

1 Rachel Matteo-Boehm (SBN 195492)
2 rachel.matteo-boehm@bryancave.com

3 Roger Myers (SBN 1461640)
4 roger.myers@bryancave.com

5 Jonathan G. Fetterly (SBN 228612)
6 jon.fetterly@bryancave.com

7 Leila C. Knox (SBN 245999)
8 leila.knox@bryancave.com

9 BRYAN CAVE LLP
10 560 Mission Street, Suite 2500
11 San Francisco, CA 94105-2994
12 Telephone: (415) 675-3400
13 Facsimile: (415) 675-3434

14 Attorneys for Plaintiff
15 COURTHOUSE NEWS SERVICE

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA
18 WESTERN DIVISION

19 Courthouse News Service,

20 Plaintiff,

21 v.

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

25 Defendant.

Case No. CV11-08083 SJO (FMMx)

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

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

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF FACTS AND OF THE CASE	3
A. Throughout the U.S., CNS Reports On Complaints The Day They Are Filed	3
B. Many Courts Allow The Press To See Complaints The Day The Are Filed	4
C. Ventura Superior Denied Access Until Complaints Were Fully Processed	6
D. Reversing Dismissals, The Ninth Circuit Said The Facts If Proven Showed Violation of The First Amendment Right Of Timely Access To Complaints	7
E. After The Ninth Circuit Ruling, Access Improved But Problems Remain	9
I. CNS IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE NINTH CIRCUIT FOUND A RIGHT OF ACCESS AND DEFENDANT CANNOT CARRY HIS BURDEN TO SHOW DELAYING ACCESS WAS JUSTIFIED	11
II. THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES TO CIVIL COMPLAINTS UPON RECEIPT BY A COURT FOR FILING	13
A. There Is A Long History Of Access To And Reporting On New Complaints	14
B. There is A Well-Recognized Value In Access To Complaints Upon Receipt	16
III. DELAYING ACCESS FOR “EVEN A DAY OR TWO” CANNOT SURVIVE THE COMPELLING INTEREST OR TIME, PLACE AND MANNER TESTS	20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CNS IS ENTITLED TO A PERMANENT INJUNCTION TO STOP
THE ONGOING DELAYS IN ACCESS AND PREVENT DEFENDANT
FROM DENYING ACCESS UNTIL COMPLAINTS ARE FULLY
PROCESSED 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Associated Press v. Dist. Ct.,
705 F.2d 1143 (9th Cir. 1983) Passim

In re Associated Press,
172 Fed. App’x. 1 (4th Cir. 2006)21, 25

Baugh v. CBS, Inc.,
828 F. Supp. 745 (N.D. Cal. 1993).....11

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP,
2016 U.S. App. LEXIS 3233 (2d Cir. Feb. 24, 2016) passim

Bell v. City of Boise,
709 F.3d 890 (9th Cir. 2013)24

Cal-Almond v. U.S. Dep’t of Agric.,
960 F.2d 105 (9th Cir. 1992)14

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....11

In re Charlotte Observer,
882 F.2d 850 (4th Cir. 1989)20

Comite de Jornaleros de Glendale v. City of Glendale,
2005 U.S. Dist. LEXIS 46603(C.D. Cal. May 13, 2005).....22

Comite de Jornaleros de Redondo Beach v. Redondo Beach,
657 F.3d 936 (9th Cir. 2011)2, 12

In re Cont’l Ill. Secs. Litig.,
732 F.2d 1302 (7th Cir. 1984)20

Courthouse News Service v. Jackson,
2009 U.S. Dist. LEXIS 62300 (S.D. Tex. July 20, 2009) passim

Courthouse News Service v. Jackson,
2010 U.S. Dist. LEXIS 74571 (S.D. Tex. Feb. 26, 2010).....1, 7

1 *Courthouse News Service v. Planet,*
2 750 F.3d 776 (9th Cir. 2014) Passim

3 *Courthouse News Service v. Planet,*
4 614 Fed. App’x. 912 (9th Cir. 2015) Passim

5 *Crumpton v. Gates,*
6 947 F.2d 1418 (9th Cir. 1991)13

7 *Detroit Free Press v. Ashcroft,*
8 303 F.3d 681 (6th Cir. 2002)14

9 *Doe v. JBF RAK LLC,*
10 2014 U.S. Dist. LEXIS 98688 (D. Nev. July 18, 2014) 11, 12, 13, 19

11 *Doe v. Pub. Citizen,*
12 749 F.3d 246 (4th Cir. 2014) 13, 17, 23

13 *Dorsey v. National Enquirer, Inc.,*
14 973 F.2d 1431 (9th Cir. 1992)11

15 *Elrod v. Burns,*
16 427 U.S. 347 (1976).....24

17 *Gallagher Benefit Servs. v. De La Torre,*
18 283 Fed. App’x. 543 (9th Cir. 2008)24

19 *Globe Newspaper Co. v. Pokaski,*
20 868 F.2d 497 (1st Cir. 1989).....19, 21

21 *Grove Fresh Distribs. v. Everfresh Juice Co.,*
22 24 F.3d 893 (7th Cir. 1994) 13, 18, 20

23 *Hurley v. Nw. Pub’ns.,*
24 273 F. Supp. 967 (D. Minn. 1967).....15

25 *In re Eastman Kodak,*
26 2010 WL 2490982 (S.D.N.Y. June 15, 2010)18, 19

27 *Jacobsen v. U.S. Postal Service,*
28 812 F.2d 1151 (9th Cir. 1987)25

1 *Kansas Health Care Ass’n v. Kansas Dep’t of Soc. & Rehab. Servs.*,
2 31 F.3d 1536 (10th Cir. 1994)24

3 *Klein v. City of San Clemente*,
4 584 F.3d 1196 (9th Cir. 2009) 2, 22, 24, 25

5 *Leigh v. Salazar*,
6 677 F.3d 892 (9th Cir. 2012)12

7 *Levenstein v. Salafsy*,
8 164 F.3d 345 (7th Cir. 1998)13

9 *Long Beach Area Peace Network v. City of Long Beach*,
10 574 F.3d 1011 (9th Cir. 2009)22

11 *Lugosch v. Pyramid Co.*,
12 435 F.3d 110 (2d Cir. 2006) 13, 16, 23, 25

13 *NAACP, Western Region v. Richmond*,
14 743 F.2d 1346 (9th Cir. 1984)22

15 *Nvidia Corp. Deriv. Litig.*,
16 2008 U.S. Dist. LEXIS 120077 (N.D. Cal. 2008)19

17 *O’Shea v. Littleton*,
18 414 U.S. 488 (1974).....8

19 *Press-Enterprise Co. v. Superior Court*,
20 464 U.S. 501 (1984).....16

21 *Press-Enterprise Co. v. Superior Court*,
22 478 U.S. 1 (1986).....16

23 *Railroad Comm’n v. Pullman Co.*,
24 312 U.S. 496 (1941).....8

25 *Republic of Phil. v. Westinghouse Elec. Corp.*,
26 139 F.R.D. 50 (D.N.J. 1991)13

27 *Richmond Newspapers v. Virginia*,
28 448 U.S. 555 (1980).....1

1 *Rosebrock v. Beiter*,
2 788 F. Supp. 2d 1127 (C.D. Cal. 2011)12, 24

3 *Rosebrock v. Beiter*,
4 745 F.3d 963 (9th Cir. 2014)12, 24

5 *Seattle Times v. District Court*,
6 845 F.2d 1513 (9th Cir. 1988)14

7 *Standard Chtd. Bank Int’l. v. Calvo*,
8 757 F. Supp. 2d 258 (S.D.N.Y. 2010)19

9 *Stuhlbarg Int’l Sales Co. v. Brush & Co.*,
10 240 F.3d 832 (9th Cir. 2001)24

11 *U.S. ex rel. Dahlman v. Emergency Physicians*,
12 2004 U.S. Dist. LEXIS 31304 (D. Minn. Jan. 5, 2004)16

13 *U.S. v. Amodeo*,
14 71 F.3d 1044 (2d Cir. 1995)22

15 *U.S. v. Loughner*,
16 769 F. Supp. 2d 1188 (D. Ariz. 2011)12

17 *U.S. v. Brooklier*,
18 685 F.2d 1162 (9th Cir. 1982) 19, 21, 22

19 *U.S. v. Corbitt*,
20 879 F.2d 224 (7th Cir. 1989)16

21 *U.S. v. Guerrero*,
22 693 F.3d 990 (9th Cir. 2012)13

23 *Valle Del Sol Inc. v. Whiting*,
24 709 F.3d 808 (9th Cir. 2013)12

25 *Valley Broadcasting Co. v. U.S. Dist. Court*,
26 798 F.2d 1289 (9th Cir. 1986)21

27 *Vassiliades v. Israely*,
28 714 F. Supp. 604 (D. Conn. 1989).....18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Whiteland Woods, L.P. v. Township of W. Whiteland,
193 F.3d 177 (3d Cir. 1999)14

Wood v. Ryan,
759 F.3d 1076 (9th Cir. 2014)11

State Cases

Campbell v. New York Evening Post, Inc.,
245 N.Y. 320 (1927)2, 15

Lybrand v. State Co.,
184 S.E. 580 (S.C. 1936)15

Nast v. Michels,
107 Wn. 2d 300 (1986)19, 20

Newell v. Field Enters.,
91 Ill. App. 3d 735 (1980)15, 17

Paducah Newspapers v. Bratcher,
118 S.W.2d 178 (Ky. 1938)17

Salzano v. N. Jersey Media Group,
993 A.2d 778 (N.J. 2010)15

Shiver v. Valdosta Press,
61 S.E.2d 221 (Ga. App. 1950)15

Siegel v. Sun Printing & Pub’g Ass’n,
223 N.Y.S. 549 (App. Div. 1927)15

Federal Statutes

42 U.S.C. § 1983 7, 8, 12, 13

Federal Rules

Fed. R. Civ. P. 56(a)12

1 State Statutes

2 Ala. Code § 147 (1940).....15

3 Del. Rev. Code, Ch. 36 § 7A (1935).....15, 20

4 Cal. Civ. Proc. Code § 1893 (1949).....15

5 Idaho Code § 67-2031.....15

6 Ill. Stat. § 24-16.....15

7 Iowa Code. § 633.4615

8 Mass. Ann. Law Vol. 1, Ch. 4 § 715

9 Minn. Stat. § 15.17(4).....15

10 Mont. Rev. Codes § 90-1001-5 (1947).....15

11 N.C. Gen. Stat. § 132-1 (1943).....15

12 N.J. Stat., Ch. 3 § 47:3-115

13 Or. Comp. Law § 82-70215

14 Tenn. Code § 9748 (1934)15

15 Utah Code § 104-47-2 (1945).....15

16

17 State Rules

18 California Rule of Court 1.206

19 California Rule of Court 2.5507

20

21 Other Authorities

22 Doggett & Mucchetti, *Public Access to Public Courts: Discouraging*

23 *Secrecy in the Public Interest*, 69 Tex. L. Rev. 643 (1991)18

24 H. Cross, *The Right to Know* (1953)..... 15, 20

25

26

27

28

1 **INTRODUCTION**

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

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

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

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

27
28 _____
¹ See generally *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

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

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

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

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

27 _____
28 ² Throughout this memorandum, all emphases are added and all citations to quotations
within quotations are omitted unless otherwise noted.

1 **STATEMENT OF FACTS AND OF THE CASE**

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

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

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

17 CNS produces a variety of publications. Its new litigation reports – including
18 16 in California alone – feature original staff-written reports of newsworthy new civil
19 complaints within particular jurisdictions that are emailed to subscribers nightly.
20 Although not all new complaints are significant enough to be included, the new
21 litigation reports cover many more complaints than do the daily newspapers. CNS’s
22 website (www.courthousenews.com), which does not require a subscription, is
23 updated daily with staff-written articles and columns and averages about one million
24 readers per month. Other publications include its dingers, which alert subscribers that
25 a new lawsuit has been filed against a particular party, and its trackers, which update
26 subscribers on developments in cases they are following. CNS’s reporting is
27 frequently cited as the source for stories by news outlets such as the New York Times,
28 the Washington Post, the ABA Journal, and many others. UF 13-17.

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

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

11 In the 1980s and ‘90s, journalists who covered Ventura Superior could review
12 and report on new civil complaints “the same day they had been received for filing by
13 the court.” UF 21 (quoting Sturgeon Dec., ¶ 6). This was not unusual; in most courts
14 around the country, there is a long-standing tradition of providing reporters with
15 access to the day’s new complaints. *Id.* 19.³ In some courts where clerks are able to
16 process complaints quickly, this access may be provided after processing. *Id.* 20. In
17 other courts, access is provided before the complaints have been fully processed. *Id.*
18 19. As technology changes in a particular court or a court moves to a new building,
19 the specific procedures for access sometimes also change. *See id.* 22. But the
20 fundamentals of providing same-day access are relatively simple.

21 One example is the Central District of California, which CNS has been covering
22

23
24 ³ When CNS began reporting in 1990, it was one of several news outlets reviewing
25 new civil filings at the courthouse. As traditional media’s budgets shrank, that
26 practice declined. UF 29. But that does not mean there is a lack of public interest in
27 new civil cases. To the contrary, the public retains a keen interest in new filings,
28 which continue to have “the potential to affect a great number of people in very
significant ways.” *Id.* 28 (quoting Drechsel Dec., ¶ 14). For that reason, news outlets
whose reporters used to review new complaints side by side with CNS are now CNS
subscribers and/or rely on CNS’s website as a source for stories. *See id.* 12.

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

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

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

26
27
28 ⁴ UF 19-21 (citing declarations from 28 CNS journalists and three other reporters).

1 **C. Ventura Superior Denied Access Until Complaints Were Fully Processed**

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

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

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

21 _____
22 ⁵ It is no coincidence that the other clerks “who have been most strident in this
23 position” are those who work for the few courts that adopted the Court Case
24 Management System, or CCMS, including Orange, San Diego and Sacramento
25 Superior Courts. UF 126 (quoting Girdner Dec., ¶ 82). CNS “experience[s] delays”
26 in obtaining access in these courts, *id.* 127 (quoting same, ¶ 89), and Defendant has
27 been in communication with these clerks about the defense of this case. *Id.* 128.

28 Working with the Judicial Council of California – which hired Defendant’s attorneys,
see id. 129 – the clerks got new efilng rules to treat complaints as not “officially
filed” until fully processed, RJN, Exhs. 1-3, even though the filing date is the date it
was received, which is the filing date mandated by California Rule of Court 1.20.

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

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

9 While Defendant has attempted to dispute those delays, his own staff’s status
10 reports – which track “backlogs” and which he failed to produce until a witness
11 testified to their existence, UF 66-70 – revealed Ventura Superior viewed delays of up
12 to 36 days *to even begin processing a new complaint* as “within reason.” *Id.* 67.⁶

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

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

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

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

1 On November 20, 2011, Judge Real granted Defendant’s motion to abstain from
2 hearing the case under *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) and
3 *O’Shea v. Littleton*, 414 U.S. 488 (1974), and dismissed the case. ECF, Doc. 38.⁷

4 On April 7, 2014, the Ninth Circuit reversed. Recognizing that “Pullman
5 abstention ‘is generally inappropriate when First Amendment rights are at stake,’” the
6 Court of Appeal rejected its application to this case because it found “no question that
7 CNS itself has alleged a cognizable injury caused by the Ventura County Superior
8 Court’s denial of timely access to newly filed complaints.” *Planet I*, 750 F.3d at 784,
9 788 (citation omitted). It also rejected *O’Shea* abstention because an injunction would
10 not significantly intrude into state proceedings because “Ventura County Superior ...
11 has available a variety of simple measures to comply with an injunction granting CNS
12 all or part of the relief requested, should CNS prevail on the merits.” *Id.* at 791.

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

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

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

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

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

6 **E. After The Ninth Circuit Ruling, Access Improved But Problems Remain**

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

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

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

3 After a news report of the oral argument was circulated in the Civil Department
4 in May 2013, it undertook a “pilot program” in June 2013 to “test” making scanned
5 copies of complaints available before processing. UF 76-77. Although “the test
6 project in scanning the new filings went well,” *id.* 77, scanning was not implemented
7 while the appeal was pending. After the Ninth Circuit issued its decision on April 7,
8 2014, however, there was a flurry of activity.

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

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

I.

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

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

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

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

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

22
23 ⁸ This includes *all* Defendant’s affirmative defenses. *Rosebrock*, 745 F.3d at 971
24 (“party asserting mootness bears a ‘heavy burden’ in meeting this standard”); *Leigh v.*
25 *Salazar*, 677 F.3d 892, 901 (9th Cir. 2012) (once a “court determines that a right of
26 access exists ..., it must determine whether [government] has overcome that right by
27 demonstrating an overriding interest that the viewing restrictions are essential to
28 preserve ... and are narrowly tailored to serve those interests.”); *Valle Del Sol Inc. v.*
Whiting, 709 F.3d 808, 826 (9th Cir. 2013) (“[t]o satisfy the [time, place or manner]
narrow tailoring requirement, “the Government... bears the burden of showing that the
remedy it has adopted does not burden substantially more speech than is necessary”).

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

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

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

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

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

1 **A. There Is A Long History Of Access To And Reporting On New Complaints**

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

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

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

26
27 ¹⁰ The determination that the right of access, where it exists, attaches immediately is
28 one the Ninth Circuit and others made as a matter of law. *See supra* footnote 9. This
history confirms complaints were public from the time they were submitted for filing.

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

2 *First*, since *Campbell v. New York Evening Post, Inc.*, 245 N.Y. 320 (1927), “the
3 weight of modern authority” holds reports about a complaint are privileged against libel
4 liability once it is submitted for filing and issuance of a summons. *Salzano v. N. Jersey*
5 *Media Group*, 993 A.2d 778, 790 (N.J. 2010); see *Lybrand v. State Co.*, 184 S.E. 580,
6 582-83 (S.C. 1936)). This brought libel law into compliance with a tradition of access
7 to report on complaints “the same day” they were filed, *Shiver v. Valdosta Press*, 61
8 S.E.2d 221, 226 (Ga. App. 1950); *Hurley v. Nw. Pub’ns*, 273 F. Supp. 967, 969 (D.
9 Minn. 1967); *Siegel v. Sun Printing & Pub’g Ass’n*, 223 N.Y.S. 549, 550 (App. Div.
10 1927) (“[c]harges ... became known to-day when ... Counsel ... started an action”), or
11 “[o]ne day after.” *Newell v. Field Enters.*, 91 Ill. App. 3d 735, 739 (1980).

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

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

23 ¹¹ Cross, *supra*, at 329-35 (citing, e.g., Idaho Code § 67-2031 (“received or is required
24 to receive for filing”); Ill. Stat. § 24-16 (“All records ... kept by ... clerks”); Mass.
25 Ann. Law Vol. 1, Ch. 4 § 7 (“received ... or required to receive”); N.J. Stat. Ch. 3, §
26 47:3-1 (same); N.C. Gen. Stats. § 132-1 (1943) (“received”); Tenn. Code § 9748
27 (1934) (“records required to be kept in any court”)).

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

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

10 **B. There is A Well-Recognized Value In Access To Complaints Upon Receipt**

11 With respect to the second part of the “‘experience’ and ‘logic’ test” – which
12 considers “the value of openness”¹³ – the Second Circuit held that “[l]ogical
13 considerations also support a presumption of public access” to complaints. *Bernstein*,
14 2016 U.S. App. LEXIS 3233, *17. “Public access to complaints allows the public to
15 understand the activity of the federal courts, enhances the court system’s
16 accountability and legitimacy, and informs the public of matters of public concern.
17 Conversely, a sealed complaint leaves the public unaware that a claim has been
18 leveled and that state power has been invoked – and public resources spent – in an
19 effort to resolve the dispute.” *Id.* “These considerations indicate that public access to
20 the complaint and other pleadings has a ‘significant positive role,’ in the functioning
21 of the judicial process.” *Id.* at *17-18 (citation omitted to *Lugosch*, 435 F.3d at 120).

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

25 The public ... has a strong interest in knowing about civil litigation, not at
26

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

1 some undefined point in the future, but immediately when cases are filed and
2 even before there is any formal court action. The very fact that a lawsuit has
3 been filed is of importance to the public and any number of specialized
4 audiences, even before any official proceeding takes place. Nor is it realistic
5 for any entity other than the media to monitor civil filings on a systematic (and
6 systemic) basis. In this respect, the media inherently play a vital surrogate role
7 for the public generally and for any specialized audiences the media may serve.
8 Drechsel Dec., ¶ 18; see UF 25-28.¹⁴ This is the view not just of an academic; courts
9 extended the fair report privilege to reports about complaints from the day they are
10 received for filing because “the public’s interest in being informed on contemporary
11 problems which have entered the judicial system for adjudication” is “even stronger
12 today when an increasing number of society’s problems are resolved through the
13 judicial process.” *Newell*, 91 Ill. App. 3d at 746. “[T]he entire judicial system from
14 the filing of a complaint until final decision before the highest court of review should
15 be exposed to the bright light of public scrutiny.” *Id.*; accord, e.g., *Paducah*
16 *Newspapers v. Bratcher*, 118 S.W.2d 178, 180 (Ky. 1938).

17 As a general matter, “[t]he public’s interest in monitoring the work of the courts
18 is subverted when a court delays” access. *Co. Doe*, 749 F.3d at 272. “Because the
19 public benefits attendant with open proceedings are compromised by delayed
20 disclosure of documents, we ...emphasize that the public and press generally have a
21 contemporaneous right of access to court documents ... when the right applies.” *Id.*
22

23 ¹⁴ Many reporters used to review the day’s complaints. UF 106 (up to seven in the
24 Central District and Los Angeles Superior), 29 (five in New York and Chicago). Now
25 this task falls to CNS. *Id.* (“With the enormous loss of newsroom jobs in the past 10-
26 12 years, even a large metro daily ... may have only one court reporter, and that
27 person is likely to focus on criminal court. The result is that organizations like CNS
28 play a particularly important role as monitors of the civil justice system. Some of the
nation’s largest daily newspapers now subscribe to CNS to monitor civil filings for
important and newsworthy cases”) (quoting Drechsel Dec., ¶ 45).

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

11 Even when complaints are newsworthy beyond their filing date, the greatest
12 “value of openness” lies in immediate reports. For example, ““a lawsuit against a
13 publicly traded corporation that has the potential to move the stock market is
14 something that the readers of a financial news reporting service such as Bloomberg
15 would be interested in knowing about immediately.”” *MacLean Dec.*, ¶ 12; UF 25-28.
16 Timely access may be a matter of life and death. GM car owners need to know a new
17 complaint alleges a “broad and deadly problem with GM ignition switches,” *Drechsel*
18 *Dec.*, ¶ 14; UF 28, and implant recipients need to know a new cases alleges a “faulty
19 heart valve ... could be a killer.” *Doggett & Mucchetti, Public Access to Public*
20 *Courts: Discouraging Secrecy in the Public Interest*, 69 *Tex. L. Rev.* 643, 648-49
21 (1991) (““secrets buried in court records, literally, kill and maim””).

22 “The filing of the complaint is likely to be the first occasion that the public
23 could become aware of the dispute.” *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D.
24 Conn. 1989). It “forms the basis of a civil action and invokes the jurisdiction of the
25 Court” and is thus “a pleading essential to the Court's adjudication of the matter as
26 well as the public's interest in monitoring the federal courts.” *In re Eastman Kodak*,
27 2010 WL 2490982, *1 (S.D.N.Y. June 15, 2010). Like sealing complaints, delaying
28 access can “spawn considerable mischief” by “conceal[ing] the very existence of

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.

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

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

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

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

1 Defendant's own status reports show delays of between one and 39 days just to
2 start the procedure of processing new complaints, UF 67-70, and CNS' records show
3 delays of one to 34 days in obtaining access to 94 percent of new complaints during
4 summer 2011, just before this lawsuit was filed, *id.* 63; *see also id.* 70 (Defendant's
5 status report in July 2011 shows delays of up to 5 weeks to begin processing
6 complaints), 99 percent in December 2012, and 100 percent in July 2012 and 2013.
7 *Id.* 64. If provisions to allow access "within 24 hours" are unconstitutional unless
8 "substantive prerequisites to closure have been satisfied," *Brooklier*, 685 F.2d at 1168-
9 71, the delays reflected in the undisputed facts must be unconstitutional unless
10 justified. *Id.*; *Pokaski*, 868 F.2d at 507 ("even a one to two day delay impermissibly
11 burdens the First Amendment") (citing *Associated Press*, 705 F.2d at 1147).

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

20 To date, Defendant has not argued denying access until after processing could
21 meet the "overriding" governmental interest test. There is a good reason for that. The
22 interests he has asserted are not supported by the evidence – for example, witnesses
23 could cite no examples of complaints being lost or damaged or of private information
24 becoming public, UF 90-105 – or are "insufficient to justify a complete denial of
25 access" until convenient for the court. *In re Associated Press*, 172 Fed. App'x. 1, 5-6
26 (4th Cir. 2006) ("while we are sympathetic to the administrative burdens faced by the
27 district court, we cannot agree that the incremental rise in those burdens that would be
28 caused by providing access justifies the denial" of "contemporaneous access") (citing
Valley Broadcasting Co. v. U.S. Dist. Court, 798 F.2d 1289, 1295 (9th Cir. 1986)).

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

8 *First*, the Ninth Circuit has held delaying access for even 24-48 hours must be
9 “strictly and inescapably necessary” to protect an overriding interest. *Associated*
10 *Press*, 705 F.2d at 1145 (quoting *Brooklier*, 685 F.2d at 1167). That is because delay
11 *is* a denial of access – “a total restraint on the public’s first amendment right of access
12 even though the restraint is limited in time,” *id.* at 1147 – which, Defendant concedes,
13 requires strict scrutiny. ECF Doc. 61-1 at 28; *U.S. v. Amodeo*, 71 F.3d 1044, 1050 (2d
14 1995) (excluding public “*temporarily or permanently*” from court records must meet
15 test for closure). Consequently, a “slight delay’ in availability” of new complaints
16 cannot constitute “a reasonable time, place, or manner restriction” but must meet the
17 overriding interest test. *Jackson*, 2009 U.S. Dist. LEXIS 62300, *11.

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

26
27 ¹⁵ Defendant also cannot show the interests he asserts are “sufficiently significant” to
28 justify his policy or “that the proposed communicative activity endangers those
interests.” *Klein v. San Clemente*, 584 F.3d 1196, 1202-03 &n.5 (9th Cir. 2009).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV.

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

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

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

It necessarily follows that not only has CNS shown it is entitled to a declaratory judgment as a matter of law on its section 1983 First Amendment claim, but that it will continue to be deprived of its “contemporaneous right of access to court documents” absent injunctive relief. *Co. Doe*, 749 F.3d at 272; *Lugosch*, 435 F.3d at 126 (“Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.”). CNS is therefore entitled to a permanent injunction because it has shown (1) success on the merits, (2) likely irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in its favor and (4)

1 an injunction is in the public interest. *Rosebrock*, 788 F. Supp. 2d at 1145.¹⁶

2 Delays in access constitute irreparable harm. ““The loss of First Amendment
3 freedoms, for even minimal periods of time, unquestionably constitutes irreparable
4 injury.”” *Lugosch*, 435 F.3d at 127 (quoting, e.g., *Elrod v. Burns*, 427 U.S. 347, 373
5 (1976)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009)
6 (reversing denial of injunction and remanding with instructions to issue “appropriate
7 injunction” where, as here, “[t]he harm is particularly irreparable” because ““timing is
8 of the essence”” and “[a] delay of even a day or two may be intolerable””).¹⁷

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

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

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

1 Court has available a variety of simple measures to comply with an injunction
2 granting CNS all or part of the relief requested”). And the Ninth Circuit has
3 “consistently recognized the ‘significant public interest’ in upholding free speech
4 principles,” to protect not only “the free expression interests of [plaintiffs], but also
5 the interests of other[s],” such as the “would-be recipients” of CNS’ reports. *Klein*,
6 584 F.3d at 1208. In sum, “[t]he balance of equities and the public interest thus tip
7 sharply in favor of enjoining [Defendant’s policy].” *Id.*

8 CONCLUSION

9 “Where the precious First Amendment right of freedom of the press is at issue,
10 the prevention of access ... is, each day, an irreparable injury: the ephemeral
11 opportunity to present one’s [report] to an interested audience is lost and the next
12 day’s opportunity is different.” *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154
13 (9th Cir. 1987). While that case involved access to a public forum, federal courts also
14 “emphasize the importance of immediate access [to public records held by a court]
15 where a right to access is found.” *Lugosch*, 435 F.3d at 126 (citing cases).

16 Defendants arguments against enforcing this “important First Amendment right
17 of access,” *Planet I*, 750 F.3d at 786, are weak. “This is not a case in which
18 disclosure would reveal details of an ongoing investigation, pose a risk to witnesses,
19 endanger national security, or reveal trade secrets.” *Bernstein*, 2016 U.S. App. LEXIS
20 3233, *22. Rather, this case simply involves Defendant’s administrative preference
21 for processing complaints before allowing access to them, which cannot overcome the
22 right of timely access. *In re Associated Press*, 172 Fed. App’x. at 5. Plaintiff CNS
23 therefore respectfully requests this Court grant its motion for summary judgment.

24 Dated: March 14, 2016

BRYAN CAVE LLP

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

26 Rachel E. Matteo-Boehm

27 Attorneys for Plaintiff

28 COURTHOUSE NEWS SERVICE