

1 Craig M. Waugh (Bar No. 026524)  
2 Laura Sixkiller (Bar No. 022014)  
3 DLA Piper LLP (US)  
4 2525 East Camelback Road, Suite 1000  
5 Phoenix, Arizona 85016-4232  
6 Tel: 480.606.5100  
7 Fax: 480.606.5101  
8 craig.waugh@us.dlapiper.com  
9 laura.sixkiller@us.dlapiper.com  
10 DLAPHX@us.dlapiper.com

11 Adam J. Pié (*pro hac vice* pending)  
12 Michael Bakhama (*pro hac vice* pending)  
13 DLA Piper LLP (US)  
14 The Marbury Building  
15 6225 Smith Avenue  
16 Baltimore, Maryland 21209  
17 Tel: 410.580.3000  
18 Fax: 410.580.3001  
19 adam.pie@us.dlapiper.com  
20 michael.bakhama@us.dlapiper.com

Victoria Lopez (Bar No. 330042)  
Jared Keenan (Bar No. 027068)  
Benjamin L. Rundall (Bar No. 031661)  
American Civil Liberties Union Foundation  
of Arizona  
P.O. Box 17148  
Phoenix, Arizona 85011  
Tel: 602.650.1854  
Fax: 602.650.1376  
vlopez@acluaz.org  
jkeenana@acluaz.org  
brundall@acluaz.org

21 *Attorneys for Plaintiffs*

22 **IN THE SUPERIOR COURT OF ARIZONA**  
23 **IN AND FOR THE COUNTY OF MARICOPA**

24 Jewish Community Relations Council of  
25 Greater Phoenix; Paul Rockower;  
26 Alan Zeichick,

27 Plaintiffs,

28 v.

State of Arizona; Arizona Department of  
Corrections, Rehabilitation & Reentry;  
Mark Brnovich; David Shinn; John Does  
1-10,

Defendants.

CASE NO.: \_\_\_\_\_

**VERIFIED COMPLAINT**

(Declaratory Judgment)

(Tier 3 Case)

Plaintiffs Jewish Community Relations Council of Greater Phoenix, Paul Rockower,  
and Alan Zeichick bring this Complaint for declaratory and injunctive relief against

1 Defendants State of Arizona, Arizona Department of Corrections, Rehabilitation & Reentry,  
2 Mark Brnovich, David Shinn, and John Does 1-10.

3 **INTRODUCTION**

4 1. While views may differ on the proper scope and merits of the death penalty in  
5 Arizona, a consensus has long existed under an evolving sense of decency and justice that  
6 cyanide gas – the primary method used to exterminate Jewish people and members of other  
7 minority groups during the Holocaust in World War II – should no longer be used in this State.  
8 In 1992, the Arizona Constitution was amended to add lethal injection and to eliminate lethal  
9 gas as a method of capital punishment, permitting its use only as to those sentenced to death  
10 for crimes committed before the enactment of the Amendment – and only at their election.

11 2. This case does not challenge the State’s authority to impose capital punishment  
12 in certain cases; rather, Plaintiffs seek to prevent the grievous moral and constitutional injury  
13 of taxing Arizonans, including victims of the Holocaust, and effectively forcing them to  
14 subsidize and relive unnecessarily the same form of cruelty used in World War II atrocities.

15 3. In 1992, the Defendant State of Arizona (“State of Arizona”) executed Don  
16 Harding using cyanide gas. According to Jim Belanger, Harding’s attorney who witnessed his  
17 client’s execution, Harding’s “face was red and contorted as if he were attempting to fight  
18 through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then  
19 took several quick gulps of the fumes. . . . Don’s body started convulsing violently and his  
20 arms strained against the straps. His face and body turned a deep red and the veins in his temple  
21 and neck began to bulge until I thought they might explode. . . . Every few seconds he gulped  
22 for air. He was shuddering uncontrollably and his body was wracked with spasms. His head  
23 continued to snap back and forth. His hands were tightly clenched. . . . Several more minutes  
24 passed before the most violent of Don’s convulsions subsided. Then the muscles along his left  
25 arm and back began twitching in a wavelike motion under his skin.” In total, it took almost 11  
26 minutes for the gas to kill Harding. Jim Belanger, Opinion, *I watched Don Harding’s execution*  
27 *in an Arizona gas chamber. His face still haunts me*, Arizona Central (June 8, 2021), a true  
28 and correct copy of which is attached as **Exhibit 1**.

1           4.       The next time the State of Arizona executed a prisoner using this method was  
2 Walter LaGrand in 1999. This time, the gas took even longer to kill: 18 minutes. An eyewitness  
3 reported seeing Walter “coughing violently – three or four loud hacks – and then, in what  
4 appeared to be his last moments of consciousness, he made a gagging sound before falling  
5 forward.” Patty Machelor, *LaGrand: 18 minutes to die*, Tucson Citizen (Mar. 4, 1999), a true  
6 and correct copy of which is attached as **Exhibit 2**.

7           5.       Throughout the 1970s and 1980s, eyewitness accounts of cyanide gas executions  
8 in other states consistently described the horrors of this method of execution in even more  
9 chilling detail. The witnessed horrors included strenuous convulsions, agonizing gasps,  
10 agonized shrieking and thrashing, and one individual in so much pain he repeatedly smashed  
11 his head into a metal pole.

12          6.       For Jewish citizens, and survivors of the Holocaust, this horror is particularly  
13 harrowing. When John Steiner, an employee at California’s San Quentin Prison, was asked to  
14 serve as a witness for such an execution, he flatly refused. Steiner explained that he had seen  
15 enough such “execution[s]” during his time at Auschwitz-Birkenau, where the Nazis murdered  
16 his mother and over a million other Jews and others deemed “deviants.” Mr. Steiner explained:  
17 “I refused to act as a witness because, among other things, I knew that lethal gas is an  
18 excruciatingly painful method of execution. Witnessing a person being gassed to death would  
19 bring back horrendous memories of the hideous fate suffered by millions, which included my  
20 family, extended relatives, and friends. Even without witnessing the execution, being at San  
21 Quentin brought back all the memories, including the ghastly odors of the death camp  
22 Auschwitz-Birkenau.” Declaration of John M. Steiner, Ph. D., *Fierro v. Gomez*, a true and  
23 correct copy of which is attached as **Exhibit 3**.

24          7.       The State of Arizona is preparing to use this horrific method of execution once  
25 again using taxpayer funds collected from Arizonans, including approximately 80 Holocaust  
26 survivors who currently call our State their home. Many of these survivors are horrified at  
27 being taxed to implement the same machinery of cruelty that was used to murder their loved  
28 ones. The American Jewish Committee, one of the nation’s oldest Jewish advocacy groups,

1 has said: “Arizona’s decision to employ Zyklon B gas as a means of execution defies belief. .  
2 . . Whether or not one supports the death penalty as a general matter, there is general agreement  
3 in American society that a gas devised as a pesticide, and used to eliminate Jews, has no place  
4 in the administration of criminal justice.” American Jewish Committee, *AJC Decries Arizona*  
5 *Plan to Use Zyklon B for Prisoner Executions*, Press Release (June 7, 2021), a true and correct  
6 copy of which is attached as **Exhibit 4**.

7         8.       Now, 30 years after the State of Arizona first acknowledged the horrors of lethal  
8 gas as a method of execution and eliminated it in all but a narrow set of cases, the question of  
9 lethal gas is not one of mere policy—it has taken on constitutional dimensions. The chilling  
10 eyewitness descriptions of this grisly method of execution leaves no room for doubt that it is  
11 a paradigmatically cruel and unusual form of punishment. The scientific understanding of its  
12 physiological effects has evolved; the history of its use in Arizona and elsewhere has become  
13 scarred with horrifying mishaps and unnecessary human suffering; federal courts have  
14 properly struck down its use as cruel and unusual punishment under the Eighth and Fourteenth  
15 Amendments to the United States Constitution; and other states have abandoned its use  
16 altogether.

17         9.       The State of Arizona has a long history of support for its Jewish citizens, as  
18 evidenced most recently when Governor Ducey signed into law a new bill requiring that  
19 Arizona students in grades 7-12 receive education regarding the Holocaust. Governor Ducey  
20 has cited a rise in antisemitism as a reason Holocaust education is necessary.

21         10.       In addition to the 80 or more Holocaust survivors living in Arizona, many more  
22 survivors throughout the country are among our last living witnesses to the horrors associated  
23 with death by cyanide gas. Their loved ones were killed in gruesome fashion by one of the  
24 most heinous regimes in history, using the very method on which the State now spends  
25 taxpayer money in preparation to execute those sentenced to death.

26         11.       The inescapable association of cyanide gas with the Holocaust and Nazi  
27 Germany, and in particular the large-scale retreat from its use by other states as well as in  
28 Arizona, stands as a powerful testament to its status in 2021 as a “cruel and unusual” form of

1 punishment. In light of all these factors, the time is long overdue for Arizona’s courts to strike  
2 down the remaining, narrow vestiges of the use of cyanide gas for execution. The State  
3 expressed its rejection of cyanide gas executions decades ago, and thus no persuasive State  
4 interest exists to continue this outdated, barbaric, and emotionally charged reminder of one of  
5 our world’s darkest chapters.

6 12. Plaintiffs therefore respectfully request that this Court declare the use of cyanide  
7 gas as a form of execution to be cruel and unusual punishment as applied under Article 2,  
8 section 15 of the Arizona Constitution and issue a permanent injunction barring Defendants  
9 from expending any further taxpayer funds to further its use of cyanide gas for executions.

10 **PARTIES**

11 13. Plaintiff Jewish Community Relations Council (“JCRC”) of Greater Phoenix is  
12 an Arizona nonprofit corporation serving as an advocate for Jewish residents and taxpayers in  
13 Arizona, particularly in the Greater Phoenix area. The JCRC fosters education, dialogue, and  
14 advocacy within and outside the Jewish community, providing a collective voice in advancing  
15 the causes of Justice, Compassion and Equity. The JCRC is located at 12701 North Scottsdale  
16 Road #203, Scottsdale, Arizona 85254.

17 14. Plaintiff Paul Rockower, a taxpaying resident of Arizona, is the Executive  
18 Director of the JCRC of Greater Phoenix. Mr. Rockower resides in Phoenix, Arizona.

19 15. Plaintiff Alan Zeichick, a taxpaying resident of Arizona, is a member of the  
20 Board of Directors of the JCRC of Greater Phoenix. Mr. Zeichick resides in Phoenix, Arizona.

21 16. Because this Complaint seeks to challenge the constitutionality of Arizona’s  
22 lethal gas regulations, Plaintiffs bring this action against the State of Arizona and its agents  
23 responsible for operating Arizona’s lethal gas program. Pursuant to A.R.S. § 12-1841, a Notice  
24 of Claim of Unconstitutionality along with copies of this Complaint and all contemporaneous  
25 filings have been or will be served on the Attorney General, the Speaker of the House of  
26 Representatives, and the President of the Senate.

27 17. Defendant Arizona Department of Corrections, Rehabilitation & Reentry  
28 (the “ADCRR”) is an executive agency of the State of Arizona and is responsible for

1 administering the execution of the death penalty subject to a death warrant issued by the  
2 Arizona Supreme Court. The ADCRR is further responsible for purchasing the materials  
3 necessary to conduct an execution by lethal gas and for operating and maintaining Arizona’s  
4 gas chamber. The ADCRR is headquartered at 1601 W. Jefferson, Phoenix, Arizona 85007.

5 18. Defendant Mark Brnovich is the current Attorney General for the State of  
6 Arizona. As this Complaint seeks a declaratory judgment rejecting statutes authorizing the use  
7 of cyanide gas as unconstitutional, “the attorney general of the state is [the] proper party  
8 defendant in declaratory judgment actions involving the constitutionality of a statute,  
9 ordinance, or franchise.” *Ethington v. Wright*, 66 Ariz. 382, 388 (1948).

10 19. Defendant David Shinn is the current Director of the ADCRR. Director Shinn is  
11 responsible for overseeing the ADCRR, including the administration of the execution of the  
12 death penalty subject to a death warrant issued by the Arizona Supreme Court.

13 20. Defendants John Does 1-10 are employees of ADCRR who, in the course of  
14 their employment at the ADCRR, oversee or engage in activities in furtherance of the  
15 Defendants lethal gas operations. The identities of Defendants John Does 1-10 are not yet  
16 known to Plaintiffs. Plaintiffs reserve the right to amend this Complaint as those entities are  
17 identified in discovery.

18 **STANDING, JURISDICTION, AND VENUE**

19 21. Plaintiffs seek a declaratory judgment and injunctive relief to prevent  
20 Defendants from engaging in the unconstitutional practice of cyanide gas executions.

21 22. “The question of standing in Arizona does not raise constitutional concerns  
22 because, unlike the U.S. Constitution, Arizona’s constitution contains no case or controversy  
23 requirement.” *Karbal v. Ariz. Dep’t of Revenue*, 215 Ariz. 114, 116, ¶ 7 (App. 2007).  
24 Standing in Arizona presents a prudential consideration centered on judicial restraint—not a  
25 jurisdictional issue. *Biggs v. Cooper ex rel. Cty. of Maricopa*, 236 Ariz. 415, 418, ¶ 8  
26 (2014). *See also Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Arizona*, 148  
27 Ariz. 1, 6 (1985) (“We impose that restraint to insure that our courts do not issue mere advisory  
28

1 opinions, that the case is not moot and that the issues will be fully developed by true  
2 adversaries.”).

3 23. Standing requires petitioners to “show a particularized injury to  
4 themselves.” *Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 17 (2005). As relevant here,  
5 taxpayers have standing “in an appropriate action to question illegal expenditures made or  
6 threatened by a public agency,” *Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432  
7 (App. 1979), and “to challenge a legislative act that expend[s] monies *for an unconstitutional*  
8 *purpose*,” *Bennett v. Napolitano*, 206 Ariz. 520, 527, ¶ 30 (2003) (emphasis original). This  
9 right is “based upon the taxpayers’ equitable ownership of such funds and their liability to  
10 replenish the public treasury for the deficiency which would be caused by the  
11 misappropriation.” *Ethington*, 66 Ariz. at 386.

12 24. As taxpaying residents of Arizona, and a non-profit organization that represents  
13 Arizona taxpayers with a particular interest in this issue, Plaintiffs have standing to pursue  
14 declaratory and injunctive relief to prevent the unconstitutional expenditure of taxpayer funds.  
15 Moreover, Plaintiffs collectively have suffered a particularized injury, as their own tax dollars  
16 were used, and potentially will continue to be used, to finance Defendants’ lethal gas program,  
17 including the use of the same cyanide gas used by Nazi Germany to kill millions of Jews.

18 25. The Arizona statute, A.R.S. § 13-757(B), authorizing the use of lethal gas in  
19 executions, is unconstitutional as applied under the Arizona Constitution. Ariz. Const. art. 2,  
20 § 15. It sanctions and authorizes cruel and unusual punishment as applied through the  
21 enactment of a particularly painful and barbaric form of execution. Ariz. Const. art. 2, §  
22 15. Likewise, the portion of Article 22, section 22 of the Arizona Constitution that authorizes  
23 the use of lethal gas in executions must yield to the prohibition against the infliction of cruel  
24 and unusual punishment. The Ninth Circuit twice recognized the use of cyanide gas in this  
25 manner as unconstitutional 25 years ago in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir.  
26 1996), *vacated as moot in light of Cal. Penal Code Section 3604 by Gomez v. Fierro*, 519 U.S.  
27 918 (1996) (mem.); *LaGrand v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999) *vacated as*  
28 *waived by petitioner by Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).

1 26. This Court has jurisdiction to hear this Complaint under the Uniform Declaratory  
2 Judgments Act, A.R.S. §§ 12-1831 *et seq.*

3 27. Venue is appropriate under A.R.S. § 12-401, as the ADCRR, the Department  
4 responsible for implementing the State’s lethal gas program, is headquartered in Phoenix,  
5 Arizona.

6 **GENERAL ALLEGATIONS**

7 **I. Arizona’s Death Penalty Protocol**

8 **A. Arizona’s Capital Punishment Statutes and Regulations Strongly Disfavor**  
9 **the Use of Lethal Gas**

10 28. As stated in Article 22, section 22 of the Arizona Constitution and A.R.S. § 13-  
11 757(A), the default method for capital punishment in Arizona is “an intravenous injection of  
12 a substance or substances in a lethal quantity sufficient to cause death, under the supervision  
13 of the state department of corrections.”

14 29. Although lethal injection is the default method for capital punishment, any  
15 “defendant who is sentenced to death for an offense committed before November 23, 1992”  
16 retains the option to “choose either lethal injection or lethal gas.” Ariz. Const. art. 22, § 22;  
17 A.R.S. § 13-757(B). If a “defendant fails to choose either lethal injection or lethal gas, the  
18 penalty of death shall be inflicted by lethal injection.” A.R.S. § 13-757(B).

19 30. Of the 112 death row prisoners in Arizona, 17 were convicted of crimes  
20 occurring prior to the effective date of Article 22, section 22 and have the option to choose  
21 between lethal injection and lethal gas as the method of execution.

22 31. A.R.S. § 13-757(B) does not designate the kind of lethal gas to be used when an  
23 individual elects lethal gas over lethal injection. Because the statute is silent as to which  
24 specific gas shall be used, the Director of the ADCRR has the discretion to choose any lethal  
25 gas so long as the manner of execution does not violate Article 2, section 15’s bar against cruel  
26 and unusual punishment.

27 32. Under the ADCRR’s current protocol (*infra*, Exhibit 8), those who choose lethal  
28 gas are strapped into a chair in the center of the gas chamber. Colored levers are then used to



1 drop sodium cyanide into a pot of sulfuric acid under the chair, releasing deadly hydrogen  
2 cyanide gas into the air. While it remains to be determined whether the ADCRR has succeeded  
3 in procuring the sodium cyanide called for under its protocol (*infra* ¶ 35), Arizona’s operative  
4 execution protocol contemplates using the same gas as deployed in Nazi Germany to carry out  
5 the Holocaust.

6 **B. The State Must Spend Taxpayer Funds on its Cyanide Gas Protocol Every**  
7 **Time it Seeks to Execute a Defendant Sentenced to Death Prior to**  
8 **November 23, 1992**

9 33. Defendants are currently seeking warrants to execute two of the 17 criminal  
10 defendants sentenced to death before November 23, 1992: Frank Atwood and Clarence Dixon.

11 34. As recently disclosed ADCRR records demonstrate, in preparation for seeking  
12 warrants of execution against Mr. Atwood and Mr. Dixon, ADCRR has spent taxpayer funds  
13 to refurbish the gas chamber and purchase the lethal gas compound.

14 35. First, in early December 2020, ADCRR spent taxpayer funds on the chemical  
15 ingredients required to create cyanide gas. On December 8, 2020, ADCRR purchased a  
16 Potassium Cyanide Brick for \$1,529.50. On December 11, 2020, ADCRR purchased Sodium  
17 Hydroxide, Sulfuric Acid, and non-regulated Phenolphthalein Sigma Aldrich for \$687.11.  
18 Lethal gas purchases and invoices, a true and correct copy of which is attached as **Exhibit 5**.<sup>1</sup>

19 36. On December 17, 2020, ADCRR conducted an inspection of the gas chamber  
20 located inside the Central Unit at ASPC-Florence Complex. The assessment consisted of a  
21 physical inspection of all sealing surfaces and the condition of all rubber seals, the exercise of  
22 all the levers and the corresponding actuating parts, the exercise of all valves, and the flow test  
23 of the plumbing. The inspection included a physical inspection of the chamber for corrosion,

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24 <sup>1</sup> In response to the Guardian’s Arizona Public Records Law request, the ADCRR produced a  
25 collection of documents related to Arizona’s lethal gas program. Those documents included  
26 invoices for the chemicals needed to create the lethal gas and the inspection and repair records  
27 for the lethal gas chamber. Copies of those documents are available at  
28 <https://www.documentcloud.org/documents/20791805-arizona-lethal-gas-and-lethal-injection-documents-may-2021>.

1 seal integrity, and operational functionality. ADCRR, *Rehabilitation and Reentry*  
2 *Memorandum*, (Dec. 17, 2020), a true and correct copy of which is attached as **Exhibit 6**.

3 37. Some of ADCRR’s testing of the gas chamber was alarmingly simplistic,  
4 including using a candle to test that the room was “air tight [sic].” Specifically, employees of  
5 ADCRR held a flame of the candle up to the sealed windows and door. If the candle’s flame  
6 remained steady and did not flicker, the chamber was deemed to be sufficiently airtight. *Id.*

7 38. The December 17, 2020 inspection found several deficiencies in Defendants’  
8 gas chamber, including significant concerns with the rubber seals throughout the vessels  
9 because of their age, slow drainage and overflowing, and an inoperable exhaust fan in the  
10 chemical mixing room. *Id.*

11 39. As a result of the inspection, ADCRR engaged a company to refurbish and  
12 recertify the gas chamber for operational readiness, address the drainage system issues, and  
13 install a high volume (CFM) fan in the chemical mixing room. Although the costs for all these  
14 refurbishments have yet to be publicly disclosed, taxpayer funds were expended to pay the  
15 cost of testing and refurbishments to the gas chamber. *Id.*

16 40. ADCRR has admitted that it approved the purchase of lethal gas ingredients  
17 along with the costs of the inspection and refurbishment of the gas chamber so that the State  
18 would be “prepared to perform its legal obligation and commence the execution process as  
19 part of the legally imposed sentence, regardless of method selected.” Meryl Kornfield, *Arizona*  
20 *plans to execute prisoners with a lethal gas the Nazis used at Auschwitz*, *The Washington Post*  
21 (June 1, 2021), a true and correct copy of which is attached hereto as **Exhibit 7**.

22 41. Therefore, every time Defendants seek to put to death one of the 17 people  
23 eligible to elect lethal gas as the manner of execution, Defendants will be required to repeat  
24 this process. This process must be completed before anyone has even made an election on  
25 method, meaning that regardless of whether any of the remaining individuals eligible to elect  
26 lethal gas does so, additional Arizona taxpayer funds will be spent to further Defendants’  
27 cyanide gas protocol.

28 ///

1           **C. In a Rush to Prepare Defendants’ Gas Chamber for Use, ADCRR**  
2           **Purchased the Wrong Chemicals Required Under Their Own Internal**  
3           **Protocol**

4           42. ADCRR’s gas chamber protocol details how an execution by lethal gas must be  
5 performed. *See* ADCRR Department Order (“DO”) 710, Revised March 10, 2021, a true and  
6 correct copy of which is attached as **Exhibit 8**.

7           43. ADCRR DO 710 explicitly states that the chemical gas components for a lethal  
8 gas execution are sodium cyanide, phenolphthalein solution, and sulfuric acid.

9           44. Rather than purchase sodium cyanide, ADCRR purchased potassium cyanide for  
10 use in the gas chamber.

11           45. The use of a different form of cyanide is not a minor detail. As both the World  
12 Health Organization and National Research Council detail, the substances have different  
13 structures, molecular weights, and properties that, if not appropriately accounted for, could  
14 change the resulting byproduct of the chemical reaction dictated in Arizona’s protocol. *See*  
15 World Health Organization, *Cyanide in Drinking-water: Background document for*  
16 *development of WHO Guidelines for Drinking-water Quality* (2009) (available at  
17 [https://www.who.int/docs/default-source/wash-documents/wash-chemicals/cyanide-](https://www.who.int/docs/default-source/wash-documents/wash-chemicals/cyanide-background-document.pdf?sfvrsn=29c5b9f4_4)  
18 [background-document.pdf?sfvrsn=29c5b9f4\\_4](https://www.who.int/docs/default-source/wash-documents/wash-chemicals/cyanide-background-document.pdf?sfvrsn=29c5b9f4_4)); National Research Council, *Prudent*  
19 *Practices in the Laboratory: Handling and Disposal of Chemicals*, Appendix B excerpts at  
20 394-95 (1995) (available at <https://www.nap.edu/read/4911/chapter/14#267>).

21           46. The failure to account for these differences in types of cyanide could alter the  
22 lethal gas composition and possibly result in additional complications, thus exacerbating the  
23 cruel and unusual aspects of this form of execution.

24           **II. The Movement Away From Lethal Gas, Making it an Unusual Form of**  
25           **Punishment**

26           **A. Arizona, Consistent With Other States, Has Wisely Moved Away From the**  
27           **Death Penalty by Lethal Gas**

28           47. In 1992, Arizona voters overwhelmingly voted against the use of lethal gas.  
Specifically, in 1992 the Arizona legislature referred to the voters a constitutional amendment

1 (Proposition 103) changing the approved method of execution from lethal gas to lethal  
2 injection. The only exception concerned those convicted of crimes committed prior to  
3 November 1992, who retain the option to elect lethal gas. A.R.S. § 13-757(B).

4 48. Proponents of the Amendment on the legislative counsel argued almost 30 years  
5 ago that the “[t]he passage of Proposition 103 would provide for a more humane manner by  
6 which condemned prisoners are put to death. A civilized society should not inflict unnecessary  
7 suffering on any person, even those persons who are condemned to die. Execution by lethal  
8 injection would result in a much quicker, less dramatic and less painful death.” Arizona Sec’y  
9 of State, *State of Arizona 1992 Ballot Propositions Guide*, at 16-17, (available at  
10 <https://www.azsos.gov/sites/default/files/pubpam92.pdf>) (last visited February 10, 2022). A  
11 survey of Arizona voters at that time agreed with proponents, as 70% of them believed that  
12 lethal injection was the most humane form of execution as opposed to only 8% favoring lethal  
13 gas. *Death Penalty Statewide Poll, Arizona Republic* (March 26-29, 1992), a true and correct  
14 copy of which is attached as **Exhibit 9**.

15 49. Even then-Attorney General Grant Woods, a strong supporter of the death  
16 penalty, advocated in favor of moving away from lethal gas. After the execution of Donald  
17 Harding, Attorney General Woods explained that he supported the move away from lethal gas,  
18 noting that he did not “know who came up with this concept of a gas chamber in the first place.  
19 Maybe that was innovative a while ago, but it’s not today.” Michael Murphy, *Woods says he*  
20 *didn’t see finger gesture, The Phoenix Gazette* (April 7, 1992), a true and correct copy of  
21 which is attached as **Exhibit 10**.

22 50. Arizonans overwhelmingly voted in favor of the Amendment, with over 76%  
23 voting to replace lethal gas with lethal injection.

24 **B. In Practice, States Across the Country Have Largely Abandoned Lethal**  
25 **Gas**

26 51. Since the United States Supreme Court lifted the national moratorium on capital  
27 punishment in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), states have rarely utilized lethal  
28 gas in executions.

1           52.     According to the Death Penalty Information Center, since 1976, states have  
2 executed 1,542 people. A vast majority of those executions (1,362) occurred through lethal  
3 injection. The second most utilized form of execution during that period was electrocution  
4 (163).

5           53.     Of the over 1,500 executions since 1976, only 11 used lethal gas. The executions  
6 occurred in only 5 states, and two of them – North Carolina and Nevada - have since eliminated  
7 lethal gas. N.C. Gen. Stat. § 15-187, 1983 Nev. Stat., ch. 601, § 1, at 1937.

8           54.     No state has executed a person using lethal gas after the State of Arizona  
9 executed Walter LaGrand in 1999.

10           **C.     Over the Past 50 Years, More and More States Have Eliminated the**  
11           **Practice of Execution by Lethal Gas**

12           55.     New Mexico was the first state to reject the gas chamber statutorily for lethal  
13 injection when it enacted its *Post-Furman* capital punishment reform in 1979. N.M. Stat. Ann.  
14 § 31-14-11.

15           56.     Nevada, Mississippi, and North Carolina followed suit in 1983. Nev. Rev. Stat.  
16 Ann. § 176.355; Miss. Code Ann. § 99-19-51 and Senate Bill No. 2185; N.C. Gen. Stat. § 15-  
17 187. North Carolina amended its execution statute to give those sentenced to death the choice  
18 to die in the gas chamber or by lethal injection, and then revised the statute again in 1998 to  
19 remove the option of lethal gas entirely. N.C. Gen. Stat. § 15-187.

20           57.     Oregon abandoned lethal gas for lethal injection in 1984. Or. Sec’y of State,  
21 GENERAL ELECTION VOTERS’ PAMPHLET 28–33 (1984); 226 Or. Rev. Stat. § 137.473).

22           58.     Colorado eliminated the gas chamber in 1988 when it adopted lethal injection.  
23 Colo. Rev. Stat. 16-11-401 (1991); *see also* Colo. Rev. Stat. § 16-11-901 (repealing the death  
24 penalty in its entirety).

25           59.     Maryland also replaced the gas chamber with lethal injection in 1994. Md. Code  
26 Ann. art. 27, § 627 (1994) (repealed 2002); *see also* Md. Code Ann., Crim. Law § 2-303(1)  
27 (LexisNexis 2002 & Supp. 2007); 2013 Md. Laws, Ch. 156, Sec. 1, eff. 10/1/2013 (repealing  
28 the death penalty in its entirety).

1           **D. To Date, Only Seven States Have Statutes Authorizing the Use of Lethal**  
2           **Gas, Almost Always Subject to Significant Restrictions**

3           60. Seven states currently still have statutory language authorizing lethal gas in some  
4 respects: Alabama, Arizona, California, Oklahoma, Mississippi, Missouri, and Wyoming. Ala.  
5 Code § 15-18-82.1(a); A.R.S. § 13-757; Cal. Pen. Code § 3604(b); Okla. Stat. tit. 22, § 1014;  
6 Miss. Code § 99-19-51; Mo. Rev. Stat. § 546.720; Wyo. Stat. § 7-13-904.

7           61. Three of those seven states *only* authorize lethal gas if lethal injection is found  
8 unconstitutional. Wyo. Stat. § 7-13-904 (b), Okla. Stat. tit. 22, § 1014(B), Miss. Code § 99-  
9 19-51(2). In practice, therefore, only four states currently authorize the use of lethal gas.

10          62. Three of those four remaining states (including Arizona) designate lethal  
11 injection as the default method of execution, with lethal gas available only at the election of  
12 the condemned (and, as in Arizona, this option may be available to only a subset of death row  
13 prisoners). Ala. Code § 15-18-82.1(a); A.R.S. § 13-757(B); Cal. Pen. Code § 3604(b). Only  
14 Missouri currently authorizes the state to use lethal gas or lethal injection without any  
15 qualifications. Mo. Rev. Stat. § 546.720.

16          63. Even in those states that still authorize lethal gas, the use of cyanide has largely  
17 been abandoned. Since the national moratorium on capital punishment ended in 1976,  
18 Wyoming, Oklahoma, Alabama, and Missouri have not used lethal gas in executions.

19          64. Three other states that currently authorize lethal gas have in practice abandoned  
20 the cyanide gas method used by Arizona. Alabama, Oklahoma, and Mississippi authorize the  
21 use of nitrogen hypoxia as a substitute. Okla. Stat. tit. 22, § 1014(B); Ala. Code § 15-18-  
22 82.1(a); Miss. Code § 99-19-51(2).

23           **III. The Medical Community’s Understanding of Lethal Gas**

24           **A. The Medical Community’s Understanding of the Effects of Lethal Gas on a**  
25           **Human Demonstrates that the Practice is Cruel and Unusual Under**  
26           **Arizona’s Constitution**

27          65. Contrary to the original belief by early proponents of the gas chamber, death by  
28 lethal gas has proven to be neither quick nor painless.

1           66. In 1994, the Northern District of California held an extensive trial on whether  
2 executions by cyanide gas inflict torturous pain and suffering. *Fierro v. Gomez*, 865 F. Supp.  
3 1387, 1404 (N.D. Cal. 1994). The Court heard eight days of evidence, with 10 testifying  
4 witnesses including six expert witnesses, 44 witnesses testifying through declarations or  
5 affidavits, and 78 exhibits totaling over 4,000 pages. The Court entered a detailed factual order  
6 concluding that the executions violated the analogous provisions of the U.S. Constitution  
7 prohibiting cruel and unusual punishment.<sup>2</sup>

8           67. Notably, the State of Arizona conceded the detailed testimony and findings of  
9 the intense pain and suffering inflicted on individuals executed with cyanide gas in *LaGrand*  
10 *v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999) (“Counsel for the State has candidly admitted  
11 that if the question of Arizona’s use of lethal gas went to trial, the record would be no different  
12 than it was in *Fierro*.”).

13           68. Individuals who are put to death in the gas chamber do not become immediately  
14 unconscious upon the first breath of lethal gas but rather can remain conscious for multiple  
15 minutes. *Fierro*, 865 F. Supp. at 1404.

16           69. During this time, individuals suffer intense, visceral pain, primarily due to  
17 hypoxia or a lack of oxygen to the cells. The hypoxic state can continue for several minutes  
18 after the cyanide gas is released in the execution chamber. While conscious, the person may  
19 suffer extreme pain throughout their arms, shoulders, back, and chest. The experience, often  
20 referred to as “air hunger,” is comparable to a major heart attack or being held under water. *Id.*

21  
22  
23 <sup>2</sup> The order was upheld initially on appeal by the Ninth Circuit. *Fierro*, 77 F.3d 301, 309 (9th  
24 Cir. 1996). The California legislature subsequently amended its death penalty statute during  
25 the pending appeal. After the amendment, the United States Supreme Court granted certiorari  
26 and vacated and remanded on the sole ground that the challenged statute had been amended in  
27 the interim. *Gomez v. Fierro*, 519 U.S. 918 (1996). On remand, the Ninth Circuit vacated its  
28 prior opinion because the prisoners did not elect (as permitted by the amended statute) lethal  
gas, and thus lacked standing to challenge its constitutionality. *Fierro v. Terhune*, 147 F.3d  
1158 (9th Cir. 1998). No federal court has reached the merits of a constitutional gas challenge  
since the initial *Fierro* decisions.

1           70. Other possible effects of the cyanide gas include tetany, an extremely painful  
2 contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced  
3 cellular suffocation causes further profound mental agony including anxiety, panic, terror, and  
4 pain. *Id.*

5           71. Inhalation of the gas itself is also painful and causes burning and constriction of  
6 the throat and air passageways. As a result, a person could suffer a range of afflictions  
7 including nausea, dizziness, rapid and dramatic mood changes, and increased physical  
8 agitation. *Id.*

9           72. As another court explained, “the national trend had more recently moved away  
10 from lethal gas because it was thought to kill by asphyxiation and that the suffocation or  
11 strangulation accompanying the asphyxiation could cause extreme pain for as long as twelve  
12 minutes.” *Evans v. State*, 396 Md. 256, 342 (2006).

#### 13 **IV. Eyewitness Testimony Corroborates Medical Testimony**

14           73. Eyewitness accounts of prior lethal gas executions, both in Arizona and across  
15 the nation, demonstrate that the use of lethal gas is cruel.

16           74. Since 1976, Arizona has only held two lethal gas executions, Donald Harding in  
17 1992 and Walter LaGrand in 1999, both using cyanide gas. Eyewitness reports from both  
18 executions describe the process as gruesome and inhumane. Such eyewitness accounts are also  
19 frequently reported in the news, where the public in Arizona and elsewhere is confronted with  
20 considering and experiencing vicariously the horrors of this method of death.

##### 21 **A. The Execution of Donald Harding**

22           75. In 1992, the State of Arizona executed Donald Harding using cyanide gas.  
23 Multiple eyewitnesses described in gruesome and painful detail his death, which took  
24 approximately eleven minutes to complete.

25           76. For example, Jim Belanger, Harding’s attorney, witnessed his client’s death in  
26 1992. Mr. Belanger described Harding’s “face was red and contorted as if he were attempting  
27 to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight.  
28



1 Don then took several quick gulps of the fumes.” Jim Belanger, Opinion, *I watched Don*  
2 *Harding’s execution in an Arizona gas chamber. His face still haunts me*, Arizona Central  
3 (June 8, 2021) (Ex. 1).

4 77. Mr. Belanger reported that “Don’s body started convulsing violently and his  
5 arms strained against the straps. His face and body turned a deep red and the veins in his temple  
6 and neck began to bulge until I thought they might explode.” *Id.*

7 78. Mr. Belanger observed that “[e]very few seconds he gulped for air. He was  
8 shuddering uncontrollably and his body was wracked with spasms. His head continued to snap  
9 back and forth. His hands were tightly clenched.” *Id.*

10 79. Mr. Belanger noted that “[s]everal more minutes passed before the most violent  
11 of Don’s convulsions subsided. Then the muscles along his left arm and back began twitching  
12 in a wavelike motion under his skin.” *Id.*

13 80. Mr. Belanger concluded his observations with these haunting remarks in a sworn  
14 affidavit:

15 During the entire time I was in the room, until the execution was over, my  
16 knees were shaking so badly I thought I might fall down. At least two times  
17 I had to lean against the wall that was immediately behind me. My heart  
18 continued to race until I was out of the witness room. At one point I thought  
19 I might throw up. I wept. ...

20 Nothing in my life prepared me for the horror of Don being ritualistically and  
21 methodically stripped of his humanity and then watching him being tortured  
22 to death. I will never forget the look on his face when he turned to me several  
23 seconds after first having inhaled the fumes. It is an image of atrocity that  
24 will haunt me for the rest of my life. Don Harding’s death was slow, painful,  
25 degrading, and inhumane. He [sic] would not tolerate such cruelty even to  
26 put an animal to death. He literally choked and convulsed to death in front  
27 of my eyes. I felt embarrassed and humiliated for having witnessed the gross  
28 brutalization of another human being. God willing, something such as this  
will never happen again.

26 Declaration of James J. Belanger, *Fierro v. Gomez*, a true and correct copy of which is attached  
27 as **Exhibit 11**.

1           81. Other witnesses corroborate Mr. Belanger’s account. Carla McClain testified in  
2 *Fierro v. Gomez* that Mr. Harding immediately began to “moan and groan[] very loudly, loudly  
3 enough” for the witnesses to “hear through the extremely thick metal walls” of the gas  
4 chamber.” Declaration of Carla McClain, *Fierro v. Gomez*, a true and correct copy of which  
5 is attached as **Exhibit 12**; *see also* Declaration of Donna Hamm, *Fierro v. Gomez* (describing  
6 Harding making “a low, guttural sound of sheer torment”), a true and correct copy of which is  
7 attached as **Exhibit 13**.

8           82. Ms. McClain further testified that Harding’s “body turned bright red, almost  
9 purple as he clenched and convulsed in obvious pain.” Declaration of Carla McClain, *Fierro*  
10 *v. Gomez* (Ex. 12).

11           83. Similarly, then-Attorney General Woods described the execution as “a terrible  
12 thing to witness” and lamented that it “took so long.” The experience “solidified” his opinion  
13 that the State should abandon lethal gas. Michael Murphy, *Woods says he didn’t see finger*  
14 *gesture*, The Phoenix Gazette (April 7, 1992) (Ex. 10).

15           **B. The Execution of Walter LaGrand**

16           84. In 1999, the State of Arizona performed its last execution to date via lethal gas  
17 when ADCRR executed Walter LaGrand. According to eyewitness accounts, Mr. LaGrand’s  
18 execution was even more excruciating than Harding’s.

19           85. Patty Machelor, a reporter for the Tucson Citizen, witnessed Mr. LaGrand’s  
20 execution in 1999.

21           86. Ms. Machelor described Mr. LaGrand’s lethal gas execution as “agonizing  
22 choking and gagging continued over several minutes.” Patty Machelor, *LaGrand: 18 minutes*  
23 *to die*, Tucson Citizen (Mar. 4, 1999) (Ex. 2).

24           87. Ms. Machelor stated that, shortly after the vapor rose, Mr. LaGrand began  
25 “coughing violently – three or four loud hacks – and then, in what appeared to be his last  
26 moments of consciousness, he made a gagging sound before falling forward.” *Id.*

27           88. After he fell forward, Mr. LaGrand’s body continued to twitch for several  
28 minutes afterward. *Id.*

1           89. In total, it took approximately 18 minutes for Mr. LaGrand to die, seven minutes  
2 longer than Don Harding’s execution in 1992. *Id.*

3           **C. The Horrific Executions of Harding and LaGrand Were Not Isolated**  
4           **Incidents**

5           90. In October 1979, the State of Nevada executed Jesse Bishop using cyanide gas.  
6 Tad Dunbar, a reporter, observed Mr. Bishop “immediately gasped and convulsed strenuously.  
7 His body stiffened and his head lurched back. His eyes widened, and he strained as much as  
8 the straps would allow. He unquestionably appeared to be in pain. I noticed that he had urinated  
9 on himself. . . . He alternately strained and then relaxed against the straps for about ten  
10 minutes.” Declaration of Tad Dunbar, *Fierro v. Gomez*, a true and correct copy of which is  
11 attached as **Exhibit 14**.

12           91. Four years later, the State of Mississippi executed Jimmy Lee Gray using  
13 cyanide gas. Dennis Balske testified that “[o]nce the gas reached Mr. Gray’s face he began to  
14 thrash around in his chair. . . . The chilling sound of his head desperately smashing against the  
15 pole reverberated through the area over and over again. About the seventh time he pounded  
16 his head against the pipe, his desperation was so great that the six-sided glass chamber seemed  
17 to shake with the impact. He slumped and lay still for a few moments, then tensed up and  
18 resumed his struggling, again smashing his head against the pole. Mr. Gray struggled for air  
19 while his body contorted and twisted.” Declaration of Dennis N. Balske, *Fierro v. Gomez*, a  
20 true and correct copy of which is attached as **Exhibit 15**; *see also* Declaration of Dan A.  
21 Lohwasser, *Fierro v. Gomez* (“He looked like he was being strangled to death. It was obvious  
22 that Mr. Gray was in excruciating pain.”), a true and correct copy of which is attached as  
23 **Exhibit 16**.

24           92. In May 1987, Mississippi executed Connie Ray Evans in the gas chamber.  
25 Robert Marshall testified that it took thirteen minutes for Mr. Evans to die. Mr. Marshall  
26 testified that he “heard a ‘thump’ and gas began to rise from below Mr. Evans’ chair. He then  
27 let out the first of several loud agonizing gasps. I saw the muscles tightening and bulging on  
28 his neck. His forced breathing and tensed body exhibited excruciating pain. He lost control of

1 his bodily functions. Saliva drooled from his mouth, running down his chin, and hanging in a  
2 long rope from his chin. . . . It took the cyanide gas thirteen minutes to kill Mr. Evans, the  
3 longest and most horrific thirteen minutes of my life.” Declaration of Robert R. Marshall,  
4 *Fierro v. Gomez*, a true and correct copy of which is attached as **Exhibit 17**.

5 93. In June 1989, Leo Edwards died in Mississippi’s gas chamber after what  
6 Kenneth Rose described as fourteen minutes of agony. Mr. Rose testified that “[w]hen [the  
7 gas] reached [Edwards] face, he gasped, then started banging his head and throwing himself  
8 back and forth in the chair. His body strained so desperately against the straps that I was afraid  
9 they would cut him. He then let out a shriek of terror, the first of many. It was the sound of  
10 pure torment. My heart raced as I tried to control my own reaction to the torture I was  
11 witnessing . . . The shrieking and thrashing lasted for several minutes; he remained alive for  
12 some time after that.” Declaration of Kenneth Rose, *Fierro v. Gomez*, a true and correct copy  
13 of which is attached as **Exhibit 18**.

#### 14 **V. Lethal Gas Executions Raise Painful Memories of the Holocaust**

##### 15 **A. The Use of Lethal Gas Chambers is Particularly Offensive to Holocaust** 16 **Survivors and Their Descendants, Many of Whom Have Made Arizona** 17 **Their Home**

18 94. The use of hydrogen cyanide, also known as Zyklon B, during the Holocaust is  
19 well documented.

20 95. While initially used for sanitation and pest control, in 1941 Zyklon B was used  
21 in the Nazi concentration camps, first experimentally and then routinely, as an agent of mass  
22 annihilation. Jewish Virtual Library, *Gassing Victims in the Holocaust: Zyklon-B* (available at  
23 <https://www.jewishvirtuallibrary.org/background-and-overview-of-gassing-victims>) (last  
24 visited February 10, 2022).

25 96. At its height, an average of 6,000 Jews were killed each day using Zyklon B at  
26 the Auschwitz II killing center, according to the U.S. Holocaust Memorial Museum.

27 97. The developers of Zyklon B described the horrifying potential of the substance:  
28 as “Hydrogen cyanide HCN, prussic acid, is a chemical compound in the form of a powerfully

1 poisonous, volatile colorless liquid with the odor of bitter almonds. Prussic acid is considered  
2 a battlefield poison agent. Its action depends on the restraint of cellular respiration as a result  
3 of neutralizing the respiratory enzymes. Prussic acid passes through the mucous membranes  
4 and the skin, but principally through the lungs, into the blood. It blocks the process by which  
5 oxygen is released from red blood corpuscles and the result is a sort of internal asphyxiation.  
6 This is accompanied by symptoms of injury to the respiratory system, combined with a feeling  
7 of fear, dizziness and vomiting.” *Id.*.

8 **B. Holocaust Survivors Have Testified to Their Horror at the Use of Cyanide**  
9 **Gas as a Form of Execution**

10 98. Gloria Lyon testified that although “[i]nnocent Holocaust Victims can never be  
11 compared with convicted murders[.] . . . [a]s a person who saw the daily horror of mass  
12 extermination by gas, I know that execution by gas is torture and it can never be anything  
13 less.” Declaration of Gloria H. Lyons, *Fierro v. Gomez*, a true and correct copy of which is  
14 attached as **Exhibit 19**.

15 99. John Steiner testified of his experiences with both the gas chamber at Auschwitz-  
16 Birkenau and at California’s San Quentin Prison. During his employment at San Quentin, he  
17 was asked to serve as a witness to a lethal gas execution: “I refused to act as a witness because,  
18 among other things, I knew that lethal gas is an excruciatingly painful method of execution.  
19 Witnessing a person being gassed to death would bring back horrendous memories of the  
20 hideous fate suffered by millions, which included my family, extended relatives, and friends.  
21 Even without witnessing the execution, being at San Quentin brought back all the memories,  
22 including the ghastly odors of the death camp Auschwitz-Birkenau.” Declaration of John  
23 Steiner, *Fierro v. Gomez* (Ex. 3).

24 **C. The Horror Expressed in *Fierro* is Certainly Felt No Less Deeply in Arizona**

25 100. Arizona is the home to approximately 80 Holocaust survivors, with 55 survivors  
26 in the metro Phoenix area alone, who came to the United States seeking to escape their  
27 traumatic experiences in the war. Jessica Goodman, *Arizona is the home to at least 80*  
28 *remaining Holocaust survivors*, Arizona Family (Apr. 8, 2021) (available at

1 [https://www.azfamily.com/news/arizona-is-the-home-to-at-least-80-remaining-holocaust-](https://www.azfamily.com/news/arizona-is-the-home-to-at-least-80-remaining-holocaust-survivors/article_c657643a-88b4-11eb-97e0-e3cca1b5d3d3.html)  
2 [survivors/article\\_c657643a-88b4-11eb-97e0-e3cca1b5d3d3.html](https://www.azfamily.com/news/arizona-is-the-home-to-at-least-80-remaining-holocaust-survivors/article_c657643a-88b4-11eb-97e0-e3cca1b5d3d3.html)).

3 101. News of Defendants’ revival of the gas chamber has horrified Jewish residents  
4 and advocacy groups.

5 102. Plaintiffs JCRC, Mr. Rockower and Mr. Zeichick are deeply troubled by the  
6 State of Arizona’s potential use of hydrogen cyanide as a means of execution, and the provision  
7 of taxpayer funds to support this horrific practice. Inspired by Jewish values, Plaintiffs are  
8 committed to building a cohesive and collaborative community built on trust, respectful  
9 dialogue and understanding among all peoples. State-sponsored killing of a human being  
10 through a practice known to cause pain and suffering undermines Plaintiffs’ efforts and is an  
11 affront to Jewish values. Plaintiffs find it shocking that the State of Arizona chose to use the  
12 very same chemical compound that was used by the Nazis in Auschwitz and other  
13 extermination camps to murder more than one million people. Plaintiffs observe that nearly  
14 the entire civilized world, including most of the United States, has abandoned this barbaric  
15 practice, and strongly believe execution by hydrogen cyanide to be both cruel and unusual.

16 103. Janice Friebaum, vice president of the Phoenix Holocaust Association, whose  
17 family members were murdered at the Nazi death camp of Treblinka, explained that  
18 “[u]niformly, Holocaust survivors and their descendants are nothing short of horrified of this  
19 form of execution being utilized” and believe that the use of lethal gas by the State of Arizona  
20 is “tantamount to giving posthumous approval to the evils conducted by the Nazis. We’re  
21 basically saying what the Nazis did was OK.” Erik Ortiz, *Jewish groups condemn Arizona’s*  
22 *potential use of gas executions*, NBC News (June 14, 2021) (available at  
23 [https://www.nbcnews.com/news/us-news/jewish-groups-condemn-arizona-s-potential-use-](https://www.nbcnews.com/news/us-news/jewish-groups-condemn-arizona-s-potential-use-gas-executions-n1270585)  
24 [gas-executions-n1270585](https://www.nbcnews.com/news/us-news/jewish-groups-condemn-arizona-s-potential-use-gas-executions-n1270585)).

25 104. The American Jewish Committee, one of the nation’s oldest Jewish advocacy  
26 groups, has said that it is especially troubled by the State’s purchase of materials to make  
27 hydrogen cyanide gas, which was part of a pesticide known as Zyklon B that the Nazis used  
28 in Auschwitz and other extermination camps. As the American Jewish Committee explained,

1 “Arizona’s decision to employ Zyklon B gas as a means of execution defies belief. . . . Whether  
2 or not one supports the death penalty as a general matter, there is general agreement in  
3 American society that a gas devised as a pesticide, and used to eliminate Jews, has no place in  
4 the administration of criminal justice.” American Jewish Committee, *AJC Decries Arizona*  
5 *Plan to Use Zyklon B for Prisoner Executions*, Press Release (June 7, 2021) (Ex. 4).

#### 6 CAUSES OF ACTION

#### 7 **Count I – Declaratory Judgment and Injunctive Relief, Violation of the Prohibition** 8 **against cruel and unusual punishment, Article 2, section 15 of the Arizona Constitution**

9 105. Plaintiffs incorporate the allegations in Paragraphs 1-104 as if fully stated herein.

10 106. Arizona’s Uniform Declaratory Judgment Act provides that any person “whose  
11 rights, status or other legal relations are affected by a statute, municipal ordinance, contract or  
12 franchise, may have determined any question of construction or validity arising under the  
13 instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status  
14 or other legal relations thereunder.” A.R.S. § 12-1832.

15 107. One may seek declaratory relief “as soon as a justiciable controversy exists.”  
16 *Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, 267, ¶ 17 (App. 2013) (internal  
17 quotation and citation omitted). A justiciable controversy exists when there is an “assertion of  
18 a right, status or legal relation in which the plaintiff has a definite interest and a denial of it by  
19 the opposing party.” *Samaritan Health Servs. v. City of Glendale*, 148 Ariz. 394, 395 (App.  
20 1986).

21 108. The prohibition against cruel and unusual punishment contained in Article 2,  
22 section 15 of the Arizona Constitution is interpreted consistently with the Eighth Amendment  
23 of the U.S. Constitution. *State v. Davis*, 206 Ariz. 377, 380-81, ¶¶ 12-13 (2003).

24 109. The method of punishment is deemed unconstitutional if the manner of  
25 execution creates a “‘substantial risk of serious harm’ and . . . serious pain and suffering” that  
26 would qualify as ‘cruel and unusual punishment’ under the Eighth Amendment,” *Cook v. State*,  
27 230 Ariz. 185, 188, ¶ 8 (App. 2012) (citation omitted), or violates “broad and idealistic  
28

1 concepts of dignity, civilized standards, humanity, and decency.” *Weatherford ex rel. Michael*  
2 *L. v. State*, 206 Ariz. 529, 534, ¶ 13 (2003) (citation omitted).

3 110. Defendants’ use of lethal gas, particularly cyanide gas, as a means of capital  
4 punishment violates all core tenants of Article 2, section 15 of the Arizona Constitution’s  
5 prohibition against cruel and unusual punishment.<sup>3</sup> Specifically, Defendants’ lethal gas  
6 protocol is unconstitutional as applied in its use of cyanide gas.

7 111. First, the use of cyanide gas as a means of capital punishment creates a  
8 “substantial risk of serious harm,” including “serious pain and suffering.” *Cook*, 230 Ariz. at  
9 188, ¶ 8. As the testimony and findings in *Fierro v. Gomez* prove – and many additional,  
10 similar witness accounts – lethal gas, and specifically cyanide gas, exposes individuals to  
11 several minutes of excruciating pain while conscious, comparable to being held under water.  
12 Beyond the physical pain a person exposed to cyanide gas endures, they are subject to  
13 substantial mental torture as cyanide-induced cellular suffocation causes anxiety, panic, terror,  
14 and mental anguish. The pain and torture inflicted on individuals has been repeatedly  
15 corroborated by eyewitness testimony observing lethal gas executions in Arizona and across  
16 the country.

17 112. The State of Arizona conceded more than 20 years ago that *Fierro*’s detailed  
18 testimony and findings of the intense pain and suffering inflicted on individuals executed  
19 through lethal gas would be the same under Arizona’s protocol. *LaGrand*, 173 F.3d at 1149  
20 (“Counsel for the State has candidly admitted that if the question of Arizona’s use of lethal gas  
21 went to trial, the record would be no different than it was in *Fierro*.”).

22 113. Second, the use of cyanide gas as a means of capital punishment violates “broad  
23 and idealistic concepts of dignity, civilized standards, humanity, and decency.” *Weatherford*,  
24 206 Ariz. at 534, ¶ 13. As the legislative record has demonstrated, states across the country,  
25

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26 <sup>3</sup> As Article 2, section 15 of the Arizona Constitution is interpreted consistently with and bound  
27 by the Eighth Amendment prohibition against cruel and unusual punishment, all of Arizona’s  
28 death penalty provisions, including Article 22, section 22 of the Arizona Constitution, must  
yield to the scope of Article 2, section 15.



1 including Arizona, have moved away from lethal gas and in particular cyanide gas. To date,  
2 only one state authorizes the use of lethal gas without the election of the defendant. Moreover,  
3 no state has used lethal gas as a method of execution in over two decades.

4 114. In amending its Constitution, Arizona citizens overwhelmingly approved the  
5 replacement of lethal gas as a form of capital punishment and sought to limit its use as much  
6 as possible. In light of the established medical and eyewitness testimony, and the collective  
7 movement away from lethal gas, Article 2, section 15 of the Arizona Constitution's prohibition  
8 against cruel and unusual punishment – which is consistent with the U.S. Constitutional  
9 prohibition on cruel and unusual punishment – must prevail over any limited, conflicting  
10 authority contained in Article 22, section 22.

11 115. The codification of a lethal gas exception in the Arizona Constitution does not  
12 prevent this Court from striking the current lethal gas regulations as unconstitutional as applied  
13 through the ADCRR's cyanide gas protocol. The Arizona Supreme Court has previously  
14 struck down Arizona constitutional provisions that violate federal constitutional rights and, *a*  
15 *fortiori*, it can strike down a protocol provision within the ordinary discretion of an  
16 administrative agency such as the ADCRR. *See Simpson v. Miller*, 241 Ariz. 341, 349-50  
17 (2017); *State v. Wein*, 244 Ariz. 22, 31 (2018).

18 116. Plaintiffs have a definite and irreparable injury in the continuation of lethal gas  
19 as a means of capital punishment in this State. As those sentenced to death prior to November  
20 23, 1992 have the option to elect lethal gas, every time a warrant of execution is sought for  
21 one of them the State will be required to expend additional taxpayer funds to inspect its gas  
22 chamber and purchase the lethal gas ingredients required under ADCRR regulations, which  
23 currently designates sodium cyanide although ADCRR has recently procured *potassium*  
24 cyanide by mistake. This must be done regardless of whether someone will elect lethal gas or  
25 lethal injection.

26 117. The expenditure of Arizona taxpayer funds to promote the availability of death  
27 by cyanide gas is grossly offensive to Plaintiffs, Arizona's Jewish Citizens, those Holocaust  
28 survivors who now reside in Arizona, and many other citizens of Arizona and the United

1 States. The State of Arizona’s continued authorization of the use of the same lethal gas used  
2 by Nazi Germany forces upon its citizens a painful reminder of the torture and heinous murders  
3 inflicted on Jewish people and other ethnic, racial, and social groups during the Holocaust.

4 118. Because Arizona’s system requires an individual to elect lethal gas, no person  
5 sentenced to death may challenge the constitutionality of lethal gas. *See LaGrand*, 526 U.S. at  
6 119 (holding that the defendant, by electing lethal gas over lethal injection, “has waived his  
7 claim that execution by lethal gas is unconstitutional.”); *Fierro v. Terhune*, 147 F.3d at 1160  
8 (remanding to district court with order to vacate the injunction on ripeness grounds because  
9 criminal defendants had not “elect[ed] to have their death sentences imposed by lethal gas.”).  
10 Those sentenced to death in Arizona thus are caught in a horrific Catch-22 that prevents this  
11 important constitutional issue from being addressed in that context.

12 119. Plaintiffs, however, present a justiciable controversy, as Defendants have  
13 already spent taxpayer funds in furtherance of an unconstitutional form of punishment.  
14 Plaintiffs likewise will repeatedly suffer injury through the improper additional expenditure of  
15 their taxpayer funds on cyanide gas ingredients and gas chamber testing and refurbishments  
16 each time the State seeks to execute someone sentenced to death prior to November 23, 1992.

17 120. Plaintiffs are likely to succeed on the merits. At least two courts have previously  
18 held that the use of cyanide gas is unconstitutional, including one concerning Arizona’s lethal  
19 gas protocol. Since those decisions, states, including Arizona, have overwhelmingly moved  
20 away from the use of cyanide gas, as no state has executed a defendant using any form of lethal  
21 gas, including cyanide gas, in over two decades.

22 121. Plaintiffs have suffered an irreparable injury. Plaintiffs’ tax dollars have been  
23 spent, and will continue to be spent, on a practice that is not only grotesquely offensive to  
24 Plaintiffs, Jewish citizens, and Holocaust survivors living in Arizona; but violates the Arizona  
25 Constitution’s prohibition against cruel and unusual punishment found in Article 2, section 15.

26 122. Because Defendants will be required to expend funds every time Defendants  
27 seek a warrant of execution against someone sentenced to death prior to November 23, 1992,  
28 Defendants’ injurious acts will be continuing in nature.

1           123. Plaintiffs anticipate that additional taxpayer funds will be spent on this practice  
2 in the near future in light of Defendant Brnovich’s proclamation that his office will do  
3 “everything we can, and do everything I can to ensure that every 21 of those individuals have  
4 exhausted their appeals ends up getting the death penalty before I leave office. [sic]” Craig  
5 Smith, *AZ Attorney General oversees return to executions*, KGUN 9 News, (last updated Mar.  
6 27, 2021) (available at [https://www.kgun9.com/news/local-news/az-attorney-general-](https://www.kgun9.com/news/local-news/az-attorney-general-oversees-return-to-executions)  
7 [oversees-return-to-executions](https://www.kgun9.com/news/local-news/az-attorney-general-oversees-return-to-executions)).

8           124. Because the use of cyanide gas is unconstitutional, no other remedy, including  
9 monetary damages, is adequate to compensate for Plaintiffs’ injury other than injunctive relief  
10 striking all cyanide gas statutes and regulations as unconstitutional and enjoining Defendants  
11 from spending any taxpayer funds on cyanide gas activities.

12           125. The equities in this case strongly favor Plaintiffs’ cause. As the State itself  
13 passed regulations restricting the use of lethal gas to a limited number of individuals and  
14 Defendants still have other means to pursue capital punishment against those individuals,  
15 Defendants’ hardships from an injunction would be negligible if not non-existent. Arizona will  
16 benefit from the elimination of the last vestiges of this outdated and horrible method of  
17 execution. Without an injunction, Plaintiffs’ tax dollars will continue to be used to finance a  
18 practice that is unconstitutional and grotesquely offensive to Plaintiffs, Jewish citizens,  
19 Holocaust survivors living in Arizona, and many others. This injury will recur every time  
20 Defendants seek a warrant of execution against someone sentenced to death prior to November  
21 23, 1992.

22           126. Finally, the public interest would be served, not disserved, by a permanent  
23 injunction in this case. Striking down cyanide gas will not prevent Defendants from pursuing  
24 the death penalty, it will only end the use of an unconstitutional and rare means of doing so.  
25 Given that the practice has overwhelmingly fallen out of favor, both in Arizona and across the  
26 country, and Arizona overwhelmingly voted to eliminate lethal gas prospectively in 1992, the  
27 public interest favors the granting of this injunction.

28           127. Plaintiffs accordingly asks this Court to declare that:

- a. The use of cyanide gas violates the prohibition against cruel and unusual punishment in Article 2, section 15 of the Arizona Constitution and is therefore unconstitutional;
- b. All statutes and regulations authorizing the use of cyanide gas, including but not limited to ADCRR DO 710, are unconstitutional as applied because they violate the prohibition in Article 2, section 15 of the Arizona Constitution against cruel and unusual punishment;
- c. Defendants' use of lethal gas, as applied through the use of cyanide gas in a gas chamber, violates the prohibition against cruel and unusual punishment in Article 2, section 15 of the Arizona Constitution and is therefore unconstitutional; and
- d. Defendants' expenditures related to its cyanide gas program are unlawful expenditures, as the expenditures are made in furtherance of unconstitutional authority.

128. Plaintiffs further ask this Court to issue an injunction that enjoins Defendants from using cyanide gas in any executions and from making any further expenditures related to its lethal gas program.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for relief against Defendants as follows:

- A. For a declaratory judgment as described herein;
- B. For permanent injunctive relief as follows: (1) enjoining Defendants from using cyanide gas in any executions; and (2) enjoining Defendants from making any further expenditures related to its cyanide gas protocol; and
- C. For an award of such other and further relief as the Court deems just and proper under the circumstances.

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1 Dated: February 15, 2022

2  
3 By: /s/ *Craig M. Waugh*

4 Craig M. Waugh (Bar No. 026524)  
5 Laura Sixkiller (Bar No. 022014)  
6 DLA Piper LLP (US)  
7 2525 East Camelback Road, Suite 1000  
8 Phoenix, Arizona 85016-4232  
9 Tel: 480.606.5100  
10 Fax: 480.606.5101  
11 craig.waugh@us.dlapiper.com  
12 laura.sixkiller@us.dlapiper.com  
13 DLAPHX@us.dlapiper.com

14 -and-

15 Adam J. Pié (*pro hac vice* forthcoming)  
16 Michael Bakhama (*pro hac vice* forthcoming)  
17 DLA Piper LLP (US)  
18 The Marbury Building  
19 6225 Smith Avenue  
20 Baltimore, Maryland 21209  
21 Tel: 410.580.3000  
22 Fax: 410.580.3001  
23 adam.pie@us.dlapiper.com  
24 michael.bakhama@us.dlapiper.com

25 -and-

26 Victoria Lopez (Bar No. 330042)  
27 Jared Keenan (Bar No. 027068)  
28 Benjamin L. Rundall (Bar No. 031661)  
American Civil Liberties Union of Arizona  
P.O. Box 17148  
Phoenix, Arizona 85011  
Tel: 602.650.1854  
Fax: 602.650.1376  
vlopez@acluaz.org  
jkeenanacluaz.org

*Attorneys for Plaintiffs*

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**VERIFICATION**

I, Tim Eckstein, state that:

1. I have read the foregoing Verified Complaint, know the contents thereof, and verify under penalty of perjury that the information contained therein is true and correct to the best of my knowledge.

Executed on February 15, 2022

**Jewish Community Relations Council  
of Greater Phoenix**

*/s/ Tim Eckstein*

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By: Tim Eckstein  
Its: Chairman of the Board  
Jewish Community Relations Council of  
Greater Phoenix