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11 PACIFIC NEWS SERVICE

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14
15 PACIFIC NEWS SERVICE,

16 Plaintiff,

17 v.

18 MATTHEW CATE, Secretary of the
19 California Department of Corrections and
20 Rehabilitation; VINCENT CULLEN, Acting
Warden, California State Prison at San
21 Quentin; ARNOLD SCHWARZENEGGER,
Governor, State of California; and Does 1-50,

22 Defendants.
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Case No. C 06 1793 JF HRL

DEATH PENALTY CASE

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

NATURE OF ACTION

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2 1. This action is brought to vindicate the right of the press and the public to attend,
3 meaningfully observe, and gather and report on important information at California executions.
4 These executions are administered by the California Department of Corrections and
5 Rehabilitation and the California State Prison at San Quentin. On information and belief, these
6 institutions, along with the California Governor's Office and perhaps others, were responsible for
7 developing the regulations that govern the method for carrying out executions by lethal injection.
8 The right at issue is guaranteed by the First and Fourteenth Amendments of the United States
9 Constitution and is primarily effectuated by members of the press who are actually present at
10 executions and who serve as surrogates for the press and the public at large. Plaintiff, a media
11 organization that reports on California executions, seeks temporary, preliminary, and permanent
12 injunctive relief to prevent the defendants from executing any death row inmates in a manner
13 that conceals important information to which the public is constitutionally entitled. Specifically,
14 society is constitutionally entitled to publicly observe the physical process and procedures by
15 which the State puts an executed inmate to death and how the inmate dies. Society's
16 constitutional right includes having access to the observable physical impact of the lethal
17 procedure. Defendants' use of pancuronium bromide, a paralytic agent that acts as a chemical
18 curtain over the lethal injection process, makes it impossible for witnesses to observe adequately
19 the dying process. This lawsuit is not a challenge to the death penalty or to all lethal-injection
20 executions. Rather, plaintiff contends that California must not execute death row inmates in a
21 manner that violates the First Amendment rights of the press and of the public. The public
22 requires information in order to make informed decisions, via democratic processes, whether
23 executions should be conducted at all, and if so, how. The First Amendment claim, therefore,
24 vindicates the public's right of access to information related to that democratic decision-making
25 process.

JURISDICTION AND VENUE

26
27 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question),
28 § 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 an execution by lethal injection. PNS is a
18 California non-profit corporation based in San Francisco, California.

19 5. Defendant Matthew Cate is the Secretary of the California Department of
20 Corrections and Rehabilitation (“the Department”). Cate, or those under the control of the
21 Secretary of the Department, developed the regulations setting forth California’s execution
22 protocol, and are responsible for implementing it.

23 6. Defendant Vincent Cullen is the Acting Warden of the California State Prison at
24 San Quentin (“San Quentin Prison”). California death row inmates are incarcerated and
25 executed at San Quentin Prison. Cullen, or those under the control of the Warden of San
26 Question Prison, developed the regulations setting forth California’s execution protocol, and are
27 responsible for implementing it.

28

1 indefinitely the execution of Michael Angelo Morales. The original version of PNS's complaint
2 in this lawsuit challenged the March 16, 2006 version of Procedure 770. *Second*, Procedure 770
3 was revised again on May 15, 2007, following this Court's issuance of its December 15, 2006
4 Notice of Intended Decision in *Morales v. Cate*, Case Nos. C-06-219-JF-HRL & C-06-926-JF-
5 HRL. The Notice of Intended Decision, in evaluating Mr. Morales' Eighth Amendment claim,
6 identified numerous substantive defects with the lethal injection protocol and invited Defendants
7 to address those defects. PNS's First Amended Complaint in this lawsuit challenged the May 15,
8 2007 version of Procedure 770. *Third*, Procedure 770 was superseded by the Lethal Injection
9 Regulations, following a decision by the Marin Superior Court in *Morales v. CDCR*, Case No.
10 CIV 061436 (Cal. Sup. Ct.), invalidating Procedure 770 for non-compliance with California's
11 Administrative Procedures Act. The state now claims that it has complied with California's
12 Administrative Procedures Act and that the Lethal Injection Regulations became final on
13 August 29, 2010. PNS's current complaint, this Second Amended Complaint, challenges the
14 Lethal Injection Regulations.

15 11. California's lethal injection protocol, in policy and practice, has remained
16 unchanged since its inception in one critical respect: It provides for execution by injection with a
17 lethal combination of three chemical substances, in the following order: first, sodium pentothal, a
18 short-acting barbiturate; second, pancuronium bromide, which paralyzes all voluntary muscles;
19 and third, potassium chloride, which causes cardiac arrest.

20 12. The intended purpose of the first drug administered in the Lethal Injection
21 Regulations, sodium pentothal (also known as sodium thiopental), is to render the inmate
22 unconscious and therefore unable to experience pain. The intended purpose of the third drug,
23 potassium chloride, is to bring about the rapid death of the inmate by stopping his heart. The
24 intended purpose of the second drug, pancuronium bromide (also known as Pavulon), is in
25 dispute and is discussed in more detail below. The parties agree, however, that one intended
26 purpose and effect of pancuronium bromide is to induce paralysis. Defendants have also
27 publicly admitted that at least one reason for using pancuronium bromide is to conceal
28 "involuntary muscle movement" with unpredictable consequences. Ultimately, Defendants have

1 never provided a constitutionally legitimate and justifiable reason for administering pancuronium
2 bromide. The primary apparent function of this drug is to conceal important aspects of the
3 execution process from the press and the public.

4 13. Defendants Cate, Cullen, and Schwarzenegger, and the Doe Defendants are acting
5 under color of California law when promulgating or amending the Lethal Injection Regulations
6 and when carrying out executions.

7 14. A limited number of members of the press and the public are permitted to witness
8 executions in California. These eyewitnesses serve as surrogates for those members of the press
9 and the public who are not able to attend executions personally. Thus, the First Amendment
10 rights of the public and the press to attend and meaningfully observe executions are effectuated
11 by these surrogates.

12 15. Death row inmates have challenged the Lethal Injection Regulations and its
13 predecessor, Procedure 770, arguing that this protocol violates constitutional and statutory
14 provisions enacted to prevent cruelty, pain, and torture. As a result, the issue of whether
15 California's lethal injection protocol illegally subjects death row inmates to an undue risk of a
16 painful death has received substantial media attention in California and nationwide, and is of
17 great interest to the public. When the Department was drafting the current regulations it received
18 more than 20,000 comments from members of the public, which also shows the intensity of the
19 public's interest in executions by lethal injection.

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

25 17. One example of information that the public historically had access to when
26 viewing executions is the process of dying. Historically, members of the public had the ability to
27 observe the manner in which the executed inmate's body responded to those instrumentalities
28 that brought about his death. For instance, during executions by the firing squad, hanging, and

1 electrocution, witnesses were historically able to see the way in which the inmate's body
2 responded to the lethal apparatus or instrumentality. As the Ninth Circuit put it, "The public and
3 press historically have been allowed to watch the condemned inmate enter the execution place,
4 be attached to the execution device and then die." *California First Amendment Coalition v.*
5 *Woodford*, 299 F.3d 868, 876 (9th Cir. 2002). The use of pancuronium bromide during the lethal
6 injection process—as mandated by the Lethal Injection Regulations—prevents society from
7 watching, in a meaningful way, executed inmates die.

8 18. Another example of information that is concealed from the public as a result of
9 pancuronium bromide is information about the humaneness of the lethal injection process—
10 namely, whether the inmate experiences pain, and if so, how much. A major controversy
11 surrounding the California's lethal injection protocol focuses on whether the inmate is properly
12 anaesthetized before dying. Specifically, a substantial question has been raised as to whether
13 that protocol ensures adequate delivery of sodium pentothal to the inmate. In past and current
14 challenges to the Lethal Injection Regulations and Procedure 770, inmates have alleged
15 shortcomings in the protocol, suggesting that prior California executions performed under
16 Procedure 770 actually subjected inmates to excruciating pain. But the inclusion of pancuronium
17 bromide in the protocol renders the inmate incapable of showing any pain: his body will remain
18 motionless whether or not he experiences pain. The pancuronium bromide will suppress
19 important information, including both physical reactions of the body, such as voluntary or
20 involuntary coordinated muscle movement, and verbal indicia of pain. As a result, pancuronium
21 bromide acts as a chemical curtain that conceals indicia of pain from the members of the press
22 and the public that are observing the executions.

23 19. Importantly, pancuronium bromide conceals important information from members
24 of the press and the public whether pain is present *or absent*. If the inmate does experience pain,
25 execution witnesses will not be able to observe the inmate's physical indicia of pain because of
26 the inmate's paralysis. If the inmate is completely anaesthetized and does not experience pain,
27 execution witnesses will not be able to determine whether the lack of any physical response is a
28 result of pancuronium bromide or of unconsciousness. Thus, pancuronium bromide masks

1 important information about the presence *or absence* of pain.

2 20. Additionally, pancuronium bromide masks both *disputed* and *undisputed* indicia
3 of pain or consciousness. In the lawsuits brought by death row inmates challenging Procedure
4 770 and in the larger social debate, there are often disputes as to whether or not an inmate's
5 physical responses during the execution process indicate that the inmate was conscious and
6 experienced pain while dying. For instance, litigants and interested members of society regularly
7 debate whether prolonged lethal injection executions, where breathing persists several minutes
8 after the anesthetic is administered, constitute evidence of a botched execution. Pancuronium
9 bromide conceals from members of the public viewing executions both types of physical
10 responses—those that could and could not be reasonably disputed as indicia of pain. The press
11 and the public are entitled to witness, interpret, and report on both types of physical responses.
12 Thus, the First Amendment right protects access to information that may or may not be relevant
13 to a Court's determination as to whether or not an inmate experiences pain.

14 21. The Lethal Injection Regulations also prevent the witnesses from using auditory
15 information to evaluate the execution process. In past executions that used a curtain to hide
16 portions of an execution—such as the 1992 execution of Rickey Ray Rector in Arkansas—media
17 witnesses who were prevented from seeing the execution were nonetheless able to report that
18 they had heard the prisoner moaning in pain, apparently as the executioners attempted to insert
19 IV lines. Pancuronium bromide would prevent a prisoner from verbally expressing any pain that
20 occurred after it was administered. In addition, the Lethal Injection Regulations incorporate a
21 new information-management provision: the new execution chamber contains a microphone that
22 allows witnesses to hear what is occurring in the chamber, but this microphone is to be switched-
23 off immediately before the chemicals are administered. 15 C.C.R. § 3349.4.5(f)(5). On
24 information and belief, this will prevent witnesses from hearing whether the prisoner expresses
25 pain and also any statements by execution-team members that indicate whether the execution is
26 proceeding according to plan.

27 22. Aside from the issue of pain, society also has an interest in observing portions of
28 the execution process that could be perceived as undignified or inhumane. As an example, the

1 guillotine, as a method of execution, may well be painless. Nonetheless, society has an interest
2 in observing the physical effect of a guillotine on the body of an executed inmate because many
3 members of society may find these effects to be undignified or inhumane.

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

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

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

1 condemned inmate, the injection of intravenous lines or other aspects of a lethal injection
2 execution would be perceived as brutal by the public and thus was, to that extent, prompted by
3 considerations other than legitimate concerns for prison personnel safety.” *California First*
4 *Amendment Coalition*, 299 F.3d at 880.

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

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

15 27. The Lethal Injection Regulations result in irreparable injury to plaintiff PNS
16 because the information suppressed and concealed by the protocol can never be reacquired.

17 28. This complete and permanent loss of socially valuable information to the press
18 and to the public cannot be redressed by legal remedies.

19 29. Defendants’ prior intentional attempts to conceal information about the execution
20 process from the press and the public weigh in favor of injunctive relief.

21 30. An actual controversy exists between plaintiff and defendants as to whether the
22 Lethal Injection Regulations violate plaintiffs’ First Amendment rights.

23
24 **PRAYER FOR RELIEF**

25 WHEREFORE, plaintiff Pacific News Service prays for:

- 26 1. A declaration of the First Amendment rights of plaintiff;
27 2. Temporary, preliminary, and permanent injunctive relief to enjoin the defendants,
28 their officers, agents, servants, employees, and all persons acting in concert with them from

1 employing an execution procedure that conceals important information to which plaintiff and the
2 public are constitutionally entitled;

3 3. Reasonable attorneys' fees pursuant to 42 U.S.C. § 1983 and the laws of the
4 United States;

5 4. Costs of suit; and

6 5. Any such other relief as the Court deems just and proper.

7 Dated: October 6, 2010

ACLU FOUNDATION OF
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