******EXECUTIONS SCHEDULED FOR APRIL 17, 20, 24, and 27, 2017******

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF ARKANSAS**

**JASON McGEHEE, STACEY JOHNSON, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE,**

**Plaintiffs,**

**v.**

**ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity, and WENDY KELLEY, Director, Arkansas Department of Correction, in her official capacity,**

**Defendants.**



**Case Number** 4:17-cv-00179-KGB

EXPEDITED HEARING REQUESTED

**MEMORANDUM OF LAW IN SUPPORT OF**
**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs in this case are Arkansas inmates whom Defendant Hutchinson has scheduled for execution over the coming weeks. Defendant Kelley intends to execute Plaintiffs by lethal injection of a three-drug midazolam protocol—a concoction that, as Kelley probably knows and definitely should know, cannot anesthetize Plaintiffs and is almost certain to cause them unconstitutional suffering. Despite acknowledged problems with midazolam, Hutchinson has set eight executions to occur on a schedule of unprecedented speed. Over a ten-day span beginning April 17, 2017, and running

through April 27, 2017, eight of the nine Plaintiffs are slated for back-to-back executions on four separate nights. Hutchinson's admitted reason for this haste is that the State's supply of midazolam—*the very drug that has caused botched executions in the past*—expires on April 30. Rather than attempting to obtain more of the drug, Hutchinson has chosen to have Plaintiffs executed *en masse*.

Quite apart from midazolam's inappropriateness as an execution drug, Hutchinson's schedule raises independent problems of constitutional magnitude. The Arkansas Department of Correction ("ADC") has not conducted an execution since November 2005. It does not have appropriate protocols or training materials in place to conduct eight executions over ten days. It does not have a contingency plan in place in case something goes awry. The rushed schedule appreciably increases the risk of harm to Plaintiffs, falls far outside the bounds of modern penological practice, and disrespects the Plaintiffs' fundamental dignity—defects that all run against the Eighth Amendment's protection. The schedule also effectively deprives Plaintiffs of their right to counsel under 18 U.S.C. § 3599, which guarantees indigent, death-sentenced inmates—a description that fits each Plaintiff—an attorney at every stage of the proceeding leading up to death. On top of all that, Kelley has created policies that prevent Plaintiffs from accessing the courts and from having the assistance of counsel during the execution if and when something goes wrong.

Plaintiffs' claims are likely to succeed on the merits. Plaintiffs will be irreparably harmed—executed—without relief. The public interest runs against any execution that will cause a prisoner excruciating pain; it especially runs against eight such executions conducted over just ten days, without adequate safeguards and backup plans, and without the protections of counsel that death-sentenced prisoners are entitled to during the final stages of their encounter with the criminal-justice system. And the equities are in Plaintiffs' favor. Therefore, Plaintiffs respectfully request that the Court grant a preliminary injunction preventing the State from conducting the executions currently scheduled for April 17, 20, 24, and 27, 2017.

## BACKGROUND

In April 2015, Hutchinson signed Act 1096, codified at Ark. Code Ann. § 5-4-617. The Act permits the ADC to execute death-row inmates with either a barbiturate or a three-drug mixture of midazolam (a sedative) followed by vecuronium bromide (a paralytic) followed by potassium chloride (a heart-stopping agent). Kelley has chosen the latter method of execution. Most of the Plaintiffs (Davis and Lee excepted) challenged the Act in state court the day it was filed. After the U.S. Supreme Court decided *Glossip v. Gross*, 135 S. Ct. 2726 (2015), Plaintiffs jointly filed a new suit in state court challenging the Act and the midazolam protocol as a violation of the Arkansas Constitution.

In that suit, Plaintiffs argued that the Arkansas Constitution does not encompass the requirements of *Glossip*—specifically, the rule that prisoners challenging the method of their executions under the Eighth Amendment must plead and prove an alternative. The Arkansas Supreme Court rejected that argument, held *Glossip* applies under the Arkansas Constitution's Cruel or Unusual Punishment Clause, and held that Plaintiffs' state-court complaint did not adequately allege an alternative execution method under the heightened fact-pleading standards that Arkansas uses in civil cases. *See Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016). The Arkansas Supreme Court made no comment on whether midazolam is able to render Plaintiffs insensate to the pain caused by the second and third drugs in the cocktail.

The Arkansas Supreme Court stayed the finality of its decision as Plaintiffs challenged its interpretation of *Glossip* in a cert petition to the U.S. Supreme Court. The U.S. Supreme Court denied the cert petition on February 21, 2017, with two Justices dissenting. Plaintiffs filed a petition for rehearing from that denial, which the Court has scheduled for conference on April 13. In the meantime, the parties have continued to litigate the question of whether the Arkansas Supreme Court's opinion in *Johnson* permits further amendment of the state-law claims in the state-court complaint.

On February 24, 2017, the Attorney General of Arkansas requested execution dates for eight Plaintiffs, Nooner excepted. On February 27, 2017, Hutchinson set those dates on a timetable that no state has attempted in the modern death-penalty era: eight

executions in a ten-day span, with Davis and Ward to be executed on April 17, Johnson and Lee to follow on April 20, Jones and Marcel Williams to follow on April 24, McGehee and Kenneth Williams to follow on April 27. The State's supply of midazolam expires on April 30. Hutchinson admitted in a statement to the press that he scheduled the executions in this manner because it is "uncertain" whether the State can get more midazolam. *See* Matthew Haag & Richard Fausset, *Arkansas Rushes to Execute 8 Men in the Space of 10 Days*, N.Y. Times, Mar. 3, 2017, *available at* http://nyti.ms/2ln3kc4.

The setting of dates triggered a number of additional responsibilities for Plaintiffs' counsel. These include submission of clemency applications—which, because of the schedule, Plaintiffs were given no more than seventeen days to prepare, and in some case as few as eight—pursuit of available stay remedies, and preparations for their clients' executions. Plaintiffs' counsel have also attempted to obtain information about the ADC's protocols and its preparations to conduct executions for the first time in 11 years and at a pace unheard of in at least half a century. To date, the ADC has disclosed only one procedure with clarity: Plaintiffs will be limited to having one attorney view the execution, and this attorney will have no ability to contact the judiciary or even co-counsel via phone (or via any other means) during the execution.

## ARGUMENT

"The primary function of a preliminary injunction is to preserve the *status quo* until, upon final hearing, a court may grant full, effective relief." *Kan. City S. Transp. Co., Inc.*

*v. Teamsters Local Union No. 41*, 126 F.3d 1059, 1066 (8th Cir. 1997) (quotation omitted). The Eighth Circuit announced its standard for preliminary relief in *Dataphase Systems, Inc. v. C.L. Systems*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc):

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Under this test, no single factor is determinative. *Dataphase*, 640 F.2d at 114; *Kan. City*, 126 F.3d at 1066. Rather, all of the factors must be balanced to determine whether to grant the injunction. *International Ass'n of Machinists & Aero. Workers v. Schimmel*, 128 F.3d 689, 692 (8th Cir. 1997). In considering the likelihood of the movant prevailing on the merits, "a court does not decide whether the movant will ultimately win." *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). While "an injunction cannot issue if there is *no chance* on the merits, the Eighth Circuit has rejected a requirement [that the] party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits." *Id.* (internal quotations, citations omitted) (emphasis added). If, as here, the preliminary injunction "is sought to enjoin something other than government action based on presumptively reasoned democratic processes"—*viz.*, a statute—then the test is whether the plaintiff has a "fair chance of prevailing." *Planned Parenthood v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008).

In the instant case, the equities favor the issuance of preliminary relief to preserve the *status quo*. For the reasons set forth below, it is likely that Plaintiffs will succeed on the merits. Without relief, Plaintiffs face the irreparable harm of death. The countervailing harm to Defendants—a delay in their expedited execution schedule—is negligible in comparison, especially considering that this schedule is the very source of one of the constitutional harms in this case. Finally, the public interest favors a reprieve until this case is resolved on its underlying merits.

## I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs have filed a seven-count complaint containing the following claims: (1) the execution timetable deprives Plaintiffs of counsel guaranteed by 18 U.S.C. § 3599; (2) executions on the current timetable violate the Eighth Amendment; (3) use of midazolam as the first drug in a three-drug cocktail violates the Eighth Amendment; (4) executions using the ADC's protocols (or lack thereof) violate the Eighth Amendment; (5) executions using midazolam, with the ADC's protocols (or lack thereof), and on the current timetable violate the Eighth Amendment in combination; (6) Kelley's viewing policies deprive Plaintiffs of their right to access the courts; (7) Kelley's viewing policies deprive Plaintiffs of counsel guaranteed by 18 U.S.C. § 3599. Plaintiffs have a cause of action to assert each claim through 42 U.S.C. § 1983. For the reasons stated below, they have a "fair chance of prevailing" on each. *Rounds*, 530 F.3d at 732.

### A. Plaintiffs are likely to show that the execution schedule violates their right to counsel under 18 U.S.C. § 3599.

The United States Congress has guaranteed each Plaintiff the effective representation of counsel by operation of 18 U.S.C. § 3359. Unambiguously, the Plaintiffs are entitled to counsel to represent them in various stages of capital litigation, including "applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." Setting eight executions in ten days, and with no more than sixty days between the setting of the dates and the last of the eight executions, effectively denies each Plaintiff the assistance of counsel Congress guaranteed in § 3599.

Petitioners have shown by the declarations attached to the complaint that the task of representing one condemned inmate set to be executed is overwhelming and requires proceedings in numerous courts. Compl. Exhs. 12–14. Effective representation demands preparing and presenting clemency matters to the state clemency board and to the Governor; motions for stays of execution to the appropriate state and federal courts; and the development of other issues that do not ripen until the client comes under warrant, such as competency to be executed. But the lawyer's role does not end there. Effective representation also includes working with the inmate, his family, the prison, and other lawyers.

Brian Mendelsohn has done capital habeas work for twenty-six years and has handled ten execution-warrant cases as lead or co-counsel. As Mendelsohn explains,

"[h]andling a last stage, execution warrant is a monumental task that has many moving parts and takes place in many different forums." Compl. Exh. 12 ¶4. Mendelsohn describes in detail the responsibilities of a lawyer appointed under § 3599. Rob Lee is likewise a long-time capital litigator. He explains that end-stage litigation "is sophisticated and high-pressure work that often must be accomplished within extremely short deadlines and presented to at the highest levels of the judicial system." Compl. Exh. 13 ¶12. Lee also discusses the impact on a lawyer of representing just one client with an execution date:

> As Executive Director at VCRRC, I would never require counsel to simultaneously work multiple cases under threat of imminent execution. It is a doomed proposal, and does an unethical disservice to the clients. If an execution is carried out, proponents of capital punishment as well as others presume that the legal process was conducted in a thorough and competent manner. It would be a cruel deception to compress the process until it is distorted beyond any ability to accomplish that which it is proclaimed to accomplish.

*Id.* ¶16. These comments concern just *one case* with an execution date—to say nothing of multiple cases with multiple dates.

At a preliminary-injunction hearing, Plaintiffs will present additional evidence showing the nature and extent of capital counsel's responsibilities in end-stage litigation—responsibilities that Congress has mandated and that the federal courts have placed on counsel when appointing them under § 3599. Through the testimony of Mendelsohn, Lee, and others, Plaintiffs will show the difficulty of representing even one

client with an execution date and how that is compounded when there are multiple executions scheduled.

Here three Plaintiffs (Johnson, Jones, and Kenneth Williams) are represented by one (and only one) solo practitioner, Jeff Rosenzweig, who was appointed under § 3599. The Federal Public Defender, also appointed under § 3599, represents two Plaintiffs (McGehee and Marcel Williams) and is co-counsel for two more (Davis and Ward). The eighth Plaintiff scheduled for execution, Ledell Lee, is represented by a solo practitioner, Lee Short, who represents Lee essentially by himself and who was appointed under § 3599 only seven months ago, giving him very little time to establish a relationship with Lee and to familiarize himself with the case. Under the current conditions, it is impossible for counsel to balance their numerous responsibilities to multiple clients and to adequately perform the duties that § 3599 demands.

Plaintiffs have made a prima facie showing that the ten-day execution schedule drains all meaning from § 3599 and the orders of appointment entered by the federal courts. They are likely to succeed on their claim that Hutchinson's schedule violates their right to end-stage counsel under § 3599.

**B. Plaintiffs are likely to show that the execution schedule violates the Eighth Amendment.**

Under *Glossip*, prisoners challenging a "method of execution" must show that the current method is likely to cause suffering and that an alternative method is available. *Glossip*, 135 S. Ct. at 2737. A "method of execution" claim is one that challenges the

instruments of and guidelines for the execution—*e.g.*, the execution drug that the state intends to use, or the protocol the state intends to follow when administering that drug. *Cf. Baze v. Rees*, 553 U.S. 35 (2008). Claim Two, which focuses on Hutchinson's execution schedule, does not fall under this rubric—rather, the mode of analysis is whether the schedule is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Under this standard, it violates the Eighth Amendment to execute eight men in ten days. Even were the *Glossip* test to apply, however, Plaintiffs are likely to succeed because the schedule itself causes a serious risk of severe harm and there is a readily available alternative—a more reasonable schedule.

**i. Executing eight men in ten days violates the Eighth Amendment because it is contrary to evolved standards of decency.**

To determine whether a particular punishment is "cruel and unusual" under the Eighth Amendment, the Court must look to standards that "currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311–12. "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). In turn, to determine whether a particular capital-punishment practice violates evolving standards of decency, the Court must

assess the "objective indicia of society's standards"—as expressed by "state practice with respect to executions"—and must also consult its own "independent judgment." *Id.* at 421.

Applying these standards, Plaintiffs are likely to succeed in showing that our society has evolved to the point that it is no longer acceptable—and thus unconstitutional—to execute eight men within ten days, and on a schedule that requires two executions a day. Half a century or more ago, this sort of practice was common. To list just a few examples, Pennsylvania hung eleven men in one day in 1877; electrocuted six men over the course of two weeks in 1918, with two executions a day; and electrocuted another five over the course of a week in 1939, with one triple and one double execution. *See* Executions in the U.S. 1608–2002: The ESPY File 284, 294, 300, *available at* http://bit.ly/2nic94O. South Carolina electrocuted six men in a day in 1931. *Id.* at 316. Georgia executed six men over the course of ten days in 1957, with a single execution following a triple following a double. *Id.* at 100–01. Our society long ago abandoned such barbarism. No state has executed so many people in so short a timeframe since capital punishment resumed in this country in 1977; no state has executed as many men in even a month since Texas did so twenty years ago. Death Penalty Info. Ctr., *Arkansas Schedules Unprecedented Eight Executions in Ten-Day Period, available at* http://bit.ly/2lmr6Qo. There have been only ten multiple executions in the last forty years, with the last occurring in 2000. *Id.*

As state practice with respect to executions shows, the current schedule does not conform to the standards followed in a civilized society. A regime of four double executions within ten days does not respect

Plaintiffs' individual "dignity of the person." *Kennedy*, 554 U.S. at 420. And as the Court's independent judgment is likely to confirm, this schedule violates the Eighth Amendment.

**ii. Hutchinson's execution schedule entails a substantial risk of severe harm to Plaintiffs that can easily be avoided.**

Were the Court to construe Claim Two as a *Glossip*-style method-of-execution claim, or were the Court to disagree that four double executions in ten days contradicts evolved standards of decency, Plaintiffs would still be likely to show that the schedule entails an unjustified risk of substantial harm and that there is an alternative available.

First, the proof will show that a schedule of eight lethal injections in ten days entails a serious risk of causing Plaintiffs severe suffering. The proof comes in two primary forms. The first is experiential. The last time a state tried to hold a double execution—Oklahoma in 2014—the result was the botched execution of Clayton Lockett. *See* Compl. ¶15.b. A subsequent investigation found that the stress of two executions contributed to the botch and that, as a result, executions should be spaced at one-week intervals, at least. Compl. Exh. 4 at 28. The Arkansas execution schedule creates an even greater amount of stress on the execution team than the Lockett schedule; a concomitantly higher risk of a botch exists here.

The second form of proof—testimony from former corrections officials—supports these experiential findings. Jennie Lancaster, who has overseen twenty-three North Carolina executions, will testify that the spacing of these executions creates a high risk of error, and thus of suffering to Plaintiffs during the execution. This risk stems from the monumental stress on the people performing the executions; the inability to focus on the individual physiological characteristics of each condemned man; and the absence of any reasonable period in which to review and correct problems that arise during each execution. Compl. Exh. 15 ¶¶10, 14, 16. In light of this heightened risk, "it would essentially be professional malpractice for any department of corrections official to attempt to stage eight executions as currently scheduled in Arkansas." *Id.* ¶20.

There is a readily available alternative that would prevent the objectively intolerable risk of harm that Hutchinson's execution schedule entails—Defendants could simply schedule the executions at an interval that permits a rational post-execution assessment, that reduces the intense pressure and stress the current schedule will cause to staff, and that respects the individuality of each Plaintiff. The Eighth Amendment requires Defendants to adopt this alternative. *Baze*, 553 U.S. at 52.

### C. Plaintiffs are likely to show use of midazolam in the drug cocktail violates the Eighth Amendment.

#### i. Plaintiffs are likely to succeed under *Glossip*.

Under the Supreme Court's decision in *Glossip*, Plaintiffs must make a two-prong showing to succeed on Claim Three: (1) they must show that the current method entails

a "substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment," *Glossip*, 135 S. Ct. at 2737; and (2) they must "plead and prove a known and available alternative," *id.* at 2739. Plaintiffs will likely be able to make both showings.

First, there is a significant amount of evidence that midazolam cannot render Plaintiffs insensate to the tremendous suffering that, as Defendants cannot dispute, would result without adequate anesthesia. As an initial matter, there have been at least four botched executions using midazolam, including one, in Alabama, that used a drug protocol almost identical to Arkansas's. This thirty-four minute execution was marked by the condemned man's prolonged coughing and heaving as well as his movement after injection of the midazolam. Compl. Exh. 6. Second, Dr. Craig Stevens, a doctor of pharmacology, has closely studied midazolam and explains that, because of its physical mechanism of operation, the drug cannot prevent Plaintiffs from feeling the torturous effects of the second and third drugs. Compl. Exh. 16 at 33. Dr. Joel Zivot, an anesthesiologist, concurs. Compl. Exh. 17 ¶23. Drs. Stevens and Zivot will elaborate upon these opinions and the views expressed in their declarations at the hearing.

In short, over the past two years, the scientific evidence has mounted that midazolam is a wildly inappropriate execution drug. This evidence has led Florida (which has conducted the vast majority of midazolam executions) and Arizona to

abandon midazolam in recent months. Indeed, only seven states even allow for midazolam as an execution drug, and only four—Arkansas, Alabama, Ohio, and Virginia—have shown any intention of actually using it. The drug has already become an unusual instrument of death.

As for Ohio, a federal district court recently enjoined executions there after finding that "use of midazolam as the first drug in Ohio's present three-drug protocol will create a 'substantial risk of serious harm' or an 'objectively intolerable risk of harm' as required by . . . *Glossip*." *In re Ohio Execution Protocol Litig.*, No. 11-1016, 2017 U.S. Dist. Lexis 11019, at *182 (S.D. Ohio Jan. 26, 2017). As it happens, Dr. Steven's testimony was crucial to this conclusion. The Court should reach the same conclusion after examining the evidence in this case.

Second, Plaintiffs are likely to show, after discovery and development of proof, that there is an available alternative execution method that would reduce the risk (nay, certainty) of pain inherent in the midazolam protocol. These alternatives are as follows:

- FDA-approved, manufactured pentobarbital. Everyone would agree that manufactured pentobarbital, a barbiturate, is a superior execution drug to midazolam. The conventional wisdom is that states cannot obtain manufactured pentobarbital for use in executions. The conventional wisdom is wrong.

In January, it emerged that Missouri has recently acquired manufactured pentobarbital, as shown by public litigation documents. *See* Exh. 18; Chris McDaniel,

*Missouri Execution Drug Purchases Revealed*, BUZZFEED, Jan. 8, 2017, *available at* http://bzfd.it/2mg1UQJ. This acquisition was facilitated by a state statute shielding drug suppliers from disclosure. Arkansas has a similar statute, which will allow it to obtain execution drugs heretofore believed to be unavailable (such as the vecuronium bromide and potassium chloride the state has acquired in the past year). Ark. Code Ann. § 5-4-617(i). Factual development will further demonstrate the availability of manufactured pentobarbital to the State.

- Firing squad. Firing squad is a vastly superior execution method to lethal injection. As Dr. Jonathan Groner attests, the firing squad "will cause a nearly instantaneous death," and this "swift death will also be painless." Exh. 19 ¶¶ 6–7. Dr. Groner concludes that the "current midazolam protocol has a far greater risk of causing pain and suffering compared to the firing squad." *Id.* ¶9.

Additional scientific and historical data back Dr. Groner up. In a 1938 firing-squad execution in Utah, the executioners used an electrocardiograph to measure electrical activity in the condemned inmate's heart. The inmate's heart stopped 15.6 seconds after he was shot. *See* Deborah W. Denno, *The Firing Squad as "a Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. MICH. J.L. REF. 749, 785–86 (2016). By contrast, when Ronald Bert Smith was executed using a midazolam protocol almost exactly the same as Arkansas's, he heaved and coughed for thirteen minutes and took thirty-four minutes to die. Besides that, of 144 firing-squad executions in the United

States, two have been botched—one because the prisoner refused to be tied to a chair (thus creating a moving target), and one because the executioners intentionally missed their mark. Denno, *supra*, at 787. By contrast, in a study of all executions from 1910–2010, lethal-injection was the method that was botched the most, at a rate of just over seven percent. *Id.* at 781.

The firing squad is a method available to the State. As they will freely admit, Defendants have ample access to weaponry and skilled marksmen. Utah conducted a firing-squad execution as recently as 2010, and it has a detailed protocol governing how it is to be done. Exh. 20. Defendants need not reinvent the wheel. They are required to adopt an alternative execution method that would prevent Plaintiffs from feeling the unconstitutional suffering the midazolam protocol causes. *Baze*, 553 U.S. at 52.

- Removal of vecuronium bromide. The Eighth Amendment forbids infliction of gratuitous suffering on prisoners. *Hope v. Peltzer*, 536 U.S. 730, 738 (2002). Ergo, it forbids the state from using vecuronium bromide, which simply adds an unnecessary quantum of suffering to the prisoner's execution. The drug causes "air hunger" and "serious psychic trauma." Exh. 16 at 19–20. The State has no need to inflict those torments to achieve the Prisoners' death. While this alternative would still cause pain—because the midazolam will not prevent Plaintiffs from feeling the effects of the third drug—it will nevertheless reduce Plaintiffs' suffering significantly. Kelley is required to use this option under Eighth Amendment law.

- Compounded pentobarbital. Pentobarbital in compounded form would substantially reduce Plaintiffs' suffering during the execution, assuming appropriate safeguards—such as acquisition from a reliable pharmacy and testing shortly before execution to determine the drugs' identity, potency, and reliability—are put in place to prevent the risks inherent in compounded drugs. Texas and Georgia have conducted many executions in recent years with compounded pentobarbital, Texas as recently as March 7 of this year. And in January an Ohio federal court granted a preliminary injunction against using midazolam after finding that compounded pentobarbital is sufficiently available. Essential to that determination, Ohio has passed a law to shield drug suppliers from identification. *In re Ohio Execution Protocol Litig.*, 2017 U.S. Dist. Lexis 11019, at *184–85. Arkansas has a similar law. Ark. Code Ann. § 5-4-617(i). Further factual development will show that Arkansas, like Ohio, is likely to be able to use compounded pentobarbital.

- Sevoflurane. Sevoflurane is an anesthetic gas that operates like a barbiturate and can cause death on its own. Compl. Exh. 16 at 35. Like a barbiturate, it would substantially reduce Plaintiffs' suffering during execution. The equipment and training needed for this execution method are readily available. *Id.* The gas itself is also available to the ADC from Piramal Critical of Bethlehem, PA. *See* Compl. Exh. 21 ¶2.

- Nitrogen hypoxia. Nitrogen hypoxia is an execution method in which the prisoner is deprived of oxygen. Unlike asphyxia, hypoxia allows the prisoner to exhale

carbon dioxide, thus preventing any feeling of air hunger or panic. Oklahoma and Louisiana have both studied nitrogen hypoxia and have concluded it is a painless and easily available method of execution. Compl. Exhs. 22 & 23. Oklahoma has adopted it as an execution method. 22 Okla. Stat. § 1014(B). Arkansas could do the same.

**ii. Plaintiffs are likely to succeed because the State has shown a subjective intent to stick with a painful execution protocol whatever the alternatives.**

*Glossip*'s framework aside, in the prison setting, the Eighth Amendment's core protection is against state officials' deliberate indifference to the harm their actions cause to prisoners. If there is proof of harm—and, for the reasons discussed above, there is ample proof the midazolam protocol will torture the prisoners—there is an Eighth Amendment violation if state officials have a "sufficiently culpable state of mind" and persist in inflicting the harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Defendants have indeed showed a "sufficiently culpable state of mind" in this instance. Given the well-known inappropriateness of midazolam as an execution drug, some lawmakers have attempted to study and adopt more humane methods of execution (specifically, nitrogen hypoxia). Rather than permitting deliberation over such methods, Defendants' agent, the Attorney General, has insisted that they not even be considered and that the torturous midazolam protocol continue to be used. One legislator has said on the record that death-row inmates need to be punished "in the least humane way" rather than "wasting taxpayer money" on studies of better methods—a position her committee later endorsed. Compl. Exh. 24.

In light of Defendants' deliberate indifference to the harms of midazolam and their insistence that it be used regardless of alternatives, Plaintiffs need not show an alternative to the midazolam protocol. Instead, Defendants' "sufficiently culpable state of mind" establishes an Eighth Amendment violation. *Farmer*, 511 U.S. at 834.

**D. Plaintiffs are likely to show that the execution protocol (or lack thereof) violates the Eighth Amendment.**

Plaintiffs are likely to succeed on their claim that Kelley's execution protocol subjects them to a substantial risk of serious harm in violation of the Eighth Amendment. This claim is distinct from that rejected in *Baze* because Plaintiffs do not argue that the protocol, properly followed, would lead to a constitutional execution. *See Baze*, 553 U.S. at 49. Instead, Plaintiffs assert—and support that assertion with affidavits and documentary evidence—that if the executioners follow the protocol as written, it is "sure or very likely to cause serious illness and needless suffering." *Id.* at 50.

First, the protocol is inadequate to ensure that Plaintiffs are in an anesthetized state before administration of the second and third drugs. The protocol instructs the Deputy Director, or his designee, to verify that the prisoner is "unconscious" after injection of the midazolam. The protocol contains no further guidance on what that means or how to assess it. Plaintiffs must reach anesthesia or else they will feel the effects of the second and third drugs. Compl. Exh. 16 at 21; Compl. Exh. 17 ¶20. The protocol fails to require that the executioners have experience necessary to adequately assess anesthetic depth; fails to provide guidance about when anesthesia has been reached; and fails to

require equipment that would measure physiological signs consistent with general anesthesia. The protocol basically requires the Deputy Director to eyeball whether the prisoner is "unconscious." Plaintiffs requested additional documents from Kelley describing the measures used to determine "unconsciousness" or defining the term; they were told that no such documents exist. Compl. Exhs. 2 & 3. Dr. Zivot, an experienced anesthesiologist, opines:

> It is my professional opinion that because the protocol uses a sedative rather than an anesthetic, fails to use personnel trained in assessing anesthetic depth, fails to instruct the personnel on signs of consciousness, and fails to provide equipment necessary to judge anesthetic depth, there is a serious risk that the prisoner will be able to feel and experience the injection and the effects of the Vecuronium Bromide and Potassium Chloride.

Compl. Exh. 17 ¶22.

Second, the protocol is insufficient to ensure that the IVs will be administered correctly. The protocol instructs the executioners to administer a dose of midazolam in an amount 10-20 times greater than a clinical dose. There are serious risks of pain from the administration of a large amount of the drug. As set forth in the complaint and Dr. Zivot's declaration, administering such a large dose of midazolam creates a significant risk the Plaintiffs' vein will burst and/or that the midazolam will precipitate (fall out of solution). Compl. Exh. 17 ¶¶10, 16, 19. Either or both would be 1) painful in itself and 2) reduce the amount of midazolam entering the bloodstream, thus blunting whatever sedative effect the drug will have.

Third, the protocol is insufficient to ensure that problems that arise during the execution can be corrected. Drs. Stevens and Zivot are prepared to testify that the lethal-injection protocol will fail at its intended task of anesthetizing the prisoner and preventing the painful stimuli from vecuronium bromide and the potassium chloride. *See* Compl. Exh. 16 at 34; Compl. Exh. 17 ¶22. The protocol fails to put in place safeguards to ensure that the Plaintiffs will not be injected with the second and third chemicals while they are still able to experience pain. Moreover, the protocol risks that the Plaintiffs will regain consciousness after the administration of vecuronium bromide or potassium chloride. Kelley has made no contingency plan for resuscitation or antidote if the execution fails. *See* Exhs. 2 & 3. As Dr. Zivot explained in his declaration:

> I have a great concern that the protocol does not provide a plan for resuscitation or antidote of the chemicals in the event that the execution fails. Based on my training and experience, I expect that the prisoner will never reach general anesthesia with the injection of Midazolam. I think a likely scenario is that after the first injection of the Vecuronium Bromide the prisoner will move, gasp, or otherwise show signs of awareness. If this happens, and the Vecuronium Bromide is not reversed, the prisoner will suffocate. . . It is also possible that the Midazolam may need to be reversed. Midazolam on its own is not a fatal drug, but it can cause airway collapse or cause confusion and lack of awareness in the patient that would cause them to fail to clear their own airway or choke.

Compl. Exh. 17 ¶¶23–24. Contingency planning—which was also absent in the botched Lockett execution, *see* Compl. Exh. 4 at 27—is a necessity.

Plaintiffs have proffered alternatives that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of serious pain." *Baze*, 553 U.S. at 52. In Claim

Four, the Plaintiffs set forth several safeguards to ensure that the risk of harm is mitigated. These safeguards include requiring properly trained and certified personnel, providing sufficient guidance on when general anesthesia has been reached, providing equipment on which physiological signs consistent with general anesthesia can be monitored, and having on hand life-saving equipment and antidotes in case the execution fails. *See* Compl. ¶¶ 151–159. Taking these precautions would prevent the torturous botched executions that have been seen in other states. *See* Compl. ¶15.

**E. Plaintiffs are likely to show that a combination of midazolam, the protocols (or lack thereof), and the execution schedule violates the Eighth Amendment.**

In the event the Court does not find it likely that Plaintiffs will show an independent Eighth Amendment violation in Claim Two, Three, or Four, Plaintiffs would likely show that the combination of the issues raised in all three claims—an expedited and compressed execution schedule, using an inappropriate execution drug, and with a deficient lethal-injection protocol—violates the Eighth Amendment. They would be likely to show that on one of several bases.

First, all these factors in combination will render the upcoming executions literally cruel and unusual. They will be cruel because, as described above, the execution cocktail causes torture, and the execution protocol (or lack thereof) causes additional risk of harm. They are unusual because no state has attempted an execution schedule of this speed at least half a century, and no state has *ever* compounded the risk attendant to this execution schedule with the risk midazolam entails.

Second, executions combining all these factors contravene evolved standards of decency as indicated by "state practice with respect to executions." *Kennedy*, 554 U.S. at 420. As discussed in Part I.B.i., the schedule itself is unheard of in the modern era. On top of that, midazolam has become increasingly unusual, with states moving away from, not toward, the drug. *See Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."). This year alone, Florida and Arizona have abandoned it; in the past year, only Alabama and Virginia have actually used it in an execution (once each). An execution spree using this flawed execution drug (and with a deficient protocol to boot) does not comport with standards of decency society accepts.

Finally, if the *Glossip* framework applies, Plaintiffs are likely to satisfy that framework as well. As discussed above, each factor—the schedule, midazolam, and the skimpy protocol—entails a substantial risk on its own; the risk is increased threefold in combination. And plenty of alternatives are available, as discussed above. One is to adopt a schedule with appropriate spacing between executions. If Defendants prefer a mass execution, they could have their schedule but significantly reduce the risk of the current executions by choosing a method, such as firing squad, that does not entail the problems caused by midazolam and the lethal-injection protocol. Whatever the State favors, it cannot persist in a reckless execution process when alternatives are at its fingertips. *Baze*, 553 U.S. at 52.

**F. Plaintiffs are likely to show that Kelley's viewing policies violate their right of access to courts.**

Plaintiffs have a due process and First Amendment right of access to the courts, which includes asserting a claim that their Eighth Amendment and/or Fourteenth Amendment rights have been violated, or will be violated, at any time during the proceedings. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). These rights do not disappear during an execution; rather, the urgency of their enforceability is heightened. If circumstances arise during an execution that present a constitutional injury, there must be a mechanism for Plaintiffs, through counsel, to petition the courts for appropriate relief, as was done in the case of Joseph Wood. *See* Compl. Exh. 5.

Plaintiffs' counsel will not be allowed to view the IV team's efforts to obtain IV access; they will not be able to hear any part of the process other than the inmates' last words; and ADC personnel have full discretion as to when they can obstruct the view of the lethal-injection procedure itself. *See* Compl. Exh. 1. Also, counsel will not be able to both view the execution and have access to a means of communication with appropriate authorities. *See* Compl. Exh. 10. Preventing counsel from viewing the entirety of the execution process, while also prohibiting communication with co-counsel and with appropriate authorities as necessary, prevents effective and meaningful access to the courts. *See Bounds*, 430 U.S. at 821; *Cooey v. Strickland*, No. 2:04-CV-1156, 2011 WL 320166, at *10 (S.D. Ohio Jan. 28, 2011). Defendants have no legitimate penological

objective in denying Plaintiffs' counsel access to view the entirety of the execution. Nor do they have a legitimate penological reason for disallowing communication. They cannot "show more than a formalistic logical connection between [the] regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006); *Sharp v. Johnson*, 669 F.3d 144, 157 (3d Cir. 2012). As a result, Plaintiffs are likely to succeed on this claim.

**G. Plaintiffs are likely to show that Kelley's viewing policies violate their right to counsel under 18 U.S.C. § 3599.**

Plaintiffs are represented by appointed counsel, and their right to counsel pursuant to 18 U.S.C. § 3599 continues until the state has finally caused their death. *See Harbison v. Bell*, 556 U.S. 180 (2009). Section 3599 explicitly requires counsel to pursue "all available post-conviction process," including "applications for stays of execution and other appropriate motions and procedures." These encompass motions that may be necessary if the execution is prolonged or if it is otherwise apparent during the execution that the Plaintiffs' Eighth Amendment rights are being violated. Plaintiffs' right to counsel, especially at a time when a Plaintiffs will be incapacitated and strapped to a gurney, is the mechanism that assures them the right to access the courts. *Wolff*, 418 U.S. at 579.

Kelley's counsel has informed Plaintiffs' counsel that if a Plaintiff has more than one attorney, only one attorney will be allowed to witness the execution. Compl. Exh. 9. Kelley's predecessors have never before restricted counsel's access to the execution in this fashion, and Kelley has articulated no reason at all (much less a legitimate one) for

restricting access now. Besides that, the Plaintiff's single attorney will not have access to a telephone during the execution if she chooses to view the execution. Compl. Exh. 10. Kelley's policies also prevent any witness, including the attorneys, from viewing and hearing the complete execution process, including what is perhaps the most important part of the process, the affixation of the needles to the Plaintiff. Compl. Exh. 1.

These policies effectively deny Plaintiffs counsel guaranteed under § 3599 and prevent them from making necessary "applications for stay of execution and other appropriate motions and procedures." First, the viewing and hearing policies prevent counsel from gathering information needed to determine whether Plaintiffs' right to a constitutional execution is respected. If the executioners repeatedly puncture a Plaintiff with needles over the course of hours—as occurred during the attempted Romell Broom execution in Ohio, for example—counsel cannot make an appropriate motion to put a stop to that. Second, the one-attorney restriction *literally* deprives Plaintiffs of final-stage attorneys who were appointed under § 3599 explicitly to file appropriate post-conviction motions. Third, Kelley's no-phone policy prevents § 3599 counsel from contacting co-counsel or the courts should something go wrong during the execution.

Kelley believes that the right to counsel is satisfied if a single attorney is sequestered to the witness area without the assistance of co-counsel and without access to the outside world. *See* Compl. Exh. 10. The evidence shows the naiveté of that belief. As Dale Baich explains, in at least one execution, lawyers appointed under § 3599 found it

necessary to conduct a hearing before a federal judge by telephone shortly after an execution began. Compl. Exh. 14 ¶15. In this proceeding, counsel filed an Emergency Stay of Execution and presented the motion by telephone after the inmate had not expired within an hour of the execution beginning. During this telephone hearing, Wood's counsel was able to relate to the federal judge that Wood continued to gasp for breath twenty minutes after the execution drugs had been injected into him. *See* Compl. Exh. 5. Wood's counsel was able to make this showing because he was able to communicate with co-counsel in the execution chamber and then access a phone. Kelley's policies prevent the presentation of evidence to the court at a critical time during which Plaintiffs are guaranteed counsel.

Plaintiffs have made a prima facie showing that they will succeed on the merits of this claim as seen in the declarations presented here. At a preliminary-injunction hearing, Planitiffs will present live testimony concerning the importance of viewing the entire execution process and § 3599's guarantee of representation even in the execution chamber. Plaintiffs will likely succeed in showing that § 3599 intends for federally appointed counsel to be able to view the entire execution and to present stay motions and other motions that the statute and the federal court's orders of appointment contemplate.

## II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF PRELIMINARY RELIEF IS DENIED

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (quotation omitted). Defendants will execute Plaintiffs if the Court does not grant preliminary relief. Execution is the ultimate irreparable harm. This requirement is satisfied.

## III. THE BALANCE OF HARDSHIPS TILTS IN PLAINTIFFS' FAVOR

The equities favor injunctive relief. Without injunctive relief, Plaintiffs stand to suffer the irreparable harm of an intolerably painful death and/or death without the rights to counsel and access to the courts. By contrast, the only hardship a preliminary injunction would work against Defendants would be a delay in the scheduled executions. Plaintiffs took immediate steps to challenge the schedule when it was issued less than a month ago, and they have now sought relief well in advance of their executions. *Cf. In re Ohio Execution Protocol Litig.*, 2017 U.S. Dist. Lexis 11019, at *197–98 (equities in plaintiffs' favor where there was no undue delay in filing). Indeed, it is the execution schedule itself that creates one of the core constitutional harms at issue in this case. Defendants cannot set an unprecedented execution schedule and then convincingly claim that the equities bar review of that schedule's legality. Instead, the equities favor full and effective review of Plaintiffs' claims.

## IV. INJUNCTIVE RELIEF WOULD SERVE THE PUBLIC INTEREST

"[I]t is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Here, it is in the public interest to ensure review of whether the execution schedule, the execution protocol, and Kelley's viewing policies are unconstitutional. It is also in the public interest to determine whether Defendants' schedule and viewing policies violate Plaintiffs' important statutory right to counsel. Defendants would likely respond that the public interest favors execution of criminal judgments. That may be true in general, but the public interest does not favor an unprecedented schedule of executions that, as discussed at length above, likely violates Plaintiffs' rights. Defendants can exercise their interest in carrying out criminal judgments without doing so in a manner that violates Plaintiffs' constitutional rights and statutory right to counsel.

## CONCLUSION

For the reasons stated herein, and to be further shown at the hearing, Plaintiffs respectfully request that the Court grant a preliminary injunction blocking their executions until the claims in their complaint can be fully adjudicated.

Respectfully submitted,

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