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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THE ASSOCIATED PRESS, et al.,	)	Case No. 1:12-cv-00255-EJL
	)	
Plaintiffs,	)	PLAINTIFFS' RESPONSE TO
	)	DEFENDANTS' OPPOSITION [DKT 8]
v.	)	TO EXPEDITED MOTION FOR
	)	PRELIMINARY INJUNCTION [DKT 2] &
C.L. (BUTCH) OTTER, et al.,	)	STATUTORY SUPPLEMENT TO
	)	DEFENDANTS' OPPOSITION TO PLS'
Defendants.	)	MPI, DKT. NO. 2 [DKT 11]

COME NOW the plaintiffs in this matter by and through their attorney of record, Charles A. Brown, and hereby respond to the defendants' opposition [Dkt 8] to the plaintiffs' Expedited Motion for Preliminary Injunction [Dkt. 2] and the Statutory Supplement to Defendants' Opposition to Plaintiffs' Expedited Motion for Preliminary Injunction, Dkt. No. 2 [Dkt 11] as follows:

I. - PREAMBLE

The facts of this case are admitted by both parties, and are the focus of the complaint and the motion for preliminary injunction. The IDOC standard operating procedure for executions

prevents the viewing of the initial phase of the execution (approximately 20 minutes). It is also admitted that a protest was made prior to the Rhoades execution in regard to exactly that issue.

The Department of Corrections indicated they would review their protocol in that regard but did not want to concern themselves with it during the Rhoades execution.

After the Rhoades execution they apparently reviewed their protocol and have not changed it. A complaint in the above-entitled matter was filed at 5:09 p.m. PDT on May 22, 2012, as well as the unissued summons, just three (3) business days after the execution of Mr. Leavitt was ordered on May 17, 2012 (a Thursday). The motion for the preliminary injunction was filed at 6:18 p.m. PDT on May 22, 2012. On May 23, 2012, the summonses were issued by the Clerk of the above-entitled court. The above-entitled court also issued an Order ordering mediation and setting forth a briefing schedule. That Order was then included with the complaint, summons, motion, and brief and were emailed to the process server in Boise, Idaho, on the morning of May 24, 2012. The process server had to print six (6) sets of the above-referenced documents and then serve. Service was made at 3:40 p.m. PDT on May 24, 2012. An expedited service fee was paid in order to have the service made on the same date of delivery to the process server.

The speed of the Plaintiffs in filing a complaint, which had to meet the "well-pleaded complaint rule", and also the responsiveness of the above-entitled court, is nothing less than remarkable. Any implication of delay alleged by the Defendants is unsupported.

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II. - GOVERNING LEGAL STANDARDS

A. Applicable Preliminary Injunction Law

The Plaintiffs are likely to succeed on the merits, but more importantly that the merits of the preliminary hearing injunction are, indeed, the merits of the case as a whole. The Defendants have argued that there are penological interests that override all other considerations but such a stance is not supported by the case law.

The Plaintiffs also assert that they will suffer irreparable harm in the absence of preliminary relief. The Defendants have already admitted that they had an opportunity to review its protocol before the Rhoades execution, but chose not to change that protocol for the Rhoades execution. Thereafter, they indicated they had reviewed the protocol and chose not to change the protocol in regard to the Leavitt execution. So now, this time with regard to the Leavett execution, which is the focus of the complaint herein, the State will again prevent Plaintiffs from viewing the initial phase of the execution process. It is interesting to note that the Defendants do not assert that they will suffer any type of harm if the injunction is granted. Instead, they discuss the sensitivities of Mr. Leavitt and other prisoners on death row, but certainly the events during the execution process prior to the actual injection of the lethal dose cannot be more unsettling than the actual death of the condemned himself.

Given the fact that the Defendants had over five (5) months to change their protocol in order to conform with existing law in the Ninth Circuit and has consciously chosen not to do so, the equities in this matter are strongly in the Plaintiffs' favor. The strength of the Plaintiffs' position in this matter is compelling.

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An injunction is in the public's interest because of the public's right to know all details of an ultimate expression of supreme governmental authority in our society that is the taking of the life of a human being.

B. Burdens of Proof and Persuasion

Strict scrutiny applies to content-based restrictions of fundamental First Amendment rights. As to the rights essential to individual liberty in our society, fundamental rights include all rights encompassed under the First Amendment. In the context of the First Amendment, the Ninth Circuit treated the question of the public's right to view the execution of a condemned prisoner, utilizing a two-part approach applied by the Supreme Court. *Woodford*, 299 F.3d at 875 citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9, 106 S. Ct. 2735 (1986). It evaluated "(1) 'whether the place and process have historically been open to the press and general public' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* The Ninth Circuit summarized that "[t]he Supreme Court's two-pronged test leads us to conclude that the public has a First Amendment right to view executions." *Woodford*, 299 F. 3d at 875. Axiomatically, then, this First Amendment right to view qualifies as one that is fundamental in nature.

Fundamental liberties are deemed so critical to a free society that they may not be impaired by government action unless such action is motivated by a compelling government interest. Transgressions against fundamental rights are typically evaluated under strict scrutiny analysis. Yet government restrictions within the realm of free speech, which encompasses the right to view, may be either content-based or content neutral. "Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the 'principle inquiry in

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determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And, to be sure, "not every interference with speech triggers the same degree of scrutiny under the First Amendment." *Id.* at 637.

So, the quality of the particular interference in so far as neutrality, or lack thereof, determines the appropriate level of applicable scrutiny. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) citing *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964), and cases cited; *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). Censorship is chiefly motivated by content control. *Id.* at 96. "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wise-open [sic].'" *Id.* quoting *New York Times Co.*, 376 U.S. at 270. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (Kennedy, J., concurring); *Consolidated Edison Co. of N.Y. v. Public Serv. Commn. of N.Y.*, 447 U.S. 530, 536 (1980); *Mosley*, 408 U.S. at 95. Strict scrutiny, then, applies to a government transgression against a fundamental, First Amendment right only where expressive activity is restricted based on content.

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Because IDOC Standard Operating Protocol 135 constitutes a content-based restriction on the live viewing of the execution process, the regulatory provision is subject to strict scrutiny review. The IDOC offers no compelling or overriding justification grounded upon any articulated concern over the internal order and security of the prison system that would warrant the promulgation and implementation of the Protocol. Similarly, the IDOC offers no legitimate penological interest grounded upon any articulated concern over the internal order and security of the prison system that would warrant continued application of the Protocol. Not only is IDOC Standard Operating Protocol 135 presumptively invalid, it patently violates the fundamental First Amendment freedom of every unincarcerated citizen of Idaho to view the entirety of a state-sanctioned execution process designed to achieve justice for all people in this state.

III. - DISCUSSION OF PENOLOGICAL OBJECTIVES

A. Idaho's History Inclusive of Discussion of States Supplemental Statutory Brief Filed May 30, 2012

The Plaintiffs herein are alleging that a violation of the First Amendment of the United States Constitution has occurred during the Rhoades execution and will obviously reoccur during the Leavitt execution, if not prevented by a order of a federal court. The Plaintiffs are not seeking to interpret the First Amendment to the Idaho Constitution nor the California Constitution, and the interpretation of the First Amendment to the United States Constitution should not rest upon an *ad hoc* analysis of what the Defendants perceive to be the history of executions in the State of Idaho.

The Plaintiffs herein have filed a verified complaint. Even though the Defendants have filed two affidavits that rely upon hearsay and allegations without appropriate foundation, Plaintiffs complaint is essentially uncontroverted.

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Plaintiffs' verified complaint in ¶ 25. alleges an openness to executions historically which was discussed and ruled upon by the Ninth Circuit Court in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 3 Med. L. Rptr. 2345 (9th Cir. 2002).

The Defendants have provided a Statutory Supplement which argues or at least implies that after 1899 executions in Idaho were ". . . closed from public view within the walls of the state penitentiary . . ." but actual history speaks otherwise. If the Defendants had perused its own archives it would have found differently.

Idaho has a long and consistent history of media witnesses attending its state executions to serve as the eyes and ears of the public. In fact, only one execution in the state's history did not have news media witnesses present; that was a hurry-up double hanging held in the middle of the night in 1951 by a frightened prison warden who feared inmate riots and, as a result, had all traces of the gallows removed by morning.

Before 1901, executions in Idaho were held at the county level, and most were public. Hundreds of people typically attended. When Henry McDonald, murderer and spinner of tall tales, was hanged in 1881 in Silver City, 300 people watched. Several thousand were present for the triple hanging of James Romain, David Renton, and Christopher Lower on the outskirts of Lewiston in 1864 for the infamous Magruder Massacre. A crowd of 300 watched Anthony McBride's hanging at Crane Gulch, 2 miles north of Boise (near the present-day site of Highlands Elementary School), in January of 1868. More than 200 people gathered for the hanging of Kuok Wah Choi in Quigley Canyon, northeast of Hailey, in 1884. *See* book entitled "Hanged, A History of Idaho's Executions," by Kathy Deinhardt Hill published in 2010.

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In 1896, the black cap that had been pulled over the head of James Ellington as he was hanged in Boise slipped off, uncovering his face as he died. The *Idaho Daily Statesman* reported the mishap as a "horrifying spectacle."

In 1899, the Idaho Legislature passed a law centralizing executions and felony punishments at the state prison. Though the legislation called on the state prison board to provide "a suitable room or place, closed from public view within the walls of the State penitentiary" for executions, that did not spell the end of media witnesses to Idaho executions.

The first execution conducted at the prison under the new rules was the hanging of murderer Ed Rice on November 30, 1901. The headline in the December 1, 1901, *Idaho Daily Statesman* read, "Ed Rice Dies on Scaffold; Walked unflinchingly from cell to gallows up the steps; Spoke not a word of his dastardly crime."

The *Statesman* reporter, and other media witnesses, were present from the moment the death warrant was read to the condemned man in his cell; walked with him and a priest from the cell to the scaffold; and reported on every detail of the execution, its lead-up, and even its aftermath, when guards placed the body in a coffin and "carried it to one of the small houses on the (prison) grounds."

The *Statesman* reported that a few minutes before 8 o'clock, prison Warden Arney "stated that only those present in a religious, official or reportical (sic) capacity could enter the cell, on account of its size, to hear the death warrant read." Those included George Wheeler of the *Capitol News*, Fred Flood of the *Statesman*, and Guy Flenner of the *Evening Bulletin*.

In his account in the *Statesman*, Flood wrote, "The body swung not to the right and left, the rope made not a single twist, but facing the sun in the eastern sky, like one standing erect, all that was mortal of Ed Rice was there before his fellows, while the tide of life fast ebbed away."

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When James Connors was hanged on December 16, 1904, the headline in the *Idaho Daily Statesman* the next day read, "Connors Meets Death Bravely; Retains his nerve to the end and declines to make a statement; Murderer of Deputy Sheriff Sweet of Blackfoot display remarkable coolness on the gallows; Execution conducted in perfect manner by Warden Ackley."

The article reported that Connors ascended the steps of the gallows "on tiptoe in front of the guards." Asked for any final words, the paper reported that Connors responded, "I have nothing to say," speaking "in clear and unwavering tones."

In 1906, the *Statesman* reported in detail on the hanging of William Henry Hicks Bond for the murder of Charles Daly "before 23 spectators." The paper's August 11, 1906, edition reported that after the cap was placed over Bond's head and the noose around his neck, "Bond's muffled voice agonizing in its entreaty, was heard: 'God! God have mercy on my soul! Oh God hear my prayer! God hear my dying words!' ... Bond's body dropped the five feet to the end of the rope and his soul was in eternity."

This was the norm for Idaho executions, members of the news media have served as witnesses throughout the history of state executions and up to the present day. In fact, on May 8, 1909, the *Idaho Daily Statesman* published a photograph of a hand-written, elaborately lettered invitation/ticket the newspaper had received the day before from Warden John W. Snook, stating, "Admit Reporter Boise Statesman, To the execution of, Fred Seward, May 7th, at 8 O'clock a.m."

The *Capitol Evening News*, on May 7, 1909, carried the headline, "Fifty people witness execution at the State Penitentiary today," and the *Statesman* reported the next day, "No evidence of weakness was manifested until the very last when the black cap was drawn over his head. Then his whole being shuddered as though chilled by a cold blast." It also referenced "the assembled party

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of newspaper men, officials and others who had been permitted to witness the hanging." Seward was hanged "for the murder of Clara O'Neill, a notorious woman of Moscow," according to records at the Old Idaho Penitentiary.

Similar first-person reports were published on the 1924 execution of Noah Arnold and the 1926 execution of John Jurko.

At Idaho's last hanging, the October 18, 1957, execution of Raymond Allen Snowden, a dozen witnesses entered a viewing room for the hanging in a new indoor gallows. "Several newspaper reporters were also at the execution, but all declined to enter the observation room," wrote author Kathy Deinhardt Hill in her book "Hanged, A History of Idaho's Executions," published in 2010. Prison guard Mark Maxwell, who attended the execution, told Idaho Oral History Center interviewer Kathleen Dodson in 1981, "There was two or three newspaper guys here. ... They didn't want in - they all waited out here."

Inside the viewing room, witnesses saw the condemned man, strapped to a full-length backboard, fall awkwardly through the trap door and take 15 minutes to die. Said Maxwell, "Lots of guards didn't want to be here - just like the newspapermen."

At Idaho's next execution, the 1994 death by lethal injection of Keith Eugene Wells, media witnesses included longtime *Associated Press* correspondent Bob Fick. He reported, "Inmates pounded on the walls and stomped on the floor in protest as the execution took place." Fick was among four media witnesses; he reported that Wells had no final statement. "It took longer than they had anticipated that it would take," he recalled in a 2011 interview with Boise State Public Radio's Samantha Wright. He remembered the lethal injection procedure as "sterile and antiseptic," in contrast to Wells' crime, during which Wells beat his two victims to death with a baseball bat at a

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Boise bar. *See* "Media Witness to an Execution," 11/15/2011 interview of Bob Fick by Samantha Wright, Boise State Public Radio: http://boisestatepublicradio.org/post/media-witness-execution and *also see* "Idaho Holds First Execution in 36 Years," By Bob Fick, Associated Press Writer, Jan. 6, 1994, Google News/The Prescott Courier: http://news.google.com/newspapers?nid=886&dat=19940106&id=PrtSAAAAIBAJ&sjid=pH0DAAAAIBAJ&pg=5208,805363.

In November of 2011, Idaho executed Paul Ezra Rhoades. Four media witnesses - - Rebecca Boone of the *Associated Press*; Nate Green, *Idaho Press Tribune*; Mac King, KIVI-TV; and Ruth Brown, *Idaho Falls Post-Register* -- attended the execution. They shared their detailed observations, including the condemned man's last words, with other reporters and the public immediately afterward.

Said Boone, "He apologized for the Michelbacher murder but did not take responsibility for the other two murders." Reported Brown, "His fingers tapped and his legs fell limp before he took one last gasp of air." Green said the procedure was "very quiet and somber." He also reported that once Rhoades was dead, a friend of one of the victims muttered, "The devil has gone home." *See* Link to KTVB account of media witness statements, Paul Ezra Rhoades execution, 11/18/2011: http://www.ktvb.com/home/Paul-Ezra-Rhoades-execution-134051813.html.

The attached articles and links referenced in the Affidavit of Ms. Betsy Russell are of public record and contained in the State of Idaho's archives and F.R.E. 201 allows the above-entitled Court to take Judicial Notice of the same, and that request is hereby made.

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B. Discussion of Idaho's Penological Objectives as to Witness Protocol.

1) Applicable Standard

The level of scrutiny applicable to the review of challenges to prison regulations measures whether that regulation bears a reasonable relation to legitimate penological objectives. *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868, 878 (9th Cir. 2002). Alternatively, this can be described as rational basis scrutiny. Of the three levels of scrutiny applied to evaluate the constitutionality of governmental action, rational basis is the most deferential to the government. As a result, the challenger in any contest over the validity of the governmental activity bears the burden of proof.

But it is not enough to abandon the analysis after reaching the mere conclusion that rational basis scrutiny applies. The real key to a complete analysis rests in the recognition that those objectives pursued by a government actor must be *legitimate* objectives. Penal institutions play a critical role in the "preservation of societal order through enforcement of the criminal law." *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974), ***overruled on other grounds***, *Thornburgh v. Abbott*, 490 U.S. 401, 409-414, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). "The identifiable government interests at stake in this task are the preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.* And so, a good reason, even though persuasive, does not necessarily equate to a legally cognizable reason that correlates to a legitimate governmental interest. The *Procunier v. Martinez* although overturned on other grounds the heart and substance of its original ruling as it applies in this matter remains intact.

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The IDOC enjoys no blank slate upon which it can unilaterally craft prison regulations in contravention of, and without regard for, the limitations and safeguards of the United States Constitution. Rather, the United States Supreme Court long ago addressed the appropriate objectives to be achieved by the promulgation of prison regulations. Those regulations must be reasonably related to a legitimate objective. *Pell v. Procunier*, 417 U.S. 817, 827, 94 S. Ct. 2800, 41 L. Ed.2d 495 (1974). Otherwise, a regulation "'represents an 'exaggerated response' to those concerns.'" *Woodford*, 299 F.3d at 878 quoting *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 96 L. Ed.2d 64 (1987) quoting *Pell*, 417 U.S. at 827, 94 S. Ct. 2800.

"The 'legitimate policies and goals of the corrections system' are deterrence of future crime, protection of society by quarantining criminal offenders, rehabilitation of those offenders and preservation of internal security." *Woodford*, 299 F.3d at 878 quoting *Pell*, 417 U.S. at 822-23. "It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Pell*, 471 U.S. at 823. Although, according to *Pell*, the exaggerated response test was originally intended to treat the rights of prisoners, the Ninth Circuit has applied it to restrictions placed upon the rights of those outside prison walls, but affected by the policies of prison officials. *Woodford*, 299 F.3d at 879. And so, the IDOC possesses no deferential entitlement to ignore the mandates of either the United States Supreme Court or the United States Constitution.

Another consideration in assessing the validity of government action which inhibits the exercise of a right rest upon the availability of alternative means by which to effect that right. "Because witnesses cannot see first-hand the manner in which the intravenous lines are injected, they will not be privy to any complications that may arise during this initial invasive procedure. *Id.* at

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883. Because no alternative exists to direct observation of the preparatory stages involved with an execution, the shielding of this phase "entirely eliminates independent, public eyewitness observation of several critical steps of the execution process." *Id.* The public is forced to rely on information provided them by prison officials. *Id.* These officials may well harbor an interest in withholding details of the execution process that, in their opinion, might appear unseemly, unsavory or damaging to the reputation of the prison and its officials. The lack of available alternative avenues to ascertain information on a topic of paramount public importance represents a critical factor in assessing the legitimacy of governmental restrictions that impair the exercise of constitutional rights.

2) The Penological Objectives Advanced by the IDOC Lack Legitimacy

The IDOC advances four underlying objectives to support the validity and authority of IDOC Standard Operating Protocol 135. It asserts that these various rationales reflect "legitimate penological objectives." Yet, although such a description would otherwise connote conformance with the determination of the United States Supreme Court on the matter of legitimate penological interests, no basis exists in the Court's decisional jurisprudence for any of these supposed legitimate objectives.

This requirement that regulatory action by prison administration conform to penological objectives established by judicial precedent, and thereby established as legitimate, serves as a significant limitation imposed on the discretion of prison authorities. For example, the California Department of Corrections defended a regulation which allowed the screening of both incoming and outgoing mail on the basis that censorship of prisoner mail was "'within the discretion of prison administrators.'" *Procunier v. Martinez*, 416 U.S. 396, 416, 416, 94 S. Ct. 1800, 1812, 40

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L. Ed. 2d 224 (1974) *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989) citing Brief for Appellants 21. "[T]he heart of appellants' position is not that the regulations are justified by a legitimate governmental interest but that they do not need to be." *Martinez*, 416 U.S. at 415, 94 S. Ct. 1800, 1812, 40 L. Ed. 2d 224 (1974) overruled by Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). In the end, "the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration." *Id.* at 416. Unlike the California Department of Corrections, the IDOC apparently recognizes the need for a legitimate governmental interest to justify Standard Operating Protocol 135. However, IDOC's mere awareness of this constitutional prescription neither excuses ignorance of its underlying substance nor confers authority upon the Department to fashion or fabricate self-styled "legitimate penological objectives" tailored for convenience.

First, the IDOC maintains in its brief that preserving the condemned inmate's "right to privacy during as much as possible of his final conscious moments" represents a legitimate penological interest. See page 6 of Defendants' Opposition brief. However, "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Pell*, 417 U.S. at 822. "[S]imply because prison inmates retain certain constitutional rights does not mean these rights are not subject to restrictions and limitations." *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447 (1979). And, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id.* So, the constitutional rights of prisoners are narrower in scope than those enjoyed by the public at large. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). Prisoners remanded to the IDOC forfeit

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entitlement to the unfettered exercise of individual liberties. *State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302 (Idaho App. 2000); *see also Lewis v. Casey*, 518 U.S. 343, 346 (1996). "A detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Bell v. Wolfish*, 441 U.S. at 546. A prisoner's right to privacy is no exception.

The United States Supreme Court has considered a prisoner's right to privacy in the context of a Fourth Amendment challenge to a regulation that prevented prisoner observation of unannounced living quarter searches. Although prior decisions had invalidated the room-search rule, the Court reasoned that "[i]t may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell." *Id.* at 556. "[G]iven the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope." *Id.* at 557. Incarceration necessarily curtails the rights and privileges otherwise exercised by free individuals. The assertion by the IDOC that a condemned prisoner retains a right to privacy of such degree to warrant its preservation, and one which deserves protection as a legitimate penological objective of the Department, seems incredulous. Unless prisoners committed to the Idaho penal system enjoy a level of privacy substantially similar to that enjoyed by individuals outside prison walls, the IDOC must recognize the contradiction inherent within its position.

Second, the IDOC argues that "considering how an extended witness period may affect other death row inmates" constitutes a legitimate penological interest. See page 7 of Defendants' Opposition brief. But the fact that a condemned prisoner may not wish for their execution to be sensationalized, or be made into a spectacle, is not a legitimate penological interest recognized by the Supreme Court. In fact, such a conciliatory approach to the sensitivities of the

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inmate population serves only to thwart the primary penal goal to deter future crime. Under the guise of protecting inmate sensibilities, the IDOC seeks to mute the impact of the execution process on the general public and thereby avoid potentially negative controversy. What's more, the IDOC argument does not arise from any concern over maintenance of the internal order and security of the institution.

Third, the IDOC proposes that a legitimate penological interest lay in "shielding the family and friends of the condemned inmate from the public suffering that the inmate might incur during extended witness periods or delays in the execution process." Yet pursuit of this interest not only saves the family and friends of the prisoner from witnessing any potential suffering of the condemned during the execution procedure, but blinds the public at large from the harsh reality that accompanies death by execution. To be certain, "[i]t is critical for the public to be reliably informed about the lethal injection method of execution." *Woodford*, 299 F.3d at 884. Witness attendance at an execution assures public involvement in the process, and transparency fuels "informed public debate," which "is the main purpose for granting a right of access to governmental proceedings." *Id.* The IDOC makes speculative assertions with no empirical support.

A prison regulation or practice that restrains First Amendment rights "must further an important or substantial governmental interest unrelated to the suppression of expression." *Martinez*, 416 U.S. at 413. Referencing the censorship of mail by prison authorities, the Supreme Court has determined that the practice may not be employed "simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial government interests of security, order, and rehabilitation." *Id.* That logic applies by analogy to implementation of IDOC Standard

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Operating Protocol 135, which purposely censors and conceals a critical stage of the execution process in order to achieve a sanitary result for consumption by the general public. The IDOC may not shroud the execution process from the public eye simply to avert unfavorable criticism, avoid negative press or control damage to the Department's reputation.

Fourth, IDOC argues that protecting the identity of Medical Team members is a legitimate interest. In fact, since this argument relates closely to the recognized penological goal of preserving security within the institution, it appears strongest. But while the IDOC emphasizes the importance of identity protection and anonymity, beyond noting a potential adverse effect on the recruitment or retention of Medical Team members, it fails to adequately explain the reason why it considers such protection so essential. One can surmise that the primary concern over identity protection finds root in the possibility of retaliation from either prisoners within the institution or the public. Regardless, the complaint in this matter has made it repeatedly clear that the Plaintiffs are not seeking the identity of the medical team or others in the execution chamber with the condemned. Said individuals are garbed in medical masks and don't have name tags and such is not being challenged herein.

The IDOC avoids addressing the issue of possible retaliation against Medical Team members because of the attitude of the Ninth Circuit toward retaliation in *Woodford*. As the Court remarked, "[E]ven assuming an execution team member were identified by a witness, the notion of retaliation is pure speculation." *Id.* at 882. In that case, the California Department of Corrections failed to show that any "execution team member has ever been threatened or harmed by an inmate or by anyone outside the prison because of his participation in an execution." *Id.* Indeed, "prison officials may pass regulations in anticipation of security problems." *Id.* citing *Casey v. Lewis*, 4 F.3d

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1516, 1521 (9th Cir. 1993). But, "they must at a minimum supply some evidence that such potential problems are real, not imagined. Here, Defendants fail to explain why we should disregard the history of safety surrounding those officials whose identities have always been publicly known." *Id.* The IDOC lacks any concrete, documented evidence of retaliation that would lend support to the contention that protecting the identity of Medical Team members represents a legitimate penological interest.

3) The Test for Regulatory Reasonableness

In order for a regulation to be deemed reasonable, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984). Not only must the regulation be legitimate, it must also be neutral. *Id.* at 90. Strictly regarding prisoner rights, as opposed to civilians affected by prison regulations, "[w]e have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* citing *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979).

Another factor relevant to the reasonableness of prison regulations which restrict a prisoner's right addresses the availability of alternative means that would allow the exercise of that right. *Id.* The potential impact, or "ripple effect," of accommodating the right on prison staff, the prisoner population and prison resources presents an important additional consideration. *Id.* Deference to a prison regulation would be appropriate only if that "ripple effect" is deemed significant. *Id.*

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More fundamentally, the evaluation of any foreseeable "ripple effect" is confined to the context of potential detriment to prison order and security. *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989). A threat to the internal order and security of a prison "raises the prospect of precisely the kind of 'ripple effect' with which the Court in *Turner* was concerned." *Id.* To be sure, it is nearly impossible to conceive any regulatory action undertaken by prison administration that could not somehow be construed as creating a "ripple effect" within a prisoner population. And so, protecting the "private dignity" of death row inmates from the effects or adversities that may flow from publicity surrounding an execution does not, without more, make IDOC Standard Operating Protocol 135 reasonable. Blades Decl., ¶ 6 [Dkt 8-3]. Neither do such considerations, devoid of any expressed concern for prison order and security, justify defense of the Protocol as serving a legitimate penological interest.

For purposes of the instant matter, though, which involves a prison regulation that violates the constitutional rights of civilians living outside the walls of the prison system, rather than the rights of those housed within, a fourth factor proves critical. This factor probes reasonableness by evaluating the absence, or lack of, ready alternatives that might allow the right to be accommodated. "By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* This is not, as the Supreme Court notes, a "least restrictive alternative" test. *Id.* at 90-91. "But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

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So, under the *Turner* analysis, as applied by the Ninth Circuit to the rights of the public outside prison walls, and where full accommodation of the public's constitutional rights can be achieved at minimal cost to penological interests by merely drawing open the curtains of secrecy, IDOC Standard Operating Protocol 135 represents an "exaggerated response."

4) IDOC Protocol Presents a Consequential Restriction on the Rights of Nonprisoners

In 1974, the Supreme Court considered the standard of review appropriate for prison regulations that impair the First Amendment rights of prisoners, as well as nonprisoners, through censorship of mail. *Martinez*, 416 U.S. 396. Prisoners of the California Department of Corrections challenged a regulation which authorized screening of both incoming and outgoing letters by prison employees. Irrespective of the traditional deference afforded the judgment of prison administrators by the judiciary, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Martinez*, 416 U.S. at 405-06 citing *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

The Court noted that both the author and recipient of a communication possess a First Amendment interest in uncensored correspondence, albeit in different degrees. *Id.* at 408. "Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." *Id.* Whether or not the nonprisoner party to a communication acts as the sender or recipient, "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners." *Id.* at 409. Addressing infringement of the rights of nonprisoners, the Court continued:

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> Accordingly, we reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners. Into this category of argument falls appellants' contention that 'an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother.' This line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail. We therefore turn for guidance, not to cases involving questions of 'prisoners' rights,' but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.

Martinez, 416 U.S. at 409 (internal citations omitted). In the context of penal institutions, only preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry and rehabilitation justify censorship of prisoner mail. *Id.* at 412-13. And "the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration." *Id.* at 416. So, beyond pursuit of legitimate penological objectives, restrictions that impair the rights of nonprisoners, whose freedoms have been neither forfeited nor limited by incarceration, violate the liberty protections afforded by the United States Constitution.

The *Martinez* Court analyzed the content-based correspondence regulation according to a strict scrutiny standard. *Martinez*, 416 U.S. at 413-14. Involvement of the First Amendment rights of free citizens played a critical role. The decision "turned on the fact that the challenged regulation caused a 'consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners.'" *Turner v. Safley*, 482 U.S. 78, 85 (1987) citing *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (emphasis in original). So, "implication of the interests of nonprisoners may support application of the *Martinez* standard" simply because a consequential restriction may impair the constitutional rights of those outside the prison system. *Turner*, 482 U.S. at 97 citing *Martinez*, 416 U.S. at 409.

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Outside any articulable concerns for prison order and security, the constitutional pronouncements of *Martinez* regarding infringement of nonprisoner rights through implementation of penal regulations remain viable today. And, this viability continues despite limitation and overruling of the decision by subsequent jurisprudence on issues not relevant to the instant matter at hand. *Thornburgh*, 490 U.S. at 409-14. Where *Martinez* had originally required that regulations censoring prisoner mail be "generally necessary" to a legitimate government interest, the Court has now adopted an approach more deferential to the judgment of prison officials. 416 U.S. at 414. This revision corrects some confusion that developed as to whether *Martinez* required application of a "least restrictive alternative" analysis to regulatory action undertaken by prison administration. *Thornburgh*, 490 U.S. at 410. In addition, *Martinez* could be read as making a distinction in the treatment of incoming correspondence from prisoners and incoming correspondence from nonprisoners. *Id.* at 411-13. Because *incoming* correspondence poses a substantially greater threat to prison security than *outgoing* correspondence, the *Martinez* standard has been limited to *outgoing* mail. *Id.* at 413. Fear that "language in *Martinez* might be too readily understood as establishing a standard of 'strict' or 'heightened' scrutiny" for all discretionary action taken by prison officials drove revision. *Id.* at 410. "[S]uch a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with maintenance of order and security within prisons." *Id.* at 410 (footnote omitted). So, while the application of the *Martinez* standard to the rights of nonprisoners may well be limited or inappropriate within the context of a genuine threat to prison order and security, where such a threat is absent, the *Martinez* standard of strict scrutiny applies with robust vitality.

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IDOC Standard Operating Protocol 135 imposes significant burdens on the fundamental First Amendment rights of free citizens residing outside the walls of the Idaho prison system. Although the form of the particular right at issue in this matter, the right to view, is distinct from that impaired by the censorship of mail, both fall squarely within the province of the First Amendment. Where the IDOC fails to articulate any intelligible threat, or even raise a specter of concern over the possibility of a threat, to prison order and security, a standard of strict scrutiny must apply in evaluating the constitutional propriety of the IDOC Protocol.

V. CONCLUSION

The Defendants argue strongly that its penological interests are to support the sensitivities of the condemned, his family, and others similarly convicted and waiting their plight on death row. The Defendants fail to point to any type of case law that supports its allegation that these convicted prisoners, who have had their Constitutional rights diminished tremendously due to their convictions and incarceration, somehow have Constitutional rights that overcome, and are more important than, the Constitutional rights of society as a whole. The position adopted by the Defendants herein flies in the face of the rationale and logic as expressed by the Ninth Circuit Court in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 3 Med. L. Rptr. 2345 (9th Cir. 2002). For the Defendants to now argue that the condemned's sensitivities, and those of other inmates on death row, should somehow trump the Constitutional rights that free citizens have enjoyed for well over 200 years is neither supported by law nor logic.

The prayer in Plaintiffs' complaint requests this Court to "Grant a permanent mandatory injunction requiring all phases of the execution process".... "be conducted in full and open view of

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the assembled witnesses to that execution." Such is necessary to comply with mandate and spirit of the First Amendment.

RESPECTFULLY SUBMITTED on this 4th day of June, 2012.

Charles A. Brown
Attorney for Plaintiffs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of June, 2012, I filed the foregoing with the Clerk of the Court electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Michael S. Gilmore	mike.gilmore@ag.idaho.gov colleen.funk@ag.idaho.gov paul.panther@ag.idaho.gov
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AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant in the manner indicated:

Thomas C. Perry, Esq. Office of the Governor	via facsimile to: 208-334-3454

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