U.S. Court of Appeals Docket No. 18-56216

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

OPENING BRIEF OF APPELLANT COURTHOUSE NEWS SERVICE

Rachel Matteo-Boehm, Esq.
Roger Myers, Esq.
Katherine Keating, Esq.
Jennifer Steeve, Esq.
BRYAN CAVE LEIGHTON PAISNER LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel: 415-675-3400
rachel.matteo-boehm@bclplaw.com
Attorneys for Plaintiff-Appellant
COURTHOUSE NEWS SERVICE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Courthouse News Service ("CNS") hereby certifies that it is a privately held corporation with no parent corporation and that no publicly held corporation holds more than 10 percent of its stock.

DATED: January 22, 2019

BRYAN CAVE LEIGHTON PAISNER LLP
RACHEL MATTEO-BOEHM
ROGER MYERS
KATHERINE KEATING
JENNIFER STEEVE

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes and Rules

State Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

This action arises under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. § 1983. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief).

The district court entered final judgment August 17, 2018. Excerpts of Record ("ER") 1-2. The Notice of Appeal was timely filed September 12, 2018. ER101.

This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court err in holding the "right of access" is "not coextensive with the First Amendment's protection of free speech," ER27, where this Court has said "CNS's right of access claim implicates the same fundamental First Amendment interests as a free expression claim," and "'ensures'" the "'constitutionally protected discussion of government affairs is an informed one.'" *CNS v. Planet*, 750 F.3d 776, 785-88 (9th Cir. 2014) ("*Planet I*")?[1]

2. Did the district court err in holding, on the basis of the "experience" and "logic" test of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), that "the public doesn't have a First Amendment right of access to civil complaints" until, at earliest, the end of the next day ***after*** they are submitted for filing, ER43, and only delays of two days or more, ER55, need be constitutionally justified?

3. Did the district court err in concluding that strict scrutiny did not apply to any of the delays here, ER43-46?

4. Did the district court err in ruling, for the purposes of time, place and manner ("TPM") analysis on summary judgment ("MSJ"), that Defendant hadn't "ignore[d] readily available alternatives," ER54, where CNS presented alternatives to protect confidential complaints as well as, if not more effectively than, the

[1] Citations to internal quotations are omitted, and emphases added, unless noted.

practices of Orange County Superior Court ("OCSC") while freeing the 99.9% of non-confidential unlimited complaints for prompt public review, and Defendant had the burden of proof but failed to show alternatives would not work at OCSC?

5. Did the district court err in its trial ruling that OCSC's practice of withholding all complaints for clerk confidentiality review "does not burden substantially more access than necessary," ER12, where the court only applied TPM analysis to complaints delayed 2+ days?

6. Did the district court err in its trial ruling that "ample alternative channels exist to obtain information in new complaints during the delays," ER12, 56, based on evidence plaintiffs sometimes publicize complaints, and the court thought prompt access to complaints is not important, ER56-57?

INTRODUCTION

Filing a complaint is the opening bell of a new civil lawsuit. Through the complaint, the public – usually via the press – learns the power of the judiciary has been invoked, by whom, and to what end. That is why the First Amendment safeguards the public's right to access new complaints. *Planet I*, 750 F.3d at 788.

According to the rulings below, however, the press and public cannot invoke the First Amendment until access has been delayed at least two days. A complaint filed Wednesday morning could be withheld, and no reason given, through Thursday evening. The reason for withholding only matters starting Friday morning. Weekends and holidays further lengthen delays.

Policies that delay public access to civil complaints might not always violate the First Amendment. But they should always be subject to it. And when the justification for delays is tested, the testing must be meaningful. The district court deferred to Defendant's conclusory assertion that OCSC cannot protect confidential complaints unless it withholds all complaints for clerk review. But this does not pass muster because of at least two readily available alternatives used by many e-filing courts that provide timely access to new civil complaints: require confidential complaints be paper-filed (like the district court below), or use the e-filing interface to identify confidential filings and automatically secure them. Defendant and the district court claimed these alternatives would not work at

OCSC. But if this Court scratches the surface of this conclusory assertion, it will see it is not so.

Technology should illuminate the halls of government, not darken them. The district court's orders should be reversed.

STATEMENT OF THE CASE

CNS is a news service founded 28 years ago from a belief that civil litigation deserved more news coverage. ER2239-40. Originally covering a single court – the Central District of California – CNS today employs more than 240 people and covers courts nationwide. *Id.*

CNS publishes original content on a website freely available to the public, read by hundreds of thousands each month. ER2243, 2304-2360, 2787, 2793-2854, 3496. It also offers subscriber-only publications, including New Litigation Reports, emailed to subscribers nightly, which contain staff-written summaries of new complaints. ER2007-49, 2240. These reports do not cover criminal or family law cases and, in California, include only "unlimited" cases, which "seek[] permanent injunctive relief, or with an amount in controversy exceeding $25,000." *Planet I*, 750 F.3d at 779 n.1.

A sub-category of unlimited cases featured prominently in CNS's California reports are those designated "complex," typically "the most weighty of the day's complaints," ER1995, including antitrust, construction defect, securities, environmental, mass tort, and class action complaints. Cal. R. Ct. 3.400(c).

CNS subscribers include law firms, libraries, government agencies, and other media outlets, from the *Los Angeles Times* in the West to *The Wall Street Journal* in the East. ER2241-42. CNS has been credited as the source for stories

by newspapers (*Orange County Register*, *New York Times, Washington Post*), legal publications (*ABA Journal*), television (ABC, CBS, NBC, Fox), magazines (*New York Magazine*), radio (NPR), and online media (Huffington Post, Politico). ER2244, 2787-88, 2855-66.

A. Traditional Access

To engage the public's attention about newsworthy lawsuits, the media must report on them in the same news cycle as their filing, before they are overtaken by tomorrow's news. It has thus been traditional for clerks to give each day's new complaints to reporters by the end of the day. ER2245-51, 3090-3460.

Paper-filing courts typically provide this access by making complaints available after they cross the intake counter, ***before*** more extensive administrative processing. ER744, 2245-51, 3090-3460. Paper filers hand a new complaint to a counter clerk, who completes initial intake tasks (*e.g.*, checking for signatures and other threshold filing requirements, taking payment for the filing fee), then places the complaint in a box (or bin or stack) on the intake counter. *See*, *e.g.*, ER1581-83, 2245-50, 3118, 3121, 3123, 3146-47, 3166-67, 3262-63. The press retrieves the day's filings from the box, bin, or stack in time to report newsworthy ones in that evening's or next morning's newspaper (or, for CNS, that evening's New Litigation Report). Later, a clerk completes more time-consuming post-filing administrative tasks, traditionally called "docketing" and today called "processing"

(*e.g.*, entering party names and addresses, assigning judges, checking against vexatious litigant lists). *E.g.*, ER744, 2245-2250, 3106-07, 3146, 3404-05.

The move to e-filing made it even easier for courts to provide timely access to new complaints. Instead of clerks doing basic intake work, that work is done by e-filing software (which checks for threshold submission requirements and can segregate confidential filings from public ones). ER1374, 2302, 2705. Instead of sitting in a box on the intake counter, new e-filed complaints sit in an electronic queue, and – as long as the court doesn't withhold them – the press can review them before or during clerical processing. ER2272. This allows journalists to report on new complaints shortly after filing, with busy clerks attending to processing as their schedules allow.

Federal courts were the first to move to e-filing, and the overwhelming majority of district courts continued to make e-filed complaints available right after they cross the (now electronic) intake counter. ER2246-49 2272-73, 3219-20. Many state e-filing courts also continued timely access in the e-filing environment. ER2273, 2284-88. For example, when Los Angeles Superior – the largest trial court in the country – made e-filing mandatory in 2018, it opened a "media access portal" so new complaints can be seen upon receipt, before processing. RJN 1, 6-8. Another California example, Fresno Superior, makes e-filed complaints available upon receipt, before processing. ER2274-77.

E-filing courts elsewhere do the same, including in Alabama, Connecticut, Georgia, Nevada, New York, and Utah. ER2273, 2280-85, 3140-41, 3167-68, 3252-55, 3329-33, 3390, 3428-29. New York's e-filing trial courts make complaints available upon receipt through a public website, using temporary case numbers and disclaimers that cases have not been officially "accepted." ER2280-85. Others offer web access via court-issued credentials, ER3167-68, 3329-33, 3428-29, or make complaints available on computer terminals at the courthouse (or press room open late) before processing or case number assignment. ER3140-41, 3252-55.

Like OCSC, all these courts must keep confidential filings confidential. Unlike OCSC, they do so without withholding access to the overwhelming majority that are not confidential. Instead, they require confidential complaints to be paper-filed or use the e-filing interface to automatically identify and exclude them from public view. In New York, for example, confidential categories must be paper-filed, and can't be selected from the e-filing interface. ER1335-37, 2285-87, 2511. Federal courts often require the same, including the Central District of California. C.D. Cal. L.R. 79-5.2.1-5.2.2; ER1356-57, 2289-90. In Fresno, e-filers cannot proceed until they choose from a drop-down menu of three options, one of them "confidential," ER2277-79; *see also* ER2285, 2288-89, 2511, and those designated confidential filings are automatically secured.

B. Access at OCSC

When CNS began covering OCSC in 1995, OCSC made complaints available in a press box, before processing. ER731-32, 1581-83, 2248, 2253-54, 3502-03. Reporters, including from the *Los Angeles Times*, *Los Angeles Daily Journal*, and *Orange County Register*, reviewed the box and reported on newsworthy ones. *Id.*

Delays began when the court started withholding complaints from the box until each had been scanned, ER2257-58, even though, as CNS pointed out, this was unnecessary. ER3517-22. When OCSC transitioned to e-filing,[2] it chose to condition public access to all complaints on manual clerk review. A newly e-filed complaint sits in an OCSC electronic queue until a "legal processing specialist" ("LPS") turns to completing tasks like confirming names and addresses electronically entered by the filer match those in the documents and adding electronic filing stamps. ER1440-76. The LPS then "accepts" the transaction, and the complaint is made public. ER1482-83. Not even docket information is visible before clerical "acceptance." ER1996. Though it takes LPSs a relatively short time to process each filing, it commonly takes a day or more to begin this work. ER1704-05.

[2] E-filing is now mandatory for civil unlimited cases, except for *pro per* litigants, who paper-filed 2,671 unlimited complaints at OCSC in 2016. ER2666, 2669.

C. Delays

From January 1, 2017 to March 31, 2018, OCSC made only ***59%*** of new unlimited complaints available the day of filing, withholding ***39%*** one court day, and ***2%*** two or more court days. ER380. "Complex" complaints were delayed more often and longer. OCSC made only ***25%*** of new complex cases available the day of filing, withholding ***48%*** one court day, and ***27%*** two court days or more. ER331, 344, 351. These averages mask weekly and monthly variations. For example, in February 2018, OCSC withheld ***86%*** of complex cases two or more court days. ER344, 351.

D. Resolution Efforts

When OCSC announced plans for e-filing, CNS urged it to use the opportunity to restore traditional timely access. ER2263-64, 2464-65. Never mentioning confidentiality, OCSC refused based on its view that complaints are not public records until staff process and "accept" them – a position Defendant maintains to this day. ER1608-11, 1784-88, 1811-20, 1822-27, 1923-26, 1941-42, 2263-64, 2365-67, 2465, 2470-75, 3037-38, 3046-47.

After this view was rejected in *CNS v. Planet*, 2016 WL 4157210 (C.D. Cal. May 26, 2016) ("*Planet* Order"), CNS tried again. ER2270, 2417-20. Defendant's predecessor instructed OCSC's counsel to "'[s]end [CNS] the usual response,'" *i.e.*, "'Thank you, but we're not inclined to change our processes.'" ER1917-18,

2270-71, 2422. When Defendant became Clerk, CNS tried again, ER2271, 2424-25, but he refused to "alter[] [OCSC's] current procedures." ER2271, 2427.

E. Complaint and Preliminary Injunction Motion

CNS filed suit in January 2017, alleging a single claim for declaratory and injunctive relief under the First Amendment and § 1983 to prevent Defendant from "continuing his policies that deny CNS timely access to new civil unlimited jurisdiction complaints once they are received by the court for filing, including … his practice of denying access to complaints until after administrative processing." ER3535-36. CNS moved for a preliminary injunction. ER3461-92. In opposition, OCSC raised, for the first time, confidentiality as a basis for withholding. ER3048-80. Access to complaints before processing was impossible, Defendant said, because clerks must conduct a "confidentiality review" to identify complaints that (1) fall within discrete categories confidential by law;[3] or (2) are accompanied

[3] Defendant identified these categories as (1) False Claims Act complaints (Gov't Code § 12652(c)(2)); (2) Safe-at-Home name change petitions (Civ. Proc. Code § 1277(b)); (3) Insurance Frauds Protection Act complaints (Ins. Code § 1871.7(e)(2)); (4) petitions to keep voter information confidential (Elec. Code § 2166.5); (5) complaints to recover damages for childhood sexual abuse (Civ. Proc. Code § 340.1(m)-(p)); and (6) fee waiver applications. ER1392-93, 2707-08.

The fifth category does not belong. Section 340.1 complaints sometimes name defendants as Does, Civ. Proc. Code § 340.1(g)&(m), but are not confidential. Clerks do not check whether defendants are properly named Does. ER1519.

Defendant rightly excluded unlawful detainers, as only limited jurisdiction unlawful detainers are confidential. Civ. Proc. Code § 1161.2. The district court mistakenly included this category in its MSJ analysis. ER50-51, 53.

by a motion to seal under California Rules of Court 2.550-2.551. ER3060-62.[4]

In reply, CNS pointed out alternatives other e-filing courts use to protect the tiny percentage of confidential civil complaints without withholding the vast majority that are not confidential. ER3032-37. And yet instead of talking about these alternatives at the preliminary injunction hearing, the district court focused on "the business model of [CNS]," who reads CNS's publications, and why. ER2966-71. After ordering additional briefing on whether "First Amendment values might be only a minor factor here, if a factor at all" because of "indications that [CNS's new litigation reports] allow law firms to chase after new business," ER2957-58, the court denied CNS's motion on the ground "minor delays … do not constitute a First Amendment violation," noting "the vast majority of those who would benefit would be those with a commercial interest in gaining quick access to newly filed complaints." ER2716-17.

CNS appealed the denial of its motion (No. 17-56331), which was consolidated for oral argument with the pending appeal in *Planet* (No. 16-55977). Argument was held June 28, 2018. The following day, this Court vacated submission in 17-56331.[5]

---

[4] Confidential complaints make up less than one-tenth of one percent (<0.1%) of the 14,000 unlimited complaints e-filed at OCSC annually. ER1392-99, 1408-10.

[5] The preliminary injunction denial in that appeal merged with the final judgment. *Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 730-31 (9th Cir. 2017).

F. MSJ

After the district court denied CNS's motion to stay in light of the pending appeals, ER2709,[6] Defendant filed its MSJ, insisting OCSC's current procedures were the only way to keep confidential complaints confidential. ER2636, 2644. But OCSC presented no evidence to support this assertion, ER2671, 2675, 2702,[7] and Defendant testified OCSC never considered "what other courts do with respect to handling confidential complaints." ER1799-1801. In the end, his defense rested on evidence LPSs kept confidential eight e-filings in 2016 and eight in 2017 based on text entered in the "comments" field of OCSC's e-filing interface, and two based on requests for confidentiality on complaints' face pages. ER2672, 2679-84. Defendant provided ***no evidence*** to show alternatives would not have protected these 18 filings (<0.1% of the 28,000 unlimited complaints in 2016-2017, ER2667) without delaying access to the 99.9% of non-confidential complaints.

[6] CNS subsequently moved for a stay in this Court, which was denied. Dkt. 54.

[7] The declarants who asserted they were "not aware of any way for OCSC" to protect confidential filings without LPS review and "not aware of any other state trial court system that" protects confidential filings without delaying access at least as much as OCSC does, ER2675, 2702, also testified they had never considered less restrictive alternatives, ER1496-97, 1527, 1682-83, 1692-93, and were not familiar with other state courts' systems and procedures. ER1686-87.

The night before the March 1, 2018 hearing, the district court issued a tentative granting the MSJ in part. ER60.[8] At the hearing, the court again focused on CNS's subscribers, asking if firms' "motivation" for subscribing to CNS's reports affected the "First Amendment interest." ER686-87.

On May 9, 2018, the court largely adopted as final its tentative ruling ("MSJ Order"). ER16. Acknowledging *Planet I* established a "First Amendment right [of] 'timely' access to new complaints," the MSJ Order said its "first task is … to determine the definition of 'timely' access." ER32. Applying *Press-Enterprise II*'s "experience" and "logic" test to answer this question, the MSJ Order concluded "the public doesn't have a First Amendment right to access new civil complaints on the same day they are submitted to the courts" and "timely access is provided – at a minimum – when complaints are released the calendar day after they're submitted." ER43. Determining strict scrutiny did not apply to the delays, ER43-46, the MSJ Order turned to TPM, but only applied it to delays of 2+ days. ER55. It concluded OCSC showed it had "no readily available less restrictive alternatives," but deferred for trial questions of whether OCSC's procedures burdened substantially more speech than necessary and left adequate alternative channels of communication, saying "issues of material fact" regarding delay

[8]After the tentative blessed withholding complaints until at least the end of the next day after filing, delays immediately worsened. In March 2018, OCSC provided access to just 38% of complaints the day of filing. The remaining 62% were delayed at least one day, with some delayed 5+ court days. ER14.

statistics prevented it from determining "if or when delays longer than one day may violate the First Amendment." ER55-56, 58.

G. Stipulated Bench Trial

Following the MSJ Order, the court granted the parties' joint request for a summary bench trial based on a stipulated written record. ER631-36. The parties identified the settled record, ER613-24, submitted additional evidence, ER625-30, 383-611, filed trial briefs, ER276-344, and in July 2018 presented closing arguments. ER196-275.[9]

In August 2018, the court issued findings of fact and conclusions of law ("FFCL"). Based on evidence that by the end of the ***next*** court day ***after*** filing, the public could see 98% of complaints (59% day of filing + 39% delayed one court day), ER7, and without commenting on greater delays for complex cases, the court concluded TPM was satisfied, ER11-12, entering judgment for Defendant. ER1.

The delays at trial were what OCSC was able to achieve with the weight of a lawsuit bearing down on it. Predictably, access further deteriorated post-judgment. From December 10-14, 2018, for example, OCSC made only 6% of new unlimited complaints available the day of filing, withholding 6% one court day, 53% two days, and 23% three court days. RJN 2-5.[10]

---

[9] At the pretrial conference, the court instructed counsel not to relitigate any issue determined on MSJ. ER643.

[10] Date of release was unavailable for 12% of the week's complaints. RJN 4-5.

SUMMARY OF ARGUMENT

The heart of this case was decided at summary judgment, and the MSJ Order must be reversed because it is based on fundamental errors of law. At trial, the district court imposed the same flawed framework to a narrower set of delays, and its FFCL must also be set aside, judgment for Defendant vacated, and further proceedings conducted under the proper analysis. These errors include:

First, the district court based both its MSJ Order and FFCL on its unprecedented determination that the First Amendment right of access is a lower First Amendment right, deserving less protection than the so-called "negative right" to free speech. This corrupted the district court's entire analysis.

Second, the MSJ Order erred as a matter of law by holding the *Press-Enterprise II* "experience" and "logic" test dictates the right of access to unlimited complaints does not attach until, at earliest, the end of the next day after filing, and intervening delays need not satisfy any constitutional scrutiny.

Third, the district court erred as a matter of law in failing to apply strict scrutiny at MSJ or trial.

Fourth, the MSJ Order erred in its TPM determination that less restrictive alternatives would not protect confidential complaints at least as well as withholding all complaints for clerical review, despite uncontroverted evidence showing the opposite.

Fifth, the district court erred in its MSJ Order and at trial by applying TPM as if only complaints delayed two or more days impacted CNS's right of access, leading to, *inter alia*, the erroneous conclusion that OCSC's procedures do not burden substantially more speech than necessary.

STANDARDS OF REVIEW

None of the court's errors can be shielded from reversal by the standard of review. Appellate review of the district court's partial grant of summary judgment is de novo. *Oswalt v. Resolute Indus.*, 642 F.3d 856, 859 (9th Cir. 2011).

Even at trial, because of the "'special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged,'" this Court must "subject even a district court's factual determinations upholding restrictions on speech to particular scrutiny: … 'an independent, de novo examination of the facts.'" *Charles v. City of LA*, 697 F.3d 1146, 1157 (9th Cir. 2012). And, of course, all conclusions of law are also reviewed de novo. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996).

I

THE RIGHT OF ACCESS IS A CORE COMPONENT OF FIRST AMENDMENT PROTECTION FOR FREE SPEECH, NOT, AS THE DISTRICT COURT THOUGHT, A LESS FAVORED ADJUNCT TO IT

The district court's original sin was its theory the right of access is a second-class citizen in the First Amendment firmament. Describing the right of free speech as a shield, "a negative right to be free from government interference," but the right of access as a "sword, a positive or affirmative right requiring the government to act," the district court viewed the former as strong and worthy of vigorous enforcement, but the latter – because it supposedly allows "the public to obtain information from an otherwise potentially unwilling source" – as a weaker step-sibling, to be protected only warily. ER12, 37 ("First Amendment negative rights are much broader than the affirmative right of access."), 78 ("because 'the stretch of this protection is theoretically endless,' it must be invoked with discrimination and temperance") (misapplying *Richmond Newspapers v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring)).

This led to multiple errors. The court incorrectly concluded the right of "timely access" is never violated when complaints are delayed by almost two full days, during which the government need not offer any justification nor satisfy ***any*** scrutiny. ER34-43. And it mistakenly failed to treat longer delays as denials of "timely access" subject to strict scrutiny or violating TPM scrutiny. ER6-12, 43-58.

The court cited *Houchins v. KQED*, 438 U.S. 1 (1978), to support its "reluctan[ce] to find implied affirmative constitutional rights." ER28. But *Houchins* involved the First Amendment as a sword to access "prisons from which the public has traditionally been excluded," *Gannett Co. v. DePasquale*, 443 U.S. 368, 392 n.24 (1979), pre-dated the right of judicial access, and is inapt. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694 (6th Cir. 2002) ("*Houchins* is not the applicable standard to resolve the First Amendment claim of access now before us."). "[I]n contrast," courts "have traditionally been open to the public." *Gannett*, 443 U.S. at 392 n.4. While *Gannett* did "not decide … whether this factual difference is of any constitutional significance," *id.*, the Court soon held that it did.

The year after *Gannett* rejected a right, under the Sixth Amendment, to attend suppression hearings, proceedings were closed in 146 cases, including 33 trials. Cerruti, "*Dancing in the Courthouse": The First Amendment Right of Access Opens A New Round*, 29 U. Rich. L. Rev. 237, 261 (1995). The next term, the Court held a "tradition of public access" to trials distinguished *Houchins* and supported a right, under the First Amendment, to shield that traditional access from interference unsupported by a sufficiently "compelling" justification. *Richmond Newspapers*, 448 U.S. at 598 (Brennan, J., concurring). Justice Brennan's "caution regarding the scope of the right of access," ER29, did not implicate its strength and simply underscored that it most readily applies where there has been "a tradition of

accessibility," *Richmond Newspapers*, 448 U.S. at 589, and "the structural value of public access" is served by timely reporting. *Id.* at 592, 598.

For the same reasons, "courts of appeals have widely agreed that [the right of access] extends to civil proceedings and associated records," including "timely access to newly filed complaints." *Planet I*, 750 F.3d at 786, 788. And "where it applies," that right is "inextricably intertwined with the First Amendment right of free speech," *id.* at 785, providing a shield against "arbitrary interference with access." *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring).

II

THE MSJ ORDER ERRED IN FINDING AS A MATTER OF LAW *PRESS-ENTERPRISE II* ALLOWS COURTS TO DELAY ACCESS FOR UP TO TWO DAYS WITHOUT ANY SCRUTINY OR JUSTIFICATION

Aside from misjudging the nature and strength of the access right, the court below misjudged its scope in ruling the public does not have a right to access new complaints until – ***at the earliest*** – the end of the next day ***after*** they are filed.

If the district court is correct, reporters could travel many miles to a clerk's office to see a highly newsworthy new complaint of clear public interest (like CNS's examples, ER2001-04, 2009-2237, 2744), and be told by the clerk, "you can't see it today, and I don't have to give you a reason, come back late tomorrow." On Friday, reporters would have to wait until Monday. That is because, under the MSJ Order, the reason for the denial of access wouldn't matter until, ***at the earliest***, the morning of the second day after filing. The result is

nothing short of a constitutionally sanctioned blackout period for new civil actions, during which the information in the complaint – the factual allegations, the legal claims, even the parties' identities – is secret to all but court and filer.[11]

No other case has sanctioned a bright line withholding period under *Press-Enterprise II*'s experience and logic test, and it is contrary to *Planet I* and *II*. While there may be circumstances under which access to complaints is delayed without violating the First Amendment, the reasons for delay ***do*** matter, and those reasons – along with alternatives – must be considered under at least a TPM analysis, if not strict scrutiny.

Even if the court could apply *Press-Enterprise II* in this unprecedented way, the conclusion it reached cannot be correct. Neither experience nor logic allows clerks to withhold access to new complaints for up to two days without reason.

A. Delayed Access To New Complaints Must Be Tested By At Least TPM Analysis Considering Reasons For Delays And Alternatives, *Not* By Using Experience And Logic To Set A Bright-Line Rule Allowing Delay

In *Planet I*, this Circuit said a "delay in making the complaints available" may be constitutional, but not because there is no right of access until some arbitrary period following filing of a new complaint. 750 F.3d at 793 n.9. Rather, *Planet I* explained "the right of access may be overcome by an 'overriding

[11] A delay of even one day means once a week, on Fridays, the delay is 3 days, and up to almost 4 days for a complaint filed Friday morning and made available late Monday afternoon. Holidays add more delay.

[governmental] interest based on findings that closure is essential to preserve higher values,'" and the "delay in making the complaints available may also be analogous to a permissible 'reasonable restriction[] on the time, place or manner of protected speech.'" *Id.*

Planet II held the district court erred in dismissing CNS's complaint on the ground that, "as a matter of law, … the First Amendment right of access does not mandate same-day access to civil complaints … as a purely legal question divorced from the legal framework discussed in" *Planet I.* 614 Fed.App'x 912, 914 (9th Cir. 2015). *Planet II* "reverse[d] and remand[ed] … so that the district court may properly evaluate the merits of CNS's claims, consistent with our prior opinion" – *i.e.*, under strict scrutiny or TPM, per footnote 9 of *Planet I. Id.*

Implicit in *Planet I* and *II* is that the "fact specific inquiry" this Circuit wanted the district court to conduct, and the "legal framework" it wanted the court to apply to determine whether the delays were constitutional, was not whether a right of access to new complaints exists – which is what "the Supreme Court's two-part 'experience' and 'logic' test" determines. *U.S. v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012). Rather, the question was whether delays in access could be justified – and the right of access could thus be overcome – on the facts, through strict scrutiny or TPM analysis.

That conclusion is confirmed by how *Press-Enterprise II*'s experience and

logic analysis is conducted. It is not "fact-specific," but a legal determination – usually by reference to case law and statutes rather than testimony or documentary evidence – into whether particular documents or proceedings have traditionally been open and "'whether public access plays a significant positive role in the functioning of the particular process in question.'" 478 U.S. at 8.[12] It is the ***post***-"experience" and "logic" part of the analysis, conducted ***after*** a First Amendment access right is found to exist, that ***is*** fact-specific and considers whether delays can be justified under strict scrutiny or TPM analysis considering the reasons for delays and alternatives. *E.g.*, *Oregonian Pub. Co. v. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (party opposing access must "present facts supporting closure and … demonstrate that any available alternatives would not protect his interests"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949-50 (9th Cir. 2011) (TPM requires consideration of "evidence in support of" First Amendment restrictions, and consideration of "readily available alternatives").[13]

---

[12] *E.g.*, *Press-Enterprise II*, 478 U.S. at 10-11 & n.3 (based on historical example and case law); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1068 (3rd Cir. 1984) (history based on "survey of the legal authorities"); *Seattle Times v. Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988) (history based on case law and statute); *CFAC v. Woodford*, 299 F.3d 868, 876-77 (9th Cir. 2002) (history based on books, law review articles and case law); *Guerrero*, 693 F.3d at 1000-01 (affirming history based on one unpublished district court decision and five state court decisions).

[13] This and other circuits determine if there is a right of access before deciding if delays, even short ones, are constitutional. *E.g.*, *Associated Press v. Dist. Court*,

What *Planet I*, *Planet II*, and other authority teach is that whether access is "timely" is determined not by applying experience and logic, but through strict scrutiny or TPM analysis. As in *Planet II*, the court below erred in applying *Press-Enterprise II* to hold, as a matter of law, access delayed until the end of the next day after filing is ***per se*** timely.

Nor does timely access equate to "instant access" or "access upon receipt" in the literal sense, terms the district court used interchangeably – along with "same day access," ER22 – to incorrectly describe what CNS seeks. As CNS has explained, this action seeks only to "preserve the history and tradition" of access, not conditioned on administrative processing, which has for the most part meant "same-day access, which exists in the federal courts and still exists in many state courts, as evidenced by [CNS's] declarations." ER208. With e-filing, the only difference is access requires no clerk action at all. This is why e-filing courts that do not withhold filings for processing – including most federal courts and many state courts – typically make documents available nearly simultaneously with filing. *See* ER20, 2271-73. "Instant access" is not what CNS seeks or demands; it

---

705 F.2d 1143, 1145-47 (9th Cir. 1983) (finding "first amendment right of access to pretrial documents" before finding "48 hours" delay unjustified); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502, 507 (1st Cir. 1989) (answering "threshold issue … whether the First Amendment is implicated" before finding "even a one to two day delay impermissibly burdens the First Amendment"); *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (finding right exists before rejecting "'minimal delay' in access").

is the natural result when an e-filing court does not withhold complaints for processing.

B. Concluding That Complaints Can Be Withheld For No Reason Until At Least The Day After Filing Defies Both Experience And Logic

It is too late in the day to say there is no First Amendment "right of access to newly-filed [complaints] in civil cases." *CNS v. Jackson*, 2009 WL 2163609, *4 (S.D. Tex. July 20, 2009). This Court twice found "'no question that CNS ... has alleged a cognizable injury caused by [the Ventura clerk's] denial of timely access to newly filed complaints.'" *Planet II*, 614 Fed.App'x at 914 (quoting *Planet I*, 750 F.3d at 788). On remand, that district court correctly read this to mean "the Ninth Circuit recognizes a qualified right of timely access to newly filed complaints." *Planet* Order, *21; *accord Doe v. JBF RAK*, 2014 U.S. Dist. LEXIS 98688, *11-12 (D. Nev. July 18, 2014). Even the court below acknowledged "*Planet I* ... established that there is a qualified First Amendment right to 'timely' access to new complaints," which application of "the experience and logic analysis confirms." ER31, 43; *accord Bernstein v. Bernstein Litowitz Berger & Grossmann*, 814 F.3d 132, 141 (2d Cir. 2016) (experience and logic "both" support First Amendment access to new complaints).

While a few courts have concluded the right of access attaches at a certain stage of particular proceedings, *e.g.*, *CFAC*, 299 F.3d at 873 ("we ... conclude that the public does indeed enjoy a First Amendment right of access to view executions

from the moment the condemned is escorted into the execution chamber"), that approach has not been applied to complaints.

Planet II held the district court "disregarded our mandate 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. On remand, the *Planet* Order rejected the argument that the right of access does not attach until after clerks complete processing.

If a First Amendment right of access to complaints exists, it must "attach" at some point. Whether it "attaches when new complaints are received" for filing, as the *Planet* Order, *12, held, is before this Court in *Planet III*. Even if *Planet III* has not affirmed this ruling by the time this appeal is decided, it is clear the *Planet* Order was correct that the right of access attaches on receipt for filing, and the court below – which asked the same question but reached a different result – was not.

1. The Order Below Conflicts With The *Planet* Order, And If *Planet* Is Affirmed, The Court Below Necessarily Erred

Following the second remand in *Planet*, a newly-assigned district judge applied *Press-Enterprise II* and found that while there was not a "universal," "unyielding," "bright line rule mandating same-day access to newly filed complaints" in all circumstances, experience and logic supported a "qualified right of timely access to newly filed complaints [that] arises when a complaint is

received by a court, rather than after it is 'processed.'" *Planet* Order, *11-13. It then went on to consider whether the delays – including shorter delays that remained after the Ventura clerk changed policies following *Planet I* – were constitutional under strict scrutiny and TPM. *Id.* *13-21.

Although the court below used different terminology, framing its "first task" as "determin[ing] the definition of 'timely' access," ER32, its MSJ Order makes clear it was asking the same question already answered in *Planet* – at "what point in time this qualified right ***attaches***." *Planet* Order, *12.

But it never squarely answered that question. Nor did it acknowledge it had been asked and answered by another judge of the same court.[14] Instead, it said *Press-Enterprise II* "sufficiently establishes only what the definition of timely is ***not***." ER32 (emphasis original). It then implicitly contradicted *Planet* by effectively concluding there is no right of access until the ***day after*** "complaints are submitted" for filing. ER43.

This was obvious legal error. *Planet I* and *II* rejected the notion that the right of access to complaints does not attach until judicial action, and the *Planet*

[14] While "there is no such thing as 'the law of the district,'" *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991), "'[j]udges of the same district court customarily follow a previous decision of a brother judge upon the same question except in unusual or exceptional circumstances.'" *Flores v. Stock*, 715 F. Supp. 1468, 1471 (C.D. Cal. 1989). The MSJ Order departed from the *Planet* Order without even mentioning it, let alone unusual or exceptional circumstances warranting departure.

Order and the court below rejected the premise that the right does not attach until some undetermined period after complaints are processed. The only logical choice left – and the one most consistent with the evidentiary record and the law – is that the right attaches when a complaint is received for filing, as the *Planet* Order held. Delays beyond that point may be constitutional, but only if they satisfy strict scrutiny or TPM analysis.

2. Experience Does Not Justify *Per Se* Delays Of Up To Two Days

In *Planet*, Judge Otero considered "a number of declarations" from CNS "demonstrating that there is a long history of courts making complaints available to the media and the public soon after they are received, regardless of whether courts use paper filing or e-filing systems." *Planet* Order, *12. Based on this evidence, and noting that under California Rule of Court 1.20(a), a complaint is "deemed filed on the date it is received by the court clerk,"[15] the *Planet* Order found the presumption of access attaches when a court receives a complaint, although it may be overcome under strict scrutiny or TPM analysis.

Presented with the same declarations (more than 30), the court below did not acknowledge that "complaints have historically been made available to the public and the press soon after they are received by the court." *Planet* Order *12.

[15] This rule is applicable to e-filed complaints, at least when received on a court day. Cal. Civ. Pro. Code § 1010.6(b)(3); *Cintron v. Union Pac. R.*, 813 F.2d 917, 920 (9th Cir. 1987) ("'papers and pleadings including the original complaint are considered filed when they are placed in the possession of the clerk of the court.'").

Instead, it said experience showed "timely access is provided – at a minimum – when complaints are released the calendar day after they're submitted." ER43.

To reach this conclusion, the district court erred in least four ways.

Misstating CNS's evidence – The district court concluded the record did not "concern practices ***throughout*** the United States," and "evidence CNS cites concerns only 25 states." ER35 (emphasis original). In fact, CNS's declarations showed a tradition of access soon after receipt at courts in 27 states, from all parts of the country – north,[16] south,[17] middle,[18] east[19] and west[20] – including two states, Arizona and Colorado, where the court erroneously said CNS "hasn't submitted any evidence." *Id.* This alone – and combined with cases and a treatise adding six

---

[16] ER2452, 2454, 3130-31, 3358-63 (Michigan), 2508, 3175, 3187-88, 3227-28 (Minnesota), 2455, 3187-89, 3455-60 (Wisconsin).

[17] ER2454-55, 2508-09, 3219, 3428-30 (Alabama), 2454, 2509, 3420-24 (Arkansas), 2453, 2456, 2509, 3219, 3251-58 (Georgia), 2452, 2508-10, 3154-57, 3228 (Louisiana), 2453, 2509, 3308-11 (Tennessee) 2453-54, 3292-305, 3413-19 (Texas); 2458, 3398-400 (Virginia).

[18] ER2454, 3384-85 (Colorado), 2452, 2456, 2509, 3105-11, 3222 (Illinois), 2455, 3440-44 (Nebraska), 2452, 2456, 2508-09, 3111-22 (Ohio), 2454, 2458, 2510, 3419-20 (Oklahoma), 2452, 2509, 3140-42, 3219 (Utah).

[19] ER2454, 3389-93 (Connecticut), 2450, 2452, 2455-56, 2508-10, 3122-28, 3168-71, 3219-22, 3318 (New York), 2452, 2456-57, 2456-57, 3096-100, 3160-62 (Pennsylvania), 2452, 3128-30, 3219 (New Jersey).

[20] ER2453, 2455, 2458, 2510, 3318, 3339 (Alaska), 2454, 3382-84 (Arizona), 2452-58, 2491, 3146-49, 3199-3205, 3214-21, 3261-64, 3315-19, 3325-29, 3340-49, 3366-68, 3372-74, 3377-78, 3396-98, 3403-07, 3433-37(California, including OCSC), 2453-58, 2508-10, 3229, 3318, 3336-39, (Hawaii), 2452, 2456-57, 2508-10, 3166-68, 3329-36 (Nevada), 2452, 2455-57, 2509-10, 3133-40, 3152-54, 3318 (Oregon), 2455, 2509, 3226-27, 3318, 3447-51 (Washington).

more with a history of access to judicial records on receipt, for a total of 33 states[21] – is more than sufficient for a "widespread tradition" of access. *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam). Indeed, *Press-Enterprise II* found access based on practices in the "vast majority of States," although citing only 19. 478 U.S. at 10-11 & nn.3-4.[22]

The district court also stated CNS "submit[ted] evidence about only a handful of any state's courts," but while this was true for states with lower populations and fewer metropolitan courts meriting daily coverage, it was not true for more populated states. *See* ER2452-56, 2491, 3146-49, 3199-201, 3204-05, 3214-21, 3261-64, 3316-19, 3325-29, 3340-49, 3366-68, 3372-74, 3380, 3396-98, 3403-07, 3433-37 (California), 2450, 2452, 2455-56, 2508-10, 3122-28, 3168-71, 3219-22, 3318 (New York), 2453-54, 3292-305, 3413-19 (Texas). The court also erroneously said CNS's evidence did not include Texas state courts; CNS included four of them. ER2453-54, 3292-305, 3413-19.

---

[21] *Cox v. Lee Enter.*, 222 Mont. 527, 529 (1986); *Lybrand v. State*, 179 S.C. 208, 215 (1936); *Paducah Newspapers v. Bratcher*, 274 Ky. 220, 224 (1938); *Hoeflicker v. Higginsville Advance*, 818 S.W.2d 650, 652 (Mo. App. 1991); H. Cross, *The People's Right to Know* 139, 329 (1953) (citing statutes in Delaware and Idaho).

[22] While the test looks to "'experience … throughout the United States,'" uniformity is not required. *El Vocero*, 508 U.S. at 150. "[E]xceptions [are] allowed," *Detroit Free Press*, 303 F.3d at 701, as long as access has been "widespread," *El Vocero*, 508 U.S. at 150, in "several" states. *Cal-Almond v. U.S. Dep't of Agric.*, 960 F.2d 105, 109 & n.1 (9th Cir. 1992).

Violating MSJ rules by crediting "missing" evidence – Factoring heavily in its analysis was the court's conclusion that "[w]hat's missing from CNS's evidence is particularly telling." Because "CNS itself publicly claims that it 'provides coverage of more than 2,000 courts around the country, spanning all 50 states," the court inferred "the omissions in CNS's court survey were deliberate, and that over half the country doesn't provide the type of access CNS seeks." ER36.

In concluding evidence ***not before the Court*** supported the moving party, and competing data from CNS was insufficiently compelling, the court weighed evidence. It also made a credibility assessment that CNS's presentation was intentionally misleading. Even as it drew inferences based on what was not in the record, it overlooked evidence supporting CNS. Discounting evidence from which it should have drawn "justifiable inferences in favor of the non-moving party," *Fresno Motors v. Mercedes Benz*, 771 F.3d 1119, 1125 (9th Cir. 2014), is prohibited at summary judgment, as is weighing of evidence, failing to view the record in the light most favorable to the non-movant, and assessing credibility. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Berry v. Baca*, 379 F.3d 764, 769 (9th Cir. 2004).

The tradition of timely access to new complaints that supports a right of access attaching "when a complaint is received by a court," *Planet* Order, *12-13, does not occur in a vacuum. It evolves where reporters cover courts daily. Courts

then adopt procedures that enable reporters who visit the court daily to have access to new actions soon after they are received – typically at day's end, with some exceptions. Conversely, these procedures have not evolved in courts, such as in less populated areas, where reporters visit less frequently, or do not visit in person. ER3211.[23] But this does not mean the tradition of access on receipt does not exist where reporters were there to see them, or that this tradition was insufficient.

Moreover, CNS's declarations make clear that the comprehensive coverage it offers today is relatively recent; for the first half of its 28 years, its coverage was limited to major California courts and a smattering of courts in other major metropolitan areas. ER3208, 3212-28. What is relevant for purposes of tradition, then, is not access in all courts CNS covered as of MSJ, but the tradition as CNS found it when CNS first began covering the nation's largest courts in the 1990s, ***before*** media court coverage shrank following loss of revenue caused by the Internet. ER2242, 2251, 2256.[24]

---

[23] For those courts where CNS does not have the resources to cover in-person but reviews records over the Internet, CNS has no personal knowledge of, and cannot attest to, the speed with which new complaints may be available at the courthouse itself.

[24] In its MSJ tentative, the district court said MSJ declarations contained inadmissible evidence the court "cannot consider," but it did not specify which portions either in its tentative, ER67-68, or MSJ Order, ER24. This Court reviews decisions on the admissibility of evidence for abuse of discretion. *Masson v. New Yorker Mag.*, 85 F.3d 1394, 1399 (9th Cir. 1996). As in other contexts, "[a]n order that fails to articulate its reasoning must be vacated and remanded because meaningful appellate review is impossible when the appellate panel has no way of

Concluding a degradation of access eviscerates tradition – "What has happened is a degrading of access. That is, in fact, what has led to the filing of this suit." ER676, *see* 207, 2256, 2267-70. This is illustrated by two examples the district court used to find a "mixed experience of access." ER36. Reporter Sergio Frez's declaration described how, prior to the adoption of the ill-fated California Case Management System ("CCMS"), San Diego Superior provided access in most cases by the end of the day. ER2265-67, 3200, 3237-43. Dallas reporter David Lee attested to the same tradition, ER3299-2302, but the district court ignored it and other evidence about that court. ER3225. In both cases, the MSJ Order focused on recent delays.

Yet a recent deterioration of access resulting from a change in policy does not undermine a longstanding tradition. *See New York Civil Liberties Union v. New York Transit Auth.*, 684 F.3d 286, 301 (2d Cir. 2012) (rejecting argument that "experience" prong not established where relevant proceedings had been closed "for the [administrative body's] entire brief history"); *CFAC*, 299 F.3d at 875 (finding history of public access to executions even though after 1937 they were "moved out of public fora and into prisons," and attendances greatly restricted).

Nor does the introduction of e-filing change the experience analysis, as the district court suggested, citing *U.S. v. Doe*, 870 F.3d 991 (9th Cir. 2017), for the

---

knowing whether relevant factors were considered and given appropriate weight." *Pintos v. Pacific Creditors*, 605 F.3d 665, 679 (9th Cir. 2010).

notion that "tradition may … have a smaller role to play with the right of access to e-filings." ER34. *Doe* conflated e-filing – the way pleadings reach the court – with the independent question of how a court makes them publicly available. But the relief CNS seeks need not entail Internet access. ER2572, 3490. More importantly, *Doe* was resolved in precisely the manner CNS maintains is correct – by weighing risks of disclosure ***not*** as part of experience and logic, but in the ***second*** part of the analysis, in that case by strict scrutiny. 870 F.3d at 997-98.

Failing to consider case law confirming tradition – the court also made no mention of case law establishing a tradition of access to complaints soon after they are received by the court. *E.g.*, *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 2016 WL 1071107, *9 (S.D.N.Y. Mar. 18, 2016) ("experience" and "logic" supported making newly filed complaint public), *aff'd*, 814 F.3d 132 (2d Cir. 2016); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 398 (1956) ("press has for time out of mind published the contents of a pleading filed in Court, though no further action has been taken thereon"); *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (1992) (complaints, "[o]nce … filed with the court, … lose their private nature and … the right of access attaches.").

That is why, for nearly a century, the "clear trend" has been for courts to recognize a privilege for journalists to report on complaints once "'filed in court." *Salzano v. N. Jersey Media Grp.*, 201 N.J. 500, 517-19 (2010). A "privilege to

report on judicial proceedings … when the complaint is filed," *Newell v. Field Enters.*, 415 N.E.2d 434, 444 (Ill. App. Ct. 1980), reflected the reality that reporters could obtain and report on complaints "filed the same day." *Hurley v. Nw. Publications*, 273 F. Supp. 967, 969, 972 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *see, e.g.*, *Shiver v. Valdosta Press*, 82 Ga. App. 406, 413 (1950), *Siegel v. Sun Printing & Publ'g*, 223 N.Y.S. 549, 550-52 (Sup. Ct. 1927).

3. Logic Does Not Support *Per Se* Delays Of Up To Two Days

In *Planet*, the district court found that while logic did not require complaints to be accessible the "exact moment they are received," or "an unyielding same-day access requirement," it ***did*** "demand[] that the qualified right of access must arise the moment a complaint is received by the court." *Planet Order*, *12.[25]

Without addressing the *Planet* Order, the court below reached the opposite conclusion through several material errors. ER36-42.

Misunderstanding of what "logic" tests – The "logic" analysis is not limited to the question of whether "public access plays a significant positive role in the functioning of the particular process," *Press-Enterprise II*, 478 U.S. at 8, which the court said CNS "fail[ed] to acknowledge." ER36. Rather, logic analysis

[25] While the *Planet* Order found both experience and logic confirmed a right of access that attaches when a complaint is received for filing, the two parts of this test are "complementary considerations," *Press-Enterprise II*, 478 U.S. at 8, and one, "even without [the other], may be enough to establish the right." *In re Copley Press*, 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008).

recognizes the access right also stems from "the first amendment's 'core purpose' of assuring free public discussion." *U.S. v. Peters*, 754 F.2d 753, 758 (7th Cir. 1985) (quoting *Richmond Newspapers*, 448 U.S. at 575). And it distinguishes between "governmental processes [that] operate best under public scrutiny" and those that "would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 8-9. Like "docket sheets," complaints "do not constitute the kinds of government records that function properly only if kept secret, like grand jury proceedings." *Hartford Courant v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004).

Incorrect view that only judicial acts warrant scrutiny – The district court said "the interest in 'informed public discussion of ongoing judicial proceedings' isn't triggered by the mere submission of a complaint to a court," ER40 (quoting *Planet I*, 750 F.3d at 787), on the theory that filing a complaint does not involve judicial proceedings:

> [J]udicial proceedings are ultimately proceedings that actively involve the courts. … Yet when a complaint is first submitted, courts have no immediate role to play unless the complaint is accompanied by some specific request, like a [TRO]. … At that point therefore, there aren't really any 'governmental affairs' to discuss.

ER39-40. This position was rejected in *Planet II*, which held Judge Real "disregarded [the] mandate" of *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.

It also failed to recognize that *Planet I* said delays in access to new complaints "deter[] … informed public discussion of ongoing judicial proceedings," 750 F.3d at 787, or the view implicit in that statement: complaints describe a judicial proceeding that the "public cannot discuss" so long as they are withheld. *Id.* at 788.[26]

Other courts agree. The Second Circuit rejected the view that logic did not support access to a complaint not yet the subject of judicial action. As it recognized, filing a complaint – even one the parties settled and sought to dismiss shortly after filing – implicates free speech on "matters of public concern" about judicial proceedings because, without access, the "public is unaware that a claim has been leveled and that state power has been invoked – and public resources spent." *Bernstein*, 814 F.3d at 141. A complaint "'initiates judicial proceedings,'" *id.* at 140, and with the "filing" of a "petition stating the plaintiff's cause," the "controversy is no longer a private one," but "is in all respects a judicial proceeding." *Paducah*, 274 Ky. at 224-25; *Kurata v. L.A. News Publ'g Co.*, 4 Cal. App.2d 224, 227 (1935) (rejecting view that "complaint, unanswered and not having been placed within the scrutiny of any court or judge, is not a 'judicial proceeding'"). The public thus has a "'right to know'" – "'when a plaintiff invokes the Court's authority ***by filing a complaint***'" – "who is invoking it, and

[26] The premise that access does not attach until judicial action is also at issue in the pending *Planet* appeal. Ninth Circuit No. 16-55977, Dkt. 24, at 17, 49-52.

towards what purpose, and in what manner.'" *McCrary v. Elations Co.*, 2014 WL 1779243, *6 (C.D. Cal. Jan. 13, 2014).

Improper consideration of motives of CNS and its subscribers – The district court also erred by considering the value (or, in its eyes, the lack thereof) of CNS's publications and why law firm subscribers may read them. Concluding a reference to "the readers' 'firm'" in CNS's New Litigation Reports "confirm[s] that CNS's audience is lawyers rather than the public at large," ER41, the court surmised "[l]awyers in private firms are likely very familiar with reports like [CNS's] and know that their firms don't subscribe to them to foster an 'informed public discussion of ongoing judicial proceedings.' … They subscribe to find out who's being sued so they can get new clients." ER41.[27] The court then asked itself if these things mattered and decided they did:

> Does it matter …. if an organization seeks a right of access not to disseminate information on the functioning of government to the general public, but to share revenue-generating data with a select few? The answer is probably no – unless, as here, there's no evidence that the right of access sought also meaningfully promotes the free discussion of governmental affairs.

ER42. This was obvious legal error. The Supreme Court has repudiated as "startling and dangerous" the view that "First Amendment protection depends

[27] The court cited nothing to support its view of why firms subscribe to CNS, and the record reflects CNS reports can be used to alert current clients of suits, watch for cases that may affect clients even if not parties, and monitor plaintiffs, lawyers, and litigation trends. ER2241, 3210, 3496; *Bernstein*, 814 F.3d at 140.

upon a categorical balancing of the value of the speech against its societal costs," *U.S. v. Stevens*, 559 U.S. 460, 470 (2010). Thus, while "'journalists may seek access to judicial documents for reasons unrelated to the monitoring of Article III functions,'" the "'motive'" of any particular requestor is "'generally... irrelevant.'" *Lugosch v. Pyramid Co.*, 435 F.3d 110, 123 (2d Cir. 2006).

Even if motive were relevant, it would not support the analysis below. That is because "[a] profit motive ... does not diminish ... First Amendment rights." *Daily Herald v. Munro*, 758 F.2d 950, 958 (9th Cir. 1984) (Norris, J., concurring). Not only is "the economic motive" of a publisher or its subscribers not relevant, neither is any "perceived [lesser] value of certain speech." *Dex Media West v. City of Seattle*, 696 F.3d 952, 957, 960, 964 (9th Cir. 2012). Consequently, yellow pages are "entitled to the full protection of the First Amendment," *id.* at 954, as is content about court records accessed and sold by "for-profit ... aggregation websites," *Nieman v. VersusLaw*, 512 Fed.App'x 635, 638 (7th Cir. 2013), and bond ratings used by subscribers or readers for financial gain. *In re City of Orange*, 245 B.R. 138, 144-45 (C.D. Cal. 1997).

Nor are the constitutional rights CNS seeks to enforce only for the benefit of CNS and its subscribers (which are not just law firms, but also media, academia, libraries, and government, ER2241-42). As *Planet I* recognized, the rights CNS seeks to enforce equally protect "anyone else who has tried to access a complaint –

or was deterred from trying because he did not think it was possible." 750 F.3d at 788. And the district court ignored CNS's website, which is free to non-subscribers and widely relied on by other media. ER2243-44, 3497. "[W]hen we protect the constitutional rights of a few, it inures to the benefit of all." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th Cir.), *vacated as subsequently mooted*, 138 S. Ct. 353 (2017).

Misguided view of the role of accuracy in reporting – As CNS and media amici explained below, access to new complaints is critical to ensure accurate reporting on the facts and claims alleged. ER2259, 2589-90. But the court said this, too, was "insufficient to recognize the right of access" because complaints contain allegations that are not "trustworth[y]." ER38. Not only has this argument been rejected, *Bernstein*, 814 F.3d at 140-43, it misses the point. Access to complaints is essential not to report the allegations as "reliable" fact, ER38, but to accurately inform the public about what the allegations are, who is involved, and what is at stake, ER2589-90; *Bernstein*, 814 F.3d at 143, without which any public discussion cannot be "'an informed one.'" *Planet I*, 750 F.3d at 785, 787-88.

Erroneous view that newsworthiness is irrelevant – The court also said "newsworthiness has no effect on whether or when a right attaches," distinguishing cases protecting timely access because "those opinions consider the interests of the public and the press in contemporaneous access only ***after*** determining that a right

of access attaches." ER37 (emphasis original). That, again, misses the point.

"Our cases, and, indeed, the controlling jurisprudence of the Supreme Court … emphasized that the values that animate the presumption in favor of access require as a 'necessary corollary' that, once … found to be appropriate, access ought to be 'immediate and contemporaneous'" because delay undermines "'newsworthiness'" and the "'benefit of public scrutiny and may have the same result as complete suppression.'" *In re Associated Press*, 162 F.3d 503, 506-07 (7th Cir. 1998) (citing, *e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)); *accord Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014). Courts thus recognize a "'significant public interest'" in access "'contemporaneously'" with submission or introduction into evidence. *U.S. v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (quoting *In re NBC*, 635 F.2d 945, 952 (2d Cir. 1980)) (also citing *Nebraska Press*); *Lugosch*, 435 F.3d at 121.[28]

This is no less true of complaints. *Planet* Order, *13 (logic supports access attaching upon receipt because "timing is a critical element of a story's newsworthiness"); *CNS v. Tingling*, 2016 WL 8739010 (S.D.N.Y. Dec. 16, 2016);

[28] As cases citing *Nebraska Press* illustrate, the district court erred in asserting it and *Elrod v. Burns*, 427 U.S. 347 (1976), were inapplicable because the former involved "prior restraints" and neither "involve[d] the First Amendment right of access at all." ER37. In establishing the right of access, the Supreme Court cited *Nebraska Press* on the value of timely reporting about the judicial system, *Richmond Newspapers*, 448 U.S. at 573; *id.* at 592-93 (Brennan, J., concurring), and appellate courts cite *Elrod* to emphasize the importance of contemporaneous access. *E.g.*, *Lugosch*, 435 F.3d at 127; *Detroit Free Press*, 303 F.3d at 710.

Jackson, 2009 WL 2163609, *4. It is only when new actions are still "current news that the public's attention can be commanded," *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), and the value of informed public discussion fully realized. As media amici noted, "[t]imeliness is often a critical component of the editorial decision to publish or not publish a news story," and "[i]mmediacy … is even more vital in the digital era." ER2588. It therefore "make[s] little sense to restrict the media's ability to monitor until after court personnel have had an opportunity to delay providing access." *Planet* Order, *13.

III

OCSC'S SUPERFICIALLY PLAUSIBLE JUSTIFICATION FOR DELAYING ACCESS CANNOT BEAR THE WEIGHT OF STRICT SCRUTINY OR TPM

Once the First Amendment right of access attaches, there may be reasons to delay access, but they must pass constitutional scrutiny. *Planet I*, 750 F.3d at 793 n.9. "[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary," *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012), but that is what the district court did, deferring to Defendant's personal belief – an "opinion," ER1944 – that OCSC's procedures are the only way to protect confidential complaints. When analyzing First Amendment restrictions, "the devil lies in the details," *Askins v. U.S. Dep't Homeland Security*, 899 F.3d 1035, 1045 (9th Cir. 2018), and the evidence shows at least two alternatives other courts use – (1) requiring confidential complaints to be paper-filed or (2)

automatically identifying and segregating them through the e-filing interface – are not only readily available to OCSC, but would work as well if not better than its current procedures to protect the tiny percentage (less than 0.1%) of confidential unlimited complaints while freeing the remaining 99.9% for prompt public review.

These readily available alternatives, and Defendant's failure to offer any evidence why they would not work at OCSC, means neither strict scrutiny (which the court failed to apply) nor TPM analysis can be satisfied. And, as shown below, the court's strict scrutiny and TPM rulings are riddled with other errors, too.

A. The District Court Erred By Not Applying Strict Scrutiny

Under strict scrutiny, Defendant must establish (1) a substantial probability a compelling government interest would be harmed in the absence of his policies; and (2) no less restrictive means exist for protecting that interest. *Guerrero*, 693 F.3d at 1002. The district court never applied this test because, it said, "nothing here … equate[s] any delays in complaint access with access denials," and "strict scrutiny isn't the appropriate framework to assess the delays in this case." ER33, 46. Nor did it apply strict scrutiny at trial, including to the longer delays for complex cases. This was error and contrary to this Court's decisions in *Associated Press*, 705 F.2d at 1147, and *U.S. v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982).

The district court erroneously thought these decisions "didn't involve delayed access" but rather a public "categorically cut off from ongoing judicial

proceedings." ER45. In fact, *Associated Press* struck down an order requiring documents to be filed under seal and providing 48 hours for the parties and press to request unsealing. 705 F.2d at 1145. Because that order "impermissibly reverse[d] the 'presumption of openness,'" it was "irrelevant that some of these pretrial documents might only be under seal for, at a minimum, 48 hours" since "[t]he effect … is a total restraint on the public's first amendment right of access even though … limited in time." *Id.* at 1147 (citing *Brooklier*, 685 F.2d at 1169-71). That passage in *Brooklier* did not discuss, let alone turn on, the difference between access to a hearing and a transcript of that hearing, as the court below claimed. ER44-45. Rather, it rejected the view that "the restriction on first amendment rights would be limited because only a small portion of the trial would be closed, and transcripts of closed proceedings would be made available … probably within 24 hours." 685 F.2d at 1170. Contrary to the court below, these cases hold "even a one to two day delay impermissibly burdens the First Amendment" unless they satisfy strict scrutiny. *Pokaski*, 868 F.2d at 507 (citing, *e.g.*, *Associated Press*, 705 F.2d at 1147).[29]

[29] *Accord, e.g., NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 1220 n.42 (1999) ("'delay[]'" from "temporarily seal[ing] the hearing transcripts, thereby precluding access to information in the first instance," was "subject to 'exacting First Amendment scrutiny'").

Consequently, even if the district court correctly found Defendant satisfied TPM review – which, as shown below, it did not – this Court must reverse because Defendant did not and could not satisfy strict scrutiny.

B. The District Court's TPM Analysis Contains Multiple Errors, Most Notably Ignoring Less Restrictive Alternatives

Even under the intermediate TPM scrutiny the court below did apply, "'the Government bears the burden of proving the constitutionality of its actions.'" *Comite*, 657 F.3d at 944. Defendant must prove his policy is [1] "'justified without reference to the content of the regulated speech,[30] ... [2] narrowly tailored to serve a significant government interest, and ... [3] leave[s] open ample alternative channels for communication of the information.'" A policy is not narrowly tailored if Defendant has "feasible, readily identifiable, and less-restrictive means of addressing [his] concerns" or if it "'burden[s] substantially more speech than is necessary.'" *Id.* at 945, 947, 950.

The district court's TPM analysis was flawed from the outset because it was filtered through the mistaken premise that the right of access does not apply until, at earliest, the day after a complaint is filed. It thus considered only delays of 2+ days to be "untimely," ER54-55, and never required OCSC to justify the pervasive delays below that threshold.

[30] Content neutrality is not at issue.

Errors continued from there. On MSJ, the district court concluded OCSC had no readily available less restrictive alternatives other than withholding all complaints until after clerk review. ER52-54. But it reached this result by accepting Defendant's unsupported assertion this was so, ignoring uncontroverted evidence that OCSC could easily protect confidential complaints at least as effectively as it does now without delaying access, and by putting the burden of proof on CNS instead of Defendant.

The district court deferred for trial decisions on whether OCSC's procedures burdened substantially more speech than necessary and left open ample alternative channels, saying it first needed to "separate[] delays of no more than one day from longer delays," ER55. Trial evidence, in turn, showed from January 1, 2017 to March 31, 2018, OCSC made only ***59%*** of new unlimited complaints available the day of filing, withholding ***39%*** one court day, and ***2%*** two or more court days. ER380. It also showed "complex" cases were more delayed, with OCSC making only ***25%*** of complex complaints available the day of filing, withholding ***48%*** one court day and ***27%*** two court days or more, while individual weeks were an up-and-down rollercoaster of access. ER331, 344, 351. The court nevertheless concluded "OCSC's privacy review does not burden substantially more access than necessary" and leaves "alternatives channels … while access to complaints is delayed." ER12.

1. Uncontroverted Evidence At MSJ Showed Available Alternatives

If there are "obvious alternatives" to OCSC's procedures "that would achieve the same objectives" with significantly less impact on access, the procedures cannot be a valid TPM restriction. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1039-40 (9th Cir. 2009); *accord Comite*, 657 F.3d at 950 ("[e]ven under … 'time, place and manner' analysis, we cannot ignore the existence of these readily available alternatives.").[31] As with other TPM elements, Defendant bore the burden and was required to provide "'tangible evidence'" his practices were "'necessary' to advance the proffered interest." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001).

The truth is all courts handle confidential filings. If it were impossible, or even less effective, to protect them without withholding all complaints for manual review, other e-filing courts – including most in the federal system – would not make complaints available before clerk review. But that is exactly what they do, and typically by (1) requiring paper-filing for confidential documents; or (2) adding check-boxes or drop-down menus requiring e-filers to indicate confidentiality and automatically segregating confidential filings from public review queues.

[31] Nor can they satisfy strict scrutiny. *Guerrero*, 693 F.3d at 1002.

The district court could not have properly resolved this issue in Defendant's favor unless – viewing evidence in the light most favorable to CNS – the evidence showed there was no genuine dispute of material fact that ***both*** alternatives were unavailable or would not have "achieve[d] the same objectives," *Long Beach*, 574 F.3d at 1039-40, as OCSC's current system. Examining the evidence, it is clear Defendant did not meet his burden, and the district court was only able to conclude "OCSC cannot be said to ignore readily available alternatives," ER54, by committing many of the same errors that marred its *Press-Enterprise II* analysis and putting the burden on the wrong party.

a. Alternative 1: Paper-Filing Confidential Complaints

The first alternative is requiring paper-filing of confidential complaints. California's Central, Northern, and Southern Districts do this, C.D. Cal. L.R. 79-5.2.1-5.2.2; ER1356-57, 2289-90, as do state courts, including in Alabama, ER1354, New York, ER1336-37, and Connecticut, ER1340-43, and all provide timely access to new complaints. ER2246-48, 2272-73, 2280-88, 3204-05, 3328-29, 3389-90, 3428-29. The "comparison[] between [these] institutions" and OCSC is "analytically useful when considering whether the government is employing the least restrictive means." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005); *accord Edwards*, 262 F.3d at 866 ("small sampling" of "ordinances

employed by other cities … demonstrates that less restrictive alternatives … are readily available.").

Unable to argue – let alone prove – that requiring paper-filing for confidential complaints is not an available and effective solution, Defendant ignored it entirely. ER2639-40, 2642-63, 1303-04. Indeed, the record reflects Defendant never considered the paper-filing alternative, ER1802, 1951, even though it is the method OCSC uses to protect a category of confidential complaints – gang injunctions – for which it considers secrecy paramount. ER1897 (gang injunctions "are not electronically filed" and are instead "hand-logged because there's a lot of security concerns about those"). Nor would this alternative impose any burden on OCSC, given thousands of complaints are already paper-filed. ER2669.

Defendant's failure of proof required the district court to deny MSJ. Instead, it faulted ***CNS*** for failing to provide "evidence that [this] alternative would achieve OCSC's interests as effectively as OCSC's existing practice," ER53, as though it were CNS, not Defendant, who bore the burden of proof (and as though the efficacy and availability of this alternative were not evident from the record). The court said paper filing wouldn't work because it would "rely on plaintiffs to know the proper procedure for filing a confidential complaint." ER53. Nothing in the

record supports this assertion. Moreover, OCSC's confidentiality review procedures ***already*** rely on filers, as the next section demonstrates.

b. Alternative 2: Automatic Segregation

OCSC could also use a second alternative: as e-filers for information for the e-filing system needs to automatically segregate confidential documents. Like paper-filing, this alternative is readily available, and would ***not*** require OCSC to "adopt a new e-filing system." ER53. The evidence also showed it would be at least as effective as OCSC's current procedures.

OCSC requires e-filers to indicate a document is confidential by typing a request into a box labeled "Message to the eFiling Clerk" (the "comments" box) or marking the complaint's face page. ER1487-89, 1618-19, 2292-93. Before "accepting" a new complaint, LPSs spend "two seconds" reading any text in the "comments" box and look at the complaint's face for "a second or two" for words like "confidential" or "under seal." ER1542-44, 1571-73. If they notice such terms, or a confidential statute's code section[32] on the face page, they manually set security as non-public in the case management system. ER1487-89, 1491-94,

[32] OCSC provided no evidence of any confidential filing caught by LPS review based solely on a statutory reference. ER2672, 2679-84.

1618-19. OCSC clerks do not read through complaints, let alone evaluate their content. ER1489, 1538.[33]

The infirmities of this procedure, versus requiring e-filers to provide enough information for the system to automatically identify and secure confidential complaints, are self-evident. But the record also included testimony from an expert in computer user-interface design that "OCSC's current procedure … amplifies the potential for human error" because (1) it "requires the e-filer to remember to request confidentiality … rather than explicitly requiring the e-filer to address the question of confidentiality," (2) "an e-filer entering comments into a free-form text box might not use the key words or code section the LPS looks for to identify confidentiality"; and (3) "even if the e-filer uses these key terms, the LPS can overlook them despite their best diligence." ER1982-83.[34]

To cure these problems – and, at the same time, eliminate manual clerk review – OCSC could add a checkbox or drop-down menu to the interface, such as:

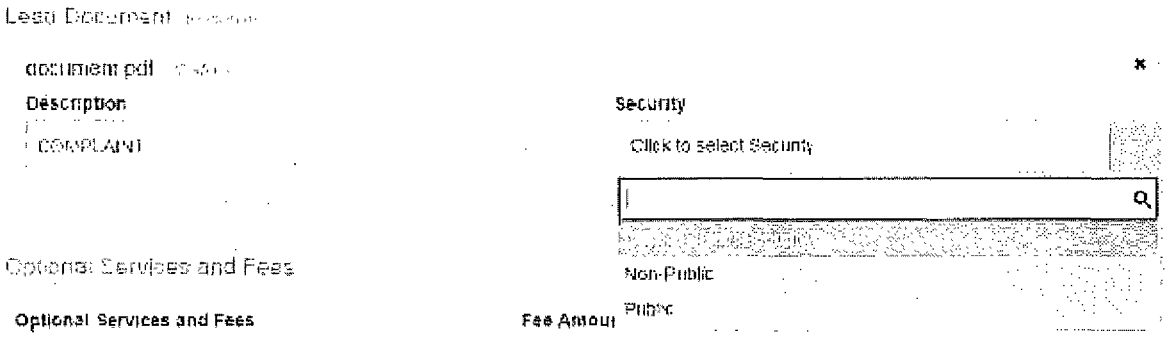
Does your filing contain confidential material?

○ **yes**
◉ **no**

[33] Nor do they look for confidential information such as social security numbers. Cal. R. Ct. 1.201 ("The responsibility for excluding or redacting identifiers … rests solely with the parties and their attorneys. The court clerk ***will not review*** each pleading or other paper for compliance with this provision.").

[34] The district court erroneously excluded other parts of the expert declaration but admitted these statements. ER71.

ER1982. Or:



ER2288-89; *see also* ER2277-79.

If OCSC doubts the ability of e-filers to recognize a document should be confidential, it could prompt them as to confidential categories. For example:

Are you filing a Safe at Home name change petition?

- ○ **yes**
- ◉ **no**

ER1982.

Other e-filing courts use such mechanisms, ER2277-79, 2288-89, and Defendant conceded OCSC could do the same. ER1796-97. Indeed, OCSC's e-filing system can already automatically secure filings based on filer input. ER404-14, 421-22, 2292, 2295. Defendant's unsupported assertion that configuring OCSC's e-filing interface in this way would entail "the creation and adoption of an entirely new filing system," ER1303, is thus disingenuous at best. At the least, CNS's evidence, and Defendant's failure to explain why OCSC's 100-person

Court Technology Services staff, ER1725, could not configure its "state-of-the-art e-filing system," ER2705, this way, despite an ongoing $3.4 million migration and upgrade of the system, ER1733-38, established a genuine dispute precluding summary judgment.[35]

Nor was Defendant correct in suggesting this alternative would not "comply with California law that requires ***courts*** to keep certain information confidential," and "shift[] to a system that puts the onus on filers." ER2640 (emphasis original).

When California made certain categories of filings non-public, it did not mandate that court staff manually inspect each one. Rather, e-filing courts satisfy any obligation to keep confidential records confidential by giving e-filers the means to "***transmit***[]" such records "to the court in a secure manner that preserves the confidentiality of the records to be lodged." Cal. R. Ct. 2.551(d)(1); *accord* 2.577(d)(1) (Safe at Home petitions). E-filing courts accomplish this by requiring

[35] CNS's expert also testified such a modification "is a relatively simple and inexpensive task." ER1983. The district court erroneously excluded this testimony on the grounds the expert lacked information about OCSC's system and "ha[d]n't sufficiently established his expertise in the relevant area of programming." ER70-71. The expert's "29 years of experience in designing and programming advanced user interfaces," ER71, as a "systems and software engineer" proficient in 13 coding languages, with extensive experience "design[ing] and develop[ing]" software applications, ER1987, together with his review of OCSC's e-filing functionality, ER757, 1980-84, was more than enough to support his testimony. *See* ER753-772, 775-805. Any concerns about the testimony go to its weight, not its admissibility. *City of Pomona v. SQM N. Am.*, 750 F.3d 1036, 1044 (9th Cir. 2014); *Kennedy v. Collagen*, 161 F.3d 1226, 1227-31 (9th Cir. 1998).

filers to provide information that enables the e-filing system to automatically segregate them.[36]

Moreover, OCSC's system ***already*** "puts the onus on filers." *See* ER1982-83. LPSs keep complaints confidential based solely on what e-filers write in the "comments" box or on the complaint's face page. *E.g.* ER1641 ("[Y]ou're relying on the filer to designate[] it as … sealed, correct?" "Correct."), 1487-89, 1537, 1572, 1619, 1693, 1765. Each of the 18 filings OCSC says LPSs caught in 2016-2017 was identified ***only*** because the e-filer explicitly requested confidential handling, either in the "comments" text or on the face page. ER2672, 2679-84.

Defendant never explained how a system that relies on e-filers to remember confidentiality and think to use the "comments" box to request it,[37] and then depends on a two-second LPS review to notice confidential designations, could be more effective than one that prompts for confidentiality and automatically segregates confidential records. Instead, he asked the district court to accept – without evidence – that "there is good reason to doubt" that such a system "works

[36] This is the electronic equivalent of the sealed envelope in which paper filers must lodge confidential documents. Cal. R. Ct. 2.551(d)(1)&(2), 2.577(d)(1). It is also akin to cover sheet forms used to alert staff to confidentiality. Cal. R. Ct. 2.571(c) (False Claims Act); 2.577(d)(2) (Safe at Home petitions).

[37] Remarkably, OCSC's e-filing FAQ answers the question "How do I file my documents under seal or as confidential?" with "If your document is filed under seal or is confidential pursuant to statute, ***no special action is needed***." ER1321; *see also* ER1565. Filers are instructed to note the need for confidentiality in the "comments" section of the interface only if filing a document sealed by court order. ER1321

as well as" OCSC's procedures. ER2640. In place of evidence, Defendant cited two articles, ER1304, 2640 – one of which the district court cited repeatedly, ER50, 53[38] – but both ***support*** the technical solutions available to OCSC. Clarke, *A Contrarian View of Two Key Issues in Court Records Privacy & Access*, Nat'l Ctr. for State Courts 58 (2016) ("When the courts react to business problems associated with the electronic world by restricting access …, [they] risk[] undercutting courts' legitimacy."); Clarke, *Best Practices for Court Privacy Formulation*, Nat'l Ctr. for State Courts 5 (July 2017) ("potential for automated workflows to reduce court costs is quite large.").

Adding to these errors, the district court also overlooked – as it did in its *Press-Enterprise II* analysis – constraints of the MSJ procedural posture. Saying it would have given CNS's evidence more "weight" if CNS also provided evidence of "the way other courts balanced various interests to choose which … systems to adopt," ER53, the district court weighed evidence, prohibited at MSJ, and made an impermissible inference in favor of ***Defendant***. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (in "failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party").

[38] This district court also relied on additional dicta from *Doe*, 870 F.3d at 997, ER53, but it only spoke to the unrelated question of whether Internet access might factor into policy about what records should be public in the first place.

In short, rather than acknowledge Defendant's "failure … to explain why another institution with the same … interests was able to" serve those interests without burdening access, the district court "completely defer[red] to [OCSC's] judgment." *Warsoldier*, 418 F.3d at 1000-01.

2. Even Under TPM, Defendant Is Not Free To Choose Procedures That Unnecessarily Burden Access

Although OCSC "need not necessarily employ the ***least***-restrictive alternative, it may not select an option that unnecessarily imposes significant burdens on First Amendment-protected" access. *Comite*, 657 F.3d at 950 (emphasis original). "Put another way, the regulation must 'focus[] on the source of the evils the city seeks to eliminate … and eliminate[] them without at the same time … significantly restricting a substantial quantity of speech that does not create the same evils.'" *Id.* at 947. Without "evidence to justify" withholding all complaints "in such a sweeping manner," *id.* at 949, TPM cannot be satisfied.

At trial, CNS showed Defendant's policies resulted, from January 1, 2017 to March 31, 2018, in OCSC making only ***59%*** of new unlimited complaints available the day of filing, withholding ***39%*** one court day, and ***2%*** two or more court days, ER380, with even worse delays for complex cases (***25%*** available the day of filing, withholding ***48%*** one court day, and ***27%*** two court days or more). ER331, 344, 351. And as noted, the averages paved over delay potholes, such as in February 2018, when OCSC withheld ***86%*** of complex cases two or more court

days (and intervening weekend meant longer actual delays). ER344, 351. But because the court erroneously applied the TPM test only to complaints delayed 2+ days, ER54-55, and ignored the greater delays for complex cases, it concluded OCSC did "not burden substantially more access than necessary." ER12. Given the alternatives available, it is clear the "broad sweep" of Defendant's policies burdens much more access "than the 'evil[s]' it seeks to remedy require, and [its] main objectives … could be achieved by far less intrusive means." *Berger v. City of Seattle*, 569 F.3d 1029, 1048 (9th Cir. 2009).

3. OCSC's Policy Does Not Leave Ample Alternative Channels For The Press And Public To Learn Of New Civil Lawsuits

To satisfy TPM's "alternative channels" element, OCSC's policy must allow "alternative[s] for expression concerning fast-breaking events" and "time-sensitive speech." *Long Beach*, 574 F.3d at 1038. When speakers seek to engage in "[i]mmediate speech … on immediate issues," delaying the communication even "one business day[]" fails because "dissemination delayed is dissemination denied." *NAACP v. Richmond*, 743 F.2d 1346, 1355-56 (9th Cir. 1984).

At MSJ and trial, Defendant and the district court suggested two possible alternative channels: obtaining complaints directly from the plaintiff and eventual disclosure by the court. ER57-58, 1305-06, 2636-37.

The district court cited examples of the first option as a virtue, asserting that it "shows that information about new complaints has effectively spread even when

access to new complaints has been denied." ER57-58. Aside from the dubious wisdom of plaintiffs "control[ling] news about the initiation of litigation," ER2262, relying on plaintiffs to disseminate complaints means the public only learns about those that plaintiffs want to publicize.

As to the second option, neither Defendant nor the district court explained how OCSC's eventual disclosure of a complaint could be an "alternative channel[] of access while … the actual complaint[] is delayed." ER56. As *Planet I* observed, "the public cannot discuss the content of … complaints about which it has no information." 750 F.3d at 788. Instead of addressing this head-on, the district court fell back on its mistaken belief that access is a lesser species of First Amendment right, ER56-57; *infra* Section I, and that the filing of a new complaint is not "a 'public event' where 'spontaneity is part of the message.'" ER57. For these reasons as well, the court erred.

CONCLUSION

The ruling below is riven with serious reversible errors.

The greatest was the notion that the right of access does not exist until the end of the next day after filing. Failing to test a clerk's reason for withholding under proper TPM analysis or strict scrutiny – including meaningful consideration of the readily available alternatives for protecting confidentiality used by many other e-filing other courts – was another. And underlying it all was the

proposition, contrary to Supreme Court and Circuit precedent, that the First Amendment right of access is not a full First Amendment right.

Left unchecked, and allowed to spread, the orders below would transform the tradition of open access to new complaints that exists in our country to one of secrecy. Delays like those at OCSC in the second week of December – 6% of complaints available the day of filing; 6% one court day later; 53% two court days later; and 23% three court days later, RJN 2-5 – would become commonplace. The result would be less information, and less accurate information about civil lawsuits, contrary to the principles this Court and the Supreme Court have said underpin the First Amendment right of access.

This Court should reverse the MSJ and trial rulings below.

DATED: January 22, 2019 BRYAN CAVE LEIGHTON PAISNER LLP

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

STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, this appeal is related to *Courthouse News Service v. Yamasaki*, Ninth Circuit Appeal No. 17-56331, an appeal from the denial of CNS's preliminary injunction; and to *Courthouse News Service v. Planet*, Ninth Circuit Appeal No. 16-55977, which raises the same or closely related issues as those in both the instant appeal and Appeal No. 17-56331. Appeal Nos. 17-56331 and 16-55977 were consolidated for purposes of oral argument, which was held June 28, 2019 before a panel consisting of Judges Kim McLane Wardlaw, N. Randy Smith, and Mary H. Murguia. On June 29, 2018, this Court issued an order in Appeal No. 17-56331 vacating submission pending further order of the Court.

DATED: January 22, 2019 BRYAN CAVE LEIGHTON PAISNER LLP

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

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Ninth Circuit Rule 32-1. This brief uses 14-point proportional type and contains 13,930 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

DATED: January 22, 2019

BRYAN CAVE LEIGHTON PAISNER LLP
ROGER MYERS
RACHEL MATTEO-BOEHM
KATHERINE KEATING
JENNIFER STEEVE

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

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, 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

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-56216

I am the attorney or self-represented party.

This brief contains 13,930 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Rachel Matteo-Boehm **Date** January 22, 2019
(use "s/[typed name]" to sign electronically-filed documents)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 18. Certificate for Paper Copy of Electronic Brief

Instructions for this form: http://www.ca9.uscourts.gov/forms/form18instructions.pdf

9th Cir. Case Number(s) 18-56216

My name is Rachel Matteo-Boehm

I certify that this brief is identical to the version submitted electronically on *(date)*:

January 22, 2019.

Signature /s/ Rachel Matteo-Boehm **Date** January 23, 2019

(either manual signature or "s/[typed name]*" is acceptable)*

Burnett, Nancy

From: ca9_ecfnoticing@ca9.uscourts.gov
Sent: Friday, February 01, 2019 4:06 PM
To: Burnett, Nancy
Subject: 18-56216 Courthouse News Service v. David Yamasaki "ECF Paper Copies of Brief Filed"

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 02/01/2019 at 4:05:37 PM PST and filed on 02/01/2019

Case Name: Courthouse News Service v. David Yamasaki
Case Number: 18-56216

Docket Text:
Received 7 paper copies of Opening Brief [12] filed by Courthouse News Service. [11176727] (SD)

Notice will be electronically mailed to:

John W. Amberg
Mr. Bruce D. Brown
Jonathan Gavin Fetterly, Attorney
Mr. Nathaniel Garrett, Attorney
Ms. Katherine Ann Keating, Attorney
Ms. Rachel Elizabeth Matteo-Boehm, Attorney
Mr. Roger Rex Myers
Robert A. Naeve, Litigation Counsel
Jennifer R. Steeve
Craig Stewart, Attorney
Mr. Cary Donahue Sullivan, Attorney