No. _____

In the Supreme Court of the United States

In re: OHIO EXECUTION PROTOCOL LITIGATION,

BENNIE ADAMS, et al.,

Plaintiff,

and

CHARLES LORRAINE,

Plaintiff-Appellee,

v.

JOHN KASICH, Governor, State of Ohio, et al.,

Defendants-Appellants,

APPLICATION OF OHIO GOVERNOR JOHN KASICH ET AL. TO VACATE STAY OF EXECUTION

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INTRODUCTION

On January 11, 2012, the federal district court in this case entered an order staying the execution of Charles Lorraine. Although acknowledging that Ohio's current execution protocol comports with the Eighth Amendment, the district court enjoined the execution because it concluded that admittedly minor deviations from the protocol in one prior execution violated the Equal Protection Clause under the strict scrutiny and class-of-one tests. The Sixth Circuit refused to vacate the stay. The court of appeals did not reckon with any legal arguments, but nonetheless made the pronouncement that "the federal courts [will] monitor every execution [in Ohio] on an ad hoc basis." *In re Ohio Execution Protocol Litigation*, No. 12-3035, slip op. at 2 (6th Cir. Jan. 13, 2012) (attached at Appx. A). Because the district court's order lacks any support in law and because the order sweepingly affects the State's entire capital system, this Court should vacate the stay.

A novel and unsupportable theory of equal protection led to these circumstances. Lorraine claims that the Equal Protection Clause provides condemned prisoners protections above and beyond those guaranteed by the Eighth Amendment. Ohio's most recent execution—of Reginald Brooks—involved minor deviations from the State's execution protocol. Lorraine argues that those deviations show that he will be treated differently from other similarly situated capital inmates, in violation of equal protection. Holding that Lorraine had a strong likelihood of success on the merits of that claim, the district court relied on two inapplicable equal protection doctrines.

First, the district court held that any deviation from Ohio's execution protocol must survive strict scrutiny. Capital inmates have a fundamental right to be free from cruel and unusual punishments, the district court reasoned, and therefore any procedure "burdening" that right must be narrowly tailored to achieve a compelling governmental interest. But the Fourteenth Amendment does not demand strict scrutiny when a separate constitutional provision—here, the Eighth Amendment—supplies the mode of analysis and reveals no impinged fundamental right. Where a State's execution protocol presents a "*sure or very likely*" risk of severe pain, the protocol violates the Eighth Amendment. *Baze v. Rees*, 553 U.S. 35, 49-50 (2008) (plurality opinion). Otherwise, the federal courts leave management of executions to the States. By replacing the risk-of-harm standard with strict scrutiny, the district court markedly lowered the bar for stays-of-execution in Ohio and rendered irrelevant the Eighth Amendment's risk-of-harm analysis.

Second, the district court held that each condemned inmate in Ohio is a "class of one" for equal protection purposes. The court's theory goes like this: By deviating from its protocol, Ohio treats every condemned inmate differently, which constitutes arbitrary and intentional discrimination in violation of the Equal Protection Clause. Yet the Equal Protection Clause "tolerates occasional errors of state law or mistakes in judgment." *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cnty.*, 488 U.S. 336, 343 (1989). The effect of the district court's holding is that any variation from the execution protocol—great or small, intentional or

mistaken—amounts to a constitutional violation. This distortion of equal protection cannot stand.

The reality of the State's deviations further underscores the weakness of the district court's theories. Three deviations are the basis for the stay. First, the execution team member who administered the drug was supposed to announce the start and finish times of each injection. Instead the drug administrator announced the start and stop (but not the time) of each syringe, and a different team member recorded the times. Second, the team leader was supposed to document the name, expiration date, and lot number of the drug. The team leader took photographs of the drug vials (with the name, expiration date, and lot number displayed) before and after the execution. A trained pharmacist then wrote down the information. The district court concluded that this was a deviation. Third, the execution team is supposed to indicate on a checklist that it reviewed the inmate's medical chart the day before his execution. Instead the checklist did not show this, although officials took action prior to the execution to verify that the necessary reviews had been completed as required. The district court also complained that the Director of Ohio's Department of Rehabilitation and Correction did not prospectively approve these deviations. Mistakes of this sort do not violate equal protection.

It also bears mentioning that these deviations do not violate the Eighth Amendment either. Lorraine did not allege, and the courts below did not hold, that these deviations present a "*sure or very likely*" risk of "serious illness and needless

suffering." *Baze*, 553 U.S. at 49-50 (plurality opinion). In the end, the district court's stay has no basis in the Eighth Amendment or the Equal Protection Clause.

The point is not that the State's executions have been faultless, or to brush aside minor deviations from the protocol. The State of Ohio and its execution team take seriously the duty to perform executions constitutionally and according to the protocol. The point, however, is that those two obligations—acting constitutionally and acting according to the protocol—are separate inquiries. The federal courts have authority to intervene only if the State fails on the first score.

Unless this Court vacates the stay, Ohio's corrections system will face ongoing uncertainty and disruption. This concern is not hypothetical: In July 2011, the district court stopped another execution on these equal protection grounds. The State has scheduled executions into 2014, with the next one planned for February 22, 2012. There are 101 Ohio capital inmates who have raised these equal protection claims—87 as parties to this litigation and 14 who have filed similar complaints. If this Court does not vacate the district court's stay, these executions may not go forward because, in the words of the Sixth Circuit, "the federal courts [will] monitor every execution on an ad hoc basis." Appx. A at 2. Given the weakness of the district court's legal foundation, that result cannot stand.

STATEMENT OF CASE AND FACTS

In May 1986, Lorraine fatally stabbed an elderly couple in their home. A jury convicted him of aggravated murder and recommended a death sentence, which the trial court imposed. The Ohio Supreme Court later affirmed the convictions and sentence. *See State v. Lorraine*, 613 N.E.2d 212 (Ohio 1993). Lorraine then

attempted, but failed, to vacate that judgment in state and federal post-conviction proceedings. *See Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002). Finally, Lorraine intervened in federal litigation under 42 U.S.C. § 1983, challenging the constitutionality of Ohio's lethal-injection protocol.

A. Capital prisoners unsuccessfully attacked Ohio's lethal injection protocol under the Eighth Amendment.

Beginning in 2004, capital prisoners filed complaints against state officials under 42 U.S.C. § 1983, claiming that Ohio's lethal injection protocol—a three-drug administration of sodium thiopental, pancuronium bromide, and potassium chloride—violated the Eighth Amendment's ban on cruel and unusual punishments. See *Cooey v. Strickland*, 479 F.3d 412, 414 (6th Cir. 2007). The Sixth Circuit concluded that many of these claims were time barred and ordered them dismissed. *Id*. at 424; *accord Getsy v. Strickland*, 577 F.3d 309 (6th Cir. 2009).

Notwithstanding those procedural rulings, Ohio revised its protocol to lessen the likelihood of problems with its executions. The State removed strict time deadlines on the execution, ordered in-depth medical examinations of the prisoner, altered procedures for intravenous administration of the drugs, and required ongoing inspection of the prisoner's arms during the drug administration. *See Cooey*, 479 F.3d at 424. In 2009, the State announced that it would institute more training for execution team members and require more supervision of the person administering the drugs. *See Getsy*, 577 F.3d at 313.

But the biggest change occurred in November 2009: Ohio decided to discontinue the three-drug protocol used in at least 30 States and to adopt instead

the method advanced by the capital prisoners in *Baze*, 553 U.S. at 51 (plurality opinion) ("a one-drug protocol that dispenses with the use of pancuronium and potassium chloride, and additional monitoring by trained personnel"). Ohio would now administer intravenously a single, large dose of a barbiturate.[1] *See Cooey (Biros) v. Strickland*, 589 F.3d 210, 219-20 (6th Cir. 2009). If officials encountered difficulties in establishing or maintaining an intravenous site, a backup procedure—an intramuscular injection of midazolam and hydromorphone (two anesthetics)—would be used. *Id*. at 220.

New legal challenges were filed after Ohio adopted this new execution method. Prisoners claimed that Ohio's new protocol—and the risk of its improper administration by state officials—constituted cruel and unusual punishment. The Sixth Circuit rejected those claims, holding that Ohio's new protocol "conforms with the Constitution's prohibition on cruel and unusual punishment, and the record indicates that it is a decided improvement on the protocol that Ohio has utilized in the past." *Id*. at 216.

B. The district court then began entertaining equal protection challenges based on deviations from the protocol in past executions.

With their Eighth Amendment claims foreclosed, capital prisoners switched focus to the Equal Protection Clause. They claimed that Ohio has a "policy and pattern of deviations from the written execution protocol," and that these deviations "treat each condemned inmate differently, burdening his fundamental rights and constituting disparate treatment that is not rationally related in any way to a

[1] Ohio originally used sodium thiopental in this process. It switched to pentobarbital in January 2011.

legitimate state interest." *Cooey (Smith) v. Kasich*, No. 2:04-cv-1156, 2011 U.S. Dist. LEXIS 73606, at *63-64 (S.D. Ohio July 8, 2011).

Acting on another prisoner's motion for a temporary restraining order in July 2011—the motion of Kenneth Smith—the district court identified four prior deviations from the execution protocol:

First, the protocol requires execution team members to sign a written verification after they prepare the drug dosage, but documentation did not exist in several cases. *Id*. at *71.

Second, the protocol requires officials to assess the prisoner's veins on the morning of the execution. *Id*. at *73. In certain cases, however, no documentation exists on whether an official performed this assessment. The district court concluded that this "open[ed] the door to the medical step being overlooked and thus left undone." *Id*. at *74.

Third, the protocol requires the presence of two individuals qualified to mix and administer the drugs—one performs the task, the other observes. But two executions—Vernon Smith in January 2010 and Michael Beuke in May 2010—were performed with just one qualified individual present. *Id*. at *75.

Fourth, the district court found that "Ohio . . . fails to exercise control over who participates in an execution." *Id*. at *84. In the failed execution of Romell Broom in October 2009, the Warden reached out to a doctor who was not part of the execution team, who then advised and assisted the execution team members as they unsuccessfully attempted to locate a suitable vein for the I.V. *Id*.

The district court called these "core" deviations and said that they signaled "almost no limit to what other core written protocol provisions Ohio can selectively abandon during an execution." *Id*. at *86-87.

The court then concluded that these deviations afforded a colorable equal protection claim to every capital prisoner, both because the State offered "no compelling reason" for the deviations under strict scrutiny and because the "deviations [were] revealed to be irrational . . . arbitrary and capricious" under a class-of-one analysis. *Id*. at *94, *98.

In so ruling, the court excused any requirement that a capital prisoner satisfy the Eighth Amendment standard of showing risk of harm from a particular deviation: "[J]ust because the core deviations may not result in a substantial risk of severe pain does not mean that they do not matter." *Id*. at *100.

The district court granted a temporary restraining order and preliminary injunction, halting the execution of Kenneth Smith in July 2011.

C. Rather than appeal in *Smith*, the State enhanced its protocol.

Although the State disagreed with the district court's equal protection analysis, it committed to addressing the identified deviations. Gary Mohr, the new director for the Department of Rehabilitation and Correction, ordered a comprehensive review of Ohio's execution protocol and practices. To ensure a full assessment, the Governor granted reprieves to several capital prisoners who had execution dates in the summer and fall of 2011. *See Cooey (Brooks) v. Kasich*, No. 2:04-cv-1156, 2011 U.S. Dist. Lexis 128192, at *10 (S.D. Ohio Nov. 4, 2011).

At the end of this process, Ohio affirmed its commitment to the written protocol and imposed additional prophylactic measures. It determined that deviations from "less core components" must be approved by Director Mohr, and that deviations from "essential or core components" are impermissible. *Id*. at *19. All together, the changes "strip[] the warden of much of his execution-related discretion." *Id*. at *23. The State also created checklists and safeguards, added additional members to the medical team, and created a "special assistant" position to audit the performance of team members. *Id*. at *19, *35, *40.

When these protocols were challenged, the district court announced that the reforms allayed its earlier concerns: "Absent evidence that a policy and practice of permissible core deviations continues to exist, the conclusion of subjective adherence that proved so damaging to Defendants in Smith is absent here." *Id*. at *28. It accordingly denied a request to enjoin the November 2011 execution of Reginald Brooks.

D. When Lorraine challenged the latest protocol, the district court announced that even non-significant deviations could violate equal protection.

Facing a January 18, 2012 execution date, Lorraine sought a temporary restraining order and preliminary injunction. Like the prisoners before him, Lorraine claimed that Ohio continued to deviate from its execution protocol, and that these deviations were arbitrary and irrational. *See In re Ohio Execution Protocol Litigation*, No. 11-cv-1016, at 6 (S.D. Ohio Jan. 11, 2012) (attached at Appx. B).

The State disclosed all documents in its possession on the Brooks execution and a hearing was held. From that information, the district court identified three deviations. Appx. B at 13-15.

First, the start and finish times of the injections were not announced by the person assigned that task. The protocol require the drug administrator to announce the start and finish times of each injection to the Command Center contact for capture on the timeline. *Id.* at 13. The special assistant's report indicated that "the Drug Administrator announced the start and stop of each syringe but did not announce the actual time of each action." Sixth Circuit Appx. 109. Another team member then recorded "[t]he actual start and stop times for each syringe . . . on the Equipment Room and Execution Checklist." *Id.* The district court concluded that this was a deviation.

Second, the protocol requires the execution team leader to "document the name or description, the expiration date, and the lot number of the execution drugs used." Appx. B at 13. The team leader took photographs of the drug vials (photographically documenting the name, expiration date, and lot number displayed) before and after the execution. Sixth Cir. Appx. 65-86 (photos). A second person, who is a trained pharmacist, then wrote down that information. The district court concluded that this was a deviation.

Third, the protocol requires execution officials to review the prisoner's medical chart the day before the execution. But the checklist did not show that this review was completed for Brooks's execution. The special assistant flagged this

omission on the morning of the execution, and "Director Mohr and Warden Morgan . . . took action prior to the execution to verify that the necessary assessments and reviews had been completed as required." Sixth Cir. Appx. 108. The district court concluded that this was a deviation.

The district court stated that "[a]ssuming *arguendo* that all of these deviations fall under the category of non-core deviations, this Court is not greatly concerned with the fact that one state actor fulfilled a function specifically assigned only to another actor by the protocol." Appx. B at 14. But Ohio "fail[ed] to follow the chain of command and obtain permission for these non-core deviations." *Id*. at 21. As a result, the court held, the State "puncture[d] one of the core components of the protocol that safeguards the constitutionality of Ohio's execution process." *Id*. at 21-22.

Again applying equal protection concepts of strict scrutiny and class-of-one analysis, the court then enjoined Ohio "from implementing an order for the execution of Charles Lorraine issued by any court of the State of Ohio until further Order from this Court." *Id*. at 23.

E. The Sixth Circuit refused to vacate the district court's order.

The State asked the Sixth Circuit to vacate the district court's temporary restraining order and preliminary injunction, asserting that its equal protection analysis was flawed. The court of appeals declined. Without analyzing the constitutional issues, the court of appeals "agreed with the district court that the State should do what it agreed to do: in other words it should adhere to the execution protocol it adopted." Appx. A at 2. "[W]hether slight or significant

deviations from the protocol occur," the Sixth Circuit stated, "the State's ongoing conduct requires the federal courts to monitor every execution on an ad hoc basis, because the State cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death." *Id.*

ARGUMENT

A. The stay order should be vacated.

The district court granted relief under the Equal Protection Clause of the Fourteenth Amendment. Appx. B at 6, 15. The court grounded its equal protection holding both in strict scrutiny and class-of-one analysis. Neither provides a legitimate basis for the conclusion that Lorraine is likely to succeed on the merits. Contrary to the district court's novel theory, the Fourteenth Amendment does not heighten cruel-and-unusual-punishment standards above the bar set by the Eighth Amendment. Accordingly, Lorraine is not entitled to the temporary restraining order currently in place barring his execution.

1. The stay order is erroneously premised on a strict-scrutiny review of Ohio's execution protocol.

The district court's strict-scrutiny analysis repudiates the limitations of a traditional Eighth Amendment inquiry, holding instead that narrow tailoring and a compelling interest are required to justify elements of Ohio's execution protocol under the Equal Protection Clause. Appx. B at 15 (criticizing the state for "attempt[ing] to transform" Lorraine's claim into a "pure Eighth Amendment claim"). But the equal protection guarantees of the Fourteenth Amendment do no additional work where the Eighth Amendment defines the constitutional right at

stake. There is no added protection against cruel and unusual punishments embodied in the Fourteenth Amendment. And strict scrutiny does not apply to every aspect of Ohio's execution protocol merely by using a Fourteenth Amendment lens to inspect Eighth Amendment rights.

The Fourteenth Amendment does not demand strict scrutiny for every claim that state action *affects* a fundamental right. *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (reversing lower court that applied strict scrutiny because statute "affected" First Amendment rights). Voting is a fundamental right, but "the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (upholding regulation under lessened scrutiny). The right to marry is generally fundamental, but by "reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The right to travel is generally fundamental, but not every classification affecting the right demands strict scrutiny. *Jones v. Helms*, 452 U.S. 412, 417 (1981) (reversing lower court judgment that rested "entirely on the premise" that a statute impaired a fundamental right to travel). Certain familial relationships are protected as fundamental rights, but statutes that do not "'directly and substantially' interfere with family living arrangements" do not "burden a fundamental right." *Lyng v.*

Castillo, 477 U.S. 635, 638 (1986) (reversing district court that applied heightened scrutiny). A statute that tracks the definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973), does not punish the exercise of a fundamental right; the fundamental expressive right ends where unprotected speech begins.

Put another way, if the claim fails the substantive standards of the underlying right, the strict-scrutiny equal protection argument likewise fails. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) ("Because we hold . . . that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to [the] equal protection claims."); *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (reversing lower court and applying rational-basis review because ordinance did not impinge First Amendment rights); *Harris v. McRae*, 448 U.S. 297, 322 (1980) (applying rational-basis equal protection review because statute "violates no constitutionally protected substantive rights"); *cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) ("[Q]uite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications.") (Stewart, J., concurring).

Adding the Equal Protection Clause to an enumerated-rights argument does not automatically elevate the level of scrutiny. The courts of appeals—including the Sixth Circuit—regularly draw that conclusion from this Court's decisions. In the First Amendment realm, "If every time, place, and manner regulation were subject to strict scrutiny under the Equal Protection Clause simply because it *burdened*

constitutionally protected speech, [the] intermediate-scrutiny test would be rendered obsolete." *Brown v. City of Pittsburgh*, 586 F.3d 263, 283 n.22 (3d Cir. 2009) (emphasis added). Only certain speech restrictions qualify for strict scrutiny, "whether viewed through the lens of First Amendment or Equal Protection doctrine." *Id.*; *see also, e.g.*, *Xcaliber Int'l Ltd. v. Attorney Gen. of La.*, 612 F.3d 368, 381 (5th Cir. 2010) ("Since we are not persuaded by [the] arguments implicating the First Amendment, [the] Equal Protection claim is subject to rational-basis review."); *Miller v. City of Cincinnati*, 622 F.3d 524, 539 (6th Cir. 2010) (declining request to use strict scrutiny by way of the Equal Protection Clause because well-developed First Amendment law commanded lesser scrutiny); *cf. Cooey (Biros)*, 589 F.3d at 234 (rejecting substantive due process claim that was unlikely to extend beyond the protections of the Eighth Amendment).[2]

Even when a policy is prophylactic of a fundamental right, strict scrutiny is inappropriate to measure state action that falls short of the prophylaxis, but not the Constitution. *See, e.g.*, *Sadler v. Sullivan*, 748 F.2d 820, 824-25 (3d Cir. 1984) (equal-protection challenge to application of speedy-trial statute measured against rational basis even though statute was designed to "more effectively protect" the fundamental Sixth Amendment right because Sixth Amendment and statute provided "separate bases" to evaluate trial delay).

[2] The class-of-one theory does no more to trigger strict scrutiny than the Equal Protection Clause alone. *See, e.g.*, *Scarbrough v. Morgan Cty. Bd. of Ed.* 470 F.3d 250, 261 (6th Cir. 2006) ("[W]e decline to extend the fundamental rights analysis to classes of one. . . . To [do so] would allow the Equal Protection Clause to render other constitutional provisions superfluous.").

At least one federal court has confronted—and rejected—the suggestion that the Fourteenth Amendment increases the scrutiny applied to what is really an Eighth Amendment claim. "[T]he Court has already determined that [the State] has not implemented its lethal injection protocol in a manner that subjects Plaintiffs to a substantial risk of serious harm [in violation of the Eighth Amendment]. Therefore, [the State's] actions have not burdened Plaintiffs' fundamental right to be free from cruel and unusual punishment. In addition, Plaintiffs do not allege they belong to a suspect class. Therefore, Plaintiffs are not entitled to strict scrutiny review." *West v. Brewer*, No. CV-11-1409, 2011 U.S. Dist. LEXIS 147216, at *55 (D. Ariz. Dec. 21, 2011).

Strict scrutiny is not appropriate here. The Fourteenth Amendment adds nothing to claims that relate solely to interests protected by the Eighth Amendment. The Eighth Amendment is the beginning and the end of the constitutional analysis, and the district court here made no finding whatsoever that the deviations posed a demonstrated risk of severe pain or objectively intolerable risk of harm. Layering in the Fourteenth Amendment adds confusion, not clarity. Because nothing in Ohio's execution protocol transgresses the Eighth Amendment, the stay issued below must be vacated.

2. Lorraine's class-of-one claim fails.

The district court also concluded that Lorraine had a strong likelihood of success on the merits of his "class-of-one" equal protection claim. Not so. To establish an equal protection violation under a class-of-one theory, a claimant must show that he has been "intentionally treated differently from others similarly

situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). Lorraine fails on the first requirement: that the State *intentionally* treat him differently than other condemned inmates.

The class-of-one claim concept serves a narrow purpose: It prevents the government from singling out individuals for "intentional and arbitrary discrimination." *Olech*, 528 U.S. at 564 (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)). "The paradigmatic 'class of one' case . . . is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen[,] . . . depriving him of a valuable property right that identically situated citizens toward whom the official bears no ill will are permitted the unfettered enjoyment of." *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005). But the recognition of such a protection does not mean that every "claim of differential treatment will suddenly become the basis for a federal constitutional claim." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 608 (2008). Moreover, the Equal Protection Clause "tolerates occasional errors of state law or mistakes in judgment." *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 343.

The deviations in this case may have constituted "erroneous or mistaken performance" of a state protocol, but they were "not without more a denial of the equal protection of the laws." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Nor can Lorraine show that he is being singled out for differential treatment. His class-of-

one argument alleges that the State has failed to comply with its written protocol consistently. Nothing about that claim is personal to him. And to the contrary, all the plaintiffs in this consolidated litigation have advanced this argument.

Lorraine calls the variations "random," and seems to accept that they were not intentional. Appx. C at 22 (Motion for Temporary Restraining Order). That is enough to defeat his claim under *Olech*, but Lorraine persists, suggesting that intent makes no difference. In his view, the problem is that the State deviated from the protocol, "intentionally [or] otherwise." *See* Omnibus Compl. (Dist. Ct. D.E. 4), ¶ 1096, p. 142. This amounts to an argument that equal protection requires all executions to follow the protocol in an identical manner. *But see DeYoung v. Owens*, 646 F.3d 1319, 1328 (11th Cir. 2011) (rejecting such a claim). Lorraine cites no authority for this remarkable proposition, and it is easy to see why. State corrections systems "could not function if every [corrections] decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983). Executions are a human endeavor and therefore will, over time, treat one prisoner somewhat differently from another. That does not transform every mishap into a federal constitutional violation.

This leads to the final point: The district court's order and the Sixth Circuit's opinion damage the interests of federalism and finality that should guide federal courts in these matters. The district court's order impermissibly interferes with Ohio's "legitimate interest in carrying out a sentence of death in a timely manner." *Baze*, 553 U.S. at 61 (plurality opinion). The court of appeals has approved this

interference, holding that the district court is "require[d] . . . to monitor every execution on an ad hoc basis." Appx. A at 2. To be sure, the Constitution provides a check on how States carry out executions, but the Equal Protection Clause does not give the federal courts license to chaperon Ohio's compliance with its protocol. The courts here have gone too far, and this Court should vacate the stay.

3. The Eighth Amendment likewise does not justify the stay.

Lorraine worries that the State's deviations present a "risk that Lorraine will be subjected to an unconstitutional execution." Appx. C at 27. We have read this book before, but under a different cover. Complaints that executions present a risk of harm arise under the Eighth Amendment. Given that Lorraine's equal protection arguments fall short, he is left only with a claim sounding in the Eighth Amendment. And any such claim is meritless here.

The Eighth Amendment, applicable to the States under the Fourteenth Amendment, protects condemned prisoners from execution practices that "create[] a demonstrated risk of severe pain." *Baze*, 553 U.S. at 61 (plurality opinion). Lorraine thus bears the "heavy burden" of showing that Ohio's practices present a "*sure or very likely*" risk of "serious illness and needless suffering." *Baze*, 553 at 49-50. *See also Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (stay lifted where district court did not find substantial likelihood of severe pain). He cannot make this showing.

To begin, the Sixth Circuit has repeatedly blessed Ohio's written protocol, and nothing in the district court's opinion requires reevaluation of those decisions. *See Cooey (Beuke) v. Strickland*, 604 F.3d 939 (6th Cir. 2010); *Cooey (Biros)*, 589

F.3d 210. Indeed, the simplicity of a single-drug protocol (the very protocol requested by the plaintiffs in *Baze*) eliminated the risk of harm that allegedly plagued a three-drug protocol, a risk that inspired the numerous additional safeguards—redundancies in personnel assignments, documentation, prisoner evaluations—that are now the focus of the district court's criticism.

What is more, Lorraine did not allege, and the courts below did not hold, that Ohio's alleged recent deviations violate the Eighth Amendment. And for good reason: The State's deviations, standing alone or together, do not create a demonstrated risk of severe pain. First, the designated execution team member did not announce the start and finish times of each injection. Second, a trained pharmacist, rather than the Team Leader, documented certain drug information. And third, the execution team did not document whether it had reviewed the inmate's medical chart. *See* Appx. B at 13. Lorraine cannot bootstrap evidence of these deviations—deviations which all parties agree did not create a risk of severe pain—into a conclusion that more serious deviations will occur during his execution.

At most, Lorraine has identified "isolated mishap[s]," which do not "alone give rise to an Eighth Amendment violation." *Baze*, 553 U.S. at 50 (plurality opinion). Showing that the State's procedures "create opportunities for error" is not enough to demonstrate constitutional infirmity. *Id.* at 53. "Accidents happen for which no man is to blame." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). The Eighth Amendment is "specifically concerned with the unnecessary and wanton infliction of pain in penal institutions," *Whitley v. Albers*, 475 U.S. 312, 327

(1986), not the perfect administration of executions. The stay is not justified under the Eighth Amendment.

B. Immediate review is warranted.

The Sixth Circuit directed the district court "to monitor every execution on an ad hoc basis." Appx. A at 2. That sweeping directive, and the district court order underlying it, are worthy of immediate review:

First, the equal protection theory espoused by the district court, and implicitly adopted by the Sixth Circuit, is entirely novel. Up to this point, prisoners complaining about a State's maladministration of execution protocols did so under the Eighth Amendment. These prisoners faced a tall obstacle: To prevail, they had to establish that the State's past mistakes revealed a "substantial risk of serious harm" or an "objectively intolerable risk of harm" for the condemned prisoner. *Baze*, 553 U.S. at 50 (plurality opinion).

But prisoners in the Sixth Circuit who now raise § 1983 method-of-execution challenges need not prove any risk of harm or injury. A showing of "risk of serious harm" is irrelevant because the equal protection inquiry "relies not on such physical impact, but instead targets whether the state government is living up to its constitutional obligations in how it ends the life of citizens." *Cooey (Smith)*, 2011 U.S. Dist. LEXIS 73606, at *101. To that end, "it does not matter whether there is a qualifying risk of severe pain—a conclusion rejected by the only medical expert who testified—but only the creation of unequal treatment impacting the fundamental protection involved." *Cooey (Brooks)*, 2011 U.S. Dist. LEXIS 128192, at *15-16. Under this analysis, a capital prisoner in the Sixth Circuit (and only in

the Sixth Circuit) can halt an execution by uncovering any past deviation, no matter how slight, from a State's established protocol.

Second, the rulings below authorize a monumental expansion of federal court oversight over Ohio's execution protocols. Before every execution date, a prisoner seeks a temporary restraining order and preliminary injunction. As Lorraine did here, the prisoner will subpoena Director Mohr, the warden, and members of the execution team—and then question them about every facet of Ohio's most recent execution. If any discrepancy with the protocols is unearthed, the prisoner will charge an equal protection violation, and the district court will halt the execution. In Ohio, this process will repeat every forty-five days as a new execution date approaches.

To perform this inquiry, the district court has, in every respect, functioned as a "board[] of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation." *Baze*, 553 U.S. at 51 (plurality opinion). Before Ohio is cast further into this morass, it seeks guidance from this Court on whether the Equal Protection Clause even supplies federal courts with such expansive authority.

Third, the district court's most recent order imposes an impossible burden on state officials—notably, Director Mohr. Ohio may proceed with executions, the court stated, only if it agrees to obtain advance permission from Director Mohr for any deviation from the protocols. Appx. B at 18-21. But not all deviations are foreseeable. The mistakes of the past—where the warden and lower level officials

approved significant deviations from the protocols—will no longer occur. But under the district court's recent ruling, even unintentional and non-significant errors will constitutionally doom the State.

To be clear, the State wants to prevent deviations from the protocols—no matter how slight or unconnected to the well-being of the prisoner. But the district court wants the State to ensure that Director Mohr will catch and approve every deviation of any nature in advance of the execution. No State realistically could conduct executions under such standards. And because those standards have no constitutional mooring, immediate review is warranted to set right the path of Ohio's method-of-execution proceedings.

CONCLUSION

For all of these reasons, the Court should vacate the district court's stay order.

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January 20, 2012

FOR FULL-TEXT PUBLICATION

No. 12-3035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: OHIO EXECUTION PROTOCOL LITIGATION

BENNIE ADAMS, et al.,

Plaintiff,

and

CHARLES LORRAINE,

Plaintiff-Appellee,

v.

JOHN KASICH, Governor, State of Ohio; GARY MOHR, Director, ODRC; DONALD MORGAN, Warden, Southern Ohio Correctional Facility; ANONYMOUS EXECUTION TEAM MEMBERS 1-50, c/o Southern Ohio Correctional Facility,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

O R D E R

BEFORE: NORRIS, SUHRHEINRICH and STRANCH; Circuit Judges.

Before this Court is the State of Ohio's emergency motion to vacate the district court's order staying the execution of Charles Lorraine, scheduled for January 18, 2012, at 10:00 a.m. On January 11, 2012, District Judge Gregory Frost issued a lengthy written opinion granting the stay, based on persistent failure or refusal of the State to follow its own written execution protocol.

Based upon the analysis of the district court's January 11, 2012 Opinion and Order granting a preliminary injunction and a stay of execution, as well as the district court's July 8, 2011 Opinion and Order entered in this same litigation and reported at 801 F. Supp.2d 623 (S.D. Ohio 2011), we conclude that the State's arguments in support of the emergency motion to vacate the stay are not well-taken. We agree with the district court that the State should do what it agreed to do: in other words it should adhere to the execution protocol it adopted. As the district court found, whether slight or significant deviations from the protocol occur, the State's ongoing conduct requires the federal courts to monitor every execution on an ad hoc basis, because the State cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death.

The State's emergency motion to vacate the stay is DENIED. The stay will remain in place until further order from the district court on the hearing set for February 24, 2012.

ENTERED BY ORDER OF THE COURT

CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: OHIO EXECUTION PROTOCOL LITIGATION

Case No. 2:11-cv-1016
JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel

This document relates to: Charles Lorraine.

OPINION AND ORDER

This case is frustrating.

For close to eight years, the Court has dealt with inmate challenges to the constitutionality of Ohio's execution protocol.[1] During that time, the litigation has morphed from focusing primarily on allegations of cruel and unusual punishment to allegations of equal protection violations. Ohio has been in a dubious cycle of defending often indefensible conduct, subsequently reforming its protocol when called on that conduct, and then failing to follow through on its own reforms. Occasionally in this litigation, state agents lie to the Court. At other times, different state actors impress this Court with their sincere devotion to carrying out the unenviable task of executing death-sentenced inmates within constitutional parameters. As a result of laudable effort by the various state actors involved–motivated either by duty, embarrassment, the decisions of this Court, or a combination of any of the foregoing–Ohio finally arrived at a protocol that on paper satisfies every Eighth and Fourteenth Amendment challenge thrown against it. Then once again Ohio decided to carry out the protocol in a manner

[1] The original execution protocol case dates back to 2004. Over the years, various inmates filed additional cases. By agreement of the parties, the Court ultimately consolidated all the execution protocol cases under case number 2:11-cv-1016 and closed the four original cases on the docket so that the parties would be able to proceed under only one case number. *See* ECF No. 11.

that simply ignores a key component of the execution scheme.

The end result is that rather than proceeding to a final conclusion in this case that would enable Ohio to proceed to fulfill its lawful duty to execute inmates sentenced to death free from this ongoing litigation, Ohio has unnecessarily and inexplicably created easily avoidable problems that force this Court to once again stay an execution.

This is frustrating to the Court because no judge is a micro-manager of executions and no judge wants to find himself mired in ongoing litigation in which he must continually babysit the parties. But the law is what it is, and the facts are what they are. The Constitution demands that a judge honor the rights embodied in that document, that a judge appreciate the nuance involved in those rights rather than adopting a constitutionally irresponsible, "big-picture, close enough" approach, and that a judge follow the evidence presented by the parties to whatever principled conclusion it leads–no matter how easily avoided and frustrating that conclusion may be. In other words, *if Ohio would only do what it says it will do*, everyone involved in this case can finally move on.

The captioned case is before the Court for consideration of Plaintiff Charles Lorraine's motion for a temporary restraining order and a preliminary injunction (ECF No. 7), Defendants' memorandum in opposition (ECF No. 39), Lorraine's reply memorandum (ECF No. 41), Lorraine's supplemental memorandum in support (ECF No. 50), and Defendants' supplemental memorandum in opposition (ECF No. 52).[2] Also before this Court is Lorraine's motion to strike (ECF No. 53) and Defendants' memorandum in opposition (ECF No. 54). The motion to strike

[2] All pinpoint references to documents filed on the electronic docket shall be to the original page numbers of the documents involved, not to the page numbers assigned by the electronic filing system.

is meritless. But because Lorraine has demonstrated a substantial likelihood of succeeding on his Equal Protection claim, this Court must find the motion for injunctive relief well taken and orders that Ohio cannot proceed to execute him under its current approach.

I. Background[3]

This litigation is a 42 U.S.C. § 1983 civil rights action brought by multiple inmates who challenge various facets of the execution protocol used by the State of Ohio. Plaintiff Charles Lorraine is an inmate on Ohio's death row who is set to be executed on January 18, 2012. On November 23, 2011, Lorraine filed a motion for a temporary restraining order and preliminary injunction to stay his execution. (ECF No. 7.) Pursuant to S. D. Ohio Civ. R. 65.1(a), the Court held an informal preliminary conference with the parties on December 1, 2011, at which the Court set a briefing schedule and a hearing date. (ECF No. 10.)

The Court held the hearing on Plaintiff's motion for injunctive relief on January 3, 2012. Both sides presented testimony and agreed to various stipulations. The parties also proposed that this Court permit supplemental post-hearing briefing, which the parties agreed could present additional evidence and argument outside the in-court hearing context, and the Court accepted that joint proposal. The parties have submitted their post-hearing briefs, and the motion for injunctive relief is now ripe for disposition. While this Court was working on its injunctive relief decision, Lorraine then filed a motion to strike that Defendants oppose.

II. Motion to Strike Analysis

[3] The findings of fact related to this Opinion and Order are not conclusive given that "findings of fact and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits." *United States v. Edward Rose & Sons*, 384 F.3d. 258, 261 (6th Cir. 2004) (citing *University of Texas v. Camenisch*, 451 U.S. 390 395 (1981)).

On January 6, 2012, Defendants filed their supplemental memorandum in opposition. (ECF No. 52.) Defendants failed to file this supplemental memorandum by the 5:00 p.m. deadline to which they agreed. *See* ECF No. 51, 1/3/12 Hrg. Tr., at 42 ("And defendants have agreed to file their reply brief by five o'clock p.m. on Friday of this week."). Given that Defendants managed to file the supplemental memorandum within under an hour of the agreed-upon deadline and the importance of the issues involved, however, this Court will consider the untimely filing. The Court advises the parties to honor all future commitments they make to this Court, but given the history of this litigation, that statement perhaps rings as a hollow admonishment.

Lorraine seeks to strike "all or at least parts of Defendants' brief." (ECF No. 53, at 1.) He argues that Defendants' supplemental memorandum contains false assertions of fact and other misleading representations, as well as presenting often self-contradicting legal arguments that fall outside the intended scope of the agreement permitting supplemental briefing.

This is a ridiculous argument. The point of the supplemental briefing was to permit the parties to argue additional facts in regard to the relevant law. Moreover, the solution for false or misleading contentions and for jumbled legal arguments is to let the Court do its job and parse the briefing to reach its own factual and legal conclusions. Polite jurisprudence dictates qualifying as potentially hyperbolic the statement that if judges struck a document each time an attorney allegedly played fast and loose with the facts and the law, the docket of every case in every court in every corner of this country would likely consist primarily of entry of appearance filings and court orders striking documents. Lawyering 101 and common sense suggest that just because an attorney does not like something in an opponent's brief does not mean that the brief

cannot be filed.

The Court notes that given its substantive content, Lorraine's motion to strike is essentially a reply memorandum submitted under the guise of a motion, a transparent end run around the prohibition on filing additional memoranda. This is not a clever technique. Defendants' memorandum in opposition similarly presents substantive content, although to a significantly lesser degree. Rather than strike the offending filings as impermissible briefing, the Court simply **DENIES** the motion to strike and moves on to the actual merits of the injunctive relief issue before this Court. (ECF No. 53.)

III. Injunctive Relief Analysis

A. Standard Involved

In considering whether injunctive relief staying Lorraine's execution is warranted, this Court must consider (1) whether Plaintiff has demonstrated a strong likelihood of success on the merits; (2) whether Plaintiff will suffer irreparable injury in the absence of equitable relief; (3) whether a stay would cause substantial harm to others; and (4) whether the public interest is best served by granting a stay. *Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (citing *Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007); *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). As the Sixth Circuit has explained, " '[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.' " *Id.* (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

B. Likelihood of Success[4]

Lorraine's motion asserts arguments falling under his fourth claim, which is an Equal Protection claim under 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Thus, in order to prevail on his § 1983 claim, Lorraine must show that, while acting under color of state law, Defendants deprived or will deprive him of a right secured by the Federal Constitution or laws of the United States. *See Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003). Lorraine pleads that "Defendants' overarching execution policy, including their wholly discretionary approach to their written execution protocol and their informal policies, violates [his] rights to equal protection under the law as guaranteed by the Fourteenth Amendment." (ECF No. 4 ¶ 1077.) He contends that the September 18, 2011 protocol is facially invalid because it codifies disparate treatment of similarly situated individuals without sufficient justification so as to be arbitrary, irrational, and capricious. Lorraine also asserts that he is a class of one subject to treatment that burdens his fundamental rights in a manner that is not rationally related in any way to a legitimate state interest.

This Court has previously opined on similar arguments, although the evidence before the Court has grown over time. On July 8, 2011, the Court issued a decision in which it set forth at

[4] By order of this Court and by continuing agreement of the parties, all references to Ohio's execution team members are again by generic identifiers established by the parties and employed to address anonymity and safety concerns.

length numerous deviations by state actors from the state execution protocol then in effect, including core deviations that subverted the key constitutional principles that control the execution process. *Cooey (Smith) v. Kasich*, Nos. 2:04-cv-1156, 2:09-cv-242, 2:09-cv-823, 2:10-cv-27, 2011 WL 2681193 (S.D. Ohio July 8, 2011). This Court therefore enjoined Ohio and any person acting on its behalf from implementing an order for the execution of Plaintiff Kenneth Smith until further Order from the Court.

In response, Defendants revised Ohio's execution protocol and practices. This resulted in the current iteration of the state's execution protocol, which became effective on September 18, 2011. Ohio then proceeded to pursue the resumption of executions.

The next inmate seeking a stay via injunctive relief to come before this Court was Reginald Brooks. Brooks' stay motion came on for a hearing from October 31, 2011 through November 2, 2011. The Court took the motion under advisement and, after examining the new protocol and the proffered evidence of Defendants' practices in implementing that protocol, issued a November 4, 2011 Opinion and Order that explained that "[t]he dispositive questions . . . have been whether [Brooks] is correct that Defendants routinely deviate from mandated or core provisions set forth in the written protocol and whether [Brooks] has sufficiently proved that the protocol fails to address sufficiently varied constitutional concerns. The answer to both questions is no." *Cooey (Brooks) v. Kasich*, Nos. 2:04-cv-1156, 2:09-cv-242, 2:09-cv-823, 2:10-cv-27, 2011 WL 5326141, at *12 (S.D. Ohio Nov. 4, 2011).

Notably, the crux of the rationale behind that decision is that Brooks failed to present evidence that he was likely to prove that Defendants are not doing what they say they are doing in conducting executions under the current protocol. Of significance is that, unlike in the *Smith*

proceedings, Defendants were now saying that they got the message that it mattered that their actions matched their words. *Trust us*, Defendants said, *we will not deviate from the core components of the protocol*. This Court accepted that contention. *Trust us*, Defendants continued, *we will let only the Director decide whether to allow any potentially permissible deviation from the non-core components of the protocol*. This Court also accepted that statement. As set forth below, Defendants have once again fooled the Court.

In addition to suggesting that this Court was simply wrong in the *Brooks* decision, Lorraine also argues that evidence previously not before the Court indicates that Defendants are once again nonsensically deviating from the protocol while telling this Court whatever it wants to hear in order to avoid execution stays. Essentially, Lorraine's contentions present three basic issues for extended discussion: whether what happened during the Brooks execution proceedings prior to his arriving at Southern Ohio Correctional Facility ("SOCF") helps Lorraine, whether non-core deviations that occurred at SOCF during the Brooks execution help Lorraine, and whether the core deviation involving the manner in which the non-core deviations during the Brooks execution were handled helps Lorraine.

Lorraine makes much of the assessment planning revolving around Brooks prior to his transfer to SOCF. Section VI(B)(3) of the protocol requires that Ohio conduct a parent institution assessment of an inmate within a specified period of time before his or her scheduled execution date. This evaluation includes a vein assessment as part of a hands-on examination of the inmate, a review of his medical chart "by appropriately trained medical staff at the parent institution," and a mental health assessment conducted by "[a]n appropriate member of the mental health staff at the parent institution." The purpose of the assessment is to identify vein

access problems and any individualized medical or mental health issues that might impact the execution process.

As the parent institution assessment deadline was approaching, Brooks was away from his parent institution. Due to state court proceedings, Brooks was housed at a county jail and, as the deadline approached, various state actors involved in the execution process began to discuss and make plans for how they could meet the protocol requirement if Brooks was not returned to his parent institution by the deadline date. One contingency plan discussed was for parent institution personnel to discuss with county jail personnel the assessments over the phone, with the county personnel conducting the examinations. Some preliminary plans were made to carry out this plan, including the setting of a time for the assessments. There is contradictory testimony as to whether Ohio Department of Rehabilitation and Correction Director Gary Mohr was informed of this contingency plan at that stage. He states that he was, while his subordinates state that he was not. The discrepancy is meaningless because the plan was ultimately not carried out. It does not matter if there indeed was a failure to inform Director Mohr immediately of the contingency plan, because there was in the end no deviation that required his approval: Ohio retrieved Brooks from the county jail and returned him to the state institution in time to conduct the parent institution assessment.

Lorraine argues that this last fact does not render irrelevant that the contingency plan contemplated would in his opinion not have satisfied the protocol. He posits that Defendants' mere contemplation and planning for an off-site assessment presents evidence of a disregard for the protocol that punctures Defendants' actual compliance with the protocol. In other words, Lorraine presents a bad actor theory in which Ohio is guilty of unconstitutional conduct for what

various actors thought about doing, even if the contingency plan never reached culmination. Lorraine overreaches.

This Court does not care what Defendants *thought* about doing to satisfy the protocol's parent institution assessment of Brooks. Nor does the Court care what various state actors *discussed* in contemplating how they could satisfy the requirement, what *preliminary steps* they undertook, or how that contingency plan scenario *might* have played out. What the Court cares about is whether Defendants ultimately satisfied the parent institution component of the protocol. They did, and they did so in accordance with the protocol specifications.

Whatever plans were considered or started or abandoned or approved, what matters is whether parent institution assessment was completed. How it might have been alternatively attempted and whether that contingency plan would have met the protocol requirements so as to render any constitutional concerns irrelevant is speculation that would only serve to provide an advisory opinion on a hypothetical course of action that in the end proved unnecessary.

This Court also notes that although it need not opine on whether the contingency plan would have met the protocol requirements so as to satisfy the constitutional issues involved, Mohr testified that under current circumstances, he would not have approved the contingency plan deviation. That deviation may or may not have been fine, but the key point here is that the contingency plan would have ultimately been presented to Mohr, who would have had the final say on the protocol deviation.

Lorraine attempts to make much of the fact that Dr. Martin Escobar, the individual who conducted the assessment of Brooks, lied to this Court during the *Brooks* hearing. By agreement of the parties, Escobar testified via telephone during that prior hearing. In its November 4, 2011

Opinion and Order, the Court explained the importance of his testimony as follows:

> The new protocol calls for an assessment of an inmate within a specified number of days prior to his or her execution. Belatedly disclosed hearing evidence indicates that Ohio conducted such evaluations, even if at least one of the individuals examining Plaintiff did not know the reasons for the evaluation until after the fact and even he only fulfilled the requirements of the assessment essentially by luck. The physician who conducted the hands-on examination of Plaintiff testified that he performed the IV assessment of Plaintiff's veins as a matter of course because he routinely does so in many physical evaluations. Ohio thus fell into compliance with this protocol requirement. It would have made much more sense [had] the doctor . . . been told beforehand that Ohio needed a pre-execution protocol for Plaintiff. Inexplicably, he was not, despite the fact that the doctor opined that as part of his duty to care for inmates, he believes that he could ethically perform such an assessment. Regardless, the requisite assessment was completed.

Cooey (Brooks), 2011 WL 5326141, at *10. That prior analysis necessitates three comments.

First, Ohio apparently did *not* fall into protocol compliance. Subsequent to the *Brooks* hearing, Lorraine deposed Escobar. (Pl.'s Ex. 39, Escobar Dep.) In his deposition, after asking whether he was going to get in trouble for his latest, "true" testimony, Escobar testified that he had known that he was assessing Brooks for an execution, that nurse Mary Helen Lapushansky had explained to him the purpose of the examination just prior to the assessment (contrary to Lapushansky's own deposition), and that he had previously testified to the contrary in order to protect himself and to assist Brooks' parent institution, Bobby, and Mohr in this litigation.

Second, Lorraine again overreaches when he seeks to inflate Escobar's falsehoods into a sweeping indictment presenting evidence of Ohio's impropriety. The Court is not yet prepared to accept the premise that Escobar's conduct reflects a deceptive attitude necessarily attributable to Defendants or the premise that any defendant or agent thereof led Escobar to provide false testimony. This Court will address the issue of Escobar's false testimony and Lapushansky's possible false testimony later. The forthcoming consequences of their actions is tangential to

whether Lorraine warrants a stay of execution.

Third, regardless of the first two points, the important takeaway for purposes of Lorraine's injunctive relief motion is that Escobar performed the protocol assessment of Brooks. Whether by accident or intentionally, Ohio complied with the protocol.

Lorraine, similar to Brooks before him, questions the sufficiency of all of the examinations or assessments Ohio provides even if they were done in compliance with the protocol. He argues that by failing to inform some of the medical examiners of the purpose of the evaluations or of the details of the execution protocol. This Court explained in the *Brooks* Opinion and Order:

> Plaintiff questions the sufficiency of the assessment. He argues that the protocol requires that the execution team be informed of his physical condition, including high blood pressure that testimony indicated could result in Plaintiff's demise at nearly any moment. Plaintiff perhaps places more demands than either the protocol or the Constitution compel. Full information sharing would certainly make sense, even if not compelled by Ohio's rules or the Constitution. But in making the argument he does, Plaintiff overlooks a key fact: he is refusing to take his medication. Any risk related to his high blood pressure is in part self-inflicted, and Plaintiff has directed this Court to no authority supporting the proposition that a state violates equal protection when it fails to communicate every potential medical roadblock an inmate voluntarily creates to being healthy enough to execute. Other record evidence similarly supports the conclusion that Ohio conducted the requisite mental health evaluation, even if the conclusions reached did not necessarily agree with older conclusions reached prior to Plaintiff entering the system as a death-sentenced individual. It would make sense for the execution team to know as much detail as possible about an inmate's physical and mental condition. It does not violate the Constitution if they know less than everything.

Cooey (Brooks), 2011 WL 5326141, at *10. The Court adheres to its prior analysis.

The foregoing discussion leads to the conclusion that Lorraine has failed to present Brooks-related evidence of pre-SOCF shortcomings that present constitutional infractions. The Court therefore turns to the second main topic presented by Lorraine's argument: Ohio's

commission of non-core deviations from the protocol once Brooks arrived at SOCF.

Lorraine points to a number of clear deviations in the Brooks execution from the protocol. Section VI(H)(1)(c) provides that a second "Drug Administrator shall announce the start and finish times of each injection to the Command Center contact for capture on the timeline." The evidence reflects that ODRC in-house counsel Greg Trout has issued a memorandum directing that the Equipment Room and Execution checklist recorder shall make the announcements. Section VI(I)(10) of the protocol requires that "[t]he Team Leader . . . document the name or description, the expiration date, and the lot number of the execution drugs used." Defendants did not adhere to this requirement in Brooks and had another individual perform this task; evidence indicates that the task has been assigned to Denise Dean in future executions.

Defendants concede several of these deviations, but argue that they are insubstantial because ultimately, someone performed or will perform the required functions. In other words, they argue that substantial compliance is acceptable.

Other evidence indicates that Ohio failed to review Brooks' medical chart upon his arrival at SOCF, despite Section VI(E)(2) requiring this review. There was no record of such review on the checklist Ohio has created to prove that it was done. Defendants explain that "the boxes are located at the far left side [of the checklist] and may have been unintentionally missed." (ECF No. 52, at 14.) A mark that something was completed on the checklist is proof that it occurred, according to SOCF Warden Donald Morgan . He then testified that the failure to check off an action does "not necessarily" mean that it did not occur. Defendants thus attempt to shield themselves by demanding that Lorraine prove a negative, while concurrently holding up

the completed portions checklist as proof positive of protocol compliance. This Court doubts that a file review was conducted. There is no sensible reason for Defendants to offer no evidence that it was done, such as testimony by the person who allegedly did it.

Assuming *arguendo* that all of these deviations fall under the category of non-core deviations, this Court is not greatly concerned with the fact that one state actor fulfilled a function specifically assigned only to another actor by the protocol. Such a deviation is a non-core variation that can properly occur under the protocol scheme accepted as constitutional by this Court in the Brooks proceedings. The problem is that such deviations, as well as the lack of a file review, did not properly occur in the Brooks execution. The reason they cannot be regarded as having properly occurred is because they were not approved in the only manner in which they could have been approved. This is not to say that Ohio must perform all executions in a precisely identical manner. All that is required is that Ohio apply the same overarching rules in every execution, with these rules allowing for necessary and approved non-core deviations.

The Court thus rejects Defendants' invitation to accept substantial compliance with non-core protocol provisions as acceptable. The road to impermissible if not maddening micro-management consists of attempting to assign weight or value to each unapproved deviation, trying to gauge when a few deviations are fine but when too many are too much. Moreover, the protocol itself rejects permissible non-core deviations that are not approved by the Director. It is thus not the individual non-core deviations themselves or in the aggregate that lead to this Court's rejection of substantial compliance. Rather, what is significant is the overarching core concern implicated that makes the non-core deviations errors as opposed to approved departures.

By the evidence presented at the *Brooks* testimony, Defendants presented this Court with what amounts to a fifth core component of the protocol: the Director and only the Director can approve non-core protocol deviations. This rule provides a coherence and equality to the protocol that, given the testimony in the Brooks hearing, would otherwise be lacking. The Sixth Circuit's explanation of the constitutional right involved provides the necessary context in which to view the salvaging effect of the protocol's chain-of-command practice:

> "The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. The Supreme Court has stated that this language 'embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly.' " *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005) (quoting *Vacco*, 521 U.S. at 799, 117 S.Ct. 2293). To establish a claim for relief under the Equal Protection Clause, a plaintiff must demonstrate that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. *Id.; see also TriHealth, Inc.*, 430 F.3d at 788.

Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich., 470 F.3d 286, 298 (6th Cir. 2006). When the disparate treatment burdens a fundamental right, strict scrutiny applies. *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010). What this means is that any core deviation from the protocol is permissible only if it is narrowly tailored to a compelling governmental interest. *Cf. Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007).

The fundamental right involved in inmate claims such as Lorraine's claim is the right to be free from cruel and unusual punishment. As they have in the past, Defendants continue to attempt to transform Lorraine's Fourteenth Amendment claim into a pure Eighth Amendment claim. But as this Court has previously explained in its *Smith* Opinion and Order,

> the former claim sufficiently targets that sweeping core deviations would at least burden Plaintiff's fundamental right by negating some of the precise procedural

> safeguards that this Court and the Sixth Circuit heralded in prior discussions of Eighth Amendment claims in this same litigation. For present purposes, it does not matter whether there is a qualifying risk of severe pain–a conclusion rejected by the only medical expert who testified–but only the creation of unequal treatment impacting the fundamental protection involved.

Cooey (Smith), 2011 WL 2681193, at *29. The Court also explained the problem with core deviations that lack any rational basis, noting:

> The Sixth Circuit has explained the class of one approach:
>
> > When a plaintiff does not allege that the government's actions burden a fundamental right or target a suspect class, the plaintiff is said to proceed on a so-called "class of one" theory and must prove that the government's actions lacked any rational basis. *Radvansky*, 395 F.3d at 312. Under rational basis scrutiny, government action amounts to a constitutional violation only if it "is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005). A "plaintiff may demonstrate that the government action lacks a rational basis . . . either by negativing every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will." *Id.* at 711; *see also TriHealth, Inc.*, 430 F.3d at 788 (citing *Warren*, 411 F.3d at 710).
>
> > Under rational basis review, the defendant "has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.' " *Id.* at 790 (quoting *Fed. Comm. Comm'n v. Beach Comm., Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). The burden falls squarely to the plaintiff, who must overcome the presumption of rationality by alleging that the defendant acted in a manner clearly contrary to law. *Id.*

Id. at *29-30 (quoting *Club Italia Soccer & Sports Org., Inc.*, 470 F.3d at 298). Similar to Smith and Brooks before him, Lorraine "also asserts that the only rationale for core deviations that eliminate safeguards and introduce greater uncertainty into the execution process is to merely

complete the executions at all or nearly all costs." *Cooey (Brooks)*, 2011 WL 5326141, at *4.

Within this context, Defendants represented to this Court in the Brooks proceedings two fundamental precepts. One was that Ohio would not and in fact could not deviate from the core protocol provisions set forth in Section IV of the protocol. The other precept was that all non-core protocol deviations are permissible, but only if they are approved by the Director.

In regard to the first precept, the four core protocol provisions track this Court's articulation in *Smith* of prior deviations from core components of past protocols. The Court explained in the *Brooks* Opinion and Order:

> In [the *Smith*] Opinion and Order, this Court noted that "[t]he core components of the written protocol as set forth in the [then applicable] incarnation of the execution protocol are adequate even if capable of further refinement. It is only Ohio's implementation of these core components that is often grossly and inexplicably inadequate." Such flawed implementation manifested itself in what this Court described as four core deviations: (1) Ohio fails to document the preparation of the execution drugs, (2) Ohio fails to follow formalized procedures designed to ensure adequate preparation for the administration of drugs by IV, (3) Ohio fails to adhere to systemic redundancies that would minimize if not eliminate the possibility of human error, (4) Ohio fails to exercise control over who participates in an execution. The overarching issue underlying all of these problems was that Defendants perceived that they were free to ignore their own protocol due to convenience, pragmatism, or incompetence, which meant that Ohio would ignore the constitutional restraints on state actors' conduct.
>
> Things have changed. It does not matter to this Court whether Ohio has acted motivated by admirable intent or whether it has been begrudgingly dragged toward respectability. What matters is that as a result of state action, the written protocol is now binding, the possibility of variations from less core components has been curtailed and such variations now run to one decisionmaker, and the possibility of variations from the most essential or core components now lies outside the discretion of any decisionmaker because they are not possible. Moreover, Defendants have tightened procedures and have implemented checklists and safeguards extrinsic to the protocol that, effectively employed, will serve to reinforce the protocol requirements. Warden Donald Morgan correctly described the checklists as a checks and balances system that is not mentioned in the written protocol but assists in maintaining compliance with that protocol. Such practices that technically exist outside the written protocol constitute the same type of unwritten practices that in the

> past served to prop up inferior execution protocol versions. Ohio would be foolish to now abandon them, and the state's implementation of these practices warrants positive recognition.

Cooey (Brooks), 2011 WL 5326141, at *5 (citation omitted). Thus, the Court recognized that Ohio had improved its protocol and practices:

> The net effect of Ohio's revised practices and revised protocol is essentially twofold. First, there is a return to viewing the protocol and unwritten practices as linked. Like other courts entertaining challenges to lethal injection protocols under § 1983, this Court followed for much of this litigation the parties' lead in "us[ing] the term 'protocol' to encompass not only the quantities, preparation, injection, and the actual drugs administered during the execution process, but also all policies, procedures, and staff qualification requirements." *Walker v. Epps*, 587 F. Supp. 2d 763, 766 n.3 (N.D. Miss. 2008). In the Smith decision, this Court discontinued use of the blanket term "protocol" in such a manner because it failed to capture the division that Defendants' Smith-era approach presented. The Smith evidence previously suggested an overarching execution policy and a notably subordinate written execution protocol. The contemporary evidence now supports that Defendants have returned to a protocol that embodies an expression of an overall concern for constitutional conduct. Moreover, the evidence indicates that unwritten policies and practices once again support the constitutionality of Ohio's execution practices, rendering the protocol more sound.
>
> The second effect of Ohio's recent efforts is that Plaintiff has failed to meet his burden of proof.

Id. at *5-6. The problem with reaching this same conclusion here is that by now again endorsing a system in which non-core deviations can occur without approval and without consequence, Ohio has punctured the practice that lent its new protocol the saving grace this Court afforded it in the *Brooks* Opinion and Order.

This practice, or the second *Brooks* precept, is that Ohio has told this Court that a fifth non-variable component of the protocol is that only the Director can approve non-core deviations. Defendants then failed to follow that procedure for the non-core deviations set forth above. This again presents every aspect of the protocol except for the specifically identified core

components as a set of preferred practices or suggestions subject to variable implementation from inmate to inmate based on good reasons, bad reasons, or no reasons at all.

This result runs directly adverse to the rationale animating the *Brooks* decision, in which the Court stated:

> [T]he written protocol is no longer a set of guidelines that can be set aside regardless of the constitutional effect of such action. This fact is perhaps best captured in the testimony of Regional Director Edwin Voorhies, who has changed his position once again, but this time to a position that favorably addresses constitutional concerns. Previously in this litigation, he testified that the written execution protocol carries the force of administrative law. The SOCF warden is required to follow the protocol, Voorhies testified in 2009, and former DRC Director and former SOCF warden Terry J. Collins, his then-supervisor, agreed. At the Smith hearing, Morgan, the latest SOCF warden, testified that the written protocol in effect at that time was merely a set of guidelines. Voorhies surprisingly agreed. This led the Court to conclude that Ohio's execution protocol was (and might have always been) an advisory compilation of guidelines subject to being ignored.
>
> The Brooks hearing presented a different story. Ohio Department of Rehabilitation and Correction Director Gary Mohr's testimony in particular indicated a rejection of the pervasive bureaucratic ennui that this Court has long targeted as notably troubling. He described the Smith decision as difficult to read, which concerned this Court and its law clerks until Mohr explained that he did not mean there was inept writing presenting a confusing Opinion and Order. Rather, Mohr testified, what he meant was that the criticism leveled at Ohio was troubling or uncomfortable. He explained that the new protocol and approach was intended to embrace a policy of strict compliance. Mohr also clarified protocol language so that the protocol's use of "variation" and "deviation" were revealed to mean the same thing–departures from the written protocol–and he testified that only he could approve a "variation of a substantial nature," or as he defined it, a variation that would have an impact on the execution itself. Mohr described variations from requisite training as intolerable.
>
> Morgan and Voorhies largely echoed Mohr. The new protocol strips the warden of much of his execution-related discretion in a sense, and Morgan evinced an understanding that he cannot delegate his execution duties to a team member. Like Mohr, Morgan testified that there is no difference in the written protocol between a variation and a deviation. Unlike Mohr, Morgan also testified that there is no difference between a substantial variation, or a variation of a substantial nature, and the terms "variation" or "deviation." In other words, Morgan understood the protocol to mean that a departure is a departure, and he explained that they all fall

above his pay grade. Morgan testified that Mohr has made it clear that the protocol is to be faithfully, consistently, and strictly applied.

Voorhies now agrees. He testified that although Section II of the written protocol still uses the term "guidelines," his approach is now quite different than the approach he expressed in the Smith hearing. He agreed that the protocol went from binding administrative law to advisory to binding again. Voorhies also testified that a deviation is the same as a variation under the protocol and that a team member cannot vary from the protocol.

The Court notes that Mohr testified that he understood the protocol to permit the warden to authorize protocol deviations. This is of course incorrect. It appears Mohr was crediting only Section V, the second unnumbered paragraph of which provides that "[a]ny variation of a substantial nature must be approved by the Director as described in this policy." Section VI(A)(6) expressly provides, however, that "[o]nly the Director may authorize a deviation from the procedures in this policy directive." Thus, one protocol provision leaves substantial variations only to the Director, and another provision leaves any variation or deviation to the Director. The end result is that *all* departures from the written protocol are up to the Director. The error on Mohr's part in recognizing the full scope of his responsibility does little for Plaintiff's cause for two reasons.

First, the only example non-substantial variation or deviation Mohr suggested (and the only one mentioned throughout the hearing) was when a warden would adjust inmate visitation. Mohr correctly recognized this as falling within the warden's purview, even if he failed to explain or recognize why it is within the warden's ability. Section VI(E)(7) specifically provides the warden with the discretion to increase visiting opportunities in the manner Mohr and others contemplated. Increasing visitation time or frequency is therefore actually not a deviation from the written protocol, but is instead a commendable part of that protocol. There can be no constitutional violation in giving an inmate more visitation and, more important for present purposes, there is technically no written protocol departure when a warden does so.

Second, both Morgan and Voorhies testified that variations or deviations were left to the Director. Team Member # 10, the execution team leader, testified multiple times that he lacks the authority to authorize deviations. Even if Mohr thought that select subordinates could authorize protocol departures, the subordinates do not, and any possible departure would consequently flow upward to the only decisionmaker empowered under the protocol to authorize or deny the departure. The end result is the same: as the protocol contemplates, only the Director ultimately passes judgment on protocol departures. The Court also notes its suspicion that Mohr will no doubt recognize the mandate of Section VI(A)(6) following the filing of today's decision.

Id. at *6-7. Based on this reasoning, the Court concluded in *Brooks* that irrational adherence was a thing of the past. Lorraine's evidence from the Brooks execution suggests this Court was wrong. It is therefore again no longer true that "the possibility of variations from less core components has been curtailed and such variations now run to one decisionmaker." *Cooey (Brooks)*, 2011 WL 5326141, at *5.

Defendants have failed to present this Court with any evidence that the non-core deviations were presented to Mohr. They have also failed to present this Court with any evidence that, recognizing the problem presented with failing to follow the chain of command and obtain permission for these non-core deviations, they have since corrected course in order to adhere to the core protocol component of asking first instead of seeking forgiveness later. If there were testimony in this record that all such deviations would be presented to Mohr for those inmates following Brooks such as Lorraine, today's result would likely be different. This is what frustrates the Court. Do not lie to the Court, do not fail to do what you tell this Court you must do, and do not place the Court in the position of being required to change course in this litigation after every hearing. It should not be so hard for Ohio to follow procedures that the state itself created. Today's adverse decision against Defendants is again a curiously if not inexplicably self-inflicted wound.

This Court has no interest in micro-managing executions in Ohio. That is not a judge's role and it is certainly not this Court's inclination. By Ohio's own design, the ODRC Director is the designated micro-manager of the state's executions. Defendants failed in the Brooks execution to present Mohr with the information he needed to fulfill this role. Such conduct and Defendants' refusal to admit and remedy the error punctures one of the core components of the

protocol that safeguards the constitutionality of Ohio's execution process.

The latest events in this litigation invoke the saying that the more things change, the more they stay the same. Ohio created a new protocol and its agents indicated that they would comply with that protocol, presenting this Court with an interpretation of the protocol in which there are five core components from which they cannot vary. Ohio's failure to stand by its representation that all possible deviations flow up to the Director means that, once again, "[i]t is the policy of the State of Ohio that the State follows its written execution protocol, except when it does not. This [remains] nonsense." *Cooey (Smith)*, 2011 WL 2681193, at *1. The first injunctive factor therefore weighs in Lorraine's favor.

C. Irreparable Injury, Substantial Harm to Others, and the Public Interest

Given the weight the Court assigns to the first factor discussion presented above, this Court need not and shall not address the remaining factors in much detail. The Court notes that the irreparable injury a constitutional violation presents is clear and favors a stay. *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (explaining that "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated" and "a successful showing on the first factor mandates a successful showing on the second factor-whether the plaintiff will suffer irreparable harm"). This Court is not persuaded that issuance of injunctive relief will cause substantial harm to the State or others by comparison. The Court also recognizes that the public interest is served only by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001) (" '[I]t is always in the public interest to prevent violation of a party's constitutional

rights.' " (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994))). By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights. Finally, this Court declines to require a security bond for obvious reasons. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (explaining that whether to require a bond is within the discretion of the court).

IV. Conclusion

As in prior injunctive relief decisions, the Court does not conclusively hold today that Ohio's method of execution practices are constitutional or unconstitutional. Today's decision only recognizes that based on all of the record evidence, Lorraine has met his burden of persuading this Court that he is substantially likely to prove unconstitutionality and prevail in this litigation. Accordingly, the Court **DENIES** Lorraine's motion to strike (ECF No. 53) and **GRANTS** Lorraine's motion for a temporary restraining order and a preliminary injunction (ECF No. 7). It is thus **ORDERED**, **ADJUDGED**, and **DECREED** that the State of Ohio, and any person acting on its behalf, is hereby **STAYED** from implementing an order for the execution of Charles Lorraine issued by any court of the State of Ohio until further Order from this Court.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BENNIE ADAMS, et al.,	)	**Case No. 2:11-cv-1016**
	)	**District Judge Gregory L. Frost**
Plaintiffs,	)	**Magistrate Judge Mark R. Abel**
	)	
v.	)	**Plaintiff Lorraine's Motion for a**
	)	**Temporary Restraining Order and a**
JOHN KASICH, et al.,	)	**Preliminary Injunction**
	)	
Defendants.	)	**(Expedited Oral Argument and**
	)	**Evidentiary Hearing Requested)**
	)	
	)	**Death Penalty Case: Execution Scheduled**
	)	**for January 18, 2012**

Plaintiff Charles Lorraine's Motion for a
Temporary Restraining Order and Preliminary Injunction

Plaintiff Charles Lorraine, having filed his Complaint in the above-captioned case, submits this motion, pursuant to Federal Rule of Civil Procedure 65(a) and (b), for a temporary restraining order ("TRO"), a preliminary injunction and a stay of execution. Lorraine seeks injunctive relief barring Defendants and each of them and/or their agents, from acting jointly or severally to execute him on January 18, 2012, by means that will deprive him of his rights in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

In light of the scheduled execution date, a temporary restraining order and a preliminary injunction are necessary to allow Lorraine to litigate his claims before he is unconstitutionally executed. Lorraine requests expedited discovery, oral argument and an evidentiary hearing with post-hearing briefing as the Court deems necessary on his motion. The reasons supporting this request are explained in the attached memorandum in support.

Respectfully submitted this 23rd day of November, 2011.

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Memorandum in Support

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I. Introduction

This request for a temporary restraining order and preliminary injunction staying Plaintiff Charles Lorraine's execution involves one fundamental issue:

> Defendants plan to attempt to execute Lorraine on January 18, 2012. This case, consolidated with the other lethal injection cases, will ultimately be tried on the merits before this Court. If Lorraine can demonstrate a likelihood of success on the merits of his constitutional challenges to Defendants' execution policy to which he will be subjected, should Defendants be temporarily and preliminarily enjoined from attempting to execute him on January 18, 2012?

Or, as this Court phrased it recently in granting Kenneth Smith's requested injunctive relief: has Plaintiff demonstrated that he is likely to succeed in establishing that Ohio has an unconstitutional execution policy so that he deserves a stay of execution that will afford him the chance to prove his case? *Cooey (Smith) v. Kasich*, No. 04-1156, Doc. No. 947, PageID 25929, 2011 U.S. Dist. LEXIS 73606, *9-10 (S.D. Ohio July 8, 2011).[1]

Whether Lorraine can demonstrate a likelihood of success on the merits of his Equal Protection claims involves the following consideration:

> The Fourteenth Amendment guarantees equal protection of the laws. Defendants have a demonstrated, lengthy and continuing pattern of arbitrary and capricious deviations from their written execution protocol sufficient to satisfy the injunctive relief standard, which continues under the September 18, 2011 written protocol. Defendants' actions cannot survive strict scrutiny because they burden the fundamental rights of a class of persons that includes Lorraine. And their actions cannot withstand rational basis scrutiny because they are irrational. *Should Defendants be enjoined from attempting to execute Lorraine in a way that will violate his rights to equal protection?*

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[1] Per discussions involving the Court and counsel for both sides, *Cooey v. Kasich*, Case No. 04-cv-1156 and the cases already consolidated with that case, will be consolidated with the above-captioned case and renamed.

Granting a temporary restraining order and a preliminary injunction is proper and necessary. Lorraine has a substantial likelihood of prevailing on the merits of both of his equal protection claims; there is a threat of irreparable harm to him; an injunction will not cause substantial harm to others; and the public interest lies in favor of not subjecting Lorraine to an unconstitutional execution, and in ensuring that Defendants are required to abide by the federal Constitution in carrying out criminal sentences.

Moreover, Defendants' adoption of the September 18, 2011 written execution protocol does nothing to change the proper result. In the *Smith* order, the Court observed that the written protocol was constitutional under the Equal Protection Clause as written; it was Defendants' behavior and attitudes in administrating the written protocol that were constitutionally problematic. Defendants responded to the *Smith* order, however, primarily by changing the written protocol. Although Defendants professed fealty to the requirements of the written protocol in proceedings on a motion for injunctive relief filed by Reginald Brooks, discovery will demonstrate that Defendants continue to struggle in their efforts to comply with the written protocol. And the September 18, 2011 written protocol facially violates the Equal Protection Clause, because it explicitly codifies arbitrary and irrational unequal treatment of death-sentenced inmates.

II. Procedural Background

On March 1, 2011, the Supreme Court of Ohio set Plaintiff Lorraine's execution date for January 18, 2012. On March 9, 2011, Defendants adopted a revised written execution protocol. Defendants adopted another revised written execution protocol on April 11, 2011. On May 10, 2011, undersigned counsel filed a motion for injunctive relief on behalf of Kenneth Smith raising various constitutional claims including, for the first time in Ohio's lethal injection litigation,

claims for violations of rights protected by the Equal Protection Clause of the Fourteenth Amendment. Following extensive briefing on the injunctive relief motion and on Defendants' motion for summary judgment as to Smith, this Court held a hearing on Smith's motion on June 29, 2011. At that hearing, the Court heard testimony from four witnesses, and new and critical evidence was discovered for the first time. Following post-hearing briefing related to evidence produced to Smith's counsel the night before the hearing, the Court issued an opinion and order granting a TRO and preliminary injunction in Smith's favor.

In the July 8, 2011 order, the Court made extensive findings of fact related to Defendants' execution policy, including Defendants' written execution protocol. The Court found that Defendants deviate from their written execution protocol in at least four "core" ways. The Court rejected Defendants' arguments that the equal protection claims are simply Eighth Amendment claims by another name. The Court found that Defendants' actions treated Smith disparately and burdened his fundamental rights without any compelling governmental interest. The Court also found that Defendants' actions treated Smith disparately and that the disparate treatment was arbitrary, capricious and irrational, without any legitimate governmental interest. After finding that Smith had demonstrated a strong likelihood of success on the merits of his equal protection claims, the Court found that "[t]he first injunctive factor weighs heavily in [Smith's] favor." *Cooey (Smith) v. Kasich*, 2011 U.S. Dist. LEXIS 73606, at *105 (S.D. Ohio July 8, 2011). The Court then found that the other injunctive factors weighed in favor of a stay. Accordingly, the Court enjoined Defendants and anyone acting on their behalf from attempting to execute Kenneth Smith on July 19, 2011.

The remaining schedule of executions was and/or is as follows:

- Brett Hartman — August 16, 2011
- Billy Slagle — September 20, 2011
- Joseph Murphy — October 18, 2011
- Reginald Brooks — November 15, 2011
- Charles Lorraine — January 18, 2012
- Michael Webb — February 22, 2012
- Mark Wiles — April 18, 2012
- Abdul Awkal — June 6, 2012
- John Eley — July 26, 2012
- Donald Palmer — September 20, 2012
- Brett Hartman — November 13, 2012
- Ronald Post — January 16, 2013
- Fred Treesh — March 6, 2013
- Steven Smith — May 1, 2013
- Billy Slagle — August 7, 2013
- Harry Mitts — September 25, 2013

Following the *Smith* proceedings, all parties and the Court proceeded with a "next man up" approach. Following a motion for injunctive relief filed on July 20, 2011 by the undersigned on behalf of Brett Hartman, Defendant Kasich reprieved Hartman's execution date to November 13, 2012. Hartman withdrew his injunctive relief motion as a result.

Counsel next filed a motion for injunctive relief on behalf of Billy Slagle on July 22, 2011, at which point additional discovery depositions began. Undersigned counsel subsequently

filed an amended motion for injunctive relief on Slagle's behalf on August 25, 2011, following Defendants' adoption of a revised written execution protocol with an effective date of September 18, 2011. The Court scheduled a hearing on Slagle's motion for September 13, 2011. On September 2, 2011, Defendant Kasich reprieved Billy Slagle's execution date to August 7, 2013, and Slagle therefore withdrew his injunctive relief motion.

On September 8, 2011, undersigned counsel filed a motion for injunctive relief on behalf of Joseph Murphy. The Court scheduled a hearing on Murphy's injunctive relief motion for Thursday, September 29, 2011. On Monday, September 26, 2011, Defendant Kasich commuted Murphy's sentence to life in prison, and the scheduled hearing, like those for Hartman and Slagle, was cancelled when Murphy withdrew his injunctive relief motion.

On September 29, 2011, undersigned counsel filed a motion to intervene, a proposed complaint, and a motion for injunctive relief on behalf of Reginald Brooks. The Court scheduled a hearing on Brooks's motion to begin on October 31, 2011. Following briefing, the Court granted Brooks's motion to intervene on October 7, 2011. The Court held a hearing on Brooks's injunctive relief motion on October 31, 2011-November 2, 2011. Brooks's equal protection claims included the same arguments and evidence Smith presented. Following the hearing, the Court found that "the execution protocol and Defendants' approach to the protocol have by all appearances matured. . . . Defendants have addressed the key concerns that provided the animus underlying the *Smith* decision." (Order denying Pl. Brooks's Mot. for Injunctive Relief, Doc. No. 264, p. 9, PageID 10079.) The Court denied Brooks's motion, citing a lack of evidence presented to warrant injunctive relief. Defendants executed Brooks on November 15, 2011.

Meanwhile, on October 24, 2011 and again on October 27, 2011, the Court held status conferences at the undersigned counsel's request to discuss procedural matters related to

numerous additional inmates joining the lethal injection litigation by the end of November of 2011. Plaintiff Lorraine was among over eighty inmates who filed an Omnibus Complaint in the above-captioned case on November 14, 2011, per the discussions between the Court and opposing counsel during the status conferences.

In accordance with the approach employed since the *Smith* proceedings, Lorraine, as the "next man up," now files his injunctive relief motion, well in advance of his execution date. As of the date of this motion, undersigned counsel has received only a single document of evidence in the entire time following the Brooks injunctive relief hearing; the timeline of Brooks's execution, which was only provided to Lorraine's counsel at his prompting. Additional document and deposition discovery related to the Brooks execution is necessary.

III. This Court should grant Lorraine a temporary restraining order and a preliminary injunction.

A. Summary of the argument

Despite the *Brooks* order, and under the same reasoning that this Court adopted in its *Smith* order, Lorraine is likewise deserving of injunctive relief. Defendants' past and present failures to follow the written protocol's requirements in administering executions subject Lorraine to violations of his Fourteenth Amendment right to equal protection of the laws.

Lorraine is one of a small class of condemned inmates whose fundamental rights are being violated because they cannot be ensured that Defendants will apply their execution policy equally to all similarly situated persons. Likewise, Lorraine, as a class of one, will not be treated the same as similarly situated individuals as demonstrated by Defendants' ongoing failure to comply with their execution protocol. There is no rational basis for the different treatment.

Lorraine seeks a TRO and preliminary injunction barring Defendants from executing him by means that will violate his constitutional rights. *See* Fed. R. Civ. P. 65.

B. The relevant law governing the injunctive relief requested.

The purpose of TRO and preliminary injunctive relief is to preserve the status quo until the rights of the parties can be fairly and fully litigated through a final hearing or trial on the merits of a request for a permanent injunction. *See Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held"); *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1378 (6th Cir. 1995) (citations omitted).

The following factors determine whether injunctive relief such as a preliminary injunction is warranted: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction." *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). No single factor is determinative. *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001). The four factors are to be balanced; they are not prerequisites to be met. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citing *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) and *In re De Lorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)). Accordingly, the degree of likelihood of success required to obtain a preliminary injunction may depend on the strength of the other three factors. *De Lorean Motor Co.*, 755 F.2d at 1229.

C. The relevant evidence to consider includes all of the historical evidence related to Defendants' administration of their execution protocol and policies.

The evidence relevant to Lorraine's claims should not be limited to just the evidence produced since Defendants adopted their September 18, 2011 written protocol. Defendants have demonstrated a lengthy pattern of non-compliance with their execution protocol. The fact that

the failed Broom execution and several other executions in which troubling non-compliant behavior were discovered were conducted under a previous written protocol does not diminish the relevance of that evidence to Lorraine's claims. Critically, at the time of the Broom failure, as now, Defendants' position was that they would follow the written execution protocol. But they did not do so when it became inconvenient, impractical, or difficult to carry out the execution.

Moreover, Defendants discarded their previously sworn position regarding the written protocol when it became inconvenient, impractical or difficult to follow the protocol during the execution of Vernon Smith. That execution was just the second one following the Broom failure. Defendants similarly discarded their promised adherence to the written protocol in the execution of Michael Beuke four months later.

While Defendants had previously sworn that they followed their written protocol as binding law, that position was ultimately disproven. And the way in which non-compliance related to executions of Vernon Smith, Michael Beuke, Darryl Durr, Michael Benge, Joseph Clark, Reginald Brooks and others came to light reveals that only through close judicial scrutiny will Defendants' non-compliant actions be discovered. Notwithstanding Defendants' assurances and promises to comply with the protocol, they took the strategic tack of arguing that the written protocol was in fact "mere guidelines" when their non-compliance was discovered in *Smith*. When that argument proved unconvincing to this Court in *Smith*, Defendants again reversed their stated position and again pledged fealty to the written protocol during the *Brooks* proceedings.

The best indicator of Defendants' behavior in the future is the evidence of their behavior in the past, so the evidence of Defendants' actions before the September 18, 2011 protocol remains highly relevant to the question whether they will faithfully follow the written protocol

going forward. Furthermore, Lorraine believes that the evidence will demonstrate Defendants' pattern of non-compliance continues even under the September 18, 2011 version of the protocol. There has now been an execution under the revised protocol. Lorraine has reason to believe the evidence will demonstrate that the *appearance* of compliance is Defendants' key consideration, not compliance itself, especially when failure to comply would, under the protocol, require cancellation of an execution. Lorraine further believes that evidence will demonstrate Defendants will go to great lengths to preserve the appearance of compliance. Accordingly, notwithstanding Defendants' assurances during the *Brooks* hearing, Defendants' goal remains the same as that condemned in the *Smith* order—to complete an execution at all costs—and their actions reflect that. The evidence that predates the September 18, 2011 protocol remains highly relevant to Lorraine's claims.

D. Lorraine has a strong likelihood of success on the merits of his Fourteenth Amendment Equal Protection Clause claims.

It is not necessary for Lorraine to demonstrate a likelihood of success on the merits of both of his Equal Protection claims; either ground entitles Lorraine to temporary and preliminary injunctive relief. *Cf. Shieh v. Mortgage Electr. Registration Sys., Inc.*, No. C 11-0106, 2011 U.S. Dist. LEXIS 5932, *5-6, 2011 WL 109548, *2 (N.D. Cal. Jan. 12, 2011) (rejecting TRO request in part because "plaintiff has failed to adequately set forth a likelihood of success on the merits *of any claim in her complaint*") (emphasis added).

Defendants will violate Lorraine's rights under the Fourteenth Amendment's Equal Protection Clause because they have a policy of adhering to their execution protocol except when they don't. Accordingly, this Court may predicate injunctive relief on the likelihood of success on the merits of Lorraine's claims in the Fourth Claim in his Complaint. (*See* Omnibus Complaint, Doc. No. 4.)

Defendants' written protocol encompasses more than just the specific lethal drugs to be administered. The protocol also contains numerous other mandates and non-discretionary requirements, such as qualification requirements for the participants with specialized roles, for instance, and training and rehearsal requirements for all team members. The protocol also includes mandates that must occur before the inmate even leaves the parent institution.

In the past, Defendants or others in their same official positions have testified that they would follow, and would not deviate from, the written protocol. But that professed position has not prevented non-compliance with the written protocol. Defendants have again stated that they would not deviate from the written protocol, but Lorraine believes the evidence will yet again demonstrate that Defendants' professed position has not and will not prevent non-compliance with the written protocol. In short, the history of Defendants' non-compliance with their protocol is lengthy, it grows ever longer with each monthly execution they conduct, and it is directly relevant to showing that Lorraine's constitutional rights will be violated.

The purpose of the equal protection clause "is to secure every person within the State's jurisdiction against intentional and arbitrary" differential treatment, whether "occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005) (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (internal quotation marks and citation omitted)); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (same).

In a suit brought under § 1983, a plaintiff must prove a violation of the underlying constitutional right. *Howard v. Grinage*, 82 F.3d 1343, 1350 (6th Cir. 1996) (citation omitted). So, for example, in a suit involving a Fourth Amendment violation, the plaintiff "must prove that the official conduct was 'unreasonable.'" *Id.* Or in a claim alleging a violation of one's liberty

interests protected by the procedural component of the Due Process Clause, a plaintiff "must prove something more than negligence." *Id.*

Here, Lorraine alleges violations of his rights protected under the Equal Protection Clause of the Fourteenth Amendment. "To establish a claim for relief under the Equal Protection Clause, a plaintiff must demonstrate that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Club Italia Soccer v. Shelby*, 470 F.3d 286, 298 (6th Cir. 2006) (citations omitted). Lorraine's equal protection claims are founded upon both the first and third of these grounds.

For purposes of either and both of these equal protection claims, Lorraine satisfies the first of the two-part inquiry: he is similarly situated with the other condemned inmates subject to execution at Defendants' hands merely by sharing the singular characteristic that they are all subject to execution under Defendants' policy. *See Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (explaining that in assessing the "similarly situated" inquiry, "courts should not demand exact correlation, but should instead seek relevant similarity") (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)).

The analysis for the second inquiry on Lorraine's claims is unique to the particular type of claim, but Lorraine can satisfy the second consideration for both claims.

1. Defendants' non-compliance with their written execution protocol will unconstitutionally burden the fundamental rights under the First, Eighth, Ninth, and Fourteenth Amendments of a class of persons that includes Lorraine, in violation of the Equal Protection Clause.

Defendants' pattern of non-compliance with their execution protocol treats each condemned inmate differently and burdens the fundamental rights, under the First, Eighth, Ninth,

and Fourteenth Amendments, of the class of inmates who are under a death sentence in Ohio—which includes Lorraine.

a. Strict scrutiny applies.

When an equal protection claim implicates a burden on the fundamental rights of a class of persons, the state action involved is subjected to strict judicial scrutiny. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (explaining that strict scrutiny is the standard of review where a state practice interferes with a fundamental right or discriminates against a suspect class of individuals); *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999) (same); *see also Miller v. City of Cincinnati*, 622 F.3d 524, 539 (6th Cir. 2010) (explaining that strict scrutiny is appropriate if state action treating persons differently infringes on a class of people's fundamental rights); *Bower v. Mt. Sterling*, 44 Fed. App'x. 670, 676 (6th Cir. 2002) (citing, *inter alia*, *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 n.1 (6th Cir. 1997)).

Under strict scrutiny, state action—or inaction, as the case may be—will be presumptively unconstitutional, and must be enjoined—*e.g.*, by a prohibitory injunction—or required—*e.g.*, by a mandatory injunction—if the subject state action is not necessary to achieve a compelling state interest. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The class of persons in question for this type of equal protection claim need not be a "suspect classification" for strict scrutiny to apply, so long as the fundamental rights of a class of persons is infringed. *See Miller*, 622 F.3d at 539 (identifying a class of persons, finding that the class was not a suspect class, and explaining that, therefore, "strict scrutiny is appropriate only if the classification infringes on fundamental rights").

Here, the class of persons in question is those subject to a death sentence in Ohio and therefore subject to an execution at Defendants' hands. And Defendants' application of their execution policy infringes on the fundamental rights of this class of persons.[2]

b. Defendants are burdening fundamental rights under the First, Eighth, Ninth, and Fourteenth Amendments.

Fundamental rights are those explicitly or implicitly derived from the Constitution itself. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). This includes explicitly enumerated rights "such as freedom of speech or religion." *See Bower v. Mt. Sterling*, 44 Fed. App'x. 670, 676 (6th Cir. 2002) (citing, *inter alia*, *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 n.1 (6th Cir. 1997)); *see also, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ("The right to counsel is a fundamental right of criminal defendants."). It likewise includes the Eighth Amendment's explicit proscription on cruel and unusual punishment. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) ("State efforts to implement capital punishment must certainly comply with the Eighth Amendment."). It also, by definition, includes the fundamental, unenumerated rights arising under the principles of liberty and/or natural law such as Lorraine's right to privacy, his right to personal dignity, his right to bodily integrity and others, all of which are protected by the Ninth Amendment.

Defendants' non-compliance with their written execution protocol denies or substantially burdens Lorraine's fundamental rights to free speech, to be free from cruel and unusual punishment, to privacy, personal dignity, bodily integrity and other unenumerated rights arising under the principles of liberty and/or natural law, and to due process.

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[2] Lorraine will refer to burdens on his fundamental rights as shorthand for "the fundamental rights of the class of persons that includes Lorraine."

The core principle from the Supreme Court's opinions addressing "fundamental right" equal protection claims is that procedural safeguards are the cornerstone upon which equal protection rests. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) (explaining that equal protection applies not just to the initial "allocation" of the fundamental right in question, but "applies as well to *the manner of its exercise*") (emphasis added); *id.* at 109 (holding that the procedures employed by the State of Florida to conduct its recount of ballots were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter").

Here, Defendants' written protocol expressly codifies a burden on the inmate's free speech rights by vesting in the Warden discretion to cut off the inmate's last words based on the Warden's subjective interpretation of those words. Similarly, the Supreme Court has found that the procedural safeguards contained in a state's execution protocol—as written and as applied—are the critical bulwark to ensure against an Eighth Amendment violation during an execution. *Baze*, 553 U.S. at 56 (concluding that, on the record evidence, petitioners had not demonstrated substantial risks of serious pain "*[i]n light of these safeguards*" that Kentucky follows) (emphasis added). In the same way, the written execution protocol also functions as a bulwark against violations of an inmate's fundamental, unenumerated rights arising under the principles of liberty and/or natural law such as the rights to privacy, to personal dignity, and to bodily integrity, which are protected by the Ninth Amendment.

Applying these principles, it follows that if a state does not actually abide by its own written execution protocol, those critical safeguards are a nullity, *see Dickens*, 631 F.3d at 1146, or, at least, "inconsistent with the minimum procedures necessary to protect the fundamental right[s]" of a condemned inmate, *Bush*, 531 U.S. at 109. This, in turn, implicates the

fundamental rights of the class of persons that includes condemned inmates in Ohio, including Lorraine.

The evidence of Defendants' written protocol and their pattern of non-compliance with the written protocol demonstrates that Defendants will treat each of these inmates—including Lorraine—differently than other condemned inmates in administering the written protocol. Consequently Lorraine and the other condemned inmates will not receive equal protection of the laws. Nor will they receive the full panoply of procedural protections the Supreme Court has held must be given. The evidence demonstrates that Defendants' protocol as written, and as administered in non-compliance, burdens the fundamental rights of Lorraine and the other condemned inmates. The evidence also demonstrates that Defendants' non-compliance with the protocol strips away the necessary protections of their execution protocol, thereby severely burdening, if not wholly depriving, Lorraine and the other condemned inmates of their fundamental rights.

Accordingly, the Court should apply strict scrutiny—and its presumption of unconstitutionality—to its review of this part of Lorraine's equal protection claims.

c. Defendants cannot survive strict scrutiny because their protocol non-compliance is neither necessary nor connected to achieving a compelling state interest.

Defendants bear the burden under strict scrutiny to demonstrate that their supposed purpose for their non-compliance with their written execution protocol is vital or compelling. *See Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted) (strict scrutiny review requires the government to prove that a burden on a fundamental right furthers a compelling government interest and is narrowly tailored to achieve that interest). Defendants likewise bear the burden to demonstrate that their non-compliance is necessary or the least restrictive means to achieve their purportedly compelling state interest. *Id.* And Defendants also bear the burden to

prove that their discretionary application of the protocol to limit an inmate's free speech is necessary or the least restrictive means to achieve a compelling state interest. Defendants are unable to withstand any of these burdens.

Because Defendants' written protocol and their pattern and on-going history of non-compliance demonstrate that Lorraine will be treated differently than similarly situated persons, and because Defendants' protocol and their pattern and on-going history of non-compliance substantially burden the fundamental rights of the class of persons under an Ohio death sentence which includes Lorraine, without adequate justification, Defendants are violating and will violate Lorraine's rights to equal protection. *See Cooey (Smith) v. Kasich,* No. 04-cv-1156, 2011 U.S. Dist. LEXIS 73606, *94 (S.D. Ohio July 8, 2011).

2. Defendants' non-compliance with their protocol will violate Lorraine's rights under the Equal Protection Clause because Lorraine will be treated differently than similarly situated inmates and such disparate treatment is irrational.

Lorraine can also prevail on his equal protection claims under the "class-of-one" theory. *See Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000); *see also Benjamin v. Brachman,* 246 Fed. App'x. 905, 928 (6th Cir. 2007) (explaining that "in *Olech*, the Supreme Court allowed the plaintiff's class of one claim to proceed because the municipality allegedly deviated without justification from its clear procedure[s]."); *see also Cooey (Smith),* 2011 U.S. Dist. LEXIS 73606, at *96 & 105. Such claims do not receive heightened judicial scrutiny, and are instead subject to the general "rational basis" test. *Olech*, 528 U.S. at 564; *see also Enquist v. Or. Dep't of Agriculture,* 553 U.S. 591, 601 (2008).

Under this theory, Lorraine can show that Defendants' non-compliance with their protocol treats each condemned inmate differently and that such disparate treatment is not rationally related to a legitimate state interest. *See Cooey (Smith),* 2011 U.S. Dist. LEXIS 73606,

at *95-99; *see also Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (striking down state statute on an equal protection theory by finding that the statute "fails, indeed defies, even" rational basis review, because "it lacks a rational relationship to legitimate state interests"); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down state anti-sodomy statute on a "fundamental rights" due process theory by finding that the "statute furthers no legitimate state interest which can justify its" burden on the fundamental rights in question); *id.* at 579–85 (O'Connor, J., concurring in judgment) (concluding statute at issue violated Equal Protection Clause because the state "cannot assert any legitimate state interest here").

When Defendants' actions are "unrelated to the achievement of any combination of legitimate purposes," the Court "can only conclude that the [Defendants'] actions were irrational." *Bower v. Mt. Sterling*, 44 Fed. App'x. 670, 677–78 (6th Cir. 2002) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000)). Thus, "an equal protection violation will be made out" if Defendants' pattern and on-going history of non-compliance is shown to be "irrational," or unrelated to any conceivable legitimate state interest. *See Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 791 (6th Cir. 2005) (citation omitted).

Here, Lorraine is similarly situated with other condemned inmates who are also subject to Defendants' execution protocol. Defendants' pattern and on-going history of non-compliance is irrational. Defendants have no legitimate state interest in failing to comply with their written execution protocol, and any conceivable state interests are not actually related to Defendants' compliance failures.

a. Defendants' actions, in the form of their failures to comply with their written execution protocol, are irrational.

Showing that official state action is irrational necessarily "negatives" any possibility that a challenged state action can survive rational basis review. *See Club Italia Soccer*, 470 F.3d at

299 (finding that plaintiff could not prevail on class-of-one claim because plaintiff could not show animus *or* that defendant's actions were "clearly contrary to any existing law," and, consequently, plaintiff could not negate every conceivable basis for defendant's action). Defendants' pattern and on-going history of non-compliance is irrational in several ways.

i. Defendants' non-compliance is irrational because it is clearly contrary to law.

Lorraine can "negative" any conceivable rational basis for Defendants' non-compliance by demonstrating that Defendants "acted in a manner clearly contrary to law." *Club Italia Soccer*, 470 F.3d at 298–99; *Bower*, 44 Fed. App'x at 678. When the challenged state action is contrary to state law, the legal presumption of rationality is overcome and it demonstrates the lack of a rational basis for the state's actions. *Bower*, 44 Fed. App'x at 678; *see also Club Italia Soccer*, 470 F.3d at 298. State actions that violate state or federal law are, therefore, irrational by definition, and thus incapable of surviving rational basis review.

Defendants' non-compliance violates state law. The written execution protocol, promulgated solely at the hand of the DRC Director, has the force and effect of state law. *See* Hr'g Test. of Former DRC Director Terry Collins, 16:23-17:1, Mar. 27, 2009; Collins Dep., 13:8-11, Aug. 19, 2009; 14:4-9; Ohio Rev. Code § 5120.01 (delegating to the Director of DRC the authority to manage and direct the total operations of DRC and to establish such rules and regulations as the Director prescribes); *see also*, DRC Policy 01-COM-11, ¶ I (citing ORC § 5120.01 as source of authority to promulgate policy). Accordingly, when Defendants fail to follow the explicit mandates in the written execution protocol, they are necessarily acting in a manner that is clearly contrary to state law. The evidence abundantly demonstrates that Defendants regularly and consistently deviate, vary, or substantially vary from their written protocol, and Lorraine believes the evidence will show that this continues to be the case under

the September 18, 2011 protocol. These non-compliant actions are contrary to state law, and are, therefore, irrational state actions.

ii. Defendants' non-compliance is irrational because any differences between condemned inmates upon which Defendants purportedly rely to deviate, vary or substantially vary from the protocol's mandates are illusory, or any such differences are not actually the basis for Defendants' non-compliant actions.

Defendants' actions are also irrational because their non-compliant actions are based on illusory differences between condemned inmates. And their non-compliance is also irrational because any purported differences are not actually the bases for Defendants' deviations, variations, or substantial variations. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966) (citing *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Carrington v. Rash*, 380 U.S. 89, 93 (1965); *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37 (1928); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Although rational basis review is the "most deferential of standards," the Supreme Court has insisted on knowing the relation between the disparate treatment effected by the state action and the state interest or objective to be attained. *Romer*, 517 U.S. at 632–33; *see also Rinaldi*, 384 U.S. at 308-309 (explaining that the Equal Protection Clause requires that the distinctions that underpin disparate treatment must have "some relevance to the purpose for which" the disparate treatment is applied) (citations omitted)). Furthermore, governmental action which disparately treats similarly situated individuals must be rationally founded on differences that are real and not illusory. *See, e.g., San Antonio Independent School District*, 411 U.S. at 36-37; *Lindsey v. Normet*, 405 U.S. 56, 70 (1972); *Rinaldi*, 384 U.S. at 308-309. Conversely, "[d]isparate treatment of similarly situated persons who are dissimilar only in immaterial respects is not rational." *Trihealth, Inc.*, 430 F.3d at 790. There are no differences between

Lorraine and other similarly situated inmates that might justify Defendants' failures to comply with their written protocol.

And any differences that might exist are immaterial, illusory, or not actually the basis for Defendants' non-compliance. For example, the evidence will demonstrate that the failures in compliance related to Reginald Brooks's execution were not based on anything unique to Brooks that might have reasonably supported deviation, variation, or substantial variation from the written protocol's mandates. Ironically, it was only Brooks's individual characteristics — namely his refusal to take his blood pressure medication, based on his paranoid schizophrenic delusions — that led to Defendants having any records related to Brooks's physical health that they could pass off as evidence of the required pre-execution vein and physical health assessments required by the protocol. But that medical assessment was done solely because of Dr. Escobar's efforts to limit any potential medical malpractice liability if Brooks were to have suffered a stroke, heart attack or kidney failure. Brooks's individual characteristics were decidedly *not* the reason for Defendants' failure to conduct the required assessments and to complete the other associated communication requirements.

Moreover, many of the non-compliant actions or failures occur long before the Execution Team has any information about an inmate, such as failures to attend mandatory annual training or execution rehearsals because the team member in question is on vacation. Defendants have previously advanced several purported justifications for their non-compliant behavior, but these all amount to interests of administrative convenience. Any failures to comply with the written protocol based on administrative convenience are Defendant-centric; they are not related to, let alone based on, any concerns about any particular inmate.

Additionally, even the compliance failures related to the unsuccessful attempt to execute Romell Broom cannot be rationalized as attributable to any unique, individual characteristics applicable to Broom. There is no evidence that there was anything medically unique about Broom that would have rationalized or necessitated a deviation from the written policy, even when Defendants were unable to obtain IV access. (Heath Testimony, Biros TRO Hearing, December 4, 2009, at 42-43.) Any deviations in that failed execution attempt—such as involving a medical doctor who was untrained to participate in an execution, who clearly did not have a comprehensive understanding of what she was being told or asked to do and who similarly failed to establish IV access—are related only to Defendants' "incompetence or inability to perform under the circumstances." (*See* Doc. No. 621, at 184, 187.) That evidence, along with evidence of other executions in which Defendants failed to comply with their written protocol in effect at the time when doing so would have made completing an execution impractical, difficult or impossible, is still highly relevant to showing how Defendants will act under their September 18, 2011 written protocol.

iii. Defendants' pattern and on-going history of non-compliance is irrational because it is arbitrary and capricious.

Defendants' actions are also irrational because they are arbitrary and capricious. *See Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (a court can find an equal protection violation when the facts show that state action is "simply arbitrary and capricious action" rather than a state's policy); *see also Reed v. Reed*, 404 U.S. 71, 76 (1971) (a state's actions "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the [state action], so that all persons similarly circumstanced shall be treated alike") (citing *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Or, put another way,

Defendants' non-compliant actions are wholly unrelated to the achievement of any legitimate state purpose, and are, therefore, irrational. *See Trihealth*, 430 F.3d at 788.

There is no consistency in Defendants' non-compliance such that one might reasonably conclude that the non-compliance is for any particular purpose other than carrying out an execution at all costs. Instead, Defendants' non-compliant actions are actually a collection of random deviations, variations and substantial variations from the protocol, with similar or wholly different non-compliant behavior from execution to execution. This makes genuine application of the written protocol's protections freakish, merely random, or by arbitrary choice. These are all sufficiently problematic concerns to constitute irrational actions. *See Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."). The evidence shows that Defendants' non-compliant actions are arbitrary and capricious, and therefore irrational state actions. This is sufficient evidence to conclude that Defendants' actions cannot survive rational basis review.

b. Defendants have no legitimate state interest in failing to comply with their written execution protocol, and any conceivable state interests are not actually related to Defendants' non-compliance.

Not only are Defendants' actions in deviating, varying, or substantially varying from their policy irrational, but Defendants also have no legitimate state interest in failing to comply with their written policy, and any conceivable legitimate state interests are not actually related to Defendants' deviations.

i. Administrative convenience is not a legitimate state interest.

The only state interests Defendants have advanced in this litigation to justify their behavior amount to interests in administrative convenience. (*See, e.g.*, Defs' Mot. for Summary Judgment, Doc. No. 842, PageID 21120–21; Aff. of Dir. Moore, Attached as Ex. 1 to Defs.' Mot.

for Summary Judgment in Defs.' Favor of Pl. Jerome Henderson's Remaining Claims, Doc. No. 831-1, PageID 19860–68, ¶¶ 27, 31, 34, 35–36, 38–42); Defs.' Reply Br., Doc. No. 861, PageID 21769-77 (attempting to explain away noncompliance with execution policies); *see also*, Pls.' Mem. in Opp. to Defs.' Mot. for Summary Judgment, Doc. No. 849, PageID 21231-33; Pls.' Sur-Reply Br., Doc. No. 864.)

For instance, Defendants at various points in this litigation have cited weather conditions, team members' unavailability, team members' vacations, and hour-and-wage-related employment concerns and the like to excuse their numerous instances of deviations from the training and/or execution rehearsal requirements and other requirements that mandate how an execution must be administered. They cite administrative convenience to excuse incredible breaches of the execution protocol during the Vernon Smith and Michael Beuke executions, when TM # 21 conducted the execution administration alone rather than in the presence and with the assistance of a second medically trained and qualified person who was a member of the execution's medical team. They cite administrative convenience to excuse breaches of the written protocol—and likely the state and/or federal controlled substances laws—in obtaining execution drugs. And the evidence shows that the mentality of skirting rules, regulations and restrictions regarding obtaining difficult-to-find execution drugs continues apace regarding pentobarbital. Defendants also attempted to pass off documents and actions that had nothing to do with the execution protocol's vein, physical, and/or mental health assessments as if they were evidence of compliance with the protocol, arguably based on administrative concerns; they had failed to actually comply with the protocol's mandates, but upon information and belief they did not want to have to seek a reprieve for inmates Slagle and Brooks based on those failures. Defendants also failed to identify, discuss, confer about, or otherwise even acknowledge a

genuine, documented medical issue with Brooks's shoulder that affected Brooks from the time he was strapped to the execution bed.

Lorraine can negate any administrative convenience interest, however, because the law is clear: a state's disparate treatment of similarly situated individuals "cannot be justified on the ground of administrative convenience." *Rinaldi*, 384 U.S. at 309–10; *see also Frazier v. Manson*, 703 F.2d 30, 35 (2d Cir. 1983) ("The constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative inconvenience."); *cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1973) (addressing a due process claim and using analysis essentially identical to equal protection analysis, holding that "[w]hile it might be easier for the school board to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month of pregnancy, *administrative convenience alone is insufficient to make valid what otherwise is a violation* of due process of law") (emphasis added).

Accordingly, as a matter of law, Defendants' non-compliance with the written protocol cannot be rationalized on the basis of administrative convenience. This, too, is sufficient to conclude that Defendants' actions cannot survive rational basis review.

ii. The evidence demonstrates that the only conceivable, legitimate justification for Defendants' pattern and on-going history of non-compliance with their written protocol is not actually related to Defendants' actions.

Defendants' pattern and on-going history of non-compliance with their written protocol is not rationally related to a legitimate state interest because the overwhelming evidence demonstrates that the only conceivable, legitimate reason for Defendants to fail to comply with their written execution protocol are unrelated to their actions. It is conceivable that a condemned inmate's unique, individual characteristics, such as Kenneth Smith's medical conditions, might

require Defendants to rationally deviate or vary from their protocol. But those deviations or variations from the protocol are not what Lorraine is alleging violates his rights to equal protection under the law.

3. Conclusion

Lorraine has demonstrated that he is likely to succeed on the merits of his claims. Accordingly, the first element of the preliminary injunction analysis weighs heavily in his favor.

E. There is a substantial threat that Lorraine will suffer an irreparable injury if the temporary restraining order and preliminary injunction is not granted.

If a TRO and preliminary junction is not granted, Lorraine will suffer irreparable harm as a matter of law, and as a matter of fact.

1. Lorraine will suffer irreparable injury as a matter of law.

If it is found that a constitutional right is being threatened or impaired, "a finding of irreparable injury is mandated," and "a successful showing on the first factor mandates a successful showing on the second factor—whether the plaintiff will suffer irreparable harm." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001); *see also KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 676 F.Supp. 2d 649, 653 (N.D. Ohio 2009) (explaining that a plaintiff demonstrates irreparable harm if the plaintiff's claim is based upon a violation of the plaintiff's constitutional rights). Additionally, "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010).

Because Lorraine has demonstrated a likelihood of success on his constitutional claims, a finding of irreparable harm exists as a matter of law.

2. Lorraine will suffer irreparable injury as a matter of fact.

Even if a finding of irreparable harm were not mandated by law upon a finding of likely success on Lorraine's constitutional claims, there is no doubt in this case that failure to grant a temporary restraining order and preliminary injunction would cause Lorraine irreparable injury in fact, since Defendants will execute—or at least attempt to execute—him, and soon. Lorraine will be denied the protections of the Equal Protection Clause, as vividly demonstrated by the face of the written protocol and by Defendants' lengthy pattern and on-going history of non-compliance with that written execution protocol.

Additionally, Lorraine is not seeking monetary damages, and there is no clear way to quantify the damages Defendants' actions will cause. When this is so, courts should consider the injury to be irreparable, with no adequate remedy at law. *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995) (citation omitted) ("An injury is irreparable if it cannot be undone through monetary remedies."); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (finding that without preliminary injunctive relief, the corporate plaintiff would suffer losses that might include the death of the company through bankruptcy, and "[c]ertainly" that type of injury "meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless"); *Warren v. City of Athens*, 411 F.3d 697, 712 (6th Cir. Ohio 2005) (financial ruin qualifies as irreparable harm for which there is no adequate remedy at law).

There is nothing more final and irreversible than death, and Lorraine obviously cannot be compensated adequately through money damages if or when Defendants violate his constitutional rights in executing him. For Defendants to unconstitutionally execute Lorraine before he has a chance to be heard on the merits of his claims would be irreparable harm for which he has no adequate remedy. A "final judgment" in the above-captioned case will be useless for Lorraine if his execution is not stayed.

F. Granting a temporary restraining order will not substantially harm other parties and, if there was some harm, Plaintiff Lorraine's potential injury outweighs that harm.

While recognizing that State of Ohio has an interest in seeing finality by imposing the sentence of death, substantial harm will not ensue from this injunction. Lorraine is seeking to enjoin Defendants from violating his constitutional rights in the process of carrying out his sentence. Under these circumstances, this Court should not permit Lorraine's execution to proceed before the Court has the opportunity to review his constitutional claims. The delay resulting from granting the relief sought here will have little adverse effect on the State's interest and will ensure that it does not perform an unconstitutional execution. *See Gomez v. U.S. Dist. Ct. For N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.").

Accordingly, the risk that Lorraine will be subjected to an unconstitutional execution outweighs the State's interest in carrying out Lorraine's sentence on January 18, 2012; the balance of equities favor granting a TRO and preliminary injunction preventing Defendants from attempting to execute Lorraine on that date.

G. The public interest would be served by issuing a temporary restraining order.

The public interest is served by enforcing constitutional rights. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (citing *Chabad of S. Ohio v. City of Cincinnati*, 233 F.Supp. 2d 975, 987 (S.D. Ohio 2002)); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001) ("[I]t is always in the public interest to prevent violation of a party's

constitutional rights." (citation omitted)); *see also Miller*, 622 F.3d at 540 ("[w]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because 'it is always in the public interest to prevent violation of a party's constitutional rights.'") (quoting *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

Additionally, the public has no interest in seeing its citizens' rights violated in the context of the execution process. *See In re Kemmler*, 136 U.S. 436, 447 (1890). And "the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." *Cooey (Smith)*, 2011 U.S. Dist. LEXIS 73606, at *106.

The public interest will also be served because Ohio will continue to conduct executions unconstitutionally unless forced by this Court to make necessary changes. Ohio has twelve executions scheduled at the time of this motion, at the rapid pace of approximately one every 30-45 days, up to and including September 25, 2013. And additional motions to set execution dates remain pending in the Supreme Court of Ohio. There is a strong public interest in ensuring that these executions are carried out within the bounds of the Constitution.

IV. Certification of Notice

The undersigned counsel for Lorraine certify that they have given notice of this motion for a TRO and preliminary injunction to counsel for Defendants, Charles Wille, Thomas Madden and Justin Lovett, by emailing a copy of this motion and all attachments to each of them on this 23rd day of November, 2011. Mr. Wille and Mr. Madden will also receive notice through the Court's ECF system.

V. Conclusion and Prayer for Relief

For the reasons outlined in this memorandum, this Court should:

(1) grant Lorraine expedited discovery;

(2) order expedited briefing on Lorraine's motion;

(3) grant Lorraine an expedited oral argument and an evidentiary hearing on his request for a temporary restraining order or preliminary injunction, if the Court deems oral argument and an evidentiary hearing necessary in order to grant Lorraine's motion;

(4) grant Lorraine the opportunity to submit post-hearing briefing, if the Court deems it necessary; and

(5) grant Lorraine a temporary restraining order and preliminary injunction prohibiting Defendants from executing him as scheduled on January 18, 2012, until further order of the Court;

(6) grant a temporary restraining order and preliminary injunction prohibiting Defendants from executing any inmates as currently scheduled, until further order of the Court;

(7) grant any other relief as this Court deems appropriate.

Respectfully submitted,

/s/ Allen L. Bohnert
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I electronically filed the foregoing **Plaintiff Charles Lorraine's Motion for a Temporary Restraining Order and Preliminary Injunction** with the Clerk of the United States District Court for the Southern District of Ohio using the CM/ECF system, which will send notification of such filing to the following at the e-mail address on file with the Court:

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/s/ Allen L. Bohnert
Assistant Federal Public Defender
Trial and Lead Counsel for Plaintiff
Charles Lorraine

No. _____

In the Supreme Court of the United States

In re: OHIO EXECUTION PROTOCOL LITIGATION,

BENNIE ADAMS, et al.,

Plaintiff,

and

CHARLES LORRAINE,

Plaintiff-Appellee,

v.

JOHN KASICH, Governor, State of Ohio, et al.,

Defendants-Appellants,

CERTIFICATE OF SERVICE

I, Charles L. Wille, counsel of record for Defendants-Appellants et al., hereby declare that the Application of Ohio Governor John Kasich et al. to Vacate Stay of Execution was served on Counsel for Plaintiff-Appellee:

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The foregoing document was served on this 20th day of January, 2012 by regular U.S. mail.

s/Charles L. Wille
Charles L. Wille
Assistant Attorney General