IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

CHARLES L. RYAN, Director of the Arizona Department of Corrections, et al., Petitioners, v. JOSEPH RUDOLPH WOOD, III, Respondent.	(Capital Case) EXECUTION SCHEDULED FOR JULY 23, 2014, 10:00 A.M. (M.S.T.)

APPLICATION TO VACATE STAY OF EXECUTION

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In a 15–11 vote, the Ninth Circuit declined en banc to lift a stay of an execution scheduled for Wednesday, July 23, 2014, based on a divided Ninth Circuit panel's newfound concept that the public, *not the inmate here*, has a generalized First Amendment right to information in the government's possession regarding the State's supplier of lethal drugs and its execution personnel. The panel majority's novel view—a view rejected by 11 circuit judges dissenting from the denial of en banc review—is an unprecedented expansion of anything this Court has said about the public's First Amendment right of access to governmental proceedings, and is in direct conflict with a recent decision of the Eleventh Circuit, *Wellons v. Comm'r, Ga. Dep't of Corr.*, No. 14–12663–P, 2014 WL 2748316, __ F.3d __ (11th Cir. June 17, 2014), and a recent decision of the Georgia Supreme Court, *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014). As the 11 dissenting judges found, the panel's opinion "is contrary to Supreme Court precedent, is not sound, and creates a circuit split." (Callahan, J., dissenting, Appendix G, at 1.) The dissenting judges further noted that the panel majority's opinion's attempt to limit information obtainable under this newly recognized right—to information "intrinsically intertwined" with the right—"are amorphous at best, and if not vacated, will be invoked every time a state sets an execution date." (*Id.*)

Moreover, the stay imposed by the panel majority is equally unprecedented. Wood has no more alleged right to the information he seeks than does the general

public. As the panel dissent explained, "It is unthinkable that if anyone else had brought this suit we would stop a lawful execution until the State yielded the information." (Bybee, J., dissenting, Appendix B, at 1–2.) Wood is not trying to enjoin the allegedly unlawful act; instead he seeks to enjoin his execution, which does not challenge as unlawful, so that he can litigate a claim (along with 5 other plaintiffs) on the public's behalf. There is a "mismatch" between the remedy—a stay of a lawful execution—and Wood's assertion of the public's First Amendment right. (Callahan, J., dissenting from denial of en banc review, Appendix G.)

Finally, as the en banc dissent observed, given the panel majority's opinion, "a defendant facing the death penalty never need show any likelihood of success on a First Amendment claim in order to obtain an injunction because the nature of his sentence inherently tips the balance of hardship in his favor." (Callahan, J., dissenting, Appendix G, at 4.)

The stay of execution and opinion below should be vacated.

I. PROCEDURAL HISTORY.

Less than 1 month before his scheduled execution, Joseph Wood, along with five other Arizona death row inmates, filed a Complaint asserting three claims under 42 U.S.C. § 1983, including the claim at issue here: that the State's denial of the source(s) and manufacturer(s), National Drug Codes, and lot numbers of the lethal injection drugs to be used in their executions; information detailing the

medical, professional, and controlled-substances qualifications of execution personnel; and documentation detailing the manner by which the State developed its lethal injection protocol violated the public's First Amendment right of access to governmental proceedings. (Dist. Ct. Order, Appendix C, at 4–5.) Several days later, Wood filed his motion for a preliminary injunction enjoining his execution based on this asserted public First Amendment right. (*Id.* at 5.) The district court denied injunctive relief, finding that Wood's claim of a First Amendment right of access to governmental proceedings was not likely to succeed on the merits. (*Id.* at 15.)

Based solely on another Ninth Circuit opinion holding that the public enjoys a First Amendment right to *view* executions from the moment the condemned enters the execution chamber, *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), a divided panel of the Ninth Circuit concluded that Wood presented "serious questions" going to the merits of his First Amendment claim and that the balance of hardships tipped "sharply" in his favor, and reversed the district court's denial of preliminary injunctive relief. (Panel Majority Opinion, Appendix A.) Although the panel majority specifically disclaimed that it found a First Amendment right to the sought-after information, its conditional preliminary injunction stays Wood's execution until the State provides Wood with the name and

provenance of the drugs to be used in his execution and qualifications of the medical personnel. (*Id.* at 28.)

Judge Bybee dissented from the majority, concluding that the panel majority's "novel" remedy of a stay of Wood's execution was inappropriate since Wood did not challenge the lawfulness of his execution, he asserted a generalized public First Amendment right, and he could demonstrate no likelihood of success on the merits of his claim. (Bybee, J., dissenting, Appendix B.) Although a majority of the Ninth Circuit's non-recused active judges voted against rehearing en banc, 11 Circuit Judges dissented. (Kozinski, C.J., dissenting from denial of en banc review, Appendix F; Callahan, J., dissenting from denial of en banc review, Appendix G.)

II. ARGUMENTS.

A. *A stay of Wood's execution is an inappropriate remedy for the public harm alleged.*

"A preliminary injunction is an 'extraordinary and drastic remedy.'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). A petitioner seeking a preliminary injunction must demonstrate: (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip in his favor," *and* (4) "that an injunction is in the public interest." *Winter v. Natural Res. Def. Counsel*, 555 U.S.

7, 20 (2008). This Court has emphasized that, like other stay applicants, an inmate seeking a stay of execution must satisfy all of these requirements, "including a showing of a *significant possibility of success on the merits*." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (emphasis added). Further, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

The Ninth Circuit panel majority effectively found a public right of access to the information Wood seeks, and 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." (Bybee, J., dissenting, Appendix B, at 33.) Although the purpose of a preliminary injunction is to preserve the status quo until the case can proceed to the merits, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), 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)[1] and disclose the information required by the majority—to which the majority purportedly did not actually 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, Appendix B, at 34.)

Further compounding this error, Wood is not trying to enjoin the allegedly unlawful act (failure to disclose the requested information), but instead his execution, which he does not challenge as unlawful. The panel majority's remedy bears no relationship to the type of claim Wood has asserted and "is unrelated to the defendant's innocence or the propriety of the sentence." (Callahan, J., dissenting, Appendix G, at 5.) In fact, there are five other plaintiffs who will continue to litigate the merits of the public First Amendment right Wood is claiming. Thus, the fact that Wood will be executed if he does not obtain injunctive relief does not mean that the *public's* purported First Amendment interest is "likely to suffer irreparable harm in the absence of preliminary relief." *See Winter*, 555 U.S. at 20. Although Wood concedes that, if there were a First

[1] A.R.S. § 13–757(C) states: "The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure" under Arizona's open records laws.

Amendment right of access, he would have no more right to the information than any other member of the public, "[i]t is unthinkable that if anyone else had brought this suit [the court] would stop a lawful execution until the State yielded the information." (Bybee, J., dissenting, Appendix B, at 1–2.) Thus, "[w]hatever 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.* at 33.)

Furthermore, the Ninth Circuit's novel remedy raises questions regarding the limits of a federal court's equitable power to extend to constitutional claims unrelated to an execution. If a death row inmate were to file an Eighth Amendment claim challenging prison conditions a week before his execution, would he be entitled to a stay of execution to litigate the claim if a court found he had a likelihood of success on the merits? The absurdity of such a result is precisely what has occurred here: the Ninth Circuit has enjoined a State from carrying out a lawful execution so that the inmate can pursue litigation unrelated to the lawfulness of the execution, thereby ignoring "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584.

When presented with a similar situation over a decade ago, the Seventh Circuit found the request for injunctive relief "frivolous." *Graham*, 255 F.3d at

907. There, the plaintiffs asked for an injunction against Timothy McVeigh's execution because they asserted that he had evidence that would assist them in prosecuting a pending civil lawsuit. *Id.* at 906. The court concluded that "[n]o rule of federal law precludes the government from carrying out judgments entered in criminal cases just because those judgments may have adverse effects on third parties." *Id.* at 907. Similarly, here, nothing precludes the State from carrying out an unchallenged, lawful execution simply because the condemned has brought a claim asserting a right of the general public.

The novel remedy fashioned by the Ninth Circuit makes clear 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." (Bybee, J., dissenting, Appendix B, at 33.) Instead, Wood is trying to obtain details about his execution presumably so that he can challenge the execution using whatever information he can obtain. But by so doing, he makes an end run around the standard that an inmate must meet to be entitled to such information under the Eighth and Fourteenth Amendments. *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). As Judge Kozinski observed in his, "If Baze could not get a stay of execution under the Eighth Amendment, *see Baze v. Rees*, 553 U.S. 35, 62–63 (2008), Wood certainly is not entitled to one under the First." (Kozinski, C.J., dissenting, Appendix F, at 1.)

Accordingly, a stay of execution is an inappropriate remedy for the public First Amendment right asserted.

. . .

B. *The Ninth Circuit's decision effectively creates a newfound First Amendment right of access to any government information that is related to an open proceeding.*

Wood cannot show a likelihood of success on the merits to warrant preliminary injunctive relief because the Ninth Circuit's decision erroneously creates an unprecedented and newfound First Amendment right of access to any government held information that is "inextricably intertwined" with a public proceeding. (See Panel Majority Opinion, Appendix A, at 13–14.) "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *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); *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."). 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, it contains a qualified right of access to governmental *proceedings*. For example, this Court has 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 a 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).

The Ninth Circuit 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).

The Ninth Circuit 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 Ninth Circuit panel majority in this case concluded that the First Amendment right of access applies to the source(s) and manufacturer(s) of the drugs that Arizona intends to use in Wood's execution and information regarding the qualifications of personnel that will take part in the execution. But *California First Amendment Coalition* says

nothing about a right to information the government possesses. This Court has never found a right to this information, and at least two courts have found that such a right does not exist. *Wellons*, 2014 WL 2748316, at *6; *Owens*, 758 S.E.2d at 805–06.

California First Amendment Coalition, upon which the panel majority primarily relies, stands for the proposition that the public enjoys the right to view Wood's execution and nothing more. In that case, the Ninth Circuit recognized no right to any documents or governmental information related to the lethal injection execution. *See Cal. First Amendment Coal.*, 299 F.3d at 877 ("We therefore hold that the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber . . . ."). The case certainly did not create a constitutional right to know the drug manufacturer or other information about the source of the drugs or information about personnel taking part in the execution process.

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. This 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." (Bybee, J., dissenting, 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. (*Id.*)

This Court's right-of-access jurisprudence 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 seeking this information 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 addresses the public's right to view an execution. (Bybee, J., dissenting, Appendix B, at 13.) Neither Wood nor the panel majority cites a single case finding a First Amendment right of access to the type of information at issue. Instead, the Ninth Circuit'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*, 758 S.E.2d at 805–06 (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. (Bybee, J., dissenting, 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. (*Id.* at 14–15.) It would render superfluous the federal Freedom of Information Act and state open 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-Enterprise 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, Inc. v. Chester*, 797 F.2d 1164, 1172 (3d Cir. 1986). Worse yet, the panel majority's expansion of the right of access will have wide-ranging effect on all government agencies and information related to any policy decisions of the agency. Such an approach is foreclosed by this Court's clear 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" (Bybee, J., dissenting, Appendix B, at 15), and should be reversed by this Court.

C. *The panel majority misapplied this Court's 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 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) (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. (Opening Brief at 22–30.) This historical evidence, relied on by the panel majority, "is best characterized as sporadic and anecdotal." (Bybee, J., dissenting, Appendix B, at 17.) Nothing that Wood or the panel majority cites establishes that the *government* historically provided open access to the identities of a particular execution method's manufacturer. Indeed, several of Wood's 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. (Bybee, J., dissenting, 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' or Edward Snowden's disclosure of classified government documents surely does not establish a public right of access under the First Amendment to similar information in the government'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, 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 panel majority cite to Arizona's previous disclosures of similar information, all were pursuant to discovery or court order. (Bybee, J., dissenting, 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. II*, 478 U.S. at 8–9). In finding this newfound right of access to information regarding the source of drugs to be used in Wood's execution, the panel majority states that this information is necessary for the public to "meaningfully evaluate [an] execution protocol cloaked in secrecy." (Panel Majority Opinion, Appendix A, at 27.) But Arizona's protocol is anything but cloaked in secrecy. The Arizona Department of Corrections publishes its protocol on its website. http://azcorrections.gov/Policies

/700/0710.pdf. The public thus has access to all of the provisions of the protocol which include: the names of the drugs to be used, the amounts of the drugs to be delivered in the execution, the manner in which the drugs will be administered, and the qualifications of persons tasked with placing intravenous lines for the administration of the drugs. *Id.* (Appendix E, at ER 81, 102–06.) In addition, viewing members of the public have access to the execution from the point where the IV team enters the room to place the IV lines in the inmate until the pronouncement of death. (*Id.* at ER 96, 104.) Arizona provides all the information necessary to further any public debate regarding its protocol.

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 the fact they are FDA approved. The source is, at best, of marginal relevance. (Callahan J., dissenting, Appendix G, at 3; Bybee, J., dissenting, 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. (*Id.* at 23–24.) Even Wood concedes that public unveiling of previous

lethal drug manufacturers has resulted in those manufacturers refusing to provide their products for use 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, this 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.

D. *The panel majority applied the wrong standard in granting injunctive relief.*

In the context of a capital case, this Court has held that inmates seeking a stay of execution "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 this 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." Significantly, by failing to apply *Hill's* higher standard the panel majority "suggests that a defendant facing the

death penalty never need show any likelihood of success on a First Amendment claim in order to obtain an injunction because the nature of his sentence inherently tips the balance of hardship in his favor." (Callahan, J., dissenting, Appendix G, at 4.)

"[A]bsent firmer guidance from the Supreme Court, it will be almost impossible for any state in the Ninth Circuit to actually carry out a constitutionally valid capital sentence." (Callahan, J., dissenting, Appendix G, at 5.)

CONCLUSION

Petitioners respectfully requests that this Court vacate the stay of execution and vacate the opinion entered by the court below.

DATED this 21st day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, I electronically mailed this Application to Vacate Stay to the U.S. Supreme Court to be lodged for filing.

Copies of this Motion were electronically mailed this date to:

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