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

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Robert Towery, et al.,

) No. CV-12-245-PHX-NVW

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Plaintiffs,

) DEATH PENALTY CASE

10

vs.

) **ORDER DENYING MOTION FOR  
PRELIMINARY INJUNCTION**

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Janice K. Brewer, et al.,

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Defendants.

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Before the Court is a motion for preliminary injunction filed by Plaintiff Samuel Lopez, who is an Arizona prisoner under sentence of death. (Doc. 62.) Lopez is scheduled to be executed by lethal injection on Wednesday, May 16, 2012. The motion will be denied for the reasons that follow.

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**BACKGROUND**

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In 2007, a group of Arizona death row prisoners filed a § 1983 complaint challenging numerous aspects of Arizona’s then-in-effect lethal injection protocol.<sup>1</sup> That protocol was based on Department Order 710, dated November 1, 2007, and as modified by an exhibit submitted by the parties as part of a joint report to the Court. *See Dickens v. Brewer*, No. CV-07-1770-PHX-NVW, 2009 WL 1904294, at \*1 & n.2 (D. Ariz. Jul. 1, 2009) (unpublished order). This Court granted summary judgment in favor of Defendants, concluding that Arizona’s protocol was “substantially similar” to that approved by the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008), and thus did not subject inmates to a

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<sup>1</sup> None of the Plaintiffs in this matter were parties to that litigation.

1 substantial risk of serious harm in violation of the Eighth Amendment. The Court of Appeals  
2 for the Ninth Circuit affirmed. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

3 The version of the protocol at issue in *Dickens* required sequential administration of:  
4 (1) sodium thiopental (pentothal), an ultra fast-acting barbiturate that induces  
5 unconsciousness; (2) pancuronium bromide, a paralytic neuromuscular blocking agent that  
6 prevents any voluntary muscle contraction; and (3) potassium chloride, which causes skeletal  
7 muscle paralysis and cardiac arrest. “It is uncontested that, failing a proper dose of sodium  
8 thiopental that would render [a] prisoner unconscious, there is a substantial, constitutionally  
9 unacceptable risk of suffocation from the administration of pancuronium bromide and pain  
10 from the injection of potassium chloride.” *Baze*, 553 U.S. at 53.

11 In October 2010, on the eve of his execution, Arizona prisoner Jeffrey Landrigan filed  
12 a § 1983 complaint describing a nationwide shortage of sodium thiopental and alleging that  
13 the Arizona Department of Corrections (“ADC”) had imported the drug from a non-FDA-  
14 approved foreign manufacturer. The district court granted a temporary restraining order to  
15 permit further discovery regarding efficacy of the drug. *Landrigan v. Brewer*, No. CV-10-  
16 2246-PHX-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25, 2010) (unpublished order). The  
17 Supreme Court reversed, noting that there was “no evidence in the record to suggest that the  
18 drug obtained from a foreign source is unsafe” and “no showing that the drug was unlawfully  
19 obtained.” *Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (Mem.).

20 Subsequently, Arizona prisoner Daniel Cook filed a complaint similar to that of  
21 Landrigan, alleging an unconstitutional risk of serious pain from use of non-FDA approved  
22 sodium thiopental. The district court dismissed the complaint, finding that it failed to  
23 sufficiently state a claim for relief. *Cook v. Brewer*, No. CV-10-2454-PHX-RCB, 2011 WL  
24 251470 (D. Ariz. Jan. 26, 2011) (unpublished order). The Ninth Circuit affirmed and noted  
25 that Arizona’s protocol contains safeguards that would prevent the administration of the  
26 second and third drugs if the prisoner were not sufficiently anesthetized. *Cook v. Brewer*,  
27 637 F.3d 1002, 1007-08 (9th Cir. 2011) (*Cook I*). Based on newly-discovered evidence  
28 surrounding the foreign-manufactured sodium thiopental and ADC’s acquisition thereof,

1 Cook refiled a complaint on the eve of his execution. The district court summarily dismissed  
2 the complaint, and the Ninth Circuit affirmed. *Cook v. Brewer*, No. CV-11-557-PHX-RCB,  
3 2011 WL 1119641 (D. Ariz. Mar. 28, 2011) (unpublished order), *aff'd*, 649 F.3d 915 (9th  
4 Cir.) (*Cook II*), *cert. denied*, 131 S. Ct. 2465 (2011).

5 On May 24, 2011, the night before the scheduled execution of Arizona prisoner  
6 Donald Beaty, ADC notified Beaty and the Arizona Supreme Court that it intended to  
7 substitute pentobarbital for sodium thiopental in carrying out Beaty's execution but that the  
8 remaining aspects of the lethal injection protocol would be followed. In this notice, ADC  
9 also stated that the change was necessitated by information it had received that day from the  
10 United States Department of Justice, indicating that ADC's supply of sodium thiopental was  
11 imported without compliance with the Controlled Substances Act and could not be used.

12 Beaty filed a § 1983 complaint, asserting a due process violation from insufficient  
13 notice and arguing that a last-minute drug substitution would make it impossible for ADC  
14 to comply with the protocol's training requirement, thus subjecting him to a substantial risk  
15 of pain and suffering. This Court denied injunctive relief, concluding that the lack of  
16 practice with pentobarbital was insufficient to demonstrate a risk of serious harm in light of  
17 the protocol's safeguards ensuring the prisoner's anesthetization prior to administration of  
18 pancuronium bromide and potassium chloride. *Beaty v. Brewer*, 791 F.Supp.2d 678, 684 (D.  
19 Ariz. 2011). The Ninth Circuit affirmed. *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir.), *cert.*  
20 *denied*, 131 S. Ct. 2929 (2011).

21 On June 10, 2011, ADC amended Department Order 710 to provide for the  
22 administration of sodium thiopental or pentobarbital as the first of the three sequentially-  
23 administered drugs in its lethal injection protocol.

24 On July 15, 2011, Thomas West, along with the plaintiffs in *Dickens*, filed a § 1983  
25 complaint challenging ADC's implementation of its lethal injection protocol. Specifically,  
26 the plaintiffs alleged that ADC's failure to follow its written protocol and the addition of  
27 pentobarbital created a substantial risk of unnecessary pain and violated their rights to due  
28 process and equal protection. West also sought emergency injunctive relief to enjoin his

1 impending execution, which was denied. *See West v. Brewer*, CV-11-1409-PHX-NVW,  
2 2011 WL 2836754 (D. Ariz. Jul. 18, 2011) (unpublished order), *aff'd*, 652 F.3d 1060 (9th  
3 Cir.), *cert. denied*, 131 S. Ct. 3092 (2011). Thereafter, this Court denied a motion for  
4 summary dismissal and ordered expedited discovery.

5       Following a bench trial in December 2011, the Court entered judgment against the  
6 *West* plaintiffs, finding no constitutional infirmities from ADC's implementation of its lethal  
7 injection protocol. *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628 (D.  
8 Ariz. Dec. 21, 2011) (unpublished order), *appeal docketed*, No. 12-15009 (9th Cir. Jan. 3,  
9 2012). In particular, the Court determined that none of the complained-of  
10 deviations—default use of a femoral central intravenous (“IV”) line; failure to conduct  
11 required background checks of the IV team members, document their qualifications, and  
12 ensure IV-setting as part of their current professional duties; and failure to affix multiple  
13 labels on syringes and accurately document disposal of unused drugs—created a substantial  
14 risk the plaintiffs would be improperly anesthetized or otherwise suffer needless suffering  
15 and severe pain. The Court noted that ADC Director Charles L. Ryan has “discretion to  
16 deviate from the written protocol when safety, security, or medical issues in individual  
17 circumstances require temporary deviation from the written protocol.” *Id.* at \*11. However,  
18 the Court further observed that the written protocol should reflect actual practice and should  
19 be amended if “ADC no longer intends to follow the protocol as currently written.” *Id.*

20       On January 25, 2012, ADC again amended Department Order 710 (“the January 2012  
21 Protocol”). The revised protocol permits execution using either a three-drug or one-drug  
22 protocol and requires ADC's director to choose between these two protocols at least seven  
23 days prior to a scheduled execution. Ariz. Dep't Corr., Dep't Order 710, § 710.01, ¶ 1.1.2.4  
24 & Attach. D, § C.1 (Jan. 25, 2012) (hereinafter “DO 710 (Jan. 2012)”). The protocol further  
25 directs that the director, upon consultation with the IV team leader, shall determine the  
26 catheter sites and that a central femoral venous line may not be utilized unless placed by a  
27 medically-licensed physician with relevant experience. DO 710 (Jan. 2012), § 710.02, ¶  
28 1.2.5.4 & Attach. D, § E.1.

1           The January 2012 Protocol also changed the composition and experience requirements  
2 for the IV (Medical) team:

3           The IV Team will consist of any two or more of the following: physician(s),  
4 physician assistant(s), nurse(s), emergency medical technician(s),  
5 paramedic(2), military corpsman, phlebotomist(s) *or other appropriately*  
6 *trained personnel* including those trained in the United States Military. All  
7 team members shall have at least one year of relevant experience in placing  
8 either peripheral or central femoral intravenous lines.

9 DO 710 (Jan. 2012), § 710.02, ¶ 1.2.5.1 (emphasis added). The previous version used the  
10 phrase “or other medically trained personnel” instead of “other appropriately trained  
11 personnel” and required one year of “*current* and relevant *professional* experience in their  
12 assigned duties on the Medical Team” rather than just one year of “relevant experience.”  
13 Ariz. Dep’t Corr., Dep’t Order 710, Attach. D, § B.1 (Sept. 12, 2011) (hereinafter “DO 710  
14 (Sept. 2011)”). In addition, the revised protocol requires IV team members to participate in  
15 “at least one training session with multiple scenarios within one day prior to a scheduled  
16 execution” rather than ten execution “rehearsals” annually as previously required. DO 710  
17 (Jan. 2012), §§ 710.02, ¶ 1.1.2, 710.02, ¶ 1.2.5.5; DO 710 (Sept. 2011), Attach. D, § B.5.  
18 Finally, the revised protocol permits only telephonic contact between an inmate and his  
19 attorney after 9:00 p.m. the night before a scheduled execution, whereas previously counsel  
20 were permitted unlimited non-contact visitation. DO 710 (Jan. 2012), § 710.11, ¶ 1.5; DO  
21 710 (Sept. 2011), § 710.09, ¶ 1.5.

22           On February 6, 2012, Plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983,  
23 challenging the manner and means by which ADC intends to execute condemned inmates by  
24 lethal injection. (Doc. 1.) Specifically, Plaintiffs alleged that on its face ADC’s revised  
25 protocol impermissibly eliminates safeguards, increases the ADC director’s discretion, and  
26 codifies arbitrary and disparate treatment of capital prisoners, in violation of the Eighth and  
27 Fourteenth Amendments. Plaintiffs further alleged constitutional violations from ADC’s  
28 intent to execute them using the three-drug protocol, including use of pancuronium bromide  
imported from a foreign source, instead of the one-drug option. Finally, Plaintiffs alleged  
that the January 2012 Protocol violates their due process right to notice concerning the

1 specific drugs and venous access to be used during execution and their right of access to  
2 counsel and the courts.

3         On February 14, 2012, Plaintiffs Moormann and Towery, who had been notified  
4 pursuant to the January 2012 Protocol that ADC intended to execute them using the three-  
5 drug protocol, moved for a preliminary injunction to enjoin their impending executions.  
6 Following a hearing, at which neither party presented witnesses, the Court denied injunctive  
7 relief. (Doc. 42.) On February 27, less than 48 hours before the first scheduled execution  
8 and immediately preceding oral argument before the Ninth Circuit, ADC discovered  
9 belatedly that its foreign-supplied pancuronium bromide had expired the previous month and  
10 filed notice of intent to administer the one-drug protocol using domestically-obtained  
11 pentobarbital. *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). During argument to the  
12 Ninth Circuit, counsel for ADC made representations regarding the qualifications of the IV  
13 Team in place for the impending executions, preparation of backup syringes, and attorney-  
14 client visitation the morning of the executions. *Id.* at 658. The appellate court ultimately  
15 determined that Plaintiffs had failed to establish a likelihood of success on the merits of their  
16 Eighth Amendment and equal protection challenges. *Id.* at 659-61.

17         Between February 29 and April 25, 2012, ADC carried out the executions of Plaintiffs  
18 Moormann, Towery, and Kemp using the one-drug protocol. Each had either a peripheral  
19 catheter, femoral catheter, or both inserted as the primary and backup IV lines during the  
20 execution process. With regard to Towery, the IV Team made numerous unsuccessful  
21 attempts to set a primary peripheral catheter, ultimately inserting a femoral central line for  
22 the primary IV and a peripheral catheter in the prisoner's hand as the backup line.

23         On April 19, 2012, Plaintiffs filed a second amended complaint, alleging new claims  
24 based on application of the January 2012 Protocol and withdrawing the claim concerning  
25 foreign-imported pancuronium bromide. Specifically, the amended complaint alleged that  
26 ADC treated Towery differently from other prisoners by spending nearly an hour to set the  
27 IV catheters and that this differential treatment burdened Towery's fundamental right to be  
28 free from cruel and unusual punishment. Plaintiffs also alleged that Towery was denied

1 access to counsel during ADC's attempts to set the IV catheters and thus, as applied, the  
2 January 2012 Protocol prevents Plaintiffs from asserting legal claims based on their right to  
3 be free from torture or a lingering death.

4 Plaintiff Lopez filed the instant motion for preliminary injunctive relief on May 1,  
5 2012. Defendants filed a response, and Lopez filed a reply. (Docs. 64, 65.)

#### 6 DISCUSSION

7 A preliminary injunction is "an extraordinary and drastic remedy, one that should not  
8 be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek*  
9 *v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). An injunction may  
10 be granted only where the movant shows that "he is likely to succeed on the merits, that he  
11 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
12 equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural*  
13 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Beardslee v. Woodford*, 395 F.3d  
14 1064, 1067 (9th Cir. 2005). Under the "serious questions" version of the sliding-scale test,  
15 a preliminary injunction is appropriate when a plaintiff demonstrates that "serious questions  
16 going to the merits were raised and the balance of hardships tips sharply in the plaintiff's  
17 favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)  
18 (citation omitted). This approach requires that the elements of the preliminary injunction test  
19 be balanced, so that a stronger showing of one element may offset a weaker showing of  
20 another. "[S]erious questions going to the merits' and a balance of hardships that tips  
21 sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the  
22 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is  
23 in the public interest." *Id.*

24 In the context of a capital case, the Supreme Court has emphasized that these  
25 principles apply when a condemned prisoner asks a federal court to enjoin his impending  
26 execution because "[f]iling an action that can proceed under § 1983 does not entitle the  
27 complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547  
28 U.S. 573, 583-84 (2006). Rather, "a stay of execution is an equitable remedy" and "equity

1 must be sensitive to the State’s strong interest in enforcing its criminal judgments without  
2 undue interference from the federal courts.” *Id.* at 584.

3 **I. Merits of Claims**

4 Lopez asserts that he can meet the preliminary injunction standard on each of the  
5 claims raised in his second amended complaint. His motion is based in large measure on  
6 ADC’s implementation of the January 2012 Protocol in the Moormann, Towery, and Kemp  
7 executions.

8 **A. Eighth Amendment**

9 The Eighth Amendment “prohibits punishments that involve the unnecessary and  
10 wanton inflictions of pain, or that are inconsistent with evolving standards of decency that  
11 mark the progress of a maturing society.” *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir.  
12 2004). That prohibition necessarily applies to the punishment of death, precluding  
13 executions that “involve torture or a lingering death, or do not accord with the dignity of  
14 man.” *Beardslee v. Woodford*, 395 F.3d at 1070 (internal citations omitted). A violation of  
15 the Eighth Amendment can be established by demonstrating there is a “substantial risk of  
16 serious harm” that is sure or very likely to cause pain and needless suffering. *Dickens v.*  
17 *Brewer*, 631 F.3d at 1144-46 (adopting *Baze* plurality); *see also Brewer v. Landrigan*, 131  
18 S. Ct. at 445. The risk must be an “‘objectively intolerable risk of harm’ that prevents prison  
19 officials from pleading that they were ‘subjectively blameless for purposes of the Eighth  
20 Amendment.’” *Baze*, 553 U.S. at 50 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

21 Lopez argues that ADC’s actions surrounding the insertion of IV catheters in  
22 condemned prisoners demonstrates an objectively intolerable risk of harm. (Doc. 62 at 24-  
23 25.) Specifically, Lopez asserts that Towery was subjected to a risk of “pain and discomfort”  
24 from the placement of a backup IV line in one of his hands after the IV Team was unable to  
25 place a line in either of his arms, and that Kemp was subjected to an increased risk of pain  
26 and suffering from placement of a femoral central line. (*Id.* at 25.) This Court previously  
27 rejected the argument that use of a femoral central line creates a risk of constitutionally  
28 unacceptable pain and suffering:



1 In *Baze*, the Court stated, “Simply because an execution method may  
2 result in pain, either by accident or as an inescapable consequence of death,  
3 does not establish the sort of ‘objectively intolerable risk of harm’ that  
4 qualifies as cruel and unusual.” 553 U.S. at 50. In addition, “a condemned  
5 prisoner cannot successfully challenge a State’s method of execution merely  
6 by showing a slightly or marginally safer alternative.” *Id.* at 51. “To qualify,  
7 the alternative procedure must be feasible, readily implemented, and in fact  
8 significantly reduce a substantial risk of severe pain.” *Id.* at 52 (emphasis  
9 added).

6 At trial Plaintiffs’ expert described the process involved in placing a  
7 femoral central line. Unlike a peripheral IV, for which the needle and catheter  
8 are one unit and are placed just below the surface of the skin into a visible  
9 vein, a central line requires use of a larger needle to go through skin,  
10 subcutaneous tissue, and muscle to reach the larger femoral vein. An  
11 ultrasound is used to locate the vein and a local anesthetic (lidocaine) is  
12 applied. Once the needle reaches the vein, a guide wire is threaded into the  
13 vein, the needle is removed, the skin next to the wire is incised with a scalpel  
14 to enlarge the opening, a dilator slightly larger than the catheter is used to clear  
15 a wider path, and then the catheter is placed and secured with two sutures or  
16 staples. Unlike a peripheral IV, the placement of a central line requires an  
17 advanced level of training and is ordinarily undertaken only by a physician.

13 At most, the evidence at trial showed that a prisoner may experience  
14 some pain and discomfort during placement of a central line if the topical  
15 anesthetic is improperly administered before the skin is punctured. However,  
16 this pain, as Plaintiffs’ own expert conceded, is difficult to quantify. The  
17 evidence at trial also demonstrated that none of the prisoners during the past  
18 five executions verbally complained of, or appeared to experience, any pain  
19 while [the Medical Team Leader] placed the central line.

17 Therefore, the Court finds that any pain attendant to placement of a  
18 central line, beyond that likely to accompany placement of a peripheral IV  
19 line, falls far short of the severity needed to trigger an Eighth Amendment  
20 violation. *Cf. Baze*, 553 U.S. at 53 (describing the “constitutionally  
21 unacceptable” pain from suffocation and cardiac arrest a prisoner would  
22 experience if not fully anesthetized prior to administration of pancuronium  
23 bromide and potassium chloride). Accordingly, the Eighth Amendment does  
24 not require that ADC administer the drugs through a peripheral vein whenever  
25 feasible. To find otherwise would in effect turn this Court into a “board[] of  
26 inquiry charged with determining ‘best practices’ for executions.” *Id.* at 51.

22 *West*, 2011 WL 6724628, at \*17-18.

23 Lopez has not cited any legal authority or alleged any facts that bring into question  
24 the prior conclusion in *West* that the Eighth Amendment is not offended by administration  
25 of lethal chemicals through a femoral central line. Nor is there any persuasive or even  
26 colorable reason to think that placement of a peripheral IV line in a prisoner’s hand, while  
27 possibly more uncomfortable than other peripheral sites, poses an objectively intolerable risk  
28 of severe pain that qualifies as cruel and unusual. Indeed, the IV line was placed in Towery’s

1 hand only after placement at all preferable peripheral sites had failed. The contention that  
2 Towery was thus subjected to cruel and unusual punishment because it was necessary to  
3 place the backup IV in his hand is meritless.

4 Therefore, Lopez’s assertion that the IV-placement process in the Towery execution  
5 gives rise to an objectively intolerable risk of serious harm in future executions is also  
6 meritless. Again, an objectively intolerable risk of pain for purposes of the Eighth  
7 Amendment is not established “[s]imply because an execution method *may result in pain*,  
8 either by accident or as an inescapable consequence of death.” *Baze*, 553 U.S. at 50  
9 (emphasis added). Repeated punctures in IV-placement attempts are not uncommon in the  
10 execution context, as shown by the evidence in the *West* litigation, and do not result in the  
11 type of pain prohibited by the Eighth Amendment. Nor is it rare in therapeutic medicine.  
12 Lopez asserts that both the femoral artery and the femoral vein were punctured and that  
13 Towery likely experienced pain as a result. (Doc. 65 at 3.) He further asserts that ADC  
14 administered lethal chemicals to Robert Comer through his femoral artery. (*Id.*) Accepting  
15 these allegations as true, they fall far short of showing that arterial administration results in  
16 a constitutionally unacceptable level of pain. Moreover, the Supreme Court has emphasized  
17 that “an isolated mishap alone does not give rise to an Eighth Amendment violation,  
18 precisely because such an event, while regrettable, does not suggest cruelty, or that the  
19 procedure at issue gives rise to a substantial risk of serious harm.” *Baze*, 553 U.S. at 50  
20 (internal citation omitted). The difficulty and delay in placing two working IV lines in  
21 Towery appears to be atypical and may very well have been a result of his having been a  
22 habitual intravenous drug user. *See Towery v. Ryan*, 641 F.3d 300, 313 (9th Cir. 2010).  
23 While undoubtedly disquieting to a condemned inmate awaiting execution, repeated efforts  
24 to set IV lines do not, in and of themselves, suggest malevolence from Defendants, extreme  
25 pain, or even unnecessary pain. For these reasons Lopez has failed to show either “serious  
26 questions” or a likelihood of success on the merits of an Eighth Amendment claim based on  
27 placement of IV lines in past executions.

28 Lopez also asserts that Defendants “have designed a protocol that permits unfettered

1 discretion at the very points where *Baze* sought to limit the potential for error through  
2 safeguards” and thus Arizona’s lethal injection protocol is “outside the constitutional  
3 framework constructed in *Baze*.” (Doc. 62 at 25.) However, Lopez acknowledges that *Baze*  
4 considered the risk of pain only in the context of administering a three-drug protocol. (*Id.*  
5 at 24.) In *Baze*, the safeguards against maladministration of the first anesthetic drug were  
6 found important because there is no dispute that administration of pancuronium bromide and  
7 potassium chloride to a conscious individual will cause excruciating pain and suffering.  
8 *Baze*, 553 U.S. at 53-56. Here, ADC has notified Lopez that it intends to administer the one-  
9 drug protocol, the same method of execution advocated by both the plaintiff in *Baze* and the  
10 plaintiffs in *Dickens* and *West*. Under Arizona’s one-drug protocol, ADC will administer  
11 only a lethal dose of anesthetic; it will not administer either pancuronium bromide or  
12 potassium chloride. Thus, Lopez’s concern that Arizona’s one-drug protocol is “outside the  
13 constitutional framework” of *Baze* does not survive scrutiny.

14 A one-drug protocol using a lethal dose of barbiturate is not immune from attack  
15 under the Eighth Amendment. However, in the context of the complaint in this case,  
16 Plaintiffs have not asserted that maladministration of the lethal chemical used in Arizona’s  
17 one-drug regimen will cause substantial pain.<sup>2</sup> Rather, the Eighth Amendment claim  
18 presented in the complaint is that a condemned inmate may not be sufficiently unconscious  
19 when receiving a dose of pancuronium bromide and potassium chloride. (*See* Doc. 58 at 22  
20 (“The January 2012 Protocol no longer has constitutionally adequate protections to ensure  
21 that a prisoner will not suffer *from the second and third drugs*.”); *see also* Doc. 8 at 8 (“[U]se  
22 of a barbiturate-only protocol would eliminate the risk of substantial pain that would occur  
23 if pancuronium bromide and potassium chloride were administered to an improperly  
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25 <sup>2</sup>Although he does not directly assert that Kemp experienced substantial pain as a  
26 result of being injected with pentobarbital, Lopez references a witness’s statement that Kemp  
27 shook “violently” for five or six seconds, possibly as a result of a partial seizure. (Doc. 62  
28 at 13.) If in fact Lopez is asserting that execution using only a lethal dose of pentobarbital  
results in constitutionally unacceptable pain, there is insufficient evidence in the record to  
establish a likelihood of success on such a claim.

1 anesthetized prisoner.”.) Lopez has not demonstrated any objectively intolerable risk of  
2 pain from administration of the one-drug protocol.

### 3 **B. Disparate Treatment**

4 Lopez argues that, on its face and as applied, the January 2012 Protocol violates his  
5 right to equal protection. (Doc. 62 at 20.) The Equal Protection Clause of the Fourteenth  
6 Amendment commands that no State shall “deny to any person within its jurisdiction the  
7 equal protection of the laws.” U.S. Const. amend. XIV, § 1. A state practice that  
8 discriminates against a suspect class of individuals or interferes with a fundamental right is  
9 subject to strict scrutiny. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).  
10 Lopez asserts that Defendants’ disparate treatment of different condemned inmates burdens  
11 his right to be free from cruel and unusual punishment.<sup>3</sup>

12 In *Towery*, the Ninth Circuit observed that a prisoner’s right to be free from cruel and  
13 unusual punishment “is not affected simply because that prisoner is treated less favorably  
14 than another, where one means of execution is no more likely to create a risk of cruel and  
15 unusual punishment than the other, and both are constitutionally available.” *Towery*, 672  
16 F.3d at 660. However, a risk of being subjected to cruel and unusual punishment may be  
17 implicated if plaintiffs show an actual pattern of treating prisoners differently in ways that  
18 “affect the *risk* of pain to which they would be subjected.” *Id.* Lopez argues that each of the  
19 prisoners that have been executed since adoption of the January 2012 Protocol have been  
20 treated differently with respect to placement of the IV catheters and that these variances  
21 affected the risk of pain to which each was subjected. (Doc. 62 at 23.) That is mistaken.

22 First, the Ninth Circuit has recognized that the task of selecting which IV site to use  
23 may appropriately be made on a case-by-case basis, based on “individualized and changing  
24 factors” such as the condition of a prisoner’s veins. *Towery*, 672 F.3d at 661. Second, in  
25 *Towery*, the Ninth Circuit found that Plaintiffs had failed to show a pattern of treating

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26  
27 <sup>3</sup>Lopez does not urge the class-of-one equal protection theory advanced by Moormann  
28 and *Towery* in their motion for preliminary injunction. It is difficult to see how any such  
claim could survive after *Towery*. 672 F.3d at 660-61 (rejecting class-of-one argument).

1 prisoners differently in ways that affected the risk of pain, either generally or with respect  
2 to the planned application of the January 2012 Protocol to Moormann and Towery, including  
3 the fact that ADC's Director had the discretion to decide whether to use peripheral or central  
4 femoral IV access after consultation with the IV Team Leader. *Id.* at 659-60. There is no  
5 dispute that at the time of the *Towery* decision, ADC had utilized either peripheral or femoral  
6 (or both) IV lines in carrying out each of the previous 26 executions by lethal injection.  
7 Third, as already addressed above, use of a femoral catheter is no more likely to create a risk  
8 of cruel and unusual punishment than use of a peripheral catheter. For these reasons, Lopez  
9 has not raised serious questions or shown a likelihood of success on the merits of his equal  
10 protection claim.

### 11 C. Lack of Notice

12 Lopez argues that the January 2012 Protocol fails to provide reasonable notice of  
13 "critical aspects" of the mode and manner in which Defendants will carry out executions,  
14 including the method of IV access and the qualifications of the individuals placing the IV  
15 catheters. (Doc. 62 at 16.) He asserts that failing to provide this information and preventing  
16 access to counsel during the insertion of IV lines deprives him of his right to notice and an  
17 opportunity to be heard under the Due Process Clause of the Fourteenth Amendment.<sup>4</sup>  
18 Plaintiffs Moormann and Towery raised a similar claim in their motion for preliminary  
19 injunction, which the Court found wanting.<sup>5</sup> (Doc. 42 at 24-26.) Lopez has provided no new  
20 authority that was not previously considered by the Court.

21 To establish a procedural due process violation, Plaintiffs must show that (1) they had  
22 a property or liberty interest with which Defendants interfered, and (2) Defendants failed to  
23 use constitutionally sufficient procedures in depriving Plaintiffs of that right. *Kentucky Dep't*  
24 *of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). "[A]n individual claiming a  
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26 <sup>4</sup>The access-to-counsel issue is discussed next in Section I.D.

27 <sup>5</sup>Plaintiffs did not appeal this aspect of the Court's ruling. *See Towery*, 672 F.3d at  
28 656 n.3.

1 protected interest must have a legitimate claim of entitlement to it. Protected liberty interests  
2 ‘may arise from two sources—the Due Process Clause itself and the laws of the States.’” *Id.*  
3 (citing *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)).

4 Lopez does not allege that Arizona law creates an enforceable liberty interest. Indeed,  
5 as explained in the Court’s prior order, Arizona’s lethal injection protocol is not statutory—it  
6 is issued by ADC and sets out technical procedures for carrying out lethal injection. (Doc.  
7 42 at 18.) Rather, Lopez relies on a district court ruling in *Oken v. Sizer*, 321 F.Supp. 2d 658,  
8 664 (D. Md.), *stay vacated*, 542 U.S. 916 (2004) (Mem.), in which the court stated:  
9 “Fundamental fairness, if not due process, requires that the execution protocol that will  
10 regulate an inmate’s death be forwarded to him in prompt and timely fashion.” However,  
11 there is no dispute that Lopez has access to ADC’s protocol. The issue is whether he has a  
12 due process right to advance notice of the intended method of IV access and the  
13 qualifications of the IV Team who will be placing the IV catheters. He does not.

14 First, Lopez has pointed to no authority suggesting he has a right, prior to an  
15 execution, to challenge the qualifications of the IV Team or the method of intravenous  
16 access. *See Clemons v. Crawford*, 585 F.3d 1119, 1129 n.9 (8th Cir. 2009) (noting lack of  
17 authority indicating due process right to probe into backgrounds of execution personnel).  
18 Second, Lopez has not shown that lack of such notice will impair consideration of a colorable  
19 Eighth Amendment claim. To require the requested notice would in effect permit  
20 constitutional challenges based on speculative injuries and the possibility of negligent  
21 administration. The Sixth Circuit has recognized that such actions are

22 not only unsupported by Supreme Court precedent but [are] also beyond the  
23 scope of our judicial authority. *See, e.g., Gregg v. Georgia*, 428 U.S. 153,  
24 174-75 (1976) (“[W]hile we have an obligation to insure that constitutional  
25 bounds are not overreached, we may not act as judges as we might as  
26 legislators.”). While the Eighth Amendment does provide a necessary and not  
27 insubstantial check on states’ authority to devise execution protocols, its  
28 purpose is not to substitute the court’s judgment of best practices for each  
detailed step in the procedure for that of corrections officials. *See Baze*, 128  
S. Ct. at 1537 (“[A]n inmate cannot succeed on an Eighth Amendment claim  
simply by showing one more step the State could take as a failsafe for other,  
independently adequate measures. This approach would serve no meaningful  
purpose and would frustrate the State’s legitimate interest in carrying out a  
sentence of death in a timely manner.”).

1 *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009).

2 Lopez has not shown any credible prospect that information concerning venous access  
3 and the IV Team will lead to presentation of a viable Eighth Amendment claim. Specifically,  
4 Lopez has not alleged any facts to support the inference that the risk of pain and suffering  
5 during a lethal injection execution changes substantially based on the siting of the  
6 intravenous access, and the Court has rejected the argument that use of a femoral central line  
7 creates a risk of constitutionally unacceptable pain and suffering. *See West*, 2011 WL  
8 6724628, at \*17-18. Therefore, due process does not require advance notice of intended  
9 venous access sites.

10 Similarly, any pre-execution challenge based on qualifications of the IV Team would  
11 likely fail to establish a substantial risk of serious harm. Before both this Court and the Ninth  
12 Circuit, Defendants asserted that the “relevant experience” necessary for selection to the IV  
13 Team under the revised protocol “means that IV Team members must have no less than the  
14 training that is traditionally given for people to be licensed to place IVs.” *Towery*, 672 F.3d  
15 at 658. This representation is “binding” as to the meaning of “appropriately trained” and  
16 “relevant experience” in the context of the January 2012 Protocol. *Id.* Moreover, the  
17 protocol requires that a central femoral line be placed only by a medically-licensed physician  
18 with at least one year of relevant experience placing such lines. DO 710 (Jan. 2012), §  
19 710.02, ¶ 1.2.5.1, ¶ 1.2.5.4 & Attach. D, § E.1. Given these requirements, any pre-execution  
20 challenge to the qualifications of individual IV Team members would necessarily be based  
21 on speculation as to their ability to set IV catheters. Consequently, due process does not  
22 demand more notice than is already set forth in the protocol concerning the qualifications of  
23 the IV Team.

24 The lack of correlation between the due process right alleged in this case and the  
25 ability to pursue a claim of cruel and unusual punishment is even more pronounced here  
26 because Lopez will be executed using a one-drug protocol, and he has not alleged or  
27 identified the harm that would result from faulty IV siting or deficient IV Team  
28

1 qualifications. Again, implementation of a one-drug protocol is not immune from attack  
2 under the Eighth Amendment. However, Lopez simply has not articulated any specific harm  
3 from the risk of maladministration of a barbiturate in the absence of pancuronium bromide  
4 and potassium chloride also being administered as part of the execution protocol.

5 In substance, the relief Plaintiffs seek under the guise of due process is a right to  
6 judicial pre-clearance in every execution regarding whether ADC will comply with its  
7 protocol and how it will deal with contingencies. This is simply not a proper role for the  
8 judiciary in the absence of a demonstrated likely deprivation of constitutional rights.  
9 Admittedly, ADC does not have a perfect track record in the way it has administered and  
10 changed its protocol since resumption of executions in October 2010. *See Towerly*, 672 F.3d  
11 at 653. Most recently, ADC's failure to discover until the last minute the expiration of its  
12 supply of pancuronium bromide, forcing an unexpected, eve-of-execution switch to the one-  
13 drug protocol, is inexplicable. On the other hand, at least one last-minute change—the  
14 switch to pentobarbital on the eve of Beaty's execution—was driven by inmate litigation, not  
15 caprice.

16 In *West*, testimony was heard concerning the importation of sodium thiopental and the  
17 Department of Justice's eve-of-execution request that the imported drug not be used in  
18 Beaty's execution. The evidence showed that it was reasonable for ADC to believe the FDA  
19 had "approved" the drug's importation, that ADC was unaware of certain DEA requirements  
20 for importing sodium thiopental, and that ADC did not intentionally or knowingly import  
21 drugs unlawfully. *West*, 2011 WL 6724628, at \*19. Although ADC had deviated from its  
22 protocol either inadvertently or by design, such deviations were not undertaken in bad faith  
23 and none subjected condemned inmates to an objectively intolerable risk of harm. *Id.* at \*17.  
24 Consequently, the plaintiffs' contentions that ADC could not be trusted to adhere to its  
25 protocol and that judicial oversight was necessary to ensure protocol compliance were  
26 unpersuasive. Similarly, nothing in the instant motion carries the burden of persuasion.

27 **D. Access to Counsel and Courts**

28 The January 2012 Protocol precludes in-person legal visitation after 9:00 p.m. the day



1 before a scheduled execution, instead permitting only telephonic contact with attorneys of  
2 record. Lopez alleges such calls will take place in a holding cell where ADC officers will  
3 be present and thus there will be “no opportunity for privileged communication.” (Doc. 62  
4 at 18.) This restriction, Lopez asserts, violates his rights to meaningful access to counsel and  
5 the courts under the First, Fifth, Eighth, and Fourteenth Amendments.

6 In its prior order denying injunctive relief for Moormann and Towery, the Court  
7 addressed this claim and determined that Plaintiffs had failed to establish a likelihood of  
8 success on the merits. (Doc. 42 at 26-28.) During oral argument before the Ninth Circuit,  
9 counsel for Defendants agreed to the panel’s request to permit counsel for Towery and  
10 Moormann to meet in person with their clients the morning of each execution, thus mooting  
11 appeal of the issue for Towery and Moormann. *Towery*, 672 F.3d at 658. The court  
12 referenced ADC’s “long-standing” practice of permitting such visitation. *Id.*

13 Although Lopez asserts he has no reason to believe ADC will permit similar access,  
14 Defendants state in their response that counsel for Lopez will be permitted in-person  
15 visitation the morning of the execution up to 7:00 a.m. (Doc. 64 at 13.) Defendants assert  
16 that morning-of visitation was permitted from 6:00 to 7:00 a.m. for the Landrigan, King,  
17 Beaty, Bible, and West executions, and that, notwithstanding the terms of the current  
18 protocol, ADC intends to offer the same visitation terms to counsel for Lopez. Lopez asserts  
19 that he should be permitted visitation at least until 45 minutes before the start of the 10:00  
20 a.m. execution, as directed by the Ninth Circuit for the executions of Moormann and Towery.  
21 *See Towery*, 672 F.3d at 658 (referencing 2004 version of Department Order 710). The issue  
22 of meeting in person with counsel up to 7:00 a.m. may not be technically moot, but Lopez’s  
23 fear that ADC will dishonor its commitment to allow such access is unpersuasive, especially  
24 in light of ADC’s honoring its commitment made to the Ninth Circuit concerning the Towery  
25 and Moormann executions.

26 The dispute remains concerning in-person meeting with counsel from 7:00 a.m. up to  
27 and during the execution. This Court previously determined that Plaintiffs had not shown a  
28 likelihood of success on their access-to-courts claim based on the visitation policy change

1 enacted by the January 2012 Protocol. The Court adopts its previous conclusion, which  
2 applies with stronger force the closer the time of execution approaches. Communication with  
3 counsel by telephone is still permitted past 7:00 a.m. It is difficult to see how Lopez could  
4 speak in confidence with his lawyer in person, but not in confidence on the telephone, as he  
5 conclusorily asserts. Like Towery and Moorman before him, Lopez makes no attempt to  
6 show that confidential telephone communication cannot be effective in the three hours before  
7 execution. The legitimate purpose of access to courts is served by telephonic contact.  
8 Moreover, after the exhaustive and repetitive litigations that Lopez's counsel have conducted  
9 in numerous prior executions, the chance of anything happening in the last minutes that could  
10 result in successful immediate litigation attenuates well below the threshold for injunctive  
11 relief.

12 Lopez also argues that he is entitled to have counsel observe the IV-placement  
13 procedure. (Doc. 62 at 19; Doc. 65 at 4 n.3.) He alleges that ADC refused Towery's request  
14 to meet with counsel during the hour it took to set functioning IV lines and that without such  
15 access he will be denied meaningful access to the courts.

16 Prisoners have a constitutional right of access to the courts that is "adequate, effective,  
17 and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). However, this right  
18 "guarantees no particular methodology but rather the conferral of a capability—the capability  
19 of bringing contemplated challenges to sentences or conditions of confinement before the  
20 courts." *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Consequently, an inmate who brings a  
21 § 1983 claim based on his right of access to the courts must be able to show that the  
22 infringing act somehow defeated his ability to pursue a legal claim. That is, a prisoner must  
23 show he suffered an "actual injury" as a result of the defendant's actions. *Id.* at 348-49. An  
24 "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such  
25 as the inability to meet a filing deadline or to present a claim." *Id.* at 348. The right of  
26 access does not create "an abstract, freestanding right," but exists to vindicate other rights.  
27 *Id.* at 351.

28 Lopez does not identify any contemplated litigation that will be inhibited by the lack

1 of access to counsel during the IV-placement procedure, other than to speculate that some  
2 circumstance may arise immediately prior to his execution that presents a constitutional  
3 concern. This is insufficient to demonstrate actual injury under *Lewis v. Casey*. Moreover,  
4 as discussed above, repeated attempts to place an IV line do not raise a *per se* claim of cruel  
5 and unusual punishment. If the IV Team is unable to place a functioning IV line, Arizona's  
6 protocol provides that the Director may restart the procedure at a later time within the  
7 warrant's 24-hour period or abandon the effort altogether. DO 710 (Jan. 2012), Attach. D,  
8 § I.3. In such event, nothing in Arizona's protocol precludes the prisoner from access to  
9 counsel and, consequently, pursuit of any appropriate judicial remedies.

10 Lopez's argument from the circumstances of the Towery execution especially fails.  
11 Even with after-the-fact examination, there was nothing in the Towery execution that would  
12 have warranted judicial proceedings. The difficulty of finding IV access sites required  
13 immediate further effort by the IV Team, not intervention by this Court.

## 14 **II. Irreparable Harm, Balance of Equities, and Public Interest**

15 Although there is a likelihood of irreparable harm in every § 1983 action challenging  
16 a proposed method of execution, that factor alone is insufficient to warrant injunctive relief  
17 where there is no significant possibility of success on the merits. In *Hill v. McDonough*, the  
18 Court recognized the "important interest in the timely enforcement of a sentence" and  
19 cautioned that federal courts "can and should protect States from dilatory or speculative  
20 suits." 547 U.S. at 584-85. Given the State's "strong interest in enforcing its criminal  
21 judgments without undue interference from the federal courts," and because "the victims of  
22 crime have an important interest in the timely enforcement of a sentence," the Court  
23 concludes that the balance of equities favors Defendants and that a stay of execution to  
24 resolve Lopez's speculative allegations is not in the public interest. *Id.* at 584.

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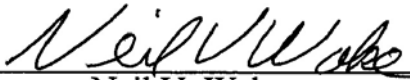
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**IT IS THEREFORE ORDERED** that the Motion by Plaintiff Lopez for Preliminary Injunction (Doc. 62) is **DENIED**.

DATED this 7<sup>th</sup> day of May, 2012.

  
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Neil V. Wake  
United States District Judge