

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,
Petitioner,

v.

JOSH TEWALT, ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPLICATION FOR STAY OF EXECUTION

Directed to the Honorable Elena Kagan
as Circuit Justice for the Ninth Circuit

THIS IS A CAPITAL CASE WITH AN EXECUTION
SCHEDULED FOR FEBRUARY 28, 2024

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Thomas E. Creech respectfully requests a stay of execution while his petition for certiorari is pending pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f).

BACKGROUND

The Idaho Department of Correction (IDOC) intends to execute Thomas E. Creech at 10:00 a.m. on February 28, 2024. It intends to do so in the face of unprecedented secrecy regarding his execution, a secrecy unmatched by any other state in the United States and one usually reserved for third world countries. It has named a single drug, of highly doubtful provenance, backed by a single piece of paper, which in itself has no indicia of reliability and has not been subject to adversarial testing. It revealed this selection in late November of 2023.

In this short window of time, despite near herculean efforts, Mr. Creech has not been permitted discovery or any meaningful due process by which to challenge how the state intends to execute him. Instead of thoughtful consideration and despite a motion for a preliminary injunction being filed on February 6, 2024, *see* Dist. Ct. Dkt. 123, denial of the motion for a preliminary injunction came at the eleventh hour on Friday, February 23, 2024, *see* App. 007-029, and the appeal process in the Ninth

Circuit afforded him mere hours from the filing of the letter brief supporting the appeal to the denial of the petition for rehearing en banc.¹

A STAY OF EXECUTION IS WARRANTED

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” See *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In deciding the present application, the Court must apply four factors: 1) whether Mr. Creech “has made a strong showing that he is likely to succeed on the merits” of any of his claims; 2) whether he “will be irreparably injured absent a stay”; 3) whether a “stay will substantially injure” the State; and 4) “where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).² As set forth below, all four factors are satisfied.

I. Mr. Creech is likely to succeed on the merits.

To begin, Mr. Creech has made a strong showing that he is likely to succeed on the merits, i.e., there is “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari” and there is “a significant possibility of reversal of the lower court’s decision.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

First, certiorari review is reasonably probable because Mr. Creech has identified a substantial need for guidance from the Court on issues of great national

¹ The panel ordered that Mr. Creech’s motion for preliminary injunction be submitted as the opening brief, and that Mr. Creech could file a letter brief addressing the District Court’s ruling. See App.183.

² Unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

importance, and he has brought a strong vehicle for it to do so. As elaborated on in more detail in his certiorari petition, Mr. Creech is asking the Court to provide clarity on the question of whether unprecedented state secrecy can offend due process by creating such an “impenetrable roadblock[]” so as to eviscerate an inmate’s ability to have an Eighth Amendment claim heard at a meaningful time and a meaningful manner. *See Lopez v. Brewer*, 680 F.3d 1068, 1082 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part).

The State relies on the secrecy statute it enacted in 2022, Idaho Code § 19-2716A(4), a state statute which shields the identity of the compounder, manufacturer, or supplier of lethal injection chemicals, as grounds to refuse to provide any more information. It also – in discovery in an entirely separate legal challenge in an unrelated case – revealed that it intended to execute Mr. Creech by means of manufactured pentobarbital. In this separate unrelated case, it also provided discovery consisting of a single page “certificate of analysis,” generated at the request of and paid for by the State. This document, uncertified and unattested to by any identifiable source, had all possible identifying information redacted, including the name of the testing lab, and any licensing or regulatory numbers. App. 044-045.

The limited information this certificate ostensibly provided raises far more questions than it answered. And each and every single one of these questions remain unanswered by the State, even though Mr. Creech presented a declaration from an expert in his request for a preliminary injunction before the District Court indicating that the answers to such questions are of profound importance to the reliability and

quality of the drugs, *see* App. 177. The State's obstruction to obtaining these answers violates Mr. Creech's procedural due process rights.

The Ninth Circuit has missed the mark on Mr. Creech's due process claim. App. 004. His claim is not that the State didn't disclose its plans to use pentobarbital, or that his success must rise or fall on whether he knows the identity of the drug's source. His claim is that the State's refusal to provide any additional information, including any information by which he or his experts could evaluate the reliability or quality of that pentobarbital, entirely eviscerates his ability to have his method of execution challenge heard at a meaningful time and in a meaningful manner. The devil is in the details, and the details about what the State has procured – the actual, physical drug – are of critical importance. Indeed, the Ninth Circuit below did not even adhere to their own case law regarding due process claims of this nature. *Id.*; *see also infra* Part II. The panel consequently did not decide when and how a due process right to accurate details about an execution might exist, and what the boundaries of that right are.

Additionally, and putting aside the many extant questions regarding the pentobarbital's provenance and quality, the fact that the State claims it to be *manufactured* as opposed to compounded raises additional concerns that likewise have gone unanswered. There is a significant and unanswered possibility, raised by Mr. Creech in litigation below, that the State obtained the drug via Akorn, a pharmaceutical company that went out of business in February 2023 and as Mr. Creech put forward in his motion for preliminary injunction in the District Court,

there are now substantial questions regarding any drugs manufactured by Akorn. *See App.* 172-174. The panel mentions the possibility that the State obtained drugs via Akorn, *id.* at 003, but then tosses it to the side. Given the likelihood that this allegation is true – despite being given the opportunity to do so, the State did not deny it in preliminary injunction litigation in the district court – the panel should have at least attempted to grapple with it.

The fact remains that, despite the Ninth Circuit’s apparent conclusion that simply knowing the name of the drug is enough to satisfy due process, *id.* at 003-04, the State of Idaho has erected incredible barricades to Mr. Creech knowing how and with precisely what it intends to kill him. Yet the State has refused to tear down any of these barriers to information – certainly not in the time Mr. Creech has left before being executed. The State’s implacable secrecy and the Ninth Circuit’s rushed consideration of Mr. Creech’s significant claims have thus erected an “impenetrable roadblock[]” to Mr. Creech being heard at a meaningful time and in a meaningful manner. *See Brewer*, 680 F.3d at 1082 (Berzon, J., concurring in part and dissenting in part).

Additionally, as discussed in more detail in his petition for certiorari, Mr. Creech is also asking this Court to provide guidance to the circuit courts regarding the amount of process that is due to a petitioner moving through appellate review as his execution date nears. While Mr. Creech understands that the circuit courts are concerned with the expediency of death row appeals in such a situation, he maintains that the Due Process Clause still applies. The Ninth Circuit’s handling of his case in

the rushed manner that it did deprived Mr. Creech of the opportunity to be heard in a meaningful way.

Barely more than two hours after Mr. Creech filed his notice of appeal from the district court's decision, the Ninth Circuit ordered the parties to file their district court briefing with the circuit court in lieu of appellate briefs. App. 183. Citing an "interest in expediency," the Ninth Circuit then allowed the parties the opportunity to submit letter briefs—provided those briefs were submitted in a mere six hours and twenty-three minutes from the entry of the order. *Id.* Less than twenty-four hours after Mr. Creech submitted his letter brief—and without the benefit of oral argument—the Ninth Circuit issued a per curiam opinion affirming the district court's denial of relief. App. 184, 001-006. Then, the Ninth Circuit demanded that Mr. Creech file any request for rehearing—panel or en banc—within a mere fourteen hours and twenty-one minutes, beginning at 8:39 p.m. local time for Mr. Creech's legal team. App. 184. After just two and a half hours—and without waiting for a response from the State, although its deadline was not for another three hours—the Ninth Circuit informed Mr. Creech that no judge had requested a vote on his overnight request for rehearing by the internal deadline the court had set for itself. App. 030. All of this "expediency," and yet the execution date was still three days away.

The Ninth Circuit's rush to judgment—without briefing, argument, or adequate consideration of the important constitutional issues at stake—is the antithesis of due process of law. This truncated appellate review deprived Mr. Creech

of his right to be meaningfully heard and placed its own “impenetrable roadblock[]” in the path of petitioners like Mr. Creech seeking to vindicate their Eighth Amendment rights. *See Brewer*, 680 F.3d at 1082 (Berzon, J., concurring in part and dissenting in part).

It is an opportune time for this Court to consider the issues that Mr. Creech presents in his Petition for Certiorari. And Mr. Creech’s petition provides the ideal chance for the Court to do so.

At a bare minimum, Mr. Creech’s claims are surely “plausib[le],” and that should be enough to satisfy this factor for purposes of a stay of execution. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O’Connor, J., in chambers).

II. The balance of harms weighs in Mr. Creech’s favor.

The second and third factors – whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—also weigh in Mr. Creech’s favor.

Irreparable harm will occur to Mr. Creech if his execution is not stayed until the petition for writ of certiorari is considered. If this Court does not stay Mr. Creech’s execution, he will be executed without the opportunity to fully litigate his meritorious writ of certiorari. That is an “irremediable” harm because an “execution is the most irremediable and unfathomable of penalties.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury “is necessarily present in capital cases”); *Evans v. Bennett*, 440 U.S.

1301, 1306 (1979) (Rehnquist, Circuit Justice) (granting a stay of execution and noting the “obviously irreversible nature of the death penalty”). This Court has granted stays to prevent far less severe consequences. *See, e.g., Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (issuing a stay to stop a court from broadcasting a trial, as it would have chilled testimony).

Allowing the government to execute Mr. Creech while his petition is pending also risks “effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (Burger, C.J., in chambers). Because “the normal course of appellate review might otherwise cause the case to become moot,’ . . . issuance of a stay is warranted.” *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants “stays as a matter of course”).

With respect to the harm Mr. Creech’s opponent would suffer, this Court should take the eminently reasonable approach it took recently in *Glossip v. Oklahoma*, No. 22A941, May 5, 2023. There is no tangible harm to the State. A simple delay to accurately determine the merits of this writ of certiorari ensures constitutional compliance. The State cannot claim harm for having to follow the law. *See, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (noting that “contrary to the State’s contention that its interest in executing [petitioner] outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the

State ... or its citizens from postponing petitioner’s execution to determine whether that execution would violate the Eighth Amendment.”).

Moreover, although the State has a recognized interest in the enforcement of criminal judgments, it “also has an interest in its punishments being carried out in accordance with the Constitution of the United States.” *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990). Yet the State has unclean hands here: it has hidden the very method by which it intends to execute Mr. Creech until the eleventh hour. Its interest in enforcing its criminal judgments therefore must be made subordinate to its interest in conforming its conduct to the Constitution. In other words, a stay to prevent a potentially unconstitutional execution is a fortiori warranted.

The irreparable harm that denying a stay would cause Mr. Creech also far outweighs the harm that granting a stay would cause the State. To be sure, the State and the victims have an interest in carrying out timely executions. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). But a delayed execution is a temporary harm that is ultimately redressable; a premature execution is permanent and irreparable. *In re Holladay*, 331 F.3d at 1177 (considering the “irreparability of the injury” of a premature execution to be “self-evident”).

III. The public has an interest in Mr. Creech’s claim being heard, and Mr. Creech did not delay in bringing it.

Turning to the final factor, the public has an interest in Mr. Creech’s claim being heard. Indeed, the public interest is always served when the Constitution is vindicated. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) (“[I]t is always in

the public interest to prevent the violation of a party's constitutional rights."); *Ray v. Comm'r, Ala. Dep't of Corrs.*, 915 F.3d 689, 701 (11th Cir. 2019) ("[T]he public has a serious interest in the proper application and enforcement of the Establishment Clause"); *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). And this case involves serious constitutional violations. The State has scheduled Mr. Creech for execution despite his having a right to bring a method-of execution challenge but having no way to vindicate it and no forum in which to do so. It is therefore in the public's interest to ensure the State comply with the Constitutional protections afforded to Mr. Creech.

Additionally, although the public does have an interest in finality, that interest here is substantially diminished by the fact that Mr. Creech is not responsible for a significant amount of the delay that has occurred in carrying out his death sentence. The reason that he has not yet been executed is that he has had challenges pending in court to his conviction and death sentence for the last forty-plus years. One large chunk of time is attributable to the fact that Mr. Creech was resentenced to death twelve years after his initial punishment was imposed as a result of his constitutional rights being violated at the initial proceeding, which no court corrected until the Ninth Circuit intervened after extensive litigation. *See Creech v. Arave*, 947 F.2d 873, 881–85 (9th Cir. 1991), *rev'd in part*, 507 U.S. 463 (1993). Years more were tacked onto the case by virtue of this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), a decision that "represent[ed] a remarkable sea change in decades-old precedent-law which lower courts and litigants understood as settled." *Haynes v. Thaler*, 489 F.

App’x 770, 776 (5th Cir. 2012) (Dennis, J., dissenting), *vacated on unrelated grounds*, 569 U.S. 1015 (2013)). *Martinez* compelled a remand, substantial additional proceedings at the Ninth Circuit, replacement briefs on appeal, a new oral argument, and a lengthy opinion—all of which took about eleven years to accomplish. *See generally Creech v. Richardson*, 59 F.4th 372, 380–82 (9th Cir.), *cert. denied*, 144 S. Ct. 291 (2023).

Throughout all of the above, the parties and the courts both required a substantial amount of time to ensure the issues received the appropriate level of care and scrutiny. All of these delays flow from the premise that courts are “particularly sensitive to insure that every safeguard is observed” in cases where “a defendant’s life is at stake.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.). They certainly do not speak to any delay by Mr. Creech in bringing the claim at bar now.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Creech respectfully requests that this Court grant this application and stay his execution pending a decision on his certiorari petition.

Respectfully submitted this 26th day of February 2024.



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