

Nos. 20-1290(L), 20-1386

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

COURTHOUSE NEWS SERVICE,

Plaintiff-Appellee,

v.

**GEORGE SCHAEFER, in his official capacity as Clerk of the Circuit
Court for Norfolk, Virginia; JACQUELINE SMITH, in her official
capacity as Clerk of the Circuit Court for Prince William County,
Virginia,**

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:18-cv-391-HCM

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 28 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFF-APPELLEE**

Bruce D. Brown, Esq.

Counsel of Record

Katie Townsend, Esq.*

Caitlin Vogus, Esq.*

William Powell, Esq.*

Reporters Committee for

Freedom of the Press

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** Of Counsel*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press,
(name of party/amicus)Atlantic Media, Inc., Boston Globe Media Partners, LLC, California News Publishers Associationwho is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? ☐ YES ☒ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bruce D. Brown

Date: 7/6/2020

Counsel for: Reporters Committee

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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Workshop at
(name of party/amicus)American University, Investigative Studios, The Media Institutewho is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
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- Counsel has a continuing duty to update the disclosure statement.

No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

MPA - The Association of Magazine Media, National Association of Broadcasters,
(name of party/amicus)National Freedom of Information Coalition, National Press Club Journalism Institute,who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

The National Press Club, National Press Photographers Association, The News Leaders Association,
(name of party/amicus)The NewsGuild - CWA, Radio Television Digital News Associationwho is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

Society of Environmental Journalists, Society of Professional Journalists,
(name of party/amicus)Virginia Coalition for Open Government, Virginia Press Associationwho is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

The E.W. Scripps Company, The New York Times Company, Sinclair Broadcast Group, Inc.

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gannett Co., Inc.

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☒ YES ☐ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☒ YES ☐ NO
If yes, identify all such owners:
BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
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No. 20-1386Caption: Courthouse News Service v. Schaefer

Pursuant to FRAP 26.1 and Local Rule 26.1,

POLITICO LLC

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
 (appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☒ YES ☐ NO
 If yes, identify all parent corporations, including all generations of parent corporations:

POLITICO LLC's parent corporation is Capitol News Company.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
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Signature: /s/ Bruce D. Brown

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Counsel for: Reporters Committee

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), ALM Media, LLC, The Associated Press, Atlantic Media, Inc., Boston Globe Media Partners, LLC, California News Publishers Association, The E.W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Investigative Studios, The Media Institute, MPA - The Association of Magazine Media, National Association of Broadcasters, National Freedom of Information Coalition, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, The NewsGuild - CWA, POLITICO LLC, Radio Television Digital News Association, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, the Virginia Coalition for Open Government, and the Virginia Press Association.

Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media lawyers in 1970, when the nation’s press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation,

amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amici file this brief in support of Plaintiff-Appellee Courthouse News Service (“CNS”). Amici are members or representatives of the news media. Amici or the journalists and news organizations they represent rely on timely access to judicial records to report the news. Some of amici are CNS subscribers, including The Associated Press, Boston Globe Media Partners, LLC, The E.W. Scripps Company, Gannett Co., Inc., and Sinclair Broadcast Group, Inc.

Amici have a strong interest in ensuring that courts correctly interpret and apply the First Amendment right of access to court documents. Timely access to court documents, including civil complaints, is essential to reporting on the legal system and the judicial branch. Amici write to emphasize the public interests at stake in this case and the importance to members of the news media and the public of contemporaneous access to civil complaints.

SOURCE OF AUTHORITY TO FILE

Counsel for both Plaintiff-Appellee and Defendants-Appellants have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(c)(5) STATEMENT

No party's counsel authored any part of this brief. No person other than amici or their counsel contributed money intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment right of access to judicial proceedings and documents recognizes that the public's understanding and oversight of the judicial process are essential to our system of self-governance. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 575–77 (1980) (plurality opinion). Access to newly filed civil complaints, in particular, is important because a complaint is the foundational document that sets a lawsuit in motion and triggers the judicial process. The public has a right to learn about the matters occupying space on the courts' dockets and consuming judicial resources.

The important work that journalists do requires timely access to civil complaints. Because freshness and speed are key aspects of the news business, delay can result in a complete denial of meaningful access, both for reporters and for the members of the public who rely on the press for information. Prompt access to civil complaints ensures that the public learns about important cases while they are still newsworthy, promotes accuracy in reporting, and leads to more meaningful public debate about those cases.

Not only does timely access to civil complaints benefit the public, but it is also constitutionally required. Every federal court to reach the issue has held that the First Amendment right of access applies to civil complaints. More specifically, both the “experience and logic” test and the “analytical” approach demonstrate that the First Amendment right of access applies to civil complaints and requires that such access be timely.

Once the First Amendment right of access attaches, it can be overcome only by “an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 9–10 (1986) (“*Press-Enterprise II*”) (citing *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”)); see also *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014). Most courts have applied this strict scrutiny standard as defined in *Press-Enterprise II* to denials of access to judicial proceedings and records subject to the First Amendment right of access. Time, place, or manner analysis, on the other hand, is more appropriate for issues of courtroom decorum—not denials of access. Regardless of what standard applies, however, the delays by Norfolk Circuit Court Clerk George Schaefer and Prince William Circuit Court Clerk Jacqueline Smith (the “Clerks”) in providing access to civil complaints at issue in this case are unconstitutional.

Amici therefore urge affirmance of the district court's judgment holding that the Clerks' delays in providing access to civil complaints violate the public's qualified First Amendment right of access.

ARGUMENT

I. Timely access to civil complaints before processing benefits the public and the press.

By definition, news must be timely. News is not breaking or hot unless it is contemporaneous. In the era of online publishing, especially, news is disseminated instantaneously, and the public expects to obtain up-to-the-second information from news outlets. For reporters who cover the courts, delivering the news thus requires timely access to civil complaints. The quintessential legal document, a complaint initiates litigation and frames the issues presented—providing the first picture of a case's who, what, when, where, and why. In short, reporters need timely access to complaints in order to inform the public about what is happening in court.

When news media organizations like CNS have contemporaneous access to civil complaints, it is the public that benefits. As the United States Court of Appeals for the Ninth Circuit explained in a similar case brought by CNS, “[t]he news media’s right of access to judicial proceedings is essential not only to its own free expression, but also to the public’s.” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“*Planet I*”) (quoting *Leigh v. Salazar*, 677 F.3d 892,

900 (9th Cir. 2012)). “The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Id.*; *see also Cox Broad. Corp. v. Cohn.*, 420 U.S. 469, 490–91 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”).

And access delayed is access denied, for both the press and the public: “The public’s interest in monitoring the work of the courts is subverted” when access is not contemporaneous. *Pub. Citizen*, 749 F.3d at 272. Timely access to civil complaints allows the press to report on new civil disputes at the moment they are most newsworthy, enhances the accuracy and completeness of news reports, and fosters public understanding and discussion of judicial affairs. These benefits of timely access to civil complaints flow, ultimately, to the public.

A. Newsworthiness depends on timeliness.

Timeliness is a critical component of news. As one journalism scholar stated succinctly, “It is, after all, called the ‘news’ business and not the ‘olds’ business.” Janet Kolodzy, *Convergence Journalism: Writing and Reporting Across the News Media* 59 (2006); *see also* Fred Fedler et al., *Reporting for the Media* 123 (8th ed. 2005) (describing timeliness as one of the key characteristics of news). A news story that is hot in the morning might develop substantially by

afternoon. Kolodzy, *supra*, at 59 (“[I]f a man is shot at a drugstore in the morning and police are searching for a suspect, then that’s news in the morning. But if by late afternoon, police have arrested a woman suspected in the shooting, then the arrest is more timely than the shooting in the 6:00 p.m. newscast.”). And by the next business day—or as the Clerks put it, “within one court day”—an entirely new set of headlines will have replaced yesterday’s news.

The U.S. Supreme Court and federal courts of appeals have repeatedly recognized timeliness as a fundamental feature of news. *See, e.g., Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (recognizing a quasi-property interest in “hot” news). As the Seventh Circuit wrote of the right of access to judicial records, “The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.” *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *see also Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (recognizing that even a brief loss of First Amendment freedoms constitutes “irreparable injury”).

Immediacy in news reporting is even more vital in the digital age because, as technology advances, the definition of “fresh” continues to evolve. *See* Toni Locy, *Covering America’s Courts* 13 (2013) (“In the Internet age, a deadline passes every second.”). These days, news arrives not once per day, but more than once per minute. The websites of *The Washington Post* and *The New York Times*, for example, label the timeliness of news updates up to the minute. A case study of the 2012 presidential campaign by professor Daniel Kreiss found that social media had shortened the 24-hour news cycle, ushered in by cable news, to just two hours. David Uberti, *How Political Campaigns Use Twitter to Shape Media Coverage*, *Colum. Journalism Rev.* (Dec. 9, 2014), <https://perma.cc/C3Q3-TWUH>. And the public’s voracious appetite for timely news has kept pace with the evolving technology. “By a large majority, nearly two-thirds of adults now say they look at news at least several times a day. We are now a nation of serial news consumers.” *How Americans Describe Their News Consumption Behaviors*, Am. Press Inst. (June 11, 2018), <https://perma.cc/M3L2-84PB>.

The importance of timeliness to newsworthiness is reflected in recent reporting on activity in the Virginia judicial system. Reporters routinely rely on newly filed civil complaints to disseminate information about topics of public concern while they are still timely—often the same day. *See, e.g., Lee Monument Lawsuit Cites Plummeting Property Value*, WTVR CBS 6 (June 15, 2020),

<https://perma.cc/T7RS-SYNG> (reporting on a lawsuit filed the same day); Michelle Murillo, *Lawsuits Claim Northam's COVID-19 Orders Unconstitutional*, WTOP News (June 9, 2020), <https://perma.cc/3FLW-6K9M> (reporting at 12:20 p.m. about lawsuit filed the same day); A.J. Nwoko, *Lawsuit Filed Against Richmond Police Department Over Tear-Gas Being Used on Peaceful Protesters*, WWBT NBC 12 (June 4, 2020), <https://perma.cc/WJX2-EHS3> (reporting on a lawsuit filed “[m]inutes before John Marshall Courthouse on 9th Street in Richmond closed” the same day).

In the modern news environment, policies that delay access to judicial records can amount to a complete denial of meaningful access, because “old news” does not receive the same level of public attention as timely news and may not be published at all. In contrast, timely access to civil complaints allows the news media to learn of new civil lawsuits as they are filed and to report about them to the public when their newsworthiness is at its apex.

B. Timely access to civil complaints facilitates accurate and complete news reporting.

Court records are the most valuable and direct sources of information for reporting on lawsuits. Virginia law recognizes the desirability of reporters relying on court documents by granting a fair report privilege from potential defamation liability to journalists who provide accurate accounts of court proceedings. *See Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988) (discussing various policy

rationales underlying the fair report privilege in Virginia, including the role of the press in informing the public about significant and newsworthy lawsuits); *Alexandria Gazette Corp. v. West*, 93 S.E.2d 274, 278 (Va. 1956) (holding that the fair report privilege applied when a journalist relied on a notice and affidavit she discovered “in making her daily routine check of the Clerk’s Office”). Journalists often look to court records, including civil complaints, to ensure that their reporting is fair, accurate, and complete.

Reporters and their audiences benefit tremendously when news reports can reference, quote from, and even hyperlink to court documents, including complaints. In a textbook on legal news reporting, professor and veteran journalist Toni Locy stresses this point. *See Locy, supra*, at 61–67 (focusing on the theme that, when reporting on courts, “reading is fundamental”). Locy advises reporters not to rely solely on press releases and statements given by attorneys and to be aware of the potential for ulterior motives that lawyer-advocates may have when speaking with the press. *Id.* at 3–4. Instead, Locy instructs reporters to “review[] court filings or other public records” to determine whether and how a fact or allegation should be reported. *Id.* at 9. Thus, immediate access to primary source documents is important for reporters writing the first news stories about a lawsuit to make their reporting fairer and more accurate.

Timely access to civil complaints facilitates thorough and complete

reporting by the news media about newly filed civil lawsuits. Journalists rely on the information contained in civil complaints to report the “core dispute” underlying new civil suits, including the factual and legal underpinnings of the claims. *See* Beth Winegarner, *6 Tips for Reporters Tracking State Legal Cases*, Poynter (Sept. 27, 2013), <https://perma.cc/64DQ-5WWX> (recommending that reporters “skim through [court documents in newly filed cases] to find out what the core dispute is about—and what kind of legal remedies, including money, the plaintiffs are asking for”). In the current news environment, stories build upon each other and are updated regularly online. It is therefore important that the first news stories about a lawsuit be accurate and complete, with as much information as possible derived from official, primary sources. Journalism on newly filed cases will be more authoritative and accurate if the complaints themselves are available for inspection, copying, and reference by members of the news media.

- C. Timely access to civil complaints benefits the public by promoting understanding and meaningful debate about judicial processes and matters occupying the courts’ dockets.

The American people rely on the news media for information about the workings of government, including the judicial system. As the U.S. Supreme Court has stated: “[An] untrammelled press [is] a vital source of public information,’ . . . and an informed public is the essence of working democracy.”

Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 585

(1983) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (writing that “the Founding Fathers gave the free press the protection . . . so that it could bare the secrets of government and inform the people”).

The public has a right to be informed about matters that are now pending before state courts and that may demand court resources for years to come. *See Virginia Dep’t of State Police v. Wash. Post*, 386 F.3d 567, 574 (4th Cir. 2004) (observing that “the operation of the court system is a matter of utmost public concern”) (internal quotation marks omitted). Indeed, the public can engage in meaningful discussion and debate about pending lawsuits and can observe the operation of the judicial system only when it knows those lawsuits are underway and can access prejudgment records. *See Public Citizen*, 749 F.3d at 268 (finding that access to civil docket sheets “provides onlookers an overview of the court proceedings and allows them to ascertain the parties to the case, the materials that have been filed, and the trial judge’s decisions”). For that reason, access to “complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation’s court systems.” *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (*Planet III*) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)).

Timely access to newly filed civil complaints also permits individuals, through news reports, to learn about pending suits, which may inform them about their own legal rights. By reading or hearing timely news reports about new civil suits, citizens may realize that they too have legal rights at issue, learn that they may pursue civil remedies, or discover that they may be able to join an existing civil lawsuit. *See, e.g.,* Jesse Paul, *Planned Parenthood Victims’ Lawsuit Could Be in Limbo as Holding Pattern in Criminal Case Drags On*, Denver Post (Nov. 21, 2016), <https://perma.cc/57B4-UHHT> (noting that two plaintiffs in a civil case against a healthcare provider joined the filing after reading news reports of the civil case). Thus, timely reporting on new civil complaints could facilitate consolidation of cases, which conserves judicial resources. In other cases, it is possible that members of the public may discover they have personal knowledge about a pending lawsuit, enabling them to come forward as witnesses.

II. The First Amendment requires contemporaneous access to civil complaints.

A. The First Amendment right of access applies to civil complaints and requires access contemporaneously with their filing.

The First Amendment right to the freedom of speech—a cornerstone of our constitutional system—“would lose much meaning” without the right of access to public proceedings. *Richmond Newspapers*, 448 U.S. at 576–77. As the Ninth Circuit has explained, the two are “inextricably intertwined” because, while the

right to free speech protects rigorous debate of governmental activities, it is the right of access that guarantees it is an informed debate. *Planet I*, 750 F.3d at 785. Thus, the right of access is “an essential part of the First Amendment’s purpose to ‘ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.’” *Id.* (quoting *Globe Newspaper Co.*, 457 U.S. at 604).

This Court has recognized that a qualified First Amendment right of access extends to civil proceedings and records, including civil docket sheets and materials filed in connection with a summary judgment motion. *Public Citizen*, 749 F.3d at 267–69. This Court has not yet addressed the question of whether the First Amendment right of access applies to newly filed civil complaints. However, as the district court below recognized, other federal circuit courts have consistently held that it does. *See Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016); (holding that the First Amendment presumption of access applies to civil complaints); *Planet III*, 947 F.3d at 585 (“[T]he press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed.”); *see also* J.A. 1494–95 (citing additional federal district court opinions recognizing a First Amendment right of access to civil complaints).

To determine whether the First Amendment grants a right of access to a particular class of court records, the Fourth Circuit has applied two different tests: a “logic and experience” test and the “analytical” approach. The logic and experience test looks to whether the particular document has been open to the press and general public historically and “whether public access plays a significant positive role in the functioning of the particular process in question” *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (quoting *Press-Enterprise II*, 478 U.S. at 9–10). The analytical approach looks to whether access to the document is “a necessary corollary of the capacity to attend the relevant proceedings.” *Doe*, 749 F.3d at 267 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

Civil complaints have traditionally been available to the public. See *Bernstein*, 814 F.3d at 141 (“experience” supports First Amendment right of access to complaints, which have “historically been publicly accessible by default, even when they contain arguably sensitive information”); *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 36 (Tenn. 1956) (stating that the “press has for time out of mind published the contents of a pleading filed in Court, though no further action has been taken thereon”). Logic also supports the right of access to civil complaints. “Public access to complaints allows the public to understand the activity of the . . . courts, enhances the court system’s accountability and legitimacy, and informs the

public of matters of public concern.” *Bernstein*, 814 F.3d at 141; *see also Planet I*, 750 F.3d at 785, 787-88. Thus, under the logic and experience test, the First Amendment right of access applies to newly filed civil complaints.

The analytical approach produces the same result. Like the docket sheets to which this Court found a First Amendment right of access in *Public Citizen*, complaints are a “critical component to providing meaningful access to civil proceedings.” 749 F.3d at 268. Indeed, as noted *supra*, access to the complaint is a critical component of meaningful access to a civil proceeding. The complaint identifies the parties involved, the claims asserted, and the alleged factual basis for those claims. Further, the filing of a complaint sets the civil justice process in motion. Accordingly, “when a plaintiff invokes the Court’s authority by filing a complaint, the public has a right to know who is invoking it, and towards what purpose, and in what manner.” *In re NVIDIA Corp. Derivative Litig.*, No. C 06-06110 SBA, 2008 WL 1859067, at *3 (N.D. Cal. Apr. 23, 2008); *see also McCrary v. Elations Co., LLC*, No. EDCV-13-00242, 2014 WL 1779243, at *6 (C.D. Cal. Jan. 13, 2014) (suggesting that the centrality of the complaint to the lawsuit also makes the document central to “the public’s understanding of the judicial process and of significant public events”); *see also Courthouse News Serv. v. Jackson*, Civil Action No. H-09-1844, 2009 WL 2163609, at *5 (S.D. Tex. July 20, 2009). The First Amendment right of access therefore applies to civil complaints.

Moreover, as this Court has recognized, the right of access afforded by the First Amendment is a right of *contemporaneous* access. *Pub. Citizen*, 749 F.3d at 272; *see also Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).

Therefore, “[e]ach passing day [access is denied] may constitute a separate and cognizable infringement of the First Amendment.” *Id.* (quoting *Neb. Press Ass’n*, 427 U.S. at 254). This Court’s precedent leads to the conclusion that the public has a First Amendment right to access civil complaints when they are filed, and access must be provided in a timely manner.

- B. When evaluating delays to the First Amendment right of access, the proper test is strict scrutiny, rather than a time, place, or manner analysis.

Although the First Amendment right of timely access to civil complaints is qualified, the Supreme Court held in *Press-Enterprise II* that once the right attaches access may only be denied or delayed by “an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” 478 U.S. at 9–10 (citing *Press-Enterprise I*, 464 U.S. at 510).

The Supreme Court, as well as this and other circuit courts of appeals, have made clear that strict scrutiny as defined by the Court in *Press-Enterprise II* is the appropriate standard for determining whether the First Amendment right of access to judicial records has been overcome. *See id.* at 13–14; *see also Leigh*, 677 F.3d

at 899 n.5 (collecting cases that apply strict scrutiny, as defined in *Press-Enterprise II*, when evaluating the right of access). As this Court has held, when the First Amendment right of access applies, “access may be restricted only if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest.” *Pub. Citizen*, 749 F.3d at 266.

By contrast, time, place, and manner analysis, which generally calls for intermediate scrutiny, does not properly apply in the context of the First Amendment right of access to court records and proceedings. The Ninth Circuit in *Planet III* observed that delays in access to civil complaints “resemble” time, place, and manner restrictions, but the court still applied what it called the “rigorous” standard from *Press-Enterprise II*. *Planet III*, 947 F.3d at 595–96. The separate body of case law regarding reasonable time, place, or manner restrictions developed in the context of restrictions on the exercise of free speech rights. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech.”); *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 536 (1980) (explaining that “the essence of time, place, or manner regulation” was recognizing the effect of “various methods of speech”). In contrast, as explained above, courts

in First Amendment right of access cases have overwhelmingly followed the mandate of *Press-Enterprise II* and applied strict scrutiny.

A time, place, or manner analysis is simply conceptually incompatible with delays in access like the ones at issue here. In *Richmond Newspapers v. Virginia*, a plurality of the Supreme Court suggested in dicta in a footnote that time, place, or manner restrictions may be appropriate to maintain the “quiet and orderly setting” of a courtroom. 448 U.S. at 581 n.18 (plurality opinion). The plurality went on to suggest that courts may prioritize seating for media representatives using time, place, or manner restrictions “when not every person who wishes to attend can be accommodated” because of the “limited capacity” of a courtroom. *Id.* But such issues of decorum or courtroom management do not prevent the public from accessing proceedings or documents in their entirety, as the delay in access to newly filed civil complaints does here. The delays in access to civil complaints at issue in this case impose a much greater and different kind of burden on the First Amendment right of access than rules necessary to maintain the quiet and orderly setting of a courtroom. As with other denials of access to judicial records, they are therefore more appropriately scrutinized under *Press-Enterprise II*’s strict scrutiny standard.

That the civil complaints at issue are eventually made available to the public does not change the applicability of the strict scrutiny standard. A delay in

accessing civil complaints amounts to a denial of access to them for the period of time they are withheld, and the delay is therefore subject to strict scrutiny. As the Ninth Circuit found in analyzing delays in access to documents subject to the First Amendment right of access, “It is irrelevant that some . . . documents might only be under seal for, at a minimum, 48 hours The effect . . . is a total restraint on the public’s first amendment right of access even though the restraint is limited in time.” *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983); *see also Jackson*, 2009 WL 2163609, at *4 (finding that a “24 to 72 hour delay in access is effectively an access denial”). The Supreme Court has stated that a loss of First Amendment rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373 (citation omitted); *see also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“[E]ven a one to two day delay impermissibly burdens the First Amendment.”). Thus, delays in access to civil complaints are effectively denials of the First Amendment right of access and are subject to strict scrutiny.

C. The Clerks have violated the First Amendment right of access under either strict scrutiny or a time, place, and manner analysis.

Regardless whether the appropriate standard for evaluating delayed access to civil complaints is strict scrutiny or a time, place, and manner analysis, amici agree with the district court and CNS that the Clerks have not met their burden to justify the delays in access to civil complaints under either standard. J.A. 1501

(“Defendants cannot satisfy their burden under either test.”); Pls-Appellee’s Br. at 37. To satisfy strict scrutiny, the Clerks must show that their policies are narrowly tailored to a compelling government interest. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Under intermediate scrutiny, time, place, and manner restrictions on protected speech are permitted only when they are (1) “justified without reference to the content of the regulated speech,” (2) “narrowly tailored to serve a significant governmental interest,” and (3) “leave open ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791.

The Clerks argue that they must process civil complaints before permitting public access to them to protect privacy interests. Defs.-Appellants Br. at 9. Even if the privacy interests asserted by the Clerks are a compelling government interest (under strict scrutiny) or significant government interest (under a time, place, and manner analysis)—which amici do not concede—the Clerks’ policies are not narrowly tailored for two reasons. First, Virginia law makes the filer, not the clerk, responsible for redacting confidential information in civil complaints. *E.g.*, Va. Code §§ 8.01-420.8(A); 17.1-223(B)(i). This statutory requirement more directly serves the privacy interests identified by the Clerks to justify their delays in providing access to civil complaints. Second, since this litigation was filed, the Clerks have begun providing CNS timely access to civil complaints without any

evidence that such access has caused the release of any confidential information. The Clerks can simply continue their current practices, which are more narrowly tailored because they apparently permit the Clerks to both protect privacy and provide timely access to civil complaints.

Even if the Court applies a time, place, and manner analysis to this case, it should still hold in favor of CNS because the Clerks have not left open “ample alternative channels” for access to this information. As explained above, delays are effectively denials of access; members of the press and the public have no access to newly filed civil complaints from the court during the time the Clerks withhold them for processing. *See, e.g., Planet I*, 750 F.3d at 787–88 (“CNS cannot report on complaints [the clerk] withholds.”).

D. Profit motive is irrelevant to the constitutional right of access.

Finally, the Clerks criticize CNS for seeking access to civil complaints that have “commercial value” to CNS. Defs.-Appellant’s Br. at 13, 26. CNS’s commercial interest in civil complaints is irrelevant to the determination of its First Amendment right of access. Courts do not examine the commercial or nonprofit status of a news organization when evaluating its constitutional rights.

The Supreme Court has repeatedly determined that commercial interest is irrelevant to a constitutional inquiry concerning First Amendment rights. *See Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit

motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”); *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1973) (“If a newspaper [or website]’s profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales,” and “[s]uch a basis for regulation clearly would be incompatible with the First Amendment”). The Supreme Court has thus made it clear that any applicable First Amendment rights operate with full force regardless of whether a news organization seeks to earn a profit.

In addition, the First Amendment right of access is held broadly by the general public. A single news organization’s commercial model does not affect, let alone extinguish, a constitutional right of access held by the public. All members of the public, and not just CNS’s paid subscribers, would benefit from access, and all members of the public, which include for-profit news media organizations, possess a First Amendment right of timely access to civil complaints. *See Richmond Newspapers*, 448 U.S. at 586 n.2 (stating that “the media’s right of access is at least equal to that of the general public”).

If profit motive were relevant to determining whether the constitutional right of access to judicial records applies, then most news organizations would be

stripped of their right of access, to the substantial detriment of the public.

Countless newspapers, including *The New York Times*, *The Washington Post*, and *The Virginian-Pilot*, for example, require paid subscriptions to access full online content, and articles in the print editions appear alongside paid advertisements.

Paid advertisements also are an indispensable source of revenue for broadcast television and radio stations in local communities across the country. Such for-profit activity helps to sustain the news industry. Any argument “that the constitutional guarantees of freedom of speech and of the press are inapplicable” where speech is commercially motivated would “shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (internal quotations omitted). In short, that CNS might sell its services to the public after exercising its right of access to civil complaints “is as immaterial in this connection as is the fact that newspapers and books are sold.” *Id.*

CONCLUSION

For the foregoing reasons and the reasons stated in CNS’s brief, amici urge the Court to affirm the district court’s order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the lengths permitted by Federal Rules of Appellate Procedure 29(a)(5) because it contains 5,577 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 2016 and has a typeface of 14-point Times New Roman.

Dated: July 6, 2020

/s/ Bruce D. Brown

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