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

PLAINTIFF-APPELLANT'S RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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Introduction

"En banc courts are the exception, not the rule." *United States v. Ameriean-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960). Because the majority opinion in this case does not directly conflict with United States Supreme Court law or any other Court of Appeals opinion, rehearing en banc is not appropriate. *See* Fed. R. App. P. 35(a); Ninth Circuit Rule 35-1. Rather, the opinion directly follows the controlling case in this Circuit, as established in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), and reaffirmed by subsequent cases by this Court. In addition, rehearing is not appropriate because the majority opinion does not "substantially affect" a rule of national application, but instead affects only the instant case. *See* Ninth Circuit Rule 35-1.

The majority opinion does no more than recognize that there are serious questions going to the merits of Joseph Wood's First Amendment claim, and that equitable factors favor a conditional injunction. A preliminary injunction has been entered and 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. Moreover, the narrow holding in this case does not contradict Supreme Court precedent, nor does it have broad implications. Instead, it applies the law regarding historically open governmental proceedings

that play a significant role in government functioning to the instant case. Finally, there is no actual circuit split, contrary to Defendants-Appellees' allegation.

Because this Court typically grants rehearing en banc when necessary to secure or maintain uniformity of this Court's decisions, or when a case raises a question of exceptional importance, *see* Fed. R. App. P. 35(a)—neither of which factor is present here—it should deny Defendants-Appellees' petition for rehearing en banc.

I. The conditional preliminary injunction staying Mr. Wood's execution does not conflict with the Supreme Court's or this Court's precedent.

1. The panel majority entered a preliminary injunction conditioned upon the release of relevant and limited information regarding Defendants-Appellees' execution proceedings. The majority's decision merely preserves the status quo until the case can be heard on the merits. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). The majority relied upon the "serious questions" test—a rephrasing of the "likelihood of success on the merits" test, *see Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012)—to determine that Mr. Wood met the requirements for injunctive relief. Contrary to Defendants-Appellees' position, Mr. Wood was "not required to prove his case in full at a preliminary-injunction hearing[.]" *Univ. of Texas*, 451 U.S. at 395 (citations omitted).

The panel majority held that Mr. Wood has shown serious questions going to the merits of his claims. (Slip Op. at 23-24, attached hereto.) The majority also found that irreparable harm exists because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." (Slip Op. at 24) (citing *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (same); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012) (same)). Indeed, even where there is "an alleged deprivation of a constitutional right . . . , most courts hold that no further showing of irreparable injury is necessary." *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (citation omitted).

In considering the equitable reasons for its decision, the majority noted that "Wood's execution would likely not be delayed much, if at all, by giving him the information he seeks[.]" (Slip Op. at 26.) Indeed, as the majority reasoned, "[g]iven the small impact the injunction will have on the state, the importance of First Amendment rights generally, and the critical importance of providing the public with the information it needs to debate the most severe form of punishment that exists, we conclude that the balance of equities tips sharply in Wood's favor." (Slip Op. at 26.) The majority entered an injunction contingent upon Defendants-Appellees' release of specific information about historically open execution

proceedings. (Slip Op. at 28) (noting that once information is released, the injunction shall be discharged and the execution may proceed).

In other words, the majority issued a conditional preliminary injunction that allows Defendants-Appellees to either release the information and go forward with the scheduled execution of Mr. Wood as planned, or decline to release the information and litigate the matter in the ordinary course, as there is still a pending complaint in the district court in this case. (*See* Dist. Ct. ECF No. 25) (striking motion to dismiss and ordering parties to meet and confer).

2. Defendants-Appellees argue that the majority erred by granting a stay of execution because a stay is unnecessary to further public discourse regarding Mr. Wood's execution. (Pet. at 4.) This is wrong. First, this case becomes moot upon Mr. Wood's execution. Mr. Wood is a member of the public who retains his First Amendment rights. (Slip Op. at 9 n.1) (noting that a prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system") (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). He has a right as an "*individual citizen* [to] effectively participate in and contribute to our republican system of self-government[]" (Slip Op. at 9, n.1.) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (emphasis added)), which he cannot exercise if he is executed.

Additionally, Mr. Wood as a member of the public has an individual right to participate in the constitutionally protected public discussion of governmental affairs. To engage in this discussion, he and the public must have information "[t]o determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the 'initial procedures' which are invasive, possibly painful and may give rise to serious complications." (Slip Op. at 10-11) (citing *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002)). The discrete and narrow information that Mr. Wood seeks, which is "closely tied" to his upcoming execution (Slip Op. at 14 n.2), is "arguably necessary for a full understanding" of the execution proceedings (Slip Op. at 13). Providing information about the execution proceeding "creates a sense of fairness that commands more respect for the judicial process from the public." (Slip Op. at 20) (citing *Cal. First Amendment Coal.*, 299 F.3d at 876).

3. The majority's decision issuing a conditional injunction is not in conflict with *Hill v. McDonough*, 547 U.S. 573 (2006). To the extent that Defendants-Appellees suggest that the "serious questions" test is not sufficient because it is separate from the "likelihood of success on the merits test," this Court recently rejected that proposition when a Arizona death-sentenced prisoner made that exact argument: "To the extent Lopez argues that the 'serious questions going

to the merits' consideration is a *separate and independent analysis* from the court's assessment of Lopez's likelihood of success on the merits, Lopez misunderstands our precedent." *Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (emphasis added). The "serious questions" test is simply a variation of the "likelihood of the merits" test based on the claim before the Court. And the majority explained this in its opinion. (Slip Op. at 7-8.) Thus, the majority properly analyzed Mr. Wood's claim under the preliminary-injunction standard and under *Hill*.

II. The majority decision does not conflict with Supreme Court precedent, nor does it create a right of access to "all" governmental information.

1. Mr. Wood has not sought to bar the State from lawfully imposing the death penalty. (Dissenting Op. at 34, attached hereto.) Rather, Mr. Wood asserted that he has an individual First Amendment right of access to specific information about the drugs and choice of drug protocol that Arizona intends to use in his execution, as well as information regarding the qualifications of the executioners.[1]

[1] The limited information Mr. Wood requested is readily available through documents maintained by the Defendants-Appellees. *See* Dep't Order 710.01, §1.2.5.6, ER 081 ("Documentation of IV Team members' qualifications, including training of the team members, shall be maintained by the Department Director or his designee."); Letter from Director Ryan to Dale Baich, dated May 6, 2014, ER 116 (explaining that in choosing midazolam and hydromorphone, Defendants-Appellees "relied on declarations and sworn testimony provided in the Ohio Execution Protocol litigation (Case No 2:11-cv-1016) out of the Southern District of Ohio"); ER 67-72 (previously provided copies of drug labels and packaging, which includes the information that Mr. Wood seeks here).

The majority's opinion reached issues no further than those specifically raised in this case.

The majority considered a narrow factual question based on the existence of a qualified right of access to information and documents regarding historically open government proceedings, and limited its holding "to the information Wood seeks." (Slip Op. at 14 n.2.) The opinion does not deviate from established Supreme Court or Ninth Circuit precedent—precedent that holds that a right of access attaches when a government proceeding has been historically open, and when public access plays a significant positive role in the functioning of the particular process at issue. *Cal. First Amend. Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. 1, 8-9 (1986)). Once the right of access attaches to the proceeding, then citizens must have "reliable information" that allows public scrutiny. *Id.* at 876. Because the opinion does not conflict with the Supreme Court's or this Court's precedent, there is no reason to rehear the case en banc.

2. Moreover, the majority's holding does not "dramatic[ally] expan[d]" the right of access to government information. (Pet. at 10.) Contrary to the argument urged by Defendants-Appellees, the majority does not hold that there is now a constitutional right to have access to all government information. *Cf.*

Houchins v. KQED, 438 U.S. 1 (1978) (plurality).[2] Rather, the issue Mr. Wood raised involves a question as to whether "the First Amendment right, in the context of [] public executions, attaches *to the specific information he requests*." (Slip Op. at 24) (emphasis added).

This case does not, therefore, "obviate the need for federal Freedom of Information Act or state public records laws . . . ." (Pet. at 10.) Instead—and in spite of Defendants-Appellees' straw-man argument—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 particular governmental proceeding has historically been open, and whether public access would contribute a significant positive affect to the functioning of that proceeding.

Nor can the majority's holding "have wide-ranging effect on all government agencies and information related to any policy decisions of the agency." (Pet. at 10-11.) Again, courts will evaluate other claims of access under the *Press-Enterprise* standard. If the courts find that the "government agencies and

[2] To the extent that *Houchins* remains intact, it stands only for the proposition that there is no right of access to *all* governmental information—nothing more, and nothing less. The statement that "[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[]" lost its absolutist meaning two years after the case was decided, when the Court decided *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality). Defendants-Appellees' continued reliance on a case that no longer stands for its original proposition demonstrates the weakness of their position. (*See, e.g.*, Pet. at 5, 8.)

information" at issue do not meet that standard, they will deny a First Amendment right of access.

3. Here, Mr. Wood has asked for information related to historically open government proceedings; he has not asked for information that is covered by Freedom of Information (FOI) statutes.[3] FOI laws are designed to provide access to information related to government proceedings that have not historically been open to the public. That is, FOI laws open *more* documents to public review than those available through the First Amendment. Because the FOI laws address non-constitutionally-protected information, the government is free to exclude categories of information from release.

Moreover, reliance on constitutional protections does not result in trying to use "the First Amendment as a discovery tool or FOIA request for documents related to his execution." (Pet. at 9.) Rather, Mr. Wood has relied on fundamental constitutional protections that attaches to execution proceedings, *Cal. First Amend. Coal.*, 299 F.3d at 877, to ask for *specific information* (*i.e.*, *not* "every piece of

[3] Whether governmental information is *also* available via a FOI request is not relevant to a First Amendment analysis. The government is free to make constitutionally protected information available through administrative processes. What it cannot do is hide constitutionally protected information behind the label of FOI statutes, and then remove that information from FOI access and claim that because the information was available through FOI requests, the information has no constitutional protection.

information potentially related to the proceeding," (Pet. at 9)) that is "inextricably intertwined" with historically open proceedings. (Slip Op. at 13-14.)

By granting Mr. Wood access to the limited information that is related specifically to the scheduled execution proceeding, the panel majority acted consistently with the law of this Court and the Supreme Court.

4. Finally, the fact that "no Supreme Court case has found a right to this information" (Pet. at 8) does not foreclose the argument asserted by Mr. Wood, and the decision by the panel majority. Defendants-Appellees argue that a plaintiff can only prevail on a matter if the court has previously decided exactly the issue currently before it. But courts apply principles of law to specific facts before them; they do not address hypothetical factual scenarios.

For example, in the controlling case here, this Court applied principles of law from Supreme Court precedent to the issue before it: "This appeal concerns the restriction on viewing lethal injection executions imposed on the public and the press by San Quentin Institutional Procedure 770." *Cal. First Amend. Coal.*, 299 F.3d at 870. Applying those principles, the Court explained that "the same functional concerns that drove the [Supreme] Court to recognize the public's right of access to criminal trial proceedings compel us to hold that the public has a First Amendment right to view the condemned as he enters the execution chamber . . . ." *Id.* at 877. The fact that the Court "sa[id] nothing about information in the

government's possession, but merely the public's right to view an execution" (Pet. at 9) is unsurprising; the Court was not asked to evaluate access to information. And the fact that *California First Amendment Coalition* "did not create a constitutional right to know" (Pet. at 8) the specific information that Mr. Wood requests is likewise unsurprising.

Defendants-Appellees' argument that rehearing en banc is appropriate because the Court had not yet decided the precise issue before the panel is illogical. If that were true, then this Court would always need to rehear cases that present issues of first impression.

III. Documents that are inextricably intertwined with historically open execution proceedings directly contribute to the constitutionally protected, informed discussion of governmental affairs.

1. The information requested plays a significant role in the functioning of execution proceedings. The "constitutionally protected 'discussion of governmental affairs' [must be] an *informed* one." *Globe Newspaper*, 457 U.S. at 605 (emphasis added). In granting the conditional injunction, the majority recognized that "more information about the drugs used in lethal injections can help an alert public make better informed decisions about the changing standards of decency in this country surrounding lethal injection." (Slip Op. at 22.) Indeed, knowing both information about the drugs to be used and the qualifications of the individuals performing the executions will allow public to discern whether the

State is using safe and reliable drug manufacturers, and will give the public more confidence that executions will be administered safely and pursuant to certain standards. (*Id.*) The majority's well-reasoned and limited holding ensures that the public will receive this information before the State executes Mr. Wood.

2. Neither *Richmond Newpapers*, nor the Supreme Court jurisprudence flowing from it, requires that a history of openness must be solely of the government's own making. (Pet. at 12.) 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*, 478 U.S. at 8; *Richmond Newspapers*, 488 U.S. at 565-572. These analyses, which 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 has the Court held 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 to historically open proceedings. The panel majority's reliance on the historical openness of the type of proceedings and related information requested here is consistent with Supreme Court precedent.

IV. This case is not in conflict with the Eleventh Circuit.

The majority opinion follows the controlling case in this Circuit, and it is not in conflict with *Wellons v. Commissioner, Georgia Department of Corrrections*, 2014 WL 2748316 (11th Cir. June 17, 2014). In *Wellons*, the Eleventh Circuit rejected the prisoner's claim that the First Amendment provides him with a right of access to information about the drugs used in executions. In denying the claim, the court provided no analysis supporting its conclusion that the First Amendment does not permit the right of *individual* access in executions. *Id* at *6. As such, there is no actual circuit conflict between this case and *Wellons*. What is more, the conclusion reached in *Wellons* is inconsistent with Supreme Court law. *See Pell*, 417 U.S. at 822 (recognizing that a prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"); *Globe Newspaper Co.*, 457 U.S. at 604 (explaining that the purpose of the First Amendment's right of access is "to ensure that *the individual citizen* can effectively participate in and contribute to our republican system of self-government") (emphasis added). The Eleventh Circuit's cursory conclusion in *Wellons* provides no reason for the Court to rehear this case en banc.

Conclusion

The issue decided by the panel in this case is narrow. It is soundly based on this Court's precedent, which has been reaffirmed over time. It requires the State of Arizona to comply with the First Amendment and provide Mr. Wood with limited information about the execution proceeding. Nothing more. Review of this case is not necessary to maintain uniformity in this Court's decisions, nor to address a case of exceptional importance. Fed. R. App. P. 35(a). For these reasons, the petition for rehearing should be denied.

Respectfully submitted: July 20, 2014.

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CERTIFICATE OF SERVICE

I certify that on July 20, 2014, I transmitted the foregoing Response in Opposition to Petition for Rehearing En Banc 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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