NO. 12-35456

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ASSOCIATED PRESS, a New York corporation; IDAHO STATESMAN PUBLISHING, LLC, a Delaware limited liability company d/b/a The Idaho Statesman; LEE ENTERPRISES, INCORPORATED, a Delaware corporation d/b/a The Times-News; THE IDAHO PRESS CLUB, INC., an Idaho corporation; PIONEER NEWSPAPERS, INC., a Nevada corporation d/b/a Idaho Press-Tribune, Idaho State Journal, Standard Journal, Teton Valley News, The News-Examiner, The Preston Citizen, and Messenger Index; TPC HOLDINGS, INC., an Idaho corporation, d/b/a Lewiston Tribune and Moscow-Pullman Daily News; BAR BAR INC., an Idaho corporation d/b/a Boise Weekly; COWLES PUBLISHING COMPANY, a Washington corporation, d/b/a The Spokesman Review; and IDAHOANS FOR OPENNESS IN GOVERNMENT, INC., an Idaho non-profit corporation;	)	District Court No. 1:12-cv-00255-EJL District of Idaho Boise
Plaintiffs/Appellants,	)	
v.	)	
C.L. (BUTCH) OTTER, in his official capacity as the Governor of the State of Idaho; ROBIN SANDY, HOWARD G. "J.R." VAN TASSEL, and JAY L.	)	

NIELSEN in their official capacity as the Idaho Board of Correction; BRENT D. REINKE, in his official capacity as the Director of the Idaho Department of Correction; and KEVIN KEMPF in his official capacity as Division Chief of Operations of the Idaho Department of Correction,

Defendants/Appellees.

OPENING BRIEF OF THE APPELLANTS

On appeal from the United States District Court for the District of Idaho
the Honorable Edward J. Lodge, United States District Judge, presiding.

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants *THE ASSOCIATED PRESS;* LEE ENTERPRISES, INCORPORATED; THE IDAHO PRESS CLUB, INC.; PIONEER NEWSPAPERS, INC.; TPC HOLDINGS, INC.; BAR BAR INC.; COWLES PUBLISHING COMPANY, and IDAHOANS FOR OPENNESS IN GOVERNMENT, INC., each indicate that there is no parent corporation and no publicly held corporation which owns 10% or more of its stock.

Plaintiff-Appellant IDAHO STATESMAN PUBLISHING, LLC is owned by the member The McClatchy Company which has no parent corporation but is publicly traded on the NYSE under the ticker symbol MNI. Contrarius Investment Mangement Limited owns 10% or more of the stock of The McClatchy Company.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

That this matter has already been scheduled for oral argument at 9:30 a.m. on June 7, 2012.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in denying Plaintiffs/Appellants' Expedited Motion for Preliminary Injunction?

II. Did the District Court in its determination that Plaintiffs/Appellants' Motion to Take Judicial Notice is irrelevant to the determination on Plaintiffs/Appellants' Expedited Motion for Preliminary Injunction?

STATEMENT OF THE CASE

That the lower court denied Plaintiffs/Appellants' request for preliminary injunction allowing full viewing of the execution process from entry into the execution chamber to finalization of the execution. Said ruling is in contravention of established First Amendment rights that allow said viewing.

STATEMENT OF FACTS

Due to the shortened time frame in regard to this appeal, the facts of this case have been fully established by the Defendants/Appellees' two affidavits filed in the lower court [Dkt. 8-1, 8-3], the Request for Judicial Notice [Dkt 16], Affidavit of Betsy Russell [Dkt 15], and Plaintiffs/Appellants' verified complaint filed in this matter.

SUMMARY OF ARGUMENT

The Plaintiffs/Appellants simply allege that *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) has direct applicability to the facts herein and that the uncontested affidavits submitted by the Defendants/Appellees do not avoid the direct application of said case. This combined with the history of openness of executions in the State of Idaho, as found by the lower court, clearly establishes Plaintiffs/Appellants' right to prevail on this appeal.

ARGUMENT

TIMELINESS

The United States District Court denying Plaintiffs/Appellants' motion for a preliminary injunction relies in large part on "a strong presumption against eleventh hour motions for injunctive relief related to scheduled executions." Order, p. 9. In support of that position, the Court refers to a request for a stay of execution brought by a prisoner sentenced to death, who challenged the lethal injection procedure as constituting cruel and unusual punishment. *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004). However, the context of this case is factually distinct from the matter at hand for two primary reasons.

First, the request for injunctive relief made in this matter originates not with a prisoner whose liberty has been restricted due to conviction and confinement for a crime, but with members of a free press, as representatives of the public, seeking to vindicate their First Amendment rights. Plaintiffs/Appellants have been neither convicted nor confined subsequent to a full criminal

proceeding. The rights of the neither the press nor the public have been limited by criminal conduct. They should be allowed full exercise of the panoply of fundamental freedoms guaranteed by the U.S. Constitution, which includes a First Amendment right to view the process of execution in its entirety.

Second, the prisoner in that *Nelson* requested a stay of execution, permission to temporarily restrain the enforcement of a criminal judgment, rather than a preliminary injunction. That request for a stay of execution was merely treated as a request for injunctive relief by the deciding court as a matter of convenience. As Plaintiffs/Appellants have repeatedly stressed, Plaintiffs/Appellants' request for injunctive relief is not a veiled attempt to secure a stay of Mr. Leavitt's execution. Neither do Plaintiffs/Appellants seek to interrupt or impede the administration of justice through delayed execution of a criminal judgment. Plaintiffs/Appellants make an actual request for a preventive relief, not one that can be framed or characterized as a request for an injunction. Plaintiffs/Appellants maintain a real and genuine interest securing protection for the exercise of a fundamental First Amendment right recognized under the United States Constitution.

While the Court admits the significance of the legal issues involved in this matter, it finds it more prudent to deny Plaintiffs/Appellants' request for relief in favor of discovery and an evidentiary hearing. That process could take weeks or even months, and it is unknown how many additional executions—executions conducted in violation of the First Amendment of the U.S. Constitution—might occur within that time. Meanwhile, both the status quo, whereby the IDOC Protocol prevents Plaintiffs/Appellants from viewing the entirety of the execution process, and the

injury to Plaintiffs/Appellants' fundamental freedom continues unabated. Only issuance of a preliminary injunction prevent further injury to Plaintiff.

Plaintiffs/Appellants' request for preliminary injunctive relief is not an attempt to find a backdoor route to stop an execution. Unlike the prisoner in *Nelson*, Plaintiffs/Appellants are not seeking a stay of execution and are not alleging that the lethal injection procedure constitutes cruel and unusual punishment. Plaintiffs/Appellants' merely seek protection for a fundamental right duly recognized under the First Amendment and the United States Constitution.

In the lower court's Order entered on June 5, 2012, the court specifically found:

> Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record.

Order p. 2

The lower Court then seems to suggest that Plaintiffs/Appellants' delay from 2002 to its filing of the Complaint on May 22, 2012 has caused the Defendants/Appellees inconvenience:

> The opinion in CFAC IV was issued in August 2002 and Plaintiffs have waited until less than three weeks before an execution in 2012 and long after the Rhoades execution in the fall of 2011, to bring their § 1983 challenge that clearly existed since the IDOC updated its protocol before the Rhoades execution in the fall of 2011.

Order, p. 8.

The court throughout its order places a great deal of weight upon the date upon which the complaint was filed.

The court does not address the issue that instead of resorting to litigation prior to the Rhoades execution a letter was written on behalf certain media members asking for the Defendants/Appellees to re-evaluate the protocol. *See* Exhibit C to Plaintiffs/Appellants' verified complaint. The Defendants/Appellees then indicated that they would revisit their protocol but wanted to go forward with the Rhoades execution in an unfettered manner. Director Reinke states, *see* Exhibit D to Plaintiffs/Appellants' verified complaint:

> We are aware of the Ninth Circuit Court's ruling which you cite in your correspondence. The ruling was based on facts unique to California.

No clarification was given as to what those unique facts were, nor in its briefing has the Defendants/Appellees informed anyone as to how the facts were unique to California.

The media did not challenge the protocol nor the execution at said time.

It has to be assumed that the filing of a lawsuit at such a juncture where the Defendants/Appellees is representing they are going to review their protocol would have been deemed premature and litigious.

Director Reinker also states prior to the Rhoades execution:

> In the months to come we shall review every aspect of Friday's execution.
> As we do, we shall welcome your clients' input on how we can improve this process.

See Exhibit F to Plaintiffs/Appellants complaint (emphasis added).

Without obtaining additional input from media the Defendants/Appellees revised their protocol on January 6, 2012 (*see* Exhibit to Mr. Zmuda's affidavit), but did not address the viewing aspect of the protocol which had been raised with them prior to the Rhoades execution.

Thereafter, members of the media met on January 24, 2012, with representatives of the Department of Correction in order to again express their concerns. *See* ¶ 24, p. 8 of Plaintiffs/Appellants' verified complaint.

In a letter dated February 1, 2012, *see* Exhibit F to Plaintiffs/Appellants' verified complaint, the Defendants/Appellees stated that the IDOC is choosing not to change their protocol and the letter further stated:

> I have reviewed the Woodford opinion and am aware of the decision reached by the court based on the facts and evidence presented in California. It is the IDOC's position, however, that there are several distinctions unique to Idaho which distinguishes Idaho's execution process from the California process considered by the court.

Again, the unique nature of California's execution process has not been revealed or discussed in briefing presented to the Court below.

Thus, perhaps Judge Lodge's finding that there was a delay of 10 years before the filing of the complaint herein is not supported by the facts. Is it not wise and even admirable that media would seek to open discussions and to avoid litigation in order to ask that the Defendants/Appellees revisit their protocol based upon the direct application of the *Woodford* case.

Then the time period between February 1, 2012, and the date the verified complaint was filed on May 22, 2012, needs to be addressed. It should be noted that the letter written on November 16, 2011 (*see* Exhibit C to Plaintiffs/Appellants' verified complaint) sets forth members of the media which are not present in the above-entitled litigation, inclusive of:

The Post Register
Blackfoot Morning News
Newspaper Association of Idaho
Idaho State Broadcasters Association

In the above-entitled court heading, the media represented included in this litigation but who were not involved previously are:

LEE ENTERPRISES, INCORPORATED d/b/a The Times-News

Standard Journal
Teton Valley News
The News-Examiner
The Preston Citizen
Messenger Index

Moscow-Pullman Daily News

BAR BAR INC. d/b/a Boise Weekly

COWLES PUBLISHING COMPANY d/b/a The Spokesman Review

IDAHOANS FOR OPENNESS IN GOVERNMENT, INC.

Thus the coalition of media representatives that had the wear-withal to go forward with the litigation shifted in a relatively short period of time to the date that the verified complaint was filed

on May 22, 2012. The media does not speak with one voice. Many considerations factor into a huge decision in initiating litigation against any governmental entity, especially in a rural state.

It should also be noted that it was on May 17, 2012, that the death warrant was issued as to Mr. Leavitt to occur on June 12, 2012.

Thus, within three (3) business days from entry of the death warrant on the latter part of May 17, 2012, the Plaintiffs/Appellants had the verified complaint filed on May 22, 2012, that had to meet the "well pleaded complaint rule" and was detailed and exhaustive in regard to the allegations contained therein.

The lower court's order appears to place the onus of delay from 2002 to 2012 on the shoulders of the Plaintiffs/Appellants herein and states that the Plaintiffs/Appellants somehow failed to explain this delay to the court. All of the underlying exhibits to the verified complaint set forth in detail exactly what occurred in the months before the filing of the verified complaint and is not mentioned by the lower court in its order whatsoever.

The lower court then finds on page 8 of the Order as follows:

> The Court is very concerned that to the extent Plaintiffs could establish the IDOC's protocol *does* need to be changed to protect First Amendment rights of the public, there is insufficient time for the IDOC to amend the policies and practice changes in the protocol without a delay in the scheduled execution.

(Emphasis in original.)

Does the Defendants/Appellees obtain the benefit of such a shortened scheduling date, but not bear the responsibility for the same?

The United States District Court denying Plaintiffs/Appellants' motion for a preliminary injunction relies in large part on "a strong presumption against eleventh hour motions for injunctive relief related to scheduled executions." Order, p. 9. In support of that position, the Court refers to a request for a stay of execution brought by a prisoner sentenced to death, who challenged the lethal injection procedure as constituting cruel and unusual punishment. *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004). However, the context of this case is factually distinct from the matter at hand for two primary reasons.

First, the request for injunctive relief made in this matter originates not with a prisoner whose liberty has been restricted due to conviction and confinement for a crime, but with members of a free press, as representatives of the public, seeking to vindicate their First Amendment rights. Plaintiffs/Appellants have been neither convicted nor confined subsequent to a full criminal proceeding. The rights of the neither the press nor the public have been limited by criminal conduct. They should be allowed full exercise of the panoply of fundamental freedoms guaranteed by the U.S. Constitution, which includes the right to view the process of execution in its entirety.

Second, the prisoner in that case requested a stay of execution, permission to temporarily restrain the enforcement of a criminal judgment. That request for a stay of execution was merely treated as a request for injunctive relief by the deciding court as a matter of convenience. As Plaintiffs/Appellants have repeatedly stressed, Plaintiffs/Appellants' request for injunctive relief is not a veiled attempt to secure a stay of Mr. Leavitt's execution. Neither do Plaintiffs/Appellants seek

to interrupt or impede the administration of justice through defeating execution of a criminal judgment. Plaintiffs/Appellants request for preliminary relief is a genuine request for a preventive injunction in the purest sense to secure protection for a recognized fundamental right.

Again, does the onus of the Defendants/Appellees' scheduling of the Leavitt execution go unquestioned and the delay from 2002 forward fall on the above-entitled Plaintiffs/Appellants' shoulders?

PRELIMINARY INJUNCTION FACTORS

Standard for Issuance of Preliminary Injunctions

Concerns that the U.S. Navy's use of sonar during training exercises would adversely affect marine wildlife led a coalition of environmental organizations to request the issuance of a preliminary injunction based upon the alleged violation of numerous federal environmental laws. *Natural Resources Defense Council, Inc.*, *v. Winter*, 530 F. Supp. 2d 1110 (C.D. Cal. 2008). An injunction issued and was upheld by the Ninth Circuit Court of Appeals. *Natural Resources Defense Council, Inc.*, *v. Winter*, 518 F.3d 658 (9th Cir. 2008) *rev'd,* 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Navy appealed, and the U.S. Supreme Court ultimately reversed based upon its evaluation of the interests according to a four-pronged test. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). In its Order, The United States District Court relies upon analysis *Winter* test factors to deny Plaintiffs/Appellants' request for a preliminary injunction.

It is significant that *Winter* and the standards it pronounced treated not fundamental, First Amendment rights afforded by the U.S. Constitution, but, rather, issues related to the environment and protection of the environment under federal statute. Whether the *Winter* test was adequate to assess the degree of injury caused by governmental transgressions against fundamental rights, or whether the test could be properly adapted for that purpose, was not addressed. And certainly, the First Amendment was not an issue present in that matter.

First Amendment rights, including the right to view, are unique in the sense of being intangible. Unlike the number of marine mammals swimming off the coast of California, that lend themselves to empirical study, fundamental rights are difficult to quantify. When changes to the environment cause damage to marine life, that damage can be measured. But when a fundamental right, such as the First Amendment right to view, is damaged through deprivation, that damage is unseen. It is unseen because the chilling effect of that deprivation upon the course of a robust public debate can never be known. It is simply not possible to quantify the harm caused by suppression of a fundamental, First Amendment right.

A fundamental right and a preliminary injunction are both extraordinary. "A preliminary injunction is an extraordinary remedy never awarded as a matter of right." *Winter*, 555 U.S. at 24, 129 S. Ct. at 376 quoting *Munaf v. Geren*, 553 U.S. 674, 689-90, 128 S. Ct. 2207, 2218-2219, 171 L. Ed. 2d 1 (2008). Courts "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief'" on an individual, case

by case basis. *Id*. quoting *Amoco Production Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). The District Court applied the four Winter factors to the extraordinary facts present in this matter.

In determining the standard that must be met for the issuance for a preliminary injunction, the lower court discusses the four factor test of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). But the Court discusses but doesn't seem to apply the "serious impact test" as set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) :

> In other words, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met."

Order, p. 7.

A. Likelihood of Success on the Merits

The District Court agreed with Plaintiffs/Appellants that at least some members of the public possess a "critical interest" in viewing the execution process. Order, p. 11. In addition, it recognized the existence of a First Amendment right to view an execution "from the time an inmate enters the execution chamber." Order, p. 12. The Court then undertook to "determine if the limits placed by IDOC to restrict the public's view of the execution…are reasonably related to legitimate penological objections or whether the limits represent an exaggerated response to prison officials concerns." *Id*.

citing *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). In that pursuit, the Court proceeded to recite and evaluate the four factors of the *Turner* test.

In concluding this step of analysis, the Court states, "Plaintiffs have presented strong arguments based on binding Ninth Circuit case law that IDOC's objectives may not justify restricting the viewing of the execution process until after the inmate has been restrainedand IVs are placed. However, the Court cannot find based on the current record, that Plaintiffs/Appellants have provided 'substantial evidence' that IDOC's Protocol 135 is an 'exaggerated response' to the security concerns presented." Order, p. 15.

The *Turner* analysis employed by the District Court, however, is inapplicable to the facts of the instant matter. The Supreme Court's decision in *Turner* addressed prisoner rights, not the rights of unincarcerated, free citizens. Likewise, the *Turner* test was devised to determine whether a prison regulation infringes upon the constitutional rights of an *incarcerated prisoner*. And so, the *Turner* test employs rational basis scrutiny, to decide whether a particular regulation is "reasonably related" to a legitimate interest, but, again, in the context of *prisoner rights*.

The *Turner* test was never intended to measure whether a prison regulation infringes upon the rights of *free citizens*. "[W]hen a prison regulation impinges on *inmates'* constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261 (emphasis added). Referring to *Procunier v. Martinez*, which treated the constitutionality of prison mail regulations, the Supreme Court explained

> The Martinez Court based its ruling striking down the content-based regulations on the First Amendment rights of those who are not prisoners, stating that '[w]hatever 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. Our holding therefore 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, 482 U.S. at 85, 107 S. Ct. at 2260 quoting *Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S. Ct. 1800, 1809, 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) (emphasis in original) (internal citations omitted). Free citizens, who are not prisoners, enjoy rights removed from the criminally convicted. The *Turner* standard is inappropriate as a constitutional yardstick to measure whether a government regulation impairs the rights of free citizens.

Since this matter involves the press and the public, persons who are not prisoners, and the rights are fundamental in character, the rational basis scrutiny standard applied under the *Turner* test is inappropriate. As Plaintiffs/Appellants have aptly stated in their pleadings, Plaintiffs/Appellants' fundamental rights are properly evaluated according to the heightened standard of strict scrutiny.

Because the *Turner* test is not relevant to the facts of this case, Plaintiff is not required to demonstrate by "substantial evidence" that IDOC Protocol135 represents an "exaggerated response" by the Department. In fact, the relevance of the strict scrutiny standard shifts the burden of proof onto the shoulders of the IDOC. Where a penal regulation deprives the fundamental right of a person

who is not a prisoner, it is the IDOC who bears the burden of showing that IDOC Protocol 135 serves a compelling government interest.

The conclusion that Plaintiffs/Appellants failed to demonstrate a likelihood of success on the merits is in error.

The Defendants/Appellees has supplied to the lower court various statutory references which imply that executions had been closed to the public since 1899. The lower court's order swiped this argument away in its entirety:

> Since 1901, the applicable Idaho statute has been revised to state that executions will be "closed from public view within the walls of the state penitentiary." *See* Statutory Supplement to Def. Opposition to Pls.' Expedited Motion for Preliminary Injunction, Dkt. 11. However, the undisputed reality as supported by the newspaper accounts of past executions and the specific language in IDOC's Protocol 135 (which provides for numerous witnesses including the media), is that some portion of the public has historically viewed the execution process in Idaho. Further, this Court agrees with Plaintiffs that society has a critical interest in having at least some members of the public view the government's implementation of a death warrant.

Order, p. 11 (emphasis added).

Then the lower court rules that:

> Having acknowledged there is a First Amendment right to view an execution from the time an inmate enters the execution chamber, the Court must determine if the limits placed by IDOC to restrict the public's view of the execution until the preliminary procedures of restraint and placement of IVs is concluded by medical personnel are reasonably related to legitimate penological objections or whether the limits represent an exaggerated response to prison officials' concerns.

Order, p. 12.

The lower court then references the two affidavits filed by Jeff Zmuda, the IDOC Deputy Chief of the Bureau Prisons, and Randy Blades, the Warden of the Maximum Security Institution, which carries out the execution of death warrants. It is the Plaintiffs/Appellants' position herein that those affidavits, even though they contain hearsay and lack foundation, do not pass Constitutional muster. The penological concerns are not articulated in protocol 135 nor have they ever been articulated previously by the Defendants/Appellees. The lower court also found:

> The Court agrees that Plaintiffs may ultimately prevail on their challenges that the Defendants penological objectives do not satisfy the requirements of Turner or that alternative practices cannot be included in the protocol to satisfy the public's interest and penological security and safety concerns.

Order, p. 15-16.

The lower court also states:

> [T]he record needs to be more fully developed and in all fairness IDOC should be provided the opportunity to provide detailed evidence to support the conclusions of experienced IDOC personnel set forth in the declarations that extending the portion of the execution that is viewed by witnesses will have a detrimental effect on the safety and security of the inmates and prison officials.

Order, p. 16.

Prior to the Rhoades execution in November of 2011, the Defendants/Appellees was put on notice that their protocol was in question. The Defendants/Appellees indicated it was going to review their guidelines and chose not to change said guidelines. The Defendants/Appellees was fully aware of the above entitled Court's opinion issued in 2002 and did nothing.

Surely the penological concerns as expressed in their affidavits must be an outgrowth of that review of their protocol which they have represented they underwent when first faced with the questioning of that protocol prior to the Rhoades execution.

Now, the Plaintiffs/Appellants herein are being burdened by the Defendants/Appellees's inability to fairly and completely articulate their penological concerns as expressed? Again, the penological concerns as expressed by the Defendants/Appellees simply do not pass Constitutional muster.

B. Irreparable Harm

In accordance with the *Winter* test, the District Court required that the Plaintiffs/Appellants demonstrate not only the possibility of irreparable to Plaintiffs/Appellants' interests, but that irreparable harm is likely. Order, p. 16. Because the IDOC Protocol will allow Plaintiffs/Appellants to view a portion of the execution process, but still not the preparatory stage prior to administration of the lethal injection itself, the Court found irreparable harm unlikely in the absence of a preliminary injunction. *Id*. "Additionally, there will most likely be other executions in the future and if Plaintiffs are successful after a full evidentiary hearing, the protocol can be changed without any harm to Plaintiffs, the public or Defendants." *Id*. at 16-17. Such a conclusion egregiously underestimates the degree of harm caused by the deprivation of a fundamental, First Amendment right possessed by free citizens.

Given the nature of Plaintiffs/Appellants interest in the free exercise of a fundamental First Amendment right, the fact of actual and irreparable harm without the protection of injunctive relief is indisputable. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976). Plaintiffs/Appellants have already suffered actual and irreparable harm due to the promulgation of the IDOC Protocol, and will continue to suffer the deprivation of a fundamental right without protective relief. But it is impossible to accurately quantify the extent of that harm. As to the need for vigilance against government action that threatens First Amendment rights, the Eleventh Circuit remarked

> One reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.

Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) *certified question answered,* 450 So. 2d 224 (Fla. 1984). It is axiomatic that loss of First Amendment freedoms, including the right to view the entirety of the execution process, results in irreparable harm to Plaintiffs/Appellants.

Once an execution occurs, that execution will never be repeated. The right to view that execution, to observe its compliance with acceptable standards of dignity and justice, will never be regained. Damage to the exercise of Plaintiffs/Appellants' First Amendment freedoms can never be repaired. That harm is magnified by the recognition that Plaintiffs/Appellants, as witnesses to an

execution, "act as representatives for the public at large." *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002).

The conclusion that Plaintiffs/Appellants are not likely to suffer irreparable harm in the absence of preliminary relief is in error.

Essentially the lower court's order is finding that regardless of the Plaintiffs/Appellants' First Amendment rights being violated despite protest in the Rhoades execution in November of 2011, that the violation of those First Amendment rights once again does not constitute irreparable harm. The lower court finds in its order that the Plaintiffs/Appellants' have the First Amendment right to view the execution process from the entry into the chamber onward, but chooses to ignore the fact that the violation of First Amendment rights in regard to the Leavitt execution is a profound event. The lower court is essentially finding that a First Amendment right can be violated today as long as it is possible for First Amendment rights to be reasserted at some date in the future. Such a finding flies in the face of what our Constitutional rights are all about.

C. Balance of Equities

The District Court describes Plaintiffs/Appellants' legal arguments as "strong." Order, p. 17. But in deciding that the balance of equities favors the IDOC it relies on the contention that "it is simply too late to hold an evidentiary hearing prior to the scheduled execution date." *Id.* "Also it is too late to incorporate any necessary changes that may be required in the protocol if Plaintiffs are successful on their claims." *Id.* However, especially given the strength of Plaintiffs/Appellants'

position, any cursory conclusion that Plaintiffs/Appellants lose the balance of equities is far from obvious.

Because, as stated previously, the standard of strict scrutiny applies to a content-based regulation which impairs the First Amendment rights enjoyed by persons who are not prisoners, the government action in question must be closely scrutinized. In order for the balance to weigh in favor of the IDOC, it must assert a compelling interest that supports continued implementation of the IDOC Protocol. A compelling interest would be grounded in the maintenance of order and security at the prison facility. Such a necessary compelling interest is absent from the IDOC pleadings.

The unparalleled importance of a fundamental, First Amendment right deems the determination of actual, irreparable harm absolutely crucial to the propriety of injunctive relief. Both actual and threatened harm to Plaintiffs/Appellants caused by the continued implementation of the IDOC Protocol without injunctive protection far outweighs the minimal inconvenience, or potential inconvenience, that might be caused to the Department due to issuance of injunctive relief. Perhaps the Department would need to reschedule the execution of Mr. Leavitt for a later date. Perhaps changing the Protocol would provide Mr. Leavitt the opportunity to mount a procedural appeal. But, instead, perhaps the Department could simply draw open the curtains on the preparatory stage and proceed as scheduled with only minor adjustments. Genuine harm to the IDOC beyond mere inconvenience is speculative at best. On the other hand, Plaintiffs/Appellants have suffered, and will

suffer, both actual and threatened harm in the exercise of Plaintiffs/Appellants' First Amendment freedoms.

Even if the balance of equities were even between the fundamental, First Amendment Right of Plaintiffs/Appellants and a compelling interest of the IDOC, the scale should favor Plaintiffs/Appellants. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Comm. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474, 127 S. Ct. 2652, 2669, 168 L. Ed. 2d 329 (2007). Here, the IDOC, which continues to promulgate a content-based restriction by preventing the viewing of the entirety of the execution process, is the censor.

The conclusion that Plaintiffs/Appellants lose the balance of equities is in error.

The lower court states in its order:

> This is a close call for the Court as the Court finds Plaintiffs' legal arguments are strong.

Order, p. 17.

Again, the lower court then places administrative concerns of the Defendants/Appellees over that of the First Amendment rights of its citizens:

> Also, it is too late to incorporate any necessary changes that may be required in the protocol if Plaintiffs are successful on their claims.

Id.

A court's order will take care of the protocol. The curtain will be pulled aside to allow viewing of what is planned to occur regardless. Again, the lower court expresses its concern about the administrative issues that might arise:

> Further any changes to the protocol may delay the execution and open the door to further challenges by the condemned that the protocol has been changed.

Order, p. 17.

The lower court has specifically found that the Plaintiffs/Appellants have a First Amendment right to view the proceeding and then the speculation by the lower court in regard to administrative concerns of the Defendants/Appellees simply pales in comparison to the absolute Constitutional rights involved.

D. Public Interest

In examining the public interest factor of the *Winter* test, the District Court maintains that "Plaintiff's interest in allowing the public to more fully view the execution process does not outweigh the public's interest in proceeding with a scheduled execution." Order, p. 18. It also describes as "limited" the First Amendment rights "relating to that portion of the execution viewed by witnesses" and continues to state that those rights do "not trump the competing interest of the public to enforce a valid death warrant." Order, pp. 18-19. The Court appears to be dissecting the public interest from that of the Plaintiffs/Appellants to form two distinct, separate and competing interests. It then balances the equities of the two interests against one another. This approach creates

an artificial division, which ignores the fact that the Plaintiffs/Appellants' interest and the public interest are singular in nature.

As touched upon previously, Plaintiffs/Appellants, functioning as news media, act as "surrogates for the public." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573, 100 S. Ct. 2814, 2825, 65 L. Ed. 2d 973 (1980). Plaintiffs/Appellants act to vindicate the fundamental, First Amendment rights of the public rather than to denigrate those interests, or somehow compete to defeat them. Stated quite simply, Plaintiffs/Appellants' interest is the public interest. By witnessing the execution process, Plaintiffs/Appellants verify that death warrants are enforced effectively in accord with the public interest. The relationship between the Plaintiffs/Appellants' interest and the public interest at this level of analysis may be described as atomic in the sense that its singular, unitary nature is incapable of being divided into parts. Plaintiff and the public enjoy not a competitive, but a symbiotic relationship with regard to the First Amendment right to view an execution.

Public interest favors a dynamic and robust debate on topics of social importance. Protection of Plaintiffs/Appellants right to view the entirety of the execution process assures that the content of this public discourse will not be arbitrarily skewed or deliberately slanted in favor of a particular viewpoint. And so, "it is always in the public's interest to prevent the violation of a party's constitutional rights" when considering the propriety of a preliminary injunction in the context of a First Amendment right. *G & V Lounge v. Michigan Liquor Control Commn.*, 23 F.3d

1071, 1079 (6th Cir. 1994). Plaintiffs/Appellants right to view the entirety of an execution from start to finish is no exception.

The conclusion that an injunction is not in the public's interest is in error.

The lower court finds:

The public has a significant interest in enforcing its criminal judgments.

Order, p. 18.

It should also be noted that the public has a significant interest in not only having courts recognize their First Amendment rights, but protecting and enforcing those Constitutional rights against governmental authority.

It is correct that Mr. Leavitt was originally sentenced to death in 1985. The constitutional rights far predate 1985.

CONCLUSION

The purpose of this appeal is to request that the lower Court's denial of Plaintiffs/Appellants request for preliminary injunctive relief be reversed, and that the execution process from entry into the execution chambers onward be open to viewing as requested in the prayer to Plaintiffs/Appellants' complaint.

The purpose of this appeal is not only to appeal in regard to the denial of the motion for preliminary injunction but the lower court also seems to make a ruling that "Plaintiffs' Motion to Take Judicial Review (Dkt. 16) is irrelevant to the determination on the motion for preliminary

injunctive relief" (*see* Order, p. 20) to the extent that said motion to take judicial review is denied that too is appealed. Despite such language, the lower court specifically finds "However, the undisputed reality as supported by the newspaper accounts of past executions and the specific language in IDOC's Protocol 135 (which provides for numerous witnesses including the media), is that some portion of the public has historically viewed the execution process in Idaho." *See* Order, p. 11. Thus, Plaintiffs/Appellants have uncertainty as to the lower Court's ruling but to the extent that it denies the taking of Judicial Notice of what was submitted, reviewed, and relied upon by the lower Court we request its consideration herein.

The purpose of this appeal is to request attorney fees and costs as to this appeal pursuant to 42 U.S.C. 1988.

RESPECTFULLY SUBMITTED on this 6th day of June, 2012.

s/ Charles A. Brown
Charles A. Brown
Attorney for Plaintiffs/Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th 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:

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s/ Charles A. Brown
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