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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PACIFIC NEWS SERVICE,

Plaintiff,

v.

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation; ROBERT L. AYERS, Acting Warden for the California State Prison at San Quentin,

Defendants.

Case No. C 06 1793 JF RS

PLAINTIFF PACIFIC NEWS SERVICE'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

Dept: Courtroom 3, 5th Floor
Date: July 19, 2006
Time: 1:30 p.m.
Judge: Hon. Jeremy Fogel

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I. INTRODUCTION

Defendants' motion to dismiss must be denied under the controlling authority of *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC II*"), *modifying in part*, 150 F.3d 976 (9th Cir. 1998) ("*CFAC I*") (collectively, "*CFAC*"). The principles enunciated by the Ninth Circuit in *CFAC* are directly applicable to the factual allegations of this Complaint and are dispositive of this motion.

In *CFAC*, plaintiff media organizations challenged San Quentin prison's practice of closing a curtain in front of the execution chamber during certain portions of the prison's lethal injection executions. The curtain prevented members of the media and the press from viewing critical aspects of the execution process. San Quentin officials claimed they needed the curtain to protect the anonymity of the prison staff, and therefore, to ensure the execution could proceed smoothly. The lawsuit sought to vindicate the media's First Amendment right of access to important public proceedings, a right that was first recognized in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). That right is central to our system of self-government because "valuable public debate—as well as other civic behavior—must be informed." *Id.* at 587 (Brennan, J., concurring).

The Ninth Circuit's ruling upheld the media plaintiffs' claim of a First Amendment right of access. It held that they had standing because the curtain inhibited their reporting on the execution. The court also held that the First Amendment right of access attaches to executions, because executions are historically open and because the information that can be gleaned from observing executions—particularly whether the inmate experiences pain—is crucial to informing the public debate on the death penalty. And it held that the socially valuable information to be gleaned from opening the curtain outweighed the prison's asserted interest in anonymity, particularly because the execution team could take less restrictive action to achieve their stated goal, by wearing masks.

The claim raised here is nearly identical to the claim in *CFAC*. Plaintiff Pacific News Service is a media organization that reports on executions. Instead of a physical curtain, PNS complains of a chemical curtain. PNS alleges that San Quentin's practice of paralyzing inmates

while it is executing them suppresses the same socially important information that was at issue in *CFAC*: whether or not the inmate is experiencing pain during the execution. San Quentin officials create this chemical curtain by administering to the inmate pancuronium bromide, a paralytic agent, which does not contribute to or hasten the inmate's death. Because it paralyzes the inmate, pancuronium bromide prevents witnesses from discerning whether or not the inmate is experiencing pain. Prison officials simply inject a curtain into the inmate.

The legal analysis is the same as it was in *CFAC*. PNS has standing because it reports on executions, and San Quentin's practice of paralyzing inmates during the execution inhibits that reporting. And *CFAC* has already held that the First Amendment right of access attaches to executions. Finally, here, as in *CFAC*, the First Amendment interest in observing important information outweighs the government interest in suppressing that information. Indeed, this is an even clearer case than *CFAC*. Although San Quentin officials asserted an ostensibly rational interest in execution team anonymity in *CFAC*, they have no reason to paralyze inmates while executing them, other than the illegitimate purpose of creating the appearance that executions are more peaceful and painless than they actually may be.

In their motion to dismiss, Defendants manufacture a distinction between the media "observing" an execution and the media "controlling" an execution. Their strategy is clear: they need some way to distinguish the physical curtain in *CFAC* from the chemical curtain at issue here. But the distinction they've come up with is incoherent. Every successful assertion of a constitutional right "controls" what the government does in *some* way. For instance, the *CFAC* plaintiffs "controlled" executions by forcing California to remove its curtain. Moreover, Defendants' distinction ignores that PNS is not even seeking to control an *execution*. Paralyzing inmates has nothing to do with executing them: the paralytic drug serves no purpose in the execution process. In fact, Defendants are perfectly able to execute inmates without paralyzing them, just as they are able to execute inmates without closing a curtain.

Defendants try to cast this distinction between "observing" and "controlling" both as a standing argument and as an argument rooted in the First Amendment right of access case law. No standing case or First Amendment right of access case makes this distinction.

Thus, Defendants' motion to dismiss must be denied.

II. FACTS

As explained below, for both the Rule 12(b)(1) and Rule 12(b)(6) aspects of the motion to dismiss, the factual allegations of the Complaint must be taken as true. Defendants have not submitted any declarations or other evidence in support of their motion to dismiss. Thus, the following facts are the only ones before the Court:

Plaintiff PNS is a media organization that reports on California executions. Compl., ¶ 4. PNS is interested in disseminating information on what eyewitnesses to California executions observe during the lethal injection process. *Id.* Defendants James Tilton and Robert Ayers are the respective heads of the California Department of Corrections and Rehabilitation ("CDCR") and the San Quentin prison, which is within CDCR. *Id.*, ¶¶ 5 & 6. These institutions administer every California execution. *Id.*, ¶ 8.

Executions by lethal injection are performed pursuant to San Quentin Operational Procedure No. 770 ("Procedure 770"). *Id.*, ¶ 10. Members of the press and the public view these executions. *Id.*, ¶ . Procedure 770 involves the injection of three drugs, in order: sodium pentothal, pancuronium bromide, and potassium chloride. *Id.*, ¶ 11. Sodium pentothal is intended to anesthetize the inmate so that he is unable to feel pain. *Id.*, ¶ 12. Pancuronium bromide paralyzes all of the inmate's voluntary muscles. *Id.*, ¶ 11. It therefore prevents the inmate from moving, speaking, or communicating in any manner. *Id.*, ¶ 17. Potassium chloride stops the inmate's heart. *Id.*, ¶ 11.

There is a serious question as to whether Defendants are properly administering sodium pentothal during lethal injection executions. *Id.*, ¶ 16. If they are improperly administering sodium pentothal, the inmate would experience intolerable and unnecessary pain when the other two drugs are administered. *Id.* However, because Defendants administer pancuronium bromide, the press and public witnesses observing the execution will never know whether the inmate is experiencing this intolerable and unnecessary pain while dying. *Id.*, ¶ 17. There is potentially other socially valuable information, unrelated to pain, that pancuronium bromide is also suppressing. *Id.*, ¶ 19-20.

Pancuronium bromide is therefore a chemical curtain. *Id.*, ¶ 1. It prevents execution witnesses from seeing what is really happening during an execution. *Id.*, ¶¶ 17-20. Pancuronium bromide serves no legitimate functional or penological purpose during an execution, such as anesthetizing the inmate or hastening his death. *Id.*, ¶ 21. Defendants know this, but nonetheless continue to use pancuronium bromide. *Id.* Therefore, Defendants *intentionally* use pancuronium bromide to conceal socially important information from the press and the public. *Id.*, ¶ 22.

III. ARGUMENT

A. PNS has standing to pursue its First Amendment claim.

PNS has standing for the same reason that the *CFAC* plaintiffs had standing: a media organization that reports on governmental proceedings has standing to challenge restrictions that impede their ability to report on those proceedings. Defendants cite no contrary authority. Indeed, close scrutiny of Defendants' standing argument reveals that they are not really making a standing argument at all. Rather, their challenge is to the merits of PNS's claim.

1. When analyzing this Rule 12(b)(1) motion, the allegations in the Complaint are taken as true.

When analyzing standing, the Court must take the allegations in PNS's Complaint as true. This is because Defendants have neither challenged the *factual* allegations in the PNS Complaint nor submitted any declarations in support of their 12(b)(1) motion. Consequently, there will be no evidentiary hearing. *See McLachlan v. Bell*, 261 F.3d 908, 909 & n.2 (9th Cir. 2001) (holding that factual allegations in the complaint are accepted as true if the court is not called upon to hold an evidentiary hearing); *see also Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176-77 (3d Cir. 2000) (*citing Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("At the outset, we must emphasize a crucial distinction, often overlooked, between 12(b)(1) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar [Rule 12(b)(6)] safeguards to the plaintiff: the court must consider the allegations of the complaint as true.")).

Thus, Defendants' argument that "Plaintiff's allegations are not presumed to be true" is simply wrong. Indeed, all four cases cited by Defendants recognize the distinction that PNS raises between those Rule 12(b)(1) motions where the defendant challenges the factual allegations of the complaint by submitting competent evidence and those Rule 12(b)(1) motions where the complaint's factual allegations go unchallenged. *See* Mot. to Dismiss Compl. at 3; *Frasure v. United States*, 256 F. Supp. 2d 1180, 1184 (D. Nev. 2003); *Anderson v. United States*, 245 F. Supp. 2d 1217, 2020 (M.D. Fla. 2002); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003); *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558-59 (9th Cir. 1987).

PNS may rest on its Complaint and need not submit evidence to establish standing.

2. The Ninth Circuit's *CFAC I* opinion mandates a finding that PNS has standing.

To establish Article III standing, PNS must demonstrate that: (1) it will suffer an "injury-in-fact"; (2) "the injury is fairly traceable to the challenged action"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (*citing Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). As a shorthand, these requirements are labeled "injury in fact," "causation," and "redressability." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

In *CFAC I*, the Ninth Circuit held that media organizations that report on executions have standing to challenge alleged violations of the First Amendment right to witness executions. This holding was never revisited in *CFAC II*. *CFAC I* reasoned:

> [Plaintiffs] have covered or observed executions in the past and are likely to do so in the future. The restrictive procedures of which [Plaintiffs] complain[] could hinder its members' ability to do their work and would cause an injury in fact to them. In particular, [Plaintiff] could be stifled in reporting to the public about how executions were being carried out.

CFAC I, 150 F.3d at 980-81. This analysis regarding injury-in-fact and causation applies equally to PNS's claim in this case. PNS has "covered or observed executions in the past and is likely to do so in the future." *Id.*; *see* Complaint, ¶ 4 (alleging that PNS "reports on, among other things,

the application of the death penalty in California"). Defendants do not contest this. In addition, "the restrictive procedures of which [PNS] complains"—namely the use of pancuronium bromide—could hinder its members' ability to "report[] to the public about how executions were being carried out." *CFAC I*, 150 F.3d at 980-81; *see* Complaint ¶¶ 18-20 (describing information important to the public that is concealed by pancuronium bromide). Defendants do not contest this point either. Thus, PNS satisfies the injury-in-fact and causation requirements.

Although *CFAC I* did not expressly address the third standing requirement, redressability, it was not seriously in dispute there or here. In *CFAC I*, enjoining the state from drawing the curtain would reveal to execution witnesses reportable information concerning the "initial procedures," thereby redressing the *CFAC* plaintiffs' concerns. Similarly, the injunction sought here would prohibit San Quentin officials from suppressing important information about the execution process.

Thus, *CFAC I*, which Defendants never cite, answers the standing question in PNS' favor.

3. Defendants confuse the concept of standing with the merits-level inquiry of whether PNS states a valid First Amendment claim.

Ultimately, Defendants do not raise any actual *standing* arguments because they have fundamentally confused the concept of standing with the merits of PNS's First Amendment challenge. It goes without saying that the question of standing is separate from and independent of the question of whether a plaintiff states a valid claim on the merits. For instance, in *CFAC I* itself, the Ninth Circuit held that the plaintiffs had standing, despite holding that the plaintiffs would not necessarily prevail on the merits. 150 F.3d at 980 n.8; *see also Flynt v. Rumsfeld*, 355 F.3d 697, 699 & 702-03 (D.C. Cir. 2004) (holding that although reporters have *standing* to challenge a military regulation that prevents them from "accompany[ing] ground troops on combat missions" in Afghanistan, the regulation does not violate the First Amendment).

Defendants' motion evidences their confusion between the concept of standing and the merits-level inquiry. Defendants correctly recite the three Article III standing requirements in Section A of their standing argument. *See* Mot. to Dismiss Compl. at 2-3. But, Section B of

their standing argument—where they purport to apply the law of standing to this case—only makes merits-level arguments. Indeed, Section B's heading reads: "Because Plaintiff Has No Legally Protected Interest In The Means By Which An Execution Is Conducted The Court Lacks Jurisdiction To Hear The Case." *Id.* at 3. In essence, Defendants argue that because PNS has no First Amendment right, PNS lacks standing. Moreover, of the nine cases cited in Section B of Defendants' standing argument, eight contain no discussion of standing at all. They simply pertain to the *merits* of the constitutional rights at issue in those cases. *Id.* at 3-5. The ninth case, *Flynt v. Rumsfeld*, actually held that the plaintiffs there *did* have standing. 355 F.3d at 702. Even still, the only portion of *Flynt* that Defendants cite to pertains to *Flynt*'s holding on the merits. *See* Mot. to Dismiss Compl. at 5; *Flynt*, 355 F.3d at 703.

Thus, Defendants do not make a standing argument at all. Rather, they only attack the Complaint on the merits, to which PNS now turns.

B. The PNS Complaint states a claim for which relief may be granted.

There is no dispute that when analyzing the merits of PNS' First Amendment claim, the Court must accept the factual allegations in the Complaint as true. *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). Thus, the Court must take as true PNS' allegations that "pancuronium bromide serves no legitimate functional or penological purpose in the lethal injection protocol," and that Defendants "intentionally administer pancuronium bromide to conceal important information from the press and the public." *Id.*, ¶¶ 21, 22. It is with these serious allegation in mind that the Court should approach the relevant First Amendment case law.

1. PNS states a meritorious claim for violation of its First Amendment right of access.

This case involves the application of the First Amendment right to attend and witness important public proceedings in the context of an execution. That right was established in *Richmond Newspapers*, 448 U.S. 555. This presumptive right of access to government proceedings now attaches to virtually every phase of the criminal and civil justice process,[1] to

[1] *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*")

executive proceedings,[2] and to executions inside prisons.[3] The primary purpose of this First Amendment access right is "[t]o ensure that [the] constitutionally protected 'discussion of government affairs' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982).

Courts employ a two-step analysis to determine whether a restriction on access to a particular government proceeding violates the First Amendment. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9-10 (1986) ("*Press-Enterprise II*"). First, the First Amendment right of access must attach to the proceeding. *Id.* Second, if the First Amendment access right does attach, the restriction must survive a First Amendment balancing test: the legitimate governmental interests it serves must outweigh the loss of First Amendment values. *Id.* Thus, even where the First Amendment right of access attaches to a proceeding, it is qualified, not absolute. *Id.*

To state a claim under the First Amendment for violation of the right of access, the Complaint's allegations must establish (1) that the First Amendment right of access attaches to executions, and (2) that the state's practice of paralyzing death row inmates fails the appropriate First Amendment balancing test. The Complaint satisfies both prongs of this test. The first prong is directly controlled and established by *CFAC II*, a decision that binds this Court. The second prong is clearly satisfied, given the allegations that pancuronium bromide serves no legitimate purpose during an execution and that the state intentionally paralyzes inmates in order to conceal socially important information from the public and press.

(voir dire proceedings); *Press-Enterprise II*, 478 U.S. 1 (preliminary hearings in criminal prosecution); *Oregonian Publ'g Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990) (plea agreements); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984) (civil trials).

[2] *See, e.g., Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569 (D. Utah 1985) (formal agency hearings); *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (White House events).

[3] *CFAC II*, 299 F.3d at 877; *KQED, Inc. v. Vasquez*, 18 Media L. Rep. 2323 (N.D. Cal. 1991). *See also Oregon Newspaper Publishers Assn. v. Oregon*, 988 P.2d 359 (Or. 1999) (vindicating analogous public right to meaningfully witness executions based on state statute).

a. *CFAC II* has already decided as a matter of law that the qualified First Amendment access right attaches to executions.

CFAC II held that the press and the public have a right to meaningfully observe executions "from the moment the condemned enters the execution camber through, to and including, the time the condemned is declared dead." *CFAC II*, 299 F.3d at 885-86 (citations omitted). Defendants concede this. Mot. to Dismiss Compl. at 3. This holding, on its face, satisfies the first step of the two-step analysis performed in First Amendment right-of-access cases.

Importantly, *CFAC II*'s reasons for extending the First Amendment right of access to executions are particularly relevant in the context of PNS's claim. *CFAC II*'s holding rested on three considerations:

1. the developing body of case law recognizing the First Amendment right of access to most aspects of the criminal justice system, including trials, pre- and post-trial proceedings, and prisons;

2. the historical tradition of public access to executions, from Twelfth century England to the modern American practice; and

3. the functional importance of public access to executions, namely its contribution to public dialogue on the humaneness of the death penalty and the appearance of fairness that public access fosters.

CFAC II, 299 F.3d at 874-77.

The primary type of information to which PNS seeks access is the indicia of pain that an inmate manifests during the *killing* process (not merely indicia of pain during the "initial procedures," which were at issue in *CFAC*). This is precisely the type of information in which there is historical and functional interest. As the District Court stated in *CFAC*:

> Courts evaluating the constitutionality of methods of execution rely in part on eyewitness testimony. *See, e.g.*, *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997); *Sims v. Florida*, 2000 WL 193226 at *7-8 (Fla. 2000); *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994). This eyewitness testimony is crucial to the review of execution protocols which the courts frequently undertake. While courts rarely invalidate a state's execution procedure, ongoing challenges and threats of challenge motivate states to modify their procedures. For example, lethal gas and electrocution have been vigorously challenged in recent years. In response to these challenges, most states have either moved to the use of lethal injection or make it available as an alternative to gas, electrocution or hanging. See, e.g., *Bryan v. Moore*, 120 S. Ct. 1003 (2000) (certiorari to determine constitutionality of electrocution dismissed as improvident after state modified statute to permit execution by lethal injection); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996)

> (constitutionality of hanging a 400-pound man rendered moot after state modified statute to permit lethal injection).

CFAC, 2000 WL 33173913 at *9 (N.D. Cal. 2000), *aff'd*, 299 F.3d 868 (9th Cir. 2002).

This Court should heed both the holding and reasoning in *CFAC* when evaluating Defendants' motion to dismiss. Defendants consistently mischaracterize PNS's Complaint as an effort by a news organization to satisfy its predictable preference for more information, as if PNS merely seeks information of trivial importance. Defendants claim that PNS seeks greater access to executions because "such access might lead to more thorough or better reporting" (Mot. to Dismiss Compl. at 5, lns 4-5), because PNS seeks an "execution comporting more closely with its preferences" (Mot. to Dismiss Compl. at 6, lns 7-8), or because PNS's ability to report "would be enhanced by access to particular information or locations" (Mot. to Dismiss Compl. at 6, lns 7-8). This is simply not true. Through this lawsuit, PNS seeks access to precisely the type of *important* information that motivated the *CFAC* court to recognize the right of access to executions in the first place: information about pain that the inmate may experience as a result of the execution process. Thus, the importance of the type of information PNS seeks is a key consideration.

b. Defendants' alleged intentional use of pancuronium bromide to conceal important information from the public cannot survive the First Amendment balancing test.

Given that the First Amendment access right attaches to executions, the only remaining question is whether the particular challenged restriction survives First Amendment scrutiny. The restriction at issue here is San Quentin's use of pancuronium bromide to paralyze the inmate's body so as to conceal from the public possible manifestations of pain or other important information.

In the prison context, courts typically use the four-factor balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), to evaluate whether an asserted constitutional right outweighs the legitimate penological interests of the prison. *See CFAC II*, 299 F.3d at 877-79[4]; *Walker v.*

[4] The *CFAC II* court had serious doubts about employing the deferential *Turner* standard because the challenged restriction—the drawing of the curtain—actually infringed the rights of non-prisoners. 299 F.3d at 878-79. Nonetheless, *CFAC II* persisted with the *Turner* test because

Sumner, 917 F.2d 382, 385-86 (9th Cir. 1990); *Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002). Courts use the *Turner* test because it is deferential to prison officials, who face "complex and intractable" problems of prison administration that are not easily resolved by judicial decree. *CFAC II*, 299 F.3d at 877-78 (*quoting Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)). The *Turner* test itself lays out those "legitimate policies and goals of the corrections system" that fall within the special province or expertise of prison officials: "deterrence of future crime, protection of society by quarantining criminal offenders, rehabilitation of those offenders and preservation of internal security." *Id.* at 878 (*citing Pell v. Procunier*, 417 U.S. 817, 822-23 (1974)).

With those "legitimate penological objectives" defined, the *Turner* test states: "in reviewing a challenge to a prison regulation that burdens fundamental rights, [courts] are directed to ask whether the regulation is reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to those concerns." *Id.* (internal quotations omitted) (*quoting Turner*, 482 U.S. at 87). More specifically:

> In determining whether a restriction on the exercise of rights is reasonable or exaggerated in light of those penological interests, four factors are relevant: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) what impact accommodation of the asserted constitutional rights 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.

Id. (internal quotations omitted) (*quoting Turner*, 482 U.S. at 89-91).

Two important observations should be made about the first prong of the *Turner v. Safley* test. First, if the government has an illegitimate purpose of concealing information from the public, it automatically fails the balancing test. *CFAC II*, 299 F.3d at 880. Second, if there is no

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CFAC I had done so, and the subsequent panel found itself bound by *CFAC I*. *Id.* at 879. Because Defendants cannot prevail even under the *Turner* standard, it is immaterial to the outcome of this motion whether a less deferential balancing test should apply.

Additionally, *CFAC II* actually applied a stricter version of the *Turner* test, requiring slightly greater scrutiny of government conduct. 299 F.3d at 879-80 (requiring a "closer fit"). Again, because this heightened standard is immaterial to the outcome of the balancing test in this motion, PNS omits further discussion of it here.

"legitimate governmental interest" that justifies the restriction on fundamental rights, there is no need for further analysis because there is nothing against which to weigh the infringement of the plaintiff's rights. *Id.* at 883 ("the first factor is arguably dispositive."); *see also Walker*, 917 F.2d at 385 ("The first of these factors constitutes a *sine qua non*.").

Defendants' practice of paralyzing inmates during executions clearly fails this test, for two independent reasons. First, PNS has alleged that Defendants *intentionally* paralyze inmates to conceal information from the public. Second, PNS has alleged that there is no legitimate government interest in using pancuronium bromide. Thus, for purposes of this motion, there is no interest to weigh against the loss of PNS's First Amendment access rights. This case is therefore even easier than the numerous cases where courts refused to dismiss the complaint at the pleadings stage, even where the government was able to assert a plausible penological interest to justify its conduct. *See, e.g.*, *Hydrick v. Hunter*, No. 03-56712, 2006 WL 1493100, at *9-*10 (9th Cir. June 1, 2006) (pending publication in the Federal Reporter); *Whitmire*, 298 F.3d 1134 (scrutinizing the prison's asserted justification for the challenged policy); *Walker*, 917 F.2d at 385-86. In these cases, the Ninth Circuit refused to weigh the government's asserted penological interests against the asserted right at the pleadings stage to justify dismissing the complaint. Here, Defendants do not even attempt to assert an interest in paralyzing inmates while executing them. *See* Mot. to Dismiss Compl. at 4-5 ("Putting to one side whether Plaintiff correctly understands the effects of pancuronium and the reasons it is used by the state, the 'right' Plaintiff claims for itself is not provided by the First Amendment."). Thus, any balancing that is performed to decide this motion must be resolved in PNS's favor.

Yet, Defendants somehow appear to have missed that a First Amendment balancing test exists. Defendants argue that "the First Amendment does not guarantee unfettered access to places, events, or information." *See id.* at 7; *see also id.* at 4-5. They then cite numerous cases where the plaintiff raising a First Amendment right of access lost. *Id.* at 7. The only principle that can be gleaned from this analysis is that the plaintiff always loses, and the government always wins. Of course, PNS recognizes that the First Amendment right of access is not "unfettered." This is why there is a balancing test. Nowhere in their 9-page brief, however, do

Defendants even mention a balancing test. Nor do Defendants cite the numerous Supreme Court cases in which the plaintiff raising a First Amendment right of access claim prevailed. *See, e.g.*, *supra* footnotes 1-3.

This failure to recognize that a balancing test exists explains the central fallacy in Defendants' brief. Defendants appear to believe that there is a bright-line distinction between "*observ*[*ing*]" an execution and "defin[ing] *how* the execution should be conducted." *See* Mot. to Dismiss Compl. at 4. But this notion fundamentally contradicts the idea of a balancing test. Whenever a plaintiff prevails under *Turner*, the court is necessarily, in some sense, telling the government what to do. *Turner* applies whenever a prison official is alleged to have violated a fundamental right, not just in the execution context. Thus, the balancing test was used in *CFAC* to "define *how* the execution should be conducted" (i.e., without a curtain), and in *Turner* itself to "define *how*" the prison operated. *Turner*, 482 U.S. at 94-99 (holding invalid a prison rule requiring prior approval before inmates could marry). The *Turner* test already takes into consideration the deference owed to prisons, but nonetheless countenances courts striking down prison rules when they unjustifiably violate fundamental rights. Thus, the bright-line distinction Defendants seek to draw between "*observ*[*ing*]" an execution and "defin[ing] *how* the execution should be conducted" simply does not exist.

2. *Cohen v. Cowles Media* has no applicability to this case.

Instead of addressing *Turner*, Defendants argue instead that the PNS Complaint should be dismissed under the doctrine that neutral rules of general applicability "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Mot. to Dismiss Compl. at 8 (*quoting Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). But this case is a far cry from *Cohen* and its line of cases. *See also Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 640-41 (1994).

In *Cohen*, a confidential source sued reporters who broke their promise of confidentiality. The reporters invoked the First Amendment as a defense. They argued that they could not be held liable on a promissory estoppel theory under Minnesota law, because that would effectively punish them for reporting important news. The Supreme Court rejected the reporters' argument.

The Court held that there was no basis for heightened First Amendment scrutiny because the state law of promissory estoppel, which "simply requires those making promises to keep them," was (1) neutral toward First Amendment conduct and (2) generally applicable to all citizens, not just members of the press. *Cohen*, 501 U.S. at 669-72.

But paralyzing inmates during an execution is not neutral toward First Amendment conduct—that is, it necessarily inhibits the ability of the press to gather information of public importance. In the very same way that the physical curtain in *CFAC* was not neutral towards the free flow of information to the public, this chemical curtain has the natural and direct effect of cutting off access to information. More so than a curtain, paralysis serves no legitimate purpose during an execution. Additionally, PNS has alleged that Defendants *intentionally* paralyze inmates to conceal information. Thus, there is no way in which Defendants' use of pancuronium bromide can be seen as neutral to First Amendment conduct.

Perhaps more importantly, paralysis of inmates is not a generally applicable rule. Procedure 770 does not call for the paralysis of all inmates at San Quentin; only the ones who are being executed receive pancuronium bromide. San Quentin's practice of paralyzing inmates during executions is not like Minnesota's generally applicable rule of promissory estoppel, which is only occasionally applied to First Amendment conduct. Rather, pancuronium bromide inhibits public access to information *every time* it is used during an execution. This is not a case of the press or the public seeking a special exemption from a "rule" that is otherwise applied across-the-board; PNS challenges the "rule" in every instance it is applied.

The doctrine concerning neutral rules of general applicability has no relevance to PNS's Complaint.

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IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: June 20, 2006

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

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