

No. 16-20556

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JEFFERY WOOD; ROLANDO RUIZ; ROBERT JENNINGS; TERRY
EDWARDS; RAMIRO GONZALES,

Plaintiffs-Appellants

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal
Justice; LORIE DAVIS, Director, Correctional Institutions Division,
Texas Department of Criminal Justice; JAMES JONES, Senior Warden;
UNKNOWN EXECUTIONERS,

Defendants-Appellees

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division

PLAINTIFFS-APPELLANTS' PRINCIPAL BRIEF

This is a Capital Case

Appellant Terry Edwards is Scheduled to be Executed on Jan. 26, 2017

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. Many of the issues raised in this appeal have not been addressed by this Court and are of significant importance. Oral argument will assist the Court in understanding the issues presented and in resolving the merits. *See* Fed. R. App. P. 34(a); 5th Cir. R. 34.2.

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STATEMENT OF JURISDICTION

Plaintiffs appeal a final judgment entered on August 19, 2016, by the District Court for the Southern District of Texas, Houston Division. ROA.404. Plaintiffs filed a Notice of Appeal the same day judgment was entered. ROA.380. This Court has jurisdiction under Title 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred by requiring Plaintiffs to demonstrate that the State's use of compounded pentobarbital constitutes an Eighth Amendment violation *before* reviewing Plaintiffs' Equal Protection claim under strict scrutiny, thereby making any Equal Protection claims superfluous.
2. Whether the district court erred by converting Defendants' Motion to Dismiss into a motion for summary judgment without proper notice and opportunity for Plaintiffs to be heard.
3. In the alternative, whether the district court erred by applying a heightened pleading requirement beyond what is articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and failing to accept Plaintiffs' well-pleaded facts as true.

4. Whether the district court erred by dismissing Plaintiffs' Eighth and Fourteenth Amendment claims under Texas's two-year statute of limitations without accepting as true Plaintiffs' new facts that arose in 2015 that give rise to Defendants' constitutional violations.

STATEMENT OF THE CASE

This is an Equal Protection case that seeks narrow and modest relief. Plaintiffs' claims arose in October 2015 when the State of Texas stipulated, in a separate 42 U.S.C. § 1983 action challenging Texas's lethal injection protocol, to test the compounded pentobarbital for potency and sterility that it would use in the executions of two similarly-situated death row inmates shortly before their executions. ROA.9–10. The State refuses to provide the same safeguard for Plaintiffs. In *Whitaker v. Livingston*, the State agreed to test the compounded pentobarbital shortly before Thomas Whitaker's and Perry Williams's executions to address the concerns raised in their § 1983 action—that the drug had degraded or become contaminated because of

suspect manufacturing and storage conditions.¹ The Plaintiffs in this case, five men on death row, have the same concerns as the *Whitaker* plaintiffs. *See* ROA.9–10.

Then, nine months later and just one week before Mr. Williams’s scheduled execution, Appellees’ counsel asked a Harris County Assistant District Attorney to move the convicting court to withdraw the then-pending July 14, 2016 execution date. The convicting court did so. ROA.27 at ¶ 59. Defendants sought to have Mr. Williams’s execution date withdrawn because, according to a press account, they could not accomplish the testing that they had agreed to do nine months earlier before Mr. Williams’s scheduled execution. ROA.27 at ¶ 59; ROA.434 at 9–23.

Appellees’ decision to withdraw Mr. Williams’s execution date instead of testing the compounded pentobarbital in a timely fashion raised grave concerns for Plaintiffs about the quality of the drugs with which Appellees intend to carry out future executions. ROA.27 at ¶ 60.

¹ That case, *Whitaker v. Livingston*, is currently on appeal in this Court. *See* Appeal No. 16-20364. The Defendants-Appellees in *Whitaker* are the same as the Defendants-Appellees in this case, though the individuals serving in the positions have changed.

Appellees' own records demonstrate that the test takes approximately two days to complete. ROA.63 (showing that the pentobarbital sample was received on March 17, 2016, and that the test was completed on March 18, 2016). There is a strong inference that the State obtained tests results that indicated that its inventory of compounded pentobarbital had degraded or was contaminated. ROA.433 at 23–ROA.434 at 1.

This is not idle speculation; the State had the opportunity to explain why it could not obtain the test results prior to Mr. Williams's execution or why it will not test the drugs prior to Plaintiffs' executions, but the State refused to answer because it was "confidential." ROA.431 at 11–12. If it were true that the State simply made a mistake and failed to schedule the lab test before Mr. Williams's execution, as the district court speculated was the most likely cause,² Appellees' counsel would have set the record straight when the district court asked. ROA.431 at 9–12. The State's refusal to explain what happened

² ROA.434 at 3–6 ("I can give you the most probable cause, sloppy administrative procedures and recordkeeping and the Bureau of Prisons didn't assign somebody to get it done on time, or duck season opened, and the guy who was assigned left precipitously.").

suggests that Appellants' concerns about the degradation and contamination of the State's inventory of compounded pentobarbital are valid.

Plaintiffs' case was pending for seven days before the district court dismissed it on the merits. Plaintiffs filed their Complaint on August 12, 2016, along with a Motion for a Preliminary Injunction or in the Alternative Temporary Restraining Order ("Preliminary Injunction Motion") and Motion for Expedited Discovery on the same day. ROA.8; ROA.134; ROA.98. On August 15, 2016, the district court issued an Order setting a hearing date on August 16, 2016, at 1:00 PM for Plaintiffs' two Motions. ROA.249. On the morning of the hearing, Defendants filed oppositions to Plaintiffs' two pending Motions and a separate Motion to Dismiss for Failure to State a Claim with respect to each of Plaintiffs' four causes of action. ROA.285; ROA.294; ROA.254. Plaintiffs and Defendants appeared before the district court on August 16, 2016. Although the minute entry filed by the district court after the hearing states that arguments were heard on "all pending motions," ROA.330, no party addressed Defendants' Motion to Dismiss. *See* ROA.422–ROA.490.

On August 19, 2016, the Court dismissed each of Plaintiffs’ four causes of action *on the merits*. ROA.379; ROA.368 (“On August 16, 2016, the court held a hearing **on the merits** of this case.”) (emphasis added). First, the district court dismissed Plaintiffs’ Equal Protection claim (Count III) because (1) the State’s stipulation is immune to an Equal Protection claim because it was made in litigation, (2) Plaintiffs are not “similarly situated” to Whitaker and Williams, and (3) Plaintiffs did not establish that the failure to provide pre-execution testing burdened Plaintiffs’ fundamental rights. ROA.395. These holdings, and the underlying findings, are in error as a matter of fact, law, and procedure.

Second, the court dismissed Plaintiffs’ Counts I, II, and IV under the applicable statute of limitations, concluding that they were “claims relating to the lethal-injection procedure” and that Plaintiffs have been on notice of the execution procedures that Texas will use since (1) 2008, when Texas adopted a three-drug execution protocol, (2) August 2012, when Texas changed the protocol to a single dose of pentobarbital, or (3) October 2013, when the State started using compounded pentobarbital rather than manufactured pentobarbital. ROA.395–396.

The district court added that “[i]f these claims were not precluded, the plaintiffs would still fail to state a claim upon which relief can be granted,” and “the claims fail on the merits.” ROA.396. In its analysis of Defendants’ Motion to Dismiss the method-of-execution challenge, the court relied upon, for example, “an affidavit, a report, and laboratory results” (including two expert declarations) submitted by Plaintiffs. ROA.397. The district court concluded that “[t]he plaintiffs have not shown that Texas uses expired drugs to execute people. That should end the inquiry.” ROA.398.

With several Plaintiffs facing execution in the near-term, Appellants filed in this Court a Motion for Stay Pending Appeal, and, in the alternative, Motion to Expedite Appeal. August 24, 2016 Motion. This Court denied the Motion to Stay, and in a docket entry deemed the Motion to Expedite Appeal as “moot.” September 12, 2016 Opinion.

Since the filing of the Complaint, three of the Plaintiffs, Messrs. Wood, Jennings, and Ruiz, obtained stays of execution from the Texas Court of Criminal Appeals. *Ex parte Wood*, No. WR-45,500-02 (Tex. Crim. App. Aug. 19, 2016); *Ex parte Jennings*, Nos. WR-67,208-03 and WR-67,208-04 (Tex. Crim. App. Sept. 2, 2016); *Ex parte Ruiz*, Nos. WR-

27,328-03 and WR-27,328-04 (Tex. Crim. App. Aug. 24, 2016). Plaintiff Gonzalez’s originally-scheduled execution date, August 10, 2016, was withdrawn and reset for November 2, 2016. That date was withdrawn on September 30; no new execution date has been set. Both withdrawals were based on the trial court’s concerns about the substance of and pendency of this litigation. See *State v. Gonzales*, No. 04-02-9091-CR (38th D.Ct., Medina County, Texas). On September 29, 2016, Mr. Edwards’s execution date, scheduled for October 19, 2016, was modified to January 26, 2017. *State v. Edwards*, No. F02-15086-N (195th D.Ct., Dallas County, Texas).

To date, the State has executed only one prisoner since Plaintiffs filed this lawsuit. Barney Fuller, who had decided not to pursue his appeals, was executed on October 5, 2016. The execution took an unprecedented thirty-eight minutes—at least twice the length of previous executions.³

³ “Texas man who killed neighbor couple has been executed,” *Houston Chronicle*, Oct. 6, 2016, *available at* <http://www.chron.com/news/texas/article/Texas-man-who-killed-2-neighbors-wants-execution-9712158.php>. Upon information and belief, the beyond use date of the drugs used to carry out Mr. Fuller’s execution was October 31, 2016. Plaintiffs have asked Defendants’ counsel to provide specific information

LEGAL STANDARD

Several of the district court’s decisions at issue are substantive and procedural. First, “[c]onstitutional challenges are questions of law that are reviewed de novo.” *United States v. Sierra-Hernandez*, 192 F.3d 501, 503 (5th Cir. 1999) (citing *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir. 1998)). With respect to Equal Protection, this Court must review the district court’s findings of fact for clear error and its conclusions of law de novo. *Walker v. City of Mesquite*, 402 F.3d 532, 535 (5th Cir. 2005) (citing *Ayers v. Thompson*, 358 F.3d 356, 368 (5th Cir. 2004)) (footnote omitted). “A factual finding is not clearly erroneous as long as it is plausible in the light of the record read as a whole.” *Walker*, 402 F.3d at 535 (quoting *United States v. Cluck*, 143 F.3d 174, 180 (5th Cir. 1998)).

Second, the district court’s procedural decisions must be reviewed *de novo*. “[W]hen a district court grants a motion styled [as] a motion to dismiss, but bases his ruling on facts developed outside the pleadings,

about the drugs used, including the assigned beyond use date, whether and when the drugs were tested, and the results.

or *sua sponte* enters an order for summary judgment, the appellate court will review the order under the standards laid down in [Rule 56].” *Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, LLC*, 255 Fed. App’x 775, 783-84 (5th Cir. 2007) (internal quotation marks and citations omitted). Accordingly, on appeal, this Court must review the district court’s grant of summary judgment *de novo*, viewing all the evidence in the light most favorable to Plaintiffs and drawing all inferences in Plaintiffs’ favor. *Id.* (citing *Crawford v. Formosa Plastics, Corp.*, 243 F.3d 899, 902 (5th Cir. 2000)). Summary judgment is proper when the evidence reflects no genuine issue of material fact and the non-movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Gen. Retail Servs.*, 255 Fed. App’x at 783 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In the alternative, the Court must review the district court’s grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*, “accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.” *Toy v. Holder*, 714 F.3d 881,

883 (5th Cir. 2013) (citing *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks and citation omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Motions to dismiss are rarely granted and generally viewed with disfavor. *Alpha Kappa Alpha Sorority Inc. v. Converse Inc.*, 175 F. App’x 672, 676 (5th Cir. 2006) (citing *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)). Unless the plaintiffs cannot prove any set of facts entitling them to relief, the complaint should not be dismissed. *Alpha Kappa Alpha Sorority, Inc.*, 175 F. App’x at 676 (citing *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391, 395 (5th Cir. 2005)).

This Court must review the district court’s denial of Plaintiffs’ oral motion for leave to amend their Complaint for abuse of discretion. *Fahim v. Marriott Hotel Servs.*, 551 F.3d 344, 347 (5th Cir. 2008) (citing *Cambridge Toxicology Grp. v. Exnicios*, 495 F.3d 169, 177 (5th Cir. 2007)). Federal Rule of Civil Procedure 15(a) permits leave to amend “when justice so requires.” “A decision to grant leave is within the

discretion of the court, although if the court lacks a substantial reason to deny leave, its discretion is not broad enough to permit denial.” *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) (quoting *Louisiana v. Litton Mortg. Co.*, 50 F.3d 1298, 1302-03 (5th Cir. 1995)).

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether the Equal Protection Clause of the Fourteenth Amendment requires the State of Texas to provide Plaintiffs with the same safeguards it promised to provide to other condemned inmates. The remedy that Plaintiffs seek is modest: that Defendants test the compounded pentobarbital that it intends to use to execute them for potency and sterility shortly before their executions. This test takes just one or two days to complete. It would not place an undue cost or burden on the State, or delay Plaintiffs’ or other scheduled executions. As Plaintiffs detailed in their Complaint, recent and substantial evidence suggests the State’s supply of compounded pentobarbital has degraded or become contaminated, raising a substantial risk that Plaintiffs will suffer excruciating pain during their executions. The testing Plaintiffs seek would eliminate that risk.

The district court's opinion relies on a mischaracterization of Plaintiffs' claims, the application of an erroneous legal standard, and a concomitant dearth of appropriate process. Thus, district court's errors are substantive and procedural. Each error compels reversal.

First, the district court erred when it required Plaintiffs to prove that the State of Texas violated their Eighth Amendment rights in order to state a claim for an Equal Protection violation under the Fourteenth Amendment. This ruling renders the Equal Protection Clause superfluous to the Eighth Amendment. That is, if a court finds that the Eighth Amendment has been violated, there has *already* been a constitutional violation, so there is no need to consider the Equal Protection Clause. Moreover, the result would be nonsensical: plaintiffs asserting a right to strict scrutiny premised on a fundamental right explicitly stated in the Constitution would be held to a higher standard than those whose claim was based on the burdening of a fundamental right that is not explicitly reflected in the Constitution, e.g. claims based on rights to privacy, travel, or voting.

Second, the district court's procedural framework for its dismissal defied the applicable law and rules of procedure. The district court

failed to consider the facts in Plaintiffs' Complaint, much less accept as true all plausible facts, or consider them in a light more favorable to Plaintiffs. Rather, the district court misconstrued the facts that Plaintiffs set forth, ignored others, and in some instances simply supplied its own facts.⁴ Although the district court held a hearing on Plaintiffs' Motion for a Temporary Restraining Order, neither the court nor the parties addressed the arguments in Defendants' Motion to Dismiss, which was filed just hours before the hearing. The district court granted Defendants' Motion to Dismiss before Plaintiffs had an opportunity to respond.

Finally, the district court erred by ruling that Plaintiffs' claims under the Eighth and Fourteenth Amendments were barred under Texas's two-year statute of limitations for personal-injury claims. The court's conclusion was based on the finding that Plaintiffs were on

⁴ For example, the district court conducted its own internet research on the frequency with which people die with their eyes open and questioned Plaintiffs' counsel about these "facts" at the preliminary injunction hearing. ROA.433 at 3–27. Judge Hughes also speculated that the reason the State did not obtain test results prior to Mr. Williams's scheduled execution dated was because it was "duck season" and someone just dropped the ball. ROA.434 at 3–6.

notice of their claims when Texas announced its pentobarbital execution protocol in 2012. But this misconstrues the nature of Plaintiffs' claims.

Plaintiffs did not become aware of their injury until press accounts released in 2015 and 2016 brought to light information that raised significant concerns regarding the qualifications of the State's supplier and the manufacturing and storage procedures for the State's inventory of compounded pentobarbital. The district court's dismissal on statute of limitations grounds relies on a mischaracterization of Plaintiffs' claims.

Because of these errors, the district court's Order on Dismissal should be reversed, and the case should be remanded to the district court for appropriate discovery and briefing.

ARGUMENT

I. The District Court Misapplied the Equal Protection Clause to Deny Plaintiffs' Constitutional Rights.

A. Appellants Are Not Required to Prove that the State Violated Their Eighth Amendment Rights to Trigger Strict Scrutiny for Their Equal Protection Claim.

Appellants' claim under the Equal Protection Clause of the Fourteenth Amendment is subject to strict scrutiny because the State's

refusal to test the execution drugs burdens a fundamental right. ROA.401. The district court, however, improperly held that strict scrutiny applies to Appellants' Equal Protection claim only if the State *violated* their Eighth Amendment rights. ROA.402. This cannot be the law.

The district court wrongly applied the standard for an Eighth Amendment method-of-execution claim when it analyzed Appellants' Equal Protection claim and held that it did not warrant strict scrutiny. ROA.401–402. The Eighth Amendment standard, announced in *Glossip v. Gross*, requires plaintiffs to show “a substantial risk of serious harm.” 135 S.Ct. 2726, 2737 (2015) (internal quotation marks and citations omitted). The district court explained that “the plaintiffs do not show that a fundamental right has been burdened—they do not show that not re-testing the compounded pentobarbital shortly before their execution creates an unreasonable risk of significant pain—a fundamental right.” ROA.401.

But Appellants are not required to prove that the State violated their Eighth Amendment rights for strict scrutiny to apply to their Equal Protection claim. *In re Ohio Execution Protocol Litig.*, 868 F.

Supp. 2d 625, 637 (S.D. Ohio 2012) (“This Court is again reluctant to hold that there can only be an equal protection violation when there is an Eighth Amendment violation.”). “To require an Eighth Amendment violation would suggest a narrow perspective that transforms the Equal Protection Clause into nothing more than a redundant backdoor route to the Eighth Amendment.” *Id.* at 639. As one court opined, applying strict scrutiny only when a fundamental right has been violated would render equal protection claims superfluous:

If strict scrutiny of statutory classifications under the Equal Protection Clause is triggered only when their interference with the exercise of a fundamental right is impermissible, . . . then in essence the court must find that the statute violates the fundamental right prior to engaging in equal protection analysis. In that case, equal protection analysis would be superfluous, as the statute would already have been declared unconstitutional because of its violation of the underlying fundamental right. Put another way, if strict scrutiny is only triggered by something that has already been determined to be impermissible, why then the need for strict scrutiny?

Special Programs, Inc. v. Courter, 923 F. Supp. 851, 855 (E.D. Va. 1996).

Instead, the Equal Protection Clause serves as an additional protection against unequal treatment, even when such treatment does not violate an underlying fundamental right. *Id.* (“It makes no

difference that the restriction placed upon some classes under the statute does not, in and of itself, violate the First Amendment. The Equal Protection Clause is an additional guarantee that *otherwise permissible* government restrictions will be applied in an even-handed manner, not unduly favoring some over others.”).

To trigger strict scrutiny for an equal protection claim, Appellants need only show “mere impingement upon” a fundamental right. *Id.* at 855–56 (“[I]t is mere impingement upon, not impermissible interference with, the exercise of a fundamental right that triggers strict scrutiny.”). Appellants satisfy this standard. Indeed, the State stipulated to provide testing of its compounded pentobarbital shortly before Whitaker’s and Williams’s executions to allay concerns that the drug had degraded or become contaminated, which would cause intolerable pain. *Whitaker v. Livingston*, No. CV H-13-2901, 2016 WL 3199532, at *3 (S.D. Tex. June 6, 2016). Plaintiffs do not assert an equal protection right based on some trivial State action in previous executions (e.g., claiming they have the right to the same last meal or to the same room temperature). Rather, Plaintiffs request the same safeguard provided to the *Whitaker* plaintiffs—a safeguard implemented for the precise

purpose of redressing the same substantial risks Plaintiffs complain of here. Because the claim implicates a fundamental right, strict scrutiny applies. As described more fully *infra* sections I.D and I.E., when Plaintiffs’ Equal Protection claim is analyzed under strict scrutiny, Plaintiffs win; Plaintiffs’ claim, at bottom, should survive a motion to dismiss.

B. Under the District Court’s Faulty Analysis, Some Fundamental Rights Are More Equal than Others.

The Equal Protection Clause ensures that all citizens are treated equally under the law when there is a fundamental right at stake. This case relates to the fundamental right of any citizen—including inmates on death row—to be free from experiencing, or being at unnecessary risk of experiencing, cruel and unusual punishment. This right is firmly rooted in the U.S. Constitution. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). “[R]ights are fundamental if their source, explicitly or implicitly, is the Constitution.” *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001) (internal quotation marks and citations omitted). Thus, a right is “fundamental” either because (1) the U.S. Constitution explicitly recognizes it, or (2) a court has

determined that the Constitution implicitly recognizes it as worthy of the highest protection of the law, such as the rights to vote, to privacy, to marriage, etc.

But if the district court's analysis is correct, ironically, not all fundamental rights are treated equally. A survey of this Court's precedent where a fundamental right is judicially recognized, i.e. a right that is *implicit* in the Constitution but not enumerated therein, illuminates the problem. For example, in the context of the fundamental right of privacy, this Court made clear that a district court may not look to whether a fundamental right has been unduly burdened *before* it decides whether to apply strict scrutiny. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 335–36 (reversing District Court denial of a preliminary injunction for improperly applying rational review). This Court explained that “‘undue burden’ concerns the **ultimate question** of the balance between the state proffered justifications for a measure and the burdens imposed by it as opposed to the level of scrutiny employed in making this evaluation.” *Id.* (explaining Supreme Court's decision in *Maher v. Roe*, 432 U.S. 464 (1977)) (emphasis added).

Similarly, in the context of the alleged fundamental right to move about freely in public, this Court applied strict scrutiny without even deciding that it was, in fact, a fundamental right. *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (“Because we assume that the curfew impinges upon a fundamental right, we will now subject the ordinance to strict scrutiny review.”). The fact that this Court upheld the challenged government conduct in setting a nightly curfew for children under strict scrutiny does not change the fact that it was entitled to the highest level of review. *Id.* Thus, this Court applied strict scrutiny for Equal Protection challenges to government actions that impinged on the right of privacy, *Deerfield Med. Ctr.*, 661 F.2d at 335–36, and even to move freely about in public, *Qutb*, 11 F.3d at 492, yet the district court refused to apply strict scrutiny to Plaintiffs’ Equal Protection challenge based on the fundamental right to be free from cruel and unusual punishment. ROA.401–402. Surely the Constitution demands a more even-handed result.

C. When Strict Scrutiny Is Applied, the State Has No Compelling Interest in Refusing to Perform a Two-Day Test.

To survive strict scrutiny, the State's actions must be narrowly tailored to achieve a compelling governmental interest. *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014). The State cannot demonstrate that it has a compelling interest in denying Appellants a safeguard that it has promised to Mr. Williams and Mr. Whitaker. Thus the State's refusal to test the compounded pentobarbital for potency and sterility shortly Plaintiffs' executions does not survive strict scrutiny.

The State provides no argument that it has any reason to withhold testing from some death-row inmates, though the Order on Dismissal surmises that testing would “not just add[] one insubstantial step but would require an infinitude of indefinite demands.” ROA.399.⁵ Presumably the State objects because the testing would add some time and expense to the execution process. But this is not a “compelling”

⁵ This is entirely speculative. First, the testing was the district court's idea. Second, when the Defendants in *Whitaker* stipulated to conducting the test, one reason was to obviate repeat litigation every time a new batch of drugs is used or a new source is found.

reason because “mere pursuit of administrative convenience that risks flawed executions is not a legitimate state interest.” *Cooey v. Kasich*, 801 F. Supp. 2d 623, 653 (S.D. Ohio 2011) (paraphrasing *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). Further, “deviations that introduce uncertainty and eliminate safeguards” do not meet a legitimate government interest, let alone a compelling one. *Cooey*, 801 F. Supp. 2d at 653.

The test itself takes just a couple of days, as shown in the laboratory reports released by the State to Appellant Wood’s and Appellant Ruiz’s lawyers. ROA.63 (showing that the pentobarbital sample was received on March 17, 2016, and that the test was completed on March 18, 2016). Because execution dates are set a minimum of ninety days in advance,⁶ this additional two days of testing hardly affects the time frame. A delay would only occur if the compounded pentobarbital itself was either impure or not potent. In those instances, the testing Plaintiffs seek would prevent him from suffering excruciating pain, such as the feeling of suffocation or an

⁶ See Tex. Code Crim. Proc. Art. 43.141.

intense burning sensation in the veins. *See* ROA.308–309 at ¶¶ 10–11 *and Baze v. Rees*, 553 US 35, 121 (2008) (Ginsburg, J., dissenting) (discussing the importance of procedures “to lower the risk that the inmate will be subjected to the agony of conscious suffocation . . .”). Thus, this simple, two-day test would either (1) have no appreciable effect on the State or the execution date; or (2) prevent one of the Appellants from cruel and unusual pain and suffering.

In denying Appellants Motion for Preliminary Injunction, the district court stated that Appellants “[do not] get the benefit that Whitaker and Williams had because maybe they had better lawyers or the state had weaker lawyers or I don’t know. It doesn’t matter.” ROA.469 at 48:12-14. On the contrary, it *does* matter why the State is providing a safeguard to Williams and Whitaker but denying that same safeguard to Appellants. “The purpose of the Equal Protection Clause is to secure every person within the state’s jurisdiction against *intentional* and *arbitrary* discrimination.” *Sonnier v. Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007). By using old compounded pentobarbital without testing to confirm its sterility and potency, the State is

“selectively introducing risk into some executions but not others.”
Cooley, 801 F. Supp. 2d at 653. This is an equal protection violation.

By testing the compounded pentobarbital for Mr. Williams and Mr. Whitaker but not for Appellants, the State is infringing on Appellants’ Fourteenth Amendment right to equal protection. Denying them this small but crucially important safeguard implicates their fundamental right to be free from cruel and unusual punishment, and the State cannot demonstrate that its conduct is narrowly tailored to achieve a compelling government interest. In fact, the State can set forth no legitimate reason to refuse the testing.

D. The State’s Stipulation to Test Compounded Pentobarbital Before Its Use in the Executions of the *Whitaker* Plaintiffs Is Subject to the Equal Protection Clause.

The district court incorrectly held that the decisions made by the State as a party in litigation are immune from equal protection challenges. ROA.400. The district court proclaimed that “[t]he right to equal protection of the law does not apply when Texas, acting as a defendant in a suit, agrees to respond to particular claims brought in concrete cases.” ROA.400. In an attempt to substantiate this position, the district court pointed to only one case: *Enquist v. Oregon Dep’t of*

Agric., 553 U.S. 591 (2008). ROA.400. The district court cited *Enquist* as standing for the proposition that equal protection claims may not be alleged against state action that involves discretionary decision-making. ROA.400. But *Enquist* is inapposite.

Enquist addressed whether a public employee may bring a class-of-one claim under the Equal Protection Clause. 553 U.S. at 594 (“The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee’s membership in any particular class.”). After analyzing this issue, the *Enquist* Court held that “a ‘class-of-one’ theory of equal protection has no place in the public employment context.” *Id.* The *Enquist* Court emphasized that its opinion was limited to this singular, narrow holding:

In concluding that the class-of-one theory of equal protection has no application in the public employment context—and *that is all we decide*—we are guided, as in the past, by the “common-sense realization that government offices could not function if every employment decision became a constitutional matter.”

Id. at 607 (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)) (emphasis added). *Enquist* did not pronounce a rule that decisions made by a state as a litigant are protected from equal protection challenges. By citing *Enquist* as establishing this rule, the district court misconstrued the opinion and inappropriately expanded its clear, explicit holding. Because *Enquist* was the district court's sole legal authority on the issue, the district court's conclusion is not supported by the law.

Appellants may allege an equal protection claim based on the State's stipulation to the *Whitaker* plaintiffs. Stipulations and settlement agreements executed by a state during litigation are subject to equal protection challenges. *See, e.g., Lancaster v. Curry*, No. C 08-5334 MMC PR, 2011 WL 1990586, at *4–5 (N.D. Cal. May 23, 2011) (analyzing whether a settlement agreement between the state and a prisoner violated another prisoner's equal protection rights and dismissing the claim as untimely); *Abrams v. Bronstein*, 310 N.E.2d 528, 532 (N.Y. 1974) (finding that the state violated the petitioners' equal protection rights by not providing the petitioners with a benefit that the state granted to similarly-situated individuals pursuant to a stipulation in another lawsuit). The State stipulated that it would test

the compounded pentobarbital shortly before its use in the executions of the *Whitaker* plaintiffs. By refusing to provide this same safeguard to Appellants, the State violated Appellants' equal protection rights.

E. As Death Row Inmates in Texas, Appellants and the *Whitaker* Plaintiffs Are Similarly Situated.

Appellants, five men on Texas's death row awaiting execution by lethal injection, ROA.11–12, are in all relevant respects similarly situated to the *Whitaker* plaintiffs, who are two men on Texas's death row awaiting execution by lethal injection. ROA.9. In dismissing Appellants' Equal Protection claim on a motion to dismiss, the district court incorrectly found that Appellants are not similarly situated to the *Whitaker* plaintiffs. ROA.401. This Court could reverse based upon Plaintiffs' allegation alone that similarly situated individuals were treated differently under the law. *Rolf*, 77 F.3d at 828. In *Rolf*, this Court reversed the dismissal of landowners' Equal Protection claim because the “second amended complaint alleges that they have been treated differently than similarly situated individuals.” *Id.*

Here, not only did the district court refuse to credit Plaintiffs' allegation that they were similarly situated to the *Whitaker* plaintiffs as required by *Rolf*, it decided, instead, that the two groups of death row

inmates are different. ROA.401. The district court did so for three reasons: (1) the *Whitaker* plaintiffs filed suit long before their execution dates, whereas Appellants filed suit shortly before the first plaintiff was set to be executed; (2) the *Whitaker* plaintiffs' claims were not barred by a two-year statute of limitations, whereas the district court held that the Appellants' claims were; and, (3) in any case, the *Whitaker* decision already dismissed claims that are fundamentally the same in form and substance as Appellants' claims. ROA.401.

Setting aside the district court's procedural error at the motions to dismiss stage, and even assuming (without conceding) that these distinctions are true, they are irrelevant to determine whether Appellants and the *Whitaker* plaintiffs are similarly situated for purposes of Appellants' Equal Protection claim. There is no dispute that Appellants and the *Whitaker* plaintiffs are death row inmates that the State intends to execute by the lethal injection of compounded pentobarbital. Appellants contend that the State is violating Appellants' Equal Protection rights by denying them a safeguard during their execution process that will be granted to the *Whitaker* plaintiffs. Therefore, Appellants and the *Whitaker* plaintiffs are similarly situated

for the purpose of Appellants' Equal Protection claim. The distinctions offered by the district court—comparing the timeliness and substance of Appellants' other claims to the *Whitaker* plaintiffs' claims—are immaterial to the similarly-situated analysis.

II. The District Court Erred by Converting Defendants' Motion To Dismiss into a Motion for Summary Judgment.

By relying on matters outside of the pleadings, the district court converted Defendants' Rule 12 Motion to Dismiss into a Motion for Summary Judgment Pursuant to Rule 56. Rule 12(d) provides that “[i]f, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d); *see also Gen. Retail Servs.*, 255 Fed. App'x at 783-84. Because the district court also did not provide Plaintiffs with adequate notice and a fair opportunity to be heard, and this error was not harmless, this Court must reverse.

A. The Court Did Not Provide Proper Notice That It Would Decide Plaintiffs' Claims on the Merits or an Opportunity to Be Heard.

Although a court may enter judgment independent of a motion for summary judgment “after giving notice and a reasonable time to respond,” the district court failed to provide Plaintiffs with any notice that their claims would be summarily dismissed. Fed. R. Civ. P. 56(f). This Circuit long has recognized the need for strict adherence to the notice requirement. *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977); *Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979); *Hanson v. Polk Cnty. Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979); *Estate of Smith v. Tarrant Co. Hosp. Dist.*, 691 F.2d 207, 208 (5th Cir. 1982); *Powell v. U.S.*, 849 F.2d 1576, (5th Cir. 1988).⁷ The notice requirement serves two important functions: it prevents surprise to the party that judgment is entered against, and it prevents the use of summary judgment to prematurely cut off discovery. *Gen. Retail Servs.*, 255 Fed.

⁷ Even after the Rule was amended in 2009 to remove the ten-day notice requirement, this Circuit still strictly adheres to requiring adequate notice and an opportunity to respond. *See, e.g., Albanil v. Coast 2 Coast, Inc.*, 444 Fed. App'x 788, 801-02 (5th Cir. 2011).

App'x at 784. The district court's judgment suffers from both perceived evils. As this Court recognized:

[Litigants] cannot read over the judge's shoulder, or penetrate his memory. [...] Where there is a motion to dismiss for failure to state a claim upon which relief may be granted, there can never be a wide overview by the trial court, beyond the pleadings to include matters outside, without affording all litigants the opportunity to offer their perspectives on the additional matter by way of admissible evidence.

Davis, 561 F.2d at 571-72.

The Court's decision in *Underwood v. Hunter* is similar to this case. 604 F.2d at 368-69. In *Underwood*, the plaintiff brought four claims to challenge the Alabama constitution that disfranchised those convicted of certain crimes. The plaintiff moved for a preliminary injunction to restore his right to vote along with two other claims. *Id.* at 368. A few days before the hearing on the preliminary injunction, the state moved to dismiss the case for failure to state a claim. *Id.* Unlike here, the parties in *Underwood* also argued the merits of the motion to dismiss at the hearing, and the court heard testimony from four witnesses. *Id.* The court granted the motion to dismiss three causes of action, followed by a separate dismissal on the fourth cause of action. *Id.* at 368-69.

This Court reversed:

Here the plaintiffs had no indication that a summary judgment, a final judgment, might result from the preliminary injunction hearing. The first indication that the material produced for the hearing would be used to support a summary judgment was the Court's order of dismissal. Loss on a preliminary injunction motion may not mean a loss at the trial on the merits. Similarly, a motion to dismiss may result in a rejection of the pleadings, but it does not go to the merits of the case. Consequently, a summary judgment carries far greater impact than the matters explicitly before the court at the hearing.

Id. at 369. This Court required an opportunity for the plaintiff to provide additional arguments and material going to the issue of summary judgment. *Id.* This was true even if the district court believed that plaintiffs had already provided everything, because “[w]hen such a limited adjudication (the preliminary injunction) is the order of the day, we cannot say with assurance that the party will present everything they have.” *Id.* (quoting *Georgia Southern & Florida Railway Co.*, 373 F.2d 493, 498 (5th Cir. 1967)).

Underwood could just as easily have been describing the district court proceedings in this case. Plaintiffs here also were deprived of notice of a dismissal on the merits, but were given even less of an opportunity to respond than the *Underwood* plaintiffs. It is undisputed

that Plaintiffs were not given an opportunity to respond to the State's Motion to Dismiss. Because the Motion was filed the same day as the Preliminary Injunction hearing, Plaintiffs could not file a written response. Neither the Court nor the parties so much as mentioned the Defendants' Motion at the hearing; Plaintiffs were not aware that Defendants' Motion was ripe for argument. At the hearing, the court did not entertain any witness testimony. On the whole, the district court failed to adhere to the strict notice requirement and failed to provide Plaintiffs with a full opportunity to be heard before dismissing their claims on the merits.

B. The District Court's Error Was Not Harmless and Warrants Reversal.

The district court's error was not harmless, and this Court should reverse. *See Albanil*, 444 Fed. App'x at 800 (reversing district court's *sua sponte* dismissal of minimum wage claim). "Failure to provide proper notice is harmless error 'if the nonmovant has no additional evidence or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact.'" *Id.* (quoting *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local Union 150, AFL-CIO*, 335 F.3d

643, 650 (7th Cir. 2003)). “[T]he party seeking to avoid summary judgment must present specific evidence that creates a genuine issue of material fact, or at least identify how additional discovery would yield such an issue.” *Gen. Retail Servs.*, 255 Fed. App’x at 790 (internal quotation marks and citations omitted).

Here, there are at least two genuine issues of material fact that preclude summary judgment. *See* ROA.398 (“As in *Whitaker*, the plaintiffs’ assertions are based on two assumptions: (a) Texas uses drugs with miscalculated beyond-use dates, and (b) a drug used past its beyond-use date is inherently cruel.”).⁸ First, with respect to the beyond-use date, Defendants put in no independent evidence upon which the district court could rely to grant summary judgment. Plaintiffs attached Defendants’ own lab reports to their Complaint, ROA.63–64, showing pentobarbital that was received by the State on

⁸ Plaintiffs also sought additional discovery that likely would reveal additional genuine issues of material fact to warrant denial of summary judgment to Defendants. ROA.98; *see Gen. Retail Servs.*, 255 Fed. App’x at 790 (“[T]he party seeking to avoid summary judgment must present specific evidence that creates a genuine issue of material fact, or at least identify how additional discovery would yield such an issue.” The district court denied Plaintiffs’ Motion for Expedited Discovery without opinion. ROA.365.

3/17/2016 with a handwritten “exp 3/31/2017” (nearly one year), and pentobarbital that was received by the State on 4/06/2016 with a handwritten “use by date 10/31/16” (more than six months). ROA.63, ROA.64. Plaintiffs also submitted the expert declaration of Dr. James H. Ruble, with supporting references to the United States Pharmacopeia (“USP”) to demonstrate that the alleged expiration and beyond-use dates were well beyond anything supported by the scientific evidence of record. ROA.180.⁹ Accordingly, Plaintiffs set forth facts, not assumptions.

Second, regarding the so-called assumption that “drugs used past its [sic] beyond-use date is inherently cruel,” Plaintiffs put in two expert declarations based on medical facts. Again, the State disputed these facts, but put forth no evidence to support a finding of summary judgment that using drugs after the beyond-use date would be free from a substantial risk of pain. The district court “resolved” the factual dispute through imposition of its own research, opinions, and an

⁹ Dr. Ruble said that the longest a compounded pentobarbital product would remain sterile and potent was 45 days, if kept frozen. ROA.186; ROA.228–230. The State proffered no evidence of its own storage conditions.

assessment of the credibility of Plaintiffs' experts, despite never having seen either of them testify. *See* ROA.397–398. The district court's actions contravened the relevant standards; Plaintiffs' proffered material facts are sufficient to survive summary judgment. *Gen. Retail Servs.*, 255 Fed. App'x at 790.

The district court's failure to provide notice to Plaintiffs is aggravated by its failure to provide any discovery whatsoever, particularly given that a significant number of the central (and disputed) facts are in Defendants' exclusive control. *See Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 725-26 (5th Cir. 2003) (holding that the district court unfairly converted the motion for judgment on the pleadings into a summary judgment motion when it had previously stayed discovery). No discovery was permitted in this case. Indeed, the case only was pending for seven days.

The district court justified its action by mischaracterizing Plaintiffs' case as “an extension of another case that this court recently dismissed and pends on appeal,” in which “[t]he facts and theories underlying those claims [in *Whitaker*] have already been described by this court in depth.” ROA.392–393 (citing *Whitaker*, 2016 WL 3199532).

The Plaintiffs, however, were not parties to the *Whitaker* lawsuit and rely on it only to the extent that the testing promised to the *Whitaker* plaintiffs serves as the basis for Plaintiffs' Equal Protection challenge. Neither are the claims raised, nor the lack of process, the same as in *Whitaker*.

The district court's error in dismissing Plaintiffs' action pursuant to a summary judgment standard, without notice or an opportunity to be heard, where there were numerous disputed issues of material fact, without providing any discovery, was not harmless error.

III. In the Alternative, the District Court Erred by Applying the Wrong Standard and by Failing to Accept Plaintiffs' Factual Allegations as True.

The district court committed reversible error when it altered the *Iqbal* standard for judgment on the pleadings while also refusing to take as true Plaintiffs' well-pled facts, claims, and experts' reports, or construe them in the light most favorable to the Plaintiffs.

A. The District Court Wrongly Described the Proper Standard for Dismissing a Case on the Pleadings.

The district court explicitly stated that it would hold Plaintiffs' Complaint to the standard enumerated by the Supreme Court in

Glossip and *Baze*. ROA.396; ROA.396 at n.8 (citing *Glossip*, 135 S.Ct. at 2737 (quoting *Baze*, 553 U.S. at 50) (emphasis added) (“Sufficiently **to state a claim** to challenge Texas’s method of execution, the **plaintiffs must plead** (a) the use of compounded pentobarbital has a demonstrated risk of severe pain, and (b) a readily implementable and feasible alternative method of execution.”).¹⁰ However, neither of those cases were decided at the motion-to-dismiss stage. In fact, *Glossip* was decided on a motion for preliminary injunction, which requires a showing of likelihood of success on the merits. *Glossip*, 135 S.Ct. at 2736, 2785. *Baze* was decided after a full trial on the merits, where Plaintiff had to meet her burden by a preponderance of the evidence. *Baze*, 553 U.S. at 41. Accordingly, the district court erred in requiring Plaintiffs to prove their case at the motion-to-dismiss stage.

The Supreme Court articulated the proper standard for dismissing a case based only on the pleadings in *Ashcroft v. Iqbal*: “To survive a motion to dismiss, a complaint must contain sufficient factual matter,

¹⁰ In addition to the fact that Plaintiffs’ Equal Protection claim does not depend on prevailing on this underlying standard, see *supra*, the district court analyzed this claim, as others, under an erroneous standard.

accepted as true, to state a claim to relief that is plausible on its face.” 556 U.S. at 678 (2009) (internal quotation marks and citations omitted); *see also Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (“When considering a motion to dismiss, the court accepts as true the well-pled factual allegations in the complaint, and construes them in the light most favorable to the plaintiff.”) Importantly, the “plausibility standard is not akin to a ‘probability requirement,’” though “it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (citation omitted).

In contrast to the Supreme Court’s standard and this Court’s precedent, the district court inserted a crucial extra word:

The court accepts all **substantiated** allegations in the complaint as true and construes them in the light most favorable to the plaintiffs.

ROA.395 (citing *Iqbal*, 566 U.S. at 678) (emphasis added). Though *Iqbal* cautions that there is no “probability requirement,” the district court nonetheless rejected an expert’s affidavit because “[n]owhere in his five-page affidavit does the phrase ‘with reasonable medical probability’ appear.” ROA.397. Because the district court clearly expressed the incorrect standard, the dismissal should be overturned.

B. The District Court Did Not Accept As True Plaintiffs’ Factual Allegations.

The district court should have, but did not, accept as true Plaintiffs’ well-pleaded factual allegations. *Taylor*, 296 F.3d at 378. For example, the district court stated that “plaintiffs have no facts that would allow a reasonable inference that these doses are materially less potent, sterile, or stable[.]” ROA.373. But the Complaint explains, at length, the reasons that the execution drugs’ potency and sterility are questionable:

The applicable literature and appropriate experts reflect that compounded drugs that are consumed beyond the use by date set out by USP¹¹ <797> risk problems with sterility and potency that could cause excruciating pain at the time of injection for purposes of execution Injection of drugs that impotent, contaminated, or impure would cause severe pain at the time of injection and during the course of an execution.

ROA.34-35 at ¶¶ 83–84; *see also* ROA.19 at ¶ 34 (“Compounded preparation are assigned a [beyond use date] to prevent degradation of a compound that the USP has calculated is likely to occur after a set

¹¹ The Complaint explains that this source, the USP, “is the seminal scientific advisory publication concerning the compounding of sterile injectables.” ROA.18 at n.2. Notably, the State’s own testing laboratory uses the USP as a standard. ROA.178 (under ‘Notes,’ explanation of tests conducted refer to USP standards).

time frame The use of compounded pentobarbital that has long surpassed its recommended BUD to conduct executions raises grave concerns about potency, sterility, and stability of the pentobarbital, and thus, of the risk of severe pain to the inmate.”); ROA.23 at ¶ 40 (no explanation for why the State’s BUD is so different from the USP’s recommendations); ROA.24 at ¶ 53–54 (explaining storage anomalies). The district court erroneously disregarded, rather than credited, those facts. ROA.397–398 (Section 8.A, entitled “Risk”).

Numerous examples exist where the district court did not accept as true Plaintiffs’ well-pleaded facts. As discussed above, *supra* Section I.E., this Court has reversed when a district court failed to accept a complaint’s assertion that the plaintiffs were similarly situated individuals. *Rolf*, 77 F.3d at 828. Here, the Complaint explains why Plaintiffs are similarly situated to the *Whitaker* plaintiffs, but the district court did not accept as true that fact. ROA.9. As discussed below, *infra* Section IV, the district court entirely ignored the newly-discovered information regarding the sources of Texas’s execution drugs stated in the Complaint, ROA.30 at ¶ 72 and ROA.32 at ¶ 78, and

thereby wrongly concluded that the statute of limitations had run on several of Plaintiffs claims. ROA.256-57.

By failing to accept as true the well-pleaded facts in Plaintiffs' Complaint, the district court wrongly dismissed the case. As explained below, this is not a harmless mistake.

C. The Plaintiffs' Factual Allegations, Taken As True, State a Claim for Relief.

At the hearing on Plaintiffs' Motion for Temporary Restraining Order, Plaintiffs acknowledged the deficiency that there was an additional known and available alternative method of execution that they had not plead. Plaintiffs sought leave to amend their Complaint to "name re-tested compounded pentobarbital" as that second known alternative. ROA.399. The Federal Rules provide amendment to pleadings as a matter of course, and the district court's denial of Plaintiffs' Motion to Amend is reversible error. *See* Fed. R. Civ. P. 15(a)(1); *see also Rolf*, 77 F.3d at 828 (quoting *Litton Mortgage Co.*, 50 F.3d at 1302-03) ("A decision to grant leave is within the discretion of the court, although if the court lacks a substantial reason to deny leave, its discretion is not broad enough to permit denial."). The district court's refusal to grant leave to amend bolsters Plaintiffs' assertion

that, on the whole, their claims were dismissed without consideration. Thus, when the appropriate standard is applied, and Plaintiffs' re-plead claims are considered, Plaintiffs' Complaint easily meets the requirement that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

IV. Plaintiffs' Claims Under the Eighth and Fourteenth Amendments Are Not Barred by Texas's Two-year Statute of Limitation.

The district court dismissed Plaintiffs' claims under the Eighth and Fourteenth Amendments (i.e. Counts I, II and IV) under Texas's two-year statute of limitations for personal-injury actions. ROA.395–396. Plaintiffs do not challenge Texas's use of pentobarbital or even compounded pentobarbital, by itself, during their executions. Thus, the State's adoption of various protocols in 2008, August 2012, or October 2013 are not accrual events that placed Plaintiffs on notice of their injury. The injury here arises from the State's use of compounded pentobarbital that has a high risk of degradation or contamination, which will result in an intolerable risk of severe pain—an injury that can be easily remedied by a simple test shortly before Plaintiffs'

executions. The factual basis for these claims did not arise until 2015 and continue to evolve.

In October 2015, a news story revealed that Texas attempted to import execution drugs from India, despite the fact that the FDA has made clear that importation of such drugs into the United States is illegal, and that in late July the attempted shipment had been detained in Houston by the FDA.¹² Another article published in October 2015 reported that Texas purchased execution drugs from Chris Harris, who not only has no pharmaceutical background, but registered his “facility” with the DEA using a small office space and his old apartment building, where he has not lived for years (and on which he owes back rent).¹³

¹² Chris McDaniel and Chris Geidner, *Arizona, Texas Purchased Execution Drugs Illegally Overseas, But FDA Halts The Import*, BUZZFEED NEWS, Oct. 22, 2015, available here: <http://www.buzzfeed.com/chrismcdaniel/arizona-texas-purchased-execution-drugs-illegally#.rfgBRVw1l8>; Tasneem Nashrulla, Chris Geidner and Chris McDaniel, *Three States Bought Illegal Execution Drugs from Supplier in India*, BUZZFEED NEWS, Oct. 23, 2015, available here: <http://www.buzzfeed.com/tasneemnashrulla/three-states-bought-illegal-execution-drugs-from-supplier-in#.cu4O346Mqo>; Chris Geidner and Chris McDaniel, *States Lawyer Up, Looking to Find a Way to Buy Execution Drugs from Overseas*, BUZZFEED NEWS, Oct. 25, 2015, available here: <http://www.buzzfeed.com/chrisgeidner/states-lawyer-up-looking-to-find-a-way-to-buy-execution-drug#.vuM2Qay6DM>.

¹³ Chris McDaniel and Tasneem Nashrulla, *This is the Man in India Who is Selling States Illegally Imported Execution Drugs*, BUZZFEED NEWS, Oct. 20, 2015, available

In addition, information only recently came to light regarding the conditions under which Texas transports and stores compounded pentobarbital. In August 2015, Texas provided three vials of lethal injection drugs to Virginia for the execution of Alfred Prieto. According to recent court records in *Prieto v. Clarke*, Virginia prison officials testified that they were told by Texas prison officials that the vials did not need to be refrigerated, were not refrigerated during the car ride back from Texas, and should be kept “on the counter.” ROA.24 at ¶ 54 (citing Prelim. Inj. Hr’g at 82:17–18, 88:9–15, Oct. 1, 2015, ECF No. 27, *Prieto v. Clarke*, No. 3:15-cv-587 (E.D. Va.)). Five days later Defendants averred to the *Whitaker* court that all drugs are kept refrigerated and transported in temperature-controlled environments. ROA.24 at ¶ 54. Plaintiffs submitted with their Motion for Temporary Restraining Order or in the Alternative Preliminary Injunction the expert report of Dr. James H. Ruble demonstrating that pentobarbital is a high-risk sterile injectable that has a very short shelf life. ROA.183–184, ROA.186.

here: <http://www.buzzfeed.com/chrisrmcdaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp#.va84ZbEA6n>.

Pentobarbital will rapidly degrade if it is kept at room temperature (i.e. within 24 hours). ROA.186. These facts undermine, at best, the State's credibility with respect to the manner in which the lethal injection drugs are stored, which is a factor that is integral to the drugs' beyond use date. This information underscores Plaintiffs' concerns that there is a clear and intolerable risk that the drugs will degrade before Plaintiffs' executions.

Indeed, the most compelling fact indicating problems with the State's supply of compounded pentobarbital occurred on July 6, 2016—just weeks before Plaintiffs filed their complaint—when the State announced a delay in the execution of inmate Perry Williams on the purported grounds that it did not have sufficient time to test the drug prior to the July 14, 2016 execution date. According to press accounts:

Jason Clark, a spokesman for the Texas Department of Criminal Justice, said while the state has enough drugs to carry out all seven executions scheduled through October, Perry Eugene Williams' execution was delayed because the agency could not get the test results back in time. [. . .] Prison officials said the delay was ordered by a Houston

court after they alerted it the test results could not be obtained on time.¹⁴

It is impossible for the statute of limitations to bar Plaintiffs' claims when it was the recent facts, all of which occurred in 2015 and 2016, that placed Plaintiffs on notice of their injuries under the Eighth and Fourteenth Amendments. The statute of limitations does not begin to accrue until "the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001) (quoting *Russell v. Bd. Of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993)). Until these facts came to light, Plaintiffs were unaware of the full scope of the current degradation and contamination risks associated with the State's inventory of compounded pentobarbital.

At the motion-to-dismiss stage, the trial court must weigh all reasonable inferences in Plaintiffs' favor. *In re Katrina Canal Breaches*

¹⁴ Mike Ward, Drug Testing Delays Execution for Houston Killer, Houston Chronicle, July 6, 2016, available here: <http://www.chron.com/news/politics/texas/article/Drug-testing-delay-execution-for-Houston-killer-8344549.php>.

Litig., 495 F.3d 191, 205 (5th Cir. 2007). The State’s response confirms that the news and press releases that Plaintiffs allege give rise to their claims are true. It certainly confirms that Plaintiffs allegations are *plausible*. In fact, the State’s “not enough” time excuse is implausible: the State had over six months to conduct a test that takes just two days to complete. The State stipulated it would test the drug in October 2015 and scheduled Williams’s July execution on January 15, 2016. ROA.35 at ¶¶ 56–57. The State’s failure to obtain test results for Williams raises a strong inference that the State’s inventory of compounded pentobarbital has degraded or become contaminated.

But the district court did not even consider or address any of these recent developments. Instead, the Court held that Plaintiffs’ claims were time-barred as a matter of law based solely on the date when the State announced its execution protocol. Such a position leads to absurd and unjust results. It would provide an absolute bar to any challenge to the State’s execution protocol two years after the protocol is announced without any consideration of new information that demonstrates that the protocol presents a severe risk of cruel and unusual punishment. That is the situation here. New facts emerged since the State began to

use compounded pentobarbital in October 2013 that indicate that the State's supply of lethal injection drugs is increasingly suspect and at risk of becoming impotent, degraded or contaminated. These facts demonstrate a concomitant risk that Plaintiffs will be subject to excruciating pain at the time of their execution.

Finally, Plaintiffs' due process claims under the Fourteenth Amendment (Counts II and IV) should not be barred by the statute of limitations in any event because they do not challenge the State's method of execution. ROA.38; ROA.45. Count II challenges Defendants refusal to provide information relevant to the integrity, purity, stability, and potency of the drug or drugs at the time of execution. While this information is crucial to Plaintiffs' ability to protect their right not to be subject to cruel and unusual punishment, ROA.38–42, it does not challenge the method of execution itself. Count IV challenges the State's ability to change the execution protocol without any notice whatsoever to the condemned, including Plaintiffs. ROA.45. Any purported assurances proffered by Defendants regarding the efficacy of the drugs currently in their possession are meaningless when (1) Defendants' ability to continue to obtain compounded pentobarbital is

quickly coming to an end; (2) the drugs currently in their possession may not be the drugs that will be used to carry out Plaintiffs' executions; and (3) the absence of any notice requirement means that an entirely different protocol could be used to carry out the execution of any one of the named Plaintiffs. ROA.45–46.¹⁵

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that this Court reverse the judgment of the district court, and remand this matter for full discovery and a trial on the merits.

¹⁵ These are not the same claims foreclosed by the statute of limitations by this Court. *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Circ. 2013). While *Sepulvado* rejected an inmate's due process right to absolute transparency in the execution procedures, it should not be read to provide the State of Texas with the right to cloak in secrecy information central to Plaintiffs' ability to protect their constitutional rights. In the words of Justice Brandeis, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman," and the government action that warrants the brightest light is the official act of killing a citizen. Brandeis, *Other People's Money—and How Bankers Use It* (1914).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2016, I electronically transmitted Plaintiffs-Appellants' Principal Brief using the ECF system for filing. Based on records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrant(s):

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,087 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font, with footnotes in 12-point Century Schoolbook font.

Dated: October 24, 2016

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