NO. 23-6830

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

JOSH TEWALT, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR FEBRUARY 28, 2024

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Whether Thomas E. Creech ("Creech") is entitled to a preliminary injunction.

STATEMENT OF THE CASE

Creech is an inmate committed to the Idaho Department of Correction ("IDOC") and housed at the Idaho Maximum Security Institution ("IMSI"). Creech was serving a life sentence for two counts of first-degree murder at the Idaho State Correctional Institution ("ISCI") when he murdered another inmate, twenty-three-year-old David Jensen, in 1981 by beating him with a battery-filled sock until Jensen's skull shattered, caved in, and blood was splashed on the floors and walls. *State v. Creech* ("*Creech II*"), 670 P.2d 463, 465 (1983); *see also State v. Creech* ("*Creech I*"), 589 P.2d 114 (1979). Once the battery-filled sock broke open, Creech kicked Jensen in the throat and the head while Jensen laid helpless. *Creech II*, 670 P.2d at 465. After some time, a guard found Jensen, and he was taken to the hospital where he died that day. *Id.*

Creech pleaded guilty to first-degree murder for killing Jensen on August 28, 1981, and was sentenced to death. *Creech II*, 670 P.2d at 465-66. Creech had four prior murder convictions when he killed Jensen. *See Creech v. Richardson* ("*Creech VI*"), 59 F.4th 372, 377 (9th Cir. 2023). Creech has claimed responsibility for killing twenty-six people. *Id.*

After decades of litigation, on January 30, 2024, a death warrant was entered for Creech. Creech is scheduled for execution on Wednesday, February 28, 2024. Creech's death warrant expires at 11:59 on February 28, 2024. Creech is to be executed with a single-chemical pentobarbital protocol.

Creech initiated this case in March 2020. Creech asserts three claims: (1) an Eighth Amendment method-of-execution claim; (2) a due process claim alleging that the Idaho Department of Correction's Standard Operating Procedure 135.02.01.001[1] ("SOP 135") is invalid because it does not account for a firing squad execution; and (3) an allegation that IDOC's "refus[al] to provide [him] with information that would enable him to determine how IDOC intends to execute him violates his rights to due process." (Appendix to Petition for Writ of Certiorari ("App.") B, p. 023).

On February 6, 2024, Creech filed a motion for preliminary injunction. The district court denied Creech's motion on February 23, 2024. The district court denied the preliminary injunction with respect to all three claims. As it relates to Creech's Eighth Amendment claim, Creech was required to establish two elements: (1) IDOC's method-of-execution creates a "substantial risk of severe pain;" and (2) he was required to identify a "feasible, readily implemented" alternative method which "in fact significantly reduces a substantial risk of severe pain" and "the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 587 U.S. ___, 139 S. Ct. 1112, 1125 (2019). The district court found that Creech was not able to establish the first prong because his allegations were based on speculation. With respect to the alternative method prong, the district court explained that the claim fails "as a matter of law" because he did not identify an alternative method.

As it relates to the due process claims, the district court determined that Creech was not likely to succeed on either because IDOC is to use manufactured

[1] A copy of SOP 135 can be found at http://forms.idoc.idaho.gov/WebLink/0/edoc/283090/Execution%20Procedures.pdf.

pentobarbital and is complying with SOP 135—Creech was aware of both of these facts and circumstances when he filed his second-amended complaint. The district court reasoned that the firing squad claim was irrelevant because IDOC is administering manufactured pentobarbital. Regarding the potential due process right to information claim, the district court rejected it because: (a) Creech knew IDOC was using manufactured pentobarbital when he filed his second-amended complaint; (b) Idaho law maintains as confidential the chemical's source's identity; (c) the District of Idaho, relying on numerous cases, has determined that disclosure would seriously harm Idaho's death penalty laws; and (d) the collateral information Creech seeks is immaterial because the chemical has been has been tested, certified as being pentobarbital, and has passed all applicable regulatory and quality standards. Creech has no due process right to the identity of the State's source. (*See* App. B, p. 23). The district court noted that "Creech's preliminary injunction motion does not challenge [Idaho's disclosure-protection statute, Idaho Code § 19-2716A]."

Creech appealed the district court's order denying his request for a preliminary injunction the same day it was issued, Friday, February 23, 2024. The Ninth Circuit expedited the appellate process and, after both sides had a chance to brief the case, issued its decision on Saturday, February 24, 2024. The Ninth Circuit affirmed Judge Brailsford with respect to all issues.

Creech then petitioned this Court for certiorari at the end of the day on Monday, February 26, 2024. Creech has raised two issues: (1) whether Idaho Code § 19-2716A violates due process; and (2) whether the Ninth Circuit's decision to

expedite the matter violates due process. Neither of these issues were presented to the lower courts.

STANDARD OF REVIEW

"Review of a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. A petition is only granted for compelling reasons. *Id.* Compelling reasons exist where, for example, a court of appeals entered a decision in conflict with another court of appeals or has departed from the accepted and usual course of judicial proceedings. *Id.* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* The Supreme Court does not grant certiorari merely because an issue "may present an intellectually interesting and solid problem." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). "Nor does it sit for the benefit of the particular litigants." *Id.* Rather, "[a] principal purpose for which [the Court] use[s] [its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

"This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 664 (2004) (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring)). A court abuses its discretion only 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).

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Resources Def. Council, Inc.,* 555 U.S. 7, 24 (2008).

THE WRIT SHOULD BE DENIED

This case is on appeal from a denial of a motion for preliminary injunction. (*See generally* App. B, pp. 7-29). Creech did not raise the constitutionality of Idaho Code § 19-2716A until he was in front of the Ninth Circuit. (*See* App., pp. 23-24). Now, when seeking a writ of certiorari, Creech has abandoned his main claim, an Eighth Amendment method-of-execution claim, along with his second-pled claim, a claim that IDOC's execution protocol violates due process because it does not account for a firing squad execution. (*See* Petition, pp. 021-23). Creech brings a challenge to the constitutionality of Idaho Code § 19-2716A under the guise of his third claim: that IDOC "refus[ed] to provide [him] with information that would enable him to determine how IDOC intends to execute him violates his rights to due process." (*See id.* at pp. 023-24). Creech also asserts, for the first time, that the Ninth Circuit's expedited appeal process, necessitated by his fast-approaching execution, violated his due process rights. *See Ramirez v. Collier*, 595 U.S. 411, 450 (2022) (Thomas, J., dissenting) ("Prisoners engage in abusive litigation in several different ways. For instance, some prisoners hold off bringing new claims until the last minute in order to force courts to stay or enjoin an execution simply to afford themselves more time to consider the merits of the claims." (citations omitted)).

This Court should not grant Creech's petition. Creech is not entitled to a preliminary injunction because he has not established a likelihood of success on the merits, and a preliminary injunction is contrary to the public's interest and balance of equities. The Ninth Circuit's Opinion did not conflict with another circuit's holding, and the expedited appellate process was required because Creech appealed to the

Ninth Circuit when his execution was just five days away. Contrary to Creech's assertions, this case is not uniquely poised for appeal because his claims fail on the merits and do not otherwise comport with established Supreme Court precedent. Therefore, Respondents respectfully request this Court deny Creech's petition for certiorari.

1. The Ninth Circuit Correctly Affirmed the District Court's Denial of Creech's Preliminary Injunction.

While permitting Creech leave to amend his complaint to add his third claim, the Ninth Circuit acknowledged that "other circuits to consider the issue have rejected due process claims to execution-related information." *Creech v. Tewalt* ("*Creech V*"), 84 F.4th 777, 793 (9th Cir. 2023) (citing *Jones v. Comm'r*, 811 F.3d 1288, 1295 (11th Cir. 2016); *Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir. 2016); *Zink v. Lombardi*, 783 F.3d 1089, 1108–09 (8th Cir. 2015) (en banc) (per curiam); *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014) (per curiam)). However, the Ninth Circuit allowed Creech the opportunity to allege his claim because it had "left open the possibility that prisoners 'may be able to assert a procedural due process right to [such] 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.* (quoting *First Amend. Coal. of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1080 (9th Cir. 2019)). And it did so premised on Miller's recommendation on amendment: "A wise judicial practice would be to allow at least one amendment *regardless of how unpromising* the initial pleading appears because it usually is unlikely that the district court will be able to determine conclusively on

the face of a defective pleading whether the plaintiff actually can state a claim for relief." *Id.* (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2023) (emphasis added)). In contrast to Creech's contentions, he was provided meaningful time and opportunity when he raised his method-of-execution claim in his second-amended complaint.

Creech's Eighth Amendment claim required Creech to establish two things: (1) that IDOC's method-of-execution creates a "substantial risk of severe pain;" and (2) he was required to identify a "feasible, readily implemented" alternative method which "in fact significantly reduces a substantial risk of severe pain" and "the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. The district court found that his claims did not meet these standards. (App. B, pp. 12-19). The Ninth Circuit affirmed the district court's finding, reasoning that: (a) "Creech acknowledges he does not have any known conditions that create a substantial risk of severe pain or needless suffering"; (b) Creech's claims pertaining to anesthesiologists were "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"; and (c) Creech "failed to show why the medical team's ability to observe the execution through real-time video feed, rather than a window, is inadequate." (*Id.* at pp. 5-6).

More notably, Creech's Eighth Amendment claim fails as a matter of law because he refuses to identify an alternative method. This Court has been clear: a prisoner challenging a state's method of execution "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. Creech's refusal to do so is "an independent reason [his claim] necessarily fails as a matter of law." (App. B, at p. 20). Therefore, Creech cannot turn around and say that he needs more time to investigate his claim or that the State's disclosure-protection statute otherwise impedes his ability to have an Eighth Amendment method-of-execution challenge heard at a meaningful time and in a meaningful manner.

The Ninth Circuit correctly affirmed the district court's denial of Creech's Due Process claims. The Ninth Circuit acknowledged that Creech conceded that he knows IDOC will use manufactured pentobarbital, and that much of his original argument was "premised on his contention that the State had not informed him of its intended method of execution." (App. B, p. 4). Creech was apprised of IDOC's method when he filed his second-amended complaint. Creech had access to SOP 135, providing him with notice of the manner in which his execution would be carried out. SOP 135 authorizes IDOC to administer a single-chemical protocol using pentobarbital, and IDOC had confirmed the method. SOP 135 sets out the training requirements for and procedures to be used during his execution. Creech received adequate disclosure of IDOC's planned method-of-execution to comport with whatever due process requires.

Due Process does not require IDOC to disclose IDOC's source's identity. In response to the extreme pressure from anti-death penalty advocates and capital inmates, which results in suppliers refusing to supply chemicals and otherwise

ceasing operation, *see Glossip v. Gross*, 576 U.S. 863, 870-71 (2015), states have enacted disclosure-protection statutes. *E.g.,* Idaho Code § 19-2716A; *see also* Petition, pp. 12-13 (collecting statutes). This Court has acknowledged the necessity for these statutes. *Glossip*, 576 U.S. at 870-71. Federal courts have similarly found the need for such identity protection and have created their own disclosure test under Federal Rule of Civil Procedure 26. (*See, e.g.,* App. A, pp. 37-42, 50-57 (collecting sources)). Respondents are not aware of any court finding such statute unconstitutional. Creech is not likely to succeed on the merits of either of his Due Process claims.

Creech points to Justice Sotomayor's dissent from denial of certiorari in *Zagoraski v. Parker*, 139 S. Ct. 11 (2018) for support. However, that case is clearly distinguishable, as demonstrated by Creech's own quotation. The quoted provisions pertain to Justice Sotomayor's concerns that the inmates in that case were unable to know if Tennessee was able to obtain pentobarbital. *Id.* at 13. Here, in contrast, Creech knew IDOC had obtained manufactured pentobarbital when he filed his second-amended complaint.

Creech's reliance on Justice Sotomayor's dissent in *Bucklew* is no different. Creech relies on Justice Sotomayor's dissent for the notion that meritorious claims are sometimes realized "at the eleventh hour." 139 S. Ct. at 1147. The footnote following Justice Sotomayor's statement, however, indicates she was referring to a state's "recent equivocation about the availability of its preferred lethal injection protocol," states' "'scrambl[ing]" to formulate 'new and untested' execution methods," and states "refus[ing] to inform a prisoner of the drugs that would be used to execute

him." *Id.* (citations omitted). Such fears are not present here since IDOC disclosed that it is using a single-chemical pentobarbital protocol, and single-chemical pentobarbital protocols have "been used to carry out over 100 executions, without incident," have "been repeatedly invoked by prisoners as a less painful and risky alternative to the lethal injection protocols of other jurisdictions," were upheld in 2019 by this Court as applied to an inmate with "a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter," and have "been upheld by numerous Courts of Appeals against Eighth Amendment challenges similar to the one presented here." *Barr v. Lee*, 591 U.S. ___, 140 S. Ct. 2590, 2591 (2020) (per curiam) (internal citations omitted).

Similarly, Creech's reliance on circuit precedent is misplaced. Creech notes that the Ninth Circuit has acknowledged there *may* be a Due Process right to information where the information is necessary to present an Eighth Amendment method-of-execution claim. The cases Creech cites for support, however, are inapposite to his claims. For example, Creech cites to Judge Berzon's concurrence and partial dissent in *Lopez v. Brewer*, 680 F.3d 1068 (9th Cir. 2012). However, Lopez did not concern such a Due Process challenge. *See id.* at 1072 ("We note that in this appeal Lopez did not advance the argument offered by the dissent, namely a due process challenge[.]"). Regardless, Judge Berzon's concurrence expressed concerns about Arizona not providing details about its execution procedures. Conversely, IDOC has detailed its procedures. *See* SOP 135.

Creech's reliance on *In re Ohio Execution Protocol Litig.*, 845 F.3d 231 (6th Cir. 2016), is misplaced, but telling nonetheless. Creech does not rely on *In re Ohio* to contend that protecting information is in violation of an inmates rights, rather, he points to the evidentiary hearing in that case. Creech sought an evidentiary hearing with the district court when moving for a preliminary injunction. (*See* Petition, pp. 27-28). Judge Brailsford denied the motion because Creech's claims failed based on the undisputed facts. (*Id*. at 028 ("Because these facts are undisputed, an evidentiary hearing on Creech's preliminary injunction hearing is unnecessary."). Creech seeks an evidentiary hearing because it has the same practical effect as a stay of execution. Creech should not be awarded an evidentiary hearing because he has not established a likelihood of success on his claims. *See Ramirez*, 595 U.S. at 452 (Thomas, J., dissenting) ("And, in many other ways, yet more prisoners 'deliberately engage in dilatory tactics' designed to drag execution-delaying claims out 'indefinitely.'" (citations omitted)).

Respondents respectfully request that this Court denies Creech's petition for certiorari as to the denial of his request for a preliminary injunction.

2. The Ninth Circuit's Expedited Appeal Process Did Not Violate Due Process.

Creech has claimed for the first time that the Ninth Circuit's expedited appeal process violates due process. Because he failed to preserve this claim, the Court should not consider it. Additionally, Creech cannot succeed on the merits.

a. <u>Creech Did Not Preserve His Claim That the Ninth Circuit's Expedited Appeal Process Violates Due Process.</u>

Creech did not object or otherwise challenge the Ninth Circuit's expedited appeal process before the Ninth Circuit. (App. A, pp. 1-6). He did not object to the Ninth Circuit's direction to submit district court briefing as well as a letter brief. (*Id.*) He did not object to the truncated timeline. (*Id.*) He did not challenge the expedited pace of litigation in his petition for rehearing en banc. (App. C, p. 30).

Creech has failed to preserve this issue. *See Rotkiske v. Klemm*, 589 U.S. ___, 140 S. Ct. 355, 361 (2019) (where petitioner failed to raise an issue before the circuit court or in his petition for certiorari, he could not rely upon it for relief); *see also Williams v. Hobbs*, 562 U.S. 1097, 131 S. Ct. 558, 559 (2010) ("As a general matter, however, a party wishing to raise an objection and preserve an issue for appeal must 'pu[t] the court on notice as to [its] concern.'" (Sotomayor, J., dissenting from denial of certiorari) (citing *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 174, 109 S. Ct. 439, 102 L.Ed.2d 445 (1988)).

The Court has acknowledged it has the *power* to hear unpreserved claims. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so."); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) ("There is doubtless no jurisdictional bar to our reaching [an unpreserved issue]"). But the Court has recognized prudential concerns may warrant against such consideration. *See City of Springfield*, 480 U.S. at 259. The Court declined to exercise its jurisdiction to consider an unpreserved issue where the issue was strenuously objected to by the responding party at the first opportunity. *Id.* at 260 (distinguishing *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985),

in which the Court exercised its jurisdiction to consider an unpreserved issue that was fully briefed and argued before the circuit court, included in the petition for certiorari, and not objected to in respondent's brief in opposition or merits brief). In contrast, the Court exercised its discretion to review a jury instruction that was not objected to at trial, and therefore not preserved, "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration … would be served if we refused now to reach the merits ourselves." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Here, Creech asks this Court to intervene in not only the Ninth Circuit's internal procedures but all circuit courts' expedited procedures. (*See* Petition, p.11 (asking this Court to "provide guidance to the lower courts with respect to the amount of process that is due to pre-execution litigation."). This Court should decline Creech's offer to enmesh itself in this procedure – a procedure that has been made necessary due to often dilatory tactics promoted by condemned inmates. *See, e.g.*, *Rhines v Weber,* 544 U.S. 269, 277-78 (2005) ("[C]apital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death".). The Ninth Circuit necessarily had to review this matter on an expedited basis given Creech's fast-approaching execution date to ensure that Creech had an opportunity to seek relief before it and this Court. Creech now posits that the process intended to provide him with the opportunity to seek relief has created a bar to such

opportunity. Creech's claim is patently absurd, especially in light of his failure to present even a colorable claim for the relief sought.

This Court should decline the invitation to consider Creech's unpreserved objection.

b. Because the Ninth Circuit Rules Gave Creech Notice of Its Expedited Procedures and an Opportunity to Be Heard, Its Expedited Appeal Process Satisfies Due Process.

The Ninth Circuit expedited Creech's appeal because he appealed five days before his scheduled execution. Surely, if the Ninth Circuit did not expedite review so his claim could be considered before his execution, Creech would be arguing that was a due process violation. *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990) ("Courts have recognized that extreme delay in the processing of an appeal may amount to a violation of due process.") (citations omitted).

Regardless, Creech has not pointed to an adequate basis for granting certiorari based on the expedited procedures. Creech only argues that in the context of executions, prolonged proceedings are necessary with respect to every claim. This Court has indicated otherwise. For example, one of the Ninth Circuit cases Creech cited to earlier, *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011), involved Arizona substituting the chemical it was using for an execution eighteen hours before the execution occurred. On the day of execution, while the case was pending before the Ninth Circuit, this Court denied certiorari as well as an application for a stay of execution. 563 U.S. 1018 (2011); *see also* 649 F.3d at 1074 (Tallman, J., concurring) ("Nevertheless, we cannot say that Beaty has not been afforded all the process he is

due. Apparently, the Supreme Court agrees. While we voted on whether to rehear this case en banc, the Court denied Beaty's petition for certiorari challenging the State's decision to substitute the drugs.").

This Court has specifically acknowledged that circuit courts can expedite proceedings:

> The Court of Appeals is in a better position to determine the merits of Smith's request for rehearing and how much time it needs adequately to consider his claims. In the past, the Court of Appeals has addressed this case in an expeditious manner, consistent with our opinion in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983). I have no reason to believe that the court will not expedite consideration of Smith's suggestion for rehearing. The Court of Appeals also has authority to order that the mandate issue forthwith if Smith's request for a rehearing is denied.

Kemp v. Smith, 463 U.S. 1344, 1345 (1983) (footnote omitted) (habeas corpus case); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) ("And, as is also true of consideration of appeals, a district court may, within the constraints of due process, expedite proceedings on the merits.") (citation omitted).

Federal Rule of Appellate Procedure 2 provides:

> (a) In a Particular Case. On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Circuit courts have suspended appellate rules under Rule 2 to expedite their decision or for good cause:

> Given that the scheduled execution is less than two days away, and that the United States has been able to respond to the emergency petition, we grant Mr. Moody's motion to suspend the operation of Rule 22(a), which would have required us to transfer the petition to the district court. Under Rule 2 we may suspend the provisions of an appellate rule

> to "expedite [our] decision" or "for good cause," and we conclude that this standard is met here.

Moody v. U.S. Atty. Gen., 730 Fed. Appx. 851, 852–53 (11th Cir. 2018) (unpublished); *see also United States v. Asencio*, 777 Fed. Appx. 278, (10th Cir. 2019) (unpublished) (suspending rule to consider untimely motion "in the interest of judicial efficiency."); *Plante v. Dake*, 599 Fed. Appx. 13 (2nd Cir. 2015) (unpublished) ("Under the aegis of Rule 2, circuit courts have summarily disposed of appeals using similar but not always identical language.") (citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)). Creech fails to identify any reason for this Court to suspend the circuit court's ability to run their own dockets and serve the interests of judicial economy and justice.

In addition, Creech was on notice of the procedures to be used in capital proceedings. The Ninth Circuit has adopted General Orders, which provide, in relevant part:

> 8.1 Capital Case Coordinator
>
> ***
> (b) principal duties
>
> (3) if necessary, establish deadlines for filing dispositions with respect to applications for leave to file second or successive 2254 petitions or 2255 motions or related civil proceedings as defined in Circuit Rule 22-3;
>
> (4) establish deadlines for requesting an en banc vote with respect to applications for leave to file second or successive 2254 petitions or 2255 motions or related civil proceedings;
>
> (5) establish, in his or her discretion, a period for exchange of memoranda, which either may be a separate period, or may occur contemporaneously with the period established for voting;

> (6) establish the procedure and time schedule for polling the judges with respect to applications for leave to file second or successive 2254 petitions or 2255 motions or related civil proceedings in which an en banc vote has been requested. The Capital Case Coordinator shall inform the Clerk of the procedure and time schedule. Each judge shall be responsible for informing the Capital Case Coordinator and Clerk how he or she may be contacted….

Ninth Circuit General Orders 8.1(b). The Ninth Circuit appropriately followed the processes as set forth in the General Orders. *See, e.g., Perez v. City of Roseville*, 926 F.3d 511, 525 (9th Cir. 2019) (rejecting challenge to substitution of judge upon death of original author pursuant to general orders); *Umanetz v. Ashcroft*, 113 Fed. Appx. 812 (2004) (citing general orders as support for procedures followed) (unpublished).

Finally, Creech does not and cannot demonstrate that he was denied due process. Creech couches his claim in the fact that the question of whether to recommend rehearing en banc was submitted prior to the lapse of the deadline for a response to his petition. He does not assert lack of notice, opportunity to be heard, or impartial tribunal. *See generally Ingraham v. Wright*, 430 U.S. 651, 682, 683 (1977) (discussing requirements of procedural due process when such rights attach). Creech submitted a petition for rehearing en banc before the Ninth Circuit issued its denial. Where Creech had notice that the Ninth Circuit used expedited procedures, of the expedited procedures to be used in his case, an opportunity to file his letter brief and petition for rehearing en banc, and an impartial decision-maker, he received all of the process to which he is due.

Respondents ask this Court to deny the petition on the due process grounds related to Ninth Circuit expedited procedures.

CONCLUSION

The state respectfully requests that Creech's Petition for a Writ of Certiorari be denied.

DATED this 27th day of February 2024.

Respectfully submitted,
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Attorney General of Idaho

/s/ *Alan Hurst*

ALAN HURST *
SOLICITOR GENERAL