*****DEATH PENALTY CASE*****
Executions Scheduled for April 17, 20, 24, and 27, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

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

v. **Case No. 4:17-CV-179-KGB-BD**

ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity, and WENDY KELLEY, Director, Arkansas Department of Correction, in her official capacity **DEFENDANTS**

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Asa Hutchinson, in his official capacity as Governor of the State of Arkansas, and Wendy Kelley, in her official capacity as Director of the Arkansas Department of Correction ("the ADC") (collectively, "the State") submit this brief in support of their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction.

Introduction

Plaintiffs' motion for a preliminary injunction is another in a long series of efforts to halt their lawful executions, or at least to delay them until after one of Arkansas's lethal drugs expires at the end of April. Plaintiffs have all been

convicted of capital murder decades ago and sentenced to death for their heinous crimes. They have all had multiple opportunities to challenge their convictions, sentences, and the method by which their lawful sentences of execution will be carried out. Each has exhausted his right to direct and collateral review in both state and federal court. Some have previously sought and been denied clemency, and others have previously been on the verge of execution. Their guilt is beyond dispute, and Arkansas is entitled to carry out their lawful sentences without further, unwarranted delay.

The instant lawsuit is the Plaintiffs' fourth bite at the apple challenging the State's current lethal-injection protocol. As discussed in the State's motion to dismiss and corresponding brief, the Complaint is barred by the Eleventh Amendment and should be dismissed for multiple reasons: (1) the execution schedule does not violate any right to effective assistance of counsel; (2) the execution schedule itself does not and cannot violate the Eighth Amendment; (3) the Eighth Amendment challenge to the midazolam protocol is barred by *res judicata*, collateral estoppel, and fails to state a claim; (4) the other protocol-related claims are time-barred, were actually litigated (or could have been litigated) in previous lawsuits, and fail to state a claim; (5) the wholly speculative claim regarding the combined risks of both the execution schedule and the midazolam protocol is not cognizable under the Eighth Amendment; and (6) even accepting the Plaintiffs' allegations as true, there is no violation of the constitutional rights of access to the courts and counsel.

Because the Plaintiffs have no cognizable legal claims, they certainly cannot make a clear and rigorous showing of a likelihood of success on the merits as required to obtain a stay of executions. Moreover, even assuming arguendo that the Court concluded one or more of the Prisoners' claims were legally cognizable, the factual record now and the record as it will stand after the preliminary-injunction hearing will show that the Prisoners do not have a significant likelihood of success on such claim(s).

Factual Background

The Plaintiffs in this action are nine Arkansas prisoners who were convicted of capital murder and sentenced to death for their heinous crimes ("the Prisoners") many years ago. They have each enjoyed multiple opportunities to challenge their lawful convictions and sentences. Their guilt is beyond dispute.

Since their convictions and sentences, the Prisoners have been involved in numerous lawsuits, in state and federal courts, challenging different aspects of Arkansas's method-of-execution statute and the ADC's lethal-injection protocol. The Prisoners have generally been unsuccessful in prevailing on their legal claims. *See Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016) (dismissing as barred by sovereign immunity Prisoners' cruel-or-unusual punishment challenges to the current method-of-execution act and the ADC's current lethal-injection protocol), *cert. denied*, No. 16-6496, 2017 WL 670646 (U.S. Feb. 21, 2017); *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707 (2015) (rejecting federal and state constitutional challenges to the ADC's drug protocol as well as policies regarding the selection,

training, and qualifications of members of the execution team and the method by which the drugs would be injected); *Ark. Dep't of Corr. v. Williams*, 2009 Ark. 523, 357 S.W.3d 867 (2009) (dismissing as moot inmates' challenge to 2008 administrative directive governing lethal-injection protocol).[1]

The Prisoners' multiple federal-court challenges have likewise failed. Just yesterday, Judge Price Marshall denied the Prisoners' request for an emergency stay of the currently-scheduled executions for all but one plaintiff, Jason McGehee, for whom the Arkansas Parole Board has recently recommended clemency to the Governor in *Ledell Lee, et al. v. Governor Asa Hutchinson, et al.*, U.S. District Court, E.D. Ark., No. 4:17-cv-00195-DPM. **(Ex. 24)** Among other claims, the Prisoners in *Lee v. Hutchinson* unsuccessfully argued that the State's current execution schedule deprives them of their right to effective assistance of counsel during clemency proceedings. **(Ex. 24)** *See also* Compl. (Mar. 28, 2017) (DE 2) in *Lee v. Hutchinson*, U.S. District Court, E.D. Ark., No. 4:17-cv-00195-DPM.

The Prisoners' previous federal-court challenges specifically to the ADC's lethal-injection procedures have failed. *See, e.g.*, *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010) (holding that ADC's lethal-injection protocol, including requirements that "trained, educated, and experienced persons" serve on the IV team and establish central venous line, was constitutional); *Jones v. Hobbs*, 604 F.3d 580 (8th

[1] The Prisoners' only success was a single Arkansas Supreme Court ruling that invalidated an earlier method-of-execution statute on the ground that it delegated complete, unfettered discretion to the ADC in selecting the lethal agent in violation of the state constitution's separation-of-powers article. *See Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844 (2012).

Cir. 2010) (granting State's motion to vacate stays of execution because the death-row inmates failed to demonstrate a significant possibility of success on the merits of their claim that the Arkansas method-of-execution act was unconstitutional; act was previously held constitutional, and claims that State could adopt a different, unconstitutional protocol or might deviate from the current protocol at the eleventh hour were purely speculative); *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010) (rejecting inmates' challenge to prior method-of-execution act under the Food, Drug and Cosmetic Act and the Controlled Substances Act); *Williams v. Hobbs*, No. 5:09-cv-394-JLH, 2010 WL 749563 (E.D. Ark. Mar. 2, 2010) (rejecting argument that prior method-of-execution act violated due process by suppressing information regarding how a defendant's death sentence would be carried out); *Nooner v. Norris*, 491 F.3d 804 (8th Cir. 2007) (holding that state prisoner convicted of capital murder and sentenced to death was not entitled to a preliminary injunction staying his execution in order to litigate the constitutionality of Arkansas's lethal-injection protocol in a Section 1983 suit).

Arkansas Act 1096 of 2015 and the ADC's Current Lethal-Injection Protocol. Due to this never-ending stream of litigation and drug shortages resulting from the intimidation tactics and threats by anti-death penalty advocates, Arkansas has not carried out an execution since 2005. In 2015, the Arkansas General Assembly amended the method-of-execution act to, among other things, "address the problem of drug shortages" by "adopt[ing] alternative methods of lethal injection to bring about the death of the condemned prisoner." Ark. Act 1096 of

2015, § 1(b). To that end, Act 1096: (1) codifies a three-drug lethal-injection protocol exactly the same as the one that was upheld by the United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), as an alternative to the single-drug protocol upheld by the Arkansas Supreme Court in *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707 (2015); (2) permits ADC to obtain lethal-injection drugs from FDA-registered facilities and accredited compounding pharmacies in addition to traditional pharmaceutical manufacturers; and (3) requires ADC to "keep confidential all information that may identify or lead to the identification of . . . entities and persons who compound, test, sell, or supply the drug or drugs" used in the execution process, unless required to disclose such information in litigation by court order. *See* Act 1096, § 2(c), (d), (g).

After Act 1096 was adopted, the ADC was able to procure a supply of FDA-approved drugs sufficient to carry out eight then-scheduled executions due to the confidentiality afforded to the supplier under Act 1096. *See Kelley v. Johnson*, 2016 Ark. 268, at 17, 496 S.W.3d 346, 358 (2015). The ADC then adopted its current lethal-injection procedure utilizing the three-drug midazolam protocol. *See* ADC's Lethal Injection Procedure (Aug. 6, 2015), Compl. Ex. 1. Other than the different drug protocol, the current execution procedure is very similar to the 2008 procedure. *Compare* 2008 procedure, Compl. Ex. 11 at pp. 15-19, *with* 2015 procedure, Compl. Ex. 1. There are no material differences between the 2008 and 2015 procedures with regard to general execution procedures, IV set-up procedures, lethal-injection procedures (including procedures for assessing the condemned inmate's

consciousness and monitoring IV infusion sites), and IV team qualifications. *See* Compl. Exs. 1 & 11.

Prisoners' First Lawsuit Challenging Act 1096. On April 6, 2015, almost immediately after Act 1096 became law, the Prisoners filed suit attacking its constitutionality in the Circuit Court of Pulaski County, Arkansas, in a case styled *Marcel Williams, et al. v. Wendy Kelley, et al.*, Case No. 60CV-15-1400. The *Williams* complaint—filed by Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, and Kenneth Williams[2]—challenged Act 1096 under various provisions of the United States Constitution (including the First Amendment, the Eighth Amendment, the Due Process Clause, the Ex Post Facto Clause, and the Supremacy Clause) as well as corresponding provisions of the Arkansas Constitution. The State removed that complaint to federal court. *See* Notice of Removal and Complaint (Apr. 10, 2015) (DE 1 & 2) filed in *Marcel Williams, et al. v. Wendy Kelley, et al.*, U.S. District Court, E.D. Ark., No. 4:15-CV-206-JM. After removal, the Prisoners promptly nonsuited the federal case. *See* Notice of Voluntary Dismissal Without Prejudice (Apr. 18, 2015) (DE 4) in *Williams v. Kelley*, U.S. District Court, E.D. Ark., No. 4:15-CV-206-JM.

The same day that they nonsuited the 2015 federal action, the Prisoners filed an "Amended Complaint" in Pulaski County Circuit Court No. 60CV-15-1400 raising only state-law challenges to Act 1096. *See Kelley v. Johnson*, 2016 Ark. 268,

[2] Plaintiffs Don Davis and Ledell Lee filed motions to intervene in the first Pulaski County case, which the circuit court granted on May 20, 2015, and June 9, 2015, respectively.

at 5, 496 S.W.3d 346, 352 (2016). They then filed a "Second Amended Complaint" in Pulaski County Circuit Court No. 60CV-15-1400 on May 1, 2015, again raising only state constitutional challenges to Act 1096. The State moved to dismiss for lack of subject-matter jurisdiction and, on July 17, 2015, after full briefing, the Plaintiffs voluntarily nonsuited their claims without prejudice. **(Ex. 17)** The dismissal of No. 60CV-15-1400 was the second time the Prisoners' constitutional claims against Act 1096 were dismissed.

Prisoners' Second Lawsuit Challenging Act 1096 and the ADC's 2015 Lethal-Injection Procedure. On June 29, 2015—while the State's motion to dismiss Pulaski County Case No. 60CV-15-1400 was still pending—the Prisoners[3] filed a new state-court lawsuit challenging the constitutionality of Act 1096 under a different style and case number, *Stacey Johnson, et al. v. Wendy Kelley*, Circuit Court of Pulaski County, Arkansas, No. 60CV-15-2921. In their complaint in the *Johnson* case, the Prisoners affirmatively alleged that they "voluntarily dismissed the federal case without prejudice in order to return their causes of action to state court (***where they belong***)." Compl. in *Johnson* (June 29, 2015), Pulaski County, Ark., No. 60CV-15-2921, ¶ 4 (emphasis added). They asserted only state constitutional challenges to Act 1096, including challenges under the state ban on cruel-or-unusual punishment as well as other state constitutional provisions that mirror the federal claims brought in the first state-court case.

[3] All nine of the Plaintiffs in this case filed the second lawsuit in the Pulaski County Circuit Court.

As is traditionally the case, because the Prisoners had exhausted their direct and collateral challenges to their convictions and death sentences, the Governor set execution dates in early September 2015. The Prisoners sought a stay of the scheduled executions based on their challenge to Act 1096. The Arkansas Supreme Court entered an order staying all executions "pending the resolution of the litigation currently pending in the Pulaski County Circuit Court."[4] *See* Per Curiam in *Kelley v. Griffen*, Arkansas Supreme Court No. CV-15-829 (Oct. 20, 2015) **(Ex. 19)**.

On September 28, 2015, the Prisoners filed an Amended Complaint in *Johnson v. Kelley*, Pulaski County Case No. 60CV-15-2921 **(Ex. 18)**, to include new claims challenging the constitutionality of the ADC's Lethal Injection Procedure. Among other claims, the Prisoners alleged that the ADC's lethal-injection procedure violated the state constitutional ban on cruel or unusual punishment because the first drug in the protocol (midazolam) would not sufficiently anesthetize the condemned inmates to render them unconscious and insensate to the effects of the second and third drugs; because the ADC's protocol lacked sufficient qualification and training requirements for members of the IV team; because the protocol

[4] Contrary to Arkansas law, the state trial court had initially entered a stay of the executions. The only state court that can stay an execution after a death warrant has issued is the Arkansas Supreme Court. In Case No. CV-15-829, the Arkansas Supreme Court granted the State's emergency petition for a writ of certiorari and lifted the stay of executions previously imposed by the Pulaski County Circuit Court. But the Arkansas Supreme Court simultaneously granted the Prisoners' request for a stay pending resolution of the Pulaski County litigation in Pulaski County Case No. 60CV-15-2921.

contained insufficient criteria for assessing consciousness; because the people performing the consciousness check lacked adequate training or experience to accurately determine consciousness; and because, regardless of the consciousness check, the inmates would still purportedly experience severe pain from the administration of the second and third drugs.

In an attempt to satisfy the method-of-execution pleading standards established by the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Prisoners alleged that five alternative execution procedures were available that would significantly reduce the risk of severe pain and suffering: (1) the firing squad; (2) an FDA-approved, fast-acting injectable barbiturate; (3) an overdose of anesthetic gas; (4) a massive overdose of an injectable opioid drug; and (5) a massive overdose of a transdermal opioid patch. The Prisoners sought, among other relief, a declaration that Act 1096 is unconstitutional it its entirety, both as applied and on its face, a declaration that the ADC's lethal-injection procedure is unconstitutional, and an injunction preventing the ADC from carrying out the 2015 executions pursuant to Act 1096 and/or the protocol. The Prisoners in their Amended Complaint again made crystal clear that they had voluntarily dismissed their federal constitutional claims "in order to return their causes of action to state court, ***where they belong***." Am. Compl. (Sept. 28, 2017) in *Johnson v. Kelley*, Pulaski County Case No. 60CV-15-2921, ¶ 4 (emphasis added) **(Ex. 18)**.

The State moved to dismiss the Amended Complaint for failure to allege sufficient facts to state a cognizable constitutional claim. The state circuit court denied the State's motion in relevant part after a hearing. *See* Mem. Order Denying Mot. to Dismiss Am. Compl. (Oct. 9, 2015) in *Johnson v. Kelley*, Pulaski County Case No. 60CV-15-2921. The parties then engaged in some discovery[5] and filed cross-motions for summary judgment. The State's motion for summary judgment was wholly based on sovereign immunity because the Prisoners had failed to adduce any evidence to raise a triable issue of fact on any cognizable constitutional claim. The circuit court denied the motion in relevant part. *See* Mem. Order Concerning Pls.' Mot. Partial Summ. J., Defs.' Cross Mot. Summ. J., & Defs.' Mot. for Prot. Order (Dec. 3, 2015) in *Johnson v. Kelley*, Pulaski County Case No. 60CV-15-2921. The circuit court denied the parties' cross-motions for summary judgment on the substantive cruel-or-unusual punishment and due-process claims, finding that genuine issues of material fact precluded summary judgment in favor of either party. *See id.* The State appealed.

Arkansas Supreme Court's Dismissal of the Prisoners' Constitutional Claims as Barred by Sovereign Immunity. On appellate review, the Arkansas Supreme Court reversed the circuit court's "decision *in toto* and dismiss[ed] the Prisoners' amended complaint." *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016) (emphasis added). The Arkansas Supreme Court adopted the standards

[5] ADC responded to the Prisoners' requests for admissions and interrogatories and produced a number of documents regarding its lethal drugs and lethal-injection procedure in response to their requests for production.

enunciated by the United States Supreme Court in *Baze* and *Glossip* and held that, "in challenging a method of execution under the Arkansas Constitution, the burden falls squarely on a prisoner to show that (1) the current method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering and that gives rise to sufficiently imminent dangers; and (2) there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain." *Johnson*, 2016 Ark. 268, at 15, 496 S.W.3d at 357.

In evaluating the Prisoners' substantive cruelty claim, the Arkansas Supreme Court agreed with ADC that the Prisoners failed to meet their burden of pleading and then providing at least some evidence to establish that their proposed alternative methods of execution were feasible and capable of being readily implemented by ADC. *Id.* at 16-20, 496 S.W.3d at 357-60. The court held that the Prisoners' allegations that the proposed alternative drugs were "commercially available" did not establish that "ADC, as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution." *Id.* at 19, 496 S.W.3d at 359. The Arkansas Supreme Court thus reversed the lower court's conclusion that the Prisoners had adequately pled and provided sufficient evidence to create a triable issue that there are known, feasible, readily implemented, and available alternatives to the lethal-drug options in Act 1096. *Id.*

The Arkansas Supreme Court also rejected as "entirely conclusory in nature" the Prisoners' allegations that death by firing squad "would result in instantaneous

and painless death" and that "ADC has firearms, bullets, and personnel at its disposal to carry out an execution." *Id.* The court reiterated the well-established rule that "[c]onclusory statements are not sufficient" to state a claim. *Id.* The court went on to "emphasize that merely reciting bare allegations is not sufficient to show that a firing squad is a readily implemented alternative." *Id.* The court explained that this is especially true where the proposed alternative is not and in history has never been authorized by Arkansas law. *See id.* at 19-20, 496 S.W.3d at 360 (noting that the Prisoners' proposal did "not comply with the current statutory scheme" and that "[i]n our history, the General Assembly has never seen fit to authorize this form of execution"). The court concluded, "For these reasons, it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution." *Id.* (citation omitted).

The Arkansas Supreme Court thus reversed in its entirety the Pulaski County Circuit Court's ruling on the Prisoners' cruelty claim because they neither pled nor provided any evidence at all to show that there is a known, feasible, readily implemented, and available alternative method of execution to the ADC. *Id.* The court also upheld the confidentiality provisions in Act 1096. *Id.* at 21-32, 496 S.W.3d at 360-66. Because the Arkansas Supreme Court's conclusions meant that the Prisoners could not overcome the State's sovereign immunity, that court dismissed the case. *Id.*; *see also Ark. Tech Univ. v. Link*, 341 Ark. 495, 501-02, 17 S.W.3d 809, 812-13 (2000) (explaining that dismissal of the case is the appropriate remedy on summary judgment where sovereign immunity prevails).

The Prisoners sought but did not obtain rehearing from the Arkansas Supreme Court. But the Arkansas Supreme Court did agree to stay the mandate while the Prisoners sought a writ of certiorari from the United States Supreme Court. The United States Supreme Court denied the Prisoners' request for review. *Johnson v. Kelley*, No. 16-6496, 2017 WL 670646 (U.S. Feb. 21, 2017). After the United States Supreme Court's denial, the Arkansas Supreme Court issued the mandate in *Kelley v. Johnson*, No. CV-15-992, on February 24, 2017. **(Ex. 20)** The mandate finalized the Arkansas Supreme Court's dismissal of the state-court case. *See* Ark. Sup. Ct. R. 5-3(a).

Post-Johnson State-Court Proceedings. After the mandate issued, the Prisoners filed a procedurally-improper "Second Amended Complaint" in the Pulaski County Circuit Court. *See* Sec. Am. Compl. (Feb. 24, 2017) in Pulaski County Case No. 60CV-15-2921 **(Ex. 21)**. The self-styled Second Amended Complaint brought several of the same causes of action that the Arkansas Supreme Court had just dismissed earlier that day, including the substantive cruelty claims against Act 1096 and the ADC's lethal-injection procedure.

The Prisoners relied on this Second Amended Complaint to argue to the Arkansas Supreme Court that its October 20, 2015, stay of executions (discussed above) remained in effect. *See* Prisoners' Responses to the State's Motion for Clarification (Mar. 1, 2017) in Ark. Supreme Court No. CV-15-829.[6] Specifically,

[6] On February 27, 2017, the State filed an emergency motion for clarification of the order staying executions in Arkansas Supreme Court Case No. CV-15-829. The State fully believed that the stay dissolved under its own terms when the court

the Prisoners argued that the stay did not dissolve upon issuance of the Arkansas Supreme Court mandate because that Court's decision did not end the litigation in Pulaski County Case No. 60CV-15-2921. The Prisoners argued that the Arkansas Supreme Court did not dismiss their claims "with prejudice" so they could plead further, and that the issuance of the mandate restored jurisdiction in the state circuit court. *See* Prisoners' Resp. to Mot. for Clarification in No. CV-15-829 at 2. According to the Prisoners, the stay remained in effect because the Prisoners amended their complaint "to respond to the pleading defects per *Johnson*." *Id.* at 4, 6. The Prisoners further asserted that the stay remained in effect because the Prisoners have an appeal of the circuit court's dismissal of their separation-of-powers and ex-post-facto claims remaining. *Id.* at 6-7. According to the Prisoners, there could be no "resolution" of the state-court litigation as contemplated by the stay order "until the circuit court enters final judgment and appeals are exhausted." *Id.* at 3. The Prisoners also urged the Arkansas Supreme Court to "issue a new stay for the duration of the litigation" should the Court determine that the previous stay had expired. *Id.* at 9.

For its part, the State explained that the litigation challenging the State's current method-of-execution act in Pulaski County Circuit Court No. 60CV-15-2921

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issued the mandate in *Kelley v. Johnson*, No. CV-15-992, and took actions consistent with that understanding, including issuing death warrants. However, out of an abundance of caution, and because the Prisoners' counsel had made statements to the press and to the Governor advancing a different view that the stay remained in effect, ADC sought to ensure that the Supreme Court agreed that the stay that was put into effect while the lethal-injection case reached and was decided by the appellate court had been extinguished.

was finally over at 12:38 p.m. on February 24, 2017, when the Arkansas Supreme Court issued the mandate in No. CV-15-992. *See* Emergency Mot. for Clarification in Ark. Supreme Court No. CV-15-829 (Feb. 27, 2017), ¶ 1. The State argued that the Arkansas Supreme Court's decision in *Johnson* dismissed (as barred by sovereign immunity) the Prisoners' lawsuit in its entirety, and that the stay of executions automatically lifted when the high court issued its mandate on February 24, 2017. *Id.* ¶¶ 1, 4. The State argued that the *Johnson* court's dismissal of the Prisoners' method-of-execution claims on the merits (*i.e.*, at the summary-judgment stage) "fully and completely resolved the Pulaski County Circuit Court proceedings as contemplated in" the order staying executions. *Id.* ¶ 5. The State also argued that the Supreme Court's dismissal of the Prisoners' complaint in No. CV-15-992 also operated as a final adjudication on the merits (even if somehow incorrectly treated as a motion-to-dismiss decision) because it was actually the *third* time that their claims challenging Act 1096 of 2015 were dismissed and, therefore, operated as a dismissal *with prejudice* under Ark. R. Civ. P. 41(b). *Id.* ¶¶ 6-14 (citing *Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 436 S.W.3d 445 (2014) and *Brown v. Tucker*, 330 Ark. 435, 441, 954 S.W.2d 262, 266 (1997)).

The Arkansas Supreme Court concluded that the State was correct. On March 2, 2017, the Supreme Court clarified that the stay had automatically dissolved upon the issuance of the mandate in *Johnson*, CV-15-992. *See* Formal Order in *Kelley v. Johnson*, No. CV-15-829 (Mar. 2, 2017) **(Ex. 22)**. The only way the stay would have automatically dissolved—under its explicit terms—is if the

issuance of the mandate fully terminated the litigation in the state circuit court case. *See id.* (clarifying that stay of executions "dissolved upon issuance of [the] Court's mandate on February 24, 2017 in CV-15-992").

On March 16, 2017, the State moved to strike or in the alternative dismiss the Second Amended Complaint filed in Pulaski County as barred by the mandate doctrine, the law-of-the-case doctrine, *res judicata*, collateral estoppel, and for failure to state a claim. On March 28, 2017, Pulaski County Circuit Judge Wendell Griffen granted the State's the motion to dismiss, holding that the Arkansas Supreme Court's decision in *Kelley v. Johnson* "dismissed the litigation, with prejudice[.]" Order (Mar. 28, 2017) in *Johnson v. Kelley*, Pulaski County Circuit Court No. 60CV-15-2921, at 5 **(Ex. 23)**. Judge Griffen explained: "Simply put, when the Arkansas Supreme Court reversed this Court's previous ruling it also dismissed Plaintiffs' amended complaint, with prejudice . . . [which] effectively ended this Court's jurisdiction over all claims and contentions asserted in the lawsuit that led to the dismissal." *Id.* at 6-7. "This Court has no power to consider challenges to Act 1096 that were raised in the lawsuit that was dismissed by the Arkansas Supreme Court ruling in *Kelley v. Johnson*." *Id.* at 7. The state court made crystal clear that "the Arkansas Supreme Court has decided and declared that Plaintiffs are not entitled to a trial" on their cruel-or-unusual-punishment claim regarding the ADC's protocol pursuant to Act 1096. *Id.*

Litigation Activity After Stay of Executions Lifted. After the claims asserted in *Johnson v. Kelley* were finally resolved upon the issuance of the

Arkansas Supreme Court's mandate on February 24, 2017, and the stay of executions lifted, the Governor set execution dates for eight of the Prisoners as follows: Don Davis and Bruce Ward on April 17, 2017; Stacey Johnson and Ledell Lee on April 20, 2017; Marcel Williams and Jack Jones on April 24, 2017; and Jason McGehee and Kenneth Williams on April 27, 2017. Since then, the Prisoners have initiated an avalanche of legal proceedings in multiple forums.

Most of the Prisoners have filed clemency applications with the Arkansas Parole Board and participated in clemency hearings before that Board. On March 27, 2017, a month after the Governor set their execution dates, the Prisoners filed the instant Section 1983 action. The following day, they filed another Section 1983 lawsuit against Governor Hutchinson, Director Kelley, and members of the Arkansas Parole Board alleging a variety of claims, including ineffective assistance of counsel claims, in connection with the allegedly "unprecedented" execution and clemency schedule. *See Ledell Lee, et al. v. Governor Asa Hutchinson, et al.*, U.S. District Court, E.D. Ark., No. 4:17-cv-00195-DPM. Many of the Prisoners have been evaluated by medical and mental-health professionals, presumably for the purpose of investigating the viability of new legal challenges to their convictions or sentences. Indeed, there has been a flurry of new habeas/post-conviction relief requests filed in the Prisoners' criminal cases. *See Ward v. Hutchinson*, Jefferson County Circuit Court No. 35CV-17-206 (civil complaint filed in March alleging that Ward is incompetent to be executed); *McGehee v. State*, Arkansas Supreme Court No. CR-98-510 (petition to recall the mandate filed by McGehee in March; denied on

March 16; McGehee has filed a motion for reconsideration); *Johnson v. State*, Arkansas Supreme Court Nos. CR-98-743, CR-02-1362, and CR-05-1180 (petition to reinvest jurisdiction to file a petition for writ of error coram nobis, petition for recall of the mandate, and petition for stay of execution filed in March); *Lee v. State*, Arkansas Supreme Court Nos. CR-96-553 and CR-08-160 (motion to recall the mandate and order a new trial, and motion to take as a case and to stay Lee's execution filed in April); *Williams v. Kelley*, United States District Court for the Eastern District of Arkansas No. 5:02CV450 (motion for relief from judgment filed by Williams on April 1 in his closed federal habeas case).

Preliminary Injunction Standards and the Proper Scope of an Injunction

To be entitled to a preliminary injunction, a plaintiff must normally show that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24-25 (2008); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). A preliminary injunction is an extraordinary remedy and the burden of establishing the propriety of an injunction is on the movant. *See Watkins, Inc. v. Lewis,* 346 F.3d 841, 844 (8th Cir. 2003).

Where, as here, a preliminary injunction would effectively enjoin the operation of state law, a movant must first make a more *rigorous* showing of likelihood of success on the merits. *See Planned Parenthood of Minn. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc); *see also Mazurek v. Armstrong*, 520

U.S. 968, 972 (1997) (per curiam) (injunctions "should not be granted unless the movant, *by clear showing*, carries" a burden greater than required on summary judgment) (internal quotation marks omitted) (emphasis in original). "A more rigorous standard 'reflects the idea that government policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Rounds*, 530 F.3d at 732 (quoting *Able v. U.S.*, 44 F.3d 128, 131 (2nd Cir. 1995) (per curiam)). "[I]n a case such as this one, where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, [] district courts [must] make a threshold finding that a party is likely to prevail on the merits." *Id*. at 732-33. "By reemphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id*. at 733.

Indeed, the Supreme Court has emphasized that, when an inmate seeks to challenge an execution through a Section 1983 action, "like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing, among other cases, *Mazurek*'s "clear showing" requirement); *see also Nooner v. Norris*, 491 F.3d 804, 807-08 (8th Cir. 2007). And in cases involving

imminent executions, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584; *see also id*. ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."); *Nooner*, 491 F.3d at 807-08. The Prisoners do not meet the heightened standard for success on the merits as pronounced by the Eighth Circuit and the Supreme Court.

"To succeed in demonstrating a threat of irreparable harm, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Roudachevski v. All–Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir.1996)). Certainly, "speculative harm does not support a preliminary injunction." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, 696 F.3d 771, 779 (8th Cir. 2012) (citing *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare*, 602 F.2d 150, 154 (8th Cir. 1979)). But even harm that is certain and imminent does not constitute irreparable harm unless it is also great. *See Roudachevski*, 648 F.3d at 706; *see also Munson v. Gilliam*, 543 F.2d 48, 52 (8th Cir. 1976) (finding no irreparable harm where injury was not "great"). The Prisoners do not meet the standard for irreparable harm because their allegations and evidence of harm are entirely speculative.

Under these standards, no preliminary injunction is warranted in this case. But if the Court erroneously concludes otherwise, the injunction must be drawn as narrowly as possible to provide only the relief necessary to remedy specific harms

established by the Prisoners. *See Lytle v. U.S. Dep't of Health & Human Servics.*, 612 Fed.Appx. 861, 862-63 (8th Cir. 2015) ("We note that injunctive relief must be narrowly tailored to remedy only the specific harms established by the plaintiff."); *Doe v. South Iron R-1 Sch. Dist.*, 498 F.3d 878, 884 (8th Cir. 2007) (holding that appellate court must carefully review injunction to determine that it is not overly broad; finding not overly broad the succinct, clearly-written, conduct-limited preliminary injunction); *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 790 (8th Cir. 2004) ("Provisions of an injunction may be set aside if they are broader than necessary to remedy the underlying wrong.") (citing *EEOC v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998)); *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) ("An injunction must be tailored to remedy specific harm shown."); *E. W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1113-17 (8th Cir. 1969) (discussing in detail the problems with overbroad injunctions and ultimately setting aside entire preliminary injunction as overbroad); *Brotherhood of R. R. Carmen of Am., Local No. 429 v. Chicago & N.W. Ry. Co.*, 354 F.2d 786, 800 (8th Cir. 1965) (setting aside injunction that went "far beyond enjoining just the conduct of the minor dispute giving rise to it and thus [wa]s in violation of traditional concepts of judicial restraint in equity matters").

The Prisoners request a blanket stay of all executions based on the seven claims asserted in the Complaint—but the only claim that could possibly justify a stay of the executions is the Prisoners' claim that the use of midazolam violates the Eighth Amendment (Claim III). To be clear, even if the Court agrees with the

Prisoners on one or more of Claims I, II, IV, V, VI, and VII, the proper remedy would *not* be to stay all executions.[7]

On Claims I and II—that the execution schedule violates the Prisoners' right to counsel and the Eighth Amendment—the proper remedy would be to enjoin the ADC from carrying out the current schedule, or enjoin the Governor from carrying out whatever number of executions per day or days is constitutionally impermissible. Because the Governor has the power to issue reprieves, the Governor could alter the schedule to remedy any potential constitutional deficiency the Court finds. On Claim IV—that the ADC's execution protocol or lack thereof violates the Eighth Amendment—the proper remedy would be to enjoin the ADC to take whatever steps the Court believes are necessary and missing from the ADC's execution protocol. On Claim V—that the combined effect of midazolam (Claim III) plus the current execution schedule (Claims I and II) and protocol (Claim IV) violates the Eighth Amendment—the proper remedy would be to enjoin the ADC from carrying out the current schedule, or enjoin the Governor from carrying out whatever number of executions per day or days is impermissible, and enjoin the ADC to take whatever steps the Court believes are necessary and missing from the ADC's execution protocol, which would remedy any impermissible "combined effect." On Claims VI and VII—that the ADC's execution policies violate the Prisoners' right to access the courts and right to counsel—the proper remedy would be to enjoin the ADC to take whatever steps the Court believes are necessary and

[7] Additionally, even if the Court grants relief on Claims I, II, IV, V, VI, and/or VII, that relief cannot and should not include a stay of the *first* execution.

missing from the ADC's execution policies. None of the claims other than the midazolam claim (Claim III) can possibly warrant a stay of all executions.

Discussion

I. The Prisoners are not entitled to a preliminary injunction staying their executions.

The Court should deny the Prisoners' motion for a preliminary injunction preventing the State from conducting the executions currently scheduled for April 17, 20, 24, and 27, 2017 because the Prisoners have not and cannot make a clear and rigorous showing of a significant likelihood of success on the merits on any of their claims. And both the balance of equities and the public interest weigh heavily against a stay. These Prisoners all have been lawfully convicted, and lawfully sentenced to death. The postconviction judicial process has confirmed that they received fair trials and are guilty. The State has a significant interest in seeing justice done and carrying out lawful death sentences—for the victims, the victims' families, and the public in general. The State is prepared for these executions and has devoted significant time and resources to this solemn endeavor. **(Ex. 1, ¶¶ 33-34)**

The State's midazolam supply is expiring at the end of April 2017, and the State currently does not have a source from which to buy more. **(Ex. 1, ¶ 11; Ex. 7)** So a temporary stay would effectively commute these Prisoners' death sentences. The victims and their families have been waiting for justice for decades while the Prisoners have split their claims and bounced around from court to court and forum

to forum in a deliberate effort to obstruct the State's efforts in carrying out their lawfully-imposed sentences. The Arkansas Supreme Court just finalized its order dismissing *all* of their method-of-execution claims with prejudice six weeks ago **(Ex. 20)**. The current protocol has been in place since August 2015. Compl. Ex. 1. And the record shows that almost all of its provisions—including all of the provisions subject to the Prisoners claims in this case (other than the midazolam claim)—were actually carried over from the 2008 procedure. Compl. Ex. 11. The Prisoners initially raised their Eighth Amendment claims in state court two years ago, but they deliberately and voluntarily dropped them in order to get out of federal court and back to state court. **(Ex. 17)** And now, just weeks before their scheduled executions, the Prisoners have waited until the very last possible minute to bring more Section 1983 claims in this Court. This last-minute effort by the Prisoners appears to be a deliberate attempt to swamp the Court with so many claims and at best marginally relevant information that the Court feels like it has no choice but to issue the preliminary injunction while the Court sorts it all out. The principal (but not only) problem for the Prisoners is that, at the end of the day, none of their claims have any legal merit whatsoever, which means that a stay of executions is absolutely inappropriate under binding precedent.

A. The Prisoners are unlikely to succeed on the merits of Claim I (Complaint ¶¶ 31-74) because the execution schedule cannot even theoretically violate the Prisoners' right to effective assistance of counsel.

The Prisoners (except Nooner) claim that the State's execution schedule "denies each of them the effective representation of counsel, which was guaranteed

to them when they were appointed counsel by the federal courts" under 18 U.S.C. § 3599. Compl. ¶ 32. As far as the State understands their claim, the Prisoners are alleging that the execution schedule is so compressed that it makes it difficult (emotionally and physically) for them to adequately file all the motions and applications that they are authorized under Section 3599 to file.

The Prisoners' claim that the execution schedule denies them effective assistance of counsel fails as a matter of law for four reasons: (1) Section 3599 does not apply to cases brought under 42 U.S.C. § 1983; (2) Section 3599 does not afford a protected right to effective assistance of counsel in any event; (3) even if the Prisoners had a right to effective assistance of counsel under Section 3599, the Prisoners' claim is not ripe and cannot be asserted prospectively as they seek to do in this case; and (4) the Prisoners are plainly not suffering from ineffective assistance of counsel at this time, and their speculative contention that counsel will suddenly become ineffective in the future fails to state a claim. For each of these reasons, and certainly all four reasons taken together, the Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of their claim that the execution schedule violates their right to effective assistance of counsel.

1. 18 U.S.C. § 3599 does not apply Section 1983 cases.

As a threshold matter, Section 3599 counsel are not appointed for the purpose of bringing Section 1983 claims like the ones Prisoners' counsel have brought in the last several weeks. Accordingly, to the extent the Prisoners are

claiming that the execution schedule makes it impossible for counsel to effectively bring and litigate such cases, their claim cannot possibly be cognizable. Moreover, that counsel have been spending time and resources on claims for which Section 3599 does not authorize appointed counsel greatly undermines, if not completely eviscerates, their claim that the execution schedule has made it impossible for them to effectively carry out the duties that Section 3599 actually does authorize.

Section 3599 ensures the appointment of at least one attorney in "every *criminal* action in which a defendant is charged with a crime which may be punishable by death…." 18 U.S.C § 3599(a)(1) (emphasis added). Section 3599 also ensures counsel for postconviction proceedings seeking to vacate or set aside any death sentence. *Id*., § (a)(2). Section 3599 does *not* authorize appointed counsel to file additional cases under 42 U.S.C. § 1983. A prisoner (or any litigant) has "no statutory or constitutional right to have counsel appointed in a civil case." *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (citing *Wiggins v. Sargent*, 753 F.2d 663, 668 (8th Cir. 1985)). The Prisoners cannot use Section 3599 as the basis for any claim about effective assistance of counsel in this case or any future 1983 case they might theoretically bring because Section 3599 does not apply to this case or any Section 1983 case.

Section 3599 does authorize federally-appointed counsel to represent capital defendants in state clemency proceedings. *See Harbison v. Bell*, 556 U.S. 180 (2009). But nothing in the statutory language or the language of *Harbison* indicates that federally-appointed counsel is authorized to represent prisoners in Section

1983 actions such as this. In *Harbison*, the Court looked to the language of Section 3599(e) to infer that federal-appointed counsel is authorized to represent prisoners in state clemency proceedings. 556 U.S. at 185-87. Section 3599(e), which sets forth the responsibilities of counsel appointed under Section 3599, provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Id. This language plainly speaks only to criminal cases, postconviction proceedings, and clemency proceedings—it says nothing about civil actions under Section 1983 or otherwise, and no court has held that Section 3599 authorizes appointed counsel to represent prisoners in civil actions filed under Section 1983 or otherwise.

Moreover, the majority opinion in *Harbison* is limited to the availability of federal-appointed Section 3599 counsel for prisoners in state clemency proceedings—*Harbison* says nothing about the availability of counsel for proceedings other than criminal cases involving a possible death sentence and postconviction proceedings arising directly out of those cases. As noted by Chief Justice Roberts in his concurrence, "it is plain that not every lawsuit involving an inmate that arises after the federal habeas proceeding is included" in the language of Section 3599(e) authorizing federally-appointed counsel for "subsequent stages of

available judicial proceedings." 556 U.S. at 195 (Roberts, C.J., concurring). "Surely 'subsequent stage[s]' do not include, for example, ***a challenge to prison conditions*** or a suit for divorce in state court, even if these available judicial proceedings occur subsequent to federal habeas." *Id.* (Internal quotation and brackets in original, emphasis added). A challenge to prison conditions, of course, is a civil action typically brought under Section 1983 in federal court—but it is plain from the language of Section 3599 and the opinions in *Harbison* that counsel appointed under Section 3599 is only authorized to represent prisoners in criminal, habeas, and clemency proceedings in federal court—not civil cases filed under Section 1983.

Section 3599 is not relevant to any Section 1983 case that the Prisoners may file. Indeed, the parameters of Section 3599 only demonstrate that the lawyers who have filed this case and who also happen to be the Prisoners' appointed counsel under Section 3599 in other cases plainly have the time and the ability to go above and beyond their authorized duties under Section 3599 to pursue new lines of attack not even contemplated by Section 3599, and for which there is no right to counsel at all. The Prisoners' Claim I should be denied because the Prisoners claim a right to effective assistance of counsel under Section 3599, but Section 3599 does not apply as a matter of law—it is therefore impossible for the Prisoners to make a clear and rigorous showing that they are likely to succeed on the merits of the ineffective assistance claim.

2. Even if Section 3599 applied, it does not include a right to effective assistance of counsel.

The Prisoners implicitly concede, as they must, that the right to counsel under the Sixth Amendment does not apply in this context. This is why the Prisoners try to shoehorn an ineffective assistance claim through Section 3599. But courts have repeatedly and consistently held that the authorization for appointed counsel in Section 3599 does not create a right to *effective* assistance of counsel—because there is "no constitutional right to an attorney in state post-conviction proceedings." *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

Where counsel is provided during post-conviction stages, as with Section 3599, courts consistently acknowledge that no ineffective assistance of counsel claims are cognizable. *See Gardner v. Garner*, 2010 WL 2413238, 383 Fed. App'x 722, 728 (10th Cir. 2010) (stating "[t]he constitutional right to the effective assistance of counsel does not extend beyond direct appeal, even if state law provides for the appointment of counsel in post-conviction proceedings"); *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008) (finding that even though inmate was entitled to post-conviction counsel under state and federal law, that does not mean that he was entitled to effective assistance *per se*); *Van Adams v. Schriro*, No. CV-04-1359, 2009 WL 89465 (D. Ariz. Jan. 14, 2009) (stating "[n]o court has held that there is a statutory right to competent performance by habeas counsel . . . .").

In *Gardner*, a death-row inmate brought due-process claims against the Utah Board of Pardons and Parole and others alleging conflicts of interest and due-process violations stemming from a lack of "meaningful representation" by his

federally-appointed counsel. *Gardner*, 383 Fed. App'x at 724. *Gardner* explained that a "state-created interest" in affording counsel to inmates during post-conviction matters (as Section 3599 does and as Arkansas does in Ark. Code Ann. § 16-91-202) does not convert the right into a constitutionally-protected one. *Id.* at 728 (citing *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007)). In such circumstances, a state has "made a valid choice to give prisoners the assistance of counsel [in post-conviction proceedings] without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position at trial and on first appeal as of right." *Id.* (quoting *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

Accordingly, the Tenth Circuit panel denied Gardner's counsel's request to find that their appointment as federally-funded habeas counsel afforded a constitutional platform from which to launch a collateral due-process challenge to clemency proceedings on the basis of effectiveness of counsel's representation. *Id.* at 729. Just yesterday in a ruling handed down from the bench in *Lee v. Hutchinson*, U.S. District Court, E.D. Ark., No. 4:17-cv-0195-DPM, District Judge Price Marshall adopted the Tenth Circuit's reasoning in *Gardner* and rejected the Prisoners' claim for ineffective assistance of counsel in clemency proceedings due to the current execution schedule. *See* Defendants' Exhibit 24 (transcript of Judge Marshall's April 26, 2017 ruling).

Likewise, in this case, the Prisoners are not afforded a constitutional platform from which to collaterally challenge the execution schedule on the basis of

the (speculative, *infra*) ineffectiveness of counsel. Even taking the Prisoners' factual allegations as true and accepting their speculative prediction and evidence that the effectiveness of their counsel will deteriorate under the execution schedule, the Prisoners simply do not have a cognizable effective assistance of counsel claim to assert in this case. The Prisoners are therefore unable to make a clear and rigorous showing that they are likely to succeed on this claim.

3. Even if Section 3599 applied and afforded a right to effective assistance of counsel, the Prisoners' claim would only be cognizable after a Prisoner has suffered a denial of effective assistance—the claim cannot be used prospectively as the Prisoners seek to do in this case.

No case in any court in this country has ever used the right to effective assistance of counsel prospectively as the Prisoners seek to use it in this case. Ineffective assistance is a backward-looking claim where the question is whether a person who holds the right *had* effective counsel—not a forward-looking guessing-game as to whether a person who holds the right *may* receive effective counsel in the future. *See Strickland v. Washington*, 466 U.S. 668 (1984); *U.S. v. Cronic*, 466 U.S. 648 (1984). A speculative claim that counsel might be deficient at some point in the future is not ripe. The purported right cannot be applied prospectively before any violation of any right to effective assistance has even occurred.

An ineffective assistance of counsel claim is not ripe during the criminal trial where ineffective assistance occurs, and is not generally considered ripe even on direct appeal except "where the record has been fully developed, where not to act would amount to a plain miscarriage of justice, or where counsel's error is readily

apparent." *U.S. v. Ramirez-Hernandez*, 449 F.3d 824, 827 (8th Cir. 2006) (citing *U.S. v. Cook*, 356 F.3d 913, 919-20 (8th Cir. 2004)). Of course, none of these situations apply where a plaintiff or a lawyer simply predicts that ineffective assistance may occur in the future, as here. Courts routinely deny ineffective assistance claims as premature where plaintiffs attempt to bring them before they are ripe. *See*, *e.g.*, *U.S. v. Young*, 243 Fed. App'x 105, 106 (6th Cir. 2007) ("We find it is premature, on direct appeal, to rule on a claim advancing the denial of the effective assistance of counsel."); *U.S. v. Kember*, 648 F.2d 1354, 1365 (D.C. Cir. 1980) ("we . . . decline to rule on the basis of speculation. At this juncture, we reject as premature appellants' contention that their Sixth Amendment right to the effective assistance of counsel has been violated").

The Prisoners cannot bring a prospective or preemptive ineffective assistance of counsel claim because any such claim is fatally speculative and premature as a matter of law. The Prisoners make no allegation and offer no evidence showing that counsel has already been deficient or that such deficiency has prejudiced the Prisoners. The Court should decline to grant an injunction for this reason alone.

4. The Prisoners are not suffering from ineffective assistance of counsel at this time—and there is no reason to believe their speculative contention that counsel will become ineffective in the future.

Each of the Prisoners already has appointed counsel under Section 3359. Compl. ¶¶ 33 & 36. Many of the Prisoners are represented by multiple lawyers including an unquantified team of lawyers from the Federal Public Defenders Office (*id.*, ¶¶ 38-40; 44-46). And as noted above, they have alleged no specific deficiency

of any of their counsel, nor have they alleged that prejudice has resulted from any such deficiency of counsel.

The Prisoners are plainly not suffering from ineffective assistance of counsel at this time. As explained earlier, in addition to this case in which the Prisoners bring seven claims in an attempt to undermine everything from the State's method-of-execution statute to the ADC's execution protocol to the ADC's internal policies to the effectiveness of their own lawyers, the Prisoners recently filed *another* federal case in which they brought numerous attacks against Arkansas's clemency process (*Lee et al. v. Hutchinson, et al.*, U.S. District Court, E.D. Ark., No. 4:17-cv-0195-DPM, *supra*), and the Prisoners have unsuccessfully attempted to revive a state-court case with numerous already-litigated challenges against the Arkansas method-of-execution statute and lethal-injection protocol (*Johnson et al. v. Kelley, et al.*, Pulaski County Circuit Court No. 60CV-15-2921, *supra*). Most of the Prisoners (all who want to) have sought clemency through counsel, several have been evaluated by medical personnel, and many have initiated renewed postconviction proceedings. *See Ward v. Hutchinson*, Jefferson County Circuit Court No. 35CV-17-206 (civil complaint filed in March alleging that Ward is incompetent to be executed); *McGehee v. State*, Arkansas Supreme Court No. CR-98-510 (petition to recall the mandate filed by McGehee in March; denied on March 16; McGehee has filed a motion for reconsideration); *Johnson v. State*, Arkansas Supreme Court Nos. CR-98-743, CR-02-1362, and CR-05-1180 (petition to reinvest jurisdiction to file a petition for writ of error coram nobis, petition for recall of the mandate, and petition

for stay of execution filed in March); *Lee v. State*, Arkansas Supreme Court Nos. CR-96-553 and CR-08-160 (motion to recall the mandate and order a new trial, and motion to take as a case and to stay execution filed in April); *Williams v. Kelley*, United States District Court for the Eastern District of Arkansas No. 5:02CV450 (motion for relief from judgment filed by Williams on April 1 in his closed federal habeas case).

In the instant case alone, since its filing on March 27, 2017, the Prisoners' counsel have filed a 1000+ page complaint and exhibits, moved for a preliminary injunction, propounded exhaustive discovery requests upon the defendants, participated in two telephonic hearings, and identified and/or subpoenaed no less than 14 preliminary-injunction-hearing witnesses (and have indicated they will likely add more witnesses until the agreed deadline to exchange witness lists on Saturday). The Prisoners' counsel have performed their work in this case all while conducting a three-day preliminary-injunction evidentiary hearing in *Lee v. Hutchinson* before Judge Marshall and while simultaneously seeking relief in multiple state clemency and court proceedings, *supra*. Their ability to simultaneously handle all of these tasks is unsurprising given that, in this case alone, nine attorneys have entered appearances for the Prisoners, and several additional attorneys appear to be receiving notices of electronic filings in this case and assisting the counsel of record. In sum, the Prisoners, collectively and individually, have launched a barrage of litigation through counsel in a last-ditch

attempt to undermine the scheduled executions. The Prisoners' counsel is not ineffective at this time under any definition.

Against the backdrop of superior legal service up to the present, including filing and handling cases that Section 3599 does not even contemplate appointed counsel bringing and handling, the speculative suggestion that counsel will suddenly become ineffective because of emotion, stress, or other work cannot be enough to support this claim. The Prisoners fail to make a clear and rigorous showing that they are likely to succeed on the merits of Claim I, and the request for a preliminary injunction should be denied accordingly.[8]

[8] If there is simply too much to be done for the battalion of attorneys already representing the Prisoners, then the obvious solution would be to appoint more counsel for the Prisoners—but the Prisoners say that *only their current attorneys* have the necessary "familiar[ity] with complex and nuanced issues that arise in litigation for stays of executions and the clemency process, as well as with the extensive record of the case and with the client himself" (Complaint, ¶ 74)—and because *only their current attorneys are uniquely capable of providing effective assistance*, "counsel cannot unload a case onto new counsel at the last minute." *Id.* In other words, the Prisoners admit in circular fashion that they are currently receiving abundantly effective assistance from their existing attorneys who are uniquely qualified to handle this complex litigation and uniquely familiar with their cases. The Prisoners' own admission that they are receiving and have been receiving *uniquely* effective assistance of counsel belies their unsupported speculation that this will suddenly change overnight. And the Prisoners' contention that any problem cannot be remedied through appointment of additional counsel plainly shows that what the Prisoners seek is not effective assistance of counsel—which they already have—but rather, a stay of executions based on their speculative and unsupported assertion that counsel will suddenly become spectacularly and irredeemably ineffective in the future. The Court should not accept this invitation to tilt at windmills.

B. The execution schedule does not violate the Eighth Amendment as a matter of law, and the Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of Claim II (Complaint ¶¶ 75-100).

The Prisoners (except Nooner) claim that the execution schedule violates the Eighth Amendment for two independent reasons: (1) the schedule is contrary to the evolving standards of decency, and (2) the schedule creates an objectively intolerable risk of substantial harm that is sure or very likely to occur and, moreover, is contrary to evolving standards of decency. Compl. ¶ 76. The Prisoners have not and cannot make a clear and rigorous showing that they are likely to succeed on these claims, nor can they make a showing of harm that is not entirely speculative.

The first claim is simply frivolous. The Eighth Amendment's prohibition on "cruel and unusual" punishment does not contain within it (literally or figuratively) a constitutional directive about how many executions can be held on one night or in a certain number of days—the Court should not grant a preliminary injunction on this claim. With respect to the second claim, the Prisoners contend, without supporting legal authority, that a "compressed" execution schedule will impose "extraordinary" and "multiplied" stress on those involved in the executions, which will "surely" result in a "botched" execution or executions. The State's affidavits from current and former corrections officials in Arkansas and the testimony of those officials and other witnesses about these claims at the preliminary-injunction hearing completely undermine the Prisoners' speculation about the execution schedule. Of course, the Court need not consider evidence because the claim fails as

a matter of law in any event—an "accident" or "maladministration" of the protocol does not give rise to an Eighth Amendment claim. But even if the Court considers the evidence, the Prisoners cannot meet their burden to warrant a preliminary injunction on Claim II.

1. Lack of standing.

The Prisoners each lack standing to pursue their Eighth-Amendment claim that the scheduling of *other executions* near in time to their own violates the Eighth Amendment's evolving standards of decency. The right to be free from cruel and unusual punishment under the Eighth Amendment is personal and applies to the circumstances of a state's execution of an *individual* to be executed—it has nothing to do with other executions or any scheduled execution(s) of other prisoners. *See Miller v. Alabama,* 567 U.S. 460, 132 S. Ct. 2455, 2463 (2012) ("The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees *individuals* the right not to be subjected to excessive sanctions.'") (citation omitted) (emphasis added); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) ("[A] cardinal principle [] of our constitutional order [is] the *personal* nature of constitutional rights . . . .") (emphasis added); *Whitmore v. Ark.*, 495 U.S. 149, 160 (1990) (only a person himself subject to the death penalty has standing to assert an Eighth Amendment objection under the Cruel and Unusual Punishment Clause to its imposition); *Alderman v. U.S.*, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."). A complaint that the State should not be executing multiple

people within days of each other is exactly the type of generalized grievance that does not give rise to Article III standing. *See Flast v. Cohen*, 392 U.S. 83, 106 (1968) (noting that a plaintiff may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government").

The Eighth Amendment is concerned only with each individual Prisoner's personal right to be free from cruel and unusual punishment, which has nothing to do with any other executions or other facts in the broader world that are not directly relevant to an individual Prisoner's execution. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 318 (1986) ("Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.") (internal quotations and citation omitted); *see also Graham v. Florida*, 560 U.S. 48, 59-61 (2010) (explaining the concept of proportionality of individual punishment to the individual criminal, the seriousness of his offense, and his culpability). Of course, if the Prisoners each lack standing to bring Claim II, the Court should not grant a preliminary injunction based on Claim II.

2. The evolving standards of decency test under the Eighth Amendment is about individual punishment and individual circumstances.

The Prisoners offer no legal support whatsoever for their evolving standards of decency argument. This is unsurprising because no court has ever held or even intimated the possibility that the Eighth Amendment applies to a particular

execution schedule. The Prisoners can cite no case where any court has ever come anywhere close to concluding that the constitutional prohibition against cruel and unusual punishment includes a right to be the only person executed on a given day or in a given week or under any particular schedule. This Court should not take it upon itself to be the first.

The Prisoners' evolving standards of decency challenge against the execution schedule runs headlong into an insurmountable obstacle—the "evolving standards of decency that mark the progress of a maturing society" protected by the Eighth Amendment under *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) is *personal* and *unique* to the individual capital defendant to be executed and has nothing to do with surrounding circumstances such as whether other capital defendants are scheduled to be executed or not. *See*, *e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting) (evolving standards of decency requires "due consideration of the *uniqueness of each individual defendant* when imposing society's ultimate penalty") (emphasis added); *Washington v. Watkins*, 655 F.2d 1346, 1373 n.52 (5th Cir. 1981) (noting that evolving standards of decency "ensures that an *individual* death sentence is consistent with public attitudes and evolving standards of decency" and "ensures that *capital defendants are treated as unique human beings*, with appropriate consideration given to whether imposition of the death penalty *in the particular case* would further the retributive and deterrent values in whose absence capital punishment would not comport with the dignity of man") (emphases added). To be sure, the execution method to be applied to an

individual capital defendant must meet the "evolving standards of decency" requirement—but surrounding and fully extraneous circumstances such as whether *other* capital defendants are scheduled to be executed are completely irrelevant to the inquiry.

Moreover, the Prisoners' bare assertion that states have rarely held multiple executions on the same day or on consecutive days or in the same week is simply and demonstrably false. Publicly-available sources (of which the Court can take judicial notice)—like the searchable execution database on the website for the Death Penalty Information Center (DPIC) (https://deathpenaltyinfo.org/views-executions)—show that numerous states including Arkansas have held multiple executions on the same day, on consecutive days, and two and three days apart. The DPIC includes 27 executions held in Arkansas since 1990, and even in that small sample size, there are *four* occasions where multiple executions have been held on the same day in Arkansas: two lethal-injection executions on May 11, 1994; *three* lethal-injection executions on August 3, 1994; *three* lethal-injection executions on January 8, 1997; and two lethal-injection executions on September 8, 1999. Examples from other states include: two lethal-injection executions by Texas on January 31, 1995; two lethal-injection executions by Illinois on March 22, 1995; two lethal-injection executions by Texas on June 4, 1997 (as well as lethal-injection executions by Texas on May 28, June 2, June 3, June 11, June 16, and June 17, 1997—eight executions by Texas in a 22-day period); two lethal-injection executions by Illinois on November 19, 1997; two lethal-injection executions by South Carolina

on December 4, 1998; and two lethal-injection executions by Texas on August 9, 2000. On numerous occasions, executions in Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Virginia have been carried out within days of other executions—often on consecutive days. The execution schedule at issue in this case is not some outlier that offends basic notions of decency but is, in fact, entirely consistent with executions that have been taking place nationwide and in Arkansas for decades.

The publicly-available sources of information on this point are buttressed by the Affidavit of ADC Director Wendy Kelley (Defendants' Exhibit 1), which establishes that of 196 executions in Arkansas since 1913, 84 condemned inmates have been executed on the same night as at least one other inmate, including multiple occasions where three or four inmates have been executed on the same night. *Id.*, ¶ 15. 26 of those executions have been by lethal injection since 1990, and of those, multiple inmates have been executed on the same night on four occasions—including three inmates in the same night twice. *Id.*, ¶ 16. It is also not uncommon in Arkansas to conduct multiple executions within days or weeks of each other. *Id.*, ¶ 17. As the DPIC website confirms, *supra*, other states have performed multiple lethal-injection executions on the same night as well. *Id.*, ¶ 18. And other states frequently carry out executions within days or within one week of other executions. *Id.*, ¶¶ 18-20.

Scheduling executions on the same day or within days of other executions is commonplace in Arkansas and other states that perform executions, and does not

violate evolving standards of decency under the Eighth Amendment. The Prisoners are trying to constitutionalize policy and have the Court serve as a reviewer of best practices—directly contrary to the courts' well-settled deference to executive-branch action, especially in the prison context. *See*, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (discussing the "wide-ranging deference in the adoption and execution of policies and practices" afforded by courts to prison officials and the Executive Branch and citing cases). But if the Court takes that leap, what rule should the Court command from the judicial branch? Executions cannot occur on the same day? Executions cannot occur on consecutive days? Executions must be set a week apart or a month apart? How is this Court to decide such a question except for simply replacing the Executive Branch's policy judgment with its own?

The Prisoners have failed to make a clear and rigorous showing that they are likely to succeed on their claim that the execution schedule violates evolving standards of decency under the Eighth Amendment.

3. The Prisoners' claim that the execution schedule increases stress and thereby poses an objectively intolerable risk of substantial harm that is sure or very likely to occur is entirely speculative.

The Prisoners ask the Court to infer an Eighth-Amendment violation based on their speculation that the execution schedule will cause increased stress among persons involved in the executions and their further speculation that this somehow creates an objectively intolerable risk of substantial harm that is sure or very likely to occur. But the Eighth Circuit has repeatedly explained that the Eighth Amendment does *not* warrant a general supervisory role for the courts to oversee

executions, the Eighth Amendment does *not* impose a best-practices requirement, and the Eighth Amendment does *not* recognize a claim arising out of speculative risk that an accident or maladministration of execution protocol *might* occur. *See Zink v. Lombardi*, 783 F.3d 1089, 1100-03 (8th Cir. 2015); *Clemons v. Crawford*, 585 F.3d 1119, 1125-27 (8th Cir. 2009); *Taylor v. Crawford,* 487 F.3d 1072, 1080 (8th Cir. 2007). Binding precedent forecloses the Prisoners' speculative Eighth-Amendment challenge against the execution schedule. The request for a preliminary injunction should be denied.

The Eighth Circuit has "emphasize[d]" that the Eighth Amendment is not concerned with the risk of accident, maladministration of a protocol, or isolated mishaps occurring in lethal-injection executions. *Taylor v. Crawford*, 487 F.3d at 1080; *see also Zink v. Lombardi*, 783 F.3d at 1100-03. Rather, the focus of an Eighth-Amendment inquiry is on whether the prison's actual policy *inherently* imposes a constitutionally-significant risk of needless pain to an *individual* inmate set to be executed. *Taylor*, 487 F.3d at 1080. The Prisoners' claim reaches far beyond this limited question and asks the Court to infer a constitutional violation based on the Prisoners' speculation that some accident or maladministration *might* occur based on circumstances such as increased stress that *might* arise from the execution schedule. The Prisoners' speculation about how the execution schedule may or may not affect those involved in administering the executions, and their further speculation that the execution schedule might cause those carrying out executions to fail to perform their duties under the ADC's protocol, fails to make a

clear and rigorous showing that the execution schedule results in an objectively intolerable risk of substantial harm under the Eighth Amendment.

United States Supreme Court precedent confirms the insufficiency of the Prisoners' challenge against the execution schedule under the Eighth Amendment. Simply because an execution method *may* result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual according to the Supreme Court. *Baze v. Rees*, 553 U.S. 35, 50 (2008). Isolated mishaps (whether arising from stress or for other reasons) do not give rise to an Eighth-Amendment violation because they do not suggest cruelty or that the procedure itself gives rise to a substantial risk of harm. *Baze*, 553 U.S. at 50.

Even where prisoners point to numerous opportunities for error under a given protocol, these risks do not establish an Eighth-Amendment violation. *Baze*, 553 U.S. at 53. *See also Zink*, 783 F.3d at 1100-03 (potential drug storage problems or contamination are isolated mishaps that do not create an Eighth-Amendment violation); *Taylor*, 487 F.3d at 1083 (concluding that Missouri's written protocol was constitutional on its face and that requiring the state to engage a physician trained in administration of anesthesia, purchase equipment to monitor anesthetic depth, maintain specific court-ordered record-keeping practices, and hire a supervising physician was not required under the Eighth Amendment).

Since the Supreme Court's decision in *Baze*, the Eighth Circuit has repeatedly held that "[t]he mere fact 'an execution method may result in pain,

either by accident or as an inescapable consequence of death,' does not amount to an Eighth Amendment violation." *Nooner v. Norris*, 594 F.3d 592, 599 (8th Cir. 2010) (citing *Clemons*, 585 F.3d at 1125); *Zink*, 783 F.3d at 1100 (speculation is insufficient to state an Eighth Amendment claim and even accepting as true the hypotheticals presented in prisoners' complaint would amount to no more than an isolated mishap, which does not give rise to an Eighth-Amendment violation). The *Nooner* court disposed of allegations of numerous "risks" associated with Arkansas's lethal-injection protocol, again concluding that the written protocol sufficiently overcame the Eighth-Amendment challenge despite the inmates' speculative assertions about likely risks. 594 F.3d at 603-08. *See also Baze*, 553 U.S. at 51 ("Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death."); *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009) ("Permitting constitutional challenges to lethal injection protocols based on speculative injuries and the possibility of negligent administration is not only

unsupported by Supreme Court precedent but is also beyond the scope of our judicial authority.").

It is against this backdrop of authority from the Eighth Circuit and the United States Supreme Court that the Prisoners in this case ask the Court to divine a likelihood of an Eighth-Amendment violation based on their rampant speculation regarding the execution schedule and the many problems that the Prisoners imagine may arise out of the execution schedule. The Court should decline the Prisoners' invitation to rule counter to the great weight of binding authority. Given the relevant legal authority, this is not a claim for which the Court needs to consult evidence. But the Affidavit of ADC Director Kelley confirms that the ADC is prepared to carry out the executions under the schedule that the Prisoners challenge. Defendants' Exhibit 1, ¶ 33.

Although there is of course a level of stress inherently related to executions, ADC officials undergo weeks of preparation leading up to an execution night. *Id.*, ¶ 34. And preparing to execute more than one condemned prisoner on a given night does not increase the level of stress on correctional officers, the executioner, members of the IV team, and others who participate in the execution process. *Id.*, ¶ 35. In fact, Director Kelley's own investigation and discussion with a former ADC director confirm that stacking executions is actually *better* than having eight separate dates because the stress of executions is more associated with an execution *night* than with a specific number of executions—having eight separate dates to prepare for would be *more* stressful than having four dates with stacked executions.

Id., ¶ 35. Based on her personal experience and her discussions with a former ADC director who was responsible for carrying out multiple double and triple executions, and her discussions with corrections officials in Arkansas, Director Kelley disagrees with the testimony offered for the Prisoners by Warden Jennie Lancaster: "I disagree with her contentions that the current execution schedule is inappropriate or somehow violates my professional or ethical duties." *Id.*, ¶ 37.

The testimony of former ADC Director Larry Norris, who was responsible for carrying out the last 23 executions held in Arkansas, confirms that the execution schedule does not offend the Eighth Amendment as asserted by the Prisoners. *See* Defendants' Exhibit 2. Former Director Norris confirms that preparation for an execution or executions is "essential," "crucial," and "invaluable." *Id.*, ¶ 19. Preparation takes weeks, but the preparation is the same for each execution—"so whether there is one or more than one execution in a given night or week, the pre-execution preparations are the same." *Id.*, ¶ 20. The preparations are "continuous and are treated with the utmost seriousness and dignity." *Id.*, ¶ 21.

Based on former ADC Director Norris' experience (including overseeing the last 23 Arkansas executions), "the current schedule of executions is more favorable than performing eight executions on eight separate occasions." *Id.*, ¶ 22. Preparing for an execution "is, of course, stressful on staff"—but "[p]reparing for four nights of executions as opposed to eight nights is easier on the staff, both physically and emotionally." *Id.* In fact, had former Director Norris' opinion been elicited, he "would have recommended four executions in one night." *Id.*

Former ADC Director Norris also disagrees with Warden Lancaster's testimony for the Prisoners—specifically, former Director Norris disagrees with Lancaster's opinion that performing multiple executions on one day creates more stress, and that the level of stress can lead to fatigue, which would naturally be expected to lead to human error. *Id.*, ¶ 23. According to former Director Norris based on his experience of conducting multiple executions on four separate occasions (experience that Lancaster apparently lacks completely), former Director Norris "did not find that to be true." *Id.* "We did not experience any of the errors Ms. Lancaster is referring to on the four dates in the 1990's in which we performed multiple executions." *Id.* Former Director Norris agrees with Ms. Lancaster's assessment that every execution involves coordination among numerous individuals, but that coordination "is more manageable for four nights as opposed to eight." *Id.*, ¶ 24.

In sum, the Prisoners' allegations and evidence about isolated mishaps and risks of accidents arising out of the execution schedule are insufficient to support an Eighth-Amendment claim as a matter of law, and the testimony of the current ADC Director and the former ADC Director who was responsible for carrying out the last 23 executions in Arkansas dispel the Prisoners' speculative concerns about stress and resulting mishaps or accidents arising out of the execution schedule. The Prisoners have not and cannot make a clear and rigorous showing that they are likely to succeed on the merits of Claim II. The Prisoners' request for a preliminary

injunction should be denied because the execution schedule does not violate the Eighth Amendment.

C. The midazolam protocol does not violate the Eighth Amendment as a matter of law, and the Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of Claim III (Complaint ¶¶ 101-118).

In Claim III, all of the Plaintiffs allege that the use of midazolam as the first drug in a three-drug protocol violates the constitutional ban on cruel and unusual punishment. This claim is absolutely barred by *res judicata* and collateral estoppel and, in any event, fails to state a cognizable Eighth-Amendment claim. For each and all of these reasons, the Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of Claim III, and the Court should deny their request for a preliminary injunction barring their executions on this basis.

1. The midazolam claim is barred by res judicata *and collateral estoppel.*

Federal courts are required to respect the decisions of state courts. Under 28 U.S.C. § 1738, "[t]he records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State." The Eighth Circuit has explained that "federal courts are limited to the extent [they] cannot give review to claims that have already been fully adjudicated in state court." *Sparkman Learning Center v. Ark. Dep't of Human Servs.*, 775 F.3d 993, 998 (8th Cir. 2014). "If a state court would not hear the case because it was precluded by a previous holding in that state's courts, the federal courts must 'give the same

preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.'" *Id.* (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982)). "Federal courts do not provide a forum to relitigate claims previously decided adversely in state courts." *Id.* In *Knutson v. City of Fargo*, 600 F.3d 992 (8th Cir. 2012), the Eighth Circuit held that litigants could not bring claims before a federal court that were actually fully decided by state courts in what would amount to appellate review of the state-court ruling. *See id.* at 995-96.

Under 28 U.S.C. § 1738, federal courts apply state law to decide whether claims previously decided in that state's courts, which are then brought in federal court, are barred by the prior state-court judgment. *Sparkman Learning Ctr.*, 775 F.3d at 998. Under Arkansas law, the doctrine of *res judicata* ends litigation by preventing a party from relitigating for a second time a matter in which it has already had an opportunity to be heard. *Powell v. Lane*, 375 Ark. 178, 185, 289 S.W.3d 440, 444 (2008). This is because a plaintiff is "required to join all acts which [he] could have brought against the [defendant] in the same lawsuit, if it is possible for [him] to do so in that lawsuit." *Lundquist v. Rice Mem. Hosp.*, 238 F.3d 975, 978 (8th Cir. 2001).

Arkansas law bars relitigation of a subsequent suit under claim preclusion when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve

the same parties or their privies. *Jayel Corp. v. Cochran*, 366 Ark. 175, 178, 234 S.W.3d 278, 281 (2006). *Res judicata* bars relitigation of claims that were actually litigated in the first suit as well as claims that could have been litigated. *Id.*; *Powell v. Lane*, 375 Ark. 178, 185, 289 S.W.3d 440 (2008). When a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* applies even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* Moreover, strict privity in the application of *res judicata* is not required. *Parker v. Perry*, 355 Ark. 97, 104, 131 S.W.3d 338, 344 (2003). Instead, for privity to exist, there only needs to be "substantial identity" of the parties. *Id.* When two parties are so identified with one another that they represent the same legal right, privity exists for the purposes of *res judicata*. *Id.* As discussed below, each of the elements of *res judicata* is satisfied in this case, and it is therefore impossible for the Prisoners to succeed on the merits of their midazolam claim.

a. The Arkansas Supreme Court issued a final judgment on the merits in *Kelley v. Johnson*.

The Arkansas Supreme Court issued a final judgment that decided the constitutional issues before it—including the Prisoners' claim that the use of midazolam as the first drug in its protocol would amount to cruel or unusual punishment—on the merits in *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016). The majority opinion made clear that the court was reversing the lower court's denial of summary judgment to the State based on the Prisoners' failure to meet proof with proof and substantiate their method-of-execution (midazolam) claim. *See Johnson*, 2016 Ark. 268, at 12-13, 496 S.W.3d at 355-56 (discussing

summary-judgment standard of review with regard to the Prisoners' midazolam claim); *id.* at 16, 496 S.W.3d at 357-58 (discussing the parties' contentions on the midazolam claim both on the pleadings and on the merits); *id.* at 16-18, 496 S.W.3d at 358-59 (discussing evidence presented by both sides on the midazolam claim); *id.* at 18-19, 496 S.W.3d at 359 (agreeing with the State that the Prisoners "have not met their burden of demonstrating . . . that the proposed alternative drugs are available to ADC for use in an execution"). Thus, as the Pulaski County Circuit Court recently held in dismissing the Prisoners' "Second Amended Complaint" filed after the appeal, the Supreme Court's decision *Kelley v. Johnson* was a dismissal on the merits that fully and completely resolved the Prisoners' state-court case. **(Ex. 23)**

The Supreme Court's dismissal of the Prisoners' claims in *Kelley v. Johnson* also operated as a final adjudication on the merits because it was actually the *third* time that their claims challenging Act 1096 of 2015 were dismissed and, therefore, operated as a dismissal *with prejudice* under state law. *See, e.g.*, *Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 436 S.W.3d 445 (2014). It is well settled in Arkansas that "'there is a limit to the number of times a case can be dismissed,' regardless of whether the dismissals are voluntary or involuntary." *Ballard Group*, 2014 Ark. 276, at 19, 436 S.W.3d at 456 (quoting *Bakker v. Ralston*, 326 Ark. 575, 579, 932 S.W.2d 325, 327 (1996)). In *Ballard Group*, the Arkansas Supreme Court held that a plaintiff's "failure to comply with the requirements of Arkansas Rule of Civil Procedure 8 for pleading facts is [] a 'failure of the plaintiff to

comply with these rules' as contemplated in Rule 41(b)," and thus "a dismissal granted for failure to state facts upon which relief can be granted under Rule 12(b)(6) constitutes an involuntary dismissal under Rule 41(b)." 2014 Ark. 276, at 20, 436 S.W.3d at 456-57 (quoting Ark. R. Civ. P. 41(b)). Under Ark. R. Civ. P. 41(b), an involuntary dismissal "is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits." Ark. R. Civ. P. 41(b). In *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997), the Supreme Court applied Rule 41(b) and modified a Rule 12(b)(6) dismissal to one with prejudice when the plaintiff had filed a prior lawsuit against the same defendant but had voluntarily nonsuited that case.

Under *Ballard Group* and *Brown*, the Arkansas Supreme Court's dismissal of the Prisoners' claims in *Johnson*—whether under Rule 12(b)(6) for failure to state a claim or on the merits on summary judgment—was an adjudication on the merits with prejudice. As in *Brown*, the Prisoners here filed a prior lawsuit against the State challenging Act 1096 of 2015 in Pulaski County Circuit Court Case No. 60CV-15-1400[9] but voluntarily nonsuited that case after the State removed it to federal

[9] As discussed *supra*, the plaintiffs in the first state-court case were the same as the plaintiffs in the second state-court case and the Prisoners here, except that Don Davis and Ledell Lee did not initially join as parties. Both Davis and Lee later moved to intervene in No. 60CV-15-1400 and to proceed *in forma pauperis*, which the circuit court granted. *See* Orders on Requests to Proceed in Forma Pauperis in Pulaski County Case No. 60CV-15-1400 (May 20, 2015 and June 9, 2015) (showing Davis and Lee as "Intervening Plaintiffs" in the case captions and granting their motions to proceed *in forma pauperis*). The Prisoners' first state-court case challenged the 2015 method-of-execution act on the following federal and state

court. The Prisoners' voluntary nonsuit of their federal constitutional claims, including their Eighth-Amendment challenge to the midazolam protocol, was the first time their midazolam claim was dismissed. The same day that they nonsuited the federal action, the Prisoners filed an "Amended Complaint" in Pulaski County Circuit Court No. 60CV-15-1400 raising only state-law challenges to the midazolam protocol and other provisions of Act 1096.[10] After the State moved to dismiss that Amended Complaint and a subsequent Second Amended Complaint for lack of jurisdiction, the Prisoners stipulated to the dismissal of Pulaski County Circuit Court No. 60CV-15-1400 without prejudice. **(Ex. 17)** That was the second dismissal of the Prisoners' midazolam claim.

The Prisoners[11] then re-filed their midazolam claim (and other state-law claims) in Pulaski County Circuit Court Case No. 60CV-15-2921, which the Arkansas Supreme Court reversed and dismissed on the merits in *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016). The United State Supreme Court then declined review. The Arkansas Supreme Court's recent order **(Ex. 22)** clarifying that the stay of executions imposed in Ark. Supreme Court No. CV-15-829

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constitutional grounds: (1) Contracts Clause; (2) First Amendment; (3) procedural Eighth Amendment; (4) Due Process; (5) separation of powers (judicial and legislative); (6) substantive Eighth Amendment; (7) Ex Post Facto; (8) Supremacy Clause.

[10] The Prisoners in their amended complaint asserted the same claims as the original complaint, except that they were brought under the Arkansas Constitution.

[11] Consistent with their actions in either filing or intervening in the first state-court lawsuit, all nine of the Prisoners joined in the complaint filed in Pulaski County Circuit Court No. 60CV-15-2921.

dissolved upon the issuance of the mandate in *Kelley v. Johnson*, Ark. Supreme Court No. CV-15-992, unequivocally confirmed that the Prisoners' state-court case was over. In addition, the Supreme Court's dismissal in *Johnson* was the third time that a court dismissed the Prisoners' constitutional challenges against Act 1096—including the cruelty claim against the use of midazolam in executions—and thus operated as an adjudication on the merits under the plain language of Ark. R. Civ. P. 41(b). The Pulaski County Circuit Court confirmed in its recent order dismissing the Prisoners' "Second Amended Complaint" in No. 60CV-15-2921 that the Arkansas Supreme Court's decision in *Kelley v. Johnson* was a final dismissal on the merits with prejudice. **(Ex. 23)** For all of these reasons, the Court should conclude that the Prisoners' midazolam claim was adjudicated on the merits in previous state-court litigation, thus satisfying the first element of the State's *res judicata* defense.

b. The other elements of *res judicata* are satisfied.

There can be no dispute that the Pulaski County Circuit Court (and the federal district court upon removal) had jurisdiction to consider the Prisoners' midazolam claims under the federal and state constitutions in the prior lawsuits. As the docket sheets reflect, and as summarized in the Factual Background section *supra*, the prior suits were fully contested in good faith by all parties. In prior proceedings before the state court, the State moved to dismiss multiple iterations of the Prisoners' midazolam claim filed in two different cases, the parties litigated the propriety of a preliminary injunction or temporary restraining order enjoining

midazolam executions before the trial court and the Arkansas Supreme Court, and then the parties cross-moved for summary judgment and presented all of the evidence they had to support their positions on the merits of the midazolam claim.

Under the fourth element, this Court must determine whether this case involves the same claims that were presented in the state-court action. In the Eighth Circuit, in determining whether two causes of action are the same for *res judicata* purposes, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990). In *Lane*, the court held it "indisputable" that federal-law claims raised in a second lawsuit that were based on the same facts as a prior suit brought under state law presented "the same claim for res judicata purposes." *Id.* at 743. The cases involved "precisely the same nucleus of operative facts." *Id.* The gist of all the claims in both cases was that the defendants wronged the plaintiffs and should be required to disgorge the proceeds from an asset sale. *Id.* The Eighth Circuit found that the federal claims were barred despite the fact that some of those claims "would involve some evidence that perhaps was not relevant in" the first case due to the different elements of the causes of action alleged. *Id.* The Eighth Circuit concluded that the plaintiffs' reliance in the second suit "on different substantive law and new legal theories does not preclude the operation of res judicata" because the doctrine "prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different." *Id.* at 744. "Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that

was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim." *Id.* (citing cases).

The same result is required here. The Prisoners in *Kelley* asserted claims that Act 1096 and the ADC's 2015 lethal-injection procedure (and specifically the use of midazolam) violated the constitutional ban on cruel-or-unusual punishment under the State constitution, and they bring the same claim now, except that it is under the Eighth Amendment. Just like in *Lane*, the Prisoners' claims are barred by *res judicata* despite their attempt to dress them up to look different. It is evident from the face of the pleadings that the Eighth-Amendment claims asserted in this matter arise out of the same nucleus of operative facts as the previous litigation in *Kelley v. Johnson*. The applicable standards of pleading and proof to sustain a viable method-of-execution claim are the same under both the Eighth Amendment and the State-law equivalent. *Johnson*, 2016 Ark. 268, at 14-15, 496 S.W.3d at 357 (adopting *Baze* and *Glossip* standards). Under *Lane*, this Court should conclude that the doctrine of *res judicata* bars the Prisoners' midazolam claim under the Eighth Amendment because it is the same claim that was adjudicated by the state court in *Johnson*. *See id.*; *see also Sparkman Learning Center*, 775 F.3d at 999 (affirming dismissal of complaint based on *res judicata* when the same due process claims were raised first in state court and then later in federal court).

Finally, the privity element is satisfied here. Both the state-court suits and this case involve the same parties or their privies representing the same legal rights

or interests: nine death-row inmates on one side seeking to invalidate Arkansas's midazolam protocol and stay their executions, and the State on the other seeking to sustain the statute and procedure and to carry out its lawful duty of carrying out the Prisoners' lawful sentences. This meets the privity requirement under Arkansas law. *See Sparkman Learning Ctr.*, 775 F.3d at 999 (holding that state officials were in privity with a state agency sued in a prior lawsuit despite the addition of new parties); *see also Collum v. Hervey*, 176 Ark. 714, 3 S.W.2d 993 (1928) (finding privity between a husband and wife); *Francis v. Francis,* 343 Ark. 104, 31 S.W.3d 841 (2000) (finding privity between a brother and sister); *Hardie v. Estate of Davis,* 312 Ark. 189, 848 S.W.2d 417 (1993) (finding privity between a testator and his remote heirs); *Phelps v. Justiss Oil Co.,* 291 Ark. 538, 726 S.W.2d 662 (1987) (finding privity between a landlord and tenant); *S. Farm Bureau Cas. Ins. Co. v. Jackson,* 262 Ark. 152, 555 S.W.2d 4 (1977) (finding privity between an insurer and its insured); *Curry v. Hanna,* 228 Ark. 280, 307 S.W.2d 77 (1957) (finding privity between a bankrupt debtor and his trustee).

As shown, all of the elements of *res judicata* are satisfied here. The midazolam claim is based on the same facts and claim as the previous state-court litigation: the ADC's adoption of a lethal-injection procedure that employs midazolam as the first drug in the protocol, and whether that causes cruel and unusual punishment. *Res judicata* applies even if the Prisoners plead slightly different facts or rely on some different evidence in support of their midazolam claim. All of the facts alleged that are relevant to the midazolam claim were (or

could have been) raised in the state court. Instead, the Prisoners have simply taken yet another bite at the apple[12] and added some new allegations about the protocol or purported alternative methods of execution that they could have pleaded before in the state court but did not. As discussed above, *res judicata* clearly bars relitigation of claims that could have been litigated in the first suit as well as the claims that were actually litigated when the two lawsuits arise out of the same common nucleus of operative facts. Because *res judicata* clearly bars the midazolam claim, it is impossible for the Prisoners to make the required clear and rigorous showing that they are likely to succeed on the merits of this claim, and the Court should deny their request for preliminary injunctive relief.

c. The Prisoners' claims are also barred by collateral estoppel.

Collateral estoppel is similar to the doctrine of *res judicata* in that it "serves both judicial and private interests in the termination of litigation," but it can apply even if a second suit is brought on a different cause of action than a prior suit. *Oldham v. Pritchett*, 599 F.2d 274, 276, 278 (8th Cir. 1979). Collateral estoppel is a legal doctrine that "bar[s] the relitigation of factual or legal issues that were determined in a prior . . . court action" and "applies to bar relitigation in federal court of issues previously determined in state court." *In re Scarborough*, 171 F.3d 638 (8th Cir. 1999). Federal courts look to the substantive law of the forum state in

[12] *See* Sec. Am. Compl. ¶¶ 2, 5, 8, 11 in Pulaski County Circuit Court No. 60CV-15-2921 (explaining the five previous complaints and amended complaints the Prisoners have filed challenging the midazolam protocol).

applying the collateral estoppel doctrine and give a state-court judgment preclusive effect if a court in that state would do so. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994).

In Arkansas, collateral estoppel runs to issues as opposed to the full case and does not require mutual identity of parties. *State Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 15, 59 S.W.3d 438, 444 (2001). If the following four elements are satisfied, a court's determination on an issue is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Id.* For an issue to be "actually litigated," it must be raised in the pleadings or otherwise, the defendant must have had a full and fair opportunity to be heard, and a decision must have been rendered on the issue. *See Powell v. Lane*, 375 Ark. 178, 186, 289 S.W.3d 440, 445 (2008).

As discussed in detail above, the Prisoners challenged the constitutionality of the ADC's midazolam protocol in state court. The issues of whether midazolam is "*sure or very likely* to cause serious illness and needless suffering," and whether there are alternative methods of execution that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain" were actually litigated in *Johnson*. *See Glossip*, 135 S. Ct. at 2737. The midazolam claim was raised in the pleadings, all parties had a full and fair opportunity to be heard on the

issue (both on a motion to dismiss and on cross-motions for summary judgment on that claim), and the Supreme Court rendered a final decision on the merits of the midazolam claim in *Kelley v. Johnson*. The Arkansas Supreme Court's decision was that the Prisoners had not properly pleaded nor sustained their burden to show there is a known, feasible, readily implemented, and available alternative method of execution available to the ADC. The Prisoners are collaterally estopped on that issue. Thus, then and now, their midazolam cruelty claim cannot survive.

The Prisoners cannot avoid the preclusive effect of the prior decision on the midazolam claim by pointing to their new factual allegations in the Complaint regarding drug "freshness" or newly-identified alternative execution methods. As the Eighth Circuit Court of Appeals explained in *Lundquist v. Rice Memorial Hospital*, collateral estoppel bars relitigation of an ultimate issue of fact—such as whether using midazolam in lethal-injection executions is cruel or unusual—when that issue was determined by a final judgment in a prior proceeding. 121 Fed. Appx. 664, 668 (8th Cir. 2005). "Collateral estoppel relates to the sub-elements and facts one must prove up in order to sustain an overarching cause of action." *Id.* On remand after an appeal or in a second case, a party has the "opportunity to produce truly 'new' evidence" on an issue, but a party does "not receive a second chance at producing evidence" on the ultimate issue of fact that should have been produced in the first case, "as collateral estoppel bars that result[.]" *Id.* at 668-69. Because collateral estoppel bars relitigation of the midazolam claim, the Court should

conclude that the Prisoners have not and cannot establish a likelihood of success on this claim and deny the motion for preliminary injunction.

2. The Prisoners cannot make a clear and rigorous showing of likelihood of success on the merits on the midazolam claim.

In addition to being barred by *res judicata* and collateral estoppel, the midazolam claim also fails because the Prisoners can neither plead nor prove a plausible Eighth-Amendment claim. "While methods of execution have changed over the years," the United States Supreme Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015). Prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is "*sure or very likely* to cause serious illness and needless suffering" and that gives rise to "sufficiently *imminent* dangers." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (emphasis added). To state a method-of-execution claim under the Eighth Amendment, the Prisoners must first plead facts to establish that the execution protocol entails a "substantial risk of serious harm" or an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Id.*

As noted above, "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* For example, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), a

plurality of the United States Supreme Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," *id.* at 462, and concluded that such "an accident, with no suggestion of malevolence," did not give rise to an Eighth-Amendment violation. *Id.* at 463-64. "In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

Second, the Prisoners must plead facts and adduce evidence to prove that "any risk posed by the challenged method is substantial when compared to known and available alternative methods of execution." *Glossip*, 135 S. Ct. at 2737-38. Under this prong of the test, the Prisoners "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737. This burden is not met "by showing a slightly or marginally safer alternative." *Id.*

a. The Prisoners cannot make a clear and rigorous showing that alternative execution methods are known, available, and readily implemented by the State.

While the Prisoners in their Complaint have attempted to satisfy the standards set by the United States Supreme Court in *Baze* and *Glossip* by

identifying a number of proposed alternative methods of execution, the Prisoners have failed to allege facts or adduce evidence demonstrating that those alternative methods are known, feasible, readily implemented, and available to ADC and that they would significantly reduce a substantial risk of severe pain. As a result, the midazolam claim fails as a matter of law, and the Court should deny the Prisoners' request for preliminary injunctive relief.

i. The Prisoners fail to establish that the firing squad is an available execution method.

The Arkansas Supreme Court in *Johnson* already rejected the Prisoners' claim that death by firing squad is a feasible and readily-implemented alternative based on their "entirely conclusory" allegations that "ADC has firearms, bullets, and personnel at its disposal to carry out an execution." *Johnson*, 2016 Ark. 268, at 19, 496 S.W.3d at 359.[13] While the Prisoners now include allegations and evidence about the State of Utah's firing-squad protocol, Utah's protocol does not prove that the firing squad is "feasible" and "readily implemented" by ADC. *See id.* For example, the Prisoners fail to demonstrate that the ADC has an appropriate facility to carry out an execution by firing squad. They produce no evidence regarding the specific weapons that may be readily available to ADC for use in such executions. The Prisoners fail to do anything more than speculate that ADC has access to

[13] As the Arkansas Supreme Court noted, as they do now in their federal Complaint, the Prisoners' state-court complaint alleged that ADC conceded to having "firearms, bullets, and personnel at its disposal" that could be used to carry out an execution by firing squad. *Johnson*, 2016 Ark. 268, at 19, 496 S.W.3d at 359. The Arkansas Supreme Court still found their allegations that this method "is capable of ready implementation" to be "entirely conclusory in nature." *Id.*

personnel who are trained in the use of those specific weapons and that they would possess the required skill to be quickly qualified to participate as a member of the firing squad. Indeed, the Prisoners do not offer proof on how much training and the type of qualification testing that would be required, let alone how long it would take to perform such training and testing. The Prisoners do not offer any evidence that the ADC has the right kind of ammunition and other equipment needed to make a firing-squad execution readily available to the ADC. Without adducing such proof at the preliminary-injunction stage, they fail to carry their heavy burden in order to support a stay. They simply have not made the required clear and rigorous showing that the firing squad is a viable, feasible, and readily available alternative to lethal injection.

In addition, the Prisoners fail to clearly demonstrate that an execution by firing squad would, in fact, significantly reduce a demonstrated risk of severe pain. The Prisoners' proof about the firing squad in this regard is purely speculative. While they offer conclusory evidence that an execution by firing squad will cause a "nearly instantaneous and painless death," their own expert concedes that his conclusion is based on the unsupported assumption that the shooters hit their mark (the heart). *See* Groner Aff. ¶ 3, Compl. Ex. 19. Plaintiffs fail to offer any proof (nor could they) demonstrating that an execution by firing squad is foolproof or that the marksmen would hit their mark 100% of the time. Indeed, the Prisoners do not even allege (much less support with evidence) how often an Arkansas firing squad will hit their mark and cause a quick and painless death. Instead, the Prisoners

merely speculate that the firing squad will go off without a hitch, while the Utah protocol they suggest specifically addresses and thus obviously contemplates situations where the prisoner is not rendered unconscious by the first shot(s). *See* Compl. Ex. 19. As the *Johnson* court held, such rank speculation cannot support a claim.

The State will offer evidence demonstrating the fallacy of Dr. Groner's opinions. The State's has retained Dr. Joseph F. Antognini, who is a medical doctor board-certified in anesthesiology and who has taken care of patients who have received gunshot wounds to the chest, to testify in this matter. He has submitted a declaration **(Ex. 3)** and will testify at the preliminary-injunction hearing that multiple bullets piercing the chest and exiting the back could cause severe pain. Furthermore, that pain would persist for the 10-15 seconds before unconsciousness ensues, even if the shooters hit their mark. And, if the shooters miss, this method will cause severe pain and suffering. *See* Declaration of Joseph F. Antognini, M.D., M.B.A., Defs.' Ex. 3, ¶ 50. In short, the firing squad is not sure to significantly reduce a risk of substantial pain when compared to the ADC's current lethal-injection protocol.

Undoubtedly, should Arkansas adopt the firing squad as a method of execution, the Prisoners would lodge countless constitutional challenges to that protocol based on all sorts of issues, such as the qualifications and training of the marksmen, the number of marksmen, the type and caliber of guns and bullets used, the location and size of the execution chamber (including, for example, claims that a

gust of wind could cause a bullet to miss its mark), the distance of the marksmen from the condemned inmate, and any number of other matters in an attempt to invalidate that protocol. In any event, the Prisoners' speculative and conclusory allegations in this case do not establish that the firing squad is both "feasible" and "readily implemented" by the State.

The failure of the Prisoners to provide anything other than speculative and conclusory allegations is particularly problematic given the fact that a firing squad has never been authorized and used in Arkansas's history. *See Johnson*, 2016 Ark. 268, at 20, 496 S.W.3d at 360. In *Johnson*, the Arkansas Supreme Court was right that the absence of any history of authorization and use of a particular method by the State of Arkansas should weigh heavily against a conclusion that such method is readily implemented and available to ADC. *Id.* The Prisoners' conclusory and unsubstantiated allegations could not overcome this skepticism. *Id.* Therefore, as in *Johnson*, "it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution." *Id.*

ii. The Prisoners fail to establish that any other execution methods are available to ADC.

In addition to the firing squad, the Complaint alleges, and the Prisoners adduce some evidence in an attempt to establish, the following as available alternative execution methods: (1) FDA-approved, manufactured pentobarbital; (2) a two-drug cocktail of midazolam and potassium chloride; (3) compounded pentobarbital; (4) anesthetic gas overdose; and (5) nitrogen hypoxia. Compl. ¶¶ 110-115. The Prisoners, however, fail to establish a plausible claim that any of

these proposals are known, feasible, readily implemented, and actually available to ADC for use in lethal-injection executions.

The Prisoners' assertions that any of these alternatives are actually available to the ADC for use in executions are entirely speculative. Like the Prisoners' allegations of "commercial availability" that the Arkansas Supreme Court rejected in *Johnson*, the allegation in the Complaint that FDA-approved, manufactured pentobarbital is available to ADC because the Missouri Department of Corrections *may* have been able to obtain it at some point in the past fails as a matter of law. *See* Compl. ¶ 110; *Johnson*, 2016 Ark. 268, at 18-19, 496 S.W.3d at 359 (agreeing with ADC that the Prisoners did not meet their burden of pleading alternative drugs based on "commercial availability" because the fact that "the drugs are generally available on the open market says nothing about whether ADC, as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution"). The United States Supreme Court held in *Glossip* that pentobarbital (whether manufactured or compounded) is not readily available to the states to use in executions. 135 S. Ct. at 2733-34. The Prisoners have failed to adduce any evidence to show that pentobarbital is actually available to the ADC for use in executions. Moreover, ADC Director Wendy Kelley has submitted an affidavit attesting that her efforts to procure a barbiturate for use in executions were unsuccessful. **(Ex. 1, ¶¶ 6-7)** And ADC Deputy Director was unable to find a willing supplier of *any* of the alternatives the Prisoners proposed in their last lawsuit. **(Ex. 13)** The Prisoners have not offered any proof that there is any

supplier of manufactured pentobarbital anywhere in the country willing to sell it to the ADC for use in executions. That is hardly surprising since manufacturers of controlled substances like midazolam are doing everything in their power to prevent those drugs from ending up in the hands of state departments of correction for use in lethal-injection executions. **(Ex. 14)**

The Prisoners' newly-suggested two-drug cocktail of midazolam and potassium chloride makes no sense. If midazolam fails to sufficiently anesthetize the Prisoners—as they have maintained in this and two previous lawsuits—then removing the second drug in the protocol will do nothing to cure the constitutional violation. The Prisoners have always steadfastly maintained that injecting them with potassium chloride without sufficient anesthesia would torture them and burn them alive from the inside. *See* Am. Compl. in *Johnson v. Kelley* (Sept. 28, 2015), Pulaski County Circuit Court No. 60CV-15-2921, ¶¶ 75-76. They should be judicially estopped from presenting a newfangled "alternative" method of execution that is completely at odds with their theory of the case.

Similarly, the Prisoners' current claim that the ADC could use compounded pentobarbital directly contradicts their allegations in the Pulaski County case that the use of compounded drugs would violate the Eighth Amendment due to their inherent unreliability. *Id.* ¶¶ 51-56. They should be estopped from turning a 180 on that issue now that their previously-proposed "alternatives" have been rejected by the Arkansas Supreme Court. In addition, and in any event, the Prisoners have not identified a single compounding pharmacy that would be willing and able to

produce and sell compounded pentobarbital to the State for use in executions. Nor do they allege or offer any proof of a willing supplier for any of their other proposed alternatives—save the sevoflurane gas option. The fact that the Prisoners could only find *one* supplier for *one* of their five proposed alternative execution methods underscores the reality that their claimed "alternatives" truly are *not* available to the ADC, and shows that they have not satisfied their burden of pleading and proving available alternatives under *Glossip*.

In addition, with respect to several of their proposed alternatives (the proposed two-drug protocol, anesthetic gas, and nitrogen hypoxia), the Prisoners do not and cannot allege that they have ***ever been authorized and used anywhere in the world*** as a method of execution. In fact, the Prisoners' own allegations underscore the experimental nature of their claims rather than establish that these methods are "known" and "available" as required by *Baze* and *Glossip*. The skepticism of proposed alternatives that have never been authorized and used in Arkansas is only heightened when evaluating proposed alternatives that have never been authorized or used anywhere in the world. Indeed, because such methods have never been used anywhere in the nation (or perhaps the world) as execution methods, they are not "known alternatives," nor can they be considered readily available. When combined with the flimsy nature of the Prisoners' allegations, such alternatives cannot meet the second prong of the *Glossip* test as a matter of law. *See Johnson*, 2016 Ark. 268, at 20, 496 S.W.3d at 360.

As shown, despite filing their midazolam claim in three different courts and amending their claims multiple times, the Prisoners still fail to substantiate their conclusory and speculative allegations and, therefore, have not made the required clear and rigorous showing of likelihood of success on their method-of-execution claim based on the use of midazolam. In addition, the Prisoners fail to adduce any evidence showing that the use of these experimental alternative drugs or methods would pose "significantly" less risk of severe harm to the Prisoners. Any form of execution undoubtedly poses some risk of harm or pain, and there is nothing in the Complaint or the preliminary-injunction motion to show that the risk to the Prisoners is "significantly" less under their proposals as compared to the protocol adopted by the ADC under Act 1096. Because their proposed methods are either completely untested or unavailable to ADC, their allegations (and proof) in this regard are speculative and fail to support a claim. *See Baze v. Rees*, 553 U.S. 35, 50-53 (2008); *Zink v. Lombardi*, 783 F.3d 1089, 1100-03 (8th Cir. 2015); *Nooner v. Norris*, 594 F.3d 592, 599 (8th Cir. 2010); *Clemons v. Crawford*, 585 F.3d 1119, 1125-27 (8th Cir. 2009); *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009); *Taylor v. Crawford,* 487 F.3d 1072, 1080 (8th Cir. 2007).

b. The Prisoners have not made a clear and rigorous showing that midazolam is sure or very likely to cause needless suffering.

The Prisoners' midazolam claim also fails because they cannot prove the second essential element of a method-of-execution claim under *Glossip*: that the State's midazolam protocol is sure or very likely to cause needless suffering. The

central issue here is whether midazolam has the ability to sedate a person so deeply that he enters a state of anesthesia, making him insensate to the painful stimuli caused by the administration of the second and third drugs in the ADC's lethal injection protocol. The State has adduced evidence from two qualified experts—board-certified anesthesiologist Joseph F. Antognini, M.D., M.B.A., and clinical pharmacologist and toxicologist Daniel Buffington—that midazolam is sure or very likely to work exactly as intended in Arkansas's protocol. **(Exs. 3 & 4)**

According to the leading treatise on pharmacology, midazolam belongs to the benzodiazepine class of drugs which affect the central nervous system ("CNS"), causing "sedation, hypnosis, decreased anxiety, muscle relaxation, anterograde amnesia, and anticonvulsant activity." Laurence L. Brunton et al., *Goodman & Gilman's The Pharmacological Basis of Therapeutics* 402 (11th ed. 2006) (chapter by Dennis S. Charney et al.). The student textbook ***authored by the Prisoners' own expert witness in this case***, Dr. Craig Stevens, explains that benzodiazepines are a class of drugs that, generally speaking, produce anesthesia: "The benzodiazepines produce a dose-dependent but limited depression of the CNS. Lower doses have a sedative and anxiolytic effect, whereas ***higher doses produce*** hypnosis (sleep) and ***anesthesia***." George M. Brenner and Craig W. Stevens, *Pharmacology* 192 (4th ed. 2013) (emphasis added) **(Ex. 5)**; *see also id.* at Figure 19-3 ("Benzodiazepines exhibit a ceiling effect, which precludes severe CNS depression after ***oral***

administration of these drugs. ***Intravenous administration of benzodiazepines can produce anesthesia*** *and mild respiratory depression*.") (emphasis added).[14]

Midazolam is a particularly potent and fast-acting benzodiazepine that was specifically developed as an "anesthetic agent." Sze-Chuh Cheng & Edward Brunner, *Inhibition of GABA Metabolism in Rat Brain Synaptosomes by Midazolam,* 55 *Anesthesiology* 41, 41 (1981). As explained in the leading pharmacology treatise, midazolam can produce surgical anesthesia, coma, and even fatal intoxication at very high doses.[15] Brunton et al., *supra*, at 401. The textbook authored by Plaintiff's expert witness is in agreement. Brenner & Stevens, *supra*, at 189, tbl. 19-1 (listing midazolam's major clinical use as "anesthesia") **(Ex. 5)**. Importantly, midazolam has been approved by the FDA for the induction of general anesthesia, and the FDA-approved package insert for midazolam warns that the potential side effects of an excessive dose include profound cardiorespiratory depression, cardiac arrest, coma, and death. **(Ex. 6)**

Not only do the scientific literature and the FDA-approved drug information establish the efficacy of midazolam for use for anesthesia, experts on both sides of death penalty litigation have given sworn testimony that a 500-milligram intravenous dose of midazolam is sufficient to render an individual unconscious and

[14] Figure 19-3 of Professor Stevens's textbook appears in his expert report in this case. Compl. Ex. 16 at 8. However, the textbook's unequivocal statement that benzodiazepines can produce anesthesia and respiratory depression if administered intravenously was replaced in the litigation report with a new statement that a plateau is reached "before reliable general anesthesia is obtained." *Id.*

[15] The doses reported in the literature are much lower than the 500 mg dose used in Arkansas's lethal-injection protocol.

insensate to pain. *See* Antognini Decl. ¶ 10(a) **(Ex. 3)**; Buffington Decl. ¶ 6 **(Ex. 4)**; *see also Glossip*, 135 S. Ct. at 2742 (crediting the testimony of Dr. Lee Evans, a doctor of pharmacy and Dean of the Auburn University School of Pharmacy, who testified that a 500 mg dose of midazolam will render a condemned prisoner unconscious and "***insensate during the remainder of the procedure***," that fatalities have occurred at much smaller doses, and explaining that another expert witness for the inmates, doctor of pharmacy Larry Sasich (who has also previously been retained by the Prisoners in this case but has since apparently been fired) testified that, as the dose of midazolam increases, it is "expected to produce sedation, amnesia, and finally ***lack of response to stimuli such as pain***" and that even low doses of midazolam are sufficient to induce unconsciousness) (emphasis added); Testimony of Mark Dershwitz, MD, PhD **(Ex. 8)** (testimony of practicing anesthesiologist, pharmacologist, and professor at the University of Massachusetts Medical School that 500 mg of midazolam "is far more than necessary to induce unconsciousness, or a state of general anesthesia, on any human. . . meaning that they could not perceive or process any sort of noxious stimuli"); Testimony of Mark Heath, MD **(Ex. 11)** (inmate expert testifying that midazolam in very high doses "will completely ablate—completely destroy—consciousness," and that a 500 mg dose of midazolam is "much larger than a dose that is needed to produce unconsciousness" and "will with certainty produce death"). Midazolam is so reliable at rendering persons unconscious and insensate to noxious stimuli that Dr. Dershwitz and other anesthesiologists have used it as the

anesthetic agent for significant, lengthy surgeries such as neurosurgery. **(Ex. 8)** The State also offered testimony of Dr. Dershwitz that a dose of 25-30 mg would render a person completely unconscious and unable to consciously process any noxious stimuli; in fact, voluntary breathing stops after a dose of 25-30 mg. **(Ex. 8; *see also* Exs. 9-10** (including additional opinions of Dr. Dershwitz to rebut the Prisoners' allegations in this case).

While the Prisoners' expert, Dr. Stevens, has now changed his tune in his litigation report and contradicts his own textbook with regard to midazolam's ability to reliably induce a state of general anesthesia, and the Prisoners offer another so-called "expert" opinion that lacks any support whatsoever (Compl. Ex. 17), no reasonable fact finder could credit their made-for-litigation theories because they are contrary to the FDA-approved label; they are not supported by any study of humans (or, for that matter, intact animals); they have been rejected in the record testimony of three anesthesiologists and two doctors of pharmacy; and they go against the leading treatise on pharmacology as well as Professor Stevens's own textbook. Given the overwhelming evidence that a 500 mg dose of midazolam would, at a minimum, render a person unconscious and insensate to pain (if not induce coma and death), this Court cannot possibly conclude that the Prisoners have made the required clear and rigorous showing required to support their stay request.

The Arkansas General Assembly is not without discretion in this area, so long as its choice does not violate the constitutional standard. Permitting a cruel-and-unusual punishment claim to go forward in the face of overwhelming evidence

in favor of the State would threaten to transform courts into "boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51. "Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." *Id*.

c. Midazolam protocols have been upheld by numerous courts, including the United States Supreme Court and the Arkansas Supreme Court.

Both the United States Supreme Court and the Arkansas Supreme Court have upheld the use of the same midazolam protocol as Arkansas's in the face of cruel-and-unusual-punishment challenges. The Oklahoma protocol that was approved by the United States Supreme Court in *Glossip* calls for the administration of the same three drugs as in Arkansas. *Glossip*, 135 S. Ct. at 2734-35. In *Glossip*, the Supreme Court affirmed factual findings by the federal district court, after a three-day evidentiary hearing, that a 500-milligram dose of midazolam (the same dose employed in the ADC protocol) "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs," and that "a 500-milligram dose alone would likely cause death by

respiratory arrest within 30 minutes or an hour." *Id.* at 2736. In doing so, the Supreme Court rejected the prisoners' argument, like the Prisoners' allegations here, that midazolam has a "ceiling effect" after which an increase in the dose administered will not have any greater effect on the inmate. *Id.* at 2740-41 (noting that the prisoners' own experts acknowledged that the ability of midazolam to render a person insensate to the second and third drugs "has not been subjected to scientific testing" and that "there is no scientific literature addressing the use of midazolam as a manner to administer lethal injections in humans").

The Supreme Court reiterated in *Glossip* that, "[w]hen a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain." *Id.* at 2741. "Here, petitioners' own experts effectively conceded that they lacked evidence to prove their case beyond dispute." *Id.* Moreover, the Supreme Court explained that the safeguards adopted by Oklahoma to ensure that midazolam was properly administered (confirming viability of two IV access sites and monitoring the offender's level of consciousness significantly reduced the risk that the protocol violated the Eighth Amendment. *Id.* at 2742. The same safeguards appear in Arkansas's protocol. Compl. Ex. 1.

Under *Glossip* and *Johnson*, Claim III fails to state a claim concerning the midazolam protocol and is barred by sovereign immunity. The United States Supreme Court has recently rejected death-row inmates' last-ditch efforts to overrule *Glossip*. *See, e.g.*, *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (denying petition

for writ of certiorari to reconsider constitutionality of three-drug midazolam protocol). And numerous other courts have likewise upheld the same three-drug midazolam protocol used in Arkansas. *See, e.g.*, *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015) (upholding a state's three-drug protocol with midazolam); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1269 (11th Cir. 2014) (same); *Banks v. State*, 150 So. 3d 797, 800-01 (Fla. 2014) (same); *Howell v. State*, 133 So. 3d 511, 518-22 (Fla. 2014) (same); *Muhammad v. State*, 132 So. 3d 176, 196-97 (Fla. 2013) (same). The Prisoners simply cannot make the required clear and rigorous showing that they are likely to succeed on the merits of their midazolam claim when the State is using the very same protocol as the one upheld by the United States Supreme Court in *Glossip,* by the Arkansas Supreme Court in *Johnson*, and by numerous other courts.

D. The Prisoners are not likely to succeed on the merits of their claim that the ADC's lethal-injection procedure violates the Eighth Amendment (Claim IV, Complaint ¶¶ 119-159).

In Count IV, the Prisoners claim that various other parts of the ADC's 2015 lethal-injection procedure (besides its use of midazolam) violate the Eighth Amendment, including parts of the procedure related to execution team qualifications, consciousness-check procedures, the absence of a resuscitation plan/equipment, IV setting, drug storage, drug preparation, and drug-pushing procedures, viewing procedures, documentation procedures, and more. Claim IV is fatally flawed for three reasons. First, it is time-barred. Second, it is barred by *res judicata* and collateral estoppel. And third, it fails to state a viable cruelty claim

because it is utterly speculative in nature and depends on a faulty assumption of future negligence by ADC staff. For each of these reasons, Claim IV provides no basis for preliminary injunctive relief.

1. The Prisoners' protocol claims are time-barred.

First, all of the Prisoners' protocol-related claims are barred by the statute of limitations. Section 1983 claims are tort actions and are governed by the statute of limitations applicable to personal injury actions in the state where the Section 1983 action is brought. *Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992); *Miller v. Norris*, 247 F.3d 736 (8th Cir. 2001). Arkansas has a three-year statute of limitations for personal injury actions. Ark. Code Ann. § 16-56-105(3); *Ketchum*, 974 F.2d at 82. Thus, 42 U.S.C. § 1983 actions filed in Arkansas are limited to a three-year limitations period. Similarly, challenges to a state's method of execution are subject to the limitations period applicable to constitutional challenges brought pursuant to 42 U.S.C. § 1983. *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008). The limitations period begins to run on the date the state review is complete or the date on which the prisoner becomes subject to a new or substantially changed execution protocol, whichever occurs later. *Wellons v. Comm'r, Ga Dept. of Corr.*, 754 F.3d 1260, 1263-65 (11th Cir. 2014); *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

"Of course, a claim that accrues by virtue of a substantial change in a state's execution protocol is limited to the particular part of the protocol that changed." *Gissendaner v. Commr., Georgia Dept. of Corrections,* 779 F.3d 1275, 1280–81 (11th

Cir. 2015), *cert. denied sub nom*. *Gissendaner v. Bryson*, 135 S. Ct. 1580 (2015). "In other words, a substantial change to one aspect of a state's execution protocol does not allow a prisoner whose complaint would otherwise be time-barred to make a 'wholesale challenge' to the State's protocol." *Gissendaner*, 779 F.3d at 1281. Citing decisions from the Eleventh, Fifth, and Sixth Circuits, the Eighth Circuit has explained that lethal-injection claims are time barred where they could have been asserted against any past lethal-injection protocol, not just a recently-modified one. *Bucklew v. Lombardi*, 783 F.3d 1120, 1128-29 (8th Cir. 2015) (citing *Wellons v. Comm'r, Ga. Dep't of Corr*., 754 F.3d 1260, 1263–64 (11th Cir.2014); *Walker v. Epps*, 550 F.3d 407 (5th Cir.2008), *cert. denied*, 558 U.S. 829 (2009); *Cooey v. Strickland*, 479 F.3d 412, 416–24 (6th Cir.2007), *cert. denied*, 553 U.S. 1014, 1006 (2008)).

The Eighth Circuit's observations in *Bucklew* are compelling here. Not only could the Prisoners have asserted their challenges to the ADC's lethal-injection procedures nearly a decade ago (*see* Compl. Ex. 11)—they actually did so in *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010). The Prisoners have been aware of the provisions of the protocol they now challenge since at least 2008—i.e., training requirements, staff qualifications, consciousness checks, IV protocols, drug-pushing protocols, the procedure for opening the curtain between the execution chamber and the witness room, etc.—and they actually litigated most of those issues in *Nooner*. *See Nooner*, 594 F.3d 592; *see also* Pls.' Compl. Ex. 11 (reproducing the entire 2008 Administrative Directive regarding execution procedures). Plaintiffs' conclusory

challenges to staffing, personnel, training, anesthetic depth, and drug storage could have been asserted against the 2008 "lethal injection protocol, not just the modified protocol adopted in [2015]." *Bucklew v. Lombardi*, 783 F.3d at 1129.

The ADC's 2015 procedures in these areas are virtually identical to the 2008 procedures. *Compare* Pls.' Compl. Ex. 1 *with* Pls.' Compl. Ex. 11. Under both procedures, the ADC Director is responsible for determining the policies and procedures to be followed in carrying out lethal-injection executions. In both the 2008 and the 2015 procedures, the ADC's Deputy Director for Health and Correctional Programs—who must be healthcare trained and experienced in establishing and monitoring IVs, the mixing of chemicals, and assessing consciousness—is responsible for supervising executions. *See Nooner*, 594 F.3d at 597. The procedures for mixing lethal chemicals and labeling of syringes are very similar. The requirement to establish two independent IV infusion sites is present in both the 2008 and the 2015 procedures. The IV team qualifications are the same. Both procedures require a medically-acceptable determination that the inmate is completely unconscious before administering the (potentially painful) second and third drugs in the protocol. Because the Prisoners' Eighth-Amendment challenges to the 2015 procedure could have been (and actually were) asserted against the ADC's 2008 procedure, they are time-barred and must be dismissed with prejudice.

2. The Prisoners' protocol claims are barred by res judicata *and collateral estoppel.*

The Prisoners' protocol claims are barred for a second reason, as well. They now bring the same legal challenges to the ADC's procedures that were or could

have been adjudicated on the merits in prior lawsuits involving the same parties or their privies. *See Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010); *see also Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707 (2015) (rejecting federal and state constitutional challenges to the ADC's procedures regarding the selection, training, and qualifications of members of the execution team and the method by which the drugs would be injected). As a result, they are barred by *res judicata* and collateral estoppel just like the midazolam claim discussed in the preceding section.

3. The Prisoners' protocol claims are too speculative to support an Eighth-Amendment violation.

Third, as discussed in Part I.B(3) *supra*, the Prisoners' claims that that ADC might commit negligence in the future and fail to properly follow the protocol as written, which would then result in unconstitutional suffering, are entirely speculative and fail to state a claim. As explained above, merely suggesting a slightly or marginally safer alternative to a State's lethal-injection protocol also does not create an actionable Eighth-Amendment claim. *Baze*, 553 U.S. at 50. Permitting Eighth-Amendment violations on this ground would transform courts into "boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51. This "best practices" approach is not grounded in any precedent, including from the United States Supreme Court. *See Baze*, 553 U.S. at 51. Further, as noted above, it would necessarily "embroil courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role

that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." *Baze*, 553 U.S. at 51.

Since the Supreme Court's decision in *Baze*, the Eighth Circuit has repeatedly held that "[t]he mere fact 'an execution method may result in pain, either by accident or as an inescapable consequence of death,' does not amount to an Eighth Amendment violation." *Nooner v. Norris*, 594 F.3d 592, 599 (8th Cir. 2010) (citing *Clemons v. Crawford*, 585 F.3d 1119, 1125 (8th Cir. 2009); *Zink v. Lombardi*, 783 F.3d 1089, 1100 (8th Cir. 2015) (speculation is insufficient to state an Eighth Amendment claim and even accepting as true the hypotheticals presented in prisoners' amended complaint would amount to no more than an isolated mishap, which does not give rise to an Eighth Amendment violation). Like the *Baze* court, the Eighth Circuit relies on the ADC's written protocol to determine whether an Eighth Amendment violation exists. *Nooner*, 594 F.3d at 601. Because the ADC's written protocol is constitutional on its face, then allegations of risks of accidents or isolated mishaps are not relevant to the court's constitutional analysis. *Nooner*, 594 F.3d at 601-02 (relying on and quoting *Baze*).

Even where prisoners point to numerous opportunities for error under a prison's lethal-injection protocol, courts hold that these risks do not establish an Eighth-Amendment violation. *See Baze*, 553 U.S. at 53. In *Baze*, the Supreme Court rejected the prisoners' claims that the (1) potential for inadequate dosing of the lethal drug; (2) risk of improper mixing; (3) possibility of IV failure; and (4) lack of adequate training and means for monitoring anesthetic depth established a

sufficiently substantial risk of harm. 553 U.S. at 53-54. The Court agreed that compliance with the manufacturer's instructions for reconstituting and mixing, the protocol's requirement that the IV Team have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman, the requirement that a backup line be established prior to the administration of the drugs, and monitoring of the process by the warden and deputy warden negated the prisoners' allegations of substantial or imminent risk sufficient to establish an Eighth Amendment violation. *Baze*, 553 U.S. at 54-56. Those same procedural safeguards are included in Arkansas's protocol (Compl. Ex. 1), and so the Prisoners have no viable Eighth-Amendment claim based on the current protocol. *See id.*; *see also Taylor v. Crawford*, 487 F.3d 1072, 1083 (8th Cir. 2007) (concluding that Missouri's written protocol was constitutional on its face and that requiring the state to engage a physician trained in administration of anesthesia, purchase equipment to monitor anesthetic depth, maintain specific court-ordered record-keeping practices, and hire a supervising physician was not required under the Eighth Amendment).

Indeed, not even allegations and evidence related to past allegedly "botched" executions, not undertaken under the protocol at issue, can establish that Arkansas's current lethal-injection protocol creates a substantial risk of serious harm. *See Nooner v. Norris*, 594 F.3d 592. In *Nooner*, the plaintiffs[16] alleged that the ADC "botched" four previous executions because the prisoners showed signs of

[16] The *Nooner* plaintiffs are also plaintiffs in this cause of action, including Terrick Terrell Nooner, Don William Davis, and Jack Harold Jones, Jr.

consciousness within three minutes of being injected with the first drug. 594 F.3d at 601. Relying on the holding in *Taylor v. Crawford*, the court restated the rule that the current protocol *as written* is the focus of any constitutional inquiry. *Nooner,* 594 F.3d at 601-02. Focusing next on *Baze v. Rees*, the Eighth Circuit reiterated that an isolated mishap does not give rise to an Eighth-Amendment violation. *Id.* at 602 (citing *Baze, supra*). "[A]ny risk that [Arkansas's lethal-injection] procedure will not work as designated . . . is merely a risk of accident, which is insignificant in our constitutional analysis," the Eighth Circuit held. *Id.* at 603 (citing *Taylor*, 487 F.3d at 1080). The *Nooner* court likewise disposed of the plaintiffs' other allegations of "risks" associated with the State's lethal-injection protocol, again concluding that the written protocol sufficiently overcame the inmate's Eighth-Amendment challenge. *See id.* at 603-08 (holding that the written protocol sufficiently satisfies requirements for training and qualifications members of the IV and execution team, provides adequate safeguards against the unnecessary infliction of pain during IV establishment through the use of a local anesthetic, provides for monitoring of the IV infusion sites, and requires consciousness determination and back up doses of the first chemical before additional chemicals are injected). The Eighth Circuit will not, absent supporting factual allegations, infer that a State will disregard its own lethal injection protocol. *See Clemons v. Crawford*, 585 F.3d 1119, 1128 (8th Cir. 2009).

The State has adduced evidence establishing that the ADC's lethal-injection procedures contain adequate safeguards to minimize any risk of error. Director

Wendy Kelley's affidavit establishes that ADC and other departments of correction have conducted multiple double and triple executions in close succession on numerous occasions; ADC staff has undergone weeks of preparation for the upcoming executions; the IV team and backup team are qualified and trained medical professionals; a debriefing with mental-health professionals is conducted with all participants and contingency plans are made for participants determining they cannot or do not want to proceed following each execution; and that the protocol ensures that the condemned inmate is unconscious through the application of medically-appropriate graded stimuli before the administration of the second and third drugs; and that two people with medical training will simultaneously closely monitor the infusion site for evidence of infiltrate, vein collapse, or other problems. **(Ex. 1, ¶¶ 14-17, 33-34, 36, 38-39, 41-44)** Similarly, former ADC Director Larry B. Norris, who is a former nurse and phlebotomist and was responsible for carrying out the last 25 executions in Arkansas, has testified about weeks and weeks of preparation that go into an execution night, and the fact that the pre-execution preparations are the same whether there is one or more than one execution scheduled in a given night or week. **(Ex. 2, ¶¶ 1, 3-4, 13-14, 19-20)** He also stated that, based on his considerable experience, the current execution schedule will not increase the risk of error for the members of the IV team because they are trained medical professionals who are used to working under stressful conditions. **(Ex. 2, ¶¶ 27-28)**

Moreover, the constitution does not mandate the "use of execution procedures that may be medically optimal in clinical contexts." *Taylor v. Crawford*, 487 F.3d at 1084. "For exceedingly practical reasons, no State can carry out an execution in the same manner that a hospital monitors an operation." *Id.* Constitutional standards do not require physicians to become executioners, and prisoners have no right to execution by physician. *See id.* Accordingly, the State has broad discretion to determine the procedures for conducting an execution. *Id*. at 1084.

E. The Prisoners' claim that the combined effect of the midazolam protocol and the execution schedule violate the Eighth Amendment (Claim V, Complaint ¶¶ 160-165) is utterly speculative and fails to state a claim.

Just like Claim IV, Claim V is utterly speculative and cannot state a cognizable Eighth-Amendment claim. It fails for all of the same reasons discussed in Part I.D, *supra.* In addition, the Prisoners' attempt to compound three purported "risks"—by claiming that the allegedly "compressed schedule" will somehow add to the risk inherent in the use of midazolam and the other risks inherent in the ADC's other procedures—is nonsensical. If their midazolam claim is correct (which it is not, *see supra* Part I.C), then any potential for personnel or procedural error adds nothing of constitutional significance because even if everything went exactly as planned, there would still be a constitutional violation. Conversely, if the risk of execution team error is relevant, that would only be because properly used midazolam would acceptably perform its intended function.[17] To put it another

[17] Likewise, if the midazolam claim is barred as the State asserts, then it cannot be used to bolster the inherently speculative scheduling claim.

way, the perceived risks included in Claim V are mutually exclusive, and cannot possibly be combined in some sort of multiplier fashion to turn a constitutionally-acceptable risk into a clear violation. In short, this claim is based on rank speculation of drug failure on top of rank speculation of anticipated future negligence by ADC staff. And even if it wasn't speculative, it fails as a matter of law because the Eighth Amendment is not violated by an accident or maladministration of the protocol. *See supra* Part I.B.3.

F. The Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of Claims VI and VII (Complaint ¶¶ 166-181) because the ADC's policies do not violate the Prisoners' right of access to the courts or right to counsel.

In Claims VI and VII, the Prisoners essentially complain that because ADC's policy permits only one lawyer to witness each execution on behalf of the Prisoner to be executed, and because the Prisoner's lawyer, like every other execution witness pursuant to state law, is not permitted to bring a cell phone with recording capabilities into the witness room, the Prisoners' right to access the courts (Claim VI) and right to counsel (Claim VII) will somehow be violated during the executions.[18] But the ADC's neutral policy is not a *per se* violation of either

[18] The Prisoners contend that their attorneys are presented with a Hobson's choice of either declining to view an execution and having access to a phone, or viewing an execution and having no access to a phone (Complaint, ¶ 169)—and that the only remedy to ensure adequate access to the courts is "to have at least two attorneys present at the viewing." *Id.*, ¶ 172. The Prisoners contend further that to protect their right to counsel, they need two attorneys present at the executions—"one who can respond to any problems that arise, and one who can continue making a record of the execution." *Id.*, ¶ 178. The Prisoners contend that if only one attorney is allowed to witness an execution, that Prisoner's right to access the

constitutional right even as the policy is characterized by the Prisoners. As a threshold matter, these claims are time barred because the ADC's witness and technology policies have not changed since at least 2008 (*see* Complaint Ex. 11). But even if the Court believes that the Prisoners may bring a claim seeking to compel the ADC to allow greater access to a phone (without recording capability), or to permit a second lawyer to witness each execution on behalf of the Prisoner to be executed, or otherwise, the Court can order the ADC to adjust its policy. Claims VI and VII cannot, however, form the basis of any stay of execution or alteration of the execution schedule. And in any event, for the reason explained below, the Prisoners have not and cannot make a clear and rigorous showing of likelihood of success on these claims, and the ADC has already clarified its policy to alleviate the Prisoners' concerns, so a preliminary injunction is unwarranted.

The Prisoners' right-to-access-the-courts claim (Claim VI) fails as a matter of law because the Prisoners' constitutional right to access the courts does not turn on whether the Prisoners are permitted to have counsel witness their executions, or whether counsel is permitted access to a phone during executions, or any other matter complained about in Claims VI and VII. It is, of course, well-established that prisoners have a constitutional right of access to the courts. *Bounds v. Smith,* 430 U.S. 817, 821 (1977). To meet constitutional muster, a prisoner's access to the

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courts will be offended by the policy preventing that attorney from accessing a phone. *Id*., ¶ 179. And the Prisoners contend that the policy prohibiting a witnessing attorney from "seeing and hearing the full execution process" infringes the Prisoner's right to counsel because the IV is set out of view of witnesses and because the witnesses do not have access to audio of the execution. *Id*., ¶ 180.

courts must be "adequate, effective, and meaningful." *Id.* But *Bounds* "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. 343, 356 (1996). Conceptually, this right does not turn on any other event such as an execution—rather, it is simply a right to the "capability" of bringing a contemplated claim in court. The Prisoners in this case clearly have that capability through their lawyers (who have plainly already contemplated numerous claims on behalf of their clients)—ADC's policies governing executions do not bar access to courts for the Prisoners' attorneys. Claim VI fails at the outset for this reason alone.

Similarly, as a threshold matter, the Prisoners' right to counsel (Claim VII) is discrete and limited, not boundless in scope and number as the Prisoners seem to believe. The Prisoners in this case have counsel (as discussed above, many if not all of them have multiple attorneys representing them). Although the right to counsel may include a right to have *some* meaningful attorney-client contact leading up to an execution and may include a right to have *an* attorney witness the execution, ADC's policy permits each Prisoner to have access to counsel on the day of the execution and permits an attorney for each Prisoner to witness each execution (and additional provisions have been made to allow a second attorney for each Prisoner in the warden's office during each execution, *infra*). The Prisoners demand more—that they be permitted to have *multiple* attorneys present to witness each execution, that the witnessing attorneys be permitted phone access, and so on. But there is no

constitutional imperative in the conceptual right to counsel that requires satisfaction of these demands. Claims VI and VII fail as a matter of law because the Prisoners have failed to state a claim for violation of their rights to access the courts or to counsel.

If the Court considers Claims VI and VII any further, the claims should be analyzed under *Turner v. Safley*, 482 U.S. 78 (1987), which sets forth the appropriate standard for review of prison policies. The *Turner* factors include: (1) whether there exists a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prisoners; (3) the impact accommodation of the asserted constitutional right will have on guards and other prisoners, and on the allocation of prison resources generally; and (4) the absence of ready alternatives is evidence of the reasonableness of a prison regulation. *Id.* at 89-91. Analyzed under the *Turner* factors, the Prisoners' allegations in Claims VI and VII and evidence offered in support of those claims fail to make a clear and rigorous showing that the Prisoners are likely to succeed on the merits of these claims.

The Court does not need evidence to conceive the legitimate government interests—which are actually codified by statute in Ark. Code Ann. § 16-90-502—served by the ADC's prohibition of phones and other devices with recording technology, as well as the ADC's limitations on the number of witnesses to an execution, including attorneys representing the Prisoner to be executed. Arkansas

has made a valid policy choice in Ark. Code Ann. § 16-90-502 to limit execution witnesses to one attorney per inmate and to prohibit audio and video recordings of executions, and ADC's lethal-injection policy is consistent with (and actually required by) state law. The Prisoners have failed to advance any legitimate reason why the Court should second-guess this State policy. *See*, *e.g.*, *Entertainment Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1017-18 (S.D. Ind. 2001) (noting various legitimate interests furthered by prison policy prohibiting recording or broadcasting of executions and holding that "[w]hatever First Amendment protection exists for viewing executions, it is not violated by the [prison's] explicit regulation against recording or broadcasting them to the public"). First, the ADC's policy is validly and rationally connected to maintaining security in the prison setting. Second, the policy promotes the government's interest in not sensationalizing executions or dehumanizing condemned prisoners set to be executed—an interest likely shared by the Prisoners and their families. Third, the policy preserves the solemnity of executions—another interest that is likely shared by the Prisoners and their families. Fourth, the recording prohibition protects the privacy and dignity of the condemned prisoner—an interest that is again likely shared by the Prisoners and their families—and also protects the privacy and dignity of victims and their families who are witnessing executions as well as the persons who carry out the executions. Of course, limitations on the number of witnesses and what portions of executions may be witnessed promote many of the same interests as the prohibition on recording devices.

The other *Turner* factors also militate in favor of the ADC. As explained above, the Prisoners don't have a cognizable right to exercise—actually, the Prisoners' alternative means of exercising their right to counsel and right to access the courts *is* their means of exercising those rights—so the second *Turner* factor militates in the ADC's favor. Allowing the Prisoners to bring two or more lawyers to witness executions would violate Ark. Code Ann. § 16-90-502(e)(1)(E) and strain the ADC's limited space in the witness room, and allowing those lawyers to bring recording devices would not only violate the statutory prohibition on recording devices in the witness room under Ark. Code Ann. § 16-90-502(e)(5)(C), but also obliterate the State's legitimate interests in not sensationalizing executions, not dehumanizing condemned prisoners, preserving the solemnity of executions, and protecting the privacy and dignity of the condemned prisoners and their families, the victims and their families, and the persons who carry out the executions—so the third *Turner* factor militates in the ADC's favor. Only the fourth *Turner* factor—available alternatives—is debatable, and the ADC submits that *at most*, the Court should allow the Prisoners' counsel to have access to a landline. But as demonstrated below, the evidence shows that the Prisoners' counsel *will* have access to a landline (and fax machine), so an injunction is unnecessary.

In *Grayson v. Warden*, 2016 WL 7118393 (11th Cir. Dec. 7, 2016), the Eleventh Circuit upheld Alabama's policy prohibiting witnesses, including counsel for the condemned prisoner, from having cell phone *or landline* access during execution of a condemned prisoner. The Court of Appeals noted that the condemned

prisoner who claimed that the policy infringed his right to access the courts was unlikely to succeed on the merits because he did not cite, and the court did not find, "any precedent suggesting that Alabama's policy prohibiting witnesses from having cell phone or landline access infringes on the First, Eighth, or Fourteenth Amendments." *Id*. at *8. The court also found that "to state a valid right-of-access claim, [the prisoner] would have to establish an actual injury"—but the "request for access to a cell phone or landline is based on the possibility that something might go wrong during his execution, which does not qualify as an 'actual injury.'" *Id*. The Court should adopt the reasoning of the Eleventh Circuit and decline grant an injunction under Claim VI.

In *Cooey v. Strickland*, 2011 WL 320166 (S.D. Ohio Jan. 28, 2011), the district court considered numerous challenges against Ohio's execution policy and resolved two claims relevant to this case. First, the court concluded that the policy allowing a condemned prisoner to designate three witnesses for his own execution but requiring him to use one of those designations if he wished to have his execution witnessed by his attorney did *not* violate the condemned prisoner's right to counsel. *Id*. at *5-7. The court held that "the fact that an inmate can have counsel present to witness an execution only if the inmate designates counsel as one of the three permissible witnesses" did *not* run afoul of the Constitution. *Id*. at *5. "A system that requires an inmate to forego one layperson witness in order to have counsel present in no way functions as an infringement on any right to counsel or effectuates any preclusive effect of constitutional import." *Id*. at *6. Notably, the

district court's entire discussion of the condemned prisoner's right to counsel in *Cooey v. Strickland* consistently refers to counsel in the singular—there is no suggestion that the condemned prisoner might possibly need or be entitled to have *multiple* attorneys present to witness his execution as the Prisoners seek in this case. The Court should decline to grant an injunction under Claim VII.

The *Cooey* district court also addressed a challenge against the prison's policy prohibiting access to cell phones *and* landlines. 2011 WL 320166 at *12. The policy "provide[d] an inmate's counsel only with access to an office containing a telephone located in a separate building from the execution building." *Id.* The court noted that the prison's rationale for the prohibition was "purported security concerns" and that "prophylactic policy judgments, and even remote security concerns can nonetheless pass muster as constitutionally reasonably justifications necessitating alternative reasonable accommodations." *Id.* And although it was "less than clear how security concerns might reach counsel's use of an institution phone located in the execution building itself," the condemned inmate failed to direct the court "to any controlling authority supporting the propositions that the Constitution compels that counsel be permitted to bring a cell phone or personal computer into the building in which the execution takes place or that counsel be afforded the use of a telephone located in that specific building." *Id.* The court found it unnecessary to rule on the merits of the constitutional claim, however, because the record supported the fact that "the unwritten custom and practices surrounding the protocol" afforded counsel with access to a landline in the execution building. *Id.*

Again, if the Court is concerned by the ADC's policy in this case, the Court can simply direct the ADC to allow the Prisoners' attorneys to access a landline in the execution building—but as explained below, the ADC has already clarified its policies to alleviate the Prisoners' concerns in Counts VI and VII, as in *Cooey*.

On April 3, 2017, ADC's Chief Counsel James DePriest wrote to counsel for the Prisoners and provided a copy of the ADC's execution protocol (which the Prisoners challenge in Counts VI and VII). *See* Defendants' Exhibit 16. In his letter, Mr. DePriest explained that although "[m]uch of the information remain[ed] unchanged," the ADC "made provisions for the second legal counsel for the inmate [to be executed]." *Id.* "At the request of the inmate, such additional counsel will be allowed to enter the Cummins Unit and remain in the Deputy Warden's office for the duration of the execution." *Id.* Moreover, the ADC has provided the Prisoners' counsel with "the phone numbers for inbound and outbound calls and faxes from the Deputy Warden's office" and has taken steps to "assure that those lines are available to counsel for the inmate for any communication which such counsel may deem necessary." *Id.* Accordingly, as of the April 3 clarification by ADC's Chief Counsel, each Prisoner will be permitted to have one attorney view the execution in the witness room and *a second attorney* in the warden's office *with access to a telephone and fax machine* for the duration of each execution. The Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of their claims about access to courts and counsel.

ADC Director Kelley's affidavit confirms the fact that the ADC has already clarified its execution-day policy to resolve the Prisoners' concerns about counsel and phone access—and her affidavit goes even farther than the letter from ADC's Chief Counsel. "ADC has informed the Prisoners' counsel that, on the date of execution, one legal counsel for the inmate will be allowed to visit the inmate at the holding cell" and "[t]he time of visitation is not limited except for specified inmate activities such as showering or eating." Defendants' Exhibit 1, ¶ 45. The Prisoner's counsel may remain with the Prisoner at the holding cell until the Prisoner is escorted to the execution chamber, at which time, counsel may choose to be escorted to the witness room, the warden's office, or the visitation center through completion of the execution. *Id*., ¶ 46. At the request of the inmate, an *additional* legal counsel will be allowed to enter the unit and remain in the warden's office during the execution. *Id*., ¶ 48. Although state law prohibits anyone from making an audio or video recording of an execution and the ADC has never allowed anyone to bring cell phones or other devices with recording capabilities to witness executions (*id*., ¶¶ 49-50), the ADC will make available *two* outbound phone lines for the use of counsel who visits the Prisoner in the holding cell, and inbound and outbound phone lines and an inbound and outbound fax line for the use of (additional) counsel who chooses to be in the warden's office for the execution. *Id*., ¶ 51. And, the counsel who chooses to be in the warden's office for the execution will be permitted to bring a laptop computer to the warden's office. *Id*., ¶ 52.

The Court should hold that the ADC's policies applicable during executions do not violate the Prisoners' right to counsel or right to access the courts as a matter of law, and decline to award relief on Counts VI and VII of the Complaint for that reason. But even if these claims did not fail as a matter of law, the evidence shows that the ADC will allow each Prisoner to meet with counsel with minimal restriction and with phone access on the execution date, the ADC will allow one attorney to view the execution in the witness room, and the ADC will allow a second attorney to be in the warden's office during the execution with access to a phone, a fax machine, and a laptop computer. These policies do not violate the Prisoners' right to access the courts or right to counsel—if anything, the ADC has gone far beyond what is required. The Prisoners cannot make a clear and rigorous showing that they are likely to succeed on the merits of their claims that these policies violate their rights to access the courts and counsel. But if the Court believes it necessary, the Court can adjust ADC policy to remedy any concern the Court may have—however, Claims VI and VII cannot form the basis of any stay of execution or alteration of the execution schedule.

Conclusion

For the foregoing reasons, the Prisoners are not entitled to a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, do hereby certify that on this 7th day of April, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF filing system, which shall send notification of the filing to any participants.

/s/ Jennifer L. Merritt
Jennifer L. Merritt