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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Robert Towery, Robert Moormann,
Pete Rovogich, Thomas Kemp, Samuel
Lopez, Milo Stanley, Daniel Cook, and
Richard Stokley,

Plaintiffs,

v.

Janice K. Brewer, Governor of Arizona;
Charles L. Ryan, Director, Arizona
Department of Corrections; Ron Credio,
Warden, Arizona Department of
Corrections - Eyman; Lance Hetmer
Warden, Arizona Department of
Corrections - Florence; IV Team Leader;
IV Team Members 1-5; Special
Operations Team Leader; Special
Operations Team Recorder; Special
Operations Team Members 1-5; and
Does 1-25,

Defendants.

Case No. 2:12-cv-00245-NVW

DEATH PENALTY CASE

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

Plaintiffs, by undersigned counsel, allege as follows:

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Nature of the Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations by the Arizona Department of Corrections (“ADC”) of Plaintiffs’ right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and for violations and threatened violations of Plaintiffs’ rights to due process, to access to courts, and to equal protection under the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

2. This Complaint does not challenge Plaintiffs’ underlying capital conviction or sentences of death, nor does it allege that lethal injection as a form of execution is *per se* unconstitutional. Rather, Plaintiffs challenge only the manner and means by which ADC intends to execute condemned inmates by lethal injection under its protocol dated January 25, 2012.

3. Plaintiffs seek equitable, injunctive, and declaratory relief.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violations), § 2201 (declaratory relief), and § 2202 (injunctive relief).

5. Venue is proper in this district under 28 U.S.C. § 1391(b) because all Plaintiffs are currently incarcerated in Arizona State Prison Complex-Eyman, located within this District. All executions performed by Defendants are carried out in Central Unit at Arizona State Prison Complex-Florence, also located within this District. The wrongful acts giving rise to this Complaint have occurred and/or will occur in this District.

The Parties

6. Plaintiffs are United States citizens and residents of the State of Arizona. They are currently death-sentenced prisoners under the supervision of ADC. They are incarcerated at ASPC-Eyman, Browning Unit, in Florence, Arizona.

7. Plaintiff Daniel Cook is a United States citizen and a resident of the State of Arizona. He is currently a death-row prisoner under the supervision of ADC. He is

1 incarcerated at ASPC-Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona,
2 85232. Mr. Cook was sentenced to death on August 8, 1988, and therefore may choose
3 under Arizona Revised Statutes Section 13-757(B), whether to be executed by lethal injection
4 or lethal gas. If he does not make a selection, Mr. Cook will be executed by lethal injection.

5 8. Plaintiff Richard Stokley is a United States citizen and a resident of the State
6 of Arizona. He is currently a death-row prisoner under the supervision of ADC. He is
7 incarcerated at ASPC-Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona,
8 85232. Mr. Stokley was sentenced to death on July 14, 1992, and therefore may choose under
9 Arizona Revised Statutes Section 13-757(B), whether to be executed by lethal injection or
10 lethal gas. If he does not make a selection, Mr. Stokley will be executed by lethal injection.

11 9. Defendant Janice K. Brewer is the Governor of the State of Arizona and is
12 being sued in her official capacity for equitable relief.

13 10. Defendant Charles Ryan is the Director of ADC and is being sued in his
14 official capacity for equitable relief.

15 11. Defendant Ron Credio is the Warden of Arizona State Prison Complex-Eyman,
16 where death-row prisoners are housed, and is being sued in his official capacity for equitable
17 relief.

18 12. Defendant Lance Hetmer is the Warden of Arizona State Prison Complex-
19 Florence, where ADC performs all Arizona executions, and is being sued in his official
20 capacity for equitable relief.

21 13. Defendant IV Team Leader is the person assigned the role of IV Team Leader,
22 as defined in Arizona Department of Corrections Order 710 and Attachment D, and is being
23 sued in his or her official capacity for equitable relief.

24 14. Defendants IV Team Members 1-5 are the persons assigned the role of IV
25 Team member, as defined in Arizona Department of Corrections Order 710 and Attachment
26 D, and are each being sued individually in his or her official capacity for equitable relief.

27 15. Defendant Special Operations Team Leader is the person assigned the role of
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1 Special Operations Team Leader, as defined in Arizona Department of Corrections Order
2 710 and Attachment D, and is being sued in his or her official capacity for equitable relief.

3 16. Defendant Special Operations Team Recorder is the person assigned the role
4 of Special Operations Team Recorder, as defined in Arizona Department of Corrections
5 Order 710 and Attachment D, and is being sued in his or her official capacity for equitable
6 relief.

7 17. Defendants Special Operations Team Members 1-5 are the persons assigned
8 the role of Special Operations Team members, as defined in Arizona Department of
9 Corrections Order 710 and Attachment D, and are each being sued individually in his or her
10 official capacity for equitable relief.

11 18. Defendants Does 1-25 are other unknown ADC officers, successors in office,
12 agents, contractors, and employees, along with those acting in concert with them, who have
13 or will participate in Plaintiffs' executions by virtue of their roles in designing,
14 implementing, and/or carrying out the lethal injection process. These Defendants will
15 participate in Plaintiffs' executions in various capacities, including in ordering, supplying,
16 distributing, transporting, storing, or mixing lethal injection drugs; or preparing,
17 implementing, or carrying out lethal injection itself. The identities of these Defendants either
18 have not yet been disclosed or have not been determined, but if and when Plaintiffs discover
19 their identities, Plaintiffs will amend this Complaint accordingly.

20 **Exhaustion of Administrative Remedies**

21 19. Exhaustion is not necessary under the Prison Litigation Reform Act ("PLRA"),
22 42 U.S.C. § 1997e, because this action does not challenge prison conditions, and because
23 there are no available administrative remedies capable of addressing the challenged
24 constitutional violations.

25 20. Attempting to exhaust available administrative remedies in an effort to resolve
26 this issue would be futile because the internal grievance process does not allow for
27 modification of the ADC lethal-injection protocol. Moreover, because the ADC Director has
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1 unfettered discretion to change the protocol at anytime—even after providing notice as to
2 certain aspects of the protocol—any attempt to grieve the protocol would be illusory.

3 **Relevant Facts**

4 21. Plaintiffs incorporate by reference each and every statement and allegation set
5 forth throughout this Complaint as if fully stated herein.

6 22. Plaintiffs are death row prisoners awaiting execution in Arizona. Under
7 Arizona law, a sentence of death shall be carried out by lethal injection under the supervision
8 of ADC. Ariz. Rev. Stat. § 13-757(A). But “a defendant sentenced to death for an offense
9 committed before November 23, 1992 shall choose either lethal injection or lethal gas at least
10 twenty days before the execution date. If the defendant fails to choose either lethal injection
11 or lethal gas, the penalty of death shall be inflicted by lethal injection.” Ariz. Rev. Stat. § 13-
12 757(B).

13 23. The statute does not specify the drugs, dosages, drug combinations, or manner
14 of intravenous line access to be used in the execution process. Nor does the statute set forth
15 requirements for the certification, training, or licensure required for those individuals who
16 participate in the execution process.

17 24. All of the details and methods involved in the execution process are to be
18 determined at the sole discretion of ADC. ADC promulgates a written protocol governing
19 execution procedures in Arizona. ADC Department Order 710 (“DO 710”) establishes
20 procedures for planning and carrying out executions. Attachment D to DO 710 governs the
21 preparation and administration of lethal drugs when carrying out an execution.

22 25. ADC has amended its written lethal-injection protocol seven times since
23 October 2007.

24 26. ADC’s current written lethal-injection protocol became effective on January
25 25, 2012 (hereinafter, the “January 2012 Protocol”).

26 27. The January 2012 Protocol allows for a condemned prisoner to be executed
27 using either a three-drug or a one-drug protocol.
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1 28. If a three-drug protocol is used, executions will occur via administration of a
2 sequence of three drugs—either sodium thiopental or pentobarbital, pancuronium bromide,
3 and potassium chloride.

4 29. Sodium thiopental is an ultra-fast-acting barbiturate. If properly administered,
5 the barbiturate anesthetizes the prisoner and permits the other drugs to be administered
6 without causing pain. *See Dickens v. Brewer*, 631 F.3d 1139, 1142 (9th Cir. 2011).

7 30. Pentobarbital, like sodium thiopental, is a barbiturate. The FDA package insert
8 classifies pentobarbital as a short-acting barbiturate, not an ultra-short acting barbiturate like
9 sodium thiopental. Developed in 1928, pentobarbital has never been considered as an agent
10 to induce anesthesia. Pentobarbital is also not clinically used to induce anesthesia.

11 31. The second drug, pancuronium bromide, is a paralytic. Administration of
12 pancuronium bromide renders individuals completely paralyzed—unable to move, speak, or
13 even breathe—yet the drug has no amnesic or analgesic properties. An individual who is
14 improperly anesthetized will slowly suffocate as a result of the paralytic while being unable
15 to communicate or otherwise indicate that he is awake, alert, and suffering. *See Dickens*, 631
16 F.3d at 1142.

17 32. The final drug, potassium chloride, causes cardiac arrest. *See Dickens*, 631
18 F.3d at 1142. If given to a conscious person, potassium chloride causes a severe burning
19 sensation and would result in severe pain.

20 33. When using a three-drug protocol, the purpose of the barbiturate is not to kill
21 the prisoner but to produce a deep and long-lasting anesthesia. The purpose of the
22 pancuronium bromide is to paralyze the muscles. The purpose of the potassium chloride is
23 to kill the prisoner by stopping the heart. *See Dickens*, 631 F.3d at 1142.

24 34. If a prisoner is not properly anesthetized before being given the second and
25 third drugs, he will suffocate and experience excruciating pain. *See Baze v. Rees*, 553 U.S.
26 35, 53 (2008) (“It is uncontested that, failing a proper dose of sodium thiopental that would
27 render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of
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1 suffocation from the administration of pancuronium bromide and pain from the injection of
2 potassium chloride.”); *see also Dickens*, 631 F.3d at 1142.

3 35. The use of a barbiturate-only protocol would eliminate the risk of substantial
4 pain that would occur if pancuronium bromide and potassium chloride were administered to
5 an improperly anesthetized prisoner.

6 36. The January 2012 Protocol contains significant departures from the previous
7 version, which the Ninth Circuit determined to be constitutional on its face. *See Dickens*,
8 631 F.3d at 1150.

9 37. The January 2012 Protocol provides the ADC Director with unfettered
10 discretion in determining the manner in which a prisoner will be executed.

11 38. The ADC Director can select wholly different manners of execution for
12 otherwise similarly situated inmates without offering any justification for the disparate
13 treatment or adhering to any established standards for making such a determination. The
14 determination is wholly arbitrary and lacks any guidelines, standards, or other rational bases
15 for choosing between different procedures.

16 39. The January 2012 Protocol also removes several of the safeguards that the
17 Supreme Court in *Baze* found necessary in assessing whether a lethal injection protocol
18 comports with the Eighth Amendment.

19 40. The January 2012 Protocol eliminates the prisoners ability to have attorney
20 visits after 9:00 p.m. on the day before a scheduled execution.

21 41. The January 2012 Protocol violates Plaintiffs’ rights under the First, Fifth,
22 Eighth and Fourteenth Amendments to the United States Constitution.

23 **A. In 2009, ADC Added Safeguards to its Lethal-Injection Protocol in**
24 **Response to Litigation**

25 42. In September 2007, several prisoners sentenced to death in Arizona brought
26 an action for injunctive relief under 42 U.S.C. § 1983 alleging that Arizona’s lethal-injection
27 procedures violated the Eighth Amendment to the United States Constitution. *Dickens v.*
28 *Brewer*, Case No. 2:07-cv-1770-NVW (D. Ariz.) (Compl., Sept. 14, 2007, ECF No. 1).

1 43. During the *Dickens* litigation, the defendants amended the ADC lethal-injection
2 protocol. *Dickens v. Brewer*, 2009 WL 1904294, at *1 (D. Ariz. July 1, 2009). After
3 discussions with the plaintiffs, the *Dickens* defendants agreed to make substantial changes
4 that were designed to add crucial safeguards to the process and with the goal of decreasing
5 the risk of harm to condemned prisoners.

6 44. The defendants agreed that ADC would conduct medical license and criminal
7 background checks on all medical team members prior to allowing them to participate in an
8 execution, upon the issuance of a warrant of execution, and annually. (*Dickens*, Joint Report,
9 ECF No. 131 (“Joint Report”) at 3:8-12, Ex. A § B ¶ 2; *see also Dickens*, 2009 WL 1904294,
10 at *16.

11 45. The defendants agreed that the members of the medical team would have “at
12 least one year of current and relevant professional experience in their assigned duties on the
13 Medical Team.” Joint Report at Ex. A § B ¶ 4; *see also Dickens*, 2009 WL 1904294, at *16.

14 46. The use of a qualified and competent medical team increases the likelihood that
15 medical aspects of the execution process will be performed correctly, including setting of
16 IVs, preparation of drugs, monitoring consciousness, and administering the full dose of drugs
17 into the prisoner’s circulatory system, thus decreasing the risk of pain and suffering.

18 47. The *Dickens* defendants agreed that ADC would “by default” administer lethal
19 drugs “through a peripheral intravenous line.” Joint Report at Ex. A § F ¶ 1; *see also*
20 *Dickens*, 2009 WL 1904294, at *16.

21 48. Based upon ADC’s representations that it would add the above-described
22 safeguards to its lethal-injection protocol, the district court granted summary judgment to
23 Defendants, finding that, “[a]s written, the Arizona Protocol does not subject inmates to a
24 substantial risk of serious harm and does not violate the Eighth Amendment.” *Dickens*, 2009
25 WL 1904294, at *25.

26 49. The Ninth Circuit upheld the district court’s judgment. *Dickens v. Brewer*, 631
27 F.3d 1139 (9th Cir. 2011).
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1 **B. The *West v. Brewer* Trial Revealed That ADC Has Not Followed the**
2 **Safeguards That It Adopted To Obtain a Favorable Outcome in *Dickens***

3 50. After ADC conducted four executions under the version of the written protocol
4 found constitutional in *Dickens*, the *Dickens* plaintiffs, along with Thomas West,¹ filed a
5 lawsuit based on the premise that ADC's failure to follow its protocol violated plaintiffs
6 constitutional rights. *See West v. Brewer*, Case No. 2:11-cv-01409-NVW (D. Ariz, filed July
7 16, 2011).

8 51. It is undisputed that Defendants did not conduct background and license checks
9 on the two medical team members who participated in the executions of Jeffrey Landrigan,
10 Eric King, Donald Beaty, Richard Bible, and Thomas West, and who were responsible for
11 inserting IV lines, preparing and mixing drugs, and monitoring the prisoner throughout the
12 execution.

13 52. It is undisputed that the two medical team members did not have one year of
14 current experience in placing central femoral or peripheral IV lines.

15 53. It is undisputed that in the last five executions, a central femoral line was
16 placed. In four executions, the central line was the primary line used to deliver the lethal
17 drugs.

18 54. It is undisputed that one of the medical team members had not placed an IV
19 line in fifteen years and that he had a criminal record.

20 55. It is undisputed that the medical team leader, who determined whether the
21 prisoner was unconscious after the first drug was administered, would not be able to tell
22 using his methods for determining consciousness whether the prisoner was unconscious or
23 paralyzed.

24 56. Although the district court expressed reservations about deviations between the
25 written protocol and its application, it ultimately found that none of the deviations viewed
26 in isolation violated the Eighth Amendment. *West v. Brewer*, Case No. 2:11-cv-01409 (D.

27 _____
28 ¹Thomas West was executed on July 19, 2011.

1 Ariz. Dec. 21, 2011) (ECF No. 112).

2 57. The district court's decision is currently on appeal in the Ninth Circuit. *West*
3 *v. Brewer*, Case No. 12-15009 (9th Cir.).

4 **C. ADC Subsequently Adopted a Protocol that Eliminates Safeguards,**
5 **Increases the Director's Discretion, and Codifies Arbitrary and Disparate**
6 **Treatment**

6 58. ADC issued a revised protocol on January 25, 2012.

7 59. The January 2012 Protocol eliminates most of the crucial safeguards that
8 Defendants previously included in the execution protocol to obtain a favorable summary
9 judgment ruling in *Dickens*.

10 60. The January 2012 Protocol instructs that a Special Operations Team and an IV
11 Team will carry out an execution. There is no longer a Medical Team.

12 61. Members of the IV Team are not subject to the same training, selection, and
13 preparation criteria required of the Medical Team under the previous protocol.

14 62. The IV Team consists of any two or more of the following: physician(s),
15 physician assistant(s), nurse(s), emergency medical technician(s), paramedic(s), military
16 corpsman, phlebotomist(s) or "other appropriately trained personnel," including those trained
17 in the United States Military. (DO 710.02, § 1.2.5.1.) The January 2012 Protocol does not
18 define "other appropriately trained personnel."

19 63. The addition of the term "other appropriately trained personnel" means that
20 there are no objective criteria or formal certification required for participating in executions.
21 The ADC Director, who has no medical training, is left to decide what qualifies as
22 "appropriately trained."

23 64. ADC removed necessary safeguards designed to make the process safer by
24 decreasing the required qualifications of the team members who will perform the medical
25 aspects of the procedure.

26 65. The IV Team members—the qualifications of whom are less stringent than
27 those previously required for the Medical Team members—are responsible for inserting
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1 either peripheral IV catheters or a central femoral line and for ensuring that all lines are
2 functioning properly throughout the procedure. The IV Team members are assigned to
3 supervise the Special Operations Team in mixing and preparing drugs and monitoring the
4 level of consciousness.²

5 66. The only requirement for IV Team members is that they have “at least one year
6 of relevant experience in placing either peripheral or central femoral intravenous lines.” (DO
7 710.02, § 1.2.5.1.)

8 67. There is no longer any requirement that the IV Team member have current
9 experience.

10 68. Under the January 2012 Protocol, it is no longer required that the IV Team
11 members undergo a personal interview before being selected to participate in an execution.

12 69. The decreased criteria requirements to be on the IV Team increase the risk of
13 harm because the January 2012 Protocol allows minimally qualified or incompetent
14 personnel to conduct executions.

15 70. ADC removed a requirement that execution team members participate in
16 ongoing training activities. Under the January 2012 protocol, IV Team members no longer
17 have to participate in at least ten training sessions per year. IV Team members are required
18 only to participate in “at least one training session with multiple scenarios within one day
19 prior to the scheduled execution.” (DO 710.02, § 1.1.2; *see also* DO 710.02, § 1.2.5.5.)

20 71. The decrease in training requirements increases the chance that IV Team
21 Members will be unprepared to properly carry out executions and unable to detect and correct
22 problems that arise during the process, thus subjecting the prisoner to an increased risk of
23 harm.

24 72. The January 2012 Protocol vests substantial authority in the IV Team Leader.
25

26
27 ²The Medical Team was responsible for mixing the drugs, preparing the syringes, and
28 monitoring the prisoner under the previous protocol. Now the Special Operations team
performs these tasks under the supervision of the IV Team. (DO 710.02, § 1.2.5.4.)

1 The IV Team Leader’s responsibilities include (1) advising the ADC Director as to where
2 to place the primary and backup IV lines for each prisoner; (2) supervising the Special
3 Operations Team in mixing the chemicals;³ (3) monitoring the prisoner’s level of
4 consciousness;⁴ and (4) attaching the leads from the electrocardiograph and checking the
5 electrocardiograph’s function. (DO 710 Attach. D, §§ B, ¶ 1; D, ¶¶ 7, 9; and E, ¶ 1.)

6 73. The January 2012 Protocol gives the ADC Director discretion to select the IV
7 Team Leader without mandating any qualifications beyond those listed in requirements for
8 IV Team Members. (*See* DO 710.02, § 1.2.5.3)

9 74. The requirements for IV Team members do not include supervisory experience,
10 experience or competence in consciousness monitoring, or qualifications to select the
11 appropriate venous access.

12 75. The Special Operations Team, which consists of a minimum of five team
13 members, including a Team Leader, a Recorder, and three additional team members, prepares
14 the designated drug(s) and syringes for a total of one complete set of drugs. (DO 710 Attach.
15 D, § B, ¶ 2.)

16 76. The January 2012 Protocol does not set forth any requirements for the
17 individuals serving on the Special Operations Team.

18 77. The Division Director for Offender Operations selects the Special Operations
19 Team members and team leader.

20 78. There is no requirement that the Special Operations Team members have any
21 minimum qualifications, including experience mixing or preparing drugs. This increases the
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23
24 ³This section of Attachment D is inconsistent with DO 710.02 § 1.2.5.4, which states
25 that the IV Team, not the IV Team Leader, shall “supervise the Special Operations team in
the mixing of the chemicals.”

26 ⁴This section of Attachment D is inconsistent with DO 710.02 § 1.2.5.4, which states
27 that the IV Team shall “supervise the Special Operations team in . . . monitoring the inmate
28 (including the level of consciousness and establishing the time of death).” Whether the IV
Team Leader is responsible for personally monitoring the level of consciousness or
supervising others, it still requires expertise that is not indicated in the protocol.

1 risk that the inmate will receive the wrong drug, will receive the drugs in the wrong order,
2 or will receive improperly mixed drugs, any of which causes substantial pain and suffering,
3 including awareness of death by suffocation.

4 79. Under the January 2012 Protocol, the ADC Director has sole discretion to
5 determine “which [drug] protocol will be used for the scheduled execution.” (DO 710 Attach.
6 D, § C ¶1.)

7 80. There are four options from which the ADC Director can choose.

8 81. Option A is a three-drug protocol, which includes: four (4) syringes of 1.25
9 grams of sodium thiopental; two (2) syringes of 60 milligrams of pancuronium bromide; and
10 two (2) syringes of 120 milliequivalents of potassium chloride.

11 82. Option B is a three-drug protocol, which includes: two (2) syringes of 2.5
12 grams of pentobarbital; two (2) syringes of 60 milligrams of pancuronium bromide; and two
13 (2) syringes of 120 milliequivalents of potassium chloride.

14 83. Option C is a one-drug protocol, which includes: four (4) syringes of 1.25
15 grams of sodium thiopental.

16 84. Option D is a one-drug protocol, which includes: two (2) syringes of 2.5 grams
17 of pentobarbital.

18 85. The January 2012 Protocol calls upon the ADC Director to inform the prisoner
19 in writing, seven days prior to the scheduled execution date, which combination of drugs will
20 be used in his or her execution.

21 86. The January 2012 Protocol does not provide any guidance or rationale for
22 selecting one option over another, nor does it specify how the ADC Director will make the
23 decision.

24 87. The January 2012 Protocol eliminates the peripheral catheter as the default
25 method. Instead, the ADC Director determines whether to use peripheral or central femoral
26 IV access.

27 88. Peripheral IV access is safer as a default method of IV access because it does
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1 not involve the larger, deeper vein accessed in a central line placement. Peripheral IV access
2 is not an invasive surgical procedure.

3 89. Placement of a central femoral line is an invasive, complicated surgical
4 procedure that is difficult to perform without significant training and experience.

5 90. Placement of a central femoral line should only be used when medically
6 indicated and by medical personnel with extensive training in this specific procedure.

7 91. Central femoral line placement can cause great pain, as it requires placing the
8 IV in a vein which can be anywhere from half an inch to several inches below the skin, and
9 it can cause painful and dangerous complications.

10 92. The January 2012 Protocol does not limit the time or attempts to place an IV
11 catheter.

12 93. A time limitation in setting IV lines is a necessary safeguard. Multiple attempts
13 to place an IV threatens the integrity of the prisoner's veins and increases the chance that
14 even if a line is set, it will fail.

15 94. The January 2012 Protocol also removes the pre-execution assessment of the
16 prisoner's veins that was in the prior version of the protocol. A venous assessment is a
17 necessary safeguard to ensure, *inter alia*, proper placement of catheters.

18 95. The January 2012 Protocol eliminates the preparation of a backup set of drugs.

19 96. The January 2012 Protocol is unclear and contradictory on the question of
20 whether a back-up catheter is required.

21 97. One section of the January 2012 Protocol indicates that the "IV Team shall
22 insert a primary IV catheter and a backup IV catheter." (DO 710 Attach D, § E, ¶ 1.)

23 98. Another section of the protocol states that the ADC Director will determine the
24 "catheter(s) site(s)" (DO 710 Attach D, § E, ¶ 1), suggesting that a single catheter site will
25 be used.

26 99. The January 2012 Protocol instructs that "[t]he IV Team shall be responsible
27 for inserting *either peripheral IV catheters or a central femoral line* as determined by the
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1 Director acting upon the recommendation of the IV Team Leader.” (DO 710.02, § 1.2.5.4)
2 (emphasis added). The language here suggests that there would either be two peripheral
3 catheters or one central line.

4 100. A backup IV line is a necessary safeguard in ensuring that a sufficient dose of
5 the barbiturate is administered. If the primary line fails, then there is a functioning backup
6 line to use immediately.

7 101. The January 2012 Protocol does not inform prisoners of how or when the ADC
8 Director will make the determination of which IV line(s) will be established.

9 102. The ADC Director does not provide notice to the condemned prisoner whether
10 femoral or peripheral IV access will be used.

11 **D. Executions of Robert Moormann and Robert Towery**

12 103. On January 10, 2012, the Arizona Supreme Court issued warrants of execution
13 for Robert Moormann and Robert Towery. Robert Moormann’s execution was scheduled
14 for February 29, 2012. Robert Towery’s execution was scheduled for March 8, 2012.

15 104. After the warrants were issued, Towery and Moormann, through counsel, asked
16 Director Ryan to provide them with information regarding the process by which they would
17 be executed, including qualifications of the team members, which drugs would be
18 administered, and where the IV lines would be set.

19 105. On February 2, 2012, counsel for Towery and Moormann received letters from
20 the Attorney General advising, as a courtesy, that Director Ryan had made the decision to use
21 the three-drug protocol in each of the executions. The letter did not indicate whether the first
22 drug used would be sodium thiopental or pentobarbital.

23 106. In that same letter dated February 2, 2012, the Attorney General also advised
24 counsel for Towery and Moormann that Director Ryan also decided to use the pancuronium
25 bromide imported from in Great Britain in 2011, in carrying out each of their executions.

26 107. The pancuronium bromide was imported from Dream Pharma, Ltd., a grey-
27 market distributor.

28

1 108. On February 3, 2012, Towery and Moormann received letters from Director
2 Ryan informing them that ADC will not release any information regarding the qualifications
3 of the IV Team. Director Ryan again informed Towery and Moormann that ADC planned
4 to use imported pancuronium bromide in the each of their executions.

5 109. On February 27, 2012, Director Ryan informed Moormann and Towery that
6 ADC would use a one-drug protocol in carrying out their executions because it had just
7 discovered that day that its entire supply of pancuronium bromide was expired.

8 110. Under the January 2012 Protocol, upon receipt of the execution warrant, the
9 Housing Unit 9 team leader is to “[e]nsure that complete sets of chemicals are on site and
10 immediately available for use.” (DO 710 Attach. D, § A.) Defendants failed to do this.

11 111. Robert Moormann was executed on February 29, 2012. His execution was
12 scheduled to begin at 10:00 a.m.

13 112. Moormann’s attorneys visited with him until 9:15 a.m. on February 29, 2012.

14 113. At 9:30 a.m., Moormann had been strip searched and was placed in upper
15 restraints.

16 114. At 9:50 a.m., Moormann was secured to the execution table.

17 115. At 9:55 a.m., the Director determined the catheter(s) site(s).

18 116. At 10:05 a.m., the Housing Unit 9 Section Leader advised the Director that the
19 IV procedure was complete.

20 117. Moormann had two IV catheters placed in each of his arms near his elbows.
21 The left peripheral catheter was designated as the primary IV line. The right peripheral
22 catheter was designated as the back-up IV line.

23 118. At 10:23 a.m., Moormann made his last statement.

24 119. At 10:28 a.m., the Housing Unit 9 Section Leader advised the witnesses that
25 Moormann had been sedated.

26 120. At 10:33 a.m., Moormann was pronounced dead.

27 121. Robert Towery was executed on March 8, 2012. His execution was scheduled
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1 to begin at 10:00 a.m.

2 122. Towery's attorneys visited with him until 9:15 a.m. on March 8, 2012.

3 123. At 9:30 a.m., Towery had been strip searched and was placed in upper
4 restraints.

5 124. At 9:35 a.m., Towery asked the Director what the protocol was and where the
6 drugs had been obtained.

7 125. At 9:49 a.m., Towery was secured to the execution table.

8 126. At 9:52 a.m., the Director determined the catheter(s) site(s).

9 127. At 10:28 a.m., after multiple attempts of the left and right peripheral
10 (approximately four in the right and two in the left), the IV Team Leader recommended the
11 right femoral catheter as the primary IV line and left peripheral catheter as the back-up IV
12 line.

13 128. At 10:31 a.m., the Director called the Attorney General's office and provided
14 an update regarding the IV process.

15 129. At 10:37 a.m., the Director spoke with Jeff Zick at the Attorney General's
16 office.

17 130. At some point during the attempts to set the IV lines, Towery asked to speak
18 with his counsel Dale Baich, but he was not permitted to do so.

19 131. At approximately 10:45 a.m., Towery's execution had not yet started.
20 Towery's counsel, Dale Baich, asked an ADC employee if there was anything that he needed
21 to know regarding Towery or the execution procedure. The ADC employee checked with
22 the command center and informed Baich that command had nothing to report.

23 132. At 10:50 a.m., the right femoral catheter was placed; the left peripheral catheter
24 was unsuccessful. The Director had a discussion with the IV Team Leader regarding the
25 back-up IV line.

26 133. At 10:59 a.m., a catheter was placed right in Towery's right hand.

27 134. The right femoral catheter was designated as the primary IV. The right hand
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1 catheter was designated as the back-up IV.

2 135. At 10:59 a.m., the Housing Unit 9 Section Leader advised the Director that the
3 IV procedure was complete.

4 136. At 11:17 a.m., Towery made his last statement.

5 137. At 11:22 a.m., the Housing Unit 9 Section Leader advised the witnesses that
6 Towery had been sedated.

7 138. At 11:26 a.m., Towery was pronounced dead.

8 139. The doctor who ADC hired to conduct its executions in 2010-2011 informed
9 ADC that it would be painful to administer a large amount of barbiturate through a small
10 peripheral vein in lower extremity.

11 140. An autopsy of Towery revealed that his peripheral veins of the antecubital
12 fossae were thin walled and pliable without signs of sclerosis.

13 **E. Scheduled Executions of Thomas Kemp and Samuel Lopez**

14 141. Plaintiff Thomas Kemp is scheduled to be executed on April 25, 2012.

15 142. Plaintiff Samuel Lopez is scheduled to be executed on May 13, 2012.

16 143. Via letter dated March 22, 2012, Director Ryan informed counsel for Thomas
17 Kemp that no more than two legal visitors will be permitted to see Kemp and they will only
18 be permitted a one-hour visit (from 6:00 a.m. until 7:00 a.m.) on the morning of his
19 scheduled execution. Kemp is scheduled to be executed at 10:00 a.m.

20 144. In that same letter, Director Ryan indicated that ADC intends to carry out the
21 execution using a one-drug protocol with pentobarbital.

22 145. In that same letter, Director Ryan indicated that back-up chemicals would not
23 be prepared in syringes unless they are required.

24 **F. Defendants Unlawfully Imported Lethal-Injection Drugs**

25 146. In September 2010, ADC imported the three lethal-injection drugs (sodium
26 thiopental, which is a controlled substances under the federal Controlled Substances Act
27 (CSA); pancuronium bromide; and potassium chloride), from a small drug distributor, Dream
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1 Pharma Ltd., which operates out of the back of a driving school in London, England.

2 147. None of these drugs comply with federal drug regulations under the Food,
3 Drug, and Cosmetics Act (FDCA).

4 148. These drugs are unapproved by the FDA. It was illegal for the Food and Drug
5 Administration (FDA) to “allow[] shipments of a misbranded and unapproved drug to enter
6 the United States for use in state lethal injection protocols. . . .” *Beaty v. FDA*, No. 1:11-cv-
7 00289-RJL, 2012 WL 1021048, at *1 (D.D.C. Mar. 27, 2012)

8 149. “[D]rugs from foreign countries do not have the same assurance of safety as
9 drugs actually regulated by the FDA due to the risk that counterfeit or unapproved drugs will
10 be sent to consumers and also because without regulation of repackaging, storage conditions,
11 and many other factors, drugs delivered to the American public from foreign countries may
12 be very different from FDA approved drugs with respect to formulation, potency, quality, and
13 labeling.” *In re Canadian Import Antitrust Litigation*, 470 F.3d 785, 789 (8th Cir. 2006)
14 (internal citations omitted).

15 150. In October 2010, ADC imported a second shipment of sodium thiopental.
16 Despite being repeatedly warned that these actions run afoul of federal laws (*i.e.*, the CSA
17 and the FDCA), ADC persisted in its actions.

18 151. On May 24, 2011, the federal Drug Enforcement Administration informed the
19 State of Arizona that the State had violated the Controlled Substances Act when it imported
20 the sodium thiopental.

21 152. ADC’s imported drugs are illegal. *See Beaty v. FDA*, 2012 WL 1021048
22 (D.D.C. Mar. 27, 2012); *see also Brewer v. Landrigan*, 131 U.S. 445 (2010).

23 153. ADC’s imported drugs are also presumptively unsafe. *Beaty*, 2012 WL
24 1021048, at *9 (finding that the importation of FDA-unapproved drugs violates the federal
25 FDCA, and that part of the FDA’s evaluation under that statute involves the FDA’s
26 expressed “concern about ‘the safety risks associated with the importation of prescription
27 drugs from foreign countries,’ [because] foreign drugs are more likely to be counterfeit or
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1 contaminated than FDA-approved products”) (internal quotation marks and citations
2 omitted).

3 **FIRST CLAIM FOR RELIEF**

4 **The January 2012 Protocol Lacks the Necessary Safeguards Required under *Baze v.***
5 ***Rees* (8th Amendment; 42 U.S.C. § 1983)**

6 154. Plaintiffs incorporate by reference each and every statement and allegation set
7 forth in this Complaint as if fully set forth herein.

8 155. In *Baze v. Rees*, the United States Supreme Court found Kentucky’s lethal-
9 injection protocol constitutional because it had necessary safeguards that reduced the
10 substantial risk of a prisoner suffering during the implementation of the three-drug protocol.
11 553 U.S. 35 (2008).

12 156. The Ninth Circuit upheld the written protocol that ADC adopted to obtain a
13 summary judgment ruling in the *Dickens* litigation, because it contained safeguards that were
14 “substantially similar” to the Kentucky protocol that the Supreme Court upheld in *Baze*. *See*
15 *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2009). The Ninth Circuit affirmed the
16 district court’s decision “[b]ecause the protocol’s safeguards are adequate under the *Baze*
17 standard and because there is no material issue of fact regarding compliance with the
18 protocol.” *Id.* at 1141.

19 157. The January 2012 Protocol eliminates many safeguards that ADC adopted in
20 *Dickens*. The few remaining safeguards fall substantially short of maintaining the “important
21 safeguards” that the Supreme Court found acceptable in *Baze* and that the Ninth Circuit
22 relied on in upholding the *Dickens* protocol.

23 158. In *Baze*, the Supreme Court found that the most significant safeguard in the
24 Kentucky protocol was the requirement that each member of the IV team had at least one
25 year of professional experience as a certified medical assistant, phlebotomist, EMT,
26 paramedic, or military corpsman. *Baze*, 553 U.S. at 55. Of note, Kentucky uses a
27 phlebotomist and an EMT who have daily experience setting IV catheters. *Id.*

28 159. The Supreme Court noted that IV team members, along with the rest of the

1 execution team, participated in at least ten practice sessions per year. *Id.* These training
2 sessions involved a rehearsal of the execution process, including setting IV lines on
3 volunteers. *Id.*

4 160. The Supreme Court found that the use of a primary and backup IV line ensures
5 that if a prisoner did not receive a sufficient dose of the barbiturate through the primary line,
6 he would be able to receive additional drugs through the backup line. *Id.* Consistent with
7 using a backup line, the Court also noted that Kentucky requires that two sets of the lethal-
8 injection drugs be prepared before the execution begins. *Id.*

9 161. The Supreme Court determined that Kentucky's one-hour time limit to
10 establish an IV was not excessive. *Id.* at 55.

11 162. Unlike the protocol approved in *Baze* and in *Dickens*, the January 2012
12 Protocol does not require the IV Team to have current professional experience setting IV
13 lines.

14 163. Unlike the protocol approved in *Baze* and in *Dickens*, the January 2012
15 Protocol does not require that the IV Team members be medically trained. The language
16 now permits any individual to participate in executions who the ADC Director deems are
17 "appropriately trained."

18 164. The January 2012 Protocol only requires that the IV Team attend one training
19 session on the day prior to an execution. Unlike the protocol approved in *Baze*, the January
20 2012 Protocol provides no description of what shall be done at the sole training other than
21 having "one training session with multiple scenarios." Unlike the protocol approved in *Baze*,
22 there is no requirement that the IV Team practice siting IVs during the training.

23 165. Unlike the protocol approved in *Baze*, the January 2012 Protocol has no time
24 limitation for the IV Team to find and set the IV catheters. "Punishments are cruel when they
25 involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Without
26 a time restriction for setting an IV line, and without proper qualifications of the IV Team, the
27 January 2012 Protocol increases the risk that Plaintiffs will suffer a lingering death.
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1 and the state action will be upheld only if the state can show that such action is narrowly
2 drawn to serve a compelling state interest. *Cooley*, 2011 WL 2681193, at *29 (S.D. Ohio July
3 8, 2011); *In re Ohio Execution Protocol Litigation*, 2012 WL 118322 (6th Cir. Jan. 13, 2012)
4 (affirming district court’s grant of temporary restraining order for Charles Lorraine based on
5 equal-protection claim where the state follows its written protocol except when it does not);
6 *Green v. City of Tuscon*, 340 F.3d 891 (9th Cir. 2003); *see also Vacco v. Quill*, 521 U.S.
7 793, 799-800 (1997).

8 175. Absent the burden upon a fundamental right, the government violates the equal
9 protection clause if individuals are “intentionally treated differently from others similarly
10 situated and . . . there is no rational basis for the difference in treatment.” *Vill. of*
11 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

12 176. On its face, the January 2012 Protocol violates the Equal Protection Clause.

13 177. By allowing the ADC Director to arbitrarily choose between a three-drug and
14 one-drug protocol, the January 2012 Protocol codifies arbitrary treatment of Arizona
15 prisoners sentenced to death.

16 178. By allowing the ADC Director to have discretion to select execution team
17 members, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners
18 sentenced to death.

19 179. By allowing the ADC Director to have the discretion to eliminate a backup
20 catheter, the January 2012 Protocol codifies arbitrary treatment of Arizona prisoners
21 sentenced to death.

22 180. By allowing the ADC Director to have the discretion to select either
23 pentobarbital or unlawfully imported sodium thiopental, the January 2012 Protocol codifies
24 arbitrary treatment of Arizona prisoners sentenced to death.

25 181. The ADC Director has discretion to select unlawfully imported drugs to be
26 used in executions.

27 182. Before Moormann’s and Towery’s executions, ADC asserted its intention to
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1 use imported pancuronium bromide in carrying out their executions. The imported
2 pancuronium bromide, as well as the imported potassium chloride, are illegal substances
3 under the Food, Drug and Cosmetics Act. *See Beaty*, 2012 WL 1021048, at *2.

4 183. In carrying out Towery's and Moormann's execution, the ADC Director had
5 no compelling interest in, or rational basis for, first selecting a three-drug protocol. The
6 ADC Director's decision to ultimately use a one-drug protocol was not a result of a reasoned
7 decision making process. Rather, it was only made because ADC failed to comply with its
8 protocol and determine whether the drugs were available for use before the Director made
9 a selection.

10 184. Director Ryan has no compelling state interest in, or rational basis for, selecting
11 an inherently risky three-drug protocol over the safer, readily available one-drug alternative.
12 While both three- and one-drug protocols are intended to cause the same result, they are
13 nevertheless substantially different.

14 185. Director Ryan has no compelling state interest in, or rational basis for, treating
15 condemned prisoners differently when it comes to selecting the team members who will be
16 carrying out execution, or determining whether to use a backup catheter, or whether to
17 choose an anesthetic drug imported from a foreign source over a domestic drug not labeled
18 for anesthetic purposes.

19 186. The January 2012 Protocol provides no guidelines or standards for determining
20 when and under what circumstances such distinctions may be warranted. Clear standards
21 must exist, and deviations from those standards result in equal protection violations.
22 Defendants have adopted a policy that codifies unbridled discretion and arbitrary treatment.
23 Deviation is the standard.

24 187. Plaintiffs' rights to equal protection under the Fourteenth Amendment are
25 violated by the January 2012 Protocol.
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1 **THIRD CLAIM**

2 **Similarly Situated Prisoners Are Not Treated Alike Under the Protocol As**
3 **Applied (8th & 14th Amendments; 42 U.S.C. § 1983)**

4 188. Plaintiffs incorporate by reference each and every statement and allegation set
5 forth throughout this Complaint as if fully set forth herein.

6 189. The procedures for carrying out a death sentence “must be implemented in a
7 reasoned, deliberate, and constitutional manner.” *Towery v. Brewer*, ___ F.3d ___, 2012 WL
8 627787, *1 (9th Cir. Feb. 28, 2012). As it has been applied and will continue to be applied,
9 the January 2012 Protocol violates the Equal Protection Clause.

10 190. In carrying out Towery’s execution, ADC treated Towery differently from
11 other prisoners. This different treatment occurred because of the lack of standardized,
12 written procedures.

13 191. It took ADC approximately ten minutes to set two peripheral IV catheters in
14 Moormann.

15 192. In carrying out Towery’s execution, ADC attempted for nearly an hour to set
16 peripheral lines, making at least six punctures in Towery’s arms during that time.

17 193. Kentucky’s protocol approved in *Baze* set a time limit of one hour to attempt
18 to set IV lines.

19 194. After several unsuccessful attempts to set a peripheral IV line in the right and
20 left arm, the IV Team Leader recommended using the right femoral vein as the primary line
21 and the left peripheral as the backup line.

22 195. At least thirty minutes after the decision to use the left peripheral as the backup
23 line, ADC then decided to set a peripheral line in the right hand as the backup line.

24 196. By setting a catheter in Towery’s hand despite being informed by its own
25 contracted executioner that administering a barbiturate through a small peripheral vein would
26 be painful, ADC increased the risk of pain endured by Towery and burdened Towery’s
27 fundamental right to be free from cruel and unusual punishment.

28 197. ADC had no rational basis, let alone a compelling governmental interest, to

1 select a backup line that it knew would be inherently more painful.

2 **FOURTH CLAIM FOR RELIEF**

3 **Failure to Provide Adequate Notice of the Specific Drugs and of the Type**
4 **of Venous Access That Will Be Used in Executions (14th Amendment; 42**
5 **U.S.C. § 1983)**

6 198. Plaintiffs incorporate by reference each and every statement and allegation set
7 forth throughout this Complaint as if fully set forth herein.

8 199. “The fundamental requisite of due process of law is the opportunity to be
9 heard. This right to be heard has little reality or worth unless one is informed that the matter
10 is pending” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)
(internal citations omitted).

11 200. “Fundamental fairness, if not due process, requires that the execution protocol
12 that will regulate a prisoner’s death be forwarded to him in prompt and timely fashion.”
13 *Oken v. Sizer*, 321 F. Supp. 2d 658, 664 (D. Md. 2004), *stay vacated*, 542 U.S. 916 (2004).

14 201. The January 2012 Protocol does away with any timely notice of the manner in
15 which the prisoner will be executed.

16 202. Under the January 2012 Protocol, ADC is required only to inform the prisoner
17 seven days before his execution the drug or drugs by which he will be executed.

18 203. Approximately one month before Moormann’s scheduled execution, ADC
19 informed Moormann that it would be using a three-drug protocol in carrying out his
20 execution. Just two days prior to Moormann’s execution, ADC informed Moormann that it
21 would instead be using a one-drug protocol in carrying out his execution. ADC violated its
22 own written protocol by providing notice to Moormann only forty-eight hours before the
23 execution.

24 204. Under the January 2012 Protocol, Plaintiffs are not provided any notice
25 regarding where ADC intends to site the IV catheters that will be used to introduce the lethal
26 drugs in their circulatory systems.

27 205. The January 2012 Protocol removed the venous access check and provides no
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1 time limit for setting IV lines. Plaintiffs will not have any knowledge what veins are deemed
2 accessible for the IV lines. Nor are Plaintiffs aware of how long ADC will have to attempt
3 to set the lines.

4 206. Towery's veins were pliable, and were not hardened or otherwise
5 compromised.

6 207. Robert Towery was punctured at least six times during the attempt to set a
7 catheter in his arms. During ADC's attempt to unsuccessfully set IV catheters in his arms,
8 Towery asked to speak with his attorney. Towery was denied access to his attorney. When
9 Towery's attorney inquired about the execution process, in which there was a delay, his
10 attorney was not provided any information.

11 208. Plaintiffs will be denied access to counsel while ADC is attempting to set IV
12 lines.

13 209. By failing to provide adequate notice of either of these decisions and by
14 preventing prisoners from having access to counsel during the insertion of IV lines,
15 Defendants are depriving Plaintiffs of their right to notice and an opportunity to be heard, in
16 violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs have no
17 meaningful opportunity challenge the method of execution if they do not learn of this method
18 until seven days before their scheduled execution or if they are not informed at all, much less
19 if they are prevented from speaking with counsel when complications arise.

20 **FIFTH CLAIM FOR RELIEF**

21 **Access to Counsel and the Courts Under the Protocol As Written (1st, 5th**
22 **8th, and 14th Amendments; 42 U.S.C. § 1983; 18 U.S.C. § 3599)**

23 210. Plaintiffs incorporate by reference each and every statement and allegation set
24 forth in this Complaint as if fully set forth herein.

25 211. The January 2012 Protocol on its face violates Plaintiffs' federal constitutional
26 rights to due process and to access to the courts and thereby implicates their right to be free
27 from cruel and unusual punishment. U.S. Const. amends. I, V, VIII & XIV.

28 212. Sections 710.11, 1.5.1 and 1.5.2 of DO 710 deny Plaintiffs legal visits after

1 2100 hours the day prior to a scheduled execution. Instead, Plaintiffs will only be permitted
2 telephone contact with the attorneys of record. The telephone calls will take place in a
3 holding cell where ADC officers will be present. There is no opportunity for privileged
4 communication.

5 213. Plaintiffs have a federal constitutional right to be free from cruel and unusual
6 punishment and to be competent during their execution. *See* U.S. Const. amends. VIII &
7 XIV; *Ford v. Wainwright*, 477 U.S. 399 (1986).

8 214. Plaintiffs are entitled to appointed counsel throughout the execution procedure.
9 *See* 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009). Plaintiffs are entitled to
10 have access to counsel in every proceeding subsequent to their appointment, including the
11 day of an execution, in order to pursue legal claims that may arise.

12 215. Plaintiffs also have a due process and First Amendment right to access to the
13 courts, which includes asserting a claim that their Eighth and/or Fourteenth Amendment
14 rights have been violated, or will be violated, at any time during their proceedings. *See*
15 *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (affirming that “prisoners have a constitutional
16 right of access to the courts”); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (noting that
17 “right of access to the courts . . . is founded in the Due Process Clause”).

18 216. Plaintiffs’ right to access the courts inherently injects the issue the right of
19 meaningful access to counsel. *See Cooley v. Strickland*, 2011 WL 320166, at *7 (S.D. Ohio
20 Jan. 28, 2011).

21 217. Plaintiffs will have no means by which to meaningfully access the courts if they
22 are denied privileged communication with attorneys in the twelve hours prior to an execution.
23 Plaintiffs’ ability to openly confer with counsel makes counsel’s presence valuable to
24 Plaintiffs and thus renders meaningful the ability to access the courts on Plaintiffs’ behalf.

25 218. ADC has no legitimate governmental interests that outweigh Plaintiffs’
26 constitutional right to access the courts. This is evident by the fact that in the past, ADC has
27 permitted twenty-eight condemned prisoners to have in-person visitation with their attorneys
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1 on the day of their execution.

2 219. If circumstances arise immediately prior to Plaintiffs' executions that present
3 a constitutional injury under the Eighth or Fourteenth Amendments, certainly Plaintiffs have
4 the right to litigate those claims.

5 220. The only way to protect Plaintiffs' rights would be to guarantee access to
6 counsel, who could in turn petition the courts for appropriate relief. Because the January
7 2012 Protocol strips away this right, it is unconstitutional on its face.

8 **SIXTH CLAIM FOR RELIEF**

9 **Access to Counsel and the Courts Under the Protocol As Applied (1st, 5th**
10 **8th, and 14th Amendments; 42 U.S.C. § 1983; 18 U.S.C. § 3599)**

11 221. The January 2012 Protocol as applied violates Plaintiffs' federal constitutional
12 rights to due process and to access to the courts and thereby implicates their right to be free
13 from cruel and unusual punishment. U.S. Const. amends. I, V, VIII & XIV.

14 222. The January 2012 Protocol gives the Director overbroad discretion in carrying
15 out an execution. The actions of Defendants have violated or will violate Plaintiffs'
16 constitutional rights.

17 223. Plaintiffs have a federal constitutional right to be free from cruel and unusual
18 punishment. *See* U.S. Const. amend. VIII. "Punishments are cruel when they involve torture
19 or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890).

20 224. Plaintiffs are entitled to appointed counsel throughout the execution procedure.
21 *See* 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009). Plaintiffs are entitled to
22 have access to counsel in every proceeding subsequent to their appointment, including during
23 an execution in order to pursue legal claims that may arise.

24 225. Robert Towery was punctured at least six times during the attempt to set a
25 catheter in his arms. During ADC's attempt to unsuccessfully set IV catheters in his arms,
26 Towery asked to speak with his attorney. Towery was denied access to his attorney. When
27 Towery's attorney inquired about the execution process, in which there was a delay, his
28 attorney was not provided any information. Towery was denied his right to access the courts

1 and present an Eighth Amendment challenge to Defendants' actions.

2 226. Circumstances arose during Towery's execution for which he should have been
3 permitted to access his counsel and the courts. *See Broom v. Strickland*, Complaint, ECF No.
4 3, No. 09-cv-00823-GLF (S.D. Ohio Sept. 18, 2009) (alleging Eighth Amendment violations
5 where numerous unsuccessful attempts were made to access prisoner's veins during
6 execution); *see Broom*, Opinion and Order, ECF No. 48 at 4 (finding that "[t]here is no doubt
7 that the Eighth Amendment applies to Plaintiff's situation").

8 227. If circumstances arise during Plaintiffs' execution similar to what occurred on
9 with Robert Towery, they would have a legal claim that their right to be free from "torture
10 or a lingering death" was being violated. The only way to protect their rights and to ensure
11 that the violation immediately stopped would be through access to counsel, who could in turn
12 seek redress in the courts. The January 2012 Protocol as applied prevents Plaintiffs from
13 asserting this right and is therefore unconstitutional.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs pray for:

- 16 (1) Injunctive relief to enjoin Defendants, their officers, agents, servants,
17 employees, and all persons acting in concert with them from executing
18 Plaintiffs until such time as Defendants can demonstrate that measures are in
19 place to allow for Plaintiffs' execution in a manner that complies with the
20 First, Fifth, Eighth, and Fourteenth Amendments to the United States
21 Constitution;
- 22 (2) Injunctive relief ordering Defendants, their officers, agents, servants,
23 employees, and all persons acting in concert with them to allow Plaintiffs to
24 have access to counsel on the morning of the execution up until one hour
25 before the execution;
- 26 (3) Injunctive relief ordering Defendants, their officers, agents, servants,
27 employees, and all persons acting in concert with them to allow Plaintiffs to
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- have access to counsel during the insertion of IV catheters;
- (4) Injunctive relief preventing Defendants from using illegal (e.g., non-FDA approved) lethal-injection drugs currently in Defendants' possession, as well as any that Defendants may acquire in the future;
- (5) Appropriate and necessary discovery and an evidentiary hearing to permit Plaintiffs to prove their constitutional claims;
- (6) Costs and attorney fees; and
- (7) Any such other relief as the Court deems just and proper.

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