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

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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

JOSEPH J. PERKOVICH
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
Tel: (212) 400-1660
j.perkovich@phillipsblack.org

AMY P. KNIGHT*
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

**Counsel of Record*

FOR PUBLICATION

FILED

JUN 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK JARVIS ATWOOD, Plaintiff-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections, Rehabilitation & Reentry; JAMES KIMBLE, Warden, ASPC-Eyman; JEFFREY VAN WINKLE, Warden, ASPC-Florence; LANCE HETMER, Assistant Director for Prison Operations, Arizona Department of Corrections, Rehabilitation & Reentry; MARK BRNOVICH, Attorney General, Attorney General of Arizona; UNKNOWN PARTY, Named as John Doe - Arizona-Licensed Pharmacist, Defendants-Appellees.	No. 22-15821 D.C. No. 2:22-cv-00860-MTL-JZB OPINION

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Argued and Submitted June 6, 2022
San Francisco, California

Before: M. Margaret McKeown, Consuelo M. Callahan, and Sandra S. Ikuta, Circuit Judges.

Per Curiam

Frank Atwood is scheduled to be executed in Arizona on Wednesday, June 8, 2022. On May 19, 2022, he sued various Arizona Department of Corrections, Rehabilitation & Reentry ("ADCRR") officials and the Arizona Attorney General, Mark Brnovich, (collectively "Defendants") challenging Defendants' proposed protocol for his execution. Atwood filed a motion for a preliminary injunction prohibiting his execution until such time as Defendants can assure the district court that his execution would comply with various federal statutes and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The district court denied the motion for a preliminary injunction and Atwood has appealed and filed two motions to stay his execution. We deny the motions because: (1) we defer to the district court's finding that Defendants' accommodations for Atwood's degenerative spinal disease preclude a finding that their lethal injection protocol creates a substantial risk of severe pain; (2) even assuming without deciding that Defendants' Execution Protocol may give rise to a liberty interest, there is insufficient evidence that Atwood's due process rights were violated; and (3) given that Defendants shall execute Atwood by lethal injection, he lacks standing to challenge Defendants' protocol for execution by lethal gas.

I

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence

of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Glossip v. Gross*, 576 U.S. 863, 876 (2015) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The burden of persuasion is on the movant, who must make a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis removed).

We review a denial of a request for a preliminary injunction for an abuse of discretion, *Am. Hotel v. Lodging Ass'n v. City of L.A.*, 834 F.3d 958, 962 (9th Cir. 2016), and dismissal of a claim for lack of standing de novo, *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995). We review the district court's factual determinations for clear error. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019).

II

Atwood alleges that he is wheelchair-bound from a degenerative spinal disease and experiences "intense and profoundly debilitating pain along his spine as a consequence of chronic degeneration of vertebral bodies" that have "caused multiple compressions of the nerve roots as they pass from the spinal cord to the arms and legs," which "has resulted in permanent damage that manifests as profound weakness and unremitting pain." To minimize the pain, Atwood maintains a seated position in his wheelchair and partially reclines with one leg bent when he attempts to sleep. He asserts that lying flat on his back exacerbates his conditions, causing severe pain. Atwood alleges that ADCRR's lethal injection

protocol requires that he be secured lying down on the execution table for a period of time prior to the administration of lethal drugs and that this will cause him excruciating and unnecessary pain.

Defendants do not dispute that Atwood has a degenerative spinal disease that causes him significant pain. Before the district court, Defendants provided photographs showing Atwood resting in his cell on his bed propped up by pillows and blankets. Defendants stated they will make accommodations in their Execution Protocol by providing Atwood a medical wedge and tilting the execution table, which will put Atwood in a position similar to the position he assumes in his cell and thus avoid any unnecessary pain due to his condition.[1]

The district court denied Atwood relief on this claim. Citing *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. 863 (2015), the district court held that the Eighth Amendment does not guarantee a prisoner a painless death and that a defendant's Eighth Amendment rights are impinged only when the risk of potential pain is "substantial when compared to a known and available alternative." The district court further recognized that a state's choice of execution procedures is entitled to a measure of deference. The district court found that the accommodations that Defendants proposed "preclude a finding that ADCRR's

[1] On appeal Arizona offered to permit Atwood to bend a knee during the execution, but at oral argument Atwood's counsel rejected that offer.

lethal injection protocol creates a substantial risk of severe pain." It determined that "[t]here is 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."

In *Glossip*, the Supreme Court held "that prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50 (plurality opinion)). On this record we hold that the district court did not commit clear error by determining that the Execution Protocol, as modified with these accommodations, does not create a substantial risk of severe pain due to Atwood's spinal disease.

III

ADCRR's Execution Protocol provides that Defendants "will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out." The Execution Protocol also authorizes prisoners subject to a warrant of execution to request and receive a "quantitative analysis of any compounded or non-compounded chemical to be used in the execution." Atwood alleges that these requirements amount to a state-created liberty interest, and that Defendants have disregarded these requirements in violation of his due process rights.

The district court found that even assuming Atwood could establish such a liberty interest, there was insufficient evidence that Arizona has deviated from its Execution Protocol to support his due process claim.

Even assuming without deciding that Atwood has a liberty interest created by the Execution Protocol,[2] the district court did not clearly err in determining Atwood had failed to show the Execution Protocol was violated. As noted by the district court, "[t]he Protocol neither defines 'quantitative analysis' nor sets forth requirements for how a [beyond use date] must be assigned." Defendants provided Atwood with quantitative analysis information and an affidavit certifying that the compound's beyond use date was after the date the execution is to be carried out. The district court's finding that there was insufficient evidence to conclude that Arizona violated the Execution Protocol is not clearly erroneous.

IV

Finally, we address Atwood's allegation that he was deprived of his state law liberty interest in choosing the manner of his execution, because Arizona failed to provide a constitutional choice of lethal gas as a method of execution. Because Atwood committed his capital murder before November 23, 1992, he had a choice

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[2] We reject Defendants' argument that Atwood waived his contention that Arizona's Execution Protocol gives rise to a liberty interest. *See W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 925 (9th Cir. 2012) ("There is no waiver if the issue was raised, the party took a position, and the district court ruled on it.").

of execution method under Arizona law between lethal gas and lethal injection. *See* Ariz. Rev. Stat. § 13–757(B); Ariz. Const. art. 22, § 22. Because Atwood did not timely designate a method, his method of execution will be lethal injection by operation of Arizona law. Ariz. Rev. Stat. § 13–757(B). Atwood, however, argues that the choice was illusory because Arizona uses hydrogen cyanide, which he claims is an unconstitutional method of lethal gas execution.

The district court properly dismissed these claims for lack of standing because Arizona intends to execute Atwood by lethal injection. A defendant lacks standing to challenge the constitutionality of an execution method that will not be used in the defendant's execution. *See Fierro v. Terhune*, 147 F.3d 1159, 1160 (9th Cir. 1998) (holding that "[b]ecause neither plaintiff has chosen lethal gas as his method of execution . . . neither plaintiff has standing to challenge the constitutionality of execution by lethal gas and the plaintiffs' claims are not ripe for decision."). We are bound by our prior decision, and are likewise without jurisdiction to address these claims.

Atwood's motions for a stay of execution are denied.[3]

[3] Atwood's "motion to bifurcate ruling" is denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Frank Jarvis Atwood,

Plaintiff,

v.

David Shinn, et al.,

Defendants.

No. CV-22-00860-PHX-MTL (JZB)

ORDER

Plaintiff Frank Atwood is scheduled to be executed on Wednesday June 8, 2022. On May 19, 2022, he sued various Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR") officials and Arizona Attorney General Mark Brnovich challenging aspects of ADCRR's Execution Protocol. On May 26, 2022, Plaintiff filed a Motion for Preliminary Injunction seeking an Order "prohibiting Defendants . . . from executing [Plaintiff] according to [ADCRR's] Execution Procedures . . . until such time as Defendants can assure this Court that [Plaintiff's] execution would be in compliance with the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (Doc. 16 at 22). Briefing on the motion was completed on Thursday June 2, 2022, and the Court held a Preliminary Injunction hearing on Friday June 3, 2022 at 2:00 p.m.[1]

In the meantime, Plaintiff also filed a motion to sever Counts VI and VII of his First Amended Complaint—challenges to Arizona's designation of hydrogen cyanide as the gas

[1] The Court notes that at the conclusion of the preliminary injunction hearing, Plaintiff's counsel requested a continuation of the hearing into the weekend. As the Court explained, Plaintiff had abundant time in the days leading up to the hearing to indicate that additional time might be necessary yet failed to do so.

to be used in a lethal gas execution—because those claims did not implicate Defendant John Doe, the pharmacist preparing the lethal injection drugs to be used in Plaintiff's execution, whose identity is unknown to Plaintiff. (Doc. 25). Because Defendants maintain Plaintiff will be executed by lethal injection, the Court directed Plaintiff to show cause why those claims should not be dismissed for lack of standing. (Doc. 31). Plaintiff responded to the Order to Show Cause. (Doc. 40).

After considering the parties' briefing, testimony, and evidence, the Court will deny the Motion for Preliminary Injunction, dismiss Counts VI and VII, and enter judgment on those claims.

I. Background

In his First Amended Complaint, Plaintiff alleges he is wheelchair bound from a degenerative spinal disease and experiences "intense and profoundly debilitating pain along his spine because of chronic degeneration of vertebral bodies" that have "caused multiple compressions of the nerve roots as they pass from the spinal cord to the arms and legs," which "has resulted in permanent damage that manifests as profound weakness and unremitting pain." (Doc. 21 at 8). To minimize the pain Plaintiff experiences, he maintains a seated posture in his wheelchair and partially reclines when "attempting to sleep." Plaintiff maintains that "[l]ying flat on his back exacerbates his conditions, causing maximum pain." (*Id.*). For these reasons, Plaintiff alleges ADCRR's lethal injection protocol would subject him to significant pain not necessary to accomplish his execution. (*Id.* at 9). Specifically, Plaintiff alleges that a review of logs from Arizona's 14 most recent executions reflects that prisoners are secured on the execution table for an average of 44 minutes prior to the administration of lethal drugs. (*Id.* at 10). Because of Plaintiff's spinal condition, he alleges that would cause him excruciating and unnecessary pain.

Plaintiff also asserts that ADCRR's Execution Protocol requires that lethal injection drugs have a "beyond use date" ("BUD") after the date of the execution and authorizes prisoners subject to a warrant of execution to request and receive a "quantitative analysis" about the drugs to be used in an execution. (*Id.* at 16). Plaintiff alleges that Defendants

have refused to provide this information or verify the pentobarbital to be used in Plaintiff's execution has an appropriate BUD. Additionally, Plaintiff alleges the quantitative analysis disclosed in conjunction with Clarence Dixon's execution did not meet United States Pharmacopeia standards. (*Id.* at 20-25). With respect to the option to be executed by lethal gas, Plaintiff alleges Defendants' specification of intention to use hydrogen cyanide as its lethal gas was intended to cause gratuitous pain. (*Id.* at 18).

Plaintiff presents the following claims for relief: ADCRR's lethal injection procedures as applied to Plaintiff violate Plaintiff's Eighth Amendment, Americans with Disabilities Act (ADA), and Rehabilitation Act (RA) rights (Counts I, II, and III); ADCRR is discriminating against Plaintiff because of his disability in violation of the Fourteenth Amendment's Equal Protection Clause (Count IV); ADCRR's refusal to abide by its own Execution Protocol by failing to provide a BUD and appropriate quantitative analysis for the pentobarbital it intends to use during Plaintiff's execution violates his procedural due process rights under the Fourteenth Amendment (Count V); and ADCRR's election to use cyanide gas violates Plaintiff's Eighth and Fourteenth Amendment rights (Counts VI and VII). Plaintiff also alleges ADCRR's execution protocols violate Plaintiff's right to access the courts under the Fourteenth Amendment and statutory right to counsel under 18 U.S.C. § 3599 (Counts VIII and IX); and the potential for pentobarbital intoxication, should the execution be interrupted or suspended, violates Plaintiff's Eighth and Fourteenth Amendment rights (Count X).

In his motion for injunctive relief, Plaintiff presents background facts regarding his spinal condition, anticipated difficulties with IV insertion based on prior executions, inadequacy of the lethal injection drugs Defendants intend to use to execute Plaintiff, and Defendants' improper designation of hydrogen cyanide as the lethal gas to be used in its executions. (Doc. 21).

In contrast, however, the motion for injunctive relief only squarely argues Plaintiff's likelihood of success on the merits of his claims in Counts I, II, and III. In the argument section of his motion, Plaintiff does not discuss the BUD for the pentobarbital or identify

any caselaw that supports his BUD due process claim. Plaintiff's motion discusses nitrogen gas, but only as an alternative method of execution as required by *Glossip v. Gross*, 576 U.S. 863 (2015).

Against this backdrop, Defendants responded to the motion for injunctive relief, and indicated that Plaintiff would be provided a medical wedge during the execution to alleviate the pain he would otherwise suffer due to his spinal condition. Defendants further argued that the table in the execution room is capable of being tilted to further alleviate any pain Plaintiff might experience while lying on his back.

In his reply, Plaintiff argued Defendants "ignore the central justification for an injunction," namely, "relief in order to prevent Defendants from using inadequately tested, inadequately vetted high-risk compounded drugs for his lethal injection." (Doc. 35 at 3). As to Plaintiff's claim concerning his spinal condition, he replies that Defendants' accommodations are not sufficient to alleviate his pain.

The Court permitted Defendants to file a sur-reply, which explained why they only addressed Plaintiff's Eighth Amendment claim related to his spinal condition and not the drugs to be used during his execution. (Doc. 43).

Because of the confusion surrounding the precise scope of the relief Plaintiff was seeking, the Court began the evidentiary hearing by asking Plaintiff to explain the parameters of his request for injunctive relief. Plaintiff explained that the motion for injunctive relief was filed as an "umbrella" motion intended to encompass all the claims alleged in the First Amended Complaint. (June 3, 2022 Preliminary Injunction Hearing Transcript at 7:9-11). As noted, however, the motion only addressed the *Winter* factors as to Plaintiff's claims regarding his spinal condition and how that condition would result in substantial pain during a lethal injection execution if he was compelled to lie on his back. As a result, the Court had no briefing on any of Plaintiff's other claims, including those regarding the propriety of the pentobarbital to be used or the reliability of the BUD ascribed to it. Further, the Court has no briefing regarding how any deviations from ADCRR's Execution Protocol might implicate a cognizable liberty interest under the Fourteenth

Amendment. Not only is the Court unaware of any authority which authorizes the issuance of an injunction in this way, this limited record greatly impedes the Court's ability to meaningfully consider Plaintiff's claims and evidence. Nevertheless, because of the exigencies of the situation, the Court permitted Plaintiff to present testimony during the hearing as to claims other than those related to his spinal condition.

The Court will address the claims Plaintiff presented during the preliminary injunction hearing. The claims appear to fall into three main categories: (1) Plaintiff's claim that a lethal injection execution pursuant to the Execution Protocol will violate Plaintiff's Eighth Amendment and ADA rights because of his serious spinal condition; (2) Plaintiff's claim that Defendants' failure to perform a quantitative analysis of the pentobarbital violates his due process and Eighth Amendment rights; and (3) Plaintiff's claim that Defendants' designation of hydrogen cyanide gas for a lethal gas execution violates his Eighth and Fourteenth Amendment rights.[2]

II. Standard for Injunctive Relief

"A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted) ("[a] preliminary injunction is an extraordinary remedy never awarded as of right").

A plaintiff seeking a preliminary injunction must show that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm without an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. "But if a plaintiff can only show that there are 'serious questions going to

[2] Plaintiff did not present evidence regarding his claims that Defendants are discriminating against Plaintiff based on his disability in violation of the Fourteenth Amendment (Count IV), that Plaintiff may experience a denial of access to the courts and of access to counsel during his execution in violation of 18 U.S.C. § 3599 and the Fourteenth Amendment (Counts VIII and IX), and that the potential for pentobarbital intoxication should the execution be interrupted or suspended violates Plaintiff's Eighth and Fourteenth Amendment rights (Count X). The Court, therefore, will not address those claims.

the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). Under this serious questions variant of the *Winter* test, "[t]he elements . . . must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680 F.3d at 1072. When the government opposes a preliminary injunction,"[t]he third and fourth factors of the preliminary-injunction test—balance of equities and public interest—merge into one inquiry." *Porretti*, 11 F.4th at 1047. The "balance of equities" concerns the burdens or hardships to a prisoner complainant compared with the burden on the government defendants if an injunction is ordered. *Id.* The public interest mostly concerns the injunction's impact on nonparties rather than parties. *Id.* (citation omitted). Regardless, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citation omitted).

Regardless of which standard applies, the movant "has the burden of proof on each element of the test." *See Envtl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000). Generally, "[w]hen a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015); *see De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) (preliminary injunctive relief is inappropriate for matters "lying wholly outside the issues in the suit").

III. Discussion

A. Spinal Condition[3]

The Eighth Amendment prohibits execution procedures that inflict cruel and unusual punishment. *See Baze v. Rees*, 553 U.S. 35 (2008). In *Baze*, the Supreme Court

[3] The Court did not receive any argument or evidence regarding how Defendants' planned accommodation of Plaintiff's spinal condition is nonetheless violative of the ADA or the RA (Counts II and III). The Court therefore only analyzes Plaintiff's Eighth Amendment challenge in Count I.

rejected the petitioners' argument that "unnecessary risk" violated the Eighth Amendment and held instead that prisoners facing execution must demonstrate "a 'substantial risk of serious harm,'" or "an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they [are] 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, & n. 9 (1994)). Several years later, the Supreme Court further made clear in *Glossip v. Gross* that the standard set forth in *Baze* governs "all Eighth Amendment method-of-execution claims"). *Glossip*, 576 U.S. at 877-78.

Together, *Baze and Glossip* confirm that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 47; *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) ("T][he Eighth Amendment does not guarantee a prisoner a painless death."). *Baze* provides instead that the Constitution affords a "measure of deference to a State's choice of execution procedures" and does not authorize courts to serve as "boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51 & n.2. The Eighth Amendment is not impinged unless the risk of pain the prisoner might experience is "substantial when compared to a known and available alternative." *Glossip*, 576 U.S. at 878 (citing *Baze*, 553 U.S. at 61).

Plaintiff argues—and Defendants do not dispute—that he suffers from a serious spinal condition that causes him significant pain. Dr. Joel Zivot testified that Plaintiff has a "series of skeletal deformities throughout his spine, really from the top of his back, the cervical spine region, all the way really to the base of his spine." (June 3, 2022 Preliminary Injunction Hearing Transcript at 98-99). Dr. Zivot opined that, as a result, Plaintiff cannot lie flat, and that the least painful position for Plaintiff requires him to sit at an approximately 60-degree angle with at least one leg bent.

Defendants introduced photographs depicting Plaintiff at rest in his cell. In the photographs, he is on his bed, propped up by pillows and blankets, and his right leg is bent. In several pictures, Plaintiff appears to be asleep, but in one picture Plaintiff is awake. Plaintiff does not appear to be in acute distress. Defendants assert they plan to provide

Plaintiff with a medical wedge on top of the execution table, which will allow Plaintiff to lie in a similar position to when he was in his cell.

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. The Court finds that these accommodations preclude a finding that ADCRR's lethal injection protocol creates a "substantial risk of severe pain" or seeks to "superadd terror, pain, or disgrace" to Plaintiff's execution. *Bucklew*, 139 S. Ct. at 1124, 1130. The Eighth Amendment does not require a pain-free execution. *Id.* at 1124. There is 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. And although the Court recognizes the pain Plaintiff experiences at all times, that is no basis upon which to conclude his execution violates the Eighth Amendment. Therefore, the Court finds that Plaintiff is not likely to succeed on the merits of his claim and that he has raised serious questions going to the merits of his claim.

B. Pentobarbital

Plaintiff raises two interrelated challenges to the pentobarbital. First, he argues that ADCRR has deviated from its Execution Protocol in significant ways, thereby violating Plaintiff's right to due process. Plaintiff further alleges there are significant questions about the provenance and quality of the pentobarbital to be used, which create a substantial risk of serious harm in violation of the Eighth Amendment. The Court notes, however, that Plaintiff did not raise an Eighth Amendment challenge to the pentobarbital to be used in his execution. Plaintiff's singular claim in Count V is a due process challenge to Defendants' deviation from the Execution Protocol and the settlement agreement entered in *Wood v. Ryan*, 14-CV-01447-PHX-NVW. As noted, the Court does not have authority to issue an injunction regarding a claim not raised in the complaint. *Pac. Radiation Oncology, LLC*, 810 F.3d at 636. Therefore, the Court will only address Plaintiff's due process claim.[4]

[4] Even if Plaintiff had properly raised an Eighth Amendment claim challenging the propriety or quality of the pentobarbital to be used in his execution, the evidence he

Plaintiff argues that ADCRR's Execution Protocol and the Settlement Agreement in *Wood v. Ryan*, 14-CV-01447-PHX-NVW, create binding requirements Defendants must follow. Plaintiff further argues that Defendants failed to perform a quantitative analysis of the pentobarbital to be used in Plaintiff's execution or to perform the specialized testing required to extend the BUD for compounded pentobarbital violate his due process rights. In support of his due process claim, Plaintiff points to a specific provision of the Settlement Agreement in *Wood v. Ryan*:

> **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties intend, that Defendants and the ADC will remove from the ADC's current execution procedures the sentence—"[t]his Department Order outlines internal procedures and does not create any legally enforceable rights or obligations"—and that Defendants and the ADC will never again include such language or substantially similar language in any future version of the ADC's execution procedures (together, "Covenant No. 1").

Plaintiff assumes this provision automatically creates a cognizable liberty interest in ADCRR's Execution Protocol.[5] Plaintiff further points out that the protocol requires Defendants to perform a "quantitative analysis" and to use non-expired lethal injection drugs. Plaintiff challenges the substance of Defendants' quantitative analysis and of the methodology used by the compounding pharmacist to assign the BUD on the pentobarbital to be used in Plaintiff's execution.

Plaintiff's argument suffers from several fatal flaws. The first is that Covenant 1 from the *Wood* Settlement Agreement does not automatically create a liberty interest cognizable under the Fourteenth Amendment. Indeed, Plaintiff fails to point to any caselaw

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provided was not sufficient to establish a likelihood of success or serious questions on the merits of his claim that using the compounded pentobarbital introduces a substantial risk of severe pain. *See Baze*, 553 U.S. at 50.

[5] The Court notes Defendants mis-analyze Plaintiff's due process claim. Defendants contend "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Defendants would be correct if Plaintiff were presented a *substantive* due process claim. But Plaintiff presents a *procedural* due process claim. As a result, it is, in fact, appropriate to evaluate Plaintiff's due process challenge.

that recognizes a state-created liberty interest under similar circumstances. During the evidentiary hearing, Plaintiff relied on *Wolff v. McDonnell*, 418 U.S. 539 (1974) for the proposition that traditional due process cases establish a liberty interest in this case. But merely citing that canonical case is insufficient to recognize a specific liberty interest in Arizona's Execution Protocol.

Further, even if Plaintiff could establish a liberty interest, there is insufficient evidence to conclude Arizona has deviated from its Execution Protocol. The Protocol neither defines "quantitative analysis" nor sets forth requirements for how a BUD must be assigned. As a consequence, there is insufficient evidence that Plaintiff's due process rights have been violated. Without any additional authority, Plaintiff has not shown a likelihood of success, or even serious questions, going to the merits of his claim.

Because the plaintiff bears the burden of "demonstrat[ing] that it meets all four" factors in order to obtain a preliminary injunction, *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776-77 (9th Cir. 2011), and Plaintiff has failed to meet the first factor under either standard, his motion for injunctive relief must be denied.

IV. Order to Show Cause

In its June 1, 2022 Order, the Court directed Plaintiff to show cause why Counts VI and VII should not be dismissed for lack of standing. (Doc. 31). Plaintiff filed his response, contending that he has standing to pursue his due process challenge because he was not provided a constitutional choice of the lethal gas to be used in his execution. Plaintiff argues that his "injury began occurring as soon as the window for making the choice allowed by statute (A.R.S. § 13-757) closed without [Plaintiff] being offered a valid choice" and that such injury continues.

What Plaintiff does not provide, however, is a citation to any authority that he has a due process liberty interest under the Fourteenth Amendment to a choice regarding the method of his execution. Without such authority, there can be no viable due process claim. Nor does Plaintiff identify how he could now choose lethal gas—of whatever type—under Arizona Revised Statute § 13-757. Therefore, because Plaintiff has not established that he

is likely to be executed using lethal gas, there is no basis to conclude he has standing to pursue his Eighth or Fourteenth Amendment claims in Counts VI and VII.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Preliminary Injunction (Doc. 16) is **denied**.

IT IS FURTHER ORDERED that Counts VI and VII are **dismissed**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Sever Counts VI and VII (Doc. 25) is **denied as moot**.

IT IS FURTHER ORDERED that because there is no just reason for delay, *see* Fed. R. Civ. P. 54(b), the Clerk of Court must **enter judgment** as to Counts VI and VII.

IT IS FURTHER ORDERED the action remains ongoing as to Plaintiff's remaining claims in Counts I-V and VIII-X.

Dated this 4th day of June, 2022.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Frank Jarvis Atwood,

Plaintiff,

v.

David Shinn, et al.,

Defendants.

NO. CV-22-00860-PHX-MTL (JZB)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered pursuant to the Order filed on 6/04/2022.

IT IS ORDERED AND ADJUDGED that there is no just reason to delay entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). Judgment is hereby entered in favor of Defendants as to Counts VI and VII only.

Debra D. Lucas
District Court Executive/Clerk of Court

June 6, 2022

By s/ Rebecca Kobza
Deputy Clerk

FILED

JUN 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK JARVIS ATWOOD, Plaintiff-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections, Rehabilitation & Reentry; et al., Defendants-Appellees.	No. 22-15821 D.C. No. 2:22-cv-00860-MTL-JZB District of Arizona, Phoenix ORDER

Before: S. R. THOMAS, Circuit Judge and Capital Case Coordinator

The three-judge panel has issued an opinion affirming the judgment of the district court and denying the request for a stay of execution. The Appellant subsequently filed a Petition for Rehearing En Banc. Pursuant to the rules applicable to capital cases when an execution date has been scheduled, a deadline was established for any judge to request a vote on whether the panel opinion should be reheard en banc. No judge requested a vote within the established time period. Therefore, en banc proceedings with respect to the panel opinion are concluded. The Petition for Rehearing En Banc is denied. The panel opinion affirming the district court is the final order of this Court pertaining to this appeal.

The mandate shall issue forthwith.

No. 22–15821

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK JARVIS ATWOOD,

Plaintiff-Appellant,

v.

DAVID SHINN, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. 2:22–cv–00860–MTL
[CAPITAL CASE]

DEFENDANTS-APPELLEES' CONSOLIDATED ANSWERING BRIEF AND RESPONSE TO MOTIONS FOR STAY OF EXECUTION

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

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Jeffrey L. Sparks (AZ Bar No. 27536)
Deputy Solicitor General
Section Chief of Capital Litigation

Laura P. Chiasson (AZ Bar No. 19025)
Ginger Jarvis (AZ Bar No. 014487)
Assistant Attorneys General
Capital Litigation Section
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542–4686
CLDocket@azag.gov

Attorneys for Defendants-Appellees

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. §§ 1292(a)(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court abuse its discretion when it denied Atwood's last-minute request for emergency injunctive relief on claims arising from his spinal condition and the compounded pentobarbital that will be used in his execution three days from now?

2. By operation of Arizona law, Atwood will be executed by lethal injection. Did the district court err when it dismissed Atwood's claims challenging executions by lethal gas for lack of standing?

STATEMENT OF THE CASE

In 1987, Atwood was sentenced to death for the 1984 murder of 8-year-old V.L.H. During the ensuing 30 years, Atwood pursued his appeals in the state and federal courts. On May 3, 2022, the Arizona Supreme Court issued a warrant for his execution, setting his execution for June 8, 2022. Because Atwood's crime was committed before November 23, 1992, he could choose to be executed either by lethal injection or lethal gas. *See* Ariz. Const. art. 22, § 22. Atwood was required to make this choice "at least twenty days before the execution date," which was May 19, 2022. A.R.S. § 13–757(B). On May 18, 2022, Atwood completed and signed a form indicating his refusal to select an execution method. Under Arizona law, Atwood's failure to choose a method means that he will be executed by lethal injection. *Id*.

A. *Complaint and request for injunctive relief.*

On May 19, 2022, Atwood filed his initial complaint in the instant case. He filed an amended complaint on May 27, 2022. Atwood's amended complaint presented the following claims for relief. Due to his spinal condition ADCRR's lethal injection procedures violate his Eighth Amendment, Americans with Disabilities Act (ADA), and Rehabilitation Act (RA) rights (Counts I, II, and III); ADCRR is discriminating against Atwood because of his disability in violation of the Equal Protection Clause (Count IV); ADCRR's alleged failure to comply with

its execution procedures by failing to provide a beyond use date (BUD) and appropriate quantitative analysis for the pentobarbital it will use in Atwood's execution violates his procedural due process rights under the Fourteenth Amendment (Count V); ADCRR's choice to use cyanide gas for a lethal gas execution violates Atwood's Eighth and Fourteenth Amendment rights (Counts VI and VII); ADCRR's execution procedures violate Atwood's right to access the courts under the Fourteenth Amendment and right to counsel (Counts VIII and IX); and the potential for pentobarbital intoxication if the execution is interrupted violates Atwood's Eighth and Fourteenth Amendment rights (Count X).

On May 20, 2022, with Atwood's execution date fast approaching, the district court ordered Atwood to file a notice no later than May 24, 2022, indicating "whether and when he may file a motion for emergency injunctive relief." Doc. 5, at 4.[1] On May 24, Atwood filed a notice stating that he intended to file a motion for injunctive relief by May 26, 2022. Doc. 9. Atwood filed his motion on that date. Doc. 16.

With respect to Counts I, II, and III, in his amended complaint, Atwood alleged that he is confined to a wheelchair due to a degenerative spinal disease and

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[1] Citations to "Doc." refer to documents in the district court's docket in the case below.

experiences "intense and profoundly debilitating pain along his spine because of chronic degeneration of vertebral bodies." Doc. 21, at 8. He stated that he maintains a seated position in his wheelchair and partially reclines when "attempting to sleep" to minimize the pain he experiences. *Id.* Atwood further alleged that "[l]ying flat on his back exacerbates his conditions, causing maximum pain." *Id.* Atwood claimed that, for these reasons, ADCRR's execution protocol would subject him to significant pain not necessary to accomplish his execution by requiring him to be restrained flat on his back during the lethal injection procedure. *Id.* at 9.

Regarding Count V, Atwood asserted in his amended complaint that ADCRR's execution procedures requires that any drugs used for lethal injection must have a "beyond use date" (BUD) after the date of the execution and entitles an inmate for whom an execution warrant has been sought to a "quantitative analysis" of the drugs that will be used. *Id.* at 16. Atwood alleged that ADCRR had failed to provide this information or to verify that the pentobarbital that will be used in his execution has an appropriate BUD. *Id.* He further alleged that the quantitative analysis provided for his execution did not meet United States Pharmacopeia standards. *Id.* at 20–25.

In his motion for injunctive relief, Atwood presented background facts about his spinal condition, potential difficulties with IV insertion based on previous

executions, alleged inadequacies of the pentobarbital ADCRR will use in his execution, and ADCRR's designation of hydrogen cyanide for use in lethal gas executions. Doc. 16, at 3–12. However, as the district court noted, the "motion for injunctive relief only squarely argue[d] [Atwood's] likelihood of success on the merits of his claims in Counts I, II, and III," which alleged violations of various rights based on his spinal condition and being required to lie flat on his back on the lethal injection table. Doc. 46, at 3; *see also* Doc. 16, at 13–18. The motion did not include any legal authority in support of any of the amended complaint's other claims. *See generally* Doc. 16.

In response, Defendants stated that ADCRR would provide a medical wedge on the execution table to alleviate the alleged pain Atwood would otherwise suffer while lying on the execution table due to his spinal condition and that the table is capable of being tilted if necessary to further alleviate any pain Atwood might experience. Doc. 23, at 3–5; Doc. 27. Defendants included photographs of the medical wedge on the execution table as it will be placed for Atwood's execution, as well as the table tilted at an angle. Doc. 27. Defendants additionally provided photographs showing Atwood on his back in his cell with his shoulders and head propped up on pillows. Doc. 23, Exhibit A.

Atwood's reply contended that Defendants "ignore the central justification for an injunction," which he asserted was "relief in order to prevent Defendants

from using inadequately tested, inadequately vetted high-risk compounded drugs for his lethal injection." Doc. 35, at 3. In light of the limited nature of Atwood's motion for preliminary injunction, the district court granted Defendants' request for leave to file a sur-reply addressing Atwood's additional injunction claims regarding the drugs. Doc. 37; 41.

B. ***Preliminary injunction hearing and district court's ruling.***

The district court held a hearing on Atwood's request for emergency injunctive relief on June 3, 2022.[2] At the outset, the court asked Atwood to explain the scope of his request for injunctive relief. Tr. 6/3/22, at 7. Atwood contended that he intended the motion for injunctive relief to serve as an "umbrella" to cover all claims in the amended complaint. *Id.* Atwood presented three witnesses at the hearing: James Ruble, who testified regarding compounded pentobarbital and beyond use dates; Amanda Bass, an attorney with the Federal Public Defender's Office who relayed her observations of the May 11, 2022 execution of Clarence Dixon; and Dr. Joel Zivot, who testified regarding Atwood's spinal condition.

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[2] The court had set the hearing in an order issued a week earlier, on May 27, 2022. Doc. 17.

On June 4, 2022, the district court denied injunctive relief and dismissed Counts VI and VII (lethal gas) for lack of standing. Doc. 46. The court noted that Atwood's motion for injunctive relief "only addressed the *Winter*[3] factors as to Plaintiff's claims regarding his spinal condition and how that condition would result in substantial pain during a lethal injection execution if he was compelled to lie on his back." *Id.* at 4. Thus, "the Court had no briefing on any of Plaintiff's other claims, including those regarding the propriety of the pentobarbital to be used or the reliability of the BUD ascribed to it" and "no briefing regarding how any deviations from ADCRR's Execution Protocol might implicate a cognizable liberty interest under the Fourteenth Amendment." *Id.* at 4–5. Observing that Atwood's negligence in failing to brief these issues "greatly impedes the Court's ability to meaningfully consider Plaintiff's claims and evidence," the court nonetheless "permitted Plaintiff to present testimony during the hearing as to claims other than those related to his spinal condition" because of "the exigencies of the situation." *Id.* at 5.

The court first addressed Atwood's request for regarding to his spinal condition. The court noted Dr. Zivot's opinion that Atwood "cannot lie flat, and that the least painful position for Plaintiff requires him to sit at an approximately

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[3] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

60-degree angle with at least one leg bent," and that Defendants introduced photographs showing Atwood at rest in his cell, on his bed propped up by pillows and blankets with his right leg bent." *Id.* at 7. The court observed that in these photographs Atwood "does not appear to be in acute distress." *Id.* at 7. And the court noted that Defendants will provide Atwood "with a medical wedge on top of the execution table, which will allow Plaintiff to lie in a similar position to when he was in his cell." *Id.* at 7–8. Based on this evidence, the court found that "these accommodations preclude a finding that ADCRR's lethal injection protocol creates a 'substantial risk of severe pain' or seeks to 'superadd terror, pain, or disgrace' to Plaintiff's execution." *Id.* at 8 (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124, 1130 (2019)). There was no evidence that the position Atwood "will be in using the medical wedge will be substantially different from the position he assumes in his cell," and "although the Court recognizes the pain Plaintiff experiences at all times, that is no basis upon which to conclude his execution violates the Eighth Amendment." *Id.* The court therefore concluded that Atwood failed to show that he was likely to succeed on the merits of his claim. *Id.*

The court next addressed Atwood's claims regarding the compounded pentobarbital. Atwood had contended that ADCRR's execution procedures and settlement agreement in *Wood v. Ryan*, 14-CV-01447-PHX-NVW, create binding requirements, and that Defendants failed these requirements by failing "to perform

a quantitative analysis of the pentobarbital to be used in Plaintiff's execution or to perform the specialized testing required to extend the BUD for compounded pentobarbital." *Id.* at 9. Specifically, Atwood pointed to requirements in the execution procedures and the settlement agreement that ADCRR perform a "quantitative analysis" of the execution drugs and use non-expired drugs. *Id.* These alleged failings, Atwood contended, violated his procedural due process rights. *Id.*

The court first concluded that Atwood failed to point to any authority supporting the contention that the *Wood* settlement agreement created a due process liberty interest under the Fourteenth Amendment. *Id.* Moreover, the court found that, even if Atwood could establish such a liberty interest, "there is insufficient evidence to conclude Arizona has deviated from its Execution Protocol":

> The Protocol neither defines "quantitative analysis" nor sets forth requirements for how a BUD must be assigned. As a consequence, there is insufficient evidence that Plaintiff's due process rights have been violated. Without any additional authority, Plaintiff has not shown a likelihood of success, or even serious questions, going to the merits of his claim.

Id. at 10. As a result, the court found that Atwood failed to show that he is likely to succeed on that claim. *Id.*

Finally, the district court dismissed Counts VI and VII (lethal gas) for lack of standing. *Id.* Atwood cited no authority that he had a due process liberty interest

under the Fourteenth Amendment to a choice regarding his method of execution. *Id.* Nor could he identify how he is still able to choose lethal gas under A.R.S. § 13–757. Thus, the court found, "because Plaintiff has not established that he likely to be executed using lethal gas, there is no basis to conclude he has standing to pursue his Eighth or Fourteenth Amendment claims in Counts VI and VII." *Id.* at 10–11.

Atwood appealed to this Court, and this Court issued an emergency briefing schedule. Atwood filed two separate opening briefs[4] (one addressing the denial of injunctive relief and one addressing the dismissal of Counts VI and VII), and two motions for stay of execution (one addressing his claims surrounding his spinal condition and the lethal injection drugs and one addressing lethal gas). This consolidated brief responds to all of Atwood's pleadings.

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[4] This Court noted that Atwood "was not authorized to submit two opening briefs," but directed the Clerk to file both "in light of the time sensitivity involved." Order, 6/5/2022.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it denied Atwood's request for a preliminary injunction based on claims arising from his spinal condition and the BUD and quantitative analysis of the compounded pentobarbital that will be used in his execution. First, Atwood failed to show that he is likely to succeed on claims arising from his back condition because ADCRR has accommodated him by placing a medical wedge on the execution table that will allow Atwood to recline in a position substantially similar to how he voluntarily reclines in his cell. Second, Atwood failed to show that he is likely to succeed on his procedural due process claim arising from the BUD and quantitative analysis because ADCRR's execution procedures and a related settlement agreement do not create a due process liberty interest and, even if they did, the record fails to establish that ADCRR failed to comply with these requirements. Additionally, the remaining factors also weigh heavily against a preliminary injunction at this late hour. For the same reasons, this Court should deny Atwood's motion for a stay of execution.

The district court also did not err when it dismissed Atwood's claims challenging lethal gas for lack of standing. By operation of Arizona law, Atwood will be executed by lethal injection, not lethal gas. Thus, any decision by this Court on the constitutionality of lethal gas would be an advisory opinion that

would not affect Atwood's execution. For this reason, and because the State would be harmed by delaying Atwood's execution simply to litigate a method of execution that will not be used in this case, this Court should also deny Atwood's motion for stay of execution.

STANDARD OF REVIEW

This Court reviews the district court's denial of a request for preliminary injunction for an abuse of discretion, *Am. Hotel v. Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 962 (9th Cir. 2016), and dismissal of claims for lack of standing de novo, *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED ATWOOD'S REQUEST FOR INJUNCTIVE RELIEF ON CLAIMS ARISING FROM HIS SPINAL CONDITION AND THE BUD AND QUANTITATIVE ANALYSIS OF THE EXECUTION DRUG.

A. *Standard for injunctive relief.*

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id*. Moreover, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments[.]" *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Id*. (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). Equity does not tolerate last-minute abusive delays "in an attempt to manipulate the judicial process." *Nelson*, 541 U.S. at 649 (quoting *Gomez*). "Repetitive or piecemeal litigation presumably raises similar concerns" as litigation that is "speculative or filed too late in the day." *Hill*, 547 U.S. at 585. *See also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653,

654 (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

To be entitled to a stay, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Ramirez v. Collier*, ___ U.S. ___, 142 S. Ct. 1264, 1275 (2022) (citing *Winter v. Natural Res. Def. Council, Inc*, 129 S. Ct. 365, 374, 376 (2008)); *McDonough*, 547 U.S. at 584; *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997 (per curiam).

These principles apply when a capital defendant asks a federal court to stay his pending execution. *Hill*, 547 U.S. at 584. A stay of execution is an equitable remedy and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. A court can consider "the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Beardslee*, 395 F.3d at 1068 (quoting *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991)). Thus, courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed

unnecessarily in bringing the claim." *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

Moreover, last minute stays of execution—as Atwood requests here, mere days before his scheduled execution—are particularly disfavored, as well-worn principles of equity attest. Late-breaking changes in position, last-minute claims arising from long-known facts, and other "attempt[s] at manipulation" can provide a sound basis for denying equitable relief in capital cases. *Ramirez*, ___ U.S. ___, 142 S. Ct. at 1282 (citing *Gomez v. United States Dist. Court for Northern Dist. of Cal*., 503 U.S. 653, 654 (1992) (*per curiam*) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."); see also *Hill*, 547 U.S. at 584 ("A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." (cleaned up)).

B. *The district court did not abuse its discretion when it concluded that Atwood was not likely to succeed on the merits and did not raise serious questions going to the merits of his claims.*

1. The district court did not abuse its discretion in finding that Atwood failed to demonstrate a likelihood of success on claims arising from his spinal condition.

Atwood asserted in his amended complaint that Appellees' lethal injection protocol, as applied to him, would violate the Eighth Amendment due to physical

issues that make it painful for him to lie flat on his back during the lethal injection procedure. Doc. 21, at 61–66. He also sought a preliminary injunction on this claim. *See* Doc. 16. The district court denied injunctive relief after finding that Atwood failed to demonstrate that he was likely to succeed on the merits. Doc. 46. This Court reviews this finding for an abuse of discretion. *See Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir 2008).

As the district court noted, Appellees did not dispute that Atwood has a physical condition that causes him significant pain. Doc. 46, at 7. Atwood asserted in his motion for preliminary injunction that he "suffers severe pain when he is supine, flat on his back" and complained that this is the position he will be in when executed. Doc. 16, at 18. Because of this condition, ADCRR has provided him with additional pillows and blankets. Using these pillows and blankets, Atwood is able to lie on his back, as is demonstrated by photographs Appellees attached to their Response. V-ER-1297–1300. These photographs contradict Atwood's claim that he must "contort his body into unnatural positions" to alleviate his pain. Doc. 6, at 14. The district court described the photographs: "In the photographs, [Atwood] is on his bed, propped up by pillows and blankets, and his right leg is bent. In several pictures, [Atwood] appears to be asleep, but in one picture [Atwood] is awake. [Atwood] does not appear to be in acute distress." Doc. 46, at

7. Atwood does not assert that the court below abused its discretion in making this factual finding.

To accommodate Atwood's spinal condition during the execution, ADCRR has modified the execution table with a wedge pillow that will allow Atwood to lie in a propped-up, reclined position. *See* V-ER-1464–68. The district court found that this accommodation, along with the ability to tilt the table if needed, "precludes a finding that ADCRR's lethal injection protocol creates a 'substantial risk of severe pain' or seeks to 'superadd terror, pain, or disgrace' to [Atwood's] execution." VII-ER-1549. Atwood asserts that this finding was an abuse of discretion. Doc. 6, at 17. He also challenges the district court's finding that he will be in substantially the same position on the execution table as the position he voluntarily assumes when resting in his cell. *Id*.

Atwood asserts that the evidence does not "show that the 'medical wedge' to be used during the execution would, by itself, allow Mr. Atwood to position his upper body in a manner that mirrors his position in the photos." *Id*. at 17. He claims that there is no evidence that the wedge on the execution table will elevate his upper body to the same degree it is elevated when he rests. *Id*. at 17–18. In making this argument, Atwood incorrectly assumes that he is currently using a wedge pillow in addition to other pillows to prop himself up when he rests. *Id*. Appellees explained, however, that Atwood has been using an extra pillow and/or

blankets to help prop him up; he does not have a specialized wedge pillow in his cell. *See* V-SER-1460–61. Thus, his claim that he needs a pillow in addition to the wedge is based on a faulty premise.

In any event, the district court had photographs of Atwood resting in his cell and photographs of the wedge on the execution table. It did not abuse its discretion by relying on these photographs to conclude that Atwood's upper body will be elevated to a similar degree on the execution table as it is when he rests in his cell.[5] Atwood has not demonstrated that the district court abused its discretion by finding that his position on the execution table will be substantially similar to the position he assumes when he is at rest.

Atwood also challenges the district court's observation that the execution table can be tilted if needed to make Atwood more comfortable. Doc. 6, at 18. He contends that tilting the table will not alleviate his pain while he is on his back. *Id*. If this is the case, however, then the tilting function need not be utilized during Atwood's execution. The wedge alone is sufficient to raise Atwood's upper body to a position similar to the position he now assumes when he rests.

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[5] In one of the photographs, Atwood's upper body does not seem to be inclined at all. Rather, the pillows merely prop up his head and shoulders. *See* V-ER-1300.

Atwood next argues that he will not be in a substantially similar position on the execution table as he is when he rests, because his right leg is bent in each of the photographs. Doc. 6, at 18–19. He asserts "[t]he bent knee is critical." *Id*. at 19. He further assumes that ADCRR's procedures "would force Mr. Atwood to lie with his legs extended flat in front of him, causing severe pain." *Id*. If this Court deems it necessary, however, 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. *See id*. at 18 (Atwood alleging that "both a bend from the waist … and a bend at the knee" is required). Therefore, Atwood's argument that having both legs outstretched will cause significant pain is not a basis to find that the district court abused its discretion in denying injunctive relief.

Atwood finally asserts that he offered "multiple alternatives that could be readily implemented and would not entail superadding pain." Doc. 6, at 24. But while Atwood proffered other execution methods as alternatives that would substantially reduce the risk of severe pain he would suffer *if executed while lying flat on his back*, he does not assert that they would substantially reduce any risk of pain he will suffer if executed *while propped up by a wedge pillow*. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 ("Mr. Bucklew has still failed to present any evidence suggesting that [another execution method] would significantly reduce his risk of pain."). Because Atwood has failed even to allege (let alone

demonstrate) that another method will substantially reduce his risk of pain if he is executed while sitting up on the table, the district court did not abuse its discretion by finding that he is not likely to succeed on the merits of his claim. *See* VII-ER-1549.

2. The district court did not abuse its discretion when it found that Atwood was not likely to succeed on his procedural due process claim arising from the pentobarbital's BUD and quantitative testing.

The Fourteenth Amendment prohibits a State from depriving any person of "life, liberty, or property, without due process of law;…" U.S. Const. amend. XIV, § 1. "To create a liberty interest, a statute or regulation must contain 'explicitly mandatory language,' *i.e.,* specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Rodriguez v. McLoughlin*, 214 F.3d 328, 338 (2d Cir. 2000) (quoting *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 463 (1989)). Moreover,

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [the plaintiff] may be deprived of the particular interest in question.

Thompson, 490 U.S. at 464 n.4 (emphasis in original). Also, just because ADCRR "has established procedures to be followed does not mean that it has created a protectable liberty interest." *Rodriguez*, 214 F.3d at 339. "A liberty interest is of

course a substantive interest of an individual; it cannot be the right to demand needless formality." *Olim v. Wakinekona*, 461 U.S. 238, 280 (1983) (alteration omitted) (citing *Shango v. Jurich*, 681 F.2d 1091, 1100–01 (7th Cir. 1982)). "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id*.

Further, "[a] violation of state law does not by itself constitute a violation of the Federal Constitution," *Nordlinger v. Hahn*, 505 U.S. 1, 26 (1992), and "'a mere error of state law is not a denial of due process,'" *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)). In *Pavatt v. Jones*, 627 F.3d 1336, 1341 (10th Cir. 2010), the court found that a death row inmate failed to establish a substantial likelihood of prevailing on a due process challenge to the state's execution protocol based on the inmate's assertion that the protocol violated state law. In reaching that conclusion, the court noted that there was no indication the state denied the inmate the opportunity to challenge the protocol administratively or in state court. *Id.* Here, Atwood does not even contend that there has been any violation of state law, only that the protocol and settlement agreement (which are not law) will be violated. If an alleged violation of state law did not create a protected liberty interest under the due process clause, then surely an alleged violation of a protocol or settlement agreement that is not law cannot.

The requirement in ADCRR's execution procedures and the *Wood* settlement agreement to use non-expired drugs does not create a protectable liberty interest because it is merely a procedure to be followed. Atwood's *substantive* liberty interest is to be executed without violating the Eighth Amendment's prohibition against "cruel and unusual punishment[]." The use of execution drugs within their beyond use date and quantitative testing are merely procedural safeguards. Atwood, by claiming to have a liberty interest in the drug's BUD and results of quantitative testing, demands needless formality which the Supreme Court has never countenanced. Instead, such a claim should be analyzed under the Eighth Amendment's specific rubric and not under the generalized notions of due process.

For example, in *Sepulvado v. Jindal*. 729 F.3d 413 (5th Cir. 2013), Louisiana sought to carry out an execution without disclosing its execution protocol. *Id*. at 415—16. Louisiana, however, disclosed it would use a single dose of pentobarbital. *Id*. Sepulvado joined an existing a 42 U.S. § 1983 suit alleging that failure to disclose the details of the execution protocol violated his Due Process rights under the Fourteenth Amendment. *Id*. "There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol." *Id*. at 420. Thus, if a state may *withhold* its execution protocols in conformity with the Due Process Clause,

the fact of disclosing the protocols to explain the procedures cannot *create* such a due process right.

Atwood has failed to establish that ADCRR's execution procedures and the *Wood* settlement agreement create a due process liberty interest. The district court thus did not abuse its discretion.

Moreover, Atwood waived the contention that the execution procedures and settlement agreement by failing to brief that issue or provide the district court with supporting authority. The sole reference to this claim in Atwood's motion for preliminary injunctive was this single sentence: "It would also violate Plaintiff's right to procedural due process pursuant to the Fourteenth Amendment, with respect to his liberty interest in Defendants' adherence to their legal obligations under the Department's Execution Procedures concerning preparation of the compounded sodium pentobarbital solution designated for Mr. Atwood's execution." ER 0005. Atwood provided no supporting authority and no additional argument to support this bare-bones contention. And when asked by the district court at the hearing what case law supported his claim, Atwood could only answer,

"[t]he standard liberty interest cases certainly support that," naming "*Wolf*[6] and other cases." Tr. 6/3/22, at 136–37.

In contrast, less than 48 hours after the hearing, Atwood provided this Court with 7 pages of briefing on his due process claim containing citations to multiple cases. Opening Brief (B), at 24–30. By failing to present these arguments and authorities to the district court and presenting them now for the first time on appeal, Atwood has waived them. *See, e.g., Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) ("These arguments are raised for the first time on appeal, and because they were never argued before the district court, we deem them waived.").

Even if Atwood could show a due process liberty interest in the execution procedures and settlement agreement, the district court still did not abuse its discretion in finding that there was insufficient evidence to conclude that ADCRR had deviated from its protocol or the settlement agreement. Atwood presented testimony at the evidentiary hearing challenging the sufficiency of the BUD and quantitative analysis report provided by ADCRR. As the district court noted, however, "[t]he Protocol neither defines 'quantitative analysis' nor sets forth requirements for how a BUD must be assigned." Doc. 46, at 10.

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[6] Atwood presumably referred to *Wolff v. McDonnell*, 418 U.S. 539 (1974).

ADCRR in fact complied with its own procedures and the settlement agreement by confirming that the compounded pentobarbital will be within its beyond use date at the time of Atwood's June 8, 2022, execution; the pentobarbital's beyond use date is October 6, 2022. Doc. 37-1 (Attachment to Sur-Reply; provided in SERs); *see also* ER 0053. The district court correctly noted that neither the execution procedures nor the settlement agreement contains requirements for how a BUD must be assigned. Atwood points to no authority for the idea that he possesses a procedural right to challenge the BUD provided by Defendants. Defendants' execution procedures do not purport to create any such right, and Atwood cites no constitutional provision, statute, or case law supporting such a right. By comparison, if Defendants were using a manufactured drug for Atwood's execution with a manufacturer's expiration date on the label, Atwood would not be entitled to dispute the method by which the manufacturer arrived at that conclusion. The same is true here. Although Defendants' execution protocol and the settlement agreement require that any drug execution drug must not be past its BUD, those documents do not include any requirements for how a BUD must be assigned and purport to create no procedural right to challenge an expiration date or BUD assigned to the drug that will be used in an execution.

Had the plaintiffs in the *Wood* settlement (on which the BUD requirement in ADCRR's execution procedures is based) wanted to include requirements for how

a BUD must be assigned, they could have negotiated for such terms. They did not. Atwood cannot retroactively insert them now. Thus, the district court did not abuse its discretion when it concluded that, if Atwood had any due process right, it has not been violated.

Similarly, ADCRR complied with its procedures and the settlement agreement by providing a quantitative analysis. As the district court noted, the protocol does not define "quantitative analysis." Doc. 46, at 10; *see also* ER 0054. The *Wood* settlement agreement states only that the quantitative analysis must "reveal[], at a minimum, the identity and concentration of the compounded or non-compounded chemicals." Plaintiff's Exhibit 3, at 7, Preliminary Injunction Hearing. The quantitative analysis ADCRR provided to Atwood contained that information—it states that chemical consists of "pentobarbital sodium" at a concentration of "98.2%" or "49.0968mg/1ml." Plaintiff's Exhibit 10, Exhibit B (report titled "Certificate of Analysis," indicating date received of 04/12/2022, and date tested of 04/13/2022).

As with BUD, if the plaintiffs in the *Wood* settlement (again, on which the quantitative analysis requirement in ADCRR's execution procedures is based) had wanted to include more requirements or a more specific definition of "quantitative analysis," they could have negotiated to include those terms. As with additional BUD requirements, they did not do so. Atwood cannot now attempt to

retroactively change the terms of that settlement or ADCRR's execution protocols. Thus, the district court did not abuse its discretion when it concluded that, if Atwood had any due process right, it has not been violated.

C. *The remaining* Winter *factors also support the district court's denial of injunctive relief.*

Even if a plaintiff can show a likelihood of success on the merits, "a preliminary injunction does not follow as a matter of course." *Benisek v. Lamone,* 138 S. Ct. 1942, 1943 (2018). Rather, a court must also consider whether the movant has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief…." *Id*. at 1944. While Atwood asserts that he will "suffer irreparable injury unless the injunction issues," he identifies no irreparable injury he will suffer. *See* Dkt. 5, at 8.

To the extent Atwood believes the execution procedures will cause a substantial risk of severe pain because he will be forced to lie flat on his back, he is incorrect. *See* Dkt. 5, at 4. As explained above, Atwood will not be lying flat on the execution table during the execution. Instead, he will be in a position that the district court found is not "substantially different from the position he assumes in

his cell" when he is at rest. VII-ER-1549.[7] Accordingly, he will not suffer the severe pain he fears, and this Court should deny injunctive relief.

Atwood identifies no irreparable injury that will flow if a preliminary injunction is not issued on his claim related to the testing of the execution drugs. See Dkt. 5, at 5–7. Nor could Appellees discern any. Because Atwood has identified no irreparable injury that will flow if this Court does not stay his execution, this Court should deny his motion.

Before granting a preliminary injunction, this Court must also determine that the balance of equities tips in [Atwood's] favor." *Benisek*, 138 S. Ct. at 1944. Atwood does not address the "balance of equities," let alone argue that it tips in his favor. *See* Dkt. 5, at 7–8. In failing to address this point, Atwood ignores his own inequitable conduct and the State's interest in carrying out his sentence. *Id.*; s*ee Hill*, 547 U.S. at 584 ("[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.").

"[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944. Atwood has known for more

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[7] To the extent this Court orders that Atwood be permitted to have one leg bent while lying on the execution table, as shown in the photographs, ADCRR will accommodate that requirement.

than a year that the State was seeking a warrant for his execution. The Arizona Supreme Court issued the warrant on May 3, 2022, setting his execution for June 8, 2022. Yet Atwood filed the instant complaint in district court 19 days before his scheduled execution—17 days after the Arizona Supreme Court issued its warrant. He waited another 6 days (until 13 days before his execution) to file a motion for a preliminary injunction in the court below, doing so only after this Court ordered him to indicate whether he intended to file a such a motion. *See* Dist. Ct. Dkt. 5, 16.

In that preliminary injunction motion, Atwood sought relief only on his claims of Eighth Amendment and ADA violations; he did not allege that he could demonstrate a likelihood of success on his claims related to the drug testing. *See* I-ER-13–20; VII-ER-1544–45. And rather than request the same reasonable accommodation he now uses to lie comfortably on his back, Atwood sought a new method of execution that he knows cannot be accomplished by his June 8 execution date. Thus, Atwood's true goal in the motion below, and here, is not to minimize the pain he will experience during his execution, but to delay the execution indefinitely by requesting alternative methods he knows the State is unable to provide absent significant changes to its execution protocol and to the state constitution.

Nor has Atwood acted diligently in seeking a preliminary injunction on his drug-testing claims. As just noted, he failed to seek injunctive relief on those claims in the court below, asserting for the first time in his reply that injunctive relief was warranted on that claim. Even so, he still did not allege a likelihood of success on those claims. *See* VI-ER-1475–83. Thus, he did not squarely seek injunctive relief on the drug testing claims until he came to this Court, just 3 days before his scheduled execution. Atwood has not acted equitably in seeking a stay, and this Court should deny his request.

Finally, to obtain a stay Atwood must show that "an injunction is in the public interest." *Benisek*, 138 S. Ct. at 1944. Atwood asserts that "it is always in the public interest to prevent the violation of a party's constitutional rights." Dkt. 5, at 12 (quotation marks omitted). But because Atwood's constitutional rights will not be violated during his execution, this truism is irrelevant.

Moreover, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. In particular, Arizona has provided victims a constitutional right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process" and to "a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(1), (10). Atwood's victims waited 30 years for Atwood to complete his appeals. Now that he has, this Court

should consider their right (and the State's) to a speedy resolution of this already drawn-out case.

Denying Atwood's motion and allowing the execution to proceed on June 8, 2022, will violate none of Atwood's rights and will ensure the long-awaited conclusion to Atwood's kidnapping and murder of an 8-year-old girl almost 40 years ago.

D. *This Court should deny Atwood's motion for stay of execution.*

As addressed above, the relevant *Winter* factors weigh heavily against Atwood's request for a stay of execution. Thus, in addition to affirming the district court's denial of emergency injunctive relief, this Court should likewise deny Atwood's motion for a stay of execution.

II. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED ATWOOD'S CLAIMS REGARDING LETHAL GAS, A METHOD THAT WILL NOT BE USED FOR HIS EXECUTION, FOR LACK OF STANDING UNDER BINDING PRECEDENT.

A. *Atwood lacks standing to challenge a method of execution that will not be used.*

Because Atwood committed his capital murder before November 23, 1992, he had a choice of execution method under Arizona law between lethal gas and lethal injection. *See* A.R.S. § 13–757(B); Ariz. Const. art. 22, § 22. Because

Atwood did not timely designate a method,[8] his method of execution will be lethal injection by operation of Arizona law. A.R.S. § 13–757(B). As a result, under binding Supreme Court precedent, Atwood has waived any Eighth Amendment challenge to Arizona's lethal gas execution protocols. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (Arizona death row inmate who chose lethal gas when Arizona law permitted choice between lethal gas and lethal injection waived Eighth Amendment challenge to lethal gas). By refusing to choose a method, Atwood seeks to retain standing to challenge both methods, including a method that will not be used. This is not permitted, particularly at the eleventh hour.

Moreover, even if Atwood could challenge the constitutionality of an alternative execution method under Arizona law, his contention that the type of gas used under Arizona's current lethal gas protocol is unconstitutional is without merit. First, it is settled that capital punishment is constitutional[9] and that there thus must be constitutional means of carrying it out. *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)). Methods of execution have changed over the years, and the United States Supreme Court has

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[8] In fact, Atwood actively refused to select a method, signing a document to that effect. Doc. 23, at 2.

[9] *See Gregg v. Georgia*, 428 U.S. 153 (1976).

never invalidated as in infliction of cruel and unusual punishment a State's chosen procedure for carrying out a death sentence. *Id.* (quoting *Baze*, 553 U.S. at 48). *See also Barr v. Lee*, ___ U.S. ___, ___, 140 S. Ct. 2590, 2591 (2020) (nothing that the Court has yet to hold any state's method of execution qualifies as cruel and unusual) (quoting *Bucklew v. Precythe*, 587 U.S. ___, ___, 139 S. Ct. 1112, 1114 (2019)). This is because "far from seeing to superadd terror, pain, or disgrace to their executions, the States have sought more nearly the opposite," developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries." *Id.* (quoting *Bucklew*, 139 S. Ct. as 1124). *See*, *e.g.*, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463–64 (1947) (plurality opinion) (rejecting challenge to electric chair); *In re Kemmler*, 136 U.S. 436 (1890) (same); *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1879) (upholding sentence of death by firing squad).

Second, Atwood's reliance on this Court's 1996 opinion finding *California's* lethal injection protocols unconstitutional is unavailing given that the United States Supreme Court vacated that opinion. *See Gomez v. Fierro*, 519 U.S. 918 (1996). The Court vacated that opinion, referencing the California statute permitting an opinion of lethal injection. In other words, the option of either lethal injection or lethal gas was grounds to vacate this Court's conclusion regarding the

constitutionality of one of those methods. Here, Atwood avoids a choice and baselessly asserts both options are unconstitutional.

Finally, the district court correctly noted that Atwood lacks a "viable due process claim" arising from Arizona law permitting him a choice in the method of execution. Doc. 46, at 10. Arizona law permits Atwood a statutory choice between methods, but this does not create a Fourteenth Amendment liberty interest, nor does it implicate the Eighth Amendment. This Court has no basis to analyze hypothetical alternative to a method of execution statutorily and state constitutionally permitted in Arizona that Atwood has not chosen to employ. The district court correctly dismissed Counts VI and VII on this ground. *Id.* at 2, 11.

B. *This Court should deny Atwood's motion for stay of execution.*

Atwood has failed to establish that he is entitled to a stay of execution pending litigation of his dismissed lethal gas claims. First, as explained above in responding to the arguments in Atwood's opening brief on these claims, he has failed to show that he is likely to succeed on the merits. *See Ramirez*, 142 S. Ct. at 1275. Because Atwood bears the burden of "demonstrat[ing] that it meets all four" factors in order to obtain a stay of execution, *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776-77 (9th Cir. 2011), his motion should be denied based on his failure to meet the first factor.

In any event, Atwood fails to meet the other relevant factors. Even if a plaintiff can show a likelihood of success on the merits, "a preliminary injunction does not follow as a matter of course." *Benisek*, 138 S. Ct. at 1943. Rather, a court must also consider whether the movant has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief…." *Id*. at 1944. Atwood argues that without a stay to litigate his lethal gas claims he will never have "had a meaningful opportunity" to select between lethal injection or lethal gas and he "fears … that a lethal injection execution would also be torturous." Motion at 4. If, however, does not receive a stay of execution, then he will be executed by lethal injection, not lethal gas. His lethal gas claims would be moot because that method was not used. Atwood faces no risk of irreparable harm from an inability to litigate a method of execution that will not be used on him.

Before granting a preliminary injunction, this Court must also determine that the "balance of equities tips in [Atwood's] favor." *Benisek*, 138 S. Ct. at 1944. Atwood claims that the balance of hardships and equities "tips strong" in his favor because he "is being denied the meaningful choice between lethal gas and lethal injection that he is guaranteed by State law" and "[p]roceeding with his execution without giving him that choice creates a grave risk he will be subjected to a lethal injection execution that would cause him extreme pain." But Atwood has failed to show a likelihood on his claims asserting that lethal injection will cause him pain.

And the State, which has a strong interest in timely enforcement of its criminal judgments, would be harmed by delaying a lawful execution in order to litigate a method of execution that will not be used on Atwood.

Finally, Atwood must show that "an injunction is in the public interest." *Benisek*, 138 S. Ct. at 1944. Atwood asserts that "granting preliminary relief would injure no public interest" because "[t]he State and the public have no particular interest in Mr. Atwood being killed on June 8, 2022" rather than another date. Dkt. 16, at 21. But "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. In particular, Arizona has provided victims a constitutional right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process" and to "a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(1), (10). Atwood's victims waited 30 years for Atwood to complete his appeals. Now that he has, this Court should consider their right (and the State's) to a speedy resolution of this already drawn-out case. This Court should deny Atwood's motion for a stay of execution.

CONCLUSION

For the reasons above, Defendants-Appellees respectfully request that this Court affirm the district court's judgment and deny Atwood's request for a stay of execution.

Respectfully submitted,

Mark Brnovich
Attorney General

/s/
Jeffrey L. Sparks
Deputy Solicitor General
Section Chief of Capital Litigation

Laura P. Chiasson
Ginger Jarvis
Assistant Attorneys General

Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Ninth Circuit Case No. 22–15821

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: s/ Jeffrey L. Sparks **Date:** June 5, 2022

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

Ninth Circuit Case No. 22–15821

I am the attorney or self-represented party.

This brief contains 8,213 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

Ninth Circuit Case No. 22–15821

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 5, 2022.

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s/ Maria Palacios
Legal Secretary
Criminal Appeals
Capital Litigation Sections
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542–4686

PHILLIPS BLACK, INC.
a nonprofit, public interest law practice

JOSEPH J. PERKOVICH
PO Box 4544
New York, New York 10163

j.perkovich@phillipsblack.org
212 400 1660 (tel)
973 221 9509 (fax)

Principal Attorneys:
Jennifer Merrigan†
John R. Mills‡
Joseph J. Perkovich⸘
Jessica Sutton^

May 14, 2022

VIA E-MAIL (bkeogh@azadc.gov; Jeffrey.Sparks@azag.gov)

Brad Keogh
Arizona Dep't of Corrections,
Rehabilitation and Reentry
1601 W. Jefferson
Phoenix, AZ 85008

Jeffrey L. Sparks
Office of the Attorney General
Capital Litigation Section
2005 N. Central Avenue
Phoenix, AZ 85004

Re: Frank J. Atwood, June 8, 2022, execution date

Messrs. Keogh and Sparks:

I write regarding Mr. Atwood's impending execution date of June 8, 2022, and his Arizona constitutional and statutory option to choose lethal gas as its method, as noted in the warrant issued on May 3, 2022. The Department's Execution Procedures,[1] which specify cyanide gas, violate Mr. Atwood's right to a choice of method.

Article 22, section 22 of the Arizona Constitution guarantees Mr. Atwood the right to choose between lethal gas and lethal injection as his method of execution. Arizona Revised Statutes § 13-757(B) implements that right and contemplates a choice of lethal gas by twenty days before the execution date, which, for Mr. Atwood's warrant, falls on May 19, 2022. However, the Department's designation of sodium cyanide with a sulfuric acid and water mixture, to make hydrogen cyanide,[2] renders this statutory method unconstitutional. To be clear, locking a human being in a chamber and flooding it with gas to extinguish his life should be a barbarism banished to history, not a current mode of correctional administration. Nonetheless, numerous other gases instead of cyanide may be used to conduct a constitutional execution under Arizona law. After the issuance of his execution warrant, Mr. Atwood proposed such an alternative, nitrogen, to the Department through its administrative grievance procedure as called for under the Prison Litigation Reform Act of 1995.[3] The Department refused to process his grievance. Thus, this letter demands that the Department immediately implement a nitrogen lethal gas method.

Mr. Atwood, who is physically disabled, possesses a dire individual need for a lawful gas method due to spinal disease, worsened from years of medical neglect while in the Department's custody. Application of the Department's lethal injection procedures, which require the condemned's full restraint to the execution table, would inflict on Mr. Atwood the maximum level of pain the human

[1] *Infra* n.6.
[2] *Infra* n.6 (Attachment E).
[3] Pub. L. 104-134.

† Admitted in Missouri and Pennsylvania
‡ Admitted in Arizona, California, and North Carolina
⸘ Admitted in New York
^ Admitted in Massachusetts and Missouri

brain can process.[4] Based on past execution logs, this would likely transpire for upwards of an hour *before* the actual administration of the Department's execution chemicals, a compounded injectable solution of unestablished adequacy and provenance that, itself, could cause extreme pain and fail in manifold ways, including by reducing Mr. Atwood to a vegetative state or by taking his life only after a prolonged, torturous process.

As you know, Arizona's constitution and statute fail to designate a kind of gas for its lethal gas method,[5] and historically that determination has fallen to the Department. As noted, the current manual specifies the use of sodium cyanide with a sulfuric acid and water mixture, which produces hydrogen cyanide.[6] The Execution Procedures can actually include gas method specifications because Arizona is the only United States jurisdiction with a purportedly operational gas chamber, a vessel manufactured and procured in 1949.[7] Notwithstanding the Department's possession of an operational chamber and the explicit persistence of this execution method under the state's constitution and statute, the Department's ten immediately prior manuals, dating back to 2010, make no mention of any procedure for a lethal gas execution, let alone designate the kind of gas for one.[8] I have not seen any manual issued between the date of the Department's last cyanide execution, Mar. 3, 1999,[9] and Dec. 16, 2010,[10] thus I am unaware whether the Department's procedures had thereafter ceased contemplating the gas method.[11]

Twenty-five years before the delivery of the Department's gas chamber, Nevada was the first state to use cyanide, executing Mr. Gee Jon on February 8, 1924, after its supreme court upheld the statute ushering in the lethal gas method nationally.[12] Initially, Nevada envisioned administering the poison into the condemned's "cell at night to execute him in his sleep," but "because half the

[4] *See Atwood v. Days, et al.*, 2:20-cv-623-JAT-JZB, Doc. 173 at 2 (D. Ariz. Dec. 7, 2021)
[5] Ariz. Const. art. XXII, § 22; A.R.S. § 13-757(B).
[6] Department Order 710 – Execution Procedures, effective Jun. 13, 2021, last revised Apr. 20, 2022; Attachment E, Lethal Gas.
[7] Just three other states contemplate a "lethal gas" choice. Cal. Penal Code § 3604 (lethal injection is administered, unless prisoner chooses lethal gas); Mo. Ann. Stat. § 546.720 (statute contemplates injection and gas and is ambiguous as to selection; Missouri has not used lethal gas in modern period); Wyo. Stat. Ann. § 7-13-904 (designates lethal gas only in the event lethal injection is deemed unconstitutional). In the past seven years, three states have legislated a nitrogen hypoxia option. On April 17, 2015, the Oklahoma Legislature first amended its methods statute to authorize nitrogen hypoxia in the event lethal injection is held unconstitutional or deemed "otherwise unavailable." Okla. Stat. Ann. Tit. 22 § 1014. On March 22, 2018, Alabama adopted a prisoner choice of nitrogen hypoxia or electrocution in conjunction with the default method of lethal injection. Ala. Code § 15-18-82.1.b. On April 14, 2022, the Mississippi Legislature amended its statute, effective July 1, 2022, to permit a nitrogen hypoxia execution even when lethal injection is available. 2022 Miss. Laws H.B. 1479, amending Miss. Code Ann. § 99–19–51.
[8] These ten manuals have the following effective dates: Dec. 17, 2010; Sep. 5, 2011; Jan. 25, 2012; Mar. 26, 2014; Sep. 30, 2015; Apr. 29, 2016; Jan. 11, 2017; Jun. 7, 2017; Jun. 13, 2017; and Nov. 20, 2019.
[9] *Infra* n.20.
[10] *Supra* n.8.
[11] Public records reflect the Department's purchase in late 2020 of substantial amounts of potassium cyanide, a different kind of cyanide from what the Department now specifies (*viz.*, sodium cyanide). While it is not apparent the Department is capable of carrying out its own cyanide gas plan, Mr. Atwood's present demand to use an alternative gas is premised on the nature, itself, of the poisonous gas the Department currently designates rather than any question of the Department's capacity to deploy it. But such capacity is by no means apparent.
[12] *State v. Gee Jon*, 211 P. 676 (Nev. 1923).

cell block potentially could have been killed . . . a special enclosure had to be built."[13] Thus was born the prototypical gas chamber for penological use, a precursor to large-scale chambers to deploy cyanide gas for genocidal use.[14] In the years between Nevada's innovation and Nazi Germany's massive scaling of the technology, Arizona supplanted hanging with lethal gas by a 1933 plebiscite amending the constitution, which the state supreme court promptly upheld.[15] States carried out nearly 600 cyanide gas executions in the decades following Nevada's legislation and before *Furman v. Georgia*[16] struck down all capital statutes.[17]

Upon reestablishment of capital punishment after *Gregg v. Georgia*[18] only 11 lethal gas executions have occurred in the United States,[19] all of which used cyanide gas and the last of which was this Department's execution in 1999 of Walter LaGrand, entailing 18 minutes of violent asphyxiation.[20] As I am sure you are aware, Mr. LaGrand's was one of just two such executions the Department conducted post-*Gregg*; it also used hydrogen cyanide[21] to execute Donald Harding in 1992,[22] a death reported as "extremely violent," in which Mr. Harden's "body turn[ed] from red to purple," and credited with the constitutional amendment adopting lethal injection as the state's default method.[23]

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[13] Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Punishment Clause of the Eighth Amendment*, 74 Or. L. Rev. 995, 1004 (1995) (citing Michael V. DiSalle, *The Power of Life or Death* (1965), at 21).
[14] *See generally United Kingdom v. Tesch*, 1 L. Rep. Tr. War. Crim. 93 (1947) (finding supplier of Zyklon B cyanide gas to German concentration camps in violation of "the laws and usages of war").
[15] *Hernandez v. State*, 43 Ariz. 424, (1934) (rejecting challenge on ex post facto and cruel and unusual punishments grounds).
[16] 408 U.S. 238 (1972).
[17] *See generally* Scott Christianson, *The Last Gasp: The Rise and Fall of the American Gas Chamber* (2010).
[18] 428 U.S. 153 (1976).
[19] Since the post-*Gregg* resumption of executions, in Utah in 1977, there were only nine lethal gas executions conducted outside of Arizona: one in Nevada in 1979, four in Mississippi between 1983 and 1989, two in California in 1992 and 1993, and two in North Carolina in 1994 and 1998. *See* Death Penalty Information Center, Execution Database: deathpenaltyinfo.org.
[20] Patty Machelor, *LaGrand: 18 minutes to die*, Tucson Citizen, Mar. 4, 1999.
[21] *Supra* n.6.
[22] Charles Howe, *Arizona Killer Dies in Gas Chamber*, S.F. Chron., Apr. 7, 1992, at A2. *See Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 655–56 (1992) (Stevens, J., dissenting) (citation omitted). In dissent from per curiam order vacating stays of execution, Justice Stevens recapitulated eyewitness descriptions of Mr. Harding's cyanide gas execution, which took ten minutes and thirty-one seconds:

> When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes. [] At this point Don's body started convulsing violently. ... His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode. [] After about a minute Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched. [] After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth.... [] Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete.

[23] AP, *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, New York Times, Apr. 25, 1992, § 1, 9.

As noted above,[24] California conducted two cyanide gas executions in the modern era, in 1992 and 1993, precipitating constitutional challenges in federal court culminating in the Ninth Circuit's ruling in *Fierro v. Gomez*,[25] which held "the district court's factual findings regarding . . . the type and level of pain inflicted during execution by lethal gas under California's [cyanide] protocol, when combined with its finding that there exists a substantial risk that this pain will last for several minutes, dictate" that the protocol violated the Cruel and Unusual Punishments Clause.[26] The State of California petitioned for certiorari review, and during the petition's pendency, the California Legislature made lethal injection the primary method of execution.[27] Given the overhaul of the statute, the Supreme Court summarily granted, vacated, and remanded the case,[28] calling for further consideration in light of the legislation.[29] In the wake of the California litigation, a habeas corpus petitioner challenged Arizona's lethal gas statute—as apart from its protocol of cyanide gas.[30] The Ninth Circuit ruled *sua sponte* that that question was unripe under Article III ripeness doctrine, which serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[31]

Two years later, the aforementioned Walter LaGrand sought to challenge Arizona's lethal gas on the eve of his execution, having chosen that method in order to do so. During that litigation, Arizona conceded that its cyanide gas protocol was substantially similar to the California protocol held unconstitutional after trial in *Fierro*, and that a trial on its own gas protocol would produce a record identical to *Fierro*'s.[32] The Supreme Court, however, deemed the choice of gas as a waiver rather than the means by which a challenge of that method ripens.[33] Given these precedents, Mr. Atwood's present moment—under warrant and before Arizona's statute requires a choice of lethal gas—is precisely ripe for resolution of the constitutionality of cyanide gas.

In holding California's protocol unconstitutional in *Fierro* in 1996,[34] the Ninth Circuit found that the evidence of California's two cyanide gas executions established that the condemned endured conscious exposure to the poisonous gas "probably … anywhere from 15 seconds to one minute," with "a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes."[35] Of course, this degree of suffering from cyanide asphyxiation pales in comparison to Arizona's executions of Messrs. Harding and LaGrand,

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[24] *Supra* n.19.
[25] 77 F.3d 301, 308 (9th Cir. 1996).
[26] *Id.*
[27] Cal. Penal Code § 3604.
[28] *Gomez v. Fierro*, 519 U.S. 918 (1996).
[29] Nonetheless, by the time of *Fierro*, it had become "clear that [the use of cyanide gas] exacted 'exquisitely painful' sensations of 'anxiety, panic, [and] terror,' leading courts to declare it unconstitutional." *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (Sotomayor, J., dissenting from denial of certiorari in method of execution challenge) (quoting *Fierro*, 77 F.3d at 308).
[30] *Poland v. Stewart* ,117 F.3d 1094 (9th Cir. 1997).
[31] *Id.* at 1104 (quoting *Clinton v. Acequia, Inc.* 94 F.3d 568, 572 (9th Cir. 1996).
[32] *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999).
[33] *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).
[34] 77 F.3d at 308.
[35] *Fierro*, 77 F.3d at 308 (quoting *Fierro v. Gomez*, 865 F. Supp. 1387, 1389 (N.D. Cal. 1994)).

wherein the men agonized, largely conscious, for over 10 and 18 minutes, respectively, before succumbing.[36]

But lethal gas itself does not require the use of a chemical agent banned under the multilateral Chemical Weapons Convention.[37] Scientific, medical, and industrial hygiene research have long established that various inert or noble gases can be used in a constitutional execution.[38] Oklahoma, Alabama, and Mississippi have recognized this in the context of their own profound difficulties with lethal injection executions and thus in recent years have incorporated nitrogen hypoxia into their methods statutes.[39] At bottom, lethal gas per se is not an unconstitutional method, but the use of a radically noxious poison, especially one integral to the Nazi Holocaust, plainly is.

In closing, it is surreal that, in 2022, Mr. Atwood must make the case that cyanide gas is odious and unlawful. That Mr. Atwood must seek the refuge of a gas chamber prepared to extinguish his life with a *benign* gas such as nitrogen should also seem absurd. But it is a vitally necessary method for him now and the only conceivable one available under Arizona law for the Department to carry out his sentence constitutionally. I implore you to address the unmistakable failings of the Department's current procedures immediately and to thereby remedy this grave constitutional violation and potential moral failing in the name of the people of Arizona.

Sincerely,

/s/ Joseph J. Perkovich
JOSEPH J. PERKOVICH

cc: Laura Chiasson, Esq. (laura.chiasson@azag.gov)
Sam Kooistra, Esq. (sam@azcapitalproject.org)
Amy P. Knight, Esq. (amy@amyknightlaw.com)
David A. Lane, Esq. (dlane@kln-law.com)

[36] *Supra* nn.20, 22.
[37] *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. 22 U.S.C.A. § 6701 (12)(C) (Schedule 3 chemical agents, including hydrogen cyanide).
[38] Lubomir Straka, et al., *Sucidal Nitrogen Inhalation by Use of Scuba Full-Face Diving Mask*, 58 J. Forensic Sc. 1, 3 (2013); J. Ernsting, *The Effect of Brief Profound Hypoxia upon the Arterial and Venous Oxygen Tensions in Man*, J. Physiol. 169, Air Force Inst. Of Av. Med. 1-23 (1963) 292-311.
[39] *Supra* n.7.

Gmail

Sam Kooistra <sam@azcapitalproject.org>

Frank Atwood: Jun. 8, 2022, execution

Sparks, Jeffrey <Jeffrey.Sparks@azag.gov> Mon, May 16, 2022 at 3:51 PM
To: Joe Perkovich <j.perkovich@phillipsblack.org>, Brad Keogh <bkeogh@azadc.gov>
Cc: "Chiasson, Laura" <Laura.Chiasson@azag.gov>, Sam Koistra <sam@azcapitalproject.org>, Amy Knight <amy@amyknightlaw.com>, David Lane <dlane@kln-law.com>

Mr. Perkovich,

We are in receipt of you letter of May 14 demanding that ADCRR implement a nitrogen lethal gas method. We disagree 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.

Thank you,

Jeff Sparks

Chief Counsel

Capital Litigation Section

Office of the Attorney General

Solicitor General's Office

Capital Litigation Section

2005 N. Central Ave.

Phoenix, AZ 85004

(602) 542-4686

Jeffrey.Sparks@azag.gov

[Quoted text hidden]

PHILLIPS BLACK, INC.
a nonprofit, public interest law practice

JOSEPH J. PERKOVICH
PO Box 4544
New York, New York 10163

j.perkovich@phillipsblack.org
212 400 1660 (tel)
973 221 9509 (fax)

Principal Attorneys:
Jennifer Merrigan†
John R. Mills‡
Joseph J. Perkovich⸸
Jessica Sutton^

May 18, 2022

VIA E-MAIL (Jeffrey.Sparks@azag.gov)
Jeffrey L. Sparks
Office of the Attorney General
Capital Litigation Section
2005 N. Central Avenue
Phoenix, AZ 85004

Re: Frank J. Atwood, June 8, 2022, execution date

Mr. Sparks:

I write in relation to Mr. Atwood's right to choose a lethal gas execution method under A.R.S. § 13-757(B), a choice that he is entitled to make through May 19, 2022, in relation to the June 8, 2022, execution date under his warrant entered May 3, 2022. *State v. Atwood*, CR-87-0135-AP.

Under Article 22, Section 22 of the Arizona Constitution and A.R.S. § 13-757(B), Mr. Atwood is entitled to a choice of lethal gas that does not violate the Eighth Amendment to the United States Constitution or Article 2, Section 15 of the Arizona Constitution.

As my correspondence to you and Mr. Keogh of May 14, 2022, reflects, the Department of Corrections, Rehabilitation and Reentry (the "Department")'s specification of cyanide gas under its Execution Procedures (DO 710) renders the State's lethal gas option unconstitutional.[1] Further, there is no impediment to the Department implementing a constitutional lethal gas method instead. The Department's failure to provide a constitutional gas method thus violates Mr. Atwood's rights under the Arizona and United States Constitutions and A.R.S. § 13-757(B). That right is especially important for Mr. Atwood because as explained in my May 14 letter (*supra*), the State's lethal injection method violates the Eighth Amendment as applied to Mr. Atwood. He therefore has extraordinary reasons to exercise his right to choose a constitutional lethal gas execution, as this choice permits self-help to overcome the State's Eighth Amendment violation by its lethal injection method.

[1] That demand letter follows Mr. Atwood's individual submission of a grievance against the Department's designation of cyanide gas submitted on May 1, 2022, and which the Department disposed of as "unprocessed," both initially and on appeal on May 5, 2022.

† Admitted in Missouri and Pennsylvania
‡ Admitted in Arizona, California, and North Carolina
⸸ Admitted in New York
^ Admitted in Massachusetts and Missouri

As you know, A.R.S. § 13-757(B) requires the inmate to choose his method 20 days prior to his execution, and further provides that if he fails to choose, the State will use lethal injection.[2] That provision cannot apply where the State has not offered lawful choices. Mr. Atwood is not hereby choosing cyanide gas as his method of execution. But Mr. Atwood respectfully demands that the State immediately designate a constitutional lethal gas method under the Department's Execution Procedures so he may have his right to choose a lethal gas method restored before the State violates § 13-757(B) upon the lapsing of the 20-day choice period ending 12:01 a.m., May 20. While the State is on the precipice of violating its obligation to provide a constitutional choice within the time period contemplated by the statute, the Arizona Constitution ensures Mr. Atwood's right to choose between the injection and gas methods. 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.

Finally, it has come to our attention that both the Complex Warden and the Deputy Warden have approached Mr. Atwood in Browning Unit and exhorted him to elect one of the existing methods of execution, notwithstanding the unavailability of a legally valid choice. Mr. Atwood is represented by counsel, and the Department's staff must not communicate with him about his legal choices without counsel present. Please advise Department personnel that, on behalf of Mr. Atwood's legal team, I may be reached in relation to any future questions or matters of that nature.

Sincerely,

/s/ Joseph J. Perkovich
JOSEPH J. PERKOVICH

cc: Brad Keogh, Esq. (bkeogh@azadc.gov)
Laura Chiasson, Esq. (laura.chiasson@azag.gov)
Sam Kooistra, Esq. (sam@azcapitalproject.org)
Amy P. Knight, Esq. (amy@amyknightlaw.com)
David A. Lane, Esq. (dlane@kln-law.com)

[2] The Department's Execution Procedures purport to curtail this statutorily dictated choice period by one day, requiring the condemned to choose 21 days prior to the execution. The Department does not have the power to override the statutory provision. Accordingly, Mr. Atwood is statutorily entitled to a lawful choice of method until May 19, and it remains the State's obligation to remedy its deprivation of his choice before that statutory period lapses. Beyond May 19, Mr. Atwood's state constitutional entitlement to lawful choices between injection and gas persists, as do his federal constitutional rights attendant to that right.

Gmail

Sam Kooistra <sam@azcapitalproject.org>

Frank Atwood: Jun. 8, 2022 execution date: choice of method

Sparks, Jeffrey <Jeffrey.Sparks@azag.gov> Thu, May 19, 2022 at 8:26 AM
To: Joe Perkovich <j.perkovich@phillipsblack.org>
Cc: Brad Keogh <bkeogh@azadc.gov>, "Chiasson, Laura" <Laura.Chiasson@azag.gov>, Amy Knight <amy@amyknightlaw.com>, Sam Koistra <sam@azcapitalproject.org>, David Lane <dlane@kln-law.com>

Mr. Perkovich,

As I stated previously, ADCRR will not be making any changes to its current lethal gas procedures.

Thank you,

Jeff

Jeff Sparks

Chief Counsel

Capital Litigation Section

Office of the Attorney General

Solicitor General's Office

Capital Litigation Section

2005 N. Central Ave.

Phoenix, AZ 85004

(602) 542-4686

Jeffrey.Sparks@azag.gov

[Quoted text hidden]

JOSEPH J. PERKOVICH, ESQ.
NY Bar No. 4481776
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
Tel: (212) 400-1660
j.perkovich@phillipsblack.org

AMY P. KNIGHT, ESQ.
AZ Bar No. 031374
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

DAVID A. LANE, ESQ. (*pro hac vice*)
CO Bar No. 16422
REID ALLISON, ESQ. (*pro hac vice*)
CO Bar No. 52754
Killmer, Lane & Newman, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
Tel: (303) 571-1000
dlane@kln-law.com
rallison@kln-law.com
Attorneys for Frank Jarvis Atwood

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Frank Jarvis Atwood, Plaintiff, v. David Shinn, Director, Arizona Department of Corrections, Rehabilitation	No. CV-22-00860-PHX-MTL (JZB) **RESPONSE TO ORDER TO SHOW CAUSE**

& 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,

Defendants.

EXECUTION WARRANT ISSUED FOR JUNE 8, 2022, 10:00 A.M.

On June 2, this Court ordered Plaintiff "to show cause why Counts VI and VII should not be dismissed for lack of standing." (Doc. 31). This Court should find that Plaintiff *does* have standing because otherwise, no plaintiff will ever be able to challenge the State's outrageous choice of a torturous gas option when a painless option is available, as if he were to affirmatively choose that unconstitutional gas method in order to challenge it, he would be denied standing by virtue of the fact that he had selected it. If this Court nonetheless finds Mr. Atwood has no standing, it should enter judgment immediately pursuant to Federal Rule of Civil Procedure 54(b) so that Mr. Atwood may seek review of this issue before his June 8th execution date arrives.

A. Mr. Atwood Must Have Standing Because Otherwise, Arizona's Choice of Hydrogen Cyanide Is Completely Immune From Challenge.

This Court stated in its Order, citing general standing law, that "Based on the operation of § 13-757, it is unclear how a decision on the constitutionality would redress an impending injury." (Doc. 31 at 3). Understanding of this issue requires context, and the Ninth Circuit has already considered closely related problems.

In *Poland v. Stewart,* 117 F.3d 1094 (9th Cir. 1997), Michael Poland, like Mr. Atwood, was entitled to a choice between lethal gas and lethal injection, but Poland's

claim was presented as part of his habeas corpus petition, before he was set for execution and asked to make such a choice. The Court explained that unless he actually chose lethal gas, the claim was not ripe because he did "not currently face any risk of execution by lethal gas and will face no hardship or immediate or certain danger if we do not review his Eighth Amendment lethal gas claim at this time." *Id.* at 1104.[1] The Court relied on its decision in *Poland* when it told the same thing to brothers Karl and Walter LaGrand. *LaGrand v. Stewart,* 133 F.3d 1253, 1263 (9th Cir. 1998).

Subsequently, Karl LaGrand *did* choose lethal gas, albeit with the recognition that the same method had been found unconstitutional in California. *LaGrand v. Stewart,* 173 F.3d 1144, 1149 (9th Cir. 1999). The Ninth Circuit recognized that because he had chosen gas, he could challenge it, and it was, in fact, unconstitutional, and consequently issued a stay of execution. *Id.* The Supreme Court, however, vacated that stay, and never took up the question raised by the State's petition for certiorari: "Does an inmate who chooses to be executed by lethal gas, rather than the available constitutional method of lethal injection, waive his right to complain that lethal gas is unconstitutional?" 525 U.S. 1173 (1999). Karl LaGrand underwent a horrific execution by hydrogen cyanide gas shortly thereafter.

As it stands, then, *Poland* suggests an inmate cannot challenge lethal gas as a method if he faces no risk of a lethal gas execution. Michael Poland, however, brought his challenge before the question of method had been put to him at all. Mr. Atwood, in contrast, was asked to choose, and prior to the date by which he would have had to elect gas, his counsel twice contacted counsel for the Department and the Attorney General's Office, demanding to be offered a gas option that was not unconstitutional, such as nitrogen, and explaining that in the absence of a constitutionally viable option for lethal

[1] Poland was subsequently executed by lethal injection.

gas, his decision not to elect hydrogen cyanide could not be construed as a failure to choose pursuant to A.R.S. § 13-757, which would have triggered the automatic use of lethal injection. (Amended Complaint Exhibits 32, 34). Thus, unlike Poland, he *is* facing an imminent execution and *has* expressed a desire to choose gas—just not the torturous one Arizona has designated. Accordingly, *Poland* does not foreclose standing for Mr. Atwood.

Additionally, the Court must be clear on the specific legal claims being asserted here. Claim VII is a claim that execution by hydrogen cyanide lethal gas would violate the Eighth Amendment, which appears to be the claim the Court had in mind in issuing its order. But Claim VI asserts a different injury, and one that occurs not through the eventual use of hydrogen cyanide (which this Court rightly recognizes is unlikely to occur), but through the State's failure to offer Mr. Atwood the choice it is required to offer him—thus depriving him of a liberty interest in that choice without due process of law, under the Fourteenth Amendment. That injury began occurring as soon as the window for making the choice allowed by statute (A.R.S. § 13-757) closed without Mr. Atwood being offered a valid choice, and continues at present and will continue until he is either executed without ever being given a valid choice, or the choice is offered. It cannot be said that the violation is unlikely to occur when it is already underway.

Of course, the constitutionality of hydrogen cyanide gas as an execution method is relevant to this due process claim, because it is that method's unconstitutionality that renders the purported choice Mr. Atwood has been offered a false one that does not satisfy Arizona's duties under its own Constitution and statute. Thus, even if this Court determines that Mr. Atwood has no standing per se to assert Claim VII, that issue still must be determined in order to resolve Claim VI.

B. If this Court determines that Mr. Atwood does not have standing, it should find that there is no just reason for delay and immediately enter final

judgment on Claims VI and VII pursuant to Federal Rule of Civil Procedure 54(b).

Federal Rule of Civil Procedure 54(b) provides in relevant part:

> When an action presents more than one claim for relief ... or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

This rule "was adopted 'specifically to avoid the possible injustice of delay[ing] judgment o[n] a distinctly separate claim [pending] adjudication of the entire case.... The Rule thus aimed to augment, not diminish, appeal opportunity.'" *Jewel v. National Security Agency*, 810 F.3d 622, 628 (9th Cir. 2015) (quoting *Gelboim v. Bank of Am. Corp.,* 574 U.S. 405, 408 (2015).

In making the certification determination, courts consider judicial administrative interests, namely "whether the certified order is sufficiently divisible from the other claims such that the 'case would [not] inevitably come back to [the Court of Appeals] on the same set of facts.'" *Id.* (quoting *Wood v. GCC Bend, LLC,* 422 F.3d 873, 879 (9th Cir. 2005). This inquiry "does not require the issues raised on appeal to be completely distinct from the rest of the action." *Id.*; *see also Wood,* 422 F.3d at 881 ("We do not mean to suggest that claims with overlapping facts are foreclosed from being separate for purposes of Rule 54(b). Certainly they are not. Both the Supreme Court and our court have upheld certification on one or more claims despite the presence of facts that overlap remaining claims when, for example. . . the case is complex and there is an important or

controlling legal issue that cuts across (and cuts out or at least curtails) a number of claims.").

Claims Six and Seven (the "gas claims") are separable from those that remain, and the issues are such that no appellate court will have to decide the same issues more than once if the appeal of these two claims is allowed to proceed now. Specifically, there is no standing dispute at all on the lethal injection-related claims, and the only basis for a dismissal of Claims 6 and 7 at this time would be standing, which can be decided on a very limited set of largely undisputed facts. The question of how to reconcile *Poland* and *Fierro,* in terms of how a lethal gas method could ever be challenged in Arizona, shares no common questions or facts with questions of how Mr. Atwood may be positioned during a lethal injection execution, the suitability of lethal injection drugs, the qualifications of the lethal injection team, or Mr. Atwood's access to counsel. Although the merits of the gas claims may have some overlap with the lethal injection claims, in that both involve an 8th Amendment analysis and the availability of each method may bear on the analysis of the other, the question of *standing* for the gas claims is entirely separate from the lethal injection claims. Accordingly, there is no risk of repeated litigation, nor of the appeal mooting the rest of the litigation or vice versa. Accordingly, judicial administrative interests do not counsel waiting for judgment on the other claims before proceeding with an appeal of the standing decision.

Courts also consider "the equities involved." *Curtiss-Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 8 (1980) (considering parties' financial interests in proceeding with

immediate appeal). Here, tere is no just reason for delay. Indeed, delay would be manifestly *unjust*, given the short timeline remaining before the execution in question must occur and the enormous stakes. The question of standing here is clearly one for the Court of Appeals, which has in the past issued two decisions in this area that are difficult to reconcile, in cases involving similar gas claims that were not filed alongside lethal injection claims. Certifying it as a final judgment now will permit the Court of Appeals to begin the process of making that determination while the complex factual issues underlying the lethal injection claims proceed in this Court, and if the Court of Appeals finds Mr. Atwood *does* have standing, it will permit those claims to resume in this Court. Refusing to certify the dismissal of these claims and enter final judgment would lead either to an execution while the question of whether Arizona's choice of method violated Mr. Atwood's constitutional rights is not fully resolved, or to an even greater time crunch on this obviously difficult legal issue than already exists. *Cf. Alfaro v. Johnson,* 862 F.3d 1176, 1179 (9th Cir. 2017) (resolving appeal of single claim from still-pending capital habeas petition on which district court had entered judgment under Rule 54(b)). Moreover, proceeding to resolve the standing issue now would not prejudice the State, who presumably also has an interest in final resolution of the issues as expeditiously as possible.

Accordingly, if this Court finds Mr. Atwood has no standing for Claims VI and VII, it should rule that there is no just reason for delay, and immediately enter final judgment under Rule 54(b). *Cf. Krause v. Yavapai County,* 2020 WL 4530467 (D. Ariz.

Aug. 6, 2020) (entering judgment under Rule 54(b) in favor of one of multiple defendants in § 1983 action after finding that defendant immune from suit, noting "even if the Court of Appeals were to take other appeals in this action, it would not have to decide absolute immunity more than once.").

DATED: June 3, 2022

Respectfully submitted,

/s *Joseph J. Perkovich*

Joseph J. Perkovich
Amy P. Knight
David Lane
Reid Allison

Attorneys for Frank Atwood