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10  
 11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN FRANCISCO DIVISION

14  
 15 **LOS ANGELES TIMES**  
**COMMUNICATIONS LLC, et al.,**

16 Plaintiffs,

17 v.

18  
 19 **SCOTT KERNAN, et al.,**

20 Defendants.

C 18-02146-RS

C 06-0219-RS

**DEFENDANTS' NOTICE OF PARTIAL  
 MOTION AND PARTIAL MOTION TO  
 DISMISS THE COMPLAINT FOR  
 DECLARATORY AND INJUNCTIVE  
 RELIEF UNDER FRCP 12(b)(6) FOR  
 FAILURE TO STATE A CLAIM;**

**MEMORANDUM OF POINTS AND  
 AUTHORITIES**

Date: June 21, 2018  
 Time: 1:30 p.m.  
 Courtroom: 3, 17th Floor  
 Judge: The Honorable Richard Seeborg  
 Trial Date: None set  
 Action Filed: April 11, 2018

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1           **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

2           **PLEASE TAKE NOTICE** that on June 21, 2018, at 1:30 p.m., or as soon thereafter as the  
3 matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San  
4 Francisco, CA 94102, Defendants Secretary Scott Kernan and Warden Ronald Davis and will  
5 move this Court to dismiss a portion of the action under Federal Rule of Civil Procedure 12(b)(6)  
6 because several parts of Plaintiffs' complaint fail to state a claim upon which relief can be  
7 granted. Specifically, Defendants contend that the Plaintiffs' following claims fail to state a  
8 claim upon which relief can be granted: (1) the procedures barring witnesses from observing the  
9 process of preparing the lethal injection chemical violate the First Amendment, and (2) the  
10 procedures barring witnesses from viewing efforts to provide medical assistance to an inmate in  
11 the event that the execution is discontinued violate the First Amendment.

12           The motion will be based on this Notice of Motion, the Memorandum of Points and  
13 Authorities, and the pleadings and papers filed in this suit.

14   **MEMORANDUM OF POINTS AND AUTHORITIES**

15   **INTRODUCTION**

16           The scope of the First Amendment right to view an execution is clearly established and  
17 does not extend to viewing the preparation of chemicals before an execution begins or to the  
18 medical treatment of an inmate after an execution is discontinued.

19           *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) provides  
20 for a right of the press and public to view executions from the moment the condemned is escorted  
21 into the execution chamber, including those initial procedures that are inextricably intertwined  
22 with the process of putting the condemned inmate to death. *Id.* at 877. Defendants are not aware  
23 of, and Plaintiffs have not cited any, Ninth Circuit or U.S. Supreme Court case that extends the  
24 First Amendment right of access to an execution beyond these parameters. Plaintiffs in their  
25 complaint request that this court do so by ordering that they be allowed to observe the process of  
26 mixing and preparing lethal injection chemicals and any medical intervention in the event an  
27 execution has been discontinued.

1 In order to establish this asserted extension of the First Amendment, Plaintiffs must plead  
2 facts sufficient to meet the two-pronged test from *Press-Enterprise Co. v. Superior Court (Press-*  
3 *Enterprise II)*, 478 U.S. 1 (1986). Specifically, Plaintiffs must demonstrate that the place and  
4 process they seek to access has historically been open to the press and general public, and that  
5 public access plays a significant positive role in the functioning of the particular process in  
6 question. *Id.* at 8. And, even if Plaintiffs have properly pled their right to access the process of  
7 mixing and preparing lethal injection chemicals and any medical intervention following  
8 discontinuation of an execution, which they have not, they are also required to show that  
9 Defendants' decision to bar access to those procedures is an "exaggerated response" that is not  
10 "reasonably related to legitimate penological objectives." *California First Amendment Coal. v.*  
11 *Woodford*, 299 F.3d 868, 878 (9th Cir. 2002) (citing *Turner v. Safeley*, 483 U.S. 78, 87 (1987)  
12 (quotation omitted).)

13 Plaintiffs do not allege facts to support historical public access to either of these events or  
14 that access will have a positive role in the functioning of the execution. And even if the court  
15 were to determine that Plaintiffs plead facts sufficient to establish a right of access, and they have  
16 not, Plaintiffs' conclusory allegation that Defendants have no penological interest sufficient to  
17 deny either right of access is factually insufficient and does not meet the pleading requirements of  
18 the Federal Rules of Civil Procedure to support the claims. (ECF No. 1 at ¶ 35; Fed. R. Civ. P.  
19 8.)

20 Accordingly, Plaintiffs fail to state a claim of right of access to view preparation of the  
21 chemical or the provision of medical care and those claims should be dismissed.

### 22 **STATEMENT OF THE ISSUES**

23 Plaintiffs allege, among other things, that the inability of witnesses to view either the  
24 preparation of the lethal injection chemical approximately three hours before an execution has  
25 begun or efforts to provide medical treatment to an inmate after an execution is discontinued,  
26 violate the media's First Amendment right to view executions. Therefore, the issues brought to  
27 this Court by way of a motion to dismiss are:

1 1. Do Plaintiffs plead sufficient facts to state a plausible claim of violation of a First  
2 Amendment right of access to observe the preparation of lethal injection chemicals which, by  
3 regulation, occurs before a condemned inmate is brought to the execution chamber and prepared  
4 for the execution?

5 2. Do Plaintiffs plead sufficient facts to establish a plausible claim of a First  
6 Amendment right to observe provision of medical care to an inmate after the discontinuation of  
7 an execution?

### 8 STATEMENT OF FACTS

9 The Department's lethal injection execution regulations (Regulations) that went into effect  
10 on March 1, 2018, provide that "[a]pproximately three hours prior to the initial scheduled  
11 execution date and time," a team of prison officials prepares three doses of the lethal injection  
12 chemical (for a total of 9 syringes for pentobarbital and 15 syringes for thiopental) in the Infusion  
13 Control Room. Cal. Code Regs. tit. 15, § 3349.6(g)(4)(C). As recognized by Plaintiffs, this  
14 process takes place prior to the time the inmate enters the execution room and before witnesses  
15 attending the execution are escorted to the designated witness rooms. (ECF No. 1, 7:20-21.)  
16 (ECF No. 1 at 7:20-21 and 8:3-15 (citing Cal. Code Regs. tit. 15, §§ 3349.6(g)(4)(C), 3349.6(h),  
17 3349.7(b)(4), 3349.6(k)(1), and 3349.7(a)(3).)

18 The Regulations also provide standards for when an execution must be stopped and medical  
19 assistance summoned. (ECF No. 1 at ¶ 25 (citing Cal. Code Regs., tit. 15, § 3349.7 (c)(12) and  
20 (d).) The Regulations do not direct how such medical care should be administered. Plaintiffs  
21 correctly note that witnesses are not able to observe the medical treatment that an inmate may  
22 receive from medical providers after the execution is discontinued. (ECF No. 1 at 9:3-6 (citing  
23 Cal. Code Regs. tit. 15, §§ 3349.7(c)(12), and 3349.7(d).)

24 Plaintiffs assert that "Defendants' concealment of the preparation and administration of the  
25 chemical used in lethal injection procedures and the provision of any 'medical assistance' to an  
26 inmate necessarily impacts Plaintiffs' First Amendment rights." (ECF No. 1 at 13:1-3.) This is a  
27 legal conclusion, and Plaintiffs plead no facts in support of the existence of such a right. The  
28 complaint does not allege any facts to demonstrate that historically, either in California, or in

1 other states that have had lethal injection execution procedures in effect for decades, the public  
2 has been able to view the preparation of chemicals or the provision of medical treatment of a  
3 condemned inmate when an execution is discontinued. (*See* ECF No. 1.)

4 Plaintiffs also do not allege facts to support their conclusions that a right of access plays a  
5 role in the functioning of the execution, let alone a significant positive role. Plaintiffs merely  
6 describe what they believe they are entitled to observe, but provide no factual support for how  
7 such observations would have any significant positive role in the functioning of the execution  
8 process; for example, plaintiffs state that observing the preparation of the chemical to be used  
9 would allow witnesses to:

- 10 • Determine “which drug (thiopental or pentobarbital) Defendants are using in the  
11 execution and whether the execution team is following protocols to avoid foreseeable  
12 errors in the execution process that could cause pain to the inmate.” (*Id.* at 12:10-14);  
13 and
- 14 • Observe “efforts to provide the inmate with ‘medical assistance’ in the event  
15 administration of the lethal injection chemical does not cause death would allow  
16 witnesses to determine the nature of the execution team’s response when the  
17 execution does not proceed as intended, and the impact of errors in the execution  
18 process on the inmate.” (*Id.* at 12:14-17.)

19 Plaintiffs also summarily conclude that there is no legitimate functional or penological  
20 purpose that supports the denial of their asserted right to watch while an inmate receives medical  
21 care from health care providers after an execution has been discontinued. (ECF No. 1, 11: 10-  
22 13.) However, Plaintiffs do not allege that the providers of medical care are part of an execution  
23 team, or that the manner in which medical professionals will provide treatment, is in any way  
24 governed by the Regulations. (*See* ECF No. 1.) Nor do they address the right to privacy of an  
25 inmate who is receiving medical treatment. (*Id.*) Plaintiffs only allege in a conclusory manner  
26 that they have an even greater interest in witnessing executions involving lethal injection than  
27 with other methods of execution (ECF No. 1 at 12:24-26), but do not allege any facts in support  
28 of this conclusion.

## STANDARD OF REVIEW

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2 A complaint may be dismissed for a failure to state a claim upon which relief can be  
3 granted. *See* Fed. R. Civ. P. 12(b)(6). To survive dismissal, “a complaint must contain sufficient  
4 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim  
5 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
6 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,  
7 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007);  
8 citing *Twombly*, 550 U.S. at 556). “Factual allegations must be enough to raise a right to relief  
9 above the speculative level, on the assumption that all the allegations in the complaint are true  
10 (even if doubtful in fact).” *Twombly*, 550 U.S. at 555 (internal quotation marks and ellipsis  
11 omitted).

12 To determine whether a complaint states a claim sufficient to withstand dismissal, a court  
13 considers the contents of the complaint and its attached exhibits, documents incorporated into the  
14 complaint by reference, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor*  
15 *Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007); *Lee v. City of Los Angeles*, 250 F.3d 668, 688  
16 (9th Cir. 2001). The court must accept as true all factual allegations contained in the complaint.  
17 That principle, however, “is inapplicable to legal conclusions. Threadbare recitals of the  
18 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*,  
19 556 U.S. at 678. Accordingly, as stated in *Iqbal*, not every allegation made is a factual one:  
20 “Although for the purposes of a motion to dismiss we must take all of the factual allegations in  
21 the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual  
22 allegation.” *Id.* at 679.

## ARGUMENT

### **I. PLAINTIFFS HAVE NOT PLED SUFFICIENT FACTS TO DEMONSTRATE A FIRST AMENDMENT RIGHT TO OBSERVE THE PREPARATION OF THE LETHAL-INJECTION CHEMICAL OR THE PROVISION OF MEDICAL ASSISTANCE TO A CONDEMNED INMATE AFTER AN EXECUTION IS DISCONTINUED.**

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27 The law does not support Plaintiffs’ conclusions that the First Amendment *guarantees* the  
28 right of access to information for activities occurring before an execution or medical treatment

1 after an execution has ceased. (ECF No. 1 at ¶¶ 4 and 5 (emphasis added).) In *California First*  
2 *Amendment Coalition v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002), the court recognized the  
3 longstanding premise that “[i]t is well-settled that the First Amendment guarantees the public—  
4 and the press—a *qualified* right of access to governmental proceedings.” (Citation omitted;  
5 emphasis added.) The *California First Amendment Coalition* court defined the right of access in  
6 this context as “a First Amendment right to view executions from the moment the condemned is  
7 escorted into the execution chamber, including those ‘initial procedures’ that are inextricably  
8 intertwined with the process of putting the condemned inmate to death.” *Id.* at 877. While  
9 *California First Amendment Coalition* did not address the right of access to information about a  
10 proceeding, other courts have recognized that a right of access to a proceeding does not  
11 necessarily imply a right of access to information about that proceeding. *See Guardian News &*  
12 *Media LLC v. Ryan*, No. CV-14-02363-PHX-GMS, 2017 WL 4180324 at \*8 (D. AZ. Sept. 21,  
13 2017), *appeal docketed*, No. 17-17083 (9th Cir., Oct. 17, 2017), citing to *United States v. Corbitt*,  
14 879 F.2d 224, 228-29 (7th Cir. 1989). When analyzing whether a right of access attaches to  
15 information about a proceeding, a court must analyze not whether there is a right of access to  
16 information generally but to each specific type of information sought. *See In re Boston Herald,*  
17 *Inc.*, 321 F.3d 174, 184 (1st Cir. 2003). In such a situation, the Court must consider whether the  
18 test set forth in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986),  
19 is satisfied as applied to each category of information the Plaintiffs seek.

20 The first prong of the *Press-Enterprise II* test asks “whether the place and process have  
21 historically been open to the press and general public.” *Press-Enterprise II*, 478 U.S. at 8. The  
22 second prong of the test examines whether public access plays a significant positive role in the  
23 functioning of the particular process in question. *Id.* Answering the second question requires the  
24 Court to consider both the benefits and detriments of public access. *See United States v. Index*  
25 *Newspapers, LLC*, 766 F.3d 1072, 1087-88 (9th Cir. 2014). As explained more fully below,  
26 Plaintiffs have not pled any facts to support either, let alone both, prongs of the *Press-Enterprise*  
27 *II* test with regard to viewing the preparation of the lethal-injection chemical, or any efforts to  
28 provide medical assistance to an inmate after an execution has ceased.

1           **A. Plaintiffs Have Not Pled Sufficient Facts to Demonstrate a Right to**  
2           **Observe the Preparation of the Lethal-Injection Chemical.**

3           Plaintiffs have not pled any facts that, if assumed true, would show that, historically, the  
4 public and the press have been granted access to observe preparation of the lethal injection  
5 chemicals before the inmate enters the lethal injection room. This alone demonstrates that the  
6 Plaintiffs have failed to state facts sufficient to plead an essential element of this claim and as a  
7 result the claim should be dismissed.

8           Additionally, Plaintiffs allege only conclusory allegations regarding the role of the press as  
9 it relates to executions in general to support their claim of access to observe the preparation of the  
10 chemical. (ECF No. 1 at ¶¶ 5, 29, and 30.) Noticeably absent from their complaint are any facts  
11 that show what positive role to the process access to this particular information affords.

12           Plaintiffs' failure to allege these facts is fatal to these claims. Leave to amend the  
13 complaint should not be granted because there is no law supporting the notion that witnesses to an  
14 execution have a First Amendment right to view the preparation of lethal injection drugs before  
15 an inmate is brought to the execution chamber. Although the Ninth Circuit has held that there is a  
16 qualified First Amendment right of access to execution proceedings, it is nevertheless subject to  
17 closure on the basis of legitimate penological purposes, *Woodford*, 299 F.3d 868, 877-79, and no  
18 precedent has extended *California First Amendment Coalition* to information about preparations  
19 occurring before the inmate's entrance into the execution chamber. *First Amendment Coal. of*  
20 *Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 956 (D. Az. 2016), *appeal docketed*, No. 17-16330 (9th  
21 Cir. June 28, 2017).

22           Plaintiffs impermissibly assert a legal conclusion couched as a factual allegation when they  
23 claim that Defendants have no legitimate functional or penological purpose for concealing  
24 information pertaining to preparation of the lethal injection chemical. Therefore, even if this  
25 court is inclined to find that Plaintiffs have pled sufficient facts to assert a claim of a First  
26 Amendment Right to access to view preparation of the chemical, Plaintiffs have nevertheless  
27 failed to establish that there is no legitimate penological interest in the denial of access during  
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1 execution proceedings. Indeed, Plaintiffs have alternative means by which they may obtain this  
2 information, such as a Public Records Act request.

3 **B. Plaintiffs Do Not Plead Facts Sufficient to Establish a Right to Observe**  
4 **Any Medical Assistance Provided to the Inmate After an Execution Has**  
5 **Been Discontinued.**

6 Because the established First Amendment right to access pertains only to a right to view an  
7 execution, Plaintiffs do not have a right to view the provision of medical care to an inmate after  
8 an execution has been discontinued. As Plaintiffs correctly note, the Regulations require the  
9 Warden to stop the execution and summon medical assistance for the inmate if death is not  
10 declared within ten minutes following administration of the third dose of the Lethal Injection  
11 Chemical. (ECF No. 1 at 8:25-9:3; see also Cal. Code Regs. tit. 15, § 3349.7(c)(12).) The  
12 Regulations also require the Team Administrator to immediately request response by medical  
13 personnel to the Lethal Injection Facility if the execution is stopped or stayed for any reason after  
14 infusion of the Lethal Injection Chemical has commenced, *to provide any medical care that is*  
15 *deemed necessary.* (Cal. Code Regs. tit. 15, § 3349.7(d) (emphasis added.)) The express terms of  
16 the Regulations require the provision of medical assistance because the execution has been  
17 discontinued. The Regulations do not address the manner in which medical personnel should  
18 render treatment and treatment decisions are left solely to the discretion of the responding  
19 medical personnel.

20 Plaintiffs' request for access cannot be established as a matter of First Amendment right  
21 because Plaintiffs do not allege any facts to demonstrate a historical basis for permitting  
22 witnesses to observe efforts to provide medical assistance to an inmate after an execution is  
23 discontinued, nor do they allege facts to demonstrate a positive role by the press or the public as  
24 relates to the provision of medical care once an execution has been discontinued. To the contrary,  
25 the balance weighs against providing this type of access because allowing such access runs afoul  
26 of state and federal medical privacy laws. The United States Supreme Court has stated that  
27 "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy;  
28 they are not like animals in a zoo to be filmed and photographed at will by the public or by media

1 reporters, however 'educational' the process may be for others." *Houchins v. KQED, Inc.* 438  
2 U.S. 1, 5 n.2 (1978).

3 Patients have a right to privacy in their medical information under the state Constitution.  
4 Cal. Const. art. 1, § 1, *see also* California Civil Code sections 56-56.37, the California physician-  
5 patient privilege (Evidence Code sections 990-1007) and the Health Insurance Portability and  
6 Accountability Act (HIPAA). It has been held that the state privacy right protects against  
7 invasions of privacy by private citizens as well as the state. *Porten v. University of San*  
8 *Francisco*, 64 Cal.App.3d 825, 829 (1976), followed in *Park Redlands Covenant Control*  
9 *Committee v. Simon*, 181 Cal.App.3d 87, 98 (1986). Efforts to treat an inmate are not efforts to  
10 execute him. The public has no right to observe inmate medical treatment in any context.  
11 Therefore, drawing the curtain and escorting the witness out of the area provides the inmate the  
12 required legal measure of privacy and dignity while he or she is being given medical assistance,  
13 and furthers prison official's penological interest in maintaining such privacy rights.

14 The Regulations provide that the Warden may stop the execution and summon medical  
15 assistance for an inmate if an execution has ceased. Cal. Code Regs. tit. 15, §§ 3349.7(c)(12) and  
16 (d). However, the specifics of the actual provision of medical assistance to the inmate is not part  
17 of the execution or the Regulations, and is a separate medical process subject to independent  
18 medical privacy laws. Therefore, facts meeting the *Press-Enterprise II* factors must be pled, but  
19 Plaintiffs have failed to do so. Plaintiffs have not and cannot allege facts to demonstrate that the  
20 function has historically been open to observation by the public and media or that Plaintiffs will  
21 have any role, much less a positive role, in the process. Plaintiffs do not have a First Amendment  
22 right to observe the provision of medical care.

23 As stated above, Plaintiffs conclusory allegations that Defendants have no legitimate  
24 functional or penological purpose for concealing information pertaining to the provision of  
25 medical care are not sufficient to plead facts to support their assertion that the First Amendment  
26 claim is improperly obstructed, even if the court was inclined to find the pleading sufficient to  
27 state a claim of First Amendment right to access.

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**CONCLUSION**

Plaintiffs have not pled facts which if assumed true would show that, pre-execution preparations of chemicals, or medical treatment provided to an inmate after an execution procedure was halted, have historically been open to public viewing. Nor have Plaintiffs acknowledged, let alone pled facts, to demonstrate a positive role by the media in either process, that would allow this court to extend the established access to view an execution to extend to information about preparations before the execution or procedures and processes following the discontinuation of the execution. Further, leave to amend should not be granted because there is no law establishing that the media has a right to watch the preparation of chemicals before an execution is set to begin or the provision of medical care to an inmate after the execution has been discontinued. Plaintiffs' conclusory allegations of an insufficient penological interest by Defendants to deny the asserted rights of access to information do not support Plaintiffs claim for declaratory relief even in the event of a finding that a First Amendment right to access is sufficiently plead.

Therefore, Defendants respectfully request that their partial motion to dismiss be granted without leave to amend.

Dated: May 3, 2018

Respectfully Submitted,

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