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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Courthouse News Service,

Plaintiff,

v.

Michael D. Planet, in his official capacity as Court Executive Officer of the Ventura County Superior Court.

Defendant.

Case No. CV11-08083 SJO (FMMx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF COURTHOUSE NEWS SERVICE

Date: April 18, 2016
Time: 10:00 a.m.
Judge: Hon. S. James Otero

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INTRODUCTION

From time out of mind, journalists could come to the courthouse to review the new complaints filed that day. Acting as a surrogate for members of the public who did not have time to do so,[1] members of the press would examine the complaints to determine which may be of interest to their readers, then write reports about those that seemed newsworthy for the newspaper distributed that afternoon or the next morning.

With the Internet devastating newspapers' revenue, this task now falls in many courts to the reporters of Plaintiff Courthouse News Service ("CNS"). As the Ninth Circuit recognized in the first appeal in this action, and as is clear from the evidence in support of this motion, "[i]n courthouses around the country – large and small, state and federal – CNS reporters review civil complaints on the same day they are filed." *Courthouse News Service v. Planet*, 750 F.3d 776, 779 (9th Cir. 2014) ("*Planet I*").

At Ventura Superior, however, access to new complaints has been delayed for "days or weeks," a result of Defendant Michael Planet's refusal to make copies available for review "until they have been fully processed." *Id.* After Defendant refused to change his policy or remedy the delays despite CNS's efforts to reach an amicable resolution, CNS was compelled to file this action in September 2011.

Though the years and energy Defendant has spent fighting it might suggest otherwise, this case only seeks to restore the simple premise that new civil complaints filed throughout the day can and should be available for media review by the end of the day. This is hardly extraordinary. Indeed, CNS simply seeks the same relief ordered by a federal court in Texas, which preliminarily and permanently enjoined a Houston clerk from denying same day access to new complaints on the basis of a similar no-access-until-processing policy. *Courthouse News Service v. Jackson*, 2009 U.S. Dist. LEXIS 62300, *4-6 n.1, 11, 14-15 (S.D. Tex. July 20, 2009); *Courthouse News Service v. Jackson*, 2010 U.S. Dist. LEXIS 74571 (S.D. Tex. Feb. 26, 2010).

[1] *See generally Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

For nearly three years after this lawsuit was filed, Defendant maintained it was "not possible" to provide access prior to full processing, ECF Doc. 25-2, ¶ 2, and media access to new complaints continued to be delayed. But since new complaints, once "filed in the office of the county clerk … become public documents," *Campbell v. New York Evening Post, Inc*., 245 N.Y. 320, 326 (1927), Defendant began claiming a complaint is not "filed" until processed – and at the same time had his staff backdate the file date stamped onto the complaint to the day it was submitted for filing.

After the Ninth Circuit's first decision in this case, however, Defendant found a way to do what he said was "not possible" and announced he would allow access to complaints the day they are received, prior to processing. Yet he continues to assert a "complaint remains a purely private document" until processed. ECF Doc. 62-1 at 31.

Defendant's belated change of policy does not moot this case, as delays persist and he still insists he is entitled to deny access to complaints until they are processed. But it does preclude Defendant from carrying his burden of proving denial of access until after processing "'is essential to preserve'" an "'overriding [governmental] interest,'" *Planet I*, 750 F.3d at 793 n.9,[2] as his new policy shows alternatives can protect those interests. And even if "delay in making the complaints available [was] analogous to a permissible 'reasonable restriction[] on the time, place, or manner of protected speech,'" *id.* – which it is not – his new policy confirms his old policy was not "'narrowly tailored to serve a significant governmental interest.'" *Comite de Jornaleros de Redondo Beach v. Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011).

CNS is therefore entitled to summary judgment, declaratory relief and a permanent injunction to stop the irreparable harm that results from a "'delay of even a day or two," *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009), in exercising the public's "important First Amendment right of access ... to civil proceedings and associated records and documents." *Planet I*, 750 F.3d at 786.

[2] Throughout this memorandum, all emphases are added and all citations to quotations within quotations are omitted unless otherwise noted.

STATEMENT OF FACTS AND OF THE CASE

In its second opinion, the Ninth Circuit held the court that then had this case "erred by evaluating the question of same-day access as a purely legal question divorced from the legal framework discussed in our prior opinion" and facts alleged. *Courthouse News Serv. v. Planet*, 614 Fed. App'x 912, 914 (9th Cir. 2015) ("*Planet II*"). While summary judgment focuses on facts in the record rather than those alleged, this Court must still evaluate "the merits of CNS's claims, consistent with [the appellate] … opinion[s]." *Id.* at 915. This Statement of Facts and of the Case thus recaps both the background of this case and the framework of those opinions.

A. Throughout the U.S., CNS Reports On Complaints The Day They Are Filed

CNS is a nationwide news service that focuses on the court record, from the initial pleading though judgment and appeal. Statement of Uncontroverted Facts ("UF") 8. Its more than 2,700 subscribers include lawyers, law firms, law schools, law libraries, government offices and judges. *Id.* 11-12. Many media also subscribe, from the Los Angeles Times in the west to the Wall Street Journal in the east, putting CNS in the position of a nationwide pool reporter. *Id.*; *Planet I*, 750 F.3d at 780.

CNS produces a variety of publications. Its new litigation reports – including 16 in California alone – feature original staff-written reports of newsworthy new civil complaints within particular jurisdictions that are emailed to subscribers nightly. Although not all new complaints are significant enough to be included, the new litigation reports cover many more complaints than do the daily newspapers. CNS's website (www.courthousenews.com), which does not require a subscription, is updated daily with staff-written articles and columns and averages about one million readers per month. Other publications include its dingers, which alert subscribers that a new lawsuit has been filed against a particular party, and its trackers, which update subscribers on developments in cases they are following. CNS's reporting is frequently cited as the source for stories by news outlets such as the New York Times, the Washington Post, the ABA Journal, and many others. UF 13-17.

Nationwide, CNS employs more than 250 reporters and editors, each of whom covers one or more federal and/or state courts. At larger courts, reporters visit their assigned court every day, near the end of each court day. The reporter reviews all of the complaints filed earlier that day to determine which ones merit coverage. In California state courts, CNS only reviews "unlimited jurisdiction" complaints, in which the amount in controversy exceeds $25,000. Any delay in a reporter's ability to review a new complaint delays CNS's ability to report on it, and is a particular problem when there is an intervening weekend and/or holiday, when a delay of even one court day results in actual delays of three or more calendar days. *See* UF 10-19.

B. Many Courts Allow The Press To See Complaints The Day The Are Filed

In the 1980s and '90s, journalists who covered Ventura Superior could review and report on new civil complaints "'the same day they had been received for filing by the court.'" UF 21 (quoting Sturgeon Dec., ¶ 6). This was not unusual; in most courts around the country, there is a long-standing tradition of providing reporters with access to the day's new complaints. *Id.* 19.[3] In some courts where clerks are able to process complaints quickly, this access may be provided after processing. *Id.* 20. In other courts, access is provided before the complaints have been fully processed. *Id.* 19. As technology changes in a particular court or a court moves to a new building, the specific procedures for access sometimes also change. *See id.* 22. But the fundamentals of providing same-day access are relatively simple.

One example is the Central District of California, which CNS has been covering

[3] When CNS began reporting in 1990, it was one of several news outlets reviewing new civil filings at the courthouse. As traditional media's budgets shrank, that practice declined. UF 29. But that does not mean there is a lack of public interest in new civil cases. To the contrary, the public retains a keen interest in new filings, which continue to have "'the potential to affect a great number of people in very significant ways.'" *Id.* 28 (quoting Drechsel Dec., ¶ 14). For that reason, news outlets whose reporters used to review new complaints side by side with CNS are now CNS subscribers and/or rely on CNS's website as a source for stories. *See id.* 12.

for more than 25 years. Until the Central District adopted e-filing, reporters would get a stack of new filings each afternoon from the clerk's office. A host of reporters – from the Los Angeles Times, Los Angeles Daily News, Copley News Service, Orange County Register, Associated Press ("AP"), City News Service and CNS – reviewed the new actions each day, "long before they were docketed." UF 106 (quoting Girdner Dec., ¶ 26). After the Central District adopted e-filing, new complaints flow into public view on courthouse terminals or online via PACER immediately upon receipt, even on nights and weekends, before any court employee has taken any action on the complaint. *Id.* As a result, reporters can review new cases almost immediately after they are e-filed on public computer terminals in the records room. *Id.*

Similarly, at the downtown branch of Los Angeles Superior, the press has for decades had same-day access to new complaints. Each afternoon, reporters from publications such as the Los Angeles Times, Daily Journal, City News Service and United Press International would check out a cart that held the day's new complaints. A final staff run from the intake counter to the records room was made at 4:30, when the intake counter closed, and reporters could stay until 5 to review the new cases, even though the general public was asked to leave the records room at 4:30. The complaints had not been docketed. UF 106. With the advent of scanning, staff began to upload new complaints before they are docketed to the court's computer system, where they can be viewed via terminals in the press room. Reporters are able to review complaints by the end of the day on the day they are filed. *Id.*

Other state and federal courts across the nation also traditionally have and do provide(d) journalists with same-day access to new complaints, both in paper and e-filing form. UF 19-21. These procedures are set forth in detail in the accompanying declarations of CNS's reporters and editors, as well as third-party witnesses.[4]

[4] UF 19-21 (citing declarations from 28 CNS journalists and three other reporters).

C. Ventura Superior Denied Access Until Complaints Were Fully Processed

Although many courts across the country provide same-day access to new civil complaints, CNS has seen a trend in recent year in which a handful of state courts refuse to allow journalists to see new civil complaints on the date reflected by the "filed" stamp. UF 125. Instead, these clerks take the position that new civil complaints may not be made public until after they are "processed," an amorphous term that includes different administrative tasks depending on the court. The result has been access delays. Among those courts, Ventura Superior was one of the worst.[5]

In 2010, CNS began daily coverage in Ventura and tried to work with the clerk to find mutually agreeable procedures for its reporter to access by the end of the day the eight or so unlimited complaints filed each day. *Id.* 35. Those efforts were rebuffed. In July 2011, Defendant informed CNS that "'[w]hile I appreciate [CNS's] interest in same-day access, the Court ... cannot make any filings available until the requisite processing is completed.'" *Id.* 37 (quoting Girdner Dec., Ex. 14); *see id.* 34.

Defendant's policy barring access until "processing" resulted in substantial delays. Processing complaints in CCMS required inputting extensive information, which meant it "'took longer.'" UF 48 (quoting Camacho Dep. 171:3). Indeed, processing and creating a file is so elaborate, *id.* 49 (describing process), a supervisor believed complaints should be made public before processing since entering all the data into CCMS "'just slows down the process … because it is all manual labor. You

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[5] It is no coincidence that the other clerks "who have been most strident in this position" are those who work for the few courts that adopted the Court Case Management System, or CCMS, including Orange, San Diego and Sacramento Superior Courts. UF 126 (quoting Girdner Dec., ¶ 82). CNS "experience[s] delays" in obtaining access in these courts, *id.* 127 (quoting same, ¶ 89), and Defendant has been in communication with these clerks about the defense of this case. *Id.* 128. Working with the Judicial Council of California – which hired Defendant's attorneys, *see id.* 129 – the clerks got new efiling rules to treat complaints as not "officially filed" until fully processed, RJN, Exhs. 1-3, even though the filing date is the date it was received, which is the filing date mandated by California Rule of Court 1.20.

are entering data. You are getting your labels, you are assembling your folder, putting it all together. Locating [the complaint] actually to records [in CCMS], so that all takes a fair amount of time.'" *Id.* 48 (quoting McLaughlin Dep. 54:5-10), 101.

Consequently, during a four-week period shortly before CNS filed suit in September 2011, CNS reviewed 152 new complaints. The results showed 28 complaints (about 18%) were available the court day after they were filed, and 115 – more than 75% of those filed – were not made available for review for two or more court days, with actual delays stretching up to 34 calendar days. UF 68.

While Defendant has attempted to dispute those delays, his own staff's status reports – which track "backlogs" and which he failed to produce until a witness testified to their existence, UF 66-70 – revealed Ventura Superior viewed delays of up to 36 days ***to even begin processing a new complaint*** as "within reason." *Id.* 67.[6]

D. Reversing Dismissals, The Ninth Circuit Said The Facts If Proven Showed Violation of The First Amendment Right Of Timely Access To Complaints

CNS filed suit and moved for a preliminary injunction on September 29, 2011, alleging causes of action for deprivation of First Amendment and common law rights under color of state law in violation of 42 U.S.C. § 1983, and violation of California Rule of Court 2.550, which mandates public access to court records. ECF Docs. 1, 3.

In its complaint, CNS sought the same declaratory and injunctive relief it had sought and obtained in *Jackson I*, 2009 U.S. Dist. LEXIS 62300, *14-15 (granting motion for preliminary injunction preventing Houston state court employees from denying CNS "access on the same day the petitions [i.e., complaints] are filed" with certain exceptions) and *Jackson II*, 2010 U.S. Dist. LEXIS 74571, *3-6 (entering permanent injunction and final judgment). The case was assigned to Judge Real.

[6] Defendant's reports for this period note delays of four weeks to start processing "New Complaints (from backlog)," and of a week for unlimited complaints. UF 68. In deposition, the manager who prepared Defendant's evidence disputing the delays conceded it was based on computer entries made before complaints were placed in the media bin and she had not confirmed when the complaints actually got there. *Id.* 53.

On November 20, 2011, Judge Real granted Defendant's motion to abstain from hearing the case under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and *O'Shea v. Littleton*, 414 U.S. 488 (1974), and dismissed the case. ECF, Doc. 38.[7]

On April 7, 2014, the Ninth Circuit reversed. Recognizing that "Pullman abstention 'is generally inappropriate when First Amendment rights are at stake,'" the Court of Appeal rejected its application to this case because it found "no question that CNS itself has alleged a cognizable injury caused by the Ventura County Superior Court's denial of timely access to newly filed complaints." *Planet I*, 750 F.3d at 784, 788 (citation omitted). It also rejected *O'Shea* abstention because an injunction would not significantly intrude into state proceedings because "Ventura County Superior … has available a variety of simple measures to comply with an injunction granting CNS all or part of the relief requested, should CNS prevail on the merits." *Id.* at 791.

On remand, CNS filed an amended complaint asserting a single cause of action under § 1983 for violation of its First Amendment right of access. ECF, Doc. 58. Despite the Ninth Circuit's conclusion that CNS alleged a viable First Amendment claim, Defendant moved to dismiss on the ground the First Amendment provides no right of same-day access to new complaints. ECF, Doc. 61. On August 20, 2014, Judge Real granted the motion and again dismissed the case. ECF, Docs. 78, 82.

Finding "the district court disregarded our mandate," the Ninth Circuit again reversed. *Planet II*, 614 Fed. App'x. at 915. The question was not, the Court of Appeals ruled, whether the First Amendment provided a right "of same-day access" per se, but whether the "important First Amendment right of access [that] 'extends to civil proceedings and associated records and documents'" was violated by the delays alleged by CNS – or whether "this 'right of access'" could be "'overcome [either] by [showing] an "overriding [governmental] interest based on findings that closure is essential to preserve higher values"'" or by showing "'[t]he delay in making the

[7] CNS earlier had consented to dismissal of its third cause of action, for violation of Rule of Court 2.550, after Defendant invoked his Eleventh Amendment immunity.

complaints available … [was] analogous to a permissible "reasonable restriction[ ] on the time, place, or manner of protected speech."'" *Id.* at 914-15 (quoting *Planet I*, 750 F.3d at 786 & 793 n.9 (further citation omitted)).

On remand, the Ninth Circuit instructed the Clerk of Court for the Central District to assign this case to a different judge. *Id.* at 915.

E. <u>After The Ninth Circuit Ruling, Access Improved But Problems Remain</u>

While the first appeal was pending, Defendant's status reports show Ventura Superior continued to have "huge backlogs of work to be processed," including "new filings." UF 70. Although those reports did not identify the new filings that were backlogged, others report new unlimited complaints could sit unprocessed for a week without being considered a backlog. *Id.* And that was just to start the processing of new complaints, which is elaborate and "'takes a fair amount of time.'" *Id.* 48 (quoting McLaughlin Dep., 54:9-10) – 51. After the complaint was processed and new file assembled, the clerks on the New Filings Desk – who handled most unlimited complaints but rotated frequently – were subject to "quality control" for varying periods of time lasting from several weeks to several months. *Id.* 54-55. This check for errors in processing – which "could take one to several days to complete," as files could "stack up" on the clerks' and/or supervisors' desks waiting for "quality control," and making corrections required additional time, *id.* 57-58 – occurred after the clerk had "located" the files in the CCMS database to the media bin, but before the file was actually taken to that bin so they could be reviewed by the press and public. *Id.* 56.

Consequently, while the appeal was pending CNS continued to experience delays in access to new civil complaints at Ventura Superior similar in frequency and duration to those occurring before it filed suit. UF 63. In March 2013, an email from Ventura Superior's Assistant Executive Officer to a reporter acknowledged "delays in the processing or new filings[,] judgments, writs[,] abstracts" and other documents had "grown from two weeks to six weeks." *Id.* 71. While Civil staff questioned those figures internally, they acknowledged a delay of 12 days in even starting the

processing of some new files, even though it was attempting to keep "the backlog … to a minimum" with respect to unlimited filings. *Id.*

After a news report of the oral argument was circulated in the Civil Department in May 2013, it undertook a "pilot program" in June 2013 to "test" making scanned copies of complaints available before processing. UF 76-77. Although "the test project in scanning the new filings went well," *id.* 77, scanning was not implemented while the appeal was pending. After the Ninth Circuit issued its decision on April 7, 2014, however, there was a flurry of activity.

Various proposals were floated to cure the problem. One was to have a clerk "make[] copies of Complaints for cases that she doesn't locate to the media bin," so the press and public could see them while they were with a Judicial Officer, Legal Research or the Orders clerk. UF 83. It was rejected. *Id.* Another was to have the parties submit an extra copy of the complaint and exhibits for the media to review, which would cost the court nothing because "we weren't paying the cost of making the copy." *Id.* 81. But a Deputy Court Executive Officer "wasn't very fond of the idea of requiring counsel to provide the copy. Customer service-wise, she didn't think it was a good idea" to have "the attorneys provide [the] extra copy so that we weren't paying for the cost." *Id.* 82 As a result, that proposal was also rejected. *Id.*

Ultimately, Ventura Superior adopted a new policy in June 2014, implementing the scanning procedure, under which new unlimited complaints would "typically" be scanned on intake and made available for electronic viewing on the day received by the clerk, prior to processing. UF 115. At points since then, CNS has had improved access to new complaints on the day of filing. But more recently between 30 and 50 percent of new unlimited complaints have not been available until 2 to 5 days after filing. *Id.* 64, 72. And Defendant and his executive officers continue to defend the legality of his prior practices – premised on the implacable belief that "until a new unlimited civil complaint is processed, it's not a public record," *id.* 33 – and absent judgment from this Court, they could resume that policy at any time. *Id.* 117-121.

I.

CNS IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE NINTH CIRCUIT FOUND A RIGHT OF ACCESS AND DEFENDANT CANNOT CARRY HIS BURDEN TO SHOW DELAYING ACCESS WAS JUSTIFIED

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This is especially true, and "[s]ummary disposition is particularly favored," in cases like this one "involving First Amendment rights," *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 752 (N.D. Cal. 1993), because "'unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights.'" *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992). As the Ninth Circuit observed in *Planet I*, this "chilling effect" is not limited to where the media are sued, but includes action that "stifles the 'free discussion of governmental affairs'" and "informed public discussion of ongoing judicial proceedings," such as the "alleged violation of CNS's First Amendment right" of "timely access to newly filed complaints"." 750 F.3d at 787-88.

Here, summary disposition is facilitated by the case's prior trips to the Court of Appeals and "[t]he Ninth Circuit's recognition in *Courthouse News Service* that there is a qualified First Amendment right of public access to judicial records in civil cases, including newly filed complaints." *Doe v. JBF RAK LLC*, 2014 U.S. Dist. LEXIS 98688, *11-12 (D. Nev. July 18, 2014) (citing *Planet I*, 750 F.3d at 786-87); *Planet II*, 614 Fed App'x. at 914; *Wood v. Ryan*, 759 F.3d 1076, 1081-82 (9th Cir. 2014) ("[W]e recently acknowledged the First Amendment right of access 'to civil proceedings and associated records and documents.'") (quoting *Planet I*, 750 F.3d at 786), *vacated on other grounds*, 135 S. Ct. 21 (2014); *accord Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 2016 U.S. App. LEXIS 3233, *10-11, 16-18 (2d Cir. Feb. 24, 2016) (affirming ruling that "complaint is a judicial document subject to a presumption of public access under both the First Amendment and the common law").

As CNS has submitted evidence to support those holdings, it "is entitled to judgment as a matter of law" if it shows "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), that "the delays in access to civil complaints" in Ventura violate this First Amendment right of access recognized by the Ninth, and now Second, Circuits. *Planet II*, 614 Fed. App'x. at 914. Once CNS makes that showing, "the burden to justify non-disclosure [during the delay] shifts to … the Defendant." *U.S v. Loughner*, 769 F. Supp. 2d 1188, 1194 (D. Ariz. 2011); *Comite de Jornaleros*, 657 F.3d at 944 ("'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'").[8]

As the Court has observed, "when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. … Rather, the moving party's initial burden 'may be discharged by "showing" – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case.'" *Rosebrock v. Beiter*, 788 F. Supp. 2d 1127, 1134 (C.D. Cal. 2011), *aff'd*, 745 F.3d 963 (9th Cir. 2014). Undisputed evidence shows the delays in access violated the First Amendment, and Defendant cannot carry his burden to justify those delays. As it was his custom, policy and/or practice, implemented under color of "California law," of not "granting access to civil unlimited complaints until they have been processed," that caused this deprivation of First Amendment rights, UF 38 (quoting Planet Dep., Ex. 14-25), summary judgment for CNS on its § 1983 claim is warranted.

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[8] This includes ***all*** Defendant's affirmative defenses. *Rosebrock*, 745 F.3d at 971 ("party asserting mootness bears a 'heavy burden' in meeting this standard"); *Leigh v. Salazar*, 677 F.3d 892, 901 (9th Cir. 2012) (once a "court determines that a right of access exists …, it must determine whether [government] has overcome that right by demonstrating an overriding interest that the viewing restrictions are essential to preserve … and are narrowly tailored to serve those interests."); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013) ("'[t]o satisfy the [time, place or manner] narrow tailoring requirement, "the Government... bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary").

II.

THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES TO CIVIL COMPLAINTS UPON RECEIPT BY A COURT FOR FILING

"[T]he requirements for relief under section 1983 have been articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Here, there is no genuine dispute of material fact on the last three elements; indeed, Defendant admits as much. UF 1-4, 30-39. Consequently, if delays in access deprived CNS of its First Amendment right of access, CNS has met the requirements for relief under § 1983.

The starting point for this analysis is the Ninth Circuit's recognition that the "First Amendment right of public access to judicial records in civil cases" includes a right of access to "newly filed complaints." *Doe*, 2014 U.S. Dist. LEXIS 98688, *11-12 (citing *Planet I*, 750 F.3d at 786-87); *see also Bernstein*, 2016 U.S. App. LEXIS 3233, *10-11, 16-18 (recognizing First Amendment right of access to civil complaints); *Levenstein v. Salafsy*, 164 F.3d 345, 348 (7th Cir. 1998) ("in all but the most extraordinary cases … complaints must be public").[9]

Even if the Ninth Circuit had not settled the issue, the undisputed facts satisfy "the Supreme Court's two-part 'experience' and 'logic' test" to "determine whether there is a right of access," *U.S. v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012), by showing the history and value of access to complaints upon receipt by the court.

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[9] As the Ninth Circuit and many others have held, the right of access "'involves a ***right of contemporaneous access***.'" *Republic of Phil. v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 60 (D.N.J. 1991)), *aff'd*, 949 F.2d 653 (3d Cir. 1991); *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("public and press generally have a contemporaneous right of access to court documents … when the right applies"); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 126 (2d Cir. 2006); *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary … is that once found to be appropriate, access should be immediate and contemporaneous."); *Associated Press v. District Court.*, 705 F.2d 1143, 1147 (9th Cir. 1983).

A. <u>There Is A Long History Of Access To And Reporting On New Complaints</u>

In Ventura, contemporaneous access to newly filed complaints – i.e., the ability "'to review new civil complaints that had been received for filing by the court that same day'" – dates to at least "around 1979," and continued until at least 1994, and likely until Defendant became Clerk in 2001. UF 21 (quoting Rimer Dec., ¶ 5) ("'I do not recall a single instance during the entire six-year period I covered the Ventura Superior Court that I was unable to view a complaint the same day it was received for filing as long as I was there when the court closed.'") (quoting Sturgeon Dec., ¶ 7).

Beyond Ventura, CNS has presented evidence to support its allegations that "many courthouses across the country have adopted procedures to facilitate same-day media access to civil complaints." *Planet II*, 614 Fed. App'x. at 914. With its motion, CNS submits declarations from 31 journalists throughout the country – and an expert who covered courts before joining academia – attesting to same-day access to civil complaints in 100 federal and state courts in some 30 states. UF 19. The declarations contain evidence on access upon receipt dating to the 1970s and 1980s.

That, alone, is more than sufficient to find a right of access to newly filed civil complaints that attaches upon receipt by the court.[10] The Ninth Circuit, among others, have found a "history of access … by reviewing ***current state statutes***" and practices. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (citing *Cal-Almond v. U.S. Dep't of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992)); *Seattle Times v. District Court*, 845 F.2d 1513, 1516 (9th Cir. 1988) (citing Bail Reform Act of 1984 for tradition of access to pretrial release proceedings, even though they "do not share with criminal trials an unbroken history of public access"); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 180 (3d Cir. 1999) ("no hesitation in holding [plaintiff] had a constitutional right of access" based on 30-year old statute).

[10] The determination that the right of access, where it exists, attaches immediately is one the Ninth Circuit and others made as a matter of law. *See supra* footnote 9. This history confirms complaints were public from the time they were submitted for filing.

Moreover, this evidence does not stand alone but is supported by three points.

First, since *Campbell v. New York Evening Post, Inc.*, 245 N.Y. 320 (1927), "the weight of modern authority" holds reports about a complaint are privileged agains libel liability once it is submitted for filing and issuance of a summons. *Salzano v. N. Jersey Media Group*, 993 A.2d 778, 790 (N.J. 2010); *see Lybrand v. State Co.*, 184 S.E. 580, 582-83 (S.C. 1936)). This brought libel law into compliance with a tradition of access to report on complaints "the same day" they were filed, *Shiver v. Valdosta Press*, 61 S.E.2d 221, 226 (Ga. App. 1950); *Hurley v. Nw. Pub'ns*, 273 F. Supp. 967, 969 (D. Minn. 1967); *Siegel v. Sun Printing & Pub'g Ass'n*, 223 N.Y.S. 549, 550 (App. Div. 1927) ("[c]harges … became known to-day when … Counsel … started an action"), or "[o]ne day after." *Newell v. Field Enters*., 91 Ill. App. 3d 735, 739 (1980).

Second, "most" state access statutes dating to 1934 were "broad enough to cover judicial records," typically defined to include any "document, or paper … which is the property of any court, … or which any officer or employee … has received or is required to receive for recording or filing." H. Cross, *The Right to Know* 139, 329 (quoting Del. Rev. Code Ch. 36 § 7A (1935)).[11] Many of these statutes required access "'on demand.'" *Id.* at 337 (quoting Ala. Code § 147 (1940)).[12]

Third, "since the adoption of the Federal Rules of Civil Procedure in 1938," which required federal lawsuits to be commenced by the filing of a complaint, "the history of the last eight decades under the Federal Rules" has been to provide "public access to complaints" when filed. *Bernstein*, 2016 U.S. App. LEXIS 3233, *16-18.

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[11] Cross, *supra*, at 329-35 (citing, e.g., Idaho Code § 67-2031 ("received or is required to receive for filing"); Ill. Stat. § 24-16 ("All records … kept by … clerks"); Mass. Ann. Law Vol. 1, Ch. 4 § 7 ("received … or required to receive"); N.J. Stat. Ch. 3, § 47:3-1 (same); N.C. Gen. Stats. § 132-1 (1943) ("received"); Tenn. Code § 9748 (1934) ("records required to be kept in any court")).

[12] Cross, *supra*, at 337-46 (citing, e.g., Cal. Civ. Proc. Code § 1893 (1949); Idaho Code § 9-302; Iowa Code. § 633.46; Minn. Stat. § 15.17(4); Mont. Rev. Codes § 93-1001-5 (1947); Or. Comp. Laws § 2-702; Utah Code § 104-47-2 (1945)).

That last point was enough, by itself, for the Second Circuit to find a "strong historical tradition of public access to complaints" that supported a First Amendment right of access to complaints, *id.*, *17, a right that applies once "documents [are] submitted to the court." *Lugosch*, 435 F.3d at 124; *U.S. v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("the first amendment right of access extends to documents ***submitted*** in connection with a judicial proceeding"). That conclusion is only buttressed by the declarations submitted with this motion and the cited authorities, all of which reflect a "long-standing public policy in open access to complaints." *U.S. ex rel. Dahlman v. Emergency Physicians*, 2004 U.S. Dist. LEXIS 31304, *3-4 (D. Minn. Jan. 5, 2004).

B. <u>There is A Well-Recognized Value In Access To Complaints Upon Receipt</u>

With respect to the second part of the "'experience' and 'logic' test" – which considers "the value of openness"[13] – the Second Circuit held that "[l]ogical considerations also support a presumption of public access" to complaints. *Bernstein*, 2016 U.S. App. LEXIS 3233, *17. "Public access to complaints allows the public to understand the activity of the federal courts, enhances the court system's accountability and legitimacy, and informs the public of matters of public concern. Conversely, a sealed complaint leaves the public unaware that a claim has been leveled and that state power has been invoked – and public resources spent – in an effort to resolve the dispute." *Id.* "These considerations indicate that public access to the complaint and other pleadings has a 'significant positive role,' in the functioning of the judicial process." *Id.* at *17-18 (citation omitted to *Lugosch*, 435 F.3d at 120).

All these "logical considerations," and more, apply to access upon receipt by the court of new unlimited civil complaints in state court as well as federal. That is why reporters come to the courthouse every afternoon to review the day's complaints:

The public … has a strong interest in knowing about civil litigation, not at

[13] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). The "experience" and "logic" terminology comes from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*").

some undefined point in the future, but immediately when cases are filed and even before there is any formal court action. The very fact that a lawsuit has been filed is of importance to the public and any number of specialized audiences, even before any official proceeding takes place. Nor is it realistic for any entity other than the media to monitor civil filings on a systematic (and systemic) basis. In this respect, the media inherently play a vital surrogate role for the public generally and for any specialized audiences the media may serve.

Drechsel Dec., ¶ 18; *see* UF 25-28.[14] This is the view not just of an academic; courts extended the fair report privilege to reports about complaints from the day they are received for filing because "the public's interest in being informed on contemporary problems which have entered the judicial system for adjudication" is "even stronger today when an increasing number of society's problems are resolved through the judicial process." *Newell*, 91 Ill. App. 3d at 746. "[T]he entire judicial system from the filing of a complaint until final decision before the highest court of review should be exposed to the bright light of public scrutiny." *Id.*; *accord, e.g., Paducah Newspapers v. Bratcher*, 118 S.W.2d 178, 180 (Ky. 1938).

As a general matter, "[t]he public's interest in monitoring the work of the courts is subverted when a court delays" access. *Co. Doe*, 749 F.3d at 272. "Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we …emphasize that the public and press generally have a contemporaneous right of access to court documents … when the right applies." *Id.*

[14] Many reporters used to review the day's complaints. UF 106 (up to seven in the Central District and Los Angeles Superior), 29 (five in New York and Chicago). Now this task falls to CNS. *Id.* ("'With the enormous loss of newsroom jobs in the past 10-12 years, even a large metro daily … may have only one court reporter, and that person is likely to focus on criminal court. The result is that organizations like CNS play a particularly important role as monitors of the civil justice system. Some of the nation's largest daily newspapers now subscribe to CNS to monitor civil filings for important and newsworthy cases ….'") (quoting Drechsel Dec., ¶ 45).

One reason, of course, is that"[t]he newsworthiness of a particular story is often fleeting." *Grove Fresh*, 24 F.3d at 897. Complaints may be front-page news "'above the fold'" when submitted for filing but may not even be reported "'[w]hen access to a new complaint is withheld for a day or more.'" UF 26 (quoting Girdner Dec., ¶ 64) ("'delayed access can mean that cases can more easily slip through the cracks since reporters may not be able to return over and over to check on availability'") (quoting Drechsel Dec., ¶ 26). As a federal court in Texas recognized, "'[t]o delay or postpone disclosure'" of new complaints – even a "24 to 72 hour delay" – "'undermines the benefit of public scrutiny and may have the same result as complete suppression.'" *Jackson*, 2009 U.S. Dist. LEXIS 62300, *11 (quoting *Grove Fresh*, 24 F.3d at 897).

Even when complaints are newsworthy beyond their filing date, the greatest "value of openness" lies in immediate reports. For example, "'a lawsuit against a publicly traded corporation that has the potential to move the stock market is something that the readers of a financial news reporting service such as Bloomberg would be interested in knowing about immediately.'" MacLean Dec., ¶ 12; UF 25-28. Timely access may be a matter of life and death. GM car owners need to know a new complaint alleges a "broad and deadly problem with GM ignition switches," Drechsel Dec., ¶ 14; UF 28, and implant recipients need to know a new cases alleges a "faulty heart valve … could be a killer." Doggett & Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643, 648-49 (1991) ("'secrets buried in court records, literally, kill and maim'").

"The filing of the complaint is likely to be the first occasion that the public could become aware of the dispute." *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989). It "forms the basis of a civil action and invokes the jurisdiction of the Court" and is thus "a pleading essential to the Court's adjudication of the matter as well as the public's interest in monitoring the federal courts." *In re Eastman Kodak*, 2010 WL 2490982, *1 (S.D.N.Y. June 15, 2010). Like sealing complaints, delaying access can "spawn considerable mischief" by "conceal[ing] the very existence of

lawsuits from the public." *Standard Chtd. Bank Int'l. v. Calvo*, 757 F. Supp. 2d 258, 260 (S.D.N.Y. 2010). Absent access, there is often no way to know a case has been filed, *id.*, and even if alerted to the lawsuit, the press and public have no independent information about the facts or "alleged breaches" of law said to give rise to the action until the complaint is made available. *Eastman Kodak*, 2010 WL 2490982, *1.

Consequently, "immediate access facilitates accurate, balanced reporting. Journalists operating under deadline and competitive pressure will gravitate toward sources who provide information when journalists need it. … [I]f documents are not available, those sources are likely be those with the most to gain by trying their cases in the court of public opinion – i.e., the most inherently biased sources." Drechsel Dec., ¶ 27 ("complaints are at least bound by rules of civil procedure and confined to the factual and legal issues involved"); UF 25. By delaying access, Ventura and Orange County Superior allowed local agencies to control coverage by giving copies of complaints only to media of their choice. Girdner Dec., ¶¶ 66-67; UF 27.

In sum, "'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.'" *Doe*, 2014 U.S. Dist. LEXIS 98688, *11 (quoting *In re Nvidia Corp. Deriv. Litig.*, 2008 U.S. Dist. LEXIS 120077, *11 (N.D. Cal. 2008)). Not after the clerk's office finishes processing, even if that is only "48 hours" later, *Associated Press*, 705 F.2d at 1147, or "24 hours." *U.S. v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access to court filing, even for "as little as a day," "delays access to news, and delay burdens the First Amendment"); Girdner Dec., ¶ 63 ("A delay in access of even one court day means that news is delayed by a full news cycle. When there is an intervening weekend or holiday, or both, the delay extends up to four days."); UF 25-28. Rather, "[***s***]***ame day access*** by attorneys and the general public to court case files,… ***is vital***." *Nast v. Michels*, 107 Wn. 2d 300, 308 (1986) (holding that "next day access to court case files" under the common law "is too slow.").

III.

DELAYING ACCESS FOR "EVEN A DAY OR TWO" CANNOT SURVIVE THE COMPELLING INTEREST OR TIME, PLACE AND MANNER TESTS

The flip side of repeatedly recognizing that "access must be provided 'contemporaneously'" where the right of access applies *Nast*, 107 Wn.2d at 308 (quoting *In re Cont'l Ill. Secs. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984)) – and that it has long applied as soon as any judicial record "'[is] received … for recording or filing,'" H. Cross, *supra*, at 329 (quoting Del. Rev. Code Ch. 36 § 7A (1935)) – is that courts have consistently concluded that even a "procedurally implemented ***1-day turnaround time is unacceptable***." *Nast*, 107 Wn.2d at 308.

The Ninth Circuit explained the reason for this rule in its first case holding "the public and press have a first amendment right of access to pretrial documents." *Associated Press*, 705 F.2d at 1145. Even where "pretrial documents might only be under seal for … 48 hours" from the "'court's receipt of a submitted document,'" the delay in access was unconstitutional because "[t]he effect of the order is a total restraint on the public's first amendment right of access even though the restraint is limited in time," and the trial court did not meet the test for sealing. *Id.* at 1145, 1147.

This rule applies to complaints. Even a "'slight delay' in availability'" of 1-3 days from receipt for filing has been held to be unconstitutional unless the delay meets the test for sealing because "'[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'" *Jackson*, 2009 U.S. Dist. LEXIS 62300, *11 (quoting *Grove Fresh*, 24 F.3d at 897). Delaying access to complaints "'unduly minimizes, if it does not entirely overlook, the value of "openness" itself, a value which is threatened whenever immediate access … is denied, whatever provision is made for later public disclosure.'" *Id.* (quoting *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989)). That has never been more true; in today's "24/7" news cycle, "delay [has] never [been] more dangerous'" to "'business and investors,'" public health and safety. Drechsel Dec., ¶¶ 14, 45-49; UF 28.

Defendant's own status reports show delays of between one and 39 days just to start the procedure of processing new complaints, UF 67-70, and CNS' records show delays of one to 34 days in obtaining access to 94 percent of new complaints during summer 2011, just before this lawsuit was filed, *id.* 63; *see also id.* 70 (Defendant's status report in July 2011 shows delays of up to 5 weeks to begin processing complaints), 99 percent in December 2012, and 100 percent in July 2012 and 2013. *Id.* 64. If provisions to allow access "within 24 hours" are unconstitutional unless "substantive prerequisites to closure have been satisfied," *Brooklier*, 685 F.2d at 1168-71, the delays reflected in the undisputed facts must be unconstitutional unless justified. *Id.*; *Pokaski*, 868 F.2d at 507 ("even a one to two day delay impermissibly burdens the First Amendment") (citing *Associated Press*, 705 F.2d at 1147).

In its decisions in this case, the Ninth Circuit noted that "'this right of access may be overcome by an "overriding [governmental] interest based on findings that closure is essential to preserve higher values."'" *Planet II*, 614 Fed. App'x. at 914 (quoting *Planet I*, 750 F.3d at 793 n.9). The Ninth Circuit also acknowledged Defendant could attempt to argue "that '[t]he delay in making the complaints available may also be analogous to a permissible "reasonable restriction[ ] on the time, place, or manner of protected speech."'" *Id.* (quoting *Planet I*, 750 F.3d at 793 n.9).

To date, Defendant has not argued denying access until after processing could meet the "overriding" governmental interest test. There is a good reason for that. The interests he has asserted are not supported by the evidence – for example, witnesses could cite no examples of complaints being lost or damaged or of private information becoming public, UF 90-105 – or are "insufficient to justify a complete denial of access" until convenient for the court. *In re Associated Press*, 172 Fed. App'x. 1, 5-6 (4th Cir. 2006) ("while we are sympathetic to the administrative burdens faced by the district court, we cannot agree that the incremental rise in those burdens that would be caused by providing access justifies the denial" of "contemporaneous access") (citing *Valley Broadcasting Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1295 (9th Cir. 1986)).

Defendant has argued his policy of denying access until after processing was a reasonable time, place and matter ("TPM") restriction. ECF Doc. 61-1 at 9. But his theory fails because the Ninth Circuit has held "[a] delay of even a day or two" cannot constitute a reasonable TPM restriction, at least where, as here, it prevents "[i]mmediate speech" and "'timeliness may be important.'" *NAACP, Western Region v. Richmond*, 743 F.2d 1346, 1355-56 (9th Cir. 1984); *see* UF 25-28 (describing importance of same-day access to new complaints). This is true for two reasons.

First, the Ninth Circuit has held delaying access for even 24-48 hours must be '"strictly and inescapably necessary"'" to protect an overriding interest. *Associated Press*, 705 F.2d at 1145 (quoting *Brooklier*, 685 F.2d at 1167). That is because delay ***is*** a denial of access – "a total restraint on the public's first amendment right of access even though the restraint is limited in time," *id.* at 1147 – which, Defendant concedes, requires strict scrutiny. ECF Doc. 61-1 at 28; *U.S. v. Amodeo*, 71 F.3d 1044, 1050 (2d 1995) (excluding public "***temporarily or permanently***" from court records must meet test for closure). Consequently, a "'slight delay' in availability" of new complaints cannot constitute "a reasonable time, place, or manner restriction" but must meet the overriding interest test. *Jackson*, 2009 U.S. Dist. LEXIS 62300, *11.

Second, the Ninth Circuit has held a policy delaying speech "is not the least restrictive means for achieving [the government's] end," *NAACP*, 743 F.2d at 1355, and "fails to provide ample alternative means of communication" for those, like CNS and its subscribers, for whom "'time-sensitive'" speech is important. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009). Defendant therefore cannot carry his "'burden of proving'" either of these essential elements of a valid TPM regulation. *Comite de Jornaleros de Glendale v. City of Glendale*, 2005 U.S. Dist. LEXIS 46603, *10, 17 (C.D. Cal. May 13, 2005).[15]

[15] Defendant also cannot show the interests he asserts are "sufficiently significant" to justify his policy or "'that the proposed communicative activity endangers those interests.'" *Klein v. San Clemente*, 584 F.3d 1196, 1202-03 &n.5 (9th Cir. 2009).

IV.

CNS IS ENTITLED TO DECLARATORY RELIEF AND A PERMANENT INJUNCTION TO PREVENT DEFENDANT FROM DENYING ACCESS UNTIL COMPLAINTS ARE PROCESSED

Despite two Ninth Circuit decisions in this case confirming a First Amendment right of timely access to new complaints, Defendant and his senior executives still take the position that even after the clerk receives a complaint for filing – and even though the clerk's office deems that to be when the complaint was "filed," UF 23 – "'it's not a … court record until we've processed it and put it in our case management system.'" *Id.* 31 (quoting Kanatzar Dep. 112:21-23). They thus rejected suggestions by staff to make copies of new complaints available for public access when received, or to have the plaintiff provide an extra copy for the media bin before processing, *id.* 79-83, and "'came up with the scanning process instead.'" Kanatzar Dep. 156:5-6.

While the new procedure of scanning complaints so they can be viewed prior to processing is an improvement, problems continue. Last November, over 30 percent of complaints were not available for viewing the day received by the court (and many were not available for 2-5 days). *Id.* 64. On some days, less than half the complaints could be viewed the day received. *Id.* In January, it took four days for scanning to make some complaints available for viewing. *Id*. 72 And exhibits are not scanned, *id.* 115, although reporters have historically had access to complaints' exhibits. *Id.* 19.

It necessarily follows that not only has CNS shown it is entitled to a declaratory judgment as a matter of law on its section1983 First Amendment claim, but that it will continue to be deprived of its "contemporaneous right of access to court documents" absent injunctive relief. *Co. Doe*, 749 F.3d at 272; *Lugosch*, 435 F.3d at 126 ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found."). CNS is therefore entitled to a permanent injunction because it has shown (1) success on the merits, (2) likely irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in its favor and (4)

an injunction is in the public interest. *Rosebrock*, 788 F. Supp. 2d at 1145.[16]

Delays in access constitute irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Lugosch*, 435 F.3d at 127 (quoting, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (reversing denial of injunction and remanding with instructions to issue "appropriate injunction" where, as here, "[t]he harm is particularly irreparable" because "'timing is of the essence'" and "'[a] delay of even a day or two may be intolerable'").[17]

The balance of equities also supports an injunction. CNS "will be denied its First Amendment right of access to new case-initiating documents unless the Court issues this … injunction, while Defendant[] ha[s] alternative, constitutional ways to achieve [his] goals and address [his] administrative concerns." *Jackson*, 2009 U.S. Dist. LEXIS 62300, *14; *Planet I*, 750 F.3d at 791 ("The Ventura County Superior

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[16] It also follows that Defendant cannot show scanning has mooted this case, as he cannot show most if not all the factors necessary to find "'voluntary cessation'" of an unconstitutional policy" has mooted a case. *Rosebrock*, 745 F.3d at 972. Among other things, Defendant's policy change is not "evidenced by language that is 'broad in scope and unequivocal in tone,'" *id.*; to the contrary, he continues to assert a right to withhold access until after complaints are processed. And the policy change neither "fully 'addresses all of the objectionable measures'" of his prior policy nor stopped "'conduct similar to that challenged by the plaintiff[,]'" *id.*, as the ongoing delays in access show. Where, as here, "the new policy … could be easily abandoned or altered in the future," Defendant has "failed to meet [his] heavy burden to make it 'absolutely clear that the allegedly wrongful behavior … could not reasonably be expected to recur.'" *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013).

[17] Delays in access also will diminish the value of CNS's reports to its subscribers, leading to a loss of goodwill. UF 114. The loss of goodwill is a serious and hard-to-quantify hardship which "certainly supports a finding of the possibility of irreparable harm." *Gallagher Benefit Servs. v. De La Torre*, 283 Fed. App'x. 543, 546 (9th Cir. 2008); *Stuhlbarg Int'l Sales Co. v. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001). Moreover, CNS's injury is irreparable as a matter of law because the Eleventh Amendment bars it from seeking monetary damages. *Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994).

Court has available a variety of simple measures to comply with an injunction granting CNS all or part of the relief requested ….”). And the Ninth Circuit has “consistently recognized the ‘significant public interest’ in upholding free speech principles,” to protect not only “the free expression interests of [plaintiffs], but also the interests of other[s],” such as the “would-be recipients” of CNS’ reports. *Klein*, 584 F.3d at 1208. In sum, “[t]he balance of equities and the public interest thus tip sharply in favor of enjoining [Defendant’s policy].” *Id*.

CONCLUSION

“Where the precious First Amendment right of freedom of the press is at issue, the prevention of access … is, each day, an irreparable injury: the ephemeral opportunity to present one’s [report] to an interested audience is lost and the next day’s opportunity is different.” *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154 (9th Cir. 1987). While that case involved access to a public forum, federal courts also “emphasize the importance of immediate access [to public records held by a court] where a right to access is found.” *Lugosch*, 435 F.3d at 126 (citing cases).

Defendants arguments against enforcing this “important First Amendment right of access,” *Planet I*, 750 F.3d at 786, are weak. “This is not a case in which disclosure would reveal details of an ongoing investigation, pose a risk to witnesses, endanger national security, or reveal trade secrets.” *Bernstein*, 2016 U.S. App. LEXIS 3233, *22. Rather, this case simply involves Defendant’s administrative preference for processing complaints before allowing access to them, which cannot overcome the right of timely access. *In re Associated Press*, 172 Fed. App’x. at 5. Plaintiff CNS therefore respectfully requests this Court grant its motion for summary judgment.

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