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

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 17-1804/05

ASA HUTCHINSON, Governor of the State of Arkansas, and
WENDY KELLEY, Director, Arkansas Department of Correction,

Defendants/Appellants,

v.

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

Plaintiffs/Appellees.

PLAINTIFFS' RESPONSE TO EMERGENCY MOTION TO VACATE STAY OF EXECUTION/PRELIMINARY INJUNCTION

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INTRODUCTION

This case concerns an issue of the utmost importance: whether the State of Arkansas may execute eight of the Plaintiffs over the course of eleven days using an execution drug, midazolam, that scientific evidence has increasingly shown to be inappropriate for lethal injection. Plaintiffs developed that evidence last week during a four-day evidentiary hearing. After the hearing, which went late into the night most days, the district court issued a 59-page order on Defendants' motion to dismiss and a 101-page order enjoining Plaintiffs' executions via a midazolam protocol. The court heard from seventeen witnesses whose testimony covered almost 1,300 pages of transcript. The parties introduced over 90 exhibits totaling more than 2,000 pages. The district court's order contains hundreds of factual findings and multiple conclusions of law. At this stage, a more thorough consideration of Plaintiffs' claims could hardly be imagined.

Now the State has filed a 27-page motion, styled a "motion to vacate stay of execution/preliminary injunction," that misstates the standard of review, selectively represents the procedural history, and ignores vast swathes of evidence before the district court. The State demands that

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the Court review the filings, the voluminous record, and the district court's opinions in two days—days that happen to be Easter Sunday and Easter Monday. Plaintiffs ask the Court to reject the State's request for a rushed analysis of this complex record and instead give calm consideration to these grave issues after full briefing and argument.

Should the Court be inclined to make an immediate ruling on the preliminary-injunction order, it should conclude that none of the State's arguments undermines the district court's findings of fact or conclusions of law. This Court should reject the State's reductive depiction of the district court's work and should uphold the preliminary injunction. Plaintiffs respectfully request oral argument on this motion.

STANDARD OF REVIEW

The State fails to articulate the correct standard of review in this appeal. This Court reviews an order granting a preliminary injunction for an abuse of discretion. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012). An abuse of discretion occurs when the district court makes "clearly erroneous factual findings or erroneous legal conclusions." *Id.* This Court has held it will not

disturb a district court's discretionary decision if it is within the range of choices available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment. *Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994). An "appellate court must remain mindful as to the district courts being closer to the facts and the parties, and not everything which may be important in a lawsuit necessarily comes through in exactly that way on the printed page." *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).

"In light of the large degree of discretion vested in the trial court, appellants carry a heavy burden" when they seek to reverse a ruling on a preliminary injunction. *Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 859 (8th Cir. 1980) (internal quotation marks omitted). As explained further below, the State cannot meet this heavy burden. Contrary to the State's suggestion, the district court applied the appropriate standards for relief in this case, including those discussed in *Hill v. McDonough*, 547 U.S. 573 (2006). PI Order at 49. It is incumbent upon the State to identify some clearly erroneous factual finding or erroneous legal conclusion. Their motion does not do so.

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Background

A. District-court proceedings.

On February 27, 2017, Defendant Hutchinson ordered eight of the nine Plaintiffs to be executed, with four nights of double executions to occur from April 17 to April 27. Hutchinson readily admitted that he chose this schedule—unprecedented in the modern history of capital punishment—because he is "uncertain" whether the State can restock its supply of midazolam. Camila Domonoske, *Arkansas Readies for 8 Executions, Despite Outcry over Pace, Method*, NPR, Mar. 31, 2017, *available at* http://n.pr/2p36BdM.

On March 27, 2017, Plaintiffs filed a complaint and a motion for preliminary injunction requesting relief on seven grounds: (1) the execution schedule violates Plaintiffs' right to counsel under 18 U.S.C. § 3599; (2) the schedule violates Plaintiffs' right to be free from cruel and unusual punishment; (3) use of midazolam in the lethal-injection protocol violates the Eighth Amendment; (4) lack of safeguards in the protocol violates the Eighth Amendment; (5) a combination of the schedule, midazolam, and lack of safeguards in the protocol violates the Eighth Amendment; (6) the State's policies restricting attorney

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witnessing and phone access during executions violate Plaintiffs' right of access to courts; and (7) the State's policies restricting attorney witnessing and phone access during executions violate Plaintiffs' right to counsel under § 3599.

In a 59-page opinion, the district court dismissed the first and fourth claims. The court also partially dismissed the second claim, holding that Plaintiffs had not stated a claim that the schedule would cause them a substantial risk of harm, but allowing them to proceed on the claim that the schedule violates evolving standards of decency. The court declined to dismiss any of the other claims. The court then granted a preliminary injunction on all the remaining claims with the exception of the evolving-standards-of-decency claim.[1]

[1] On the access-to-courts claim and the § 3599 claim based on execution witnessing, the district court ordered the parties to fashion an acceptable remedy and file a progress report by noon on Monday. Defendants do not seek to vacate the preliminary injunction on these two claims. Nor do they explicitly seek to vacate the preliminary injunction on the claim that the schedule, midazolam, and lack of safeguards in the protocol violate the Eighth Amendment in combination.

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B. Prior state-court proceedings.

Defendants are correct that Plaintiffs have been involved in previous execution-protocol litigation in state court. But their account of that litigation is deficient. The fuller picture shows why Plaintiffs' midazolam claim is not barred by res judicata or collateral estoppel.

The state-court opinion with supposed preclusive effect is *Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016). In the operative *Johnson* complaint, Plaintiffs made three challenges to the State's method-of-execution statute. First, they argued that the part of the law shielding drug suppliers from public identification violates various parts of the state constitution. Second, they argued that use of midazolam violates the state constitutional prohibition on cruel or unusual punishment. Third, they argued that the method-of-execution statute violates state constitutional provisions on separation of powers and ex post facto laws.

Defendants asserted sovereign immunity as a defense to each claim. Under Arkansas law, the State is immune from suit unless it waives sovereign immunity or unless the plaintiff adequately pleads and proves the State is acting illegally or unconstitutionally. *See Bd. of Trs. v. Burcham*, 2014 Ark. 61, at 3–4.

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Whether a state defendant moves to dismiss on sovereign-immunity grounds or for failure to state a claim under Ark. R. Civ. P. 12(b)(6) makes little functional difference in the circuit court (i.e., the Arkansas trial court). On either motion, the State is seeking to show the plaintiff has not made out her claim of illegal conduct. The State's choice of defense makes a major difference in appellate procedure, however, for denial of a sovereign-immunity defense—including denials based on the conclusion that the plaintiff pleaded sufficiently or submitted enough proof at summary judgment to invoke the sovereign-immunity exception—is immediately appealable. Ark. R. App. P. – Civ. 2(a)(10). Moreover, in any interlocutory appeal based on sovereign-immunity, the plaintiff is not permitted to cross-appeal any claims the circuit court has dismissed. *See Ark. State Claims Comm'n v. Duit Constr. Co.*, 445 S.W.3d 496, 503–04 (Ark. 2014).

That is precisely what happened in *Johnson*. The Pulaski County Circuit Court dismissed Plaintiffs' separation-of-powers and ex post facto claims; denied summary judgment to either party on the midazolam claim; and granted summary judgment to Plaintiffs on the secrecy claims. The State filed an interlocutory appeal to challenge the

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orders that went against it. This procedural maneuver had two effects. First, it blocked Plaintiffs from pursuing any evidence of midazolam's efficacy before appeal. Second, it allowed the State to seek immediate relief but left Plaintiffs' separation-of-powers and ex post facto claims stranded until entry of final judgment by the circuit court.

That final judgment never came. Instead, the case has been in limbo in the absence of any explicit direction from the Arkansas Supreme Court. *Johnson*'s decretal language was "reversed and dismissed." *Id.* at 366. The court said nothing to prevent Plaintiffs from filing another complaint to address the deficiencies the opinion identified in the pleading. *Cf. id.* at 369 (Hart, J., dissenting) ("Because the majority dismisses for failure to plead sufficient facts, I submit that the dismissal is without prejudice, and [Plaintiffs] may plead further."). So when the Arkansas Supreme Court issued its mandate and jurisdiction returned to the circuit court, Plaintiffs sought to amend the complaint.

The circuit court refused to permit the amendment. In an order issued March 28, 2017, it held that *Johnson* "dismissed the litigation, with prejudice"—though the Arkansas Supreme Court never said it was doing that. Defs.' Ex. 23 at 5. The circuit court also said *Johnson*

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rendered it "powerless to even enter judgment on the separation-of-power and ex post facto contentions so that Plaintiffs could seek appellate review on them," *id.* at 6—though that statement contradicts well-established Arkansas law. *See Convent Corp. v. City of N. Little Rock*, 492 S.W.3d 498 (Ark. 2016). The circuit court's order is still subject to challenge in the Arkansas Supreme Court, notice of which is due April 27.

ARGUMENT

I. The Court Should Not Expedite Consideration of This Appeal

The State considers its motion an "emergency," but it offers no good reason for this Court to adjudicate the merits of this appeal without the benefit of full briefing and argument from the parties. An expedited appeal is functionally a substitute for a motion to stay the district court's order. *See In re Grand Jury Proceedings Subpoena to Testify to Wine*, 841 F.2d 230, 232 (8th Cir. 1988) (denying motion to stay and expediting appeal). As with a motion for stay, the burden is on the movant to justify the necessity of departing from the normal process of appellate review. *Lankford v. Sherman,* 451 F.3d 496, 503 (8th Cir. 2006). Movants must show that they will suffer irreparable harm

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without immediate review, and that harm must be balanced against the impact on other parties. *Brady v. Nat'l Football League,* 640 F.3d 785, 789 (8th Cir. 2011). Any such showing must be balanced against the potential impact on the other parties. *Id.* In addition, the movant must show that the merits are so clear that "no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

The balance of the equities in this case favors Plaintiffs' request for comprehensive briefing and review. First, as discussed *supra*, the record in this case is voluminous; the district court's findings, conclusions, and reasoning are meticulously detailed. Careful review of such a lengthy record cannot reasonably occur in two days. Second, the State will suffer no irreparable harm. Whatever harm is caused by the delay in the execution schedule, and by the expiration a batch of the State's drugs, is not irreparable. Other states' ability to conduct constitutionally acceptable executions belies any claim of irreparable harm. *See* PI Order at 81. Third, Plaintiffs risk suffering grievous and irreparable harm if they are executed in a manner that violates the Eighth Amendment. *Cf. In re Ohio Execution Protocol,* 2017 WL

1279282, at *10. Fourth, the public has an interest in ensuring that executions are properly carried out without violence to any person's constitutional rights. *Id.* Likewise, the public has an interest in ensuring that litigants have adequate time to present their cases and that the appellate courts have adequate time to consider them. Finally, the State cannot show such a strong probability of success that expedited review is essential or necessary. To the contrary, the district court's exhaustive analysis and the important issues in this case are not amenable to summary review.

II. The District Court's Conclusion that Plaintiffs Are Likely to Succeed Is Not an Abuse of Discretion

The State identifies three ways the district court abused its discretion when granting the preliminary injunction on the "midazolam claim": the claim is barred by res judicata and collateral estoppel; Plaintiffs failed to show that midazolam is very likely to cause needless suffering; and Plaintiffs failed to show a readily available alternative execution method.

As an initial matter, what Defendants characterize as Plaintiffs' method-of-execution "claim" is actually two claims—one based on the

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use of midazolam alone, and a second based on the combination of the execution schedule, use of midazolam, and lack of adequate safeguards in the protocol. The district court entered a preliminary injunction on both. ECF No. 54 ("PI Order") at 53. The State's failure to raise a specific challenge to the combination claim in its motion is sufficient for this Court to uphold the preliminary injunction at this time. And even had the State properly challenged the combination claim, the preclusion arguments would not apply to that claim, as it became ripe only when Hutchinson set the execution schedule.

With that caveat, Plaintiffs address each of the State's arguments in turn.

A. Neither res judicata nor collateral estoppel applies.

The State fails to show the district court abused its discretion on the res judicata issue. First, under Arkansas law, a court may only apply res judicata when a prior decision has been "adjudicated on the merits." *First Commercial Bank, N.A. v. Walker*, 969 S.W.2d 146, 150 (Ark. 1998). An adjudication on grounds of subject-matter jurisdiction—like sovereign immunity—is not "on the merits." *See id.*; *see also* Restatement (First) of Judgments § 49.

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Sovereign immunity is jurisdictional in nature. *Johnson*, 496 S.W.3d at 354 ("sovereign immunity is jurisdictional immunity from suit"); *DFA v. Staton*, 942 S.W.2d 804, 805 (Ark. 1996); *McCain v. Crossett Lumber Co.*, 174 S.W.2d 114, 120 (Ark. 1943). In *Johnson*, the State exclusively argued sovereign immunity as a bar to plaintiffs' state-law method-of-execution claims. That is the only reason appeal could be taken from the circuit court's interlocutory order. *See Johnson*, 496 S.W.3d at 354–55 (accepting State argument that "appeal is proper because sovereign immunity was the sole basis on which it moved for dismissal and for summary judgment and that the circuit court has ruled on all the issues raised in their motions"). Contrary to the State's suggestion that the Arkansas Supreme Court could "consider" the midazolam claims, Emer. Mot. at 7–8, the *Johnson* Court had jurisdiction solely to determine the circuit court's subject-matter jurisdiction under Ark. R. App. P. 2(a)(10). The Arkansas Supreme Court rested its decision solely on those sovereign-immunity grounds. *Id.* at 350. The State may not now gain the preclusive effect of a judgment that it steadfastly argued was jurisdictional in nature.

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The State's res judicata argument fails for another reason: the district court correctly concluded the disposition of Plaintiffs' state-law claims was not a final judgment. *Johnson* was an interlocutory appeal, limited solely to the sovereign-immunity issue. But the circuit court had also dismissed Plaintiffs' claims that the method-of-execution act violates the separation-of-powers and ex post facto clauses of the Arkansas Constitution. Plaintiffs were not permitted to appeal these claims under state procedural rules. *See Duit Constr. Co.*, 445 S.W.3d at 504. The interlocutory appeal did not—indeed could not—address these remaining claims. So, the resolution of the interlocutory issues could offer only incomplete relief to the parties. *Crockett & Brown, P.A. v. Wilson*, 864 S.W.2d 244, 246 (Ark. 1993) ("Finality for purposes of appeal is closely related to finality for purposes of res judicata.").

The State points to language from the Pulaski County Circuit Court to support its theory. On March 28, 2017, the circuit court accepted the argument that the *Johnson* mandate dismissed the case with prejudice. Defs.' Ex. 23 at 6. But that ruling is not binding: Appellees have moved for rehearing and may still appeal that decision. So the state case will continue at least to an appeal from the circuit court's determination

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that *Johnson* dismissed the complaint finally and with prejudice—a point upon which the Arkansas Supreme Court has never ruled.

The State further urges a novel interpretation of unsettled state law in asserting that any future suit would be barred by Ark. R. Civ. P. 41(b). The district court correctly concluded the State's reading of Rule 41(b) is unwarranted. *See* ECF No. 54 ("MTD Order") at 36. The State fails to acknowledges that Rule 41(b), even were it literally applicable,[2] is not applied literally and is subject to broad equitable exceptions that Arkansas courts would probably invoke here. *See Smith v. Washington*, 10 S.W.3d 877, 880 (Ark. 2000). An emergency motion is not an appropriate vehicle for the State to offer a novel guess at state law in support of reversing the district court.

Similarly, collateral estoppel has no application here. As explained, *Johnson* provided no final judgment. Nor did it address whether the State's midazolam protocol is likely to inflict a degree of suffering that violates Plaintiffs' right to be free from cruel and unusual punishment.

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[2] For Plaintiffs Davis and Lee, Rule 41(b) is not even literally applicable because they were not party to previous dismissals that the State argues trigger the Rule.

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Instead, it found that Plaintiffs had not pleaded an alternative execution method with the specificity required by Arkansas procedural rules.[3] Even if there had been a final state-court judgment, it could not preclude the issues because Arkansas courts apply a fact-pleading standard more exacting than federal courts' notice-pleading standard. *Compare* Ark. R. Civ. P. 8 & 12 *with* Fed. R. Civ. P. 8(a)(2). An issue cannot be precluded where the first decision was based on a higher legal standard, even if the facts were the same. *Hillman v. Ark. Highway & Transp. Dep't*, 39 F.3d 197, 200 (8th Cir. 1994) ("While the facts presented in both circumstances may indeed have been the same, the *legal standards* governing the decisions are different. The more exacting standard applied by the [earlier decisionmaker] prevents the issues from being the same. Because the issues presented in the respective proceedings were different, the district court did not err in refusing to

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[3] The State attempts to portray Plaintiffs' deficiency as one of proof, not one of pleading, but that was not how the Arkansas Supreme Court saw it. *See Johnson*, 496 S.W.3d at 369 ("[T]he circuit court erred in concluding that the Prisoners pled sufficient facts as to the proposed alternative drugs."); *id.* (finding as to the firing-squad alternative that "[c]onclusory statements are not sufficient under the Arkansas Rules of Civil Procedure, which identify Arkansas as a fact-pleading state").

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apply the doctrine of issue preclusion."). Where the standards are different, the issues are necessarily *not* the same.

B. The district court's factual determinations regarding the midazolam claims are not clearly erroneous.

The district court found, after hearing four days of testimony and assessing the relative credibility of the party's experts, that "there is a significant possibility that plaintiffs will succeed in showing that the use of midazolam in the ADC's current lethal injection protocol qualifies as an objectively intolerable risk that plaintiffs will suffer severe pain." PI Order at 56. The court found that the risk presented by midazolam was "exacerbated" by the state's scheduled execution of eight inmates over 11 days, that it had not executed an inmate since 2005, and that the execution protocol "fail[s] to contain adequate safeguards that mitigate some of the risk presented by using midazolam and trying to execute that many inmates in such a short period of time." *Id.*

The State argues that the district court's finding of an "objectively intolerable risk" is reviewed by this Court *de novo* and then proceed to attack the evidentiary basis of the finding. Emer. Mot. 10. As discussed *supra*, the district court's factual findings, upon which the "intolerable

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risk" assessment is based, are assessed for clear error. *See*, *e.g.*, *United States v. Salsberry*, 825 F.3d 499, 501 (8th Cir. 2016). There is only clear error where the "entire record definitely and firmly illustrates that the lower court made a mistake." *United States v. Marshall*, 411 F.3d 891, 894 (8th Cir. 2005). While the court can hardly be expected to review the "entire record" for clear error in a matter of days, Plaintiffs show below that the district court's conclusions are well-supported by the record.

1. The evidence strongly supported the district court's finding concerning the package insert of midazolam.

Language on a package insert for the drug midazolam did not call into question the overwhelming testimony that midazolam is insufficient to achieve general anesthesia. The State argues that, "[a]ccording to the manufacturer-prepared, FDA-approved drug information for midazolam, the drug can be used to induce general anesthesia, without narcotic premedication or other sedative premedication." Emer. Mot. 10. The district court heard extensive testimony and reviewed authoritative medical literature on this issue. It found that the label "does not significantly undercut" Plaintiffs' evidence that midazolam is not, by itself, an effective general

anesthetic. PI Order at 64. The court based its finding on the inconsistent language of the insert, the actual "clinical experience with the drug," and the fact that the label does not establish that midazolam is "a sole agent for anesthesia." *Id.* at 63–64. The court's finding is well-supported by the record.

The evidence was consistent that midazolam is effective as *one medication among several* in the early stages of anesthesia. As Dr. Groner testified, "Midazolam can be used as a preanesthetic agent to reduce anxiety. It can be used as a component of anesthesia." Tr. 587. Dr. Stevens testified similarly: "[A]s you increase the dose, you don't quite make it up to true anesthesia or general anesthesia. You can definitely increase sedation. They use it to prevent anxiety every day in millions of patients. You can definitely use it to induce sleep. It is used a lot for that as well." Tr. 247. Dr. Zivot testified that "[t]he entirety of an induction involves more than a single drug." Tr. R. 939.

The overwhelming weight of the evidence established that midazolam by itself does not and cannot establish a state of general anesthesia. As Dr. Zivot explained, midazolam does not "create the kind of deep unresponsiveness" necessary for surgical procedures: "an

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anesthetic, an induction agent is an agent that's intended to create the kind of deep unresponsiveness that signals . . . when surgery will . . . begin. [Midazolam] doesn't create the kind of rapid unresponsiveness that the other sorts of induction agents create, so it's just not practical in that way." Tr. 30-31. Dr. Groner concurred: "midazolam is not a general anesthetic. . . . It would be malpractice for me to do something like an appendectomy with midazolam as the sole anesthetic." Tr. 587; *see also* Tr. 287 (Stevens).

The language on midazolam's packaging does not contradict this evidence. The "indications and usage" section contains no indication that midazolam can be used as a *sole* agent to induce anesthesia. The package reads "Midazolam Injection is indicated" "intravenously for induction of general anesthesia, ***before administration of other anesthetic agents***. With the use of narcotic premedication, induction of anesthesia can be attained within a relatively narrow dose range and in a short period of time. Intravenous midazolam can also be used as a component of intravenous supplementation of nitrous oxide and oxygen (balanced anesthesia)." Defs.' Ex. 6 at 3 (emphasis added). This language supports the testimony of Plaintiffs' experts, who explained

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that midazolam *alone* is insufficient to induce general anesthesia. *See, e.g.*, Tr. 943.

The district court received into evidence authoritative medical texts and heard expert testimony demonstrating that the language of the package insert does not support the conclusion that midazolam is a sole agent of general anesthesia. As Dr. Zivot explained, "[a]nesthesia involves a combination of many different drugs. The state of anesthesia is perhaps the way to think of that term, but that doesn't mean that that is a result of a single drug being administered." Tr. 957. An authoritative medical text, for example, explained that "'the clinical literature often refers to the anesthetic effects and uses of certain benzodiazepines, but *the drugs do not cause a true general anesthesia, because awareness usually persists*.'" Tr. 356 (emphasis added). Dr. Stevens testified that the package insert reflects the actual clinical practice—that midazolam is used as one component of many medications given to patients at the beginning of anesthesia, not that midazolam by itself produces general anesthesia. Tr. 353 (Stevens); *see also* Tr. 592 (Dr. Groner).

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The district court was correct to credit the testimony of experienced professionals, which is supported by clinical and pharmacological research, rather than relying on the State's selective reading of the fine print on midazolam's packaging.

2. The evidence strongly supports the district court's finding that midazolam does not by itself produce general anesthesia.

General anesthesia requires "that a patient should . . . have no pain or at least minimal pain." Tr. 20. The district court did not err by finding that midazolam does not block pain. As the district court observed, "[m]any witnesses testified that midazolam has no analgesic effect, meaning it is not a pain reliever," and "[e]ven [State expert] Dr. Antognini admitted it would not be his sole choice for pain relief." PI Order at 66.

The State nonetheless claims that Dr. Zivot "concede[d] that midazolam *can be used* for induction of anesthesia and used as the sole anesthetic for very painful medical procedures, such as endotracheal intubation and C-section surgeries." Emer. Mot. 11 (citing Tr. 942-43) (emphasis added). The State mischaracterizes the record. When asked by State's counsel whether "midazolam could be used for the induction

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of anesthesia and used as the sole anesthetic for very painful medical procedures" such as endotracheal intubation, Dr. Zivot responded, "I could practice poor medicine in a number of ways, and that would be one of them." Tr. 942. Dr. Zivot agreed only that midazolam "could be" used, but "we could also just give them saline." Tr. 943. He explained that midazolam is "not an analgesic," and it would therefore be, like saline, "insufficient" to alleviate pain in such medical procedures. Tr. 943. This Court should reject the State's attempt to rely on this passage to support its arguments.

In fact, there was significant evidence that midazolam's role in a combination of drugs is to create amnesia and that it in no way blocks the experiencing of pain. The actual evidence was overwhelming that midazolam is "not an analgesic," i.e., it does not alleviate pain and is therefore not used for that purpose. *See* Tr. 587 (Dr. Groner) ("Midazolam does not have analgesic properties, and we do not use it for analgesia."); Tr. 29 (Dr. Zivot) ("Midazolam is not what's referred to as an analgesic. Analgesics are medications that take pain away. . . . But midazolam is not considered to be an analgesic in any dose."); *see also* Tr. 236-42 (Stevens). Dr. Antognini agreed that his "colleagues disagree

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with [his] characterization of midazolam as having analgesic properties." Tr. 1038. He also admitted that *Miller's Anesthesia*, which is an authoritative text in the field (Tr. 1021), has stated in the "past six or seven editions" that benzodiazepines (the class of drugs that includes midazolam) "lack analgesic properties." Tr. 1037. His belief that midazolam can act as an analgesic is based on "studies where the midazolam is injected directly into the spinal cord." Tr. 1037-38.

The State also urges that the district court "ignored" evidence of scientific papers regarding midazolam's effects. *See* Emer. Mot. 10, 12. This argument is belied by the district court's opinion. The court explained that "[i]f the parties are correct in regard to the available science, there is very little published regarding scientific study in humans of the effects of midazolam on humans at certain doses." PI Order at 57. The court "reviewed and heard testimony" regarding "many" studies "in reaching its determination." *Id.* at 59. Ultimately, the court found that the scientific papers were "mixed," and ultimately "there is very little published regarding scientific study in humans of the effects of midazolam on humans at certain doses." *Id.* at 57–58. The

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district court did not clearly err by crediting well-explained expert testimony tailored to the specific facts at hand.

The State argues that the district court "ignored" evidence of a scientific paper regarding the effect of midazolam on the readings of a "BIS" monitor. Emer. Mot. 10, 12. In fact, the district court devoted nearly a page of its opinion to this study and found that "[t]here appear to be very few readings plotted below a BIS score of 60." PI Order at 58. Far from ignoring this evidence, the district court considered it and found it to support a finding that midazolam was insufficient to create general anesthesia. That finding was not clear error.

3. The district court considered and did not credit Dr. Antognini's testimony.

Relying on testimony from Dr. Antognini, its expert, the State claims the district court ignored "undisputed evidence" that "[a] 20 to 30 mg dose of midazolam will induce general anesthesia in a 200-lb man sufficient to endure painful medical procedures," and "[a] 500-mg dose of midazolam is far more than you would need to anesthetize a person and render him insensate to severe pain." Emer. Mot. 10–11 (citing Tr. 998–1000, 1003–04, 1057–58). Dr. Antognini's opinions were in fact sharply disputed, against the weight of scientific evidence, and

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undermined by, inter alia, his own prior testimony in another case. The district court considered his opinions in depth, but ultimately found they lacked credence. PI Order at 61–63.

As already discussed, the district court heard and credited extensive testimony from experts and authoritative medical tests stating that, contrary to Dr. Antognini's opinion, midazolam does *not* produce a state of general anesthesia. *See* Tr. 30-31, 287, 587. The court heard accounts of patients under clinical doses of midazolam engaging in coherent, detailed conversations with their doctor. Tr. 941; Slip Op. at 62. The court learned why thousands of people overdose on opioids, but "[w]e don't hear about all this problem with people taking Xanax and dying from overdose."[4] Tr. 1068. The court recognized that unrebutted evidence from autopsies of midazolam executions provided further support for the scientific and pharmacologic fact that midazolam does not effectuate general anesthesia but instead results in long and painful executions. *See* PI Order at 71; Tr. 70-71, 956-57.

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[4] Xanax is an oral form of benzodiazepine. Midazolam is an intravenous form of benzodiazepine. Tr. 244.

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By contrast, the district court ruled that Dr. Antognini's testimony "does not lend credence to defendants' theory of the science." PI Order at 62–63. The court recounted Dr. Antognini's evasive answers when asked about using midazolam as a general anesthetic. *Id.* It recognized that Dr. Antognini's key opinion—that "[a] 500-mg dose of midazolam [as contained in the Arkansas Execution Protocol] is far more than you would need to anesthetize a person and render him insensate to severe pain"—depended on his (current) view that benzodiazepines do not have a "ceiling effect." As the court explained:

> If there is a ceiling effect of midazolam, then midazolam's effect will level off after a certain dose of midazolam is administered, and administering more midazolam will not increase its effect. In other words, more midazolam in a protocol will not render a deeper state of sedation or general anesthesia, despite defendants' contentions to the contrary.

Id. at 61. Extensive expert testimony and published studies presented to the district court demonstrated that benzodiazepines like midazolam *do* have a ceiling effect because they only work on certain GABA receptors in the brain, and there is a limited number of these receptors. *See* Tr. 247–69 (Dr. Stevens) (discussing published studies of the ceiling effect); *see also* Tr. 27–28 (Dr. Zivot); ECF No. 2-2 at 207. The district

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court found this testimony credible in part because it explained "the mechanism by which midazolam works," PI Order at 68, and because it was supported by published scientific studies. *Id.* at 61–62. By contrast, the court noted that "Dr. Antognini takes the position that it is unlikely GABA would ever be depleted, discounting the theory of the ceiling effect, but disclaiming much knowledge beyond that about how the process works." *Id.* at 61. The court also observed that Dr. Antognini's present testimony about the ceiling effect contradicts his prior sworn testimony that the ceiling effect is real and that it is reached at a dose of only about 20 to 25 mg of midazolam. *Id.* at 61–62. Based on its exhaustive review of the record, the district court was well-supported in rejecting Dr. Antognini's opinions.

4. The district court found Dr. Stevens to be a credible witness.

The State wrongly argues that the district court "ignored" evidence related to Dr. Stevens's textbook. *See* Emer. Mot. 10, 11. On the contrary, the district court acknowledged that "Dr. Stevens was cross examined effectively as to the table from the textbook he co-authored and regarding his arithmetic error when attempting to calculate the dose at which it would be possible to see the ceiling effect from

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midazolam." PI Order at 68. The district court continued, however, that "Dr. Stevens gained credibility by discussing the mechanism by which midazolam works and opining that it is not possible to alter that fundamental mechanism." *Id.* As this Court has previously explained, a trial judge's decision to credit the testimony of one witness over another is virtually unreviewable. *United States v. $63,530.00 in U.S. Currency*, 781 F.3d 949, 957 (8th Cir. 2015). That the district court did not find the State's cross examination to be fatal to the credibility of a witness does not rise to the level of clear error. *See United States v. Allmon*, 500 F.3d 800, 806 (8th Cir. 2007).

5. There was ample evidence that midazolam has a ceiling effect below the dose in the Arkansas lethal injection protocol (500 mg).

The district court did not commit clear error by finding midazolam's ceiling effect is below 500 mg. The State launches several attacks on this finding. First, it argues the district court erred by finding that there was a ceiling effect at all. Emer. Mot. 12. Second, it argues the district court relied on Dr. Stevens's calculation of a precise ceiling effect. *Id.* Finally, it argues the ceiling effect is below the level necessary

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to induce general anesthesia. *Id.* at 13. As explained below, the district court did not commit clear error.

There was significant evidence to find that midazolam has a ceiling effect. The district court found that the "theory of a ceiling effect with midazolam seems to be fairly accepted." PI Order at 60. Dr. Zivot testified that midazolam has a ceiling at which "additional dosages have no effect." Tr. 27–28. Dr. Stevens explained in great detail the neuro-chemical mechanism by which benzodiazepines work. The drug binds to neurons at the GABA receptors, and when each GABA receptor is occupied, additional dosages of the drug have no effect. Tr. 248–54. As the district court noted, even the State's expert acknowledged that he had previously testified that at clinical doses of 20 to 25 milligrams he would expect "what we call the knee in the curve, so the bend of the curve, as you see the ceiling effect occur." Tr. 1027. He further testified that his "understanding of the literature" is that at "20 to 25 milligrams, you would expect for it to start leveling off." Tr. 1027. Testimony of Drs. Zivot, Stevens, and Antognini on this point all contradicted the testimony of the State's other witness, Daniel

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Buffington. The district court's finding that midazolam has a ceiling effect was not clearly erroneous.

Having disputed that the ceiling effect exists at all, the State next criticizes the district court for not determining the precise dosage at which the ceiling effect of midazolam is reached. Emer. Mot. 12-13. However, as admitted by the State's own expert, the ceiling effect of midazolam can already be seen in clinical doses. PI Order. at 62. Accordingly, the precise level of the ceiling effect is inapposite here because it would be well below the dose called for in the lethal-injection protocol.

6. The district court found Plaintiffs' expert testimony more credible.

The State asserts, without support, that the district court "concluded that the expert evidence cut 50-50." Emer. Mot. 13. Not so. The district court heard four days of evidence and, as the opinion makes clear, found the testimony of the Plaintiffs' experts more credible. The district court made credibility findings regarding the respective experts that are not clearly erroneous. *See $63,530.00 in U.S. Currency*, 781 F.3d at 957.

In multiple ways, the district court found the State's expert testimony inconsistent, incomplete, or imprecise. *See* PI Order at 59

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(finding defense expert's reliance on animal studies while defense counsel attacked reliance of animal studies an "inconsistency" that "went largely unexplained"); *id.* at 60 (relating that defense experts would not agree to the "fairly accepted" ceiling effect of midazolam); *id.* at 61 (finding Dr. Antognini disagreed that GABA could be depleted but disclaimed knowledge of how the process worked); *id.* at 63 (relating that Dr. Antognini testified about the "Lazarus effect" on direct but admitted in cross-examination that in his 30 years of medical practice he had never seen the "Lazarus effect"); *id.* at 66 (finding Buffington's belief that injection of vecuronium bromide by itself would be a "peaceful experience," contrary to Dr. Antognini's testimony, "casts some doubt"); *id.* at 67 (finding Dr. Antognini's testimony "to support, to some degree, plaintiffs' argument that severe pain will result from this protocol, even if it is not remembered").

As explained above, the district court also explicitly found that Dr. Stevens was a credible witness because he was able to explain "the mechanism by which midazolam works and opining that it is not possible to alter that fundamental mechanism." PI Order at 68. The court relied on Dr. Zivot's testimony regarding autopsies

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from midazolam executions and found that "defendants' witnesses did not address them." PI Order at 71. The district court's determinations were well-supported and warrant deference by this Court.

7. The district court appropriately considered evidence of other midazolam executions.

The district court found that the anecdotal evidence of other midazolam executions had "evidentiary value for the purpose of assessing the scientific opinions offered by the parties' experts," and that the evidence "is more consistent with plaintiff's theory of the case." PI Order at 69. The district court said this testimony related to midazolam executions "is personal and rings true." It considered the anecdotes regarding other evidence for the "limited purpose" of assessing the scientific opinions of the respective parties. *Id.*

The State mischaracterizes the district court as "basing its decision on a few anecdotal accounts of executions in other states" and contends the court was "fixat[ed] on the Lockett execution." Emer. Mot. 13. To the contrary, while the district court addressed the Lockett execution,

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there is no discussion of it in the district court's analysis of other midazolam executions.

Far from fixating on known botched executions, the district court examined executions that occurred in Florida, where there had not been reported problems. The court credited unrebutted testimony based on several autopsy reports showing that "death was not instantaneous under the Florida protocol but instead occurred slowly, with impaired circulation or injury causing fluid to fill the lungs. Dr. Zivot offered testimony that this would cause a terrifying experience with the person feeling like his lungs are filling with fluid." PI Order at 71. The district court found that the Florida protocol required the "very quick administration of drug two, the paralytic," and "efforts to expel the fluid would not be observed in the condemned inmate." *Id.* The State did not offer contrary evidence. *Id.*

C. The district court's factual determinations regarding alternatives are not clearly erroneous.

Plaintiffs are also likely to show that there is a "known and available alternative method of execution that entails a lesser risk of severe pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015). The availability of

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an alternative is a "factual finding" subject to the "clear error" standard of review. *Id.* at 2738. The State offers a mélange of arguments for why the district court erred, but none of them withstand scrutiny.

As an initial matter, the State urges the Court to accept the Eleventh Circuit's opinion in *Arthur v. Dunn*, 840 F.3d 1268 (11th Cir. 2016), which held, after a trial on the merits, that the plaintiff's professed alternative of compounded pentobarbital flunked the *Glossip* test because the plaintiff had not proven "there is *now* a source for pentobarbital *that would sell it to ADOC for use in executions.*" *Id.* at 1302. This language conflicts with the standard the Sixth Circuit recently applied in reviewing a preliminary injunction against midazolam executions. The Sixth Circuit found the question to be whether the State has a "reasonable possibility" of acquiring the alternative method, not whether the method is "immediately available." *In re Ohio Execution Protocol*, No. 17-3076, 2017 WL 1279282, at *9 (6th Cir. Apr. 6, 2017).

The district court gave two sound, practical reasons for rejecting the Eleventh Circuit's "immediately available" standard at the preliminary-injunction stage: it places an impossible burden on Plaintiffs and puts

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their attorneys in the untenable position of developing execution protocols for their clients. The State says Plaintiffs should shoulder the sole burden of identifying alternative execution drugs that are available at the snap of their fingers. That makes little sense in light of Arkansas law ensuring secrecy regarding lethal injection suppliers. It shields suppliers' identities precisely because the suppliers do not want to be known to Plaintiffs' counsel.

In addition to the district court's reasons, Plaintiffs offer a third, related reason the Sixth Circuit's interpretation is correct: it is most consistent with *Glossip* itself. *Glossip* explains that a drug is not available if the state has made a "good-faith effort" to implement it but has been unable to do so. *Glossip*, 135 S. Ct. at 2738. The "reasonable possibility" standard requires the State to exercise at least some good-faith effort to obtain an alternative before executing a prisoner with a method shown to be torturous.

Whatever label is used to describe the "availability" standard, there is ultimately one question of fact under *Glossip*: could the State implement a less painful method of execution after a "good-faith" effort to do so? The district court did not clearly err, at the preliminary-

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injunction stage, by concluding Plaintiffs are likely to show that their proposed methods of execution are available to the State upon reasonable effort and that those methods would cause Plaintiffs less suffering than the midazolam protocol.

- Pentobarbital. The district court did not clearly err in concluding that Plaintiffs are likely to show that pentobarbital, whether in manufactured or compounded form, is available to the State with reasonable efforts. The evidence shows that Missouri has obtained manufactured pentobarbital in the recent past (ECF No. 2-2, Ex. 18); Texas and Georgia have used compounded pentobarbital in many recent executions.[5] The State's own expert pharmacist, Daniel Buffington, said that, though he was not personally aware of where Arkansas could get compounded pentobarbital, he believes it is available, a point he has

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[5] The State criticizes Plaintiffs' reliance on pentobarbital in compounded form because they previously complained about the risks of compounded drugs. The State fails to note that Plaintiffs have also said compounded drugs would be acceptable if adequate safeguards were enacted to counter the risks inherent in compounded drugs. The important question is whether compounded pentobarbital, despite whatever risks it carries, would be substantially safer than midazolam. It is widely accepted that it would be, and the State has never argued otherwise.

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made before. Tr. 695–700, 702. And the State's law shielding the drug suppliers has allowed the State to rapidly restock its supply of execution drugs. Tr. 1226.

Most importantly, the State has made effectively no effort to obtain pentobarbital in any form. The district court heard from the two people responsible for obtaining execution drugs for the State. Approximately two years ago, ADC Director Wendy Kelley unsuccessfully sought a barbiturate from three sources. Tr. 1232. She has not tried since then. Tr. 1220. ADC Deputy Director Rory Griffin testified that he has *never* tried to obtain a barbiturate. Tr. 809. Griffin admitted that is because "I have the drugs I need to conduct the execution." Tr. 872. True, in October 2015, Griffin called a few pharmaceutical companies,[6] "based on litigation," after the attorney general's office gave him some numbers and told him to call. Tr. 863. But that is not the "good-faith effort" *Glossip* contemplates.

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[6] The people he called had titles like "media contact" and "vice president of litigation and regulatory." Tr. 862–63. The State's motion erroneously reports that these calls occurred in 2016.

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- Sevoflurane. The evidence shows that sevoflurane is a gas that has the properties of a barbiturate and that it can cause death on its own. Tr. 270–71. As such, it would cause less pain to Plaintiffs than midazolam. It is fairly simple to administer. Pls.' Ex. 16 at 35. And, as the State admits, Plaintiffs have identified at least one supplier willing to sell it to the ADC for executions. Tr. 212–16. So this alternative meets even the "immediately available" test the State advances.

The State's only objection is that no state has used sevoflurane in an execution before. On the State's view, any alternative execution method must be "tried and true." Emer. Mot. 21. But *Glossip* contains no "tried and true" requirement. Indeed, by emphasizing society's progress toward a "more humane way to carry out death sentences," it suggests the opposite is correct. *Glossip*, 135 S. Ct. at 2732. The State's approach would prevent the development of more humane execution methods simply for want of prior application. Indeed, that approach would have prohibited lethal injection, a method never used before the 1980s.

- Hypoxia. As with sevoflurane, so with hypoxia. The novelty of the method does not render it "unknown." The district court correctly pointed out that multiple states have studied it and found it safe,

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available, and administrable; one state has adopted it in statute. PI Order at 83. The court committed no clear error in determining that Plaintiffs are likely to prove this method.

- Firing squad. The State does not contest the availability of firing squad as an execution method. Indeed, a former corrections department head said he could have conducted a firing squad if required. Tr. 751. Instead, the State attacks the district court's reliance on the testimony of Dr. Jonathan Groner, claiming he had no basis for his opinion. That is incorrect. Dr. Groner testified that, based on his medical training, his knowledge of the heart's mechanisms, and his practical experience, a correctly performed firing squad would cause rapid unconsciousness. Tr. 583. Based upon his knowledge of midazolam, he testified that a firing squad would be less painful than the current protocol. Tr.588. The district court was entitled to rely on this opinion when assessing the probability that Plaintiffs will show the superiority of a firing squad.

III. The District Court Properly Balanced the Equities

Although "a State retains a significant interest in meting out a sentence of death in a timely fashion," *Nelson v. Campbell*, 541 U.S. 637, 644 (2004), the harm from a delay in meting out a death sentence

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is not irreparable. "By contrast, there is no question that the harm Plaintiffs face, execution by a method that the district court determined is likely unconstitutional, is an irreparable harm." *In re Ohio Execution Protocol*, 2017 WL 1279282, at *10.

Contrary to the State's argument, the district court addressed its claim that Plaintiffs were dilatory in bringing this action. The court's reasons for rejecting that assertion are sound. PI Order at 50–52. Plaintiffs have not been dilatory in challenging the midazolam protocol, portions of which have only recently been provided to them. On the contrary, they have consistently attempted to challenge the protocol (without being heard on the merits) and the schedule (eight dates set February 27, 2017). Plaintiffs have moved as expeditiously as possible under the circumstances. Additionally, the district court weighed the harm to the victims' families but still felt compelled to stay the executions. *Id.* at 3. The district court made more than a "passing reference" to the equities, as the State contends. Emer. Mot. 23.

For several reasons, the Court should disregard the State's claim that the public-interest calculus should include the expiration date of the State's midazolam. First, there is no evidence the ADC is unable to

obtain more midazolam. Second, Plaintiffs have provided proof that the State has done little, if anything, to even *try* to procure additional midazolam. Tr. 1240. The drug's expiration date is a manufactured emergency. The expiration date of a drug cannot, in any event, outweigh the public's interest in ensuring that constitutional rights are upheld, especially when the use of that very drug is likely unconstitutional. The district court did not abuse its discretion in weighing the equities and considering the public interest.

IV. Plaintiffs Are Likely to Succeed on the Cross-Appealed Claim

The district court erred by concluding that Plaintiffs are not likely to show that Hutchinson's execution schedule—four double executions over the course of eleven nights—violates the evolving standards of decency that define the bounds of the Eighth Amendment. To determine whether a particular punishment is "cruel and unusual" under the Eighth Amendment, the Court must look to standards that "currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*

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at 311–12. "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). In turn, to determine whether a particular capital-punishment practice violates evolving standards of decency, the Court must assess the "objective indicia of society's standards"—as expressed by "state practice with respect to executions"—and must also consult its own "independent judgment." *Id.* at 421.

Applying these standards, Plaintiffs are likely to succeed in showing that our society has evolved to the point that it is no longer acceptable—and thus unconstitutional—to attempt to execute six, seven, or eight men within eleven days, and on a schedule that requires two executions a day. More than half a century ago, this sort of practice was common. However, our society has long ago abandoned such barbarism. No state has executed so many people in so short a timeframe since capital punishment resumed in this country in 1977; no state has executed as many men in even a month since Texas did so twenty years ago. Pls.' Ex. 34. There have been only ten multiple executions in the last 40 years, with the last occurring in 2000. *Id.* The last time a multiple

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execution was attempted (Clayton Lockett), it failed, and a thorough, state-sponsored investigation revealed that the stress caused by the setting of a double execution contributed to the botched execution. Pls.' Ex. 19 at 30. The investigative report recommended that executions be set at least a week apart. *Id.* at 35.

Societal knowledge has also developed over the past twenty years—and continues to develop—evidencing that multiple executions are likely to result in mental-health problems for those involved in the execution process. Tr. 159, 170, 176. Evolving standards of decency must appropriately take into account the toll exacted on officers charged with carrying out punishment on behalf of the State, especially when considering the isolation caused by the veil of secrecy surrounding the process. Tr.107. A period of time allowing for debriefing after each execution is critical to avoiding mental-health casualties from participation in the process. Tr.142–44. Other states have at least implicitly acknowledged the importance of debriefing by specifically accounting for it in their protocols. *See, e.g.*, Pls.' Ex. 33 at 1, 21 (Ohio protocol calling for "critical incident debriefing" "immediately following the execution"); Pls.' Ex. 31 at 8, 36 (Arizona protocol calling for

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"debriefing immediately upon completion of the event"). Arkansas's proposed schedule does not allow for the critical debriefing period called for by evolving practices in this field. In particular, the State has made no formal provisions for any debriefing period or protocol, Tr.326, and the State has confirmed it has no intention of conducting *any* debriefing between any two executions scheduled on the same night, Tr.325.

As recent state practice with respect to executions shows, the current schedule does not conform to the standards followed in a civilized society. A regime of four double executions within ten days—or any schedule that does not allow for an appropriate debriefing and quality-assessment period and appropriate period for individual preparation and treatment of the inmate—does not respect Plaintiffs' individual "dignity of the person," nor does it take into consideration the human toll taken on other participants in the process. *See Kennedy*, 554 U.S. at 420.

The district court determined that "neither the Supreme Court nor the Eighth Circuit Court of Appeals is prepared to recognize an evolving standards of decency claim in this context, meaning plaintiffs are unlikely to prevail on the merits of this claim." PI Order at 54. To reach

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this conclusion, the district court relied on the opinion of the Southern District of Ohio in similar litigation. *In re Ohio Execution Protocol Litig.*, No. 11-1016, 2017 WL 378690 (S.D. Ohio Jan. 26, 2017). However, in contrast to the plaintiffs in the Ohio litigation, Plaintiffs here are not seeking a ruling that the death penalty is unconstitutional *per se*. Rather, Plaintiffs are challenging the compressed *scheduling of the executions* as contrary to the evolving standards of decency, making this case more akin to *Atkins* and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court relied on the "evolving standards of decency" in finding certain applications of the death penalty unconstitutional. Applying that standard to the facts at issue here, Plaintiffs are likely to succeed.

CONCLUSION

The district court's factual findings and conclusions of law are sound. The State has exhibited no good reason for rushed consideration of this matter over a holiday weekend. For the reasons stated above, the Court should set this case for full briefing and argument. Should the Court feel inclined to rule immediately, it should deny the State's motion to vacate the stay of execution/preliminary injunction.

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CERTIFICATE OF COMPLIANCE

I certify that:

1. Excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,184 words. In No. 17-1804, Plaintiffs have simultaneously filed a motion to exceed the type-volume limit of Fed. R. App. P. 27(d)(2)(A).

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/s/ John C. Williams
JOHN C. WILLIAMS

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I filed the foregoing using this Court's CM/ECF system, which shall automatically serve notice on opposing counsel.

/s/ John C. Williams
JOHN C. WILLIAMS