No. 12-16084

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL V. LOPEZ,

Plaintiff-Appellant,

–vs–

JANICE K. BREWER, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. 2:12-cv-00245-NVW

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violation), § 2201 (declaratory relief), and § 2202 (injunctive relief). Plaintiffs' appeal is from a denial of their preliminary injunction motion, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court apply the correct standard in denying Plaintiffs' motion for preliminary injunction?

2. Are Plaintiffs' rights to access to counsel and the courts violated by ADC's decision to end in-contact attorney visitation at 7:00 a.m. the day of an execution?

3. Does Arizona's lethal injection protocol as implemented in the last three executions violate Plaintiffs' rights to be free from cruel and unusual punishment and equal protection?

4. Was the district court's decision denying Lopez an evidentiary hearing on his speculative claims clearly erroneous?

INTRODUCTION

Plaintiff Samuel Lopez seeks a preliminary injunction enjoining his execution on May 16, 2012. Specifically, Lopez contends that the Arizona Department of Corrections' ("ADC's") lethal injection protocol revised effective January 25, 2012, violates his First, Fifth, Eighth, and Fourteenth Amendments rights. Because the revised protocol does not take away constitutional safeguards ensuring that an inmate is not at serious risk of pain during an execution, this Court should deny Lopez's motion.

Prior to the executions of Robert Moormann and Robert Towery, this Court and the United States Court of Appeals for the Ninth Circuit denied similarly-sought injunctive relief, and those two executions were carried out without any evidence of significant pain or suffering.

The Arizona Supreme Court subsequently issued execution warrants for Thomas Kemp and Lopez, after which ADC provided notice of its intent to make two minor changes to the procedures followed in carrying out the Moormann and Towery executions: (1) backup chemicals would be immediately available to be placed in syringes but would not be placed in the syringes (a process that takes less than 90 seconds) unless necessary, and (2) attorney visits would be permitted the morning of execution between 6:00 a.m. and 7:00 a.m., rather than from 7:15 a.m. until 9:15 a.m. The first change was made to avoid

unnecessarily wasting execution chemicals, which are in short supply. The second change was made to avoid unnecessary delay in carrying out the executions and is a return to the policy followed without objection in the prior 6 executions. Kemp did not object to these changes, and his execution was carried out without incident on April 25, 2012.

STATEMENT OF THE CASE

In 2007, several plaintiffs filed a § 1983 action challenging numerous aspects of Arizona's lethal injection protocol.[1] The district court denied relief, 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 did not create a substantial risk of serious pain to inmates executed under the protocol . *See Dickens v. Brewer*, No. CV–07–1770–PHX–NVW, 2009 WL 1904294, at *1 & n. 2 (D.Ariz. July 1, 2009) (unpublished order). On February 9, 2011, this Court affirmed. *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011).

The protocol reviewed in *Dickens* required the sequential administration of the following: (1) sodium thiopental, an ultra-fast acting barbiturate that induces unconsciousness; (2) pancuronium bromide, a paralytic neuromuscular blocking agent that prevents any voluntary muscle contraction; and (3)

[1] Plaintiffs Towery and Moorman were not parties to this initial protocol challenge.

potassium chloride, which causes skeletal muscle paralysis and cardiac arrest. On June 10, 2011, ADC amended its protocol to provide for the administration of sodium thiopental or pentobarbital as the first of the three sequentially-administered drugs.

On July 15, 2011, Thomas West, along with the *Dickens* Plaintiffs, brought another § 1983 challenge to ADC's protocol alleging that ADC's failure to follow every aspect of its written protocol and its substitution of pentobarbital for sodium thiopental created a substantial risk that inmates would suffer unnecessary pain in violation of the Eighth and Fourteenth Amendments. Plaintiffs later amended their complaint to include an equal protection and due process claim. After a 3-day bench trial, the district court found no constitutional infirmities from ADC's implementation of its lethal injection protocol. *West v. Brewer*, No. CV–11–1409–PHX–NVW, 2011 WL 6724628, at * 10–21 (D.Ariz. Dec. 21, 2011). The court found that none of the complained-of-deviations created a substantial risk of needless suffering and severe pain. *Id*. at *13–21. The court noted, however, that ADC should amend its protocol to reflect its current practice, particularly with regard to IV placement and qualification standards for execution team members. *Id*. at * 13.

Consistent with the district court's findings in *West*, on January 25, 2012, ADC amended its protocol to reflect its current practice during executions.

ADC also provided for discretion in implementing either a one-drug or the current three-drug administration of chemicals. (ER 320–55.)

The amended protocol changed the composition and experience required for the IV team:

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

(ER 326.)

This amended protocol now requires the IV team members to have 1 year of relevant experience, rather than the "aspirational" requirement in the prior protocol that the team members have medical licenses and one year of "current" and relevant experience. *See West*, 2011 WL 6724628, at * 13 ("The Court finds credible Director Ryan's testimony that obtaining qualified [team members] is very difficult due to fears of professional repercussions from participating in executions."). In addition, IV team members are no longer required to attend trainings when no execution warrant is pending. Instead, they must attend trainings on the day before an execution. (ER 322, 326.) The protocol directs that the director, upon consultation with the IV team leader, shall determine the

catheter sites and that a femoral venous line may be utilized unless placed by a medically-licensed physician with relevant experience. (ER 326.)

On February 14, 2012, ADC notified Plaintiffs Moormann and Towery that it intended to use a three-drug protocol in their pending executions. Following a hearing, the district court denied a preliminary injunction to enjoin their pending executions. (Dist. Doc. 42.) Less than 48 hours before the Moormann execution, ADC discovered that its supply of pancuronium bromide had expired and filed a notice of intent to administer the one-drug protocol using domestically-obtained pentobarbital. *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). ADC made representations at oral argument before this Court regarding the qualifications of the IV team members in place for the pending executions. *Id*. at 658. ADC also represented that attorney visitation would be allowed, at the suggestion of the panel, on the day of execution for the pending executions, and that backup chemicals would be placed in syringes. *Id*. This Court determined that Plaintiffs failed to establish a likelihood of success on the merits of their Eighth Amendment and equal protection challenges. *Id*. at 659–61.

Between February 29 and April 25, 2012, ADC carried out the executions of Moormann, Towery, and Thomas Kemp. (Dist. Doc. 66, at 6.) Each inmate had either a peripheral catheter, femoral line, or both inserted during the

executions. (*Id*.) In Towery's execution, the IV team made numerous attempts to set a peripheral catheter. (ER 158.) The IV team ultimately set a femoral line for the primary IV and a peripheral catheter in Towery's hand as the backup line. (*Id*.) There is no evidence that any of these inmates suffered pain in their publically-witnessed executions.

District Court Order

In denying Lopez's request for a preliminary injunction, the district court found: (1) Arizona's implementation of its January 2012 protocol did not violate the Eighth Amendment; (2) there was no support for Lopez's equal protection claim; (3) Lopez failed to show that he was entitled to notice regarding IV access and the qualifications of ADC's IV team; and (4) Lopez failed to demonstrate a due process violation by ADC's precluding in-person visitation after 7:00 a.m. the day of the execution. (ER 003.)

As to Lopez's Eighth Amendment claims, the district court found that ADC's insertion of IV catheters, specifically a femoral catheter, does not create an intolerable risk of severe pain to the inmate. (ER 010–11) (citing *West v. Brewer*, No. CV–11–1409–PHX–NVW, 2011 WL 6724628, at *17–18 (D. Ariz. Dec. 21, 2011) (unpublished order), *appeal docketed*, No. 12–15009 (9th Cir. Jan. 3, 2012)). The district court also found meritless Lopez's claim that the backup IV catheter in the hand during Towery's execution posed an objectively

intolerable risk of pain. Lopez failed to demonstrate a compelling "reason to think that placement of a peripheral IV line in a prisoner's hand, while possibly more uncomfortable than other peripheral sites, poses an objectively intolerable risk of severe pain that qualifies as cruel and unusual." (ER 011.)

The district court found that Lopez's argument that ADC's one-drug protocol gives unfettered discretion to the Director to select drugs and IV placement did not survive scrutiny. (ER 013.) The *Baze* safeguards relating to selection and administration of the first anesthetic drug are important in a three-drug protocol because there was no dispute that the administration of pancuronium bromide and potassium chloride to a conscious inmate will cause excruciating pain and suffering. *Id*. (citing *Baze*, 553 U.S. at 53–56.) Because Arizona's one-drug protocol administers only a lethal dose of anesthetic, the concern attendant to other drugs is not present. *Id*.

As to Lopez's equal protection claim, the district court found that Lopez failed to raise serious questions or show a likelihood of success on the merits of his equal protection claim. (ER 015.) The court held that this Court recognized that "the task of selecting which IV site to use may appropriately be made on a case-by-case basis, based on 'individualized and changing factors' such as the condition of the prisoner's veins." (ER 014) (citing *Towery*, 672 F.3d at 661.) Following this Court's decision in Towery, the district court found that Lopez

failed to demonstrate that ADC had a pattern of treating prisoners differently in ways that affected the risk of pain. *Id*. at 12–13. The court also held that use of the femoral central line is no more likely to create a risk of cruel and unusual punishment than use of a peripheral catheter. (ER 015.)

The district court likewise found Lopez's claim that ADC's protocol does not provide adequate notice regarding the method of IV access and qualifications of the IV team to be meritless. (ER 015–17.) Lopez failed to provide any authority suggesting that he has a liberty interest in Arizona's execution protocol. (ER 015–16.) Moreover, Lopez failed to cite to any authority suggesting that he has a right to, prior to an execution, challenge the qualifications of the IV team members or the method of IV access. (ER 016.)

Finally, the district court denied Lopez's claim that his right to meaningful access to counsel and the courts is violated by Arizona's protocol. (ER 018–21.) The district court found that Lopez, like the previous plaintiffs, failed to show a likelihood of success on the merits of his claim. (ER 019.) ADC has indicated that counsel for Lopez may visit, like counsel for Landrigan, King, Beaty, Bible and West, from 6:00 a.m. to 7:00 a.m. the day of the execution. The district court found that contact after 7:00 a.m., while telephonic, still served the legitimate purpose of access to counsel and the courts. (ER 020.) Moreover, Lopez failed to "identify any contemplated litigation that will be inhibited by the

lack of access to counsel during the IV-placement procedure, other than to speculate that some circumstance may arise immediately prior to his execution that presents a constitutional concern." (ER 020–21.)

The district court found there was no likelihood of success on the merits in any of Plaintiffs' claims and, given the State's strong interest in enforcing its criminal judgments, held the balance of equities favors Defendants and denied Lopez's request for a stay of execution. (ER 021.)

SUMMARY OF ARGUMENT

Since amending its lethal injection protocol in January 2012, ADC has carried out three executions using a one-drug protocol. Each of these publically-witnessed executions was carried out without incident.

In this case, Lopez contends, based in large measure on ADC's implementation of the protocol in the Moormann, Towery, and Kemp executions, that ADC will violate his constitutional and equal protection rights by not allowing attorney contact visitation up to 45 minutes prior to the execution, improperly siting IV access. None of these claims raise serious questions and Lopez fails to demonstrate a likelihood of success on the merits of his claims.

At the discretion of the director, ADC allows attorney contact visitation between 6:00 and 7:00 a.m. the day of an execution. The written protocol since

2008 provided for attorney visitation to end at 9:00 p.m. the day before the execution. ADC's director has historically allowed visitation on the morning of an execution between 6 and 7 a.m. The January 2012 amended protocol did not change the visitation protocol. Despite this recent history, at the suggestion of this Court's reliance on superseded protocols in *Towery v. Brewer*, ADC allowed visitation until 9:15 a.m. the day of the executions of Moormann and Towery. For the execution of Kemp, ADC followed its written protocol, but the director used his discretion to allow contact visitation from 6:00 to 7:00 a.m. the day of the execution.

Lopez does not have an abstract free standing claim to attorney contact in this context. The right of access exists to vindicate other rights. Lopez fails to identify any contemplated litigation that will be inhibited by the lack of access to counsel after 7:00 a.m. the day of his execution, other than to speculate that there may be some circumstance that may arise prior to his execution that could present constitutional concern. This type of speculation does not warrant injunctive relief.

Likewise, Lopez's claims that his Eighth Amendment rights will be violated based on the executions of Towery and Kemp do not present serious questions or a likelihood of success on the merits. Lopez argues that repeated attempts at IV placement during the Towery execution demonstrated an

objectively intolerable risk of pain. He also asserts that the placement of the backup IV catheter in the right hand and a puncture to the femoral artery demonstrates an objectively intolerable risk of harm. However, Lopez provides no evidence that Towery suffered unconstitutional pain or discomfort. An objectively intolerable risk of pain for purposes of the Eighth Amendment is not established simply because an execution method may result in pain. Here, there is no evidence that any of the three recent inmates executed using a one-drug protocol suffered any pain.

The district court correctly found that Lopez's claims are speculative and did not raise serious questions warranting injunctive relief.

ARGUMENTS

I

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

Standard of Review.

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). An abuse of discretion will only be found if the district court based its decision "on an erroneous legal standard or clearly erroneous findings of fact." *Id*.

A preliminary injunction is "an extraordinary and drastic remedy, one that

should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). An injunction may be granted only where the movant shows that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005).

In the context of a capital case, the Supreme Court has emphasized that these principles apply when a condemned prisoner asks a federal court to enjoin his impending execution because "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). Rather, "a stay of execution is an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. at 584.

Plaintiffs contend that the district court erred in failing to apply this Court's "sliding-scale" test in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). This argument is unpersuasive. The district court cited to the standard set forth in *Wild Rockies* in its order denying the preliminary

injunction and specifically balanced the State's stronger interest in enforcing its criminal judgments against Plaintiffs weaker irreparable harm claim. (ER 010, 031–32.) By citing the standard, it is assumed that the district court knew and followed the law. *See United States v. Cervantes-Valenzuela*, 931 F.2d 27, 29 (9th Cir.1991) (district courts are presumed to follow the law).

On balance, because Plaintiffs did not establish a likelihood of success on the merits, their claim of irreparable harm is outweighed by the State's interest in finality. Thus, this Court should deny Plaintiffs' request for a preliminary injunction. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (standard for granting preliminary injunction balances plaintiff's likelihood of success on the merits against the relative hardship to the parties).

In a post-*Wild Rockies* case, this Court specifically reiterated that an inmate seeking to enjoin his execution must demonstrate that he is likely to succeed on the merits. *See Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (en banc) (following the *Winter* standard set forth by the Supreme Court). The district court in the instant case applied the appropriate standard.

II

LOPEZ FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIM THAT ARIZONA'S LETHAL INJECTION PROTOCOL DENIES ACCESS TO COUNSEL AND THE COURTS WARRANTING A PRELIMINARY INJUNCTION.

Lopez contends that Arizona's current lethal injection protocol denies him access to counsel and the courts. Because ADC permits communication between the prisoner and his counsel on the morning of an execution, Lopez's claim that he is denied his right to counsel and access to court fails.

The current protocol provides that attorney contact visitation terminates at 9:00 p.m. the day before an execution, but permits attorney telephone contact thereafter. (D.O. 710.11 § 1.5.2.) This requirement was in place during the Landrigan, King, Beaty, Bible, and West executions. *See* Deposition of Dora Schriro, Ex. 32, 3508 protocol, *Dickens v. Napolitano*, No. CV-07-01770-PHX-NVW (D. Ariz.). ADC's director, however, allowed attorney contact visitation on the morning of those executions between 6:00 a.m. and 7:00 a.m. In *Towery*, this Court relied on prior protocols that had been superseded to request that ADC allow attorney contact visitation with Towery and Moormann until 9:15 a.m. the day of their executions. *See Towery*, 672 F.3d at 658. ADC complied with that request for those executions.

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

Here, Lopez argues that his right to access to counsel and the courts is violated in two ways: (1) the written protocol and the discretion used by the director in granting visitation violates his right to access; and (2) by failing to allow counsel access to the inmate during the IV placement. Neither argument is compelling.

Lopez fails to demonstrate a likelihood of success on the merits on his right to access claim.

In *Towery*, at the request of this panel, ADC agreed to allow visitation until 9:15 a.m. on the day of the executions of Towery and Moormann. 672 F.3d at 658. For the April 15, 2012 execution of Thomas Kemp, ADC followed its written protocol regarding contact visitation, but after notice to counsel, allowed attorney visitation from 6:00 to 7:00 a.m. the day of the execution. ADC will allow attorney visitation from 6:00 to 7:00 a.m. the day of execution for Lopez. Ending visitation at 7:00 a.m. is necessary to avoid delay in carrying out the execution because confidentiality concerns relating to the identity of execution team members requires that movement to the execution chamber and placement of the IV's not take place until the attorney visit ends.

Lopez argues that Towery's execution provides proof that greater access to counsel than ADC affords is necessary. Specifically, he argues that because the IV team had difficulty accessing Towery's veins, and there was an apparent puncture to Towery's femoral artery, Lopez's counsel needs to be present for the IV placement. Lopez fails to identify any contemplated litigation at that stage that would require access to courts. If there is difficulty finding a vein, as in Towery's execution, it is hard to imagine what possible claim could be raised at that hour. The IV team is tasked with finding IV access, and as the district court found, "there was nothing in the Towery execution that would have warranted judicial intervention." (ER 021.) In any event, if the IV team is unable to place

a functioning IV catheter, Arizona's protocol provides that the director may restart the procedure at a later time within the warrant's 24-hour period or abandon the effort altogether. DO 710 (Jan. 2012), Attach. D, § I.3. In this scenario, nothing in the protocol precludes the prisoner from access to counsel and pursuit of any appropriate judicial remedy.

Lopez's reliance on *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2012 WL 1132607, at *15 (S.D. Ohio April 4, 2012), discussing the alleged failed execution of Rommell Broom, is speculative. In that case, it was alleged that Ohio introduced a doctor who was not a member of the execution team who incorrectly placed an IV in the inmate's ankle. Lopez uses this to argue that he needs access to counsel because this could happen in Arizona. This is highly speculative and not the type of claim that warrants injunctive relief.

The district court correctly found that Lopez's claim is speculative and he failed to demonstrate a likelihood of success on the merits. This Court should affirm the district court's denial of injunctive relief.

III

LOPEZ FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS EIGHTH AND FOURTEENTH AMENDMENT CLAIMS.

Lopez contends that ADC's implementation of its current lethal injection protocol violates the Eighth and Fourteenth Amendments. Specifically, he argues that the IV team's placement of IV lines not only creates an objectively reasonable risk of severe pain, but that ADC is not subjectively blameless in their actions. In addition, Lopez argues that his equal protection rights are violated by Arizona's protocol.

Eighth Amendment.

The Eighth Amendment "prohibits punishments that involve the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society." *Cooper v. Rimmer*, 379 F.3d 1029, 1032 (9th Cir. 2004). That prohibition necessarily applies to the punishment of death, precluding executions that "involve torture or a lingering death, or do not accord with the dignity of man." *Beardslee v. Woodford*, 395 F.3d at 1070 (internal citations omitted). A violation of the Eighth Amendment can be established by demonstrating there is a "substantial risk of serious harm" that is sure or very likely to cause pain and suffering. *Dickens v. Brewer*, 631 F.3d at 1144–46 (adopting *Baze* plurality);

see also Brewer v. Landrigan, 131 S. Ct. 445 (2010). The risk must be an "'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze*, 553 U.S. at 50 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

The standard for granting injunctive relief is that set forth by Chief Justice Roberts in *Baze*:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol similar to the [Kentucky] protocol we uphold today would not create a risk that meets this standard.

Id. at 61.

Lopez alleges that the circumstances of the Towery and Kemp executions demonstrate that ADC officials "have created an objectively intolerable risk of harm for which they cannot be subjectively blameless." Lopez's arguments are without merit.

Lopez questions whether the IV team members in the Towery execution were qualified because they were unsuccessful in setting a peripheral line. Lopez cites Towery's private autopsy report, which states that *after Towery's elbow pit was incised*, Towery's "superficial veins were readily exposed and identified.

The walls are thin, delicate and translucent without sclerosis or surrounding scar." (Doc. 54–1, Exhibit W.) Lopez therefore argues that Towery had "good veins," and the IV team members were unable to set a peripheral line because they were unqualified to do so. Lopez's argument is unpersuasive.

Towery's private medical examiner did not attempt to set a peripheral IV while Towery was alive, and his description of Towery's veins *after his arm was incised* does not show that a qualified IV team member would have been able to set a peripheral line. The protocol requires that an IV team member be a "physician, physician assistant, nurse, emergency medical technician, paramedic, military corpsman, phlebotomist or other appropriately trained personnel" and "have at least one year of relevant experience in placing either peripheral or central femoral intravenous lines." (D.O. 710.02 § 1.2.5.1.) Despite Lopez's claim that Towery had "good veins," [2] the medical doctor and nurse tasked with placing IV catheters determined to the contrary and placed the primary line in the femoral vein.

Lopez also suggests that the IV team leader was unqualified because after unsuccessful attempts to set a peripheral line in either of Towery's arms, the IV

[2] *See Towery v. Schriro*, 641 F.3d 300, 313 (9th Cir. 2010) (addressing whether trial counsel should have presented evidence that Towery was a "skilled intravenous drug user").

team leader initially recommended using the left peripheral line as the backup line. Towery argues that because the IV team had already been unsuccessful setting a peripheral line, it was "unreasonable" for the IV team leader to suggest another attempt to set a peripheral line as a backup. (*See* ER 132.) At the same time, however, Lopez argues that Towery's hand was an inappropriate site for a backup line because of a greater potential for discomfort. Assuming the IV team leader, a medically-licensed physician,[3] suggested making a final effort to set a peripheral backup line, rather than proceeding straight to setting the backup line in Towery's hand, this reflects the IV team leader's efforts to keep Towery as free from any discomfort as possible. This was not unreasonable.

Ultimately, the IV team leader, after discussion with the Director, and after an additional attempt to secure a peripheral line as the backup line, used Towery's right hand as the location for the backup line. (ER 152, Attachment 1.) These circumstances do not reflect a lack of qualifications, but instead the IV team leader's efforts to follow the protocol's requirement to secure a backup line. *See Towery*, 672 F.3d at 658 ("The IV Team members shall insert a primary

[3] The protocol requires that when a central femoral line is used—as it was in Towery's execution—it must be placed by a medically-licensed physician with relevant experience. D.O. 710.02 § 1.2.5.4.

IV catheter and a backup IV catheter, as required by Attachment D, § E.1 of the 2012 Protocol.")

Lopez provides no evidence that Towery suffered "serious harm" or was exposed to an unconstitutional risk of severe pain by the placement of the backup IV catheter in his hand. *See Baze*, 553 U.S. at 49–50. In the Towery execution, the IV team member's unsuccessful attempts to set peripheral IV lines and the use of the hand as a site for the backup line did not create the 'substantial risk of severe pain' the Supreme Court was concerned about in *Baze*. Lopez's reliance on the "medical team leader's" testimony during the *West* litigation that if pentobarbital was administered in a smaller vein "down, away from the elbow," "it would most likely cause *discomfort,*" is unpersuasive. (*See* ER 147 (emphasis added)). Lopez fails to demonstrate that this "discomfort" rises to the level of the severe pain prohibited by the Eighth Amendment. In any event, there is no evidence that Towery experienced unconstitutionally severe pain in the placement of that IV catheter.

Lopez asserts that Kemp was subjected to an increased risk of pain from the placement of a femoral central line. The argument that a central femoral line creates a risk of constitutionally unacceptable pain has been rejected. *See West v. Brewer*, 2011 WL 6724628, at *17–18. In *West*, the evidence at trial demonstrated that a prisoner may experience some pain and discomfort during

the placement of a central line if the topical anesthetic was improperly administered. Plaintiff's own expert, however, testified that the pain was difficult to quantify. In any event, the evidence demonstrated that no prisoner during the past five executions verbally complained of, or appeared to experience, any pain while a central line was placed.

Lopez does not cite to any authority or allege any facts here that warrant a finding that placement of a central line offends the Eighth Amendment. There is no evidence that Towery or Kemp suffered any pain in their publically-witnessed executions.

Lopez's assertion that Kemp's torso and right arm shook for approximately 6 seconds after he was given pentobarbital also does not demonstrate that Kemp suffered harm or risk of pain. While Lopez's medical expert believes that Kemp may have suffered a partial seizure, he does not opine that it was a result of the execution protocol and notes instead that it "could be related to medication administration, previous head injury or stroke, or a history of seizures." (ER 132.) Kemp, like Towery and Moormann, was executed using a one-drug protocol. He was not administered a paralytic drug (as would have been required in the three drug protocol) that would have rendered him incapable of expressing pain. Moreover, Lopez's medical expert does not suggest that Kemp experienced serious harm or severe pain. (*Id.*)

"Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50. For this reason, this Court should affirm the district court's denial of injunctive relief.

Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A state practice that interferes with a fundamental right or that discriminates against a suspect class of individuals is subject to strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Lopez asserts that ADC's disparate treatment of different condemned inmates burdens his right to be free from cruel and unusual punishment.

In *Towery*, this Court found that a prisoner's right to be free from cruel and unusual punishment "is not affected simply because that prisoner is treated less favorably than another, where one means of execution is no more likely to create a risk of cruel and unusual punishment than the other, and both are constitutionally available." 672 F.3d at 660. A risk of being subjected to cruel and unusual punishment, however, may be implicated if prisoners show an

actual pattern of treating prisoners differently in ways that "affect the risk of pain to which each was subjected." *Id*.

Lopez argues that each of the inmates executed under the January 2012 protocol have been treated differently with respect to the placement of IV's and the variances regarding IV placement affected the risk of pain each inmate was subjected. This claim should be denied.

This Court recognized that it is appropriate that decisions about the execution method "be made on a case-by-case basis, as they may well depend on individualized and changing factors such as the availability of particular people to participate in the execution, the supply of drugs available to the State at a given time, and the condition of the prisoner's veins." *Towery*, 672 F.3d at 661. In addition, this Court found that the plaintiffs in Towery had failed to show a pattern of treating inmates differently in ways that affected the risk of pain, either generally or with respect to the planned application of the January 2012 protocol, including the fact that the director had the discretion to decide whether to use peripheral or central line IV access after consulting the IV team leader. *Id*. at 659–60.

The district court correctly found that Lopez failed to raise serious questions or showed a likelihood of success on the merits of his equal protection claim. There is no dispute that at the time of this Court's *Towery* decision, ADC

had utilized central line or peripheral IV placement in every execution. As stated above, use of the femoral line is no more likely to create a risk of severe pain than use of a peripheral catheter. The fact that there were differences in how the executions of Moormann, Towery , and Kemp were carried out does not support Lopez's argument that ADC engages in a pattern of treating prisoners differently in ways that subject them to a substantial risk of pain. Neither Moormann, Towery, nor Kemp was exposed to or experienced significant pain. Because Lopez has failed to demonstrate some way in which the director's discretion is being irrationally exercised so that Lopez is being treated less favorably than others, his argument necessarily fails. *See Towery*, 672 F.3d at 661.

IV

LOPEZ IS NOT ENTITLED TO RELIEF OR AN EVIDENTIARY HEARING BASED ON HIS SPECULATIVE CLAIMS.

Lopez asserts that he is entitled to relief based on the uncontested affidavits he submitted below. At a minimum, he argues, the district court should have held an evidentiary hearing on his claims. Taking Lopez's affidavits as true, he is not entitled to an evidentiary hearing or relief. Lopez fails to demonstrate that any inmate has suffered unconstitutional pain during the administration of the January 2012 protocol.

Speculative injury does not justify a finding of immediate irreparable harm warranting injunctive relief. *See Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). The district court found Lopez's claims of risk of harm to be speculative. For example, Lopez argues that the autopsy finding that Towery's femoral artery was punctured demonstrates that Towery *would* have suffered pain *if* he was provided the drugs arterially. (Opening Brief at 31–32.) Although the autopsy finding is considered evidence, Lopez fails to demonstrate that Towery was given the lethal drugs arterially, and more importantly, he fails to show that Towery actually suffered pain as a result of any IV placement. Towery was executed under the one-drug protocol. As a result, he was not given a paralytic agent and was thus able to verbalize any pain or discomfort during the IV placement and before the administration of the lethal drug. There is no evidence that Towery complained of any pain.

Lopez also contends that placement of the IV catheter in Towery's right hand was unnecessary and against the advice of ADC's "Medical Team Leader." The district court found that the placement of the IV catheter in Towery's hand did not subject Towery to cruel and unusual punishment. Lopez asserts that is not the issue here—the issue, according to Lopez, is that it was simply unnecessary to place the IV catheter in the hand because Towery had good veins. (Opening Brief at 36–37.) Whether Towery had good veins is not relevant to the

inquiry here. The issue is whether Towery suffered intolerable pain in the placement of the IV catheter in his hand. Clearly, Lopez presents no evidence that Towery suffered pain. The Arizona protocol provides that a backup catheter be placed and the IV team determined that because they could not access a peripheral vein in the arms, the catheter would be placed in the hand.

Lopez is again essentially asking this Court to become a "board of inquiry" and micromanage Arizona's execution process. *See Baze*, 553 U.S. at 51 (permitting an Eighth Amendment showing on speculative evidence would "threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions . . . .") Lopez's claims are speculative and do not warrant relief. In *Hill*, the Supreme Court recognized the "important interest in the timely enforcement of a sentence" and cautioned that federal courts "can and should protect States from dilatory or speculative suits." 547 U.S. at 584–85. Because Lopez has not set forth any type of claim that would entitle him to relief, he has not established an equitable basis for a stay of execution. Given the State's strong interest in enforcing its judgments without undue interference from the federal courts, and because "the victims of crime have an important interest in the timely enforcement of a sentence," this Court should conclude that the balance of equities favors Defendants and that a stay of execution to resolve Lopez's speculative allegations is not in the public interest. *Id*. at 584.

CONCLUSION

For the above reasons, Defendants-Appellees request that this Court affirm the district court's denial of Lopez's request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2012.

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,278 words.

s/ Jeffrey A. Zick
Assistant Attorney General

No. 12-16084

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL V. LOPEZ, Petitioner-Appellant, –vs– JANICE BREWER, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. 2:12-cv-00245-NVW **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 11th day of May, 2012.

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