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

17 Robert Towery, et al.,
18 Plaintiffs,

19 v.

20 Janice Brewer, et al.,
21 Defendants.

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

Motion for Leave to File
Second Amended Complaint

22 Plaintiffs hereby seek leave of this Court to file their Second Amended Complaint for
23 Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983]. This Court should “freely
24 give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). In the unique circumstances
25 of this case, Plaintiffs could not have included the factual allegations and related legal claims
26 when they filed their Amended Complaint. As such, this Court should allow them leave to
27 amend.
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1 Plaintiffs have recently learned additional information that supports their claims and
2 that gives rise to new legal claims. Specifically, Plaintiffs have learned previously
3 unavailable information from the executions of Robert Moormann (February 29, 2012), and
4 Robert Towery (March 8, 2012). On March 22, 2012, Plaintiffs received photographs from
5 the Pima County Medical Examiner related to the autopsies of Moormann and Towery.¹ On
6 March 23, 2012, Defendants provided counsel for Plaintiffs with documentation related to
7 the executions of Moormann and Towery. On April 2, 2012, Plaintiffs received a final report
8 of Towery's private autopsy performed by Joseph Cohen, M.D.

9 Also, on March 27, 2012, the United States District Court for the District of Columbia
10 issued a memorandum opinion and order in *Beaty v. FDA*, No. 1:11-cv-00289-RJL, 2012 WL
11 1021048 (D.D.C. Mar. 27, 2012). In that case, the plaintiffs, a group of death-sentenced
12 prisoners in Arizona, California, and Tennessee, sued the defendants, which included the
13 Food and Drug Administration (FDA), alleging that the defendants violated provisions of the
14 Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301, et seq., "by improperly
15 allowing shipments of a misbranded and unapproved new drug to enter the United States for
16 use in state lethal injection protocols, which will be used during plaintiffs' executions."
17 *Beaty*, 2012 WL 1021048 at *7. The court issued summary judgment for the plaintiffs,
18 concluding that "defendants have acted arbitrarily and capriciously, and have abused their
19 discretion both by departing from FDA's own regulations and longstanding policies and by
20 undermining the purpose of the FDCA." *Id.* at *10. The court ordered the FDA to
21 "immediately notify any and all state correctional departments which it has reason to believe
22 are still in possession of any foreign manufactured thiopental that the use of such drug is
23 prohibited by law and that, that thiopental must be returned immediately to the FDA." *Beaty*
24 *v. FDA*, No. 1:11-cv-00289-RJL, Order, ECF No. 24 at 2.

25 These facts give rise to Plaintiffs' need to amend their complaint. Indeed, the initial
26

27 ¹As of this filing, Plaintiffs have not yet received the autopsy reports from Pima
28 County.

1 complaint alleged constitutional violations based solely on the written protocol. Now,
2 Defendants have completed two executions under this protocol. The circumstances
3 surrounding those executions result in legal challenges to the protocol *as applied*. Moreover,
4 the court's ruling in *Beatty v. FDA* further supports Plaintiffs' claims related to the illegal
5 importation of lethal-injection drugs.

6 For these reasons, Plaintiffs respectfully seek leave of this Court to file an amended
7 complaint.

8 Respectfully submitted this 2nd day of April, 2012.

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18 By: s/Dale A. Baich
19 Counsel for Plaintiffs Rogovich,
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21 Kelly J. Henry
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23 By: s/Kelly J. Henry (with permission)
24 Counsel for Plaintiff Lopez
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Certificate of Service

I hereby certify that on this 2nd day of April, 2012, I electronically transmitted the foregoing to the Clerk’s office using the CM/ECF System for filing.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Michelle Young
Legal Assistant
Capital Habeas Unit