

1 Rachel Matteo-Boehm (SBN 195492)
 2 rachel.matteo-boehm@hro.com
 3 David Greene (SBN 160107)
 4 david.greene@hro.com
 5 Leila C. Knox (SBN 245999)
 6 leila.knox@hro.com
 7 HOLME ROBERTS & OWEN LLP
 8 560 Mission Street, Suite 250
 9 San Francisco, CA 94105-2994
 10 Telephone: (415) 268-2000
 11 Facsimile: (415) 268-1999

12 Attorneys for Plaintiff
 13 COURTHOUSE NEWS SERVICE

14 UNITED STATES DISTRICT COURT
 15 CENTRAL DISTRICT OF CALIFORNIA
 16 WESTERN DIVISION

17 Courthouse News Service,

18 Plaintiff,

19 v.

20 Michael D. Planet, in his official capacity
 21 as Court Executive Officer/Clerk of the
 22 Ventura County Superior Court.

23 Defendant.

CASE NO. CV11-08083 R (MANx)

**REPLY BRIEF OF COURTHOUSE
 NEWS SERVICE IN SUPPORT OF
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: Nov. 21, 2011
 Time: 10:00 am
 Courtroom: G-8 (2nd Floor)
 Judge: The Hon. Manuel L. Real

TABLE OF CONTENTS

Page

1

2

3 INTRODUCTION 1

4 RESPONSE TO DEFENDANT’S STATEMENT OF FACTS 2

5 A. Courthouse News Does Not Dispute That Ventura Superior Is

6 Short-Staffed And Facing Serious Budget Difficulties, But

7 Courthouse News Is Not Asking Defendant Or His Staff To Work

8 Faster Or Spend Money 2

9 B. Not Only Does Ventura Superior Bar Access Until After Processing,

10 But Courthouse News Cannot See New Complaints Until After They

11 Have Been “Approved For Public Viewing” 3

12 C. Defendant’s After-The-Fact And Erroneous Analysis Of Delays

13 Based Solely On Computer Records Is Insufficient To Rebut The

14 Delays In Access Courthouse News’ Reporter Personally Observed And

15 Experienced 4

16 D. Defendant’s Focus On E-Filing Is A Red Herring 5

17 I. DEFENDANT MUST BE PRELIMINARILY ENJOINED FROM

18 ENFORCING HIS POLICY OF DENYING COURTHOUSE NEWS

19 SERVICE ACCESS TO NEW CIVIL UNLIMITED COMPLAINTS

20 UNTIL AFTER THE COMPLAINTS HAVE BEEN FULLY PROCESSED 8

21 A. Courthouse News Seeks Only To Preliminarily Enjoin Defendant

22 From Enforcing His Rule That Treats Court Records As Non-Public

23 Until They Have Been Fully Processed; This Is A Prohibitory

24 Injunction 8

25 B. Courthouse News Has Satisfied Each Of The Four Requirements

26 For A Preliminary Injunction 10

27 1. Courthouse News Has Shown A Likelihood Of Success On The

28 Merits, Or At Least Raised Serious Questions, Because Defendant

 Has Not Met His Burden To Satisfy The First Amendments’

 Stringent Test For Justifying Even Temporary Denials Of Access 11

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

- a. The Public Has A First Amendment Right Of Access To Civil Complaints 11
- b. Defendant’s Justifications For His Current Policy Of Denying Access Until After Processing Has Been Completed Are Wholly Insufficient To Satisfy The Strict Three-Part First Amendment Test..... 14
- 2. Absent Injunctive Relief, Courthouse News Will Be Irreparably Harmed..... 18
 - a. Denial Of The First Amendment Right Of Access To Court Records, For Even Minimal Times, Constitutes Irreparable Injury That Supports The Issuance Of A Preliminary Injunction 18
 - b. Courthouse News Will Also Suffer Non-Constitutional Harm If the Preliminary Injunction is Not Granted 21
- 3. The Balance Of Equities Tips In Favor Of Courthouse News 21
- 4. The Preliminary Injunction Will Serve The Public Interest..... 22

- III. THERE IS NO BASIS FOR DEFENDANT’S REQUEST THAT THIS COURT REQUIRE A “SIZEABLE BOND” 23
- CONCLUSION 24

1 **TABLE OF AUTHORITIES**

2 **Page(s)**

3 **FEDERAL CASES**

4 *Alliance For The Wild Rockies v. Cottrell,*
5 632 F.3d 1127 (9th Cir. 2011) 11

6 *Associated Press v. District Court,*
7 705 F.2d 1143 (9th Cir. 1983) 12

8 *Barahona-Gomez v. Reno,*
9 167 F.3d 1228 (9th Cir. 1985) 23

10 *Blanco v. American Academy of Forensic Sciences,*
11 2010 U.S. Dist. LEXIS 20698 (9th Cir. 2010) 10

12 *Cal-Almond, Inc. v. U. S. Department of Agriculture,*
13 960 F.2d 105 (9th Cir. 1992) 20

14 *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency,*
15 766 F.2d 1319 (9th Cir. 1985) 23

16 *California Pharmacists Association v. Maxwell-Jolly,*
17 563 F.3d 847 (9th Cir. 2009) 21

18 *In re Charlotte Observer,*
19 882 F.2d 850 (4th Cir. 1989) 12

20 *Colorado River Indian Tribes v. Town of Parker,*
21 776 F.2d 846 (9th Cir. 1985) 21

22 *Courthouse News Service v. Jackson,*
23 2009 U.S. Dist. LEXIS 62300, 38 Media L. Rep. 1890 (S.D. Tex. 2009)..... 20, 22

24 *Dahl v. HEM Pharmaceuticals Corp.,*
25 7 F.3d 1399 (9th Cir. 1993) 9

26 *Detroit Free Press v. Ashcroft,*
27 303 F.3d 681 (6th Cir. 2002) 20

28 *Elrod v. Burns,*
427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) 19

1 *Gilder v. PGA Tour*,
2 936 F.2d 417 (9th Cir. 1991) 18
3
4 *Globe Newspaper Co. v. Pokaski*,
5 868 F.2d 497 (1st Cir. 1989)..... 13
6
7 *Globe Newspaper Co. v. Superior Court*,
8 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) 19
9
10 *Hartford Courant Co. v. Pellegrino*,
11 380 F.3d 83 (2d Cir. 2004) 20
12
13 *Houchins v. KQED*,
14 438 U.S. 1 (1978)..... 20
15
16 *Huminski v. Corsones*,
17 386 F.3d 116 (2d Cir. 2004) 20
18
19 *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*,
20 998 F.2d 157 (3d Cir. 1993) 15
21
22 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,
23 571 F.3d 873 (9th Cir. 2009) 9
24
25 *Mastrovincenzo v. City of New York*,
26 435 F.3d 78 (2d Cir. 2006) 9
27
28 *New York Civil Liberties Union v. New York City Transit Authority*,
652 F.3d 247 (2d Cir. 2011) 20

Phoenix Newspapers, Inc. v. United States District Court,
156 F.3d 940 (9th Cir. 1998) 12

Press-Enterprise Co v. Superior Court, (“*Press-Enterprise I*”)
464 U.S. 501 (1984)..... 14

Press-Enterprise Co. v. Superior Court, (“*Press-Enterprise II*”)
478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) 13, 20

Publicker Industrial, Inc. v. Cohen,
733 F.2d 1059 (3d Cir. 1984) 20

1 *Richmond Newspapers v. Virginia*,
2 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) 11, 13, 18, 19, 20, 22
3 *Rivera-Puig v. Garcia-Rosario*,
4 983 F.2d 311 (1st Cir. 1992)..... 20
5 *Rocky Mt. Bank v. Google*,
6 2011 U.S. App. LEXIS 7867, 39 Media L. Rep. 1783 (9th Cir. 2011)..... 15
7 *Stuhlbarg International Sales Co. v. John D. Brush & Co.*,
8 240 F.3d 832 (9th Cir. 2001) 21
9 *United States v. Brooklier*,
10 685 F.2d 1162 (9th Cir. 1982) 12
11 *Winter v. Natural Resources Defense Council, Inc.*,
12 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) 10

13 **STATE CASES**

14 *Estate of Hearst*,
15 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977) 13
16 *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*,
17 20 Cal. 4th 1178, 86 Cal. Rptr. 2d 778 (1999) 13, 24
18 *In re NVIDIA*,
19 2008 WL. 1859067 (N.D. Cal. 2008) 17

20 **STATE STATUTES**

21 Cal. Gov't Code § 68150(1) 13
22 Cal. Penal Code § 868..... 13
23
24
25
26
27
28

1 **INTRODUCTION**

2 At bottom, Defendant’s opposition is based on little more than a faulty premise:
3 that processing must precede access to court records.

4 Although Courthouse News disputes Defendant’s erroneous assessment of the
5 extent of the delays in access at Ventura Superior, it does not deny that Ventura
6 Superior is experiencing serious budget shortfalls, or that those shortfalls have led to
7 staffing shortages and other challenges that may delay the processing of new
8 complaints. But whether Defendant has established good cause for those processing
9 delays is not the question before this Court. Courthouse News is not asking
10 Defendant to spend money on extra staff for processing, or for his already-busy staff
11 to process new complaints any faster. All that Courthouse News is seeking is a
12 preliminary injunction directing Defendant to cease his practice of not allowing
13 Courthouse News’ reporter to see the less than ten new unlimited jurisdiction
14 complaints that are filed each day until after they have been fully processed, thereby
15 allowing same-day access to these public records and bringing Ventura Superior in
16 line with the many other state and federal courts across the nation that provide same-
17 day access to new complaints before full processing. Indeed, the failure of
18 Defendant’s premise is evident from the fact that many of these other courts are facing
19 staffing and budget difficulties of their own, but nevertheless do not require reporters
20 who visit the court every day to wait to see new complaints until after those courts
21 have finished the full range of administrative tasks associated with processing.

22 Defendant cannot justify the delays in access at his court in light of the
23 presumptive First Amendment right of access to civil court complaints, or even under
24 the common law right of access. Courthouse News has thus shown a likelihood of
25 success on the merits sufficient to warrant injunctive relief and, as set forth below, has
26 satisfied the other factors that must be considered by this Court as well. Accordingly,
27 this Court should issue a preliminary injunction to prevent the continued deprivation
28 of timely access to public court documents as this case proceeds.

1 timely manner, those difficulties are largely irrelevant to the preliminary injunction
2 that Courthouse News seeks.

3 **B. Not Only Does Ventura Superior Bar Access Until After Processing, But**
4 **Courthouse News Cannot See New Complaints Until After They Have**
5 **Been “Approved For Public Viewing”**

6 Through the Declaration of Cheryl Kanatzar (“Kanatzar Decl.”), on which
7 Defendant relies for much of the evidentiary support for his opposition, Defendant
8 acknowledges that not only does his court not “grant access to ‘partially processed’
9 complaints,” but indeed, that he does not provide access until after a complaint has
10 been both “processed” and “approved for public viewing.” Kanatzar Decl., ¶¶ 21, 35.

11 In addition, although Courthouse News had earlier estimated that an average of
12 fifteen new unlimited jurisdiction complaints are filed each day, Sept. 28, 2011
13 Declaration of Julianna Krolak (“Krolak Decl.”), ¶ 10, according to Defendant, that
14 number is even lower – less than ten unlimited jurisdiction complaints are filed each
15 day.² Before Courthouse News’ reporter can view those complaints, however, they

16
17 ² According to paragraph 14 of the Kanatzar Declaration, Ventura Superior “receives
18 approximately 8 civil unlimited complaints ... on a daily basis.” However, in an email
19 from Court Program Manager Julie Camacho attached as Exhibit H to the Kanatzar
20 Declaration, Ms. Camacho states that the court receives “on average 6” unlimited
21 complaints each day. Most of these complaints are “dropped off” in paper form at the
22 public filing windows and processed by “back counter” Court Processing Assistants
23 (“CPAs”), who are responsible for opening a new file, issuing a case number and
24 providing conformed copies to counsel. Kanatzar Decl., ¶¶ 15, 16. In addition, some
25 complaints (1) are placed in drop boxes located near the clerk’s office in the same
26 building, where civil filings can be placed prior to 5:00 p.m., (2) faxed or emailed to
27 the court, in which case the CPA generates a printout of the document, (3) delivered
28 by messengers in bulk to unattended “Window 14,” or (4) arrive by mail. *Id.*, ¶¶ 4,
13, 31. The fact that there are several entry points for new complaints is typical for
state trial courts. Supplemental Declaration of William Girdner (“Supp. Girdner
Decl.”), ¶ 17. In any event, at Ventura Superior, none of these entry points are very
far away from each other. Supplemental Declaration of Julianna Krolak (“Supp.
Krolak Decl.”), ¶ 12.

1 must be processed by Court Processing Assistants (“CPAs”), after which time they are
2 “approved for public viewing.” In the case of “newly appointed” CPAs, their
3 processing is subject to a “quality control review” (*i.e.*, a double checking process)
4 performed by supervisor, Ms. Martha McLaughlin, who looks for any errors in
5 processing and, if errors are found, returns them back to the newly hired CPA, who
6 then corrects the errors and resubmits the file to the supervisor for approval. This
7 process can “take from one to several days.”³ Kanatzar Decl., ¶¶ 34-35.

8 **C. Defendant’s After-The-Fact And Erroneous Analysis Of Delays Based**
9 **Solely On Computer Records Is Insufficient To Rebut The Delays In**
10 **Access Courthouse News’ Reporter Personally Observed And Experienced**

11 Defendant also disputes the extent of the delays in access at his court, claiming
12 on the basis of an after-the-fact computer analysis performed by his Court Program
13 Manager, Julie Camacho, that Courthouse News’ reporter Julianna Krolak had same-
14 day access to many more complaints than what she actually saw on a same-day basis
15 during the tracking exercise described in her opening declaration, and that many other
16 complaints were available “the day after receipt,” again contrary to what Ms. Krolak
17 actually experienced.⁴

18 In so doing, Defendant is employing a tactic that is all too common in those
19 courts where Courthouse News has experienced delays – outright denial that they exist
20 at all, or an argument that they are not so bad as what Courthouse News is reporting.
21 In most instances, these discrepancies stem from a failure of on-the-ground court staff

22
23 ³ Defendant employs fourteen CPAs, including one hired in August 2011. Kanatzar
24 Decl., ¶¶ 6, 29. However, Ms. Kanatzar does not specify how many CPAs are
25 considered to be “newly appointed” such that the complaints they process are subject
26 to the “quality control” process described in paragraph 34 of her declaration.

27 ⁴ Ms. Camacho does not specify whether her references to the “day after receipt” refer
28 to calendar days or court days. To the extent they refer to court days, even by
Defendant’s own accounting, the “day after receipt” could mean actual delays that are
much longer, given intervening weekends and court holidays.

1 to actually carry out access practices that are supposed to be in place. In this case, Ms.
2 Krolak has, on many occasions, requested to see complaints that, according to Ventura
3 Superior’s California Court Case Management System (“CCMS”), should have
4 already been placed in the media bin, but in fact were not in the media bin and were
5 not available for review. Similarly, Ms. Krolak has on several occasions requested to
6 see complaints that, according to CCMS, were supposed to be on the shelves but were
7 in fact not on the shelves and thus similarly not available for review. Supplemental
8 Declaration of Julianna Krolak (“Supp. Krolak Decl.”), at ¶¶ 8-10. Thus, by
9 Courthouse News’ own experience, the information that Defendant relies on for his
10 assessment of access delays – the CCMS “location history” screen – does not always
11 accurately reflect the actual location of Ventura Superior’s records.

12 Defendant’s assertion of what his *computer records* show is not an adequate
13 basis to contradict the contemporaneous tracking exercise Ms. Krolak personally
14 performed and described in her September 28, 2011 declaration. Krolak Decl., ¶¶ 12-
15 13. Nowhere in Ms. Camacho’s declaration does she state that she personally placed
16 any of the complaints that were the basis of her analysis in the media bin or otherwise
17 verified that particular complaints were in fact placed in the media bin on a particular
18 date. As such, she has no personal knowledge of when a particular complaint was
19 actually put in the bin and made available to Ms. Krolak. In contrast, Ms. Krolak’s
20 tracking exercise was based on her firsthand knowledge of what she personally saw
21 and experienced on her daily visits to Ventura Superior – *i.e.*, it was based entirely on
22 the on-the-ground reality of what was occurring. Krolak Decl., ¶¶ 12-13; *see also*
23 Supp. Krolak Decl., ¶¶ 2-7. Given all of this, Defendant’s assertions that the delays
24 reported by Courthouse News “conflict in every way with what the actual data
25 shows,” Opp. at 5, cannot be credited.

26 **D. Defendant’s Focus On E-Filing Is A Red Herring**

27 Defendant insists that his court is different from other courts that provide same-
28 day access because Ventura Superior is not an e-filing court and is thus “burdened by

1 the substantial administrative task imposed by the need to process by hand every
2 document filed with the court.” Opp. at 2. There are several responses to this.

3 *First*, Defendant suggests that the lack of e-filing at Ventura Superior means his
4 staff faces burdens associated with the need to “process by hand every document filed
5 with the court” above and beyond those faced by other courts. Opp. at 2. But the fact
6 is that many state courts in California and around the country do not have e-filing
7 programs, or only have them for limited case types, and thus similarly “process by
8 hand” every or almost every document filed with the court. Indeed, e-filing is a
9 relatively new invention. For most of the twenty-one years that Courthouse News has
10 been in existence, courts have processed documents “by hand” and have still managed
11 to ensure that news reporters who visit every day have access to the newly filed
12 complaints at the end of the day. *See* Sept. 27, 2011 Declaration of William Girdner
13 (“Girdner Decl.”), ¶ 13 & Exh. 3; Supplemental Declaration of William Girdner
14 (“Supp. Girdner Decl.”), ¶¶ 12-14.

15 *Second*, numerous courts that do not have e-filing programs, or only have e-
16 filing programs for limited case types, currently provide reporters who visit every day
17 with same-day access to new complaints. In California, these courts include, but are
18 not limited to, the superior courts for the counties of Los Angeles, San Francisco,
19 Santa Clara, Alameda, Contra Costa, and Riverside. In all of these courts, all or most
20 of the court filings are, as in Ventura, processed “by hand.” The same is true for many
21 other state courts across the country. Girdner Decl., ¶¶ 13-14, 16 & Exh. 3; Supp.
22 Girdner Decl., ¶¶ 12-14.

23 *Third*, even though federal district courts have largely converted to e-filing,
24 many of these courts, including the Northern and Central Districts of California,
25 continue to require case-initiating documents such as complaints to be filed in
26 traditional paper form. Girdner Decl., ¶¶ 13, 15 & Exh. 3; Supp. Girdner Decl., ¶ 15.

27 *Fourth*, far from improving timeliness of access, e-filing and other electronic
28 technologies often bring with them delays in access, because courts often make e-filed

1 documents available only after various administrative tasks have been completed or
2 after information has been entered into complex electronic case management systems.
3 For example, at the Orange County Superior Court, which like Ventura Superior now
4 uses CCMS and in addition has an e-filing program provided by a private vendor,
5 access to new complaints has been delayed by these electronic technologies, and
6 complex commercial cases, which are required to be e-filed, take even longer on
7 average to be made available for review than paper-filed complaints.⁵ Supp. Girdner
8 Decl., ¶¶ 8, 10. Similarly, at the Eighth Judicial District Court in Las Vegas, reporters
9 saw the majority of new civil complaints on a same-day basis until the court switched
10 to mandatory e-filing. Following that switch, the court began requiring reporters to
11 review new complaints at computer terminals, but this system resulted in complaints
12 not being available for viewing until the day after filing, due to the fact that
13 complaints did not appear on the terminals until after they had been “accepted” by the
14 clerk’s office, and only after the terminals had been updated to reflect the new filings.⁶
15

16 ⁵ Consistent same-day access to new civil complaints used to be the rule in Orange
17 County. In the past, a box with new complaints was delivered to reporters near the
18 end of each court day so that they could review the complaints and, once finished,
19 return them to court staff. The *Los Angeles Times*, the *Orange County Register*, and
20 the *Daily Journal* all checked the new filings, as did Courthouse News. Today, the
21 exclusive means of reviewing new complaints is on computer terminals, where
22 reporters view scanned versions of paper-filed complaints and e-filed complaints after
23 court staff has posted them for public viewing. Most unlimited civil complaints are
24 not made available until at least one court day after filing, and many are delayed
25 longer, with e-filed complex complaints taking longer on average to be made available
26 than paper-filed complaints. Orange County is thus a prime example not only of the
27 tradition of same-day access, but the recent erosion of that tradition in some courts
28 prompted in large part by the very electronic technologies Defendant suggests are
needed to provide timely media access. Supp. Girdner Decl., ¶¶ 8-10.

⁶ After Courthouse News brought these delays to the attention of the court, the court
adopted a new system: an electronic in-box feature at public access terminals at the
courthouse through which reporters see exactly what the clerk’s office sees as new
complaints flow in throughout the day. Complaints can be viewed as soon as they

1 Girdner Decl., ¶ 13 & Exh. 3; Sept. 28, 2011 Declaration of Christopher Marshall
2 (“Marshall Decl.”), ¶ 6; Supp. Girdner Decl., ¶ 11.

3 **I.**

4 **DEFENDANT MUST BE PRELIMINARILY ENJOINED FROM ENFORCING**
5 **HIS POLICY OF DENYING COURTHOUSE NEWS SERVICE ACCESS TO**
6 **NEW CIVIL UNLIMITED COMPLAINTS UNTIL AFTER THE**
7 **COMPLAINTS HAVE BEEN FULLY PROCESSED**

8 As set forth in Courthouse News’ opening memorandum, this Court should
9 issue the requested preliminary injunction barring Defendant from enforcing his
10 policy that newly filed complaints are not public documents, subject to review by
11 Courthouse News and others, until after such records have been fully processed and in
12 some cases subject to a further quality control review. Courthouse News has satisfied
13 all of the requirements for this preliminary injunction to issue.

14 **A. Courthouse News Seeks Only To Preliminarily Enjoin Defendant From**
15 **Enforcing His Rule That Treats Court Records As Non-Public Until They**
16 **Have Been Fully Processed; This Is A Prohibitory Injunction**

17 The parties dispute whether the preliminary injunction is “prohibitory,” that is
18 whether it will prohibit Defendants from acting, or whether it is “mandatory,” that is,
19 it would require Defendant to take certain action. To the extent these labels even
20 matter – Courthouse News is entitled to the preliminary injunction even under a
21 heightened standard – the preliminary injunction Courthouse News seeks is
22 prohibitory.

23 The same four-part test applies regardless of whether the requested preliminary
24 injunction is deemed “prohibitory” or “mandatory.” The only difference in the

25 cross the electronic equivalent of the intake counter at the clerk’s office, even if court
26 staff has not yet reviewed, processed, and/or manually uploaded the complaint for
27 electronic viewing. Girdner Decl., ¶ 13 & Exh. 3; Marshall Decl., ¶ 6. Notably, a
28 return to same-day access was achieved by that court in a manner that mirrors the
preliminary injunctive relief Courthouse News is seeking in this case: the court simply
ceased requiring Courthouse News to wait to see new complaints until after clerk’s
office staff had completed certain processing tasks.

1 analysis is that a truly mandatory preliminary injunction should not be granted “unless
2 the facts and law clearly favor the moving party.” *Dahl v. HEM Pharmaceuticals*
3 *Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (affirming the grant of a mandatory
4 preliminary injunction). But mandatory injunctions remain appropriate where
5 “extreme or very serious damage will result.” *See Marlyn Nutraceuticals, Inc. v.*
6 *Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).

7 Mandatory injunctions are disfavored because they are difficult to undo.
8 *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006). Thus, and
9 because the distinction between prohibitory and mandatory injunctions, as well as
10 determining what is the “status quo,” is largely a matter of semantics, a court
11 distinguishing between the two should focus on whether it will be difficult to reverse
12 the effects of the injunctive relief. *Id.* For this reason, an injunction that merely
13 prevents the government from enforcing an unlawful policy is seen as prohibitory.
14 *See id.* at 90. Such injunctions are easily undone: the agency can just go back to
15 applying its policy should it defeat the lawsuit.

16 As Defendant’s opposition makes clear, there is only one obstacle to Defendant
17 providing Courthouse News and others with same-day access to newly filed civil
18 complaints: his policy that filed records must be “processed, filed and approved for
19 public viewing.” Kanatzar Decl., ¶ 35. *See also* Girdner Decl., ¶ 26 & Exh. 7
20 (Defendant stating policy that records are not approved for public viewing “until the
21 requisite processing is completed.”). Absent the processing-before-access
22 requirement, the records would be available to the press and the public regardless of
23 how many employees the court had available to perform the processing. That is, the
24 records would be accessible while they were awaiting such processing.

25 The preliminary injunction simply seeks to bar Defendant from enforcing this
26 processing-before-access policy, an assertion of its claimed authority to “approve
27
28

1 records for public viewing.”⁷ Should Defendant ultimately win this lawsuit, he can
2 resume his policy of denying access until such processing is completed. As such,
3 there is no reason to apply a heightened standard.

4 Defendant’s arguments to the contrary are without merit. As Defendant notes, a
5 prohibitory injunction is seen as preserving the last uncontested status quo. Opp. at
6 11. The key words are “last uncontested.” See *Blanco v. American Acad. of Forensic*
7 *Sciences*, 2010 U.S. Dist. LEXIS 20698, *5 (9th Cir. 2010) (“Although issuing such an
8 order would technically require an affirmative act on the part of defendant, it would
9 arguably not upset the status quo between the two parties, because their relationship
10 would simply be returned to its pre-conflict state for the duration of these
11 proceedings.”). Defendant’s processing-before-access policy, and the denial by the
12 court of same-day access, has always been contested by Courthouse News. If it is true
13 that Ventura Superior has “never” granted access “to partially processed complaints,”
14 there is no uncontested position – no status quo – to which to return. However, the
15 preliminary injunction would “return” the parties to the historical position in which
16 the press was routinely granted the access that Courthouse News seeks by this action,
17 and by which the public enjoys its undisputed First Amendment right of access.

18 **B. Courthouse News Has Satisfied Each Of The Four Requirements For A**
19 **Preliminary Injunction**

20 As set forth in Courthouse News’ opening memorandum, to obtain a
21 preliminary injunction, the moving party must demonstrate that (1) it is likely to
22 succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of
23 preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is
24 in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25,
25 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

26
27
28 ⁷ Notably, Defendant never cites to the actual preliminary injunction sought, referring
instead to the language of the Complaint and the ultimate relief sought. Opp. at 10.

1 Courthouse News has satisfied each requirement.⁸

2 **1. Courthouse News Has Shown A Likelihood Of Success On The Merits, Or**
3 **At Least Raised Serious Questions, Because Defendant Has Not Met His**
4 **Burden To Satisfy The First Amendment’s Stringent Test For Justifying**
5 **Even Temporary Denials Of Access**

6 Courthouse News has demonstrated that it is highly likely to succeed on the
7 merits of this action. Defendant has conceded that the public has a First Amendment
8 right of access to civil court records. And Courthouse News has demonstrated that
9 Defendant cannot justify denying same-day access to new civil complaints.

10 **a. The Public Has A First Amendment Right Of Access To Civil**
11 **Complaints**

12 As set forth in its opening memorandum, the public has a First Amendment
13 right of access to civil court records, which necessarily includes complaints.
14 Defendant has conceded this point. *See* Mem. of Points and Authorities In Support of
15 Defendant’s Motion to Dismiss, (Docket #21), at 18 (“CNS alleges that it has both a
16 constitutional and common law right of access to court records, and that such access
17 must be timely. Ventura Superior Court does not dispute either proposition.”).⁹

18 That concession is all that is needed for the qualified protection first announced
19 in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-81, 100 S. Ct. 2814, 65 L.
20 Ed. 2d 973 (1980), to attach. In order to overcome the qualified right of access, and
21 permissibly impose delays in access, Defendant must now demonstrate:

22 _____
23 ⁸ Alternatively, if the moving party can only demonstrate “serious questions going to
24 the merits,” rather than a “likelihood of success,” the preliminary injunction may issue
25 nonetheless if the balance of hardships tips sharply toward the movant, so long as
26 there is a likelihood of irreparable injury and the injunction is in the public interest.
27 *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

28 ⁹ Courthouse News also will prevail on its common law claim. However, since
Defendant has conceded the First Amendment right of access, Defendant’s failure to
meet the burden necessary to overcome that right is in itself sufficient for the
preliminary injunction Courthouse News seeks.

- 1 (1) The existence of a right of comparable importance to the First
2 Amendment that is threatened by public access to the court records;
- 3 (2) A substantial probability of irreparable damage to the asserted right will
4 result if access is not withheld; and
- 5 (3) A substantial probability that alternatives to withholding access will not
6 adequately protect the asserted right.

7 *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940, 949 (9th Cir.
8 1998); *Associated Press v. District Court*, 705 F.2d 1143, 1145-46 (9th Cir. 1983);
9 *United States v. Brooklier*, 685 F.2d 1162, 1168-69 (9th Cir. 1982).

10 Defendant, however, attempts to avoid this analysis by framing the “right” of
11 access at issue in a far too limited way. According to Defendant, Courthouse News
12 can only succeed if it has a First Amendment *right of same-day access*. Opp. at 12.

13 This is not the proper analysis. The temporal characteristics of the denial in
14 access are considered in the second part of the analysis, the three-part test for whether
15 the First Amendment right can be abridged in a specific situation. It is not part of the
16 threshold determination of whether the First Amendment right exists at all. The
17 relevant threshold inquiry is not the “tradition” and “logic” of same-day access; it is
18 rather the “tradition “ and “logic” of access to a type of document as a general matter.

19 Thus, in *Associated Press*, the Ninth Circuit first analyzed whether or not the
20 public had a First Amendment right of access to records filed in the course of criminal
21 pre-trial and trial proceedings. Only *after* it answered that threshold question in the
22 affirmative did the Ninth Circuit move on to the second layer of the analysis, that is,
23 whether the trial court’s rule delaying access until after a judicial review of each
24 record was an acceptable infringement on that right. 705 F.2d at 1146. The Ninth
25 Circuit did not look at the public’s “right of same-day access” to such records as a
26 threshold question, as Defendant would have this Court do. Other courts that have
27 analyzed delays in court access have similarly considered the propriety of the delay in
28 the second part of the analysis. *See, e.g., In re Charlotte Observer*, 882 F.2d 850, 856

1 (4th Cir. 1989) (considering whether proposed “minimal delay” was acceptable in light
2 of established First Amendment right of access); *Globe Newspaper Co. v. Pokaski*,
3 868 F.2d 497, 507 (1st Cir. 1989) (considering proposed delay in access as part of
4 least restrictive means analysis); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*,
5 20 Cal. 4th 1178, 1219 & n. 42, 86 Cal. Rptr. 2d 778 (1999) (subjecting a temporary
6 sealing of court records to “exacting First Amendment scrutiny”); *Estate of Hearst*, 67
7 Cal. App. 3d 777, 785, 136 Cal. Rptr. 821 (1977) (considering proposed delay in
8 access as part of least restrictive means analysis). The “tradition” and “logic” analysis
9 presented by Defendant is thus irrelevant.¹⁰

10 Defendant also contends that he need only provide “reasonable” access because
11 (1) that is all California law requires, and (2) the Supreme Court acknowledges
12 “reasonable limitations” in access in *Richmond Newspapers*. Opp. at 15-16. As to the
13 first point, Cal. Gov’t Code § 68150(l), which requires “reasonable access,” certainly
14 cannot operate as a limitation on First Amendment rights. *See Press-Enterprise Co. v.*
15 *Superior Court*, 478 U.S. 1, 13-14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (“*Press-*
16 *Enterprise II*”) (holding that Cal. Penal Code § 868’s allowance of a closed hearing
17 upon a showing of reasonable probability of harm must incorporate the more
18 demanding standards of the three-part test). As to the second point, the later cases that
19 interpreted *Richmond Newspapers*, working off of the formulation proposed by Justice
20 Brennan in his concurrence, articulated the three-part test for the very purpose of
21 determining what those reasonable limitations might be.

22
23
24 ¹⁰ One point in Defendant’s “tradition” analysis does bear a response. Defendant
25 proffers a “Report Card” produced by Courthouse News as evidence of a lack of
26 tradition of same day access. Opp. at 6. However, that report card was produced to
27 document the recent deterioration in access, not as an historical overview of access.
28 *See Supp. Girdner Decl.* at ¶ 4. For example, Orange County historically provided
same-day access, but now has a bad grade because of the recent deterioration in that
access that appears to be largely due to the introduction of CCMS and e-filing. *Id.* at
¶¶ 8-10.

1 Thus, with the fact of the public’s First Amendment right of access to civil
2 complaints established, the question is whether Defendant has met his burden of
3 proving that his particular denial of access – denying public access until after
4 processing – overcomes the presumption of access.

5 **b. Defendant’s Justifications For His Policy Of Denying Access Until**
6 **After Full Processing Are Wholly Insufficient To Satisfy The Strict**
7 **Three-Part First Amendment Test**

8 Although the First Amendment right of access is not absolute, it can only be
9 overcome in “rare” circumstances and “only for cause shown that outweighs the value
10 of openness.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984)
11 (“*Press-Enterprise I*”). As determined by the three-part test set forth above,
12 Defendant has not even come close to overcoming this presumptive right.

13 Beginning at paragraph 30 of her declaration, Ms. Kanatzar lists several reasons
14 why, as she puts it “it is not possible to guarantee ‘same-day access’ to newly filed
15 civil unlimited complaints.” However, this is not a list of reasons why it is not
16 “possible” to grant same-day access. Rather, it is a list of reasons why the *processing*
17 of new complaints may be delayed.¹¹ Only later in her declaration does Ms. Kanatzar
18 finally assert four interests that purportedly justify Defendant’s processing-before-
19 access rule: (1) safety and security of court personnel; (2) ensuring that financial
20 information in fee application waivers is kept private; (3) concerns about filing fee
21

22
23
24 ¹¹ Among these asserted reasons are (1) the need for newly-filed civil complaints to be
25 delivered from their various points of entry into the court to the “new filings desk;”
26 (2) court closures due to budgetary shortfalls; (3) certain other complaints that require
27 initial approvals from a judicial officer; and (4) the “quality control review” process
28 the court uses for newly-appointed CPAs. Kanatzar Decl., ¶¶ 31-34. In addition, Ms.
Kanatzar points to the fact that certain complaints are accompanied by TRO requests
that need to go to judicial officers immediately, *id.* at ¶ 33, but as noted in Courthouse
News’ moving papers, it is not seeking same-day access to these complaints.

1 checks; and (4) the possibility that a complaint received for filing might later be
2 rejected.¹²

3 Even assuming *arguendo* that these interests would satisfy the first prong of the
4 First Amendment test, they do not pass the second or third prongs because for each
5 interest raised, there is no substantial probability of irreparable injury and there are
6 clear alternatives to Defendant’s policy of denying access until after full processing.

7 *First*, Ms. Kanatzar asserts that she cannot let reporters go “behind the counter”
8 to review new civil complaints, and that the court’s “current policies prohibit
9 members of the general public from accessing processing desks where new unlimited
10 civil complaints are maintained prior to processing.” Kanatzar Decl., ¶¶ 35-36. But
11 as is demonstrated by examples of access procedures used by other courts, *see* Girdner
12

13
14 ¹² In the latter part of her declaration, Ms. Kanatzar implies that Courthouse News is
15 somehow requesting to see new complaints before they have been “filed” with the
16 court. Kanatzar Decl., ¶¶ 35, 37-40. To the extent Defendant is somehow suggesting
17 that a document is not “filed” until some undefined point after has been fully
18 processed by court staff, such suggestions have no merit. The right of access to court
19 records attaches when those records are submitted to the court for its consideration
20 and action – an event that has historically been referred to as filing, and sets the
21 relevant date for determining whether that document has been filed in a timely manner
22 under the applicable statute of limitations and other laws and rules. Any technical
23 definition of “filing” that results in the court’s having possession of a document
24 submitted in the context of the court’s adjudicatory powers but that is categorically
25 excluded from public access until some undetermined time as court administrators
26 decide they will make it available for public inspection (even if only for a relatively
27 short time) is antithetical to principles of access guaranteed by the First Amendment.
28 *See, e.g., Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir.
1993) (“by submitting pleadings and motions to the court for decision, one ... exposes
oneself [to] public scrutiny”) (quotation omitted); *accord Rocky Mt. Bank v. Google*,
2011 U.S. App. LEXIS 7867, at *3, 39 Media L. Rep. 1783 (9th Cir. 2011) (common
law right of access applied even though records had been lodged rather than filed;
such documents were judicial records subject to the right of access). Indeed, Ventura
Superior acknowledges this by dating records as having been “filed” on a earlier date
even if the record is not processed until a later date. Kanatzar Decl., ¶¶ 13, 16.

1 Decl., ¶ 13 & Exh. 3, while many courts allow reporters to go behind the counter to
2 review new complaints, and/or allow reporters to remove complaints directly from the
3 desks of intake and processing clerks, there are many ways to provide same-day
4 access that do not involve behind-the-counter access or having reporters directly
5 access complaints on the desks of processing or intake clerks. For example, numerous
6 courts provide same-day access to new complaints by making them available for
7 review for a defined window of time at the end of the day, after which time they can
8 be sent along for further processing. Sometimes complaints are provided in a box or
9 basket; sometimes by some other method. Some courts require the reporter to show or
10 leave collateral (such as a driver’s license or press pass); direct that review be
11 performed in a designated area; comply with a check-out procedure; or even require
12 the reviewing reporter to obtain a security clearance (*e.g.*, a Live-Scan clearance).
13 Girdner Decl., ¶¶ 13-16 & Exh. 3; Marshall Decl., ¶¶ 4-6.¹³

14 But even if permitting Courthouse News’ reporter to go behind the counter
15 and/or directly access processing desks were the only way that same-day access could
16 be provided, the justification offered by Ms. Kanatzar is not sufficient to show why
17 this would not be “workable.” As tragic as the Employment Development
18 Department shooting no doubt was, Ms. Kanatzar fails to offer any specific reason
19 why that isolated incident, no doubt involving an extremely deranged person,
20 somehow translates into the idea that a credentialed reporter who visits the court on a
21 daily basis and has done so for the last ten years is a security risk. Many courts allow
22
23
24

25 ¹³ If Ventura Superior wished, it could further facilitate this process by requiring
26 complaints to be “dropped” in a designated place to make it even easier to retrieve
27 them later in the day, or even by requiring parties to file an extra copy of complaints.
28 Many other variations on this procedure are available as well. Indeed, there are as
many different ways of providing same-day access before full processing as there are
courts. *See* Girdner Decl., ¶¶ 13-16 & Exh. 3; Marshall Decl., ¶¶ 4-6.

1 reporters to go behind the counter and directly access processing desks; if Defendant
2 was really concerned, he could require Ms. Krolak to obtain a security clearance.

3 *Second*, Ms. Kanatzar asserts that Ventura Superior’s practice of delaying
4 access until after full processing is necessary to ensure the “privacy of litigants.”
5 Kanatzar Decl., ¶ 37. But the law is clear that complaints are *public documents*, and
6 “when a plaintiff invokes the Court’s authority by filing a complaint, the public has a
7 right to know who is invoking it, and toward what purpose, and in what manner.” *In*
8 *re NVIDIA*, 2008 WL 1859067, at *3 (N.D. Cal. 2008). As for fee waiver
9 applications, these are separate documents and as evidenced by the fact that other
10 courts handle fee waivers and yet still provide access prior to full processing, there are
11 clearly alternatives for maintaining the confidentiality of these applications that do not
12 require access to the complaints to be delayed. Supp. Girdner Decl., ¶¶ 12-13.

13 *Third*, Ms. Kanatzar claims that allowing access to new complaints until after
14 they have been fully processed would violate Ventura Superior’s “accounting
15 protocols” because filing fee checks are attached to the new complaints until after they
16 are processed. *Id.*, ¶ 38. Again, Ventura Superior is not the only court that handles
17 such checks, and this has not stopped other courts from providing timely access.
18 There are alternatives for addressing this concern short of imposing a no-access-until-
19 full-processing policy. The most common of these is to remove checks from
20 complaints right away. *See* Girdner Decl., ¶ 13 & Exh. 3; Supp. Girdner Decl., ¶ 16.

21 *Fourth*, Ms. Kanatzar asserts that Ventura Superior cannot allow access to
22 complaints until after they have been fully processed because it is possible a
23 complaint might be “rejected” for filing, and allowing access to such complaints
24 would not “ensure and promote public trust and confidence in the Court and its
25 filings.” *Id.*, ¶ 39. As with Defendant’s other justifications for delayed access,
26 Ventura Superior is not the only court that rejects complaints from time to time, and
27 yet this has not stopped other courts from providing reporters with access to new
28 complaints before they have been fully processed. The reason for this is clear: given

1 the importance of the constitutional rights at issue, timely access is appropriate even if
2 it occasionally results in a complaint being reviewed by the press that is later rejected.
3 Ms. Kanatzar offers no reason why this would erode the “public trust and confidence”
4 in the court, and in fact, none exists. Even complaints that are later rejected are public
5 records, access to which enables the public to oversee the court’s diligence and
6 fairness in accepting complaints. *See Richmond Newspapers*, 448 U.S. at 572 (noting
7 public interest in overseeing workings of the courts and observing, that “[p]eople in an
8 open society do not demand infallibility from their institutions, but it is difficult for
9 them to accept what they are prohibited from observing.”).

10 *Finally*, Ms. Kanatzar asserts that Ventura Superior’s current practice of
11 delaying access until after a complaint has been processed “complies with California
12 law,” but as discussed above, neither California’s statutes or rules of court can justify
13 providing a lesser degree of access than is guaranteed by the First Amendment.

14 Thus, Defendant cannot show a “substantial probability” that allowing
15 Courthouse News to access new complaints before full processing would irreparably
16 damage the interests he cites to support his policy of access-after-processing, nor can
17 he show that there are not alternative ways of addressing his concerns that do not
18 involve delaying access until after processing. Accordingly, Courthouse News is
19 likely to succeed on the merits of its First Amendment claim or, at the very least, has
20 raised “serious questions” that “involve a fair chance of success on the merits” so as to
21 justify injunctive relief. *E.g., Gilder v. PGA Tour*, 936 F.2d 417, 422 (9th Cir. 1991).

22 **2. Absent Injunctive Relief, Courthouse News Will Be Irreparably Harmed**

23 Courthouse News has also shown that it will suffer irreparable injury of both a
24 constitutional and non-compensable nature should the injunction not issue.

25 **a. Denial Of The First Amendment Right Of Access To Court Records,
26 For Even Minimal Times, Constitutes Irreparable Injury That
27 Supports the Issuance of A Preliminary Injunction**

28 As set forth in Courthouse News’ opening memorandum, the deprivation of
First Amendment rights, for even minimal periods of time, constitutes irreparable

1 injury. *See Elrod v. Burns*, 427 U.S. 347, 357, 96 S. Ct. 2673, 49 L. Ed. 2d 547
2 (1976). Defendant’s sole basis for opposing this well-established principle is the
3 remarkable assertion that it should not extend to the First Amendment right of access
4 to court records and proceedings because the right of court access is distinct from the
5 right of free speech. Opp. at 17. Defendant is wrong.

6 The Supreme Court, in first articulating the court access right, explained that
7 the First Amendment right of access to court proceedings is derived from and is an
8 essential component of freedom of speech. As the high court’s plurality wrote:

9 Free speech carries with it some freedom to listen. ... What this means in
10 the context of trials is that the First Amendment guarantees of speech and
11 press, standing alone, prohibit government from summarily closing
12 courtroom doors which had long been open to the public at the time that
13 Amendment was adopted.

14 *Richmond Newspapers*, 448 U.S. at 576; *see also id.* at 577 (describing the right of
15 court access as “assured by the amalgam of the First Amendment guarantees of speech
16 and press, and their affinity to the right of assembly is not without relevance.”); *id.* at
17 580 (“We hold that the right to attend criminal trials is implicit in the guarantees of the
18 First Amendment; without the freedom to attend such trials, which people have
19 exercised for centuries, important aspects of freedom of speech and ‘of the press could
20 be eviscerated.’”); *id.* at 587-88 (“The structural model links the First Amendment to
21 that process of communication necessary for a democracy to survive, and thus entails
22 solicitude not only for communication itself, but also for the indispensable conditions
23 of meaningful communication.”) (Brennan, J., concurring) (citation and footnote
24 omitted). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05,
25 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (describing the purpose of the First
26 Amendment right of access as “to ensure that this constitutionally protected
27 ‘discussion of governmental affairs’ is an informed one”).

28 This finding has been echoed by the appellate courts that have applied

1 *Richmond Newspapers* outside of the context of physical access to criminal
2 proceedings. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067 (3d Cir.
3 1984) (civil proceedings and records); *New York Civil Liberties Union v. New York*
4 *City Transit Authority*, 652 F.3d 247, 254 (2d Cir. 2011) (administrative adjudicatory
5 proceedings). *See also Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir.
6 2004); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 322-23 (1st Cir. 1992) (each
7 characterizing court access rights as free speech).

8 As a result, the denial of the constitutional right of court access is an
9 “irreparable injury” that will satisfy that requirement of a preliminary injunction. *See*
10 *Huminski v. Corsones*, 386 F.3d 116, 156 (2d Cir. 2004); *Courthouse News Service v.*
11 *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *13, 38 Media L. Rep. 1890 (S.D. Tex.
12 2009). The irreparable nature of the injury is further pronounced when the denial of
13 access results the media’s inability to bring timely news coverage to the public about
14 newsworthy events. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-95 (6th Cir.
15 2002); Supp. Girdner Decl., ¶¶ 2-3.

16 Defendant further errs in suggesting that the right of access is more properly
17 described by the reasoning of the three-judge plurality of *Houchins v. KQED*, 438
18 U.S. 1, 9-10 (1978), a case decided two years before *Richmond Newspapers*. In
19 *Houchins*, the Court considered the press’s right, above and beyond that of the public,
20 to access certain closed portion of a county jail. *Id.* at 2-3. To the extent the
21 *Houchins* plurality opinion remains good law, it does not accurately describe the
22 constitutional right of access to court and court-like proceedings. *See Cal-Almond,*
23 *Inc. v. U. S. Dep’t of Agriculture*, 960 F.2d 105, 109 n.2 (9th Cir. 1992) (explaining
24 that while *Houchins* says no “general” right of access to governmental information,
25 “the line of cases from *Richmond Newspapers* to *Press-Enterprise II* recognizes that
26 there is a limited constitutional right to some government information”); *Detroit Free*
27 *Press*, 303 F.3d at 710-11 (applying *Richmond Newspapers* instead of *Houchins* to
28 determine right of access to administrative adjudicatory proceeding).

1 **b. Courthouse News Will Also Suffer Non-Constitutional Harm If The**
2 **Preliminary Injunction Is Not Granted**

3 As also set forth in Courthouse News’ opening memorandum, Courthouse
4 News will suffer irreparable harm, independent of its constitutional injury, because its
5 inability to report on new actions in a timely manner will result in a loss of customer
6 goodwill. Although commercial injuries may otherwise be compensable with
7 retrospective monetary relief, because such relief is barred by the 11th Amendment, it
8 is an irreparable injury that will support the issuance of a preliminary injunction. *See*
9 *California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009).

10 Defendant claims that Courthouse News’ loss of goodwill is not concrete, and
11 that Courthouse News must provide evidence that it has already experienced such
12 losses to demonstrate irreparable harm. Opp. at 18. But although the Ninth Circuit
13 requires that a loss of goodwill not be entirely speculative, *Colorado River Indian*
14 *Tribes v. Town of Parker*, 776 F.2d 846, 849-50 (9th Cir. 1985), it does not require
15 that such loss have already occurred or even be certain to occur. It is sufficient that
16 there be evidence of a “threatened” loss of prospective customers and goodwill, and
17 the resulting “possibility of irreparable [harm].” *See Stuhlberg Int’l Sales Co. v. John*
18 *D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001).

19 The evidence that Courthouse News has presented, *see* Girdner Decl., ¶ 28;
20 Supp. Girdner Decl., ¶¶ 2-3, is thus sufficient to establish irreparable harm in the form
21 of an un-compensable loss of goodwill.

22 **3. The Balance Of Equities Tips In Favor Of Courthouse News**

23 As set forth in Courthouse News’ opening memorandum, the balance of
24 equities tips sharply in favor of granting the preliminary injunction. As discussed
25 above, as long as Defendant enforces his processing-before-access policy, the press,
26 and through the press, the public, are denied their First Amendment rights of access
27
28

1 and information about the workings of Ventura Superior.¹⁴

2 Defendant again relies on its financial limitations to tip the balance of equities
3 back in its favor. However, as discussed above, Courthouse News is not asking this
4 Court to make Ventura Superior spend more money, or reassign staff, or make any
5 similar resource adjustment. The problem is not the lack of resources. The problem is
6 Defendant's insistence on denying access to newly filed complaints until after they
7 have been fully processed. As further discussed above, each of the concerns
8 Defendant has about providing access prior to final processing can be addressed in
9 ways that do not infringe on Courthouse News' and the public's First Amendment
10 rights, and do not require Defendant to reallocate his existing resources in any
11 significant way. *See Jackson*, 2009 U.S. Dist. LEXIS 62300, at *14 (concluding
12 injury to Courthouse News outweighed any damage any injunction requiring same-
13 day access could cause Houston court clerk).

14 **4. The Preliminary Injunction Will Serve The Public Interest**

15 Defendant's contention that the public interest will not be served by the
16 preliminary injunction must be rejected on similar grounds.¹⁵ As discussed above,
17

18 ¹⁴ Defendant downplays this constitutional injury by characterizing it as one borne by
19 Courthouse News alone. *Opp.* at 19-20. However, even if Courthouse News'
20 constitutional injury could be so easily dismissed, the contention is inaccurate. As
21 discussed above, Courthouse News and other members of the media function as
22 surrogates for the public, gathering the news on the public's behalf. *Richmond*
23 *Newspapers*, 448 U.S. at 572-73. Moreover, as set forth in Courthouse News'
24 opening memorandum, Courthouse News itself functions as a pool reporter for other
25 members of the media who are not able to send a reporter to the court every day. *See*
26 *Girdner Decl.*, ¶¶ 7, 10 & Exh. 2; Courthouse News' MPA at 5. And news coverage
27 is highly sensitive to delays in access. Where there is timely access; reporters flock to
28 the source of news, and the converse is also true. *Girdner Decl.*, ¶ 32.

¹⁵ Defendant again argues here that the First Amendment right of access is a distinct
right from the right of free speech, and that only the latter strongly serves the public
interest. *Opp.* at 20. As discussed above, that assertion is wrong. *See supra* at
Section II(B)(2)(a).

1 providing Courthouse News and others with access to newly filed complaints before
2 processing has been completed will not harm the public interest in any way. All of
3 Defendant’s concerns can be addressed in ways that do less damage to the
4 constitutional right of access.¹⁶

5 **III.**
6 **THERE IS NO BASIS FOR DEFENDANT’S REQUEST**
7 **THAT THIS COURT REQUIRE A “SIZEABLE BOND”**

8 This Court has “discretion to dispense with the security requirement, or to
9 request mere nominal security, where requiring security would effectively deny access
10 to judicial review.” *Cal. ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766
11 F.2d 1319, 1325 (9th Cir. 1985) (finding proper the district court’s exercise of its
12 discretion to waive bond), *amended on other grounds*, 775 F.2d 998 (9th Cir.);
13 *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1985) (determining nominal
14 \$1,000 bond in class action not to be an abuse of discretion). Indeed, the waiver of
15 bond is proper in any case, such as this one, in which the court concludes that there is
16 no realistic likelihood of harm to the defendant. *Barahona-Gomez*, 167 F.3d at 1237.

17 Defendant requests that the Court require Courthouse News to post a “sizeable
18 bond,” ostensibly to cover the costs “staff resources” that Defendant contends he
19 would be compelled to increase in the event this Court orders injunctive relief. But
20 again, Courthouse News is not asking Defendant to process cases any more quickly,
21 or to hire more staff. Simply requiring Defendant to cease his practice of delaying
22 access to new complaints until full processing does not in and of itself cost a single
23 penny; requiring Defendant to provide same day access to complaints even if they
24 have not yet been fully processed need not involve anything more than *de minimis*

25 _____
26 ¹⁶ Defendant also argues that the granting of the preliminary injunction will create a
27 slippery slope for the granting of more intrusive access rights. Opp. at 22. However,
28 this is irrelevant for the purposes of the propriety of the very limited relief sought
here. But even so, the three-part constitutional scrutiny is designed to help courts
draw bright lines in future cases.

1 costs associated with, for example, purchasing a box where newly-filed complaints
2 could be placed for media review during a defined window of time at the end of the
3 day, together with minimal staff time to walk over new complaints to the box
4 (although this staff time could be eliminated altogether if Courthouse News’ reporter
5 was simply permitted to access the desks of processing and intake clerks as reporters
6 do in other courts). In addition, there might be minimal staff time to accept collateral
7 or oversee a check-out procedure. But none of these things justify the “sizeable bond”
8 Defendant seeks.

9 Moreover, Defendant fails to appreciate that such procedures would *eliminate*
10 the staff time that is currently consumed by current review procedures used by
11 Ventura Superior. *See* Krolak Decl., ¶¶ 6, 9-10. Courts always have and always will
12 devote some resources to comply with the constitutional obligation to make their
13 records open and accessible to the public. *E.g., NBC Subsidiary*, 20 Cal. 4th at 1226
14 (“The need to comply with the requirements of the First Amendment right of access
15 may impose some burdens on trial courts.”). Thus, the relevant question for the
16 purposes of considering the bond question is not what the cost of providing access to
17 court records is, but rather what, if any, additional, incremental cost of providing
18 timely versus delayed access would be.

19 Defendant’s request for a “sizable bond” should thus be rejected, and this Court
20 should waive or at least require only a minimal bond from Courthouse News.

21 CONCLUSION

22 Defendant’s opposition boils down to his insistence that he and his staff cannot
23 possibly do what so many other state and federal courts in California and across the
24 country have been able to accomplish without any undue burden: allow news reporters
25 who visit every day for the specific purpose of reviewing the day’s new complaints to
26 see those new complaints on the same day they are filed, even if the full range of
27 administrative tasks associated with processing those complaints have not yet been
28

1 completed. Such an assertion is simply not credible, let alone sufficient to overcome
2 the First Amendment rights at issue here or even the common law right of access.

3 Not only is Courthouse News highly likely to prevail on the merits of its claims,
4 but as a matter of law, it will suffer irreparable harm absent relief, and the balance of
5 hardships tips decidedly in its favor. Accordingly, Courthouse News respectfully
6 requests that the Court enter the preliminary injunction it has requested: namely that
7 Defendant be preliminarily enjoined from enforcing his policy of denying Courthouse
8 News Service access to new unlimited jurisdiction civil complaints filed at the
9 Ventura County Superior Court until after they have been fully processed and
10 “approved for public viewing,” and that Defendant be further directed to provide
11 Courthouse News’ reporter with access to new unlimited civil complaints no later than
12 the end of the day in which they are filed, except in those instances where the filing
13 party is seeking a TRO or other immediate relief or has properly placed the filing
14 under seal. In addition, for the reasons set forth in its opening memorandum and in
15 this reply brief, Courthouse News also renews its request that the bond requirement be
16 waived or set at a nominal amount.

17 Date: November 7, 2011

HOLME ROBERTS & OWEN LLP
RACHEL MATTEO-BOEHM
DAVID GREENE
LEILA KNOX

18
19
20
21 By: /s/ Rachel Matteo-Boehm
Rachel Matteo-Boehm
Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE