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23 **IN THE UNITED STATES DISTRICT COURT**
 24 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
 25 **SOUTHERN DIVISION**

26 Courthouse News Service,

27 Plaintiff,

28 vs.

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

Defendant.

Case No. 8:17-cv-00126 AG (KESx)

**NOTICE OF APPEAL OF
 PLAINTIFF COURTHOUSE NEWS
 SERVICE TO THE UNITED
 STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT**

**PRELIMINARY INJUNCTION
 APPEAL**

RELATED TO APPEAL 16-55977

1 NOTICE IS HEREBY GIVEN that Courthouse News Service (“CNS”), the
2 plaintiff in the above-captioned matter, hereby appeals to the United States Court of
3 Appeals for the Ninth Circuit from the Order Denying Motion for a Preliminary
4 Injunction (“Order”), dated August 7, 2017. A copy of the Order is attached hereto
5 as **Exhibit 1**.

6 CNS’s Representation Statement is attached hereto as **Exhibit 2** pursuant to
7 Federal Rule of Appellate Procedure 12(b) and Circuit Rule 3-2(b).

8 CNS further provides notice that this appeal is related to *Courthouse News*
9 *Serv. v. Planet*, Ninth Circuit Appeal No. 16-55977, which raises the same or
10 closely related issues to the instant appeal and is before a panel consisting of Judges
11 Kim McLane Wardlaw, N. Randy Smith and Mary H. Murguia. As such, CNS
12 respectfully submits it would be appropriate to schedule the hearing in the instant
13 appeal so it may be heard at the same time and by the same panel as No. 16-55977.¹

14 Dated: September 4, 2017

BRYAN CAVE LLP

15 By: /s/ Rachel E. Matteo-Boehm

Rachel E. Matteo-Boehm

16 Attorneys for Plaintiff

17 COURTHOUSE NEWS SERVICE

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23
24 ¹ Appeal No. 16-55977 arose from an appeal by Defendant Michael Planet, in his
25 official capacity as Court Executive Officer/Clerk of the Ventura County Superior
26 Court, from the judgment of the Central District of California granting declaratory
27 relief and permanent injunction to CNS following an order granting in part CNS’s
28 motion for summary judgment in a case involving the same or closely related legal
and factual issues as the instant appeal. The merits appeal in *Planet* is consolidated
with cross-appeal No. 16-56714, which arose from an order granting in part and
denying in part CNS’s motion for attorneys’ fees and costs in the same action.

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EXHIBIT 1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

COURTHOUSE NEWS SERVICE

Plaintiff,

v.

DAVID YAMASAKI

Defendant.

**CASE NO.
SACV 17-00126 AG (KESx)**

**ORDER DENYING MOTION
FOR A PRELIMINARY
INJUNCTION**

1 Plaintiff Courthouse News Service (“CNS”) sued Defendant David Yamasaki in his
2 official capacity as Court Executive Officer/Clerk of the Orange County Superior Court
3 (“OCSC”) for injunctive and declaratory relief. CNS alleges that the OCSC delays access to
4 complaints filed in the OCSC, thus violating CNS’s First Amendment rights. CNS now asks
5 the Court to “enjoin[] Defendant from denying CNS’s right of timely access to new
6 unlimited complaints.” (Dkt. No. 11-1 at 32.) Also pending before the Court is an application
7 for leave to file an *amici curiae* brief supporting Defendant’s opposition, from the Orange
8 County Bar Association, Family Violence Appellate Project, Legal Aid of Orange County,
9 Public Law Center, and Veterans Legal Institute. (Dkt. No. 22.) This *amici* brief may
10 underscore the powerful arguments made on behalf of a court system facing financial
11 struggles as it attempts to meet weighty First Amendment arguments.
12

13 14 15 **1. PRELIMINARY MATTERS**

16
17 Before diving into the merits of CNS’s motion for a preliminary injunction, the Court
18 must address the application to file *amici curiae* (“Application”) and CNS’s two requests for
19 judicial notice.
20

21
22 CNS argues that the Application should be denied because it is untimely and because
23 it wouldn’t contribute to the Court’s understanding of the relevant facts and law. The *amici*
24 *curiae* brief addresses the following issues: “(1) litigants’ constitutional right to privacy under
25 both the United States and California Constitutions, (2) cases in which courts have weighed
26 an individual’s right to privacy against the public’s right to access judicial information when
27 determining whether to allow disclosure of the information, and (3) how Orange County
28 litigants’ constitutional and statutory right of privacy should be weighed in determining

1 whether to issue a preliminary injunction in this case.” (Dkt. No. 22 at 7.) The Court
2 GRANTS the Application under the Court’s “broad discretion to permit individuals or
3 entities to participate in a case as *amici curiae*.” *Ctr. for Biological Diversity v. U.S. Bureau of Land*
4 *Mgmt.*, 2010 WL 1452863, at *2 (D. Ariz. Apr. 12, 2010).

5
6
7 Next, there are two requests for judicial notice from CNS. In the first one, CNS asks
8 the Court to take judicial notice of 36 declarations filed in another case within the Central
9 District of California. (Dkt. No. 12.) In the second request for judicial notice, CNS asks the
10 Court to take judicial notice of nine printouts from government websites. (Dkt. No. 20.)
11 Defendant doesn’t oppose CNS’s first request but opposes the second request, arguing that
12 new evidence shouldn’t be submitted by a party through its reply brief. Defendant also uses
13 this opportunity to rebut CNS’s new arguments. Putting aside whether a request for judicial
14 notice is the proper procedure here, the Court has considered all documents in the first
15 request and has considered only rebuttal evidence from the second request.
16

17
18 Finally, the Court invited further briefing from both parties after the hearing on this
19 motion for preliminary injunction. Both parties filed additional briefs and third parties filed
20 an *amici curiae* brief supporting CNS’s position.
21

22 2. LEGAL STANDARD

23
24
25 “[A]n injunction is an equitable remedy.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305,
26 311 (1982). The grant or denial of equitable relief is committed to the sound discretion of the
27 district court. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A plaintiff
28

1 seeking a preliminary injunction “must establish that he is likely to succeed on the merits,
2 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
3 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
4 *NRDC, Inc.*, 555 U.S. 7, 20 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
5 1135 (9th Cir. 2011) (applying the *Winter* four-element test). “[A] preliminary injunction is an
6 extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear*
7 *showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)
8 (emphasis in original) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and*
9 *Procedure* § 2948, pp. 129–130 (2d ed.1995)).

12 3. ANALYSIS: FINDINGS OF FACTS AND LEGAL CONCLUSIONS

15 3.1. Likelihood of Success on the Merits

17 CNS is a national news service that specializes in reporting on civil lawsuits. CNS
18 currently has around 2,220 subscribers. The further briefings show that of those, the vast
19 majority—2,049—are law firms and lawyers, while 101 are non-law firm business entities, 29
20 are media entities, 18 are academic institutions, 17 are government individuals or entities, 4
21 are non-profit entities, and 2 are libraries not affiliated with schools. Of CNS’s 2,220
22 subscribers, 537 are located in California and 85 are located in Orange County. Of the 85
23 Orange County subscribers, again, the vast majority—78—are law firms and lawyers and 7
24 are non-law firm business entities. CNS emails litigation reports to its subscribers who, as
25 noted, are almost all law firms and lawyers. Those litigation reports contain summaries of all
26 significant new complaints filed in a particular court. CNS also has a website with new stories
27 and commentary that is freely available to the public.
28

1 The OCSC receives more new civil case filings in a year than any other superior court
2 in California, except Los Angeles County. It sits in a county that has a population of more
3 than three million residents and is one of the largest state trial courts in the country. Almost
4 all unlimited civil cases in OCSC are electronically filed (“e-filed”). Before making them
5 publicly available, OCSC reviews all new e-filed civil unlimited complaints to ensure they’re
6 not subject to California laws requiring that they be sealed or maintained in confidence.
7 Cases that are subject to such laws include but are not limited to (a) name changes under the
8 Safe at Home Program, (b) Election Voter Registry cases, (c) False Claims Act cases, (d)
9 cases involving a violation of Insurance Code Section 1871, and (e) sexual abuse of a minor
10 cases. At the same time the OCSC staff review complaints for confidentiality, they also spent
11 an additional few minutes completing the remaining steps necessary to formally accept the
12 complaints for filing. CNS alleges, through a 42 U.S.C. § 1983 claim, that OCSC is violating
13 CNS’s First Amendment rights by delaying access to newly filed unlimited civil complaints.
14
15

16
17 “The First Amendment, in conjunction with the Fourteenth, prohibits governments
18 from ‘abridging the freedom of speech, or of the press; or the right of the people peaceably
19 to assemble, and to petition the Government for a redress of grievances.’” *Richmond*
20 *Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (quoting U.S. Const. amend. I). “The
21 Supreme Court has recognized that newsgathering is an activity protected by the First
22 Amendment.” *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). “To provide this First
23 Amendment protection, the Supreme Court has long recognized a qualified right of access
24 for the press and public to observe government activities.” *Id.* at 898. So under the First
25 Amendment, “the public and press have a . . . right of access to pretrial documents in
26 general.” *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1145 (9th
27 Cir. 1983). This First Amendment right of access includes a right of “*timely* access to newly
28

1 filed complaints.” *Courthouse News Serv. v. Planet* (“*Planet P*”), 750 F.3d 776, 788 (9th Cir. 2014)
2 (emphasis added). And it is “qualified.” *Leigh*, 677 F.3d at 898.

3
4 The First Amendment “right of access may be overcome by an overriding
5 [governmental] interest based on findings that closure is essential to preserve higher values.”
6 *Planet I*, 750 F.3d at 785 n. 9 (alteration in original) (internal quotations omitted). There may
7 be “reasonable restrictions on the time, place, or manner of protected speech, provided the
8 restrictions are justified without reference to the content of the regulated speech, that they
9 are narrowly tailored to serve a significant governmental interest, and that they leave open
10 ample alternative channels for communication of the information.” *Ward v. Rock Against*
11 *Racism*, 491 U.S. 781, 791 (1989).

12
13
14 To succeed on a section 1983 claim, a plaintiff must first show that the defendant was
15 acting under “under color of law.” *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1538 (9th Cir.
16 1992). Here, it’s clear that Defendant was acting in his official capacity under color of state
17 law while implementing or enforcing the OCSC policies that delay access to newly filed
18 complaints. So to prevail on the merits of its claim, CNS must prove that OCSC denied
19 “timely access” to newly filed complaints. *Planet I*, 750 F.3d at 788.

20
21
22 OCSC argues that the public *does* receive timely access to newly filed complaints and
23 the analysis should thus end there. And even if that access were delayed, OCSC argues that it
24 is still proceeding constitutionally because the delayed public disclosure of newly filed
25 unlimited civil complaints is a reasonable restriction. The Court agrees with OCSC that
26 public access to the newly filed complaints at issue are timely here.
27
28

1 The parties portray the relevant statistics differently. According to CNS, almost half
 2 of the new unlimited complaints during the last three months of 2016 (over 1,500
 3 complaints) were delayed anywhere between one and nine days. But as OCSC points out,
 4 89% of complaints filed in their court become publicly available within 8 business hours. So
 5 the vast majority of complaints filed in OCSC are publicly available very soon after they're
 6 filed.
 7

8
 9 CNS relies on a recent ruling by Judge Otero where he held that CNS was entitled to
 10 a similar injunctive relief against the Ventura County Superior Court ("VCSC"). *Courthouse*
 11 *News Serv. v. Planet* ("Planet IP"), No. CV 11-08083-SJO, 2016 WL 4157210 (C.D. Cal. May 26,
 12 2016). But as OCSC points out, *Planet II* is distinguishable. OCSC averages more than 100
 13 new case filings per day than VCSC. The delays that CNS complains of here are minor given
 14 the heavy caseload in the OCSC. Specifically, the delays from October to December 2016
 15 that CNS describes look like the following when they're broken down.
 16
 17

18 Availability (in	18 Number of Cases	18 Percent of Total
19 Business Hours)		
20 < 8	2,922	89.2%
21 8-15	239	7.3%
22 16-23	67	2.0%
23 24-31	21	0.6%
24 32-39	13	0.4%
25 40-47	6	0.2%
26 48-55	3	0.1%
27 56+	3	0.1%

1 Total:	2 3,274	3 100%
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4 (Dkt. No. 17 at 15–16.)

5
 6 As the chart shows, only about 10 percent of the new unlimited civil complaints
 7 become publicly available after more than eight business hours. In contrast, Judge Otero held
 8 that delays of over 36 hours for 50 percent or more of newly filed complaints were untimely
 9 and thus unconstitutional in VCSC, while stating that timely access didn't mean a "same-day
 10 right of access." *Planet II*, 2016 WL 4157210 at *11. Similarly, in *Courthouse News Service v.*
 11 *Jackson*, delays between 24 to 72 business hours were deemed untimely. *Jackson*, No. CIV A
 12 H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009)

13
 14
 15 The Court recognizes the importance of timeliness of news. And as CNS points out,
 16 the U.S. Supreme Court has made it clear that First Amendment rights apply to news
 17 organizations even when they have a profit motive, and that speech isn't transformed into
 18 commercial speech on the basis of the speaker's economic interest. *Pittsburgh Press Co. v.*
 19 *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). But the minor delays here,
 20 compared to other cases where courts found delays to be unconstitutional, simply do not
 21 constitute a First Amendment violation.

22
 23
 24 While the conclusion of this Court just stated is based on the law, it is worthwhile to
 25 briefly review some of the policy issues that are implicated by CNS's proposals. If, as CNS
 26 would have it, these newly filed complaints were made immediately available, significant
 27 privacy interests would be at risk. Of course, if OCSC hired more staff to go through the
 28

1 massive case-load more quickly, processing could occur faster with due concern for privacy
2 interests. But the only way more staff could be hired is if more money was taken from
3 scrimping taxpayers for the budget-strapped OCSC. Thus, tax payers would be pressed into
4 promoting CNS's profits.
5

6
7 The further briefings now shed further light, sometimes not so bright, on what may
8 be driving this lawsuit. It seems that if CNS had its way, the vast majority of those who
9 would benefit would be those with a commercial interest in gaining quick access to newly
10 filed complaints. While CNS properly heralds its role as a purveyor of First Amendment
11 rights for the general public, the facts show that over 92% of CNS's subscribers are paying
12 law firms. Law firms likely then solicit business using the information CNS provides. And, as
13 indicated, taxpayers shouldn't have to be encumbered with helping to fulfil CNS's business
14 goals. In sum, the interests that would be served by CNS's proposals are dwarfed by the
15 burdens it would impose.
16

17 18 **3.2. Remaining Elements**

19
20 Since CNS isn't likely to succeed on the merits of its claim, it's unnecessary to analyze
21 the remaining *Winter* prongs.
22

23 24 **4. DISPOSITION**

25
26 The Court GRANTS the application for leave to file *amici curiae* brief. (Dkt. No. 22.)

27 The Court DENIES the motion for a preliminary injunction. (Dkt. No. 11.)
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IT IS SO ORDERED.

Dated: August 7, 2017



ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
20 **SOUTHERN DIVISION**

21 Courthouse News Service,
22 Plaintiff,

23 vs.

24 David Yamasaki, in his official capacity
25 as Court Executive Officer/Clerk of the
26 Orange County Superior Court,
27 Defendant.

Case No. 8:17-cv-00126 AG (KESx)

**PLAINTIFF COURTHOUSE NEWS
SERVICE'S REPRESENTATION
STATEMENT**

1 Pursuant to Fed. R. App. P. 12(b) and Circuit Rule 3-2(b), the following is a
2 list of all parties to this action, including the names, addresses and telephone
3 numbers of their respective counsel.

4 Plaintiff Courthouse News Service is represented by:

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Dated: September 4, 2017

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Appeal Documents

8:17-cv-00126-AG-KES Courthouse News Service v. David Yamasaki

ACCO,(KESx),DISCOVERY,MANADR,STAYED

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Notice of Electronic Filing

The following transaction was entered by Matteo-Boehm, Rachel on 9/4/2017 at 1:34 PM PDT and filed on 9/4/2017

Case Name: Courthouse News Service v. David Yamasaki

Case Number: 8:17-cv-00126-AG-KES

Filer: Courthouse News Service

Document Number: 58

Docket Text:

NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiff Courthouse News Service. Appeal of Order on Motion for Preliminary Injunction, Order on Motion to File Amicus Brief[56]. (Appeal Fee - \$505 Fee Paid, Receipt No. 0973-20451122.) (Attachments: # (1) Exhibit 1, # (2) Exhibit 2)(Matteo-Boehm, Rachel)

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8:17-cv-00126-AG-KES Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

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