RECENT CASES

CONSTITUTIONAL LAW — CAPITAL PUNISHMENT — NINTH CIRCUIT HOLDS THAT THE PUBLIC HAS THE RIGHT TO HEAR THE SOUNDS OF EXECUTIONS. — *First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069 (9th Cir. 2019), *reh'g and reh'g en banc denied*, No. 17-16330 (9th Cir. Oct. 28, 2019).

After officials injected Joseph Wood, a death row inmate in Arizona, with lethal drugs, he reportedly rose up and spent nearly two hours struggling to breathe before at last succumbing to his death.[1] The death of Wood, who "appeared to be in agony" throughout the process,[2] intensified growing scrutiny around state-administered executions.[3] Recently, in *First Amendment Coalition of Arizona, Inc. v. Ryan*,[4] a Ninth Circuit panel held that the public has the right under the First Amendment "to hear the sounds of executions in their entirety."[5] The panel correctly recognized the right of the public to observe — visually and aurally — government proceedings of such import and finality. Yet in evaluating Arizona's procedures, the panel had no choice but to apply an overly deferential standard of review. Though the Ninth Circuit declined to rehear *Ryan* en banc, cases like *Ryan* present an opportunity for the court to override its panel precedent and adopt a more appropriate standard of review that accounts for the right of the public implicated by execution-access regulations.

Wood's execution followed a string of botched executions in Arizona.[6] Under the challenged state procedures, witnesses sat in a room adjacent to the execution room and could watch and hear initial stages of the execution through monitors and speakers.[7] After inserting intravenous lines into the inmate's body, officials would open the curtains of the witness room and turn off the microphone, enabling witnesses to watch, but not hear, the rest of the execution.[8] Before Wood's

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[1] First Amendment Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1073 (9th Cir. 2019), *reh'g and reh'g en banc denied*, No. 17-16330 (9th Cir. Oct. 28, 2019). Contrary to reports from journalists and some witnesses, Arizona's governor said Wood did not suffer and the procedure was conducted lawfully. Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES (July 23, 2014), https://nyti.ms/1nWaAjV [https://perma.cc/3C9G-E4QU].

[2] *Ryan*, 938 F.3d at 1073 (summarizing journalists' reports of the execution).

[3] *See Arizona Inmate Dies 2 Hours After Execution Began*, ASSOCIATED PRESS (July 24, 2014), https://apnews.com/bbda09e8400b4ae1b984262d056b8829 [https://perma.cc/62X6-XTGE].

[4] 938 F.3d 1069.

[5] *Id.* at 1075.

[6] In one execution, officials punctured the inmate at least eleven times while seeking a vein. First Amendment Coal. of Ariz., Inc. v. Ryan, 188 F. Supp. 3d 940, 948 (D. Ariz. 2016). In another, officials injected additional doses of drugs after the inmate was pronounced dead. *Id.* at 947.

[7] *Ryan*, 938 F.3d at 1073.

[8] *Id.* Witnesses could hear brief updates from officials about the inmate's consciousness. *Id.*

execution, he and five other death row inmates had challenged the state's procedures in a civil rights action.[9] After his execution, the remaining plaintiffs, joined by two additional inmates and a nonprofit group dedicated to free speech and government accountability, filed an amended complaint.[10] Among other claims,[11] the plaintiffs argued Arizona's procedures restricted the public's right of access to government proceedings under the First Amendment by preventing the public from hearing executions in their entirety and failing to provide information such as the source of the lethal drugs and the qualifications of the execution officials.[12] The resulting lack of transparency, the plaintiffs argued, also violated their right of access to the courts under the First Amendment, which grants inmates the opportunity to challenge their confinement in part through adequate access to information.[13]

The district court dismissed the plaintiffs' First Amendment claims.[14] The district court first recognized a Ninth Circuit panel's holding in *California First Amendment Coalition v. Woodford*[15] that "the press and the public have a First Amendment right to view execution proceedings from the moment the condemned enters the execution chamber."[16] Since Arizona's procedures allowed public viewing[17] and the plaintiffs did not allege that "the press and general public have historically had greater . . . aural access to executions," the district court reasoned, plaintiffs could not claim a right to *hear* executions on the basis of *Woodford*.[18] Similarly, "[t]he public's First Amendment right to view court proceedings does not . . . reach behind an execution to learn everything about the execution," such as drug origins or officials' qualifications.[19] The district court also dismissed the plaintiffs' claim that their right of access to the courts was violated, finding the right "does not include a right to discover causes of action or to litigate effectively."[20]

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[9] Wood v. Ryan, No. CV-14–1447-PHX, 2014 WL 3385115, at *2 (D. Ariz. July 10, 2014).

[10] *Ryan*, 188 F. Supp. 3d at 944.

[11] The plaintiffs also alleged violations of their Eighth Amendment rights, due process rights, and equal protection rights. *Id.* at 949, 951–52, 958–60.

[12] *Id.* at 954.

[13] *Id.*

[14] *See id.* at 954–58. Some of the non–First Amendment claims survived the motion to dismiss. *See id.* at 949–54. The parties subsequently settled all remaining non–First Amendment claims. *Ryan*, 938 F.3d at 1073.

[15] 299 F.3d 868 (9th Cir. 2002).

[16] *Ryan*, 188 F. Supp. 3d at 955 (citing *Woodford*, 299 F.3d at 885–86).

[17] *Id.* at 956.

[18] *Id.* at 957.

[19] *Id.*

[20] *Id.* at 958 (quoting Schad v. Brewer, No. CV-13-2001-PHX, 2013 WL 5551668, at *9 (D. Ariz. Oct. 7, 2013)).

A Ninth Circuit panel reversed in part, concluding that the public has a right to hear executions in their entirety.[21] Writing for the panel, Judge Watford[22] began by reviewing various missteps in Arizona's executions.[23] Ultimately, he found not only that "the First Amendment right of access to governmental proceedings encompasses a right to hear the sounds of executions," but also that Arizona's procedures "impermissibly burden that right."[24]

Judge Watford performed the same analysis conducted by the *Woodford* panel.[25] First, he held that the plaintiffs had plausibly alleged a First Amendment right to *hear* executions[26] because "executions have historically been open to . . . the general public,"[27] and auditory access could "play a significant role in the proper functioning of capital punishment" by helping the public understand whether Arizona carries out executions "in a humane and lawful manner."[28]

Second, he addressed the question of whether Arizona's restrictions "impermissibly burdened" the right to hear executions.[29] In doing so, Judge Watford pronounced that a "deferential standard of review applies" since the regulation affects "executions that will take place inside a prison,"[30] and officials should retain "broad discretion to carry out the complex task of prison administration."[31] This standard — from the Supreme Court case *Turner v. Safley*[32] — uses a four-factor test[33] to evaluate whether a regulation is "reasonably related to legitimate penological objectives, or whether it represent[s] an exaggerated response to

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[21] *Ryan*, 938 F.3d at 1075.

[22] Judge Watford was joined in full by Judge Rawlinson and joined in part by Judge Berzon.

[23] *Ryan*, 938 F.3d at 1072.

[24] *Id.* at 1075.

[25] *Id.* The *Woodford* panel analyzed whether a First Amendment right to view executions existed and whether the restriction at issue "impermissibly burdened" that right. *Id.* at 1076.

[26] *Id.* at 1075–76. In reaching this conclusion, Judge Watford applied a two-prong test from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). The test asks: (1) "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8.

[27] *Ryan*, 938 F.3d at 1075.

[28] *Id.* at 1076.

[29] *Id.*

[30] *Id.* at 1077.

[31] *Id.* at 1076 (citing Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 877–79 (9th Cir. 2002)).

[32] 482 U.S. 78 (1987).

[33] *See Ryan*, 938 F.3d at 1077 (noting that *Turner*'s four-factor test analyzes "(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 are 'obvious, easy alternatives . . . that fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests'" (alteration in original) (quoting *Turner*, 482 U.S. at 89–91)).

those concerns."[34] Upon applying the standard, Judge Watford held that the plaintiffs plausibly alleged that Arizona "unconstitutionally restricted the ability of witnesses to hear the sounds of executions."[35]

Judge Watford affirmed the dismissal of the remaining claims. Citing precedent and the "default rule" that the public does not have a right of access to *all* government information,[36] he held that the First Amendment right of access to government proceedings does not entitle the public to information on execution drugs or officials' qualifications.[37] Likewise, he held that the First Amendment right of access to the courts does not include the right to "discover grievances[] and to litigate effectively" and thus did not apply to the case at hand.[38]

Judge Berzon dissented from one part of the majority's holding.[39] She argued that because the plaintiffs plausibly alleged Arizona "concealed information in a deliberate effort to limit their ability to litigate the conditions" of their executions, the plaintiffs' claim that their right of access to the courts had been violated should stand.[40]

Ultimately, the *Ryan* panel correctly upheld the public's right to hear executions in their entirety. However, precedent bound the panel to evaluate Arizona's procedures under the Supreme Court's *Turner* standard, a deferential standard of review for prison regulations. The Ninth Circuit, sitting en banc, should revisit its use of this deferential standard in challenges to execution-access procedures that primarily implicate a right of the public. After all, neither the articulation nor use of *Turner* by the Supreme Court requires its application in such cases. Moreover, the public nature of the right asserted in *Ryan* demands higher scrutiny of restrictions on the right, and a less deferential standard would not unduly burden inmate rights or hinder prison administration.

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[34] *Id.* at 1076 (quoting *Woodford*, 299 F.3d at 878). Since the access regulation does not allow for case-by-case discretion, Judge Watford added that the court requires a "closer fit" between the restriction and state interests. *Id.* at 1077 (quoting *Woodford*, 299 F.3d at 879).

[35] *Id.* Judge Watford applied the four-factor test from *Turner*. On the first factor, he rejected the state's argument that it had an interest in concealing execution officials' identities because witnesses could already hear the officials' voices during the initial stages of the execution. *Id.* And he rejected the argument that allowing witnesses to hear executions might lead to "second-guess[ing]" by officials, finding that the state "does not have a legitimate penological interest in hampering efforts to ensure the constitutionality of its executions." *Id.* On the second factor, he found that no alternative means of conveying execution sounds exists. *Id.* On the third and fourth factors, he found that turning on the execution microphone would entail little cost and would not have a "significant impact" on prison operations. *Id.* at 1078.

[36] *Id.* at 1079–80.

[37] *Id.* at 1080.

[38] *Id.* (alteration in original) (quoting Lewis v. Casey, 518 U.S. 343, 354 (1996) (emphasis omitted)).

[39] *Id.* at 1081 (Berzon, J., concurring in part and dissenting in part).

[40] *Id.* at 1083–84. While the court was not evaluating such a claim, she also argued Arizona's execution procedures might violate inmates' Fourteenth Amendment procedural due process rights. *Id.* at 1084–85.

Tracing the origin of the *Turner* standard and its application to executions in the Ninth Circuit provides helpful background for the *Ryan* decision. In *Turner*, decided in 1987, the Court acknowledged the need to balance "valid constitutional claims of prison inmates" with "the recognition that 'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.'"[41] The Court declared that even "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[42] Eleven years later, in *California First Amendment Coalition v. Calderon*,[43] a Ninth Circuit panel applied this reasoning to review a restriction on public viewing of executions.[44] Then, in 2002, the Ninth Circuit panel in *Woodford* applied *Turner* to the same restriction on public viewing.[45] The *Woodford* panel noted "[t]he Supreme Court has never applied *Turner* in a case such as this one, where the regulation promulgated by prison officials is centrally concerned with restricting the rights of *outsiders*."[46] Still, because *Calderon* had established Ninth Circuit precedent in applying *Turner* to the execution-access regulation, the *Woodford* panel determined that *Turner* controlled.[47] More than fifteen years later, similarly bound by precedent, the *Ryan* panel followed suit.[48]

Yet Supreme Court precedent does not necessarily mandate application of *Turner* to regulations like those in *Ryan*, which primarily implicate a right of the public. Thus, *Ryan* offered an opportunity for the Ninth Circuit, sitting en banc, to shift away from the *Turner* standard.

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[41] Turner v. Safley, 482 U.S. 78, 84 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

[42] *Id.* at 89. A strict scrutiny analysis, the Court held, would "distort the decisionmaking process" and "hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* The Court identified four factors for analysis. *See id.* at 89–91; *see also supra* note 33.

[43] 150 F.3d 976 (9th Cir. 1998).

[44] *See id.* at 982 (reviewing the regulation "in terms of the legitimate policies and goals of the corrections system" per the test articulated in *Pell v. Procunier*, 417 U.S. 817, 822 (1974), and later incorporated in *Turner* (internal quotation marks omitted)).

[45] *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 878 (9th Cir. 2002). The panel opted not to apply the standard used in public-right-of-access cases since executions "take place within prison walls," calling for a standard from cases involving prison regulations. *Id.* at 877.

[46] *Id.* at 878 (emphasis added). The panel cited the Court's use of a stricter standard to review a prison regulation affecting the public in *Procunier v. Martinez*, 416 U.S. 396. *Woodford*, 299 F.3d at 878. Yet the panel did not apply this stricter standard due to the Court's subsequent determination that the standard applied only to regulations of inmates' outgoing correspondence. *Id.* (citing Thornburgh v. Abbott, 490 U.S. 401, 413 (1989)).

[47] *Id.* at 879. Per Supreme Court precedent, the panel added a requirement for a "closer fit" between the regulation and the state's interests since the regulation did not allow for case-by-case discretion. *Id.* (emphasis omitted) (quoting *Abbott*, 490 U.S. at 412).

[48] *Ryan*, 938 F.3d at 1075 ("Our conclusion follows directly from the holding and reasoning of *Woodford*.").

Indeed, the *Ryan* panel characterized Arizona's auditory access restriction as one that limits the press and public, not inmates.[49] Meanwhile, in *Turner*, the Court specified that the standard applies when a regulation "impinges on inmates' constitutional rights,"[50] differentiating its reasoning from that of a prior case involving a regulation that affected the rights of *both* inmates and the public.[51] While the Court later held that "any attempt to forge separate standards for cases implicating the rights of outsiders is out of step with the intervening decisions" that provided a basis for *Turner*,[52] the decisions cited by the Court involved direct challenges to the rights of *both* the public and inmates.[53] As the *Woodford* panel itself pointed out, the Court has never applied *Turner* to a regulation that primarily infringes on the rights of nonprisoners.[54]

Indeed, the public nature of the right asserted in *Ryan* calls for a higher level of scrutiny of restrictions on that right. A heightened standard of review would better account for the values underlying the public's right of access to government proceedings, a right that serves to "increase public confidence in the administration of justice, create an informed public, and strengthen and secure our system of government."[55] Restrictions on the right of access carry higher stakes in the context of capital punishment, the constitutionality of which, the Court has stated, depends on "the evolving standards of decency that mark the progress of a maturing society."[56] In fact, Arizona requires at least

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[49] *Id.*

[50] Turner v. Safley, 482 U.S. 78, 89 (1987).

[51] *Id.* at 85 (discussing *Martinez*, in which the Court used a stricter standard to review restrictions on correspondence between inmates and the public).

[52] *Abbott*, 490 U.S. at 410 n.9; *see also* Rice v. Kempker, 374 F.3d 675, 681 (8th Cir. 2004) (citing *Abbott* to conclude one's status as a prisoner does not determine whether *Turner* applies to regulations that may affect prisoners and nonprisoners).

[53] *See Abbott*, 490 U.S. at 410 n.9 (citing decisions on regulations of media interviews with inmates, distribution of materials from union to inmates, and mailing of books to inmates); *see also id.* at 424–27 (Stevens, J., concurring in part and dissenting in part) (arguing that the cited cases did not warrant departure from the Court's use of a stricter standard to review regulations that implicate nonprisoners' rights).

[54] *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 878 (9th Cir. 2002). The lack of decisions on point may stem from the small number of Supreme Court cases — fewer than fifty — that reference *Turner*. In recent cases in which Justices have invoked the *Turner* standard in the context of executions, the challenged regulations directly implicated the rights of the inmate. *See, e.g.*, Murphy v. Collier, 139 S. Ct. 1475, 1482–83 (2019) (mem.) (Alito, J., dissenting from grant of application for stay) (arguing *Turner* may apply to a regulation of the presence of spiritual advisors in the execution room).

[55] Shira Poliak, *The Logic of Experience: The Role of History in Recognizing Public Rights of Access Under the First Amendment*, 167 U. PA. L. REV. 1561, 1601 (2019).

[56] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The Court has also found that capital punishment categorically differs from other penalties, thus requiring closer review of its implementation. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

twelve "reputable citizens" to serve as execution witnesses,[57] suggesting an interest in preserving public oversight of executions.[58] And as Judge Watford noted in *Ryan*, "more comprehensive coverage" of executions requires both visual and auditory access,[59] which carries unique emotional potency.[60] The botched executions in Arizona and other states[61] further underscore the importance of execution access — an essential ingredient for public awareness and reform[62] — and, by extension, the need for a less deferential standard to review these claims. Selection of an alternative standard falls outside the scope of this comment, though the standard for right-of-access claims may serve as a starting point.[63]

Though *Ryan* upheld the public's right to hear executions even under *Turner*, a court's selection of its standard of review presents more than merely a semantic question.[64] A deferential standard such as *Turner* grants significant discretion to prison administrators, creating room for abuse.[65] In fact, the *Ryan* panel's ruling marks an aberration

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[57] ARIZ. REV. STAT. ANN. § 13-758 (2020).

[58] *See Woodford*, 299 F.3d at 875–76 (noting "[w]hen executions were moved out of public fora . . . the states implemented procedures that ensured executions would remain open to some public scrutiny," *id.* at 875, including access for media and witnesses who "act as representatives for the public," *id.* at 876).

[59] *Ryan*, 938 F.3d at 1076.

[60] *Cf.* Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2415 (2014) (suggesting abortion regulations that require pregnant individuals to hear fetal heartbeat sounds constitute "emotional government appeals" against abortions).

[61] *See* Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. CRIM. L. & CRIMINOLOGY 443, 455–59 (2017); *see also supra* note 6.

[62] *See, e.g.*, Clay Calvert et al., *Access to Information About Lethal Injections: A First Amendment Theory Perspective on Creating a New Constitutional Right*, 38 HASTINGS COMM. & ENT. L.J. 1, 37–38 (2016) (arguing for increased public access to executions to enable reform).

[63] *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) ("[T]he presumption [of a right of access] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (first alteration in original) (citation omitted)). In fact, in 2012, a federal court used a stricter standard than *Turner* to evaluate an execution-access restriction. *See* Phila. Inquirer v. Wetzel, 906 F. Supp. 2d 362, 372 (M.D. Pa. 2012) (judging whether the restriction is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest" (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982))). Notably, Pennsylvania's executions do not take place in penal institutions. *Id.* at 369. As another alternative, the Court has applied strict scrutiny to certain prison regulations. *See, e.g.*, Johnson v. California, 543 U.S. 499, 508–09 (2005) (applying strict scrutiny to evaluate an unwritten policy of separating prisoners by race). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 818–19 (2006) (reporting the results of an empirical study that found 74% of prison policies survived strict scrutiny, *id.* at 818, and arguing that even under strict scrutiny, "the underlying rationale of *Turner* may still exert some gravitational pull . . . toward deference," *id.* at 819).

[64] *But see* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 878 n.4 (9th Cir. 2002) (suggesting choice of standard of review may be "largely semantic" given the nature of *Turner* deference).

[65] *See, e.g.*, David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 995 (2016) (arguing corrections officials "abuse" the discretion granted by *Turner*).

from typical applications of *Turner*, which has proved extremely deferential in practice.[66] A heightened standard would offer more reliable protection of the rights of the public implicated in execution-access challenges.

Moreover, the use of a less deferential standard in cases like *Ryan* would not unduly endanger inmate rights or hamper prison administration. One could argue *Ryan* properly applied *Turner* since execution regulations inherently impact inmate rights. After all, auditory access to executions may limit an inmate's right to privacy[67] or, if auditory access hindered officials' ability to carry out executions, an inmate's right to be free from cruel and unusual punishment.[68] However, the *Ryan* plaintiffs claimed Arizona's restrictions violated only the rights of the *public*,[69] and increased public access to executions could actually drive reform that *protects* inmates.[70] In addition, the policy rationale of *Turner*[71] does not apply in cases like *Ryan*. The *Ryan* panel dismissed concerns that auditory access may disrupt executions or endanger officials,[72] and the *Woodford* panel noted the execution-access regulation at issue did not "implicate[] security *inside* the prison."[73]

Precedent ultimately bound the *Ryan* panel to the *Turner* standard. Given ongoing litigation around public access to executions,[74] the en banc Ninth Circuit or the Supreme Court — if faced with the *Ryan* case or a similar challenge — ought to consider a higher standard of review to better account for the right of the public that hangs in the balance.

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[66] *See id.* at 980 ("[M]any lower court decisions have defanged [the *Turner* standard] with an obsequious deference to prison administrators.").

[67] *See* Houchins v. KQED, Inc., 438 U.S. 1, 5 n.2 (1978) ("Inmates . . . retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will . . . ."); Imbar Sagi, *One Step Forward, Two Steps Back*, 37 LOY. L.A. L. REV. 105, 114 (2003) (arguing the Ninth Circuit should have recognized an inmate's right to privacy in *Woodford*).

[68] *See* Michael Lawrence Goodwin, *An Eyeful for an Eye — An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585, 598–607 (1998) (arguing statutes granting the right to view executions may violate inmate rights under Eighth and Fourteenth Amendments); *see also* Defendants-Appellees' Answering Brief at 28, *Ryan*, 938 F.3d 1069 (9th Cir. 2019) (No. 17-16330) (arguing auditory access may "distract[]" officials as they carry out executions).

[69] Appellants' Opening Brief at 24–25, *Ryan*, 938 F.3d 1069 (9th Cir. 2019) (No. 17-16330). The plaintiffs' claim of a public right of access to executions may even imply consent to public access, thus nullifying claims of a right to privacy. *See* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 418 (1993) (suggesting a "legislative scheme providing for a private execution based upon the right of privacy must be waivable at the condemned inmate's request").

[70] *See* Calvert et al., *supra* note 62, at 37–38.

[71] Turner v. Safley, 482 U.S. 78, 90 (1987) (calling for deference "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff").

[72] *Ryan*, 938 F.3d at 1077.

[73] Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 882 (9th Cir. 2002).

[74] *Ryan* may provide a basis for decisionmaking in future execution-access cases. *See, e.g.*, Complaint ¶ 44, BH Media Grp., Inc. v. Clarke, No. 19-cv-00692 (E.D. Va. Sept. 23, 2019) (alleging defendant violated public's First Amendment right to view executions in their entirety). Some of these recent challenges have failed, indicating mixed opinions among courts on the right of access. *See* Okla. Observer v. Patton, 73 F. Supp. 3d 1318, 1331 (W.D. Okla. 2014).