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11 PACIFIC NEWS SERVICE

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 PACIFIC NEWS SERVICE,
16
17 Plaintiff,

18 v.

19 JAMES E. TILTON, Secretary of the
California Department of Corrections and
Rehabilitation; ROBERT L. AYERS, JR.,
20 Warden, California State Prison at San
Quentin, San Quentin, CA; ARNOLD
21 SCHWARZENEGGER, Governor, State of
California; and Does 1-50,
22
23 Defendants.

Case No. C 06 1793 JF RS

DEATH PENALTY CASE

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF [42 U.S.C. § 1983]**

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NATURE OF ACTION

1. This action is brought pursuant to 42 U.S.C. § 1983 to vindicate the right of the press and the public to attend, meaningfully observe, and gather and report on important information at California executions. These executions are administered by the California Department of Corrections and Rehabilitation and the California State Prison at San Quentin. These institutions, along with the California Governor’s Office, were responsible for developing the lethal injection protocol. The right at issue is guaranteed by the First and Fourteenth Amendments of the United States Constitution and is primarily effectuated by members of the press who are actually present at executions and who serve as surrogates for the press and the public at large. Plaintiff, a media organization that reports on California executions, seeks temporary, preliminary, and permanent injunctive relief to prevent the defendants from executing any death row inmates in a manner that conceals important information to which the public is constitutionally entitled. Specifically, society is constitutionally entitled to see the physical process by which the State puts an executed inmate to death and how the inmate dies. Society’s constitutional right includes having access to the observable physical impact of the lethal procedure on the inmate. Defendants’ use of pancuronium bromide, a paralytic agent that acts as a chemical curtain over the lethal injection process, makes it impossible for witnesses to view adequately the dying process. This lawsuit is not a challenge to the death penalty or to all lethal injection executions. Rather, plaintiff contends that California may not execute death row inmates in a manner that violates the First Amendment rights of the press and of the public. The public requires information in order to make informed decisions, via democratic processes, whether executions should be conducted at all, and if so, how. The First Amendment claim, therefore, vindicates the public’s right of access to information related to that democratic decision-making process.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (further relief). This

1 action arises under the First and Fourteenth Amendments to the United States Constitution and
2 under 42 U.S.C. § 1983.

3 3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the California State
4 Prison at San Quentin in San Quentin, California, is located in this District. All executions
5 conducted by the State of California (“State”) occur at San Quentin. The events giving rise to
6 this complaint will occur in this District.

7 **THE PARTIES**

8 4. Plaintiff Pacific News Service (“PNS”) is a non-profit media organization,
9 founded in 1969, that reports on, among other things, the application of the death penalty in
10 California. PNS syndicates daily stories to subscribing mainstream and community newspapers
11 across the United States. PNS stories include feature-length commentary, news analysis, and
12 investigative reporting. PNS also sponsors magazine articles, books, TV segments and films.
13 Additionally, PNS owns and operates New America Media, an association of hundreds of
14 independent news organizations that cover, at least in part, issues pertaining to ethnic or minority
15 communities. New America Media publishes content generated both internally and from its
16 member organizations. Pacific News Service is interested in disseminating information on what
17 eyewitnesses to California executions observe during the lethal injection process. PNS is a
18 California non-profit corporation based in San Francisco, California.

19 5. Defendant James E. Tilton is the Secretary of the California Department of
20 Corrections and Rehabilitation (“the Department”). Tilton or those under his control developed
21 the most recent version of the execution protocol.

22 6. Defendant Robert L. Ayers, Jr. is the Warden of the California State Prison at San
23 Quentin (“San Quentin Prison”). California death row inmates are incarcerated and executed at
24 San Quentin Prison. Ayers or those under his control developed the most recent version of
25 California’s execution protocol.

26 7. Defendant Arnold Schwarzenegger is the Governor of the state of California. His
27 office (“the Governor’s Office”) developed, in conjunction with the other Defendants, the most
28 recent version of California’s execution protocol.

1 8. Plaintiff does not know the true names of Does 1-50 but alleges that they have or
2 will participate in California executions by virtue of their roles in designing, implementing,
3 and/or carrying out the lethal injection process. When plaintiff discovers the Doe Defendants'
4 true identities, it will amend its complaint accordingly.

5 **CLAIM**

6 **VIOLATION OF RIGHT OF ACCESS TO PUBLIC PROCEEDINGS PROTECTED BY**
7 **THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES**
8 **CONSTITUTION**

9 **(42 U.S.C. § 1983)**

10 9. Under California law, death sentences shall be carried out by “administration of a
11 lethal gas or by an intravenous injection of a substance or substances in a lethal quantity
12 sufficient to cause death, by standards established under the direction of the Department of
13 Corrections.” Cal. Penal Code § 3604(a). The statute prescribes no specific drugs, dosages, drug
14 combinations, or the manner of intravenous line access to be used in the execution process; nor
15 does the statute prescribe any certification, training, or licensure required of those who
16 participate in the execution process. All of the details of the execution process were determined
17 by the Department, its subsidiary, San Quentin Prison, and the Governor’s Office.

18 11. San Quentin Operational Procedure No. 770 (“Procedure 770”) is the lethal
19 injection protocol adopted by the Department and has evolved since it was first adopted in the
20 mid-1990’s. There have been two recent revisions of Procedure 770. First, the Department
21 revised Procedure 770 after its February 21, 2006 decision to postpone indefinitely the execution
22 of Michael Angelo Morales. This revision was issued on March 16, 2006. The most recent
23 revision of Procedure 770—and the version on which this complaint is based—was issued on
24 May 15, 2007. Neither revision enacted changes that are material to PNS’s First Amendment
25 claim.

26 12. Procedure 770, in policy and practice, has remained unchanged since its inception
27 in one critical respect: It provides for execution by injection with a lethal combination of three
28 chemical substances, in the following order: first, sodium pentothal, a short-acting barbiturate;

1 second, pancuronium bromide, which paralyzes all voluntary muscles; and third, potassium
2 chloride, which causes cardiac arrest.

3 13. The intended purpose of the first drug administered in Procedure 770, sodium
4 pentothal (also known as sodium thiopental), is to render the inmate unconscious and therefore
5 unable to experience pain. The intended purpose of the third drug, potassium chloride, is to
6 bring about the rapid death of the inmate by stopping his heart. The intended purpose of the
7 second drug, pancuronium bromide (also known as Pavulon), is in dispute and is discussed in
8 more detail below. The parties agree, however, that one intended purpose and effect of
9 pancuronium bromide is to induce paralysis. Defendants have also publicly admitted that at least
10 one reason for using pancuronium bromide is to conceal “involuntary muscle movement” with
11 unpredictable consequences. Ultimately, Defendants have never provided a constitutionally
12 legitimate and justifiable reason for administering pancuronium bromide. The primary apparent
13 function of this drug is to conceal important aspects of the execution process from the press and
14 the public.

15 14. Defendants Tilton, Ayers, and Schwarzenegger, and the Doe Defendants are
16 acting under color of California law when promulgating or amending Procedure 770 and when
17 carrying out executions.

18 15. A limited number of members of the press and the public are permitted to witness
19 executions. These eyewitnesses serve as surrogates for those members of the press and the
20 public who are not able to attend executions personally. Thus, the First Amendment rights of the
21 public and the press to attend and meaningfully observe executions are effectuated by these
22 surrogates.

23 16. Death row inmates have challenged Procedure 770, arguing that this protocol
24 violates constitutional and statutory provisions enacted to prevent cruelty, pain, and torture. As a
25 result, the issue of whether Procedure 770 illegally subjects death row inmates to an undue risk
26 of a painful death has received substantial media attention in California and nationwide, and is of
27 great interest to the public.

28

1 17. Members of the press and the public who witness executions at San Quentin are
2 unable to observe and report on significant aspects of the execution process historically observed
3 by eyewitnesses and reported to the public at large. This is because pancuronium bromide, the
4 second drug in the lethal injection cocktail, paralyzes all movement of the inmate's voluntary
5 muscle fibers.

6 18. One example of information that the public historically had access to when
7 viewing executions is the process of dying. Historically, members of the public had the ability to
8 observe the manner in which the executed inmate's body responded to those instrumentalities
9 that brought about his death. For instance, during executions by the firing squad, hanging, and
10 electrocution, witnesses were historically able to see the way in which the inmate's body
11 responded to the lethal apparatus or instrumentality. As the Ninth Circuit put it, "The public and
12 press historically have been allowed to watch the condemned inmate enter the execution place,
13 be attached to the execution device and then die." *California First Amendment Coalition v.*
14 *Woodford*, 299 F.3d 868, 876 (9th Cir. 2002). The use of pancuronium bromide during the lethal
15 injection process in the context of Procedure 770 prevents society from watching, in a
16 meaningful way, executed inmates die.

17 19. Another example of information that is concealed from the public as a result of
18 pancuronium bromide is information about the humaneness of the lethal injection process—
19 namely, whether the inmate experiences pain, and if so, how much. A major controversy
20 surrounding Procedure 770 focuses on whether the inmate is properly anaesthetized before
21 dying. Specifically, a substantial question has been raised as to whether Procedure 770—either
22 as written or as carried out—ensures adequate delivery of sodium pentothal to the inmate. In
23 past and current challenges to the protocol, inmates have alleged shortcomings in Procedure 770,
24 suggesting that prior California executions performed under Procedure 770 actually subjected
25 inmates to excruciating pain. But the inclusion of pancuronium bromide in the protocol renders
26 the inmate incapable of showing any pain: his body will remain motionless whether or not he
27 experiences pain. The pancuronium bromide will suppress important information, including
28 both physical reactions of the body, such as voluntary or involuntary coordinated muscle

1 movement, and verbal indicia of pain. As a result, pancuronium bromide acts as a chemical
2 curtain that conceals indicia of pain from the members of the press and the public that are
3 observing the executions.

4 20. Importantly, pancuronium bromide conceals important information from members
5 of the press and the public whether pain is present *or absent*. If the inmate does experience pain,
6 execution witnesses will not be able to observe the inmate's physical indicia of pain because of
7 the inmate's paralysis. If the inmate is completely anaesthetized and does not experience pain,
8 execution witnesses will not be able to determine whether the lack of any physical response is a
9 result of pancuronium bromide or of unconsciousness. Thus, pancuronium bromide masks
10 important information about the presence *or absence* of pain.

11 21. Additionally, pancuronium bromide masks both *disputed* and *undisputed* indicia
12 of pain or consciousness. In the lawsuits brought by death row inmates challenging Procedure
13 770 and in the larger social debate, there are often disputes as to whether or not an inmate's
14 physical responses during the execution process indicate that the inmate was conscious and
15 experienced pain while dying. For instance, litigants and interested members of society regularly
16 debate whether prolonged lethal injection executions, where breathing persists several minutes
17 after the anesthetic is administered, constitute evidence of a botched execution. Pancuronium
18 bromide conceals from members of the public viewing executions both types of physical
19 responses—those that could and could not be reasonably disputed as indicia of pain. The press
20 and the public are entitled to witness, interpret, and report on both types of physical responses.
21 Thus, the First Amendment right protects access to information that may or may not be relevant
22 to a Court's determination as to whether or not an inmate experiences pain.

23 22. Aside from the issue of pain, society also has an interest in observing portions of
24 the execution process that could be perceived as undignified or inhumane. As an example, the
25 guillotine, as a method of execution, may well be painless. Nonetheless, society has an interest
26 in observing the physical effect of a guillotine on the body of an executed inmate because many
27 members of society may find these effects to be undignified or inhumane.

28

1 23. Finally, there is still other socially relevant information—unrelated to the process
2 of dying, indicia of pain, and humaneness or indignity—that may be important to the public. For
3 instance, while fighting off the effects of the sedative, sodium pentothal, an inmate may attempt
4 to express sentiments or information unrelated to pain, such as repentance, confession, anger, or
5 defiance. The First Amendment right of the public and the press encompasses these types of
6 information as well.

7 24. Either pancuronium bromide serves no legitimate functional or penological
8 purpose in the lethal injection protocol, or any incidental legitimate function that it does serve is
9 outweighed by its effect of concealing information that the First Amendment protects.
10 Pancuronium bromide does not meaningfully affect consciousness or the perception of pain.
11 And, when administered as provided for in Procedure 770, it does not hasten death. Thus,
12 pancuronium bromide appears to serve no purpose other than concealing important information
13 about the execution process from the public and the press. Defendants know that pancuronium
14 bromide’s only function is to conceal information, but defendants continue to administer the drug
15 despite this knowledge.

16 22. Defendants therefore intentionally administer pancuronium bromide to conceal
17 important information from the press and the public. This would not be the first time that
18 defendants and their predecessors incorporated into the lethal injection process procedures
19 intentionally aimed at concealing important information from those viewing the execution.
20 Specifically, in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir.
21 2002), the plaintiff media organization challenged the San Quentin Prison and Department policy
22 of drawing a physical curtain in front of the lethal injection chamber while prison guards
23 strapped down the inmate and inserted intravenous lines into his arms. On the basis of an
24 internal Department of Corrections memo, the district court found and the Ninth Circuit affirmed
25 that “Procedure 770 was motivated, at least in part, by a concern that the strapping of a
26 condemned inmate, the injection of intravenous lines or other aspects of a lethal injection
27 execution would be perceived as brutal by the public and thus was, to that extent, prompted by
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1 considerations other than legitimate concerns for prison personnel safety.” *California First*
2 *Amendment Coalition*, 299 F.3d at 880.

3 **ALLEGATIONS IN SUPPORT OF DECLARATORY AND INJUNCTIVE RELIEF**

4 23. The inclusion of pancuronium bromide in Procedure 770 necessarily impacts
5 Plaintiff’s First and Fourteenth Amendment rights. Pancuronium bromide prevents the press and
6 the public from obtaining various categories of information, including information about the
7 dying process, about pain, about the humaneness and dignity of the process, and about still other
8 information that society values. The press and the public are entitled to each of these types of
9 information, all of which are masked by pancuronium bromide. Additionally, Defendants
10 administer pancuronium bromide with the intention of concealing information from the press and
11 the public. This conduct violates plaintiff’s First and Fourteenth Amendment rights to
12 meaningfully witness and obtain information at executions.

13 24. Procedure 770 results in irreparable injury to plaintiff PNS because the
14 information suppressed and concealed by the protocol can never be reacquired.

15 25. This complete and permanent loss of socially valuable information to the press
16 and to the public cannot be redressed by legal remedies.

17 26. Defendants’ prior intentional attempts to conceal information about the execution
18 process from the press and the public weigh in favor of injunctive relief.

19 27. An actual controversy exists between plaintiff and defendants as to whether
20 Procedure 770 violates plaintiffs’ First Amendment rights.

21
22 **PRAYER FOR RELIEF**

23 WHEREFORE, plaintiff Pacific News Service prays for:

- 24 1. A declaration of the First Amendment rights of plaintiff;
- 25 2. Temporary, preliminary, and permanent injunctive relief to enjoin the defendants,
26 their officers, agents, servants, employees, and all persons acting in concert with them from
27 employing an execution procedure that conceals important information to which plaintiff and the
28 public are constitutionally entitled;

- 1 3. Reasonable attorneys' fees pursuant to 42 U.S.C. § 1983 and the laws of the
- 2 United States;
- 3 4. Costs of suit; and
- 4 5. Any such other relief as the Court deems just and proper.

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6 Dated: June 28, 2006

ACLU FOUNDATION OF
NORTHERN CALIFORNIA

KEKER & VAN NEST, LLP

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8
9 By: /s/ Wendy J. Thurm

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