Case Brief: *Courthouse News Service v. Smith*[*]

INTRODUCTION

Being a licensed attorney and member of the Virginia Bar is a profound accomplishment that allows individuals the privilege of practicing law. Members of the Virginia Bar are granted the bonus of remote access to judicial records through a government program that ordinary citizens are not privy to. Virginia Code § 17.1-293(E)(7) allows lawyers with a Virginia Bar license to "skip the trip to the courthouse and view civil court records remotely" through the Officer of the Court Remote Access System ("OCRA").[1] Virginia implemented the OCRA system in 2012 at 105 courthouses as a way to provide remote access to nonconfidential civil court records.[2] Individuals with OCRA access can view court documents remotely, twenty-four hours a day, seven days a week.[3]

Though this is a great aid to lawyers, the limited access draws First Amendment scrutiny because only one group is given access to information, therefore limiting what information enters the marketplace. Courthouse News Service ("Courthouse News") challenged this statute because it wanted remote access to court records in order to (1) "provide more comprehensive news coverage about new civil actions in all or most of Virginia's Circuit Courts" and (2) reduce cost of travel and waiting time for reporters covering the courts.[4] Courthouse News primarily publishes on "law, cases, major rulings, trials, [and]

1. Courthouse News Serv. v. Smith, 126 F.4th 899, 905 (4th Cir. 2025), *aff'g in part*, *vacating in part*, Courthouse News Serv. v. Hade, 631 F. Supp. 3d 349 (E.D. Va. 2022).

> In each jurisdiction that uses OCRA, an authorized user pays a subscription fee to access the court records that jurisdiction makes available online. The records are available to the subscriber over the internet anytime, anywhere. But Virginia law forbids "any data accessed by secure remote access to be sold or posted on any other website or in any way redistributed to any third party."

Id. (quoting VA. CODE ANN. § 17.1-293(H)).

2. Brief of Amici Curiae the Reporters Committee for the Freedom of the Press and 38 Media Organizations in Support of Plaintiff-Appellant at 4, Courthouse News Serv. v. Smith, 126 F.4th 89 (4th Cir. 2023) (No. 22-2110), 2023 WL 2061776 [hereinafter Reporters Committee Amicus Brief].

3. *Id.*

4. Complaint Alleging Violation of Civil Rights Pursuant to 42 U.S.C. § 1983 and Seeking Injunctive and Declaratory Relief paras. 42, 48, Courthouse News Serv. v. Hade, 631 F. Supp. 3d 349 (E.D. Va. 2022), *aff'd in part*, *vacated in part*, *and remanded sub nom.*, Courthouse News Serv. v. Smith, 126 F.4th 899, 905 (4th Cir. 2025) (No. 3:21-cv-00460-HEH), 2021 WL 7352208 [hereinafter Complaint].

arguments and opinions within the state and federal courts."[5] On average, its reporters can cover five courthouses out of Virginia's 120 circuit courts on a daily basis because of time and costs,[6] so having remote access to documents would allow its limited number of reporters to reach more courthouses and report more news.[7] The case was eventually reviewed by the Fourth Circuit Court of Appeals.

The Fourth Circuit in *Courthouse News Service v. Smith*[8] held that Virginia Code § 17.1-293(E)(7), restricting the benefit of OCRA to only designated parties, is constitutional under the First Amendment because the statute "resembles a time, place, and manner regulation" as opposed to a content-based restriction.[9] In doing so, the court created a barrier for reporters in an already-shrinking media field.[10]

FACTS OF THE CASE

In 2016, Courthouse News requested OCRA access from nearly fifty Virginia circuit courts and was ignored or told it could not have access unless its reporters were Virginia-licensed attorneys.[11] Some of the denials cited Virginia Code § 17.1-293 which limits what information the clerk can publish and who can have OCRA access.[12] The statute allows government agencies and attorneys in good standing with the Virginia State Bar to pay for an OCRA subscription once authorized by the clerk.[13] None of the Courthouse News

5. *About Us*, COURTHOUSE NEWS SERV., https://www.courthousenews.com/about-us/ [https://perma.cc/3KQW-Y6NG (staff-uploaded archive)].

6. Courthouse News Service's Omnibus Memorandum of Law in Opposition to Defendant Karl R. Hade's Rule 12(b)(1) Motion To Dismiss, Defendant Karl R. Hade's Rule 12(b)(6) Motion To Dismiss, and Defendant Jacqueline C. Smith's Rule 12(b)(6) Motion To Dismiss at 9, Courthouse News Serv. v. Smith, 126 F.4th 899 (4th Cir. 2025) (No. 3:21-cv-00460-HEH), 2021 WL 12291062 [hereinafter Omnibus Memorandum].

7. Complaint, *supra* note 4, para. 47 ("[Courthouse News Service] can only report on a select number of Virginia Circuit Courts on a daily basis, others on less periodic basis, and some not at all.").

8. 126 F.4th 899 (4th Cir. 2025).

9. *Id.* at 908.

10. *See infra* Potential Impact.

11. Complaint, *supra* note 4, para. 34.

12. *Id.*

> [N]o court clerk shall post on the Internet any document that contains the following information: (i) an actual signature, (ii) a social security number, (iii) a date of birth identified with a particular person, and (iv) the name of the person's parents so as to be identified with a particular person, (v) any financial account number or numbers, or (vi) the name and age of any minor child.

VA. CODE ANN. § 17.1-293(B).

13. The exemption grants

Virginia reporters were licensed to practice law in Virginia, so the clerks at various courthouses told Courthouse News that neither the organization nor its reporters qualified for the exemption.[14]

In January of 2019, during a deposition for another case to which Courthouse News was a party, Prince William County Clerk Jacqueline Smith[15] said she had the discretion to offer OCRA subscriber access to Courthouse News and was willing to provide access in the spirit of "being transparent and providing the highest possible service."[16] Courthouse News followed up on that comment, asked for access, and was denied for not providing a Virginia bar license number on its application.[17] Eventually, Smith provided Courthouse News with a "Non-Attorney OCRA subscriber agreement," but its access would have an annual subscription cost of $1,200[18]—nearly six times the amount that Virginia-licensed attorneys pay[19]—plus "certain dissemination and publication prohibitions on the filings" that impeded upon its ability to publish information found in documents on OCRA, defeating the purpose for which the news company desired access.[20]

Courthouse News sued the Executive Secretary of the Supreme Court of Virginia[21] and Smith, hoping to receive OCRA access for the same price as Virginia attorneys and an exemption from any dissemination restrictions.[22] The Commonwealth of Virginia intervened, and the case against the Executive

> secure remote access to nonconfidential court records, subject to any fees charged by the clerk, to members in good standing with the Virginia State Bar and their authorized agents, pro hac vice attorneys authorized by the court for purposes of the practice of law, and such governmental agencies as authorized by the clerk.

VA. CODE ANN. § 17.1-293(E)(7).

14. Complaint, *supra* note 4, paras. 31–32.

15. The clerk of the court, Jacqueline C. Smith, is a defendant in this case. She was elected in 2017 and won re-election in 2023 by over 95,000 votes. *Clerk of the Circuit Court's Bio*, PRINCE WILLIAM, VA., https://www.pwcva.gov/department/circuit-court/clerk-of-circuit-courts-bio [https://perma.cc/WL58-558H].

16. Complaint, *supra* note 4, para. 3; Omnibus Memorandum, *supra* note 6, at 9–10. This statement was made during a deposition regarding another case Courthouse News Service brought, *Courthouse News Service v. Schaefer*, that involved a § 1983 claim involving a qualified First Amendment right of access to "newly filed civil complaints." Complaint, *supra* note 4, para. 35; *see also* Courthouse News Serv. v. Schaefer, 440 F.Supp. 3d 532, 537 (E.D. Va. 2020).

17. *See* Complaint, *supra* note 4, para. 36.

18. *Id.* para. 38.

19. Virginia-licensed attorneys pay $200 annually for OCRA access. *Id.* para. 31.

20. *Id.* para. 3.

21. Complaint, *supra* note 4, para. 11.

22. Complaint, *supra* note 4, paras. 1–2; Omnibus Memorandum, *supra* note 6, at 10.

Secretary was dismissed due to the Office's lack of authority to give OCRA access.[23]

Courthouse News argued that Virginia Code § 17.1-293 violated the First Amendment, specifically through § 17.1-293(E)(7) (the "Access Restriction") and § 17.1-293(H) (the "Dissemination Restriction").[24] The Access Restriction limits remote access to OCRA to "members in good standing with the Virginia State Bar and their authorized agents, pro hac vice attorneys authorized by the court for purposes of the practice of law, and such governmental agencies as authorized by the clerk."[25] The Dissemination Restriction prohibits the "selling, posting, or redistributing [of] data obtained from OCRA."[26]

The district court granted summary judgment in favor of the Commonwealth on the First Amendment claims because the Virginia statute was a "content-neutral time, place, and manner regulation[]" that was justified by Virginia's interest in the "orderly and efficient administration of justice and protection of sensitive personal information contained in court filings."[27] The Fourth Circuit reviewed the case de novo.[28]

LEGAL ISSUE AND OUTCOME

In the Fourth Circuit opinion, the majority acknowledged that there is a First Amendment right to contemporaneous access to civil court records but held it was not at stake here because Courthouse News had access to the same documents available through OCRA at courthouse kiosks.[29] The court explained that Courthouse News and other members of the public could access judicial records in person at the courthouse on the same day as requested or the next court date if the request is impractical.[30] Moreover, court records were available

23. Response Brief for Virginia at 17, Courthouse News Serv. v. Smith, 126 F.4th 899 (4th Cir. 2025) (No. 22-2110).

24. *Courthouse News Service*, 126 F.4th at 906.

25. VA. CODE ANN. § 17.1-293(E)(7).

26. *Id.* § 17.1-293(H). Courthouse News also brought an equal protection claim under the Fourteenth Amendment, but this was quickly dismissed by lower courts because there was no suspect class or fundamental right that was implicated by either the Access Restriction or Dissemination Restriction. *Courthouse News Service*, 126 F.4th at 906. The Fourth Circuit did away with the equal protection claim through its application of *Brown v. City of Pittsburgh*, which held that "[w]here the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily survives scrutiny under the Equal Protection Clause." *Courthouse News Service*, 126 F.4th at 917–18 (alteration in original) (internal quotation omitted) (citing *Brown v. City of Pittsburgh*, 586 F.3d 263, 264 (3d Cir. 2009)).

27. *Courthouse News Service*, 126 F.4th at 906.

28. *Id.*

29. *Id.* at 907. This is especially true for certain types of documents like "newly filed civil complaints," "summary judgment motions," judicial opinions in regard to summary judgment motions, and "docket sheets." *Id.*

30. *Id.* (citing Courthouse News Serv. v. Schaefer, 2 F.4th 318, 328 (4th Cir. 2021)).

faster at the courthouse public kiosks than through OCRA,[31] and new filings did not become available on OCRA outside of business hours.[32] Therefore, the majority held Courthouse News was not asserting a First Amendment right of online access but contending its reporters and the public deserve the same means of access as Virginia lawyers.[33] With that framing in mind, the majority explained the Access Restriction must be analyzed as a time, place, and manner restriction instead of a content-based regulation[34] because it regulates "when, where, and how Courthouse News may access those court records: during business hours at the courthouse using public access terminals instead of all hours of every day, remotely, using a personal computer with internet access."[35]

Since the regulation was determined to be a time, place, and manner restriction it was subject to "relaxed scrutiny," meaning in order to be constitutional it needed to be (1) content neutral, (2) narrowly tailored, and (3) necessary to further a compelling government interest.[36]

Under the first element, Courthouse News argued that though the statute was facially content neutral, the regulation operated as a content-based regulation because it favored some speakers over others.[37] The court rejected this argument and affirmed the district court's holding that this regulation was content neutral on its face because it did not treat records differently based on the subject matter.[38] The court explained there was "no reason to think that providing Virginia attorneys, but not the general public, with online access to court records ha[d] any relation to the content of the records each group accesses," especially because the Access Restriction reflects a preference on *how* non-attorneys access records, not *what* records they access.[39] The court reiterated that Courthouse News could access the same materials in person as attorneys could online.[40]

The court then considered the second element, whether the government interests asserted by Virginia were significant enough to satisfy the restriction, which Courthouse News did not dispute.[41] The Commonwealth said the statute

31. Once the clerk scans new filings, they are available "almost immediately" at the kiosks but are uploaded to OCRA "usually within five minutes." *Id.* at 906–07.

32. *Id.* at 907 & n.6.

33. *Id.* at 907–08.

34. *Id.* at 908.

35. *Id.*

36. *Id.*

37. *Id.* at 909.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 910. While Courthouse News did not dispute the significance of the government interests, the court held the Commonwealth waived its argument by waiting until its reply brief to raise it. *Id.*

furthered its interests in protecting sensitive information found in court records and the efficient administration of justice.[42] The court affirmed both interests were sufficient, emphasized how civil litigation can implicate privacy interests of litigants and third parties, and stated the government did have an interest in preventing the dissemination of private information.[43] The court specifically noted concerns about private information and signatures being publicly accessible as well as information released during discovery being a threat to a party's privacy or reputation.[44]

Finally, the court analyzed whether the Access Restriction was narrowly tailored to serve the interest and whether it restricted more speech than necessary under the third element.[45] Here, Virginia asserted its concern with data mining,[46] which has been an issue with OCRA and other government databases,[47] because information gained by bots can be used for theft, fraud, and exploitation.[48] The court found it material that Virginia presented evidence that state online records had been targets of data-mining bots, and mitigating measures such as registration agreements and anti-scripting tactics had been insufficient in stopping bots.[49] By limiting public online access, Virginia claimed it nearly eliminated the possibility of data mining because at the courthouse, people cannot download the records, and they must ask for documents to be printed individually.[50] Furthermore, the lawyers who have online access are governed by the Rules of Professional Responsibility and could be sanctioned for sharing the data.[51]

The majority also held that the Access Restriction did not burden more speech than necessary because the public could still access records at the courthouse, and the restriction only blocked online access, a medium that is

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 911, 916. A regulation "is narrowly tailored if it . . . 'promotes a substantial government interest that would be achieved less effectively absent the regulation,' and . . . does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 911 (quoting Ross v. Early, 746 F.3d 546, 555 (4th Cir. 2014)).

46. Data mining or data harvesting is when a bot programmed to seek personal information can look through databases and collect information. *Id*. at 911. A bot can be created and used by anyone "with rudimentary programming knowledge." *Id.*

47. *Id.* at 911–12.

48. *Id.*

49. *Id.* at 912–13 ("We are satisfied the Commonwealth has demonstrated that the threat of data mining for records available in OCRA is 'real, not merely conjectural,' and that the Access Restriction 'alleviates [that] harm[] in a direct and material way' while also fostering attorneys' access to information necessary for performing their obligations as officers of the court." (alterations in original) (quoting *Ross*, 746 F.3d at 556)).

50. *Id.* at 912.

51. *Id.*

"uniquely vulnerable" to data mining.[52] Further, the alternatives pitched by Courthouse News—more redaction, "restricting online access for all except the parties and their counsel in case types where identifiers commonly appear," and "commonly-used bot management, mitigation and protection practices"—either burdened more speech or were inadequate in protecting personal information.[53] If the clerk were to redact more information, it would increase costs and lead to delays in the publication of court documents.[54] By sealing more documents, more speech could be burdened and blocked—plus, data could still be mined.[55] Virginia's "actual experience" attempting to use bot management systems showed this alternative failed to further the government's interest in protecting personal data in the documents.[56] Moreover, the Access Restriction still left additional channels of communication through in-person kiosks.[57]

Since the majority held there was no constitutional right of access implicated through the Access Restriction, the First Amendment claim against the Dissemination Restriction was dismissed due to lack of standing.[58] To have standing to challenge the Dissemination Restriction, the court said Courthouse News needed to demonstrate the restriction was burdening its speech.[59] However, the Dissemination Restriction only applied to those with OCRA access,[60] and since Courthouse News did not have access nor a First Amendment right to access, the Dissemination Restriction did not apply, and Courthouse News could not be injured.[61] Though Courthouse News tried to suggest the restriction indirectly injured them because its reporters could acquire electronic court records from attorneys with access, the majority said Courthouse News needed to show an attorney was willing to do that, otherwise the injury was "too speculative."[62]

In his dissent, Judge Gregory argued that the challenged restrictions both implicated a First Amendment right to access and were subject to strict scrutiny.[63] Whereas the majority saw the Access Restriction as a time, place, and manner regulation, he viewed it as listener-based discrimination.[64]

52. *Id.* at 914.
53. *Id.* at 915.
54. *Id.*
55. *Id.*
56. *Id.* at 915–16.
57. *Id.* at 916.
58. *Id.* at 917.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 919 (Gregory, J., dissenting).
64. *Id.*

Judge Gregory placed the Access Restriction within the context of "the confluence of two lines of First Amendment jurisprudence: the First Amendment's guarantee of access to judicial documents and its prohibition on content discrimination," which together he said ensured a "right to be free from 'listener-based discrimination.'"[65] The idea of listener-based discrimination had yet to be "christened or fully defined," Judge Gregory admitted, but it is "lurking" in the jurisprudence.[66] He explained that listener-based discrimination is when the government limits "access to its records based on the identity of the requester (the would be 'listener') as a means of controlling the content of the listener's resulting speech."[67] Here, Virginia limited access to digital documents based on the listener's—Courthouse News'—professional identity as a nonlawyer.[68] By limiting reporter access, Judge Gregory argued the government controlled what information was available and limited the speech reporters can produce—after all, "[w]ithout access to information, the press is silenced; it cannot speak."[69] With that in mind, Judge Gregory said the Access Restriction should be subject to strict scrutiny as a content-based regulation.[70]

Judge Gregory defended his strict-scrutiny approach through the lens of a "public forum analysis."[71] He argued that public forum analysis is "instructive," as the nature of the documents should be analyzed when government property is involved.[72] He explained that "[w]hen the listener seeks access to documents which are 'historically associated with free exercise of expressive activities,'" courts should apply strict scrutiny; otherwise, there is "leeway" to limit speech based on identity of the listener.[73] Since the "tradition of openness [of court documents] is intertwined with the press' freedom," Judge Gregory argued the case should be remanded to a lower court to apply strict scrutiny.[74]

Judge Gregory further explained his disagreement with the majority revolved around one major point.[75] The majority emphasized there is not a "freestanding right to online access," which he agreed with as "the government

65. *Id.*

66. *Id.*

67. *Id.* at 921.

68. *Id.* at 921–22. "Lawyers can use the information obtained from OCRA to assist in performing their professional duties, such as writing briefs and making legal arguments. But news services cannot use OCRA to perform their professional duties: to report on the news." *Id.* at 921.

69. *Id.* at 921–22.

70. *Id.* at 922–23.

71. *Id.*

72. *Id.*

73. *Id.* at 923 (quoting White Coat Waste Project v. Greater Richmond Transit Co., 35 F.4th 179, 196 (4th Cir. 2022)).

74. *Id.* Judge Gregory did not affirmatively state the Access Restriction would pass strict scrutiny because he would have remanded it to lower courts to apply. *Id.* at 924.

75. *Id.* at 924.

could shut down OCRA in its entirety without implicating the First Amendment."[76] However, the majority characterized the case as being about "one organization's access to civil court documents," whereas he saw it as being about "the government's discriminatory limitation on OCRA access."[77] Judge Gregory argued that such limitation cannot be characterized as a time, place, and manner restriction when Courthouse News can never use OCRA in any time, place, or manner.[78]

Moreover, Judge Gregory viewed the Dissemination Restriction as an improper prior restraint[79] that was "independent" of the First Amendment right of access asserted by Courthouse News.[80] Though there is access to the same documents online and at the courthouse, Judge Gregory saw the Dissemination Restriction as a "blatant form of prior restraint" because it stops publishers or anyone else from sharing truthful information in public documents.[81] Though Virginia argued the restriction was not a prior restraint because it governs dissemination, not access,[82] Judge Gregory disagreed and analogized to Fourth Circuit precedent in *Soderberg v. Carrion*[83] where the court applied strict scrutiny to a Maryland statute banning the broadcasting of official court recordings of criminal proceedings instead of using the relaxed scrutiny of a time, place, and manner restriction because the publication of lawfully obtained information of public interest cannot be punished.[84]

POTENTIAL IMPACT

The implications of the *Courthouse News* holding have potential to negatively affect the future of judiciary-focused reporting. As pointed out in the Reporters Committee for the Freedom of the Press' Amicus Brief, "Journalists regularly rely on remote online systems like OCRA to access court records which, in turn, enables them to timely and accurately report on court cases of public interest."[85] Online access is a great aid to the public and reporters

76. *Id.*

77. *Id.*

78. *Id.*

79. "[T]he term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Id.* at 925 (quoting Alexander v. United States, 509 U.S. 544, 550 (1993)).

80. *Id.*

81. *Id.*

82. *Id*. (citing Response Brief of the Commonwealth of Virginia at 50, Courthouse News Serv. v. Smith, 126 F.4th 899 (4th Cir. 2025) (No. 22-2110)).

83. 999 F.3d 962 (4th Cir. 2021).

84. *See id.* at 969; *Courthouse News Serv.*, 126 F.4th at 925.

85. Reporters Committee Amicus Brief, *supra* note 2, at 7. Recognizing how important access to court documents is for the public and media, federal courts have provided online access to court documents for three decades through the Public Access to Court Electronic Records ("PACER")

who focus on federal cases, but state restrictions, like Virginia's, negatively impact the electorate by making it more difficult for nonlawyers to be informed and hold the judiciary accountable as reporters are barred from electronic access.[86] These restrictions pose a threat to the marketplace of ideas as less information is given to the public. Further, it hurts judicial accountability, which is especially important at the state court level, as nearly twenty states hold partisan judicial elections and even more have partisanship reflected in part of the process.[87]

The marketplace of ideas and judicial accountability are even more threatened as news deserts continue to grow in Virginia and the United States broadly. Many Virginia journalists cover multiple communities within one masthead, a practice that has become more common as local newspapers have closed and media deserts have grown.[88] In Virginia, there are 1.87 news outlets per 100,000 people, so each news publisher has to cover multiple communities and topics with limited staff.[89] In most of Virginia, each county has one weekly newspaper covering its entirety,[90] likely making judicial news a low priority on its publication list unless it involves a noteworthy community member or tragic event. Specialty newspapers, like Courthouse News, fill in the gaps by covering

system. PACER "provides electronic public access to federal court records. PACER provides the public with instantaneous access to more than 1 billion documents filed at all federal courts." *Frequently Asked Questions*, PACER, https://pacer.uscourts.gov/help/faqs [https://perma.cc/47AW-74KB] (select "What Is PACER?" in dropdown menu). However, users can still incur fees when using it. Generally, a user is charged a fee based on the number of results their search generates and are charged ten cents per page, but certain documents like dockets, motions, orders, judgments, or briefs have a maximum cost of three dollars. *PACER Pricing: How Fees Work*, PACER, https://pacer.uscourts.gov/pacer-pricing-how-fees-work [https://perma.cc/32MJ-AT94]. Additionally, courts in at least thirty-eight states have modeled their online electronic record systems after PACER and provide contemporaneous access to court records digitally, including North Carolina through eCourts which has broad access to court documents in most counties. Reporters Committee Amicus Brief, *supra* note 2, at 8; ECOURTS, https://www.nccourts.gov/ecourts [https://perma.cc/9ULP-ERBG].

86. *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1449. Limiting online court access also hinders the ability of litigants "to assess their likelihood of success in litigation," historians to make sense of legal and social movements, and social scientists investigating human behavior through the judicial system. *Id.*

87. *Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/6LXV-8EAA].

88. Zach Metzger, *The State of Local News: The 2024 Report*, NW. MEDILL LOC. NEWS INITIATIVE (Oct. 23, 2024), https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2024/report/ [https://perma.cc/UN5K-6MXR]. The report shows that 206 counties across the country have no news source, twenty states "have fewer than 1,000 employees remaining in the newspaper industry," circulation in print and digital forms are down, and the total number of newspapers decreased by 3,296 between 2005 and 2024. *Id.*

89. *Id.*

90. *Id.*; *Virginia*, NW. MEDILL LOC. NEWS INITIATIVE, https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/explore/#/statelocalnewslandscape?state=VA&stateCode=51 [https://perma.cc/YN2U-BUNF (staff-uploaded archive)].

subjects that local news outlets lack the capacity or expertise to cover, like legal reporting,[91] and are one of the only ever-present watchdogs for the Virginia courts.[92] Courthouse News and media services like it are essential for a check on the judiciary—judicial power and discretion are often easier to abuse in the mundane practices of the court where there are fewer eyes scrutinizing decisions compared to higher-profile cases where many are looking for updates.

Filling the gaps of reporting through specialty newspapers is tough work without online access because courthouses are spread out across the state. For example, 105 Virginia courts use OCRA, spread across nearly 30,000 square miles, and it is an impossible challenge for the Courthouse News reporters, or any reporter, to cover that many courthouses with adequate depth.[93] Courthouse News said that even if one reporter's sole job was to travel to courthouses to view documents, they could only reach twenty-five courts during the workweek, still leaving many communities in the dark regarding its judiciary.[94] With OCRA access, journalists would use the time that would normally be spent traveling and waiting at the kiosks to report on more judicial decisions in greater depth.[95] Online access, therefore, can improve the accuracy and depth of reporting and lead to prompt publication of judicial news because travel time is reduced or eliminated.[96]

With Fourth Circuit precedent establishing online-access restrictions are subject to only "relaxed scrutiny" through a time, place, and manner analysis,[97] the high ideals of an informed electorate and judicial accountability are within the hands of the state legislatures or appointed judicial committees tasked with

91. *See Specialty Newspapers*, FIVEABLE, https://library.fiveable.me/key-terms/mass-media-society/specialty-newspapers [https://perma.cc/6M9K-A2NY] ("Specialty newspapers play a crucial role in addressing the information needs of underserved markets by providing tailored content that might not be covered by larger media outlets. They fill gaps in coverage for specific communities or professional fields, fostering informed discussions and engagement around pertinent issues.").

92. Reporters Committee Amicus Brief, *supra* note 2, at 8.

93. *See id.* at 12.

94. *Id.* at 14.

95. *Id.* at 9. The Reporters Committee Amicus Brief cites particularly to articles covering civil cases brought against President Trump after the riots on January 6, 2021. *Id.*

96. *See id.*

97. *See* Courthouse News Serv. v. Shaefer, 2 F.4th 318, 328 (4th Cir. 2021) (establishing that time, place, and manner restrictions are subject to "more relaxed scrutiny," which requires that limitations be "content-neutral, narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice" (quoting Courthouse News Serv., 947 F.3d 581, 585, 595 (2020))); *see also* Courthouse News Serv. v. Smith, 126 F.4th 899, 908 (4th Cir. 2025). The majority's analysis of the restriction is correct because the court framed the restriction as a matter of *how* reporters access documents rather than if they had access to them at all. Therefore, to rule in favor of Courthouse News, a court would first have to shift to Judge Gregory's framing and view the issue as being one that implicates the right of access generally.

creating online-access rules.[98] These groups must work to strike the balance between protecting privacy and ensuring accessible court records for the sake of a well-informed electorate. To do this, courts should avoid blanket rules based on case categories, have procedural mechanisms in the upload process that ease the burden of redaction, and create an appeals process for decisions made by the clerk's office.

First, blanket rules based on categorial characteristics of cases are dangerous in this context. It may seem reasonable, for example, to propose a rule that online access to documents should be unavailable for cases involving juveniles, child abuse, and divorce proceedings,[99] but writing this blanket rule into a statute would be a mistake. A case out of North Carolina involving the closing of dependency hearings is illustrative of this problem.[100]

In the ongoing litigation of *Civil Rights Corps v. Walker*,[101] Civil Rights Corps, a judicial accountability group, sued after allegedly being consistently barred from attending North Carolina Judge Doretta Walker's dependency hearings.[102] Though Judge Walker allegedly often closed dependency hearings generally, she specifically stopped Civil Rights Corps from attending hearings.[103] Allegedly, the courtroom was repeatedly closed without the mandatory case-by-case analysis and this acted as a general blanket rule.[104]

These dependency hearings have qualities that warrant an argument for limited access to the hearings and documents as they involve minors and the sensitive workings of a family.[105] However, there are qualities that also weigh in favor of these hearings needing to be the most accessible ones in the court system: (1) the outcomes of these hearings reshape communities; (2) these hearings involve "perhaps the oldest of the fundamental liberty interests recognized"—"care, custody, and control" of a child; and (3) judges have a great amount of discretion in these hearings, yet the closing of the hearings is not

98. *See generally* Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 89–93, 100 (2006) (discussing how various courts make policies for online access portals for court documents).

99. Ardia, *supra* note 86, at 1429.

100. Complaint for Declaratory and Injunctive Relief, Civil Rights Corps v. Walker, No. 1:24-cv-943 (M.D.N.C. Nov. 13, 2024). There are elements common between the Civil Rights Corps and Courthouse News cases. Both involve a restriction that (1) is particularly impacting a specific group, Civil Rights Corps or Courthouse News; (2) also affects the public generally; and (3) hinders the openness of courtroom proceedings. *Id.* para. 80; *Courthouse News Serv.*, 126 F.4th at 905–06.

101. Complaint for Declaratory and Injunctive Relief, *supra* note 100.

102. *Id.* paras. 2, 7.

103. *Id.* para. 7.

104. *Id.* paras. 7, 22. This is a broader issue across the country as well. *See id.* para. 22.

105. *See id.* paras. 3, 4.

challenged consistently.[106] With the consequences of these hearings being so great and judicial accountability so limited, a categorical rule closing all dependency hearings or sealing all documents would be both unconstitutional[107] and unwise as it opens the door for judicial abuse in a sensitive area. After all, "Secrecy disadvantages people when they are fighting for what is dearest to them: their families."[108]

Rather, the only categorical rules that should be adopted should be based on the types of data found in court documents that are specifically susceptible to exploitation like signatures, full names and ages of minor children, social security numbers, and driver's license numbers.[109] These examples are easy to define and identify as specific and most susceptible to data mining as pointed out in *Courthouse News*.[110] However, when making these categorical rules, states will need to be specific and be prepared to justify them if challenged on First Amendment grounds. Some courts have held categorical rules on types of data unconstitutional as they violate the public's First Amendment right to access.[111] Therefore, it will be in the state's best interest to keep the categories objective, limited, and specifically defined.[112] For example, a rule removing "financial information" from documents or removing records containing that type of information from online access portals would be overly broad and likely unconstitutional as it would go against the presumption of access.[113] However, a rule that allowed for the redaction of financial account information would be narrower, and the government interest in keeping it out of court records due to data mining is stronger.[114]

Second, protective measures for redacting sensitive information should be built into the online access software. In *Courthouse News*, Virginia claimed a review process would "cost substantial additional funds," delay the uploading

106. *Id.* paras. 3, 4, 5. (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)). For a more in-depth analysis on the importance of transparency and access in this hearing, see Brief of Amici Curiae the First Amendment Clinic at Duke Law School et al. in Support of Plaintiff Civil Rights Corps' Motion for a Preliminary Injunction at 16–23, Civil Rights Corps v. Walker, No. 1:24-cv-943 (M.D.N.C. Dec. 13, 2024) [hereinafter Duke First Amendment Clinic Amicus Brief].

107. Ardia, *supra* note 86, at 1429.

108. Duke First Amendment Clinic Amicus Brief, *supra* note 106, at 26.

109. *See* Courthouse News Serv. v. Smith, 126 F.4th 899, 910 (4th Cir. 2025).

110. *See id.* at 910–11.

111. *See generally* Ardia, *supra* note 86, at 1437 n.342 (discussing cases that found a First Amendment violation due to categorical data exceptions for court document restrictions).

112. *See id.* at 1438.

113. *See id.*; Burkle v. Burkle, 37 Cal. Rptrx. 3d 805, 808 (Cal. Ct. App. 2006) (holding that a state statute requiring the sealing of divorce records is unconstitutional).

114. *See* Ardia, *supra* note 86, at 1438. A rule defining financial account information through specific examples like routing numbers would be even better.

documents, and hurt the "administration of justice."[115] However, if clear categorical rules are based on types of data found, the process should be cheaper and faster. As long as statutes and court rules are clearly written, attorneys will be able to understand what information they can presumptively redact out of court documents. It could become common practice to upload both a redacted and an unredacted document to the online system, or a state can equip systems with drop-down menus with the types of information presumptively redactable and have lawyers select the reason for each redaction.[116] As artificial intelligence continues to improve, an in-house scanning tool that looks for information to redact could also be developed to aid the protection of data.[117]

Though these mechanisms will require more upfront costs and potentially additional time for the clerk's office and attorneys, those additional funds would likely not be "substantial," would aid the in administration of justice, and further judicial accountability. These mechanisms would increase the start-up costs of creating online portals but are not nearly as expensive as employing additional clerks to impose the policies; they strike a balance that aids the electorate by empowering the press while still protecting parties' sensitive information. Additionally, by presuming full access, attorneys are incentivized through these mechanisms and the Rules of Professional Responsibility to play a major part in protecting their clients' information.[118] Rules could even allow courts to put sanctions on lawyers who do not take measures to protect sensitive client information.[119]

Third, there should be procedures established for challenging redactions or applying for a special redaction. As with any system, whether based in discretion or automation, states should have clear guidelines on what to do when lawyers or a party have something published or redacted which they believe should not have been. These procedures would likely begin with the attorney or party submitting a form to the clerk's office whose judgment would ultimately be appealable to the judge in charge of the case itself. Further, if a lawyer is concerned about certain information, they should be acting proactively

115. Courthouse News Serv. v. Smith, 126 F.4th 899, 915 (4th Cir. 2025). One clerk claimed it would quadruple the costs. *Id.*

116. For other design mechanisms that could enhance privacy without hurting public access, see Ardia, *supra* note 86, at 1448.

117. *See id.*

118. *See id.* at 1443, 1445–46. Virginia argued that the Rules of Professional Responsibility are strong enough to stop lawyers from improperly using data in OCRA. *Courthouse News Serv.*, 126 F.4th at 912. The Fourth Circuit did not address this argument directly but did accept the Commonwealth's argument that the Rules of Professional Responsibility are an effective tool to stop the misuse of data by attorneys. *Id.* Avoiding malpractice claims would also be a potential motivator to work proactively with the online systems. Ardia, *supra* note 86, at 1445.

119. Ardia, *supra* note 86, at 1445.

with the judge and opposing counsel to discuss concerns and create a case-specific plan that honors access while still protecting privacy interests in personal identifiers.

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