No. 14-16310

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood III, Plaintiff-Appellant,

vs.

Charles L. Ryan, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:14-cv-01447-NVW-JFM

REPLY BRIEF OF PLAINTIFF-APPELLANT

EXECUTION SCHEDULED: JULY 23, 2014 at 10:00AM MST (10:00 PDT)

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INTRODUCTION

The Defendants-Appellees (hereinafter referred to as Arizona Department of Corrections or ADC) assert that the issue here "is a legal one. . . ." (Answering Br. at 27.) Therefore, ADC only responded to the legal arguments that Mr. Wood made in his Opening Brief. But even assuming this Court considers only the legal issues, and ignores the erroneous and unsupported findings made by the district court (*see* Opening Br. at 37-44), Mr. Wood prevails on the legal issue because the public has a First Amendment right of access to information regarding execution proceedings. For the reasons stated in Mr. Wood's Opening Brief and this Reply, this Court should reverse the decision of the district court and grant Mr. Wood relief.

I. The public has a First Amendment right of access to executions.

This Court has held that there is a First Amendment right of access to execution proceedings. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002). But contrary to the law, ADC argues that there is no First Amendment right of access to the information that Mr. Wood is seeking. (Answering Br. at 8.) ADC makes three assertions: (1) that there is no general First Amendment right to government information (*id.* at 9-13); (2) that the qualified First Amendment right of access to governmental proceedings is inapplicable to the information Mr. Wood seeks (*id.* at 14-18); and (3) that Mr.

Wood is not entitled to relief under the *Press-Enterprise II* standard because the requested information has not been historically available to the public and would not play a significant role in the functioning of capital punishment (*id.* at 18-27). ADC is wrong.

A. Mr. Wood seeks information regarding a governmental proceeding to which he has a First Amendment right of access; he is not seeking a general right to all government information.

Mr. Wood has not asserted a general constitutional right to all government information.[1] Rather, he asserts that under *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and subsequent cases, the First Amendment does establish a public right of access to governmental proceedings and records that historically have been open to the public, and where access aids the proper functioning of the

[1] ADC relies upon cases that simply affirm a principle that Mr. Wood does not contest—there is no general constitutional right of access to *all* government information, or *all* information provided by FOIA laws. (Answering Br. at 11-12.)

Curiously, in addition to the cases standing for the proposition that there is no general constitutional right of access to all government information, ADC cites *Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 758, 756 (1976), relying only upon a quoted parenthetical that says, "Freedom of speech presupposes a willing speaker." (Answering Br. at 13.) ADC does not explain this citation, but it is inapplicable to this case. The requirement of a "willing speaker" is not part of the test for access to government proceedings or records. *Virginia State Pharmacy Board* does not address the right of access at all. Instead, it discusses the requirement of a "willing speaker" as a prerequisite to traditional First Amendment cases challenging government *restrictions* on private speech. Where individuals seek to challenge a law that restricts the speech of a third party, it is necessary to show that the third party is "willing" to speak; otherwise, challenging the law restricting speech would have no effect. Thus, there is no relevance between the concept of a willing speaker and the right asserted by Mr. Wood in the matter before this Court.

proceeding and is important for effective democratic oversight. *See, e.g.*, *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*) (citing *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty*, 457 U.S. 596, 604 (1982)).

Because the Framers of the Constitution "were concerned with broad principles, and wrote against a background of shared values and practices," the U.S. Supreme Court recognized that the First Amendment encompasses rights even if they are not "unambiguously enumerated in the very terms of the Amendment[.]" *Globe Newspaper*, 457 U.S. at 604. As the Court recognized, even though a "right of access to criminal trials is not explicitly mentioned in terms in the First Amendment[,]" that right is nevertheless protected. *Id.* Thus, it does not matter that there is no express right of access. *See, e.g.*, Answering Br. at 12 (noting that the First Amendment "does not expressly address the right of the public to receive information"). What matters is whether the Court has found that the governmental proceeding in question has been historically open to the public, and that access plays a significant role in the functioning of the proceeding. Here, this Court has already determined that executions are historically open governmental proceedings to which a First Amendment right of access attaches.

ADC also relies upon two recent cases from Georgia as support for why this Court should reject Mr. Wood's First Amendment claim. (Answering Br. at 9-10.) As already addressed in the Opening Brief, those two cases are not only non-

binding authority, but also lack in legal reasoning or analysis, and therefore should not be adopted by this Court. (Opening Br. at 45-50.) ADC has offered no response to Mr. Wood's argument distinguishing these two cases. The other cases cited by ADC are not relevant to the issue here because, as ADC admitted, none have addressed the First Amendment issue. (Answering Br. at 10-11.)[2]

B. Mr. Wood, as a member of the public, is entitled to the information he is seeking.

Mr. Wood seeks access to information related to execution proceedings. As he asserted, he has a First Amendment right of access to information regarding the source(s), manufacturer(s), National Drug Codes (NDCs), and lot numbers of the drugs ADC intends to use in his execution; non-personally-identifying information detailing the medical, professional, and controlled-substances qualifications and certifications of the personnel ADC intends to use in his execution; and

[2] *See, e.g.*, *Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014) (reversing issuance of preliminary injunction and agreeing that "petitioner had failed to show a likelihood of success that his 14th and 8th Amendment rights would be violated") (citation omitted); *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013) (noting that the court's review is "limited to determining whether the [district] court erred by issuing an injunction and stay on due-process grounds"); *Williams v. Hobbs*, 658 F.3d 842, 845 (8th Cir. 2011) (noting that the prisoners argued that Arkansas' law "violates the ex post facto clause and their due process right to access the courts"); *In re: Lombardi*, 741 F.3d 888, 891 (8th Cir. 2014) (en banc) (deciding discovery issue related to Eighth Amendment and Ex Post Facto claims); *Whitaker v. Livingston*, 732 F.3d 465, 466-67 (5th Cir. 2013) (noting that plaintiffs raised claims under Eighth and Fourteenth Amendments, Supremacy Clause, and Due Process clause).

information and documents[3] detailing the manner in which ADC developed its lethal-injection drug protocol. (Dist. Ct. ECF No. 11 at 1-2.) The First Amendment dictates a right of access to this information.

This Court has unequivocally stated that the First Amendment right to access extends to the records and documents associated with historically open proceedings. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014). ADC nevertheless argues that "the press and public's First Amendment right to attend a criminal trial . . . [does] not include access to exhibits displayed in court but in the custody of the court clerk," and that by this logic the First Amendment "right to attend an execution does not equate to a First Amendment right to require production of information regarding the execution process." (Answering Br. at 16-17.) The authority upon which ADC relies does not support this proposition.

First, ADC relies on *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978). (Answering Br. at 16.) In *Nixon*, the trial court permitted the press to listen to the Watergate tapes played during the court proceedings, and it also provided the press with transcripts of the tapes. "The transcripts were not admitted as evidence, but were widely reprinted in the press." *Id.* at 594. Broadcasters later sought

[3] ADC re-labels this request as information about the "government's thought process behind creating its protocol." (Answering Br. at 16.) Mr. Wood, however, is not seeking ADC's thought process; he has requested the documents upon which Director Ryan indicated he relied in selecting the current two-drug protocol. (ER 119) (requesting "the actual documents you relied upon").

permission to copy, broadcast, and sell to the public portions of the tapes that had been played at trial. *Id.* The trial court denied this request. The Supreme Court held that the press could not be prevented from reporting what it had learned and what it was entitled to know; however, there was no concern about "a truncated flow of information" because the press *already had access to the information* it sought. *Id.* at 609. In other words, the press had no special right of access beyond the right of access the public already enjoyed. *Id.*

Second, ADC cites *Radio & Television News Ass'n of S. California v. U.S. Dist. Court for Cent. Dist. of California*, 781 F.2d 1443 (9th Cir. 1986). (Answering Br. at 17.) In *Radio & Television News*, the trial court granted media access to the trial, but ordered defense counsel to refrain from speaking to the media. *Id.* at 1444. Again, the crux of this Court's analysis was that "[t]he media is granted access to the same information, but nothing more, that is available to the public." *Id.* at 1447. Here, Mr. Wood, who is not a member of the press, does not seek access above and beyond that to which he, as a member of the public, is entitled under the First Amendment.

A careful reading of *Nixon* and *Radio & Television News* demonstrates that ADC has misconstrued the import of these cases. In both cases, the press and the public had access to the information they sought, including the information contained in the courts' exhibits. The courts, therefore, did not deny access to

information; they merely denied special treatment to the press. In contrast, ADC is denying Mr. Wood and the public access to significant, historically-open proceedings, in violation of the First Amendment.

Mr. Wood requests First Amendment access to documents directly related to historically open governmental proceedings. *Courthouse News Serv.*, 750 F.3d at 786. Contrary to ADC's argument otherwise (Answering Br. at 17), this right of access does not obviate the need for federal Freedom of Information statute (FOI) (or state public-records acts.) This is so because the FOI statute, which was an outgrowth of the Administrative Procedure Act (APA), was devised to provide access to governmental functions that were *not* historically open proceedings.

Congress passed the APA (5 U.S.C. section 1002) in 1946, and included a "Public Information" section that was "drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance." H. Rep. No. 1497, 89th Congress, 2nd Session, House Committee on Government Operations (May 9, 1966) (S. 1160), Section II, "Background," subsection "The 'Public Information' Section of the Administrative Procedures Act." (citing H. Rep. No. 752, 79th Cong. 1st sess.). However, Congress found that this section, "though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather

than disclosing information." *Id.* at Section III, "The Need for Legislation." As a result of these agency abuses, Congress passed the FOI statute to "emphasize that [the Public Information section] of the [APA] is not a withholding statute but a disclosure statute . . . ." S. Rep. No. 813, 89th Congress, 1st Session, Senate Committee on the Judiciary (Oct. 4, 1965) (S. 1160), "What S. 1160 Would Do."

Thus, the Public Information section of the APA, and the subsequently-passed FOI statute, represents Congress's decision that agency actions, which have not historically been open proceedings, would henceforth be generally open to inspection. These statutes exist because the documents they address do not implicate First Amendment issues; historically open execution proceedings, however, do implicate the First Amendment. *Cal. First Amendment Coal.*, 299 F.3d 868.

C. This Court has already held that an execution is a governmental proceeding to which a First Amendment right of access attaches.

As explained (Opening Br. at 14-16), this Court has already determined that a right of access attaches to executions because both of *Press-Enterprise II*'s "complementary considerations"—historically having been open to the public, and public access playing a significant positive role in governmental functioning—are satisfied. *Cal. First Amendment Coal.*, 299 F.3d at 875, 877. ADC argues that it is not sufficient that this Court has already reached that holding. Instead, ADC argues that Mr. Wood must show that he can demonstrate that the complementary

considerations exist, not simply for executions, but for the limited information he seeks about the execution proceeding.

1. Mr. Wood need not demonstrate historical access to the precise information that he is seeking.

Over a decade ago, this Court held that executions are historically open governmental proceedings. *Cal. First Amendment Coal.*, 299 F.3d at 875-76. Yet, ADC argues that this Court need not follow that decision here because the "type" of information he seeks must have been made historically available by the government. ADC's argument fails for several reasons.

a. The government cannot dictate whether a proceeding is historically open to the public.

First, ADC's argument that it is the government that must have made the information historically available is incorrect. (Answering Br. at 19-20.) Beyond pointing out that *California First Amendment Coalition* noted that it was the states that had implemented procedures to ensure executions remained open, *see* 299 F.3d at 875, ADC does not point to any authority supporting its assertion. Instead, ADC writes into *Press Enterprise II* a requirement that does not appear in the case or the jurisprudence following it—that the history of openness must be solely of the government's own making. (Answering Br. at 19.) The Supreme Court has relied upon broad and wide-ranging analyses of historical openness, noting that it is a "complementary" consideration to the role open access plays in the functioning

of government. *Press Enterprise II*, 478 U.S. at 8; *Richmond Newspapers*, 488 U.S. at 565-572. These analyses, focused on the purposes of openness, include detailed histories of foreign processes, community observances, and town meetings. *Richmond Newspapers*, 448 U.S. at 565-572. Nowhere does the Court hold that historical openness turns solely on the government's choice. Indeed, what has made the Court's First Amendment jurisprudence, and the instant action, necessary is the government's unwillingness to provide public access.

b. The government has historically provided information regarding executions.

But even assuming that historical openness should turn on the government's willingness to disclose information, ADC incorrectly asserts that the government has not historically provided access to information about methods of execution, including information about the manufacturers of the supplies and implements involved.

Mr. Wood provided a robust history of materials and equipment used to carry out executions being available to the public. (Opening Br. at 21-30.) He also demonstrated that during legal proceedings from 2010 and 2013, ADC provided information about the source of the drugs used to carry out executions by lethal injection. It did so without requiring that the name of the drug and information that identified its source be protected. (Opening Br. at 34-36.) ADC even provided documents that included the name of the catheters used to deliver the

lethal chemical into the prisoners' veins, as well as documents that included the name of the manufacturer of the belts used to restrain prisoners on the execution table. (Hr'g Tr. at 13:5-13:8, ER 030.)

ADC failed to address the fact that, as Mr. Wood pointed out, the nooses used in Arizona hangings are on display at the Pinal County Historical Society and Museum in Florence, Arizona. (Opening Br. at 25-26.) Moreover, the Historical Society also displays the "Double Execution Chair used in the gas chamber of the Arizona State Prison when two brothers were executed in 1934." *See* Pinal County Historical Society and Museum, Our Exhibits, *available at* http://www.pinalcountyhistoricalmuseum.org/exhibits.htm (last accessed July 15, 2014). Certainly the museum would have had to obtain permission from ADC to display these items, the viewing of which is equivalent to specific information about the execution drugs and displaying it. ADC cannot shield itself from history and the ongoing public display of that history.

In *Globe Newspaper*, the Supreme Court rejected an argument similar to that advanced by ADC. In that case, the state court interpreted a statute to prevent, under all circumstances, the press and general public from attending a criminal trial during the testimony of the victim, where the victim was a minor and sexual assault was alleged. *Globe Newspaper*, 457 U.S. at 602. The Court explained that "[w]hether the First Amendment right of access to criminal trials can be restricted

in the context of any particular criminal trial, such as a murder trial . . . or a rape trial, depends not on the historical openness of *that type of trial* but rather on the state interests assuredly supporting the restriction." *Id.* at 605, n.13 (emphasis added). Here, the openness of the execution depends not on the *type* of execution but the fact that executions have been historically-open governmental proceedings. What is more, ADC has not asserted any interest—let alone a compelling one—to keep records about the execution from the public.

Moreover, ADC cannot rely on the assertion that the methods of executions have changed in order to avoid the established law that there is a right of access to information about executions. *Cal. First Amendment Coal.*, 299 F.3d at 876 (analyzing executions beginning in England in 1196 through current procedures); *see also United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (citation omitted) ("A new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure."). Otherwise, each new method of execution would remove elements of transparency that surrounds these historically open proceedings. In other words, according to ADC's account of the availability of information encompassed by execution proceedings, ADC would be able to impose secrecy simply by changing its execution method.

c. Other states have historically provided information about lethal drugs.

Other states have historically provided information about drugs used in lethal injections. ADC cites to recent litigation in other states in which prisoners sought information regarding their respective state's lethal-injection process. (Answering Br. at 21.) ADC claims that "[t]he existence of the cases provides strong evidence that the type of information Wood seeks has been historically unavailable, thus requiring inmates to bring legal challenges in attempt to obtain it." (Answering Br. at 21-22). ADC's reliance on these cases as "strong evidence" supporting the argument is not strong—it is simply wrong.

In Georgia, until the lethal-injection secrecy act was passed in 2013, the Georgia Department of Corrections routinely provided prisoners and members of the press and public with detailed information about the drugs used in lethal injections, typically photocopying the labels for the drugs—which identified their name, lot number, place of manufacture, and chemical properties—along with invoices for the ordering of the drugs. *See* Letter from Bethany Whetzel to Stephanie Yellin dated Oct. 15, 2012, *Wellons v. Owens*, No. 1:14-cv-01827-WBH, Ex. 5, ECF No 1-8 (N.D. Ga. filed June 12, 2014) (letter from department of corrections attaching copies of the labels of lethal-injection drugs). Thus, ADC's reliance on the Eleventh Circuit's decision in *Wellons*, as well as the

Georgia Supreme Court's decision in *Owens v. Hill*, 2014 WL 2025129 (Ga. May 19, 2014), cannot support the broad assumption ADC makes.

Similarly, the case from Arkansas upon which ADC cites, *Williams v. Hobbs*, 658 F.3d 842, 845 (8th Cir. 2011), involved a challenge to the state's Method of Execution Act, in which the prisoners argued that it violated the ex post facto clause and their due process rights. No First Amendment challenge was raised. What is more, in that particular case, the law at issue allowed for disclosure of the "choice of chemicals" to be used in executions. *Id.* at 850. The Arkansas Department of Corrections has, in fact, provided documentation of the supplier/manufacturer of the lethal-injection drug pursuant to a public request for such information. *See* Affidavit of Joshua Lee, dated July 16, 2014 (ER 187).[4]

Missouri, much like Georgia, has historically provided to the public information about the suppliers of its lethal-injection drugs. *See* Dep. Tom Clements dated Dec. 22, 2010, *Ringo v. Lombardi*, No. 2:09-cv-04095-NKL, Ex. 10 at 34-35, ECF No. 210-4 (W.D. Mo. filed Jan. 21, 2011) (answering without objection that drugs are supplied by Morris & Dickson and discussing Hospira as manufacturer); *see also* Answers to Interrogs., *Lombardi*, No. 2:09-cv-04095-NKL, Ex. 6 at 12-13, ECF No. 210-4 (answering interrogatory #12 without

[4] Mr. Wood has filed a separate motion seeking leave of this Court to supplement the record on appeal with information regarding ADC's allegation that this case, along with others, is "strong evidence" that states historically have not provided information of the type Mr. Wood is seeking. (Ninth Cir. ECF No.19-1)

objection and listing all lethal-injection drug suppliers). It was not until 2013, when Missouri began to use compounding pharmacies, that it refused to reveal details about the drug suppliers. Moreover, ADC's reliance on *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) (en banc), is misplaced because the Eighth Circuit reversed the district court's order, which required disclosure of the compounding pharmacy, because it determined the prisoner could not state a claim for relief under the Eighth Amendment or the Ex Post Facto clause. There was no First Amendment claim.

Texas too has historically provided information about the supplier of the lethal-injection drugs. It was not until a few months ago that Texas Attorney General Greg Abbott did "an about-face from previous open government decisions" and decided to withhold information about drug suppliers. *See* Greg Abbott, *Keep execution drug supplier secret*, Austin American-Statesman, May 29, 2014, *available at* http://www.mystatesman.com/news/news/greg-abbott-keep-execution-drug-supplier-secret/nf9bQ/?icmp=statesman_internallink_textlink_apr2013_statesmanstubtomystatesman_launch#252dd6b5.3797509.735383 (last visited July 15, 2014). "The decision reversed course at the attorney general's Open Records Division, which had previously ordered prison officials to reveal the state's drug suppliers under the Texas Public Information Act." *Id.*; *see also* Mike Ward, A*bbott switches mind on death drug secrecy*, Houston Chronicle, May 29,

2014, available at http://www.chron.com/default/article/Abbott-switches-mind-on-death-drug-secrecy-5514843.php (last visited July 15, 2014) (noting that Abbott's "decision reversed three rulings since 2010 that had mandated the information about the suppliers be made public"). Therefore, ADC's assertion that recent case law constitutes "strong evidence" that other states have not historically provided information similar to that which Mr. Wood seeks here is factually inaccurate.

2. Information regarding the execution process plays a significant role in the functioning of capital punishment in our society.

The Supreme Court's First Amendment right-of-access jurisprudence does not hold that secrecy is acceptable on the basis that it would make the government's job easier or because openness could make its job more contentious. Rather, openness plays a significant role in the process and merits a First Amendment right to access because it enhances "the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper*, 457 U.S. at 606. As described in the Opening Brief, openness plays a significant public role by "informing the public discussion of government affairs, assuring the public perception of fairness, promoting the community-therapeutic effect of criminal justice proceedings, providing a public check on corrupt practices, intimidating potential perjurers, and generally enhancing the performance of all involved in the process." (Opening Br.

at 14) (citations omitted). A right of access to the methods of execution serves each of these purposes. *See Cal. First. Am. Coal.*, 299 F.3d at 876-77. "Secrecy is profoundly inimical to this demonstrative purpose of the trial process," *Richmond Newspapers*, 448 U.S. at 595, just as it is to the historically open proceedings of executions. *See Cal. First. Am. Coal.*, 299 F.3d at 876-77.

ADC, however, argues that "[t]he information Wood seeks would not significantly benefit the functioning of capital punishment" because granting "public access to the information Wood seeks has the effect of ceasing the function of that process altogether." (Answering Br. at 25-26.) This argument eviscerates the second portion of the *Press Enterprise-II* inquiry and misconstrues the purposes of the First Amendment right to access.[5]

ADC focuses on public commentary regarding drug manufacturers and the fact that certain manufacturers, once learning of the use, chose not to distribute their products for use in executions. But the free-market consequence resulting from release of certain information does not mean that access to information about execution proceedings does not "play[] a particularly significant role in the functioning of the juridical process and the government as a whole." *Globe Newspaper*, 457 U.S. at 606.

[5] ADC cites *Press Enterprise II* for the proposition that "some kinds of government operations . . . would be totally frustrated if conducted openly." (Answering Br. at 26.) This general citation does nothing to show that is the case here, and this Court's decision in *California First Amendment Coalition* indicates otherwise.

The First Amendment right of access should not be eroded based on ADC's unsupported speculation that openness would frustrate its ability to carry out an execution. *See generally New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 303 (2d Cir. 2012) (internal citations omitted) (The Transit Authority "suggests that the possibility that some respondents would be dissuaded from contesting their notices of violation in person suffices to outweigh any potential benefits of publicity. But far from showing that this danger is real, the NYCTA has 'offered no empirical support for th[is] claim.' Like the Sixth Circuit, 'we do not believe speculation should form the basis for . . . a . . . restriction of the public's First Amendment rights.'"). This is especially so in light of the fact that Arizona has been able to carry out thirteen executions since October 1, 2010 (*i.e.*, ADC has executed every prisoner for which the State of Arizona has requested a warrant).[6] And nationwide, 155 prisoners (including those in Arizona) have been executed since October 1, 2010.[7]

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[6] *See* Ariz. Dep't Corrections, Executed since 1992, *available at* http://www.azcorrections.gov/inmate_datasearch/Minh_NewDeathRow.aspx (last visited July 15, 2014). Jeffrey Landrigan, October 26, 2010; Eric King, March 29, 2011; Donald Beaty, May 25, 2011; Richard Bible, June 30, 2011; Tom West, July 19, 2011; Robert Moorman, Feb. 29, 2012; Robert Towery, March 8, 2012; Tom Kemp, Apr. 25, 2012; Samuel Lopez, June 28, 2012; Daniel Cook, Aug. 8, 2012; Richard Stokley, Dec. 5, 2012; Edward Schad, Oct. 9, 2013; Robert Jones, Oct. 23, 2013.

[7] Death Penalty Information Center, http://www.deathpenaltyinfo.org/executions-united-states, and databases therein (last visited July 15, 2014).

Indeed, the Supreme Court recognized the crucial nature of openness in justice proceedings:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—*or even the urge for retribution*. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner.

Richmond Newspapers, 448 U.S. 555, 571 (1980) (emphasis added; internal quotations omitted; alteration in original). To that end, publicity is crucial. "Without publicity, all other checks are insufficient." *Id.* (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)).

Furthermore, the history of lethal injection itself, including the history of its development, has also been openly discussed—by the person who invented the original three-drug protocol, as well as by at least two of the physicians who have served as executioners in various states. Lethal injection was devised in 1977 by Jay Chapman, M.D., who was at the time Oklahoma's medical examiner. Josh Sanburn, *Creator of Lethal Injection Method: 'I Don't See Anything That Is More Humane,'* Time, May 15, 2014, *available at* http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/ (last visited July 15, 2014). Dr. Chapman has participated in several media interviews, in which he described how he came to choose the three drugs in the protocol, and in which he discussed

current political, legal, and medical issues surrounding the lethal-injection process. *Id.*; *see also* Elizabeth Cohen, *Lethal injection creator: Maybe it's time to change formula*, CNN.com, undated 2007 article, *available at* http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/ (last visited July 15, 2014).

Two physicians who have participated in executions have also been publicly interviewed. Carlo Musso, M.D., provided extensive comments for an article in the New England Journal of Medicine that discussed the ethics of physician participation in executions. Atul Gawande, *When law and ethics collide—Why physicians participate in Executions*, N. Eng. J. Med., Mar. 26, 2006, *available at* http://www.nejm.org/doi/full/10.1056/NEJMp068042 (last visited July 15, 2014); *see also* Jeremy Kohler, *Diagnosis: Death*, St. Louis Post-Dispatch, Aug. 13, 2006, at B-1 ("I've made my choice to speak out about my participation and to get involved in the debate over the ethical and moral choices we make."). Musso explained that "he has exposed himself to criticism from death-penalty foes, but he has also received letters from medical students commending him for his . . . bravery." *Id.* Dr. Musso specifically told another author "to go ahead and use his name. . . . He didn't want to seem as if he was hiding anything, he said." Gawande, *When law and ethics collide—Why physicians participate in Executions*. And Alan Doerhoff, M.D., who "assisted Missouri, Arizona, and the federal

government" with their lethal-injection procedures, has spoken in detail about his experiences. Assoc. Press, *AP Interview: Doctor behind executions speaks out*, NewsOK, Aug. 15, 2008, *available at* http://newsok.com/ap-interview-doctor-behind-executions-speaks-out/article/3283986 (last visited July 12, 2014). Dr. Doerhoff was specifically identified as the executioner in Arizona, and he performed the execution of Robert Comer in Arizona in May 2007. Dr. Doerhoff's deposition was filed before the district court in *Dickens v. Brewer*, No. 07-1770-NVW (D. Ariz.), ECF 108-2 at Ex. 10.

Indeed, for evidence of local discussion of and by executioners of their qualifications, one need look no further than *West v. Brewer*, No. 11-CV-1409-PHX-NVW (D. Ariz. Dec. 21, 2011), in which the Medical Team Leader—the person in Arizona responsible for mixing the drugs, setting the lines and declaring death—testified in the district court. In addition, two transcripts of depositions of the Medical Team Leader, one from 2008 and one from 2011, were offered into evidence in that same case and are part of the court record. *West*, Test. of Medical Team Leader, Minute Entry, Dec. 6, 2011, ECF No. 101; *see also* Plaintiff's Exhibit List, filed Dec. 7, 2011, ECF No. 104 (Ex. 198 is the Deposition of MTM [Medical Team Member], Oct. 1, 2008, *Dickens v. Brewer*, 07-cv-1770-PHX-NVW, redacted copy; Ex. 265 is the Deposition of Medical Team Leader, Oct. 24, 2011, redacted copy). In those proceedings, there was extensive discussion of the

Medical Team Leader's qualifications, as well as of how the medical team leader decided to conduct executions in Arizona. This is the same type of information that Mr. Wood seeks, which ADC claims has not been historically available to the public.

Additionally, ADC's own actions in 2010 provide another example of the importance of public information and debate. Until 2010, there had been no information prompting a cause for concern about the source of the lethal-injection drugs. The public assumes that state officials follow the law as they act to enforce the law. *See, e.g.*, *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (noting that "we have long presumed that officials of the Executive Branch will adhere to the law as declared by the court").[8] It was not until prisoners and the public became aware that ADC (and departments of corrections in other states) were potentially violating federal law that departments of corrections became defensive about releasing information about the drugs.

[8] The Supreme Court's decision in *Heckler v. Chaney*, 470 U.S 821 (1985), is consistent with the public's (and the courts') earlier assumption that public officials follow the law as it relates to executions. There, prisoners challenged the use of lethal-injection drugs that were "approved by the FDA for the medical purposes stated on their labels, [but that] were not approved for use in human executions." *Id.* at 823. Thus, from the time that *Heckler* was decided until information came to light in 2010, the public had no reason to doubt that states were using drugs approved by the FDA in lethal-injection executions.

ADC erroneously asserts that "recent history of lethal injection executions" demonstrates this information has never been made available by the states, including Arizona. (Answering Br. at 20.) With respect to Arizona, ADC is correct that the issue of the source of lethal-injection drugs did not arise until 2010. But it was ADC's own actions in 2010 that led to this attention.

On September 21, 2010, the Arizona Supreme Court ordered the State of Arizona to report by October 1, 2010, whether it had the appropriate supplies of lethal-injection drugs. Order, *State v. Landrigan*, No. CR-90-0323-AP (Ariz. Sup. Ct. filed Sept. 21, 2010). On October 1, the Arizona Republic reported that Arizona was looking for its drugs, not only in other states, but in other countries as well. Michael Kiefer, *Arizona Obtains Drug Supply for Oct. Execution*, Ariz. Republic, Oct. 1, 2010, http://www.azcentral.com/arizonarepublic/local/articles/2010/10/01/20101001deathdrugs1001.html (last visited July 15, 2014). At that point, a condemned Arizona death-row prisoner informed ADC and the state courts that acquisition from another country would likely violate the federal Controlled Substances Act, as well as the Food, Drug, and Cosmetics Act. (Opening Br. at 32-33.)

Consequently, after these reports, prisoners and the general public sought information about ADC's attempts (and attempts by departments of corrections in other states) to acquire its supply of lethal-injection drugs. *See, e.g.*, Kiefer,

Arizona Obtains Drug Supply for Oct. Execution; Nathan Koppel, *The Sun Shines In Texas on Lethal Injection*, Nov. 19, 2010, http://blogs.wsj.com/law/2010/11/19/the-sun-shines-in-texas-on-lethal-injection/ (last visited July 15, 2014); Stephen Colbert, *Tiny Triumphs – Lethal Drug Shortage*, Dec. 15, 2010, http://thecolbertreport.cc.com/videos/rr8wvk/tiny-triumphs---lethal-drug-shortage (last visited July 15, 2014). And, contrary to ADC's assertion otherwise, other states provided information to the public about the source of lethal-injection drugs.

Contrary to ADC's assertion, Mr. Wood did more than merely "suggest[]" that ADC "did something unlawful or wrong when [it] imported sodium thiopental from Dream Pharma in England." (Answering Br. at 23, n3.) Mr. Wood has demonstrated that ADC acted unlawfully when it imported the drug. (Opening Br. at 32-33 (noting that on May 24, 2011, the Drug Enforcement Administration (DEA) informed the State that ADC obtained its sodium thiopental in violation of the Controlled Substances Act (CSA)).) *See also West v. Brewer*, No. CV–11–1409–PHX–NVW, 2011 WL 6724628 (D.Ariz. Dec. 21, 2011) at *10 (noting that the DEA "informed ADC that its supply of sodium thiopental was imported without compliance with the Controlled Substance Act").

As early as October 1, 2010 death-row prisoners had placed ADC on notice that its importation would likely violate the CSA, as well as the Food, Drug, and Cosmetics Act. (Opening Br. at 32-33); *see also* Mot. for Order Directing the State

to Provide Information and to Abide by its Current Written Lethal Injection Protocol and Memorandum in Support, *State v. Landrigan*, No. CR-90-0323-AP (Ariz. Sup. Ct.), filed Oct. 1, 2010, at 8 n.23 ("If the State obtained the drug or chemical from a source outside the United States, this Court should direct the State to provide all information pertaining to the importation of the drug or chemical (*e.g.* . . . DEA Import Permit Number . . . .); Opp'n to State's Mot. for Warrant of Execution, *State v. Cook*, No. CR-88-0301-AP (Ariz. Sup. Ct.), filed Oct. 22, 2010, at 6-7 ("Moreover, sodium thiopental is a schedule III prescription drug regulated under a complex set of federal laws that address the . . . *importation of controlled substances*. This Court should require the State to demonstrate that it has not obtained sodium thiopental in violation of federal law, before it issues a warrant for an execution in which the State would use that drug.") (citations omitted; emphasis added). Despite these warnings, however, Defendant Ryan continued to file affidavits avowing that ADC "lawfully" acquired its lethal-injection drugs. (Opening Br. at 33 n.19.) These affidavits were proven wrong with the DEA's notice of May 24, 2011. *West*, 2011 WL 6724628, at *10.

ADC was equally on notice that there was cause for concern about using Dream Pharma, the foreign company from which it imported drugs. Approximately four days before ADC placed its order with Dream Pharma, Dr. Sara Turnbow, the senior pharmacist at ADC's pharmacy procurement provider,

warned ADC's then-Deputy Director Charles Flanagan about Dream Pharma and its website (http://www.dreampharma.com/). As explained in *West*, 2011 WL 6724628 at *9, Dream Pharma's website:

> "leaves something to be desired; it is nothing like the pharmaceutical wholesale distribution websites we use here in the United States." She further noted, "It makes me wonder whether Dream Pharma is reputable and where exactly the medication would be coming from" and that the sodium thiopental offered for sale "pretty likely" was not approved by the FDA. She also warned Flanagan that there is a "'gray' market in the pharmaceutical industry and in this particular instance, you need to be sure that the product is actually thiopental and that it is going to work."

Dr. Turnbow's concerns about the lack of FDA approval were subsequently confirmed. *Cook v. Food and Drug Administration*, 733 F.3d 1, 3 (D.C. Cir. 2013) (affirming the district court's judgment "permanently enjoin[ing] the FDA from allowing the importation of apparently misbranded or unapproved thiopental . . . ." but vacating the "portion of the remedial order pertaining to thiopental already in the possession of the states.").

It is against this backdrop of the gray-market pharmaceutical industry, and prior unlawful behavior and misrepresentations by ADC, that Mr. Wood asks for information that will allow him the right as an "individual citizen" to "effectively participate in and contribute to our republican system of self-government." That participation is guaranteed by the First Amendment and "ensures that this constitutionally protected discussion of governmental affairs is an informed one."

Cal. First Amendment Coal., 299 F.3d at 875 (quoting *Globe Newspaper*, 457 U.S. at 604) (internal quotations omitted). How the government conducts itself when it acts to enforce the law (and whether it does so lawfully) is a matter in which "public access plays a significant positive role in the functioning . . . ." *Cal. First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8-9) (internal quotations omitted).

II. Mr. Wood is entitled to a preliminary injunction.

ADC argues that Mr. Wood is not entitled to injunctive relief because he has not raised a plausible First Amendment claim. (Answering Br. at 27-29.) Therefore, according to ADC, he will not suffer irreparable harm and an injunction is not in the public interest. *Id.* ADC also notes that any factual findings of the district court unsupported by the record are "of no consequence" because this is a purely legal issue. (*Id.* at 27.) Mr. Wood agrees this is a legal issue, but he asserts that under the law, his First Amendment right of access has been violated. Therefore, he has already suffered irreparable harm, and this factor weighs in his favor of injunctive relief. Moreover, the public interest also weighs in favor of an injunction because relief will contribute to the benefit of the public at large.

ADC also contends that the balance of equities is against Mr. Wood because of delay and that Mr. Wood could have initiated his request for injunctive relief sooner. However, as Mr. Wood has explained, he filed his request for relief only

days after receiving the mandatory notice pursuant to ADC's execution protocol of the type of drugs that would be used in his scheduled execution. (Opening Br. at 53-54.) Indeed, the district court recognized that Mr. Wood may not have had a justiciable case or controversy if he brought his case sooner. (Hr'g Tr. at 25:21-26:2, ER 42-43.) Mr. Wood attempted to obtain the information he seeks in his injunction sooner, through letter requests to Defendant Ryan. However, his requests were not met. Therefore, after several attempts to obtain the information from ADC, once he received the official notice of the drug protocol that would be used, Mr. Wood quickly filed the request for relief in the courts. Under these circumstances, equity favors Mr. Wood and not ADC.

CONCLUSION

For the reasons set forth in his Opening Brief and this Reply, Mr. Wood respectfully requests that this Court grant him relief.

Respectfully submitted: July 16, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules Appellate Procedure 32(a)(7)(B). It contains 6,830 words, excluding the parts exempt under Federal Rules Appellate Procedure 32(a)(7)(B)(iii). It was prepared in a proportionately spaced typeface (Times New Roman, a Windows system font) of size 14 points using Word 2010.

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CERTIFICATE OF SERVICE

I certify that on July 16, 2014, I transmitted the foregoing Reply Brief using the Appellate CM/ECF system for filing and transmittal of a Notice of Docket Activity to the following ECF registrants:

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