

No. 18-56216

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,
Plaintiff-Appellant,

v.

DAVID YAMASAKI, in his official capacity as Court Executive Officer/Clerk of
the Orange County Superior Court,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL**

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.
Caitlin V. Vogus, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

Additional amici counsel listed in Appendix B

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Boston Globe Media Partners, LLC, is a privately held company. No publicly held corporation owns 10% or more of its stock.

California News Publishers Association is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

Cox Media Group, Inc. is privately owned, and no publicly held corporation owns 10% or more of its stock.

Digital First Media, LLC. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

Hearst Corporation is privately held and no publicly held corporation owns 10% or more of Hearst Corporation.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Newspaper Association is a non-stock nonprofit Missouri corporation. It has no parent corporation and no subsidiaries.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

New England First Amendment Coalition has no parent corporation and no stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* 1

Fed. R. APP. 29(a)(4)(E) STATEMENT..... 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

 I. The First Amendment right of access attaches to civil complaints at the time of their filing, which in an electronic-filing court is at receipt. 5

 II. When evaluating delays to the First Amendment right of access, the proper test is strict scrutiny, rather than a time, place, or manner analysis..... 9

 III. Even if a time, place, manner analysis is applicable, the delays in providing access here are unconstitutional. 13

CONCLUSION..... 16

CERTIFICATE OF COMPLIANCE WITH RULE 32(g) 18

APPENDIX A..... 19

APPENDIX B..... 28

CERTIFICATE OF SERVICE 31

FORM 8: CERTIFICATE OF COMPLIANCE FOR BRIEFS

TABLE OF AUTHORITIES

CASES

<i>Associated Press v. U.S. Dist. Ct.</i> , 705 F.2d 1143 (9th Cir. 1983)	7, 10, 11
<i>Bernstein v. Bernstein Litowitz Berger & Grossman LLP</i> , 814 F.3d 132 (2d Cir. 2016)	5, 6
<i>Cal. First Amendment Coal. v. Woodford</i> , 299 F.3d 868 (9th Cir. 2002)	5
<i>City of Greenville, Ill. v. Syngenta Crop Prot., LLC</i> , 764 F.3d 695 (7th Cir. 2014).....	7
<i>Co. Doe v. Pub. Citizen</i> , 749 F.3d 246 (4th Cir. 2014).....	7
<i>Comite de Jornaleros de Redondo Beach v. City of Redondo Beach</i> , 657 F.3d 936 (9th Cir. 2011).....	14
<i>Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York</i> , 447 U.S. 530 (1980).....	9
<i>Courthouse News Service v. Jackson</i> , No. CIV A H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009).....	10
<i>Courthouse News Service v. Planet</i> , 614 F. App’x 912 (9th Cir. 2015) (“ <i>Planet II</i> ”)	3, 6
<i>Courthouse News Service v. Planet</i> , 750 F.3d 776 (9th Cir. 2014) (“ <i>Planet I</i> ”)	<i>passim</i>
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	11
<i>Globe Newspaper Co. v. Pokaski</i> , 868 F.2d 497 (1st Cir. 1989).....	11
<i>Globe Newspaper Co. v. Super. Ct.</i> , 457 U.S. 596 (1982)	5
<i>Grove Fresh Distributors, Inc. v. Everfresh Juice Co.</i> , 24 F.3d 893 (7th Cir. 1994).....	11
<i>In re NVIDIA Corp. Derivative Litig.</i> , No. C 06-06110 SBA, 2008 WL 1859067 (N.D. Cal. Apr. 23, 2008)	6
<i>In re Specht</i> , 622 F.3d 697 (7th Cir. 2010)	7
<i>Kamakana v. City & Cnty. of Honolulu</i> , 447 F.3d 1172 (9th Cir. 2006).....	6
<i>Leigh v. Salazar</i> , 677 F.3d 892 (9th Cir. 2012)	8, 10
<i>Leucadia, Inc. v. Applied Extrusion Techs., Inc.</i> , 998 F.2d 157 (3d Cir. 1993)	7

McCrary v. Elations Co., LLC, No. EDCV 13-00242 JGB, 2014 WL 1779243
 (C.D. Cal. Jan. 13, 2014) 6

Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976)..... 15

Press-Enterprise Co. v. Super. Ct., 464 U.S. 501 (1984) (“*Press-Enterprise I*”) 8

Press-Enterprise Co. v. Super. Ct., 478 U.S. 1 (1986) (“*Press-Enterprise II*”) ... 3, 8

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)..... 3, 4, 9, 10

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 9, 12

Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991)..... 7

OTHER AUTHORITIES

Br. of *Amici Curiae* The Reporters Committee for Freedom of the Press and 27
 Media Organizations, *Courthouse News Service v. Planet*, 16-55977, 16-56714
 (9th Cir. July 7, 2017)..... 11

Br. of *Amici Curiae* The Reporters Committee for Freedom of the Press and 31
 Media Organizations, *Courthouse News Service v. Yamasaki*, No. 17-56331 (9th
 Cir. Oct. 10, 2017) 11, 13, 15

Toni Locy, *Covering America’s Courts* (2013)..... 13

RULES

Cal. Rules of Court 1.20 6

Cal. Rules of Court 1.201 14

Fed. R. App. P. 29..... 1, 2

Super. Ct. Orange Cnty., Local Rules, rule 352 6

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Boston Globe Media Partners, LLC, California News Publishers Association, Californians Aware, Cox Media Group, Inc., Digital First Media, The E.W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Hearst Corporation, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, MPA – The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, New England First Amendment Coalition, News Media Alliance, Online News Association, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, and Tully Center for Free Speech. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Plaintiff-Appellant Courthouse News Service (“CNS”). Some of *amici* are CNS subscribers, including the *Los Angeles Times*, *The San Jose Mercury News* (which is owned by Digital First Media), the *Detroit Free Press* (which is owned by Gannett Co., Inc.), *The Boston Globe*, the *Houston Chronicle* and *San Antonio Express News* (which are owned by Hearst Corporation), and the *Atlanta Journal Constitution* (which is owned by Cox Media

Group, Inc.). As members of the news media or organizations who advocate on the news media's behalf, *amici* have a strong interest in the policies governing the right of access to court documents. Timely access to court documents, including complaints, is essential to reporting on the legal system and the judicial branch. *Amici* write to emphasize the importance to members of the news media and the public of access to civil complaints that is contemporaneous to their filing.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellant and Defendant-Appellee have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The First Amendment right of access to judicial proceedings and documents recognizes that the public’s oversight and understanding of the activities of the judicial branch is essential to our system of self-governance. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–77 (1980) (plurality opinion). Access to newly filed civil complaints, in particular, is important because complaints are the foundational document that sets a lawsuit in motion and triggers court actions. The public has a right to learn about the matters occupying space on the courts’ dockets and consuming judicial resources. Because that right does not depend on the complaint being the subject of a hearing, *see Courthouse News Service v. Planet*, 614 F. App’x 912, 914–15 (9th Cir. 2015) (“*Planet II*”), the right of access necessarily attaches at the time the complaint is filed with the court. Indeed, delay can result in a complete denial of meaningful access. Therefore, the First Amendment requires contemporaneous access to civil complaints upon their filing.

Once the right of access attaches, it can only be overcome by restrictions that survive strict scrutiny, as defined by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”). Courts have consistently applied strict scrutiny when denials of access are at issue. Time, place, manner restrictions, on the other hand, are more appropriate for issues of

courtroom decorum—not denials of access. Therefore, the U.S. District Court for the Central District of California erred below by concluding that a time, place, or manner analysis applied.

Even when applying a time, place, or manner analysis, however, the district court erred by determining that the delays imposed by Defendant-Appellee David Yamasaki (“Defendant”) in Orange County Superior Court are permissible. The delays fail even intermediate scrutiny because (i) the public has no alternative channel to view the complaint while access is being constructively denied and (ii) the process-before-access approach taken by Defendant unnecessarily and substantially burdens the exercise of First Amendment rights while alternative approaches exist that can serve the proffered interest of protecting privacy.

Therefore, *amici* urge reversal of the district court’s final judgment finding that the Defendant’s delays in providing access to civil complaints do not violate the public’s qualified First Amendment right of access.

ARGUMENT

I. The First Amendment right of access attaches to civil complaints at the time of their filing, which in an electronic-filing court is at receipt.

The First Amendment right to free speech—a cornerstone of our constitutional system—“would lose much meaning” without the right of access to public proceedings. *Richmond Newspapers*, 448 U.S. at 576–77. Indeed, this

Court has recognized that the two are “inextricably intertwined” because, while the right to free speech protects rigorous debate of governmental activities, it is the right of access that guarantees it is an informed debate. *Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) (“*Planet P*”) (citing *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 874 (9th Cir. 2002)). Thus, the right of access is “an essential part of the First Amendment’s purpose to ‘ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.’” *Id.* (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982)).

This Court has found that the First Amendment right of access applies to civil complaints. *See Planet I*, 750 F.3d at 786 (“[T]here is no question that CNS itself has alleged a cognizable injury [under the First Amendment] caused by the . . . denial of timely access to newly filed complaints.”); *see also Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 141 (2d Cir. 2016). Indeed, access to the complaint is a critical component of meaningful access to a civil proceeding. The complaint identifies the parties involved, the claims asserted, and the alleged factual basis for those claims. Further, the filing of a complaint sets the civil justice process in motion. Accordingly, “when 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.” *In re NVIDIA*

Corp. Derivative Litig., No. C 06-06110 SBA, 2008 WL 1859067, at *3 (N.D. Cal. Apr. 23, 2008); *see also McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB, 2014 WL 1779243, at *6 (C.D. Cal. Jan. 13, 2014) (suggesting that the centrality of the complaint to the lawsuit also makes the document central to “the public’s understanding of the judicial process and of significant public events”) (quoting *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

The public’s right of access attaches to civil complaints upon filing—which in an electronic-filing court, such as Orange County Superior Court, is equivalent to their receipt by the court—and not, as the district court held, the end of the next day. As this Court said in *Planet I* and emphasized again in *Planet II*, the right of access applies to *newly filed* civil complaints and does not depend on the complaint being the subject of a hearing. *See Planet II*, 614 F. App’x at 914–15; *Planet I*, 750 F.3d at 788; *see also Bernstein*, 814 F.3d at 140 (“[T]he fact of filing a complaint, whatever its veracity, is a significant matter of record.”). Further, both the California Rules of Court and the Orange County Superior Court’s Local Rules explain that a court document is considered to be filed when it is received by the court, before any processing occurs. *See* Cal. Rules of Court 1.20 (“Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk.”); Super. Ct. Orange Cnty., Local Rules, rule 352 (“[F]iling occurs at the time the document is received by the court and a confirmation of receipt is

created.”). Thus, because a newly filed civil complaint is a public document and filing occurs at receipt using the Defendant’s electronic filing system, *amici* agree with CNS that the receipt of a complaint for filing triggers the right of access here. Opening Br. of Appellant Courthouse News Service 29–30, ECF No. 12; *see also City of Greenville, Ill. v. Syngenta Crop Prot., LLC*, 764 F.3d 695, 697 (7th Cir. 2014) (holding that once documents affecting the disposition of litigation are “filed with a court,” the right of access attaches (citing *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010))); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161–62 (3d Cir. 1993) (“Numerous other courts have also recognized the principle that the filing of a document gives rise to a presumptive right of access.”).

Finally, the right of access afforded by the First Amendment is a right of immediate access. *See Co. Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (emphasizing that “the public and press generally have a contemporaneous right of access to court documents”); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). This Court has held that even a 48-hour delay in unsealing judicial records amounts to a “total restraint on the public’s first amendment right of access.” *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983). In short, the public has a First Amendment right to access civil complaints upon their receipt by a court for filing in an electronic-filing court.

II. When evaluating delays to the First Amendment right of access, the proper test is strict scrutiny, rather than a time, place, or manner analysis.

Amici recognize that the First Amendment right of timely access to civil complaints is a qualified right. Once the right attaches, however, access may only be denied or delayed by “an overriding [governmental] interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise II*, 478 U.S. at 9 (citing *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”).

The Supreme Court, as well as this and other circuit courts of appeals, have made clear that strict scrutiny is the appropriate standard when the right of access applies. *See id.* at 13–14; *Leigh v. Salazar*, 677 F.3d 892, 899 n.5 (9th Cir. 2012) (collecting cases that apply strict scrutiny, as defined in *Press-Enterprise II*, when evaluating the right of access). Indeed, this Court recognized that the *Press-Enterprise II* test properly “balances the vital public interest in preserving the media’s ability to monitor government activities against the government’s need to impose restrictions if necessary for safety or other legitimate reasons.” *Leigh*, 677 F.3d at 900.

Planet I noted in dicta that delays “*may* also be analogous” to time, place, or manner restrictions, 750 F.3d at 793 n.9 (emphasis added), but such an analysis, which calls for intermediate scrutiny, is not applicable in the context of the First

Amendment right of access to court records and proceedings. The case law regarding reasonable time, place, or manner restrictions developed in the context of restrictions on the exercise of someone's free speech rights. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of *protected speech*." (emphasis added)); *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (explaining that "the essence of time, place, or manner regulation" was recognizing the effect of "various *methods of speech*" (emphasis added)). In contrast, as explained above, courts in right of access cases have overwhelmingly followed the mandate of *Press-Enterprise II* and applied strict scrutiny. Indeed, the district court acknowledged that it "isn't aware of any binding authority analyzing restrictions on a First Amendment right of access within the time, place, and manner framework." *Courthouse News Service v. Yamasaki*, 312 F. Supp. 3d 844, 870 (C.D. Cal. May 9, 2018).

A time, place, or manner analysis is simply conceptually incompatible with delays in access like the ones at issue here. In *Richmond Newspapers v. Virginia*, a plurality of the Supreme Court suggested in dicta in a footnote that time, place, or manner restrictions may be appropriate to maintain the "quiet and orderly setting" of a courtroom. 448 U.S. 555, 581 n.18 (1980) (plurality opinion). The plurality

went on to suggest that courts may prioritize seating for media representatives using time, place, or manner restrictions “when not every person who wishes to attend can be accommodated” because of the “limited capacity” of a courtroom. *Id.* Such issues of decorum or courtroom management, however, do not *prevent* the public’s access to proceedings or documents—and sometimes even *maximize* access by prioritizing members of the media, who can report on proceedings to a larger audience. *See Leigh*, 677 F.3d at 900 (“[T]he media are ‘surrogates for the public.’” (quoting *Richmond Newspapers*, 448 U.S. at 573)). Closures, sealings, and delays in access, however, impose a much greater and totally different kind of burden on the right of access and are therefore more appropriately scrutinized under the *Press-Enterprise II* analysis.

Indeed, delays in accessing civil complaints are equivalent to denials of access to those documents. As this Court found in analyzing delays in access to other documents subject to the First Amendment right of access: “It is irrelevant that some . . . documents might only be under seal for, at a minimum, 48 hours The 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; *see also Courthouse News Service v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (finding that a “24 to 72 hour delay in access is effectively an access denial”). The Supreme Court has stated

that a loss of First Amendment rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted); *see also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“[E]ven a one to two day delay impermissibly burdens the First Amendment.” (citing *Associated Press*, 705 F.2d at 1147)).

As *amici* have previously emphasized to this Court, timeliness is an essential component of newsworthiness; “old news” does not receive the same level of public attention as timely news, and thus may not be published at all. *See* Br. of *Amici Curiae* The Reporters Committee for Freedom of the Press and 31 Media Organizations at 11–14, *Courthouse News Service v. Yamasaki*, No. 17-56331 (9th Cir. Oct. 10, 2017) (hereinafter “*Amici Brief*”); Br. of *Amici Curiae* The Reporters Committee for Freedom of the Press and 27 Media Organizations at 7–9, *Courthouse News Service v. Planet*, 16-55977, 16-56714 (9th Cir. July 7, 2017).¹

¹ For example, *amici* have previously emphasized to this Court that, in such a fast-paced world, what may be relevant and informative to the public this afternoon may not be as much so by tonight or tomorrow. *See Amici Brief*, at 11–14 (citing examples from the *Orange County Register* and the *Los Angeles Times* of reporting on matters of public concern based on complaints filed the same day). “The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.” *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009). In contrast, access to civil complaints upon their receipt by the court allows the news media to learn of

Thus, delays in access to civil complaints are effectively denials of access—burdening the exercise of First Amendment rights beyond restrictions for purposes of courtroom decorum—and must pass strict scrutiny.

III. Even if a time, place, manner analysis is applicable, the delays in providing access here are unconstitutional.

Even assuming, *arguendo*, that the analysis for time, place, or manner restrictions is the appropriate standard for delayed access of the kind at issue here, *amici* agree with CNS that the Defendant has not met his burden under that standard. Applying intermediate scrutiny, time, place, and manner restrictions on protected speech are permitted only when they “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791 (citations omitted).

First, the Defendant has not left open “ample alternative channels” for access to this information. As noted above, delays are effectively denials of access, *see supra* Section II; members of the press and the public have no means of accessing a newly filed civil complaint during the extended processing delays

new civil lawsuits as they are filed and to report on them to the public when their newsworthiness is at a height.

Defendant creates. *See, e.g., Planet I*, 750 F.3d at 787–88 (“CNS cannot report on complaints [the clerk] withholds.”). Parties are also not a sufficient alternative channel for access. First, as a matter of complete, accurate, and ethical reporting,² it is often critical that reporters “review[] court filings or other public records,” among other things—rather than only press releases or statements from the parties—to determine whether and how a fact or allegation should be reported, according to a former federal courts reporter for *The Washington Post* and *USA Today*. Toni Locy, *Covering America’s Courts* 9 (2013). Parties or their attorneys may not always be willing or available to share copies of court-filed civil complaints when reporters call to ask, and that assumes the reporters would find out about the litigation at all. Without a publicly-available complaint, journalists and the public would have no way to discover that the litigation was initiated in the first place, unless the parties chose to contact the press. CNS and the public’s First Amendment right to obtain judicial records should not be left to the whims or

² As *amici* have noted previously, in today’s news cycle, where stories build upon each other and are updated by the minute online, it is important that the first news stories about a lawsuit be accurate and complete, with as much information as possible derived from official, primary sources. *See Amici Brief*, at 14–16. Journalists rely on the information in civil complaints to report the “core dispute” involved in newly filed civil claims, and complaints allow reporters to shed light on important facts underlying the causes of action that may be missing from the public’s understanding if access to the complaints is delayed until after the story is reported. *Id.*

preferences of the parties. In a fast-paced, breaking news environment, a single, accessible source for complaints—the court—promotes accuracy, completeness, and public understanding much more than a system in which reporters must rely on individual parties or their attorneys. The lack of available alternative channels demonstrates why intermediate scrutiny is not suited for analyzing complete deprivations of access such as the delays at issue here.

Further, the processing-before-access approach is not narrowly tailored to a significant government interest, and it burdens the First Amendment significantly more than necessary. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011) (explaining that under intermediate scrutiny, the government “may not select an option that unnecessarily imposes significant burdens on First Amendment-protected speech”). While *amici* acknowledge that privacy concerns are important in theory, the California Rules of Court ultimately place the burden on the parties—not the clerk—to redact any sensitive information. Cal. Rules of Court 1.201(b) (“The responsibility for excluding or redacting identifiers . . . from all documents filed with the court rests solely with the parties and their attorneys. The court clerk will not review each pleading or other paper for compliance with this provision.”). CNS cites two alternative approaches that more appropriately serve the narrow privacy interests

asserted by the Defendant, while placing considerably less burden on exercise of First Amendment rights. Opening Br. of Appellant 49–58, ECF No. 12.

The Defendant’s current practices unnecessarily deny access to *all* complaints pending action by a clerk, regardless of their potential for containing unredacted private information. This lack of access when the complaint is most newsworthy could mean the public never learns about it. As *amici* have emphasized throughout this litigation, immediacy is usually an essential component of newsworthiness, affecting how a story is covered by the news media or whether it is covered at all. *See Amici Brief* at 11–14; *see also Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”). These delays thus deny meaningful access to civil complaints and unconstitutionally burden the right of access that this Court has recognized as “an essential part of the First Amendment.” *Planet I*, 750 F.3d at 785.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court recognize that the First Amendment right of access to civil complaints applies upon filing—which in an electronic filing court is equivalent to their receipt by the

court—and reverse the district court’s motion for summary judgment and trial rulings.

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown

Counsel of Record

Katie Townsend

Caitlin V. Vogus

THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020

Washington, D.C. 20005

Phone: (202) 795-9300

Fax: (202) 795-9310

bbrown@rcfp.org

*Additional counsel for *amici* are listed in Appendix B.

Dated: January 29, 2019
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 32(G)

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

- 1) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,313 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Dated: January 29, 2019
Washington, D.C.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

With some 500 members, **American Society of News Editors (“ASNE”)** is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and

Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The **Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Boston Globe Media Partners, LLC publishes *The Boston Globe*, the largest daily newspaper in New England.

The **California News Publishers Association ("CNPA")** is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications and more than 100 digital services.

Digital First Media publishes the *San Jose Mercury News*, the *East Bay Times*, *St. Paul Pioneer Press*, *The Denver Post* and *the Detroit News* and other community papers throughout the United States, as well as numerous related online news sites.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video

news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 120 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the *San Francisco Chronicle*, *Houston Chronicle*, and *Albany Times Union*; hundreds of magazines around the world, including *Cosmopolitan*, *Good Housekeeping*, *ELLE*, *Harper's BAZAAR* and *O, The Oprah Magazine*; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television

networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sduniontribune.com, attract audiences throughout California and across the nation.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer*, *The (Raleigh) News and Observer*, and the (Fort Worth) *Star-Telegram*. McClatchy operates media companies in 28 U.S.

markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

MPA – The Association of Magazine Media (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Newspaper Association is a 2,400-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Missouri.

The **National Press Photographers Association** (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously

promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The **News Media Alliance** is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and

independent media to provide the public with news and information on matters of public concern.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and

stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The **Tully Center for Free Speech** began in Fall 2006 at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
*Counsel for American Society of News
Editors
Counsel for Association of Alternative
Newsmedia*

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Dan Krockmalnic
Boston Globe Media Partners, LLC
1 Exchange Place
Boston, MA 02109
617-929-7157

Jim Ewert, General Counsel
California News Publishers
Association
2701 K St.
Sacramento, CA 95816

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Heidi Eddy-Dorn
Cox Media Group, Inc.
6205 Peachtree Dunwoody Road
Atlanta, GA 30328

Marshall W. Anstandig
Senior Vice President, General
Counsel and Secretary
Digital First Media
4 North 2nd Street, Suite 800
San Jose, CA 95113
manstandig@bayareanewsgroup.com
1-408-920-5784

James Chadwick
Counsel for Digital First Media LLC
Sheppard Mullin Richter & Hampton
LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Barbara W. Wall
Senior Vice President & Chief Legal
Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Jonathan Donnellan
Ravi V. Sitwala
Diego Ibarguen
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Jeff Glasser
Vice President, Legal
Los Angeles Times Communications
LLC & The San Diego Union-
Tribune, LLC
2300 E. Imperial Highway
El Segundo, CA 90245

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

James Cregan
Executive Vice President
MPA – The Association of Magazine
Media
1211 Connecticut Ave. NW Suite
610
Washington, DC 20036

Tonda F. Rush
Counsel to National Newspaper
Association
CNLC, LLC
200 Little Falls Street, Suite 405
Falls Church, VA 22046
(703) 237-9801 (p) (703) 237-9808
(fax)
tonda@nna.org

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY 14202
*Counsel for National Press
Photographers Association*

Kurt Wimmer
Covington & Burling LLP
850 10th Street NW
Washington, DC 20001
Counsel for the News Media Alliance

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

D. Victoria Baranetsky
General Counsel
Reveal from The Center for
Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
*Counsel for Society of Professional
Journalists*

CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on January 29, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 8. Certificate of Compliance for Briefs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains **words**, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated .
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov