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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Guardian News & Media LLC, et al.,

No. CV-14-02363-PHX-GMS

10

Plaintiffs,

ORDER

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v.

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Charles L. Ryan, et al.,

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Defendant.

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Pending before the Court are the Motion for Summary Judgment by Plaintiffs Arizona Republic, Associated Press, Guardian News & Media LLC, KPHO Broadcasting Corporation, KPNX-TV Channel 12, and Star Publishing Company (Doc. 43), and the Motion for Summary Judgment by Defendant Charles L. Ryan (Doc. 45). For the following reasons, the Court grants in part and denies in part Plaintiffs’ motion, and denies Defendant’s motion.

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BACKGROUND

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This case concerns the extent to which the press and the public are entitled to view executions in Arizona and to obtain information relating to those executions. Plaintiffs are members of the news media. They contend that the press and the public have a First Amendment right to view aspects of executions that are not currently open to public view pursuant to state policies. (Doc. 1 at 11.) They also contend that the press and the public have a First Amendment right to certain information about executions—specifically, the “source, composition, and quality” of the drugs used and the “qualifications” of those involved in the execution. (*Id.*) Plaintiffs seek a declaratory judgment that these rights

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1 exist and an injunction prohibiting the State from violating them. (*Id.* at 11–12.)

2 Executions in Arizona are conducted pursuant to Arizona Revised Statutes
3 (“A.R.S.”) §§ 13-757 and 13-758, and Arizona Department of Corrections (“ADC”) Department Order 710, (Doc. 52-1 at 1, PDF 7). Department Order 710 is a public
4 document; the most recent version, effective as of October 23, 2015, is available online at
5 https://corrections.az.gov/sites/default/files/policies/700/0710_-_effective_10-23-15.pdf.
6 Various provisions in the state statute and in Department Order 710 relate to the
7 information to which Plaintiffs assert a right of access.
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9 The parties have filed cross-motions for summary judgment on whether, and the
10 extent to which, the First Amendment grants the access Plaintiffs seek and overrides any
11 state statutory provisions to the contrary.

12 DISCUSSION

13 I. Legal Standard

14 The Court grants summary judgment when the movant “shows that there is no
15 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
16 of law.” Fed. R. Civ. P. 56(a). In making this determination, the Court views the
17 evidence “in a light most favorable to the non-moving party.” *Warren v. City of*
18 *Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). Where the parties have filed cross-motions
19 for summary judgment, the Court “evaluate[s] each motion independently, ‘giving the
20 nonmoving party in each instance the benefit of all reasonable inferences.’” *Lenz v.*
21 *Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2015) (quoting *ACLU v. City of*
22 *Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003)). Even when both parties assert that
23 there is no uncontested issue of material fact and seek summary judgment, the Court must
24 make its own determination whether a dispute exists and may deny summary judgment to
25 both if appropriate. *See United States v. Fred A. Arnold, Inc.*, 575 F.2d 605, 606 (9th Cir.
26 1978) (per curiam). “[A] party seeking summary judgment always bears the initial
27 responsibility of informing the district court of the basis for its motion, and identifying
28 those portions of [the record] which it believes demonstrate the absence of a genuine

1 issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

2 Although “[t]he evidence of [the non-moving party] is to be believed, and all
3 justifiable inferences are to be drawn in [its] favor,” the non-moving party “must do more
4 than simply show that there is some metaphysical doubt as to the material facts.”
5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The
6 nonmoving party cannot avoid summary judgment by relying solely on conclusory
7 allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
8 “A party asserting that a fact cannot be or is genuinely disputed must support the
9 assertion by: (A) citing to particular parts of materials in the record . . . or other materials;
10 or (B) showing that the materials cited do not establish the absence or presence of a
11 genuine dispute, or that an adverse party cannot produce admissible evidence to support
12 the fact.” Fed. R. Civ. P. 56(c). Substantive law determines which facts are material, and
13 “[o]nly disputes over facts that might affect the outcome of the suit under the governing
14 law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby,*
15 *Inc.*, 477 U.S. 242, 248 (1986). “A fact issue is genuine ‘if the evidence is such that a
16 reasonable jury could return a verdict for the nonmoving party.’” *Villiarimo v. Aloha*
17 *Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at
18 248). Thus, the nonmoving party must show that the genuine factual issues “can be
19 resolved only by a finder of fact because they may reasonably be resolved in favor of
20 either party.” *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
21 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

22 **II. Analysis**

23 Plaintiffs assert the right to view the totality of the execution. Plaintiffs also assert
24 a right to more information than can be gathered from simply being present and
25 witnessing the totality of the execution. Specifically, they seek (1) information about the
26 “composition” and “quality” of the lethal execution drugs, (2) information about the
27 qualifications of those who perform the execution, and (3) the identity of the source or
28 sources of the lethal injection drugs.

1 Plaintiffs claim that each of these asserted rights derives from the First
2 Amendment right of access. Beginning in the 1980s, in a series of cases dealing with
3 criminal proceedings, the Supreme Court recognized that “[f]ree speech carries with it
4 some freedom to listen.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576
5 (1980). “In guaranteeing freedoms such as those of speech and the press, the First
6 Amendment can be read as protecting the right of everyone to *attend* trials so as to give
7 meaning to those explicit guarantees.” *Id.* (emphasis added). Though this “right of
8 access” was initially recognized in the context of criminal trials, the Supreme Court
9 described it in language that could apply to other government proceedings. *See, e.g.,*
10 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982) (describing the
11 right of access as “protect[ing] the free discussion of governmental affairs” and
12 “ensur[ing] that this constitutionally protected discussion of governmental affairs is an
13 informed one”).

14 To determine whether there is a First Amendment right of access to a government
15 proceeding, courts consider two “complementary considerations”: (1) whether the
16 proceeding has “historically been open to the press and general public” and (2) “whether
17 public access plays a significant positive role in the functioning of the particular process
18 in question.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (“*Press-*
19 *Enterprise II*”). “These considerations of experience and logic are, of course, related, for
20 history and experience shape the functioning of governmental processes.” *Id.* at 9.
21 Where a government proceeding passes the “tests of experience and logic,” there arises
22 “a qualified First Amendment right of public access.” *Id.* But even then, the right of
23 access “is not absolute.” *Id.* The government may still close a proceeding to which a
24 right of access attaches by showing a sufficient justification to do so. *Id.* at 13–14. The
25 burden the government must meet to justify closure depends on the type of proceeding.
26 *Compare Globe Newspaper*, 457 U.S. at 606–07 (“Where . . . the State attempts to deny
27 the right of access in order to inhibit the disclosure of sensitive information, it must be
28 shown that the denial is necessitated by a compelling governmental interest, and is

1 narrowly tailored to serve that interest.”), with *Cal. First Amendment Coal. v. Woodford*,
2 299 F.3d 868, 877 (9th Cir. 2002) (applying a more deferential standard to closure of
3 executions). Regardless of the standard applied, “*Press-Enterprise II* balances the vital
4 public interest in preserving the media’s ability to monitor government activities against
5 the government’s need to impose restrictions if necessary for safety or other legitimate
6 reasons.” *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). “Under this framework, a
7 court cannot rubber-stamp an access restriction simply because the government says it is
8 necessary.” *Id.* “[C]ourts have a duty to conduct a thorough and searching review of any
9 attempt to restrict public access.” *Id.*

10 **A. The Right to View the Totality of the Execution Proceeding**

11 Here, Plaintiffs seek the right “to see and hear the totality of an execution,
12 including whether the State is administering additional doses of lethal injection drugs.”
13 (Doc. 1 at 11.) For example, during the execution of Joseph R. Wood on July 23, 2014,
14 witnesses could see Wood but could not see the execution team administering additional
15 doses of the lethal injection drugs after the initial dose failed to induce death. Witnesses
16 could “watch and listen via closed-circuit television as two IV lines were inserted into
17 Mr. Wood inside the death chamber,” but then “[a]fter the IVs were set, the closed-circuit
18 television was turned off, the curtains to the chamber were opened, and the audio
19 allowing witnesses to hear inside the chamber were shut off.” (Galvan Decl., Doc. 47-1
20 at 174, ¶¶ 3–5.) “For the remainder of the execution, the views of the observers were
21 restricted to line-of-sight observation of Wood from a distance. Observers could not see
22 where the drugs were mixed and injected into the IV lines.” (*Id.* at 174 ¶ 6.) The
23 observers were unable to view execution team members administering the additional
24 doses and were therefore “completely unaware while observing the execution that
25 additional doses were being administered.” (*Id.* at 175 ¶ 15.)

26 Though Department Order 710 does not fully describe the layout of the execution
27 complex, it identifies three rooms relevant to the Court’s analysis. The “execution room”
28 is where the defendant is secured to a gurney, connected to IVs, and, eventually,

1 executed. (Doc. 52-1 at PDF 35, Dep’t Order 710-D(D).) The “chemical room” is where
2 the “Special Operations Team” prepares the drugs and syringes. (*Id.* at PDF 31, Dep’t
3 Order 710-D(B).) Eventually, the drugs are injected into the IV lines from this room as
4 well. (*Id.* at PDF 37, Dep’t Order 710-D(F)(3).) Witnesses are located in the “witness
5 room.” (*Id.* at PDF 36, Dep’t Order 710-D(D)(10).) While members of the “IV Team,”
6 in the execution room, place the IV catheters, witnesses in the witness room observe the
7 process via audio and video feeds. (*Id.*) The audio feed from the execution room is
8 turned off prior to the administration of lethal chemicals. (*Id.*) At some point after the
9 IVs are placed, witnesses are able to view the defendant directly through a window
10 between the execution room and the witness room. The curtains on this window may be
11 closed, however, at the direction of the Director of ADC. (*Id.* at PDF 37, Dep’t Order
12 710-D(F)(5).) At no point do witnesses have audio or visual information about what is
13 happening in the chemical room.

14 A.R.S. § 13-758 regulates who may be present at executions. Plaintiffs do not
15 challenge any specific provision of that statute, but rather some of the state practices
16 which delineate what witnesses may and may not see. Plaintiffs note, for example, that
17 they are unable “to see and hear the totality of an execution, including whether the State
18 is administering additional doses of lethal injection drugs.” (Doc. 1 at 11.) According to
19 Plaintiffs, “ADC violates this access right by excluding the administration of drugs from
20 observation, leaving witnesses unaware of the administration of doses beyond those
21 called for by its protocol.” (Doc. 43 at 7.) Plaintiffs also challenge a provision of
22 Department Order 710 that authorizes the ADC Director to “direct the curtains to the
23 witness viewing room be closed, and, if necessary, for witnesses to be removed from the
24 facility.” (Doc. 52-1 at PDF 37, Dep’t Order 710-D(F)(5).)

25 In *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir.
26 2002), the Ninth Circuit addressed a California execution protocol that prevented
27 witnesses from observing the execution until after the prisoner had been strapped down
28 and the IV lines inserted. *Id.* at 871. The Ninth Circuit applied the *Press-Enterprise II*

1 test in determining that the public and the press have a right of access to executions. The
2 Court concluded: (1) “[t]he public and press historically have been allowed to watch the
3 condemned inmate enter the execution place, be attached to the execution device and then
4 die,” and (2) “[i]ndependent public scrutiny—made possible by the public and media
5 witnesses to an execution—plays a significant role in the proper functioning of capital
6 punishment.” *Id.* at 876. The Court determined that “[b]ecause there is both an historical
7 tradition—beginning with entirely public executions and continuing with the practice of
8 inviting official witnesses—and a functional importance of public access to executions,
9 both prongs of the [experience and logic test] have been satisfied.” *Id.* at 877. In scope,
10 this right is the right to view the entirety of a criminal execution, “from the moment the
11 condemned is escorted into the execution chamber, including those initial procedures that
12 are inextricably intertwined with the process of putting the condemned inmate to death.”
13 *Id.* The same logic applies with equal force to the administration (or subsequent
14 administrations) of doses of the lethal injection drugs when and if such additional
15 injections are deemed necessary.

16 The Ninth Circuit also determined that the standard for determining whether the
17 right of access to view executions can be overcome is the “unitary, deferential standard
18 for reviewing *prisoners’* constitutional claims,” even though restricting the public’s right
19 of access to executions affects “the rights of outsiders rather than prisoners.” *Id.* at 877–
20 78 (“Because the executions at issue here take place within prison walls . . . and are
21 staffed by the same personnel who participate in the daily operations of the prison, our
22 level of scrutiny must be guided by the line of cases addressing constitutional challenges
23 to prison regulations, rather than by those governing access to governmental
24 proceedings.”). This “hands-off approach” is applied to issues of prison administration
25 because the nature of such problems is “peculiarly within the province of the legislative
26 and executive branches of government.” *Id.* (quoting *Procunier v. Martinez*, 416 U.S.
27 396, 404–05 (1974)). In applying this deferential standard, a court must determine
28 “whether the regulation ‘is reasonably related to legitimate penological objectives, or

1 whether it represents an exaggerated response to those concerns.” *Id.* at 878 (quoting
2 *Turner v. Safley*, 482 U.S. 78, 87 (1987)). However, the Ninth Circuit determined that
3 because a restriction on the public’s right to view executions is “broad in nature,” there
4 must be a “closer fit” than usual between the restriction and the state’s interest in the
5 security of those involved in executions. *Id.* at 879.

6 Plaintiffs identify two ways in which Department Order 710 falls short of allowing
7 the press and the public the access to which they are entitled. The first is ADC’s failure
8 to provide a means of viewing the administration of lethal injection drugs, including the
9 administration of additional or subsequent doses of the drug. Defendant has not
10 established that the failure to provide this access “is reasonably related to legitimate
11 penological objectives” and does not “represent[] an exaggerated response to those
12 concerns.” *Turner*, 482 U.S. at 87. Defendant’s assertion that “physical and logistical
13 difficulties exist, given that the drugs are administered into the IV lines in a separate
14 room,” (Doc. 53 at 10), carries no weight in the absence of any indication of what those
15 difficulties might be, particularly since closed-circuit televisions are already used to allow
16 witnesses to view the insertion of the IV lines. *See* Fed. R. Civ. P. 56(c) (“A party
17 asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to
18 particular parts of the record . . . or (B) showing that the materials cited do not establish
19 the presence of a genuine dispute”). Defendant mentions ADC’s interest in
20 “protecting the anonymity of personnel in the room where the drugs are administered,”
21 (Doc. 53 at 10), but this assertion fails factually and legally. If ADC can maintain the
22 anonymity of its personnel while focusing a camera on the IV placement site, as provided
23 for in Department Order 710-D(D)(10), there is no reason it cannot likewise focus a
24 camera on the area in the chemical room in which syringes are injected into the IV line.
25 Alternatively, the Ninth Circuit has held that “[t]he use of surgical garb is a practical
26 alternative to restricting access to witness lethal injection executions in order to conceal
27 the identity of such execution staff should security concerns warrant such concealment.”
28 *Associated Press v. Otter*, 682 F.3d 821, 825 (9th Cir. 2012) (quoting *Cal. First*

1 *Amendment Coal.*, 299 F.3d at 884). Indeed, Department Order 710-D(G)(4) already
2 calls for the IV Team Leader to be “dressed in a manner to preserve their anonymity.”
3 By failing to provide for the contemporaneous awareness¹ of the administration of drugs,
4 ADC violates Plaintiffs’ right of access, without a legitimate penological purpose for
5 doing so.

6 The second problem is the Director’s discretionary authority to “direct the curtains
7 to the witness viewing room be closed, and, if necessary, for witnesses to be removed
8 from the facility.” (Doc. 52-1 at PDF 37, Dep’t Order 710-D(F)(5).) Of course, the right
9 to view executions may be burdened if the state can show legitimate penological reasons
10 for ordering a closing of a particular execution, so long as there is a “close fit” between
11 the means of closing the execution and the ends sought. But Department Order 710 does
12 not cabin the Director’s authority in this or any other way. It may be, as Defendant
13 asserted at oral argument, that the Director would only exercise this authority in a
14 situation where legitimate penological objectives called for it. But, a court should not
15 “uphold an unconstitutional statute merely because the Government promises to use it
16 responsibly.” *United States v. Stevens*, 559 U.S. 460, 480 (2010). Nor is the prospect of
17 retrospective relief, should the Director use this authority improperly, sufficient to save
18 the provision as written. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First
19 Amendment freedoms, for even minimal periods of time, unquestionably constitutes
20 irreparable injury.”). This provision violates Plaintiffs’ First Amendment right of access
21 without legitimate penological justification.

22 The Court therefore grants summary judgment to Plaintiffs on this issue.
23 Defendants are permanently enjoined from conducting lethal injection executions without
24 providing a means for witnesses to be aware of the administration(s) of lethal drugs, and
25 from invoking Department Order 710-D(F)(5) as currently written to close the viewing of

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27 ¹ Plaintiffs’ pleadings assert a right to “see and hear” the administration of drugs.
28 However, at oral argument, Plaintiffs clarified that they do not seek an audio feed into the
chemical room, and conceded that a video feed showing the administration of drugs
would satisfy the asserted right of access.

1 an execution absent the existence of a legitimate penological objective which would merit
2 such closure.

3 **B. The Right to Obtain Information About Executions**

4 In addition to seeking unrestricted access to the execution proceeding itself,
5 Plaintiffs also seek access to information about (1) the “composition”² and “quality” of
6 the lethal injection drugs, (2) the qualifications of those performing the executions, and
7 (3) the identity of the source or sources of lethal injection drugs. Both state statutory law
8 and Department Order 710 speak to the extent of access currently allowed as to this
9 information.

10 If the execution involves the use of any compounded chemicals, Department Order
11 710 specifies that the compounded chemicals must be “obtained from a certified or
12 licensed compounding pharmacist or compounding pharmacy in good standing with their
13 licensing board.” (Doc. 52-1 at PDF 32, Dep’t Order 710-D(C)(2).) The Inspector
14 General’s Office reviews the licensing, certification, and criminal history of the
15 compounding pharmacist or pharmacy. (*Id.*) As of the October 23, 2015 revision to
16 Department Order 710,³ “[a] qualitative analysis of the compounded chemical to be used
17 in the execution shall be provided upon request within ten calendar days after the state
18 seeks a Warrant of Execution.” (*Id.*)

19 Department Order 710 describes the medical training required to participate in the
20 “Intravenous Team” (“IV Team”), which is responsible for inserting intravenous lines.
21 The IV Team comprises “any two or more of the following: physician(s), physician
22 assistant(s), nurse(s), emergency medical technician(s) (EMT’s), paramedic(s), military
23 corpsman or other certified or licensed personnel including those trained in the United
24 States Military.” (Doc. 52-1 at PDF 12, Dep’t Order 710.03.1.2.5.1.) All members of the
25 IV Team must be “currently certified or licensed within the United States to place IV

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27 ² Plaintiffs do not define “composition” in their Complaint. A full reading of Plaintiffs
28 arguments and evidence indicates that “composition” includes information about
concentration and potency.

³ The October 23, 2015 revision was published after the complaint in this case was filed.

1 lines.” (*Id.*)

2 By statute, “[t]he identity of executioners and other persons who participate or
3 perform ancillary functions in an execution and any information contained in records that
4 would identify those persons is confidential and is not subject to disclosure” A.R.S.
5 § 13-757(C). Citing the statute, Department Order 710 also addresses confidentiality, in
6 an introductory section entitled “Important Guidelines Regarding Confidentiality and
7 Voluntariness of Participation in an Execution.” (Doc. 52-1 at PDF 8.) It provides that
8 “[t]he anonymity of any person . . . who participates in or performs any ancillary
9 function(s) in the execution, including the source of the execution chemicals, and any
10 information contained in records that would identify those persons are, as required by
11 statute, to remain confidential and are not subject to disclosure.” (*Id.*)

12 Determining whether these provisions violate Plaintiffs’ First Amendment right of
13 access requires an examination of just how far that right of access extends. As a general
14 matter, the First Amendment does not guarantee “a right of access to government
15 information or sources of information within government control.” *Houchins v. KQED*,
16 438 U.S. 1, 15 (1978) (plurality opinion). The *California First Amendment Coalition*
17 decision addressed only the right to *view* executions and did not address whether there
18 was a right to access related information. Generally, simply because the public and the
19 press have a right to access a proceeding does not automatically imply a right to
20 information about the proceeding. In the context of *some* judicial proceedings, the Ninth
21 Circuit has found a right of access to *some* related documents but not others. *See, e.g.*,
22 *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (“We begin with the
23 presumption that the public and the press have a right of access to criminal proceedings
24 *and documents filed therein.*”) (emphasis added); *Associated Press v. U.S. Dist. Court*,
25 705 F.2d 1143, 1145 (9th Cir. 1983) (noting that pretrial documents “are often important
26 to a full understanding” of the judicial process and thus “[t]here is no reason to
27 distinguish between pretrial proceedings and the documents filed in regard to them”). So,
28 too, has the Supreme Court. *Press-Enterprise II* itself involved the right of access to a

1 document: a transcript of a preliminary hearing. 478 U.S. at 5.

2 But the right of access to a given proceeding does not automatically grant a right
3 to access all information related to that proceeding, or even all information that would
4 help in meaningfully understanding the proceeding. See *First Amendment Coal. of Ariz.*
5 *v. Ryan*, No. CV-14-01447-PHX-NVW, 2016 WL 2893413, at *13 (D. Ariz. May 18,
6 2016) (“The public’s First Amendment right to view court proceedings does not reach
7 back to sitting in on the police’s, the prosecutor’s, or the judge’s preparation for the
8 proceeding.”). Transcripts of hearings on a motion to seal would certainly help the public
9 understand the underlying criminal proceeding. But they are not subject to a right of
10 access. See *In re Copley Press, Inc.*, 518 F.3d 1022, 1027–28 (9th Cir. 2008). Access to
11 a presentencing investigation report prepared by a court’s probation department would
12 help the public understand a sentencing hearing. But while there is a First Amendment
13 right of access to sentencing hearings, see *United States v. Rivera*, 682 F.3d 1223, 1229
14 (9th Cir. 2012), whether there is a right of access to presentence investigation reports
15 requires a case-by-case, common law analysis. See *United States v. Schlette*, 842 F.2d
16 1574, 1582–84 (9th Cir. 1988).

17 To extend *California First Amendment Coalition* to cover all related documents
18 and information that would help more fully understand the execution goes beyond its
19 holding. Rather, if information about executions is encompassed by a First Amendment
20 right of access, that right of access is best determined by an independent application of
21 the *Press-Enterprise II* test to the specific information sought. See *In re Boston Herald,*
22 *Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) (“[T]he First Amendment does not grant the press
23 or the public an automatic constitutional right of access to every document connected to
24 judicial activity. Rather, courts must apply the *Press-Enterprise II* standards to a
25 particular class of documents or proceedings and determine whether the right attaches to
26 that class.”); *United States v. Corbitt*, 879 F.2d 224, 228–29 (7th Cir. 1989) (“[T]he
27 press’ right of access to documents submitted for use in a hearing must be considered
28 separately from the press’ right to attend the hearing itself.”).

1 Unlike the right to view executions, the existence of a right to access information
2 about executions has not been decided in the Ninth Circuit.⁴ The Ninth Circuit has noted
3 that the *Press-Enterprise II* test is used “to evaluate right of access claims in a variety of
4 nonjudicial contexts.” See *Courthouse News Serv., Inc. v. Planet*, 750 F.3d 776, 786 (9th
5 Cir. 2014) (citing *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir.
6 1992)). The Court therefore applies the *Press-Enterprise II* test here.

7 Initially, however, this challenge occurs not with respect to any pending execution
8 but with respect to Arizona’s execution policy on its face. Facial challenges are generally
9 “disfavored.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450
10 (2008). Courts should be cautious in declaring statutes unconstitutional where claims of
11 facial invalidity “rest on speculation” and thereby anticipate questions of constitutional
12 law that may not need to be addressed. *Id.* Courts have discretion to deny summary
13 judgment when the factual record is underdeveloped. See *Askew v. Hargrave*, 401 U.S.
14 476, 478–79 (1971) (per curiam) (finding summary judgment inappropriate when
15 “pleadings and an affidavit” were inadequate to decide the claim and holding that the
16 “claim should not be decided without fully developing the factual record at a hearing”).
17 This is especially so when a court is asked to resolve a First Amendment facial challenge
18 through a declaratory judgment at the summary judgment stage. See *Eccles v. Peoples*
19 *Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1948) (“Caution is appropriate
20 against the subtle tendency to decide public issues free from the safeguards of critical
21 scrutiny of the facts, through use of a declaratory summary judgment.”); *Nation*
22 *Magazine v. U.S. Dep’t of Def.*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (declining to

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24 ⁴ Two courts in this district have considered the question and reached opposing
25 conclusions. Compare *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668
26 (D. Ariz. Oct. 7, 2013), with *Wood v. Ryan*, No. CV-14-1447-PHX-NVW (JFM), 2014
27 WL 3385115 (D. Ariz. July 10, 2014), *rev’d*, 759 F.3d 1076 (9th Cir. 2014), *vacated*, 135
28 S. Ct. 21 (2014). The Ninth Circuit reversed the latter decision and noted in the course of
granting a preliminary injunction that there was a “serious question[] as to whether a First
Amendment right, in the context of executions, attaches to” information about drug
manufacturers and qualifications of executioners. *Wood v. Ryan*, 759 F.3d 1076, 1086
(9th Cir. 2014, *vacated*, 135 S. Ct. 21 (2014)). That decision was subsequently vacated by
the Supreme Court. *Ryan v. Wood*, 135 S. Ct. 21 (2014).

1 “grant plaintiffs’ request for declaratory relief on their right of access claim” when issues
2 were “presented in a highly abstract form” and “a full record [was not] available”). With
3 this in mind, it is clear even without going through the *Press-Enterprise II* analysis that
4 several of the issues are not appropriate for summary judgment at this time.

5 **1. Composition and Quality of the Execution Drugs**

6 On October 23, 2015, after Plaintiffs filed their motion for summary judgment,
7 ADC promulgated a revised version of Department Order 710. (*See* Doc. 52 at ¶ 13.)
8 Department Order 710 now provides that “[i]f any compounded chemical is used” in the
9 execution, “[a] qualitative analysis of the compounded chemical . . . shall be provided
10 upon request within ten calendar days after the state seeks a Warrant of Execution.”
11 (Doc. 52-1 at PDF 32, Dep’t Order 710-D(C)(2).) Plaintiffs still assert that “[t]his
12 revised protocol does not indicate that ADC will make public information about the
13 source, composition, or quality of the execution drugs.” (Doc. 52 at ¶ 14.) A plain
14 reading of the policy, however, indicates that ADC will do exactly that, at least with
15 respect to compounded chemicals. It would, after all, be a deficient “qualitative analysis
16 of the compounded chemical to be used” that did not adequately and fairly disclose the
17 composition and quality of the drug. Because Department Order 710 requires ADC to
18 provide an advance “qualitative analysis of the compounded chemical” that ADC will use
19 in the execution, and because Plaintiffs have not yet requested or received such a
20 qualitative analysis, there is presently no sufficient factual basis for the Court to conclude
21 that the state’s procedures for disclosing information about compounded chemicals
22 violates any First Amendment rights that Plaintiffs may have to such information. And
23 while the new policy makes no provision for a qualitative analysis of non-compounded
24 chemicals, Plaintiffs have thus far focused their arguments on the need for information
25 about compounded drugs. At this point, there has been neither evidence nor argument
26 respecting a demand or need for information about the quality and source of non-
27 compounded drugs. It would be, at best, premature for the Court to rule that the state
28 policy in this respect is unconstitutional. *See A.L. Mechling Barge Lines, Inc. v. United*

1 *States*, 368 U.S. 324, 342 (1961) (“We think that sound discretion withholds the remedy
2 [of declaratory judgment] where it appears that a challenged ‘continuing practice’ is, at
3 the moment adjudication is sought, undergoing significant modification so that its
4 ultimate form cannot be confidently predicted.”). Summary judgment is therefore denied
5 to both parties as to whether there is a right of access to information about the
6 “composition” and the “quality” of the drugs.

7 **2. Qualifications of Execution Personnel**

8 There is also a problem with Plaintiffs’ request for information about the
9 “qualifications of those chosen to administer” the lethal injection drugs. (Doc. 43 at 1.)
10 Plaintiffs do not specify the nature of the qualifications they believe the First Amendment
11 requires to be disclosed in addition to those that are already disclosed by Department
12 Order 710.⁵ Plaintiffs make no argument that the First Amendment requires the
13 government to establish particular qualifications, only that the First Amendment requires
14 unspecified “qualifications” to be disclosed to the public. Yet, state statutory law
15 prohibits the disclosure of any information that would identify those who participate in or
16 have ancillary functions in executions. A.R.S. § 13-757(C) (“The identity of
17 executioners and other persons who participate or perform ancillary functions in an
18 execution and any information contained in records that would identify those persons is
19 confidential and is not subject to disclosure.”). An untethered requirement that a team
20 member’s “qualifications” be disclosed, which presumably would require disclosure
21 beyond the generic qualifications already established by Department Order 710, risks
22 disclosing information which could identify a team member. Without knowing what
23 qualifications Plaintiffs seek, the Court cannot determine whether the disclosure of such
24 qualifications would violate the statute, and whether, if so, it would fall within the ambit
25 of the First Amendment, through the *Press-Enterprise II* test or otherwise, to nevertheless

26
27 ⁵ Department Order 710 provides that the IV Team comprises “any two or more of the
28 following: physician(s), physician assistant(s), nurse(s), emergency medical
technician(s) (EMT’s), paramedic(s), military corpsman or other certified or licensed
personnel including those trained in the United States Military.” (Doc. 52-1 at PDF 12,
Dep’t Order 710.03.1.2.5.1.)

1 compel the disclosure of such qualifications. The Court cannot grant summary judgment
2 on such a generalized request.⁶ Therefore, the Plaintiffs' request for summary judgment
3 is denied as to qualifications. Because it is not clear that Plaintiffs would be unable to
4 request qualification information that would not be identifying, however, Defendant's
5 motion is also denied.

6 3. Identities of the Sources of the Execution Drugs

7 Plaintiffs also seek to compel the identity of the sources of lethal injection drugs
8 despite the identity protection afforded by A.R.S. § 13-757(C). In Department Order
9 710, ADC makes clear that the confidentiality granted by A.R.S. § 13-757(C) extends to
10 those who provide ADC with lethal injection drugs. (Doc. 52-1 at PDF 8.) The
11 compounding and/or preparation of such drugs constitutes at least an ancillary function to
12 an execution. Plaintiffs argue that they have a qualified right of access to this
13 information pursuant to the First Amendment and the statute and policy are therefore
14 unconstitutional. Further, because Plaintiffs seek to have a declaratory judgment entered
15 on the question as a matter of law, they seek a determination that the statute is
16 unconstitutional *per se* and is not capable of a constitutional application, at least as it
17 applies to withholding the manufacturer of lethal injection drugs. The scope of Plaintiffs'
18 requests and, accordingly, the state laws and policies implicated, are clearer than in the
19 other requests for information. Here, too, however, summary judgment is inappropriate,
20 as is revealed by an application of the *Press-Enterprise II* test to the facts of this case.

21 The burden is on the Plaintiffs to establish that the First Amendment entitles them
22 to obtain the identity of the lethal injection drug manufacturer despite the statute's
23 restriction on such information. Plaintiffs contend that the "experience and logic"
24 analysis of *Press-Enterprise II*, *see* 478 U.S. at 8, demonstrates this entitlement. The

25
26 ⁶ Plaintiffs have clarified, at oral argument and in subsequent written submission to the
27 Court, that they seek "whatever information [the State] obtains about the relevant
28 qualifications of those appointed to the IV team." (Doc. 69 at 3 n.1.) While this makes it
possible to *eventually* determine what that information is and whether it might run the
risk of identifying team members, the facts are insufficient to make that determination at
this point.

1 “experience” prong requires a court to consider whether the information at issue has
2 “historically been open to the press and general public.” *Id.* This inquiry is “significant
3 in constitutional terms not only ‘because the Constitution carries the gloss of history’ but
4 also because ‘a tradition of accessibility implies the favorable judgment of experience.’”
5 *Globe Newspaper*, 457 U.S. at 605 (quoting *Richmond Newspapers*, 448 U.S. at 589
6 (Brennan, J., concurring in judgment)). The historical inquiry “does not look to the
7 particular practice of any one jurisdiction, but instead to the experience in that *type* or
8 *kind* of hearing throughout the United States.” *El Vocero de P.R. v. Puerto Rico*, 508
9 U.S. 147, 150 (1993) (internal quotation marks omitted).⁷

10 Plaintiffs characterize all of their requests for information as asking for
11 information about the “means” of the execution, to make sure that the “means” are
12 functioning properly. (Doc. 43 at 13–14.) The historical record Plaintiffs present does
13 lend support to a historical tradition of the public viewing of executions—a matter
14 already decided by *California First Amendment Coalition*. It also suggests that in some
15 types of executions the public was able to inspect some of the instrumentalities of
16 execution. For example, Plaintiffs proffer evidence that “hangings, the dominant method
17 of execution in the United States for most of American history, were usually public
18 events that were often viewed by large audiences,” and that the witnesses “typically had
19 access to information about the instruments used to carry out the execution.” (Banner
20 Decl., Doc 47-1 at 19 ¶ 2.) At jail-yard hangings, “some spectators carefully examined
21 the gallows before the execution, trying out the pulleys and the spring.” (*Id.* at 21 ¶ 11.)
22 Plaintiffs also proffer evidence that when the “first gas chamber execution in American
23

24 ⁷ The experience prong, however, may be less relevant if the proceeding at issue has
25 undergone significant changes over time. In *Seattle Times Co. v. U.S. Dist. Court*, 845
26 F.2d 1513, 1516 (9th Cir. 1988), the Ninth Circuit applied the *Press-Enterprise II* test to
27 the issue of press access to briefs filed in a pretrial detention hearing. The Court noted
28 that changes in pretrial proceedings generally, and bail procedures specifically, meant
that the traditional “informal procedures are no longer adequate.” *Id.* at 1516. This
meant that “[u]nder these circumstances, the historical tradition surrounding bail
proceedings is much less significant.” *Id.* The Court then found that the logic inquiry
“weigh[ed] heavily in favor of a right of access to bail proceedings” and found a qualified
right of access on that basis. *Id.* at 1516–17.

1 history” occurred, “[n]ewspapers reported that the lethal gas used in the Nevada
2 execution was manufactured by the California Cyanide Company of Los Angeles.”
3 (Christianson Decl., Doc 47-1 at 42 ¶ 16.)

4 Nevertheless, Plaintiffs do not dispute that there are different levels of access to
5 the different instrumentalities used in the different methods of executions. There does
6 appear, within the application of some still-used historical execution techniques, a
7 concern to keep confidential the identities of those involved in the execution from the
8 public and, at times, even from the executioners themselves. For example, Plaintiffs’
9 expert Stuart Banner describes, in a book he cites in his declaration, the manner in which
10 firing squad executions in Nevada were carried out in the early part of the twentieth
11 century:

12 The firing squad was located in a tent to hide the sharpshooters’ identity
13 from the spectators. A target was placed over the condemned person’s
14 heart. Some of the guns were loaded with bullets and others with blanks, in
15 a pattern not known to the shooters, so that none would know whether he
16 was actually an executioner.

17 Stuart Banner, *The Death Penalty: An American History* 203 (2002).⁸

18 Similarly, A.R.S. 13-757(C) or its predecessor—the Arizona statute that affords
19 confidentiality to those involved in even ancillary aspects of executions—has been in
20 place since 1998, less than six years after Arizona adopted lethal injection as a method of
21 execution. *See* 1998 Ariz. Sess. Laws ch. 232, § 1 (adding present-day A.R.S. § 757(C));
22 1993 Ariz. Sess. Laws ch. 2, § 1 (adopting lethal injection). The State did disclose the
23 identity of one of its suppliers in 2013, pursuant to a court order, and that information
24 was apparently already available to the public. (Def’s Resp. to Interrogatories, Doc. 47-1

25 ⁸ Similar measures were apparently taken in the 1977 execution of Gary Gilmore and the
26 2010 execution of Ronnie Lee Gardner, both executed in Utah by firing squad. *See The*
27 *Law: After Gilmore, Who’s Next to Die?*, Time, Jan. 31, 1977, <http://content.time.com/time/magazine/article/0,9171,918639,00.html> (“Hidden behind the curtain stood five
28 riflemen armed with .30-.30 deer rifles, four loaded with steel-jacketed shells, the fifth
with a blank.”); Ray Sanchez, *Ronnie Lee Gardner Executed by Firing Squad in Utah*,
ABC News, June 18, 2010, <http://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786> (“A team of five anonymous
marksmen [stood] behind a brick wall cut with a gun port One rifle was loaded with
a blank so no one knew who fired the fatal shot.”).

1 at 205.) But ADC has also refused to disclose the identities of drug suppliers on several
2 occasions. (*Id.* at 204.) And, as to the lessons to be drawn from this history, the affidavit
3 of Carson McWilliams in this matter suggests that disclosures that have been made have
4 resulted in a refusal by suppliers to provide execution drugs, in response to the negative
5 reaction by members of the public towards the manufacturer. (*See* McWilliams Decl.,
6 Doc. 50-1 at 2–3.)

7 The historical inquiry requires an examination not just of local experience but of
8 the experience of the type or kind of proceeding throughout the United States. *See El*
9 *Vocero de P.R.*, 508 U.S. at 150. Some states have adopted laws barring the disclosure of
10 the identities of the suppliers of lethal injection drugs.⁹ Such laws are generally of recent
11 vintage, having been adopted within the past decade. South Dakota, to take a
12 representative example, adopted statutory protections for executioner identities in 2008¹⁰
13 and extended that protection to drug suppliers in 2013.¹¹ Other states that authorize
14 capital punishment have no such statutory protections. Of course, the use of lethal
15 injection as a method of execution is itself a relatively recent development, dating back to
16 1977. *See Baze v. Rees*, 553 U.S. 35, 42 (2008). The actual practices of information
17 disclosure by various states since the adoption of lethal injection might well be
18 illuminating in determining the lessons of experience, but such evidence has not been
19 presented and is beyond the appropriate scope of judicial notice. At least some states that
20 employ lethal injection have determined that disclosure of the identities of lethal injection
21 suppliers does not carry the “favorable judgment of experience,” but the facts before the
22 Court at this point do not lend themselves to a broader conclusion than this on the

23
24 ⁹ *See, e.g.*, Okla. Stat. Ann. tit. 22, § 1015(B) (West 2016) (“The identity of all persons
25 who participate in or administer the execution process and persons who supply the drugs,
26 medical supplies or medical equipment for the execution shall be confidential”);
27 S.D. Codified Laws § 23A-27A-31.2 (2016) (“The name, address, qualifications, and
28 other identifying information relating to the identity of any person or entity supplying or
administering the intravenous injection substance or substances . . . are confidential.”).

¹⁰ 2008 S.D. Sess. Laws ch. 117, § 25.

¹¹ 2013 S.D. Sess. Laws ch. 113, § 1.

1 “experience” prong.

2 The “logic” prong requires a court to consider “whether public access plays a
3 significant positive role in the functioning of the particular process in question.” *Press-*
4 *Enterprise II*, 478 U.S. at 8. In deciding that public access played an important role in
5 allowing the press total access to an execution proceeding, the Ninth Circuit observed
6 that “[i]ndependent public scrutiny . . . plays a significant role in the proper functioning
7 of capital punishment” and that “[a]n informed public debate is critical in determining
8 whether execution by lethal injection comports with ‘the evolving standards of decency
9 which mark the progress of a maturing society.’” *Cal. First Amendment Coal.*, 299 F.3d
10 at 876 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Plaintiffs argue that disclosure
11 of the sources of lethal injection drugs contributes to this informed public debate. They
12 submit evidence that information about the *source* of the drugs is necessary for the public
13 to assess the drugs’ *quality*. (Waisel Decl., Doc. 47-1 at 135–40.) Plaintiffs present
14 evidence that compounding pharmacies are largely unregulated by the FDA, and that
15 several recent high-profile tragedies have occurred as a result of disease outbreaks or
16 other problems at compounding pharmacies. (*Id.* at 136–37.) Even if the quality of an
17 individual batch could be verified by qualitative analysis, more information about the
18 source of the drug could “allow observers to evaluate the pharmacy’s reputation by
19 checking such facts as its volume of drug sales, number of drug recalls, litigation filed
20 against it or citations issued by the FDA or state pharmacy board.” (*Id.* at 137.) This, in
21 turn, could arguably “support[] public confidence in the execution process itself and
22 ensure[] an informed debate over capital punishment.” (Doc. 43 at 14.)

23 But the logic prong requires consideration not just of the benefit to the public but
24 also of the detriment to the government. Even when it is clear that openness and public
25 scrutiny would serve a beneficial purpose, logic may still dictate that there is no right of
26 access if the public access would place a substantial burden on the governmental
27 function. *See id.* at 8–9 (noting in describing the logic prong that “[a]lthough many
28 governmental processes operate best under public scrutiny, it takes little imagination to

1 recognize that there are some kinds of government operations that would be totally
2 frustrated if conducted openly”); *see also, e.g., United States v. Kravetz*, 706 F.3d 47, 54
3 (1st Cir. 2013) (“As for logic, there is scant value *and considerable danger*” in finding a
4 right of access to Rule 17(c) subpoenas.” (emphasis added)); *PG Publ’g Co. v. Aichele*,
5 705 F.3d 91, 111 (3d Cir. 2013) (“In addition to considering the benefits that would result
6 from press and public access, we must take account of the flip side—the extent to which
7 openness impairs the public good. Indeed, the logic analysis *must* account for the
8 negative effects of openness, for otherwise it is difficult to conceive of a government
9 proceeding to which the public would not have a First Amendment right of access.”
10 (internal citations and quotation marks omitted)).

11 The Ninth Circuit followed this balancing approach in applying the *Press-*
12 *Enterprise II* test in the context of pre-indictment warrant proceedings. *See Times Mirror*
13 *Co. v. United States*, 873 F.2d 1210, 1217 (9th Cir. 1989). There, the Ninth Circuit held
14 that even though “it is unquestioned that open warrant proceedings might operate as a
15 curb on prosecutorial or judicial misconduct,” that “social utility . . . would be
16 outweighed by the substantial burden openness would impose on government
17 investigations.” *Id.* (internal quotation marks omitted). As a result, the court held, there
18 was “no First Amendment right of access” to pre-indictment warrant proceedings at all.
19 *Id.* at 1218. Following this analysis, the Court must weigh both the benefits and costs of
20 disclosure in determining whether a qualified right of access exists.

21 Thus, Defendant in this case does not contest that there could be aspects of
22 openness that would insure the quality of execution drugs. Rather, Defendant presents
23 evidence that if the source of the drugs used in lethal injection executions were made
24 public, the drugs would become “highly difficult, if not impossible” to obtain.
25 (McWilliams Decl., Doc 50-1 at 2 ¶ 7.) Defendant presents evidence in the form of the
26 declaration of Carson McWilliams, who is employed by ADC as the Director of the
27 Division of Offender Operations and is “tasked with locating suppliers of lethal injection
28

1 drugs.”¹² (*Id.* at 2 ¶¶ 1–2.) McWilliams states that “[l]ethal injection drugs have been
2 difficult to obtain without promises of confidentiality of the supplier.” (*Id.* at 2 ¶ 3.)

3 After the identity of a supplier for midazolam was publicly revealed in
4 litigation in another state, that supplier wrote to the Arizona Department of
5 Corrections, as well as corrections departments in other states, stating that it
6 would no longer sell the drug to corrections departments for use in lethal
7 injections. Compounding pharmacies that provided pentobarbital for
8 executions began refusing to provide it after their identities were released
9 publicly and they began receiving threats.

10 (*Id.* at 2 ¶ 4.) This evidence indicates two distinct, albeit related, dangers proceeding
11 from public disclosure of execution drug sources: not only that Arizona would be unable
12 to carry out executions, which presents a substantial burden on a governmental function,
13 but that drug suppliers would face threats or boycotts for their participation in the
14 execution process when state statute guarantees their anonymity.

15 Plaintiffs have presented evidence that disclosure of the drugs’ source may well
16 contribute to informed public discourse about capital punishment. Defendant has
17 presented evidence that disclosure of the drugs’ source may impair Arizona’s ability to
18 obtain lethal injection drugs—and, by extension, Arizona’s important government
19 interest in carrying out executions entirely. To determine whether there is a qualified
20 right of access to the drugs’ source requires this Court to weigh whether the “social
21 utility” of disclosure “would be outweighed by the substantial burden openness would
22 impose on” Arizona’s ability to carry out executions. *Times Mirror*, 873 F.2d at 1217
23 (internal quotation marks omitted). On similar facts, a district court in Ohio recently
24 determined, albeit in the context of a Rule 26(c) protective order dispute rather than a
25 First Amendment right of access question, that the balance of interests favored non-
26 disclosure. *See In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2015 WL
27 6446093, at *10 (S.D. Ohio Oct. 26, 2015). Nevertheless, the Court is disinclined to

28 ¹² Mr. McWilliams’s declaration is admissible evidence. Where a declaration is “based on personal knowledge, legally relevant, and internally consistent,” the evidence in the declaration is “sufficient to establish a genuine dispute of material fact.” *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497–98 (9th Cir. 2015). Personal knowledge may be inferred from a declarant’s position. *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000).

1 grant summary judgment to either side on this question, especially when as it pertains to
2 suppliers of lethal injection drugs doing so would require a *per se* determination that
3 A.R.S. § 13-757(C) is unconstitutional. If the parties wish to pursue a declaratory
4 judgment on this matter, they must provide the Court with a more complete factual and
5 legal record.

6 Moreover, even if the Court were, in this case, to determine that the First
7 Amendment provides a qualified right of access to the identity of drug sources, that right
8 of access can be overcome. The level of scrutiny a court is to apply in determining
9 whether the qualified right of access is overcome depends on the type of process
10 involved. In *California First Amendment Coalition* the Ninth Circuit applied a relaxed
11 standard of review as applied to executions. Rather than require “specific, on the record
12 findings . . . demonstrating that ‘closure is essential to preserve higher values and is
13 narrowly tailored to serve that interest,’” 478 U.S. at 13–14, which is the *Press*
14 *Enterprise II* standard, the Court merely required that the State show “legitimate
15 penological objectives”—the *Turner* standard—to burden the right to view the execution.
16 *Cal. First Amendment Coal.*, 299 F.3d at 873. Although the *Turner* standard originally
17 applied only to regulations affecting prisoners, and *California First Amendment Coalition*
18 only extended it to an execution taking place within a prison, it may make sense to extend
19 it here to restrictions on information related to executions—as it can hardly be questioned
20 that capital punishment implements the state’s penological objectives. Just like prison
21 administration generally and execution administration within prisons, the logistical steps
22 in administering executions may not be “readily susceptible of resolution by decree” and
23 “require expertise, comprehensive planning, and the commitment of resources, all of
24 which are peculiarly within the province of the legislative and executive branches of
25 government.” *Cal. First Amendment Coal.*, 299 F.3d at 877–78 (quoting *Procunier v.*
26 *Martinez*, 416 U.S. 396, 404–05 (1974)).

27 Nevertheless, the Court need not decide which level of scrutiny applies here,
28 because, for the reasons specified above, the Court declines to rule as a matter of

1 summary judgment that the public has a qualified right of access to the identity of the
2 supplier of the state’s lethal injection drugs. In the absence of such a ruling, the question
3 of whether that right of access can be overcome does not yet present itself. Nevertheless,
4 the evidence presented by both parties indicates that the relationship between public
5 opinion, supplier confidentiality, and government ability to carry out executions may be a
6 dynamic one. A categorical resolution may be particularly inappropriate here, when the
7 relevant inputs in the constitutional analysis are not static facts and may require case
8 specific analysis. *See, e.g., El Vocero de P.R.*, 508 U.S. at 151 (“The concern of the
9 majority below that publicity will prejudice defendants’ fair trial rights is, of course,
10 legitimate. But this concern can and must be addressed on a case-by-case basis.”); *Globe*
11 *Newspaper*, 457 U.S. at 608 (“A trial court can determine on a case-by-case basis
12 whether closure is necessary to protect the welfare of a minor victim.”).

13 On summary judgment, the moving party or parties must “show[] that there is no
14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
15 of law.” Fed. R. Civ. P. 56(a). The record before the Court at this time is insufficient to
16 make the determination whether there is a qualified right of access in the public to the
17 source of lethal injection drugs and if so whether the state has a sufficient interest to
18 overcome that right. The “critical scrutiny of the facts” that the Supreme Court called for
19 in cases involving the declaration of public rights demands more. *See Eccles*, 333 U.S. at
20 434.

21 The Court therefore denies summary judgment to both parties on the matter of
22 enjoining Defendant to disclose the source of the ADC’s lethal injection drugs.

23 CONCLUSION

24 The public and the press enjoy a qualified First Amendment right of access to
25 view executions in their entirety, including each administration of the means of achieving
26 death, and Defendant has not overcome this right of access. The Court therefore grants
27 Plaintiffs a permanent injunction requiring Defendant to allow execution witnesses to
28 view the entirety of the execution, including each administration of drugs, and declares


1 that all sections of Department Order 710 that provide to the contrary are unconstitutional
2 on their face.

3 Summary judgment as to whether there is a qualified First Amendment right of
4 access to information about executions is inappropriate at this time. The stage of the
5 proceedings and the current factual record prevent the declaration of the rights of the
6 parties at this stage.

7 **IT IS THEREFORE ORDERED** that the Motion for Summary Judgment by
8 Plaintiffs (Doc. 43) is **GRANTED IN PART AND DENIED IN PART**.

9 **IT IS FURTHER ORDERED** that the Motion for Summary Judgment by
10 Defendant Charles L. Ryan (Doc. 45) is **DENIED**.

11 Dated this 21st day of December, 2016.

12 
13 Honorable G. Murray Snow
14 United States District Judge