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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 LOS ANGELES TIMES  
COMMUNICATIONS LLC, KQED, INC.,  
19 SAN FRANCISCO PROGRESSIVE  
MEDIA CENTER,

20 Plaintiffs,

21 v.

22 SCOTT KERNAN, SECRETARY OF THE  
CALIFORNIA DEPARTMENT OF  
23 CORRECTIONS AND  
REHABILITATION, RONALD DAVIS,  
24 WARDEN OF THE CALIFORNIA STATE  
PRISON AT SAN QUENTIN,

25 Defendants.  
26

Case No. 3:18-cv-02146-RS

**PLAINTIFFS' OPPOSITION TO  
PARTIAL MOTION TO DISMISS  
COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF UNDER FRCP  
12(B)(6) FOR FAILURE TO STATE A  
CLAIM**

Date: June 21, 2018  
Time: 1:30 p.m.  
Dept.: 3, 17th Floor  
Judge: Hon. Richard Seeborg

Date Filed: April 11, 2018

Trial Date: Not Yet Set

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1 **I. INTRODUCTION**

2 Plaintiffs Los Angeles Times Communications LLC, KQED, Inc., and San Francisco  
3 Progressive Media Center (collectively “News Organizations”) filed this lawsuit to vindicate the  
4 First Amendment right of the press and the public to observe public proceedings. In *California*  
5 *First Amendment Coalition v. Woodford* (“CFAC”), the Ninth Circuit affirmed this right as it  
6 applies to executions, including procedures that are “inextricably intertwined with the process of  
7 putting the condemned inmate to death.” 299 F.3d 868, 877 (9th Cir. 2002). The State’s<sup>1</sup> lethal  
8 injection regulations violate this right by blocking access to three key portions of the execution  
9 process: (1) preparation of the lethal chemicals (*i.e.*, mixing the chemicals), (2) administration of  
10 the chemicals (*i.e.*, injecting the chemicals), and (3) the effects of a failed execution attempt (*i.e.*,  
11 where administration of the chemicals under the State’s protocol does not result in death),  
12 including the consequences to the inmate and any medical assistance provided.

13 The State’s Partial Motion to Dismiss does not dispute that the News Organizations have  
14 adequately pled a claim to view the administration of the chemicals. However, the State argues  
15 that there is no right of access to observe the preparation of the chemicals, or the effects of a  
16 failed execution attempt. These arguments are fundamentally flawed.

17 *First*, the State contends fallaciously that because *CFAC* did not specifically address a  
18 right to observe chemical preparation or the provision of medical assistance, no such right exists.  
19 Nothing in *CFAC* supports such a limiting reading. To the contrary, the text and reasoning of  
20 *CFAC* actually suggest that the right of access does apply to chemical preparation and to any  
21 execution outcomes where death has not yet occurred because these stages are “inextricably  
22 intertwined with the process of putting the condemned inmate to death.” *Id.* at 877.<sup>2</sup> Moreover,  
23 *CFAC* expressly rejects the State’s approach of defining events as either pre- or post-execution  
24 and therefore outside of the scope of the right to access. 299 F.3d at 876 (“[D]efendants define

25 \_\_\_\_\_  
26 <sup>1</sup> This brief uses “the State” to refer to Defendants Scott Kernan, the Secretary of the California  
Department of Corrections and Rehabilitation (“CDCR”), and Ronald Davis, the Warden of San  
Quentin Prison.

27 <sup>2</sup> The State’s policy of blocking observation of any medical assistance provided in the event of a  
28 failed execution attempt also violates the permanent injunction entered in *CFAC*, which prohibits  
any interference with the right of access until the inmate is declared dead.

1 [the execution] as beginning when the lethal chemicals begin to flow. This definition, however, is  
2 simply of the defendants’ own making”).

3         *Second*, the State contends that the News Organizations have failed to allege facts to  
4 support a historical and functional basis for a right to observe chemical preparation and the effects  
5 of a failed execution attempt. But the State ignores the allegations in the Complaint—as well as  
6 the judicial findings in *CFAC* and in this Court’s decision in *Morales v. Tilton*, 465 F. Supp. 2d  
7 972 (N.D. Cal. 2006)—that do exactly that. *See, e.g.*, Compl., ¶¶ 33 & 37. The State’s contention  
8 that the Complaint must allege a history of access to chemical preparation or medical assistance  
9 in the specific context of lethal injection executions is simply wrong. *CFAC* held that the press  
10 has a right to view the strapping of an inmate to the gurney in lethal injection executions based  
11 not on the historical ability to observe that very act, but rather, on the historical ability to view  
12 analogous events in hangings and lethal gas executions. 299 F.3d at 876. Logically, the interest in  
13 the public observing the execution process reaches its height when a state-sponsored execution  
14 goes awry, and this lawsuit focuses on those areas where an execution could go wrong (*e.g.*,  
15 chemical preparation and administration) or has gone wrong (*e.g.*, when medical assistance is  
16 required). *See, e.g., Morales*, 465 F. Supp. 2d at 980 (finding that “[i]mproper mixing,  
17 preparation, and administration” of chemicals raised the possibility of an Eighth Amendment  
18 violation).

19         *Third*, the State suggests that a legitimate state interest may justify limiting the First  
20 Amendment right of access. The State cannot raise an affirmative defense predicated on facts  
21 outside the four corners of the complaint at the motion to dismiss stage. In any event, with  
22 respect to the preparation of the lethal chemicals, the State fails to identify what that interest  
23 might be. With respect to the provision of medical assistance in the event of a failed execution  
24 attempt, the State contends—disingenuously—that the inmate’s privacy and dignity interest  
25 justifies an encroachment on the press’s right of access. The Ninth Circuit has rejected this type  
26 of argument, noting the obvious irony of a state’s invocation of the privacy and dignity interest of  
27 a person it is publicly attempting to execute. *Associated Press v. Otter*, 682 F.3d 821, 824–25 (9th  
28 Cir. 2012). Moreover, the fact that the State seeks to conceal the provision of medical

1 assistance—an event that occurs only when an execution has gone wrong—supports the News  
2 Organizations’ allegation that the State’s true motive is to hide information. That is not a  
3 legitimate basis to limit the First Amendment right of access.<sup>3</sup>

4 For these reasons, the State’s Partial Motion to Dismiss should be denied.

## 5 **II. FACTUAL BACKGROUND**

6 The following factual background derives from the allegations of the Complaint, which,  
7 for purposes of the State’s Motion to Dismiss, should be accepted as true.

### 8 **A. California’s Current Execution Procedures**

9 The default method of execution in California is lethal injection. Compl. ¶ 17; Penal  
10 Code § 3604(a) (unless inmate elects lethal gas, execution method is “an intravenous injection of  
11 a substance or substances in a lethal quantity sufficient to cause death”). CDCR’s procedures for  
12 administering the death penalty are located in Title 15 of the California Code of Regulations §  
13 3349, *et seq.* (the “Lethal Injection Regulations” or “the Regulations”). Compl. ¶ 18. The most  
14 recent version of the Lethal Injection Regulations went into effect on March 1, 2018. *Id.*

15 The Regulations call for injection of a single chemical: either pentobarbital or thiopental.  
16 *Id.* ¶ 20. The Warden of San Quentin Prison selects which of the two drugs to use and need not  
17 alert the public as to which drug he selects. *Id.* There is societal interest in knowing the choice of  
18 chemical. FDA-approved manufacturers of pentobarbital prohibit its use in executions. *Id.* And  
19 thiopental is not available domestically and cannot be lawfully imported into the United States.  
20 *Id.*

21 Pursuant to the Regulations, the process for executing an inmate proceeds in several steps.  
22 First, a team of prison officials prepares three doses of the selected lethal injection chemical. *Id.* ¶  
23 23. The preparation process varies depending on the chemical selected, and thus would allow an  
24 observer to ascertain the chemical used in the execution. *Id.* ¶ 22. For pentobarbital, prison  
25 officials prepare three trays with three syringes each, for a total of nine syringes. *Id.* ¶ 23. For  
26 thiopental, officials prepare three trays of five syringes each, for a total of 15 syringes. *Id.*

27 <sup>3</sup> *CFAC*, 299 F.3d at 880 (noting that the State’s “concern that the strapping of a condemned  
28 inmate, the injection of intravenous lines or other aspects of a lethal injection execution would be  
perceived as brutal by the public” was not a legitimate penological interest).

1 Regardless of the chemical selected, it “shall be prepared according to the instructions provided  
2 by the Lethal Injection Chemical Supplier.” Cal. Code Regs., tit. 15, §3349.6(g)(3). Preparation  
3 occurs in an Infusion Control Room, which is directly adjacent to the Lethal Injection Room  
4 where the inmate is ultimately executed. Compl. ¶ 16.

5 Next, prison officials escort execution witnesses into a designated witness room abutting  
6 the Lethal Injection Room. *Id.* ¶ 24. The witness room provides a direct view into the Lethal  
7 Injection Room. *Id.* Witnesses can also listen to activities in the Lethal Injection Room via a  
8 public address system. *Id.* Importantly, however, witnesses are not able to view anything that  
9 goes on in the Infusion Control Room. *Id.* Accordingly, they are unable to view the preparation  
10 of the lethal injection chemicals. *Id.*

11 After the witnesses arrive—and fifteen minutes before what the Regulations call the  
12 “scheduled execution ... time”—prison officials escort the inmate into the Lethal Injection Room.  
13 *Id.* ¶ 25. After the inmate enters the room, the following steps occur (though the Regulations are  
14 silent on when they occur in relation to the “scheduled execution... time”): prison officials strap  
15 the inmate to a gurney and insert intravenous lines into the inmate. *Id.*; Compl., Exh. A at  
16 § 3349.6(k), 3349.7. The intravenous lines extend into the Infusion Control Room, where a  
17 second set of prison officials injects doses of the lethal injection chemical into the intravenous  
18 lines. *Id.* The doses are administered one at a time until the inmate dies or until all three doses  
19 have been used. *Id.* ¶ 26. Again, witnesses are unable to observe activities that occur in the  
20 Infusion Control Room, including administration of the lethal chemical. *Id.* ¶ 16.

21 If the inmate is still alive after three doses, the Regulations require the Warden to “stop  
22 the execution” and “summon medical assistance” for the inmate. *Id.* ¶ 27. At this point, prison  
23 officials close the curtains on the viewing windows to the Lethal Injection Room, turn off the  
24 public address system, and escort witnesses out of the witness room. *Id.* Witnesses are not able to  
25 view the effects of a failed execution attempt, including the consequences to the inmate and any  
26 medical assistance provided. *Id.*

### 27 **B. The State’s Prior Lethal Injection Protocol**

28 In *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006), this Court found that



1 California’s prior lethal injection procedure suffered from several “critical deficiencies” that  
2 raised significant Eighth Amendment concerns. Most notably, prison staff’s “admitted failure to  
3 follow the simple directions provided by the manufacturer of sodium thiopental” raised the  
4 specter of improper preparation and administration of the lethal chemicals. *See id* at 979-80. The  
5 Court also found that prison staff lacked sufficient training and professionalism, kept unreliable  
6 records, and operated in sub-standard conditions. *See id.* at 979-80. Due to these, and other,  
7 deficiencies, the Court concluded that there was “an undue and unnecessary risk of an Eighth  
8 Amendment violation,” and encouraged the State to conduct “a thorough review of the lethal-  
9 injection protocol” and to “review and revise” the protocol appropriately. *Id.* at 981-84.

### 10 C. Public Access to Executions in California

11 Executions in the United States have historically been fully open to the public. Compl. ¶  
12 33. Witnesses were able to see not only a condemned prisoner’s death, but the details regarding  
13 the specific means used to execute the prisoner and the after-effects of the execution. *Id.* ¶ 33-34.  
14 Thus, for an execution by hanging, the public was provided access to detailed information about  
15 the size, quality, and production of the rope used. *Id.* ¶ 34.

16 California has continued this tradition of public access. *Id.* ¶ 28. California Penal Code  
17 § 3605, for example, requires that “at least 12 reputable citizens” must be invited to attend any  
18 execution conducted in California. Compl. ¶ 28. Journalists are frequently chosen for inclusion  
19 among those selected to serve as witnesses. *Id.* ¶ 29. Those selected subsequently report on what  
20 they observe and, in doing so, serve as surrogates for members of the press and public who are  
21 not able to attend executions personally. *Id.*

22 Public access to executions serves an important role promoting confidence in the integrity  
23 of our criminal justice system and informing our national dialogue about the propriety of, and  
24 proper procedures for, executing prisoners by lethal injection. *Id.* ¶ 30. Absent the ability to  
25 witness firsthand how lethal injection executions are actually conducted and the consequent  
26 effects on the condemned, the public will be deprived of critical information regarding whether  
27 execution procedures are being properly implemented and whether execution by lethal injection  
28 comports with our society’s evolving standards of decency. *Id.* ¶¶ 30-33, 39.

1           However, despite the history of public access to executions and the important role that  
2 access plays, the Lethal Injection Regulations attempt to limit access to lethal injection executions  
3 in two ways. First, the Lethal Injection Regulations require that critical portions of the execution  
4 process, including both the preparation and the administration of lethal injection chemicals, occur  
5 in the Lethal Injection Room, outside of the view of witnesses. *Id.* ¶ 35. Second, the Regulations  
6 prohibit witnesses from viewing the effects of the State’s failed effort to execute an inmate,  
7 including the consequences to the inmate and any attempts to render medical assistance. *Id.*

8           These limitations deprive the public of critical information regarding executions by lethal  
9 injection. Because of these limitations, the public is unable to gather information regarding:

- 10           • Which lethal injection chemical is being used in the execution (*id.* ¶¶ 37-38);
- 11           • How prison officials prepare and administer the lethal chemical, including whether  
12           they do so properly and in accordance with established protocols (*id.* ¶¶ 5, 37, 38);
- 13           • The number of doses used in the execution (*id.* ¶¶ 5, 38);
- 14           • How the prisoner reacted to each dose (*id.* ¶¶ 5, 38);
- 15           • How effectively and professionally the execution staff performed when the execution  
16           progresses as intended (*id.* ¶¶ 5, 38);
- 17           • How effectively and professionally the execution staff performed if and when the  
18           execution does not progress as intended (*id.* ¶¶ 5, 37); and,
- 19           • How the inmate is affected by errors in the execution process (*id.* ¶ 37).

20           This information is particularly important in the context of lethal injection executions because  
21 such executions involve more complicated procedures and greater room for error. *Id.* ¶¶ 5, 37.

22           The State’s attempts to limit public access to executions is not motivated by a legitimate  
23 penological purpose, but is instead motivated by a desire to suppress important information about  
24 the execution process from the public and the press. *Id.* ¶¶ 35-36, 38. Notably, this isn’t the first  
25 time the State has attempted to deprive the public of access to critical parts of the lethal injection  
26 process. *Id.* ¶ 36. The State previously prevented witnesses from viewing the process of strapping  
27 the condemned inmate to the gurney and inserting intravenous lines into the inmate. *Id.* In  
28 subsequent litigation challenging that practice, the Ninth Circuit determined that the State’s

1 conduct was not prompted by legitimate concerns for prison personnel safety, but rather by  
2 concerns that the process of strapping down an inmate and inserting intravenous lines would be  
3 perceived as brutal. *Id.*

4 The limitations on public access in the present Lethal Injection Regulations are motivated  
5 by similar concerns. *Id.* ¶¶ 35-36, 38. The State has provided no explanation for depriving the  
6 public of access to either the preparation/administration of lethal chemicals or the attempts to  
7 render assistance to an inmate following administration of the final lethal injection dose. *Id.* ¶ 38.  
8 That fact, coupled with the State's prior attempts to improperly conceal critical aspects of the  
9 execution process, raise the inference that it is doing so with the goal of suppressing important  
10 information about the execution process from the public and the press. *Id.* ¶¶ 35-36, 38.

#### 11 **D. The News Organizations' Lawsuit**

12 In response to the State's limitations on public access to important aspects of lethal  
13 injection executions, the News Organizations initiated this lawsuit on April 11, 2018. *See*  
14 *generally*, Compl. The News Organizations seek to enforce the First Amendment right of the  
15 press and the public to observe California executions. Specifically, they seek the ability to  
16 observe (1) the preparation of lethal injection chemicals, (2) the administration of lethal injection  
17 chemicals, and (3) the effects of a failed execution attempt, including the consequences to the  
18 inmate and any medical assistance provided. Compl. ¶ 46. The State filed its Partial Motion to  
19 Dismiss on May 3, 2018, challenging only the first and third items.

### 20 **III. ARGUMENT**

21 The Complaint adequately alleges facts sufficient to find a First Amendment right of  
22 access to observe the preparation of the chemicals and the effects of a failed execution attempt,  
23 including the consequences to the inmate and any medical assistance provided, in a California  
24 execution. The right exists whether one analyzes the execution-specific rubric set out in *CFAC* or  
25 the more general test set out in *Press-Enterprise, Co. v. Superior Court*, 478 U.S. 1 (1986)—  
26 although either standard provides an independently sufficient basis to deny the State's Motion.

27 The State presents no legitimate state interest in limiting the right of access. The State  
28 cannot articulate one with respect to blocking access to chemical preparation. The State asserts an

1 inmate’s privacy and dignity interest as a basis to block observation of the inmate in the event of  
2 a failed execution attempt, but the Ninth Circuit has rejected a state’s assertion of those interests  
3 in the execution context. *Associated Press*, 682 F.3d at 824–25. In any event, an asserted state  
4 interest is not a legitimate basis to dismiss a case at the pleading stage. *Van Hook v. Curry*, No.  
5 C06-3148 PJH (PR), 2008 WL 685646, at \*2 (N.D. Cal. Mar. 13, 2008).

6 **A. Legal Standard: Motion to Dismiss**

7 On a motion to dismiss, “the court must construe the complaint in the light most favorable  
8 to the plaintiff, taking all her allegations as true and drawing all reasonable inferences from the  
9 complaint in her favor.” *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Facts outside  
10 the pleadings may not be considered. *Arpin v. Santa Clara Valley Transp. Auth.*, 261 F.3d 912,  
11 925 (9th Cir. 2001). Rule 12(b)(6) motions are “especially disfavored” where the complaint sets  
12 forth a novel legal theory “that can best be assessed after factual development.” *McGary v. City of*  
13 *Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004).

14 **B. Legal Standard: First Amendment Right of Access**

15 The First Amendment guarantees a qualified right of access to governmental proceedings.  
16 *CFAC*, 299 F.3d at 873. That right of access extends not only to the general public, but to the  
17 press as well. *Id.* at 873 n.2.

18 To determine whether a particular public proceeding is subject to a right of access, courts  
19 weigh the two factors set out by the Supreme Court in *Press-Enterprise*: (1) whether the place  
20 and process have historically been open to the press and general public and (2) whether public  
21 access plays a significant positive role in the functioning of the particular process in  
22 question. 478 U.S. 1, 8-9 (1986). “The experience [*i.e.*, historical] prong, however, may be less  
23 relevant if the proceeding at issue has undergone significant changes over time.” *Guardian News*  
24 *& Media LLC v. Ryan*, 225 F. Supp. 3d 859, 866 (D. Ariz. 2016) (citing *Seattle Times Co. v. U.S.*  
25 *Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988), where the historical prong received less weight  
26 because the proceeding at issue, pre-trial detention proceedings, had changed over time).

27 When the right of access exists, the government may not restrict it without a sufficient  
28 justification. *Guardian News & Media LLC*, 225 F. Supp. 3d at 866. “The burden the government

1 must meet to justify closure depends on the type of proceeding.” *Id.* Where, as here, a right of  
 2 access attaches to prison proceedings, access to the proceedings may only be limited if doing so is  
 3 “reasonably related to legitimate penological objectives” and does not represent “an exaggerated  
 4 response to those concerns.” *CFAC*, 299 F.3d at 878 (quoting *Turner v. Safley*, 482 U.S. 78, 87  
 5 (1987)) (internal quotation marks omitted). To determine whether a restriction on the exercise of  
 6 rights is reasonable or exaggerated in light of those penological interests, four factors are relevant:

7 (1) whether there is a valid, rational connection between the prison regulation and  
 8 the legitimate governmental interest put forward to justify it; (2) whether there are  
 9 alternative means of exercising the right that remain open to prison inmates; (3)  
 10 what impact accommodation of the asserted constitutional right will have on  
 guards and other inmates, and on the allocation of prison resources generally and  
 (4) whether there exist ready alternatives that fully accommodate the prisoner’s  
 rights at de minimis cost to valid penological interests.

11 *CFAC*, 299 F.3d at 878 (quoting *Turner*, 482 U.S. at 87) (internal quotation marks and alterations  
 12 omitted).

13 The Ninth Circuit has already held that executions—and California executions in  
 14 particular—satisfy the two-prong *Press-Enterprise* test. *CFAC*, 299 F.3d at 877. The press  
 15 plaintiffs in *CFAC* challenged California’s policy of closing a curtain in front of execution  
 16 witnesses while the State brought the inmate into the lethal injection chamber, strapped him down  
 17 to the gurney, and inserted IV catheters. After finding both the historical and functional prongs  
 18 satisfied, the court stated:

19 We therefore hold that the public enjoys a First Amendment right to view  
 20 executions from the moment the condemned is escorted into the execution  
 21 chamber, including those “initial procedures” that are inextricably intertwined with  
 the process of putting the condemned inmate to death.

22 *Id.* This holding led the court to affirm the District Court’s injunction, which permanently  
 23 enjoined the State “from preventing uninterrupted viewing of executions from the moment the  
 24 condemned enters the execution chamber through, to and including, the time the condemned is  
 25 declared dead.” *Id.* at 885-86.

26 **C. The News Organizations have pled facts sufficient to establish a First**  
 27 **Amendment right of access.**

28 Whether applying *CFAC* or the two-prong *Press-Enterprise* test, the allegations of the

1 Complaint establish a right to observe both the preparation of lethal injection chemicals and any  
2 medical assistance that the State provides in connection with a failed execution attempt.

3 **1. The News Organizations have pled facts establishing a right of access**  
4 **under CFAC.**

5 The language and reasoning of *CFAC* itself provides for a First Amendment right of  
6 access to observe both the preparation of chemicals in a lethal injection execution and the effects  
7 of a failed execution attempt. The right of access to executions established in *CFAC* does not turn  
8 on the State’s definition of when an execution begins and ends, but instead includes those  
9 procedures that are “inextricably intertwined with the process of putting the condemned inmate to  
10 death.” 299 F.3d at 877.

11 As a threshold matter, the Court should reject the State’s effort to categorize events as  
12 either pre-execution or post-execution and therefore outside the scope of the First Amendment  
13 right of access. The *CFAC* court rejected that very approach. In *CFAC*, the State attempted to  
14 argue that the initial procedures of strapping the inmate to the gurney and inserting the IV  
15 catheters were, by definition, outside the scope of an execution because they occurred before the  
16 infusion of the lethal drugs. 299 F.3d at 877. *CFAC* rejected the State’s “definition” of when an  
17 execution begins as one of “defendants’ own making.” *Id.* Now, the State is attempting to revive  
18 this rejected approach by advocating for an unstated definition of an execution—of its “own  
19 making”—that begins after chemical preparation and ends when the Warden deems it over.<sup>4</sup>  
20 *CFAC* precludes this argument.

21 Once the Court dispenses with the State’s attempt to define away the issue, *CFAC* itself

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22  
23 <sup>4</sup> The Regulations themselves use a definition of the term “execution” that is of the State’s “own  
24 making” and contrary to *CFAC*. By way of illustration, the State has drafted the Regulations to  
25 provide that fifteen minutes before the “scheduled execution time,” the inmate is to be escorted  
26 into the Lethal Injection Room; he is then strapped to the gurney and prison officials attach  
27 intravenous lines. Compl. ¶ 25. This implies that escorting in the inmate, strapping him down,  
28 and attaching intravenous lines are not part of the “execution.” But *CFAC* uses the term  
“execution” to include these activities. 299 F.3d at 877 (“the public enjoys 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.”) (emphasis added). *CFAC* bars the State from blocking  
observation of these initial procedures on the theory that they occur before the “execution,” as the  
State wrongly contends here.

1 entitles the News Organizations to view the preparation of lethal chemicals because that activity  
2 is inextricably intertwined with the process of putting the condemned inmate to death. The News  
3 Organizations have so alleged (Compl., ¶ 45), and that allegation must be taken as true. *Doe*, 419  
4 F.3d at 1062. This allegation is also well-supported. Chemical preparation takes place shortly  
5 before the State begins administration of the chemicals. Compl., ¶¶ 23, 25, 26. These chemicals  
6 cause death. *Id.*, ¶ 26. Their preparation occurs in the same Infusion Control Room where the  
7 State administers the chemicals (Compl., ¶¶ 24, 25)—an activity that is subject to a right of  
8 access. The mixing of the chemicals is therefore part and parcel of the execution and subject to  
9 the public’s access rights.

10 The improper mixing of chemicals also can lead to an execution that could cause pain to  
11 the inmate. *Id.* ¶ 37. One of the “critical deficiencies” that this Court found with respect to the  
12 State’s prior lethal injection protocol was “improper mixing, preparation, and administration of  
13 sodium thiopental by the execution team.” *Morales*, 465 F. Supp. 2d at 980 (emphasis omitted)  
14 (“team members’ admitted failure to follow the simple directions provided by the manufacturer of  
15 sodium thiopental further complicates the inquiry as to whether inmates being executed have been  
16 sufficiently anesthetized”). Notably, the State does not attempt to address these allegations, let  
17 alone contend a lack of intertwinement. Because preparation of lethal chemicals satisfies *CFAC*’s  
18 “inextricably intertwined” requirement, it is subject to a First Amendment right of access.

19 Similarly, the effects of a failed execution attempt, including the consequences to the  
20 inmate and any medical assistance provided, are “inextricably intertwined with the process of  
21 putting the condemned inmate to death.” *CFAC*, 299 F.3d at 877. These allegations appear in the  
22 Complaint and must be taken as true. Compl., ¶ 45. Provision of medical care is inextricably  
23 intertwined with the killing process because it occurs at a time when the inmate may still die *in*  
24 *the Lethal Injection Chamber* as a result of the infusion of the lethal chemical. Indeed, inmates in  
25 other states have died after the state halted execution attempts. *See, e.g., See* Jeffrey E. Stern, *The*  
26 *Cruel and Unusual Execution of Clayton Lockett*, *The Atlantic* (Jun. 2015)  
27 <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> (as of  
28 May 20, 2018). In other words, the Lethal Injection Regulations allow the State to block access

1 to what may turn out to be the end of the execution—albeit one where something has gone wrong.  
2 Even if the inmate does not ultimately die, the State’s ability to close a curtain when medical  
3 assistance is provided would block witnesses from viewing the effect of the lethal chemicals on  
4 the inmate and the medical assistance needed to treat him or her. Compl. ¶ 5 (“how effectively  
5 and professionally the execution staff perform if the execution does not proceed as intended”);  
6 ¶ 37 (“extent to which actions or omissions of the execution team caused ultimate errors in an  
7 execution, as well as the effect of those errors on the inmate”). Public scrutiny of how the State  
8 responds to a failing execution attempt—including any medical assistance provided—is crucial to  
9 ensure that the public understands “whether lethal injection executions are fairly and humanely  
10 administered.” *CFAC*, 299 F.3d at 876 (discussing functional importance of public access to  
11 executions).

12 Finally, *CFAC* permanently enjoined the State from blocking the media’s view of any  
13 medical assistance provided to a condemned inmate in the Lethal Injection Chamber. The  
14 injunction in *CFAC* prohibits the State “from preventing uninterrupted viewing of executions  
15 from the moment the condemned enters the execution chamber through, to and including, the  
16 time the condemned is declared dead.” 299 F.3d at 885-86. Because the State only provides  
17 medical assistance at a time when the inmate has not yet been declared dead, under *CFAC*, the  
18 State may not interrupt witnesses’ viewing of the execution at that time. This injunction is a  
19 separate reason—independent of the News Organizations’ First Amendment rights—as to why  
20 the State’s policy of closing a curtain before the inmate dies is illegal. If the State wishes to  
21 implement that policy, as proposed in its Regulations, it must first seek to lift the *CFAC*  
22 injunction.

23 **2. The News Organizations have pled facts establishing a right of access**  
24 **under *Press-Enterprise*.**

25 Access is also required under the Supreme Court’s *Press-Enterprise* test because the  
26 historical and functional prongs are satisfied with respect to preparation of chemicals and effects  
27 of a failing execution attempt, including impacts on the inmate and medical assistance provided.

28 At the outset, the State mischaracterizes the historical prong of *Press-Enterprise* as



1 requiring the News Organizations to plead facts demonstrating historical access to the particular  
2 procedures at issue (*i.e.*, chemical preparation and medical assistance) in the context of a lethal  
3 injection execution. There is no such requirement. To satisfy the historical prong, the News  
4 Organizations need only show that the public has historically been permitted access to *analogous*  
5 procedures, whether in lethal injection executions, or in other methods of execution such as  
6 hangings or lethal gas. The Ninth Circuit’s finding of a historical right of access to lethal  
7 injections was founded on the history of access to executions in general, not a history of access to  
8 lethal injection executions specifically. *See CFAC*, 299 F.3d at 875-76 (finding a right to view the  
9 escorting of an inmate into the lethal injection chamber based on the public’s ability to view the  
10 condemned inmate’s “assent up the gallows” in hangings and the “escort[ing] [of the inmate] into  
11 the gas chamber” in lethal gas executions). The Ninth Circuit’s approach makes sense, as lethal  
12 injection executions did not exist at the time the Founders enacted the Constitution.

13           Throughout American history, the public has had access to all aspects of an execution,  
14 including procedures analogous to the preparation of lethal chemicals (*i.e.*, the preparation of the  
15 instrumentality of death) and the provision of medical treatment in connection with a failed  
16 execution attempt. *See CFAC*, 299 F.3d at 875 (“Executions were fully open events in the United  
17 States.”). The “preparation of the instrumentalities of an execution” was historically open. Compl.  
18 ¶ 33; *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668, at \*5 (D. Ariz. Oct. 7,  
19 2013) (historically, “the specific means used to execute [a] prisoner” were “open and obvious to  
20 the public.”). Thus, for example, in advance of an execution by hanging, the public was provided  
21 “access to detailed information about the size, quality, and production of the rope.” *Id.* ¶ 34.  
22 Similarly, public access has extended historically to include observing the full effects of both  
23 successful and unsuccessful execution attempts. *See* Compl. ¶ 33. The results of an unsuccessful  
24 execution were open and obvious to everyone, given that hangings took place on scaffolds before  
25 large crowds, numbering in the thousands. *Id.*, ¶ 34. As these facts establish, the public has long  
26 retained the right to observe both the preparation of the instrumentalities of an execution and the  
27 effects of the execution, whether successful or not. Thus, the historical prong of the *Press-*  
28 *Enterprise* test supports a right of access to view these same activities in a lethal injection

1 execution.<sup>5</sup>

2 The functional prong of the *Press-Enterprise* test also supports a right of public access to  
 3 these proceedings because public access would play a significant positive role in improving how  
 4 lethal injection executions are conducted. Public observation of the preparation of lethal injection  
 5 chemicals will, for example, unveil mistakes made during the preparation process that can cause  
 6 severe pain to the inmate. Compl. ¶¶ 5, 37-38. Identifying errors in this manner is critical not only  
 7 because it allows the errors to be corrected going forward, but because knowing whether and how  
 8 often errors are occurring will aid the public and the courts in deciding whether lethal injection  
 9 executions are or can ever be “fairly and humanely administered” consistent with the  
 10 requirements of the Eighth Amendment. *CFAC*, 299 F.3d at 876; *see also* Compl. ¶¶ 30-33, 39.  
 11 Concern over these very kinds of preparation errors prompted this Court’s finding in *Morales* that  
 12 California’s prior lethal injection protocol created “an undue and unnecessary risk of an Eighth  
 13 Amendment Violation.” 465 F. Supp. 2d 981, 979-80.

14 Public observation of the chemical preparation process will also allow witnesses to  
 15 identify which chemical the State chooses to use during an execution. The Regulations require  
 16 prison officials to prepare a different number of syringes depending on the lethal injection  
 17 chemical selected. Compl. ¶ 22. If witnesses observe officials preparing nine syringes, then they  
 18 can infer the selected drug is pentobarbital. *Id.* Conversely, if they observe officials preparing 15  
 19 syringes, they can infer the selected drug is thiopental. *Id.* Knowing which drug the State is

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20 <sup>5</sup> These allegations concerning the public’s historic ability to see the “effects” of an execution  
 21 (Compl. ¶ 33), and the fact that they took place before large crowds (Compl., ¶ 34) suffice at the  
 22 pleading stage. If the Court believes greater specificity is required, Plaintiffs seek leave to amend  
 23 to include allegations discussing, for example, the public’s historic witnessing of *failed* execution  
 24 attempts and their aftermath. This includes hangings that involved “snapped ropes, to necks that  
 25 slipped out of nooses, to decapitations, partial and total, to post-hanging revivals of the  
 26 supposedly dead.” Austin Sarat, *Gruesome Spectacles*, p 34 (2014). An 1889 newspaper account  
 27 of a “Horrible Execution” in Texas describes how “[t]he stretch of the rope let all fall to the  
 28 ground. The rope broke in the case of William Walker and fell loose around him as he lay  
 struggling and groaning. He talked for three minutes when he was taken up by the sheriff and  
 deputies and again placed on the scaffold.” *Id.* at 42 (quoting “A Horrible Execution,” *Dallas  
 Morning News* (May 11, 1889), 1). Indeed, the after-effects of execution efforts—whether  
 successful in killing the inmate or not—were traditionally public: “[C]orpses were customarily  
 cut down for at least an hour after the drop, not only for the purposes of drama and edification,  
 but also to foreclose the possibility of recovery after ‘death.’” *Id.* at 31 (emphasis added).  
 Spectators were often allowed to “examine the dangling corpse.” Stuart Banner, *The Death  
 Penalty: An American History* 158-61 (2002).

1 employing in an execution is significant because each chemical is subject to different use and  
2 import restrictions. *Id.* ¶ 20. Permitting the public to determine which drugs the State has chosen  
3 to use in an execution will reveal whether the State violated any restrictions while conducting an  
4 execution by lethal injection: in particular, whether it obtained a chemical in violation of a  
5 manufacturer’s distribution controls (pentobarbital) or unlawfully imported a drug (thiopental).  
6 *Id.* The public is entitled to know this information. *See CFAC*, 299 F.3d at 876 (“Independent  
7 public scrutiny—made possible by the public and media witnesses to an execution—plays a  
8 significant role in the proper functioning of capital punishment.”); *compare, e.g.,* Max Brantley,  
9 *Drug distributor says Arkansas deceitful in obtaining execution drug*, Arkansas Times (Apr. 14,  
10 2017), [https://www.arktimes.com/ArkansasBlog/archives/2017/04/14/drug-company-says-](https://www.arktimes.com/ArkansasBlog/archives/2017/04/14/drug-company-says-arkansas-deceitful-in-obtaining-execution-drug)  
11 [arkansas-deceitful-in-obtaining-execution-drug](https://www.arktimes.com/ArkansasBlog/archives/2017/04/14/drug-company-says-arkansas-deceitful-in-obtaining-execution-drug), with Ed Pilkington, *Death penalty states illegally*  
12 *imported drugs for executions despite warnings*, The Guardian (Oct. 23, 2015),  
13 [https://www.theguardian.com/us-news/2015/oct/23/death-penalty-states-drugs-illegal-sodium-](https://www.theguardian.com/us-news/2015/oct/23/death-penalty-states-drugs-illegal-sodium-thiopental)  
14 [thiopental](https://www.theguardian.com/us-news/2015/oct/23/death-penalty-states-drugs-illegal-sodium-thiopental).<sup>6</sup>

15 Public observation of the rendering of medical aid in connection with a failed execution  
16 attempt will also serve the function of supplying important information about the consequences of  
17 failed lethal injection executions. By blocking from public view the administration of medical aid  
18 to a prisoner following a failing execution attempt, the State is obscuring not only the aid being  
19 provided, but the harm the prisoner may have suffered as a result of the execution attempt. *Id.* ¶¶  
20 5, 37. This information will allow the public to appreciate the full spectrum of risks and outcomes  
21 a prisoner faces—particularly given that the current version of the Lethal Injection Regulations  
22 has not yet been used in any execution. *See CFAC*, 299 F.3d at 876. As an example, the execution  
23 of Clayton Lockett received significant coverage when he died from complications resulting from  
24 a botched lethal injection execution in Oklahoma after the execution had been cancelled. *See*  
25 Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, The Atlantic (Jun. 2015)

26  
27 <sup>6</sup> *CFAC* has already held that providing access to executions serves a positive role in the  
28 functioning of capital punishment. 299 F.3d at 876-77. In any event, the question is a legal one,  
but to the extent the Court believes greater factual specificity is required, Plaintiffs seek leave to  
amend.

1 <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> (as of  
2 May 20, 2018).

3 Notably, the public is entitled to gather this information first-hand and cannot be forced to  
4 obtain it from an alternate source, as the State suggests. Mot. at 8:1-2. The public need not “rely  
5 on the same prison officials who are responsible for administering the execution to disclose and  
6 provide information about any difficulties with the procedure.” *CFAC*, 299 F.3d at 883. Only  
7 through “independent, public eyewitness observation” of lethal injection executions can the  
8 public verify that the Lethal Injection Regulations are being properly implemented and determine  
9 whether they impose an undue risk of harm on prisoners. *See id.* Accordingly, the allegations in  
10 the Complaint satisfy the second *Press-Enterprise* factor.<sup>7</sup>

11 **D. The State has not identified a legitimate penological purpose sufficient to**  
12 **defeat the News Organizations’ First Amendment right of access.**

13 The Court should reject the State’s assertion that a legitimate penological purpose justifies  
14 nullifying the News Organizations’ First Amendment rights of access. At the outset, that  
15 argument is an affirmative defense premised on facts existing outside the four corners of the  
16 Complaint. *See Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) *abrogated on other*  
17 *grounds by Johnson v. California*, 543 U.S. 499 (2005). Accordingly, it cannot be raised on a  
18 motion to dismiss. *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1083 (N.D. Cal. 2012);  
19 *see also Van Hook v. Curry*, No. C06-3148 PJH (PR), 2008 WL 685646, at \*2 (N.D. Cal. Mar.

20 <sup>7</sup> The State makes the absurd suggestion that “Plaintiffs have alternative means by which they  
21 may obtain ... information [about chemical preparation], such as a Public Records Act request.”  
22 Mot. at 8. For the reasons explained above, the existence of an alternative means of acquiring the  
23 information would not defeat Plaintiffs’ claim. In any event, the “alternative” of a Public Records  
24 Act request is not adequate. First, that statute applies only to “[p]ublic records.” Gov. Code  
25 § 6253(a). It is not clear there will be any “record,” such as a videotape recording, of the  
26 execution team’s preparation of the chemical. Second, an after-the-fact recording would no more  
27 substitute for live observation than a recording of a trial would satisfy the public’s right to  
28 observe courtroom proceedings. *See CFAC*, 299 F.3d at 876-77 (analogizing observation of  
executions to “public observation of criminal trials”). Third, the State has a history of vigorously  
fighting the public’s efforts to obtain information about lethal injection, and its suggestion that it  
would freely provide the information in response to a Public Records Act request is belied by  
history. *See, e.g., ACLU of Northern California v. Superior Court*, 202 Cal. App. 4th 55 (2011)  
(in response to Public Records Act request, CDCR refused to disclose name of pharmaceutical  
company and others from which it sought to acquire lethal injection chemicals). Fourth, the State  
does not even suggest that the Public Records Act would be an alternative means of obtaining  
information about the effects of a failed execution attempt.

1 13, 2008) (“[I]t is not possible to tell on a motion to dismiss, where the court has only the  
2 complaint before it, whether plaintiff’s claim will survive the *Turner* analysis, because the  
3 defendants’ proposed ‘legitimate penological interest’ is unknown.”).

4 Even were that not the case, the State’s argument would still be meritless because the  
5 News Organizations have alleged facts raising an inference that the restrictions on access in the  
6 Lethal Injection Regulations stem, not from a legitimate penological purpose, but from a desire to  
7 conceal important information from the public. Compl. ¶ 36. A desire to conceal or to improve  
8 the optics of the execution process is not a legitimate basis for limiting the right of access. *CFAC*,  
9 299 F.3d at 880 (noting that a desire to avoid the perception of brutality in an execution is not a  
10 legitimate penological purpose). Here, the Regulations themselves identify no cognizable interest  
11 served by limiting public observation. *Id.* ¶ 38. The Regulations are suspect because they restrict  
12 access, particularly with respect to the provision of medical aid, only when something has gone  
13 wrong. *Id.* ¶ 27. The State also has a history of denying access to executions with the sole  
14 objective of suppressing important information about those executions. *Id.* ¶ 36. These allegations  
15 support the conclusion that the State’s goal in restricting the observation of lethal injection  
16 executions is to conceal information, which is not legitimate.

17 Nothing in the State’s Partial Motion to Dismiss suggests otherwise. As an initial matter,  
18 the State has identified no penological justification for denying access to the preparation of lethal  
19 injection chemicals. It is therefore fair to assume none exists. *See Armstrong*, 275 F.3d at 874. As  
20 to the rendering of medical aid, the State identifies one possible penological objective for  
21 restricting public access—inmate privacy—without even affirming that this was in fact the State’s  
22 basis for the restriction. Mot. at 8:23-9:13. But the State’s argument fails for two reasons.

23 First, the State has no basis to invoke the inmate’s privacy right to block the public’s right  
24 of access. Inmate privacy is not a penological interest under *Turner* because it is not related to a  
25 prison’s interest in security, order, or rehabilitation. *See Associated Press*, 682 F.3d at 823-24.  
26 (harboring “significant doubt” as to whether an inmate’s dignity interest could qualify as a  
27 penological interest, without deciding the issue). The State cites no law suggesting otherwise. Nor  
28 does the State have standing to assert the inmate’s privacy rights. *Cf. Assoc. for Los Angeles*

1 *Deputy Sheriffs v. Los Angeles Times Comms. LLC*, 239 Cal. App. 4th 808, 821 (2015) (“the right  
2 of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose  
3 privacy has been invaded”).

4       Second, the Ninth Circuit has rejected the argument that “the condemned prisoner’s  
5 privacy and dignity interests” justify limiting the First Amendment right of public access to  
6 executions. *See Associated Press*, 682 F.3d at 823-24. The State “already offends the dignity of  
7 condemned inmates and the sensibilities of their families and fellow inmates by allowing  
8 strangers to watch as they are put to death.” *Id.* at 824–25. “It strains credulity for the [State] to  
9 assert that these interests will be offended to a meaningfully greater degree” merely because  
10 witnesses are allowed to observe efforts expended to save a prisoner’s life in addition to those  
11 expended to take it.<sup>8</sup> *Id.* And given that the only scenario in which the State provides medical  
12 assistance is one where something has gone wrong with the execution—raising the specter of a  
13 botched execution—the public interest in observing the inmate is particularly great.

14       Accordingly, no valid penological interest supports the State’s prohibition on viewing the  
15 preparation of lethal injection chemicals or provision of medical treatment to a condemned  
16 inmate.

#### 17 **IV. CONCLUSION**

18       For the foregoing reasons, the News Organizations respectfully request that the Court  
19 deny the State’s Partial Motion to Dismiss in its entirety.

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25 <sup>8</sup> It further strains credulity for the State to assert that it is concerned with protecting inmate  
26 privacy given that the Regulations do not offer the inmate a choice of whether to waive his  
27 privacy rights. While the News Organizations do not concede that an inmate’s invocation of his  
28 privacy interest would as a generic matter suffice to block observation of medical assistance  
provided in connection with a failed execution attempt, the State’s failure even to offer the inmate  
a waiver suggests that the State’s focus is not on the inmate’s interests, but on its own interest in  
concealment—which is not a legitimate interest. *CFAC*, 299 F.3d at 880 (observing that altering  
public perception of an execution is not a legitimate penological interest).

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Dated: May 24, 2018

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**ATTESTATION**

I, Ajay S. Krishnan, am the ECF user whose Login and Password authorized the filing of this document. Under Civil Local Rule 5-1(i)(3), I attest that the other above signatory has concurred in the filing of this document.

Dated: May 24, 2018

By: /s/ Ajay S. Krishnan  
AJAY S. KRISHNAN