

No. 22-2110

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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COURTHOUSE NEWS SERVICE,

*Plaintiff-Appellant,*

v.

JACQUELINE C. SMITH, in her official capacity as the Clerk of the  
Circuit Court for Prince William County, Virginia, and THE  
COMMONWEALTH OF VIRGINIA,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia

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RESPONSE TO PETITION FOR REHEARING  
OF THE COMMONWEALTH OF VIRGINIA

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## INTRODUCTION

En banc review here is not “necessary to secure or maintain uniformity of the court’s decisions” or to resolve questions of “exceptional importance.” Fed. R. App. P. 35. The petition should therefore be denied.

Far from creating a conflict, the panel decision follows Fourth Circuit precedent closely. Indeed, the very cases that Courthouse News Service (CNS) cites show that the panel correctly held that Virginia’s regulation of the time, place, and manner of accessing court records is not subject to strict scrutiny. *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021); *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019).

CNS’s argument that the panel opinion creates an intercircuit conflict also fails. Numerous sister circuits, including in *Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020), have also held that time, place, and manner regulations on access to court proceedings or records are subject to “relaxed scrutiny.” *Id.* at 595. And no case has applied strict scrutiny where, as here, a court provides public access at the courthouse while also providing limited online access to ensure the privacy of sensitive personal information in court records. Nor has any court held that “listener-based discrimination” renders court records

systems subject to strict scrutiny. Pet. 10. Rather than resolving a circuit split, CNS asks this Court to create one.

En banc review is also unwarranted to resolve any question of “exceptional importance.” Fed. R. App. P. 35. The correct application of intermediate scrutiny is a highly factbound question, and the panel’s resolution of it is unlikely to have effects beyond the specific records system at issue here. And Virginia law does not restrain the press from either obtaining or publishing information about court records. It simply provides for the public to access those records at courthouses rather than online to safeguard sensitive personal information from data mining.

### **STATEMENT**

Circuit courts in Virginia provide contemporaneous public access to non-confidential civil filings and other court records at the courthouse during business hours. JA81. The Prince William Circuit Court, for example, has terminals that the public may use to view and copy records Monday through Friday, 8:30 a.m. to 5:00 p.m. JA81–82. “There is no evidence that any court business occurs outside of business hours,” and “when the clerk scans new civil filings, they are available to the public ‘almost immediately’ at the courthouse, while [online] availability occurs

‘shortly thereafter.’” *Courthouse News Serv. v. Smith*, 126 F.4th 899, 907 & n.6 (4th Cir. 2025) (quoting JA87).

Circuit courts may also provide online access to court records. But if a circuit court makes records publicly available online, it must ensure that certain sensitive personal information, such as social security numbers, dates of birth, parents’ maiden names, financial account numbers, and certain information about minor children, is redacted. Va. Code § 17.1-293(B).

The elected clerk of each circuit court chooses the technology systems for that court. JA216–217. Virginia circuit courts vary in size, resources, and technological capacity. JA216. Some circuit courts offer no online access, JA82, JA86, and at least one court has a public online access system, JA80, JA166–169, JA217–221. Most courts do not provide public online access because ensuring that sensitive personal information is properly redacted is costly and time-consuming. JA137–138.

Many circuit courts, including the Prince William Circuit Court, use the Officer of the Court Remote Access system (OCRA), provided by the Office of the Executive Secretary of the Supreme Court of Virginia (OES), JA82–84, JA209. OCRA is a system for Virginia-barred attorneys

and their authorized agents, attorneys admitted *pro hac vice*, and certain governmental agencies. Va. Code § 17.1-293(E)(7). OCRA subscribers may not sell, post online, or otherwise redistribute records they obtain through OCRA except with “security safeguards.” Va. Code § 17.1-293(H). Without this provision, any OCRA subscriber could make all court records publicly available online, and “any entity could . . . write an algorithm to harvest such private information from the records and use that information to the detriment of Virginia litigants.” JA562–563. The dissemination provision does not apply to court records obtained at a courthouse.

OES operates other public online court records systems. JA128. These systems “have all been, and continue to be, subjected to . . . data mining from around the world.” JA129. “[A]nyone with rudimentary programming knowledge” can convert imaged documents “to searchable text, aggregate that data in a database, and subsequently search through the data for” personally identifiable information using computer programs known as “bots.” JA128–129, JA539.

OES has attempted to prevent data mining, but “determined data miners” have “anticipated and circumvented” its efforts. JA130. For

example, limiting numbers of searches is ineffective because a bot can “adapt and search just under [the] algorithm’s limit,” then the data miner may “reapply for access” using different credentials, which OES has “no real way to vet.” JA130–131. In addition, bots can obtain sensitive personally identifiable information, such as dates of birth. JA130. Data mining has also been a serious issue for other jurisdictions that offer online public access to court records. JA130–132.

Data-mined personal information is used in the commission of crimes and frauds. Most notably, data mining enables identity theft, in which criminals use the victims’ “personal or financial information without [their] permission” to commit fraud. Federal Trade Comm’n, What to Know About Identity Theft, <https://tinyurl.com/ycys97f5> (last visited February 26, 2025).

Because OCRA was not designed for public access, it lacks critical safeguards that would be needed for a public system to prevent data mining of sensitive personal information. JA226. Instead, OCRA safeguards data privacy by circumscribing access to a small group of vetted individuals who can easily be held accountable for violations, such

as through bar disciplinary actions. See, *e.g.*, Va. Sup. Ct. R. Pro. Conduct 1.6.

CNS claimed that providing OCRA access to attorneys but not the public violated the First Amendment and Equal Protection Clause. The district court disagreed, holding that the law satisfies intermediate scrutiny because it is “content-neutral, narrowly tailored and necessary’ to preserve a significant governmental interest.” JA545 (quoting *Schaefer*, 2 F.4th at 328).

The panel affirmed. It held that the Virginia law “resembles a time, place, and manner regulation,” because it governs “when, where, and how Courthouse News may access those court records: during business hours at the courthouse,” rather than “remotely, using a personal computer with internet access.” *Smith*, 126 F.4th at 908. Therefore, it held that intermediate scrutiny applied under *Schaefer*, 2 F.4th at 328.

The panel held that the Virginia law satisfies intermediate scrutiny. It is content-neutral because it “applies to all nonconfidential civil court records in the same fashion,” and the governmental interest in preventing “mass data harvesting of electronic documents” “has nothing to do with the content of any given court record” or “disapproval of the

ideas or viewpoints expressed.” *Smith*, 126 F.4th at 909–10. It is “narrowly tailored” to the significant governmental interests in “protecting sensitive personal information contained in court records and furthering the orderly and efficient administration of justice.” *Id.* at 910. Providing online access “to a self-policing, pre-vetted group subject to codified Rules of Professional Conduct and serious professional sanctions for violating those Rules” allows Virginia easily to identify and punish any person who misuses personal data. *Id.* at 912. The panel further held that CNS “lacks standing” to challenge the dissemination provision because it “applies only to individuals with remote online access to court records,” and CNS presented no evidence that OCRA subscribers would supply the information to CNS. *Id.* at 917.

The dissent would have applied strict scrutiny on the ground that providing OCRA access to attorneys but not the public constituted “listener-based discrimination.” *Smith*, 126 F.4th at 919 (Gregory, J., dissenting). The dissent asserted that a “listener-based discrimination” doctrine is “lurking in our jurisprudence,” though “yet to be christened.” *Ibid.*

## ARGUMENT

### I. En banc review is not needed to maintain uniformity

#### A. The panel opinion follows Fourth Circuit precedent

En banc review is unnecessary to “secure or maintain uniformity of the court’s decisions,” Fed. R. App. P. 35(a)(1), because the panel opinion follows Fourth Circuit precedent.

First, the panel decision follows *Schaefer*. Contra Pet. 8. *Schaefer* applied intermediate scrutiny to a First Amendment challenge concerning court record access. It held that access regulations are subject to “relaxed scrutiny” when they “resemble time, place, and manner restrictions.” *Schaefer*, 2 F.4th at 328 (quoting *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 n.17 (1982)) (internal quotation marks omitted). Following *Schaefer* requires applying intermediate scrutiny here because the Virginia law regulates “when, where, and how [CNS] may access those court records.” *Smith*, 126 F.4th at 908. Indeed, CNS elsewhere contends that *Schaefer* itself is wrongly decided. Pet. 9–10.

The panel ruling also follows *Schaefer*’s holding that access should be provided “as expeditiously as possible.” Contra Pet. 8–9 (quoting *Schaefer*, 2 F.4th at 328). The panel decision quotes *Schaefer* in holding

that “contemporaneous” access typically means “the same day on which the [document] is filed, insofar as it is practicable[,] and when not practicable, on the next court date.” *Smith*, 126 F.4th at 907 (quoting *Schaefer*, 2 F.4th at 328). *Schaefer* does not support CNS’s argument that the court must provide online access so CNS can “skip the trip to the courthouse.” *Id.* at 905. *Schaefer* involved procedural delays that led to *no* public access, sometimes for days after filing. 2 F.4th at 322. The “expeditiously” standard thus applies to “*when* access is required,” not the particular *method* of access. *Id.* at 327 (emphasis added). And *Schaefer* did not consider questions of online access at all. See *id.* at 322. It is undisputed that there is no “unconstitutional time lag or delay” in making court records publicly available at the courthouse here. *Smith*, 126 F.4th at 907. Public access is therefore provided “as expeditiously as possible.” *Schaefer*, 2 F.4th at 328 (quotation omitted).

Likewise, the panel decision follows *Fusaro*. CNS characterizes *Fusaro* as holding that “statutes discriminating in how speaker/recipients can access information” in government records are generally subject to strict scrutiny unless particular exceptions are met. Pet. 10. But *Fusaro* held no such thing. *Fusaro* applied intermediate

scrutiny to a law that imposed “speaker-based restrictions combined with content-based restrictions” on access to government voter lists. 930 F.3d at 252. *Fusaro* explained that “courts rightly should hesitate before intruding into areas—like the disclosure of government information—that depend on policy considerations reserved to the political branches.” *Fusaro*, 930 F.3d at 253. Accordingly, “not all conditions on access to government information will provoke constitutional concerns.” *Id.* at 255.

Conditions on access may create a First Amendment issue where content-based restrictions pose a “risk of viewpoint discrimination.” *Id.* at 252, 254–55. This Court ultimately upheld the content-based restriction under intermediate scrutiny, concluding that it furthered the State’s “legitimate and substantial interest in protecting privacy rights of citizens by establishing appropriate limitations on access to or use of personal information citizens are compelled to furnish to [the] government.” *Fusaro v. Howard*, 19 F.4th 357, 370 (4th Cir. 2021) (citation omitted).

The panel decision follows *Fusaro*. Unlike in *Fusaro*, the law here is content-neutral. *Smith*, 126 F.4th at 909. And it does not discriminate based on viewpoint, “demonstrated most vividly” by the fact that “all

court records accessible to Virginia attorneys via OCRA are available for public inspection and copying at the courthouse.” *Smith*, 126 F.4th at 909–10. *Fusaro* does not even suggest that strict scrutiny should apply here.

CNS also errs in asserting a conflict with *Doe v. Public Citizen*, 749 F.3d 246 (4th Cir. 2014). *Doe* applied *Press-Enterprise Co. v. Superior Ct. of California*, 464 U.S. 501, 503 (1984), to a district court’s decision to seal court records, *Doe*, 749 F.3d at 266. The other cases CNS cites likewise address denials of public access, such as courtroom closures or sealing. *Virginia Dep’t of State Police v. Washington Post*, 386 F.3d 567, 571 (4th Cir. 2004); *In re Charlotte Observer*, 882 F.2d 850, 850 (4th Cir. 1989). But “the Supreme Court has instructed that ‘limitations on the right of access that resemble time, place, and manner restrictions on protected speech [will] not be subjected to such strict scrutiny’” as denials of access. *Schaefer*, 2 F.4th at 328 (quoting *Globe Newspaper Co.*, 457 U.S. at 607 n.17). The panel’s decision to apply intermediate scrutiny to the time, place, and manner regulation here thus follows Fourth Circuit precedent.

Finally, CNS errs in contending that the panel “departs from precedent” in its application of intermediate scrutiny. CNS criticizes the panel for citing *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014), asserting that *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015), held that *McCullen v. Coakley*, 573 U.S. 464 (2014), imposed a more demanding standard. Pet. 16–17. To the contrary, the panel followed both *Reynolds* and *Ross*, which do not conflict. See *Smith*, 126 F.4th at 910, 913, 915–16 (citing *Reynolds*, 779 F.3d at 228, 228 n.4, 232).

*Reynolds* nowhere held that *McCullen* overruled *Ross*. *Reynolds*, 779 F.3d at 225–26 (quoting both *Ross*, 646 F.3d at 552–53, and *McCullen*, 573 U.S. at 486, to set forth the narrow-tailoring test). Rather, it held that the government must provide some evidence “supporting its assertion that a speech restriction does not burden substantially more speech than necessary.” *Reynolds*, 779 F.3d at 229. But the government need not show that a speech restriction is “the least restrictive or least intrusive means of serving the government’s interests.” *Id.* at 226 (citation omitted). That standard aligns with *Ross*, which held that the government must “make some evidentiary showing,” but need not “present a panoply of empirical evidence.” 746 F.3d at 556.

The Supreme Court’s recent ruling in *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (2025), confirms that *Ross* remains good law. *TikTok* explained that the government cannot “ignore less restrictive approaches already proven effective.” *Id.* at 71, citing *McCullen*, 573 U.S. at 490–94. At the same time, intermediate scrutiny provides the government significant “latitude . . . to design regulatory solutions to address content-neutral interests.” *Id.* at 71 (quotation omitted). Its legislative judgment can be based on “deductions and inferences,” and need not demonstrate “that its chosen regulatory path is best or ‘most appropriate.’” *Id.* at 70 (quotation omitted).

As the panel held, Virginia presented evidence that its other public court record systems have been targets of data mining, and that the “problems have persisted despite various preventive measures the Commonwealth has imposed.” *Smith*, 126 F.4th at 911, 912 (citing JA129–131). Intermediate scrutiny does not require the Commonwealth to implement CNS’s preferred “flawed alternatives for OCRA and then, only after exposing the sensitive personal information of its citizens to malicious actors, turn to the more effective method of restricting OCRA

access to attorneys.” *Id.* at 916. No precedent is to the contrary, and en banc review is unwarranted.

**B. The panel decision accords with holdings of other circuits**

CNS’s argument that the panel decision conflicts with the Ninth Circuit’s ruling in *Planet*, 947 F.3d at 595, is likewise incorrect. Pet. 7–11. Like *Schaefer*, *Planet* held that “limitations on the right of access that resemble ‘time, place, and manner’ restrictions on protected speech, would not be subjected to such strict scrutiny.” *Planet*, 947 F.3d at 595 (quotation omitted). *Planet* held that such regulations “are constitutionally permitted where they are content-neutral, narrowly tailored” and serve an “important interest,” the same intermediate scrutiny standard that *Schaefer* applied. *Id.* at 585. CNS, not the *Schaefer* court, misreads *Planet*. Pet. 10.<sup>1</sup>

Further, both the Supreme Court and sister circuits have held that access regulations that resemble time, place, and manner regulations are subject to intermediate scrutiny. See *Globe Newspaper*, 457 U.S. at 607

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<sup>1</sup> The panel did not hold that *Schaefer* conflicts with *Planet*. Pet. 9. It declined to address CNS’s argument that *Planet* applied a “purportedly more stringent standard” because *Schaefer* had already determined the applicable standard. *Smith*, 126 F.4th at 908.

n.17; *United States v. Kerley*, 753 F.2d 617, 620–21 (7th Cir. 1985) (holding that “[a] limitation on the public access to a trial is not subject to the same ‘strict scrutiny’ given a denial of access,” and “withstand[s] constitutional scrutiny so long as it is reasonable and neutral, as with time, place, and manner restrictions generally”); *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 114 (2d. Cir. 1984) (holding a limitation on access to court proceedings “is simply a ‘time, place, and manner’ restriction [that] should not be subjected to strict scrutiny”); *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983) (holding that a time, place, and manner courtroom-access regulation is constitutional “if it is reasonable, if it promotes significant governmental interests, and if the restriction does not unwarrantedly abridge” speech) (cleaned up).

The panel opinion thus follows precedent of both this Court and sister circuits, while CNS’s proposed rule would conflict with every other circuit to consider this question.

**II. En banc review is unnecessary to resolve any question of exceptional importance**

**A. The panel's ruling that the Virginia law satisfies intermediate scrutiny is factbound and correct**

En banc review is also unnecessary to resolve any questions of exceptional importance. Fed. R. App. P. 35. The panel's decision that the Virginia law satisfies intermediate scrutiny is highly factbound. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 372 (3d Cir. 2016) (noting "the rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis."). It is therefore unlikely to have broader implications for future cases.

Even as to this records system, the petition does not present questions of exceptional importance. CNS primarily contends that the qualified First Amendment right of access to court records is important. Pet. 12. But CNS, "like the general public, has contemporaneous access to the civil court records" at the courthouse. *Smith*, 126 F.4th at 907. CNS would like to have online access as well, but does not "claim a freestanding First Amendment right of online access." *Ibid*. Rather, CNS claims that "if the clerk offers Virginia attorneys online access," then online access must also be provided to CNS and the public. *Id.* at 908.

Thus, CNS's proffered rule would not provide any right to access Virginia's OCRA system. Instead, it would put Virginia circuit clerks to the choice of shutting down OCRA access for attorneys, or "expend[ing] substantial resources" on a fundamental re-design of OCRA so that public access would not cause fraudulent "exploitation of personal information" in court records. JA555. Particularly for the many circuit courts with limited resources, the likely result would be to reduce access to court records for attorneys, thereby impeding the efficient administration of justice. *Smith*, 126 F.4th at 912–13, 915.<sup>2</sup> Declining to force this "significant policy change" on the Commonwealth does not raise any question of exceptional importance necessitating en banc review. JA555.

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<sup>2</sup> CNS's contention that "no other state currently prohibits the public and press from remote access" is unsupported. Pet. 16 (cleaned up). Virginia presented evidence that other alternatives would be less effective at preventing data mining, while CNS failed to present "evidence about how other courts' online access systems work and whether they are effective at safeguarding the sensitive personal data." *Smith*, 126 F.4th at 916. And before the panel, CNS asserted that 38 states allow remote public access. Op. Br. at 58 (Docket No. 22). That figure itself is highly misleading because it counts all States in which *any* court offers remote public access, even if most courts do not. JA79. In fact, the 38-state count *included Virginia*, because the Alexandria Circuit Court provides public remote access. JA80, JA159.

En banc review is also unnecessary to consider whether “listener-based discrimination” triggers strict scrutiny. Pet. 2. Neither this Court, the Supreme Court, nor any sister circuit has recognized such a doctrine. And no such doctrine “is lurking in [First Amendment] jurisprudence.” Pet. 2 (quotation omitted). Regulations of access to judicial records or proceedings that resemble time, place, and manner regulations are subject to intermediate scrutiny. *Smith*, 126 F.4th at 908 (quoting *Schaefer*, 2 F.4th at 328); see I.A–B, *supra*.

Further, this Court already examined the appropriate levels of scrutiny for claims of “speaker-based discrimination” in access to government records in *Fusaro*. *Fusaro* explained that “speaker-based” discrimination in access to government records does not alone trigger First Amendment concerns. *Fusaro*, 930 F.3d at 252. Rather, “the crucial consideration in assessing the propriety of a restriction on access to government information is whether it represents, or poses a substantial risk of, viewpoint discrimination.” *Fusaro*, 930 F.3d at 263. Thus, “speaker-based conditions on access” are potentially problematic only when combined with content-based rules to “favor some viewpoints or ideas at the expense of others.” *Id.* at 255 (quotation omitted). There is

no basis for applying strict scrutiny to the content- and viewpoint-neutral time, place, and manner regulation of access here. *Smith*, 126 F.4th at 909 (explaining that the law is content neutral because it “applies to all nonconfidential civil court records in the same fashion,” and regulates only “*how* non-attorneys may access those records.”).

**B. CNS’s petition does not present exceptionally important questions concerning the dissemination provision**

Finally, the panel ruling’s regarding the dissemination provision also does not raise any questions of exceptional importance.

The panel correctly held that CNS lacks standing to challenge this provision because it applies to OCRA subscribers, which CNS is not, and CNS did not “show that there exists a speaker willing to convey the information.” *Smith*, 126 F.4th 917; see *Stephens v. County of Albemarle*, 524 F.3d 485, 492 (4th Cir. 2008). The panel’s straightforward application of settled standing doctrine does not present any question of exceptional importance. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).<sup>3</sup>

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<sup>3</sup> CNS suggests that the panel decision conflicts with *In re Wall St. J.*, 601 Fed. Appx. 215 (4th Cir. 2015), Pet. 15, but that is a nonprecedential opinion. That case is also inapposite because it involved a complete denial of access to a sealed proceeding, such that the rights of the press were “directly impaired.” 601 Fed. Appx. at 218.

CNS also asserts that whether the dissemination provision constitutes a “prior restraint” is exceptionally important. Pet. 15. But the panel did not rule on this question, because it correctly held that CNS lacks standing to raise it. *Smith*, 126 F.4th at 917. In any event, the provision is not a prior restraint; nothing prohibits CNS from publishing any lawfully obtained court record. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101 (1979); see JA559. Because CNS cannot lawfully obtain records from OCRA, it also cannot publicly disseminate records obtained from OCRA; it must obtain the records from the courthouse. CNS is free to report on any public court documents, because every document available on OCRA is available to CNS at the courthouse. The First Amendment does not guarantee CNS the method of access that best suits its business model.

### CONCLUSION

This Court should deny the petition for rehearing and rehearing en banc.

Respectfully submitted,

Commonwealth of Virginia

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## CERTIFICATE OF COMPLIANCE

This brief complies with this Court's February 14, 2025 order because it contains 3,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface.

*/s/ Erika L. Maley*

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**CERTIFICATE OF SERVICE**

I certify that on February 27, 2025, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*/s/ Erika L. Maley*

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Erika L. Maley