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 11 COUNTY SUPERIOR COURT

11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

14 COURTHOUSE NEWS SERVICE,
 15 Plaintiff,
 16 v.
 17 MICHAEL PLANET, IN HIS
 18 OFFICIAL CAPACITY AS COURT
 19 EXECUTIVE OFFICER/CLERK OF
 20 THE VENTURA COUNTY
 21 SUPERIOR COURT,
 22 Defendant.

Case No. CV11-08083
 Assigned for all purposes to
 Hon. Manuel L. Real
**DEFENDANT’S CORRECTED
 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

1
2 Before turning to the merits of CNS’s Opposition, three overarching points
3 are worthy of preliminary note:

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

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

18 But members of the press simply do *not* enjoy any such right of “special
19 access.” To the contrary, the law does *not* grant to CNS or other member of the
20 press any greater right to review court filings than that enjoyed by members of the
21 general public. *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S. Ct. 2646, 33 L. Ed.
22 2d 626 (1972) (“the First Amendment does not guarantee the press a constitutional
23 right of special access to information not available to the public generally”); *see*
24 *also Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (noting that “a claimed *special*
25 *privilege* of access . . . is not essential to guarantee the freedom to communicate or
26 publish”); *Pell v. Procunier*, 417 U.S. 817, 834, 94 S. Ct. 2800, 41 L. Ed. 2d 495
27 (1974) (“The Constitution does not . . . require the government to accord the press
28 special access to information not shared by members of the public generally”);

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

4 And that’s the rub of this case. As we demonstrate below, the public only
5 has a *qualified* or *reasonable* right of access to court files. And in this case, CNS
6 does *not* claim that Ventura Superior Court refused to permit Ms. Krolak to review
7 newly filed complaints on the same basis as others of the general public. Instead,
8 CNS explicitly alleges at paragraphs 29 and 30 of its Complaint it took too long for
9 Ventura Superior Court to make these complaints to Ms. Krolak. But because “the
10 challenged policies did not ‘deny the press access to sources of information
11 available to members of the general public,’ those policies did not violate the First
12 Amendment.” *California First Amendment Coalition v. Calderon*, 150 F. 3d 976,
13 981 (9th Cir 1998).

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

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

FACTUAL ALLEGATIONS
A. A Tradition Of Same-Day Access To New Civil Complaints
of the crucial role played by the media to inform interested
cases, it has been a longstanding tradition for courts to
sit the court every day with access to that day's new civil
complaints on the day on which they are filed. This same-day access
members 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 alleged
32. Defendant's actions under color of state law
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
Courthouse 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.

12
13 Under these circumstances, this Court should reject as facile CNS's argument
14 that dismissal is inappropriate because its complaint states "a facially plausible
15 claim to relief" arising from alleged "delays in general." (Opp. at 17:3-5.) It is
16 settled that a complaint must allege "enough facts to state a claim to relief that is
17 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 127 S. Ct.
18 1955, 167 L. Ed. 2d 929 (2007). Allegations about "delays in general" that are
19 "merely consistent with" the asserted violation of the alleged right to "same-day
20 access" are insufficient to render them plausible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
21 1949 173 L. Ed. 2d 868 (2009); *see also Twombly*, 550 U.S. at 563 (stating *Conley*
22 *v. Gibson's* "no set of facts" formulation "is best forgotten as an incomplete,
23 negative gloss on an accepted pleading standard" and does not describe "the
24 minimum standard of adequate pleading to govern a complaint's survival").
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1 ARGUMENT

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

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

6 1. **CNS Improperly Conflates The *Younger* And *O'Shea***
7 **Abstention Doctrines.**

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

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

26
27 ¹ *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974).

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

1 CNS contends that *O’Shea* abstention is permissible “only if the requested
2 relief meets three conditions,”³ and that “a court must not abstain unless all of these
3 elements are satisfied.” (Opp. at 9 & n.4.) That is simply an inaccurate statement
4 of law. Although courts have identified various factors which militate toward
5 exercising equitable abstention under *O’Shea*, including those identified by CNS,
6 none has articulated a multi-factor test for *O’Shea* abstention (as is the case for
7 *Younger* abstention⁴) that must be satisfied prior to its application. *Cf. Family Div.*
8 *Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 703 (D.C.
9 Cir. 1984) (concluding a district court should “stay its hand” under *O’Shea*
10 principles “where granting the prayer for relief would require the federal court to
11 monitor day-to-day operations of local courts”); *Parker v. Turner*, 626 F.2d 1, 7-8
12 (6th Cir. 1980) (finding *O’Shea* abstention appropriate where federal relief would
13 be “intrusive and unworkable,” including where such relief would “interfere with
14 the day-to-day conduct of state trials”). Moreover, even where courts *have*
15 articulated a multi-factor test for applying abstention doctrines, the Ninth Circuit
16 has recognized that those tests “have not always captured all the relevant factors,
17 and thus may have obscured rather than clarified the path to proper judicial
18 decisionmaking.” *Green v. City of Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001) (en
19 banc), *overruled on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 968-70
20 (9th Cir. 2004) (en banc).

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

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

27 ⁴ *Younger* abstention is appropriate when (1) state proceedings are ongoing,
28 (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).

1 access” to newly filed complaints (*see* Compl. Prayer, ¶¶ 1-2) nevertheless highly
2 intrudes upon the administration of a state’s judicial system by dictating how
3 severely limited funds and personnel are to be allocated.⁵ To be sure, neither
4 *O’Shea* nor *E.T.* stand as the factual “floor” for invoking abstention. Rather, under
5 the same principles that guided the Court’s abstention ruling in *O’Shea* and cases
6 that followed, this Court should likewise “stay its hand.” Indeed, federalism
7 concerns are heightened when “a federal court decree [would] ha[ve] the effect of
8 dictating state or local budget priorities.” *Horne v. Flores*, 129 S. Ct. 2579, 2593-
9 94, 174 L. Ed. 2d 406 (2009) (“States and local governments have limited funds.
10 When a federal court orders that money be appropriated for one program, the effect
11 is often to take funds away from other important programs.”). That is this case.

12
13 **2. CNS’s Requested Relief Clearly Interferes With The
Administration Of Ventura Superior Court’s Operations.**

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

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

23
24 ⁵ CNS’s assertion that many e-filing courts require manually filed complaints,
25 while true, misses the point. (*See* Opp. at 20-21.) It is the fact that most *other*
26 documents can be electronically filed in e-filing courts that distinguishes the ability
27 of those courts to provide same-day access to newly filed complaints from that of
28 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.

1 the Court can see from the following excerpts from paragraphs 29 and 30 of the
2 Complaint, CNS claims that “94 percent of new complaints were *not* available on
3 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%

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

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

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

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

26
27 ⁶ Ventura Superior Court does not, however, concede the accuracy of any of
28 these figures, as detailed in its Opposition to CNS’s Motion for Preliminary
Injunction at 5.

1 414 U.S. at 501-02; *see also Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006) (“[T]he
2 relief he now seeks in the federal courts would, if granted, leave ‘the state judiciary
3 ... free to craft a remedy in the first instance.’ However, any remedy fashioned by
4 the state would then be subject to further challenges in the district court”);
5 *Pompey v. Broward County*, 95 F.3d 1543, 1546-1553 (11th Cir. 1996) (“[T]he
6 difficulty of framing a useful injunction, when considered in conjunction with the
7 affront to comity that such an injunction would constitute counsels against federal
8 court intervention. [¶] Even if the district court were able to frame such an
9 injunction in a satisfactory way, it would be unwise to do so. It would be unwise,
10 because such an injunction would be at once an insult to the state judges and an
11 empty but potentially mischievous command to these officials to avoid committing
12 any errors[.]”) (citations and internal quotations omitted); *Hoover v. Wagner*, 47
13 F.3d 845, 850-51 (7th Cir. 1995) (abstaining pursuant to *O’Shea* in First
14 Amendment case); *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992) (“If a state
15 judge does not obey a district judge’s injunction, are we willing to jail the state
16 judge for contempt? Avoidance of this unseemly conflict between state and federal
17 judges is one reason for *O’Shea* and *Younger*.”); *Ballard v. Wilson*, 856 F.2d 1568,
18 1570 (5th Cir. 1988) (“[A] federal court ruling on the practices and procedures of
19 the municipal court system . . . would require supervisory enforcement of the ruling
20 by the federal courts. This type of monitoring of state court procedures also offends
21 principles of federalism and was condemned by the Supreme Court in *O’Shea* . . .
22 .”).⁷

23
24 ⁷ Moreover, to the extent CNS’s “clarified” request for relief actually seeks to
25 enjoin the conduct of state court judges, such relief is barred by the express
26 language of 42 U.S.C. § 1983. *See also Pulliam v. Allen*, 466 U.S. 522, 536-41,
27 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984) (“The other concern raised by collateral
28 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

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

11 CNS also claims that *O'Shea* abstention has been rejected in cases "where
12 the court is merely required to replace an existing rule or policy." (Opp. at 10 &
13 n.6.) The decisions on which CNS relies refused to abstain under *O'Shea* because
14 the relief sought would not involve day-to-day monitoring of state judicial
15 proceedings. *See Family Div. Trial Lawyers*, 725 F.2d at 703-04 (concluding that if
16 challenged rule governing payment of appointed counsel was deemed
17 unconstitutional, the appropriate remedy would merely require state court to
18

19 _____
(continued...)

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

22 ⁸ *See, e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 87-89 (2d Cir.
23 2004) (rejecting application of various abstention doctrines, including *Younger*,
24 where docket sheets and case files were sealed from disclosure); *Rivera-Puig v.*
25 *Garcia-Rosario*, 983 F.2d 311, 319-20 (1st Cir. 1992) (finding *Younger* abstention
26 inapplicable in case challenging constitutionality of state court rule closing all
27 criminal preliminary hearings because there was no interference with any state
28 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).

1 reallocate funds *already appropriated for this purpose* and would not involve
2 “monitoring” of state court); *Mason v. County of Cook*, 488 F. Supp. 2d 761, 765
3 (N.D. Ill. 2007) (ordering state court to have defendants physically present in
4 courtroom for bond hearings would not require continuing supervision of state
5 court proceedings); *Lake v. Speziale*, 580 F. Supp. 1318, 1330 (D. Conn. 1984)
6 (injunction requiring state court to advise class members of their right to counsel in
7 civil contempt proceedings would not involve ongoing oversight of those
8 proceedings).

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

16 **3. CNS Concedes By Silence That It Has Not Sought Relief In** 17 **State Court.**

18 *O’Shea’s* equitable abstention doctrine is based in no small part upon the
19 “basic doctrine of equity jurisprudence that of equity should not act . . . when the
20 moving party has an adequate remedy at law and will not suffer irreparable injury if
21 denied equitable relief.” *O’Shea*, 414 U.S. at 499 (quoting *Younger*, 401 U.S. at
22 43-44).

23 In this case, CNS concedes by its silence that it has *not* sued in state court to
24 enforce its alleged right of “same-day access” to newly filed complaints. To be
25 clear, such an action is available under state law. *See, e.g., TrafficschoolOnline,*
26 *Inc. v. Superior Court*, 89 Cal. App. 4th 222, 236-37 (2001) (“no statute prohibits
27 the superior court from issuing an order to its executive officer”); *De Garmo v.*
28

1 *Superior Court*, 1 Cal. 2d 83, 86 (1934) (“the writ should issue against respondent
2 clerk, the purpose being ‘to compel the performance of an act which the law
3 specially enjoins, as a duty resulting’ from his office”).

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

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

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

15 CNS first claims that *Pullman*⁹ abstention is inappropriate because this is a
16 First Amendment case. However, it is settled that, “[a]lthough courts have avoided
17 abstention in first amendment challenges, there is no absolute rule against
18 abstention in first amendment cases.” *Almodovar v. Reiner*, 832 F.2d 1138, 1140
19 (9th Cir. 1987); *see also Chez Sez III Corp. v. Union*, 945 F.2d 628, 634 (3d Cir.
20 1991) (“The mere fact that the Ordinance is being challenged on First Amendment
21 grounds is not enough to automatically render *Pullman* abstention inappropriate in
22 this case.”). Abstention may not be appropriate in cases in which a delay in
23 adjudication will “chill” First Amendment rights, *e.g.*, *Porter v. Jones*, 319 F.3d
24 483, 493 (9th Cir. 2003), however, abstention may still be appropriate when the
25 trial court “can fashion its order in a way to reduce those dangers.” *Badham v.*
26 *United States Dist. Court for Northern Dist.*, 721 F.2d 1170, 1174 (9th Cir. 1983).

27 _____
28 ⁹ *Railroad Comm’n of Texas v. Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L.
Ed. 971 (1941).

1 In this case, CNS has *not* alleged anything that remotely suggests a “chilling”
2 of First Amendment rights. Nor could it. CNS alleges it waited almost *eleven*
3 *months* to bring this action once its reporter started her daily visits. In addition,
4 CNS explicitly alleges that whatever delays it may have experienced *did not* “chill”
5 or otherwise prevent the service from issuing its daily reports of new complaint
6 filings in Ventura. In short, *Pullman* abstention is appropriate here because CNS’s
7 commercial speech has not been “chilled,” and because CNS’s claims involve
8 administration of the state judicial system. *Hughes v. Lipscher*, 906 F.2d 961, 967
9 (3d Cir. 1990).

10
11 **2. A Decision On The Constitutional Issues In This Case Can**
12 **Be Obviated By A State Court Decision On Whether**
13 **“Reasonable Access” Can Only Be “Same-Day Access.”**

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

23 Indeed, insofar as “reasonable access” under California Government Code
24 section 68150(l) is not defined under existing law, a state court ruling requiring
25 “same-day access” to newly filed unlimited civil complaints pursuant to that
26 provision likely would obviate, or at least delimit, the federal constitutional
27 question here—a critical element of *Pullman* abstention. *Canton v. Spokane Sch.*
28 *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

1 such that construction of it by the state courts might obviate, or at least delimit,
2 decision of the federal (constitutional) question.”).

3 As the Sixth Circuit recognized in a slightly different context, just because
4 “court clerks have denied [CNS] the relief it seeks does not mean that [California]
5 law would not provide for such access were [CNS] to assert such a right in the
6 [California] courts pursuant to the statutory provisions at issue, which it has not
7 done.” *Kentucky Press Ass’n, Inc. v. Commonwealth of Kentucky*, 454 F.3d 505,
8 509-10 (6th Cir. 2006). This Court should abstain from hearing this matter.
9

10 **II. CNS HAS FAILED TO ADEQUATELY ALLEGE EITHER A**
11 **CONSTITUTIONAL OR COMMON LAW RIGHT OF “SAME-DAY**
12 **ACCESS” TO NEWLY FILED UNLIMITED CIVIL COMPLAINTS.**

13 **A. CNS Has Not Established That “Experience And Logic”**
14 **Recognize A First Amendment Right Of “Same-Day Access.”**

15 As explained in Ventura Superior Court’s Motion to Dismiss, the Supreme
16 Court has identified two related criteria for evaluating whether a First Amendment
17 right of access exists: (1) whether the place and process have historically been
18 open to the press and general public (*i.e.*, “experience”); and (2) whether public
19 access plays a significant positive role in the functioning of the particular process in
20 question (*i.e.*, “logic”). *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588-
21 89, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, Marshall, JJ, concurring).
22 Rather than address either of these criteria, CNS wholly ignores them, assumes a
23 constitutional (and common law) right of “same-day access” exists, and proceeds to
24 argue that any delays in access run afoul of its constitutional right. (Opp. at 2, 18-
25 19.)

26 **1. CNS’s Effort To Craft A “Tradition” Of Experience From**
27 **Personal Experience Should Be Rejected.**

28 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

1 Amendment right of access to civil proceedings and related court records, *no*
2 published decision has ever held that access to civil case filings must occur the
3 same day they are filed or otherwise submitted to a court. (*Id.*) Faced with this
4 fact, CNS mounts two equally anemic arguments that should be rejected.

5 *First*, to support its claim of a judicially recognized right to “same-day
6 access” to newly filed civil complaints, CNS resorts to a single, unpublished Texas
7 decision where it obtained the kind of preliminary injunctive relief it seeks here.
8 *Courthouse News Service v. Jackson*, No. H-09-1844, 2009 WL 2163609 1, **2-5,
9 38 Media L. Rep. 1890 (S.D. Tex. July 20, 2009). However, the reasoning of that
10 decision lacks rational support. Indeed, *none* of the authority on which that district
11 court relied actually held—or even considered whether—a First Amendment right
12 of “same-day access” to newly filed civil complaints exists. At most, the court’s
13 discussion of a First Amendment right of access confirms general principles of
14 *reasonable* access in criminal and civil cases. *See id.* at **3-4.

15 *Second*, CNS attempts to identify a historic tradition of “same-day access” to
16 newly filed complaints based on its *personal* experience with select state and
17 federal courts during its twenty-one years of business. (Opp. at 19-20; *see* Compl.
18 ¶¶ 10-14.) But it is the *jurisprudential* history, not one’s individual history, that
19 determines whether a historic right of access exists. In considering the public’s
20 right of access to judicial proceedings or information, the Supreme Court has long
21 grounded its analysis in historical considerations of early American jurisprudence,
22 including traditions pre-dating enactment of the Bill of Rights and the Constitution
23 itself. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-11, 106 S. Ct.
24 2735, 2741-44, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*) (discussing trial of
25 Aaron Burr and noting that “[f]rom Burr until the present day, the near uniform
26 practice of state and federal courts has been to conduct preliminary hearings in open
27 court”); *Richmond Newspapers*, 448 U.S. at 565-66 (examining cases brought in
28

1 England both before and after the Norman Conquest in 1066 and finding “nothing
2 to suggest that the presumptive openness” of English courts “was not also an
3 attribute of the judicial systems of colonial America”). Whether a historical
4 tradition of access to information exists, then, depends on a longstanding
5 recognition in *our system of justice* that such access is warranted in light of the
6 purposes served by allowing public scrutiny of the information.

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

11 **2. CNS Has Failed To Allege That “Logic” Compels A**
12 **Recognized Right Of “Same-Day Access.”**

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

23 In *Press Enterprise II*, 478 U.S. at 8, the Supreme Court explained that the
24 “logic” criterion considers “whether public access plays a significant positive role
25 in the functioning of the particular process in question.” This consideration is
26 premised on the belief that “governmental processes operate best under public
27 scrutiny.” *Id.*; see *Richmond Newspapers*, 448 U.S. at 569-73 (recognizing that
28

1 public scrutiny over the judicial system serves to (1) promote community respect
2 for the rule of law, (2) provide a check on the activities of judges and litigants, and
3 (3) foster more accurate fact finding); *United States v. Edwards*, 823 F.2d 111, 119
4 (5th Cir. 1987) (“The value served by the first amendment right of access is in its
5 guarantee of a public watch to guard against arbitrary, overreaching, or even
6 corrupt action by participants in judicial proceedings.”).

7
8 CNS fails to allege how the public’s interest in scrutinizing the Ventura
9 Superior Court judicial system is in any way harmed or diminished during the
10 minimal period of time between when a complaint is received by the court and the
11 time it is made publicly available upon filing. *See Edwards*, 823 F.2d 111, 119 (5th
12 Cir. 1987) (concluding that “significant news will receive the amount of publicity it
13 warrants . . . even when such news is not reported contemporaneously with the
14 suspect event”) (emphasis added).¹⁰

15 Tellingly, CNS also does not dispute the absence of harm from the
16 reasonable access it receives at Ventura Superior Court. (*See Mot.* at 23.) Indeed,
17 CNS does not identify a single subscriber that has complained of CNS’s
18 purportedly delayed reporting. Nor has CNS identified a single instance in which
19 any alleged delay in processing a new complaint meant that CNS lost out on an
20 opportunity to timely report on an event. (*Id.*) In fact, the opposite is true. CNS
21 touts itself as such a trusted source for timely reporting on significant litigation
22 events that numerous other news outlets use CNS’s reporting as a springboard for

23 ¹⁰ In an attempt to distinguish *Edwards* from this case, CNS again resorts to the
24 unpublished *Jackson* decision (*Opp.* at 22), which rejected the reasoning in
25 *Edwards* on the basis that the state court’s reason for delaying access to newly filed
26 complaints—implementation of an online access service—was not sufficiently
27 significant. *Jackson*, 2009 WL 2163609 at *4. However, for the reasons discussed
28 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.

1 their own reporting, which often occurs many days after CNS’s reporting. (*See*
2 Compl. ¶ 17.) There is thus no “logic”-based reason why “same-day access” to
3 newly filed unlimited civil complaints should be constitutionally recognized.

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

6 **B. Nor Does Federal Common Law Provide A Right Of “Same-Day**
7 **Access.”**

8 As it does with its constitutional claim, CNS conflates a right of *reasonable*
9 access to court records with a right of “*same-day access*,” and contends that
10 because Ventura Superior Court acknowledges that a right to reasonable access
11 exists, it must demonstrate a compelling reason for restricting access. (Opp. at 18
12 at n.14.) That argument completely overlooks the procedural posture of this case,
13 and the fact that a motion to dismiss challenges the legal sufficiency of claims
14 alleged in a complaint. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,
15 974 (9th Cir. 2010) (“The purpose of [Rule] 12(b)(6) is to enable defendants to
16 challenge the legal sufficiency of complaints”) (internal citation and quotation
17 marks omitted). Thus, for Ventura Superior Court to prevail on its motion does not
18 require it to make *any* showing whatsoever.

19 Moreover, that Ventura Superior Court acknowledges that a *qualified*,
20 constitutional and common law right of *reasonable* access to civil court records
21 exists is in *no way* an admission that such a right of access equates to a right of
22 “*same-day access*.” Indeed, Ventura Superior Court’s Motion to Dismiss argues
23 the exact opposite. (*See* Mot. at 18-23.) And, as with its constitutional claim, CNS
24 fails to identify any authority that would support a common law right of access
25 claim for failure to provide “same-day access” to newly filed unlimited civil
26 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 dismiss and abstain should be granted, and the Court should dismiss this action in its entirety.

Dated: November 8, 2011.

Respectfully submitted,

JONES DAY

By: /s/ Robert A. Naeve

Robert A. Naeve

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

LAI-3153027