Rachel E. Matteo-Boehm (SBN 195492)
rachel.matteo-boehm@bryancave.com
Roger Myers (SBN 146164)
roger.myers@bryancave.com
Leila C. Knox (SBN 245999)
leila.knox@bryancave.com
BRYAN CAVE LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105-2994
Telephone: (415) 675-3400
Facsimile: (415) 675-3434

Jonathan G. Fetterly (SBN 228612)
jon.fetterly@bryancave.com
BRYAN CAVE LLP
120 Broadway, Suite 300
Santa Monica, CA 90401-2386
Telephone: (310) 576-2100
Facsimile: (310) 576-2200

Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Courthouse News Service,

Plaintiff,

vs.

Michael Planet, in his official capacity as Court Executive Officer/Clerk of the Ventura County Superior Court,

Defendant.

Case No. CV11-08083 R (MANx)

OPPOSITION OF PLAINTIFF COURTHOUSE NEWS SERVICE TO MOTION TO DISMISS OF DEFENDANT MICHAEL PLANET

Date: August 18, 2014
Time: 10 a.m.
Judge: Hon. Manuel L. Real

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INTRODUCTION

In April, the Ninth Circuit rejected an attempt by Defendant Michael Planet, Clerk of Ventura Superior Court, to avoid defending a policy that said it was not possible to allow same-day access to civil complaints prior to processing, which can "take days or weeks." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 779 (2014).

Two months later, Defendant announced he would allow public access to civil complaints on the same day they are received, prior to processing, demonstrating he is quite capable of providing same-day access to new complaints. He also moved to dismiss, not on grounds of mootness – since he can always reverse the new policy – but on the theory Courthouse News had failed to state a cognizable claim that his original policy of denying access for "days or weeks" violated the First Amendment.

This would no doubt come as news to the Ninth Circuit, which found "no question that CNS itself has alleged a cognizable injury" to its "First Amendment right of access." *Courthouse News*, 750 F.3d at 788. Defendant never mentions this passage, nor any of the cases in the Ninth Circuit, and elsewhere, that expressly and emphatically reject each and every basis of his motion to dismiss.

Instead, Defendant constructs an alternate reality out of a few cases in other jurisdictions that are misquoted, antiquated or widely rejected. In his world, a complaint is not among the pretrial records to which the Ninth Circuit recognized a right of immediate access, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143 (9th Cir. 1983) – even though a plethora of precedent has held it is – but instead is the "purely private" property of Defendant until it is "adjudicate[ed]." MPA 21.

It is astonishing a court official takes this view, as the courts and their records are not private but belong to the public. "Litigation is a public exercise; it consumes public resources. It follows that in all but the most extraordinary cases – perhaps those involving weighty matters of national security – complaints must be public." *Levenstein v. Salafsky*, 164 F.3d 345, 348 (7th Cir. 1998). If Defendant's motion is granted, exactly the opposite would become true. His motion should be denied.

BACKGROUND

The Ninth Circuit aptly summarized the factual allegations.[1] Courthouse News, also referred to by the Ninth Circuit as CNS, "is a news wire service that specializes in reporting on civil lawsuits," with some 3,000 subscribers ranging from "major media outlets" to "law firms, university and law school libraries, " while others, including the Ninth Circuit, "rely on CNS" for "daily news" from its website. *Courthouse News*, 750 F.3d at 780, 788 & n.7. Its reporters "daily visit courthouses around the country to review recently filed civil complaints." *Id.* at 780. "In state and federal courthouses ***throughout California and across the United States***, CNS is generally able to ***access*** civil ***complaints*** on ***the day they are filed***." *Id.* (citing as examples ***all*** federal district courts, and "***many***" state courts, in California).[2]

At Ventura Superior, however, access to new complaints was often delayed for "up to thirty-four calendar days," a result of Defendant's policy of "refus[ing] to make complaints available before they had been fully processed." *Courthouse News*, 750 F.3d at 779, 782. Faced with ongoing delays and no prospect of relief from Defendant, Courthouse News filed suit for declaratory and injunctive relief. (ECF #1). Courthouse News sought the same relief it had previously obtained from a federal court in Texas, which enjoined a state court clerk from denying Courthouse News same-day access to new complaints, with exceptions for, among other things, cases where plaintiff sought emergency relief. *Courthouse News Serv. v. Jackson*, 2010 U.S. Dist. LEXIS 74571 (S.D. Tex. Feb. 26, 2010) (permanent injunction).

Defendant said it was "not possible" to provide access prior to processing and still "ensure the integrity" of filings, MPA 5, and exert "quality control" over complaints to "approve[]" them for public viewing. Req. for Jud. Not. ("RJN"),

[1] While Courthouse News filed an amended complaint after the Ninth Circuit ruled, the amended complaint did not alter the factual allegations. (ECF #58).

[2] Throughout this Opposition, all emphases are added, and all citations to quotations within quotations are deleted, unless otherwise noted.

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Exh. 41 (C. Kanatzar Decl., ¶¶ 29, 34, 39).[3] But Defendant never explained why so many courts could provide same-day access while Ventura Superior could not.

Instead, Defendant moved to dismiss on grounds, *inter alia*, of abstention under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and *O'Shea v. Littleton*, 414 U.S. 488 (1974). In November 2011, this Court granted Defendant's motion to dismiss on abstention grounds. (ECF #38). In April 2014, the Ninth Circuit reversed. Reiterating that *Pullman* abstention is "'generally inappropriate when First Amendment rights are at stake,'" the Ninth Circuit rejected it here because there is "no question that CNS itself has alleged a cognizable injury" – to wit, "violation of CNS's First Amendment right of access" – caused by "the denial of timely access to newly filed complaints." *Courthouse News*, 750 F.3d at 784, 788. And it rejected *O'Shea* abstention because Ventura Superior "has available a variety of simple measures" to provide same-day access without harming the interests it sought to protect and without federal court oversight. *Id.* at 791.

After the Ninth Circuit ruled, Defendant found a way to do what was "not possible," and altered his policy to provide same-day access "prior to processing." RJN, Exh. 40. And he moved to dismiss, again, for alleged failure to state a claim.[4]

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[3] Courts may consider on a 12(b)(6) motion any matter that may be judicially noticed, *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) – and may judicially notice matters of public record – but not any "disputed facts" in those records. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-90 (9th Cir. 2001). The Court thus may grant Courthouse News' request for judicial notice, including of how Defendant's own evidence described his policy, since that matter cannot be disputed. Defendant has not asked for judicial notice and, even if he had, his previous factual contentions supporting his position ***are*** disputed by Courthouse News, so it would be "improper for the court to consider the declaration[s] and exhibits" in support of his motion "without converting the motion to dismiss into a motion for summary judgment and giving [Courthouse News] an opportunity to respond." *Ritchie*, 342 F.3d at 909.

[4] Defendant wisely does not contend his new policy moots this case. *Adarand Constructors v. Slator*, 528 U.S. 216, 222 (2000) ("[v]oluntary cessation of challenged conduct" generally does not moot case); *Bell v. Boise*, 709 F.3d 890 (9th Cir. 2013) (change in policy that can be changed back cannot moot case).

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I.

DEFENDANT'S MOTION FAILS BECAUSE THE NINTH CIRCUIT HELD COURTHOUSE NEWS HAS STATED A CLAIM FOR VIOLATION OF THE RIGHT OF ACCESS TO NEWLY FILED COMPLAINTS

Defendant's motion to dismiss cannot be granted as long as Courthouse News has "'allege[d] "sufficient factual matter ... to state a claim to relief that is plausible on its face."'" *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012) (reversing dismissal based in part on time, place and manner analysis). The Court must "treat the factual allegations in CNS's complaint as true," and this includes "treat[ing] as true CNS's factual allegations in the exhibits attached to its complaint." *Courthouse News*, 750 F.3d at 779-80 & n.4. In addition, the Court must "construe [those factual allegations] in the light most favorable to the plaintiff[.]" *OSU Student Alliance*, 699 F.3d at 1061.

Here, the Ninth Circuit recognized Courthouse News has stated a plausible claim for relief: "[T]here is no question that CNS itself has alleged a cognizable injury caused by Ventura County Superior Court's denial of timely access to newly filed complaints." *Courthouse News*, 750 F.3d at 788. The "novel" questions it left open was whether Defendant could "overcome" that claim by establishing a defense that justified Defendant's denial of same-day access. *Id.* at 792-93 & n.9.

Despite this, most of Defendant's motion rests on the fallacious notion that "the First Amendment right of access does not attach to the documents at issue in CNS's Complaint." MPA 11. This notion not only conflicts with Ninth Circuit law, it is barred by the doctrines of "law of the case" and "rule of mandate."

Under the former, decisions "in a prior appeal must be followed in all subsequent proceedings in the same case." *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989). It includes not only a court's "explicit decisions" but also "those issues decided by necessary implications." *Id.* (quotation omitted). Under the latter – which "is similar to, but broader than, the law of the case doctrine," *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) – an appellate court's mandate "precludes

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the district court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal." *U.S. v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987). "The rule of mandate requires that, on remand, the lower court's actions must be consistent with both the letter ***and the spirit*** of the higher court's decision." *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005).

Defendant contends the Ninth Circuit took "no position" on whether the right of access attaches when complaints are newly filed and not yet "subject to some judicial decision." MPA 2, 11.[5] But this contention violates "both the letter and the spirit" of the Ninth Circuit's ruling. In concluding *Pullman* abstention did not apply in this First Amendment case, the Ninth Circuit determined Courthouse News has alleged a viable claim for "violation of the First Amendment right of access" to the documents at issue in the complaint. *Courthouse News*, 750 F.3d at 788. In finding "no question" that Courthouse News "alleged a cognizable injury caused by [the] denial of ***timely access*** to ***newly filed complaints***," *id.*, the Ninth Circuit disposed of any argument that access does not attach when complaints are "newly filed."

Accordingly, the legal determination that the First Amendment right of access attaches to the documents at issue – *i.e.*, newly filed complaints – is "part of the law of this case," the "issue was not left open by [the Ninth Circuit's] mandate" and it "may not be considered again on remand." *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985) (reversing decision violating law of case and rule of mandate).

[5] The Ninth Circuit, of course, said no such thing. Rather, it took "no position on the ***ultimate merits*** of CNS's claims." *Courthouse News*, 750 F.3d at 793. That means something different than what Defendant contends. *First*, it means the Ninth Circuit took no position on whether the evidence would ultimately support those claims. *Second*, it took no position whether either of the possible defenses it noted might overcome the right of access. *Id.* at 793 n.9. Thus Defendant can try to raise the time, place and manner defense now, but cannot re-argue that Courthouse News has not stated a claim for violation of its right of access to newly filed complaints grounded in the First Amendment freedom of speech (a position he argued extensively, *see* Answering Brief 17-20 & 30-35, and lost, in the Ninth Circuit).

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II.

DEFENDANT'S MOTION FAILS BECAUSE THE NINTH CIRCUIT HAS MADE CLEAR, AND MANY CASES HAVE HELD, COMPLAINTS ARE RECORDS TO WHICH A RIGHT OF ACCESS ATTACHES WHEN FILED

Even if "law of the case" and the "rule of mandate" did not bar Defendant from disputing that a First Amendment right of access "attach[es] to the documents at issue in CNS's Complaint," MPA 11, his motion fails because the Ninth Circuit's recognition that Courthouse News has a cognizable right of timely access to newly filed complaints is firmly rooted in both the common law and First Amendment.[6] As Courthouse News will now show, Defendant can only attempt to seek a contrary result by ignoring Ninth Circuit law – including a recent case involving the law firm representing Defendant, in which the Ninth Circuit reiterated that "'[u]nless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point,'" *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) – and by misstating the law in many of the other circuits.[7]

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[6] It is also consistent with California law, which tracks the First Amendment. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999). Even if it did not, Defendant errs in claiming state law only allows access to "documents after they have been 'filed … in the case folder.'" MPA 1 (misquoting Cal. Gov't Code § 68151(a)(1), which defines "court records" to which a right of access attaches as "[1] ***All filed records*** and [2] documents in the case folder.") (brackets added).

[7] Defendant also tries to redefine "filed" to make it appear Courthouse News seeks access to complaints "before they are … filed." MPA 1. This argument rests on the fiction that a complaint is unfiled until processed, after which the filing date is ***backdated*** to the day it was received. RJN, Exh. 41, ¶¶ 13-16. But in Ventura, complaints are "filed" when received, http://www.ventura.courts.ca.gov/drop-box.html, as they must be. Cal. R. Ct. 1.20(a) (document "deemed filed on the date it is received by the court clerk"). Even if Defendant could draw this distinction, it would make no legal difference, as the Ninth Circuit has reversed an attempt to "carve[] out [this] exception" to access, rejecting the notion that "if a document is lodged, rather than filed, with the court, it is not a judicial record or document at all and, therefore, the public is generally not entitled to access." *Rocky Mountain Bank v. Google*, 428 Fed. Appx. 690, 692 (9th Cir. 2011) ("the public's long-standing right cannot be absterged by the simple expedient of having documents lodged").

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A. Numerous Cases Have Rejected Defendant's Theory That Complaints Are Not Public Judicial Records Until They Are Acted On By The Court

Recognizing it would "spawn considerable mischief" by "conceal[ing] the very existence of lawsuits from the public," *Standard Chartered Bank Int'l v. Calvo*, 757 F. Supp. 2d 258, 259-60 (S.D.N.Y. 2010), federal courts have ***rejected*** Defendant's theory that complaints are not judicial records to which a right of access attaches "until they are considered by the court and made the subject of some judicial decision," MPA 10-11, including in the situation posited by Defendant where litigants seek to settle before any substantive action by the court. *Vassiliades v. Israely*, 714 F. Supp. 604, 605-06 (D. Conn. 1989); *see Lugosch v. Pyramid Co.*, 435 F.3d 110, 121 (2d Cir. 2006) ("Defendants read the above reference" – to the main case relied on by Defendant, *In re Reporter's Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) – "as standing for the proposition that until a district court knows the disposition of the underlying motion, any attempt at calling something a judicial document is premature. ***This reading cannot stand***."); *In re Coordinated Pretrial Proceedings*, 101 F.R.D. 34, 42-43 (C.D. Cal. 1984) (rejecting theory that "public access interests … do not attach until, essentially, the judge makes a ruling" because "***public access right attaches***" when "***documents [are] filed*** for the court's consideration in a civil case") (following *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983)).[8]

[8] Defendant's motion rests on the reading of *Reporter's Committee* rejected by *Lugosch*. MPA 12-18. *Reporter's Committee* did not address complaints, but rather summary judgment, and its theory why those records may not be public until a court rules on that motion has no bearing here. Moreover, "***subsequent decisions have declined to follow*** the reasoning and approach of the ***Reporter's Committee*** decision" on the very point for which Defendant cites it – that "'[c]ontemporaneity of access to written material does not significantly' enhance the public's ability to ensure proper functioning of the courts.'" *NBC Subsidiary*, 20 Cal. 4th at 1220 n.43 (quoting *Reporter's Committee*, 773 F.2d at 1337 n.9). The cases that reject this decision include *Brown & Williamson* and *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984), *id.*, both cited with approval in *Courthouse News*, 750 F.3d at 786.

The reason for this is clear. A "court is a transparent forum." *In re Eastman Kodak Co.*, 2010 WL 2490982, *1 (S.D.N.Y. June 15, 2010). If parties could convert a publicly funded court into a private tribunal as long as they settle prior to a "judicial decision," MPA 10, "before long a policy of openness would become a policy of secrecy," and "[n]othing is more inimical to the values of a democracy than secrecy in any part of government, and the judiciary is an important part of government." *Cook v. First Morris Bank*, 719 A.2d 724, 728 (N.J. Super. 1998).

Indeed, Defendant's proposed rule would create the sort of dual-track system – in which the public would have a right of access to files in some cases (where the court has ruled) but not in others (where it has not) – that then-Judge Kennedy said would harm the judicial system. "Confidence in the accuracy of its records is essential for a court," but "[s]uch confidence erodes if there is a two-tier system, open and closed." *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 826 (9th Cir. 1985).

Ignoring these cases, Defendant tries to create an alternate universe largely by misstating cases from other circuits. For example, after the sentence in *U.S. v. Amodeo* quoted by Defendant – "'[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of access,'" MPA 2 – the Second Circuit held the record need only "be relevant to the performance of the judicial function and useful in the judicial process … to be designated a judicial document." 44 F.3d 141, 145 (2d Cir. 1995).[9] Defendant omits that sentence because it clearly applies to complaints when filed. *See, e.g., In*

[9] Defendant also overlooks that the Fourth Circuit case he cites held documents "***are judicial records***" to which a right of access attaches if "***filed with the objective of obtaining judicial action or relief***," *U.S. v. Appelbaum*, 707 F.3d 283, 291 (4th Cir. 2013), a holding "in harmony with … several" other cases he cites. *Id.* at 290-91 (citing *In re Providence Journal Co.*, 293 F.3d 1 (1st Cir. 2002), *U.S. v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) and *Amodeo*, 44 F.3d at 145). And the First Circuit case he cites holds only "[t]hose ***documents which play no role in the adjudicative process***, … such as those ***used only in discovery***, ***lie beyond reach"*** of the right of access. *FTC v. Standard Financial Mgt. Co.*, 830 F.2d 404, 408 (1st Cir. 1987).

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re Nvidia Corp. Derivative Litig., 2008 U.S. Dist. LEXIS 120077, *10-11 (N.D. Cal. Apr. 22, 2008) ("[T]his Court cannot conclude sealing parts of a complaint is analogous to sealing records 'not directly relevant to the merits of the case.' ***It establishes the merits of a case, or the lack thereof***.").[10]

In sum, while "'[t]here may be a historical case to be made that a civil complaint filed with a court, but then soon dismissed pursuant to settlement, is not the sort of judicial record to which there is a presumption of public access,'" MPA 11 (quoting *IDT Corp v. eBay, Inc*., 709 F.3d 1220, 1222-23 (8th Cir. 2013)), Defendant's theory fails because he overlooks that the "***modern trend*** in federal cases [is] to ***treat pleadings*** in civil litigation (other than discovery motions and accompanying exhibits) ***as presumptively public***, even when the case is pending before judgment … or resolved by settlement." *IDT Corp*., 709 F.3d at 1223 (citing *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999)).

B. In The Ninth Circuit And Most Courts, A First Amendment Right Of Access Applies To Judicial Records, Such As Complaints, Upon Filing

While finding that a document is a judicial record is typically used to establish a common law right of access, cases holding complaints are judicial records also support a First Amendment right of access that, contrary to Defendant's view, "'involves a right of contemporaneous access.'" *Republic of Philippines v. Westinghouse Elec. Corp*., 139 F.R.D. 50, 60 (D.N.J. 1991) (quoting *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984)), *aff'd*, 949 F.2d 653 (3d Cir. 1991).

[10] *Accord Standard Chartered Bank*, 757 F. Supp. 2d at 259-60 (complaint meets Second Circuit "'judicial document'" test because it is one of the "important papers … which underpin a civil action and give the federal court jurisdiction over the matter"); *Vassiliades*, 714 F. Supp. at 605-06 (rejecting argument complaint should not be public at filing to allow parties to settle quickly); *Eastman Kodak*, 2010 WL 2490982 at *1 (rejecting argument complaint "'[p]lays no role in the performance of [a Court's] Article III functions'" because it "forms the basis of a civil action and invokes the jurisdiction of the court"); *U.S. ex rel. Dahlman v. Emergency Physicians*, 2004 U.S. Dist. LEXIS 31304, *3-4 (D. Minn. Jan. 5, 2004) (complaint is a "'judicial record'" under *Nixon v. Warner Comm'ns*, 435 U.S. 589, 597 (1978)).

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That is because "[t]he common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986); *accord Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004). While Defendant cites cases discussing a narrower view of the records to which the constitutional right attaches, he overlooks that in most circuits, including the Ninth, "the public and press have a first amendment right of access to pretrial documents in general." *Associated Press*, 705 F.2d at 1145;[11] *accord Oregonian Pub. Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1463-65 (9th Cir. 1990).

While these decisions involved records filed in criminal cases, the Supreme Court and Ninth Circuit – among many other courts – have recognized "there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979); *EEOC v. Erection Co.*, 900 F.2d 168, 169 (9th Cir. 1990) (finding "no … support for [a] distinction" between access to "civil proceedings … [and] criminal prosecutions"); *Cont'l Ill. Sec. Litig.*, 732 F.2d at 1308 ("[W]e agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well.") (citing *Brown & Williamson*, 710 F.2d at 1179).

The two latter cases were cited with approval in *Courthouse News*, 750 F.3d at 786, which made clear the Ninth Circuit will join those courts that "have widely agreed that [First Amendment access] extends to civil proceedings and associated records." *Id.* (also citing *N.Y. Civil Lib. Union v. NYC Transit Auth.*, 684 F.3d 286 (2d Cir. 2011); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); and *NBC*

[11] Defendant never addresses *Associated Press* except to selectively quote the concurrence, MPA 10, which took issue with the position – adopted by the majority and thus binding on this Court – that "the press has [a] right to immediate inspection." 705 F.2d at 1149 (Poole, J., concurring). Moreover, the concurrence was not arguing the press generally cannot have access before a court reviews a document, but was advocating for "'in-camera inspection'" of certain records. *Id.*

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Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178 (1999)).

As these cases illustrate, courts "have articulated two different approaches for determining whether 'the public and the press should receive First Amendment protection in their attempts to access certain judicial documents.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant*, 380 F.3d at 92). The first is "[t]he so-called 'experience and logic' approach …. 'The courts that have undertaken this type of inquiry have ***generally invoked the common law right of access to judicial documents*** in support of finding a history of openness.'" *Id.* "The second approach considers the extent to which the judicial documents are 'derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings.'" *Id.*

Like the Second Circuit, the Ninth has followed the second approach with respect to pretrial records. *Id.* at 124 ("'First Amendment right of access attaches'" to "'documents submitted in connection with judicial proceedings that themselves implicate the right of access'") (quoting *In re New York Times*, 828 F.2d 110, 114 (2d Cir. 1987) (citing *Associated Press*, 705 F.2d at 1145). Under this approach, access attaches to "civil litigation documents ***filed in court as a basis for adjudication***," *NBC Subsidiary*, 20 Cal. 4th at 1208 n.25[12] – such as "a complaint," which "forms the basis of a civil action," *Eastman Kodak*, 2010 WL 2490982 at *1 – because they are "essential" for the public to monitor the proceedings, *id.*, and know a case has been filed. *Vassiliades*, 714 F. Supp. at 606; *Pena v. Schwartz*, 853 F. Supp. 164, 166-67 (D. Md. 1994) (First Amendment access attaches to complaint).

As Courthouse News will now show, application of the "experience and logic" approach also confirms that the First Amendment provides a right "of timely access to newly filed complaints." *Courthouse News*, 750 F.3d at 788.

[12] California thus does not hold a "complaint is not subject to First Amendment right of access until 'it is … used in some manner by the court.'" MPA 11 (misquoting *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 89-90 (2007), which actually said "***discovery material*** is subject to public access … when it is filed with the court and is used in some manner by the court 'as a basis for adjudication'").

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III.

DEFENDANT'S MOTION FAILS BECAUSE THE NINTH CIRCUIT HAS FOUND A RIGHT OF IMMEDIATE ACCESS TO PRETRIAL RECORDS, WHICH EXPERIENCE AND LOGIC SHOW APPLIES TO COMPLAINTS

In a series of cases, the Supreme Court held that the right of the press and public "to attend … hear, see, and communicate observations" about criminal court proceedings was fully protected by the First Amendment "freedoms … of speech and press." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-76 (1980); *accord, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*").

Those cases noted "[t]wo features of the criminal justice system … together serve to explain why a right of access to criminal trials … is properly afforded protection by the First Amendment." *Globe Newspaper*, 457 U.S. at 605. "First, the criminal trial historically has been open to the press and general public." *Id.* "Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Id.* at 606.

These are "complementary considerations," *Press-Enterprise II*, 478 U.S. at 8, and one "alone, even without [the other], may be enough to establish the right":

> Though our cases refer to ... the "experience and logic" test, it's clear that these are not separate inquiries. Where access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows. It is only where access has traditionally not been granted that we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive.

In re Copley Press, Inc., 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008). Both of these "two principal justifications … apply, in general, to pretrial documents," *Associated Press*, 705 F.2d at 1145, and complaints in particular. *See, e.g.*, *Standard Chartered Bank*, 757 F. Supp. 2d at 259; *Dahlman*, 2004 U.S. Dist. LEXIS 31304 at *3-4.

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A. There Is A Strong, Clear History Of Access To Complaints "When Filed"

In *Associated Press*, the Ninth Circuit recognized the history of public access to pretrial records supported a First Amendment right of access: "There can be little dispute that the press and public have historically had a common law right of access to most pretrial documents." 705 F.2d at 1145. There is also no dispute this "long-standing public policy [of] open access [applies] to complaints." *Dahlman*, 2004 U.S. Dist. LEXIS 31304 at *3-4; *see, e.g., Campbell v. New York Evening Post, Inc.*, 157 N.E. 153, 155 (N.Y. 1927) ("The pleadings in an action … may be filed in the office of the county clerk, ... and when so filed they become public documents.").[13]

As Courthouse News alleges, there is a tradition of access by the end of the day a complaint is filed in nearly all federal and most state courts. Am. Comp., ¶¶ 10-14, Exh. 1.[14] State statutes and rules confirm the public nature of court records, including complaints, when filed. RJN, ¶¶ 1(a)-(mm), Exhs. 1-39.[15] Combined with the cases cited herein, this shows that at least 41 states allow access upon filing.[16]

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[13] *See also Lybrand v. The State Co.*, 184 S.E. 580, 583 (S.C. 1936) ("summons and complaint" must be filed with "clerk of the court" and "when so filed … become public documents in a public office"); *Bull v. LogEtronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971) (complaint "when filed, became a public record"); *In re Globe Newspaper Co.*, 958 N.E.2d 822, 828-29 (Mass. 2011) ("once a document is filed …it is a public record" unless a judge finds "good cause" to impound it).

[14] The two cases cited by Defendant are not to the contrary, as *ACLU v. Holder*, 652 F. Supp. 2d 654 (E.D. Va. 2009), involved a "qui tam complaint," which "must [be] file[d] … under seal," *id.* at 662, and *U.S. Tobacco v. Big South Wholesale of Va.*, 2013 U.S. Dist. LEXIS 165638 (E.D.N.C. Nov. 21, 2013), simply cited *Holder* without discussing the difference between qui tam and other complaints. *Id.* at *8.

[15] None of the statutory provisions require a showing of "interest" to justify access, as some old cases cited by Defendant once required, because the "Supreme Court has made it plain that all persons seeking to inspect and copy judicial records stand on equal footing, regardless of their motive for inspecting such records." *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 167 (3d Cir. 1993).

[16] This showing distinguishes the instant case from *IDT*, in which plaintiff failed to plead or present evidence establishing a tradition of access. 709 F.3d at 1224.

Defendant contends all this history is insufficient if it is not unbroken in all states going back to the founding of the republic and, before that, England. As Defendant surely must know, this is pure poppycock. While *Richmond Newspapers* found an "'unbroken, uncontradicted history'" supported access to trials, MPA 12 (quoting 448 U.S. at 573), such a history is "***not required***." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002). As that case noted in ***rejecting this theory***, the "Supreme Court effectively silenced this argument in *Press-Enterprise II*," and "Courts of Appeals have similarly not required such a showing." *Id.* (citing, e.g., *Cal-Almond, Inc. v. U.S. Dep't of Ag.*, 960 F.2d 105 (9th Cir. 1992)).

Rather, all that is required is a "tradition of accessibility [that] implies the favorable judgment of experience." *Globe Newspaper*, 457 U.S. at 605 (quotation omitted). That need not be long; while "the tradition of openness must be strong[,] … a showing of openness at common law is not required." *Delaware Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 515 (3d Cir. 2013) (quotation omitted).

Indeed, the Ninth and other circuits have found a "history of access … by reviewing ***current state statutes***" like the ones compiled here. *Detroit Free Press*, 303 F.3d at 700 (describing *Cal-Almond*, 960 F.2d at 109); *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1516 (9th Cir. 1988) (citing Bail Reform Act of 1984 to show tradition of access, even though bail proceedings "do not share with criminal trials an unbroken history of public access," because changes in "pretrial procedures in the modern era" make "historical tradition ... much less significant"); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) ("no hesitation" finding "constitutional right of access" based on 30-year old statute).

Thus, while it is true that 140 years ago then-Judge Holmes discerned a "plain distinction between what takes place in open court, and ... the contents of a paper filed … in the clerk's office" for purposes of the fair report defense to a libel claim, *Cowley v. Pulfiser*, 137 Mass. 392, 395 (1884) – and "some courts [at the time] … followed *Cowley*" – it is also irrelevant because in 1927 the trend began to reverse

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when New York "rejected *Cowley*." *American Dist. Tel. Co. v. Brink's Inc.*, 380 F.2d 131, 132-33 (7th Cir. 1967) (citing *Campbell*, 157 N.E. at 155-56). "Similar rulings have been made by other states," *id.*,[17] and "the weight of modern authority" now applies the defense to "filed pleadings that have not yet come before a judicial officer" because they are "[p]ublic documents to which citizens … have free access." *Salzano v. North Jersey Media Group*, 993 A.2d 778, 790 (N.J. 2010).[18]

B. <u>There Is A Well-Established Logic In Access To Complaints When Filed</u>

The Ninth Circuit found a right of immediate access to "pretrial documents" because they "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning." *Associated Press*, 705 F.2d at 1145 (quoting *Globe Newspaper*, 457 U.S. at 605). The only question, then, is whether there is anything different about a complaint that could justify a different conclusion. The answer clearly must be – and is – a resounding "no."

This question turns on whether the process operates best under public scrutiny or secrecy. *Press-Enterprise II*, 478 U.S. at 8-9 ("Although many governmental processes operate best under public scrutiny, … some … would be totally frustrated if conducted openly."). The judicial system works best under public scrutiny. *Id*.

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[17] *Citing, e.g., Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 37 (Tenn. 1956); *Torski v. Mansfield Journal Co*., 137 N.E.2d 679, 683-84 (Ohio App. 1956); *see Kurata v. L.A. News Pub. Co*., 4 Cal. App. 2d 224, 227 (1935) (rejecting theory that a "'mere pleading, … unanswered and not having been placed within the scrutiny of any court or judge, is not a 'judicial proceeding'" because "a lawsuit from beginning to end is in the nature of a judicial proceeding, the filing of the complaint being the first step therein ... [is] a public and official act in the course of judicial proceedings").

[18] *Shiver v. Valdosta Press*, 61 S.E.2d 221, 413 (Ga. App. 1950) ("this suit became a matter of public record the moment it was marked filed in the clerk's office"); *Charlottesville Newspapers, Inc. v. Berry*, 206 S.E.2d 216, 217-18 (Va. 1974) (overturning order that "public be denied access to the pleadings, motions and suit papers in all new civil actions … until 21 days have elapsed from the date of such filing"); *Estate of Hearst*, 67 Cal. App. 3d 777, 782 (1977) ("there can be no doubt that court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic").

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Access to "complaint[s]" is essential to this process because they are "essential to the Court's adjudication" and "the public's interest in monitoring … courts." *Eastman Kodak*, 2010 WL 2490982 at *1. It is thus "highly doubtful that 'California could decide not to give out [the complaints] at all without violating the First Amendment.'" *Courthouse News*, 750 F.3d at 784-85.

Flying in the face of this logic, Defendant contends there is no value in access at filing on the theory that, until it is acted on, there is "no justice to be observed," and complaints are "purely private pleadings." MPA 11, 19, 21. His extraordinary view of complaints – as private documents rather than fundamentally public records the press and public have a right to review in a timely manner – provides perhaps the best insight yet why there have been delays in access of days and weeks at Ventura Superior even as other courts routinely provide same-day access. But his view is as outdated as the 19th Century cases on which he must necessarily rely.

"[A]n action is commenced by the filing in the office of the clerk … a petition stating the plaintiff's cause of action …. [W]hen that is done the controversy is ***no longer*** a ***private*** one between two individuals, but is in all respects a judicial proceeding." *Paducah Newspapers v. Bratcher*, 118 S.W.2d 178, 180 (Ky. App. 1937); *In re Johnson*, 598 N.E.2d 406, 410 (Ill. App. 1992) ("***Once*** … ***filed with the court***, they ***lose their private nature*** and become part of the court file and 'public components' of the judicial proceeding to which the right of access attaches.").

Treating complaints as private until acted upon would "interfere with … the public's right to monitor activities in [the] courts." *Standard Chartered Bank*, 757 F. Supp. 2d at 259. "The filing of the complaint is likely to be the first occasion that the public could become aware of the dispute." *Vassiliades*, 714 F. Supp. at 606. Absent access, there is often no way to know a lawsuit has been filed; even if alerted to the suit by the filing party or docket sheet, the press and public would have no details about "the parties … and the alleged" claims. *Eastman Kodak*, 2010 WL 2490982 at *1. That would "effectively block the public's access to a significant

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segment of our [civil] justice system." *Oregonian Pub.*, 920 F.2d at 1465.

It would also harm the public interest. *Republic of Philippines*, 949 F.2d at 664. "'[S]ecrets buried in court records, literally, kill and maim.'" Doggett & Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643, 648 (1991). The public may never learn of "lawsuits over toxic spills … settled in secret," a "faulty heart valve" that "could be killer" or playground equipment alleged to be dangerous. *Id*. at 648-49.[19]

That is why courts reject both the notion that complaints are "of a private nature," *Stapp v. Overnite Transp. Co*., 1998 U.S. Dist. LEXIS 6412, *3-4 (D. Kan. Apr. 9, 1998), and attempts to restrict public access. *Nvidia*, 2008 U.S. Dist. LEXIS 120077 at *10-11 ("While a complaint is not, per se, the actual pleading by which a suit may be disposed of, it is the root, the foundation, the basis by which a suit arises and must be disposed of. … [I]t is the means by which a plaintiff invokes the authority of the court, a public body, to dispose of his or her dispute …. [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 towards what purpose, and in what manner.").

[19] As this illustrates, the modern view that a complaint is an important pleading to which public access upon filing is essential flows from changes in litigation. Until promulgation of the Federal Rules of Civil Procedure in 1938 – and similar rules in most states – there was little pre-trial activity, and the parties moved quickly to trial after the pleadings. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347, 350-86 (2003). Since then, there has been a "transformation of the trial – limited in time and space – into litigation, which can be quite lengthy and need not culminate in a trial at all." *Id*. at 406. Moreover, "[t]here were no multi-million or billion dollar lawsuits, … or even many of the legal rights of action plaintiffs now take for granted. ... Product liability law … did not exist then as it does today." Schwartz & Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 Harv. J.L. & Pub. Pol'y 1107, 1129-31 (2010). Because "an increasing number of society's problems are resolved through the judicial process," courts now recognize "the entire judicial system ***from the filing of a complaint*** until final decision before the highest court of review should be exposed to the bright light of public scrutiny." *Newell v. Field Enters.*, 415 N.E.2d 434, 444-46 (Ill. App. 1980).

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C. History And Logic Thus Confirm A Right Of Contemporaneous Access

As experience and logic confirm, the right of access "begins when a judicial document is filed." *Atlanta Journal v. Long*, 369 S.E.2d 755, 758 (Ga. 1988). It cannot "be suspended or nonexistent until after the judge has ruled," as that would violate "the important interest in contemporaneous review," *Coordinated Pretrial Proceedings*, 101 F.R.D. at 43, and "'unduly minimize[], if ... not entirely overlook, the value of "openness" itself, a value which is threatened whenever immediate access … is denied.'" *Courthouse News Serv. v. Jackson*, 2009 U.S. Dist. LEXIS 62300, *11-12 (S.D. Tex. July 20, 2009) (quoting *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989)). "In light of the values which the presumption of access endeavors to promote, a necessary corollary … is that once found to be appropriate, access should be immediate and contemporaneous." *Id*. at *11 (quoting *Grove Fresh Distribs. v. Everfresh Juice Co*., 24 F.3d 893, 897 (7th Cir. 1994)).[20]

It necessarily follows that even a "24 to 72 hour delay in access is effectively an access denial and is, therefore, unconstitutional," *id.*, because "[t]he effect … is a total restraint on the public's first amendment right of access even though the restraint is limited in time." *Associated Press*, 705 F.2d at 1147.

This does not mean, as Defendant asserts, that Courthouse News seeks a ruling that "all courts," at all times, must provide same-day access. MPA 12. Rather, the question here, as in any case, is whether a defense can "overcome" that right and justify denying access for a period of time. *Courthouse News*, 750 F.3d at 792-93 & n.9. Unable to show "an 'overriding [governmental] interest based on

[20] *See Lugosch*, 435 F.3d at 126 ("Our public access cases and those in other circuits ***emphasize the importance of immediate access where a right to access is found***."); *U.S. v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008) ("the value of … access would be ***seriously undermined if it could not be contemporaneous***"); *Company Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we … ***emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies***.").

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findings that closure is essential to preserve higher values,'" *id.*, Defendant does not assert that defense. Instead, he says "[t]he delay in making the complaints available [is] analogous to a permissible 'reasonable restriction[] on the time, place, or manner of protected speech.'" *Id.* But that defense also fails because the Ninth Circuit rejects the use of time, place and manner to justify a "delay 'of even a day or two.'" *NAACP, Western Region v. Richmond*, 798 F.2d 1346, 1356 (9th Cir. 1984).

IV.

FINALLY, DEFENDANT'S MOTION FAILS BECAUSE THE NINTH CIRCUIT PROHIBITS USE OF TIME, PLACE AND MANNER ANALYSIS TO JUSTIFY DELAYS IN EXERCISING FIRST AMENDMENT RIGHTS

As the Ninth Circuit has instructed, "[c]ertain general principles of First Amendment law guide [the Court's] analysis." *Comite de Jornaleros de Redondo Beach v. Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc). First among those is that "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions,'" *id.*, including "regulation of the time, place, or manner" ("TPM") of speech. *Id.* at 947. Contrary to Defendant's attempt to put the burden on Courthouse News, MPA 3, 21-22, "'[D]efendant bears the burden of pleading and proving it.'" *Kraus v. Presidio Trust Facilities Div.*, 572 F.3d 1039, 1046 n.7 (9th Cir. 2009). He has not and cannot carry that burden.

A. As The Ninth Circuit Has Held, Denying Access For Even A Limited Time Must Satisfy Strict Scrutiny And Is Not Merely A TPM Restriction

Conceding "a complete denial of a First Amendment access right must be necessitated by a compelling governmental interest," Defendant insists denying access for "days or weeks," *Courthouse News*, 750 F.3d at 779, is not a complete denial and thus is subject to TPM analysis. MPA 22-23. For this theory, he cites three cases applying TPM to ***courtroom access***, one case that did ***not apply TPM***, a district court decision contrary to Ninth Circuit law, and ***no Ninth Circuit*** authority.

None of the courtroom access cases hold a delay need only satisfy TPM analysis. "The passage … in *Richmond Newspapers* … – upon which [Defendant]

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relies for its 'time, place, and manner' analogy – addresses only reasonable restrictions necessary to maintain courtroom decorum and to resolve problems relating to seating capacity." *NBC Subsidiary*, 20 Cal. 4th at 1225 n.53. A restriction that "limits the underlying right of access rather than regulating the manner in which that access occurs," *Whiteland Woods*, 193 F.3d at 183, must meet the "compelling governmental interest" test. *Globe Newspaper*, 457 U.S. at 607 & n.17; *cf. U.S. v. Hastings*, 695 F.2d 1278, 1282 & n.11 (11th Cir. 1983) (rule allowing press to attend "any portion of a criminal trial," but not photograph or televise it, is a TPM restriction because it did not "'deny or unwarrantedly abridge'" what could be seen and communicated) (quoting *Richmond Newspapers*).

For that reason, courts reject Defendant's theory that TPM can be used to justify "'[d]elaying media access.'" *NBC Subsidiary*, 20 Cal. 4th at 1220 n.42 ("[a]lthough the trial court did not impose a prior restraint on the publication of information, it did close the courtroom and ***temporarily seal*** the hearing transcripts, thereby precluding access to information in the first instance. … [T]he latter acts clearly are subject to 'exacting First Amendment scrutiny.'"); *Ridenour v. Schwartz*, 875 P.2d 1306, 1309 (Ariz. 1994) (delaying access after 3 p.m. until next day was "unconstitutional denial of public access" because it "partially close[d] the court").

The Ninth Circuit used a similar analysis to hold that a court delaying access to pretrial records must "establish that the procedure '"is strictly and inescapably necessary"'" to protect a compelling interest. *Associated* Press, 705 F.2d at 1145. That is because such a delay ***is*** a "total restraint" on access for the time it is imposed, *id.* at 1147, thus requiring strict scrutiny. MPA 22.[21]

[21] "Because ***delay in access*** can result in such serious First Amendment harm," even cases cited by Defendant "do ***not*** find that such a [temporary] seal is ***a mere time, place, and manner restriction***, to be sustained if it is merely reasonable." *Reporter's Committee*, 773 F.2d at 1354 n.25 (Wright, J., concurring and dissenting in part); *see also Amodeo*, 44 F.3d at 147 (excluding "public …, ***temporarily or permanently***, from … the records" must meet substantive test for closure).

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Another court has rejected Defendant's argument that a "'slight delay' in availability" of new complaints "is a reasonable time, place, or manner restriction." *Courthouse News*, 2009 U.S. Dist. LEXIS 62300 at *1. Two others recognized that "time, place, and manner" analysis could only justify delay in access until "the end of the [court] day," at which point "the press and news media shall have access to all evidence admitted … that day." *U.S. v. Hernandez*, 124 F. Supp. 2d 698, 703, 706 (S.D. Fla. 2000); *U.S. v. Sampson*, 297 F. Supp. 2d 342, 345-47 (D. Mass. 2003).

Ignoring these cases, Defendant cites only *Barber v. Conradi*, 51 F. Supp. 2d 1257 (N.D. Ala. 1999). But in that case, the Eleventh Circuit ***reversed*** the grant of a motion to dismiss, after which defendant sought summary judgment based on the burden imposed by a pro se plaintiff's claim for access to 4,200 files, *id.* at 1258-67 – a far cry from the "approximately 8" complaints received each day in Ventura. RJN, Exh. 41, ¶ 14. The court cited ***no authority*** to support its theory that a two-hour-per-week limit was not a "total denial of access" and thus a TPM restriction, 51 F. Supp. 2d at 1267 – even though it would take plaintiff ***58 weeks*** to access all the files at 72 per week, *id.* at 1260 – and did not address any cases to the contrary, such as the Ninth Circuit's holding that a delay of 48 hours was a total denial of access. *Associated Press*, 705 F.2d at 1147. A district court decision – at a different procedural point on different facts – cannot trump Ninth Circuit law to the contrary.

B. As The Ninth Circuit Also Held, Defendant's Policy Fails TPM Scrutiny Because He Cannot Carry His Burden Of Justifying The Delay In Access

Even if TPM could apply, the test this Court must apply is not the Eleventh Circuit test Defendant cites, MPA 22, but the Ninth Circuit test, under which a TPM restriction must [1] be "'justified without reference to the content of the regulated speech, … [2] narrowly tailored to serve a significant governmental interest, and … [3] leave open ample alternative channels for communication of the information.'" *Comite*, 657 F.3d at 945 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (brackets added). Defendant does not attempt to, and cannot, meet this test.

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1. Defendant's Policy Is Not Content-Neutral Because It Requires Review Of Content To Approve Complaints For Public Viewing

Defendant did not address this threshold test because his policy – which requires staff "to examine the contents" of complaints – is "content-based." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998); *Ward*, 491 U.S. at 791 ("content neutral" means "'justified without reference to the content'").

Defendant's policy clearly references content. It provides that complaints "are not ready for review, by the press or other members of the general public," until they are "approved" for public viewing. RJN, Exh. 41, ¶ 34. Staff must "reject[]" complaints that are "incomplete," and are not supposed to let the public know they were even filed. *Id.* They are also supposed to withhold "confidential" information. *Id.*, ¶ 39. Because staff "must examine the speech to determine if it is acceptable," Defendant's policy "is content-based" and "presumptively unconstitutional." *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 964-65 (9th Cir. 2008).

2. Defendant Has Not And Cannot Demonstrate That His Policy Is Narrowly Tailored To Serve A Significant Governmental Interest

Even if it could be "'justified without reference to the content,'" the policy "must also be 'narrowly tailored to serve a significant governmental interest.'" *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010). Defendant says his policy serves "efficient administration," the "integrity of civil complaints" and the "privacy of third parties." MPA 23-24. But "'***merely invoking interests ... is insufficient***.'" *Klein v. San Clemente*, 584 F.3d 1196, 1202 (9th Cir. 2009). Defendant must not only show these interests are "sufficiently significant" to justify his policy, he "'must also show that the proposed communicative activity endangers those interests.'" *Id.* at 1202-03 & n.5.[22]

[22] *Citing, e.g., Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1228 (9th Cir. 1990) (TPM restriction may not be based "on mere speculation about danger"); *S.O.C.*, 152 F.3d at 1146 ("no evidence … to support an assumption that 'commercial' handbillers are the inherent cause of … pedestrian flow problems").

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Defendant has not shown his interests are "significant in the abstract,"[23] but even if he had, the requirement that he prove "a genuine nexus between the [policy] and the interest[s] it seeks to serve," *John v. Minneapolis Park & Rec. Bd.*, 729 F.3d 1094, 1099 (8th Cir. 2013); *Klein*, 584 F.3d at 1201-02, precludes prevailing at this stage. *Vivid Entm't v. Fielding*, 965 F. Supp. 2d 1113, 1125-27 (C.D. Cal. 2013) (denying 12(b)(6) motion on TPM grounds for this reason); *Kahle v. Villaflor*, 2012 U.S. Dist. LEXIS 9118, *43-44 (D. Haw. Jan. 26, 2013) (denying 12(c) motion).

Defendant also does not argue his policy is narrowly tailored, nor could he. "To satisfy the narrow tailoring requirement, '[Defendant] ... bears the burden of showing that the remedy [he] has adopted does not "burden substantially more speech than is necessary to further the government's legitimate interests."'" *Comite*, 657 F.3d at 948 (quoting *Ward*, 491 U.S. at 799). Defendant says denying access until after processing is necessary to protect his interests. MPA 23-24. But his acts say otherwise. After the Ninth Circuit ruled, Defendant began providing access to new complaints on the "same day" they are received, "prior to processing." RJN, Exh. 40. Defendant's own actions show same-day access does "not cause the types of problems that motivated the [policy]," *Comite*, 657 F.3d at 948, and thus delaying access "restricts significantly more speech than is necessary." *Id.* at 948.

Moreover, Defendant's new policy is a "less restrictive means of achieving [his] stated goals." *Comite*, 657 F.3d at 949. The Ninth Circuit identified several others. *Courthouse News*, 750 F.3d at 791. The presence of "a number of feasible, readily identifiable, and less-restrictive means of addressing [Defendant's] concerns"

[23] That "efficient administration" justified restricting access in one extreme case, *Barber*, 51 F. Supp. 2d at 1267, cannot trump the general rule that "administrative burdens" are "not sufficient to override" the right of "same-day access." *In re Associated Press*, 172 Fed. Appx. 1, 5-6 (4th Cir. 2006) (citing cases). The danger of "loss or destruction of the original[s]" is insufficient since "duplicates" can be used and history shows "no reasonable possibility" of harm. *Valley Broadcasting v. U.S. Dist. Ct*, 798 F.2d 1289, 1295 (9th Cir. 1986). And the privacy of third parties cannot justify a TPM rule because, *inter alia*, it requires reference to the content.

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means his policy "is not narrowly tailored." *Comite*, 657 F.3d at 950; *Klein*, 584 F.3d at 1201; *Edwards v. Coeur D'Alene*, 262 F.3d 856, 866 (9th Cir. 2001).

3. Defendant Does Not Explain How The Delays Inherent In His Policy Allow Effective Communication To An Audience For Immediate News

Alternative channels are "constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened.'" *Bay Area Peace Navy*, 914 F.2d at 1229. A policy that "effectively prevents a speaker from reaching his intended audience, … fails to leave open ample alternative means of communication." *Edwards*, 262 F.3d at 866. When a speaker seeks to engage in "[i]mmediate speech … on immediate issues," allowing it to communicate later is inadequate because it does not effectively reach the intended audience. *Richmond*, 743 F.2d at 1355-56. "[D]issemination delayed is dissemination denied." *Id.* at 1356.

Courthouse News seeks same-day access because its audience wants immediate reports about "matters of public interest" in complaints filed that day. *Courthouse News*, 750 F.3d at 779 n.1, 780, 788 & n.7; Am. Comp., ¶¶ 15-19. "[T]he delay inherent" in Defendant's policy – even if only for one business day – prevents Courthouse News from effectively reaching that audience. *Richmond*, 743 F.2d at 1355 (citing *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981)) (striking down ordinance requiring one business day's advance notice). That is because "[a] delay 'of even a day or two' may be intolerable" where, as here, "'the element of timeliness may be important.'" *Id.* at 1356.

By failing to address this issue, let alone explain how his policy permits Courthouse News to provide "fast-breaking" news to an audience for whom "time-sensitive" reports are important, *Long Beach Area Peace Network v. Long Beach*, 522 F.3d 1010, 1036 (9th Cir. 2008), *as amended*, 574 F.3d 1011 (9th Cir. 2009), Defendant "failed to meet [his] burden of showing that there are ample alternative channels" for Courthouse News to communicate effectively with its audience for same-day reports about complaints. *Comite*, 657 F.3d at 957 (Smith, J., concurring).

BRYAN CAVE LLP
560 MISSION STREET, 25TH FLOOR
SAN FRANCISCO, CA 94105-2994

CONCLUSION

The fatal flaws in Defendant's position include not just that it conflicts with settled law in the Ninth Circuit and beyond. It would also be horrible public policy.

Despite Defendant's effort to obscure the forest with the trees, he cannot hide that the position he advocates would carve out complaints from the constitutional command that pretrial records must be available for public review upon filing, *Associated Press*, 705 F.2d at 1145-47, and would allow parties to shield complaints from any public review as long as they settle before the court adjudicates the matter.

"The importance of public access to judicial records and documents cannot be belittled." *In re Special Grand Jury*, 674 F.2d 778, 781 (9th Cir. 1982). If that right is so important it mandates public access to certain "records in the files of the district court having jurisdiction of [a] grand jury" – despite "the rule of grand jury secrecy," *id.* – it is inconceivable that a court could accept Defendant's invitation to find, as a matter of law, that it does not mandate timely public access to civil complaints, one of the most "important" papers in the public government proceeding of modern civil litigation. *Standard Chartered Bank*, 757 F. Supp. 2d at 259-60.

To be sure, there may be times when a party can overcome the right of access by carrying its burden of proving that sealing is essential to protect an overriding interest. *Courthouse News*, 750 F.3d at 793 n.9. But such a showing is "fact-intensive," *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012), and neither that test – which Defendant has not attempted to meet – nor the evidence-dependent time, place and manner test can justify a blanket policy of denying access for "days or weeks" as a matter of law on a motion to dismiss. Plaintiff Courthouse News therefore respectfully requests that the Court deny Defendant's motion to dismiss.

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BRYAN CAVE LLP

By: /s/ Rachel E. Matteo-Boehm
Rachel E. Matteo-Boehm
Attorneys for Plaintiff
COURTHOUSE NEWS SERVICE

BRYAN CAVE LLP
560 MISSION STREET, 25TH FLOOR
SAN FRANCISCO, CA 94105-2994