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9
 10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF ARIZONA**

12 Edward Harold Schad, Jr.,

13 Plaintiffs,

14 -vs-

15 Robert Glen Jones, Jr.,

16 Intervenor,

17 -vs-

18 Janice K. Brewer, Governor of
 Arizona, Charles L. Ryan,
 19 Director, Arizona Department of
 Corrections, Ron Credio, Warden,
 20 Arizona Department of
 Corrections-Eyman, Lance
 21 Hetmer, Warden, Arizona
 22 Department of Corrections,
 23 Florence,

24 Defendants.

CV-13-02001-PHX-ROS

[CAPITAL CASE]

**RESPONSE IN OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 TEMPORARY RESTRAINING
 ORDER OR A PRELIMINARY
 INJUNCTION**

25 Plaintiff Edward Harold Schad and Intervenor Robert Glen Jones filed suit
 26 pursuant to 42 U.S.C.§ 1983, alleging that Defendants' failure to disclose the
 27 identity of the source of pentobarbital to be used in their forthcoming executions,
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1 and other information regarding these drugs, violates their First Amendment right
2 to access to government information, and Fourteenth Amendment rights to due
3 process. Both have moved for a temporary restraining order or a preliminary
4 injunction seeking a stay of their execution. (Dist. Ct. Docs 1, at 2; 8 at 2.)
5 Plaintiffs are not entitled to the drastic and extraordinary remedy of injunctive
6 relief; they have not made the required showing of any federal right to any
7 information concerning the drugs to be used in their executions.
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11 Furthermore, for over 2 months, Plaintiffs' Complaints demonstrate that they
12 have known Defendants were not going to divulge the source of the drugs, yet they
13 waited until a week before Schad's scheduled execution to file their lawsuits.¹
14 Now they are seeking a temporary injunction, an equitable remedy. *Hill v.*
15 *McDonough*, 547 U.S. 573, 584 (2006). A court can consider "the last-minute
16 nature of an application to stay execution in deciding whether to grant equitable
17 relief." *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991). There is
18 "a strong equitable presumption against the grant of stay" where the claim could
19 have been raised earlier so a stay would not have been necessary. *Nelson v.*
20 *Campbell*, 541 U.S. 637, 650 (2004). Hence, courts "must consider not only the
21 likelihood of success on the merits and the relative harm to the parties, but also the
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26 ¹ Exhibits A and B to Plaintiffs' Complaint dated July 19 and 30, 2013, Director
27 Ryan's response stating "ADC intends to use unexpired, domestically obtained
28 Pentobarbital for these executions." Plaintiffs had no reason to await further
requests of ADC by the ACLU.

1 extent to which the inmate has delayed unnecessarily in bringing the claim.” *Id.* at
2 649-50.

3 4 **STANDARD OF REVIEW**

5 Filing a § 1983 action does not entitle a Plaintiff to an automatic stay of his
6 execution. *Hill*, 547 U.S. at 583-84; *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir.
7 2012) (*per curiam*). A preliminary injunction is ““an extraordinary and drastic
8 remedy, one that should not be granted unless the movant, *by a clear showing*,
9 carries the burden of persuasion.’ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)
10 (per curiam).” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis
11 original). To obtain preliminary injunctive relief, Plaintiff must demonstrate that:
12 “(1) he is likely to succeed on the merits of such a claim; (2) he is likely to suffer
13 irreparable harm in the absence of preliminary relief; (3) the balance of equities
14 tips in his favor; and (4) that an injunction is in the public interest.” *Beaty v.*
15 *Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (citing *Winter v. Natural Res. Def.*
16 *Council, Inc.*, 555 U.S. 7, 20 (2008)); *Lopez*, 680 F.3d at 1072; *West v. Brewer*,
17 652 F.3d 1060 (9th Cir. 2011). Plaintiffs’ allegations in their two count Complaints
18 do not even meet the plausibility standard, let alone the “likely” standard required
19 for a preliminary injunction.
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25 **RELEVANT PROCEDURAL BACKGROUND**

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27 Schad was convicted of first-degree murder and sentenced to death for
28 killing Lorimer “Leroy” Grove more than 35 years ago, in 1978. *State v. Schad*,

1 129 Ariz. 557, 633 P.2d 366 (1981). Jones was convicted of six counts of first-
2 degree murder and he, too, was sentenced to death. *State v. Jones*, 197 Ariz. 290, 4
3 P.3d 345 (2000). After years of review by various courts, Schad is scheduled to be
4 executed on Wednesday October 9, 2013, and Jones on Wednesday October 23,
5 2013, both under Arizona's one-drug protocol. The Ninth Circuit has reviewed
6 that protocol and found it constitutional. *Lopez*, 680 F.3d at 1071 n. 2; *see also*
7 *Towery*, 672 F.3d at 661; *Dickens v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011)
8 (three drug protocol). Where a State lethal injection protocol is "substantially
9 similar" to the protocol upheld in *Baze v. Rees*, 553 U.S. 35 (2008), a stay of
10 execution is inappropriate. *Id.* at 61.

14 ARGUMENTS

15 1. *Plaintiffs' two claims are not plausible and thus have no likelihood* 16 *of success.*

17
18 Plaintiffs do not raise an Eighth Amendment claim in their Complaint, but
19 explain that their underlying concern is their Eighth Amendment right to be free
20 from cruel and unusual punishment. (Mo. at 7, 12.) "[T]o prevail on such a claim,
21 there must be a 'substantial risk of serious harm,' and 'objectively intolerable risk
22 of harm' that prevents prison officials from pleading that they were 'subjectively
23 blameless' for purposes of the Eighth Amendment." *Baze*, 553 U.S. at 35 (quoting
24 *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)). Thus, Schad and Jones
25 must show that "the conditions presenting the risk must be 'sure or very likely to
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1 cause serious illness and needless suffering,’ and give rise to ‘sufficiently *imminent*
2 dangers.’” *Cook v. Brewer (Cook I)*, 637 F.3d 1002, 1004 (2011) (emphasis
3 original). In their preliminary injunction motion the only allegation Plaintiffs
4 make in support of an Eighth Amendment claim is that “the FDA has stated, *drugs*
5 that expired are *often* unsafe and risky.” (Mo. at 13; emphasis added.) Plaintiffs
6
7 make no attempt to explain how, under Arizona’s one-drug protocol, they would
8 be sure or very likely to experience serious illness and needless suffering even if
9 the pentobarbital was expired.
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12 Moreover, *Cook I* and *Cook v. Brewer (Cook II)*, 649 F.3d 915 (9th Cir.
13 2011), control any argument that the drugs at issue here could serve as grounds for
14 an Eighth Amendment claim. Both those cases were decided under the three-drug
15 protocol where sodium thiopental, a fast-acting barbiturate anesthetizes the inmate
16 and allows the remaining two chemicals to be administered without causing pain.
17 *Dickens*, 631 F.3d at 1142. The issue in those cases was whether Cook had pled a
18 facially plausible claim. There, Cook argued that the foreign manufactured non-
19 FDA approved sodium thiopental may be “contaminated, compromised, or
20 otherwise ineffective, such that it will not properly anesthetize him” under the
21 three-drug protocol or “might not actually be sodium thiopental at all” and that
22 “using an unapproved substance from an unknown manufacturer in an execution
23 gives rise” to an Eighth Amendment violation. *Cook I*, 637 F.3d at 1006. The
24 Court concluded his allegations failed to meet the plausibility standard. *Id.* In
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1 *Cook II*, Cook alleged that the batch of sodium thiopental to be used was
2 manufactured for use in animals, not for human use and that the British
3 Government reported that there had been 12 adverse drug reaction reports in the
4 last 2 years concerning sodium thiopental, five of which were related to its efficacy
5 and one from the same batch that was to be used for lethal injection. Additionally
6 he alleged that there had been problems in three executions in the United States
7 with the imported drug and the DEA had seized the drugs in one state. *Cook II*,
8 649 F.3d at 917. Again Cook failed to state a facially plausible claim. *Id.* at 918.

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12 **a. *There is no first amendment right to know the drug manufacturer.***

13 Based solely on *California First Amendment Coalition et al. v. Woodford*,
14 299 F.3d 868 (9th Cir. 2002), Plaintiffs assert they have a First Amendment right to
15 know:
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- 17 a. The manufacturer of lethal-injection drugs to be used in their executions.
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19 b. The National Drug Codes (“NDC”) of lethal-injection drugs
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21 c. The lot numbers of lethal-injection drugs
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23 d. The expiration dates of lethal-injection drugs
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25 e. Documentation indicating that those who will handle pentobarbital or
26 other controlled substances in the execution have the appropriate federal Drug
27 Enforcement Agency (“DEA”) authorization to do so.
28

29 The *California First Amendment* case holds no such thing. That case
30 concerned “the restriction on viewing lethal injection executions imposed on the

1 public[.]” *Id* at 870. Death row inmates were not a party to the suit and its holding
2 did not create any rights for them. It certainly did not create a constitutional right
3
4 to know the drug manufacturer or other information about the source of the drugs
5 used in the execution process. 42 U.S.C § 1983 gives a cause of action to those
6 who challenge a State’s “deprivation of any rights . . . secured by the
7
8 Constitution.” Plaintiffs have provided no authority that the First Amendment² is
9 applicable to inmates under a death sentence. A court need not accept as true all
10 allegations contained in a complaint concerning legal conclusions. *Ashcroft v.*
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12 *Iqbal et al.*, 556 U.S. 662, 678 (2009). Furthermore, the Supreme Court has “never
13 intimated a First Amendment guarantee of a right of access to all sources of
14 information within government control.” *Houchins v. KQED*, 438 U.S. 1, 9
15 (1978); *see, e.g., Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528
16 U.S. 32, 40 (1999) (a law enforcement agency could deny access to information in
17 its possession without violating the First Amendment); *Lanphere & Urbaniak v.*
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19 *Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) (recognizing that generally there is
20 no constitutional right, and specifically no First Amendment right, of access to
21 government records); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-
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23 76 (3d Cir. 1986) (*en banc*) (examining the text and history of the First
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26 ² “Congress shall make no law respecting an establishment of religion, or
27 prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
28 press, or the right of the people peaceable to assemble, and to petition the
Government for a redress of grievances.” U.S. Const. Amend. I

1 Amendment and concluding that there is no First Amendment right of access to
2 state administrative agency records). Even in a criminal case deciding the issue of
3 guilt or innocence there is no general federal constitutional right to discovery.
4
5 *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

6 Not only have the Plaintiffs failed to establish a constitutional right in
7 support of this claim, but they have ignored the record demonstrating why
8 Arizona's confidentiality statute is critical. The relevant sub-section of A.R.S.
9 § 13-757 provides:

10 C. The identity of executioners and other persons who participate or
11 *perform ancillary functions* in an execution and any information
12 *contained in records that would identify those persons* is confidential
13 and is not subject to disclosure pursuant to title 39, chapter 1, article 2.
14 [§ 39-121 et seq. Arizona's public records statutes].

15 (Emphasis added.) Following this Court's disagreement with the State's position
16 in *Landrigan v. Brewer*, No. CIV-10-2246-PHX-ROS, 2010 WL 4269557 (D.
17 Ariz. Oct. 23, 2010), *aff'd*, 625 F.3d 1144 (Oct. 26, 2010), *vacated*, 131 S. Ct. 445
18 (Oct. 26 1010), Chief Judge Kozinski, dissenting with others from the denial of
19 rehearing en banc, identified the policy reason behind Arizona's statute:
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21 Because Landrigan did not meet his burden, the state had no
22 duty to come forward with any information. *Indeed, Arizona had good*
23 *reasons not to*; just twenty-four hours after the state attorney general
24 conceded that the drug was imported from Great Britain, one
25 journalist suggested the company might be criminally liable under an
26 EU regulation that makes it illegal to "trade in certain goods which
27 could be used for capital punishment, torture, or other cruel, inhuman
28 or degrading treatment." See Clive S. Smith, *The British Company*
Making a Business out of Killing, *The Guardian* (Oct. 26, 2010, 4:00
p.m.),
<http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/26/jeff>

1 rey-landrigan-execution-sodium-thiopental. Certainly Arizona has a
2 legitimate interest in avoiding a public attack on its private drug
3 manufacturing sources, particularly when Hospira-the only source of
4 sodium thiopental within the United States-hasn't yet announced when
5 the drug will actually be available for executions or how much it plans
6 to produce. Although the district court may have been annoyed with
7 the state for failing to provide the information Landrigan's lawyers
8 wanted to see, the fact remains that Landrigan was not entitled to the
9 information because he failed to make a threshold showing that he
10 will suffer harm.

11 *Landrigan v. Brewer*, 625 F.3d 1132, 1143 (9th Cir. 2010) (emphasis added).

12 Hospira never did produce more sodium thiopental and the States were forced to
13 switch to pentobarbital. When the domestic source of pentobarbital became
14 known, Lundbeck, as Plaintiffs' motion described, restricted the use of the drug to
15 prisons in States currently active in carrying out the death penalty by lethal
16 injection. (Mo. at 4-5 n. 8.) The irony is that in moving to lethal injection, "the
17 States were motivated by a desire to find a more humane alternative to then-
18 existing methods." *Baze*, 553 U.S. at 42 n.1. Instead, virtually every execution in
19 Arizona has generated costly, time-consuming litigation.

20 Plaintiffs argue that A.R.S. § 13-757(C) refers exclusively to "persons." In
21 the statutes and laws of Arizona, however, the term "person" includes "a
22 corporation, company, partnership, firm, association or society, as well as a natural
23 person." A.R.S. § 1-215(28). Thus, under A.R.S. § 13-757(C), information that
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1 would include those persons or companies that are providing ancillary³ functions
2 in an execution are confidential under state law⁴. The information Plaintiffs seek
3 would lead to the identity of the entity that is the source of the current drugs. Not
4 only do the Plaintiffs lack any federal right to such information, the information is
5 confidential under state law.
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8 **b. Plaintiffs' due process claim was previously rejected by this Court.**

9 In Claim 2, Plaintiffs assert that the State's decision not to disclose the
10 identity of the source of drugs deprives them of due process, access to the courts,
11 and denies them an opportunity to litigate their Eighth Amendment claim. (Mo. at
12 12-13.) A similar claim was rejected by this Court in *West v. Brewer*, No. CV-11-
13 1409-PHX-NVW (D. Ariz. 2011) (*Memo. Dec.*), following a discovery and a 3-day
14 trial. *Id.* at *20. There Plaintiffs were also concerned, in part, about non-
15 disclosure of information violating due process and their access to the courts. *Id.*
16 "To establish a due process challenge to executive action, as a threshold question
17 Plaintiffs must show that Defendants' behavior was 'so egregious, so outrageous,
18 that it may fairly be said to shock the contemporary conscience.'" *Id.* (citing cases).

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20 The Court concluded that Defendants' conduct under those circumstances was not
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25 _____
26 ³ "[P]roviding necessary support to the primary activities or operation of an
27 organization, institution, industry, or system[.]" Oxford Dictionary,
28 http://oxforddictionaries.com/us/definition/american_english/ancillary (last visited
Oct. 3, 2013).

⁴ An issue the ACLU is currently litigating in state court under Arizona's public record law.

1 egregious, “let alone so egregious it shocks the conscience.” *Id.* The same is true
2 here. Plaintiffs have established no constitutional right to the information they
3 seek and Defendants have rational reasons, including based on state law and prior
4 experience, to withhold the information. *See Valle v. Singer*, 655 F.3d 1223, 1237
5 n.13 (11th Cir. 2011) (rejecting the claim that secrecy prevented the death row
6 inmate from litigating his issues). Moreover, the Fifth Circuit recently concluded
7 that no appellate court has recognized a claim that the Due Process Clause provides
8 a right to even review changes in a State’s lethal injection protocol. *Sepulvado v.*
9 *Jindal*, ___ F.3d ___, 2013 WL 4711679, at *3-*4 (5th Cir. 2013).

13 There is no violation of the Due Process Clause from the
14 uncertainty that Louisiana has imposed on Sepulvado by withholding
15 the details of its execution protocol. Perhaps the state's secrecy masks
16 “a substantial risk of serious harm,” but it does not create one. Having
17 failed to identify an enforceable right that a preliminary injunction
might safeguard, Sepulvado cannot prevail on the merits.

18 *Id.* (footnotes omitted)

19 “To establish that [they were] denied meaningful access to the courts,
20 [Plaintiffs] must submit evidence showing that [they] suffered an ‘actual injury’ as
21 a result of the defendants actions.” *Id.* at 21 (citing *Lewis v. Casey*, 518 U.S. 343,
22 348 (1996)). For there to be an actual injury with respect to the planned or existing
23 litigation, the State must cause an inability, such as to meet a filing deadline or to
24 present a claim. *Casey*, 518 U.S. at 348. Here, Plaintiffs access to the courts has
25 not been hindered.
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1 Moreover, Arizona’s lethal injection protocol is publically available, and
2 there is no assertion that Plaintiff lacks access to this information. Furthermore,
3 Defendants have informed Plaintiffs that the Arizona Department of Corrections
4 (“ADC”) “intends to use unexpired, domestically obtained Pentobarbital” for the
5 executions. Plaintiffs have failed to explain how this procedure—which follows
6 the written protocol—violates their constitutional rights. Accordingly, Plaintiffs
7 have failed to allege a plausible due process claim and thus are unlikely to succeed.

10 **2. *Plaintiffs have not shown they are likely to suffer irreparable harm.***

11 Plaintiffs have “a strong interest in being executed in a constitutional
12 manner.” *See West*, 652 F.3d at 1060; *Beaty*, 649 F.3d at 1072. Because they have
13 not raised plausible claims that their execution will be unconstitutional, they are
14 not likely to suffer irreparable harm. Furthermore, given the safeguards in the
15 protocol, the nature of the one-drug procedure, and the prior constitutional
16 executions since October 2010, it is virtually assured that they will not suffer
17 irreparable harm.

21 **3. *The balance of the equities tip in favor of Defendants.***

22 It is not in the public interest to grant an injunction. A stay of execution is
23 an equitable remedy and, as such, it “must be sensitive to the State’s strong interest
24 in enforcing its criminal judgments without undue interference from the federal
25 courts.” *Hill*, 547 U.S. at 384 (citing *Nelson*, 541 U.S. at 649-50). Both Plaintiffs’
26 state and federal collateral proceedings have run their course in the years since they
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1 were sentenced to death for the murders they committed. In Schad’s case three
2 decades have elapsed. “[F]urther delay from a stay would cause hardship and
3 prejudice to the State and victims, given that the appellate process in this case has
4 already spanned more than two decades.” *Bible v. Schriro*, 651 F.3d 1060, 1066
5 (9th Cir. 2011) (*per curiam*). The State has an interest in seeing that its laws are
6 enforced and in carrying out the executions as scheduled and further delay will not
7 meet that interest. *See Hill*, 547 U.S. at 584 (recognizing that both the State and
8 the victims of crime “have an important interest in the timely enforcement of a
9 sentence.”); *see also* Ariz. Const. art. 2, § 2.1(a)(10) (an Arizona crime victim’s
10 constitutional right to a “prompt and final” conclusion of the case). Similarly, the
11 uncertainties and expense that come from the delay that often follows death
12 penalty cases, as well as the impact of such delay upon the families of their victims
13 and their communities, will only be compounded by an injunction. This is
14 especially true where, as here, the movants cannot succeed on the merits of their
15 claim.
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21 **4. *An injunction is not in the public interest.***

22 Because Plaintiffs fail to present any serious plausible questions of
23 constitutional magnitude and there has been no showing that they will suffer an
24 unconstitutional execution and equities tip in favor of Defendants, an injunction is
25 not in the public interest.
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CONCLUSION

Defendants request that the Court deny injunctive relief.

RESPECTFULLY SUBMITTED this 4th day of October, 2013.

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DATED this 4th day of October, 2013.

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I hereby certify that on October 4, 2013, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing. Participants in the case who are registered ECF users will be served by the appellate ECF system.

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