IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

COURTHOUSE NEWS SERVICE, Plaintiff, v. JUDY K. RUPP, in her official capacity as the State Court Administrator of the Administrative Office of the Courts of Maryland, *et al*., Defendants.	)	Case No. 1:22-cv-00548-BAH

PLAINTIFF COURTHOUSE NEWS SERVICE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The Fourth Circuit has already decided a challenge to a state court's policy of restricting access to newly filed civil complaints until after court staff complete administrative processing. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 329 (4th Cir. 2021); *see also, e.g.*, Schaefer Appeal Brief at 38 (ECF 98-61). That is how we know that "[t]he press and public enjoy a First Amendment right of access to newly filed civil complaints" … which "requires courts to make newly filed civil complaints available as expeditiously as possible." *Schaefer*, 2 F.4th at 329. The Fourth Circuit also established that a restriction on this right – like Defendants' no-access-before-processing policy – is unconstitutional unless its proponent can prove that it is "'content-neutral, narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice.'" *Id.* at 328 (quoting *Courthouse News Serv. v Planet*, 947 F.3d 581, 585 (9th Cir. 2020) ("*Planet III*").

Defendants' moving/opposition brief spends most of its time running away from this controlling authority, urging the Court to find that the First Amendment does not apply and that, even if it did, the Court should fashion some sort of *ad hoc* "reasonableness" test rather than the test *Schaefer* mandates. Defs.' Mem. Supp. Cross-Mot. Summ. J/Opp. to Pl.'s Mot. (ECF 95-1) ("Defs.' Opp.") at 10-25. Defendants ask the Court to ignore evidence of widespread and pervasive delays, arguing that poor access in particular courts in particular months doesn't matter as long as those delays are obscured when data is aggregated across the entire state during select time periods. *Id*. at 11 & n.7.

Defendants do not dispute that they did not evaluate the efficacy of the no-access-before-processing policy or the feasibility of alternatives, only obtaining information about their own vendor's press review queue solution when the parties were nearly a year into litigation and never consulting with their large Judicial Information Systems department or with other courts

that successfully provide access before processing. Pl.'s Mem. Supp. Mot. Summ. J. (ECF 95-1) ("CNS MSJ") at 23-24, 25-27. They do not deny that Maryland's court rules explicitly place the burden of flagging confidential information on the filer or that Defendants' internal directives explain that court staff need not read filings for confidential information. *Id*. at 21-23. Nor do they deny that only a miniscule fraction of e-filed civil complaints (less than two-tenths of one percent) were rejected for confidential information. *Id*. at 24-25; Defs.' Opp. at 27 n.19. Most of Defendants' evidence is offered to show that busy court staff cannot process all complaints on the day they are filed. Walter Decl., ¶¶ 27-28 (ECF 98-6); clerk declarations (ECF 98-7 to 98-29). This, of course, is precisely the point. As was true in the paper-filing era, withholding access for processing inevitably (and unnecessarily) leads to delays. CNS MSJ at 3-4.

Ultimately, Defendants depend on the Court replicating the analysis from the preliminary injunction order issued at the outset of this case. Fundamental errors in that analysis – errors which Defendants declined to address – preclude the Court from doing so. CNS MSJ at 15-16. In short, Defendants have provided no basis for granting summary judgment in their favor or denying summary judgment in favor of Courthouse News.

I. The Court Should Not Repeat Mistakes from the Preliminary Injunction Order

Chief among the significant errors in the Court's preliminary injunction order was mis-reading *Schaefer* as creating a bright-line rule immunizing delays from constitutional scrutiny as long as complaints are available by the end of the next court day after filing. Mem. Op. at 80 (ECF 66) ("P.I. Order"); *see* CNS MSJ at 15-16. *Schaefer*, however, "did not … articulate a safe harbor by which any court in the circuit, under any circumstances, could satisfy the First Amendment solely by making complaints available 'on the next court date' after filing." *Courthouse News Serv. v. Boyce*, 2023 WL 7287878, at *5 (E.D.N.C. Nov. 3, 2023). Rather, the Fourth Circuit "affirmed the district court's declaratory judgment findings, including the time

periods articulated in that case, based upon '[e]vidence produced at trial,' which included consideration of what 'was both possible and practicable' for the clerks to provide under the circumstances then presented." *Id*.

In addition, the P.I. Order erred by predicating its refusal to reach the second part of the *Press-Enterprise II* test (which evaluates whether an access restriction is justified) on its conclusion that the access delays at issue were permissible because they resulted from "clerical review." P.I. Order at 80. Delaying for clerical review, however, is the very restriction Courthouse News challenges in this lawsuit. Second Am. Compl. at 30-31 (ECF 79).

Having concluded, as Fourth Circuit precedent bound it to do, that a First Amendment access right attaches to e-filed civil complaints, P.I. Order at 64, the Court was required to subject the no-access-before-processing policy to constitutional scrutiny. *Schaefer*, 2 F.4th at 328. Thus, Defendants' no-access-before-processing policy can survive only if Defendants show that it is "'content-neutral, narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice.'" *Schaefer*, 2 F.4th at 328.[1] Further, to satisfy the narrow-tailoring requirement, "the government must '***show*** [ ] that it seriously undertook to address the problem with less intrusive tools readily available to it,'… and must "***demonstrate*** that [such] alternative measures ... would fail to achieve the government's interests, not simply that the chosen route is easier.'" *Reynolds v. Middleton*, 779 F.3d 222, 231–32 (4th Cir. 2015) (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)) (emphasis in *Reynolds*). Rather than test the restriction under the requisite scrutiny, however, the P.I. Order found the restriction need not be tested because "the evidence does not establish that defendants

[1] All emphases are added and internal citations omitted unless otherwise noted.

have violated the First Amendment" – a conclusion based on the Court's untested approval of delaying access for clerk review. P.I. Order at 69, 80. This circular analysis is clearly erroneous.

Moreover, the P.I. Order's statement that "in CNS's view, any delay due to clerical review and docketing violates the First Amendment," P.I. Order at 67, reflects a fundamental misapprehension of Courthouse News' position and possibly a misunderstanding of the *Press-Enterprise II* framework. Delays due to clerical review and docketing violate the First Amendment only if Defendants fail to meet their burden of proving that the no-access-before-processing policy is narrowly tailored and necessary.

Defendants' opposition ignores Courthouse News' discussion of these errors and instead insists that the Court must replicate them: "[A]s long as the data stayed the same or improved subsequent to [the P.I. Order], 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" because "[t]his is the law of the case." Defs.' Opp. at 10.

Defendants are mistaken. "In general, a court's decisions at the preliminary injunction phase do not constitute law of the case in further proceedings and do not limit or preclude the parties from litigating the merits. …'[T]his is true for the reason that a preliminary injunction decision is just that: preliminary.'" *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 948 F. Supp. 2d 538, 551 (D. Md. 2013). "Because of the lesser burden of proof required to support a motion for preliminary injunction as contrasted with a motion for summary judgment, a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits." *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Tr. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989)

(reversing "since the district court erroneously applied the 'law of the case' doctrine in disposing of the summary judgment motion" based on its prior preliminary injunction decision).

Moreover, regardless of the procedural posture of the prior decision, "[t]he ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). "The law of the case doctrine is not an 'inexorable command' but rather a prudent judicial response to the public policy favoring an end to litigation." *Sejman v. Warner-Lambert Co*., 845 F.2d 66, 68 (4th Cir. 1988). "[A] district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted." *Am. Canoe*, 326 F.3d at 514–15 (4th Cir. 2003).

II. Defendants Obscure Delays by Presenting Only Statewide Aggregate Same-Day Statistics and Otherwise Measuring Delays in "Business Hours"

Defendants seek to avoid any examination of their no-access-before-processing policy by pointing to aggregated statistics and "business hour" measurements they contend show that access is already contemporaneous. Defs.' Opp. at 10-13. This approach is misguided for two reasons. First, contemporaneity is not determined in a vacuum but rather based on a fact-intensive inquiry as to whether civil complaints are made available "as expeditiously as possible." *Schaefer*, 2 F.4th at 329; *see Boyce*, 2023 WL 7287878, at *5. Most of Defendants' evidence is directed at establishing that circuit court staff cannot ***process*** all complaints on the day they are filed. Walter Decl., ¶¶ 27-28 (ECF 98-6); clerk declarations (ECF 98-7 to 98-29). This does not establish that court staff cannot ***provide access*** to all complaints available on the day they are filed. Rather, it reinforces what Courthouse News has been saying all along: withholding access for processing will inevitably prevent the press and public from being able to review some complaints until at least the day after they are filed. Second, Defendants' statewide,

aggregated statistics hide critical variations in access and their business-hour measurements fail to capture the reality of delays as the press and public experience them.

A. Whether Access is "Contemporaneous" Despite a Restriction Cannot Be Established Solely by Numbers

Contrary to Defendants' assertion, *Schaefer* does not establish a particular "constitutionally permissible time frame," such that courts may avoid any scrutiny of access restrictions as long as newly filed civil complaints are available by the end of the next day after filing. *See* Defs.' Opp. at 9. Rather, newly filed civil complaints must be made available "as expeditiously as possible." 2 F.4th at 329. Determining what is "as expeditiously as possible" in a particular court necessarily requires a factual inquiry into the circumstances of that court. As Courthouse News has demonstrated, what is "as expeditiously as possible" for an e-filed complaint will not be the same as what is "as expeditiously as possible" for a paper-filed complaint. CNS MSJ at 3-5, 25-26 (ECF 95-1); Girdner Decl., ¶¶ 50-99 (ECF 95-2). This is why the *Schaefer* district court anticipated that full-scale implementation of e-filing would eliminate access delays altogether. *Id*. at 563 ("Improved technology at the [statewide] OES level will likely moot the access issue."). The record in this case shows that Defendants can make most e-filed civil complaints available on the day of filing as long as they do not withhold all for clerk processing. CNS MSJ at 3-5, 7, 25-26; Girdner Decl., ¶¶ 50-99 (ECF 95-2).[2]

The *Schaefer* district court determined that under "the facts of [that] case" (which involved paper-filed complaints that require physical handling by court staff), contemporaneous access meant "on the same day of filing, insofar as practicable and if not practicable within one

[2] Exceptions might include complaints filed with a Restricted Information Notice, complaints e-filed by self-represented litigants, and perhaps even complaints filed in case types that Defendants can show are far more likely to include confidential information than is typical for most civil case types. Defendants could configure their systems to continue holding complaints in these categories for clerk review prior to access. *See* CNS MSJ at 25-26; *infra* at 22-26.

court day." *Courthouse News Serv. v. Schaefer*, 440 F. Supp. 3d 532, 559 (E.D. Va. 2020); *see* CNS MSJ at 13-14.[3] The "same day if practicable" formulation does not determine what is "contemporaneous" in this case. But even if it did, applying it here would not help Defendants. By its very terms, "same day if practicable" does not mean access to a complaint is *per se* contemporaneous as long as the complaint is available by the next day after filing, as the P.I. Order concluded. Indeed, the *Schaefer* district court explained that "[b]ased upon the evidence in this case," it expected that "85-90% of the new civil filings will be accessible to the public and press on the date of filing." 440 F. Supp. 3d at 562. As discussed below, MDEC courts routinely fall below that threshold. *See* Angione Decl., Exh. C-2 (ECF 95-31).

The Fourth Circuit explained that the standard is "flexible" and "does not require perfect or instantaneous access," as "the Constitution does not require the impossible." *Schaefer*, 2 F.4th at 328. This does not mean, of course, that a solution that provides something close to immediate access for non-confidential civil complaints is inappropriate under *Schaefer*. Rather, nearly immediate access to most complaints is the natural result in an e-filing court when complaints are not withheld for processing.

B. Defendants' Statistics Do Not Provide the Information Needed to Understand the Delays in this Case

There is no dispute of material fact as to delays. The parties differ only in their views of what information is most useful. Defendants would have the Court focus on same-day statistics only at an aggregate, statewide level, while Courthouse News has provided statistics that enable

[3] "Practicable" means "capable of being put into practice or of being done or accomplished." *Practicable*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/practicable (last visited Feb. 21, 2024); *Practicable*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/practicable (last visited Feb. 21, 2024) (defining "practicable" as "able to be done or put into action"); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 678 (2d ed. 1995) ("Practicable = capable of being accomplished; feasible; possible.").

the Court to understand significant variations in delay from month to month and court to court. Defendants also urge the Court to measure delays in terms of a "business hours" measurement predicated on the very practice Courthouse News challenges.

1. Defendants' Aggregated Statistics Obscure the Reality of Delays

Courthouse News has shown the extent to which each MDEC court made new e-filed complaints available – or failed to make them available – on the day of filing in each month from January 2021 to December 2023. CNS MSJ at 7-10; Angione Decl., ¶¶ 18-25 (ECF 95-29) & Exh. C-2 (ECF 95-31). The parties' methodology as to same-day access differed only in that Courthouse News excludes complaints e-filed after 4:30 on weekdays (when the clerks' offices closed to the public) and on weekends and holidays, while Defendants treat such complaints as having been e-filed on the next day the court was open. CNS MSJ at 7-10; Angione Decl., ¶¶ 13-17 (ECF 95-29); Walter Decl., ¶ 18 (ECF 98-6).

Defendants' opposition does not criticize this methodology. Rather, they urge the Court to ignore Courthouse News' data and to focus only on more general, aggregated same-day information and only for limited time periods. Defs. Opp. at 11-12. Defendants assert that looking at "each court month-by-month" constitutes an effort "to determine absolute perfection by the clerks" and that aggregate numbers "provide an adequate representation of the data …, especially based on the relief CNS seeks in this case," Walter Decl., ¶ 29 (ECF 98-6), but they do not explain why either conclusory assertion is true. Given that Courthouse News seeks relief in each of Maryland's e-filing Circuit Courts, analyzing access in each court is not only appropriate but necessary. Similarly, looking at access on a month-by-month, court-by-court basis is the only way to understand particular assertions made by Defendants (*e.g.*, that Defendants were providing contemporaneous access as of February 2022 and that a mechanism implemented in

April 2022 "further ensure[d] ongoing timeliness compliance"). Defs.' Opp. at 2; Harris MSJ Decl., ¶¶ 35-36 (ECF 98-2); Harris P. Inj. Decl., ¶¶ 14-15 (ECF 23-32).

The only specific reason Defendants give for ignoring more detailed data is that each delayed complaint has a greater impact on the court's monthly percentage in smaller-volume courts. Walter Decl., ¶ 29 (ECF 98-6). That there are fewer e-filed complaints in smaller courts, however, does not make those complaints less important. *See, e.g.,* Opp. Decl. of Adam Angione, ¶¶ 7-8 (Courthouse News reported on at least 35 new complaints from each MDEC court and more than 100 complaints from most MDEC courts in the past year). And though, for example, only 19 civil complaints were e-filed in Washington County Circuit Court in February 2022 (excluding after-hours filings), it is significant that ***only two of them*** were available on the day of filing. *See* Angione Opp. Decl., at ¶ 9. This does not mean that court staff were not working diligently. Rather, it reflects that delays are inevitable when access is conditioned on processing by court staff. *See* Tucker Decl., ¶¶ 9-10, 14, 17 (ECF 98-27).

Moreover, Courthouse News' data reflects that access was poor during many months in Maryland's busier circuit courts. Angione Decl., Exh. C-2 (ECF 95-31). For example, throughout 2021 and 2022, the Anne Arundel Circuit Court, which over the last three years had the third-highest volume of e-filed civil complaints out of all of Maryland's e-filing courts, Angione Decl., Exh. C-7 (ECF 95-36), routinely made ***fewer than half*** of complaints that were e-filed by 4:30 p.m. (when the clerk's office closed to the public) available that day. Angione Decl., Exh. C-2 (ECF 95-31). Poor access occurred in Maryland's other larger courts even after April 2022, when the AOC implemented the mechanism to help court staff prioritize complaint processing (*e.g.*, Baltimore County: 69%, 64%, and 69% in Aug. 2022 and July and Aug. 2023; Howard: ranging from 37% to 68% in Aug. 2022 to Jan. 2023; Montgomery: 69%, 63%, 54%,

and 63% in June, July, and Oct. 2022 and Jan. 2023; Prince George's: 69% in Aug. 2023). *Id*. Aside from simplicity, the primary virtue of the statewide aggregated numbers for Defendants is that they hide the reality that "delay that varies significantly between court units and within each court unit." *Courthouse News Serv. v. Gabel*, 2021 WL 5416650, at *8 (D. Vt. Nov. 19, 2021).

2. Measuring Delays in Business Hours Fails to Convey the Delays as the Press and Public Experience Them

While Defendants provide statewide aggregated percentages for same-day access, most of their statistics are presented in terms of "business hours" that elapsed between the e-filing of a complaint and its being made available to the public. Defendants start the delay clock only when the court is open and stop the clock whenever the court is closed. This is a singularly unhelpful way to understand the impact delays have on the ability of the press and public to keep on top of new civil complaints filed in Maryland's circuit courts.

For First Amendment purposes, what matters is the passage of time as people actually experience it. The public does not know or care how many "business hours" elapsed before its release. With each passing day, the public is less likely to spare attention for a new complaint. Girdner Decl., ¶ 23 (ECF 95-2). A complaint e-filed an hour before the clerk's office closes on a Friday and made available an hour after the clerk's office opens on Monday will be counted as made available in two business hours. As a practical reality, by the time the new week starts, the public will have moved on from last week's news. *Id*. Similarly, if the clerk's office closes at 4:30 p.m., every complaint filed after 3:30 p.m. could be withheld until the following day and still have been released within one "business hour."[4] The dubious virtue of the business-hour

[4] Reinforcing the extent to which Defendants insist they can avoid constitutional scrutiny as long as they make complaints available by the end of the next day after filing, Defendants' confusing "8 hours and 1 minute" statistic conveys the percentage of complaints made available by the day ***after*** filing. Walter Depo., at 115:2-116:4 (ECF 95-60). At the preliminary injunction stage, this approach confused even Defendant's counsel, who mistakenly insisted to

measurement is that it shows how quickly clerks are processing. It is thus an appropriate metric only if one assumes the necessity of withholding access for processing.

III. Courthouse News' Claim is Not Based on the Common Law Access Right

Courthouse News' claim is based on the "First Amendment right of access to newly filed civil complaints." *Schaefer*, 2 F.4th at 329*; see* Second Am. Compl., ¶¶ 1, 4, 85-88 (ECF 79). The common law access right and categories of court records to which the First Amendment does not apply, Defs. Opp. at 15-17, 23, have no bearing on Courthouse News' claim.

Defendants' contention that the First Amendment protects only against censorship while the common law right applies to court record access, Defs.' Opp. at 15-17, is mistaken (and, in light of *Schaefer*'s holding, somewhat baffling). *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) – which Defendants cite for the proposition that "the Supreme Court has traditionally applied [the common law] to requests for government information," Defs.' Opp. at 15 – pre-date the Supreme Court's recognition of the First Amendment right to access court records.[5] Moreover, *Houchins* involves prison interviews,

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the Court that a complaint made available within "eight business hours and one business minute" would have been available on the day of filing. Fetterly Opp. Decl. ¶ 3 & Exh. H-3 (Hr'g Tr. 90:8-93:10; 100:19-104:6); P.I. Order at 15 n.11.

[5] Starting in 1980 with criminal trials, the Supreme Court recognized a First Amendment right of access to a range of proceedings in criminal cases. Defendants refer to this line of cases as the Supreme Court "veer[ing] slightly and temporarily from its path," Defs. Opp. at 16, as if subsequent case law curtailed the First Amendment access right. To the contrary, the categories of court records and proceedings to which the right has been recognized have expanded over time. *See, e.g., In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (civil litigation evidence); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir.1984) (preliminary injunction hearing); *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (discovery materials filed with summary judgment motion); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 102 (2d Cir. 2004) (civil and criminal docket sheets); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (civil complaints); *Planet III*, 947 F.3d at 585 (9th Cir. 2020); *Schaefer*, 2 F.4th at 329; *Courthouse News Serv. v. New Mexico Admin. Off. of Cts.*, 53 F.4th 1245, 1264 (10th Cir. 2022) (civil complaints).

not court record access. It is true that courts have "regularly distinguished constitutional rights from Freedom of Information Act (FOIA) rights," Defs.' Opp. at 16, but that observation is irrelevant to Courthouse News' claim, which is based on the First Amendment.

Defendants' confusion might arise from a misreading of *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005), which they cite for the misguided notion that the Fourth Circuit has generally refused to find a First Amendment right to access court records. Defs.' Opp. at 16-17. In *Buchanan*, the Fourth Circuit wrote: "This court has held that the press and public enjoy a qualified common law right of access, but not a First Amendment right, to judicial records ***including affidavits supporting investigative search warrants***." 417 F.3d at 429 (emphasis added). Defendants omitted the italicized language in the parenthetical quotation in their brief, perhaps mistakenly reading the phrase that begins with "including" as a list of examples of judicial records to which the First Amendment right does not apply. Defs.' Opp. at 16-17. The context of *Buchanan*, however, makes clear that the phrase instead describes a narrow category of judicial records to which the First Amendment does not apply – *i.e.*, those that include affidavits supporting investigative search warrants. *See also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (secrecy needed for search warrant weighs against First Amendment access); see also *Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000) (no disapproval of First Amendment right to court records generally).

IV. *Schaefer* Precludes Defendants from Using the First Part of the *Press-Enterprise II* Test to Avoid the Second Part

The *Press-Enterprise II* test, which courts use to determine whether a First Amendment access right applies and, if so, whether restrictions on that right are justified, has two main parts. 478 U.S. 1 (1986). The first part – often called the "experience and logic" test – is used to determine whether the First Amendment access right attaches to a particular category of

documents or proceedings (*e.g.*, civil complaints). *Id*. at 6-9. The second part is used to scrutinize the specific restriction at issue based on the facts of the case. In an attempt to avoid the second part of the *Press-Enterprise II* test, Defendants urge the Court to revisit the first part. Defs.' Opp. at 15-21. The Fourth Circuit, however, has resolved the first part of the test as to civil complaints, *Schaefer*, 2 F.4th at 325–28, and that holding is binding on this Court.[6] The Court's inquiry should therefore focus on whether Defendants have proven that their restriction – the no-access-before-processing policy – satisfies constitutional scrutiny under the ***second*** part of the *Press-Enterprise II* test. *See* CNS MSJ at 12-15.

According to Defendants, the Court should ignore the Fourth Circuit's recognition of a First Amendment right to access newly filed civil complaints and instead ask whether there is a First Amendment right to access "newly electronically submitted civil complaints in Maryland courts for docketing [sic] – that have not yet been reviewed and processed by the clerks." Defs.' Opp. at 17. Doing so would confuse the two parts of the *Press-Enterprise II* test because Defendants' articulation of the category of records at issue ***incorporates the challenged restriction*** – the no-access-before-processing policy. In essence, Defendants would have the Court apply the first part of the test (experience and logic) to the restriction, and never apply the second part of the test (justification of restriction) at all.

Defendants make much of conflicting evidence as to how access to paper-filed complaints worked in various Maryland courts at various times. Defs.' Opp. at 19. Courthouse News provided evidence of newly filed paper complaints being made available in wire baskets at the intake counter or in stacks behind the counter before completion of docketing in Anne

[6] The Fourth Circuit reached the same conclusion on the first part of the *Press-Enterprise II* test for civil complaints as each of the other circuit courts to have decided it. *See, e.g.*, *Bernstein*, 814 F.3d at 141; *Planet III*, 947 F.3d at 585 (9th Cir. 2020); *New Mexico AOC*, 53 F.4th at 1264.

Arundel, Baltimore City, and Prince George's County Circuit Courts from at least 2005 through 2008, Abbott Decl., ¶¶ 22-32 (ECF 95-24), while Defendants assert that access was conditioned on docketing. Defendants say, however, that Maryland's circuit courts made new paper-filed civil complaints available on request, such that any pre-access docketing practice would not have resulted in access delays.[7] However, even if this Court revisited the first part of *Press-Enterprise II* test, establishing a practice specific to Maryland courts would not help Defendants. "The 'experience' test … does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of" hearing throughout the United States....'" *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993).

Defendants' argument on the first part of the *Press-Enterprise II* test is better understood as a variation of one that has been rejected by every court to consider it: that the First Amendment right does not attach to an e-filed complaint until after court staff have processed it. *See, e.g.*, *New Mexico AOC*, 53 F.4th at 1266 (regardless of whether public access to paper-filed complaints "'historically occurred after a document was accepted by the clerk,'" "a First Amendment right to access civil complaints attaches when the complaint is filed (or submitted) to the court"); *Planet III*, 947 F.3d at 585; *Courthouse News Serv. v. Planet*, 2021 WL 1605216, at *1 (C.D. Cal. Jan. 26, 2021) (the "qualified right of timely access attaches when new complaints are received by a court, rather than after they are 'processed' … regardless of whether courts use paper filing or e-filing systems"); *Gabel*, 2021 WL 5416650, at *13; *Courthouse News Serv. v. Omundson*, 598 F. Supp. 3d 929, 944 (D. Idaho 2022) (right attaches "when the complaint is submitted to the … e-filing system, ***not*** … once the documents are reviewed/accepted/processed by a clerk.") (emphasis original).

[7] *See, e.g.*, Poyer Decl., ¶ 5 (ECF 98-8); Ensor Decl., ¶ 5 (ECF 98-9); Smith Decl., ¶ 5 (ECF 98-10).

As the district court for the District of Oregon explained, the "'experience and logic' test … determines not when the right of access attaches but whether the right attaches 'to a type of judicial proceeding or record," and "[t]hat test is not relevant here because the Ninth Circuit in *Planet* held that the right attaches to newly filed civil complaints, and the Court is bound by that precedent." *Courthouse News Serv. v. Cozine*, 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022) (quoting *Planet III*, 947 F.3d at 590). The Fourth Circuit has likewise held the First Amendment right attaches to newly filed civil complaints, and the Court is bound by that precedent.

V. Defendants' Justifications for Delaying Access for Processing Do Not Bear the Weight of Scrutiny

Recognition of Courthouse News' First Amendment right to access newly e-filed civil complaints does not automatically result in judgment in its favor. But it does mean Defendants must shoulder the burden of proving the no-access-before-processing policy is "'content-neutral, narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice.'" *Schaefer*, 2 F.4th at 328 (quoting *Planet III*, 947 F.3d at 585).

A. Defendants Cannot Evade the Standard Mandated by the Fourth Circuit

After urging the Court to find Courthouse News' claim does not implicate the First Amendment, Defendants argue their no-access-before-processing policy should be tested not under the standard set forth by the Fourth Circuit in *Schaefer* but instead under a "kind of reasonableness standard… similar to the kind of common law standard the Defendants contend would be more appropriately indicated …." Defs.' Opp. at 23. Defendants' rationale for ignoring cases that apply the standard set forth in *Schaefer* (content-neutral, narrowly tailored, and necessary to preserve the court's important interest) is that many of those cases address restrictions on speech or expression. Defs. Opp. at 24. Though calling the purported inappositeness of this authority "glaringly obvious," *id*., Defendants do not explain ***why*** they

believe the application of the standard should differ depending on whether speech or access was restricted. Moreover, as the Ninth Circuit explained in the *Planet* cases, distinctions between the interest in expression and the interest in accessing court records are largely illusory: an "alleged violation of CNS' First Amendment right of access also harms its free speech interest." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014); *see also Planet III*, 947 F.3d at 587 ("we rejected Planet's argument that this is not a free expression case").

Moreover, the Fourth Circuit disagreed that *Reynolds v. Middleton* is "a constitutional mismatch" for an access case, Defs.' Opp. at 24, citing it in its analysis of potential justifications for the delays in *Schaefer*. 2 F.4th at 329 (quoting *Reynolds*, 779 F.3d at 229). Similarly, the proposition that "'narrow tailoring requires Defendants "to prove that [they] actually tried other methods to address the problem" intended to be served by the restriction,'" is not Courthouse News' "alleg[ation]"; it is Fourth Circuit law. Defs.' Opp. at 25 (quoting CNS MSJ at 25, which, in turn, quotes *Reynolds*, 779 F.3d at 231-32).

The Court, of course, cannot accept Defendants' invitation to ignore controlling Fourth Circuit precedent. The no-access-before-processing policy can survive only if Defendants prove that it is "narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice." *Schaefer*, 2 F.4th at 328. It is not narrowly tailored if it "'burden[s] substantially more speech than is necessary to further the government's legitimate interests.'" *Reynolds*, 779 F.3d at 226. "[T]he government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest," and "[t]he government's burden in this regard is satisfied only when it presents 'actual evidence supporting its assertion[s].'" *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020). Defendants have failed to do so.

B. Court Rules Must Conform to the Constitution, Not the Other Way Around

Defendants concede that their rejection of Courthouse News' request for pre-processing access was based on their conclusion that it would require changes to Maryland's rules. Defs.' Opp. at 25; CNS MSJ at 17-18. Even if Maryland's rules did prohibit access to civil complaints prior to clerk processing, however, Defendants must nevertheless justify them under constitutional scrutiny. *See, e.g.*, *Washington-S Nav. Co. v. Baltimore & Phil. Steamboat Co.*, 263 U.S. 629, 635 (1924) (rules of court cannot abrogate substantive law); *In re Express-News Corp.*, 695 F.2d 807, 811 (5th Cir. 1982). Unable to controvert authority establishing that the existence of court rules cannot justify a practice that would otherwise infringe a constitutional right, *see* CNS MSJ at 17-18, Defendants ignore it entirely.

In addition, Defendants do not contest that Rule 16-904(b) provides only that "a ***clerk*** is not ***required*** to permit public inspection of a case record" before docketing, and thus neither prohibits pre-access review by willing clerks nor permits the State Court Administrator or AOC to deny access. Defs.' Opp. at 8; *see* CNS MSJ at 19. Similarly, unable to dispute that the plain language of Rule 20-203(a)(2) calls for clerk review but ***does not prohibit access*** while such review is pending, see CNS MSJ at 19-20, Defendants point to the interpretation of the rule by the Administrator herself in the MDEC manual. Defs.' Opp. at 8; ECF 98-47 at 2 (MDEC manual "is published under the authority granted to the State Court Administrator"). The Administrator obviously cannot justify her interpretation of a rule by citing to that very interpretation. Rather than analyzing the dozen rules Defendants contend are relevant (which Defendants describe as "intricate and highly complex") or otherwise explaining how each relates to the issues in this case, Defendants invite the Court to peruse the rules and figure this out for

itself. Harris MSJ Decl., ¶¶ 40, 44 (ECF 98-2).[8] Ultimately, Defendants' interpretation of Maryland's rules is irrelevant. If a rule, or its implementation, results in unconstitutional restrictions, it must conform to the constitution – not the other way around.

C. A Policy that Restricts Access to 100% of E-Filed Civil Complaints in an Attempt to Ferret out the Less than 0.2% that Implicate Confidentiality is Not Narrowly Tailored

As Maryland's Rules Committee explained in the 2020 report Defendants mistakenly believe supports their no-access-before-processing policy, "the traditional openness of judicial records should be maintained and … judicial records should be presumed to be open to public inspection, subject only to the legitimate security and privacy rights of those who are the subject of those records." Rules Committee Report at 4 (Feb. 21, 2020) (ECF 98-56) (cited in Defs.' Opp. at 25). This principle is entirely consistent with Courthouse News' claim.

The same Rules Committee report observed that:

> [T]here needs to be a way to alert the clerk to any restricted information in [case records], so the clerk can assure that it is protected. …. ***The clerks cannot be expected to read through all of the thousands (or millions) of documents filed with them to look for restricted information.*** Current Rule 16-913 (proposed new Rule 16-916), which applies to both paper and electronic records, requires the filer to inform the custodian, in writing, whether any part of a case record or any information in a case record, is confidential and subject to shielding. ***The custodian is not bound by the filer's determination that a record is not subject to inspection but may rely on the filer's failure to advise that a document is not subject to public inspection.***

Rules Committee Report at 12-13 (underline emphasis original).[9]

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[8] Should the Court wish to undertake this task, the rules Defendants cite are attached as an appendix to this brief.

[9] The 2020 Rules Committee report does not "explain[] why some clerical review is necessary to address concerns with operational efficiency, privacy, security, and openness," as Defendants assert. Defs.' Opp. at 25. To the contrary, the report discusses "practical obscurity" issues related to online (*i.e.*, remote) access to court records. ECF 98-56 at 2-4. The merits of remote access are irrelevant in this case because Maryland does not provide the press and public with remote access to court records, a policy that Courthouse News does not challenge here. *See* CNS MSJ at 8 n.2. Nor does the report analyze "[t]he interplay between filer error" and efficiency or

As Courthouse News pointed out in its opening brief, this is the approach currently reflected in Maryland's rules. See CNS MSJ at 21-23. The clerk's duty is to "make a reasonable effort … to shield" confidential information "that has been ***called to the attention of the custodian by the person filing***." Rule 16-916(b)(1); *see also* Rule 16-918(b)(1) ("A custodian shall take reasonable steps to prevent access to restricted information … that the custodian is ***on notice*** is included in an electronic judicial record.'"). Defendants ignore these rules, pointing instead to authority that supports the more general (and entirely uncontroversial) point that government agencies should take reasonable steps to protect information they have reason to believe warrants confidentiality. Defs.' Opp. at 26.

The AOC has implemented "reasonable steps" to protect confidential information in civil case records independent of the no-access-before-processing policy. Namely, Maryland courts secure court records that are filed with the mandatory Notice of Restricted Information form, which sets out categories of court records and information eligible for confidentiality and requires filers to designate the confidentiality basis claimed. *See* CNS MSJ at 22; Walter Decl., ¶ 33 (Restricted Information Notice "provides notice to staff so that they can review the filing and apply the appropriate security group, if warranted"). E-filings "shall not contain any restricted information" unless the filer includes a Restricted Information Notice, Rule 20-201(h), and an e-filer cannot complete the e-filing process without affirmatively acknowledging: "This submission does not contain any restricted information OR, if it does, I have filed (1) a Notice of Restricted Information and, (2) if applicable, a redacted and unredacted version of the submission per Rule 20-201.1(c)." Abbott MSJ Decl., ¶ 48 (ECF 95-24).

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confidentiality or in any way that supports Defendants' position or "discuss[] why clerical review serves to preserve the openness of court filings." Defs.' Opp. at 25.

As discussed below, the MDEC courts have the ability to automatically keep any e-filing that contains a Restricted Information Notice from the public pending confirmation by the court that the document (or portions thereof) are, in fact, entitled to secrecy. Derrick Depo., 68:12-18 (ECF 95-64); Fetterly MSJ Decl., Exh. E-17 (ECF 95-56). Filings that do ***not*** contain a Notice of Restricted Information can be released to the public in the meantime. *Id*.; *see also* Derrick Depo.,69:4-70:16, 90:12-22, 97:3-20, 200:4-202:22.

The only evidence Defendants offer in support of their confidentiality justification are examples of e-filings returned to the filer because court staff believed they contained restricted information or were filed in the wrong case type. Walter Decl., ¶ 35. Courthouse News has shown that rejections related to confidential information are exceedingly rare in the context of civil complaints, with fewer than ***two-tenths of one percent*** of civil complaints e-filed in Maryland's circuit courts from January 2021 through December 2023 rejected based on the restricted information rejection code. *See* CNS MSJ 24-25; Angione MSJ Decl., ¶ 35 & Exh. C-8 (ECF 95-29, -37). More than half of the 23 MDEC courts ***did not reject a single complaint*** based on the confidentiality rejection code over the entire three-year span. *Id*.

Defendants' only response is that "'it only takes one' inadvertent disclosure of confidential and restricted information of a citizen or business to adversely affect them." Defs.' Opp. at 27 n.19. Where the First Amendment is implicated, however, the government is not allowed to use a bazooka to attack a mosquito. Rather, Defendants must demonstrate that the no-access-before-processing policy does not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Reynolds*, 779 F.3d at 226; *see also Billups*, 961 F.3d at 688 n.9 (government "must prove that the law in dispute does not 'regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its

goals.'"). This is not possible where more than 99% of the complaints withheld under Defendants' no-access-before-processing policy present no confidentiality issues and are ultimately released to the public following clerk review.[10] In addition, Defendants could choose to provide pre-processing access to new civil complaints in a controlled environment, as many other courts do. See Girdner Decl., ¶¶ 53, 61, 65, 73.[11]

D. Speculation that Processing Complaints in an Auto-Accept Configuration Would Be Less Efficient is Unsupported and Undermined by the Record

The third justification Defendants offer for the no-access-before-processing policy – that it "ensures operational efficiency" – is an argument against automatically accepting complaints rather than a reason for withholding access for processing. Defendants assert that it "would take substantially more time" for court staff to review filings in the Odyssey case management system than it takes to review them in the File & Serve e-filing manager where they currently reside pending clerk acceptance, and that it would take more time to "remove[ ]" a rejected filing "from the court record" than it does to reject a filing from File & Serve. Defs.' Opp. at 27. Their only support for these assertions, however, are conclusory assertions in the Harris Declaration and in Defendants' own interrogatory responses. *Id.*

[10] The P.I. Order addressed confidentiality but did not determine whether Defendants proved that their no-access-before-processing policy is narrowly tailored and necessary to serve Defendants' interest in keeping confidential filings confidential, as is required for the policy to survive intermediate scrutiny. P.I. Order at 80 (declining to apply intermediate scrutiny to policy in mistaken belief that access is contemporaneous as a matter of law if it is provided by end of day following complaint's filing). Moreover, at the preliminary injunction stage, the Court did not have the information necessary to put examples of filer mistakes in a factual context that would enable the court to determine whether Defendants' policy "burden[s] substantially more speech than necessary." *Reynolds v. Middleton*, 779 F.3d at 228-29.

[11] Defendants' unsupported assertion that "the low number of rejections is the direct result of pre-access clerk review in the first instance," Defs.' Opp. at 27 n.19, is nonsensical. The number of rejections will be the same regardless of whether a court allows access prior to clerk review.

The record reflects that these assertions are based solely on speculation, and that Defendants engaged in no investigation or analysis as to the impact an auto-accept configuration would have on efficiency. Fetterly Opp. Decl., Exh. H-1 (Harris 30(b)(6) Depo. 32:4-35:21); Fetterly Decl., Exh. E-20, Preston Depo. at 208:22-209:20, 210:16-212:8 (ECF 95-59); *see Billups*, 961 F.3d at 681 (affirming judgment against city where evidence that "officials ***thought*** less-speech-restrictive alternatives would not be as effective"; "such 'post-hoc justification' … failed to satisfy the 'actually tried' evidentiary standard imposed by *Reynolds*") (emphasis in original). Moreover, the record undermines Defendants' speculation, reflecting that the number of e-filed civil complaints rejected each month in each MDEC court is very low, with 22 of 23 courts averaging fewer than five rejections each month, and most of them averaging fewer than one. Angione MSJ Decl., Exh. C-7 (ECF 95-35). Thus, even if Defendants could show that handling rejections takes longer in Odyssey than in File & Serve, they cannot show that the overall impact would be material.

VI. Defendants' Failure to Seriously Consider – Let Alone Try – Less Restrictive Alternatives to Their No-Access-Before-Processing Policy Prevents Them from Establishing Narrow Tailoring

To satisfy their burden of proving the no-access-before-processing policy is "narrowly tailored to serve a significant government interest," Defendants "must, inter alia, present evidence showing that" they "'seriously undertook to address the problem with less intrusive tools readily available to [them].'" *Billups*, 961 F.3d at 688. Instead, Defendants concede they did not seriously consider less restrictive alternatives based on their mistaken view that (1) consideration was unnecessary if the alternatives would entail a change to Maryland's rules; and (2) *Schaefer* insulated their policy from review as long as complaints are made available by the day after filing. CNS MSJ at 17-21. Lacking evidence of any meaningful effort to explore alternatives, Defendants double down on their rule-based and safe-harbor justifications. *See,*

e.g., Defs.' Opp. at 1, ("press review queue and/or an auto-accept configuration violate the Maryland Rules"), 3 ("press review queue and/or auto-accept configuration cannot be required because both would violate the [P.I. Order] and *Schaefer*").

Courthouse News does not ask the Court to order Defendants to implement any particular solution. Rather, it asks the Court to declare that Defendants' no-access-before-processing policy constitutes an effective denial of contemporaneous access and to order Defendants not to maintain the policy. Second Am. Compl. at 30-31 (ECF 79).[12] The evidence shows Defendants have numerous, less restrictive tools readily available to them, which, if implemented, would provide contemporaneous access to non-confidential civil complaints.

A. Courts Across the Nation Provide Contemporaneous Access Using Myriad Options, All of Which are Available to Defendants

As Courthouse News has demonstrated, courts provide pre-processing access to civil complaints in many different ways. Girdner Decl., ¶¶ 47-101 (ECF 95-2) & Exhs. A-5 - A22 (ECF 95-7 - 95-23). A "press review queue" is simply a generic term describing any mechanism a court uses to provide access to e-filed documents that are sitting in a virtual stack in the court's e-filing manager, awaiting clerk review. *See, e.g.*, Courthouse News 2012 Letter at 4-6 (ECF 98-4) ("Setting up an electronic media box for e-filed documents is really no different [from a clerk's office press box holding new paper-filed complaints], except that … an electronic media box only requires that an electronic copy be made available for media viewing.").[13] And "auto-

[12] Thus, Defendants' statement that "no federal court has ordered such a queue or an auto-accept configuration," Defs.' Opp. at 4, is literally true but misleading. As Defendants know, many federal courts have enjoined state courts from withholding access to civil complaints for clerical processing. *E.g.*, *Courthouse News Serv. v. Tingling*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016); *Courthouse News Serv. v. Brown*, 2018 WL 318485, at *5 (N.D. Ill. Jan. 8, 2018), rev'd on abstention grounds; *Courthouse News Serv. v. Planet*, 2021 WL 1605216, at *1 (C.D. Cal. Jan. 26, 2021); *Courthouse News Serv. v. Gabel*, 2021 WL 5416650, at *18 (D. Vt. Nov. 19, 2021); *Courthouse News Serv. v. O'Shaughnessy*, 663 F. Supp. 3d 810, 820 (S.D. Ohio 2023).

[13] Defendants' concerns that a press review queue would result in preferential access for the

accept" refers to e-filing systems that accept complaints into the court's case management system without any clerk action.[14] By definition, an auto-accept system provides pre-processing access, using whatever the access mechanism the court has already chosen to use (e.g., controlled remote access (like PACER) or access at courthouse terminals). Courthouse News' evidence details how numerous courts use different versions of press (or public) review queues or auto-accept systems to provide contemporaneous access to new non-confidential complaints, including courts using the same e-filing and case management systems, and vendor, as the Maryland circuit courts. Girdner Decl. ¶¶ 47-101 (ECF 95-2).

As a "free, out-of-the-box" option, Defendants' current e-filing vendor will configure the MDEC system to automatically accept those e-filed complaints that match Defendants' chosen parameters, and those complaints would then be accessible via the access terminals at MDEC courts. Derrick Depo. at 69:4-70:16, 71:19-73:8, 73:12-75:19 (ECF 95-64). For example, in addition to auto-accepting only complaints in non-confidential case categories and case types, Defendants could auto-accept only those e-filing that do not include a Notice of Restricted Information. Derrick Depo. 78:21-80:19, 82:20- (ECF 95-64); Preston Depo. at 36:13-43:15, 66:13-21 (ECF 95-59), and Exhs. 32, 34 (ECF 95-48, 95-50). Defendants could also choose to

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media, Defs.' Opp. at 23; Harris Decl., ¶ 52, are misplaced. First, "[w]hile media representatives enjoy the same right of access as the public, they often are provided" courthouse accommodations as "surrogates of the public." See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). More importantly, Defendants need not limit pre-processing access to members of the press. *See, e.g.*, Girdner Decl., ¶¶ 82-92 (New York and Ohio examples).

[14] Defendant mistakenly asserts that neither this Court nor other federal district courts make new civil complaints available on receipt. Defs.' Opp. at 19-20, 30 n.23. Their erroneous conclusion is based on a report that merely draws a distinction between filing documents via CM/ECF and submitting them via email or other means (ECF 98-50) and references to the PACER Locator site that aggregates filings and makes them available on a delayed basis. Courthouse News does not use the PACER Locator site for its reporting, Abbott MSJ Decl., ¶¶ 50-51, and Courthouse News confirmed this Court, like many other federal district courts, automatically makes new complaints available to the public as it receives them from filers. Abbot Opp. Decl., ¶¶ 2-6; Angione Opp. Decl., ¶¶ 13-16.

auto-accept only civil complaints e-filed by attorneys, continuing to hold complaints filed by self-represented litigants for clerk processing. Derrick Depo. at 81:6-82:10 (ECF 95-64). While it is, of course, possible that a filer could make a mistake in selecting a case category or case type or fail to include a Notice of Restricted Information, the record reflects that such mistakes are exceedingly rare, even when the universe considered includes self-represented litigants. *See* Angione Decl., ¶¶ 31-35 & Exhs. C-7 and C-8 (ECF 95-29, -36 and -37).

Alternatively, Defendants could use a press (or public) review queue to make e-filed civil complaints that match Defendant-specified criteria available while they are sitting in the MDEC e-filing system awaiting clerk review, and before they have been accepted by court staff. Defendants need not choose the press review tool their e-filing vendor has developed for its customers, though that is certainly an option. Derrick Depo., at 90:12-97:2 (ECF 95-64); Fetterly MSJ Decl., Exh. E-17 (ECF 95-56); Girdner Decl., ¶¶ 57-63, 75 (ECF 95-2). The AOC's robust Judicial Information Systems department has developed similar software in the past, Bruchalski Depo. at 21:17-25:19 (ECF 95-65), and has access to the application programming interfaces that would enable display of new e-filed civil complaints in whatever format and based on whatever parameters Defendants choose, whether on courthouse terminals, remotely, or both. *See* Derrick Depo. 114:5-115:16 (addressing free API's available from Tyler) (ECF 95-64); Girdner Decl., ¶¶ 48, 53-55, 64-70, 72-74, 91-93 (examples of non-Tyler press queues, including home-grown versions) (ECF 95-2).

Both options – auto-accept and press review queue – can be configured to filter and protect filings based on both filer designations and security settings applied by the AOC, so that only non-confidential filings are auto-accepted or made available in a press queue. Derrick Depo., 69:4-70:16, 73:12-84:4, 103:1-107:16, 200:4-202:22 (ECF 95-64); Preston Depo., 77:22-

79:15) (ECF 95-59). Such less restrictive alternatives would enable Defendants to continue withholding the few e-filed civil complaints most likely to contain confidential information for clerk review while making the rest available contemporaneously with filing. Defendant has not – and cannot – show that such alternatives would be "inadequate to serve the government's interest," as it must to survive scrutiny. Billups, 961 F.3d at 688. "[T]estimony from … officials regarding the predicted ineffectiveness of the suggested alternatives …, without more, is not sufficient to satisfy the evidentiary standards established by *Reynolds* and *McCullen*." *Id*.

B. The Security Drop-Down Menu Did Not Cause the Withholding of Non-Confidential Records

Defendants mistakenly contend that a press review queue "would undermine the public's access rights" and require "undo[ing] a mechanism that actually protects openness for the general public." Defs.' Opp. at 22. Given the presumption of openness of court records, requiring filers to designate documents as confidential if they seek to keep them out of the public record is a universal element of civil court administration in this country. Whatever designation mechanism is provided for, there will always be examples of filers seeking confidential handling of material that is not entitled to secrecy. That is why in Maryland's state courts, as in other state and federal systems, courts may not defer to filers' determination as to whether a civil filing may be withheld from the public. Rules 16-916(a)-(b), 16-918 (a)-(b).

Prior to October 2020, MDEC courts provided a drop-down menu in the civil e-filing interface enabling filers to designate a document as confidential. Not surprisingly, filers sometimes designated as confidential documents that did not qualify for confidential handling. *See, e.g.*, Defs. MSJ at 22. As with any method of filer-requested confidentiality, over-designation is (or at least should be) corrected by the court when the filing is processed. However, Maryland court staff apparently regularly failed to confirm designations were

warranted, and cases mis-designated by filers as confidential ***were never released to the public***. *See* Rules Committee Report at 13-14. This inadvertent withholding of non-confidential records led to the Notice of Restricted Information form, a positive development. *Id*. But the AOC also eliminated the security drop-down menu, such that security is no longer automatically applied based on a filer's designation. *See* MDEC Notice (ECF 98-57). Automatically applying security based on filer designation is only problematic if court staff do not review the designation to confirm that the document is, in fact, entitled to be kept from the public.

Defendants need not reinstate the security drop-down menu in order to provide pre-processing access (as other means of automatically filtering out potentially confidential documents are available, *see, e.g.*, Derrick Depo. 78:21-80:19, 82:20), but doing so would promote – not inhibit – transparency, as it would avoid the withholding of the vast majority of civil complaints not designated by filers as confidential.[15]

VII. Miscellaneous Defendant Arguments

Courthouse News' Claim is Not a Facial Challenge. The Supreme Court has recognized certain limitations when a plaintiff challenges the constitutionality of a statute based not on the plaintiff's own rights but on the potential impact the statute might have on others. *See Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999) ("[t]he traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'"). These limitations are irrelevant here because Courthouse News has brought an as-applied challenge based on its own rights, not a facial attack

[15] If the AOC reinstated the security drop-down menu, it could choose to use the words "Includes Notice of Restricted Information" for the relevant option rather than "Confidential," in order to hew closer to the relevant Maryland rules. *See* Derrick Depo. 63:2-64:21 (ECF 95-64); MDEC Notice (ECF 98-57).

based on others' rights. *See* Second Am. Compl. at 30-31. This is not a case where Courthouse News "could prevail only by invoking the rights of others through a facial challenge." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011).

Courthouse News Has Engaged in No Nefarious Tactical Shift. Defendants fault Courthouse News for some kind of strategic "pivot," suggesting that it previously "feigned timeliness concerns" but has now been "forced to reveal its hand" and has "finally revealed its true motive" by seeking pre-processing access. Defs.' Opp. at 2-4. It is not at all clear what Defendants believe has transpired. Courthouse News' claim has not changed over the course of this lawsuit. *Compare* ECF-1 (Compl.) and ECF-9 (Prelim. Inj. Mot.) *with* ECF 95 (Summ. J. Mot.). Courthouse News challenges this restriction not because its "timeliness concerns" are "feigned," but because – as Defendants' own evidence reflects – access delays will persist as long as courts withhold access for processing.

VIII. Courthouse News is Entitled to Injunctive and Declaratory Relief

Courthouse News has established that failures to provide contemporaneous access to newly e-filed civil complaints were widespread and pervasive in Maryland's circuit courts throughout 2021 to 2023. *See* Angione Decl., Exh. C-2 (ECF 95:31). Defendants did not make these new complaints "available as expeditiously as possible," *Schaefer*, 2 F.4th at 329, as evidenced by numerous less restrictive alternatives Defendants declined to consider or implement. Courthouse News is therefore entitled to a judicial declaration that Defendants violated its First Amendment right of contemporaneous access. *See Schaefer*, 2 F.4th at 329 (affirming declaratory judgment in favor of Courthouse News).

Defendants contend declaratory relief was appropriate in *Schaefer* because Courthouse News demonstrated a connection between "contemporaneous access to paper complaints, and the constitutional controversy of 'old news,'" but that the statewide pre-processing access sought in

this case represents "a wholly different outcome." Defs.' Opp. at 28. That is not true. In both *Schaefer* and this case, Courthouse News challenged the practice of withholding access for clerk processing, which resulted in delayed access to new civil complaints (*i.e.*, "old news"). *See, e.g.*, Schaefer Appeal Brief at 38 (ECF 98-61). Like the *Schaefer* defendants, Defendants bear the burden of justifying their practice under constitutional scrutiny. Courthouse News is entitled to a declaratory judgment in this case, as it was in *Schaefer*, because Defendants cannot do so.

Courthouse News is likewise entitled to a permanent injunction prohibiting Defendants' practice of withholding access until after clerk processing. *See* Girdner Prelim. Inj. Decl., ¶¶ 57-69 (ECF 9-2) (discussing cases in which courts enjoined no-access-before-processing policies similar to the one challenged here). Even with Defendants' push to speed processing in the three months leading up to summary judgment briefing (Oct.- Dec. 2023), courts routinely provided access to fewer than 90% of the complaints that had been e-filed before the clerks' offices closed each day and sometimes provided access to fewer than 70% in that three-month period. *Id*. Moreover, there is no reason to expect this pace of processing to continue if the Court grants no relief. Defendants contend they were already providing contemporaneous access when they received Courthouse News' February 2022 letter, and that a mechanism implemented in April 2022 to help clerks prioritize new complaints "further ensure[d] ongoing timeliness compliance." Defs. Opp. at 2; Harris MSJ Decl., ¶¶ 35-36 (ECF 98-2); Harris Prelim. Inj. Decl., ¶¶ 14-15 (ECF 23-32). The access breakdown by month and court for the period before February 2022 and after April 2022 reveals that what Defendants consider contemporaneous access falls well short of even the *Schaefer* district court's expectations for a paper-filing court. Angione Opp. Decl., at ¶¶ 17-19, Exh. G-1; *see also Schaefer*, 440 F.Supp.3d at 562.

Defendants' remaining arguments are equally meritless. Courthouse News' access right is not beneath protection even if Defendants do not consider the New Litigation Reports (the publications at the heart of *Schaefer*) to be "journalistic articles." Defs.' Opp. at 28-29 & n.20. The assertion that "CNS alleges no history of attempting to access, or even any real interest in" complaints filed in "the majority of the 23 courts whose clerks are sued here," Defs.' Opp. at 29, is simply wrong. *See, e.g.*, Second Am. Compl., ¶¶ 44-47; Girdner MSJ Decl., ¶¶ 25-26 (ECF 95-2); Abbott MSJ Decl., ¶¶ 9, 37 (ECF 95-24); Angione Opp. Decl., ¶ 8. Further, Defendants' assertion that Courthouse News has reported on complaints the day after they are filed, Defs.' Opp. at 30, is hardly damning where, as here, access is routinely delayed beyond they day of filing. Moreover, external circumstances will sometimes prevent a reporter from being able to report on a complaint when it becomes available.[16] The First Amendment access right does not wither and die when this happens.

CONCLUSION

Courthouse News seeks not a radical intrusion into court operations, as Defendants imply, but rather a fair application of long-established constitutional principles, including governing Fourth Circuit precedent. Defendants have failed to provide evidence that their no-access-before-processing policy is narrowly tailored and necessary to protect confidentiality or any other overriding interest. Controlling authority dictates that Defendants' motion for summary judgment be denied and summary judgment granted to Courthouse News.

[16] For example, until Baltimore City – the last remaining paper-filing court – launches e-filing in May, Courthouse News' reporter must choose to end his reporting day there or at an MDEC court, which means he risks missing complaints filed at the end of the day. *See* Girdner MSJ Decl., ¶¶ 26-28 (ECF 95-2). No matter what time of day a reporter visits the courthouse, the no-access-before-processing policy means that the court will be sitting on complaints that staff hasn't yet processed. *See* Angione Opp. Decl., ¶¶ 10-12.

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Bryan Cave Leighton Paisner LLP

/s/ Jonathan Fetterly

Jonathan Fetterly, Esq. (*admitted pro hac vice*)
Katherine Keating, Esq. (*admitted pro hac vice*)
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: (415) 675-3400
Facsimile: (415) 675-3434
E-Mail: jon.fetterly@bclplaw.com
E-Mail: katherine.keating@bclplaw.com

McNamee Hosea, P.A.

/s/ *James Tuomey*

James Tuomey, Esq. (28395)
John P. Lynch, Esq. (07433
888 Bestgate Road, Suite 402
Annapolis, Maryland 21401
Telephone: (410) 266-9909
Facsimile: (410) 266-8425
E-Mail: jtuomey@mhlawyers.com
E-Mail: jlynch@mhlawyers.com

Counsel to Courthouse News Service