No. 21- _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

David Shinn, Director, Arizona Department of Corrections, Rehabilitation & Reentry; James Kimble, Warden, ASPC-Eyman; Jeff Van Winkle, Warden, ASPC-Florence; Lance Hetmer, Assistant Director for Prison Operations, Arizona Department of Corrections, Rehabilitation & Reentry; Mark Brnovich, Attorney General of Arizona; John Doe, Arizona-licensed Pharmacist, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE – EXECUTION SCHEDULED FOR JUNE 8, 2022 AT 10:00 AM MST

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CAPITAL CASE

QUESTIONS PRESENTED

1. If a state's established method of execution would violate the Eighth Amendment as applied to that inmate, may federal courts direct specific alterations to the state's execution protocol, in a district court or on appeal, rather than requiring the state to adopt an alternative that does not violate the Eighth Amendment as applied to that inmate?

2. Under *Stewart v. LaGrand,* 526 U.S. 115 (1999), an inmate choosing a method of execution waives his ability to challenge its constitutionality. The Ninth Circuit, however, continues to hold that an inmate cannot challenge a method of execution unless he is actually subject to it—which, in states that provide an option, means choosing it. *Fierro v. Terhune,* 117 F.3d 1094, 1104 (9th Cir. 1997). Because an unconstitutional method designated by a state could never be challenged under this combination of rules, do inmates have standing to challenge a method of execution where they have clearly indicated they would choose it if the State offered a constitutional version of it?

LIST OF RELATED PROCEEDINGS

1. *Atwood v. Shinn*, Motion for Authorization to File Second or Successive Habeas Corpus Petition Under § 2245, Ninth Cir. No. 22-70084. Application denied May 27, 2022.

2. *Atwood v. Shinn et al.,* action under the Religious Land Use and Institutionalized Persons Act and related provisions, District of Arizona No. 22-cv-00625-JAT-JZB. Case remains open; preliminary injunction issued June 6, 2022.

3. *State v. Atwood*, Petition for Postconviction Relief, Pima County Superior Court No. CR01465; Petition denied June 6, 2022. Petition for Review, Arizona Supreme Court No. CR-22-0144 remains pending.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Jarvis Atwood respectfully requests that this Court grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion in this case affirming the district court's denial of a motion for preliminary injunction and dismissing Claims VI and VII is attached at Pet. App. 1-7. The district court for the District of Arizona's order denying Mr. Atwood's motion for a preliminary injunction and dismissing Counts VI and VII is attached at Pet. App. 8-18. Mr. Atwood petitioned for *en banc* review of the dismissal order only; that petition was denied. Pet. App. 20.

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The Court of Appeals issued its order denying Petitioner's appeal of the denial of a preliminary injunction, dismissal of Counts VI and VII, and stay of execution on June 7, 2022. As to the gas-related claims, the Court of Appeals denied a motion for rehearing *en banc* the same day. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

Eighth Amendment to the U.S. Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Arizona Constitution Article 22, Section 22:

> The judgment of death shall be inflicted by administering an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death except that defendants sentenced to death for offenses committed prior to the effective date of the amendment to this section shall have the choice of either lethal injection or lethal gas. The lethal injection or lethal gas shall be administered under such procedures and supervision as prescribed by law. The execution shall take place within the limits of the state prison.

Arizona Revised Statutes § 13-757(A) and (B):

> A. The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.
> B. A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

STATEMENT OF THE CASE

Application of Lethal Injection Protocol

Frank Jarvis Atwood, now 66 years old, has been incarcerated on Arizona's death row in the custody of the Department of Corrections, Rehabilitation and Reentry (the "Department") since 1987. For most of the term of this incarceration, Mr. Atwood has suffered from degenerative spondylosis in his spine, an excruciatingly painful condition that has worsened significantly as he has received, in the care of the Department, grossly insufficient medical treatment. The care was

so inadequate that when Mr. Atwood filed a lawsuit in 2020 alleging deliberate indifference, he won an injunction requiring improved medical care. The State has thus been well aware of his condition and its severity for some time.

The position of Mr. Atwood's body has a profound effect on the level of pain he experiences. Both of the doctors who have evaluated him in conjunction with this litigation (an orthopedic surgeon and an anesthesiologist/critical care doctor) agree that being stretched out flat on his back causes Mr. Atwood the worst possible pain a person can experience, while a sitting position minimizes his pain.

Arizona's Execution Procedures, known as D.O. 710, require that in a lethal injection execution, the inmate is "secured to the execution table" by a "restraint team." Logs of past Arizona lethal injection executions make clear that the restraint imposed on inmates includes a full restraint of the legs at the ankles. In Arizona's recent execution of Clarence Dixon, a witness reported seeing a member of the execution team forcibly hold down Mr. Dixon's leg to keep it flat when he began to twitch. The logs of previous Arizona executions also reveal that lethal injection executions entail lying on the table for an extended time—an average of 54.5 minutes.

The State sought a warrant for Mr. Atwood's execution on April 7, 2022, and the warrant was issued on May 3, 2022. In the interim, Mr. Atwood filed an informal complaint, an emergency grievance, and a grievance appeal, explaining that he cannot lie flat on his back as contemplated by the protocol, and requesting that if a lethal injection is conducted, it be done with peripheral catheters only,

while he is seated in his wheelchair. The Department gave no substantive response, merely indicating that the grievances would not be processed because the issue is the subject of "judicial proceeding or decisions of the courts."

After the Department refused to engage with the issue through administrative channels, Mr. Atwood filed an action in the District of Arizona pursuant to 42 U.S.C. § 1983, alleging that the lethal injection protocol as applied to him would violate the Eighth Amendment because it would superadd significant pain beyond what is necessary to accomplish the execution, and proposing as alternatives (1) lethal injection conducted with Mr. Atwood restrained seated in his wheelchair, using peripheral intravenous lines; (2) nitrogen hypoxia; and (3) firing squad, all of which could be readily implemented.

He then sought a preliminary injunction. The department did not dispute that applying the protocol as written would cause significant unnecessary pain. However, in its opposition to that motion on May 31, 2022 (eight days before the execution), the Department for the first time stated that it would provide a "specialized pillow" to alleviate Mr. Atwood's pain during the execution,[1] and that the entire table is able to tilt. It submitted several frames from its 24-hour surveillance footage of Mr. Atwood in his cell in which Mr. Atwood can be seen with his torso propped up on several blankets and pillows, with one knee bent at a 90-

[1] The Department initially claimed that it had already given Mr. Atwood such a pillow for use in his cell. It subsequently retracted that statement, which was false, and explained that Mr. Atwood simply had an extra bed pillow in his cell, but they would provide a wedge pillow for the execution.

degree angle, and argued those photographs established that Mr. Atwood could lie flat so long as his torso was elevated; the wedge pillow would accomplish that. While it argued that neither nitrogen hypoxia nor firing squad could be readily implemented, it never addressed Mr. Atwood's request to remain in his wheelchair with IV insertions limited to peripheral lines.

The District Court held a hearing on the motion for preliminary injunction, at which Mr. Atwood's expert, Dr. Joel Zivot, testified. Dr. Zivot, who had recently examined Mr. Atwood in person and reviewed his detailed medical records, explained that Mr. Atwood's pain was bearable if he was bent at the waist, with his knees up, and his head held up (i.e., not tipped back because of his cervical spine). [Tr. at 101]. This position changes the curvature of the lower spine and minimizes pressure on the nerves. [Tr. at 102]. Dr. Zivot did not think it would be possible for Mr. Atwood to be restrained on a table in any way that would allow him to assume a minimally tolerable body position. He viewed pictures of the proposed wedge pillow and testified it did not appear to elevate the head sufficiently, and that even if it was a similar angle to what was depicted in the photographs of Mr. Atwood, those were still photographs and did not indicate whether he was able to remain in that position for any length of time. [Tr. at 124] Dr. Zivot also explained that the pillow did nothing at all to address the need for Mr. Atwood to keep one leg bent for the curvature of his spine, and that his pain could not be assessed with reference to his upper body only. He maintained his opinion that Mr. Atwood needed to be seated, rather than supine. [Tr. at 128] The State presented no evidence beyond the

photographs, and offered no accommodations to address Mr. Atwood's need to keep one knee up. Nor did it explain why Mr. Atwood could not be restrained while seated in his wheelchair, with IV access by peripheral lines.

The following day, the District Court denied the motion for preliminary injunction. It stated "Plaintiff does not dispute Defendants' evidence that they plan to provide Plaintiff with a medical wedge and that the execution table is capable of being tilted, which will minimize the pain Plaintiff experiences when he lies on his back." Pet. App. 15. That, of course, was only partially true. Mr. Atwood did not dispute that the Department planned to provide a wedge, nor that the table could tilt, but he vigorously disputed that those measures would minimize his pain, and presented significant evidence that they would not suffice. The District Court went on to state there was "no evidence that the position Plaintiff will be in using the medical wedge will be substantially different from the position he assumes in his cell." *Id.* That was patently false; the photos clearly showed Mr. Atwood with one knee up, and all the evidence showed that even with a wedge, Mr. Atwood would be secured to the table—with both legs straight.

Shortly after that order was issued on Saturday evening, the Ninth Circuit ordered Mr. Atwood to file any appeal briefs he would be filing by 9:00 the next morning. Mr. Atwood did so, pointing out that the District Court had abused its discretion in equating the position Mr. Atwood assumed in the photos (with one leg bent, foot flat on the bed) with the position he would be in when restrained to the execution table with a wedge pillow (with both legs out straight), especially because

there was unrebutted evidence from Dr. Zivot that the bent leg was crucial to reducing Mr. Atwood's pain.

In its response, the Department, apparently recognizing that this was a significant weakness in the District Court's findings, asserted that if the Ninth Circuit deemed it necessary, "ADCRR will accommodate Atwood's need to bend one leg while he is on the execution table to enable him to assume the position that best alleviates his pain." Pet. App 45. It did not explain how it could accomplish that—would it leave one leg completely free? If so, how would it account for all the reasons it had always insisted on full restraint, including the significant danger of involuntary movements that could cause IV insertion to fail? Would it find some way to restrain one leg in a bent position? What would happen if the executioners were unable to set up a peripheral IV line, as happened in the immediately prior execution of Clarence Dixon? Nor was there any evidence in the record on the feasibility of this solution.

The Ninth Circuit swiftly affirmed. Counsel for Mr. Atwood expressed great concern about the safety of the last-minute one-bent-leg proposal, refusing to accept it as a solution. Rather than recognize that those problems made that solution inadequate, the Court treated the rejection of that possibility as an acceptance of the State's prior proposal of proceeding with the wedge pillow and both legs straight and secured to the table—exactly the proposal the only evidence at the hearing demonstrated would not significantly reduce the extreme level of pain. Pet. App. 4 n.1.

Choice of Lethal Gas

In large part because of these foreseeable difficulties with lethal injection, Mr. Atwood has a strong interest in the State using a different method to execute him. Arizona's constitution guarantees him that method: Article XXII, Section 22 of the Arizona Constitution provides that individuals sentenced to death for an offense committed before November 23, 1992, such as Mr. Atwood, "shall have the choice of either lethal injection or lethal gas" as the method of execution. This state-created interest is further enshrined in legislation, A.R.S. § 13-757(B). An inmate who does not make a choice will, by default, be subject to lethal injection. *Id.*

Neither the Arizona Constitution nor Arizona statute specifies the nature of the gas the Department shall use in administering a sentence by the lethal gas method. Rather, that choice is left to the Department, which has specified, in its formal written procedures, the use of sodium cyanide with a sulfuric acid and water mixture, which produces hydrogen cyanide—a torturous method that should be an odious relic of not merely the death penalty's history, last used by Arizona or any other state in 1999, but of human history, given hydrogen cyanide's use in the extermination of millions during the Holocaust.[2]

[2] In 1992, a federal district court in California, after an extensive trial, ruled hydrogen cyanide gas an unconstitutional method of execution, *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1992), a conclusion affirmed by the Ninth Circuit. *Gomez v. Fierro*, 77 F.3d 301, 302 (9th 1996). That decision was vacated by this Court, but without any merits ruling; rather, the question required further consideration because California had introduced lethal injection as an available method in the interim. *Gomez v.*

Mr. Atwood's execution warrant was issued on May 3, 2022. By statute, he was afforded until May 19, 2022, *viz.*, until 20 days prior to his execution date under the warrant of June 8, 2022, to make a choice between lethal gas or lethal injection. A.R.S. § 13-757(B). In anticipation of entry of the warrant, Mr. Atwood, using the proper grievance procedures of the Department, sought administrative relief from the designation of hydrogen cyanide as the gas method provided under the Arizona Constitution, yet, after entry of the execution warrant, Respondents refused to process his submission and, further, refused to process his attempted appeal from the initial refusal. Pet. App. 67-71.

On May 14, 2022, Mr. Atwood's counsel wrote counsel for Respondents explaining the unconstitutional nature of the designated gas, and that Respondents, due to their designation of hydrogen cyanide gas as Arizona's gas method, had rendered the method unconstitutional. He explained that the designation of nitrogen could be readily implemented and would render the gas method constitutional. *Id*. The following day, counsel for Respondents responded, stating their "disagree[ment] that ADCRR's current procedures regarding lethal gas violate any applicable statutory or constitutional provision and, therefore, ADCRR will not be making any changes to these procedures." Pet App. 72. On May 18, 2022, the day before the lapsing of the 20-day period, counsel for Mr. Atwood wrote Respondents' counsel again to request nitrogen gas as his execution method while stating "Mr.

Fierro, 519 U.S. 918 (1996) (per curiam). In *Fierro. LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999), Arizona conceded that its method was substantially similar.

Atwood is not hereby choosing cyanide gas as his method of execution." Pet App. 73-74. The letter further set forth:

> Unless and until the State provides the options it is statutorily and constitutionally required to provide, the fact that Mr. Atwood has refused to submit an ostensible choice of method that does not provide two real options cannot be construed as a failure to choose as contemplated by A.R.S. § 13-757(B), nor as an affirmative choice of lethal injection. In fact, the State has precluded Mr. Atwood from making the choice because of the State's violations, which he continues to demand that the State remedy.

Id.

On May 19, 2022, Respondent Brnovich's office, in response, reiterated the Department "will not be making any changes to its current lethal gas procedures." Pet App. 75. Later that day, Mr. Atwood brought the present suit in the District Court, challenging, with respect to hydrogen cyanide gas, (i) the denial of his due process right from a liberty interest in a constitutional lethal gas method pursuant to the Arizona Constitution and statute, and (ii) the resulting violation of the prohibition against cruel and unusual punishments. He did this despite the Ninth Circuit's existing ruling in *Fierro v. Terhune,* 147 F.3d 1159 (9th Cir. 1998) that an inmate could not challenge a method unless he was subject to it (i.e., in a choice situation, unless he had chosen it), because in his view, he had not yet chosen a method, and was not subject to the State's default position of lethal injection because he had yet to be offered the required choice. Moreover, this Court's existing law in *Stewart v. LaGrand,* 526 U.S. 115 (1999) stated that if he did chose the method, he would thereby waive any ability to challenge it. Accordingly, *Terhune*

would have to give way, to avoid leaving the Department's choice entirely unreviewable.

On June 1, 2022, the District Court ordered Plaintiff-Appellant to show cause why these two counts relating to hydrogen cyanide gas should not be dismissed for lack of standing, to which Mr. Atwood responded on June 3, 2022, explaining that he *had* expressed a desire to choose gas, and should not be subject to *Terhune*'s strictures. Pet App. 76-83. The District Court dismissed the counts for lack of standing. Pet App.17. The Court of Appeals affirmed, explaining, citing *Terhune,* that "A defendant lacks standing to challenge the constitutionality of an execution method that will not be used in the defendant's execution. . . We are bound by our prior decision." Pet App. 7. The Court then denied Mr. Atwood's petition for *en banc* review. Pet. App. 20.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE ROLE OF FEDERAL COURTS IN REVIEWING EXECUTION PROTOCOLS IN AS-APPLIED CHALLENGES.

Judges are neither doctors nor correctional professionals. They are thus poorly placed to dictate the procedures for an execution that addresses an inmate's medical needs. Yet in permitting as-applied § 1983 challenges to devolve into federal court-driven mediations in the hours before an execution has forced them to do just that, under extreme time pressure with insufficient information. This Court's pronouncements in *Glossip* and *Bucklew* have gone badly awry, with the result that inmates are being subject to *ad hoc* execution procedures based on laypersons' best

guesses about what would be (1) medically appropriate and (2) safe and effective for corrections personnel.

A. LOWER COURTS NEED GUIDANCE ON RESOLVING INCREASINGLY COMMON AS-APPLIED CHALLENGES TO EXECUTION PROCEDURES.

In 2015, this Court ruled that "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe,* 139 S.Ct. 1112, 1125 (2019) (citing *Glossip v. Gross,* 576 U.S. 863 (2015). Four years later, this Court clarified that an inmate asserting that a method was unconstitutional specifically as applied to him had to make the same showing. *Bucklew,* 139 S.Ct. at 1126-1129. In a facial challenge, the path forward is relatively clear—an alternative method must be adopted. But where an inmate has followed the directive of *Bucklew* and proposed an alternative specifically to accommodate his own medical needs, the next step is less clear.

If the existing method, as defined in the state's protocol, in fact cannot be applied to the inmate without superadding significant pain unnecessary to accomplish the execution, in theory, two possibilities exist: a court could seek a modification of the existing method in an attempt to reduce the pain inflicted by a degree sufficient to render it constitutional, or it could do what the Court appeared to contemplate in *Glossip* and *Bucklew,* and assess whether any of the proposed alternatives were feasible and readily implemented, and would significantly reduce the identified risk of severe pain.

Bucklew itself seemed to contemplated selection of a different method entirely:

> An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law. . . for example, a prisoner may point to a well-established protocol in another State as a potentially viable option. . . But the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes.

139 S.Ct. at 1128. But that is not what happened here. Instead, the District Court ordered a slight modification of the existing protocol, without medical evidence that that would suffice or any evidence from corrections officials that conducting the execution in that manner would be safe and effective.

While the impulse toward accommodation is understandable—courts are reluctant to derail executions that can be saved and reducing pain levels is an important goal—it is an intensely problematic exercise. Inmates presenting as-applied challenges typically present expert evidence about the effects of the execution procedures *as they currently exist.* They lack evidence about hypothetical alterations to that protocol, in terms of both the feasibility for corrections officials and the effect on the inmate's pain and suffering. The result is a guess and an experiment, not a determination made after careful consideration of the constitutionality of the method used to end a person's life.

Here, Mr. Atwood proposed an alternative lethal injection procedure devised by a medical expert—proceeding while he is seated in his wheelchair—as well as two other methods. While there was no dispute that being restrained flat on the

table as Arizona's Execution Procedures required would cause unnecessary and intolerable pain, the State, for the first time in litigating Mr. Atwood's preliminary injunction motion, offered to modify its protocol slightly in an attempt to reduce the pain. The only evidence at the hearing about that alternative was that it would *not* work, because the position it produced would not reduce Mr. Atwood's pain. Yet the District Court, faced with four still photographs of Mr. Atwood attempting to sleep in his cell compared with photos of the proposed modification to the execution table, decided it would in fact eliminate the constitutionally intolerable level of pain. A District Court is exceedingly poorly placed to make that sort of determination, especially in a time crunch.

What happened next further illustrates the problems produced by this approach. On appeal for the first time, the State proposed an *additional* modification, for which there was zero evidence in the record. At oral argument in the Ninth Circuit, Mr. Atwood's counsel attempted to explain the extreme risks that "solution"—of an unrestrained leg allowing Mr. Atwood to bend his knee and somewhat alleviate his severe pain—would entail, including the likelihood of involuntary movements interfering with the insertion or functioning of IV lines, but had no opportunity to present evidence about that, and thus, evidence of those risks is not in the record. If such an accommodation is to be considered, that evidence is necessary, and the issue must be raised in a forum where that can occur.

In light of those risks, he was forced to reject the proposal on the record—a rejection the Ninth Circuit apparently partially relied on in affirming the District

Court's finding that the single original modification would suffice. Pet. App 4 n.1. The result is an order that permits an *ad hoc* method of execution that has not been vetted by professionals on either side, based only on the representation of an attorney for the state. That cannot be how methods of execution are designed.

This is not the first time this problem has arisen. In 2018, Alabama was preparing to execute Doyle Lee Hamm, who suffered from lymphatic cancer that made accessing his veins exceedingly difficult. Mr. Hamm filed a § 1983 action asserting that he could not constitutionally be executed under Alabama's protocol. Rather than ruling that the method as applied was unconstitutional and allowing the State to find a new way to try again, the federal court ordered certain novel changes to the execution protocol, without allowing the parties to present evidence on their efficacy. *See Hamm v. Alabama,* No. 17-7855. And Russell Bucklew himself suffered from cavernous hemangioma, which causes vascular tumors that could disrupt the action of the proposed lethal injection drugs. *Bucklew,* 139 S.Ct. at 1121. The case turned on whether he could identify a viable alternative that would significantly reduce his risk of severe pain. *Id.*

While such solutions are perhaps intended to reduce pain, they place federal judges in an entirely inappropriate role. Execution procedures must be designed by the corrections departments who will administer them, in consultation with experts and informed by experience. They are subject to challenge by the inmates who will be subjected to them, and such challenges generally also require consultation with experts. Indeed, lower courts have complained that they "as judges cannot and

should not micromanage executions." *Lopez v. Brewer,* 680 F.3d 1068, 1084 (9th Cir. 2012); *see also Towery v. Brewer*, 2012 WL 592749 (D. Ariz. Feb. 23, 2012) ("This Court's role is not to micromanage the executive branch in fulfilling its own duties relating to executions.") (quoting *Lightbourne v. McCollum,* 969 So.2d 326 (Fla. 2007)). Without this Court's direction correcting course in the application of *Bucklew,* lower courts will continue to find themselves doing just that.

Given the aging population on death rows nationwide, this problem is likely not only to persist, but to increase. *See Dunn v. Madison,* 138 S.Ct. 9, 12 (2017) (denying cert.) (Breyer, J., concurring) (Court "may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age."). Indeed, recent years have produced a slew of executions or attempts complicated by prisoners' medical conditions, including Ohio's 2017 attempt to execute 69-year-old Alva Campbell, and its 2009 attempt to execute Romell Broom, both of whom lacked viable veins for a lethal injection.

B. THE ROLE OF THE LOWER FEDERAL COURTS IN CRAFTING INDIVIDUALIZED LETHAL INJECTION PROTOCOLS FOR INFIRM INMATES RAISES SIGNIFICANT COMITY AND FEDERALISM CONCERNS.

This Court has long recognized "the seriousness of federal judicial interference." See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975); see also *Printz v. U.S.*, 521 U.S. 898, 919 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). Federal courts involving themselves in rewriting lethal injection protocols for specific inmates, when they could put that responsibility back on the states,

compromises important values of comity and federalism. See *Younger v. Harris*, 401 U.S. 37 (1971) ("Our Federalism" entails a presumption that things work best "if the States and their institutions are left free to perform their separate functions in their separate ways.").

This principle is at its zenith in areas of traditional state functions, including criminal proceedings such as state's decision to seek an execution and how it accomplishes that. "Pending state criminal proceedings have always been viewed as paradigm cases involving paramount state interests." *Judice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting). Comity thus demands "a proper respect for state functions" and recognition that, in our federalist system, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44; see also *Huffman*, 420 U.S. at 603 ("[I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies.").

States' lethal injection protocols are developed by state officials, who have the experience and access to the information necessary to do so effectively. Federal courts undoing this work fail to respect critical values of comity. Here, the court's requirement adding a wedge pillow to the protocol, as well as the Ninth Circuit's consideration of the possibility of leaving a leg unrestrained, short-circuited this

essential state-driven process. To properly respect Arizona's right to carry out its own criminal processes, the proper solution would be for the federal court to determine if there is an Eighth Amendment violation, and if so, to require the *State* to choose and adopt a method that would be constitutionally compliant. Such a rule would also strongly encourage states to engage with the necessary accommodations when prisoners request them, rather than waiting to address them in response to a lawsuit. That would be vastly preferable for all involved—inmates, state officials, and, of course, courts who otherwise end up attempting to learn the complex details of an inmate's medical condition and the details of a state's execution procedures in a matter of days, often without the benefit of the typical adversarial process.

II. THE COURT SHOULD GRANT CERTIORARI TO PREVENT STATES FROM CREATING ENTIRELY UNREVIEWABLE UNCONSTITUTIONAL EXECUTION PROTOCOLS.

Arizona guarantees its condemned prisoners a choice between two methods, by constitution and by statute. These specifications are among the limited circumstances under which state law creates a liberty interest. *Bonin v. Calderon*, 59 F.3d 815, 841-42 (9th Cir. 1995), *superseded by statute* (citing *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 460-63 (1989)*; Dix v. County of Shasta,* 963 F.2d 1296 (9th Cir. 1992)). By explicitly guaranteeing inmates a particular substantive end—a choice between two viable methods of execution—these provisions create a legitimate entitlement, and that liberty interest is protected by the Due Process clause of the Fourteenth Amendment. Arizona has arbitrarily deprived Mr. Atwood of that choice with no process, and the federal courts have

allowed that deprivation to remain entirely immune from review. The issue is not whether Mr. Atwood will be executed by an unconstitutional method; it is whether he has been afforded the crucial choice to which he is indisputably entitled.

A. THE COURT BELOW HAS CREATED AN UNTENABLE CATCH-22.

Ninth Circuit controlling authority requires the selection of an optional method of execution in order to secure standing to challenge it. *Fierro v. Terhune*, 147 F.3d 1159, 1160 (9th Cir. 1998). But this Court has held that the election of an optional method forecloses the ability to challenge its constitutionality. *Stewart v. LaGrand*, 526 U.S. 115 (1999). The combination of these two rules produces an intolerable result: a method of execution, adopted by a state, that *no* inmate could *ever* have standing to challenge. If that is allowed to persist, Arizona—and any other state that, by law, offers inmates a choice—is free to nullify that choice by designating methods so odious and obviously unconstitutional that no inmate would ever choose them, and to keep odious methods like cyanide gas on their books for eternity. But the Ninth Circuit, faced with the effect of this Court's ruling in *LaGrand* on its prior decision in *Terhune,* has failed to rectify it.

Even before this Court decided *LaGrand,* foreclosing the option of choosing and then challenging the method, a dissenting judge on the Ninth Circuit recognized the untenable Catch-22 that court was creating:

> The law has pulled a fast one with the ripeness doctrine. Both the district court and this court found that execution by gas is cruel and unusual punishment. *See Fierro v. Gomez*, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994); *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir.), *cert. granted, vacated*, 519 U.S. 918 (1996). By refusing to address the merits of this case, we are compounding the cruelty by precluding a

> condemned individual from challenging the legality of his punishment unless he first chooses an unconstitutional method of execution. This is a cruel hoax. I therefore dissent.

Tehrune, 147 F.3d at 1160 (Pregerson, J., dissenting). The following year, this Court in *LaGrand* foreclosed even that possibility. Now, it is not only cruel and undesirable—it is impossible.

Mr. Atwood did everything he could to avoid this problem. He used the administrative grievance process. He explicitly objected to his silence being construed as a failure to choose, thus defaulting to lethal injection, because he wanted to choose gas—a constitutional gas, specifically, he proposed, nitrogen. But he had to stop short of selecting the unconstitutional cyanide gas, because making that selection would waive the challenge. The Ninth Circuit deemed itself powerless to address this dilemma. This Court's intervention is required to establish that an inmate who clearly expresses the wish to choose the method that is *supposed* to be available to him has standing to insist that it be offered.

B. THIS PROBLEM WILL CONTINUE TO ARISE, IN ARIZONA AND ELSEWHERE, UNTIL IT IS RESOLVED.

Below, *amici* identified as many as 33 Arizona death-row prisoners who are by constitution and statute eligible for the same choice presently being denied to Mr. Atwood. That is 33 people who stand to be deprived of a constitutional right with no available avenue for redress. Thus, in Arizona alone, this problem will continue to recur repeatedly in the coming months and years.

But Arizona is not the only state that gives condemned inmates a choice between methods. Nine other states currently guarantee a choice between lethal

injection and another method.[3] Moreover, as states have continued to struggle to carry out lethal injections, with a string of botched executions across multiple states, various states are continuing to explore additional methods options, raising the specter that this problem will become even more widespread.[4] This is not a one-off issue; it is a fundamental problem at the intersection of death penalty procedures and due process. This Court should grant certiorari to clarify that inmates who are entitled to a choice must have standing to challenge the constitutionality of the proffered methods.

[3] In addition to Arizona, a choice is provided in Alabama, Florida, Kentucky, Missouri, South Carolina, Tennessee, Utah, Virginia, and Washington. Source: Death Penalty Information Center, http://www.deathpenaltyinfo.org.

[4] This issue should not be confused with the very different question that arises when a prisoner affirmatively identifies an acceptable alternative method to meet this Court's requirements for pleading an Eighth Amendment challenge to the state's method. In that scenario, an inmate comes before a court asserting that a particular method would be acceptable. Here, it is the state that is obligated to supply the method, and the claim is simply that it must do so within constitutional boundaries.

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the Ninth Circuit Court of Appeals should be reversed, and this case should be remanded for further proceedings.

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Respectfully submitted,

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