No. 05-15042

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE,
Plaintiff and Appellant,

v.

JEANNE WOODFORD, Director and JILL BROWN, Warden,
Defendants and Appellees.

On appeal from the United States District Court
for the Northern District of California
The Honorable Jerry Fogel
N. D. Cal. Case No. C 04-5381 JF

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND DEATH PENALTY FOCUS IN SUPPORT OF APPELLANT

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I. INTEREST OF AMICI CURIAE

Amici American Civil Liberties Union of Northern California and Death Penalty Focus are public interest organizations holding a principled belief that capital punishment is unconstitutional. Because the institution of capital punishment currently enjoys legal sanction, we are committed to ensuring that if a state does choose to perform executions, it does so as humanely as possible.

In furtherance of that interest, amici are active participants in the public debate on capital punishment in general and on the humaneness of executions in particular. We therefore require *accurate* information on these subjects. The most telling information on the humaneness of particular execution methods is evidence of whether or not executed inmates actually experience pain. If executed inmates do experience pain, indicia of the quantity of pain experienced are central to the public debate and are of great public concern.

As members of the public, amici are holders and beneficiaries of the First Amendment right to witness executions, set out in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 886 (9th Cir. 2002). We appear in this case because we intend to exercise fully our First Amendment right to know and to disseminate information as to whether California's lethal injection procedure subjects inmates to significant pain prior to death. The decision in this case will impact our ability to do so effectively.

II. INTRODUCTION

This case will have a direct impact on the First Amendment right of the public and the press to meaningfully witness and gather information at executions. Amici draw the Court's attention to this right because neither of the parties to this litigation can single-mindedly represent the public interest in independent observation of executions, and because this First Amendment right is critical to the functioning of our democracy. As Justice Brennan explained in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 587-88 (Brennan, J., concurring) (internal citations and quotations omitted).

In support of his own claims, plaintiff Beardslee has presented evidence that Pavulon does not further the legitimate state interest in conducting an execution in an effective but humane manner. Plaintiff asserts that Pavulon's sole function is to conceal pain that the inmate will feel if he is not completely unconscious during the process. Furthermore, plaintiff has presented evidence that there is a real possibility that he will in fact experience pain, and that, if that occurs, Pavulon will effectively conceal any physical or verbal manifestations of that pain from the

media and public witnesses. This evidence is relevant to plaintiff's claims that California's lethal injection procedure could deprive him of his First and Eighth Amendment rights.

Amici submit this brief to convey to the Court that the First Amendment right of the public and the press to meaningfully witness and gather information at executions is at risk. If Beardslee is correct about the way in which Pavulon operates, the decision in this case will severely impact the public's ability to obtain information on the very issue addressed in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002): whether California's lethal injection procedure subjects condemned inmates to unconstitutional levels of pain. To permit the state to administer a drug that could conceal and distort significant information about the execution process would directly interfere with meaningful public discourse on the controversial subject of capital punishment.

III. FACTS

Donald Beardslee is scheduled to be executed by lethal injection on January 19, 2005, pursuant to San Quentin Institution Procedure No. 770 ("Procedure 770"). Under Procedure 770, three chemicals are used in combination to execute condemned inmates: (1) sodium pentothal, a fast-acting barbiturate; (2) pancuronium bromide ("Pavulon"), a chemical paralytic agent; and (3) potassium chloride, a compound that causes cardiac arrest. ER 108-09. California has used these chemicals in the same sequence since its first lethal injection execution in 1996.

The central factual dispute in this litigation is whether Procedure 770 will result in a proper administration of the barbiturate, sodium pentothal, such that the inmate will be unable to feel pain before he dies. ER 673 (Dist. Ct. Order at 4).

Both parties agree that *if* sodium pentothal is properly administered, the inmate will almost certainly die without pain. *Id.*, ER 62-63 (Heath Decl. at 4-5, ¶ 12). Additionally, even the state concedes that *if* the administration of sodium pentothal goes sufficiently awry, the inmate will experience agonizing pain prior to death. ER 542 (Def.'s Mem. Opp. T.R.O. & Prelim. Inj. at 7). In dispute therefore is how likely it is that Procedure 770 will result in inadequate administration of sodium pentothal, and in whether that amount of risk is constitutionally acceptable.[1] This amicus brief does not address this issue (as the likelihood of pain is not dispositive of our First Amendment right, *see infra* Part IV.C) except to note that the state does not dispute that there is *some* possibility that sodium pentothal will be inadequately administered.

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[1] Importantly, this was *not* the primary factual dispute in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004). A review of the state's expert witness declarations from that case demonstrates that the primary issue in *Cooper* was, *assuming that sodium pentothal is properly administered*, whether the dosage of sodium pentothal is sufficient to ensure that the condemned inmate does not regain consciousness prior to death. *See generally* ER 235-41 (Dershwitz Decl. at 1-7); ER 260-61 (Rosow Decl. at 1-2). In this case, that assumption is being directly challenged by plaintiff and his evidence.

In fact, the only portions of either of the state's expert witness declarations in *Cooper* to address California's safeguards for ensuring *proper administration* of sodium pentothal are paragraphs 20 and 21 of the Dershwitz Declaration. In paragraph 20, Dr. Dershwitz opines that preparing sodium pentothal "within one hour of its use presents no concern as to its stability and effectiveness when used." In paragraph 21, Dr. Dershwitz states, "I am informed that California uses licensed registered or vocational nurses to prepare and insert the intravenous catheters," and then opines that such nurses "would be competent to prepare and insert such intravenous catheters. These two paragraphs of Dr. Dershwitz's declaration pertain only to a fraction of the issues relating to proper administration of sodium pentothal raised by Beardslee. ER 27-28 (Pl.'s Mem. Supp. T.R.O. & Prelim. Inj. at 7-8).

Another dispute is whether the inclusion of the second drug, Pavulon, in Procedure 770 actually advances any legitimate state interest. The district court never reached this issue. ER 674-75 (Dist. Ct. Order at 5-6) (reasoning that Beardslee's inability to demonstrate a sufficiently high risk of pain was dispositive of his First and Eighth Amendment claims). The state has not attempted to proffer any justification for including Pavulon in the lethal injection cocktail. ER 542 (Def.'s Mem. Opp. T.R.O. & Prelim. Inj. at 7). Presumably, the state rests on the following finding of the district court's unpublished order in *Cooper*:

> According to Defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution.

ER 563 (*Cooper v. Rimmer*, No. C04-436 JF, 2004 WL 231325 at *3 (N.D. Cal. Feb. 6, 2004)). Beardslee argues, however, that potassium chloride, when injected immediately after Pavulon as required by Procedure 770, will cause death by cardiac arrest well before Pavulon causes death by suffocation. ER 66, 69 (Heath Decl. ¶¶ 20, 28). Thus, Beardslee argues, Pavulon does not actually kill the inmate, and therefore serves no legitimate purpose. There is no evidence in the record that refutes this point.[2]

We submit that if Beardslee is correct that Pavulon serves no legitimate purpose, then the administration of Pavulon seriously threatens the First Amendment right recognized by this Court in *CFAC*. If Pavulon does not actually assist in killing the condemned inmate, then Pavulon acts simply as a "chemical curtain" that conceals any physical or vocal manifestations of pain that an inmate

[2] Another possible state interest for using Pavulon that is contained in the record is an interest in sanitizing the execution process. As we argue below, that is an illegitimate state interest. *See infra*, Part III.B.2.

might experience. Specifically, because Pavulon is a paralytic drug, it inhibits all voluntary muscle control. ER 67 (Heath Decl. ¶ 23). The state does not dispute this point. As a result, "if the inmate is not first successfully anesthetized," Pavulon will conceal any physical or vocal manifestations of excruciating pain that would result from the administration of potassium chloride, or otherwise. *Id*. Thus, even if the inmate were experiencing agonizing pain, he would appear serene and peaceful as he would be chemically immobilized. In this way, Pavulon acts as a chemical curtain. The state does not dispute this point either.

Particularly troubling to amici, and unaddressed by the state, is the widespread prohibition on neuromuscular blocking agents such as Pavulon in animal euthanasia. Specifically, the American Veterinary Medical Association's Panel on Euthanasia has explicitly reported that animals injected with neuromuscular blocking agents can still feel pain despite being immobilized. ER 210 (Pl.'s Exh. L at 6). This concern has apparently led the AVMA and numerous states to prohibit the use of such paralytic agents, even in conjunction with anesthesia. ER 200-03 (Pl.'s Exh. K); ER 207 (Pl.'s Exh. L at 3). Thus, it would appear that the concern about the inability to detect improper administration of anesthetizing agents has lead to a ban on paralytic drugs even in the animal euthanasia context.

IV. ARGUMENT

A. THE PUBLIC AND THE PRESS HAVE A FIRST AMENDMENT RIGHT TO MEANINGFULLY WITNESS EXECUTIONS

Like the right to assemble, the "right of access to places traditionally open to the public" is incidental to but necessary for protecting the First Amendment's guarantees of speech and press. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S.

555, 576 (1980). The public and the media enjoy this First Amendment right where: (1) "the place and process have historically been open to the press and general public," and (2) public access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press-Enterprise II*"). If, after examining these two factors, it is found that the First Amendment attaches to a particular process or proceeding, a court must then apply a balancing test to determine whether the challenged government restriction on access is justified in light of its burden on First Amendment values. *See id.* at 13-14.

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, 605-06 (1982). *Richmond Newspapers, Inc. v. Virginia* first enunciated this right in the context of public observation of criminal trials, based upon centuries of traditional public observation of criminal trials dating back to Anglo-Saxon practice, and the belief that a public presence ensured fairness and an appearance of fairness in the proceeding. 448 U.S. at 564-72. This presumptive right of access to government proceedings now attaches to virtually every phase of the criminal and civil justice process,[3] executive proceedings,[4] and executions inside prisons.[5]

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[3] *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (voir dire proceedings); *Press-Enterprise II*, 478 U.S. 1 (preliminary hearings in criminal prosecution); *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990) (plea agreements); *Westmoreland v. Columbia Broadcasting System*, 752 F.2d 16 (2d Cir. 1984) (civil trials).

[4] *See, e.g.*, *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985) (formal agency hearings); *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (White House events).

This Court held in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 885-86 (9th Cir. 2002) ("CFAC"), that the First Amendment right of access attaches to executions "from the moment the condemned enters the execution chamber [to] the time the condemned is declared dead." In reaching that conclusion, the *CFAC* court first confirmed that, dating back to 1196, there has been an Anglo-American history of public access to executions. *Id.* at 875-76. That executions were moved into prisons in the mid-1800's was not found to detract significantly from that long history of openness, as members of the media and other "respectable citizens" have always been present to witness the proceeding. *Id.* at 876.

The *CFAC* court then considered the second factor that must be present before the First Amendment right attaches: the functional importance of a public presence at the proceeding in question. A public presence at executions was found to have functional value for three reasons. First, and most importantly, this Court emphasized the public's need for "reliable information" on the humaneness of the death penalty, not merely because such information is generally important for public debate affecting our system of self-government, but because capital punishment is a unique issue where the pertinent legal standard – "evolving standards of decency which mark the progress of a maturing society" – is inherently tied to prevailing and emerging societal beliefs. *Id.* Thus, the *CFAC* court placed a high premium on the media's ability "[t]o determine whether lethal injection executions are fairly and humanely administered." *Id.* Second, a public

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[5] *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002); *KQED, Inc. v. Vasquez*, 18 Media L. Rptr. 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).

presence was considered functionally important to the administration of executions because "public access fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id.* at 876-77. Third, public observation of executions was thought to contribute to a sense of community catharsis because of the value of "be[ing] permitted to see justice done." *Id.* at 877.

Thus, a historical tradition and functional considerations led this Court to hold that a First Amendment access right attaches to executions, "from the moment the condemned enters the execution chamber [to] the time the condemned is declared dead." As the *CFAC* court has already held that the First Amendment access right attaches to executions, the unresolved question in this case is whether California's purported interests in using Pavulon justify the use of that drug.

B. THE INFORMATION AT ISSUE HERE IS PRECISELY THE TYPE OF INFORMATION TO WHICH THE *CFAC* COURT SOUGHT TO ENSURE ACCESS

California's use of Pavulon poses precisely the type of threat to First Amendment information-gathering values that the *CFAC* court sought to prohibit. Additionally, California's use of Pavulon may be motivated by the same illegitimate state interest in sanitizing the execution process that was rejected in *CFAC*.

1. Both *CFAC* and this Case Involve Restrictions on the Ability of Execution Witnesses to Observe the Inmate's Manifestations of Pain

In *CFAC*, the restriction on access at issue was a prison policy of drawing a curtain inside the execution chamber during the "initial execution procedures," thus obstructing the public's view of the prison guards bringing the inmate into the

chamber, strapping him down, and inserting a catheter into each arm. *Id.* at 876. The concern was that the public was prevented from witnessing these "'initial procedures' which are invasive, *possibly painful* and may give rise to serious complications." *Id.* (emphasis added). Because there was a long history of viewing analogous initial procedures, and because public scrutiny of these "possibly painful" initial procedures was thought to have functional importance to the way the lethal injection is administered, the *CFAC* court held that a First Amendment access right attached to the entire execution. The legal and policy rationale underlying the right of the public to meaningfully witness and gather information at executions was well-stated by the district court in *CFAC*:

> The court also believes that the Eighth Amendment or, at any rate, the Eighth Amendment and the First Amendment, taken together, mandate the public's presence during the entire execution. A punishment satisfies the Constitution only if it is compatible with "the evolving standards of decency which mark the progress of a maturing society." *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). Under this construct, methods of execution which cause excessive pain are considered cruel and unusual. *See In re Kemmler*, 136 U.S. 436, 447 (1890). The public's perception of the amount of suffering endured by the condemned and the duration of the execution is necessary in determining whether a particular execution protocol is acceptable under this evolutionary standard.

California First Amendment Coalition v. Woodford, No. C96-1291VRW, 2000 WL 33173913 at *9 (N.D. Cal. July 26, 2000), *aff'd*, 299 F.3d 868 (9th Cir. 2002).

The same rationale applies here. Pavulon operates by inhibiting an inmate's physical and vocal reactions to pain. These indicia of pain – namely, the body's voluntary and involuntary physical and vocal responses to the death apparatus –

have been historically available to those witnessing executions and have been instrumental for the core First Amendment purpose of affecting societal perceptions of execution methods and advocating changes in those methods. Just as the physical curtain did in *CFAC*, Pavulon conceals from the public and media witnesses whatever pain the inmate might be experiencing.[6]

The type of information to which Pavulon blocks access – *i.e.*, eye witness observation of the inmate's manifestations of pain – is important for evaluating methods of execution. As this Court stated in *CFAC*:

> Independent public scrutiny – made possible by the public and media witnesses to an execution – plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with "the evolving standards of decency which mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86. 101 (1958). To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures," which are invasive, possibly painful and may give rise to serious complications."

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[6] Notably, the use of a paralytic agent such as Pavulon is novel and specific to the lethal injection procedure. No other execution method's protocol calls for the administration of a paralytic drug. *See, e.g.*, LOUIS PALMER, ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES (2001) at 162 (electric chair), 191 (firing squad), 243-44 (hanging) & 316 (lethal gas). The idea of using such a drug first arose when Oklahoma sought to devise a lethal injection protocol in 1977. Deborah Denno, *When Legislature Delegate Death*, 63 OHIO ST. L. J. 63, 95-96 (2002). The first use of a paralytic agent in an American execution was the December 7, 1982 lethal injection execution of Charlie Brooks in Texas. PALMER, *supra*, at 316-17. The first use of a paralytic agent in a California execution was the February 23, 1996 lethal injection execution of William Bonin. *Id.* at 92.

299 F.3d at 876. Suppression of "independent public scrutiny" and corruption of the "informed public debate" on capital punishment, which centers on the issue of pain, is precisely the concern surrounding Pavulon. By witnessing the physical and vocal responses of condemned inmates to the lethal injection, the public, through these witnesses, would be able to assess whether the lethal injection causes severe pain.

There has been significant historical use of this type of evidence. As the district court noted 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-pund man rendered moot after state modified statute to permit lethal injection).

CFAC, 2000 WL 33173913 at *9.

In *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (en banc), when considering whether Washington's hanging protocol violated the Eighth

Amendment prohibition on cruel and unusual punishment, this Court stressed the importance of "objective evidence of pain involved in the challenged [execution] method." *Id.* at 682. The most probative evidence of pain in that case was the first-hand witness observations, recounted in the majority opinion, of the movements of the body of an inmate who had been hanged pursuant to Washington's protocol:

> [w]hen Mr. Dodd's body dropped through the trap door there simply was no significant activity, there was no twisting, turning, no swinging. I carefully observed his chest and abdomen and I believe that there was one minimal effort at inspiration, breathing in, and following that, within several seconds, there may have been a small second inspiratory action.

Id. at 685 (noting that the witness "then watched [the executed inmate's] body for between 60 and 120 seconds). In a separate passage discussing evidence excluded by the trial court as irrelevant to Washington's *specific* hanging protocol, the *Campbell* majority referenced "two newspaper accounts of the execution of Richard Quinn in 1910, stating that Quinn was asphyxiated and 'pleaded pitifully with attendants to take him up and spring the drop again.'" *Id.* Thus, this Court's *Campbell v. Wood* en banc opinion demonstrates how evidence of the physical and vocal manifestations of pain can impact both the legal and societal acceptability of specific methods of capital punishment. This is precisely the type of evidence that will be unavailable to the public if Pavulon indeed serves to mask pain.

Similarly, when issuing a temporary restraining order against further lethal gas executions on the basis of Eighth Amendment concerns, a district court in this circuit stated:

> Although defendants argue that eye witness accounts of gas chamber executions . . . were not competent evidence

> of the fact the death by lethal gas is slow, painful and torturous, it is unclear to the court what other evidence could be more probative.

Fierro v. Gomez, 790 F. Supp. 966, 971 n.7 (subsequent history omitted); *see also California First Amendment Coalition v. Calderon*, 150 F.3d 976, 978 (9th Cir. 1998) ("Eyewitness media reports of the first lethal gas executions sparked public debate over this form of execution and the death penalty itself.") *aff'd after remand by* 299 F.3d 686 (9th Cir. 2002). If a drug like Pavulon had been administered to inmates executed by lethal gas, it is unclear that the evidence ultimately used to demonstrate the unconstitutionality of that procedure would have been available.

Thus, at issue in this case is precisely the type of information that has previously been critical to both society and the courts in determining whether a particular execution method is humane.

Additionally, the *CFAC* plaintiffs presented evidence about the "possibly painful" initial portions of an execution, namely restraining the prisoner and inserting intravenous shunts in his arms, a process that can be time-consuming and painful if prison officials are unable to find a suitable vein. 299 F.3d at 876. However painful and distasteful that process might be, it pales in comparison to the "excruciating pain" caused by potassium chloride if the inmate is not properly anesthetized. ER 67 (Heath Decl. ¶22).

2. Both *CFAC* and this Case Raise Serious Questions About Whether the State Is Attempting to Sanitize Executions By Preventing Witnesses from Viewing Possibly Painful Procedures

As in *CFAC*, the record in this case raises an issue as to whether Pavulon is used to sanitize the execution process in a manner that is antithetical to the First Amendment right of access.

To determine, in the execution context, whether a state's interest in restricting the public's First Amendment right of access is justified, courts apply the four factor "exaggerated response" test of *Turner v. Safley*, 482 U.S. 78 (1987). *CFAC*, 299 F.3d at 878. This Court described the test as follows:

> Thus, in reviewing a challenge to a prison regulation that burdens fundamental rights, we are directed to ask whether the regulation is reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to those concerns. The legitimate policies and goals of the corrections system are deterrence of future crime, protection of society by quarantining criminal offenders, rehabilitation of those offenders and preservation of internal security. 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 right will have on guards and other inmates, and on the allocation of prison resources generally and (4) whether there exist ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

Id. If the prison is unable to put forward any legitimate penological interests that have a rational relationship to the regulation at issue, the remaining three *Turner* factors do not apply. *See Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) ("The rational relationship of the *Turner* standard is a sine qua non.").

In *CFAC*, the California prison's motive in drawing a physical curtain during the initial portion of the lethal execution procedure was revealed in an internal prison memorandum, quoted by the district court:

> in the event of a hostile and combative inmate, it will be necessary to use additional force and staff to subdue, escort and secure the inmate to the gurney. It is important that we are perceived as using only the minimal amount of force necessary to accomplish the task. In reality, it may take a great deal of force. This would most certainly be misinterpreted by the media and inmate invited witnesses who don't appreciate the situation we are faced with.

CFAC, 2000 WL 33173913 at *4, *aff'd*, 299 F.3d 868 (9th Cir. 2002). This state interest in sanitizing the execution process never made it past the first *Turner* factor. The district court dismissed this state interest as illegitimate, and the Ninth Circuit affirmed. 299 F.3d at 880 ("As its third reason for striking down Procedure 770, the district court found that the procedure [*i.e.*, drawing the curtain] was motivated at least in part by a desire to conceal the harsh reality of executions from the public. We find no clear error in the district court's factual finding.").

In this case, too, the state's own witnesses suggest that Pavulon may be used as a means of controlling negative public perceptions of the execution process.[7]

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[7] Another possible state interest in using Pavulon, the interest in killing a condemned inmate by stopping his breathing, does not appear to have any evidentiary basis in the record. It is possible that the state may be attempting to rely on the following finding of the district court in *Cooper*:

> According to Defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution.

ER 563 (*Cooper v. Rimmer*, 2004 WL 231325 at *3). Whether or not Kevin Cooper challenged this alleged state interest, Beardslee has. ER 49 (Pl.'s Mem. Supp. Mot. for T.R.O. & Prelim. Inj. at 29) ("Potassium chloride, which is administered last and stops the heart, is, clearly and logically, the substance that causes death. (Exhibit A, ¶ 20, Declaration of Dr. Mark Heath)."). Beardslee's assertion that Pavulon does not actually cause death in the execution context goes undisputed by the state.

ER 240 (Dershwitz Decl. at 6) ("[Pavulon] would also act to prevent the manifestations of seizure activity. Such seizures occur commonly after a person's heart stops beating. Thus the absence of pancuronium bromide [Pavulon] may be erroneously interpreted by the lay observer as pain or discomfort."); ER 260 (Rosow Decl. at 1) ("Pancuronium prevents involuntary reflex movements that may be caused by potassium chloride."); ER 281 (Sperry Test. at 2) (Georgia's expert witness in challenge to the use of Pavulon in that state) ("And that's really what the Pavulon is meant for is to paralyze all the muscles such that those outwardly aesthetically unpleasant things are not seen and do not occur.").

Deciding what the public should and should not be able to witness is an illegitimate motive that is directly contrary to the First Amendment right of access. This was the state motive behind using a physical curtain in *CFAC*, which was found to be illegitimate. 299 F.3d at 880; *see also Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring) (noting the vindication of his prior position that an "official prison policy of concealing knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press").

As this motive to sanitize the process is not a legitimate state interest, the use of Pavulon cannot satisfy the first *Turner* factor. Because a regulation that does not satisfy the first *Turner* factor is a per se "exaggerated response," *see Prison Legal News*, 238 F.3d at 1151, the state's use of Pavulon raises serious First Amendment concerns.

C. THE DEGREE OF RISK OF PAIN IS NOT DISPOSITIVE OF THE PUBLIC'S FIRST AMENDMENT RIGHT TO MEANINGFULLY OBSERVE THE EXECUTION PROCEEDINGS

Although the state and the district court have emphasized that Beardslee has only raised a speculative possibility that he will be subjected to excruciating pain under Procedure 770, that point is not dispositive of the First Amendment right of the public and the press.

Because the purpose of the First Amendment right, in part, is to engage in "independent public scrutiny" of the government, *see CFAC*, 299 F.3d at 876, the state's representations of what takes place at executions is no substitute for the public's right of access. Rather, the very notion of a *right* of access is that the First Amendment entitles the public to gather and interpret information for itself. *See Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

A separate reason why the public's First Amendment right to witness executions does not depend on a showing of likelihood of pain is that the sole purpose of the right is not only to uncover government misconduct. The right functions to permit the public to see whatever it is that the government is doing, be it right or wrong. As this Court stated in *CFAC*, "public access . . . fosters an appearance of fairness, thereby heightening public respect for the judicial process." 299 F.3d at 877-78 (omission in original) (quoting *Globe Newspaper*, 457 U.S. at 606). So, in the execution context, the public has an interest both in accurately

observing a painful execution and in accurately observing a painless execution. Either outcome is valuable to informed public debate.[8]

Thus, this court's conclusion on the disputed issue in this litigation of the probability that Beardslee will actually experience excruciating pain during his execution is not dispositive of amici's First Amendment right to insure meaningful witness observation of the proceeding. As there is at least a possibility that Procedure 770 causes pain that is sufficiently noteworthy to impact public debate– and it is undisputed that there is, *see, e.g.*, Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES, Oct. 7, 2003 – the First Amendment right of access cannot be eliminated by the government's claim that there is nothing to see. While there is certainly doubt as to whether Procedure 770 causes pain, it is undisputed that Pavulon, by inducing paralysis, prevents the public from witnessing some aspect of the execution process.

D. THE LEGAL AND POLICY CONSIDERATIONS UNDERLYING THE *CFAC* DECISION SHOULD INFORM THIS COURT'S ANALYSIS OF PLAINTIFF'S EIGHTH AND FIRST AMENDMENT CLAIMS

California's use of Pavulon appears to implicate the same legal and policy considerations that motivated this Court's *CFAC* decision. Those considerations

[8] Thus, courts that have granted relief to plaintiffs seeking to assert their First Amendment access rights have openly acknowledged the possibility that there is no government wrongdoing to uncover. *See, e.g.*, *Press-Enterprise II*, 478 U.S. 1, 5 (noting that the trial court judge who had read the preliminary hearing transcript sought by the media plaintiffs had described the document as "neither 'inflammatory' nor 'exciting'"); *CFAC*, 299 F.3d 868, 876 (describing the procedures that the public was barred from witnessing as only "possibly painful").

should also inform this Court's review of plaintiff's Eighth and First Amendment claims.

First, the information-suppressing effect of Pavulon directly pertains to this Court's review of plaintiff's evidence tending to show a violation of the Eighth Amendment. If Pavulon indeed acts as a chemical curtain that prevents those witnessing executions from ascertaining whether the condemned inmate is suffering excruciating pain, then California's use of Pavulon during all eight of its past lethal injection executions would have made it very difficult to obtain reliable, probative evidence of an Eighth Amendment violation. As demonstrated above, the primary purpose of the First Amendment right of access to executions is to expose any Eighth Amendment violations associated with the execution process. *See CFAC*, 299 F.3d at 876. Thus, when reviewing plaintiff's evidence of an Eighth Amendment violation, this Court should consider the difficulty plaintiff faced in obtaining any evidence at all.

Second, the public's First Amendment right to witness executions should impact the Court's consideration of plaintiff's First Amendment right to express pain during his execution. Without witnesses, plaintiff's alleged First Amendment right to express pain would lose much of its meaning, and without an ability on the part of a condemned inmate to express pain, the public's First Amendment right of access to information at executions would be severely undermined.

V. CONCLUSION

The First Amendment right of the public and press in witnessing and gathering accurate information at executions is a critical one, and should be considered by this Court when evaluating the evidence and legal claims presented in this case.

Dated: January 11, 2005

Respectfully Submitted,

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Alan L. Schlosser, Esq.
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT COURT RULE 32-1

Case No. 05-15042

I certify that:

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, uses Times Roman 14-point typeface, and contains 5,108 words.

Dated: January 11, 2005

_____
Alan L. Schlosser
Attorney for Amici

PROOF OF SERVICE

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Cynthia D. Williams