U.S. Court of Appeals Docket No. 17-56331

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff/Appellant,

vs.

DAVID YAMASAKI, in his official capacity as Court Executive Officer/Clerk of the Orange County Superior Court,

Defendant/Appellee.

On Appeal from a Decision of the United States District Court
for the Central District of California
Case No. 8:17-cv-00126 AG (KESx)
The Honorable Andrew J. Guilford

MOTION OF APPELLANT COURTHOUSE NEWS SERVICE TO ASSIGN CASE FOR HEARING WITH RELATED CASE

Rachel Matteo-Boehm, Esq.
Roger Myers, Esq.
Katherine Keating
Jonathan G. Fetterly, Esq.
BRYAN CAVE LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel: 415-675-3400
rachel.matteo-boehm@bryancave.com

Attorneys for Plaintiff-Appellant
COURTHOUSE NEWS SERVICE

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27(a)(1) and Item (1) of Circuit Advisory Committee Note to Rules 34-1 to 34-3, Appellant Courthouse News Service ("CNS") respectfully requests that this case be scheduled for hearing with the related case *Courthouse News Serv. v. Planet*, Appeal No. 16-55977 ("*Planet III*"), which is before a panel consisting of Judges Kim McLane Wardlaw, N. Randy Smith and Mary H. Murguia (the "Panel").[1]

Both *Planet III* and this appeal require this Circuit to consider the First Amendment "right of '***timely*** access to newly filed complaints.'" *Courthouse News Serv. v. Yamasaki*, No. SACV 17-00126 AG (KESx), 2017 WL 3610481, *2 (C.D. Cal. Aug. 7, 2017) (ECF 56) (quoting *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) ("*Planet I*")) (emphasis in *Yamasaki*). Both address whether that right attaches "'upon receipt,'" *Planet III*, Appellant's Consol. Resp./Reply 2 ("ACRR") (Dkt. 55) (citing *Yamasaki*), and whether *Planet I* "demand[s] a … justification" for denying access until after processing, *id.* at 2-3, as the district court in *Planet* held but *Yamasaki* did not.

As Appellee's counsel put it in *Planet III*,[2] both cases involve a "similar claim CNS asserted" against the clerks of two California Superior Courts (Ventura

[1] *Planet III* is the third appeal in an action CNS filed in 2011. The Panel for the two prior appeals consisted of Judges John T. Noonan, Wardlaw and Murguia. In January 2017, Judge Smith was drawn to replace Judge Noonan on the Panel.

[2] Counsel for the parties are the same in both *Planet III* and the instant appeal.

County in *Planet*, Orange County here) challenging their policies of withholding access to new complaints until after the completion of administrative tasks associated with "processing" of those complaints by court staff. ACRR 2.[3]

Scheduling this appeal so it may be heard at the same time and by the same panel as *Planet III* will promote judicial efficiency and avoid inconsistent results on the "novel and important First Amendment questions" raised by CNS's claims. *Planet I*, 750 F.3d at 793; *see* Ninth Cir. Gen. Order 3.3(c) ("A case may also be advanced in calendaring so that it may be heard at the same time as a case that involves the same legal issues."); Cir. Ad. Comm. Note to R. 34-1 to 34-3 ("When other pending cases raise the same legal issues, the Court may advance or defer the hearing of an appeal so that related issues can be heard at the same time.").

Scheduling this appeal to be heard with *Planet III* should not delay the hearing in either since briefing in the former is governed by Circuit Rules 3-3 and briefing in the latter is nearly complete. Moreover, any slight delay that might result would be more than justified by the opportunity to further the interests in efficient resolution by having the Panel consider both appeals and in preventing the risk of inconsistent decisions if a different panel were to decide the instant appeal.

[3] As discussed further below, the primary factual difference is that *Planet* involves complaints filed in paper, while this appeal involves e-filed complaints. But because Ventura intends to move to e-filing, the order and judgment on appeal in *Planet* apply "regardless of whether such courts use paper filing or e-filing." *Courthouse News Serv. v. Planet*, 2016 WL 4157201, *12, 21 (C.D. Cal. May 26, 2016), *judgment entered*, 2016 WL 4157354 (C.D. Cal. June 14, 2016).

BACKGROUND

The *Planet* Litigation

CNS brought the *Planet* action against the clerk of the Ventura County Superior Court ("VSC") in September 2011, seeking declaratory and injunctive relief prohibiting him from enforcing a policy that denied access to new civil complaints until court staff had completed administrative "processing" tasks. The district court dismissed the action in November 2011 on abstention grounds.

The Panel reversed and remanded in a 32-page decision, discussing at length the nature of CNS's First Amendment claim and observing that "there is 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 788. On remand, the district court granted Planet's motion to dismiss on the ground that CNS had not alleged a cognizable claim for violation of its right of timely access to new complaints. CNS again appealed.

The Panel accepted the second appeal, again reversing and remanding "so that the district court may properly evaluate the merits of CNS's claims, consistent with [the Panel's] prior opinion." *Courthouse News Serv. v. Planet*, 614 Fed. App'x 912, 915 (9th Cir. 2015) ("*Planet II*"). After remand, the parties completed discovery and cross-moved for summary judgment. On May 26, 2016, the district court granted in part CNS's motion and denied Planet's motion.

Interpreting *Planet I* as "recogniz[ing] a qualified right of timely access to newly filed complaints," the district court held that right "attaches when new complaints are received by a court." *Courthouse News Serv. v. Planet*, 2016 WL 4157201, *12 (C.D. Cal. May 26, 2016) ("*Planet* Order") (citing 750 F.3d at 788). It also found VSC's clerk had "not met his burden" of proving that denying access until after processing was necessitated by an "'overriding [governmental] interest'" and "'essential to preserve higher values,'" or constituted a "'reasonable restriction[] on the time, place, or manner of protected speech,'" which were the possible justifications for withholding complaints identified in *Planet I*. *Id.* at *6-7, 17-19 (quoting 750 F.3d at 793 n.9) (further quotations omitted).

The *Planet* Order declared that VSC's "policy of requiring that newly filed complaints be 'processed' before providing access … violates CNS's qualified First Amendment right of timely access," and enjoined the VSC clerk from refusing to make those complaints available until after processing. *Id.* at *19. Although it declined to "create[] a bright-line rule mandating same-day access to newly filed complaints," the district court rejected as unconstitutional procedures resulting in complaints filed after 3 p.m. (when the records department closed for the day) being unavailable until at least "the next day." *Id.* at *12, 20-21. The district court's judgment expressly stated that the "qualified First Amendment right of timely access" to newly filed complaints "attaches on receipt regardless of

whether courts use paper filing or e-filing systems." Judgment, *Courthouse News Serv. v. Planet*, 2016 WL 4157354, *1 (C.D. Cal. June 14, 2016).

Planet appealed on July 8, 2016, and the Panel accepted *Planet III* on August 12, 2016. Briefing in *Planet III* will be completed this month.[4]

The *Yamasaki* Litigation

Like VSC prior to *Planet*, Orange County Superior Court ("OSC") denies press and public access to all newly filed unlimited complaints – most of which are e-filed – until after administrative processing. *Yamasaki*, 2017 WL 3620481 at *2. This policy resulted in access delays ranging from one to nine days for nearly half the civil unlimited complaints filed in the fourth quarter of 2016. *Id.* at *3. OSC refused to change its policy despite the Order and Judgment in *Planet*.

On January 24, 2017, CNS filed suit against David Yamasaki in his official capacity as clerk of OSC, alleging that OSC's policy of withholding new civil unlimited complaints from the public and press violated the First Amendment.[5]

On January 30, 2017, CNS moved for a preliminary injunction on the ground that *Planet* decisions prohibit OSC from denying access to newly filed unlimited complaints until after OSC has completed the administrative tasks

[4] Planet's appeal has been consolidated with CNS's appeal of the order granting in part CNS's motion for attorneys' fees. *Planet III*, Nos. 16-55977 & 16-56714 (Jan. 18, 2017) (Dkt. 17) (granting unopposed motion to consolidate merits and fees appeals); *id.* (July 25, 2017) (Dkt. 54) (setting due dates for final briefing).

[5] Other than *Planet*, this is the only case CNS has filed anywhere in this Circuit.

involved in processing them. In opposition, OSC argued – as had VSC – that denying access until after processing was necessary to protect privacy interests.

On August 7, 2017, a different judge in the Central District denied CNS's motion. Without noting or applying the ruling in the *Planet* Order holding that the right of timely access attaches upon receipt, *Yamasaki* held that denying access to almost half of new complaints for between one and nine days did "not constitute a First Amendment violation" because 89 percent were available "within 8 business hours" (while being spread over multiple days). 2017 WL 3620481 at *2-3.

The court cited two "policy" rationales to support its ruling. *First*, it said OSC could only comply with an injunction "if [it] hired more staff" so "processing could occur faster with due concern for privacy interests." *Id.* at *4. But it did so without applying the "overriding [governmental] interest" or time, place or manner tests set out in *Planet I*, 750 F.3d at 793 n.9, which the *Planet* Order found fatal to VSC's similar privacy arguments. *Second*, it said "the interests that would be served by CNS's proposals are dwarfed by the burdens it would impose," 2017 WL 3620481 at *4, but did so without acknowledging or applying the Panel's previous conclusions that "CNS's right of access claim implicates… fundamental First Amendment interests" and delays in access to new complaints "also risks harming the public's First Amendment interests." *Planet I*, 750 F.3d at 787-88.

CNS noticed its appeal from the *Yamasaki* Order on September 4, 2017.

THE ISSUES IN THIS APPEAL SHOULD BE DECIDED BY THE PANEL THAT CONSIDERED THEM TWICE BEFORE (IN *PLANET I* AND *II*) AND WILL CONSIDER THEM AGAIN IN *PLANET III*

The instant appeal and *Planet III* "raise the same or closely related issues" and are thus "related cases" under Ninth Circuit Rule 28-2.6. And though this appeal arises from a challenge to the policy of a different superior court clerk, the factual context is remarkably similar to that of *Planet III*. Assigning the instant appeal for hearing with *Planet III* will therefore avoid the "inefficiency" that would otherwise result if "a whole new learning curve has to be developed by three new judges who have no knowledge of the case." *U.S. v. Cordoba*, 194 F.3d 1053, 1064 (9th Cir. 1999) (Goodwin, J., concurring) (discussing reasons why Ninth Circuit panels should accept comeback cases, as the Panel did in *Planet*).

Hearing the appeals together will also eliminate the risk of inconsistent decisions on the "important First Amendment question" before the Court in both cases. *Planet I*, 750 F.3d at 779.[6]

[6] Yamasaki's counsel (who also represents Planet) apparently intends to argue the *Yamasaki* Order "clarifies the application of the First Amendment right of access to filings in state courts" and that its publication "will provide needed guidance to state courts around the country." Letter to Judge Guilford (Aug. 25, 2017) (ECF 57); *see Planet III*, ACRR 2-3, 16, 22 n.8, 53 (arguing for reversal of *Planet* Order based on *Yamasaki*). That, at least, was the reason defense counsel gave on August 25 for requesting publication of the *Yamasaki* Order (ECF 57). The court below invited a request to publish in June, when it informed the parties that it was still drafting its Order on CNS's motion for a preliminary injunction – which had been heard in March – "in part because others may request that the Order be published." In Chambers Order re Pending Mot. for Prelim. Inj. (June 15, 2017) (ECF 53).

1. The Same First Amendment Question Is At The Heart Of Both Appeals

The fundamental question in both *Planet III* and the instant appeal is the same: May courts deny access to new civil complaints for a day or longer without satisfying either of the two tests identified in *Planet I*, 750 F.3d at 793 n.9 (the "'overriding [governmental] interest'" and time, place or manner ("TPM") tests)?

In *Planet III*, VSC challenges, *inter alia*, application of the overriding interest and TPM tests to reject a policy of terminating access to the Records Department – "the sole area in which one can read" complaints prior to processing, *Planet*, 2016 WL 4157210 at *21 – while continuing to receive and scan complaints (into terminals in an empty room), thereby denying access to about 30 percent of new complaints for one to five days. J. Krolak Dec., ¶ 42 (ECF 12-1 at 95).[7] In this appeal, CNS challenges a ruling that OSC can deny access to about 50 percent of new complaints for one to nine days without applying or satisfying the overriding interest or TPM tests. *Yamasaki*, 2017 WL 3620481 at *2-3.

The Panel should hear both appeals because if the *Planet* Order was correct, then *Yamasaki* cannot stand. A panel already prepared to consider one order is ideally situated to consider the other. Conversely, parallel consideration by two different panels invites inefficiency and disharmony between the decisions.

[7] As this declaration illustrates, the appeals also share a similar record. In *Planet*, CNS filed 36 declarations to demonstrate the history and logic of access on receipt, which it resubmitted via a request for judicial notice in *Yamasaki* (ECF 12).

2. *Yamasaki* Involves The Natural Extension Of *Planet* To E-Filing

What Appellee's counsel has recognized as the "similar" nature of CNS's claims in these two cases also weighs in favor of their being heard at the same time by the same panel. ACRR 2. In each case, CNS brought a First Amendment challenge to the policy of a Superior Court clerk who refused (and in the case of OSC, continues to refuse) to permit access to newly filed civil unlimited complaints prior to the completion of administrative processing. In each case, the clerk asserted (and in the case of OSC, continues to assert) administrative confidentiality review during processing as a reason for withholding access.

The primary factual difference is that VSC is a paper-filing court and OSC is an e-filing court.[8] Given the importance of ensuring that First Amendment rights apply equally across the paper and digital worlds, *see generally Reno v. ACLU*, 521 U.S. 844 (1997), this weighs in favor of hearing the cases together, especially since the *Planet* Order expressly applies "regardless of whether … courts use paper filing or e-filing systems," 2016 WL 4157210 at *12, 21, and the ruling in *Planet III* is also likely to apply to both since VSC intends to move to e-filing. *Id.* at *15.

[8] The *Yamasaki* court thought a primary factual difference was that OSC "averaged more than 100 new case filings per day than" VSC. 2017 WL 3610481 at *3. But that only becomes meaningful if processing must precede access (in which case the speed at which staff can process different caseloads may matter). The size of the caseload was utterly irrelevant to the *Planet* Order precisely because it held that access must precede processing unless the justification for putting processing first met the overriding interest or TPM test, neither of which *Yamasaki* applied.

3. If The Appeals Are Not Heard Together, *Yamasaki* May Be Decided First

The Panel spent significant parts of four years – 2012-15 – on the "novel and important First Amendment questions" raised by CNS. *Planet I*, 750 F.3d at 793. It thus made sense for the Panel to decide the First Amendment issues in *Planet III* arising from the application of *Planet I* and *II*. But as an appeal from the denial of a preliminary injunction, briefing here is expedited and the hearing has priority. Unless they are heard together, there is a very real chance *Yamasaki* – not *Planet III* – will decide the First Amendment issues arising from the application of *Planet I* and *II*, which would undermine the efficiency the Panel had promoted by accepting that "comeback case." *Cordoba*, 194 F.3d at 1064 (Goodwin, J., concurring)

POSITION OF OPPOSING COUNSEL

Pursuant to paragraph (5) of the Circuit Advisory Committee Note to Circuit Rule 27-1, CNS's counsel contacted Appellee's counsel on September 5 and informed Appellee's counsel that CNS intended to file this motion, as well as the grounds for it; namely, that both the instant appeal and *Planet III* will require the consideration of the same or closely related legal issues; both appeals involve highly similar facts; scheduling both appeals for hearing together will promote judicial efficiency and avoid inconsistent results on the important First Amendment questions at issue in both appeals; and the *Yamasaki* appeal should be decided by the same panel that considered the same issues in *Planet I* and *II* and

will consider them again in *Planet III*. As of the time of the filing of this motion, Appellee's counsel had not yet replied to provide Appellee's position on the motion.

CONCLUSION

For all the foregoing reasons, Appellant CNS respectfully requests that the Court grant its motion to have the instant appeal heard with *Planet III*.

DATED: September 6, 2017

BRYAN CAVE LLP

By: /s/ Rachel Matteo-Boehm
Rachel Matteo-Boehm
Attorneys for Plaintiff-Appellant
Courthouse News Service

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation set forth in Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure. This motion uses 14 point proportional type and contains 2,768 words, excluding the accompanying documents authorized by Rule 27(a)(2)(B) of the Federal Rules of Appellate Procedure, and excluding the items not counted per Rule 32(f) of the Federal Rules of Appellate Procedure.

DATED: September 6, 2017

BRYAN CAVE LLP
RACHEL MATTEO-BOEHM
ROGER MYERS
KATHERINE KEATING
JONATHAN FETTERLY

By: /s/ Rachel Matteo-Boehm
Rachel Matteo-Boehm
Attorneys for Plaintiff-Appellant
Courthouse News Service

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rachel Matteo-Boehm