No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

JOSH TEWALT, ET AL.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR FEBRUARY 28, 2024 AT 10:00 A.M. MST

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CAPITAL CASE

QUESTIONS PRESENTED

Idaho currently has one of the, if not the, most stringent execution-secrecy regimes in the country, seeking to execute prisoners while informing them of nothing more than the name of the lethal injection chemical that is to be used. Any other information which might allow a death-row inmate to evaluate the quality, effectiveness, reliability, or provenance of the chemical is withheld. Instead, the State has provided only a heavily-redacted two-page document from a contracted laboratory, which is not dated, signed, or connected to the State's chemicals in any way, and which does not indicate the use of industry-standard testing protocols. This document purportedly asserts that the chemical falls within normal limits. In denying Mr. Creech's motion for preliminary injunction the district court accepted this document at face value, and after refusing to accept formal briefing the Court of Appeals rejected his appeal of that denial in twenty-three hours. The questions presented are:

Whether it comports with due process for a state to refuse to provide a condemned inmate information about his method of execution that would enable him meaningfully to mount an Eighth Amendment challenge to that method; and

Whether it comports with due process for the federal courts to artificially truncate a death-row inmate's only appeal challenging the withholding of all execution information bar the name of the lethal injection chemical.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are all listed in the caption.

RELATED PROCEEDINGS

Ada County District Court
Case No. 10252
State v. Creech
Findings imposing death penalty, Jan. 25, 1982
Judgment of conviction, Mar. 17, 1983
Order denying motion to withdraw guilty plea, June 24, 1983

Idaho Supreme Court
Case Nos. 14480/15000
State v. Creech, 670 P.2d 463 (Idaho 1983)
Opinion issued denying relief, May 23, 1983
Petition for rehearing denied, Sept. 21, 1983

Idaho Supreme Court
Case No. 15114
State v. Creech
Order dismissing appeal, Jan. 24, 1984

United States Supreme Court
Case No. 83-5818
Creech v. State, 465 U.S. 1051 (1984)
Petition for certiorari denied, Feb. 27, 1984

Idaho Supreme Court
Case No. 15475
State v. Creech
Denial of motion to withdraw guilty plea affirmed, June 20, 1985
Petition for rehearing denied, Dec. 31, 1985

United States District Court, District of Idaho
Case No. 86-1042
Creech v. State
Habeas petition denied, June 18, 1986

United States Court of Appeals, Ninth Circuit
Case No. 86-3983
Creech v. State, 947 F.2d 873 (9th Cir. 1991) (en banc)
Affirmed in part, reversed in part, remanded, Oct. 16, 1991

United States Supreme Court
Case No. 91-1160
State v. Creech, 507 U.S. 463 (1993)
Reversed and remanded, March 30, 1993

Ada County District Court
Case No. 10252
State v. Creech
Judgment of Conviction, Apr. 17, 1995

Ada County District Court
Case No. SPOT-95-00154-D
Creech v. State
Post-conviction petition denied, Dec. 12, 1996

Idaho Supreme Court
Case Nos. 22006/23482
State v. Creech, 966 P.2d 1 (Idaho 1998)
Opinion issued denying relief, Aug. 19, 1998
Petition for rehearing denied, Oct. 23, 1998

United States Supreme Court
Case No. 98-8278
Creech v. State
Petition for certiorari denied, June 4, 1999

Ada County District Court
Case No. SPOT0000403D
Creech v. State
Post-conviction petition denied, Jan. 25, 2001

Idaho Supreme Court
Case No. 27309
Creech v. State, 51 P.3d 387 (Idaho 2002)
Opinion issued dismissing appeal, June 6, 2002
Petition for rehearing denied, Aug. 1, 2002

Ada County District Court
Creech v. State
Case No. SPOT0200712D
Post-conviction petition denied, Apr. 25, 2003

Idaho Supreme Court
Case Nos. 29681/29682
State v. Creech
Appeal dismissed, Dec. 23, 2005

United States District Court, District of Idaho
Case No. CV 99-0224-S-BLW
Creech v. Hardison
Judgment of dismissal, March 31, 2010
Order denying relief on remand, Jan. 29, 2016

Ada County District Court
Case No. CV PC 2008-6064
Creech v. State
Order dismissing petition for post-conviction relief, Mar. 30, 2011

United States Court of Appeals, Ninth Circuit
Case No. 10-99015
Creech v. State
Order vacating and remanding, June 20, 2012
Opinion denying relief July 20, 2022
Order denying petition for rehearing and amending opinion, Feb. 6, 2023

United States Supreme Court
Case No. 23-5039
Creech v. Richardson, 144 S. Ct. 291 (2023)
Petition for certiorari denied, Oct. 10, 2023

Ada County District Court
Case No. CV01-22-9424
Creech v. State
Judgment dismissing petition for post-conviction relief, Dec. 1. 2022

United States District Court, District of Idaho
Case No. 1:23-cv-463
Creech v. Richardson
Petition dismissed, Jan. 12, 2024

Idaho Supreme Court
Case No. 50336
Creech v. State
Opinion issued denying relief, Feb. 9, 2024

United States District Court, District of Idaho
Case No. 1:20-cv-114
Creech v. Tewalt
Order entered denying relief, Feb. 23, 2024

United States District Court, District of Idaho
Case No. 1:24-cv-066
Creech v. Idaho Commission of Pardons & Parole
Order entered denying relief, Feb. 23, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-275
Creech v. Richardson
Opinion issued denying relief, Feb. 24, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-1000
Creech v. Tewalt
Opinion issued denying relief, Feb. 24, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-978
Creech v. Tewalt
Opinion issued denying relief, Feb. 24, 2024

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

State Statutes

Rules

Other

INTRODUCTION

Petitioner Thomas E. Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, App. 001–006, and is available at *Creech v. State*, No. 24-978, 2024 WL 748385 (9th Cir. Feb. 24, 2024).[1]

JURISIDICTIONAL STATEMENT

On February 24, 2024, the United States Court of Appeals for the Ninth Circuit denied Mr. Creech relief and issued an opinion disposing of the appeal. *See id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

STATE STATUTE INVOLVED

This case involves Idaho Code § 19-2716A, which provides in pertinent part:

> For purposes of carrying out the provisions of section 19-2716, Idaho Code, the identities of any of the following persons or entities involved in the planning, training, or performance of an execution shall be confidential, shall not be subject to disclosure, and shall not be

[1] In this petition, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

admissible as evidence or discoverable in any proceeding before any court, tribunal, board, agency, or person:

(a) The on-site physician and any member of the escort team or medical team; and

(b) Any person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process.

I.C. § 19-2716A(4).

STATEMENT OF THE CASE

Mr. Creech has never been afforded an opportunity to meaningfully challenge the way in which the State intends to kill him. He was first sentenced to death for the killing of David Jensen on January 25, 1982;[2] at the time of his sentencing lethal injection executions did not yet exist.[3] After his death sentence was vacated and he was resentenced to death thirteen years later, he engaged in state post-conviction and then federal habeas litigation from 1995 until 2023. During that time, Idaho executed two inmates by means of lethal injection, employing compounded pentobarbital. *See* App. 146-147.

[2] Since his original death sentence was imposed in 1982, Mr. Creech has been engaged in continual litigation, covering numerous proceedings and issues. Here, he will only set forth the events relevant to the question presented.

[3] The first person in the country executed by lethal injection was Charles Brooks, whom Texas executed using sodium thiopental in December of 1982. Robert Reinhold, *Technician Executes Murderer in Texas by Lethal Injection*, N.Y. Times (Dec. 7, 1982).

In December of 2018, Mr. Creech and his then-co-plaintiff Gerald Pizzuto[4] wrote to the Director of the Idaho Department of Correction ("IDOC") seeking information related to their lethal injection executions, including the type and amount of drugs to be used; how those drugs were made, tested, and acquired; and when they would be obtained, among other facts. *Pizzuto v. Tewalt*, 997 F.3d 893, 897 (9th Cir. 2021). IDOC refused to answer, pointing them instead to Idaho's execution protocol. *Id.* at 898.

On March 5, 2020, Messrs. Creech and Pizzuto filed an Original Complaint pursuant to 42 U.S.C. § 1983, alleging *inter alia* that the deprivation of "execution-related information violate[d] their right to due process under the Fourteenth Amendment[.]" *Id.* An Amended Complaint followed shortly thereafter, alleging "violations and threatened violations of their constitutional rights in connection with the State's efforts to execute them while providing them essentially zero information about its plans on how it will do so." Dist. Ct. Dkt. 18. The State, however, continued to refuse to provide the information sought. In 2022, while the instant case was pending on an appeal from the district court's dismissal of the Amended Complaint,[5] Idaho passed a statute to protect it from having to do so; Idaho Code Section 19-

[4] Mr. Pizzuto was the former co-plaintiff of Mr. Creech in this case. However, he was dismissed as a plaintiff and has separate lethal injection litigation pending in the district court, which is currently in discovery. *See Pizzuto v. Tewalt*, No. 1:21-cv-267 (D. Idaho).

[5] This was the second such appeal taken to the Ninth Circuit in this case. In both cases, as to the issues relevant to the instant petition, Mr. Creech was victorious. *See Creech v. Tewalt*, 84 F.4th 777, 793-94 (9th Cir. 2023); *Pizzuto*, 997 F.3d at 896.

2716A(4) (effective July 1, 2022) shields the identity of the compounder, manufacturer, tester, or supplier of lethal injection chemicals.

The appeal of the district court's dismissal was resolved on October 13, 2023, when the Ninth Circuit found that the district court's dismissal should be partially reversed and Mr. Creech should be entitled to amend several of his claims, including the due process claim. *Creech*, 84 F.4th at 793-94. Three days before that, however, on October 10, 2023, this Court denied certiorari in his federal habeas corpus appeal. *Creech v. Richardson*, 144 S. Ct. 291 (2023) (Mem.). On October 12th, the State sought and obtained an execution warrant which set Mr. Creech's execution for November 8, 2023. Pursuant to Idaho's new law regarding methods of execution, the IDOC Director certified that lethal injection execution was "available" in Mr. Creech's case. Dist. Ct. Dkt. 86-9. But Mr. Creech was not told what drug or combination of drugs were "available" for the State to use to kill him. The execution protocol Idaho proposes using allows for the IDOC Director to choose between four drug possibilities or combinations, or to abandon the protocol and select any drug he desires. *Creech*, 84 F.4th at 784, 793; Dist. Ct. Dkts. 86-6, 86-10.

On October 17, 2023, acting on the truncated timeline imposed by the death warrant, Mr. Creech submitted a Motion for Leave to Amend Complaint, attaching a Proposed Second Amended Complaint that included an amended version of his long-standing due process claim as well as an Eighth Amendment challenge to what he guessed might be his method of execution, lethal injection employing compounded pentobarbital. Dist. Ct. Dkt. 86-1 at 43-57, 63-74. At an October 18, 2023, emergency

hearing on that and additional motions, counsel for Appellees admitted that the firing squad remained a possibility for Mr. Creech's execution. Dist. Ct. Dkts. 93; 118 at 16. And even after Mr. Creech's execution was briefly stayed pending a clemency hearing and the scheduled November 2023 execution date passed, the State was asserting that it continued to pursue other chemicals to use alongside pentobarbital. Dist. Ct. Dkts. 103 at 16; 86-5 at 5.

In mid-November of 2023, Mr. Creech learned via the local newspaper that the State had procured one 15-gram dose of pentobarbital for his execution, at a cost of $50,000. App. 031-042. The State did not formally disclose its choice of pentobarbital until November 27th – and then only in Mr. Pizzuto's case, not his own. Dist. Ct. Dkt. 125-7 at 7, 11. Mr. Creech also learned that in Mr. Pizzuto's case the State had paid for a heavily-redacted "certificate of analysis" from a contracted laboratory indicating that at some point some testing had been done on one 50ml vial of someone's pentobarbital. App. 044-045. Another document produced by the State in *Pizzuto* discovery seemed to indicate that the State had procured six such vials; if the vial that was tested was part of the lot sent to the State, then only one of those six – or 16%– of the pentobarbital was tested. App. 044-045; Dist. Ct. Dkt. 126-1. Finally, on January 10, 2024, the State claimed to Mr. Pizzuto it had somehow procured manufactured, not compounded, pentobarbital, which expires in February 2025. Dist. Ct. Dkts. 123-7 at 9; 123-10 at 3.

On January 30, 2024, the day after clemency was denied, the district court ruled on Mr. Creech's Motion for Leave to Amend, which had then been pending for

105 days. App. 046-070. Also on that day, the State obtained a new death warrant, this time scheduling Mr. Creech's execution for February 28, 2024. In rapid succession, on January 31, 2024 (the next day) Mr. Creech filed his Second Amended Complaint, App. 071-139, and on February 6, 2024, filed a Motion for Preliminary Injunction and supporting Memorandum, Dist. Ct. Dkt. 123; App. 140-161. Attached to the latter were a total of thirty-seven exhibits detailing not only his numerous serious health conditions, which include an abdominal aortic aneurysm the size of a billiard ball, Dist. Ct. Dkt. 123-4, but also the significant problems caused by the fact that even now the State refuses to answer his 2018 questions about its lethal injection chemicals, *see, e.g.*, App. 163-177.

In preliminary injunction litigation, Mr. Creech raised the possibility that the State obtained the drug via Akorn, a pharmaceutical company that went out of business in February 2023. According to the declaration of one of his experts, a pharmacologist with expertise in the Drug Quality and Security Act of 2013, the drug's alleged two-year expiration date, ending in February of 2025, is consistent with the drug having originated at Akorn. App. 163, 172-173. Expressly asked to deny it had obtained the drug via that now-defunct company, the State declined. *See* Dist. Ct. Dkts. 123-13 at 3-4; 132.

But Akorn is an American manufacturer of pentobarbital which collapsed in part due to serial Food and Drug Administration (FDA) violations involving the quality of its product, fraudulent quality tests submitted to the FDA, and manipulated or even fabricated testing data. App. 173. Its last audit, three months

before it filed for bankruptcy, reflected "serious problems[,]" such as process controls not being followed and equipment malfunctions leading to "alterations in the safety, identity, quality, or purity of the drugs produced." *Id.* Akorn's bankruptcy likewise meant a complete recall of its product and consequent inability to enforce the drug controls which would ordinarily have prevented its pentobarbital from ending up in the hands of executioners.[6] *Id.* at 172-173. According to the declaration from Mr. Creech's pharmacology expert, which he attached to his Motion for Preliminary Injunction, the potential that Akorn was the State's source of pentobarbital raised "serious concerns" about its quality and reliability. *Id.* at 173.

Mr. Creech's expert also raised a number of concerns about the provenance, quality, and reliability of the State's pentobarbital as well as the paucity of information it had released about the drug's purported testing. Specifically, she questioned whether the pentobarbital had indeed been properly tested, since she could tell nothing about the identity of the testing laboratory, whether it was properly accredited and could be certified for regulatory compliance, or why the laboratory's proprietary testing protocols (not the industry-standard United States Pharmacopeia protocols) were used. *Id.* at 167-169. She also raised concerns about why only a fraction of the State's pentobarbital was tested and how much of the initial purchase order remains usable, since the testing process destroys the product. *Id.* at 170, 175. Finally, she expressed further concern regarding whether the pentobarbital might

[6] All American and European manufacturers of pentobarbital forbid the sale of their product for execution purposes. App. 171.

have been manufactured overseas in a country like China or India with less rigorous quality protections in place, *id.* at 172, 175-175, and pointed out that the State had failed to rule out the drug having been made for veterinary, not human, use, *id*. at 174.[7] Answers to all of these questions, Mr. Creech argued below, were necessary in order to fully and meaningfully litigate his Eighth Amendment claim; the State's continued refusal to answer any of these questions, which were more specific versions of the ones he had begun asking back in 2018, was therefore a violation of his procedural due process rights, he claimed. *Id*. at 076-077, 127-137.

While preliminary injunction litigation was ongoing, the State filed an Answer to the Second Amended Complaint. Dist. Ct. Dkt. 135.

On February 23, 2024, however – seventeen days after the motion was filed, seven days after it was fully briefed, and with five days remaining until Mr. Creech's execution – the district court issued an opinion denying Mr. Creech's Motion for Preliminary Injunction and refusing to stay his imminent execution. App. 007-029.

At 1:09 p.m. on Friday, February 23, 2024, Mr. Creech filed a Notice of Appeal appealing this denial.[8] App. 183. At 3:37 p.m. that day, the United States Court of Appeals for the Ninth Circuit forbade formal briefing, ordering the parties instead to submit to the appellate court copies of their district court briefing along with any

[7] Veterinary medications are suitable for animal physiologies and metabolisms, and need not meet the stringent quality, potency, and purity standards required for human-use medications. App. 174.

[8] Although the Ninth Circuit utilizes Pacific Standard Time, the times recited herein are given in Mountain Standard Time, the time zone in Boise, Idaho, where Mr. Creech is incarcerated.

exhibits the parties wished the court to consider, and permitting the parties to file optional "letter briefs" in lieu of Appellant's and Appellees' Briefs. *Id.* Mr. Creech's thirty-nine pages of district court briefing and ninety-two pages of exhibits were submitted at 4:37 p.m. and 5:21 p.m. that same day, and his twelve-page Letter Brief was filed at 9:03 p.m., again the same day. *Id.* Also, on Friday the 23rd, the State filed a total of 207 pages' worth of briefing and exhibits, and over the course of the next twelve hours both parties litigated an emergency motion to stay Mr. Creech's execution in submissions totaling an additional 18 pages. *Id.* at 183-184. All told, by 3:29 p.m on Saturday, February 24, 2024, the parties had collectively submitted 368 pages to the Ninth Circuit for review. *Id.* at 183-184.

Mr. Creech's capital appeal was denied by the panel five hours later, at 8:15 p.m. on Saturday, February 24, 2024. *Id.* at184. The denial consisted of a five-page per curiam opinion devoting a total of two paragraphs to his due process claim. App. 003-004. Citing no law and never mentioning the relationship between the information Mr. Creech sought and his ability to make an Eighth Amendment challenge, the panel held that "the State has adequately disclosed the planned method of execution" and that Mr. Creech was unlikely to succeed "on his claim that due process additionally requires the State to disclose the source of the drug." *Id.* at 004. Any other concerns "about the provenance, quality, and reliability of the drug" were based on speculation and unnecessary to satisfy due process, the panel held. *Id.*

At 8:39 p.m. the night of Saturday the 24th, the Ninth Circuit ordered Mr. Creech to file any petition for rehearing by 11:00 a.m. on Sunday, February 25, 2024,

granting the State until 4:00 p.m. that day to respond. App. 184. After he filed his Petition for Rehearing En Banc at 9:39 a.m. on Sunday the 25th, however, the Ninth Circuit denied it at 12:11 p.m., *id.*, having apparently dispatched the petition for voting without waiting for the State's response. The mandate was issued three minutes later. *Id.*

This Petition for Writ of Certiorari timely followed.

REASONS FOR GRANTING THE WRIT

Mr. Creech is asking the Court to provide clarity on the question of when a state's execution secrecy regime affords so little opportunity to mount a method-of-execution challenge that it violates due process. That is a question which has bedeviled death row litigants and unnecessarily complicated method-of-execution challenges for years, with Justice Sotomayor bringing it to the Court's attention in *Zagorski v. Parker*, 139 S. Ct. 11, 13 (2018) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari), over half a decade ago.

The question is more urgent now than it has ever been. Over the past decade the states still performing executions have displayed an unrelenting focus on preventing death row inmates from obtaining accurate execution information by passing extensive secrecy statutes. As a result, condemned litigants' ability to make their case has progressed far beyond simply being unable to prove a method is "available," as was the case in *Zagorski*, *id.*; inmates now, Mr. Creech among them, will be injected with chemicals until they are dead without ever being allowed to know or contest where those chemicals came from, whether the State obtained them legally,

under what circumstances they were tested, or if they were even made for human use. As a result, those same inmates are unable to satisfactorily demonstrate that the chemicals pose a substantial risk of causing the inmates severe pain during their executions. Given this intense and ever-growing focus on execution secrecy, it is critical for the Court to determine how far the states can go under the Due Process Clause in imposing limits on death row inmates' ability to present federal constitutional claims. The present case gives the Court the perfect opportunity to draw that line.

Similarly, Mr. Creech also asks the Court to provide guidance to the lower courts with respect to the amount of process that is due to pre-execution litigation. This question, too, is one of increasing urgency. Over the last several years, this Court has signaled its intention to "curtail[ ] the constitutional guarantees afforded" to death row inmates, in large part because of the delays between their death sentences and their executions. *Bucklew v. Precythe*, 587 U.S. ___, 139 S. Ct. 1112, 1144 (2019) (Breyer, J., dissenting). But the line between expeditious consideration of capital litigation that occurs while the inmate is under a warrant for execution and the requirements of procedural due process has not yet been clearly drawn. Here too, the instant case provides the Court with an ideal opportunity to begin formulating those boundaries.

I. Due process scrutiny of state execution secrecy schemes and their effect on method-of-execution claims is needed.

There are numerous signs that states performing executions are withholding information from condemned inmates in such a way that prevents them from making

critical federal constitutional challenges to the ways in which the states plan to conduct executions, and that more guidance from this Court is therefore in order.

Execution secrecy in general has long been a concern of the Court. For instance, over a century ago in *In re Medley*, 134 U.S. 160 (1890), the Court ordered the grant of a petition for writ of habeas corpus in part due to an executioner keeping secret the date and time at which he planned to execute the condemned. The modern era of the death penalty, however, has seen states retaining the death penalty being open about the dates of executions but committing to withholding a much broader swath of execution information, ranging from the identities of executioners to the names of companies providing or compounding lethal injection chemicals. Legislative enactments codifying these attempts to shield execution information from scrutiny have proliferated over the past several decades. Ariz. Rev. Stat. § 13-757(C) (effective Dec. 31, 1998); Ark. Code Ann. § 5-4-617(i)(1) (effective July 24, 2019); Fla. Stat. § 945.10(1)(j) (effective May 12, 2022); Ga. Code Ann. § 42-5-36(d)(2) (effective July 1, 2013); Idaho Code § 19-2716A (effective July 1, 2022); Ind. Code § 35-38-6-1(f) (effective Apr. 27, 2017); Kan. Stat. Ann. § 22-4001(b) (effective May 13, 1999); Ky. Rev. Stat. Ann. § 45A.720 (effective Apr. 10, 1990); La. Stat. Ann. § 15:570(G) (effective June 10, 2003); Miss. Code Ann. § 99-19-51(4) (effective May 3, 2016); Mo. Rev. Stat. § 546.720(2) (effective Aug. 28, 2007); Mont. Code. Ann. § 46-19-103(5) (Apr. 15, 1989); Neb. Rev. Stat. § 83-967 (effective Aug. 30, 2009); N.C. Gen. Stat. § 132-1.2(7) (effective Aug. 5, 2015); Ohio Rev. Code. Ann. § 2949.221 (effective Mar. 23, 2015); Okla. Stat. Ann. tit. 22, § 1015(B) (effective Nov. 1, 2011); Or. Admin. R.

291-024-0016(3) (effective Aug. 23, 1996); 61 Pa. Stat. and Cons. Stat. Ann. § 4305(c) (effective Oct. 13, 2009); S.C. Code § 24-3-580 (effective May 12, 2023); S.D. Codified Laws § 23A-27A-31.2 (effective Mar. 7, 2013); Tenn. Code Ann. § 10-7-504(h)(1) (effective Apr. 29, 2013); Tex. Crim. Pro. Code Ann. art. 43.13(b) (effective Sept. 1, 2015); Wyo. Stat. Ann. § 7-13-916 (effective Feb. 25, 2015); *see also* Piper Hutchinson, *Execution Drug Secrecy Mandated Under Louisiana Proposal*, La. Illuminator (Feb. 21, 2024), *available at* https://lailluminator.com/2024/02/21/execution-drug-secrecy-mandated-under-louisiana-proposal/ ("Muscarello's bill would shield records from the public related to executions, including who sells execution drugs and equipment to the state. Anyone who violated the law could be subject to up to two years of incarceration and a fine of up to $50,000.").

That rapidly-spreading commitment to execution secrecy has caused fresh concern at the Court. In *Zagorski*, Justice Sotomayor's dissent from the denial of certiorari pointed to the ways in which "rules of secrecy surrounding individuals involved in the execution process[ ]" "severely constrained" death row inmates in Tennessee from being able to determine whether the state could or could not obtain pentobarbital. 139 S. Ct. at 13. "Short of cold-calling every pharmacy in the country and asking . . . , it is anyone's guess how the prisoners were supposed to meaningfully challenge the State's claim that it could not obtain the drug." *Id.* Yet the lower court faulted those prisoners "for failing to offer direct proof[,]" even though Tennessee's commitment to secrecy made such direct proof next to impossible to obtain. *See id.*

Similarly, dissenting in *Bucklew v. Precythe*, Justice Sotomayor pointed to execution secrecy as one reason why meritorious constitutional claims pertaining to execution methods might "come to light even at the eleventh hour," since executions methods "have been moving targets subject to considerable secrecy in recent years[.]" 139 S. Ct. at 1147 (citing, *inter alia*, Deborah Denno, *Lethal Injection Chaos Post-*Baze, 102 Geo. L.J. 1331, 1376-80 (2014)).

These statements constitute a recognition that state secrecy can and does have a critical impact on death row inmates' ability to challenge the ways in which executions will be conducted, even though such inmates have a constitutional right to make those challenges. In other words, these statements are a tacit recognition that secrecy can prevent condemned litigants from receiving the process which they are due. But members of this Court are not alone in recognizing this interaction between procedural due process and Eighth Amendment method-of-execution challenges; the Ninth Circuit also recognizes a potential due process right to accurate execution information if denial of that information would prevent the meaningful presentation and consideration of such an Eighth Amendment claim. *See Creech*, 84 F.4th at 793 (citing *First Amend. Coal. v. Ryan*, 938 F.3d 1069, 1080 (9th Cir. 2019)); *Lopez v. Brewer*, 680 F.3d 1068, 1079-81 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part); *Beaty v. Brewer*, 649 F.3d 1071, 1072-73 (9th Cir. 2011) (Reinhardt, J., dissenting from denial of rehearing en banc); *Landrigan v. Brewer*, 625 F.3d 1132, 1134-35 (9th Cir. 2010) (Wardlaw and Fletcher, JJs., concurring in denial of rehearing en banc); *see also Floyd v. Daniels*, No. 21-16134, 2021 WL

5406851, at *2 (9th Cir. Nov. 18, 2021) (Berzon, J., concurring) ("There is also, in my view, a procedural-due-process-based right to a reasonable period to contest the drug protocol.").

Nor is the Ninth Circuit alone in considering cases in which due process issues arise in the execution-secrecy realm. *See generally Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013) (inmate alleged that uncertainty with respect to Louisiana's execution protocol violated due process); *cf. Jones v. Comm'r,* 812 F.3d 923, 924-25 (11th Cir. 2016) (Marcus, J., concurring in denial of initial hearing en banc) (although inmate's appeal did not challenge dismissal of Eighth Amendment claim, he had no standing to challenge Georgia secrecy statute which prevented him from knowing the manufacturer of the drugs, their qualifications, or the time frame of drug manufacture).

But perhaps the most notable (non-Ninth Circuit) case in this area is *In re Ohio Execution Protocol Litig.*, 845 F.3d 231 (6th Cir. 2016), *cert. denied sub nom. Fears v. Kasich*, 583 U.S. 875 (2017). There the plaintiffs were facing a protective order that, they maintained, "cut[ ] off all discovery on Ohio's execution procedures," even though such discovery "would assist in identifying the suppliers or manufacturers of Ohio's lethal-injection drugs as well as any one related to carrying out executions in Ohio." *Id.* at 235. It was not sufficient, they said, to simply be told that an unknown laboratory using unknown testing protocols to evaluate drugs created by some unknown source had certified those drugs were acceptable. *See id.*

But that protective order was not imposed by the lower court merely on Ohio's say-so. Instead, it was entered after an extensive evidentiary hearing at which the district court heard evidence regarding the actual burden on the state of Ohio to reveal more detailed information. *Id.* at 237. At that hearing, the condemned themselves naturally had the opportunity to observe and question those witnesses, who gave answers which the district court weighed in due course. *See id.* Critically, Ohio also offered to provide samples of the drugs themselves for testing if ordered to by the district court, although the plaintiffs declined to pursue that offer. *Id.* at 239. The bar to execution information in this case, in other words, took place *after* the plaintiffs were afforded ample process in order to seek it.

Such wide-ranging opinions from the Circuit Courts of Appeal reflect the need for the Court's guidance on this issue. What process is due for an inmate who knows little or nothing regarding how he will be killed? To what is he entitled in order to try to challenge his method of execution? Must he trust the state that is about to kill him when the state simply avers that the method will be painless? Death row inmates must know. So, too, must the states and the courts.

In sum, widespread deficiencies and discrepancies exist in how the states address the question of what information a death row inmate must be afforded in order to meaningfully mount a method-of-execution challenge. There is already an established rule of law for addressing this question: the Due Process Clause. What is missing is a blueprint to the lower courts on what the Clause demands in the state execution-secrecy context, and that is the gap the present case can fill.

II. Due process scrutiny of how the federal courts address expedited execution litigation is likewise warranted.

Both this Court and the execution states have demonstrated increasing impatience with the notion of having to delay executions. *See, e.g.*, *Hamm v. Smith*, 143 S. Ct. 1188, 1190-91 (2023) (Mem.) (Thomas, J., dissenting from denial of certiorari) (expressing frustration with the potential of an Eleventh Circuit case to lead to stays of executions that might delay death sentences from being carried out).

But members of the Court have also long expressed concerns with this perceived need to expedite cases to the execution chamber. In response to the majority's frustration with Russell Bucklew, whose federal habeas case became final in 2006 and who had filed his method-of-execution challenge "just days before his scheduled execution[,]" *Bucklew*, 139 S. Ct. at 1119, 1133-34, numerous justices wrote dissenting opinions urging the Court not to take the "principles of federalism and finality" too far by limiting the ability of death row inmates to be heard "based on little more than our own policy impulses[,]" *id.* at 1147 (Sotomayor, J., dissenting). Death has long been and continues to be different, in other words; requests for equitable relief from a human being facing execution are entitled to "careful hearing on [their] own merits[,]" given that there is "a human life at stake." *Id.*

Urging the courts to take time and care in deciding execution-eve challenges, Justice Sotomayor went on to note that the cost of "cursory review" of such challenges "would be unacceptably high." *Id.* "There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out

violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness." *Id.* at 1148.

Writing separately in that same case, Justice Breyer conceded that it might conceivably be possible to end delays in capital litigation by limiting the protections afforded the condemned and enabling more expeditious consideration of their cases. *Id.* at 1145 (Breyer, J., dissenting). "But to do so would require us to pay too high a constitutional price."

Though these Justices did not say so because the cases at bar did not raise the issue, their concerns about ensuring that executions occur on the state's proposed schedule (at the expense of full and careful consideration of death row inmates' claims) sound in due process. The core of due process is not just the right to bring a claim or to have it heard, but to a *meaningful* opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). Artificially imposing an enormously accelerated timeline to take up, consider, and decide substantial constitutional questions, such as the extent of the due process right to information in the execution-secrecy context, is therefore at odds with due process. *See Miller v. French*, 530 U.S. 327, 350 (2000) (explaining that "whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question").

Given the ever-increasing push for more expeditiousness once a state issues an execution warrant, due process scrutiny of the push to quickly dispose of capital cases, including those raising serious constitutional concerns, is therefore necessary. The extremity of the timeframe afforded Mr. Creech to bring his due-process claim

provides an ideal vehicle through which the Court can establish an outer boundary to what due process requires.

III. This case presents the perfect facts to consider.

The clean and simple facts of the instant case are also uncomplicated because there has not been a lack of diligence on Mr. Creech's part. He first sought execution information from IDOC in 2018 and brought his due process access-to-information claim in 2019; the past half-decade has seen him diligent in pursuing that claim and continuing to seek information. This easily differentiates his situation from the many cases in which it is the inmate's conduct which requires a claim to be disposed of on the eve of execution. *See, e.g.*, *McKenzie v. Day*, 57 F.3d 1461, 1463, 1468–69 (9th Cir. 1995) (discussing a constitutional claim raised for the first time in opposition to a motion to set an execution date). This leaves the Court free to consider what process is due to inmates in his situation without concern that such process will be construed to apply to dilatory death row inmates.

Indeed, the history of Mr. Creech's due-process claim shows that, through no fault of his own, the claim spent years unresolved in the appellate court. After his position was twice vindicated in that appellate court, his case was finally remanded for good to the district court in October of 2023. He promptly presented an amended complaint to the district court once more, as authorized to do by the Ninth Circuit, *Creech*, 84 F.4th at 793-94, and once again presented the district court with his due-process claim. It was then the district court, not Mr. Creech, which left the claim lingering, still unresolved, until the day after clemency was denied and it became clear that Mr. Creech was going to be executed in a month or less.

Despite Mr. Creech's diligence in seeking information, on January 30, 2023, the day on which the district court denied the State's motion to dismiss the claim, his lack of knowledge about what the State intended to use to kill him remained profound, even though his execution was only twenty-nine days away. As detailed above, the State forbade him from knowing when its lethal injection chemicals were obtained; from whom they were obtained (including whether or not they were obtained via a defunct American company that went out of business due to FDA violations, contravening the company's own drug controls); whether they were obtained through an intermediary or not; whether they were manufactured overseas or not; who manufactured them; by what methods they were tested; who tested them; when they were tested; whether the testing laboratory was properly accredited and complied with regulatory controls; whether the chemicals were in the State's possession when they were tested; whether indeed it was the State's lot of chemicals that was tested; whether the chemicals were shipped and stored within the temperature and humidity range necessary to maintain them within normal limits; how much of the chemicals remain usable and in the State's possession following any testing that might have been done; from what industry the State obtained the chemicals (such as from a hospital, pharmacy, or veterinarian); and whether the chemicals were made for human use or to euthanize animals. Instead, the State provided only a single-page document of completely unknown origin, unsigned and undated, providing some numbers and some "test results" that were verbatim copies of the test criteria themselves. App. 044-45.

Mr. Creech can find no state in the country with comparable execution-information embargoes. And this extraordinary level of secrecy is compounded by the fact that the State claims for itself the right to "suspend" or alter its execution protocol at any time (which it has indeed done), *see id.* at 784, 793, and in whatever way it chooses.

Still seeking information, or at least the chance to pursue it, Mr. Creech's preliminary injunction motion seeking to stay his execution until he could properly pursue his due process claim had attached (among numerous other exhibits) an affidavit from an expert pharmacologist. *See generally* App. 162-77. Although she identified serious concerns about the quality and reliability of the State's pentobarbital, she was unable to evaluate any specific data about the drug and its provenance given that the State would not provide the information necessary for her to do so.[9] *See id.* But those concerns, Mr. Creech pointed out to the district court, in turn gave rise to serious concerns about the risk of severe harm in his execution, such that he should be entitled to more information in order to meaningfully make that challenge. App. 150-54.

The district court's own order denying the injunction tacitly agrees that more information was necessary. The State had a document that obviated Mr. Creech's concerns, the court held, App. 010-11, without ordering a hearing, much less the

[9] To provide just one example, the State's refusal to identify the laboratory which tested the pentobarbital meant the expert could not tell whether that laboratory was properly accredited or complied with appropriate regulatory provisions. *See* App. 169.

disclosure of anywhere near the amount of information the Ohio district court considered before limiting access to drug-testing information. Additionally, the district court here noted, Mr. Creech's pharmacologist could not confirm details about whether the purported testing of the pentobarbital was proper because Idaho law prevents Mr. Creech, and by extension his experts, from knowing the identity of the laboratory. *Id.* at 017. But without such information, the court characterized the expert declaration's statements as "speculative[.]" *Id.* Mr. Creech was therefore caught in a trap of the State of Idaho's making: he needed information to make his method-of-execution claim less "speculative," *id.*, but by passing its execution secrecy statute the State had already decided he was not entitled to the information, *id.* at 023, meaning he would never be able to progress past a "speculative" claim. There was no route to the information, and hence no route to due process.

This finding on the district court's part was an error of law; state action cannot – for obvious reasons – trump the Fourteenth Amendment right to due process. *Shelley v. Kraemer*, 334 U.S. 1, 18, 20 (1948). In its haste to progress Mr. Creech's case to his execution date, however, the Ninth Circuit signed off on the district court's justification in a single sentence. App. 004.

Though Mr. Creech is a condemned inmate facing an execution in a matter of days and was prosecuting his only appeal regarding how the State intends to kill him, this was not the only way in which the appellate court deprived Mr. Creech of the process to which he was due. Even though that method of execution – pentobarbital – was only revealed to him ninety-eight days before his Ninth Circuit appeal was

initiated, the appellate court denied his appeal without formal briefing or oral argument in a mere twenty-three hours. Ninety-nine days after learning the State of Idaho had chosen a drug with which to kill him, in other words, his only appeal regarding that method was dismissed out of hand.

Careful scrutiny of the docket sheets for the most recently-executed inmates in this country reveals no comparable situation in the Ninth or any other circuit. An instructive comparator can instead be found in the Ninth Circuit's scheduling order in *Floyd v. Daniels*, Dkt. 8, No. 21-16134 (9th Cir. July 8, 2021). There, faced with a July 26, 2021, execution date, the court granted an unopposed motion to expedite the appeal and set a briefing schedule that contemplated an opening brief, an answering brief, and a reply brief filed over the course of six days (from July 12th to July 17th, 2021), with oral argument set for July 19, 2021. The eight days contemplated there far exceed the twenty-three hours afforded Mr. Creech.[10]

Indeed, Mr. Creech can find no other case in which, after no formal briefing or oral argument was allowed, submissions to the appellate court were extremely limited, and the court abandoned its own deadlines in ways that favored the State by lessening its workload, a capital appeal was decided so quickly and cursorily. Even taking into account the amount of time the district court required to issue an order

[10] To be sure, Mr. Creech's execution date was closer in time to the submission of his appeal to the Ninth Circuit than was Mr. Floyd's. Once again, though, that was not Mr. Creech's doing. At every stage he has been prompt in presenting, filing, and pursuing his due-process claim. Mr. Creech is likewise not responsible for the fact that once a warrant for execution issues, it must be accomplished with thirty days. Idaho Code §19-2715(2).

denying the preliminary injunction, the Ninth Circuit had multiple days remaining in which to consider that denial. It took less than a single one.

The instant case thus presents an ideal juxtaposition of a diligent death row inmate combined with a plain refusal on the part of both the State and the courts to provide process. That is, not only did the State deprive Mr. Creech of the ability to meaningfully challenge his method of execution through unprecedented levels of state secrecy, but the timelines imposed upon him by the lower courts left him without the ability to press that claim in any forum. Death row inmates in Mr. Creech's position clearly have a right to challenge their methods of execution, but artificially-curtailed and -expedited execution litigation leaves them without a remedy, however much they might try to seek one. This in turn crystallizes the due process issue for this Court's consideration. The instant petition poses the simplest question in this complex area, and it is a question this Court should now answer.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 26th day of February 2024.

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