

2022 WL 593603

Only the Westlaw citation is currently available.

United States District Court, D. Oregon,  
Portland Division.

COURTHOUSE NEWS SERVICE, Plaintiff,

v.

Nancy COZINE, in her official capacity as  
Oregon State Court Administrator, Defendant.

Case No. 3:21-CV-00680-YY

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Signed February 14, 2022

**Attorneys and Law Firms**Jonathan G. Fetterly, Pro Hac Vice, Katherine Keating, Pro  
Hac Vice, Bryan Cave Leighton Paisner LLP, San Francisco,  
CA, Eric D. Lansverk, Hillis Clark Martin & Peterson,  
Seattle, WA, for Plaintiff.Abigail Fallon, Christina L. Beatty-Walters, Carla Scott,  
Oregon Department of Justice, Special Litigation Unit - Trial  
Division, Portland, OR, for Defendant.**FINDINGS AND RECOMMENDATIONS**

YOU, Magistrate Judge.

\*1 Plaintiff Courthouse News Service brings this 42 U.S.C. § 1983 action against the Oregon State Court Administrator, Nancy Cozine (“defendant”), asserting that Oregon state court policies regarding public access to newly filed civil complaints violate the First and Fourteenth Amendments. Compl., ECF 1. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201 (declaratory relief).

Defendant has filed a motion for summary judgment, Mot., ECF 13, which should be DENIED for the reasons discussed below.

**FINDINGS****I. Background Facts and Procedural History**

Plaintiff is a media organization that provides coverage for filings and proceedings in state and federal trial and appellate

courts nationwide. Compl. ¶ 7, ECF 1. As relevant to this case, plaintiff publishes the *Oregon Report*, an evening newsletter featuring news on civil actions filed in this district court and Oregon circuit courts. *Id.* ¶ 16. Defendant, in her capacity as the Oregon State Court Administrator, is responsible for the oversight and administration of Oregon circuit courts. *Id.* ¶ 8.

The crux of this dispute centers on the timeliness of media access to new civil complaints filed in Oregon's circuit courts. Plaintiff alleges that filing procedures associated with mandatory electronic filing (“e-filing”) practices adopted by the Office of the State Court Administrator (“OSCA”), of which defendant is in charge, unconstitutionally infringe upon the media's First Amendment right of access to newly filed civil complaints. *See generally* Compl., ECF 1.

To provide context for plaintiff's allegation, the court first describes the OSCA's past procedures for providing access to complaints physically filed in circuit court, and then illustrates OSCA's current procedures, which require nearly all documents to be e-filed. Prior to the OSCA's adoption of a mandatory e-filing system, litigants who wished to file a civil complaint had to either physically bring their documents or mail them to the courthouse. Cozine Decl. ¶ 5, ECF 14; *see also id.*, Ex. 1, at 1, ECF 14-1. Upon receiving these paper complaints, court staff reviewed the documents for proper form and legibility and checked to ensure the payment or waiver of court fees. *Id.* If these requirements were met, the documents were considered “accepted” and staff began “manual processing,” a procedure that included stamping documents, processing payments, creating and entering case information into the Oregon Judicial Information Network (OJIN), and preparing a physical case file for the court's use. *Id.* As the manual processing occurred, court staff also made non-confidential public documents available for members of the media to review and photocopy.<sup>1</sup> *Id.* This process allowed members of the media, including plaintiff's reporters, to see “all or nearly all of the new civil complaints filed” every day. Brown Decl. ¶ 5, ECF 18.

<sup>1</sup> For example, in Multnomah County Circuit Court, documents collected throughout the day were retained and placed in a physical press review box. At 4:00 p.m. every court day, the clerk's office made this physical press review box available for reporters to review until the courthouse closed. Cozine Decl. ¶ 5, ECF 14; *see also id.*, Ex. 1, at 1, ECF 14-1. At the same time, documents filed and accepted by the court after 4:00 p.m. but before

closing were brought over to reporters who were reviewing filings in a nearby cubicle. *See* Brown Decl. ¶ 5, ECF 18. Documents brought to reporters between 4:00 p.m. and closing “had been stamped ‘filed’ and assigned a case number by the intake clerk, but they were not yet docketed.” *Id.* This process ensured that reporters “saw all or nearly all the new civil complaints filed that day.” *Id.*

\*2 Between 2012 and 2016, OSCA implemented its current e-filing requirements at courts across the state. These requirements mandated that nearly all court documents, including new civil complaints, be e-filed instead of physically submitted to the court. Compl. ¶ 21, ECF 1. Because new civil complaints were being e-filed, Oregon courts ceased their practice of providing physical documents to media reporters for review. Instead, to gain access to new civil complaints, reporters must wait until the complaint is “accepted”<sup>2</sup> and “automated processing” is complete, at which point electronic copies of documents are available via remote access or courthouse computer terminals. Cozine Decl. ¶ 6, ECF 14; *see also id.*, Ex. 1, at 2, ECF 14-1. In the context of this lawsuit, “automated processing” is simply a digitized form of “manual processing”: the court’s systems automatically charge fees, generate party records and case numbers, stamp documents, and create case entries. *See id.*, Ex. 1, at 1-2, ECF 14-1.

<sup>2</sup> Acceptance is the same in both physical and e-filing procedures: it occurs after a court clerk has assessed the documents for proper form and legibility and checked for the payment of fees.

It is the timeliness of the “accepted” and “automated processing” procedures within e-filing that forms the crux of plaintiff’s lawsuit. Defendant alleges that automated processing “automatically happens after acceptance,” ensuring that most complaints are made available to the press within “two to three minutes” of the procedure. Cozine Decl. ¶ 6, ECF 14; *id.*, Ex. 1 at 2, ECF 14-1. Plaintiff, however, has produced evidence of “significant” delays between the time a document is electronically submitted to the court and the time it is made available to media members—delays that are sometimes “several days or longer.” *See* Brown Decl. ¶¶ 11-12, ECF 18. Plaintiff’s allegations revolve around this delay: documents filed in-person at the courthouse under prior OSCA procedures were made available to the media on the same day, while “with e-filing, ... there are regular and ongoing delays” that “can be several days or longer.” *Id.*

## II. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must “go beyond the pleadings” and “designate ‘specific facts showing that there is a genuine issue for trial.’ ” *Id.* at 324 (citing FED. R. CIV. P. 56(e)).

The court “does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial.” *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). “Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party.” *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

## III. Law Regarding First Amendment Right of Access to Court Filings

As an initial matter, the parties agree that the Ninth Circuit’s decision in *Courthouse News Service v. Planet* (“*Planet III*”) provides the applicable standard for evaluating whether a court’s administrative procedures violate the media’s “right of timely access to newly filed nonconfidential complaints.” 947 F.3d 581, 585 (2020). *Planet III* established a two-pronged test for this analysis. First, a reviewing court must determine whether “the qualified First Amendment right of access” exists as to the judicial record in question. In making this determination, the court considers “(1) whether that proceeding or record ‘ha[s] historically been open to the press and general public’ and (2) ‘whether public access plays a significant positive role in the functioning of the particular [governmental] process in question.’ ” *Id.* at 590 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). If both elements are met, a qualified First Amendment right of access attaches to the implicated judicial records, and the reviewing court then considers whether a restriction on that right “is essential to preserve higher values and is narrowly tailored to serve those interests.” *Id.* at 595 (quoting *Press-Enterprise*, 478 U.S. at 13-14). Importantly, here, defendant seeks summary judgment on the first prong alone; in other

words, she has not asked the court to evaluate the second prong, which requires an analysis of whether the OSCA's procedures survive a "balancing test" that is "rigorous, but not strict [ ] scrutiny." *Id.* at 596 (citing *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)).

\*3 While the parties agree on the applicability of *Planet III* to this case, they greatly differ on its persuasive weight to the unique facts of this case. Thus, before analyzing arguments regarding defendant's motion, it is prudent to detail the *Planet* trilogy of cases that form the Ninth Circuit's jurisprudence.

The *Planet* cases involved legal challenges against two distinct case filing procedures adopted by the Ventura County Superior Court in California ("Ventura Court"). In the first procedure, adopted between November 2010 and June 2014, the Ventura Court offered a physical bin where members of the media could access new filings after they had been processed. *Id.* at 586. Before new civil complaints were placed in the bin, however, the Ventura Court required court staff to follow a seven-step procedure:

First, a [court assistant] reviews the documents to determine that the complaint is being filed in the correct court and the documents necessary to initiate the case are presented with the correct filing fee or fee waiver. Second, the [court assistant] enters all the required case information to "create" a new case in [the court's case management system]. Third, all accompanying instruments, for example checks, are entered and the receipt is generated. Fourth, any summons required are issued. Fifth, the documents are stamped as "Filed." Sixth, the labels generated from [the court's case management system] are placed on the physical case file, along with the filing date, courtroom assignment, and case destruction stamp. Finally, the documents are placed in a physical case file.

*Courthouse News Serv. v. Planet*, No. CV1108083SJOFFMX, 2016 WL 4157210, at \*4 n.6 (C.D. Cal. May 26, 2016),

*judgment entered*, No. CV1108083SJOFFMX, 2016 WL 4157354 (C.D. Cal. June 14, 2016), *aff'd in part, rev'd in part and remanded*, 947 F.3d 581 (9th Cir. 2020).

In addition to the seven-step procedure, some complaints were also subjected to a quality check process that took "one to several days to complete." *Id.* at \*4. Further, complaints requiring "immediate judicial review" were immediately sent to judges, with copies of only the first pages of the complaint placed in the physical bin. *Planet III*, 947 F.3d at 586-87. The overall policy created "significant delays between the filing of a complaint and its viability" to the press; certain documented periods had "half of the filed complaints [take] two or more court days to become publicly available." *Id.* at 587.

In June 2014, after the *Planet III* plaintiff filed suit over the seven-step policy, the Ventura Court instituted a new "scanning policy." *Id.* This procedure required court clerks to "scan all new civil complaints before reviewing or processing them." *Id.* The scanned complaints were accessible via computer terminals located in the Ventura Court's clerk's office; press reporters could view the documents during a seven-hour window on the days the court was open. *Id.* Scans of cases filed after the conclusion of each seven-hour window were made available on the terminals the next day. *Id.*

After multiple rounds of litigation, the Ninth Circuit addressed the constitutionality of the Ventura Court's policies in *Planet III*.<sup>3</sup> The court began its analysis by detailing a "long presumed [ ] First Amendment 'right of access to court proceedings and documents.'" *Id.* at 589 (quoting *Oregonian Publishing Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990)). Importantly, this right of access extended to news organizations because the "press serves ... to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)).

3 In the original *Planet* suit, the district court dismissed the case under the *Pullman* and *O'Shea* abstention doctrines. *Courthouse News Serv. v. Planet*, No. CV11-08083 R MANX, 2011 WL 11715054 (C.D. Cal. Nov. 30, 2011). In *Planet I*, the Ninth Circuit reversed the decision to abstain and remanded the case to the district court. 750 F.3d 776 (9th Cir. 2014). Upon remand, the district court "erroneously interpret[ed]" the Ninth Circuit's mandate and "ruled on a different issue entirely." See *Courthouse News Serv. v. Planet*,

No. 2:11-CV-08083-R-MAN, 2014 WL 12740134 (C.D. Cal. Aug. 28, 2014), *rev'd and remanded*, 614 F. App'x 912 (9th Cir. 2015). This led the Ninth Circuit to again reverse in *Planet II* and reassign the case to a different judge. 614 F. App'x 912 (9th Cir. 2015). The new judge ultimately issued a declaratory judgment and permanent injunction in plaintiff's favor, and cross-appeals at the Ninth Circuit followed, resulting in the decision in *Planet III*. *Courthouse News Serv. v. Planet*, No. CV1108083SJOFFMX, 2016 WL 4157354 (C.D. Cal. June 14, 2016), *vacated and remanded*, 947 F.3d 581 (9th Cir. 2020).

\*4 Next, the Ninth Circuit presented its test for evaluating whether “the qualified First Amendment right of access” attaches to a particular judicial record. *Id.* at 590. Such a right exists if (1) the “proceeding or record ha[s] historically been open to the press and general public” and (2) “public access plays a significant positive role in the functioning of the particular [governmental] process in question.” *Id.* at 590 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). If both elements are met, a qualified First Amendment right of access attaches to the implicated judicial records, and the reviewing court then considers whether a restriction on that right “is essential to preserve higher values and is narrowly tailored to serve those interests.” *Id.* at 595.

Importantly, the first question—whether the qualified right of access applies to newly filed civil complaints—was easily resolved in *Planet III*. The Ninth Circuit concluded that “the First Amendment right of access to information reaches civil judicial proceedings and records,” and the parties agreed the Ventura Court had a “long-standing policy of providing timely access to court records” and that “experience and logic support a public right of access to newly filed civil complaints.” *Id.* at 590-91.

However, the parties disagreed as to *when* this qualified First Amendment right attached to newly filed civil complaints. Specifically, the *Planet III* defendant argued the right attached “only at the moment [the pleading becomes] the subject of some type of judicial action.” *Id.* at 591. The Ninth Circuit rejected this argument, finding that “absent ... a substantial showing in the private nature of a judicial record, once documents have been filed in judicial proceedings, a presumption arises that the public has the right to know the information they contain.” *Id.* at 592 (citing *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). In short, the *Planet III* court established that the

media's qualified First Amendment right attached to newly filed civil complaints as soon as they are “filed in judicial proceedings”; the parties in the instant case do not dispute this proposition. *Id.*

After finding that a First Amendment right of access attached to newly filed complaints, the *Planet III* court scrutinized the Ventura Court's two different filing processes. The panel ultimately concluded that only the seven-step process unconstitutionally infringed upon the media's right of access, i.e., the second prong of the analysis; the more recent “scanning” procedure survived scrutiny and was deemed constitutional.<sup>4</sup> *Id.* at 595-600. While making these rulings, however, the court clearly identified the tension between a court's need to administratively process complaints and the media's desire to deliver news to the general public. The panel reasoned:

Though we conclude, as did the district court, that the qualified right of access to nonconfidential civil complaints arises when they are filed with the court, we do not view that conclusion as demanding immediate, pre-processing access to newly filed complaints. At the same time, however, we recognize, like the district court, that a necessary corollary of the right to access is a right to timely access. [The plaintiff's] reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems.

*Id.* at 594. This court recognizes that a similar tension applies to the parties involved in this case.

4 The specific facts and rationale underlying this decision are immaterial to this motion, as defendant does not argue for consideration of this factor while seeking summary judgment.

#### IV. Analysis

\*5 In her motion for summary judgment, defendant posits that the OSCA's procedures do not unconstitutionally infringe upon plaintiff's qualified First Amendment right of access to newly filed civil complaints. Mot., ECF 13. Defendant offers two interlocking arguments to support this claim. First, defendant alleges that e-filed complaints are immediately made available to media reporters after they are considered filed under Oregon law. *Id.* at 6-7. Second, defendant asserts that current procedures associated with e-filing are superior to past procedures involving physically filed complaints, thus warranting summary judgment. *Id.* at 7-8.

#### A. General Applicability of *Planet III*

Defendant first notes that while *Planet III* recognizes a First Amendment right of access for media organizations, the right only attaches to civil complaints *at the time of filing*. Mot. 6, ECF 13. She then alleges the Oregon Uniform Trial Court Rules (UTCRC), the administrative rules that apply to Oregon's circuit courts, differentiate between the electronic "submission" of a document and when the document is considered "filed" by the court. *Id.* at 7. Defendant specifically points to the UTCRC's definition of "electronic filing," which reads:

#### 21.060 FILES OF THE COURT

##### (1) Electronic Filing

(a) The electronic filing of a document is accomplished when a filer submits a document electronically to the court, the electronic filing system receives the document, and the court accepts the document for filing.

(b) When the court accepts the electronic document for filing, the electronic document constitutes the court's record of the document.

OR. UNIF. TRIAL CT. RULES § 21.060 (2022). In short, defendant alleges an e-filed civil complaint is not considered "filed" until court staff examine the pleading for compliance with court regulations and formally accept the document. Thus, defendant argues the OSCA's procedures, which provide public access to documents after they are formally accepted and processed by court clerks, are consistent with *Planet III*'s conclusion that the First Amendment right of access attaches at the time a document is filed.

This argument, while colorable, is unpersuasive for several reasons. First, defendant's position contradicts the language employed in *Planet III*. In describing the district court's

decision, the Ninth Circuit noted that the "right to timely access attaches at the moment of filing, *i.e.*, when the complaint is received by the court." *Planet III*, 947 F.3d at 588 (emphasis added). This description describes a point in time consistent with the UTCRC's definition of when a document is considered "submitted":

#### 21.080 ELECTRONIC FILING AND ELECTRONIC FILING DEADLINES ...

(3) The court considers a document submitted for an electronic filing when the *electronic filing system receives the document*. The electronic filing system will send an email to the filer that includes the date and time of receipt, unless the filer has elected through system settings not to receive the email.

OR. UNIF. TRIAL CT. RULES § 21.060 (2022) (emphasis added). In other words, regardless of various labels and terminology employed by the OSCA, the *Planet III* right of access attaches when the court receives the document; that specific time aligns with the UTCRC's description of when a document is considered "submitted" to the court.

Second, defendant's position on when a document is considered "filed" is inconsistent with the definition of the term. In the judicial context, "filed" is defined as "to *submit* documents necessary to initiate a legal proceeding." *Filed*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/filed> (last visited February 7, 2012) (emphasis added). Importantly, the definition only contemplates the *submission* of the document; it does not consider any review by court personnel. Thus, the plain meaning of "filed" supports the *Planet III* court's holding that the moment of filing occurs when the document is received by the court.

\*6 Third, the Ninth Circuit declined to address the very argument defendant now advances in earlier iterations of the *Planet* jurisprudence. In *Planet II*, the Ventura Court executive offered the following "question presented":

Whether the First Amendment creates a right to access civil complaints on the same day they are received by [Ventura Court] clerks, even before these complaints are processed, filed,

and entered into the court's official records.

Appellee's Ans. 2, Docket Entry 20, *Courthouse News Service v. Planet*, 14-5644 (9th Cir., Dec. 19, 2014). The Ventura Court executive argued that “scanned complaints do not constitute official records ... and may ultimately be rejected for failure to comply with the California Rules of Court” and specified that complaints could become official records “only after they are assigned a case number, stamped ‘filed’ and placed in a file folder.” *Id.* at 21-22 (some internal quotations removed).

Instead of addressing the merits of the presented question, the panel remanded the case yet again because the district “erred” by “narrow[ing] the legal question” to one “divorced from the legal framework discussed in [*Planet I*].” *Courthouse News Serv. v. Planet*, 614 F. App'x 912, 914–15 (9th Cir. 2015).<sup>5</sup> While the Ninth Circuit's actions in *Planet II* did not unequivocally reject the Ventura Court executive's position—a position defendant now adopts—it *did* choose to remand the case instead of finding, for example, that the First Amendment right of access to newly filed civil complaints does not attach until court staff process the document. Thus, the Ninth Circuit's actions in *Planet II* raise significant concern on the overall persuasiveness of the defendant's position.

<sup>5</sup> While *Planet II* is an unpublished opinion, this court cites to it pursuant to Ninth Circuit Rule 36-3.

In addition to the time-of-filing argument discussed above, defendant also opines that the *Planet III* opinion is of little persuasive value when applied to this case. Defendant identifies two distinctions between the facts in the *Planet* trilogy and this action: (1) the implicated procedures in the *Planet* cases only concerned physical filings as opposed to electronic submissions, and (2) Oregon and California's administrative rules surrounding document filing are distinguishable. Mot. 8-9, ECF 13; Reply 2, ECF 21. Defendant alleges that these crucial distinctions make the *Planet* cases “not on all fours” with the present facts. Mot. 9, ECF 13; Reply 4, ECF 21.

While these distinctions do exist, they do not diminish *Planet III*'s value to a point where summary judgment for the defendant is warranted. First, while the procedures analyzed in *Planet III* only involved in-person court filings, the Ninth

Circuit found that a First Amendment right of access applies to all newly filed civil complaints; that right is not affected by the method by which the document was submitted. 947 F.3d at 590-91. If anything, the opinion reinforces the importance of this right as society continues to digitize: the Ninth Circuit recognized that “the need for immediacy of reporting news is even more vital in the digital age, where timeliness is measured in terms of minutes or seconds.” *Id.* at 594 (internal quotation removed). These words suggest the media's right of access to newly filed complaints remains even when a court transitions to mandatory e-filing.

\*7 Second, the parties disagree as to whether substantial differences exist between Oregon and California's court rules surrounding e-filing. *See* Mot. 8-9, ECF 13; Opp. 8-10, ECF 16; Reply 2-4, ECF 21. However, the labels and terminology a state court employs to identify different parts of the filing process cannot have a determinative effect on *when* the First Amendment right of access attaches. Put differently, if defendant's position was correct, court administrators could potentially evade the *Planet III* holding—and abrogate the media's First Amendment right of access—by adopting administrative rules that define a document as “filed” much later in the judicial review process. Such a proposition not only contradicts the Supreme Court's jurisprudence, which makes clear that administrative rules cannot abrogate constitutional rights, but also is antithetical to the importance of media access that *Planet III* identified. *See Washington-S. Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635–36 (1924) (“The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. But no rule of court can ... abrogate or modify the substantive law.”); *Planet III*, 947 F. 3d at 589-92 (discussing the vital role media plays in making the public aware of court filings).

## B. Historical Nature of the Right of Access in Oregon Courts

Defendant also invokes the first factor in the *Planet III* test, and argues the OSCA's current access procedures are superior to previous policies surrounding access to in-person filings. Specifically, defendant argues that current OSCA procedures make documents accessible “from any location in the world, moments after acceptance,” and contends this access is relatively easier than that of prior OSCA policies, which, at minimum, required a reporter to be physically present at the courthouse. Mot. 7, ECF 13.

Defendant's argument is flawed in two respects. First, it mischaracterizes the inquiry that the court employs to assess whether a qualified First Amendment right of access applies to newly filed civil complaints in Oregon courts. The relevant inquiry is simply "whether that proceeding or record has historically been open to the press and general public." *Press-Enterprise*, 478 U.S. at 8. It is not a comparison of whether current procedures are more accessible than historical counterparts; it is simply a question of whether the court system historically made that type of filing available for public review. *See Planet III* at 591 (noting that "Ventura County has a longstanding policy of providing timely access to court records") (internal quotation removed).

Second, even if the inquiry necessitated a comparison of present and former policies, the question of whether current OSCA procedures offer improved access to newly filed complaints remains unresolved. Defendant's pleadings make clear that at least on a theoretical level, access to filings is improved because scanned complaints are immediately available to anyone via remote access. Mot. 7, ECF 13; *see also* Cozine Decl. ¶¶ 5-7, ECF 14. But whether the change has actually improved access is disputed, as plaintiff has provided evidence, obtained through discovery and via declaration, detailing "regular and ongoing delays" of "several days or longer" in accessing e-filed complaints. *See* Brown Decl. ¶¶ 11-12, ECF 18 (alleging that complaints filed in person were made available by the end of the day, while e-filed complaints face delays of "several days or longer").

### C. Availability of Relief

Defendant separately seeks summary judgment by arguing "there is no relief the Court could award to redress [plaintiff's] alleged harm." Mot. 10, ECF 13. Specifically, defendant alleges that plaintiff "asks this court to order OSCA to provide the same access to press as existed before e-filing," and claims plaintiff "already has that access." *Id.*

Defendant's argument is unpersuasive on two grounds. First, as described above, there is an unresolved question of fact as to whether plaintiff currently possesses a similar right of access to newly filed civil complaints to the one it previously held under OSCA's physical filing procedures. Simply put, while defendant may posit that current administrative processes surrounding the availability of e-filed documents are similar to previous policies involving physically filed documents, plaintiff has presented evidence suggesting "regular and ongoing delays" of "several days or longer"

before certain new civil complaints are made available to the public. *See* Brown Decl. ¶ 12, ECF 18.

\*8 Second, defendant mischaracterizes plaintiff's prayer for relief. In addition to a request for declaratory judgment, plaintiff seeks a preliminary and permanent injunction prohibiting defendant from "continuing her policies and practices that deny [plaintiff] timely access to new nonconfidential civil complaints." Compl. 16-17, ECF 1. Plaintiff has not requested that defendant restore a similar right of access to the one that existed prior to the adoption of e-filing; it simply asks that defendant be barred from using practices that unconstitutionally infringe upon the qualified First Amendment right of access described in *Planet III*.

To be clear, this court cannot mandate that defendant provide plaintiff with "immediate, pre-processing access to newly filed complaints." *Planet III*, 947 F.3d at 594. However, "a necessary corollary of the right to access is a right to timely access." *Id.* Defendant, as the movant for summary judgment, bears the burden of demonstrating "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. PRO. 56(a). At a minimum, there remain issues of material fact regarding timely access, and thus, summary judgment is improper at this time.

## RECOMMENDATIONS

For the reasons set forth above, defendant's Motion for Summary Judgment (ECF 13) should be DENIED.

## SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, February 28, 2022. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

## NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

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Slip Copy, 2022 WL 593603

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