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**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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| <p>TABERON DAVE HONIE,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>BRIAN REDD, Director, Utah Department of Corrections; BART MORTENSEN, Warden, Utah State Correctional Facility; RANDALL HONEY, Director of Prison Operations, Utah State Correctional Facility; DOES I through X, inclusive, in their official capacity,</p> <p style="text-align: center;">Defendants.</p> | <p>Case No. _____ (to be supplied by the Clerk)</p> <p>REDACTED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF DUE TO INTENDED METHOD OF EXECUTION</p> <p>(DEATH PENALTY CASE)</p> <p>EXECUTION SET FOR AUGUST 8, 2024</p> |
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Plaintiff Taberon Honie, through his counsel, hereby files this Complaint seeking both preliminary and permanent relief, and requests this Court declare and enforce his rights under the Utah Constitution and the Utah Code of Criminal Procedure, and issue an injunction under Utah Rule of Civil Procedure 65A and Utah Const. art. I, § 9 of the Utah Constitution, commanding Defendants not to carry out Honie’s execution using the three-drug combination of ketamine, fentanyl, and potassium chloride. Utah’s lethal injection protocol and procedures pose a substantial risk of serious pain and unnecessary suffering in violation of Honie’s right to be free from the

infliction of unnecessary rigor and cruel and unusual punishment. Honie has a procedural due process right to an adequate opportunity to litigate his challenge to the Utah Department of Corrections (UDC) lethal injection protocol before his scheduled execution. Finally, Defendants' refusal to grant counsel access to a communications device, such as a phone, during the execution violates Honie's right to access the courts under Utah Const. art. I, § 11.

INTRODUCTION

1. On August 8, 2024, Defendants intend to carry out Honie's execution using a novel and untested lethal injection procedure. The Utah Department of Corrections (UDC) intends to intravenously inject Honie with sequential overdoses of ketamine, fentanyl, and potassium chloride.

2. Expert evidence establishes that this untested combination of drugs "superadds pain well beyond what's needed to effectuate a death sentence." *Bucklew v. Precythe*, 587 U.S. 119, 137 (2019). Traditionally, multi-drug execution protocols have used a barbiturate, such as sodium thiopental or pentobarbital, as the first drug because that category of drugs is capable of anesthetizing the prisoner. The first drug in UDC's novel protocol, ketamine, is not a barbiturate, but a dissociative anesthetic, and cannot render a prisoner unconscious and insensate to the painful effects of the subsequent drugs. Though ketamine can, to some extent, ameliorate the pain typically inflicted during certain aspects of surgery, such as lacerations, it does not relieve other types of pain, such as the feeling of suffocation or cardiac arrest. Utah would be the first state to ever use ketamine in an execution. There is a reason that no other jurisdiction has used it for executions—it carries numerous deleterious side effects that will cause severe suffering in and of themselves. Ketamine is structurally similar to phencyclidine (commonly known as PCP or "angel dust"), and, like PCP, is notorious for creating a psychotic state. Ketamine commonly produces paranoia,

anxiety, strong hallucinations, disorientation, distorted self-perception, and out-of-body experiences. These side effects are known to occur even at doses significantly lower than that required by UDC's current Protocol. And the greater the dose of ketamine, the greater the adverse effects. Intravenous injection of ketamine at UDC's intended dosage will cause Honie to become highly intoxicated and experience hallucinations, delirium, delusional ideation, and psychosis, exposing him to unnecessary mental anguish and rendering him incompetent to be executed. In addition to creating a psychotic state, rapid IV administration of large doses of ketamine commonly causes airway obstruction and vocal cord contraction, leading to suffocation. Ketamine also causes nausea and vomiting, especially at high doses. The risk of choking is exacerbated because Honie will be strapped down on a gurney and unable to adequately lift his head.

3. Fentanyl, the second drug in UDC's current Protocol, is also not a general anesthetic, but a synthetic opioid. It has been used in only one execution in the United States, as part of a four-drug protocol administered to a death-sentenced prisoner who volunteered for execution.¹ For that reason, the constitutionality of high doses of fentanyl in executions has never been subject to judicial review. Even in high doses, fentanyl cannot reliably induce unconsciousness, which is necessary to prevent prisoners from feeling "superadd[ed] pain" from the third drug, potassium chloride. *Bucklew*, 587 U.S. at 138. When delivered in large doses, like UDC's Protocol requires, fentanyl produces chest wall rigidity (known as "wooden chest" syndrome). This will cause Honie to feel as if his chest has turned to stone, rendering him unable to breathe.

¹ Fentanyl was the second drug administered in a 2018 Nebraska execution, and was preceded by the administration of diazepam (a muscle relaxant). See Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. TIMES (AUG. 14, 2018), <https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html>.

4. Potassium chloride, the last drug in Utah's three-drug protocol, is intended to stop the heart. There is a substantial risk that the combination of ketamine and fentanyl in the dosage amounts provided in UDC's Protocol will not induce the necessary depth of anesthesia to render Honie unconscious, unaware, and insensate to pain. It is well established that if a prisoner is not adequately unconscious and insensate to pain when potassium chloride is administered, the prisoner will experience excruciating suffering. *See Baze v. Rees*, 553 U.S. 35, 53 (2008) (plurality opinion) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of ... pain from the injection of potassium chloride."). As the drug is administered, Honie will feel as if his veins have been set on fire and he is being burned alive, followed by the agonizing pain of cardiac arrest.

5. In sum, UDC's novel protocol creates an unnecessary and substantial risk that the first drug, ketamine, will send Honie into a psychotic state akin to psychological torture and render him incompetent for execution. The Protocol also creates an unnecessary and substantial risk that the second drug, fentanyl, will cause Honie to suffer from chest wall rigidity and suffocation. Finally, the Protocol also creates an unnecessary and substantial risk that Honie will not be adequately anesthetized and will suffer a horrific death when the final drug, potassium chloride, is injected into his body. For these reasons, independently and cumulatively, UDC's lethal injection protocol presents an unnecessary and substantial risk of serious harm, which is objectively intolerable under Utah Const. art. I, § 9.

6. One court has already been presented with the constitutionality of an execution protocol that includes ketamine and fentanyl, albeit administered in a different order. After holding an evidentiary hearing, a federal district court imposed a preliminary injunction that, in part, prohibited the State of Nevada from carrying out an execution using a similar three-drug protocol

involving ketamine, fentanyl, and potassium chloride.² *Floyd v. Daniels*, No. 3:21-cv-00176-RFB-CLB, 2021 WL 2827291 (D. Nev. July 6, 2021). That case is now proceeding in the normal course of litigation, without the threat that the State will execute the prisoner before he has an opportunity to vindicate his right to an execution free from unnecessary pain and suffering. Utah now attempts to do precisely what a federal district court said Nevada cannot.

7. The constitutional problems in UDC's Protocol are further multiplied by several other deficiencies in the Protocol, including contradictory procedures and missing components. For months, Honie requested that UDC amend its execution protocol—which was last updated in 2010—to reflect the procedures it intends to implement in his execution. And although several aspects of the 2010 Protocol are moot due to the need to conduct executions at a new location and with new drugs, UDC refused. UDC understood that amending its Protocol could reset the statute of limitations on method of execution challenges.³ In a clear attempt to manipulate the legal system, UDC created supplemental lethal injection procedures that are inconsistent with the 2010 Protocol and failed to explain how to reconcile the inconsistencies. As a result, the execution procedures are not only spread across multiple documents, but inherently contradictory and unintelligible. Indeed, a trained anesthesiologist with over 42 years of experience administering the same drugs called for in UDC's lethal injection procedure, concluded, “the new instructions for fentanyl and ketamine are incoherent (indeed, as an anesthesiologist, even I cannot interpret these instructions with certainty without making some assumptions that do not appear in the

² Nevada's Protocol permits eight different potential combination of drugs, one of which is the same combination of drugs and doses Utah intends to administer to Honie: 1000mg ketamine, 2500mcg fentanyl, and 2400mEq potassium chloride. The protocols differ on the sequence of the first two drugs and when the consciousness check should be conducted.

³ By substantially changing the execution drugs, the statute of limitations are reset whether or not UDC formally amends the protocol.

protocol).” Ex. 1, Declaration of Dr. Gail Van Norman, M.D., at 10-11 (hereinafter “Dr. Van Norman’s Declaration”). Dr. Van Norman also concluded that the pharmacist who developed UDC’s new protocol “made a number of erroneous assumptions and statements, and is either not knowledgeable of, or chose to omit critical information regarding the drugs ketamine and fentanyl and how they behave in the suggested doses when injected into human subjects.” *Id.* at 7.

8. Further compounding these issues, UDC intends to strip counsel witnessing Honie’s execution of the ability to communicate with co-counsel and the courts during the execution. Counsel will, therefore, be unable to vindicate Honie’s right to a constitutional execution through judicial intervention in the event that foreseeable problems arise.

9. UDC seeks to execute Honie using a novel protocol that “create[s] ‘a significant risk of unnecessary suffering.’” *Bucklew*, 587 U.S. at 124 (quoting *Baze*, 553 U.S. at 113). At the same time, UDC does not provide adequate access to counsel and the courts to vindicate his rights during the execution. Allowing the State to proceed with Honie’s execution under these conditions would subject him to cruel and unusual punishment, in violation of Utah Const. art. I, § 9. And allowing the State to proceed with the execution before Honie has an opportunity to litigate his constitutional challenge would further violate his procedural due process rights.

PARTIES

10. Plaintiff Taberon Honie is a United States citizen who resides in the State of Utah. Honie is subject to a sentence of death imposed by the Fifth District Court of Utah and is currently incarcerated at the Utah State Correctional Facility (USCF) in Salt Lake City, Utah. His execution is scheduled for August 8, 2024. Honie brings this Complaint pursuing legal and any other available remedies to ensure the protection of his physical person and his constitutional rights

while under the custody of the State of Utah, pursuant to Articles I, §§ 7, 9, and 11 of the Utah Constitution and also under Utah state law.

11. Defendant Brian Redd is the current Executive Director of UDC. Redd is responsible for managing the operations of Utah state prison facilities, including USCF, and the custody of prisoners confined therein. Redd is ultimately responsible for the overall operations and policies of UDC, including overseeing executions, and ensuring those executions are carried out in conformity with the law. *See, e.g.*, Utah Code of Criminal Procedure § 77-19-9(2) (“[T]he court shall make an order requiring the executive director of the Department of Corrections or the executive director’s designee to ensure that the judgment is executed[.]”); § 77-19-10(6) (“The [D]epartment [of Corrections] shall adopt and enforce rules governing procedures for the execution of judgments of death.”). Redd is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

12. Defendant Bart Mortensen is the Warden of USCF and is responsible for carrying out death warrants issued by Utah courts. Mortensen is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

13. Defendant Randall Honey is the Director of Prison Operations for UDC. Honey is responsible for overseeing the daily operations of UDC facilities, including USCF. Honey is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

14. Defendants John/Jane Does I through X (“Does”) are unnamed and anonymous employees, staff, contractors, or agents of UDC or the State of Utah who have participated, or will participate, in preparing for or carrying out Honie’s execution in capacities involving, *inter alia*, developing and implementing UDC’s lethal injection protocol, setting IV lines, strapping Honie to the gurney, and prescribing, storing, handling, or administering ketamine, fentanyl, and potassium

chloride intended for use in Honie's execution. Honie does not know and the UDC Defendants have not revealed the identities of these Defendants.

JURISDICTION AND VENUE

15. The acts upon which the liability described in this Complaint will occur are in Salt Lake County, State of Utah.

16. Pursuant to Rule 26(c)(3) of the Utah Rules of Civil Procedure, Plaintiffs are seeking non-monetary relief; therefore, the case should be designated as a Tier 2 case.

17. This District Court is the proper venue and has jurisdiction over this case pursuant to Utah Code Ann. § 78B-3a-201, in that the negligent and/or wrongful conduct occurred/will occur in Salt Lake County.

18. The District Court also possesses original jurisdiction to adjudicate the claims presented in this complaint and grant the requested relief, exercising its constitutional authority and the "power to issue all extraordinary writs" as delineated in the Utah Const. art. VIII, § 5.

19. This is a State Constitutional case based upon the treatment of a prisoner with unnecessary rigor and cruel and unusual punishment as provided in Article I, § 9 of the Utah Constitution, which reads:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

20. Exhaustion of administrative remedies is not necessary because there are no available administrative remedies capable of addressing the violations of federal law challenged in this pleading. Moreover, because the Defendants, particularly Redd, claim they have the

discretion to change the Execution Protocol at any time—even after providing notice as to certain aspects—any attempt to grieve would be futile.

FACTS

A. History of executions by lethal injection in Utah

21. Historically, executions by lethal injection, including in Utah, were carried out with a three-drug combination involving the ultra-short acting barbiturate sodium thiopental, a musculoskeletal paralytic, and potassium chloride. However, the majority of executions across the country are now carried out with a single drug—the barbiturate pentobarbital—which eliminates several inherent risks associated with three-drug protocols.

22. Utah has not attempted a lethal injection execution in nearly 25 years. Since the United States resumed executions in 1977, Utah has carried out four lethal injection executions: Pierre Dale Selby in 1987, Arthur Bishop in 1988, William Andrews in 1992, and Joseph Mitchell Parsons in 1999.⁴

B. Utah’s 2010 Execution Protocol

23. Utah Code of Criminal Procedure § 77-19-10(6) requires that “the [D]epartment [of Corrections] shall adopt and enforce rules governing procedures for the execution of judgments of death.”

24. In June 2010, UDC developed a detailed 242-page Execution Protocol, which outlines specific procedures for executions conducted by both lethal injection and firing squad. An

⁴ DPIC, *Execution Database*, <https://deathpenaltyinfo.org/database/executions> (last visited July 8, 2024) (located applying state filter to include Utah).

unredacted and sealed version of the 2010 Protocol is attached hereto as Exhibit 2.⁵ The public version of 2010 Protocol is attached hereto as Exhibit 3 (redactions in original) (cited as “TMF”).

25. The 2010 Protocol prescribes a three-drug combination of sodium thiopental, pancuronium bromide (musculoskeletal paralytic), and potassium chloride for all executions carried out by lethal injection. *See, e.g.*, TMF 01/05.11 (“Equipment and Materials Checklist: Execution by Injection” containing sodium thiopental, pancuronium bromide, and potassium chloride); TMF 01/05.15 (B)(3)(a-c) (instructions for loading and labeling syringes containing sodium thiopental, pancuronium bromide, and potassium chloride); TMF 01/05.15 (B)(3)(d)(1-2) (describing the purpose of “secondary syringes” containing sodium thiopental, pancuronium bromide, and potassium chloride); TMF 01/05.15 (I)(3)(c),(f),(g) and (j) (instructions for the administration of primary syringes of sodium thiopental, pancuronium bromide, and potassium chloride); TMF 01/05.15 (B)(3)(f)(1)(iii) and (p) (instructions for use of “secondary syringes” containing sodium thiopental, pancuronium bromide, and potassium chloride).

26. The 2010 Protocol does not make any reference to ketamine or fentanyl.

27. Utah has never attempted an execution by lethal injection under UDC’s 2010 Protocol.

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ UDC provided Honie's counsel with the unredacted Protocol in a password-protected PDF that cannot be copied or printed. Honie is currently seeking a printable copy directly from UDC. Once UDC provides a format accessible by the Court, Honie will file Exhibit 2 under seal. In the meantime, Exhibit 2 serves as a placeholder.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Previous litigation challenging UDC's 2010 Protocol

30. On March 23, 2023, four death-sentenced prisoners in Utah filed a Complaint in this Court challenging UDC's 2010 Protocol under various provisions of the Utah Constitution. Complaint, *Menzies, et al., v. Utah Dep't of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. Mar. 23, 2023), Dkt. No. 1. On April 14, 2023, the *Menzies* Plaintiffs filed a Second Amended Complaint, adding Honie as a named Plaintiff. Ex. 4, Second Am. Compl., *Menzies, et al., v. Utah Dep't of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. Apr. 14, 2023), Dkt. No. 21. The *Menzies* Plaintiffs argued, in relevant part, that 1) the 2010 lethal injection protocol violates the unnecessary rigor

clause of Article I, § 9 of the Utah Constitution (Claim Two); 2) Plaintiffs have been “deprived of due process under Article 1, § 7 of the Utah Constitution because the 2010 execution protocol is heavily redacted and because Defendants may alter the protocol without giving notice to Plaintiffs”⁶ (Claim Three); and 3) the 2010 Protocol denies Plaintiffs “their right to counsel and access to the courts because ... Plaintiffs will be unable to communicate with counsel throughout the execution proceedings; and ... counsel will be unable to view the setting of the IVs during execution by lethal intravenous injection”⁷ (Claim 5).

31. On December 22, 2023, the court granted UDC’s Motion to Dismiss, and dismissed each of Plaintiffs’ claims without prejudice. Ex. 5, Order at 3. The court found the statute of limitations barred relief because “[a]ll” of the claims plead in the Second Amended Complaint “rise out of Defendants’ [2010] execution protocol.” *Id.* at 3. Because “Plaintiffs allege that the protocols were last amended on June 10, 2010, and that each of the Plaintiffs will be executed according to the 2010 protocols,” “[a]ll of the facts asserted in the Second Amended Complaint existed in 2010 and each of the claims alleged in the Second Amended Complaint could have been raised in 2010.” *Id.* at 3. The Court emphasized that “Plaintiffs based their claims on the 2010 protocol, not upon a possible amendment to the protocol that came after 2010 or may come in the future.” *Id.* at 4.

32. The court’s order granting UDC’s Motion to Dismiss was also grounded in the Plaintiffs’ failure to state claims for relief under Utah R. Civ. P. 12(b)(6). In determining whether Plaintiffs’ lethal injection claims met the pleading standard, the court accepted the following facts

⁶ Ex. 5, Order Granting Mot. to Dismiss, at 18, *Menzies, et al., v. Utah Dep’t of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. Dec. 22, 2023), Dkt. No. 90 (hereinafter “Order”) (describing Claim Three of the Second Amended Complaint).

⁷ *Id.* at 23-24 (describing Claim Five of the Second Amended Complaint).

as true: “the 2010 protocol for administering lethal injections in Utah requires personnel to administer a three-drug cocktail: 1) sodium thiopental, a barbiturate intended to render a person unconscious and insensate; 2) pancuronium bromide, a neuromuscular blocking agent, which paralyzes a person and causes suffocation; and 3) potassium chloride, which causes the feeling of being burned alive and induces cardiac arrest.” *Id.* at 12. The court concluded that under these facts—“based upon the way the protocols are written” at the time—Plaintiffs had not shown that the protocols present imminent danger of needless suffering. *Id.* at 14. The court also held that the *Menzies* Plaintiffs could not obtain relief as plead because they did not propose an alternative method of execution by, for example, “provid[ing] other state’s protocols themselves and alleg[ing] that the alternative protocols... will ‘in fact significantly reduce[] a substantial risk of severe pain.’” *Id.* at 15.

33. With respect to the *Menzies* Plaintiffs’ due process claim, “the Court decline[d] to categorically rule that no combination of facts could give rise to a due process violation under the Utah Constitution for failure to disclose execution protocols.” *Id.* at 21. The court found that “the facts that have been asserted in *this* case are insufficient to show Plaintiffs’ due process rights have been or will be violated by redactions and possible changes to the execution protocol.” *Id.* (emphasis in original).

34. With respect to the *Menzies* Plaintiffs’ access to counsel claim, the court declined to consider any argument that UDC would prevent counsel from accessing a phone to raise claims with the court during executions because “Plaintiffs assert no facts to support this argument anywhere in their Second Amended Complaint.” *Id.* at 24. The court added that “there is nothing in the protocols that affirmatively limits an inmate’s counsel from . . . using a phone during an execution. In fact, other than giving a definition of ‘attorney of record’ as an inmate’s attorney, the

2010 protocols do not prescribe or proscribe any attorney behavior during the execution, except to the extent an attorney is named as a witness to the execution.” *Id.* at 24-25. The court ordered the *Menzies* Plaintiffs to file a Motion for Leave to Amend the Complaint within 21 days, or the case would be dismissed without prejudice. *Id.* at 29.

35. The *Menzies* Plaintiffs filed a Motion for Leave to File a Third Amended Complaint on January 12, 2024, Ex. 6, Mot. and Third Am. Compl., *Menzies, et al., v. Utah Dep’t of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. Jan. 12, 2024), Dkt. No. 92, and filed a Supplement to the Third Amended Complaint on March 7, 2024, Ex. 7, Suppl. to Third Amend. Compl., *Menzies, et al., v. Utah Dep’t of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. Mar. 7, 2024), Dkt. No. 118. The Plaintiffs’ proposed Third Amended Complaint and Supplement contained the same claims from the operative complaint, but also plead alternative methods of execution, including a single-drug lethal injection protocol using pentobarbital, and facts supporting Plaintiffs’ arguments that they should be entitled to equitable tolling of the statute of limitations. Plaintiffs also argued that the statute of limitations with respect to claims about UDC’s lethal injection protocol had not yet begun to run because the 2010 protocol will *necessarily* need to be changed before any plaintiff is executed by lethal injection since sodium thiopental is not available.

36. On May 24, 2024, the court issued an order denying the *Menzies* Plaintiffs’ request to amend and supplement on the basis that doing so would be “futile” since the statute of limitations barred relief for claims based on the 2010 Protocol. Ex. 8, Order Denying Mot. for Leave to Am. and Mot. to Suppl. at 2, *Menzies, et al., v. Utah Dep’t of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. May 24, 2024), Dkt. No. 137. In addressing the fact that UDC must amend its lethal injection protocol to accommodate the need to use new drugs, the court concluded that Plaintiffs’ lethal injection claim “is not yet ripe to be raised.” *Id.* at 14. Because UDC had not yet amended

the protocol to include new drugs, “the last event necessary to complete a cause of action has not yet occurred[.]” *Id.* The court explicitly stated that “[a] future amendment to the 2010 protocol may give rise to a claim at a later date[.]” *Id.* at 14.

37. Two days later, the *Menzies* Plaintiffs filed a Notice of Appeal. Ex. 9, Notice of Appeal, *Menzies, et al., v. Utah Dep’t of Corr.*, No. 230901995 (3rd Jud. Dist. Ct. May 28, 2024), Dkt. No. 140. On June 6, 2024, Plaintiffs filed a Rule (19)(a) Petition for Extraordinary Writ in the Utah Supreme Court, seeking injunctive relief barring UDC from carrying out executions under the 2010 Protocol. Ex. 10, Pet. for Extraordinary Writ, *Menzies, et al., v. State*, No. 20240608-SC, (Utah June 6, 2024). The next day, UDC disclosed its intent to carry out Honie’s execution using ketamine, fentanyl, and potassium chloride, but did not provide other critical information, such as the dosages for each drug or the order they would be administered. On June 14, 2024, the *Menzies* Plaintiffs filed a Supplement to their Extraordinary Writ Petition and requested a stay of execution based on UDC’s intent to use new drugs and failure to provide critical information about how it intends to deviate from the 2010 Protocol. Ex. 11, Suppl. to Pet. for Extraordinary Writ, *Menzies, et al., v. State*, No. 20240608-SC (Utah June 14, 2024).

38. On June 18, 2024, Honie filed a Rule 23C Petition for Emergency Relief in the Utah Supreme Court. Ex. 12, Pet. for Emergency Relief, *Honie v. State*, Nos. 20240608-SC, 20240559-SC (Utah June 18, 2024). The Petition relied on facts related to UDC’s newly announced lethal injection protocol using new drugs, and therefore, “raise[d] separate legal challenges that could not have been brought during the pendency of the [*Menzies*] civil suit.” *Id.* at 2.

39. On July 8, 2024, the Supreme Court denied both the *Menzies* Plaintiffs Rule (19)(a) Petition for Extraordinary Writ and Honie’s Rule 23C Petition for Emergency Relief on procedural grounds. Ex. 13, Order, *Menzies et al., v. State*, Nos. 20240559-SC & 20240608-SC (Utah July 8,

2024), at 1-2 (finding a Rule 23C motion “is not the appropriate mechanism to seek a stay or injunction pending appeal,” and “[t]he Rule 19(a) petition is denied because Petitioners have not shown that there is no other ‘plain, speedy, or adequate remedy’ available to them.”) (citing Utah R. App. P. 19(a)). In doing so, the court stated, “Should Petitioners refile their petition for extraordinary relief in district court, our denial of the Rule 23C motion should not be interpreted as a comment on the merits of any stay or injunction Petitioners might seek in connection with that petition.” *Id.* at 2.

40. Also on July 8, 2024, the Utah Supreme Court issued an order retaining jurisdiction for the *Menzies* Plaintiffs’ appeal dismissing their operative complaint and denying their motion to file a Third Amended Complaint challenging the 2010 Protocol. Ex. 14, Order, *Menzies, et al., v. State*, No. 20240559-SC (Utah July 8, 2024). That appeal, involving the 2010 Protocol before UDC updated it with new drugs and new procedures, is still pending.

D. Utah’s new lethal injection protocol

1. UDC changed its 2010 lethal injection protocol

41. On April 30, 2024, the State filed an Application for Execution Warrant for Honie. The State also filed a Proposed Execution Warrant, which identified “lethal injection” as the required method for carrying out Honie’s execution. Ex. 15, Appl. for Execution Warrant at 3, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. Apr. 30, 2024), Dkt. No. 15.; Ex. 16, Proposed Warrant of Execution at 3, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. Apr. 30, 2024), Dkt. No. 16. At that time, the drugs Utah planned to use in future executions were unknown. Though the then-current lethal injection protocol specifically called for sodium thiopental, pancuronium bromide, and potassium chloride, sodium thiopental is not legally obtainable in the United States.⁸ Because

⁸ UDC, *Honie Press Conference*, at 07:17 (June 11, 2024), <https://www.youtube.com/watch?v=mqpPWTgqD24> (Defendant Redd stating, “Sodium Thiopental is widely unavailable”).

UDC could not—and still cannot—obtain sodium thiopental, UDC necessarily could not adhere to the 2010 Protocol.

42. On May 2, 2024—two days after the State requested Honie’s execution warrant—counsel for Honie served a subpoena on Defendants seeking information related to UDC’s execution procedures, including the drugs Defendants planned to use in executions by lethal injection and an unredacted version of the 2010 Protocol. Ex. 17, Subpoena, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. May 2, 2024), Dkt. No. 22. On May 24, 2024, UDC filed a partial objection to the subpoena, arguing that it required disclosure of privileged or protected information that is exempt from disclosure by Utah’s public records act and that the request was overbroad and imposed an undue burden. Ex. 18, Obj. in Part to Subpoena Duces Tecum at 1-2, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. May 24, 2024), Dkt. No. 54. On May 30, 2024, counsel for Honie filed a motion to compel production based on the legal insufficiencies of UDC’s objections and its failure to produce any documents. Ex. 19, Mot. to Compel, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. May 30, 2024), Dkt. No. 61. On June 7, 2024, UDC filed an objection to Honie’s motion to compel. Ex. 20, Mem. Opposing Mot. to Compel, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. June 7, 2024), Dkt. No. 83.

43. That same day—one business day before the scheduled hearing on the State’s application for Honie’s execution warrant—UDC disclosed for the first time the drugs it intended to administer during Honie’s execution: ketamine, fentanyl, and potassium chloride. Ex. 21, Notice Re: Substances to be Used in Event of Execution by Lethal Injection at 2, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. June 7, 2024), Dkt. No. 80 (hereinafter “Notice”). Only one of the three drugs—potassium chloride—was retained from the 2010 Protocol. UDC provided no other details about the new lethal injection procedures, such as the doses to be administered, the amount

of time required between each dose, the order of their administration, and if and when a consciousness check would be conducted.

44. No execution has ever been carried out—in Utah or any other state—using ketamine, fentanyl, and potassium chloride. UDC supported its choice to adopt a novel, untested combination of drugs for Honie’s execution with the declaration from the person who recommended that approach: an unnamed pharmacist licensed in an unknown state. Ex. 21, Notice at 5-7. The declaration—which was not signed by its author—indicated that the pharmacist concluded that the never-before-used “3-drug combination consisting of Ketamine, Fentanyl, and Potassium Chloride” is “the most humane way to conduct execution by lethal injection” after researching how other states have carried out executions by lethal injection. *Id.* at 6, ¶¶ 5, 9.

45. At the June 10 hearing on the State’s application for a warrant, Honie’s counsel argued numerous deficiencies with the State’s plan to implement the anonymous pharmacist’s novel drug combination in Honie’s execution. Ex. 22, Tr. of: Warrant of Execution Hr’g at 8-12, 20-28, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. June 10, 2024), Dkt. No. 91 (hereinafter “Transcript”). Counsel noted that pharmacists—who are not medical doctors—lack the requisite knowledge, training, experience, and expertise to recommend particular drug combinations and dosages for conducting executions consistent with Article I, § 9’s prohibition on cruel and unusual punishment. Counsel argued that Honie had a due process right to adequate notice of his method of execution and that Defendant’s last-minute notification—one day before the hearing—was inadequate to satisfy due process. Counsel also argued that Defendants refusal to provide an updated protocol based on the new drugs and failure to provide dosages, concentrations, order of drugs, wait times between injections, consciousness checks instructions, or virtually any

information indicating how the execution would be carried out, violated Honie’s due process right to adequate notice of his method of execution.

46. Despite these deficiencies, the court granted the State’s application and issued a warrant scheduling Honie’s execution for August 8, 2024. Ex. 23, Warrant of Execution, *State v. Honie*, No. 981500662 (5th Jud. Dist. Ct. June 10, 2024), Dkt. No. 85. In doing so, the Court did not address Honie’s arguments about the problems related to the new lethal injection drugs, instead holding that it was without discretion to withhold issuance of the execution warrant under the statute.

2. Unconstitutional risks created by the three drugs in Utah’s new Protocol

47. Even though no execution has ever been carried out with the combination of ketamine, fentanyl, and potassium chloride, each of these drugs carry known side effects that produce a substantial risk of causing unnecessary and severe physical and psychological pain and suffering.

a. Risks created by Utah’s intended use of ketamine

48. The intended purpose of ketamine in Utah’s new protocol is to, along with the second drug fentanyl, render Honie unconscious and insensate to pain and suffering throughout the execution procedure. Ex. 24, Dosage Information at 2-3 (prescriptions for ketamine and fentanyl to be used in Honie’s execution both state “will use for anesthesia”); *see* Ex. 21, Notice at 6 ¶ 14 (“Both Ketamine and Fentanyl ... are the best way to mitigate any pain or discomfort during the execution process.”).

49. Ketamine is clinically a last resort anesthetic and is inappropriate for executions. Under traditional three-drug execution protocols, the first drug delivered is a barbiturate, such as sodium thiopental or pentobarbital, for the purpose of inducing general anesthesia and rendering

the prisoner unconscious and insensate to pain. Unlike sodium thiopental and pentobarbital, however, ketamine is not a barbiturate. Rather, ketamine is categorized as a dissociative anesthetic. “High-dose ketamine produces a specific kind of anesthesia called ‘dissociative anesthesia’ ... that does not produce unconsciousness and only moderate pain relief.” Ex. 1, Dr. Van Norman’s Declaration at 5. Indeed, ketamine “*activates* arousal centers in the brain and *increases*, rather than suppresses, EEG activity in the cerebral cortex.” *Id.* at 18. For that reason, it is rarely used to produce general anesthesia, and when it is, it is always used in combination with other general anesthetics.

50. Even when ketamine is used in surgery, it is “seldom used” in high doses. *Id.* at 7. *See also id.* at 19 (“[T]o this day it is rare for [ketamine] to be used in human anesthesia other than in modest doses and with administration of multiple additional drugs[.]”). Ketamine has a ceiling effect with respect to pain relief, meaning after a certain dosage level, additional amounts of the drug do not enhance its analgesic effects. Dosages beyond ketamine’s ceiling effect will not increase pain relief or render a person unconscious, but it will “increase all of the other problematic side effects” associated with the drug. *Id.* at 19. Ketamine is a “psychomimetic drug (psychotic inducing),” and is structurally similar to phencyclidine, (also known as PCP or angel dust). Ex. 25, Declaration of James D. Stoehr, Ph.D., at 3 (hereinafter “Dr. Stoehr’s Declaration”). At modest to high doses, ketamine is known to induce horrific hallucinations, dysphoria, paranoia, anxiety, and psychosis. These effects often “beg[i]n within seconds of injection.” Ex. 1, Dr. Van Norman’s Declaration at 19. “High-dose ketamine produces delirium and terrifying hallucinations in virtually 100% of patients if not used in combination with multiple other anesthetic agents.” *Id.* at 6. In surgical settings, ketamine is typically combined with multiple other medications targeted at reducing these adverse psychological symptoms. UDC’s new protocol, however, does not

incorporate those medications. Additionally, the dosage required by the new protocol is over twice ketamine's ceiling effect. *Id.* at 19. As a result, Honie "will experience extreme feelings of terror and delirium due to the ketamine." *Id.* at 24. And the hostile, death-inducing environment of an execution chamber will inevitably exacerbate the severity of this psychological torture. Ex. 25, Dr. Stoehr's Declaration at 3.

51. There is a substantial risk that the administration of the first drug under Utah's new protocol will cause Honie to experience "psychotic symptoms (paranoia, delusions, hallucinations, anxiety and panic)." Ex. 25, Dr. Stoehr's Declaration at 7. The State's use of ketamine thus creates a substantial risk that Honie will suffer harm in violation of his Article I, § 9 rights.

52. In addition to sending Honie into a psychotic state and failing to render him unaware, there is a substantial risk that UDC's prescribed ketamine dose will also result in severe suffering from suffocation. Rapid IV administration of large doses of ketamine commonly causes respiratory depression, choking, and laryngospasm—when an individual's vocal cords suddenly close, rendering that individual unable to breathe. "In emergency medical situations when ketamine is used, ventilation support would be available" to combat airway obstruction. Ex. 25, Dr. Stoehr's Declaration at 4. UDC's new Protocol does not include any precautions for the known side effects of ketamine. Though ketamine acts as a painkiller to the type of pain typically inflicted during surgeries, such as lacerations, it does not relieve other types of pain, like the sensation of suffocation. Ex. 1, Dr. Van Norman's Declaration at 19-20 ("There is no evidence that ketamine has any effect on vagal nerve receptors in the lungs that are responsible for the sensations of shortness of breath, suffocation and air hunger, or the extreme pain and suffering these sensations cause."). When airway obstruction "occur[s] in an individual that is only partially sedated, confused, and delirious, panic could quickly take over as breathing becomes increasingly more

difficult.” Ex. 25, Dr. Stoehr’s Declaration at 4. According to Dr. Van Norman, “virtually 100% of inmates [executed by UDC’s new protocol] will experience the extreme pain and suffering of muscle rigidity, inability to breathe, suffocation and air hunger while still in a state of consciousness, contrary to the pharmacist’s assertions.” Ex. 1, Dr. Van Norman’s Declaration at 24.

53. Ketamine also causes nausea and vomiting, especially at high doses. Ex. 25, Dr. Stoehr’s Declaration at 8. Vomiting increases the risk of choking, given Honie will be strapped down on the gurney and unable to adequately lift his head.

54. Expert opinion establishes that the administration of ketamine, even when combined with fentanyl, will not produce a flat-line EEG, *i.e.*, will not result in a state of unawareness. Studies of human patients demonstrate that “neither drug alone nor in combination with the other produces deep unconsciousness.” Ex. 1, Dr. Van Norman’s Declaration at 13. According to Dr. Van Norman, “[e]ven at doses many times higher than the high doses proposed by Utah, patients retain consciousness and reactivity to their surroundings[.]” *Id.* While under sedation using ketamine plus fentanyl, there is a substantial likelihood that Honie will remain conscious and, therefore, be able to feel severe pain and horrific stimuli, such as that associated with the second and third drugs in the lethal injection procedure.

55. The new Protocol requires a consciousness check after fentanyl is administered to ensure he is unconscious before the execution team administers the fatal dose of potassium chloride.⁹ According to UDC’s 2010 Protocol, the consciousness check is conducted via mere “visual inspection”—not by a trained medical professional—but by a prison Warden, Defendant

⁹ If the execution team were to follow the 2010 Protocol, which UDC claims will still apply in Honie’s execution, the consciousness check is supposed to be administered after the first drug, ketamine, and before any fentanyl is administered. TMF 01/05.15 (I)(3)(f).

Mortenson. TMF 01/05.15 (I)(3)(f)(1)(a). The lethal injection protocols in several other states require medically trained professionals to physically confirm the prisoner is not conscious by applying stimuli to the prisoner's body. *See, e.g.*, Ex. 26, Nevada Execution Protocol at 58 (“[T]he Attending Physician or other medical personnel will attempt to elicit an interpretable physical response to a verbal stimulus (i.e. move fingers, open eyes) and to a physical stimulus in the form of a medical grade pinch.”); Ex. 27, Arizona Execution Protocol at 16 (“[A]n IV Team member will ... physically manipulate the inmate to check consciousness[.]”); Ex. 28, Idaho Execution Protocol at 8 (“The Medical Team leader ... will ... physically confirm the condemned person is unconscious by using all necessary medically appropriate techniques such as giving verbal stimulus, soliciting an auditory response, touching eyelashes, conducting a sternal rub.”); Ex. 29, Alabama Execution Protocol at 18 (requiring an IV team member to conduct a consciousness check by “saying the condemned inmate’s name”, “strok[ing] the condemned inmate’s eyelashes,” and “pinch[ing] the condemned inmate’s arm”). The side effects of ketamine create a substantial and unjustifiable risk that the consciousness check will produce false results. The “dissociative properties of the [ketamine] tend to ‘lock the patient inside their brain’ ... [and] can give the false impression that the patient is asleep.” Ex. 1, Dr. Van Norman’s Declaration at 13. *See also* Ex. 25, Dr. Stoehr’s Declaration at 3 (stating “the individual may visually appear unconscious, immobile and unresponsive” even though “brain activity” on an EEG would show an “awake or dream state”).

b. Risks created by Utah’s intended use of fentanyl

56. The intended purpose of fentanyl is to, along with the first drug ketamine, anesthetize Honie, rendering him unconscious and insensate to pain and suffering throughout the execution procedure. Ex 24, Dosage Information at 2-3 (prescriptions for ketamine and fentanyl

to be used in Honie’s execution both state “will use for anesthesia”). Fentanyl, however, cannot reliably induce unawareness. Fentanyl is a synthetic opioid, not an anesthetic. Ex. 1, Dr. Van Norman’s Declaration at 13. And while fentanyl has analgesic properties, fentanyl, like ketamine, does not relieve all types of pain, including the sensation of suffocation. *Id.* The inclusion of fentanyl in UDC’s novel drug protocol, therefore, does not alleviate the substantial and unjustified risks that Honie will be sensate while suffering the torturous effects of potassium chloride, or that he will agonizingly suffocate to death.

57. It is well established that even high doses of fentanyl cannot reliably block awareness. *Id.* This recognition in the field of anesthesiology dates back thirty-five to forty years, when practitioners utilizing high doses of fentanyl by itself, or with a limited additional agent such as a benzodiazepine, in performing open heart surgeries discovered instances of patient awareness during operations.¹⁰ As a result, doctors stopped using high-dose fentanyl to achieve anesthetic depth, and other formulas, including fentanyl in lower dosages but used in combination with myriad other chemical agents, became the standardized practice.

58. Fentanyl, like ketamine, has a well-documented ceiling effect for pain relief. The ceiling effect occurs at doses “less than half of the dose called for in the Utah proposal.” Ex. 1, Dr. Van Norman’s Declaration at 14. Doses above the ceiling “provide no further pain relief and do not render a person unconscious.” *Id.* Indeed, studies involving human subjects who were given fentanyl doses the equivalent of approximately ten times the ceiling and two to four times the dose called for in Utah’s proposal “remained conscious and responsive to surgical stimulus.” *Id.* at 15.

¹⁰ See, e.g., Jonathan B. Mark & Leslie M. Greenberg, *Intraoperative Awareness and Hypertensive Crisis during High-Dose Fentanyl-Diazepam-Oxygen Anesthesia*, 62 *Anesth Analg*, 698-700 (1983); Nagaprasadarao Mummaneni, M.D., et al., *Awareness and Recall with High-Dose Fentanyl-Oxygen Anesthesia*, 59 *Anesth Analg*, 948-49 (1980).

Studies also show that “[c]ombining fentanyl with ketamine does not appear to ‘enhance’ any sedative effects that might result from each drug alone.” *Id.* at 16.

59. At the doses UDC’s new Protocol requires, fentanyl will cause both respiratory depression (reduced frequency of breathing) and severe muscle rigidity, also known as “wooden chest syndrome.” *Id.* This will make Honie feel as if his “chest is encased in concrete,” “prevent[ing him] from being able to inhale or exhale, and caus[ing] extreme pain and suffering from shortness of breath and sensations of suffocation.” *Id.* These effects can occur within 1-2 minutes, and continue to increase over 3-5 minutes following injection. *Id.* Severe muscle rigidity from fentanyl, often renders individuals unable to move, increasing the likelihood that Honie will appear unconscious to the Warden during the consciousness check, “despite remaining wide awake.” *Id.* at 17. As discussed above, ketamine will not relieve the excruciating sensation of suffocation. *Id.* at 19. The influence of ketamine on the respiratory airway would, however, “interact with and intensify the effects of fentanyl on respiration and skeletal muscle rigidity.” Ex. 25, Dr. Stoehr’s Declaration at 4. In a medical setting, fentanyl is typically used in combination with other medications that would “mitigate [fentanyl’s] effect on the chest wall and airway[.]” but those medications are not included in UDC’s protocol. *Id.* at 5. Increasing the dose of fentanyl would not increase the likelihood of rendering an individual unaware; “it only increases the likelihood of respiratory collapse and suffocation.” *Id.* In addition, fentanyl at the dosage UDC intends to administer to Honie “will certainly intensify the persecutory delusions, panic, and struggling associated with ketamine dissociation.” Ex. 25, Dr. Stoehr’s Declaration at 6.

60. As will be discussed below, the new Protocol requires a consciousness check after fentanyl is administered. Ex. 30, July 5 Protocol at 2.¹¹ But the Protocol does not allow enough

¹¹ On July 5, UDC unveiled new protocol provisions that outline the drug administration procedure for ketamine, fentanyl, and potassium chloride. However, UDC asserts that both this new

time for the maximal (peak) effect of fentanyl to occur. Though the peak effect of fentanyl takes *up to five minutes*, Ex. 1, Dr. Van Norman’s Declaration at 10, the Protocol allots just *60 seconds* for the drug to take effect before the consciousness check. TMF 01/05.15 (B)(3)(d)(1). Even if ketamine and fentanyl were sufficient to anesthetize an individual, without adequate time for the drugs to take effect and without a reliable consciousness check, UDC’s Protocol presents “a substantial, constitutionally unacceptable risk of . . . pain from the injection of potassium chloride.” *Baze*, 553 U.S. at 53 (2008).

c. Risks created by Utah’s intended use of potassium chloride

61. Utah’s Protocol calls for potassium chloride to be administered as the last drug in its three-drug method. This drug interferes with the electrical signals that stimulate the contractions of the heart and will induce cardiac arrest. It is well recognized, however, that if the personnel carrying out the execution fail to ensure Honie has first achieved the requisite depth of anesthesia, he will suffer a torturous death akin to the feeling of being set on fire. *See Baze*, 553 U.S. at 53 (finding it “uncontested” that, failing a proper dose of the anesthetic, “there is a substantial, constitutionally unacceptable risk of . . . pain from the injection of potassium chloride”).

62. Potassium chloride “cauterizes or ‘sears’ the walls [of] the veins when it contacts them, rupturing the cells, destroying tissues and causing agonizing pain.” Ex. 1 Dr. Van Norman’s Declaration at 23. “This pain does not stop when injection is complete, because the injury to the lining of the blood vessels continues to expand through the tissues, like an internal severe burn.” *Id.* A prisoner, therefore, must be insensate and unaware before receiving high dose intravenous potassium chloride “to avoid a torturous death.” Ex. 25, Dr. Stoehr’s Declaration at 7. “Given that

procedure and the conflicting procedure from the 2010 protocol—which provides instructions for administering sodium thiopental and pancuronium bromide—remain in effect, even though those drugs will no longer be used.

the combination of ketamine and fentanyl will not produce unconsciousness ... the overwhelming likelihood is that [Honie] will experience agonizing pain during the final stages of execution.” Ex. 1, Dr. Van Norman’s Declaration at 23.

3. Risks presented by inadequate provisions for training execution team members

63. UDC’s training and qualification requirements for the execution team members are inadequate to ensure that the team members are prepared to competently perform the duties required under the execution Protocol. Adequate credentials and training are even more crucial given UDC intends to administer a combination of drugs that has never been used before in any context.

64. The requirements for the IV team provide conflicting information regarding whether IV team members must be professionally qualified to set intravenous lines or administer intravenous drugs. TMF 01/05.03 (B)(3)(b). The execution Protocol requires the selection of “two or more persons trained in accordance with accepted medical practices” to set IVs and administer drugs. TMF 01/05.03 (A)(2). However, the Protocol also permits the selection of phlebotomists who, by their professional licensure, do not set IVs or administer drugs. The failure to specify the licensure requirement and to require personnel trained in setting IVs and administering IV drugs permits a scenario where unqualified personnel are completing these tasks. TMF 01/05.03 (B)(3)(b).

65. The Protocol fails to provide a contingency plan for problems that can prevent the full delivery of the drugs, including a dislodged or partially dislodged IV catheter, leaks in the tubing, or syringe errors, among other problems that can arise.

66. Because UDC has taken the position that its new drug combination is not a change to the 2010 Protocol—which, unlike the July 5 Protocol—requires a barbiturate and a paralytic

instead of a dissociative anesthetic and an opioid—UDC does not have any contingency plans in place specifically related to its use of ketamine and fentanyl. Apart from administering one additional dose of ketamine, UDC’s Protocol does not include any instructions in the event that the ketamine and fentanyl do not have the desired effect of rendering Honie unconscious. UDC also does not have any contingency plans in the event the fentanyl and ketamine render Honie in a state of physical and/or mental distress.

67. The Protocol also does not require UDC to maintain, possess, and know how to use the equipment, drugs, and procedures that would be needed to reverse or ameliorate the effect of the lethal injection drugs in the event the execution is called off or death does not occur. The Protocol does not include life-saving contingency plans, should they become necessary. This is particularly problematic given the novel drug combination, the lack of written procedures specific to the drug combination and the resulting increased risk that Honie will not be rendered insensate by the administration of the ketamine and fentanyl and could be rendered in a state of physical and mental suffering.

4. UDC’s refusal to formally update its Protocol to reflect necessary changes based on new drugs

68. The risks associated with implementing a novel execution procedure with inadequate training are further compounded by UDC’s refusal to amend its own written Protocol. Instead, the execution team is required to follow multiple documents with contradictory instructions for how to carry out Honie’s execution.

69. Defendants have taken the position that all UDC’s planned deviations from the 2010 Protocol for Honie’s execution should not be considered changes to the existing Protocol, because the 2010 Protocol grants UDC the discretion to make those changes. According to UDC, because the 2010 protocol quotes Utah Code of Crim. P. 77-19-10(2)(b) in a section listing relevant

statutes, the use of a lethal injection drug substitute is within the terms of the Protocol and therefore does not require any changes to the Protocol. Honie does not dispute that Utah Code of Crim. P. § 77-19-10(2)(b) allows UDC to adopt a protocol that substitutes sodium thiopental for an “equally or more effective substance sufficient to cause death.” But the Protocol UDC has purported to adopt has not codified any substitution for sodium thiopental or any other drug.¹² As discussed above, the 2010 Protocol outlining required lethal injection procedures contemplates only the use of sodium thiopental, pancuronium bromide, and potassium chloride. Contrary to UDC’s assertions, its own Protocol—by its plain terms—does not grant UDC unfettered discretion to substitute drugs without “[a]pproval for the changes ... documented in writing.” TMF 01/02.01 (B)(3). As of the date of this filing, none of the changes to the procedures outlined in the 2010 Protocol have been approved by the Executive Director in writing.

70. UDC has adamantly defended its refusal to amend the 2010 Protocol in order to assert a statute of limitations defense against Honie’s efforts to challenge UDC’s lethal injection protocol under state law.¹³ But Defendants’ own statements demonstrate this position is untenable. At the June 10 hearing on the State’s application for Honie’s execution warrant, the State explicitly refused Honie’s requests to provide an updated written execution protocol and argued the court should not order UDC to do so because “[t]here is no reason to update it.” Ex. 22, Transcript at 24. Within a span of minutes, counsel for UDC also stated, “The prison [where executions are conducted] has moved, and *so we have to update* [the Protocol].” *Id.* at 28 (emphasis added). Similarly, at a press conference the following day, in direct response to a question about whether

¹² See paragraph 28, *supra*, discussing the fact that the UDC Executive Director’s failure to sign 2010 Protocol and approve it in writing means UDC never actually adopted it.

¹³ At the hearing on the State’s application for Honie’s execution warrant, the court acknowledged that “Judge Sanchez [of the third judicial district court] rule[d] that a new protocol with a new drug could be the basis for a future Eighth Amendment claim[.]” Ex. 22, Transcript at 29.

the use of new drugs necessitated updating the 2010 Protocol, the UDC Director of Communications stated there was no need to change the policy because “we are only going to be coming up with a different combination of drugs.”¹⁴ Immediately after, he conceded, “There are some small technical changes we do need to make to the policy, but those are all related to the move of the prison from Draper to Salt Lake City ... we’ll be following [the Protocol] *as much as possible* outside of those small changes that we need to make.”¹⁵ Despite UDC’s inconsistent statements, UDC cannot deny—and have already admitted—“Things have changed obviously since the last time this took place back in 2010.”¹⁶

71. UDC’s acknowledgment of the need to update the protocol to reflect the new prison in Salt Lake City and its surrounding roads, while refusing to revise the procedure for administering drugs that are no longer in use to align with the drugs that will actually be used, reveals UDC’s malicious intentions and indifference to unnecessary pain and suffering. *See* Ex. 31, Eric Zuckerman’s Declaration at ¶¶ 11-12, Ex. E (July 10 email from UDC counsel stating UDC is still editing the 2010 Protocol to reflect changes related to the execution location and will produce a new Protocol signed by Defendant Redd “in the next couple days.”)

72. Despite its position that “the only changes that will need to be made to the department’s execution policy are related to the prison’s relocation, not the administration of the drugs[,]”¹⁷ UDC has made significant changes to the administration of the drugs. On July 5, 2024,

¹⁴ UDC, *Honie Press Conference*, at 07:32 (June 11, 2024) <https://www.youtube.com/watch?v=mqpPWTgqD24>.

¹⁵ *Id.* at 7:58.

¹⁶ *Id.* at 0:12.

¹⁷ Emily Ashcraft, ‘*The clock is ticking: Utah prepares for first execution since 2010*, KSL.COM (June 11, 2024, 12:12 PM) <https://www.ksl.com/article/51039552/the-clock-is-ticking-utah-prepares-for-first-execution-since-2010>.

UDC’s counsel provided Honie what he described as “operation instructions for the med team” or “the sheets they will get that walk them step by step through the process.” Ex. 31, Eric Zuckerman’s Declaration at ¶ 9, Ex. D. *See generally* Ex. 30, July 5 Protocol. Though UDC claims these instructions to the execution team merely “mirror the [2010] protocol word for word,”¹⁸ with the only change being the substitution of new drugs, these instructions deviate from the 2010 Protocol in three additional ways: when to conduct the consciousness check, when to administer a secondary dose of the first drug, and whether to administer secondary doses of the second and third drugs at all.

73. UDC’s 2010 Protocol implements a consciousness check—which is critical to ensure the prisoner is unaware and insensate to excessive pain and suffering—after the *first* drug is administered. TMF 01/05.15 (I)(3)(f). Under the July 5 Protocol, however, the consciousness check is supposed to occur after the *second* drug is administered. Ex. 30, July 5 Protocol at 2.

74. Though both protocols require the execution team to *prepare* backup syringes for each of the three drugs administered in the lethal injection procedure, only the 2010 Protocol instructs the execution team to *use* the secondary syringes of the second and third drugs. According to the 2010 Protocol, the execution team must administer the secondary syringe of the first drug “in the event the condemned has not lost consciousness sixty (60) seconds after the first administration of the chemical[.]” TMF 01/05.15 (B)(3)(d), and both the second and third drug sequentially “in the event the condemned has not been pronounced dead after the first administration of the chemicals.” TMF 01/05.15 (B)(3)(d). In contrast, the July 5 Protocol does not direct the execution team to use the backup syringes of the second or third drug at any point during the execution. *See generally*, Ex. 30, July 5 Protocol. In fact, the July 5 Protocol does not

¹⁸ Ex. 31, Eric Zuckerman’s Declaration at ¶ 4.

provide any instructions for how the execution team should respond if Honie is still alive after the initial dose of potassium chloride is administered. Notably, potassium chloride is the third and final drug used in both the 2010 Protocol and the July 5 Protocol, but the dose of potassium chloride in the July 5 Protocol is half that of the 2010 Protocol. *Compare* TMF 01/05.15 (I)(3)(j) (requiring 240 milliequivalents of potassium chloride) *with* Ex. 30 July 5 Protocol at 2 (requiring 120 mEq of potassium chloride). Other states that employ potassium chloride as the final drug in their lethal injection procedures use the same dosage in the 2010 Protocol and still require a secondary dose in the event death has not occurred. *See e.g.*, Ex. 26 Nevada Execution Protocol at 60-61.

75. The two operational protocols also differ in their instructions on when to administer the backup syringe of the first drug. Unlike the 2010 Protocol, the July 5 Protocol instruct the execution team to administer the backup of the *first* drug, not after the primary syringe of the *first* drug, but after the primary syringe of the *second* drug. Ex. 30, July 5 Protocol at 2. In other words, if the execution team were to follow the 2010 Protocol, they should administer the backup syringe of ketamine *before* any fentanyl is administered, whereas the July 5 Protocol requires additional ketamine *after* the fentanyl. Because UDC refuses to amend its 2010 Protocol, the execution team now must adhere to two contradictory sets of instructions, with no explanation for how to resolve these contradictions.

76. Even more problematic is the fact that the July 5 Protocol calls for a secondary dose of ketamine. Because the initial dose of ketamine is well beyond the dosage amount that would trigger the ceiling effect, any additional dose of the drug will have no effect. Ex. 1, Dr. Van Norman's Declaration at 19. This illogical step in the lethal injection procedure is undoubtedly a result of UDC's refusal to amend the 2010 Protocol to account for its choice of new drugs.

77. According to the 2010 Protocol, “The Executive Director/designee may direct deviation from or adjustment to the policies and procedures in this manual at any time when necessary for the good of the Department’s mission in carrying out the execution[,]” but “[a]pproval for the changes shall be documented in writing.” TMF 01/02.01 (B)(3). To date, all of the changes discussed above—new drugs, new dosages, new timing for the consciousness check, new instructions for backup syringes, and the new prison location—have not been documented and approved by the Executive Director in writing. Like the 2010 Protocol, the July 5 Protocol has not been signed by the Executive Director. And Honie has not received any documents related to the updated prison location, despite UDC’s “rolling obligation” to produce them. Ex. 22, Transcript at 62; *see id.* at 62-63 (“As you find documents, you need to turn them over immediately[.]”). Just two days ago, when counsel for Honie asked UDC counsel if Defendants intended to provide additional changes to the protocol, such as changes related to the new location, UDC counsel responded, “I thought we gave that to you.” Ex. 31, Eric Zuckerman’s Declaration at ¶ 10. Despite UDC counsel’s promises to follow-up, Honie still has not received those changes. Indeed, the very next day, UDC counsel informed Honie’s counsel “UDC is still finishing the edits and it needs Dr. Redd’s signature.” Ex. 31, Eric Zuckerman’s Declaration at ¶¶ 11-12, Ex. E.

78. There are still several aspects of UDC’s 2010 lethal injection protocol that have not been—and must be—updated based on the new drugs. Because the new drugs do not have the same properties as those they are replacing, simply substituting the new drugs in the old protocol is insufficient and dangerous. *See* Ex. 1, Dr. Van Norman’s Declaration at 10 (describing UDC’s plans to use new drugs in a “2010 protocol that was originally developed for an entirely different set of execution drugs” as “shocking and unconscionable”). UDC has implicitly acknowledged

guard by the execution warrant. UDC “was not aware” the State was going to request an execution warrant, and “found out from the federal defender” after the warrant was filed. Ex. 32, UDC’s Executive Team Text Messages.

82. UDC had not finalized its new lethal injection procedures at the time Honie’s execution warrant was issued. On June 14, 2024—four days after Honie received an execution warrant—Defendant Redd told reporters that “an operational plan for how this execution will be carried out will be available in coming days.”²⁰ On June 19, counsel for UDC emailed counsel for Honie, stating “we should also have an updated protocol for the lethal injection process for you by the end of this week.” Ex. 31 Eric Zuckerman’s Declaration at ¶ 3, Ex. A. In a phone call later that day, UDC counsel confirmed that Defendants would produce the “full protocol for the specific drugs” by Saturday, June 22. *Id.* ¶ 4. When counsel for Honie did not receive the updated “full protocol” as promised, counsel sent a follow-up email to UDC on June 25 asking for an updated estimate of production. *Id.* ¶ 5. In a phone call later that day, counsel for UDC informed Honie’s counsel that UDC was “still finalizing” the lethal injection procedures and were meeting weekly “to get it ironed out.” *Id.* ¶ 6. UDC counsel estimated it would take “at least a couple of weeks” to finalize the new procedures. *Id.* On June 28, UDC counsel told Honie’s counsel that he would produce it in another 9-10 days. *Id.* ¶ 7. When UDC finally disclosed its July 5 Protocol, critical information was still missing. *See, e.g.*, Ex. 1, Dr. Van Norman’s Declaration at 10 (“The concentration of drugs in the syringes is missing..., which along with the dose of drug allows determination of the volume of the drug to be injected, and therefore an estimate of the injection time, time of onset of effects, and time of peak effects.”).

²⁰ Kristen McPeck, *Utah set to proceed with lethal injection of Taberon Honie despite Idaho’s failed attempt*, 2KUTV (June 14, 2024, 3:42 PM), <https://kutv.com/news/local/utah-set-to-proceed-with-lethal-injection-of-taberon-honie-despite-idahos-failed-attempt-brian-redd-utah-dept-department-of-corrections-execution-thomas-creech>.

83. According to an [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Just two days later, the unnamed pharmacist granted Defendant Honey permission to sign on the pharmacist's behalf his/her declaration recommending a three-drug combination that does not include [REDACTED]. Ex. 21, Notice at 2-3. The next day, the State filed the unnamed pharmacist's declaration and announced its intention to conduct Honie's execution with ketamine, fentanyl, and potassium chloride. *Id.* at 1-2.

84. At the June 10 hearing, counsel for UDC stated that "much of the information is already provided [in the 2010 Protocol] on how the IV lines will be set up. That's not going to change." Ex. 22, Transcript at 30. UDC counsel repeatedly referred to the IV lines as an illustrative example demonstrating that "[t]here is no change to be made in some of the most fundamental issues here[,]" *id.* at 28-29, and therefore "no need to update" the 2010 Protocol. *Id.* at 24. Just 10 days later, UDC counsel contradicted its representations to the court by informing Honie's counsel in a phone call that "some of the IV information *will change* because technology has progressed since 2010 and the IV team is recommending better lines." Ex. 31, Eric Zuckerman's Declaration at ¶ 4 (emphasis added). UDC did not—and still has not—provided any additional details about these changes. *See generally* Ex. 30, July 5 Protocol. At best, UDC intends to implement new protocols about the IV lines that have not yet been documented, approved in writing, or disclosed to Honie; at worst, UDC decided to ignore the recommendations of medical professionals in an attempt to avoid resetting the statute of limitations on Honie's challenges to his method of execution.

85. In addition to inconsistent information about changes to IV lines, UDC has also provided inconsistent information about the dosage of the drugs, the timing of their administration, the labeling of syringes, the mechanism for administering saline throughout the lethal injection procedure, and the process for obtaining the drugs.

86. With respect to the dosages, the June 7 declaration of the unnamed pharmacist states that “[t]he recommended dose of each drug is dependent on a variety of factors, such as the defendant’s age and weight” and that the pharmacist would determine the dosage “after reviewing [Honie’s] medical chart.” Ex. 21, Notice at 6, ¶ 11. At the June 10 hearing, Honie argued that pharmacists were not qualified to determine drug dosage, and that “[t]here is no reason that they could not have looked through Mr. Honie’s medical file to get this [dosage] information” by now. Ex. 22, Transcript at 20. Counsel for UDC responded consistent with the unnamed pharmacist’s declaration—that the pharmacist will determine the dosage amount and the calculation will be “dependent upon various factors, health conditions, and other conditions specific to the individual.” *Id.* at 30. *See also id.* at 15. The next day, Defendant Redd reiterated this position, stating “Until the warrant was signed, we can’t finalize those things. I mean the weight of the individual may change.”²¹

87. On June 19, UDC provided Honie—for the first time—the exact dosages for each drug to be used in his execution. *See* Ex. 24, Dosage Information at 1 (chart depicted below).²²

²¹ Utah Dep’t of Corr., *Honie Press Conference*, YouTube at 09:04 (June 11, 2024), <https://www.youtube.com/watch?v=mqpPWTgqD24>.

²² Though the disclosure did not provide any additional information about the administration of the drugs apart from that in the chart above, the information was organized in the same format as Idaho’s Protocol, which dictates that all the chemicals in the chart, 1A-9A, be administered sequentially in the order they are listed; any backup dose instructions would be included in a separate chart with chemicals labeled 1B-9B. Ex. 28, Idaho DOC Protocol at 3, 8-9.

| LID Utah Chemical Chart 1 | | |
|--|--|--------|
| Syringe No. | Label Syringe No. Label | |
| 1A (complete 1-2) 500mg Ketamine | GREEN 1A (complete 1-2) 500mg Ketamine 5ml | GREEN |
| 2A (complete 1-2) 500mg Ketamine | GREEN 2A (complete 1-2) 500mg Ketamine 5ml | GREEN |
| 3A (flush) 60mL Saline | BLUE 3A (flush) 60mL Saline | BLUE |
| 4A (complete 6-7) 1250mcg Fentanyl Citrate | YELLOW 4A (complete 4-5) 1250mcg Fentanyl Citrate 10ml | YELLOW |
| 5A (complete 6-7) 1250mcg Fentanyl Citrate | YELLOW 5A (complete 4-5) 1250mcg Fentanyl Citrate 10ml | YELLOW |
| 6A (flush) 60mL Saline | BLUE 6A (flush) 60mL Saline | BLUE |
| 7A (complete 9-10) 120mEq Potassium Chloride | RED 7A (complete 7-8) 120mEq Potassium Chloride | RED |
| 8A (complete 9-10) 120mEq Potassium Chloride | RED 8A (complete 7-8) 120mEq Potassium Chloride | RED |
| 9A (flush) 60mL Saline | BLUE 9A (flush) 60mL Saline | BLUE |

The doses “are expressed in total mg or mcg, without a calculation for variation in individuals.”

Ex. 1, (Dr. Van Norman’s Declaration at 8. Though UDC repeatedly claimed that it could not provide Honie with the dosages because they needed to be calculated based on Honie’s current weight and medical information, UDC never conducted any such calculations. Instead, the dosages UDC provided on June 19—a total of 1,000 milligrams of ketamine, 2,500 micrograms of Fentanyl, and 240mEq of potassium chloride—are identical to those allotted for each of these drugs in Nevada’s three-drug execution protocol. Ex. 26, Nevada Execution Protocol at 23-26. Nevada’s Protocol requires these dosages for all executions carried out using fentanyl, ketamine, and potassium chloride, regardless of the prisoner’s age, weight, or medical history.

88. Two weeks later, UDC provided Honie the July 5 Protocol that prescribes half the dosages previously provided. Ex. 30, July 5 Protocol at 2. UDC gave no explanation for this change, or how the execution team is expected to resolve the discrepancies between the two documents. Notably, these doses were also “expressed in total mg or mcg, without a calculation for variation in individuals.” Ex. 1, Dr. Van Norman’s Declaration at 8.

89. These facts demonstrate that Defendants’ misleading and false statements to courts, Honie, and the public were, at best, unintentional mistakes, and at worst, purposeful

misrepresentations with the intention of denying Honie adequate information and time to meaningfully litigate his challenges to Utah’s execution procedures.

90. In addition to providing inconsistent information about the dosage of the drugs, UDC has also been inconsistent about the labeling of the syringes for each drug. The 2010 Protocol requires the two syringes filled with the first drug to both be labeled “Syringe #1”, the syringes filled with the second drug to be labeled “Syringe #2”, and the third drug “Syringe #3”. TMF 01/05.15 (B)(3). The Dosage Information, however, indicates that the two syringes filled with the first drug are supposed to each be labeled “GREEN 1A”, and “GREEN 2A”, the two syringes for the second drug are to be labeled “YELLOW 4A” and “YELLOW 5A”; and the two syringes for the third drug are to be labeled “RED 7A” and “RED 8A”. Ex. 24, Dosage Information at 1. Labeling is critical not only because it aids with differentiating between the drugs, but because the instructions to the IV team for which drugs to administer and when are written, in part, in terms of the labels on the drugs in both the 2010 Protocol and the July 5 Protocol. *See e.g.*, Ex. 30, July 5 Protocol at 2 (stating “administer backup syringe ‘1’”); TMF 01/05.15 (I)(3)(c)(2) (“syringe #1 shall be removed”).

91. UDC has also provided inconsistent information about the timing of administration for each drug. The 2010 Protocol requires a wait time of “at least 60 seconds” after the administration of *only* the first drug. TMF 01/05.15 (I)(3)(f) (“A period of sixty (60) seconds shall pass after the administration of the Sodium Thiopental[.]”). But in a phone call on June 25, 2024, after Honie’s counsel stressed that Honie could not consult with experts about the Protocol without critical details that have yet to be provided, UDC counsel stated that UDC intended to implement a *50-second* wait period after the administration of *both* the first and second drugs. Ex. 31, Eric Zuckerman’s Declaration at ¶ 6. Seconds matter in a lethal injection procedure, as they play a

critical role in determining the effect of the drugs. The July 5 Protocol, however, did not reflect the 2010 Protocol or what UDC counsel previously informed Honie. Instead, the July 5 Protocol requires a *60-second* wait period after the administration of *both* the first and second drugs. Ex. 30, July 5 Protocol at 2. UDC provided no explanation for these changes, or how the execution team is expected to resolve the discrepancies between the 2010 Protocol and the July 5 Protocol.

92. UDC has also been inconsistent about the mechanism of saline administration throughout the lethal injection procedure. The 2010 Protocol requires saline to be administered from a “bag of Normal Saline IV solution” controlled by a “Flo Trol clamp.” TMF 01/05.15 (F)(1-2). In contrast, the Dosage Information provided to Honie on June 19 indicates that saline is to be administered via three separate saline flush syringes with 60mL solution. Ex. 24, Dosage Information at 1. *See also* chart from paragraph 87 above. The July 5 Protocol, however, reverts back to requirements of the 2010 Protocol. Ex. 30, July 5 Protocol at 2. This change reflects not only a difference in the mechanism of saline administration, but also potentially in volume. But because the 2010 Protocol speaks to the administration of saline only in terms of seconds of flow and does not provide any details that would affect the speed of the flow, the 2010 Protocol does not provide sufficient information to calculate the volume of saline that will actually be administered. This is a critical detail, as the saline affects the speed at which the drugs will be administered, which impacts how they will affect the body. Again, UDC provided no explanation for these changes, or how the execution team is expected to resolve the discrepancies between the July 5 Protocol and the Dosage Information.

93. UDC has also been inconsistent about the procedures it will follow to obtain the new drugs. The unknown pharmacist’s declaration clearly states that the pharmacist “would prescribe” the three drugs to be administered in Honie’s execution. Ex. 21, Notice at 6 ¶ 9. At the

June 10 hearing, Honie argued that it is illegal for any pharmacist to prescribe two of the three drugs. Ex. 22, Transcript at 8-9.²³ UDC did not directly respond to these arguments at the hearing. Nine days later, however, UDC counsel told Honie’s counsel in a phone conversation that a “doctor”—not a pharmacist—will prescribe the drugs, and that the pharmacist’s declaration stating otherwise was merely UDC counsel’s “typo.” Ex. 31, Eric Zuckerman’s Declaration at ¶ 4.

94. The most recent changes to the 2010 Protocol—the July 5 Protocol—consisted of “operation instructions for the med team” which UDC characterized as “the sheets they will get that walk them step by step through the process.” *Id.* at ¶ 9, Ex. D. These two pages alone contained at least eleven typos, which not only make the “operation instructions” difficult to read, but impossible to follow. *See generally*, Ex. 30, July 5 Protocol. For example, step four of the section entitled “IV Placement Process” ends mid-sentence. *Id.* Additionally, the instructions for administering saline dictate that the clamp shall “be allowed to run for XXX seconds.” *Id.* at 2. The failure to identify the number of seconds is a substantive issue that leaves the execution team guessing what they are supposed to do. Similarly, the “Syringe Preparation” section of the July 5 Protocol appears to be completely blank. Ex. 30 July 5 Protocol at 1. In contrast, the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²³ Utah Code Ann. § 58-17b-627(1)(c) clearly states that pharmacists are not permitted to prescribe “a controlled substance that is included in Schedules I, II, III or IV” under Utah law or the federal Controlled Substances Act (CSA). *See also* Utah Code Ann. § 58-37-6(7)(a). Under both the state and federal CSA, ketamine is listed as a Schedule III drug, § 58-37-4(2)(c)(ii)(G), and fentanyl is listed as a Schedule II drug, § 58-37-4(2)(b)(ii)(I). *See also* DEA, *Drug Scheduling*, U.S. Drug Enf’t Admin., <https://www.dea.gov/drug-information/drug-scheduling>.

[REDACTED]. To add to confusion, as discussed above, the June 19 Dosage Information references a color-coded and numbered labeling system that is not mentioned in either the 2010 Protocol or the July 5 Protocol.

95. Notably, the July 5 Protocol only addresses “work assignments” for the “IV team” and the “Execution Team lead/Medical Amin.” Ex. 30, July 5 Protocol. But those are not the only individuals who play a role in carrying out the execution. Indeed, the Warden is responsible for conducting the consciousness check. Yet there are no new instructions for the Warden, even though UDC has changed consciousness check procedures since the 2010 Protocol.

96. Given all the inconsistencies among the 2010 Protocol, July 5 Protocol, and the June 19 Dosage Information, it is no surprise that Dr. Gail Van Norman, an anesthesiologist with ample experience setting up IV lines and administering both ketamine and fentanyl, described UDC’s written lethal injection procedures as “incoherent.” Ex. 1, Dr. Van Norman’s Declaration at 11 (“[I]ndeed, as an anesthesiologist, even I cannot interpret these instructions with certainty without making some assumptions that do not appear in the protocol.”).

6. UDC’s new protocol was not developed by qualified medical professionals

97. The involvement of adequately trained medical professionals in developing execution protocols is particularly imperative in the lethal injection context. Indeed, lethal injection is the method of execution that has resulted in the most botched executions. In 2022 alone, 7 out of 19 lethal execution attempts were botched.²⁴

98. Upon information and belief, UDC did not consult with medical professionals with the appropriate expertise prior to adopting its new, untested lethal injection protocol.

²⁴ *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFORMATION CENTER (Dec. 16, 2022), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

99. UDC admitted that it was a pharmacist—not a medical doctor— “who has conducted research and recommended a three-drug combination to administer death by lethal injection.” Ex. 21, Notice at 1. “Pharmacists do not receive specialized training in the prescription of general anesthetic agents, nor do they administer anesthetic agents. A pharmacist does not have sufficient knowledge or experience to prescribe anesthetic medications in clinical, let alone toxic, doses.” Ex. 1, Dr. Van Norman’s Declaration at 6.

100. Expert Dr. Gail Van Norman, an anesthesiologist with over 42 years of experience administering the drugs in UDC’s protocol, has identified several glaring deficiencies with the declaration of the pharmacist who developed UDC’s new lethal injection procedures. Such deficiencies “demonstrate a lack of experience with [ketamine and fentanyl], a lack of understanding of how they are currently used in medical procedures, and a lack of understanding of the limits of their ability to affect consciousness and symptoms of dyspnea (shortness of breath), air hunger, suffocation, as well as their history of inadequate pain relief during surgeries, unless combined with multiple other medications.” Ex. 1, Dr. Van Norman’s Declaration at 7.

101. First, “[t]he Pharmacist erroneously asserts that fentanyl is an anesthetic agent[;] [but] [n]ot even the FDA classifies fentanyl as an anesthetic agent.” Ex. 1, Dr. Van Norman’s Declaration at 7.

102. Second, “[t]he Pharmacist asserts that the combination of high-dose ketamine and fentanyl is ‘used in surgery all the time,’ but “[t]his statement is not true.” *Id.* Indeed, “[h]igh-dose fentanyl/ketamine anesthesia fell out of favor in the 1980’s for its inability to assure unconsciousness, its failure to provide adequate pain reduction (analgesia) and its [adverse] side effects.” *Id.*

103. Third, the pharmacist fails to acknowledge that because of fentanyl's ceiling effect, "less than half of the dose called for in Utah's proposal" will actually have an effect on Honie. Ex. 1, Dr. Van Norman's Declaration at 14. *See also id.* at 7. As discussed above, the ceiling effect also renders the backup syringe of ketamine completely ineffective for its intended purpose.

104. These errors demonstrate that UDC's new Protocol was not developed by a medical professional with the requisite knowledge, training, experience, and expertise to develop a constitutionally acceptable lethal injection procedure.

7. Failure to provide adequate and meaningful access to counsel and to the courts

105. Given the novel nature of the drug combination, UDC's refusal to tailor its protocol specific to these new drugs, its failure to involve adequately trained medical professionals at critical stages of the process (such as the selection of the drugs and the consciousness check), and the likelihood that Honie will be rendered incompetent for execution after the administration of the first drug in the three-drug Protocol, it is imperative that Honie have meaningful access to counsel and the courts during his execution.

106. "The [D]epartment shall adopt rules governing the attendance of persons ... at the execution." Utah Code Ann. § 77-19-11(8).

107. UDC's 2010 Protocol and state statute allow prisoners to designate five people as witnesses to his execution. *See* TMF 01/02.03 (C)(1); Utah Code Ann. § 77-19-11(2)(d). Neither the 2010 Protocol nor statute explicitly permit or exclude legal representatives from serving as one of the prisoner's five allotted witnesses. The 2010 Protocol also grants Defendant Redd, as the UDC Executive Director, the discretion to "make additions to the witness list when necessary." TMF 01/02.04 (A)(4).

108. According to the 2010 Protocol, [REDACTED]

109. The 2010 Protocol [REDACTED]

110. The 2010 Protocol requires UDC to “coordinate all telephone needs” for news media to use at the Media Center and provide “[e]ach news agency . . . dedicated phone lines” when requested. TMF 01/08.07 (A)(1-2). “If the Department is unable to install collect-call-only telephones, personal phones may be used.” TMF 01/08.07 (A)(3).

²⁵ The facts related to UDC’s witnessing policies and procedures are derived from its 2010 Protocol. As previously discussed, UDC cannot follow its 2010 Protocol because it intends both to use different drugs and to carry out executions in a location different than that described in the 2010 Protocol. *See e.g.*, “The prison [where executions are conducted] has moved, and so we have to update [the Protocol].” Ex. 22, Transcript at 28. Although UDC has been promising Honie an updated version signed by Director Redd reflecting these changes, Honie has not yet received it. *See* Ex. 31, Eric Zuckerman’s Declaration at ¶¶ 10, Ex. F.

[REDACTED]

112. The 2010 Protocol does not provide any provisions either permitting or excluding access to phones or computers by the prisoner's legal counsel. "[O]ther than giving a definition of 'attorney of record' as an inmate's attorney, the 2010 protocols do not prescribe or proscribe any attorney behavior during the execution, except to the extent an attorney is named as a witness to the execution." Ex. 5, Order at 24-25.

113. On June 19, Honie requested, through his counsel, that UDC allow 1) his counsel to witness his execution, and 2) his co-counsel "in a room adjacent to the witness room with [a] computer, wifi capability or mifi approval, and a cell phone." Ex. 31, Eric Zuckerman's Declaration at ¶¶ 11-12, Ex. E. Honie's counsel also provided, at UDC's request, a copy of Arizona's Execution Protocol, which allows the same communication systems Honie asked of UDC. *Id.* at ¶ 12; *see also* Ex. 27, Arizona Execution Protocol at 17. On June 25, UDC counsel informed Honie's counsel in a phone call that Defendants would not make separate accommodations for Honie's legal team, but counsel could witness the execution provided Honie designated counsel as one of his five allotted witnesses. Ex. 31 Eric Zuckerman's Declaration at ¶ 13. Three days later—without any explanation—Defendants informed Honie's counsel that Defendant Redd "is very strongly leaning against" allowing Honie to designate counsel as witnesses. *Id.* at ¶ 15. On July 2, after Honie's counsel repeatedly asserted that Honie's rights to meaningful access to courts still applied until the moment of his death, UDC finally agreed, again, to allow Honie to designate his counsel as one or more of his allotted witnesses. *Id.* at ¶ 16, Ex. C.

114. Defendants, however, continue to deny Honie’s request for his witnessing counsel to have access to some type of communication with his co-counsel and therefore the court. *Id.* at

¶ 17. In a phone call, UDC’s counsel informed counsel for Honie:

I do understand your concern about whether it looks like there is suffering you want to be able to intervene or call a court. Nobody will be allowed a phone. There will be a phone, a direct line from the execution chamber to the Attorney General. That is going to be the fastest way to stop anything. Nobody is allowed phones.

Id. at ¶ 13. Honie’s counsel clarified that Honie’s request did not require phone access in the witness room itself, as access to co-counsel with a communications device in an adjacent room would also suffice. *Id.* Honie’s counsel informed UDC counsel that he had previously toured the execution chamber and had personal knowledge that there is a small room adjacent to the holding cell near the chamber that could be used for this purpose. *Id.* On July 3, UDC counsel suggested that—as a “potential solution”—Honie’s witnessing counsel could go find UDC counsel “nearby” and discuss any issues that arise during the execution with him. *Id.* at ¶ 17, Ex. C. After Honie’s counsel explained that would not resolve the issue, UDC counsel stated, “Honie’s counsel may not bring a phone into the prison and UDC will not provide counsel access to a cell phone or a land line or a computer with internet access under any circumstances.” *Id.*

115. Once Honie’s counsel leaves his vehicle at the staging area, he will no longer be able to communicate with anyone outside of those in his direct presence. If the execution requires intervention from Honie’s legal team—which only those witnessing the execution would know—Honie’s counsel will need a UDC officer to escort him out of the building and drive him back to his car at the staging area before he can access a device to communicate with a court, or with co-counsel with computer access to file an emergency motion. Such a delay will prolong any

unconstitutional suffering Honie experiences and effectively eviscerate his ability to vindicate his rights. Denying Honie's legal witness phone access is to deny Honie access to courts.

8. Readily available alternative to Utah's lethal injection procedures.

116. Solely for the purposes of this Complaint, and because the Supreme Court has made it a prerequisite to a successful Eighth Amendment method-of-execution challenge, counsel for Honie identifies the following alternative method of execution that is feasible, can be readily implemented, and would significantly reduce the substantial risk of severe pain presented by Utah's current execution Protocol: execution by a one-drug lethal injection procedure using the barbiturate pentobarbital.²⁶

117. At least ten states currently authorize a single-drug pentobarbital protocol as a method of execution: Ex. 34, Texas Execution Protocol at 10-11; Ex. 27, Arizona Execution Protocol at 28); Ex. 28, Idaho Execution Protocol at 5; Ex. 35, Missouri Execution Protocol at 1; Ex. 36, Kentucky Execution Protocol at 2; Ex. 37, Georgia Execution Protocol at 5; Ex. 38, Louisiana Execution Protocol at 15, 18-19; Ex. 39, Ohio Execution Protocol at 2; Ex. 40, North Carolina Execution Protocol at 1, 17-18; and Ex. 41, South Dakota Execution Protocol at 2. At least one additional state, Montana, permits use of pentobarbital in combination with other drugs. Ex. 42, Montana Execution Protocol at 51.

118. Exactly half of the 24 executions carried out across the country in 2023,²⁷ and, over half of the nine executions conducted so far this year were carried out with pentobarbital as the

²⁶ Honie does not concede that he is required to plead an alternative under state law. Article I, § 9 is more protective than its federal Eighth Amendment counterpart and the issue of whether a Plaintiff must plead an alternative method of execution in a challenge to the State's methods of execution is an issue of first impression in Utah.

²⁷ Amber McLaughlin (MO), Robert Fratta (TX), Wesley Ruiz (TX), Leonard S. Taylor (MO), John Balentine (TX), Gary Green (TX), Arthur Brown (TX), Michael Tisius (MO), Johnny Johnson (MO), Jedidiah Murphy (TX), Brent Brewer (TX), and David Renteria (TX) were each

only drug.²⁸ Put differently, since the beginning of 2023, there were 17 executions that employed the same alternative method Honie offers in this Complaint.

119. In addition to the jurisdictions that have carried out executions in the last 18 months, namely Texas, Missouri and Georgia, other jurisdictions have carried out executions in recent years using a single-drug pentobarbital protocol. Arizona, for example, used a single-drug pentobarbital protocol to conduct three executions in 2022 and recently announced that it intends to schedule execution dates as soon as early 2025.²⁹ The federal government also executed 13 prisoners using a single-drug pentobarbital protocol in 2020 and 2021.³⁰ Since January 2020, there have been at least forty-three executions conducted by this method throughout the country.³¹

120. Notably, when Texas updated its execution protocol as recently as September 2023, the Texas Department of Criminal Justice chose to retain pentobarbital as its only authorized method of execution. *See* Ex. 34, Texas Execution Protocol. Since updating its protocol nine

executed with pentobarbital. DPIC, *Execution Database*, <https://deathpenaltyinfo.org/database/executions> (last visited June 30, 2024) (located applying filters to include 2023 and lethal injection as the method of execution).

²⁸ Ivan Cantu (TX), Willie James Pye (GA), Brian Dorsey (MO), David Hosier (MO), and Ramiro Gonzales (TX) were each executed with pentobarbital. *Id.* (located applying filters to include 2024 and lethal injection as the method of execution).

²⁹ Stacey Barchenger & Jimmy Jenkins, *Arizona intends to resume death penalty in 2025, Democratic Attorney General says*, Arizona Republic (May 17, 2024, 4:03 PM), <https://www.azcentral.com/story/news/politics/arizona/2024/05/17/arizona-death-penalty-executions-could-resume-next-year-attorney-general-says/73736877007/>.

³⁰ DPIC, *Execution Database*, <https://deathpenaltyinfo.org/database/executions> (last visited June 30, 2024) (located applying filters to include federal, 2020-2021, and lethal injection as the method of execution).

³¹ *Id.* (located applying filters to include 2020 and method of execution).

months ago, Texas has executed three people using pentobarbital, and intends to conduct at least two more executions using pentobarbital by the end of 2024.³²

121. The number of recent executions involving pentobarbital clearly demonstrates that the drug is a feasible, available, and readily implemented alternative to Utah's current 3-drug combination. Yet, the unnamed pharmacist who determined Utah's lethal injection protocol recommended a 3-drug procedure, at least in part, because he or she believed "Pentobarbital is unavailable." Ex. 21, Notice at 6 ¶¶ 7-8. But public records requests confirm that at least three states added to their inventory of pentobarbital in just the last year and a half. According to the records, the Texas Department of Criminal Justice received eight new doses of pentobarbital in January 2023, and another 8 doses in October 2023. Ex. 43, Texas Storage Inventory. Also in 2023,³³ the Idaho Department of Corrections obtained 15 grams of pentobarbital, and purchased another three doses in the last six months.³⁴ And 3.5 months ago, the Georgia Department of Corrections obtained six new doses of pentobarbital on March 14, 2024, two of which were used in an execution later that month. Ex. 44, Georgia Inventory Log. Additionally, the Indiana Department

³² *Upcoming Executions*, Death Penalty Information Center, <https://deathpenaltyinfo.org/executions/upcoming-executions> (last visited June 30, 2024).

³³ *What drug was used in Idaho's unsuccessful execution of Idaho's longest death-row inmate?*, KTVB (Mar. 5, 2024, 10:52 PM) <https://www.ktvb.com/article/news/investigations/7-investigates/what-drug-was-used-idahos-unsuccessful-execution-thomas-creech/277-6f3fa13d-402e-48e9-8ccb-68c877b751a1>. The botched execution of Thomas Creech caused by the execution team's failure "to establish a viable vein to insert an IV line," not because of any issues arising from the drug pentobarbital itself. *Id.*

³⁴ Kevin Fixler, *Idaho buys another round of lethal injection drugs. Could next execution happen soon?* Idaho Statesman (June 12, 2024, 8:12 AM) <https://www.idahostatesman.com/news/northwest/idaho/article288676215.html>.

of Corrections announced just last month that it recently obtained pentobarbital intended for carrying out executions.³⁵

122. Even after receiving a subpoena to produce “all documents relating to the procurement or attempted procurement of lethal substances . . . that UDC may use in an execution,” UDC has failed to provide any documentation or information demonstrating that they even attempted to procure pentobarbital or explaining why, given that numerous other states have and are able to acquire this drug, Utah is unable to do so. Ex. 17, Subpoena. Notably, when discussing Honie’s upcoming execution, Defendant Redd indicated that UDC has “had similar staff go to other states to learn from their experiences [carrying out executions], we communicate on a regular basis . . . There are professionals that we speak with, so we just try to learn and prepare.”³⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

123. The above demonstrates that a single dose pentobarbital execution protocol is a readily implemented alternative to UDC’s current Protocol.

CLAIMS FOR RELIEF

³⁵ Matt Christy, *Holcomb, Rokita push for Indiana’s first execution since 2009*, CBS4 (June 26, 2024, 4:49 PM) <https://cbs4indy.com/indiana-news/holcomb-rokita-push-for-indianas-first-execution-since-2009/>.

³⁶ Kristen McPeek, *Utah set to proceed with lethal injection of Taberon Honie despite Idaho’s failed attempt*, 2KUTV (June 14, 2024, 3:42 PM), <https://kutv.com/news/local/utah-set-to-proceed-with-lethal-injection-of-taberon-honie-despite-idahos-failed-attempt-brian-redd-utah-dept-department-of-corrections-execution-thomas-creech>.

³⁷ *What drug was used in Idaho’s unsuccessful execution of Idaho’s longest death-row inmate?*, KTVB (Mar. 5, 2024, 10:52 PM) <https://www.ktvb.com/article/news/investigations/7-investigates/what-drug-was-used-idahos-unsuccessful-execution-thomas-creech/277-6f3fa13d-402e-48e9-8ccb-68c877b751a1>.

CLAIM ONE

Carrying out Honie’s execution under UDC’s current lethal injection protocol violates Article I, § 9 of the Utah Constitution by Subjecting Honie to Unnecessary Rigor and Cruel and Unusual Punishment.

124. Honie realleges and incorporates herein by reference all of the preceding paragraphs of this Complaint as if set forth in full below.

125. As discussed above, Article I, § 9 of the Utah Constitution protects individuals from being treated with unnecessary rigor.

126. Utah’s three-drug execution protocol, utilizing ketamine, fentanyl, and potassium chloride violates Honie’s right to be free from infliction of cruel and unusual punishment under Article I, § 9 to the Utah Constitution.

A. Utah’s lethal injection protocol presents a substantial risk of serious harm.

127. Article I, § 9 forbids UDC, in carrying out a death sentence, from inflicting pain beyond that necessary to end the condemned prisoner’s life. *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death ... something more than the mere extinguishment of life.”); *see also Baze*, 553 U.S. at 48 (2008) (stating an execution violates prohibitions on cruel and unusual punishment if it “superadd[s] pain to the death sentence”); *Bucklew*, 587 U.S. at 120 (“[T]he law has always asked whether the punishment superadds pain well beyond what’s needed to effectuate a death sentence.”). The Supreme Court has explained that “to prevail on such a claim there must be a ‘substantial risk of serious harm.’” *Baze*, 553 U.S. at 50 (citing *Farmer v. Brennan*, 511 U.S. 825, 842, 846, n.9 (1994).)

1. The three drugs in Utah’s lethal injection protocol create an unconstitutional risk of pain and suffering.

128. Utah’s Execution Protocol presents an unnecessary and substantial risk of serious harm in violation of Article I, § 9. The never-before-used drug combination is an “unusual form

of punishment that will intensify the sentence of death with a cruel superaddition of terror, pain, and disgrace.” *Bucklew*, 587 U.S. at 133 (cleaned up).

129. Article I, § 9 of the Utah Constitution reads:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

130. The Utah Supreme Court has clarified the “unnecessary rigor” clause of Article I, § 9 of the Utah Constitution as follows:

The unnecessary rigor clause of the Utah Constitution protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require. The restriction on unnecessary rigor is focused on the circumstances and nature of the process and conditions of confinement.

Dexter v. Bosko, 2008 UT 29, ¶ 17, 184 P.3d 592, 596. The Court went on to say, “This may include being unnecessarily exposed to an increased risk of serious harm.” *Id.* ¶ 19.

131. The Utah Supreme Court has also held:

[T]he [unnecessary rigor clause] makes section 9 broader than its federal counterpart. Article I, section 9 is also a self-executing provision that prohibits specific evils that can be remedied without implementing legislation.

State v. Lafferty, 2001 UT 19, ¶ 73, 20 P.3d 342, 365 (internal citations omitted).

132. Utah’s lethal injection protocol, which calls for injections of ketamine, fentanyl, and potassium chloride, creates an unnecessary risk that Plaintiff will suffer unnecessary severe pain during his execution.

a. Ketamine

133. Defendants’ use of ketamine, a dissociative anesthetic, as the first drug in its lethal injection procedure contributes to the substantial risk of severe harm presented by UDC’s novel

protocol. Ketamine, even in combination with the second drug fentanyl, will not reliably produce a state of unconsciousness. The drug, similar to the drug phencyclidine (PCP), will cause Honie to experience a dissociative state of dysphoria. In addition to causing suffering on its own, this state will interfere with the consciousness check. The end result is that, following administration of the first drug, Honie will be conscious but in a state of incompetence. Its use in UDC's protocol creates an undue and substantial risk that Honie will be aware and will suffer excessive pain when the second drug, fentanyl, is administered, and an unnecessarily horrific death when the third drug, potassium chloride, is introduced into his body.

134. Ketamine is also likely to cause airway obstruction that will lead to suffocation. Furthermore, ketamine, especially in high doses, causes nausea and vomiting.

135. Utah's proposed use of ketamine presents a substantial risk of severe harm to Honie in violation of his Article I, § 9 rights.

b. Fentanyl

136. The second drug to be utilized, fentanyl, does not reliably induce a state of unawareness, even at high doses, and cannot reliably put Honie in a state of being so deeply anesthetized as to be unaware. In addition, as a result of the administration of fentanyl, Honie is sure to suffer from chest wall rigidity and respiratory depression, causing him to experience the sensation of being unable to breathe. Finally, fentanyl can interfere with consciousness checks, leading to continuation of the execution despite Honie's awareness.

c. Potassium chloride

137. Injecting Honie with the third and final drug in Utah's protocol, potassium chloride, will induce cardiac arrest, resulting in his death. The "pain associated with potassium infusion is severe, burning in nature, and would cause extreme suffering in an individual that is not deeply

anesthetized.” Ex. 25, Dr. Stoehr’s Declaration at 7. The United States Supreme Court recognizes that if Honie has not achieved the requisite depth of anesthesia, he will suffer unconstitutional, excruciating pain from administration of the potassium chloride. *See e.g., Baze*, 553 U.S. at 53.

138. “[T]he purposeless and needless imposition of pain and suffering” is by definition an “unconstitutional punishment.” *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)); *see Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Joint opinion of Stewart, Powell, and Stevens, JJ.) (pronouncing that a “sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (explaining that punishment involving hitching post “amounts to gratuitous infliction of ‘wanton and unnecessary’ pain” and violates “basic concept underlying the Eighth Amendment [,which] is nothing less than the dignity of man”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (explaining punishment is excessive if it is “nothing more than the purposeless and needless imposition of pain and suffering”); *Francis v. Resweber*, 329 U.S. 459, 463 (1947) (“The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.”). That is precisely the case here. Executing Honie under the current protocol, despite the existence of less harmful alternatives, would violate his Article I, § 9 right to be free from cruel and unusual punishment and unnecessary rigor.

2. The lack of necessary safeguards in Utah’s execution protocol increases the substantial risk of harm.

139. On their own, the harm from Utah’s three-drug procedure renders any execution unconstitutional. But the substantial risk of severe harm is heightened even further by UDC’s refusal to update the 2010 Protocol and by the protocol’s failure to provide for adequate training

and qualifications of staff involved in the execution process, and adequate access to counsel and the courts during the execution.

140. The 2010 Protocol also does not require UDC to maintain, possess, and know how to use the equipment, drugs, and procedures that would be needed to reverse or ameliorate the effect of the lethal injection drugs in the event the execution is called off or death does not occur. The 2010 Protocol does not include life-saving contingency plans, should they become necessary. This is particularly problematic given the novel drug combination, the lack of written procedures specific to the drug combination, and the resulting increased risk that Honie will not be rendered insensate by the administration of the ketamine and fentanyl, but will be rendered in a state of physical and mental suffering due to the ketamine and fentanyl.

141. These shortcomings of Utah’s execution protocol exacerbate the risk that Honie will suffer pain or severe harm during his execution.

B. There are feasible, readily implemented alternative methods that would significantly reduce the substantial risk of severe pain.

142. The United States Supreme Court has held that “where (as here) the question in dispute is whether the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew*, 587 U.S. at 134 (citing *Glossip v. Gross*, 576 U.S. 863, 868-78 (2015)); *see Baze*, 553 U.S. at 52.

143. Though a prisoner offering an alternative method of execution “is not limited to choosing among those presently authorized by a particular State’s law[,]” the method Honie proffered—a single drug procedure utilizing pentobarbital—is authorized in Utah. *Bucklew*, 587 U.S. at 140. *See Utah Code Ann. § 77-18-113* (authorizing lethal injection and firing squad).

144. Honie does not suggest that a method of execution must be instantaneous or painless to meet constitutional standards. However, a method of execution must refrain from causing unnecessary or superadded pain or suffering. As discussed above, execution by a single dose of pentobarbital is feasible, can be readily implemented by the UDC, and would significantly reduce the risk of severe pain inherent in UDC's current Protocol. Defendants, therefore, are constitutionally obligated to employ such methods.

1. Pentobarbital is a feasible alternative

145. One of the express ways a plaintiff may establish a reasonably available alternative to a State's method of execution is to identify a "well-established protocol in another State as a potentially viable option." *Bucklew*, 587 U.S. at 140.

146. Execution by a single-drug barbiturate protocol "has become a mainstay of state executions." *Barr v. Lee*, 591 U.S. 979, 980 (2020) (per curiam). As discussed above, at least ten states currently authorize a single-drug pentobarbital protocol as a method of execution.

147. Since January 2020, there have been at least forty-three executions using a single dose of pentobarbital throughout the country. Since the beginning of 2023, 17 executions employed the same alternative method Honie offers in this Complaint.

148. Additionally, public records requests confirm that at least three states added to their inventory of pentobarbital in just the last year and a half.

149. The number of recent executions involving pentobarbital and the ability of other jurisdictions to continue to acquire the drug clearly demonstrates that a single-drug pentobarbital protocol is a feasible and available alternative to Utah's current three-drug combination that can be readily implemented.

150. Execution by a single dose of pentobarbital has been constitutionally tested and approved by the Supreme Court of the United States. *Lee*, 591 U.S. at 980. It has also repeatedly been upheld by United States Courts of Appeals. *See, e.g., Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (per curiam); *Gissendaner v. Comm’r*, 779 F.3d 1275 (11th Cir. 2015) (per curiam).

2. Pentobarbital significantly reduces the substantial risk of pain inherent in Utah’s lethal injection current protocol.

151. When carried out properly, a single-drug pentobarbital protocol, does not carry the “same risk of pain” inherent in other lethal injection protocols, such as a three-drug protocol. *Lee*, 591 U.S. at 980. Indeed, a single drug barbiturate protocol is a “proven alternative method” with a “track record of successful use.” *Bucklew*, 587 U.S. at 142 (citing *McGehee v. Hutchinson*, 854 F.3d 488, 493 (2017)). A single drug pentobarbital protocol has been used in “over 100 executions, without incident,” and it has been “repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions.” *Lee*, 591 U.S. at 980 (emphasis in original).

152. Unlike ketamine and fentanyl, pentobarbital is a general anesthetic that will render a person unconscious and insensate to pain. *Id.* At high doses, pentobarbital is also fatal. In single drug executions, pentobarbital “acts as both an anesthetic and the cause of death,” rendering a person unconscious and insensate to pain before causing their death. Ex. 25, Dr. Stoehr’s Declaration at 3. A single drug protocol using pentobarbital would virtually eliminate the issues with the consciousness check inherent in UDC’s protocol, since executions by pentobarbital “do not even require consciousness checks.” *Id.* Additionally, if there is a mistake during the administration of pentobarbital, or the drug does not result in death, it can simply be readministered

without causing any of the adverse side effects that would lead to torturous pain and suffering from potassium chloride.

153. Additionally, pentobarbital does not produce the adverse side effects of ketamine and fentanyl that, on their own but particularly in combination, would lead to severe pain and suffering, such as psychosis and chest wall rigidity. *Id.* at 4. Given the myriad of issues with UDC's chosen drugs and consciousness check procedures, "[e]xecution by a single dose of pentobarbital would significantly reduce the substantial risk of severe pain associated with Utah's current lethal injection procedure utilizing ketamine, fentanyl and potassium chloride." *Id.* at 2.

154. The trend among the death penalty states is to utilize a one-drug protocol with pentobarbital to serve as the anesthetic and fatal drug. Honie's proposed alternative aligns with that trend. Execution by a one-drug procedure utilizing compounded pentobarbital that complies with all state and federal compounding requirements, and has been tested for purity and potency, with records of testing, chain of custody, and compounding formula disclosed to prisoners and their counsel, presents a feasible method of execution that—along with implementation of necessary measures and safeguards to assure a lawful and humane execution that complies with the guarantees afforded to all citizens including Honie under Article I, § 9—is available to Utah and UDC.

CLAIM TWO

Proceeding with Honie's execution violates his right to due process under Article I, § 7 of the Utah Constitution.

155. Honie realleges and incorporates herein by reference all the preceding paragraphs of the instant Complaint as if set forth in full below.

156. Article I, § 7 of the Utah Constitution established that "[n]o person shall be deprived of life, liberty or property, without due process of law.

157. Article I, § 7 of the Utah Constitution requires the state to provide all persons, including those convicted of capital offenses that are facing execution, with constitutionally sufficient notice and opportunity to be heard before interfering with the fundamental rights of such persons.

158. The Due Process Clause of Article I, § 7 entitles Honie to notice and an opportunity to be heard before being deprived of life, liberty, or property.

159. Being “deprived of life” unequivocally implicates a constitutionally protected interest under due process, and the United States Supreme Court has held that constitutionally protected “liberty interests are implicated” when the government plans to “inflict[] appreciable physical pain.” *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

160. Honie has a due process right to adequate notice of the specifics of the lethal injection method by which UDC intends to execute them. *See, e.g., First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 953 (D. Ariz. 2016), *aff’d in part, rev’d in part and remanded*, 938 F.3d 1069 (9th Cir. 2019) (“In some cases, the State’s change to an inmate’s execution method may be so significant, so near the date of execution, and so unsupported by state interests, that it denies the inmate the process he is due in order to raise an Eighth Amendment challenge.”); *Pizzuto v. Tewalt*, 997 F.3d 893, 904-06 (9th Cir. 2021). At least four federal district courts have held that a prisoner has a due process right to notice of at least the method of execution. *See, e.g., In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, 2018 U.S. Dist. LEXIS 209769, at *43 (S.D. Ohio Dec. 12, 2018) (“Plaintiffs have a right to notice of the intended method of execution[.]”); *First Amend. Coal. of Arizona, Inc.*, 188 F. Supp. 3d at 940; *Oken v. Sizer*, 321 F. Supp. 2d 658, 665 (D. Md. 2004) (explaining that due process does not permit federal courts to “tak[e] [the state’s] word that [an inmate’s] rights will not be violated”); *Floyd v. Daniels*, No.

3:21-cv-00176-RFB-CLB, 2021 U.S. Dist. LEXIS 125738, at *11 (D. Nev. July 6, 2021) (“The Court holds that pursuant to the Due Process Clause, Floyd is entitled to detailed notice as to the manner of his execution.”). Additional precedent establishes that prisoners facing the death penalty are entitled to notice when there has been a change in the intended method of execution. *See, e.g., Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (per curiam); *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997); *see also Sims v. State*, 754 So.2d 657, 665 (Fla. 2000) (per curiam); *DeShields v. State*, 534 A.2d 630, 639 n.7 (Del. 1987); *Wetzel v. Wiggins*, 85 So.2d 469, 471 (Miss. 1956); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984).

161. Due process requires that the 2010 Protocol be amended and tailored to the UDC’s selection of new drugs. Instead, UDC has side-stepped its duties to adopt a clear protocol by creating new, contradictory procedures—disclosed to Honie in piecemeal fashion—that it claims do not replace, but supplements its 2010 Protocol. This has resulted in a lethal injection protocol that is not only incomplete but incoherent. The individuals charged with carrying out executions must refer to UDC’s written protocol to understand when and how to implement lethal injection procedures. But the protocol is dispersed amongst at least three documents—the 2010 Protocol, the Dosage Information, and the July 5 Protocol—which contradict each other, and UDC has not provided any guidance for how to resolve the contradictions. Indeed, Honie cannot even determine which additional documents the protocol is comprised of because none of them have been approved in writing by UDC’s Executive Director, as required. Failure to lay out these procedures in a manner that is clear to all involved parties creates the added risk that Honie will be subjected to unnecessary pain and suffering because execution personnel will be unprepared and unguided

in the event problems arise. As such, UDC's Protocol will lead to an ad hoc process that is unreliable and inherently dangerous.

162. UDC waited until two months before Honie's scheduled execution to inform him that it intended to inject him with an untested drug combination to kill him. UDC did not provide any additional information, such as the dosages for each drug or the order they were to be administered. This information is critical to any investigation into whether UDC's new drug combination poses a substantial risk of severe pain and unnecessary suffering. Yet, UDC waited another twelve days to provide Honie with this basic information. Over the next month, UDC disclosed additional changes in a piecemeal fashion, further inhibiting Honie's ability to meaningfully consult with medical experts about the protocol. UDC did not provide Honie with the new operating procedures for the IV and execution teams until last week—just one month before Honie's scheduled execution. Given UDC's numerous inconsistent statements about what changes it anticipated making to the protocol, Honie could not meaningfully investigate UDC's lethal injection procedure prior to receiving the July 5 Protocol. And even after, the July 5 Protocol created more questions than answers because the procedures are inconsistent with both the 2010 Protocol and the Dosage Information. Procedural due process principles require that Honie be afforded an adequate opportunity to litigate the UDC's untested protocol. Due process principles require both notice and the opportunity to be heard. Fundamental fairness is inextricably intertwined with Honie's ability to vindicate his Article I, § 9 rights.

163. UDC continues to assert that its Protocol grants it the discretion to continue making changes up until Honie is deceased. Under UDC's logic, UDC could change the drugs it intends to use in Honie's execution the day it is scheduled to happen, without any notice to Honie.

164. Honie deserves adequate time to investigate the medical implications of UDC's untested protocol, particularly in light of all the evidence suggesting UDC did not adequately consult with its own medical professionals in developing the Protocol. Honie's procedural due process rights encompass his ability to meaningfully litigate against Defendants' execution protocol.

165. For these reasons, executing Honie pursuant to Utah's execution protocol would violate Honie's due process rights under the Article I, § 7 of Utah's Constitution.

CLAIM THREE

The use of ketamine under Utah's lethal injection protocol will produce psychosis and render Honie incompetent to be executed pursuant to *Ford v. Wainwright*.

166. Honie realleges and incorporates herein by reference all the preceding paragraphs of the instant Complaint as if set forth in full below.

167. Ketamine is derived from phencyclidine (PCP). The injection of ketamine under Utah's execution protocol will cause Honie to become highly intoxicated and to experience hallucinations, delusional thinking, and psychotic ideations.

168. UDC's July 5 Protocol require the execution team to adhere to the following procedure: inject Honie with ketamine, allow 15 seconds for saline to flow, wait another 60 seconds, inject Honie with fentanyl, allow for 15 seconds for saline to flow, wait another 60 seconds, and then, if Honie is unconscious, inject him with potassium chloride. That procedure alone—which does not take into account the time each injection takes to administer—means that Honie, assuming he passes the consciousness check, will be under the influence of ketamine's psychotic effects for at least two and a half minutes before he is injected with the drug that will cause his death. If he is still conscious after the first two drugs—which he likely will be—then he

will be injected with another dose of ketamine, increasing the amount of time Honie will be under the influence of the psychosis-inducing drug.

169. Ketamine IV has an onset of action time of mere seconds and duration of action of 10-20 minutes. While under the influence of ketamine administered intravenously at the dosage Utah's Protocol requires for at least two and a half minutes, Honie will likely experience a state of psychosis. As a result, Honie will likely no longer have a rational understanding that he is being executed or why, rendering him incompetent to be executed.

170. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane,” which was defined as a person whose mental condition “prevents him from comprehending the reasons for the penalty or its implications.” *Id.* at 410, 417. The Supreme Court further explained in *Panetti v. Quarterman*, 551 U.S. 930 (2007), that Article I § 9 prohibits the execution of a person who lacks a “rational understanding” of “the State’s rationale for [his] execution.” *Id.* at 958-59. The Supreme Court recently reiterated that the inquiry under *Ford* is concerned not with the particular disorder of the inmate but with the “particular *effect*,” stating that the *Ford* standard “has no interest in establishing any precise *cause*.” *Madison v. Alabama*, 586 U.S. 265, 277 (2019).

171. A *Ford* claim becomes ripe when an execution is imminent. Here, because the State has issued a warrant for Honie’s execution and the execution is currently scheduled for the week of August 8, 2024, Honie’s presentation of his *Ford* claim is ripe. *See Burton v. Stewart*, 549 U.S. 147, 154-55 (2007) (per curiam) (finding capital prisoner’s *Ford* claim was “necessarily unripe until the State issued a warrant for his execution”); *see also Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir. 2016) (Because a *Ford* claim inquires into the prisoner's mental state near the time of

execution, a *Ford* claim is typically not ripe until an execution date has been set.). Furthermore, Utah Code of Crim. P. 77-19-204 requires that “[w]hen a court has good reason to believe an inmate sentenced to death is incompetent to be executed, it shall stay the execution[.]”

172. Though counsel does not have information that Honie is currently incompetent, he will become so after he is injected with ketamine, the first drug in Utah’s protocol. Because Honie will be unable to vindicate his rights under *Ford* at that time, this Court should address this claim now.

CLAIM FOUR

UDC’s refusal to allow counsel witnessing Honie’s execution access to a communications device or access to counsel with a communications device during the execution violates Article I, § 11 of the Utah Constitution.

173. Honie realleges and incorporates herein by reference all the preceding paragraphs of this Complaint as if set forth in full below.

174. The Utah Constitution states, “All courts shall be open, and every person, for an injury done to the person in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, with or without counsel, any civil cause to which the person is a party.” Utah Const. art. I, § 11. There is no analog to the Open Courts Clause in the federal constitution. The Utah Supreme Court has stated that “[t]he clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality.” *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

175. The Utah Supreme Court has interpreted the Open Courts Clause to provide both procedural and substantive protections. *Laney v. Fairview City*, 2002 UT 79, ¶ 33, 57 P.3d 1007, 1017; *see also Berry*, 717 P.2d at 675 (noting the Open Courts Clause is related to the Due Process

Clause both “in their historical origins and to some extent in their constitutional functions”). Under the Open Courts Clause, neither the legislature nor the courts may implement limitations on a plaintiff’s ability to obtain review of his claims that are so inflexible as to effectively close the courthouse doors to a plaintiff. *See Berry*, 717 P.2d at 675-77.

176. The Court of Appeals addressed the framework for assessing a violation of the Open Courts Clause in *Currier v. Holden*, 862 P.2d 1357 (Utah Ct. App. 1993).³⁸ The court noted that in assessing a challenge under the Open Courts Clause a court must “first inquire[] into whether a statute abrogating an existing remedy provides ‘an effective and reasonable alternative remedy,’” and “if no alternative remedy is provided, examine[] whether the statute eliminates ‘a clear social or economic evil’ through means that are not unreasonable or arbitrary.” *Id.* at 1362 (quoting *Berry*, 717 P.2d at 680). Looking to the Utah Supreme Court’s precedent, the Court of Appeals noted courts should also consider “the degree to which a statute impairs an individual’s right to seek remedy,” and “the nature of the right impaired.” *Id.* at 1363. The Utah Court of Appeals found, “[t]he greater the intrusion upon the constitutionally protected interest, the greater and more explicit the state’s reasons must be’ for enacting the particular statute.” *Id.* (quoting *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 358 (Utah 1990)). The *Currier* court found that the statute of limitations at issue created a “relatively severe limitation on an individual’s right to petition for habeas corpus relief[,]” suggesting the court should “carefully scrutinize the purpose and effectiveness” of the limitation. *Id.* at 1364. As to the nature of the right impaired, the court noted

³⁸ The *Patterson* Court cited *Petersen v. Utah Lab. Comm’n*, 2017 UT 87, ¶ 20, 416 P.3d 583, for the proposition that only if a statute has “abrogated a cause of action” does it violate the Open Courts Clause, and found that *Patterson*’s claim failed because he did not “apply the *Petersen* framework to rule 65C’s time bar.” *Patterson v. State*, 2021 UT 52, ¶¶ 201, 202, 504 P.3d 92, 135. Although *Currier* was decided before *Petersen*, the two cases recite the same basic framework, and both rely heavily on the Court’s decision in *Berry*. Compare *Petersen*, 2017 UT 87, ¶ 20, 416 P.3d at 589 with *Currier*, 862 P.2d at 1362. *Currier*, however, discusses application of the Open Courts Clause specifically within the context of habeas corpus.

that Utah courts have attributed greater legal significance to “individual liberties historically considered as ‘the indispensable conditions of a free society’ than to ‘liberties which derived merely from shifting economic arrangements.” *Id.* (quoting *Allen v. Trueman*, 110 P.2d 355, 365 (Utah 1941) (Wolfe, J., concurring)). Accordingly, the court found the limitations at issue required higher scrutiny.³⁹ *Id.* The court noted that statutes of limitation “do not create a total abrogation of all remedies,” as was forbidden in *Berry*. Therefore, a reviewing court will invalidate a statute of limitations “if it imposes a disability ‘on individual rights which is too great to be justified by the benefits accomplished.’” *Id.* at 1365 (quoting *Condemarin*, 775 P.2d at 358).

177. To make this determination the court balanced “the nature of the action, the interests of government and the interests of the litigant.” *Id.* at 1369. Balancing these factors required the court to “weigh the countervailing interests of the State and of a petitioner” and “to consider these interests relative to the nature of the writ of habeas corpus.” *Id.* at 1370. In balancing these factors, the court noted the importance of the right to a writ of habeas corpus, as expressed by both the Utah Supreme Court and the Supreme Court of the United States, and the lack of flexibility in the statute of limitations, allowing the state to apply the limitations period “regardless of the equities of the particular situation.” *Id.* at 1371. The court ultimately held that balancing both parties’ interests and considering those interests relative to the nature of the Great Writ, “the inflexible three-month filing period created by this statute of limitations is unreasonable” and the statute therefore violated the Open Courts Clause. *Id.* at 1372.

³⁹ The court found that consideration of the nature of the right impaired “only has potential to modify the review of limitations on important, if not constitutionally based personal rights,” therefore “we suspect that the analysis in this opinion will rarely trigger heightened scrutiny of statutes of limitations, preserving the legislative prerogative in most instances.” *Currier*, 862 P.2d at 1372.

178. In this case, as in *Currier*, Honie’s right to ensure he is “not deprived of life or liberty in derogation of a constitutional right” also requires higher scrutiny. *Id.* at 1365 (quoting *Hurst v. Cook*, 777 P.2d 1029, 1034 (Utah 1989)). This is even more true where Honie’s very life is at stake. Failure to allow Honie any avenue for relief on a claim that his constitutional rights are being violated “impose[] a disability ‘on individual rights which is too great to be justified by the benefits accomplished[,]’” *id.* (quoting *Condemarin*, 775 P.2d at 358), and would therefore violate Honie’s rights under the Open Courts Clause.

179. Counsel for prisoners in other states have been forced to file such motions during their client’s executions. For example, during Arizona’s nearly 2-hour execution of Joseph Wood, two of the three attorneys attending the execution were permitted to leave the witness room to access a phone; they then filed a stay motion invoking Wood’s Eighth Amendment rights, which resulted in a thirty-minute hearing before a federal judge. *McGehee*, 463 F. Supp. 3d at 921.

180. Arizona’s Protocol now explicitly allows witnessing attorneys immediate access to a cell phone: “While the attorney witness is in the witness room, a member of the Witness Escort Team shall hold one mobile phone designated by the attorney, to be made available to the attorney in exigent circumstances.” Ex. 27, Arizona Execution Protocol at 17. Ohio likewise provides that “at all times after counsel enters the witness room, counsel shall have free access to the phone near the entrance door of the Death House.” Ex. 39 Ohio Execution Protocol at 14.

181. UDC has categorically refused to allow Honie’s counsel access to any communication devices—phones or otherwise—at USCF during his execution. As a result, Honie’s counsel will not have the ability to communicate with anyone outside the witness room—including the courts and the remainder of Honie’s legal team—at any point during the execution. Counsel must have this capability to ensure his client’s Eighth Amendment rights are protected

throughout the duration of his execution. *See McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 925 (E.D. Ark. 2020), *aff'd sub nom. Johnson v. Hutchinson*, 44 F.4th 1116 (8th Cir. 2022) (“Plaintiff has an Eighth Amendment right not to be subjected to cruel and unusual punishment, and substantial caselaw supports the contention that this right attaches until his successful execution.”) (quoting *Coe v. Bell*, 89 F. Supp. 2d 962, 966-67 (M.D. Tenn. 2000), *vacated as moot*, 230 F.3d 1357 (6th Cir. 2000)).

182. UDC’s novel, never-before-used method of execution heightens the risk that Honie will need access to counsel and to the courts during his execution to vindicate his rights under *Ford v. Wainwright* and the cruel and unusual and unnecessary rigor provisions of Article I, § 9.

183. Honie has a right to access to courts under the Open Courts Clause of the Utah Constitution. This right guarantees him the ability, through counsel, to contact a judge during his execution should it appear the execution is being carried out in a way that violates Article I § 9. *See, e.g., Coe*, 89 F. Supp. 2d at 967 (holding that a death-row prisoner’s right to access courts encompassed a right to have counsel view his execution with access to a telephone); *McGehee*, 463 F. Supp. 3d at 925 (same).

184. UDC does not have a legitimate penological interest in denying counsel who will witness Honie’s execution the ability to communicate with the courts—either directly or through co-counsel. Permitting attorneys to bring a telephone, or providing an outbound line in the execution building, would not impose substantial burdens on prison guards, other prisoners, or the allocation of prison resources. As discussed above, at least two corrections departments with similar security concerns, Arizona and Ohio, allows for the very accommodation that Honie has requested from UDC. “Such accommodations would be made only in the limited circumstance of the duration of an execution.” *McGehee*, 463 F. Supp. 3d at 930. Additionally, Honie’s counsel

would use the communication device, whether it be a phone or computer, for the sole purpose of communicating with his other counsel and the courts.

185. UDC's Protocol has established not one, but four lines of direct communication between UDC personnel present at the execution and the Attorney General's Office. There is no reason UDC cannot provide one line for Honie's counsel. Honie cannot rely on the Attorney General's Office—who requested Honie's execution warrant—to protect his interests during his execution. Indeed, the Attorney General's Office has repeatedly argued that's Honie's lethal injection challenges have no merit.

186. The Open Courts Clause of the Utah Constitution demands that if circumstances arise during Honie's execution that present constitutional concerns, the prison cannot hinder his efforts to pursue a legal claim because that would abrogate an existing remedy without providing an alternative remedy. *Currier*, 862 P.2d at 1357.

CLAIM FIVE

Ketamine and fentanyl are not equal or more effective substances than sodium thiopental.

187. Utah Code of Crim. P. 77-19-10(2) requires that lethal intravenous injection be carried out by (a) "sodium thiopental; or (b) other equally or more effective substance sufficient to cause death."

188. Fentanyl and ketamine are not equally or more effective than sodium thiopental.

189. As described above, sodium thiopental is a barbiturate used in lethal injection executions to induce general anesthesia, rendering the prisoner insensate to pain. In contrast, ketamine nor fentanyl are not barbiturates. Ketamine is a dissociative anesthetic that "does not produce unconsciousness." Ex. 1, Dr. Van Norman's Declaration at 5. Fentanyl is a synthetic opioid, not an anesthetic, and it also does not produce unconsciousness. *Id.* at 13.

190. Fentanyl and ketamine belong to different classes of drugs and do not achieve the same results as sodium thiopental. Sodium thiopental renders the prisoner insensate to the torturous effects of the third drug, potassium chloride, whereas fentanyl and ketamine do not. Additionally, ketamine can cause hallucinations, delirium, delusional ideation, and psychosis, which sodium thiopental does not. Fentanyl causes chest rigidity, shortness of breath, and suffocation. Since neither ketamine nor fentanyl produce unconsciousness or render a person insensate to the effects of potassium chloride, they are not equally or more effective than sodium thiopental.

191. As a result, fentanyl and ketamine do not meet the statutory requirements under Utah Code of Crim. P. 77-19-10(2). Therefore, their use in Honie's execution would violate Utah law.

CLAIM SIX

Utah's refusal to follow or update its own protocol violates Utah Code of Criminal procedure 77-19-10(6).

192. According to the Utah Code of Crim. P. 77-19-10(6), "The department shall adopt and enforce rules governing procedures for the execution of judgments of death." UDC satisfies this statutory requirement by maintaining and ensuring compliance with a current and detailed execution Protocol that outlines procedures for each of Utah's two methods of execution: firing squad and lethal injection. As the 2010 Protocol itself states that "[t]he purpose" of the protocol is "to provide the Department's policies, procedures, and post orders for planning and carrying out the sentence for the execution of a person convicted of a capital offense." TMF 01/01.01(A).

193. As discussed above, UDC has insisted that it will not amend the 2010 Protocol, which specifies that lethal injection executions will be carried out by a three-drug combination of sodium thiopental, pancuronium bromide, and potassium chloride. Despite this refusal to amend or update its execution protocol, UDC does not intend to use the drugs specified in the 2010

Protocol to execute Honie. Instead, it intends to use fentanyl and ketamine, two drugs not referenced in the 2010 Protocol at all.

194. Utah's 2010 Protocol lays out the rules governing procedures for the execution of judgments of death. However, UDC is refusing to enforce those rules, choosing instead to follow contradictory procedures using entirely different drugs. This failure to enforce its own rules governing procedures for the execution of judgments of death is illegal under state law, as it violates Utah Code of Crim. P. 77-19-10(6).

PRAYER FOR RELIEF

WHEREFORE, Honie requests the following relief:

1. That this Court assume jurisdiction of this cause and set this case for a hearing on the merits.
2. That this Court issue a declaratory judgment declaring and enforcing Honie's rights under Article I, § 9 and, further, issue a temporary restraining order or a preliminary or permanent injunction prohibiting Defendants from carrying out any lethal injection on Honie until such time as Defendants take the reasonable and necessary steps to devise a new procedure or procedures to carry out a lawful execution and produce a new execution protocol, with reasonable and necessary adjustments made, so that Honie may be executed in a constitutional manner.
3. That this Court issue a declaratory judgment declaring and enforcing the rights of Honie, as alleged above, and further issue a temporary restraining order or preliminary or permanent injunction to enforce Honie's rights under the Article I, § 11, prohibiting Defendants from carrying out Honie's execution without allowing counsel witnessing the execution to have meaningful and adequate access to a communication device at USCF.

4. Any other relief that this Court deems appropriate.

WHEREFORE, Honie prays this Court enter an order and judgment as stated above.

DATED this 11th day of July, 2024

/s/ Eric Zuckerman
Jon M. Sands
Federal Public Defender
Eric Zuckerman
Assistant Federal Public Defender
Attorney for Plaintiff Taberon Honie

INDEX OF EXHIBITS

| Exhibit | Description |
|---------|--|
| Ex. 1 | Declaration of Gail Van Norman, M.D., dated July 7, 2024 |
| Ex. 2 | REDACTED (Blank) |
| Ex. 3 | UDC Execution Protocol (redacted TMF) |
| Ex. 4 | Second Am. Compl., <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. Apr. 14, 2023), Dkt. No. 21 |
| Ex. 5 | Order Granting Mot. to Dismiss, <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. Dec. 22, 2023), Dkt. No. 90 |
| Ex. 6 | Mot. and Third Am. Compl., <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. Jan. 12, 2024), Dkt. No. 92 |
| Ex. 7 | Suppl. to Third Amend. Compl., <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. Mar. 7, 2024), Dkt. No. 118 |
| Ex. 8 | Order Denying Mot. for Leave to Am. and Mot. to Suppl., <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. May 24, 2024), Dkt. No. 137 |
| Ex. 9 | Notice of Appeal, <i>Menzies, et al., v. Utah Dep't of Corr.</i> , No. 230901995 (3rd Jud. Dist. Ct. May 28, 2024), Dkt. No. 140 |
| Ex. 10 | Pet. for Extraordinary Writ, <i>Menzies, et al., v. State</i> , No. 20240608-SC, (Utah June 6, 2024) |
| Ex. 11 | Suppl. to Pet. for Extraordinary Writ, <i>Menzies, et al., v. State</i> , No. 20240608-SC (Utah June 14, 2024) |
| Ex. 12 | Pet. for Emergency Relief, <i>Honie v. State</i> , Nos. 20240608-SC, 20240559-SC (Utah June 18, 2024) |
| Ex. 13 | Order, <i>Menzies et al., v. State</i> , Nos. 20240559-SC & 20240608-SC (Utah July 8, 2024) |
| Ex. 14 | Order, <i>Menzies, et al., v. State</i> , No. 20240559-SC (Utah July 8, 2024) |
| Ex. 15 | Appl. for Execution Warrant, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. Apr. 30, 2024), Dkt. No. 15 |
| Ex. 16 | Proposed Warrant of Execution, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. Apr. 30, 2024), Dkt. No. 16 |
| Ex. 17 | Subpoena, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. May 2, 2024), Dkt. No. 22 |
| Ex. 18 | Obj. in Part to Subpoena Duces Tecum, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. May 24, 2024), Dkt. No. 54 |
| Ex. 19 | Mot. to Compel, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. May 30, 2024), Dkt. No. 61 |
| Ex. 20 | Mem. Opposing Mot. to Compel, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. June 7, 2024), Dkt. No. 83 |
| Ex. 21 | Notice Re: Substances to be Used in Event of Execution by Lethal Injection, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. June 7, 2024), Dkt. No. 80 |
| Ex. 22 | Tr. of: Warrant of Execution Hr'g, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. June 10, 2024), Dkt. No. 91 |

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| Ex. 23 | Warrant of Execution, <i>State v. Honie</i> , No. 981500662 (5th Jud. Dist. Ct. June 10, 2024), Dkt. No. 85 |
| Ex. 24 | Dosage Information |
| Ex. 25 | Declaration of James D. Stoehr, Ph.D., dated July 6, 2024 |
| Ex. 26 | Nevada Execution Protocol |
| Ex. 27 | Arizona Execution Protocol |
| Ex. 28 | Idaho Execution Protocol |
| Ex. 29 | Alabama Execution Protocol |
| Ex. 30 | UDC July 5 Protocol |
| Ex. 31 | Declaration of Eric Zuckerman, dated July 10, 2024 |
| Ex. 32 | UDC's Executive Team Text Messages |
| Ex. 33 | REDACTED (Blank) |
| Ex. 34 | Texas Execution Protocol |
| Ex. 35 | Missouri Execution Protocol |
| Ex. 36 | Kentucky Execution Protocol |
| Ex. 37 | Georgia Execution Protocol |
| Ex. 38 | Louisiana Execution Protocol |
| Ex. 39 | Ohio Execution Protocol |
| Ex. 40 | North Carolina Execution Protocol |
| Ex. 41 | South Dakota Execution Protocol |
| Ex. 42 | Montana Execution Protocol |
| Ex. 43 | Texas Storage Inventory re Pentobarbital |
| Ex. 44 | Georgia Inventory Log (2024) |
| Ex. 45 | REDACTED (Blank) |