

First Amendment Challenge to Restriction on Public Access to Electronic Court Records Advances

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Ruling on several motions to dismiss on January 14, the U.S. District Court for the Eastern District of Virginia denied an effort to dismiss Courthouse News Service's (CNS) First Amendment challenge to Virginia's restrictions on public access to electronic court records. This clears the way for the lawsuit to proceed on the merits. Although this case specifically involves access to civil case court records filed in Virginia state courts of record, the broader underlying issue of public and commercial access to electronic court records is a significant issue, particularly for members of the consumer reporting industry who rely on remote access systems to prepare up-to-date and complete reports.

As Troutman Pepper [previously reported](#), CNS filed suit in July 2021 in the Eastern District of Virginia, styled *Courthouse News Service v. Hade, et al.*, No. 3:21-cv-00460 (E.D. Va. 2021). The suit named defendants Karl Hade, in his official capacity as the executive secretary of the Supreme Court of Virginia, and Jacqueline Smith, in her official capacity as the clerk for the Circuit Court of Prince William County, VA. The suit alleged that the Virginia courts violated the First Amendment and Equal Protection Clause by providing Virginia-barred attorneys with instant electronic access to newly filed court records by paying an annual fee to use the Officer of the Court Remote Access System, while members of the public, including commercial parties, are limited to in-person requests at the courthouses. CNS also alleged that the clerk of court offered CNS digital access to newly filed civil court records for a price six times higher than the price for Virginia-barred attorneys, but CNS asserted that the requirement of a higher fee still violated the First Amendment.

Hade and Smith, the court official defendants in the Virginia suit, filed several motions to dismiss the Virginia suit. First, Hade filed a motion to dismiss for lack of jurisdiction, arguing that he is protected from suit under the principle of sovereign immunity. Hade and Smith also each filed motions to dismiss for failure to state a claim, principally arguing that CNS had not identified a First Amendment right that was violated, and that the access restrictions survive constitutional scrutiny under both the First Amendment and Equal Protection clauses.

The court addressed all three motions to dismiss in a single memorandum opinion and order, which denied the motion to dismiss for lack of jurisdiction, and granted in part the motions to dismiss for failure to state a claim.

On the sovereign immunity issue, the court held that Hade could be sued under the *Ex Parte Young* exception to sovereign immunity. This doctrine allows state officers to be sued in their official capacity when the plaintiff is only seeking prospective injunctive relief to remedy the enforcement of an unconstitutional policy or statute and the official: (1) has a special relation to the challenged policy or statute; and (2) has acted or threatened to enforce the policy or statute. *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010). The court held that the complaint

sufficiently alleged that Hade maintained a “special relation” to the challenged policy and has “acted or threatened” to enforce it. Thus, Hade’s motion to dismiss for lack of jurisdiction was denied.

On the First Amendment issue, the court recognized that, although strict constitutional scrutiny normally applies to violations of the First Amendment, a more relaxed form of scrutiny applies when the limitation of a First Amendment right at issue resembles a “time, place, and manner” restriction. *Courthouse News Serv. v. Schaefer*, 2 F. 4th 318, 328 (4th Cir. 2021). This relaxed scrutiny requires the restriction to be content-neutral, narrowly tailored, and necessary to preserve a significant governmental interest. *Id.* The court held that, although the challenged access restriction does resemble a time, place, and manner restriction and is therefore subject to relaxed scrutiny, the allegations could support a reasonable inference that the access restriction is not narrowly tailored to preserve a significant government interest, and thus could violate the First Amendment. For this reason, the court denied the defendants’ motions to dismiss as to the First Amendment claim.

Finally, on the Equal Protection Clause issue, the court held that the access restriction was subject only to rational basis scrutiny because it did not involve a fundamental right or a suspect class. The court noted non-attorneys are not a suspect class. Further, CNS did not argue that it has a fundamental First Amendment right to access civil court records *remotely*, but instead that it has a right to equal access to court records. Applying rational basis scrutiny, the court held that the restriction was justified by the legitimate government interest of protecting confidential and private information contained in the civil court records, and the complaint did not contain allegations that this interest “is implausible or lacks all rationality.” Accordingly, the court granted the motion to dismiss as to the Equal Protection claim only.

The survival of CNS’s First Amendment claim is significant, as it will allow the litigation to proceed and require the defendants to prove that the policy of restricting instant digital access to electronic court records to barred attorneys is narrowly tailored and necessary to preserve a significant government interest.

Relatedly, CNS also filed a suit in December in the U.S. District Court for the Eastern District of California, alleging that certain California courts violated the First Amendment by delaying access to newly filed civil complaints until after administrative processing, in contrast to other California courts that provide immediate access to registered users through public review queues. That case is *Courthouse News Service v. Toste et al.*, No. 1:21-cv-01790 (E.D. Cal. 2021), which Troutman Pepper reported on [here](#). Troutman Pepper will continue to monitor these cases and other litigation implicating the important issue of unhindered access to court records.

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