

No. CR-13-0282-AP

**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,
Appellee,

v.

AARON BRIAN GUNCHES,
Appellant.

*MARICOPA COUNTY SUPERIOR COURT
No. CR2003-038541-001*

**BRIEF OF *AMICI CURIAE*
PUBLIC HEALTH PROFESSIONALS
IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION.....	2
ARGUMENT	4
A. The Court May Not Authorize Unlawful Conduct	4
B. The State Has Not Demonstrated That It Can Lawfully Perform An Execution.....	6
1. Lethal injection drugs are federally regulated.....	7
2. The State’s effort to concoct commercially unavailable execution chemicals implicates numerous state and federal drug laws	8
3. The State seeks permission to violate federal drug laws	13
C. The State Threatens Public Safety When It Sidesteps The Legitimate Supply Chain.....	19
CONCLUSION	24

TABLE OF CITATIONS

Cases

<i>Ansley v. Banner Health Network</i> , 248 Ariz. 143 (2020)	5
<i>Beaty v. Food & Drug Admin.</i> , 853 F. Supp. 2d 30 (D.D.C. 2012)	7, 23
<i>Cook v. Food & Drug Admin.</i> , 733 F.3d 1 (D.C. Cir. 2013)	7
<i>First Amendment Coalition of Ariz, Inc. v. Ryan</i> , No. CV-14-01447-PHX-NVW (6/22/17)	16
<i>In re Fed. Bureau of Prisons' Execution Protocol Cases</i> , 980 F.3d 123 (D.C. Cir. 2020).....	7, 8
<i>Kamen v. Kemper Fin. Servs.</i> , 500 U.S. 90 (1991)	5
<i>Matter of Fee</i> , 182 Ariz. 597 (1995)	24
<i>McLaughlin v. Jones in & for Cnty. of Pima</i> , 243 Ariz. 29 (2017)	6
<i>Nat'l Union Indem. Co. v. Bruce Bros.</i> , 44 Ariz. 454 (1934)	4
<i>Ringo v. Lombardi</i> , 706 F. Supp. 2d 952 (W.D. Mo. 2010).....	7
<i>State v. Gunches</i> , No. CR-13-0282-AP (Ariz.)	passim
<i>Washington County v. Gunther</i> , 452 U.S. 161 (1981).....	5

Constitutional Provisions

Ariz. Const. art. II, § 3.....	5
U.S. Const. art. VI, ¶ 2.....	5

Statutes

21 U.S.C. § 331 16

21 U.S.C. § 352 16

21 U.S.C. § 353a 11, 13, 17

21 U.S.C. § 360eee 12, 18

21 U.S.C. § 822 12

21 U.S.C. § 825 15

21 U.S.C. § 827 12

21 U.S.C. § 828 12

21 U.S.C. § 830 12

A.R.S. § 13-757 18

A.R.S. § 13-759 5

A.R.S. § 32-1967 16

A.R.S. § 32-1971 11, 12, 13, 17

Rules

Ariz. R. Crim. P. 31.23 5

Regulations

21 C.F.R. § 1301.71 12

21 C.F.R. § 1302.01 15

21 C.F.R. § 1306.03 12

21 C.F.R. § 1306.04 17

21 C.F.R. § 1308.12 12

Administrative Materials

89 Fed. Reg. 55986 (Jul. 8, 2024) 15

ADCRR, Dep’t Order 710 – Execution Procedures..... 13, 16, 18, 21

Exec. Order No. 2023-05 (1/20/23) 2

FDA, *Drug Establishments Current Registration Site* 14

FDA, *Human Drug Compounding* (12/18/24)..... 11

FDA, *Registered Outsourcing Facilities* 23

Letter from Atty. Gen. Brnovich to Gov. Ducey (8/20/20) 3, 8, 15

Letter from Dir. Thornell to Gov. Hobbs re: ADCRR’s Execution
Preparedness (11/22/24)..... 11, 13, 15

Letter from FDA to ADCRR re: Thiopental Sodium imported
by Arizona Department of Corrections (4/20/17) 7

Scott Gottlieb, M.D., Comm’r, FDA, *Remarks at the FDA
Public Meeting on Enhanced Drug Distribution Security
under the Drug Supply Chain Security Act (DSCSA)*
(Feb. 28, 2018) 8

U.S. Dep’t of Justice, Office of Legal Policy, *Review of the Federal Execution Protocol Addendum and Manner of Execution Regulations* (Jan. 2025) 10

Publications

Anna B. Johnson, *Pentobarbital* (Nat’l Lib. of Med. Feb. 25, 2024)..... 6

Chiara Eisner, *Unmarked cars and secret orders: How a pharmacy prepared drugs for Texas’ executions*, N.P.R. (Jul. 10, 2024) 22

Corinna Barrett Lain, *Secrets of the Killing State* (2025) 22

David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, THE NEW YORK TIMES (July 1, 2011)..... 9

Emily Holshouser, *Death penalty foes want Hobbs to publish the independent report she spiked*, AZ MIRROR (Dec. 12, 2024) 2, 10, 19

Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, THE NEW YORK TIMES (May 13, 2016)..... 9

Jonathan Allen, *U.S. lawmakers ask four companies about role in government’s execution drugs*, REUTERS (7/14/20)..... 14

Joseph J. Palamar et al., *Monitoring illicit pentobarbital availability in the United States: A National Drug Early Warning System briefing*, DRUG AND ALCOHOL DEPENDENCE (Oct. 2024) 20

Lauren Gill et al., *Company linked to federal execution spree says it will no longer produce key drug*, THE INTERCEPT (6/22/24)..... 15

Lethal Injection Information Center, *Industry Statements* 9

Michael Kiefer, *Secret jars in a prison fridge hold AZ’s lethal injection drugs, and they may be expired*, AZ MIRROR (1/17/25) 14, 16, 21

Prashant Yadav et al., *When government agencies turn to unregulated drug sources: Implications for the drug supply chain and public health are grave*, JOURNAL OF THE AMERICAN PHARMACISTS ASSOCIATION (2018)..... passim

Terri D’Arrigo, *Pentobarbital Making Its Way Into Illicit Drug Supply*, PSYCHIATRIC NEWS (Dec. 3, 2024)20

Other Authorities

AMA Code of Med. Ethics 10

ANA Position Statement (2024)..... 10

APhA Policy Statement (Mar. 30, 2015)..... 10

Black’s Law Dictionary (11th ed. 2019).....6

Brief for the Ass’n for Accessible Med. as *Amicus Curiae* in Support of Neither Party in *Bucklew v. Precythe*.....9, 19

IACP Position Statement (Mar. 24, 2015) 10

Joint Resp. to Pet. for Special Action, No. CV-23-0055-SA (Mar. 15, 2023)6

Letter from Dr. Philip D. Hansten et al. to Timothy Lockwood, Chief, Regulation & Policy Mgmt. Branch, Cal. Dep’t of Corr. & Rehab. (Aug. 14, 2017)..... 9, 15

State’s Mot. to Modify Briefing Sched., No. CR-87-0135-AP (6/22/21) 13

USP General Chapter 797 – *Pharmaceutical Compounding – Sterile Preparations* 17

INTEREST OF AMICI CURIAE

The *amici curiae* are public health professionals, scientists, former regulators, and educators. These individuals have spent decades working in their respective fields seeking to protect the public health and to ensure the safety and efficacy of drugs in the United States.

The *amici* are deeply concerned about the significant public safety risks the State creates by relying on pentobarbital to conduct executions. Because there is no safe or legal way to obtain pentobarbital, the State has procured illicit raw ingredients, mixed by an unregulated compounding pharmacy, in violation of state and federal drug laws. This is done clandestinely, under the State's broad interpretation of execution secrecy. These acts injure public safety by supporting illicit drug supply chains that increase the chance of lethal drugs reaching the public.

The State cannot violate or obstruct federal law in its effort to conduct lethal injections. The *amici* therefore seek to participate in order to inform the Court of the legal infirmity and dangers posed by these efforts, and to urge the Court not to trigger a cascade of federal drug violations by issuing a death warrant.

INTRODUCTION

In 2023, Governor Hobbs declared that “a comprehensive and independent review must be conducted” concerning the State’s execution protocols, including “the lethal injection drug . . . procurement process,” and appointed Judge David Duncan as Commissioner to make recommendations for “transparency, accountability, and safety.”¹ In his review, Judge Duncan observed “chilling examples” of illegal conduct, including “shipments of state procured lethal drugs delivered to a private home in Phoenix with no apparent or verifiable chain of custody, [and] the storage of lethal drugs in unmarked jars with no labeling whatsoever.”² But his recommendations never came. Instead, in the wake of the November 2024 general election, Governor Hobbs abruptly dismissed Judge Duncan and terminated the independent review.³ We are left, once again, to accept on faith that the State will procure and handle lethal drugs of abuse in a safe and legal manner.

¹ [Exec. Order No. 2023-05 \(1/20/23\)](#).

² [Emily Holshouser, *Death penalty foes want Hobbs to publish the independent report she spiked*, AZ MIRROR \(Dec. 12, 2024\)](#).

³ [Id.](#)

Against this backdrop, the State asks this Court to issue a warrant for the killing of Aaron Brian Gunches by lethal injection. This Court is not being asked to review the death sentence, but to *authorize* executive department personnel to engage in specific conduct—namely, to prepare and dispense pentobarbital, a dangerous drug of abuse. Thus, this brief addresses the narrow question whether the State’s method of obtaining and administering pentobarbital complies with federal drug legislation, which this Court cannot itself violate or obstruct.

The answer is no. Indeed, for years, the State’s explicit position has been that it may purposefully disregard federal law in its pursuit of executions.⁴ Because pentobarbital *cannot* be acquired for executions through the legitimate supply chain, the State is using raw ingredients from a facility not registered with the FDA, “compounded” into injectable solution by shady pharmacies that are willing to violate the law. The result is an illegal—and unacceptable—threat to public health and safety, including the types of outbreaks from contaminated drugs and diversion to drug dealers that have occurred in other states.

⁴ See [Letter from Atty. Gen. Mark Brnovich to Gov. Doug Ducey \(8/20/20\)](#).

ARGUMENT

A. The Court May Not Authorize Unlawful Conduct

Until the State demonstrates that it has adopted and implemented procedures that comply with federal drug laws, this Court must decline to issue a death warrant.

The Court has already recognized that it may not authorize an execution upon a showing of “good cause,” including “constitutional or statutory impediments to proceeding.” *State v. Gunches*, No. CR-13-0282-AP, 2023 WL 11813238, at *3 (Ariz. Mar. 2, 2023). And the Court has strongly implied that it will not issue a death warrant upon a non-speculative showing that the State cannot “carry out the sentence in compliance with state and federal law.” *Id.* at *3.

The Court was undoubtedly correct. No statute or rule of procedure may *compel* the Court to lend its imprimatur to unlawful conduct.⁵ And no matter the positions taken by the parties, it is always the duty of the

⁵ This principle is so fundamental that it is recognized even in commercial settings and observed “not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced.” *Nat’l Union Indem. Co. v. Bruce Bros.*, 44 Ariz. 454, 466 (1934).

Court to exercise its “independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991).

In particular, A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(a) cannot constitutionally compel this Court to authorize a killing that violates federal law. “The Constitution of the United States is the supreme law of the land to which all government, state and federal, is subject.” Ariz. Const. art. II, § 3; *accord* U.S. Const. art. VI, ¶ 2. “Under the Supremacy Clause, federal statutes enacted pursuant to a power conferred by the Constitution preempt conflicting state laws.” *Ansley v. Banner Health Network*, 248 Ariz. 143, 147, ¶ 11 (2020).

The legislature has chosen to condition infliction of the ultimate penalty upon obtaining a warrant that “authorizes the director . . . to carry out the execution.” A.R.S. § 13-759(A). The word “authorizes” means “endowing formally with a power or right to act.” *Washington County v. Gunther*, 452 U.S. 161, 169 n.9 (1981). As the State itself has acknowledged, to “authorize” means to “give legal authority,” “empower,” “formally approve,” or “sanction.” Black’s Law Dictionary (11th ed.

2019).⁶ But this Court cannot grant power, right, or legal authority to executive department personnel to violate federal law, which “is binding on state court judges, just as on other state officers.” *McLaughlin v. Jones in & for Cnty. of Pima*, 243 Ariz. 29, 35, ¶ 25 (2017). Before issuing a warrant, then, the Court must assure itself that the State can “carry out the sentence in compliance with state and federal law.” *Gunches*, 2023 WL 11813238, at *3

B. The State Has Not Demonstrated That It Can Lawfully Perform An Execution

The State seeks from this Court a warrant to prepare and dispense pentobarbital, a “high-risk habit-forming drug categorized by the Federal Controlled Substances Act under DEA Schedule II.”⁷ As such, pentobarbital is highly regulated by federal statutes and is not exempt from regulation when used in executions. But the State openly flouts these federal rules, risking public health and safety.

⁶ See Joint Resp. to Pet. for Special Action, No. CV-23-0055-SA (Mar. 15, 2023) at 10.

⁷ [Anna B. Johnson, Pentobarbital \(Nat’l Lib. of Med. Feb. 25, 2024\)](#).

1. Lethal injection drugs are federally regulated

Federal courts have repeatedly held that the Controlled Substances Act (“CSA”) and the Food, Drug, and Cosmetic Act (“FDCA”) govern the manufacture, distribution, and dispensing of lethal injection drugs. *E.g.*, *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 980 F.3d 123, 136 (D.C. Cir. 2020); *Cook v. Food & Drug Admin.*, 733 F.3d 1, 3 (D.C. Cir. 2013); *Ringo v. Lombardi*, 706 F. Supp. 2d 952, 955 (W.D. Mo. 2010). But for more than a decade the State has premised its lethal injection regime on its apparent view that federal law simply does not matter.

The State has been told otherwise no fewer than three times. When the State illegally imported thiopental for executions, a district court held that the FDA “acted inconsistently with FDA regulations . . . thereby threatening the public health,” in releasing the shipment. *Beaty v. Food & Drug Admin.*, 853 F. Supp. 2d 30, 41 (D.D.C. 2012), *aff’d in part, vacated in part on other grounds*, *Cook*, 733 F.3d 1. When the State tried again just three years later, the FDA detained the illegal thiopental and rejected the State’s contention that “*Beaty/Cook* was wrongly decided.”⁸

⁸ [Letter from FDA to ADCRR re: Thiopental Sodium imported by Arizona Department of Corrections \(4/20/17\) at 2.](#)

And finally, just three months after the State again misstated that it could “lawfully” obtain execution drugs because the FDA “lacked jurisdiction” to regulate them,⁹ the D.C. Circuit affirmed *Beatty/Cook* and held that “the FDCA applies when already-covered drugs like pentobarbital are used for lethal injections.” *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 980 F.3d at 137.

All told, the State has been notified three separate times that it cannot circumvent federal law to perform lethal injections. Issuing a death warrant without first requiring the State to demonstrate that it can lawfully procure pentobarbital would say the opposite.

2. The State’s effort to concoct commercially unavailable execution chemicals implicates numerous state and federal drug laws

The FDCA, the CSA, and their implementing regulations create a “a closed, secure U.S. drug supply chain for the distribution and delivery of finished drug products. Every link in that chain must be secure.”¹⁰ But the supply chain for lethal injection drugs is neither closed nor secure

⁹ [Brnovich](#), *supra* note 4.

¹⁰ [Scott Gottlieb, M.D., Comm’r, FDA, Remarks at the FDA Public Meeting on Enhanced Drug Distribution Security under the Drug Supply Chain Security Act \(DSCSA\) \(Feb. 28, 2018\)](#).

because legitimate pharmaceutical companies have refused to provision executioners. “Over 60 global healthcare companies have taken action to prevent their medicines being misused in lethal injection executions.”¹¹ These companies have lawfully and reasonably concluded that their products should not be used for untested purposes in what amounts to unregulated medical experimentation.¹² Thus, the drugs used in lethal injections are not available from any FDA-approved manufacturer because all such approved manufacturers restrict the sale of their life-saving medicines for this purpose as, for example, Pfizer did in 2016.¹³

¹¹ [Lethal Injection Information Center, *Industry Statements* \(last visited Jan. 30, 2025\).](#)

¹² *See, e.g.,* [Brief for the Ass’n for Accessible Med. as *Amicus Curiae* in Support of Neither Party, *Bucklew v. Precythe*, No. 17-8151 \(U.S. July 23, 2018\) at 5-10; David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, THE NEW YORK TIMES \(July 1, 2011\); Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, THE NEW YORK TIMES \(May 13, 2016\).](#)

¹³ *Id.*; [Letter from Dr. Philip D. Hansten et al. to Timothy Lockwood, Chief, Regulation & Policy Mgmt. Branch, Cal. Dep’t of Corr. & Rehab. \(Aug. 14, 2017\); Prashant Yadav et al., *When government agencies turn to unregulated drug sources: Implications for the drug supply chain and public health are grave*, JOURNAL OF THE AMERICAN PHARMACISTS ASSOCIATION \(2018\) at 1.](#) Pharmaceutical companies
(continued)

In sum, the free market has rendered judgment against lethal injection. But instead of accepting that judgment, state governments, including ours, have resorted to unlawful practices and shady suppliers, encouraging them to break the rules that keep patients and the public safe, in order to maintain their outdated execution regimes. In particular, the U.S. Department of Justice noted earlier this month that, because “the primary manufacturer of injectable pentobarbital that has been approved by the FDA . . . has restricted the use of the drug in capital punishment,” states “have found chemical companies that provide powdered active pharmaceutical ingredient (API) pentobarbital in bulk and then used compounding pharmacies to create an injectable solution.”¹⁴ And that is the State’s strategy here; the Arizona Department

are not alone in objecting to the untested use of drugs for killing prisoners. The American Medical Association, American Nurses Association, American Pharmacists Association, and International Academy of Compounding Pharmacists also prohibit or discourage their members from participating in lethal injections. See [AMA Code of Med. Ethics § 9.7.3 \(2017\)](#); [ANA Position Statement \(2024\)](#); [APhA Policy Statement \(Mar. 30, 2015\)](#); [IACP Position Statement \(Mar. 24, 2015\)](#).

¹⁴ [U.S. Dep’t of Justice, Office of Legal Policy, *Review of the Federal Execution Protocol Addendum and Manner of Execution Regulations \(Jan. 2025\)* at 7](#); [Holshouser](#), *supra* note 2 (noting that legitimately sourced drugs are “unavailable”).

of Corrections, Rehabilitation, and Reentry (“Department”) “only maintains raw material pentobarbital that is ready for compounding.”¹⁵

“Compounding is generally a practice in which a licensed pharmacist . . . combines, mixes or alters ingredients of a drug to create a medication tailored to the needs of an individual patient.”¹⁶ Compounded drugs are not approved by the FDA “and lapses in quality control have caused patient injury and death.”¹⁷ Thus, state and federal law permit compounding *only* when “the drug product is compounded for an identified individual patient based on the receipt of a valid prescription order” with a notation “that a compounded product is necessary for the identified patient.” 21 U.S.C. § 353a(a); A.R.S. § 32-1971(B) (same). Further, compounding pharmacies must use *only* raw ingredients (APIs) “that are manufactured by an establishment that is registered” with the FDA and “that are accompanied by valid certificates of analysis.” 21 U.S.C. § 353a(b)(1)(A)(ii), (iii); A.R.S. § 32-1971(B) (same).

¹⁵ [Letter from Dir. Ryan Thornell to Gov. Katie Hobbs re: ADCRR’s Execution Preparedness \(11/22/24\) ¶ 5, at page 7.](#)

¹⁶ [FDA, Human Drug Compounding \(12/18/24\).](#)

¹⁷ [Yadav et al.](#), *supra* note 13, at 2.

The Arizona legislature has never authorized compounding of commercially unavailable execution drugs that double as drugs of abuse. To the contrary, compounding pharmacies “shall have access to active pharmaceutical ingredients for use in compounding . . . in order to provide *chronically ill patients* and *terminally ill patients* with the prescribed individual course of *treatment*.” A.R.S. § 32-1971(B) (emphasis added). Indeed, in authorizing compounding, the legislature expressly provided that “[t]his section does *not* allow any treatment or use of medication that is intended to cause the death of the patient.” A.R.S. § 32-1971(D) (emphasis added).

Aside from restrictions on compounding, the trade in pentobarbital is heavily regulated because pentobarbital is a Schedule II controlled substance. *See* 21 C.F.R. § 1308.12(e)(3). Thus, compounding pharmacies cannot lawfully distribute pentobarbital without a prescription from a DEA-registered practitioner. 21 U.S.C. § 828(a); 21 C.F.R. § 1306.03. Further, any person who distributes pentobarbital must register with the DEA, 21 U.S.C. § 822(a), keep required records, 21 U.S.C. §§ 827, 830, 360eee *et seq.*, and “provide effective controls and procedures to guard against theft and diversion,” 21 C.F.R. § 1301.71(a).

3. *The State seeks permission to violate federal drug laws*

This Court will trigger a cascade of federal drug violations if it issues a death warrant for Gunches, beginning with the unlawful distribution of pentobarbital API to the compounding pharmacy. Because injectable pentobarbital expires no more than 45 days after compounding,¹⁸ the Department “only maintains raw material pentobarbital that is ready for compounding,” and “intends to utilize its compounder only after a warrant is issued.”¹⁹

But distributing pentobarbital for compounding is unlawful because current protocol does not require the Department to obtain the required prescription for compounding. Nor has the State demonstrated any ability to obtain a prescription, and it likely cannot, given that the prescriber would need to certify that a compounded product is medically necessary for an identified individual patient. 21 U.S.C. § 353a(a); A.R.S. § 32-1971(B). Thus, by issuing a death warrant, this Court would

¹⁸ See State’s Mot. to Modify Briefing Sched., No. CR-87-0135-AP (6/22/21) at 2.

¹⁹ [Thornell](#), *supra* note 15, ¶¶ 4-5, at pages 6-7. See also [ADCRR, Dep’t Order 710 – Execution Procedures \(Oct. 23, 2024\), Att. D, § A\(2\)](#) (chemicals to be ordered “[u]pon receipt of the Warrant of Execution”).

authorize the Department to obtain compounded pentobarbital without a prescription in violation of state and federal law.

The raw ingredients the State would distribute to obtain the unlawfully compounded drug are problematic in their own right. In violation of state and federal law, current protocol does not require the Department to use pentobarbital API sourced from an FDA-registered manufacturer. And while the identity of the State's supplier has not been officially revealed, several sources have credibly reported that the supplier is a company called Absolute Standards, a manufacturer of reference chemicals used to calibrate machines.²⁰ Absolute Standards is not registered with the FDA to produce drugs for human consumption, nor was it FDA-registered in 2020.²¹

Whether or not Absolute Standards is the mystery supplier, there is simply *no* known supplier of FDA-approved pentobarbital that will sell

²⁰ *E.g.*, [Michael Kiefer, Secret jars in a prison fridge hold AZ's lethal injection drugs, and they may be expired, AZ MIRROR \(1/17/25\)](#); [Jonathan Allen, U.S. lawmakers ask four companies about role in government's execution drugs, REUTERS \(7/14/20\)](#).

²¹ *Id.*; [FDA, Drug Establishments Current Registration Site \(last visited Jan. 31, 2025\)](#).

to executioners.²² The State itself admitted in its 2024 DEA application that pentobarbital “is not available . . . within the current domestic supply of the United States.” Notice of Application, 89 Fed. Reg. 55986 (Jul. 8, 2024). Thus, by issuing a death warrant, this Court would authorize the State to compound injectable drugs of abuse from black-market ingredients not approved by the FDA in violation of the law.

Equally disturbing is that the Department’s “current supply of raw material pentobarbital” was obtained half a decade ago and was “sent to the Department in unlabeled and unmarked jars.”²³ Distributing, receiving, and storing a controlled substance in “unlabeled and unmarked jars” plainly violates the CSA’s labeling and packaging requirements. 21 U.S.C. § 825; 21 C.F.R. § 1302.01 *et seq.* It also renders the drugs “misbranded” under state and federal law, barring them from

²² [Hansten](#), *supra* note 13, at 1; [Yadav et al.](#), *supra* note 13, at 3 (noting that Professional Compounding Centers of America stopped selling pentobarbital API to its members in 2014). Even Absolute Standards is out of the business, telling legislators that it stopped manufacturing pentobarbital API shortly after the reported sale to the Department. See [Lauren Gill et al., Company linked to federal execution spree says it will no longer produce key drug, THE INTERCEPT \(6/22/24\)](#).

²³ [Thornell](#), *supra* note 15, ¶ 6 at page 7; [Brnovich](#), *supra* note 4.

the chain of commerce. A.R.S. § 32-1967; 21 U.S.C. §§ 331(a), 352. Standing alone, the misbranding of these drugs seriously jeopardizes public health and safety.

That the illicit pentobarbital was obtained in 2020 is further problematic because the contents of the unmarked jars are likely expired, which notably violates a specific civil settlement as well as generally applicable laws and regulations.²⁴ The current protocol fails to ensure that the chemicals bear the required FDA labels that would reveal the expiration dates, which they admittedly do not.²⁵ Indeed, the Department reportedly told Judge Duncan that pentobarbital API *cannot* expire.²⁶ But United States Pharmacopeia (“USP”) quality standards mandate that ingredients received by a compounding pharmacy without a vendor-specified expiration date “must be assigned a conservative expiration date, not to exceed 1 year after receipt by the compounding facility”—a

²⁴ See *First Amendment Coalition of Ariz, Inc. v. Ryan*, No. CV-14-01447-PHX-NVW, ECF No. 187, ¶ 2(f) (6/22/17).

²⁵ [ADCRR Dep’t Order 710](#), *supra* note 19, Att D., § A(1)(III); [Kiefer](#), *supra* note 20.

²⁶ [Kiefer](#), *supra* note 20.

deadline that passed four years ago.²⁷ Federal and state law require compounding pharmacies to abide by USP standards. A.R.S. § 32-1971(B); 21 U.S.C. § 353a(b). Thus, by issuing a death warrant, this Court would authorize the Department to evade these state and federal quality controls.

Once the Department unlawfully obtains injectable pentobarbital compounded from illicit and likely expired ingredients, someone will need to inject the drug into Gunches, which cannot be done lawfully without a prescription. 21 U.S.C. § 829(a). But current protocol does not require the Department to obtain a prescription, nor could it likely obtain one, given the requirement that a controlled-substance prescription “to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 C.F.R. § 1306.04(a). Thus, by issuing a death warrant, this Court would authorize the State to dispense an unprescribed controlled substance in violation of federal law.

²⁷ [USP General Chapter 797 – Pharmaceutical Compounding – Sterile Preparations § 9.3.](#)

Finally, the State’s unlawful procurement program is conducted fully in secret. Under Arizona law, “[t]he identity of executioners and other persons who participate or perform ancillary functions in an execution . . . is confidential and is not subject to disclosure.” A.R.S. § 13-757(C). The Department interprets this provision to include “the source of the execution chemicals,” meaning that the API supplier and compounder are effectively insulated from oversight in regard to their production of these chemicals.²⁸ Procuring controlled substances in secret blatantly violates federal “track and trace” rules that maintain the closed supply chain. *See* 21 U.S.C. § 360eee *et seq.* This Court cannot endorse a “regulatory vacuum” that permits suppliers to cut corners and allow dangerous drugs of abuse to proliferate.²⁹

In sum, the entire process of killing Gunches is predicated on the false notion that the Department may simply ignore state and federal law. If this Court issues a death warrant, it will be authorizing the State to secretly distribute likely expired and illicit controlled substances to a

²⁸ [ADCRR Dep’t Order 710](#), *supra* note 19, at 2.

²⁹ [Yadav et al.](#), *supra* note 13, at 2.

compounding pharmacy without a prescription, and then to dispense the unlawfully compounded chemicals without a prescription, all in violation of state and federal law. But there is no lethal-injection exception to our drug laws, nor to the Supremacy Clause. The Court cannot constitutionally lend its authority to these unlawful acts.

C. The State Threatens Public Safety When It Sidesteps The Legitimate Supply Chain

The safety violations the State asks this Court to authorize are not merely technical or academic. Rather, they go to the heart of the closed system of controls that maintains the integrity of the United States drug supply chain. The Court would do well to heed Judge Duncan’s warning against “the danger posed when governments seek to circumvent those limitations by non-standard measures,” creating a “threat to public safety.”³⁰

Pentobarbital is an emerging drug of abuse. The DEA recently seized five kilograms of pentobarbital smuggled from Mexico, enough to

³⁰ [Holshouser](#), *supra* note 2. This is to say nothing of the distinct harm that occurs when states stockpile execution drugs that are “essential” for medical purposes and thereby contribute to drug shortages. [Brief for the Ass’n for Accessible Med.](#), *supra* note 12, at 14.

kill at least 1,000 people, according to the Department’s execution protocol.³¹ It has been found in counterfeit pills and falsely marketed as fentanyl, oxycodone, and heroin. “One national drug analysis program detected pentobarbital in 217 drug submissions from 2020 to 2023, and there were at least 12 fatal exposures linked to use from 2020 to 2022.”³² The DEA further reports 259 diversions of pentobarbital, including burglaries and employee thefts.³³

These figures are likely understated because barbiturates have not recently been a focus of investigation.³⁴ Further, “[u]nknown exposure can occur if the drug is mixed into counterfeit pills or sold in powder form represented to be another drug.”³⁵ That pentobarbital can be abused “in

³¹ [Terri D’Arrigo, *Pentobarbital Making Its Way Into Illicit Drug Supply*, PSYCHIATRIC NEWS \(Dec. 3, 2024\)](#); [Joseph J. Palamar et al., *Monitoring illicit pentobarbital availability in the United States: A National Drug Early Warning System briefing*, DRUG AND ALCOHOL DEPENDENCE \(Oct. 2024\)](#).

³² [Palamar et al.](#), *supra* note 31.

³³ [D’Arrigo](#), *supra* note 31.

³⁴ *Id.* This was not always the case. Barbiturates have “a long history of misuse,” and have been “widely overprescribed, diverted, and misused,” causing thousands of deaths. [Palamar et al.](#), *supra* note 31.

³⁵ [Palamar et al.](#), *supra* note 31.

powder form”—precisely the substance in which the State unlawfully traffics—should be particularly concerning to this Court.

The problem of drug abuse in this country presents enough *unavoidable* difficulties. The last thing Arizona needs is an unforced error—the establishment of a state-sponsored illicit supply chain. The Department’s current protocol props up the wrong people: shady compounders who operate in secret and are willing to violate the law to generate lucrative business.³⁶ At the same time, the State provides no assurance that it can maintain a closed system of distribution for these drugs, particularly given that the State is willfully violating the closed system that already exists.³⁷ The State has concluded that the ends justify the means, even if the means are blatantly unlawful. What the State will feel justified in doing next with these drugs is anybody’s guess.

³⁶ See [Kiefer](#), *supra* note 20 (reporting that the Department paid \$1.5 million for its pentobarbital API stockpile).

³⁷ For whatever it’s worth, the current protocol requires only that the chemicals be stored in a manner “to ensure compliance with manufacturer specifications,” which says nothing about compliance with controlled-substance regulations. [ADCRR Dep’t Order 710](#), *supra* note 19, Att. D, §§ A(1)(III), C(7).

These are not hypothetical concerns. As other *amici* have noted, every single compounding pharmacy that has been unmasked for supplying execution drugs has had safety and regulatory violations.³⁸ For example, compounded pentobarbital used in Georgia was found to be yellow and cloudy hours before an execution (it should have been clear and colorless); compounded pentobarbital used in South Dakota was “contaminated with fungus.”³⁹ These threats can and do reach the general public. For instance, it was recently revealed that the compounder who provided execution drugs to Texas had been simultaneously selling fentanyl to drug dealers and users.⁴⁰

While the identity of the State’s compounding pharmacy is kept secret, Arizona compounders do not have a stellar record. Arizona has only four compounding pharmacies registered with the FDA (a small subset of compounders who do business as “outsourcing facilities”), and all four had serious safety violations noted at the most recent FDA

³⁸ See Corinna Barrett Lain, *Secrets of the Killing State* 165-68 (2025).

³⁹ [Yadav et al.](#), *supra* note 13, at 3.

⁴⁰ [Chiara Eisner, *Unmarked cars and secret orders: How a pharmacy prepared drugs for Texas’ executions*, N.P.R. \(Jul. 10, 2024\).](#)

inspection, including one that resulted in a product recall.⁴¹ Notably, these are the pharmacies that are required to register with the FDA and submit to inspections—one can only imagine what happens at the pharmacies that are *not* FDA-registered. And the current protocol does not require the State’s mystery compounder to register with the FDA.

Even state facilities cannot securely contain drugs that are acquired and handled covertly, outside legitimate supply channels. In *Beaty*, for instance, the district court documented “instances in which thiopental went missing from the California DOC’s facilities” because “the person responsible for maintaining custody of thiopental was . . . an illicit drug smuggler.” 853 F. Supp. 2d at 42 n.8. Sometimes the drugs do not even make it to the prison. At least one of the shipments of foreign thiopental at issue in *Beaty*—though ostensibly ordered by Arizona, California, or Tennessee—“was received by a pharmacy in Georgia.” *Id.*

In sum, the State seeks authority to illicitly engage an unsafe and porous supply chain that cannot be tracked or controlled. The risks to public safety are unjustifiable.

⁴¹ [FDA, *Registered Outsourcing Facilities* \(last updated Jan. 16, 2025\)](#).

CONCLUSION

The issue presented by the State's motion is not so much about the ultimate punishment as it is about the ultimate irony—the State seeks to take life in the name of the law that the State itself flagrantly disregards. A lawless bureaucracy asks this Court for authority to commit acts that indisputably will violate state and federal law and endanger public safety. But the Court has repeatedly held, in contexts far less solemn than this, that a lawful end cannot justify illegitimate means. *E.g.*, *Matter of Fee*, 182 Ariz. 597, 602 (1995). The Court should do so again and decline to warrant the State's conduct.

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Respectfully submitted,

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Certificate of Compliance

The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, contains 4,577 words, and does not exceed the word limit set by Arizona Rule of Criminal Procedure 31.12(a)(4).

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