

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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COURTHOUSE NEWS SERVICE,) AU:20-CV-01260-LY
)
Plaintiff,)
)
v.) AUSTIN, TEXAS
)
MEGAN LAVOIE,)
)
Defendant.) JULY 25, 2022

TRANSCRIPT OF MOTIONS HEARING/BENCH TRIAL
VOLUME 1
BEFORE THE HONORABLE LEE YEAKEL

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09:33:19 1 (Open court)

09:33:19 2 THE COURT: We're here today for what I had
09:33:26 3 originally set for everything that was going to happen in this
09:33:32 4 case in Cause Number 20-CV-1260, *Courthouse News Service v.*
09:33:42 5 *originally Price and LaVoie*, although I believe we're down to
09:33:48 6 just Ms. LaVoie as the party in this case.

09:33:51 7 So let me get announcements by the parties, first
09:33:56 8 from the plaintiffs as to who is here and whether you're ready.

09:33:59 9 MR. DOW: Matt Dow, Your Honor, John Edwards, and
09:34:02 10 John Fetterly for the plaintiff, and Plaintiff is ready.

09:34:05 11 THE COURT: And for the defendant?

09:34:07 12 MS. MERIDETH: Caroline Merideth, Ben Lyles, and
09:34:10 13 Chris Hilton for Director LaVoie.

09:34:13 14 THE COURT: All right. Well, let me -- I want to
09:34:16 15 make some observations first, and I try to say this with
09:34:21 16 affection for you-all because I was on your side of the bench
09:34:24 17 for 28 1/2 years. Lawyers have eyes, but they don't always see
09:34:36 18 things, and lawyers have ears, and they don't always hear
09:34:39 19 things. And it's even more rare that they understand things,
09:34:44 20 particularly when it comes from a judge.

09:34:46 21 This case has a history. And we had a scheduling
09:34:55 22 conference back in April, and we have discussed this case on
09:35:00 23 several occasions. And I set the case for today by order of
09:35:10 24 May the 10th, 2022 and indicated that I would take up motions
09:35:18 25 by the State, bring them forward, and take up their motion to

09:35:22 1 dismiss at this time.

09:35:29 2 The end of this month I will have been on this bench
09:35:31 3 19 years, which is kind of hard for me to understand. It seems
09:35:38 4 it hasn't been that long. And from the beginning I have given
09:35:39 5 this talk, but it has come more quickly in between iterations
09:35:48 6 of it as the years have gone on about how busy the federal
09:35:52 7 district courts in the Austin Division of the Western District
09:35:54 8 of Texas are.

09:35:55 9 We are totally underwater. We do not have enough
09:36:00 10 judicial positions. The Congress of the United States refuses
09:36:04 11 to look on the needs of the people in setting judgeships. The
09:36:11 12 last time we had a judicial position in Austin was 1991, 31
09:36:18 13 years ago. Unless you've been in a cave somewhere, the
09:36:21 14 population of the Austin Division has just about doubled in
09:36:26 15 that time. And the legal activity in an area and the docket
09:36:30 16 size of the courts are generally, if not always, a direct
09:36:37 17 relationship of how many people you put down in an area. The
09:36:40 18 more people you put in an area, the more people sue one another
09:36:43 19 and the more crimes get committed, which leads to an increase
09:36:52 20 in the criminal docket.

09:36:52 21 All of the judicial positions that you've heard about
09:36:56 22 during the four years of President Trump and now coming up on a
09:37:01 23 little over a year and a half of President Biden have been
09:37:06 24 filling vacancies. I'm sure that there are a lot of people
09:37:09 25 around the country that are very happy those two presidents

09:37:11 1 have filled vacancies. It has done nothing for Austin because
09:37:16 2 we do not have a vacancy in Austin. We do not have a vacancy
09:37:20 3 anywhere there is a judge that helps with the Austin docket.
09:37:25 4 So that's totally unhelpful to me.

09:37:29 5 Therefore, Judge Pitman and I have a lot of demands
09:37:32 6 on our time. Time is at a premium. We do everything we can to
09:37:38 7 shoehorn in things to get people in front of us so we can do
09:37:42 8 the people's business in the courts.

09:37:44 9 It is not helpful when I have set a case with the
09:37:52 10 hope of resolving it almost three months ago and I'm still
09:37:58 11 getting filings on the Friday before today and the Saturday
09:38:02 12 before today and the Sunday before today. I like to prepare
09:38:08 13 for hearings. I think you are entitled to have me read what
09:38:14 14 you file and have me prepared, whether you like the ultimate
09:38:19 15 result or not, when I sit down on the bench and hear the
09:38:22 16 arguments and see the evidence that you have worked on to
09:38:26 17 present to this court. I simply cannot do that if I'm still
09:38:32 18 getting filings just before we have a setting at 9:30.

09:38:37 19 In addition, I'm not going to do that, because I like
09:38:45 20 to have some weekend time, too. And now that we have the fancy
09:38:51 21 electronic system, I don't sit by my computer all weekend to
09:38:58 22 see if something got filed in a case and then either pull it up
09:39:03 23 or print it out at home or get in my car and come down to the
09:39:09 24 office and spend another two or three hours on what you want to
09:39:12 25 have me look at that you should have given me to look at some

09:39:15 1 weeks ago.

09:39:16 2 Long story short is: I expect more pretrial
09:39:20 3 preparation out of the lawyers, and I expect it to be done
09:39:25 4 farther out by the lawyers. And I expect you, if there is
09:39:30 5 going to be last-minute filings, that you-all have talked about
09:39:35 6 those filings before and see what you can work out.

09:39:40 7 So the long story short is: I'm not happy with where
09:39:43 8 we are in this case this morning. I'm not sure how much of it
09:39:48 9 I'm going to hear. I'm not sure whether I'm going to go into a
09:39:52 10 bench trial this morning or whether -- since I have other
09:39:55 11 things that I haven't read or prepared on, I'm going to back
09:39:59 12 off and now set this for the State's motions and deal with the
09:40:03 13 motions first before we go into a bench trial.

09:40:07 14 That's just the situation you're in, and it is the
09:40:12 15 reason that I set this case way out for a resolution date,
09:40:16 16 because I thought it needed to be resolved.

09:40:19 17 So what -- the way we're going to start out this
09:40:22 18 morning, because I have been through as much as I could get
09:40:30 19 through in this case, is I want to know -- and I really want to
09:40:38 20 know it without a lot of advocacy at first because I believe,
09:40:49 21 as I believe in most state cases, most cases where the State's
09:40:52 22 a party, whether the party -- or whether the State has
09:40:56 23 initiated the action or whether the private parties initiated
09:41:06 24 the action, that most of the facts when you're arguing state
09:41:09 25 action or a state statute or rule, the facts are undisputed

09:41:18 1 with regard to the major facts that would lead to whether there
09:41:22 2 is a cause of action, whether there is a standing situation,
09:41:26 3 whether the party sued does have the power, if I rule in favor
09:41:31 4 here of the plaintiff, to provide the relief sought.

09:41:40 5 I don't think it is that hard to get to that point.
09:41:51 6 I recognize that probably everybody at both counsel tables
09:41:54 7 disagree with me on that. But that is what you are faced with
09:41:57 8 here. And so what I think will be most useful to me is, one, I
09:42:06 9 want to run through several motions that we have highlighted to
09:42:10 10 see if they are still live motions or whether with the change
09:42:15 11 in the complexion of this case since we last met, they're moot,
09:42:21 12 so I can narrow it down to see exactly what I'm going to look
09:42:25 13 at. And then we're going to have a discussion for a while, and
09:42:29 14 then I am going to see what we're actually going to do with
09:42:32 15 this case.

09:42:33 16 So the motions I want to see about to try to clean
09:42:38 17 this case up first are Document 21 which is "Plaintiff
09:42:44 18 Courthouse News Service's Amended Motion For Preliminary
09:42:47 19 Injunction," filed May the 23rd, 2022. So I will hear -- is
09:42:56 20 that a motion that I need to hear when I take things up?

09:42:59 21 MR. DOW: No, Your Honor.

09:43:00 22 THE COURT: All right. And then the -- the
09:43:03 23 "Plaintiff Courthouse News' Motion for Expedited Discovery,
09:43:08 24 Entry of Briefing Schedule, and Hearing on the Plaintiff's
09:43:13 25 Motion for Preliminary Injunction." You agree that's moot now,

09:43:17 1 I think?

09:43:17 2 MR. DOW: Yes, Your Honor.

09:43:18 3 THE COURT: All right. And then the Defendant Travis
09:43:21 4 County Clerk's motion, Document Number 30, because Travis
09:43:26 5 County is no longer a party in this case, we get rid of that
09:43:29 6 motion, too. Am I right?

09:43:30 7 MR. DOW: Yes, Your Honor.

09:43:31 8 THE COURT: All right. The State agree with all of
09:43:34 9 that?

09:43:35 10 MS. MERIDETH: Yes, Your Honor.

09:43:35 11 THE COURT: All right. Now, with that having been
09:43:40 12 done, what I think I have left in the way of motions is
09:43:54 13 "Director LaVoie's Motion to Dismiss Plaintiff's Second Amended
09:43:59 14 Complaint" and then other than the kind of recent haggling over
09:44:05 15 what has been filed lately, what I'm going to do about the
09:44:12 16 merits on the case; is that right? Is the only substantive
09:44:14 17 motion left the motion to dismiss the second amended complaint?

09:44:17 18 MS. MERIDETH: Yes. That's the substantive motion
09:44:18 19 that is left.

09:44:20 20 MR. DOW: Yes, Your Honor.

09:44:20 21 THE COURT: So here's what I want: We have statutes
09:44:23 22 in this case. We have the Office of Court Administration. We
09:44:27 23 have the Director of the Office of Court Administration. We
09:44:31 24 have district clerks all around the state that get impacted by
09:44:34 25 whatever this court is going to do.

09:44:41 1 If -- and I will reveal my age here. If I ever
09:44:48 2 thought before we had not accomplished anything with computers
09:44:53 3 and electronic filing, I am absolutely convinced of it after
09:44:57 4 reviewing this case. I became convinced of it when I went on
09:45:01 5 this bench. It was a simpler time when you walked over to the
09:45:11 6 district clerk's office and you filed something, and the
09:45:13 7 district clerk put a file-mark on it and the district clerk put
09:45:18 8 it in a file and everybody knew what it was.

09:45:20 9 And it is astounding to me to read, although it
09:45:25 10 reaffirms my prejudice, that we've gotten where we move more
09:45:31 11 slowly with all of the fancy electronic filing than we did
09:45:38 12 before, except when you-all want to file things on Saturday and
09:45:44 13 Sunday. We could have avoided that quite a bit without an
09:45:47 14 electronic filing system.

09:45:52 15 So what I want to do, without advocacy right now,
09:46:01 16 except to the extent it's necessary, I'm going to start with
09:46:03 17 the plaintiff, and I want you to walk me through the timeline
09:46:16 18 facts of this case. What was the system? What occurred with
09:46:20 19 the director or the Office of Court Administration or the
09:46:25 20 Supreme Court or the committee the Supreme Court formed or all
09:46:30 21 of them that led to the CM/ECF system, how it works. And at
09:46:44 22 that point I'll have a base level, and I'll hear some argument.

09:46:52 23 Now, from the defendant's point of view,
09:46:55 24 Ms. Merideth, if you don't see the need to interrupt the
09:47:00 25 plaintiff until they finish doing what I just asked them to

09:47:05 1 do -- and I don't favor the plaintiff; I just read from top to
09:47:08 2 bottom because I'm old-fashioned and the plaintiff is above the
09:47:12 3 "v." and has the burden on the whole case, so that's why I
09:47:15 4 start with them -- you may feel free to stand up and you may
09:47:18 5 interject things if this needs to be a discussion. You don't
09:47:21 6 have to wait. Because at this point I don't want to hear
09:47:30 7 advocacy. I just want to get me from point A to point F in
09:47:31 8 this case and where we are.

09:47:33 9 So, Mr. Dow, or whoever is with you, whoever wants to
09:47:35 10 present that, walk me through it. Walk me through it slowly.
09:47:43 11 I want to make sure I fully understand how we got from there to
09:47:44 12 here.

09:47:49 13 MR. DOW: Thank you, Your Honor. So the timeline
09:47:51 14 starts 2013 with mandatory e-filing for Texas state courts.

09:48:03 15 THE COURT: Now, who mandated that, and how did it
09:48:06 16 come about?

09:48:07 17 MR. DOW: The Texas Supreme Court by order mandated
09:48:09 18 that, and it came about by virtue of the Office of Court
09:48:13 19 Administration entering into an agreement with Tyler
09:48:22 20 Technologies for the mechanism, the procedure, of e-filing in
09:48:30 21 the State of Texas.

09:48:32 22 THE COURT: And why did the OCA do that? Did the OCA
09:48:36 23 do that on its own and then tell the Supreme Court they were
09:48:42 24 going to do that, or did the Supreme Court or any committee
09:48:46 25 formed by the Supreme Court mandate the OCA to look into a

09:48:51 1 system of electronic filing, and the OCA responded to the
09:48:56 2 Supreme Court?

09:48:56 3 MR. DOW: It was by virtue of the Texas Supreme
09:48:59 4 Court's amended order, which is -- that was in December of
09:49:07 5 2012. And so the OCA, pursuant to that amended order, then
09:49:17 6 started carrying out and implementing the ability for litigants
09:49:25 7 to e-file in Texas.

09:49:31 8 THE COURT: So 2013 -- or 2012 we had an amended
09:49:35 9 order by the Supreme Court. In 2013 OCA started following
09:49:41 10 through with that and entered into a contract with Tyler what?

09:49:47 11 MR. DOW: Tyler Technologies.

09:49:50 12 THE COURT: All right.

09:49:51 13 MR. DOW: Okay. And that -- that agreement has been
09:49:59 14 amended, and that's part of our case. But I -- without -- I
09:50:03 15 don't want to start advocating.

09:50:05 16 So that's when our timeline begins, when we left the
09:50:11 17 paper world where -- you know, where I would go to the Travis
09:50:18 18 County District Courthouse and I would actually take a petition
09:50:24 19 to the third floor and give it to an assistant clerk there at
09:50:30 20 the counter on the third floor. And that -- that deputy clerk
09:50:35 21 would file stamp that petition, and then that petition would
09:50:42 22 then kind of get behind the counter for processing. That -- in
09:50:51 23 2013 that changed with what we call EFM, the electronic filing
09:51:00 24 manager.

09:51:05 25 THE COURT: All right. And what we're arguing about

09:51:11 1 in this case is the most recent iteration of that original
09:51:17 2 contract, an amended contract of some point between OCA as one
09:51:23 3 contracting party and Tyler Technology as the other contracting
09:51:29 4 party.

09:51:29 5 MR. DOW: Yes, Your Honor. A June 24, 2022
09:51:35 6 amendment.

09:51:37 7 THE COURT: All right.

09:51:42 8 MR. DOW: So no longer would I go to the courthouse
09:51:47 9 and, at the counter, file my petition. After mandatory
09:51:55 10 e-filing, my legal assistant, now at her computer, hits "send,"
09:52:06 11 and that petition is transmitted, filed, where it then sits in
09:52:18 12 the electronic filing -- file manager, that EFM. And that's
09:52:25 13 where we get to the heart of the story.

09:52:28 14 But one -- without advocating, it's just not me
09:52:34 15 saying --

09:52:35 16 THE COURT: You can state your position a little bit.
09:52:36 17 I just don't want to hear argument right now.

09:52:39 18 MR. DOW: All right. If we look at Texas Rule of
09:52:41 19 Civil Procedure 21, Subpart (f)(5), it defines the filing when
09:52:55 20 that transmission occurs. So when the legal assistant presses
09:53:03 21 "send," that's the same thing as me going to the third floor in
09:53:10 22 the old days of the district clerk's office and presenting my
09:53:17 23 petition on that counter.

09:53:19 24 So that's --

09:53:21 25 THE COURT: Well, let me make sure we understand one

09:53:24 1 another. You stood at the counter and you slid a complaint
09:53:33 2 over the counter. And when I first did that, O.T. Martin was
09:53:39 3 the district clerk, and John Dickson was a very young deputy
09:53:44 4 district clerk who was often there to accept the filing. It
09:53:49 5 was there, and when they put the file stamp down on it, it was
09:53:54 6 filed.

09:53:55 7 So when your legal assistant hits "send," does the
09:54:02 8 moment it hit the electronic file manager, is it filed then or
09:54:10 9 is it unfiled while it sits during this first step, as you
09:54:15 10 describe it?

09:54:16 11 MR. DOW: It is filed.

09:54:17 12 THE COURT: Okay.

09:54:18 13 MR. DOW: It is filed for all purposes, including
09:54:24 14 statute of limitations. It is filed.

09:54:29 15 THE COURT: All right. And electronically a notice
09:54:33 16 goes on it that it's filed in some way?

09:54:36 17 MR. DOW: Yes, Your Honor.

09:54:36 18 THE COURT: All right.

09:54:37 19 MS. MERIDETH: Your Honor, so the actual cause number
09:54:39 20 and notice that the document is filed is not entered until the
09:54:42 21 document is transmitted into clerk's case management system.

09:54:47 22 THE COURT: All right.

09:54:48 23 MS. MERIDETH: So it is deemed filed for purposes of
09:54:51 24 the statute of limitations for Texas Rule of Civil Procedure
09:54:55 25 21(f), but it's -- but the actual, you know, act of -- the

09:55:00 1 traditional act of the clerk assigning the cause number and
09:55:04 2 affixing the stamp, if we're looking back to tradition, that
09:55:08 3 happens when the document is transmitted into the clerk's case
09:55:11 4 management system.

09:55:13 5 THE COURT: Do you agree?

09:55:14 6 MR. DOW: Partly.

09:55:15 7 THE COURT: All right.

09:55:17 8 MR. DOW: So that act of my legal assistant hitting
09:55:23 9 "send," that transmission it's filed. It's filed just as if
09:55:28 10 I'm standing there at the counter and it's file stamped.

09:55:32 11 But then it is correct it then sits in this EFM
09:55:41 12 awaiting administrative processing by the district clerks.
09:55:48 13 Just -- just as in the old days when I would file that petition
09:55:56 14 and it's file stamped, it then would go behind the counter and
09:56:01 15 the deputy clerks would -- would do their thing.

09:56:05 16 Here --

09:56:07 17 THE COURT: Or to really take you back, the clerk
09:56:11 18 picked up the phone and said, "The next number we're going to
09:56:16 19 assign is Number 15,000." That's a round number. And that
09:56:23 20 phone call would go to Paul Holt. So if he had something he
09:56:28 21 wanted to file, he could bring it over and get that number.

09:56:31 22 MR. DOW: I didn't know that.

09:56:32 23 THE COURT: Local lore from the old days, before we
09:56:35 24 had anything electronic.

09:56:38 25 MS. MERIDETH: And, Your Honor, just to add in a note

09:56:40 1 to traditional times, I think, you know, this all is under the
09:56:44 2 assumption that there is no line at the clerk's office, that
09:56:47 3 there is no stack of papers lining up. So this is -- this is
09:56:52 4 under the assumption that the clerk is ready and able to take
09:56:55 5 your filing there at the clerk's counter.

09:56:57 6 THE COURT: Well, there's always a delay of some
09:57:02 7 kind. It depends on when you get there and what you do. But
09:57:06 8 when you first -- when Mr. Dow's legal assistant first hits
09:57:12 9 "send," there's not a delay. Everything goes right into EFM.
09:57:18 10 There might be a delay of it coming out of EFM, or there might
09:57:23 11 be a delay in the timeline you're going to tell me about now
09:57:26 12 about what happens when the clerk starts taking action on it.
09:57:30 13 I presume that's going to be the next step?

09:57:32 14 MR. DOW: Yes, Your Honor. So, rather than what's
09:57:42 15 going on now behind the counter on the third floor of the
09:57:45 16 Travis County Courthouse, we now have that petition sitting in
09:57:50 17 the EFM awaiting administrative processing by whichever
09:58:01 18 district clerk that case is filed with. And that gets to the
09:58:05 19 guts of the dispute.

09:58:09 20 I don't think, but I -- and I don't want to get ahead
09:58:13 21 of my skis -- it's this administrative processing by the local
09:58:19 22 district clerk that creates the delayed access that is
09:58:29 23 different from the traditional access that we enjoyed in the
09:58:36 24 days of paper. And so that's where -- and the reason I say I
09:58:46 25 don't think there's any dispute about that is, when my legal

09:58:52 1 assistant hits "send" for that newly filed petition, she
09:58:56 2 receives a notice of filing from the Texas Court system that
09:59:02 3 says "Please allow 24 to 48 hours for court processing." And
09:59:11 4 that's one of our exhibits. There's -- and there's actually
09:59:17 5 another similar document from the web -- the Texas Courts
09:59:26 6 website which says "Allow one to two business days for this
09:59:35 7 administrative processing."

09:59:43 8 And so we at least know there is that administrative
09:59:46 9 delay while the local district clerk does his or her thing with
09:59:53 10 that petition.

09:59:53 11 THE COURT: All right. Stop right there. Did you
09:59:55 12 have something you wanted to say, Ms. Merideth?

09:59:57 13 MS. MERIDETH: Yes. I wanted to provide
09:59:59 14 clarification as far as the transfer of the document from the
10:00:03 15 electronic file manager, the EFM, to the case management
10:00:06 16 system, which is also called the CMS.

10:00:10 17 So when the e-filed document arrives into the EFM,
10:00:21 18 which is like a conduit to the clerk's case management system,
10:00:24 19 once that document arrives in the EFM, there's really three
10:00:31 20 options for clerk. The clerk can accept the filing, the clerk
10:00:38 21 auto-accept the filing, or the clerk can make the filing
10:00:41 22 available via the press review tool and then accept the filing
10:00:45 23 at a later time.

10:00:46 24 So I think Mr. Dow's position is that this processing
10:00:51 25 is built into the EFM model. But really what the EFM does is

10:00:56 1 that it presents the petition to the clerk to then accept, and
10:01:02 2 then they have different ways in which they can accept the
10:01:04 3 petition. So they can auto-accept, they can conduct whatever
10:01:09 4 process they feel they need to do before they need to accept
10:01:12 5 the document, or they can make it available to the public or
10:01:17 6 press via the press review tool before acceptance.

10:01:22 7 THE COURT: All right. So it hits EFM and then goes
10:01:29 8 to clerk's CMS; is that right?

10:01:32 9 MR. DOW: It's submitted to EFM. When my legal
10:01:36 10 assistant --

10:01:36 11 THE COURT: Right.

10:01:37 12 MR. DOW: It's submitted to EFM.

10:01:39 13 THE COURT: Yeah. I shouldn't have used the word
10:01:42 14 "hits."

10:01:43 15 MR. DOW: I think I used that.

10:01:45 16 THE COURT: I find it more descriptive.

10:01:49 17 MR. DOW: So here's the -- this is -- this is
10:01:54 18 important. That petition, that newly filed petition sits in
10:02:00 19 the EFM until the district clerk over in west Texas logs in and
10:02:11 20 grabs that petition through that district clerk's --

10:02:17 21 THE COURT: All right. I don't want to get down in
10:02:24 22 the nuance of computers, so keep this on kind of a general
10:02:30 23 level. The mainframe, the server, whether it's in the cloud or
10:02:40 24 not, wherever the EFM is, is not in the local county.

10:02:48 25 MR. DOW: Correct, Your Honor.

10:02:49 1 THE COURT: All right. Is it at the -- does the
10:02:52 2 Office of Court Administration have the system, the electronic
10:02:56 3 system, in that office?

10:03:02 4 MR. DOW: Yes, Your Honor.

10:03:02 5 THE COURT: And they provide maintenance and updates
10:03:06 6 and work, but it is -- it is run -- and don't read legal
10:03:12 7 connotation into this -- it is run by the Office of Court
10:03:14 8 Administration; is that correct?

10:03:17 9 MS. MERIDETH: Yes. But I need to add a
10:03:19 10 clarification to the EFM. So the clerks actually can log into
10:03:25 11 the EFM and customize the EFM. So, yes, OCA -- or, yes, the
10:03:31 12 electronic filing manager is part of the Texas e-file contract,
10:03:38 13 but the clerks actually can create their own review queue and
10:03:44 14 customize the tools offered by OCA.

10:03:46 15 So the clerks actually can -- they have a lot of --
10:03:52 16 they have an ability to customize their own review queue. So
10:03:56 17 there's an interplay between the electronic filing manager and
10:04:01 18 then the clerk's ability to customize that electronic filing
10:04:03 19 manager -- I'm sorry -- their review queue.

10:04:08 20 THE COURT: All right. So we go back, we have the
10:04:10 21 contract, we have the EFM system put in place. It's basically
10:04:16 22 administered by OCA. We have 254 district clerks in Texas.
10:04:22 23 Each district clerk at this point can -- has its own little
10:04:29 24 space that it can go to in the EFM system and do certain
10:04:33 25 customizing that would be in effect in that clerk's county --

10:04:41 1 the district clerk's county that would handle petition filings
10:04:49 2 in that county consistent with whatever modifications or
10:04:55 3 customizing that that district court has done.

10:04:59 4 MR. DOW: Correct, Your Honor.

10:05:00 5 THE COURT: But, basically, at this point we're not
10:05:02 6 out of EFM yet. It's -- it's all at OCA.

10:05:11 7 MR. DOW: Correct.

10:05:12 8 THE COURT: Okay.

10:05:13 9 MR. DOW: And that's -- that's where -- our case is
10:05:19 10 about delayed access under the First Amendment. There's no --
10:05:26 11 there's no argument by the plaintiff that the district clerks
10:05:30 12 don't need to do their administrative processing. We don't
10:05:35 13 have any -- we're not squawking with the district clerks for
10:05:39 14 that. But these newly filed petitions, while they await each
10:05:48 15 district clerk to do his or her thing with the administrative
10:05:51 16 processing, those newly filed petitions are not available to
10:05:57 17 the public or press.

10:06:01 18 THE COURT: I've got that.

10:06:02 19 MR. DOW: Okay.

10:06:03 20 THE COURT: But filings happen. They're sitting in
10:06:13 21 EFM. Now, what initiates the next step? What gets it out of
10:06:26 22 what I'm going to call "OCA's domain" and solely into the
10:06:30 23 district clerk's domain?

10:06:34 24 MR. DOW: The next step is for the respective
10:06:37 25 district clerk for that case to log into the EFM through that

10:06:45 1 district clerk's case management system and do that district
10:06:52 2 clerk's administrative processing.

10:06:58 3 THE COURT: All right.

10:06:58 4 MR. DOW: And then --

10:06:59 5 MS. MERIDETH: And I need to make a technical
10:07:01 6 correction there, because it's the -- the clerk actually logs
10:07:06 7 into a web portal provided by the EFM. And at that point the
10:07:11 8 clerk then accepts the filing from the EFM into their case
10:07:16 9 management system.

10:07:18 10 MR. DOW: So that -- and that's important. The
10:07:20 11 district clerk is logging into -- going behind the counter, so
10:07:26 12 to speak -- into the EFM. So, once again, that's -- now I'm
10:07:32 13 starting to get -- starting to advocate, but --

10:07:35 14 THE COURT: No, no. But I'll -- I think I understand
10:07:38 15 what the problem is, but I don't get to resolving the problem
10:07:42 16 until I make sure I know what the path is.

10:07:46 17 So you file a new petition on Saturday morning, which
10:07:53 18 is what lawyers are prone to do. Okay. So it sits -- you do
10:07:59 19 it electronically, and it sits in EFM. And presumably the
10:08:05 20 district clerk's office in Loving County is closed. Because
10:08:11 21 there are very few people that live in Loving County, it may or
10:08:14 22 may not even open on Monday, but let's presume that it's going
10:08:17 23 to.

10:08:17 24 So Monday morning the clerk's office is open for
10:08:20 25 business. At that point the clerk in Loving County doesn't

10:08:24 1 know that he or she has had a new lawsuit filed on Saturday.

10:08:30 2 Am I correct?

10:08:32 3 MR. DOW: No. They -- the district clerk in Loving
10:08:35 4 County receives a notification.

10:08:38 5 THE COURT: Well, how does the district clerk know?
10:08:41 6 Does she or he get it at home?

10:08:43 7 MR. DOW: No. At the courthouse.

10:08:45 8 THE COURT: All right. Well Monday morning comes. I
10:08:49 9 have my computer turned off when I walk in. I presume
10:08:52 10 computers in the district clerk's office are turned off.

10:08:57 11 So how then does the clerk become essentially aware
10:09:03 12 of the fact that a new petition got filed on Saturday?

10:09:09 13 MR. DOW: When the district clerk turns on his or her
10:09:13 14 computer, there's a notification received from the EMS *[sic]*.

10:09:21 15 THE COURT: Does that clerk have to go to --

10:09:24 16 MR. DOW: EFM.

10:09:25 17 THE COURT: -- EFM, or does that happen as soon as
10:09:29 18 the clerk turns the computer on? What steps does the clerk
10:09:33 19 make to satisfy himself or herself that there's been something
10:09:40 20 filed?

10:09:40 21 MR. DOW: The clerk has to log in.

10:09:43 22 THE COURT: All right. So Monday morning comes. The
10:09:45 23 clerk logs into EFM. We're hopeful that the clerk or district
10:09:50 24 clerk does that first thing. But, theoretically, they might
10:09:55 25 not log in until noon or three o'clock in the afternoon. That

10:09:59 1 could happen?

10:10:00 2 MR. DOW: Correct, Your Honor.

10:10:01 3 THE COURT: All right. So the clerk has to log in.

10:10:03 4 So the clerk logs in, and what does the clerk see?

10:10:09 5 MR. DOW: The clerk sees -- is in the queue now and

10:10:12 6 sees the newly filed petition.

10:10:15 7 THE COURT: All right.

10:10:16 8 MR. DOW: And then the clerk in, whether it's Loving

10:10:19 9 County or Dallas County, then, you know, looks at the petition

10:10:25 10 to make sure there aren't any -- you know, make sure no

10:10:29 11 corrections are necessary, assigns it to the court, and what

10:10:34 12 they do, that administrative clerical piece of it.

10:10:39 13 THE COURT: All right.

10:10:40 14 MS. MERIDETH: Your Honor?

10:10:41 15 THE COURT: I'm going to come back to you. Don't

10:10:43 16 worry. I've got you.

10:10:44 17 So there's a clerical review. The clerk manually or

10:11:03 18 physically adds the file number?

10:11:07 19 MR. DOW: Or online adds the file number, correct.

10:11:09 20 THE COURT: Yeah. But the clerk has to do that.

10:11:11 21 Right now all the clerk knows when the clerk logs in is the raw

10:11:17 22 data. She sees this Plaintiff's Original Petition filed by

10:11:25 23 Matt Dow. And if you follow the usual style, over to the right

10:11:28 24 there's a blank for the number.

10:11:29 25 So it doesn't have a number when the clerk first sees

10:11:33 1 it; is that right?

10:11:37 2 MR. DOW: The system burns it in. And back -- and
10:11:43 3 dates it, once again, going back to when my legal assistant
10:11:48 4 submitted, electronically transmitted. So all of that just
10:11:54 5 happens.

10:11:57 6 THE COURT: All right. So, see, this is important to
10:12:00 7 me. So, now, is that true in all 254 counties, or is that one
10:12:10 8 of the things the district clerk can customize?

10:12:16 9 MR. DOW: It was true. Now they can customize that.

10:12:19 10 THE COURT: So the district clerk could just look at
10:12:24 11 a raw petition that doesn't have a file number or a date stamp
10:12:29 12 on it?

10:12:32 13 MR. DOW: It would have an envelope number, but, yes,
10:12:36 14 you're correct.

10:12:36 15 THE COURT: Do you agree with that?

10:12:37 16 MS. MERIDETH: Yes. And, Your Honor, just to
10:12:39 17 clarify, I think you hit the nail on the head there, is that
10:12:43 18 the clerks -- so just to back up to the idea of a filing on the
10:12:48 19 weekend, if the clerk has decided to enable auto-accept, then
10:12:53 20 that filing would be automatically accepted no matter what time
10:12:56 21 of day. So it would look, essentially, like the Pacer system,
10:13:02 22 which Plaintiff has referenced.

10:13:05 23 And that then the clerk could -- I think the question
10:13:08 24 here, you're right, is we have no idea what these clerks are
10:13:12 25 doing. We don't know what they're -- what they're doing when

10:13:16 1 they're reviewing documents. We don't know if it's for
10:13:19 2 sensitive information. We don't know if it's because of
10:13:22 3 another reason. So the -- the electronic filing manager
10:13:26 4 provides the tools for the clerk to really do -- to fulfill
10:13:32 5 their duties as the custodian of record.

10:13:36 6 But it's ultimately up to the clerk to decide how
10:13:39 7 they want to review a document, if they want to review a
10:13:42 8 document, if they want to auto-accept a document, or if they
10:13:46 9 want to enable the press review tool and accept a document
10:13:49 10 later.

10:13:53 11 THE COURT: Back to you.

10:13:54 12 MS. MERIDETH: I'm sorry. If I could provide just
10:13:56 13 one more clarification?

10:13:57 14 THE COURT: You may.

10:13:57 15 MS. MEREDITH: The cause number is added in the case
10:14:00 16 management system of the clerk.

10:14:02 17 THE COURT: All right. Now, Mr. Dow.

10:14:12 18 MR. DOW: So, Your Honor, I don't -- and we can
10:14:19 19 work -- we're prepared to talk about delay, whether it's 24 to
10:14:24 20 48 hours or eight days. We're prepared to offer evidence as to
10:14:31 21 that. But let me -- this auto --

10:14:33 22 THE COURT: No. I'm sure that what I'm going to
10:14:36 23 hear, when and if I get to that point in this case, that in a
10:14:43 24 state that is geographically the size of France and as divided
10:14:48 25 initially into 254 political subdivisions that are counties,

10:14:55 1 the evidence is going to show me that it's all over the map as
10:15:00 2 to when things get filed and when they're available to the
10:15:04 3 public on a county-by-county basis.

10:15:08 4 Without arguing what's the worst-case scenario and
10:15:11 5 what's the best-case scenario, I think you both will agree it's
10:15:15 6 all over the map; there's no rhyme or reason as to how it
10:15:17 7 works.

10:15:18 8 MR. DOW: Correct, Your Honor, yes.

10:15:19 9 THE COURT: Okay.

10:15:20 10 MR. DOW: So -- so this is where we get to really the
10:15:27 11 meat of the argument from the plaintiff's side, and that is --
10:15:31 12 or the case that we rely on is this *Press Enterprise II* case,
10:15:38 13 and it talks about two questions that the court has to ask:
10:15:40 14 You know, the experience and logic test, which is traditional
10:15:46 15 access back when there was paper.

10:15:48 16 And then the second question is, are the restrictions
10:15:54 17 that exist, do they survive constitutional scrutiny? And, in
10:16:01 18 particular, does the OCA here have a compelling governmental
10:16:08 19 interest to maintain its practices that do -- I'll try not to
10:16:14 20 be argumentative -- that do create delayed access? Or are
10:16:19 21 there less restrictive alternatives?

10:16:22 22 And this -- this is where we land. There are less
10:16:27 23 restrictive alternatives. There's the auto-accept tool that
10:16:34 24 you just heard about, and there's also the press review tool.
10:16:41 25 That's a -- that's a queue that is the subject of the

10:16:49 1 June 24, 2022 amendment between OCA and Tyler, which allows --

10:16:59 2 THE COURT: What year was that June 24th amendment?

10:17:01 3 MR. DOW: 2022.

10:17:03 4 THE COURT: Okay. A recent amendment, right now.

10:17:05 5 MR. DOW: Correct, Your Honor.

10:17:06 6 THE COURT: All right.

10:17:06 7 MR. DOW: And the press review tool allows members of
10:17:10 8 the media to be able to access newly filed petitions while they
10:17:17 9 sit in the EMF -- EFM awaiting the administrative processing
10:17:26 10 that occurs.

10:17:27 11 THE COURT: All right. Tell me -- no. Actually, I'm
10:17:32 12 going to ask Ms. Merideth this. Tell me what reviews district
10:17:39 13 clerks normally make.

10:17:43 14 MS. MERIDETH: And the answer is that OCA doesn't
10:17:47 15 know what the clerks are reviewing.

10:17:51 16 THE COURT: Well, I'll tell you I'm not surprised to
10:17:53 17 hear that because, again, we're creatures of our own
10:17:57 18 background. I feel with absolute certainty, when I first
10:18:06 19 started practicing law and probably for a large amount of that
10:18:10 20 time, but I can't say it was for 100 percent and I can't say
10:18:14 21 it's true today, the district clerk in Travis County didn't
10:18:18 22 review a plaintiff's complaint -- I mean the plaintiff's
10:18:21 23 petition for anything. It came in, it was pushed across the
10:18:25 24 counter, it got file-marked originally with a hand stamp where
10:18:31 25 they wrote in the time, and then we got really fancy and had a

10:18:32 1 little machine you stuck it under that automatically had the
10:18:35 2 time on it, and then they put a file-mark on it.

10:18:38 3 And if a member of the press happened to be standing
10:18:41 4 there and said "I really want a copy of that," they'd make that
10:18:43 5 copy right away. Nobody looked at it to see if there was a
10:18:46 6 problem or anything. That was the lawyer's problem. If you
10:18:48 7 messed up your petition, then you just weren't in very good
10:18:54 8 shape, or the defendant would raise it and a judge would take
10:18:58 9 care of it at that point.

10:19:00 10 So, you know, we're going to get to a little bit of
10:19:07 11 advocacy in a minute, but I will tell you this court has
10:19:10 12 concern as to whether there needs to be, and whether there's a
10:19:16 13 legitimate reason for any -- the clerk to take any action other
10:19:23 14 than to file the petition that got handed to the clerk. And I
10:19:28 15 guess, then, that impacts -- if it's auto-accept, we don't have
10:19:35 16 that problem because it's automatically up and you-all get to
10:19:39 17 look at it as quickly as it hits -- or your client gets to.

10:19:43 18 And I presume, then, if somebody -- -- if the clerk
10:19:48 19 didn't want to do that, then the press review thing would solve
10:19:51 20 that because the media still got immediate access to what was
10:19:58 21 filed. And if the clerk later reviewed and decided to reject
10:20:03 22 the filing, that would also show up somewhere in there as a
10:20:08 23 rejection. I'm just trying to figure out in my own mind a
10:20:12 24 legitimate basis for any review or delay after filing.

10:20:16 25 MS. MERIDETH: And, Your Honor, I think that question

10:20:19 1 can be answered by district clerks, because they're elected
10:20:23 2 officials and it's really their duty to accept filings. And --

10:20:27 3 THE COURT: Well, and I know where you're going.
10:20:28 4 You're coming back to the traditional Attorney General opinion
10:20:32 5 that there's no one person you can sue, you've got to sue all
10:20:35 6 254 district clerks, because everything is going to be
10:20:40 7 different.

10:20:41 8 MS. MERIDETH: I -- Your Honor, I think that the
10:20:47 9 question is, you know, there are some clerks that are complying
10:20:51 10 with the current -- with -- they are reviewing documents and
10:20:55 11 accepts documents in a timely manner. And so forcing every
10:21:00 12 single clerk to use a press review tool or auto-accept is like
10:21:04 13 forcing medicine upon everyone that's not necessarily ill.

10:21:08 14 THE COURT: No. But you also filed a motion to
10:21:11 15 dismiss, and what you're telling me is there's no one person
10:21:16 16 you can sue. That suing the Office of Court Administration
10:21:23 17 will not get the plaintiff the relief they want because the
10:21:27 18 Office of Court Administration doesn't have the power to tell
10:21:30 19 the district clerk in Menard County or the district clerk in
10:21:34 20 Tarrant County or the district clerk in Hood County to change
10:21:37 21 the way they're doing things.

10:21:39 22 MS. MERIDETH: Yes. That's correct.

10:21:42 23 MR. DOW: And our position is that the OCA, because
10:21:48 24 it's the OCA that is the one that -- the only one that
10:21:52 25 contracts with Tyler Technologies and negotiates changes to the

10:22:00 1 system --

10:22:00 2 THE COURT: Yeah. But can this court tell OCA how to
10:22:06 3 contract?

10:22:07 4 MR. DOW: No.

10:22:08 5 THE COURT: Or I'll just jump into this. I have a
10:22:14 6 big question, having reviewed what I reviewed before you gave
10:22:22 7 me additional things, that I don't know why the federal court
10:22:25 8 is in this. I don't know why we wouldn't abstain, because it's
10:22:29 9 the Supreme Court of Texas that has put all of this together.

10:22:35 10 I -- I have great concern about the State's argument
10:22:42 11 that OCA doesn't have the power to do anything, because I don't
10:22:46 12 think I have the power to tell OCA how they're going to
10:22:49 13 contract.

10:22:53 14 MR. DOW: They've already contracted, though. So
10:22:56 15 that --

10:22:56 16 THE COURT: I understand: Are you asking me to change
10:22:58 17 the contract?

10:22:59 18 MR. DOW: No. No, Your Honor.

10:23:00 19 THE COURT: You're asking me to void the contract?

10:23:02 20 MR. DOW: No. I'm not -- no.

10:23:04 21 THE COURT: Well, what are you asking me to do?

10:23:06 22 MR. DOW: I'm asking for a permanent injunction that
10:23:10 23 the OCA stops its practice of continuing delayed access. And
10:23:20 24 they have -- they have the two tools to do that. The solution
10:23:29 25 is at hand, either with the press review tool, which is the --

10:23:33 1 THE COURT: But is the OCA delaying access?

10:23:37 2 MR. DOW: Yes.

10:23:38 3 THE COURT: Or are various district clerks delaying
10:23:47 4 access? Some are, some aren't.

10:23:49 5 MR. DOW: And, Your Honor, the O -- the answer is,
10:23:58 6 you know, the delay is created by the district clerk
10:24:03 7 administrative processing. I'm not going to try and circle
10:24:08 8 around that. That is the cause for the delay. But here's --
10:24:14 9 and it's just where we are, you know. The OCA is the agency,
10:24:25 10 it's the entity, that is in charge of and, you know,
10:24:29 11 administers the electronic file manager, the EFM, and has
10:24:36 12 negotiated with Tyler Technologies to provide an auto-accept
10:24:45 13 tool and to provide a press review tool.

10:24:52 14 And what -- and what we hear from the OCA is, well,
10:24:56 15 that's for the district clerks to decide. No. Because, once
10:25:01 16 again, if we go behind the --

10:25:06 17 THE COURT: Well, is the OCA telling them not to use
10:25:13 18 the auto-accept or the press review tools?

10:25:16 19 MR. DOW: No, Your Honor.

10:25:17 20 THE COURT: Is the OCA telling every district clerk
10:25:22 21 to use auto-accept or press review?

10:25:25 22 MR. DOW: No, Your Honor.

10:25:26 23 THE COURT: Well, then here's where I'm kind of hung
10:25:32 24 up with this. The Attorney General comes in here and
10:25:38 25 consistently takes the position in a whole variety of things, a

10:25:42 1 lot of times, because I hear them all. I should give either
10:25:49 2 frequent filer points or frequent responder points to the
10:25:52 3 Attorney General's Office. I know most of them, at least every
10:25:55 4 one that sets foot in the courtroom a lot.

10:25:58 5 So I'll just give one example. The Texas Election
10:26:02 6 Code says the Secretary of State is the chief elections officer
10:26:06 7 of the State of Texas. It says that. To my mind that means
10:26:12 8 the Secretary of State's in charge of the election process in
10:26:15 9 the State of Texas. And if you've got a problem with our
10:26:18 10 election process, you see the Secretary of State. And I think
10:26:22 11 I can make an argument that that's the reason the legislature
10:26:26 12 has that in the statute, because we're a big state, as I've
10:26:30 13 said, 254 counties.

10:26:32 14 The Attorney General does not agree with that
10:26:35 15 position and consistently argues that if you've got a problem
10:26:38 16 with an election, you need to sue the election official in the
10:26:43 17 county or the political subdivision where the election took
10:26:49 18 place. Consistently in that instance and other instances where
10:26:56 19 that general point is raised as to who you sue, the Fifth
10:27:02 20 Circuit supports the Attorney General and looks at Texas's
10:27:09 21 political scheme that way.

10:27:12 22 So where I'm trying then to get with you is to tell
10:27:17 23 me why this case is any different. Because when I read
10:27:23 24 Chapter 72, is it, of the -- the --

10:27:28 25 MS. MERIDETH: The Texas Government --

10:27:29 1 THE COURT: -- Texas Government Code, I see that the
10:27:34 2 OCA is charged with assisting the process of the courts, making
10:27:47 3 recommendations, consulting with district clerks. And I don't
10:27:50 4 see that statute giving the OCA real power to do anything. So
10:28:07 5 tell me where they get their power to do anything or it gets
10:28:10 6 its power to do anything.

10:28:10 7 MR. DOW: They get their power based on what they've
10:28:12 8 done over the years. So negotiating the contract and the
10:28:18 9 amendments with Tyler Technologies. They -- they maintain that
10:28:24 10 electronic file manager. So someone has to -- you know, with
10:28:34 11 the duties comes responsibility, and with our First Amendment
10:28:40 12 claim, Your Honor -- so the answer to your question is I think
10:28:47 13 the OCA has to be able to articulate a compelling governmental
10:28:52 14 interest under *Press Enterprise II* as to why there is delayed
10:29:05 15 access. And the delayed access --

10:29:07 16 THE COURT: But there's not uniform delayed access.

10:29:10 17 MR. DOW: Maybe the number of days is not uniform,
10:29:13 18 Your Honor. That's true. But the -- what is uniform is -- and
10:29:19 19 this is true -- that delayed access occurs under the OCA's
10:29:27 20 watch in the electronic file manager.

10:29:35 21 THE COURT: So you're saying the OCA has the power to
10:29:39 22 reach down and look at Burnet County and say: "District Clerk,
10:29:52 23 you're taking way too much time to have these petitions
10:30:00 24 available to the public, and we want you to stop"?

10:30:03 25 MR. DOW: No.

10:30:04 1 THE COURT: So what can OCA do that this court can
10:30:09 2 order OCA to do with these problems?

10:30:17 3 MR. DOW: Texas Government Code, Section 72.031(b) (1)
10:30:28 4 and (2), where the OCA is granted broad authority. That's my
10:30:35 5 words. But let me quote -- let me quote from 72.031 --

10:30:39 6 THE COURT: Let me get to it.

10:30:41 7 MR. DOW: -- (b) (1) and (2).

10:30:42 8 THE COURT: All right. Texas Government Code 71.

10:30:49 9 MR. DOW: 72 --

10:30:50 10 THE COURT: 72.

10:30:50 11 MR. DOW: -- .031(b).

10:31:02 12 THE COURT: All right.

10:31:04 13 MR. DOW: And under (b), numbers (1) and (2).

10:31:12 14 THE COURT: All right.

10:31:12 15 MR. DOW: And, specifically, Your Honor, the OCA is
10:31:20 16 to implement an electronic filing system for use in the courts
10:31:26 17 of this state and --

10:31:27 18 THE COURT: Wait. So OCA has satisfied (1) or has
10:31:34 19 done (1). They have implemented an electronic filing system
10:31:40 20 for use in the courts of this state.

10:31:42 21 MR. DOW: Yes.

10:31:44 22 THE COURT: Everybody in agreement on that? OCA did
10:31:46 23 that?

10:31:47 24 MR. DOW: Yes, Your Honor.

10:31:47 25 THE COURT: Okay. Now (2).

10:31:49 1 MR. DOW: "Allow public" -- and I'm quoting. "Allow
10:31:52 2 public access to view information or documents in the state
10:31:57 3 court document database."

10:32:00 4 THE COURT: All right. And the state court document
10:32:02 5 database is?

10:32:05 6 MR. DOW: The EFM.

10:32:06 7 MS. MERIDETH: Your Honor, that's -- the state court
10:32:09 8 document database is actually Research Texas, and that's a
10:32:15 9 completely separate system that was ordered by the Supreme
10:32:18 10 Court of Texas. And OCA received authority to implement
10:32:25 11 Research Texas by that Supreme Court order. And also JCIT made
10:32:33 12 recommendations as to that database as well, and both JCIT and
10:32:38 13 the Supreme Court of Texas decided that only documents that
10:32:45 14 were filed and accepted -- accepted documents by the clerk
10:32:48 15 would be accessible via Research Texas.

10:32:51 16 THE COURT: All right.

10:32:53 17 MS. MERIDETH: And just to add more clarification --

10:32:55 18 THE COURT: No. Don't add. I wasn't sure that was a
10:32:57 19 clarification; it was a statement. So let me then ask this.
10:33:05 20 This is why I wanted to walk through all of this, because
10:33:09 21 lawyers are really good at filing a lot of papers and not
10:33:12 22 really good about giving the kind of trail I like, and we've
10:33:16 23 been spending an hour getting this trail right now and we're
10:33:19 24 not through yet.

10:33:19 25 Is there anywhere a state court document database

10:33:31 1 such as is described in Section 72.031(b) (2) of the Texas
10:33:40 2 government code, whether that state court document database is
10:33:46 3 maintained by the Office of Court Administration or anywhere
10:33:50 4 else? That's a yes-or-no question. Is there a state court
10:33:55 5 document database?

10:33:56 6 MS. MERIDETH: Yes.

10:33:57 7 MR. DOW: Yes.

10:33:58 8 THE COURT: And where is that?

10:34:00 9 MS. MERIDETH: So it's called Research Texas.

10:34:05 10 THE COURT: Research Texas?

10:34:06 11 MS. MERIDETH: Yes.

10:34:07 12 THE COURT: All right.

10:34:07 13 MS. MEREDITH: And it's essentially -- it's an
10:34:10 14 additional database for users to access filings so that they
10:34:19 15 don't --

10:34:19 16 THE COURT: Who maintains it?

10:34:21 17 MS. MERIDETH: OCA.

10:34:22 18 THE COURT: Okay.

10:34:25 19 MS. MERIDETH: And if I could give more
10:34:26 20 clarification, JCIT recommended Research Texas, and that
10:34:33 21 JCIT --

10:34:34 22 THE COURT: Now, what is JCIT?

10:34:37 23 MS. MERIDETH: So JCIT is the Judicial Committee on
10:34:41 24 Information Technology, and it's a committee of the Supreme
10:34:42 25 Court of Texas.

10:34:43 1 THE COURT: All right. Just a minute. Initialisms
10:34:50 2 come easy to you. They don't come easy to me because I hear
10:34:53 3 them in all different contexts.

10:34:54 4 So it's the Judicial Committee --

10:34:57 5 MS. MERIDETH: -- on Information on Technology.

10:34:59 6 THE COURT: And that is a committee established by
10:35:03 7 the Supreme Court; is that right?

10:35:06 8 MS. MERIDETH: Yes. And the code section is Texas
10:35:09 9 Government Code Section 77.031.

10:35:13 10 THE COURT: All right.

10:35:26 11 MS. MEREDITH: And Section 77.031 delineates the
10:35:32 12 powers and duties of JCIT. And if we go to subsection (5),
10:35:42 13 they are tasked with developing minimum standards for an
10:35:47 14 electronically-based document system to provide for the flow of
10:35:49 15 information within the judicial system in electronic form and
10:35:52 16 recommend rules relating to the electronic filing of documents
10:35:56 17 with courts.

10:35:58 18 So JCIT offers recommendations regarding the filing
10:36:01 19 system, regarding Research Texas, and then the Supreme Court
10:36:05 20 then essentially ratifies those recommendations and then orders
10:36:11 21 OCA to act on those recommendations.

10:36:14 22 And so while, yes, OCA can enter into contracts
10:36:20 23 regarding the electronic filing manager, regarding the Texas
10:36:22 24 e-file system and Research Texas, it's stemming from JCIT's
10:36:26 25 recommendations and then ordered by the Supreme Court of Texas.

10:36:29 1 THE COURT: So go back to an hour ago. So is the
10:36:34 2 path: The Supreme Court, pursuant to Chapter 77, established
10:36:49 3 the Joint Committee on Information Technology? Is that the
10:36:57 4 first step?

10:36:58 5 MS. MERIDETH: Yes.

10:36:58 6 THE COURT: And then the Joint Committee on
10:37:00 7 Information Technology interacted how with Office of Court
10:37:06 8 Administration?

10:37:07 9 MS. MERIDETH: So JCIT makes recommendations.

10:37:15 10 THE COURT: And they recommended to OCA what an
10:37:17 11 electronic filing system should look like?

10:37:20 12 MS. MERIDETH: Yes.

10:37:24 13 THE COURT: Okay. And then OCA contracted with --
10:37:46 14 Mr. Dow, what's the name of that company? Tyler?

10:37:48 15 MR. DOW: Tyler Technologies.

10:37:51 16 THE COURT: All right. Do you agree that that was
10:37:55 17 the path?

10:37:56 18 MR. DOW: I'm sorry, Your Honor. Could ...

10:38:01 19 THE COURT: All right.

10:38:02 20 MR. DOW: I ...

10:38:04 21 THE COURT: The legislature establishes the Joint
10:38:07 22 Committee on Information Technology and says it operates under
10:38:13 23 the direction and supervision of the Chief Justice of the
10:38:16 24 Supreme Court.

10:38:18 25 MR. DOW: Yes, Your Honor.

10:38:19 1 THE COURT: All right. That committee gets formed.

10:38:23 2 MR. DOW: Yes.

10:38:23 3 THE COURT: Okay. So that committee that is

10:38:26 4 operating under the direction and supervision of the Chief

10:38:29 5 Justice of the Supreme Court, it then makes recommendations to

10:38:33 6 the Office of Court Administration on an electronic filing

10:38:37 7 system.

10:38:38 8 MR. DOW: Correct.

10:38:39 9 THE COURT: The Office of Court Administration then

10:38:43 10 contracts with Tyler Technology for that system.

10:38:53 11 MR. DOW: For the e-filing system.

10:38:54 12 THE COURT: Yeah. We're in agreement there?

10:38:57 13 MR. DOW: Yes, Your Honor.

10:38:58 14 THE COURT: All right. Then I'm jumping now back to

10:39:03 15 where we were, Section 72.031 of the Texas Government Code,

10:39:10 16 (b), "The office as authorized by Supreme Court rule or order

10:39:16 17 may allow public access to view information or documents in the

10:39:24 18 state court document database."

10:39:25 19 So there is a state court document database, as

10:39:32 20 defined in 72.031(a)(5), that was established or authorized by

10:39:41 21 the Supreme Court for storing documents filed with the court of

10:39:46 22 this state, and that is called Research Texas.

10:39:53 23 MS. MERIDETH: Yes.

10:39:55 24 MR. DOW: Yes, but may I add something?

10:39:59 25 THE COURT: Yes.

10:40:00 1 MR. DOW: Post-acceptance. So what Research Texas,
10:40:08 2 that database, that is -- that is holding petitions that have
10:40:20 3 been filed and administratively processed by the district
10:40:26 4 clerks.

10:40:26 5 THE COURT: I was going to get to that. So that
10:40:30 6 question was going to be, so once a petition hits EFM, it is
10:40:46 7 not automatically placed in the Research Texas database.

10:40:50 8 MR. DOW: Correct, Your Honor.

10:40:52 9 MS. MERIDETH: So, Your Honor, there's a step missing
10:40:54 10 there. The document goes from the EFM to the case management
10:40:58 11 system, and then the Supreme Court has decided that the -- that
10:41:02 12 the document doesn't skip the step, that the document flows
10:41:05 13 through the case management system of the clerk. And then upon
10:41:08 14 acceptance of the clerk --

10:41:11 15 THE COURT: Yeah.

10:41:12 16 MS. MERIDETH: -- is reproduced in Research Texas.

10:41:14 17 THE COURT: But that's the step. What I'm saying,
10:41:17 18 there has to be clerk action to get it into Research Texas.

10:41:21 19 MS. MERIDETH: Yes. And that was the Supreme Court's
10:41:24 20 and JCIT's decision.

10:41:26 21 THE COURT: All right. Well, let's make sure. All
10:41:29 22 right. Document goes into -- I keep going over this because,
10:41:40 23 if I got you back in here tomorrow, no offense, I would hear
10:41:43 24 something different that I didn't hear today. So I'm just
10:41:45 25 trying to cover it all today.

10:41:46 1 Documents sits in EFM. Clerk comes in on Monday
10:41:50 2 morning, going back to my example, logs into EFM, finds out
10:41:55 3 there's a new petition sitting there. The clerk then takes an
10:42:01 4 affirmative act to put it in their case management system? Or
10:42:07 5 is it automatically in the case management system, or is it
10:42:11 6 just sitting there waiting for the clerk to take an affirmative
10:42:16 7 act?

10:42:16 8 MR. DOW: The district clerk has to accept it into
10:42:19 9 that district clerk's --

10:42:20 10 THE COURT: So once the clerk accepts it to the
10:42:28 11 clerks CMFS, the clerk hasn't done anything with it yet. The
10:42:32 12 clerk hasn't reviewed it or anything. The clerk just hits a
10:42:36 13 key stroke and puts it in the clerk's CMFS; is that right?

10:42:40 14 MS. MERIDETH: So the clerk review -- if the clerk
10:42:43 15 wants to take action to review a document, that happens in the
10:42:46 16 electronic filing manager. And then the clerk -- once the
10:42:51 17 clerk accepts the document, it's then transferred into the case
10:42:54 18 management system.

10:42:55 19 THE COURT: Okay. So the clerk, once it gets into
10:42:59 20 CMS, then it automatically goes to Research Texas?

10:43:03 21 MS. MERIDETH: That's correct. And the -- the county
10:43:06 22 also makes documents available via the case management system.
10:43:10 23 So, essentially, Research Texas is an additional overlay that
10:43:15 24 provides additional access to the public.

10:43:17 25 THE COURT: No. But it is the state court document

10:43:21 1 database that Chapter 72 anticipates.

10:43:26 2 MS. MERIDETH: Yes.

10:43:26 3 THE COURT: Even though you might also be able to go,
10:43:30 4 depending on how each individual county does its business and
10:43:33 5 files public records in the individual counties. Is that what
10:43:37 6 you're saying?

10:43:38 7 MS. MERIDETH: Yes. And Research Texas also -- it
10:43:40 8 doesn't make every single document available. It makes
10:43:45 9 nonconfidential documents available.

10:43:47 10 THE COURT: Well, I don't think we have a debate over
10:43:49 11 documents that are sealed or confidential at this point, and
10:43:53 12 I'm not going to get bogged down in that. I'm sure if it's a
10:43:57 13 problem, I'll get a second lawsuit about it and we'll be able
10:44:00 14 to handle that.

10:44:05 15 But it is not on the state court document database
10:44:11 16 until it goes into the clerks CMS. Am I correct?

10:44:16 17 MR. DOW: Correct.

10:44:17 18 MS. MERIDETH: That's correct.

10:44:18 19 MR. DOW: And accepted.

10:44:20 20 THE COURT: No. Wait a minute. You added a step.

10:44:22 21 MR. DOW: I did.

10:44:23 22 THE COURT: "And accepted." I'm the clerk. I'm
10:44:26 23 sitting there. I see I've got something in my manager. I hit
10:44:33 24 a button and put it in my CMS. Now, are you saying that it
10:44:39 25 doesn't automatically go? Because I thought I understood

10:44:49 1 Ms. Merideth to say it automatically went to Research Texas.

10:44:52 2 MR. DOW: The district clerk has to accept it first.

10:44:57 3 THE COURT: Well, is that a step different than

10:44:59 4 putting it in CMS?

10:45:01 5 MR. DOW: Yes. Yes, sir.

10:45:02 6 MS. MEREDITH: No.

10:45:02 7 THE COURT: Does that come before or after you put it

10:45:05 8 in CMS?

10:45:06 9 MR. DOW: It happens at the same time. Right. So

10:45:12 10 it's the --

10:45:12 11 THE COURT: Is there one click by the clerk that

10:45:14 12 accepts it and puts it in CMS?

10:45:17 13 MR. DOW: Yes, Your Honor.

10:45:18 14 THE COURT: All right. And even if the clerk later

10:45:20 15 has second thoughts, it's already in there and it's already

10:45:22 16 gone to Research Texas.

10:45:24 17 MR. DOW: Correct.

10:45:25 18 THE COURT: Okay. All right.

10:45:28 19 MR. DOW: But Your Honor?

10:45:37 20 THE COURT: Yeah?

10:45:37 21 MR. DOW: You asked the question just a minute ago

10:45:43 22 about, so is this 72.031(b)(2), is the -- I think what I heard

10:45:54 23 was: So is the Research Texas what was contemplated as far as

10:46:00 24 the state court.

10:46:02 25 THE COURT: No. I don't ask if it was contemplated.

10:46:08 1 That says, "The office is authorized" -- "the office" being
10:46:11 2 OCA -- "by Supreme Court rule or order may ..." Is the OCA
10:46:19 3 authorized by Supreme Court rule or order to allow public
10:46:27 4 access to view information or documents in the state court
10:46:33 5 document database, which is a database established and
10:46:39 6 authorized by the Supreme Court for storing documents prepared
10:46:44 7 or filed in a court.

10:46:46 8 What I -- what I'm still trying to do is this is "See
10:46:49 9 Spot Run." You know, has the Supreme Court authorized a state
10:46:57 10 court document database or established such a database as
10:47:04 11 described in 72.031(5)? Yes or no? Either one of you.

10:47:16 12 MR. DOW: They authorized Research Texas do that.

10:47:18 13 THE COURT: My question was, yes or no: Have they
10:47:22 14 established or authorized a state court document database, as
10:47:31 15 described in 72.031(a)(5)? Yes or no? Did they do that?

10:47:35 16 MR. DOW: Yes.

10:47:40 17 THE COURT: Do you agree with that?

10:47:41 18 MS. MERIDETH: Yes.

10:47:41 19 THE COURT: All right. So they've done that. And
10:47:43 20 are we in agreement that that state court document database is
10:47:47 21 Research Texas?

10:47:51 22 MR. DOW: Yes, Your Honor.

10:47:51 23 MS. MERIDETH: Yes, Your Honor.

10:47:52 24 THE COURT: All right. So when I then read (b)(2),
10:47:59 25 "Allow public access to view information or documents in

10:48:02 1 Research Texas." I'm substituting "Research Texas" for the
10:48:06 2 "state court document database." Does the public have access
10:48:12 3 to view information or documents that are in Research Texas?

10:48:19 4 MR. DOW: Yes, Your Honor.

10:48:19 5 THE COURT: Now, I know we're going to talk in a
10:48:22 6 minute about how they get there because -- and the delay. I'm
10:48:27 7 just trying to walk through this. So then we get over here to
10:48:30 8 (3), and that really is not the basis of this lawsuit, as I
10:48:36 9 understand it, that the OCA can charge a fee -- a reasonable
10:48:44 10 fee for additional optional features in the state court
10:48:48 11 document database? We're not even arguing about that?

10:48:48 12 MR. DOW: No, Your Honor.

10:48:49 13 THE COURT: All right. So we've got it, and it's to
10:48:51 14 Research Texas. But it doesn't get to Research Texas until a
10:49:00 15 specific district clerk pushes a button which accepts the
10:49:08 16 document and places it in the district clerk's CMS.

10:49:16 17 MR. DOW: Yes, Your Honor.

10:49:16 18 THE COURT: Then it goes directly to Research Texas.

10:49:20 19 MR. DOW: Yes, Your Honor.

10:49:23 20 MS. MERIDETH: Yes. That's correct.

10:49:24 21 THE COURT: All right. Now, your beef is, Mr. Dow?

10:49:31 22 MR. DOW: My beef is going back to 72.031(b)(2),
10:49:39 23 allow public access. What -- what sits in that Research
10:49:45 24 Texas --

10:49:46 25 THE COURT: Your argument is a temporal argument.

10:49:49 1 MR. DOW: We want preprocessing access.

10:49:53 2 THE COURT: You don't want the clerk to sit on it
10:49:55 3 until the clerk gets through with it and accepts it before you
10:49:59 4 get to see it?

10:50:01 5 MR. DOW: Yes, Your Honor.

10:50:03 6 THE COURT: And the State's position is?

10:50:06 7 MS. MERIDETH: This State's position is that it's the
10:50:08 8 district clerks that get to decide how they want to process the
10:50:13 9 document, if they want to process the document. Additionally,
10:50:18 10 JCIT has already considered, essentially, a statewide mandate
10:50:21 11 of the press review tool back in October of 2020 and they
10:50:26 12 recommended against essentially requiring the tool for every
10:50:29 13 county. And then the -- and then the Supreme Court didn't take
10:50:32 14 any action on the recommendation. So OCA's understanding is
10:50:37 15 that the Supreme Court has essentially made the decision not to
10:50:42 16 implement the press review tool statewide. And JCIT nor the
10:50:48 17 Supreme Court have taken any other action.

10:50:50 18 And I will add, though, that the auto-accept tool was
10:50:53 19 included in the latest contract back for the e-file two system,
10:51:02 20 and that was recommended by JCIT.

10:51:07 21 THE COURT: So what do I order OCA to do or not do to
10:51:18 22 grant you the relief you seek, Mr. Dow?

10:51:21 23 MR. DOW: Cease the practice of not utilizing either
10:51:30 24 the auto-accept tool or the press review tool preprocessing so
10:51:38 25 that the public and the press can view newly filed petitions

10:51:48 1 before each district clerk performs their clerical
10:51:54 2 administrative processing.

10:52:00 3 THE COURT: Well, said another way, I order the OCA
10:52:04 4 to tell every district clerk in Texas that they must have
10:52:08 5 either auto-accept or press review.

10:52:12 6 MR. DOW: No, Your Honor.

10:52:12 7 THE COURT: Then tell me what's the difference
10:52:14 8 between the way you phrased it and the way I phrased it.

10:52:17 9 MR. DOW: It goes back to the EFM. We know that the
10:52:24 10 OCA is the one that contracts and amends the contracts with
10:52:31 11 Tyler Technologies. And that --

10:52:34 12 THE COURT: All right. Let me stop you right there.
10:52:35 13 But every one of the 254 district clerks in the state of Texas
10:52:41 14 has the option of auto-accept or press review as it stands
10:52:45 15 right now?

10:52:47 16 MR. DOW: Correct.

10:52:48 17 THE COURT: OCA is not preventing any district clerk
10:52:54 18 from having auto-accept and/or press review?

10:52:59 19 MR. DOW: Correct, Your Honor.

10:53:01 20 THE COURT: Now keep going with why it's not two
10:53:05 21 sides of the same coin.

10:53:06 22 MR. DOW: Well, they're -- we've settled with the
10:53:10 23 Travis County District Clerk, but there are 253 other district
10:53:15 24 clerks.

10:53:15 25 THE COURT: So it's a lot of trouble, and that's why

10:53:18 1 I said earlier about the Attorney General's usual position on
10:53:21 2 this. And I recognize that.

10:53:23 3 MR. DOW: And --

10:53:24 4 THE COURT: But I'm not sure that a lot of trouble is
10:53:29 5 something that I'm able to grant relief for.

10:53:33 6 MR. DOW: I would -- if I could just -- yes. You're
10:53:37 7 right that it's a lot of trouble. But I don't think that
10:53:44 8 there's any question that the OCA has the right and the
10:53:55 9 authority to simply implement the press review tool or the
10:53:59 10 auto-accept tool while petitions are in the EFM. There's
10:54:07 11 nothing preventing that, and it doesn't change anything.

10:54:13 12 THE COURT: So you're -- I am getting down to your
10:54:16 13 argument. And I've learned over the years that it's better for
10:54:19 14 me to take three hours right now and understand what the
10:54:22 15 arguments are then trying to do something.

10:54:24 16 So you're saying that you believe that the OCA right
10:54:30 17 now under their contract with Tyler Technology, once a document
10:54:46 18 anywhere in the state of Texas filed with the district clerk
10:54:51 19 hits EFM, then OCA can just on its own make that available? It
10:54:59 20 could happen at OCA?

10:55:01 21 MR. DOW: Yes, Your Honor.

10:55:07 22 THE COURT: Ms. Merideth?

10:55:08 23 MS. MERIDETH: Yes. And OCA's position is that,
10:55:11 24 essentially, CNS is asking this court to mandate OCA to amend
10:55:18 25 its contract to either require the press review tool or to

10:55:23 1 require auto-accept.

10:55:24 2 THE COURT: No. Back up right there. How would --
10:55:28 3 according to Mr. Dow, there wouldn't have to be an amended
10:55:32 4 contract; that the power is there within the contract between
10:55:35 5 EFM and Tyler Technology to where EFM -- I mean, OCA could just
10:55:49 6 allow anybody to access EFM through OCA and get access to these
10:55:55 7 documents?

10:55:58 8 MR. DOW: They would -- OCA could allow anyone to
10:56:02 9 access the newly filed petitions in the EFM through either the
10:56:08 10 auto-accept tool. That would be anyone.

10:56:11 11 THE COURT: To authorize it in the EFM as is
10:56:15 12 administered by OCA and not authorize it through anything a
10:56:21 13 district clerk had anywhere in the country?

10:56:22 14 MR. DOW: Yes.

10:56:23 15 THE COURT: You could sit down, I could sit down,
10:56:25 16 members of the press could sit down whenever they wanted to,
10:56:30 17 access a website at the Office of Court Administration, pull up
10:56:36 18 EFM, and find out everything that had been filed in the courts
10:56:41 19 of the state of Texas, whether it had been accepted by the
10:56:44 20 district clerk or not?

10:56:45 21 MR. DOW: Yes, Your Honor.

10:56:46 22 THE COURT: Do you believe that's possible? I'm not
10:56:49 23 asking you to agree to it. I'm not asking you whether you
10:56:52 24 think it's advisable. I'm not asking whether you think it's
10:56:56 25 legal. Does that technology exist?

10:56:58 1 MS. MERIDETH: Does the -- can the press review tool
10:57:02 2 be linked to the EFM? Is that what Mr. Dow is asking?

10:57:07 3 THE COURT: No. That's what I'm asking.

10:57:09 4 MS. MERIDETH: Okay. Yes. That is possible. And
10:57:11 5 we've never contended that it's not technically possible.

10:57:13 6 THE COURT: All right. But is OCA of the opinion
10:57:20 7 that they couldn't do that without direction of the Supreme
10:57:23 8 Court or that they're barred right now from doing that because
10:57:28 9 of the interaction of 77 and 72? Why would they not be able to
10:57:37 10 do that right now if they saw fit to do it?

10:57:40 11 MS. MERIDETH: Yes, Your Honor. Well, there's two
10:57:42 12 reasons. Number one, because the clerks are the custodian of
10:57:50 13 the record, and it's OCA's position that it's ultimately up to
10:57:53 14 the clerk to determine how they want to accept the document.
10:57:56 15 If they want to accept the document -- sorry. If they want to
10:57:59 16 make the document available via the press review tool before
10:58:02 17 acceptance, if they want to auto-accept, or if they want to
10:58:07 18 conduct whatever process they -- they need to do before they
10:58:12 19 accept the document, clerks are elected officials and that's
10:58:15 20 how the Texas Constitution has laid out the clerks' structure.
10:58:20 21 There is no governing body over the clerks. There is no
10:58:23 22 disciplinary body over the clerks.

10:58:25 23 The Office of Court Administration can't even force
10:58:29 24 counties to use the EFM. Recently there was a county that
10:58:33 25 wasn't using the EFM, and all OCA could do was ask the county

10:58:37 1 to use the EFM.

10:58:39 2 So, essentially, OCA really -- OCA has no teeth to
10:58:44 3 force those counties to use the tool.

10:58:47 4 THE COURT: No, no. But I think -- there's a little
10:58:53 5 difference in what you're saying. There is a difference in
10:58:58 6 saying that district clerks have total control over themselves
10:59:07 7 and their filings. There's a difference between that and
10:59:10 8 saying now that we have this statewide electronic system,
10:59:18 9 before the district clerk accepts it, if some other entity read
10:59:24 10 OCA has it, that entity can make it available to the public.

10:59:31 11 MS. MERIDETH: And our position is that OCA cannot
10:59:33 12 make those documents available.

10:59:34 13 THE COURT: And why can OCA not? Because of the
10:59:39 14 Supreme Court's rulings? Because they don't want to? Why can
10:59:43 15 OCA not do this?

10:59:45 16 MS. MERIDETH: There's two reasons: Because the
10:59:47 17 clerk is the custodian of the document. It's their duty to
10:59:49 18 accept the document to make the record of the court. And so
10:59:53 19 OCA's position is that it's the clerk's decision.

10:59:56 20 THE COURT: Well, but --

10:59:58 21 MS. MERIDETH: That it fringes upon the duty --

11:00:00 22 THE COURT: -- if OCA has that, why can't they do
11:00:05 23 with it whatever they want to? Is it purely a positional
11:00:09 24 thing, or is there law out there or rule out there that says
11:00:11 25 OCA can't do that?

11:00:17 1 MS. MERIDETH: Okay. And let me back up. So can
11:00:20 2 members of the public log directly into the EFM? So the answer
11:00:24 3 to that is no. The members of the public can't.

11:00:26 4 THE COURT: All right. Well, that just cost me
11:00:29 5 30 minutes.

11:00:30 6 MS. MEREDITH: I apologize.

11:00:30 7 THE COURT: I'll never get that back.

11:00:32 8 MS. MEREDITH: I've been corrected.

11:00:34 9 THE COURT: Yes.

11:00:35 10 MS. MEREDITH: And our position is that -- and I can
11:00:37 11 pull up the statutes that I have cited in my briefing. But
11:00:43 12 Texas law provides duties to the clerk that OCA cannot infringe
11:00:48 13 upon. And then, secondly, the Supreme Court of Texas has
11:00:52 14 already followed JCIT's recommendation against the press review
11:00:58 15 tool statewide.

11:00:59 16 So OCA's position is that the Supreme Court has
11:01:02 17 already decided that the -- that the press review tool should
11:01:06 18 not be implemented statewide.

11:01:20 19 THE COURT: All right. Mr. Dow, now back to my
11:01:21 20 question of is this an OCA problem or is this a Supreme Court
11:01:25 21 problem.

11:01:27 22 MR. DOW: It's an OCA problem because -- you were
11:01:32 23 going to ask a question?

11:01:33 24 THE COURT: Well, I was going to ask you: If the
11:01:35 25 Supreme Court is telling OCA what to do, how can this court go

11:01:39 1 against the Supreme Court?

11:01:40 2 MR. DOW: I don't think that's correct. I don't
11:01:43 3 think the Texas Supreme Court is telling the OCA how to manage
11:01:51 4 and negotiate the contracts and the amendments.

11:01:55 5 THE COURT: No. But we're through the contract now.
11:01:57 6 There is a contract, you know. And I still am having a problem
11:02:11 7 with why what you're asking me to do isn't to amend that
11:02:14 8 contract or order that that contract be construed in a certain
11:02:18 9 way.

11:02:20 10 MR. DOW: I'm not asking you to amend the contract.
11:02:26 11 I'm not. The answer -- my answer to your question, Your Honor,
11:02:33 12 is: It is the OCA that manages/oversees the EFM. And
11:02:43 13 that's -- and they -- and the OCA has already negotiated with
11:02:51 14 Tyler Technologies for two different tools that would allow
11:03:00 15 members of the public and press to view newly filed petitions
11:03:08 16 preprocessed in the EFM. And that, I think, if I -- and if we
11:03:15 17 go back to 72.031(b)(2) --

11:03:28 18 THE COURT: Yeah.

11:03:29 19 MR. DOW: -- "Allow public access to view information
11:03:32 20 or documents in the state court document database," that has to
11:03:40 21 satisfy the First Amendment.

11:03:42 22 THE COURT: Well, but -- but, if I understand
11:03:47 23 Ms. Merideth, her position is it doesn't get to the state court
11:03:51 24 document database without action by the particular district
11:03:56 25 clerk.

11:03:57 1 MS. MERIDETH: That's correct, Your Honor. And that
11:03:59 2 was a decision made by JCIT and the Supreme Court of Texas.

11:04:04 3 THE COURT: So do I order that, once it's on EFM,
11:04:13 4 that it goes immediately into the state court document
11:04:17 5 database? Is that what you're asking?

11:04:19 6 MR. DOW: No, Your Honor. I'm asking for an order
11:04:26 7 that requires the OCA to implement the auto-accept tool.

11:04:37 8 THE COURT: Where do I have the power to order the
11:04:42 9 OCA to implement the auto-accept tool? And if I do, where then
11:04:51 10 does the OCA have the power to instruct the district clerks to
11:04:56 11 do it?

11:04:57 12 MR. DOW: Well, the OCA has already -- the OCA
11:05:03 13 doesn't have to -- we're not changing the duties of the
11:05:06 14 district clerks and we're not asking you to have OCA say
11:05:10 15 anything to the district clerks. All we're asking for is
11:05:15 16 that ...

11:05:18 17 THE COURT: No. Go ahead.

11:05:20 18 MR. DOW: ... is that the practice and how they do
11:05:24 19 things, that it allows -- that they start allowing the public
11:05:31 20 and the press to use either the auto-accept tool or the press
11:05:38 21 review.

11:05:39 22 THE COURT: But how can they tell the public or the
11:05:45 23 press that they can use auto-accept or press review? Because I
11:05:51 24 thought that's part of what district clerks have the power to
11:05:56 25 do or not do.

11:05:59 1 MR. DOW: That's the way the OCA has contracted with
11:06:04 2 Tyler, is to push -- push those two different tools off to the
11:06:11 3 district clerks. But that -- but that is -- that's
11:06:18 4 postprocessing. That's postacceptance. It doesn't address --

11:06:25 5 THE COURT: No. It's not post -- it may be post, but
11:06:29 6 here's the deal. This is why we've got to break this out and
11:06:33 7 not generalize on it.

11:06:36 8 Right now there is a contract between Tyler
11:06:44 9 Technology and the OCA, which came about in that chain that we
11:06:50 10 previously discussed of the Supreme Court and the committee and
11:06:55 11 everything like that. All right. Forget about the previous
11:06:59 12 iterations of the contract. The contract right now allows an
11:07:06 13 auto-accept function or a press review function.

11:07:10 14 MR. DOW: Yes, Your Honor.

11:07:11 15 THE COURT: But the only entities that can
11:07:16 16 immediately -- that can sign up for that are the district
11:07:20 17 clerks. Am I right?

11:07:22 18 MR. DOW: As currently written, yes, Your Honor.

11:07:26 19 THE COURT: All right. So what you want me to do is
11:07:32 20 then say that once a document hits the ECM, which is where it
11:07:45 21 goes when your legal assistant first files it, and that is in a
11:07:51 22 database maintained by the OCA.

11:07:54 23 MR. DOW: Correct.

11:07:55 24 THE COURT: The OCA will have its -- will allow
11:08:03 25 individuals to access that database, not the state court

11:08:12 1 document database.

11:08:14 2 MR. DOW: Correct.

11:08:18 3 THE COURT: And, Ms. Merideth, you say that the OC --
11:08:36 4 Office of Court Administration can't do that.

11:08:38 5 MS. MERIDETH: Yes. You're right. The Office of
11:08:43 6 Court Administration cannot do that.

11:08:45 7 THE COURT: And why can't the Office of Court
11:08:48 8 Administration do this?

11:08:49 9 MS. MERIDETH: Because that would basically usurp the
11:08:51 10 duties of the clerk. It would essentially force every single
11:08:54 11 clerk to either use the press review tool or use auto-accept.

11:08:59 12 THE COURT: That is a general argument, and it may
11:09:05 13 mean that it would put the OCA at odds with, potentially,
11:09:16 14 Chapter 77.

11:09:18 15 MS. MERIDETH: Essentially, the Director would be
11:09:20 16 acting *ultra vires*.

11:09:22 17 THE COURT: Well, what -- what you're saying is --
11:09:28 18 and I'm looking for why it's illegal. I'm looking for why you
11:09:32 19 can't do it, other than that district clerks are a powerful
11:09:36 20 political force in Texas and there are 254 of them and you
11:09:41 21 might not want to do that. A governor might not want to have
11:09:44 22 that happen. An attorney general might not want to have that
11:09:47 23 happen. Various state representatives and senators might not
11:09:50 24 want to have that happen. But once the OCA has legally
11:09:59 25 established a database that has information on it, why can't

11:10:02 1 the OCA allow access to that database?

11:10:05 2 And I think that's really what your argument is.

11:10:07 3 MR. DOW: Yes, Your Honor.

11:10:08 4 THE COURT: Is to allow the public to access the
11:10:12 5 database because the filed -- or the submitted but unaccepted
11:10:20 6 petition is on that database.

11:10:23 7 MR. DOW: Could I?

11:10:24 8 THE COURT: Yes.

11:10:25 9 MR. DOW: Deemed filed. They are filed.

11:10:29 10 THE COURT: For purposes of what have you, yeah.

11:10:32 11 Well, are they filed or are they deemed filed, because
11:10:35 12 definition of "deemed" is something that really didn't happen,
11:10:38 13 but we're going to make it up and say it happened. That's
11:10:41 14 deeming. Are they filed or are they not filed?

11:10:42 15 MR. DOW: Filed.

11:10:43 16 THE COURT: So they're filed but not accepted?

11:10:45 17 MR. DOW: Correct.

11:11:10 18 THE COURT: All right. Back to you, Ms. Merideth.

11:11:12 19 You've had a conference now. You've gotten advice from your
11:11:14 20 lawyers.

11:11:15 21 MS. MERIDETH: Yes. So there's two points. Number
11:11:17 22 one, it's not technically possible for users. And I apologize;
11:11:22 23 I have to correct myself. It's not possible for users to
11:11:25 24 access those documents via the EFM. And the second point is
11:11:31 25 that, essentially, OCA would become the clerk if OCA starts --

11:11:37 1 if it was even technically possible, OCA would essentially be
11:11:41 2 functioning as the clerk.

11:11:43 3 THE COURT: Okay. Why is it not technically
11:11:44 4 possible?

11:11:45 5 MS. MERIDETH: Because my understanding is that the
11:11:48 6 EFM would have to be connected to the case -- to the --
11:11:53 7 pardon -- the --

11:11:55 8 First of all, I think I have to ask what -- what tool
11:12:00 9 is CNS seeking? Because my understanding is that the public
11:12:06 10 can't just access the EFM. There would have to be a tool that
11:12:11 11 attaches to the case management system of the clerk.

11:12:16 12 THE COURT: Well, you-all are going to have to tell
11:12:18 13 me that. I get to ask the questions. You don't get to ask the
11:12:22 14 questions. You know, I spent a large amount of the morning
11:12:25 15 finding, well, this could happen, and now I'm hearing it can't
11:12:29 16 happen. So that may be grounds for an evidentiary hearing,
11:12:36 17 because you've now said it's not technically possible.

11:12:40 18 And let's forget about the public. I'll worry about
11:12:43 19 them later. Let's talk about Courthouse News Service, which is
11:12:47 20 a part of the public. Why, technically, could Courthouse News
11:12:52 21 Service not have access through the Office of Court
11:12:57 22 Administration to filed, but not accepted, documents on the
11:13:05 23 system?

11:13:07 24 MS. MERIDETH: If I could just have a brief
11:13:09 25 conference.

11:13:09 1 THE COURT: The question was really to you. Why is
11:13:12 2 that not technically possible, as distinguished from
11:13:16 3 contractually possible or advisable or any number of other
11:13:21 4 words we could use. Why, if I ordered that right now and
11:13:25 5 everybody said "that's a good idea," why could it not happen?

11:13:29 6 MS. MERIDETH: Could I have brief moment, Your Honor?

11:13:31 7 THE COURT: You may.

11:13:32 8 MS. MERIDETH: Just to make sure.

11:13:39 9 Your Honor, if we need to get there, we can provide a
11:13:42 10 witness to provide that information. But we're getting into
11:13:45 11 the ...

11:13:45 12 THE COURT: Does anybody just know? They could tell
11:13:48 13 me in a shorthand version without a witness. Is it -- is it --
11:13:54 14 you know, there a lot of smart computer people out there, and I
11:13:58 15 bet of bunch of them work for Courthouse News Service.

11:14:00 16 MS. MERIDETH: Unfortunately, it's too technical at
11:14:04 17 this point, and so we ...

11:14:05 18 THE COURT: For even a district judge to understand?

11:14:07 19 MS. MERIDETH: I think for me to understand, for me
11:14:10 20 to be able to speak the tech. I think we'd have to contact the
11:14:18 21 software vendor to make sure we get clarification and provide
11:14:22 22 accurate information to the Court.

11:14:26 23 MR. HILTON: And, Your Honor, we do have a witness on
11:14:28 24 our witness list who can answer that question specifically
11:14:30 25 about why -- you know, the technical issues. It's just going

11:14:33 1 to get too far into the weeds for us mere lawyers.

11:14:40 2 THE COURT: All right. Mr. Dow?

11:14:41 3 MR. DOW: Your Honor, do you mind if I point you to a
11:14:49 4 prospective plaintiff's exhibit?

11:14:50 5 THE COURT: Well, why don't you just tell me about
11:14:50 6 it?

11:14:50 7 MR. DOW: They have technical ability to do this
11:14:52 8 through the -- and it's as simple as they have to make it
11:15:02 9 available to the press, the press review tool, and that CNS
11:15:06 10 would have to create a log-in.

11:15:09 11 THE COURT: What would Office of Court Administration
11:15:12 12 have to do?

11:15:15 13 MR. DOW: Create a queue for registered users -- for
11:15:20 14 users to register using the press review tool to log in and
11:15:27 15 access the petitions.

11:15:29 16 THE COURT: All right. And the Supreme Court has
11:15:33 17 said they're not going to adopt press review statewide; is that
11:15:37 18 correct?

11:15:37 19 MR. DOW: No.

11:15:39 20 THE COURT: Wait a minute. Let me hear Ms. Merideth.

11:15:42 21 MS. MERIDETH: That's correct. JCIT recommended
11:15:45 22 against that.

11:15:45 23 THE COURT: And so did the Supreme Court then not act
11:15:48 24 on it, or did they accept what the committee said?

11:15:52 25 MS. MERIDETH: Yeah. OCA's understanding is --

11:15:54 1 THE COURT: No. Don't tell me what anybody's
11:15:56 2 understanding is. Tell me what you as the lawyer standing in
11:15:58 3 front of me. The committee recommended against statewide
11:16:02 4 application of the press review function, and what did the
11:16:07 5 Supreme Court do?

11:16:07 6 MS. MERIDETH: And the Supreme Court didn't take
11:16:11 7 action to recommend --

11:16:13 8 THE COURT: All right.

11:16:14 9 MS. MERIDETH: -- or order the press review tool.

11:16:15 10 THE COURT: All right. And it's the Attorney
11:16:18 11 General's position the Supreme Court has to order statewide
11:16:24 12 application of the press review tool or it doesn't apply to all
11:16:29 13 254 county clerks?

11:16:31 14 MS. MERIDETH: Yes.

11:16:32 15 THE COURT: All right. Now you.

11:16:34 16 MR. DOW: I don't think that's what 72.031
11:16:38 17 contemplates.

11:16:39 18 THE COURT: No. But is that what happened?

11:16:41 19 MR. DOW: No.

11:16:43 20 THE COURT: What happened?

11:16:44 21 MR. DOW: They -- the Supreme Court didn't -- didn't
11:16:48 22 act on it.

11:16:49 23 THE COURT: That's just what Ms. Merideth said.

11:16:51 24 MR. DOW: Okay. I'm sorry.

11:16:52 25 THE COURT: That the committee recommended it and the

11:16:54 1 Supreme Court took no action on it.

11:16:56 2 MR. DOW: Correct, Your Honor.

11:16:57 3 THE COURT: All right.

11:16:58 4 MR. DOW: Sorry about that.

11:16:59 5 THE COURT: It's all right. No. If you haven't been
11:17:03 6 reading appellate cases lately, you don't know how this country
11:17:07 7 and the appellate courts are consumed with textualism right
11:17:13 8 now. So when I write anything, I have got to make sure that I
11:17:17 9 have paid attention to the text of what was done, whether it's
11:17:21 10 by statute or whether it's by rule or whether it's by other
11:17:25 11 actions. So, you know, we're going to take this down to the
11:17:29 12 smallest granular leveling in determining it.

11:17:33 13 MR. DOW: Then I need to make a correction.

11:17:35 14 THE COURT: All right.

11:17:36 15 MR. DOW: The J --

11:17:36 16 THE COURT: You weren't going to make it until I told
11:17:39 17 you that?

11:17:39 18 MR. DOW: I was going to make it anyway.

11:17:42 19 THE COURT: Okay.

11:17:42 20 MR. DOW: But now I'm definitely going to make it.

11:17:45 21 THE COURT: Okay.

11:17:45 22 MR. DOW: The J --

11:17:46 23 THE COURT: Yeah.

11:17:46 24 MR. DOW: That committee, they recommended not
11:17:49 25 utilizing the press review tool statewide.

11:17:53 1 THE COURT: Okay.

11:17:53 2 MR. DOW: And the Texas Supreme Court didn't say yea
11:17:56 3 or nay --

11:17:57 4 THE COURT: All right.

11:17:57 5 MR. DOW: -- to that.

11:18:06 6 THE COURT: So are we at the point -- just a minute.

11:18:32 7 So are we at the point, because I'm sliding back into
11:18:36 8 what I need to hear testimony on and where I am on the State's
11:18:45 9 motion to dismiss. Are we at the point where, except for the
11:18:57 10 technical situation, could the OCA order the relief sought by
11:19:10 11 the plaintiff?

11:19:11 12 MS. MERIDETH: No, Your Honor.

11:19:12 13 THE COURT: And why could -- presume we have solved
11:19:17 14 the technical problem. Why could OCA not order that?

11:19:21 15 MS. MERIDETH: Because, number one, the Supreme Court
11:19:24 16 of Texas has recommended against it. Number two, because this
11:19:29 17 relief would assume the duties of the clerk. And I can point
11:19:33 18 out the direct statutes: Texas Government Code 51.303(a), the
11:19:41 19 clerk --

11:19:42 20 THE COURT: What was the -- what was the section?

11:19:45 21 MS. MERIDETH: 51.

11:19:46 22 THE COURT: Are you saying five?

11:19:48 23 MS. MERIDETH: Yes. Chapter 51.

11:19:50 24 THE COURT: All right. 303(a), "The clerk of a
11:20:00 25 district court has custody of, and shall carefully maintain and

11:20:03 1 arrange, the records relating to or lawfully deposited in the
11:20:08 2 clerk's office."

11:20:10 3 Now, why does that conflict with giving the public
11:20:16 4 access to a database that contains material in it? What I'm
11:20:23 5 saying is, it may be that this whole system wasn't carefully
11:20:28 6 enough thought through with regard to all the statutes that may
11:20:31 7 interact or conflict with one another. And that is not
11:20:34 8 uncommon. But I don't see why that -- I don't see what
11:20:44 9 protects the records in the EFM database that is maintained by
11:20:57 10 the Office of Court Administration.

11:21:00 11 MS. MERIDETH: Well, our position is that that
11:21:02 12 they're not OCA's documents; they're essentially the clerk's
11:21:05 13 documents. And so EFM would essentially be allowing the public
11:21:09 14 to look at these documents without authorization of the clerks.
11:21:13 15 And we could -- we have -- we likely will have testimony that
11:21:16 16 confirms that as well.

11:21:23 17 THE COURT: Well, this is the Attorney General game
11:21:25 18 again. I'm happy to hear that testimony, but you-all always
11:21:29 19 jump out with a motion to dismiss because you don't want me to
11:21:32 20 hear that testimony. You want me to rule on the basis of
11:21:36 21 pleadings.

11:21:41 22 Now, my question is: As a citizen, I don't like the
11:21:45 23 optics of the Attorney General not wanting to have a fully
11:21:50 24 developed record on an issue of public importance that then has
11:21:56 25 the courts rule on it on the basis of that -- a district court

11:22:03 1 rule on it on the basis of fully developed record and then
11:22:06 2 appeal it to the Court of Appeals and, if necessary, to the
11:22:10 3 Supreme Court, and get it worked out.

11:22:13 4 I've never understood the philosophy of not wanting a
11:22:18 5 complete record, which is -- which I hear all the time from the
11:22:24 6 Attorney General.

11:22:24 7 MS. MERIDETH: Your Honor, we're prepared today to
11:22:34 8 provide a full record.

11:22:35 9 THE COURT: Mr. Dow?

11:22:36 10 MR. DOW: I just -- I wanted to go back, if I may, on
11:22:40 11 the is it technologically doable, providing the press review
11:22:50 12 tool.

11:22:50 13 THE COURT: I can tell you I'm not going to rule on
11:22:52 14 that until I take evidence on it.

11:22:53 15 MR. DOW: All right. Then I am not going to get into
11:22:56 16 the -- okay.

11:22:56 17 THE COURT: Because, you know, even the people that
11:23:01 18 say it's impossible say I need to hear technical evidence on
11:23:05 19 that.

11:23:05 20 MR. DOW: I'll stand down on that.

11:23:07 21 THE COURT: I'm not able to hear you argue and say,
11:23:09 22 okay, I can do this with just hearing argument on it. If one
11:23:13 23 side or the other thinks it requires testimony, then it
11:23:17 24 requires testimony.

11:23:20 25 MR. DOW: Yes.

11:23:20 1 THE COURT: All right.

11:23:23 2 MR. DOW: Could I offer one thing?

11:23:26 3 THE COURT: Yes.

11:23:26 4 MR. DOW: The -- the argument that the newly filed
11:23:32 5 petitions, I think what I heard was they -- they're owned or
11:23:39 6 they belong to district clerks. It's the public that should
11:23:45 7 have access to those newly filed petitions. And that's --
11:23:51 8 that's why we're here. It's -- and obviously for the press.
11:24:00 9 You probably didn't need that clarification from me.

11:24:02 10 THE COURT: Well, let me write something down here,
11:24:05 11 and then I'm going to ask you about that. Let's suppose that I
11:24:18 12 accept that. All right. What that argument basically is --
11:24:31 13 basically, is your argument they are not the clerk's records?
11:24:35 14 Or is your argument they are the clerk's records, but the clerk
11:24:41 15 cannot deny public access to them?

11:24:44 16 MR. DOW: I -- yes. And including the OCA can't deny
11:24:50 17 public access.

11:24:51 18 THE COURT: Well, there's a difference. There's a
11:24:53 19 difference in the way we approach that to try to reach release
11:24:57 20 as to whether they're the clerk's records and the clerk has
11:25:02 21 control over the records even though they are in the possession
11:25:07 22 of OCA. Or whether once they go on the EFM database, they are
11:25:21 23 also, perhaps, OCA records and OCA is answerable. That point
11:25:31 24 reaches right to the gravamen of the complaint and whether I
11:25:35 25 can grant relief.

11:25:37 1 You know, my biggest problem with this whole case is,
11:25:41 2 no matter what I think is a good idea, is how can I grant
11:25:44 3 relief? And that's what I want to hear from both of you on at
11:25:48 4 the appropriate time. Because I'm not as convinced as you are
11:25:52 5 that I can grant relief against OCA. I'm not convinced that I
11:25:56 6 can't. But I think it's far from an obvious choice. And I
11:25:59 7 think part of the issue comes down to, now that we've raised
11:26:10 8 it, whose records are they?

11:26:11 9 If they're the clerk's records, then we're kind of
11:26:15 10 back to what I started with. I don't think there's any one
11:26:19 11 person in the state of Texas that's capable of being sued over
11:26:25 12 all those records. And I come back to the precedent that I've
11:26:34 13 seen with the Fifth Circuit on how elections are conducted.

11:26:37 14 You may be in the position that you have to deal with
11:26:40 15 each individual district clerk. That's the trouble argument.
11:26:45 16 If the records are in the possession of the Office of Court
11:26:52 17 Administration, then that's a different consideration, if they
11:27:01 18 have control over them or any part of them, as to what kind of
11:27:05 19 remedy that can be fashioned.

11:27:08 20 MR. DOW: And I would say, Your Honor, that the --
11:27:13 21 the newly filed petitions belong to the public. Granted, the
11:27:21 22 district clerk --

11:27:22 23 THE COURT: No, no. Let's -- they belong to the
11:27:24 24 public whether they're in the hands of the district clerk and
11:27:29 25 under the district clerk's control or whether there's equal

11:27:35 1 control because they go to this other database or whether
11:27:38 2 they're out of the control of the district clerk now because
11:27:43 3 they also are maintained by someone else.

11:27:46 4 But we can say they're the public's records, but
11:27:52 5 they're not the public's records until it's ruled that the
11:27:56 6 public has access to them. And that's what comes down to a
11:28:00 7 standing argument and who is the right person to sue to gain
11:28:05 8 access to those records.

11:28:06 9 They are public records. At the moment your legal
11:28:11 10 assistant pushes the button, that's a public record, in my
11:28:15 11 opinion. But that's not what we're arguing about here. We're
11:28:19 12 arguing about whether the district clerk or the OCA can shield
11:28:24 13 those records from the public or whether they must be made
11:28:30 14 available to the public.

11:28:31 15 MR. DOW: So my answer to your question is OCA and
11:28:36 16 the district clerk have equal access. I should have said that
11:28:42 17 from the beginning.

11:28:43 18 THE COURT: Yeah. I know that. But then the
11:28:45 19 question is, you know, can I order the OCA to do something or
11:28:53 20 can I not?

11:28:54 21 MR. DOW: You can.

11:28:56 22 THE COURT: I know you say that.

11:28:57 23 MS. MERIDETH: Your Honor, if I may? I'd like to
11:28:59 24 point out that Mr. Dow mentioned -- he did not mention custody,
11:29:05 25 he mentioned access. And so I think there's a -- there's a big

11:29:09 1 difference between access and custody. And if you look at
11:29:13 2 section -- it's Chapter 51.303 states in -- in Subsection (a)
11:29:19 3 that "The clerk of a district court has custody and shall
11:29:22 4 certify, maintain, and arrange the records relating to --
11:29:27 5 THE COURT: Yeah.
11:29:27 6 MS. MERIDETH: -- or lawfully deposited ..."
11:29:29 7 But, Your Honor, if we look back at the civil
11:29:32 8 procedures section -- Chapter -- or Rule 21 that Mr. Dow has
11:29:36 9 been citing to, I mean, these -- these documents are in the
11:29:40 10 custody of the clerk essentially as soon as they are entering
11:29:44 11 the EFM because the clerk is the custodian of records. And
11:29:47 12 it's up to the clerk to maintain the security and safety of the
11:29:50 13 document.
11:29:52 14 THE COURT: Except they're not. Somebody at OCA can
11:29:57 15 sit down and look at them.
11:30:00 16 MS. MERIDETH: And, Your Honor, that's access, not
11:30:02 17 custody.
11:30:06 18 THE COURT: Well, if somebody at OCA sits down and
11:30:10 19 looks at them, it's not breaking and entering. I mean, it's
11:30:15 20 out there for people to look at.
11:30:17 21 MS. MERIDETH: Your Honor, OCA cannot access the
11:30:20 22 documents in EFM. That's my understanding. Even OCA can't
11:30:24 23 peer behind the veil and look at those documents.
11:30:27 24 THE COURT: All right. See? And now we're 3 1/2 --
11:30:31 25 or 2 1/2 hours into finding out things, which is why I wanted

11:30:35 1 to do this. You know, you think I could have learned all this
11:30:38 2 from looking at all of the reams of paperwork that you filed?

11:30:42 3 That's the problem when you're the judge.

11:30:43 4 So what we're now being told is -- I'm now being told
11:30:49 5 is OCA maintains EFM, and nobody at OCA can access anything
11:31:06 6 that's being maintained on EFM?

11:31:11 7 MS. MERIDETH: That's correct.

11:31:21 8 THE COURT: So OCA can only access the document once
11:31:30 9 it is moved to the individual clerk's case management system
11:31:38 10 and it pops up on Research Texas?

11:31:41 11 MS. MERIDETH: Yes. That's correct. OCA can't
11:31:44 12 access the document in the case management system. They
11:31:47 13 have -- but once the document is accepted into the case
11:31:50 14 management system, it is instantly uploaded to Research Texas.
11:31:55 15 So at that point OCA can access the document.

11:32:23 16 THE COURT: Mr. Dow?

11:32:24 17 MR. DOW: I don't know if they can or can't, but
11:32:29 18 access -- they, being OCA, access the newly filed petitions
11:32:35 19 while they sit in the EFM. But I do know that they can have
11:32:42 20 Tyler Technologies configure it so they can.

11:32:48 21 THE COURT: Sure. And so that's what I'm saying what
11:32:51 22 you're asking me to do is to order them to do something
11:32:57 23 regarding their contract --

11:32:58 24 MR. DOW: No, Your Honor.

11:32:59 25 THE COURT: -- with Tyler Technology.

11:33:00 1 Well, how is it anything -- you know, if I accept
11:33:05 2 everything you say is correct and I render an order like you
11:33:11 3 say I ought to render, exactly how is that going to be worded?
11:33:17 4 What is the wording of your order? Suppose we've tried this
11:33:21 5 for a month or suppose suddenly the State says, oh, it was a
11:33:25 6 bad idea for us to contest this, but we want some legal
11:33:28 7 guidance on what we're supposed to do. What's the order going
11:33:32 8 to say?

11:33:33 9 MR. DOW: Cease the practicing -- stop the practice
11:33:37 10 of not --

11:33:40 11 THE COURT: What's the practice? Define the practice
11:33:43 12 to me.

11:33:43 13 MR. DOW: Not allowing -- well, delayed access. But
11:33:50 14 specifically not allowing the press review tool to be utilized
11:34:00 15 while petitions sit in EFM.

11:34:03 16 THE COURT: All right. And the State tells me
11:34:07 17 there's a technical reason why that can't be done.

11:34:12 18 MS. MERIDETH: Yes.

11:34:14 19 THE COURT: All right. Then here's what we're going
11:34:21 20 to do. We're going to recess until one o'clock. And because
11:34:25 21 the State has indicated that they will put together -- the full
11:34:30 22 record will be fine. I want a full record on this. And I
11:34:34 23 think where we start is, because we've spent a good amount of
11:34:39 24 time on this this morning, I want to start with all I want to
11:34:43 25 know is the technical way this whole thing works from the

11:34:52 1 witnesses that you're prepared to call, their point of view on
11:34:55 2 it, and how we get there.

11:34:56 3 Because I come back to where I'm far from convinced
11:34:59 4 that I have the power with the party that's before me to do
11:35:03 5 what is requested by the plaintiff, whether I think it should
11:35:07 6 be done or not. And so what I want to do is to try to work
11:35:12 7 through these technical items so we know exactly what could or
11:35:19 8 could not be done. And then I want to hear the legal arguments
11:35:22 9 on why it's district clerks' records, why even if it could
11:35:26 10 happen, it can't happen or shouldn't happen.

11:35:32 11 MS. MERIDETH: Yes, Your Honor.

11:35:32 12 THE COURT: Is that good enough?

11:35:33 13 MR. DOW: Yes, Your Honor.

11:35:34 14 THE COURT: All right. That's where I want to start
11:35:35 15 at one o'clock.

11:35:36 16 MR. DOW: Thank you.

11:35:37 17 THE COURT: All right. Court will be in recess until
11:35:40 18 one o'clock.

11:35:40 19 (Recess)

13:04:37 20 (Open court)

13:04:37 21 THE COURT: Good to see you again this afternoon.

13:04:42 22 Since we had our discussion this morning and I kind
13:04:45 23 of indicated -- I did indicate how I would like to proceed on
13:04:49 24 this initially, it is the court's position that both sides can
13:04:55 25 use any of the evidence that's presented, whether they call the

13:04:58 1 witnesses or not or whether who cross-examines them or not.

13:05:03 2 I am interested as I said, among other things, in the
13:05:07 3 technical aspects of how the whole program works. So what
13:05:12 4 would be the easiest thing, Mr. Dow, for you to call witnesses
13:05:16 5 first, which would be the normal thing in a bench trial, but we
13:05:21 6 also have the motion to dismiss that I'm taking up. So,
13:05:28 7 Ms. Merideth, I'm open to both of you on how is the best way to
13:05:33 8 proceed, but nobody operates to their disadvantage depending on
13:05:38 9 who calls the witnesses or where the witnesses are.

13:05:40 10 MR. DOW: Your Honor, if we're going to focus on the
13:05:43 11 technology now, I'm fine with the Director going first with the
13:05:49 12 evidence.

13:05:51 13 THE COURT: Ms. Merideth, how do you feel with that?

13:05:54 14 MR. HILTON: Your Honor, Chris Hilton on behalf of
13:05:57 15 the state. I just want to make sure I understand. Of course
13:06:01 16 we're happy to provide testimony if that's what the Court would
13:06:04 17 like. But is that for a purpose of the bench trial or for
13:06:07 18 purpose of deciding the motion to dismiss? I just want to be
13:06:10 19 clear procedurally where we are.

13:06:12 20 THE COURT: Well, we're taking them both up at the
13:06:15 21 same time.

13:06:15 22 MR. HILTON: Okay.

13:06:16 23 THE COURT: And you haven't waived anything in your
13:06:18 24 motion to dismiss. I do think that what the OCA is capable of
13:06:27 25 doing with EFM is important. I think I need a record on it. I

13:06:39 1 think it could impact on your motion to dismiss because you may
13:06:41 2 be entitled to a motion to dismiss on the law. And, if you
13:06:45 3 are, that's fine. If not, I'm going to convert it to a motion
13:06:50 4 for summary judgment, and we'll take up, you know, what we have
13:06:53 5 here.

13:06:53 6 But in order for me to rule that the OCA can't --
13:07:03 7 that if I rule in favor of the plaintiff, I can't grant them
13:07:06 8 the relief they seek because it's against the OCA, I think it's
13:07:11 9 important for me and I think it will be important for the
13:07:14 10 Circuit to know whether or not it was possible for OCA to
13:07:22 11 provide EFM -- here we go with all of these initialisms -- if I
13:07:32 12 ordered them to do it as opposed to just the other legal
13:07:39 13 matters. So I think that makes the motion to dismiss just on
13:07:43 14 the pleadings kind of iffy, because I don't see how I can do it
13:07:51 15 just on the pleadings.

13:07:52 16 So what I would propose doing is making whatever
13:07:53 17 record we can make, and then I'll make a decision on that
13:07:55 18 motion. And we'll call it, whether it's to dismiss or whether
13:07:58 19 you got summary judgment granted. But your legal arguments are
13:08:03 20 still alive on that.

13:08:06 21 MR. HILTON: That makes complete sense, Your Honor.
13:08:08 22 I appreciate the explanation and carrying the motion to dismiss
13:08:11 23 with the trial. That makes sense.

13:08:13 24 If I may, though, if you'll give me just a minute to
13:08:15 25 address you. Your comments this morning about where the case

13:08:19 1 is and the level of preparation and the shape that it's in, you
13:08:24 2 know, all these questions you've outlined are extremely
13:08:27 3 important, and you deserve a full record of that and so does
13:08:30 4 the Circuit. Unfortunately, what we have here is a situation
13:08:34 5 where we've had a constantly shifting target throughout the
13:08:37 6 case.

13:08:37 7 This case was filed in 2020. We weren't added as a
13:08:40 8 defendant until March of this year. And the -- the live
13:08:43 9 pleading before Your Honor today was filed less than three
13:08:46 10 weeks ago, after the close of discovery. So all of these
13:08:50 11 questions that are coming after our discussion this morning,
13:08:53 12 those are things that neither side has had an opportunity to
13:08:56 13 take discovery on. Indeed, we didn't even know that was
13:08:59 14 necessary until after the close of discovery in the scheduling
13:09:01 15 order.

13:09:02 16 So, you know, we are mindful of how busy the Court is
13:09:05 17 and certainly don't want to take up or waste the time you've
13:09:08 18 set aside for us. That being said, you know, this case has
13:09:12 19 changed dramatically since we were brought in and agreed to the
13:09:16 20 schedule that we're here on today. And, you know, I think that
13:09:22 21 the Court is not being served by the preparation --

13:09:24 22 THE COURT: Don't be hesitant. If you think it would
13:09:28 23 be helpful to come back another day and do this, let me know.

13:09:32 24 MR. HILTON: That's what I was building up for. I
13:09:34 25 want to suggest that perhaps a continuance here, go through

13:09:37 1 some discovery, litigate this in the normal course. You know,
13:09:40 2 when we initially set up this schedule, that was under a very
13:09:44 3 different complaint. We had another party. We didn't
13:09:47 4 understand the position and the role that we played in the
13:09:49 5 plaintiff's claims. And the Court just seems to be poorly
13:09:53 6 served by trying to proceed today and try to cobble this
13:09:55 7 together at the last minute.

13:09:57 8 THE COURT: Well, let me tell you the only way I
13:09:59 9 could be more poorly served, is if I let you out of my sight
13:10:04 10 for a while and you file a whole bunch more things.

13:10:09 11 MR. HILTON: I have been in your court before,
13:10:11 12 Your Honor. You know what we would do. That being said --
13:10:14 13 and, again, if you want to hear testimony, we're prepared to
13:10:17 14 present our witnesses.

13:10:18 15 THE COURT: Well, I'm trying to figure out the most
13:10:21 16 expeditious way to handle this, but I have to fit it into the
13:10:25 17 docket, too. Believe me, if I'm not dealing with you-all this
13:10:29 18 afternoon, I have something else I can do. I don't -- I don't
13:10:32 19 have anything that doesn't have something lined up behind it in
13:10:37 20 the way we do things.

13:10:38 21 What I want to do is -- what I really want to make
13:10:42 22 sure we do, as we spent all that time this morning, which was
13:10:47 23 very helpful to me, walking through what has happened and where
13:10:52 24 we are. Because, honestly, I thought I'd spent some time with
13:10:56 25 the record, but apparently not enough, because I didn't glean

13:10:59 1 very much of what we got through this morning from the record.
13:11:02 2 And I think it's important. And I think there's maybe a lot
13:11:08 3 more moving parts to this than initially either side thought
13:11:15 4 there was.

13:11:16 5 And, as I've said several times today, a whole lot of
13:11:22 6 it is involved with, under the Texas system of administrative
13:11:28 7 law and any number of different topics, who can you sue? And
13:11:33 8 that is not an easy thing to point out. As I've told the
13:11:39 9 plaintiffs, I'm not willing to say that OCA is the wrong party,
13:11:45 10 but I'm concerned about it. I don't think it's nearly as
13:11:48 11 obvious as you do.

13:11:50 12 I think -- and I'm not wedded to this, but I think
13:11:55 13 the Supreme Court may be the ultimate decision-maker in this
13:11:59 14 case. And I'm not suggesting that you run out and sue the
13:12:03 15 Supreme Court. I'm just saying these are questions that the
13:12:07 16 court has that the court thinks are difficult.

13:12:10 17 Mr. Dow, how do you feel about this?

13:12:15 18 MR. DOW: Your Honor, we'll do -- we'll proceed
13:12:18 19 however you want to proceed. It is true that we did file a
13:12:24 20 motion for leave to amend our petition on July 1st, I think it
13:12:33 21 was, and the motion for leave was granted, so our second
13:12:35 22 amended complaint, asking for statewide relief I think it's
13:12:40 23 been on file since July 10, I believe.

13:12:43 24 But I don't think a bunch of discovery is necessary.
13:12:48 25 The -- the Director hasn't served us with anything.

13:12:52 1 THE COURT: No. But, you know, as I said this
13:12:55 2 morning, but I'll just back up on that, I'm glad the Director
13:13:01 3 hasn't served you with anything else because I've got more
13:13:04 4 things in at the end of last week and over the weekend than I
13:13:08 5 wanted to get in in this case. And, it would have only --
13:13:13 6 I don't know. Let me ask both of you while I have
13:13:17 7 you, what additional discovery would need to be get done?
13:13:23 8 Because I continue to go back, and I'll go back to what I said
13:13:25 9 earlier, it is beyond me why there would need to be any facts
13:13:32 10 in this case that either couldn't be stipulated to as
13:13:39 11 stipulated facts or facts that would say, if Janice Smith was
13:13:46 12 testifying in this case, this is what she would say -- which is
13:13:50 13 little bit different than agreed facts, because the other party
13:13:54 14 is not agreeing that those facts are true, but that's what she
13:13:57 15 would say -- why we can't get this resolved down to that.

13:14:03 16 Because I think we all know what happened here. We
13:14:09 17 went through the complete sequence. I believe the defendants
13:14:12 18 are going to be able to show that -- well, we pretty much
13:14:16 19 agreed this morning that the counties are all over the map. I
13:14:19 20 think the contract is the contract. I presume you know we've
13:14:23 21 got that. The amendments are the amendments. I've got the law
13:14:28 22 on what OCA's empowered to do, what the committee is empowered
13:14:34 23 to do. I know what the Supreme Court can do. All of those
13:14:37 24 things interact as to who's got responsibility here.

13:14:41 25 And I think the bottom line for what we're doing here

13:14:46 1 is seeing whether OCA can continue to be sued or whether OCA
13:14:52 2 cannot continue to be sued. And if OCA can continue to be
13:15:04 3 sued, then we determine whether or not I can grant relief or
13:15:10 4 what relief I should grant.

13:15:11 5 If I find that OCA cannot continue to be sued, I want
13:15:17 6 to be able to do that on the basis of impossibility. That was
13:15:23 7 the technical argument, that even if I think everything the
13:15:27 8 plaintiff says is correct, they can't respond on the question
13:15:33 9 of unable to respond, that's when I will consider the legal
13:15:37 10 questions that you-all raise with regard to what the OCA is
13:15:44 11 empowered to do, with regard to what responsibilities the
13:15:48 12 district clerks have over records in their possession,
13:15:52 13 et cetera, all the things we talked about this morning.

13:15:54 14 That may ultimately resolve the case or it may not.
13:16:02 15 But I'm having a hard time figuring out what discovery would
13:16:04 16 need to be done to get us to this point.

13:16:08 17 Mr. Hilton, I'm going to refer to you first since you
13:16:12 18 threw the discovery cat out on in the courtroom.

13:16:16 19 MR. HILTON: I said "discovery" and I said
13:16:18 20 "continuance." I said two bad words.

13:16:20 21 THE COURT: Yeah, well, continuance is not a bad
13:16:22 22 word. As I said, there is no such thing as judicial economy in
13:16:26 23 my court. There's just scheduling. I mean, I'm going to fill
13:16:31 24 all of my days. You know, it's not going to get easier. But I
13:16:34 25 would prefer not to go deeply into this case and then find out

13:16:40 1 it just didn't make sense to get started with it and we need to
13:16:44 2 come back anyway.

13:16:45 3 If we're going to come back, I'd rather find a day or
13:16:47 4 how much time you think it's going to take and put you in it
13:16:50 5 and get it done instead of piecemeal. So what kind of
13:16:53 6 discovery do you think is out there?

13:16:56 7 MR. HILTON: There are three main areas where I think
13:16:58 8 discovery could be beneficial to the Court, as the Court
13:17:00 9 understands the case. And I think you have a handle on many of
13:17:02 10 the major issues that could decide the case.

13:17:06 11 The first is the full extent and the details of all
13:17:10 12 these technical issues that we've begun to discuss today, but
13:17:14 13 that we really could not have had an appreciation they were
13:17:18 14 going to be so important really until we got here today, not
13:17:21 15 understanding what was going to be important to the Court and
13:17:23 16 not understanding how -- you know, fully appreciating how
13:17:27 17 Plaintiff's claims were going to change. So the discovery on
13:17:29 18 that I think would be very beneficial. And we can give
13:17:32 19 preliminary answers today, but I think any answer we would give
13:17:35 20 you would necessarily require confirmation and discussion with
13:17:38 21 others.

13:17:39 22 The second area I think would be into what exactly
13:17:41 23 the clerk -- it is that the clerks are doing. That is
13:17:45 24 obviously something that's important to the Court. We had a
13:17:48 25 clerk in this case, and we thought this case when we're added

13:17:51 1 to it was about what's going on in one county and with one
13:17:54 2 clerk. That clerk has been dismissed, and we've subpoenaed her
13:17:59 3 to testify today. We can ask her some questions, if needed.
13:18:01 4 But now we're talking about 253 other counties, some of which
13:18:04 5 provide access timely, some of which don't.

13:18:07 6 And to understand all that is going to be crucial to
13:18:10 7 these issues of authority and what's --

13:18:11 8 THE COURT: Yeah. But why can't you all just agree?

13:18:17 9 MR. HILTON: And I appreciate you asking that
13:18:18 10 question because that's an important question, and we may be
13:18:20 11 able to. We may get into this discovery and realize, well, we
13:18:23 12 agree on the basic facts. But sitting right here right know,
13:18:26 13 we don't know. They don't know and we don't know.

13:18:28 14 THE COURT: I know. But let me tell you, when I
13:18:31 15 suggest that you agree on it, that it is sufficient probably
13:18:34 16 for this record -- I can't speak for an appellate court who may
13:18:38 17 review it later. But it's sufficient for me to have a general
13:18:42 18 overview of what's going on in Texas with examples that you
13:18:47 19 might be able to agree on.

13:18:49 20 You know, I presume maybe large counties are handling
13:18:52 21 it differently from small counties and vice versa. I don't
13:18:56 22 think I need 253-county rundown. It's not like when the
13:19:01 23 Supreme Court decides to do a 50-state review to see whether
13:19:05 24 they're in line with everything else.

13:19:07 25 I think what we're going to find out, unless I'm

13:19:12 1 wrong, is some counties are utilizing one of the two systems
13:19:22 2 that is acceptable to the plaintiffs. Others are not doing
13:19:28 3 either.

13:19:28 4 MR. HILTON: I'm sure that that's right. And I think
13:19:30 5 some of those counties that aren't doing either are still
13:19:33 6 nonetheless providing timely access to filings.

13:19:36 7 THE COURT: Yeah. And this would be helpful to know.
13:19:38 8 But I'm trying -- what I'm trying to tell you is you-all put
13:19:44 9 your heads together on this and be reasonable, you don't have
13:19:47 10 to pride yourself in knowing you've now visited 252 counties,
13:19:52 11 and you've probably also both been in Travis and Harris
13:19:56 12 Counties, the two that have settled. So you now can click off
13:19:59 13 of your bucket list I was in physically at all 254 counties in
13:20:02 14 Texas because you just took depositions in 252 of them.

13:20:07 15 MR. HILTON: Well, your point is well taken, but that
13:20:09 16 takes me to the third area where I think discovery might be
13:20:12 17 beneficial. And that's with regard to data. And this also
13:20:15 18 gets into the motion to strike that we we're forced to file
13:20:18 19 late on Friday. We were requested to produce data on a
13:20:22 20 statewide basis after the close of discovery. And in the
13:20:27 21 course of compiling that data, we realized that it would take
13:20:29 22 months and great expense to understand the statewide data.

13:20:32 23 So in lieu of conducting 254 depositions, let's just
13:20:36 24 get the data and bring that to the Court, and you can get that
13:20:39 25 statewide picture. Well, it's not that simple. And we

13:20:42 1 discovered that in trying to respond to Plaintiff's discovery
13:20:43 2 request, and Judge Lane denied a motion to compel additional
13:20:46 3 data on Friday.

13:20:47 4 Instead, what they've done is they've come up with
13:20:49 5 their own data, and we have no idea what it is, where it came
13:20:52 6 from, who collected it, or how.

13:20:56 7 THE COURT: All right. Mr. Dow, let me hear from
13:20:59 8 you.

13:21:00 9 MR. DOW: Your Honor, as far as the technical side,
13:21:05 10 if I could, the OCA has already admitted that, technically
13:21:12 11 speaking, the answer to the question of whether the press
13:21:19 12 review tool could be toggled as soon as the documents hit the
13:21:25 13 EFM, could that happen, and the OCA in its 30(b)(6) deposition
13:21:33 14 answered, technologically speaking, yes. And that's in our
13:21:40 15 designations, page 32 and 33. So I think the technical piece
13:21:47 16 is -- I don't think any more discovery is needed as to that.

13:21:52 17 THE COURT: Well --

13:21:53 18 MR. HILTON: May I respond, Your Honor?

13:21:54 19 THE COURT: Just a minute. Yeah. But see, that
13:21:57 20 changed this morning when I was hearing argument or hearing the
13:22:02 21 factual basis. Now, it may frustrate you, it may annoy you.
13:22:10 22 But a remember one time in front of Judge Myers, a very fine
13:22:19 23 state district judge here, when I was arguing a matter to him
13:22:23 24 and the other side was taking a different position. And his
13:22:31 25 comment was, "Mr. Yeakel, you may actually beat them to death

13:22:36 1 on the merits, but there is an issue here."

13:22:38 2 So you may have a judicial admission here already. I
13:22:41 3 don't know. But we're not taking that up now.

13:22:44 4 MR. DOW: All right.

13:22:44 5 THE COURT: And I'm not going to tell you how to
13:22:47 6 practice law, but I'm telling you, from my point of view, I'm
13:22:49 7 trying to get my hands around this. Because guess what? Once
13:22:52 8 I write an order and an opinion, it's going to be for one of
13:22:57 9 you or for the other one of you, and I don't get to tell the
13:23:02 10 Circuit what it means. They have only my writing and what you
13:23:11 11 tell them I did, the winner.

13:23:13 12 And so I rely greatly on the winner once you go to
13:23:16 13 the Circuit. And I want to make sure that before I establish a
13:23:21 14 winner in this case, I've had all the information in front of
13:23:23 15 me I get to have. I recognize reversal is an occupational
13:23:29 16 hazard, but I'm not going to go out of my way to try to put it
13:23:33 17 in the record.

13:23:33 18 MR. DOW: So as to the second basis that the Director
13:23:41 19 says a continuance would be helpful, what are the clerks doing?
13:23:43 20 That doesn't matter.

13:23:45 21 THE COURT: No. This isn't the second basis. This
13:23:47 22 is --

13:23:48 23 MR. DOW: What they would want discovery on.

13:23:50 24 THE COURT: -- the one basis. We're just talking
13:23:50 25 about discovery right now.

13:23:52 1 MR. DOW: That's correct. So the second point they
13:23:54 2 would like discovery on is what are the clerks doing? And
13:23:57 3 that's irrelevant to delayed access, because this goes back to
13:24:07 4 submitting or filing the newly filed petition, my legal
13:24:11 5 assistant. It sits in the EFM. And under *Press Enterprise II*,
13:24:22 6 is there -- are there restrictions on access? And we know that
13:24:29 7 there are because of the administrative processing. So I don't
13:24:33 8 think we need to take any district clerks' depositions.
13:24:38 9 they've subpoenaed Velva Price.

13:24:40 10 THE COURT: I understand. I don't think you need to
13:24:42 11 do that either, except I have a really hard time with you-all,
13:24:50 12 which is why I sent you-all to Judge Lane, because I'm busy
13:24:53 13 getting you-all to agree to my satisfaction to a record that I
13:24:58 14 can look at and see succinctly in front of me what is going on
13:25:04 15 here.

13:25:04 16 It's -- you know, I've got -- I'm sitting here
13:25:09 17 looking at four binders of varying sizes in front of me right
13:25:13 18 now. If I had my way, I would do away -- you've heard me say
13:25:21 19 this before -- will all dispositive motions, period. I would
13:25:23 20 pass a law to that. And you'd either get your case settled or
13:25:26 21 you'd come in here and just try it and I could look through all
13:25:31 22 the evidence.

13:25:32 23 If we want to talk about inefficiency, it's when the
13:25:33 24 court has to go through all kinds of motions and, if the case
13:25:36 25 is still alive, then try the case. It would be more efficient

13:25:39 1 and cost-effective for everybody just to walk in here and try
13:25:42 2 the case. It would also provide a record which gets over my
13:25:47 3 optics problem to the public with why we would want to keep
13:25:51 4 anything out of the record.

13:25:52 5 But we're beyond that. I'm not going to do this. I
13:25:59 6 think the State raises very important issues. I think the
13:26:01 7 plaintiff raises very important issues. And I'm not going to
13:26:04 8 do it on something that's truncated. I want to have the full
13:26:09 9 picture in front of me so I can set it out, because I really
13:26:15 10 think this is a deal where you, regardless of those Supreme
13:26:21 11 Court cases, where under Texas law we've got to look at what
13:26:24 12 policy the Supreme Court sets, what the Supreme Court does
13:26:28 13 through its committee, and what the role of the OCA is and what
13:26:32 14 the role of the district clerks are. And the role and -- and
13:26:36 15 whether or not, you know, those records that the district clerk
13:26:44 16 has become public records the moment your legal assistant hits
13:26:50 17 the "send" button.

13:26:51 18 And, if so, whether or not the law that we talked
13:26:55 19 about this morning that states the district clerk's duties and
13:27:01 20 responsibilities gives the district clerk any dominion over
13:27:11 21 those records and what happens with them, as the State seemed
13:27:16 22 to infer to me, or whether or not those laws are instructive to
13:27:22 23 the district clerk that you've got to keep the records and you
13:27:26 24 can't dispose of them and they have to be available at all
13:27:29 25 times.

13:27:29 1 And I don't get to go plug my court reporter's record
13:27:37 2 into a computer and it produces an opinion for me, so these are
13:27:42 3 things that I want to know before I write an opinion. I think
13:27:46 4 it's important.

13:27:47 5 And I think the problem we have here, really, is the
13:27:52 6 problem of the electronic world. Society always is ahead of
13:28:00 7 the law. The law is always slow to catch up with society. And
13:28:05 8 I can argue to you that that's good because we need one of the
13:28:08 9 three branches of government that doesn't immediately react to
13:28:12 10 the flavor of the day, that there's a little lag on it, a
13:28:17 11 little not quite as urgent as what the legislative branch or
13:28:22 12 the executive branch feels. And it used to be society would
13:28:26 13 advance and then the law would advance. Now we're in the
13:28:29 14 electronic world, and society advances over here and the law
13:28:33 15 advances to right here. And then society advances again.

13:28:38 16 I think the issues that we talked about this morning
13:28:46 17 were not ever contemplated when we went to an electronic filing
13:28:50 18 system in the state. I think everybody is going to
13:28:53 19 electronics. The federal courts were ahead of state courts on
13:28:56 20 it. The State of Texas determined to do this, and they did it.
13:29:01 21 I think the State did it and the Supreme Court established
13:29:04 22 policy. And working through its committee and the OCA, did it
13:29:09 23 in order to make information easier to file and more readily
13:29:16 24 available.

13:29:17 25 And now we're in a situation that we're trying to

13:29:25 1 reconcile those things, and you've got another entity out there
13:29:28 2 called the OCA that has documents in their possession and what
13:29:32 3 they can do with it and how it works. And I'm not going to do
13:29:40 4 this on truncated basis.

13:29:42 5 I want both the State -- all, the State, the public,
13:29:46 6 and your client, Mr. Dow, to be treated fairly on this. And if
13:29:50 7 everybody agrees I did it, great. If somebody doesn't, then
13:29:53 8 the Circuit can say, no, we can do it better, or, no, he did it
13:29:56 9 right. And then we can see what the Supreme Court would say
13:30:01 10 based on their previous position.

13:30:03 11 So that's what I'm going to do. But I want you-all
13:30:06 12 to work harder to agree on getting a record together for me on
13:30:11 13 this. But I do think it might help you to at least have some
13:30:21 14 discovery on what the technical people are going to say,
13:30:23 15 because -- OCA, because it might be that you might want to have
13:30:30 16 a technical person, too.

13:30:32 17 Because I think it's important to know whether the
13:30:38 18 OCA could provide this easily, can't provide it at all, or it
13:30:44 19 would be a burden on the State fisc to order them to do it. I
13:30:50 20 think those are all relevant considerations in this case.

13:30:59 21 MR. HILTON: And, Your Honor, we'll certainly, if
13:31:00 22 given time, work in good faith with Mr. Dow to agree to as much
13:31:05 23 as possible. I think where we are today, we simply haven't had
13:31:08 24 the time to work through these issues.

13:31:11 25 THE COURT: I think this case changed its complexion

13:31:16 1 after the last time we were all together.

13:31:17 2 MR. DOW: It did, Your Honor. I fully admit to that.

13:31:21 3 THE COURT: Now, there isn't going to be anything new
13:31:27 4 filed.

13:31:28 5 MR. DOW: No. Not from us.

13:31:31 6 MR. HILTON: I have a duty to the State of Texas to
13:31:34 7 defend my client, Your Honor but we will do everything we can
13:31:37 8 to not burden --

13:31:37 9 THE COURT: Well, let me make this real easy. There
13:31:41 10 will be no new filings in this case without leave of court.

13:31:46 11 MR. HILTON: Understood, Your Honor.

13:31:48 12 THE COURT: That way it's open for you, but you've
13:31:50 13 got to tell me why you've got to file something.

13:31:53 14 MR. HILTON: I understand.

13:31:54 15 THE COURT: Now, if you can't agree on discovery,
13:31:57 16 discovery is exempt from that. But I'm going to tell you
13:32:01 17 you're going back to the magistrate judge, because I'm not
13:32:03 18 going to deal with concerns. I was tempted to send this whole
13:32:07 19 case to the magistrate judge. But I decided, no, this is
13:32:10 20 something that the district judge needs to deal with on the
13:32:15 21 merits. This is not a magistrate judge thing.

13:32:17 22 But, if you're going to file any pleadings or motions
13:32:21 23 or anything other than the ones that involve discovery, you've
13:32:24 24 got to seek leave of court before you do it. And you can ask
13:32:28 25 for that leave in a one-page document, and I can assure you

13:32:33 1 that the first thing that's going to happen if I get one of
13:32:35 2 those, if you don't have a detailed certificate of conference
13:32:38 3 on it -- and lawyers don't read our certificate of conference
13:32:44 4 rules in our local rules very carefully because they just say
13:32:47 5 "It's four o'clock in the afternoon. I tried to call Mr. Dow.
13:32:50 6 It's now 4:15. He hadn't called me back. I'm going to presume
13:32:55 7 he's opposed to it and I file it."

13:32:56 8 That's not what a certificate of conference means. A
13:32:59 9 certificate of conference says you've talked to the other
13:33:02 10 lawyer. The other lawyer is opposed to your motion, and this
13:33:04 11 is why. And I expect you to put certificates of conference
13:33:08 12 like that on any motion.

13:33:09 13 Discovery is another deal. I urge you to agree on
13:33:11 14 it. If you can't agree on it, you're going to go to the
13:33:14 15 magistrate on that.

13:33:16 16 MR. HILTON: Understood, Your Honor.

13:33:16 17 THE COURT: Now, what else would we accomplish if I
13:33:18 18 put this off for a while.

13:33:24 19 MR. HILTON: The last point -- which I don't think
13:33:26 20 Mr. Dow responded to it; I want to make sure he had an
13:33:27 21 opportunity to do that if he'd like -- was the data issue. I
13:33:31 22 think that's an area where we really do have to have more
13:33:34 23 dialogue. We simply didn't have the time.

13:33:35 24 THE COURT: I want the data. And it doesn't have to
13:33:38 25 be every county. But, you know, it can be a general summary

13:33:44 1 that you-all agree to that says in a -- in most large counties,
13:33:50 2 such and such, this is what the data would show and other
13:33:55 3 counties, this, or however you want to arrange it. West Texas
13:33:59 4 does it this way and East Texas does it a different way.

13:34:03 5 MR. HILTON: Understood. And that makes perfect
13:34:05 6 sense. This is an area where there is significant expense and
13:34:08 7 time involved to get the data in the format that's going to be
13:34:12 8 usable for the Court. So I just want to give the Court fair
13:34:15 9 warning that this is an area where we're going to have to do a
13:34:16 10 lot of work together, but we're happy to do that.

13:34:19 11 THE COURT: But don't get down in the weeds on it.

13:34:22 12 MR. DOW: Yeah. This is -- this does not bode well.
13:34:26 13 This is going to take a lot of time and money and expense for
13:34:31 14 discovery on the data.

13:34:34 15 THE COURT: No.

13:34:35 16 MR. DOW: And so were already getting off on a rocky
13:34:37 17 relationship.

13:34:38 18 THE COURT: I have suggested to you that you not do
13:34:41 19 discovery on the data, that you talk about it. It's easy to
13:34:45 20 get -- don't let your first reaction be to follow the rules of
13:34:49 21 civil procedure. The rules of civil procedure is a default
13:34:53 22 mechanism that the courts have put in place when you can't
13:34:57 23 agree on things. That's all it is.

13:35:00 24 It's not a checklist for lawyers to follow during a
13:35:04 25 trial. And you-all can get what data is necessary together.

13:35:10 1 It doesn't have to be lengthy. It simply is what I have -- and
13:35:15 2 this is what we went over this morning, and don't make it any
13:35:19 3 more complex than it is.

13:35:25 4 It's this. This is this case from the court's point
13:35:28 5 of view: The Supreme Court established a committee to look
13:35:37 6 into electronic filing. The committee made a recommendation to
13:35:43 7 the Supreme Court. The Supreme Court told the OCA what to do.
13:35:50 8 The OCA contracted with Tyler Technology. That's where we are.

13:36:01 9 Now, the issues with regard to that, then, is: Who
13:36:10 10 has control of the documents? Is it the district clerk, or is
13:36:14 11 it a combination of the district clerk and OCA, and what we're
13:36:19 12 going to do about it. So I only want as little bit more data
13:36:25 13 as is necessary to do that. This is not a lengthy thing. I
13:36:30 14 want more than what I have, but I don't need a lengthy run of
13:36:36 15 it.

13:36:37 16 I believe I already know what the data is, if you
13:36:41 17 don't get down in the weeds. I know what the mega-picture is.
13:36:44 18 Because, hard to believe, but I practiced law on your side of
13:36:48 19 the bench for 28 1/2 years, and I did it in big counties and
13:36:52 20 little counties. And I took depositions around the state and I
13:36:54 21 filed things around the state, and I've been to a lot of these
13:37:00 22 counties. And I know the way it works, even though I have been
13:37:03 23 doing some form of the bench since 1998. But it hadn't changed
13:37:10 24 that much, except we've got the intrusion of electronic filing.
13:37:17 25 And that's all we are dealing with.

13:37:19 1 So don't make this harder than it needs to be. I
13:37:21 2 don't need a lot of data. I want enough data to support a
13:37:26 3 record where everybody who doesn't know anything about this
13:37:29 4 case, who hasn't spent the time on it you've spent on it or
13:37:33 5 you've spent on it or was in this courtroom today or in any of
13:37:36 6 our other hearings, can pick up something I write and read it
13:37:40 7 and know what we were talking about and know what the issue was
13:37:43 8 and how this court ruled on it. That's all I'm looking for.
13:37:48 9 And we can do this with some expeditiousness.

13:37:54 10 And what I want to get it down to is where we get all
13:38:01 11 of this done in a day, where I can give you a day to come in
13:38:06 12 here, we'll pull it -- put it all on. And I will tell the
13:38:09 13 State it could all end with your motion to dismiss. That could
13:38:14 14 happen. Or it could end because I go back through everything
13:38:19 15 I've already gotten, and I convert your motion to dismiss to a
13:38:23 16 motion for summary judgment and say it was supported by that
13:38:26 17 and you win, or anything else that gets filed after discovery.
13:38:32 18 Or I can say I accepted all of these documents into evidence
13:38:37 19 and then I heard additional testimony, and this is the way I
13:38:41 20 rule on the merits.

13:38:42 21 I submit to everybody you would be better off with a
13:38:46 22 merits ruling. Because then if it goes to the Circuit, the
13:38:49 23 Circuit doesn't get balled up in burdens of proof and what the
13:38:54 24 court considers. I sing this song all the time, and lawyers
13:38:58 25 always ignore me. But you're always better off with a merits

13:39:02 1 ruling than you are on a motion to dismiss or a summary
13:39:04 2 judgment, just because then you've got a ruling that is a
13:39:09 3 absolute dispositive ruling but doesn't have any little
13:39:15 4 problems with the procedures and, you know, what the court had
13:39:19 5 to consider and what weight I had to give it.

13:39:22 6 But I want to get it done in a day, and I want to
13:39:26 7 rule on it. But I need additional evidence, and part of it is
13:39:29 8 on this technological deal.

13:39:34 9 I realize it's not off to a good start, but it wasn't
13:39:37 10 off to a good start to begin with.

13:39:40 11 MR. DOW: It's all good. Thank you, Your Honor. I
13:39:47 12 bet we end up --

13:39:48 13 THE COURT: It's good for you because you've got
13:39:49 14 people down there paying you. The people to my left and me are
13:39:52 15 all getting paid the same thing no matter how hard we work on
13:39:55 16 this. You get overtime when you go back tonight and work into
13:39:58 17 the dark? Well, neither do I. I spent all of last week trying
13:40:02 18 a criminal case and got a hung jury, so that did me no good
13:40:06 19 whatsoever. I'm going to have to try it again. I'm not going
13:40:09 20 to get paid twice to try that case.

13:40:12 21 So what are we looking at time-wise. Be reasonable.
13:40:17 22 Don't tell me what you think you want me to hear. From the
13:40:21 23 plaintiff's point of view, I know this is urgent, but urgency
13:40:27 24 gets defined by what the rest of my calendar looks like.

13:40:32 25 So let's be realistic and not come back here again,

13:40:36 1 where we all have a complete record. And I also am aware that
13:40:48 2 both the Attorney General and Mr. Dow has more than one case.

13:40:52 3 So I think we need to -- we'll look at your dockets, too.

13:41:05 4 MR. DOW: Your Honor, my wife and I are going to
13:41:09 5 Scotland for our 40th wedding anniversary on September 14.

13:41:14 6 THE COURT: You-all have been married 40 years?

13:41:16 7 MR. DOW: Yesterday.

13:41:16 8 THE COURT: Children. Congratulations.

13:41:19 9 MR. DOW: Thank you.

13:41:19 10 THE COURT: I can't even remember my 40th
13:41:21 11 anniversary. I'll tell you that.

13:41:23 12 MR. DOW: People always tell me "congratulations,"
13:41:25 13 and they say "condolences" to her. But, anyway --

13:41:28 14 THE COURT: It's always a miracle to everybody else.

13:41:32 15 MR. DOW: September 14th --

13:41:33 16 THE COURT: Well, if it makes you feel any better,
13:41:35 17 we're going to Scotland on the 3rd of August.

13:41:39 18 MR. DOW: Okay. So I'm going to be out of pocket
13:41:43 19 September 14th through the 29th. So I don't know if getting a
13:41:48 20 one-day trial before the 14th of September or that first week
13:41:55 21 of October.

13:41:57 22 MS. MERIDETH: Your Honor, I'm going to be out of
13:41:59 23 country the 22nd through the 3rd.

13:42:01 24 THE COURT: Of September?

13:42:03 25 MS. MERIDETH: Yes. September 22nd through the 3rd

13:42:09 1 of October.

13:42:17 2 (Discussion off the record)

13:42:34 3 THE COURT: That is going to get us to October,
13:42:36 4 because I'm not going to get back from when I'm gone and
13:42:38 5 squeeze you-all into some little narrow slot where you-all are
13:42:41 6 wanting to get out of pocket. And I think I have a pretty good
13:42:47 7 feel on, because I see the Attorney General's people a lot and
13:42:50 8 I see Mr. Dow and his partners a lot, and I have a pretty good
13:42:54 9 idea that, you know, you need to been concentrating on your
13:42:58 10 vacations and taking some time off and not worrying about me.

13:43:08 11 What would we think about October the 11th, which is
13:43:15 12 a Tuesday?

13:43:18 13 MR. HILTON: I apologize, Your Honor. I'll be in
13:43:20 14 trial in El Paso that week. I'll be back the following week.

13:43:23 15 THE COURT: Oh, I'm terribly, terribly sorry.

13:43:26 16 All right. As luck would have it, the week of the
13:43:29 17 17th is a good week with me. You may paint on a clean canvas
13:43:37 18 which day that week is worthwhile. And I submit to you it
13:43:40 19 would be better not to do it on Monday, the 17th. Even though
13:43:48 20 we had this case on a Monday, that was the vacant date. But a
13:43:51 21 lot of times everybody likes to get to their office and see
13:43:54 22 what happened to them ahead of time, and Monday is often not
13:43:57 23 the best time to do something.

13:43:59 24 MR. DOW: We can do any day that week. We'd love it
13:44:02 25 if we -- if not Monday, but we're available, Your Honor.

13:44:06 1 MS. MERIDETH: That Thursday, the 20th, would be
13:44:09 2 preferable for us.

13:44:09 3 THE COURT: Work for you?

13:44:11 4 MR. DOW: Yes, Your Honor.

13:44:11 5 THE COURT: Works for me. Now, we're going to do
13:44:30 6 that 20th at 9:30. Please, please, please do this: The first
13:44:39 7 thing you do is sit down, and I really want you to agree on
13:44:43 8 what you're going to do and come up with a plan.

13:44:55 9 And if you have a problem agreeing on that, I want
13:44:57 10 you to contact Ms. Baffes -- that's Kathryn Baffes, the
13:44:58 11 chambers attorney who has overall supervision of your file --
13:45:01 12 and tell her you're having a problem and we need to have a
13:45:04 13 phone call. I don't want to do this with competing filings.
13:45:14 14 If you can't work this out, I will get you on the phone, and we
13:45:17 15 will talk about what your problem is and I will resolve it then
13:45:20 16 so we can get this done.

13:45:22 17 I stress again I think this is an important case,
13:45:26 18 both from the State's point of view and from the media's point
13:45:30 19 of view and from the people of the state of Texas' point of
13:45:33 20 view. But it needs to be where we can get it done in an
13:45:37 21 orderly fashion.

13:45:40 22 MR. DOW: Thank you, Your Honor.

13:45:43 23 THE COURT: Now, are there other things -- we talked
13:45:51 24 about this morning about motions that were no longer necessary
13:45:56 25 to be heard. Is there anything else that right now I ought to

13:46:05 1 take up, or are we -- or are we in reasonably good shape on
13:46:09 2 everything else at this moment?

13:46:16 3 MS. MERIDETH: Your Honor, we did file a motion to
13:46:18 4 strike Plaintiff's exhibit list, but I think at this point it's
13:46:21 5 moot, and we'll probably all be filing new exhibit lists before
13:46:26 6 then.

13:46:26 7 THE COURT: That will be fine. Everybody can file
13:46:29 8 new exhibit lists.

13:46:30 9 Now, let me tell you what I'm prepared to do, so I
13:46:33 10 want you to look at this, too. I've got a lot of binders with
13:46:39 11 a lot of exhibits of things you-all have previously filed,
13:46:42 12 whether you've objected to them or not. What I want you to do
13:46:44 13 is look at one another's filings, what you've done now, because
13:46:53 14 the goal would be that you agree to those to be considered when
13:46:56 15 we have our hearing as opposed to making one another prove them
13:47:01 16 up with a witness or do this or that. And if you need to have
13:47:03 17 affidavits that shed light on that, that's fine. But I don't
13:47:08 18 want to really set aside a whole lot of time to go through
13:47:11 19 what's admissible and what's not.

13:47:13 20 As we approach the October date -- and if we're doing
13:47:20 21 it on Thursday, the 20th, it does not mean as we approach the
13:47:25 22 18th or the 19th. But as we approach October 1st, if you've
13:47:31 23 got any problems with that, call us and let me take it up then.
13:47:37 24 Because I would like to walk in here on the 20th, take what
13:47:44 25 evidence we have to take, admit everything we're going to admit

13:47:48 1 into the record, and then I hear arguments from you and we get
13:47:51 2 this resolved. I don't want to come in and we spend an hour
13:47:56 3 dealing with what your objections to one another's evidence is.
13:48:00 4 I want to get that done ahead of time.

13:48:02 5 Now, you can have an objection -- you can agree that
13:48:07 6 something is admissible, and that doesn't mean you disagree --
13:48:11 7 I mean, that you agree with the content of it. But I want to
13:48:15 8 get everything in to where you can argue this case and attack
13:48:20 9 one another's positions and support your own positions. That's
13:48:24 10 what I'm trying to get to.

13:48:29 11 Anything else while I have you?

13:48:31 12 MS. MERIDETH: No, Your Honor. Thank you.

13:48:33 13 MR. DOW: Your Honor, this might also be helpful. We
13:48:37 14 did file joint stipulated facts.

13:48:40 15 THE COURT: Yes.

13:48:40 16 MR. DOW: At Docket 64. So maybe we can work on --

13:48:45 17 THE COURT: Yeah. And I thank you for that. We
13:48:47 18 didn't ever get to the good part of what you filed. And if you
13:48:52 19 want to leave those intact and file additional stipulated
13:48:56 20 facts --

13:48:56 21 MR. DOW: Okay.

13:48:57 22 THE COURT: -- that's fine. Or if you think it fits
13:48:59 23 together better if you just do one set of stipulated facts,
13:49:03 24 because you might want to rearrange them or something. However
13:49:06 25 you want to do that is fine with me.

13:49:09 1 MR. DOW: Thank you, Your Honor.

13:49:10 2 THE COURT: Yeah. What else?

13:49:18 3 MR. DOW: Have a great time in Scotland.

13:49:20 4 (Discussion off the record)

13:50:05 5 THE COURT: All right. Well, thank you-all.

13:50:07 6 Although it might not be apparent to those who observed today,

13:50:11 7 I think we covered a lot of ground today, I've got a whole lot

13:50:14 8 better feel for this case, and we'll go from there.

13:50:16 9 So court's in recess. Have a nice day.

13:50:20 10 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**
2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 1st day of August 2022.

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