21-3098

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COURTHOUSE NEWS SERVICE; VERMONT PRESS ASSOCIATION, INC.; NEW ENGLAND FIRST AMENDMENT COALITION; GRAY MEDIA GROUP, INC. d/b/a *WCAX-TV*; GANNETT VERMONT PUBLISHING, INC. d/b/a *Burlington Free Press*; SAMPLE NEWS GROUP, LLC *d/b/a Barre-Montpelier Times Argus and Rutland Herald; VTDigger, a project of the* VERMONT JOURNALISM TRUST, LTD.; VERMONT COMMUNITY NEWSPAPER GROUP, LLC d/b/a *Stowe Reporter, News & Citizen, South Burlington Other Paper, Shelburne News*, and *The Citizen*; and DA CAPO PUBLISHING, INC. d/b/a *Seven Days*,
Plaintiffs - Appellees,

v.

PATRICIA GABEL, in her official capacity as the State Court Administrator of the Supreme Court of the State of Vermont; AMANDA STITES, in her official capacity as Clerk of Court for Addison, Bennington, and Rutland Counties; MARGARET VILLENEUVE, in her official capacity as Clerk of Court for Caledonia, Essex,

(Caption continued next page)

Orleans, and Washington Counties;)
CHRISTINE BROCK, in her official)
capacity as Clerk of Court for Chittenden)
County; GAYE PAQUETTE, in her official)
capacity as Clerk of Court for Franklin,)
Grand Isle and Lamoille Counties; and)
ANNE DAMONE, in her official capacity)
as Clerk of Court for Orange, Windham and)
Windsor Counties,)
Defendants - Appellants.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

At the time this action was filed, the District Court should have abstained from exercising jurisdiction based on principles of comity, equity, and federalism. *See Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1070-75 (7th Cir. 2018). And at the time of the District Court ruling, this case was moot because the Vermont judiciary was making complaints publicly available faster than most courts and Appellees identified no authority suggesting that this was unconstitutional.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court should have abstained from exercising jurisdiction based on principles of comity, equity, and federalism.

2. Whether Appellees' First Amendment instant access claim fails as a matter of law.

3. Whether the District Court should have dismissed this case as moot.

4. Whether the District Court erred when it enjoined the operation of electronic filing and public access rules adopted by the Vermont Supreme Court.

STATEMENT OF THE CASE

During 2020 and 2021, while experiencing severe staffing constraints during a pandemic, the Vermont courts transitioned to electronic filing. Before the transition was complete, Courthouse News began tracking access rates in anticipation of filing suit. And in May 2021, Courthouse News brought this action. Courthouse News objected to a series of Vermont Supreme Court rules that required clerks to review proposed new filings before making them publicly available. It contended below that the Vermont Judiciary was making an average of 54.8% of proposed new civil complaints publicly available the day they were filed and that this was inconsistent with a nationwide tradition of faster access under the experience and logic framework set forth by the Supreme Court in *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986).

Appellants sought dismissal on abstention, merits, and mootness grounds. In response to Appellants' observation that Courthouse News's litigation history, and internal data, contradicted its nationwide tradition theory, Courthouse News abandoned its initial tradition theory entirely. It now asserts that "the vast majority" of courts

nationwide do not meet constitutional access standards. *Courthouse News Serv. v. Gabel*, 21-cv-132, Doc. No. 51 at 3 (D.Vt.). The District Court denied Appellants' motion to dismiss and effectively enjoined the operation of a series of rules adopted by the Vermont Supreme Court.

SUMMARY OF ARGUMENT

For more than a decade, Courthouse News has been systematically asking federal courts, on a circuit-by-circuit basis nationwide, to order state courts to change their traditional public access practices. It has now brought 21 lawsuits against clerks for 60 counties or cities, and seven statewide court administrators, including at least one test case in 10 of the 11 circuits that cover multiple states. *See* fn.3 below. In these cases, Courthouse News has consistently alleged that state courts are deviating from a nationwide tradition of courts making complaints publicly available faster and with less prior human review. *Id.*

But Courthouse News's theory that there is a nationwide tradition of courts making complaints instantly available without prior human review is – and always has been – false. If there was, Courthouse News would not have filed lawsuits in 10 circuits that together cover the vast majority of the country. And Courthouse News would have supported

its tradition theory below with reporter declarations showing an established and widespread tradition of courts nationwide making complaints instantaneously available without prior human review. It also would have presented data from its nationwide searchable database showing a nationwide instantaneous access tradition.

Courthouse News did not submit any reporter declarations, or data about other courts. And it did not address any state courts in 40 of the 50 states. Rather, it submitted only a general declaration from its founder addressing some federal courts and an unspecified percentage of the state courts in 10 states. A085. But federal courts handle less than 5% of civil cases.[1] And the United States Supreme Court, the Seventh Circuit, and some federal district courts, including the court below, do not provide instant access to case initiating filings. *Brown*, 908 F.3d at 1065 (Supreme Court and Seventh Circuit); A085 (District of Vermont and some other district courts). By failing to address: (1)

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[1] *Compare* Court Statistics Project, State Court Digest, 2018 Data, https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf (range of approximately 15-20 million new civil cases per year from 2009-18) *with* United States Courts, Federal Judicial Caseload Statistics 2020, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (range of approximately 274,000-333,000 per year from 2011-2020).

any state courts in 40 states, (2) many of the federal courts, and (3) many state courts in the states it did address, Courthouse News failed to address the vast majority of courts in this country.

In essence, Appellees contend that because about twenty percent of the courts in this country made a debatable policy choice, the First Amendment requires the other eighty percent to make the same choice. It does not. The District Court ruling below should be reversed.

First, Courthouse News's nationwide litigation campaign violates "principles of equity, comity, and federalism." *Brown*, 908 F.3d at 1065. In *Brown,* the Seventh Circuit correctly abstained from considering a similar case after observing that federal courts should not be "dictating in the first instance how state court clerks manage their filing procedures" as they transition to e-filing. *Id.* at 1075. And when *Brown* was briefed in the spring of 2018, Courthouse News had filed only a handful of other complaints and was nominally challenging true outlier practices. *Brown's* comity concerns are even more salient now that Courthouse News has abandoned that fiction by bringing 21 cases in 10 circuits asking federal courts to "dictat[e] in the first instance how" most state courts nationwide "manage their filing procedures." *Id.*

Second, the District Court's First Amendment analysis is wrong as a matter of law. Every federal appellate court that has considered an instant access demand like that made by Courthouse News has questioned or rejected it. *See Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021) (First Amendment "does not require" "instantaneous access" and "provides . . . some leeway where same-day access would be impracticable"); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 583, 587, 598–99 (9th Cir. 2020) (finding the First Amendment does not demand "immediate, pre-processing access to newly filed complaints" and upholding a scanning policy CNS claimed prevented same-day access to between "one-third and more than one-half" of complaints); *Brown*, 908 F.3d at 1066, 1070-75 (characterizing "a delay of no more than one business day" as "minimal" and remanding for dismissal on abstention grounds); *Sullo & Bobbitt PLLC v. Milner*, 765 F.3d 388, 394 (5th Cir. 2014) (affirming the dismissal of a complaint where the plaintiff law firm failed to allege that other courts nationwide provided access to the requested records "within one business day of their filing"); *Barth v. City of Macedonia*, 187 F.3d 634 at *1 (6th Cir.

1999) (unpublished) (affirming dismissal of challenge to 24 hour pre-review policy for court record requests).

The District Court erred as a matter of law when it failed to apply the Supreme Court's experience and logic framework, failed to place the burden of meeting the framework on Courthouse News, and applied strict scrutiny. Every appellate court that has considered a Courthouse News case has started by applying the experience and logic framework and none has applied strict scrutiny. After discussing the experience and logic framework, the Fourth and Ninth Circuits held that the First Amendment does not require instantaneous access to complaints and the Seventh characterized delays on the order of one business day as "appear[ing] to be minimal." *Schaefer*, 2 F.4th at 328; *Planet*, 947 F.3d at 594; *Brown*, 908 F.3d at 1070.

The District Court should have found that Appellees' claim failed as a matter of law when Courthouse News failed to establish a First Amendment right to instantaneous, prereview access to complaints under the experience and logic framework. Its suggestion that *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) requires instantaneous access is wrong. *Lugosch* involved an almost six-month

appeal of a 17-month District Court delay and remanded for a "fact-specific inquiry" about whether parts of a "massive" "fifteen-volume" appendix were privileged. 435 F.3d at 116-17, 125. *Lugosch* did not involve, or contemplate, instantaneous action by anyone at any time.

The District Court also erred when it suggested the question before it was whether Vermont's process was "narrowly tailored and 'essential to preserve higher values.'" Ruling at 26 (quoting *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 144 (2d Cir. 2016)). *Bernstein* addressed the standard that applies when access is permanently denied by a sealing order. 814 F.3d at 144. Access denials are subject to strict scrutiny, but "'[o]f course, limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech" are not. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, at 606-607, n.17 (1982).

The rules Courthouse News challenges "resemble time, place, and manner restrictions," which need only be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. *Schaefer*, 2 F.4th at 328; *Planet*, 947 F.3d at 595. They are content neutral because they

apply "to all new civil complaints without regard to their content." *Courthouse News Serv. v. Glessner*, 549 F. Supp. 3d 169, 191 (D. Me. 2021); *accord Planet*, 947 F.3d at 595. They are narrowly tailored to serve the significant governmental interest in the "fair and orderly administration of justice" by ensuring compliance with court rules, protecting privacy interests, and advancing administrative efficiency. *See Planet*, 947 F.3d at 596; *Glessner,* 549 F. Supp. 3d at 191. And they leave open ample alternative channels for communication "because they expressly give the public and press access to newly filed complaints" as soon as they are accepted and the challenged "minor delays d[o] nothing to deter the informed public discussion of ongoing judicial proceedings." *Glessner*, 549 F. Supp. 3d at 192; *Planet*, 947 F.3d at 606 (Smith, J., concurring) (quotations omitted).

ARGUMENT

I. Principles of comity, equity, and federalism call for abstention

This Court should join the Seventh Circuit in rejecting Courthouse News's attempt to violate basic "principles of equity, comity, and federalism" and remand for dismissal of this case. *Brown*, 908 F.3d at

1065.[2] *Brown* correctly abstained after observing that federal courts should not be "dictating in the first instance how state court clerks manage their filing procedures" as they transition to e-filing. 908 F.3d at 1075. And when *Brown* was filed in 2017, Courthouse News had only filed a handful of other complaints and was nominally challenging public access policies that were unusually slow, true outliers when compared to the traditional practices of other courts nationwide.

Courthouse News has now abandoned any pretense of only suing courts with slow, nontraditional access policies. Rather, it is asking federal courts, on a circuit-by-circuit basis nationwide, to "dictat[e] in the first instance how" the vast majority of courts "manage their filing procedures." *Brown,* 908 F.3d at 1075.

A. Courthouse News is engaged in a systematic nationwide campaign that violates core principles of equity, comity, and federalism

Courthouse News's federal court campaign seeks to violate core principles of "equity, comity, and federalism" by asking federal courts to

[2]This Court reviews "*de novo* the 'essentially' legal determination of whether the requirements for abstention have been met." *Disability Rights New York v. New York*, 916 F.3d 129, 131, 133 (2d Cir. 2019) (quoting *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 197-98 (2d Cir. 2002)).

change the traditional access policies of the vast majority of courts in this country. *Brown,* 908 F.3d at 1065. Courthouse News has now brought 21 lawsuits against clerks for 60 counties or cities and seven state court administrators, including at least one test case in 10 of the 11 circuits that cover multiple states.[3]

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[3] All claimed that clerks reviewed and processed complaints before making them publicly available and all but *Planet* involved courts accepting or requiring e-filings. *See Courthouse News Serv. v. Glessner*, 549 F. Supp. 3d 169, 172, 174 181 (D.Me. 2021) (Maine state court administrator and one clerk; access "after clerk processing"); *Courthouse News Serv. v. Gabel*, 2021–cv–3098 (2d Cir.) (Vermont state court administrator and clerks for 14 counties); A.001, ¶ 3, *Courthouse News Serv. v. Tingling*, No. 16–cv–8742, (S.D.N.Y. 2016) (clerk for New York County, New York; "processing"); Complaint, ¶¶ 3, 5, *Courthouse News Serv. v. Idoni*, 7:17–cv–4214 (S.D.N.Y. 2017) (clerk for Westchester County, New York; "processing"; 38% not available same-day); Complaint, ¶¶ 30, 37, *Schaefer*, No. 2:18–cv–391 (E.D.Va.)(clerks for a city and county in Virginia; processing); Complaint, ¶ 3, *Courthouse News Serv. v. Harris*, 1:22–cv–548 (D.Md.) (Maryland state court administrator and 22 clerks; "processing"); *Courthouse News Serv. v. Jackson*, No. 09–1844, 2009 WL 2163609 at *1 (S.D. Tex. 2009) (clerk for Harris County, Texas; access after review, verification, and indexing); Complaint, ¶ 2, *Courthouse News Serv. v. Price*, 1:20-cv-01260 (W.D.Tex) (clerk for Travis County, Texas; "processing"); Complaint, ¶¶ 7, 8, *Courthouse News Serv. v. Pureval*, 1:21-cv-197 (S.D. Ohio) (clerk for Hamilton County, Ohio; "processing"; periods in which more than 40% not available same-day); *Brown*, 908 F.3d at 1065, 1066 (clerk for Cook County, Illinois; "processing"; almost 40% not available same-day); Complaint, ¶ 44, *Courthouse News Serv. v. Gilmer*, 21-2632 (8th Cir.) (Missouri state court administrator, clerk for St. Louis County; processing); *Planet*, 947 F.3d at 586, 594 (clerk for Ventura

Many of these lawsuits, including this one, and suits against officials in New Mexico, New York, Illinois, Ohio, and Oregon, target officials Courthouse News alleges make more complaints available same-day than the 49–51% of complaints it covered same-day on average across all federal and state courts it covered daily in the data it produced below. *Id.*[4] Indeed, Courthouse News expressly stated below that it is dissatisfied with the access practices of "the vast majority of the more than 3,000 courts" it covers. A.441 at 3.

County, California; qualified right does not demand "pre-processing access"); *Courthouse News Serv. v. Yamasaki*, 312 F. Supp. 3d at 851, 853 (clerk for Orange County, California; processing); Complaint, ¶ 1, *Courthouse News Serv. v. Toste*, 1:21–cv–1790 (E.D. Cal.) (clerks for seven counties in California; processing); Complaint, ¶ 5, *Courthouse News Serv. v. Fleming*, 5:18–cv–6118 (N.D. Cal. 2018) (clerk for Santa Clara County, California; processing); Complaint, ¶ 5, *Courthouse News Serv. v. Taniguchi*, 21–cv–414 (N.D. Cal. 2021) (clerk for San Mateo County, California; processing); Complaint, ¶ 5, *Courthouse News Serv. v. Calvo*, 3:21–cv–822 (N.D. Cal. 2021) (clerk for Santa Cruz County, California; processing); Complaint, ¶ 5, *Courthouse News Serv. v. Omundson*, 1:21–cv–305 (D. Idaho) (state court administrator; processing); Complaint, ¶¶ 3, 23, *Courthouse News Serv. v. Cozine*, 3:21-cv-680 (D. Or.) (state court administrator; processing; 32% not available same-day); Complaint, ¶ 3, *Courthouse News Serv. v. Pepin*, 1:21-cv-710 (D.N.M.) (state court administrator and clerk for one judicial district; processing; 30% not available same-day); Complaint, ¶ 5, *Courthouse News Serv. v. Forman*, 4:22–cv–106 (N.D. Fla) (clerk for Broward County, Florida and chair of the Florida efiling authority; processing).

[4] The data is described in more detail in Section II.A.2.a.

Courthouse News initially claimed below that Vermont courts were deviating from a "long-standing tradition in courts across the country" of courts making complaints available faster than Vermont has since transitioning to electronic filing. Doc. 26 at 5. But as described in Section II.A.2.a., this claim was not true and Courthouse News has effectively abandoned it.

Rather, Courthouse News is systematically asking federal courts around the country to order state courts to provide a level of "instant access" that many federal courts, and the vast majority of state courts, have never provided before and do not provide now. The United States Supreme Court and the Seventh Circuit, for example, do not provide instant access. *Brown*, 908 F.3d at 1065. The Supreme Court electronic filing guidelines provide for the posting of case initiating filings "only after the clerk's office has received and reviewed the paper version of the filing, determined that it should be accepted for filing, and assigned a case number." Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, 10(a); https://www.supremecourt.gov/filingandrules/ElectronicFilingGuidelines.pdf.

Courthouse News also correctly acknowledged below that the District of Vermont, and some other federal district courts, do not provide instant access either. A.076 ¶ 29 (clerks in the District of Vermont "record basic case information" before making complaints available). And Courthouse News clearly does not have instant access to complaints in the vast majority of state courts. To the contrary, Courthouse News was able to cover an average of 42-46% of complaints same-day overall across all state courts it covered daily over the last six years. A.180, Exhibit 6.

As the Seventh Circuit observed, the concept of a court ordering access it, and the Supreme Court, do not provide "on the basis of the same Constitution that applies to federal courts" is "unusual, and perhaps even hypocritical." *Brown*, 908 F.3d at 1065. The District of Missouri recently correctly agreed, finding *Brown* persuasive, and noting that the idea of a district court "impos[ing] on a state court a practice which is not currently employed by the Supreme Court of the United States" is "very strange, indeed." *Courthouse News Serv. v. Gilmer*, 543 F. Supp. 3d 759, 769 (E.D. Mo. 2021). The "district court should have abstained from exercising jurisdiction over this case"

rather than ordering a level of access it does not itself provide. *Brown*, 908 F.3d at 1066.

B. This Court has previously approvingly cited *Brown* and should adopt its reasoning here

The Seventh Circuit grounded its analysis in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and ultimately decided to abstain based on the "principles of equity, comity, and federalism" that "underlie all of the abstention doctrines." *Brown*, 908 F.3d at 1065,1071. Although doctrines calling for the abstention from interference in state sovereignty take different forms, all are rooted in "the avoidance of needless friction with state policies" and a "scrupulous regard for the rightful independence of the state governments[.]" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717-18 (1996) (reciting six different Supreme Court cases establishing different forms of abstention); *id.* at 718 (quoting *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)).

As it explained, *O'Shea* is an extension of the doctrine found in *Younger v. Harris*, 401 U.S. 37 (1971). *Id.* Strictly applied, *Younger* only mandates abstention when "(1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state

proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Spargo v. New York State Comm'n on Jud. Conduct*, 351 F.3d 65, 75 (2d Cir. 2003). But *O'Shea* holds "that even where no state proceedings are pending, federal courts must abstain where failure to do so would result in 'an ongoing federal audit of state criminal proceedings.'" *Disability Rts. New York v. New York*, 916 F.3d 129, 134 (2d Cir. 2019) (quoting *O'Shea*, 414 U.S. at 500).

This Court has previously approvingly cited *Brown* and applied *O'Shea* "in similar situations" to this case and should do so again here. *Id.* at 134. For example, *Disability Rights* cited *Brown* while explaining that *O'Shea* establishes that the comity "considerations underlying *Younger* are still very much at play even when a suit is filed prior to the onset of state proceedings." *Id.* (citing *O'Shea*, 414 U.S. at 500; *Brown*, 908 F.3d at 1072). *Disability Rights* also correctly rejected Courthouse News's primary abstention argument below, which was that *Sprint Commc'ns Inc. v. Jacobs*, 571 U.S. 69 (2013) limits the scope of *O'Shea*. To the contrary, while "*Sprint* made clear that *Younger's* scope should be limited to the three specified categories" *Sprint* discussed, it "did not

suggest that abstention under *O'Shea* should be circumscribed." *Disability Rights*, 916 F.3d at 135 n.3. Rather, courts have correctly "continued to apply *O'Shea* even after *Sprint*" as *Disability Rights* did when it abstained from considering a challenge to New York's guardianship procedures. *Id.* at 135 n.3 (citing, *e.g., Brown* and two other circuit cases), 135-137 (applying *O'Shea* and abstaining).

This Court has also applied *O'Shea* on many other occasions to refrain from intervening in the operations of state courts in other ways. *See, e.g.*, *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975) (directing district court to abstain from enjoining state court criminal pre-trial procedures); *Fishman v. Off. of Ct. Admin. New York State Cts.*, No. 20-1300, 2021 WL 4434698, at *2 (2d Cir. Sept. 28, 2021) (describing *O'Shea* as "prohibiting federal courts from intervening in state courts' procedures and processes"); *Kaufman v. Kaye*, 466 F.3d 83, 87 (2d Cir. 2006) (abstaining from considering a state court's procedures for assigning panels of appellate judges).

Federal courts do not have the "'power to intervene in the internal procedures of the state courts' and cannot 'legislate and engraft new procedures upon existing state . . . practices.'" *Disability Rights,* 916

F.3d at 136 (quoting *Kaufman*, 466 F.3d at 86). The district court below concluded that its injunction would not result in "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state . . . proceedings." A.515 at 22 (quoting *Planet I*, 750 F.3d at 791-92). But Courthouse News's nationwide campaign seeks to invoke the equitable power of the federal courts to change the traditional practices of the vast majority of state courts. And "few interests can be considered more central than a state's interest in regulating its own judicial system." *Spargo*, 351 F.3d at 75–76.

The district court also cited *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) for the prospect that "'the weight of the First Amendment issues involved counsels against abstaining.'" A.515 at 22 (quoting *Hartford Courant*, 380 F.3d at 85, 100). But *Hartford Courant* did not cite or discuss *O'Shea* and involved a practice of permanently sealing entire case files, without any clear statutory or judicial authority for doing so, not making complaints publicly available within a few business hours. *Id.* at 85, 99-102. *Disability Rights*, in contrast, directly applied *O'Shea*. 916 F.3d at 134–137.

1. The Vermont Supreme Court took a thorough, thoughtful, and public approach to adopting the enjoined rules

To assist it in updating court rules, the Vermont Supreme Court appoints advisory committees to review rules, propose changes, and circulate proposed changes for public comment. *See* Advisory Committee on Rules of Public Access to Court Records, About the Committee, https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/access-records-committee. The Court itself is then "responsible for promulgating any amendment[s]." *Id.* When adopting the rules the District Court effectively enjoined, the Vermont Supreme Court balanced the interests of not just the press and litigants, but also witnesses and the general public.

The public access and electronic filing rules the District Court enjoined were the product of a thorough, thoughtful, and public two-year deliberative process. The process began in 2018 with the Vermont Supreme Court Advisory Committee on Rules of Public Access to Court Records. The Public Access Committee is composed of members of the media, judges, current and retired justices, lawyers, and a representative of the Vermont ACLU. *Id.*

The Public Access Committee met many times throughout 2018 to consider updating the Vermont public access rules in advance of the transition to electronic filing. *Id.* (collecting 2018 minutes). It then sent the draft rules to the Court with a request that they "be published" for public comment. *Id.;* Minutes Dated December 10, 2018 at 10. The Special Advisory Committee on Rules for Electronic Filing then followed a similar process in 2019 as to the rules for electronic filing. *See* Special Advisory Committee on Rules for Electronic Filing, https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/e-filing-committee (collecting 2019 meeting minutes).

Both committees received public feedback from a variety of sources, including Courthouse News, and provided that feedback "to the Supreme Court for its consideration." Public Access Committee Meeting Minutes Dated April 19, 2019 at 2, https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/access-records-committee.; *accord* Electronic Rules Committee Meeting Minutes Dated September 20, 2019 at 2, https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/e-filing-committee (committee provided the Court with a

memorandum discussing public comments and its "discussions, responses, and actions" along with its rule proposals).

After considering the relevant issues and feedback, the Vermont Supreme Court adopted the rules Appellees now challenge, which are entirely consistent with the First Amendment. *See* Vt. R. Pub. Access to Ct. Recs., Rs. 1, 3, 6, 7 (all adopted May 1, 2019); Vt. R. Elec. Filing, R. 5 (adopted December 10, 2019); Section II below. The purpose of the Vermont Public Access rules is to further "the complementary responsibilities to provide public access . . . to judicial-branch records and to protect the confidentiality of case information where such confidentiality is required by statute, rule, or court order." Vt. R. Pub. Access, R. 1.

2. The Vermont courts successfully applied the Vermont Supreme Court's rules while transitioning to e-filing under extraordinarily adverse circumstances

According to Courthouse News's expert, Vermont courts made an average of "54.8" percent of complaints publicly available the day they were filed while transitioning to e-filing, without adjusting for

weekends or holidays. A.216. at 4.[5] 54.8% is higher than the 49-51% of complaints Courthouse News covered same-day across all federal and state courts it covered daily over the last six years in the data it produced below. A.180, Exhibit 6. And Appellees' calculation is based on a window during which the Vermont judiciary was rolling out a new e-filing system under extraordinarily difficult circumstances.

The first group of Vermont courts began accepting electronic filings on March 15, 2020, just as the Governor and Vermont Supreme Court declared a state of emergency in response to the early stages of the Covid 19 pandemic. A.209 ¶ 3; Executive Order 01-20, https://governor.vermont.gov/content/declaration-state-emergency-response-covid-19-and-national-guard-call-out-eo-01-20; Administrative Order No. 49, https://www.vermontjudiciary.org/attorneys/rules/promulgated.

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[5] This figure was calculated using electronic transmission data produced by Appellants and reflects when complaints would ordinarily have been available on courthouse public access terminals. Put another way, it reflects what access rates would have been in the absence of any Covid-19-related court and terminal closures. Courthouse News did not challenge any Covid-19-related emergency orders or administrative directives limiting courthouse access below.

The lowest access rates calculated by Appellees' expert were during this period, when the courts faced a perfect storm of "implementation challenges and resource limitations." *See* A.216, Figure 2 (reflecting low access rates from the beginning of the rollout through May 2020), *Brown*, 908 F.3d at 1074. The judiciary did not have the equipment it needed for staff to immediately transition to remote work. A.209 ¶ 4. And before trying to get that equipment, the judiciary's limited IT staff needed to prioritize: (1) obtaining and implementing a remote hearing system and (2) the equipment needs of the team directly responsible for transitioning courts to electronic records. *Id.* ¶ 6. It is impossible to seamlessly implement a new e-filing process, while transitioning unexpectedly to remote work, without sufficient equipment, during a pandemic.

Access rates subsequently rose, before declining again in the window during which a second, larger group of courts transitioned to e-filing, again under adverse circumstances. A.216 Figure 2; A.209 ¶ 8. A team supporting the first group of e-filing courts had to conduct the initial trainings for the second group remotely. *Id.* ¶ 9. The second group of courts began using electronic records in September, and accepting e-

filings in October, just as rising October case counts forced staff to work in pods and caused additional remote work equipment shortages. *Id.*

Access rates rose again, before dipping in March and April 2021 as the final group of courts transitioned and the judiciary began a planned process of centralizing the review of e-filings on a division-by-division basis. *Id.* ¶¶ 10, 19–20. The third transition, and centralization process, also involved significant implementation challenges and resource limitations. Like many employers, the judiciary experienced serious hiring difficulties during the pandemic, and had the highest number of open positions it has had in the last decade at the time Courthouse News filed suit. *Id.* ¶ 11.

Access rates dipped again in July as a centralized team that was already covering criminal filings was cross-trained to begin reviewing civil filings and began getting up to speed. A.209 ¶ 25. The judiciary was not able to meet its initial centralized staffing goals, but by October, had filled five new permanent statewide positions and was working to fill five more. *Id.* ¶ 26; A.488 ¶ 2. A centralized team was reviewing all filings of interest to Courthouse News for many courts and usually, but not always, reviewing them for the remaining courts. *Id.* ¶

3. The goal was a complete, permanent civil expansion by the end of 2021. *Id.*

The District Court appeared to be skeptical about how quickly the judiciary worked to complete the centralization process. A.515 at 19. But it is not possible to immediately build a centralized team by drawing staff from exceptionally understaffed individual courts without compromising their operations. And it is very difficult to quickly hire new staff with a limited budget in a state with one of the lowest unemployment rates, and highest rates of open jobs, in the country. *See* April Barton, Vermont's worker shortage is among the greatest in the country, study says, Burlington Free Press (Sept. 14, 2021), https://www.burlingtonfreepress.com/story/news/2021/09/14/vermont-has-fourth-largest-labor-shortage-according-study/8330277002/.

After an initial two-week period in July during which the centralized team worked to get up to speed, the Vermont Superior courts made 67% of initial civil filings available same-day through the end of September, significantly more than the 49-51% of complaints Courthouse News covered overall same-day over the last six years in other courts. A.468, Exhibit 12, A.180 Exhibit 6. Vermont's 95% rate within one business

day was also significantly higher than Courthouse News's 77–83% overall rate within one business day over the last six years across all of the federal and state courts it covered daily combined. A.490 Exhibits 13A, 15A.[6]

In sum, it would have been "particularly appropriate" for the District Court to abstain in light of the extraordinary "implementation challenges and resource limitations" Vermont faced while transitioning to electronic filing. *Brown*, 908 F.3d at 1074. Indeed, it is remarkable that the Court Administrator was able to facilitate the transition at all, much less do so while apparently making complaints available faster than most courts nationwide. And as in *Brown,* which concerned "CNS's displeasure with a delay of no more than one business day in access to the vast majority of electronically filed complaints" the delays during the rollout "appear to [have been] minimal." *Id.* at 1066, 1070.

The District Court erred when it disregarded the implementation challenges and resource constraints the Vermont courts faced, the policy considerations the Vermont Supreme Court balanced, and the

[6] The Centralized and Noncentralized rows in the cited exhibits refer to the courts that the centralized team was always, and usually, but not always, covering respectively.

traditional practices of other courts nationwide. Its injunction forced the Vermont Supreme Court to issue an emergency order ceasing pre-access review of civil complaints so long as the district court's injunction is in place. *See* Vermont Supreme Court, Emergency Order Amending Rule 5(d) of the Vermont Rules for Electronic Filing (Dec. 20, 2021), https://www.vermontjudiciary.org/sites/default/files/documents/EMERGENCYPROMULGATEDVREF5%28d%29--STAMPED%20%28003%29.pdf

The District Court's injunction is particularly problematic because it is almost uniquely harsh among courts that have considered the same issue. No appellate court has adopted Courthouse News's instant access theory and most courts that have reached the merits of Courthouse News cases have sought to adopt flexible standards. *See, e.g.*, *Schaefer*, 2 F.4th at 328 (upholding "flexible standard" of access on "'the same day on which the complaint is filed, insofar as is practicable;' and when not practicable, on the next court date"); *Planet,* 947 F.3d at 596 ("even in this era of electronic filing systems, instantaneous public access . . . could impair the orderly filing and processing of cases");

Pepin, 2021 WL 4710644, at *35 (concluding that access within five business hours is timely).

The District Court's injunction against pre-access review of civil complaints strikes at the heart of Vermont courts' sovereignty over their own procedures. Pre-access review that takes no more than ten minutes would still violate the injunction in this case. Vermont courts now have no way to proactively protect the privacy of parties and witnesses in newly filed civil complaints—privacy interests that the Vermont courts judged important enough to institute a resource-intensive pre-access review process in the first place.

II. Every appellate court that has considered Appellants' timing theory has correctly questioned or rejected it

This case does not ask whether Vermont will make nonconfidential civil complaints publicly available. The Vermont Supreme Court's public access rules require public access and the Vermont courts provide it. *See, e.g.*, Vt. R. Pub. Access to Ct. Recs., R. 1 ("These rules cover the complementary responsibilities to provide public access . . . to judicial-branch records and to protect the confidentiality of case information where such confidentiality is required by statute, rule, or court order.").

Rather, this case asks whether the First Amendment requires Vermont courts to provide instantaneous access – with no prior review by anyone of any kind for any purpose – to anything a transmitter indicates can be filed. This Court has not previously considered that question and it appears that every circuit that has considered an instantaneous access demand has questioned or rejected it. *See Schaefer*, 2 F.4th at 328 (First Amendment "does not require" "instantaneous access"); *Planet*, 947 F.3d at 594 (First Amendment does not require "immediate, preprocessing access to newly filed complaints"); *Brown*, 908 F.3d at 1066, 1070-75 (characterizing "a delay of no more than one business day" as "minimal" and remanding for dismissal on abstention grounds); *Sullo*, 765 F.3d at 394 (affirming the dismissal of a complaint demanding access to court records within one business day); *Barth*, 187 F.3d 634 at *1 (affirming dismissal of challenge to 24 hour pre-review policy for court record requests).

Courts have varied in how they approach instantaneous access demands. Nearly all have started by applying the Supreme Court's experience and logic framework and some have ended their analysis at that stage. Others have continued on to apply a time, place, and

manner framework to challenged practices. A few outlier district courts have applied strict scrutiny.[7] But no appellate court has, and however they have framed their analysis, it appears that every appellate court to consider an instantaneous access demand has questioned or rejected it.

Here, whether the Court begins and ends with the experience and logic framework, defines the term contemporaneous in context, or applies a time, place, and manner, framework, Courthouse News's claim fails as a matter of law.

A. The District Court erred as a matter of law when it declined to apply the experience and logic test to evaluate Courthouse News's proposed new instantaneous access right

Every appellate court in a Courthouse News case has started by applying the *Press-Enterprise* experience and logic framework. After doing so, the Fourth and Ninth Circuits held that the First Amendment

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[7] Appellees' reliance on the district court rulings in *Tingling* and *Jackson* to assert that strict scrutiny applies is misplaced. There have been three circuit level rulings since *Tingling* and *Jackson* were decided and none of them applied strict scrutiny. *Tingling* does not involve a written decision at all – the ruling was read from the bench and consists of less than three pages of analysis. *See* 2016 WL 8739010 at * 18–20. And the ruling in *Jackson* is five pages long in its entirety. 2009 WL 2163609 at *1-5. In short, both cases involved legal errors after minimal briefing on highly expedited timeframes.

does not require instantaneous access to complaints and the Seventh characterized delays on the order of one business day as "appear[ing] to be minimal." *Schaefer*, 2 F.4th at 328; *Planet*, 947 F.3d at 594; *Brown*, 908 F.3d at 1070. The District Court should have found that Appellees' claim failed as a matter of law when Courthouse News failed to establish a First Amendment right to instantaneous, prereview access to complaints under the experience and logic framework.

The experience and logic framework looks at experience – what has been done traditionally – and logic – whether the proposed access right would play a significant positive role in the functioning of the process in question. And it does so under a burden shifting framework. First, a plaintiff alleging a particular right must establish the claimed access right. *See N. Jersey Media Group Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (*Press Enterprise* "seems to place the burden of proof on the party alleging a First Amendment right"); *Gannett Co., Inc. v. Delaware*, 571 A.2d 735, 743 (Del. 1990) ("the proponent of the First Amendment claim must satisfy a two-part threshold test" under *Press Enterprise* for a qualified right to attach). If they do, the burden shifts to the defendant to justify a restriction on that access right. *United*

States v. Black, 483 F. Supp. 2d 618, 623 (N.D. Ill. 2007) (collecting cases) ("The party alleging the existence of the qualified First Amendment right bears the burden of establishing both parts of this threshold test. . . Only then does the burden shift to the party seeking closure").

This basic structure makes sense. If a proposed access right does not pass the test of experience and logic, the First Amendment does not require that type of access. The plaintiff's claim fails as a matter of law and there is no need to apply any level of scrutiny. If a plaintiff shows that experience and logic do establish a particular access right, the burden shifts to the defendant to justify a challenged restriction on that benchmark access level.

The District Court should have started its analysis by asking whether Courthouse News established that there is "an established and widespread tradition" "throughout the United States" of courts making complaints available faster than Vermont that "plays a significant positive role" in the operation of courts. *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150-51 (1993); *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016). Because

Courthouse News did not do so, the Court did not need to apply any level of scrutiny at all.

Instead of applying the experience and logic framework, the District Court quoted *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) for the prospect that once a presumption of access applies "'access should be immediate and contemporaneous.'" *Id.* at 24. But *Lugosch* did not involve, or contemplate, instantaneous action by anyone at any point. In *Lugosch*, this Court held that a District Court erred when it declined to rule on an attempt by news organizations to access sealed documents for more than 17 months. 435 F.3d at 113, 117.

Lugosch acted quickly, not instantaneously, when it expedited the organizations' appeal and issued a decision in just under six months. *See Lugosch*, No. 05–3620, Docket Sheet, Entries dated 7/15/05-1/10/06. And *Lugosch* ultimately remanded for "a fact- specific inquiry" about whether, or not, sealed documents submitted as part of a "massive" "fifteen-volume" appendix were privileged. 435 F.3d at 116, 125. The district court then resolved the privilege dispute quickly – not instantaneously – issuing a decision and order just under five months

later. *Lugosch v. Congel*, No. 00–cv–784, 2006 WL 6651777 (N.D.N.Y. May 5, 2006).

Lugosch did not establish an instantaneous access right by using the words "quickly," immediate," and "contemporaneous" interchangeably in the context of a six-month appeal, followed by a remand for a process likely to take several additional weeks or months. *See Id.* at 113, 126, 127. Indeed, the quotation the District Court emphasized below confirms that it misread *Lugosch*. The District Court specifically relied on *Lugosch*'s quotation of a Seventh Circuit case, *Grove Fresh Distib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), for the prospect that "'once found to be appropriate, access should be immediate and contemporaneous.'" A.515 at 24.

But when a District Court in the Seventh Circuit relied on *Grove Fresh* to order instantaneous access in a Courthouse News case, the Seventh Circuit reversed and remanded for dismissal of the case. And like *Grove Fresh*, *Lugosch* "addressed delays on the order of months and years, not hours or even minutes," remanded for a multiweek adversarial process, and "does not . . . compel the instant access . . . ordered by the district court here." *Brown*, 908 F.3d at 1070, n. 5.

This straightforward conclusion is also consistent with every other appellate ruling in a Courthouse news case. It is consistent with *Planet*, because the Ninth Circuit found that the First Amendment does not demand "immediate, pre-processing access to newly filed complaints." 947 F.3d at 594. And it is consistent with *Schaefer*'s conclusion that "contemporaneous" needed to be defined in context and does not mean "perfect or instantaneous." 2 F.4th at 328.

1. By failing to address any state courts in 40 of the 50 states, and many federal courts, including the Supreme Court, Appellees failed to show an established and widespread instantaneous access tradition under the experience prong of *Press Enterprise*

If there was a nationwide tradition of courts providing instantaneous, pre-review access to new complaints, Courthouse News could certainly demonstrate it. One of Courthouse News's subscription products is a set of regional new litigation reports it emails to subscribers every weekday evening. Law firms can subscribe to the reports by "office" or "for firm-wide distribution" and receive summaries of newly filed complaints, "dings and download links." A.023 Exhibit 1 at 1. And Courthouse News maintains a searchable, nationwide

database of the complaints it covers that shows: (1) when each complaint was filed and (2) when Courthouse News covered it.

If there was an instantaneous access tradition, Courthouse News could demonstrate it by submitting declarations from its reporters stating that the courts they cover every day make complaints available instantaneously. It could also submit data from its database showing coverage percentages for courts it covers every day that are consistent with courts providing instantaneous, pre-review access. Or Courthouse News could combine the two approaches by submitting reporter declarations and showing that they are consistent with its data.

Instead, Appellees failed to address the traditional practices of the vast majority of courts nationwide. Courthouse News presented no declarations from anyone who covers any courts on a daily basis and presented no data about how fast it has been able to cover complaints outside of Vermont. Instead, it offered only declarations from its founder, William Girdner, which emphasized primarily the practice of some federal courts. Girdner Declaration; Girdner Reply Declaration. But federal courts handle less than 5% of civil cases and many of them, including the Supreme Court, the Seventh Circuit, and the District of

Vermont, do not provide instantaneous access to case initiating filings. *See* fn1, above; *Brown*, 908 F.3d at 1065 (Supreme Court and Seventh Circuit); A.076 ¶ 29. As to the state courts that handle more than 95% of civil cases, Mr. Girdner addressed only an unspecified number of courts in 10 states.

By failing to address roughly 80% of the courts in this country, Appellees failed to carry their burden of alleging or showing a nationwide tradition of courts making complaints available: (1) instantaneously, (2) without prior human review, or (3) faster than Vermont. For example, in *Sullo & Bobbitt PLLC v. Milner*, 765 F.3d 388, 393-94 (5th Cir. 2014), the Fifth Circuit affirmed the dismissal of a complaint because the Plaintiffs failed to allege that other courts nationwide "provide access to [the requested] documents within one business day."

So too here. While Courthouse News did not present any of its data to the District Court, it did produce data showing when it covered every complaint it covered nationwide in May and June of the last 10 years.[8]

[8] Appellants limited their requests to the two months before the PI filing below for each of the last 10 years to make the total data volume

Indeed, this appears to be the first Courthouse News case involving actual coverage data, presumably because state and local officials face tremendous resource disadvantages when Courthouse News sues them. It is exceedingly difficult for a public entity with limited resources to quickly respond to a PI motion filed by a seven-lawyer team that can devote 1300 hours to one case in six months. And state officials do not cover all 50 states, have a searchable nationwide database, or have the ability to quickly create one covering thousands of other courts operating different e-filing platforms.

Considered together, the evidence Courthouse News offered, and the data it produced, flatly contradict its prereview instantaneous access tradition theory. First, the record suggests that there is a nationwide tradition of pre-access human review of complaints. During the review process Courthouse News objected to below, a clerk checks for a signature, unredacted information exempt from disclosure, and comments left by the filer, then confirms that the filer correctly

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more manageable on an expedited timeframe. Appellants' expert then analyzed the most recent six years of data produced.

designated a proposed complaint as public, confidential, or sealed, and selected the correct filing codes, filing fee, and case type. A.209¶ 13.

According to Courthouse News, before e-filing, "the nearly universal" pre-access complaint intake process included a clerk taking many of the same steps: "tak[ing] a cursory look at the complaint," "check[ing] for a signature," "confirm[ing]" the correct fee was paid, "stamping" the complaint and providing a receipt. A.076 ¶ 21. And Courthouse News has now alleged in more than 20 lawsuits against 60 clerks and seven court administrators for entire states that e-filing jurisdictions around the country complete *all* of their administrative processing of complaints before making them publicly available, not just an initial review. *See* fn. 2 above. Vermont "does not." A.209 ¶ 12. Rather, clerks complete a series of additional tasks after any filings they accept are posted for public viewing. *Id.* ¶ 15.

Second, according to Courthouse News, Vermont courts made "54.8 percent" of new complaints publicly available same-day while transitioning to e-filing. 51–9 at 4. 54.8% is higher than Courthouse News's overall average same-day coverage percentage (49-51%) across all state and federal courts it covered on a daily basis in each of the last

six years in the data it produced and higher than its coverage percentage in 61-72% of other state courts in those years. A.180, Exhibit 3; A.490, Exhibit 14.

And Courthouse News began counting complaints before Vermont completed its e-filing transition and began centralizing the review of new filings. By the time of the District Court's ruling, a central team was covering most of the types of filings of interest to Courthouse News statewide and Vermont's same-day percentage had risen to 67%. A.488, ¶ 3; A.468, Exhibit 12. 67% is more than Courthouse News covered same-day in 72-82 percent of other state courts over the last six years. A.490, Exhibit 14. Indeed, 67% is equal to or higher than the average percentage of complaints Courthouse News covered daily in federal courts in three of the last six years. A.468, Exhibit 9.

Notably, all of these figures are consistent with the straightforward premise that most courts nationwide currently have a clerk review complaints before making them publicly available and always have. Indeed, when confronted with its own data, Courthouse News abandoned the tradition theory it has been litigating for more than a decade and admitted that it seeks to change the operation of the "vast

majority" of courts. A.441 at 3. Courthouse News's failure to carry its burden requires the reversal of the District Court ruling.

The District Court's suggestion that Appellants "exclude the federal courts from their analysis and use unreliable data" from "CNS's publication dates" does not change this conclusion for four reasons. A.515 at 25-26. First, Appellants' analysis does not "exclude the federal courts." It contains six different exhibits presenting data about Courthouse News's coverage percentages for federal courts. A.180, Exs. 3, 6; A.468, Exhibit 9; A.490, Exs. 13, 13A, 13B.

Second, the District Court's suggestion shifted the burden of establishing a tradition from Courthouse News to Appellants. CNS's claim would fail even if its data was not considered because the record would contain no proof about roughly 80% of courts on an issue as to which CNS bore the burden of proof. *See N. Jersey*, 308 F.3d at 209; *Gannett*, 571 A.2d at 743; *Black*, 483 F. Supp. 2d at 623.

Third, a statistical analysis of more than a million nationwide data points is far more reliable than a declaration that: (1) does not address about 80% of courts and (2) was prepared by someone who does not cover any courts on a daily basis.

Fourth, Mr. Girdner suggested that the "fundamental reason" he did not believe Courthouse News's data reflected "a national standard" was that an unspecified percentage of courts "no longer" provide historical access rates "in the wake of electronic filing." A264. But if state courts really were changing their traditional access policies as they transitioned to e-filing, Courthouse News's same-day coverage percentage in state courts would have dropped sharply over the last six years as many state courts transitioned to e-filing. Instead, it was the same – 46% – in both 2016 and 2021. A204. And Courthouse News would have covered almost all complaints same-day in the state courts Mr. Girdner identified as examples of courts providing same-day access before transitioning to e-filing, not less than half of them same-day in most of those courts. *Compare* A82 *with* 484.

Many of the rulings in previous Courthouse News cases also support the conclusion that Courthouse News's claim fails under the experience and logic framework. In the *Planet* and *Yamasaki* cases, the lower courts correctly placed the burden of establishing a tradition on Courthouse News. And after polling its reporters nationwide,

Courthouse News failed to establish a nationwide tradition of same-day access, much less instantaneous access.

The *Planet* district court found that CNS's "32 declarations" "failed to meet its burden" of showing a nationwide same-day access tradition that was not factually disputed on summary judgment, but did establish a more general right to timely access. *Planet*, No. 11–cv–8083, 2016 WL 4157210, *11-12 (C.D. Cal. 2016). *Yamasaki* went a step further and found "no tradition of same-day access" because the declarations addressed only "a handful" of the courts in the states they covered and did not address many states at all. *Courthouse News Serv. v. Yamasaki*, 312 F. Supp. 3d 844, 862-63 (C.D. Cal. 2018).

The Ninth Circuit decided *Planet* first and vacated *Yamasaki* without explanation "for further proceedings consistent" with *Planet*. *Yamasaki*, 950 F.3d 640 (9th Cir. 2020). It began by applying the experience and logic framework to the declarations and rejected Courthouse News's theory that the First Amendment "demand[s] immediate, pre-processing access to newly filed complaints." *Planet,* 947 F.3d at 590–94. *Planet* concluded instead that there was a more general right "to timely access." *Id.* at 594. This supports reversal here

at the experience and logic stage because Courthouse News has made no showing that Vermont courts are not providing "timely access." To the contrary, Vermont courts appear to have at all times provided timely access consistent with, or faster than, the traditional practices of most other courts.

The Fourth Circuit similarly began by applying the experience and logic test. *Schaefer*, 2 F.4th at 325–28. It concluded that the First Amendment requires contemporaneous access. *Id.* at 327–28. And it concluded that contemporaneous "in this context" as meaning "the same day on which the complaint is filed, insofar as is practicable; and when not practicable, on the next court date – exempting inconsequential deviations and extraordinary circumstances." *Id.* at 328 (quotations omitted). The Fourth Circuit then confirmed that "[t]his flexible standard does not require perfect or instantaneous access." *Id.*

More recently, the District of New Mexico discussed *Schaefer* and *Planet* while applying the experience and logic framework and concluded that the First Amendment requires timely, but not instantaneous access. *Courthouse News Serv. v. Pepin*, No. 21–cv–710, 2021 WL 4710644, *38-40 (D.N.M. Oct. 8, 2021). Because "the First

Amendment right of access to civil complaints must be grounded in a historic level of access under *Press-Enterprise II*' *Pepin* looked "to the level of access given to the press" before efiling "for guidance." *Id.* at *39. It then concluded that access within five business hours was generally timely. *Id.* at *41. *Pepin* supports reversal at the experience and logic stage because Courthouse News has not shown an established and widespread tradition of courts outside of Vermont providing access as fast as Vermont does, much less faster.

2. Appellees also failed to show that instantaneous access to complaints, without prior human review, would play a significant positive role in the civil litigation process under the logic prong of Press Enterprise

Appellees also failed to show that that their proposed instantaneous access right would play "a significant positive role in the functioning of the particular process in question." *Bernstein*, 814 F.3d at 141. Because the question is whether a proposed right would play "a significant positive role," not whether it would serve "some good," the logic prong requires consideration of both positive and negative potential consequences of a proposed right. *NYCLU v. NY City Transit Auth.*, 684 F.3d 286, 302, n.13 (2d Cir. 2012) (quotations omitted). It

"essentially asks whether openness enhances the ability of the government proceeding to work properly and to fulfill its function." *Id.*

Public access at traditional rates: (1) "allows the public to understand the activity of the federal courts," (2) "enhances the court system's accountability and legitimacy," and (3) "informs the public of matters of public concern." *Bernstein*, 814 F.3d at 141. Indeed, Appellees did not allege – or claim when asked in discovery – that any Appellee ever did not cover a Vermont complaint because it was not made publicly available the day it was filed. A175-76. As the *Planet* concurrence observed when discussing a policy that did not make "between one third and more than one half" of complaints available same-day, such "minor delays did nothing to deter the informed public discussion of ongoing judicial proceedings." *Planet*, 947 F.3d at 587, 600 (Smith, J. concurring) (quotations omitted) (so stating while applying a time, place, and manner framework).

On the other hand, providing instant access can reduce "the court system's accountability and legitimacy" in two significant ways. *Bernstein*, 814 F.3d at 141. First, providing instantaneous access can harm litigants and nonparties involved in litigation. As the Vermont

Rules of Public Access note, "personal identifying information in government records has long been identified as a source of identity theft." Rules of Public Access, Rule 6, Reporter's Notes to Rule 6(b)(14). Protecting the "privacy interests of litigants and third parties" is a substantial government interest. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984). This is not a hypothetical concern and it cannot be eliminated by placing the onus solely on filers.

For example, a man in Alabama was accused by federal prosecutors in 2017 "of obtaining names, birth dates and Social Security numbers of about 43 people" from online state court criminal records and stealing the identities of dozens of people. ID theft case reveals vulnerability of states court website, Fox5 Atlanta, April 12, 2017, https://www.fox5atlanta.com/news/id-theft-case-reveals-vulnerability-of-states-court-website; Ala. R. Civ. P. 5.1(a). Seven co-conspirators were similarly "indicted on identity theft charges after obtaining personal information" from PACER in 2003. *See Yamasaki*, 312 F. Supp. 3d at 871. While this predated Federal Rule 5.2's redaction requirement, PACER continues to regularly expose similar information on a widespread basis.

Indeed, the Federal Judicial Center found that unredacted Social Security numbers were displayed 16,811 times in federal filings made in one month alone in 2013 and were present at a rate of one in every 380 district court filings. Joe Cecil *et al*, Unredacted Social Security Numbers in Federal Court PACER Document, 5, Fed. Judicial Ctr. (Oct. 25, 2015) https://www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents. And the overall frequency of protected information in federal court filings is higher still. Social Security numbers are one of several things federal filers must redact and the Federal Judicial Center observed that it saw "instances of each of these [other] types of unredacted protected information," but "did not attempt to" count them all. *Id.* at 4.

Between the beginning of the e-filing transition, and the end of July 2021, Vermont reviewers used a rejection code for documents filers designated as public that contained nonpublic information 66 times across all filing types. A214. Staff also left 72 rejection comments referring to the inclusion of nonpublic information in documents designated as public while using other codes. A215. These figures reflect formal rejections of electronic filings tracked in Vermont's e-

filing system and would not include any informal counseling of litigants or rejections of proposed paper filings. A review of the civil documents associated with these rejections indicates that staff rejected at least 12 documents litigants proposed filing as part of civil cases that contained nonpublic information. A215. Six had an initial envelope type, which means that the filer proposed including them as part of the initiation of a civil case. *Id.* Prospective filers appear to have intended for three of these documents to be exhibits to two proposed civil complaints and hence, a part of them. *Id.*; Fed. R. Civ. P. 10(c).

Second, providing instant access can reduce "the court system's accountability and legitimacy" by appearing to prioritize lucrative private interests over mitigating the risk of the public harms described above. *Bernstein*, 814 F.3d at 141. *Sullo* and *Yamasaki* are illustrative. The Plaintiff in *Sullo* was a law firm seeking access to misdemeanor criminal citations "within one business day" for use "advertis[ing] its services to criminal defendants." *Sullo,* 765 F.3d at 390–91. And in *Yamasaki*, it was undisputed that more than 92% of Courthouse News's subscribers were "lawyers or law firms that pay to receive proprietary reports describing newly filed civil complaints." Pltfs. Stmt. of Genuine

Disputes, *CNS v. Yamasaki,* No. 17-cv-126, Doc. No. 84, ¶ 31 (C.D.Cal. Jan 8, 2018). As the court noted in *Yamasaki*, lawyers in private firms are likely very familiar with the litigation reports published by Courthouse News, and

> know that their firms don't subscribe to them to foster an informed public discussion of ongoing judicial proceedings . . . . They subscribe to find out who's being sued so they can get new clients. It's a very profitable business, but it's also time sensitive. The first contact with the defendant often has the advantage.

Id. at 866 (quotations omitted). Before *Yamasaki*, Courthouse News consistently brought complaints solely in its own name. And even now, Appellees focus solely on new civil complaints – the type of filing most relevant to the solicitation by lawyers of new business. Of course, attorney advertising is not illegal and profit motives do not divest litigants of First Amendment rights.

But the question here is whether Courthouse News showed that its proposed instantaneous prereview access right would play "'a significant positive role'" in the ability of courts "to work properly" and fulfill their function, considering all of the potential positive and negative effects of the proposed right. *NYCLU*, 684 F.3d at 302 (quoting *Press Enterprise*, 478 U.S. at 8). It did not. Courthouse News

did not show that access within a business day ever had any impact on the ability of the public to understand and monitor the operation of Vermont courts.

Indeed, it is difficult to see how the descriptions of the two Vermont cases discussed in the litigation reports Courthouse News provided in support of its preliminary injunction motion – which read, in their entirety "Contract" and "Personal Injury" – could possibly further informed public discourse and enhance the legitimacy of courts. A054. The potential damage to the Vermont "court system's accountability and legitimacy" of regularly exposing personally identifying information of Vermonters that could be used to foster identity theft, in contrast, is far more straightforward.

Logic supports a presumption of public access to complaints that parties seek to seal because public access: (1) "allows the public to understand the activity of the federal courts," (2) "enhances the court system's accountability and legitimacy," and (3) "informs the public of matters of public concern." *Bernstein*, 814 F.3d at 141. This makes sense because "a sealed complaint leaves the public" permanently "unaware that a claim has been leveled and that state power has been

invoked – and public resources spent – in an effort to resolve the dispute." *Id.* Permanently sealing complaints thus reduces the ability of the public to understand what courts do, scrutinize their activity, and understand matters of public concern.

But the question here is not whether complaints should be permanently sealed. While transitioning to e-filing under extraordinarily difficult circumstances, Vermont courts made 54.8% of complaints available the day they were filed and 77.4% within one day. A225. After moving to centralize the review process, those figures rose to 67% same-day and 95% within one business day. A505. All of these figures are higher than Courthouse News's overall coverage percentages outside of Vermont.

Appellees cannot show that instantaneous access to court filings enhances the ability of the court system to work properly and fulfill its function, given the little benefit it promises and the real risks it entails. And Appellees can still less show why logic supports instantaneous access when the timely access Vermont courts already provide delivers nearly all the benefits of instantaneous access while avoiding the corresponding significant downsides.

B. Appellees' claim also fails as a matter of law under the intermediate scrutiny that applies to time, place, and manner restrictions

1. The District Court erroneously applied strict scrutiny

The parties devoted considerable attention below to what level of scrutiny would apply if Courthouse News had established its claimed right. Courthouse News contended that strict scrutiny applied and Appellants responded that appellate courts have uniformly rejected that position. The District Court did not cite or discuss *Globe*'s explanation that access denials are subject to strict scrutiny but "limitations on [a] right of access" "that resemble 'time, place, and manner' restrictions on protected speech" are not. *Globe Newspaper,* 457 U.S. at 607-608, n.17. Nor did it address the Fourth and Ninth Circuits' application of *Globe* and conclusion that strict scrutiny does not apply to challenged access practices because they "resemble time, place, and manner restrictions." *Schaefer*, 2 F.4th at 328; *Planet*, 947 F.3d at 595.

Instead, the District Court stated that the question before it was whether Vermont's process was "narrowly tailored and 'essential to preserve higher values.'" A540 (quoting *Bernstein*, 814 F.3d at 144). This was an error of law. *Bernstein* addressed the standard that applies

when access is permanently denied by a sealing order. 814 F.3d at 144. Access denials are subject to strict scrutiny, but "'[o]f course, limitations on the right of access that resemble time, place, and manner restrictions on protected speech" are not. *Globe*, 457 U.S. at 606-607, n.17. "The appropriate standard by which to evaluate the constitutionality of a content neutral regulation that imposes only an incidental burden on speech is the intermediate level of scrutiny." *Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2d Cir. 2007).

Because the rules Courthouse News challenges "resemble time, place, and manner restrictions" the District Court applied the wrong level of scrutiny. *Schaefer*, 2 F.4th at 328; *Planet*, 947 F.3d at 595.

2. The challenged rules are content neutral, narrowly tailored, and leave open ample alternative channels for communication

Time, place, or manner restrictions are constitutional provided they "'are justified without reference to the content of the regulated speech . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" *Carew–Reid v. Metro. Transp. Auth.*, 903 F.2d 914, 916 (2d Cir. 1990) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791

(1989)). The challenged rules here should also have been upheld under the time, place, and manner framework.

a. The challenged rules are content neutral

First, the challenged rules are "content-neutral." *Planet,* 947 F.3d at 595. A restriction is content neutral when it is "justified without reference to the content of the regulated speech." *Marcavage v. City of New York*, 689 F.3d 98, 104 (2d Cir. 2012) (quotations omitted). The rules here are content neutral because they apply "to all new civil complaints without regard to their content." *Glessner*, 549 F. Supp. 3d at 191; *accord Planet*, 947 F.3d at 595.

b. The rules are narrowly tailored to serve a significant governmental interest in the fair and orderly administration of justice

Second, the rules are narrowly tailored to serve a significant governmental interest. A restriction is narrowly tailored "'so long as [it] . . . promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Carew-Reid*, 903 F.2d at 917 (quoting *Ward*, 491 U.S. at 799). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest" a regulation "will not be invalid simply because a court

concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800.

The "fair and orderly administration of justice" is a well-recognized significant governmental interest. *Planet*, 947 F.3d at 596. It encompasses substantial interests in "ensuring compliance with court rules," *Glessner*, 549 F. Supp. 3d at 191, protecting the "'privacy interests of litigants and third parties' in civil litigation" and "'administrative efficiency interests.'" *Planet*, 947 F.3d at 596 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 n.20, 35 (1984) and *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990)). "Even in this era of electronic filing . . . instantaneous public access" to complaints "could impair the orderly filing and processing of cases with which clerk's offices are charged. *Planet*, 947 F.3d at 596.

The Vermont public access and electronic filing rules are "narrowly tailored to these interests because they expressly provide for public access to civil complaints" that are accepted for filing within minutes of their acceptance. *Glessner*, 549 F. Supp. 3d at 191. Pre-access human review is "what traditionally occurs when a litigant walks up to the clerk's office window with a paper complaint." *Id.* at 191. Indeed,

Courthouse News averred below that "the nearly-universal" paper complaint intake process includes a clerk "tak[ing] a cursory look at the complaint," "check[ing] for a signature," and "confirm[ing]" the filing fee and "stamping" the complaint before making it publicly available. A082.

Courthouse News's historic coverage percentages, and nationwide litigation campaign, confirm that Vermont's practices are narrowly tailored and consistent with, or faster than, the traditional review practices of most courts nationwide. In each of the last six years, Courthouse News covered less than 54.8% of complaints same-day on average: (1) across all state courts it covered daily (42-46%) and (2) across all state and federal courts it covered daily combined (49-51%). A204. Combined, or state court only, figures are the most accurate reflection of nationwide practices because as described above, state courts handle more than 95% of civil cases. Indeed, many individual states have historically received more than three times as many new civil case filings as all of the federal district courts combined.[9]

[9] John Broderick & Lawrence Friedman, *State Courts and Public Justice: New Challenges, New Choices*, 100 Ky. L.J. 857, 857 (2012) (comparing

Vermont's rules are also consistent with the practice of many federal courts, as described in more detail in Section I.A., including the Supreme Court, the Seventh Circuit, the District of Vermont, and some other district courts, which do not make case initiating documents instantly available. *See Brown,* 908 F.3d at 1065 (Supreme Court and Seventh Circuit); A085(District of Vermont and unspecified number of other district courts). And Vermont's 67% figure in the window before the ruling below was greater than or equal to Courthouse News's federal court coverage average in three of the last six years. A480, 487.

c. The rules leave open ample alternative channels for communication

The Vermont rules "leave open ample alternative channels for communication" "because they expressly give the public and press access to newly filed complaints as soon as they are entered in the case file." *Glessner*, 549 F. Supp. 3d at 192. And they do not "deny or unwarrantedly abridge the opportunities for the communication of thought" because reporters can "get the complaints in a timely enough manner to report on newsworthy issues." *Planet*, 947 F.3d at 606

278,000 combined federal filings in 2006 and 2007 with more than 950,000 filings in 2005 in five different individual states)

(Smith, J., concurring). Appellees did not allege, or claim when asked by interrogatory, that any Appellee ever did not cover a complaint because Vermont did not make it available the day it was filed. A175-76. Thus, the challenged "minor delays did nothing to deter the informed public discussion of ongoing judicial proceedings." *Planet*, 947 F.3d at 606 (Smith, J., concurring) (quotations omitted).

d. The rules are consistent with the broad weight of authority among courts applying time, place, and manner analyses throughout the country

Planet, Schaefer, Brown, Pepin, and *Glessner* all support reversal of the District Court ruling here. And all were decided on limited records that, unlike here, did not include meaningful comparative data showing whether, or not, the policies they considered actually were restrictions that delayed access from traditional levels. According to Courthouse News's expert, Vermont initially made 54.8% of complaints available same-day and 77.4% of complaints available within one day, without adjusting for weekends and holidays. A219. And Vermont averaged 67% same-day and 95% within one business day in the interval leading up to the ruling. A505. Courthouse News's overall average coverage percentage in courts it covers daily has been lower than both Vermont

figures in each of the last six years. A204. In other words, Courthouse News's position is effectively that Vermont is imposing an unreasonable restriction on access by making access available faster than most courts.

In *Planet*, the District Court enjoined two policies. The Ninth Circuit affirmed as to the first, which "delay[ed] access for up to two weeks," but reversed as to the second, which did not make "between one-third and more than one half" of complaints available same-day. *Planet*, 947 F.3d at 587, 596-600. *Planet's* time, place, and manner analysis supports reversal because, without the benefit of any comparative data, *Planet* reversed a district court ruling as to a policy that did not make "between one-third and more than one half" of complaints available same-day. *Id.* at 587. 54.8% is within that range and 67% is faster.

In *Schaefer*, the clerk's offices initially made "19%" and "42.4%" of complaints available same-day. 2 F.4th at 322. *Schaefer* affirmed a finding that this was too slow and defined contemporaneous as "the same day on which the complaint is filed, insofar as is practicable; and when not practicable, on the next court date – excepting inconsequential deviations and extraordinary circumstances." *Id.* at

328 (quotations omitted). *Schaefer* supports reversal because Vermont initially made as many complaints available same-day as was practicable, 54.8%, while rolling out a new e-filing system with severe pandemic driven staffing constraints.

Being forced by a pandemic to suddenly transition to remote work without the necessary technology, or the ability to get it, is certainly an extraordinary circumstance. *Id.* So is having pandemic driven exceptionally high levels of attrition, vacancies, and recruiting difficulties. *Id.* And as it became practicable for the Vermont judiciary to increase same-day rates as conditions improved and the centralization process moved forward, it did so. Vermont's ultimate 95% access rate within one business day was greater than or equal to Courthouse News's average federal court coverage percentage in five of the last six years and much greater than its average across all courts combined, and state courts only, in all six. A497, 505.

Brown supports reversal because it correctly characterized a dispute concerning "CNS's displeasure with a delay of no more than one business day in access to the vast majority of electronically filed

complaints" as involving delays that "appear to be minimal." 908 F.3d at 1066, 1070.

Finally, *Pepin* and *Glessner* support reversal. Both expressly recognized that instantaneous access is not required under a time, place, and manner framework. *Pepin*, 2021 WL 4710644 at *41 (concluding based on a limited record that access within five business hours was timely); *Glessner*, 549 F. Supp. 3d 193 (explaining "there is no right of instantaneous access" and rejecting a challenge to a pre-access human review process). And both did so without the benefit of comparative data showing that they were considering procedures that made complaints available faster than most courts do nationwide.

e. The District Court erred by unduly narrowing its focus

In short, the District Court unduly narrowed its focus by not answering the questions – and addressing the interests – discussed above. It then conducted a privacy analysis that was flawed as a matter of law and policy for five additional reasons.

First, the District Court erred by focusing solely on civil complaints while considering a generally applicable framework. A challenged restriction "should not be measured by the disorder that would result

from granting an exemption solely to [Plaintiffs]" because if one group is "allowed a dispensation" "other groups" must be as well, "which would then create a much larger threat" to the interest the policy serves. *Marcavage*, 689 F.3d at 107. During the initial e-filing rollout, court staff in Vermont used a rejection code for public documents containing nonpublic information 66 times across all filing types and left 72 rejection comments referring to the inclusion of nonpublic information in documents while using other rejection codes. A216-17.

Second, the District Court correctly recognized that it could not order preferential access for Appellees, but then effectively did just that. It rejected Appellees' request for a media queue because Appellees' First Amendment rights "are coextensive with and do not exceed those rights of members of the public in general." *Schaefer*, 2 F.4th at 326, n.5 (quotations omitted); *see also Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (media does not have "a constitutional right of special access . . . not available to the public generally"). But it then issued an order specific to the "newly filed civil complaints" most relevant to Courthouse News's attorney advertising clients. A545.

Third, the District Court ignored the importance of uniform rules. The Vermont judiciary's long-term plan since the e-filing rollout began has been "to centralize the review process for all case types, on a division-by-division basis" across its civil, criminal, environmental, family, and probate divisions. A213. This requires cross training reviewers to cover different filing types across divisions. A214. The most efficient way to operate a centralized team is to have procedures that are as uniform as possible so that members can shift their focus from division-to-division throughout the day as filing volumes fluctuate. Unique, nonuniform procedures are inefficient. They require more staff time and training, decrease the ability of staff to cover multiple divisions, and cause technical issues like duplicative fees and parties, which require still more staff time to resolve.

Fourth, the District Court erred by effectively conducting a less restrictive alternative analysis. *See Ward*, 491 U.S. at 800. Before proposing uniform rules, the Vermont Supreme Court Advisory Committee on Rules of Public Access thoughtfully considered potential alternatives to human review, including redaction software, which it discussed with the Judiciary's CIO and rejected as too expensive and

limited in its ability to address nonnumeric information. *See* Minutes of December 10, 2018 Meeting at 5; https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/access-records-committee.

Finally, the District Court was wrong to suggest that Vermont's review process is unique. A541. Many clerks throughout the country have explained that protecting privacy is one of their goals when reviewing filings. *See, e.g., Brown*, 908 F.3d at 1067 ("The Clerk explained that . . . if complaints were released to the press before processing, confidential information contained therein could be exposed"); *Pepin*, 2021 WL 4710644 at *6 (finding, as a matter of fact, that court staff "review documents . . . for confidentiality"); *Yamasaki*, 312 F. Supp. 3d at 853 (describing the "privacy review" then conducted by court staff).

III. Courthouse News's claim was moot at the time of the ruling

As described in more detail in Section I.B.2. above, the access rates Appellees calculated for Vermont cover its initial rollout of a new e-filing system on a decentralized county-by-county basis with exceptional staffing constraints during a pandemic. Later in the process, Vermont

moved to centralize the review of civil filings. And after a two week ramp-up period for the central team in July, 2021, Vermont made 67% of initial civil filings available same-day through the end of September and 95% within one business day. A487, 505.[10]

In contrast, over the last six years, Courthouse News covered a combined average of 70-79% of complaints within one business day in other state courts it covered daily, and 77-83% across all state and federal courts it covered daily, respectively. A497. Vermont's 95% figure was also greater than or equal to Courthouse News's one business day coverage average across all federal courts it covered daily in five of the last six years. A497, 505. In percentile terms, Courthouse News's same-day coverage percentage was below Vermont's 67% rate in between 72 and 82% of state courts over the last six years. A501.

The District Court concluded that this case was not moot because Appellants: (1) had not eliminated pre-access review entirely and (2) could revert to their initial practices. A533. The first conclusion was

[10] The Centralized and Noncentralized rows in the Donohue exhibits refer to the counties in which the centralized team was reviewing all of the types of initial civil filings of interest to Courthouse News, and to the counties in which it was reviewing some, but not all, of such filings, respectively.

wrong because the First Amendment does not require instantaneous, pre-review access. For the second conclusion, the District Court cited *Schaefer*. *Id.* But in *Schaefer*, the clerks asserted that they had increased access rates "without hiring any new employees," "changing employee or court hours," or changing any policies or practices. 2 F.4th at 323.

Vermont, in contrast, started with a decentralized county-by-county and division-by-division review process. It then created an entirely new central review team, staffed it with newly created statewide positions, and cross-trained the team to cover multiple divisions. A213-14, 489. It did so as part of a long-term plan to permanently centralize the review process for all case types. A213, 489.

"The voluntary cessation of allegedly illegal conduct usually will render a case moot 'if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events completely and irrevocably eradicated the effects of the alleged violation.'" *Lamar Advert. of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 375 (2d Cir. 2004) (quoting *Granite State Outdoor Advert., Inc. v. Town of Orange, Conn.*, 323 F.3d

450, 451 (2d Cir. 2002)). "Where, as here, the defendant is a government entity, '[s]ome deference must be accorded to a [state's] representation that certain conduct has been discontinued.'" *Id.* at 376 (quoting *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992)).

The District Court should have dismissed this action as moot because there was no reasonable expectation that Vermont would reverse course and nothing in the record suggests that making 95% of complaints available within one business day is unconstitutional.

IV. Appellees failed to establish their entitlement to an injunction

Finally, Appellees failed to show that: (1) they "suffered an irreparable injury," (2) the "balance of hardships" supported an injunction and (3) "the public interest would not be disserved" by an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2006) (quotations omitted).

A. By failing to show that any Appellee has ever not covered a Vermont complaint because it was not made available same-day, Appellees failed to show irreparable harm

The caselaw of this court "suggests" that when "a plaintiff does not allege injury from a rule or regulation that directly limits speech,

irreparable harm is not presumed and must still be shown." *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (citing *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003)). Put another way, irreparable harm may be presumed if a rule directly limits speech. *Bronx Household*, 331 F.3d at 349. "In contrast" where, as here, "a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury." *Id.* at 350.

Because every appellate court that has considered an instantaneous access claim has questioned or rejected it, Appellees were not injured by the rules they challenge. Put another way, under the challenged rules, reporters can "get the complaints in a timely enough manner to report on newsworthy issues." *Planet*, 947 F.3d at 606 (Smith, J., concurring). Discovery below bears out this commonsense conclusion. Every Appellee was asked "[h]as any Plaintiff ever decided not to publish information about a civil complaint filed in a Vermont state court because it was not made publicly available by court staff the same day it was submitted?" and none said yes. A173-74.

B. The equities weighed against an injunction because Appellees identified no constitutional violations and the rules and statute they challenged serve important public purposes

As described above, Appellees fell well short of establishing a constitutional violation. And the access figures Courthouse News offered for Vermont are higher than the percentage of complaints it has been able to cover same-day on average across all other courts it covers daily around the country in each of the last six years. A204.. The equities weigh strongly against enjoining a process that promotes public access at higher rates than most courts while mitigating the risk of litigants improperly publishing Social Security numbers and other personally identifying information.

C. The public interest weighed against an injunction because the Vermont rules simultaneously promote public access and other important public interests

The rules and statute Appellees challenge are designed to "promote public access, while balancing privacy concerns and the court's interests in orderly and efficient administration." *Glessner*, 549 F. Supp. 3d at 193. The Vermont courts promote public access by making 95% of complaints available within one business day and Appellees have not identified a single complaint they did not cover because of Vermont's

electronic filing procedures. Appx.173-74, 505. The challenged "minor delays" here "did nothing to deter the informed public discussion of ongoing judicial proceedings." *Planet*, 947 F.3d at 606 (Smith, J., concurring) (quotations omitted).

At the same time, Vermont's e-filing process has enhanced the legitimacy of Vermont courts, and protected the public, by mitigating the risks associated with the publication of personally identifying information. As described in Section II.A.2. above, Social Security numbers are regularly exposed in federal filings and since the inception of e-filing, Vermont reviewers have regularly rejected filings containing unredacted personally identifying information.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the District Court ruling below and remand for dismissal of this action.

Dated: April 1, 2022

STATE OF VERMONT

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. Local Rule 32.1(a)(7)(B) because this brief contains 13,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook style.

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