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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LOS ANGELES TIMES COMMUNICATIONS LLC, et al., Plaintiffs, **v.** **SCOTT KERNAN, et al.,** Defendants.	C 18-02146-RS **DEFENDANTS' REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER FRCP 12(b)(6) FOR FAILURE TO STATE A CLAIM** Date: July 19, 2018 Time: 1:30 p.m. Courtroom: 3, 17th Floor Judge: The Honorable Richard Seeborg Trial Date: None set Action Filed: April 11, 2018

INTRODUCTION

Defendants' motion to dismiss established that Plaintiffs have no First Amendment right to view preparatory events before an execution begins, or to witness medical treatment administered after an execution is stopped. In their opposition, Plaintiffs argue that *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) ("*CFAC*") suggests that the right of access to observe lethal-injection executions applies to chemical preparation and to any execution outcomes where death has not yet occurred because these stages are "inextricably intertwined with the process of putting the condemned inmate to death." They are mistaken. CFAC established that the press and public have a First Amendment right to view executions *from the moment the condemned is escorted into the execution chamber*, including those initial procedures that are inextricably intertwined with the process of putting the condemned inmate to death. *Id.* Nothing in *CFAC* or later precedent supports Plaintiffs' contention that they must be allowed to view the preparation of the lethal-injection chemicals, which occurs hours before an execution begins, or the provision of medical care to a condemned inmate once the execution has been discontinued.

Plaintiffs' contention that there is a historical basis for a right to observe chemical preparation and the effects of a failed execution attempt is also incorrect and is not supported by any case law. To the contrary, the district court case they rely on is not binding and, like the *CFAC* decision, did not indicate that there is a First Amendment right to view the chemical preparation hours before an inmate enters an execution chamber or the medical assistance provided to an inmate after an execution has been discontinued. Similarly, Plaintiffs have failed to demonstrate how access to chemical preparation or to the provision of medical care would play a significant positive role.

Lastly, this Court should reject Plaintiffs' claim that Defendants' true motive for barring witnesses from viewing efforts to provide medical assistance to an inmate in the event an execution is discontinued "is to hide information." (ECF No. 18, 6:28-7:3.) As explained more fully below, because any medical assistance that would be given to the inmate is distinct from the execution process, it is appropriate to shield that assistance from public view.

ARGUMENT

I. THE DECISION IN *CALIFORNIA FIRST AMENDMENT COALITION V. WOODFORD* DOES NOT SUPPORT PLAINTIFFS' CONTENTIONS THAT THEY HAVE A FIRST AMENDMENT RIGHT TO VIEW THE PREPARATION OF THE LETHAL CHEMICALS OR THE PROVISION OF MEDICAL ASSISTANCE TO AN INMATE.

Defendants' motion noted that the scope of the First Amendment right to view an execution is clearly established and does not extend to viewing the preparation of chemicals before an execution begins or to the medical treatment of an inmate after an execution is discontinued. (ECF No. 12, 1:16-18.) As mentioned, in *CFAC*, the Ninth Circuit held that the press and public have a First Amendment right to view executions *from the moment the condemned is escorted into the execution chamber*, including those initial procedures that are inextricably intertwined with the process of putting the condemned inmate to death. 299 F.3d at 877. The court noted that the executions' "initial procedures," included the guards' escorting the condemned into the chamber, strapping him to the gurney and inserting the intravenous lines. *Id.* at 876.

Plaintiffs' opposition contends that "the language and reasoning of *CFAC* itself provides for a First Amendment right of access to observe both the preparation of chemicals in a lethal injection execution and the effects of a failed execution attempt." (ECF No. 18, 14:5-7.) With regard to the preparation of chemicals, Plaintiffs assert that the *CFAC* decision "entitles the News Organizations to view the preparation . . . because that activity is inextricably intertwined with the process of putting the condemned inmate to death." (ECF No. 18, 15:1-2.) However, Plaintiffs fail to cite any case law that supports their expansive interpretation of the phrase "inextricably intertwined" in *CFAC*. In fact, "inextricably intertwined" is discussed by the Ninth Circuit not within a vacuum as a free-standing element, but rather is limited by the temporal parameters identified by the holding, i.e., as beginning at the time the condemned enters the chamber.

Moreover, courts have recognized that no precedent has extended *CFAC* to information about preparations occurring before the inmate's entrance into the execution chamber. *First Amendment Coal. of Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 956 (D. Az. 2016), appeal docketed, No. 17-16330 (9th Cir. June 28, 2017). The case law fails to establish that witnesses to an execution have a First Amendment right to view the preparation of lethal injection drugs before

an inmate is brought to the execution chamber. Plaintiffs' view that such preparation is somehow "inextricably intertwined" with the process of putting the inmate to death should be rejected by this Court. In the *Ryan* decision, the court refused to recognize the sort of broad First Amendment right to view execution preparations that Plaintiffs appear to be seeking in this case. It observed that "[t]he public's First Amendment right to view court proceedings does not reach back to sitting in on the police's, the prosecutor's, or the judge's preparation for the proceeding. Nor does it reach behind an execution to learn everything about the execution to come. If an inmate has rights to such information, they come out of the Eighth Amendment, perhaps as aided by procedural due process in an appropriate case, not the First Amendment. The press has no such right, not without the Court making new law that extends beyond historical practice and legal authority." *Id* at 957.

Similarly meritless is Plaintiffs' claim that "the effects of a failed execution attempt, including the consequences to the inmate and any medical assistance provided, are 'inextricably intertwined with the process of putting the condemned inmate to death.'" (ECF No. 18, 15: 19-21.) As noted in the moving papers, the lethal-injection regulations provide that the Warden shall stop the execution and summon medical assistance for an inmate if an execution has ceased. Cal. Code Regs. tit. 15, §§ 3349.7(c)(12) and (d). (ECF No. 12, 8:7-14.) Providing medical assistance to the inmate is not part of the execution or the regulations, and is a separate process that, unlike an execution, consists of medical treatment. *Id.* at 8:19-23. Plaintiffs' conclusory assertions that public scrutiny of any such medical assistance is crucial to ensuring that the public understands "whether lethal injection executions are fairly and humanely administered" is not supported by the relevant case law. While the *CFAC* court noted that the public has a First Amendment right to view executions, it never addressed whether witnesses should be permitted to view the medical care provided to an inmate once an execution has been stopped. *CFAC*, 299 F.3d. at 877. Witnesses only have a right to view executions; there is no support for the contention that witnesses must be permitted to view the medical assistance that an inmate might receive after the execution has been halted. Further, under Plaintiffs' unsupported and extreme view of the term "inextricably intertwined," which they use without reference to the context found in CFAC, the

media could presumably continue to observe an inmate during his subsequent hospitalization after a halted execution, again without regard to the inmate's privacy. In short, Plaintiffs do not have a First Amendment right to observe the provision of medical care to a condemned inmate under *CFAC*.

II. PLAINTIFFS CANNOT SATISFY THE *PRESS-ENTERPRISE* TEST.

In the motion to dismiss, Defendants argued that Plaintiffs had not pled any facts that, if assumed true, would show that, historically, the public and the press have been granted access to observe preparation of the lethal injection chemicals before the inmate enters the lethal injection room. (ECF No. 12, 7: 3-5.) Defendants further stated that Plaintiffs had not alleged any facts to demonstrate a historical basis for permitting witnesses to observe efforts to provide medical assistance to an inmate after an execution has been discontinued. *Id.* at 8:19-23.

Plaintiffs' opposition asserts that to satisfy the historical prong of the *Press-Enterprise* test, "the News Organizations need only show that the public has historically been permitted access to **analogous** procedures, whether in lethal injection executions, or in other methods of execution such as hangings or lethal gas." (ECF No. 18, 17: 3-6.) Plaintiffs then contend that "[t]hroughout American history, the public has had access to all aspects of an execution, including procedures analogous to the preparation of lethal chemicals (i.e., the preparation of the instrumentality of death) and the provision of medical treatment in connection with a failed execution attempt." However, neither of the cases cited by Plaintiffs—*CFAC* and the decision in *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668, at *5 (D. Ariz. Oct. 7, 2013)—support Plaintiffs' claim that the public has "long retained the right to observe both the preparation of the instrumentalities of an execution and the effects of the execution, whether successful or not." (ECF No. 18, 17:25-27.)

Specifically, the *CFAC* opinion noted that historically, "executions were fully open events in the United States," and that "the press and the public historically have been allowed to watch the condemned inmate enter the execution place, be attached to the execution device and then die." 299 F.3d at 875. Nothing in the *CFAC* opinion supports the view that the public has historically been permitted to watch preparations analogous to the preparation of lethal chemicals,

which occurs before the inmate enters the "execution place," or a medical procedure involving a condemned inmate. In fact, the CFAC court acknowledged well-established precedent that "penal institutions 'by definition, are not 'open' or public places'" *Id.* at 877. Moreover, the *Schad* court merely noted that historically "the actual means of execution was open and obvious to the public: rope, sodium cyanide gas, and electricity." 2013 WL 5551668, at *5. Under California's lethal-injection regulations, the means of execution are similarly open and obvious—the doses of chemicals are "administered one at a time until the inmate dies or until all three doses have been used." (ECF No. 18, 8:18-19.) As with *CFAC*, the *Schad* opinion does not bolster the argument that there is a historical basis for permitting witnesses to observe efforts to provide medical assistance to an inmate after an execution is discontinued, or to view the preparation of execution chemicals. Accordingly, Plaintiffs have failed to establish that the *Press-Enterprise* test supports a right of access to view those activities.

Given that the failure to satisfy the first-prong of the *Press Enterprise* test warrants dismissal of Plaintiffs' claims, there is no need for the Court to analyze the second prong of the test, which examines whether public access plays a significant positive role in the functioning of the particular process in question. *Id.* Nevertheless, Plaintiffs cannot demonstrate a positive role by the press or the public as relates to the provision of medical care once an execution has been discontinued. Contrary to Plaintiffs' claims, in the case of an execution that has been stopped, Defendants are respecting the inmate's right to privacy in receiving medical aid, not concealing any harm the prisoner may have suffered during the execution attempt. As mentioned in the moving papers, viewing the provision of medical care cannot be permitted because it runs afoul of state and federal medical privacy laws. *See, e.g.,* California Civil Code sections 56-56.37, the California physician-patient privilege (Evidence Code sections 990-1007) and the Health Insurance Portability and Accountability Act (HIPAA). Because the provision of medical assistance to the inmate is not part of the execution or the Regulations, and is a separate medical process subject to independent medical privacy laws, Plaintiffs cannot satisfy the second prong of *Press Enterprise* with regard to the provision of medical care in the Regulations.

III. PLAINTIFFS' CONTENTION THAT THE RIGHT TO PRIVACY IS "PURELY A PERSONAL ONE" IS INCORRECT.

In arguing that the State does not have standing to assert the inmate's privacy rights, Plaintiffs claim that "the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded." (ECF No. 18, 21:27-22:3, quoting *Assoc. for Los Angeles Deputy Sheriffs v. Los Angeles Times Comms. LLC*, 239 Cal. App. 4th 808, 821 (2015). However, federal courts have consistently acknowledged the right of a physician, as a custodian of records, to assert the privacy rights of his patients. *Sterner v. U.S. Drug Enforcement Agency*, 467 F.Supp.2d 1017, 1025-26 (S.D. Cal. 2006). For example, in *Pagano v. Oroville Hospital*, 145 F.R.D. 683, 696 (E.D.Cal.1993) (overturned on other grounds), the court recognized a physician's duty, as custodians of their patients' medical records, to assert the privacy rights of his patients. Citing several California state cases, the court found that physicians "must be permitted to speak" for their absent patients where a physician's rights are coincident with their patients. *Id.*, citing *Wood v. Superior Court (Bd. of Medical Qual.)*, 166 Cal.App.3d 1138, 1145 (1985). The *Sterner* court, after noting that it found cases like *Pagano* persuasive, concluded that a physician, as a custodian of his patient's records, has standing to assert privacy rights on behalf of his patients. 467 F.Supp.2d at 1026.

The decisions in cases like *Sterner* and *Pagano* establish that the right of privacy is not merely a "personal one." Here, the provision of medical assistance to a condemned inmate after an execution is discontinued would be left solely to the discretion of the responding medical personnel. Those medical providers, like the physicians in *Sterner* and *Pagano,* have the ability to assert privacy rights on behalf of a patient—in this case, the condemned inmate.

Plaintiffs' reliance on the decision in *Associated Press v. Otter*, 682 F.3d 821 (9th Cir. 2012) is also misplaced. Although the court in that case rejected the argument that the condemned prisoner's privacy and dignity interests justified limiting the First Amendment right of public access to executions, it did not address whether such interests would justify limiting the access of witnesses to any medical treatment that a condemned inmate receives after an execution has ceased. *Id.* at 824-25. In fact, "[i]nmates in jails, prisons, or mental institutions retain certain

fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978). Accordingly, this Court should conclude that Plaintiffs do not have a right to watch the provision of medical care to an inmate after an execution has ceased.

CONCLUSION

For the foregoing reasons, Defendants' partial motion to dismiss should be granted without leave to amend.

Dated: June 14, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **LA Times, et al. v. Kernan, et al.** No. **C 18-02146-LB**

I hereby certify that on June 14, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 14, 2018, at San Francisco, California.

L. Santos	*/s/ L. Santos*
Declarant	Signature

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