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

DEFENDANTS'-APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35 STATEMENT OF REASONS TO GRANT REHEARING

Pursuant to Rule 35(b)(1) of the Federal Rules of Appellate Procedure, Defendants-Appellees request rehearing en banc. The panel majority enjoins Arizona from conducting a lawful execution without finding a violation of any constitutional right. Specifically, it does not find that Wood, or the public, has a First Amendment right to the information he seeks, but forces Arizona to disclose the information nonetheless, effectively finding a First Amendment right to the information. Also, by finding that Wood has raised a serious question whether the First Amendment grants the public the right to know the source of lethal injection drugs, the specific qualifications of execution team members, and information explaining how a state created its lethal injection protocol, the majority opinion (appendix A) conflicts with Supreme Court decisions unequivocally holding that the First Amendment does not mandate "a right of access to government information or sources of information within the government's control." *Houchins v. KQED*, 438 U.S. 1, 15 (1978) (plurality opinion); *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."); *Los Angeles Police Dep't 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".)

Furthermore, this case involves a question of exceptional importance because it directly conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in *Wellons v. Comm'r, Ga. Dept. of Corr.*, __ F.3d __, 2014 WL 2748316, at *6 (11th Cir. June 17, 2014) (per curiam), which held that the district court correctly denied injunctive relief because a death row inmate did not possess a First Amendment right to the source of lethal injection drugs and the qualifications of the execution team.

Accordingly, Defendants-Appellees seek rehearing by the majority. *See* Rule 40, Fed. R. App. P.; Circuit Rule 40. If the majority declines to reconsider its opinion, Defendants-Appellees respectfully request that the case be heard en banc. *See* Rule 35, Fed. R. App. P.; Circuit Rule 35.

INTRODUCTION

This case presents no question about the lawfulness of Wood's execution. Nor does the panel majority find a First Amendment right to the information Wood seeks. Despite this, the panel majority halts Arizona's lawful execution based solely on "serious questions" as to whether Wood has a First Amendment right to the information he seeks. This is neither legally sound nor fair.

The panel majority reversed the district court's denial of a stay of execution for Plaintiff-Appellant Joseph Wood, concluding that he raised a "serious question" regarding his claim that there is a *public* First Amendment right of access to the source and manufacturer of drugs to be used in his execution, the specific qualifications of execution personnel, and documents and information involved in the State's development of its lethal injection protocol. By staying Wood's execution when he is asserting only the public's right to information, the majority demonstrated that "this litigation is not really about the scope of the First Amendment right of the public to access certain information pertaining to an execution," and has "co-opted [the First Amendment] as the latest tool in this court's ongoing effort to bar the State from lawfully imposing the death penalty." (Bybee, J., dissenting, Appendix B, at 33–34.) Moreover, the majority's novel recognition of a First Amendment right to the this information dramatically expands the right of access to government proceedings in a unprecedented and unprincipled manner that obliterates the Supreme Court's longstanding precedent that the First Amendment does not provide access to government-held information. Accordingly, this Court should accept en banc review and reverse the majority's decision.

ARGUMENT

I. A STAY OF EXECUTION IS AN IMPROPER REMEDY FOR THE PUBLIC HARM ASSERTED.

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). Wood has asserted, and the panel majority found, a public right of access to the information he seeks, and the panel granted Wood a stay of execution. Wood's claim is based on the idea that the information sought is necessary to further public discourse regarding his execution, but "[i]t is not self-evident that the First Amendment right will be irreparably harmed if that information is not disclosed before Wood's execution, but is instead disclosed only if the view espoused by Wood ultimately prevails after the case is fully litigated." (Appendix B, at 33.) Accordingly, a stay of execution is an inappropriate remedy for the public right asserted. "Whatever benefit society derives from being able to discuss who made the drug and who injected it would presumably still inure to the public if that conversation occurred after Wood has been executed." (*Id.*)

II. THE MAJORITY'S DECISION CREATES A NEWFOUND FIRST AMENDMENT RIGHT OF ACCESS TO ANY GOVERNMENT INFORMATION THAT IS RELATED TO AN OPEN PROCEEDING.

The majority's decision creates an unprecedented and newfound First Amendment right of access to any government held information that is "inextricably intertwined" with a public proceeding. But "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED*, 438 U.S. 1, 15 (1978) (plurality opinion); *see also Los Angeles Police Dep't 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."). Instead, "[a]s 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). As Wood concedes, the Freedom of Information Act and its state law equivalents were intended to provide the public with access to information that the constitution does not. (Reply Brief, at 7, 8.) Accordingly, "the Supreme Court "has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." *McBurney v. Young*, __ U.S. __, 133 S. Ct. 1709, 1718 (2013). 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.

Although the First Amendment does not include a broad right of access to governmental information, the First Amendment contains a qualified right of access to governmental *proceedings*. 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.

Relying solely on *California First Amendment Coalition*, the majority concluded that the First Amendment right of access applies to the sources(s), manufacturer(s), National Drug Codes, and lot numbers of the drugs that Defendants intend to use in Wood's execution; information regarding the

qualifications of personnel that will take part in the execution; and information and documents detailing how Defendants developed their two-drug protocol. But that case says nothing about a right to information the government possesses. Indeed, no Supreme Court case has found a right to this information.

California First Amendment Coalition, upon which the majority primarily relies, stands for the proposition that the public enjoys the right to view Wood's 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, 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. The Supreme Court has repeatedly held that the First Amendment does not provide a general right of access to government-held information. *See Houchins*, 438 U.S. at 15; *see also*

Los Angeles Police Dep't, 528 U.S. at 40. This is the default principle that should apply; the right of access to governmental proceedings is an exception, limited to governmental "proceedings and documents filed therein." (Appendix B, at 12, quoting *CBS, Inc.*, 765 F.2d at 825.) The right of access to governmental proceedings and documents filed therein does not extend to every piece of information potentially related to the proceeding, even if the proceeding is open. (Appendix B, at 12.)

This Court's precedent does not provide access to the information Wood seeks because unlike courtroom proceedings, there are no "documents filed therein" with respect to an execution. The access Wood seeks is not to a proceeding or documents filed therein, but to information in the government's possession. In so doing he is attempting to use the First Amendment as a discovery tool or FOIA request for documents related to his execution. *California First Amendment Coalition*, however, says nothing about information in the government's possession, but merely the public's right to view an execution. (Appendix B, at 13.) Neither Wood nor the majority cites a single case finding a First Amendment right of access to the type of information at issue. Instead, the majority's decision creates a circuit split with an opinion issued a month ago by the Eleventh Circuit, concluding that the First Amendment did not provide a right of access to the source of execution drugs

and qualifications of execution participants. *Wellons*, 2014 WL 2748316, at *6. It is also directly inconsistent with a recent opinion of the Georgia Supreme Court. *Owens v. Hill*, 758 S.E.2d 794, 805–06 (Ga. 2014) (holding that First Amendment did not apply to source of execution drugs, and that even if *Press-Enterprise II* test was applicable, there still was no First Amendment right).

Taken to its logical conclusion, the majority's dramatic expansion of the right of access causes the exception to "swallow the default rule," that there is no First Amendment right to information in the government's control. (Appendix B, at 14.) Since the right of access applies to criminal trials, the majority's expansion of that right could conceivably attach to all documents in the prosecutor's possession, jury pool records, jurors' personal information, and jury deliberations. (Appendix B, at 14–15.) It 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. Worse yet, the majority's expansion will have wide-ranging effect on all government agencies and

information related to any policy decisions of the agency. 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, the majority's ruling "strikes out on its own" (Appendix B, at 15), and should be reversed by the en banc court.

III. THE MAJORITY MISAPPLIED THE PRESS-ENTERPRISE II CONSIDERATIONS.

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-Enterprise 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).

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.) This historical evidence, relied on by the majority, "is best characterized as sporadic and anecdotal." (Appendix B, at 17.) Nothing that Wood or the majority cites 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. (Appendix B, citing *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).) 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, qualifications of personnel performing a lethal injection, or the development of lethal injection protocols. Although Wood and the majority cite to Defendants' previous disclosures of similar information, all were pursuant to discovery or court order. (Appendix B, at 19.) Wood thus failed to establish a historical tradition of access to the information he seeks

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). Public access to the drug manufacturer's identity would not play a positive role in the functioning of Arizona's execution protocol because the State has already disclosed the type of drugs, dosages, expiration dates, and fact they are FDA approved. The source is of marginal relevance.

(Appendix B, at 21.) Moreover, as several courts and Judge Bybee observed, disclosing the manufacturer "inhibits the functioning of the process in ways that harm the state, its citizens, and the inmate himself" because when the identities of lethal injection chemical manufacturers become public, it becomes all but impossible for the states to obtain drugs. (Appendix B, at 23–24.) 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. (Opening Brief, 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.

IV. THE MAJORITY APPLIED THE WRONG STANDARD IN GRANTING INJUNCTIVE RELIEF.

In the context of a capital case, the Supreme Court has held that "inmates seeking time to challenge the manner in which the State plans to execute must satisfy all of the requirements for a stay, including *a showing of a significant possibility of success on the merits*." *Hill*, 547 U.S. at 584 (emphasis added). Instead of holding Wood to the burden required by the Supreme Court, the

majority, based on circuit precedent, granted injunctive relief largely because it concluded that Wood raised "serious questions going to the merits." (Exhibit A, at 8, quoting *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012).) This lower burden directly conflicts with *Hill* because it did not require Wood to establish a significant possibility of success on the merits, which he must do to be entitled to a stay of execution. Had the majority applied the correct standard, it would not have reversed the district court because Wood has failed to show any possibility, much less a significant one, of success on the merits of his novel First Amendment claim. Accordingly rehearing or rehearing en banc should be granted in order to apply the correct standard, as set forth by the Supreme Court, to Wood's request for injunctive relief.

CONCLUSION

For the reasons above, Appellees request that this Court accept rehearing en banc and reverse the majority's decision.

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 19, 2014.

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 3,333 words.

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