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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Frank Jarvis Atwood,

Plaintiff,

v.

David Shinn, Director, Arizona
Department of Corrections, Rehabilitation
& Reentry; James Kimble, Warden,
ASPC-Eyman; Jeff Van Winkle, Warden,
ASPC-Florence; Lance Hetmer, Assistant

CASE NO. 2:22-cv-00860-JAT-JZB

**AMENDED COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

This is a capital case.

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Director for Prison Operations, Arizona
Department of Corrections, Rehabilitation
& Reentry; Mark Brnovich, Attorney
General of Arizona; John Doe, Arizona-
licensed Pharmacist,

Defendants.

**EXECUTION WARRANT ISSUED
FOR JUNE 8, 2022, 10:00 A.M.**

COMPLAINT

1. Plaintiff Frank J. Atwood, through his counsel, seeks both preliminary and permanent relief, requesting this Court declare and enforce his rights under the Eighth Amendment to the United States Constitution, the Americans with Disabilities Act, the Rehabilitation Act, 18 U.S.C. § 3599, and 42 U.S.C. § 1983, and issue an injunction commanding defendants not to carry out any method of execution as set forth in the applicable promulgation of the Arizona Department of Corrections, Rehabilitation and Reentry (the “Department”). The resulting execution protocols and procedures, facially and as applied to Plaintiff, pose an unnecessary risk of causing substantial pain and suffering in violation of his right to be free from the infliction of cruel and unusual punishments. The Arizona Supreme Court has issued a warrant for Plaintiff’s execution scheduled June 8, 2022 and to transpire for 24 hours from time of commencement. Defendants have set 10:00 a.m. as the time of commencement.

I. INTRODUCTION

2. If the State is to be allowed to execute people, Courts have held fast to the requirement, as a fundamental matter of decency, that they not do so in a way that is unnecessarily painful. It is death itself that is the punishment, not the method of its

1 infliction.

2 3. Arizona has undertaken to give its condemned a choice, enshrined in its
3 Constitution, between two methods: lethal injection or lethal gas. That choice means
4 nothing if one or both of the options are illegal, and for Frank Atwood, the ways the State
5 has chosen to implement each of these options does not meet minimal constitutional
6 standards.

7 4. Mr. Atwood, a devout Orthodox Christian, is now 66 years old, wheelchair-bound,
8 and in constant pain from a degenerative spinal condition, which has worsened
9 significantly as he has received decades of inadequate care from the State.
10

11 5. The way Arizona has chosen to conduct lethal injections, its default option, requires
12 the inmate to be stretched flat on his back on a gurney—something that with his condition,
13 Frank Atwood cannot do without suffering unimaginable pain. The State has also been
14 careless with its execution drugs, failing to keep its own promises to ensure that it only
15 uses drugs that have not expired and have passed important quality checks, according to
16 the minimum standards considered medically acceptable.

17 6. For its other option, lethal gas, Arizona has inexplicably chosen cyanide gas—the
18 gas used by Nazi Germany to commit a genocide in the 1940s and widely acknowledged
19 to cause an especially painful death—when other lethal gasses that could accomplish an
20 execution with far less suffering are available.

21 7. Arizona promised Mr. Atwood he could choose the method by which the State ends
22 his life, something it has a constitutional duty to do in a manner that is consistent with
23 evolving standards of decency. Instead, he has been given the choice between two forms
24

1 of torture, when non-torturous possibilities exist.

2 **II. PARTIES**

3 8. Frank J. Atwood is a state prisoner incarcerated at the Arizona State Prison
4 Complex—Eyman, housed in its Browning Unit. He is imprisoned under a death sentence
5 entered in the Arizona Superior Court in 1987 and faces an execution date of June 8, 2022,
6 due to a warrant of the Arizona Supreme Court entered May 3, 2022.

7 9. Defendant Mark Brnovich is the Attorney General of Arizona, is the chief legal
8 officer of the state, and has general supervisory authority over county and local prosecutors.
9 Attorney General Brnovich is responsible for initiating and pursuing the execution process
10 for state prisoners under sentence of death. Further, the Attorney General is responsible for
11 the administration of the victims’ rights program, which administers a plan for assisting
12 and monitoring state and local entities that are required to implement and comply with
13 victims’ rights laws, including A.R.S. §13-4433(B). See A.R.S. § 41-191.06. Attorney
14 General Brnovich is sued in his official capacity and is alleged to have acted in all regards
15 under color of state law.
16

17 10. Defendant David Shinn is the director of the Arizona Department of Corrections,
18 Rehabilitation and Reentry. He is being sued in his official capacity, and is alleged to have
19 acted in all regards under color of state law. He is responsible for the oversight and
20 enforcement of policies and procedures generally applicable to ~~all prisons and~~ all prisoners
21 and is responsible for carrying out Mr. Atwood’s execution.
22

23 11. Defendant James Kimble is the warden of ASPC-Eyman. He is being sued in his
24 official capacity, and is alleged to have acted in all regards under color of state law.

1 12. Defendant Jeff Van Winkle is the warden of ASPC-Florence. He is being sued in
2 his official capacity, and is alleged to have acted in all regards under color of state law.

3 13. Defendant Lance Hetmer is the Assistant Director for Prison Operations of
4 ADCRR. Arizona’s execution protocol charges him with “the planning and overall
5 direction of all pre-execution, execution and post-execution activities.” He is being sued in
6 his official capacity, and is alleged to have acted in all regards under color of state law.

7 14. Defendant John Doe, anonymous pharmacist retained by Arizona Department of
8 Corrections, Rehabilitation and Reentry to conduct pharmaceutical compounding of high-
9 risk compounded sterile preparations, including but not limited to pentobarbital sodium
10 solution for use in executions, including the execution of Plaintiff ordered to occur on June
11 8, 2022. He is alleged to have acted in all regards under color of state law.

12
13 **III. JURISDICTION**

14 15. This case arises under the United States Constitution and presents a federal question
15 within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331
16 and 28 U.S.C. § 1343(3). This action is brought pursuant to 42 U.S.C. § 1983. Further, 28
17 U.S.C. § 2254 is implicated also.¹

18 16. The Court has the authority to grant declaratory relief pursuant to the Declaratory
19

20
21 _____
22 ¹ Controlling authority dictates that a challenge to method of execution be brought under
23 42 U.S.C. § 1983. *See Hill v. McDonough*, 547 U.S. 573 (2006); *Bucklew v.*
24 *Precythe*, 139 S.Ct. 1112 (2019). However, when the alternative method proposed by the
inmate is not presently available under state law, it is unsettled whether the challenge
should be brought instead as a petition for a writ of habeas corpus under 28 U.S.C. §
2254, and a case raising that question was recently argued in the Supreme Court. *See*
Nance v. Ward, No. 21-439 (argued April 25, 2022).

1 Judgment Act, 28 U.S.C. §§ 2201 and 2202.

2 17. The Court has the authority to award costs and attorneys' fees under 42 U.S.C. §
3 1988.

4 **IV. VENUE**

5 18. Venue is proper in this District under 28 U.S.C. § 1391(b). Defendants are
6 sued in their official capacities, and their official places of business are located within this
7 District. The events giving rise to this complaint have occurred or will occur within this
8 District.

9 **V. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

10 19. Plaintiff attempted to exhaust any available administrative remedies. Defendants
11 failed to process his grievances.
12

13 **VI. FACTS ~~REGARDING MR. ATWOOD'S MEDICAL CONDITION~~**

14 **A. Mr. Atwood Is Wheelchair-bound from Degenerative Spinal Disease, a**
15 **Severely Painful Condition Worsened by the Deliberate Indifference of the**
16 **Department.**

17 20. Mr. Atwood, now 66 years old, has been incarcerated on Arizona's death row in the
18 custody of the Department since 1987. For most of the term of this incarceration, Mr.
19 Atwood has suffered from degenerative spondylosis in his spine, an excruciatingly painful
20 condition that has worsened significantly as he has received, in the care of the Department,
21 grossly insufficient medical treatment.

22 21. The treatment he was receiving was so inadequate to meet his medical needs that in
23 2020, he was forced to file a lawsuit against the Department simply to obtain a basic
24 minimum standard of medical care. *Atwood v. Days*, No.: CV20-00623-PHX-JAT (JZB).

1 A renowned orthopedic surgeon, Dr. Philip Davidson, evaluated him, and supported by a
2 detailed declaration from Dr. Davidson, Mr. Atwood moved for a preliminary injunction,
3 asking the Court to order the Department to restore minimally adequate treatment,
4 including effective pain medication. The Court held an evidentiary hearing on October 29,
5 2021, and on December 7, 2021, issued an Order (Exhibit 1) containing detailed findings
6 of fact about Mr. Atwood's condition, which remain true today. The Court concluded Mr.
7 Atwood had "shown a likelihood of success on the merits of his deliberate indifference
8 claim regarding the treatment of his pain," and that a reasonable jury could find the
9 Department's healthcare contractor "failed to competently treat [Mr. Atwood]'s serious
10 pain needs and acted with deliberate indifference." *Id.* at 13.

12 22. Based on extensive interview~~ing~~ and detailed review of voluminous medical records
13 and imaging studies, Dr. Davidson opined that Mr. Atwood has "severe spondylosis with
14 severe radicular symptoms," specifically including myelomalacia (softening of the spinal
15 cord due to hemorrhaging inside the spine) at vertebrae C5-C6 in the neck, causing
16 "radiating pain, weakness, and motor dysfunction." Exhibit 2, Davidson Dec., ¶ 27. The
17 most painful condition he has, however, is in his lumbar (lower) spine, where neural
18 compression and degenerative spondylosis are "highly painful." *Id.* ¶ 28.

19 23. Dr. Davidson opined that Mr. Atwood has critical need for both an interventional
20 pain specialist and an orthopedic spine surgeon or neurosurgeon to address his severe
21 chronic pain., *id.* ¶¶ 31-32, and that "to a great extent, more likely than not, his current state
22 of spinal degeneration and symptomatology is a result of negligence and under-treatment
23 rendered while this patient has been incarcerated by the State of Arizona." *Id.* ¶ 34.
24

1 24. Dr. Joel Zivot, a board-certified anesthesiologist, physically examined Mr. Atwood
2 on May 16, 2022, ~~afers well as~~ conducting a detailed record review. He, too, concluded
3 that “Mr. Atwood suffers from intense and profoundly debilitating pain along his spine as
4 a consequence of chronic degeneration of vertebral bodies” that have “caused multiple
5 compressions of the nerve roots as they pass from the spinal cord to the arms and legs,”
6 which “has resulted in permanent damage that manifests as profound weakness and
7 unremitting pain.” Exhibit 3, Zivot Dec, ¶ 6. He identified “among other indications of
8 extreme disrepair, 16 instances of severe foraminal stenoses throughout his cervical and
9 lumbar spine,” causing pain that is “extremely difficult to treat.” *Id.* ¶ 8.

11 25. The position of Mr. Atwood’s body has a profound effect on the level of pain he
12 experiences. Dr. Zivot explains that Mr. Atwood “has identified how he can position his
13 body in an attempt to relieve the bony compression on his nerve roots,” but unfortunately,
14 that strategy “has also resulted in profound and permanent limitations of his body
15 mechanics.” *Id.* ¶ 9.

16 26. Both doctors agree that a slouched sitting position is the least painful for Mr.
17 Atwood. Dr. Davidson recognizes:

18 Mr. Atwood suffers constant pain. In order to minimize its severity, he seeks
19 to continually maintain a seated posture, either slouching in his wheelchair
20 or partially reclining on his back, in bed while attempting to sleep. This
21 general condition causes considerable sleeping difficulties. Since Fall 2020,
22 he has experienced too much pain to sleep either on his side or his back.
Lying flat on his back severely exacerbates his conditions, causing maximum
pain.

23 Ex. 2, ¶ 21.

24 27. Dr. Zivot confirms:

1 Mr. Atwood is unable to assume a recumbent position less than with his body
2 at approximately a 60 degree head up angle. His neck extension is also
3 limited secondary to fusion of the 5th and 6th cervical vertebrae. When his
4 upper body is lowered to an angle less than 60 degrees, he experiences
5 immediate and intense lower back pain, right greater than left, and radiating
down the right leg to the knee. His right-side pain level is maximal, with the
left nearly at that maximum level. . . . Any increase in recumbency results in
intense and immediate pain.

6 Ex. 3, ¶ 10.

7 **B. As Applied to Mr. Atwood, the Department’s Lethal Injection Protocol**
8 **~~Will~~ould Superadd Significant Pain Not Necessary to Accomplish Execution.**

9 28. Even if a compounded pentobarbital lethal injection is carried out on Mr. Atwood
10 exactly as planned under the Arizona Department of Corrections, Rehabilitation and
11 Reentry, Department Order 710 - Execution Procedures (effective Jun. 13, 2021, last
12 revised Apr. 20, 2022), “Execution Procedures,” Exhibit 4, and even if pentobarbital can
13 be a humane form of execution—although neither premise is established—such an
14 execution cannot be administered to Mr. Atwood, as a consequence of his particular
15 physical condition, in particular without superadding pain well beyond what is needed to
16 effectuate a death sentence ~~as a consequence of his particular physical condition.~~

17 **1. Restraint to the Execution Table Will Inflict Maximum Pain on Mr.**
18 **Atwood.**

19 29. The Execution Procedures outline the execution process in great detail. The required
20 steps include:

21 13.5.2.2 Prior to moving the inmate from the holding cell to the execution
22 table, the Director shall confer with the Attorney General or designee and the
Governor or designee to confirm there is no legal impediment to proceeding
with the lawful execution.

23 13.5.2.3 When the inmate is secured on the execution table by the team and
24 readied by qualified medical personnel, the Warden shall advise the Director.

1 30. In Attachment D, governing lethal injection, the Execution Procedures also state:

2 D.5 After the inmate has been secured to the execution table, the Restraint
3 Team Leader shall personally check the restraints which secure the inmate to
4 the table to ensure they are not so restrictive as to impede the inmate's
circulation, yet sufficient to prevent the inmate from manipulating the
catheter and IV lines.

5 31. Upon information and belief, the "execution table" referred to is a flat table with
6 two swiveling arm rests, both of which are extended during an execution so that the
7 prisoner's arms are perpendicular to the body. When "secured on the execution table," the
8 inmate is placed flat on his back and he is strapped down with leather straps from his ankles
9 to his chest with each arm secured and extended to the side.

10 32. The Department has been conducting executions by lethal injection since 1993. A
11 study of logs from the 14 executions prior to Arizona's resumption of executions with Mr.
12 Dixon in May, 2022, reveals that inmates are ~~often~~ secured on the table for a significant
13 period of time, typically 44 minutes before the actual administration of chemicals begins
14 ~~(as high as 54 minutes, with a median of 23 minutes)~~. Exhibit 5, Execution Charts. This
15 occurs while corrections personnel attempt to accomplish the delicate medical task of
16 inserting an IV, which was a stage among the 14 comprising this set that, in itself, took
17 more than 50 minutes to conduct for three individuals (with the longest time being 67
18 minutes), and had a median time of 23 minutes. *Id.*

19 33. While lying down on one's back while being held securely on the execution table,
20 as the protocol requires, may not pose difficulties for most inmates, for Frank Atwood, that
21 alone would ~~likely be the most painful part of the execution procedure and would~~ cause
22 him excruciating—and unnecessary—pain.
23
24

1 34. According to Dr. Davidson, “[b]eing strapped down to a gurney or table would
2 cause [Mr. Atwood] severe pain. Sitting upright is considerably less painful for him. Ex.
3 2, ¶ 21. It is his “professional opinion that Mr. Atwood cannot be placed in a supine position
4 on a gurney, strapped in place and maintained as such for any length of time without
5 experiencing severe and immediate exacerbation of pain.” *Id.* ¶ 29.

6 35. Dr. Zivot confirms that “Mr. Atwood is not able to lie in a recumbent position on
7 the execution table as a result of the experience of intense and untreatable pain,” (Ex. 3, ¶
8 14), and “[f]orcefully subjecting Mr. Atwood to be positioned as stated in the written
9 execution procedures would result in subjecting Mr. Atwood to intense, excruciating, and
10 unremitting pain from the moment he is so placed on the execution table and for the
11 duration of his restraint in performance of the execution procedures.” *Id.* ¶ 17.

12 36. Both doctors opine that the only way to execute Mr. Atwood by lethal injection
13 without inflicting extreme additional pain would be to do so while Mr. Atwood remains
14 seated in a chair. Ex. 2, ¶ 37; Ex. 3, ¶ 16.

15 37. The Execution Procedures do not contemplate the inmate being in a seated position,
16 or any position other than fully ~~prone~~supine. It would not be possible to conduct a lethal
17 injection execution of Mr. Atwood under the current Execution Procedures without causing
18 him severe, unremitting pain.

19 38. Conducting an execution—even an execution by lethal injection—does not
20 inherently require the inmate to lie flat on his back; this is instead a requirement of the
21 specific method Arizona-Defendants have chosen. The pain it would inflict on Mr.
22 Atwood is thus well beyond what is needed to effectuate a death sentence.
23
24

1 39. There is no penological or other justification for inflicting this unnecessary pain on
2 Mr. Atwood, and subjecting him to this procedure amounts to the wanton infliction of pain
3 with no legal justification.

4 **2. IV Team Lacks Competence to Ensure Viable Catheter Insertion for**
5 **Mr. Atwood.**

6 40. The Execution Procedures pose an additional problem for Mr. Atwood. Under ¶
7 3.2.5.3, Defendant Shinn, as Director, is responsible for designating the IV Team Leader.
8 Ex. 4, . This role of IV Team Leader has extensive, critical responsibility for performance
9 of the execution, reflected in repeated specification of the IV Team Leader’s discretion and
10 duties, as do other IV Team members. But these procedures establish no minimum
11 qualifications or other criteria for any individual to be eligible to be designated by the
12 Director as the IV Team Leader or as a member of that team. Further, the Execution
13 Procedures empower Defendant Shinn, as Director, to take certain critical medically-based
14 decisions, such as whether to “instruct the Special Operations Team to administer an
15 additional dose of the lethal chemical followed by the sterile saline solution flush. This
16 may be administered via the primary or backup IV catheter, as determined following
17 consultation with the IV Team.” Ex. 4, Att. D, ¶ 6. Yet the position of Director is neither
18 required to possess, nor currently held by someone who possesses, medical qualification
19 to make such determinations.

20
21 41. Regarding IV lines, the Execution Procedures require that there be two possibilities,
22 a peripheral IV catheter or, should personnel be unable to establish such a line, a central
23 femoral line:
24

1 3.2.5.4 The IV Team shall be responsible for inserting either peripheral IV
2 catheters or a central femoral line as determined by the Director acting upon
3 the recommendation of the IV Team Leader. . . . A central femoral venous
4 line shall not be used unless the person placing the line is currently qualified
by experience, training, certification or licensure within the United States to
place a central femoral line.

5 42. If Mr. Atwood were to be in a seated position for his execution, it would not be
6 possible to insert a central femoral line, should the corrections personnel be unable to
7 establish a peripheral IV line, because “[t]he bent at the waist positioning of Mr. Atwood
8 makes it not possible to access the femoral vein, which is located in the crease of the groin.”
9 Ex. 3, ¶ 16.

10 43. Nor would it be possible to insert a central line in the neck instead, even if the
11 Execution Procedures contemplated that, which they do not. This is because “[a]n
12 intravenous central line inserted in the neck while sitting carries the high likelihood of
13 causing a venous air embolus – air is sucked into the blood stream and enters the heart
14 resulting in a cardiac arrest.” *Id.*

15 44. In the Department’s most recent execution, of Clarence Dixon on May 11, 2022,
16 after attempting for approximately 17 minutes to insert a peripheral line, corrections
17 personnel ultimately ~~attempted to insert~~ed a femoral central line. Exhibit 6, Bass dec., ¶¶
18 5-9. However, they struggled to accomplish that, too, ultimately making a set of incisions
19 in his groin area that left staff cleaning up blood over the course of several minutes. *Id.* ¶¶
20 10-12. ~~Personnel whose skill level yielded that travesty could not safely insert an IV in Mr.~~
21 ~~Atwood, should they have any trouble establishing a peripheral catheter. Visibility of the~~
22 ~~IV insertion process was limited and often impaired. Exhibit 29, Bass suppl. dec., ¶3. As~~
23

1 Mr. Dixon’s counsel has observed, his body was generally “visible on the television
2 monitors, [but] the overhead camera positioned directly above him was so far away that
3 [counsel] could not see details of the medical staff members’ attempts to place an IV in his
4 left arm at a given site (e.g., his upper versus lower arm), or of their subsequent placement
5 of IVs in his right arm and femoral vein.” *Id.* This configuration deprived counsel of
6 sufficient visibility of the IV Team in this critical step.

7
8 45. Difficulties and complications in the IV insertion can, in their own right, elevate to
9 the infliction of extreme pain and harm. Further, the risk of a botched execution elevates
10 in correlation with the imprecision of the IV line. Exhibit 30, Zivot suppl. dec., ¶3.

11 46. As Mr. Dixon’s counsel observed from the witness room, the IV Team Leader, with
12 shaking hands, made two failed attempts at IV access in Mr. Dixon’s arms and then, on a
13 third attempt, connected IV tubing to the needle. Ex. 6 at ¶¶ 5-8. It is not known whether
14 this third IV was properly situated in a vein, or whether the IV catheter was merely rammed
15 into the tissue surrounding the vein.

16 47. After this third, possibly successful attempt, the IV team apparently abandoned
17 peripheral IV access, and decided to place a catheter in Mr. Dixon’s femoral vein (a large
18 vein in the groin), *id.* at ¶¶ 10-13, doing so without the use of the ultrasound equipment the
19 Execution Procedures required to be on hand, Ex. 4, Att. D, ¶ A.2.

20 48. It appears that execution team members used surgical instruments to access Mr.
21 Dixon’s femoral vein, though the physical positioning of the staff and the camera denied
22 adequate visibility on the proceedings:

23
24 Medical staff members stood between Clarence and the witnesses throughout

1 the entire time the femoral vein was accessed obstructing our view through
2 the window. From the television monitors, I could see a medical staff
3 member inject a clear liquid into Clarence’s right upper leg, but I could not
4 tell whether Clarence was injected more than once. Through the viewing
5 room window, I saw a medical staff member pick up a metal instrument from
6 the tray that looked like a scalpel and, from the monitors, it appeared the
7 medical staff member began to cut into Clarence’s right upper leg. I could
8 not see any details of how many times Clarence was cut and only saw a pool
9 of blood that a medical staff member wiped.

10 Ex. 29, ¶5.

11 49. Dr. Zivot observes, based on the creditable “reporting in the media and through Ms.
12 Bass’s direct observations, it is apparent that a failure in establishing a working line was
13 an entirely plausible outcome. This shoddy performance is deeply concerning given that
14 the immediately prior execution (Joseph Wood), was disastrous, due in part to IV failure.”

15 Ex. 30, ¶14.

16 50. Dr. Zivot further explains that the IV Team’s

17 switch to central IV access from peripheral access after only two failed
18 attempts is a substantial and highly unusual departure from normal clinical
19 practice. Femoral venous access carries numerous risks, including laceration
20 of the femoral artery (and severe bleeding and exsanguination therefrom),
21 painful injury to the femoral nerve (which is close to the femoral vein and
22 artery), injury to the bladder, the urethra, and the colon.

23 Ex. 30, ¶16.

24 51. Should the IV Team, instead of inserting a peripheral IV line, hastily proceed to
25 attempt to insert a central femoral line in Mr. Atwood while he is strapped to the table—as
26 it did with Mr. Dixon—the pain and resulting uncontrollable movements such a procedure
27 will cause, due to his preexisting poor health, is virtually certain to expose him to a very
28 high risk of collateral severe injury, such as a punctured bladder, which could derail the

1 execution process entirely. Exhibit 31, report of Dr. Heath at 19.²

2 An execution where there is no alternative to a peripheral IV catheter cannot be conducted
3 under the current Execution Procedures.

4 **C. Defendants Recognizes the Legal Obligation to Comply with Lethal Injection**
5 **Compounding Procedures, Yet Fail to Do So.**

6 52. The Department's Execution Procedures include several specific provisions relating
7 to the requirements for drugs to be used in a lethal injection and the information that must
8 be provided to the condemned about those drugs at specific points in the process, to permit
9 the condemned to investigate, assess, and verify that information ~~provided~~ while there is
10 still time before his execution. Those provisions concerning the preparation of the lethal
11 injection chemicals, which appear in Attachment D, include a requirement that

12 A.1.III. . . . ADC will only use chemicals in an execution that have an
13 expiration or beyond-use date that is after the date that an execution is carried
14 out.

14 The Procedures in Attachment D also specify:

15 C.2. A quantitative analysis of any compounded or non-compounded
16 chemical to be used in the execution shall be provided upon request within
17 ten calendar days after the state seeks a Warrant of Execution.

18 **1. Compounded Pentobarbital often Causes Painful Executions.**

19 53. Compounded pentobarbital has a problematic history in lethal injection executions,
20 with a long list of problematic executions, including but not limited to the following.

21 54. On January 14, 2021, the federal government executed Corey Johnson using
22 compounded pentobarbital. Shortly after officials administered the drug, Mr. Johnson told

23 _____
24 ² See, e.g., *Hamm v. Dunn, et al.*, No. 2:17-cv-2084-KOB, Doc. 103 at 19 (N.D. Ala. Mar. 26, 2018).

1 his spiritual advisor that his “hands and mouth were burning.”³

2 55. On January 13, 2021, the federal government executed Lisa Montgomery using
3 compounded pentobarbital. Immediately after the drug entered her veins, Ms. Montgomery
4 began gasping for air. Her stomach throbbed before she was pronounced dead.⁴

5 56. On December 11, 2020, the federal government executed Alfred Bourgeois using
6 compounded pentobarbital. Seconds after prison officials administered the drug, Mr.
7 Bourgeois’s stomach began to quiver uncontrollably, and he grimaced in pain. Nearly 30
8 minutes passed between the administration of pentobarbital and the pronouncement of
9 death.⁵

10 57. On September 22, 2020, the federal government executed William LeCroy using
11 compounded pentobarbital. Immediately after federal officials administered the drug, Mr.
12 LeCroy’s stomach began to heave uncontrollably. In the fifteen minutes between the
13 injection and his time of death, color drained from Mr. LeCroy’s limbs, his face became
14 ashen, and his lips tinted blue.⁶

15 58. On July 16, 2020, the federal government executed Wesley Purkey using
16 compounded pentobarbital. A subsequent autopsy of Mr. Purkey revealed a buildup of fluid
17

18
19
20 ³ Michael Tarm, “Executioners Sanitized Accounts of Death in Federal Cases,”
Associated Press, February 17, 2021.

21 ⁴ Tom Wood, “Witness Reveals Final Moments of Lisa Montgomery Before Her
Execution,” *LAD Bible*, January 13, 2021.

22 ⁵ Michael Tarm, “U.S. Executes Truck Driver Who Killed Daughter,” *Associated Press*,
December 11, 2020.

23 ⁶ Michael Tarm, “Executioners Sanitized Accounts of Death in Federal Cases,”
Associated Press, February 17, 2021; Michael Tarm, “U.S. Executes Killer Obsessed
24 with Witchcraft,” *Associated Press*, September 21, 2020.

1 in his lung tissues, causing his lungs to expand to four times their normal weight. These
2 findings were consistent with pulmonary edema, a condition which develops following the
3 injection of high doses of pentobarbital, due to the drug’s injurious effects on human blood
4 vessels. When pentobarbital is administered at high doses, the drug damages the barrier
5 between the blood vessels and air sacs in the lungs, allowing the lungs to fill with fluid,
6 and causing individuals to experience air hunger and feelings of suffocation and drowning
7 prior to death.⁷

8
9 59. Since 2013, Texas has carried out executions via compounded pentobarbital. The
10 state continues to rely on this single-drug protocol, and demonstrates a recent, documented
11 history of visibly botched executions using this method.

12 60. On August 21, 2019, the State of Texas executed Larry Swearingen using
13 compounded pentobarbital. After prison officials administered the drug, Mr. Swearingen
14 declared that he could “taste” the effects of the lethal dose, and described burning in his
15 right arm.⁸

16 61. On September 26, 2018, the State of Texas executed Troy Clark using compounded
17 pentobarbital. It took 21 minutes for Mr. Clark to die. After prison officials administered
18 the drug, Mr. Clark stated that the pentobarbital “burned going in” and that “I feel it.” He
19

20
21
22 ⁷ Second Suppl. Expert Decl. of Gail Van Norman M.D. ¶ 20, *In re Fed. Bureau of*
23 *Prisons Execution Protocol Cases*, Case No. 1:19-mc-00145 (D.D.C. Aug. 7, 2020), ECF
24 No. 183-2.

⁸ Keri Blakinger, “Larry Swearingen Executed Despite Claims of Innocence,” *Houston*
Chronicle, August 21, 2019.

1 grunted and gasped before he stopped moving.⁹

2 62. On July 17, 2018, the State of Texas executed Christopher Young using
3 compounded pentobarbital. It took 25 minutes from the time of administering the drug
4 until the time of death, and Mr. Young cried out twice using an obscenity to say he could
5 taste the drug and that it was burning. He also said something unintelligible before he
6 stopped moving.¹⁰

7 63. On June 27, 2018, the State of Texas executed Danny Bible using compounded
8 pentobarbital. After the pentobarbital was administered, Mr. Bible cried out “burning” and
9 “it hurts.”¹¹

10 64. On February 1, 2018, Texas executed John Battaglia using compounded
11 pentobarbital. After prison officials administered the drug, Mr. Battaglia cried out, “Oh, I
12 feel it!” 22 minutes passed between the injection of pentobarbital and the pronouncement
13 of Mr. Battaglia’s death.¹²

14 65. On January 30, 2018, the State of Texas executed William Rayford. During Mr.
15 Rayford’s execution, after compounded pentobarbital had been administered, he attempted
16 to sit up, lifted his head, jerked his head back multiple times, grimaced, and shook.¹³

17
18
19 ⁹ Juan A. Lozano and Michael Graczyk, “Texas Executes Man in the Torture, Drowning
20 of Ex-Roommate,” *Associated Press*, September 26, 2018.

21 ¹⁰ Christopher Young, Death Row Inmate From San Antonio, Executed for Deadly 2004
22 Robbery,” *Associated Press*, July 17, 2018.

23 ¹¹ Jolie McCullough, “Danny Bible Executed for a 1979 Rape and Murder, Despite
24 Claims That He was Too Sick for Lethal Injection,” *The Texas Tribune*, June 27, 2018.

¹² “Dallas Man Smiles Before Being Executed for Killing Two Daughters While Mother
Listened,” *CBS News*, February 1, 2018.

¹³ “Texas Executes Dallas Man for Ex-Girlfriend’s 1999 Slaying,” *CBS News*, January
31, 2018.

1 66. On January 18, 2018, Texas executed Anthony Shore using compounded
2 pentobarbital. At the end of Mr. Shore’s final statement, he began to tremble, appeared
3 agitated, and said “I can feel that it does burn. Burning!”¹⁴

4 67. On May 4, 2018, Georgia executed Robert Earl Butts, Jr. using compounded
5 pentobarbital. Immediately after prison officials administered the drug, Mr. Butts cried out,
6 “It burns, man.”¹⁵

7 68. In March 2015, the State of Georgia attempted to execute Kelly Gissendaner using
8 compounded pentobarbital. On March 3, prison officials called off the execution because
9 the drugs appeared “cloudy.” Observers reported particles floating in the syringe, which
10 appeared “like clumps of cottage cheese.” Experts opined that the drug had likely
11 precipitated – causing solid clumps of pentobarbital active pharmaceutical ingredient (API)
12 to appear in the solution – due to shortcomings in the compounding process.¹⁶

13
14 **2. Defendants Have Undertaken Deeply Fawed Preparation of**
15 **Pentobarbital.**

16 69. In October 2020, the Department paid \$1.5 million to purchase a kilogram (1,000
17 1-gram vials) of pentobarbital sodium salt from an undisclosed source to use in lethal
18 injection executions. By March 2021, ~~the Department’s~~ Defendant Director Shinn
19 communicated to ~~the Defendant~~ Attorney General ~~of Arizona~~ Brnovich readiness to

20
21 _____
22 ¹⁴ “Tourniquet Killer’ Anthony Allen Shore Executed in Texas for 1992 Strangling,” *CBS*
News, January 19, 2018.

23 ¹⁵ “It Burns Man,’ Georgia Man Says During Execution for Killing Prison Guard,” *CBS*
News, May 4, 2018.

24 ¹⁶ Chris McDaniel, “Georgia Says ‘Cloudy’ Execution Drug Was Just Too Cold, But
Expert Gave A Second Possible Cause,” *Buzzfeed News*, May 11, 2015.

1 proceed with executions. Before seeking execution warrants in the Arizona Supreme Court,
2 the Attorney General publicly identified 20 individuals whom his office intended to
3 execute during his elected term.

4 70. On April 6, 2021, ~~the State~~ Defendant Brnovich initiated novel litigation in the
5 Arizona Supreme Court, which depended on the State's unsubstantiated representations
6 about the eventual expiry, or what is known in pharmaceutical terms as the "beyond-use
7 date" or ("BUD"), of injectable pentobarbital solution compounded from those vials of salt.
8 In short, the State wanted the Court to drastically shorten the time between its first request
9 and the ultimate execution date so its drugs would not expire during the process. This
10 litigation emanated from the State's obligations under the Department's Execution
11 Procedures, and raised a central controversy: would the Department's pharmacist be able
12 to establish a BUD later than execution dates that would be issued pursuant to the requested
13 schedule?
14

15 71. The litigation culminated in scheduling orders on May 21, 2021, for Mr. Clarence
16 Dixon and Mr. Atwood, based on ~~the State's~~ Defendant Brnovich's representations that ~~its~~
17 the State's drugs had a 90-day BUD. But by June 22, 2021, the State threw back into
18 question the central controversy about the ability to establish a BUD when it conceded that
19 prior representations of a 90-day BUD were mistaken and asserted that the Department's
20 pharmacist had "revised" their prior opinion. The State explained, "until certain specialized
21 testing of a sample batch is conducted," there would not be a sufficient BUD after all to
22 conduct an execution under the schedule it had obtained from the Court. Exhibit 7, Motion
23 to Modify. On July 21, 2021, the Court vacated its prior scheduling and instructed the State
24

1 to return after conducting “specialized testing to determine a beyond-use date for
2 compounded doses of the drug.”

3 72. On January 5, 2022, the State proclaimed in a new motion that the Department’s
4 pharmacist had conducted “specialized testing” of injectable pentobarbital sodium made
5 from the Department’s kilogram of salt to determine a BUD it would then apply to later-
6 compounded batches, and was poised to compound batches with a standard BUD adequate
7 to schedule executions under the previously considered time constraints. Exhibit 8, Motion.
8 The Arizona Supreme Court ultimately granted the State’s expedited motions for execution
9 dates for Mr. Dixon (May 11, 2022) and Mr. Atwood (June 8, 2022), but the State did not
10 disclose an actual BUD for the drugs it intended to use in either execution.
11

12 73. On May 3, 2022, Mr. ~~Clarence~~ Dixon filed suit in the District of Arizona against the
13 Department concerning ~~the-its~~ failure ~~of the State~~ to disclose the BUD of the drugs intended
14 for his scheduled execution—drugs ~~the Department~~ Defendants had compounded and
15 tested the same way it intended to proceed with Mr. Atwood’s drugs. Mr. Dixon then filed
16 an emergency motion for injunctive relief to which the State responded and cross-moved
17 for dismissal. On May 6, 2022, District Judge Humetewa ordered Defendants to file, later
18 that same day, a notice “stat[ing] the Beyond Use Date for the compounded pentobarbital
19 the State intends to use to execute Plaintiff . . . and, [i]f unable to provide such specific
20 information, the Notice must explain to the Court why the State is unable to provide [the
21 BUD].” Exhibit 9, Order.
22

23 74. The State then filed a notice, attaching as an exhibit a nine-paragraph declaration,
24 redacted and anonymized, from the Department’s compounding pharmacist, disclosing that

1 the pharmacist is an Arizona-licensed pharmacist who “follow[s] the guidelines and
2 requirements found in the United States Pharmacopeia.” Exhibit 10, Notice.— The
3 pharmacist, Defendant Doe, attested that they prepared a single test batch of sodium
4 pentobarbital solution, which they “provided to a [sic] FDA registered laboratory for
5 stability testing in order to establish the solution’s Beyond Use Date.” *Id.*— ~~The~~
6 ~~Department’s pharmacist~~ Defendant Doe then stated the “test results establish that the
7 sodium pentobarbital solution has a Beyond Use Date of 180 days from the date of initial
8 testing.” *Id.* ~~He~~ considered this to constitute a “stability study.” *Id.* The pharmacist then
9 attested to having prepared the solution designated for Mr. Dixon on February 26, 2022
10 (two days after the State moved this Court for Mr. Dixon’s execution warrant) “from the
11 same sodium pentobarbital powder that was used for the stability study.” Finally, the
12 pharmacist concluded that “[b]ased on the stability study results, the Beyond Use Date of
13 the solution I prepared on February 26, 2022 is August 25, 2022.” *Id.*

15 75. On May 8, 2022, in opposition to Mr. Dixon’s motion for injunctive relief, the State
16 Department argued the federal court “should allow Defendants to carry out Dixon’s
17 execution [on May 11] with newly compounded pentobarbital that is within a BUD that
18 does not require stability testing. Exhibit 11, Opposition. On May 9, 2022, the parties
19 settled the action by Mr. Dixon’s acceptance of the State’s offer to compound a new batch
20 of pentobarbital sodium and supply “quantitative” analysis to Mr. Dixon that same day.
21 Exhibit 12, Stipulation. The pharmacist prepared the new drugs at that time.

23 76. Expert pharmacist James Ruble has explained that this “tight timeframe prevent[ed]
24 sterility and endotoxins testing,” as needed for “the detection of contaminants.” Exhibit 13,

1 Ruble dec., ¶ 52.

2 77. The only disclosures the State has made about the BUD for Mr. Atwood’s drugs are
3 third-party laboratory certificates for testing of a single sample batch of the prepared
4 solution. The disclosures neither reflect any information about the methodology or
5 procedures the pharmacist used in preparing the single test batch, nor the pharmacist’s
6 analysis to calculate and establish a transferrable BUD from the bald laboratory numbers.
7 As of yet, there is no evidence that the pharmacist has established any documented
8 methodology for the testing designed to yield a BUD that may be assigned to subsequent
9 preparations. *Id.* ¶¶ 27- 29.

10
11 78. As Dr. Ruble confirms, prevailing standards for such testing anticipate “a minimum
12 of three batches and from each batch the provision of multiple samples.” *Id.* ¶ 29. Further,
13 it is necessary to document the kinds of testing, the testing conditions, and the storage
14 conditions. *Id.* Prevailing standards recognize that the compounding ingredients—both the
15 active ingredient (in this case, pentobarbital sodium) and inactive ones—remain the same
16 in future batches and that documentation of this is maintained. Absent such identity, a
17 BUD cannot be extrapolated to a subsequently prepared compound. *Id.*

18
19 79. Review of the third-party laboratory results the State-Department provided reflect,
20 on their face, that the single test batch the-Department’s-pharmacistDefendant Doe
21 prepared failed to meet prevailing USP standards. *Id.* ¶¶ 39-40. Specifically, the batch
22 failed to satisfy the USP Monograph-established pH range of 9.0 and 10.5, given that it
23 returned a 10.6 pH. Such a result renders the “batch . . . unusable and it is self-evident that
24 a batch that would need to be discarded cannot supply data for extrapolation to establishing

1 BUDs for other batches.” *Id.* “Elevation of a pH level outside the accepted parameters
2 presents serious concerns,” *id.* ¶ 43, due to “the exponential effects of pH deviations on the
3 degradation of many drugs, certainly including high-risk sterile compounds such as
4 pentobarbital sodium.” *Id.* ¶ 42. Elevated pH levels are susceptible to “catastrophic effects
5 on venous endothelial cells,” which “constitute the inner lining of veins and comprise the
6 site of actual contact between injected solutions, i.e., pentobarbital sodium, and the venous
7 circulatory system.” *Id.* A pH reaching 11 could “strip[] away any buffer for the
8 innumerable nerve endings throughout the venous system.” *Id.* ¶ 43.

9
10 80. Despite the failure of ~~the pharmacist’s~~ Defendant Doe’s lone test batch to meet vital
11 applicable standards, in the *Dixon* federal litigation, the ~~State Department~~ asserted that
12 these lab results permitted it to “extrapolate [a] 180-day BUD for *all future batches from*
13 *the API salt.*” *Id.* ¶ 39. That extrapolation is not permissible.

14 81. The inadequacy of the pharmacist’s “specialized testing” or “stability testing” under
15 USP requirements establishes that the drugs prepared circa April 7, 2022, for Mr. Atwood’s
16 lethal injection lack an extended BUD. As a result, the latest BUD these drugs could
17 possess, if they “were immediately frozen and have been kept frozen solid” since their
18 preparation (and there is no evidence that they have), would be May 22, 2022, well short
19 of the June 8, 2022 execution date. *Id.* ¶-12. Thus, “the State has failed to compound
20 pentobarbital for use on June 8, 2022, with a BUD after that date” *id.* ¶-10, in violation of
21 its obligations under the Department’s Execution Procedures.

22
23 82. Aside from the BUD-related disclosures that have failed to establish a BUD, the
24 State has provided just two pages, both heavily redacted, regarding the batch of drugs it

1 intends for Mr. Atwood, ~~both heavily redacted~~. The first was disclosed on April 15, 2022,
2 and the second three days later, each reflecting a single test that measured only the potency
3 of the pentobarbital sodium solution. Exhibit 14, Lab results.

4 83. These pages do not contain enough information to assess the suitability of the drugs
5 for use in Mr. Atwood's execution, and do not constitute a "quantitative analysis" as
6 contemplated by the Execution Procedures.

7 **D. Defendants' Ancillary Procedures May Impede Plaintiff's Rights During the**
8 **Execution.**

9 84. The Execution Procedures contemplate one or more attorneys for the condemned
10 having access to witness the execution. Ex. 4, ¶5.1.1.6; ¶13.5.1.3. Further, "[w]hile the
11 attorney witness is in the witness room, a member of the Witness Escort Team shall hold
12 one mobile phone designated by the attorney, to be made available to the attorney in exigent
13 circumstances. The mobile phone may not be used inside the witness room." The term
14 "exigent circumstances" is undefined. This condition may obstruct Plaintiff's counsel's
15 exercise of professional judgment in communicating with counsel's legal team, the courts,
16 or a medical expert.

17 85. The ability of Plaintiff's counsel to communicate at all will be dictated by an
18 unspecified Witness Escort Team member. The procedures do not define "Witness Escort
19 Team" or "Teams," although the latter term appears once, under the heading of Technical
20 Operations Requirements (¶ 13.5.1). The Execution Procedures provide no indication of
21 the qualifications, background, training, or anything else concerning criteria for selection
22 to this team and their actual responsibilities and tasks.

1 86. Defendants’ “Contingency Procedure” for the Department’s lethal injection
2 protocol requires that an AED (automated external defibrillator), “will be readily available
3 on site in the event that the inmate goes into cardiac arrest at any time prior to dispensing
4 the chemicals; trained medical staff shall make every effort to revive the inmate should this
5 occur.” *Id.*, Att. D, §6. Further, the Contingency Procedure expressly concerns only an
6 emergency “aris[ing] at any time before the order to proceed with the execution is issued
7 by the Director[,]” or “[i]f the Director determines to stand down [after commencement of
8 the procedure].” *Id.*, G.2, G.3.

9
10 87. The execution could be halted for various reasons other than from Defendant
11 Shinn’s determination to cease the process, including because a stay is entered during the
12 process because the execution is not going to plan. Resuscitation might be necessary after
13 some amount of the compounded pentobarbital has been dispensed.

14 88. The Execution Procedures accord Defendant Shinn the authority to “direct the
15 curtains to the witness viewing room be closed, and if necessary for witnesses to be
16 removed from the facility, only in the event of a legitimate penological objective which
17 would merit such closure and/or removal.” *Id.*, ¶13.5.1.2. The provision provides no
18 indication of criteria for penological objectives nor limits to Defendant’s discretion in
19 relation to visibility of the execution processes.

20
21 **E. Defendants’ Specification of Hydrogen Cyanide as its Lethal Gas Is a**
22 **Determination to Gratuitously Inflict Pain.**

23 89. Amendment to Article XXII, § 22 of the Arizona Constitution, provides that
24 individuals sentenced to death for an offense committed before November 23, 1992, “shall

1 have the choice of either lethal injection or lethal gas” as the method of execution. This
2 state-created interest is further enshrined in legislation, A.R.S. § 13-757(B). Neither the
3 Arizona Constitution nor Arizona statute specifies the nature of the gas the Department
4 shall use in the lethal gas method.

5 90. Like its lethal injection protocol, the Department’s Execution Procedures for
6 carrying out a lethal gas execution is part of D.O. 710, specifically Attachment E of that
7 order (“the lethal gas protocol”). Ex. 4. The Execution Procedures can actually ~~include~~
8 specify a gas method specifications because Arizona is the only United States jurisdiction
9 with a purportedly operational gas chamber, a vessel manufactured and procured in 1949.¹⁷

10
11 91. The lethal gas protocol specifies the use of sodium cyanide with a sulfuric acid and
12 water mixture, which produces hydrogen cyanide.

13 92. The selection of cyanide gas, as opposed to some other lethal gas, was made at the
14 discretion of the Department, and thus ultimately of Defendant Shinn, its Director, and
15 perhaps that of other Defendants with the Department.

16
17
18 ¹⁷ Just three other states contemplate a “lethal gas” choice. Cal. Penal Code § 3604 (lethal
19 injection is administered, unless prisoner chooses lethal gas); Mo. Ann. Stat. § 546.720
20 (statute contemplates injection and gas and is ambiguous as to selection; Missouri has not
21 used lethal gas in modern period); Wyo. Stat. Ann. § 7-13-904 (designates lethal gas only
22 in the event lethal injection is deemed unconstitutional). In the past seven years, three
23 states have legislated a nitrogen hypoxia option. On April 17, 2015, the Oklahoma
24 Legislature first amended its methods statute to authorize nitrogen hypoxia in the event
lethal injection is held unconstitutional or deemed “otherwise unavailable.” Okla. Stat.
Ann. Tit. 22 § 1014. On March 22, 2018, Alabama adopted a prisoner choice of nitrogen
hypoxia or electrocution in conjunction with the default method of lethal injection. Ala.
Code § 15-18-82.1.b. On April 14, 2022, the Mississippi Legislature amended its statute,
effective July 1, 2022, to permit a nitrogen hypoxia execution even when lethal injection
is available. 2022 Miss. Laws H.B. 1479, amending Miss. Code Ann. § 99–19–51.

1 93. Mr. Atwood has a constitutional and statutory right to choose between lethal
2 injection and lethal gas as his method of execution. But hydrogen cyanide gas, the lethal
3 gas method ~~Defendants designated chosen by the Department~~, has a documented history of
4 producing agonizing, unconstitutional levels of pain as it inflicts death.¹⁸

5 **1. Arizona Law Provides Mr. Atwood a Choice of Lethal Gas but the**
6 **Nature of that Gas Is Left to Defendants's Discretion.**

7 94. In 1933, voters approved the addition of Article 22, Section 22 to the Arizona
8 Constitution, which established lethal gas as the State's method of execution. Nearly 60
9 years later, in 1992, voters approved an amendment to that section of the constitution to
10 establish lethal injection as the method of execution for all future offenses resulting in a
11 death sentence. For older offenses, however, the 1992 amendment provided "that
12 defendants sentenced to death for offenses committed prior to the effective date of the
13 amendment to this section shall have the choice of either lethal injection or lethal gas." The
14 amendment became effective on November 23, 1992.

15 95. The statutory counterpart of Article 22, Section 22 similarly reflects that capital
16 defendants whose offenses predate the effective date of the 1992 amendment may, at their
17 choice, select between lethal gas and lethal injection. It further specifies that that choice
18 may be made 20 days prior to the defendant's execution date. The relevant statute provides
19 in part: "A defendant who is sentenced to death for an offense committed before November
20 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the
21

22
23 ¹⁸ Generally, it is an internationally banned chemical. *See* Chemical Weapons Convention
24 Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. 22 U.S.C.A. § 6701
(12)(C) (Schedule 3 chemical agents, including hydrogen cyanide).

1 execution date.” A.R.S. § 13-757(B).

2 96. In 1987, Mr. Atwood was sentenced to death for a crime which occurred in 1984.
3 He thus has a right under Arizona’s statutes and constitution to decide whether he will be
4 executed by lethal gas or lethal injection.

5 97. Notably, neither Article 22, Section 22 nor any Arizona statute specify what lethal
6 gas or gases can or shall be used to carry out a lethal gas execution, nor do they provide
7 any guidance or limitation of any kind as to the identity of the gas to be used in executions,
8 other than that it be lethal.

9
10 98. The decision about which lethal gas to use in a lethal gas execution is thus vested
11 entirely in the discretion of the Department, which is charged with carrying out executions,
12 and its Director, Defendant Shinn, and other Defendants in their capacities serving the
13 Department. The only implicit limitation is that the gas selected may not violate the bars
14 against cruel and unusual punishment found in Article 2, Section 15 of the Arizona
15 Constitution and the Eighth Amendment to the United States Constitution.

16 99. The decision to designate hydrogen cyanide gas to carry out lethal gas executions
17 was thus made by Defendants in their sole discretion.

18 100. Under the lethal gas protocol, the condemned is strapped into a chair in the
19 gas chamber. After the gas chamber is sealed, a system of valves and levers is used to
20 combine sodium cyanide¹⁹ with sulphuric acid and distilled water. This combination causes
21

22
23 _____
24 ¹⁹ Despite the specification of sodium cyanide, public records reflect Defendants’
purchase in late 2020 of substantial amounts of potassium cyanide, a different kind of
cyanide from what the Department now specifies (*viz.*, sodium cyanide). Exhibit 15.

1 a chemical reaction that creates a cloud of hydrogen cyanide gas which fills the gas
2 chamber. Inhaling cyanide gas is fatal to the inmate strapped to the chair located inside the
3 chamber.

4 **2. History and Precedent of Hydrogen Cyanide Gas Leaves No Doubt it**
5 **Inflicts Extreme Pain and Suffering.**

6 **a. Nevada innovates with cyanide gas execution in 1924**

7 101. Twenty-five years before the delivery of the Department's gas chamber
8 (*supra*), Nevada was the first state to use cyanide, executing Mr. Gee Jon on February 8,
9 1924, after its supreme court upheld the statute ushering in the lethal gas method
10 nationally.²⁰ Initially, Nevada envisioned administering the poison into the condemned's
11 "cell at night to execute him in his sleep," but "because half the cell block potentially could
12 have been killed . . . a special enclosure had to be built."²¹

13 102. Thus was born the prototypical gas chamber for penological use, a precursor
14 to large-scale chambers to deploy cyanide gas for genocidal use.²² In the years between
15 Nevada's innovation and Nazi Germany's massive scaling of the technology, Arizona
16 supplanted hanging with lethal gas by a 1933 plebiscite amending the constitution (*supra*),
17
18
19

20 _____
21 ²⁰ *State v. Gee Jon*, 211 P. 676 (Nev. 1923).

22 ²¹ Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The*
23 *Ninth Circuit's Misapplication of the Cruel and Unusual Punishment Clause of the*
24 *Eighth Amendment*, 74 Or. L. Rev. 995, 1004 (1995) (citing Michael V. DiSalle, *The*
Power of Life or Death (1965), at 21).

²² See generally *United Kingdom v. Tesch*, 1 L. Rep. Tr. War. Crim. 93 (1947) (finding
supplier of Zyklon B cyanide gas to German concentration camps in violation of "the
laws and usages of war").

1 which the state supreme court promptly upheld.²³ States carried out nearly 600 cyanide gas
2 executions in the decades following Nevada’s legislation and before *Furman v. Georgia*,
3 408 U.S. 238 (1972), struck down all capital statutes.²⁴

4 103. Upon reestablishment of capital punishment after *Gregg v. Georgia*, 428
5 U.S. 153 (1976), only 11 lethal gas executions have occurred in the United States,²⁵ all of
6 which used cyanide gas and the last of which was this Department’s execution in 1999 of
7 Walter LaGrand, entailing 18 minutes of violent asphyxiation.²⁶

8 104. Mr. LaGrand’s was one of just two such executions the Department
9 conducted post-*Gregg*; it also used hydrogen cyanide to execute Donald Harding in 1992,²⁷
10 a death reported as “extremely violent,” in which Mr. Harden’s “body turn[ed] from red to
11 purple,” and credited with the constitutional amendment adopting lethal injection as the
12 state’s default method.²⁸

13
14 *b. Arizona’s Execution of Donald Harding, 1992*

15 105. The State of Arizona executed Donald Harding using cyanide gas in 1992.
16
17

18 ²³ *Hernandez v. State*, 43 Ariz. 424, (1934) (rejecting challenge on ex post facto and cruel
and unusual punishments grounds).

19 ²⁴ See generally Scott Christianson, *The Last Gasp: The Rise and Fall of the American
Gas Chamber* (2010).

20 ²⁵ Since the post-*Gregg* resumption of executions, in Utah in 1977, there were only nine
21 lethal gas executions conducted outside of Arizona: one in Nevada in 1979, four in
Mississippi between 1983 and 1989, two in California in 1992 and 1993, and two in
22 North Carolina in 1994 and 1998. See Death Penalty Information Center, Execution
Database: deathpenaltyinfo.org.

23 ²⁶ Patty Machelor, *LaGrand: 18 minutes to die*, Tucson Citizen, Mar. 4, 1999.

24 ²⁷ Charles Howe, *Arizona Killer Dies in Gas Chamber*, S.F. Chron., Apr. 7, 1992, at A2.

²⁸ AP, *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, New York
Times, Apr. 25, 1992, § 1, 9.

1 Multiple eyewitnesses described the gruesome, painful details of Mr. Harding’s death,
2 which took ten minutes and thirty-one seconds to complete.

3 106. Later that year, Justice Stevens quoted the first-hand account of Mr.
4 Harding’s death from his attorney, who witnessed it:

5 When the fumes enveloped Don’s head he took a quick breath. A few seconds
6 later he again looked in my direction. His face was red and contorted as if he
7 were attempting to fight through tremendous pain. His mouth was pursed
8 shut and his jaw was clenched tight. Don then took several more quick gulps
9 of the fumes. [] At this point Don’s body started convulsing violently. ... His
10 face and body turned a deep red and the veins in his temple and neck began
11 to bulge until I thought they might explode. [] After about a minute Don’s
12 face leaned partially forward, but he was still conscious. Every few seconds
13 he continued to gulp in. He was shuddering uncontrollably and his body was
14 racked with spasms. His head continued to snap back. His hands were
clenched. [] After several more minutes, the most violent of the convulsions
subsided. At this time the muscles along Don’s left arm and back began
twitching in a wavelike motion under his skin. Spittle drooled from his
mouth... [] Don did not stop moving for approximately eight minutes, and
after that he continued to twitch and jerk for another minute. Approximately
two minutes later, we were told by a prison official that the execution was
complete.

15 *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 655–56 (1992) (Stevens,
16 J., dissenting) (citation omitted).²⁹

17 107. Other witnesses corroborate Mr. Belanger’s account. Veteran Tucson Citizen
18 reporter Carla McClain, a media witness with almost 25 years of experience as a reporter,
19 testified that Mr. Harding immediately and continuously “groaned loudly and began to
20 choke to death.” Exhibit 16, McClain dec.

21 108. Ms. McClain observed Mr. Harding’s hand clenching, followed by his head
22

23 ²⁹ See also Jim Belanger, Opinion, *I watched Don Harding’s execution in an Arizona gas*
24 *chamber. His face still haunts me*, Arizona Republic (June 8, 2021).

1 dropping down before jerking “high and back.” *Id.*

2 109. Ms. McClain recounted that Mr. Harding “groaned again and again, gasped,
3 and his body turned bright red, almost purple as he clenched and convulsed in obvious
4 pain.” *Id.*

5 110. Even after Mr. Harding appeared to have become unconscious, after several
6 minutes of agony, Ms. McClain observed that “He seemed to continue gasping and
7 shuddering,” and that his “chest convulsed and muscles quivered.” *Id.*

8
9 111. Donna Hamm also witnessed Mr. Harding’s execution. After Mr. Harding
10 inhaled the cyanide gas, Ms. Hamm observed that his[“]

11 head was thrown back violently against the chair and he turned his head from
12 side to side. He jerked and twisted as if gasping for air. At the same time, his
13 body buckled against the straps. Severe convulsing began, and continued
14 throughout. Even through the thick glass of the gas chamber, I heard him
15 moan a low, guttural [sic] sound of sheer torment. I prayed for him to go
16 quickly.”[”]

17 Exhibit 17, Hamm dec.

18 112. Ms. Hamm observed that Mr. Harding’s body shook and convulsed so
19 severely that she thought he might move the chair he was strapped into. She noticed that
20 for a two minute period “his hand never stopped contorting in bizarre ways.” *Id.* Ms. Hamm
21 also noted that Mr. Harding’s “body, especially his back and neck had turned a deepening
22 red.” *Id.*

23 113. Ms. Hamm described Mr. Harding’s death as “prolonged, ritualistic torture,”
24 and she believed that his death was more gruesome and painful than that of her own father,
who burned to death in a fire following a plane crash. Memories of the manner of Mr.

1 Harding's death were so traumatic that she found it difficult to sleep for days afterward. *Id.*

2 114. Then-Attorney General Grant Woods also observed the execution. A
3 supporter of the death penalty, Mr. Woods stated that Mr. Harding "needed to know from
4 start to finish that we were not going to cut him any slack because he didn't deserve it. That
5 means right up to the end." Michael Murphy, *Woods says he didn't see finger gesture*,
6 *Phoenix Gazette* (April 7, 1992). Exhibit 18.

7 115. Nonetheless, Mr. Woods also expressed that Mr. Harding's execution was "a
8 terrible thing to witness" and that observing it hardened his opinion that the state should
9 no longer use lethal gas as a method of execution. He further stated "It took so long... I
10 don't know who came up with this concept of a gas chamber in the first place. Maybe that
11 was innovative a while ago, but it's not today." *Id.*

12
13 *c. Execution of Walter LaGrand, 1999*

14 116. Arizona's most recent lethal gas execution was that of Walter LaGrand in
15 1999 (*supra*). Like Mr. Harding, Mr. LaGrand was executed using cyanide gas. Like Mr.
16 Harding, eye witnesses reported that his death was extremely painful.

17 117. Patty Melchor, a reporter for the Tucson Citizen, served as a media witness
18 at Mr. LaGrand's execution. Patty Machelor, *LaGrand: 18 minutes to die*, *Tucson Citizen*
19 (Mar. 4, 1999), Exhibit 27.

20 118. Ms. Melchor reported that after Mr. LaGrand "became enveloped in a cloud
21 of cyanide vapor," he "began coughing violently – three or four loud hacks – and then, in
22 what appeared to be his last moments of consciousness, he made a gagging sound before
23 falling forward." *Id.*

1 119. Afterwards, Ms. Melchor observed that Mr. LaGrand's body continued to
2 twitch for several minutes after falling forward. *Id.*

3 120. Another media witness, Bart Graves of KTAR, reported that during the
4 execution Mr. LaGrand gurgled and coughed violently and that his back muscles contorted
5 until his head finally dropped. Christina Leonard, *LaGrand dies in state gas chamber*,
6 Arizona Republic (Mar. 4, 1999), Exhibit 19.

7 121. A reporter with the Arizona Daily Star who witnessed the execution, Heather
8 Urquides, reported that Mr. LaGrand strained against the straps holding him in place until
9 he finally slumped over. *Id.*

10 122. In total, it took approximately 18 minutes for Mr. LaGrand to die. *Id.*

11 *d. Cyanide Gas Executions Elsewhere*

12 123. While the LaGrand and Harding executions are the only cyanide gas
13 executions performed in Arizona over the last half century, other states had~~ve~~ performed
14 cyanide gas executions in the modern era, prior to LaGrand's. As with the two Arizona
15 executions, accounts of those executions reflect that cyanide gas is an extremely painful
16 method of killing.

17 124. For example, in 1979, the State of Nevada executed Jesse Bishop using
18 cyanide gas. Tad Dunbar served as a media witness to that execution. ~~Mr. Dunbar and~~
19 reported that after the cyanide was released into the acid, Mr. Bishop took a deep breath.
20 ~~Mr. Dunbar testified after doing this, Mr. Bishop and~~ “
21

22 immediately gasped and convulsed strenuously. His body stiffened and his
23 head lurched back. His eyes widened, and he strained as much as the straps
24 would allow. He unquestionably appeared to be in pain. I noticed that he had

1 urinated on himself.... He alternately strained and then relaxed against the
2 straps for about ten minutes.²²

3 Exhibit 20, Dunbar dec.

4 125. While he did not have preconceptions about the nature of a lethal gas
5 execution prior to observing the Bishop execution, Mr. Dunbar stated that he “was
6 surprised to see that death did not appear to come rapidly or painlessly under that method
7 of execution.” *Id.*

8 126. In 1983, the State of Mississippi executed Jimmy Lee Gray using cyanide
9 gas. Mr. Gray’s attorney, Dennis Balske, witnessed the execution. Exhibit 21, Balske dec.

10 127. Mr. Balske was able to view the great physical distress Mr. Gray was in as
11 soon as he breathed in the cyanide gas, testifying in an affidavit as follows:

12 Once the gas reached Mr. Gray’s face, he began to thrash around in his chair.
13 He jerked forward and back, repeatedly slamming his head on a metal
14 support pole situated behind the chair. The chilling sound of his head
15 desperately smashing against the pole reverberated through the area over and
16 over again. About the seventh time he pounded his head against the pipe, his
17 desperation was so great that the six-sided glass chamber seemed to shake
18 with the impact. He slumped and lay still for a few moments, then tensed up
19 and resumed his struggling, again smashing his head against the pole. Mr.
20 Gray struggled for air while his body contorted and twisted.

21 *Id.*

22 128. — Eight minutes into the execution, Mr. Balske and other witnesses were
23 ordered to leave the witness room despite the fact that Mr. Gray “was still struggling for
24 air and banging his head.” *Id.*

25 129. Calling the execution “a nightmare,” Mr. Balske stated that “Nothing in my
26 experiences as an attorney or a human being could have prepared me to witness the
27 prolonged and torturous death of Jimmy Lee Gray.” He described the execution as “vile

1 and repulsive to observe” and “clearly excruciating and horrific” for Mr. Gray. *Id.*

2 130. A media witness to the Gray execution, Dan Lohwasser, corroborated Mr.
3 Balske’s account. He testified that after the cyanide gas was released, Mr. Gray strained
4 against the straps holding him in place and that after several minutes he began to slam his
5 head into the metal pole behind the chair he was placed in. Mr. Lohwasser reported that
6 Mr. Gray’s “mouth took on an anguished, distorted expression as he gasped for air... He
7 let out a very long guttural groan. He looked like he was being strangled to death. It was
8 obvious that Mr. Gray was in excruciating pain.” Exhibit 22, Lohwasser dec.

9
10 131. Mr. Lohwasser, who experienced combat and was exposed to violent deaths
11 during the Vietnam War, described Mr. Gray’s execution as “far more cruel, barbaric, and
12 demoralizing than any other violent and gruesome acts that I have witnessed.” *Id.*

13 132. In 1987, Mississippi executed Connie Ray Evans using cyanide gas. One of
14 Mr. Evans’ attorneys, Robert Marshall, witnessed the execution. Mr. Marshall reported that
15 after the cyanide gas was generated, Mr. Evans let out “the first of several loud agonizing
16 gasps.” Mr. Evans lost control of his bodily functions and a rope of saliva hung from his
17 chin. The muscles on his neck tightened and bulged, and his “forced breathing and tensed
18 body exhibited excruciating pain.” It took 13 minutes for Mr. Evans to die. Exhibit 23,
19 Marshall dec.

20
21 133. Mr. Marshall reported experiencing nightmares about the Evans execution
22 for years after it took place. *Id.*

23 134. In 1989, Mississippi executed Leo Edwards using cyanide gas. The execution
24 was witnessed by his attorney, Kenneth Rose. Mr. Rose reported that after the cyanide gas

1 was released, Mr. Edwards began banging his head and straining fiercely against the straps
2 which held him in place. He let out several “shriek[s] of terror.” Exhibit 24, Rose dec.

3 135. Mr. Rose was certain “that Mr. Edwards was conscious and suffering
4 excruciating pain during the execution. I do not believe that an unconscious person could
5 scream the agonizing screams that ripped through that room in Mississippi. I was disgusted
6 and sickened by the pain and torment I saw in Leo Edwards’ final desperate minutes of
7 life.” *Id.*

8
9 *e. Cyanide Gas and Mass Exterminations*

10 136. During the Second World War, Nazi Germany systematically murdered
11 millions of civilians it deemed undesirable, including Romani people, Slavs, homosexuals,
12 disabled persons, and approximately six million Jews, among others. Millions of these
13 victims died in gas chambers at Auschwitz-Birkenau and other extermination camps.

14 137. Victims of the Nazis murdered in the gas chamber at Auschwitz-Birkenau
15 and elsewhere were killed primarily using hydrogen cyanide gas, sold under a commercial
16 formulation bearing the name “Zyklon B.”

17 138. Zyklon B was originally developed for agricultural purposes as a pesticide.
18 During the 1940s, however, the Nazi regime obtained and began using it as a method of
19 mass murder.

20 139. The Nazis used Zyklon B to murder approximately 1.1 million people
21 between 1942 and 1945. At its height, an average of 6,000 Jews were killed each day using
22 Zyklon B at the Auschwitz II killing center, according to the U.S. Holocaust Memorial
23 Museum.
24

1 140. As a teenager in Czechoslovakia, Gloria Lyon and other members of her
2 family were interned by the Nazis at Auschwitz-Birkenau. While she was imprisoned there,
3 Ms. Lyon lived in constant fear of the gas chamber and witnessed countless others taken
4 there to be killed. She “knew it was a painful death, as I had heard screams coming from
5 the gas chamber.” Exhibit 25, Lyon dec.

6 141. Ms. Lyon stated that while

7 “[i]nnocent Holocaust victims can never be compared with convicted
8 murderers..., the fact remains that being suffocated to death with poisonous
9 gas is always cruel, painful, inhumane and barbaric. As a person who saw
10 the daily horror of mass extermination by gas, I know that execution by gas
is torture and it can never be anything less.”

11 *Id.*

12 142. Similarly, John Steiner, a Jewish man from Prague, along with his family
13 were captured and imprisoned by the Nazis. During his ordeal, Mr. Steiner was imprisoned
14 at Auschwitz-Birkenau for more than a year, where he witnessed countless people taken
15 away to be killed in the gas chamber. Exhibit 26, Steiner dec.

16 143. Years later, after immigrating to the United States, Mr. Steiner was employed
17 at San Quentin prison in California and was asked to serve as a witness at a lethal gas
18 execution. Mr. Steiner declined, stating that he “knew that lethal gas is an excruciatingly
19 painful method of execution. Witnessing a person being gassed to death would bring back
20 horrendous memories of the hideous fate suffered by millions, which included my family,
21 extended relatives, and friends.” *Id.*

22 144. Mr. Atwood has a family connection to the millions of innocent lives killed
23 by the Nazis in the gas chamber. His mother, Alice Shelton, was a woman of Jewish
24

1 heritage native to Vienna, Austria. Along with other members of her family, Alice fled
2 Austria, after Nazi Germany annexed that country in 1938, and eventually settling in the
3 United States.

4 145. ~~Had Before emigrating,~~ Alice and her family ~~not escaped, they would have~~
5 faced the fate of death in the Nazi gas chamber that befell millions of others ~~who were less~~
6 ~~fortunate.~~

7 *f. Fierro v. Gomez and California's Use of Cyanide*

8 146. In 1994, the Northern District of California held an extensive trial on whether
9 executions by cyanide gas inflict torturous pain and suffering. *Fierro v. Gomez*, 865 F.
10 Supp. 1387 (N.D. Cal. 1994). Following an eight-day trial, the Court entered a detailed
11 factual order concluding that executions using cyanide gas constituted cruel and unusual
12 punishment in violation of the Eighth Amendment.

13 147. At issue in *Fierro* was the State of California's use of cyanide gas in
14 executions, the same gas Arizona used in the Harding and LaGrand executions and which
15 is called for by ~~the Department's~~ Defendants' current lethal gas protocol.

16 148. Evidence considered by the district court included a review of accounts of
17 Arizona's execution of Donald Harding by cyanide gas in 1992, discussed above. Based
18 upon this review, the court noted that Mr. Harding's "execution was, by all accounts,
19 prolonged and apparently agonizing." 865 F. Supp. ~~Id.~~ at 1408.

20 21 149. In *Fierro*, the Court, "based on the evidence presented at trial, the testimony
22 of the experts and the scientific literature introduced as exhibits," found that an inmate
23 exposed to cyanide gas remained ed conscious for up to several minutes after inhaling the gas.
24

1 865 F. Supp. at 1404.

2 150. The Court continued:

3 During this time [of consciousness after inhaling cyanide gas], the court finds
4 that inmates suffer intense, visceral pain, primarily as a result of lack of
5 oxygen to the cells. The experience of “air hunger” is akin to the experience
6 of a major heart attack, or to being held under water.... Other possible effects
7 of the cyanide gas include tetany, an exquisitely painful contraction of the
8 muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced
9 cellular suffocation causes anxiety, panic, terror, and pain.

10 *Id.* (citations omitted).³⁰

11 151. Subsequent to *Fierro*, the State of Arizona conceded that the method of lethal
12 gas execution it employed—that is, execution by cyanide gas—was substantially similar
13 to the California method at issue in *Fierro*. *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th
14 Cir. 1999).

15 152. The State further conceded the detailed testimony and findings of the intense
16 pain and suffering inflicted on individuals executed with cyanide gas found by the district
17 court in *Fierro*. 173 F.3d ~~*Id.*~~ at 1149 (“Counsel for the State has candidly admitted that if
18 the question of Arizona’s use of lethal gas went to trial, the record would be no different
19 than it was in *Fierro*.”). *Id.*

20 153. In the same case, the Ninth Circuit reaffirmed its earlier conclusion, based

21 ³⁰ The district court’s findings of fact and order were affirmed on appeal by the Ninth
22 Circuit. *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996). Subsequently, the California
23 legislature amended the state’s death penalty statute to eliminate lethal gas as a method of
24 execution. On that ground alone, the U.S. Supreme Court vacated the decisions below
and remanded for further proceedings. *See Gomez v. Fierro*, 519 U.S. 918 (1996). On
remand, the Ninth Circuit dismissed case for lack of standing. *Fierro v. Terhune*, 147 F.3d
1158 (9th Cir. 1998). On information and belief, no federal court has reached the merits
of a constitutional gas challenge since the initial *Fierro* decisions.

1 on the *Fierro* record, that execution by cyanide gas violated the Eighth Amendment. *Id.*

2 *g. Arizona's Long Absence of Any Gas Protocol*

3 154. Although Arizona conducted two lethal gas executions in the 1990s, from at
4 least 2010 until 2021,³¹ the Department did not maintain a formal lethal gas execution
5 protocol.³²

6 155. During that period, D.O. 710, at times, provided that qualifying inmates be
7 notified of their option to select lethal gas over lethal injection. It further broadly directed
8 Department staff to ensure that the gas chamber was maintained.

9 156. However, during this period, D.O. 710 contained no provisions outlining
10 how gas executions were to take place or the identity of the lethal gas or gases to be used
11 in a lethal gas execution.

12 157. On March 10, 2021, D.O. 710 was amended. This amendment added
13 Attachment E, the lethal gas protocol.

14 158. With this addition, for the first time in at least a decade, the Department
15 possessed a formal protocol for carrying out a lethal gas execution. The newly adopted
16 lethal gas protocol described a method for carrying out executions via sodium cyanide with
17 a sulfuric acid and water mixture, to make hydrogen cyanide.

18 159. Thus, in 2021, the Department formally adopted cyanide gas as its method
19
20

21 _____
22 ³¹ Counsel for plaintiff have not accessed any manual issued between the date of the
23 Department's last cyanide execution, March 3, 1999, and December 16, 2010 (*infra*
24 n. [+1]#32).

³² These ten manuals in effect prior to the current iteration (*supra*) have the following
effective dates: Dec. 17, 2010; Sep. 5, 2011; Jan. 25, 2012; Mar. 26, 2014; Sep. 30, 2015;
Apr. 29, 2016; Jan. 11, 2017; Jun. 7, 2017; Jun. 13, 2017; and Nov. 20, 2019.

1 of lethal gas execution despite the State’s concession more than two decades prior, in the
2 *LaGrand* case, that execution by cyanide gas results in a torturous, highly painful death.
3 173 F.3d at 1149.

4 160. The current version of the lethal gas protocol is identical to the one published
5 in 2021, including its selection of cyanide gas as the lethal gas.

6 161. Prior to the entry of his execution warrant on May 3, 2022, Mr. Atwood was,
7 of course, unable to choose a method for his execution.³³ Thus, any dispute about the lethal
8 gas method or, for that matter, Defendants’ lethal injection method, did not ripen for Mr.
9 Atwood until the date of that Arizona Supreme Court order. Under A.R.S. § 13-757(B) and
10 per the terms of the Arizona Supreme Court’s warrant, Mr. Atwood was entitled to choose
11 lethal gas as his execution method until May 19, 2022, 20 days prior to his execution date
12 of June 8, 2022.

13
14 162. On May 14, 2022, undersigned counsel sent a demand letter to counsel for
15 Defendants explaining that their designation of hydrogen cyanide gas renders the State’s
16 gas method unconstitutional and that the use of nitrogen could be readily implemented and
17 would be constitutional. Exhibit 32. The following day, counsel for Defendants responded,
18 stating their “disagree[ment] that ADCRR’s current procedures regarding lethal gas violate
19 any applicable statutory or constitutional provision and, therefore, ADCRR will not be
20 making any changes to these procedures.” Exhibit 33.

21
22
23 ³³ In anticipation of the warrant, he sought administrative relief within the Department’s
24 proper grievance procedures, yet Defendants refused to process his submission and,
further, refused to process his attempted appeal from the initial refusal.

1 163. On May 18, 2022, the day before the lapsing of the 20-day period at 12:01
2 a.m. on May 20, 2022, counsel for Mr. Atwood wrote Defendants’ counsel to request
3 nitrogen gas as his execution method while stating “Mr. Atwood is not hereby choosing
4 cyanide gas as his method of execution.” Exhibit 34. The letter further set forth:

5 While the State is on the precipice of violating its obligation to provide a
6 constitutional choice within the time period contemplated by the statute, the
7 Arizona Constitution ensures Mr. Atwood’s right to choose between the injection
8 and gas methods. Unless and until the State provides the options it is statutorily
9 and constitutionally required to provide, the fact that Mr. Atwood has refused to
10 submit an ostensible choice of method that does not provide two real options
11 cannot be construed as a failure to choose as contemplated by A.R.S. § 13-757(B),
12 nor as an affirmative choice of lethal injection. In fact, the State has precluded Mr.
13 Atwood from making the choice because of the State’s violations, which he
14 continues to demand that the State remedy.

15 *Id.*

16 164. With Defendants’ designation of hydrogen cyanide gas, had Mr. Atwood
17 selected the lethal gas method by the statutory deadline of May 19, Supreme Court
18 authority would foreclose his ability to challenge the method’s violation of the Eighth
19 Amendment.³⁴ Thus, Mr. Atwood brought the present action on May 19, seeking, inter alia,
20 vindication of his liberty interest in the present Arizona constitutional and statutory
21 guarantees of his choice of a lethal gas method and of his right to be free from cruel and
22 unusual punishment.

23 165. On May 19, 2022, Defendant Brnovich’s office, in response, reiterated the
24 Department “will not be making any changes to its current lethal gas procedures.” Exhibit
25 35.

³⁴ *Stewart v. LaGrand*, 526 U.S. 115 (1999) (per curiam).

1 **VII. Constitutional Pleading Requirement of Alternative Execution Methods**

2 **A. Seated Administration of Intravenous Catheter and Lethal Injection.**

3 166. Plaintiff maintains his challenge of Defendants' use of compounded
4 pentobarbital sodium injection for the reasons pleaded herein concerning the adequacy of
5 the compounding. Defendants have failed to establish that the compounded injectable
6 solution prepared for use to execute Mr. Atwood on June 8, 2022, is adequate for its
7 intended purpose.

8 167. Apart from Defendants' unlawful use of the Department's retained
9 compounding pharmacist's preparation of injection chemicals, Plaintiff has pleaded
10 Defendants' violation of the prohibition against the infliction of cruel and unusual
11 punishments as-applied to Plaintiff due to his particular health history and status.

12 168. Defendants, through the operation of the Department's Execution
13 Procedures, for which Defendants are responsible for preparing, promulgating, and
14 imposing, intend to restrain Plaintiff's arms, body, and legs to the Department's execution
15 table before the insertion of any intravenous catheter, the conducting of other procedures
16 associated with conducting lethal injection such as the seating of witnesses of the
17 execution, and ultimately the administration of injectable solution to conduct the lethal
18 injection. This restraint of Plaintiff to the execution table would gratuitously inflict extreme
19 pain, doing so for an extensive period that the Department's record from prior executions
20 indicates would transpire for a period of approximately an hour or more, even if the
21 administration of the injection itself is successful as planned.

22 169. Plaintiff hereby pleads an alternative to Defendants' lethal injection
23
24

1 procedures. Plaintiff pleads that Defendants secure him to his wheelchair and insert an
2 intravenous catheter and administer the lethal injection while he remains seated.

3 **B. Spinal Surgery**

4 170. Defendants could also undertake to sufficiently treat Mr. Atwood’s condition
5 and attendant pain, addressing the reason he is unable to lie flat to begin with. As Dr.
6 Davidson explains, “surgical intervention is likely necessary to address the underlying
7 causes of his chronic pain.” Ex. ~~XX-2~~-¶ 32.

8 **C. Nitrogen Gas**

9 171. As set forth above, the Arizona Constitution and Arizona’s method of
10 execution statute provide for lethal gas as a method of execution for capital defendants,
11 such as Mr. Atwood, who are sentenced to death for offenses which occurred before
12 November 23, 1992. Ariz. Const. Art. 22 Sec. 22; A.R.S. § 13-757(B). Neither authority
13 specifies the kind of gas that may or must be used under that method.
14

15 172. In the past seven years, three states have legislated a nitrogen hypoxia option.
16 Nitrogen presents numerous advantages as a method.

17 173. On April 17, 2015, the Oklahoma Legislature first amended its methods
18 statute to authorize nitrogen hypoxia in the event lethal injection is held unconstitutional
19 or deemed “otherwise unavailable.” Okla. Stat. Ann. Tit. 22 § 1014.

20 174. On March 22, 2018, Alabama adopted a prisoner choice of nitrogen hypoxia
21 or electrocution in conjunction with the default method of lethal injection. Ala. Code § 15-
22 18-82.1.b.

23 175. In 2017, the Mississippi legislature amended that state’s lethal injection
24

1 statute to provide for nitrogen hypoxia as an alternative method of execution in the event
2 that lethal injection is ruled unconstitutional or otherwise becomes unavailable. 2017 Miss.
3 Laws Ch. 406, amending Miss. Code Ann. § 99–19–51.

4 176. On April 14, 2022, the Mississippi Legislature amended its statute, effective
5 July 1, 2022, to permit a nitrogen hypoxia execution even when lethal injection is available.
6 2022 Miss. Laws H.B. 1479, amending Miss. Code Ann. § 99–19–51.

7 177. None of the foregoing states, however, possess even a purportedly
8 operational gas chamber. Arizona is the single United States jurisdiction with such a
9 chamber. Defendants encounter no impediments to implementing a nitrogen hypoxia
10 protocol by revision to the Execution Procedures and modest measures in preparation with
11 respect to the use of the Department’s chamber. The following implementation scenarios
12 use the chamber, which is adjacent to the execution room in Housing Unit 9. Ex. 4, Att. E,
13 ¶ 2.
14

15 **1. Implementation.**

16 178. In setting forth a lethal gas execution using nitrogen, three detailed
17 implementation scenarios are presented here. Each may be readily implemented and is
18 inexpensive, simple, and much safer to prison staff and witnesses than an execution under
19 the Department’s hydrogen cyanide procedures pursuant to Att. E of the Execution
20 Procedures.
21

22 **a. Underlying scientific principles**

23 179. Nitrogen gas (N₂) constitutes approximately 80% of the natural atmosphere.
24 It is not perceived or recognized by the natural senses because it is odorless, tasteless,

1 colorless, and non-irritating. Nitrogen gas is largely chemically inert under normal
2 environmental conditions and has no substantial biochemical or medicinal activities.

3 180. Nitrogen is intrinsically harmless to human health and well-being, ~~given that~~
4 ~~approximately 80% of every inhaled breath is nitrogen gas.~~ However, inhaling nitrogen
5 in the absence of oxygen (which comprises approximately 20% of the atmosphere) is
6 universally lethal, because continued intake of oxygen, of course, is necessary for
7 supporting human life. Hypoxia occurs when a gas, such as nitrogen, essentially displaces
8 oxygen in someone's inhalation. In slight contrast, anoxia occurs when oxygen is
9 eliminated entirely from inhalation.
10

11 181. Inhaling concentrated nitrogen gas produces rapid and painless
12 unconsciousness and death in both humans and animals. Its efficacy in producing death in
13 humans is well-known and well-understood due to industrial accidents in which workers
14 die due to inadvertent exposure to nitrogen-rich environments. Nitrogen gas is not
15 detectable by human senses, unlike many other industrial gases, thus workers entering or
16 exposed to nitrogen-rich oxygen-depleted chambers succumb without awareness or
17 warning that the chamber is uninhabitable.

18 182. The sensation and experience of oxygen deprivation is well-understood by
19 medical, industrial, chemical engineering, aerospace, military, and other scientific
20 professions and organizations.³⁵ Oxygen deprivation, whether via displacement by inert
21

23 ³⁵ J. Ernsting, *The Effect of Brief Profound Hypoxia upon the Arterial and Venous*
24 *Oxygen Tensions in Man*, J. Physiol. 169, Air Force Inst. Of Av. Med. 1-23 (1963) 292-
311.

1 gas (such as nitrogen) or by high altitude environments,³⁶ produces rapid decline in mental
2 and cognitive faculties, followed by complete unconsciousness (“blacking out”) and death
3 by cardiac arrest. The initial phase is not unpleasant, and sometimes involves mild
4 euphoria, mild giddiness, amusement, and a sense of well-being. It is painless. The process
5 rapidly produces unconsciousness.

6 183. Regarding aviation contexts, the literature is abundant ~~regarding on~~ “Time
7 of Useful Consciousness” (“TUC”), which denotes the amount of time a pilot has to correct
8 hypoxia before losing the ability to do so.³⁷ Inhaling zero percent oxygen (i.e., 100%
9 nitrogen) will produce a TUC on order of 5 seconds, and total unconsciousness and death
10 shortly thereafter.

11
12 *b. Implementations, specific to the Department’s extant chamber*

13 184. The Department’s gas chamber is purported to be impervious to all forms of
14 gas, as evidenced by the Department’s ability to conduct executions using the highly toxic
15 cyanide gas within feet of officials and witnesses who participate and observe, unaffected
16 and unharmed. Ex. 4, Att. E.

17 185. Even in the event of the chamber’s substantial leakage of nitrogen into the
18

19 ³⁶ The observation of oxygen deprivation is also important because of high-altitude
20 environments encountered in aviation and elevated terrain. The hypoxia caused by high-
21 altitude is not caused by nitrogen displacing/replacing oxygen, rather it results from the
22 low concentration of oxygen in the air causing decreased uptake in the lungs and blood.
However, the effects on the brain are the same, as evidenced by the current method of
training pilots for hypoxic exposure using excess nitrogen rather than hypobaric (low
pressure) chambers.

23 ³⁷ S. Izraeli et al., “Determination of the ‘time of useful consciousness’ (TUC) in
24 repeated exposures to simulated altitude of 25,000 ft, 59 Aviat. Space Environ. Med
1103-05 (1988).

1 witness or working area of the facility, the dilution of that nitrogen by the volume in the
2 environment would likely subject the witnesses and personnel to a lesser degree of hypoxia
3 than they encounter during commercial air travel.

4 186. The Department's gas chamber is already equipped with a venting system
5 and chimney historically for evacuating toxic cyanide gas upon completion of the given
6 execution. This same system would be suitable and effective for evacuating concentrated
7 nitrogen gas and replacing it with normal air to render the chamber safe for entry to remove
8 Mr. Atwood's body. In contrast, Attachment E to the Execution Procedures contemplates
9 the following measures post-hydrogen cyanide gassing:
10

11 CAUTION: Although smoke tests suggest that the [gas] Chamber is purged
12 in approximately 3 to 5 minutes, it is recommended that the period between
13 opening the exhaust and air inlet valves and opening the Chamber door be
14 about 15 minutes. As a precautionary measure, it is recommended that the
15 Physician and the Restraint Team removing the body wear hydrocyanic acid
16 gas masks or approved respirators and rubber gloves and that the hair of the
deceased inmate be ruffled in order to allow any residually trapped gas to
escape. Close the Chamber door, but not tightened more than contact with
the gasket, and aerate for one hour as necessary to clear any residual
ammonia.

17 Ex. 1, Att. E, ¶ 31.

18 187. Further, the Lethal Gas procedures provide: "The Restraint Team shall hose
19 down all the surfaces and the deceased inmate prior to removal from the chair." *Id.* at ¶ 32.

20 **2. Three Potential Approaches.**

21 188. The following paragraphs plead three readily implemented alternative
22 methods using nitrogen gas in the Department's chamber to cause nitrogen hypoxia. These
23 are:

24 A. flooding the chamber with pure nitrogen gas delivered from readily

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purchasable nitrogen cylinders;

B. fitting a face mask, similar to those worn by pilots or by hospitalized patients, and delivering pure nitrogen gas from readily available purchasable nitrogen cylinders; and

C. combining (A) and (B): pure nitrogen would be delivered to the mask as in (B), while the chamber containing Mr. Atwood would be flooded with pure nitrogen as in (A).

Method A: Flooding the gas chamber with nitrogen.

189. Under this implementation, Nitrogen cylinders are placed in a convenient and proximal location to the gas chamber.³⁸ Standard cylinder regulators govern the flow of nitrogen gas and are easily controlled by hand or simple wrench-like tools. The nitrogen gas is carried via tubing, which can be of any nature convenient to the Department. It would be necessary to drill holes in the gas chamber to permit the tubing to enter the chamber, and several states, such as California, have drilled holes in their gas chambers to pass intravenous tubing for lethal injection procedures.³⁹ If desired, the Department could run several tubes to increase the rate of flooding of the chamber with nitrogen. After securing Mr. Atwood within the chamber and closing the chamber, the nitrogen cylinder

³⁸ Suitable nitrogen gas cylinders, regulators, and tubing can be readily purchased here: <https://www.airgas.com/Gases/Nitrogen/category/626>
Airgas
544 W Iron Ave, Suite 101
Mesa, AZ 85210
See also airgas.com.

³⁹ The Department could create holes that are easily covered by screw caps to permit reversion to using hydrogen cyanide gas while maintaining the high-performance seal that cyanide toxicity requires (as compared to nitrogen).

1 regulators would be opened, gas would flow via the tubing into the chamber, and Mr.
2 Atwood would quickly and painlessly become unconscious and then succumb to the deep
3 hypoxia.

4 190. Monitoring of Mr. Atwood's vital signs during the procedure could be
5 accomplished easily via routine monitors such as a pulse oximeter and EKG (although this
6 would necessitate drilling another hole in the chamber for the leads).

7 191. Upon completion of the procedure, the already existing ventilation system is
8 used to remove the pure nitrogen gas and replace it with normal atmosphere. This process
9 is identical to that used to clear the gas chamber after a hydrogen cyanide gas execution,
10 but with enormously reduced risk of injury and death to the personnel. In order to prevent
11 pressure accumulation in the chamber, the cyanide vent could be left open in the process.

12 *Method B: Nitrogen gas delivery via face mask.*

13 192. As noted above, pilot training for high-altitude hypoxia involves the delivery
14 of high-nitrogen low-oxygen gas into a face mask. Other vocations and avocations require
15 such functionality from face masks.⁴⁰ There are numerous such masks readily available
16 from numerous suppliers.⁴¹ For example, looking to Tennessee's recent activity reflects
17 five executions between 2018 and 2020 by electrocution, all involving a hood over the
18 condemned's head under that state's protocol.⁴² Pilot oxygen masks are designed for
19
20

21
22 ⁴⁰ Lubomir Straka, et al., *Suicidal Nitrogen Inhalation by Use of Scuba Full-Face Diving Mask*, 58 J. Forensic Sc. 1, 3 (2013).

23 ⁴¹ https://www.aircraftspruce.com/menus/ps/oxygen_mask.html.

24 ⁴² See, e.g., Matt Lakin, *What I saw when I watched David Earl Miller die*, The Tennessean, Dec. 8, 2018.

1 comfort and adequate seal, and would not cause any pain, suffering, or discomfort to Mr.
2 Atwood.

3 193. Under this implementation, flexible plastic tubing is used to deliver the pure
4 nitrogen to the mask, and the flow rate (up to 50 liters/minute) can be controlled by a
5 medical gas regulator such as what is used to deliver oxygen to patients. Delivery of the 50
6 liters/minute flow rate would exceed an individual's maximum inspiratory rate.⁴³ REF.
7 Thus, the condemned's inspiration would become anoxic, that is, he would breathe pure
8 nitrogen.

9
10 194. A single nitrogen cylinder could be located within the gas chamber, turned
11 on by hand, and the chamber door would not need to be closed or sealed as the delivery of
12 nitrogen into the ambient air of the facility would be negligible. Alternatively, a nitrogen
13 cylinder or cylinders could be located as described in Method A, via the creation of holes
14 in the chamber wall for tubing to pass through.

15 195. Monitoring of vital signs, including oxygen saturation, and EKG can be
16 accomplished as in Method A. Post-execution removal of Mr. Atwood's body can be
17 accomplished after venting the chamber with no risk whatsoever of toxicity or death to the
18 prison staff. Compare Ex. 4, Att. E, ¶ 31, *infra*.

19 *Method C: Combined gas chamber flooding and mask.*

20 196. Combining Method A and Method B is unnecessary, because each one on its
21
22

23 ⁴³ Göran Berndtsson, Leif Ekman, "A New Simplified Technique for Measuring
24 Inspiratory Flow Characteristics," 20 J. of Int'l Soc. For Respiratory Protection 91 (F/W
2003).

1 own would deliver rapidly fatal anoxic inhaled gas. However, the Department could
2 combine those two methods for the sake of redundancy.— The preparation and safety
3 measures would be the same as those applicable to Method A.

4 **D. Firing Squad**

5 197. Currently, firing squad is not a statutory alternative method of execution in
6 Arizona. See A.R.S. § 13-757. As a practical matter of the method’s required materials and
7 technical capacity, there is no impediment to implementation of the firing squad
8 immediately. The history of capital punishment reflects there is no method of execution
9 simpler to carry out effectively.

10
11 198. As reflected herein, the method is neither unusual nor cruel, and it is clearly
12 a known method. *Glossip v. Gross*, 576 U.S. 863, 867 (2015) (citing *Baze v. Rees*, 553 U.S.
13 35, 61 (2008) (plurality opinion)).

14 199. The first recorded use of a firing squad to carry out capital punishment in the
15 United States occurred over four hundred years ago, in 1608.⁴⁴ It has been a common
16 means of military execution since at least the Napoleonic era. Exhibit 28, ~~Declaration of~~
17 ~~James S. Williams, M.D., M.Sc., dated May 4, 2022 (“Williams Dec.”) dec.~~, at 8. By 1879,
18 the Supreme Court upheld a death sentence by firing squad. *Wilkerson v. Utah*, 99 U.S.
19 130, 134-35 (1879) (cited in *Glossip*, 576 U.S. at 869 (2015)). Following the restoration of
20 capital punishment after *Gregg v. Georgia*, 428 U.S. 153 (1976), Utah famously executed
21

22
23 ⁴⁴ Deborah W. Denno, *The Firing Squad as “A Known and Available Alternative Method*
24 *of Execution” Post-Glossip*, 49 U. Mich. J. Law Ref. 749, 778 (2016) (citing M. Watt
Espy & John Ortiz Smykla, EXECUTIONS IN THE UNITED STATES: 1608-1987 at I (1987).

1 Mr. Gary Gilmore, a volunteer for his punishment, *Gilmore v. Utah*, 429 U.S. 1012, 1013
2 (1976), ushering in the modern era of executions. In 2010, Utah once again used a firing
3 squad to carry out a death sentence.⁴⁵

4 200. The most recent Supreme Court opinion on methods of execution once again
5 noted the availability of “execution by firing squad” has long been understood as
6 “[c]onsistent with the Constitution’s original understanding” “that the Eighth Amendment
7 forbade the gruesome methods of execution described by Blackstone [in Commentaries on
8 the Laws of England].” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (discussing
9 *Wilkinson v. Utah*, in approval). In underscoring the *Bucklew* majority opinion’s
10 “statement that ‘we see little likelihood that an inmate facing a serious risk of pain will be
11 unable to identify an available alternative,’” Justice Kavanaugh highlighted the State of
12 Missouri, as well as Justice Sotomayor’s, emphases on the availability of this alternative,
13 with the latter, having previously described it as “an alternative method of execution that
14 generally causes an immediate and certain death, with close to zero risk of a botched
15 execution.” *Id.* at 1136 (Kavanaugh, J., concurring) (citing *Arthur v. Dunn*, 137 S. Ct. 725,
16 733-34 (2017) (Sotomayor, J., dissenting from denial of certiorari).

18 201. The basic operation of a firing squad is well known, and simply encompasses
19 “multiple riflemen firing simultaneously” upon the subject. Ex. 28 at 8. Medical knowledge
20 of the effects gunshot wounds have on the body is extensive. *Id.* at 4. Two ways of assuring
21 an immediate and painless death are well established: targeting the cardiovascular bundle
22

23 _____
24 ⁴⁵ Ed Pilkington, Rachel Stevenson, “Death row inmate executed by Utah firing squad,”
[*The Guardian*, Jun. 18, 2010.](#)

1 and the brainstem. *Id.* ~~The~~ As James S. Williams, M.D., emergency trauma care physician
2 and firearms expert, has explained, the cardiovascular bundle is “the aggregate anatomic
3 region comprising the heart and the large arteries and veins near to and with the
4 mediastinum.” *Id.* at 9.

5 202. The traditional manner of firing squad executions targets the former, viz., the
6 heart and the great vessels which lead to and from it in the chest, thereby denying the blood
7 supply to the central nervous system. *Id.* “When the firing squad’s bullets strike the heart
8 and great vessels, the immediate effect is to cause cessation of blood circulation at its
9 source.” *Id.* The resulting “trauma to the cardiovascular bundle” immediately “cause[s]
10 cessation of blood circulation at its source,” by either (a) stopping the heart
11 “electrophysiologically (by cessation of organized beating),” (b) “structurally disrupt[ing
12 the heart] to the point of being unable to generate pulse pressure,” or (c) disrupting “the
13 arteries leading from the heart [such that] blood flowing out of the heart cannot be delivered
14 to the brain and body.” *Id.* “[T]he net effect is a catastrophic drop in blood pressure in the
15 brain.” *Id.* “The brain’s function depends upon a continuous supply of oxygen via the
16 blood, and if that blood supply is stopped, loss of consciousness ensues within a matter of
17 10 seconds or less, and cortical/brainstem death inevitably follows within a matter of
18 minutes.” *Id.* at 5.

19
20 203. Longstanding “medical knowledge of the terminal effects of cardiovascular
21 bundle gunshot wounds,” reflects that death occurs rapidly. *Id.* at 5, citing M. Fackler,
22 “Gunshot Wound Review,” 28 *Annals of Emergency Medicine* Vol. 2, 194-203 (1966);
23 V.J.M. DiMaio, *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic*
24

1 Techniques (2d Ed. 1999) CRC Press.

2 204. Further, experience reflects that this manner of death, by gunshot wound to
3 the cardiovascular bundle, causes “minimal pain.” Ex. 28 at 5. For instance, “field medics
4 in the U.S. Armed Forces” report “that the response to being shot with a rifle in the chest
5 can be highly variable, depending on range, ballistic trajectory, and point and angle of
6 impact, and the anatomic path of the bullet within the body.” *Id.* It is understood that
7 “subjects who are shot in the central chest (cardiovascular bundle) typically exhibit no life
8 signs when examined, even when the time between injury and examination is only a matter
9 of a few (five to fifteen) seconds.” *Id.* Specific inquiries of death by firing squad
10 substantiate this “short interval between gunshot wound to the chest and death.” *Id.* For
11 instance, a published electrocardiogram from a 1938 firing squad execution reflects that
12 “the subject experienced immediate onset of ventricular fibrillation after bullet impact.” *Id.*
13 at 5-6.

15 205. While death occurs rapidly from gunshot wounds to the cardiovascular
16 bundle, the loss of consciousness and therefore the capacity to feel pain is effectively
17 instantaneous. This “immediate onset of ventricular fibrillation” or “arrhythmia typically
18 causes loss of consciousness almost immediately,” rendering the subject “insensible to
19 pain.” *Id.*

21 206. Survivors of thoracic gunshot wounds inform an understanding of pain levels
22 from such gunshot wounds. “Invariably, these persons describe the sensation as being that
23 of a severe blunt blow to the chest, like a hard punch, or being struck with a club or bat.”
24 *Id.* at 6.

1 207. The simplicity of the firing squad presents an exceedingly low risk of a
2 botched execution due to executioner error. *Id.* at 7. Individuals capable, by virtue of their
3 familiarity with the use of firearms, to participate in a firing squad are in abundance. *Id.*
4 Arizona possesses more than 14,500 sworn officers licensed to carry and use a firearm. *Id.*

5 208. The feasibility of the firing squad method is well-established as “a traditional
6 and common means of execution since at least the 19th Century.” *Id.* As noted above, Utah
7 has long provided execution by firing squad as a statutory method of execution. Utah Code
8 Ann. § 77-19-10(3).⁴⁶ In 2015, Oklahoma revised its execution statute to contemplate firing
9 squad as an alternative contingent upon the legal or actual unavailability of other methods.
10 Okla. Stat. tit. 22, § 1014(D).⁴⁷ Effective May 14, 2021, South Carolina’s execution statute
11 provides electrocution as its method but permits the choice of either “firing squad or lethal
12 injection, if it is available at the time of election.” S.C. Code Ann. § 24-3-530.⁴⁸ Effective
13

14
15 ⁴⁶ The Utah Code provides firing squad as an alternative to lethal injection, pursuant to a
16 “court hold[ing] that a defendant has a right to be executed by a firing squad,” § 77-18-
17 113(2), or “[i]f a court holds that execution by lethal injection is unconstitutional on its
18 face,” § 77-18-113(3)(a), or “that lethal injection is unconstitutional as applied.” § 77-18-
19 113(3)(b). Further, “the method of execution for the defendant is the firing squad if the
20 sentencing court determines the state is unable to fully obtain the substance or substances
21 necessary to conduct an execution by lethal intravenous injection 30 or more days before
22 the date specified in the warrant issued upon a judgment of death [].” § 77-18-113(4).

23 ⁴⁷ Okla. Stat. tit. 22, § 1014(A) specifies the method of lethal injection, and, under §
24 1014(B), if that method “is held unconstitutional by an appellate court of competent
jurisdiction or is otherwise unavailable, then the sentence of death shall be carried out by
nitrogen hypoxia,” and if both preceding methods are deemed unconstitutional or
unavailable, then by electrocution, § 1014(C). Firing squad is available if the three
preceding methods are ruled out.

⁴⁸ Two men recently scheduled for executions challenged the constitutionality of this
method and their dates were stayed pending determination of the question in the South
Carolina Supreme Court. Caitlin Byrd and Maayan Schechter, “SC Supreme Court stays
April execution by firing squad, another one set for May,” *The State*, Apr. 25, 2022.

1 July 1, 2022, Mississippi’s execution statute will provide the Commissioner and other
2 officials of the Department of Corrections the discretion to designate either lethal injection,
3 nitrogen hypoxia, electrocution, or firing squad, with the stated “preferred method” being
4 lethal injection. Miss. H.B. No. 1479, amending Miss. Code § 99-19-51.

5 209. Historically, rifles have been the conventional choice for firing squads. Ex.
6 28 at 8. Historical practice also supports the use of “no fewer than five and the maximum
7 no more than ten” rifles. *Id.* Typically, the given “squad’s rifles are aimed at the central
8 lower one-third of the condemned man’s chest, in the vicinity of the heart. The primary
9 purpose of this aiming point is to yield a quick death, and the secondary purpose is to avoid
10 disfiguring the face and head of the person being shot.” *Id.* at 9.

11
12 210. ~~The Existing~~ firing squad protocol from Utah, which used this method last
13 in 2010 (*supra*), presents a very straight forward set of steps:

- 14 a. The condemned is secured in a seated position, with an aiming point or target
15 affixed to the chest;
- 16 b. The firing squad, consisting of 5 riflemen, faces the condemned at a distance
17 of 21 feet, armed with service rifles of .30 caliber;
- 18 c. The squad’s rifles are loaded with 2 rounds each by the squad commander;
19 one of the rifles is loaded with blank cartridges, but the members of the firing
20 squad are not aware of which rifle is so loaded prior to firing;
- 21 d. On the order of the D.O.C. Director or his Designee, the firing squad
22 commander gives the order to fire, and all 5 riflemen discharge their rifles at
23 the target on the condemned man’s chest simultaneously;
- 24 e. Three minutes after the first volley, the attending physician examines the
condemned to determine if life signs are present; if so, he continues to check
for life signs every 1 minute to a maximum of 10 minutes; and if life signs are
still present, a second volley shall be fired;
- f. If, after the first volley, the condemned shows obvious signs of life or
consciousness, a second volley shall be immediately fired.

Ex. 28 at 9-10 (see also Appendix B to Ex. 28 for a copy of this protocol).

1 211. The positioning of the condemned requires the person’s firm restraint “so an
2 accurate aiming point may be established.” *Id.* at 10. Further, it is advised to affix “[a]
3 circular target roughly 3-4 inches in dimension . . . over the lower 1/3 of the subject’s
4 sternum, overlapping the left sternal border, but not overlapping the inferior margin or right
5 border of the sternum.” *Id.* Such targeting “direct[s] the riflemen’s bullets into the upper
6 half of the heart, where the pace-making structures of the heart reside, or into the aorta and
7 other great vessels, where the outflow of blood from the heart proceeds.” *Id.*

8 212. Beyond considerations about the seated positioning of the condemned,
9 various details further define the basic workings of the method. These include the distance
10 from the rifleman to the target, and the presence of a “backstop . . . behind the body of the
11 condemned,” which “should consist of a ~~law~~yer of ballistically absorbent material such as
12 layers of lumber or sandbags.” *Id.* at 11.

13 213. As noted herein, Mr. Atwood has been disabled since 2015 and needs the aid
14 of a wheelchair. Application of “the foregoing firing squad procedures for him while he is
15 seated in a standard wheelchair” is entirely feasible. *Id.* at 10. Further, Mr. Atwood “could
16 be placed in a purpose-built seat and secured to it” for a standard firing squad procedure.
17 *Id.*

18 **VIII. CLAIMS FOR RELIEF**

19 ***Claim I***

20 ***42 U.S.C. § 1983 – Eighth and Fourteenth Amendments, As-Applied to Plaintiff***

21 214. All prior paragraphs of this Complaint are hereby incorporated into this claim
22 by reference.
23
24

1 215. Frank Atwood was convicted and sentenced to death in 1987. Article XXII,
2 § 22 of the Arizona Constitution, provides that individuals sentenced to death for an offense
3 committed before November 23, 1992, “shall have the choice of either lethal injection or
4 lethal gas” as the method of execution. See also A.R.S. § 13-757.

5 ***a. Defendants’ lethal injection procedures as-applied to Plaintiff violate the***
6 ***Cruel and Unusual Punishments Clause***

7 216. Due to Frank Atwood’s long-standing chronic disease afflicting his vertebral
8 bodies stemming from severe spondylosis, a degenerative spinal disease worsened over
9 time by Defendants’ deliberate indifference to the provision of his needed medical attention
10 while Plaintiff has been in their custody, a lethal injection execution by application of the
11 Department’s Execution Procedures will inflict maximally severe pain upon him,
12 irrespective of the quality or adequacy of the compounded pentobarbital sodium designated
13 for use in his execution.

14 217. Defendant’s application of the lethal injection procedures under the
15 Department’s Execution Procedures requires securing Mr. Atwood by restraints on his
16 limbs to affix him in a lying position to the Department’s execution table. In imposing this
17 position and restraint to the execution table, Defendants will inflict severe pain on Mr.
18 Atwood due to his longstanding lumbar and cervical spinal and nerve conditions and the
19 acute, maximal pain he experiences when lying flat, which emanates from numerous
20 regions of his lower extremities associated with specific, severely compromised vertebrae.
21

22 218. The Department’s Execution Procedures gives Defendant Director Shinn
23 discretion to instruct the Department’s “IV Team Leader” to insert a central femoral venous
24

1 line in conducting a lethal injection. The insertion of a femoral central line to Mr. Atwood
2 would require him to lie flat, with his hips extended. Mr. Atwood cannot achieve that
3 positioning without experiencing maximal pain. Due to the degree of pain that would result
4 from that positioning, Mr. Atwood would likely involuntarily jerk and writhe without
5 control of his movements during any attempt to establish a femoral line.

6 219. Mr. Atwood is unable to sustain physical positioning to permit the use of a
7 femoral central line for any length of time without experiencing severe pain.

8 220. Thus, as a further consequence of Mr. Atwood's spinal and nerve condition
9 that would cause the acute, unmanageable pain that results when he is made to lie flat on
10 his back, Defendants' application of the Department's Execution Procedures in relation to
11 the discretion of Defendant Director Shinn to direct the Department's "IV Team" to insert
12 a central femoral intravenous line would inflict maximal pain and substantially risk the
13 laceration of Mr. Atwood's femoral artery, bladder, bowels, or other internal organs in
14 connection to the lethal injection procedures, greatly increasing the risk of adding further
15 severe pain and additional dire health risks in the course of the execution. Defendants'
16 discretion under the Department's procedures is highly susceptible to compromising the
17 viability of the execution itself
18

19 221. The demonstrated incompetence of the IV Team, coupled with the added
20 complications of Plaintiff's physical status and health condition, create a likelihood of
21 improper catherization for Mr. Atwood's lethal injection, exposing him to undue risk of
22 inadequate delivery of the chemicals and dire complications, such as a highly prolonged or
23 failed execution process.
24

1 ***b. Various readily implemented alternatives exist:***

2 ***1. Alternatives to unconstitutional restraint to execution table***

3 222. Assuming the establishment of the quality and adequacy of the compounded
4 pentobarbital sodium designated for use in his execution, readily implemented alternatives
5 in conducting a lethal injection execution without inflicting severe pain exist.

6 223. Defendants may restrain Mr. Atwood while he remains seated in his
7 wheelchair, then establish a non-femoral intravenous line and administer to him in this
8 position a lawful, pharmaceutically adequate compounded pentobarbital sodium.

9 224. Defendants may perform readily available medical procedures, including
10 interventional pain modalities such as fluoroscopically-guided injections, and surgical
11 procedures as determined through consultation with an orthopedic spine surgeon or
12 neurosurgeon to address Mr. Atwood's condition substantially caused by the deliberate
13 indifference of the Defendants over a span of years.

14 ***2. Alternatives to lethal injection***

15 225. Additional readily implemented alternatives to a lethal injection execution
16 that would not superadd extraordinary pain exist.

17 226. A competently administered lethal dose of nitrogen gas, which would cause
18 death by nitrogen hypoxia, or the use of a noble gas, such as helium or xenon, for lethal
19 gas purposes provide alternatives plainly within Arizona's existing constitutional and
20 statutory framework.

21 227. Further, the Department's explicit lethal gas procedures under its Execution
22 Procedures establish that Arizona is the only jurisdiction currently equipped with a
23
24

1 purportedly functional gas chamber. While other jurisdictions present gas or nitrogen
2 hypoxia as a statutory method of execution, none other than Arizona presently purports to
3 be able to conduct such an execution.

4 228. The Department has possessed its current gas chamber since circa 1949,
5 having reportedly refurbished it in some manner recently. Defendants face no legal obstacle
6 to electing nitrogen gas (or various other options among the noble gases, *supra*), as plainly
7 evidenced by the Department's designation of hydrogen cyanide gas, the use of which was
8 held to violate the Cruel and Unusual Punishments Clause by the Ninth Circuit Court of
9 Appeals over 25 years ago, *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), though the
10 Supreme Court vacated and remanded that decision for reconsideration in light of
11 amendments to the California death penalty statute altering, during the pendency of the
12 *Fierro* petition for writ of certiorari, the grounds of the prisoners' standing and the ripeness
13 of the challenge to the method of cyanide gas.

15 229. The use of nitrogen gas or a noble gas, if administered competently, would
16 not present a substantial risk of superadding pain. Nitrogen hypoxia is known to be
17 painless.

18 230. The firing squad presents another readily implemented alternative to methods
19 under the Execution Procedures that would not superadd extraordinary pain. This is not a
20 statutory alternative under current Arizona law. Both Utah, [Utah Code Ann. § 77-19-10\(3\)](#),
21 and Oklahoma, [Okla. Stat. tit. 22, § 1014\(D\)](#), have long provided this statutory option,
22 while South Carolina, [S.C. Code Ann. § 24-3-530](#), has recently taken legislative steps to
23 include it, [as has Mississippi, Miss. Code § 99-19-51](#).

1 231. The first recorded use of a firing squad for capital punishment in the United
2 States occurred over four hundred years ago, in 1608, and by 1879, the Supreme Court
3 upheld a death sentence by firing squad, *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879),
4 an authority that remains good law. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2015))
5 (citing *Wilkerson* and “the Constitution’s original understanding ... permit[ing] an
6 execution by firing squad”).

7 ***c. Conclusion***

8 232. Defendants’ intention to gratuitously inflict severe pain for an extensive
9 period under the Department’s Execution Procedures for lethal injection, as applied to Mr.
10 Atwood, who is physically disabled, irrespective of the quality or adequacy of the
11 compounded pentobarbital sodium designated for use in his execution, violates the Cruel
12 and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause
13 of the Fourteenth Amendment of the United States Constitution.

14 233. Atwood hereby realleges and incorporates by reference the preceding
15 paragraphs in this Complaint.
16

17 ***Claim II***

18 ***42 U.S.C. § 12101- Americans With Disabilities Act***

19 234. All prior paragraphs of this Complaint are hereby incorporated into this claim
20 by reference.

21 235. A primary purpose of the Americans with Disabilities Act (“ADA”), 42
22 U.S.C. § 12101, *et seq.*, enacted July 26, 1990, is to ensure that people with disabilities
23 receive accommodations to participate in the programs, services, and activities offered by
24

1 public entities.

2 236. The ADA defines a “public entity” to include any state or local government
3 or any department, agency, special purpose district, or other instrumentality of a State or
4 local government, 42 U.S.C. § 12131(1). The Department is a “public entity” within the
5 meaning of the ADA, of which Defendants are officers responsible for exercising control
6 and authority over its operations.

7 237. The ADA also prohibits public entities from providing individuals who have
8 disabilities with separate or unequal benefits or services. The ADA, and specifically 42
9 U.S.C. §§ 12131-12134, prohibits discrimination in public services on the basis of
10 disability.
11

12 238. Frank Atwood has a physical impairment that substantially limits one or
13 more of his major life activities, and, thus, he is an individual with disabilities within the
14 meaning of the ADA, 42 U.S.C. § 12102(2). The Department has recognized Mr. Atwood’s
15 disability under the ADA for many years.

16 239. Currently with respect to Mr. Atwood, the Department offers a “service,
17 program, or activity,” namely an execution that is not unnecessarily painful, for which Mr.
18 Atwood meets the essential eligibility requirements, as do all death-sentenced inmates, by
19 constitutional necessity. Thus, Mr. Atwood is a “qualified individual with disabilities”
20 within the meaning of the ADA, 42 U.S.C. § 12131(2).
21

22 240. Under the lethal injection procedures in the Department’s Execution
23 Procedures, and irrespective of the quality of the compounded pentobarbital sodium
24 designated for use in his execution, Defendants will secure Mr. Atwood in a supine, or

1 lying down, position by restraints attached to the Department's execution table, which will
2 inflict severe pain and thereby exclude Mr. Atwood from participation in their services,
3 programs, and activities, and, solely by reason of his disability, deny him the rights and
4 benefits (i.e., an execution without superadding severe pain) accorded to other prisoners
5 who are executed, in violation of the ADA.

6 241. In addition, Defendants have violated the ADA by intentionally failing or
7 refusing to provide reasonable accommodations and modifications to policies, practices,
8 and procedures to Mr. Atwood.

9 242. The Defendants have willfully disregarded their duties under the ADA and
10 have knowingly allowed unlawful conditions and practices to continue in the Department's
11 Execution Procedures as applied to Mr. Atwood.

12 243. Despite the clear provisions of the ADA, the Defendants persist in imposing
13 conditions and practices that discriminate against Mr. Atwood in relation to the application
14 of its lethal injection procedures under the Department's Execution Procedures.

15 244. As a direct and proximate result of the acts, omissions, and violations alleged
16 above, Plaintiff will suffer damages, including but not limited to severe pain and suffering
17 and the resulting infringement upon his religious exercise at the moment of his death, in
18 violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

19
20
21 ***Claim III***
29 U.S.C. § 794 - Rehabilitation Act

22 245. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*)
23 guarantees that people with disabilities will not be excluded from participating in any
24

1 program or activity, solely on the basis of their disability, by any entity that receives federal
2 financial assistance.

3 246. On information and belief, the Department, of which Defendants are officers
4 responsible for exercising control and authority over its operations, receives federal
5 funding for the operation of certain of its programs.

6 247. Frank Atwood is an individual with a disability within the meaning of the
7 Rehabilitation Act of 1973.

8 248. Mr. Atwood is qualified to participate in the services, programs, activities,
9 and benefits Defendants provide to prisoners within the meaning of the Rehabilitation Act
10 of 1973, including executions that do not inflict severe pain.

11 249. Defendants have discriminated against Mr. Atwood on the basis of disability
12 in violation of 29 U.S.C. § 794 and its implementing regulations. Such discrimination
13 includes but is not limited to failure to provide reasonable modifications and
14 accommodations of their Execution Procedures, as required to comply both with the Eighth
15 Amendment's prohibition against the infliction of cruel and unusual punishment, and with
16 the Department's Execution Procedures, which states "The Department shall make every
17 effort in the planning and preparation of an execution to ensure the execution process:
18 Faithfully adheres to constitutional mandates against cruel and unusual punishment." Ex.
19 4, Execution Procedures at page 1.

20
21 250. Defendants have acted with deliberate indifference to the strong likelihood
22 that, without accommodations and modifications, application to Mr. Atwood of the
23 Department's lethal injection procedures under its Execution Procedures, irrespective of
24

1 the quality of the compounded pentobarbital sodium designated for use in his execution,
2 would likely result in a violation of federally protected rights.

3 251. Defendants are denying Mr. Atwood access to programs, benefits and
4 services provided to other prisoners for which he is qualified to participate, in the form of
5 an execution that is not unnecessarily painful, solely on the basis of his disability, thereby
6 violating the Rehabilitation Act of 1973.

7 252. Despite the clear provisions of the Rehabilitation Act of 1973, the
8 Defendants persist in imposing conditions and practices that discriminate against Mr.
9 Atwood.

10 253. As a direct and proximate result of the acts, omissions, and violations alleged
11 above, Plaintiff will suffer damages, physical injuries, including but not limited to
12 excruciating pain and suffering. Plaintiff has been injured and aggrieved by and will
13 continue to be injured and aggrieved by Defendants' discrimination, in violation of the
14 Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*).

15
16 ***Claim IV***

17 ***42 U.S.C. § 1983 – Violation of Fourteenth Amendment – Equal Protection***

18 254. Plaintiff hereby incorporates all other paragraphs in the Complaint as if fully
19 set forth herein.

20 255. Mr. Atwood is disabled.

21 256. In applying the lethal injection procedures in the Department's Execution
22 Procedures, irrespective of the quality of the compounded pentobarbital sodium designated
23 for use in his execution, Defendants will inflict severe pain upon him solely on the basis of
24

1 Mr. Atwood's disability.

2 257. Defendants are discriminating against Mr. Atwood because of his disability.

3 258. Defendants have provided no legitimate governmental purpose for
4 discriminating against Mr. Atwood.

5 259. As a direct and proximate result of Defendants discriminatory treatment, Mr.
6 Atwood will suffer damages, including but not limited to severe pain and suffering, in
7 violation of the Equal Protection Clause of the Fourteenth Amendment to the United States
8 Constitution.

9
10 ***Claim V***
11 ***42 U.S.C. § 1983 – Violation of Fourteenth Amendment – Due Process of Law***
(Procedural Due Process — lethal injection)

12 260. Mr. Atwood hereby realleges and incorporates by reference the preceding
13 paragraphs in this Complaint.

14 261. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully
15 set forth herein.

16 262. Under the Department's Execution Procedures, ~~D.O. 710~~, Ex. 4, Att. D, ¶
17 A.1.III. and ¶ C.2, Mr. Atwood has a state-created liberty interest and a right to procedural
18 due process in the use of execution chemicals that (i) have an expiry, known in
19 pharmaceutical terms as a beyond-use date, or BUD, later than the execution date of June
20 8, 2022, under Mr. Atwood's current warrant, and (ii) have been subjected to a
21 scientifically valid quantitative analysis performed and provided to Mr. Atwood by ten
22 calendar days after the State of Arizona's motion, by Defendant Brnovich, for an execution
23 warrant in the Arizona Supreme Court filed on April 7, 2022.
24

1 263. Defendants specifically and intentionally removed from the Department’s
2 Execution Procedures, last revised April 20, 2022, language included in prior protocols
3 that stated the Execution Procedures Department Order “does not create any legally
4 enforceable rights or obligations.”⁴⁹

5 264. In securing the current warrant from the Arizona Supreme Court ordering
6 Mr. Atwood’s execution on June 8, 2022, Defendant Brnovich repeatedly between April
7 2021 and April 2022 invoked the Defendants’ specific legal obligations concerning
8 quantitative analysis and BUD under the Execution Procedures as necessitating certain
9 relief from the Arizona Supreme Court in the scheduling of execution warrants.
10

11 265. On January 5, 2022, Defendant Brnovich renewed his motion in the Arizona
12 Supreme Court for a briefing schedule for an execution warrant for Plaintiff, having
13 similarly moved that court on January 5, 2021. On both occasions, Defendant Brnovich
14 invoked Defendants’ obligations under the Execution Procedures with respect to the
15 preparation of lethal injection chemicals as the basis for the special relief he thereby sought
16 from the Arizona Supreme Court. On April 5, 2022, premised upon his invocation of the
17 legal obligations of Defendants concerning the specific compounding requirements stated
18 in the Execution Procedures, the Arizona Supreme Court granted Defendant Brnovich the
19 relief that he sought and entered a scheduling order.
20

21 266. On April 7, 2022, Defendant Brnovich moved the Arizona Supreme Court
22 for the present warrant to execute Plaintiff, which that court granted on May 3, 2022,
23

24 ⁴⁹ *Supra* n.32#, Jan. 11, 2017 iteration.

1 scheduling the June 8, 2022 execution date.

2 267. Defendant Brnovich invoked Defendants’ certain obligations in relation to
3 lethal injection chemicals that would be prepared specifically for executing Mr. Atwood
4 under the Execution Procedures while ignoring the substance of these very obligations.

5 268. Defendants are depriving Plaintiff of his resulting liberty interest and
6 procedural due process by failing to evidence, by any valid method, that the compounded
7 chemicals Defendants have specifically prepared for executing Mr. Atwood possesses a
8 BUD later than the ordered execution date of June 8, 2022, and otherwise establishing that
9 these chemicals are adequate for the intended execution purpose as adduced in quantitative
10 analysis provided by ten calendar days from the above execution warrant motion on April
11 7, 2022.

12 269. Under the Execution Procedures, Defendants, “[u]pon receipt of the Warrant
13 of Execution,” (which for Plaintiff was entered on May 3, 2022, and immediately
14 transmitted to Defendants, who directly served Mr. Atwood individually), “the Housing
15 Unit 9 Section Leader” (who is either Defendant Kimble or would report to him), “shall . .
16 . [e]nsure that complete sets of chemicals are on site,⁵⁰ not expired, and immediately
17 available for use.” Ex. 4, Att. D., ¶ A.1.III. As noted, Defendants are further obligated to
18 “only use chemicals in an execution that have an expiration or beyond-use date that is after
19 the date that an execution is carried out.” *Id.*

20 270. In Defendant Brnovich’s submissions to the Arizona Supreme Court, he
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22

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⁵⁰ The Housing Unit 9 site contains the execution room and gas chamber.

1 expressed his office would disclose the required “quantitative analysis” testing within 10
2 days of his motion for a warrant and would at that time also “include certification of the
3 beyond-use date.” Defendant has not, nor has anyone else, disclosed any such certification.

4 271. Notwithstanding the foregoing, Defendants have failed even to state a BUD
5 for the execution chemicals designated for the execution of Plaintiff under his present
6 warrant.

7 272. Further, Defendants failed to submit scientifically valid quantitative analysis
8 by the appointed date pursuant to Defendant Brnovich’s warrant motion on April 7, 2022.

9 273. Defendants are depriving Mr. Atwood of this liberty interest by failing to
10 provide any BUD, much less a scientifically valid one, pursuant to the Execution
11 Procedures.

12 274. Defendants are depriving Mr. Atwood of this liberty interest by failing to
13 provide a scientifically valid quantitative analysis of the compounded chemicals pursuant
14 to the Execution Procedures that Defendants have designated for use in a lethal injection
15 of Mr. Atwood.

16 275. Defendants’ failure to establish a BUD for, and to submit a quantitative
17 analysis of, their execution chemicals prepared for executing Plaintiff pursuant to the
18 Execution Procedures precludes the use of these specific chemicals and any other specific
19 chemicals with which Defendants would seek to replace them.

20 276. Defendants’s retained compounding pharmacist, Defendant Doe, who is
21 anonymous, has prepared execution chemicals for Defendants prior to, and specifically for,
22 Plaintiff’s execution. Defendant’s pharmacist has attested to being an Arizona-licensed
23
24

1 pharmacist and to “follow[ing] the guidelines and requirements found in the United States
2 Pharmacopeia” in preparing the high-risk compounded sterile preparations of injectable
3 pentobarbital sodium, as specifically designated by Defendant Brnovich and other
4 Defendants under the Execution Procedures.

5 277. Defendants are further violating Mr. Atwood’s rights by failing to establish
6 basic compliance of the Department’s compounding pharmacist with the pharmaceutical
7 standards and specific compendium requirements of the United States Pharmacopeia and
8 The National Formulary for its compounding of chemicals designated for Mr. Atwood’s
9 June 8, 2022, execution date.
10

11 278. The Department’s Execution Procedures provides no process for challenging
12 Defendants’ failure to comply with these obligations governing the preparation of its lethal
13 injection chemicals, or for adjudicating Defendants’ adherence to them.

14 279. Defendants refuse to provide Plaintiff the opportunity to be heard in person,
15 or otherwise, in order to present witnesses and documentary evidence, to confront and
16 cross-examine adverse witnesses, or to have evidence against Defendants disclosed for
17 consideration in the application of their legal obligations under the Execution Procedures.

18 280. Plaintiff may suffer damages, including but not limited to the extraordinary
19 indignity and harm of a botched execution that may inflict severe pain in ending his life or
20 leave him in a vegetative or severely disabled state as a direct and proximate result of
21 Defendants’ failure to provide Mr. Atwood sufficient process to challenge the conduct of
22 his execution with compounded pentobarbital sodium solution that (a) does not have an
23 established BUD later than the scheduled execution date, (b) hasve not been subjected to
24

1 scientifically valid quantitative analysis, and (c) has~~ve~~ not been compounded in satisfaction
2 of basic medical and pharmaceutical standards (*see* compendium requirements, USP).

3 281. Plaintiff may suffer damages, including but not limited to the extraordinary
4 indignity and harm of a botched execution that may inflict severe pain in ending his life
5 and/or leave him in a vegetative or severely disabled state as a direct and proximate result
6 of Defendant Doe's failure to non-negligently prepare, and the other Defendants' failure to
7 ensure such non-negligent preparation of, the compounded pentobarbital sodium solution
8 designated for Mr. Atwood's execution. These damages may result from Defendant Doe's
9 failure to prepare this compounded pentobarbital sodium solution adequately to ensure
10 these drugs (a) have an established BUD later than the scheduled execution date, (b) have
11 been subjected to scientifically valid quantitative analysis, and (c) have not been
12 compounded in satisfaction of basic medical and pharmaceutical standards ~~standards~~ (*see*
13 compendium requirements, USP).
14

15 282. Executing Mr. Atwood pursuant to the Execution Procedures' lethal injection
16 procedures will violate his right to procedural due process under the Fourteenth
17 Amendment to the United States Constitution.

18 ***Claim VI***

19 ***42 U.S.C. § 1983 – Violation of Fourteenth Amendment – Due Process of Law***
20 ***(Procedural Due Process — lethal gas option)***

21 283. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully
22 set forth herein.

23 284. Enactment of Article XXII, § 22 of the Arizona Constitution in 1933
24 established lethal gas as the method of execution for the state's death penalty

1 285. The current amendment to Article XXII, § 22 of the Arizona Constitution,
2 provides that individuals sentenced to death for an offense committed before November
3 23, 1992, “shall have the choice of either lethal injection or lethal gas” as the method of
4 execution. This state-created interest is further enshrined in legislation, A.R.S. § 13-
5 757(B). Neither the Arizona Constitution nor Arizona statute specifies the nature of the gas
6 the Department shall use in the lethal gas method.

7
8 286. Plaintiff was convicted and sentenced to death by the Arizona Superior Court
9 in 1987, thus the underlying offense was committed before November 23, 1992, and this
10 choice applies to Mr. Atwood.

11 287. Plaintiff has a state-created liberty interest, as established by the Arizona
12 Constitution and Arizona statute, in choosing the method that the Defendants use to execute
13 him.

14 288. Plaintiff further has a state-created liberty interest in Defendants refraining
15 from conduct that would gratuitously inflict extreme pain and suffering or from other
16 conduct that renders either statutory method of execution in violation of the constitutions
17 of Arizona or the United States, or other law.

18 289. The Department’s Execution Procedures contained in Attachment E (Ex. 4),
19 which Defendants promulgate, interpret, and apply in the course of their duties, provide
20 that hydrogen cyanide gas, known as Zyklon B when Nazi Germany deployed it for mass
21 exterminations, shall be the lethal gas.

22
23 290. As the Arizona Supreme Court specified in its execution warrant entered
24 May 3, 2022, Arizona statute provides twenty days from the given execution date for the

1 condemned individual to choose between injection and gas methods. A.R.S. § 13-757(B).
2 With respect to Mr. Atwood’s current date of June 8, 2022, he has been entitled to make
3 such a choice through the date of the ~~present~~ initial Complaint in this cause, filed May 19,
4 2022.

5 291. The Arizona Constitution, itself, does not delimit a period for choosing an
6 execution method pursuant to a pending execution warrant. Ariz. Const. Art. XXII, § 22.

7 292. Historical and legal precedent, confirmed by scientific study, establish that
8 execution by hydrogen cyanide lethal gas would gratuitously inflict extreme pain, plainly
9 violating the prohibition against the infliction of cruel and unusual punishment under the
10 Eighth Amendment to the United States Constitution.

11 293. Plaintiff₅ (Mr. Atwood, individually), submitted a written grievance of this
12 issue to Defendants on or around May 1, 2022, who refused to process his grievance.
13 Plaintiff sought to appeal the decision, which Defendants also refused to process.

14 294. Plaintiff’s counsel have written counsel in Defendant Brnovich’s office and
15 general counsel for other Defendants on May 14 and May 18 to demand remediation of the
16 rights violation arising from Defendants’ designation of cyanide gas. Plaintiff specifically
17 “respectfully demand[ed] that the State immediately designate a constitutional lethal gas
18 method under the Department’s Execution Procedures so he may have his right to choose
19 a lethal gas method restored before the State violates § 13-757(B) upon the lapsing of the
20 20-day choice period ending 12:01 a.m., May 20.”

21 295. On May 19, 2022, Defendant Brnovich’s office, in response, reiterated the
22 Department “will not be making any changes to its current lethal gas procedures.”
23
24

42 U.S.C. § 1983 – Violation of Eighth Amendment

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2 301. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully
3 set forth herein.

4 302. Enactment of Article XXII, § 22 of the Arizona Constitution in 1933
5 established lethal gas as the method of execution for the state’s death penalty.

6 303. The current amendment to Article XXII, § 22 of the Arizona Constitution,
7 provides that individuals sentenced to death for an offense committed before November
8 23, 1992, “shall have the choice of either lethal injection or lethal gas” as the method of
9 execution. This state-created interest is further enshrined in legislation, A.R.S. § 13-
10 757(B). Neither the Arizona Constitution nor Arizona statute specifies the nature of the gas
11 the Department shall use in the lethal gas method.

12 304. Plaintiff was convicted and sentenced to death by the Arizona Superior Court
13 in 1987, thus the underlying offense was committed before November 23, 1992, and this
14 choice applies to Mr. Atwood.

15 305. Plaintiff further has a state-created liberty interest in Defendants refraining
16 from conduct that would gratuitously inflict extreme pain and suffering or from other
17 conduct that renders either statutory method of execution in violation of the constitutions
18 of Arizona or the United States, or other law.

19 306. The Department’s Execution Procedures contained in Attachment E, which
20 Defendants promulgate, interpret, and apply in the course of their duties, provide that
21 hydrogen cyanide gas, known as Zyklon B when Nazi Germany deployed it for mass
22 exterminations, shall be the lethal gas.
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1 with the execution calling for court intervention.

2 312. Plaintiff’s counsel’s ability to communicate during what very well could be
3 the most pressing need Plaintiff shall have for counsel and to access the courts is thus
4 entirely in the control of a corrections officer who is not required to possess any particular
5 qualifications or training nor to be guided by certain criteria for permitting communication.

6 313. The prospective denial of Plaintiff’s counsel’s access to observe Plaintiff
7 during the execution, the prospective denial to communicate with Plaintiff’s legal team,
8 and the prospective denial to access the courts before and during the execution violate
9 Plaintiff’s rights under the Fourteenth Amendment to the United States Constitution.

10
11 *Claim IX*
12 *42 U.S.C. § 1983 – 18 U.S.C. § 3599 – Right to Counsel*

13 314. Plaintiff hereby incorporates all other paragraphs of this Complaint as if fully
14 set forth herein.

15 315. Plaintiff recites and incorporates the paragraphs comprising the immediately
16 prior claim (VIII, ¶¶ 308-313), and claims that the prospective denial of Plaintiff’s
17 counsel’s access to observe Plaintiff during the execution, the prospective denial to
18 communicate with Plaintiff’s legal team, and the prospective denial to access the courts
19 before and during the execution violate Plaintiff’s statutory rights to counsel pursuant to
20 18 U.S.C. § 3599.

21 *Claim X*
22 *42 U.S.C. § 1983 – Violation of Eighth and Fourteenth Amendments*
23 *Right to Be Free from Serious Harm*

24 316. The Execution Procedures possess a “Contingency Procedure” that

1 contemplates the availability of a defibrillator for use at the discretion of Defendant Shinn
2 before or after commencement of a lethal injection. The Contingency Procedure fails to
3 contemplate specific care for pentobarbital intoxication in the event that an execution is
4 interrupted or suspended after commencement of dispensing of the compounded
5 preparation.

6 317. The failure to contemplate foreseeable modalities reflects deliberate
7 indifference and violates Plaintiff's rights under the Eighth and Fourteenth Amendments
8 to the United States Constitution.

9
10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff Frank Jarvis Atwood prays that the Court provide relief
12 as follows:

- 13 1. That this Court assume jurisdiction of this cause and set this case for a hearing on
14 the merits.
- 15 2. That this Court issue a declaratory judgment declaring and enforcing Plaintiff's
16 rights under the Sixth, Eighth, and Fourteenth Amendments and, further, issue a
17 temporary restraining order or a preliminary or permanent injunction commanding
18 Defendants not to carry out any execution of Plaintiff unless and until such time as
19 Defendants remedy the foregoing enumerated violations of Plaintiff's rights, so
20 that Plaintiff may be executed in a constitutional manner.
- 21 3. Other such relief as this Court deems proper and just.

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23 DATED this 19-27th day of May, 2022.
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/s/ Joseph J. Perkovich _____

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