

Ballard Spahr LLP  
1 East Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
Telephone: 602.798.5400

1 David J. Bodney (006065)  
2 Craig C. Hoffman (026017)  
3 BALLARD SPAHR LLP  
4 1 E. Washington Street, Suite 2300  
5 Phoenix, AZ 85004-2555  
6 Telephone: 602.798.5400  
7 Facsimile: 602.798.5595  
8 Email: bodneyd@ballardspahr.com  
9 Email: hoffmanc@ballardspahr.com

6 David A. Schulz, *pro hac vice*  
7 Jonathan Manes, *pro hac vice*  
8 Amanda Lynch (student certification pending)  
9 Lourdes Pantin (student certification pending)  
10 Ben Picozzi (student certification pending)  
11 MEDIA FREEDOM AND  
12 INFORMATION ACCESS CLINIC  
13 P.O. Box 208215  
14 New Haven, CT 06520  
15 Telephone: 203.432.9387  
16 Facsimile: 203.432.3034  
17 Email: dschulz@lskslaw.com

13 *Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

16 Guardian News & Media LLC, *et al.*, )  
17 Plaintiffs, ) NO. 2:14-cv-02363-GMS  
18 v. ) **PLAINTIFFS' MOTION FOR**  
19 Charles L. Ryan, ) **SUMMARY JUDGMENT**  
20 Defendant. ) Oral Argument Requested  
21 ) Assigned to the Hon. G. Murray Snow

22 Pursuant to Fed. R. Civ. P. 56, plaintiffs Guardian News & Media LLC,  
23 Associated Press, *The Arizona Republic*, KPNX-TV Channel 12, KPHO Broadcasting  
24 Corporation, and *The Arizona Daily Star* request that this Court grant summary judgment  
25 in their favor (a) declaring that defendant's refusal to disclose the source, composition,  
26 and quality of lethal injection drugs and the qualifications of those who administer them  
27 violates the public's First Amendment right of access to State executions; (b) declaring  
28 that defendant's failure to allow witnesses at lethal injection executions to observe the

1 totality of the proceeding, including the administration of all lethal injection drugs,  
2 violates the public’s First Amendment right of access to State executions; and  
3 (c) enjoining defendant from violating plaintiffs’ First Amendment rights at all future  
4 executions by lethal injection, together with such other and further relief as the Court  
5 deems just and proper.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **PRELIMINARY STATEMENT**

8 This case concerns the public’s right to fully observe and understand the means by  
9 which executions are carried out by the State of Arizona. Specifically, plaintiffs seek  
10 disclosure of both the source, quality, and composition of the drugs actually used in  
11 executions and the qualifications of those who administer them, as well as visual access  
12 to the entire execution process, including the administration of all execution drugs. As  
13 demonstrated below, the public has a First Amendment right of access to this  
14 information, which is critical to assessing the effectiveness and propriety of executions  
15 carried out by defendant Director of the Arizona Department of Corrections (“ADC”).

16 **FACTUAL BACKGROUND**

17 The relevant facts supporting summary judgment are set out in plaintiffs’ Rule 56  
18 Statement of Facts (“SOF”) and the expert reports attached thereto<sup>1</sup> and are only  
19 summarized here in brief.

20 **A. The Information About Arizona’s**  
21 **Means of Execution That Is at Issue**

22 Spurred by litigation brought by death row inmates, ADC makes public its lethal  
23 injection protocol. SOF ¶ 43. This protocol identifies only the names of the drugs ADC  
24 may use at an execution and the intended doses. SOF ¶ 62. To induce death in the manner

25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiffs submit four expert reports in support of this motion: the declaration of Stuart  
27 Banner sworn to June 4, 2015 (“Banner Decl.”); the declaration of Scott Christianson  
28 sworn to June 8, 2015 (“Christianson Decl.”); the declaration of Austin Sarat sworn to  
June 5, 2015 (“Sarat Decl.”); the declaration of David Waisel sworn to June 9, 2015  
 (“Waisel Decl.”).

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1 intended, however, lethal injection drugs must be of proper purity, concentration, and  
2 potency and must be administered properly. SOF ¶¶ 64, 76. Arizona does not disclose  
3 information needed to assess the effectiveness of the chemicals actually used or the  
4 ability of those chosen to administer them. SOF ¶¶ 61-63.

5 A drug's attributes can vary significantly depending upon its source. SOF ¶¶ 64-  
6 65, 67-68, 70. Arizona currently allows ADC to obtain lethal injection drugs from  
7 compounding pharmacies. SOF ¶ 66. These pharmacies are not regulated by the FDA and  
8 their products can range widely in quality. SOF ¶¶ 67-68. Drug potency can vary, which  
9 can result in a slow and prolonged death, and compounded drugs can contain  
10 contaminants that produce severe pain during or immediately after injection. SOF ¶¶ 70,  
11 72. An investigation by the FDA in 2012 revealed problems with more than 75% of the  
12 compounding pharmacies reviewed. SOF ¶ 68.

13 Adequately trained personnel are also essential to proper administration of lethal  
14 injection drugs. SOF ¶¶ 76-81. Lethal injection drugs are administered through  
15 intravenous catheters, which must be inserted and maintained correctly to ensure the  
16 inmate is adequately anesthetized. SOF ¶ 77. Monitoring intravenous lines and  
17 consciousness are technical skills that require specific expertise. SOF ¶¶ 79-81.  
18 Observers need to know basic information about the lethal injection drugs in use and  
19 those who are administering them to understand what they are witnessing. SOF ¶¶ 64-81.

20 **B. The Tradition of Public Access to**  
21 **Information About the Means of Execution**

22 Information about the means of execution and the manner in which it is  
23 administered has been publicly available throughout the history of this country. SOF ¶ 1.  
24 Until 1830, virtually all executions were hangings conducted in the open. SOF ¶ 3. The  
25 public typically could observe the full execution, from the arrival of prisoners to their  
26 death, as well as the construction and operation of the gallows. SOF ¶¶ 6-8. When  
27 executions were moved inside prison grounds, public access continued to be allowed  
28 through the use of press observers, who reported to the public at large. SOF ¶ 5.

1 When new technologies were used to conduct executions, such as the electric chair  
2 and gas chamber, public observation continued to be the norm, and details of the methods  
3 of operation of these devices were publicly known. SOF ¶¶ 9-17. These disclosures were  
4 important to ensure that executions occurred as intended, and they also facilitated a  
5 public debate that led to improvements in the implementation of the death penalty  
6 nationwide. SOF ¶¶ 18-26. For example, Arizona voters adopted lethal injection as a  
7 means of execution less than a year after reporters covering Donald Harding’s execution  
8 by cyanide gas described an “inhuman” scene, in which Harding turned red, struggled  
9 against the straps restraining him, and convulsed for eleven minutes. SOF ¶¶ 35-38.

10 Through a combination of litigation and voluntary disclosure, Arizona has until  
11 recently provided public access to comparable details about the drugs used in lethal  
12 injections. SOF ¶¶ 46-50. For example, the public learned in 2010 that ADC had illegally  
13 imported sodium thiopental from London supplier Dream Pharma, Ltd. SOF ¶¶ 47-48. In  
14 2013, Arizona obtained another drug, pentobarbital, which ADC subsequently disclosed  
15 had been manufactured by Lundbeck, Inc. SOF ¶ 49.

16 **C. Arizona’s Refusal to Reveal Crucial Information About**  
17 **Its Means of Conducting Lethal Injection Executions**

18 ADC now refuses to disclose the source, composition, and quality of drugs used to  
19 execute inmates or to reveal the qualifications of those who administer lethal injection  
20 drugs. SOF ¶¶ 61-63. ADC asserts a right to keep this information confidential under  
21 state law. SOF ¶ 61. ADC’s refusal to disclose the source, composition, and quality of  
22 drugs used in executions increases the risk of error, inhibits the ability of observers to  
23 understand what they are seeing, and prevents informed public discussion and meaningful  
24 democratic oversight of the execution process. SOF ¶¶ 51-59, 69-74.

25 The importance of public access to this information is underscored by recent  
26 events. On July 23, 2014, Arizona executed Joseph R. Wood. SOF ¶ 54. During the  
27 nearly two hour process, observers could see Wood but could not see ADC officials  
28 administering *fourteen* additional doses of midazolam and hydromorphone after the

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1 single dose called for by Arizona’s protocol did not quickly induce death. SOF ¶¶ 54-58.  
2 Only after Wood’s execution did ADC first perform quality tests on the drugs that it had  
3 acquired from a still-undisclosed source. SOF ¶¶ 59, 63.

4 Nationwide, lethal injections are more than twice as likely to be botched as  
5 executions using other methods. SOF ¶ 60. Just last month, Oklahoma cancelled an  
6 execution only moments before it was to occur, upon realizing it had received a shipment  
7 of the wrong drug. Manny Fernandez, *Oklahoma Appellate Court Stays Execution for 3*  
8 *Inmates*, N.Y. Times, Oct. 2, 2015, [http://www.nytimes.com/2015/10/03/us/oklahoma-](http://www.nytimes.com/2015/10/03/us/oklahoma-court-stays-execution-for-3-inmates.html)  
9 [court-stays-execution-for-3-inmates.html](http://www.nytimes.com/2015/10/03/us/oklahoma-court-stays-execution-for-3-inmates.html).

10 **Procedural Posture**

11 Plaintiffs filed suit in October 2014, asserting a claim under 42 U.S.C. § 1983 for  
12 the violation of their First Amendment right of access. The parties have completed  
13 discovery in accordance with the Case Management Order. There appearing to be no  
14 material facts genuinely in dispute, the case is ripe for disposition on summary judgment.

15 **ARGUMENT**

16 **I.**

17 **THE PUBLIC HAS A CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION ABOUT THE MEANS USED FOR STATE EXECUTIONS**

18 **A. The First Amendment Conveys a Right of Public Access to Executions**

19 **1. The Supreme Court has articulated clear standards for identifying where the First Amendment right of access exists.**

20 The First Amendment provides the public a right to access certain government  
21 proceedings and related records. The Supreme Court first articulated the scope of this  
22 right in 1980, in considering whether the Constitution conveys to the general public a  
23 right to attend criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555  
24 (1980). The Court explained that the First Amendment’s express guarantees of free  
25 speech, press, and the right to petition the government necessarily incorporate an implicit  
26 right of access to certain government information. *Id.* at 576-78.  
27  
28

1 This right plays a “structural role” in enabling democracy to function. It is based  
2 on “the principle that debate on public issues should be uninhibited, robust, and wide-  
3 open” and its “antecedent assumption that valuable public debate—as well as other civic  
4 behavior—must be informed.” *Id.* at 587 (citation omitted) (Brennan, J., concurring).  
5 After *Richmond Newspapers*, the Court reaffirmed and extended the right in a series of  
6 cases that established a two-part test for determining *where* the constitutional access right  
7 applies and imposed strict standards that must be met before the right can be abridged.  
8 See *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 9 (1986) (access to  
9 preliminary hearings); *Press-Enter. Co. v. Superior Court (Press-Enter. I)*, 464 U.S. 501,  
10 505 (1984) (*voir dire*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08  
11 (1982) (testimony of child victim of sex offense).

12 This two-part test, dubbed the “history and logic test,” identifies when the right of  
13 access attaches. It requires a court to consider (1) “whether the place and process have  
14 historically been open to the press and general public” and (2) “whether public access  
15 plays a significant positive role in the functioning of the particular process in question.”  
16 *Press-Enter. II*, 478 U.S. at 8.

17 Where the right access exists, the government bears a “weighty” burden to defeat  
18 it. *Globe Newspaper*, 457 U.S. at 606. The constitutional access right “may be overcome  
19 only by an overriding interest based on findings that closure is essential to preserve  
20 higher values and is narrowly tailored to serve that interest.” *Press-Enter. I*, 464 U.S. at  
21 510; see also *Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir.  
22 1990) (listing three substantive requirements government must meet before overcoming a  
23 qualified right to access). The evidence needed to abridge the right is demanding; it  
24 cannot be overcome by conclusory assertions. *Press-Enter. II*, 478 U.S. at 14.

25 **2. Under controlling Ninth Circuit precedent, the right of access extends**  
26 **to the entirety of a State-sponsored execution.**

27 The Ninth Circuit has held that the First Amendment right of access extends to the  
28 entire execution. In *California First Amendment Coalition v. Woodford*, 299 F.3d 868

1 (9th Cir. 2002), the Ninth Circuit held that the constitutional access right extends to  
 2 executions and struck down a regulation restricting public viewing of executions at San  
 3 Quentin Prison in California as inconsistent with that right. In *Associated Press v. Otter*  
 4 (*Associated Press I*), 682 F.3d 821 (9th Cir. 2012), the Ninth Circuit further held that  
 5 Idaho’s policy of excluding observers from the initial insertion of the intravenous lines  
 6 violated the right of access to executions. Under this controlling authority, the First  
 7 Amendment access right unambiguously requires uninterrupted access “from the moment  
 8 the condemned is escorted into the execution chamber.” *Cal. First Amendment Coal.*, 299  
 9 F.3d at 870-71; *see also Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 371 (M.D.  
 10 Pa. 2012) (“[P]ublic perception of fairness and transparency concerning the death penalty  
 11 . . . can only be achieved by permitting full public view of the execution.”).

12 ADC violates this access right by excluding the administration of drugs from  
 13 observation, leaving witnesses unaware of the administration of doses beyond those  
 14 called for by its protocol. *See* SOF ¶¶ 55-58. At the most recent execution, observers did  
 15 not know that *fourteen* extra doses of the midazolam-hydromorphone combination were  
 16 used to induce death. SOF ¶¶ 55-57. ADC’s conduct of the execution prevented observers  
 17 from understanding how the execution was being carried out. This Court should declare  
 18 that ADC’s conduct violated the public access right and enjoin ADC to permit full  
 19 viewing of all future executions, including the viewing of each administration of drugs.

20 **B. The Right of Access to Executions Encompasses a**  
 21 **Right to Information About the Means of Execution**

22 **1. The right to attend proceedings incorporates a right to the information**  
 23 **necessary to understand what transpires and to exercise oversight.**

24 The First Amendment access right applies not only to attendance at a proceeding,  
 25 but also to information that is necessary for attendance to be meaningful. Courts have  
 26 widely recognized the existence of a constitutional right to inspect the records of judicial  
 27 proceedings that are themselves subject to the access right. *See Associated Press v. U.S.*  
 28 *Dist. Court for Cent. Dist. of California (Associated Press II)*, 705 F.2d 1143, 1145 (9th

1 Cir. 1983) (right of access to civil motion papers); *Lugosch v. Pyramid Co. of Onondaga*,  
 2 435 F.3d 110, 120 (2d Cir. 2006) (right of access to summary judgment motion papers);  
 3 *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (right of access to records in  
 4 criminal prosecutions); *In re Washington Post*, 807 F.2d 383, 389-90 (4th Cir. 1986)  
 5 (same); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (same). This  
 6 “public attendance” approach recognizes that access to records is “a necessary corollary  
 7 of the capacity to attend the relevant proceedings.” *In re N.Y. Times Co. to Unseal*  
 8 *Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009) (citation  
 9 omitted). As the Ninth Circuit has held, “[t]here is no reason to distinguish between . . .  
 10 proceedings and the documents filed in regard to them.” *Associated Press II*, 705 F.2d at  
 11 1145. The public has a right to access records relating to judicial proceedings because  
 12 they are “important to a full understanding of the way in which ‘the judicial process and  
 13 the government as a whole’ are functioning.” *Id.*

14 The same principle applies to executions. Because the public has a right of access  
 15 to an execution, *Cal. First Amendment Coal.*, 299 F.3d at 877, it also has a right to  
 16 information that is “important to a full understanding” of an execution. While the First  
 17 Amendment does not generally grant “a right of access to government information or  
 18 sources of information within the government’s control,” *Houchins v. KQED, Inc.*, 438  
 19 U.S. 1, 15 (1978), it does protect a right of public access to records that are inextricably  
 20 intertwined with a proceeding subject to the access right, including executions.

21 **2. Information about the source, concentration, and quality of the drugs**  
 22 **used and those who administers them is necessary for meaningful**  
 23 **access to executions and for democratic oversight of them.**

24 Last year, the Ninth Circuit acknowledged that information about the source,  
 25 quality, and composition of lethal injection drugs is “like the memoranda, factual  
 26 findings, affidavits, and transcripts recognized in other cases” and is “inextricably  
 27 intertwined with the process of putting [an inmate] to death.” *Wood v. Ryan*, 759 F.3d  
 28 1076, 1081, 1082 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014) (citation omitted). The right of  
 access attaches to this information because it is essential both to understand what



1 transpires during an execution and to exercise meaningful democratic oversight of the  
2 State’s power to put an individual to death. SOF ¶¶ 18, 64-65, 71-74.

3 Information about the means of execution is necessary for a meaningful  
4 understanding of the proceeding. Viewing an execution, much like viewing a trial, does  
5 not provide the complete picture. Access to the related information enables  
6 comprehension of the proceeding and is essential for meaningful commentary on the  
7 efficiency and propriety of the means used. SOF ¶¶ 18, 64-65, 71-74. As the Ninth  
8 Circuit has explained, “more information about the drugs used in lethal injections can  
9 help an alert public make better informed decisions about the changing standards of  
10 decency in this country surrounding lethal injection” and “will give the public more  
11 confidence than a state’s generic assurance that executions will be administered safely  
12 and pursuant to certain qualifications and standards.” *Wood*, 759 F.3d at 1085-86.

13 In this respect, access to information about the lethal injection drugs used and the  
14 qualifications of those who administer them effectuates “a major purpose” of the First  
15 Amendment: “to protect the free discussion of governmental affairs.” *Globe Newspaper*,  
16 457 U.S. at 604 (internal citations omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218  
17 (1966)). In order to engage in an intelligent debate about government conduct, citizens  
18 must first understand what the government is doing. The First Amendment access right  
19 ensures that the “constitutionally protected ‘discussion of governmental affairs’ is an  
20 informed one.” *Id.*

21 The limited information requested by plaintiffs is subject to the First Amendment  
22 access right because it is essential to understanding the means used by the State at  
23 executions, which are themselves subject to the constitutional access right.

24 **C. The “History and Logic Test” Independently Confirms That the**  
25 **Right of Access Extends to Information About the Means of Execution**

26 The Supreme Court’s “history and logic” test independently confirms that the First  
27 Amendment right to access extends to information about the source, concentration, and  
28 quality of lethal injection drugs and about those who administer them. This test “does not

1 look to the particular practice of any one jurisdiction, but instead ‘to the experience in  
2 that *type* or *kind* of hearing throughout the United States . . . .’” *El Vocero de Puerto Rico*  
3 *v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983  
4 F.2d 311, 323 (1st Cir. 1992)).

5 **1. There is a long history in the United States of public access to**  
6 **information about the means of execution.**

7 As established by the record before the Court, the public has traditionally enjoyed  
8 broad access to information about the methods of execution and their effectiveness since  
9 the founding of this country. *See* SOF ¶ 1; *see also Cal. First Amendment Coal.*, 299 F.3d  
10 at 868 (noting that historically, “executions were fully open events”).

11 This tradition of access has long provided the public with material information  
12 about the means of execution used. Some historic records reflect that members of the  
13 public were able to observe the construction of the scaffold and were permitted to inspect  
14 the scaffold by testing its spring and pulley mechanisms. SOF ¶ 7. Moreover, public  
15 accounts “supplied information about both the types of ropes used in hangings and the  
16 manufacturers who provided them.” *Wood*, 759 F.3d at 1083. Members of the public  
17 could see the manner in which the noose was tied and collected pieces of rope, allowing  
18 them to determine its size and quality. SOF ¶¶ 7-8.<sup>2</sup>

19 The practice of affording public access to the information needed to assess the  
20 means of execution persisted as execution methods became more sophisticated. New  
21 York’s Electrical Execution Act of 1888, N.Y. Laws § 489(5), which adopted  
22 electrocution as the state’s execution method, became the prototype for modern execution  
23 statutes. SOF ¶ 21. Its enactment followed extensive public discussion, testing, hearings,  
24 and press coverage concerning the precise apparatus to be used in electrocutions. *Id.* This

25 \_\_\_\_\_  
26 <sup>2</sup> Even when hangings were moved into jail yards, the public continued to enjoy access to  
27 this type of information about how the hangings were carried out. Local officials allowed  
28 journalists and other members of the general public to attend closed proceedings, which  
were attended by hundreds of public representatives. SOF ¶ 5. Even non-invitees were  
often afforded the opportunity to inspect the gallows before uninvited members of the  
public were cleared from the grounds. SOF ¶¶ 7-8.

1 debate included “specific details of the type of electricity and equipment used.” *Wood*,  
2 759 F.3d at 1084.

3 The public enjoyed similar access to information concerning gas chambers. Eaton  
4 Metal Products Co., the exclusive provider of lethal gas chambers to Arizona and other  
5 states, filed patent applications publicly disclosing its devices’ inner workings. SOF  
6 ¶¶ 11-12. Newspapers described the “size, cost, and makeup” of Eaton’s gas chambers,  
7 *Wood*, 759 F.3d at 1083, and documented Eaton’s efforts to install them in various states.  
8 SOF ¶ 13. Journalists also reported states’ efforts to obtain permits to operate their  
9 chambers and the company’s maintenance practices. *Id.* The public also knew the source,  
10 composition, and quality of lethal gas used in the chamber. For example, in Nevada,  
11 newspapers reported that state officials had chosen to use hydrogen cyanide. SOF ¶ 14.  
12 They also reported that California Cyanide Co. manufactured the state’s lethal gas, and  
13 company officials openly described their product’s lethality. SOF ¶ 15. Further, “the  
14 identities of many of the officials who handled the chemical up until the point of  
15 execution were a matter of public record.” *Wood*, 759 F.3d at 1083. One Nevada official  
16 published a clinical study reporting the effects of the gas on a prisoner’s cardiac and  
17 respiratory action. SOF ¶ 16. In North Carolina, newspapers sponsored a study that found  
18 the use of hydrocyanic acid made slow and painful death more likely. SOF ¶ 24.

19 Throughout this history, the public was routinely provided access to information  
20 about the effects of execution methods. In the nineteenth and twentieth centuries,  
21 newspapers in Arizona, New York, Ohio, and other states reported the physical effects of  
22 hangings on prisoners’ bodies. SOF ¶¶ 6, 20. Following the transition to gas chambers  
23 and other execution methods, journalists continued to report, in detail, the procedures  
24 used during execution, the qualifications of the officials performing or advising  
25 executions, and the pain and suffering of the condemned. SOF ¶¶ 10-17, 22, 24-25, 32-  
26 37. Across history, journalists with direct access to execution proceedings and personnel  
27 have described the statements and movements of the prisoners, the length of time until  
28

1 death, the statements of executing officials, and the psychological effects of executions  
2 on witnesses. SOF ¶ 2

3 Arizona's current veil of secrecy surrounding its lethal injection drugs and those  
4 who administer them departs from this long tradition of access to information about the  
5 means of execution. Arizona adopted lethal injection in 1992. *See* Ariz. Const. art. 22,  
6 § 22; Ariz. Rev. Stat. § 13-757(A)-(B). Six years later the State exempted from its  
7 disclosure laws records identifying "executioners and other persons who participate or  
8 perform ancillary functions." Act of May 29, 1998, 1998 Ariz. Sess. Laws, ch. 232, § 1  
9 (codified as amended at Ariz. Rev. Stat. § 13-757(C)).

10 Between 1992 and 2010, Arizona's lethal injection protocols required the state to  
11 use sodium thiopental in executions. SOF ¶ 40. Hospira, Inc. was known to be the only  
12 approved manufacturer of sodium thiopental until it exited the market in 2011. *See*  
13 *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). As recently as 2013, Arizona publicly  
14 disclosed the source of its pentobarbital, in response to court order. SOF ¶ 49; *see also*  
15 *Schad v. Brewer*, No. CV-13-2001-PHX-ROS (D. Ariz. Oct. 5, 2013), ECF No. 24. This  
16 past access to drug information in Arizona is consistent with access previously afforded  
17 elsewhere. In *Wood*, the Ninth Circuit noted that Arkansas released the "manufacturer  
18 and batch numbers" of its lethal injection drugs in 2013, and observed that Texas and  
19 Louisiana had "only recently attempted to shield the identities of suppliers of lethal  
20 injection drugs." 759 F.3d at 1083-84.

21 **2. Access to details about the means of execution improves the**  
22 **functioning of executions and is necessary for democratic oversight.**

23 Access to information about the means of execution also "plays a particularly  
24 significant positive role in the actual functioning of the process." *Press-Enter. II*, 478  
25 U.S. at 11. In the context of criminal trials, the Supreme Court noted that access to the  
26 proceedings produces both specific benefits to the functioning of trials and general  
27 support for the trial system. Public attendance improves the performance of all trial  
28 participants, discourages perjury by witnesses and abuse by judges, and encourages those

1 with relevant information to come forward—specific benefits to the process. *See, e.g.*,  
2 *Press-Enter. I*, 464 U.S. at 508; *Richmond Newspapers*, 448 U.S. at 594. Public access  
3 also assures the public that justice is being done in ways that secret proceedings cannot,  
4 supporting the legitimacy of the judicial system. As the Court explained, “[o]penness thus  
5 enhance[s] both the basic fairness of the criminal trial and the appearance of fairness so  
6 essential to public confidence in the system.” *Press-Enter. I*, 464 U.S. at 508.

7 The same is true of access to information about the means of execution. It both  
8 improves the execution process and is essential to public confidence in the operation of  
9 the system of executions. It is also necessary for meaningful voter discussion of the  
10 means of imposing capital punishment.

11 First, access to information about the source, quality, and concentration of the  
12 drugs used in an execution helps assure the effectiveness of the drugs used and reduces  
13 the risk of errors. “Proper drug purity, concentration, and potency are essential for the  
14 safety and functioning of intravenously administered drugs . . . .” Waisel Decl. ¶ 21; SOF  
15 ¶ 64. For example, minor changes in osmolality, acid-base status, and purity can  
16 substantially affect a “drug’s effectiveness and suitability.” Waisel Decl. ¶ 46; SOF ¶ 73.  
17 Subtle differences in drug qualities can result in extreme differences in execution. SOF  
18 ¶¶ 72-73. Public disclosure of the source, quality, and concentration of a drug provides an  
19 advance check against error and is critical for the public to assess whether it will function  
20 as intended. Knowing the name of the drug alone does not convey the information needed  
21 to know that the chemicals used will be effective. SOF ¶¶ 71-74, 80.

22 Second, knowing this information is essential to ensuring that unnecessary pain is  
23 not caused upon injection. SOF ¶¶ 71-74. Disclosure of the source, quality, and  
24 composition of a drug informs the public about “the speed with which a drug should have  
25 its intended effect, the depth of sedation, and the likelihood of unnecessary pain.” Waisel  
26 Decl. ¶ 25; SOF ¶¶ 71-72. Neither effectiveness nor pain may be apparent from observing  
27 an execution. SOF ¶¶ 71-74, 80.

28

1 The source of the drugs used in lethal injection is itself vital information because it  
2 serves as “an important indicator of quality,” particularly where compounding  
3 pharmacies are involved. Waisel Decl. ¶ 26; SOF ¶ 65. This information allows  
4 “observers to evaluate the pharmacy’s reputation by checking such facts as its volume of  
5 drug sales, number of drug recalls, litigation filed against it or citations issued by the  
6 FDA or state pharmacy board.” Waisel Decl. ¶ 32; SOF ¶ 69. Unlike pharmaceutical  
7 manufacturers, compounding pharmacies face little government oversight. They are  
8 largely unregulated by the FDA, and compounded drugs are not FDA-approved. SOF  
9 ¶ 67. Given their key role in the execution process, compounding pharmacies warrant  
10 public scrutiny that can only come with access to information about their role. SOF  
11 ¶¶ 66-70. As a recent spate of botched executions has demonstrated, the process needs  
12 accountability—Joseph Wood’s execution in 2014 lasted nearly 2 hours and required 15  
13 doses of drugs. SOF ¶¶ 54-55.

14 Disclosure of the source and quality of drugs thus promotes the functioning of the  
15 execution process. As discussed above (Part I.B.2), it equally supports public confidence  
16 in the execution process itself and ensures an informed debate over capital punishment.  
17 Without the relevant information about the means of execution citizens cannot know if  
18 lethal injections are “fairly and humanely administered” or rather are “invasive, possibly  
19 painful and may give rise to serious complications.” *Cal. First Amendment Coal.*, 299  
20 F.3d at 876.

21 The Supreme Court has long recognized the shifting and evolving public opinion  
22 concerning execution methods. What methods of execution are cruel and unusual—as  
23 prohibited by the Eighth Amendment—“[are] not fastened to the obsolete, but may  
24 acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v.*  
25 *United States*, 217 U.S. 349, 378 (1910). Thus, the Court draws “from the evolving  
26 standards of decency that mark the progress of a maturing society” in determining what  
27 constitutes cruel and unusual punishment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But  
28 for society to assess whether capital punishment comports with its evolving standards of

1 decency, it must have access to information concerning the procedure itself. In the debate  
 2 “whether lethal injection executions are fairly and humanely administered, or whether  
 3 they ever can be,” the public “must have reliable information about the ‘initial  
 4 procedures.’” *Cal. First Amendment Coal.*, 299 F.3d at 876.

5 In short, public access to information about the means of execution has historically  
 6 been available, and it both improves the functioning of the process and is necessary to  
 7 support the legitimacy of State executions. Both “history” and “logic” compel recognition  
 8 of a First Amendment right of access to this information.

## 9 II.

### 10 **ADC FAILS TO DEMONSTRATE ANY PROPER BASIS** **TO LIMIT THE PUBLIC’S RIGHT OF ACCESS** **TO INFORMATION ABOUT ITS MEANS OF EXECUTION**

11  
 12 ADC has offered no justification sufficient to overcome the public’s constitutional  
 13 right of access to the information at issue. To overcome the access right ADC must  
 14 demonstrate “an overriding interest based on findings that closure is essential to preserve  
 15 higher values and is narrowly tailored to serve that interest.” *Press-Enter. I*, 464 U.S. at  
 16 510. The Ninth Circuit uses a three-part test to determine whether the State has met its  
 17 burden. It requires ADC here to show that: “(1) closure serves a compelling interest;  
 18 (2) there is a substantial probability that, in the absence of closure, this compelling  
 19 interest would be harmed; and (3) there are no alternatives to closure that would  
 20 adequately protect the compelling interest.” *Oregonian Publ’g*, 920 F.2d at 1466 (citing  
 21 *Press-Enter. II*, 478 U.S. at 13-14).<sup>3</sup> ADC has identified two justifications for its refusal  
 22 to divulge information; neither can satisfy this test.

23 <sup>3</sup> In *California First Amendment Coalition*, the Ninth Circuit applied a less stringent test  
 24 laid out in *Turner v. Safley*, 482 U.S. 78 (1987). That test does not apply to the assertion  
 25 of constitutional rights by plaintiff news organizations. As the Ninth Circuit recognized,  
 26 the *Turner* test has never been applied by the Supreme Court in cases asserting the rights  
 27 of “outsiders” rather than prisoners, but that test governed as “law of the case” in *Cal.*  
 28 *First Amendment Coal.* 299 F.3d at 878-79. Moreover, *California First Amendment*  
*Coalition* considered a specific prison’s procedure that limited public access to  
 proceedings taking place “within prison walls.” *Id.* at 877. In contrast, plaintiffs’ request  
 for information about lethal injection drugs does not seek physical access to a prison or to  
 its staff; it seeks external information needed to understand proceedings the public may

1 ADC's first justification is that the information at issue is "confidential pursuant to  
 2 A.R.S. § 13-757(C)." Def.'s Ans. to Interrog. ¶ 2 [Decl. David A. Schulz Ex. A ("Schulz  
 3 Decl.")]<sup>4</sup> But a state law cannot defeat a constitutional right. U.S. Const. art. VI, cl. 2.  
 4 Indeed, the Supreme Court has repeatedly upheld the First Amendment access right over  
 5 state laws authorizing secrecy. *Globe Newspaper*, 457 U.S. at 610-11 (Massachusetts  
 6 laws requiring closed testimony by juvenile victims of sex offenses); *Richmond*  
 7 *Newspapers*, 448 U.S. 555 (1980) (Virginia law authorizing closed trials).

8 ADC is on no more solid ground in claiming that the information at issue is not  
 9 subject to disclosure based upon prison security. *See* Def.'s Resp. to Pls.' Req. for Prod.  
 10 ¶ 14 [Schulz Decl. Ex. N]. ADC has provided no evidence explaining how disclosing the  
 11 information plaintiffs seek could endanger prison security, let alone establish a  
 12 "substantial probability" of prejudice to prison security. ADC has also failed to  
 13 demonstrate that there are no alternatives that would adequately protect this interest.

14 ADC has argued in other litigation that disclosing the identities of drug  
 15 manufacturers would limit the drugs' availability. This speculative assertion likewise  
 16 fails to justify a denial of the public's right to information about the means of execution.  
 17 *See Schad*, 2013 WL 5551668, at \*6. ADC has produced no evidence showing that public  
 18 knowledge would actually prevent it from obtaining lethal injection drugs. Arizona's  
 19 continued "refusal to disclose information concerning the manufacture and quality of its  
 20 lethal injection drugs" frustrates the functioning of the execution process: such obstinacy  
 21 "prevents the press and public from accessing the kind of detailed information . . . that  
 22 has been central to promoting change to policy and protocol." *Sarat Decl.* ¶ 27.

23 already observe. That the information at issue is held by ADC should not give the State  
 24 leeway to avoid the heavy burden it otherwise must meet to abridge the public access  
 25 right. However, even if this Court were to adopt the *Turner* test, ADC's arguments would  
 26 still fail under that standard. *See Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013  
 27 WL 5551668, at \*5 (D. Ariz. Oct. 7, 2013).

28 <sup>4</sup> The statute provides that "[t]he 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." A.R.S. § 13-757(C).



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**CONCLUSION**

For the foregoing reasons, plaintiffs’ motion for summary judgment should be granted in all respects.

RESPECTFULLY SUBMITTED this 9th day of October 2015.

By: /s/ Craig C. Hoffman

David J. Bodney (006065)  
Craig C. Hoffman (026017)  
BALLARD SPAHR LLP  
1 E. Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
Tel: (602) 798-5400  
Fax: (602) 798-5595  
Email: bodneyd@ballardspahr.com

David A. Schulz, *pro hac vice*  
Jonathan Manes, *pro hac vice*  
Amanda Lynch (student certification pending)  
Lourdes Pantin (student certification pending)  
Ben Picozzi (student certification pending)  
MEDIA FREEDOM AND  
INFORMATION ACCESS CLINIC<sup>5</sup>  
P.O. Box 208215  
New Haven, CT 06520  
Tel: (203) 432-9387  
Fax: (203) 432-3034  
Email: dschulz@lskslaw.com

Ballard Spahr LLP  
1 East Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
Telephone: 602.798.5400

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<sup>5</sup> This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to present the school’s institutional views, if any.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically transmitted the attached document to the clerk's office using the CM/ECF system for filing and transmittal of a notice of electronic filing to all registered parties this 9th day of October, 2015:

s/ Catherine M. Weber

Ballard Spahr LLP  
1 East Washington Street, Suite 2300  
Phoenix, AZ 85004-2555  
Telephone: 602.798.5400

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