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

First Amendment Coalition of Arizona,
Inc.; Charles Michael Hedlund; Graham
S. Henry; David Gulbrandson; Robert
Poyson; Todd Smith; Eldon Schurz, and
Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC;
James O'Neil, Warden, ASPC-Eyman;
Greg Fizer, Warden, ASPC-Florence;
and Does 1-10, Unknown ADC
Personnel, in their official capacities as
Agents of ADC,
Defendants.

Case No: 2:14-cv-01447-NVW-JFM

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

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1 no advance or contemporaneous notice to any witness, counsel, or court. *See generally*
 2 *Lopez v. Brewer*, 680 F.3d 1084, 1093-94 (9th Cir. 2012) (Pregerson, J., dissent)
 3 (discussing series of mishaps and mistakes that have occurred during Arizona’s
 4 deviations from its written execution procedures).

5 3. Compounding the unconstitutionality of their absolute discretion,
 6 Defendants refuse to conduct their executions with the transparency the First Amendment
 7 requires. Defendants argued to the United States Supreme Court that Wood’s pleas for
 8 transparency were unfounded because “*nearly every detail about his execution is*
 9 *provided* to him and to the general public, *including exactly what and how much lethal*
 10 *drugs will be used*, how they will be administered, and the qualifications of those placing
 11 the IV lines to administer them.”³ In reality, Wood’s execution was an experiment,
 12 conducted ad hoc, in which Defendants injected Wood with 13 more than the maximum
 13 number of permitted doses of *each* of the two drugs in the protocol, midazolam and
 14 hydromorphone, thus administering 750 milligrams of each drug rather than the 50
 15 milligrams that the State had promised to use.⁴

16 4. When Wood’s counsel sought the District Court’s intervention through a
 17 telephonic hearing, Defendants falsely represented to the Court the dosages they had
 18

19 ³ Reply Brief of State of Arizona in support of Application for Stay at 2, *Ryan v. Wood*,
 20 No. 14A82 (U.S. July 22, 2014) (emphases added). Similarly, Judge Bybee, dissenting
 21 from the Ninth Circuit Court of Appeals’ grant of stay, expressly relied on the State’s
 22 assurances in asserting that both Wood and “[t]he public know[] precisely how the State
 23 intends to end Wood’s life and can investigate [based on already available information]
 24 whether the drugs are suited to that purpose,” and, indeed, “[a]nyone who reads the
 25 protocol will know exactly how Arizona plans to carry out [his] execution.” *Wood v.*
 26 *Ryan*, 759 F.3d 1076, 1100 (9th Cir. 2014) (Bybee, J., dissenting), *vacated*, 135 S. Ct. 21
 27 (2014) (mem.).

28 ⁴ Fernanda Santos, *Executed Arizona Inmate Got 15 Times Standard Dose, Lawyers Say*,
 N.Y. TIMES, Aug. 1, 2014, <http://nyti.ms/1ohRODF>. The result of Defendants’
 improvisational and hidden-from-view execution was that Wood lingered alive for
 almost two hours after being first injected with what Defendants represented were lethal
 doses of the two drugs, gasping for air more than 640 times in manner that journalist
 witnesses described as “like a fish on shore gulping for air.” Laurie Roberts, *Arizona*
Needs a Timeout After Botched Execution, ARIZ. REPUBLIC July 23, 2014, 6:34 PM,
[http://www.azcentral.com/story/laurieroberts/2014/07/23/woods-execution-](http://www.azcentral.com/story/laurieroberts/2014/07/23/woods-execution-botched/13073777)
[botched/13073777](http://www.azcentral.com/story/laurieroberts/2014/07/23/woods-execution-botched/13073777).

1 administered to Wood. Specifically, at 3:35 p.m. on the day of the execution (103
2 minutes after the drugs began to flow), Defendants told the Court that Wood had received
3 a “[a] second dose of drugs.” By 3:33 p.m., however, Wood had in fact received not just
4 his second, but also his *third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh,*
5 *and twelfth* injections of the drugs; he would later receive three more undisclosed
6 injections during the telephonic hearing. Yet no one, other than the State, knew this at the
7 time of the hearing, because Defendants cloak their execution process. Thus, no witness
8 present at the execution was able to observe Defendants’ repeated injections of the drugs,
9 none could know how many injections he had received, and none, including Wood’s
10 counsel, could contradict Defendants’ false representations to the Court.

11 5. Defendants’ revised protocol abandons the combination of midazolam and
12 hydromorphone, but replaces it with yet another combination that Arizona has never
13 previously used. This three-drug combination begins with midazolam (ostensibly to
14 render the prisoner insensate to pain), then adds a drug to paralyze the prisoner, and
15 concludes with a painful drug that stops the prisoner’s heart. The paralytic agent serves
16 as a *chemical* curtain, masking whether midazolam is in fact effective in preventing the
17 prisoner from suffering the intense pain of the heart-stopping drug, and furthermore
18 creates its own suffering through slow suffocation. The press, the prisoners, and the
19 people of Arizona have a right to know whether Arizona’s execution process subjects
20 prisoners to intense physical pain, and the use of a paralytic agent is just as effective in
21 preventing disclosure of that fact as if the execution occurred without any public witness
22 at all.

24 6. Given Defendants’ past broken promises to this Court, the U.S. Court of
25 Appeals for the Ninth Circuit, and the U.S. Supreme Court, significant injunctive relief is
26 essential to ensure that Defendants adhere to adequate written procedures.

Jurisdiction and Venue

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil-rights violations), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief). Plaintiffs invoke this Court's jurisdiction pursuant to the First, Eighth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b). Condemned Plaintiffs are currently incarcerated at the Arizona State Prison Complex ("ASPC")—Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona, located in this District. Additionally, the Coalition resides in this District.

9. All executions conducted by Defendants occur at the Central Unit at ASPC—Florence, which is in this District. Thus, events giving rise to this Complaint have occurred and/or will occur in this District.

Parties to the Action

10. Plaintiff First Amendment Coalition of Arizona, Inc. ("Coalition"), is a non-profit corporation made up of organizations dedicated to advancing free speech, accountable government, and public participation in civic affairs. Founded in 1981, the Coalition is located in Phoenix, Arizona. Members of the Coalition include the Arizona Broadcasters Association; the Arizona Newspapers Association; the Arizona-New Mexico Cable Telecommunication Association; the Arizona Press Club; the Society of Professional Journalists, Valley of the Sun Chapter; and individual news media companies and reporters. The Coalition asserts a claim under only the First Amendment to vindicate the rights of access of the press and the public to government proceedings and information; the Coalition does not join the separate First, Eighth, and Fourteenth Amendment claims advanced by the Condemned Plaintiffs.

11. Plaintiff Charles Michael Hedlund is a United States citizen and a resident of the State of Arizona. He is currently subject to a sentence of death imposed by the

1 Superior Court of Maricopa County. Hedlund is incarcerated at ASPC–Eyman, Browning
2 Unit, in Florence, Arizona.

3 12. Plaintiff Graham S. Henry is a United States citizen and a resident of the
4 State of Arizona. He is currently subject to a sentence of death imposed by the Superior
5 Court of Mohave County. Henry is incarcerated at ASPC–Eyman, Browning Unit, in
6 Florence, Arizona.

7 13. Plaintiff David Gulbrandson is a United States citizen and a resident of the
8 State of Arizona. He is currently subject to a sentence of death imposed by the Superior
9 Court of Maricopa County. Gulbrandson is incarcerated at ASPC–Eyman, Browning
10 Unit, in Florence, Arizona.

11 14. Plaintiff Todd Smith is a United States citizen and a resident of the State of
12 Arizona. He is currently subject to a sentence of death imposed by the Superior Court of
13 Coconino County. Smith is incarcerated at ASPC–Eyman, Browning Unit, in Florence,
14 Arizona.

15 15. Plaintiff Robert Poyson is a United States citizen and a resident of the State
16 of Arizona. He is currently subject to a sentence of death imposed by the Superior Court
17 of Mohave County. Poyson is incarcerated at ASPC–Eyman, Browning Unit, in Florence,
18 Arizona.

19 20 16. Plaintiff Eldon Schurz is a United States citizen and a resident of the State
21 of Arizona. He is currently subject to a sentence of death imposed by the Superior Court
22 of Maricopa County. Schurz is incarcerated at ASPC–Eyman, Browning Unit, in
23 Florence, Arizona.

24 17. Plaintiff Roger Scott is a United States citizen and a resident of the State of
25 Arizona. He is currently subject to a sentence of death imposed by the Superior Court of
26 Maricopa County. Scott is incarcerated at ASPC–Eyman, Browning Unit, in Florence,
27 Arizona.

1 18. Defendant Charles L. Ryan is the Director of ADC and is being sued in his
2 official capacity for equitable, injunctive, and declaratory relief.

3 19. Defendant James O'Neil is the Warden of ASPC–Eyman, where
4 Condemned Plaintiffs are incarcerated, and is being sued in his official capacity for
5 equitable, injunctive, and declaratory relief.

6 20. Defendant Greg Fizer is the Warden of ASPC–Florence, where Condemned
7 Plaintiffs will be executed, and is being sued in his official capacity for equitable,
8 injunctive, and declaratory relief.

9 21. Defendants John and Jane Does are unknown employees, staff, contractors,
10 or agents of ADC or the State of Arizona who are ADC's officers, successors in office,
11 agents, contractors, staff, and employees, along with those acting in concert with them,
12 who have participated or will participate in Condemned Plaintiffs' executions in
13 capacities involving, *inter alia*, setting IV lines, handling drugs that are classified as
14 controlled substances, and developing and implementing ADC's execution procedures—
15 including the protocols governing the preparation and administration of drugs chosen for
16 executing people. Plaintiffs are not aware of the true identities of the John and Jane Does,
17 but allege that when Plaintiffs discover their identities, Plaintiffs will amend this
18 Complaint accordingly.⁵

19
20 22. At all times herein mentioned, each of the Defendants was or will be the
21 agent, servant, representative, officer, director, partner or employee of the other
22 Defendants and, in doing the things herein alleged, was or will be acting within the scope
23 and course of his/her/its authority as such agent, servant, representative, officer, director,
24 partner or employee, and with the permission and consent of each Defendant.

25
26 _____
27 ⁵ Plaintiffs refer to Defendants variably as “Defendants,” “the State,” and/or “ADC”
28 where appropriate. Plaintiffs note, however, that their use of any of these phrases should
not be interpreted as limiting the scope of their claims, which are brought against each
and all of the Defendants.

The Rights at Issue

23. Executions carry out a public verdict that exacts retribution on the public's behalf. It is imperative—and mandated by the First Amendment—that members of the press have access to the preparation for and implementation of executions.

24. Press coverage of executions is crucial to provide the public with the information needed to evaluate whether and how their elected officials are adhering to the Constitution as they carry out “a horrendous brutality on our behalf.” *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissent), *vacated*, 135 S. Ct. 21 (2014) (mem.); *see Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) (“To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the . . . [‘]procedures,’ which are invasive, possibly painful and may give rise to serious complications. This information is best gathered first-hand or from the media, which serves as the public’s surrogate.”). Media access to the details of executions is particularly important because those few journalists allowed to witness an execution typically report to other media organizations what they observe.

25. The media historically has had access not just to the event of an execution itself, but also to the state’s pre-execution planning, the execution methods the state intends to use, the qualifications of the persons involved, and potential contingency procedures.⁶ Knowing how the state plans to carry out its “precise execution-day routine” is crucial because, “by knowing what happens in a ‘textbook’ execution . . . reporters are not as likely to be surprised or traumatized, and will know if something goes wrong.”⁷

⁶ *E.g.*, STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 158-61 (2002) (describing ability of spectators at executions to inspect the gallows, test the pulleys, play with the spring, examine the dangling corpse, and keep pieces of the rope as souvenirs).

⁷ Cynthia Barnett, *Covering Executions*, AM. JOURNALISM. REV. (May 1995), available at <http://ajrarchive.org/article.asp?id=1265>.

1 26. Prisoners also have First Amendment rights regarding information about
2 their impending executions. The secrecy with which Arizona conducts its executions
3 impairs those rights.

4 27. In addition, condemned prisoners have unique rights tied to their impending
5 executions. The Eighth Amendment to the Constitution, applicable to the States through
6 the Fourteenth Amendment, prohibits the infliction of “cruel and unusual punishments.”
7 Punishments are “cruel when they involve torture or a lingering death.” *Baze v. Rees*, 553
8 U.S. 35, 46 (2008) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). They are also
9 cruel and unusual when they involve gratuitous mutilation of the body. For more than a
10 century, the States and the American public have sought to ensure the “most humane and
11 practical method” for carrying into effect the sentence of death. *See, e.g., Malloy v. South*
12 *Carolina*, 237 U.S. 180, 185 (1915); STUART BANNER, *THE DEATH PENALTY: AN*
13 *AMERICAN HISTORY* 192-93, 296-97 (2002) (describing the evolution of executions from
14 hanging, to firing squad, to electrocution, to lethal gas, to lethal injection). *See generally*
15 AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S*
16 *DEATH PENALTY* (2014). A condemned prisoner is entitled to a humane death that does
17 not cause “needless suffering,” prolonged lingering, or deliberate infliction of pain. *See*
18 *Farmer v. Brennan*, 511 U.S. 825, 846 & n.9 (1994). A condemned person cannot be
19 subjected to a method of execution that is “sure or very likely to cause serious illness and
20 needless suffering.” *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze*, 553
21 U.S. at 50).

22
23 28. In addition to (and subsumed within) a condemned prisoner’s Eighth
24 Amendment right to be from the risk of harm or a lingering death, dozens of treaties,
25 laws, and the interests in life and liberty protected by the Fourteenth Amendment protect
26 a prisoner’s right to dignity and to be free from non-consensual medical experiments.⁸

27
28 ⁸ *See, e.g.*, 42 U.S.C. § 3515b; 45 C.F.R. Part 46; 40 C.F.R. Part 26; G.A. Res. 217 (III)
A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2220 (XXI) A,

1 See *Beardslee v. Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005) (“[T]he Eighth
2 Amendment prohibits punishments that . . . do not accord with ‘the dignity of man’”
3 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))).

4 29. Further, the Due Process and Equal Protection Clauses of the Fourteenth
5 Amendment protect a prisoner’s right to a state’s consistent and nonarbitrary application
6 of and adherence to its own announced procedures where those procedures concern a
7 fundamental interest. See, e.g., *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 68
8 (2009); *Bush v. Gore*, 531 U.S. 98, 103 (2000); *Perry v. Brown*, 671 F.3d 1052, 1082-85
9 (9th Cir. 2012) (explaining that a state cannot arbitrarily or selectively withdraw
10 procedures concerning liberty interests once it has provided them, even if not
11 constitutionally mandated *a priori*), *vacated and remanded on other grounds sub nom.*
12 *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Myers v. Ylst*, 897 F.2d 417, 421 (9th
13 Cir. 1990).

14 30. Finally, the Condemned Plaintiffs also have a right under the Fourteenth
15 Amendment to bodily integrity, which encompasses the right to be free from harmful and
16 unwarranted administrations of drugs without a compelling state interest for so doing.
17 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (“It is settled now . . .
18 that the Constitution places limits on a State’s right to interfere with a person’s . . . bodily
19 integrity.”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); *Washington*
20 *v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a
21 nonconsenting person’s body represents a substantial interference with that person’s
22 liberty”); *Rochin v. California*, 342 U.S. 165, 173 (1952).

23
24
25 International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 39/46,
26 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or
27 Punishment (Dec. 10, 1984); G.A. Res. 3452, Declaration on the Protection of All
28 Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (Dec. 9, 1975); World Conference on Human Rights, *Vienna
Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993);
Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949,
6 U.S.T. 3316, 75 U.N.T.S. 135; THE NUREMBURG CODE (1947).

Relevant Facts

A. Obstacles to the Constitutional Use of Lethal Injection.

31. When the Supreme Court decided *Baze* in 2008, a majority of States used the same lethal injection formula of sodium thiopental, pancuronium bromide, and potassium chloride.

32. Since *Baze*, many States have encountered difficulty obtaining sodium thiopental or pentobarbital which, as barbiturates, can reliably induce a coma-like state of deep unconsciousness and, in sufficient doses, cause death. Manufacturers of sodium thiopental and pentobarbital have refused to make their products available for executions.⁹ This is in part because, as then-Chief Judge Kozinski noted, lethal injection involves “[s]ubverting medicines meant to heal the human body to the opposite purpose . . . [resulting in] an enterprise doomed to failure.”¹⁰

33. As a result, some states have experimented with different untested drug combinations to execute prisoners. States have also turned to compounding pharmacies, whose products are not always reliable,¹¹ and to illegal methods¹² to obtain drugs for executions.

⁹ See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1360-66 (2014); *id.* at 1361 (“The shortage of sodium thiopental led prison officials to seek out questionable alternative sources of the drug throughout the world, ranging from England to Pakistan.”); Makiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs From U.S. Prisons*, BLOOMBERG BUSINESS (Feb. 7, 2013), <http://www.bloomberg.com/bw/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons> (reporting announcement by Danish pentobarbital manufacturer H. Lundbeck A/S that it “would require customers to buy [pentobarbital] through a single wholesaler and to sign a form confirming they won’t resell it, aren’t a prison, and know Lundbeck opposes executions”).

¹⁰ *Wood v. Ryan*, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, C.J., dissental), *vacated*, 135 S. Ct. 21 (2014) (mem.).

¹¹ Missouri and Texas, for instance, have turned to compounding pharmacies to create analogues of branded drugs. Reliance on compounding pharmacies is risky, however, because regulations governing such pharmacies are lax and vary from state to state, and instances of contamination abound; American Medical Association guidelines even warn doctors that prescribing compounded medications can lead to malpractice liability. See Denno, *supra* note 9, at 1366-68. Unsafe practices by compounding pharmacies have caused numerous public health crises over the years. *A Continuing Investigation into the*

1 34. The resort to experimental combinations and procedures, and to
2 compounding and/or illegal means of obtaining drugs for execution has resulted in a
3 disturbing series of executions.

4 35. One experiment has been to substitute midazolam, a benzodiazepine, for
5 the barbiturate previously used as the first drug in a three-drug combination. Midazolam
6 (also sold under the trade name Hypnovel™ and Versed™) is a short-acting, water-
7 soluble benzodiazepine used most commonly as a premedication (i.e., in advance of
8 anesthesia) for sedation. The FDA-approved intravenous dose for an adult patient is 1
9 milligram to 2.5 milligrams to induce sedation. Labeling instructions caution that high

11 *Fungal Meningitis Outbreak and Whether it Could Have Been Prevented Before the*
12 *Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce,*
13 *113th Cong. 2 (2013) (statement of Margaret A. Hamburg, M.D., Comm'r, FDA)*
14 *[hereinafter Hamburg Statement] (reporting multiple incidences over the past twenty*
15 *years where compounded drugs have caused deaths and serious injuries). In 2012,*
16 *injectable steroids produced by the New England Compounding Center (NECC) led to a*
17 *tragic fungal meningitis outbreak across twenty states, infecting more than 800*
18 *individuals and resulting in 64 deaths. Kurt Eichenwald, Killer Pharmacy: Inside a*
19 *Medical Mass Murder Case, NEWSWEEK (Apr. 16, 2015, 7:07 AM),*
20 *http://www.newsweek.com/2015/04/24/inside-one-most-murderous-corporate-crimes-*
21 *us-history-322665.html. An FDA inspection report of NECC facilities following the*
22 *outbreak noted several alarming observations, including yellow and greenish residue*
23 *lining on surfaces of equipment used in producing sterile drug products, “dark, hair-like*
discoloration” along the edges of a “Clean Room” used to formulate and fill sterile
preparations, and multiple vials of sterile injectable drugs containing “greenish black
foreign matter” and “white filamentous material.” FDA, FORM FDA 483 ISSUED TO
BARRY J. CADDEN OF NEW ENGLAND COMPOUNDING PHARMACY INC. 1, 7-8 (Oct. 26,
2012),
available at
http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOp
erationsandPolicy/ORA/ORAElectronicReadingRoom/UCM325980.pdf. A subsequent
FDA investigation of 55 compounding pharmacies found that more than 75% of those
inspected had “serious issues,” such as “lack of appropriate air filtration systems,
insufficient microbiological testing, and other practices that create risk of
contamination.” Hamburg Statement at 5.

24 ¹² Michael Kiefer, *Arizona Again Tries to Import Illegal Execution Drug,*
25 *ARIZ. REPUBLIC, Oct. 22, 2015, 9:27 AM,*
26 *http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/74406580*
27 *(detailing Arizona’s second failed attempt to illegally import execution drugs); see also*
28 *Ariane De Vogue, DOJ Tells Arizona It Illegally Obtained Death Penalty Drug, ABC*
NEWS, May 25, 2011, http://abcnews.go.com/Politics/Controversial-arizona-execution-
set/story?id=13679827 (reporting on the U.S. Department of Justice’s request that
Arizona turn over its stores of illegally imported sodium thiopental mere hours before
Donald Beaty’s scheduled execution, belying the state’s claims throughout the litigation
leading up the litigation that it had obtained its drugs legally).

1 doses (*e.g.*, more than 1 milligram) must be titrated slowly in order to be effective.
2 Specifically, the FDA-approved label counsels that doses of 1-to-2 milligrams be
3 administered over the course of three minutes. To be effective, midazolam must be
4 stored at temperatures between 68 and 77 degrees Fahrenheit. It typically has a shelf life
5 of three years from manufacture.

6 36. Hydromorphone (also sold under the trade name Dilaudid™) is a potent
7 opioid drug, derived from morphine. The FDA-approved starting intravenous dosage for
8 medicinal use is 0.2 to 1 milligram. To be effective, hydromorphone must also be stored
9 at temperatures between 68 and 77 degrees Fahrenheit.

10 37. To Condemned Plaintiffs' knowledge and belief, these drugs have never
11 been tested on humans or non-human animals at anywhere near the levels used by
12 Arizona to execute Joseph Wood.¹³

13 38. On January 16, 2014, the State of Ohio executed Dennis McGuire using a
14 combination of 10 milligrams of midazolam and 40 milligrams of hydromorphone—the
15 same drugs used by Defendants in Wood's execution, albeit in much smaller amounts.
16 This was the first time in the United States that a two-drug formula of midazolam and
17 hydromorphone was used to execute a prisoner.

18 39. Documents obtained through discovery in other litigation show that, in
19 advance of McGuire's execution, Ohio officials exchanged emails with various medical
20 professionals about how the combination of midazolam and hydromorphone would
21 work. These emails and other documents revealed that Ohio was warned that these drugs
22 could cause a prisoner to "gasp" and "hyperventilate" as he died, and that using these
23 drugs to execute a person could end in "disaster," "a terrible, arduous, tormenting
24 execution that is also an ugly visual and shameful spectacle," in part because, before

25 ¹³ See Ashby Jones, *Lethal-Injection Drug Is Scrutinized*, WALL ST. J., June 1, 2014,
26 8:25 PM, <http://online.wsj.com/articles/lethal-injection-drug-is-scrutinized-1401668717>
27 ("Anesthesiologists say they typically administer midazolam to a patient only a few
28 milligrams at a time and therefore know little about the effects of much larger doses
'It's uncharted territory' said David Waisel, an anesthesiologist at Boston Children's
Hospital who has testified on behalf of death-row inmates. 'States literally have no idea
what they're doing to these people.'").

1 losing consciousness, the patient likely would be “subjected to the intoxicating effects of
 2 these drugs, which include hallucinations.”¹⁴ Ohio officials expressed their concern
 3 about going forward with something that might become “a distasteful and disgusting
 4 spectacle” that “would create the appearance, at least, of suffering, which would upset
 5 witnesses and inspire litigation.”¹⁵

6 40. Those concerns materialized at McGuire’s execution. Those who
 7 witnessed the 26-minute execution reported that McGuire struggled and gasped loudly
 8 for air “like a fish lying along the shore puffing for that one gasp of air that would allow
 9 it to breathe.”¹⁶ After reviewing how McGuire’s execution could have gone so badly, the
 10 State of Ohio announced that it would increase the dosages of hydromorphone and
 11 midazolam to 50 milligrams each in its next execution.¹⁷ Subsequently, a federal court
 12 ordered all executions in the State of Ohio stayed for a year pending review of the
 13 State’s lethal-injection protocol.¹⁸ Further executions in the State of Ohio are now
 14 postponed until at least 2017.¹⁹

15 41. On April 29, 2014, the State of Oklahoma executed Clayton Lockett.
 16 Officials took 51 minutes to place an IV line, eventually believing they had properly
 17 inserted the IV in a vein in Lockett’s groin, after unsuccessfully attempting to place the
 18

19
 20 ¹⁴ Ben Crair, *Exclusive Emails Show Ohio’s Doubts About Lethal Injection*, NEW
 21 REPUBLIC, Aug. 17, 2014, [http://www.newrepublic.com/article/119068/exclusive-](http://www.newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution)
 22 [emails-reveal-states-worries-about-problematic-execution](http://www.newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution).

23 ¹⁵ *Id.*

24 ¹⁶ Lawrence Hummer, *I Witnessed Ohio’s Execution of Dennis McGuire. What I Saw*
 25 *Was Inhumane*, GUARDIAN (Jan. 22, 2014, 1:51 PM),
 26 [http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-](http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane)
 27 [untested-lethal-injection-inhumane](http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane).

28 ¹⁷ Josh Sweigart, *Ohio Increases Drug Dosage for Executions*, Dayton Daily News (Apr.
 29 28, 2014, 6:45 PM), [http://www.daytondailynews.com/news/news/crime-law/ohio-](http://www.daytondailynews.com/news/news/crime-law/ohio-increases-drug-dosage-for-executions/nfj9T/)
 30 [increases-drug-dosage-for-executions/nfj9T/](http://www.daytondailynews.com/news/news/crime-law/ohio-increases-drug-dosage-for-executions/nfj9T/).

¹⁸ See Order, *In re: Ohio Execution Protocol Litig.*, No. 2:11-cv-1016 (S.D. Ohio Aug.
 31 8, 2014), ECF No. 494.

¹⁹ See Press Release, Ohio Dep’t of Rehab. & Corr., *Execution Dates Revised* (Oct. 19,
 32 2015), <http://www.drc.ohio.gov/Public/press/press439.htm>.

1 IV in his jugular vein and other locations.²⁰ Oklahoma used an untested three-drug
2 formula that relied on an initial injection of 100 milligrams of midazolam intended to
3 render the prisoner unconscious, after which time the state planned to administer
4 vecuronium bromide (a paralytic) and then potassium chloride (to induce cardiac
5 arrest).²¹

6 42. The 43-minute execution did not go as planned. More than 20 minutes
7 after the drugs had been administered, Lockett was still conscious, and he struggled to
8 speak. He was reported as saying “Man,” “I’m not,” and “something’s wrong.”
9 Witnesses also reported that Lockett, at points, was “twitching” and “convulsing” so
10 violently that “it looked like his whole upper body was trying to lift off the gurney.”²²
11 Officials then drew the blinds and discovered that femoral catheter that was placed by
12 the physician-executioner had, at some point during the execution, failed. Some of the
13 drugs eventually massed in Lockett’s tissue, creating a swelling under his skin “smaller
14 than a tennis ball, but larger than a golf ball.”²³ Because the insertion point had been
15 obscured from the view of both the witnesses and the physicians, no one had previously
16 noticed the swelling. The curtains were then closed. The physician-executioner then
17 tried to insert the IV into Lockett’s left femoral vein, but penetrated Lockett’s femoral
18 artery instead. After all of this, the physician-executioner reported that Lockett’s heart
19 was still beating. At that point, the governor of Oklahoma called off the execution, 43
20 minutes after it had begun.²⁴ Ten minutes later, Lockett died.

21 43. On July 23, 2014, Arizona executed Joseph Wood after reportedly
22 injecting him with 75 times the amount of midazolam used in McGuire’s botched
23

24 ²⁰ Erik Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, N.Y. TIMES, May 1, 2014, <http://nyti.ms/1ktZUJa>.

25 ²¹ Jones, *supra* note 13.

26 ²² Josh Levs, Ed Payne & Greg Botelho, *Oklahoma’s Botched Lethal Injection Marks New Front in Battle over Executions*, CNN (last updated Sept. 8, 2014),
27 <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/>.

28 ²³ OKLA. DEP’T OF PUB. SAFETY, THE EXECUTION OF CLAYTON D. LOCKETT 18 (2014).

²⁴ *Id.* at 18-19.

1 execution, and 7.5 times the amount of midazolam used in Lockett's botched execution.
2 This was only the second execution carried out in the United States using a combination
3 of midazolam and hydromorphone. Arizona proceeded with the execution even though
4 the press had disclosed the documents from Ohio that documented that medical
5 professionals were concerned with using those two drugs for executions.²⁵

6 44. On January 15, 2015, Oklahoma executed Charles Warner. His last words
7 were that his "body [wa]s on fire."²⁶ Despite having represented to Warner's counsel
8 and, later, to the United States Supreme Court, that Warner was executed with a
9 combination of midazolam, rocuronium bromide, and potassium chloride, Oklahoma's
10 representations were later found to be false. Rather than using potassium chloride, it was
11 later revealed, the state somehow instead used potassium acetate. That inexplicable
12 mistake—which, not without irony, occurred during litigation about Oklahoma's claims
13 of secrecy over the source and identity of the drugs it uses in executions—became
14 apparent only after Oklahoma attempted to execute *another* prisoner, Richard Glossip,
15 on September 30, 2015, again using potassium acetate. After the state realized that it had
16 the wrong drug, mere minutes before Glossip's execution was to begin, it stayed
17 indefinitely his execution along with all others in Oklahoma pending the outcome of an
18 investigation into how Oklahoma acquired the wrong drug.²⁷ Several prison officials are
19 now the subjects of a grand jury investigation.²⁸

20 ²⁵ See, e.g., Sweigart, *supra* note 17 (reporting in April 2014—three months before
21 Wood's execution—that the combination of midazolam and hydromorphone posed
severe risks if used for executions).

22 ²⁶ 'My Body is on Fire': Oklahoma Proceeds with Executions Using Controversial
23 Method, RT (Jan. 16, 2015, 5:50 PM), <https://www.rt.com/usa/223431-oklahoma-execution-onfire-warner/>.

24 ²⁷ Eyder Peralta, *Oklahoma Used the Wrong Drug to Execute Charles Warner*, NPR
25 (Oct. 8, 2015, 2:40 PM), <http://www.npr.org/sections/thetwo-way/2015/10/08/446862121/oklahoma-used-the-wrong-drug-to-execute-charles-warner>.

26 ²⁸ One of those officials is Robert Patton, who was the Director of the Oklahoma
27 Department of Corrections during the time of the Lockett, Warner, and attempted
Glossip's execution; Patton announced his resignation in December 2015. See Graham
28 Lee Brewer, *Oklahoma Dep't of Corr. director resigns*, OKLAHOMAN, Dec. 4, 2015,
<http://newsok.com/article/5464745>. Patton was formerly the Division Director of
Offender Operations at the ADC, and was a defendant in previous litigation before

B. Arizona's Long History of Deviating from Its Execution Plans.

45. Long before Joseph Wood was taken to the execution chamber, Arizona had failed repeatedly to execute other condemned prisoners in a constitutional manner, no matter the method used.

46. On February 21, 1930, Arizona executed Eva Dugan, the first (and last) woman to be executed in the State. At her execution by hanging, the snap of the rope decapitated her, sending her severed head into the crowd of witnesses, five of whom fainted as a result. In part because of Dugan's horrific execution, Arizona abandoned hanging as its preferred method of execution.²⁹

47. Arizona switched its execution method to the gas chamber, which it used until the ugly execution of Donald Harding, on April 6, 1992. Harding's death by asphyxiation in the gas chamber took 11 minutes, much of which time he spent cursing and screaming epithets at the state attorney general.³⁰ One reporter who witnessed the "ugly event," during which Harding turned red and purple while writhing in pain, remarked that "animals [are put to] sleep more humanely."³¹ Conflicting press accounts reported that the scene was so disturbing that the attorney general became physically ill from watching it.³²

challenging the Arizona lethal injection protocol. *See infra* ¶ 93; *see also* Nolan Clay & Rick Green, *Embattled Oklahoma Corrections Department Director Testifies Before Multicounty Grand Jury*, OKLAHOMAN, Oct. 21, 2015, <http://newsok.com/article/5455039>.

²⁹ *See Wood v. Ryan*, 759 F.3d 1076, 1083 (9th Cir. 2014) ("Public outcry over a reportedly botched hanging in Arizona led to debate over methods of execution and the eventual adoption in that state of the gas chamber."), *vacated*, 135 S. Ct. 21 (2014) (mem.); AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 54-60 (2014).

³⁰ *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, N.Y. TIMES (Apr. 25, 1992), <http://www.nytimes.com/1992/04/25/us/gruesome-death-in-gas-chamber-pushes-arizona-toward-injections.html>.

³¹ SARAT, *supra* note 29, at 112 n.168.

³² *See* Elizabeth Weil, *It's Not Whether to Kill, but How*, N.Y. TIMES, Nov. 4, 2007, http://www.nytimes.com/2007/11/04/weekinreview/04weil.html?pagewanted=all&_r=0 ("One 1992 lethal gas execution in Arizona caused an attorney general to throw up and a warden to threaten to quit if he had to execute by that method again.").

1 48. In response to Donald Harding's execution, Arizona voters, by a margin of
2 77% to 23%, approved adopting lethal injection as Arizona's method of execution. At
3 first, Arizona adopted the three-drug protocol used in other states and later approved by
4 the Supreme Court in *Baze*: sodium thiopental, a fast-acting barbiturate that, in very
5 large doses, will act as anesthesia; pancuronium bromide, a paralytic agent that paralyzes
6 voluntary muscles; and potassium chloride, a drug that at lethal doses causes cardiac
7 arrest.

8 49. Arizona used the same *Baze* three-drug protocol to execute 21 prisoners
9 between 1993 and 2000. In at least one execution, the prisoner was punctured eight
10 times in his arms and punctured in his foot. In another execution, the prisoner had five
11 puncture marks on his arms and there was evidence of surgical cutdown on his foot. In
12 yet another execution, the prisoner's head was seen to jerk back and forth several times
13 after the lethal drugs were administered.

14 50. Then, from 2000 to 2007, it executed no prisoners. This was due primarily
15 to the pending federal litigation involving the constitutionality of Arizona's death
16 sentencing scheme. *See generally Ring v. Arizona*, 536 U.S. 584 (2002) (finding
17 unconstitutional Arizona's law that aggravating factors are determined by a judge rather
18 than a jury); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (reversing Ninth Circuit
19 decision and holding that *Ring* was not retroactive). After this moratorium, on May 22,
20 2007, Arizona executed Robert Comer, a prisoner who waived his appeals.

21 51. On July 13, 2007, Arizona then sought a warrant of execution for Jeffrey
22 Landrigan. While the State's motion for a warrant was pending, several prisoners filed a
23 civil complaint against the State challenging Arizona's lethal-injection procedures under
24 the Eighth Amendment. *See Complaint, Dickens v. Brewer*, No. 07-cv-1770-NVW (D.
25 Ariz. Sept. 14, 2007), ECF No. 1.

26 52. On September 25, 2007, the Arizona Supreme Court issued a warrant of
27 execution for Landrigan, *see State v. Landrigan*, No. CR-90-0323-AP (Ariz. Sept. 25,
28 2007); that same day, the United States Supreme Court granted certiorari in *Baze*. On

1 October 11, the Arizona Supreme Court stayed Landrigan's execution in light of the
2 grant of certiorari in *Baze*. *Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007).
3 Arizona then amended its execution procedures twice in the next month, while the civil
4 litigation in *Dickens* was ongoing. After discovery, the State agreed to "fix" all of the
5 concerns raised by the plaintiffs (except for plaintiffs' request that the State switch from
6 a three-drug to a one-drug protocol) by amending its written protocol. Based on the
7 State's promises in its briefing and at oral argument, this Court granted summary
8 judgment on July 1, 2009. Order, *Dickens v. Brewer*, No. 07-cv-1770-NVW (D. Ariz.
9 July 1, 2009), ECF No. 138. In so doing, this Court warned that "to the extent
10 [Defendants] deviate from [their promises], they're taking great risks." See Transcript of
11 Oral Argument at 22:19-20, *Dickens*, No. 07-cv-1770-NVW, ECF No. 136.

12 53. Arizona again sought a warrant to execute Landrigan. At the time of its
13 renewed request for a death warrant, in April 2010, Defendants' written procedures still
14 prescribed a three-drug lethal-injection combination, using sodium thiopental as the first
15 chemical.

16 54. While Arizona's efforts to obtain a warrant for his execution were under
17 way, Landrigan learned of a nationwide shortage of sodium thiopental, a fact that he
18 presented to the Arizona Supreme Court. In response to an order from the Arizona
19 Supreme Court, Defendants promised the court that they had a sufficient quantity of
20 drugs to execute Landrigan.

21 55. Defendants refused, however, to disclose how they had obtained their
22 sodium thiopental. At oral argument before the Arizona Supreme Court, Arizona's
23 counsel would admit only that it was *not* manufactured by Hospira—which, at the time,
24 was the only FDA-sanctioned domestic manufacturer of sodium thiopental.

25 56. This led to a federal lawsuit seeking information about the source of
26 Arizona's execution drugs. See *Landrigan v. Brewer*, No. 2:10-cv-2246-ROS (D. Ariz.
27 Oct. 21, 2010). The district court granted Landrigan a temporary stay of execution to
28 allow him to proceed with his challenge to the use of non-FDA-sanctioned sodium

1 thiopental from an unidentified source, Order Granting Motion for a Temporary
2 Restraining Order, No. 2:10-cv-2246-ROS, ECF. No. 21, and the Court of Appeals for
3 the Ninth Circuit affirmed. *Landrigan v. Brewer*, 625 F.3d 1144 (9th Cir. 2010). The
4 Supreme Court, however, in a 5-4 order, vacated the stay, and Landrigan was executed
5 on October 26, 2010. *Brewer v. Landrigan*, 562 U.S. 996 (2010) (mem.). He was
6 pronounced dead approximately 11 minutes after the first drug was injected, and
7 approximately four minutes after the potassium chloride was injected. After Landrigan
8 was declared dead, the State continued to inject additional doses of the backup chemicals
9 into his body until the physician-executioner advised Defendant Ryan that, if they
10 continued with the injections, Landrigan's inferior vena cava could rupture.

11 57. The press later discovered and reported that Arizona obtained the sodium
12 thiopental used to execute Landrigan from "a pharmaceutical company operating out of
13 a west London driving school."³³

14 58. Shortly after Landrigan's execution, on December 10, 2010, the Court of
15 Appeals for the Ninth Circuit heard oral argument in *Dickens v. Brewer*, 631 F.3d 1139
16 (9th Cir. 2011). Among other things, the *Dickens* litigation concerned Defendants'
17 repeated errors in carrying out executions, and their refusal to follow their own written
18 protocol for executions. Chief among these errors was Arizona's decision to hire and
19 give responsibility for carrying out the execution to a medical team member who later
20 testified that he knowingly "improvised" the doses of lethal-injection drugs and never
21 adhered to any protocol. *Dickens*, 631 F.3d at 1147. Another of Arizona's medical team
22 members had had his nursing license suspended and had a lengthy arrest record. *Id.*

23 59. During oral argument, Defendants argued that the problems identified by
24 plaintiffs had been fixed, and contended that it was "purely speculative" to say
25
26

27 ³³ Owen Bowcott, *London Firm Supplied Drugs for US Executions*, GUARDIAN (Jan. 6,
28 2011, 12:45 PM), <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>.

1 Defendants would not follow their procedures. Defendants assured the Court of Appeals
2 that they had “every incentive” to follow their protocol as written.³⁴

3 60. On February 9, 2011, based on Arizona’s promises to adhere to its new
4 procedures, the Ninth Circuit Court of Appeals in *Dickens* affirmed this Court’s
5 rejection of plaintiffs’ claims. The Court noted that Arizona’s past problems with its
6 execution regime apparently had been fixed and that, based on Defendants’ promises to
7 adhere to their new, *Baze*-compliant protocol, “[t]he notion that Arizona might adopt and
8 use a new, unconstitutional protocol can only be dismissed as rank speculation.”
9 *Dickens*, 631 F.3d at 1150.

10 61. On March 29, 2011, Arizona executed Eric King. He was pronounced dead
11 approximately 17 minutes after the first drug (sodium thiopental) began to flow. After
12 the three-drug formula was administered, King was then given an additional dose of
13 potassium chloride, followed by an additional dose of sodium thiopental. No valid
14 explanation was provided for injecting these additional doses.

15 62. Donald Beaty’s execution was then scheduled for May 25, 2011. On May
16 24, 2011—eighteen hours before Beaty’s execution was to begin, Defendants provided
17 notice that, in accordance with federal concerns regarding the legality of the State’s
18 acquisition of its drugs, Defendants would not be using sodium thiopental, which they
19 had illegally acquired and used in two prior executions (Landrigan and King). Instead,
20 Defendants advised Beaty that they would replace sodium thiopental with pentobarbital.
21 That evening, Beaty filed a motion with the Arizona Supreme Court asking it to vacate
22 the warrant or stay the execution. On May 25, 2011, the Arizona Supreme Court allowed
23 his execution to go forward based on “the State’s avowal that the only change in the
24 execution protocol is to substitute pentobarbital for sodium thiopental.” Order, *State v.*
25 *Beaty*, No. CR-85-0211-AP/PC (Ariz. May 25, 2011). *But see id.* at 2-3 (Hurwitz, J.,

26 ³⁴ During oral argument, the Court of Appeals ordered Defendants to submit the final
27 written protocol that was at issue; Defendants subsequently filed a notice stating that the
28 protocol they intended to follow consisted of the challenged protocol along with all of
the unwritten amendments to it to which Defendants had agreed during the course of
litigation.

1 dissenting) (noting that although he doubted that Beaty could demonstrate harm from
2 pentobarbital, he would nevertheless stay the execution because “the application now
3 before us was created by the State’s last-minute decision to substitute one barbiturate for
4 another, and we have been compelled to address this issue literally overnight.”). Beaty
5 was pronounced dead approximately 11 minutes after the first drug began to flow.

6 63. On June 30, 2011, Defendants executed Richard Bible using the same
7 pentobarbital-based three-drug combination used in Beaty’s execution. He was
8 pronounced dead approximately 6 minutes after the first drug began to flow.

9 64. On July 16, 2011, three days before Thomas West was scheduled to be
10 executed, West and other plaintiffs filed a complaint alleging that Defendants’
11 unwillingness to follow their written protocol, as well as Defendants’ application of their
12 protocol, violated the Eighth Amendment. Complaint, *West v. Brewer*, No. 2:11-cv-
13 01409-NVW (D. Ariz. July 16, 2011), ECF No. 1. The plaintiffs alleged that Defendants
14 failed to conduct required trainings, failed to obtain drugs legally from a safe and
15 reputable source, and failed to administer drugs through peripheral instead of femoral
16 lines—all in violation of the State’s own written protocol. Also on July 16, West filed a
17 motion for a TRO or preliminary injunction.

18 65. This Court denied West’s motion for an injunction, and the Court of
19 Appeals for the Ninth Circuit affirmed. *West v. Brewer*, 652 F.3d 1060 (9th Cir. 2011).
20 In its order, the panel specifically relied upon representations made by Defendants
21 through counsel. Of note, ADC’s counsel represented that the written lethal-injection
22 protocol adopted in *Dickens* “had been followed in the past and, more importantly, will
23 be followed in West’s execution.” *Id.* at 1060. The court also relied upon counsel’s
24 representations that the drugs as specified in the protocol were available and in ADC’s
25 possession and that ADC would follow the IV insertion locations as outlined in the
26 protocol. *Id.* at 1060-61. After his further appeals failed, West was executed on July 19,
27 2011. He was pronounced dead approximately 8 minutes after the first drug began to
28

1 flow. West was the last of five prisoners that Arizona executed using a three-drug
2 combination.

3 66. Despite West's execution, the civil case he had spearheaded proceeded.
4 After discovery, eighteen depositions, and a three-day bench trial—which demonstrated
5 that ADC had repeatedly deviated from its protocol in past executions and had imported
6 sodium thiopental in violation of federal law—this Court denied plaintiffs the relief they
7 sought, *see West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628 (D. Ariz.
8 Dec. 21, 2011). One month later, on January 25, 2012, ADC changed its protocol again.

9 67. Like the prior protocols, the January 2012 protocol provided the ADC
10 Director with unfettered discretion to determine the manner in which a prisoner would
11 be executed, and expanded that discretion by allowing the Director to choose any one of
12 four different drug protocols. The Director had to inform the prisoner only seven days
13 before the execution which drug protocol would be used. The January 2012 protocol also
14 removed safeguards related to screening and training of individuals placing IV lines, and
15 removed the requirement that the peripheral veins be the default method of access. It
16 also removed the requirement of a backup line and removed the ability for a prisoner to
17 have a legal visit on the morning of an execution.

18 68. The abrupt and substantial January 2012 change in lethal-injection
19 procedures prompted another lawsuit by prisoners scheduled for execution. *See*
20 Complaint, *Towery v. Brewer*, No. 12-cv-00245 (D. Ariz. Feb. 6, 2012), ECF No. 1. The
21 plaintiffs identified three main problems with the January 2012 procedures: (1) the
22 procedures removed safeguards critical to a constitutionally acceptable means of
23 execution under *Baze*; (2) they treated similarly situated condemned prisoners differently
24 with no rational or compelling basis; and (3) they interfered with condemned prisoners'
25 right of access to the court by denying in-person legal visits on the day of a scheduled
26 execution.

1 69. On February 23, 2012, this Court denied plaintiffs' motion for a
2 preliminary injunction. The plaintiffs appealed, and the Court of Appeals for the Ninth
3 Circuit set argument for 4:00 p.m. on February 27, 2012.

4 70. At 10:35 a.m. on February 27, 2012—five hours before oral argument was
5 set to begin—ADC notified plaintiffs of its intent to change its intended method of
6 execution by administering a one-drug protocol (specifically, one injection of a five-
7 gram dose of pentobarbital). ADC explained that it had overlooked, until the very
8 morning of oral argument and two days before the execution itself, that the pancuronium
9 bromide it had planned to inject in the prisoner had expired *six weeks* prior to the event.
10 ADC did not explain how it had overlooked the expiration of its drug when it had sought
11 execution warrants for two upcoming executions more than a month earlier. Nor did it
12 explain why it did not comply with the written terms of its protocol, which required
13 ADC officials to ensure that the chemicals were ordered and available at the time that a
14 warrant of execution is issued.

15 71. During oral argument on February 27, 2012, the Court of Appeals asked
16 how ADC would carry out the impending executions, because the procedures were
17 unclear. Defendants made several promises about how the protocol would be changed to
18 ensure that team members were duly qualified, that IV lines would be properly placed,
19 and that prisoners would have access to counsel on the morning of their executions.

20 72. On February 28, 2012, the Court of Appeals issued an opinion affirming
21 the denial of relief, based *not* on ADC's written procedures but rather on the avowals
22 made by Defendants' counsel during oral argument. *See Towery v. Brewer*, 672 F.3d 650
23 (9th Cir. 2012) (per curiam). In its decision, the court expressed its exasperation with
24 Defendants' repeated failures to follow their execution procedures. With respect to
25 Defendants' last-minute "discovery" of the expired pancuronium bromide, the Court
26 complained that, "[h]ow such a discovery escaped the State for the past six weeks is
27 beyond us, and gives us pause as to the regularity and reliability of Arizona's protocols."
28

1 *Id.* at 653. The court also took issue with Arizona's repeated deviations from its
2 procedures and string of broken promises:

3 Over time, the State of Arizona, however, has insisted on
4 amending its execution protocol on an ad hoc basis—through
5 add-on practices, trial court representations and
6 acknowledgments, and last minute written amendments—
7 leaving the courts with a rolling protocol that forces us to
8 engage with serious constitutional questions and complicated
9 factual issues in the waning hours before executions. **This
10 approach cannot continue.**

11 We are mindful of the admonition requiring us to refrain
12 from micro-managing each individual execution, but the
13 admonition has a breaking point. . . . **Unless permanent
14 changes are made in the manner in which Arizona amends
15 its protocols, Arizona's ongoing conduct may require us to
16 monitor every execution on an ad hoc basis, because the
17 State cannot be trusted to fulfill its otherwise lawful duty
18 to execute inmates sentenced to death.**

19 *Id.* (emphases added) (internal quotation marks and citation omitted).

20 73. On February 29, 2012, Robert Moorman was executed with five grams of
21 pentobarbital. He was pronounced dead approximately 10 minutes after the
22 administration of pentobarbital.

23 74. On March 8, 2012, Towery's execution went forward. It took 59 minutes
24 to set the IV lines, one minute shy of *Baze's* upper limit on an unconstitutionally lengthy
25 attempt to place an IV line. ADC did not allow witnesses to view the insertion of the
26 lines.

27 75. ADC told Towery that it would shut off the microphone during his last
28 statement if he said anything disparaging about ADC. Therefore, prior to his execution,
Towery and his attorney devised a code so that Towery could communicate any
problems when the IV lines were inserted. While Towery was speaking his last words,
he indicated—through code—that he was hurt repeatedly during the insertion of the lines

1 and that the team made many attempts to set the IV lines, and also that he had been
2 prevented from speaking with his counsel.

3 76. Towery was executed with five grams of pentobarbital. Towery was
4 pronounced dead 9 minutes after the administration of pentobarbital. *See Lopez v.*
5 *Brewer*, 680 F.3d 1084, 1091 (9th Cir. 2012) (Berzon, J., concurring in part and
6 dissenting in part) (“[Arizona’s] secrecy restrictions and refusals of public and attorney
7 access, taken together, leave condemned prisoners, their attorneys, the district court, and
8 this court with precious little indication of whether past executions have actually been
9 conducted in a constitutional manner. The condemned clients, without access to their
10 attorneys, are left to communicate with them in elaborate codes during their last
11 statements, while we are left to parse cryptic execution logs and autopsy reports in an
12 effort to determine whether an inmate suffered pain, and if so, how much.”); *id.* at 1095-
13 96 (Reinhardt, J., dissent) (explaining the “chilling” details of ADC’s treatment of
14 Towery and concluding that, “if a skilled lawyer were instructing the state on how best
15 to avoid *any* meaningful review of the constitutionality of its execution procedures, he
16 would be hard pressed to improve on the unconscionable regime that the state has
17 adopted”).

18 77. A private autopsy was performed on Towery on March 16. The autopsy
19 revealed that Towery was punctured at least eleven times—three or more times on each
20 arm (at the antecubital fossa), one or more on the right hand, and at least four in the
21 femoral region.

22 78. On April 25, 2012, Thomas Kemp was executed as scheduled, but not as
23 planned. As Judge Pregerson later recounted, “[s]oon after receiving the lethal injection
24 in his central femoral line, Kemp’s right arm and torso began shaking ‘violently.’ . . . [In
25 addition, a]n autopsy report revealed that despite Kemp’s good veins that were quite
26 prominent, Kemp had ‘at least three or more’ punctures, including ‘at least one puncture
27 in the right femoral area and at least two punctures over the left upper extremity.’”
28 *Lopez*, 680 F.3d at 1093-94 (Pregerson, J., dissent). Kemp was executed with five

1 grams of pentobarbital. Kemp was pronounced dead 7 minutes after the administration
2 of pentobarbital.

3 79. The next prisoner scheduled for death, Samuel Lopez, filed a motion for a
4 preliminary injunction to stay his execution on May 1, 2012. The district court denied
5 the motion. On appeal, the Court of Appeals affirmed, but warned Arizona yet again that
6 its constant deviations from its procedures could not continue. “Although we uphold the
7 district court’s decision, we caution, yet again, that Arizona’s ad hoc approach risks
8 going beyond *Baze*’s safe harbor.” *Id.* at 1075.

9 80. In her separate opinion concurring in part and dissenting in part, Judge
10 Berzon described some of the ways in which ADC had deviated from the promises it had
11 made just months earlier regarding the qualifications of the IV Team and the prisoners’
12 access to counsel. *Id.* at 1080 (Berzon, J., concurring in part and dissenting in part). In
13 her view, ADC’s “approach to devising, announcing, and recording the execution
14 procedures it uses effectively denied Lopez of his procedural due process right to have
15 his Eighth Amendment challenge heard at a meaningful time [and] in a meaningful
16 manner.” *Id.* at 1079.

17 81. Lopez petitioned for rehearing en banc, which the Court of Appeals
18 denied. In a dissent from rehearing en banc, Judge Reinhardt, joined by six other judges,
19 expressed the judges’ frustration with Arizona, noting that, after Kemp’s and Towery’s
20 botched executions, it was apparent that “the State of Arizona has subjected prisoners
21 whose lives it takes—and has subjected this court—to a mockery of the constitutional
22 requirement of due process.” *Id.* at 1094 (Reinhardt, J., dissental); *see also id.* at 1093-94
23 (Pregerson, J., dissental).

24 82. On June 27, 2012, Arizona executed Lopez. For the first time, witnesses
25 were able to observe the insertion of the IV lines through a closed-circuit monitor. Lopez
26 was executed with five grams of pentobarbital. He was pronounced dead approximately
27 29 minutes after the administration of pentobarbital.
28

1 83. On August 8, 2012, Arizona executed Daniel Cook. Again, witnesses were
2 able to observe the insertion of the IV lines through a closed-circuit monitor. Cook was
3 executed with five grams of pentobarbital. He was pronounced dead approximately 37
4 minutes after the administration of pentobarbital.

5 84. On September 21, 2012, Arizona published new lethal-injection
6 procedures.

7 85. On December 5, 2012, Arizona executed Richard Stokley. Again,
8 witnesses were able to partially observe the insertion of the IV lines through a closed-
9 circuit monitor. It took 50 minutes to set the IV and it was set in the femoral vein.
10 Stokley was executed with five grams of pentobarbital. He was pronounced dead
11 approximately 19 minutes after the administration of pentobarbital.

12 86. The next prisoners scheduled to be executed were Edward Schad and
13 Robert Jones. They filed a motion for a temporary restraining order aimed at obtaining
14 the identity and sourcing of the pentobarbital Arizona planned to use for their
15 executions. Lundbeck, the only legally authorized manufacturer of pentobarbital, had
16 announced in July 2011 that it would no longer sell or make available to prisons any
17 pentobarbital.³⁵ Akorn, another drug company, took over Lundbeck's distribution of
18 pentobarbital, but it, too, continued Lundbeck's restrictions. Thus, Schad and Jones
19 asserted that they had a First Amendment right to know how and where Arizona had
20 obtained sufficient quantities of non-expired pentobarbital for their executions,
21 scheduled for more than a year after all sales to prisons had stopped.

22 87. The district court agreed with Schad and Jones, and held that the plaintiffs
23 established a "First Amendment right to access information regarding the manufacturer
24 of the lethal-injection drugs, the National Drug Code of the drugs, the lot numbers of the
25

26 ³⁵ Kitamura & Narayan, *supra* note 9 (reporting announcement by pentobarbital
27 manufacturer Lundbeck that it "would require customers to buy [pentobarbital] through
28 a single wholesaler and to sign a form confirming they won't resell it, aren't a prison,
and know Lundbeck opposes executions"); *see also* Press Release, H. Lundbeck A/S,
Lundbeck divests several products in the US as part of long-term business strategy (Dec.
22, 2011), <http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=635094>.

1 drugs, and the expiration date of the drugs.” Order at 1, *Schad v. Brewer*, No. 2:13-cv-
 2 2001-ROS (D. Ariz. Oct. 4, 2013), ECF No. 23. The court ordered ADC to provide such
 3 information no later than 12:00 p.m., on October 5. ADC did not appeal the decision.
 4 Instead, it complied with the court’s order and disclosed that the pentobarbital to be used
 5 in Schad’s and Jones’s executions was manufactured by Lundbeck.

6 88. On October 9, 2013, Schad was executed as scheduled. Witnesses were
 7 able to observe the insertion of the IV lines through a closed-circuit monitor. Schad was
 8 executed with five grams of pentobarbital. He was pronounced dead approximately 9
 9 minutes after the administration of pentobarbital.

10 89. On October 23, 2013, Arizona executed Robert Jones. It took nearly 50
 11 minutes for the IV lines to be set and it was set in the femoral vein. Jones was executed
 12 with five grams of pentobarbital. He was pronounced dead approximately 17 minutes
 13 after the administration of the pentobarbital. Jones’s execution was the last of eight
 14 executions in which ADC used a one-drug protocol of pentobarbital.

15 90. On March 26, 2014, Defendants adopted new Procedures, which provided
 16 for, among others, a new execution drug combination—one dose of 50 milligrams each
 17 of midazolam and hydromorphone. The next prisoner to be executed, and the only
 18 prisoner executed under those procedures, was Joseph Wood.

19 91. Since *West*, Arizona’s last nine executions have gone as follows:

20 Prisoner Name	21 Date	22 Drug	23 Time to Die After Injecting Drug(s)	24 Difficulty setting IV	25 Strong Physical Reaction
26 Robert Moorman	27 Feb. 29, 2012	28 5 grams pentobarbital	10 min.		
Robert Towery	Mar. 8, 2012	5 grams pentobarbital	9 min.	Nearly hour-long attempt to place IV successfully; punctured artery; at least 11 punctures; set femoral line	
Thomas Kemp	Apr. 25, 2012	5 grams pentobarbital	7 min.	Multiple punctures from botched IV attempts; set femoral line	Violent seizures

Prisoner Name	Date	Drug	Time to Die After Injecting Drug(s)	Difficulty setting IV	Strong Physical Reaction
Samuel Lopez	June 27, 2012	5 grams pentobarbital	29 min.		
Daniel Cook	Aug. 8, 2012	5 grams pentobarbital	37 min.	Several attempts in the right arm; set line that failed	
Richard Stokely	Dec. 5, 2012	5 grams pentobarbital	19 min.	Set right arm on first attempt; three unsuccessful attempts on left arm; set femoral line; 50 total minutes to set IVs	
Edward Schad	Oct. 9, 2013	5 grams pentobarbital	9 min.		
Robert Jones	Oct. 23, 2013	5 grams pentobarbital	17 min.	At least 3-4 attempts to set IV; nearly 50 minutes for IV lines to be set in femoral vein	
Joseph Wood	July 23, 2014	750 mg midazolam; 750 mg hydromorphone	117 min.		Loud, prolonged gasping

C. Wood's Failed Execution.

92. Prior to Wood's execution, Wood and other condemned prisoners filed suit to confirm exactly what drugs Defendants would use, how Defendants would use them, and how the persons charged with administering them were qualified to do so.

93. On behalf of the public, on May 12, 2014, a reporter from the Arizona Republic requested information from Defendants regarding communications between Defendant Ryan and Robert Patton, then the Division Director of Offender Operations at the ADC. Defendants did not respond to this request until August 15, 2014, several weeks after Wood's execution had been carried out.

94. Wood filed a motion for a preliminary injunction to stay his execution. This Court denied his motion, but, on July 19, 2014, the Court of Appeals for the Ninth Circuit reversed, and granted a "conditional preliminary injunction, staying Wood's execution until the State of Arizona has provided him with (a) the name and provenance

1 of the drugs to be used in the execution and (b) the qualifications of the medical
2 personnel, subject to the restriction that the information provided will not give the means
3 by which the specific individuals can be identified.” *Wood v. Ryan*, 759 F.3d 1076, 1088
4 (9th Cir. 2014), *vacated*, 135 S. Ct. 21 (2014) (mem.).

5 95. In the case litigated by Schad and Jones, ADC did not appeal the district
6 court’s decision ordering ADC to disclose facts about the pentobarbital at issue in their
7 executions and complied with that order. With Wood’s execution, however, Defendants
8 opposed revealing similar information about the midazolam and hydromorphone to be
9 used in Wood’s execution and petitioned the United States Supreme Court to lift the
10 stay.

11 96. In their petition, Defendants argued that Wood’s pleas for greater
12 transparency in Arizona’s execution process were unfounded because, in Defendants’
13 words, Wood “blithely ignores that nearly every detail about his execution is provided to
14 him and to the general public, including exactly what and how much lethal drugs will be
15 used, how they will be administered, and the qualifications of those placing the IV lines
16 to administer them.”³⁶

17 97. The Supreme Court lifted the stay, but Defendants did not keep their
18 promise. Wood’s execution went wrong in many ways, chief among them that he
19 received thirteen doses more than the initial dose plus one backup dose set forth in
20 Defendants’ Procedures. Defendants never disclosed to Wood ahead of his execution
21 that they contemplated this radical departure from their procedures; rather, they
22 affirmatively represented to the courts that Wood had no reason to be concerned about
23 the dosages he would receive.

24 98. At the outset, witnesses were able to watch and listen via closed-circuit
25 television as Wood’s IVs were inserted. After the IVs were set, the closed-circuit
26 television was turned off, and the audio feed was turned off, but the curtains over the
27

28 ³⁶ Reply Brief of State of Arizona in support of Application for Stay, *Ryan v. Wood*, No. 14A82, at 2 (U.S. July 22, 2014).

1 window to the chamber were opened. For the remainder of the execution, witnesses'
2 views were restricted to line-of-sight observation of Wood in the execution chamber,
3 (but not of the room in which the drugs were being mixed and injected).

4 99. Because the microphone was turned off, the only audio that witnesses were
5 able to hear came when members of Defendants' execution team briefly reported certain
6 updates to the witnesses via a microphone in the same chamber as Wood. It was only
7 during these brief updates that witnesses and the media—and, by extension, the Arizona
8 public—could hear the sounds that accompanied the movements they had been
9 observing.

10 100. Wood remained alive for 117 minutes after the drugs were first
11 administered. Defendants knew early on, however, that Wood's execution was not going
12 as planned.

13 101. Twelve minutes into his execution, after having appeared to be sedated,
14 Wood rose upward against his restraints and gulped for air. He would eventually gasp
15 for air more than 640 times.³⁷

16 102. Within minutes of Wood's arousal, Defendants chose to depart from the
17 execution protocol without informing Wood's counsel, the public, or the court. At the
18 18- and 24-minute marks, but without giving notice to any observers, Defendants
19 administered second *and third* doses of the midazolam-hydromorphone combination.
20 Neither the administration of the second and third doses, nor the subsequent twelve
21 doses, were visible to witnesses.

22 103. Defendants administered these secondary and tertiary doses to Wood
23 without first performing a consciousness check, as provided under the terms of the
24 written protocol.

25 104. Witnesses did not know that Defendants secretly were improvising with
26 the amounts of drugs they were injecting into Wood. It was obvious, however, that long

27 ³⁷ Patrick McNamara, *Tucson Killer's Execution Takes Two Hours*, ARIZ. DAILY STAR
28 (July 23, 2014, 10:00 PM), <http://tucson.com/news/state-and-regional/3ac6d417-866e-5884-a09b-7244a9c18b46.html>.

1 after the execution had begun, Wood was still alive. Roughly an hour after Defendants
2 had begun injecting the drugs, Wood's counsel sought to stop Defendants from
3 proceeding any further. Because Defendants barred Wood's counsel (though not
4 everyone present) from bringing cell phones to the execution or having cell phones near
5 the execution chamber, it took nine minutes before Wood's counsel, accompanied by
6 ADC personnel, was provided with a phone to call co-counsel to begin the process of
7 contacting this Court. During this time, Defendants injected Wood with at least one
8 additional dose of midazolam and of hydromorphone.

9 105. Once this Court was contacted and a hearing commenced, Defendants
10 falsely represented the dosages they had administered to Wood. At one point, just over
11 100 minutes into Wood's ordeal, Defendants told this Court that they had only injected
12 Wood twice when, by that time, they had actually injected him twelve times with each
13 drug.

14 106. The labeling instructions for midazolam state that doses of 1 to 2
15 milligrams should be administered over the course of three minutes. Defendants
16 ultimately administered Wood 750 milligrams of midazolam over 117 minutes—an
17 average of more than 6 milligrams per minute.

18 107. Defendants represented to the court, during the telephonic hearing in the
19 course of the execution, that Wood was "brain dead," and thus beyond resuscitation or
20 experiencing pain. Defendants did not have available, or use, the medical equipment and
21 diagnostic techniques needed to diagnose brain death. In reality, Wood was not brain
22 dead, because if a person is drawing breaths without assistance, that person is not brain
23 dead, and Wood was visibly gasping.

24 108. Defendants also did not have on hand any of the drugs that could reverse
25 the effects of the drugs they had administered in case the execution did not proceed as
26 anticipated. Such drugs are well known and readily available to Defendants.

27 109. The reports of journalists who witnessed Wood's execution describe
28 suffering and a lingering death beyond what the Constitution permits:

- “like a fish on shore gulping for air”;³⁸
- “gulp[ing] like a fish on land”;³⁹
- “death by apnea”;⁴⁰
- “a snoring, sucking, similar to when a swimming-pool filter starts taking in air, a louder noise than I can imitate”;⁴¹ and
- “I saw a man who was supposed to be dead, coughing—or choking, possibly even gasping for air.”⁴²

110. Other news reports similarly describe Wood’s execution as one of agony:

- “snoring, gasping and gurgling”;⁴³
- “gasping and struggling to breathe”;⁴⁴
- “in grotesque agony, choking his way to death”;⁴⁵
- “another unexpectedly prolonged execution using disputed lethal injection drugs”;⁴⁶ and

³⁸ Roberts, *supra* note 4.

³⁹ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZ. REPUBLIC (Nov. 6, 2014, 10:01 AM), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Mauricio Marin, *Witness to a 2-hour Arizona Execution: Joseph Wood’s Final 117 Minutes*, GUARDIAN (July 24, 2014, 7:35 AM), <http://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died>.

⁴³ Editorial, *Problems with Execution Drugs Must Be Solved*, KNOXVILLE NEWS SENTINEL (July 28, 2014, 3:00 AM), http://www.knoxnews.com/opinion/editorials/editorial-problems-with-execution-drugs-must-be-solved_43109448.

⁴⁴ Charles P. Pierce, *It’s Time to End Our State-Sponsored Barbarism*, ESQUIRE (July 24, 2014, 5:15 AM), http://www.esquire.com/blogs/politics/Another_Execution_Horror_Story.

⁴⁵ James Poulos, *Dysfunction and the Death Penalty*, ORANGE CNTY. REGISTER (Aug. 9, 2014, 7:00 AM), <http://www.ocregister.com/articles/death-631022-penalty-punishment.html>.

⁴⁶ Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES, July 23, 2014, at A1.

- “[like] catch[ing] a fish and throw[ing] it on the shore, the way the fish opens and closes its mouth.”⁴⁷

111. Senator John McCain, a survivor of barbaric treatment during the Vietnam War, initially described Wood’s execution as “torture.”⁴⁸ Then-Governor Jan Brewer issued a statement noting her “concern” about “the length of time it took for the administered drug protocol” to kill Wood. Although she expressed her confidence in ADC, Governor Brewer directed the ADC immediately to begin an investigation in light of her concerns.⁴⁹

112. That the Governor determined that an investigation was needed confirms that Defendants did not, at any time, provide the media, the public, Wood’s counsel, or the court with relevant facts concerning the planning for of the execution. Defendants also prevented the witnesses of Wood’s execution from seeing, hearing, or learning much of what transpired during the execution.

113. In the aftermath of Wood’s execution, on July 31, 2014, reporters from the Arizona Republic again asked Defendants for information about Wood’s execution and Defendants’ lethal-injection procedures. Defendants did not adequately respond. Another public records request was sent to the Arizona Department of Corrections, on June 2, 2015, and ADC spokesman Andrew Wilder responded to the reporter to confirm

⁴⁷ Megan McCracken & Jennifer Moreno, *Botched Executions Can’t Be New Norm*, CNN (Sept. 8, 2014, 7:14 AM), <http://www.cnn.com/2014/07/26/opinion/mccracken-moreno-botched-executions>.

⁴⁸ Burgess Everett, *McCain: Arizona Execution ‘Torture’*, POLITICO (July 24, 2014, 4:59 PM), <http://www.politico.com/story/2014/07/john-mccain-arizona-execution-109350.html>.

⁴⁹ *Id.*; see also Press Release, Ariz. Dep’t of Corr., Independent Review Process for Wood Execution Underway (Aug. 1, 2014), <https://corrections.az.gov/article/independent-review-process-wood-execution-underway>; Press Release, Ariz. Dep’t of Corr., Department of Corrections Statement on Review of July 23 Execution (July 24, 2012), <https://corrections.az.gov/article/department-corrections-statement-review-july-23-execution>; Press Release, Ariz. Dep’t of Corr., Convicted Murderer Joseph Wood Executed (July 23, 2014), <https://corrections.az.gov/article/convicted-murderer-joseph-wood-executed>. The company chosen for the review issued a report on December 15, 2014.

1 the request had been received. After the department failed to timely produce the
2 requested records, Republic reporter Michael Kiefer followed up with Wilder on June
3 12, 2015, and Wilder said the ADC “would be in touch.” That was the last Kiefer heard
4 from him. On October 21, 2015, Kiefer sent the identical request to the Arizona
5 Attorney General and was told the information sought had already been
6 released. However, the state never provided Kiefer with a copy of the requested
7 documents. Rather, the documents’ limited “release” was made only as part of discovery
8 in other litigation. The ADC has failed to respond to any further questions about the
9 requested documents or the state’s amended lethal injection protocol

10 114. Like the executions of Eva Dugan and Donald Harding, Wood’s execution
11 should mark a turning point. Arizona’s written execution procedures should not keep the
12 lethal injection process cloaked in secrecy, and defendants should follow the written
13 protocol.

14 **D. Arizona’s Continued Refusal to Cabin Its Discretion and Provide**
15 **Transparency.**

16 115. In the wake of Wood’s execution, Plaintiffs filed their First Amended
17 Complaint (“FAC”), on September 18, 2014, alleging a series of constitutional violations
18 flowing from Defendants’ pattern of botched executions, clandestine execution
19 processes, and repeated and arbitrary deviations from their written procedures.

20 116. On October 9, 2014, Defendants filed a motion to dismiss only four of
21 Plaintiffs’ nine claims.

22 117. On October 29, 2014, before ruling on the motion to dismiss, this Court
23 held a status conference hearing, during which this Court expressed concern about
24 Defendants’ pattern of broken promises, crisis litigation, and deviations from their
25 written procedures. At the end of the hearing, this Court ordered the parties to meet and
26 confer to implement ways to remedy the problems that have long plagued Arizona’s
27 death penalty regime, and litigation respecting that regime.

1 118. Consequently, the parties stipulated to stay this litigation until Defendants
2 published revised execution procedures. The parties further agreed that Defendants
3 would solicit Plaintiffs' input on the new proposed procedures before publishing them.

4 119. On December 22, 2014, ADC announced in a press release the completion
5 of the investigation ordered by the Governor. The investigative report fails to address
6 who made the decision to deviate from the protocol and administer to Wood an
7 additional thirteen doses of midazolam/hydromorphone, and how the decision was made.
8 The press release indicated that ADC should "develop contingencies if a similar delay
9 occurs in the future."

10 120. Not until September 23, 2015, nearly ten months after this Court stayed
11 this litigation, did Defendants finally transmit a draft of their revised procedures to
12 Plaintiffs. The revised procedures identify four separate drug protocols, none of which
13 involves a combination of midazolam and hydromorphone. The procedures also commit
14 to provide prisoners with qualitative information about the use of any compounded
15 pentobarbital, and agree to give notice at the time a warrant is sought of the chemicals
16 that Defendants would use for an execution.

17 121. On October 6, 2015, Plaintiffs transmitted to Defendants a set of proposed
18 modifications to Defendants' revised procedures.

19 122. On October 8, 2015, pursuant to the parties' stipulation, counsel for
20 Plaintiffs and Defendants met in person to confer about the revised procedures and
21 Plaintiffs' proposed changes thereto.

22 123. During that meet-and-confer, Defendants did not identify which of the four
23 drug protocols they planned to use.

24 124. Nor did Defendants identify any expiration dates for midazolam or other
25 drugs in their possession.

26 125. Defendants also did not mention that, in July 2015, while the stay was in
27 place, they attempted to purchase and to unlawfully import 1,000 vials of sodium
28 thiopental, at a cost of \$26,700, from an unlicensed seller in India. The FDA seized the

1 shipment upon arrival because, under Federal law, non-FDA-approved sodium
 2 thiopental may not be imported into the United States. The press first reported
 3 Defendants' importation on October 22, 2015.⁵⁰

4 126. As a result of the meet-and-confer discussion, Defendants published their
 5 new Procedures, on October 23, 2015. Defendants accepted only a handful of Plaintiffs'
 6 material proposals. Among them, Defendants agreed to provide a condemned prisoner's
 7 counsel with a workspace at the prison on the day of an execution and a telephone to be
 8 used during an execution in the event that Court intervention is again needed.
 9 Defendants also agreed to provide a qualitative report for any compounded chemical
 10 used in an execution, rather than just pentobarbital. And Defendants agreed to allow
 11 witnesses to observe the prisoner entering the execution chamber.

12 127. Defendants' new Procedures continue to lack, however, elements falling
 13 into three broad categories that are critical to the constitutionally permissible
 14 administration of the death penalty in Arizona: namely, (1) cabining Defendants'
 15 unbounded discretion, (2) providing the public and the prisoners with the transparency
 16 required under the First, Eighth, and Fourteenth Amendments, and (3) ensuring that the
 17 executions are humane and comport with the Eighth Amendment.

18
 19
 20 ⁵⁰ See Chris McDaniel & Chris Geidner, *Arizona, Texas Purchased Execution Drugs*
 21 *Illegally Overseas, But FDA Halts The Import*, BUZZFEED NEWS (Oct. 22, 2015),
 22 [http://www.buzzfeed.com/chrisgcdaniel/arizona-texas-purchased-execution-drugs-](http://www.buzzfeed.com/chrisgcdaniel/arizona-texas-purchased-execution-drugs-illegally#.mrxzamj9Q)
 23 [illegally#.mrxzamj9Q](http://www.buzzfeed.com/chrisgcdaniel/arizona-texas-purchased-execution-drugs-illegally#.mrxzamj9Q) (reporting that Arizona Corrections Department contracted with
 24 Harris Pharma, a purported pharmaceutical manufacturer and distributor located in India,
 25 to illegally import 1,000 vials of sodium thiopental from India, which the FDA seized at
 26 the airport); Tasneem Nashrulla, Chris McDaniel & Chris Geidner, *Three States Bought*
 27 *Illegal Execution Drugs From Supplier In India*, BUZZFEED NEWS (Oct. 23, 2015),
 28 [http://www.buzzfeed.com/tasneemnashrulla/three-states-bought-illegal-execution-drugs-](http://www.buzzfeed.com/tasneemnashrulla/three-states-bought-illegal-execution-drugs-from-supplier-in#.smWva8A7RW)
[from-supplier-in#.smWva8A7RW](http://www.buzzfeed.com/tasneemnashrulla/three-states-bought-illegal-execution-drugs-from-supplier-in#.smWva8A7RW) (noting that Arizona paid Chris Harris of Harris
 Pharma \$26,000 for 1,000 vials of sodium thiopental); Chris McDaniel & Tasneem
 Nashrulla, *This Is The Man In India Who Is Selling States Illegally Imported Execution*
Drugs, BuzzFeed News (Oct. 20, 2015), [http://www.buzzfeed.com/chrisgcdaniel/this-](http://www.buzzfeed.com/chrisgcdaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp#.qxvvyzQM81)
[is-the-man-in-india-who-is-selling-states-illegally-imp#.qxvvyzQM81](http://www.buzzfeed.com/chrisgcdaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp#.qxvvyzQM81) (describing
 communications between four death penalty states and Chris Harris, the same drug
 salesman in India who arranged Arizona's illegal importation of sodium thiopental,
 regarding the states' purchase of sodium thiopental).

1 1. *Unbounded Discretion.*

2 128. Defendants' new Procedures continue to grant them absolute and
3 unreviewable discretion to change the Procedures in any way, and at any time they
4 "determine[]" that "deviation or adjustment is required." Defendants expressly
5 confirmed at the meet-and-confer with Plaintiffs that they believe their discretion
6 includes: (a) the discretion to use chemicals, combinations, and/or dosages not reflected
7 in the written Procedures, including the same combination of midazolam and
8 hydromorphone administered to Wood; (b) the discretion to change the chemicals to be
9 used, at any time and in any way, even after the death warrant has been sought and
10 obtained, and without notice to the prisoner; (c) the discretion to change any of the
11 purported timeframes that would otherwise protect the constitutional rights of
12 condemned prisoners, the public, and the press; and (d) the discretion to close the blinds
13 and/or otherwise obstruct the witnesses' ability to view and hear the execution at any
14 time.

15 129. Defendants will continue to take advantage of this unfettered discretion to
16 alter critical aspects of the new Procedures at the last minute or even during executions.
17 Such discretion renders any other protection in the new Procedures meaningless.

18 130. Defendants' unbounded discretion, on its own, violates the Constitution's
19 protections for prisoners, the public, and the press. Notwithstanding the 35-page
20 document that Defendants, in litigation, have held out as identifying "exactly" how they
21 will execute their prisoners, Defendants, in practice, exercise unfettered discretion to
22 deviate from any portion of the Procedures, at any time, and in any way, without giving
23 notice to counsel and the courts while doing so, and thus defeating any meaningful effort
24 by the public, the prisoners, or the courts to subject the State's executions to meaningful
25 oversight. Indeed, among the first words of the Procedures, in the section entitled
26 "Purpose," the Procedures state that they "shall be followed as written *unless deviation*
27 *or adjustment is required*, as determined by the Director of the Arizona Department of
28

1 Corrections (Department). This Department Order outlines internal procedures and *does*
 2 *not create any legally enforceable rights or obligations.*”

3 131. The Procedures also purport to retain the discretion “to change the
 4 timeframes established” by the Procedures whenever there are (undefined) “exigent
 5 circumstances.” In Landrigan’s execution, Defendants used this discretion to administer
 6 drugs into Landrigan’s body after he was pronounced deceased. In King’s execution,
 7 Defendants used this discretion to administer an additional dose of potassium chloride
 8 despite failing to first conduct a consciousness check or administer additional sodium
 9 thiopental. In Beaty’s execution, Defendants used this discretion to change the intended
 10 drug merely 18 hours before the execution. For Moorman’s and Towery’s executions,
 11 Defendants used this discretion to change the intended drug mere days before their
 12 executions, and five hours before oral argument in the Court of Appeals. In Wood’s
 13 execution, Defendants used this discretion to administer 13 injections more than the
 14 Procedures had prescribed as a maximum.⁵¹ Without fundamental change, Defendants
 15 will be free in future executions to “deviat[e from] or adjust[]” the Procedures again.

16 2. *Concealment of Facts Critical to Due Process and the Public’s*
 17 *Assessment of Arizona’s Death Penalty Regime.*

18 132. Defendants’ Procedures also continue to shroud in secrecy much of their
 19 execution processes

20 133. The Procedures themselves, because they are rules made by the ADC, are
 21 exempt from Arizona’s Administrative Procedures Act. ARIZ. REV. STAT. ANN. § 41-
 22 1005(A)(23). As a result, they were not required to undergo the notice and comment
 23 protections that are required for other State regulations and that ensure that State
 24 regulations afford due process to those affected by them. Moreover, as the above history
 25 has demonstrated, Defendants’ discretionary changes to their Procedures have so far

26 ⁵¹ The Procedures provide that: “If deemed appropriate, the Director may instruct the
 27 Special Operations Team to administer *an* additional dose of the lethal chemical(s).”
 28 ARIZ. DEP’T OF CORR., DEPARTMENT ORDER MANUAL, EXECUTION PROCEDURES,
 attachment D, at 7 (Oct. 23, 2015) (emphasis added), *available at*
https://corrections.az.gov/sites/default/files/policies/700/0710_-_effective_10-23-15.pdf.

1 been shielded from meaningful judicial scrutiny.⁵² See, e.g., *State v. Cook*, 281 P.3d
2 1053, 1058 (Ariz. Ct. App. 2012) (noting that although ADC “has not yet violated the
3 Arizona Constitution’s separation of powers doctrine[,]” the court “underscore[s],
4 however, the concern [it has] regarding the Department’s past practice of altering the
5 protocol on a last-minute basis. If the Department were to continue the practice in such a
6 way as to unreasonably limit or hamper the courts from exercising meaningful judicial
7 review of its actions, then, depending on the facts, we might be presented with a
8 separation of powers violation.”).

9 134. Most critically, the new Procedures and the new Protocol C (a combination
10 of midazolam, a paralytic, and potassium chloride) hide critical information from the
11 public, the prisoners, and the press behind a pharmaceutical cloak.

12 135. Midazolam belongs to a class of drugs called benzodiazepines. Midazolam
13 has no pain-relieving effects, and it is not used as a sole agent to maintain
14 unconsciousness in painful procedures. Because of midazolam’s mechanism of action,
15 there is a point at which additional doses of midazolam cease to affect the central
16 nervous system (the brain and spinal cord). Midazolam, at any dose, will not reliably
17 keep a person insensate during the administration of painful stimuli.

18 136. Sodium thiopental and pentobarbital belong to a class of drugs called
19 barbiturates. The mechanism of action for barbiturates is different than that
20 for benzodiazepines. Unlike benzodiazepines, barbiturates can keep a person insensate
21 to painful stimuli and, in high doses, will cause death.

22 137. Defendants have now adopted and stated their intention to use a three-
23 drug protocol to execute the condemned plaintiffs that depends upon midazolam to
24 render them insensate to pain, upon a paralytic to prevent them from moving or
25 vocalizing, and upon potassium chloride to stop their hearts.

26 ⁵² In contrast, California recently released a new set of proposed execution procedures,
27 which it submitted for public notice and comment. See Maura Dolan & Paige St. John,
28 *California Proposes New Single-Drug Method for Executions*, L.A. TIMES (Nov. 6,
2015, 1:45 PM), <http://www.latimes.com/politics/la-me-pol-ca-execution-protocol-20151105-story.html>.

1 138. There is no valid governmental interest served by using the paralytic in an
2 execution. The paralytic's suppression of breathing does not hasten the death
3 subsequently caused by the potassium, nor does it protect against the condemned
4 prisoner's pain. If midazolam, despite its ceiling effect, actually were effective at
5 maintaining unconsciousness despite painful stimuli, then the paralytic would be a
6 gratuitous and arbitrary administration of an unwarranted chemical, amounting to an
7 assault and a battery of the prisoner; if midazolam is *not* effective, on the other hand,
8 then the paralytic serves a pernicious purpose—to mask the burning pain caused by a
9 lethal dose of potassium chloride, and the sensation of suffocation caused by the
10 paralytic itself. The paralytic prevents a prisoner from alerting observers, through sound
11 or movement, that he is experiencing pain and suffering.

12 139. Arizona's public, and the Condemned Plaintiffs, have a right to know
13 whether midazolam reliably keeps prisoners unconscious and insensate to the pain of
14 potassium chloride. Defendants could not constitutionally carry out a painful execution
15 behind closed curtains; they similarly ought not be permitted to carry out a painful
16 execution behind a chemical curtain

17 140. The Procedures also do not allow any observers—not even counsel or just
18 one member of the press—to witness the entire execution visually or aurally. While the
19 IVs are being inserted behind closed curtains, witnesses can hear the proceedings but
20 must watch them only on a closed-circuit television screen. After the IVs are inserted,
21 the curtains open, but the television screens and audio feed are turned off. The
22 Procedures allow viewing curtains to be drawn at any point Defendants choose, thus
23 preventing public evaluation of the State's actions, its real-time deviations from the
24 Procedures, and whether the prisoner is or has become aware of the procedure and is
25 substantially likely to be experiencing pain

26 141. Especially troubling, the Procedures do not allow real-time evaluation of
27 Defendants' administration of the drugs, which takes place in a separate room. Because
28 much of the execution takes place out of sight or is obscured, witnesses do not have the

1 ability to confirm that Defendants have administered the correct⁵³ and unexpired drugs
2 in the execution; witnesses cannot observe whether and when Defendants are
3 administering a drug called for in the Procedures; witnesses cannot observe which drug
4 (or saline) Defendants have selected for any given injection; and witnesses cannot
5 observe how many doses of drugs Defendants have administered. Absent such real-time
6 tracking, the press has no way effectively to report to the public how Arizona is carrying
7 out its executions and whether Arizona is following its written protocol, and counsel for
8 Condemned Plaintiffs has no way effectively to challenge Defendants' representations
9 about what they are doing to a prisoner during an execution, and whether an execution
10 should be abandoned because the State has departed from the Procedures and the risks of
11 harm or indignity warrant such relief.

12 142. Before the execution takes place, moreover, the Procedures do not provide
13 a mechanism for notifying the prisoner of the qualifications and selection of the Special
14 Operations and IV Team members to administer the drugs selected for the execution, let
15 alone within a meaningful time-frame to allow for judicial review. Nor do the
16 Procedures provide for disclosure of the chain of custody and storage conditions of the
17 drugs procured for and to be used in the execution, thus defeating any ability of the
18 public to learn and prisoners to evaluate whether the drugs have been continuously
19 stored within, *e.g.*, the temperature limits indicated on the drugs' FDA-approved
20 labeling, or whether the drugs will have passed their expiration date by the time of the
21 scheduled execution.

22 3. *Rejection of Safety Measures*

23 143. Defendants' Procedures also reflect a rejection of proposals from Plaintiffs
24 to make the State's executions more humane. Those include requiring that any member
25 of the IV team possess certification or licensure that would at least meet the minimal
26

27 ⁵³ The Procedures provide that the "source of the execution chemicals" is confidential,
28 ARIZ. DEP'T OF CORR., *supra* note 51, at 2, despite Schad and Jones's success in
establishing that the source of the drugs is not and need not be confidential, and despite
the lack of any detrimental impact from such disclosure.

1 qualifications necessary for IV insertion recommended by the Arizona State Board of
2 Nursing; and requiring that any member of the IV team charged with inserting a central
3 femoral line have experience with successfully inserting a central venous catheter under
4 clinical supervision.

5 144. The Procedures also do not require ADC to maintain, possess, and know
6 how to use the equipment, drugs, and procedures that would be needed to reverse or
7 ameliorate the effect of the administered drugs in the event the patient is suffering from
8 air hunger or pain caused by the potassium chloride, despite the ready availability of
9 drugs to reverse the effects of the drugs called for in Defendants' Procedures.

10 * * *

11 145. In light of Defendants' past failures and departures from the Procedures,
12 there is a substantial likelihood of immediate irreparable injury resulting from
13 Defendants' violations of the Constitution. Change is required, and such change should
14 be ordered and supervised by this Court.

15 **Exhaustion of Administrative Remedies**

16 146. Condemned Plaintiffs do not believe that exhaustion is necessary under the
17 Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, because this suit does not
18 challenge prison conditions, and because there are no available administrative remedies
19 that could address the challenged constitutional violations. Despite the inapplicability of
20 the PLRA, Condemned Plaintiffs have exhausted all the remedies available to them in an
21 effort to resolve these issues.

Claims for Relief

Claim One (by all Plaintiffs): By deliberately concealing the effects of midazolam and potassium chloride behind a chemical curtain created by the paralytic, Defendants have violated Plaintiffs' First Amendment right of access to governmental proceedings, and have violated the Condemned Plaintiffs' rights to be free from severe harm, experimentation, and unnecessary body mutilation under the Eighth Amendment's Cruel and Unusual Punishments Clause and the Fourteenth Amendment's Due Process Clause.

147. Plaintiffs incorporate by reference each and every statement and allegation set forth throughout this Complaint as if fully rewritten here.

148. The First Amendment, made applicable to the states by the Fourteenth Amendment, guarantees designated members of the public and the press a qualified right of access to government proceedings, including executions.

149. The First Amendment also protects the right to petition the government for redress of grievances including the right of access to the courts. That right of access to the courts is especially critical for prisoners, because their access to other remedies is limited. State action that denies a plaintiff the opportunity to litigate gives rise to a claim that the state is violating the plaintiff's right of access to the courts.

150. Defendants intend to use a three-drug protocol to execute the Condemned Plaintiffs, using midazolam as the first drug, a paralytic as the second, and potassium chloride as the third.

151. Defendants' use of midazolam in a three-drug protocol cannot reliably ensure that Petitioner will remain in a state in which he will be unable to experience pain caused by the potassium chloride. Consequently, Defendants' intended and imminent use of the paralytic in the Condemned Plaintiffs' executions will violate the Condemned Plaintiffs' rights under the Eighth and Fourteenth Amendment to be free from severe pain, experimentation, and the gratuitous invasion of the body.

152. There is no governmental interest served by using a paralytic. The paralytic drug, as used in the state's protocol, does not serve the statutory function of causing death, nor does it protect against the prisoner's experience of pain. If midazolam

1 is not effective at maintaining unconsciousness despite painful stimuli, then the paralytic
2 only masks the immense pain caused by the potassium chloride; if midazolam is
3 effective, on the other hand, then the paralytic is, at best, a gratuitous and arbitrary
4 administration of an unwarranted and harmful chemical that has its own, non-visible
5 torturous effects.

6 153. Critically, through Defendants' use of a paralytic as the second drug in
7 their midazolam-based protocol, Defendants deprive and have a policy of depriving
8 Plaintiffs of their First Amendment rights by preventing them from observing
9 midazolam's efficacy at maintaining unconsciousness and the pain and suffering caused
10 by the administration of the paralytic itself and the third drug, potassium chloride, and, if
11 warranted, to challenge the constitutionality of that pain.

12 154. Obstructing the press and other witnesses from observing the reality of the
13 condemned prisoner's experience of sequential injections of midazolam and potassium
14 chloride necessarily deprives the Arizona public of informed and accurate media
15 coverage of that critical event, and serves as a content-based restriction on important
16 expression. As such, Defendants' use of the paralytic is subject to strict scrutiny, in
17 which the burden is on Defendants to show that it is narrowly tailored to bring about a
18 compelling interest. There is no compelling, nor legitimate, nor even rational reason for
19 this deprivation.

20 155. Defendants in future executions will continue to deprive Plaintiffs and
21 others similarly situated of their First Amendment rights, and will violate the
22 Condemned Plaintiffs' Eighth and Fourteenth Amendment rights if Defendants are not
23 required to cease using the paralytic.

24 **Claim Two (by Condemned Plaintiffs only): Defendants use of the paralytic, which**
25 **is at best superfluous and at worst masking immense pain, invades Condemned**
26 **Plaintiffs' liberty interests in bodily integrity protected by the Due Process Clause of**
the Fourteenth Amendment.

27 156. Condemned Plaintiffs incorporate by reference each and every statement
28 and allegation set forth throughout this Complaint as if fully rewritten here.

1 157. The Condemned Plaintiffs have a right under the Fourteenth Amendment
 2 to be free from harmful and unwarranted administrations of drugs without a compelling
 3 state interest for so doing. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849
 4 (1992) (“It is settled now . . . that the Constitution places limits on a State’s right to
 5 interfere with a person’s . . . bodily integrity.”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497
 6 U.S. 261, 278 (1990); *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible
 7 injection of medication into a nonconsenting person’s body represents a substantial
 8 interference with that person’s liberty”); *Rochin v. California*, 342 U.S. 165, 173 (1952).

9 158. As set forth above, Defendants have made clear their intent to use a three-
 10 drug protocol based on midazolam, a paralytic, and potassium chloride to execute the
 11 Condemned Plaintiffs. Condemned Plaintiffs’ execution under that protocol is imminent.

12 159. As set forth above, the paralytic is at best entirely superfluous, and at
 13 worst, masks immense pain. Defendants’ execution of Condemned Plaintiffs using a
 14 drug protocol with midazolam as the first drug that involves a paralytic will be invasive,
 15 offensive, disfiguring, and/or torturous.

16 160. Defendants have no rational basis, much less a compelling interest, for
 17 executing Condemned Plaintiffs in this manner.

18 **Claim Three (by Coalition only): By deliberately concealing necessary information**
 19 **from the public and the media, Defendants have violated the Coalition’s First**
 20 **Amendment right of access to governmental proceedings.**

21 161. The Coalition incorporates by reference each and every statement and
 22 allegation set forth throughout this Complaint as if fully rewritten here. The Coalition
 23 does not, however, assert claims based on alleged violations of the Eighth or Fourteenth
 24 Amendments.

25 162. Defendants deprived the Coalition of its First Amendment rights by
 26 preventing it from aurally and visually observing the full execution proceeding without
 27 interruption, including observing the provenance and amounts of drugs actually used, the
 28 timing and method of their administration, and their effect upon the prisoner—from the

1 time the prisoner is escorted to the execution chamber until the prisoner dies—and by
2 failing to disclose, in advance of the execution, details about the drugs used, the
3 rationale for the selection of these drugs and their dosages, the chain of custody in how
4 the drugs were obtained and stored, the qualifications and training of the persons
5 administering them, and Defendants’ ability to respond and preparation for responding
6 to complications. This obstruction, by extension, deprived the Arizona public of
7 informed and accurate media coverage of a critical event that is carried out in on the
8 public’s behalf.

9 163. Defendants will continue to deprive the Coalition, and others similarly
10 situated, of their First Amendment rights in future executions if Defendants are not
11 required to disclose the information described above and to allow witnesses
12 meaningfully to observe the entire execution procedure, including the details listed
13 above, both in preparation for the execution and from the moment the condemned
14 prisoner enters the execution chamber until the time the condemned prisoner is declared
15 dead.

16 **Claim Four (by Condemned Plaintiffs only): By deliberately concealing necessary**
17 **information from Condemned Plaintiffs, Defendants have violated Condemned**
18 **Plaintiffs’ First Amendment right to be informed about the manner in which**
19 **Defendants implement the most serious penalty available in the criminal justice**
20 **system.**

21 164. Condemned Plaintiffs incorporate by reference each and every statement
22 and allegation set forth throughout this Complaint as if fully rewritten here.

23 165. Prisoners also have a First Amendment interest, no less powerful than that
24 of the public and the press, in being informed of the means by which the state intends to
25 carry out executions, especially where the prisoner has been condemned to death.

26 166. Defendants’ deliberate concealment of information that would enable
27 Condemned Plaintiffs to determine how Defendants intend to carry out their death
28 sentences, including by failing to disclose in advance of the execution details about the
drugs used, the rationale for the selection of these drugs and their dosages, the chain of

1 custody in how the drugs were obtained and stored, the qualifications and training of the
2 persons administering them, and Defendants' ability to respond and preparation for
3 responding to complications, deprives Condemned Plaintiffs of their First Amendment
4 right of access to governmental proceedings. Defendants' further decision to prevent
5 Condemned Plaintiffs' counsel and other witnesses from aurally and visually observing
6 the full execution proceeding without interruption, including the provenance and
7 amounts of drugs actually used, the timing and method of their administration, and their
8 effect upon the prisoner, deprives Condemned Plaintiffs of their First Amendment right
9 of access to governmental proceedings.

10 167. Defendants will continue to deprive Condemned Plaintiffs of their First
11 Amendment rights if Defendants are not required to provide timely access and disclosure
12 to prisoners scheduled for execution as described above.

13 **Claim Five (by Condemned Plaintiffs only): By deliberately concealing necessary**
14 **information from Condemned Plaintiffs regarding the violation of the Eighth**
15 **Amendment, Defendants have violated Condemned Plaintiffs' First Amendment**
right to petition the government for redress of grievances.

16 168. Condemned Plaintiffs incorporate by reference each and every statement
17 and allegation set forth throughout this Complaint as if fully rewritten here.

18 169. Defendants' refusal to adhere to the Procedures as written and to provide
19 Condemned Plaintiffs with information sufficient to enable them to determine how
20 Defendants intend to execute them violates Condemned Plaintiffs' First Amendment
21 right to petition the government for redress of grievances.

22 170. The First Amendment right to petition the government for redress of
23 grievances includes the right of access to the courts.

24 171. The right of access to the courts is especially critical for prisoners, because
25 their access to other remedies is limited.

26 172. State action that denies a plaintiff the opportunity to litigate gives rise to a
27 claim that the state is violating the plaintiff's right of access to the courts.
28

1 173. The right of access to the courts is an ancillary claim, which is necessary
2 for the vindication of underlying rights.

3 174. By deliberately concealing information about the efficacy of midazolam
4 and the pain caused by an execution (through use of the paralytic), the specific drugs,
5 expiration dates, provenance, storage, dosages, administration technique, and other
6 details about how Defendants intend to execute Condemned Plaintiffs, and by retaining
7 absolute discretion to change at any time and without notice how Condemned Plaintiffs
8 will die, Defendants have erected a condition that frustrates Condemned Plaintiffs'
9 ability to litigate their claims relating to the constitutionality of their executions. This
10 frustrating condition deprives Condemned Plaintiffs of their First Amendment right to
11 petition the government for redress of grievances. This frustrating condition also
12 deprives Condemned Plaintiffs of their due-process right of access to the courts, as well
13 as their ability to challenge the constitutionality of their executions under the Eighth
14 Amendment and Fourteenth Amendment.

15 175. Indeed, Defendants' repeated mistakes in past executions establish that a
16 condemned prisoner needs much more detailed information, and much sooner, than
17 Defendants currently provide—and needs to be able to depend on the fact that such
18 information will not change during litigation or before his execution—in order to
19 effectively assess whether there is a substantial risk that the prisoner will suffer physical
20 harm, a lingering death, or some other cruel and unusual means of execution.

21 176. Defendants' deliberate concealment of information that would enable
22 Condemned Plaintiffs to determine how Defendants intend to carry out their death
23 sentences, including information relating to lethal-injection drugs, Defendants' plans and
24 reasons for the dosages they intend to administer, the competence, training, and
25 authority of Defendants to handle controlled substances, and the qualifications of the
26 execution personnel, deprives Condemned Plaintiffs of their right not to be deprived of
27 their lives without due process of law, and their ability to determine whether Defendants
28

1 are capable of carrying out Condemned Plaintiffs' executions in a lawful, constitutional
2 manner.

3 **Claim Six (by Condemned Plaintiffs only): Defendants' past experimentation and**
4 **improvisation with unprecedented methods and dosages of drugs amounts to a cruel**
5 **and unusual punishment, in violation of the Eighth Amendment's Cruel and**
6 **Unusual Punishments Clause and the Fourteenth Amendment's Due Process**
7 **Clause.**

8 177. Condemned Plaintiffs incorporate by reference each and every statement
9 and allegation set forth throughout this Complaint as if fully rewritten here.

10 178. Defendants have created, maintained, and implemented lethal-injection
11 protocols, procedures, practices, customs, and training and execution methods that they
12 intend to use to execute Condemned Plaintiffs. As designed and applied, Defendants'
13 lethal-injection execution Procedures are constitutionally flawed. Defendants have no
14 legitimate penological justification for adopting lethal-injection Procedures that make it
15 sure or very likely that Defendants will needlessly and gratuitously inflict severe pain
16 and a lingering death on Condemned Plaintiffs.

17 179. The excessive discretion vested in ADC, Defendants' proven failure to
18 adhere to any stable and reliable method of execution, and Defendants' improvised
19 decision to give Wood thirteen doses more than was permitted under the Procedures,
20 demonstrate that each execution carried out by Defendants constitutes an experiment
21 conducted on prisoners to determine how they react to drugs intended to kill them. This
22 violates the Eighth and Fourteenth Amendments' guarantee of dignity even in
23 punishment, and the right to be free from unusual punishments.

24 180. Defendants' freedom to experiment on Condemned Plaintiffs pursuant to
25 the Procedures violates Condemned Plaintiffs' rights under the Eighth Amendment and
26 their rights to substantive and procedural Due Process under the Fourteenth Amendment
27 of the United States Constitution.
28

1 **Claim Seven (by Condemned Plaintiffs only): Defendants' refusal to abide by the**
2 **notice provisions in their Procedures deprives Condemned Plaintiffs of their right to**
3 **know and challenge their method of execution, in violation the Fourteenth**
4 **Amendment's Due Process Clause.**

5 181. Condemned Plaintiffs incorporate by reference each and every statement
6 and allegation set forth throughout this Complaint as if fully rewritten here.

7 182. Defendants' Procedures arbitrarily, irrationally, and without a compelling
8 State interest, deny Condemned Plaintiffs their right to know how ADC intends to
9 execute them.

10 183. By deliberately concealing information about the specific drugs, expiration
11 dates, provenance, storage, dosages, administration technique, and other details about
12 how ADC intends to execute Condemned Plaintiffs, and by refusing to agree to be
13 bound by the notice provisions in their Procedures, Defendants have deprived
14 Condemned Plaintiffs of their right to notice and an opportunity to be heard, in violation
15 of the Due Process Clause of the Fourteenth Amendment. Condemned Plaintiffs have no
16 meaningful opportunity to challenge the method of execution or the drugs or dosages
17 selected if, as in Wood's case, they and the courts are given grossly inaccurate,
18 undependable, or likely-to-change information as to the amount or type of drugs that will
19 be used.

20 **Claim Eight (by Condemned Plaintiffs only): Defendants' pattern of deviating from**
21 **their Procedures and exercising their discretion in inhumane ways increases the risk**
22 **of being subjected to an unusual or lingering death, in violation the Fourteenth**
23 **Amendment's Equal Protection Clause.**

24 184. Condemned Plaintiffs incorporate by reference each and every statement
25 and allegation set forth throughout this Complaint as if fully rewritten here.

26 185. The Fourteenth Amendment to the United States Constitution requires that
27 similarly situated persons be treated alike, and further requires that a state's practices
28 and procedures concerning fundamental rights be administered in a nonarbitrary fashion.

1 186. Condemned Plaintiffs, individually, are each a “class of one,” similarly
2 situated relative to one another and to any other prisoner facing execution in Arizona
3 because all such individuals face execution under the Procedures.

4 187. Defendants’ Procedures concern prisoners’ fundamental rights, including
5 the right to be free from cruel and unusual punishment.

6 188. Defendants’ unfettered discretion to follow or not follow their Procedures
7 at will and without a principled basis for determining when deviations are warranted
8 means that Defendants have (and will) apply their Procedures to Condemned Prisoners
9 in an arbitrary fashion, leading to disparate treatment across executions.

10 189. Where disparate treatment burdens a fundamental right, strict scrutiny
11 applies, and the state action will be upheld only if the state can show that such action is
12 narrowly drawn to serve a compelling state interest.

13 190. Further, where a state has purported to provide procedures governing the
14 administration of a process affecting fundamental rights, the state cannot arbitrarily or
15 selectively deviate from those procedures once it has provided them, even if not
16 constitutionally mandated *a priori*.

17 191. Defendants have created, maintained, and implemented lethal-injection
18 protocols, procedures, practices, customs, and training and execution methods that they
19 intend to use to execute Condemned Plaintiffs. As designed and applied, Defendants’
20 lethal-injection execution Procedures are constitutionally flawed. Defendants have no
21 legitimate penological justification, nor rational basis, nor compelling state interest in
22 permitting Defendants to, at whim, administer any amount, of any drug, without notice,
23 to a prisoner who is being executed.

24 192. The Procedures provide no guidelines or standards for determining when
25 and under what circumstances such distinctions may be warranted. Clear standards must
26 exist, and arbitrary deviations from those standards result in equal protection violations.
27 Defendants have adopted Procedures that codify unbridled discretion and arbitrary
28

1 treatment. Deviation is the standard, as demonstrated by Defendants' administration of
2 Wood's execution.

3 **Prayer for Relief**

4 Wherefore, the Coalition and Condemned Plaintiffs jointly pray for:

- 5 1. Temporary, preliminary, and permanent injunctive relief to enjoin the
6 Defendants, their officers, agents, servants, employees, and all persons acting in
7 concert with them from concealing execution-related, non-personally identifying
8 information that the Coalition and Condemned Plaintiffs require in order to
9 ensure their First Amendment right of access to governmental proceedings,
10 including but not limited to:
 - 11 a. The efficacy of midazolam and the pain caused by potassium chloride,
12 which Defendants conceal through use of a paralytic;
 - 13 b. The manufacturer(s) and other suppliers of the lethal-injection and other
14 drugs that Defendants will or may use in Condemned Plaintiffs'
15 executions;
 - 16 c. The lot numbers of the lethal-injection and other drugs that Defendants
17 will or may use in Condemned Plaintiffs' executions;
 - 18 d. The National Drug Codes ("NDCs") of the lethal-injection and other drugs
19 that Defendants will or may use in Condemned Plaintiffs' executions;
 - 20 e. The expiration dates of the lethal-injection and other drugs that Defendants
21 will or may use in Condemned Plaintiffs' executions;
 - 22 f. Documentation (not including personally identifying information)
23 establishing that each person who will handle controlled substances in the
24 executions have the appropriate DEA authorization to do so;
 - 25 g. Documentation sufficient to establish from whom the drugs were
26 purchased;
 - 27 h. Documentation sufficient to establish what efforts Defendants made,
28 including unsuccessful efforts, to obtain drugs for use in executions;

- i. Documentation sufficient to establish where and how the drugs that have been and/or are proposed to be used for executions have been or will be transported and stored, at all stages from the point of purchase to their use in an execution;
 - j. Documentation (not including personally identifying information) establishing that those who will be responsible for inserting any IVs are qualified to do so;
 - k. The precise dosage and administration process of the lethal-injection drugs that Defendants will or may use in Condemned Plaintiffs' executions;
 - l. The rationale for Defendants' selection of the drugs, dosages, and process it will use in Condemned Plaintiffs' executions;
 - m. The ability for witnesses to observe visually and aurally the entirety of an prisoner's execution, unfettered, from the time that the prisoner is brought into the death chamber, and before any procedures are begun or needles or intravenous lines administered, until death; and
 - n. Information detailing emergency contingency procedures and the qualifications of personnel who are expected to intervene if medical intervention is necessary;
2. An order granting Plaintiffs their reasonable attorneys' fees under 42 U.S.C. § 1988 and the laws of the United States; and
 3. Any such other relief as the Court deems just and proper.

The Condemned Plaintiffs additionally pray for:

4. An order declaring that Defendants' current means, methods, practices, procedures, and customs regarding execution by lethal injection violate the First, Eighth, and Fourteenth Amendments to the United States Constitution;
5. Temporary, preliminary, and permanent injunctive relief barring Defendants from executing Condemned Plaintiffs under the current or any future protocol, so long as such execution would violate Condemned Plaintiffs' federal

1 constitutional rights under the First, Eighth, and Fourteenth Amendments to
2 the United States Constitution;

- 3 6. Temporary, preliminary, and permanent injunctive relief to enjoin the
4 Defendants, their officers, agents, servants, employees, and all persons acting
5 in concert with them from concealing information that is not related to the
6 identification of persons participating in executions, and that is necessary to
7 ensure Condemned Plaintiffs' First Amendment right to petition the
8 government for redress of grievances, including but not limited to:
- 9 a. The efficacy of midazolam and the pain caused by potassium chloride,
10 which Defendants conceal through use of a paralytic
 - 11 b. The manufacturer(s) and other suppliers of the lethal-injection drugs that
12 Defendants will or may use in Condemned Plaintiffs' executions;
 - 13 c. The lot numbers of the lethal-injection drugs that Defendants will or may
14 use in Condemned Plaintiffs' executions;
 - 15 d. The NDCs of the lethal-injection drugs that Defendants will or may use in
16 Condemned Plaintiffs' executions;
 - 17 e. The expiration dates of the lethal-injection drugs that Defendants will or
18 may use in Condemned Plaintiffs' executions;
 - 19 f. Documentation (not including personally identifying information)
20 establishing that each person who will handle controlled substances in the
21 executions have the appropriate DEA authorization to do so;
 - 22 g. Documentation sufficient to establish from whom the drugs were
23 purchased;
 - 24 h. Documentation sufficient to establish what efforts Defendants made,
25 including unsuccessful efforts, to obtain drugs for use in executions;
 - 26 i. Documentation sufficient to establish where and how the drugs that have
27 been and/or are proposed to be used for executions have been or will be
28

- 1 transported and stored, at all stages from the point of purchase to their use
- 2 in an execution;
- 3 j. Documentation (not including personally identifying information)
- 4 establishing that those who will be responsible for inserting any IVs are
- 5 qualified to do so;
- 6 k. The precise dosage and administration process of the lethal-injection drugs
- 7 that Defendants will or may use in Condemned Plaintiffs' executions;
- 8 l. The rationale for Defendants' selection of the dosages and process it will
- 9 use in Condemned Plaintiffs' executions;
- 10 m. The ability for Condemned Plaintiffs' counsel to observe visually and
- 11 aurally the entirety of a prisoner's execution, unfettered, from the time that
- 12 the prisoner is brought into the death chamber, and before any procedures
- 13 are begun or needles or intravenous lines administered, until death; and
- 14 n. Information detailing emergency contingency procedures and the
- 15 qualifications of personnel who are expected to intervene if medical
- 16 intervention is necessary;
- 17 7. Appropriate and necessary discovery and an evidentiary hearing to permit
- 18 Condemned Plaintiffs to prove their constitutional claims;
- 19 8. Appointment of an independent monitor to assess Defendants' creation of and
- 20 adherence to a constitutional execution protocol;
- 21 9. An order granting Condemned Plaintiffs their reasonable attorneys' fees under
- 22 42 U.S.C. § 1988 and the laws of the United States; and
- 23 10. Any such other relief as the Court deems just and proper.
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- 27
- 28

1 Respectfully submitted this 26th day of January, 2016.

2 Jon M. Sands
3 Federal Public Defender
4 District of Arizona
5 Dale A. Baich
6 Robin C. Konrad

7 s/ Dale A. Baich
8 Counsel for Plaintiffs Charles Michael
9 Hedlund; Graham S. Henry; David
10 Gulbrandson; Robert Poyson; Todd Smith;
11 Eldon Schurz, and Roger Scott

12 Mark E. Haddad (*admitted pro hac vice*)
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15 Aimee G. Mackay (*admitted pro hac vice*)
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20 s/ Mark E. Haddad
21 Counsel for Plaintiffs First Amendment
22 Coalition of Arizona, Inc.; Charles Michael
23 Hedlund; Graham S. Henry; David
24 Gulbrandson; Robert Poyson; Todd Smith;
25 Eldon Schurz; and Roger Scott
26
27
28

Certificate of Service

I hereby certify that on January 26, 2016, I electronically filed the foregoing Second Amended Complaint for Violations of 42 U.S.C. § 1983 and Equitable, Injunctive, and Declaratory Relief with the Clerk's Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Chelsea Pitman
Legal Assistant
Capital Habeas Unit