

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB # 3586
Chief of Civil Litigation

MICHAEL S. GILMORE, ISB # 1625
Deputy Attorneys General
Statehouse, Room 210
P.O. Box 83720

Boise, ID 83720-0010
Telephone: (208) 334-4130
Facsimile: (208) 854-8073
mike.gilmore@ag.idaho.gov

MARK A. KUBINSKI, ISB #5275
Lead Deputy Attorney General
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
Boise, ID 83706

Telephone: (208) 658-2097
Facsimile: (208) 327-7485
mkubinsk@idoc.idaho.gov

Attorneys for IDOC Defendants

THOMAS C. PERRY, ISB #7203
Counsel to the Governor

Office of the Governor
P.O. Box 83720
Boise, ID 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454
tom.perry@gov.idaho.gov

Attorney for Governor Otter

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE ASSOCIATED PRESS, *et al.*,)

Plaintiffs-Appellants,)

vs.)

C.L. (BUTCH) OTTER, *et al.*,)

Defendants-Appellees.)

Appeal No. 12-35456

D.C. No. 1:12-cv-00255-EJL

District of Idaho, Boise

APPELLEES' OPENING BRIEF

Defendants-Appellees in this Appeal are officers of the State of Idaho sued in their official capacities regarding the State's protocol for witnessing the execu-

tion of Mr. Richard A. Leavitt, scheduled for June 12, 2012. The Court of Appeals has jurisdiction under 28 U.S.C. § 1292(a)(1) to hear this appeal from an Order of the District Court of the District of Idaho that denied Plaintiffs-Appellants' Motion for a Preliminary Injunction (MPI).

ISSUE ON APPEAL

Did the District Court's Order denying Plaintiffs-Appellants' Motion for a Preliminary Injunction analyze the issues consistently with the standards for granting or denying a Preliminary Injunction?

STANDARD OF REVIEW FOR GRANT OR DENIAL OF A PRELIMINARY INJUNCTION

The Court of Appeals reviews a District Court's decision to grant or deny a preliminary injunction under an abuse-of-discretion standard:

We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In deciding whether the district court has abused its discretion, we employ a two-part test: first, we "determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested"; second, we determine "if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1104 (9th Cir. 2010) (internal quotation marks and citations omitted), *cert. granted on other grounds*, — U.S. —, 131 S.Ct. 992 (2011). A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion. *Id.* The district court's conclusions of law are reviewed *de novo* and its findings of fact for clear error. *Alliance for the Wild Rockies*, 632 F.3d at 1131.

Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012).

**THE DISTRICT COURT’S ORDER SHOULD BE AFFIRMED UNDER THE
PIMENTEL STANDARD**

The District Court’s Order denied an MPI that asked for the execution chamber to be in view of witnesses from the time Mr. Leavitt enters the chamber. Dkts. 2, 19. The *Pimentel* test for reviewing the District Court’s Order is a deferential one. As shown below, the District Court’s Order¹ readily passes the *Pimentel* test both in its analysis of proper procedure and in its analysis of the substantive law.

Applicable Procedural Law. The District Court identified the correct procedural law to apply when considering a motion for a preliminary injunction. The District Court cited FRCP 65(b) and Ninth Circuit case law, noting that both require Movants to *demonstrate* immediate threatened injury. Order, p. 4. Regarding matters to be considered when deciding whether to grant or deny a preliminary injunction, the District Court cited Supreme Court and Ninth Circuit case law (1) regarding its discretion, (2) that injunctive relief is not given as of right and should not be granted unless the movant carries the burden of persuasion, and (3) that the District Court must balance competing claims. Order, pp. 4-5. The District Court reviewed the Supreme Court’s *Winter* test and the Ninth Circuit’s *Alliance-for-the-Wild-Rockies* test for granting or denying injunctive relief. Order, pp. 5-7. The District Court thus applied the correct procedural law for grant or denial of a preliminary injunction.

¹ The District Court’s Order is Dkt. 19 in the ECF numbering in the District of Idaho. For simplicity, all references to the District Court’s Order will be “Order, p. ___,” without further reference to Dkt. 19.

Applicable Substantive Law. The District Court reviewed *CFAC III* and *CFAC IV*, the two most relevant Ninth Circuit decisions on public access to executions. The District Court's Order cited one or both of these cases at pages 8-10 and 12-14. The District Court thus applied the correct case law on the merits.

Applicable Law of Timeliness. The District Court cited the history of executions in California between *CFAC III* and *IV* that were not enjoined with regard to press coverage of the placement of IVs while that case was tried on remand. The District Court also discussed the teachings of *Nelson v Campbell*, 541 U.S. 637, 649-50 (2004), regarding last-minute challenges to death penalty procedures. Order, pp. 7-10. Based upon these decisions the District Court weighed the timeliness issue in a manner that was logical, plausible and supported by inferences that may be drawn from the facts in the record. Order, pp. 7-10.² The District Court

² For example, the District Court said at page 8 of the Order:

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. ... [T]he Court is not in position based on the record ... to evaluate whether or not substantial evidence exists establishing the IDOC's ... limits on the public's access to the viewing of an execution are reasonably related to legitimate [penological] concerns. The Court is very concerned that to the extent Plaintiffs could [prove a case] there is insufficient time for the IDOC to amend the policies and practice changes in the protocol without a delay in the scheduled execution. ... Additionally, any changes to Protocol 135 need to follow the due process requirements for amending any IDOC protocol.

The District Court added at page 9:

In filing ... in late May (less than a month before a scheduled execution), Plaintiffs are attempting to force the Court to rule without a

did not abuse its discretion in its analysis of Plaintiffs' lack of timeliness.

The Preliminary Injunction Factors. The District Court used the four preliminary injunction factors of *Winter*. Order, p. 10. It analyzed each of those four factors in a manner that was logical, plausible and supported by inferences that may be drawn from facts in the record.

Factor One—Likelihood of Success on the Merits. The District Court acknowledged that Plaintiffs-Appellants had correctly cited *CFAC IV*'s holdings regarding public access to executions in California, Order, p. 10, and further stated consistently with *CFAC III* and *IV* that it must determine whether Idaho's limits on the public's view of the execution are "reasonably related to legitimate penological objections or [are] an exaggerated response to prison officials' concerns," *id.*, p. 12. From this starting point firmly grounded in *CFAC III* and *IV*, the District

complete record. The Court declines to take this approach to such a serious constitutional question. Moreover, ... there is a strong presumption against eleventh hour motions for injunctive relief related to scheduled executions: [quoting *Nelson*].

The District Court summarized its timeliness considerations at pages 9-10:

Since Plaintiffs aver it is not their intent ... to delay the ... execution, the Court finds a more prudent course of consideration of the legal issues presented and which are also subject to being raised again in the future, would be to allow discovery and a full evidentiary hearing to determine whether IDOC's execution protocol does or does not satisfy the First Amendment This would be consistent with the procedure utilized ... in the *CFAC* cases. The legal issues presented are significant, but the Court should not be forced by the late filing of pleadings of having to make decisions of this significance without a full evidentiary hearing. Simply put, the current scheduled execution does not allow adequate time for discovery, an evidentiary hearing, a ruling by this Court and a potential appeal by the unsuccessful litigant to the Ninth Circuit before the scheduled execution date.

Court recited from the Declarations of Deputy Chief of the Bureau of Prisons Jeff Zmuda and Warden Randy Blades concerning their penological objectives. Order, pp. 12-13. In contrast to Deputy Chief Zmuda's and Warden Blades' evidence, the District Court observed: "Plaintiffs challenge, by way of *argument*, not *evidence*, that Defendants' concerns are not legitimate penological concerns." Order, p. 13 (emphasis added). Harkening back to *CFAC III*'s admonitions that Plaintiffs must prove their case, the District Court said at page 13:

It is the Plaintiffs' burden to present the Court with "substantial evidence" that Protocol 135 represents an exaggerated response to IDOC's concerns for security and safety. *CFAC III* at 983. Plaintiffs ... do not provide any rebuttal affidavits to the declarations of experienced prison officials. While ... Defendants must substantiate their concerns with actual evidence of retaliation ... , inability to get medical personnel ... , the impact of extending the viewing ... , Plaintiffs have not provided any evidence to counter declarations of IDOC personnel.

The District Court expressed "significant concerns regarding [Defendants'] penological objectives" and "whether they outweigh the First Amendment rights of the public," Order, p. 14, *i.e.*, it acknowledged Plaintiffs' legal position. In the end, however, the District Court returned to the record, like the Court did in *CFAC III*: "[T]he Court cannot find based on the current record, that Plaintiffs have provided 'substantial evidence' that IDOC's Protocol 135 is an 'exaggerated response' to the security concerns presented." Order, p. 15. The District Court concluded its analysis of Plaintiffs' likelihood of success with a logical, plausible and record-based application of relevant *CFAC* factors:

... Plaintiffs may ultimately prevail on their challenges that the Defendants['] penological objectives do not satisfy ...

Turner or that alternative practices cannot ... satisfy the public's interest and penological security and safety concerns. But the 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, pp. 15-16. Thus, the District Court did not abuse its discretion regarding Plaintiffs' likelihood of success on the merits.

Factor Two—Likelihood of Irreparable Harm. The District Court's short analysis of this factor was logical, plausible and supported by the record:

It is Plaintiffs' burden to establish that irreparable harm is likely ... if the injunction is not granted. The Court finds irreparable harm is not likely Plaintiffs ... do not want the scheduled execution delayed due to their lawsuit. The witnesses still will be allowed to see the execution process from the time after the inmate is restrained and IVs are placed. Under the current protocol, witnesses will be allowed to view the condemned inmate as he receives the lethal drug. 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.

Order, pp. 16-17. Thus, the District Court did not abuse its discretion regarding Plaintiffs' likelihood of irreparable harm if no preliminary injunction were issued.

Factor Three—The Balance of Equities. The District Court said that the balance of equities was a close call: "Plaintiffs' legal arguments are strong," but "it is simply too late to hold an evidentiary hearing prior to the scheduled execution date," and, "it is too late to incorporate any necessary changes that may be

required in the protocol if Plaintiffs are successful on their claims.” Order, p. 17.

The District Court concluded its analysis of the equities as follows: “[A]ny changes to the protocol may delay the execution and open the door to further challenges by the condemned [¶] . . . [I]t is uncertain if medical team personnel would decide not to participate . . . if the protocol is changed [T]he Court finds the balance of equities tips in favor of the Defendants and proceeding with the scheduled execution.” Order, p. 18. Thus, the District Court did not abuse its discretion regarding its balance of the equities.

Factor Four—The Public Interest. The last sentence of this part of the analysis encapsulates the District Court’s determination of the public interest: “The Court finds the limited First Amendment rights relating to the portion of the execution that is viewed by witnesses and which has not been fully litigated does not trump the competing interest of the public to enforce a valid death warrant scheduled within a week.” This plainspoken expression of the public interest is not an abuse of discretion.

CONCLUSION

The District Court’s Order analyzed the Motion for a Preliminary Injunction under applicable procedural and substantive law. It engaged in a reasoned, record-based analysis that weighed competing factors for and against a preliminary injunction in a measured, articulate manner. The District Court’s Order far exceeds the *Pimentel* minimum and should not be set aside as an abuse of discretion. Defendants-Appellees ask that the District Court’s Order denying the Motion for a Preliminary Injunction be affirmed.

DATED this 6th day of June, 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ Michael S. Gilmore
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 6, 2012.

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

By /s/ Michael S. Gilmore
Michael S. Gilmore
Deputy Attorney General