

U.S. Court of Appeals Docket No. 24-6697

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COURTHOUSE NEWS SERVICE,

Plaintiff/Appellee,

vs.

SARA OMUNDSON, in her official capacity as
Administrative Director of Idaho Courts,

Defendant/Appellant.

On Appeal from a Decision of the United States District Court
For the District of Idaho
Case No. 1:21-cv-00305-DCN
The Honorable David C. Nye

ADDENDUM OF APPELLEE COURTHOUSE NEWS SERVICE

Roger Myers
Rachel Matteo-Boehm
Jonathan Fetterly
Katherine Keating
BRYAN CAVE LEIGHTON PAISNER LLP
3 Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel: 415-675-3400

roger.myers@bclplaw.com; rachel.matteo-boehm@bclplaw.com;
jon.fetterly@bclplaw.com; katherine.keating@bclplaw.com

Attorneys for Plaintiff-Appellee
COURTHOUSE NEWS SERVICE

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I.R.E.F.S. 2. Definitions

The following definitions apply to this chapter:

- (a)** "Conventional filing" means a process whereby a filer files a paper document with the court.
- (b)** "Document" means a pleading, a paper, a motion, a declaration, an application, a request, a brief, a memorandum, an exhibit, or other instrument submitted by a filer, including any exhibit or attachment referred to in the instrument. Depending on the context, as used in this chapter, "document" may refer to an instrument in either paper or electronic form.
- (c)** "Electronic filing" means the process whereby a filer electronically transmits documents to a court in an electronic form to initiate an action or to be included in the court file of an action.
- (d)** "Electronic filing system" means the systems provided by the Idaho Supreme Court for the electronic filing (File and Serve and Guide and File) and the electronic service of a document via the Internet, excluding the electronic filing of criminal citations by
- (e)** "Electronic service" means the electronic transmission of a notice of filing by the electronic filing system to the electronic mail (email) address of a party who has consented to electronic service per Rule 17(a)(1). The notice will contain a hyperlink to access a document that was filed electronically for the purpose of accomplishing service. When the serving entity is the court, electronic service may be completed through the electronic filing system or through conventional email.
- (f)** "Filer" means a person registered with the electronic filing system who submits a document for filing with the court and/or submits a document for service through the electronic filing system. The filer may be an attorney representing a party in the case, a party, or anyone authorized to submit documents for filing on their behalf. The filer may also be a third party tasked with submitting reports, evaluations, or other communications for filing as directed by the court or required by law.
- (g)** "Service contact" means any party and their email address designated for electronic service between the parties through the electronic filing system.

(h) "Other service contact" means any person associated with the filer for purposes of an action whom the filer wishes to receive email notification from the electronic filing system of documents electronically served in the action. An "other service contact" includes another attorney, administrator, or staff from the filer's place of business, or another person who is associated with the filer regarding the action or otherwise has a legitimate connection to the action.

(i) "Accept" refers to the determination that a document electronically filed has met the standards set forth in the rules below. The court has the discretion to later reject such a filing if it deems it appropriate to do so.

(j) "Confidential" in reference to a document or information means the document or information will not be accessible to the public because it is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32 or it has been sealed by court order pursuant to Idaho Court Administrative Rule 32 or it contains information barred from disclosure to the public under federal or state law. The information or document that is confidential may be accessible to certain court personnel and where applicable, to certain governmental entities as authorized by law, court rule, or court order.

(k) "Conventionally signed document" means a paper document with a handwritten signature.

(l) "Envelope" is a filing and/or service of documents submitted to the court through the electronic filing system. An envelope can contain one or more documents submitted to the court or others for the same case.

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: <https://isc.idaho.gov/IREFS2>

I.R.E.F.S. 3. Official Court Record

Rule 3: Official Court Record

(a) The official court record for a case filed or maintained in accordance with these rules is the electronic case file maintained by the court, as well as any paper filings and other conventional filings maintained by the court in accordance with these rules.

(b) If a court digitizes, records, scans or otherwise reproduces a document that is filed in paper into an electronic record, document or image for entry in the court's case file, the court's electronic record, document or image is the official court record of the filed document.

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: <https://isc.idaho.gov/IREFS3>

I.R.E.F.S. 5. Exceptions to Electronic Filing of Documents

The documents identified in this rule are exceptions to the requirement for electronic filing.

(a) Probate / Wills. Probate matters must be filed electronically; however, any original will, along with any pleading to which it is attached, must be filed both electronically and conventionally. The conventional filing must be made no more than seven business days, excluding legal holidays, from the date of electronic filing.

(b) Warrants. A document delivered to the court to secure an arrest warrant pursuant to Idaho Criminal Rule 4 or an initial juvenile detention order pursuant to Idaho Juvenile Rule 7 must be filed conventionally. A document delivered to the court to secure a search warrant pursuant to Idaho Criminal Rules 41 may be filed conventionally.

(c) Limits on Exhibits. A demonstrative or oversized exhibit must be filed conventionally. Trial exhibits must not be filed unless or until they are offered by a party to be admitted into evidence.

(d) Grand Jury Material. Grand jury materials, which should also be accompanied by a disk or CD-ROM containing the documents in .pdf format, if possible, must be filed conventionally.

(e) Charging Documents. Charging documents in a criminal action including complaints and indictments must be filed conventionally unless filed through an electronic system approved by the Supreme Court.

(f) Federally Restricted Storage. A document or image that is barred from electronic storage must be filed conventionally, including but not limited to sexually explicit images of a minor.

(g) Document Submitted for *In Camera* Inspection. A document submitted for *in camera* inspection must be filed conventionally.

(h) Motion to Redact or Seal a Document. A motion to redact or seal a document by court order pursuant to Idaho Court Administrative Rule 32(i) and the document that is the subject of the motion may be filed conventionally. If filed electronically, the motion must comply with Rule 7.

(i) Foreign Subpoena. A foreign subpoena submitted to an Idaho court must be filed conventionally.

(j) Law Enforcement Documents. Law enforcement, including state police, sheriff's offices, police departments, and probation and parole officers, may file the following documents conventionally:

- documents for which no case number exists at the time of filing;
- documents related to a court event scheduled for the same day as the filing;
- bonds and accompanying documents received at the jail, and
- documents pertaining to an arrest for one or more offenses where at least one of the offenses is a new filing with no existing case number.

(k) Hospitalization of Mentally Ill, Detention Without a Hearing. A document delivered pursuant to Idaho Court Administrative Rule 100 after office hours, during the weekend, or on a holiday, will be filed in accordance with the procedure set out in Idaho Court Administrative Rule 100.

(l) Persons with Neurocognitive Disorders, Protective Custody Without a Hearing. A document delivered pursuant to Idaho Court Administrative Rule 101 after office hours, during the weekend, or on a holiday, will be filed in accordance with the procedure set out in Idaho Court Administrative Rule 101.

(m) Order of Removal Upon Issuance of a Summons (C.P.A.). A document delivered pursuant to Idaho Juvenile Rule 34 after office hours, during the weekend, or on a holiday, will be filed in accordance with the procedure set out in Idaho Juvenile Rule 34.

(n) Other Documents that cannot be Filed Electronically. Any document or thing that cannot be scanned or otherwise converted to a Portable Document Format (.pdf) must be filed conventionally. Upon a showing of good cause, the court may accept for conventional filing a document that would otherwise be required to be filed through the electronic filing system.

(Adopted April 15, 2019, effective July 1, 2019; amended April 30, 2024, effective April 30, 2024; amended September 30, 2024, effective October 1, 2024; amended December 18, 2024, effective January 1, 2025; amended effective January 24, 2025.)

Source URL: <https://isc.idaho.gov/IREFS5>

I.R.E.F.S. 7. Sealed and Confidential Documents

(a) **Motions to Redact or Seal by Court Order.** Motions to redact or seal records under Idaho Court Administrative Rule 32(i) may be filed electronically only as follows:

(1) The filer must select the Filing Code “Motion to Redact or Seal Newly Filed Records” or “Motion to Redact or Seal Previously Filed Records,” as appropriate, when submitting the motion.

(2) If the motion requests the redaction or sealing of records that have not previously been filed in the action, the filer must submit those records for review. The records must be submitted as a separate document in the same envelope as the motion or, if necessary due to file size, in multiple envelopes in compliance with Rule 6. The filer must select the Filing Code “Subject Document-Motion to Redact or Seal Newly Filed Records” when submitting the document or documents that are the subject of the motion to redact or seal.

(3) Filers should be aware that while previously unfiled records that are the subject of a motion to redact or seal and are submitted with that motion will be temporarily sealed as provided in Idaho Court Administrative Rule 32(i)(2), the motion will be publicly accessible.

(b) **Confidential Documents.** Documents that are filed as attachments and are “confidential” as defined by Rule 2(j), including any document previously ordered sealed by the court, may be filed electronically only as follows:

(1) The document must be submitted as a separate document in the same envelope as the pleading or motion to which it pertains or, if necessary due to file size, in multiple envelopes in compliance with Rule 6.

(2) When submitting a confidential document, the filer must select the Filing Code “Confidential Document-IREFS 2(j).” When filed, the document will not be accessible to the public, but will be accessible to court staff and, where applicable, to certain governmental entities as authorized by law, court rule, or court order. The court will verify that documents submitted with this Filing Codes are confidential and, if they are not, the court may make the documents publicly accessible.

(Adopted April 15, 2019, effective July 1, 2019; amended December 18, 2024, effective January 1, 2025)

Source URL: <https://isc.idaho.gov/IREFS7>

I.R.E.F.S. 11. Manner of Filing

(a) Electronic filing. A document will be considered filed when:

- (1) the document has been electronically submitted to the court's electronic filing system; and
- (2) the submission has been acknowledged and the document accepted for filing.

(b) Converting conventional filing to electronic format. The court may digitize, record, scan, or otherwise reproduce a document that is filed conventionally into an electronic record, document, or image.

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: [https://isc.idaho.gov/IREFS11\](https://isc.idaho.gov/IREFS11)

I.R.E.F.S. 12. Time of Filing**(a) File date.**

(1) For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight in the time zone where the court is located on the day the document must be filed. If electronic transmission of a document is submitted and received before midnight it will be considered filed on that day, unless that date is a Saturday, Sunday, or legal holiday, in which case it is deemed filed on the next available business day. For any questions of timeliness, the time and date registered by the electronic filing system will be determinative. For documents electronically filed, the date and time that the filer submits the electronic filing will serve as the filing date and time for purposes of meeting the statute of limitations or any other filing deadlines, even if placed into an error queue for additional processing.

(2) If the document is accepted for filing, the date and time of filing entered in the register of actions relate back to the date and time the electronic filing system received the document. When the document is accepted for filing, the electronic filing system will affix the date and time of submission on the document as the date and time of filing of the document. When the document is accepted for filing, the electronic filing system will electronically notify the filer.

(b) Proposed orders. A proposed order is not file-stamped unless it is signed by the judge after review.

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: <https://isc.idaho.gov/IREFS12>

I.R.E.F.S. 13. Request for Correction; Rejected Filing: Relief

(a) Rejected Documents. Documents that do not comply with this rule, or the requirements of the aforementioned Electronic Filing Guide or court policy, may be returned to the filer for correction. If the document is not corrected as requested within the time frame provided for in subsections (b) and (c) of this rule, the document will be deemed to have not been filed.

(b) Request for correction. If a document submitted electronically for filing is not accepted, the electronic filing system will send notification to the filer that explains why the document was rejected or will describe an error or irregularity and request correction and resubmission by the filer.

(c) Resubmission of rejected filing; relief. A filer who resubmits a document within 3 business days (excluding legal holidays) of the date of the request for correction under this section may request, as part of the resubmission, that the date of filing of the resubmitted document relate back to the date of submission of the original document to meet filing requirements. If the third day following request for correction is not a judicial day, then the filer may resubmit the filing with a request under this subsection on the next judicial day. A filer who resubmits a document under this subsection must copy the existing envelope and include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of corrected filing, request filing relate back to _____, the date of original submission."

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: <https://isc.idaho.gov/IREFS13>

I.R.E.F.S. 15. Privacy Protections for Filings Made with the Court

(a) Responsibility of filer. It is the responsibility of the filer to ensure that protected personal data identifiers are omitted or redacted from documents before the documents are filed. This responsibility exists whether the documents are filed electronically or conventionally, and even if the filer did not create the document. The responsibility to redact also applies to documents that are initially exempt from disclosure but later become public pursuant to court rule. The clerk of the court will not review filings to determine whether appropriate omissions or redactions have been made. Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made.

(b) Personal data identifiers to be redacted. Personal data identifiers should not be included in any document filed with the court unless such inclusion is required by the court, by statute or court rule, or is material to the proceedings. If the identifiers must be included, then the following personal data identifiers must be partially redacted from the document, including exhibits:

(1) Social Security Numbers. If an individual's social security number must be included, only the last four (4) digits of that number are used.

(2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child are used.

(3) Dates of Birth. If an individual's date of birth must be included, only the year is to be used and the date specified in the following format: XX/XX/1998.

(4) Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers are to be used and the number specified in substantially the following format: XXXXX1234.

(5) Driver's License Numbers and State-Issued Personal Identification Card Numbers. If an individual's driver's license number or state issued personal identification card number must be referenced, only the last four digits of that number are to be used and the number specified in substantially the following format: XXXXX350F.

(6) Employer or Taxpayer Identification Number. If an employer identification number or business' taxpayer identification number must be included, only the last four (4) digits of that number are used.

(c) Exceptions to redaction requirement.

(1) The redaction requirement does not apply to the record of a court, tribunal, administrative or agency proceeding if that record was filed before the effective date of this rule.

(2) The redaction requirement does not apply to documents that are exempt from public disclosure pursuant to Idaho Court Administrative Rule 32.

(3) The redaction requirement of an individual's date of birth does not apply to the defendant's date of birth on documents in criminal cases.

(4) The redaction requirement of a minor's full name does not apply to documents related to a name change for the minor.

(d) Options when personal data identifiers are necessary. A party filing a redacted document need not also file an unredacted version of the document; however, where inclusion of the unredacted personal data identifiers is required by the court, by statute or court rule, or is material to the proceedings in a document that is open to the public the party must choose the most appropriate option below:

(1) File the redacted document together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be clearly identified as a reference list filed pursuant to this rule and may be amended as of right. Any reference in the action to a listed identifier will be construed to refer to the corresponding item of information. The reference list is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the reference list with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(2) File the redacted document together with an unredacted copy of the document. The unredacted copy must be clearly identified as an unredacted copy filed pursuant to this rule. The unredacted copy is exempt from public disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the unredacted copy with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

Regardless of which option is selected, the filer must file the exempt from public disclosure document in compliance with Rule 6(b)(2)(B).

(e) Unredacted document inadvertently submitted. If an unredacted document is inadvertently submitted without a reference list or redacted copy, then the filer must submit a redacted copy as soon as possible. In the “Comments to Court” the filer must identify the original unredacted document, the date it was submitted, and request that the original unredacted document be marked as exempt from disclosure.

(f) Parties to use caution. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

- (1) Medical records, treatment and diagnosis;
- (2) Employment history;
- (3) Individual financial information;
- (4) Insurance information;
- (5) Proprietary or trade secret information;
- (6) Information regarding an individual’s cooperation with the government; and
- (7) Personal information regarding the victim of any criminal activity.

(g) Sanctions. Failure to comply with this rule is grounds for contempt. If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.

(Adopted April 15, 2019, effective July 1, 2019)

Source URL: <https://isc.idaho.gov/IREFS15>

**I.C.A.R. 32. Records of The Judicial Department - Examination and Copying
- Exemption From and Limitations on Disclosure.**

(g) Court records exempt from disclosure. Except as provided in paragraph (h) of this rule, court records specified below are exempt from disclosure. Any willful or intentional disclosure or accessing of a sealed, shielded, or exempt court record, not otherwise authorized under this rule, may be treated as a contempt of court.

(1) Documents and records to which access is otherwise restricted by state or federal law;

(2) Pre-trial risk assessments and pre-sentence investigation reports, except as provided in Idaho Criminal Rule 32;

(3) Affidavits or sworn testimony and records of proceedings in support of the issuance of search or arrest warrant pending the return of the warrant;

(4) Unreturned search warrants;

(5) Unreturned arrest warrants, except bench warrants, or summonses in a criminal case, provided that the arrest warrants or summonses may be disclosed by law enforcement agencies at their discretion;

(A) An "arrest warrant" is a warrant issued for the arrest and detention of a defendant at the initiation of a criminal action.

(B) A "bench warrant" is a warrant issued for the arrest and detention of a defendant who has already appeared in a criminal action, and it would include a warrant issued for failure to appear at a hearing or trial, a warrant issued for violation of the conditions of release or bail, and a warrant issued for a probation violation.

(6) Unless otherwise ordered by the custodian judge, applications made and orders granted for the interception of wire, electronic or oral communications pursuant to Idaho Code § 18-6708, recordings of intercepted communications provided to the court, and reports made to the court regarding such interceptions under Idaho Code § 18-6708(7);

(7) Except as provided by Idaho Criminal Rules or statutes, records of proceedings and the identity of jurors of grand juries;

(8) Except as provided by the Idaho Criminal Rules or Idaho Rules of Civil Procedure, the names of jurors placed in a panel for a trial of an action and the contents of jury qualification forms and jury questionnaires for these jurors, unless ordered to be released by the presiding judge;

(9) Juvenile court records as hereinafter provided:

(A) All court records of Child Protective Act proceedings.

(B) In Juvenile Corrections Act cases filed before July 1, 2017, all court records of Juvenile Corrections Act proceedings on a petition filed under I.C. § 20-510 pending an admit/deny hearing held pursuant to Rule 6, I.J.R. to permit the parties to request that the court consider, or permit the court to consider on its own motion, closing the records and files. Thereafter the court records shall be open unless the court enters an order exempting them from disclosure. At the admit/deny hearing the court shall determine whether the court records shall remain exempt from disclosure as provided in 1. and 2. below:

1. Court records of Juvenile Corrections Act proceedings brought against a juvenile under the age of fourteen (14), or brought against a juvenile fourteen (14) years or older who is charged with an act that would not be a felony if committed by an adult, shall be exempt from disclosure if the court determines by a written order in each case that the records should be closed to the public.

2. Court records of Juvenile Corrections Act proceedings brought against a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult, shall be exempt from disclosure if the court determines upon a written order made in each case that extraordinary circumstances exist which justify that the records should be confidential. If the juvenile is not found to have committed an act which would be a felony if committed by an adult or the charge is reduced to allege an act which would not constitute a felony if committed by an adult, all existing and future case records and documents shall be exempt from disclosure if the court determines by written order in each case that the court records should be closed to the public.

(C) In Juvenile Corrections Act cases filed on or after July 1, 2017, all court records of Juvenile Corrections Act proceedings on a petition filed under I.C. § 20-510 except as provided in 1, 2, and 3 below:

1. The court may release juvenile court records if the court finds, upon motion by the prosecuting attorney, interested party, or other interested persons, that the public's interest in the right to know outweighs the adverse effect of the release of the records on the juvenile's rehabilitation and competency development. In making this decision, the court may consider the following factors:

- a. Age of the juvenile;
- b. Seriousness of the offense;
- c. Whether the offense deals with persons or property;
- d. Prior record of the juvenile;
- e. The juvenile's risk to reoffend; and
- f. The impact on the victim or victims.

2. The following individuals or entities may inspect juvenile court records without a court order unless otherwise prohibited by law:

- a. Probation officers;
- b. Law enforcement officers;
- c. The Department of Juvenile Corrections;
- d. The Department of Correction;
- e. The Department of Health and Welfare pursuant to its statutory responsibilities in title 16, chapter 16; title 16, chapter 24; or title 20, chapter 5, Idaho Code.

3. The victim of misconduct is entitled to receive:

- a. The name, address and telephone number of the juvenile offender involved;
- b. the name of the juvenile offender's parents or guardians, and their addresses and telephone numbers;
- c. The petition, the decree, and orders of restitution;
- d. Any other information as provided in title 19, chapter 53, Idaho Code.

(D) Notwithstanding any other provision of paragraph (g)(9) of this rule, reports prepared pursuant to I.C. § 20-520(1), and other records and reports described in paragraph (g)(17) of this rule are exempt from disclosure.

(E) Notwithstanding any other provision of paragraph (g)(9) of this rule, the court shall make available upon the written request of a superintendent or an employee of the school district authorized by the board of trustees of the school district, the facts contained in any records of a juvenile maintained under Chapter 5, Title

20, Idaho Code. If a request is made to examine records in courts of multiple districts, it shall be ruled upon by the Chief Justice.

(10) All records of proceedings relating to hospitalizations pursuant to Idaho Code sections, 66-326, 66-329, 66-406, 16-2413, 16-2414, 56-2104 and 56-2105.

Provided, the court may disclose these records when consented to by the person identified or his or her legal guardian, or the parent if the individual is a minor. The court in its discretion may make such records available to the spouse, or the immediate family of the person who is the subject of the proceedings;

(11) A uniform citation (the citation only, not the case type); however courts may share the citation with federal, state and local officials or their agents in the exercise of their official duties and powers;

(12) Adoption records and records of proceedings to terminate the parent and child relationship under Chapter 20 of Title 16, Idaho Code, except that an adopted person or a child whose parental rights were terminated may obtain non-identifying medical information in all cases, and the court may also in its discretion make information from the records available, upon such conditions as the court may impose, to the person requesting the record, if the court finds upon written verification of a medical doctor a compelling medical need for disclosure;

(13) All records of proceedings relating to the consent required for abortion for minors brought pursuant to I.C. 18-609A(1) or (3);

(14) All records of proceedings relating to the judicial authorization of sterilization procedures pursuant to I.C. 39-3901;

(15) Documents filed or lodged with the court in camera;

(16) Protection order petitions and related records, maintained pursuant to either the domestic violence crime prevention act or chapter 79, title 18 of the Idaho Code, except orders of the court;

(17) Records maintained by a court that are gathered at the request or under the auspices of a court (other than records that have been admitted in evidence);

(A) to determine an individual's need for counseling, rehabilitation, treatment or assistance with personal conflicts;

(B) to assist in assigning an appropriate disposition in the case, including the ADR screening report and screening reports prepared by Family Court Service Coordinators or their designees;

(C) to provide the court with a recommendation regarding the custody of minor children;

(D) to provide a court with a psychological evaluation of an individual;

(E) to provide annual or other accountings by conservators and guardians, except to interested parties as defined by Idaho law;

(F) to provide personal or identifying information on individuals for internal court use, including case information sheets filed pursuant to Idaho Rule of Civil Procedure 3(d) or Idaho Rule of Family Law Procedure 201, and victim information/restitution sheets.

(18) A reference list of personal data identifiers or an unredacted copy of a document filed pursuant to Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure 2.6 or Idaho Rule of Family Law Procedure 218; however, courts will share the reference list or unredacted copy with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(19) All court filings, including attachments, in guardianship or conservatorship proceedings whether temporary or permanent, and in proceedings involving a protective arrangement under I.C. § 15-5-409, and whether for an adult, a minor, or a developmentally disabled person, except to interested persons as defined in section 15-1-201, Idaho Code, guardians ad litem, court visitors, or any monitoring entity as defined by Idaho law, or any attorney representing any of the foregoing; provided, however, the following shall not be exempt from disclosure:

(A) the register of actions for the case;

(B) letters of guardianship and letters of conservatorship, and any supplemental orders, decrees or judgments describing, limiting, or expanding the rights and duties of the guardian or conservator;

(C) any order by the court regarding bond by a conservator, and the conservator's bond ;

(D) any order, decree, or judgment dismissing, concluding, or otherwise disposing of the case.

(20) The records in cases involving child custody, child support, and paternity, except that officers and employees of the Department of Health and Welfare shall be able to examine and copy such records in the exercise of their official duties. Other exceptions to this rule are that the register of actions shall be available to the public, and a redacted copy of any order, decree or judgment issued in the case shall be available to the public. However, no redacted copy of any order, decree or judgment must be prepared until there is a specific request for the document. Provided further that any person may request that the court make other records in the case available for examination and copying. Any individual may make the request by filing a court-provided form. When the court receives such a request, it shall promptly review the records in the case and shall make the records available except for those records or portions of records that allege abuse, abandonment or neglect of a child, or which the court determines would inflict undue embarrassment to or put at risk a person referenced in the record who was a child at the time of the filing of the record, or which are exempt from disclosure under other provisions of Supreme Court rules.

This subsection (g)(20) shall apply only to records in cases filed on or after July 1, 2012, and to records in cases in which a motion to modify an order, decree or judgment was filed on or after July 1, 2012.

(21) Records of judicial work product or drafts, including all notes, e-mail, memoranda or drafts prepared by a judge or a court-employed attorney, law clerk, legal assistant or secretary;

(22) Personnel records, application for employment and records of employment investigations and hearings, including, but not limited to, information regarding sex, race, marital status, birth date, home address, telephone number, applications, testing and scoring materials, grievances or complaints against an employee, correspondence, and performance evaluations; provided the following are not exempt from disclosure: a public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, status, workplace, employing agency, and any adverse official action taken against an

employee as a result of a grievance or complaint (except a private letter of reprimand), and after such action is taken (except when the action is a private letter of reprimand), the record of any investigation and hearing leading to the action;

(23) Applications, testing and scoring to be included on a court maintained roster;

(24) Computer programs and related records, including but not limited to technical and user manuals, which the judicial branch has acquired and agreed to maintain on a confidential basis;

(25) Records maintained by the state law library that link a patron's name with materials requested or borrowed in the patron's name with a specific subject about which the patron has requested information or materials;

(26) Allegations of attorney misconduct received by the Idaho State Bar and records of the Idaho State Bar relating to attorney discipline, except where confidentiality is waived under the Idaho Bar Commission Rules;

(27) All records relating to applications for permission to take the Idaho bar examination or for admission to practice as exempted from disclosure in the Idaho Bar Commission Rules;

(28) All records and records of proceedings, except the identity of applicants for appointment to judicial office, of the Idaho Judicial Council or any District Magistrates Commission pertaining to the appointment, performance, removal, disability, retirement or disciplining of judges or justices. Provided, however, that the record of a disciplinary proceeding filed by the Judicial Council in the Supreme Court loses its confidential character upon filing;

(29) Pending grant applications and attachments submitted to the Guardian Ad Litem Grant Review Board for consideration of grant funding authorized under Title 16, Chapter 16, Idaho Code. Provided, however, such applications and attachments will no longer be exempt following the Board's consideration of all applications and the Supreme Court's awarding of grant funds.

(h) Permissive Release of Judicial Decision in Exempted Categories. Records of courts' determinations in proceedings exempt from disclosure under (g) of this rule may, by direction of the court issuing the determination, be subject to inspection, examination and copying in a manner that preserves the anonymity of the participants to the proceeding. In particular, the Supreme Court and the

Court of Appeals may provide copies of their rulings in appeals from proceedings exempt from disclosure under paragraph (g) by using "John Doe/Jane Doe" designations or other anonymous designations in documents made available for inspection, examination and copying. Further deletions from the decisions may be made if necessary to preserve anonymity.

(i) Redaction and Sealing of Court Records.

(1) Filing a motion. Parties to a case, or non-parties whose rights are affected by or who otherwise have a right to access information contained in a court file, may move to redact, disclose, seal, or unseal records in a case file. The court at its own discretion may also move to redact, disclose, seal, or unseal records in a case file in accordance with this rule.

(2) When a hearing must be held. When a motion is filed under this rule, the court shall hold a hearing on the motion if one is requested by a party to the case, or if one is requested by a non-party whose rights are affected. The court may also hold a hearing at its own discretion. The court is not required to hold a hearing if the court concludes redaction is necessary to prevent the disclosure of personal data identifiers under subsection (i)(3)(A)(7) of this rule.

(A) If the motion seeks to redact or seal newly filed records, the records will be temporarily sealed for seven days. In those seven days, the court will review the motion and records to decide if they should remain temporarily sealed. The court may order the records to remain temporarily sealed pending a decision on the motion if the records appear to contain information that falls under subsection (i)(3) of this rule. Any order to continue the temporary sealing must be in writing and identify the applicable provisions of subsection (i)(3) of this rule. The written order will be publicly available.

(B) If the motion seeks to redact or seal previously filed records, the court at its discretion may temporarily seal the records pending a hearing or a final decision, utilizing the same criteria and requirements contained above with regard to temporarily sealing newly filed records.

(C) An order to redact or seal records may be challenged by a non-party whose rights may be affected by the decision.

(3) Orders to redact or seal. Consistent with the presumption in these rules of public access to information, when entering an order redacting or sealing records

in a case file, a court must fashion the least restrictive exception from disclosure and provide the reason for the redaction or sealing.

(A) Prior to entering an order redacting or sealing records, the court must make one or more of the following determinations:

1. The records contain highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person.
2. The records contain facts or statements that the court finds might be libelous.
3. The records contain facts or statements that may compromise a person's financial security or could reasonably result in economic or financial loss or harm to a person who has an interest in the records.
4. The records contain facts or statements that could compromise the security of Judicial Branch personnel, property, or sealed or exempt court records maintained by the Judicial Branch.
5. The records contain facts or statements that might endanger a person's life or safety.
6. That it is necessary to temporarily seal or redact the records to preserve the right to a fair trial.
7. The records contain personal data identifiers that should have been redacted pursuant to Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure 2.6, or Idaho Rule of Family Law Procedure 218.

(B) Regardless of whether a motion is filed or a hearing occurs, no record can be redacted or sealed (aside from presentence investigation reports) unless the court first enters a written order that includes the determinations made under subsection (i)(3)(A) above. The order must specifically identify the records to be redacted or sealed, and a copy of the order must be served on the Clerk of the District Court. The order shall remain publicly available and subject to examination, inspection or copying by the public, but should not reveal the content of the information protected from disclosure.

(C) When a record is redacted under this rule, the original, unaltered record must be preserved under seal. A redacted copy, so marked, shall be substituted for the original in the court file and only the redacted copy shall be subject to examination, inspection or copying by the public.

(D) When a record is sealed under this rule, it shall not be subject to examination, inspection or copying by the public except as otherwise provided in these rules.

(E) Presentence investigation reports are presumptively sealed as described in Idaho Criminal Rule 32 and unless a court orders otherwise, may only be disclosed in the manner identified by that rule. No order or hearing is required to seal a presentence investigation report.

(4) Orders to unredact or unseal.

(A) In any order removing redactions or unsealing records, the court must explain its reasoning for the decision. Those reasons may include, but are not limited to:

1. A determination that none of the factors listed under subsection (i)(3)(A) preclude release of the records.
2. A determination that release is permitted elsewhere in court rule, including other subsections of Idaho Court Administrative Rule 32.

The order must also specifically identify the records to be changed, and a copy of the order must be served on the Clerk of the District Court.

(B) When the court issues an order for a limited disclosure of records that will otherwise remain sealed or exempt from disclosure, its order shall contain appropriate limitations on disseminating the disclosed information.

(5) Filing under seal. Sealed records and records requested to be redacted or sealed must be filed in compliance with Idaho Rules for Electronic Filing and Service 5, 6, and 7 if they are filed electronically.

(6) Changes to orders. The court may reconsider, alter, or amend any order issued under the provisions of this rule at any time.

(7) Provisions concerning exempt records. Exempt records are different than sealed or redacted records and are addressed in Idaho Court Administrative Rule 32(f) and (g). Access to records otherwise exempt from disclosure is addressed in Idaho Court Administrative Rule 32(c) and (h).

(Repealed in its ENTIRETY April 27, 2007, NEW Rule 32 adopted April 27, 2007; effective July 1, 2007, amended and effective February 1, 2009; amended March 18, 2011, effective July 1, 2011; amended February 9, 2012, effective July 1, 2012; amended October 5, 2013, effective January 1, 2014; amended November 25, 2013, effective January 1, 2014; amended April 2, 2014; effective July 1, 2014; amended April 2, 2015, effective April 15, 2015; amended May 7, 2015, effective July 1, 2015; amended April 12, 2016, effective July 1, 2016; amended November 14, 2016, effective November 22, 2016; amended June 30, 2017, effective July 1, 2017; amended May 14, 2019; effective July 1, 2019; amended May 4, 2020; effective July 1, 2020; amended March 9, 2023, effective April 1, 2023; amended March 30, 2023, effective May 1, 2023; amended December 21, 2023, effective January 1, 2024; amended September 30, 2024, effective October 1, 2024; amended September 13, effective January 1, 2025; amended December 9, effective January 1, 2025; amended December 17, effective January 1, 2025; amended April 23, 2025, effective April 23, 2025.)

Source URL: <https://isc.idaho.gov/icar32>

Note: I.C.A.R. 32 is lengthy and therefore only the sections referenced in the brief are quoted in this Addendum. The full version of the Rule is available at the source listed above.

I.C.A.R. 33. Withdrawal of Files.

No paper, record or file in any action or proceeding shall be removed from the custody of the clerk except that such papers, records and files may be withdrawn for the use of the court.

(Adopted December 2, 2015, effective July 1, 2016.)

Source URL: <https://isc.idaho.gov/icar33>

I.R.C.P. 2.6. Privacy Protection for Filings Made with the Court

(a) Responsibility of Filer. It is the responsibility of the filer to ensure that protected personal data identifiers are omitted or redacted from documents before the documents are filed. This responsibility exists whether the documents are filed electronically or conventionally, and even if the filer did not create the document. The responsibility to redact also applies to documents that are initially exempt from disclosure but later become public pursuant to court rule. The clerk of the court will not review filings to determine whether appropriate omissions or redactions have been made.

(b) Personal Data Identifiers to be Redacted. Personal data identifiers should not be included in any document filed with the court unless such inclusion is required by the court, by statute or court rule, or is material to the proceedings. If the identifiers must be included, then the following personal data identifiers must be partially redacted from the document, including exhibits:

- (1) Social Security Numbers. If an individual's social security number must be included, only the last four (4) digits of that number are used
- (2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child are used.
- (3) Dates of Birth. If an individual's date of birth must be included, only the year is to be used, and the date specified in the following format: XX/XX/1998.
- (4) Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers are to be used, and the number specified in substantially the following format: XXXXX1234.
- (5) Driver's License Numbers and State-Issued Personal Identification Card Numbers. If an individual's driver's license number or state issued personal identification card number must be referenced, only the last four digits of that number are to be used and the number specified in substantially the following format: XXXXX350F
- (6) Employer or Taxpayer Identification Number. If an employer identification number of business' taxpayer identification number must be included, only the last four (4) digits of that number are used.

(c) Exceptions to Redaction Requirement.

- (1) The redaction requirement does not apply to the record of a court, tribunal, administrative or agency proceeding if that record was filed before the effective date of this rule.
- (2) The redaction requirement does not apply to documents that are exempt from disclosure pursuant to Idaho Court Administrative Rule 32.
- (3) The redaction requirement of a minor's full name does not apply to documents related to a name change for the minor.

(d) Options When Personal Data Identifiers are Necessary. A party filing a redacted document need not also file an unredacted version of the document; however, where inclusion of the unredacted personal data identifiers is required by the court, by statute or court rule, or is material to the proceedings in a document that is open to the public the party must choose the most appropriate option below:

- (1) File the redacted document together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be clearly identified as a reference list filed pursuant to this rule and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information. The reference list is exempt from disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the reference list with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.
- (2) File the redacted document together with an unredacted copy of the document. The unredacted copy must be clearly identified as an unredacted copy filed pursuant to this rule. The unredacted copy is exempt from disclosure pursuant to Idaho Court Administrative Rule 32; however, courts will share the unredacted copy with other government agencies as required or allowed by law without court order or application for purposes of the business of those agencies.

(e) Unredacted document inadvertently submitted. If an unredacted document is inadvertently submitted without a reference list or redacted copy, then the filer must submit a redacted copy as soon as possible. The filer must also identify the original unredacted document, the date it was submitted, and request that the original unredacted document be marked as exempt from disclosure.

(f) Parties to Use Caution. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

- (1) Medical records, treatment and diagnosis;
- (2) Employment history;
- (3) Individual financial information;
- (4) Insurance information;
- (5) Proprietary or trade secret information;
- (6) Information regarding an individual's cooperation with the government; and
- (7) Personal information regarding the victim of any criminal activity.

(g) Sanctions. Failure to comply with this rule is grounds for contempt. If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.

(h) Privacy Protections in Orders, Judgments, and Decrees.

(1) If possible, the court must refrain from including in a court order, judgment, or decree the personal data identifiers set forth in subsection (b) of this rule. If unredacted personal data identifiers are required by statute or court rule, or are material to the proceedings and must be included in an order, judgment, or decree that is open to the public then the unredacted document will be protected from public access. Copies of the unredacted document must be served on the parties and must be available to the parties and other government agencies without court order for purposes of the business of those agencies. A redacted copy of the order, judgment or decree must be available to the public; however, no redacted copy of any order or judgment must be prepared until there is a specific request for the document, in which case the document must be redacted in the manner specified in subsection (b) of this rule.

(2) Exceptions. The court may include unredacted personal data identifiers in documents that are exempt from disclosure pursuant to Idaho Court Administrative Rule 32.

(Adopted March 1, 2016, effective July 1, 2016 [1]; Repealed and new rule effective July 1, 2019 [2].)

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U.S. Court of Appeals Docket No. 24-6697

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COURTHOUSE NEWS SERVICE,

Plaintiff/Appellee,

vs.

SARA OMUNDSON, in her official capacity as
Administrative Director of Idaho Courts,

Defendant/Appellant.

On Appeal from a Decision of the United States District Court
For the District of Idaho
Case No. 1:21-cv-00305-DCN
The Honorable David C. Nye

ANSWERING BRIEF OF APPELLEE COURTHOUSE NEWS SERVICE

Roger Myers
Rachel Matteo-Boehm
Jonathan Fetterly
Katherine Keating
BRYAN CAVE LEIGHTON PAISNER LLP

3 Embarcadero Center, 7th Floor

San Francisco, CA 94111

Tel: 415-675-3400

roger.myers@bclplaw.com; rachel.matteo-boehm@bclplaw.com;
jon.fetterly@bclplaw.com; katherine.keating@bclplaw.com

Attorneys for Plaintiff-Appellee
COURTHOUSE NEWS SERVICE

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INTRODUCTION¹

Appellant Sara Omundson, Administrative Director of Idaho Courts, turns somersaults to avoid reaching the only part of this case that has not already been determined by controlling Ninth Circuit authority: whether her policy of withholding access to new non-confidential civil complaints until clerks have completed a “ministerial review,” AOB 6, survives First Amendment scrutiny.

To satisfy the First Amendment, Appellant must “demonstrate first that there is a ‘substantial probability’” her policy is justified by an overriding government interest that “would be impaired by immediate access, and second, that no reasonable alternatives exist to ‘adequately protect’” that interest. *CNS v. Planet*, 947 F.3d 581, 596 (9th Cir. 2020) (“*Planet III*”); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9, 14 (1986) (“*Press-Enterprise II*”). Scores of courts around the country that share the same interests as Idaho manage to protect those interests without withholding access for processing. They do so by using alternatives that are equally available to Appellant.

Unable to explain why Idaho cannot do what other courts do, Appellant attempts to re-litigate what this Court has already established: (1) that federal courts should not abstain from deciding First Amendment claims based on policies like Appellant’s that delay making newly filed civil complaints available, *CNS v.*

¹ In this brief, emphases in ***bold italics*** are added and those in *italics* were in the original. Citations for quotations within quotations are omitted unless noted.

Planet, 750 F.3d 776, 793 (9th Cir. 2014) (“*Planet I*”) & *Planet III*, 947 F.3d at 587-88, 591 n.4; (2) that the First Amendment qualified right to access complaints attaches when the filer submits them to the court rather than after court staff deem them sufficiently “processed,” *Planet III*, 947 F.3d at 588, 594; and (3) that the “rigorous scrutiny” of *Press-Enterprise II* applies to policies that create pervasive and ongoing delays in accessing complaints. *Id.* at 594-96.

Once this Court reaches the fact-intensive scrutiny of Appellant’s policy that she tries to avoid, it will find – as did the district court – that her arguments cannot be squared with the record in this case. Appellant is perfectly capable of avoiding the access delays caused by her no-access-before-processing policy without sacrificing any overriding government interest, just as other courts do.

The district court’s judgment in favor of Courthouse News Service (“CNS”) should be affirmed.

STATEMENT OF JURISDICTION

Plaintiff-Appellee Courthouse News Service (“CNS”) agrees that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 (as well as 28 U.S.C. §§ 1343 and 2201), this Court has jurisdiction pursuant to 28 U.S.C. § 1291, and the appeal is timely.

ISSUES PRESENTED

1. Whether the district court correctly concluded Appellant’s abstention argument was foreclosed by *Planet I & III*, and by rejection of the primary authority on which Appellant relies by all five circuits to consider it, including this one, *Planet III*, 947 F.3d at 591 n.4, because it abstained under an “approach ... inconsistent with our precedent and Supreme Court guidance.” *CNS v. Schaefer*, 2 F.4th 318, 325 n.2 (4th Cir. 2021) (quoting and rejecting *CNS v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018)); see *CNS v. Corsones*, 131 F.4th 59, 78 (2d Cir. 2025) (collecting cases contrary to *Brown*).

2. Whether the district court correctly followed *Planet III*, 947 F.3d at 594, and every other court addressing the question to conclude that the qualified First Amendment right of access to new civil complaints attaches when the filer submits it to the court, rather than at some subsequent stage after court staff deem the complaint to have been sufficiently processed. *E.g.*, *Corsones*, 131 F.4th at 66; *CNS v. New Mexico*, 53 F.4th 1245, 1261-62 (10th Cir. 2022); *CNS v.*

O'Shaughnessy, 663 F. Supp. 3d 810, 818 (S.D. Ohio 2023); *CNS v. Cozine*, 2022 WL 1000775, at *2 (D. Or. Apr. 4, 2022).

3. Whether the district court correctly concluded that Appellant failed to justify her no-access-before-processing policy, and the pervasive access delays it causes, by “demonstrat[ing] first that there is a ‘substantial probability’ that” an overriding interest “would be impaired by immediate access” to new e-filed civil complaints, and, “second, that no reasonable alternatives exist to ‘adequately protect’ that government interest,” as she was required to do under *Planet III*, 947 F.3d at 596, and *Press-Enterprise II*, 478 U.S. at 9.

ADDENDUM

Pursuant to Rule 28-2.7, an addendum listing relevant rules has been submitted separately.

STATEMENT OF THE CASE

A. About Courthouse News Service

CNS is a nationwide news service founded more than 30 years ago to report on civil litigation. 6-ER-1126. It employs about 240 people, mostly editors and reporters, covering state and federal trial and appellate courts in all 50 states, and reporting on general news through its website. *Id.*

CNS' website (www.courthousenews.com) is free to the public and read daily by roughly 30,000 people. 6-ER-1129. CNS' subscriber publications include New Litigation Reports, which contain original, staff-written reports on new litigation focusing on actions involving businesses and public entities in a particular geographic region, e-mailed to subscribers the evening of each court day. 6-ER-1127. CNS' approximately 2,300 subscribers include law firms, news media, libraries, non-profits, government entities, and businesses. 6-ER-1128-29. Regional subscribers include Boise's Office of City Attorney, *The Salt Lake Tribune*, and Weber State University. *Id.*

CNS functions as a pool reporter for news about civil litigation. Its many subscribing media outlets include *The Los Angeles Times*, *San Jose Mercury News*, *The Wall Street Journal*, *The Boston Globe*, *The Denver Post*, *The Dallas Morning News*, and CNN. *Id.* CNS reporting is frequently credited as the source for news stories by a wide variety of media (e.g., *The New York Times*, *The Wall Street*

Journal, *New York Magazine*, *U.S. News and World Report*, ABC News, Fox News, *Politico*, NPR). 6-ER-1129.

The New Litigation Report covering the Idaho courts is The Big Sky Report, which includes civil complaints filed in Idaho, Montana, and Wyoming. 6-ER-1127-28. CNS does not cover family and probate filings (among others) and does not review or report on complaints that are statutorily confidential or accompanied by a motion to seal. *Id.* In Idaho, CNS’ review is limited to complaints in a defined category that does not include any confidential as a matter of rule or law. SER-19.²

B. How Courts Provide Timely Access To E-Filed Complaints

In the age of paper records, courts around the country made new civil complaints available to reporters shortly after receipt by the court, regardless of whether clerks had completed docketing or other clerical tasks, such that reporters could see them by the end of the day they were filed. 6-ER-1130-33 (¶¶ 12-22). This allowed the press to report on new actions while they were most newsworthy and likely to capture the public’s attention. 6-ER-1129-33 (¶¶ 11-19).

Despite the challenge inherent in working with paper – only one person at a time can handle the document – reporters and court staff found ways to work

² CNS seeks only complaints in “A.A. filing fee category,” which encompass “civil cases where the amount in controversy exceeds \$10,000.” 1-ER-27 (n.12); SER-32-38.

cooperatively so that reporters could review complaints that had not yet been processed. 6-ER-1133 (¶ 22). Providing timely access before processing in an e-filing court is even easier. An e-filed complaint is simply a PDF document to be viewed and downloaded. 6-ER-1134 (¶ 23); SER-87 (90:10-92:17). Reporters and clerks can access it simultaneously. 6-ER-1134 (¶ 23).

Unfortunately, as state courts have transitioned to e-filing, some built unnecessary access delays into their systems, withholding e-filed complaints until court staff finished processing them. Busy clerks often struggle to complete these clerical tasks on the day of filing, which means that “no-access-before-processing”³ policies nearly always prevent the press from learning about a substantial percentage of new civil actions until a day or more after filing, when the public has moved on to the next day’s news. 6-ER-1134-35 (¶ 25).

Of necessity, all e-filing courts conduct some kind of clerical review of new filings, and all have a mechanism for handling filer mistakes (*e.g.*, missing signatures, illegible pages). *See* 6-ER-1140-41 (¶ 43). Some courts automatically accept e-filed documents, addressing clerical issues post-acceptance when the documents are sitting in the court’s case management system. 6-ER-1138-41 (¶¶ 35-43); *see also, e.g.*, 5-ER-966-70, 5-ER-1039-40 (N.D. Cal. and D. Idaho e-filing procedures for correcting errors). In other courts, clerks process on the front

³ “No-access-before-process” is the name the Ninth Circuit gave to such policies in *Planet III*, 947 F.3d at 587.

end, culminating with the clerk’s manual “acceptance” of the complaint into the case management system or returning it to the filer for correction (*i.e.*, rejection). 6-ER-1141 (¶ 44); SER-198-99 (¶ 8(c)). ***Auto-accept and clerk-accept courts are equally capable of providing timely access to new e-filed civil complaints.*** 6-ER-1137-55 (¶¶ 34-76). In auto-accept courts, clerks can attend to clerical issues ***after*** acceptance. In clerk-accept courts, access can be provided ***while*** clerks are still attending to clerical tasks that precede acceptance.

Examples of Auto-Accept Courts. The overwhelming majority of federal district courts are auto-accept courts. A new complaint is available to anyone with a PACER account moments after the court receives it. 6-ER-1138 (¶ 35). State courts have also implemented auto-accept systems, including Connecticut, Hawaii, and Missouri (through homegrown systems developed in-house) and Alabama, Nevada, and Utah (through software from three different vendors). 6-ER-1138-40 (¶¶ 36-42); Request for Judicial Notice (“RJN”), ¶ 3, ¶ 15 & Exhs. 3, 15. Tyler Technologies, Idaho’s e-filing vendor, will configure Idaho’s system to auto-accept complaints at no charge to Idaho. SER-72 (29:24-30:23); 5-ER-923-24.

Examples of Clerk-Accept Courts that Don’t Withhold Access for Processing. Many courts – including statewide in Arizona, Florida, Iowa, Kansas, New Mexico, New York, Vermont, and many in California, Georgia, Ohio, and Texas – condition “acceptance” of a complaint on action by a human clerk but

don't withhold access prior to acceptance. 6-ER-1141-55 (¶¶ 44-76); RJN, ¶¶ 1, 2, 4, 6-7, 14, 16 & Exh. 1, 2, 4, 6-7, 14, 16.

Some display complaints that have not yet been “accepted” alongside complaints that have been “accepted” in the same public portal. *See, e.g.*, 5-ER-972-73, 6-ER-1141-1145 (¶¶ 45-49). Others make complaints that have not yet been accepted available through a separate portal or review queue, sometimes to the public at large, 6-ER-1140 (¶ 41), 6-ER-1151 (¶ 66), sometimes limited to those credentialed by the court, 6-ER-1148 (¶¶ 56-60, 65-66, 68-70, 76), 6-ER-1155 (¶ 76); sometimes available for free, 6-ER-1140 (¶ 41), 6-ER-1151 (¶¶ 66, 68), sometimes subject to payment, 6-ER-1150-53 (¶¶ 65, 70), 6-ER-1155 (¶ 76); sometimes through court-developed software, 6-ER-1153-56 (¶¶ 73, 78), sometimes through vendor-provided software, 6-ER-1148-51 (¶¶ 56-60, 64, 67).

However implemented, systems that do not withhold access for processing allow new, nonconfidential complaints to be read and reported on the day the complaint is submitted to the court, when the new action is most newsworthy and capable of commanding public attention. 6-ER-1134-35 (¶¶ 25-26), 1159 (¶ 86).

C. How E-Filing Works In Idaho

Idaho's district courts (“Idaho Courts”) use software from vendor Tyler Technologies. 6-ER-1136 (¶ 28). While Tyler's software can be configured as either auto-accept or clerk-accept, Idaho's system is currently configured for

manual clerk acceptance, with public access withheld until after acceptance. 6-ER-1134-35 (¶¶ 25-26), 6-ER-1279 (¶ 3).⁴

Submission. After registering for an account, an e-filer logs into the Idaho Courts’ e-filing system. 7-ER-1434-35 (¶ 23), 7-ER-1480-83. The filer selects a “Location” (*e.g.*, Ada County District Court), a “Category” (*e.g.*, “Civil”), and a “Case Type” (*e.g.*, “AA – All Initial District Court Filings (Not Listed in E, F, and H1)”) from drop-down menus. 7-ER-1435 (¶ 23(c)-(e)), 7-ER-1485-87, 7-ER-1491-92. The filer then uploads the documents to be filed, selecting the document type (*e.g.*, “Complaint”) from a drop-down menu. 7-ER-1435 (¶¶ 23(e)-24), 7-ER-1494-97. The filer’s selections allow the court to dictate which filings are publicly accessible. 5-ER-923-33; SER-79-81 (60:25-67:5), SER-85-90 (81:14-85:10, 89:21-90:7, 95:1-103:16).

Finally, the filer enters payment information and clicks the “submit” button. 7-ER-1435-36 (¶ 25), 7-ER-1499-1500. Some defects in an e-filing (*e.g.*, insufficient funds, file format issues) will cause it to be automatically rejected, without ever reaching court clerks. SER-82, SER-108 (69:6-70:6; 166:21-167:6). Otherwise, the e-filer receives an automated e-mail instructing the filer to “allow

⁴ Courts preferring the clerk-accept configuration of Tyler’s system can set it up to allow access before or during processing by using Tyler’s off-the-shelf press review tool software, *or* Tyler will give them – free of charge – the technical specification (API) enabling the courts to custom-tailor their own on-receipt access mechanism. *See infra* 57.

24-48 hours for clerk office processing.” 6-ER-1276-77. The filing then sits in the court’s electronic document repository (known as the “e-filing manager”) waiting for a clerk to process it. *See* SER-73 (33:25-34:19; 36:6-11).

Clerk Processing. Idaho Court clerks access e-filed documents from the e-filing manager and “perform a ministerial review.” SER-197 (¶ 6). For a new complaint, this involves “checking for” the following: (1) case information sheet; (2) certification of service; (3) party names in caption; (4) correct filing fees paid; (5) required signatures included; and (6) the proper division of the District Court selected. SER-197, SER-200-201 (¶¶ 6, 8(d)(iii)).

“If there is an issue with one or more of these items,” the clerk returns the complaint to the filer for correction (also known as “rejecting” the complaint). SER-73 (34:8-19), SER-197 (¶ 6). “If the documents ... do not need clerical corrections,” the clerk “‘accepts’ the submission.” SER-198-99 (¶ 8(c)), SER-201 (¶ 8(d)(iv)). Though this processing takes less than five minutes, SER-203-04 (¶ 10(a)), it often takes a day or more for clerks to turn to it. Once “accepted,” a copy of the complaint moves into the court’s case management system, at which point it becomes publicly available.

D. CNS Attempted To Fix The Problem Before It Began

When, in 2016, CNS learned the Idaho Courts planned to implement e-filing, it wrote to the clerk for Ada County (Idaho’s largest county), attempting to

avoid the access delays that sometimes result from a transition to e-filing. 6-ER-1136, 6-ER-1219-32. The Ada County clerk responded, acknowledging that CNS had “same day access to the paper record,” 6-ER-1136-37 (¶ 31), 6-ER-1233-34, and referred the matter to state-level administrators. *Id.*

Despite additional attempts to point Idaho to a solution that would avoid access delays, e-filing was launched in Ada County without it, and the delays CNS had predicted came to pass. *See* 6-ER-1137 (¶ 32), 6-ER-1236-38. Conversations between CNS and Idaho administrators “stalled in early 2017,” as Appellant waited for the Ninth Circuit to decide *Planet III*. 6-ER-1237.

E. CNS Tried To Resolve The Delays Again After *Planet III* But Was Rebuffed

After *Planet III* settled key legal issues and affirmed the unconstitutionality of a California court’s no-access-before-processing policy, CNS renewed its request to Appellant, again urging that Idaho solve the problem of “ongoing and persistent” access delays by providing pre-processing access. 6-ER-1137, 6-ER-1236-38. Appellant responded that she “did not find a statewide or Ada county delay that was currently ongoing and persistent” and would not provide access to e-filed complaints that “have not yet been accepted for filing by the court clerks’ offices.” 6-ER-1137, 6-ER-1261-63.

On July 31, 2021, CNS brought this lawsuit, alleging that new civil complaints e-filed in Idaho’s district courts “are regularly withheld from the press

and public until after they have been processed by court staff, resulting in delayed access.” 12-ER-2774 (¶ 5). Importantly, CNS’ complaint does not allege that *any* access delay violates the First Amendment. Rather, it alleges that Appellant’s no-access-before-processing policy causes ongoing and pervasive delays and cannot be justified under the applicable constitutional test. 12-ER-2781-84 (¶¶ 33-46).

F. Delays Caused By Appellant’s Policy

Appellant’s own data reflects that Idaho Courts withheld *nearly half* (42%) of all civil complaints e-filed from January 2021 through July 2022 until at least the following day. 7-ER-1429-32 (¶¶ 4-18), 7-ER-1440-41. Approximately 15% were unavailable for two calendar days or longer. 7-ER-1440-41. Delayed complaints included especially newsworthy ones, such as lawsuits about a fatal airplane collision over Lake Coeur D’Alene and alleged sexual assault by an Idaho legislator against a teenage legislative page. 6-ER-1280-1331.

Individual courts’ delays during that period were regularly worse, varying in degree from court to court, month to month, and week to week. 7-ER-1387-93 (¶¶ 4, 6-15), 7-ER-1395-1426; SER-175 (native spreadsheet). For example, the district court for Kootenai County, Idaho’s third-most populous county, withheld 98% of complaints for two calendar days or longer. 7-ER-1404-06.

G. The District Court Denied Appellant’s Motion To Dismiss, Rejecting Both Abstention And The Notion That *Planet III* Forecloses Any Outcome Leading To “Immediate” Access

Appellant moved to dismiss based on abstention and failure to state a claim.

12-ER-2763-64. Her 12(b)(6) theory was that if Idaho courts did not withhold access to new e-filed complaints until after “ministerial review,” the resulting access would be immediate. 12-ER-2765-66. Because *Planet III* said the First Amendment did not require immediate access in all situations, she argued, CNS’ claim was “not supported by a cognizable legal theory.” 12-ER-2766.

The district court denied the motion, concluding that “abstention does not apply in this case” and that *Planet III* “does not stand for the proposition asserted by Omundson.” 1-ER-56.⁵ The court explained CNS “is not actually asking for immediate access; it is asking for un-delayed access. Thus, the relevant question is whether any delay is occurring in Idaho and, if so, whether that delay is justifiable” under the second step of the *Press-Enterprise II* test as required by *Planet III*. 1-ER-50. The court declined to resolve the “very fact driven” “second step of the *Press-Enterprise II* analysis on the current record.” *Id.* Instead, “discovery and further briefing [were] necessary to understand the full picture of what is happening in Idaho state court.” 1-ER-52.

⁵ In the same order, the district court denied CNS’ preliminary injunction motion. 1-ER-38.

H. On Summary Judgment, Appellant Failed To Carry Her Burden Of Justifying Her No-Access-Before-Processing Policy

Following discovery, the parties filed cross-motions for summary judgment. 6-ER-1332-33, 7-ER-1501-03. The district court granted CNS’ motion and denied Appellant’s, entering declaratory judgment and a permanent injunction. 1-ER-36-37. The court confirmed its prior ruling that the First Amendment access right attaches “when the complaint is submitted to the respective e-filing system, *not* ... once the documents are reviewed/accepted/processed by a clerk.” 1-ER-23.

Turning to whether Appellant had satisfied the “‘fact-intensive’ test” set out in *Press-Enterprise II* and *Planet III*, 1-ER-27, the district court found that although Appellant had pointed to “important concerns,” the district court found “*no evidence that giving CNS more timely access would hinder her ability to address those concerns.*” 1-ER-31-33. In addition, the court found that “alternatives to the current system ... seem reasonable,” and are used by “[o]ther states ... with good success.” 1-ER-34. The court concluded that it would “not dictate what Omundson must do moving forward, but under the second step of the *Press-Enterprise II* test, she must do something because her current system impermissibly delays CNS’ First Amendment access.” 1-ER-36.

SUMMARY OF ARGUMENT

The AOB tries mightily to make it appear that this case is different from the access dispute that led to what the district court called the “*Planet* trilogy.” 1-ER-

18. But when this Court digs into the well-developed record of this case and the binding precedent resulting from *Planet* – as well as the decisions of other courts presented with the same issue, including in the e-filing context – it will find that the district court correctly concluded there were no genuine issues of material fact and that CNS was entitled to summary judgment. As CNS will explain:

Abstention. This Circuit has twice rejected the argument that the federal abstention doctrines relied on and/or alluded to by Appellant are satisfied in cases like this one. It has also rejected the Seventh Circuit’s abstention analysis in *Brown*, as have four other circuit courts. The Idaho Supreme Court case Appellant relies on for the first time on appeal does not change the result here.

When the right of access attaches. Appellant advances a fiction that no access delays exist by claiming that the First Amendment clock does not start ticking until she says it does. Despite the AOB’s repeated insistence, based on administrative definitions, that the complaint at issue here “have not been ‘filed,’” the district court correctly found that for constitutional access purposes, “‘filed’ is best understood to mean when the complaint is submitted to the respective e-filing system, not to mean once the documents are reviewed/accepted/processed by a clerk.” 1-ER-61-62. In so ruling, the district court reached the same conclusion as every other court to consider the same question.

Delays and level of scrutiny. Alternatively, Appellant seeks to minimize the access delays in this case – and maximize deference to her unnecessary policy choices – by framing the delays in terms of “business hours;” erroneously suggesting CNS is seeking a per se right of “immediate access;” and claiming that the district court erred by applying the *Press-Enterprise II* scrutiny that *Planet III* requires.

Application of Press-Enterprise II scrutiny. Applying the correct constitutional test to the summary judgment record in this case, the district court correctly found Appellant failed to carry her burden under *Press-Enterprise II*. Providing access before processing does not interfere with courts’ ability to review and address any issues in new complaints. The notion that access to a complaint that is later rejected would somehow create confusion that damages confidence in the courts is unsupported and unsupportable. And reviewing for confidential information cannot be a reason to withhold for processing when searching for confidential information is not a part of clerk review in Idaho.

Nor has Appellant shown that she lacks alternatives to her current system. She could cure delays by auto-accepting the complaints at issue – something Idaho’s e-filing vendor will enable for no charge. Or she could use the off-the-shelf press review tool her vendor offers. Or she could use her vendor’s free

technical specification (API) to build whatever variation of pre-processing access she prefers into the new access portal she has already begun developing.

Other state courts around the country use these alternatives, including states using the same e-filing system Idaho uses. If pre-processing access generally, or any alternative in particular, had caused problems in any of these courts, Appellant surely would have said so. Instead, the summary judgment record reflects that neither she nor CNS is aware of **any** problem arising from pre-processing access in any court. SER-159-60 (Rog. 26); 6-ER-1147, 6-ER-1149-50, 6-ER-1152-53.

The Idaho Courts implemented their access restriction with knowledge that it would lead to pervasive delays and that alternatives were available. 6-ER-1136-37, 6-ER-1219-63. Having chosen this unconstitutional path, they should not be heard to complain that it would now be inconvenient to make adjustments. The judgment of the district court should be affirmed.

I.

PLANET I & III AND CNS v. YAMASAKI CONTROL THIS CASE

Two Ninth Circuit cases – *Planet* and *CNS v. Yamasaki* – resulted in two published decisions (*Planet I & III*) and one published order (*CNS v. Yamasaki*, 950 F.3d 640 (9th Cir. 2020)),⁶ that provide the law of the circuit for this case. Another decision, *CNS v. Planet*, 614 F.App’x 912 (9th Cir. 2015) (“*Planet II*”), while unpublished, “helps to contextualize the Ninth Circuit’s ruling in *Planet III*.” 1-ER-45.

A. The Planet Trilogy

In September 2011, CNS filed suit against California’s Ventura County clerk, Michael Planet, to address pervasive delays in access to newly filed civil complaints caused by Ventura’s policy of withholding new complaints until they had been administratively “processed” by court clerks. That litigation included three appeals:

Planet I – In 2011, the district court granted Ventura’s motion to dismiss, abstaining under *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *O’Shea v. Littleton*, 414 U.S. 488 (1974). *CNS v. Planet*, 2011 WL 11715054 (C.D. Cal. Nov. 30, 2011). In 2014, this Court reversed, concluding the “novel and

⁶ Under Circuit Rule 36-5, “[a]n order may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used.”

important” First Amendment issues “may be adjudicated on the merits in federal court, where they belong.” *Planet I*, 750 F.3d at 793.

Planet II – On remand, the district court granted a second motion to dismiss. *CNS v. Planet*, 2014 WL 12740134, at *4 (C.D. Cal. Aug. 8, 2014). On appeal, Ventura’s single issue presented was “[w]hether the First Amendment creates a right of access to civil complaints ..., even before those complaints have been ***processed, filed, and entered into the court’s official records.***” Appeal No. 14-56444, Dkt. 20, at 2. This Court again reversed, saying the district court “failed to conduct the proper analysis dictated by” *Press-Enterprise II*. *Planet II*, 614 F.App’x at 914-15.

Planet III – On remand, a new district court judge granted in part and denied in part CNS’ motion for summary judgment, *CNS v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016), concluding: (1) “CNS has succeeded in establishing a qualified First Amendment right of *timely access* to such complaints that *attaches when new complaints are received by a court,*” *id.* at *12; and (2) Ventura’s no-access-before-processing policy violated the First Amendment because Ventura failed to justify it under either *Press-Enterprise II*-level scrutiny or the intermediate time, place, and manner test Ventura argued should apply. *Id.* at *16-21.

Planet appealed. In January 2020, this Court issued *Planet III*, affirming as to the no-access-before-processing policy.⁷ *Planet III* includes rulings on most of the matters at issue in this case, including (1) abstention; (2) when the qualified First Amendment right of access to new complaints attaches; and (3) the level of scrutiny used to test the constitutionality of access delays.

Entering judgment for CNS on remand, the district court said there is “a qualified First Amendment right of timely access to newly filed civil complaints” that “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.*” *CNS v. Planet*, 2021 WL 1605216, at *1 (C.D. Cal. Jan. 26, 2021).

B. CNS v. Yamasaki

Filed shortly after the summary judgment ruling in *Planet*, *CNS v. Yamasaki* also involved delays in access caused by a no-access-before-processing policy. Unlike Ventura, the court at issue – California’s Orange County Superior Court (“OCSC”) – was an e-filing court.

Parting ways with *Planet*, a different district court judge granted OCSC’s summary judgment motion, concluding “the public doesn’t have a First

⁷ The Ninth Circuit upheld Ventura’s policy of scanning new complaints and posting them to public access terminals, which Ventura adopted after *Planet I*, based on evidence that conditions at the time had left Ventura without alternatives. *Planet III*, 947 F.3d at 599-600.

Amendment right to access new civil complaints on the same day they are submitted to the courts,” and “timely access is provided – at a minimum – when complaints are released the calendar day after they’re submitted.” *CNS v. Yamasaki*, 312 F. Supp. 3d 844, 867-68 (C.D. Cal. 2018). One month after the *Planet III* ruling, the same panel that decided *Planet III* issued a “for publication” order reversing and remanding “for further proceedings consistent with this Court’s opinion in [*Planet III*].” *Yamasaki*, 950 F.3d at 640. In doing so, this Court effectively rejected the district court’s creation of what amounted to a one-calendar-day constitutional grace period, during which complaints could be withheld for any reason or no reason at all. *Yamasaki* subsequently settled after OCSC agreed to cease its no-access-before-processing policy and provide on-receipt access through a press review queue. 5-ER-1108-10; 6-ER-1153-55 (¶¶ 73-76).

II.

ABSTENTION IS FORECLOSED BY *PLANET I* AND *III* AND THE REJECTION OF APPELLANT’S ONLY AUTHORITY BY EVERY CIRCUIT TO CONSIDER IT

Nothing about this case makes it so different from *Planet* – in which this Court rejected abstention not once but twice – to make it one of the rare exceptions to the rule that ““federal courts have a strict duty to exercise the jurisdiction that is conferred upon”” it. *Center for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d

1041, 1051 (9th Cir. 2019)).⁸ Appellant argues *Planet* is distinguishable, that this case is “more similar to” *Brown*, and that an Idaho case changes the result here. AOB 15-21. But the purported distinctions Appellant relies on are illusory, and *Planet III* “already soundly *rejected* the holding in *Brown*,” 1-ER 53, as has *every single court* since *Brown*, except one district court that was reversed. *See CNS v. Gilmer*, 48 F.4th 908, 913-15 (8th Cir. 2022).

A. Appellant Places Misguided Faith In *Brown*

In *Planet I*, CNS sued over the same issue as here: denial of access to new complaints “until they have been fully processed.” 750 F.3d at 779. The clerk obtained abstention in the district court under *O’Shea* on the notion that “if CNS prevailed, federal district courts would, in effect, dictate how the state courts should allocate scarce resources,” and under *Pullman* on the theory that state law “could obviate any federal constitutional issue.” *Id.* at 782; AOB 15. This Court reversed in *Planet I*. After *Brown*, the clerk argued abstention again in *Planet III*, but this Court rejected the Seventh Circuit’s approach. *Planet III*, 947 F.3d at 591 n.4 (“[w]e disagree ... with the Seventh Circuit’s decision to abstain”).

Appellant neglects to mention *Brown* has also been rejected by *every other*

⁸ The federal courts’ “unflagging obligation” to exercise their jurisdiction “is particularly weighty when those seeking a hearing in federal court are asserting ... their right to relief under 42 U.S.C. § 1983.” *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983). An abstention doctrine cannot be applied unless each of its requirements are met; balancing the elements is not permitted. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

appellate court to consider it. The only court to do what Appellant asks and follow *Brown* – the district court in *CNS v. Gilmer*, 543 F. Supp. 3d 759 (E.D. Mo. 2021) – was reversed, 48 F.4th at 913-15, making the Eighth Circuit one of five circuits to reject *Brown*, along with the Second (*Corsones*, 131 F.4th at 78), Fourth (*Schaefer*, 2 F.4th at 324-25), and Tenth (*New Mexico*, 53 F.4th at 1257-63).

This is not surprising. *Brown* “acknowledged that the facts did not fit perfectly within the four principal abstention doctrines,” *Gilmer*, 543 F. Supp. 3d at 766, including “*Younger*, [and] its extension in *O’Shea* and [*Rizzo v. Goode*, 423 U.S. 362 (1976)],” and instead “base[d] [its] decision on the more general principles of federalism that underlie all abstention doctrines.” 908 F.3d at 1071. But that is not how *Younger* abstention works, as the Supreme Court explained in *Sprint Commc’ns v. Jacobs*, 571 U.S. 69 (2013). Because *Brown* “flatly ignores” this “recent Supreme Court guidance emphasizing *Younger* abstention should not be applied ‘outside ... three exceptional categories,’” 1-ER-54-55 (quoting *Sprint*, 571 U.S. at 78) – which *Brown* conceded do not exist in CNS cases, 908 F.3d at 1072 – it cannot be followed.

This is no less true in cases involving access “in each county of the State” to complaints filed “in electronic form,” *Corsones*, 131 F.4th at 63, as Appellant suggests. AOB 11, 17. Both the Second and Tenth Circuits rejected *Brown* in the context of cases involving e-filed complaints statewide. Even within that context,

both circuits found a “bright-line rule invalidating [a] pre-access review process” does “not unreasonably intrude upon the ... judiciary’s autonomy or risk the sort of ‘monitoring of the operation of state court functions that’ *O’Shea* prohibits.” *Corsones*, 131 F.4th at 77-78; *accord New Mexico*, 53 F.4th at 1257-63. As this Court has observed, “*O’Shea* abstention has proved exceedingly rare.” *Redd v. Guerrero*, 84 F.4th 874, 887 (9th Cir. 2023) (discussing *Planet I*).

Indeed, though some e-filing courts have adjusted their practices in response to litigation challenging no-access-before-processing policies, Appellant can point to no example of subsequent intervention from a federal court (which would have been a matter of public record), let alone an “ongoing federal audit” of state proceedings. *Planet III*, 750 F.3d at 791-92; *see, e.g.*, 6-ER-1141-47 (¶¶ 45-53) (New York), 6-ER-1148-49 (¶¶ 57-58) (multiple California counties), 6-ER-1151-52 (¶¶ 68-69) (Florida), 6-ER-1153-55 (¶¶ 73-76) (OCSC, California); RJN, ¶¶ 2, 3, 15 & Exhs. 2, 3, 15 (Missouri; New Mexico).

B. The *Citizens* Decision Provides No Basis For Abstention

Appellant also asserts a new theory for abstention, not raised below: that abstention is warranted to prevent federal courts from “interfering with” an Idaho Supreme Court decision, *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. Of Commissioners*, 168 Idaho 705 (2021). AOB 11, 15, 18-20.

Even if not waived,⁹ this theory has no merit.

In *Citizens*, a clerk reviewing an e-filed petition for administrative review thought it needed a case information sheet and returned it to the filer for correction (*i.e.*, “rejected” it) rather than “accepting” it. The *Citizen* parties disputed whether the filer had made the correction and re-submitted the petition, such that it would have received a filing date as of the original submission, under IREFS 13(c). The Idaho Supreme Court concluded the petition had not needed a cover sheet in the first place, should not have been rejected, and was “filed” as of the date it was first submitted. *Id.* Thus, *Citizens* does nothing more than repeat what IREFS 13 says.

Nothing in *Citizens* – or IREFS 13(c) – is inconsistent with the district court’s ruling that the right of access attaches upon submission, a ruling dictated by *Planet III*, 947 F.3d at 588, 594, and every other case that has addressed this issue, as discussed in Section III *infra*. Nor do Idaho’s rules – or *Citizens* – preclude pre-processing access. The district court did not “improperly weigh[in] on and contradict Idaho substantive law,” as Appellant suggests. AOB 19.

Moreover, Appellant’s reliance on *Citizens* could not support abstention here

⁹ The “well-established principle that in most instances an appellant may not present arguments in the Court of Appeals that that it did not raise in the court below,” *Serv. Emps. Int’l Union v. Nat’l Union of Healthcare Workers*, 598 F.3d 1061, 1073 (9th Cir. 2010), applies equally to “new,” *Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 570 (9th Cir. 1987), and/or “alternate theor[ies].” *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 552 (9th Cir. 1996).

because her theory that “failing to abstain leads to federal courts interfering with Idaho *substantive* law,” AOB 18, is not grounds for abstention under *Younger* or *O’Shea* and *Rizzo*, see *Gilmer*, 48 F.4th at 913-14, or any other abstention doctrine. Only *Pullman* abstention involves questions of state law, but aside from referencing its standard of review on appeal, AOB 14, Appellant has not raised *Pullman*, for good reason. As *Planet I* recognized, *Pullman* does not apply by its terms: it is only allowed where, inter alia, “the proper resolution of the possible determinative issue of state law is uncertain,” *Planet I*, 750 F.3d at 783-84, which is not the case here. More fundamentally, as *Planet I* recognized, “*Pullman* abstention ‘is generally inappropriate when [as here] First Amendment rights are at stake.’” *Id.* at 784.

III.

AS *PLANET III* AND EVERY COURT TO CONSIDER THE QUESTION HAS CONCLUDED, THE FIRST AMENDMENT ACCESS RIGHT ATTACHES WHEN THE FILER SUBMITS THE COMPLAINT

Every court to have considered the question, including this one, has rejected the notion that the First Amendment access right only attaches to a complaint if and when court staff deem it to have been sufficiently processed. *E.g.*, *Planet III*, 947 F.3d at 588, 594; *Corsones*, 131 F.4th at 66; *New Mexico*, 53 F.4th at 1262. “Never dissuaded,” 1-ER-21, Appellant asks this Court to ignore this authority – and common sense – and hold the district court erred in reaching the conclusion

“that ‘the First Amendment right of access attaches to complaints when the court receives them, regardless of the technical terms and clerical processes used by the court.’” 1-ER-21 (quoting *New Mexico*, 53 F.4th at 1262).

The appeal of this argument to court administrators is understandable. It “creatively puts any delay in the process *before*” post-processing “acceptance” (what Appellant considers “filing”), such that a complaint could sit in a clerk’s computer queue indefinitely “while various processes and procedures are completed,” without ever implicating any constitutional access right. 1-ER-22.

It is also obvious why the argument has been uniformly rejected: If “the labels and terminology a state court employs to identify different parts of the filing process” could have “a determinative effect on when the First Amendment right of access attaches,” administrators could avoid constitutional scrutiny “by adopting administrative rules that define a document as ‘filed’ much later in the judicial review process.” *CNS v. Cozine*, 2022 WL 593603, at *7 (D. Or. Feb. 14, 2022). Such a result “not only contradicts the Supreme Court’s jurisprudence, which makes clear that administrative rules cannot abrogate constitutional rights, but also is antithetical to the importance of media access that *Planet III* identified.” *Id.*

A. *Planet III* Established That The First Amendment Access Right Attaches When The Filer Submits A Complaint To The Court

Appellant’s assertion that “[t]he complaints at issue here are not analogous to those in *Planet III* because they have not yet been ‘filed with the court,’” AOB

3, ignores that – like Appellant – the *Planet* clerk insisted that “new unlimited civil complaints received [by the court] **are not ‘filed’** until after they are processed, nor do newly filed complaints become ‘official court records’ or ‘public records’ until after they are processed.” *Planet*, 2016 WL 4157210, at *3.

The *Planet* district court rejected this position, holding the First Amendment right attaches “when the complaint is received by the court” rather than “after a complaint has been sufficiently ‘processed.’” *Id.* at *12. On appeal, the Ninth Circuit characterized the holding as “the right to timely access attaches at the moment of filing, *i.e.*, when the complaint is **received** by the court,” *Planet III*, 947 F.3d at 588, and agreed with it: “[W]e conclude, **as did the district court**, that the qualified right of access to nonconfidential civil complaints arises when they are filed with the court” *Id.* at 594.

An e-filed complaint sitting in Idaho’s e-filing manager awaiting clerk processing is no different from the paper-filed complaints in *Planet* that were sitting in a basket awaiting clerk processing. *See Planet*, 2016 WL 4157210, at *4-5. As the District of Oregon recognized in the context of the same Tyler e-filing system Idaho uses, RJN, ¶ 13 & Exh. 13, “the facts ... in *Planet* confirm that the right of access attaches when the court receives the document” because “Ventura[’s] seven-step acceptance process and quality control review ... mirror[s] Oregon’s after-submission review of e-filed complaints.” *CNS v. Cozine*, 2022

WL 1000775, at *2.

Appellant’s procedure – review by a clerk, acceptance, and transfer into an electronic case file – is functionally the same as in *Planet*, where clerks would “review complaints,” enter their data into a case management system, “stamp the[m] ... as ‘Filed’” once accepted, then transfer them into the “case file” – all *before* allowing access. *Planet*, 2016 WL 4157210, at *13. Contrary to Appellant’s suggestion, AOB 25, an e-filed complaint sitting in Idaho’s e-filing manager waiting for clerk processing is not like a paper complaint in the hands of a filer standing in line at the filing counter: “While filers waiting in line at the clerk’s window have not yet submitted their paper complaints to the court, electronic complaints waiting in the digital queue has already been submitted by the filer and received by the court.” *New Mexico*, 53 F. 4th at 1267.

Appellant’s attempts to equate Idaho’s e-filing system with the clerk’s physical “countertop,” *e.g.* AOB 10, 27-28, do not provide a basis to distinguish *Planet* either. While e-filing systems and filing counters are both ways to submit filings to the court, Appellant’s “countertop” argument breaks down because she erroneously assumes an e-filed complaint submitted by a filer “has not crossed the clerk’s ‘counter’ until the clerk accepts it.” AOB 27. However, it is undisputed “[e]lectronic submissions are made [by filers] through the public-facing side of File & Serve,” SER-198, and once submitted the filing is “electronically delivered

to the clerk’s inbox” where it is then available for clerk review and processing. SER-74 (38:17-40:10), 5-ER-914.

As the Tenth Circuit explained, in e-filing, “submission of a complaint” is “‘when the magic of the electronics brings that document ... to the court,’ ... ‘the moment when [a clerk] could begin to look at it.’” *Id.* “[T]his critical moment in time – regardless of whether a filer hands a paper complaint to an intake clerk, or whether a filer hits the ‘submit’ button on the electronic-filing software – is when the First Amendment right of access attaches.” *Id.* This moment of submission is when the filer invokes “‘the authority of the people of the United States ... to achieve his personal ends.’” *Planet III*, 947 F.3d at 592-93.

B. Courts Have Uniformly Found The First Amendment Access Right Attaches On Receipt, Regardless Of Administrative Definitions

The folly of using a clerical definition to dictate when a constitutional right applies was evident not only to the district court, 1-ER-20-25, but to every other court that has considered similar arguments, whether in the context of paper-filed or e-filed complaints.

The Tenth Circuit explicitly rejected the notion that terminology associated with New Mexico’s e-filing system – the same Tyler system Idaho uses, RJN, ¶ 10 & Exh. 10 – could determine whether and when the First Amendment applies to e-filed complaints: “[T]he First Amendment right of access attaches to complaints when the court receives them, regardless of the technical terms and clerical

processes used by the court.” *New Mexico*, 53 F.4th at 1261-62.

In *CNS v. Gabel*, 2021 WL 5416650, at *9 (D. Vt. Nov. 19, 2021), which also involved a Tyler system, *id.* at *3, *8 n.3, the district court observed “[t]he public right of access generally attaches when a newly filed civil complaint is received by a court.” The Second Circuit affirmed, holding the “First Amendment right of access to newly filed complaints ... attaches upon a court’s *receipt* of such complaints.” *Corsones*, 131 F.4th at 66.

As in these other cases, Appellant’s attempt to “disingenuously focus on the technical terms applied to various intake and docketing tasks, rather than the delay such tasks may cause” – must be rejected. *New Mexico*, 53 F.4th at 1266; *see also O’Shaughnessy*, 663 F. Supp. 3d at 818 (rejecting clerk’s argument that “a complaint is not filed until she says it is”); *Cozine*, 2022 WL 1000775, at *2 (“[A]s *Planet* makes clear, the right of access to civil complaints attaches when they are submitted to the court.”).

Notwithstanding this authority, Appellant asserts *Press-Enterprise II* “experience” and “logic” does not support a right of access on receipt in Idaho because, she says, “the press and public did not have pre-acceptance access to complaints in Idaho like CNS seeks in this case.” AOB 28-32. As the district court correctly explained, the experience-and-logic test does not hinge on the “timing of CNS’ historical access,” in the way that Appellant suggests, but instead

“looks to the whole ‘place and process’ of the access” 1-ER-24 (quoting *Press-Enterprise II*, 478 U.S. at 8); *accord*, e.g., *New Mexico*, 53 F.4th at 1266-69; *Corsones*, 131 F.4th at 68 n.12 (argument that CNS must show that “a novel ‘instantaneous access right’ ... satisfies the ‘experience and logic’ test ... misunderstands the *Press-Enterprise II* framework”). Moreover, 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).¹⁰ The First Amendment applies to civil complaints in Idaho the same as it does to civil complaints in the rest of the country.

In a similar argument, the AOB repeatedly asserts that, unlike the complaints in *Planet*, those here are not “judicial documents” because, the AOB claims, the complaints here are not “filed” under her interpretation of Idaho’s administrative definitions. This argument fares no better than others in this same category. Just as courts have found administrative labels do not affect substantive First Amendment rights, this Court has previously found that the “public’s right to access” to what is “quintessential[ly] a judicial document” “cannot be absterged”

¹⁰ Misrepresenting the testimony of CNS’ reporter, the AOB says she only wanted to review paper-filed complaints “the clerk had accepted for filing because she would not report on something that ‘hadn’t been filed yet in the legal system.’” AOB 29-30. Read in context, the reporter was using “filed” in the ordinary sense – *i.e.*, complaints handed to the intake clerk. 8-ER-1814 (58:11-59:3).

by procedural distinctions like whether a document is “filed” or merely “lodged.”

Rocky Mountain Bank v. Google, 428 F.App’x 690, 692 (9th Cir. 2011).¹¹

C. **Idaho’s Own E-Filing Rules Undermine Appellant’s Argument**

It is black letter law that in the event of a conflict between the constitution and court rules, the constitution controls. *Washington-S. Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635–36 (1924) (“[t]he function of rules is to regulate the practice of the court and to facilitate the transaction of its business... no rule of court can abrogate or modify the substantive law.”).

In any event, Idaho’s rule that an e-filed document “will be considered filed” when it has been “accepted for filing,” IREFS 11(a), sits in a framework compatible with the traditional understanding of what it means to “file” a document. *See* 1-ER-22-23 (“Omundson’s interpretation is contradictory to [Idaho’s rules].”). Idaho defines “[e]lectronic filing” as “the process whereby a filer electronically *transmits* documents to a court in an electronic form to initiate an action or to be included in the court file of an action.” IREFS 2(c). For e-filed documents, “the date and time that the filer submits the electronic filing will serve as the filing date and time for purposes of meeting the statute of limitations or any

¹¹ *Rocky Mountain* and the cases Appellant cites at AOB 25-26 & n.4 for the definition of the term “judicial document” involved the common law right of access, which is distinct from the First Amendment right of access at issue here. While the common law right of access applies to all “judicial documents,” it is not as protective of access rights as the First Amendment right.

other filing deadlines, *even if placed into an error queue for additional processing.*” IREFS 12(a)(1). As long as the document is not rejected, “the electronic filing system will affix the date and time of submission on the document as the date and time of filing of the document.” IREFS 12(a)(2).¹²

Similarly misplaced is Appellant’s reliance on IREFS 3 for the proposition that an e-filed document becomes part of the “official court record” when it is “accepted.” *See, e.g.*, AOB 6, 23-24 & n.3, 30-31. IREFS 3 says no such thing. It provides only that “[t]he official court record for a case” consists of “the electronic case file” and “any paper filings,” but that the court may digitize a document filed in paper and consider that electronic version to be “the official court record of the filed document.” IREFS 3.

IV.

APPELLANT CONCEDES, AS SHE MUST, THAT HER POLICY HAS CREATED PERVASIVE DELAYS IN ACCESS TO CIVIL COMPLAINTS

While the parties disagree about how delays caused by Appellant’s no-access-before-processing policy should be measured, there is no dispute pervasive delays exist. Appellant provided detailed data about the complaints in the relevant categories that were e-filed throughout Idaho from January 1, 2021, to July 31,

¹² Even if an e-filing is rejected, it will still receive a filing date and time as of the original submission as long as the filing is corrected and re-submitted within three business days. IREFS 13(c). Only if a document is returned for correction and not re-submitted will it “be deemed to have not been filed.” IREFS 13(a).

2022. 7-ER-1429-31 (¶¶ 4-13), 9-ER-2123-24, 10-ER-2129-2411; SER-174. Both parties used this same data to analyze delays in access to the complaints at issue during this period. *Id.*

A. The Delays In This Case

Appellant does not and cannot dispute that during this period Idaho Courts withheld ***nearly half (42%)*** of all complaints at issue until at least the following day. 7-ER-1429-32 (¶¶ 4-18), 7-ER-1440-41. Or that approximately 15% were unavailable for two calendar days or longer. 7-ER-1440-41. Or that individual delays during that period were regularly worse, varying in degree from court to court, month to month, and week to week. 7-ER-1387-1426; SER-175. For example, the district court for Kootenai County, Idaho’s third-most populous county, withheld every complaint e-filed in April 2021 until at least the following day, with 98% of them withheld for two calendar days or longer. 7-ER-1404-06.¹³ And there were “several documented periods,” *Planet III*, 947 F.3d at 597, during 2021 and 2022, where it took Kootenai County two or more court days to process and make available one-fifth to ***more than three-quarters*** of newly filed complaints:

¹³ Appellant notes *Planet* measured delays in court days rather than calendar days (*i.e.*, intervening weekends and holidays not counted), AOB 42, but does not mention that counting in court days does not change the percentage of complaints that Idaho Courts withheld until at least the following day – ***nearly half (42%)***. 7-ER-1432 (¶¶ 16-18), 7-ER-1442-44. Approximately 10% of all complaints at issue during the period were unavailable for two court days or longer. 7-ER-1442-44.

Time Period	Same Day (%)	Next Day (%)	2+ Day (%)
Jan. 2021	36	41	23
Feb. 2021	21	8	71
March 2021	18	5	77
April 2021	0	2	98
June 2021	11	14	75
July 2021	31	38	31
Aug. 2021	49	26	26
Sept. 2021	23	38	40
Oct. 2021	20	3	78
Nov. 2021	0	21	79
Dec. 2021	39	39	21
March 2022	9	63	28

7-ER-1393, 7-ER-1420-21, 7-ER-1424. These delays are hardly a “far cry,” AOB 13, from those in *Planet*, where the Court focused on several periods between 2012 and 2014 where it took two or more court days for Ventura County to process and make available “one-fifth to two-thirds of newly filed complaints.” *Planet III*, 947 F.3d at 597-98.

The delays in this case are comparable to the pre-lawsuit delays in *CNS v. Schaefer*, 440 F. Supp. 3d 532, 547-48 (E.D. Va. 2020), *aff’d*, 2 F.4th 318 (4th Cir.

2021), and *Corsones*, 131 F.4th at 65 (45% delayed a day or more, 23% delayed two or more days), and longer than those in *CNS v. Tingling*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016) (rejecting position that “[t]he next business day ... is immediate enough” where one-third of complaints were held at least one day). RJN, ¶ 17 & Exh. 17 at 34-35, 46-52). They are also longer than the one-day grace period in the *Yamasaki* district court decision that was reversed by this Court. 312 F. Supp. 3d at 867-68; *rev’d*, *Yamasaki*, 950 F.3d at 640.

Moreover, the cases that have struck down these no-access-before-processing policies have not done so solely, or even primarily, on the length of the delay. Rather, once a presumptive constitutional right of access has attached, the next question is whether, under constitutional scrutiny, the delay is justified by the reasons given for it and a lack of alternatives. Put another way, when it comes to ongoing delays caused by policies challenged as constitutional, whether those delays can be justified is answered not by looking at their length as an abstract matter like the district court reversed in *Yamasaki*, but by applying meaningful and fact-specific constitutional scrutiny to determine whether those delays can be justified under the circumstances of the particular case.

B. How Appellant Measures Delays

Unable to deny these delays, Appellant offers a way to measure them so they seem “insignificant and easily justified.” AOB 43. She disregards the actual

passage of time from the complaint's submission to when it becomes available to the public. Instead, she stops the clock whenever the courthouse is closed to the public, presenting the delays in "business hours." *See* AOB 42-43. The district court recognized how "business hours" compares to the actual passage of time: "[I]f a complaint was filed at 3:00pm on a Friday and reviewed by 9:00am the following Monday, that would only count as three business hours even though two and a half calendar days had elapsed." 1-ER-28.

Measuring a delay in "business hours" rather than court or calendar days yields a smaller number but does not make the actual delay any shorter or less problematic. CNS measures delays in calendar days because it reflects time as humans actually experience it. The press and public care whether a complaint was filed today or yesterday or last week. They do not know or care how many hours court staff were working during that span. Even before the Internet, and especially now, the daily news cycle – and the reality that most people sleep at night – means that a delay until the following day or longer is qualitatively different than a delay within a single day. *See* 6-ER-1129-30 (¶¶ 11-12).

Appellant's "business hour" calculation renders her assertion that the relief CNS seeks would merely make complaints available "a few hours sooner," AOB 45, disingenuous. As Appellant knows, taking "a few" "business hours" to process a complaint filed after 3:00 p.m. – as many of the most newsworthy complaints

typically are – means it won’t be available until the next day the court is open.

And even under Appellant’s “business hour” calculations, substantial numbers of complaints had still not been processed after three business days (24 “business hours”). 9-ER-2123-24 (¶ 6(j)).¹⁴

V.

APPELLANT CANNOT SATISFY HER BURDEN OF JUSTIFYING HER NO-ACCESS-BEFORE-PROCESSING POLICY

In order to survive the *Press-Enterprise II* scrutiny that *Planet III* held is required in cases like this one, Appellant “must demonstrate first that there is a ‘substantial probability’” that an overriding interest ... “would be impaired by immediate access, and second, that no reasonable alternatives exist to ‘adequately protect’ that government interest.” *Planet III*, 947 F.3d at 596; *Press-Enterprise II*, 677 F.3d at 9, 14. This part of the *Press-Enterprise II* test “is ‘rigorous,’ but not strict, scrutiny,” *Planet III*, 947 F.3d at 596, and the government bears the burden of satisfying this “fact-intensive” second stage. *Leigh v. Salazar*, 677 F.3d 892,

¹⁴ Appellant further confuses her delay statistics by including all types of initial filings, as opposed to the A.A. filing fee category of cases that are at issue here. For example, she says “it took an average of 4.82 business hours statewide between submission of an initial civil filing and clerk review,” AOB 43, without mentioning the statistic is based on *all* initial filings.

900 (9th Cir. 2012). The undisputed evidence shows that Appellant cannot meet this burden.¹⁵

A. Following *Planet III*, The District Court Correctly Tested Appellant’s Delay-Causing Policy Under *Press-Enterprise II* “Rigorous” Scrutiny

Planet III recognized that a practice that creates ongoing delays in access to new complaints may be constitutional, but only if it satisfies *Press-Enterprise II* scrutiny. 947 F.3d at 596. Despite this binding authority, Appellant insists the district court should have applied the intermediate-level time, place, and manner (“TPM”) test the defendant and concurring judge in *Planet* argued for, but that *Planet III* expressly declined to apply. 947 F.3d at 596 n.9. Appellant’s TPM argument has already been decided by this Court, and it did not carry the day.

The Second Circuit similarly rejected TPM for access-delay challenges, explaining:

[TPM] applies when the achievement of a significant government objective necessitates some imposition on a claimed right that is largely immaterial to the exercise of that right, whether that

¹⁵ As in her motion to dismiss, Appellant misreads *Planet III* as foreclosing any outcome that would result in “immediate access.” AOB 3, 46-47. To the contrary, when the Court observed that the First Amendment access right does not, in and of itself, “demand[] immediate, pre-processing access” to newly filed complaints, 947 F.3d at 594, it was speaking to the qualified nature of the right. When the right of access attaches, “a presumption of access arises.” *Id.* at 594-96. Appellant then has the opportunity to justify her delay-causing restriction by satisfying *Press-Enterprise II* scrutiny. As the district court recognized, in an e-filing environment, immediate access is the natural result when clerks do not delay access for processing – *i.e.*, where access is “un-delayed.” 1-ER-50.

imposition at one or another time or place, or in one or another relatively comparable manner. ... where a court withholds public access to a complaint, there may be no alternative channel for the public to become aware of the complaint and its substance. ... furthermore, news is a perishable commodity. “The peculiar value of news is in the spreading of it while it is fresh.”

Corsones, 131 F.4th at 73 (quoting *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918)).¹⁶

Appellant also claims *Planet III* is “flawed,” AOB 36, because, she says, “[a]lthough the *Planet III* majority claimed this standard was a “more relaxed” standard ... the standard applied by the *Planet III* majority closely resembled ‘strict scrutiny.’” AOB 35. But as the Second Circuit observed, *Press-Enterprise II* scrutiny “is not strict scrutiny”:

The strict scrutiny standard was well established by 1986, when *Press-Enterprise II* was decided. If the Supreme Court had intended policies that burden the right of access to be reviewed under strict scrutiny, it would have said so. Strict scrutiny is far stricter than the *Press-Enterprise II* standard. Applying strict scrutiny to a state practice or policy generally means its death knell. ... While *Press-Enterprise II* scrutiny is demanding, it is not strict scrutiny.

Corsones, 131 F.4th at 73.¹⁷

¹⁶ In *Schaefer*, the district court said: “Fourth Circuit precedent requires the application of strict scrutiny to this case.” 440 F. Supp. 3d at 559. However, it misread *Planet III* as applying “intermediate [TPM] review, *id.*, so it applied – and found the restrictions at issue in that case failed – both tests. The Fourth Circuit affirmed on TPM grounds. 2 F.4th at 328 (4th Cir. 2021).

¹⁷ As the Second Circuit further explained, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), both “predate *Press-Enterprise II*, in which the Supreme Court

Appellant lobbies for the TPM standard because she believes she would not have to justify her no-access-before-processing policy under TPM. AOB 36 Appellant is mistaken. “First Amendment interests ... require” courts to “apply [TPM] mid-level scrutiny with care, paying attention to the details of the regulation at issue, the state of the record, and the fit between the regulation and the government interest asserted.” *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (en banc). In addition to proving its policy is “content-neutral” and leaves open “““ample alternative channels for communication of the information,”” the government must prove it is “““narrowly tailored to serve a significant government interest,””” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011), “demonstrat[ing]” its policy “will in fact alleviate those harms in a direct and material way.” *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994). TPM restrictions must “not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

Ventura’s no-access-before-processing policy did not survive even the TPM test the *Planet III* concurrence applied. Even under TPM, Judge Smith concluded

crystallized the framework for evaluating the right of access to court documents. If there is incompatibility between the earlier pronouncements and *Press-Enterprise II*, the later formulation superseded the original and is controlling.” *Corsones*, 131 F.4th at 73.

Ventura failed to “explain how ‘processing’ the complaints before making them available to the press furthered his stated reason for the policy.” *Planet III*, 947 F.3d at 604 (N.R. Smith, J., concurring as to Part III).

B. Appellant Has Failed To “Demonstrate A Substantial Probability That” Any Overriding Government “Interest ... Would Be Impaired” Without Her No-Access-Before-Processing Policy

Though obscured by lofty language – like “promoting access to the courts” and “ensuring public confidence in the judicial system,” AOB 13 – a closer look reveals that Appellant offers three “interests” to justify her no-access-before-processing policy: (1) ensuring clerical errors are corrected; (2) preventing the confusion that would supposedly result if someone saw a complaint that was later rejected and never corrected; and (3) preventing release of confidential information. *See* 1-ER-31.¹⁸

For each, Appellant must “demonstrate ... a ‘*substantial probability*’ that [the] interest ... *would* be impaired by immediate access.” *Planet III*, 947 F.3d at 596. Imagining scenarios in which an interest might theoretically be implicated is not enough. To overcome the presumption of access, the government must prove its policy will actually advance its stated goals. *Press-Enterprise II*, 478 U.S. at 14

¹⁸ Other interests mentioned (*e.g.*, “managing judicial resources,” “protecting document security”), AOB 13, are not interests she claims are protected by withholding access for clerk review. Rather, they are reasons she gives for not adopting particular alternatives and are properly addressed in relation to the “alternatives” prong of the *Press-Enterprise II* test. *See infra* 49-60.

(requiring a “substantial probability that the defendant’s right to a fair trial **will** be prejudiced by publicity that **closure would prevent**”); *Leigh*, 677 F.3d at 900 (“[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary”). “[C]onclusory assertion[s]” are insufficient. *Press-Enterprise II*, 478 U.S. at 15.

1. Ensuring Clerical Errors Are Corrected

Appellant’s emphasis on Idaho clerks as “gatekeepers for improperly submitted documents,” AOB 38, misses the point. CNS does not seek – and the district court did not order – the “[e]liminat[ion of] clerk review.” AOB 45. Every e-filing court – including those that do not condition access on processing – addresses clerical errors in e-filed complaints. *See, e.g.*, 6-ER-1140-41 (¶ 43); AOB 38. Appellant offers no interest – let alone an overriding one – that could be harmed if such clerical “errors are corrected **after** the documents become public rather than before.” 1-ER-31.

2. Preventing Confusion

Appellant asserts that “providing access before acceptance of a complaint by the clerk could erode public confidence in the court system” because “the press and public would have access to a complaint that was never filed [*i.e.*, accepted], thereby causing unnecessary suspicion as to why.” AOB 31. Setting aside whether this even qualifies as an “overriding interest,” *Press-Enterprise II*, 478

U.S. at 9, this factually unsupported supposition as to what “could” happen falls into the category of speculation – far short of what *Press-Enterprise II* requires.

The overwhelming majority of e-filed civil complaints are not rejected, and most of those rejected are ultimately accepted. 4-ER-664-66. Appellant offers no evidence that the failure of an e-filed complaint to mature into an active case has been “wrongly attributed to an oversight or error by the judiciary,” AOB 31, in any of the numerous courts that have provided pre-processing access for years.

Moreover, if Appellant is correct that the public would be curious as to why a complaint was submitted, returned, and not subsequently corrected, that weighs in favor of giving the public *more* information about what happened with a particular complaint – not erasing any trace of it. “[T]he withdrawal or rejection of a complaint might itself be a matter of public interest that the press deems newsworthy.” *New Mexico*, 53 F. 4th at 1268. Indeed, Appellant’s own evidence establishes that a plaintiff might file a complaint solely to pressure a settlement, with the intention of withdrawing it once the defendant has either capitulated or called plaintiff’s bluff. SER-191. In that scenario, “[t]he public still has a right to know that the filing of the complaint in our courts influenced the settlement of the dispute.” *Planet III*, 947 F.3d at 592-93.

3. Confidentiality

Much of Appellant’s summary judgment argument in the district court

centered around the supposed risk that pre-processing access would result in the disclosure of confidential information. Perhaps because the record contains no evidence that the no-access-before-processing policy is necessary to protect confidential information, Appellant’s brief barely mentions this justification beyond the bare assertion that the policy “serve[s] ... privacy interests.” AOB 13.

Appellant was wise to reduce her reliance on her confidentiality justification. Idaho Courts can withhold access to complaints based on confidential information in only narrowly defined circumstances:

Documents Exempt from Disclosure. Certain categories of documents are presumptively exempt from disclosure by rule or statute. *See* ICAR 32(g). *No such documents are at issue in this case.* SER-19-20.

Documents Filed with a Motion to Seal. Documents may be sealed only by order of the court pursuant to a motion under ICAR 32(i). If the motion is e-filed with the document proposed for sealing, the filer “must select” a particular “filing code” (i.e., document type) that automatically keeps the document out of the public record until the motion is decided. IREFS 5(h), 7(a)(2)-(3); *see supra* at 10.

Protected Personal Data Identifiers. Social security numbers, financial account numbers, and other “personal data identifiers” should be redacted from complaints, but, as in *Planet*, Idaho expressly places the burden of redacting on

filers. IREFS 15(a)-(b); IRCP 2.6(a)-(b). “It is the *responsibility of the filer* to ensure that protected personal data identifiers are omitted or redacted from documents before the documents are filed. *The clerk of the court will not review filings to determine whether appropriate omissions or redactions have been made.*” IRCP 2.6(a); IREFS 15(a) (same). Compare *Planet III*, 947 F.3d at 597 (“no-access-before-process policy bears no relationship to ... concerns about privacy and confidentiality” where a court rule “requires the filer – not the court – to exclude or redact private information from publicly filed judicial documents”). The rules provide for sanctions against filers who knowingly violate the rules. IRCP 2.6(f)-(g); IREFS 15(f)-(g).

Given these rules, it is not surprising that Idaho’s “ministerial review” of civil complaints does *not* include a review for confidential information. See, e.g., SER-197 (¶ 6); 11-ER-2468-69 (¶ 3), 11-ER-2480-81 (¶ 3). Declarations from court personnel suggest that “an individual *could* inadvertently or maliciously submit a complaint with confidential information, such as social security numbers, birthdates, bank account information, etc.,” 11-ER-2477 (¶ 12), 11-ER-2485 (¶ 11), 11-ER-2499 (¶ 12), 11-ER-2506 (¶ 12), 11-ER-2511-12 (¶ 12), but *not one of them* identified an instance where this actually happened, let alone where clerk

review prevented such information from being included in a public filing.¹⁹ Four months of statewide complaint data shows not a single complaint rejected for failure to redact such information. 7-ER-1433 (¶¶ 19-20), 7-ER-1445-76.

C. Appellant’s Arguments About Alternatives Show A Lack of Will, Not A Lack Of Options

Under *Press-Enterprise II*, Appellant has the burden to prove that “no reasonable alternatives exist to adequately protect” her interests. *Planet III*, 947 F.3d at 596. Despite Appellant’s repeated – but factually unsupported – insistence, Idaho need not “revamp” or “overhaul its statewide e-filing system” to fix the delays. AOB 3, 8, 11. Nor are alternative options “undisputedly limited” based on Idaho Courts’ Tyler e-filing and case management systems. AOB 46.

The parties agree that alternatives fall within three categories: (1) Idaho could configure its current system to automatically accept the complaints at issue; (2) Idaho could keep its clerk-accept configuration but use Tyler’s off-the-shelf “press review tool” application to provide access to complaints awaiting clerk

¹⁹ The district court’s summary judgment order notes a statement Appellant’s counsel made during the hearing about an incident in which a “party wanted to publish ... nasty things about the prosecutor which the clerk caught and didn’t allow to be filed.” 1-ER-33, 2-ER-98 (31:4-8). In reality, the anecdote involved an attorney who filed a criminal-case document that contained “inflammatory information” and then “demand[ed]” it “be published on the Idaho Supreme Court’s cases of interest website.” 11-ER-2453 (¶ 14). The record does not support counsel’s assertion that clerk review led to the rejection of the filing, nor can Appellant point to authority that would permit a front-line clerk to refuse to accept a complaint based on a subjective view the contents are “inflammatory.”

review; (3) Idaho could keep its clerk-accept system, but use free, Tyler-provided technical specifications (API) to customize a solution to provide access to complaints awaiting clerk review. This last category leaves Appellant free to tailor the access to whatever Idaho prefers: a virtually unlimited array of choices.

Conspicuously absent from Appellant’s brief is any reference to the undisputed evidence that numerous courts – many of which use the same e-filing system as Idaho – do not withhold access to new e-filed civil complaints until after processing, using alternatives equally available to Appellant. 5-ER-971-73, 6-ER-1138-56, 6-ER-1264-65. Neither Appellant nor CNS is aware of *any problem* arising from pre-processing access in these courts. SER-159-60 (Rog. 26); 6-ER-1147 (¶ 53), 6-ER-1149-50 (¶¶ 61, 63), 6-ER-1152-53 (¶¶ 69, 71). The district court correctly concluded, on the basis of this evidence, that “those alternatives seem reasonable. Other states use alternative methods with good success.” 1-ER-34.²⁰

1. Auto-Accepting The Complaints At Issue

There is no dispute that Idaho could remedy the delays at issue by automatically accepting the categories of civil complaints at issue so they can be accessed regardless of whether clerks have completed processing. More than

²⁰ Appellant is wrong in saying the district court’s conclusion that “there [do] appear to be alternatives to the current system,” 1-ER-34, was based solely on federal-court practices. AOB 2, 9-10.

twenty Tyler state courts have configured their systems to auto-accept certain filings, SER-84 (77:17-78:17), with Nevada’s Eighth Judicial District Court using Tyler’s system to auto-accept all new complaints. 6-ER-1138-39 (¶ 38), 1264-67. Alabama, Connecticut, Hawaii, and Utah also use statewide auto-accept systems, 6-ER-1138-40 (¶¶ 36-37, 42), and Missouri’s auto-accept pilot program is slated to extend statewide by the end of the year. RJN, ¶¶ 3, 15 & Exhs. 3, 15.

Unable to point to any problems experienced by the courts that use auto-accept, Appellant dismisses this alternative based on trumped-up and/or hypothetical concerns about (1) “costs,” (2) “security,” and (3) “prejudice to litigants.” AOB 52-54.

a. So-Called “Costs”

Despite implying the opposite, Appellant does not contend Idaho would incur any out-of-pocket costs for auto-accept. It is undisputed that Tyler would charge Idaho *nothing* to configure its system to automatically accept the complaints at issue. SER-72 (29:19-30:23); 5-ER-923-24.

Instead, Appellant claims auto-accept “would put a significant strain on Idaho Courts’ judicial resources because filing errors typically addressed by court clerks will suddenly require court action to fix.” AOB 52. Her support for this is a statement from an Idaho judge that “a judicial order of some sort would be required to take any action in response to an improperly submitted complaint that

was automatically accepted,” which would “dramatically increase the workload of judges.” 11-ER-2427-28. This argument breaks down for three reasons.

First, as the district court observed, “[i]t is not clear ... why a judge, as opposed to a clerk, would need to fix the errors simply because the case was ‘officially on file’ instead of in the ‘pre-processing’ phase.” 1-ER-30. The rule Appellant relies on for this notion, ICAR 33, doesn’t say this.

Second, if Appellant believed this rule would make auto-accept burdensome, it could be changed. 1-ER-29-30; 7-ER 1645 (94:11-25). As the district court observed, “if a rule appears to be dictating *who* can edit materials based on where the file is, it might make the most sense to simply change the rule.” 1-ER-30. Appellant’s response to the court’s observation, AOB 39-42, is misleading and illogical. The district court did not “[r]equir[e] Idaho” to make **any** rule change, let alone require it to “vest its clerks with powers that would affect the substantive legal rights of litigants with no judicial oversight” AOB 40. Whether it chooses an auto-accept or clerk-accept configuration, Idaho is capable of deciding what actions can be taken by clerks and what must be handled by judges and of directing personnel accordingly.

Third, even if judicial action were required to correct filer errors in an auto-accept system, it would not a “significant[ly] strain” judicial resources, AOB 52, or “dramatically increase” judges’ workloads. 11-ER-2427-28. Four months of

undisputed statewide rejection data shows that each Idaho Court rejected an average of *fewer than two* of the complaints at issue each month. 7-ER-1433-34 (¶¶ 21-22), 7-ER-1477-79.²¹ As the district court correctly found, “the number of rejections per day is minimal.” 1-ER-30. “Thus, whether it is a judge or clerk that needs to address these cases, such could hardly be called burdensome.” *Id.*

Aware of how infrequently the complaints at issue in this case are rejected, Appellant seeks to dramatically expand the universe of filings – and thus inflate the number of rejections – by claiming that if Idaho’s no-access-before-processing policy is unconstitutional as to the complaints at issue, it is unconstitutional as to all court records (*e.g.*, subsequent civil filings; all filings in family, criminal, probate, and small claims proceedings) such that she will “have to eliminate this practice with respect to *all* submissions that would qualify as judicial documents” AOB 45.

The district court was right to reject this maneuver. 1-ER-28. CNS’ action seeks only A.A. categories of new civil complaints, not the entire universe of court

²¹ The assessment of Appellant’s declarant was based on a mistaken belief that all “civil filings” were at issue, 11-ER-2426 (¶ 5), rather than civil complaints in the relevant category. If he had known how few such complaints are rejected within his entire Judicial District (Bannock, Bear Lake, Caribou, Franklin, Oneida, and Power Counties), he could hardly have predicted a “dramatic[] increase” in judicial workloads. *See* 7-ER-1445-51 (Jan. 2021: one rejection in Caribou, one in Oneida, three in Bannock, and none in Bear Lake, Franklin, or Power), 7-ER-1452-1460 (July 2021: five total), 7-ER-1461-67 (Jan. 2022: two total), 7-ER-1468-76 (July 2022: three total).

records. *See, e.g., Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (“We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.”). Nor is there a record in this case that could be used to determine the constitutionality of practices as to the many categories of court records not at issue in this case.

b. “Security Concerns”

Appellant’s “security concern” with auto-accept—namely, her criticism of auto-accept’s supposed inability to “protect against malicious or inadvertent disclosure of confidential information,” AOB 54—fails because, as discussed *supra* at 46-49, Idaho clerk review does not include looking for confidential information. *See, e.g.,* SER-197; 11-ER-2468-69 (¶ 3), 11-ER-2480-81 (¶ 3).

c. “Prejudice To Litigants”

Appellant’s contention that automatically accepting the complaints at issue would be “prejudic[ial] to litigants” is equally unsound. AOB 54. Her argument that “filing errors” in an automatically accepted complaint would “go unnoticed for an indefinite period of time,” *id.*, begs the question of why Idaho clerks would delay their review of new complaints indefinitely if they were automatically accepted. Nothing in the record suggests that clerks court not promptly review complaints following auto-acceptance.

Moreover, despite her repeated claims of “prejudice,” Appellant points to a

single hypothetical scenario where auto-accept might require a choice between taking judicial action or impacting “the rights of litigants”: a plaintiff might select the wrong county from the e-filing interface, with neither the filer nor the court noticing the mistake until after the statute of limitations has lapsed. AOB 39, 54-55. But even that far-fetched situation would not be catastrophic. If reluctant to make the plaintiff bear the brunt of its error, the court could “transfer the case to the venue listed on the face of the complaint.” 11-ER-2451-52 (¶ 9). There is no evidence that this scenario has *ever* come to pass in auto-accept courts, let alone that it happens so frequently as to render auto-accept an unreasonable alternative.

2. Tyler’s Press Review Tool

Appellant acknowledges that Tyler offers an off-the-shelf “press review tool” to its customers,²² but she has rejected this option because of cost (\$108,000/year) and supposed security concerns. AOB 47-50. At summary judgment, Appellant said Idaho’s Court Technology Fund could not “support the cost of” Tyler’s press review tool because of a projected funding shortfall for 2024 such that an appropriation request would have to be made to the state legislature. 2-ER-211-12 (¶¶ 20-21). Whether a need to obtain money from the legislature could render alternative unreasonable is a moot point because for FY2025 the Fund

²² Courts using Tyler’s “press review tool” include numerous e-filing courts throughout California, Georgia and Texas. 6-ER-1148-49 (¶¶ 56-61); RJN, ¶¶ 4, 6, 7 & Exhs. 4, 6, 7.

revenue is projected to exceed expenditures by \$3.1 million. RJN, ¶ 9 & Exh. 9.

Appellant’s “security” arguments are based not on evidence of security risks but rather on Tyler’s apparent refusal to provide information Idaho requested per internal procedures for vetting vendor software. 5-ER-983-85 (58:3-60:6).

Appellant could get the information if she began the process of amending the e-filing contract to include the press review tool, but she cites the lack of information as a reason not to consider such amendment. 5-ER-980-82 (31:24-33:21).

Nor does the record bear out Appellant’s claim that “some of the answers [Tyler] provided raise serious concerns.” AOB 48. The supposed “serious concern” is whether those accessing e-filed documents in the press review tool could “manipulate” them. 7-ER-1519 (¶ 46); SER-184 (¶ 19). But Tyler has answered this question, explaining that its press review tool merely displays documents, and that it is *not possible* to modify them from within the tool. SER-85-88 (82:23-83:14, 85:17-23, 91:5-93:3). Appellant’s “cyber-security” witness Jennifer Dvorak admitted that she had never seen Tyler’s press review tool in operation or even spoken to personnel at courts that use it. 8-ER-1894 (24:9-20).

Lacking a basis to attack Tyler’s press review tool, Appellant criticizes a *different* Tyler-provided public access portal that Idaho *already uses*. AOB 49-50. She points to reports that in 2022, third-party bots accessed non-public information from the same Tyler portal used by a different entity. AOB 49-50. Tyler’s press

review tool was not involved. SER-116 (200:16-201:5).

In the same breath, Appellant notes that CNS sometimes uses bots to review public information on court web sites. While it is true that CNS sometimes uses bots “to assist the reporter in gathering routine clerical information such as the docket entries,” although it does not do so in Idaho, 8-ER-1705 (94:11-19, 95:3-8, 95:12-24), 8-ER-1716 (138:20-139:10), it is baseless and inappropriate for Appellant to suggest that CNS has engaged in “sweeping” activities “similar” to whatever caused the unrelated Tyler portal incident. AOB 49-50.

Finally, Appellant’s criticism of Tyler’s press review tool as lacking “security settings” to “prevent against inadvertent or malicious disclosure of confidential information,” AOB 48-49, fails because, again, Idaho clerks do not review complaints for such information. *See supra* 46-49. Similarly, the comment that Tyler “does not indemnify its customers” if complaints containing confidential information appear in a press review queue implies that Idaho Courts view themselves as potentially liable for allowing access to a complaint that contains confidential information when, in reality, Idaho disclaims any such responsibility. IRCP 2.6(a); IREFS 15(a).

3. Using Tyler’s Free API To Develop A Tailored Solution

Finally, Tyler will provide – at no cost to Idaho – an application programming interface (“API”) that Idaho can use to modify its website to provide

access to complaints while they await ministerial review. 11-ER-2552 (191:17-193:12). Doing so would address the security concerns Appellant professes having about Tyler’s press review tool, as Idaho could dictate security parameters for itself. As for cost, even if Appellant engaged a vendor to develop the queue, the record reflects that other courts have done so *for as little as \$12,500*. 6-ER-1153 (¶ 71). Appellant does not attempt to quantify any development, “personnel,” or “data hosting” costs, AOB 51, instead relying on Idaho’s since-remedied budget shortfall to assert that a legislative appropriation would be necessary. 2-ER-212 (¶ 21); *see* RJN, Exh. 9.

The record reflects that many state court systems have managed to provide such portals expeditiously, tailoring them to the jurisdiction’s preferences. For example, following a preliminary injunction against a no-access-before-processing policy, the New York courts adjusted their public access portal to display newly filed complaints alongside those that had been “accepted,” completing the necessary programming within six weeks. 6-ER-1141-47 (¶¶ 45-53). Similarly, after insisting that its no-access-before-processing policy was necessary to protect confidential filings, California’s OCSC agreed to implement an “Electronic Media Inbox into which new [e-filed complaints would] be automatically deposited upon receipt [by the court] for review by members of the media.” 5-ER-1108-14, 6-ER-1154-55 (¶¶ 74-76).

Florida also resolved a challenge to delays caused by its no-access-before-processing policy by creating a free, registration-based access portal. 5-ER-971-73, 6-ER-1151-52 (¶¶ 67-69). Launched within 75 days of entering into a settlement agreement, the portal notifies users that “[t]he documents found on this webpage have not been accepted by the Clerk and are not official court documents.” *Id.* Similarly, within three months of a preliminary injunction against Franklin County, Ohio’s no-access-before-processing policy, the clerk had “modified her public webpage to permit online viewing by the public of newly e-filed, non-confidential, civil filings upon receipt.” RJN, ¶ 1 & Exh. 1 (¶¶ 2-3).

Arizona developed its News Media Portal in response to a CNS request, with CNS agreeing to pay the vendor’s development costs (\$12,500). 5-ER-1106-07, 6-ER-1152-53 (¶¶ 70-72). Minnesota, New Mexico, and South Dakota – all of which use Tyler’s e-filing system – have also developed or are currently developing their own mechanisms to provide access to complaints that are awaiting clerk review. RJN, ¶¶ 2, 5, 8, 10-12 & Exhs. 2, 5, 8, 10-12.

Appellant offers no evidence that Idaho could not do the same. Her assertion that Tyler “has not provided” information her staff requested “regarding the security, functionality, and costs of the API,” AOB 51, is misleading. On November 7, 2022, Dvorak testified that she expected to evaluate API functionality once Tyler began providing it to its customers. 8-ER-1894 (21:4-22:8), 8-ER-1923

(137:15-138:11). Three days later, Appellant learned that Tyler had already begun providing the API to courts that wanted it. 11-ER-2552 (191:18-23). Having had the opportunity to evaluate “security” and “functionality” of the API first-hand since it became available, Appellant cannot plead self-imposed ignorance.

Moreover, Appellant fails to mention that even as this case was pending, she was already “talking with other vendors to see if we could build our own” access portal and had “some funding set aside in the budget ... to start that project of building a new portal.” 7-ER-1630 (34:5-35:2, 35:8-15). As she explained, “it has been the bane of my existence that we don’t have a portal that does the things that we would really like it to do, and so we are in the process of building that out” 7-ER-1630 (35:20-24).

Appellant had declined, however, to discuss with vendors the possibility of including press review functionality in the new portal – not because of technical or logistical considerations, but because court “rules tell me that a document is available to the public when it is placed in a case file, and so I’m ... in negotiations to have a system built on the case files.” 7-ER-1631 (37:7-38:12). Appellant’s preference to continue withholding access for processing, of course, does not render “unreasonable” the option of including pre-acceptance access within the portal she is already working to build.

CONCLUSION

To borrow from the Supreme Court’s discourse on narrow tailoring, “[t]he point is not that [Appellant] must enact all or even any of the proposed measures discussed above. The point is instead that [Appellant] has available to [her] a variety of approaches that appear capable of serving [her] interests,” without restricting access to the complaints at issue. *McCullen*, 573 U.S. at 493–94.

As the district court correctly recognized, Idaho can choose for itself the best way to provide pre-processing access. 1-ER-36-37. What it cannot do is choose “the path of least resistance” – maintaining the unconstitutional choice to delay access that it could have avoided from the start – for “mere convenience.” *McCullen*, 574 U.S. at 486. CNS respectfully requests that the Court affirm the judgment of the district court.

DATED: May 21, 2025

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ Rachel Matteo-Boehm

Rachel Matteo-Boehm

Attorneys for Plaintiff-Appellee

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