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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Edward Harold Schad, Jr., et al.,
18 Plaintiffs,

19 v.

20 Janice K. Brewer, et al.,
21 Defendants.

Case No.2:13-cv-02001-ROS

Opposition to Transfer

**Executions Scheduled October 9, 2013,
and October 23, 2013**

22 On October 2, Plaintiff Edward Harold Schad, Jr., filed a complaint
23 against Defendants,¹ in which he alleged that Defendants are violating his First
24 Amendment right of access to governmental (execution) proceedings by refusing
25 to turn over public information about “how the State and its justice system
26 implement the most serious punishment a state can exact from a criminal

27 ¹ Compl. (ECF No. 1), emailed for filing at 7:13 p.m. on October 2. It was
28 processed on 8:57 a.m. on October 3. Later on October 3, Plaintiff Robert Glen
Jones, Jr., filed a motion to intervene. (ECF No. 8.)

1 defendant—the penalty of death.”² *California First Amendment Coalition v.*
2 *Woodford*, 299 F.3d 868, 873 (9th Cir. 2002). Under this Court’s local rules, this
3 case is properly assigned, because The Honorable Roslyn O. Silver was the
4 assigned judge for Mr. Schad’s *habeas corpus* proceedings. See Order (Dkt. No.
5 3, filed Jan. 15, 1998) (reassigning case “by lot to Judge Roslyn O. Silver”),
6 *Schad v. Ryan*, No. 2-97-cv-02577-ROS (D. Ariz.).

7 Plaintiff Robert Glen, Jr., Jones filed a Motion to Intervene (ECF No. 8)
8 (Defendants do not oppose intervention.) Jones joined with Schad in filing a
9 Motion for Preliminary Injunction. (ECF No. 11.)

10 Plaintiffs have requested relief in the form of an order directing Defendants
11 to provide non-confidential information that Plaintiffs have requested;
12 Defendants, however, argue that this case “involves part of a continuing process
13 of last-minute constitutional challenges to Arizona’s ability to enforce its
14 scheduled executions[,]” and therefore ask that the case be reassigned to the
15 Honorable Neil V. Wake. (Mot. Transfer Case to Judge Wake (“Transfer Mot.”),
16 ECF No. 10 at 1, filed Oct. 3, 2013.) Defendants misunderstand Plaintiffs’ status
17 as plaintiffs in this particular action, and misread the Local Rules of Civil
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20 ² Plaintiffs also allege violations of their Due Process right to the
21 information. That claim includes no allegations related to the constitutionality of
22 Defendants’ execution protocol, and it raises no Eighth Amendment claim. As
23 Plaintiffs explained in their motion for preliminary injunction, they allege that
24 “[b]y denying their legitimate and reasonable request for information regarding
25 the drug to be used in their executions, Defendants have actively prevented
26 Plaintiffs from being able to determine whether they have a valid claim that their
27 Eighth Amendment right to be free from cruel and unusual punishment will be
28 violated during their executions.” (Motion by Plaintiffs Edward Harold Schad, Jr.,
and Robert Glen Jones, Jr., for Preliminary Injunction, and Memorandum in
Support Thereof, ECF No. 11 at 12, filed Oct. 3, 2013.)

Plaintiffs’ claim is only a claim for access to information; the claim raises
no issues related to the constitutionality of lethal injection.

1 Procedure. For these reasons, Plaintiffs respectfully request that Defendants’
2 request be denied.

3 First, Defendants misunderstand the interests of Plaintiff Schad and
4 Plaintiff Jones. These Plaintiffs have brought their own individual First
5 Amendment and Due Process claims to this Court, and do so in order to vindicate
6 their personal constitutional rights. They are individuals petitioning the
7 government for the redress of their grievances. Therefore, Plaintiffs do not
8 understand how their *individualized* First Amendment and Due Process concerns
9 can be labeled a “continuing process of last-minute constitutional challenges . . .”
10 (Transfer Mot. at 1.) Plaintiffs recognize that other death-row prisoners have
11 raised their own constitutional claims in the past, but Plaintiffs have not been
12 party to those claims. (Indeed, as explained below, Plaintiffs’ First Amendment
13 and Due Process claims are unrelated to lethal-injection challenges that other
14 prisoners have pursued.) Defendants have not identified a “process” in which
15 Plaintiffs participate; instead, Defendants simply issue an *ipse dixit* that such a
16 process exists. Plaintiffs are not part of any “process.” Plaintiffs’ First
17 Amendment rights (as with other constitutional rights), are personal to each
18 individual, must be asserted by each individual, and *are* being asserted by each
19 Plaintiff through his counsel. Defendants’ claim otherwise is flawed and cannot
20 stand as support for their motion.

21 Second, Plaintiffs’ claims are not co-extensive, or even “closely related”
22 (Transfer Mot. at 2) to lethal-injection challenges that were heard by Judge Wake.
23 Plaintiffs here raise First Amendment and Due Process claims for *access to*
24 *information*. On the other hand, the cases that were before Judge Wake pressed
25 claims that—as Defendants correctly explain—alleged “that ADC’s lethal
26 injection protocol was unconstitutional in violation of the Eighth Amendment.”
27 (Transfer Mot. at 2, *citing Dickens v. Brewer*, No. CV-07-1770-PHX-NCW, 2009
28 WL 1904294 (D. Ariz. July 1, 2009).) Subsequently, after the Arizona

1 Department of Corrections (ADC) changed its protocol, death-row prisoners who
2 faced execution under that protocol filed suit, alleging that the protocol's changes
3 rendered ADC's new protocol unconstitutional under the Eighth Amendment. *See*
4 *West v. Brewer*, 652 F.3d 1084 (9th Cir. 2011). After the *West* case was settled,
5 and after several prisoners were executed in ways that suggested violations of the
6 Eighth Amendment, three death-row prisoners who were scheduled to be executed
7 under a potentially unconstitutional protocol sued to vindicate their constitutional
8 rights. *Towery v. Brewer*, 672 F.3d 650, 652-53 (9th Cir. 2012); *Lopez v. Brewer*,
9 680 F.3d 1068 (9th Cir. 2012). (Although these issues are not related to the
10 claims that Plaintiffs now raise, it is worth noting that the Ninth Circuit stated that
11 "Arizona's actions come perilously close to losing safe-harbor protection under
12 *Baze* [v. Rees, 553 U.S. 35 (2008)]." *Lopez*, 680 F.3d at 1074. Moreover, the
13 court admonished that "the inability of the class of condemned prisoners to
14 procure details about the execution process is troubling. This lack of access is
15 compounded by the State's touting of the public nature of the execution, while
16 concurrently curtailing transparency by shrouding the IV siting process in a cloak
17 of secrecy." *Id.*)

18 The issues in those cases are not related to Plaintiffs' claims. The cases
19 before Judge Wake involved issues such as the siting of intravenous lines, the type
20 of surgical procedures that ADC used in executions, the qualifications of the
21 executioners to conduct medical procedures that are part of executions, and the
22 efficacy of the drug ADC intended to use as the constitutionally required
23 anaesthetic. The case currently before this Court involves First Amendment and
24 Due Process claims of access to information. Accordingly, Defendants' claim that
25 Judge Wake is familiar with these issues is faulty, and does not support their
26 request for transfer of the case.

27 Finally, Defendants misread the rules related to case transfer. As set forth
28 in Rule 3.8(e) of the Local Rules of Civil Procedure:

1 The Clerk of Court must randomly assign complaints filed by
2 incarcerated persons and habeas corpus petitions to a District Judge
3 and randomly refer them to a Magistrate Judge. *Any future pleadings*
4 *filed by the incarcerated person or habeas corpus petitioner must be*
5 *directly assigned and referred to the same District Judge and*
6 *Magistrate Judge to whom the earlier case was assigned and referred,*
7 unless otherwise ordered by the Court.

8 (Emphasis added.)

9 This local rule was amended in December 2011. Previously, the local rule
10 provided that “any future pleadings lodged or filed by the prisoner shall be
11 assigned to the same District Judge.” Former LRCiv. 3.5(c). That language has
12 since been strengthened; any future pleadings “*must be directly assigned* and
13 referred to the same District Judge.” LRCiv. 3.8(e) (emphasis added).

14 Rather than citing Rule 3.8, Defendants instead rely on Rule 42(a) of the
15 Local Rules of Civil Procedure in order to support their motion. Their reliance on
16 this rule is misplaced. Rule 42(a) provides that a party may file a motion to
17 transfer cases to a single judge “*whenever two or more cases are pending* before
18 different Judges.” (Emphasis added). At this time, there are no related cases
19 pending before Judge Wake. Indeed, Judge Wake issued his final order in *West v.*
20 *Brewer* in December 2011. *See* Case No. 11-cv-1409-NVW, 2011 WL 6724628
21 (D. Ariz. Dec. 21, 2011). That case has been terminated, and the appeal has been
22 withdrawn. *See* West, No. 11-cv-1409-NVW, Joint Dismissal Agreement
23 Pursuant to Rule 42(b) (ECF No. 20), filed March 13, 2013. *Towery* and *Lopez*
24 are equally finished.

25 Judge Wake has no “pending cases,” and he has no specific familiarity with
26 the First Amendment and Due Process issues that Plaintiffs raise in this matter.
27 Accordingly, the case should remain before “the same District Judge and
28 Magistrate Judge to whom the earlier case was assigned and referred” Rule
3.8(e).

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Respectfully submitted this 3rd day of October 2013.

Kelley Henry
Federal Public Defender

Denise Young

s/ Kelley Henry
Counsel for Schad

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Certificate of Service

I hereby certify that on October 3, 2013 , I electronically filed the foregoing Opposition to Transfer 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