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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COURTHOUSE NEWS SERVICE,

Plaintiff,

v.

MICHAEL PLANET, IN HIS OFFICIAL CAPACITY AS COURT EXECUTIVE OFFICER/CLERK OF THE VENTURA COUNTY SUPERIOR COURT,

Defendant.

Case No. CV11-08083

Assigned for all purposes to Hon. Manuel L. Real

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS AND ABSTAIN

Date: November 21, 2011
Time: 10:00 a.m.
Courtroom: 8

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INTRODUCTION

Before turning to the merits of CNS's Opposition, three overarching points are worthy of preliminary note:

1. CNS agrees that its third claim for relief is barred by the Eleventh Amendment and should have been filed in state court. (Opp. at 23-24.) This claim should be dismissed accordingly.

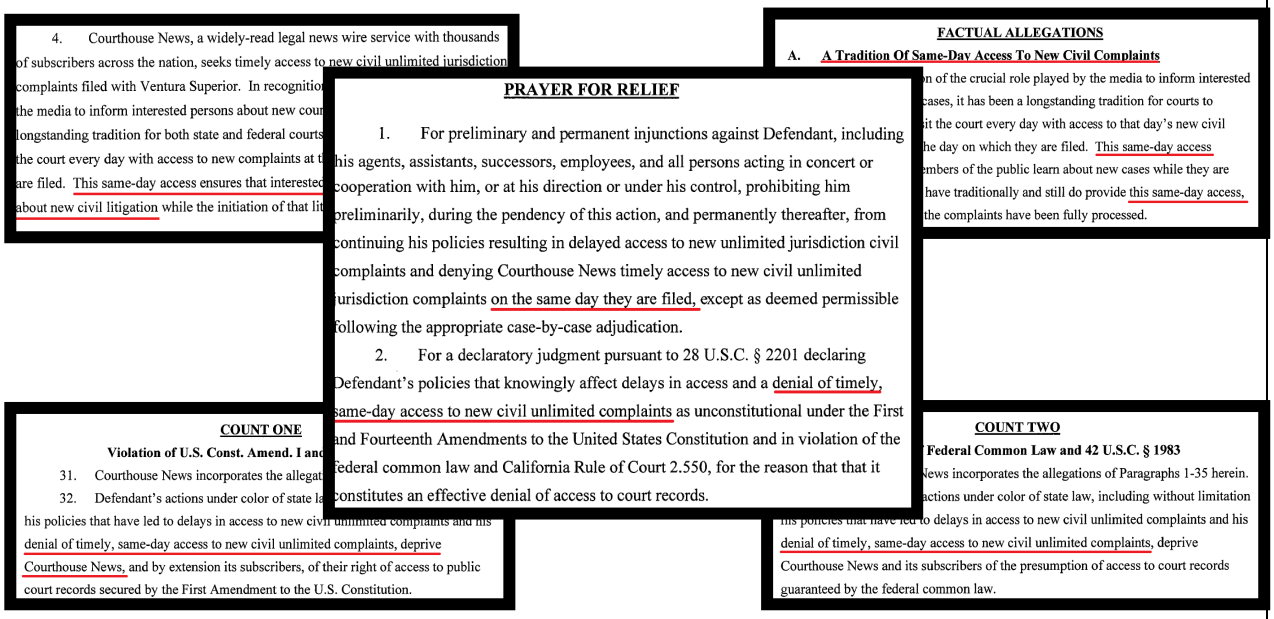
2. Much of CNS's argument, both here and in its motion for preliminary injunction, is premised on the assumption that members of "The Press" have a greater right of access to court records than do members of the general public. (*E.g.* Declaration of Christopher Marshall In Support of Motion For Preliminary Injunction, Ex. 4 at at 23 ("While I am not a lawyer, it is my understanding that . . . the law also recognizes it is appropriate to create *special access procedures* for the media so they can convey that information to other interested members of the legal, academic and business communities").) Hence, CNS argues, it's okay for Ms. Krolak to go behind the counter and to review unfiled documents *before* they are released to the general public, because *she's* a *reporter*, and must therefore have a greater right to know. (*E.g.* Compl. ¶¶ 25 – 26.)

But members of the press simply do *not* enjoy any such right of "special access." To the contrary, the law does *not* grant to CNS or other member of the press any greater right to review court filings than that enjoyed by members of the general public. *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) ("the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally"); *see also Houchins v. KQED, Inc.,* 438 U.S. 1, 12 (1978) (noting that "a claimed *special privilege* of access . . . is not essential to guarantee the freedom to communicate or publish"); *Pell v. Procunier*, 417 U.S. 817, 834, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) ("The Constitution does not … require government to accord the press special access to information not shared by members of the public generally");

Asociación de Periodistas de PR v. Mueller, 529 F. 3d 52, 58 (1st Cir. 2008) (noting that "[t]he First Amendment does not grant the press a special right of access to property beyond the public domain").

And that's the rub of this case. As we demonstrate below, the public only has a *qualified* or *reasonable* right of access to court files. And in this case, CNS does *not* claim that Ventura Superior Court refused to permit Ms. Krolak to review newly filed complaints on the same basis as others of the general public. Instead, CNS explicitly alleges at paragraphs 29 and 30 of its Complaint it took too long for Ventura Superior Court to make these complaints to Ms. Krolak. But because "the challenged policies did not 'deny the press access to sources of information available to members of the general public,' those policies did not violate the First Amendment." *California First Amendment Coalition v. Calderon*, 150 F. 3d 976, 981 (9th Cir 1998).

3. In a transparent attempt to avoid dismissal, CNS now mischaracterizes the relief it seeks, claiming at page 16 of its Opposition that it seeks relief "not just from the denial of same-day access in particular, *but also because of delays in access in general* . . . ." (Opp. at 16:25-28.) While it is true that CNS's complaint provides background facts regarding perceived "delays in access in general," the relief CNS seeks has *nothing* to do with "delays in general." Instead, it is patently clear that the *only* relief CNS seeks is an order *requiring* Ventura Superior Court to provide "same-day access," a phrase that, as the Court can see, is peppered throughout CNS's complaint in general, and emphasized in its prayers for relief in particular:



4. Courthouse News, a widely-read legal news wire service with thousands of subscribers across the nation, seeks timely access to new civil unlimited jurisdiction complaints filed with Ventura Superior. In recognition the media to inform interested persons about new cour longstanding tradition for both state and federal courts the court every day with access to new complaints at t are filed. This same-day access ensures that interested about new civil litigation while the initiation of that lit

FACTUAL ALLEGATIONS

A. A Tradition Of Same-Day Access To New Civil Complaints

n of the crucial role played by the media to inform interested cases, it has been a longstanding tradition for courts to it the court every day with access to that day's new civil he day on which they are filed. This same-day access embers of the public learn about new cases while they are have traditionally and still do provide this same-day access, the complaints have been fully processed.

PRAYER FOR RELIEF

1. For preliminary and permanent injunctions against Defendant, including his agents, assistants, successors, employees, and all persons acting in concert or cooperation with him, or at his direction or under his control, prohibiting him preliminarily, during the pendency of this action, and permanently thereafter, from continuing his policies resulting in delayed access to new unlimited jurisdiction civil complaints and denying Courthouse News timely access to new civil unlimited jurisdiction complaints on the same day they are filed, except as deemed permissible following the appropriate case-by-case adjudication.

2. For a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring Defendant's policies that knowingly affect delays in access and a denial of timely, same-day access to new civil unlimited complaints as unconstitutional under the First and Fourteenth Amendments to the United States Constitution and in violation of the federal common law and California Rule of Court 2.550, for the reason that that it constitutes an effective denial of access to court records.

COUNT ONE

Violation of U.S. Const. Amend. I and

31. Courthouse News incorporates the allegat

32. Defendant's actions under color of state la

his policies that have led to delays in access to new civil unlimited complaints and his denial of timely, same-day access to new civil unlimited complaints, deprive Courthouse News, and by extension its subscribers, of their right of access to public court records secured by the First Amendment to the U.S. Constitution.

COUNT TWO

Federal Common Law and 42 U.S.C. § 1983

News incorporates the allegations of Paragraphs 1-35 herein.

actions under color of state law, including without limitation his policies that have led to delays in access to new civil unlimited complaints and his denial of timely, same-day access to new civil unlimited complaints, deprive Courthouse News and its subscribers of the presumption of access to court records guaranteed by the federal common law.

Under these circumstances, this Court should reject as facile CNS's argument that dismissal is inappropriate because its complaint states "a facially plausible claim to relief" arising from alleged "delays in general." (Opp. at 17:3-5.) It is settled that a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Allegations about "delays in general" that are "merely consistent with" the asserted violation of the alleged right to "same-day access" are insufficient to render them plausible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 173 L. Ed. 2d 868 (2009); *see also Twombly*, 550 U.S. at 563 (stating *Conley v. Gibson*'s "no set of facts" formulation "is best forgotten as an incomplete, negative gloss on an accepted pleading standard" and does not describe "the minimum standard of adequate pleading to govern a complaint's survival").

ARGUMENT

I. ABSTENTION IS WARRANTED UNDER BOTH *O'SHEA* AND *PULLMAN*.

A. *O'Shea* Abstention Is Warranted Here Where CNS's Requested Relief Would Interfere With The Administration of State Courts.

1. CNS Improperly Conflates the *Younger* and *O'Shea* Abstention Doctrines.

CNS contends that *O'Shea*[1] abstention does not apply here because the broad injunctive and declaratory relief it seeks will not highly intrude upon the state judiciary or otherwise prove unworkable. (Opp. at 7-14.) To arrive at this erroneous conclusion, CNS conflates the requirements for *Younger* abstention as applicable to *O'Shea* abstention. (*Id.* at 8-10 & n.4.) No court has so held.

Although *Younger*[2] and *O'Shea* are both borne out of comity and federalism concerns—including avoiding undue intrusion into matters of state concern—they are nevertheless *distinct* abstention doctrines. Unlike *Younger* abstention, which focuses on how granting relief in a federal lawsuit will affect *ongoing state judicial proceedings*, equitable abstention under *O'Shea* is concerned with how the adjudication and relief to be awarded in a federal suit will intrude upon the prerogatives of states to structure and fund their own governmental institutions. *See O'Shea*, 414 U.S. at 500-04 (looking to whether restructuring of state court system required); *E.T. v. Cantil-Sakauye*, No. 10-15248, slip op. 17457, 17464 (9th Cir. Sept. 13, 2011) (invoking *O'Shea* abstention where remedies pertaining to attorney caseloads potentially involved "substantial interference" with operation of state court program, "including allocation of the judicial branch budget, establishment of program priorities, and court administration.").

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[1] *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974).

[2] *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

CNS contends that *O'Shea* abstention is permissible "only if the requested relief meets three conditions,"[3] and that "a court must not abstain unless all of these elements are satisfied." (Opp. at 9 & n.4.) That is simply an inaccurate statement of law. Although courts have identified various factors which militate toward exercising equitable abstention under *O'Shea*, including those identified by CNS, *none* has articulated a multi-factor test for *O'Shea* abstention (as is the case for *Younger* abstention[4]) that must be satisfied prior to its application. *Cf. Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 703 (D.C. Cir. 1984) (concluding a district court should "stay its hand" under *O'Shea* principles "where granting the prayer for relief would require the federal court to monitor day-to-day operations of local courts"); *Parker v. Turner*, 626 F.2d 1, 7-8 (6th Cir. 1980) (finding *O'Shea* abstention appropriate where federal relief would be "intrusive and unworkable," including where such relief would "interfere with the day-to-day conduct of state trials"). Moreover, even where courts *have* articulated a multi-factor test for applying abstention doctrines, the Ninth Circuit has recognized that those tests "have not always captured all the relevant factors, and thus may have obscured rather than clarified the path to proper judicial decisionmaking." *Green v. City of Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001) (en banc)*, overruled on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 968-70 (9th Cir. 2004) (en banc).

Even if the relief CNS seeks may not involve the same degree of structural reform that existed in *O'Shea* or *E.T.* (a point Ventura Superior Court does not concede), mandating that Ventura Superior Court provide CNS with "same-day

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[3] CNS enumerates the criteria as "(1) [the relief sought] will be a major continuing intrusion, (2) it will be unworkable, and (3) it will require the federal court to audit/monitor the state court extensively on an ongoing basis." (Opp. at 9.)

[4] *Younger* abstention is appropriate when (1) state proceedings are ongoing, (2) the proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1357-58 (9th Cir. 1986).

access" to newly filed complaints (*see* Compl. Prayer, ¶¶ 1-2) nevertheless highly intrudes upon the administration of a state's judicial system by dictating how severely limited funds and personnel are to be allocated.[5] To be sure, neither *O'Shea* nor *E.T.* stand as the factual "floor" for invoking abstention. Rather, under the same principles that guided the Court's abstention ruling in *O'Shea* and cases that followed, this Court should likewise "stay its hand." Indeed, federalism concerns are heightened when "a federal court decree [would] ha[ve] the effect of dictating state or local budget priorities." *Horne v. Flores*, 129 S. Ct. 2579, 2593-94, 174 L. Ed. 2d 406 (2009) ("States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."). That is this case.

2. CNS's Requested Relief Clearly Interferes With The Administration Of Ventura Superior Court's Operations.

CNS seeks a mandatory injunction by which this Court would order the Ventura Superior Court to do something *entirely new*—that is, conduct judicial proceedings to determine the constitutionality of any alleged failure by its clerk's office to provide same-day access to newly filed complaints. (*E.g.*, Opp. at 13.) In addition, CNS wants this Court to order the Ventura Superior Court to conduct these new hearings on a "case-by-case basis." (*Id.*; *see also id.* at 18.)

The scope of CNS's requested relief is truly monumental for two related reasons. *First*, the relief CNS requests purports to require Ventura Superior Court to conduct case-by-case access reviews for virtually all newly filed complaints. As

[5] CNS's assertion that many e-filing courts require manually filed complaints, while true, misses the point. (*See* Opp. at 20-21.) It is the fact that most *other* documents can be electronically filed in e-filing courts that distinguishes the ability of those courts to provide same-day access to newly filed complaints from that of Ventura Superior Court. Because the clerk's offices in e-filing courts are not burdened by the substantial administrative task imposed by the need to process by hand the many hundreds of other documents—apart from newly filed complaints—that courts, including Ventura Superior, receive on a daily basis, their ability to provide same-day access to newly filed complaints is necessarily greater.

the Court can see from the following excerpts from paragraphs 29 and 30 of the Complaint, CNS claims that "94 percent of new complaints were *not* available on the day they were filed":

COMPLAINTS REVIEWED
Delays Reported in Calendar Days

Case availability	Number of cases	Percentage
Same-day	9	6%
Next-day	21	14%
2-6 days	94	62%
7-14 days	23	15%
15-34 days	5	3%

30. As reflected in the above charts, 94 percent of new complaints were not available on the day they were filed, with delays stretching up to 34 calendar days.

(Compl. ¶¶ 29 & 30.) That means, by CNS's own allegations, that CNS wants this Court to order Ventura Superior Court to hold a judicial proceeding to evaluate the constitutionality of any delay in access to newly filed complaints in nearly *all instances*.[6]

Second, the mandatory injunction CNS requests effectively makes this Court the overseer of the Ventura Superior Court clerk's office, and places the Superior Court at risk of federal contempt proceedings, at least in cases in which CNS or another member of the public were to challenge the propriety of the Superior Court's case-by-case decisions.

In short, CNS wants this Court to order that Ventura Superior Court judges be pulled away from other proceedings to make case-by-case determinations as to whether "same-day access" is required for a particular newly filed complaint. That sort of disruption intrudes upon state court proceedings in a manner that directly implicates important federalism concerns and warrants abstention under *O'Shea*.

[6] Ventura Superior Court does not, however, concede the accuracy of any of these figures, as detailed in its Opposition to CNS's Motion for Preliminary Injunction at 5.

414 U.S. at 501-02; *see also Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006) ("[T]he relief he now seeks in the federal courts would, if granted, leave 'the state judiciary ... free to craft a remedy in the first instance.' However, any remedy fashioned by the state would then be subject to further challenges in the district court . . . ."); *Pompey v. Broward County*, 95 F.3d 1543, 1546-1553 (11th Cir. 1996) ("[T]he difficulty of framing a useful injunction, when considered in conjunction with the affront to comity that such an injunction would constitute counsels against federal court intervention. [¶] Even if the district court were able to frame such an injunction in a satisfactory way, it would be unwise to do so. It would be unwise, because such an injunction would be at once an insult to the state judges and an empty but potentially mischievous command to these officials to avoid committing any errors[.]") (citations and internal quotations omitted); *Hoover v. Wagner*, 47 F.3d 845, 850-51 (7th Cir. 1995) (abstaining pursuant to *O'Shea* in First Amendment case); *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992) ("If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt? Avoidance of this unseemly conflict between state and federal judges is one reason for *O'Shea* and *Younger*."); *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988) ("[A] federal court ruling on the practices and procedures of the municipal court system . . . would require supervisory enforcement of the ruling by the federal courts. This type of monitoring of state court procedures also offends principles of federalism and was condemned by the Supreme Court in *O'Shea* . . . .").[7]

[7] Moreover, to the extent CNS's "clarified" request for relief actually seeks to enjoin the conduct of state court judges, such relief is barred by the express language of 42 U.S.C. § 1983. *See also Pulliam v. Allen*, 466 U.S. 522, 536-41, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984) ("The other concern raised by collateral injunctive relief against a judge, particularly when that injunctive relief is available through § 1983, relates to the proper functioning of federal-state relations. Federal judges, it is urged, should not sit in constant supervision of the actions of state judicial officers, whatever the scope of authority under § 1983 for issuing an injunction against a judge. . . . We reaffirm the . . . need for restraint by federal

CNS's authority does not compel a contrary conclusion. CNS contends that "federal courts routinely entertain challenges by the media to closure orders," and cites for that proposition inapposite decisions in which federal courts have refused to apply *Younger* abstention where state courts have entered gag, sealing, or protective orders.[8] (Opp. at 13-14.) But as CNS plainly acknowledges, Ventura Superior Court is *not* precluding access to newly filed complaints (Compl. ¶¶ 5, 22-29), nor has it implemented a blanket policy affirmatively restricting the media's access to such documents. The most that can be said, and that CNS has alleged, is that there are, at times, some minimal delays in access. (*Id.*) Thus, the rationale underlying the decisions on which CNS relies is inapplicable here.

CNS also claims that *O'Shea* abstention has been rejected in cases "where the court is merely required to replace an existing rule or policy." (Opp. at 10 & n.6.) The decisions on which CNS relies refused to abstain under *O'Shea* because the relief sought would not involve day-to-day monitoring of state judicial proceedings. *See Family Div. Trial Lawyers*, 725 F.2d at 703-04 (concluding that if challenged rule governing payment of appointed counsel was deemed unconstitutional, the appropriate remedy would merely require state court to reallocate funds *already appropriated for this purpose* and would not involve

(continued…)

courts called on to enjoin the actions of state judicial officers.") (prior to amendment to § 1983 relating to same).

[8] *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 87-89 (2d Cir. 2004) (rejecting application of various abstention doctrines, including *Younger*, where docket sheets and case files were sealed from disclosure); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 319-20 (1st Cir. 1992) (finding *Younger* abstention inapplicable in case challenging constitutionality of state court rule closing all criminal preliminary hearings because there was no interference with any state proceeding against plaintiff); *FOCUS v. Allegheny Court of Common Pleas*, 75 F.3d 834, 837, 843-44 (3d Cir. 1996) (finding *Younger* abstention inapplicable to prevent advocacy group from asserting federal challenge to state court protective order because the group's motion to intervene in underlying state case was denied; therefore, first *Younger* requirement—ongoing state court proceeding—was absent).

"monitoring" of state court); *Mason v. County of Cook*, 488 F. Supp. 2d 761, 765 (N.D. Ill. 2007) (ordering state court to have defendants physically present in courtroom for bond hearings would not require continuing supervision of state court proceedings); *Lake v. Speziale*, 580 F. Supp. 1318, 1330 (D. Conn. 1984) (injunction requiring state court to advise class members of their right to counsel in civil contempt proceedings would not involve ongoing oversight of those proceedings).

But that is not this case. There are practical realities to the "rule" CNS seeks that require far more than a substitution in "policy." They require a mandate for how the limited funds and resources available to Ventura Superior Court for *all* administrative purposes are to be allocated. They further require a mandated case-by-case adjudication by a Ventura Superior Court judge of any delays in access—exactly the sort of intermeddling with state administration that *O'Shea* counsels against.

3. CNS Concedes By Silence That It Has Not Sought Relief In State Court.

O'Shea's equitable abstention doctrine is based in no small part upon the "basic doctrine of equity jurisprudence that of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *O'Shea*, 414 U.S. at 499 (quoting *Younger*, 401 U.S. at 43-44).

In this case, CNS concedes by its silence that it has *not* sued in state court to enforce its alleged right of "same-day access" to newly filed complaints. To be clear, such an action is available under state law. *See, e.g., TrafficschoolOnline, Inc. v. Superior Court*, 89 Cal. App. 4th 222, 236-37 (2001) ("no statute prohibits the superior court from issuing an order to its executive officer"); *De Garmo v. Superior Court*, 1 Cal. 2d 83, 86 (1934) ("the writ should issue against respondent

clerk, the purpose being 'to compel the performance of an act which the law specially enjoins, as a duty resulting' from his office").

It is settled that state courts can and do "safeguard federal constitutional rights." *Middlesex County Ethics Comm'n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982); *see also Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995). It is for these additional reasons that this Court should equitably abstain from hearing this matter, so that it can be resolved in the first instance in state court.

B. *Pullman* Abstention Also Is Warranted Here Where Its Invocation Would Avoid An Unnecessary Ruling On A Federal Constitutional Question.

1. *Pullman* Abstention Has And Can Be Invoked In First Amendment Cases.

CNS first claims that *Pullman*[9] abstention is inappropriate because this is a First Amendment case. However, it is settled that, "[a]lthough courts have avoided abstention in first amendment challenges, there is no absolute rule against abstention in first amendment cases." *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987); *see also Chez Sez III Corp. v. Union*, 945 F.2d 628, 634 (3d Cir. 1991) ("The mere fact that the Ordinance is being challenged on First Amendment grounds is not enough to automatically render *Pullman* abstention inappropriate in this case."). Abstention may not be appropriate in cases in which a delay in adjudication will "chill" First Amendment rights, *e.g.*, *Porter v. Jones*, 319 F.3d 483, 493 (9th Cir. 2003), however, abstention may still be appropriate when the trial court "can fashion its order in a way to reduce those dangers." *Badham v. United States Dist. Court for Northern Dist.*, 721 F.2d 1170, 1174 (9th Cir. 1983).

In this case, CNS has *not* alleged anything that remotely suggests a "chilling" of First Amendment rights. Nor could it. CNS alleges it waited almost *eleven*

[9] *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

months to bring this action once its reporter started her daily visits. In addition, CNS explicitly alleges that whatever delays it may have experienced *did not* "chill" or otherwise prevent the service from issuing its daily reports of new complaint filings in Ventura. In short, *Pullman* abstention is appropriate here because CNS's commercial speech has not been "chilled," and because CNS's claims involve administration of the state judicial system. *Hughes v. Lipscher*, 906 F.2d 961, 967 (3d Cir. 1990).

2. A Decision On The Constitutional Issues In This Case Can Be Obviated By A State Court Decision On Whether "Reasonable Access" Can Only Be "Same-Day Access."

CNS also contends that *Pullman* abstention is inappropriate because "[t]here is no uncertain question of state law that can resolve this case." (Opp. at 15.) In so arguing, CNS states that the California Supreme Court has already determined that the right of access to courts employs the First Amendment analysis developed by the U.S. Supreme Court. (*Id.*) But as discussed more fully below, the U.S. Supreme Court has never held that the First Amendment requires more than *reasonable* access. However, that the Supreme Court has yet to define what constitutes reasonable access under the First Amendment does not mean that a state court could not do so under state law.

Indeed, insofar as "reasonable access" under California Government Code section 68150(l) is not defined under existing law, a state court ruling requiring "same-day access" to newly filed unlimited civil complaints pursuant to that provision likely would obviate, or at least delimit, the federal constitutional question here—a critical element of *Pullman* abstention. *Canton v. Spokane Sch. Dist. #81*, 498 F.2d 840, 845 (9th Cir. 1974) ("With regard to elements (2) and (3) [of the *Pullman* abstention test], it is crucial that the uncertainty in the state law be such that construction of it by the state courts might obviate, or at least delimit, decision of the federal (constitutional) question.").

As the Sixth Circuit recognized in a slightly different context, just because "court clerks have denied [CNS] the relief it seeks does not mean that [California] law would not provide for such access were [CNS] to assert such a right in the [California] courts pursuant to the statutory provisions at issue, which it has not done." *Kentucky Press Ass'n, Inc. v. Commonwealth of Kentucky*, 454 F.3d 505, 509-10 (6th Cir. 2006). This Court should abstain from hearing this matter.

II. CNS HAS FAILED TO ADEQUATELY ALLEGE EITHER A CONSTITUTIONAL OR COMMON LAW RIGHT OF "SAME-DAY ACCESS" TO NEWLY FILED UNLIMITED CIVIL COMPLAINTS.

A. CNS Has Not Established that "Experience and Logic" Recognize a First Amendment Right of "Same-Day Access."

As explained in Ventura Superior Court's Motion to Dismiss, the Supreme Court has identified two related criteria for evaluating whether a First Amendment right of access exists: (1) whether the place and process have historically been open to the press and general public (*i.e.*, "experience"); and (2) whether public access plays a significant positive role in the functioning of the particular process in question (*i.e.*, "logic"). *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588-89, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, Marshall, JJ, concurring). Rather than address either of these criteria, CNS wholly ignores them, assumes a constitutional (and common law) right of "same-day access" exists, and proceeds to argue that any delays in access run afoul of its constitutional right. (Opp. at 2, 18-19.)

1. CNS's Effort to Craft a "Tradition" of Experience from Personal Experience Should be Rejected.

As discussed in Ventura Superior Court's Motion, there is no historic right to "same-day access" of newly filed unlimited civil complaints. (Mot. at 19-20.) Although various federal and state courts have recognized the public's general First Amendment right of access to civil proceedings and related court records, *no* published decision has ever held that access to civil case filings must occur the

same day they are filed or otherwise submitted to a court. (*Id.*) Faced with this fact, CNS mounts two equally anemic arguments that should be rejected.

First, to support its claim of a judicially recognized right to "same-day access" to newly filed civil complaints, CNS resorts to a single, unpublished Texas decision where it obtained the kind of preliminary injunctive relief it seeks here. *Courthouse News Service v. Jackson*, No. H-09-1844, 2009 WL 2163609 1, **2-5, 38 Media L. Rep. 1890 (S.D. Tex. July 20, 2009). However, the reasoning of that decision lacks rational support. Indeed, *none* of the authority on which that district court relied actually held—or even considered whether—a First Amendment right of "same-day access" to newly filed civil complaints exists. At most, the court's discussion of a First Amendment right of access confirms general principles of *reasonable* access in criminal and civil cases. *See id.* at **3-4.

Second, CNS attempts to identify a historic tradition of "same-day access" to newly filed complaints based on its *personal* experience with select state and federal courts during its twenty-one years of business. (Opp. at 19-20; *see* Compl. ¶¶ 10-14.) But it is the *jurisprudential* history, not one's individual history, that determines whether a historic right of access exists. In considering the public's right of access to judicial proceedings or information, the Supreme Court has long grounded its analysis in historical considerations of early American jurisprudence, including traditions pre-dating enactment of the Bill of Rights and the Constitution itself. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-11, 106 S. Ct. 2735, 2741-44, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*) (discussing trial of Aaron Burr and noting that "[f]rom Burr until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court"); *Richmond Newspapers*, 448 U.S. at 565-66 (examining cases brought in England both before and after the Norman Conquest in 1066 and finding "nothing to suggest that the presumptive openness" of English courts "was not also an attribute of the judicial systems of colonial America"). Whether a historical

tradition of access to information exists, then, depends on a longstanding recognition in *our system of justice* that such access is warranted in light of the purposes served by allowing public scrutiny of the information.

CNS's experience with certain courts better able to provide "same-day access" to newly filed complaints is admirable but fails to demonstrate the kind of historic tradition of access relied on by the Supreme Court and lower courts as a basis for recognizing a First Amendment right of access to court records.

2. CNS Has Failed to Allege that "Logic" Compels a Recognized Right of "Same-Day Access."

Despite seeking injunctive and declaratory relief that requires Ventura Superior Court to ensure access to new unlimited civil jurisdiction complaints "on the same day they are filed" (Compl. Prayer ¶¶ 1-2), CNS now argues that the gravamen of its constitutional and common law right of access claims stems "not just from the denial of same-day access in particular," but also from delays in access generally. (Opp. at 16-17.) But CNS fails to allege how *any* purported delays in access adversely affect the "newsworthiness" of the complaints on which it reports (a determination subjectively made by CNS), or how obtaining "same-day access" would improve the functioning of the Ventura Superior Court, which is the appropriate inquiry for the "logic" component of a right.

In *Press Enterprise II*, 478 U.S. at 8, the Supreme Court explained that the "logic" criterion considers "whether public access plays a significant positive role in the functioning of the particular process in question." This consideration is premised on the belief that "governmental processes operate best under public scrutiny." *Id.*; *see Richmond Newspapers*, 448 U.S. at 569-73 (recognizing that public scrutiny over the judicial system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding); *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) ("The value served by the first amendment right of access is in its

guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings.").

CNS fails to allege how the public's interest in scrutinizing the Ventura Superior Court judicial system is in any way harmed or diminished during the minimal period of time between when a complaint is received by the court and the time it is made publicly available upon filing. *See Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) (concluding that "significant news will receive the amount of publicity it warrants . . . *even when such news is not reported contemporaneously with the suspect event*") (emphasis added).[10]

Tellingly, CNS also does not dispute the absence of harm from the reasonable access it receives at Ventura Superior Court. (*See* Mot. at 23.) Indeed, CNS does not identify a single subscriber that has complained of CNS's purportedly delayed reporting. Nor has CNS identified a single instance in which any alleged delay in processing a new complaint meant that CNS lost out on an opportunity to timely report on an event. (*Id.*) In fact, the opposite is true. CNS touts itself as such a trusted source for timely reporting on significant litigation events that numerous other news outlets use CNS's reporting as a springboard for their own reporting, which often occurs many days after CNS's reporting. (*See* Compl. ¶ 17.) There is thus no "logic"-based reason why "same-day access" to newly filed unlimited civil complaints should be constitutionally recognized.

[10] In an attempt to distinguish *Edwards* from this case, CNS again resorts to the unpublished *Jackson* decision (Opp. at 22), which rejected the reasoning in *Edwards* on the basis that the state court's reason for delaying access to newly filed complaints—implementation of an online access service—was not sufficiently significant. *Jackson*, 2009 WL 2163609 at *4. However, for the reasons discussed above, the *Jackson* decision is inapposite and should not be followed. Moreover, any delays in same-day access that CNS experiences at Ventura Superior Court are not chiefly the result of an ongoing attempt by the court to improve its processing and filing system, but of its attempt simply to stay afloat within an already overburdened, underfunded, and understaffed court system.

For all these reasons, CNS's first claim for relief should be dismissed for failure to state a claim upon which relief can be granted.

B. Nor Does Federal Common Law Provide a Right of "Same-Day Access."

As it does with its constitutional claim, CNS conflates a right of *reasonable* access to court records with a right of *"same-day access"*, and contends that because Ventura Superior Court acknowledges that a right to reasonable access exists, it must demonstrate a compelling reason for restricting access. (Opp. at 18 at n.14.) That argument completely overlooks the procedural posture of this case, and the fact that a motion to dismiss challenges the legal sufficiency of claims alleged in a complaint. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) ("The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints . . . .") (internal citation and quotation marks omitted). Thus, for Ventura Superior Court to prevail on its motion does not require it to make *any* showing whatsoever.

Moreover, that Ventura Superior Court acknowledges that a *qualified*, constitutional and common law right of *reasonable* access to civil court records exists is in *no way* an admission that such a right of access equates to a right of "*same-day* access." Indeed, Ventura Superior Court's Motion to Dismiss argues the exact opposite. (*See* Mot. at 18-23.) And, as with its constitutional claim, CNS fails to identify any authority that would support a common law right of access claim for failure to provide "same-day access" to newly filed unlimited civil complaints. Thus, CNS's second claim for relief should also be dismissed.

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CONCLUSION

For the foregoing reasons, as well as CNS's voluntary dismissal of its third cause of action under state law, Ventura Superior Court's motion to abstain and dismiss should be granted, and the Court should dismiss this action in its entirety.

Dated: November 7, 2011

Respectfully submitted,

JONES DAY

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MICHAEL PLANET, IN HIS OFFICIAL CAPACITY AS COURT EXECUTIVE OFFICER/CLERK OF THE VENTURA COUNTY SUPERIOR COURT

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