Kelley J. Henry
(TN Bar No. 021113)
Federal Public Defenders
810 Broadway, Suite 200
Nashville, TN 37203
Telephone: (315)736-5047
kelley_henry@fd.org

Denise Young, Esq.
(AZ Bar No. 007146)
2930 North Santa Rosa Place
Tucson, AZ 85712
Telephone: (520)322-5344
Dyoung3@mindspring.com

Jon M. Sands
Federal Public Defender
Dale A. Baich
(OH Bar No. 0025070)
Robin C. Konrad
(AL Bar No. 2194)
850 West Adams, Suite 201
Phoenix, Arizona 85007
dale_baich@fd.org
robin_konrad@fd.org
602.382.2816
602.889.3960 facsimile

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edward Harold Schad, Jr., and Robert Glen Jones, Jr., Plaintiffs, v. Janice K. Brewer, Governor of Arizona; Charles L. Ryan, Director, Arizona Department of Corrections; Ron Credio, Warden, Arizona Department of Corrections-Eyman; Lance Hetmer, Warden, Arizona Department of Corrections-Florence, Defendants.	Case No.2:13-cv-02001-ROS Motion by Plaintiffs Edward Harold Schad, Jr., and Robert Glen Jones, Jr., for Preliminary Injunction, and Memorandum in Support Thereof Hearing Requested **Executions Scheduled October 9, 2013, and October 23, 2013**

Plaintiffs Edward Harold Schad, Jr., and Robert Glen Jones, Jr., having filed a Complaint in the above-captioned case, move pursuant to Federal Rule of Civil Procedure 65(a) for a preliminary injunction barring Defendants from executing them without timely and meaningful disclosure regarding the drug Defendants intend to use, and without proper adjudication of the claims brought in the concomitant lawsuit.

Plaintiffs also seek a preliminary injunction requiring Defendants to provide the requested non-confidential information regarding the lethal-injection drug. Plaintiffs seek injunctive relief barring Defendants and each of them and/or their agents from acting jointly or severally to execute Plaintiffs on their scheduled execution dates in a manner that will deprive them of their rights in violation of their First and Fourteenth Amendment rights under the United States Constitution, and 42 U.S.C. § 1983. Plaintiffs also request a hearing on this motion. In the alternative, Plaintiffs seek a temporary restraining order prohibiting Defendants from administering lethal injection to them until a preliminary hearing may be held. This motion is supported by the attached memorandum.

MEMORANDUM IN SUPPORT

Plaintiff Edward Harold Schad, Jr., seeks a preliminary injunction barring Defendants from executing him on October 9, 2013. Plaintiff Robert Glen Jones, Jr., seeks a preliminary injunction barring Defendants from executing him on October 23, 2013. *See* Fed. R. Civ. Proc. 65. The purpose of a preliminary injunction is to preserve the status quo until the rights of the parties can be fully and fairly litigated. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

To be entitled to a preliminary injunction, a plaintiff must demonstrate that (1) he will likely succeed on the merits of his claim; (2) he will likely suffer irreparable harm without preliminary relief; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* (*citing Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (alteration in original).) For the reasons outlined below, Plaintiffs meet the standard for obtaining a preliminary injunction.

I. Factual Background

Plaintiff Edward Harold Schad, Jr., is under a warrant of execution and is scheduled to be put to death by lethal injection by the State of Arizona on October 9, 2013. Plaintiff Robert Glen Jones, Jr., is under a warrant of execution and is scheduled to be put to death by lethal injection by the State of Arizona on October 23, 2013.As soon as the State of Arizona asked the Arizona Supreme Court to issue warrants of execution in Plaintiffs' cases,[1] Plaintiffs asked the director of the Arizona Department of Corrections (ADC), Charles L. Ryan, to provide them with information about the lethal drug that ADC intends to use in their executions. Plaintiffs made this timely request based on their knowledge of ADC's recent and ongoing difficulty in safely and legitimately obtaining its supply of lethal-injection drugs.

For the past three years, the State has had difficulty complying with the law—and with its own lethal-injection protocol—in its acquisition of the various lethal drugs it uses. Problems complying with the law arose when the State imported two shipments of a controlled substance in violation of the federal Controlled Substance Act[2] and the federal Food, Drug, and Cosmetics Act.[3] Problems complying with ADC's own protocol arose when the State discovered—just hours before an execution—that another of its

---

[1] Mot. for Warrant of Execution, *State v. Schad*, No. CR-13-0058-PC (Ariz.), filed June 25, 2013; Mot. for Warrant of Execution, *State v. Jones*, No. CR-98-0537-AP (Ariz.), filed June 25, 2013.

[2] Letter from Deborah A. Johnston, Assoc. Deputy Att'y General, to Kent E. Cattani, Chief Counsel-Capital Litigation, May 24, 2011 (attached as Ex. F).

[3] *Cook v. FDA*, ___ F.3d ___, Nos. 12-5176, 12-5266, 2013 WL 3799987 (D.C. Cir. July 23, 2013).

Although condemned prisoners pointed out to Director Ryan and to state and federal courts that the importation of the drugs likely violated various federal laws, ADC repeatedly avowed that it had complied with all laws when it acquired the drugs. *See, e.g.*, Aff. of Charles L. Ryan, attached to State's Resp. to Mot. for Order Directing the State to Provide Information and to Abide by its Current Written Lethal Injection Protocol and Mem. in Support, *State v. Landrigan*, No. CR-90-0323-AP (Ariz.), filed Oct. 8, 2010 (attached as Ex. G); Aff. of Charles L. Ryan, Attach. A to State's Resp. to Supplemental Mem. on Mot. for Issuance of a Warrant of Execution, *State v. Cook*, No. CR-88-0301-AP (Ariz.), filed Dec. 28, 2010 (attached as Ex. H).

drugs had passed its expiration date.[4] With these problems in mind, previous condemned prisoners have asked ADC to provide information about the drugs ADC intended to use in the executions of those prisoners.

In May 2011, ADC began using Nembutal® (which is the brand name of the only FDA-approved version of pentobarbital) in executions. In August 2011, in another lawsuit before this Court related to lethal-injection procedures, ADC turned over extensive information about its supply of Nembutal®, including photographs of the actual bottles of the drugs, and photographs of the box labels containing the lot numbers and expiration dates of the drug.[5]

ADC has indicated that it intends to use, unexpired, domestically obtained pentobarbital in the scheduled execution of Mr. Schad on October 9, 2013, and in the scheduled execution of Mr. Jones on October 23, 2013.[6] ADC refused to provide any other information that it would be expected to possess, such as brand name, despite Plaintiffs' request for that information. But ADC's supply of FDA-approved domestic pentobarbital expired in March 2013,[7] and no FDA-approved sources (domestic or otherwise) are currently available to departments of corrections.[8] Owing to these facts

---

[4] *Towery v. Brewer*, 672 F.3d 650, 652-52 (9th Cir. 2012) (noting that the State changed its protocol hours before an oral argument in the court, and just two days before a scheduled execution, because ADC "discovered at the last minute that the originally planned drugs had expired in January 2012. How such a discovery escaped the State for the past six weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona's protocols.").

The lethal-injection protocol, which ADC itself developed, requires ADC to "[e]nsure that complete sets of chemicals are on site and immediately available for use[]" as soon as ADC receives a warrant of execution. ADC Dep't Order 710, Execution Procedures, at Attach. D, § A(I)(III).

[5] *See* Defs' Disclosures, Bates No. 01985 DFS' 26(a)(1) Disclosures and Responses to RFPs, (Nembutal® Purchase Order); Defs' Disclosures, Bates No. 01973-01978 DFS' 26(a)(1) Disclosures and Responses to RFP's, (Photographs of Nembutal Supply), *West v. Brewer*, No. 2:1 l-cv-01409-NVW (D. Ariz.), Aug. 19, 2011.

[6] Letter from Charles L. Ryan to Dale A. Baich, Capital Habeas Supervisor, dated July 30, 2013 (*See* ECF No. 1, Complaint, Ex. B).

[7] *See supra* n.5.

[8] *Lundbeck overhauls pentobarbital distribution program to prevent misuse.* July

about pentobarbital and to ADC's history of incorrectly avowing to state and federal courts that ADC's drug source is legitimate, Mr. Schad[9] and Mr. Jones asked Director Ryan to identify "the name of the manufacturer; the source of the substance, including whether the substance is from a domestic or foreign source; proof that the substance is approved by the Food and Drug Administration (FDA); and the legal authority for [ADC's] acquisition and possession of" the drug.[10] In response, ADC refused to provide Plaintiffs with any other information about the pentobarbital the State intends to use in their executions, other than to reiterate that it intended to use pentobarbital. Instead, despite the fact that ADC has previously provided this type of information without claiming a confidentiality exception, ADC claimed that information about the drug manufacturer and source is "confidential and is not subject to disclosure under A.R.S. § 13-757(C)."[11]

1, 2011 ("Going forward, Nembutal will be supplied exclusively through a specialty pharmacy drop ship program that will deny distribution of the product to prisons in U.S. states currently active in carrying out the death penalty by lethal injection.") (attached as Ex. I).

Lundbeck subsequently sold its rights to Nembutal® to Akorn Inc., but included the restricted-distribution program as part of the transfer. *Lundbeck divests several products in the US as part of long-term business strategy*, Dec. 22, 2011 ("As part of the agreement, Akorn will continue with Lundbeck's restricted distribution programme for Nembutal®, which was implemented to restrict the use of the product in the US.) (attached as Ex. J).

[9] Mr. Schad, through his counsel, asked Dale A. Baich of the Office of the Federal Public Defender for the District of Arizona to request certain information from ADC about the drugs ADC intended to use in his execution.

[10] Letter from Dale A. Baich, Capital Habeas Supervisor, to Charles L. Ryan, dated July 19, 2013 (*see* ECF No. 1, Complaint, Ex. A); *see also* Letter from Dale A. Baich, Capital Habeas Supervisor, to Charles L. Ryan, dated August 6, 2013 (*see* ECF No. 1, Complaint, Ex. C).

[11] Letter from Charles L. Ryan to Dale A. Baich, Capital Habeas Supervisor, dated August 16, 2013 (ECF No. 1, Complaint, Ex. D).

A.R.S. § 13-757(C) states, "The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2. [A.R.S. § 39-121 *et seq.*]."

Subsequently, ADC released a limited amount of information regarding the drug it intends to use in Plaintiffs' executions to the American Civil Liberties Union of Arizona (ACLU) in response to the ACLU's public-records request. On September 17, 2013, the ACLU asked ADC for information pertaining to drugs it intends to use in Plaintiffs' executions, including, *inter alia*, the manufacturer, distributor, lot number, expiration date, and NDC of the drugs. (Letter from Kelly Flood to Charles Ryan, Sept. 17, 2013, attached as Ex. K.) The ACLU asked for verification that the persons who would be responsible for handling the drugs are authorized to handle controlled substances, and emphasized that it was not seeking "information that would provide the identity of persons involved in the execution." (*Id.*)

On September 20, 2013, ADC provided the ACLU with certain letters exchanged between Director Ryan and Dale A. Baich of the Office of the Federal Public Defender for the District of Arizona written on behalf of Plaintiffs, and claimed that the other information the ACLU requested is confidential and "not subject to disclosure pursuant to A.R.S. § 13-757(C)." (Letter from Dawn Northup to Kelly Flood, Sept. 20, 2013, attached as Ex. L.)

On September 24, 2013, the ACLU reiterated its request, and demonstrated that ADC had previously provided the same type of information. The following day, ADC provided some documentation to ACLU relating to the pentobarbital ADC intends to use in Plaintiffs' executions. (*See* ECF No. 1, Complaint, Ex. E.) The documentation demonstrates that ADC ordered 25g of Nembutal® in 2011, on a day and month unknown, due to ADC's redactions. (*See* ECF No. 1, Complaint, Ex. E.) Defendants still have not provided this information to Plaintiffs, and it remains unclear whether Nembutal® will, in fact, be used in Plaintiffs' executions. The only legitimately available brand of pentobarbital is Nembutal®, but as noted earlier, ADC's supply expired in March 2013 and the only legitimate supplier of Nembutal® issued a statement in July 2011 that no Nembutal® could be provided to departments of corrections.

In providing the documents to the ACLU, ADC redacted a substantial amount of information, claiming that "[t]he information that has been redacted is confidential pursuant to A.R.S. § 13-757(C)." (*See* ECF No. 1, Complaint, Ex. E.) Section 13-757(C) protects from public-records requests the identity of "executioners and other persons who participate or perform ancillary functions and any information that would identify those persons . . . ." While the statute protects *persons* involved in executions, the redactions include information such as shipment receipt, due date, and the drug's National Drug Code.[12] (*See* ECF No. 1, Complaint, Ex. E(1).)

ADC also redacted or failed to provide expiration dates and lot numbers of the drug, the manufacturer and the distributor of the drug, and information identifying the controlled-substances schedule. (*See* ECF No. 1, Complaint, Ex. E.) ADC did not provide information demonstrating that ADC personnel are authorized under federal law to handle controlled substances. None of the information that has been redacted is protected by the state statute.

II. This Court Should Issue a Preliminary Injunction, or in the Alternative, a Temporary Restraining Order, Until a Preliminary Injunction Hearing Can Occur

Under the First Amendment, Plaintiffs are entitled to the information that the State refuses to provide to them. *See California First Amendment Coalition v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002) (recognizing that the public has a "right to be informed about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death"). Moreover, Plaintiffs have reason to believe that the drug that will be used in their executions is expired, or may have other efficacy problems. Without additional information, however, Plaintiffs are left unable to vindicate any potential Eight Amendment claim that they may have. *See, e.g.*, FDA, *Don't Be Tempted to Use*

[12] Each drug produced by registered drug establishments is identified by a unique number called the National Drug Code (NDC).

Expired Medicines, 01/05/2012, *at* http://www.fda.gov/Drugs/ResourcesForYou/SpecialFeatures/ucm252375.htm ("Expiration dates on medical products are a critical part of determining if the product is safe to use and will work as intended") (last accessed Oct. 3, 2013).

Here, the State of Arizona has trampled Plaintiffs' rights by keeping from them information that is not confidential. "[T]he censorial power is in the people over the Government, and not in the Government over the people." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275, (1964) (*quoting* 4 Annals of Congress, p. 934 (1794)). As the Ninth Circuit has explained, "[a]n informed public debate is critical in determining whether execution by lethal injection comports with 'the evolving standards of decency which mark the progress of a maturing society.'" *California First Amendment Coalition*, 299 F.3d at 876 (*citing Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Defendants' actions violate not only Plaintiffs' First Amendment rights as public citizens, but also their due-process rights as death-sentenced individuals who are being denied access to information that is necessary to determine whether their execution will likely violate the Eighth Amendment. At this juncture, issuance of a preliminary injunction, or in the alternative a temporary restraining order, is necessary to ensure that Plaintiffs' rights are not violated before they are executed.

A. Likelihood of Success on the Merits of Plaintiffs' Claims

Plaintiffs have raised serious questions going to, and can demonstrate a likelihood of success on, the merits of their claims. Plaintiffs need not meet the preliminary injunction standard for every claim in the lawsuit; a preliminary injunction is appropriate where there is a likelihood of success on at least one of the claims. *See Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 983 (D. Ariz. 2006) (noting that the court need not address each and every claim in determining plaintiff's likelihood of success on the merits where court has found at least one claim is likely to succeed). As explained below, Plaintiffs have demonstrated a likelihood of success on the merits, or at least

serious questions going to the merits, of their claims. This factor, therefore, weighs in favor of an injunction.

1. Claim One: Defendants' deliberate actions in hiding information violates Plaintiffs' First Amendment right to be informed about the manner in which the State implements the most serious penalty available in the criminal-justice system.

Plaintiffs have a strong likelihood of success on the merits of his claim that Defendants' decision to hide, without sufficient justification, governmental information related to an execution. *Cal. First Amendment Coal.*, 299 F.3d at 877 ("Under the public right of access cases, once the right of access attaches to a governmental proceeding, that right 'may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'") (*quoting Press–Enter. Co. v. Super. Ct.*, 478 U.S. 1, 9 (1986)). Here, Defendants claim that Arizona's statute that protects from public-records requests the identity of *persons* participating in executions also protects data relating to lethal-injection drugs, including *numerical data* such as federal drug-identification numbers and expiration dates, as well as product data identifying the drugs. Under *California First Amendment Coalition*, the improper use of public-records statutes and the statute protecting the identity of persons participating executions cannot override the First Amendment right of access to execution-related governmental proceedings.

As "individual citizen[s,]" *Cal. First Amendment Coal.*, 299 F.3d at 874, Plaintiffs have a right to "'effectively participate in and contribute to our republican system of self-government.'" *Id.* (*quoting Globe Newspaper v. Super. Ct.*, 457 U.S. 596, 604-05 (1982)). In order to participate effectively, Plaintiffs must be permitted their First Amendment right of access to governmental proceedings. *See id.* at 873 ("This right of access is premised on the 'common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'") (*citing Globe Newspaper*, 457 U.S. at 604 (internal citations omitted; alterations in original).

The First Amendment right of access to governmental proceedings extends to the execution context—that is, there exists the right of access to information "about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death." *Id.*; *see also id.* at 875 (noting that "the public has a First Amendment right of access to governmental proceedings in general and executions in California in particular . . ."). [13] Plaintiffs have asked for precisely this type of non-confidential information about governmental proceedings: they asked Defendants to provide them with information about the lethal drugs the State intends to use in implementing the death penalty. Moreover, Plaintiffs asked for the *identical type* of information that ADC has provided in the past in response to public-records proceedings, and in response to discovery requests by other death-row prisoners.

But instead of providing the information, Defendants claim that the information is exempt from public disclosure by a statute that protects the identity of *persons involved in executions*. Although Defendants' secrecy is not supportable under the First Amendment, [14] it is even less supportable here—not only because ADC has provided this

---

[13] Mr. Schad and Mr. Jones are "individual citizen[s]" with a First Amendment right of access to governmental proceedings; they are also prisoners who retain their First Amendment rights absent deprivation procedures that meet due-process requirements. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (recognizing that a prisoner "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"); *Pell*, 417 U.S. at 837 (Douglas, Brennan, Marshall, JJ., dissenting) ("'[F]oremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment. Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process.") (*citing Procunier v. Martinez*, 416 U.S. 396, 428-429 (Douglas, J., concurring) (*overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). No such procedures have occurred in this case; instead, Defendants simply assert that the information Plaintiffs requested is "confidential" pursuant to Arizona's public-records statute.

[14] Plaintiffs assert that Defendants' secrecy not only violates the First Amendment, but that it is also based on a misapplication of the state statute that protects the identity of persons participating in executions. *See, e.g.*, *Landrigan v. Brewer*, No. CIV-10-2246-PHX-ROS, 2010 WL 4269557 (D. Ariz. Oct. 23, 2010) ("Without citation to any

type of information in the past without any claim of confidential exemption, but also given Defendants' history of incorrectly avowing that their previous acquisition of lethal drugs was lawful and appropriate. *See Press-Enter.*, 478 U.S. at 7 ("'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.'") (*quoting Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

Accordingly, Defendants violated the First Amendment's guarantee of the right of access to execution-related governmental proceedings by refusing to turn over non-confidential information that helps explain how the State implements the death penalty. Defendants' secrecy also deprives Plaintiffs of their First-Amendment right to petition the government for redress of grievances. *See Cal. First Amendment Coal.*, 299 F.3d at 874 ("Therefore, although the right of access is not enumerated in the First Amendment, it is encompassed within the Amendment as a right that is 'nonetheless necessary to the enjoyment of other First Amendment rights.'") (*quoting Globe Newspaper*, 457 U.S. at 604); *cf. Pell*, 417 U.S. at 829 n.6 (holding that prison restrictions did not unconstitutionally burden prisoners' First Amendment rights to petition the government for redress of grievances because prison accorded "alternative means of communication with the press). Here, Defendants' intentional concealment of non-confidential information deprives Plaintiffs of the means necessary to petition the government for

---

authority, Defendants assert in a conclusory manner that this provision protects 'entities' involved in the execution process and thus the identity of the manufacturer who supplied the drugs must remain confidential. The Court strongly disagrees with Respondents' interpretation of Arizona's confidentiality law. The plain language of the statute references only 'executioners and other *persons*.' It is simply incongruous to suggest this law prohibits disclosure of either the manufacturer of the drug or packaging information such as a lot number or expiration date.") (citations omitted; emphasis in original). While the subsequent temporary restraining order in *Landrigan* was vacated by the Supreme Court, *see Landrigan*, No. CIV-10-2246-PHX-ROS, 2010 WL 4269559, *vacated on other grounds*, 131 S. Ct. 445 (Mem.) (2010), this Court's findings in its October 23 Order were not the basis for the Supreme Court's order.

redress. For these reasons, Plaintiffs have shown a likelihood of success on, or serious questions going to, the merits of Claim One.

2. Claim Two: Defendants' deliberate actions in hiding information regarding the lethal-injection drugs that they intend to use denies Plaintiffs their federal rights to due process and meaningful access to the courts.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. 214. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (internal citations omitted). Consistent with the opportunity to be heard is the "constitutional right of access to the courts." *See Bounds v. Smith*, 430 U.S. 817, 821 (1977). The "right of access to the courts . . . is founded in the Due Process Clause." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

Plaintiffs have a liberty interest in assuring that their executions are carried out in a manner consistent with the Eighth Amendment. *See Lopez v. Brewer*, 680 F.3d 1068, 1083-84 (9th Cir. 2012) (Berzon, J., dissenting) (*citing Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003)). Defendants cannot hide information that Plaintiffs have a constitutional right to obtain. *See* Claim One *supra*. By denying their legitimate and reasonable request for information regarding the drug to be used in their executions, Defendants have actively prevented Plaintiffs from being able to determine whether they have a valid claim that their Eighth Amendment right to be free from cruel and unusual punishment will be violated during their executions.

Under *Baze v. Rees*, an execution will violate the constitution where a prisoner can show that there is "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" 553 U.S. 35, 50 (2008) (*quoting Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). "[S]ubjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and

unusual punishment." *Baze*, 553 U.S. at 49. Plaintiffs recognize that their burden under the *Baze* standard is high. For that reason, they cannot meet the showing required without the necessary evidence regarding the drug to be used in their executions. *See Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (vacating a temporary restraining order issued on potential Eighth Amendment violation because there was "no evidence in the record to suggest that the drug obtained from a foreign source is unsafe").

But Defendants' failure to provide Plaintiffs with the requested information regarding the drug ADC intends to use in their scheduled execution has created an insurmountable barrier to the filing and prosecution of a colorable Eighth Amendment claim. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Here, Plaintiffs cannot even determine whether they have an Eighth Amendment claim because Defendants refuse to comply with its requirement under the First Amendment.

The information that Defendants have refused to disclose is critical to an assessment of the likelihood that Plaintiffs' executions will violate their constitutional rights; the refusal is at odds with the "the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." *Hudson v. McMillian*, 503 U.S. 1, 11 (1992) (*quoting Estelle v. Gamble*, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted). As the FDA has stated, drugs that expired are often unsafe and risky. *See supra* FDA, *Don't Be Tempted to Use Expired Medicines*. By deliberately concealing information *that is not confidential* from Plaintiffs, Defendants have actively prevented Plaintiffs from making a valid assessment of whether they will be executed in a manner that will violate their Eighth Amendment rights. Therefore, Defendants' actions have violated Plaintiffs' rights to due process and access to the courts.

For these reasons, Plaintiffs have shown a likelihood of success on, or serious questions going to, the merits of Claim Two.

B. Plaintiffs Are Likely to Suffer Irreparable Harm

As a matter of law, Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted. *See Towery v. Brewer*, 672 F.3d 650, 661 (9th Cir. 2012), (recognizing that irreparable harm is demonstrated by prisoners bringing § 1983 lawsuit involving upcoming execution). As described above, Plaintiffs have raised colorable claims of threatened constitutional violations of his First and Fourteenth Amendment rights under the United States Constitution. The Ninth Circuit has made clear that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore Inc. v. Super. Ct. of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 1001-1002 (9th Cir. 2005) ("'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary'") (*citing* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2948.1 (2d ed. 2011)).

Plaintiffs will also suffer irreparable harm as a matter of fact. Mr. Schad is scheduled to be executed on October 9, 2013, and Mr. Jones is scheduled to be executed on October 23, 2013. If executed without intervention of this Court, they will be deprived of their First Amendment "right to be informed about how the State" intends to execute them, *California First Amendment Coalition*, 299 F.3d at 873, and their rights to due process and access to the courts. Without this Court's issuance of a preliminary injunction or temporary restraining order, Defendants will be permitted to go forward with Plaintiffs' executions in violation of the First and Fourteenth Amendments.

Finally, Plaintiffs do not seek damages; no amount of monetary relief could compensate them once they are executed in violation of the Constitution. *See Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (constitutional violations cannot be remedied through damages). There is nothing more final and irreversible than death. If Plaintiffs are unconstitutionally executed, the harm is irreparable. Once this

violation occurs, Plaintiffs will have no recourse for an execution that violated their constitutional rights. This factor weighs in favor of an injunction.

C. The Balance of Equities Favors Plaintiffs

Under the circumstances in this case, the balance of equities tips sharply in favor of Plaintiffs. Plaintiffs are not seeking an injunction to forever prevent Defendants from carrying out Plaintiffs' death sentences. Rather, they seek only to enjoin Defendants from executing them in violation of their constitutional rights. While "the State has a significant interest in enforcing its criminal judgments, it is unclear how a short, temporary stay to resolve [Plaintiffs'] claims will threaten that interest." *Landrigan v. Brewer*, No. CV-10-02246, 2010 WL 4269559, *11 (D. Ariz. Oct. 25) (internal citation omitted), *vacated on other grounds*, 131 S. Ct. 445 (Mem.) (2010).

This Court should not permit Plaintiffs' executions to proceed before it has the opportunity to review Plaintiffs' claims. Plaintiffs have raised serious questions going to the merits of their claims, and the hardship that Plaintiffs will suffer outweighs the limited hardships of Defendants. The delay resulting from granting the relief sought here will have little adverse effect on the State's interest. "The state will get its man in the end." *See Gomez v. U.S. Dist. Ct. For N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate). But if Plaintiffs are executed without Defendants complying with the First and Fourteenth Amendments, that injury cannot be fixed. This factor weighs in favor of an injunction.

D. Granting the Injunction Would Serve the Public Interest

Preliminary relief would serve the public interest because "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d, 815, 826 (9th Cir. 2005). The "public interest is served only by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights." *In re Ohio Execution Protocol Litigation*, 840 F.Supp.2d 1044, 1059 (S.D. Ohio 2012) (citation omitted). Indeed, "the public interest has never been and could never be served

by rushing to judgment at the expense of a condemned inmate's constitutional rights." *Id.*

Here, the public interest is implicated through the First Amendment. What the State conceals from Plaintiffs, it also conceals from the public at large. ADC has refused repeated requests by not only Plaintiffs, but also by the ACLU, to provide non-confidential public information about its execution process. Claim One needs to be litigated under the normal course of a lawsuit. If the preliminary injunction is not issued, Defendants will be able to hide behind a veil of secrecy in carrying out not one but two executions. This violates not only Ninth Circuit law, *see California First Amendment Coalition*, 299 F.3d at 874-75 (finding that the First Amendment principles "carry over to the process of executing a condemned inmate"), but also fundamental principles of the First Amendment, *see Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that there is "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

Because no public interest that would be injured by the granting of preliminary relief, *Cottrell*, 632 F.3d at 1138 (considering "whether there exists some critical public interest that would be injured by the grant of preliminary relief"), this factor also weighs in favor of granting an injunction.

III. Plaintiffs Have Not Intentionally Delayed in Filing This Lawsuit and Could Not Have Raised Their Claims Sooner

Before granting injunctive relief that would prevent an execution from occurring, courts must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). There has been no such delay here.

As discussed in the factual background in Section I, since the day that the State sought warrants of execution, Plaintiffs have been actively trying to obtain the information that Defendants refuse to provide regarding the lethal-injection drug.

Defendants have continually rejected Plaintiffs' request for information. The ACLU also attempted to obtain this information, but to no avail. Neither Plaintiffs nor the ACLU have been successful in their attempts.

After receiving the limited information that ADC provided the ACLU on September 25, Plaintiffs' counsel considered the options they had in pursuing legal remedies. One week later, Plaintiffs filed their complaint with this Court. (ECF No. 1.)[15] This Complaint was filed as soon as practicable after Plaintiffs reviewed the documents from the ACLU. Plaintiffs have not delayed in bringing this lawsuit; therefore, any reason for delay should not be considered against them, but should be against Defendants.

IV. Conclusion

For the reasons outlined in this Memorandum, this Court should:

(1) grant Plaintiffs a preliminary injunction requiring Defendants to provide the requested information regarding the drugs they intend to use in Plaintiffs' executions;

(2) grant Plaintiffs a preliminary injunction preventing Defendants from carrying out their execution on the scheduled date using drugs that are compromised (*e.g.*, expired);

(3) grant Plaintiffs a hearing on their request for a preliminary injunction;

(4) alternatively, grant Plaintiffs a temporary restraining order preventing Defendants from carrying out Plaintiffs' executions until such time as this Court can hold a preliminary injunction hearing; and

(5) grant any other relief as this Court deems appropriate.

[15] Mr. Schad emailed his Complaint for filing at 7:13pm on October 2. It was processed on 8:57am on October 3.

Respectfully submitted this 3rd day of October 2013.

Kelley Henry
Federal Public Defender

Denise Young

s/ Kelley Henry
Counsel for Schad

Jon M. Sands
Federal Public Defender
Dale A. Baich
Robin C. Konrad
Assistant Federal Public Defenders

s/ Dale A. Baich
Counsel for Jones

Certificate of Service

I hereby certify that on October 3, 2013 , I electronically filed the foregoing Motion by Plaintiffs Edward Harold Schad, Jr., and Robert Glen Jones, Jr., for Preliminary Injunction, and Memorandum in Support Thereof, with the Clerk's Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Chelsea L. Hanson
Legal Assistant
Capital Habeas Unit

Exhibit F

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

May 24, 2011

Mr. Kent E. Cattani, Esq.
Chief Counsel-Capital Litigation
Office of the Arizona Attorney General
1275W. Washington Street
Phoenix, AZ 85007

Dear Mr. Cattani:

The Drug Enforcement Administration (DEA) has discovered that the Arizona Department of Corrections is presently in possession of sodium thiopental which was imported without compliance with the Controlled Substance Act and, therefore, cannot be used.

The Department would like to assist the Arizona Department of Corrections to rectify the deficiencies with respect to sodium thiopental. The DEA will provide you with a list of registered importers that Arizona may use to legally import the substance. Alternatively, if Arizona desires to obtain an importer registration, DEA will work expeditiously to process that request.

We understand the difficulty this situation presents for the State of Arizona, and would like to work with you to promptly come to an appropriate resolution. If the State has any questions about the DEA regulations governing the Department of Correction's acquisition and use of other controlled substances, we will provide you with whatever assistance we have available. In order to assist other states who have raised similar questions, a teleconference will be sponsored by the DEA on June 2, 2011. We will provide you with the dial in instructions at a later date.

Sincerely,

Deborah A. Johnston
Associate Deputy Attorney General

Exhibit G

STATE OF ARIZONA)
) ss. **AFFIDAVIT OF CHARLES L. RYAN**
COUNTY OF MARICOPA)

I, Charles L. Ryan, declare under penalty of perjury, the following to be true and accurate to the best of my belief:

1. I am currently the Director of the Arizona Department of Corrections (ADC). I was appointed to this position by Governor Janice K. Brewer.

2. I am familiar with the Departments execution protocols—Department Order 710 and Attachment F, the administration of chemicals.

3. The Department has lawfully obtained the necessary chemicals under its current written protocol—sodium thiopental, pancuronium bromide, and potassium chloride—in sufficient quantity for an execution.

4. The Department of Corrections intends to follow the current protocol as written with respect to the upcoming scheduled execution on October 26, 2010, 10:00 a.m.

DATED this 8th day of October, 2010.

Charles L. Ryan

SUBSCRIBED AND SWORN to before me this 8th day of October, 2010.

Mary K. Fuller
Notary Public

My Commission expires: August 21, 2013

OFFICIAL SEAL
MARY K. FULLER
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires Aug. 21, 2013

Exhibit H

STATE OF ARIZONA)
) ss. **AFFIDAVIT OF CHARLES L. RYAN**
COUNTY OF MARICOPA)

I, Charles L. Ryan, declare under penalty of perjury, the following to be true and accurate to the best of my belief:

1. I am currently the Director of the Arizona Department of Corrections (ADC). I was appointed to this position by Governor Janice K. Brewer.

2. I am familiar with the Department's execution protocols—Department Order 710 and Attachment F, the preparation and administration of chemicals.

3. The Department has lawfully obtained the necessary chemicals under its current written protocol—sodium thiopental, pancuronium bromide, and potassium chloride—in sufficient quantity for an execution.

4. The sodium thiopental was obtained through Dream Pharma, Ltd., a pharmaceutical supplier in the United Kingdom.

5. The Department avows that the process of shipping and receiving the chemicals was cleared and approved by United States Customs and Food and Drug Administration ("FDA") officials. *See* Attachment.

6. The Department is properly licensed by the Drug Enforcement Administration to receive sodium thiopental, a Schedule 2 drug.

7. The Department of Corrections intends to follow the current protocol as written with respect to upcoming scheduled executions.

DATED this 6th day of December, 2010.

Charles L. Ryan

SUBSCRIBED AND SWORN to before me this 6th day of December, 2010.

Mary K. Fuller
Notary Public

My Commission expires: Aug. 21, 2013

OFFICIAL SEAL
MARY K. FULLER
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires Aug. 21, 2013

Exhibit I

July 1, 2011

Lundbeck overhauls pentobarbital distribution program to restrict misuse

Release date: 01-07-2011

Release time: 06:00

New specialty pharmacy drop ship program will deny distribution of pentobarbital to prisons in U.S. states currently carrying out the death penalty by lethal injection.

Lundbeck today announced that the company has moved to alter the distribution of its medicine Nembutal® (pentobarbital sodium injection, USP) in order to restrict its application as part of lethal injection in the U.S. Going forward, Nembutal will be supplied exclusively through a specialty pharmacy drop ship program that will deny distribution of the product to prisons in U.S. states currently active in carrying out the death penalty by lethal injection. The company notified its distributors of the plan in late June.

The new distribution program ensures that hospitals and treatment centers will continue to have access to Nembutal for therapeutic purposes. Under the program, Lundbeck will review all Nembutal orders before providing clearance for shipping the product and deny orders from prisons located in states currently active in carrying out death penalty sentences.

Prior to receiving Nembutal, the purchaser must sign a form stating that the purchase of Nembutal is for its own use and that it will not redistribute any purchased product without express written authorization from Lundbeck. By signing the form, the purchaser agrees that the product will not be made available for use in capital punishment.

"Lundbeck adamantly opposes the distressing misuse of our product in capital punishment. Since learning about the misuse we have vetted a broad range of remedies - many suggested during ongoing dialogue with external experts, government officials, and human rights advocates. After much consideration, we have determined that a restricted distribution system is the most meaningful means through which we can restrict the misuse of Nembutal," says Ulf Wiinberg, Chief Executive Officer of H. Lundbeck A/S and continues: "While the company has never sold the product directly to prisons and therefore can't make guarantees, we are confident that our new distribution program will play a substantial role in restricting prisons' access to Nembutal for misuse as part of lethal injection."

Lundbeck has initiated a thorough investigation of the distribution of Nembutal to assess ways of restricting prisons' access to the medicine. Based on the initial findings, the company believes its new distribution program is the best way to achieve this. The investigation will be completed, and any possible further options that may be discovered will be evaluated.

Prior to the implementation of the drop ship program, Nembutal was sold through a more standard process utilizing several distributors to fulfill orders based on whether customers held the appropriate federal and state licenses for ordering controlled substances.

Meets important medical need

Nembutal represents less than one percent of Lundbeck's global sales but the company chose not to withdraw the product from the market because the product continues to meet an important medical need in the U.S. Nembutal is used to treat serious conditions such as a severe and life threatening emergency epilepsy.

In a recent survey of more than 200 U.S. physicians and pharmacists conducted by independent third-party research companies, 90 percent of the respondents stated that options for treating patients requiring emergency control of certain acute convulsive episodes would be compromised if Nembutal were no longer available for use. Furthermore, 95 percent of respondents reported that it is very important for their institution to have access to Nembutal for potential use in the medical care of patients. All survey respondents were from academic institutions, large community hospitals or epilepsy

centers in the U.S.

Contacts

Mads Kronborg, Media Relations Manager
Telephone (direct): +45 36 43 28 51

Simon Augustesen, Media Relations
Telephone (direct): +45 36 43 49 80

About Lundbeck

H. Lundbeck A/S (LUN.CO, LUN DC, HLUKY) is an international pharmaceutical company highly committed to improving the quality of life for people suffering from central nervous system (CNS) disorders. For this purpose Lundbeck is engaged in the research and development, production, marketing and sale of pharmaceuticals across the world, targeted at disorders such as depression and anxiety, schizophrenia, insomnia, Huntington's, Alzheimer's and Parkinson's diseases.

Lundbeck was founded by Hans Lundbeck in 1915 in Copenhagen, Denmark, and today employs 5,900 people worldwide. Lundbeck is one of the world's leading pharmaceutical companies working with CNS disorders. In 2010, the company's revenue was DKK 14.8 billion (approximately EUR 2.0 billion or USD 2.6 billion). For more information, please visit www.lundbeck.com.

Pressrelease July 1 2011 31.5 KB

Close window | Back to top

delicious Digg Facebook LinkedIn Mixx Twitter Yahoo! Buzz

Copyright 2012 H. Lundbeck A/S

Exhibit J

H. Lundbeck A/S

Ottiliavej 9
DK-2500 Valby, Denmark

Tlf +45 36 30 13 11
Fax +45 36 43 82 62

E-mail information@lundbeck.com
www.lundbeck.com

Press release

Valby, 22 December 2011

Lundbeck divests several products in the US as part of long-term business strategy

The divestiture of a portfolio of products, including Nembutal® supports Lundbeck's long-term strategy to focus on newer, strategic products in its US subsidiary portfolio.

H. Lundbeck A/S (Lundbeck) today announced that the company has entered into an agreement with Akorn Inc. (Akorn) whereby Akorn has acquired a portfolio of products comprising Nembutal® (pentobarbital sodium injection, USP), Cogentin® (benztropine mesylate injection) and Intravenous Sodium Diuril® (chlorothiazide sodium). This transaction is part of Lundbeck's long-term strategy to focus on newer, strategic products in its portfolio. As part of the agreement, Akorn will continue with Lundbeck's restricted distribution programme for Nembutal®, which was implemented to restrict the use of the product in the US.

The three products became part of Lundbeck's product portfolio through the acquisition of Ovation Pharmaceuticals, Inc. in 2009, and the medicines have never been of strategic importance to Lundbeck. Moving forward, Lundbeck will focus on newer therapies within its product portfolio that predominantly address central nervous system (CNS) disorders. In the coming years, Lundbeck US plans to launch Onfi™ for the treatment of Lennox-Gastaut syndrome, aripiprazole depot formulation for the treatment of schizophrenia and Lu AA21004 for the treatment of major depressive disorder.

"The US market is a key growth driver for Lundbeck. This transaction allows us to focus on newer, strategic products with significant revenue potential, such as Onfi™, aripiprazole depot and Lu AA21004," says Ulf Wiinberg, President & Chief Executive Officer at Lundbeck.

Under the terms of the agreement, Akorn has acquired and retains all of Lundbeck's rights and responsibilities for the manufacturing, distribution and sale of the three products included in the agreement. The agreement concerns Lundbeck's US rights for Nembutal® and global rights, including US, for Cogentin® and Diuril®.

According to the agreement, Akorn will upfront and as a milestone payment after three years pay a maximum of $60 million in cash. Lundbeck will not receive any royalties based on future Nembutal® sales. The transfer of the product portfolio is immediate, although certain filings will still need to be made with the applicable regulatory authorities to reflect the transfer. For a specified time period, Lundbeck will perform certain services on behalf of Akorn to ensure that these products will continue to be available to meet the unmet medical needs of patients.

Lundbeck contacts

Mads Kronborg
Media Relations Manager
mavk@lundbeck.com
+45 36 43 28 51

Simon Mehl Augustesen
International Media Specialist
smeh@lundbeck.com
+45 36 43 49 80

About Lundbeck

H. Lundbeck A/S (LUN.CO, LUN DC, HLUKY) is an international pharmaceutical company highly committed to improve the quality of life for people suffering from central nervous system (CNS) disorders. For this purpose Lundbeck is engaged in the research and development, production, marketing and sale of pharmaceuticals across the world, targeted at disorders like depression and anxiety, schizophrenia, insomnia, Huntington's, Alzheimer's and Parkinson's diseases.

Lundbeck was founded by Hans Lundbeck in 1915 in Copenhagen, Denmark, and today employs 5,900 people worldwide. Lundbeck is one of the world's leading pharmaceutical companies working with CNS disorders. In 2010, the company's revenue was DKK 14.8 billion (approximately EUR 2.0 billion or USD 2.6 billion). For more information, please visit www.lundbeck.com.

Exhibit K

ALESSANDRA SOLER
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA
PRESIDENT

September 17, 2013

Charles Ryan, Director
Arizona Department of Corrections
1601 West Jefferson
Phoenix, AZ 85007
cryan@azcorrections.gov

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
OF ARIZONA
P.O. BOX 17148
PHOENIX, AZ 85011
P/602.650.1854
F/602.650.1376
WWW.ACLUAZ.ORG

Re: **Urgent Public Records Request**

Dear Mr. Ryan,

Pursuant to Arizona's Public Records Law, A.R.S. § 39-121 *et seq.*, the ACLU of Arizona ("ACLU-AZ") hereby requests to be furnished with copies, or the right to examine and copy, certain public records in the possession of the Arizona Department of Corrections ("ADC"). We seek records concerning the lethal-injection drugs ADC plans to administer to Edward Harold Schad, Jr., #070566, scheduled for execution on October 9, 2013, and to Robert Glen Jones, Jr., #040496, scheduled for execution on October 23, 2013.

These records are not sought for any commercial purpose. The ACLU-AZ is a non-profit civil rights organization and this information will assist in our organization's understanding the process by which the death penalty is administered by the Arizona Department of Corrections. Nevertheless, we agree to reimburse you for reasonable costs associated with producing the requested information. If that amount will exceed $50, please let me know what it will be before you incur the costs. If your agency does not maintain the records below, please advise who does and include the proper custodian's name and address when possible.

We seek the following records (including in written, electronic, photographic, audio, video, CD, or other format) in the possession of ADC:

1. We seek all documents containing the following information about the drugs to be used in the execution of Edward Harold Schad, Jr., #070566:
    a. For all drugs approved by the federal Food and Drug Administration (FDA)
        i. The name of all drugs to be used in the execution;
        ii. The name of the manufacturer and distributor of each drug to be used in the execution;

iii. The lot number and the expiration date of each drug to be used in the execution;
iv. The National Drug Code (NDC) number that is directly associated with the particular manufacturer and lot number of the drug;
v. Any other documents in your possession that demonstrate the drug was approved by the FDA.

b. For all pre-manufactured (i.e. non-compounded) drugs not approved by the FDA
   i. The name of all drugs to be used in the execution;
   ii. The name of the manufacturer and distributor of each drug to be used in the execution;
   iii. The lot number and the expiration date of the drug;
   iv. The source of the drug, including, if known, the importer, pharmacy name, and distributor of the drug.

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF ARIZONA

c. For compounded drugs
   i. The name of the drug that ADC intends to be used in the execution;
   ii. The country of origin of the API (Active Pharmaceutical Ingredient);
   iii. The country of origin of any other ingredients used in the compounding of the drug;
   iv. The source(s) of the API and all other ingredients used, including but not limited to, the pharmacy name, chemical supply company or distributor from where it was obtained;
   v. Licensure information for the compounding pharmacy, including, but not limited to: the pharmacy's manufacturer license information, the pharmacy's wholesaler license, the pharmacy's importer/exporter license, pharmacy re-packer license, and pharmacy retailer license.

d. For all controlled substances (e.g. pentobarbital)
   i. The name of all drugs to be used in the execution;
   ii. The name of the manufacturer and distributor of each drug to be used in the execution;
   iii. The lot number and the expiration date of each drug to be used in the execution;
   iv. The registration information issued by the Drug Enforcement Administration (DEA) that permits each person involved in administering the drug the legal right to possess, handle, and administer the controlled substance. (We do not seek information that would provide the identity of persons involved in the execution. We seek only redacted copies of DEA license and registration information).

2. We seek all documents containing the following information about the drugs to be used in the execution of Robert Glen Jones, Jr., #040496:
    a. For all drugs approved by the federal Food and Drug Administration (FDA)
        i. The name of all drugs to be used in the execution;
        ii. The name of the manufacturer and distributor of each drug to be used in the execution;
        iii. The lot number and the expiration date of each drug to be used in the execution;
        iv. The National Drug Code (NDC) number that is directly associated with the particular manufacturer and lot number of the drug;
        v. Any other documents in your possession that demonstrate the drug was approved by the FDA.
    b. For all pre-manufactured (i.e. non-compounded) drugs not approved by the FDA
        i. The name of all drugs to be used in the execution;
        ii. The name of the manufacturer and distributor of each drug to be used in the execution;
        iii. The lot number and the expiration date of the drug;
        iv. The source of the drug, including, if known, the importer, pharmacy name, and distributor of the drug.
    c. For compounded drugs
        i. The name of the drug that ADC intends to be used in the execution;
        ii. The country of origin of the API (Active Pharmaceutical Ingredient);
        iii. The country of origin of any other ingredients used in the compounding of the drug;
        iv. The source(s) of the API and all other ingredients used, including but not limited to, the pharmacy name, chemical supply company or distributor from where it was obtained;
        v. Licensure information for the compounding pharmacy, including, but not limited to: the pharmacy's manufacturer license information, the pharmacy's wholesaler license, the pharmacy's importer/exporter license, pharmacy re-packer license, and pharmacy retailer license.
    d. For all controlled substances (e.g. pentobarbital)
        i. The name of all drugs to be used in the execution;
        ii. The name of the manufacturer and distributor of each drug to be used in the execution;
        iii. The lot number and the expiration date of each drug to be used in the execution;
        iv. The registration information issued by the Drug Enforcement Administration (DEA) that permits each person involved in administering the drug the legal right to possess, handle, and

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF ARIZONA

administer the controlled substance. (We do not seek information that would provide the identity of persons involved in the execution. We seek only redacted copies of DEA license and registration information).

3. All correspondence, forms, and documents shared between the Arizona Department of Corrections and any federal body, including but not limited to, the Drug Enforcement Administration, U.S. Food and Drug Administration, and United States Customs, concerning the drugs to be used in the scheduled executions of Edward Harold Schad, Jr., #070566 and Robert Glen Jones, Jr., #040496.

4. All correspondence, forms, and documents shared between the Arizona Department of Corrections and any manufacturer, distributor, or pharmacy responsible for supplying the Arizona Department of Corrections with the drugs to be used in the scheduled executions of Edward Harold Schad, Jr., #070566 and Robert Glen Jones, Jr., #040496.

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF ARIZONA

5. All invoice, order, and procuring information concerning the drugs to be used in the scheduled executions of Edward Harold Schad, Jr., #070566 and Robert Glen Jones, Jr., #040496.

Arizona Public Records Law carries with it a presumption that all records are "open to the public for inspection as public records." *Carlson v. Pima County*, 141 Ariz. 487,490,687 P.2d 1242 (1984). In *Landrigan v. Brewer,* the district court made clear that the Arizona Department of Corrections must provide the identity of manufacturers, pharmacies, and distributors from whom ADC procured lethal injection drugs. The Court in *Landrigan* stated A.R.S. 13-757(C) does not prohibit "the disclosure of either the manufacturer of the drug or packaging information such as a lot number or expiration date." *Landrigan v. Brewer,* F.Supp.2d, 2010 WL 4269557 D.Ariz., 2010. Only the identities of persons are protected under A.R.S. 13-757(C). *Id.*

We seek information the Arizona Department of Corrections has previously released regarding lethal injection drugs and procedures, without court order, in response to past discovery requests (see *West v. Brewer*) and in response to a previous public records request (*see Arizona Department Corrections July 21, 2011 answer to complaint no. LC 2011-000344-001 DT, Office of the Federal Public Defender for Arizona v. Arizona Department of Corrections*). Specifically, in *Office of the Federal Public Defender for Arizona v. ADC,* in response to the submitted complaint, and to satisfy a previously submitted public records request, ADC's answer provided information similar to the information we've requested, including: the names of the manufacturers of the lethal injection drugs used, the drugs country of origin, correspondence between ADC and various government agencies concerning lethal injection drugs, photographs of

vials, the lot number and expiration date of the lethal injection drugs to be used, and invoice and order details.

If this request is denied in part or in whole, please justify any redactions or withholdings by referencing the specific grounds on which the information is withheld under the Public Records Law. All segregable portions of otherwise exempt material must be produced. We reserve the right to appeal your decision to withhold any information.

Given the short time period between the date of this request and the scheduled executions of Robert Jones and Edward Schad, we ask that you expedite processing of this records request and send the responsive materials to us by **September 20, 2013**. If only some of the responsive materials are available, please send that information immediately and send the additional responsive materials as soon as they are available. *See A.R.S. § 39-121(D)(1) and (E)* (public records must be furnished "promptly"). Thank you for your attention to this matter. Should you have any questions, you may contact me by phone at 602-773-6018 or by email at kflood@acluaz.org.

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF ARIZONA

Sincerely,

Kelly Flood
Staff Attorney
ACLU of Arizona

CC: Dawn Northup, General Counsel, Arizona Department of Corrections

Exhibit L

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

September 20, 2013

Kelly Flood
Staff Attorney
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011

Re: Public Records Request

Dear Ms. Flood:

This letter is in response to your letter of September 17, 2013, addressed to Director Ryan and copied to me, requesting records under Arizona's public records law "concerning the lethal-injection drugs ADC plans to administer to Edward Harold Schad, Jr., #070566, . . . and Robert Glen Jones, Jr., #040496 . . . ." Records responsive to your request are attached. The remaining information you seek, to the extent ADC has such records, is confidential and not subject to disclosure pursuant to A.R.S. § 13-757(C).

Your contention that the Federal District Court's opinion in *Landrigan v. Brewer*, 2010 WL 4269559, D. Ariz. (2010), compels the disclosure of the "identity of manufacturers, pharmacies, and distributors from whom ADC procured lethal injection drugs" is misplaced. The United States Supreme Court vacated that decision in *Brewer v. Landrigan* ___ U.S. ___, 131 S. Ct. 445 (2010). Thus, it is not controlling here.

With regard to your request that the Arizona Department of Corrections ("ADC") reproduce documents provided to the Office of the Public Defender during the discovery process in *West v. Brewer*, the ADC is not required to reproduce documents provided through the formal discovery process in response to a public records request. As stated in your letter, the Office of the Federal Public Defender received the documents produced by the ADC's counsel in *West v. Brewer*, and presumably the Office of the Federal Public Defender, which currently represents inmates Schad and Jones, has those documents and must comply with any restrictions relating to their dissemination. The public records statute is not an appropriate means by which to seek information produced in prior litigation under the federal discovery rules.

Finally, the ADC is under no obligation to reproduce documents already provided in response to a prior public records request. If you could provide the 2011 public records

request you reference, it would facilitate our review of that request, as well as the response provided. Based on the general nature of your request, it is virtually impossible to comply with, and certainly not within your 3-day deadline.

Sincerely,

Dawn Northup
General Counsel

cc: Director Charles Ryan
Jeff Hood, Deputy Director
Robert Patton, Division Director, Prison Operations
Jeff Zick, Assistant Attorney General
Jon Anderson, Assistant Attorney General

Attachments to Exhibit L

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

September 5, 2013

Inmate Edward Harold Schad, Jr.
ADC #040496
ASPC-Eyman/Browning Unit
P.O. Box 3500
Florence, AZ 85132-3500

Mr. Schad:

The purpose of this correspondence is to notify you that the one-drug protocol using Pentobarbital will be used to carry out the execution scheduled for Wednesday, October 9, 2013. The one-drug protocol is outlined in Department Order 710 Attachment D, Chemical Chart A.

I also want to confirm that in accordance with your attorney's request, visitation with your pastor may occur on the morning of the execution between 8:00 a.m. and 9:00 a.m., and you have waived your visitation privileges with your attorneys of record on the morning of the execution.

Additionally, you may choose to make a final statement that is reasonable in length and does not contain vulgar language or intentionally offensive statements directed at the witnesses. The microphone will remain on during your statement. It will be turned off, however, in the event you use vulgarity or make intentionally offensive statements.

As a final matter, I want to inform you that closed-circuit monitors in the designated witness room will allow witnesses to observe the IV team's assessment of the IV sites and the insertion of the primary and the secondary IV catheters. A microphone will also be turned on during this process. After the IV catheters have been inserted, the microphone will be turned off. When the execution is ordered to proceed, the microphone will be turned on, the curtain will be opened, and the closed-circuit monitors will be turned off. The Warden will read the Warrant of Execution and you will have an opportunity to make a final statement before the execution is completed.

Regards,

Charles L. Ryan
Director

CLR/dn/hp

cc: Denise Young, Attorney for Inmate Edward Harold Schad, Jr.
Kelley J. Henry, Federal Public Defender's Office, Capital Habeas
Jeff Zick, Division Chief, Capital Appeals, Attorney General's Office
Jon Anderson, Assistant Attorney General, Capital Appeals, Attorney General's Office
Matthew Binford, Assistant Attorney General
Joe Sciarrotta, General Counsel, Office of the Governor
Jeff Hood, Deputy Director
Dawn Northup, General Counsel
Robert Patton, Division Director, Offender Operations
Ron Credio, Warden, ASPC-Eyman
Lance Hetmer, Warden, ASPC-Florence
Donna Hallam, Arizona Supreme Court
Kristine Fox, Capital Case Staff Attorney, U.S. District Court

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

August 16, 2013

Dale Baich, Supervisor
Capital Habeas Unit
Office of the Federal Public Defender
850 W. Adams Street, Suite 201
Phoenix, AZ 85007

Dear Mr. Baich:

In response to your letter of August 6, 2013, requesting the name of the manufacturer and the source of the drug the Arizona Department of Corrections ("ADC") intends to use for the executions of inmates Robert Jones (#070566) and Edward Schad (#040496), that information is confidential and is not subject to disclosure under A.R.S. § 13-757(C). As I reiterated in my letter of July 30, 2013, ADC intends to use the one-drug protocol set forth in Chart A, Attachment D of Department Order ("DO") 710. The protocol to be used for the anticipated executions of inmates Jones and Schad has not changed since ADC published changes to DO 710 in September, 2012. As you know, these changes ultimately led to the Plaintiffs in *Towery v. Brewer*, CV-00245-NVW entering a stipulated dismissal of their Complaint, challenging the constitutionality of Arizona's execution protocol. Similarly, the credentials of the IV team remain the same and are clearly stated in DO 710, Section 1.2.5.

Sincerely,

Charles L. Ryan
Director

CLR/DN/kp

cc: Jeff Hood, Deputy Director
Robert Patton, Division Director, Prison Operations
Dawn Northup, General Counsel
Jeff Zick, Division Chief, Capital Appeals, Attorney General's Office
CLR83336473

PRICE, HEATHER

From: PRICE, HEATHER
Sent: Friday, August 16, 2013 10:36 AM
To: HOOD, JEFF; PATTON, ROBERT; NORTHUP, DAWN; 'jeffrey.zick@azag.gov'
Cc: RYAN, CHARLES
Subject: Letter to Dale Baich 08/16/2013
Attachments: DOC081613.pdf

All:

Please see attached letter to Dale Baich which will go out in this afternoon's US Mail. Thank you.

Heather Price
Executive Assistant to Director Charles L. Ryan Arizona Department of Corrections
Office: 602.542.5225
Email: hprice@azcorrections.gov

Office of the
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

direct line: 602-382-2816
email: dale_baich@fd.org

RECEIVED
AUG 2013
Director's Office

August 6, 2013

Mr. Charles Ryan, Director
Arizona Department of Corrections
1601 West Jefferson
Phoenix, AZ 85007

Dear Director Ryan:

Thank you for your recent response to my letter regarding the name of the drug that the Arizona Department of Corrections (ADC) intends to use for Robert Glen Jones Jr.'s and Edward Schad's potential executions. I am writing to follow up on some of the unresolved issues from my original letter.

You stated in your response that "ADC intends to use unexpired, domestically obtained Pentobarbital" for the executions of Messrs. Jones and Schad. However, you did not provide me with the name of the manufacturer, the source of the pentobarbital, and the expiration date of the drug. For instance, if Hospira was the manufacturer for Lundbeck, and the brand name of the drug was Nembutal,[1] Messrs. Jones and Schad would know that the pentobarbital was FDA-approved.[2]

If ADC intends to use a substance that is not FDA-approved, please provide the source of that drug, the manufacturer, and the expiration date. In addition, if ADC intends to use a compounded substance, please identify the name of the pharmacist or other personnel

[1] On August 1, 2013, the State of Florida disclosed that it acquired Nembutal manufactured by Hospira for Lundbeck on June 9 and 15, 2011, that has expiration dates of September 30 and November 30, 2013. *See* Dep't of Corr. Answer to Interrogatory, *Ferguson v. Palmer*, No. 3:12-cv-0136-UAMH-JBT (M.D. Fla., Aug. 1, 2013) (ECF No. 52).

[2] You stated that FDA approval of the drugs used to carry out execution makes a difference. "If it was not FDA approved, then we may not [] acquire[] that." *See* Dep. of Charles Ryan, at 208:15-21, Oct. 14, 2011, *West v. Brewer*, No. 2:11-cv-01409-NVW (D. Ariz.).

850 West Adams Street, Suite 201, Phoenix, Arizona 85007
(602) 382-2816 / (800) 758-7053 / facsimile (602) 889-3960

CLR83336473

who will provide the compounded substance, as well as the source(s) of the ingredients that the compounder uses.

As you know, pentobarbital is a Schedule II drug. Accordingly, please provide me with the credentials of each IV Team member with respect to any Drug Enforcement Agency (DEA) registrations that authorize IV Team members to handle controlled substances.

Again, I appreciate your attention to these questions. Your prompt response will be greatly appreciated.

Sincerely,

Dale A. Baich
Supervisor
Capital Habeas Unit

DAB/clh

cc: Tim Gabrielsen
Denise I. Young
Kelley J. Henry
Jeff Hood, Deputy Director
Robert Patton, Division Director, Prison Operations
Dawn Northup, General Counsel
Jeff Zick, Division Chief, Capital Appeals, Attorney General's Office

Arizona Department of Corrections

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov

JANICE K. BREWER
GOVERNOR

CHARLES L. RYAN
DIRECTOR

July 30, 2013

Dale Baich, Supervisor
Capital Habeas Unit
Office of the Federal Public Defender
850 W. Adams St., Suite 201
Phoenix, AZ 85007

Re: Warrants of Execution for:
Robert Jones, ADC #070566 and Edward Schad, ADC #040496

Dear Mr. Baich:

In response to your letter of July 19, 2013, inquiring about the name and source of the drug the Arizona Department of Corrections ("ADC") intends to use for these executions, the ADC will follow the one-drug protocol set forth in Department Order 710 (Chart A, Attachment D). The ADC intends to use unexpired, domestically obtained Pentobarbital for these executions.

Sincerely,

Charles L. Ryan
Director

CLR/dn/kp

cc: Jeff Hood, Deputy Director
Robert Patton, Division Director, Prison Operations
Dawn Northup, General Counsel
Jeff Zick, Division Chief, Capital Appeals, Attorney General's Office

Office of the
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

direct line: 602-382-2816
email: dale_baich@fd.org

July 19, 2013

Mr. Charles Ryan, Director
Arizona Department of Corrections
1601 West Jefferson
Phoenix, AZ 85007

Dear Director Ryan:

I am writing to you on behalf of Robert Jones and Ed Schad, for whom the State has filed motions for warrants of execution.[1] In order for me to properly advise Messrs. Jones and Schad about their potential executions, I request that you provide me with the following information pertaining to the lethal substance that Arizona Department of Corrections (ADC) intends to use in his execution and ADC's authorization to use controlled substances in executions.

1. ADC Department Order 710 lists pentobarbital and sodium thiopental as the two default lethal substances used for executions in the one-drug protocol.[2] Because I believe that ADC does not have a current supply of pentobarbital[3] or

[1] Mot. for Warrant of Execution, *State v. Jones*, No. CR-98-0537-AP June 25, 2013; Mot. for Warrant of Execution, *State v. Schad*, No. CR-13-0058-PC June 25, 2013.

[2] *See* ADC Dep't Order 710, Attachment D section C, effective date Sept. 21, 2012.

[3] On September 27, 2010, ADC purchased a supply of Nembutal. *See* Defendant's Disclosures, Bates No. 01985 DFS' 26(a)(1) Disclosures and Responses to RFP's, (Nembutal Purchase Order), *West v. Brewer*, No. 2:11-cv-01409-NVW (D. Ariz.), August 19, 2011.

That supply expired in March 2013. *See* Defendant's Disclosures, Bates No. 01973-01978 DFS' 26(a)(1) Disclosures and Responses to RFP's, (Photographs of Nembutal Supply), *West v. Brewer*, No. 2:11-cv-01409-NVW (D. Ariz.), August 1, 2011.

Additionally, Nembutal has not been available to prisons in states that have capital punishment since July 1, 2011. *See* Lundbeck statement, *Lundbeck overhauls pentobarbital distribution program to restrict misuse*, http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775 (last visited May 25, 2012).

The information requested is critical in advising the clients regarding their pending executions. Your prompt response will be greatly appreciated.

Sincerely,

Dale A. Baich
Supervisor
Capital Habeas Unit

DAB/clh

cc: Tim Gabrielsen
Denise I. Young
Kelley J. Henry

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edward Harold Schad, Jr., et al., Plaintiffs, v. Janice K. Brewer, et al., Defendants.	Case No.2:13-cv-02001-ROS **Order**

Upon consideration of Plaintiffs Motion for Preliminary Injunction and the record before the Court, the motion is hereby granted.

Defendants are ordered to forthwith provide the requested information to Plaintiffs regarding the drugs Defendants intend to use in Plaintiffs' executions.

IT IS SO ORDERED.