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PACIFIC NEWS SERVICE

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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
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18 PACIFIC NEWS SERVICE,

19 Plaintiff,

20 v.

21 JEANNE WOODFORD, Acting Secretary of  
the California Department of Corrections;  
22 STEVEN W. ORNOSKI, Warden San Quentin  
State Prison, San Quentin, CA, and Does 1-50,

23 Defendants.  
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Case No.

**NOTICE OF RELATED CASE; MOTION  
TO RELATE THIS CASE WITH  
MORALES V. WOODFORD, CASE NOS. C  
06 219 JF and C 06 926 JF RS**

1 Pursuant to Civil L.R. 3-12, Plaintiff Pacific News Service (“PNS”) gives notice that  
2 *Pacific News Service v. Woodford, et al.*, Case No. \_\_\_\_\_, is related to *Morales v.*  
3 *Woodford, et al.*, Case Nos. C 06 219 JF and C 06 926 JF RS. PNS hereby moves to relate  
4 *Pacific News Service* to *Morales*, a case currently before Judge Fogel. Plaintiff Michael Angelo  
5 Morales does not oppose this motion. See Decl. of Wendy Thurm in Supp. of Pl. PNS’ Motions  
6 to Relate Cases, Consolidate, and Shorten Time, ¶ 10.

7 *Pacific New Service* is related to *Morales* because (1) both cases concern the same  
8 “transaction or event,” namely the execution of death row inmates under San Quentin  
9 Operational Procedure 770 (“Procedure 770”), and (2) conducting the cases before different  
10 judges would result in “an unduly burdensome duplication of labor and expense.” Civil L.R. 3-  
11 12(a).

12 *Pacific News Service* raises a challenge to San Quentin Operational Procedure 770  
13 (“Procedure 770”), the lethal injection protocol used in California executions, based on the First  
14 Amendment right of the press and the public to attend, meaningfully witness, gather important  
15 information at, and report on executions. Plaintiff Pacific News Service alleges that the use of  
16 pancuronium bromide, the second drug administered under Procedure 770, functions solely as a  
17 “chemical curtain” whose purpose is to conceal important information about the execution (such  
18 as whether the inmate is or is not experiencing substantial pain) from the members of the press  
19 and the public viewing the execution.

20 *Pacific News Service* and *Morales* concern the same “transaction or event.” Civil L.R. at  
21 3-12(a)(1). Both cases raise facial challenges to San Quentin Operational Procedure 770  
22 (“Procedure 770”), California’s method for executing death row inmates. The execution of Mr.  
23 Morales pursuant to Procedure 770 will violate both the claimed Eighth Amendment Rights of  
24 Mr. Morales and the claimed First Amendment Rights of Pacific News Service. The same  
25 defendants are named in both cases. Additionally, both cases challenge California’s  
26 administration of pancuronium bromide during the lethal injection procedure.

27 That the cases share a common factual basis is made evident by the Ninth Circuit’s  
28 evaluation of a similar First Amendment claim in *Beardslee v. Woodford*, 395 F.3d 1064 (9th

1 Cir. 2005). *Beardslee v. Woodford*, No. C 04 5381 JF, was a case to which *Morales* was related.  
2 In *Beardslee*, another case involving an inmate's Eighth Amendment challenge to Procedure  
3 770, the Ninth Circuit focused on the state's lack of justification for using pancuronium bromide  
4 – an issue that is central to PNS' claim. 395 F.3d at 1075-76. Additionally, although that court  
5 did not decide the First Amendment claim because it was only raised in an amicus brief for the  
6 first time on appeal, the court nonetheless noted that the claim "may have merit." *Id.* at 1076  
7 n.14.

8 Moreover, there will be "an unduly burdensome duplication of labor and expense" if  
9 these cases are conducted before different judges. Civil L.R. at 3-12(a)(1). First, Judge Fogel  
10 has already spent considerable time familiarizing himself with Procedure 770, the chemical  
11 pancuronium bromide, and the various indicia of pain during a lethal injection execution in  
12 *Morales*, as well as in *Cooper v. Rimmer*, No. C 04 436 JF, and *Beardslee v. Woodford*, No. C 04  
13 5381 JF, where the same issues were raised. Conducting *Pacific News Service* before a different  
14 judge would therefore entail the duplicative expenditure of judicial resources and labor.


15 Second, because PNS seeks to consolidate *Pacific News Service* with *Morales* for  
16 purposes of discovery and an evidentiary hearing, relating *Pacific News Service* to *Morales* is a  
17 necessary step to realizing the substantial efficiencies consolidation would bring. Specifically,  
18 plaintiffs in *Morales* and *Pacific News Service* are likely to seek similar discovery and present  
19 similar evidence to the Court. For example, both PNS and Mr. Morales are likely to seek  
20 discovery regarding the nature and administration of Procedure 770, depositions of prison  
21 officials who conceived of and administered Procedure 770, and information regarding whether  
22 past lethal injection executions pursuant to Procedure 770 subjected executed inmates to painful  
23 deaths. If disputes arise, the state will likely raise the same discovery objections vis-à-vis both  
24 sets of plaintiffs. Additionally, both cases present the question of the nature and function of  
25 pancuronium bromide in the context of a Procedure 770 execution, including whether and to  
26 what extent this chemical conceals indicia of pain during the execution. Duplication of  
27 substantial labor and expense will be avoided by deciding these disputes before a single judge  
28 and in a single proceeding.

1 For these reasons, Plaintiff PNS respectfully requests that the Court enter an order  
2 relating *Pacific News Service*, Case No. \_\_\_\_\_ to *Morales*, Case Nos. C 06 219 JF and  
3 C 06 926 JF RS.

4 Dated: March 8, 2006

ACLU FOUNDATION OF  
NORTHERN CALIFORNIA

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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
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17 PACIFIC NEWS SERVICE,  
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19 Plaintiff,

19 v.

20 JEANNE S. WOODFORD, Acting Warden,  
Secretary of the California Department of  
21 Corrections; STEVEN W. ORNOSKI, Acting  
Warden for the California State Prison at San  
22 Quentin,

23 Defendants.  
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Case No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF PACIFIC NEWS SERVICE'S  
MOTION TO CONSOLIDATE  
PURSUANT TO Fed.R.Civ.P. 42(a)**

Date:  
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**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 42(a), Plaintiff Pacific News Service (“PNS”) hereby moves to consolidate the present action with an earlier filed action now pending before Judge Fogel, *Morales v. Woodford*, Case Nos. C 06 219 JF and C 06 926 JF RS, for purposes of discovery and an evidentiary hearing. Plaintiff Michael Angelo Morales does not oppose this motion. See Decl. of Wendy Thurm in Supp. of Pl. PNS’s Motions to Relate Cases, Consolidate, and Shorten Time, ¶ 10.

Granting this motion would be consistent with the interests of efficiency and judicial economy because both actions involve common factual issues. Additionally, the two cases will involve similar, although not identical discovery.

PNS is aware that a discovery schedule and evidentiary hearing date have been established in the *Morales* case and is willing to conform to this expedited schedule. PNS therefore does not anticipate that consolidation will delay the *Morales* litigation.

**II. BACKGROUND**

On January 18, 2006, Michael Angelo Morales, a death row inmate at San Quentin State Prison set to be executed on February 21, 2006, filed a 42 U.S.C. § 1983 lawsuit challenging California’s lethal injection protocol, San Quentin Operational Procedure 770 (“Procedure 770”). Morales raised an Eighth Amendment challenge to Procedure 770, alleging that the protocol would subject him to an undue risk of suffering excruciating pain while being put to death. Morales offered evidence and raised arguments critical of Procedure 770’s ability to ensure that he would receive sufficient amounts of sodium pentothal, the drug responsible for rendering him unconscious, and therefore unable to feel the otherwise excruciating levels of pain the other two drugs in the lethal injection protocol would cause him.

Among other things, Morales alleged that the prison personnel entrusted with administering the lethal injection lacked the necessary training and experience to ensure that the sodium pentothal would be properly administered. Additionally, Morales attacked Procedure 770’s use of pancuronium bromide, the second drug administered to the inmate, which paralyzes the inmate’s voluntary muscle movement. Morales claimed that pancuronium bromide would

1 prevent him from effectively communicating with prison personnel if the sodium pentothal was  
2 not properly administered and he remained conscious for all or part of the execution process,  
3 until death.

4 Like Morales' case, PNS's action also raises a federal constitutional challenge to  
5 Procedure 770, and to pancuronium bromide's masking effects in particular.<sup>1</sup> Specifically,  
6 plaintiff PNS alleges that pancuronium bromide, which functions neither to cause the inmate's  
7 death nor to reduce the amount of pain he experiences, is nothing more than a "chemical curtain"  
8 that conceals important information about the execution process (such as evidence that the  
9 inmate is conscious and experiencing pain) from members of the press and the public viewing  
10 the execution. PNS therefore contends that Procedure 770's inclusion of pancuronium bromide  
11 violates the First Amendment right of the press and the public to attend, meaningfully witness,  
12 gather information at, and report on executions.

### 13 III. ARGUMENT

14 Rule 42(a) of the Federal Rules of Civil Procedure provides in pertinent part:

15 When actions involving a common question of law or fact are pending before the  
16 court, it may order a joint hearing or trial of any or all the matters in issue in the  
17 actions; it may order all the actions consolidated; and it may make such orders  
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

18 "The district court has broad discretion under this rule to consolidate cases pending in the  
19 same district." *Investors Research Co. v. United States Dist. Court for Cent. Dist.*, 877 F.2d 777,  
20 777 (9th Cir. 1989). In determining whether to consolidate, the court must weigh the savings of  
21 time and effort that consolidation would produce against any inconvenience, delay, or expense  
22 that it would cause. *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193, cert. denied, 460 U.S.  
23 1102 (1983).

24 "[T]ypically, consolidation is favored." *Perez-Funez v. District Directors, Immigration*  
25 *and Naturalization Service*, 611 F. Supp. 990, 994 (C.D. Cal. 1984) (citations omitted); *see also*  
26 *Weitort v. A. H. Bull & Co.*, 192 F. Supp. 165, 166-167 (E.D. Pa. 1961) (consolidation of actions

27 \_\_\_\_\_  
28 <sup>1</sup> Morales, however, challenges aspects of Procedure 770 other than the use of pancuronium  
bromide.



1 should be encouraged). Consolidation is especially favored where the actions involve common  
2 facts. *See, e.g., Bank of Montreal v. Eagle Associates*, 117 F.R.D. 530, 533 (S.D.N.Y. 1987);  
3 and *Masterson v. Atherton*, 223 F. Supp. 407, 410, *aff'd*, 328 F.2d 106 (D. Conn. 1963) (when  
4 common questions of fact and law are involved in two actions, they should be consolidated). In  
5 the present case, all the factors weigh in favor of consolidation.

6 **A. Consolidation Will Result in Substantial Savings in Time and Resources for the**  
7 **Parties and the Court Because the Cases Share Common Factual Questions and**  
8 **Will Entail Substantial Overlap in Discovery**

9 Morales and PNS raise several common factual questions: (1) whether and in what ways  
10 pancuronium bromide suppresses indicia of pain or consciousness manifested by an inmate  
11 subjected to Procedure 770; (2) what indicia of pain or consciousness an inmate would manifest  
12 if pancuronium bromide were not administered; and (3) defendants' reasons for including  
13 pancuronium bromide in Procedure 770. Because the *indicia* of pain or consciousness that an  
14 inmate might manifest are relevant to PNS's claim, the PNS lawsuit will necessarily address the  
15 mechanisms by which Procedure 770 might result in pain, a factual issue central to Morales'  
16 Eighth Amendment claim.

17 That common factual issues exist is bolstered by the Ninth Circuit's evaluation of a  
18 similar First Amendment claim in *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005).  
19 *Beardslee v. Woodford*, No. C 04 5381 JF, was a case to which *Morales* was related. In  
20 *Beardslee*, another case involving an inmate's Eighth Amendment challenge to Procedure 770,  
21 the Ninth Circuit focused on the state's lack of justification for using pancuronium bromide – an  
22 issue that is central to PNS's claim. 395 F.3d at 1075-76. Additionally, although that court did  
23 not decide the First Amendment claim because it was only raised in an amicus brief for the first  
24 time on appeal, the court nonetheless noted that the claim “may have merit.” *Id.* at 1076 n.14.

25 Common factual issues will also lead to a substantial overlap in discovery. Both PNS  
26 and Mr. Morales are likely to seek discovery regarding the nature and administration of  
27 Procedure 770, depositions of prison officials who conceived of and administered Procedure 770,  
28 and information regarding whether past lethal injection executions pursuant to Procedure 770



1 subjected executed inmates to painful deaths. Duplication of discovery will therefore be  
2 avoided.

3 **B. Consolidation Will Not Cause Unnecessary Delay of the *Morales* Action Because**  
4 **Pacific News Service Is Willing to Conform to this Court's Expedited Schedule**

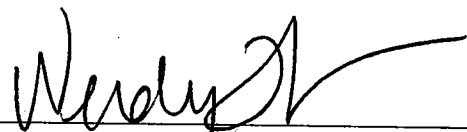
5 Rule 42(a) specifically provides that when consolidating actions, the Court "may make  
6 such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."  
7 Fed. R. Civ. P. 42(a). Based on conversations with counsel for Mr. Morales, PNS is aware of the  
8 discovery schedule and May 2, 2006 hearing date established by this Court for the *Morales* case.  
9 See Declaration of Wendy J. Thurm, ¶ 5. PNS is willing to conform to this case schedule.  
10 Consolidation would therefore not require the Court to alter the pace of litigation in the *Morales*  
11 case, and PNS does not move the Court to do so.

12 **IV. CONCLUSION**

13 Because the various claims in both actions involve common questions of fact and  
14 substantial overlap in discovery, consolidation of the two actions is appropriate. Accordingly,  
15 Pacific News Service respectfully requests the Court to grant their motion to consolidate for  
16 purposes of discovery and an evidentiary hearing, pursuant to Federal Rule of Civil Procedure  
17 42(a).

18 Dated: March 8, 2006

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20 NORTHERN CALIFORNIA  
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22 By:   
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