the Bernstein
20 decision on complaints -- needed to continue unimpaired and
21 uninterrupted. That is not what has happened here.

22 The rules which they cite, even if they are abiding by
23 those rules, are rules that cannot under the law, to use your
24 Honor's word, trump the First Amendment. The Second Circuit
25 says, "Obviously, a statute cannot override constitutional

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1 right." The constitutional right here is absolutely crisp.

2 THE COURT: In other words, those rules say that the
3 clerks have to take certain steps; it does not say that it
4 cannot provide access to the press until those steps are taken?

5 MR. HIBSHER: Exactly. None of those rules say that
6 the clerk has to do anything prior to releasing documents to
7 the press or the public. The rules that require the clerk to
8 do anything, if they do, and I think there is a bit of an
9 argument there, are very limited to things like venue,
10 signature of attorney. The Social Security number piece is
11 something that I have looked at very closely, and I did not
12 find it in the current rules as an obligation placed on the
13 clerk's office to actually do.

14 Our position is that when we have a clear
15 constitutional right and when there is a conceded delay, a
16 conceded withholding of complaints, on many days -- though it
17 is only weekend days and holidays where the delay goes on for
18 several days -- on many days we see access that goes below the
19 66 percent average and by a good deal.

20 In his affidavit the clerk of the court very candidly
21 says there are emergencies. There is one person or two people
22 who do this, they get sick.

23 We think the First Amendment requires a much higher
24 standard. The weekend filings, our papers describe some of the
25 cases that we didn't see for three and four days. They didn't

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1 rise to the notoriety of Trump v. Univision, but they were very
2 important cases that our subscribers would be very interested
3 in knowing about in our daily litigation reports.

4 I don't know if your Honor wants me to address their
5 abstention argument.

6 THE COURT: Briefly, if you will.

7 MR. HIBSHER: The abstention argument, relying on the
8 Younger-O'Shea doctrine, we think is inapplicable here. That
9 doctrine really contemplates a federal court action that will
10 interfere with ongoing state court adjudications. That is not
11 what this case is about. What we are looking for is a simple
12 order directing the clerk to provide timely access. It is the
13 very order that was issued in the Jackson case and in the
14 Planet case.

15 In the Planet case the district actually granted an
16 abstention motion, and the circuit court reversed. In
17 reversing the abstention order, the Ninth Circuit relied on the
18 Second Circuit in Hartford Courant. Neither of those cases
19 was, by the way, discussed by the defendant in their papers.

20 This is not the kind of situation that Younger-O'Shea
21 contemplates where the court is going to involve itself in
22 conflicted workings of the state judiciary. All of the cases,
23 and I will be brief and won't go into them, all of the cases
24 they cited were dramatically different from the kind of
25 injunction that we are requesting your Honor to issue.

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1 I believe that the kind of injunction that we are
2 asking for is what was issued in the Planet case and the
3 injunction in Jackson, which are the only two cases dealing
4 with delays brought on by clerks processing complaints after
5 they were filed. The kind of injunctions issued in those cases
6 are exactly the kind of injunction that we want here. It
7 doesn't constitute an inappropriate interference with the
8 workings of the state judiciary.

9 THE COURT: Talk about that. What type of burden, if
10 any, would it impose on the clerk of the court, or cost?

11 MR. HIBSHER: Our papers say that in the course of one
12 of the meetings that we had with the defendant, the defendant
13 stated that providing the kind of access we are seeking would
14 require some tweaking of the software system. Our client has
15 been involved in transitioning from paper filing to e-filing in
16 many courthouses around the country and has assisted in that
17 process, and has reported that software providers are typically
18 able to provide the kind of press-only access to new filings
19 with relatively little expenditure, if any, and relatively
20 little expense.

21 It does not require that they keep the courthouse
22 open. If they want to limit access to credentialed press, that
23 is something that is very easy to accomplish.

24 THE COURT: Let me ask you very quickly about that.
25 Hasn't the concept of credentialed press expanded tremendously

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1 in recent years? Can't I start a blog now and declare myself
2 to be press?

3 MR. HIBSHER: I'm not certain about that, your Honor.
4 Both this courthouse and the Supreme Court New York County have
5 certain requirements before an individual member of the press
6 will be issued a press pass: not required to leave their
7 telephones at the desk downstairs, admitted to the courthouse
8 much more easily than other members of the public.

9 I have to assume that with the application to achieve
10 that end, there needs to be some written support from a bona
11 fide media outlet. Might it be a blog? Perhaps. That is the
12 sort of detail that I feel very confident the clerk of New York
13 County will be able to address appropriately and will be able
14 to protect the kinds of concerns that they may have about
15 complaints which contain errant information being made
16 available immediately to the general public.

17 THE COURT: Thank you.

18 MR. HIBSHER: Thank you, your Honor.

19 THE COURT: Mr. Adlerstein, how are you?

20 MR. ADLERSTEIN: Well, thank you, your Honor.

21 I can start by advising your Honor where New York
22 State is in terms of its policies and practices in this area
23 and where County Clerk Tingling is. The last thing that New
24 York State, through its announced policies, has embodied in its
25 court rules and the last thing that Judge Tingling really wants

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1 to do is to have significant delays in documents that are
2 accepted by the court for filing disseminated to the press and
3 public. I think that all of us in this courtroom are cognizant
4 of the First Amendment requirements and are sensitive to them
5 and want to operate within the bounds that they provide.

6 However, New York State has very sensible policies
7 that are embodied in its court rules and its statutes. Two of
8 the court rules were cited in our papers. One is the one that
9 says that in accordance with the C.P.L.R. provision -- and I'm
10 quoting from New York court rule 202.5(d)(1) -- the court
11 clerk, the county clerk, as appropriate, shall refuse to accept
12 certain kinds of papers for filing. The provision goes on to
13 enunciate what the various aspects are that the county clerk
14 ought to be looking for.

15 Mr. Hibsher in his papers and oral presentation
16 focuses about change or some kind of major change that
17 supposedly took place when e-filing went into existence. The
18 court rules are promulgated by the administrative board of the
19 court, which is made up of the chief judge of the state, the
20 chief administrative judge, and all of the presiding justices
21 of the four Appellate Divisions.

22 It promulgated those rules for e-filing that have a
23 provision that says no later than the close of business on the
24 business day following the electronic filing of a document
25 there should be notification that goes out with regard to that

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1 particular document.

2 THE COURT: What does that mean?

3 MR. ADLERSTEIN: We have discussed with county clerk
4 Tingling this aspect very carefully. What it means is that
5 when a party, whether it be during the business day or whether
6 it be in the evening or whether it be on the weekend, submits a
7 pleading to the court for filing, what occurs is that there is
8 a review that takes place by a person.

9 It's not done electronically. The review process is
10 not done electronically. It is done by a person who zeros in
11 on the provisions in the administrative regulation that I
12 quoted earlier telling the court clerk that the court clerk has
13 an obligation to review pleadings for certain possible defects.

14 At that point when the county clerk is to review that
15 document and no later than the business day following that
16 presentation of the document by the intended filer, the county
17 clerk should do those processes and make a determination of
18 whether or not an index number can be issued for that pleading.
19 It is the issuance of the index number that the county clerk
20 does, after a person has eyeballed the pleading, that then puts
21 it into the system for general dissemination.

22 THE COURT: That's a policy that, and I want to be
23 careful how I say this, has no particular legal import,
24 correct?

25 MR. ADLERSTEIN: It has a very critical administrative

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1 impact.

2 THE COURT: I understand that. But the types of
3 examples that are discussed in the papers and the types of
4 things that the clerks appear to be reviewing for seem to me to
5 be somewhat ministerial. Right?

6 MR. ADLERSTEIN: They are largely ministerial. If
7 someone were to catch a pleading that was filed that is really
8 a matrimonial action and it is couched in the pleadings as
9 something else, that might be able to be rejected and then
10 straightened out. There could be some unusual situations.

11 However, there is this directive that the county clerk
12 is supposed to look for things that the court system regards to
13 be important before the issuance of an index number.

14 THE COURT: Like some typo in the caption?

15 MR. ADLERSTEIN: Not a typo in the caption, your
16 Honor. One of the provisions talks about the absence of a full
17 recitation of the parties who are in the caption. For
18 instance, if somebody sues ten people and puts John Doe, et
19 al., the clerk rejects it because the court doesn't know who
20 the other parties are.

21 THE COURT: Is a complaint a judicial document?

22 MR. ADLERSTEIN: Usually, I would say yes. However,
23 it's not accepted for filing until somebody actually reviews it
24 and it's given an index number. Whether it's a judicial
25 document before that happens, I think that's not the word of

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1 art that's used in the regulations.

2 THE COURT: In the New York State regulations?

3 MR. ADLERSTEIN: The regulations are set up so that it
4 is presented by the intended filer, there is an opportunity for
5 a person to review the document, and at that time, if the
6 document is deemed to be free of the defects, it goes in.

7 The answer would have to be I think on balance it is
8 not a judicial document until the court system says it is by
9 issuing an index number.

10 THE COURT: Is the filing of the document an event of
11 legal significance at all in your mind?

12 MR. ADLERSTEIN: It would be for statute of
13 limitations purposes. Here is how it operates. If the
14 document is deemed to be acceptable so that it gets an index
15 number, then it is deemed to have been filed for statute of
16 limitations purposes when it was first presented. However, if
17 it is rejected, the document is rejected, it is not deemed to
18 be presented for statute of limitations purposes until it is
19 accepted as having been valid at the time it was presented.
20 That's how that mechanism operates.

21 THE COURT: In New York State if you file a complaint
22 on the last day of the statute and it has an et al. but
23 otherwise is a valid complaint, the next day the clerk can
24 decline to accept that document, and that litigant is out of
25 luck on the statute?

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1 MR. ADLERSTEIN: The litigant may be, your Honor. I
2 know that there exists equitable tolling provisions that people
3 can go into court and request to have documents deemed to be
4 filed and that becomes a judicial determination, not something
5 that the clerk does.

6 THE COURT: What about this afternoon? What if there
7 is a Christmas party going on across the street at the clerk's
8 office at 60 Centre and they are not able to get to the
9 complaints that came in, say, by noon? That person can be out
10 of the box because there wasn't a person at the clerk's office
11 to review the complaint in the afternoon?

12 MR. ADLERSTEIN: I think there are people in the
13 clerk's office in the afternoon, your Honor, for paper
14 documents that are submitted. But electronically it's deemed
15 to have been received at the time it is electronically
16 presented, and then it is checked out by a person when the
17 court opens on the next business day or the same business day,
18 and at that time there is an index number that is given.

19 The important principle is that it has been the
20 practice uniformly that a person eyeballs the document before
21 the index number is issued, and it is done because of the kind
22 of provision that I mentioned earlier. It operated that way,
23 your Honor, during the time it was exclusively paper. I think
24 County Clerk Tingling clarified in his affidavit in response to
25 counsel's papers that it was never a laying in front of the

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1 press or public pleadings before they were reviewed and then
2 were given an index number.

3 THE COURT: Do you have a sense as the clerk's office
4 does this review, of the hundreds of complaints that are filed,
5 how many times they have to kick complaints back because of
6 some venue issue or because of some et al. issue or some lack
7 of signature issue?

8 MR. ADLERSTEIN: Yes. The assessment that I have
9 heard, your Honor, is that it is a very modest proportion, a
10 very modest percentage. I haven't been given an actual
11 percentage. What we are talking about is the clerk's office
12 wanting to be careful, when it takes in a case and assigns it
13 an index number, to know that it really belongs to the court
14 and that there is at least some essential structure. And this
15 is not just made up by County Clerk Tingling. This is in
16 accordance with the regulation that the administrative board of
17 the courts has promulgated.

18 THE COURT: I understand that. Let me ask you this.
19 Obviously, there is a concern on the part of the clerks that
20 documents be properly formatted and contain whatever essential
21 elements are required by the regulations. But you say it's a
22 modest number that are rejected on that basis. Talk about the
23 First Amendment and how -- and it clearly affects the First
24 Amendment -- how you can justify that process in the face of
25 the fact that what you are doing is essentially a ministerial

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1 review and, second, that the risk that is involved seems to me
2 to be so relatively miniscule: a complaint gets through and
3 they've got the wrong venue.

4 MR. ADLERSTEIN: Your Honor, I think this gets to the
5 question that your Honor asked of counsel why aren't more
6 people here. I think County Clerk Tingling's papers exemplify
7 the fact that counsel has really exaggerated the problem. You
8 do not see people complaining out there that they are not
9 getting access to New York State court pleadings either
10 uniformly or with a degree of promptness which is acceptable.
11 That's not the intention with respect to the way that it is
12 administered certainly. And the numbers that were contained in
13 the affidavit that was submitted by plaintiff here we showed
14 were exaggerated because they included weekends.

15 THE COURT: They took out the weekend and holiday
16 papers.

17 MR. ADLERSTEIN: They did. But there is something
18 very interesting about the numbers. They created a new chart.
19 They had an initial chart which had on it one column which was
20 one-day, and then the second one was two-day plus. When we
21 called them on the fact that they were including weekends and
22 holidays, they took out the two-day plus column, and instead
23 having a one-day column, they created a new column called
24 one-day plus.

25 If you take a look at the numbers that they

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1 accumulated, they come up with a figure of overall statistics
2 of 2 or more days' delay, and it is pretty much the same number
3 of matters which were filed on Fridays. I think Mr. Hibsher
4 mentioned when your Honor gave an example that it was a Friday
5 that they were talking about with respect to the one-day plus
6 column --

7 THE COURT: Generally, and you folks will correct me
8 if I'm wrong, if you look just at Monday through Thursday,
9 there was still a significant percentage of complaints that
10 they were not seeing because of this administrative review
11 process, correct?

12 MR. ADLERSTEIN: There would be cases that would be
13 filed at the end of the day. Mr. Hibsher is not asking, I
14 don't believe, for personnel to be assigned to work in the
15 courthouse past 5 o'clock. He has advised your Honor that the
16 plaintiff is not looking to keep the courthouse open past 5
17 o'clock. We put in our papers that there is a lot of budgetary
18 considerations that apply there.

19 THE COURT: Tell me about those. It sounds as if all
20 that is really required is maybe an additional terminal and
21 some software that would allow them -- I don't even know if it
22 is additional software, because apparently they have remote
23 access now -- allow them to remote access at an earlier period
24 of time.

25 MR. ADLERSTEIN: That creates some difficulties about

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1 how you set that up, about who is going to come in to get that
2 access and trying to make distinctions between how people are
3 going to get credentialed, whether or not favoring the
4 credentialed press over the public in terms of the access that
5 the public would have to documents. You would have to have all
6 of those determinations resolved.

7 Basically, what you are talking about is departing
8 from the very important operating principle that New York State
9 courts have had going forward and that is called for under the
10 regulations, which is that when a document is submitted for
11 filing and to commence a litigation -- and it would need to be
12 during normal business hours because the court is not going to
13 easily hire people to work overtime and so on in order do
14 this -- it would need to be reviewed by a person before it is
15 accepted for filing and then disseminated. That's what the
16 regulations say.

17 THE COURT: You can still do that, right, without
18 preventing the press from having access? You can do all that
19 and I'm sure you will do all that.

20 MR. ADLERSTEIN: You can have people working 24 hours
21 a day, I suppose.

22 THE COURT: Unless I'm completely misreading both sets
23 of papers, that's not what they are asking for and that is not
24 what would be required. Essentially what would be required is
25 before your staff gets through something that is e-filed, it

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1 gets made available to the press, at least to the press.

2 MR. ADLERSTEIN: Your Honor, if I may add one thing?

3 THE COURT: Sure.

4 MR. ADLERSTEIN: We have direct filing by pro ses.

5 They can apply to be able to e-file and then they can e-file.

6 You have the difficulty that would pertain that you don't know

7 what a pro se complaint is going to look like when it comes in.

8 I'm not sure how the federal courts handle the pro se

9 registration process and what the pro se clerk does with pro se

10 complaints and whether they are made immediately available by

11 the federal court as soon as they hit the computer or whether a

12 pro se can just go ahead and file from the outside and register

13 without any kind of supervision so that those complaints are

14 eyeballed by a person before they are distributed to the

15 general public, but I suspect they might not be.

16 THE COURT: I think you are probably right. I think

17 it also depends on whether they are in forma pauperis or not.

18 MR. ADLERSTEIN: Yes. You have those kinds of

19 situations where they are pro se complaints as well.

20 THE COURT: That is also an easy software fix, isn't

21 it?

22 MR. ADLERSTEIN: I don't know. I don't know what kind

23 of programming you would need to do in order to put in a

24 registration of all attorneys and have software be able to

25 recognize who is filing. Think there are some difficulties

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1 there of a practical nature that are not necessarily so easy in
2 terms of setting it up.

3 THE COURT: Mr. Adlerstein, the case law that has been
4 presented here is fairly unanimous against the position that
5 you are taking. How do you want me to analyze the cases that
6 they have cited from California and Texas? How do you suggest
7 that I analyze the state courts' procedures in light of Second
8 Circuit authority about a complaint and the Second Circuit said
9 yes, the filing of a complaint -- first of all, a complaint is
10 very easily determined to be a judicial document; it was an
11 easy determination by the Second Circuit. You seem to have a
12 little trouble with it.

13 MR. ADLERSTEIN: I think, your Honor, the Second
14 Circuit cases have not dealt with this kind of a situation
15 where you are talking about this kind of very quick processing.
16 You are talking about principles relating to what kinds of
17 documents would be deemed to be a judicial document so that
18 they would need to be available to the public. The court
19 enunciated the word "immediate" without putting a definition on
20 it. We submit to the Court that the New York State courts have
21 already a policy which is consistent with the First Amendment
22 in terms of the next business day.

23 THE COURT: The next business day is immediate?

24 MR. ADLERSTEIN: I think it is immediate enough under
25 the First Amendment. Secondly, if you take a look at the cases

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1 in California, the district court in California, which had the
2 most recent opinion on the case on remand from the Ninth
3 Circuit, said it need not be the same day. They are not going
4 to declare that there is a constitutional requirement that it
5 has to be on the same day. The Ninth Circuit, when it
6 remanded, expressed some skepticism about how immediate it was
7 going to have to be, whether it would have to be on the same
8 day. So it is not resolved there. I'm told that the
9 litigation is actually still going on in California.

10 Secondly, the clerk in California was absolutely
11 intransigent. Take a look at the district court opinion. The
12 first page talks about the fact that he withheld documents from
13 the press for weeks and that there was something going on there
14 relating to him and the way that he was handling things to
15 deliberately obstruct the press.

16 Here we have nothing of the kind. We have a New York
17 State court system which is operating pursuant to regulations.
18 The last thing that County Clerk Tingling wants to do is to
19 hold up these documents. What we are talking about is the very
20 principle of able to have a person during business hours review
21 the document before it is assigned the index number and
22 distributed to the press or public. And I'm told that once it
23 is available, it is available to the entire public.

24 THE COURT: I understand that. That's precisely what
25 we are talking about.

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1 MR. ADLERSTEIN: You are inquiring about the case law
2 being possibly against our position. I submit to the Court
3 that it doesn't come anywhere close to our situation, to a
4 state entity which is handling itself as responsibly as New
5 York State does.

6 THE COURT: As I understand at least one of the cases,
7 it is a state court where the court presented what he or she
8 believed to be a very reasonable position: that once complaints
9 are received, they need to be reviewed, and only when that
10 administrative review takes place will they be made available
11 not only to the press but to everyone else. That is precisely
12 what we are talking about here, isn't it?

13 MR. ADLERSTEIN: Not really. We put in our brief that
14 what the clerk was going through there were many more steps,
15 things like putting labels on files, getting paper files set up
16 before documents would be made available to the press.

17 THE COURT: What is the danger here, Mr. Adlerstein?
18 What is the danger of providing immediate access to filings?
19 What would be the damage to the general public, the people of
20 New York County?

21 MR. ADLERSTEIN: Your Honor, there has been a
22 determination that's been made by the administrative board that
23 the administrative board wants the county clerks to look at
24 some things before filings are completed. There has been a
25 determination by the administrative board that the public

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1 dissemination should be done by the next business day.

2 It is clear that many, many are provided the same day,
3 and even within a very, very short period of time, just a few
4 minutes. When you have the clerk there and they are working on
5 these things, there is no holdup. It's provided. Counsel may
6 have shown a couple of instances where there was an issue, but
7 this really isn't the pattern. It is not what the City of New
8 York is all about. It's not what the county clerk is all
9 about.

10 THE COURT: I understand that they don't mean to hold
11 up anything in an improper way. Still, the percentage that are
12 not provided, even when you discount holidays even when you
13 discount weekends, the percentage that are not provided on the
14 same day is substantial. By "substantial" I mean more than 25,
15 30 percent. Correct?

16 MR. ADLERSTEIN: It depends on how you measure same
17 day. If something comes in at 3:00 or 4:00 in the afternoon
18 and the county clerk doesn't have personnel on hand to be able
19 to process those until the next business day, it will get done
20 at 9:30 or 10:00.

21 THE COURT: Just so we are clear: something comes in
22 at 3:30 in the afternoon on Monday, same day is Monday.

23 MR. ADLERSTEIN: I understand. What I'm saying is
24 yes, there will be instances where something will come in in
25 the later part of the afternoon and it won't be looked at until

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1 the following business day, as New York State regulations
2 permit under their prescription, and it will be done. I think
3 the objective of the county clerk is not to sit on those types
4 of instruments until the very end of the next business day.

5 THE COURT: I wasn't making any suggestion that it is.

6 MR. ADLERSTEIN: It gets done very early in the
7 morning, when there are people there to do it.

8 It is pointed out to me, your Honor, that if that is
9 going to be the definition, we are not sure that the numbers
10 that have been put out there by the plaintiff, you are talking
11 about something that arrives at 3:30 in the afternoon and then
12 gets done by 10:00 in the morning, is really part of the
13 numbers that they are throwing out there.

14 THE COURT: I don't intend to draw any bright-line
15 definition. Thank you.

16 MR. ADLERSTEIN: You're very welcome.

17 THE COURT: Mr. Hibsher.

18 MR. HIBSHER: Thank you, your Honor. I think I heard
19 for the first time what the alleged harm would be if the policy
20 of reviewing before access is provided to the press and public
21 is granted, and it has been characterized as modest. We don't
22 have numbers. We pointed out in our papers and I said before
23 that the cases make very clear that empirical data needs to be
24 presented to illustrate the kind of harm that the defendant
25 alleges in order to meet its burden under the shifting in this

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1 kind of First Amendment entitlement case.

2 I also would like to say that the rule that Mr. Adler-
3 stein points to which provides for notification by the end of
4 the next business day is inadequate under the First Amendment.
5 When you asked me about delays before, I was looking for a
6 particular quote that I wanted to mention. It comes from the
7 Globe Newspaper case. That case said that delaying access for
8 as little as a day delays access to news, and that delay
9 burdens the First Amendment. So the next business day is not
10 acceptable. That is an issue which this case presents for your
11 Honor to decide.

12 The particular regulation that Mr. Adlerstein points
13 you to, however, says that the filer will be electronically
14 notified by the end of business the next day. That is too
15 late. If it's a complaint, the filer is the plaintiff and the
16 plaintiff will be notified the next business day. We do not
17 think that that rule, even if they were adhering to it all the
18 time, really meets the First Amendment obligations that they
19 have here.

20 You asked Mr. Adlerstein about when a document
21 becomes, I believe your words were, an official court document.
22 He conceded that when a document is filed, it tolls the statute
23 of limitations. But he provided a hypothetical in which the
24 clerk might review the document and reject it and then arguably
25 the filer would not have the benefit of the statute of

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1 limitation.

2 They did not cite any cases in their brief to that
3 end, nor did they comment on the Appellate Division, Third
4 Department case that we cited in footnote 6 of our moving brief
5 on page 15, which presents this very question: whether a
6 petition was filed for statute of limitations purposes upon
7 arrival at the clerk's office or upon an assignment of an index
8 number.

9 That is the Johnson case, which concluded that on
10 arrival at the check's office is when the filer benefits from
11 the tolling of the statute of limitations. It's not exactly
12 what we are talking about, but it's pretty close in New York
13 law. I did not see anything in their papers that explicated
14 the argument that Mr. Adlerstein makes today with any kind of
15 legal citations.

16 You also asked about pro se filings in the federal
17 court. My understanding is that that is done by paper, that
18 pro ses do not electronically file. There is a paper desk, and
19 the press has access to pro se filings as soon as they are
20 done. If your Honor wishes, I can get you a supplemental
21 declaration on that point.

22 Mr. Adlerstein talked about the Planet case in the
23 Central District of California. He described the clerk there
24 as being intransigent. I think that is probably a fair
25 characterization at the beginning of the case. The case went

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1 on for years. It went up to the Ninth Circuit two times.

2 But when Judge Otero, from the Central District of
3 California, issued the injunction that he did last May, I
4 believe. At that time the clerk was contending that they were
5 providing same day access in 97 percent of the filings. The
6 system had completely changed from the days of intransigence.
7 They were photocopying cases as soon as they came in. They
8 were scanning them, and they were providing much improved
9 access.

10 Yet Judge Otero said that the access they were
11 providing was not adequate. He directed them to provide timely
12 access upon receipt -- this is the language of the order -- and
13 precluded the clerk from doing any administrative process
14 before providing access. I think the reason was that he was
15 not persuaded that the kinds of things they were looking for
16 really rose to the kind of potential harm that would overcome
17 the First Amendment right of access, and the kinds of things
18 that the New York County Clerk is looking for similarly do not
19 do that.

20 You asked me earlier where are all the members of the
21 press. CNS has 27 hundred subscribers. Many press outlets are
22 our clients. They look to us to provide reports on civil
23 litigation. Some of these litigations are not the most
24 newsworthy cases. You don't see many reporters in the press
25 room either in New York supreme or even in the Southern

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1 District. In a certain sense not only is CNS as a media outlet
2 a surrogate for the public, it is also a surrogate for the
3 press. It is like the AP wire service.

4 So, the significance to CNS of the kinds of delays
5 that we are seeing, the 30 percent delays to next-day cases
6 being provided after the news cycle has really come to an end
7 is really enormous.

8 Implicit in one of the questions was a question about
9 CNS's motivation in seeking this First Amendment right. What
10 Lugosch in the Second Circuit said of this question is that
11 consideration of the newspaper's ultimate interest in the case
12 should not affect the weight of the presumption, the First
13 Amendment presumption. Those interested in monitoring the
14 courts may well learn of and use the information, whatever the
15 motive of the reporting journalist.

16 No one is impugning the motive of CNS here. But the
17 fact is that motive is not the issue at all. There is a First
18 Amendment right to a filed judicial document, which admittedly
19 tolls the statute of limitations. The delay of a substantial
20 number for one day and of those filed in the evening and on
21 weekends for several days is not acceptable under the First
22 Amendment, and respectfully I do not believe that the defendant
23 has met its burden.

24 THE COURT: Thank you.

25 MR. ADLERSTEIN: Your Honor, may I?

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1 THE COURT: Absolutely.

2 MR. ADLERSTEIN: I wanted to comment on just one or
3 two points very briefly. In terms of this constitutionality
4 argument relating to the regulations that I had cited, in
5 plaintiff's opening papers there was no recognition provided
6 for the regulations. There was no request that anything be
7 struck down for constitutionality purposes.

8 One of the reasons that we mentioned to the Court the
9 principles of abstention and comity was just this very thing.
10 We ask the Court take into consideration the important
11 constitutional value that lies with regard to a federal court
12 providing for measures which are going to change operations in
13 a state court and that a federal court would be careful about
14 those things and measure constitutional principles on that
15 plane.

16 I think if we are talking about the Court potentially
17 making a ruling that the regulation that was enunciated by the
18 administrative board may not pass constitutional muster, we
19 ought to see it in that light. We think it does.

20 THE COURT: First of all, I don't think that
21 plaintiffs are asking me to declare the regulations
22 unconstitutional. The regulations, constitutional or not, they
23 are not asking me to touch. The only things that they are
24 asking is, sure, go through your process, but you've got to
25 allow access at an earlier point in time.

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1 MR. ADLERSTEIN: When we brought up in regulations,
2 they suggested in their papers that the Court could well
3 declare the regulations to be improper for constitutional
4 purposes. That was an argument that was presented in their
5 papers, and they cited case law to that effect.

6 THE COURT: Okay.

7 MR. ADLERSTEIN: Also, the very fact about will this
8 be limited to New York County, obviously, something that will
9 happen in one county could well affect what happens in all.
10 The consequences in terms of court operations in the New York
11 State courts in the broad sense could be much broader than Mr.
12 Hibsher would suggest. I request that in weighing these
13 various values that have been presented here, your Honor take
14 that into consideration.

15 Lastly, with regard to the Fourth Department case that
16 was cited, I had explained that the statute of limitations
17 seemed to be tolled when it was presented. However, it's not
18 considered to be valid until it is assigned an index number, so
19 it reverts to the date of presentation for statute of
20 limitations purposes, which is not inconsistent with what
21 counsel has argued.

22 THE COURT: I'm sorry. I lost you on that last point.

23 MR. ADLERSTEIN: In other words, the principle about
24 statute of limitations is when the document is presented to the
25 court by the filer, if the courts deem the document to be

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1 acceptable and it gets an index number on a later date, it's
2 deemed to be filed on the date that it was first presented. It
3 is dependent on it being found to have been valid when
4 presented by the fact that that document gets an index number.
5 That principle I think is consistent with the case law that Mr.
6 Hibsher has presented.

7 MR. HIBSHER: Your Honor, C.P.L.R. 304(c) says that a
8 document tolls the statute of limitations upon filing. There
9 is no language in that provision that says upon filing and
10 after review by the clerk's office and the affixing of an index
11 number, and there is nothing in the defendant's answering
12 papers that says anything along these lines that certainly
13 provides any authority for that conclusion. That may be their
14 argument, but there is nothing in the law that says that.

15 If I'm a plaintiff who files a case that gets kicked
16 back because I only had the first name or I had five names and
17 then said et al., and they reject it the next day, which is
18 beyond the statute of limitations, you can be certain that I'm
19 going to litigate that issue and create some law on this point,
20 which I do not believe exists. We have looked at it. The only
21 case that came close was the Third Department case that we
22 cited in our brief and that I mentioned before.

23 We are not seeking a declaration that rule 202.5(b)(d)
24 is unconstitutional. That rule does not require the clerk to
25 withhold publication of a filed court complaint to the press.

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1 That rule merely requires the clerk to do some processing by
2 the next business day and to notify the filing party.

3 You didn't see a request for a declaration of
4 unconstitutionality as to that rule in our papers because we
5 don't believe that that is necessary. We believe that we are
6 entitled to access upon filing without review, and that may
7 translate into access on the same day that a case is filed.

8 MR. ADLERSTEIN: Your Honor, for C.P.L.R. purposes, if
9 I may, the date of filing is considered to be the date the
10 index number is issued. The regulation says the clerk shall
11 refuse to accept for filing documents that are defective in the
12 ways that are outlined by that regulation. I ask the Court to
13 take that into consideration when dealing with this particular
14 point.

15 THE COURT: Give me five, ten minutes. I'll be out
16 with a decision. Please don't go far.

17 (Recess)

18 THE COURT: It is the Court's conclusion that
19 plaintiff's motion for preliminary injunction will be granted.
20 I find that the clerk may not prevent the press from accessing
21 newly filed documents because of its review and logging
22 procedures.

23 However, the Court will look to the party in the first
24 instance to devise a procedure whereby the press will have
25 timely access to those documents, whether that means constant

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1 feed or feed during business hours only or remote feed or
2 otherwise. Again, I will leave it up to the parties in the
3 first instance, as there has been no particular method that's
4 been presented to the Court.

5 Let me first talk about abstention. I did consider
6 this issue very seriously, and I find that abstention not
7 required. The defendant in its papers argued that the Court
8 should abstain because it would require the type of federal
9 court oversight forbidden under the principle of comity
10 articulated in O'Shea v. Littleton and Younger v. Harris.

11 The Ninth Circuit has explained that O'Shea abstention
12 is inappropriate where the requested relief may be achieved
13 without an ongoing intrusion into the state's administration of
14 justice but is appropriate where the relief sought would
15 require the federal court to monitor the substance of
16 individual cases on an ongoing basis to administer its
17 judgment. Moreover, that some additional litigation may later
18 arise to enforce an injunction does not itself justify
19 abstaining from deciding a constitutional claim. That was in
20 the Planet case, reported at 750 F.3d 776, 790-92.

21 As in Planet, this Court finds that the remedy sought
22 by CNS poses little risk of an ongoing federal audit or a major
23 continuing intrusion of the equitable power of the federal
24 courts into the daily conduct of state proceedings. Again,
25 citing to O'Shea, which is reported at 414 U.S. 488. This does

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1 not present the level of intrusive relief sought in cases cited
2 by the clerk.

3 Compare *Hartford Courant v. Pellegrino*, reported at
4 380 F.3d 83, which declined to abstain in case seeking access
5 to docket sheets in Connecticut state court, with *Kaufman v.*
6 *Kaye*, reported at 466 F.3d 83, which abstained from
7 entertaining a request that state establish a new system for
8 assigning appeals to justices in the Second Department; and
9 *Wallace v. Kern*, reported at 481 F.2d 621, reversing a district
10 court's order directing that the clerk place all pro se motions
11 on the court's calendar.

12 With respect to the preliminary injunction, to obtain
13 a preliminary injunction the moving party must demonstrate (1)
14 that it is likely to succeed on the merits, (2) that it is
15 likely to suffer irreparable harm in the absence of preliminary
16 relief, (3) the balance of equities tips in its favor, and (4)
17 an injunction is in the public interest. Citing *Winter v.*
18 *Natural Resources Defense Council*, reported at 555 U.S. 7.

19 Even if the moving party can only demonstrate serious
20 questions going to the merits rather than a likelihood of
21 success, the preliminary injunction may nonetheless issue if
22 the costs outweigh the benefits of not granting the injunction.
23 Citing *Citigroup Global Markets, Inc. v. VCG Specialty*
24 *Opportunities Master Fund Limited*, reported at 598 F.3d 30.
25 CNS has demonstrated a likelihood of success on the merits.

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1 The Second Circuit has held that complaints are
2 judicial records that are subject to a presumption of public
3 access under the First Amendment. Citing *Bernstein v.*
4 *Bernstein Litowitz Berger & Grossmann LLP*, reported at 814 F.3d
5 132. In that case the Second Circuit stated that public access
6 to complaints allows the public to understand the activity of
7 the courts, enhances the court system's accountability and
8 legitimacy, and informs the public of matters of public
9 concern.

10 In light of the values which the presumption of access
11 endeavors to promote, a necessary corollary to the presumption
12 is that once found to be appropriate, access should be
13 immediate and contemporaneous. The newsworthiness of a
14 particular story is often fleeting. To delay or postpone
15 disclosure undermines the benefit of public scrutiny and may
16 have the same result as complete suppression. Each passing day
17 may constitute a separate and cognizable infringement of the
18 First Amendment.

19 Citing *Grove Fresh Distributors, Inc. v. Everfresh*
20 *Juice Company*, reported at 24 F.3d 893. See also *Lugosch v.*
21 *Pyramid Company of Onondaga*, reported at 435 F.3d 110,
22 collecting cases, including *Grove Fresh*, and noting that our
23 public access cases and those in other circuits emphasize the
24 importance of immediate access where a right of access is
25 found.

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1 To overcome the First Amendment right of access, the
2 proponent of sealing must demonstrate that closure is essential
3 to preserve higher values and is narrowly tailored to serve
4 that interest. Broad and general findings and conclusory
5 assertions are insufficient to justify deprivation of public
6 access to the record. Specific on-the-record findings are
7 required. Again citing *Bernstein v. Bernstein*.

8 State law and court rule provide that paper filings
9 are deemed filed for purposes of the statute of limitations
10 upon their acceptance by the clerk's office or when filed by
11 electronic means at the time of the electronic receipt within
12 the New York State ECF.

13 Upon receipt, the clerk's office reviews the proposed
14 filing for compliance with venue, caption, case type, as well as
15 the attorney's signature certification required by court rule.
16 In addition, the clerk's office reviews the papers to ascertain
17 whether they contain materials that, by operation of law, may
18 not be made available to the general public.

19 After this review process is completed, new civil
20 matters are logged with a case or docket number and sent to the
21 clerk's filing room for storage. New case filings are not made
22 available for viewing by the public until this review and
23 log-in process is complete.

24 According to the clerk, the review process is critical
25 to (1) establish a compliance of the filing that the require-

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1 ments proposed by state law and court rules, (2) assure
2 attorney compliance with certain of their ethical obligations
3 in commencing legal actions in state courts, and (3) avoid
4 mistakes in filing venue or case type, which can have serious
5 consequences to the statutory protections to the
6 confidentiality of parties in certain proceedings.

7 With respect to this, citing to the Tingling
8 declaration at paragraph 10.

9 The clerk argues that the review process procedures
10 are prescribed to prevent a narrow category of errant pleadings
11 at the outset in order to prevent confusion and waste. In
12 Courthouse News Service v. Planet, the Central District of
13 California considered a similar review policy allegedly
14 designed to protect the confidentiality of those filing
15 complains and third parties, to ensure information is
16 accurately input, to ensure that proper accounting procedures
17 are followed, and to maintain the integrity of the case file.

18 The court concluded that the clerk failed to meet its
19 burden of demonstrating that its policy of refusing to provide
20 public and press access to newly filed complaints until they
21 are processed is either essential to preserve higher values or
22 is narrowly tailored to serve a substantial government
23 interest. Accordingly, the court entered an order prohibiting
24 the clerk from refusing to make complaints available until
25 after they were processed and directing the clerk to make such

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1 complaints accessible to the public and the press in a timely
2 manner from the moment they are received by the Court.

3 Similarly, in Courthouse News Service v. Jackson, the
4 Southern District of Texas considered whether 24- to 72-hour
5 delays in access were constitutional where the delays resulted
6 from the clerk verifying filings for correct case number,
7 proper court, accurate title of document, and proper category
8 before they are made available to the public.

9 The court found that the delay in access to newly
10 filed petitions in this case is not a reasonable limitation on
11 access. Even if it were, the court found that the clerk failed
12 to demonstrate that the 24- to 72-hour delay in access is
13 narrowly tailored to serve such an interest and that no less
14 restrictive means of achieving that interest exists.
15 Accordingly, the court granted CNS's motion for a preliminary
16 injunction and ordered the clerk to give CNS access on the same
17 day petitions are filed.

18 As in Planet and Jackson, this Court finds that the
19 clerk has failed to meet its burden of demonstrating that its
20 policy of refusing to provide the public and press access to
21 newly filed complaints until after they are reviewed and logged
22 is either essential to preserve higher values or is narrowly
23 tailored to serve that interest.

24 In addition, the Court finds that CNS would be
25 irreparably harmed without the injunctive relief. As the court

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1 noted in Lugosch and as I indicated earlier, the loss of First
2 Amendment freedoms even for minimal periods of time
3 unquestionably constitute irreparable injury. That is Lugosch at
4 435 F.3d at 127.

5 I further find that the balance of hardships tips in
6 CNS's favor. CNS will be denied its First Amendment right of
7 access to new case-initiating documents unless the Court issues
8 this preliminary injunction while the clerk has alternative
9 constitutional ways to address its administrative concerns.

10 I note in this regard that this injunction in no way
11 restricts or comments on the regulations that are in place for
12 the clerk of the court to review and accept for filing or
13 accept for an index number the complaints when they are filed.

14 Finally, I find that injunctive relief would serve the
15 public interest. There is, of course, an important First
16 Amendment interest in providing timely access to new case-
17 initiating documents.

18 With respect to the bond, I order the plaintiff to
19 post a bond in the amount of \$5,000 by no later than Tuesday of
20 next week. What date is next Tuesday, Ms. Rivera?

21 MR. ADLERSTEIN: The 20th, your Honor.

22 THE COURT: By Tuesday, December 20th, 5:00 p.m.

23 That constitutes the decision of the Court.

24 Mr. Hibsher, anything further?

25 MR. HIBSHER: No, your Honor. Thank you.

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1 THE COURT: Mr. Adlerstein?

2 MR. ADLERSTEIN: Your Honor, the one thing I wonder
3 about your Honor's ruling is how immediate it is. The county
4 clerk is going to need to come up with a plan in combination
5 with the court system in order to implement what your Honor has
6 ordered. I would suggest that a time period be prescribed.

7 THE COURT: I'm happy to do that. Mr. Hibsher?

8 MR. HIBSHER: Your Honor, I don't have a position on
9 that. I think if your Honor ordered that this preliminary
10 injunction would take effect in 20 days, that would be
11 adequate. I don't know what the plan is that Mr. Adlerstein is
12 referring to.

13 But I can say, your Honor, that after the preliminary
14 injunction was issued in the Jackson case, the parties met and
15 conferred and they came to an agreed-upon permanent injunction.
16 As you know from our papers, I'm delighted to sit down with Mr.
17 Adlerstein to achieve that end if at all possible.

18 MR. ADLERSTEIN: Your Honor, we have the holidays
19 coming up. If we are talking about some kind of a
20 technological solution here, which is one of the possibilities
21 I think that was thrown out, that takes a little bit of time to
22 set up. I would request that we have until the beginning of
23 February to confer and come up with a plan.

24 THE COURT: Mr. Hibsher?

25 MR. HIBSHER: If Mr. Adlerstein is making a

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1 representation that technological facilities to provide the
2 kind of access that we described in our papers and in our
3 argument will in fact occur by the beginning of February, we
4 would be agreeable to that.

5 MR. ADLERSTEIN: I don't know if they can occur, but I
6 think we can come up with a plan and define what is to be done.
7 We are operating here without knowing for sure exactly how this
8 is going to be set up. I think the county clerk needs some
9 time in order to do that.

10 THE COURT: Why don't we set this down for a status
11 conference -- what makes sense? -- first week in January.
12 Between now and then I expect that the parties will have met
13 and conferred and come up with a plan going forward. If it
14 appears that there are going to be issues, tee them up as best
15 as you can and bring them to my attention.

16 MR. ADLERSTEIN: Your Honor, could we make it the
17 second week? The reason is the holidays.

18 THE COURT: I understand. Ms. Rivera?

19 THE CLERK: January 12, 2017, at 12:30 p.m.

20 THE COURT: Okay? Is there anything else?

21 MR. HIBSHER: No, your Honor.

22 THE COURT: In that event, we are adjourned. Happy
23 holidays to everyone.

24 (Adjourned)

25

