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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Joseph Rudolph Wood, et al., Plaintiffs, -vs- Charles L. Ryan, et al., Defendants.	CV 14-1447-PHX-NVW-JFM **MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6)**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants move this Court to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. In seeking injunctive relief under 42 U.S.C. § 1983, Plaintiffs assert three claims, two based on the First Amendment and one on the Supremacy Clause of the United States Constitution. Neither the First Amendment nor the Supremacy Clause creates an individually enforceable right that the Plaintiffs have been denied and there is no likelihood of substantial and immediate irreparable injury. The three claims are not plausible. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs filed suit under 42 U.S.C. § 1983, alleging that Defendants' failure to disclose information regarding the source of drugs to be used in their executions, information regarding the qualifications of personnel involved in the execution process, and information regarding development of the lethal injection protocol violates their First Amendment right to petition the government for redress of grievances and First Amendment right of access to governmental proceedings. They also allege that Defendants' failure to submit their lethal injection protocol to the Food and Drug Administration ("FDA") for review violates the Food, Drug, and Cosmetics Act ("FDCA") in contravention of the Supremacy Clause of the United States Constitution.

Plaintiffs seek temporary, preliminary, and permanent injunctive relief enjoining the Defendants from concealing the requested information and enjoining their executions, including the execution of Plaintiff Joseph Wood, scheduled for July 23, 2014. To be entitled to this equitable remedy, Plaintiffs must allege a likelihood of substantial and immediate irreparable injury resulting from the alleged violation of the Constitution or federal law. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). "The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way." *Hodger-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (*en banc*) (citing Supreme Court cases). The proper balance between state and federal authority requires restraint in issuing injunctions against state officers engaged in administrating the States' criminal laws in the absence of immediate and substantial irreparable injury. *O'Shea*, 414 U.S. at 499; *Hodger-Durgin*, 199 F.3d at 1042. Even if Plaintiffs' requested injunction was not aimed at stopping their executions, the last stage of their criminal proceedings, the "principles of equity nonetheless militate heavily against the grant of an injunction

except in the most extraordinary circumstances." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *Hodger-Durgin*, 199 F.3d at 1042. Here the Plaintiffs have not offered any plausible immediate and irreparable harm that is a direct result of the alleged violations of the First Amendment and Supremacy Clause. Balanced against this void is the "well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Hodger-Durgin*, 199 F.3d at 1043 (quoting *Rizzo*, 423 U.S. 378–79).

This Court should summarily reject Plaintiffs' requests for injunctive relief and should dismiss the Complaint for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6).

I. APPLICABLE LEGAL STANDARDS.

A Rule 12(b)(6) motion "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim is subject to dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009); *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Complaint must do more than create "a suspicion [of] a cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–

236 (3d ed. 2004)).

For purposes of a 12(b)(6) motion, the court must take all the factual allegations in the complaint as true; however, the court is not bound to accept as true a legal conclusion couched as a factual allegation. *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic*, 550 U.S. at 555). In other words, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. A complaint must allege a plausible claim for relief to survive a motion for dismiss. *Id*. at 679. This Court may "draw on its judicial experience and common sense" in deciding whether a claim is plausible. *Id*. Dismissal is thus appropriate where the plaintiff's complaint lacks a cognizable legal theory, or lacks sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

An action instituted pursuant to 42 U.S.C. § 1983 challenges a State's "deprivation of any rights . . . secured by the Constitution and laws." *See also Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986) (plaintiffs must show that defendants acted under state law and deprived plaintiffs of rights secured by Constitution or federal statutes). "Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality) (citation and internal quotation marks omitted). "[I]t is only violations of *rights*, not *laws*, which give rise to § 1983 actions." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) (emphasis original) (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)). Section 1983 "merely provides a mechanism for enforcing individual rights 'secured' elsewhere[.]" *Gonzaga*, 536 U.S. at 285. "[A]nything short of an unambiguously conferred right" does not support an individual right of action under § 1983. *Id*. at 283.

Furthermore, "one cannot go into court and claim a 'violation of § 1983'—

for § 1983 by itself does not protect anyone against anything." *Id*. (quoting *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003). Thus, for Plaintiffs to succeed there first must be some federal right applicable to the inmates, and second, there must be a plausible showing that the State has or will violate that right. *See Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

None of the Plaintiffs' three claims allege a plausible violation of any constitutional or federal right.

II. APPLICATION OF LAW TO PLAINTIFFS' CLAIMS.

A. *Claim One.*

Plaintiffs assert that Defendants' denial of certain information regarding the source of drugs to be used in their executions, qualifications of personnel involved in their executions, and development of the lethal injection protocol deprives Plaintiffs of their First Amendment right to petition the government for redress of grievances. *See* Complaint, ¶¶ 141–49. Specifically, Plaintiffs claim that Defendants have created a condition that frustrates their ability to litigate their claims by "deliberately concealing information about the specific drugs the State intends to use to execute Plaintiffs." *Id.* at ¶ 147.

Courts across the country have rejected similar claims. The Eleventh Circuit recently held that the Eighth Amendment did not entitle a death row inmate to information he argued was necessary to determine whether the state's lethal injection procedure was cruel and unusual, and that neither the Fifth, Fourteenth, nor First Amendments afford the inmate "the broad right" to know the source and manufacturer of lethal injection drugs or the qualifications of the persons who would manufacture the drugs or participate in the lethal injection process. *Wellons v. Comm'r, Ga. Dep't of Corr.*, __ F.3d __, 2014 WL 2748316, at *3–6 (11th Cir. June 17, 2014) (per curiam). Within the last year, the Fifth Circuit found that Louisiana's refusal to provide details regarding its execution protocol was not a

constitutional violation:

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

Sepulvado v. Jindal, 729 F.3d 413, 420 (5th Cir. 2013); *see also Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir 2014) ("the assertion of a necessity for disclosure does not substitute for the identification of a cognizable liberty interest").

Similarly, the Eighth Circuit has held that a death row inmate's argument grounded in an inability to *discover* potential claims fails to state a plausible due process claim because the inability to discover claims does not constitute a due process violation, *see Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011), and that the Eighth Amendment does not entitle a death row inmate to information about the physician, pharmacy, and laboratory involved in the execution process absent plausible allegations of a feasible and more humane alternate method of execution or purposeful design by the State to inflict unnecessary pain. *In re Lombardi*, 741 F.3d 888, 895–96 (8th Cir. 2014) (en banc); *see also Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (rejecting Fourteenth Amendment, Supremacy Clause, and access-to-the-courts claims challenging state's failure to disclosure information regarding the method of execution in a timely manner absent a plausible Eighth Amendment claim). And the Georgia Supreme Court recently rejected an inmate's claim under the First Amendment challenging a statute protecting the source of lethal injection drugs, stating that "[t]o the extent that [a death row inmate] s[ought] to turn the First Amendment into an Open Records Act for information relating to executions, his claim clearly fail[ed]." *Owens v. Hill*, __ S.E.2d __, 2014 WL 2025129, at *9 (Ga. May 19, 2014). As these courts' holdings demonstrate, the constitution simply does not provide

Plaintiffs with a right to the information they seek.

Nor do First Amendment principles establish that Plaintiffs' are constitutionally entitled to the information they seek. "Among other rights essential to freedom, the First Amendment protects 'the right of the people . . . to petition the Government for a redress of grievances.'" *Borough of Duryea, Pa. v. Guarnieri*, __ U.S. __, 131 S. Ct. 2488, 2491 (2011) (quoting U.S. CONST., Amdt. 1). There is no question that "prisoners retain the constitutional right to petition the government for the redress of grievances." *Turner v. Safley*, 482 U.S. 78, 84 (1987). The right to petition the government "includes a reasonable right of access to the courts." *Hudson v. Palmer*, 468 U.S. 517, 523 (1984). But, the right of access to the courts is not an unlimited one; it assures only "meaningful access to the courts." *Bounds v. Smith*, 430 U.S. 817, 823 (1977). The right of access is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). In other words, the right of access to the courts is tied to and limited by a prisoner's right to "vindication for a separate and distinct right to seek judicial relief for some wrong." *Id.* Additionally, the Supreme Court has held that the guarantee of access to the courts is one of access only, and does not encompass a right to "discover" information. *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (access to the court requires the ability to bring grievances to court, not to discover grievances or litigate effectively once in court).

To state a claim for relief, a prisoner must allege that prison officials actively interfered with his freedom to invoke the judicial process, *Blaisdell v. Frappiea*, 729 F.3d 1237, 1243 (9th Cir. 2013), or that prison officials retaliated against him for invoking the judicial process, *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). In this case, Plaintiffs have not shown—and cannot show—active interference with their right to invoke the judicial process, nor have they alleged any evidence of retaliation for invoking the judicial process.

Petitioning the government for a redress of grievances and forcing the government to turn over information within its control are two very different things. The First Amendment right to petition does not include a right to "discover" information. *See Lewis*, 518 U.S. at 354. In this case, Defendants' refusal to provide Plaintiffs with the requested information does not restrict Plaintiffs' First Amendment right to petition the government. In fact, all of the named Plaintiffs have had numerous opportunities to access the courts without any interference from Defendants. The complaint in this case serves as a clear example of Plaintiffs' unhampered ability to petition for a redress of grievances. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1430–31 (7th Cir. 1996) ("Moreover, Mr. Antonelli's invocation of the judicial process indicates that the prison has not infringed his First Amendment right to petition the government for a redress of grievances.").

To establish a denial of meaningful access to the courts, a plaintiff must establish an "actual injury" as a result of the defendant's actions. *Lewis*, 518 U.S. at 348. For there to be an actual injury with respect to the planned or existing litigation, the State must cause an inability, such as to meet a filing deadline or to present a claim. *Id*. Here, Plaintiffs' access to the courts has not been hindered. Plaintiffs do not allege that Defendants have retaliated against them or interfered with their access to the courts. Instead, they merely claim that Defendants have refused to provide certain information. *See* Complaint ¶¶ 39-43. But as the Supreme Court has stated, and courts have found, the State has no obligation under the right-to-access-to-the-courts cases to enable a prisoner to discover grievances and to litigate effectively. *Lewis*, 518 U.S. at 354; *Whitaker*, 732 F.3d at 467; *Owens*, 2014 WL 2025129, at * 8–9. Plaintiffs have therefore failed to allege a plausible First Amendment right-of-access claim and Claim One of the complaint

should be dismissed.

B. *Claim Two.*[1]

In this claim, Plaintiffs assert that Defendants' denial of the requested information violates their First Amendment right of access to governmental proceedings. *See* Complaint, ¶¶ 150–52. Plaintiffs have failed to state a claim for relief because there is no affirmative constitutional duty requiring the government to *disclose information* within its possession, and Plaintiffs have no First Amendment right to receive information within the government's control. *See* Fed. R. Civ. P. 12(b)(6).

As stated above, courts have rejected the contention that the First Amendment entitles a death row inmate to information such as the source of lethal injection drugs or execution personnel. *See Wellons*, 2014 WL 2748316, at *6 (no Fifth, Fourteenth, or First Amendment right to the source and manufacturer of lethal injection drugs or the qualifications of the persons who would manufacture the drugs or participate in the lethal injection process); *Owens*, 2014 WL 2025129, at *9–10 (First Amendment does not compel state to disclose names and other identifying information of persons and entities involved in executions, including those who manufacture drugs to be used).

These decisions rejecting similar claims by death row inmates are consistent with the general principle that the First Amendment does not include the right to information in the government's possession. "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Houchins v. KQED*, 438 U.S. 1, 15 (1978) (plurality opinion). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or

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[1] Plaintiff Wood relied solely on this argument to support his request for a temporary restraining order and preliminary injunction. (Doc. 11.) In addition to the argument presented here, Defendants rely on the arguments made in their response to Wood's motion. (Doc. 15.)

sources of information within the government's control." *Id.*; *see also McBurney v. Young*, __ U.S. __, 133 S. Ct. 1709, 1718 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). "As a general rule, citizens have no first amendment right of access to traditionally nonpublic government information." *McGehee v. Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983). For example, even in a criminal prosecution, there is no general federal constitutional right to discover information. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. "In accord with its plain language, the First Amendment broadly protects the freedom of individuals and the press to speak or publish. It does not expressly address the right of the public to receive information." *Center for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003). "By contrast, it requires some straining of the text to construe the Amendment's explicit preclusion of government interference as conferring upon each citizen a presumptive right of access to any government-held information which may interest him or her." *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1168 (3d Cir. 1986) (en banc). "It simply does not seem reasonable to suppose that the free speech clause would speak, as it does, solely to government interference if the drafters had thereby intended to create a right to know and a concomitant governmental duty to disclose." *Id.*

In contrast, the Supreme Court has recognized a First Amendment right of *access to* certain government *proceedings*. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–14 (1986) (right to transcripts of criminal preliminary hearing) (*Press-Enter. II*); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510–11 (1984) (voir dire) (*Press-Enter. I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603–11 (1982) (testimony of child victim in sex offense prosecution); *Richmond*

Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980) (criminal trial). Yet the Court has also recognized that even when a right of access attaches, it is not absolute. *See Press-Enterprise II*, 478 U.S. at 8–9; *see also El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 148–51 (1993) (per curiam). Here, however, Plaintiffs are not seeking access to a criminal proceeding, but rather information in the government's possession. Illustrating this basic distinction, in *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 609 (1978), the Supreme Court, while recognizing the press and public's First Amendment right to attend a criminal trial, concluded that this right does not create a right of access to exhibits and materials displayed in open court. *See also Radio & Television News Ass'n of So. Calif. v. Dist. Ct. for Cent. Dist. of Calif*, 781 F.3d 1443, 1447 (9th Cir. 1986) ("[T]he media's 'right to gather information' during a criminal trial is no more than a right to attend the trial and report on their observations.").

To be clear, "[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Houchins*, 438 U.S. at 14; *see also LAPD v. United Reporting*, 528 U.S. 32, 40 (1999) ("[W]hat we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment."). "[T]he right to receive information cannot be stretched to the point of creating a First Amendment right allowing the public to *compel* disclosure of all government-held information. In other words, there is no affirmative constitutional duty requiring the government to disclose non-public information within its possession." *United States v. Miami University*, 91 F. Supp. 2d 1132, 1154 (S.D. Ohio 2000) (emphasis in original).

The First Amendment does not compel the disclosure of the information sought by Plaintiffs. If this Court were to adopt Plaintiffs' view of the First Amendment, there would be no need for Arizona's public records law or the Freedom of Information Act. Plaintiffs' reading of the First Amendment is

contrary to every Supreme Court case discussing access to government information and Plaintiffs' view of the First Amendment would seem to require both federal and state governments to turn over any information within their possession. The state officials named as Defendants in the complaint have no constitutional duty disclose information under the First Amendment. Likewise, Plaintiffs have no First Amendment right to receive information within Defendants' control. There is simply no First Amendment right to the information which Plaintiffs seek. Accordingly, Plaintiffs have failed to state a claim upon which relief can be granted and Claim Two should be dismissed

C. *Claim Three.*

Plaintiffs assert that Defendants' failure to submit their lethal injection protocol to the FDA for review violates the FDCA, in contravention of the Supremacy Clause. *See* Complaint, ¶¶ 153–59. Specifically, Plaintiffs argue that Defendants' lethal injection protocol constitutes a "clinical investigation" under the FDCA, protocols for clinical investigations must be submitted to the FDA for review absent an applicable exception, and the FDCA does not contain an exception for drugs used in executions. *See* Complaint, ¶¶ 154–56. They contend that because Defendants did not submit their lethal injection protocol to the FDA for approval, they are in violation of the FDCA. *Id.* at ¶ 157. This failure to comply with the FDCA, they allege, violates the Supremacy Clause, and therefore Plaintiffs' right to be executed in a manner consistent with federal law and the United States Constitution. *Id.* at ¶¶ 158–59. But neither the FDCA nor, under these circumstances, the Supremacy Clause, can support an action under 42 U.S.C. § 1983. Because these contentions do not state a cognizable legal theory under § 1983, *Balistreri*, 901 F.2d at 699, Plaintiffs fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

The first flaw in Plaintiffs' argument is that the FDCA confers no individualized federal right enforceable under 42 U.S.C. § 1983. *See Gonzaga*,

536 U.S. at 283–84. When bringing a § 1983 claim pursuant to a federal statute, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original). "[A]nything short of an unambiguously conferred right" does not support an individual right of action under § 1983. *Gonzaga*, 536 U.S. at 283; *AlohaCare v. Hawaii, Dep't of Human Services*, 572 F.3d 740, 745–46 (9th Cir. 2009) (statute lacked the specific articulation of entitlements required to create an individual, enforceable right remediable under § 1983); *see also Lankford v. Sherman*, 451 F.3d 496, 508–09 (8th Cir. 2006) (to confer an individual right enforceable under § 1983, a "statute must focus on an individual entitlement to the asserted federal right, rather than on the aggregate practices or policies of a regulated entity, like the state").

Congress has specifically forbidden private enforcement of the FDCA, stating that "all such proceedings for the enforcement, or to restrain violations, of this [Act] shall be by and in the name of the United States." *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010) (quoting 21 U.S.C. § 337(a)); *see also, e.g., Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 811 (1986) ("Congress did not intend a private federal remedy for violations of the [FDCA]."). "The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4 (2001) (citing 21 U.S.C. § 337(a)); *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 788 (3rd Cir. 1999) ("It is well settled . . . that the FDCA creates no private right of action.").

Rather than conferring any "enforceable rights" upon individuals, the FDCA charges the FDA with investigating potential violations, 21 U.S.C. § 372, and provides that agency with enforcement remedies it may pursue. *See Buckman*, 531 U.S. at 349; *Heckler v. Chaney*, 470 U.S. 821, 835 (1985). And rather than give

individuals the right to sue under the FDCA, the Act permits individuals to petition the FDA to take administrative action.[2] 21 C.F.R. §§ 10.25(a), 10.30.

Because Congress explicitly foreclosed private enforcement of the FDCA and it confers no individual rights, § 1983 is not available to enforce its provisions. *See Gonzaga*, 536 U.S. at 283; *AlohaCare*, 572 F.3d at 745–46. Accordingly, the federal courts have consistently rejected § 1983 actions based on alleged FDCA violations. *See Foli v. Metropolitan Water Dist. of So. Cal.*, No. 11CV1765, 2012 WL 1192763, at *2–3 (S.D. Cal. April 10, 2012) ("By suing under 42 U.S.C. § 1983, Plaintiffs attempt to circumvent FDCA's limitation on who may sue to enforce the Act."); *Robertson ex rel. Robertson v. McGee*, No. 01CV60, 2002 WL 535045, at *3 (N.D. Okla. January 28, 2002) ("Because there is no private right of action under the federal regulations in question, § 1983 cannot be used to create a private right of action which otherwise does not exist."); *Murphy v. Cuomo*, 913 F.Supp. 671, 679 (N.D.N.Y. 1996) ("To the extent plaintiff's First Cause of Action [under § 1983] is based on the FDCA, defendant Zarc argues that summary judgment should be granted in its favor because the FDCA creates no private causes of action. Even a cursory review of the applicable caselaw reveals that defendant is correct.").

Even if Congress had not specifically foreclosed private enforcement of the FDCA, it still could not support a section 1983 action because Congress created a comprehensive enforcement scheme that is incompatible with the individual enforcement under § 1983. *See Blessing*, 520 U.S. at 341; *see also Heckler*, 470 U.S. at 835 (describing FDCA's comprehensive enforcement scheme for its

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[2] Decades ago, death row prisoners petitioned the FDA claiming that states' use of drugs in lethal injections violated several FDCA provisions. *Heckler*, 470 U.S. at 823. The FDA refused to investigate or take enforcement action and the United States Supreme Court found that the FDA's discretionary decision was not subject to judicial review under the Administrative Procedure Act. *Id*. at 838.

substantive provisions); *Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1254–55 (10th Cir. 1999) ("Moreover, claims that require direct interpretation and application of the FDCA are not properly recognized because such matters are more appropriately addressed by the FDA, especially in light of Congress's intention to repose in that body the task of enforcing the FDCA.") (quoting with approval *Braintree Labs, Inc., v. Nephro-Tech, Inc.*, No. 96–2459–JWL, 1997 WL 94237, at *6 (D. Kan. Feb. 26, 1997)) (denying plaintiff's ability to bringing Lanham Act claim based upon alleged FDCA violation). Thus, even without the FDCA's explicit prohibition on individual enforcement, the Act's comprehensive enforcement scheme would still foreclose a § 1983 action to enforce its provisions.

Because the FDCA cannot support a § 1983 action, Plaintiffs have failed to state a claim upon which relief can be granted, and Claim Three should be dismissed. *See O'Bryan v. McKaskle*, 729 F.2d 991, 993 n.2 (5th Cir. 1984) (court "unable to identify the legal footing for [plaintiff's] present effort to enforce [the FDCA's] detailed federal administrative scheme" in a § 1983 action).

Plaintiffs' attempt to root Claim Three in the Supremacy Clause fares no better. "[T]he Supremacy Clause, of its own force, does not create rights enforceable under § 1983." *See Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985), ("[T]he Supremacy Clause, standing alone . . . does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983."). Consequently, "a Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights privileges, or immunities' in the particular plaintiff." *Golden State Transit*, 493 U.S. at 107 n.4; *see also Whitaker*, 732 F.3d at 467 (rejecting Supremacy Clause as a basis for obtaining information about the method of execution). As demonstrated above, the FDCA creates no "rights, privileges, or immunities" in any individual, including Plaintiffs. Consequently, a § 1983 claim is unavailable for an alleged

violation of the FDCA and the Supremacy Clause. Claim Three does not state a "plausible claim for relief," and should be dismissed pursuant to Rule 12(b)(6). *See Iqbal*, 556 U.S. at 679.

III. CONCLUSION.

Plaintiffs have failed to state an actionable First Amendment claim because there is no First Amendment right to obtain the information they seek and because a refusal to provide the confidential information they have requested does not limit their ability to petition the government for a redress of grievances. Additionally, Plaintiffs have failed to state a claim for relief under the Supremacy Clause or FDCA because the FDCA expressly prohibits private enforcement, confers no individual rights, and contains a comprehensive enforcement scheme. Lacking a viable Section 1983 claim, the complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

CONCLUSION

Defendants request that this Court dismiss the Complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

RESPECTFULLY SUBMITTED this 10th day of July, 2014.

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I hereby certify that on July 10, 2014, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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