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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

COURTHOUSE NEWS SERVICE, Plaintiff vs. SARA OMUNDSON, in her official capacity as Administrative Director of Idaho Courts, Defendants.	CASE NO. 1:21-CV-00305-REP **REPLY IN SUPPORT OF DEFENDANT SARA OMUNDSON'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6) [DKT. 7]**

I. INTRODUCTION

The First Amendment does not require Idaho's state judicial system "to set aside [its] judicial operational needs to satisfy the immediate demands of the press." *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 586 (9th Cir. 2020) (*Planet III*). Courthouse News Service (CNS) asks this Court to fashion relief by reading an expansion into the qualified right of access set forth by the Ninth Circuit Court of Appeals in the

precedential case, *Planet III*, and in so doing, to interrupt the delicate balance between state and federal comity by issuing declaratory and injunctive relief that would apply broadly across Idaho's state judicial system. For the reasons outlined herein, the Court should either dismiss this action based on CNS's failure to state a cognizable claim under the current law, or decline to exercise jurisdiction over the case.

In *Planet III*, the Ninth Circuit found and held that: 1) the press has a right of timely access to newly filed, nonconfidential civil complaints; 2) that the right is qualified; and 3) that the right attaches when the complaint is filed. *Planet III* at 585. The right of timely access is qualified by the court's interest in the fair and orderly administration of justice. Incidental delays in access are constitutionally permissible when content-neutral and narrowly tailored to preserve the court's interest. *Id*.

In its opposition to Director Omundson's Motion to Dismiss, CNS argues Director Omundson mischaracterized the Ninth Circuit's holding when she argued the qualified First Amendment right of access to nonconfidential civil complaints "that attaches when the complaint is filed" "does not entitle the press to immediate access to those complaints." Mot. to Dismiss, Dkt. 7 at 4. CNS asserts that the Ninth Circuit found the right to access attaches "upon receipt." Opposition to Mot. to Dismiss, Dkt. 11 at 6. Contrary to CNS's argument, Director Omundson does not mischaracterize precedent or seek to sidestep the two-step constitutional test set forth in *Planet III*. Director Omundson asks, instead, that the Court look to the express requests and allegations in CNS's complaint and find that CNS requests relief that is not supported by the Ninth Circuit's holding in *Planet III*.

CNS also asserts that Director Omundson asks the Court to decline to exercise jurisdiction over this case "despite the Ninth Circuit's rejection of abstention *with respect to the same claim*." Dkt. 11 at 6 (emphasis added). What Director Omundson requests, however, is more distinct. Acknowledging precedent, Director Omundson asks that the Court exercise its discretion and consider the precedent "in light of the facts presented" here. Dkt. 7 at 5 (citing *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001)). There are material factual differences between the scope of relief requested in this case and the scope of relief in the *Planet* case.[1] There, the court's order applied to a single county clerk. Here, CNS asks the Court to issue declaratory and injunctive relief that would apply to all clerks' offices in the state of Idaho. Director Omundson argues that, in light of this material difference, the Court should consider whether the exercise of federal jurisdiction disregards the comity between the state of Idaho and the federal government. Director Omundson asks the Court to distinguish precedent on a principled basis.

II. ARGUMENT

A. There is no First Amendment right to the immediate access to newly received civil complaints that CNS demands in its Complaint.

CNS argues the Motion to Dismiss contains a misread of the controlling authority. Dkt. 11 at 11. That is not correct and, rather, Director Omundson's Motion requests a close-read of controlling authority and asks this Court to recognize a distinction between what

[1] Director Omundson refers to the three stages of the *Planet* litigation collectively herein as "*Planet*" when referencing the case's general facts, and otherwise refers specifically to *Planet I*, *Planet II*, and *Planet III* when discussing the discrete arguments and opinions issued in those stages of the *Planet* litigation.

CNS seeks and the contours of the qualified right to timely access to newly filed nonconfidential civil complaints recognized and defined by the Ninth Circuit.

The distinction between the rule announced in *Planet III* and the relief requested in this case is subtle, but meaningful, considered in context of the important balancing of the public's interest in contemporaneous news about filings in the courts versus the state's administrative interests in the fair and orderly processing of such filings. The public shares an interest in the orderly administration of justice—which is the interest court administrators uphold when receiving, reviewing, and filing civil complaints.

The Ninth Circuit's January 17, 2020 opinion, "*Planet III*," was issued after the parties to that case filed cross-appeals from the district court's decision on cross-motions for summary judgment, from which an injunction also issued. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020). The Ninth Circuit reviewed the district court's grant of summary judgment and found "that the qualified right of access to nonconfidential civil complaints arises when they are *filed* with the court." *Id*. at 594 (emphasis added). Importantly, though, the Court clarified that it does "not view that conclusion as demanding immediate, pre-processing access to newly filed complaints." *Id*.

In this case, CNS argues in opposition to the pending motion that the final judgment in *Planet III*, which was issued by the district court, declared that the "qualified right of timely access attaches when new complaints *are received by a court*, rather than after they are 'processed,' and that Planet's policy requiring that newly filed complaints and their associated exhibits be 'processed' prior to providing the press and public with access to

those complaints violates CNS's qualified First Amendment right of timely access to *newly filed* complaints." Dkt. 11 at 5 (emphasis added) (internal citations omitted).

The discrepancy between the Ninth Circuit's opinion, which defined the "qualified right of timely access to *newly filed* civil nonconfidential complaints that attaches when the complaint *is filed*" and the language of the final judgment from the district court was noted by the Ninth Circuit in its review of a proposed amended judgment submitted by the Ventura County clerk. In its review, the Ninth Circuit acknowledged that, "*Planet III* did not address the distinction between 'filed' and 'received' because [the clerk] did not raise the issue, and so [the clerk] abandoned any objection." *Courthouse News Serv. v. Planet*, No. CV118083DMGFFMX, 2021 WL 1605218, at *5 (C.D. Cal. Jan. 26, 2021), *judgment entered*, No. CV118083DMGFFMX, 2021 WL 1605216 (C.D. Cal. Jan. 26, 2021).

For purposes of the judgment, the Ninth Circuit adopted CNS's proposed language on the right of access attaching when complaints are "received by a court" and remanded for the district court to enter the judgment. *Id*. Notably, the Ninth Circuit did so, while also acknowledging within its order on the judgment that "this Court's final judgment should still reflect the full extent of the Ninth Circuit's ruling, including those aspects that limit CNS's relief." *Id*. at *4.

In this case, CNS asserts it is constitutionally entitled to access to non-confidential civil complaints upon receipt. Dkt. 1 ¶ 33. This is akin to arguing that the press – or the public – is entitled to access to paper filings just as they cross a clerk's counter but before they are even assigned a case number. Again, the Ninth Circuit held the qualified First Amendment right to access to nonconfidential civil complaints attaches when they are

filed; not first processed. The court carved out the qualification expressly — the First Amendment does not demand "immediate, pre-processing access to newly filed complaints." *Planet III* at 594. As such, CNS's demand for access prior to filing, upon receipt, is not supported by the clear language of the Ninth Circuit's holding in *Planet III*.

As CNS set forth in its opposition to the pending motion, the legal framework for analyzing CNS's right to access claim is established: "First the court asks whether there is a First Amendment right to the documents at issue and relatedly, at what point in time the right attaches. The Ninth Circuit has provided the definitive answer to this first question: Applying [*Press-Enterprise II*], we conclude that the press as a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed." Dkt. 11 at 11 (internal citations omitted). The distinction in language between "filed" and "received" should not be brushed aside. It is a distinction of note in the balancing framework derived from *Press Enterprise II*. As the Ninth Circuit explained, "… instantaneous public access to court filings, especially complaints, could impair the orderly filing and processing of cases with which clerk's offices are charged." *Planet III* at 596.

CNS bootstraps language from the judgment of the district court to the opinion of the Ninth Circuit to assert that the right to timely access attaches when the complaint is received. *See* Dkt. 11 at 11, n. 3. As reiterated above, that is not what the Ninth Circuit said or held. By asserting such a standard and demanding relief under that non-existent standard, CNS fails to state a claim based on a cognizable legal theory.

B. The Court should abstain in this case because CNS's requested relief would excessively intrude on sensitive state functions.

CNS asserts this claim is "virtually identical [to a] claim CNS filed in California" and as such, this Court must reject Director Omundson's request to abstain. Dkt. 11 at 14. CNS's assertion passes over significant and material distinctions in the scope of relief it requested in the California case and the scope of relief it requests here in Idaho.

In its complaint, CNS asserts Director Omundson has the power to unilaterally effectuate the relief requested. Dkt. 1, ¶¶ 8, 12. However, CNS also acknowledges in its response to the present motion, that, if it has not named the proper parties to effectuate the relief sought, they may be joined pursuant to the Federal Rules of Civil Procedure. Dkt. 11 at 16, n. 7. As a basic premise, that is true; however, the possible necessity of joinder hits the nail on the head because the relief CNS seeks would unjustifiably necessitate a declaratory and injunctive order that would apply across the state of Idaho to each clerk's office. *See* Dkt. 1 at 15.

Accepting CNS's present allegations as true, it asks the Court to issue declaratory and injunctive relief that would apply to Director Omundson, her agents, assistants, successors, employees, and all persons acting in concert or cooperation with her, or at her direction or under her control *in Idaho's state judicial system*. *Id*. This request is materially different from that in *Planet*, where CNS asked the court for relief against one single county clerk ("Michael D. PLANET, in his official capacity as Court Executive Officer/Clerk of the Ventura County Superior Court, Defendant"). *See e.g. Planet I*, 750 F.3d 776; *Planet III*, 947 F.3d 581.

As CNS recognizes in its opposition, there are several federal abstention doctrines. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12, 107 S.Ct. 1519, 1527, 95 L. Ed. 2d 1 (1987); *see e.g. Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L. Ed. 2d 674 (1974); and *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 607–08, 46 L. Ed. 2d 561 (1976).

For instance, the *O'Shea* doctrine is viewed by the Ninth Circuit as standing for the "general proposition" that federal courts "should be very reluctant to grant relief that would entail heavy federal interference in such sensitive state activities as administration of the judicial system." *Planet I*, 750 F.3d 776, 789–90 (9th Cir. 2014) (citing *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir.1992). *O'Shea* "compels abstention" where a plaintiff seeks an "ongoing federal audit" of the state judiciary. *O'Shea* abstention is intimately tied to the relief sought. *Id*. (citing *E.T. v. Cantil–Sakauye*, 682 F.3d 1121, 1124 (9th Cir.2011) (per curiam), *cert. denied*, 133 S.Ct. 476, 184 L.Ed.2d 297 (2012); *see also Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir.2006) ("holding that abstention was required where the relief sought would be overly intrusive in the administration of the New York court system") (internal citations omitted)).

In *Planet I*, as to *O'Shea* abstention, the Ninth Circuit found that the case presented an important First Amendment question involving the right of access to public records and proceedings that should be decided by the federal courts *and that plaintiff's requested relief*

would not excessively intrude on sensitive state functions. *See Planet I*, 750 F.3d 776. The *Planet* case concerned oversight of operations at Ventura County Superior Court. A single court in California. A single clerk. That is not the case here.

As detailed above, in this case, CNS asks the Court to issue declaratory and injunctive relief that would apply to Director Omundson, her agents, assistants, successors, employees, and all persons acting in concert or cooperation with her, or at her direction or under her control in Idaho's state judicial system.[2]

Moreover, if the requested relief were granted, there is the possibility of continuing need for federal oversight of Idaho's entire state judicial system. Thus, CNS's request in this case asks a federal district court to exceed the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Rizzo v. Goode*, 423 U.S. 362, 378-79, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

As stated in Director Omundson's Motion to Dismiss, if the Court grants the relief requested, it would be imposing a significant and meaningful limit on Idaho's state courts, including the independent duties conferred on the state clerks to manage state responsibilities and affairs, which are conferred by the Idaho State Constitution, state statutes, and Idaho Supreme Court rules. As such, the Court should find that CNS's request for the overexpansive federal adjudication of the issue in this lawsuit, which implicates the administration of the entire state judiciary in Idaho's state courts, calls for its abstention.

[2] Again, Director Omundson does not have the authority or control alleged by CNS in its Complaint. Idaho's county clerks are elected officials, who have independent duties and rights conferred by the Constitution of the State of Idaho, state statutes, and Idaho Supreme Court rules. These issues aside, assuming only for purposes of this Motion that Ms. Omundson has the control and authority alleged by CNS – which she does not – the Court should decline to exercise its jurisdiction.

III. CONCLUSION

For the foregoing reasons, Defendant Sara Omundson respectfully requests that the Court grant her Motion to Dismiss.

DATED this 22nd day of October, 2021.

DUKE EVETT, PLLC

By /s/Keely E. Duke
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2021, I served a copy of the foregoing on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing as follows:

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