No. 14-16310

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III,

Plaintiff-Appellant,

–vs–

CHARLES L. RYAN, Director of the Arizona Department of Corrections; et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. 2:14-CV-01447-NVW-JFM

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violation), and § 2202 (injunctive relief). Plaintiff's appeal is from a denial of his preliminary injunction motion, and this Court has jurisdiction under 28 U.S.C. § 1291(a)(1).

QUESTION PRESENTED FOR REVIEW

Did the district court abuse its discretion in denying Wood's motion for preliminary injunction by finding that the qualified First Amendment right of access to certain governmental proceedings does not extend to information regarding the source of lethal injection drugs, qualifications of personnel carrying out a lethal injection execution, and development of a lethal injection protocol?

INTRODUCTION

This civil rights action in a capital case is not about whether Arizona's lethal injection protocol will cause Plaintiff-Appellant Joseph Wood to suffer unconstitutional pain. Wood's claim is simple—he asserts that the First Amendment mandates that Arizona provide him with non-public information about the source of the drugs to be used in his execution, the qualifications of execution team members, and development of the lethal injection protocol. In essence, Wood seeks to use the First Amendment as a discovery tool. Taken to its logical conclusion, his interpretation of the First Amendment would obviate the need for the Freedom of Information Act and open records laws. But the First Amendment has no applicability to the sought-after information. Wood states that "[t]he First Amendment grants a right of access to information about the manner and method of executions because that information is crucial to the functioning of capital punishment." (Doc. 10, at 26.) However, there is no dispute that Arizona's executions are open to the public and the *manner and* method of execution—lethal injection—is a matter of public record. The information Wood seeks, contrary to his assertions, has never been public information and the Supreme Court has never held that the First Amendment includes a right to information in the government's possession. What Wood is seeking on the virtual eve of his execution is for this Court to disregard other

courts who have denied inmates this type of information and create a new, unheard of First Amendment right after two decades of litigation. This Court should affirm the district court's denial of a preliminary injunction because the First Amendment does not provide a right to the information Wood seeks.

STATEMENT OF THE CASE

Wood was convicted of the first-degree murders of his estranged girlfriend Debra Dietz and her father Eugene Dietz and sentenced to death more than 20 years ago. *State v. Wood*, 881 P.2d 1158 (Ariz. 1994). After years of review by state and federal courts, he is scheduled to be executed on Wednesday July 23, 2014 under Arizona's two-drug protocol using Midazolam and Hydromorphone.

On April 22, 2014, Wood was informed that if the Arizona Supreme Court granted the State's pending motion for warrant of execution, the Arizona Department of Corrections ("ADC") "will use Midazolam and Hydromorphone in a two-drug protocol," and that "[i]n the event ADC is able to procure Pentobarbital, ADC will provide notice of its intent to use that drug in accordance with Department Order 710." (ER 109.) On April 30, 2014, Wood requested certain information, including: an explanation of how ADC chose the amounts of Midazolam and Hydromorphone included in the protocol; the drugs' manufacturer and source, whether they were domestic or foreign, and whether

they were FDA approved; and Drug Enforcement Agency ("DEA") registrations for all team members that would handle the drugs. (ER 111–13.) Defendant Ryan responded on May 6, 2014, that: in deciding what amounts of the drugs to be used in Wood's execution, ADC relied on declarations and sworn testimony from the Ohio Execution Protocol ligation[1]; A.R.S. § 13–757(C) protects the identity of the drugs' source; the drugs were "domestically obtained and are FDA approved"; and the IV team's qualifications had not changed since previous litigation regarding the issue in *Towery v. Brewer*, No. 2:12–CV–00245–NVW (D. Ariz.). (ER 116.)

Wood responded with a request for more information, including: the identity of the manufacturers, lot numbers, expiration dates, and National Drug Codes for the Midazolam and Hydromorphone; the "actual documents" from the Ohio Execution Protocol litigation that ADC relied on in determining the amount of drugs to use; and documentation of the credentials of the medical professional(s) who would participate in the execution. (ER 118–22.) Several days later, Wood reiterated his previous requests, but also asked for documentation relating to internal and external communications between Defendants and other state departments of corrections regarding execution protocol topics. (ER 125–27; ER 129–31.)

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[1] Case No. 2:11–CV–1016 in the Southern District of Ohio.

On June 6, 2014, Defendant Ryan responded that: ADC's protocol provides that a central femoral line will not be used unless the person placing it is certified or licensed to do so; certification and licensing of the IV team is verified by the Inspector General's Office; and records relating to ADC's development of the two-drug Midazolam and Hydromorphone protocol could be found in the transcripts and declarations in the litigation of Ohio's protocol. (ER 133–34.) Attachments to Defendant Ryan's letter included purchase orders and other records related to the drugs redacted to exclude information that would identify the source or manufacturer. (ER 135–52.)

On June 26, 2014 Wood and the other Plaintiffs filed a Complaint asserting three claims for relief under 42 U.S.C. § 1983: (1) that Defendants' denial of information denies them their First Amendment right to petition the government for redress of grievances; (2) that Defendants' denial of information denies them their First Amendment right of access to government proceedings; and (3) that Defendants' failure to submit their lethal injection protocol to the Food and Drug Administration for review violates the Food, Drug, and Cosmetic Act in contravention of the Constitution's Supremacy Clause. (Dist. Ct. Doc. 1.) Plaintiff Wood filed his Motion for Preliminary Injunction or Temporary Restraining Order 6 days later, on July 2, 2014. (Dist. Ct. Doc. 11.) Wood's motion was based solely on Claim Two of the

Complaint, which alleged a deprivation of the First Amendment right of access to governmental proceedings. (Dist. Ct. Doc. 11 at 9; Doc. 16 at 2 & n.2.) On July 10, 2014, the district court denied Wood's request for a preliminary injunction. (Dist. Ct. Doc. 21.)

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Wood's motion for preliminary injunction. Wood contends that the First Amendment right of access to governmental proceedings entitles him, as a member of the public, to information identifying the manufacturer of the lethal injection drugs to be used in his execution, specific qualifications of execution team members, and an explanation of the development of Defendants' lethal injection protocol. He relies solely on this Court's opinion in California *First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), in arguing a First Amendment right to the information he seeks. The district court, however, correctly found that this case "does not extend a First Amendment right to information" about the source of lethal injection drugs. (ER 015.)

While the qualified First Amendment right of access to governmental proceedings includes the right to view executions, and the right to criminal proceedings and documents filed therein, Wood has not identified one case from this Circuit, or from any federal appellate court extending the First Amendment

right of access to compel disclosure of information beyond witnessing an execution. Even if the information Wood seeks could be construed as a "proceeding" to which there might be a qualified right of access, his claim still fails because the information he seeks has not been historically available to the public and it would not add anything of significance to the public debate surrounding lethal injection. In short, there is no First Amendment right to the information Wood seeks. Every court of record that has reviewed similar requests from inmates, whether framed as a First Amendment, due process, or Eighth Amendment claim, has found no right of access to the information Wood seeks here. Accordingly, this Court should affirm the district court's denial of a preliminary injunction because Wood cannot establish any likelihood of success on the merits.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING A PRELIMINARY INJUNCTION BECAUSE HE POSSESSES NO FIRST AMENDMENT RIGHT TO THE INFORMATION HE SEEKS.

A. STANDARD OF REVIEW.

This Court reviews a district court's denial of a preliminary injunction for an abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). An abuse of discretion will only be found if the district court

based its decision "on an erroneous legal standard or clearly erroneous findings of fact." *Id.* Here the District Court correctly concluded as a matter of law that "the First Amendment does not provide a right to access to the specific information Wood seeks." (ER 013.)

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). An injunction may be granted only where the movant shows that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005).

In the context of a capital case, the Supreme Court has emphasized that these principles apply when a condemned prisoner asks a federal court to enjoin his impending execution because "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). Rather, "a stay of execution is an equitable remedy" and "equity must be sensitive to the

State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584.

Because Wood did not establish a likelihood of success on the merits, his claim of irreparable harm is outweighed by the State's interest in finality. Thus, this Court should affirm the district court's denial of a preliminary injunction. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (standard for granting preliminary injunction balances plaintiff's likelihood of success on the merits against the relative hardship to the parties).

B. THERE IS NO FIRST AMENDMENT RIGHT TO THE INFORMATION WOOD SEEKS.

The district court did not abuse its discretion in concluding that Wood did not demonstrate a likelihood of success on the merits of his § 1983 claim because there is no First Amendment right to the information he seeks. Specifically, Wood baldly asserts that he has a First Amendment right to know:

a. the source(s) and manufacturer(s), National Drug Codes, and lot numbers of lethal injection drugs to be used in his execution;

b. information detailing the medical, professional, and controlled- substances qualifications and certifications of the personnel who will take part in his lethal injection execution; and

c. documentation detailing the manner in which Defendants developed their lethal injection protocol.

His claim lacks any chance of success because there is no affirmative constitutional absolute duty requiring the government to disclose information within its possession, and individuals have no unqualified First Amendment right to receive information within the government's control. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality) (citation and internal quotation marks omitted) ("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.").

1. *There is no general First Amendment right to government information.*

Addressing a claim nearly identical to Wood's, the Eleventh Circuit recently held that the First Amendment does not afford a death row 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. Dept. of Corr.*, __ F.3d __, 2014 WL 2748316, at *6 (11th Cir. June 17, 2014) (per curiam). Similarly, the Georgia Supreme Court rejected an inmate's First Amendment challenge to a statute protecting the source of lethal injection drugs, stating that "[t]o the extent that [a death row inmate] seeks to turn the First Amendment into an Open

Records Act for information relating to executions, his claim clearly fails." *Owens v. Hill*, __ S.E.2d __, 2014 WL 2025129, at *9 (Ga. May 19, 2014).

Other courts have consistently rejected claims for similar information brought under other constitutional provisions, such as the due process clause and the Eighth Amendment. *See 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"); *In re Lombardi*, 741 F.3d 888, 895–96 (8th Cir. 2014) (en banc) (Eighth Amendment did not entitle 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); *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 disclose information regarding method of execution in a timely manner absent a plausible Eighth Amendment claim); *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) ("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."); *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (statute denying inmate

certain information regarding execution did not constitute denial of due process right of access to the courts).

These rejections of claims similar to Wood's are consistent with the principle that the First Amendment does not contain a general 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 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); *see also Entler v. McKenna*, 487 Fed.Appx. 417, 418 (9th Cir. 2012) ("The district court properly dismissed Entler's § 1983 claim for alleged interference with his right to access public documents because there is no constitutional right to public disclosure of government documents."). 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); *Turner v. Calderon*, 281 F.3d 851, 867-68 (9th Cir. 2002).

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. "The amendment constrains our government from acting in ways which infringe upon our right to free speech; it does not create an affirmative duty upon the government to act." *Gartner v. U.S. Information Agency*, 726 F. Supp. 1183, 1188 (S.D. Iowa 1989). "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. Dept. 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.*

Consequently, the Supreme Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins*, 438 U.S. at 9; *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker."). The First Amendment right to speak and publish therefore does not include the unrestrained right to gather information from government sources:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Zemel v. Rusk, 381 U.S. 1, 16–17 (1965). Thus, because there is no First Amendment right to receive a verbatim transcript of the proceedings of Congress, the Circuit Court properly affirmed the dismissal of the Complaint. *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985).

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.").

2. *The qualified First Amendment right of access to governmental proceedings is inapplicable to the information Wood seeks.*

Although the First Amendment does not include a broad right of access to governmental information, Wood correctly notes that the First Amendment contains a qualified right of access to governmental *proceedings*. (O.B. at 12–14.) For example, the Supreme Court has a recognized a public right of access to proceedings in criminal trials, including: preliminary hearings, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–14 (1986) ("*Press-Enter. II*"); voir dire, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510–11 (1984) ("*Press-Enter. I*"); the testimony of the child victim of a sex offense, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603–11 (1982); and criminal trials in general, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

This Court has similarly recognized a qualified First Amendment right of access to "criminal proceedings and documents filed therein." *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985). This access has been applied to: transcripts of closed hearings that occurred during jury deliberations, *Phoenix Newspapers, Inc. v. United States Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998); plea agreements and related documents, *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465–66 (9th Cir. 1990);

pretrial release proceedings and documents, *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988); and pretrial suppression hearings, *United States v. Brooklier*, 685 F.2d 1162, 1170–71 (9th Cir. 1982).

This Court has also concluded that the First Amendment "right of access to criminal proceedings and documents filed therein" includes a right of the public to view executions. *California First Amendment Coal.*, 299 F.3d at 874 (quoting *CBS*, 765 F.2d at 825). The Court reached its conclusion after addressing the considerations set forth in *Press-Enter. II* for determining whether the public has a right of access to a particular government proceeding: (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8–9). These considerations weighed in favor of a public right to view executions because "[h]istorically, executions were open to all comers" and "[i]ndependent public scrutiny . . . plays a significant role in the proper functioning of capital punishment." *Id.* at 875, 876.

Wood argues that this line of authority provides the public with a First Amendment right to the information he seeks regarding the drugs to be used in his execution. But as the district court found, his interpretation stretches these

cases beyond their holdings and even their clear implication. First, *California First Amendment Coalition*, upon which he primarily relies, stands for the proposition that the public enjoys the right to view his execution and nothing more. In that case, this Court recognized no right to any documents or governmental information related to the lethal injection execution. *See Cal. First Amendment Coal.*, 299 F.3d at 877 ("We therefore hold that the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber . . . ."). The case certainly did not create a constitutional right to know the drug manufacturer or other information about the source of the drugs or information about personnel taking part in the execution process, or the government's thought process behind creating its protocol.

Furthermore, unlike the plaintiffs in *California First Amendment Coalition*, Wood does not seek access to a criminal *proceeding*, but rather access to *information* in the government's possession. Illustrating this basic distinction, the Supreme Court in *Nixon v. Warner Communications Inc.,* 435 U.S. 589, 609 (1978), recognized the press and public's First Amendment right to attend a criminal trial, but concluded that this right did not include access to exhibits displayed in court but in the custody of the court clerk. *See also Radio & Television News Ass'n of So. Cal. v. Dist. Ct. for Cent. Dist. of Cal.*, 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."). Accordingly, the public's First Amendment right to attend an execution does not equate to a First Amendment right to require production of information regarding the execution process.

Nor does Wood's reliance on this Court's recognition of the right of access to "criminal proceedings and documents filed therein" establish a right to the information he seeks. Unlike courtroom proceedings, there are no "documents filed therein" with respect to an execution. Illustrating this important distinction, the cases Wood relies upon address the right of access to documents filed in conjunction with judicial courtroom proceedings. *See Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014) (access to civil complaints filed in California Ventura County Superior Court); *Seattle Times*, 845 F.2d 1513 (pretrial documents filed in criminal case); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (access to documents filed in federal criminal case). Unlike in criminal trial proceedings, there are no documents "filed" in conjunction with an execution, which is a function carried out by the executive branch, not the judiciary.

Taken to its logical conclusion, Wood's argument would obviate the need for the federal Freedom of Information Act or state public records laws because

whether the public had a right to any particular information in the government's possession would hinge solely upon the test set forth in *Press-Enter. II* and applied in *California First Amendment Coalition*. The result would be a "sea of never-ending litigation," requiring "the courts to legislate categories of exclusions" from First Amendment access "without the benefit" of the political process. *Capital Cities Media*, 797 F.2d at 1172. But such an approach is foreclosed by clear Supreme Court precedent holding that there is no general First Amendment right to government-held information. *Houchins*, 738 U.S. at 9, 11. Accordingly, while the public's First Amendment right of access to governmental proceedings encompasses the right to view Wood's execution, it does not extend to governmental information. *See Wellons*, 2014 WL 2748316, at *6; *Owens*, 2014 WL 2025129, at *9; *see also Houchins*, 438 U.S. at 9.

3. *Alternatively, Wood is not entitled to relief under the Press-Enter. II test.*

Even adopting the extravagant view that the source of lethal injection drugs, qualifications of execution team personnel, and the development of the lethal injection protocol are governmental proceedings subject to the test set forth in *Press-Enter. II*, Wood still cannot establish a First Amendment right to the information he seeks. To determine whether there is a First Amendment right of access to a particular government proceeding, that test addresses: (1) "whether the *place and process* have historically been open to the press and

general pubic []} and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8-9) (emphasis added).

a. The information Wood seeks has not historically been public.

First, the specific information sought by Wood has not "historically been open to the press and general public." *See California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8–9). Wood goes to great lengths to argue that history is on his side, discussing what he perceives to be historical evidence of public access to information regarding the manufacturers of execution methods no longer in practice, including some, such as firing squads and electrocution, that were never used in Arizona—information he failed to present to the district court. (O.B. at 22–30.) But nothing Wood provides establishes that the *government* historically provided open access to the identities of a particular execution method's manufacturer. Indeed, several of his examples make clear that it was the manufacturers themselves who chose to publicize their identities. (*See id.* at 23–24 [hanging rope manufacturers], 27 [gas chamber manufacturer], 30 n.14 [electric chair manufacturer].)

The relevant consideration, however, is whether the *government* has historically made the particular proceeding open to the public. *See California*

First Amendment Coalition, 299 F.3d at 875 ("When executions were moved out of public fora and into prisons, *the states implemented procedures* that ensured executions would remain open to some public scrutiny.") (emphasis added). Because the First Amendment applies only to the federal government and the states,[2] it is illogical that whether private actors have disclosed information can have any effect on whether there exists a First Amendment right to particular information. For example, Wikileaks' disclosure of classified government documents surely does not establish a public right of access under the First Amendment to similar information in the public's possession. Wood cannot show a historical tradition of the *states* making information regarding the manufacturers of execution methods open to the public.

Moreover, the recent history of lethal injection executions demonstrates that the type of information Wood seeks has never historically been made available by the states. Although Arizona has been using lethal injection as a means of execution since 1993, for over two decades, Wood can provide no example of historically open access to the provenance of lethal injection drugs,

[2] The First Amendment's guarantees run against the federal government, not private interference. By incorporation into the due process clause of the Fourteenth Amendment these guaranties also run against the state. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Fourteenth Amendment "erects no shield against merely private conduct, however discriminating or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

qualifications of personnel performing a lethal injection, or the development of lethal injection protocols. To be sure, were this information historically public, numerous death row inmates across the country would not be bringing legal challenges seeking its disclosure over states' refusals to provide it. *See Wellons*, 2014 WL 2748316 (Georgia death row inmate seeking information concerning source of lethal injection drugs and qualification of execution team); *Sells*, 750 F.3d at 480 (Texas prisoners seeking information regarding the source, purchase, storage, date of manufacture, lot numbers, raw ingredients, and testing of lethal injection drugs); *Campbell v. Livingston*, __ Fed.Appx. __, 2014 WL 1887578, at *2 (5th Cir. May 12, 2014) (Texas death row inmate sought information regarding source, purpose, storage, date of manufacture, lot numbers, raw ingredients, testing, and laboratory testing of lethal injection drug); *In re Lombardi*, 741 F.3d at 889 (Missouri death row inmates seeking identity of physician who prescribed, pharmacist who compounded, and laboratory that tested lethal injection chemical); *Sepulvado*, 729 F.3d at 416 (Louisiana prisoner challenging state's refusal to disclose details of its execution protocol); *Williams*, 658 F.3d at 851–52 (Arkansas death row prisoners challenging "secrecy encompassed" in lethal injection protocol); *Owens*, 2014 WL 2025129, at *1 (Georgia inmate seeking identity of compound pharmacy and supply chain and manufacturer(s) of ingredients used to produce lethal injection drug). The

existence of the cases provides strong evidence that the type of information that Wood seeks has been historically unavailable, thus requiring inmates to bring legal challenges in an attempt to obtain it.

In sum, Wood cannot show that the government has historically made information regarding the identities of execution method manufacturers open to the public. *See California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8–9). Nor does he cite to any history demonstrating that records about the manufacturers of lethal injection drugs have ever been open to the public. Indeed, as demonstrated above, the history on that score is against him. And not only do Wood's historical articles have nothing to do with lethal injection drugs, but they also do not discuss any public availability of the actual qualifications of the executioners or how the executioners decided to conduct the executions.

Wood also contends that only in 2010 did Defendants take the position that Arizona's executioner confidentiality statute, A.R.S. § 13–757(C), applied to the source of lethal injection drugs. (O.B. at 31–33.) This is incorrect, and avoids the relevant question. Significantly, Wood provides no examples of Defendants *voluntarily* making the source of lethal injection drugs publically available, whether before 2010 or later. For example, in 2010, the district court ordered disclosure of the source of the drug that was used in the execution of

Jeffrey Landrigan. *Landrigan v. Brewer*, 2010 WL 4269557 (D. Ariz. 2010) (unreported). In the *West v. Brewer*, litigation, the source of the drug used in West's execution was revealed as part of a ligation discovery order. (*See* ER 60–63.) In *Schad v. Schriro*, 2013 WL 5551668 (D. Ariz. 2013) (not reported) the district court ordered disclosure of the source of the drugs to be used in Schad's execution.[3] These disclosures do not demonstrate that the information about the

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[3] In his papers Wood repeatedly suggests that Defendants did something unlawful or wrong when they imported sodium thiopental from Dream Pharma in England. "Dream Pharma is registered, regulated, and inspected by the United Kingdom's regulatory body, the Medicines and Healthcare products Regulatory Agency ("MHRA") and holds a wholesale dealers license. In all four of its inspections, Dream Pharma was deemed to be in compliance with the requirements of the relevant UK medicines legislation." *West v. Brewer*, 2011 WL 6724628 (D. Ariz. 2011) at *10. The Arizona Department of Corrections ("ADC") used a Customs Broker when it imported the sodium thiopental and the Broker filled out the U.S. Customs and FDA necessary documentation and the FDA released the shipment. *Id*. at *9-*10. Hours before the execution of Donald Beaty, the Department of Justice advised that DEA-236 form was necessary for importation of sodium thiopental. *Id*. at *10. Although ADC held a DEA registration certificates permitting it to handle Schedule 3 drugs, it was not authorized by the DEA to import the drugs. *Id*. at *10. Subsequently, in a suit brought against the FDA by the Federal Public Defenders in the District of Columbia, the Circuit Court held in *Cook v. Food & Drug Admin.*, 733 F.3d 1 (D.C. Cir. 2013) that the FDA did not have discretion under to have allowed the importation of the sodium thiopental. *Id*. at 11. However, because Arizona was never joined as a party, the Court vacated the district court's order "that use of such drug is prohibited by law." *Id* at 12.

Additionally, Wood makes much of ADC's decision not to appeal the district court's disclosure order in *Schad*. As the district court noted, unlike in *Schad*, here there are no concerns that the lethal injection drugs were expired. (ER 015.) That issue concerned the district court in *Schad*. *Schad*, 2013 WL 5551668, at *2. Schad was executed on October 9, 2013. A hearing was held on

(continued ...)

source of the drugs, let alone the additional information Wood seeks, has been a matter of public record. Thus, of the 13 inmates executed since 2010, on three occasions the Arizona Department of Corrections, as part of a litigation proceeding, disclosed the source of the drugs. These record-facts support the district court's that Wood had not cited any authority for the proposition "that the press and general public have historically been granted access to information identifying of the manufacturer of lethal-injection drugs." (ER 014.)

b. The information Wood seeks would not significantly benefit the functioning of capital punishment.

Wood also cannot establish that public access to the information would "play[] a significant role in the functioning of the particular process in question." *California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter.*, 478 U.S. at 8–9). Arizona's confidentiality statute 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. [§ 39-121 et seq. Arizona's public records statutes].

A.R.S. § 13–757(C). (Emphasis added.)

(... continued)
October 4, 2013 before the district court on Schad's motion for a preliminary injunction. The drugs used in his execution were labeled to expire the following month. (Dist. Ct. CV-13-002001 Doc. 24.)

Chief Judge Kozinski identified the important policy reason behind the statute:

> Because Landrigan did not meet his burden, the state had no duty to come forward with any information. Indeed, Arizona had good reasons not to; just twenty-four hours after the state attorney general conceded that the drug was imported from Great Britain, one journalist suggested the company might be criminally liable under an EU regulation that makes it illegal to "trade in certain goods which could be used for capital punishment, torture, or other cruel, inhuman 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/jeffrey-landrigan-execution-sodium-thiopental. Certainly Arizona has a legitimate interest in avoiding a public attack on its private drug manufacturing sources, particularly when Hospira-the only source of sodium thiopental within the United States-hasn't yet announced when the drug will actually be available for executions or how much it plans to produce. Although the district court may have been annoyed with the state for failing to provide the information Landrigan's lawyers wanted to see, the fact remains that Landrigan was not entitled to the information because he failed to make a threshold showing that he will suffer harm.

Landrigan v. Brewer, 625 F.3d 1132, 1143 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) (emphasis added). Simply put, when the identities of lethal injection chemical manufacturers become public, it becomes all but impossible for the states to carry out their mandated functions. Even Wood concedes that public unveiling of previous lethal drug manufacturers has resulted in those manufacturers refusing to permit their products to be used in executions. (O.B. at 38–40.) Thus, rather than play a significant role in the

functioning of lethal injection, public access to the information Wood seeks has the effect of ceasing the function of that process altogether. In this vein, the Supreme Court has recognized that "although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enter. II*, 478 U.S. at 8–9.

Furthermore, as the district court noted, Wood could not identify any need for the information he seeks other than an "abstract right to the information and its purported usefulness to public debate." (ER 015.) Instead, the information necessary for "[i]ndependent public scrutiny" of Arizona's capital punishment procedures is already publicly available—the protocol itself, the actual lethal injection drugs to be used along with their amounts, the fact that all IV team members will be qualified to place IV lines, the safeguards in the administration of the drugs. (ER 081, 103–06.) With this information, combined with the right to view executions, the public possesses the information necessary for independent public scrutiny of lethal injection executions. Moreover, Wood has failed to identify any reason for public access to the specific qualifications of the execution personnel and information regarding development of the protocol. The information sought by Wood would add nothing of significance to the public debate, and, as the district court and Chief Judge Kozinski have observed,

could have the practical effect of exerting "pressure on qualified suppliers not to supply the drugs." *Landrigan*, 625 F.2d at 1143.

C. THE REMAINING FACTORS SUPPORT THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION.

The district court did not abuse its discretion by concluding that Wood cannot show a likelihood of success on the merits because the First Amendment does not compel disclosure of the information he seeks. For the same reason—his claim plainly fails on the merits—the remaining factors also support the district court's denial of injunctive relief.

1. *Wood cannot show that he is likely to suffer irreparable harm.*

Granted, Wood has "a strong interest in being executed in a constitutional manner." *See West v. Brewer*, 652 F.3d 1060, 1060 (9th Cir. 2011). But because he has not raised any claim that he will not be executed in a constitutional manner, nor has he raised a plausible claim that his First Amendment rights have been violated, there is no showing on this record that Wood is likely to suffer irreparable harm. *See Towery v. Brewer*, 672 F.3d 650, 661 (9th Cir. 2012) (plaintiffs did not meet standard for preliminary injunction where they did "not raise serious questions of their Eighth and Fourteenth Amendment claims with regard to their executions"). Wood's assertions that the district court made certain factual findings not supported by the record is of no consequence. This issue is a legal one, one for which Wood has offered no on-point authority.

2. *The balance of equities favors Appellees.*

It is not in the public interest to grant an injunction in this case. A stay of execution is an equitable remedy and, as such, "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 384 (citing *Nelson v. Campbell,* 541 U.S. 637, 649-50 (2004). Both Wood's state and federal collateral proceedings have run their course in the more than 20 years since he was sentenced to death for the murders he committed. "[F]urther delay from a stay would cause hardship and prejudice to the State and victims, given that the appellate process in this case has already spanned more than two decades." *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011) (*per curiam*). The State has an interest in seeing that its laws are enforced and in carrying out the executions as scheduled and further delay will not meet that interest. *See Hill*, 547 U.S. at 584 (recognizing that both the State and the victims of crime "have an important interest in the timely enforcement of a sentence."); *see also* Ariz. Const. art. 2, § 2.1(a)(10) (Arizona crime victims have a constitutional right to "prompt and final" conclusion of the case). Similarly, the uncertainties and expense that come from the delay that often follows death penalty cases, as well as the impact of such delay upon the families of their victims and their communities, will only be

compounded by an injunction. This is especially true where, as here, Wood cannot succeed on the merits of his claim.

3. *An injunction is not in the public interest.*

Because Wood fails to present any plausible questions of constitutional magnitude, there has been no showing that he will suffer an unconstitutional execution, and the equities tip in favor of Appellees, an injunction is not in the public interest. Moreover, since the State sought a Warrant of Execution well over two months ago, Wood has been aware of the public protocol that identifies the qualifications of the IV team, of the types of drugs that could be used, and the presumption that Midazolam and Hydromorphone would be used, and in what amounts, unless pentobarbital could be located. Nothing prevented him from initiating a lawsuit then and seeking a stay, instead waiting until the last minute.

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CONCLUSION

For the reasons above, Appellees request that this Court affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2015.

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,448 words.

s/ Jeffrey A. Zick
Chief Counsel

No. 14-16310

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, et al.,

Plaintiffs,

–vs–

CHARLES L. RYAN, et al.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV14-1447-NVW-JFM

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 15th day of July, 2014.

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