IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COURTHOUSE NEWS SERVICE, *Plaintiff*,	*	
v.	*	Civil Action No. BAH-22-0548
JUDY K. RUPP, ET AL., *Defendants*.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT/OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INTRODUCTION

This case is not about censoring speech, nor any political or criminal consequences of expression; it is an access case. And although there are various potential distractions, the core issue is whether Defendants are meeting the federal courts' timeliness expectations when providing public access to documents electronically submitted for filing as case-initiating complaints. Putting aside any issues with the proper source of the federal courts' expectations, Defendants understand that federal law requires them to provide contemporaneous public access. In December 2022, Judge Hollander found in a thoughtful 81-page opinion that Defendants were meeting this expectation and concluded that "CNS is not likely to succeed on a claim of First Amendment violation based on delays in access due to pre-access clerical review." (ECF 66 at 67.) Nothing has changed since that ruling. Defendants continue to meet this expectation, with **92.1%** of complaints being made available the same day, with a median time of **30 minutes**, and **99.7%** within essentially **8 hours**. However, Courthouse News Service (CNS) knows that it cannot succeed against Defendants on the data and existing law, so it asks this Court to do something no court has done before: reach down into a state court system to instruct it how to operate its electronic case management system by ordering the state to implement a "press review queue" (currently at an annual cost of $108,000) or an auto-accept configuration that would reverse Judge Hollander's decision and violate the Maryland Rules.

This case represents the latest piece that CNS is trying to fit into a remarkable nationwide 15-year puzzle it has created by cleverly applying a narrow line of First Amendment precedent. With each case, CNS has slightly modified its puzzle by creating new pieces of legal precedent, which it then applies in new lawsuits against other states. In this case, however, the puzzle piece is a legal mismatch and Defendants are entitled to judgment as a matter of law.

The "controversy" alleged here began when CNS contacted the Maryland Judiciary seeking a press review queue that would give CNS instant access to electronically submitted civil complaints even before clerks accessed them.[1] The Judiciary sent the request to the Judicial Council's Major Projects Committee, which thoroughly analyzed the request and determined the press review queue violates the Judiciary's policies and Rules, which have *always* required clerk review of submissions prior to docketing and becoming public judicial records. Simply stated, the press review queue and/or an auto-accept configuration violate the Maryland Rules.

When the Maryland Judiciary thoughtfully declined to implement the press review queue, CNS pivoted its strategy. Presumably—in order to rely on the precedent CNS set for itself just three months earlier in *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532 (E.D. Va. 2020), *aff'd*, 2 F.4th 318 (4th Cir. 2021)—CNS began generally accusing Maryland's electronic courts, without details or reliable evidence, of too slowly processing complaints. At the time—and just until its recent dispositive motion filing—CNS focused the controversy on this timeliness issue.

As a result of CNS's feigned timeliness concerns, the Maryland Judiciary (1) initiated a new electronic queue that ensured continued compliance with *Schaefer* while also adhering to the Maryland Rules and policies, and (2) began to collect and analyze whether CNS's timeliness allegations were true. Through this analysis, CNS's timeliness allegations were nullified, and it was verified that the new queue could further ensure ongoing timeliness compliance.

Defendants presented this information to Judge Hollander, who found that pre-access clerk review is constitutional for the justifiable reason of ensuring that confidential and restricted information is not inadvertently disclosed, and that the *Schaefer* standard "does not require

[1] Exhibit 2, Harris Decl. (thoroughly detailing background factual information). It is additionally noteworthy that CNS previously attempted to convince Maryland of CNS's perceived benefits of a press review queue prior to electronic filing. *See e.g.*, Exhibits 3 and 4 (CNS letters).

instantaneous access upon a court's receipt of the complaint." (ECF 66 at 80, 78.) She explained, "[T]he *Schaefer* standard does not bar a brief delay, *due to clerical review*, for the purpose of addressing *operational and security* issues *before* allowing public access to a complaint." (*Id*. at 80 (emphasis added).) Applying this, Judge Hollander examined the data and found that Defendants were meeting the Fourth Circuit's timeliness expectations because "most newly filed civil complaints are accessible within a constitutionally permissible time frame." (*Id*. at 78.)

Perfection is not the standard. Rather, Judge Hollander held that the public may constitutionally be denied access to newly submitted civil complaints until clerk review for, *inter alia*, confidential and restricted information, as long as access is provided "as expeditiously possible," "insofar as practicable, and if not practicable, within one court day." (*Id.* at 76, 80) Naturally, and implicit in Judge Hollander's ruling, CNS's desired press review queue and/or auto-accept configuration cannot be required because both would violate the decision and *Schaefer*.

In response to Judge Hollander's ruling, CNS had to pivot again. Where CNS once used *Schaefer* against Defendants, it now improperly and staggeringly accuses Defendants of inappropriately seeking "safe harbor" under it. And although CNS has created its puzzle using a constitutional test (the *Press-Enterprise II* "experience and logic test") that must be *applied* to the specific *facts* of each case, CNS now seeks to have this Court ignore any application of that test to Maryland's electronic filing process, and simply declare that the whole process is *facially* invalid.

That is, CNS now attempts to complete its 360-degree pivot back to its demand for a press review queue by attempting to create and fit that last puzzle piece—facially invalidating Maryland's reasons for declining to implement the press review queue, *i.e.*, the Maryland's Rules' requirement and need for clerk review to protect confidential and restricted information. This last puzzle piece is a legal mismatch because (a) the Fourth Circuit and Judge Hollander determined

that clerk review is permissible, (b) this kind of facial challenge based on a right to access documents is squarely incompatible with the First Amendment, and (c) by finally revealing its true motives in this case, after escaping abstention on this issue,[2] CNS is forced to reveal its hand by admitting that it would like this Court to inappropriately involve itself in the technological workings of Maryland's e-filing case management systems by ordering a major change to it.

In granting CNS's desired relief, the Court would force Maryland to implement a press review queue or an auto-accept configuration. Although CNS has intimidated and exhausted many state courts with far less impressive data than Maryland into implementing a press review queue through settlement, no federal court has ordered such a queue or an auto-accept configuration, nor is there any proper legal basis to do so. Defendants are entitled to judgment as a matter of law.

STATEMENT OF FACTS[3]

CNS as a First Amendment Plaintiff

CNS sells information to its subscribers about new civil complaints in state and federal courthouses. (ECF 66 at 40, 54); Exhibit 5, Girdner Dep. at 291-92 (all of CNS's Maryland subscribers are law firms). This includes its "New Litigation Reports," which contain one to three sentence summaries of new civil complaints of interest to law firms. (*See* ECF 23 at 6-7.) "To

[2] Based on CNS's tactics, Judge Hollander declined to abstain, ECF 66 at 40-52; however, because it is now clear that CNS seeks to have this Court materially modify the MDEC process, Defendants respectfully renew their abstention request, and incorporate herein by reference ECF 23-1 at 33-38 and ECF 50 at 8-9. *See* Fed. R. Civ. P. 10(c).

[3] The facts were heavily detailed in Defendants' motion to dismiss and opposition to motion for preliminary injunction (ECF 23) and reply memorandum (ECF 50), which are adopted herein. Fed. R. Civ. P. 10(c). They are also detailed in Judge Hollander's memorandum opinion. (ECF 66.) Any citations to these filings and their exhibits will be by ECF number only and will omit any citing references. And, like Judge Hollander, ECF 66 at 4 n.4, citations to electronic pagination for ECF submissions is used. Additional facts are also included in the declarations of Pamela Q. Harris, Jamie Walter, Ph.D., and the Clerk Defendants. Exhibits 2, Exhibits 6-29.

compile the summaries, CNS employees traditionally visited courthouses to obtain the complaints. (ECF 66 at 4.)

For 15 years, CNS has filed lawsuits against state court clerks and state court administrators across the country seeking federal mandates that will provide CNS with quicker and easier access to newly submitted for filing civil complaints.[4] (ECF 23 at 8.) A full picture of CNS's litigation history is detailed in ECF 23 at 8, ECF 50 at 19-20, ECF 50-11, ECF 50-12, Exhibit 30 (current CNS Litigation Map), Exhibit 31 (current CNS Litigation Timeline), and Exhibit 32 (CNS Cases by Circuit). Currently, CNS has filed 29 lawsuits involving state court systems in 11 of the 13 federal circuits (all except the D.C. and Federal Circuits). Appellate decisions have been rendered or are pending in 7 circuits (all except the 3rd, 5th, 6th, 11th, D.C., and Federal Circuits).

CNS in Maryland

CNS makes its profit by selling copies of complaints to its "New Litigation Reports" subscribers and began doing so in 2004. (*See* ECF 9-2 ¶ 46); Exhibit 5, Girdner Dep. at 291.) In Maryland, there is an uncontested established history of CNS *only* obtaining paper complaints after clerk review. Exhibits 7-29 (Clerk Decls.); Exhibit 33, Staples Decl. at ¶ 4 (CNS Maryland "reporter" confirming same); *see* Exhibit 34, Abbott Dep. at 21-22, 100-01, 114-42 (CNS "bureau chief" confirming no known tradition of pre clerk review access throughout Maryland); Exhibit 5, Girdner Dep. at 26-27, 88-101 (CNS owner confirming that he has no personal knowledge of how courts in half the country operate in terms of "traditional access," including Maryland, and even for states he has personal knowledge with, it is few); *see generally* Exhibit 2, Harris Decl.

[4] There is difference between submitting and filing a complaint. (ECF 66 at 7.) Submittal is when a filer attempts to electronically initiate a new lawsuit. (*Id.*) Filing is when a clerk has reviewed the complaint, issued a case number, and the case/complaint is docketed. (*Id.*) Only at the time of filing (*i.e.*, after clerk review) are complaints available to the public. (*Id.*)

CNS sells two litigation reports that cover newly filed actions in Maryland: (1) the Baltimore Report, which includes coverage of this Court, the circuit courts for Baltimore County and Baltimore City, and (2) the Greater Maryland Report, which covers every other Maryland circuit court. (ECF 9-2 ¶ 16; 9-8; 9-9.) Examples are attached as Exhibits 35-38.

What CNS Alleged in its Complaint to Want and What it Now Demands

CNS claims that "defendants' policies and practice of withholding access to non-confidential electronically filed civil complaints until after clerical review and docketing has resulted in unconstitutional delays with regard to public access, in violation of the First Amendment." (ECF 66 at 8.) CNS sought to enjoin defendants from this practice and to obtain "contemporaneous access to all such complaints upon their receipt for filing.'" (*Id.* at 2.) CNS framed its case as a timing or delay of access issue. (*See id*. at 11-14.) This is no longer the case.

Judge Hollander forced CNS to finally admit that while it once pretended to seek "*contemporaneous*" access to rely on *Schaefer* and avoid dismissal, what CNS actually demands in this case is *instantaneous* access to complaints as soon as they are submitted. Exhibit 5, Girdner Dep. at 222-23 ("That's what we're suing about . . . the no-access-before-process policy."); *id.* at 192, 280 (CNS is "always looking for" "access on receipt" and "predocketing access", which is "When the complaint is received by the clerk" and before clerk review and filing) (emphasis added). Thus, CNS's faulty position can only be as Judge Hollander aptly stated, "in CNS's view, any delay due to clerical review and docketing violates the First Amendment." (ECF 66 at 67; *see id.* at 76 ("CNS claims it should obtain immediate access to the [new] suit.").) The only way to find in favor of CNS is to have this Court ignore the data, ignore the *Schaefer* "reasonably contemporaneous" standard (discussed *infra*), and misapply the First Amendment to reach down into a state court system to instruct the state how to operate its electronic case management system.

Electronic Filing in Maryland ("MDEC")

"MDEC" or "MDEC system" is the Maryland Judiciary's system of electronic filing and case management. (ECF 66 at 6.) "Maryland's transition to MDEC involved many years of planning," beginning in 2006. (*Id.* at 7.) Maryland contracted with Tyler Technologies, Inc. (Tyler) on October 28, 2011, to create an electronic filing system ("File & Serve," that filers use) and in addition for case management ("Odyssey," that courts use) (MDEC refers collectively and colloquially to a suite of applications, including these two separate products). (*Id.*; ECF 23-1 at 17-18.) The Maryland Judiciary began the transition to MDEC in October 2014 and implemented it on a rolling basis. (*Id.*) To date, 23 of 24 circuit courts use MDEC. (*Id.*) The three most recent circuit courts to go "live" are three of the four largest/busiest: Baltimore County (February 19, 2019), Montgomery County (October 25, 2021), and Prince George's County) (October 17, 2022, or eight months post-suit). *See* Exhibit 6, Walter Decl. at ¶ 20, p. 12.

File and Serve is used to initiate new suits by submitting a complaint for clerk review. (ECF 66 at 7.) After submission, "prior to receiving a new case number and being filed/docketed as a new case, a clerk must review" the complaint pursuant to the Maryland Rules. (*Id.*) Once reviewed, the submission is transmitted and publicly available. (*Id.*) Only attorneys of record may remotely access complaints and the public may view them "only at a courthouse". (*Id.* at 8, 5 n.6.)

The Defendants

Defendants are the State Court Administrator (responsible for the administration of MDEC) and 23 of the 24 elected Clerks of Court. (*Id.* at 1, 5-6.) No Defendant is responsible for creating (and the Clerk Defendants are also not responsible for implementing or enforcing) Maryland's pre-access clerk review requirement because clerk review is required by the Maryland Rules and the Clerk Defendants have no control over MDEC. (*See e.g.,* ECF 95-67 at 13; *id.* at

22-23, 27, 68-70, 80 (Judge Hollander reviewing the Maryland Rules, confirming that they require pre-access clerk review, and confirming pre-access clerk review is constitutional).) This is because the Clerk Defendants are powerless to give CNS what it wants in this case.[5] Exhibits 39-42 (Clerk Defendants' Bushell's, El Amin's, Ensor's, and Poyer's Supp. Ans. to Interrogs. each at 7-12); Exhibit 43, El Amin Dep. at 48-51; Exhibit 44, Ensor Dep. at 40-42; Exhibit 45, Poyer Dep. at 43-45; Exhibit 46, Bushell Dep. at 32-38.

Applicable Rules and Policies

Pre-access clerk review is mandated by a comprehensive reading of the applicable Maryland Rules and their legislative history, in combination with the State Court Administrator's policies and procedures for clerks' offices, including case processing, records management, and data processing. (ECF 66 at 20-27 (Judge Hollander discussing applicable Rules).) Rule 16-904(b) permits clerk review prior to public access. (*Id.* at 22-23.) Maryland's MDEC manual confirms that "Rule 20-203(a)(2) requires the clerk to review a submission prior to docketing." Exhibit 47; (ECF 23-1 at 17.)

Maryland "thoughtfully crafted numerous Rules that are pertinent to clerical duties and electronic filing. The Rules reflect the efforts of the judiciary to administer the courts, mindful of the wide variety of court records and proceedings handled by the courts, and the need to safeguard the First Amendment while also protecting individual privacy interests." (ECF 66 at 20.) "[T]he Rules as a whole make plain that lawsuits sometimes contain restricted, confidential information,

[5] Having changed the relief CNS seeks in this case, CNS also reopened the door to Defendants' argument that the Clerks should be dismissed. While Judge Hollander declined this request, ECF 66 at 55, CNS's requested relief has changed, and Defendants respectfully request the Court to reconsider dismissal because the Clerks have no control over MDEC and no relation to the relief CNS seeks. They are not even "neutral enforcement entities" as related to a press review queue and/or an auto-accept configuration. (ECF 95-1 at 24 (citing *Brandon v. Guildford Cnty. Bd. of Elec.*, 921 F.3d 194, 199 (4th Cir. 2019)).)

to which public access is not appropriate or permitted. And, the Rules, read as a whole, confer responsibilities on the Clerks to limit access to such information." (*Id.* at 27.)

The Data and Judge Hollander's No First Amendment Violation Decision

As of December 22, 2022, Judge Hollander examined the data and found that "most newly filed civil complaints are accessible within a constitutionally permissible time frame." (*Id*. at 78.) She considered that from October 1, 2021, to September 30, 2022, civil complaints were reviewed by clerks and made available to the public, on **average**, within **3.0 hours** of submission,[6] on **median**, within **1.2** hours, and **89.9%** within **8 hours and 1 minute** of submission. (*Id.* at 18-19, 78.) In the months leading to the decision, those numbers improved respectively to **1.5** on **average**, **0.8** on **median**, and **98.4%** within **8 hours and 1 minute**. (*Id.* at 19, 79.) Based on this evidence, Judge Hollander held that Defendants were providing contemporaneous access to newly submitted civil complaints for filing and were not violating the First Amendment. (*Id.* at 76, 80.)

Judge Hollander wrote that while CNS *may* produce evidence that *proves* that Defendants "*have failed or continue to fail to provide access to newly filed complaints within the time frame set forth in Schaefer*," in December 2022 the evidence *did not* "establish that defendants have violated the First Amendment" and, therefore, it was "*unnecessary to determine whether*

[6] Judge Hollander decided that time is counted "when the courts are open to the public", and not clock hours or calendar days. (ECF 66 at 76 ("In sum, the First Amendment requires the defendants to provide contemporaneous access to civil complaints, meaning access on the same-day that it is submitted, insofar as practicable, and if not practicable, within one court day. *Schaefer*, 2 F.4th at 328." (emphasis added)); *id.* at 78 (crediting Defendants' measurement of business hours rather than CNS's use of calendar days).) This is the "law of the case" and, thus, time is counted in business hours. *Hendricks v. Wash. Metro. Area. Trans. Auth*., No. 8:18-CV-02397, 2024 WL 327043, at *7 (D. Md. Jan. 29, 2024) ("The law-of-the-case doctrine recognizes that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (quoting *Graves v. Lioi*, 930 F.3d 307, 318 (4th Cir. 2019) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). "Courts 'should be loath' to revisit their prior decisions 'in the absence of extraordinary circumstances . . . .'" *Hendricks*, 2024 WL 327043, at *7 (internal citations omitted).

defendants' policy of *pre-access clerical review satisfies intermediate scrutiny*." (ECF 66 at 80-81 (emphasis added).) While Judge Hollander left the door open for CNS to provide "data showing that the defendants do not provide contemporaneous access," she held that *only if* CNS produces data proving that Defendants are *not* proving access within the time frame set forth in *Schaefer*, *only* "then the defendants will need to prove that their policies and practices satisfy intermediate scrutiny." (*Id.* at 78, 80-81.) Said another way, as long as the data stayed the same or improved subsequent to Judge Hollander's decision, then Defendants are not violating the First Amendment and, therefore, do not have to prove that their policies and procedures are constitutional under an intermediate scrutiny analysis. (*Id.* at 78.) This is the law of the case. *See supra* at note 6.

ARGUMENT

I. APPLICABLE LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "[S]ummary judgment is appropriate when the evidence 'is so one-sided that one party must prevail as a matter of law.'" *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986)).

II. THERE IS CONTEMPORANEOUS ACCESS TO NEW CIVIL COMPLAINTS.

Putting aside, *for now*, the legal complexities at issue here, and considering only the Fourth Circuit's expectations for timeliness of access to civil complaints, which allows for the kind of brief clerical review for confidential information Maryland's courts have always undertaken prior to public access, Exhibit 2, Harris Decl. at ¶¶ 5, 16, Maryland is meeting those timeline expectations and undoubtedly providing "*contemporaneous*" access to newly submitted civil complaints "as expeditiously possible," "insofar as practicable, and if not practicable, within one court day," *Schaefer*, 2 F.4th at 328. "In *Schaefer*, 2 F4th at 328, the Court described the access standard as 'flexible,' noting that it '*does not require perfect or instantaneous access*. Rather, it

provides courts with some leeway where same-day access would be *impracticable* . . . .'" (ECF 66 at 70 (emphasis added).)

In the one-year period since Judge Hollander's ruling, civil complaints have been reviewed by clerks and made available to the public, on **average**, within **1.1 hours** of submission, on **median**, within **0.5 hours** of submission, and **99.2%** within **8 hours and 1 minute** of submission. Exhibit 6, Walter Decl. at ¶ 19, pp. 12, 17, 21, 27, 33. And, if only the three most current months of data are examined (September 20, 2023, to December 12, 2023), those numbers are respectively **0.9 hours** on **average**, **0.4 hours** on **median**, and **99.7%** within **8 hours and 1 minute** of submission. *Id.* at ¶ 26, pp. 14, 18, 23, 28, 34. Thus, presently, the public has contemporaneous access to newly submitted civil complaints.[7]

Even if "same-day" access data is reviewed, Defendants' numbers remain excellent. Since Judge Hollander's decision, **88.2%** of complaints are available the same day that they are submitted. *Id.* at ¶ 26; *id.* at p. 36 (invalidating CNS's inaccurate claim that Maryland falls short of 85-90% same-day access, ECF 95-1 at 23). Currently, just focusing on the most recent three months of data—Prince George's County went live on MDEC in October 2022[8] and there is a steep learning curve to MDEC (ECF 66 at 16)—that number improves to **92.1%**.[9] *Id.*; *id.* at p. 38.

[7] Charts displaying current data (including county-by county) are at Exhibit 6, Walter Decl. at pp. 10-14. CNS would, however, have this Court examine each clerk's office, month-by-month, but an aggregate analysis and review is far more appropriate. *Id.* at ¶ 29. This is especially true because some courts have far fewer new complaints filed each month. *Id.* (less than 6 per month).

[8] CNS previously chose to only obtain complaints from Prince George's County twice per week. Exhibit 34, Abbott Dep. at 145-46. Thus, CNS has far greater and faster access there now.

[9] Despite CNS' claim of Defendants' use of "misleading statistics" to "overstate[] the percentage of complaints that were made available on the day of submission" and CNS's use of one of its own employee as a "statistician" even though he has no expertise as related to the data and statistics, ECF 95-1 at 14 and ECF 95-29 at 2 (CNS's Angione confirming he has no statistical expertise relevant to this matter), Defendants' data for "same-day" access is based on whether a complaint was submitted on or after 8:30 a.m. and accepted for filing before 4:30 p.m. the same-

And, as depicted in the relevant data charts (*id.* at pp. 36-42) and the attached declarations of the Clerks (attached as Exhibits 7-29), why 100% same-day access is not always achieved every single day (*i.e.*, why same-day access is not always practicable but is, rather, impracticable[10]) patently varies for several reasons, including end of day submittals, availability of clerk personnel and their other work duties, the complicated nature of some filings, and MDEC issues (*e.g.*, MDEC filings sometimes get "caught" in the system for unknown reasons (ECF 66 at 20)).

"For example, as the working drags on to 4:30 p.m. and court closure, the ability of the clerks to review newly submitted civil complaints for filing decreases." Exhibit 6, Walter Decl. at ¶ 26 (confirming during the most recent three months of data, a **94.8%** same-day completion rate for complaints submitted between **2:00 p.m. and 2:30 p.m.**;[11] **91.5%** between **2:30 p.m. and 3:00 p.m.**; **83.2%** between **3:00 p.m. and 3:30 p.m.**; **71.3%** between 3:30 p.m. and 4:00 p.m.; and **39.6%** between **4:00 p.m. and 4:30 p.m.**); *see* Exhibits 7-29 (Clerk Decls.) (detailing all the work and demands on the clerk offices and demonstrating why it is impracticable to expect that *every single* complaint submitted after, for example, 4:00 p.m. *every single day* be treated the same as

day. Exhibit 6, Walter Decl. at 36-38; *id.* at ¶ 18. This rightfully includes any complaint submitted after court closure from the prior court day (or non-court day, *e.g.*, a weekend), because clerks are generally not working during such time and courts are closed. *Id.* at ¶ 17.

[10] "Impracticable" means "excessively difficult to perform especially by reason of an unforeseen contingency." Impracticable, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/impracticable (last visited Feb. 1, 2024).

[11] Up until shortly before the end of 2023 (*i.e.*, just less than three months ago) CNS was not even attempting to access electronic complaints in Maryland *after* approximately 12:00 p.m. – 1:15 p.m. Exhibit 34, Abbott Dep. at 73, 76-77, 80-84; Exhibit 48, Ericson Dep. at 31-38, 57-62 (also confirming that CNS now intentionally does not attempt to obtain any paper complaints from the Circuit Court for Baltimore City after approximately 1:30 p.m.). Thus, CNS filed this suit based on a non-existent "injury." It was not until undersigned counsel pointed this out to CNS that CNS "fixed" this issue by now neglecting paper complaints in Baltimore City in favor of electronic complaints. Exhibit 5, Girdner Dep. at 13.

complaints submitted at, for example, 8:31 a.m., in that they must *absolutely* be reviewed and accepted for filing by the close of each business day *every single day*).

Clearly, these "end-of-day" submittals account for the state not being perfect *every day*.[12] Judge Hollander recognized this and held that if a complaint is filed at the end of the court day on Monday, "the Clerk *does not* violate *Schaefer* if it makes that complaint available to the public at *some point* the following Tuesday." (ECF 66 at 76 (emphasis added).) And, significantly, during all times relevant, CNS has never reported on end-of-day electronic submittals. *Supra* at note 11.

The data—which has only improved—continues to demonstrate that Defendants are providing access to complaints within a constitutionally permissible time frame under *Schaefer*. Therefore, Defendants are not violating the First Amendment and are entitled to judgment.

III. CNS'S FACIAL ATTACK IN THIS "RIGHT OF ACCESS" CASE FAILS.

If the data does not end this case (which it should), then as a threshold consideration, it is critical to recognize that this case concerns only the right to *access* government records, as distinguished, *significantly*, from the right to be protected from government *censorship* of *speech*. (ECF 79 at ⁋ 86.) This distinction is imperative because CNS's broad attempt at a facial challenge

[12] Defendants cannot be held to a perfect standard. *See e.g., United States v. Carter*, 750 F.3d 462, 465 (4th Cir. 2014) (the government is only required to show that the fit between its important goal is "'reasonable, not perfect.'"); *United States v. Uribe*, 890 F.2d 554, 557 (1st Cir. 1989) (the government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required). (*See* ECF 66 at 80 ("CNS attempts to convert the Fourth Circuit's holding from a flexible standard to a bright line rule.").) Nonetheless, as the data confirms, Defendants strive for and nearly reach same-day access perfection. To the extent that CNS wishes to conduct a *Schaefer* analysis as to why *every single* submitted complaint is not reviewed by the end of *every single* court day, the explanations are generally detailed in the declarations of the Clerk Defendants and ECF No 66 at 20. And, if a **92.1% same-day** "success rate" is not satisfactory to warrant judgment in Defendants' favor, then nothing short of perfection or instant access will, especially with over **70%** of submitted complaints that are not reviewed the same-day being **submitted after 2:30 p.m.**, *see* Exhibit 6, Walter Decl. at pp. 38, 42. (*See* ECF 66 at 76 (Judge Hollander confirming that *Schaefer* recognized that "the Constitution does not 'require the impossible.'").)

is impermissible. *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999) (no facial challenge where no speech prohibited).

Here, CNS seeks to go well beyond the as-applied relief awarded in *Schaefer*, 440 F. Supp. 3d at 564, by broadly and generally challenging Maryland's Rules, policies, and practices that operate collectively to require pre-access clerk review. (ECF 79 at 30-31); Exhibit 5, Girdner Dep. at 222-23. CNS alleges that its subscriber law firms are constitutionally deprived of timely updates about the filing of new complaints in the near 30 minutes it takes for clerks to review and process new complaints for confidential information prior to docketing. And in response to this alleged problem, CNS seeks to have this Court declare that *regardless of how-applied*, Maryland's pre-access review policies broadly and facially violate the First Amendment. (ECF 79 at ¶ 86.) CNS should not be permitted to take the extraordinary legal leaps needed to succeed here.

Subsequent to *Press-Enterprise II* (discussed *infra*), the Supreme Court addressed a case with factual similarities. *United Reporting*, 528 U.S. 32. There, a publishing company that collected arrestee demographic information from local law enforcement agencies and sold it to attorneys and other customers sought broad declaratory and injunctive relief under the First Amendment in response to a statute that placed restrictions on the information requests they needed for their reports. *Id*. The Court reversed the Ninth Circuit, explaining, "For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession." *Id*. at 40. The Fourth Circuit has applied the same standard in similar facial challenges. *See, e.g.*, *Fisher v. King*, 232 F.3d 391, 398-99 (4th Cir. 2000) (rejecting First Amendment facial challenge against policy resulting in refusal to make 911 call available for copying and inspection, explaining, as a right of access case,

it "does not carry the threat of prosecution for violating the statute and it does not restrict expressive speech, but simply regulates access to information" in the government's possession).

While the general public's interests in timely news and court openness are certainly inviting ideals, they cannot, as CNS suggests, support a First Amendment *facial* challenge in a "right of access" case like this. *United Reporting*, 528 U.S. at 41 ("Resort to a facial challenge here is not warranted because there is no possibility that protected speech will be muted.") (internal quotation marks and citations omitted). To the extent CNS attempts to rely on the effect of the pre-access clerk review policies "on parties not before the Court—its potential customers, for example—its claim does not fit within the case law allowing courts to entertain facial challenges." *Id*.

IV. A PROPER LEGAL ANALYSIS REVEALS NO TRADITION OF PRE-CLERK-REVIEW INSTANTANEOUS ACCESS TO NEW CIVIL COMPLAINTS, NOR ANY SIGNIFICANT POSITIVE ROLE SUCH ACCESS WOULD PLAY IN COURT FUNCTIONING.

In light of CNS's decades-long legal strategy, a brief and preliminary review of the relevant precedent is helpful. Although in its nationwide attack on state courts, CNS has successfully limited any discussion of common law rights, *see Schaefer*, 2 F.4th at 326, n.4 ("Courthouse News does not rely on the common-law right of access here, and so we confine our analysis to the existence of such a right under the First Amendment"), it is the standard the Supreme Court has traditionally applied to requests for government information, including court records, thus declining to apply the First Amendment altogether, *see Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (when media sought judicial records, declining to apply First Amendment, and instead applying common law "right to inspect and copy judicial records," which is "not absolute"). In line with this, the Court has regularly declined to adopt a *broad* constitutional right to obtain government information, *see Houchins v. KQED, Inc.*, 438 U.S. 1, 9-15, 16 n.* (1978) (reversing Ninth Circuit, plurality explaining Court "never intimated a First Amendment guarantee of a right of access to all sources of information within government control;" Justice Stewart

concurring, "Forces and factors other than the Constitution must determine what government-held data are to be made available to the public"), and has regularly distinguished constitutional rights from Freedom of Information Act (FOIA) rights, *see McBurney v. Young*, 569 U.S. 221, 232 (2013) (no constitutional right under FOIA).

The First Amendment, on the other hand, has traditionally been applied against government actors, including the courts, as a mechanism to protect against censorship of speech. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 543-44, 570 (1976) (applying First Amendment where court order "specifically prohibited" press from reporting about certain aspects of a criminal trial). Approximately 40 years ago, however, the Supreme Court veered slightly and temporarily from its path to create the standard upon CNS has based its nationwide litigation scheme, by applying the First Amendment to a *narrow* group of cases related to *criminal* proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-76 (1980) (Justice Stevens, concurring, "This is a watershed case . . . never before has [this Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever"); *Globe Newspaper Co. v. Superior Ct. for Norfolk County*, 457 U.S. 596, 598, 604-06 (1982) (access to sex offense proceedings); *Press-Enter. Co. v. Sup. Ct. of Cali., Riverside Cnty.* (*Press-Enterprise I*), 464 U.S. 501, 508-09 (1984) (access to criminal voir dire proceedings); *Press-Enterprise Co. v. Sup. Ct. of Cali. for Riverside Cnty.* (*Press-Enterprise II*), 478 U.S. 1, 4-5, 8 (1986) (amassing *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I* holdings, providing standard for cases claiming "First Amendment right of access to criminal proceedings").

Subsequent to *Press-Enterprise II*, in several cases involving judicial documents, the Fourth Circuit *rejected* an application of the First Amendment. *See, e.g., Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 428-29 (4th Cir. 2005) ("press and public enjoy a qualified

common law right of access, but not a First Amendment right, to judicial records"); *Fisher*, 232 F.3d at 396 (rejecting application of *Press-Enterprise II* line of cases, and instead applying the common law *Nixon* standard); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (access from clerk "is not demanded by the first amendment" where newspaper provided anecdotal evidence of the affidavits being "open for inspection by the press and public in the clerk's office").[13] In *Schaefer*, the district court granted declaratory relief, 440 F. Supp. at 562, and the Fourth Circuit accepted its application of the experience and logic test, 2 F.4th at 325-29.

The experience and logic test is "nuanced and fact-specific." *New York C.L. Union v. New York City Transit Auth.*, 675 F. Supp. 2d 411, 431, n. 26 (S.D.N.Y. 2009), *aff'd*, 652 F.3d 247 (2d Cir. 2011). Its proper analytical focus must be the "precise question" presented by the constitutional challenge. *See Fisher*, 232 F.3d at 396 (no First Amendment right to copy of audio tape played in open court). In applying the two-pronged *Press-Enterprise II* First Amendment test in this case, the Court must analyze the precise questions of: (1) whether the specific "process" at issue, *i.e.*, newly electronically submitted civil complaints in Maryland courts for docketing—that have not yet been reviewed and processed by the clerks—have "historically been open to the press and general public"; and (2) whether requiring instant public access to those complaints, prior to clerk review and processing, "plays a significant positive role in the functioning" of Maryland's courts. *Press-Enterprise II*, 478 U.S. at 8-9. Each of these two questions must be analyzed, *Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 291 (4th Cir. 2013) (*Pursuant*), and each must be answered in the negative as applied to this case.

[13] Post *Press-Enterprise II*, the Fourth Circuit has also, under dissimilar facts and often in context of sealing requests, relied on the First Amendment. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014).

The experience prong fails when applied to the precise process here because that process is the electronic filing process and pre-access clerk review has *always* been the tradition in *both* the paper and electronic worlds. Further, because the electronic filing process has only existed in Maryland courts since 2014, a long history related to electronic filing is impossible. *See Pursuant*, 707 F.3d at 286-87, 291 ("no tradition of access" over 27 years). That is, the process at issue falls—inevitably and radically—short of qualifying as the kind of centuries-old process that underwrote the relevant test. *See Press-Enterprise I*, 464 U.S. at 505 (tracing history of public criminal trials back before the Norman Conquest and early in Colonial America); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (finding "unbroken, uncontradicted history" of criminal trials being presumptively open since long before the Constitution).

Further, as the Rules Committee explained when modifying the Maryland Rules, because the transition to e-filing, coupled with internet expansion and a social media explosion, has created a fundamental shift in filing practices and access realities, clerk review is even more important in the digital age than it was in the paper days.[14] This is why there is irrefutably zero evidence of any history of pre-clerk-review access to *electronically* submitted civil complaints because, since the inception of electronic filing in 2014, the Maryland Rules, policies, and practices have required clerk review prior to public dissemination.[15] (*See* ECF 66 at 27 (confirming that the Rules require pre-access clerk review to deny access to confidential and restricted information).)

[14] As of August 2022, in just a one-month period in 2013, **5,437** documents filed in federal court improperly included one or more social security numbers. Exhibit 49, Senator Wyden Aug. 4, 2022, ltr. to Chief Justic Roberts.

[15] While CNS makes lofty claims of "courts around the nation" giving pre-clerk-review access to electronically submitted complaints, a critical review reveals that not to be the case. (*See* ECF 95-7 at 2-23 (CNS exaggerating the number of courts by including counties for statewide court systems and neglecting to identify which states and counties CNS has threatened with

And even if broader facts are applied by examining the history of *paper* filing, in Maryland there is undeniably a clear tradition of access to newly submitted complaints (both paper and electronic) being conditioned on court review and docketing. This has been confirmed by the legislative history of the rule that preceded Rule 16-904(b). (ECF 23-7 at 14 (Maryland Supreme Court Justices identifying this as "an important policy issue" and confirming that "[m]ost clerks do <u>not</u> now permit access to documents *until the docketing . . . is complete*.") (emphasis added).) This has also been confirmed by the clerks, Exhibits 7-29, as well as CNS's Maryland employee, Exhibit 33, Staples Decl. (confirming that CNS only had access to paper complaints after clerk review), and CNS's "bureau chief," Exhibit 34, Abbott Dep. at 21-22, 100-01, 114-42 (confirming no known tradition of pre-access clerk review throughout Maryland).

As further broad support for the court tradition of pre-access clerk processing, and contrary to CNS's bald assertions,[16] there is no history and tradition of the federal courts making case-initiating electronically submitted civil complaints instantaneously and widely publicly accessible. Exhibit 50, FJC Report. In the federal courts, "[t]here has long been a distinction between *submission* of a document to the court and *filing* it." *Id.* at 5 (emphasis added). And in the federal courts' current Case Management/Electronic Case Files (CM/ECF) system, there continues to be a distinction between "electronically submitting something to the court . . . and actually using CM/ECF to file it" because "[s]ubmissions are converted into filings by the court's staff *after a quality control review*." *Id.* at 3 (emphasis added). Further, the federal courts distinguish and

litigation or sued).); Exhibit 51, CNS Ans. to Interrog. No. 10 (CNS recognizing that it "unartfully" claimed that "the vast majority of [e-filing] courts" do not perform clerk review).

[16] CNS owner, Bill Girdner, has filed "declarations" claiming to have "personal knowledge" of facts related to nationwide filing practices, including in Maryland courts (despite having never stepped foot in a Maryland court or most courts). Exhibit 5, Girdner Dep. at 54, 87.

treat differently the use of the CM/ECF system "to file in an *existing* case and using CM/ECF to *initiate* a case." *Id*. at 3. (emphasis added). In some federal courts, even attorneys do not have the ability to initiate new cases electronically. *Id*. Thus, documents that have been submitted but not yet filed are not part of the file, and therefore, not publicly available. *See id*.

The public case locator website maintained by the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, Public Access to Court Electronic Records (PACER), delays *remote* online access to new cases to the general public, clearly stating, "*Newly filed cases* will typically appear on this system within 24 hours." Exhibit 52, PACER Case Locater (emphasis added), available at https://pcl.uscourts.gov/pcl/pages/search/findCase.jsf. The PACER case locater site also refers the public to a Court Information Page, which displays for each federal district court the newest remotely available cases on PACER. Exhibit 53, Court Information Page, Feb. 2, 2024.[17]

In the federal appellate courts, there is a tradition that is in complete contradiction to that which CNS claims. "[I]t is always members of the court staff who open the cases," and while "CM/ECF is used . . . to submit an original action electronically, [] it is court staff that actually make the new case's electronic record live with a case number." Exhibit 50, FJC Report at 6. Likewise, the Supreme Court posts new cases "only after the Clerk's Office has received and reviewed the paper version of the filing, determined that it should be accepted for filing, and assigned a case number." Exhibit 54, SCOTUS Electronic Submission Guidelines at 4.

[17] By way of example, this page was visited at 6:15 a.m. on Friday, 02/02/2024. *https://pcl.uscourts.gov/pcl/pages/courtInformation.jsf*. The "most recent cases" date listed for this Court is the day before, 02/01/2024. For the majority of the courts, the date is listed as two days before on 01/31/2024. None of the courts list 02/02/2024. Different days will have the same results every day, every time.

In addition, there is no evidence that pre-clerk-review access would play a significant positive role in the functioning of Maryland's courts. This piece of the test was conceived primarily from *Press-Enterprise I*, in which the Court explained that access to criminal proceedings provides "community therapeutic value" by allowing observation of whether "standards of fairness are being observed." 464 U.S. at 508-09. In this case involving electronic filing, there is no "fairness to observe" because until an electronic submission is accepted for filing, it is not a judicial record that has legal consequences. *See Pursuant*, 707 F.3d at 290 ("For a right of access to a document to exist under either the First Amendment or the common law, the document must be a judicial record."). That is, between the time a document is submitted and the time it is filed, which is generally only approximately 30 minutes in Maryland, that electronic submission is not a judicial record upon which the court can take any action because it has not been transmitted to the courts' Odyssey case management system. Exhibit 55, Preston Dep. at 207. And, to the extent a document is submitted for filing and then rejected, it will never become a part of the judicial record at all. *Id.* at 208. In other words, a civil complaint, that is electronically *submitted* for filing but has not yet been *filed/docketed*, is not part of the judicial process at all.

Further, not only is there no evidence that pre-clerk-review access to newly submitted civil complaints "plays a significant positive role in the functioning" of Maryland's electronic courts, if this Court were to force the Maryland courts to dispense with pre-access clerk review, which would then force the Maryland courts to automatically accept and send to its Odyssey case management every submitted document, it would actually significantly hinder the functioning of Maryland's courts, adding additional clerical steps and confusion to the process. *Id.* at 199-205; Exhibit 2, Harris Decl. at ¶¶ 45-48, 53-54. In *Schaefer*, the Court recognized the public's "strong interest in its elected circuit court clerks having the ability to perform their duties in an efficient

and cost-effective manner." 440 F. Supp. 3d at 564. An auto-accept configuration and a press review queue are the exact opposite of efficiency and cost-effectiveness.

And paradoxically, the press review queue that CNS seeks would undermine the public's access rights. First, to configure MDEC for a press review queue, the Maryland Judiciary would need to essentially reverse recent actions of the Rules Committee that thoughtfully modified the MDEC system to ensure that clerical review protected "the transparency required by the Rules." Exhibit 56, Rules Comm. at 13; Exhibit 55, Preston Dep. at 194-96. Prior to October 1, 2020, MDEC allowed filers to designate whether submissions should be marked as public or confidential. Exhibit 57, MDEC Notice. In 2020, however, the Rules Committee was alerted to a recurrent problem,[18] in which fliers, including attorneys, had been over-designating documents as confidential and shielding documents from public view that should have been public. Exhibit 56, Rules Comm. at 13; Exhibit 55, Preston Dep. at 194-96. That is, in order to implement the press review queue—for the sole benefit of CNS's litigation reports—the Rules Committee would have to undo a mechanism that actually protects openness for the general public. *Id*. And in fact, this is the exact problem—where court documents that should be public have been incorrectly sealed or shielded from public view—that underwrites much of the First Amendment case law cited by CNS. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 252 (4th Cir. 2014) (challenging sealing of case documents and refusal of court to reflect any record of filings on public docket, in case related to public safety); *Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 577 (4th Cir. 2004) (challenging sealing of fourteen court documents, in rape and murder case).

[18] After reporting on the trial of Jarrod Ramos, who was convicted of murdering five journalists at *The Capital* newspaper, the media alerted the Judiciary of a technical MDEC loophole, which allowed attorneys to improperly shield court submissions/filings from public view. *See* Exhibits 55, 56; Exhibits 58-60 (media perspective, summarizing issue and solution).

Further, by providing access to certain documents only to certain people (CNS), a press review queue would give its users the kind of preferential treatment over the public that the Supreme Court has warned against. *See Nixon*, 435 U.S. at 609 ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public. . . . [A] reporter's constitutional rights are no greater than those of any other member of the public.").

V. REGARDLESS OF THE SOURCE OF THE RIGHT TO ACCESS TO NEW ELECTRONIC CIVIL COMPLAINTS, THE REASONABLY CONTEMPORANEOUS, POST CLERK REVIEW, STANDARD FROM *SCHAEFER* IS APPROPRIATE.

Although Defendants contend that the "experience and logic" test fails as applied to the electronic filing process at issue in this case, and although Defendants do not concede that the First Amendment is implicated when applied to the electronic filing process at issue here, the reasonably contemporaneous access standard from *Schaefer*, which allows for "a *brief* delay, *due to clerical review*, for the purpose of addressing *operational* and *security* issues *before* allowing public access to a complaint" (ECF 66 at 80) (emphasis added) is fitting. In fact, this kind of reasonableness standard is similar to the kind of common law standard the Defendants contend would more appropriately be indicated (if a right is implicated at all). *See Nixon,* 435 U.S. at 598 (1978) (balanced with the courts' rights to have "supervisory power over its own records and files," they may properly deny access to documents that could potentially be "vehicle for improper purposes"). The policies underlying clerk review, which include preventing the dissemination of non-public information, fall squarely into this category.

VI. IF, SOMEHOW, THE COURT REACHES THE POINT OF APPLYING CONSTITUTIONAL SCRUTINY TO MARYLAND'S PRE-ACCESS CLERK REVIEW (WHICH IT SHOULD NOT), MARYLAND'S RULES, POLICIES, AND PRACTICES ARE JUSTIFIED.

Assuming, *arguendo*, that this Court finds that the data show that Defendants are not, *somehow*, providing contemporaneous access to civil complaints, *only* then must Defendants "prove that their policies and practices satisfy intermediate scrutiny." (ECF 66 at 80-81.)

Preliminarily, the reality that CNS's legal successes in "access cases" are a constitutional mismatch for the legal precedent that provides their basis becomes glaringly obvious when one seeks guidance on how to apply scrutiny. That is, intermediate scrutiny is generally applied in the First Amendment context to determine whether restrictions on *speech or expression* are narrowly tailored, *see, e.g., City of Austin, Texas v. Reagan Nat'l Advert. Of Austin, LLC*, 596 U.S. 61, 76 (2022) (applying intermediate scrutiny to city ordinance regulating advertising signs), rather than to determine issues related to *access* to judicial documents, much less the timeliness of access. This mismatch is apparent even in CNS's argument. (ECF 95-1 at 20-21) ("restriction must not 'burden substantially more *speech* than is necessary to further the government's legitimate interests'" (emphasis added) (citing *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015) (case challenging a county ordinance that prohibited solicitation)).)

Further, putting aside the clever precedent CNS has developed for itself by first targeting underperforming singular court clerk offices and then attempting to apply the law more broadly statewide—ECF 66 at 63, 72, 74 (review by the *Schaefer* clerk's office could by default take up to ten days, review by the *Gabel* clerk's office '"often takes several days to complete'", and review by the *Planet III* clerk's office took "up to two weeks,")—when courts have stretched the First Amendment to extend to *access* cases, they have applied intermediate scrutiny to situations in which the courts have *indefinitely* shielded or denied *any and all* public access to court documents. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) (company filed federal lawsuit to *indefinitely* seal large portions of the court record in order to protect its reputation, intermediate scrutiny was not met). In other words, finding guidance on how to apply constitutional scrutiny here is challenging because unlike in the relevant case law, the Maryland courts—by continuing to adhere to their tradition of a process in which clerks briefly review case-initiating documents

that are electronically submitted to the courts, prior to making them publicly available—are neither *censoring speech* nor *indefinitely* denying access to public documents.

In addition to the challenge of finding on-point legal guidance, it is difficult to follow CNS's scrutiny argument. CNS alleges that "narrow tailoring requires Defendants 'to prove that [they] actually tried other methods to address the problem' intended to be served by the restriction" (ECF 95-1 at 31) and then spin this back to allege that the Major Projects Committee improperly justified its denial of the CNS's "press review queue" request based on Rules and policies that CNS alleges are facially invalid (ECF 95-1 at 31-33). In spite of CNS presenting a confusing argument that seeks to misapply a scrutiny test that is incompatible with any actual "problem" here, to the extent that the Court accepts CNS's argument that, based on the First Amendment, Maryland must justify the pre-access clerk review process, such review is constitutionally justified.

The Major Projects Committee based its denial of the press review queue on "numerous Rules that are pertinent to clerical duties and electronic filing," and were "thoughtfully crafted" by the Maryland Judiciary's intricate system. (ECF 66 at 20.) "The Rules reflect the efforts of the judiciary to administer the courts, mindful of the wide variety of court records and proceedings handled by the courts, and the need to safeguard the First Amendment while also protecting individual privacy interests." (*Id*.) This included the Rules Committee thoughtfully considering the effect of the fundamental shift from paper to electronic records and explaining why some clerical review is necessary to address concerns with operational efficiency, privacy, security, and openness. Exhibit 56, Rules Comm. at 2-4. The interplay between filer error and these concerns were directly analyzed. *Id*. at 13-15. This analysis also included a discussion of why clerical review serves to preserve the openness of court filings. *Id*.

Clerical review prevents the dissemination of confidential and restricted information, such as social security numbers, financial information, and other personal identifying information. (ECF 66 at 68-69.) Government agencies have a legal obligation to protect sensitive information. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 534-35 (1989) (First Amendment case finding governmental power to "forestall or mitigate the injury caused" by the release of sensitive information by "classify[ing] certain information, establish[ing] and enforce[ing] procedures ensuring its redacted release, and extend[ing] a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination"); *Ostergren v. Cuccinelli*, 615 F.3d 263, 280 (4th Cir. 2010) (First Amendment case recognizing serious privacy concerns and potential harm stemming from Social Security Number dissemination that "public disclosure should be strictly curtailed"); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993) (recognizing compelling concerns over the confidentiality and misuse of Social Security Numbers and explaining how inadvertent disclosure creates the potential for "a serious invasion of privacy" because "an unscrupulous individual" could steal another person's identity); Md. Code Ann., State Gov't §§ 10-1304, 10-1301 ("Protection of Information by Government Agencies" statute, which obligates the protection of personal information by "implement[ing] and maintain[ing] reasonable security procedures and practices."); Maryland Rules 16-904, 20-201(h), and 20-203 (courts are obligated to protect sensitive information).

Further, as Judge Hollander wrote, CNS's recycled "argument that any error in a submission may be corrected after the submission has been made public is patently flawed. That is tantamount to closing the barn door after the horse has escaped. The leaking of confidential information, even for a few hours, can have severe consequences with regard to a party's privacy, safety, and economic interests.") (ECF 66 at 69.) "And, it is no answer that the burden is on the

filer to identify confidential information, as CNS suggests." (*Id.*) Just because filers are supposed to redact confidential information, they do not always do so as Defendants have demonstrated. (*Id.*) "[A]ddressing 'filer mistakes has always been part of the equation' for clerical staff." (*Id.*) Pre-access clerk review "is certainly appropriate . . ., if done within a reasonable time." (*Id.*)[19]

Clerical review also ensures operational efficiency. Under an auto-accept configuration, submittals would flow directly into Odyssey. Clerk staff would have to review all documents in Odyssey (as opposed to File & Serve) and rejected filings would have to be removed from the court record. This all would take substantially more time. Exhibit 2, Harris Decl. at ¶ 47. The workload of clerks "as well as their respective courts would increase substantially if the Auto-Accept configuration was implemented." (ECF 95-67 at 17-18).

VII. CNS'S INJUNCTION AND DECLARATORY RELIEF REQUEST FAILS BECAUSE THERE IS AN INSURMOUNTABLE DISCONNECT BETWEEN CNS'S DESIRED OUTCOME AND ANY ACTUAL CONTROVERSY OR INJURY.

While baldly asserting a "loss of First Amendment *freedoms*," and that a "balance of hardships [] supports an injunction" (ECF No. 95-1 at 34) (emphasis added), CNS fails to connect an actual controversy, or a concrete injury, to its desired outcome of instantaneous, pre-clerk-review, access to all new electronically submitted civil complaints. Because a proper analysis must filter out distractions unrelated to the actual controversy, *see Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (adjudication of constitutional issues requires "concrete legal issues, presented in actual cases" without abstractions), CNS fails to demonstrate a genuine stake in its desired

[19] CNS takes issue with the number of rejected submissions, ECF 95-1 at 30-31, because that is all CNS has to argue. But, CNS fails to recognize that "it only takes one" inadvertent disclosure of confidential and restricted information of a citizen or business to adversely affect them. CNS also fails to recognize that the low number of rejections is the direct result of pre-access clerk review in the first instance. In sum, CNS asks this Court to throw the baby out with the bath water, all to save less than 30 minutes, on median, when CNS currently only accesses newly filed civil complaints just a few of the hours per day courts are open to the public.

outcome that would assure the kind of "concrete adverseness" necessary to "sharpen" the alleged constitutional issue. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Abstract injury is insufficient to support a claim for constitutional relief. *Id*. at 103.

In *Schaefer*, although injunctive relief was denied, CNS was able to demonstrate a constitutional delay controversy supported by the facts *in that case*. *See id*. at 543 (for example, the clerk's office unabashedly displayed a sign that stated that pre-access clerk review and processing could take ten days). CNS did this by successfully weaving a connection in that case between the outcome there, *i.e.*, contemporaneous access to paper complaints, and the constitutional controversy of "old news." *See* Exhibit 61, CNS's App. Brief in *Schaefer* at 13; *Schaefer*, 440 F. Supp. 3d at 562. Here, where CNS seeks a wholly different outcome, *i.e.*, instantaneous, pre-clerk-review access to all newly electronically submitted civil complaints in Maryland, CNS cannot weave any legal connection between its desired outcome and the abstract controversy of "stale news."

To the extent CNS attempts to connect its desired outcome *in this case* to broad journalistic news reporting sourced from new lawsuits filed in Maryland's MDEC courts, it fails. When asked in written discovery to identify all of its original news stories that reported on the substance of new civil complaints in Defendants Clerks' courts during a recent 31-month period, CNS identified four articles, only two of which were responsive to the request (two related to the Circuit Court for Baltimore City).[20] Exhibit 51, CNS Ans. to Interrog. No. 20; Exhibits 62-65, CNS Articles. The

[20] In contrast to the articles written from *electronically* submitted complaints, Exhibit 62, Baltimore County Article, and Exhibit 63, Montgomery County Article, a CNS article written from a *paper* complaint complains about delays. Exhibit 64, Baltimore City Article, dated August 31, 2022. In other words, not only does this evidence fail to demonstrate a journalistic controversy, it demonstrates that the shift from paper to electronic filing has *improved* timeliness. This further supports Defendants' earlier assertions about CNS's unclear needs here (*see* ECF 50 at 7-10), and they respectfully renew this argument. Defendants recognize that while this Court rejected this

facts are that on the two occasions in which CNS needed contemporaneous access to electronically submitted civil complaints to write actual news stories, it received it.[21] Additionally, the fact that CNS can only identify two journalistic articles exhibits the disconnect between its desired outcome and any broad journalistic controversy. Likewise, CNS's litigation reports demonstrate that the shift from paper to electronic filing has improved timeliness.[22]

Further, the record does not reflect any injury that would be redressed by the judicial decision CNS seeks, *i.e.*, predocketing access to all newly submitted civil complaints. *See Just. 360 v. Stirling*, 42 F.4th 450, 459 (4th Cir. 2022) (in First Amendment analysis access case, finding no legal right to the demanded information). For the majority of the 23 courts whose clerks are sued here, CNS's factual allegations are irrelevant because CNS alleges no history of attempting to access, or even any real interest in their submissions.

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argument previously, the additional factual evidence enlightened by discovery provides further support. In addition, Defendants also respectfully renew this argument as support for a finding that, to the extent any speech is actually affected here that warrants constitutional protection, it relates to CNS's litigation reports and it is commercial speech, to which the constitution "accords a lesser protection" than "other constitutionally guaranteed expression." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

[21] The first article was written about Baltimore County Circuit Court Case No. C-03-CV-21-001696, which was submitted for filing after court hours at 5:14 p.m. on June 2, 2021, and docketed first thing the following morning, on June 3, 2021, at 8:30 a.m. Exhibit 6, Walter Decl. at ¶ 42; Exhibit 57, Baltimore County Article, and Exhibit 66, Baltimore County Complaint. Notably, although CNS proclaims a need for instantaneous access, the article was published on June 4, 2021, the day after the complaint had become publicly accessible at 8:30 a.m. The second article was written about Montgomery County Circuit Court Case No. C-15-CV-22-003258, which was submitted, docketed, and reported on all on September 2, 2022. Exhibit 6 at ¶ 43; Exhibit 58, Montgomery County Article, and Exhibit 67, Montgomery County Complaint.

[22] *Compare, e.g.*, Exhibit 35 (Baltimore Report, dated September 1, 2021), Exhibit 36 (Greater Maryland Report, dated September 1, 2021), Exhibit 37 (Baltimore Report, dated September 1, 2023), and Exhibit 38 (Greater Maryland Report, dated September 1, 2023).

Further, to the extent that CNS actually accesses electronically submitted civil complaints in Maryland courts on a regular basis in order to include information about them in its litigation reports, CNS often does not "report" on them until the following day, including in Maryland's federal courts.[23] This is supported by the testimony of CNS's Maryland employees, as well as by a review of the litigation reports themselves.

CONCLUSION

For all the foregoing reasons, the Court should deny Plaintiff's motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Respectfully submitted,

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[23] Although CNS's owner has written, "Federal courts, including the District of Maryland, provide *on-receipt* access to efiled complaints *through the PACER system*," ECF 95-4 at 3 (emphasis added), and "declared" that in this Court "new complaints can [] be viewed through PACER without the need for a clerk to first review them or complete other post-filing administrative tasks like docketing, and such filings can be viewed remotely via PACER even when the Court is closed" (ECF 9-2, ¶ 33), these statements are inaccurate (although immaterial for summary judgment). To the contrary, most federal courts do not make new civil complaints instantly *and* remotely available to the general public. *Supra* at 19-20. Subsequent submissions in *existing* cases and *case-initiating* submissions are treated differently. *Id.* Typically, case-initiating submissions are remotely available to the general public through PACER "within 24 hours" of submission. *Id*; (ECF No. 95-24 at 22).

United States District Court for the District of Maryland
Civil Case No. 1:22-cv-00548
Defendants' Cross-Motion for Summary Judgment and Opposition

EXHIBIT LIST

Exhibit	**Description**
	(omitted to conform to ECF numbering)
2	Declaration of Pamela Q. Harris, Maryland State Court Administrator (2013 – 2023)
3	Letter to Maryland Administrative Office of the Courts, Judicial Information Systems, on behalf of Courthouse News Service, dated April 8, 2008
4	Letter to Maryland Standing Committee on Rules of Practice and Procedure, on behalf of Courthouse News Service, dated September 20, 2012
5	Excerpts from Deposition William Girdner, Owner of CNS
6	Declaration of Jamie Walter, Ph.D., Maryland Administrative Office of the Courts, Program Director of Research & Analysis
7	Declaration of Dawne D. Lindsey, Clerk of the Circuit Court for Allegany County
8	Declaration of Scott Poyer, Clerk of the Circuit Court for Anne Arundel County
9	Declaration of Julie Ensor, Clerk of the Circuit Court for Baltimore County
10	Declaration of Kathy P. Smith, Clerk of the Circuit Court for Calvert County
11	Declaration of Terry Lord, Clerk of the Circuit Court for Caroline County
12	Declaration of Heather S. DeWees, Clerk for the Circuit Court for Carroll County
13	Declaration of Charlene Notarcola, Clerk of the Circuit Court for Cecil County

29	Declaration of Susan Braniecki, Clerk of the Circuit Court for Worcester County
30	Current CNS Litigation Map
31	Current CNS Litigation Timeline
32	CNS Cases By Circuit
33	Declaration of Daniel Staples, CNS Maryland Reporter (2015 – 2018)
34	Exerpts from Deposition of Ryan Abbott, CNS Bureau Chief
35	CNS Baltimore Report, dated September 1, 2021
36	CNS Greater Maryland Report, dated September 1, 2021
37	CNS Baltimore Report, dated September 1, 2023
38	CNS Greater Maryland Report, dated September 1, 2023
39	Clerk Bushell's Supplemental Answers to Interrogatories
40	Clerk El Amin's Supplemental Answers to Interrogatories
41	Clerk Ensor's Supplemental Answers to Interrogatories
42	Clerk Poyer's Supplemental Answers to Interrogatories
43	Excerpts from Deposition of Clerk El Amin
44	Excerpts from Deposition of Clerk Ensor
45	Excerpts from Deposition of Clerk Poyer
46	Excerpts from Deposition of Clerk Bushell
47	Maryland State Court Administrator's MDEC Manual
48	Excerpts from Deposition of Edward Ericson, CNS Maryland Reporter
49	Letter from Ron Wyden, United States Senator to the Honorable John G. Roberts, Jr., dated August 4, 2022
50	Federal Judicial Center, 2022 Report, Federal Courts' Electronic Filing by Pro Se Litigants, provided to Advisory Committee on Civil Rules on October 12, 2022

51	CNS's Responses to Defendants' First Set of Interrogatories
52	PACER Case Locator Page
53	Federal Court Information Page
54	Supreme Court of the United States, Office of the Clerk, Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System
55	Excerpts from Deposition of Lisa Preston Maryland Administrative Office of the Courts, Judicial Information Systems Division, Manager, Case Management Systems
56	Maryland Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rules Changes
57	Notice to MDEC Users Regarding Oct. 1, 2020, Change to E-Filing Process
58	Baltimore Sun Article dated Jan. 8, 2020, "Maryland judiciary to review policy around lawyers' button to hide filings"
59	Daily Record Article, dated Feb. 3, 2020, "Rules committee proposes stricter process for confidential e-filing"
60	Daily Records Article, dated Feb. 7, 2020, "Rules committee approves changes to court e-filing process"
61	CNS Appellate Brief from Schaefer
62	CNS Article (Baltimore County) – June 4, 2021
63	CNS Article (Montgomery County) – Sept. 2, 2002
64	CNS Article (Baltimore City) – Aug. 25, 2022
65	CNS Article (Baltimore CNS) – Aug. 31, 2022
66	Baltimore County Complaint
67	Montgomery County Complaint