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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Edward Harold Schad, Jr., Plaintiffs, -vs- Robert Glen Jones, Jr., Intervenor, -vs- Janice K. Brewer, Governor of Arizona, Charles L. Ryan, Director, Arizona Department of Corrections, Ron Credio, Warden, Arizona Department of Corrections-Eyman, Lance Hetmer, Warden, Arizona Department of Corrections, Florence, Defendants.	CV–13-02001-PHX-ROS **[CAPITAL CASE]** **RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION**

Plaintiff Edward Harold Schad and Intervenor Robert Glen Jones filed suit pursuant to 42 U.S.C.§ 1983, alleging that Defendants' failure to disclose the identity of the source of pentobarbital to be used in their forthcoming executions,

and other information regarding these drugs, violates their First Amendment right to access to government information, and Fourteenth Amendment rights to due process. Both have moved for a temporary restraining order or a preliminary injunction seeking a stay of their execution. (Dist. Ct. Docs 1, at 2; 8 at 2.) Plaintiffs are not entitled to the drastic and extraordinary remedy of injunctive relief; they have not made the required showing of any federal right to any information concerning the drugs to be used in their executions.

Furthermore, for over 2 months, Plaintiffs' Complaints demonstrate that they have known Defendants were not going to divulge the source of the drugs, yet they waited until a week before Schad's scheduled execution to file their lawsuits.[1] Now they are seeking a temporary injunction, an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A court can consider "the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991). There is "a strong equitable presumption against the grant of stay" where the claim could have been raised earlier so a stay would not have been necessary. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Hence, courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the

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[1] Exhibits A and B to Plaintiffs' Complaint dated July 19 and 30, 2013, Director Ryan's response stating "ADC intends to use unexpired, domestically obtained Pentobarbital for these executions." Plaintiffs had no reason to await further requests of ADC by the ACLU.

extent to which the inmate has delayed unnecessarily in bringing the claim." *Id*. at 649-50.

STANDARD OF REVIEW

Filing a § 1983 action does not entitle a Plaintiff to an automatic stay of his execution. *Hill*, 547 U.S. at 583-84; *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (*per curiam*). A preliminary injunction is "'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.' *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis original). To obtain preliminary injunctive relief, Plaintiff must demonstrate that: "(1) he is likely to succeed on the merits of such a claim; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that an injunction is in the public interest." *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *Lopez*, 680 F.3d at 1072; *West v. Brewer*, 652 F.3d 1060 (9th Cir. 2011). Plaintiffs' allegations in their two count Complaints do not even meet the plausibility standard, let alone the "likely" standard required for a preliminary injunction.

RELEVANT PROCEDURAL BACKGROUND

Schad was convicted of first-degree murder and sentenced to death for killing Lorimer "Leroy" Grove more than 35 years ago, in 1978. *State v. Schad*,

129 Ariz. 557, 633 P.2d 366 (1981). Jones was convicted of six counts of first-degree murder and he, too, was sentenced to death. *State v. Jones*, 197 Ariz. 290, 4 P.3d 345 (2000). After years of review by various courts, Schad is scheduled to be executed on Wednesday October 9, 2013, and Jones on Wednesday October 23, 2013, both under Arizona's one-drug protocol. The Ninth Circuit has reviewed that protocol and found it constitutional. *Lopez*, 680 F.3d at 1071 n. 2; *see also Towery*, 672 F.3d at 661; *Dickens v. Brewer*, 631 F.3d 1139, 1141 (9th Cir. 2011) (three drug protocol). Where a State lethal injection protocol is "substantially similar" to the protocol upheld in *Baze v. Rees*, 553 U.S. 35 (2008), a stay of execution is inappropriate. *Id*. at 61.

ARGUMENTS

1. *Plaintiffs' two claims are not plausible and thus have no likelihood of success.*

Plaintiffs do not raise an Eighth Amendment claim in their Complaint, but explain that their underlying concern is their Eighth Amendment right to be free from cruel and unusual punishment. (Mo. at 7, 12.) "[T]o prevail on such a claim, there must be a 'substantial risk of serious harm,' and 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless' for purposes of the Eighth Amendment." *Baze*, 553 U.S. at 35 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)). Thus, Schad and Jones must show that "the conditions presenting the risk must be '*sure or very likely* to

cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Cook v. Brewer* (*Cook I*), 637 F.3d 1002, 1004 (2011) (emphasis original). In their preliminary injunction motion the only allegation Plaintiffs make in support of an Eighth Amendment claim is that "the FDA has stated, *drugs* that expired are *often* unsafe and risky." (Mo. at 13; emphasis added.) Plaintiffs make no attempt to explain how, under Arizona's one-drug protocol, they would be sure or very likely to experience serious illness and needless suffering even if the pentobarbital was expired.

Moreover, *Cook I* and *Cook v. Brewer (Cook II)*, 649 F.3d 915 (9th Cir. 2011), control any argument that the drugs at issue here could serve as grounds for an Eighth Amendment claim. Both those cases were decided under the three-drug protocol where sodium thiopental, a fast-acting barbiturate anesthetizes the inmate and allows the remaining two chemicals to be administered without causing pain. *Dickens*, 631 F.3d at 1142. The issue in those cases was whether Cook had pled a facially plausible claim. There, Cook argued that the foreign manufactured non-FDA approved sodium thiopental may be "contaminated, compromised, or otherwise ineffective, such that it will not properly anesthetize him" under the three-drug protocol or "might not actually be sodium thiopental at all" and that "using an unapproved substance from an unknown manufacturer in an execution gives rise" to an Eighth Amendment violation. *Cook I*, 637 F.3d at 1006. The Court concluded his allegations failed to meet the plausibility standard. *Id*. In

Cook II, Cook alleged that the batch of sodium thiopental to be used was manufactured for use in animals, not for human use and that the British Government reported that there had been 12 adverse drug reaction reports in the last 2 years concerning sodium thiopental, five of which were related to its efficacy and one from the same batch that was to be used for lethal injection. Additionally he alleged that there had been problems in three executions in the United States with the imported drug and the DEA had seized the drugs in one state. *Cook II*, 649 F.3d at 917. Again Cook failed to state a facially plausible claim. *Id*. at 918.

a. *There is no first amendment right to know the drug manufacturer*.

Based solely on *California First Amendment Coalition et al. v. Woodford*, 299 F.3d 868 (9th Cir. 2002), Plaintiffs assert they have a First Amendment right to know:

a. The manufacturer of lethal-injection drugs to be used in their executions.

b. The National Drug Codes ("NDC") of lethal-injection drugs

c. The lot numbers of lethal-injection drugs

d. The expiration dates of lethal-injection drugs

e. Documentation indicating that those who will handle pentobarbital or other controlled substances in the execution have the appropriate federal Drug Enforcement Agency ("DEA") authorization to do so.

The *California First Amendment* case holds no such thing. That case concerned "the restriction on viewing lethal injection executions imposed on the

public[.]" *Id* at 870. Death row inmates were not a party to the suit and its holding did not create any rights for them. It certainly did not create a constitutional right to know the drug manufacturer or other information about the source of the drugs used in the execution process. 42 U.S.C § 1983 gives a cause of action to those who challenge a State's "deprivation of any rights . . . secured by the Constitution." Plaintiffs have provided no authority that the First Amendment[2] is applicable to inmates under a death sentence. A court need not accept as true all allegations contained in a complaint concerning legal conclusions. *Ashcroft v. Iqbal et al.*, 556 U.S. 662, 678 (2009). Furthermore, the Supreme Court has "never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED*, 438 U.S. 1, 9 (1978); *see, e.g., Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999) (a law enforcement agency could deny access to information in its possession without violating the First Amendment); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) (recognizing that generally there is no constitutional right, and specifically no First Amendment right, of access to government records); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-76 (3d Cir. 1986) (*en banc*) (examining the text and history of the First

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I

Amendment and concluding that there is no First Amendment right of access to state administrative agency records). Even in a criminal case deciding the issue of guilt or innocence there is no general federal constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

Not only have the Plaintiffs failed to establish a constitutional right in support of this claim, but they have ignored the record demonstrating why Arizona's confidentiality statute is critical. The relevant sub-section of A.R.S. § 13-757 provides:

> C. The identity of executioners and other persons who participate or *perform ancillary functions* in an execution and any information *contained in records that would identify those persons* is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2. [§ 39-121 et seq. Arizona's public records statutes].

(Emphasis added.) Following this Court's disagreement with the State's position in *Landrigan v. Brewer*, No. CIV-10-2246-PHX-ROS, 2010 WL 4269557 (D. Ariz. Oct. 23, 2010), *aff'd*, 625 F.3d 1144 (Oct. 26, 2010), *vacated*, 131 S. Ct. 445 (Oct. 26 1010), Chief Judge Kozinski, dissenting with others from the denial of rehearing en banc, identified the policy reason behind Arizona's statute:

> Because Landrigan did not meet his burden, the state had no duty to come forward with any information. *Indeed, Arizona had good reasons not to*; just twenty-four hours after the state attorney general conceded that the drug was imported from Great Britain, one journalist suggested the company might be criminally liable under an EU regulation that makes it illegal to "trade in certain goods which could be used for capital punishment, torture, or other cruel, inhuman or degrading treatment." See Clive S. Smith, The British Company Making a Business out of Killing, The Guardian (Oct. 26, 2010, 4:00 p.m.), http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/26/jeff

> rey-landrigan-execution-sodium-thiopental. Certainly Arizona has a legitimate interest in avoiding a public attack on its private drug manufacturing sources, particularly when Hospira-the only source of sodium thiopental within the United States-hasn't yet announced when the drug will actually be available for executions or how much it plans to produce. Although the district court may have been annoyed with the state for failing to provide the information Landrigan's lawyers wanted to see, the fact remains that Landrigan was not entitled to the information because he failed to make a threshold showing that he will suffer harm.

Landrigan v. Brewer, 625 F.3d 1132, 1143 (9th Cir. 2010) (emphasis added). Hospira never did produce more sodium thiopental and the States were forced to switch to pentobarbital. When the domestic source of pentobarbital became known, Lundbeck, as Plaintiffs' motion described, restricted the use of the drug to prisons in States currently active in carrying out the death penalty by lethal injection. (Mo. at 4-5 n. 8.) The irony is that in moving to lethal injection, "the States were motivated by a desire to find a more humane alternative to then-existing methods." *Baze*, 553 U.S. at 42 n.1. Instead, virtually every execution in Arizona has generated costly, time-consuming litigation.

Plaintiffs argue that A.R.S. § 13-757(C) refers exclusively to "persons." In the statutes and laws of Arizona, however, the term "person" includes "a corporation, company, partnership, firm, association or society, as well as a natural person." A.R.S. § 1-215(28). Thus, under A.R.S. § 13-757(C), information that

would include those persons or companies that are providing ancillary[3] functions in an execution are confidential under state law[4]. The information Plaintiffs seek would lead to the identity of the entity that is the source of the current drugs. Not only do the Plaintiffs lack any federal right to such information, the information is confidential under state law.

b. *Plaintiffs' due process claim was previously rejected by this Court.*

In Claim 2, Plaintiffs assert that the State's decision not to disclose the identity of the source of drugs deprives them of due process, access to the courts, and denies them an opportunity to litigate their Eighth Amendment claim. (Mo. at 12-13.) A similar claim was rejected by this Court in *West v. Brewer*, No. CV-11-1409-PHX-NVW (D. Ariz. 2011) (*Memo. Dec.*), following a discovery and a 3-day trial. *Id*. at *20. There Plaintiffs were also concerned, in part, about non-disclosure of information violating due process and their access to the courts. *Id*. "To establish a due process challenge to executive action, as a threshold question Plaintiffs must show that Defendants' behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* (citing cases). The Court concluded that Defendants' conduct under those circumstances was not

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[3] "[P]roviding necessary support to the primary activities or operation of an organization, institution, industry, or system[.]" Oxford Dictionary, http://oxforddictionaries.com/us/definition/american_english/ancillary (last visited Oct. 3, 2013).

[4] An issue the ACLU is currently litigating in state court under Arizona's public record law.

egregious, "let alone so egregious it shocks the conscience." *Id*. The same is true here. Plaintiffs have established no constitutional right to the information they seek and Defendants have rational reasons, including based on state law and prior experience, to withhold the information. *See Valle v. Singer*, 655 F.3d 1223, 1237 n.13 (11th Cir. 2011) (rejecting the claim that secrecy prevented the death row inmate from litigating his issues). Moreover, the Fifth Circuit recently concluded that no appellate court has recognized a claim that the Due Process Clause provides a right to even review changes in a State's lethal injection protocol. *Sepulvado v. Jindal*, ___F.3d ___, 2013 WL 4711679, at *3-*4 (5th Cir. 2013).

> There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol. Perhaps the state's secrecy masks "a substantial risk of serious harm," but it does not create one. Having failed to identify an enforceable right that a preliminary injunction might safeguard, Sepulvado cannot prevail on the merits.

Id. (footnotes omitted)

"To establish that [they were] denied meaningful access to the courts, [Plaintiffs] must submit evidence showing that [they] suffered an 'actual injury' as a result of the defendants actions." *Id*. at 21 (citing *Lewis v. Casey*, 518 U.S. 343, 348 (1996)). For there to be an actual injury with respect to the planned or existing litigation, the State must cause an inability, such as to meet a filing deadline or to present a claim. *Casey*, 518 U.S. at 348. Here, Plaintiffs access to the courts has not been hindered.

Moreover, Arizona's lethal injection protocol is publically available, and there is no assertion that Plaintiff lacks access to this information. Furthermore, Defendants have informed Plaintiffs that the Arizona Department of Corrections ("ADC") "intends to use unexpired, domestically obtained Pentobarbital" for the executions. Plaintiffs have failed to explain how this procedure—which follows the written protocol—violates their constitutional rights. Accordingly, Plaintiffs have failed to allege a plausible due process claim and thus are unlikely to succeed.

2. *Plaintiffs have not shown they are likely to suffer irreparable harm.*

Plaintiffs have "a strong interest in being executed in a constitutional manner." *See West*, 652 F.3d at 1060; *Beaty*, 649 F.3d at 1072. Because they have not raised plausible claims that their execution will be unconstitutional, they are not likely to suffer irreparable harm. Furthermore, given the safeguards in the protocol, the nature of the one-drug procedure, and the prior constitutional executions since October 2010, it is virtually assured that they will not suffer irreparable harm.

3. *The balance of the equities tip in favor of Defendants.*

It is not in the public interest to grant an injunction. A stay of execution is an equitable remedy and, as such, it "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 384 (citing *Nelson*, 541 U.S. at 649-50). Both Plaintiffs' state and federal collateral proceedings have run their course in the years since they

were sentenced to death for the murders they committed. In Schad's case three decades have elapsed. "[F]urther delay from a stay would cause hardship and prejudice to the State nd victims, given that the appellate process in this case has already spanned more than two decades." *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011) (*per curiam*). The State has an interest in seeing that its laws are enforced and in carrying out the executions as scheduled and further delay will not meet that interest. *See Hill*, 547 U.S. at 584 (recognizing that both the State and the victims of crime "have an important interest in the timely enforcement of a sentence."); *see also* Ariz. Const. art. 2, § 2.1(a)(10) (an Arizona crime victim's constitutional right to a "prompt and final" conclusion of the case). Similarly, the uncertainties and expense that come from the delay that often follows death penalty cases, as well as the impact of such delay upon the families of their victims and their communities, will only be compounded by an injunction. This is especially true where, as here, the movants cannot succeed on the merits of their claim.

4. *An injunction is not in the public interest*.

Because Plaintiffs fail to present any serious plausible questions of constitutional magnitude and there has been no showing that they will suffer an unconstitutional execution and equities tip in favor of Defendants, an injunction is not in the public interest.

. . . .

CONCLUSION

Defendants request that the Court deny injunctive relief.

RESPECTFULLY SUBMITTED this 4th day of October, 2013.

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DATED this 4th day of October, 2013.

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I hereby certify that on October 4, 2013, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing. Participants in the case who are registered ECF users will be served by the appellate ECF system.

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