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' REPLY TO RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Contrary to Wood's view that the majority's decision does not "substantially affect" a rule of national application, the unprecedented expansion of a First Amendment right of public access to government information and novel remedy that the panel majority constructed here raise questions of exceptional importance that require this Court's en banc consideration. Wood ignores the panel majority's unprecedented and dramatic expansion of First Amendment rights by asserting that the decision merely recognizes a serious question going to the merits of his First Amendment claim that does not contradict Supreme Court precedent and has no wider implication than the instant case. (Response, at 1–2.) But he goes on to say that a stay of *his* execution—when all he has asserted is a *public* right—is "necessary because Defendants-Appellees *refuse to comply with Mr. Wood's First Amendment right* of access to specific information regarding Arizona's execution proceedings." (*Id.* at 1. Emphasis added.) With this statement Wood reveals the true scope of the panel majority's decision—by staying Wood's execution unless Arizona reveals the information he seeks, the panel majority effectively grants Wood a First Amendment right it claims it did not recognize. Moreover, Wood's focus on his own First Amendment right when he purports to be vindicating a public right once again emphasizes that this case is not really about whether the public

possesses a First Amendment right to the source of lethal injection drugs, specific qualifications of personnel taking part in an execution, and the specific information a state department of corrections relies on in developing a lethal injection protocol. (Bybee, J., dissenting, at 33.)

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

Wood claims that the majority's grant of injunctive relief "merely preserves the status quo until the case can be heard on the merits." (Response, at 2.) But the status quo would be for the State of Arizona to commence with Wood's lawful execution on July 23, 2014, pursuant to the warrant issued by the Arizona Supreme Court. Rather than preserve this status quo, the panel majority's injunction presents the State with a choice between refraining from executing Wood (or anyone else) until it prevails on the merits in this litigation, or to violate A.R.S. § 13–757(C) and disclose the information required by the majority—to which it purportedly did not find a First Amendment right—"knowing that it might be impossible to obtain the drugs necessary to carry out future lawful executions once the identity of the manufacturer [and, potentially, execution team members] is no longer confidential." (Bybee, J., dissenting, at 34.) This difficult choice also demonstrates the error inherent in Wood's, and the panel majority's, contention that the injunction will have only a "small impact" on the State. (Response, at 3.) Further compounding this error, Wood is

not trying to enjoin the allegedly unlawful act (failing to disclose the information requested), but instead his execution, which he has not challenged as unlawful. The panel majority's remedy bears no relationship to the type of claim Wood has asserted.

Wood is similarly wrong that "this case becomes moot upon Mr. Wood's execution." (Response, at 4.) There are five other plaintiffs who will continue to litigate the merits of the *public* First Amendment right Wood is claiming even after his execution. Wood is asking to enjoin his execution not because he asserts it is unlawful, but so he can continue to litigate the First Amendment claim on the public's behalf. If the purpose of the asserted right is to allow for a "public discussion of governmental affairs" (*id.* at 5), that purpose, even with respect to Wood's specific execution, can be vindicated after the execution if the remaining plaintiffs were to prevail on the merits.

II. WOOD CANNOT DEMONSTRATE A SIGNIFICANT LIKELIHOOD OF SUCCESS ON THE MERITS.

Wood also argues that the panel majority did not err by failing to apply *Hill v. McDonough's*[1] "significant possibility of success on the merits" standard by relying on an opinion rejecting an inmate claim that that test and the "serious question" standard were not "separate and independent" analyses. (Response, at

[1] 547 U.S. 573 (2006).

5–6, citing *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012).) This response, however, fails to address the fact that by failing to apply *Hill's* more stringent standard, the panel majority's decision ignores the Supreme Court's mandate. For the reasons stated here and in the petition for rehearing en banc, Wood cannot meet the Hill standard by showing a "significant possibility of success on the merits."

III. THE PANEL MAJORITY CREATED A NEWFOUND FIRST AMENDMENT RIGHT OF ACCESS TO ANY GOVERNMENT HELD INFORMATION RELATED TO AN OPEN PROCEEDING.

Wood's response relies largely on the unfounded assertion that the panel majority's opinion is of minimal import and "reached issues no further than those specifically raised in this case." (Response, at 6–7.) His position ignores the reality of the majority decision. By expanding this Court's decision in *California First Amendment Coalition*, 299 F.3d 868 (9th Cir. 2002), beyond its holding that an execution must be open for public viewing to include a right of access to any governmental information conceivably related to an execution, the majority decision necessarily renders unconstitutional all state statutes making confidential the information at issue here, renders superfluous the federal Freedom of Information Act and its state-law equivalents, and provides an end-run around those decisions finding that the Eighth and Fourteenth Amendments do not provide grounds for releasing such information. *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).

Moreover, his contention that "courts will continue to be able to evaluate the 'complementary considerations' addressed in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)," to determine whether a First Amendment right attaches to any particular government information that is in any way

connected to a "proceeding," establishes exactly the opposite of what he claims. (Response, at 8–9.) Such an approach would make the courts—rather than Congress and the state legislatures—responsible for determining on a case-by-case basis what government information is required to be public. *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1172 (3d Cir. 1986) ("decisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives"); *cf. Baze v. Rees*, 553 U.S. 35, 51 (2008) (declining to apply a standard that "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions").

Wood speciously asserts that "Defendants-Appellees argue that a plaintiff can only prevail on a matter if the court has previously decided exactly the issue currently before it." (Response, at 10.) But by arguing that "no Supreme Court case has found a right to this information," Defendants-Appellees were highlighting the fact that the panel majority's decision expands the First Amendment right of access far beyond anything previously recognized by this Court or the Supreme Court. Indeed, Wood concedes that the controlling case here is *California First Amendment Coalition*, a case that addressed merely the public right to *view* an execution. The majority opinion stretches that decision

well beyond its logical confines, and in so doing, becomes the first court of record to recognize a public First Amendment right to government held information simply because it is related to capital punishment.

Much of Wood's—and the panel majority's—conclusion that a First Amendment right exists in this case lies on the shaky foundation that the specific information at issue is somehow a "historically open proceeding" and would have a significant positive effect on capital punishment. (Response, at 11–12.) While no one disputes what this Court's holding in *California First Amendment Coalition* that executions themselves have been historically open to public observation, Wood ignores that he has provided no historical evidence of a tradition of openness regarding the type of information he seeks and that the evidence he has provided regarding execution methods is "sporadic and anecdotal." (Bybee, J., dissenting, at 17, 19–20.) And his claim that it is irrelevant whether the government historically provided openness ignores this Court's analysis of whether the government held open executions in *California First Amendment Coalition*. (See *id.* at 17–19, citing *Cal. First Amendment Coal.*, 299 F.3d at 875).)

Nor does Wood address the fact that rather than having a significant positive effect on the relevant process—*i.e.*, capital punishment—public access to the identifying information to which the panel majority found a First

Amendment right would instead hinder Arizona's ability to obtain the drugs needed to perform lawful executions, thus destroying the process altogether. (*Id.* at 23–30.) *See also Press-Enter.*, 478 U.S. at 8–9 ("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.").

IV. THE PANEL MAJORITY'S DECISION DIRECTLY CONFLICTS WITH RECENT DECISIONS BY OTHER COURTS.

Finally, Wood takes the surprising position that the panel majority's decision somehow does not create a circuit split with the Eleventh Circuit, which recently held that the First Amendment does not provide a public right of access to the source of execution drugs and qualifications of execution participants—the exact issue addressed here. See *Wellons v. Comm'r, Ga. Dep't of Corr.*, __ F.3d __, 2014 WL 2748316 at *6 (11th Cir. June 17, 2014). Wood argues that there is no conflict because the Eleventh Circuit "provided no analysis." (Response, at 13.) But there is no getting around the fact that the results of the panel majority's opinion and *Wellons* are in direct conflict. Wood also incorrectly claims that Wellons' decision is inconsistent with *Pell v. Procunier*, 417 U.S. 817 (1974), which held that inmates retain those First Amendment rights not inconsistent with their status as a prisoner or legitimate penological goals. The *Wellons* court's reference to *Pell* simply acknowledged

that because the public did not possess a First Amendment right to the information, the inmate's status as the person to be executed did not grant him any additional right to the information. *See Wellons*, 2014 WL 2748316, at *6. (Bybee, J., dissenting, at 10.)

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 20, 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 1,902 words.

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