

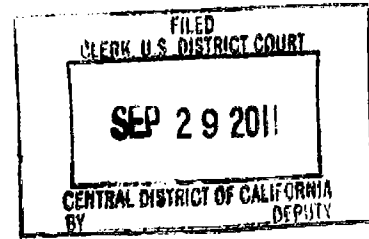
00/00/2011 16:10:27 FAX 2132499990

NATIONWIDE LEGAL

1

COPY

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

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

CV-11-08083 (MANA)

14 Courthouse News Service,
 15
 16 Plaintiff,
 17 v.

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

21 Defendant.

CASE NO. _____

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: Nov. 7, 2011
 Time: 10:00 am
 Courtroom: _____
 Judge: _____

MPA IN SUPPT. OF MOTION FOR PRELIMINARY INJUNCTION

#67085 v-l saf

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 Courthouse News Service,

17 Plaintiff,

18 v.

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

22 Defendant.

CASE NO. _____

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Date: Nov. 7, 2011

Time: 10:00 am

Courtroom: _____

Judge: _____

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF FACTS	2
A. A Tradition of Same-Day Access to New Civil Complaints	2
B. About Courthouse News Service.....	4
C. Ventura Superior’s Policy Of Not Allowing Access Until After “Requisite Processing,” And The Resulting Delays In Access.....	5
I. DEFENDANT MUST BE PRELIMINARILY ENJOINED FROM ENFORCING HIS POLICY OF DENYING COURTHOUSE NEWS SERVICE ACCESS TO NEW CIVIL COMPLAINTS UNTIL AFTER PROCESSING.....	7
A. Courthouse News Is Likely To Succeed On The Merits Because Defendant’s Policy And The Resulting Denial Of Timely Access To New Complaints Violates Courthouse News’ First Amendment And Common Law Rights Of Access, And Also Violates California Rule of Court 2.550	8
1. The Press Plays A Special Role In Vindicating The Right Of Access On Behalf Of The Public.....	8
2. There Is A Strong And Presumptive Right Of Access To Civil Court Complaints Pursuant To The First Amendment, The Common Law, and The California Rules of Court	9
3. Delays In Access Are Denials Of Access.....	14
4. Defendant Has Not, And Cannot, Satisfy The Strict Requirements For Denying The Press Timely Access To New Civil Complaints	16
5. At A Minimum, Courthouse News Raises “Serious Questions”	21
B. Absent Injunctive Relief, Courthouse News Will Be Irreparably Harmed....	21

1	C. The Balance Of Equities Tips In Favor Of Courthouse News.....	23
2	D. The Preliminary Injunction Will Serve The Public Interest.....	23
3	II. GIVEN THE FACTS OF THIS CASE, THE BOND REQUIREMENT	
4	SHOULD BE WAIVED OR AT LEAST SET AT A NOMINAL	
5	AMOUNT	24
6	CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Alliance For The Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9 th Cir. 2011).....	7
<i>Associated Press v. District Court</i> , 705 F.2d 1143 (9 th Cir. 1983).....	11, 12, 15, 17
<i>Barahona-Gomez v. Reno</i> , 167 F.3d 1228 (9 th Cir. 1999).....	24
<i>Brown & Williamson Tobacco Corp. v. F.T.C.</i> , 710 F.2d 1165 (6 th Cir. 1983).....	10
<i>Cal-Almond, Inc. v. United States Department of Agriculture</i> , 960 F.2d 105 (9 th Cir. 1992).....	11
<i>California First Amendment Coalition v. Woodford</i> , 299 F.3d 868 (9 th Cir. 2002).....	9
<i>Carroll v. Princess Anne</i> , 393 U.S. 175, 89 S. Ct. 347, 21, L. Ed. 2d 325 (1968).....	22
<i>In re Charlotte Observer</i> , 882 F.2d 850 (4 th Cir. 1989).....	15
<i>Chicago Council of Lawyers v. Bauer</i> , 522 F.2d 242 (7 th Cir. 1975).....	16
<i>In re Continental Ill. Securities Litigation</i> , 732 F.2d 1302 (7 th Cir. 1984).....	10
<i>Courthouse News Service v. Jackson</i> , 2009 U.S. Dist. LEXIS 62300, 38 Media L. Rep. 1890 (S.D. Tex. 2009).....	1, 16, 19, 20, 22, 23, 25
<i>Courthouse News Service v. Jackson</i> , 38 Media L. Rep. 1894 (S.D. Tex. 2010).....	20

1	<i>Detroit Free Press v. Ashcroft,</i>	
2	303 F.3d 681 (6 th Cir. 2002).....	8, 12
3	<i>Doctor John's, Inc. v. City of Sioux City,</i>	
4	305 F. Supp. 2d 1022 (N.D. Iowa 2004).....	25
5	<i>Doe v. Stegall,</i>	
6	653 F.2d 180 (5 th Cir. 1981).....	10
7	<i>EEOC v. The Erection Co.,</i>	
8	900 F.2d 168 (9 th Cir. 1990).....	14, 20
9	<i>Elrod v. Burns,</i>	
10	427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).....	21-22
11	<i>Gallagher Benefit Servs. v. De La Torre,</i>	
12	283 Fed. Appx. 543 (9 th Cir. 2008).....	22
13	<i>Gannett Co. v. DePasquale,</i>	
14	443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).....	10
15	<i>Gilder v. PGA Tour,</i>	
16	936 F.2d 417 (9 th Cir. 1991).....	21
17	<i>In re Globe Newspaper Co.,</i>	
18	920 F.2d 88 (1 st Cir. 1990).....	17
19	<i>Globe Newspaper Co. v. Pokaski,</i>	
20	868 F.2d 497 (1 st Cir. 1989).....	14
21	<i>Globe Newspaper Co. v. Superior Court,</i>	
22	457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).....	9
23	<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,</i>	
24	546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).....	8
25	<i>Grove Fresh Distributings, Inc. v. Everfresh Juice Co.,</i>	
26	24 F.3d 893 (7 th Cir. 1994).....	14, 18
27	<i>Hagestad v. Tragesser,</i>	
28	49 F.3d 1430 (9 th Cir. 1995).....	14, 20

1	<i>Hamilton Watch Co. v. Benrus Watch Co.,</i>	
2	206 F.2d 738 (2d Cir. 1953).....	21
3	<i>In re Iowa Freedom of Information Council,</i>	
4	724 F.2d 658 (8 th Cir. 1983).....	10
5	<i>Jacobsen v. United States Post Office,</i>	
6	812 F.2d 1151 (9 th Cir. 1987).....	21, 22
7	<i>Jorgensen v. Cassiday,</i>	
8	320 F.3d 906 (9 th Cir. 2003).....	24, 25
9	<i>Kamakana v. City & County of Honolulu,</i>	
10	447 F.3d 1172 (9 th Cir. 2006).....	8, 12, 14, 20
11	<i>Kansas Health Care Association v.</i>	
12	<i>Kansas Department of Social & Rehabilitation Services,</i>	
13	31 F.3d 1536 (10 th Cir. 1994).....	22
14	<i>Klein v. City of Laguna Beach,</i>	
15	381 Fed. App'x 723 (9 th Cir. 2010).....	7
16	<i>Klein v. City of San Clemente,</i>	
17	584 F.3d 1196 (9 th Cir. 2009).....	8, 23
18	<i>Littlejohn v. BIC Corp.,</i>	
19	851 F.2d 673 (3d Cir. 1988).....	9
20	<i>Mastrovincenzo v. City of New York,</i>	
21	435 F.3d 78 (2d Cir. 2006).....	7
22	<i>Nebraska Press Association v. Stuart,</i>	
23	427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).....	16
24	<i>New York Civil Liberties Union v. New York City Transit Authority,</i>	
25	2011 U.S. App. LEXIS 14768 (2d Cir., July 20, 2011).....	10
26	<i>New York Times Co. v. United States,</i>	
27	403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).....	22
28	<i>Nixon v. Warner Commc'ns, Inc.,</i>	
	435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).....	12, 13, 21

1	<i>In re NVIDIA,</i>	
2	2008 WL 1859067 (N.D. Cal. 2008).....	1, 12, 13
3	<i>In re Oliver,</i>	
4	33 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).....	15
5	<i>Oregonian Publ'g Co. v. United States District Court,</i>	
6	920 F.2d 1462 (9 th Cir. 1990).....	17
7	<i>Phoenix Newspapers, Inc. v. United States District Court,</i>	
8	156 F.3d 940 (9 th Cir. 1998).....	9, 13, 17
9	<i>Press-Enterprise Co. v. Superior Court ("Press-Enterprise I"),</i>	
10	464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	9
11	<i>Press-Enterprise Co. v. Superior Court ("Press-Enterprise II"),</i>	
12	478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....	9, 12
13	<i>Publicker Industrial v. Cohen,</i>	
14	733 F.2d 1059 (3d Cir. 1984).....	10
15	<i>Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.,</i>	
16	944 F.2d 597 (9 th Cir. 1991).....	22
17	<i>Richmond Newspapers, Inc. v. Virginia,</i>	
18	448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).....	1, 9, 10, 11, 15, 22
19	<i>Rocky Mt. Bank v. Google,</i>	
20	2011 U.S. App. LEXIS 7867, 39 Media L. Rep. 1783 (9 th Cir. 2011)	14
21	<i>Rushford v. New Yorker Mag., Inc.,</i>	
22	846 F.2d 249 (4 th Cir. 1988).....	10
23	<i>San Jose Mercury News v. United States District Court,</i>	
24	187 F.3d 1096 (9 th Cir. 1999).....	14
25	<i>Save Our Sonoran, Inc. v. Flowers,</i>	
26	408 F.3d 1113 (9 th Cir. 2005).....	24
27	<i>Southeastern Promotions, Ltd. v. Conrad,</i>	
28	420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).....	7

1	<i>Standard Chartered Bank v. Calvo,</i>	
2	2010 WL 2490995 (S.D.N.Y. 2010).....	13
3	<i>Stormans, Inc. v. Selecky,</i>	
4	586 F.3d 1109 (9 th Cir. 2009).....	23
5	<i>Stuhlbarg International Sales Co. v. Brush & Co.,</i>	
6	240 F.3d 832 (9 th Cir. 2001).....	22
7	<i>Times Mirror Co. v. United States,</i>	
8	873 F.2d 1210 (9 th Cir. 1989).....	12
9	<i>Tradition Club Associates, LLC v. Tradition Golf Club,</i>	
10	2008 U.S. Dist. LEXIS 104543 (C.D. Cal. 2008).....	25
11	<i>United States v. Brooklier,</i>	
12	685 F.2d 1162 (9 th Cir. 1982).....	17
13	<i>United States v. Edwards,</i>	
14	672 F.2d 1289 (7 th Cir. 1982).....	20
15	<i>U.S. v. Schlette,</i>	
16	842 F.2d 1574 (9 th Cir. 1988).....	20-21
17	<i>United States v. Simone,</i>	
18	14 F.3d 833 (3d Cir. 1994).....	15
19	<i>Valley Broad. Co. v. United States District Court,</i>	
20	798 F.2d 1289 (9 th Cir. 1986).....	14, 20
21	<i>Vassiliades v. Israely,</i>	
22	714 F. Supp. 604 (D. Conn. 1989).....	12, 13
23	<i>Whiteland Woods, L.P. v. Township of W. Whiteland,</i>	
24	193 F.3d 177 (3d Cir. 1999).....	11
25	<i>Winter v. Natural Resources Defense Council, Inc.,</i>	
26	555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).....	7
27	<i>Wood v. Georgia,</i>	
28	370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).....	22

1 **STATE CASES**

2 *In Estate of Hearst,*
3 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977).....12, 14

4 *In re Marriage of Burkle,*
5 135 Cal. App. 4th 1045, 37 Cal. Rptr. 3d 805 (2006).....11

6 *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,*
7 20 Cal. 4th 1178, 86 Cal. Rptr. 2d 778 (1999).....11, 14, 15

8 *Salzano v. N. Jersey Media Group, Inc.,*
9 201 N.J. 500, 993 A.2d 778 (N.J. 2010)8

10 **STATUTES AND COURT RULES**

11 Federal Rule of Civil Procedure 65(c).....24

12 California Rule of Court 2.5508, 14, 15, 21

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

INTRODUCTION

The filing of a new civil complaint is a critical event in the judicial process. It is “the means by which a plaintiff invokes the authority of the court, a public body, to dispose of his or her dispute with a defendant. ... [W]hen a plaintiff invokes the Court’s authority by filing a complaint, the public has a right to know who is invoking it, and toward what purpose, and in what manner.” *In re NVIDIA*, 2008 WL 1859067, at *3 (N.D. Cal. 2008).

Prompt access to new complaints is of obvious concern to the news media, whose role it is to inform other interested members of the public of the new action and its factual and legal allegations while it is still newsworthy. It is also important to the defendants to the action, who are subject to the jurisdiction of the court at the moment of filing but would not otherwise know about the lawsuit until the plaintiff serves them with the filing, sometimes days or even weeks later. And it is important to the wider group of businesses and individuals who may be indirectly affected by that lawsuit. Finally, prompt access is essential to the public’s ability to oversee the activities of an important branch of government while those activities are still current.

These benefits would be unrealized if court clerks had unfettered discretion to decide precisely when newly-filed complaints are deemed public. Thus, under the First Amendment, clerks cannot bar public access to new complaints for days or weeks unless sufficiently compelling interests justify withholding those complaints and the other stringent requirements for withholding court records are satisfied. *See, e.g., Courthouse News Service v. Jackson*, 2009 U.S. Dist. LEXIS 62300, at *4-5, 38 Media L. Rep. 1890 (S.D. Tex. 2009).

As a practical matter, the public learns about new lawsuits from news outlets, which the U.S. Supreme Court has recognized serve as “surrogates for the public” who acquire information about their courts “chiefly through the print and electronic media.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). Thus, at this Court, and at most other major state and federal

1 courts in California and across the country, it has been traditional for reporters who
2 visit the court at the end of each court day to review the new civil actions filed earlier
3 that same day, in many instances before they have been fully processed.

4 In direct contrast to this tradition of same-day access, Defendant Michael
5 Planet, as the Court Executive Officer/Clerk of the Ventura County Superior Court
6 (“Ventura Superior”), has instituted a policy by which his office assumes unguided
7 discretion to determine when the press is permitted access to newly-filed civil
8 complaints. Pursuant to that policy, complaints are withheld from press review “until
9 the requisite processing has been completed.” The result is that new complaints are
10 effectively sealed for days and in some cases weeks after they are filed. In the
11 meantime, there is no way for the public or press to learn about the claims and
12 allegations in those lawsuits unless the filing parties choose to publicize them.

13 Even in good economic times, a policy such as the one enforced by Defendant
14 can result in access delays. During the current fiscal crisis and the resulting lack of
15 staff to perform processing, the delays can be, and are, much worse. It might be
16 possible for Defendant to both enforce his policy and provide prompt access to newly-
17 filed complaints. But that certainly is not happening now. Having failed in its efforts
18 to work cooperatively with Defendant to reach an amicable resolution to these delays,
19 Courthouse News Service thus brings this action challenging the legality of
20 Defendant’s policy and the resulting deprivation of timely, same-day access. This
21 Court should find the policy invalid; enjoin its further implementation; and direct
22 Defendant to provide Courthouse News with the same timely access to new civil
23 complaints that other state and federal courts are providing to the media, even if those
24 complaints have not been fully processed.

25 **STATEMENT OF FACTS**

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

27 In recognition of the crucial role played by the media to inform interested
28 persons about new court cases, it has been a longstanding tradition for courts to

1 provide reporters who visit the court every day with access to new complaints at the
2 end of the day on which they are filed. This same-day access ensures that interested
3 members of the public learn about new cases while they are still newsworthy. Courts
4 have traditionally and still do provide this same-day access, in many instances before
5 the complaints have been fully processed. Declaration of William Girdner, ¶¶ 13-18,
6 21 & Exhs. 3, 4; Declaration of Christopher Marshall, ¶¶ 3-6.

7 For example, at this Court, a room is set up directly off the docketing
8 department with a set of pass-through boxes. At the end of each day, a staffer places
9 all of the civil complaints filed that day in the pass-through boxes so the media can
10 review them. These complaints are made available for review before they have been
11 processed. Reporters that cover the courthouse on a daily basis have a key to the
12 room where they review the complaints and then put them back in the pass-through
13 boxes. At the San Francisco Division of the U.S. District Court for the Northern
14 District of California, reporters go behind the counter and review new complaints filed
15 that same day, before they have been fully processed or posted on PACER. They are
16 also permitted access to the “transfer boxes” of new actions being sent to different
17 divisions of the court, and are provided with a copy of the intake log. Same-day
18 access to new civil complaints is also provided at the Southern and Eastern Districts of
19 California. Girdner Decl., ¶ 15 & Exh. 3; Marshall Decl., ¶ 4.

20 Similarly, at many of the superior courts in California, reporters are provided
21 with same-day access to new civil filings, a practice that is consistent with other major
22 state trial courts across the country. For example, at the San Francisco, Los Angeles,
23 and Santa Clara County superior courts, new filings are available to news reporters
24 after initial intake tasks, but well before full processing. The Superior Courts in
25 Alameda, Contra Costa, and Riverside counties also provide same day access to the
26 press, and while it is Courthouse News’ understanding that such access is provided
27 after a certain amount of additional processing has been completed, access is
28 nevertheless provided on a same-day basis. The procedures through which these and

1 other state and federal courts make new filings available on a timely basis are
2 described further in the Girdner and Marshall declarations and in the Access Summary
3 attached as Exhibit 3 to the Girdner Declaration.

4 At bottom, access is largely a matter of will. As shown by the variety and
5 effectiveness of the procedures for providing same-day access that have been
6 implemented in so many courts, any individual clerk's office can provide prompt
7 access to newly filed complaints if it has the will to do so.

8 **B. About Courthouse News Service**

9 Courthouse News is a 21-year-old nationwide legal news service specializing in
10 news reporting about civil lawsuits, from the date of filing through the appellate level.
11 Its core news publications are its new litigation reports, which are e-mailed to its
12 subscribers and contain staff-written summaries of all significant new civil complaints
13 filed in a particular court. For larger courts, reports are e-mailed to subscribers each
14 evening and provide coverage of new complaints filed earlier that same day.¹ In
15 addition, Courthouse News offers news alerts, which are delivered via email to
16 subscribers. Courthouse News also publishes four print publication, as well as a web
17 site, www.courthousenews.com, that is updated daily with news reports and
18 commentary about civil cases and appeals. Girdner Decl., ¶¶ 2-6, 8-10 & Exh. 1.

19 Nationwide, there are nearly 3,000 subscribers to Courthouse News' new
20 litigation reports, with approximately 740 in California alone. Courthouse News'
21 subscribers include lawyers and law firms, well-known media outlets such as the *Los*
22

23
24 ¹ Decisions as to which new civil complaints will receive coverage are made by the
25 reporters after reviewing all of the new filings. Although not all complaints are
26 significant enough to merit coverage, these reports provide coverage of many more
27 civil actions than is typically found in a daily newspaper. Courthouse News covers
28 Ventura Superior as part of its *Central Coast Report*. In all, Courthouse News
publishes sixteen different new litigation reports for its California subscribers,
together covering each of the four federal district courts as well as providing daily
coverage of California's largest superior courts. Girdner Decl., ¶¶ 8- 9.

1 *Angeles Times*, the *Los Angeles Business Journal*, the *Pacific Coast Business Times*,
2 the *San Jose Mercury News*, *Forbes*, the *Boston Globe*, and several universities and
3 law libraries. In addition Courthouse News' web site reports are often picked up by
4 other Internet content providers and in this way are circulated to an even larger
5 audience. Girdner Decl., ¶¶ 7, 10 & Exh. 2.

6 To produce this level of coverage, Courthouse News employs a nationwide
7 network of reporters who are assigned to cover one or more individual courts. At
8 most of the larger courts, Courthouse News' reporters visit their assigned court near
9 the end of each court day. The reporter reviews civil complaints filed earlier that day
10 and prepares an original summary of each complaint or other case-initiating document
11 that is of likely interest to Courthouse News' subscribers for inclusion in the report.
12 In California state courts, Courthouse News only reviews "unlimited jurisdiction"
13 civil complaints – that is, complaints in which the amount in controversy usually
14 exceeds \$25,000. Given the nature of this publication, any delay in the reporter's
15 ability to review a newly filed complaint necessarily creates a delay in Courthouse
16 News' ability to inform interested persons of the factual and legal allegations in that
17 complaint. This is especially problematic when there is an intervening weekend
18 and/or holiday, in which case a delay of even one court day results in actual delays of
19 three or even four calendar days. Girdner Decl. ¶¶ 8, 12.

20 **C. Ventura Superior's Policy Of Not Allowing Access Until After "Requisite**
21 **Processing," And The Resulting Delays In Access**

22 Courthouse News began covering Ventura Superior on a daily basis in
23 November 2010.² As is its typical practice, shortly after it began daily coverage,

24
25 ² Courthouse News covered Ventura Superior from 2001 through October 2010 on a
26 weekly and twice-weekly, rather than daily, basis. The obstacles to timely access
27 Courthouse News encountered during that period and its efforts to work with clerk's
28 office personnel to overcome them are described in detail in the declarations
accompanying the instant motion. Girdner Decl., ¶ 24 & Exh. 5; Marshall Decl., ¶¶ 9-
15 & Exhs. 1-3; Declaration of Julianna Krolak, ¶¶ 5-9.

1 Courthouse News attempted to work cooperatively with the clerk's office to come up
2 with mutually-workable procedures so that its reporter, Julianna Krolak, could have
3 same-day access to new unlimited jurisdiction civil complaints just as news reporters
4 do in other courts Courthouse News visits on a daily basis. Ultimately, these efforts
5 were rebuffed. In a July 11, 2011 letter, Defendant cited budget difficulties and
6 stated, "While I appreciate the Courthouse News Service's interest in same-day
7 access, the Court cannot prioritize that access above other priorities and mandates.
8 Further, the Court must ensure the integrity of all filings, including new filings, and
9 cannot make any filings available until the requisite processing is completed."
10 Girdner Decl., ¶¶ 25-26 & Exhs. 6-7; Marshall Decl., ¶¶ 16-19 & Exhs. 4-6.³

11 Defendant's enforcement of this policy has resulted in substantial delays. For
12 example, during the four-week period from August 8 through September 2, 2011,
13 Courthouse News reviewed 152 new unlimited jurisdiction complaints at Ventura
14 Superior, on average fewer than eight complaints per court day. Of the 152
15 complaints reviewed during that four-week period, only nine complaints (about 6%)
16 were made available for review on the same calendar day they were filed. Courthouse
17 News was not permitted to review the remaining 143 complaints (94%) on the day
18 they were filed, and the delays in access stretched up to thirty-four calendar days.
19 Krolak Decl., ¶¶ 12-13; Declaration of Karen Covell, ¶ 3-4 & Exhs. 1-4.

23 ³ In a final attempt to persuade Ventura Superior to bring its media access practices in
24 line with those of other larger courts, Courthouse News through its counsel wrote to
25 Defendant on August 2, 2011. In that letter, Courthouse News noted, as it had in prior
26 correspondence, the many other courts that provide the media with same-day access
27 before full processing, and that press access only results in increased costs where the
28 court imposes the requirement of complete processing before providing access.
Girdner Decl., ¶ 27 & Exh. 8; Marshall Decl., ¶ 20 & Exh. 7. As of this filing,
Courthouse News has not received a response from Defendant.

I.

**DEFENDANT MUST BE PRELIMINARILY ENJOINED FROM ENFORCING
HIS POLICY OF DENYING COURTHOUSE NEWS SERVICE ACCESS TO
NEW CIVIL COMPLAINTS UNTIL AFTER PROCESSING**

To obtain a preliminary injunction, the moving party must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). If the moving party can only demonstrate “serious questions going to the merits,” rather than a “likelihood of success,” the preliminary injunction may issue nonetheless if the balance of hardships tips sharply toward the movant, so long as there is a likelihood of irreparable injury and the injunction is in the public interest. *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The same standard applies regardless of whether the movant seeks to maintain the status quo or to halt an ongoing deprivation of rights. *See Klein v. City of Laguna Beach*, 381 Fed. App’x 723, 725 (9th Cir. 2010).⁴

Courthouse News satisfies this test. Defendant’s enforcement of his policy, and his failure to make new civil complaints available to the press in a timely manner, constitutes an effective denial of the right of access in violation of the First Amendment and other laws. Courthouse News, and by extension its subscribers, face irreparable harm if Defendant is permitted to continue to enforce his policy and thereby deny such access. Given that the injunction Courthouse News is seeking would only require Defendant to do what so many other state and federal courts

⁴ Moreover, when First Amendment rights are involved, the presumed “status quo” is the condition in which a person is free to exercise his or her First Amendment rights. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). Generally, a preliminary injunction that prohibits a governmental body from enforcing an unlawful rule, law or policy will be seen as a prohibitory rather than mandatory, injunction. *See Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006).

1 already do – i.e., provide Courthouse News with access to new complaints at the end
2 of the day of filing even if they have not been fully processed – and considering the
3 public’s strong interest in obtaining timely information about new civil lawsuits, the
4 balance of equities clearly tips in Courthouse News’s favor. Justice therefore requires
5 that this Court enjoin Defendant’s further enforcement of his policy and direct
6 Defendant to provide Courthouse News with same-day access to new civil complaints.

7 **A. Courthouse News Is Likely To Succeed On The Merits Because**
8 **Defendant’s Policy And The Resulting Denial Of Timely Access To New**
9 **Complaints Violates Courthouse News’ First Amendment And Common**
10 **Law Rights Of Access, And Also Violates California Rule of Court 2.550**

11 Given the strong presumption of timely access to civil complaints and the fact
12 that Defendant cannot meet his burden to overcome the stringent test for overcoming
13 that right of access, Courthouse News can demonstrate a very strong likelihood of
14 success on the merits. At a minimum, this action raises serious questions.⁵

15 **1. The Press Plays A Special Role In Vindicating The Right Of Access**
16 **On Behalf Of The Public**

17 Courts have recognized that the press plays a special role in vindicating the
18 public’s right of access. As the Ninth Circuit has observed, the press aids the public’s
19 vigilance over the workings of the court system by publishing information about court
20 proceedings. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.
21 2006). *See also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002)
22 (characterizing the press as “deputized” by the public “as guardians of their liberty”);
23 *Salzano v. N. Jersey Media Group, Inc.*, 201 N.J. 500, 520, 993 A.2d 778 (N.J. 2010)
24

25
26 ⁵ In the First Amendment context, the moving party need only make a colorable claim
27 that its First Amendment rights have been infringed. The burden then shifts to the
28 defendant to justify the restriction. *See Klein v. City of San Clemente*, 584 F.3d 1196,
1201 (9th Cir. 2009). *See also, e.g., Gonzales v. O Centro Espirita Beneficente Uniao*
do Vegetal, 546 U.S. 418, 429, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

1 (“Because it is impossible for the citizenry to monitor all of the operations of our
2 system of justice, we rely upon the press for vital information about such matters.”).

3 Similarly, the U.S. Supreme Court described the media as “surrogates for the
4 public,” and noted in the context of courtroom proceedings that although “media
5 representatives enjoy the same right of access as the public, they often are provided
6 special seating and priority of entry so that they may report what people in attendance
7 have seen and heard.” *Richmond Newspapers*, 448 U.S. at 573; *accord, e.g.,*
8 *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002)
9 (holding that press must have access to executions as a representative of the public).

10 **2. There Is A Strong And Presumptive Right Of Access To Civil Court**
11 **Complaints Pursuant To The First Amendment, The Common Law,**
12 **And The California Rules of Court**

13 The public’s right of access to court proceedings and records is a keystone of
14 our democratic system. “As with other branches of government, the bright light cast
15 upon the judicial process by public observation diminishes possibilities for injustice,
16 incompetence, perjury, and fraud. Furthermore, the very openness of the process
17 should provide the public with a more complete understanding of the judicial system
18 and a better perception of its fairness.” *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78,
19 682 (3rd Cir. 1988). Public access thus enhances both the basic fairness and the
20 appearance of fairness of the judicial system. *Press-Enterprise Co. v. Superior Court*,
21 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“*Press-Enterprise I*”).
22 Indeed, open and public judicial proceedings are “[o]ne of the most enduring and
23 exceptional aspects of Anglo-American justice.” *Phoenix Newspapers, Inc. v. United*
24 *States District Court*, 156 F.3d 940, 946 (9th Cir. 1998).

25 In a series of seminal cases decided in the 1980s, the U.S. Supreme Court
26 repeatedly affirmed the public and press’ First Amendment right of access to criminal
27 proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-10, 106
28 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (“*Press-Enterprise II*”) (preliminary hearings);
Press Enterprise I, 464 U.S. at 509-13 (voir dire); *Globe Newspaper Co. v. Superior*

1 *Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (testimony during
2 trial); *Richmond Newspapers*, 448 U.S. at 572-74, 589 (trial).

3 In the intervening years, the First Amendment right of access has been extended
4 not only to civil cases, but also to records filed in both criminal and civil proceedings.
5 As the U.S. the Supreme Court has noted, “there is no principled basis upon which a
6 public right of access to judicial proceedings can be limited to criminal cases. ... [¶]
7 Indeed, many of the advantages of public criminal trials are equally applicable in the
8 civil trial context. ... in some civil cases the public interest in access, and the salutary
9 effect of publicity, may be as strong as, or stronger than, in most criminal cases.”

10 *Gannett Co. v. DePasquale*, 443 U.S. 368, 386-87 n.15, 99 S. Ct. 2898, 61 L. Ed. 2d
11 608 (1979); *accord Richmond Newspapers*, 448 U.S. at 580 n.17.

12 Subsequently, the Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth,
13 Seventh and Eighth Circuits have all recognized a First Amendment right of access to
14 civil proceedings and/or documents.⁶ Similarly, the California Supreme Court has
15

16 ⁶ See, e.g., *New York Civil Liberties Union v. New York City Transit Auth.*, 2011 U.S.
17 App. LEXIS 14768, at *27-28 (2d Cir., July 20, 2011) (“the First Amendment
18 guarantees a qualified right of access not only to criminal but also to civil trials and to
19 their related proceedings and records”); *Rushford v. New Yorker Mag., Inc.* 846 F.2d
20 249, 253 (4th Cir. 1988) (“We believe that the more rigorous First Amendment
21 standard should also apply to documents filed in connection with a summary
22 judgment motion in a civil case.”); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302,
23 1308 (7th Cir. 1984) (recognizing First Amendment right to documentary evidence in
24 civil cases); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th
25 Cir. 1983) (documents filed in civil litigation; “[i]n either the civil or the criminal
26 courtroom, secrecy insulates the participants, masking impropriety, obscuring
27 incompetence, and concealing corruption”); *Publiker Indus. v. Cohen*, 733 F.2d
28 1059, 1070 (3d Cir. 1984) (recognizing First Amendment right of access to civil
cases); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983)
(concluding that high court’s reasoning for finding a First Amendment right to
criminal proceedings also applies to civil proceedings); *Doe v. Stegall*, 653 F.2d 180,
185 (5th Cir. 1981) (“First Amendment guarantees are implicated” by parties’ request
to withhold their names from a case-initiating document in a civil case).

1 recognized a First Amendment right of access to civil proceedings and documents in
2 California state courts. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.
3 4th 1178, 1212 & n.25, 86 Cal. Rptr. 2d 778 (1999) (“We conclude, in light of the high
4 court case law and its progeny, that, in general, the First Amendment provides a right
5 of access to ordinary civil trials and proceedings.”);⁷ accord, e.g., *In re Marriage of*
6 *Burkle*, 135 Cal. App. 4th 1045, 1062, 37 Cal. Rptr. 3d 805 (2006) (“[N]o basis exists
7 for concluding that court records should be differentiated from courtroom proceedings
8 for purposes of First Amendment access rights.”). And although the Ninth Circuit has
9 not yet recognized a First Amendment right to civil records, as it has explained in the
10 criminal context, “[t]here is no reason to distinguish between pretrial proceedings and
11 the documents filed in regard to them. ... We thus find that the public and press have a
12 first amendment right of access to pretrial documents in general.” *Associated Press v.*
13 *District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

14 The First Amendment right of access to civil records in general, and complaints
15 in particular, is further confirmed by the two-prong inquiry used by the Supreme
16 Court in *Richmond Newspapers* and its progeny, which examines the considerations
17 of “tradition” and “logic” to determine whether a constitutional right of access exists.
18 First, the court looks to whether the process has traditionally been open to the public.
19 The “tradition” analysis does not require that the practice of openness have ancient
20 origins. For example, the Ninth Circuit has relied on a near uniformity among *current*
21 statutory schemes to establish a history of access to voter lists. *Cal-Almond, Inc. v.*
22 *United States Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992); accord *Whiteland*
23 *Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (relying
24 on a 30-year old statute to establish “experience” of access to municipal planning
25 meetings). Rather, the tradition need only be long enough so that the “tradition of
26

27 ⁷ The California Supreme Court did recognize a single exception to this otherwise
28 broadly inclusive constitutional right: it does not include the right to access discovery
materials “that are neither used at trial nor submitted as a basis for adjudication.” *Id.*

1 accessibility implies the favorable judgment of experience.” *Press-Enterprise II*, 478
2 U.S. at 8. Indeed, “a brief historical tradition might be sufficient to establish a First
3 Amendment right of access where the beneficial effects of access to that process are
4 overwhelming and uncontradicted.” *Detroit Free Press*, 303 F.3d at 701.

5 In this case, courts have historically recognized that the public has a general
6 right to inspect and copy judicial records, including complaints in particular. *Nixon v.*
7 *Warner Commc 'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978);
8 *Kamakana*, 447 F.3d at 1178; *In re NVIDIA Corp.*, 2008 WL 1859067, at *3-4;
9 *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989). Indeed, the Ninth
10 Circuit has held that only a narrow range of documents have “traditionally been kept
11 secret.” *Kamakana*, 447 F.3d at 1178; *Times Mirror Co. v. United States*, 873 F.2d
12 1210, 1219 (9th Cir. 1989).⁸ As observed in *In Estate of Hearst*, 67 Cal. App. 3d 777,
13 784, 136 Cal. Rptr. 821 (1977), “traditional Anglo-American jurisprudence distrusts
14 secrecy in judicial proceedings and favors a policy of maximum public access to
15 proceedings and records of judicial tribunals.”⁹

16 The longstanding tradition of access to complaints is not only one of access as a
17 general matter; more particularly, there has been a tradition of affording the media
18 with *timely* access – that is, access to new complaints at the end of the day of filing –
19 irrespective of whether the complaint has been fully processed. Girdner Decl., ¶¶ 13-
20 18 & Exhs. 3, 4; Marshall Decl., ¶¶ 3-6.

22
23 ⁸ The Ninth Circuit has identified two categories of documents that fall in this
24 “narrow range”: grand jury transcripts and warrant materials in the midst of a pre-
indictment investigation. *Id.*

25 ⁹ Most of these cases considered only whether the public had a *common law* right of
26 access to the requested records. However, whether a common law right of access
27 exists informs the “tradition” prong of the constitutional analysis. *See Associated*
28 *Press*, 705 F.2d at 1145. The public’s common law right of access is discussed below.
And in the *Vassiliades* case, which involved access to complaints in particular, the
right of access was based on both the First Amendment and the common law.

1 Second, the court must ask “whether public access plays a significant positive
2 role in the functioning of the particular process in question.” As to this part of the
3 analysis, the question is whether public access would play an important role in
4 furthering the public’s interest in understanding the judicial process and in
5 maintaining the public’s trust in the judiciary. *Phoenix Newspapers*, 156 F.3d at 946-
6 48. Without a doubt, the answer as to civil complaints is “yes.” Without access to the
7 complaint, the press and the public often would not know that a lawsuit has been filed;
8 even if they were alerted to a new suit, they would not have any substantive
9 information about the factual background or the particular allegations made by the
10 filing party. As the Northern District of California recently explained:

11 [A] complaint ... is the root, the foundation, the basis by which a suit
12 arises and must be disposed of. Further, along with a summons, it is the
13 means by which a plaintiff invokes the authority of the court, a public
14 body, to dispose of his or her dispute with a defendant. ... It provides the
15 causes of action. ... It establishes the merits of a case, or the lack thereof.
16 ... when a plaintiff invokes the Court’s authority by filing a complaint,
17 the public has a right to know who is invoking it, and toward what
18 purpose, and in what manner.

19 *In re NVIDIA*, 2008 WL 1859067, at *3; *accord, e.g., Vassiliades*, 714 F. Supp. at 606
20 (denying request to seal complaint; “[t]he filing of the complaint is likely to be the
21 first occasion that the public could become aware of the dispute”); *Standard*
22 *Chartered Bank v. Calvo*, 2010 WL 2490995, at *2 (S.D.N.Y. 2010) (denying
23 plaintiff’s application to file complaint under seal and noting that such applications, if
24 granted, “conceal the very existence of lawsuits from the public.”).

25 In addition to the First Amendment right, courts have also recognized a
26 common law right of access to copy and inspect court files. *See Nixon*, 435 U.S. at
27 597 (1978). Although this common law right has evolved to serve many of the same
28 purposes as the First Amendment right of access, it is an independent right that may

1 exist even where a court has declined to identify a constitutional dimension in the
2 right to access judicial proceedings. *San Jose Mercury News v. United States District*
3 *Court*, 187 F.3d 1096, 1101 (9th Cir. 1999); *Valley Broad. Co. v. United States*
4 *District Court*, 798 F.2d 1289, 1293-94 (9th Cir. 1986).

5 The Ninth Circuit has expressly recognized a common law right of access to
6 documents filed in civil proceedings in various contexts, which applies to all court
7 files except for that very range of records that, for policy reasons, have historically
8 been kept secret. *See, e.g., Kamakana*, 447 F.3d at 1178 (affirming access to exhibits
9 to summary judgment motion); *San Jose Mercury News*, 187 F.3d at 1102 (pre-
10 judgment access to materials submitted in support of summary judgment motions);
11 *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (post-settlement access to
12 pleadings); *EEOC v. The Erection Co.*, 900 F.2d 168, 169 (9th Cir. 1990) (consent
13 decree). *See also Rocky Mt. Bank v. Google*, 2011 U.S. App. LEXIS 7867 at *3, 39
14 Media L. Rep. 1783 (9th Cir. 2011) (common law right of access applied even though
15 records had been lodged rather than filed; such documents are judicial records).

16 Finally in 2001, the California Judicial Council adopted Rule of Court 2.550,
17 which provides a presumptive right of access to court records and codified the
18 stringent standards and procedures for overcoming the First Amendment right of
19 access as set forth by the California Supreme Court in *NBC Subsidiary*. Rule of Court
20 2.550(d) & Advisory Comm. Comment.

21 **3. Delays In Access Are Denials Of Access**

22 Regardless of the origin of the right of access, access “should be immediate and
23 contemporaneous.” *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893,
24 897 (7th Cir. 1994). All but *de minimis* delays in access are the functional equivalent
25 of access denials, triggering the constitutional and common law scrutiny. *Globe*
26 *Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (observing that “even a
27 one to two day delay impermissibly burdens the First Amendment”); *Estate of Hearst*,
28 67 Cal. App. 3d at 785 (even temporary limitations on public access to court records

1 require a “sufficiently strong showing of necessity”); *NBC Subsidiary*, 20 Cal. 4th at
2 1219 & n.42 (holding that even temporary denials of access warrant “exacting First
3 Amendment scrutiny”).¹⁰ Permitting even “minimal delays ... unduly minimizes, if it
4 does not entirely overlook, the value of ‘openness’ itself, a value which is threatened
5 whenever immediate access to ongoing proceedings is denied, whatever provision is
6 made for later public disclosure.” *In re Charlotte Observer*, 882 F.2d 850, 856 (4th
7 Cir. 1989). *See also United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994)
8 (rejecting a 10-day delay in favor of immediate access).

9 As the Ninth Circuit has recognized, the rule that delays in access are the
10 equivalent to denials of access holds true even where there are competing interests of
11 the highest order. In a 1983 case involving access to court records in the John
12 DeLorean criminal trial, the Ninth Circuit found that the district court’s withholding
13 of newly filed documents for 48 hours after filing as part of a procedure designed to
14 protect the defendant’s Sixth Amendment right to a fair trial was “a total restraint on
15 the public’s first amendment right of access even though the restraint is limited in
16 time.” *Associated Press*, 705 F.2d at 1147 (issuing writ vacating district court order).

17 The reasons for this rule – that even temporary access delays implicate
18 constitutional concerns – are clear. The court’s and the public’s knowledge that the
19 public can “contemporaneously review” trial proceedings promotes transparency and
20 acts as effective check on abuse of judicial power. *Richmond Newspapers*, 448 U.S.
21 at 592 (Brennan, J., concurring) (““contemporaneous review in the forum of public
22 opinion is an effective restraint on possible abuse of judicial power””) (quoting *In re*
23 *Oliver*, 333 U.S. 257, 270, 68 S. Ct. 499, 92 L. Ed. 682 (1948)); *accord In re*
24 *Charlotte Observer*, 882 F.2d at 856. Moreover, the “newsworthiness of a particular
25

26 ¹⁰ In addition, California Rule of Court 2.550, which as noted above is derived from
27 *NBC Subsidiary*, recognizes a right of access to any document that has been “filed or
28 lodged with the court.” Rule of Court 2.550(b)(1). The rule thus recognizes that the
public character of new complaints attaches at the moment of submission to the court.

1 story is often fleeting. To delay or postpone disclosure undermines the benefit of
2 public scrutiny and may have the same result as complete suppression.” *Grove Fresh*,
3 24 F.3d at 897. Put another way, is only while the cases are still “current news that
4 the public’s attention can be commanded.” *Chicago Council of Lawyers v. Bauer*,
5 522 F.2d 242, 250 (7th Cir. 1975); *see also Nebraska Press Ass’n v. Stuart*, 427 U.S.
6 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (“the element of time is not unimportant
7 if press coverage is to fulfill its traditional function of bringing news to the public
8 promptly”). In the case of newly filed civil complaints, a delay in access is not only
9 contrary to the tradition of same-day access, but effectively hides from the public the
10 fact that a new controversy is pending before an important institution of government.
11 Girdner Decl., ¶¶ 28-31.

12 Given all of this authority, it is not surprising that in a case nearly identical to
13 this one, the Southern District of Texas found that a state court clerk’s practice of
14 denying Courthouse News same-day access to newly-filed case-initiating documents
15 (in that state, referred to as petitions) triggered First Amendment scrutiny. *Jackson*,
16 2009 U.S. Dist. LEXIS 62300, at *8-14. As the Southern District found in that case,
17 the clerk’s asserted reasons for delaying timely access – that he did not believe access
18 to new petitions was appropriate until after information about the petition had been
19 entered into a computerized database, scanned, and posted for online viewing – did
20 not satisfy the strict test for overcoming the First Amendment right of access.
21 Accordingly, that Court issued a preliminary injunction requiring the clerk to provide
22 Courthouse News same-day access to new petitions. For the reasons set forth in the
23 next section, the same result must follow here.

24 **4. Defendant Has Not, And Cannot, Satisfy The Strict Requirements**
25 **For Denying The Press Timely Access to New Civil Complaints**

26 Where there is a First Amendment right of access, that right can only be
27 overcome on a case-by-case basis, by way of an adjudicative process performed by a
28 judge where the party seeking to restrict access satisfies a stringent three-part test

1 established by the Ninth Circuit. *United States v. Brooklier*, 685 F.2d 1162, 1168-69
2 (9th Cir. 1982). Under the three-part test, the party seeking to restrict access must
3 prove:

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

10 *Phoenix Newspapers*, 156 F.3d at 949; *Associated Press*, 705 F.2d at 1145-46.

11 Importantly, the party seeking to withhold records has the burden to satisfy all
12 three prongs of this test. *Brooklier*, 685 F.2d at 1169; *accord Associated Press*, 705
13 F.2d at 1145; *Oregonian Publ'g Co. v. United States District Court*, 920 F.2d 1462,
14 1466-67 (9th Cir. 1990). In addition, in those instances where a court finds the party
15 seeking to restrict access has satisfied his burden, the court must make specific
16 findings such that a reviewing court can determine that access was properly denied.
17 *Phoenix Newspapers*, 156 F.3d at 946-47. Conclusory assertions of an interest, and
18 harm to that interest, are not sufficient. *Id.* at 950; *Oregonian Publ'g*, 920 F.2d at
19 1465; *Brooklier*, 685 F.2d at 1169.

20 This three-part test cannot be circumvented by a court clerk who assumes
21 unbridled discretion to determine whether, and for how long, records may be withheld
22 from the public. *In re Globe Newspaper Co.*, 920 F.2d 88, 97 (1st Cir. 1990)
23 (interpreting a local court rule granting judges the authority to seal records "if the
24 interests of justice so require" as requiring a detailed analysis of why sealing was
25 required in each particular case).

26 In short, Defendant simply does not have the authority to declare that newly
27 filed complaints are off limits until he determines, exercising his unbridled discretion,
28 that the press and/or public may see them. And even if he somehow had that

1 authority, he would be required to exercise it consistent with the First Amendment
2 right of access. But he has not even come close.

3 In his July 11, 2011 letter, Defendant justified his policy of not providing access
4 until after the “requisite processing” has been completed, and the resulting denial of
5 same-day access, on a need to “ensure the integrity” of new court filings. Girdner
6 Decl., ¶ 26 & Exh. 7. The deficiency in this argument is not the strength of the
7 countervailing interest. In the abstract, “maintaining the integrity of court filings” is
8 an important interest. Rather, this argument fails because Defendant cannot show a
9 “substantial probability” that allowing Courthouse News same-day access to new
10 complaints will irreparably damage that interest, or that he does not have alternative
11 ways to ensure the integrity of the court records. As numerous other courts, including
12 this Court, have recognized by virtue of their own media access policies, it is entirely
13 possible – indeed, commonplace – to devise procedures that allow both for same-day
14 access and ensure the integrity of those court records. The particular procedures used
15 vary from court to court, but the most common and straightforward method is simply
16 to allow reporters to see the day’s new complaints at the end of the day during a pre-
17 designated and defined period of time. Girdner Decl. ¶¶ 13-16 & Exh. 3; Marshall
18 Decl., ¶¶ 3-6. Of course, this is not the only means of providing same-day access.
19 For example, some courts require filing parties to file a press copy. A variety of other
20 access procedures are available as well, as reflected in the Access Summary. Girdner
21 Decl., ¶¶ 13, 18 & Exh. 3.

22 In many of these courts, access is provided after court personnel complete
23 initial intake tasks, for example accepting the filing fee, assigning a case number,
24 and/or noting the first-named plaintiff and defendant on an intake log. Any additional
25 processing of the complaints that may be required is undertaken as staffing conditions
26 allow. Girdner Decl., ¶ 19 & Exh. 3. In the interim, however, those complaints,
27 which would otherwise just be sitting on a desk, are made available to reporters who
28 ask to see them. To make sure new complaints are accounted for, it is common for

1 clerk's offices to couple their access procedure with measures such as requiring
2 reporters to provide collateral such as a driver's license or setting aside a designated
3 area for the media to review the day's new complaints. In a few instances, courts have
4 asked Courthouse News' reporters to obtain a Live Scan background check, which
5 they have done. Girdner Decl. ¶¶ 13, 21 & Exh. 3.

6 In many respects, Defendant's policy of withholding access to new complaints
7 until after processing is similar to the defendants' justifications for delayed access in
8 the *Jackson* case. There, the Harris County District Clerk refused to give Courthouse
9 News access to newly filed petitions until the court had entered information about the
10 petitions into its computerized database, "verified" them to ensure that such items as
11 the cause number, title of the document, and category were all correct, scanned the
12 paper-filed petitions, and posted both paper and e-filed petitions for electronic viewing
13 over the Internet. *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *4-5. Issuing a
14 preliminary injunction requiring the clerk to provide same-day access, the U.S.
15 District Court for the Southern District of Texas held:

16 Assuming, *arguendo*, that Defendants have an overriding interest, the
17 Court finds that they have failed to demonstrate that the 24 to 72 hour
18 delay in access is narrowly tailored to serve such an interest and that no
19 less restrictive means of achieving that interest exists. Accordingly, the
20 Court finds that Plaintiff has established there is a substantial likelihood
21 it will prevail on the merits.

22 * * *

23 There is an important First Amendment interest in providing timely
24 access to new case-initiating documents. Defendants attempt to argue
25 that providing Plaintiff with same-day access interferes with their
26 important objective of "getting online and not in line." The Court
27 acknowledges that Defendants' goal is also in the public interest.

28 However, as Plaintiff argues, same-day access and online access are not

1 mutually exclusive. Defendants may provide Plaintiff with same-day
2 access to newly-filed petitions while working in furtherance of their goal
3 to make documents available online.

4 *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *12-14 (issuing preliminary injunction
5 requiring same-day access to new petitions except where the filing party was seeking
6 a TRO or other immediate relief or had properly placed the pleading under seal).¹¹

7 In addition, as noted, the federal common law creates a presumption that the
8 public and the press have access to documents filed in civil proceedings. The
9 presumption of access that accompanies the common law right can be overcome only
10 on the basis of “articulable facts, known to the court, not on the basis of unsupported
11 hypothesis or conjecture.” *Valley Broad.*, 798 F.2d at 1293 (quoting and adopting the
12 rule of *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) and rejecting a
13 less rigorous requirement). Moreover, the party seeking to restrict access must have a
14 *compelling* reason to do so; a ‘good cause’ showing alone will not suffice.

15 *Kamakana*, 447 F.3d at 1180. In assessing the strength of one’s common law right of
16 access, among the interests that will support the common law right is the public
17 interest in understanding the judicial process, *Hagestad*, 49 F.3d at 1434; *EEOC*, 900
18 F.2d at 170, and in “keeping a watchful eye” on the workings of the government.

21 ¹¹ The order of injunction did not specify the particular manner in which same-day
22 access was required to be provided, leaving that decision up to the Harris County District
23 Clerk. In that case, the clerk elected to provide same-day access to new petitions
24 through the same web site where he had previously been providing delayed access.
25 Pursuant to a stipulated permanent injunction entered on March 2, 2010, the clerk
26 became obligated to continue to provide same-day access to new civil petitions. As it
27 stands, new petitions are made available for review free of charge on the clerk’s web
28 site for the first 24 hours after they are filed, after which time they go behind a paid
wall. In addition, pursuant to the permanent injunction, the clerk’s office became
obligated to pay \$250,000 to Courthouse News to compensate it for the attorneys’ fees
it had incurred in litigating the case. *Courthouse News Service v. Jackson*, 38 Media
L. Rptr. 1894, 1896 (S.D. Tex. 2010). Girdner Decl., ¶ 13 & Exh. 3 (Houston entry).

1 *United States v. Schlette*, 842 F.2d 1574, 1582 (9th Cir. 1988) (quoting *Nixon*, 435
2 U.S. at 598). In addition, a publisher's intention to inform the public concerning the
3 workings of government will also support a right of access, *id.*, an interest that is
4 especially strong where, as here, the documents at issue are case-initiating complaints,
5 without which members of the public have no way of learning about a new lawsuit.
6 Given these strong interests in prompt access, Defendant's bare assertion that the
7 integrity of the court's records will be endangered is not even sufficient to defeat the
8 common law right of access, let alone the stronger First Amendment right.

9 As discussed above, the California Judicial Council has written the First
10 Amendment right of access into the California Rules of Court. Cal. Rule of Court
11 2.550. Thus, for the reasons just stated, Courthouse News is also likely to succeed in
12 proving that the Defendant is in violation of Rule 2.550.

13 **5. At A Minimum, Courthouse News Raises "Serious Questions"**

14 Even if this court should determine that Courthouse News has not demonstrated
15 a likelihood of success on the merits under any of the alternative bases set for above, it
16 at least raises "serious questions" that involve a "fair chance of success on the merits."
17 *See Gilder v. PGA Tour*, 936 F.2d 417, 422 (9th Cir. 1991). "Serious questions" are
18 those that are "substantial, difficult and doubtful, as to make them a fair ground for
19 litigation and thus for more deliberative investigation." *Id.* at 422 (quoting *Hamilton*
20 *Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). Constitutional
21 issues are typically "serious questions." *Jacobsen v. United States Post Office*, 812
22 F.2d 1151, 1154 (9th Cir. 1987). Where, as here, Courthouse News is experiencing
23 substantial access delays at Ventura Superior based on a policy that, as evidenced by
24 the practices of other major courts, is not necessary to ensure the "integrity" of new
25 filings, the balance of hardships clearly tips toward an injunction.

26 **B. Absent Injunctive Relief, Courthouse News Will Be Irreparably Harmed**

27 It is well established that "[t]he loss of First Amendment freedoms, for even
28 minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v.*

1 *Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). *See also, e.g.,*
2 *New York Times Co. v. United States*, 403 U.S. 713, 724-25, 91 S. Ct. 2140, 29 L. Ed.
3 2d 822 (1971) (Brennan, J., concurring); *Carroll v. Princess Anne*, 393 U.S. 175, 182,
4 89 S. Ct. 347, 21, L. Ed. 2d 325 (1968); *Wood v. Georgia*, 370 U.S. 375, 391-92, 82 S.
5 Ct. 1364, 8 L. Ed. 2d 569 (1962).

6 As the Ninth Circuit has recognized, the irreparable nature of a First
7 Amendment injury is further enhanced when the practice sought to be enjoined delays
8 the timely dissemination of news to the public. “Where the precious First
9 Amendment right of freedom of the press is at issue, the prevention of access to a
10 public forum is, each day, an irreparable injury: the ephemeral opportunity to present
11 one’s paper to an interested audience is lost and the next day’s opportunity is
12 different.” *Jacobsen*, 812 F.2d at 1154; *accord, e.g., Jackson*, 2009 U.S. Dist. LEXIS
13 62300, at *13 (finding that denial of same-day access to new petitions constituted a
14 denial of First Amendment freedoms that caused Courthouse News irreparable harm).

15 Courthouse News will also suffer non-constitutional, yet similarly irreparable,
16 injury should injunctive relief not be granted. Prolonged delays in access will
17 diminish the value of its reports to its subscribers, leading to a loss of goodwill.
18 *Girdner Decl.*, ¶ 28. The loss of goodwill is a serious and hard-to-quantify hardship
19 which “certainly supports a finding of the possibility of irreparable harm.” *Gallagher*
20 *Benefit Servs. v. De La Torre*, 283 Fed. Appx. 543, 546 (9th Cir. 2008); *accord*
21 *Stuhlberg Int’l Sales Co. v. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001); *Rent-A-*
22 *Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th
23 Cir. 1991). Moreover, Courthouse News’ injury is irreparable as a matter of law
24 because the Eleventh Amendment bars it from seeking monetary damages. *See*
25 *Kansas Health Care Ass’n v. Kansas Dep’t of Soc. & Rehab. Servs.*, 31 F.3d 1536,
26 1543 (10th Cir. 1994).

1 **C. The Balance Of Equities Tips In Favor Of Courthouse News**

2 Defendants, in contrast, will suffer no injury. Were an injunction to issue,
3 Defendant would only need to adopt one of the numerous procedures used by other
4 courts in California and across the country, including this one, that successfully
5 provide same-day access to case-initiating filings even if processing is still underway.
6 See Girdner Decl. ¶¶ 13-18, 21 & Exh. 3. As in the *Jackson* case, absent injunctive
7 relief “Plaintiff will be denied its First Amendment right of access to new case-
8 initiating documents unless the Court issues this preliminary injunction, while
9 Defendant[] ha[s] alternative, constitutional ways to achieve [his] goals and address
10 [his] administrative concerns.” *Jackson*, 2009 U.S. Dist. LEXIS 62300, at *14
11 (concluding injury to Courthouse News outweighed any damage any injunction
12 requiring same-day access could cause Houston court clerk). Indeed, the balance of
13 interests here tips so sharply in favor of Courthouse News that it also satisfies the
14 more demanding balancing that accompanies the “serious questions” standard.

15 **D. The Preliminary Injunction Will Serve The Public Interest**

16 The public interest inquiry primarily addresses the impact on non-parties rather
17 than parties. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). The
18 plaintiff bears the initial burden of showing that the injunction is in the public interest.
19 See *Stormans*, 586 F.3d at 1139. If he does, the court can then consider whether the
20 likely consequences of the preliminary injunction on the public outweigh the benefit.
21 In so doing, the court need not consider public consequences that are too remote,
22 insubstantial, or speculative and not supported by evidence. *Id.*

23 The Ninth Circuit has consistently recognized the significant public interest in
24 upholding First Amendment rights. *Klein v. City of San Clemente*, 584 F.3d 1196,
25 1208 (9th Cir. 2009). But the public interest is even more pronounced in court access
26 cases, in which the press serves as the surrogate of the public. *Richmond Newspapers*,
27 448 U.S. at 573. The public thus suffers the same irreparable constitutional injury as
28 the press when the press is denied same day access to case-initiating records.

1 Courthouse News acknowledges that the public also has an interest in the
2 integrity of court records being preserved. However, as explained above, that interest
3 will not suffer if the preliminary injunction is granted. Defendant can simply adopt
4 one of the many methods for providing same-day access provided by other courts
5 around the country, including this one. Given the success that other courts have in
6 facilitating same-day access without sacrificing integrity, any claim that Ventura
7 Superior will fail in a similar endeavor is purely speculative.

8 II.

9 **GIVEN THE FACTS OF THIS CASE, THE BOND REQUIREMENT SHOULD** 10 **BE WAIVED OR AT LEAST SET AT A NOMINAL AMOUNT**

11 The injunction bond under Rule 65(c) of the Federal Rules of Civil Procedure is
12 merely a security device. Courthouse News is not asking Defendant to hire more staff
13 or speed up processing; to the contrary, it is simply asking that Defendant be required
14 to cease enforcing his policy of not allowing Courthouse News to see new complaints
15 until they have been processed, thus enabling it to have the same timely access to new
16 complaints that it has in other major courts. Providing same-day media access to
17 newly filed civil complaints – fundamentally, the simple act of letting a reporter *see*
18 the new complaints that, because they are newly-filed, are already centrally located in
19 the intake area – need not involve any extra expense or staff time. *See Girdner Decl.*,
20 ¶¶ 22, 27 & Exh. 8. Because Defendant does not risk monetary damage from a
21 preliminary injunction requiring him to cease enforcement of his policy, no security in
22 the form of a bond requirement is necessary, and Courthouse News respectfully
23 requests that the bond requirement be waived or at least set at a nominal amount.

24 Federal Rules of Civil Procedure 65(c) “invests the district court ‘with
25 discretion as to the amount of security required, *if any*.” *Jorgensen v. Cassidy*, 320
26 F.3d 906, 919 (9th Cir. 2003) (quoting *Barahona-Gomez v. Reno*, 167 F.3d 1228,
27 1237 (9th Cir. 1999)). Thus, a court has discretion to require only a nominal bond or
28 to waive the bond entirely. “The district court may dispense with the filing of a bond
when it concludes there is no realistic likelihood of harm to the defendant from

1 enjoining his or her conduct.” *Tradition Club Assocs., LLC v. Tradition Golf Club*
2 2008 U.S. Dist. LEXIS 104543 at *16 (C.D. Cal. 2008) (citing *Jorgensen*, 320 F.3d at
3 919); *accord Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005).

4 In addition, waiving the bond or setting it at a nominal amount is merited by the
5 constitutional issues in this case. “[R]equiring a bond to issue before enjoining
6 potentially unconstitutional conduct by a governmental entity simply seems
7 inappropriate, because the rights potentially impinged by the governmental entity’s
8 actions are of such gravity that protection of those rights should not be contingent
9 upon an ability to pay.” *Doctor John’s, Inc. v. City of Sioux City*, 305 F. Supp. 2d
10 1022, 1043-44 (N.D. Iowa 2004); *see Jackson*, 2009 U.S. Dist. LEXIS 62300 at *15
11 (ordering Courthouse News to pay only a nominal bond of \$1,000 as security for
12 injunction requiring state court clerk to provide same-day access).

13 CONCLUSION

14 For all of the foregoing reasons, Plaintiff Courthouse News Service respectfully
15 requests that its motion for a preliminary injunction be granted, and that Defendant be
16 preliminarily enjoined from enforcing his policy of denying Courthouse News access
17 to new unlimited jurisdiction civil complaints filed at the Ventura County Superior
18 Court until after the “requisite processing” has been completed, and further directed to
19 provide Courthouse News with access to new complaints no later than the end of the
20 day on which they are filed, except in those instances where the filing party is seeking
21 a TRO or other immediate relief or has properly filed the pleading under seal.

22 Date: September 29, 2011

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

23
24
25
26 By: 

Rachel Matteo-Boehm
Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE