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The Sound of Death and "Shroud of Secrecy": The Ninth Circuit's Inconsistent Application of the History and Logic Test in *First Amendment Coalition of Arizona, Inc. v. Ryan**

After the botched execution of Joseph Wood raised serious concerns about lethal injections, the Ninth Circuit recognized a right of access to hearing executions in its decision First Amendment Coalition of Arizona, Inc. v. Ryan. *While the court recognized a First Amendment right of access to the sounds of an execution, the court failed to recognize a right of access to essential information about lethal injection drugs and the qualifications of executioners. This inconsistent recognition of a First Amendment right of access impedes public scrutiny of the lethal injection process. Public scrutiny of executions is paramount to ensure executions are conducted fairly and humanely.*

This Recent Development analyzes the Ninth Circuit's decision in Ryan *and its failure to apply the history and logic test to recognize a right of access to execution-related information. This Recent Development provides the history and logic analysis to execution-related information that is absent in* Ryan*. In so doing, it argues that a right of access to specific information about execution drugs and the qualifications of executioners is necessary for public scrutiny of lethal injections. Providing access to this type of information increases transparency and accountability, thereby exposing to the public the efficacy of lethal injection drugs in delivering a painless and humane death and the qualification of executioners in properly administering the drugs.*

INTRODUCTION

During his execution, Joseph Wood struggled to breathe and gasped in agony for hours.[1] Executions by lethal injection are supposed to be a swift and humane process.[2] For Mr. Wood, it took nearly two hours and fifteen doses of

* © 2021 Isabela Palmieri.

1. First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1073 (9th Cir. 2019) ("Wood's execution was botched in several ways. According to the allegations in the plaintiffs' complaint, Wood rose up and gasped for air about 12 minutes into his execution, after first appearing to be sedated. He continued to struggle to breathe until he died, nearly two hours after the drugs were first administered.").

2. *See* Kate Pickert, *A Brief History of Lethal Injection*, TIME (Nov. 10, 2009), http://content.time.com/time/nation/article/0,8599,1815535,00.html [https://perma.cc/E548-AJ88] ("The first proposal for using injected drugs as a form of capital punishment came in the late 19th century, when a New York commission on capital punishment included the suggestion that the method might prove more humane than hanging."); *see also* Boer Deng & Dahlia Lithwick, *Liberal Guilt: In the Push To Abolish the Capital Punishment, Opponents of the Death Penalty Have Made It Less Safe*, SLATE (May 9, 2014, 5:14 PM), https://slate.com/news-and-politics/2014/05/death-

lethal injection drugs, without any consciousness checks by the execution team at any point during the process.[3] Wood was injected with 750 milligrams of two execution drugs—fifteen times the suggested amount in Arizona's execution protocol.[4] Wood's prolonged death took place a day after the U.S. Supreme Court vacated a Ninth Circuit decision conditionally staying his execution.[5]

Wood's botched execution is hardly the only one of its kind[6] and will likely not be the last. After a twenty-year moratorium on federal capital punishment,[7] the Trump administration carried out thirteen federal executions while in office—the most of any president in the last 120 years.[8] During his campaign, President Joe Biden pledged to pass legislation eliminating federal executions,[9] but the ultimate success of such legislation is uncertain. In the absence of substantial reform, greater transparency in capital punishment procedures is essential.

penalty-in-america-how-the-push-to-abolish-capital-punishment-has-made-lethal-injection-less-safe.html [https://perma.cc/L5F9-3BEK] ("Lethal injection was supposed to be the humane alternative to firing squads and hangings."). It has been strongly argued that the death penalty, regardless of how it is administered, is inhumane. *See generally* Hugo Adam Bedau, *The Case Against the Death Penalty*, ACLU (2012), https://www.aclu.org/other/case-against-death-penalty [https://perma.cc/XH3C-68MP] (providing multiple objections to the death penalty based both in law and fact).

3. *Ryan*, 938 F.3d at 1073.

4. Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, GUARDIAN (Aug. 2, 2014, 10:40 AM), https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood [https://perma.cc/9JHN-F8M3] ("The state's protocol gives the prisons director a degree of flexibility in how the execution may proceed, but only explicitly allows for 'an additional dose' of the chemicals that can be administered 'if deemed appropriate' after consciousness checks are performed three minutes into the procedure.") (last updated Oct. 6, 2018, 6:17 PM).

5. *See* Ryan v. Wood, 573 U.S. 976, 976–77 (2014).

6. In Oklahoma, the execution of Clayton Lockett lasted forty-three minutes, during which he moaned, struggled, and was partially conscious. *See* Graham Lee Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready To Try Again*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/oklahoma-executions.html?auth=login-email&login=email [https://perma.cc/5X26-UBW9 (dark archive)]. In Ohio, the execution of Dennis McGuire took twenty-four minutes—almost triple the average execution time—after the administration of a new drug combination. *See* Mark Memmott, *New Drug Combination Takes 24 Minutes To Execute Ohio Killer*, NPR (Jan. 16, 2014, 2:29 PM), https://www.npr.org/blogs/thetwo-way/2014/01/16/263099489/new-drug-combination-takes-24-minutes-to-execute-ohio-killer [https://perma.cc/6DYK-5SGZ].

7. Press Release, U.S. Dep't of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [https://perma.cc/56TM-L5P4].

8. *See* Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, AP NEWS (Jan. 15, 2021), https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50 [https://perma.cc/9ZEK-CH2U].

9. *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/justice/ [https://perma.cc/XG25-X4FF]. Even if President Biden is successful in working with Congress to pass such legislation, several states still allow the death penalty. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/553X-BPDY] (providing a fifty-state survey of the status of the death penalty as an available sentencing measure).

Following Wood's execution, in *First Amendment Coalition of Arizona, Inc. v. Ryan*,[10] the Ninth Circuit found "serious due process concerns" in Arizona's execution procedures.[11] Specifically, the court found that the procedures were often covered with a "shroud of secrecy," and that Arizona had a "pattern of deviating from its lethal injection protocols."[12] The state's lack of transparency and inconsistent adherence to its own protocols seriously hindered judicial review and public evaluation of execution procedures.[13] Ultimately, the Ninth Circuit heard challenges to two procedures of the Arizona Department of Corrections ("ADC").[14] The first claim challenged the ADC's practice of turning off the overhead microphone during part of the execution, which limits the ability of witnesses to hear any sounds a prisoner might make after intravenous lines are inserted.[15] The second claim challenged the ADC's failure to disclose information about the lethal injection drugs to be used in the execution and the qualifications of execution team members.[16]

In *Ryan*, the Ninth Circuit recognized a First Amendment right to hear a prisoner's execution in its entirety.[17] Having recognized that the public has an expansive right of access to "observe and report" on the entire execution, the Ninth Circuit noted that "[b]arring witnesses from hearing sounds . . . means that the public will not have full information regarding the administration of lethal injection drugs and the prisoner's experience as he dies."[18] However, the court found that neither the public nor the press has a right of access to information regarding lethal injection drugs—including manufacturers, sellers, lot numbers, National Drug Codes ("NDCs"), and expiration dates—or documentation on the qualifications of executioners.[19] As its justification, the court found that because "[i]nformation regarding execution drugs and personnel . . . differs from other documents to which the public has a right of access," the framework through which right of access cases are usually analyzed did not apply.[20] Instead, the Ninth Circuit should have recognized that the same values exist in both the access to the auditory portion of executions and the access to information about lethal injection drugs and personnel—the assurance that executions via lethal injection are administered fairly and humanely.

10. 938 F.3d 1069 (9th Cir. 2019).
11. *Id.* at 1072.
12. *Id.*
13. *Id.*
14. *See id.* at 1072–74.
15. *Id.* at 1073.
16. *See id.* at 1073–74.
17. *Id.* at 1075.
18. *Id.* at 1076.
19. *See id.* at 1080.
20. *Id.* at 1079.

This Recent Development discusses the Ninth Circuit's inconsistent rationale of finding First Amendment support for the public to have access to the auditory portion of executions yet finding no support for a right of access to execution-related information. Allowing access to information about lethal injection drugs and the executioners who administer them ensures that "lethal injections are fairly and humanely administered,"[21] even more so than access to the auditory information recognized by the Ninth Circuit. This Recent Development proceeds in four parts. Part I discusses executions and the main concerns surrounding the lethal injection process. Part II discusses First Amendment right of access jurisprudence and the relevant analytical framework for right of access cases. Specifically, Part II discusses in more detail the history and logic test as applied to judicial documents and prisoner executions. Part III outlines the Ninth Circuit's approach to the history and logic test in three different cases, beginning with *California First Amendment Coalition v. Woodford*,[22] followed by *Wood v. Ryan*,[23] and ending with the case in question, *First Amendment Coalition of Arizona, Inc. v. Ryan*. Finally, Part IV discusses the implications of the *Ryan* decision and the Ninth Circuit's error in failing to recognize a right of access to execution-related information.

I. EXECUTIONS, LETHAL INJECTIONS, AND UNQUALIFIED EXECUTIONERS

In 1977, Oklahoma became the first state to adopt lethal injection as a method of execution.[24] In 1982, Texas was the first state to actually execute one of its prisoners using lethal injection.[25] Since then, 1,352 people have been executed via lethal injection and it remains the preferred method of execution throughout the country.[26] Execution via lethal injection usually consists of the administration of a three-drug cocktail through intravenous lines: (1) an anesthetic to sedate the prisoner; (2) a paralytic to paralyze the prisoner; and (3) a drug to stop the heart.[27] In 2008, the U.S. Supreme Court upheld this three-drug protocol as constitutional.[28] However, Wood's botched execution

21. *Id.* at 1076.

22. 299 F.3d 868 (9th Cir. 2002).

23. 759 F.3d 1076 (9th Cir.), *vacated*, 573 U.S. 976 (2014).

24. *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline [https://perma.cc/S2SZ-T2Z5]; *see also* Pickert, *supra* note 2.

25. Pickert, *supra* note 2.

26. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/797D-EKFT].

27. Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ [https://perma.cc/4668-A3D8 (dark archive)].

28. *See* Baze v. Rees, 553 U.S. 35, 41 (2008) ("[P]etitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.").

fueled already-existing concerns about lethal injection as a method of execution.[29] The lethal injection process has three main concerns: (1) the adequacy of the three-drug lethal injection protocol; (2) the process through which drugs are obtained; and (3) the qualifications of those who administer execution drugs.[30] Each concern will be addressed in turn.

A. *Adequacy of the Three-Drug Protocol for Lethal Injections*

The first concern with executions via lethal injection is the ability of the three-drug protocol to deliver a painless, humane death.[31] One objection to this three-drug protocol is that the paralytic administered to prisoners can conceal an individual's pain or suffering from execution witnesses.[32] The first drug administered in the three-drug cocktail may also be problematic. An analysis by National Public Radio ("NPR") of more than 200 autopsies found that eighty-four percent of inmates who were executed via lethal injection showed signs of pulmonary edema—a mixture of blood, plasma, and other fluids in the lungs that can "induce the feeling of suffocation or drowning."[33] The autopsies also showed the presence of "frothy fluid" in the lower airways, indicating additional problems with the lethal injection process.[34]

First, the presence of the frothy liquid suggests that inmates were still alive when their lungs filled with fluid—as froth can only form if the inmate is still breathing.[35] Second, the frothy liquid in the lungs can only be a result of the anesthetic administered (the first drug in the three-drug cocktail), because the second drug, the paralytic, stops the lungs from working.[36] Additionally, the dosage of the anesthetic may be responsible for causing this pulmonary edema, considering an excessive dosage of drugs—especially when administered in a short amount of time—can damage the lungs.[37] As this reporting demonstrates, there are serious concerns that the anesthetics administered in lethal injections are not fully anesthetizing inmates and are subjecting them to sensations of

29. *See* Dart, *supra* note 4.

30. *See id.*

31. *See* Pickert, *supra* note 2 and accompanying text.

32. *See* Bedau, *supra* note 2; *see also* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 66 (2002) ("In an effort to present a medically sterile aura of peace, for example, executioners inject paralyzing drugs that serve no other purpose than to still a prisoner who, in reality, may be experiencing the hideous pains of dying but may not be able to express it.").

33. Noah Caldwell, Ailsa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020, 7:00 AM), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection [https://perma.cc/64KV-H2WR].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

"suffocating and drowning" induced by pulmonary edema.[38] This is problematic because, as public defender Allen Bohnert told NPR, "[w]e can't ask the [inmate] what is happening to them during the course of their execution."[39] Full transparency into the lethal injection protocol is therefore necessary to determine whether lethal injection remains a suitable and humane process of execution.

B. *Secrecy Surrounding the Acquisition of Lethal Injection Drugs*

In addition to concerns about the efficacy of execution drugs, the second objection to execution procedures is the secrecy surrounding the acquisition of lethal injection drugs. Strict federal and international regulations make lethal injection drugs difficult to obtain,[40] and states have taken unorthodox and desperate measures to import execution drugs.[41] A massive drug shortage in the United States, as well as the medical profession's ethical hesitancy to participate in executions, has driven correction facilities to use inferior methods in executions and substandard providers to acquire lethal injection drugs.[42] Some states have resorted to "illegally importing the drugs, using untested combinations, or buying from unregulated compounding pharmacies, a number of which have a history of producing contaminated products."[43] The use of compounding pharmacies is especially concerning because compounding pharmacies do not go through the same process of approval as large

38. *Id.*

39. *Id.*

40. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., ADDENDUM TO BOP EXECUTION PROTOCOL, FEDERAL DEATH SENTENCE IMPLEMENTATION PROCEDURES (July 1, 2007), https://files.deathpenaltyinfo.org/legacy/files/pdf/BOP%20Protocol%208-1-08.pdf [https://perma.cc/MJ6Q-6GY9]. For example, in previous years, both the U.S. Government and other state protocols required the administration of a three-drug injection beginning with sodium thiopental. *See, e.g.*, TENN. DEP'T OF CORR., EXECUTION PROCEDURES FOR LETHAL INJECTION 35, 44 (2007), https://files.deathpenaltyinfo.org/legacy/files/pdf/TENNlethinjec.pdf [https://perma.cc/X9D2-PE6M]. However, in 2009, the sole U.S. manufacturer of sodium thiopental ended its production of the drug, making it impossible for states to acquire it from domestic suppliers. Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704754304576095980790129692 [https://perma.cc/RKH6-NNG6 (dark archive)].

41. John Schwartz, *Seeking Execution Drug, States Cut Legal Corners*, N.Y. TIMES (Apr. 13, 2011), https://www.nytimes.com/2011/04/14/us/14lethal.html?pagewanted=all [https://perma.cc/3J2T-DWB2 (dark archive)].

42. *See* Deng & Lithwick, *supra* note 2.

43. Stephanie Mencimer, *Does This Secret Drug Cocktail Work To Execute People? Oklahom Will Find Out Tonight.*, MOTHER JONES (Apr. 29, 2014), https://www.motherjones.com/politics/2014/04/double-execution-tonight-ok-using-secret-experimental-drug-protocol/ [https://perma.cc/3YJU-LH7R]; *see also* ROBIN KONRAD, DEATH PENALTY INFO. CTR, BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 35–41 (Robert Dunham & Ngozi Ndulue eds.), https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf [https://perma.cc/T4B6-KGSF] (detailing states' unorthodox practices of obtaining lethal injection drugs).

pharmaceutical companies do, leaving the safety and efficacy of their products uncertain.[44]

Some argue that the lack of transparency surrounding drug manufacturers can impede legal challenges to executions.[45] If a defendant is not allowed to know the source and manufacturer of the drugs, they cannot ensure the quality of the drugs or the qualifications of the pharmacist who made them.[46] The quality of the drugs, including their manufacturer, can indicate whether they are suitable for lethal injections and is therefore a material piece of information to determine whether lethal injections are being administered fairly and humanely.

C. *Qualification of Executioners*

The third questionable aspect of lethal injection procedures includes the qualifications of execution team members. As Professor Deborah Denno points out, "[l]egislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out."[47] Often, lethal injections are administered by prison staff with little medical expertise and only some paramedic training.[48] This is partly due to the fact that many of the people who are medically trained to administer injections intravenously, such as doctors and nurses, are unwilling to carry out executions.[49] Some qualified individuals, such as anesthesiologists, can have their license revoked if they participate in lethal injections.[50]

Although some prison regulations require executioners to have some training or preparation to act as executioners, the extent to which each

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44. *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies [https://perma.cc/VVE8-WQDU].

45. Tracy Connor, *Will Courts Lift Veil of Secrecy Around Lethal Injections?*, NBC NEWS (Feb. 27, 2014, 9:30 PM), https://www.nbcnews.com/storyline/lethal-injection/will-courts-lift-veil-secrecy-around-lethal-injections-n40171 [https://perma.cc/KK2X-S2EK] (last updated Feb. 28, 2014, 10:37 PM).

46. An investigative report revealed that Texas secretly bought its lethal injection drugs from a compounding pharmacy that had been previously cited forty-eight times for dangerous practices. Chris McDaniel, *Inmates Said the Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.*, BUZZFEED NEWS (Nov. 28, 2018, 5:09 PM), https://www.buzzfeednews.com/amphtml/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?__twitter_impression=true [https://perma.cc/NA37-FMSA].

47. *See* Denno, *supra* note 32, at 66.

48. Owen Dyer, *The Slow Death of Lethal Injection*, 348 BMJ 16, 17 (2014).

49. Denno, *supra* note 32, at 66.

50. *See* Rob Stein, *Group To Censure Physicians Who Play Role in Lethal Injections*, WASH. POST (May 2, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/05/01/AR2010050103190.html [https://perma.cc/AV8F-6KFW (dark archive)] (noting the American Board of Anesthesiologists decided to revoke certification of any member who participates in an execution by lethal injection).

department of correction offers that training or ensures that executioners are qualified is unclear.[51] This can generate serious complications during the execution.[52] For example, some inmates have collapsed veins due to drug use or poor health, which can make it especially hard for an untrained person to find a vein.[53] Additionally, if the injection is mistakenly inserted into tissue instead of a vein, the injection drugs will not be administered effectively.[54] And, if the intravenous line is placed incorrectly, it can slip out during the execution.[55] It is thus essential to verify the qualification of executioners because any pain suffered by the inmate should not be the result of human error.

Since 2011, thirteen states have passed "secrecy statutes" that conceal information about the execution process, thereby exacerbating the problem of a lack of information surrounding lethal injections.[56] Arizona is one of those states, prohibiting disclosure of the identity of executioners or any identifying information in their records.[57] Similarly, Indiana prohibits disclosure of the identity of "a pharmacist, a pharmacy, a wholesale drug distributor, or an outsourcing facility" that contracts with the department of corrections to issue lethal injection drugs.[58] These statutes enable states to continue to follow unorthodox practices, to acquire drugs from second-rate suppliers, and to hire unqualified executioners.[59]

The secrecy surrounding information on both lethal injection drugs and the lack of qualification of executioners impedes the public's ability to ensure executions are administered fairly, safely, and legally. Disclosing the drugs' manufacturers, sellers, lot numbers, NDCs, and expiration dates—in addition to personnel qualifications—allows the public to closely scrutinize whether states are legally obtaining and adequately administering lethal injection drugs.

51. *See* Denno, *supra* note 32, at 121.

52. The execution of Clayton Lockett, an Oklahoma inmate, was partly botched by a prison staff's failure to find a vein. Katie Fretland & Jessica Glenza, *Oklahoma State Report on Botched Lethal Injection Cites Medical Failures*, GUARDIAN (Sept. 4, 2014, 11:17 PM), https://www.theguardian.com/world/2014/sep/04/oklahoma-inquiry-botched-lethal-injection-clayton-lockett [https://perma.cc/J42T-RA2P] (last updated Sept. 4, 4:47 PM). A state investigation into the execution revealed that a paramedic attempted to insert a needle into Lockett, but failed to secure it with tape and the vein became unviable. *Id.* There were two more failed attempts at finding a vein by prison staff before a physician was called. *Id.* The physician was able to insert the injection into a vein in Lockett's groin but covered the area with a sheet for privacy. *Id.* The sheet made the intravenous line insertion invisible to executioners, which ultimately concealed complications with the injection for several minutes. *Id.*

53. *See* Caldwell et al., *supra* note 33.

54. *See id.*

55. *Id.*

56. *See* KONRAD, *supra* note 43, at 4.

57. *See* ARIZ. REV. STAT. ANN. § 13-757(d) (Westlaw through the 1st Spec. Sess. of the 55th Leg. 2021). Arizona Senate Bill 1695 was introduced into the Arizona legislature on February 1, 2021, and if passed, would repeal section 13-757(d). S.B. 1695, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

58. IND. CODE ANN. § 35-38-6-1(e)–(f) (Westlaw through all legislation of the 2021 1st Reg. Sess. of the 122d Gen. Assemb.).

59. *See* KONRAD, *supra* note 43, at 69.

This Recent Development therefore argues that a First Amendment right of access to specific information about execution drugs and the qualifications of executioners should not only be recognized by the courts but is necessary to the equitable administration of justice.

II. FIRST AMENDMENT RIGHT OF ACCESS JURISPRUDENCE

While states can bar certain information from disclosure, the public may still have the right to receive that information under the free speech clause of the First Amendment.[60] The Supreme Court has recognized a First Amendment "right of access" to government proceedings through a series of decisions that first upheld a constitutional right of access to criminal trials and subsequently upheld a right of access to preliminary hearings and jury selection.[61]

In *Richmond Newspapers, Inc. v. Virginia*,[62] the Supreme Court recognized a First Amendment right of public access to criminal trials because "historical evidence demonstrates conclusively that . . . criminal trials . . . had long been presumptively open" to the public.[63] To overcome the presumption of openness, the state must prove an overriding interest to justify exclusion.[64] In *Globe Newspapers Co. v. Superior Court*,[65] the Supreme Court reaffirmed its holding in *Richmond Newspapers*, holding that the First Amendment recognizes a right of access to a criminal trial because it "historically has been open to the press and general public"[66] and "access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."[67] This framework has come to be known as the "history and logic test."[68]

60. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–76 (1980) ("The First Amendment, in conjunction with the Fourteenth, prohibits governments from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. . . . Free speech carries with it some freedom to listen.").

61. *See* Press-Enter. Co. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1, 13 (1986) (recognizing a public right of access to preliminary hearings); Press-Enter. Co. v. Superior Ct. (*Press-Enterprise I*), 464 U.S. 501, 505–10 (1984) (recognizing a public right of access to jury selection); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 610 (1982) (reinforcing the holding in *Richmond Newspapers*); *Richmond Newspapers*, 448 U.S. at 575–77 (recognizing a right of access to criminal trials); Gannett Co. v. DePasquale, 443 U.S. 368, 393–94 (1979) (recognizing a defendant's right to a public trial, but not necessarily a public right of access to the court).

62. 448 U.S. 555 (1980).

63. *Id.* at 569.

64. *See id.* at 580–81.

65. 457 U.S. 596 (1982).

66. *Id.* at 605.

67. *Id.* at 606.

68. *See id.* at 606; *cf.* Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1740 (2006) (referring to the test as the "'experience and logic' or 'history and function' pre-test").

In 1984, the Supreme Court recognized that the public's access to criminal proceedings is essential to the equitable administration of justice:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.[69]

The Supreme Court later recognized this same value in a right of public access to jury selection[70] and preliminary hearings.[71]

A. *The History and Logic Test*

The main legal framework through which right of access cases are analyzed is best known as the history and logic test. The history prong asks whether the government proceeding has "historically . . . been open to the press and general public."[72] The logic prong asks whether access to the government proceeding "plays a particularly significant role in the functioning of the judicial process and the government as a whole."[73] In the context of criminal trials, the Supreme Court has reiterated that public access "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."[74]

The right of access, however, is not absolute.[75] "If the particular proceeding in question passes these tests of experience and logic, a *qualified* First Amendment right of public access attaches."[76] However, the right can be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[77]

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69. *Press-Enterprise I*, 464 U.S. at 508.
70. *Id.* at 505–10.
71. *See Press-Enterprise II*, 478 U.S. at 10.
72. *Globe Newspaper Co.*, 457 U.S. at 605.
73. *Id.* at 606.
74. *Id.*
75. Some have advocated for a different framework through which to analyze right of access cases, but since the Supreme Court has not expressly overruled the history and logic test and many lower courts still use it, this Recent Development follows the history and logic test for analyzing the right of access to executions and related documents. *See generally* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 836 (2017) (advocating for a legal framework that focuses on "whether the structural benefits of court transparency are outweighed by the need for secrecy" rather than focusing on the history and logic of openness); Levine, *supra* note 68, at 1760 (noting "most lower courts have taken one of three different approaches to claims of an access right").
76. *Press-Enterprise II*, 478 U.S. at 9 (emphasis added).
77. Press-Enter. Co. v. Superior Ct. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984).

B. *Subsequent Applications of the History and Logic Test*

While the Supreme Court recognized a right of access to preliminary hearings, it has not explicitly extended the history and logic test to other judicial proceedings.[78] Rather, the Court has left the task of applying the law to the lower courts, leaving the boundaries of the test unclear. The qualified right of access to criminal trials is solidified in Supreme Court jurisprudence, and most lower courts recognize a qualified right of access to civil trials.[79] However, lower courts disagree as to whether court documents receive the same right of access as the proceedings to which they are related.[80]

Lower courts have usually approached right of access claims to judicial documents in one of three ways.[81] The first approach disregards the history and logic test altogether and applies a "closure validity test"—a test that is based on common law and is easier to satisfy than strict scrutiny.[82] This approach bases its reasoning on the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*,[83] where the Court held that the press has a First Amendment right to physical copies of tapes played during a trial.[84] In its decision, the Supreme Court recognized a common-law right of access to *all* judicial records, articulating that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[85] Thus, more documents are presumptively available under *Nixon* than under the other approaches.[86] However, *Nixon*'s presumption of openness is more easily overcome because of the test's wide discretion reserved to judges and the lower standard judges must meet to overcome a common-law right, versus a constitutional one.[87]

78. *See* Ardia, *supra* note 75, at 855–56 ("Since *Press-Enterprise I* and *II*, the Supreme Court has not revisited its conclusion that the First Amendment provides a qualified right of access to criminal trials and trial-like proceedings, nor has the Court had occasion to resolve whether the experience and logic test mandates a right of access to other judicial activities, including civil proceedings and court records.").

79. *See* Levine, *supra* note 68, at 1759 n.123.

80. Ardia, *supra* note 75, at 858–59 ("Courts also appear uncertain whether the experience and logic test is applicable in situations that do not closely resemble the settings in which the test arose. . . . Indecision about the scope of a First Amendment right of access is most acute in cases involving public access to pre-trial civil proceedings, court records, and administrative hearings . . . .").

81. *Id. Compare* Howard v. State, 291 P.3d 137, 142 (Nev. 2012) (applying a common-law test for access to records), *and* United States v. Haller, 837 F.2d 84, 86–87 (2d Cir. 1998) (applying the history and logic test to the proceeding in order to determine a right of access to documents related to that proceeding), *with* United States v. Corbitt, 879 F.2d 224, 228–29 (7th Cir. 1989) (applying the history and logic test directly to documents).

82. *See* Levine, *supra* note 68, at 1760.

83. 435 U.S. 589 (1978)

84. *See id.* at 608–11.

85. *Id.* at 597–99.

86. Levine, *supra* note 68, at 1761.

87. *See id.* at 1761–62; *see also* Ardia, *supra* note 75, at 871–72 ("Whereas the First Amendment requires that restrictions on access must be necessary to serve a compelling interest and be narrowly

Unlike the first approach, the second and third approaches recognize access as a First Amendment constitutional right and apply the history and logic test.[88] The second approach recognizes a right to access documents filed in a proceeding if the proceeding itself has given rise to a right of access under the First Amendment.[89] The third approach does not focus on the proceeding to which the document is related, but applies the history and logic test to the documents themselves in order to determine whether a right of access attaches.[90] These latter two approaches follow the Supreme Court's application of the history and logic test in *Richmond Newspapers* and subsequent cases.[91] Some courts follow a combination of these two approaches.[92]

Whether a document related to a proceeding is available to the public depends on which approach the court chooses to apply. The *Richmond Newspapers* line of cases—recognizing a constitutional right of access to criminal proceedings—was decided after the decision in *Nixon* recognized a common-law right of access to judicial records.[93] However, there is no indication that *Richmond Newspapers* overruled *Nixon*'s recognition of a common-law right of access in exchange for a constitutional one. Thus, some courts still choose to follow the *Nixon* approach.[94]

C. *The History and Logic Test as Applied to Prisons and Executions*

Although courts have recognized a First Amendment right of access for the public to witness prisoner executions,[95] the Supreme Court has not recognized a right of broad public access to prisons. In *Pell v. Procunier*,[96] the Supreme Court recognized that "the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance."[97] Still, the Court concluded that "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."[98] Four years later, the Court reached a similar conclusion in

tailored to serve that interest, a judge need only find under the common law that the interests in closure outweigh the interests in access.").

88. *See* Levine, *supra* note 68, at 1760.

89. *Id.*

90. *Id.*

91. *See id.* at 1761. For a brief discussion of *Richmond Newspapers* and subsequent cases, see *supra* Part II.

92. *Id.* at 1764.

93. Ardia, *supra* note 75, at 872.

94. *See, e.g.*, United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982) ("We recognize . . . that the right here in question is of non-constitutional origin.").

95. *See, e.g.*, Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 873 (9th Cir. 2002).

96. 417 U.S. 817 (1974).

97. *Id.* at 830 n.7.

98. *Id.* at 834.

Saxbe v. Washington Post Co.,[99] noting that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there."[100] Nonetheless, the Court ultimately held that prison regulations prohibiting the press from interviewing individually designated inmates did not violate the First Amendment.[101] Similarly, in *Houchins v. KQED, Inc.*,[102] the Court held that the news media did not have a right of access to interview inmates at a county jail.[103] Although the Court noted that the press acts as the "eyes and ears"[104] of the public and "can be a powerful and constructive force"[105] in remedying public injustice, it concluded that the Court has "never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[106]

Although the abovementioned Supreme Court cases failed to recognize a right of the press to have broad access to inmates, this line of jurisprudence did not invalidate a First Amendment right of access to prisons. In 1998, the Ninth Circuit noted that the Supreme Court failed to recognize a right of access in *Houchins*, *Saxbe*, and *Pell* because, in those cases, the press was seeking access superior to that afforded to the public.[107] Thus, the Supreme Court recognized limitations on the public and press's access to prisons. The Supreme Court did not totally deny the press access inside prison walls; it held "only that such a right is co-extensive with the public's right to the same information."[108] In 2002, the Ninth Circuit recognized a First Amendment right of access to view executions, concluding there was both a historical tradition of public access to executions and that public access to executions "plays a significant positive role" in the functioning of capital punishment.[109]

D. *Other Circuits' Approach to Right of Access to Execution-Related Information*

As this section explains, the Supreme Court's reluctance to recognize a constitutional right for the press to access prisons has influenced some circuit courts to deny a right of access to execution-related information. Relying mainly on the Supreme Court's decision in *Houchins*, which held that the news media did not have a right of access to interview inmates at a county jail,[110] the

99. 417 U.S. 843 (1974).
100. *Id.* at 847.
101. *See id.* at 850.
102. 438 U.S. 1 (1978).
103. *See id.* at 15–16.
104. *Id.* at 8.
105. *Id.*
106. *Id.* at 9.
107. Cal. First Amend. Coal. v. Calderon, 150 F.3d 976, 982 (9th Cir. 1998).
108. *Id.*
109. Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 875–77 (9th Cir. 2002).
110. Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978).

Sixth Circuit in *Phillips v. DeWine*[111] held that the First Amendment does not compel disclosure of information regarding the identities of execution team members nor the identities of entities that transport, manufacture, compound, or supply lethal injection drugs.[112] Although the Sixth Circuit recognized that the history and logic test has been applied in broad contexts outside of criminal trials, it ultimately concluded that "it does not follow that [the right of access] covers *all* information related to [a] proceeding."[113] The court noted that information relating to the lethal injection process and individuals participating in it was "neither information of the type filed in a government proceeding nor its functional equivalent" and was thus not covered by the right of access doctrine.[114]

In 2014, the Eleventh Circuit in *Wellons v. Commissioner, Georgia Department of Corrections*[115] noted that the First Amendment did not give individuals "the broad right" to know the manufacturer of lethal injection drugs and the qualifications of those who administer them.[116] Relevant to the Eleventh Circuit's conclusion was the fact that the Supreme Court's decision in *Pell* denying press access to inmates focused "on the public's, rather than the individual's, need to be informed so as to foster debate."[117] Thus, the individual plaintiff did not have a First Amendment right of access to information about lethal injection drugs and the qualification of his executioners.[118]

In 2015, the Eighth Circuit in *Zink v. Lombardi*[119] explicitly distinguished itself from the Ninth Circuit, which has recognized a First Amendment right of access to view executions.[120] The Eighth Circuit discussed the history and logic test "for the sake of analysis,"[121] but concluded that there was not enough evidence that "the particulars" of executions have historically been open to the public or that specific information about execution procedures played a significant enough role to justify openness.[122]

These cases showcase a pattern of circuit courts denying the public the right to access information regarding the source and manufacturer of lethal injection drugs and the qualifications of executioners. As discussed in Part III of this Recent Development, the Ninth Circuit relied on these three opinions—

111. 841 F.3d 405 (6th Cir. 2016).
112. *See id.* at 417–20.
113. *Id.* at 418–19.
114. *Id.* at 419.
115. 754 F.3d 1260 (11th Cir. 2014).
116. *Id.* at 1267 (citing Lewis v. Casey, 518 U.S. 343, 354 (1996)).
117. *Id.* at 1266 (citing Pell v. Procunier, 417 U.S. 817, 831 (1974)).
118. *Id.* at 1266–67.
119. 783 F.3d 1089 (8th Cir. 2015).
120. *Id.* at 1112; *see also* Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002).
121. *Zink*, 783 F.3d at 1112.
122. *Id.* at 1112–13.

DeWine, *Wellons*, and *Zink*—from sister circuits when it refused to find a qualified right of access to execution-related information.[123]

III. THE NINTH CIRCUIT'S APPROACH

Although the Ninth Circuit has recognized a public right of access to plea agreements,[124] documents filed in pretrial proceedings,[125] and documents filed in post-conviction proceedings,[126] it declined to extend this right of access to documents related to prisoner executions in the 2019 case *First Amendment Coalition of Arizona, Inc. v. Ryan*.[127] In *Ryan*, the Ninth Circuit concluded that information related to executions, such as information about lethal injection drugs and personnel, "bears no resemblance" to other information to which the public generally has access[128]—even though the court emphasized that access to executions plays a significant role in ensuring executions are done "fairly and humanely."[129]

The Ninth Circuit heavily relied on its 2002 decision in *California First Amendment Coalition v. Woodford* to reach its holding in *Ryan*.[130] Thus, this Recent Development discusses the holding and reasoning of *Woodford* in more detail to better contextualize the decision in *Ryan.*

A. California First Amendment Coalition v. Woodford

In 2002, the Ninth Circuit held that the public has a First Amendment right of access to view executions, starting from the moment the prisoner is escorted into the execution chamber.[131] In the case of *Woodford*, plaintiffs challenged San Quentin State Prison's Institutional Procedure 770 ("Procedure 770"), which prohibited witnesses from observing a prisoner's execution until after the prisoner had been strapped to a gurney, intravenous lines had been inserted, and the execution team exited the chamber.[132] The court applied a balancing test between "the State's ability to carry out executions in a safe and orderly manner and the public's right to be informed about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death."[133]

123. First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1080 (9th Cir. 2019) ("Other courts have reached the same conclusion.").
124. Oregonian Publ'g Co. v. U.S. Dist. Ct., 920 F.2d 1462, 1465–66 (9th Cir. 1990).
125. Associated Press v. U.S. Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983).
126. CBS, Inc. v. U.S. Dist. Ct., 765 F.2d 823, 825 (9th Cir. 1985).
127. *Ryan*, 938 F.3d at 1078–79.
128. *Id.* at 1079.
129. *Id.* at 1076.
130. *Id.* at 1075 ("Our conclusion follows directly from the holding and reasoning of *Woodford*.").
131. Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 885–86 (9th Cir. 2002).
132. *Id.* at 870–71.
133. *Id.* at 873.

In considering whether the public had a right to watch executions in their entirety, the Ninth Circuit applied the history and logic test.[134] Because "[t]he public and press historically have been allowed to watch the condemned inmate enter the execution place, be attached to the execution device and then die," the court concluded "historical tradition strongly support[ed]" the right to view the initial procedures of an execution in addition to the execution itself.[135] In concluding that the logic prong of the test was satisfied, the court reasoned that "[i]ndependent public scrutiny . . . plays a significant role in the proper functioning of capital punishment" in order to "determine whether lethal injection executions are fairly and humanely administered."[136]

Instead of analyzing the state's interest with a level of scrutiny similar to that used in right of access cases, the Ninth Circuit applied a level of scrutiny applicable to constitutional challenges to prison regulations: "whether the regulation 'is "reasonably related" to legitimate penological objectives, or whether it represents an "exaggerated response" to those concerns.'"[137] Because the court concluded that Procedure 770 was not reasonably related to a legitimate penological interest and constituted an "exaggerated response," the state's interest was insufficient to justify a restriction on the public's First Amendment right of access to view executions in their entirety.[138]

B. Wood v. Ryan

In July of 2014, the Ninth Circuit stayed the execution of Joseph Wood four days before he was scheduled to die.[139] Three months prior, Arizona sought a warrant of Wood's execution based on a double homicide charge.[140] In the process, the state notified Wood's attorney that the ADC planned to use a two-drug cocktail in Wood's lethal injection, but reserved the right to use a third drug if it became available.[141] The head of Arizona's Federal Public Defender's

134. *See id.* at 875.

135. *Id.* at 876.

136. *Id.*

137. *Id.* at 877–79 (quoting Turner v. Safley, 482 U.S. 78, 87 (1987)) ("Because the executions at issue here take place within prison walls, are administered by the same individuals who run San Quentin and are staffed by the same personnel who participate in the daily operations of the prison, our level of scrutiny must be guided by the line of cases addressing constitutional challenges to prison regulations, rather than by those governing access to governmental proceedings.").

138. *Id.* at 885–86.

139. Wood v. Ryan, 759 F.3d 1076, 1077–78 (9th Cir.) (staying Wood's execution on July 19, 2014, when his execution was scheduled for July 23, 2014), *vacated*, 573 U.S. 976 (2014).

140. *See id.* at 1078.

141. *Id.* The ADC notified Wood's attorney that it planned to use the drugs midazolam and hydromorphone to execute Wood, but that if they were able to obtain the drug pentobarbital, the ADC would notify Wood's attorney of "its intent to use that drug." *Id.* Midazolam is a drug commonly used in lethal injection executions. *See* Caldwell et al., *supra* note 33. The State of Ohio used a combination of midazolam and hydromorphone to execute Dennis McGuire, resulting in McGuire "pant[ing] for air and writh[ing] for 10 minutes." Dyer, *supra* note 48, at 16–17.

Capital Habeas Unit, Dale Baich, requested information from the ADC regarding the dosage of the drugs to be used; the name, manufacturer, and source of the drugs; and the credentials of those administering the lethal injection.[142] The ADC responded that it would follow the suggested dosage from Arizona's execution protocol, and said that the drugs were both "domestically obtained," and FDA-approved.[143] Citing Arizona's confidentiality law,[144] the ADC rejected the request to release any identifying information regarding the execution team.[145] Baich again requested information about the drug manufacturers, lot numbers, expiration dates, and qualifications of the execution team.[146] The ADC provided redacted records including some purchasing information and expiration dates, but excluded the drug's manufacturers and suppliers.[147]

In response to the ADC's partial disclosure, Wood sought to enjoin his execution until receiving information regarding (1) the source, manufacturer, NDCs, and lot numbers of the drugs to be used in his execution; (2) "non personally identifying information" relating to the qualifications of execution team members; and (3) "information and documents explaining how the Department developed its current lethal injection drug protocol."[148]

Citing *Woodford*, the Ninth Circuit noted that lethal injections are "invasive, possibly painful and may give rise to serious complications."[149] In order to judge whether this method of execution is humane and fair, the public must have reliable information about the "initial procedures that are inextricably intertwined" with an execution.[150] The court recognized that, in the Ninth Circuit, the right of access is not limited to court proceedings—it has also been extended to "documents related to those proceedings" in which the court has recognized a right of access.[151]

Because the information Wood sought is "inextricably intertwined with the execution," the court focused its analysis on the "historic openness of the

142. *Wood*, 759 F.3d at 1078.

143. *Id.*; *see id.* at 1088–89 n.1 (Bybee, J., dissenting) ("The current execution protocol, found in Department Order 710, calls for the use of 50 mg of midazolam and 50 mg of hydromorphone."). The *Wood* opinion notes that the ADC indicated that it would use the two-drug protocol on Wood and that it had chosen the dosages of both drugs based on sworn testimony in "the Ohio Execution Protocol litigation." *Id.* at 1078.

144. *Id.* at 1078. This statute makes the "identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in those records that would identify those persons . . . confidential" and therefore not subject to disclosure. ARIZ. REV. STAT. ANN. § 13-757(d) (Westlaw through the 1st Spec. Sess. of the 55th Leg. 2021).

145. *Wood*, 759 F.3d at 1078.

146. *Id.* at 1079.

147. *Id.*

148. *Id.*

149. *Id.* at 1081 (quoting Cal. First Amend Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002)).

150. *Id.* (quoting *Woodford*, F.3d at 877).

151. *Id.* (citing Oregonian Publ'g Co. v. U.S. Dist. Ct., 920 F.2d 1462, 1465 (9th Cir. 1990)).

execution itself," rather than the information sought after.[152] They relied on the analysis in *Woodford*, reaffirming that executions have been historically open to the public.[153] The court also found sufficient evidence that "important details about early methods of executions" were also open to the public, such as the type and manufacturers of ropes used in hangings, the identities of individuals who handled cyanide used in gas chambers, and specific details about electric chairs.[154] Since Wood was seeking a preliminary injunction, the Ninth Circuit was not required to determine whether this evidence was conclusive.[155] Instead, it was enough that the evidence raised "serious questions" as to whether the information sought after had historically been open.[156]

As to the logic prong, the court concluded that "more information about the drugs used in lethal injections can help an alert public make better informed decisions about the changing standards of decency in this country surrounding lethal injection."[157] Additionally, specific information about the drugs—such as its source, manufacturer, lot numbers, and NDCs—are indicative of whether state corrections departments are acquiring the drugs from "safe and reliable drug manufacturers."[158] Finally, knowing whether execution team members are qualified to perform executions gives the public "more confidence than a state's generic assurance that executions will be administered safely and pursuant to certain qualifications and standards."[159]

Based on the analysis above, the Ninth Circuit granted a conditional stay to Wood's execution.[160] Three days later, the U.S. Supreme Court vacated the Ninth Circuit's judgment, issuing a three-sentence opinion concluding that the district court judge was within his discretion to deny Wood's motion for a preliminary injunction.[161] Wood was executed the next day.[162]

C. First Amendment Coalition of Arizona, Inc. v. Ryan

The Ninth Circuit had a second chance to evaluate the First Amendment right of access to executions and execution-related information in *First Amendment Coalition of Arizona, Inc. v. Ryan*.[163] Applying its reasoning from *Woodford*, the Ninth Circuit held that the First Amendment right of access to

152. *Id.* at 1083.
153. *Id.*
154. *Id.* at 1083–84 (noting the details about ropes, gas chambers, and electric chairs were open to the public).
155. *Id.* at 1084.
156. *Id.*
157. *Id.* at 1085.
158. *Id.* at 1086.
159. *Id.*
160. *Id.* at 1088.
161. Ryan v. Wood, 573 U.S. 976, 976–77 (2014).
162. First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1073 (9th Cir. 2019).
163. *See id.*

watch executions in their entirety also encompasses the right to listen to the execution in its entirety.[164] However, that same access right *does not* encompass a right to access information regarding the lethal injection drugs used during the execution or the execution team's qualifications.[165] This Recent Development discusses each holding separately.

1. Right To Hear the Execution

The first of the plaintiffs' challenges consisted of the constitutionality of the ADC's restriction on the ability of witnesses to hear an execution in its entirety.[166] Under the ADC's procedures, the public was able to view the entire execution but the overhead microphone responsible for transmitting sounds from the execution room was turned off after the insertion of intravenous lines. In other words, the public could watch the execution, but could not hear any sounds as the prisoner died.[167] Extending its previous analysis of the public right to view executions, the court here reasoned that "[t]he historical tradition of public access described in *Woodford* includes the ability to hear the sounds of executions" because, historically, witnesses "could, no doubt, hear the sounds of the entire execution process."[168] In analyzing the logic prong of letting the public hear executions, the court borrowed from *Woodford* again and reasoned that "[e]xecution witnesses need to be able to observe and report on the entire process so that the public can determine whether lethal injections are fairly and humanely administered."[169] Thus, restricting witnesses from the sounds of an execution deprives the public from the auditory information regarding the lethal injection and "the prisoner's experience as he dies."[170]

After finding a constitutional right of the public to hear an execution in its entirety, the Ninth Circuit reviewed ADC's procedures through the same "deferential standard" it used in *Woodford*—whether the regulation was "reasonably related to legitimate penological objectives or whether it represent[ed] an exaggerated response to those concerns."[171] The court applied four factors from *Turner v. Safley*[172] that are relevant in analyzing whether a restriction is reasonable:

> (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to

164. *Id.* at 1075.
165. *Id.* at 1080.
166. *Id.* at 1072.
167. *Id.* at 1073.
168. *Id.* at 1075.
169. *Id.* at 1076.
170. *Id.*
171. *Id.* (quoting Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 878 (9th Cir. 2002) (quoting Turner v. Safley, 482 U.S. 78, 87 (1987))).
172. 482 U.S. 78 (1987).

> 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 right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) whether there are "obvious, easy alternatives . . . that fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests."[173]

Addressing these four factors, the court concluded that there was no "valid, rational connection" between the regulation—prohibiting the sounds of only parts of the execution—and the government interest—protecting the identity of executioners and decreasing the risk of litigation.[174] There was also no alternative means to exercise the right to hear the execution in its entirety.[175] Additionally, the alternative of keeping the microphone on at the time of execution would have little to no impact on guards, inmates, or prison resources.[176] Thus, ADC's restriction of the public's First Amendment right to hear executions was not justified.[177]

2. Right to Execution-Related Information

In a much shorter analysis and in a complete reversal from its reasoning in *Wood v. Ryan*, the Ninth Circuit did not recognize an equal right of access to execution-related information. The plaintiffs' second and third claims challenged the ADC's failure to disclose information about lethal injection drugs and the qualifications of executioners.[178] The ADC did disclose some drug-related information—including the chemical composition and dosages of the drugs and the drug protocol to be used in an execution—but plaintiffs sought additional information about the drugs' manufacturers, sellers, lot numbers, NDCs, and expiration dates.[179] Additionally, ADC required that execution team members be certified or licensed, but plaintiffs sought documentation proving their qualifications.[180]

In its analysis, the court seemed to be more persuaded by the *Houchins* line of cases, which generally held that the "First Amendment does not 'mandate[] a right of access to government information'"[181] than the *Richmond Newspapers*

173. *Ryan*, 938 F.3d at 1077 (quoting *Turner*, 482 U.S. at 89–91).
174. *Id.*
175. *Id.*
176. *Id.* at 1078.
177. *Id.* at 1076.
178. *See id.* at 1078–80.
179. *Id.* at 1073–74.
180. *Id.* at 1074.
181. *Id.* at 1079 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality opinion)).

line of cases, which recognized a public right of access to criminal trials.[182] Distinguishing the information sought by plaintiffs in this case from other documents in criminal proceedings to which the public generally has access, the court found that neither the public nor the press had a right of access to the sought after information relating to lethal injection drugs and the qualifications of the execution team.[183] The court reasoned that this kind of information does not resemble a transcript of a criminal proceeding, nor does it resemble documents that are a part of "the official judicial record."[184] The Ninth Circuit also noted that *Woodford*'s recognition of a right to *view* executions does not necessarily encompass the right to access the information regarding lethal injection drugs and personnel qualifications.[185] Since the court found that the information sought after here differed "in material ways" from documents in previous cases recognizing a right of access, it concluded that the public did not have a right to access it.[186] As discussed in more detail in Part IV, this decision is inconsistent with precedent and First Amendment values.

IV. THE NINTH CIRCUIT SHOULD HAVE APPLIED THE HISTORY AND LOGIC TEST TO PLAINTIFFS' REQUEST OF INFORMATION AND FOUND A QUALIFIED RIGHT OF ACCESS TO INFORMATION ABOUT PERSONNEL QUALIFICATIONS AND THE SOURCE AND MANUFACTURER OF EXECUTION DRUGS

A. *The Ninth Circuit Erroneously Relied on Other Circuits, Breaking with Its Own Precedent*

The Ninth Circuit placed too much weight on the decisions from its sister circuits, in comparison to its own precedent, to guide its holding in *Ryan*.[187] Although the Sixth Circuit identified that a First Amendment right of access to a government proceeding does not necessarily presume a right of access to *all* information related to that proceeding,[188] its position should hardly be persuasive here, especially considering the Ninth Circuit's own precedent. The

182. *Id.* at 1078 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion)). Although the Ninth Circuit recognized the right of access jurisprudence set by *Richmond Newspapers* and subsequent cases, it ultimately cites to *Houchins* to justify the denial of a right of access to execution-related information. *Id.* at 1078–79.

183. *Id.* at 1078–79.

184. *Id.* at 1079.

185. *Id.*

186. *Id.* at 1078.

187. *See id.* at 1080. The Ninth Circuit was persuaded by the Sixth Circuit's decision in *Phillips*, the Eighth Circuit's decision in *Zink*, and the Eleventh Circuit's decision in *Wellons*. *Id.* (first citing Phillips v. DeWine, 841 F.3d 405, 417–20 (6th Cir. 2016); then citing Zink v. Lombardi, 783 F.3d 1089, 1111–13 (8th Cir. 2014); and then citing Wellons v. Comm'r, Ga. Dept. of Corr., 754 F.3d 1260, 1266–67 (11th Cir. 2014)).

188. *See Phillips*, 841 F.3d at 419.

Ninth Circuit itself has recognized a right of access to documents reasonably related to a government proceeding, such as plea agreements and documents filed in pre- and post-conviction proceedings.[189]

In *Ryan*, the Ninth Circuit also cites to the Eighth Circuit to justify its reasoning.[190] But in *Zink v. Lombardi*, the Eighth Circuit explicitly differentiates itself from the Ninth Circuit, noting that the Eighth Circuit never recognized a qualified right of access to executions in the first place.[191] Thus, the Eighth Circuit declined to recognize a qualified right of access to documents related to a proceeding that itself was not constitutionally required to be open.[192]

In addition to the Ninth Circuit's misplaced reliance on other circuits, the court brushed off its own precedent, having previously applied the history and logic test to recognize a right of access to court documents. As previously mentioned, the Ninth Circuit recognized a qualified right of access to "plea agreements and *related documents*."[193] In another decision, the same Ninth Circuit noted that "[t]here is no reason to distinguish pretrial proceedings and the documents filed in regard to them. . . . [T]he public and press have a [F]irst [A]mendment right of access to pretrial documents in general."[194] And in yet another decision, the court reiterated that the values surrounding the First Amendment right of access "apply with as much force to post conviction proceedings as to the trial itself" and that the right of access "extends to *documents* filed in [government] proceedings as well as in the trial itself."[195]

Furthermore, the Ninth Circuit quickly dismissed its previous analysis in *Wood v. Ryan*, because the decision was "summarily vacated" by the Supreme Court.[196] Yet, the Ninth Circuit acknowledged that having more information about lethal injection drugs and personnel qualifications "would undoubtedly aid the public and death-row inmates in monitoring the constitutionality of Arizona's execution proceedings."[197] But in complete contradiction to the First Amendment value it recognized in *Wood v. Ryan*,[198] the Ninth Circuit found the

189. *See supra* notes 124–26 and accompanying text.

190. *See Ryan*, 938 F.3d at 1080 (citing *Zink*, 783 F.3d at 1111–13) (citing the Eighth Circuit's holding in *Zink* as persuasive authority).

191. *See* Zink v. Lombardi, 783 F.3d 1089, 1112 (8th Cir. 2015) ("[U]nlike the Ninth Circuit, we have not ruled that an execution constitutes the kind of criminal proceeding to which the public enjoys a qualified right of access under the First Amendment.").

192. *Id.* at 1112–13.

193. Oregonian Publ'g Co. v. U.S. Dist. Ct., 920 F.2d 1462, 1466 (9th Cir. 1990) (emphasis added).

194. Associated Press v. U.S. Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983).

195. CBS, Inc., v. U.S. Dist. Ct., 765 F.2d 823, 825 (9th Cir. 1985) (emphasis added).

196. First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1078 (9th Cir. 2019); *see also* Wood v. Ryan, 759 F.3d 1076 (9th Cir.), *vacated*, 573 U.S. 976 (2014).

197. *Ryan*, 938 F.3d at 1080.

198. *See Wood*, 759 F.3d at 1082 (concluding that "the right [of] access to documents intrinsically associated with public proceedings forms an important component of the . . . First Amendment right of access").

99 N.C. L. REV. 1587 (2021)

Supreme Court's analysis-free order to be more persuasive, even though the Court did not comment on the merits of the arguments.[199]

Applying the Ninth Circuit's own precedent, executions and reasonably related documents should be afforded analysis under the history and logic test. The "primary justifications" for broad access to executions should "apply with as much force" to information about lethal injection drugs and the personnel administering them.[200] As discussed in Part III, the court in *Ryan* recognized that access to executions plays a significant role in ensuring that they are performed fairly and humanely.[201] This same justification applies to information regarding the source and manufacturer of lethal injection drugs and the qualifications of execution team members. As discussed in more detail below, a right of access to this information also plays a significant role in public scrutiny of lethal injections.

B. *The History and Logic Test Suggests Information Reasonably Related to Executions Should Be Presumptively Open*

Because the right of access attaches to the viewing and hearing of an execution, it should also attach to documents closely related to that process. This includes the information sought in *Ryan*, such as the source and manufacturer of execution drugs to be used; lot numbers, NDCs, and expiration dates of the drugs; and the qualifications of execution personnel. Regardless of whether the history and logic test is applied to the execution itself or to the documents being sought, the test would still support a presumption of right of access.

As established by both *Ryan* and *Woodford*, there is a historical tradition of public access to executions. Lethal injections have been administered since at least 1982.[202] However, long before lethal injections were the preferred method of execution, members of the public were able to observe any method of execution.[203] In addition to witnessing executions, public records historically revealed detailed information about ropes used in hangings, cyanide used in gas chambers, and equipment used in electric chairs.[204] Compared to other historical methods of execution, scholars argue that more information is required to understand lethal injections due to the method's complex nature.[205]

199. *See Wood*, 573 U.S. at 976–77.

200. *CBS, Inc.*, 765 F.2d at 825.

201. *See supra* Section III.B.

202. *See* Pickert, *supra* note 2.

203. Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. CRIM. L. & CRIMINOLOGY 443, 473–74 (2017).

204. *Id.* at 474.

205. *See id.* at 475–76.

Additionally, in 2008, the Supreme Court specifically considered the constitutionality of the three-drug protocol used in lethal injections, detailing in their opinion the exact drugs used in executions and their specific purpose in the process.[206] Not only did the Supreme Court closely scrutinize lethal injection protocols in their opinion, but the Court also gave the public detailed information about the drugs used in lethal injection executions.[207] This only strengthens the argument that at least some information about execution drugs has been historically open and accessible to the public.

As to the logic prong, information about lethal injection drugs plays a significant role in the equitable administration of justice because "the drugs and drug combinations used in lethal injections affect the condemned prisoner's experience of dying to a much greater extent than other means of execution."[208] Although keeping the identity of drug manufacturers and other drug information a secret could have some benefits,[209] states have secretly engaged in unorthodox and unsafe methods to acquire lethal injection drugs by acquiring drugs internationally or from compounding pharmacies.[210] The public can only adequately evaluate executions if they know the when *and* the how of lethal injections—"with what drugs, in what quantities and concentrations, and from what sources."[211]

Further, "[t]he efficacy of the drugs strongly impacts whether lethal injection 'comports with "the evolving standards of decency"' that led our society away from arguably less humane methods of execution."[212] Considering the secrecy surrounding execution protocols[213] and possibly illegal measures states have taken to obtain lethal injection drugs,[214] disclosing the drugs' manufacturers, sellers, lot numbers, NDCs, and expiration dates—in addition to personnel qualifications—would allow the public to closely scrutinize whether states are legally obtaining and adequately administering lethal injection drugs. Thus, having access to lethal injection drug information plays

206. Baze v. Rees, 553 U.S. 35, 44–45 (2008) (plurality opinion).

207. *See id.* at 44–46.

208. Mennemeier, *supra* note 203, at 475.

209. Heather Booth notes that "keeping the manufacturer of the execution drugs a secret could facilitate obtaining the best possible drugs for the execution" because many manufacturers value privacy. Heather Booth, Note, *Better the Devil You Know: An Examination of Manufacturer Driven Lethal Injection Drug Shortages*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 395, 413 (2018).

210. *See id.*; *see also* Tom Dart, *Secret America: How States Hide the Source of Their Lethal Injection Drugs*, GUARDIAN (May 15, 2014, 11:00), https://www.theguardian.com/world/ng-interactive/2014/may/15/-sp-secret-america-lethal-injection-drugs [perma.cc/HR3M-VN7W].

211. *See* Mennemeier, *supra* note 203, at 475–76.

212. *See id.* at 477 (quoting Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002)).

213. *See generally id.* at 459–62 (detailing state secrecy statutes that shield information regarding lethal injection drugs and those who administer them from disclosure).

214. *See supra* notes 40–46 and accompanying text.

an even more significant role in ensuring executions are administered in a fair and humane manner than access to hearing the execution in its entirety, which the Ninth Circuit has already recognized the public has a constitutional right to access.

The same rationale applies to access to information about the qualifications of executioners. Although executioners have been historically "hooded,"[215] the Ninth Circuit in *Woodford* and in *Ryan* did not find that the safety and privacy of the executioner was an important enough government interest to restrict the viewing or hearing of executions.[216] Because the executioner's identity is already exposed by modern protocols used during publicly accessible executions,[217] whether executioners actually remain "hooded" today is arguable. Moreover, participation in an execution is voluntary in a number of states,[218] indicating that executioners are thus aware of the "controversial nature" of their employment.[219]

More importantly, the value in public access to information about the qualifications of executioners outweighs the interests in concealing their identities. This would serve as a check on the government and to ensure that executioners are qualified to carry out an execution properly and humanely. And "[m]aking executioner identities and qualifications subject to scrutiny would provide an incentive for prison officials to adequately screen potential executioners."[220]

States could also make the qualifications of their execution team public without revealing the identity of the executioners.[221] Revealing only the qualifications of executioners somewhat hinders the ability of the public to verify information reported by a department of corrections. However, it can still incentivize the hiring of qualified personnel and would create accountability and transparency.

215. Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2796 (2007).

216. *See* First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1077 (9th Cir. 2019); *Woodford*, 299 F.3d at 880.

217. *See Ryan*, 938 F.3d at 1077.

218. *See* Denno, *supra* note 32, app. 1, tbl.17, at 156–69 (noting the execution team in Arizona, Delaware, Georgia, New Mexico, and Washington is comprised of either volunteers or contracted persons).

219. *See* Roko, *supra* note 215, at 2814.

220. *Id.* at 2825.

221. *Id.* at 2827.

C. *A More Deferential Standard of Review than Strict Scrutiny Would Still Favor a Right of Access to Execution-Related Information*

Traditionally, the right of access can be overcome by an overriding governmental interest.[222] However, instead of applying a strict scrutiny analysis, the Ninth Circuit in *Ryan* evaluated whether Arizona's procedures met judicial scrutiny by applying the *Turner* standard,[223] a more deferential standard of review usually employed to determine the reasonableness of prison regulations.[224] In turn, when evaluating the public's right to access execution-related information, the Ninth Circuit did not apply the *Turner* standard to assess reasonableness since the court failed to apply the history and logic test to this claim in the first place. But as this Recent Development argues, the Ninth Circuit *should* have applied the history and logic test to the claim of a right to access execution-related information. This section finishes the analysis lacking in the *Ryan* opinion by applying the *Turner* standard to evaluate the reasonableness of Arizona's procedure to keep execution-related information confidential.

Under the *Turner* standard, a prison regulation is constitutional if it is "'reasonably related' to legitimate penological objectives" and does not "represent[] an 'exaggerated response' to those concerns."[225] The *Turner* standard requires the application of four different factors, each discussed in turn.

1. The Prison Regulation Must Have a Valid Rational Connection to a Legitimate Government Interest

The first *Turner* factor requires a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[226] Some interests cited by other states to justify the lack of disclosure include vague notions of security and safety.[227] In *Wood v. Ryan*, the first case related to Wood's execution, Arizona argued that disclosing this kind of information would "deter drug manufacturers from providing lethal injection drugs and lead to public disclosure of the identities of those who will administer

222. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

223. *See supra* Section III.C.2.

224. *See* Turner v. Safley, 482 U.S. 78, 89–91 (1987) (outlining the four factors of the *Turner* test). Some have argued for a different level of scrutiny, which gives "some deference to any asserted and legitimate penological interests" but considers "any feasible alternatives available to the public and press in exercising their role in an informed public debate." *See* Rachel South, Comment, *Compounding the Risk of Cruel and Unusual Punishment: The Right To Know the Manufacturer and Compounds Used in Georgia's Lethal Injection Drugs*, 7 J. MARSHALL L.J. 579, 638 (2014).

225. *Turner*, 482 U.S. at 87.

226. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

227. *See id.* at 91.

the drugs."[228] However, the Ninth Circuit found no evidence in the record supporting this claim.[229] In *First Amendment Coalition of Arizona, Inc. v. Ryan*, the second case in the series, no government interest was discussed by the court in favor of concealing execution-related information.[230] Thus, a rational connection between the regulation and the government interest does not seem to exist.

2. Alternative Means of Exercising the Right Must Exist and Remain Open to Prison Inmates

The second *Turner* factor asks whether there are "alternative means of exercising the right that remain open to prison inmates."[231] There is no alternative, legal means through which the press or the public could gather the information regarding what lethal injection drugs are being used in a facility and whether the personnel are qualified unless the prison willingly gives up that information.[232] States' lack of disclosure of information comes at "the direct expense of the public's ability to report on information it conceals."[233] Without Arizona's direct disclosure of the information sought after, plaintiffs in *Ryan* would have no alternative access to information about the source and manufacturer of the drugs; the drugs' lot numbers, NDCs, and expiration dates; and the qualification of executioners.

3. The Impact of Accommodating the Asserted Constitutional Right Must Be Considered

The third *Turner* factor asks what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[234] Considering the prison already has the information being sought, the main expense the prison would have to bear is the expense of copying or releasing information to the public—which is minimal

228. Wood v. Ryan, 759 F.3d 1076, 1086 (9th Cir.), *vacated*, 573 U.S. 976 (2014).

229. *Id.* ("[T]he State can point to no evidence in the record to support its claim that pharmaceutical companies will stop providing drugs if this information is released or that no alternatives are available even if some companies do change course. There is nothing in the record, save speculation, that manufacturers will not provide the product. . . . Similarly, the State fails to point to evidence to support its claim that releasing the qualifications of those administering the execution will lead them to being identified publicly.").

230. *See* First Amend. Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1080 (9th Cir. 2019) (finding there was not a right of access to the execution information and therefore not proceeding to a *Turner* analysis).

231. *Turner*, 482 U.S. at 90.

232. *See* South, *supra* note 224, at 643 ("There are no longer any effective alternatives available to the public to obtain information regarding the . . . preparation of the lethal injection drug.").

233. Nathanial A.W. Crider, Note, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 54 (2014).

234. *Turner*, 482 U.S. at 90.

considering the ease with which documents are digitized. And as previously noted, the Ninth Circuit did not recognize that anonymity of personnel was a legitimate governmental interest to restrict the sounds of executions, considering other identifying features of the execution process.[235] Thus, the anonymity of personnel should be a *de minimis* consideration against the disclosure of personnel qualifications.

4. No Other Obvious, Easy Alternative Exists That Accommodates Both Prisoners' Rights and Valid Penological Interests

Finally, the fourth *Turner* factor asks whether there are "obvious, easy alternatives . . . that fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests."[236] If such an alternative exists, then a prison regulation could be considered unreasonable.[237] Alternatives could be employed to protect prison staff while not hindering the public's right to information. For example, the state could release the qualifications of executioners without revealing their names or identifying information.[238] Thus, a wholesale disclosure ban on any information relating to executioners' qualifications is unreasonable and an exaggerated response to an already weak penological interest in the anonymity of executioners.

Even under this more deferential standard of review, the *Turner* factors strongly favor a right of access to execution-related information because (1) the history and logic test is satisfied; (2) there is no valid connection between maintaining the secrecy of lethal injection drug information and the qualifications of execution personnel to a legitimate penological interest; (3) there are easy, legal alternatives to maintain the anonymity of personnel; and (4) the impact to inmates, personnel, and prison resources is minimal.

CONCLUSION

The Ninth Circuit in *Ryan* mistakenly relied on persuasive, rather than binding, precedent and failed to apply the history and logic test to recognize a right of access to execution-related information. Granting access to information about lethal injection drugs and the qualifications of execution team members plays a significant role in ensuring that executions are administered fairly and

235. *Ryan*, 938 F.3d at 1077 ("The defendants attempt to justify the restrictions by arguing that they have a legitimate penological interest in ensuring that execution team members are not publicly identified or attacked. But, according to the factual allegations in the plaintiffs' complaint, witnesses can hear sounds from the execution room as the execution team brings the prisoner into the room, secures him to the table, and inserts the intravenous lines. Thus, to the extent that execution team members could be identified by the sound of their voices, witnesses can already hear their voices during the initial stages of the execution.").

236. *Turner*, 482 U.S. at 90–91.

237. *Id.* at 91.

238. *See* Roko, *supra* note 215, at 2827.

humanely. Moreover, the public has historically had access to this method of execution. Even though the *Turner* standard can be a limiting factor to the right of access in the context of prisons, the factors suggest that in this case, the government's interests do not overcome the First Amendment right of access, indicating that execution-related information should be open to the public.

Without such access, determining whether executions are fairly and humanely administered becomes an impossible task. "When a state hides critical information from the public regarding the most serious criminal sanction it permits, it violates [the] core democratic values" of legitimacy and accountability.[239] Absent substantial reform, states will continue to procure lethal injection drugs from substandard suppliers and perform executions with unqualified staff. At a minimum, the public should have information about the source and manufacturers of execution drugs and the qualifications of individuals carrying out executions. Access to more information surrounding execution by lethal injection increases transparency and accountability, placing a check on the government to administer lethal injections fairly and humanely.

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239. *See* KONRAD, *supra* note 43, at 69.

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