

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

JOSH TEWALT, ET AL.,

Respondents.

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On Petition for Writ of Certiorari  
to the Ninth Circuit Court of Appeals

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

FEB 24 2024

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

THOMAS E. CREECH,

No. 24-978

Petitioner-Appellant,

D.C. No. 1:20-cv-00114-AKB

v.

OPINION

JOSH TEWALT, Director, Idaho  
Department of Correction; TIM  
RICHARDSON, Warden, Idaho Maximum  
Security Institution; CHAD PAGE, Chief,  
Division of Prisons, Idaho Department of  
Correction, in his official capacity; and  
UNKNOWN EMPLOYEES, AGENTS,  
OR CONTRACTORS OF THE IDAHO  
DEPARTMENT OF CORRECTION,

Respondents-Appellees.

Appeal from the United States District Court  
for the District of Idaho  
Brailsford, District Judge, Presiding

Submitted February 23, 2024  
San Francisco, California

Before: William A. Fletcher, Jay S. Bybee, and Morgan Christen, Circuit Judges.

PER CURIAM:

Petitioner-Appellant Thomas Eugene Creech, a death row inmate in the custody of the Idaho Department of Correction (IDOC), appeals the denial of his motion for a preliminary injunction in this 42 U.S.C. § 1983 action raising constitutional claims concerning his method of execution. His execution is currently scheduled for February 28, 2024.

In 1981, while serving life sentences in Idaho for multiple first-degree murders, Creech killed a fellow prisoner and was sentenced to death. The circumstances of the killing and Creech's previous post-conviction proceedings are discussed in our opinion in *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023).

On February 23, 2024, the district court denied Creech's motion for preliminary injunctive relief on the grounds that Creech had not made a clear showing of a likelihood of success on the merits of any of his three constitutional claims concerning the protocol and method of his execution, and that the balance of equities and the public interest weigh against granting a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).<sup>1</sup>

We have appellate jurisdiction to review the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We review the denial of a preliminary injunction for abuse of discretion. *See Harris v. Bd. of Supervisors*, 366 F.3d 754,

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<sup>1</sup> The district court also denied Creech's request for an administrative stay. Creech does not separately appeal that ruling but, in any case, we find no error in the order denying an administrative stay.



760 (9th Cir. 2004). “The district court’s interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law.” *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). “A district court abuses its discretion if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors.” *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013). “We review the district court’s findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record.” *Id.* (internal quotation marks and citation omitted). We affirm.

The district court did not abuse its discretion in concluding that Creech is unlikely to succeed on the merits of his two due process claims. On appeal, Creech repeats his argument that the State failed to provide sufficient information about the source of its lethal injection drug, pentobarbital. More specifically, Creech raises the possibility that the State might have obtained the drug from Akorn, a pharmaceutical company that went out of business in February 2023 and subsequently recalled its product. Creech also suggests the possibility that the pentobarbital might have originated from other unreliable sources.

Though several of Creech's arguments originally were premised on his contention that the State had not informed him of its intended method of execution, he now concedes that IDOC intends to execute him by using manufactured, rather than compounded, pentobarbital. The district court found that IDOC provided Creech's counsel with a Certificate of Analysis verifying that the pentobarbital in its possession complies with regulatory and quality standards and that it has a February 2025 expiration date. We agree with the district court that the State has adequately disclosed the planned method of execution and that Creech is unlikely to succeed on his claim that due process additionally requires the State to disclose the source of the drug. Creech's other arguments about the provenance, quality, and reliability of the drug are purely speculative and are based on unauthenticated exhibits submitted with his motion and the conjecture of his expert.

Creech's other due process claim concerns the execution protocol. The district court correctly found that Standard Operating Procedure 135.02.01.001 is the applicable protocol for his execution by lethal injection and that the State has been and is presently following this protocol. That the protocol does not address execution by firing squad is immaterial, because that method will not be used for Creech's execution.

Creech also challenges his execution on Eighth Amendment grounds. The district court did not abuse its discretion in ruling that Creech was unlikely to

succeed on this claim. To challenge an execution method under the Eighth Amendment, a plaintiff must establish that his method of execution presents a risk that is “sure or very likely to cause serious illness and needless suffering” and to give rise to “sufficiently imminent dangers.” *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (internal quotations omitted) (emphasis omitted). The Supreme Court requires that the plaintiff then show “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt [the alternative method] without a legitimate penological reason.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

First, the district court correctly concluded that Creech’s Eighth Amendment claim fails as a matter of law because he has refused to identify an alternative method of execution. *See id.* Second, as with his due process arguments, Creech’s Eighth Amendment claims rely largely on suppositions that he could be at risk of suffering unnecessary pain *if* he were to have certain medical conditions. Creech requested a medical examination to determine whether he suffers from any of these pre-existing conditions, which the district court denied. We find no error in the district court ruling, as Creech acknowledges he does not have any known conditions that create a substantial risk of severe pain or needless suffering. *See Glossip*, 576 U.S. at 877. Creech’s argument that the protocol is deficient because

it does not require an anesthesiologist to administer the drug is squarely foreclosed by Supreme Court precedent, *see Baze v. Rees*, 553 U.S. 35, 59 (2008), which also recognizes that a brain monitor is not required. Finally, Creech has failed to show why the medical team's ability to observe the execution through a real-time video feed, rather than a window, is inadequate.

The district court found that Creech made a clear showing that he will suffer irreparable harm if his request for a preliminary injunction is not granted. The district court also recognized that the State has a strong interest in the finality of its judgments. The district court correctly concluded that the balance of equities and the public interest do not weigh in Creech's favor.

Because Creech has not made a clear showing of a likelihood of success on the merits of his claims and because the balance of equities and the public interest weigh against granting a preliminary injunction, the district court did not abuse its discretion in denying Creech's request for preliminary injunctive relief.

AFFIRMED.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,

Plaintiff,

v.

JOSH TEWALT; Director, Idaho  
Department of Correction; TIM  
RICHARDSON, Warden, Idaho Maximum  
Security Institution; CHAD PAGE, Chief,  
Division of Prisons, Idaho Department of  
Correction, in his official capacity; and  
UNKNOWN EMPLOYEES, AGENTS,  
OR CONTRACTORS OF THE IDAHO  
DEPARTMENT OF CORRECTION,

Defendants.

Case No. 1:20-cv-00114-AKB

**MEMORANDUM DECISION AND  
ORDER**

**INTRODUCTION**

Plaintiff Thomas Eugene Creech is a death-row inmate in the custody of the Idaho Department of Correction (IDOC). On October 16, 2023, a state district court issued a death warrant for Creech's execution. That court subsequently stayed the warrant pending the Idaho Commission of Pardons and Parole's consideration of Creech's petition for clemency. The Commission held a hearing on that petition on January 19, 2024, and on January 29, it issued a decision denying commutation. The next day, January 30, the state district court again issued a death warrant for Creech's execution. That execution is presently scheduled for February 28. Creech requests this Court stay or enjoin the execution.

Specifically, pending before the Court in this case are Plaintiff's Motion for Preliminary Injunction (Dkt. 123) and Plaintiff's Motion for Administrative Stay of Execution (Dkt. 121). Related to his preliminary injunction motion, Creech also filed an Emergency Motion for Medical

Testing, asserting “it is necessary for [Creech] to undergo cardiac testing to fully develop and substantiate his request for the injunction.” (Dkt. 127 at p. 1). In support of his preliminary injunction motion, Creech presents the Declaration of Dr. Michaela Almgren, a clinical associate professor in pharmacology, and the Declaration of Dr. Mark Heath, an anesthesiologist.<sup>1</sup> (Dkts. 123-8, 124-3). The remaining information Creech offers is not accompanied by an affidavit either authenticating or describing the information. Rather, the information is simply attached as “exhibits” to Creech’s memorandum in support of his preliminary injunction motion. *See K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) (noting basis for preliminary injunction should be supported by affidavits or verified complaint); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d ed. 2023) (noting preliminary injunction request should be supported by affidavits).

The Court finds oral argument will not significantly aid its decision-making process and decides the motions on the parties’ briefing. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B). *See also* Fed. R. Civ. P. 78(b) (“By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.”). For the reasons discussed, the Court denies the motions. Although Creech will suffer irreparable harm in the absence of an injunction, he has not made a

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<sup>1</sup> Creech attaches to his memorandum in support of his request for a preliminary injunction other declarations which were prepared in other cases and not for purposes of this case. (*See* Dkt. 123-6 (attaching Affidavit of Christine Freeman related to execution of Alabama inmate Eddie Powell); Dkt. 124-4 (attaching Declaration of Dr. Sergio D. Bergese regarding risks of painful execution caused by Idaho inmate Gerald Pizzuto’s prescription history); Dkt. 124-7 (attaching Declaration of Mary E. Spears regarding efforts to obtain preliminary injunction in Pizzuto’s case)). Creech also attaches two Declarations of Josh Tewalt, the Director of IDOC. In one, Director Tewalt attests that he served the January 30, 2024, death warrant on Creech and that lethal injection is an available execution method. (Dkt. 125-3). The other was filed in Pizzuto’s case. (Dkt. 125-5).

clear showing of a likelihood of success on the merits of any of his claims. Further, the balance of equities and the public interest weigh against granting a preliminary injunction.

### BACKGROUND

Creech originally filed this civil rights action under 42 U.S.C. § 1983 in March 2020. Since then, the district court has twice dismissed Creech’s claims; Creech has appealed those dismissals to the Ninth Circuit; and the Ninth Circuit has reversed the dismissals and remanded the case to permit Creech to reallege his claims. *See Pizzuto, et al. v. Tewalt*, 997 F.3d 893, 905, 908 (9th Cir. 2021) (reversing dismissal of claims as unripe); *Creech v. Tewalt*, 84 F.4th 777, 783 (9th Cir. 2023) (reversing in part dismissal for failure to state a claim). After the Ninth Circuit’s most recent remand, Creech moved to amend his complaint, and this Court granted that motion, in part, allowing Creech to allege three claims. (Dkt. 118).

On January 31, 2024—after the Commission denied Creech’s clemency petition and the state court issued another death warrant—Creech filed his second amended complaint asserting those three claims. (Dkt. 119). In Claim One, Creech alleges “the use of compounded pentobarbital at [his] execution violates the Eighth Amendment.” (*Id.* at § VI(A)). In support of this claim, Creech alleges that: (1) the use of pentobarbital “creates a substantial risk of serious pain and suffering because of his health conditions and medical history” (*id.* at ¶ 320); (2) the IDOC’s execution protocol, Standard Operating Procedure 135.02.01.001 (SOP 135), has “problems,” including that it does not require a “practicing anesthesiologist” to administer the chemicals or “the use of a brain consciousness monitor” (Dkt. 119 at § VI(A)(2), ¶¶ 373, 386); and (3) the medical team observes the execution through “a closed-circuit television system” rather than through a window from another room into the execution chamber. (*Id.* at ¶¶ 401, 403).

Claim Two alleges “the lack of a valid execution protocol violates [Creech’s] rights to due process.” (*Id.* at § VI(B)). He describes SOP 135 as “outdated,” failing to identify “a recipe for executions,” and inconsistent with the IDOC’s “public pronouncements.” (*Id.* at ¶¶ 424, 427). Claim Three alleges “deprivation of accurate information violates [Creech’s] Fourteenth Amendment Right to Due Process.” (*Id.* at § VI(C)). In support of this claim, Creech identifies the lack of various information including, for example, the method of execution, and he contends this absence of information precludes him from meaningfully challenging his execution. (*Id.* at ¶ 491).

Despite these allegations—many of which assert IDOC has failed to identify the execution method and express concern about the use of compounded pentobarbital—Creech now acknowledges in his emergency filings that IDOC possesses manufactured pentobarbital and that IDOC intends to use manufactured pentobarbital for his execution. (Dkt. 123-1 at p. 12; *id.* at p. 15 (acknowledging IDOC has chosen “single-drug-pentobarbital method” of execution)). According to Creech, he is now aware of the execution method in his case because IDOC produced a Certificate of Analysis of the pentobarbital which it intends to use for his execution to his counsel on January 25, 2024, six days before he filed his second amended complaint in this case.<sup>2</sup> (Dkt. 123-1 at p. 19).

The Certificate shows the tested chemical “conforms.” (Dkt. 124-8 at pp. 2, 3). According to Defendants, the Certificate “documents the results of scientific testing completed on the chemicals,” “details the process and materials used during manufacturing,” “confirms compliance with regulatory and quality standards,” and “establishes the quality and safety of the execution chemicals.” (Dkt. 123-7 at p. 4). Further, Defendants have represented the manufactured

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<sup>2</sup> The Certificate of Analysis was originally produced to Creech’s counsel in *Pizzuto v. Tewalt, et al.*, No. 1:21-cv-00359-BLW. Creech submits the Certificate in this case. (Dkt. 124-8).



pentobarbital has a February 2025 expiration date. (Dkt. 123-1 at p. 5). This recent information moots many of Creech's allegations in his second amended complaint.

### LEGAL STANDARD

Under Rule 65 of the Federal Rules of Civil Procedure, a party may obtain injunctive relief before final judgment in certain limited circumstances. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tips in his favor; and an injunction is in the public interest. *Id.* at 20. The movant must carry his burden "by a clear showing." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24.

"Under the 'serious questions' version of the test, a preliminary injunction is appropriate when a plaintiff demonstrates that 'serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor.'" *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). "This approach requires that the elements of the preliminary injunction test be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* "Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* (brackets and quotations omitted).

“[T]hese principles apply even in the context of an impending execution.” *Lopez*, 680 F.3d at 1072. In applying them, the Court considers the facts in the light most favorable to Creech, unless a fact is “blatantly contradicted by the record[] so that no reasonable jury could believe it.” *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (summary judgment context).

## ANALYSIS

### 1. Likelihood of Success on the Merits

#### a. Claim One

In Claim One, Creech alleges “the use of compounded pentobarbital at [his] execution violates the Eighth Amendment” as applied to him because of “his health concerns,” “problems with the now invalidated protocol,” and “problems with the execution facilities.” (Dkt. 119 at § VI(A)(1)-(3)). Further, in support of his preliminary injunction motion, he argues “drug reliability issues create a substantial risk of severe pain.” (Dkt. 123-1 at p. 4).

“[T]he Eighth Amendment does not guarantee a prisoner a painless death.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (per curiam). Rather, the Eighth Amendment forbids forms of punishment that intensify the death sentence with a cruel, superaddition of terror, pain, or disgrace. *Id.* To successfully challenge an execution method under the Eighth Amendment, the plaintiff must establish two factors. First, the plaintiff must establish the method presents a risk that is “*sure or very likely* to cause serious illness and needless suffering” and to give rise to “sufficiently *imminent* dangers.” *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quotations omitted). In other words, there must be an objectively intolerable, substantial risk of serious harm. *Id.*

Second, the plaintiff must show “a feasible and readily implemented alternative method of execution that would . . . significantly reduce a substantial risk of severe pain” and that “the State has refused to adopt [the alternative method] without a legitimate penological reason.” *Bucklew*,

139 S. Ct. at 1125. “The Eighth Amendment does not come into play unless the risk of pain associated with the State’s method is ‘substantial when compared to a known and available alternative.’” *Id.* (quoting *Glossip*, 576 U.S. at 878). The plaintiff may not avoid showing this second prong. Rather, the Supreme Court has ruled that “identifying an available alternative is ‘a requirement of *all* Eighth Amendment method-of-execution claims,’ alleging cruel pain.” *Id.* at 1126 (quoting *Glossip*, 576 U.S. at 867). Further, the Supreme Court has recently explained that Eighth Amendment method of execution claims face an “exceedingly high bar” because the Supreme Court has never held a State’s method of execution qualifies as cruel and unusual. *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020); *see also Bucklew*, 139 S. Ct. at 1124 (same).

### **(1) Health Concerns**

Central to Claim One is Creech’s allegation that he suffers from medical conditions, making the use of pentobarbital likely to create a substantial risk of serious pain and suffering. Specifically, Creech argues his “complex and serious medical situation makes pentobarbital an unconstitutionally risky drug to use at his execution given the danger of an excruciating heart attack, the effects of which [Creech] will acutely experience before he is adequately sedated.” (Dkt. 123-1 at p. 3). In his complaint, Creech makes numerous allegations about his health. In his brief in support of his preliminary injunction, however, he only identifies an “abdominal aortic aneurysm” and “a history of uncontrolled high blood pressure.” (*Id.*)

Importantly, Creech’s allegations acknowledge he has not been diagnosed with the medical condition which he alleges will very likely cause a substantial risk of serious pain and suffering—“extensive atherosclerotic vascular disease.” (Dkt. 119 at ¶ 335). According to his allegations, individuals with that disease, who suffer a sudden drop in blood pressure associated with large doses of pentobarbital, will likely suffer a heart attack. (*Id.*) Creech, however, repeatedly

acknowledges he has not been diagnosed with heart disease. For example, he alleges in his second amended complaint that “[t]o fully assess [his] health conditions, further testing is necessary for coronary heart disease, including a current electrocardiogram, an exercise stress test, an echocardiogram, a nuclear stress test, and CT coronary angiogram.” (*Id.*)

Creech also acknowledges in his memorandum in support of his motions for a preliminary injunction and for an administrative stay that he does not have the medical condition which makes pentobarbital “an unconstitutionally risky drug.” Specifically, Creech argues that “*if* [he] does have significant heart disease, there would be a grave prospect of him suffering an agonizing heart attack brought on by a large dose of pentobarbital. However, *to fully assess the precise contours of these risks, further testing is necessary.*” (Dkt. 123-1 at p. 3 (emphasis added); *see also id.* (“If [Creech] does have heart disease, the ‘cardiovascular risks associated with’ pentobarbital would cause ‘serious complications during the execution.’”); Dkt. 121-1 at p. 3 (stating “heart testing” and review by experts is required)). Finally, in his emergency motion for medical testing, Creech again acknowledges he has not been diagnosed with a medical condition making the use of pentobarbital unconstitutionally risky. In that motion, he states “it is necessary for [him] to undergo cardiac testing to fully develop and substantiate his request for the injunction.” (Dkt. 127 at p. 1).

The information Creech submits in the record regarding his health also does not establish he has an unstable heart condition of the nature which he alleges creates the substantial risk of severe pain and suffering. In support of his preliminary injunction, Creech submits an unsworn letter from Dr. Michael Fradley, who states:

Pentobarbital is likely to be utilized in [Creech’s] execution. Given the cardiovascular risks associated with this drug, *it would be reasonable to ensure he doesn’t have an unstable cardiac condition* that could be exacerbated by the pentobarbital leading to serious complications during the execution. As such, I would recommend optimizing her [sic] cardiovascular status by ensuring his blood

pressure is well controlled and to consider a stress test to be certain he doesn't have any high risk ischemic territories in his heart.

(Dkt. 123-4 (emphasis added)).

This statement does not establish Creech is likely to suffer a heart attack during execution before being sedated, as Creech alleges. To the contrary, Dr. Fradley suggests testing to determine *if* Creech has “an unstable cardiac condition.” (*Id.*) After reviewing Creech’s medical records, Dr. Fradley was unable to conclude Creech has such a condition. Further, Dr. Fradley notes that in November 2022, Creech underwent an endovascular repair of an abdominal aortic aneurysm without complication despite his health conditions. (*Id.*) Based on this record and Creech’s own concessions, Creech has not clearly shown he suffers a health condition making the use of pentobarbital “unconstitutionally risky.”<sup>3</sup>

## (2) Drug Reliability Issues

Additionally, Creech has failed to make a clear showing the manufactured pentobarbital in IDOC’s possession is unreliable. Claim One’s title alleges “the use of compounded pentobarbital” violates the Eighth Amendment. (Dkt. 119, § VI(A)). Indeed, a vast majority of Creech’s allegations relate to *compounded* versus manufactured pentobarbital. Creech, however, acknowledges IDOC now possesses and intends to use manufactured pentobarbital as the execution method. (Dkt. 123-1 at p. 12 (“IDOC intends to use supposedly manufactured pentobarbital for his execution.”); *id.* at p. 15 (acknowledging IDOC has chosen “single-drug-pentobarbital method” of execution)).

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<sup>3</sup> Creech has also not made a showing of a “vein-access problems.” (*See* Dkt. 123-1 at p. 11 (arguing “likelihood of vein-access problems arising)). Creech has not offered any evidence he suffers from this problem.

In 2020, the Supreme Court described pentobarbital as the “mainstay of state executions,” noting pentobarbital “[h]as been adopted by five of the small number of States that currently implement the death penalty”; [h]as been used to carry out over 100 executions, without incident”; “[h]as been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions”; “[w]as upheld [by the Supreme Court] last year, as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter”; and “[h]as been upheld by numerous Courts of Appeals against Eighth Amendment challenges.” *Barr*, 140 S. Ct. at 2591 (citing *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); *Gissendaner v. Commissioner*, 779 F.3d 1275 (11th Cir. 2015)).

Defendants represent that “the subject pentobarbital has been tested, certified as being pentobarbital, and has passed all applicable regulatory and quality standards.” (*See* Dkt. 132 at p. 13). In support, they have provided Creech’s counsel with a Certificate of Analysis showing the tested chemical is “conform[ing].” (Dkt. 124-8). Creech does not directly dispute IDOC possesses certified, manufactured pentobarbital.

Instead, Creech argues that the risks pentobarbital imposes are “intensified by the serious doubts surrounding the reliability of the specific chemicals” IDOC obtained and that “there is reason to suspect that IDOC has chosen a dubious source for its drugs.” (Dkt. 123-1 at p. 4). In support, Creech contends states have been unable to obtain manufactured pentobarbital “[f]or a number of years.” (*Id.*) As a result, Creech speculates IDOC obtained the pentobarbital from a veterinarian, a third-world country, or Akorn Pharmaceuticals, which he describes as a manufacturer that is “now-defunct” because of “massive recalls” for “pervasive defects in its merchandise.” (*Id.* at pp. 5-7).

In support, Creech offers the Almgren Declaration. Almgren states she “cannot confirm from the Certificate of Analysis that the laboratory that performed [the] testing is accredited.” (Dkt. 123-8 at ¶ 23). As discussed in greater detail below, however, under Idaho law the identity of the laboratory testing the chemicals is confidential. Idaho Code § 19-2716A (maintaining confidentiality of “[a]ny person or entity who . . . tests . . . the chemicals or substances for use in an execution”). In accord with this statute, one District Court in the District of Idaho has already ruled that requiring Defendants to disclose the execution-drug supplier’s identity would seriously harm their interest in enforcing Idaho’s death penalty laws. (Dkt. 132-2 (attaching memorandum decision in *Pizzuto v. Tewalt*, No. 1:21-cv-00359-BLW, Dkt. 88 at pp. 19-24)). Similarly, for the same reasons, requiring IDOC to disclose the identity of the drug-tester would be an undue burden on Defendants’ enforcement of the law.

The hypothetical answers Almgren posits with respect to her remaining “questions” about “whether IDOC has obtained its pentobarbital from a reliable source” are speculative (Dkt. 123-8 at ¶ 44), and the additional information Creech offers about the drug’s source is unauthenticated, inadmissible information attached to his brief. (*See, e.g.*, Dkt. 123-9 (article regarding Akorn’s bankruptcy and recall of products); Dkt. 123-11 (same); Dkt. 123-12 (same); Dkt. 123-16 (article about man from India selling illegally imported drugs)). Further, Creech does not offer any admissible evidence in support of his assertion that IDOC “deliberately circumvented lawful limitations” to obtain pentobarbital “surreptitiously in violation of restrictions” against manufacturers’ wishes. (*See* Dkt. 123-1 at p. 6).

Because Creech’s allegations primarily focus on compounded pentobarbital; because IDOC now possesses certified, manufactured pentobarbital; and because Creech proffers nothing but inadmissible speculation about the source of the chemical, Creech fails to clearly show the use

of manufactured pentobarbital—which the Supreme Court has described as the “mainstay” of executions—is “unconstitutionally risky.”

### **(3) Other Challenges**

Creech’s other challenges likewise fail to establish a clear showing of a substantial risk of severe pain and suffering. Creech alleges that “there is no window between the execution chambers and the medical team room” and argues the absence of a window increases the danger of his execution “going painfully awry.” (Dkt. 119 at ¶ 401; Dkt. 123-1 at p. 8). In support, Creech offers the Heath Declaration, in which Heath states that “the absence of a direct visual observation substantially and gratuitously increases the risk of a botched execution”; “the design of the facility departs from every other execution facility that [he has] inspected”; and “the current video system is utterly inadequate to detect intravenous infiltration.” (Dkt. 124-3 at pp. 3-4).

Defendants respond that the medical team uses “a real-time video feed” with a “telescoping camera set up directly over Creech.” (Dkt. 132 at p. 14). In support, they provide the Declaration of Liz Neville, who attests that, among other things, at least two members of the medical team “continuously monitor” the inmate using a “telescoping camera,” which is capable of “zoom[ing] in on the sites of IV catheters” “to monitor for occlusions or blockages.” (Dkt. 132-4 at ¶ 18). Additionally, the medical team “ensures that the IV catheter is working properly before leaving the execution chamber.” (*Id.*). Further, Neville attests “IDOC has secured fixed cameras in the execution chamber to permit monitoring of the entire room.” (*Id.*). The State argues this setup “provides a better view than peering through a window” from another room. (Dkt. 132 at p. 14).

Creech does not articulate why this monitoring method is inadequate. Although Heath describes the video system as “utterly inadequate,” he fails to explain how the medical team could more effectively monitor IV sites through a window from another room—a scenario which seems



unlikely. Creech also does not cite any case law for the proposition that the medical team must have a direct line-of-sight through a window versus through a real-time video feed. Meanwhile, at least one district court has approved a protocol providing for the medical team to directly observe the inmate via a camera. *See West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 2836754 \*7 (D. Ariz. July 18, 2011), *aff'd* 652 F.3d 1060 (9th Cir. 2011) (finding sufficient safeguards where medical team monitored condemned remotely via audio equipment and high-resolution camera). Accordingly, Creech has failed to clearly show that the medical team's line of sight via a real-time video feed versus a window in another room creates a substantial risk of severe pain and suffering.

Similarly, Creech has not made a clear showing that an anesthesiologist must administer the chemical or that a brain monitor is necessary to avoid a substantial risk of severe pain. As the Supreme Court has noted, "the medical community has yet to endorse the use of a BIS monitor, which measures brain function, as an indication of anesthetic awareness" and an anesthesiologist is not required to be present at an execution. *Baze v. Rees*, 553 U.S. 35, 59 (2008); *id.* at 64 (Alito, J., concurring) (recognizing that anesthesiologists cannot be required); *see also Workman v. Bredesen*, 486 F.3d 896, 910 (6th Cir. 2007) (anesthesiologist not required to monitor consciousness); *Taylor v. Crawford*, 487 F.3d 1072, 1084 (8th Cir. 2007) ("The protocol is designed to ensure a quick, indeed a painless, death, and thus there is no need for the continuing careful, watchful eye of an anesthesiologist or one trained in anesthesiology, whose responsibility in a hospital's surgery suite (as opposed to an execution chamber) is to ensure that the patient will wake up at the end of the procedure."). Moreover, the Supreme Court has noted anesthesiologists are ethically prohibited from participating in capital punishment. *Baze*, 553 U.S. at 59-60 (noting anesthesiologists' ethical guidelines prohibit them from participating in capital punishment).

#### (4) Alternative Method of Execution

Finally, Creech's refusal to identify an alternative method of execution is an independent reason Claim One necessarily fails as a matter of law. Creech's counsel has refused to identify an alternative execution method. The Supreme Court, however, requires that to establish "the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner *must* show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125 (emphasis added). The Supreme Court has concluded there is "no doubt that this standard governs all 'Eighth Amendment method-of-execution claims,'" explaining that "we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution." *Id.* at 1125, 1128-29.

Ruling on Creech's motion to amend and the State's motion to dismiss, this Court acknowledged Creech's attempts to dodge the issue of an alternative execution method by alleging his counsel has an ethical duty of loyalty not to identify such a method. (Dkt. 118 at p. 13). Regardless, the Court reasoned that Creech could not allege an alternative method if he was being forced to guess about the actual execution method IDOC intends to use. (*Id.*). Based on this reasoning, the Court concluded Creech had satisfied the pleading requirement to avoid dismissal by alleging the "removal" of certain "failings" (like obtaining chemicals from "shady offshore compounding pharmacies") "could conceivably remove the risk of an Eighth Amendment violation." (*Id.*).

Now, however, IDOC has informed Creech it intends to use manufactured pentobarbital as an execution method. Despite that IDOC has definitively identified its method, Creech continues to refuse to identify an alternative method. Instead, he “reserves the right to elaborate on the more humane alternative requirement if this Court orders counsel to do so following briefing on and resolution of the ethical conflict issue.” (Dkt. 123-1 at p. 2, n.2). The Court, however, does not need further briefing on the issue because the Supreme Court has definitively ruled a plaintiff is required to show “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew*, 139 S. Ct. at 1125. Absent this showing, not only does Creech fail to clearly establish Claim One is likely to succeed on the merits, that claim fails on the merits as a matter of law.

**b. Claim Two**

In Claim Two, Creech alleges that “the lack of a valid execution protocol violates [his] rights to due process” and that no execution protocol yet exists which can “validly govern” the execution method. (Dkt. 119 at VI(B); *id.* at ¶ 420). In support of his assertion he is likely to succeed on the merits of this claim, Creech argues that IDOC has not updated SOP 135 since March 2021; SOP 135 “speaks only to lethal injection, not the firing squad”; newly amended Idaho Code § 19-2716, which now provides for a firing squad, contemplates a revised protocol;<sup>4</sup> and “since none has been issued, there is no valid protocol.” (Dkt. 123-1 at p. 16).

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<sup>4</sup> Idaho Code § 19-2716 does not make any mention of a protocol or otherwise suggest IDOC will or is required to issue a revised protocol. Perhaps Creech’s assertion that the statute “contemplates” a revised protocol relates to the fact that the statute provides for a new method of execution—firing squad—for which IDOC does not yet have a protocol. Because IDOC intends to use lethal injection, however, the absence of a firing squad protocol is irrelevant.

As Creech's argument acknowledges, however, SOP 135 "speaks" to lethal injection, i.e., SOP 135 sets forth IDOC's protocol in the event of an execution by lethal injection. Now that IDOC has identified the execution method—lethal injection by manufactured pentobarbital—Defendants represent SOP 135 is the applicable protocol for Creech's execution. In support of their representation that IDOC intends to follow SOP 135, they offer the Neville Declaration. (Dkt. 132-4).

Neville is IDOC's Deputy Chief of Prisons and is familiar with SOP 135's implementation. (Dkt. 132-4 at ¶ 2). She attests "SOP 135 continues in full force and effect." (Dkt. 132-4 at ¶ 11). Further, she attests IDOC has been and is presently following SOP 135 and provides details, among other things, about the composition of the medical team and their licensing and certification checks; their training and compliance with policy; their testing and maintenance of equipment and supplies; and their simulation of executions. (*See, e.g.*, Dkt. 132-4 at ¶¶ 3, 6-7, 14-17, 19).

Finally, Neville explains that in the past when a death warrant issued but IDOC was unable to carry out that execution, IDOC temporarily "suspended implementation of SOP 135," meaning IDOC "cease[d] efforts to prepare to carry out" the execution under SOP 135. (Dkt. 132-4 at ¶ 10). Contrary to Creech's allegations, the IDOC's prior "suspensions" of SOP 135 did not invalidate the protocol. Rather, IDOC's suspensions of SOP 135 merely meant IDOC ceased preparing for an execution it could not carry out.

As in other cases in which a court has addressed the adequacy of SOP 135's safeguards against the substantial risk of severe pain and suffering, the Neville Declaration resolves any concerns about SOP 135's implementation and the adequacy of its safeguards against the risk of harm. *See Rhoades v. Reinke*, 671 F.3d 856, 861 (9th Cir. 2011) (noting district court correctly concluded SOP 135 protocol "as it will be implemented" contained requisite safeguards); *Creech*

*v. Reinke*, No. 1:12-cv-00173-EJL, 2012 WL 1995085, \*18 (D. Idaho June 4, 2012) (concluding “the supplemental evidentiary record” resolved any arguments about “the risk of harm”). For this reason, Creech’s claim that “the lack of a valid protocol violates [his] rights to due process” is not likely to succeed on the merits. (Dkt. 119 at p. 55).

**c. Claim Three**

In Claim Three, Creech alleges Defendants’ “refusal to provide [him] with information that would enable him to determine how the State intends to execute him violates his rights to due process.” (*Id.* at ¶ 433). By the time Creech filed his second amended complaint, however, he knew IDOC’s execution method—manufactured pentobarbital. Creech now argues the disclosure of the execution method is not enough to satisfy his due process rights and complains he does not know “who made the drugs”; the “source” of the drugs, i.e., whether from “a veterinarian, a pharmacy, a hospital or some other type of business”; “what part of the world the drugs come from”; who tested the drugs; and how much of the drugs IDOC purchased and tested. (Dkt. 123-1 at pp. 12-13, 15).

Under Idaho law, however, who manufactures, sells, supplies, and tests the drugs is confidential. Idaho Code § 19-2716A maintains as confidential “[a]ny 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.” Creech’s preliminary injunction motion does not challenge this statute.

Further, in accord with the statute, one District Court in the District of Idaho has already ruled that requiring Defendants to disclose the identity of the “execution-drug supplier would seriously harm their interest in enforcing Idaho’s death penalty laws”; the supplier’s identity had

only “marginal relevance” to the petitioner’s claims; and thus “requiring Defendants to identify their execution-drug supplier would impose an undue burden by creating an unjustifiably high risk that the supplier will be publicly identified and, consequently, that the State will be unable to obtain execution drugs in the future.” (Dkt. 132-2 at pp. 19-24 (attaching memorandum decision in *Pizzuto v. Tewalt*, No. 1:21-cv-00359-BLW, Dkt. 88 at pp. 19-24)).<sup>5</sup> Based on this authority, Creech is not likely to succeed on the merits of his claim that due process requires Defendants to identify the manufacturer, seller, supplier, or tester of the manufactured pentobarbital in IDOC’s possession.<sup>6</sup>

## 2. Irreparable Harm

Defendants argue Creech will not suffer irreparable injury if denied injunctive relief. Specifically, they argue that, because the harm resulting from an Eighth Amendment as applied claim is the substantial risk of severe pain and because Creech has failed to make a clear showing such a substantial risk exists, he will not suffer irreparable harm if the Court denies his request for

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<sup>5</sup> In support of this conclusion, the Court relied on numerous cases concluding that a State intending to carry out an execution would be unduly burdened and prejudiced by having to identify an execution-drug supplier. *See also Jordan v. Comm’r, Mississippi Dep’t of Corr.*, 947 F.3d 1322, 1340 (11th Cir. 2020) (holding that compelling the Georgia Department of Corrections to identify execution-drug supplier would impose undue burden); *Virginia Dep’t of Corr. v. Jordan*, 921 F.3d 180, 192 (4th Cir. 2019) (holding that compelling Department of Corrections to disclose execution-drug supplier’s identity would “impede Virginia’s ability to carry out executions by chilling Virginia’s current drug supplier, as well as potential future suppliers, from providing drugs for executions”); *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 238-39 (6th Cir. 2016) (finding that, if required to identify execution-drug supplier, “Defendants will suffer an undue burden and prejudice in effectuating Ohio’s execution protocol and practices”); *In re Missouri Dep’t of Corr.*, 839 F.3d 732, 736 (8th Cir. 2016) (“[T]he disclosure of [the execution-drug supplier’s] identity will result in an undue burden on [the Missouri Department of Corrections].”).

<sup>6</sup> Although I.C. § 19-2716A does not address the remainder of the information Creech seeks to know—the chemical’s industry source and country of origin—this collateral information is of minimal relevance, particularly because the Certificate of Analysis states the IDOC possesses pentobarbital which has been tested and conforms with regulatory and quality standards.

injunctive relief. In support, Defendants cite *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1283 (M.D. Ala. 2011), which ruled that irreparable injury is not the fact the inmate will die by execution if injunctive relief is denied; rather, “[t]he alleged irreparable injury [is] he may be conscious after being injected with pentobarbital and able to feel pain during the administration of the final two chemicals.” Because the inmate in *Powell* failed to establish a substantial likelihood of success that pentobarbital would likely cause serious illness and needless suffering, the court concluded he failed to show irreparable harm. *Id.*

*Powell*, however, is contrary to Ninth Circuit law. The Ninth Circuit has recognized that “every § 1983 plaintiff in an injunction appeal involving an upcoming execution” demonstrates irreparable harm. *Towery*, 672 F.3d at 661. Accordingly, the Court concludes Creech has made a clear showing he will likely suffer irreparable harm in the absence of preliminary relief if IDOC proceeds with the execution.

### **3. Balance of Equities and Public Interest**

As previously noted, “[u]nder the ‘serious questions’ version of the test, a preliminary injunction is appropriate when a plaintiff demonstrates that ‘serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.’” *Id.* at 657. Creech, however, has failed to demonstrate “serious questions going to the merits” because he fails to clearly show a likelihood of success on the merits of any of his claims. Moreover, the balance of equities and public interest do not weigh sharply in Creech’s favor.

The Supreme Court has held a State has a “strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Likewise, crime victims “have an important interest in the timely enforcement of a sentence.” *Id.* These interests are especially strong in cases in which the legal proceedings have

continued for many years. *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir. 2011) (“[T]he further delay from a stay [of execution] would cause hardship and prejudice to the State and victims, given that the appellate process in this case has already spanned more than two decades.”). Further, the Supreme Court has concluded a State has a compelling interest in finality and is entitled to the assurance of finality after years of lengthy proceedings have run their course and once a mandate has issued denying habeas relief. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). “Only with real finality can the victims of crime move forward . . . .” *Id.* “To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty.” *Id.* (quotation omitted).

The history of Creech’s federal proceedings is too long and complicated to recount here. In brief, Creech has sought relief from his death sentence in the federal courts since the reimposition of his death penalty in 1995—almost thirty years of litigation. Recently, the Supreme Court denied Creech’s petition for certiorari challenging the Ninth Circuit’s denial of his second amended habeas petition. *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023), *cert. denied* 144 S. Ct. 291 (Oct. 10, 2023). A few days later, on October 13, 2023, Creech filed his third federal habeas petition, alleging that evolving standards of decency render his death sentence unconstitutional. *Creech v. Richardson*, No. 1:23-cv-00463-AKB. This Court concluded it lacked jurisdiction over Creech’s unauthorized successive petition under 28 U.S.C. § 2244(b), and that decision is now on emergency appeal. *Creech*, No. 1:23-cv-00463-AKB at Dkts. 15, 17.

A few days after Creech filed his third federal habeas petition, the Ninth Circuit issued the mandate on its decision remanding this case to this Court, in which Creech has attempted under § 1983 to challenge the State’s execution protocol since March 2020. *See Creech*, 84 F.4th at 784. Although the Court allowed Creech to amend his complaint—for a third time—to attempt to allege



viable claims, his less than clear showing in support of his preliminary injunction motion demonstrates he is unlikely to succeed on the merits of any of his claims.

Finally, Creech filed another § 1983 case before this Court on February 5, 2024, challenging the Idaho Commission of Pardons and Parole's denial of his clemency petition. *Creech v. Idaho Comm'n of Pardons & Parole, et. al.*, No. 1:24-cv-00066-AKB. In a separate opinion, the Court will address that challenge. This litigation history demonstrates an instance in which the State's and the victims' interests in finality are especially strong given the lengthy legal proceedings that have delayed the State's timely enforcement of Creech's sentence.

Arguing the other side of the coin, Creech asserts "the public's interest in finality" is "substantially diminished" because it has taken forty years to litigate his death sentence. (Dkt. 123-1 at p. 20). Further, he argues that because he has been on death row for more than forty years, "a few more months to allow [him] to litigate the substantial issues in this case will do the State no harm." (*Id.* at p. 17). As discussed above, the Court disagrees this case involves "substantial issues." Moreover, Creech's argument for a delay ignores that a delay will undoubtedly beget more requests for further delays. Accordingly, the Court concludes the balance of equities and public interest are not in Creech's favor. Because Creech fails to make a clear showing of a likelihood of success on the merits of any of his claims and because the balance of equities and the public interest weigh against granting a preliminary injunction, the Court denies Creech's request for an injunction, even though he will suffer irreparable harm as a result.

#### **4. Evidentiary Hearing and Medical Testing**

The Court disagrees it must hold an evidentiary hearing before denying Creech's request for injunctive relief, as Creech asserts. Specifically, Creech argues the Court "should allow [him] to at least make his case at a live hearing through witnesses." (*Id.* at p. 21). The Ninth Circuit,

however, has ruled that a court does not need to have a hearing on a motion for a preliminary injunction where the essential facts are not in dispute. *Charlton v. Est. of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). Further, a hearing is unnecessary when “the movant has not presented a colorable factual basis to support the claim on the merits or the contention of irreparable harm.” *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990).

It is undisputed Creech has not been diagnosed with the medical condition—heart disease—which he contends gives rise to a substantial risk of severe pain if IDOC uses pentobarbital. Further, it is undisputed IDOC now possesses manufactured pentobarbital rather than compounded pentobarbital. Finally, Defendants have established SOP 135 is in full force and effect; IDOC is and has been following SOP 135 for purposes of Creech’s execution; and it is implementing adequate safeguards to avoid a substantial risk of severe pain and suffering. Because these facts are undisputed, an evidentiary hearing on Creech’s preliminary injunction hearing is unnecessary.

Further, the Court declines to grant Creech’s emergency motion for medical testing so that he can “undergo cardiac testing to fully develop and substantiate his request for the injunction.” (Dkt. 127). Creech cites no authority for the proposition that a court should grant a stay to allow a party to conduct discovery to develop evidence to support a preliminary injunction motion. Such “preliminary injunction litigation,” as Creech calls it, is antithetical to the Rule 65 standards for injunctive relief.

## **5. Administrative Stay**

Creech requests “his execution be administratively stayed until the Court can address [his] motion for a preliminary injunction.” (Dkt. 121-1 at p. 1). He contends that before the Court can address his request for injunctive relief, he must complete “substantial discovery,” undergo

“[h]eart testing,” have his experts review such testing, and have an evidentiary hearing with “live testimony” from his experts, who he states are “busy professionals with numerous personal and work-related obligations” that need “leeway” to appear at an in-person evidentiary hearing. (*Id.* at pp. 3-4). He estimates this “preliminary-injunction litigation cannot be adequately completed . . . in less than six months.” (*Id.* at p. 5).

The Ninth Circuit has ruled that an administrative stay “is only intended to preserve the status quo until the substantive motion . . . can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion . . . .” *Nat’l Urban League v. Ross*, 977 F.3d 698, 700-01 (9th Cir. 2020). This decision, however, does not address the applicable standard for an administrative stay of an execution in the district court for purposes of addressing a preliminary injunction motion. The parties dispute the standard for granting such a stay. Relying on *Hill*, 547 U.S. 573, Defendants argue Creech “is not entitled to a stay of execution without first making a strong showing that he is likely to succeed on the merits of his substantive claims.” (Dkt. 134 at p. 2). Creech disagrees. Regardless, having concluded Creech fails to make a clear showing he is entitled to a preliminary injunction, the Court concludes an administrative stay is inappropriate.

## ORDER

### IT IS ORDERED:

1. Plaintiff’s Motion for Preliminary Injunction (Dkt. 123) is **DENIED**.
2. Plaintiff’s Motion for Administrative Stay of Execution (Dkt. 121) is **DENIED**.
3. Plaintiff’s Emergency Motion for Medical Testing (Dkt. 127) is **DENIED**.



DATED: February 23, 2024

*Amanda K. Brailsford*  
 Amanda K. Brailsford  
 U.S. District Court Judge

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

FEB 25 2024

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

THOMAS EUGENE CREECH,

Plaintiff - Appellant,

v.

JOSH TEWALT, Director, Idaho  
Department of Correction, in his official  
capacity, et al.;

Defendants - Appellees.

No. 24-978

D.C. No.

1:20-cv-00114-AKB

District of Idaho,

Boise

ORDER

Before: MURGUIA, Chief Judge.

On February 25, 2024, Creech filed a petition for rehearing en banc from the panel's opinion affirming the district court's denial of Creech's request for preliminary injunctive relief. The full court has been advised of the petition for rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's February 24, 2024, opinion should be reheard en banc. No judge requested a vote within the time period. Accordingly, the petition for rehearing en banc is denied. En banc proceedings with respect to the panel's opinion in Appeal No. 24-978 are concluded.

The mandate shall issue forthwith in Appeal No. 24-978.



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IDAHO NEWS

# Idaho found lethal injection drugs for an execution. Here's how much they cost taxpayers

BY KEVIN FIXLER

UPDATED DECEMBER 15, 2023 5:53 AM



Idaho hasn't executed a death row inmate since June 2012, and just two in almost 30 years. The state's preferred method is lethal injection, at the Idaho Maximum Security Institution near Kuna, with a firing squad as the backup method after a new law that took effect July 1, 2023. *Courtesy Idaho Department of Correction*



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**APPENDIX D**

**App. 031**



The price of drugs that Idaho needs to execute a death row inmate has tripled since the last time the state carried out a lethal injection more than a decade ago.

The Idaho Department of Correction paid \$50,000 for 15 grams of pentobarbital, according to a purchase order for the execution drugs obtained by the Idaho Statesman through a public records request. The document's release also is the first time state prison officials have revealed which drug they acquired for the [planned execution](#) of Thomas Creech, Idaho's longest-serving death row inmate.

"Upon payment, vendor agrees to maintain and store the items in accordance with all applicable regulations until IDOC takes possession of the items," the document read. "Vendor agrees to refund IDOC an amount up to \$50,000 if it fails to provide to IDOC the purchased items, in whole or in part."

IDOC last month disclosed that prison officials had secured lethal injection drugs for the first time in years when they also announced a death warrant for the 73-year-old Creech, a convicted quadruple-murderer.

Prison officials declined to tell the Statesman whether they have the pentobarbital on hand. Creech's execution has [since been postponed](#).



Idaho death row inmate Thomas Creech, pictured here in November 2020, was convicted of three murders in the state and another in Oregon between 1974 and 1981. Now 73, he awaits a clemency hearing to see if he will remain on death row and possibly face execution by lethal injection. Federal Defender Services of Idaho *Provided*



According to the state prison system's [execution procedures](#), officials use 5 grams of pentobarbital to lethally inject a prisoner in the one-drug protocol. In case they are needed, two backup sets of syringes also are prepared for a lethal injection, each with 5 grams of pentobarbital.

**TOP VIDEOS**

Lawyer for hangar collapse victims holds press conference

IDOC Director Josh Tewalt did not respond Thursday to a Statesman interview request through a department spokesperson about Idaho's execution process. Tewalt, appointed to the post in December 2018, has not made himself available for similar interview requests from the Statesman concerning executions for more than two years.

In a phone interview with the [Idaho Capital Sun](#) earlier this month, Tewalt said IDOC won't force the issue as Creech's legal process plays out. The Idaho Commission of Pardons and Parole agreed to grant Creech a hearing in January to review whether to recommend reducing his death sentence to life in prison.

"We will not move forward unless we can do it in a way that is dignified," Tewalt said. "We are committed to carrying it out with integrity, dignity and respect for everyone involved."

Idaho Department of Correction\_Purchase Order

Contributed by Idaho Statesman



Page 1

**Bill To:**  
Idaho Department of Correction  
1299 N Orchard St, Suite 110  
Boise, ID 83706

**Purchase Order**  
THIS NUMBER MUST APPEAR ON  
ALL INVOICES, BILLS OF LADING  
AND PACKAGES.  
**P.O. Nbr:**

**Vendor Code:** Exempt  
**Acct #:**  
**Vendor:** Exempt per I.C. § 19-2716A

**Date:** [REDACTED]

**Ship-To:** Josh Tewalt  
Director

Ship Via	FOB	Prepaid Freight	Requisitioner	Vendor Contact Exempt per I.C. § 19-2716A	
Buyer	Delivery Date TBD	Terms See Below	Mstr Agree #	Sub Object	PCA

Line	Qty	U/M	Item Code/Description	Unit Price	Amount	Tax
1	1		Pentobarbital 15 grams  Upon payment, Vendor agrees to maintain and store the items in accordance with all applicable regulations until IDOC takes possession of the items.  Vendor agrees to refund IDOC an amount up to \$50,000.00 if it fails to provide to IDOC the purchased items, in whole or in part.		50000.00	N
<b>Total</b>					<b>\$50,000.00</b>	

~~Vendor~~  
By using a mark (i.e. "X"), Vendor acknowledges said mark constitutes a valid signature for this Purchase Order.

IDOC Witness  
  
IDOC Witness

UNABLE TO GET DRUGS, IDOC DELAYED EXECUTION



The prison system's ability to purchase execution drugs came as a bit of a surprise.

Prisons in states across the U.S. that maintain active capital punishment have increasingly struggled to buy the drugs used to perform lethal injections. Prison officials have said manufacturers and other suppliers won't sell them drugs like pentobarbital, a potent sedative that can stop a person's breathing in higher doses, out of fear of being identified, leading to public backlash for assisting with an execution — a hotly contested national issue.

Unable to locate execution drugs despite past efforts, Idaho last year [passed a shield law](#) that prevents the release of certain records to the public to protect the identity of potential drug suppliers. Proponents said the goal of the law is to conceal the suppliers' information to encourage them to sell the drugs to the state.

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Feb 23, 2024

Prison officials still found themselves without the ability to acquire the drugs necessary for a lethal injection. Late last year, IDOC was [forced to postpone](#) the execution of another death row inmate after the agency could not purchase them. The occurrence led state lawmakers earlier this year to pass another law that [establishes a firing squad](#) as the backup execution method when lethal injection drugs are unavailable.

In a [legal filing in March](#), state officials again acknowledged the prison system still had not been able obtain the lethal drugs. And as recently as Oct. 10 — two days before Creech was served a death warrant — state officials once more affirmed in a legal filing that Idaho's prison system “does not have the present ability to carry out an execution via lethal injection or firing squad” while the shooting facility remains in development.

As a result of the shield law, it's unclear where prison officials found the drugs intended for Creech's execution. Also redacted from the execution drug order was the purchase date.

IDOC officials cited several public records exemptions related to executions for redacting the purchase date, including those covered in the shield law. The agency failed to provide the responsive records within a maximum of 10 business days, as required by the Idaho Public Records Act. Instead, IDOC staff took more than double that amount of time, at 23 business days.

In its eventual response, IDOC raised concerns that release of the information may jeopardize the state's ability to carry out an execution.



Former Rep. Greg Chaney, R-Caldwell, an attorney, sponsored Idaho's shield law for execution records that could identify the supplier of lethal injection drugs. Sarah A. Miller  
[smiller@idahostatesman.com](mailto:smiller@idahostatesman.com)

The redaction made former state Rep. Greg Chaney, a Caldwell-based attorney who sponsored the shield law, wonder about IDOC's rationale. The law appears to have worked as intended, he said, in that it helped IDOC obtain lethal injection drugs, but concealing the purchase date left him with questions.

“Exceptions to government transparency should be as narrow as possible,” Chaney said in a statement to the Statesman. “I’d be interested to know how its disclosure would lead to the identity of the supplier. If there isn’t a way that the withheld information could lead to the disclosure of the supplier, then it goes beyond the spirit of the legislation.”

### **QUESTIONS OVER USE OF COMPOUNDING PHARMACIES**

For Idaho’s most recent executions, prison officials resorted to covert tactics to conceal information from the public about where they bought execution drugs, and how much they paid, the [Statesman previously reported](#). In the middle of a yearslong legal battle over public records, which IDOC lost in 2021 and finally forced release of documents disclosing the information, the agency further tightened its rules around records exemptions for documents related to executions.

The records revealed that IDOC used confidential cash accounts to hide the execution drug purchases from two out-of-state compounding pharmacies with questionable safety records. Compounding pharmacies are custom drug producers that are less regulated because they’re not closely monitored by the U.S. Food and Drug Administration.

In 2012, state prison officials paid as much as \$15,000 in cash for pentobarbital, according to public records and past court depositions. The drugs, bought from the Union Avenue Compounding Pharmacy in Tacoma, Washington, were used in the lethal injection execution of convicted murderer Richard Leavitt in June 2012.

The year prior, prison officials paid as much as \$10,000 in cash to the University Compounding Pharmacy in Salt Lake City for pentobarbital, according to a sworn deposition by another of IDOC’s former deputy prison chiefs, [The Salt Lake Tribune reported](#). Those drugs were used to execute Paul Rhoades, a convicted triple-murderer, in November 2011.

Because of Idaho’s new shield law, the public is no longer entitled to know whether prison officials again purchased pentobarbital from a compounding pharmacy, rather than from a commercial drug manufacturer. The difference between the two

versions is considerable, with potentially significant consequences for the expiration of a drug like pentobarbital, said Dr. Jim Ruble, an attorney and longtime doctor of pharmacy who teaches law and ethics courses at the University of Utah's College of Pharmacy.

---

Compounded pentobarbital reaches its "beyond use date" as far out as 45 days, but as early as two days, based on several factors, including the conditions in which it's stored, Ruble told the Statesman by phone. However, a manufactured version — like that sold to hospitals — doesn't expire for up to four years, he said.

"Therein is the challenge with the transparency in all of this," Ruble said. "We don't have readily available to us the recipe, so to speak, or the formulation that is being utilized by compounding pharmacies, so we have to take it to some degree on faith or face value."

When either version reaches its shelf life, it begins to lose potency and essentially becomes toxic, he said. Visible crystallized particles begin to form in the liquid pentobarbital solution, which, if injected, can cause "undue suffering" from "excessive levels of pain," Ruble told the Statesman. If injected particles are large enough, they can cause internal bleeding in tissues, the lungs or other organs.





Idaho's death row in the J Block at the Idaho Maximum Security Institution near Kuna. The execution chamber for lethal injection executions take place in nearby F Block. *Courtesy Idaho Department of Correction*

Such treatment, including during the lethal injection of a prisoner, could be grounds for a legal challenge that the use of potentially expired execution drugs violates an inmate's rights against cruel and unusual punishment guaranteed under the Eighth Amendment of the U.S. Constitution.

In a statement after IDOC announced Creech's death warrant, his attorneys at the nonprofit Federal Defender Services of Idaho said they'd be exploring just that very kind of litigation.

"Given the shady pharmacies that the state has obtained the lethal drugs from for the past two Idaho executions, ... we remain highly concerned about the measures the state resorted to this time to find a drug supplier," Deborah A. Czuba, supervising attorney of the legal nonprofit's unit that oversees death penalty cases, said in a statement. "We will be doing everything we can to fight for Mr. Creech's life, including challenging the quality of the drugs and execution by lethal injection."

### **IDOC DISPUTES PARKING LOT PURCHASE**

Attorneys at the Federal Defender Services of Idaho alleged in a prior case representing Gerald Pizzuto, another death row inmate, that Tewalt, then a deputy chief of prisons, was among two Idaho prison officials who bought the execution drugs in Tacoma in an evening exchange in a Walmart parking lot. The

compounding pharmacy in Tacoma is located across the street from the city's only Walmart.



Josh Tewalt, director of the Idaho Department of Correction since December 2018.

Flight records, previously obtained by the Statesman from the Idaho Division of Aeronautics through a public records request, place Tewalt and then-IDOC prisons chief Kevin Kempf on a state-chartered flight back and forth from Tacoma in May 2012 at an estimated cost of about \$2,500. The Tacoma pharmacist acknowledged in a December 2021 statement to the Statesman the in-person delivery of pentobarbital to members of IDOC in May 2012.

In a statement to the Capital Sun since shared with the Statesman, IDOC officials denied the account of how they acquired the drugs. The agency called the legal nonprofit's accusation that they bought the drugs in a parking lot "absurd and false," in anticipation of additional media coverage tied to Creech's scheduled execution.

"Some of it will surely include a repetition of certain absurd and false allegations that were intended to shock and mislead, like the allegation that the chemicals used in prior executions were bought in a Walmart parking lot," read the statement from Jeff Ray, IDOC's spokesperson. "Department officials deny that allegation. The chemicals were procured in accordance with state and federal laws."

This story was originally published November 17, 2023, 4:00 AM.

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Kevin Fixler is an investigative reporter with the Idaho Statesman. He previously covered local government, environment and transportation at The Press Democrat in Santa Rosa, California, and the Summit Daily News in Breckenridge, Colorado. He holds degrees from the University of Denver and UC Berkeley's Graduate School of Journalism.

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Filed in Support of Plaintiff Thomas Eugene Creech's  
Memorandum in Support of Motion for Preliminary Injunction


# **Exhibit 24**

**Certificate of Analysis**




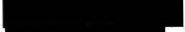

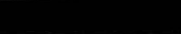


<b>Customer:</b> [REDACTED]	<b>Project:</b> [REDACTED]
<b>Contract:</b> [REDACTED]	<b>Document:</b> [REDACTED]
<b>Phase:</b> Commercial	<b>Report Date:</b> [REDACTED]
<b>Testing Site:</b> [REDACTED]	<b>LIR/DEV:</b> N/A
	<b>Raw Data:</b> N/A
<b>Sample:</b> Pentobarbital Sodium Injection, 50 mg/mL, 50 mL vial, USP	<b>Specification:</b> [REDACTED]
<b>Lot:</b> [REDACTED]	





Test	Method/ Date Tested	Acceptance Criteria	Result
Appearance	TP25481.20 [REDACTED]	Clear colorless solution essentially free from visible particulate matter in a clear glass vial.	Conforms Clear colorless solution essentially free from visible particulate matter in a clear glass vial
Color of Solution	TP69530.02 [REDACTED]	The solution is not more intensely colored than reference solution B9.	Conforms The solution is not more intensely colored than reference solution B9
Identification by Retention Time	TP69477.04 [REDACTED]	The retention time of the Pentobarbital peak in the sample injection should match the average retention time of the Pentobarbital peak in the bracketing standard injections within 2.0 %.	Conforms
Identification by UV-Spectrum (PDA)	TP69477.04 [REDACTED]	The UV spectrum of the Pentobarbital peak in the sample injection should match the UV spectrum of the Pentobarbital peak in the bracketing standard injections.	Conforms
Assay by HPLC (Pentobarbital Sodium)	TP69477.04 [REDACTED]	92.0 - 108.0% LC	Conforms 99.9%
pH	TP05627.26 [REDACTED]	9.0 - 10.0	Conforms 9.6
Related Compounds by HPLC (percent w/w of Pentobarbital Sodium label claim)	TP69478.06 [REDACTED]	Malonuric Acid Derivative ~ RRT 0.7: NMT 0.5% w/w Individual Unknown Impurities: NMT 0.2 % w/w Total Impurities: NMT 1.0 % w/w	Conforms <0.10% w/w <0.10% w/w <0.10% w/w
Ethanol Content	TP69479.05 [REDACTED]	8.5 – 11.5% v/v	Conforms 9.5% v/v
Propylene Glycol Content	TP69479.05 [REDACTED]	36.0 - 44.0% v/v	Conforms 39.0% v/v

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## Certificate of Analysis

<b>Customer:</b> 	<b>Project:</b> 
<b>Contract:</b> 	<b>Document:</b> 
<b>Phase:</b> Commercial	<b>Report Date:</b> 
<b>Testing Site:</b> 	<b>LIR/DEV:</b> N/A
	<b>Raw Data:</b> N/A
<b>Sample:</b> Pentobarbital Sodium Injection, 50 mg/mL, 50 mL vial, USP	<b>Specification:</b> 
<b>Lot:</b> 	

Test	Method/ Date Tested	Acceptance Criteria	Result
Volume in Container	TP07351.13 cUSP/NF <697> 	NLT 50 mL	Conforms 52 mL
Particulate Matter	TP00036.31 	≥10 μm: NMT 6,000 per container ≥25 μm: NMT 600 per container	Conforms 103 particles 7 particles
Sterility	TP69529.00 	Meets the cUSP <71> Sterility requirements.	Conforms
Bacterial Endotoxins	TP69528.00 	NMT 0.7 EU/mg	Conforms Beg: <0.08 EU/mg Mid: <0.08 EU/mg End: <0.08 EU/mg

**Residual Solvent Information:** The materials used to manufacture Pentobarbital Sodium Injection are found to meet requirements of USP <467> Option 1 with the exception of ethanol. Ethanol is routinely tested and controlled by the finished product specification and test results must comply with the limit established in the specification.

**Elemental Impurities Information:** Elemental impurity testing for Pentobarbital Sodium Injection (50 mg/mL, 50 mL vial) met the requirements of USP <232> and ICH Q3D Option 3 parenteral route of administration. Elemental impurities have been shown to not exceed 30% of the Option 3 elemental impurities limits. No further elemental impurity test requirements.



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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,

Plaintiff,

v.

JOSH TEWALT; Director, Idaho Department of Correction; TIM RICHARDSON, Warden, Idaho Maximum Security Institution; CHAD PAGE, Chief, Division of Prisons, Idaho Department of Correction, in his official capacity; and UNKNOWN EMPLOYEES, AGENTS, OR CONTRACTORS OF THE IDAHO DEPARTMENT OF CORRECTION,

Defendants.

Case No. 1:20-cv-00114-AKB

**MEMORANDUM DECISION AND ORDER**

**INTRODUCTION**

Pending before the Court are Plaintiff's Motion for Leave to Amend Complaint (Dkt. 86); Defendants' Motion to Take Judicial Notice (Dkt. 104); and Defendants' Motion to Dismiss Claims I, VI, and VII (Dkt. 105). On January 12, 2024, the Court heard oral argument on these motions. For the reasons set forth below, the Court denies Defendants' Motion to Take Judicial Notice and grants in part and denies in part both Plaintiff's Motion for Leave to Amend Complaint and Defendants' Motion to Dismiss Claims I, VI, and VII.

**BACKGROUND**

Plaintiff Thomas Eugene Creech is a death-row inmate in the custody of the Idaho Department of Correction ("IDOC"). He originally filed this civil rights action under 42 U.S.C. § 1983 in March 2020, raised numerous claims challenging the State's execution protocol, and

then subsequently filed an amended complaint.<sup>1</sup> *Pizzuto v. Little*, No. 1:20-cv-00114-DCN, 2020 WL 6747974, at \*1 (D. Idaho Nov. 17, 2020). Defendants moved to dismiss Creech’s amended complaint, and the district court granted the motion, concluding Creech’s claims were not ripe for review because “the ultimate question of whether [Creech] will even be executed remains an undetermined and open question, rendering the claims in this case speculative and abstract.” *Id.* at \*4.

On appeal, the Ninth Circuit concluded that some of Creech’s claims were moot, held several others were ripe, reversed the district court’s decision dismissing the case, and remanded for Creech to amend his complaint. *Pizzuto v. Tewalt*, 997 F.3d 893, 905, 908 (9th Cir. 2021). On remand, Creech filed an amended complaint, but the district court sua sponte dismissed his amended claims as futile and later denied Creech’s motion for reconsideration of that dismissal. *Creech v. Tewalt* (“*Creech I*”), No. 1:20-cv-00114-DCN, 2022 WL 60602, at \*3-4 (D. Idaho Jan. 5, 2022).

On the second appeal, the Ninth Circuit affirmed the district court’s decision in part, vacated it in part, and remanded the case once again. *Creech v. Tewalt* (“*Creech II*”), 84 F.4th 777, 783 (9th Cir. 2023). In doing so, the Ninth Circuit noted three developments during the second appeal’s pendency that potentially impact Creech’s claims: First, the Idaho legislature enacted a new statute providing that certain execution-related information shall be confidential, Idaho Code § 19-2716A. *Creech II*, 84 F.4th at 786. Second, the legislature amended another statute to authorize a firing squad as an alternative method to lethal injection, I.C. § 19-2716. *Creech II*, 84 F.4th at 787. Third, IDOC had twice scheduled another inmate’s execution and

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<sup>1</sup> Originally, Gerald Ross Pizzuto, Jr., who is also an Idaho death-row inmate, joined Creech in this action. He is, however, no longer a party to this case but is proceeding separately.

“suspended” the execution protocols in connection with those planned executions. *Id.* The Ninth Circuit remanded to the district court with instructions to grant Creech leave to amend or supplement certain claims and to allow him to seek leave to amend his complaint in other respects under Rule 15 of the Federal Rules of Civil Procedure. *Creech II*, 84 F.4th at 797.

The mandate on the Ninth Circuit’s decision issued on October 13, 2023.<sup>2</sup> On October 16, a state district court issued a death warrant,<sup>3</sup> and Creech filed his motion to amend his complaint in this case on October 17. (Dkt. 86). In his proposed second amended complaint, Creech asserts eight proposed claims for relief, including both those claims the Ninth Circuit instructed this Court to grant Creech leave to amend and other new claims. (Dkt. 86-1). According to Creech, his proposed Claims One, Six, Seven, and Eight are the realleged claims the Ninth Circuit instructed this Court to grant him leave to amend; and Claims Two, Three, Four, and Five are newly proposed claims, which the Ninth Circuit ruled Creech may seek leave to amend under Rule 15.

Defendants oppose Creech’s motion to amend to assert Claims Two, Three, Four, and Five, arguing these newly alleged claims are futile.<sup>4</sup> (Dkt. 103 at pp. 7-19). Further, they assert Claim Eight is one which the Ninth Circuit has already rejected. (*Id.* at p. 19). Defendants, however, acknowledge the Ninth Circuit instructed this Court to grant Creech leave to reallege Claims One, Six, and Seven. For this reason, they do not oppose Creech’s motion to amend to assert these

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<sup>2</sup> After the Ninth Circuit’s mandate issued, this case was reassigned to the undersigned judge.

<sup>3</sup> The death warrant scheduled Creech’s execution for November 8, 2023. On October 19, however, the state district court stayed the execution pending a commutation hearing before the Idaho Commissions of Pardons and Parole. That hearing occurred on January 19, 2024.

<sup>4</sup> Although the legal standard for amendment under Rule 15(a) of the Federal Rules of Civil Procedure includes consideration of undue delay, bad faith, repeated failure to cure, undue prejudice, and futility, Defendants’ opposition to Creech’s motion to amend focuses primarily on futility. *Sonoma Cnty. Ass’n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (noting standard).

claims; instead, they move to dismiss them, arguing that Claims One and Seven fail to state a claim for relief (Dkt. 105-1 at pp. 6-12, 14-19) and that Creech lacks standing to assert Claim Six. (*Id.* at pp. 4-5).

## LEGAL STANDARDS

### 1. Standards Governing Amendment of Claims

#### a. Rule 15(a)

Rule 15 of the Federal Rules of Civil Procedure provides a trial court should grant leave to amend freely when justice so requires. Fed. R. Civ. P. 15(a)(2). The policy favoring leave to amend is to be applied with “extreme liberality.” *Sonoma Cnty. Ass’n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). Federal policy strongly favors determination of cases on their merits. Whether to grant or deny a motion to amend is within the district court’s discretion, but “outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Courts may decline to grant leave to amend only if there is strong evidence of “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.” *Sonoma County*, 708 F.3d at 1117 (quoting *Foman*, 371 U.S. at 182). “[T]he consideration of prejudice to the opposing party carries the greatest weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.” *Eminence Capital, LLC*, 316



F.3d at 1052. “The party opposing leave to amend bears the burden of showing prejudice.” *Serpa v. SBC Telecommunications, Inc.*, 318 F. Supp. 2d 865, 870 (N.D. Cal. 2004).

**b. Rule 12(b)**

Dismissal is appropriate under Rule 12(b)(6) if the complaint fails to state a claim on which relief can be granted because it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim’s implausibility “can be based on [either] the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

A complaint fails to state a claim for relief if the factual assertions in the complaint are insufficient for the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* In other words, a complaint need not contain “detailed factual allegations,” but it must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* If the alleged facts are “merely consistent with a defendant’s liability,” the complaint has not stated a plausible claim for relief. *Id.* (internal quotation omitted).

In resolving a Rule 12(b)(6) motion, the court generally should not consider materials outside the complaint. *See Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997). The court may consider, however, any attachments to the complaint and documents to which the complaint refers (even if not appended) if the authenticity of such a document is not in question. *Id.* at 622-23. Further, a court may take judicial notice of a fact “not subject to reasonable dispute” if the fact:



“(1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b), including, for example, “records of state agencies and other undisputed matters of public record.” *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004).

Finally, a trial court must dismiss a claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure if the plaintiff lacks standing to assert the claim. Absent standing, the court lacks subject-matter jurisdiction. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

## ANALYSIS

### 1. Failure to Exhaust Administrative Remedies

As an initial matter, the Court addresses Defendants’ argument that all of Creech’s claims should be dismissed because he failed to exhaust his administrative remedies under IDOC’s grievance procedure, IDOC Divisions of Prisons Standard Operating Procedure 316.02.01.001 (“SOP 316”). (*See* Dkt. 103 at p. 5 (“Plaintiff has not made any effort to resolve the substance of any of his proposed new claims.”); Dkt. 105-1 at p. 4 (“Plaintiff has not exhausted his administrative remedies as to Claims [One], [Six], or [Seven].”); Dkt. 103-1 (explaining SOP 316 requires filing of informal concern, formal grievance, and appeal of grievance response)).

The Prisoner Litigation Reform Act of 1994 (“PLRA”) requires a prisoner to exhaust all available administrative remedies within the prison system before he can assert claims in a civil rights lawsuit challenging the conditions of his confinement. 42 U.S.C. § 1997e(a). The Court has previously ruled the exhaustion requirement, which applies to challenges to “prison conditions,” also applies to method-of-execution challenges. *Creech v. Reinke*, No. 1:12-cv-00173-EJL, 2012 WL 1995085, at \*9 (D. Idaho June 4, 2012) (unpublished).

The failure to exhaust under the PLRA is an affirmative defense, however, which the defendant must plead and prove. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc). For that reason, a defendant may assert a failure to exhaust in a Rule 12(b)(6) motion to dismiss only if the prisoner's failure to exhaust is clear from the face of the complaint and any public records subject to judicial notice. *Albino*, 747 F.3d at 1169; *see also id.* at 1166 (“In the rare event that a failure to exhaust is clear on the face of the complaint, the defendant may move for dismissal under Rule 12(b)(6).”). Otherwise, “defendants must produce evidence proving failure to exhaust in order to carry their burden.” *Albino*, 747 F. 3d at 1166.

In this case, Creech's failure to exhaust is not clear from the face of his proposed amended complaint. Creech does not and is not required to allege he exhausted his administrative remedies. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (ruling that “failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints”). Further, the information the parties provide on the issue does not make Creech's failure to exhaust “clear” but rather raises factual issues. For example, Creech apparently did submit a “concern” under SOP 316 about the use of pentobarbital violating his Eighth Amendment rights (Dkt. 103-7); the IDOC “grievance coordinator” attests Creech had “not yet [as of November 9, 2023] submitted a grievance on this matter” (Dkt. 103-1 at ¶ 15); but Creech's counsel attests that on October 30, Creech signed a grievance form which counsel gave to an IDOC guard who agreed to “accept and process the grievance form.” (Dkt. 116-1 at ¶ 5). This conflicting information raises factual questions about whether Creech has already exhausted his administrative remedies regarding Claim One, and the Court declines to resolve the issue at this juncture before Creech has filed a second amended complaint.

Further, Creech argues he is not required to exhaust administrative remedies regarding Claim Two, which asserts a procedural due process claim for lack of information regarding IDOC's execution protocol. In support, Creech states IDOC informed his counsel it would not provide him any further executed-related information. (Dkt. 114 at p. 13) ("IDOC officials were approached directly by Mr. Creech's counsel, engaged with them on their requests, and told them what execution-related information would and would not be made available."). For this reason, Creech argues any grievance would be futile. Depending on the nature of these communications, the exhaustion requirement may be excused with regard to Claim Two. *See Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (holding exhaustion requirement is excused if plaintiff has "been reliably informed by an administrator that no remedies are available").

Likewise, the requirement may also be excused with respect to Creech's other claims which assert a right to execution-related information. (*See* Dkt. 86-1 at ¶¶ 467-70, 531-32). Finally, Creech's remaining claims are statutory challenges to legislative enactments. No IDOC administrative procedure is available to address these challenges. *See Ross v. Blake*, 578 U.S. 632, 643 (2016) (ruling inmate not required to exhaust administrative remedies where procedure is unavailable).

To the extent Defendants have an affirmative defense based on Creech's failure to exhaust his administrative remedies, the Court declines to rule on that defense at this time and reserves any ruling until the parties have fully developed the record on the issue. Resolution of the issue, however, should be a priority for the parties. *Albino*, 747 F.3d at 1171 (noting "disputed factual questions relevant to exhaustion should be decided at the very beginning of the litigation").

## 2. Eighth Amendment Violations Alleged in Claims One and Eight

Creech has previously attempted to allege an Eighth Amendment violation related to his execution. By way of background, Creech previously alleged that IDOC's refusal to provide him any meaningful information about his execution creates a substantial risk he will be subjected to a severely painful execution. *See Creech II*, 84 F.4th at 796 (quoting Creech's prior "Claim Nine"). Addressing this claim, the Ninth Circuit noted that Creech failed to "identify the legal framework" for this claim and that it "appears to be most analogous to an Eighth Amendment method-of-execution claim," which requires a plaintiff to establish the execution method "creates 'a substantial risk of severe pain.'" *Id.* (quoting *Glossip v. Gross*, 576 U.S. 863, 882 (2015)).

The Ninth Circuit ruled that "given Creech's health conditions and medications," "Creech should be afforded the opportunity to amend this claim." *Id.* Relying on this ruling, Creech realleges two separate Eighth Amendment claims on remand: (1) Claim One alleges "use of pentobarbital creates a substantial risk of serious pain and suffering because of his health conditions" in violation of the Eighth Amendment (Dkt. 86-1 at ¶¶ 320-418); and (2) Claim Eight alleges, again, that the "deprivation of information creates a substantial risk [Creech] will be subjected to a severely painful execution" in violation of the Eighth Amendment. (*Id.* at ¶¶ 530-38).

### a. Claim Eight—"Deprivation of Information"

Defendants opposed Creech's amendment to add Claim Eight, arguing "the Ninth Circuit has already rejected [Creech's] claim that the Eighth Amendment includes a right to information." (Dkt. 103 at p. 19). In reply, Creech asserts the Ninth Circuit's ruling allows him to assert this claim; "the propriety of allowing the [inclusion of the] revamped claim has therefore already been

conclusively decided in [Creech's] favor"; and "he does not discuss it further." (Dkt. 111 at p. 2 n.1). This Court disagrees with Creech's reading of the Ninth Circuit's ruling.

In its opinion, the Ninth Circuit suggested Creech allege a method-of-execution Eighth Amendment claim, and at the same time, it questioned the validity of Creech's prior Eighth Amendment claim based on a lack of "any meaningful information." *Creech II*, 84 F.3d at 796. In particular, the Ninth Circuit noted Creech fails to identify a legal framework for such a claim. *Id.* On remand, instead of alleging a lack of meaningful information violated his Eighth Amendment right, Creech now alleges a "deprivation of information" violates his Eighth Amendment right. This claim, however, is not appreciably different than the one the Ninth Circuit questioned. Furthermore, Creech once again fails to identify any legal framework by which to analyze the claim. For example, Creech does not offer any citation to legal authority, any applicable standard, or any plausible elements for such a claim.

The Court declines to construct a legal framework to address Creech's purported Eighth Amendment "deprivation of information" claim. Because Creech failed to cure the deficiencies with this claim by identifying a legal framework for its analysis, the Court denies Creech's motion to amend to assert Claim Eight. *See Balistreri*, 901 F.2d at 699 (noting claim may be dismissed for "lack of a cognizable legal theory"); *Sonoma County*, 708 F.3d at 1117 (identifying repeated failure to cure deficiencies as factor in denying amendment).

**b. Claim One—"Substantial Risk of Serious Pain and Suffering"**

The Court concludes, however, that Creech's Claim One, which alleges (as the Ninth Circuit suggested) that the execution protocol creates "a substantial risk of serious pain and suffering because of his health conditions and medical history," does state a viable claim for relief under the Eighth Amendment. (*See* Dkt. 86-1 at ¶ 321) (alleging risk). Creech alleges in Claim

One that, because of his medical condition, a protocol using pentobarbital as applied to him is unconstitutional. In support of Claim One, Creech alleges numerous health issues from which he suffers including, for example, type II diabetes, mixed hyperlipidemia, edema, an abdominal vascular aneurysm, atherosclerotic vascular disease, severe coronary artery disease, mild cerebral white matter disease, and an organic brain disorder. (*Id.* at ¶¶ 322-32).

Further, Creech alleges these medical conditions “create a substantial risk of serious harm at an execution involving pentobarbital.” (*Id.* at ¶ 333). Specifically, he alleges, “a pentobarbital execution” would “likely” induce “an acute heart attack”; pentobarbital’s sedating effects “are likely to occur minutes after the heart attack” has already begun; and as a result, Creech would suffer “substantial physical suffering, including chest pain, the feeling of crushing weight, and difficulty breathing” and “psychological discomfort, including a feeling of impending doom, anxiety, or fear.” (*Id.* at ¶¶ 339-42). Creech alleges he “would experience cruel and unusual pain and suffering from a heart attack” for a “significant amount of time before the pentobarbital completely sedates him.” (*Id.* at ¶ 344).

“The Eighth Amendment does not guarantee a prisoner a painless death.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). Rather, the Eighth Amendment forbids forms of punishment that intensify the death sentence with a cruel, superaddition of terror, pain, or disgrace. *Id.* To successfully challenge an execution method under the Eighth Amendment, the plaintiff must establish two factors. First, the method presents a risk that is sure or very likely to cause serious illness and needless suffering and to give rise to sufficiently imminent dangers. *Glossip v. Gross*, 576 U.S. 863, 877 (2025). In other words, there must be an objectively intolerable, substantial risk of serious harm. *Id.*

Second, a prisoner must show that “a feasible and readily implemented alternative method of execution would significantly reduce a substantial risk of severe pain” and that “the State has refused to adopt [the alternative method] without a legitimate penological reason.” *Bucklew*, 139 S. Ct. at 1125. “The Eighth Amendment does not come into play unless the risk of pain associated with the State’s method is ‘substantial when compared to a known and available alternative.’” *Id.* (quoting *Glossip*, 135 S. Ct. at 2738). “[I]dentifying an available alternative is ‘a requirement of all Eighth Amendment method-of-execution claims,’ alleging cruel pain.” *Id.* at 1126 (quoting *Glossip*, 135 S. Ct. at 2731) (emphasis added).

In this case, Defendants argue Creech has failed to allege “IDOC’s execution protocol . . . creates a substantial risk of serious imminent harm beyond the pain attendant to death by execution.” (Dkt. 105-1 at p. 6). In support, Defendants characterize Creech’s allegations as raising only “a speculative risk” of “some increase in pain during the execution process,” asserting pain “consistent with the pain associated with death,” failing to allege “superadded pain” (*id.* at p. 9), and alleging “a near instantaneous heart attack during his execution.” (Dkt. 115 at p. 2).

Defendants’ characterization of Creech’s allegations, however, raise factual issues which are inappropriate for consideration under Rule 12(b)(6). Although Creech’s allegations do not directly parrot the case law setting forth the standard for establishing an execution method as applied to him is unconstitutional, the Court finds Creech has plausibly alleged an Eighth Amendment method-of-execution claim. *Creech II*, 84 F.4th at 796; *cf. In re Federal Bureau of Prisons’ Execution Protocol Cases*, 980 F.3d 123, 132-33 (D.C. Dist. 2020) (concluding plaintiffs plausibly alleged Eighth Amendment claim by alleging one-drug pentobarbital execution method causes “flash pulmonary edema”); *Johnson v. Lombardi*, No. 2:15-cv-4237-DGK, 2015 WL

6501083, at \*1, 3 (W.D. Mo. Oct. 27, 2015) (noting inmate suffering from “atypical parasagittal meningioma brain tumor” would suffer irreparable harm if executed with pentobarbital).

Defendants also argue Creech has failed to allege “an alternative to lethal injection using pentobarbital that he would not challenge as unconstitutional.” (Dkt. 105-1 at p. 11). Indeed, Creech attempts to dodge this issue by alleging his counsel has an ethical duty of loyalty not to identify an alternative execution method. (Dkt. 86-1 at ¶¶ 413-17; Dkt. 114 at p. 7). Nevertheless, as Creech argues, one of the challenges of identifying an alternative execution method in this case is that IDOC has not disclosed to Creech the exact method of lethal injection it certified as available for his execution. (*See* Dkt. 86-3 at p. 8) (stating that, although “facing an imminent execution date,” Creech “has been told nothing by IDOC about what drug it will use”); (*see also* Dkt. 86-1 at ¶¶ 424-26) (alleging IDOC has not identified which of “four separate options” for lethal injection it selected for Creech’s execution but told his counsel, “it [was] ‘focusing’ on obtaining pentobarbital for a single-drug protocol, without ruling out other options”).

Although Creech did not allege an alternative execution method per se, he did allege alternative manners of executing him by lethal injection. Specifically, he alleges that “if the State relies on shady offshore compounding pharmacies to procure its lethal injection chemicals, it could simply not do so”; “it could employ an anesthesiologist to monitor the execution”; it could establish a direct sight line between the medical team and [Creech]”; and “it could allow the medical team to be present in the execution chamber so that they can react quickly should complications arise.” (Dkt 86-1 at ¶ 412). Creech alleges that “removal of these failings could conceivably remove the risk of an Eighth Amendment violation occurring in [his] execution.” (*Id.*). The Court finds that these allegations satisfy the pleading requirement that Creech allege an alternative execution method, particularly because he is apparently being forced to guess about the



exact method of lethal injection IDOC intends to use. Accordingly, the Court grants Creech's motion to amend to assert Claim One and denies Defendants' motion to dismiss this claim for failure to state a claim.

### **3. Due Process Violations Alleged in Claims Two, Three, and Seven**

Creech proposes the amendment of three claims which allege due process violations under the Fifth and Fourteenth Amendments—Claims Two, Three, and Seven. Two of these claims—Claims Two and Seven—allege a lack of execution-related information. The Ninth Circuit previously addressed Creech's claim regarding Defendants' "failure to provide the execution-related information." *Creech II*, 84 F.4th at 793 (addressing prior Claim Four). In that claim, Creech alleged a lack of information about IDOC's execution procedure precluded the courts from meaningfully reviewing the constitutionality of that procedure. *Id.*

Addressing Creech's prior procedural due process claim, the Ninth Circuit acknowledged that other circuits, including the Fifth, Sixth, Eighth, and Eleventh Circuits, "have rejected due process claims to execution-related information." *Id.* Regardless, the Ninth Circuit ruled it had "left open the possibility" inmates may assert a procedural due process right to execution-related information, "when they would otherwise be denied the opportunity to have an Eighth Amendment method-of-execution challenge heard at a meaningful time and in a meaningful manner." *Id.* Contemplating whether Creech was being denied an opportunity to meaningfully assert an Eighth Amendment method-of-execution challenge, the Ninth Circuit noted that IDOC's execution protocol did "not identify the drug or drugs to be used in a particular execution" and that IDOC had twice suspended its protocol after scheduling an execution. *Id.* Based on these circumstances and the enactment of I.C. §§ 19-2716 and 19-2716A, the Ninth Circuit concluded Creech should

be allowed to amend his procedural due process claim. *Creech II*, 84 F.4th at 793-94; *see also id.* at 786-87 (noting developments during appeal).

**a. Claim Seven Alleging Deprivation of Accurate Information**

Defendants move to dismiss Creech’s Claim Seven, which Defendants characterize as Creech’s reassertion of his prior procedural due process claim that the Ninth Circuit ruled he could reallege. Creech’s Claim Seven alleges the State violates his due process rights by refusing to provide him “with information that would enable him to determine how the State intends to execute him.” (Dkt. 86-1 at ¶ 469). In support, Creech relies on various examples of IDOC’s alleged obfuscation, including IDOC’s prior suspension of SOP 135 related to another scheduled execution and its refusal to provide any information about drug testing. (Dkt. 86-1 at ¶¶ 483-86, 493-501). Creech specifically challenges the constitutionality of I.C. § 19-2716A, which prohibits the disclosure of the identity of “[a]ny 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)(b). (*See* Dkt. 86-1 at ¶ 499) (alleging I.C. § 19-2716A violates due process).

Challenging Claim Seven, Defendants do not directly address Creech’s challenge to I.C. § 19-2716A. Instead, they argue that “other circuits have routinely rejected similar due process claims”; “the Ninth Circuit has previously rejected just such a claim” in *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995); and this case is distinguishable from *First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069 (9th Cir. 2019). (Dkt. 105-1 at pp. 14-18). The problem with Defendants’ argument and citation to these authorities, however, is that the Ninth Circuit was aware of and cited to these same authorities when it ruled, nonetheless, that it has “left open the

possibility” of a procedural due process claim for failure to provide “execution-related information.” *Creech II*, 84 F.4th at 793 (citing other circuit authorities rejecting claim and relying on *First Amend. Coal.*, 938 F.3d at 1080, to conclude claim is possible); *see also Creech II*, 84 F.4th at 792 n.6 (citing *McKenzie*, 57 F.3d at 1461). Obviously, the Ninth Circuit did not read these authorities as precluding a procedural due process claim for failure to provide execution-related information.

The clear import of the Ninth Circuit’s decision addressing Creech’s previous procedural due process claim is that Creech could allege such a claim if the lack of execution-related information “rais[ed] some doubts about whether [he] will be able to have an Eighth Amendment method-of-execution challenge heard at a meaningful time and in a meaningful manner.” *Creech II*, 84 F.4th at 793. Creech’s allegations in Claim Seven raise those doubts. Specifically, Creech alleges he has been left to guess at IDOC’s intended method of execution scheduled by the October 2023 death warrant, i.e., whether IDOC intended to use only pentobarbital or some other drug or combination of drugs. Further, now that the legislature has approved a firing squad as an alternative to lethal injection if it is unavailable, I.C. § 19-2716A, Creech could conceivably be executed by firing squad (as Defendants’ counsel acknowledged during oral argument) for which there is apparently no protocol presently. For these reasons, the Court grants Creech’s motion to amend to assert Claim Seven and denies Defendants’ motion to dismiss the claim.

**b. Claim Two Alleging Lack of Valid Execution Protocol**

Like Creech’s Claim Seven, his proposed Claim Two alleges a procedural due process violation based on the lack of execution-related information, i.e., “lack of a valid execution protocol.” (Dkt. 86-1 at p. 56). In support of this claim, Creech alleges that the “now-outdated [protocol SOP 135] does not govern [his] . . . execution”; “[n]o execution protocol yet exists which

can validly govern [his] method of execution”; and the “now-outdated protocol does not identify a recipe for executions.” (Dkt. 86-1 at ¶¶ 421, 423, 425). Further, he alleges that “without notice of the procedures to be used in his execution, [he] will be deprived of his life without being able to adequately challenge the constitutionality of the procedures.” (*Id.* at ¶ 429).

Creech premises his allegation that SOP 135 (which was last revised on March 30, 2021) is “outdated” on the fact the legislature has since amended I.C. § 19-2716 in July 2023 to provide for execution by lethal injection or, alternatively, by firing squad if lethal injection is not “available.” Defendants, however, dispute Creech’s assertion that SOP 135 is outdated as “false” and assert SOP 135 “will continue in full effect unless IDOC adopts a new version.” (Dkt. 103 at pp. 10-11). Further, they argue SOP 135 “satisfies constitutional safeguards.”

In support of this latter assertion, Defendants argue courts have previously found SOP 135 meets constitutional standards, citing *Rhoades v. Reinke*, 671 F.3d 856 (9th Cir. 2011), and *Creech v. Reinke* (“*Creech III*”), No. 1:12-cv-00173-EJL, 2012 WL 1995085 (D. Idaho June 4, 2012). These cases, however, address different versions of SOP 135. *Creech III*, 2012 WL 1995085, \*16 (addressing protocol amended January 2012 and noting *Rhoades* addressed 2011 protocol). Further, the conclusions in *Rhoades* and *Creech III* that prior versions of SOP 135 were constitutional were based on additional evidence regarding how IDOC would implement SOP 135. In *Rhoades*, the Ninth Circuit affirmed the district court’s conclusion SOP 135 met the constitutional safeguards after considering the affidavit and testimony of Jeff Zmuda, the Deputy Chief of the Bureau of Prisons charged with implementing SOP 135’s procedures. *Rhoades*, 671 F.3d at 860; *see also id.* at 861 (noting district court correctly concluded SOP 135 protocol “as it will be implemented” contained requisite safeguards). Likewise, in *Creech III*, the district court considered Zmuda’s supplemental affidavit, and the Ninth Circuit concluded “the supplemental

evidentiary record” resolved any arguments about “the risk of harm.” 2012 WL 1995085, at \*13, 16.

Because the decisions in *Rhoades* and *Creech III* addressed different versions of SOP 135 and considered supplemental evidence regarding the procedure’s implementation, they are inapposite in this case. Defendants neither articulate how the 2021 version of SOP 135 is the same as prior versions nor explain why supplemental evidence is now unnecessary to establish the 2021 version of SOP 135 satisfies constitutional standards. Additionally, *Creech* is correct that no SOP addresses the protocol for execution by firing squad in the event the Director concludes lethal injection is not “available”—which is a conceivably possible future scenario.

Finally, the Court notes the 2021 version of SOP 135 provides that “this SOP is subject to revision at the discretion of the Director of the IDOC. The Director may revise, suspend, or rescind any procedural steps, at any time, at the Director’s sole discretion.” Unlike *Creech III*, there is no evidence in this case IDOC “will not exercise its discretion to depart” from the protocol “at any time,” including after a death warrant issues. *See Creech III*, 2012 WL 1995085, at \*16 (noting IDOC notified inmate “it will not exercise its discretion to depart from the 2012 Protocol”). For these reasons, the Court grants *Creech*’s motion to amend his complaint to assert Claim Two.

**c. Claim Three**

*Creech*’s proposed Claim Three also purports to assert a due process violation because I.C. § 19-2716 “permits state officials to act with unfettered discretion.” (Dkt. 86-1 at p. 59). In support of this claim, *Creech* alleges the Director has “sole and unqualified discretion in choosing which [execution] method to employ and what procedures to use during the execution,” and as a result, I.C. § 19-2716 violates his due process rights. (Dkt. 86-1 at ¶ 437). In support of his motion to amend his complaint to add Claim Three, *Creech* argues, “That kind of sweeping authority raises

all manner of constitutional questions, none of which have ever been resolved by binding precedent” and “deserve to be fully litigated, which is all that amendment guarantees.” (Dkt. 86-3 at p. 17). Creech, however, offers no legal framework for analyzing a due process claim based on a state official’s overly broad discretion. For example, he does not cite any legal authority addressing such a claim; he does not offer a standard for reviewing it; and he does not state what the elements of the claim are. The Court, meanwhile, has been unable to identify any authority providing for a due process claim based on a state official’s purportedly overbroad discretion. Because Creech’s Claim Three fails to state a claim for relief, the Court denies Creech’s motion to amend his complaint to assert Claim Three. This denial, however, is without prejudice. If Creech can identify a plausible legal framework, he may be able to reallege the claim.

#### **4. Violation of Separation of Powers Alleged in Claim Four**

In proposed Claim Four, Creech alleges I.C. § 19-2716 violates the separation of powers clause of the Idaho Constitution. *See* Idaho Constitution, art. II, § 1 (articulating distribution of powers). In support, Creech alleges that “the Idaho legislature may not delegate its lawmaking powers to another body”; “an impermissible delegation of authority occurs when the legislature grants ‘unbridled’ authority to the separate body”; and I.C. § 19-2716 “gives unbridled, unregulated, and uncontrolled discretion” to the IDOC Director by allowing him “to determine what method(s) of execution are available.” (Dkt. 86-1 at ¶¶ 439-43).

The Idaho Supreme Court has previously addressed a similar argument challenging the prior version of I.C. § 19-2716 in *State v. Osborn*, 631 P.2d 187 (Idaho 1981). At that time, I.C. § 19-2716 provided that “the punishment of death must be inflicted by the intravenous injection of a substance or substances in a lethal quantity sufficient to cause death until the defendant is dead. The director of the department of corrections shall determine the substance or substances to

be used and the procedures to be used in any execution.” Osborn, a death-row inmate, challenged this statute, arguing the legislature improperly delegated the power to inflict the death penalty to the IDOC under I.C. § 19-2716. *Osborn*, 631 P.2d at 201. The Idaho Supreme Court rejected Osborn’s argument, reasoning that “the existence of an area for exercise of discretion by an administrative officer under delegation of authority does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application.” *Id.* (quoting *Ex parte Granviel*, 561 S.W.2d 503, 514-15 (Tex. Crim. App. 1978)); *see also Creech II*, 84 F.4th at 795-96 (relying on *Osborn* and rejecting Creech’s previous separation of powers claim).

Creech does not directly address *Osborn* but rather cursorily argues I.C. § 19-2716 is a “newly-enacted statute raising new constitutional issues based on new statutory language, involving a new method of execution, a new ‘availability’ scheme that was not present in the old law,” and as a result, Claim Four is not “identical” to his prior claim rejected by the Ninth Circuit under *Osborn*. (Dkt. 111 at p. 5). Although the legislature has amended I.C. § 19-2716 since the Ninth Circuit rejected Creech’s prior separation of powers claim, the amendment does not render *Osborn* inapplicable.

The newly amended I.C. § 19-2716 does not grant the IDOC Director any greater discretion than it did previously. Under the prior version of the statute, the legislature granted the Director the authority to determine the substances and procedures to be used. Subsumed within that discretion was the authority to determine whether the substances to be used were available. The amendment to I.C. § 19-2716 now requires the Director to certify whether lethal injection—i.e., the substances for that method—is “available.” The new requirement of certification does not grant the Director greater discretion than he previously had. Further, this Court finds that, as with

the prior version of I.C. § 19-2716, the Director’s discretion under the newly amended I.C. § 19-2716 can be capable of reasonable application with appropriate protocols. Because *Osborn* remains applicable to the newly amended I.C. § 19-2716, Claim Four is futile, and the Court denies Creech’s motion to amend to assert Claim Four.

#### **5. Equal Protection Violation Alleged in Claim Five**

In Claim Five, Creech alleges I.C. § 19-2716 violates his equal protection rights. In support, he alleges he has “a fundamental right to be free of cruel and unusual punishment”; “no principled basis [exists] for determining what execution method is available and what conditions make it ‘available’”; and as a result, I.C. § 19-2716 “permits the State to act in an arbitrary manner with respect to [Creech] as compared to other condemned prisoners leading to disparate treatment across executions” and affecting his fundamental right. (Dkt. 86-1 at ¶¶ 448-51).

As Defendants note, the Ninth Circuit has previously rejected just such a claim in *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012). In that case, plaintiffs, who were death-row inmates, argued the execution protocol granting the Director of the Arizona Department of Corrections discretion to make decisions regarding how their executions would be carried out violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 659. In addressing this challenge, the Ninth Circuit noted that “treating one similarly situated prisoner differently from another with regard to punishment does not inherently impact the right to be free of cruel and unusual punishment.” *Id.* at 660. It ruled that “the class-of-one doctrine does not apply to forms of state action that ‘by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments.’” *Id.* (quoting *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 603 (2008)). Rather, a plaintiff is required to show an actual pattern of treating prisoners differently and detrimentally in ways that affect the risk of pain. *Towery*, 672 F.3d at 660. “In



other words, the existence of discretion, standing alone, cannot be an Equal Protection violation.” *Id.* at 661. Moreover, the Ninth Circuit concluded it was rational to conclude the Director was “best situated” to implement execution protocols. *Id.*

The Ninth Circuit has previously relied on *Towery* to reject Creech’s Equal Protection claim. *Pizzuto*, 997 F.3d at 907 (“To the extent [Creech] claim[s] that Idaho’s execution protocol allows so much variance in execution procedures that it violates the Equal Protection Clause, we have already rejected such a theory [in *Towery*].”). Like Creech’s prior Equal Protection claim, his proposed Claim Five fails to allege he is “being treated less favorably than others generally are.” *Id.* (quoting *Towery*, 672 F.3d at 661). Further, contrary to *Towery*, Creech fails to allege an actual pattern of treating prisoners differently and detrimentally in ways that affect the risk of pain. For these reasons, the Court denies Creech’s motion to amend to assert Claim Five.

#### **6. First Amendment Right to Access Alleged in Claim Six**

Creech’s proposed Claim Six is entitled, “Deprivation of Information Violates First and Fourteenth Amendment Rights to Access to Government Proceedings.” (Dkt. 86-1 at p. 62). Previously, the Ninth Circuit addressed Creech’s claim asserting “the public’s First Amendment right of access to government proceedings.” *Creech II*, 84 F.4th at 790. Regarding this claim, it noted that “Creech appears to be asserting the First Amendment rights of others” but that “the parties have not briefed the issue of whether Creech has standing to make this claim.” *Id.* at 791. The Ninth Circuit stated that it would “allow Creech to assert this claim on remand” and that “the district court should address whether Creech has standing to do so.” *Id.* It limited Creech’s potential amendment, however, by specifically concluding Creech’s First Amendment claim “would be futile *except* with respect to Creech asserting that his attorneys have a right to observe the entire execution.” *Id.* (emphasis added).

Relying on the Ninth Circuit’s ruling allowing him to reallege a First Amendment claim, Creech proposes Claim Six. Creech, however, disregards the express limitation on the Ninth Circuit’s ruling. Namely, he again alleges “the public—and the press—have an affirmative, enforceable right of access” to executions. (Dkt. 86-1 at ¶ 455). Because the Ninth Circuit has already concluded asserting a First Amendment right on behalf of anyone other than Creech’s attorneys would be futile, the Court denies Creech’s proposed Claim Six to the extent that it attempts to assert a First Amendment right on behalf of the press and the public.

The Court also denies Creech’s proposed Claim Six as it relates to his attorneys, whom he alleges have a constitutional right “to access the execution chamber, the right to witness the entire execution procedure, and the right to be permitted access to cameras and phones during the execution.” (*Id.* at ¶ 460). Although the Ninth Circuit did not rule such a claim would be futile, it did indicate Creech likely lacked standing to assert such a claim. *Creech II*, 84 F.4th at 791; *see also Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) (ruling ordinarily party must assert his own legal rights and cannot rest his claim for relief on legal rights of third parties).

Despite the Ninth Circuit’s instruction that standing be addressed, Creech does not allege standing to assert a violation of another’s First Amendment Rights. (*See* Dkt. 86-1 at ¶¶ 454-65) (alleging violations of others’ First Amendment Rights but not standing to do so). Further, Defendants moved to dismiss Claim Six for lack of standing (Dkt. 105-1 at pp. 4-5), but Creech failed to respond to Defendants’ argument or to otherwise argue he has standing to assert a First Amendment claim on behalf of others, including his attorneys. (*See generally*, Dkts. 86-3, 111 (providing argument in support of motion to amend); Dkt. 114 (providing argument in opposition to motion to dismiss)). Because Creech failed to provide any argument, cite any legal authority, or otherwise address his standing to assert proposed Claim Six, Creech has waived the claim. *See*

Dist. Idaho Loc. Civ. R. 7.1(e) (providing failure to respond “may be deemed a waiver by the moving party of the pleading or motion”).

## 7. Motion for Judicial Notice

Defendants filed a motion seeking judicial notice under Federal Rule of Evidence 201(b)(2) of four documents. (Dkt. 104). These documents include: (1) three IDOC press releases providing information about (a) the issuance of a death warrant for another inmate and the suspension of SOP 135; (b) IDOC’s suspension of that inmate’s execution; (c) the second issuance of a death warrant for the other inmate and the suspension of SOP 135; and (2) the Director’s declaration, dated October 12, 2023, certifying lethal injection is available for Creech’s execution. Creech does not oppose Defendants’ motion.

Notwithstanding Creech’s non-opposition, the Court declines to take judicial notice as IDOC requests. Under Rule 201(b), the court may judicially notice an adjudicative fact that is not subject to reasonable dispute because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Rule 201(b), however, only permits a court to take judicial notice of a fact, not of the source of that fact. *Williams v. Employers Mut. Casualty Co.*, 845 F.3d 891, 904 n.6 (8th Cir. 2017); *see also Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 649-50 (7th Cir. 2011) (affirming refusal to take judicial notice of various documents where offering party failed to identify facts to be noticed).

The documents for which Defendants request judicial notice contain numerous “facts”; Defendants do not identify which facts are judicially noticeable; and the Court cannot readily determine the accuracy of numerous facts based on the source of those facts. Moreover, the Court does not rely on Defendants’ conduct described in those documents to resolve either Creech’s motion to amend or Defendants’ motion to dismiss. *See, e.g., Santa Monica Food Not Bombs v.*

*City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (declining to take judicial notice of reports that were not relevant to the resolution of the appeal); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000) (declining to take judicial notice of statistics that were not relevant to any issue on appeal). Accordingly, the Court denies Defendants' motion for judicial notice.

## ORDER

### IT IS ORDERED:

1. Plaintiff's Motion to Amend (Dkt. 86) is **GRANTED IN PART AND DENIED IN PART** as set forth above. Creech may proceed on Claims One, Two, and Seven of the Second Amended Complaint. Claim Three is dismissed without prejudice. Claims Four, Five, Six, and Eight are dismissed with prejudice.
2. Defendants' unopposed Motion to Take Judicial Notice (Dkt. 104) is **DENIED**.
3. Defendants' Motion to Dismiss (Dkt. 105) is **GRANTED IN PART AND DENIED IN PART** as set forth above. Claims Four, Five, Six, and Eight of the Second Amended Complaint are dismissed with prejudice.



DATED: January 30, 2024

*Amanda K. Brailsford*

Amanda K. Brailsford  
U.S. District Court Judge

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

<b>THOMAS EUGENE CREECH,</b>	)	<b>CASE NO. 1:20-cv-114</b>
	)	
Plaintiff,	)	
v.	)	<b>SECOND AMENDED</b>
	)	<b>COMPLAINT ON BEHALF OF</b>
<b>JOSH TEWALT, Director, Idaho</b>	)	<b>THOMAS EUGENE CREECH</b>
<b>Department of Correction, TIM</b>	)	<b>FOR EQUITABLE,</b>
<b>RICHARDSON, Warden, Idaho</b>	)	<b>DECLARATORY, AND</b>
<b>Maximum Security Institution, CHAD</b>	)	<b>INJUNCTIVE RELIEF</b>
<b>PAGE, Chief, Division of Prisons, Idaho</b>	)	
<b>Department of Correction; and</b>	)	<b>EXECUTION SCHEDULED</b>
<b>Unknown Employees, Agents, or</b>	)	<b>FOR FEBRUARY 28, 2024</b>
<b>Contractors of the Idaho Department</b>	)	
<b>of Correction,</b>	)	
	)	
Defendants.	)	
	)	

### **I. Nature of the Action**

1. Plaintiff Thomas Eugene Creech<sup>1</sup> is a death-row inmate in Idaho<sup>2</sup> who brings this action pursuant to 42 U.S.C. § 1983 for violations and threatened violations of his constitutional rights in connection with the State's effort to execute him.

### **II. Justiciable Case or Controversy**

2. For the reasons set forth below, absent judicial intervention, Mr. Creech will be executed in violation of his constitutional rights.

3. There is a real and justiciable case or controversy between the parties.

### **III. Jurisdiction and Venue**

4. This action arises under 42 U.S.C. § 1983 for violations of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

5. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201(a) (declaratory relief), and 2202 (further relief).

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<sup>1</sup> Gerald Ross Pizzuto, Jr. was originally a plaintiff in this case. *See* Dkt. 1 at 1. On June 2, 2021, Mr. Pizzuto was dismissed from the proceedings. *See* Dkt. 65 at 6. The ensuing appeal was pursued by Mr. Creech alone, without Mr. Pizzuto's participation. *See* Dkt. 78. Therefore, Mr. Pizzuto is no longer a part of the present case. This second amended complaint does not relate to any of Mr. Pizzuto's litigation.

<sup>2</sup> The plaintiff refers to Idaho as "Idaho," "the State of Idaho," and "the State." Likewise, throughout this complaint, the plaintiff refers to the defendants, variously, as "the defendants," "the State," "IDOC," and other phrases, as appropriate. Their use of these expressions does not limit the scope of the claims, which are brought against each and every named defendant.

6. The Court has personal jurisdiction over the defendants as they are residents of the State of Idaho and are presently located in the State of Idaho, or are elected or appointed officials of the State of Idaho or otherwise acting on behalf of the State of Idaho.

7. Venue in this Court is proper under 28 U.S.C. § 1391 because most of the events giving rise to the claims—including executions and the procurement and maintenance of drugs used in the executions—have occurred, are occurring, or will occur in the District of Idaho.

8. Venue is further proper because, upon information and belief, the defendants all reside in the District of Idaho.

#### **IV. Parties**

9. Mr. Creech is a person within the jurisdiction of the State of Idaho.

10. Mr. Creech is an inmate under the supervision of the Idaho Department of Correction (“IDOC”).

11. Mr. Creech is confined at the Idaho Maximum Security Institution (“IMSI”).

12. Mr. Creech is under sentence of death.

13. As set forth in greater detail below, the defendants are state officials, employees, agents, and/or contractors responsible for developing, overseeing, and/or implementing death by lethal injection in Idaho.

14. Defendant Josh Tewalt (“Director Tewalt”) is the Director of IDOC.

15. Director Tewalt is responsible for approving the substances and procedures to be used in any execution performed by IDOC.

16. Defendant Tim Richardson (“Warden Richardson”) is Warden of IMSI.

17. Warden Richardson is the official executioner for inmates in Idaho state custody.

18. Defendant Chad Page (“Mr. Page”) is the Chief of the Division of Prisons for IDOC.

19. Upon information and belief, Mr. Page is currently charged with providing the official approval of Idaho’s next execution protocol for IDOC.

20. Upon information and belief, Other Unknown Employees, Agents, and/or Contractors of IDOC are involved in the development and carrying out of executions by lethal injection. Mr. Creech does not know the identities of these persons.

21. Upon information and belief, the plaintiff and the defendants are all United States citizens.

22. The defendants are all officials of the State of Idaho.

23. All of the actions that have been and will be taken by the defendants towards executing Mr. Creech and any other actions at issue in this complaint were or will be taken under color of state law.

24. The defendants are all sued in their official capacities.



**V. General Factual Allegations**

25. Mr. Creech incorporates each and every statement and allegation set forth throughout this complaint as if fully rewritten.

26. Mr. Creech was convicted of first-degree murder for the killing of David Jensen and sentenced to death for that offense in Ada County District Court.

27. Mr. Creech's murder conviction and death sentence were upheld on direct appeal in 1983.

28. After Mr. Creech obtained federal habeas relief, he was resentenced to death.

29. The new death sentence was upheld on direct appeal in 1998.

30. Once the State obtains a death warrant, which in this case it did on October 12, 2023, it has thirty days to execute Mr. Creech.

31. Mr. Creech is scheduled to be executed on November 8, 2023.

32. Mr. Creech brings this action to challenge the statute under which and by means of which the State intends to execute him, as well as the defendants' practice of hiding, changing, and obfuscating the means by which they intend to execute him.

**A. IDOC's Refusal to Provide Information to the Plaintiff**

33. On December 18, 2018, the Capital Habeas Unit of Federal Defender Services of Idaho ("CHU"), on behalf of eight of the nine Idaho state inmates (including the plaintiff) then under sentence of death, wrote to then-Director Henry Atencio of IDOC, and then-Warden Keith Yordy.

34. At that time, Idaho's execution protocol was version 3.6 of Standard Operating Procedure 135.02.01.001.

35. Mr. Creech will henceforth refer to the protocol as SOP 135.

36. The December 18, 2018 letter addressed the potential executions of those inmates and included a number of questions and requests relating to such executions in order for the CHU to assess the constitutionality and propriety of any future executions ("December 2018 CHU Letter").

37. The December 2018 CHU Letter sought answers to twenty-six questions, some with subparts, relating to the execution protocol of IDOC.

38. In sum, the CHU sought information on (1) the number, amount, and type of drugs to be used, (2) how the drugs were made, how the drugs were/would be obtained, their source, amounts, expiration date, how they were/would be acquired/transported/stored/tested, when IDOC would obtain the drugs, etc., (3) whether/when a new version of SOP 135 would be issued, and whether the current version on the website was in effect then, (4) whether witnesses would be able to observe the insertion of the IVs, (5) procedures for IV placement/length, (6) who would participate in the execution, what was their training/qualifications, and how would they be chosen, (7) whether there would be a consciousness check and the procedure for it, and (8) procedures for botched executions.

39. The CHU also requested that (1) the drugs be tested in an independent laboratory and results of that testing shared with the CHU at least sixty days prior to any execution, (2) that CHU staff/agents be given access to inspect the execution

chamber and adjoining room, (3) that CHU staff/agents be given access to the fixed cameras to determine quality for observing IV lines, (4) that the entire execution process be visible to witnesses, (5) that the whole execution chamber be filmed and audio recorded during the entire execution, (6) that at least two members of the CHU be permitted to attend the execution, (7) that at least one member of the CHU be permitted to bring a cell phone into the witness gallery with guaranteed cell phone reception, or access to a landline, (8) that an autopsy be performed after the execution at the facility of the CHU's choice, and (9) that records be preserved and centralized in one location.

40. Since the 2018 correspondence, there have been many exchanges between the CHU and IDOC over access to execution information.

41. However, IDOC has refused to provide answers to a number of basic questions regarding executions.

42. Most significantly, as of today, IDOC has not told Mr. Creech what drug<sup>3</sup> it intends to use to execute him.

43. In addition, IDOC has not told Mr. Creech whether the chemicals it has obtained have been compounded or manufactured.

44. IDOC has likewise not told Mr. Creech a single thing about the source of the chemicals, such as whether they came from abroad, how they were transported, what form they are in (e.g., frozen or not), or anything else.

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<sup>3</sup> Mr. Creech uses the term "drug" in the singular for consistency and ease of reference. He does not therefore imply anything about whether IDOC has chosen a single-drug or multi-drug protocol, which the defendants have refused to tell him.

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45. IDOC has taken the position that SOP 135 provides Mr. Creech with the necessary information about executions.

46. However, SOP 135 states: “The SOP is subject to revision at the discretion of the chief of the Operations Division or the director of the IDOC. Either person may revise, suspend, or rescind any procedural steps, at any time, at his sole discretion.”

47. Therefore, SOP 135 has limited legal significance.

48. In other jurisdictions where execution protocols afford correctional agencies unfettered discretion, state agents have abused it.

49. For instance, in the January 2015 execution of Charles Warner (“Mr. Warner”), Oklahoma used potassium acetate rather than potassium chloride, contrary to its representations to opposing counsel and the U.S. Supreme Court.

50. Mr. Warner’s last words were that his “body [wa]s on fire.”

51. In Arizona, the Department of Corrections has deviated from its protocol numerous times.

52. For example, Arizona changed its intended drug for Donald Beaty eighteen hours before his May 2011 execution.

53. Arizona has also repeatedly administered dosages well above the amounts provided for in the protocol, which it did at Joseph Wood’s July 2014 execution when it gave him thirteen more doses of each of the two drugs than the protocol allowed.

54. Nothing other than judicial intervention will check IDOC's ability to abruptly change its plans for executions with the effect of evading accountability and judicial scrutiny.

55. Unlike every other Idaho executive branch agency, IDOC is exempt from the rule-making requirements of the Idaho Administrative Procedure Act ("APA"), which include public notice and an opportunity for interested parties to comment. *See* Idaho Code § 67-5201.

56. The rule-making requirements that do apply to IDOC are far less rigorous than the APA. *See* Idaho Code § 20-212.

57. As a consequence, there are even fewer checks on IDOC's ability to change its plans for executions abruptly and even more of a need for judicial intervention to ensure it does not do so improperly and for the purpose of evading accountability and court scrutiny.

58. Idaho's execution protocol is now memorialized in version 4.0 of SOP 135, which was approved by Director Tewalt on March 30, 2021.

59. SOP 135 does not identify what drug will be used at any execution.

60. Instead, SOP 135 gives the IDOC Director four different drug options to select from in his unreviewable discretion and apart from his general authority to modify any aspect of the protocol whenever he sees fit.

61. This approach makes it difficult, and potentially impossible, for the CHU to decide whether it will need to challenge the use of any execution drugs,

since pertinent information related to the use of execution drugs is being kept a secret.

**B. Execution Procedures in Idaho**

62. The current version of SOP 135 notes that the document was “revised to comply with changes in statute[ ]” that had occurred prior to March of 2021.<sup>4</sup>

63. In 2021, when SOP 135 was revised for the fourth time, lethal injection was the only statutorily approved method of execution in Idaho.

64. The only execution procedures referred to in version 4.0 of SOP 135 pertain to executions by lethal injection.

65. Effective July 1, 2023, Idaho Code § 19-2716 was amended to include use of the firing squad as a secondary method of execution to lethal injection.

66. Section 19-2716 provides that no later than five days after the issuance of a death warrant, the IDOC Director must determine whether execution by lethal injection is “available” and certify that availability by affidavit to the court that issued the warrant. Idaho Code § 19-2716(2). If it is “available,” the execution must be by lethal injection; if it is not or if Director Tewalt does not so certify, the method of execution must be the firing squad. *Id.* § 19-2716(4).

67. It is within Director Tewalt’s sole and unqualified discretion to determine whether lethal injection is “available.”

68. The term “available” is not defined in the statute.

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<sup>4</sup> In this pleading, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.  
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69. On October 10, 2023, the State submitted to the Court in *Pizzuto v. Labrador*, D. Idaho, No. 1:23-cv-00081, a proposed Order Granting Preliminary Injunction it had drafted.

70. The language proffered by the State to this Court for its signature included the clause “the Idaho Department of Correction does not have the present ability to carry out an execution via lethal injection or firing squad[.]” *Id.*

71. Two days later, however, Defendant Tewalt announced that contrary to that representation, execution by lethal injection is in fact “available” to use in Mr. Creech’s case.

72. A concomitant press release published by IDOC’s press office advertised that IDOC “has secured the chemicals necessary to carry out an execution by lethal injection.”

73. Defendant Tewalt has affirmed, in a letter shared in part with the Idaho House Judiciary Committee on March 1, 2023, that “[s]hould the legislature choose to adopt firing squad as an alternate method, the Department of Correction will develop policies and procedures to ensure it is implemented with professionalism, respect, and dignity for everyone involved or impacted by this solemn process.”

74. Upon information and belief, however, SOP 135 has not been updated since July 1, 2023, when Section 19-2716 was amended to include the firing squad as a method of execution, or to include updated procedures pertaining to that method.

75. IDOC's press release announcing Mr. Creech's execution states, "The Department's execution policies and procedures, in their entirety, are available online." *Id.* The word "online" is a hyperlink which, when clicked, takes the reader to version 4.0 of SOP 135, dated March 30, 2021.

76. Mr. Creech will henceforth refer to version 4.0 of SOP 135 as "the now-outdated Protocol."<sup>5</sup>

**C. IDOC's Execution History and Related Problems with Executions**

77. A host of issues have arisen with respect to lethal injection executions across the country that increase the risk of problems arising at any given execution.

78. Those problems increase the possibility of something going wrong at a particular execution, such as the use of an unreliable drug.

79. Such problems increase the risk of an unconstitutionally painful execution in violation of the Eighth Amendment.

80. As a result, the problems exacerbate the risks described below in Claim One that create a danger that Mr. Creech will suffer an execution in violation of the Eighth Amendment if he is put to death by means of lethal injection.

81. Additionally, IDOC's recent history with executions reflects a pattern of pursuing lethal injection drugs in an irresponsible manner and obfuscating its plans in order to frustrate legitimate litigation and public scrutiny. As such, there is

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<sup>5</sup> When Mr. Creech refers to the now-outdated Protocol here, he also includes the associated documents hyperlinked therein, including the Execution Chemicals Preparation and Administration document, which was also updated and posted to IDOC's website on March 30, 2021.



a heightened risk that IDOC will act in the same way in connection with future executions, which makes it even more important that it be required to reveal the information at issue in this complaint.

82. The two most recent executions in Idaho were of Paul Rhoades (“Mr. Rhoades”) on November 18, 2011 and Richard Leavitt (“Mr. Leavitt”) on June 12, 2012. The following allegations relate to these two executions.

**1. Use of Unreliable Sources for Execution Drugs**

83. The following allegations reflect IDOC’s practice of seeking execution drugs in a reckless manner likely to result in the acquisition of unreliable chemicals.

84. In March 2011—as IDOC was preparing to execute Mr. Rhoades and Mr. Leavitt—Randy Blades, then the Warden of IMSI (“Mr. Blades”), started trying to obtain lethal injection chemicals.

85. To get the chemicals, Mr. Blades contacted a man named Chris Harris (“Mr. Harris”) to inquire about the possibility of obtaining lethal injection chemicals from him.

86. At the time, Mr. Harris was based in Kolkata, India.

87. Mr. Harris was a salesman whose career involved positions at a duty-free airport shop and call centers.

88. Upon information and belief, Mr. Harris has no training in the practice of pharmacy or medicine.

89. Mr. Harris has attempted to import drugs into the United States without the requisite approval by the Food and Drug Administration (“FDA”).

90. Upon information and belief, Mr. Harris has also engaged in acts of dishonesty.

91. To obtain drugs to send to Nebraska for executions, for example, Mr. Harris falsely told Naari, a pharmaceutical company, that the medications would be shipped to Africa so they could be used for anesthetic purposes in the developing world.

92. When Arizona and Texas purchased sodium thiopental from Mr. Harris for use at executions, the FDA seized the shipment upon arrival at the airport because it was imported unlawfully.

93. Like Idaho, other states, including but not limited to Arizona, Arkansas, California, Georgia, Nebraska, South Carolina, South Dakota, and Tennessee, have resorted to dubious international sources for lethal injection drugs.

94. For example, several states, including but not limited to Arizona, Arkansas, California, Georgia, South Carolina, and Tennessee, purchased mislabeled sodium thiopental for use in lethal injections from Dream Pharma, Inc., a fly-by-night pharmaceutical wholesaler/distributor who operated out of a storefront driving school in London, England.

95. These states did so even though they were not registered with the Drug Enforcement Administration (“DEA”) as an importer of non-narcotic controlled substances and did not provide a declaration of importation to the DEA.

96. The states also did not possess a DEA license to possess, dispense, or distribute a Schedule III non-narcotic controlled substance such as thiopental.

97. After the U.S. Attorney General was notified of the illegal importation, the DEA seized the thiopental in March 2011.

98. Before the thiopental was seized, it was used in two executions in September 2010 and January 2011 and both inmates' eyes were open in the midst of their executions, suggesting that they were inadequately sedated.

99. States have used unreliable domestic sources for executions as well.

100. For example, a pharmacy in Oklahoma called the Apothecary Shoppe provided drugs for at least three Missouri executions in 2013 and 2014.

101. The Apothecary Shoppe had its license put on probation after it admitted to committing 1,892 regulatory violations, including the improper extension of expiration dates and the use of questionable sterilization practices.

102. After the Apothecary Shoppe stopped providing drugs to Missouri for executions, it turned to Foundation Care, a compounding pharmacy in St. Louis.

103. Missouri used drugs from Foundation Care for seventeen executions.

104. Prior to Missouri's selection of Foundation Care, the FDA determined that the company was not testing all of its drugs for sterility and bacterial contamination, that it had inadequate controls for sterility, and that some of its drugs were contaminated with bacteria.

105. The FDA deemed Foundation Care a high-risk pharmacy.

106. Other states' questionable practices, like Idaho's questionable practice in engaging Mr. Harris, make it likely that Idaho will continue to try to obtain chemicals from unreliable sources, and therefore make increased transparency even more necessary.

## **2. Compounding Pharmacies**

107. For Mr. Leavitt's execution, IDOC obtained its chemicals from a compounding pharmacy.

108. At the time of Mr. Leavitt's execution, Jeff Zmuda ("Mr. Zmuda") was the Deputy Chief of the Bureau of Prisons for IDOC.

109. Mr. Zmuda was the Deputy Director of IDOC in 2008 and early 2009 at the time of the relevant trial proceedings in *Cover v. Idaho Bd. of Corr.*, Ada Cty., No. CV01-18-3877 (hereinafter "the *Cover* case").

110. Mr. Zmuda testified in the *Cover* case that the drugs for the Leavitt execution were acquired from a compounding pharmacy.

111. Mr. Zmuda further testified in the *Cover* case that the compounding pharmacy who provided the drugs for Mr. Leavitt's execution could not supply chemicals to IDOC for future executions because it was not in compliance with current regulations.

112. The IDOC has therefore previously relied upon an unreliable source for execution drugs, which in turn suggests a greater chance that it will do so again.

113. IDOC has refused to make public the identity of its sources of drugs for either the Rhoades or Leavitt executions.

114. In the *Cover* case, the Ada County District Court ordered IDOC to reveal the source of the drugs for the Leavitt execution.

115. Rather than complying with the order, IDOC appealed the ruling to the Idaho Supreme Court.

116. If IDOC revealed the sources of drugs for the Rhoades and Leavitt executions, it would help Mr. Creech evaluate the risks associated with his own execution.

117. IDOC's refusal to do so handicaps Mr. Creech's ability to protect his right to be free from unconstitutional executions.

118. Apart from specific problems with IDOC's previous source, its use of a compounding pharmacy suggests that it may do so again, and that in and of itself raises serious questions.

119. Compounding is a practice used by pharmacists to combine, mix, or alter ingredients to create drugs.

120. Compounding pharmacies typically follow informal recipes and attempt to approximate the patented process used in manufacturing drugs approved by the FDA.

121. The finished product is designed to replicate a variation of—but is not the same as—an FDA-approved manufactured drug that goes by the same name.

122. Compounded drugs are not FDA-approved.

123. Compounding pharmacies are not subject to the FDA's good manufacturing practice regulations.

124. The FDA does not verify the safety or effectiveness of drugs prepared by compounding pharmacies.

125. Compounding involves the use of raw ingredients, including Active Pharmaceutical Ingredients (“APIs”), which are the active ingredients in the compounded drug.

126. There are significant questions about the quality of APIs used in compounding.

127. Many APIs come from plants in India and China that are not registered with the FDA.

128. In some instances, APIs are made on the same equipment as pesticides.

129. Compounding pharmacies have been identified as a chief outlet for counterfeit bulk drugs.

130. With compounders, it is difficult to trace the raw chemicals back to the original manufacturer for information about their quality and integrity, and difficult to determine expiration dates of individual ingredients.

131. Accordingly, a chemical labeled as a particular active ingredient may actually be a different ingredient, and there is no way to have confidence that the APIs are not contaminated.

132. Compounded drugs often degrade and lose efficacy more quickly than non-compounded drugs.

133. Compounded drugs are not required to meet the stringent requirements regarding contamination, dilution, and degradation that manufactured drugs are required to meet.

134. Compounding pharmacies generally are unable to test chemicals to confirm their identity, potency, and purity, or to detect contamination.

135. While a compounding pharmacist might accurately measure or weigh individual ingredients, he or she would have no way of discovering in a pharmacy setting if the ingredients themselves were adulterated or counterfeit.

136. This method for creating drugs unnecessarily adds enormous risk that the drugs will be ineffective, sub-potent, expired, or contaminated, or that they will contain unintended additives or a substantial level of particulates.

137. Any one of these problems increases the danger that a compounded drug would not work as it is intended to and would therefore lead to a substantial risk of serious harm in an execution.

138. Preparation of drugs intended for intravenous (“IV”) administration is one of the most difficult of all pharmaceutical processes to execute.

139. For a drug to be compounded effectively, the process must be carried out under specific environmental conditions, using precise equipment, and performed by highly trained personnel.

140. There is little tolerance for error.

141. If compounded drugs are prepared improperly, the pH can become off-balance, making the preparation more caustic than a manufactured version of the product, and causing intense, burning pain to the inmate upon injection.

142. An out-of-balance pH can also cause ingredients to fall out of the solution in the form of particles, creating risks that the particle becomes contaminated or lodged in small blood vessels or in a prisoner's lungs, which would be extremely painful.

143. If the preparation is created from non-sterile ingredients, or at a facility or by an individual who lacks the expertise to maintain sterility and quality of the drug, the drug can become contaminated with fungi, bacteria, and other contaminants.

144. Contaminates include endotoxins, which would elicit an inflammatory reaction and can result in shock, or the preparations can become contaminated with a different drug from the same facility.

145. Cross-contamination can occur during compounding when the air supply for the room in which one drug is being compounded is not scrupulously segregated from the air supply in the room in which another, allergy-causing agent is being produced.

146. The consequence of contamination can be immediate anaphylaxis, i.e., a serious, life-threatening allergic reaction.

147. These various problems with compounded drugs create a substantial risk of serious pain.



148. Sterile preparations manufactured from non-sterile ingredients must be stored and transported within specific temperature requirements.

149. If these temperature requirements are not followed, there is increased risk of microbial growth, chemical degradation, contamination from physical damage to packaging, and permeability of plastic packaging.

150. Compounded drugs must be kept in carefully prescribed conditions related to the stability and properties of the specific medicine in question.

151. Stability depends on the purity and concentration of specific ingredients, packaging and environmental exposure and storage, especially for solutions.

152. Small changes in any one of those variables can cause rapid loss of drug strength or much shorter than expected shelf life.

153. Because the preparation of compounded drugs is so difficult and sensitive, Mr. Creech needs to know the identity and backgrounds of the people involved, in order for him to evaluate the risks created for his executions.

154. It is imperative to test both stability and sterility multiple times over a drug's shelf life, not just shortly after it is compounded.

155. Similarly, it is imperative to test for contaminants including endotoxins prior to the drug's use.

156. Many laboratories that hold themselves out as facilities that test compounded drugs are sub-standard.

157. Therefore, in order to gauge the quality of any compounded drugs, Mr. Creech would need to know both the results of the testing and the identity of the laboratory that performed it.

158. Correctional departments have had problems with properly maintaining compounded drugs.

159. For example, in March 2015, the Georgia Department of Corrections discovered the compounded pentobarbital that it had for an execution had become cloudy because of the temperature of the drugs, which were kept in poor storage conditions.

160. Some executions with compounded drugs have been problematic.

161. For example, in January 2014, while Michael Lee Wilson was being executed in Oklahoma with compounded pentobarbital he cried out, upon administration of the drug, that he felt his “whole body burning.”

162. A report prepared after Mr. Wilson’s execution found that the injection likely contained cross-contaminates that he was allergic to, as well as bacteria and endotoxins.

163. An April 2014 Texas execution of Jose Luis Villegas involving compounded pentobarbital likewise spurred the inmate to complain of a burning sensation.

164. In October 2012, Eric Robert, a South Dakota inmate being executed with compounded pentobarbital, gasped heavily, and observers noticed that his skin

turned a blue-purplish hue, his eyes remained open throughout the execution, and his heart continued to beat ten minutes after he stopped breathing.

165. Subsequent analysis of the pentobarbital used in the South Dakota execution indicated that it was contaminated with fungi.

166. All of the foregoing events are consistent with the administration of a compounded drug that was contaminated or sub-potent.

167. The fact that Idaho's sister states have had problems with compounded drugs makes it more likely that Idaho will, which in turn means that Mr. Creech has to know whether IDOC will use compounded drugs, and if so where they will come from.

168. Similarly, the fact that other states have had problems with compounded drugs makes it more likely that Idaho will, which in turn means that there is a greater risk that Mr. Creech will suffer an unconstitutional degree of pain at his execution.

169. The manufacturers of pentobarbital prohibit its use in executions.

170. Therefore, when pentobarbital is used in executions, it is either compounded pentobarbital or it is manufactured pentobarbital that was obtained through deceptive means.

### **3. IDOC's Obfuscation**

171. The following allegations reflect IDOC's practice of acting in such a manner as to obstruct lawful challenges to executions and to shield itself from public oversight.

172. The U.S. Supreme Court denied certiorari (“cert.”) review of Mr. Rhoades’ habeas appeal on October 13, 2011.

173. On October 14, 2011, IDOC issued a new execution SOP, providing for only three-drug executions.

174. IDOC described the new SOP in litigation as “a completely revised execution procedure.”

175. On October 19, 2011, the State secured a death warrant for Mr. Rhoades, setting his execution for November 18, 2011.

176. Given the timeline, it is apparent that the State was planning on seeking a death warrant as soon as the U.S. Supreme Court denied cert. in Mr. Rhoades’ habeas case.

177. The Supreme Court denies roughly ninety-nine percent of the cert. petitions it receives.

178. Thus, IDOC knew or should have known that it was a near certainty that the Supreme Court would deny Mr. Rhoades’ cert. petition.

179. IDOC could sensibly have tied its release of the new execution SOP to significant and relevant legal events that took place far before the denial of cert.

180. For example, the Ninth Circuit panel affirmed the denial of habeas relief on July 15, 2010.

181. In addition, the Ninth Circuit denied Mr. Rhoades’ petition for rehearing on February 10, 2011.

182. Instead of using either of these dates, IDOC waited until a little more than a month before the execution to release its SOP.

183. IDOC did so in order to give Mr. Rhoades as little time as possible to review, investigate, and challenge the State's plans.

184. Since IDOC released a new execution SOP the day after the Supreme Court denied the petition for cert., it clearly began preparing the new protocol well before then.

185. On November 18, 2011, Mr. Rhoades was executed with a three-drug combination of sodium thiopental, pancuronium bromide, and potassium chloride.

186. On January 6, 2012, IDOC created a new execution SOP, now giving the Director two three-drug options and two one-drug options.

187. The U.S. Supreme Court denied cert. in Mr. Leavitt's habeas case on May 14, 2012.

188. On May 17, 2012, the State obtained a death warrant for Mr. Leavitt, setting his execution for June 12, 2012.

189. On May 25, 2012, IDOC announced its intent to execute Mr. Leavitt with a single-drug protocol of pentobarbital.

190. Given the timeline, it is apparent that the State was planning on seeking a death warrant for Mr. Leavitt when the Supreme Court denied cert. in his habeas case.

191. IDOC knew or should have known that it was a near certainty that the Supreme Court would deny Mr. Leavitt's cert. petition.

192. IDOC could sensibly have announced its intent to use a single-drug pentobarbital protocol on significant and relevant dates that took place far before the denial of cert.

193. For example, the Ninth Circuit panel reversed this Court's grant of habeas relief on May 17, 2011.

194. In addition, the Ninth Circuit denied Mr. Leavitt's petition for rehearing on September 13, 2011.

195. Instead of using either of these dates, IDOC waited until eighteen days before the execution to announce its intention to use a single-drug protocol of pentobarbital, so as to give Mr. Leavitt as little time as possible to review, investigate, and challenge the State's plans.

196. For Mr. Rhoades's execution, IDOC kept a separate cash log for lethal injection expenses.

197. For Mr. Leavitt's execution, IDOC kept a separate cash log for lethal injection expenses.

198. On information and belief, for Mr. Rhoades's execution, IDOC kept three different sets of accounting books.

199. Each of these books had more detail than the preceding one.

200. Former IDOC Purchasing Agent Joanne Sooter ("Ms. Sooter") was instructed by her boss Theo Lowe ("Ms. Lowe"), then IDOC's Executive Financial Officer, to provide the first book if a public record request was submitted.

201. Ms. Sooter was told that if the requester continued to press for more information, the second book was to be disclosed, as it had more details and would ideally placate the individual seeking records.

202. The third book contained the real costs associated with the execution and it was not to be revealed.

203. On information and belief, for Mr. Leavitt's execution, IDOC kept three different sets of accounting books.

204. Ms. Sooter was instructed by Ms. Lowe, then Project Manager for IDOC, to provide the first book if a public record request was submitted.

205. Ms. Sooter was told that if the requester continued to press for more information, the second book was to be disclosed, as it had more details and would ideally placate the individual seeking records.

206. The third book contained the real costs associated with the execution and it was not to be revealed.

207. In the past, IDOC has refused to make execution information available to Mr. Creech when he complains through the prison's grievance system on the ground that execution dates had not yet been set.

208. However, by Idaho law, execution dates cannot be set more than thirty days in the future. *See* Idaho Code § 19-2715(2), (3).

209. Idaho death warrants can set execution dates fewer than thirty days in the future.

210. For instance, Mr. Creech's October 12, 2023, death warrant set a date twenty-seven days later for his execution.

211. Thus, IDOC's position is apparently that no information about an execution can be provided to the inmate until his execution is roughly a month away.

212. That position prevents any meaningful review of IDOC's plans for an execution.

213. It is also illogical, as IDOC plainly does begin preparing for executions before the death warrant is officially issued.

214. IDOC has in the past taken—and continues to take—the additional view that inmates must exhaust their administrative remedies before challenging methods of execution in federal court.

215. Under IDOC's rules, inmates must pursue exhaustion through three separate levels of internal review.

216. No regulations require IDOC to resolve grievances within thirty days.

217. For example, when Mr. Pizzuto was exhausting his administrative remedies to prepare for this lawsuit, IDOC took forty-five days in total to reject his grievances, counting only the time that they were pending before prison authorities and not the time it took to write or submit them.<sup>6</sup>

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<sup>6</sup> Again, Mr. Pizzuto is no longer a part of the present case; his experience is used only as an example.



218. Therefore, according to IDOC, it can wait until a death warrant has been issued to tell Mr. Creech anything about the drugs to be used in his execution and then kill him before he has had any chance to even *begin* litigating the protocol in federal court.

219. This track record reinforces the need for judicial intervention, so that IDOC is not able to continue sabotaging legitimate litigation and obstructing the review of the courts and the public.

#### **4. IDOC's Misconduct**

220. On information and belief, to prepare for Mr. Leavitt's execution, Kevin Kempf ("Mr. Kempf") and now-Director Tewalt boarded a chartered plane on or around May 30, 2012.

221. On this flight, Mr. Kempf and now-Director Tewalt had in their possession a suitcase containing more than \$10,000 in cash.

222. Both Mr. Kempf and now-Director Tewalt were IDOC employees at the time of this trip.

223. Upon information and belief, at the time of the May 30, 2012 trip, Mr. Kempf was the Division Chief of Operations for IDOC.

224. Upon information and belief, at the time of the May 30, 2012 trip, now-Director Tewalt was the Deputy Chief of the Bureau of Prisons for IDOC.

225. With their suitcase full of cash, Mr. Kempf and now-Director Tewalt flew to Tacoma Narrows Airport, in Washington State.

226. After their plane landed, Mr. Kempf and now-Director Tewalt exchanged the money for lethal injection drugs.

227. Upon information and belief, this occurred in a Walmart parking lot.

228. Mr. Kempf and now-Director Tewalt then brought the drugs back to Idaho.

229. These drugs were obtained to be used in Mr. Leavitt's execution.

230. On information and belief, Mr. Kempf at that time had no training in pharmacy science or medicine, and no education on the proper transportation and storage of drugs.

231. On information and belief, now-Director Tewalt at that time had no training in pharmacy science or medicine, and no education on the proper transportation and storage of drugs.

232. Mr. Kempf and now-Director Tewalt and any agents acting in concert with them likely acted inconsistently with the federal statutes referenced below in their handling of the pentobarbital for the Leavitt execution.

233. By federal law, pentobarbital is a Schedule II controlled substance.

234. That being the case, in order for the drug to be delivered or transferred, a valid prescription written by a licensed practitioner is necessary.

235. To be effective, the prescription must be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice.

236. A person who issues a prescription and the person who knowingly fills a prescription that is not in the usual course of business is subject to penalties under the Controlled Substances Act.

237. It is unlawful for any person, including a registrant, to distribute a Schedule II controlled substance without a prescription.

238. Whether the drugs provided to IDOC were made by a traditional compounding pharmacy or a non-traditional outsourcing facility, the absence of a prescription would violate the Federal Food, Drug and Cosmetic Act (“FFDCA”) and the Drug Quality and Security Act (“DQSA”).

239. If the drugs were supplied by a traditional compounding pharmacy, the FFDCA requires pharmacies to compound only for an identified individual patient on receipt of a valid prescription order that a compounded product is necessary for the identified patient.

240. Here, there was no valid prescription order and no identified individual patient for whom the compounded product was necessary.

241. If the drugs were supplied by an outsourcing facility, the FFDCA provides that the facility may only compound with a bulk drug substance which appears on an FDA list of drugs for which there is a clinical need, or which are on the FDA’s drug shortage list.

242. In May 2012, pentobarbital was not on the drug shortage list.

243. In May 2012, there was no clinical need for the drugs in these circumstances.

244. Under the FDCA, it is unlawful to compound drugs that are essentially copies of existing drugs, unless there is a shortage of those drugs, which there was not for pentobarbital.

245. Upon information and belief, Mr. Kempf and now-Director Tewalt were directed to take the aforementioned trip to Tacoma by Brent Reinke (“Mr. Reinke”), who was the Director of IDOC at the time.

246. On information and belief, Mr. Reinke was authorized by then-Governor Butch Otter to approve the trip.

247. After they bought drugs for an execution with a suitcase full of cash, Mr. Kempf and now-Director Tewalt were both later promoted, at separate times, to IDOC Director, the highest position in the organization.

248. Compounded pentobarbital is a high-risk sterile injectable.

249. As such, compounded pentobarbital is meant to be administered within twenty-four hours, if stored at room temperature, and within seventy-two hours, if kept refrigerated.

250. A pentobarbital preparation cannot be frozen because freezing degrades the preparation.

251. The plane that carried the drugs from Tacoma to Boise was parked for about three hours and was in the air for approximately an hour and twenty minutes, after which the chemicals presumably had to be driven elsewhere.

252. Based on the previous facts, there is reason to suspect, on information and belief, that the pentobarbital acquired by Mr. Kempf and now-Director Tewalt

may not have been properly stored during the time between when they obtained it and when it was used at Mr. Leavitt's execution.

253. IDOC ultimately acquired the drugs for Mr. Leavitt's execution in 2012 from Union Avenue Compounding Pharmacy ("Union") of Tacoma, Washington.

254. On information and belief, the pharmacist who provided the drugs for Union was Kimela Burkes.

255. In 2015, regulators inspected Union and found that it had twenty-seven outdated or expired items in its drug stock, and that it failed to properly record in its system the chronic conditions of a number of patients.

256. A follow-up inspection in 2016 discovered that Union had not fixed several of the problems, despite being warned by officials, and that some of them had actually gotten worse.

257. As a result of the regulators' complaint, Ms. Burkes agreed to a series of sanctions, including having her license placed on probation for a year.

258. For Mr. Rhoades' execution in 2011, IDOC obtained the drugs from University Pharmacy ("University") in Salt Lake City.

259. University compounded the drugs for Mr. Rhoades' execution.

260. There are significant reasons to question the reliability of University.

261. For example, state and federal regulators have cited University for a number of violations, including many in the few years before and after Mr. Rhoades' execution.

262. In 2017, state regulators inspected University and concluded that it was in violation of six different rules, including those having to do with documentation, labeling, and expiration dates.

263. The regulators noted nineteen different items, comprising twenty-seven vials total, where there were problems with the documentation of the products' expiration dates.

264. In 2014, state regulators inspected University and found that 232 medications and compounding ingredients were expired or had indeterminate expiration dates in the pharmacy's regular stock. Officials fined University \$1,050 and filed a cease-and-desist order.

265. In 2013, federal regulators with the FDA conducted several inspections of University and filed a report finding a number of problems.

266. These inspections were done only fourteen months after University provided drugs for Mr. Rhoades' execution.

267. In its report, the FDA concluded that University committed a variety of violations, including: failing to sanitize equipment enough to protect the integrity of the drugs; allowing spills, splatter, rust, and so forth to remain in sensitive areas; a technician taking out garbage in the middle of a sterilization process and then sticking his hand back into the equipment without changing his gloves; and not checking products properly to make sure they were stable and could last.

268. In 2009, state regulators cited University for dispensing sixty prescriptions to practitioners around the country based on orders that did not include the patients' names and addresses, in violation of state law.

269. University admitted the misconduct and was issued a cease-and-desist order.

270. In 2008, FDA officials observed nineteen separate problems with University after a series of inspections. The problems included issues with the pharmacy's sterilization practices, maintenance of its equipment, failure to properly document testing, inadequate measures to make sure drugs were clean and stable before they were sent to patients, improper storage of chemicals, flaws in the training regimen, and so forth.

271. Mr. Leavitt was executed on June 12, 2012, thirteen days after the pentobarbital was obtained in the manner detailed above.

272. The Idaho Board of Correction appointed Mr. Kempf as IDOC Director in December 2014.

273. The Idaho Board of Correction appointed Director Tewalt as IDOC Director in November 2018.

274. Director Tewalt is currently IDOC Director.

275. Mr. Kempf is now the Executive Director of the Correctional Leaders Association ("CLA"), formerly known as the Association of State Correctional Administrators ("ASCA").

276. Mr. Kempf took over in that position in December 2016.

277. CLA's members are the leaders of each U.S. state correctional system. In those roles, CLA members oversee more than 400,000 correctional professionals and are in charge of more than eight million inmates and other convicts.

278. Between approximately 2016 and 2018, now-Director Tewalt was Director of Operations for CLA.

279. IDOC's approach to acquiring drugs for Mr. Leavitt's execution makes it more likely that the organization will engage in similar conduct in connection with future executions, increasing the risk that it will acquire unreliable drugs.

280. IDOC did not arrange for autopsies of either Mr. Rhoades or Mr. Leavitt after their executions.

281. A valuable source of information about whether anything had gone wrong with the executions was thereby left untapped.

282. The CHU represents six of the eight inmates currently on Idaho's death row.

283. The inmates on Idaho's death row who are not represented by the CHU are in early litigation of their cases and thus far removed from an execution.

284. On March 21, 2019, the Ada County District Court found that IDOC and associated institutions and people acted in bad faith and with a lack of diligence in its execution-related responses to record requests in the *Cover* case. The court fined Jeffrey Ray ("Mr. Ray"), IDOC's Public Information Officer and the designated records custodian, because he "did nothing to fulfill his responsibilities other than trust that others would," "did not even open the digital files to see what he had



actually denied, [and] did not ensure the records he received were complete, or inquire into how the decision was made to deny any portions of the records.” In the district court’s view, Mr. Ray’s “inquiry and review was so lacking as to be an improper withholding that was performed deliberately” and there was “substantial evidence” of “his lack of good faith compliance with Idaho’s Public Records Act and avoidance of his mandatory duties under its provisions rising to the level of bad faith.”

285. In the *Cover* case, a pattern emerged of IDOC mishandling public record requests for execution-related material.

286. For example, IDOC has provided certain records to requesters while withholding the same documents from other requesters seeking the same information, with no justification for the distinction.

287. IDOC’s responses to the plaintiff in the *Cover* case also reflected a highly disorganized and unreliable approach to the retention and disclosure of execution-related materials.

288. Over the course of the *Cover* case, IDOC failed to provide execution-related material that was plainly responsive to the request and not exempt from disclosure.

289. After the plaintiff in the *Cover* case took IDOC to court over its initial response, thousands more pages of records were located that had not been provided earlier.

290. IDOC provided these materials in batches for months, each time explaining that it had found them in a place it had not searched earlier, such as a filing cabinet.

**D. Human Error at Lethal Injection Executions**

291. Correctional staff and agents have made a variety of serious mistakes at executions.

292. As a consequence, there is a higher risk that mistakes will be made at Mr. Creech's execution, making a torturous death more likely and also making it more essential that he be given access to the information requested so he can ensure his constitutional rights are protected.

293. For example, at the Oklahoma execution of Clayton Lockett in April 2014, the executioners apparently had problems setting an IV line, which took them fifty-one minutes to do.

294. During Mr. Lockett's execution, staff punctured multiple parts of his body at least twelve times before essentially jury-rigging a solution by inserting a too-short catheter in his right femoral vein and attempting to secure it with tape.

295. As a result of that failure, Mr. Lockett began to writhe and gasp after he had already been declared unconscious, kicked his leg, rolled his head, grimaced, and grunted, all for more than thirty minutes.

296. In the course of Mr. Lockett's execution, some of the lethal injection drugs massed in his tissue, creating a swelling under his skin larger than a golf ball.

297. Eventually, Mr. Lockett died of a heart attack.

298. At the Arizona execution of Robert Towery (“Mr. Towery”) in March 2012, it took fifty-nine minutes to set the IV lines.

299. An autopsy later revealed that Mr. Towery had been punctured at least eleven times.

300. Arizona officials also struggled to insert IV lines into Clarence Dixon in May 2022, requiring forty minutes in order to do so.

301. Members of Mr. Dixon’s execution team ultimately inserted an IV line into his femoral vein rather than his arm or hand.

302. Witnesses to Mr. Dixon’s execution report that he was visibly in pain and copiously bleeding from the catheter inserted into his leg.

303. Murray Hooper was also executed in Arizona in November 2022, but officials avoided the bloody mistakes of Mr. Dixon’s execution by sewing the catheter into Mr. Hooper’s groin.

304. At a Florida execution in December 2006, a misplaced IV line allowed caustic lethal injection drugs to leak into the soft tissue of the arms of inmate Angel Nieves Diaz (“Mr. Diaz”).

305. The drugs accordingly failed to render Mr. Diaz unconscious while causing chemical burns so severe that a great deal of the skin on his arms sloughed away.

306. On information and belief, Mr. Diaz likely suffocated to death before the execution drugs could end his life.

307. In 2009 in Ohio, in attempting to execute Romell Broom, the execution team stabbed him with needles for an hour and a half while trying to find a vein, using eighteen needle sticks in the process. Finally, the governor halted the execution.

308. 2022 saw so many problematic experiences that it was deemed “the year of the botched execution.”

309. Alabama, Arizona, and Texas all had botches related to execution teams’ inability to properly set IV lines.

310. In Alabama, two executions were called off completely because of IV struggles.

311. Training and regular experience are required in order to obtain IV access.

312. Errors in placing IV lines cause chemical solutions to escape into subcutaneous tissue, which can cause excruciating pain.

313. Problems in executions can also be caused by errors in preparing IVs, labelling syringes, preventing IVs from leaking, preventing veins from leaking, waiting the appropriate amount of time between injections, and injecting the chemicals properly.

314. Members of execution teams in other states have been revealed to have histories that raised questions about their suitability for the task.

315. For example, a member of the execution team in Arizona had his nursing license suspended and had a lengthy arrest record.

316. Similarly, it was found that a surgeon involved in Missouri executions was dyslexic and had prepared lower-than-expected amounts of anesthesia for several inmates who were put to death.

317. Because of these risks of human error, it is critical that Mr. Creech know the identities and credentials of the personnel tasked with executing him.

318. Execution equipment in some states has been found wanting. For instance, there have been issues raised about adequate lighting in the room where the chemicals are prepared and about adequate sightlines from that room into the execution chamber.

## **VI. Claims**

### **A. Claim One – The Use of Compounded Pentobarbital<sup>7</sup> at Mr. Creech’s Execution Violates the Eighth Amendment**

#### **1. Mr. Creech’s Health Concerns**

319. Mr. Creech incorporates each and every statement and allegation set forth throughout this complaint as if fully rewritten.

320. The use of pentobarbital at Mr. Creech’s execution creates a substantial risk of serious pain and suffering because of his health conditions and medical history, amongst other factors, all in violation of the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment.

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<sup>7</sup> If the defendants do not select pentobarbital for use at Mr. Creech’s execution, he reserves the right to challenge their choice on whatever grounds are appropriate, which may include the State’s violation of Mr. Creech’s First Amendment right to access the courts, his Due Process right to notice and hearing, his Eighth Amendment right to be free from cruel and unusual punishment, and potentially other violations.

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321. Mr. Creech was diagnosed with type II diabetes mellitus in August 2018. Mr. Creech has been treated for the past five years with Metformin to help control his diabetes.

322. Mr. Creech has a history for at least the last five years of edema in his legs, a swelling caused by the trapping of excess water. The severity of the edema has ranged over time. In May 2018, the edema was first diagnosed, Mr. Creech had +3 pitting edema in both of his lower legs. In June 2018, it was noted that Mr. Creech had +2-3 pitting edema in both of his lower legs, with his right leg worse than his left. Mr. Creech's edema has been a continuing issue over the past five years. Mr. Creech is taking hydrochlorothiazide for his edema.

323. Mr. Creech has mixed hyperlipidemia due to his type II diabetes mellitus. Mixed hyperlipidemia is a condition characterized by elevated levels of fats in the blood, including low-density lipoprotein cholesterol and triglycerides.

324. In September 2022, a large vascular aneurysm was found in Mr. Creech's abdomen. An aneurysm is a weak section of an artery wall. Pressure from inside the artery causes the weakened area to bulge out beyond the normal width of the blood vessel. An abdominal aortic aneurysm is an aneurysm in the lower part of the aorta, the large artery that runs through the torso. The aneurysm measured 5.8 centimeters, with a craniocaudal length of 8.5 centimeters.

325. In addition to the aneurysm, Mr. Creech was found to have extensive atherosclerotic vascular disease and moderate to severe coronary artery disease. Atherosclerosis is the buildup of fats, cholesterol and other substances in and on the

artery walls. This buildup is called plaque. The plaque can cause arteries to narrow, blocking blood flow. The plaque can also burst, leading to a blood clot.

326. On October 23, 2022, Mr. Creech was admitted to the hospital after he fell backwards, hitting his head, and being found unconscious by IMSI staff. Mr. Creech's blood pressure was 148/85, and he had elevated glucose levels. A CT scan of Mr. Creech's chest measured his aneurysm at 6.1 x 6.3 centimeters, with a craniocaudal length of 8.9 centimeters.

327. On November 17, 2022, Mr. Creech had surgery to place a stent graft around the aneurysm. Despite this surgery, an endoleak developed and blood continues to flow into the aneurysm. An endoleak happens when blood finds a way around the stent graft and into the aneurysm. An endoleak can be life-threatening without treatment.

328. In December 2017, Mr. Creech underwent an MRI of his brain which indicated mild cerebral white matter disease compatible with chronic small vessel ischemic disease.

329. Mr. Creech has been diagnosed as having an organic brain disorder.

330. Additionally, Mr. Creech has been diagnosed as having a major depressive disorder and post-traumatic stress disorder ("PTSD").

331. In September 2016, Mr. Creech was determined to have an allergy to Penicillin, Lithium, and Narcotics (Opium Alkaloids).

332. Mr. Creech's medical conditions create a substantial risk of serious harm at an execution involving pentobarbital.

333. Large doses of pentobarbital are likely to cause acute drops in blood pressure.

334. Individuals, like Mr. Creech, who suffer from an abdominal aortic aneurysm, are at a sharply increased cardiovascular risk.

335. In addition, in individuals with extensive atherosclerotic vascular disease, a sudden drop in blood pressure such as that associated with large doses of pentobarbital is likely to cause myocardial ischemia and/or infarction, or what is commonly known as a heart attack. To fully assess Mr. Creech's health conditions, further testing is necessary for coronary heart disease, including a current electrocardiogram, an exercise stress test, and echocardiogram, a nuclear stress test, and CT coronary angiogram.

336. Mr. Creech is additionally being treated for his depressive disorder and PTSD with a higher than FDA recommended dose of Paxil. This dose carries a higher risk for cardiac complications.

337. The onset of a heart attack under these circumstances is nearly immediate.

338. The sedating effects of pentobarbital are likely to occur minutes after the heart attack begins.

339. Heart attacks often cause substantial physical suffering, including chest pain, the feeling of a crushing weight, and difficulty breathing.

340. Heart attacks often cause substantial psychological discomfort, including a feeling of impending doom, anxiety, or fear.



341. It is likely that a pentobarbital execution of Mr. Creech would induce an acute heart attack.

342. It is likely that Mr. Creech would experience cruel and unusual pain and suffering from a heart attack.

343. It is likely that Mr. Creech would experience cruel and unusual pain and suffering from a heart attack for a significant amount of time before the pentobarbital completely sedates him.

344. Two previous executions—that of Roy Blankenship in Georgia and Eddie Powell in Alabama—confirm the risk posed to Mr. Creech by a pentobarbital execution.

345. Autopsies of Messrs. Blankenship and Powell indicated that both had clinically significant obstructive coronary disease.

346. Messrs. Blankenship and Powell were both executed by pentobarbital.

347. Both Mr. Blankenship and Mr. Powell appeared to be in pain during their executions, with witnesses observing grimacing, writhing, thrashing, and so forth.

348. The observations of both men's executions were consistent with the physical manifestation associated with heart attacks.

349. Other pentobarbital executions have taken place on different inmates who did not have obstructive coronary artery disease.

350. Most of those executions did not include the kinds of painful reactions seen when Messrs. Blankenship and Powell were put to death.

351. In addition to the risks caused by the above medical conditions, Mr. Creech's diabetes and mixed hyperlipidemia also increase the risk of a painful heart attack caused by pentobarbital.

352. The use of *compounded* pentobarbital in particular increases the risk of a painful heart attack because of the issues with compounding summarized earlier involving reliability, purity, potency, sterility, efficacy, and so forth.

353. This risk is further exacerbated when the compounding is conducted by a pharmacy with known regulatory violations like the two pharmacies IDOC selected for the Rhoades and Leavitt execution drugs.

354. Additionally, Mr. Creech suffers from brain damage.

355. In particular, Mr. Creech has many signs that indicate abnormalities of circuits that are mediated through the frontal lobe.

356. Mr. Creech has bilateral brain damage.

357. The right side of the brain is more damaged than the left.

358. Mr. Creech's neurological deficits are indicative of brain dysfunction.

359. Mr. Creech has a history of migraine headaches, which at times have become so incapacitating that he cannot move.

360. Mr. Creech has been prescribed a number of medications for his migraines.

361. Mr. Creech's neuropsychological deficits are indicative of brain dysfunction.

362. Over the years, Mr. Creech experienced a series of head injuries, including a fall from a staircase when he was a boy which led to a lapse in consciousness. After that fall, his mother removed him from the hospital against doctors' orders. In addition, Mr. Creech was in two serious car crashes at the ages of thirteen and seventeen respectively.

363. Brain damage elevates the risk that Mr. Creech could have an atypical reaction to an execution drug, potentially causing him to become agitated and confused and to decompensate.

364. In such a state, there is a heightened likelihood that obtaining IV access will be difficult.

365. Mr. Creech also has at times experienced edema, which could likewise complicate IV access.

## **2. Problems With the Now-Invalidated Protocol**

366. Idaho Code Section 19-2716, which added the firing squad as a potential execution method in Idaho, also generates new risks of severe pain and suffering if the now-invalid Protocol were nevertheless to be employed in executing Mr. Creech.

367. That statute refers to whether or not execution by lethal injection is "available," but the lack of definition of "available" creates the risk that the State could deem lethal injection "available" if it possessed only expired or contaminated chemicals.

368. Injecting Mr. Creech with expired, sub-potent, or contaminated chemicals in turn creates the substantial risk that he will experience severe pain or suffering as a result, as described above.

369. The risks of severe pain or suffering outlined above are also exacerbated by flaws in the now-outdated Protocol.

370. Under the now-outdated Protocol, the medical team members are instrumental to the carrying out of executions, as they are the ones preparing and administering the lethal chemicals, as well as monitoring the inmate's level of consciousness.

371. The now-outdated Protocol requires that members of the medical team have "three years of medical experience" in various positions, including as nurses, paramedics, and phlebotomists.

372. Individuals with those backgrounds do not have the requisite training to properly administer the chemicals in the now-outdated Protocol while accurately evaluating the possibility that the inmate is conscious, sensate, or in pain when the individual has the kind of complicated medical status that Mr. Creech does.

373. Only a practicing anesthesiologist would be fully qualified to perform that function.

374. Under the now-outdated Protocol, members of the medical team need not be physicians.

375. The now-outdated Protocol does not require that any member of the medical team be an anesthesiologist.

376. No member of the medical team assembled for Mr. Creech's execution is an anesthesiologist.

377. Indeed, no member of the medical team is even a doctor.

378. Anesthesiologists understand the pharmacology of anesthetic drugs and their interactions, which determines the sequence and timing of how chemicals should be injected.

379. Other types of medical professionals, like nurses and paramedics, do not have that scientific background.

380. When drugs are administered and the pacing is off, it can create a painful reaction.

381. A person may be experiencing pain and yet not express it in a way that is visible to the naked eye.

382. For example, an inmate could receive a large dose of pentobarbital at an execution and appear to go to sleep, yet still be going through a painful experience.

383. Anesthesiologists are experts in determining whether there is pain in such circumstances and adapting to those circumstances.

384. To do so, they rely on their clinical training.

385. Anesthesiologists also rely on brain monitors, sophisticated pieces of equipment that measure and convert brain signals so that doctors can understand a patient's level of consciousness and depth of anesthesia.

386. The now-outdated Protocol does not provide for the use of a brain consciousness monitor.

387. On information and belief, IDOC does not plan on using a brain consciousness monitor at Mr. Creech's execution.

388. If an individual without proper training were handling the drug administration at the execution under the now-outdated Protocol, and without a brain consciousness monitor, they would essentially be "guessing" the stage of consciousness and pain sensation.

389. The absence of a practicing anesthesiologist and a brain consciousness monitor add yet more risk for pain at Mr. Creech's execution in addition to the dangers described earlier.

390. In other words, Mr. Creech's health conditions create the risk of a painful execution and the flaws in the now-outdated Protocol make it more likely that the executioners will not respond appropriately, which would increase and prolong Mr. Creech's suffering.

391. This is because, if the execution does become unduly painful, the lack of a brain monitor and anesthesiologist would impede the execution team's ability to gauge the pain and therefore respond appropriately to it, such as by administering more or less pentobarbital.

392. As a result, the presence of an anesthesiologist and a brain consciousness monitor at the execution would assist IDOC in avoiding a substantial risk of significant pain during Mr. Creech's execution process.

393. None of the medical team members are pharmacologists.

394. Nevertheless, the medical team is responsible under the protocol for “mixing the chemicals.”

395. Only a pharmacologist is equipped to reliably detect the kinds of problems with compounded drugs described above.

396. The factors arrayed here—including Mr. Creech’s medical and neurological conditions, as well as IDOC’s use of unreliable drugs, the questions surrounding compounding, and the shortcomings in the now-outdated Protocol—independently and collectively create a substantial risk that his execution will cause him severe pain, in violation of the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment.

### **3. Problems With the Execution Facilities**

397. The risks associated with pentobarbital and with the protocol are compounded by serious deficiencies in the physical layout of the execution chamber.

398. During executions in Idaho, the medical team administers the lethal chemicals to the inmate, observes the individual, and has the responsibility to intervene in the event of complications.

399. While the lethal chemicals are flowing into the inmate’s veins, the medical team is positioned in a room adjacent to the execution chamber.

400. This space is referred to in SOP 135 as the medical team room.

401. There is no window between the execution chamber and the medical team room.

402. Instead, there is a solid wall between the two rooms.

403. The medical team watches the inmate on monitors on a closed-circuit television system, rather than directly.

404. That system does not allow for the medical team to adequately observe problems arising during the execution.

405. If the medical team cannot adequately detect problems in the execution, there is an increased risk the inmate will experience longer and more intense pain without assistance.

406. Undersigned counsel are not aware of any other execution chambers in the country where there is no direct sightline for the medical team to see the inmate with their own eyes, unmediated by a camera.

407. There are numerous execution chambers where such a direct sightline does exist.

408. The other problem created by this layout is the excessive distance between the medical team room and the execution chamber.

409. The amount of time that it takes to cover that distance makes it impossible for the medical team to react quickly enough to complications arising during the execution.

410. That increases the risk that the inmate will experience longer and more intense pain without assistance.



#### 4. Reasonably Available and More Humane Alternative

411. The State's refusal to provide information about Mr. Creech's execution means that he is litigating on a best-guess basis. Many aspects of his challenge imply their own reasonable alternative, dependent upon the State's choice of conduct: if the State relies on shady offshore compounding pharmacies to procure its lethal injection chemicals, it could simply not do so; or it could employ an anesthesiologist to monitor the execution; or it could establish a direct sight line between the medical team and Mr. Creech; or it could allow the medical team to be present in the execution chamber so that they can react quickly should complications arise. Removal of these failings could conceivably remove the risk of an Eighth Amendment violation occurring in Mr. Creech's execution.

412. Yet to say further would, Mr. Creech submits, violate the ethical obligations of the undersigned attorneys. It is a conflict of interest for Mr. Creech's counsel to argue for a better way for the State to kill him.<sup>8</sup>

413. Requiring the undersigned attorneys to put forth an alternative plan to execute Mr. Creech effectively requires Mr. Creech's counsel to advocate for the State. The duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *see also* Idaho R. Prof. Conduct (hereinafter "IRPC") 1.7, cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *accord* Ind. R. Prof. Conduct 1.7,

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<sup>8</sup> This conflict of interest cannot be resolved by appointing separate counsel to Mr. Creech on the question of a reasonably available and humane alternative as the conflict would extend to any attorneys appointed to represent Mr. Creech.

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cmt 1. For undersigned counsel to represent the interests of the State in killing Mr. Creech would be for counsel to effectively represent the State as a de facto client, and thus violate counsel's duty of loyalty to refrain from representing conflicting interests. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.").

414. The duty of loyalty preventing counsel from advocating in the interest of persons other than their client is broad. For example, under the Idaho Rules of Professional Conduct, attorneys are duty-bound not to represent another client whose position is "directly adverse" to their client or when there is a "significant risk" that the representation of their client "will be materially limited" by the representation of another client, former client, third person, or even "the personal interests" of counsel. IRPC 1.7(a); *accord* Ind. R. Prof. Conduct 1.7(a).

415. Additionally, counsel are duty-bound not to "use information relating representation of a client to the disadvantage of the client . . . ." IRCP 1.8(b); *accord* Ind. R. Prof. Conduct 1.8(b). Using the information undersigned counsel have uncovered in the representation of Mr. Creech, such as his extensive medical history, to point the State toward an alternative method of killing him forces counsel to wield that information to Mr. Creech's disadvantage.

416. Requiring undersigned counsel to represent the interests of the State in killing Mr. Creech would be for counsel to represent an interest to Mr. Creech's extreme detriment. Such a requirement effectively renders counsel a representative

of both Mr. Creech and the State, the diametrically opposed parties on either side of the adversarial process.

417. Mr. Creech reserves the right to plead a reasonably available and more humane alternative to whatever method of execution Idaho chooses to use against him, whether it be lethal injection by pentobarbital or some other method, if this Court orders counsel to do so following briefing on and resolution of the ethical issues noted above.

**B. Claim Two – The Lack of a Valid Execution Protocol Violates Mr. Creech’s Rights to Due Process**

418. Mr. Creech incorporates each and every statement and allegation set forth throughout this complaint as if fully rewritten.

419. Procedural due process requires fair notice of the procedures to be used in Mr. Creech’s execution and an opportunity for his challenges to those procedures to be heard.

420. No execution protocol yet exists which can validly govern either method of execution the State may use to kill Mr. Creech.

421. Upon information and belief, no such protocol will be published within the twenty-two days remaining before Mr. Creech’s scheduled execution.

422. The now-outdated Protocol does not govern Mr. Creech’s scheduled execution on November 8th.

423. IDOC’s statements about the execution create even more uncertainty around the process. Its press release announcing its intent to use lethal injection to kill Mr. Creech advertises the State’s possession of “chemicals,” plural, while IDOC  
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has told the CHU that it is “focusing” on obtaining pentobarbital for a single-drug protocol, without ruling out other options.

424. IDOC’s now-outdated protocol does not identify a recipe for executions, instead giving the Director four separate options to choose from at his unfettered discretion.

425. As of this date, the Director has not told Mr. Creech or his counsel which option he has chosen—or whether he has selected some entirely different drug.

426. Similarly, IDOC’s press release signals its adherence to the new statute – “In accordance with Idaho Code § 19-2716(2), Director Tewalt has filed an affidavit certifying that execution by lethal injection . . . is available in this matter[,]” it proclaims, *id.* – even though the State has written and promulgated no new protocol to implement that new law.

427. The mismatch between the statute, SOP 135, and IDOC’s public pronouncements reflects a lack of consensus on what procedures are to govern Mr. Creech’s execution.

428. Without notice of the procedures to be used in his execution, Mr. Creech will be deprived of his life without being able to adequately challenge the constitutionality of the procedures used to do so.

429. Idaho’s lack of any current protocol governing how it expects to execute Mr. Creech therefore violates the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

**C. Claim Three – Deprivation of Accurate Information Violates Mr. Creech’s Fourteenth Amendment Right to Due Process**

430. Mr. Creech incorporates each and every statement and allegation set forth throughout this complaint as if fully rewritten.

431. The Due Process Clause of the United States Constitution provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

432. Fundamental fairness and due process require that an individual be given an opportunity to receive notice of how one’s rights will be affected and an opportunity to respond and be heard.

433. The defendants’ refusal to provide Mr. Creech with information that would enable him to determine how the State intends to execute him violates his rights to due process; among other things, the lack of information raises a procedural barrier to challenging the constitutionality of IDOC’s execution process.

434. Instead of providing this information, the State has engaged in a pattern of misleading conduct with respect to methods of execution in the State of Idaho.

435. Until Thursday, October 12, 2023, Attorney General Labrador (through his surrogate, Deputy Attorney General LaMont Anderson) and Tewalt were emphatic, to both the Idaho Legislature and the public, that lethal injection chemicals were unavailable to IDOC. On March 1, 2023, testifying in the House Judiciary Committee in support of House Bill 186, the bill proposing the addition of

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the firing squad, Representative Bruce Skaug<sup>9</sup> reported that according to IDOC, the Department’s “continued inability to secure [pentobarbital] seems to indicate it will be unavailable for the foreseeable future, making our ability to carry out the lawful sentence of anyone on death row impossible. So, it’s a de facto end of executions in our state[.]”<sup>10</sup>

436. Rep. Skaug also read from a letter written to him by Defendant Tewalt. Defendant Tewalt had written, Rep. Skaug said, that “[a]bsent an actionable alternative method of executions, a de facto moratorium on capital punishment exists since the current law is unenforceable.” The passage of the secrecy statute shielding much of the information surrounding executions from disclosure had not helped, Defendant Tewalt reported; “still we [IDOC] cannot get those drugs.”

437. Further reporting what he had learned from IDOC, Rep. Skaug told the House Judiciary Committee that “executions . . . may never happen since we may never obtain these necessary drugs for the executions.” Other states are going

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<sup>9</sup> Representative Skaug is Attorney General Labrador’s former employer. Attorney General Labrador has admitted to co-authoring HB 186. Kevin Fixler, *Firing Squad Bill Implementation Would Cost Idaho Taxpayers*, IDAHO STATESMAN (Feb. 27, 2023), available at <https://www.idahostatesman.com/news/politics-government/state-politics/article272585057.html>; Kevin Fixler, *Idaho Seeks to Execute Longtime Death Row Inmate Gerald Pizzuto, Again. Here’s What We Know*, IDAHO STATESMAN (Feb. 24, 2023), available at <https://www.idahostatesman.com/news/northwest/idaho/article272595101.html>.

<sup>10</sup> A video recording of Rep. Skaug’s and Deputy Attorney General Anderson’s March 1, 2023, testimony is available at <https://lso.legislature.idaho.gov/MediaArchive/MainMenu.do>. All emphasis added to testimony quotations is the speaker’s own.

through “the same situation, where we can’t get the drugs for this.” Asked whether the problem were the inability obtain the drugs or simply an inability to store them safely for long enough, Rep. Skaug responded, “I would think if we could store it we would, but apparently we cannot get it at all.”

438. Deputy Attorney General Anderson was even clearer in his own testimony to the House Judiciary Committee that same day. The switch from executions by firing squad to the use of lethal injection drugs was doomed to failure, he said, because “[w]e *cannot get them*. There’s no one that will supply them.”

439. Elaborating, he further testified that, “[l]ike California, there is currently an execution moratorium in Idaho. Not a death penalty moratorium, an *execution* moratorium[,]” he said. “That’s based upon the Idaho Department of Correction being unable to secure the necessary drugs to carry out an execution. And the reason for that is because drug companies refuse to sell the drugs. Others that may have the drugs beyond the drug companies refuse to sell them. And states that also use lethal injection refuse to share because then they’re gonna put, be put in Idaho’s position, and go – and have to go find some supplier for the drugs[.]”

440. Indeed, Attorney General Labrador’s surrogate Deputy Attorney General Anderson even personally intervened in an attempt to procure lethal injection chemicals, but failed. “I’ve talked to the individual who has my job in Texas[,]” he told the House Judiciary Committee. “And the one thing he told me was they weren’t going to tell me where they got their drugs. And that’s the problems we have with getting them. My understanding is that Texas uses pentobarbital. There’s

also ongoing litigation right now in Texas because it's being alleged that the pentobarbital they're using is out of date. Although it is still – it still works, in other words they have it tested by an independent laboratory before it is used in execution. And it is my understanding don't quote me on this, that their supply is dwindling and they're going to be in trouble for a while.”

441. After HB 186 passed the House, Deputy Attorney General Anderson testified similarly to the Senate Judiciary Committee on March 13, 2023, that lethal injection executions were no longer available in Idaho.

442. That claim was not made just to the public and the legislature, however; the State made identical representations to this Court as well. At approximately 2:00 pm. on October 10, 2023, the State submitted a proposed draft order to this Court in *Pizzuto v. Labrador*, D. Idaho, No. 1:23-cv-00081, in which it proffered that “the Idaho Department of Correction does not have the present ability to carry out an execution via lethal injection or firing squad[.]”

443. Based on these representations, Mr. Creech believed that when he was executed, the method of execution would most likely be the firing squad.

444. Forty-eight hours after its representation to this Court, however, the State put out an eight-line statement announcing that its claim in the proposed order and all its claims to the legislature and the Idaho public about the dire need for the firing squad were false, and that execution via lethal injection is in fact available in Idaho.



445. IDOC's extreme lack of transparency here should be understood in the context of its general obfuscation surrounding executions.

446. As stated above, IDOC revised its execution protocol shortly before both the Rhoades and Leavitt executions, creating a situation in which the inmates had insufficient time to challenge the process before they were executed.

447. Following the same strategy, IDOC then revised its execution protocol against on March 30, 2021, which was shortly before Mr. Pizzuto's May 6, 2021 death warrant was signed.

448. However, for Mr. Pizzuto's next two death warrants (on November 16, 2022 and February 24, 2023), IDOC announced that the protocol was "suspended."

449. IDOC has never explained what it means for the protocol to be suspended, or what aspect of the protocol was suspended, or for how long.

450. Nor has IDOC ever officially declared that any previous suspension was lifted.

451. By taking this approach, IDOC has created a cloud of uncertainty over what its protocol even is at any given point in time or when it might be modified.

452. *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359, provides another example of the State's pattern of obfuscation surrounding executions. There, the plaintiff is challenging the use of pentobarbital at his execution as cruel and unusual.

453. The plaintiff in that case is represented by the same office handling Mr. Creech's case here, i.e., the Capital Habeas Unit of Federal Defender Services of Idaho ("CHU").

454. To facilitate the resolution of discovery disputes, this Court directed the CHU in the *Pizzuto* case to provide IDOC with a list of the information they desired to learn about the lethal drugs in connection with the plaintiff's execution, such as facts about testing protocols, facts about safeguards taken at the source, and many other things that go directly to the safety and reliability of the chemicals.

455. The CHU provided that list to IDOC, through their attorneys at the AG's office, on April 5, 2023.

456. IDOC has not responded to any of the questions on the list in the six-plus months since, despite discovery remaining ongoing in the case and despite being reminded multiple times by the CHU.

457. The question of drug-testing in particular underscores the sweeping ramifications of IDOC's obfuscation.

458. IDOC has maintained that it need not tell the CHU essentially any information about execution drugs if it provides the results of chemical testing.

459. However, IDOC simultaneously refuses to offer the CHU any meaningful information about the testing itself.

460. For example, Idaho's execution-secrecy statute, Idaho Code § 19-2716A(4)(b), explicitly prohibits the disclosure of the identity of the person or entity who tests execution drugs.

461. Without knowing the identity of the testing laboratory, Mr. Creech cannot confirm that it is reliable.

462. If Mr. Creech cannot confirm that the testing laboratory is reliable, the results from it are meaningless.

463. In that way, Section 19-2716A(4) prevents Mr. Creech from adequately challenging his execution, and therefore violates due process.

464. IDOC likewise will not tell IDOC anything about the testing protocols of the laboratory, its regulatory history, its training practices, and so forth.

465. Without that knowledge, Mr. Creech cannot confirm the reliability of the testing laboratory's results.

466. IDOC's prior conduct reinforces these concerns about testing.

467. With respect to the Rhoades and Leavitt executions, IDOC has insisted that it tested the lethal chemicals.

468. However, IDOC never provided any test results to counsel for Mr. Rhoades or Mr. Leavitt.

469. Moreover, IDOC now claims that it is unable to find the test results for the Rhoades and Leavitt drugs.

470. In addition, IDOC has moved to quash a subpoena for the test results that Mr. Pizzuto issued to the testing laboratory in case number 1:21-cv-359.

471. IDOC is thereby attempting to facilitate a situation in which no one will be able to see the test results from the Rhoades or Leavitt executions—or even to confirm that testing actually was done.

472. The testing laboratory chosen for the Rhoades and Leavitt executions further increases concerns about the integrity of the process.

473. For the Rhoades and Leavitt executions, IDOC chose Professional Compounding Centers of America (PCCA) to do the drug testing.

474. Eagle Analytical is the testing arm of PCCA.

475. Regulatory authorities have found numerous violations at Eagle.

476. For example, in 2013, the FDA determined that due to a host of deficiencies the companies “controls do not include the establishment of scientifically sound and appropriate specifications, standards, and test procedures designed to assure that components conform to appropriate standards of identity, strength, quality, and purity.”

477. Several of these deficiencies related to contamination, including the failure to “calculate endotoxin limits for drug product samples,” the failure to properly test for “microbial contamination,” and the failure to validate for potency assays.

478. Eagle has also been identified as engaging in poor record keeping and having inadequately trained staff.

479. Eagle’s response to the FDA report was that it “does not hold itself out as compliant with current good manufacturing practices.”

480. The violations at Eagle are precisely the kind of problems—gaps in testing for contamination and endotoxins—that have cast doubt on the reliability of lethal injection protocols elsewhere.

481. The fact that IDOC selected such a troubled testing laboratory for its most recent executions makes it even more problematic that defendants will now be

able to choose a completely secret laboratory, provide no information about that laboratory, and then rely entirely on that unknown laboratory's results in proclaiming the reliability of the drugs.

482. The timeline involved also shows that IDOC's reliance on drug testing does not cure the due process violation it is engaging in.

483. IDOC's protocol does not say when the drug testing will occur.

484. The only timeline in the protocol with respect to the testing is that the administrative team is required to review the results between seven and two days before the execution.

485. IDOC has not otherwise promised to provide the test results to the CHU any earlier than that.

486. Thus, IDOC has permitted itself to wait until forty-eight hours before the execution to reveal to the CHU the test results.

487. The idea that the CHU could review the results, consult with experts, raise claims, and have them adjudicated—all without knowing anything about the laboratory—is fantastical.

488. IDOC has also notably declined to bind itself in its protocol to the commitment of actually providing the test results to the inmate's counsel—which, again, it did not do for the last executions—raising doubts about whether even that much will happen.

489. In short, the testing does nothing to remedy the due process violation.

490. The State's misleading and obstructionist conduct surrounding what execution method is available at which point in time and how it would be implemented prevented Mr. Creech from obtaining notice of the procedures to be used in his execution. This in turn means that the State will deprive Mr. Creech of his life both without his being able to adequately challenge the constitutionality of the procedures used to do so and in a manner incompatible with fundamental fairness.

491. The State's warrant for Mr. Creech's execution on November 8, 2023, means that he will be killed without ever receiving from the defendants at a time in which he can meaningfully challenge and litigate, at the very least, the following information, in violation of his right to Due Process: (1) the number, amount, and type of drugs to be used, (2) how the drugs were made, how the drugs were/will be obtained, their source, amounts, expiration date, how they were acquired/transported/stored/tested, when IDOC will or did obtain the drugs, etc., (3) when a new version of SOP 135 will be issued, (4) whether witnesses will be able to observe the insertion of the IVs, (5) procedures for IV placement/length, (6) who will participate in the execution, what is their training/qualifications, how will they be chosen, (7) whether there will be a consciousness check and the procedure for it, and (8) procedures for botched executions.

492. The principles of fundamental fairness and due process prohibit the state from suppressing information about how a condemned prisoner's death sentence will be carried out. Without access to such information, Mr. Creech has no

way to know whether his execution will comport with the Eighth Amendment's limitations on gratuitous infliction of pain and suffering. He is further denied any effective remedy to enforce compliance with constitutional commands. Without reliable information about the manner in which the prisoner will be executed, the courts cannot meaningfully review a state's execution procedure to ensure it complies with the commands of the Constitution.

493. By depriving Mr. Creech of information necessary to challenge the execution procedures to be used and by misleading him, the Legislature, the public, and this Court about how it intends to execute him, the defendants have violated his rights to Due Process.

## **VII. Prayer for Relief**

494. In light of the above, Mr. Creech respectfully requests that the Court:

- a) Enjoin the defendants from proceeding toward and carrying out an execution of Mr. Creech with pentobarbital;
- b) Declare that any execution of Mr. Creech with pentobarbital is unconstitutional;
- c) If a drug other than pentobarbital is selected, enjoin the defendants from executing Mr. Creech until a new drug has been chosen and there has been sufficient time for his counsel to investigate and to raise any challenges to it;
- d) Enjoin the defendants from executing Mr. Creech until the State can demonstrate that it is able to do so constitutionally;

- e) Enjoin the defendants from attempting to execute Mr. Creech until the Court orders otherwise;
- f) Enter a declaratory judgment that the defendants' refusal to provide the information described above is unconstitutional;
- g) Enjoin the defendants from proceeding toward and carrying out an execution of Mr. Creech until the State discloses the information described above and there has been sufficient time for him to investigate and litigate any issues raised by the information;
- h) Enjoin the defendants from executing Mr. Creech until the Idaho Legislature has provided adequate guidance to IDOC on execution procedures;
- i) Enjoin the defendants from attempting to execute Mr. Creech until the Court orders otherwise;
- j) Authorize appropriate and necessary discovery and an evidentiary hearing to permit Mr. Creech to prove his claims;
- k) Grant any such other relief that is just and proper.

DATED this 31st day of January 2024.

*/s/ Mary E. Spears*

Mary E. Spears

Deborah A. Czuba

*Attorneys for Plaintiff*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 31st day of January 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which is designed to send a Notice of Electronic Filing to persons including the following:

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Attorneys for Plaintiff Thomas Eugene Creech

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

**THOMAS EUGENE CREECH,** )  
 )  
Plaintiff, )  
v. )  
 )  
**JOSH TEWALT**, Director, Idaho Department )  
of Correction; **TIM RICHARDSON**, Warden, )  
Idaho Maximum Security Institution; **CHAD** )  
**PAGE**, Chief, Division of Prisons, Idaho )  
Department of Correction; and **Unknown** )  
**Employees, Agents, or Contractors of the** )  
**Idaho Department of Correction,** )  
 )  
Defendants. )  
\_\_\_\_\_ )

**CASE NO. 1:20-cv-114-AKB**

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

**Execution Scheduled for  
February 28, 2023**

Plaintiff Thomas Eugene Creech respectfully asks the Court to enjoin Defendants from executing him until the claims he has presented have been resolved. “To prevail on a motion for a preliminary injunction,” Mr. Creech “must show that: (1) he is likely to succeed on the merits on his . . . federal claims; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) a preliminary injunction is in the public

interest.” *Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019).<sup>1</sup> Mr. Creech can satisfy each factor. Every part of this memorandum is incorporated into every other part.

**I. Mr. Creech is likely to succeed on the merits of his claims.**

Mr. Creech will separately address the likelihood of success on the merits of each of the three claims from his second amended complaint (Dkt. 119), in a slightly different order chosen because of the relationship between the issues: his Eighth Amendment theory based on the risk of a torturous execution (Claim 1); his due process challenge to the Idaho Department of Correction’s (IDOC’s) deprivation of execution-related information (Claim 3); and the constitutional problems flowing from the lack of a valid protocol (Claim 2).

**A. There is a likelihood of success on Claim 1.**

To prevail on an Eighth Amendment claim of the type Mr. Creech alleges, he must demonstrate: (1) that the State’s chosen method exposes the prisoner to a substantial risk of severe pain; and (2) that there is a “feasible and readily implemented alternative” that would not do so. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Mr. Creech can establish a likelihood of success “that the State’s chosen method exposes the prisoner to a substantial risk of severe pain.”<sup>2</sup> There are four factors collectively creating a substantial risk of pain here: (1) Mr.

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<sup>1</sup> In this pleading, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

<sup>2</sup> Undersigned counsel explained in Mr. Creech’s second amended complaint why his counsel were ethically prohibited from asserting a more humane alternative in certain respects in the absence of an order to the contrary, *see* Dkt. 119 at 53–54, and this Court found the pleading standard had been satisfied under the circumstances, *see* Dkt. 118 at 13–14. Mr. Creech again reserves the right to elaborate on the more humane alternative requirement if this Court orders counsel to do so following briefing on and resolution of the ethical conflict issue. Counsel does not make this assertion in a vacuum; they have consulted with a national expert on legal ethics who has advised that this indeed poses an ethical issue. In addition, it is difficult to propose an alternative method of execution when it is unknown what precisely the Director will deem

Creech's health concerns; (2) issues regarding the reliability of the drugs; (3) problems with visibility in the execution chamber; and (4) an absence of necessary safeguards in the protocol.

**1. Mr. Creech's health concerns create a substantial risk of severe pain.**

Mr. Creech's complex and serious medical situation makes pentobarbital an unconstitutionally risky drug to use at his execution given the danger of an excruciating heart attack, the effects of which Mr. Creech will acutely experience before he is adequately sedated.

On October 23, 2022, doctors at Saint Alphonsus Hospital detected in Mr. Creech an abdominal aortic aneurysm measuring 6.1 centimeters by 6.3 centimeters, which was later surgically repaired. *See* Ex. 1 at 7–8. Mr. Creech also has a history of uncontrolled high blood pressure. *See, e.g.*, Ex. 2. Based on those facts, University of Pennsylvania cardiologist and associate professor Dr. Michael Fradley judges Mr. Creech to be at an “elevated risk from a cardiovascular perspective given his multiple risk factors and his known vascular disease.” Ex. 3.

If Mr. Creech does have heart disease, the “cardiovascular risks associated with” pentobarbital would cause “serious complications during the execution.” *Id.* That risk is not hypothetical. Two inmates with coronary artery disease in Alabama were executed with pentobarbital and they had visibly painful executions. *See* Ex. 4 at 4, 6; Ex. 5 at 5; *see also Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011) (*per curiam*). If Mr. Creech does have significant heart disease, there would be a grave prospect of him suffering an agonizing heart attack brought on by a large dose of pentobarbital. However, to fully assess the precise contours of these risks, further testing is necessary, *see* Ex. 3, which Mr. Creech is moving for today.

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“available” in his unfettered discretion. *See id.* at 13 (agreeing with Mr. Creech's argument that “one of the challenges of identifying an alternative execution method in this case is that IDOC has not disclosed to Creech the exact method of lethal injection it certified as available for his execution”).

## 2. Drug reliability issues create a substantial risk of severe pain.

The risks posed to Mr. Creech by pentobarbital generally are intensified by the serious doubts surrounding the reliability of the specific chemicals obtained by IDOC. To begin, there is reason to suspect that IDOC has chosen a dubious source for its drugs, as it has in the past. IDOC has claimed in a separate proceeding involving death-row inmate Gerald Ross Pizzuto, Jr. that the pentobarbital in its possession is manufactured. *See* Ex. 6 at 8.<sup>3</sup> For a number of years, states have not had access to manufactured pentobarbital for executions. *See* Ex. 7 at 9; *see also Swearingen v. Collier*, No. 4:19-cv-3079, 2019 WL 3935285, at \*1 (S.D. Tex. Aug. 20, 2019) (describing “manufactured pentobarbital” as “unavailable” in a Texas execution case). That stems from the fact that the major manufacturers, who want their products associated with saving and not forcibly ending lives, have placed strict controls on their pentobarbital, forbidding its use in executions. *See id.*; *see also Arthur v. Dunn*, No. 2:11-cv-438, 2016 WL 1551475, at \*5 n.4 (M.D. Ala. Apr. 15, 2016) (observing how the manufacturer of pentobarbital at the time had “restricted its sale for use in human executions, making it unavailable to departments of corrections”), *aff’d*, 840 F.3d 1268 (11th Cir. 2016). In reaction, death states turned to compounding pharmacies, which make drugs specifically to order rather than manufacturing them. *See* Ex. 7 at 9; *accord Jordan v. Comm’r, Miss. Dept. of Corr.*, 947 F.3d 1322, 1332 (11th Cir. 2020). It appears to have been more than ten years since the public has been informed of a state using manufactured pentobarbital in an execution, while compounded pentobarbital has during the same time been used in many executions. *See, e.g., McGehee v. Tex. Dept. of Crim. Just.*, No. H-18-1546, 2018 WL 3996956, at \*3 n.9 (S.D. Tex. Aug. 21, 2018) (recounting how,

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<sup>3</sup> All exhibits are incorporated in this memorandum as if fully set forth herein. To the extent it is necessary for the Court to take judicial notice of any exhibits, Mr. Creech asks it to do so.

in 2013, “a loss of suppliers forced Texas to use compounded pentobarbital instead of manufactured pentobarbital”).

Yet IDOC has now somehow managed to get its hands on manufactured pentobarbital. How? Although IDOC has refused to say, there are a few different scenarios, and each of them is troubling. One likely answer is that the drugs were manufactured by Akorn, a now-defunct company that recently issued massive recalls because of pervasive defects in its merchandise. Akorn had been one of the American manufacturers of pentobarbital. *See* Ex. 7 at 10–12. In fact, at one time at least, Akorn was the sole supplier of pentobarbital in the U.S. *See* Barri Dean, Note, *What Are Those Ingredients You Are Mixing Up Behind Your Veil*, 62 How. L.J. 309, 313 (2018). Like the other manufacturers, Akorn refused to sell drugs for executions. *See* James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 Geo. L.J. 1215, 1228 n.71 (2015). Then, the company declared bankruptcy in February 2023, shuttered all of its American operations, and laid off its staff. *See* Ex. 7 at 10–11; Ex. 8. It is common for manufactured pentobarbital to have an expiration date of two years. *See* Ex. 7 at 10. According to IDOC, its pentobarbital will expire in February 2025. *See* Ex. 9 at 2. There is a good chance, then, that the pentobarbital was made in February 2023, right around the time of Akorn’s bankruptcy. *See* Ex. 7 at 11. A company entering bankruptcy and terminating its workforce is a company with a sharply reduced ability to enforce its distribution agreements. *See id.* at 10–11. The specter of IDOC’s drugs originating from Akorn is undeniable.

It is a worrisome prospect. Before it imploded, Akorn recalled all of its products. *See* Ex. 7 at 13; Ex. 10 (posting a “[d]rug recall notice for all Akorn drug products”). These recalls were driven in part by widespread concerns regarding the quality of the medications—a main driving force behind the bankruptcy to begin with. *See* Ex. 7 at 11–12; Ex. 11 (remarking that “Akorn

weathered a series of . . . warning letters” from the Food and Drug Administration (FDA), as well as “citations” and other regulatory actions before it ultimately declared bankruptcy and “laid off all of its staffers”). Regulators noted many of the principal issues regarding the quality of the medications. *See* Ex. 7 at 11–12. If IDOC intends to inject an Akorn drug into Mr. Creech’s veins, there is by definition a risk of severe pain. And that is a question—like all of the others—that IDOC won’t answer. *See* Ex. 12 at 2–3.

The other scenarios are hardly more reassuring. One is that the pentobarbital came from a veterinarian. IDOC has highlighted this possibility by refusing to deny it. *See* Ex. 6 at 5.<sup>4</sup> If the drugs were made for animals, it would incontrovertibly create a risk of severe pain to administer them to a human being, which Mr. Creech remains despite being a death-row inmate. Those risks are explored in the attached declaration of Dr. Michaela Almgren, a professor of pharmacy who has many years’ experience working and teaching in the field. *See* Ex. 7 at 12.

Then there are manufacturers other than Akorn. If IDOC has accessed pentobarbital made by an American or European company, it would be acting surreptitiously in violation of restrictions on using the drug for executions. *See* Ex. 7 at 9 (referencing the distribution restrictions imposed by American manufacturers); Ex. 13 at 7 (reflecting the acknowledgment by the Attorney General here that the European Union prohibits the provision of “products to be used with capital punishment”). In other words, IDOC would have deliberately circumvented lawful limitations to use a product to kill someone against the wishes of the businesses entitled to prevent that from happening. *See, e.g., Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072

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<sup>4</sup> In an untimely assertion, IDOC implausibly claimed that it didn’t understand what it was being asked when the straightforward question was posed to it of whether the drugs “came from a veterinary source,” Ex. 13 at 8, something it notably did not say when originally responding, *see* Ex. 6 at 5.

(2021) (categorizing “[t]he right to exclude” as “one of the most treasured rights of property ownership”). Such backdoor dealings occur outside the legal channels that exist for the very reason of ensuring a safe and reliable drug and a trustworthy chain of custody. *See* Ex. 7 at 9–10. The resulting reliability concerns are unavoidable.

Finally, if the pentobarbital originated from a manufacturer who has not barred its use in an execution, that company would have to be based somewhere other than America or Europe. Importing pentobarbital from the third world implicates a separate set of concerns. For one, there have been numerous quality-control issues with international drug manufacturers. *See id.* at 10. Such issues have been particularly widespread with supplies from China and India. *See id.* If America and Europe are ruled out, China and India become likely sources of IDOC’s drugs. For example, the U.S. and Europe collectively manufacture 54% of the active pharmaceutical ingredients (APIs) in the world—the components from which drugs are made. *See* Dr. Janet Woodcock, Director of the Center for Drug Evaluation and Research at the FDA, Cong. Test., Oct. 30, 2019, available at [Safeguarding Pharmaceutical Supply Chains in a Global Economy - 10/30/2019 | FDA](#). China and India make up 31% of the remaining 46%. *See id.* In short, wherever IDOC got the drugs from, there are reliability issues.<sup>5</sup>

The likelihood that IDOC selected a questionable source is enhanced by its past behavior, which creates an additional risk factor. *See West v. Brewer*, No. 2:11-cv-1409, 2011 WL 2912699, at \*3 (D. Ariz. July 20, 2011) (considering a correctional department’s past practices while ruling on an execution claim). For Idaho’s most recent executions, of Paul Rhoades and Richard Leavitt in 2011 and 2012, IDOC first tried to get its drugs from Chris Harris, a salesman

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<sup>5</sup> If the Court concludes that the risks concerning the drugs do not establish an Eighth Amendment violation, Mr. Creech contends that the uncertainties described above should still be taken into account in connection with Claim 3, described below.



in India who falsely told a pharmaceutical company that execution chemicals were intended for philanthropic use in Africa and whose shipment was seized by the FDA because it was illegal. *See* Ex. 14; Ex. 15; Ex. 16. Eventually, IDOC (partly through its current Director, Defendant Tewalt) acquired the drugs for the Leavitt execution in a Walmart parking lot with a suitcase full of \$15,000 in cash. *See* Ex. 17. What is more, the pharmacies chosen by IDOC for both the Rhoades and Leavitt executions were riddled with regulatory violations, including expired products, poor hygiene, bad documentation, and many additional types of misconduct—all of which led to numerous fines as well as probation and other sanctions. *See* Ex. 18.

**3. Visibility issues in the execution chamber create a substantial risk of severe pain.**

The danger of the execution going painfully awry is increased further by profound and unnecessary flaws in the physical layout of the execution chamber. As Columbia University anesthesiologist Dr. Mark Heath described after inspecting the chamber, Idaho’s chamber doesn’t allow for the execution team to watch Mr. Creech while it is pumping the lethal fluid into his body. *See* Ex. 19 at 2. Instead, the execution team sees Mr. Creech only on screens through a camera system. *See id.* Dr. Heath regards that arrangement as “unsuitable for conducting lethal injection procedures” because it “substantially and gratuitously increases the risk of a botched execution.” *See id.* at 3. This kind of remote monitoring, Dr. Heath continues, is not only unheard of in the medical setting. It is also unlike any of the eleven other execution chambers he has inspected, each of which permits the kind of visual access Dr. Heath recommends. *See id.* Given the novelty of Idaho’s set-up, the more humane alternative is clear—IDOC could and should have done what every other state did.

**4. The now-outdated protocol creates a substantial risk of severe pain.**

The risks above are intensified by the 2021 protocol, which the State apparently intends to employ in Mr. Creech’s execution notwithstanding the fact that it does not account for the current statute. *See infra* at Part I.C. Under the protocol, the medical team is instrumental to carrying out the execution. Most critically, it is the medical team that inserts the IVs, administers the lethal chemicals, and monitors the inmate’s “level of consciousness.” Dkt. 55-13 at 7. Members of the medical team are required by the now-outdated protocol to have only “three years of medical experience,” which they can acquire by serving in any number of roles, including as nurses, paramedics, phlebotomists, and emergency medical technicians (“EMTs”). *Id.*

But individuals with those backgrounds do not have the requisite training to properly administer the chemicals in the 2021 protocol while accurately evaluating the possibility that the inmate is conscious, sensate, or in pain. *See* Ex. 20 at ¶ 22. Only a practicing anesthesiologist would be fully qualified to perform that function during such an inherently risky execution. *Id.* Furthermore, the individual “may be experiencing pain and yet not expressing it” in a way that is “visible to the naked eye.” *Id.* ¶ 24. For example, “an inmate could receive a large dose of pentobarbital at an execution and appear to go to sleep, yet still be going through a painful experience.” *Id.* The members of the medical team utilized in Idaho’s executions are all either EMTs, paramedics, or nurses. *Id.* ¶ 22. They are consequently unqualified to handle the risks associated with the execution. *Id.*

In addition to their training, anesthesiologists rely on brain monitors, which are sophisticated pieces of equipment that measure and convert brain signals so that doctors can determine a patient’s level of consciousness and his depth of anesthesia. *Id.* ¶ 24. The now-

outdated protocol does not provide for the use of a brain consciousness monitor. *Id.* “If an individual without proper training were handling the drug administration at the execution” as directed under this protocol, “and without a brain consciousness monitor, they would essentially be ‘guessing’ the stage of consciousness and pain sensation.” *Id.* Again, such guesswork is unacceptable when it comes to executing a man with numerous and complicated medical issues.

In these ways, the absence of a practicing anesthesiologist and a brain consciousness monitor add yet more risk for pain at Mr. Creech’s execution. That is, Mr. Creech’s medical conditions, in conjunction with IDOC’s use of unreliable drugs and the visibility issues, create a risk of a painful execution. Then, the fact that the proper personnel and equipment will not be present at the execution makes it more likely that the medical team will fail to notice or properly address Mr. Creech’s pain, increasing his suffering even more.

There is also the concern of human error at executions which has been underscored by recent incidents in Alabama. In September 2022, Alabama called off Alan Miller’s execution after the personnel involved were unable to access his veins. *See Ex. 21.* This was only two months after the State took three hours to set an IV line on Joe James. *See id.* An autopsy afterwards revealed numerous bruised puncture sites and open wounds. *Ex. 22.* In light of these incidents, the Eleventh Circuit observed that the Alabama Department of Corrections had “show[n] a pattern of difficulty . . . in achieving IV access with prolonged attempts.” *Smith v. Comm’r, Ala. Dept. of Corr.*, No. 22-13781, 2022 WL 17069492, at \*4 (11th Cir. Nov. 17, 2022) (per curiam), *vacated in unexplained order*, 2022 WL 17039195 (2022). Such access is physiologically made more difficult by the inevitable anxiety suffered by the condemned during the process and the effect the stress has on their veins. *See id.* at \*5.

And Mr. Creech's advanced age of seventy-three is an additional risk factor increasing the likelihood of vein-access problems arising. *See, e.g., Bible v. Davis*, No. 4:18-cv-1893, 2018 WL 3068804, at \*6 (S.D. Tex. June 21, 2018). That factor is especially notable for Mr. Creech, who is significantly older than the average executed inmate. *See* Death Penalty Information Center, Execution Database, available at <https://deathpenaltyinfo.org/executions/execution-database> (showing that Mr. Creech is older than the last twenty-eight prisoners executed in America, a group with the average age of 54). If these problems can be so vexing in Alabama, a state with substantially more execution experience than Idaho, *see id.*, they are certainly an issue here. At a minimum, they are part of the constellation of risk factors creating a perfect storm for a botched execution of Mr. Creech.

**B. There is a likelihood of success on Claim 3.**

Claim 3 asserts that IDOC has, in violation of the Due Process Clause, deprived Mr. Creech of information that would allow him to attack the constitutionality of Idaho's execution plans. *See* Dkt. 119 at 57–67. The Ninth Circuit has clarified that the crux of such a claim is whether a state's obstructionism denies an inmate "the opportunity to have an Eighth Amendment method-of-execution challenge heard at a meaningful time and in a meaningful manner." Dkt. 95 at 27. That is precisely what IDOC has done. Even though executions are of the utmost public interest, IDOC has shrouded its plans for the exercise of this awesome governmental power in a level of secrecy more extreme than any other state in the country.

When IDOC issued its last death warrant for Mr. Creech, in October 2023, it did so two days after claiming that it did "not have the present ability to carry out an execution via lethal injection or firing squad," making it impossible for undersigned counsel to even know what method they were supposed to evaluate. Ex. 23 at 5. For the current death warrant, IDOC's

strategic secretiveness has only lessened slightly. Mr. Creech knows (by virtue of discovery in another inmate's case) that IDOC intends to use supposedly manufactured pentobarbital for his execution. But he knows essentially nothing else. As sketched out above, IDOC has not told him who made the drugs—a now-bankrupt company that initiated massive recalls, a fly-by-night operator in the third world, or someone else. As established above, these are precisely the sort of questions that Mr. Creech would challenge with a full-throated Eighth Amendment claim if IDOC's obfuscations hadn't hamstrung his ability to do so. *See supra* at Part I.A.

IDOC has not even informed Mr. Creech what *kind* of source it has gotten its drugs from: e.g., was it a veterinarian, a pharmacy, a hospital or some other type of business? As Mr. Creech has already demonstrated, the question of the type of source goes to the reliability of the drugs, as for example with veterinarians, and is therefore relevant to the Eighth Amendment inquiry. *See supra* at Part I.A. That degree of secrecy is unprecedented. For instance, IDOC refuses to say whether it obtained its drugs from a pharmacy based on supposed concerns about disclosing an identity, *see* Ex. 6 at 7, but there are over sixty thousand pharmacies it could be, *see* Ex. 7 at 14, and other states have carried out executions with the necessary confidentiality while routinely divulging the same fact. *See, e.g., Jordan*, 947 F.3d at 1332 (“Thus, the *pharmacy* that supplied the GDC with the pentobarbital used in Georgia's most recent executions did so under the assurance of absolute confidentiality provided by this Georgia statute.”); *In re Miss. Dept. of Corr.*, 839 F.3d 732, 734–35 (8th Cir. 2016) (similar); *King v. Parker*, No. 3:18-cv-1234, 2020 WL 4883014, at \*7 (M.D. Tenn. July 20, 2020) (similar). Of the voluminous cases where secrecy-related issues have been litigated by death-row inmates challenging their methods of execution, undersigned counsel are not aware of a single one in which a court has adopted the

defendants' outlandish position that the mere disclosure of what *industry* a source comes from is protected from discovery.

IDOC's refusal to shed light on what part of the world the drugs came from is likewise at odds with the Due Process Clause. The Department's excuse is to posit, without any citation or authority, that the answer might limit the realm of possible regions to those outside of the United States and Europe. *See* Ex. 13 at 7. More than 7 billion people live in such regions, spread out among roughly 150 countries. Undersigned counsel would need superhuman detective skills to use this information to identify a source. What counsel have instead are the ordinary tools to assert an Eighth Amendment claim when they have adequate information, which IDOC will not share.

IDOC feels that the testing of the drugs makes up for all of its caginess. *See* Ex. 13 at 2. To that end, the only meaningful documentation IDOC has given to Mr. Creech is the certificate of analysis for its pentobarbital. *See* Ex. 24. IDOC's stance is that the certificate addresses any Eighth Amendment question Mr. Creech might have about the quality of the chemicals. It doesn't. Although the certificate of analysis includes various statements about the makeup of the chemicals, it is most noteworthy for what it lacks: any information on who is doing the testing. That text is of course redacted. *See* Ex. 24. It is hardly persuasive for the defendants to tell Mr. Creech that he can skip his own due diligence into the reliability of the drugs based entirely on the say-so of a completely anonymous testing facility. How is Mr. Creech—or the Court—to know that the testing facility itself is reliable? If it isn't, the results are meaningless.

And there is reason to doubt the quality of any testing laboratory selected by the defendants. The last time IDOC tapped a company to assess execution drugs, it went to the testing arm of Professional Compounding Centers of America (PCCA), *see* Ex. 25 at 3, a

laboratory that has been cited by regulators for numerous violations, *see generally* Ex. 26. Some of those violations relate to precisely the sort of failures that have plagued lethal injections, like improper testing for “endotoxin limits” and “microbial contamination.” *Id.* at 9; *see* Ex. 27 at 4 (noting that problems with endotoxin testing led to a moratorium on executions in Tennessee for an independent review to be conducted). Confidence in the integrity of IDOC’s testing systems is further shaken by the fact that the PCCA results have mysteriously vanished both from the defendants’ and that company’s possession. *See* Ex. 28 at 7–8.

Apart from the complete mystery surrounding who produced it, the contents of the certificate trigger doubts about its trustworthiness. As Dr. Almgren recounts in her declaration, the certificate does not indicate that the testing was performed according to the United States Pharmacopeia (USP)—the proper standard, and the one she would expect to see referenced. *See* Ex. 7 at 5–6. The formulation used by the laboratory is an unfamiliar one, with unknown credibility. *See id.* And test results are only as good as the methodologies used in the testing. Given these doubts, if the certificate is to serve the ambitious role IDOC has in mind, more information is needed, like the paperwork confirming the soundness of the testing methodologies. *See id.* at 6–7.

Another set of questions arises from a comparison of the various documents produced by IDOC regarding the drugs. Specifically, a juxtaposition of the certificate of analysis with IDOC’s purchase order with its Drug Enforcement Administration (DEA) Form 222 is confusing and concerning. The DEA Form 222 describes six vials of pentobarbital in liquid form coming into IDOC’s custody, *see* Ex. 36, and the certificate of analysis appears to reflect that a single one of the vials was tested, *see* Ex. 24. Yet the purchase order notes a single “quantity” of fifteen grams. *See* Ex. 37. As Dr. Almgren shows, the way the purchase order is written is most consistent with

the ordering of a powdered drug intended to be compounded, *see* Ex. 7 at 13, which would be inconsistent with both the DEA Form 222 and the certificate of analysis, as well as with IDOC's claim that the chemicals are manufactured.

A final worry engendered by these documents relates to how much of the drugs IDOC still has, and in what condition. The single-drug-pentobarbital method chosen by Defendant Tewalt calls for fifteen grams of pentobarbital to be placed in three sets of syringes, the latter two as backups to be administered to the condemned in the event of hiccups with the earlier rounds of injections. *See* Dkt. 55-12 at 5, 9–10. Apparently, IDOC bought only fifteen grams of pentobarbital, paying \$50,000 for a single execution. *See* Ex. 37. It would seem that at least a sixth of the purchased pentobarbital was sent out for testing. *See* Ex. 24. Dr. Almgren clarifies that the testing “is a destructive process that renders the entire vial of medication unusable.” Ex. 7 at 9. IDOC consequently either has less than what it needs for an execution, or it intends to use “unusable” drugs. This is just one of many key questions left hanging by IDOC's extraordinary secrecy. Without answers, Mr. Creech lacks the means to fully press an Eighth Amendment challenge, violating his due process rights.

**C. There is a likelihood of success on Claim 2.**

Lastly, there is a likelihood of success on Claim 2, which asserts that the absence of a valid execution protocol violates Mr. Creech right to due process. On July 1, 2023, an amended version of Idaho Code § 19-2716 went into effect. *See* Senate Law 2023, ch. 141, § 1. The new statute made the firing squad an alternative method to lethal injection based on the IDOC Director's sole discretion to determine whether drugs are “available” or not. *See* Idaho Code § 19-2716. IDOC is purporting to follow the new statute here. After the latest death warrant issued, Defendant Tewalt issued a certification that lethal injection was available, *see* Ex. 29,



which is part of the amended statute, *see* Idaho Code § 19-2716(3). But IDOC hasn't updated its execution protocol since March 2021, well before the statute's amendment. *See*

<http://forms.idoc.idaho.gov/WebLink/0/edoc/283090/Execution%20Procedures.pdf>. The protocol speaks only to lethal injection, not the firing squad. *See id.* Since the enactment contemplates a revised protocol, and since none has been issued, there is no valid protocol.

These developments are merely the latest installment in IDOC's perpetual effort to do exactly what the Ninth Circuit has forbidden: "amend[] its execution protocol on an ad hoc basis—through add-on practices, trial court representations and acknowledgments, and last minute written amendments—leaving the courts with a rolling protocol that forces" the courts "to engage with serious constitutional questions and complicated factual issues in the waning hours before executions." *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012). IDOC has chosen to adopt a protocol that gives the Director four execution cocktails to choose from and Defendant Tewalt has then refused to specify the drug when executions were mere days away. *See* Dkt. 55-12. IDOC has repeatedly announced that the protocol was "suspended" during warrant periods while offering no clarity about what that means. *See* Dkt. 95 at 14. IDOC has for years declined to amend a protocol that includes a blatantly unconstitutional prohibition on spiritual advisors in the execution chamber, *see* Ex. 30; *Ramirez v. Collier*, 142 S. Ct. 1264, 1280–81 (2022), while claiming to fix the error by amending the protocol through an ad hoc declaration, *see* Ex. 31 at 2 (purporting to "revise[]" the protocol via a four-page declaration filed in court). And IDOC has insisted throughout on providing to Defendant Tewalt the authority to "revise, suspend, or rescind" anything in the protocol, at any time, for any reason, "at the Director's sole discretion"—rendering even the outdated protocol meaningless. Dkt. 55-13 at 2.

The Ninth Circuit has declared that “[t]his approach cannot continue,” *Towery*, 672 F.3d at 653, and only a preliminary injunction will stop it.

**II. Mr. Creech will suffer the most irreparable harm in the absence of an injunction.**

The next factor, irreparable harm, is abundantly present, since Mr. Creech will be put to death in the absence of judicial intervention. *See id.* at 661 (noting that the irreparable-harm factor is always present when the plaintiff is challenging his execution); *accord Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016); *Beaver v. Netherland*, 101 F.3d 977, 979 (4th Cir. 1996). Simply put, Mr. Creech will have no recourse for any constitutional violations after he is killed by the State, and so there is irreparable harm.

**III. The balance of equities and the public interest favor an injunction.**

The last criterion for a preliminary injunction considers the balance of equities and the public interest, which tip heavily in favor of an injunction. As an initial matter, Mr. Creech has been on death row for more than forty years. *See State v. Creech*, 670 P.2d 463 (Idaho 1983). An injunction for a few more months to allow Mr. Creech to litigate the substantial issues in this case will do the State no harm. *See Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay and emphasizing that the government would not “be significantly prejudiced by additional short delay”).

In addition, it would be illogical to suggest that an injunction would unduly injure the State when it is IDOC itself that has in large part made an emergency injunction necessary through its dilatory approach to the litigation. Mr. Creech initiated the instant case almost four years ago. *See* Dkt. 1. He was forced to do so because IDOC had already been stonewalling his requests for more than a year and would not convey to him even the most rudimentary information about his execution, such as the drug the defendants intended to use to put him to

death. *See id.* at 6–7. The defendants then led this Court to dismiss the case for lack of ripeness in November 2020 on the ground that the plaintiffs had “ongoing appeals for relief from their convictions.” Dkt. 34 at 8. That theory was wrong, as the Ninth Circuit easily concluded on appeal. *See* Dkt. 47 at 9.

By the time the case was back in the district court on remand, there was an active death warrant for Mr. Pizzuto (who was a co-plaintiff in this case at the time), setting his execution for June 2, 2021. Nevertheless, fifteen days out, IDOC had not announced which drug it would use. *See* Dkt. 60. Nearly two years later, another death warrant was signed for Mr. Pizzuto, setting a new execution date of March 23, 2023. This time, it was fourteen days before the execution and IDOC had still not chosen a drug. *See* Ex. 32. It was not until November 27, 2023 that IDOC revealed it had chosen a cocktail. *See* Ex. 33 at 6; Dkt. 55-12 at 5. This was despite the fact that the State obtained a death warrant for Mr. Creech on October 12, 2023 and already had the pentobarbital in hand. *See id.* at 5. In the time between IDOC’s actual acquisition of the pentobarbital and its grudging disclosure of what cocktail it had chosen, the defendants’ exceptional level of non-transparency continued. *See* Dkt. 105-1 at 18 (claiming weakly on November 13 that Mr. Creech had “been aware of the chemicals” to be used at his execution because “SOP 135 identifies pentobarbital” (and two other options that don’t include pentobarbital), “singly or in conjunction with other chemicals”); Dkt. 92 at 4 n.3 (acknowledging on October 18 only that Defendant Tewalt had “focused” his “efforts on a search for pentobarbital for use *in a single or triple drug protocol*”). Other states routinely reveal their choice of drugs, but IDOC withholds it for as long as possible, which counts powerfully against the defendants in the balancing of the equities.

As this Court has recognized, too, factors beyond either of the parties' control have likewise resulted in delay. *See* Dkt. 98 at 19. The Ninth Circuit had before it Mr. Creech's appeal of this Court's dismissal of his complaint in early 2022, *see* Dkt. 78, but did not adjudicate that appeal until October of 2023. In this second opinion, the Ninth Circuit held that Mr. Creech was entitled to seek leave to amend, as he had contended here. *See* Dkt. 88 at 35. Mr. Creech does not fault this Court for its good faith ruling against him in May 2021. Still, he should not be punished for the delay when he was doing everything in his power to proceed expeditiously and the clock was set back by an adverse judicial decision.

IDOC's slowness in Mr. Pizzuto's lethal-injection case should also weigh against the defendants in the balancing of the equities. Mr. Pizzuto made it plain to IDOC as early as April 2023 that he wished to review all of the paperwork associated with the testing of any execution drug to confirm it was done properly. *See* Ex. 34. The testing was done before the drugs came into IDOC's possession, which occurred at the latest on October 12, 2023. *See* Ex. 6 at 8. Yet the certificate of analysis was not turned over to Mr. Pizzuto until January 25, 2024, more than three months later. *See* Ex. 35. Of IDOC's many delays, this is a particularly significant one. The certificate of analysis is the sole document upon which IDOC is relying for the reliability of its drugs. Mr. Creech's claims turn to a substantial extent on his ability to investigate the certificate. The fact that it was not made available until five days before a death warrant—and thirty-three before an execution—speaks directly to why the equities cut so strongly against IDOC.

All of the above goes to show that Mr. Creech's situation is vastly different from the many cases in which the inmate's conduct requires a claim to be disposed of on the eve of an 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).

Quite to the contrary, Mr. Creech has been exceedingly diligent. He first asked IDOC for the basic facts about his execution in 2018, more than five years ago. *See* Dkt. 1 at 6. Ever since, he has been persistently pushing for more information and to present his claims, while IDOC dragged out the dialogue period, raised incorrect defenses, and hoarded critical information. It took time for Mr. Creech to finally move forward on his claims under all of these circumstances.

Furthermore, the public's interest in finality now is also substantially diminished by the reason it has taken so long to carry out Mr. Creech's death sentence. The reason that Mr. Creech has not yet been executed is that he had first-round challenges pending in court to his convictions and death sentence from the time he was charged in 1981 until the United States Supreme Court denied certiorari in his case on October 10, 2023. *See Creech v. Richardson*, 144 S. Ct. 291 (2023). That litigation took more than forty years because both parties and the courts needed time to ensure that serious claims in a capital case received the searching review that was appropriate. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."). Many of the delays in Mr. Creech's case cannot be reasonably attributed to him, such as the twelve years it took to get to a resentencing after his constitutional rights were violated at the original sentencing. *See Arave v. Creech*, 507 U.S. 463 (1993). In all events, Mr. Creech's interest in receiving thorough judicial consideration of his execution claims outweighs any interest in hastening the case to its end. Mr. Creech should be afforded time here so that he can obtain meaningful judicial review of his claims, as any party is entitled to do. *See Zagorski v. Haslam*, No. 3:18-cv-01035, 2018 WL 4931939, at \*4 (M.D. Tenn. Oct. 11, 2018) (enjoining an execution because the issues could not be resolved before the scheduled execution and delay was necessary to allow "full and fair litigation").

**IV. An injunction cannot be denied without an evidentiary hearing.**

Mr. Creech submits that the argument above is adequate to justify the entry of a preliminary injunction prohibiting his execution until the claim is completely resolved on its merits.<sup>6</sup> Insofar as the Court disagrees, it would still be inappropriate to *deny* the injunction without holding an evidentiary hearing. Such a hearing is mandatory “if essential facts are in dispute.” *Charlton v. Est. of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). Mr. Creech has presented substantial documentary evidence to meet his burden on all of the preliminary-injunction factors. Therefore, the only reason to refuse an injunction would be if the State contradicts his presentation and the Court agrees with its account. That would represent a dispute over the facts, which would call for an evidentiary hearing.

When a preliminary injunction is denied in an execution case, it means that the plaintiff’s claims will forever be mooted by his death. Before the Court sanctions such an “irremediable and unfathomable” act, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), it should allow Mr. Creech to at least make his case at a live hearing through witnesses. That is the only way for the Court to acquire the confidence necessary to authorize the execution without fearing the possibility of a torturous death. It is perhaps for the same reasons that evidentiary hearings are commonly held by district courts around the country on motions for preliminary injunctions in method-of-execution cases. *See, e.g., Glossip v. Gross*, 576 U.S. 863, 874 (2015) (recounting how a preliminary injunction hearing took place in the district court in an execution case); *Jones v. Kelley*, 854 F.3d 1009, 1012 (8th Cir. 2017) (same); *Chavez v. Fla. SP Warden*, 742 F.3d 1267,

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<sup>6</sup> On today’s date, Mr. Creech is seeking an administrative stay of execution until the request for a preliminary injunction is resolved. To the extent it is necessary, Mr. Creech incorporates here by reference his memorandum in support of his motion for an administrative stay.

1268 (11th Cir. 2014) (same); *Hamilton v. Jones*, 472 F.3d 814, 815 (10th Cir. 2007) (per curiam) (same). The same level of scrutiny is warranted here.

**V. Conclusion**

For the reasons set forth above, undersigned counsel respectfully ask the Court to enjoin Mr. Creech's execution until it has fully adjudicated his claims for relief on the merits and to hold an evidentiary hearing on the instant request if it will not be granted on the basis of the papers alone.

DATED this 6th day of February 2024.

/s/ Mary E. Spears

Mary E. Spears

/s/ Deborah A. Czuba

Deborah A. Czuba

Federal Defender Services of Idaho

*Attorneys for Plaintiff Thomas Eugene Creech*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of February 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which is designed to send a Notice of Electronic Filing to persons including the following:

Kristina Schindele

[krschind@idoc.idaho.gov](mailto:krschind@idoc.idaho.gov)

Karin Magnelli

[kmagnell@idoc.idaho.gov](mailto:kmagnell@idoc.idaho.gov)

Michael Elia

[mje@melawfirm.net](mailto:mje@melawfirm.net)

/s/ Julie Hill

Julie Hill

Filed in Support of Plaintiff Thomas Eugene Creech's  
Memorandum in Support of Motion for Preliminary Injunction

# **Exhibit 7**



**EXPERT DECLARATION OF DR. MICHAELA ALMGREN**

**I. Background and Qualifications**

1. My name is Michaela Almgren, Pharm.D., M.S. I am over the age of eighteen and competent to testify to the truth of the matters contained herein. The factual statements I make here are true and correct to the best of my knowledge.

2. I am a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy. I teach principles of sterile compounding per United States Pharmacopeia (“USP”)<sup>1</sup> Chapters 797 and 800, aseptic technique and pharmacy regulations applicable in sterile compounding environment<sup>2</sup> under 503a guidance and section 503b of the Drug Quality and Security Act of 2013, as well as pharmacokinetics, pharmacotherapy, pharmacy law, and biopharmaceutics courses. I specialize in sterile compounding, medication safety and pharmacy laws and regulations that relate to pharmacy compounding practices. I also provide advanced training and continuing education courses for pharmacists on those topics. I received my Doctor of Pharmacy degree from the University of South Carolina College of Pharmacy in 2010. Additionally, I have a master’s degree in Pharmaceutical Chemistry from the University of Florida.

3. In conjunction with my academic appointment, I currently maintain a practice site at a 503b<sup>3</sup> outsourcing pharmacy where I perform duties of an outsourcing pharmacist, clinical advisor and pharmacy student preceptor. Previously, I worked in pharmacy operations

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<sup>1</sup> USP sets standards for the identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements in the United States. The USP publishes the United States Pharmacopeia-National Formulary (USP-NF), which contains a compendium of quality standards and specifications for a wide range of pharmaceuticals and related products. USP Chapters 797 and 800 are part of the USP-NF compendium.

<sup>2</sup> Aseptic technique in drug compounding refers to specific practices to avoid physical and microbial contamination when preparing sterile medications that are to be used for parenteral applications, such as IV infusion, injection, etc.

<sup>3</sup> 503b Outsourcing Pharmacy is a compounding pharmacy that produces large batches of sterile products and distributes them directly to health systems pharmacies to address drug shortages, as specified in Section 503B of the FD&C Act.

at a large local teaching hospital as a pharmacist. I have over ten years of experience in sterile compounding and aseptic technique. Prior to joining the faculty at the University of South Carolina I worked for several years in pharmaceutical manufacturing where I was involved in drug formulation, quality assurance, quality control and analytical method development and validation. My professional qualifications are Doctor of Pharmacy and Master of Science in Pharmacy with focus on Pharmaceutical Chemistry. A copy of my CV is attached as Exhibit A.

4. I testified at an evidentiary hearing in September 2020 in a case entitled *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, which was given number 19-145 by the United States District Court for the District of Columbia.

5. In *King v. Parker*, M.D. Tenn., No. 3:18-cv-1234, I was deposed on February 4, 2022.

6. I testified at a hearing on a motion for a preliminary injunction on January 10, 2023 in *Ruiz v. Tex. Dep't of Crim. Just.*, Travis Cnty., Tex., No. D-1-N-22-7149.

7. For my work on this case, I am being paid as follows: \$300 an hour for the review of medical records and materials related to trial, as well as all necessary research; \$325 an hour for preparing to testify; and \$2,500 a day when testifying.

8. I have been asked by the Federal Defender Services of Idaho ("FDSI"), who represent death-sentenced prisoner Thomas Creech, to submit an expert medical and scientific opinion based on the information and documentation provided to me about whether there is a risk of harm and unnecessary suffering associated with Idaho's approach to the drugs intended for use at the execution.

## **II. Materials Relied Upon**

9. To assist me in preparing this report, the FDSI provided me with the following:



- a. First Amended Complaint, *Rodriguez v. Golden West Medical Center, et al.*, Pima Cnty. Case No. C20040405, filed January 10, 2005.
- b. Plaintiff's Motion for Sanctions Against Defendant University Pharmacy, Inc./Richard Rasmuson for False and Misleading Disclosure and Knowing Failure to Disclose Unfavorable Information, *Rodriguez v. Golden West Medical Center, et al.*, Pima County Case No. C20040405, filed March 5, 2005.
- c. Notice of Settlement, *Rodriguez v. Golden West Med. Ctr., et al.*, Pima Cnty Case No. C20040405, filed December 19, 2005.
- d. Food and Drug Administration Reports re: University Pharmacy, Inc., dated November 25, 2008 and February 26, 2013; and Utah State Department of Commerce Complaint Report re: University Pharmacy, dated January 4, 2017.
- e. Materials related to the acquisition of execution drugs for Richard Leavitt, including a receipt and regulatory documents related to Union Avenue Compounding Pharmacy.
- f. Materials related to the acquisition of execution drugs for Paul Rhoades, including an invoice, news article, regulatory documents, and Idaho Health and Welfare documents related to University Pharmacy.
- g. DEA Form 224 for Idaho Maximum Security Institution ("IMSI"), submitted January 4, 2021; and DEA Controlled Substance Registration Certificate for the Idaho Department of Correction ("IDOC") and for IMSI, issued October 5, 2023.
- h. Idaho Department of Health and Welfare Licensing and Certification lists of Rural Health Clinics and Hospitals, both dated April 1, 2021.
- i. IDOC Standard Operating Procedure ("SOP") 135.01.01.001, Execution Procedures, version 3.6, approved January 6, 2012.

- j. SOP 135.01.01.001, Execution procedures, version 4.0, approved March 30, 2021.
  - k. IDOC Execution and Chemical Preparation and Administration, updated March 30, 2021.
  - l. Certificate of Analysis for pentobarbital, filed in *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359, as Dkt. 108-4.
  - m. Purchase Order for pentobarbital, filed in *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359, as Dkt. 102-4.
  - n. Redacted DEA Form 222 for IDOC reflecting purchase of six packages of pentobarbital.
  - o. Professional Compounding Centers of America (“PCCA”) Warning Letter 320-21-15 from the Food and Drug Administration (“FDA”) posted on 1-7-2021.
  - p. Eagle Analytical Services contract laboratory inspection report from FDA performed in June 2013.
  - q. Tennessee Governor Bill Lee’s May 2, 2022 announcement regarding an investigation that he ordered into execution oversight in the state of Tennessee.
10. The FDSI has also provided me with discovery responses from *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359, specifically:
- a. Defendants’ Responses to Plaintiff’s Third Set of Interrogatories, dated March 22, 2023.
  - b. Defendants’ Supplemental Response to Interrogatories 7, 8, and 19, dated August 16, 2023.
  - c. Defendants’ responses to Plaintiff’s Seventh Set of Requests for Admissions, dated January 10, 2024.
11. Where necessary, I have consulted the records listed above.

**III. The information provided by IDOC raises concerns about drug quality.**

12. In my opinion, the information IDOC has provided about the pentobarbital it intends to use at Mr. Creech's execution raises concerns about the quality of the drugs.

13. To address reservations about the reliability of the pentobarbital, it is my understanding that IDOC has largely relied on the Certificate of Analysis that was filed as Dkt. 108-4 in *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359.

14. However, the Certificate of Analysis leaves many questions unanswered.

15. First, the name of the company that performed the testing is redacted. Knowing the identity of the company responsible for conducting pharmaceutical testing is crucial because the reliability and credibility of the testing laboratory play a pivotal role in guaranteeing the accuracy of results. Additionally, it allows for the verification of regulatory compliance.

16. I am aware that IDOC has described the pentobarbital as manufactured. Certificates of Analysis are often prepared by manufacturers. However, this Certificate of Analysis does not appear to me to have been prepared by the manufacturer. Rather, it seems to have been created by a contract laboratory. For example, the Certificate of Analysis includes a space at the top for "customer," "contract," and "document." I would expect to see language like that in a Certificate of Analysis prepared by a contract laboratory and not a manufacturer.

17. The Idaho execution protocol provided to me and dated March 30, 2021 [hereinafter "the 2021 protocol"] requires that the lethal chemicals be "tested at an accredited lab following [USP] or other applicable, nationally recognized or generally accepted testing standards."

18. In my opinion, any testing on the pentobarbital should be done utilizing the USP methodologies. USP methods are developed based on scientific principles and industry expertise. They provide guidelines for quality control procedures, helping pharmaceutical



companies establish robust processes to monitor and ensure the quality of medications. For a medication to bear the label of USP quality, it is necessary to subject it to testing using USP methods and satisfy all quality standards defined by USP monograph for that specific medication.

19. The Certificate of Analysis provided by IDOC suggests that not all of the testing done on the pentobarbital was performed according to USP standards. There are thirteen tests listed on the Certificate. In the “method” column, a reference to USP only appears with respect to one test: the “Volume in Container” test. For the other twelve tests, the “method” listed is provided with reference to a sequence of numbers following the letters “TP.” As one example, the “method” listed for the “appearance” test is “TP25481.20.” I am unfamiliar with these “TP” numbers. Ordinarily, if USP testing methods are used, one would expect to see “USP” where it instead reads “TP” on the Certificate.

20. The absence of the utilization of USP test methods is another indication that the testing may have been conducted by a contract laboratory rather than the pharmaceutical company itself. This is because the drug manufacturer would typically employ the prescribed USP methods.

21. The absence of references to USP standard methods in the Certificate of Analysis raises questions about whether the testing was properly performed. Those questions are especially significant in regard to the “assay by HPLC” test identified as “TP69477.04.” The USP method outlining HPLC testing for pentobarbital is clearly outlined in the drug monograph. This method has undergone validation, demonstrating its accuracy, repeatability, and precision. However, the method listed in the Certificate of Analysis is unknown, casting uncertainty on its accuracy and the reliability of the quantitation process.

22. I would need to review additional information to confirm that the testing on the pentobarbital was properly done. For instance, I would have to consider validation reports,

calibration curves, system suitability reports, recovery bracketing, and chromatography reports.

23. Although the 2021 protocol requires that the testing be done at an accredited laboratory, I cannot confirm from the Certificate of Analysis that the laboratory that performed this testing is accredited. It is also important to recognize that even accredited laboratories can encounter issues that affect their adherence to required standards. While accreditation is an important step in ensuring the quality and reliability of laboratory testing, it doesn't guarantee issues will never arise. It is essential to recognize that the quality management system in a laboratory is an ongoing process, and maintaining high standards requires continuous effort. For me to reach a firm conclusion about the reliability of the testing, I would need to review the testing laboratory's credentials and regulatory history.

24. Although the 2021 protocol states that the administrative team at IDOC will obtain technical assistance for the purpose of reviewing the test results, it is not clear what training the members of this team have that qualifies them to do so, and what type of assistance they will be receiving. The 2021 protocol notes that all the members of the administrative team are IDOC employees. It does not require that any of them have analytical chemistry and/or pharmacy-related training or any other training that would allow these individuals to properly evaluate the quality of the testing done on the pentobarbital.

25. Such training is key because there are testing laboratories—even accredited ones—that are not reliable. One example is Eagle Analytical Services. That is a company that performs quality testing of compounded products offering many tests, including potency and other USP-required testing. Eagle Analytical Services is the laboratory that is frequently contracted by PCCA<sup>4</sup> to analyse their products. IDOC has indicated that it used PCCA for the

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<sup>4</sup> PCCA stands for Professional Compounding Centers of America and it is a compounding pharmacy supply company.



testing of Mr. Leavitt's and Mr. Rhoades' lethal injection preparations. Thus, it appears that Eagle Analytical was most likely the lab previously utilized by IDOC.

26. Eagle Analytical was inspected by FDA and received a number of citations showing poor security of test data, failure to perform method validations, not following USP methodology, missing instrument qualification records, inadequate staff training, lack of a Quality Control Unit, and many other violations which could have an effect on the laboratory findings and results. Eagle also used non-compendial methods that lacked validation and did not perform investigations when Out of Specification results were reported. All of those findings are very serious and could lead to reporting incorrect information. The findings listed in the FDA's report are quite concerning, leading to the conclusion that the test results from this laboratory should be potentially viewed with scepticism, as they may not meet the necessary standards for accuracy and reliability.

27. Considering the poor record this company has, it is advisable that IDOC finds a more reliable testing facility and to assure that the testing facility is reliable, the results and records should be reviewed by an expert to assure compliance and accuracy.

28. Another crucial aspect to take into account is found in the IDOC's Execution Chemicals Preparation and Administration Manual. On page 5, within Method 4 which provides instructions on lethal injection chemical preparation utilizing pentobarbital, there is a chemical chart illustrating the preparation of three sets of syringes, with each set comprising two syringes, each containing 2.5 grams of pentobarbital. This indicates that 6 syringes, each containing 2.5 grams of pentobarbital are to be prepared by the Medical Team prior to the execution. The Form 222 indicating the transfer of pentobarbital to IDOC reveals that the supplier provided six vials of pentobarbital, each containing 2.5 grams of pentobarbital. As the IDOC protocol requires six syringes of pentobarbital for the execution, there is no possibility to conduct additional testing to verify drug potency and quality, as all six vials are designated



for use in the execution process. Testing the quality of sterile injectable products is a destructive process that renders the entire vial of medication unusable.

**IV. IDOC's possession of manufactured pentobarbital raises reliability concerns.**

29. Based on the information provided to me, I have concerns about the reliability of the pentobarbital in IDOC's possession. One concern relates to the possibility that the drug may have originated in a pharmaceutical company located in a foreign country.

30. As noted, IDOC has indicated that it has obtained manufactured pentobarbital. The American and European companies that manufacture pentobarbital, including companies like Fresenius Kabi, Hospira, and Baxter, refuse to sell the drug for execution purposes, adamantly opposing the use of their products in capital punishment. These manufacturers have generally been quite rigorous about enforcing the execution-related restrictions in their contracts. Some of these companies have taken the drastic step of ceasing the production of their drugs to prevent any possibility of their products being utilized in executions<sup>5</sup>. Additionally, certain manufacturers, such as Fresenius Kabi, have initiated legal actions to prevent the use of their drugs in execution procedures<sup>6</sup>. As a result of having difficulty obtaining the drug from the manufacturer, for a number of years, the pentobarbital used in American executions has—to my knowledge—been compounded rather than manufactured.

31. When drugs are obtained in violation of the kind of distribution restrictions described above, it increases the risk that the chemicals will be unreliable. Such violations often make chains of custody longer, so that the recipient is better able to conceal the original source. If a chain of custody becomes longer, there is more opportunity for drugs to be mishandled, improperly stored, transported under inappropriate conditions, and potentially tampered with

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<sup>5</sup> <https://dpic-cdn.org/production/legacy/HospiraJan2011.pdf>

<sup>6</sup> <https://www.theguardian.com/us-news/2018/aug/08/german-drug-maker-sues-to-halt-planned-execution-in-nebraska>

or adulterated. Those dangers are further enhanced by the fact that, when drugs begin moving outside of the usual lawful channels, there is a greater chance that they will be controlled by individuals acting who are unconstrained by the applicable regulatory framework, not following the proper procedures, and who do not have the necessary standards or qualifications.

32. Challenges in acquiring the pentobarbital sodium from the U.S. or European manufacturers raise the potential that the IDOC may have sourced pentobarbital from overseas manufacturers oftentimes located in India or China. Regrettably, companies in these regions are more prone to encountering quality issues. Reports suggest that data falsification and manipulation are common practices in pharmaceutical manufacturing plants located in India and China<sup>7</sup>. The FDA's Foreign Inspection Program is falling short in uncovering a substantial amount of fraud in overseas plants due to its approach to inspections. While FDA investigators in the United States conduct unannounced inspections, overseas inspections are pre-announced, providing plants with the opportunity to rectify any evidence of unsanitary conditions, data manipulation, and other significant quality issues. This increases the strong likelihood that medications and Active Pharmaceutical Ingredients (APIs)<sup>8</sup> manufactured overseas may exhibit significant quality problems.

33. Until recently, Akorn Pharmaceuticals was one of several companies that manufactured pentobarbital for injection in the United States. In February 2023, Akorn announced that it was declaring bankruptcy, closing all of its U.S. sites, and laying off all of its employees. IDOC has stated that the pentobarbital in its possession will expire in February 2025. Expiration dates for manufactured pentobarbital are often set two or three years in the future. Thus, if IDOC obtained pentobarbital manufactured by Akorn towards the end of the company's lifespan, the expiration date might be in February 2025. It is possible that the

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<sup>7</sup> <https://www.statnews.com/2019/10/29/data-falsification-still-problematic-china-india-generic-drug-plants/>

<sup>8</sup> API stands for Active Pharmaceutical Ingredient. It refers to the biologically active component of a pharmaceutical drug. The API is the substance responsible for the therapeutic effects of the medication.



bankruptcy of Akorn complicated the company's ability to or interest in enforcing the execution-related restrictions in its contracts.

34. The information provided above raises concerns for me regarding the possibility that IDOC acquired pentobarbital produced by Akorn Pharmaceuticals. If IDOC did obtain pentobarbital manufactured by Akorn, I would have serious concerns about the quality of the medications. Akorn Pharmaceuticals had received numerous FDA Forms 483<sup>9</sup> and Warning Letters, indicating significant concerns about the quality of their drugs. The company was known to submit fraudulent test results to the FDA, as well as manipulated testing data, often “testing into compliance”—the practice where the drug is tested repeatedly until a passing result is achieved, and even reporting fabricated data, where the results of testing were reported despite the fact that the laboratory did not own the equipment necessary to perform the testing. Some other extremely troubling examples of Akorn's unacceptable quality control and assurance practices included their insufficient data integrity controls lacking audit trail leading to inability to prevent unauthorized changes to electronic quality control information. This led to the possibility that all of their data could be questionable and subject to potential manipulation. The pervasive lack of a quality-oriented culture persisted in Akorn for an extended period over many years, making it unsurprising that the company faced bankruptcy. The extensive nature of their quality issues went beyond the scope of manageable resolution. The reports from FDA from the last on-site audit<sup>10</sup> (December 21<sup>st</sup>, 2022) before the company closed signalled serious problems—buildings where the sterile medications were manufactured were not maintained in sanitary conditions, representative samples of each shipment were not taken, process controls were not being followed and “the equipment was not maintained causing malfunction resulting in alterations in the safety, identity, quality or purity of the drugs

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<sup>9</sup> The FDA Form 483 notifies the company's management of objectionable conditions and serious quality violations at the time of the FDA inspection.

<sup>10</sup> <https://datadashboard.fda.gov/ora/cd/inspections.htm>

produced.” The list of quality problems discovered during that FDA audit was extremely concerning, however no corrective actions were taken as the company filed for Chapter 7 bankruptcy in February 2023. Given this information, it would be unsurprising if the medications manufactured by Akorn fail to meet the established quality standards.

35. Another concern that I have about the pentobarbital relates to the possibility that the drugs come from a veterinary source. As I understand it, IDOC has declined to answer the question of whether the pentobarbital derives from a veterinary source. It is not appropriate for veterinary medications to be used on human beings. Veterinary medications are often formulated in ways that are suitable for animals, taking into account their physiology, pharmacokinetic parameters, and metabolism. These formulations are not appropriate for human use. Additionally, human drugs are manufactured under significantly more stringent regulations than veterinary medications. The documentation and record-keeping requirements are extensive, covering every aspect of the manufacturing process to ensure traceability and accountability. Facilities producing veterinary drugs must meet specific standards, but these are not as extensive as those required for human drug manufacturing. Therefore, the standard of quality, potency, and purity in veterinary drugs is not on par with that of human drugs.

36. An additional concern that I have about the pentobarbital relates to the possibility that the drugs came from a foreign source. As I understand it, IDOC has declined to answer the question of whether the drugs came from a foreign source. Although IDOC has asserted that such an answer would potentially reveal the identity of its source, there are several companies in the United States registered to manufacture pentobarbital and numerous companies abroad have the capability to manufacture pentobarbital.

37. Recently, medications produced abroad have been found to be contaminated and failing to meet the quality standards set by the FDA and USP. Following a nearly two-year decrease in overseas inspections due to the pandemic, inspectors from the FDA discovered



widespread quality violations upon their return to the facilities operated by some of the major pharmaceutical companies outside of the United States. Numerous significant issues related to the quality of drugs led to the recall of several pharmaceutical products.<sup>11</sup> If pentobarbital is imported from outside of the United States, there is a possibility that it does not meet quality requirements as set by USP and FDA.

38. I have reviewed the following documents that were provided to me: Certificate of Analysis, DEA Form 222<sup>12</sup> and the IDOC's Purchase Order. I noted that the Certificate of Analysis and the DEA Form 222 matched in the information regarding the drug strength and identity. The Certificate of Analysis indicated that testing was performed on a vial of pentobarbital sodium injection 50mg/mL, 50mL vial USP, though the lot number was redacted thus it cannot be confirmed which lot was actually tested. The DEA Form 222 indicated that 6 vials of pentobarbital injection with the strength of 50mg/mL were transferred into IDOC's possession. However, the IDOC's purchase order specified the sole item ordered as pentobarbital with a quantity of 15 grams. It is not clear what product this Purchase Order refers to. Given that the quantity is listed as 1, one could infer that the API is being requested, indicating a single container of powdered drug. In such instances, it is advisable to specify "pentobarbital, USP" to denote a human-grade medication. If the Purchase Order was utilized for ordering pentobarbital injection vials, it should have included specifications for both concentration and drug quantity.

39. The Purchase Order form introduces considerable ambiguity regarding the nature of the order—whether it pertains to the Active Pharmaceutical Ingredient (API), a veterinary product, a compounded human drug, or a manufactured human drug. The order could be fulfilled using any of these product categories.

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<sup>11</sup><https://www.livemint.com/companies/news/sun-pharma-lupin-recall-drugs-in-us-over-manufacturing-issues-usfda-11702795716102.html>.

<sup>12</sup> DEA Form 222 is used for tracking of distribution of Schedule II controlled substances in the United States.

40. I have reviewed discovery responses in which the defendants have declined to indicate what type of business the pentobarbital came from out of fear that the identity of the supplier would be determined. However, there are many companies within each of the named industries that are authorized under federal law to possess pentobarbital. Every veterinarian, hospital, wholesaler, distributor, and community pharmacy with a DEA registration is authorized under federal law to possess pentobarbital. There are tens of thousands of veterinarians with DEA registrations in the United States; more than six thousand hospitals in the United States with DEA registrations; more than 800 distributors in the United States with DEA registrations; and over sixty thousand pharmacies in the United States with DEA registrations.

41. My concerns about the reliability of the source chosen by IDOC are heightened by the nature of the sources IDOC went to in the past for execution chemicals. For Mr. Rhoades' execution, IDOC used University Pharmacy, Inc., located in Salt Lake City, Utah. University Pharmacy had multiple serious violations during their FDA inspections, even after repeated FDA visits.<sup>13</sup> The great majority of the violations listed in the FDA reports related to their aseptic compounding practices. For example, the pharmacy did not use proper disinfection procedures in the area of sterile compounding, debris was observed in the crevices of weight scales, and pink dry powder accumulated in the back of the air vent exhaust. During another separate FDA audit, the pharmacy had no records of temperature monitoring in the drug storage areas and they were using non-calibrated equipment. When University Pharmacy was inspected by Utah's Board of Pharmacy, it was discovered that a total of 232 medications and compounding ingredients were expired but kept in the pharmacy's regular stock. Considering the level of the violations, it shows disregard for patient safety and basically not following USP Chapter 797 guidance. Ensuring the proper training of personnel, maintaining clean and

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<sup>13</sup> <https://www.fda.gov/media/85312/download>.



controlled environments, and following best practices in sterile compounding are essential steps to protect patient safety and maintain the integrity of compounded sterile drugs.

42. Similarly, for Mr. Leavitt's execution, IDOC chose Union Avenue Compounding Pharmacy, located in Tacoma, Washington. Union Avenue Compounding Pharmacy had major non-compliance issues that were discovered when the pharmacy was inspected by the State of Washington's Pharmacy Quality Assurance Commission.

43. It is crucial to recognize the importance of the pharmacy's practice record and experience, as not all pharmacies are equipped and experienced to prepare safe and effective sterile medications.

44. In light of the questions discussed above regarding whether IDOC has obtained its pentobarbital from a reliable source, whether the drugs have been properly tested, and so forth, I have serious concerns about the quality of the chemicals Idaho intends to use at the execution of Mr. Creech.

45. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 6<sup>th</sup> day of February 2024.

  
Dr. Michaela M. Almgren

**PACER Fee: Exempt**

**ACMS Docket Report  
United States Court of Appeals for the Ninth Circuit**

<b>Court of Appeals Docket #:</b> 24-978		<b>Docketed:</b> 02/23/2024	
<b>Nature of Suit:</b> 3550 Prisoner-Civil Rights Creech v. Tewart, et al.			
<b>Appeal From:</b> Boise, Idaho			
<b>Fee Status:</b> Paid			
<b>Case Type Information:</b>			
1) Prisoner Death Penalty			
2) Private			
3)			
<b>Originating Court Information:</b>			
<b>District:</b> <a href="#">1:20-cv-00114-AKB</a>			
<b>Trial Judge:</b> Amanda K. Brailsford, District Judge			
<b>Date Filed:</b> 03/05/2020			
<b>Date Order/Judgment:</b>	<b>Date Order/Judgment EOD:</b>	<b>Date NOA Filed:</b>	<b>Date Rec'd COA:</b>
02/23/2024	02/23/2024	02/23/2024	
<b>Prior Cases:</b>			
<b>Current Cases:</b>			

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**APPENDIX J**



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Defendant - Appellee

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THOMAS EUGENE CREECH,

Plaintiff - Appellant,

v.

JOSH TEWALT, Director, Idaho Department of Correction, in his official capacity; CHAD PAGE, Chief, Division of Prisons, Idaho Department of Correction, in his official capacity; UNKNOWN EMPLOYEES, AGENTS, OR CONTRACTORS OF THE IDAHO DEPARTMENT OF CORRECTION, in their official capacities; Warden TIM RICHARDSON,

Defendants - Appellees.

02/23/2024	1	<b>CASE OPENED.</b> A copy of your notice of appeal / petition filed in 1:20-cv-00114-AKB has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number <b>24-978</b> has been assigned to this case. All communications with the court must indicate this Court of Appeals docket number. Please carefully review the docket to ensure the name(s) and contact information are correct. It is your responsibility to alert the court if your contact information changes. <b>Resources Available</b> For more information about case processing and to assist you in preparing your brief, please review the Case Opening Information (for <a href="#">attorneys</a> and <a href="#">pro se litigants</a> ) and review the <a href="#">Appellate Practice Guide</a> . Counsel should consider contacting the court's <a href="#">Appellate Mentoring Program</a> for help with the brief and argument. [Entered: 02/23/2024 12:09 PM]
02/23/2024	<input type="checkbox"/> <a href="#">2</a> 1 pg. 130 KB	<b>ORDER FILED.</b> The panel has received the notice of appeal from the district court's February 23, 2024 order denying Petitioner-Appellant Creech's motion for preliminary injunction. In the interest of expediency, the parties are directed to file their respective briefs and exhibits from the district court as the briefs for this appeal. If the parties choose to do so, they may submit letter briefs addressing the district court's ruling by 9:00 pm on February 23, 2024. [Entered: 02/23/2024 02:37 PM]
02/23/2024	<input type="checkbox"/> <a href="#">3</a> 39 pg. 470 KB	<b>OPENING BRIEF</b> submitted for filing by Appellant Thomas Eugene Creech. [Entered: 02/23/2024 03:47 PM]
02/23/2024	4	<b>CLERK ACTION:</b> Opening Brief submitted at DE 3 by Appellant Thomas Eugene Creech is filed. No paper copies are required at this time. [Entered: 02/23/2024 03:58 PM]
02/23/2024	<input type="checkbox"/> <a href="#">5</a> 92 pg. 9118 KB	<b>EXCERPTS OF RECORD</b> submitted for filing by Appellant Thomas Eugene Creech. [Entered: 02/23/2024 04:21 PM]
02/23/2024	<input type="checkbox"/> <a href="#">6</a> 32 pg. 266 KB	<b>ANSWERING BRIEF</b> submitted for filing by Appellee Josh Tewalt, Appellee Chad Page, Appellee Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, Appellee Tim Richardson. [Entered: 02/23/2024 04:34 PM]
02/23/2024	7	<b>CLERK ACTION:</b> Excerpts of Record submitted at DE 5 by Appellant Thomas Eugene Creech are filed. No paper copies of the excerpts of record are required at this time. [Entered: 02/23/2024 04:38 PM]
02/23/2024	<input type="checkbox"/> <a href="#">8</a> 81 pg. 7774 KB	<b>EXCERPTS OF RECORD</b> submitted for filing by Appellee Josh Tewalt, Appellee Chad Page, Appellee Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, Appellee Tim Richardson. [Entered: 02/23/2024 04:51 PM]
02/23/2024	<input type="checkbox"/> <a href="#">9</a> 94 pg. 788 KB	<b>EXCERPTS OF RECORD</b> submitted for filing by Appellee Josh Tewalt, Appellee Chad Page, Appellee Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, Appellee Tim Richardson. [Entered: 02/23/2024 04:53 PM]
02/23/2024	10	<b>CLERK ACTION:</b> Answering Brief submitted at DE 6 and Excerpts of Record at DE 8 and DE 9 by Appellees Josh Tewalt, Chad Page, Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, and Tim Richardson are filed. No paper copies of the brief and excerpts are required at this time. [Entered: 02/23/2024 05:01 PM]
02/23/2024	<input type="checkbox"/> <a href="#">11</a> 8 pg. 231 KB	<b>LETTER BRIEF</b> submitted for filing by Appellee Josh Tewalt, Appellee Chad Page, Appellee Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, Appellee Tim Richardson. [Entered: 02/23/2024 07:27 PM]
02/23/2024	12	<b>CLERK ACTION:</b> Letter Brief submitted at DE 11 by Appellees is filed. No paper copies are required at this time. [Entered: 02/23/2024 07:31 PM]
02/23/2024	<input type="checkbox"/> <a href="#">13</a> 13 pg. 246 KB	<b>LETTER BRIEF</b> submitted for filing by Appellant Thomas Eugene Creech. [Entered: 02/23/2024 08:03 PM]
02/23/2024	<input type="checkbox"/> <a href="#">14</a> 2 pg. 240 KB	<b>Emergency MOTION</b> Circuit Rule 27-3 Certificate filed by Appellant Thomas Eugene Creech. [Entered: 02/23/2024 08:20 PM]
02/23/2024	<input type="checkbox"/> <a href="#">15</a> 6 pg. 169 KB	<b>MOTION</b> for Injunctive Relief filed by Appellant Thomas Eugene Creech. [Entered: 02/23/2024 08:24 PM]

02/23/2024	16	<b>CLERK ACTION:</b> Letter Brief submitted at DE 13 by Appellant Thomas Eugene Creech is filed. No paper copies are required at this time. [Entered: 02/23/2024 08:31 PM]
02/24/2024	17	<b>NOTICE OF APPEARANCE</b> by Tanner Smith for Appellee Chad Page, Appellee Josh Tewalt, Appellee Tim Richardson. [Entered: 02/24/2024 01:39 PM]
02/24/2024	<input type="checkbox"/> <a href="#">18</a> 11 pg. 155 KB	<b>RESPONSE</b> to Motion for Injunctive Relief (DE 15) filed by Appellee Josh Tewalt, Appellee Chad Page, Appellee Unknown Employees, Agents, or Contractors of the Idaho Department of Correction, Appellee Tim Richardson. [Entered: 02/24/2024 02:29 PM]
02/24/2024	19	<b>ADDED</b> Counsel for Appellee Tanner Smith for Appellee Chad Page, Appellee Josh Tewalt, Appellee Tim Richardson. [Entered: 02/24/2024 02:38 PM]
02/23/2024	20	<b>SUBMITTED ON THE BRIEFS</b> to William A. FLETCHER, Jay S. BYBEE, Morgan B. CHRISTEN. [Entered: 02/24/2024 07:08 PM]
02/24/2024	<input type="checkbox"/> <a href="#">21</a> 10 pg. 494 KB	<b>PER CURIAM OPINION</b> (William A. FLETCHER, Jay S. BYBEE, Morgan B. CHRISTEN) AFFIRMED. FILED AND ENTERED JUDGMENT. [Entered: 02/24/2024 07:15 PM]
02/24/2024	<input type="checkbox"/> <a href="#">22</a> 1 pg. 126 KB	<b>ORDER FILED.</b> Any petition for panel rehearing or rehearing en banc from the panel's February 24, 2024, opinion in Appeal No. 24-978 is due at 10:00 a.m. Pacific Time on Sunday, February 25. The appellees may file an optional response to the petition on or before 3:00 p.m. Pacific Time on Sunday, February 25. [Entered: 02/24/2024 07:39 PM]
02/25/2024	<input type="checkbox"/> <a href="#">23</a> 18 pg. 264 KB	<b>PETITION FOR REHEARING EN BANC</b> filed by Appellant Thomas Eugene Creech. [Entered: 02/25/2024 08:39 AM]
02/25/2024	<input type="checkbox"/> <a href="#">24</a> 1 pg. 130 KB	<b>ORDER FILED.</b> MURGUIA, Chief Judge. On February 25, 2024, Creech filed a petition for rehearing en banc from the panel's opinion affirming the district court's denial of Creech's request for preliminary injunctive relief. The full court has been advised of the petition for rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's February 24, 2024, opinion should be reheard en banc. No judge requested a vote within the time period. Accordingly, the petition for rehearing en banc is denied. En banc proceedings with respect to the panel's opinion in Appeal No. 24-978 are concluded. The mandate shall issue forthwith in Appeal No. 24-978. [Entered: 02/25/2024 11:11 AM]
02/25/2024	<input type="checkbox"/> <a href="#">25</a> 1 pg. 127 KB	<b>MANDATE ISSUED</b> William A. FLETCHER, Jay S. BYBEE, Morgan B. CHRISTEN [Entered: 02/25/2024 11:14 AM]