Nos. 16-55977, 16-56714

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff-Appellee,

v.

MICHAEL PLANET, in his official capacity as
Court Executive Officer/Clerk of the Ventura County Superior Court,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
Honorable S. James Otero
Case No. 2:11-cv-08083-SJO-FFM

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case, in which plaintiff Courthouse News Service ("CNS") claims a First Amendment right of same-day access to new civil complaints filed with the Superior Court of California, County of Ventura ("VSC"), is making its third appearance before this Court. Our two previous appearances focused upon CNS's claim that VSC's pre-2014 access procedures, which required that VSC clerks "process" complaints before making them publicly available, failed to provide constitutionally sufficient access. Without ruling on the ultimate merits of that claim, this Court reversed the district court's earlier orders that had dismissed CNS's complaint on abstention grounds and for failure to state a claim.

Even before this Court's last ruling, however, VSC had significantly changed its procedures. Since June 2014, VSC has electronically scanned all new complaints and made them publicly available *before* processing and placing them in official court files. Under the Scanning Policy (which has now been in place for nearly three years), VSC provides what can only be described as "timely access" to all new complaints. In particular, virtually all complaints received prior to VSC's 3:00 pm public closing time are scanned and made available for review by CNS's reporter (who arrives in the late afternoon) on the same day. In addition, VSC scans and publishes complaints received late in the day and after 3:00 pm so that CNS's reporter can review them on her visit to the clerk's office the next business

day. And while a few (3%) new complaints are not published within this time frame as a result of various human errors, they are published promptly once the errors are identified.

In summary judgment proceedings below, the district court found that evidence offered by CNS created an "irreconcilable evidentiary dispute" as to whether VSC's Scanning Policy provided timely access. But rather than deny the parties' cross-motions for summary judgment, the district court entered declaratory and injunctive relief in favor of CNS and against VSC, finding that, while the First Amendment *did not* guarantee CNS a right of "same-day" access to new complaints, it *did* guarantee a right of "timely access upon receipt" – a standard, as applied by the district court, that amounts to same-day access in sheep's clothing. Using this paradoxical standard, the district court concluded that: (a) VSC's policy of "processing" new complaints prior to providing public access, which had been *abandoned* two years earlier in 2014, contravened its newly-minted "upon receipt" standard; and (b) VSC's current Scanning Policy violates this "upon receipt" standard, because VSC does not scan exhibits appended to new complaints (even though CNS never asked to see them, and would have been given access had it asked), and because VSC closes its Records Department at 3:00 pm and makes complaints received late in the day accessible the next business day (even though

neither the district court nor CNS has explained why this is not "timely access" and courts have the inherent authority to establish business hours).

We demonstrate below that the district court's rulings are internally inconsistent and erroneous as matters of both law and fact, and that the judgment against VSC must be reversed.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. On June 14, 2016, the court entered final judgment. VSC timely appealed on July 8, 2016. *See* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court correctly rule that, even though the First Amendment *does not* grant a right of same-day access to new complaints, it *does* create a more demanding right of "timely access" which attaches at the "moment" the court receives the complaint, and that any "delay" past that moment must be justified as serving an overriding or compelling state interest?

2. Did the district court correctly deny summary judgment to VSC, when CNS presented no evidence that VSC fails to provide access to new complaints once they become the subject of judicial action?

3. Did the district court correctly grant summary judgment to CNS by finding that VSC did not automatically scan new complaint exhibits?

4. Did the district court correctly grant summary judgment to CNS by finding that VSC provided public access on the next business day for complaints received late in the day and after its clerk's office closed to the public?

5. Did the district court correctly rule that issues relating to VSC's pre-2014 new complaint processing practice were not moot?

6. Did the district court correctly grant declaratory and injunctive relief against VSC's long-abandoned processing practices?

7. Does the district court's injunction comply with Federal Rule of Civil Procedure 65's clarity and specificity requirements?

STATEMENT OF THE FACTS

When this case was last here, this Court directed the district court to "properly evaluate the merits of CNS's claims" of delayed access to new civil complaints, rather than decide the issues as a matter of law. *Courthouse News Serv. v. Planet* ("*Planet II*"), 614 Fed. App'x 912 (9th Cir. 2015). The parties subsequently explored the merits of CNS's claims through discovery and cross-motions for summary judgment, which demonstrated the following:

A. VSC Maintains Hard-Copy Files of Civil Cases.

Defendant Michael Planet is VSC's Court Executive Officer and Clerk, and is responsible for all aspects of the court operations, including the duties specified in California Rule of Court 10.610. ER-79 ¶ 3; ER-304-312. One of the thirteen delineated "duties" in Rule 10.610 relates to "records" and requires the court executive officer to "[c]reate and manage uniform record-keeping systems."

VSC does not maintain case files in electronic format and does not require litigants to submit complaints, motions, and other documents through an electronic filing system like the federal courts' PACER system. ER-79 ¶ 4; ER-333-335, 345. Instead, except for traffic tickets, VSC maintains only physical files for all actions pending before it, and litigants must submit hard paper copies of all their documents. ER-79 ¶ 4; ER-335. Thus, while balancing the often time-sensitive demands of its criminal justice matters, and the day-to-day operations of the court—including budget, facilities, jury management—VSC must also ensure the integrity of all documents received by the court and maintained in case files, and then make them available to the public and press as promptly as possible. ER-341, 359, 447-448.

B. VSC Has Always Strived To Provide Prompt Access To New Civil Complaints.

It has always been VSC's policy to provide reasonable access to all court records. ER-93 ¶ 2. From at least 2003, members of the public and press could

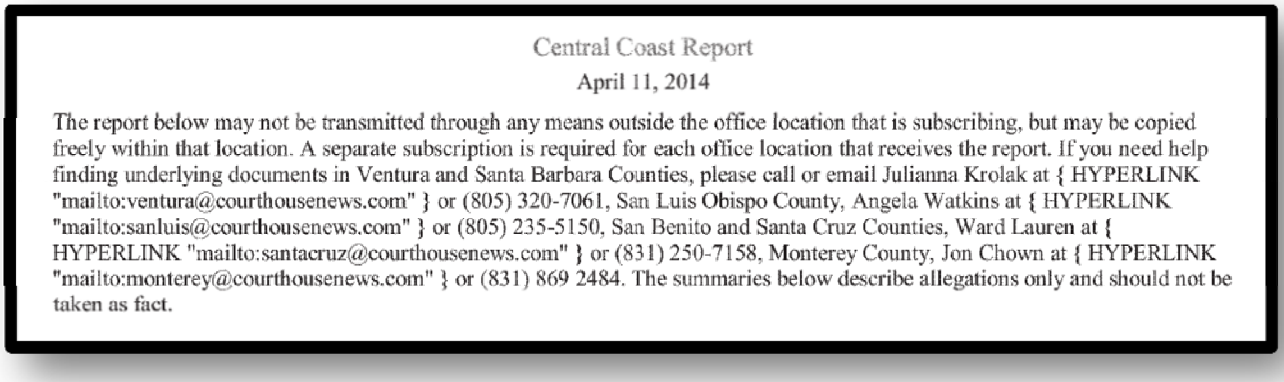
access VSC's case files by filling out a Public File Request Slip and presenting it to a court clerk. ER-465-468, 451-452. VSC also deposited new civil unlimited complaints (except those requiring immediate judicial review) in a "Media Bin" on the counter in the Records Department. ER-80 ¶ 5; ER-425-429, 432-435. VSC made those new civil complaints accessible to the public for a minimum of one week. ER-430-431, 440-441.

C. CNS Compiles And Sells Information About New Complaints.

CNS aggregates and sells information relating to new complaints filed with state and federal trial courts. Its "reporters" visit VSC and other courthouses in California and elsewhere to obtain basic information about newly-filed complaints. CNS repackages this information into jurisdiction-specific, proprietary publications referred to as "New Litigation Reports," which CNS sells primarily to lawyers and law firms. ER-79 ¶ 1; ER-1608-09 ¶ 9; ER-496-499, 506, 446. Law firms and lawyers use these reports to solicit new business. Summaries of new complaints filed at VSC appear in its "Central Coast Reports" publication, which had approximately 65 subscribers as of February 2016. ER-79 ¶ 2; ER-500-501.

CNS's New Litigation Reports do *not* describe any judicial activity. The Reports only provide court name, docket number and party names listed on a complaint, along with a cursory two- or three-sentence description of claims asserted, and the names of the plaintiff's lawyers. ER-1681.

CNS does *not* make its Reports generally available to the public. CNS limits distribution of its Reports to its subscribers, as demonstrated by the following restrictive legend, which appears atop every New Litigation Report:



Central Coast Report

April 11, 2014

The report below may not be transmitted through any means outside the office location that is subscribing, but may be copied freely within that location. A separate subscription is required for each office location that receives the report. If you need help finding underlying documents in Ventura and Santa Barbara Counties, please call or email Julianna Krolak at { HYPERLINK "mailto:ventura@courthousenews.com" } or (805) 320-7061, San Luis Obispo County, Angela Watkins at { HYPERLINK "mailto:sanluis@courthousenews.com" } or (805) 235-5150, San Benito and Santa Cruz Counties, Ward Lauren at { HYPERLINK "mailto:santacruz@courthousenews.com" } or (831) 250-7158, Monterey County, Jon Chown at { HYPERLINK "mailto:monterey@courthousenews.com" } or (831) 869 2484. The summaries below describe allegations only and should not be taken as fact.

ER-1681.

Broad distribution of CNS's report to the public would undermine CNS's business model, which depends on providing fast, exclusive access to subscribers to entice them to continue paying fees to CNS. ER-1607 ¶ 4.

One of CNS's main themes has been that immediate access to complaints is critical because the "newsworth[iness]" of their filing is fleeting. ER-1720, ¶4. As discussed below, that is not an interest that the First Amendment protects. In any event, CNS did not offer evidence showing that it disseminates "news" about VSC's new complaints beyond informing its narrow list of subscribers that a complaint was filed. Nor did CNS show that delays in making a complaint publicly available prevent it from including those complaints in its reports.

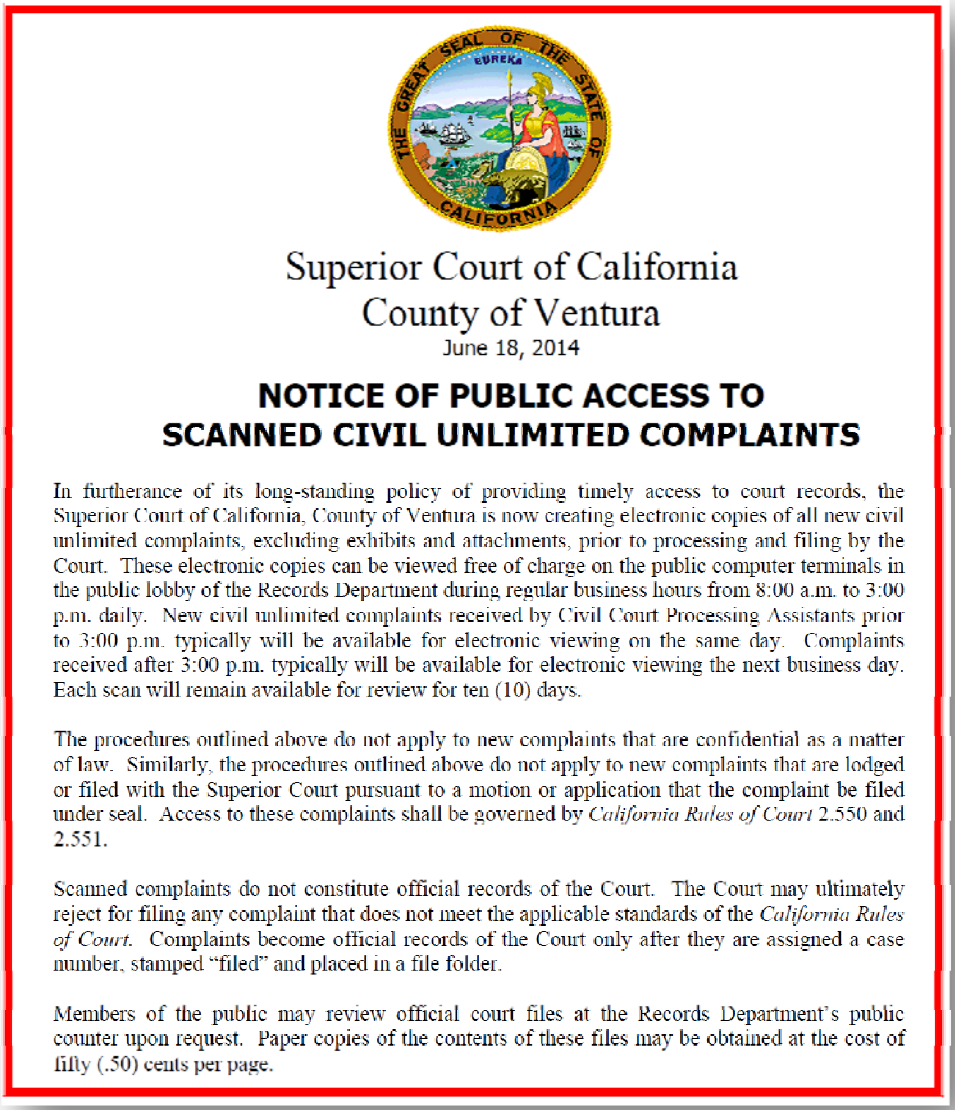
D. Prior To Adopting Its Scanning Policy In June 2014, VSC Made Prompt Processing And Publication Of New Complaints A "High Priority."

Between 2009 and July 2011, CNS and VSC conferred several times regarding CNS's access to new civil complaints and the effect that severe budget and staff shortages and court-wide system changes had on VSC's ability to timely process new civil complaints and make them available to the public. ER-79 ¶¶ 6, 7, 10; ER-444-445, 347-418, 328-329; ER-520, 523 ¶¶ 2, 3, 13; ER-483. As a result of those communications, VSC modified its procedures in or around February 2011 to prioritize the processing of new civil complaints *above all other new filings* to provide access to those new civil complaints via the Media Bin as promptly as possible. ER-446.

E. VSC Adopted Its Scanning Policy In June 2014; VSC Now Provides Access to 97% Of New Complaints On The Day Of Receipt Or The Next Business Day.

As later noted by the district court, "[t]hroughout this litigation, Planet and VSC have worked to improve their processes for taking in and making public newly filed civil complaints." ER-933. Hence, VSC jettisoned its old "processing" policy and media bin in favor of a streamlined "Scanning Policy," by which all new complaints are scanned and posted for public viewing, on a computer terminal in VSC's Records Department, ***before*** they are processed and filed as official court records. VSC issued public notices regarding its Scanning Policy on June 18,

2014, through VSC's normal means of policy announcements, including physical postings throughout the courthouse and posting on VSC's website:



Superior Court of California
County of Ventura
June 18, 2014

NOTICE OF PUBLIC ACCESS TO SCANNED CIVIL UNLIMITED COMPLAINTS

In furtherance of its long-standing policy of providing timely access to court records, the Superior Court of California, County of Ventura is now creating electronic copies of all new civil unlimited complaints, excluding exhibits and attachments, prior to processing and filing by the Court. These electronic copies can be viewed free of charge on the public computer terminals in the public lobby of the Records Department during regular business hours from 8:00 a.m. to 3:00 p.m. daily. New civil unlimited complaints received by Civil Court Processing Assistants prior to 3:00 p.m. typically will be available for electronic viewing on the same day. Complaints received after 3:00 p.m. typically will be available for electronic viewing the next business day. Each scan will remain available for review for ten (10) days.

The procedures outlined above do not apply to new complaints that are confidential as a matter of law. Similarly, the procedures outlined above do not apply to new complaints that are lodged or filed with the Superior Court pursuant to a motion or application that the complaint be filed under seal. Access to these complaints shall be governed by *California Rules of Court* 2.550 and 2.551.

Scanned complaints do not constitute official records of the Court. The Court may ultimately reject for filing any complaint that does not meet the applicable standards of the *California Rules of Court*. Complaints become official records of the Court only after they are assigned a case number, stamped "filed" and placed in a file folder.

Members of the public may review official court files at the Records Department's public counter upon request. Paper copies of the contents of these files may be obtained at the cost of fifty (.50) cents per page.

ER-345, 101-111, 438-439.

VSC does not automatically scan exhibits to complaints because they are often bulky and contain divider tabs that make scanning difficult. ER-1135 ¶¶ 6-7; ER-1371-72. However, the undisputed facts demonstrate that CNS's reporter

never asked to review any exhibits, and that VSC would have provided access to the exhibits if asked to do so. ER-1135 ¶¶ 6-7 The first time CNS complained about the failure to scan exhibits was in its Opposition to VSC's summary judgment motion. ER-1400, 1405-06

At the time of the parties' summary judgment briefing, VSC had scanned approximately 4,628 new civil complaints since the adoption of its Scanning Policy. ER-81-82 ¶16; ER-96 ¶ 6. Of those complaints, 4,494, or approximately 97%[1] "were scanned and made accessible to the public the same day they were received by VSC, subject to [VSC's] regular business hours." ER-97-98 ¶ 12. To put the matter more plainly: VSC provided public access to 97% of all new complaints either on the day they were received (if they were received before 3:00 pm) or on the next business day (if they were received after the clerk's office closed at 3:00 pm), excluding holidays and weekends. ER-345; ER-97 ¶ 11; *see also* ER-82 ¶ 17; ER-97-99 ¶¶ 11-17; ER-332, 340; 436-437. CNS's description of

[1] Like many processes, the Scanning Policy is subject to human error and VSC is aware that on a very limited number of occasions (approximately 3%), same-day access to new civil complaints was not provided. ER-82 ¶ 17; ER-97-99 ¶¶ 10-17. In any event, in each instance, the new civil complaint was made accessible to CNS very soon after VSC was made aware of the issue. ER-82 ¶ 19; ER-484-485. CNS offered evidence relating to these alleged delays, ER-1568-70 ¶¶ 41-43(Krolak Decl. ¶¶ 41-43), but exaggerated the extent of each delay by counting weekends and holidays, including cases where complaints were filed late in the day before the long Thanksgiving holiday.

the workings of VSC's scanning policy is consistent with this description. *See* ER-486-488, 532.[2]

STATEMENT OF THE CASE

A. The District Court Twice Dismissed CNS's Claims; This Court Directed the District Court To Decide CNS's Claims On The Merits.

CNS filed this suit in 2011 before VSC adopted its current Scanning Policy, alleging that (a) VSC's former practice violated the First Amendment because VSC "processed" new complaints before making them publicly available; and (b) half or more of these complaints were publicly available from between two to 34 days after filing. ER-1744-45 ¶¶ 29-30.

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[2] CNS considers anything greater than 85% same-day access to be "a thing of beauty." ER-1168-172, 1176, 1212, 1215, 1217. Indeed, reporter declarations CNS submitted in support of its Motion demonstrate that most state courts do not provide the same level of access VSC's Scanning Policy provides. Some courts provide same-day access for 75% (ER-1542 ¶ 65), 70% (ER-1418 ¶ 35), "most" (ER-1415 ¶ 20), "approximately half" (ER-1501 ¶ 16), 25% (ER-1425 ¶ 16) or "very few" (ER-1597 ¶ 59) new cases. Courts for which CNS did not provide percentages also provide access comparable to VSC, providing access to "virtually all" or "the great" or "vast majority" of complaints within twenty-four hours of filing. *See, e.g.*, ER-1524-1525 ¶ 14; ER-1474 ¶ 22; ER-1437 ¶ 11; ER-1438 ¶ 16; ER-1482 ¶ 14; ER-1432 ¶ 11; ER-1516 ¶ 13; ER-1460 ¶ 7; ER-1508 ¶ 11; ER-1494-195 ¶ 8. Many of these courts also "process" complaints before providing copies to the public. *See, e.g.*, ER-1523-24 ¶ 12; ER-1488-89 ¶ 9; ER-1438 ¶ 14; ER-1425 ¶ 16; ER-1501 ¶ 15; ER-1463 ¶ 7; ER-1451-52 ¶ 10. And, consistent with VSC's Scanning Policy, complaints received by these courts late in the day are made accessible on the next court day. *See, e.g.*, ER-1470 ¶ 7; ER-1489 ¶ 10; ER-1463-1464 ¶ 8; ER-1464 ¶¶ 8, 11; ER-1451-52 ¶ 10.

On November 30, 2011, the district court granted VSC's motion to dismiss the First Amendment claims on federal abstention grounds. ER-1733-34. This Court reversed on April 7, 2014, holding that the nature of CNS's asserted First Amendment rights rendered abstention inappropriate. *Courthouse News Serv. v. Planet (Planet I)*, 750 F.3d 776 (9th Cir. 2014). The Court remanded "so that the First Amendment issues presented by this case may be adjudicated on the merits in federal court." *Id.* at 793. The Court emphasized that it took "no position on the ultimate merits of CNS's claims, which the district court has yet to address in the first instance." *Id.*

On remand, CNS filed an amended complaint (ER-1719-32), which the district court dismissed on August 28, 2014, reasoning that the First Amendment does not guarantee a "right of same-day access to newly filed civil unlimited complaints before they have been minimally processed." ER-1709-18. In June 2015, this Court again reversed. *Planet II*, 614 F. App'x 912. The Court ruled that the "district court 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 from the allegations in CNS's complaint which allege delays in access to civil complaints exceeding 33 days from filing." *Id.*

B. The District Court Granted CNS's Summary Judgment Motion And Issued A Permanent Injunction.

On remand from *Planet II*, the case was reassigned to the Honorable S. James Otero. After engaging in discovery, the parties filed cross-motions for summary judgment in March 2016. Without holding a hearing, the district court granted CNS's motion in part, denied VSC's motion, and entered declaratory relief and a permanent injunction against VSC. ER-12-41.

1. The District Court First Held That There Is No Constitutional Right Of Same-Day Access.

Addressing what it said was the "central question" in CNS's lawsuit, the district court first ruled that the First Amendment does *not* grant a right of same-day access to new civil complaints. The court concluded that "neither the numerous non-binding cases cited by CNS ... nor the voluminous declarations submitted in support of its motion ... teach that the First Amendment requires same-day access to newly filed complaints." ER-28. Rather, "[b]ecause 'the experience test requires that a right be established nationwide' and because the existence of a nationwide practice of providing same-day access is genuinely disputed, the Court concludes that CNS has failed to meet its burden of demonstrating the existence of a qualified right of access to complaints the same day they are filed." *Id.*

The court rejected CNS's contention that same-day access is the "only logical line that can be drawn to ensure that 'timely access' is afforded ... in light of the '24/7' nature of the news cycle." ER-28-29. The court reasoned that such an argument "logically culminates with a requirement that courts make complaints available the exact moment they are received." ER-29. The district court found "that it would defy logic to read an unyielding same-day access requirement into the First Amendment." *Id.*

2. The District Court Next Found That VSC Violated A Newly-Minted Right Of "Timely Access Upon Receipt."

The district court next created a new access rule out of whole cloth, concluding that the First Amendment requires state courts to provide "timely access" to new complaints "upon receipt." Relying on the same *disputed* factual record that did *not* support a right of same-day access, the district court paradoxically concluded that "experience" and "logic" mandate that the "qualified right of timely access must arise the moment a complaint is received by the court." ER-29-30.

The district court then applied this "timely access upon receipt" standard to VSC's abandoned practice of processing complaints prior to releasing them to the public. The district court rejected the notion that the constitutionality of VSC's former practice was a moot point, ER-32-34, and ruled that the First Amendment

does not permit VSC to process complaints before making them available to the public, ER-34-38.

The district court then focused on VSC's Scanning Policy. The court did not decide whether the Scanning Policy itself provided "timely access," finding that an "irreconcilable evidentiary dispute" made it impossible to determine the issue on summary judgment. ER-40. The court nonetheless found that the Scanning Policy violated the First Amendment for two reasons. First, the court found that VSC violated the right to timely access upon receipt by not automatically scanning exhibits. ER-39-40. The court did not address the fact that CNS first raised this issue in its summary judgment opposition. Nor did the court address the undisputed facts that CNS has never asked for, or been denied access to, any new complaints' exhibits.

Second, the district court concluded that the Scanning Policy violated its timely access upon receipt rule because, "depending on when the Records Department closes its doors for the day, there is a distinct possibility that complaints filed late in the day may not be viewable by the public until the next day." ER-40. This amounts to holding VSC liable for failing to provide same-day access to new complaints filed late in the day – the precise standard the district court previously found untenable.

3. The District Court Enjoined VSC From Following Its Abandoned Processing Policy And To Provide "Timely Access Upon Receipt."

On June 14, 2016, the district court entered judgment against VSC in this matter. ER-9-11. However, the judgment created more problems than it solved, in at least the following ways.

First, the district court's judgment awarded declaratory and injunctive relief that is unsupported by the district court's summary judgment order. As noted above, the district court found that an "irreconcilable evidentiary dispute" prevented it from determining whether VSC's Scanning Policy in fact provided timely access. ER-40 Hence, the court did not undertake any level of constitutional scrutiny to determine whether this level of access satisfied the First Amendment. Nonetheless, the judgment indicates that the district court *had* evaluated the constitutionality of VSC's Scanning Policy as a whole: "Planet has not met his burden of proving that [the Scanning Policy] is essential to preserve higher values and narrowly tailored to serve that interest, or that this policy constitutes a reasonable time, place and manner restriction." ER-9-10. The court thus issued a permanent injunction requiring timely access upon receipt without finding that VSC in fact had ever denied timely access under the Scanning Policy.

Second, the district court's judgment fails to define what VSC or any other state court must do to provide "timely access upon receipt." The June 14, 2016

judgment does not define "timely," and does not explain when access is "timely" or might become "untimely." Instead, the judgment prohibits VSC "from refusing to make newly filed unlimited civil complaints and their associated exhibits available to the public and press until after such complaints and associated exhibits are 'processed,'" and requires VSC to make "complaints and exhibits accessible to the public and press in a timely manner from the moment they are received by the court, regardless of whether such complaints are scanned, e-filed, or made available in any other format, except in those instances where the filing party has properly moved to place the complaint under seal." ER-11.

CNS is now taking advantage of the inherent ambiguity in the district court's "timely access upon receipt" standard, arguing in other cases that the standard is even more demanding than "same-day access," which the district court rejected, and requires state courts to provide virtually instantaneous access to new complaints.[3]

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[3] *See Courthouse News Serv. v. Yamasaki*, Case No. 16-cv-00126, ECF No. 11-1 at 7 (C.D. Cal. Jan. 30, 2017) ("Judge Otero thus found 'a distinct possibility that complaints filed late in the day may not be viewable by the public until the next day,' which 'unconstitutionally infringed on the public's right of access'); *Courthouse News Serv. v. Tingling*, Case No. 16-cv-08742, ECF No. 10 at 22 (S.D.N.Y Nov. 14, 2016) (noting that VSC's practice of withholding access to new complaints filed late in the day until the next court day did not pass constitutional muster"); *Courthouse News Serv. v. Gabel*, Case No. 17-cv-00043, ECF 1 at 8 (D. Vt. March 17, 2017) (arguing that Judge Otero's order prevents state courts from "with[holding] new complaints from public and press review for even a short time following the clerks' receipt of those complaints for filing").

SUMMARY OF ARGUMENT

1. VSC agrees with the district court that there is no right of same-day access to new civil complaints under the "experience" and "logic" tests enunciated in *Press-Enterprise v. Superior Court*, 478 U.S. 1, 5-10 (1986). CNS failed to establish a nationwide practice of providing such access; publishing complaints upon receipt does not play a "significant positive role in the functioning" of the judicial process.

2. The district court erroneously concluded the First Amendment recognizes a right of "timely access upon receipt" in light of its prior conclusions that CNS had not established an experience or logic to same-day access. This Court should follow the majority of circuit courts in holding that "experience" and "logic" recognize a right of access to new civil complaints when they become the subject of some type of judicial action (i.e., a motion to dismiss, a summary judgment motion, or trial). Reversal is thus required because CNS offered no evidence that VSC failed to comply with this standard.

3. The district court erred in evaluating VSC's compliance using the *Press-Enterprise* compelling interest test, which is reserved for outright *denials* of access, as occurs when courts issue orders *sealing* their records.

4. Assuming that intermediate scrutiny should be used to evaluate compliance with the district court's "timely access upon receipt standard," its

decision granting summary judgment to CNS must be reversed because: (a) the First Amendment does not require state courts to automatically scan or provide access to exhibits in the absence of a request; and (b) providing access to new complaints received very late in the day on the court's next business day does not violate the First Amendment.

5. The district court should not have granted summary judgment against VSC based upon its former practice of releasing complaints after processing, which had been abandoned almost two years earlier. CNS's claims about this abandoned policy were moot. In any event, a plaintiff cannot establish a right to *current* injunctive or declaratory relief based upon abandoned *prior* practices, especially since VSC is entitled to a presumption of good faith as a government entity.

6. The district court's judgment requiring VSC to provide "timely access upon receipt" violates Federal Rule of Civil Procedure 65's requirement that injunctions be clear and precise. The judgment fails to describe what conduct is required or prohibited and leaves an ordinary person guessing what conduct is prohibited.

STANDARD OF REVIEW

This Court reviews de novo an order granting or denying summary judgment. *Guerin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002); *Padfield v. AIG*

Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002). In the context of cross-motions for summary judgment, the Court evaluates each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences. *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). This Court also conducts an independent review of the facts in First Amendment cases. *Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012).

With respect to orders granting permanent injunctive relief, legal conclusions are reviewed de novo, factual findings supporting the decision are reviewed for clear error, and the scope of the injunction is reviewed for abuse of discretion. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). Notably, though, "[c]hallenges to an injunction pursuant to [Federal Rule of Civil Procedure] 65(d) are reviewed de novo." *U.S. v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985).

ARGUMENT

I. THE QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL RECORDS.

A. The Qualified First Amendment Right Of Access To Judicial Records Promotes Trust In The Judicial Process And Curbs Abuses Of Judicial Power.

As a general matter, "[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978). "[The Supreme] Court has

repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." *McBurney v. Young*, 133 S.Ct. 1709, 1718 (2013); *see also Los Angeles Police Dept. v. United Reporting Pub'lg Corp.*, 528 U.S. 32, 40 (1999) (the Government could decide "not to give out [this] information at all"); *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946-949 (7th Cir. 2015) ("Peering into public records is not part of the freedom of speech that the first amendment protects.").

With respect to judicial records, the Supreme Court has recognized an exception but only as to records in *criminal* proceedings, on the ground that access is "an indispensable predicate to free expressions about the workings of government." *Planet I*, 750 F.3d at 785 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). This right of access is animated by two broad justifications. *Richmond Newspapers*, 448 U.S. at 565-79. First, "public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *Richmond Newspapers*, 448 U.S. at 569.

Second, openness encourages the public's acceptance of the judicial system and provides an outlet for "community concern, hostility, and emotions." *Richmond Newspapers*, 448 U.S. at 571. "When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of

the community are less likely to act as self-appointed law enforcers or vigilantes." *FTC*, 710 F.2d at 1178. Public access is necessary because "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner." *Richmond Newspapers*, 448 U.S. at 571 (internal quotation marks omitted); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849-850 (5th Cir. 1993) (citing cases).

And while a number of federal appellate courts have extended the public's right of access to civil matters,[4] these courts have made clear that the right is justified by the same concerns that animate the right of access to criminal cases. *E.g.*, *Planet I*, 750 F.3d at 786 (citing cases); *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013); *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297 (2d Cir. 2012); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067 (3d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *FTC*, 710 F.2d at 1178.

[4] The Supreme Court has never extended the First Amendment right of access to civil proceedings or to judicial records. *See Nixon v. Warner Comm.*, 435 U.S. 589 (1978) (declining to find a First Amendment right of access to tape recordings in a criminal case, explaining that "the public has never had physical access" to the records in question, and the First Amendment "generally grants the press no right to information about a trial superior to that of the public"); *id.* at 608-10.

B. The *Press-Enterprise* "Experience And Logic" Test Governs The Existence And Extent Of The Qualified First Amendment Right Of Access To Judicial Records.

The Supreme Court has articulated a two-part "experience and logic" test to determine whether a First Amendment right of access attaches to a particular kind of criminal hearing. The test examines: (1) whether the proceeding has historically been open to the public; and (2) whether the right of access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise Co. v. Superior* Court, 478 U.S. 1, 5-10 (1986); *Globe Newspaper*, 457 U.S. at 606-07.

The "experience" test considers "whether the place and process have historically been open to the press and general public." *Press-Enterprise*, 478 U.S. at 8. The test evaluates "the class of proceedings as a whole, not the particular proceedings at issue in this case." *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1086 (9th Cir. 2014). In addition, the test "does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of hearing throughout the United States.'" *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150-51 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)); *see also Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 393-94 (5th Cir. 2014) (per curiam); *U.S. v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012).

The logic prong of the *Press-Enterprise* test examines "whether public access plays a significant positive role in the functioning of the particular process in question." *Press Enterprise*, 478 U.S. at 8. As Justice Brennan explained in his famous *Richmond Newspapers* concurrence:

> The value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important *in terms of that very process*.

Richmond Newspapers, 448 U.S. at 589 (Brennan, J., concurring) (emphasis added); *see also Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990) ("logic" focuses on whether access will "curb … prosecutorial or judicial misconduct or … further the public's interest in understanding the ... justice system").

Notably, "logic" also takes into account the "potential problems created by public access," because "a test that is blind to the functional drawbacks of access becomes no test at all." *In re Boston Herald, Inc.*, 321 F.3d 174, 186 (1st Cir. 2003).

II. THE DISTRICT COURT CORRECTLY RULED THAT THE FIRST AMENDMENT DOES NOT RECOGNIZE OR PROTECT A RIGHT OF SAME-DAY ACCESS TO CIVIL COMPLAINTS.

Under the foregoing standards, the district court properly rejected CNS's claimed right of same-day access to newly filed VSC civil complaints.

A. There Is No "Experience" Of Same-Day Access To Newly-Filed Civil Complaints.

Early American jurisprudence fails to support an "experience" of public access to civil complaints. Before 1900, "all cases involving pretrial discovery" by members of the press "denied access." Katie Eccles, The Agent Orange Case: A Flawed Interpretation Of The Federal Rules Of Civil Procedure Granting Pretrial Access To Discovery, 42 Stan.L.Rev. 1577, 1603 (1990); *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) (in 18th-century litigation, "no one ever suggested that there was any 'right' of the public to be present at … pretrial proceedings"); *Schmedding v. May*, 48 N.W. 201, 202 (Mich. 1891) (declining to find a right of access to complaints which simply "frame the issue to be tried"); *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (D.C. Cir. 1894) (declining to recognize a right "to inspect and take copies from papers merely filed, but before any action had thereon by the court").

Nor is there a modern-day experience of same-day access, as CNS's own evidence demonstrates. In addition to the reporter declarations discussed in footnote 2, *supra*, CNS prepared a "Report Card" in 2011 demonstrating that the

majority of California superior courts do not provide same day access to civil complaints, some regularly delaying access for up to several weeks after receipt. ER-563-80.

CNS's evidence is consistent with state court access rules across the country, which decline to impose a same-day access requirement. At least 34 states obligate records custodians to respond to access requests within a reasonable period of time[5] or a fixed number of days—always exceeding one.[6] At least

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[5] Ariz. S.Ct.R. 123(f)(2); Cal. Gov. Code § 68150(l); Conn. Public Access Task Force recommended policy on "Access to Court Records" (adoption of policy pending); Fla. Jud. Admin. R. 2.420(m); Haw. Ct. Record R. 10.10; Ind. Code § 5-14-3-3(b); Mass. Sup. Jud. Ct.'s Judiciary/Media Steering Comm., Guidelines On the Public's Right of Access to Judicial Proceedings and Records, § V(A); Mont. Sup. Ct. Rs. for Privacy and Public Access to Court Records, Section 5.00(b); N.C.G.S.A. § 132-6(a); Neb. Sup. Ct. R. 1-809(C); Ohio R. Superintendence 45(b); 51 Okl. St. § 24A.5; SD CL § 15-15A-14; Wy. R. Governing Access to Ct. Records 4.

Rather than use the word reasonable, a few states provide for access "as promptly as practical." *See* Admin. Directive of the President Judge of the Sup. Ct of Delaware, No. 2000-5; Minn. Pub. Access to Records of the Jud. Branch R. 7(2); Mo. Ct. Operating R. 2.08; N.D. Admin. R. 41(3)(b)(2); Or. Rev. Stat. § 192.440; Public Access Policy of the Unified Judicial System of Pennsylvania, Section 5.0(A).

[6] Colo. CJD 05-01, § 5.00(c) & (d); Idaho Ct. Admin. R. 32(j); Kan. Stat. Ann. § 45-218(d); La. Rev. Stat. Ann. § 44.33(B); Me. Sup. Jud. Ct. Admin. Order JB-05-20 § III(A)(1); Miss. Code Ann. § 25-61-5; N.M. Stat. Ann. § 14-2-8(D); S.C. Code Ann. § 30-4-30(c); Tenn. Davidson County Clerk's website, http://chanceryclerkandmaster.nashville.gov/cases/public-records-search/; Utah Jud. Council R. Jud. Admin. 4-202.04(8), 4-202.06(2); Va. Code § 2.2-3704(B) (*see also* Va. Code § 17.1-208); Vt. Pub. Acc. Ct. Rec. R. 6(f) (applying time limits of 1 Vt. Stat. Ann. § 318 to court case records); Wis. Stat. § 19.34(2)(b)(1-2).

fourteen states do not specify a time limit at all,[7] with several obligating custodians to provide access only during normal business hours or subject to the court's other functions.[8] *None* of these courts require immediate access, same-day access, or timely access timely determined from the moment of receipt.

B. "Logic" Does Not Support A Constitutional Right Of Same-Day Access To Newly-Filed Civil Complaints.

The preparation and filing of civil complaints does not play any role in the functioning of the judicial process itself, and how it considers and resolves disputes. *See Press-Enterprise*, 478 U.S. at 8-9. Complaints are prepared and filed by individuals and are not in and of themselves judicial acts. *See* Cal. Civ. Proc. Code § 420 ("pleadings" including "complaints" contain "the formal allegations of the parties … for the judgment of the Court"). In addition, complaints do not "adjudicate rights," *ACLU v. Holde*r, 652 F. Supp. 2d 654, 661 (E.D. Va. 2009),

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[7] Ark. Sup. Ct. Admin. Order 19, § IX(B); Ala. Code 1975, § 36–12–40; Nev. Rs. for Sealing and Redacting Court Records, R.1(3); New Hampshire Judicial Branch FAQ, Court Records, https://www.courts.state.nh.us/sitewidelinks/faqindex.htm#COURT RECORDS; Rule 1:38 of the Rules Governing The Courts of the State of New Jersey; W.Va. Code, § 51-4-2.

[8] Alaska Admin. R. 37.5(f) (*see also* Alaska Admin. Bull. No 12 §§ V(B)(1), V(C)); Iowa Code § 22.4; Ky. Reporters' Handbook 28; Md. R. Cts. J. & Attys. 16-902(a-b) (access "during normal business hours" and no access required "until the document has been docketed or recorded and indexed"); Mich. Ct. R. 8.119(H); New York State Unified Court System, https://www.nycourts.gov/foil/CourtRecords.shtml; Rhode Island Judiciary Rules of Practice Governing Public Access to Electronic Case Information; Wash. GR § 31(d)(2) (*see, e.g.*, Clark County's procedure requires a request between 8:30 am and 4:30 pm Monday through Friday, review is under supervision, limited to 3 files per day).

aff'd on other grounds, 673 F.3d 245 (4th Cir. 2011), and "are not typically evidentiary matters that are submitted to a jury in adjudicating a controversy," *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 103 (2007).

Complaints can be subjected to judicial review by way of a demurrer, motion to strike or other motion addressed to pleadings. *See generally, e.g.*, Cal. Civ. Proc. Code §§ 430.10, 435, 436, 437c. However, it can take weeks or months before this review can occur. Hence, providing access to the press and the public on the same day the complaint is filed sheds absolutely *no* light on the judicial process itself, and does nothing to engender public trust in the judicial process or to curb potential abuses of prosecutorial or judicial power in particular.

Creation of a right of same-day access only benefits CNS, and not state courts, by forcing budget-strapped courts like VSC to promote the interests of for-profit entities like CNS over those of litigants, judicial officers, and court staff, and the courts' myriad other obligations. *See* ER-305-310 (describing court executive officer's responsibilities as including personnel, budget, facilities, contracts, information technology, jury management, operations and liaising with external agencies, in addition to overseeing court records). Advancement of CNS's commercial interests in this manner does *not* provide a basis in "logic" for creation of an access right. *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265-67 (11th Cir. 2014) (existence of access rights "turn[s] on the public's, rather than

the individual's, need to be informed so as to foster debate"); *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002) ("It is well-settled that the First Amendment guarantees *the public* ... a qualified right of access to governmental proceedings.") (emphasis added).

The district court's decision rejecting a constitutional right of same-day access should be affirmed accordingly. *E.g.*, *Sullo & Bobbitt*, 765 F.3d at 392 n.3, 393–94 (rejecting First Amendment claim asserting same-day access to criminal charging documents); *eBay*, 709 F.3d at 1224 n.* (rejecting First Amendment claim to complaints that are not subject of judicial proceedings); *In re Reporters Comm. for Freedom of Press*, 773 F.2d 1325, 1335–36 (D.C. Cir. 1985) (rejecting First Amendment right of access to civil documents until after judgment has been entered); *see also Nixon*, 435 U.S. at 598 ("Every court has supervisory power over its own records and files."); *Bell v. Commonwealth Title & Trust Co.*, 189 U.S. 131, 133 (1903) (court clerk may "make such reasonable regulations as will secure to him and his assistants full use of all the books and records of this office"); *LeClair v. New England Tel. & Tel. Co.*, 294 A.2d 698, 699 (N.H. 1972) (no right of access to "transcripts unconnected with the trial"); *Stevenson v. News Syndicate Co.*, 276 A.D. 614, 618 (N.Y. App. Div. 1950) (judicial records should be accessible but "under reasonable restrictions as to the time and mode of examining the same"); *Bend Pub. Co. v. Haner*, 244 P. 868, 870 (Or. 1926) (reporter's right to

access judicial records subject to such rules and regulations as the clerk might deem necessary).

III. THE DISTRICT COURT ERRED BY RULING THAT THE FIRST AMENDMENT REQUIRES "TIMELY ACCESS UPON RECEIPT."

While the district court properly ruled that there is no First Amendment right to same-day access, it went on to paradoxically conclude that the First Amendment requires state courts to provide access to new civil complaints in "a timely manner from the moment they are received by the court." ER-29. State courts violate this right of "timely access upon receipt" unless they can proffer a constitutionally sufficient justification for every second of delay past the moment of receipt, ER-30-31, which is why CNS now argues in other cases that Judge Otero's order in this case requires state courts to provide virtually instantaneous access to new complaints. *See* text accompanying note 3, *supra.*

The district court's "timely access upon receipt" standard should be rejected for at least the following reasons.

A. Neither "Experience" Nor "Logic" Support Creation Of A Right Of "Timely Access Upon Receipt."

1. The Record Is Bereft Of Evidence Supporting The District Court's "Timely Access Upon Receipt" Rule.

We have already explained in Section II(A) that "experience" does not support a right of same-day access – timely or otherwise – both because the common-law did not recognize a pre-judgment right of access to civil documents

at all, *see In re Reporters Comm.*, 773 F.2d at 1334, 1335-36, and because virtually all state court access rules mandate access within either a reasonable period of time or a specified number of days always exceeding one, *see* text accompanying notes 5-8, *supra*. These same authorities negate any basis for finding a tradition of granting access "upon receipt," which, as applied by the district court, imposes a more demanding standard than same-day access.

The district court attempted to buttress its conclusion that "experience" supports its "timely access upon receipt" rule by citing to a handful of declarations submitted by CNS "reporters." ER-29-30. However, as noted above, the attempt fails because: (a) the cited declarations do not speak to the "upon receipt" issue at all, but only generally extol the virtues of reporting on new complaints and of making friends with court clerks, *e.g.*, ER-1687 ¶ 4; ER-1521 ¶ 6; ER-1443 ¶ 4; ER-1445 ¶ 9; (b) the declarations fail to establish the existence of a *nationwide practice* of providing timely access "upon receipt," *see* text accompanying note 2, *supra*; *El Vocero de Puerto Rico,* 508 U.S. at 150-51; *Sullo & Bobbitt*, 765 F.3d at 393-94; and (c) the district court acknowledged that VSC "genuinely disputes whether CNS's numerous declarations reveal a history of same-day access across the nation," ER-30, which by itself should have precluded a grant of summary judgment in CNS's favor, *see Fresno Motors, LLC v. Mercedes Benz USA, LLC*,

771 F.3d 1119, 1125 (9th Cir. 2014) (summary judgment is improper "where divergent ultimate inferences may reasonably be drawn from the undisputed facts").

2. "Logic" Does Not Support The District Court's "Timely Access Upon Receipt" Rule.

The illogic of mandating same-day access to new complaints applies with equal force to the district court's conclusion that timely access should be granted to new complaints upon receipt. *See* Section II(B), *supra.* Requiring courts to provide access to new complaints upon receipt may advance the private commercial interests of aggregators like CNS. But it does nothing to engender public trust in the judicial process in general or to curb potential abuses of prosecutorial or judicial power in particular. *See Wellons*, 754 F.3d at 1265-67; *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985). In addition, no authority supports this ruling.

More generally, if the district court's approach were correct, even same-day access would not be enough. State courts would be required to justify, for example, why complaints filed in the morning were not publicly available that same morning, or why a complaint filed at 1:00 pm was made available at 4:30 pm rather than 3:00 pm. Similarly, an "access-on-receipt" standard would require state courts to justify not adopting an electronic filing system that could provide access immediately and remotely upon filing, night or day. Or it might require state courts to justify failures to hire additional staff, or failures to reassign existing staff

from other work, to ensure "timely access upon receipt." Neither the court below nor CNS has cited any case holding that the First Amendment puts that kind of stopwatch or burden on state court administrators. Nor would any such rule make sense. The Constitution does not mandate, and federal courts should not be in the business of, micromanaging state court administrators in this fashion. *See Horne v. Flores*, 557 U.S. 433, 448 (2009) ("Federalism concerns are heightened when … a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."); *Miles v. Wesley*, 801 F.3d 1060, 1065 (9th Cir. 2015) ("[A] federal court cannot substitute its judgment for [state court] resource allocation choices under these circumstances."); *see also* ER-29.

3. "Newsworthiness" Does Not Support The District Court's "Timely Access Upon Receipt" Rule.

The district court suggested that "timely access upon receipt" is required to ensure that complaints are available while they are still "newsworthy." ER-30. But the supposed "newsworthiness" of CNS's New Litigation Reports has little if anything to do with this case for two reasons.

First, CNS offered no evidence to demonstrate that: (a) all complaints filed with VSC are newsworthy; (b) CNS disseminates "news" about these new

complaints; or (c) delays in making a complaint publicly available prevents CNS from including them in its New Litigation Reports.

Second and more fundamentally, the Supreme Court has not recognized "newsworthiness" as a basis for the right of access. The right of access exists because it is "an indispensable predicate to free expressions *about the workings of government*." *Planet I*, 750 F.3d at 785 (citing *Richmond Newspapers*, 448 U.S. 555) (emphasis added). As explained in Sections II(B) and III(A)(2) above, requiring courts to provide access to new complaints does nothing to illumine the judicial process. *See also In re Reporters Comm.*, 773 F.2d at 1337 n.9 ("[A]s *Globe Newspaper*, *Richmond Newspapers*, and *Press-Enterprise* make clear, the focus is upon the public's ability to assure proper functioning of the courts. Contemporaneity of access to written material does not significantly enhance that ability."); *Klein*, 158 Cal.App.4th at 105 ("The claim that the subject of the litigation may be newsworthy—in effect, an argument that the public has a generalized right to be informed—cannot serve as a substitute for a showing of specific utility of public access to the information.").

And even if "newsworthiness" was the relevant benchmark, the lack of contemporaneous news reporting does not *itself* diminish the significance of the news reports, even in the criminal context. *U.S. v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) ("The value served by the First Amendment right of access is in its

guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, even when such news is not reported contemporaneously with the suspect event."). While CNS may have a private commercial interest in alerting law firms and other subscribers to new complaints, the ***public*** newsworthiness of a complaint for First Amendment purposes does not depend upon access at the "moment of receipt."

B. If Anything, The Right Of Access Should Arise When Complaints Become The Subject Of Judicial Action.

Rather than impose upon state court clerks a constitutional stopwatch, which starts ticking the moment a complaint is received, this Court should hold that access to civil complaints should be considered timely so long as they are made available to the public at the time the parties seek judicial resolution of the issues arising from the complaint—e.g., a motion to dismiss, a summary judgment motion, or trial.[9]

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[9] In *Planet II,* this Court stated that the district court had disregarded this Court's mandate in *Planet I* by "erroneously ruling as a matter of law that filed civil complaints which have not yet been the subject of a hearing are outside the scope of the First Amendment right of access." 614 Fed. App'x at 915. That statement does not now foreclose this Court from considering whether a right of access attaches before judicial action is sought. The Court in *Planet I* did not decide that issue. To the contrary, the Court expressly stated in *Planet I* that it took "no position on the ultimate merits of CNS's claims, which the district court has yet to address in the first instance." *Id.* Thus, whether a right of access attaches before judicial action is sought was not part of the mandate in *Planet I*. Rather, the mandate was for the district court to decide the question of the right of

This approach focuses upon the function complaints play in the judicial process itself. *E.g.*, *First Amend. Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 472 (3d Cir. 1986) ("All rights of access are not co-extensive … and some may be granted at different stages than others."); *Index Newspapers*, 766 F.3d 1072 (deciding at what stage court records related to contempt proceedings ancillary to a grand jury investigation should be made public); *U.S. v. Inzunza*, 303 F. Supp. 2d 1041, 1046 (S.D. Cal. 2004) (access analysis depends on the type of document or proceeding at issue, and "on the particular stage of the proceeding at issue"), *affirmed*, 638 F.3d 1006 (9th Cir. 2011). In addition, this approach helps distinguish between the more general common-law right of access (which is not involved here) and the more demanding constitutional standard. *See Stone v. Univ. Md. Med. Sys. Corp.*, 855 F.2d 178, 180-181 (4th Cir. 1988) ("While the common law presumption in favor of access attaches to all 'judicial records and documents,'

(continued…)

access on the merits, in light of the factual record in this case, including the length of the alleged delays. Now that the district court has done so, the question of the point at which the right of access attaches (including whether it attaches before judicial action is sought) is properly before this Court.

Similarly, this Court's ruling that "access to public proceedings and records is an indispensable predicate to free expression about the workings of government," *Planet I*, 750 F.3d at 785, does not foreclose the Court from now ruling that the access right does not attach before judicial action is sought. To the contrary, the Court's recognition that the right of access is rooted in expression about the "workings of government" only supports such a ruling.

the First Amendment guarantee of access has been extended only to particular judicial records and documents.") (citations omitted).

Hence, it should come as no surprise that this standard has been adopted by a number of federal circuit courts. *E.g.*, *Boston Herald*, 321 F.3d at 180 (1st Cir. 2003) ("Both the constitutional and the common law rights of access have applied only to judicial documents."); *U.S. v. El-Sayegh*, 131 F.3d 158, 161-62 (D.C. Cir. 1997) (no First Amendment access to documents "that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken") (emphasis omitted); *eBay*, 709 F.3d at 1224; *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 n.14 (3d Cir. 1988) ("[T]he first amendment does not require us to hold that a document never specifically referred to at trial or admitted into evidence became a part of the public record subject to presumptive public access."); *In re Reporters Comm.*, 773 F.2d at 133, 1336; *see also NBC Subsidiary (KNBC-TV) v. Super. Ct.*, 20 Cal. 4th 1178, 1209 n.25 (1999) (First Amendment right of access has been extended only "to civil litigation documents filed in court as a basis for adjudication"); *Klein*, 158 Cal.App.4th at 96-97 (no right of access to documents that are "not considered or relied on by the court in adjudicating any substantive controversy").[10]

[10] *See also Holde*r, 652 F. Supp. 2d at 661 (concluding that logic does not compel disclosure of qui tam complaint, which "does not – by itself – adjudicate rights"); *cf. Inzunza*, 303 F. Supp. 2d at 1048-49 ("[U]ntil an issue is raised before

Indeed, cases enforcing the right of access to civil records generally involve documents that were the subject of a judicial adjudication or proceeding, not simply documents that were on file with the court. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (hearing on a motion for preliminary injunction); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (evidence submitted with a motion to terminate derivative claims).

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In short, neither the law nor the facts support a constitutional standard of "timely access upon receipt." Until complaints come before a court for some form of judicial action on the merits, the predicate for the right of access does not exist. *See also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016) (public access turns on whether motions are "more than tangentially related to the merits of a case"). And construing the right in a manner consistent with its rationale avoids turning federal court judges into monitors of state court operations. The district court's summary judgment order, which relied on a different and constitutionally infirm standard, must be reversed accordingly.

(continued…)

the court ... public scrutiny does not play a positive role as neither the court nor the public is able to analyze the claims, issues, or evidence required to make an informed judgment.").

IV. EVEN IF A RIGHT OF TIMELY ACCESS EXISTS, THE DISTRICT COURT MISAPPLIED THE APPLICABLE SCRUTINY TESTS.

Assuming *arguendo* that a First Amendment right of "timely access upon receipt" applies to new complaints, the district court applied two different scrutiny standards from footnote 9 of *Planet I*, 750 F.3d at 793, in ruling on the parties' cross-motions for summary judgment, although the order lacks clarity as to which standard was applied to what conduct. ER-30-31. Before discussing the district court's particular rulings, we first address what standard of scrutiny should have been applied.

A. The "Overriding Governmental Interest" Standard Does Not Apply In This Context.

The district court suggested in portions of its order that the public's right of timely access to new complaints upon receipt is subject to a strict scrutiny test, and that VSC could overcome this right of timely access only by offering evidence of "an 'overriding [governmental] interest based on findings that closure is essential to preserve higher values.'" ER-23. That standard, however, traces back to *Press-Enterprise*, which involved an order *permanently sealing* a criminal hearing transcript and thus denying public access entirely. This case does not involve a permanent or total denial of access.

The issue here is simply one of timing—*i.e.*, whether a complaint received in the morning must be posted that morning, or whether a complaint filed at 4:00 pm must be posted that same day rather than the morning of the next court day. No

basis exists for subjecting this question to the same, more demanding, standard that governs a complete denial of access. To the contrary, federal courts recognize that delays in access must be evaluated under some form of intermediate scrutiny. *Globe Newspaper*, 457 U.S. at 607 n.17 ("Of course, limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech, would not be subject to strict scrutiny.") (citations omitted); *U.S. v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983) (deciding that rules limiting press access to the courtroom resembled time, place, manner restriction).

B. Under The Time, Place And Manner Test, The District Court's Rulings Regarding Access To Exhibits and VSC's Office Hours Must Be Reversed.

At other points in its order, the district court suggested that the public right of access might be governed by the time, place and manner ("TPM") intermediate scrutiny standard recognized in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). ER-23. Assuming for present purposes that VSC's access policies should be evaluated pursuant to this form of intermediate scrutiny, the record simply does not support the district court's rulings.

1. The First Amendment Does Not Require State Courts To Scan Exhibits In The Absence Of A Request.

The district court's ruling, that the Scanning Policy violates the First Amendment by not requiring that exhibits be automatically scanned, should be reversed for two reasons.

First, a plaintiff cannot avoid summary judgment by raising new factual allegations for the first time in an opposition to a motion for summary judgment. *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006). Doing so denies the defendant fair notice. *Id.* at 968 (citing Fed. R. Civ. P. 8(a)(2)).

CNS did not timely or properly assert its "exhibit" claim. VSC's Scanning Policy put VSC on notice in June 2014 that exhibits would not automatically be scanned. Nonetheless, CNS made no attempt to amend its complaint to mention this issue; CNS did not provide any evidence that it was denied access to exhibits; and CNS did not raise the issue in its summary judgment motion.

CNS first mentioned the exhibit issue in opposition to VSC's summary judgment motion. ER-1384, 1405-06. The only evidence CNS cited was testimony from a deposition explaining why exhibits were not automatically scanned. ER-1406; ER-1371-72. But this testimony does not support CNS's new claim that it was, in fact, denied access to exhibits. Given the belated assertion of this new claim and the lack of evidence supporting it, the district court should have rejected it entirely. There certainly was no basis for granting summary judgment *to CNS* on the issue. By itself, this necessitates reversal. *See Pickern*, 457 F.3d at 968-69.

Second, and even if CNS had properly raised the issue, the district court wholly misapplied the TPM test in ruling on the exhibits issue. Citing *Valley*

Broad. Co. v. U.S. Dist. Ct., 798 F.2d 1289, 1295 (9th Cir. 1986) (a common-law access case), the district court opined that VSC failed to "articulate facts demonstrating an administrative burden sufficient to *deny* access" to exhibits. ER-40 (emphasis added).

However, the undisputed facts show that *no such denial occurred*: Once a new civil complaint is made publicly available, the complaint itself informs interested readers that it has exhibits, and readers can simply ask for, and be given access to, whatever exhibits they choose to review. CNS offered *no* evidence that its reporter ever asked to review an exhibit, or that VSC denied any such request. To the contrary, the undisputed evidence shows that VSC would have promptly provided copies of any exhibits to CNS or anyone else who requested them. ER-1135. *See Nixon*, 435 U.S. at 609 (no first amendment violation occurs in the absence of "restrictions upon press access to, or publication of, any information in the public domain"); *In re Providence Journal Co.*, 293 F.3d 1, 17-18 (1st Cir. 2002).

No authority supports the proposition that the First Amendment obligates courts to provide access to documents in the absence of a request. Indeed, many state court rules and statutes explicitly require a request (oral or written) for court documents. *See* text accompanying notes 5-8, *supra*. Under these circumstances,

the district court's reliance on *Valley Broadcasting* was misplaced, and its decision must be reversed because the record does not show a denial of access to exhibits.

2. The First Amendment Does Not Require State Courts To Keep Their Clerk's Offices Open Past 3:00 PM.

The district court also concluded that VSC's office hours somehow violated the First Amendment as a matter of law because: (a) even though the Records Department closes at 3:00 pm, the courthouse remains open until 4:30 pm so that the public can continue to file new complaints until at least 4:30 pm, and (b) the Records Department requires all members of the public, including CNS, to leave the area once the last member of the public is helped. ER-40. From these facts, the district court observed that, "depending on when the Records Department closes its doors for the day, there is a distinct *possibility* that complaints filed late in the day *may* not be viewable by the public until the next day." ER-40 (emphases added). Citing to *Ridenour v. Schwartz*, 875 P.2d 1306 (Ariz. 1994), the court then inexplicably switched from the TPM standard and applied a strict scrutiny analysis, stating that VSC's closing time did not "serve a compelling government interest." ER-40-41. This conclusion should also be reversed for a number of reasons.

First, the district court improperly applied a "compelling interest" test when evaluating VSC's office hours. The TPM test requires only that speech limitations "be narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward,* 491 U.S.

at 791; *see also Comite de Jornaleros v. City of Redondo Beach*, 657 F. 3d 936, 947-48 (9th Cir. 2011) (en banc).

Second, the district court erroneously relied on *Ridenour v. Schwartz*, 875 P.2d 1306, for its compelling interest standard. The policy at issue in *Ridenour* *denied access* to court proceedings by preventing members of the public from attending trials occurring after 3:00 pm unless they had entered the building before that time. *Id.* The result was that persons excluded by the policy were prevented entirely from observing the proceedings.

No such denial of access is involved here. As explained above, neither CNS nor the public are permanently prevented from viewing complaints that are scanned after 3:00 pm. Rather, those complaints are available for viewing when the court reopens for the next court day. ER-345, ER-97-98, ¶ 11. Because the issue here is merely one of timing, rather than a complete denial, the district court should not have applied *Ridenour*'s strict scrutiny "compelling interest" standard, and should have applied a TPM analysis instead.

Third, the district court's holding plainly contradicts its prior holding that the First Amendment does not mandate same-day access to new complaints. To avoid the "distinct possibility" that "complaints filed late in the day *may* not be viewable by the public until the next day" a state court must of necessity take some steps to ensure that those late-filed complaints are, in fact, viewable by the public

that day and *not* the next one.[11] As explained above, the Constitution simply does not demand that state courts provide what amounts to same-day access in this fashion. *See* Sections II and III, *supra.* The district court's decision should be reversed accordingly.

Fourth, under a TPM analysis, the district court should have upheld VSC's Scanning Policy, which serves significant governmental interests by improving access to court documents, promoting administrative efficiency through elimination of the processing policy and media bin and preserving limited court resources. *See generally*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984) ("[A]ccess to [courthouse records] customarily is subject to the control of the trial court."); *Bell*, 189 U.S. at 133; *E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1124 (9th Cir. 2012) (administration of California's judicial system constitutes a "sensitive state activit[y]") (quoting *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992)); *U.S. v. Gurney*, 558 F.2d 1202, 1210 n.13 (5th Cir. 1977) (restricting access to court exhibits is reasonable where conditioned upon clerk's availability); *Bruce v. Gregory*, 65 Cal. 2d 666, 674-79 (1967) (upholding tax assessor policy to make records available during business hours, except from 8 a.m. to 8:30 a.m. and 4:30 pm to 5 pm) (citing cases).

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[11] This is the precise outcome CNS seeks in other litigation it has initiated after the district court entered judgment in this case. *See* text accompanying footnote 3, *supra*.

The district court should have deferred to VSC's office hour decisions in any event. VSC adopted the 3:00 pm closing time in response to a severe budget crisis causing budget shortfalls of up to $5.9 million. ER-520-23, ¶¶ 3-4, 6-7, 13, 15. Closing to the public at 3:00 pm allows a reduced number of clerks to catch up on the new filings before leaving work at 4:30 pm. *See Eu*, 979 F.2d at 710 (California is "entitled in our system of federalism to decide how much … money to put into courts") (Kleinfeld, J., concurring); *see also Horne*, 557 U.S. at 448; *Miles*, 801 F.3d at 1065.

Had the district court continued with its TPM analysis, it could have concluded only that the Scanning Policy was narrowly tailored. *See Ward* 491 U.S. at 799-800; *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir. 2006) ("A narrowly-tailored ... regulation need not be the least restrictive means of furthering a [government entity's] asserted interests."). After all, VSC adopted the Scanning Policy to *improve* public access to new complaints by providing same- or next-business day access 97% of the time. ER-97-98, ¶ 12. VSC does not delay access to new complaints longer than necessary to manage court operations, ER-1135 ¶¶ 6-7; ER-1371-72, and provides better access than many of the courts referenced in CNS's "Report Card" and reporter declarations, *see* note 2, *supra*; ER-563-80.

Similarly, the district court could have concluded only that VSC's Scanning Policy leaves open ample alternative channels for access. Courts have been "cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulation foreclose[s] 'an entire medium of *public expression* across the landscape of a particular community or setting.'" *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1074 (9th Cir. 2006) (citation omitted) (emphasis added). VSC does not prohibit CNS from reporting on newly-received civil complaints, or prevent CNS from providing the complaints to its subscribers, or impede CNS from obtaining the complaints from alternative sources, such as the parties themselves. *See United Reporting Publ'g Corp.*, 528 U.S. at 42-43 (statute prohibiting disclosure of arrestee names and addresses does "not restrict speakers from conveying information they already possess. Anyone who comes upon arrestee address information in the public domain is free to use that information as she sees fit"); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("[There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment

right. The right to speak and publish does not carry with it the unrestrained right to gather information.").

The district court's order ruling that VSC's Scanning Policy is unconstitutional should be reversed accordingly.

V. THE DISTRICT COURT'S RULING REGARDING VSC'S DISCONTINUED PRE-2014 PRACTICE WAS ERRONEOUS.

In addition to ruling on portions of VSC's current Scanning Policy, the district court also engaged in an extended discussion of VSC's abandoned practice of providing access to new complaints after they had been processed, declaring the former practice unconstitutional, and issuing injunctive relief prohibiting it. These rulings should also be reversed.

A. CNS's Challenge To VSC's Former Practice Is Moot.

VSC has adhered to its Scanning Policy, which makes scanned complaints promptly available prior to processing, since June 2014. The practice was formalized in a written, public announcement, posted on the Internet and at the courthouse. CNS presented no evidence that VSC has any intent to return to its pre-2014 practice. Mr. Planet himself testified without contradiction that he has no such intent. ER-324-325, 336-339. Nor did CNS offer any evidence that VSC would have any incentive to do so, as the new policy furthers VSC's longstanding efforts to provide timely access.

Despite this record, the district court concluded that the propriety of VSC's discontinued pre-2014 practice was not a moot issue. This was error.

The district court's ruling rested on the notion that VSC's adoption of the Scanning Policy was not a *bona fide* change but was merely a temporary expedient. However, governmental entities like VSC are presumed to act in good faith when they change their policies. Indeed, it is the "prevailing norm" in federal courts that, "unlike in the case of a private party, we presume the government is acting in good faith." *Am. Cargo Transp., Inc. v. U.S.*, 625 F.3d 1176, 1180 (9th Cir. 2010); *see also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity."); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring "*clear showings*" of governmental "desire to return to the old ways" to deny mootness) (citation omitted).

None of the purported facts on which the district court relied overcome this presumption of good faith. The court first relied on testimony of court officials

stating that they did not view a complaint as being a court "record" until it was processed and filed. As a matter of California law, that view is correct. *E.g.*, Cal. R. Ct. 2.259(c). But it is irrelevant to the question here, because VSC's Scanning Policy itself made clear that VSC will make complaints available to the public even before they become an official court record.

The court next pointed to Mr. Planet's testimony that VSC has considered converting to electronic filing, and that Mr. Planet said he would change the current Scanning Policy if e-filing were "better." ER-336-39. If anything, however, this supports finding mootness because it shows that VSC is committed to providing the same or better access should it convert to e-filing.

The district court also was "suspicious" of VSC's new Scanning Policy because it was adopted only after this action had been filed. However, nothing in the record supports the district court's "suspicions." In addition, this Court has previously mooted claims based on policy changes made by defendants in response to plaintiffs' lawsuits. *See Rosebrock v. Mathis*, 745 F.3d 963, 974 (9th Cir. 2014) (plaintiff's lawsuit provided a "catalyst" for the VA to issue a memorandum that mooted plaintiff's First Amendment claim for injunctive relief); *White v. Lee*, 227 F.3d 1214, 1242–44 (9th Cir. 2000) (memorandum changing HUD policy mooted plaintiff's claim for injunctive relief under First Amendment because "it addresses all of the objectionable measures that HUD officials took against the plaintiffs in

this case, and even confesses that this case was the catalyst for the agency's adoption of the new policy").

Nor is there any merit to the court's assertion that the case is not moot because "certain access problems persist even under this new policy." ER-34. The only problem the court identified is that VSC does not automatically scan exhibits and closed at 3:00 pm. *Id.* For the reasons discussed above, VSC's policy in both these respects does not create an "access problem" because it fully complies with the First Amendment. But, even if it were a problem, that would only be a reason for deciding the constitutionality of the current Scanning Policy, not a basis for finding that the previous, discontinued policy is not moot.

Finally, the court said that VSC's Scanning Policy was not sufficiently broad or unequivocal because it does not acknowledge a First Amendment right of access to complaints or prohibit staff from denying timely access. ER-34. But that assertion is irreconcilable with the policy itself, which explicitly states that it was adopted to ensure timely access, and which dictates that complaints received before 3:00 pm be scanned and made available the same day and complaints received after 3:00 pm be available the next court day. ER-345. This Court and others have found mootness even in the absence of any "procedural safeguard" that bars a return to the prior practice. *See Mathis*, 745 F.3d at 974 (noting that the Court has "previously found the heavy burden of demonstrating mootness to be

satisfied in [governmental] 'policy change' cases without even discussing procedural safeguards or the ease of changing course"); *Karras v. Gore*, No. 14cv2564 BEN (KSC), 2015 WL 74143, at *2–3 (S.D. Cal. Jan. 6, 2015) (finding county defendant's policy change of monitoring Facebook comments mooted plaintiff's request for injunctive relief under *Rosebrock* although no procedural safeguards were in place preventing defendant from creating a new Facebook page).

B. VSC's Discontinued Processing Policy Could Not Provide A Basis For Declaratory or Injunctive Relief.

Even if CNS's challenge to VSC's pre-2014 processing policy were not moot, the district court abused its discretion by issuing declaratory relief and a permanent injunction against a practice VSC discontinued years ago.

The Supreme Court has made clear that even where it does not entirely moot the case, evidence that the defendant has voluntarily ceased allegedly illegal conduct "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The party seeking relief "must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

These cases are consistent with the longstanding principle that a party can obtain injunctive relief only by showing "a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *U.S. v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952); *see also Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999) ("Cessation of the allegedly illegal conduct, though not rendering a claim moot, nevertheless may affect the ability to obtain injunctive relief, as by impacting the ability to show substantial and irreparable injury."); *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989) (noting prior "illegal activity without more, does not automatically justify the issuance of an injunction") (citation omitted). This standard is different from the standard for mootness because it goes to a different question. Mootness goes to whether the court has the right to exercise judicial power at all. But the bare existence of power does not determine whether it should be exercised. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192–93 (2000) (internal quotations omitted) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 304, 313 (1982)).

And considerations beyond the likelihood of future violations apply when evaluating injunctive relief (as opposed to deciding mootness). An "injunction is an extraordinary and drastic remedy, one that should not be granted unless the

movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted). Among other things, the court must consider whether "an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the [defendant's] activities by a federal court—a process burdensome to court and [defendant] alike." *Laidlaw Envtl.*, 528 U.S. at 193. This is an especially important consideration where, as here, a state governmental entity is involved. An injunction against a state agency must be closely scrutinized to ensure that it does not require more from the state officials than is necessary to ensure compliance with federal law. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). "Where, as here, a plaintiff seeks an injunction against a state or local government agency, 'federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Prison Legal News v. Columbia Cty.*, 942 F. Supp. 2d 1068, 1090 (D. Or. 2013) (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976)).

"The same principles apply when a declaratory judgment rather than an injunction is sought." *Chamber of Com. v. U.S. Dep't of Energy*, 627 F.2d 289, 292 (D.C. Cir. 1980). A simple finding that an issue is not moot does not mean

that the court should grant declaratory relief. "A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, *not simply to proclaim liability for a past act*." *Lawrence v. Kuenhold*, 271 Fed. App'x 763, 766 (10th Cir. 2008) (emphasis added). Indeed, declaratory relief may be appropriate only "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading*, 873 F.2d 229, 231 (9th Cir. 1989) (citations omitted). As such, a declaratory judgment is an inappropriate means of adjudicating past conduct. *Gruntal & Co. v. Steinberg*, 837 F. Supp. 85, 89 (D.N.J. 1993).

The district court evaluated none of these factors. After concluding that the case was not moot, the court proceeded to issue declaratory and injunctive relief without considering the actual likelihood that VSC would revert to its pre-2014 processing practice, let alone making any finding that the likelihood was sufficiently great to justify the inherently intrusive remedy of federal court declaratory and injunctive against state officials. Nor is there any record support for such a finding. As discussed above, VSC abandoned its former practice in favor of the Scanning Policy nearly two years before the district court issued its injunction—and it continues to adhere to the scanning policy to this day. There is

no evidence that VSC has any interest—or anything to gain—by reverting to its former practice.

C. VSC's Former Practice Was In Any Event Constitutional.

Even if the issue were not moot, and it was proper to consider declaratory and injunctive relief, the district erred in finding VSC's former practice to be unconstitutional. As discussed above, the First Amendment does not grant a right of access to newly filed complaints before any judicial action is sought on those complaints. CNS did not claim—and presented no evidence—that VSC's now-discontinued practice denied CNS or any other member of the public access to complaints before judicial action was sought. *See* Section III(B), *supra*.

VI. THE INJUNCTION THAT COMPLAINTS BE MADE AVAILABLE IN A "TIMELY MANNER" VIOLATES RULE 65'S REQUIREMENT THAT INJUNCTIONS BE CLEAR AND PRECISE.

Beyond the "close scrutiny" that must be given to any injunction against a state agency, an injunction also must comply with Federal Rule of Civil Procedure 65 and "must be sufficiently clear and precise to be understood by the violator." *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 705 (3d Cir. 1982). "[O]ne basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1047 (9th Cir. 2013) (citation omitted). "[A]n ordinary person reading the court's order should be

able to ascertain from the document itself exactly what conduct is proscribed." *Id.* (quoting 11A Charles A. Wright *et al.*, Federal Practice & Procedure § 2955 (2d ed.)); *see also Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1150 (9th Cir. 2011) (quoting *Reno Air Racing Ass'n Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006) (noting that the "benchmark for clarity and fair notice" is whether a "lay person, who is the target of the injunction" would understand what is prohibited)).

In this case, the district court's judgment falls short of Rule 65's clarity requirement. Rather than describe exactly what conduct is required or proscribed, the judgment simply instructs VSC to be "timely" when providing access to new complaints, and to do so from the moment they are received. ER-11 (emphasis added). This does *nothing* to explain when access has been provided "in a timely manner," and likewise fails to provide examples or explanations of "timeliness" and – perhaps more importantly – "*un*timeliness." *See Sullo & Bobbitt*, 765 F.3d at 392 n.3 (noting that the question presented was "a temporal one, that is, how quickly must the charging instruments be made available?"). At best, the judgment prohibits VSC from processing complaints before making them public, and requires VSC to provide access "*soon after* [the complaints] are received by the court." ER-30 (emphasis added); *see also* ER-11. However, equating "timely" with "soon" does nothing to elucidate what the court expects VSC to do, especially

given that the First Amendment does not require same-day access to begin with, and that *de minimis* instances of delays have not, in other settings, given rise to constitutional violations. *See Bruni v. City of Pittsburgh*, 824 F.3d 353, 372 n.18 (3d Cir. 2016).

An ordinary person reading the injunction would not be able to determine what is meant by "in a timely manner." *See Fung*, 710 F.3d at 1048 (vague elements of an injunction must be amended to make them comprehensible); *Partington*, 652 F.3d at 1149-50 (rejecting a "general prohibition against using 'illegal, unlicensed and false practices"). Hence, the district court's injunction must be vacated for vagueness in violation of Rule 65.

CONCLUSION

The district court's order granting summary judgment in favor of CNS, granting declaratory relief in favor of CNS, and entering a permanent injunction against VSC should be reversed.

Dated: April 24, 2017

Respectfully submitted,

JONES DAY

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STATEMENT OF RELATED CASES
(CIRCUIT RULE 28-2.6)

Defendant-Appellant is not aware of any related cases pending before this Court.

Dated: April 24, 2017.

Respectfully submitted,

JONES DAY

By: *s/ Robert A. Naeve*
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CERTIFICATE OF COMPLIANCE
(FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1)

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,763 words.

Dated: April 24, 2017.

Respectfully submitted,

JONES DAY

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