

1 JON M. SANDS  
Federal Public Defender, District of Arizona  
2 DALE A. BAICH (OH Bar No. 0025070)  
dale\_baich@fd.org  
3 JESSICA L. FELKER (IL Bar No. 6296357)  
Jessica\_felker@fd.org  
4 850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
5 602.382.2816 | 602.889.3960 facsimile

6 Counsel for Condemned Plaintiffs

7 MARK E. HADDAD (CA Bar No. 205945)  
mhaddad@sidley.com  
8 SIDLEY AUSTIN LLP  
555 West Fifth Street, Suite 4000  
9 Los Angeles, California 90013  
213.896.6000 | 213.896.6600 facsimile

10 Counsel for the Coalition and Condemned Plaintiffs

11 MARK BRNOVICH  
Attorney General  
12 (Firm State Bar No. 14000)  
JEFFREY L. SPARKS (SBN 027536)  
13 Assistant Attorney General  
Capital Litigation Section  
14 1275 West Washington  
Phoenix, Arizona 85007-2997  
15 602.542.4686 | CADocket@azag.gov

16 Counsel for Defendants  
[additional counsel listed on signature page]

17 **UNITED STATES DISTRICT COURT**  
18 **FOR THE DISTRICT OF ARIZONA**

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

22 Plaintiffs,

23 v.

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

27 Defendants.  
28

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

**STIPULATED SETTLEMENT  
AGREEMENT AND [PROPOSED]  
ORDER FOR DISMISSAL OF CLAIM  
ONE**

1           Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson,  
2 Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs,”),  
3 and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections  
4 (“ADC”); James O’Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–  
5 Florence (collectively, “Defendants”), hereby stipulate and agree as follows:

6           **WHEREAS**, Claim One of Plaintiffs’ Second Amendment Complaint (“Claim  
7 One”) challenges ADC’s intended use of lethal injection drug Protocol C that consists of  
8 midazolam, which belongs to a class of drugs called benzodiazepines, followed by a  
9 paralytic (vecuronium bromide, rocuronium bromide, or pancuronium bromide), and  
10 potassium chloride under the Eighth Amendment;

11           **WHEREAS**, Defendants contend that ADC’s previous supplier of midazolam no  
12 longer provides the drug for use in lethal injection executions and that ADC’s supply of  
13 midazolam expired on May 31, 2016;

14           **WHEREAS**, ADC has removed Protocol C, the three-drug combination  
15 beginning with midazolam that Plaintiffs’ challenge in Claim One, from Department  
16 Order 710;

17           **WHEREAS**, Defendants hereby represent, covenant, and agree, and Plaintiffs  
18 and Defendants (collectively, the “parties”) intend, that ADC will never again use  
19 midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection  
20 execution;

21           **WHEREAS**, Plaintiffs contend that they have incurred in excess of \$2,080,000 in  
22 attorneys’ fees and costs in litigating this action;

23           **WHEREAS**, the parties agree that, because of the above-described  
24 circumstances, resolution of Claim One—without further litigation, without any  
25 admission of liability, and without any final adjudication of any issue of fact or law—is  
26 appropriate and will avoid prolonged and complicated litigation between the parties;

27  
28

1           **WHEREAS**, the parties intend this stipulated settlement agreement to be  
2 enforceable by, and for the benefit of, not only the Plaintiffs but also all current and  
3 future prisoners sentenced to death in the State of Arizona (“Condemned Prisoner  
4 Beneficiaries”), who are express and intended third-party beneficiaries of this stipulated  
5 settlement agreement and who are entitled to all rights and benefits provided to Plaintiffs  
6 herein, and who, upon any showing that ADC intends to use midazolam, or any other  
7 benzodiazepine, in an execution or in an execution protocol, may continue this action as  
8 substituted plaintiffs pursuant to Rule 25(c) of the Federal Rules of Civil Procedure;

9           **WHEREAS**, the parties intend this stipulated settlement agreement to bind  
10 Defendants, ADC, and any of Defendants’ successors in their official capacities as  
11 representatives of ADC, who, in the event that any Plaintiff or Condemned Prisoner  
12 Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of  
13 Civil Procedure, will be deemed to have been automatically substituted as defendants in  
14 this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure;

15           **WHEREAS**, the parties intend and agree that, upon any breach of this stipulated  
16 settlement agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing  
17 and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules  
18 of Civil Procedure, and (b) an order shall issue permanently enjoining ADC from using  
19 midazolam, or any other benzodiazepine, in an execution or in an execution protocol;

20           **WHEREAS**, in the event that any Plaintiff or Condemned Prisoner Beneficiary  
21 moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil  
22 Procedure, the parties agree that Defendants, ADC, and/or any of Defendants’  
23 successors in their official capacities as representatives of ADC waive all objections to  
24 this Court’s reopening of this proceeding, including on the basis of timing, ripeness,  
25 mootness, or the standing of the moving parties;

26           **WHEREAS**, in the event that this stipulated settlement agreement is breached  
27 through ADC’s use or intent to use a benzodiazepine in an execution or in an execution  
28

1 protocol, and any Plaintiff's or Condemned Prisoner Beneficiary's motion to reopen this  
2 proceeding under Rule 60(b)(6) of the Federal Rules of Civil Procedure is not granted  
3 for reasons related to the moving parties' standing or the Court's jurisdiction,  
4 Defendants consent to the entry of an order in a separate action by a Plaintiff or a  
5 Condemned Prisoner Beneficiary for breach of this agreement that permanently enjoins  
6 ADC from using midazolam, or any other benzodiazepine, in an execution or in an  
7 execution protocol.

8 **IT IS THEREFORE STIPULATED AND AGREED** that:

9 (1) Claim One of Plaintiffs' Second Amended Complaint is dismissed,  
10 without prejudice.

11 (2) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary  
12 that ADC intends to use midazolam, or any other benzodiazepine, in an execution or in  
13 an execution protocol, Claim One shall be reinstated and reopened pursuant to Rule  
14 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and  
15 consent of the parties granted herein, an injunction shall issue in this action or in a  
16 separate action for breach of the parties' stipulated settlement agreement permanently  
17 enjoining ADC from using midazolam, or any other benzodiazepine, in an execution or  
18 in an execution protocol.

19 (3) Plaintiffs agree not to seek their attorneys' fees and costs incurred in  
20 litigating Claim One unless Defendants or ADC breach this stipulated settlement  
21 agreement, in which case Plaintiffs shall be entitled to seek an award of their reasonable  
22 attorneys' fees and costs incurred in litigating Claim One, in an amount to be determined  
23 by the Court, either in this action or in a separate action for breach of the parties'  
24 stipulated settlement agreement. In that circumstance, Plaintiffs shall also be entitled to  
25 seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce  
26 this stipulated settlement agreement.

27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: December 19, 2016

Sidley Austin LLP

s/ Mark E. Haddad

Mark E. Haddad

Attorneys for Plaintiffs Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz; and Roger Scott

Dated: December 19, 2016

Office of the Arizona Attorney General

s/ Jeffrey L. Sparks

Jeffrey L. Sparks

David Weinzweig

Lacey Stover Gard

John Pressley Todd

Attorneys for Defendants

I, Mark Haddad, hereby attest that counsel for Defendants, Jeffrey L. Sparks, authorized the use of his signature on, and concurred in the filing of, this document, on December 19, 2016.

s/ Mark E. Haddad

Mark E. Haddad

\* \* \*

**ORDER**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS SO ORDERED.**

DATED this \_\_\_\_ day of \_\_\_\_\_, 2016.

---

Neil V. Wake  
United States District Judge