

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

STACEY JOHNSON, JASON MCGEHEE,
BRUCE WARD, TERRICK NOONER,
JACK JONES, MARCEL WILLIAMS,
KENNETH WILLIAMS, DON DAVIS and
LEDELL LEE

PLAINTIFFS

v. No. 60CV-15-2921

WENDY KELLEY, in her official capacity as
Director of the Arkansas Department of
Correction, and ARKANSAS DEPARTMENT
OF CORRECTION

DEFENDANTS

MEMORANDUM ORDER DENYING MOTION TO DISMISS
AMENDED COMPLAINT

Plaintiffs have each been charged, tried, and convicted of capital murder, and have each been sentenced to death by lethal injection. Plaintiffs filed the instant litigation on April 6, 2015 seeking a declaratory judgment that the statutory framework pertaining to the method of execution (hereafter "MOE") enacted as Act 1096 of 2015, (codified as Arkansas Code Annotated § 5-4-617) violates several provisions of the Arkansas Constitution. Plaintiffs also seek a preliminary injunction to prohibit execution of their death sentences pursuant to the MOE prescribed by Act 1096 and the protocol disclosed to them by Defendants.

Defendants have moved to dismiss the legal challenge to Act 1096 and their MOE protocol based on the following contentions:

1. Defendants argue that the Amended Complaint fails to state a cognizable claim of a constitutional violation and, consequently, is barred by sovereign immunity pursuant to Article V, § 20 of the Arkansas Constitution.

2. Defendants argue that Act 1096 does not violate the Contracts Clause of the Arkansas Constitution (Article II, § 17) as alleged by Plaintiffs.
3. Defendants argue that Plaintiffs' facial challenge to the constitutionality of Act 1096 on freedom of speech, freedom of the press, and right of access to governmental proceedings guaranteed by Article II, § 6 of the Arkansas Constitution fails to state facts upon which relief can be granted and, as such, is barred by the doctrine of sovereign immunity.
4. Defendants contend that Plaintiffs' claim that Act 1096 violates the procedural protections implied by Article II, § 9 of the Arkansas Constitution (which prohibits cruel or unusual punishment) by preventing Plaintiffs from obtaining information that would enable them to identify the suppliers of lethal injection drugs used for carrying out death sentences fails to state facts upon which relief can be granted and, as such, is barred by the doctrine of sovereign immunity.
5. Defendants contend that Plaintiffs' allegation that Act 1096 violates their (Plaintiffs') rights to procedural and substantive due process as guaranteed by Article II, § 8 of the Arkansas Constitution fails to state facts upon which relief can be granted and, as such, must be dismissed as a matter of law.
6. Defendants contend that Plaintiffs' allegation that Act 1096 violates the separation-of-powers mandate prescribed at Article IV, §§ 1 and 2 by delegating impermissible legislative discretion to Defendants and by usurpation of the judicial function lacks merit and must be dismissed as a matter of law.
7. Defendants contend that Plaintiffs' allegation that the provision of Act 1096 regarding use of midazolam during the lethal injection protocol violates their

(Plaintiffs') right to be free from cruel or unusual punishment as guaranteed by Article II, § Section 9 of the Arkansas Constitution is facially without merit and, as such, must be dismissed as a matter of law.

The Court has reviewed the motion to dismiss and supporting brief, amended complaint and supporting affidavits, and Plaintiffs' response to the motion to dismiss. The Court also heard oral arguments on October 7, 2015 concerning the dismissal motion, and is mindful that Defendants have scheduled executions beginning on October 21, 2015 based on the MOE protocol developed pursuant to Act 1096.

A motion to dismiss challenges the legal sufficiency of pleadings, claims, or defenses. In reviewing a motion to dismiss the duty of the trial court is to determine whether the complaint alleges facts that set forth colorable claims for relief. In doing so the court does not weigh the strength of any claims or the probative force of any factual allegations asserted in the complaint.

The law has long been settled in Arkansas that in reviewing a complaint in connection with a motion to dismiss on grounds of legal insufficiency the pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. To properly dismiss a complaint the trial court must find that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the non-moving party. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W. 2d 494 (1996).

In considering a motion for a judgment on the pleadings for failure to state facts upon which relief can be granted, the facts alleged in the complaint must be treated as true and viewed in the light most favorable to the party seeking relief. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). In considering a motion to dismiss under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief, and it is improper for the trial court to look beyond the complaint to decide a motion to dismiss unless it is treating the motion as one for summary judgment. *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992); *McAllister v. Forrest city St. Imp. Dist. No. 11*, 274 Ark. 372, 626 S.W.2d 194 (1981). A complaint that alleges facts to support a cause of action under more than one theory is not demurrable if a cause of action on at least one theory is stated. *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982).

The Sovereign Immunity Defenses

Defendants argue that Plaintiffs' claims are barred by the doctrine of sovereign immunity because the Amended Complaint does not state cognizable claim of a violation of the Arkansas Constitution. Article V, § 20 of the Arkansas Constitution states: "The State of Arkansas shall never be made defendant in any of her courts."

Defendants correctly argue that a complaint must allege facts, as opposed to conclusory allegations, showing that the pleader is entitled to relief. Pursuant to the standard previously mentioned for analyzing a motion to dismiss, the Court has analyzed the Amended Complaint in the following respects.

Motion to Dismiss Plaintiffs' Contract Clause Claim

Plaintiffs contend that Act 1096 violates Article II, § 17 of the Arkansas Constitution which states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed ..." In support of that contention, the complaint alleges that Act 1096 abrogates a written partial agreement executed on June 14, 2013 intended to "streamline" earlier challenges to a prior lethal injection statute.

The agreement states, in pertinent part, as follows:

...

WHEREAS, the plaintiffs in *Johnson v. Wilson*, Pulaski Co. Circuit Court, Case No. 60CV-13-1204, have filed a civil action challenging ADC's [Arkansas Department of Correction] decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act ("FOIA").

...

NOW, THEREFORE, the parties agree as follows:

...

6. The defendants agree that, within 10 business days after ADC adopts a new lethal-injection protocol, ADC will provide a copy of the new protocol to counsel for the plaintiffs. In addition, the defendants agree that, within 10 days after they obtain possession of any drugs that ADC intends to use in a lethal-injection procedure, the defendants will notify the plaintiffs' counsel that it [sic] has obtained the drugs and will specify which drugs have been obtained and disclose the packing slips, package inserts, and box labels received from the supplier.

Defendants contend that Plaintiffs' Contract Clause claim should be denied and urge the Court to find that the June 2013 agreement has expired and that it was void from its inception because it encroached on exercise of the police power reserved to the State. Neither contention justifies dismissal.

First, the Amended Complaint alleges that the Arkansas Department of Correction agreed to disclose "the packing slips, package inserts, and box labels

received from the supplier” of lethal injection drugs. The June 2013 agreement specified that civil litigation had been filed [*Johnson v. Wilson*, Pul. Cir. No. CV 13-1204] to challenge “ADC’s decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act (“FOIA”). Paragraph 5 of the June 2013 agreement recites that “[T]he plaintiffs in *Johnson v. Wilson*, 60CV-13-1204, agree to request that the Court enter a final order of dismissal of all claims that were asserted in that case. The plaintiffs also agree to dismiss or withdraw their notice of appeal in that case.”

Moreover, the Amended Complaint alleges at Paragraph 16 that “Plaintiffs Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, Kenneth Williams, and Don Davis are all parties to the settlement agreement/contract consummated on June 14, 2013.” Paragraph 18 of the Amended Complaint alleges that Ray Hobbs, then ADC Director, was also a party to the June 2013 agreement. Paragraph 19 of the Amended Complaint alleges that Defendant ADC “was a party to the settlement agreement/contract consummated on June 14, 2013.”

The Amended Complaint alleges at Paragraph 44 that Act 1096 contains a provision (§ 2(i)2) which states:

The department shall keep confidential all information that may identify or lead to the identification of: ... (B) The entities and parties who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section [which pertains to the lethal-injection drugs authorized for execution of capital punishment], medical supplies, or medical equipment for the execution process.

At Paragraph 45, the Amended Complaint alleges that “ADC has interpreted this provision to allow it to keep secret not only the direct suppliers of the drugs but also the ultimate manufacturers of the drugs.”

The Amended Complaint alleges at Paragraph 42 that “about 12 to 18 months after the parties entered into a contract requiring the ADC to disclose the names and addresses of producers/suppliers of their drugs, the ADC and its attorneys at the Arkansas Attorney General’s Office began drafting and lobbying for passage of legislation that would abrogate the contract.” As previously mentioned, Paragraphs 44 and 45 of the Amended Complaint allege that Act 1096 is the legislation which ADC contends allows it to refuse to disclose the identities of the lethal-injection drugs suppliers/manufacturers.

The law has been settled in Arkansas for decades that “whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligations.” *Scougale v. Page*, 194 Ark. 280, 106 S.W.2d 1023 (1937) Plaintiffs have alleged specific facts regarding a June 14, 2013 agreement with Defendants pertaining to disclosure of the information sought by the instant lawsuit. Plaintiffs have identified specific provisions of Act 1096 which they contend “abrogates or lessens the means of enforcement” of the June 14, 2013 agreement. Those allegations are quite sufficient to state a claim for violation of Article II, § 17 of the Arkansas Constitution and withstand Defendants’ sovereign immunity dismissal motion as to that claim.

Defendants insist that Act 1096 does not substantially impair any rights Plaintiffs claim under the 2013 agreement and maintain that Act 1096 is constitutional “because it is reasonable and necessary to serve an important public purpose” (October 5, 2015 Motion to Dismiss Amended Complaint, p. 2). However, Act 1096 directs the ADC to maintain as confidential all information that may identify or lead to the identification of the entities and persons who compound, test, sell, or supply the drug or drugs used in

the lethal-injection protocol. Act 1096 also directs the ADC to not disclose that information in litigation without first applying to the court for a protective order regarding disclosure. Act 1096 directs the ADC to only disclose package inserts and labels for lethal-injection drugs approved by the federal Food and Drug Administration (FDA), reports from independent test laboratories, and the ADC procedure for administering the lethal-injection drugs (including the contents of the lethal-injection drug box) only if information that might identify the compounding pharmacy, testing laboratory, seller, or supplier of the lethal-injection drugs is redacted and maintained as confidential.

The Amended Complaint plainly alleges, as fact, that the information now shielded from disclosure by Act 1096 was contemplated by the June 14, 2013 agreement that settled Plaintiffs' lawsuit against Defendants. Plaintiffs alleged in their original complaint filed in the instant lawsuit that "[h]istorically, information about supplies and suppliers used for executions has been available to the public and the press." See, Plaintiffs' June 29, 2015 Complaint, paragraph 77, p. 24. The Amended Complaint alleges that when counsel for Defendants notified counsel for Plaintiffs on July 10, 2015 that the ADC had purchased midazolam, vecuronium bromide, and potassium chloride for lethal injections that notification did not disclose the "package slips" that would have identified the proximate supplier of those drugs as would have been required by Paragraph 6 of the settlement agreement and that Defendants have not disclosed any "package slips," "box labels received from the supplier (which would have identified the manufacturer, compounder, or proximate supplier of the drugs), and that counsel for Defendants produced redacted package inserts for the lethal injection drugs with information that would have identified the manufacturers or compounders of

those drugs. (Amended Complaint, paragraph 68). Those allegations are sufficient to state a claim for breach of Paragraph 6 in Plaintiffs' June 14, 2013 settlement agreement with Defendants. The fact that Act 1096 contains an emergency clause and was enacted with legislative findings that it is necessary does not render Plaintiffs' Contract Clause claim legally insufficient. The comment stated by Justice Samuel Alito, writing for the majority in the recent U.S. Supreme Court decision of *Glossip v. Gross*, No. 14-7955, 2015 WL 2473454 (June 29, 2015) that "anti-death-penalty advocates pressured pharmaceutical companies to supply the drugs used to carry out death sentences" also does not affect the legal sufficiency of the facts alleged by Plaintiffs. Defendants have obviously been able to obtain lethal-injection drugs for execution of death sentences and plainly do not want to identify the supplier(s) of those drugs.

Whether identifying the supplier(s) will hinder Defendants' ability to perform capital executions is a matter to be established by proof, not resolved by a motion to dismiss at the earliest stage of litigation. Plaintiffs correctly observe that the disagreement over whether disclosure will hinder Defendants' ability to carry out executions by lethal injection so as to make the non-disclosure requirement in Act 1096 reasonable and necessary is a matter that demands discovery and trial. The issue now before the Court is not whether Plaintiffs are entitled to judgment, but whether they have alleged facts sufficient to state a claim for relief on their claim that Act 1096 violates Article II, § 17 of the Arkansas Constitution. They have quite clearly done so. Accordingly, Defendants' motion to dismiss Plaintiffs' Article II, § 17 claim is DENIED.

Motion to Dismiss Plaintiffs' Article II, § 6 Claim

Plaintiffs' claim that Act 1096 violates their rights to freedom of speech and the press and their right of access to governmental proceedings guaranteed by Article II, § 6 of the Arkansas Constitution. Defendants acknowledge that the state constitution "guarantees a qualified right of access to governmental proceedings that (1) have historically been open to the press and general public, and when (2) public access plays a significant factor in the functioning of the process at issue and the government as a whole, citing *Ark. Television Co. v. Tedder*, 281 Ark. 152, 154, 662 S.W.2d 174, 175 (1983) (Defendant's Brief in support of Motion to Dismiss, p. 25). However, Defendants rely on the decision of the United States Supreme Court in *Houchins v. KQED, Inc.*, 438 U.S.1 (1978) and decisions of the Court of Appeals for the Eighth Circuit in *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004) and the recent decision in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) in asserting that, as a matter of law, Plaintiffs "have no constitutional right to information or documents that may identify entities and persons who compound, test, sell, or supply drugs for the execution process." (Defendants' Brief in support of Motion to Dismiss, p. 28).

Defendants contend that Plaintiffs fail to state facts "demonstrating a qualified right of public access to information regarding the source of drugs to be used in their executions" and that "even if Arkansas at one time 'voluntarily disclosed such information, it does not a tradition make' sufficient to ... conclude that public access to information about lethal drug suppliers would enhance the functioning of the death penalty in Arkansas." (Defendants' Brief, p. 29). Thus, Defendants assert that Article II, § 6 of the Arkansas Constitution guarantees only that Plaintiffs "are entitled to

information about the method of execution as well as the identification of the drug or drugs to be used in the lethal-injection procedure and, in the case of FDA-approved drugs, the redacted package inserts and labels.” (Defendants’ Brief, p. 30).

However, Defendants’ arguments do not establish that Plaintiffs’ Article II, § 9 claim is legally insufficient. Plaintiffs allege that information about the identity of the suppliers of lethal injection drugs was available to the public and media before Act 1096 was enacted, that counsel for Plaintiffs requested that information, and that the ADC disclosed it (See, June 29, 2015 Complaint, Paragraphs 24, 25, 26, and 27). Those allegations contradict Defendants’ contention that Plaintiffs fail to state facts demonstrating a history of disclosure or a qualified right of access to disclosure about the source of lethal injection drugs.

Whether Defendants will be able to obtain lethal injection drugs if required to identify the supplier(s) of those drugs is a question of fact, not a matter of law. The cases Defendants cite in support of their motion to dismiss Plaintiffs’ Article II, § 6 claim were resolved after trial on the merits, not at the pleading stage. The Court holds that Plaintiffs have alleged facts sufficient to state a claim for violation of Article II, § 6 of the Arkansas Constitution. Defendants’ motion to dismiss their claim is DENIED.

Motion to Dismiss Plaintiff’s Procedural and Substantive Due Process Claims

Plaintiffs allege that Act 1096 violates procedural protections implicit in Article II, § 8 of the Arkansas Constitution, the state equivalent to the Eighth Amendment to the U.S. Constitution that prohibits “cruel and unusual punishment,” by denying them access to information needed to identify the suppliers of lethal injection drugs and thus discover the facts required to prove a violation of Article II, § 8, (See Amended

Complaint, Paragraphs 118 and 119). Plaintiffs also allege that Act 1096 violates their rights to substantive due process by contending that “the lethal injection procedure that the ADC will purposely or knowingly employ ... entails objectively unreasonable risks of substantial and unnecessary pain and suffering, unbearable anxiety, and/or a lingering death.” (See Amended Complaint, Paragraph 125).

Defendants challenge the legal sufficiency of the procedural due process claim as a matter of law by arguing (a) that it fails to allege an actual injury caused by lack of access to information about the suppliers of lethal injection drugs and (b) that the procedural due process claim fails to allege facts showing that Plaintiffs have been deprived any interest protected by the Due Process Clause. Defendants challenge the legal sufficiency of the substantive due process claim as a matter of law and contend that (a) it fails to allege facts concerning a “known and available alternative method of execution that entails a lesser risk of pain,” (b) that Plaintiffs fail to allege facts showing that the lethal injection protocol prescribed by Act 1096 “entails a substantial risk of severe pain,” and (c) that Article II, § 9 of the Arkansas Constitution (the Arkansas counterpart to the Eighth Amendment to the U.S. Constitution) is the proper standard by which Act 1096 must be judged, not Article II, § 8 (the due process clause).

Plaintiffs’ procedural due process challenge to Act 1096, in effect, amounts to an assertion that the right to challenge the method of execution prescribed by Act 1096 is meaningless without the ability to discover facts that prove the method of execution, including non-disclosure of the identity of lethal injection drug suppliers, will subject them to the substantial risk of suffering tortured and inhumane deaths. It is beyond argument that persons sentenced to death have a right to be free from torture and

inhumane treatment during execution of their death sentences. *In re Lombardi*, 741 F.3d 888, (8th Cir. 2014), *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008), *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010). Moreover, courts have long recognized that fundamental fairness demands that persons threatened with deprivation of recognized liberty interests are entitled to a meaningful proceeding in which to adjudicate their claims. *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 252, 161 S.W.3d 803, 809 (2004), *Watkins v. State*, 2010 Ark. 156, ¶ 5, 362 S.W.3d 910, 915 (2010). The constitutional requirement of procedural due process exists to guarantee that fundamental rights are adjudicated in a fair manner, not by a perfunctory exercise.

Plaintiffs contend Act 1096 deprives them of the fundamental right to discover crucial facts needed to prove their allegation that the method of execution protocol prescribed by the statute is cruel or unusual in violation of Article II, § 9 of the Arkansas Constitution. Defendants are mistaken in contending that, as a matter of law, Plaintiffs have no right to discover information needed to prove civil claims that assert constitutional violations. The notion that Plaintiffs' Article II, § 9 cruel-or-unusual punishment claims can be meaningfully adjudicated without providing Plaintiffs access to discovery of facts needed to prove their claims flies in the face of sound trial advocacy, not to mention common sense.

By alleging that Act 1096 prevents disclosure of the identity of the supplier(s) of lethal injection drugs that will be used in their executions, and thereby prevents them from obtaining the proof that their executions carry the substantial risk of being unnecessarily painful, if not tortured, Plaintiffs have pled facts sufficient to state a claim

that Act 1096 violates Article II, § 8 of the Arkansas Constitution. Defendants' motion to dismiss Plaintiffs' Article II, § 8 claims are DENIED.

Similarly, Defendants' dismissal motion as to Plaintiffs' substantive due process claim that the method of execution protocol prescribed by Act 1096 violates Article II, § 8 is DENIED. The law does not prevent Plaintiffs from alleging alternative causes of action. They are only required, at this stage of the litigation, to allege sufficient facts to establish claims for relief. By alleging that the method of execution protocol and non-disclosure provision of Act 1096 pose a substantial risk that they will suffer unnecessarily painful deaths, if not torturous deaths, Plaintiffs have satisfied their pleading burden.

Motion to Dismiss Plaintiffs' Separation-of-Powers Claim

Defendants also urge the Court to dismiss, with prejudice, Plaintiffs' claim that Act 1096 violates Article IV of the Arkansas Constitution by excessively delegating legislative discretion to the ADC and by impairing the judicial function. Article IV provides, in pertinent part, as follows:

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Plaintiffs allege that Act 1096 violates Article IV. First, Plaintiffs claim that Act 1096 excessively delegates to the ADC "leeway to choose between, on one end, a barbiturate-only execution procedure and, on the other end, a completely different execution procedure that omits barbiturate drugs entirely" [and authorizes administration

of midazolam, a drug Plaintiffs claim will not render them unconscious or insensate to pain when the second and third drugs are administered]. (See Amended Complaint, Paragraph 130(a)(iii)). Plaintiffs also allege that Act 1096 “provides the ADC with unfettered discretion” by (a) allowing the ADC to choose a barbiturate-only procedure, (b) by allowing the ADC to “choose between pure, FDA-approved manufactured drugs and compounded drugs that are likely to cause serious pain and suffering,” (c) by granting the ADC discretion “to select the members of the execution team without any reasonable guidelines and appropriate standards to provide guidance about who should be chosen,” and (d) by giving the ADC “unfettered discretion about whether and how members of the execution team should be trained.” Plaintiffs also allege that Act 1096 intrudes into the judicial function by imposing a secrecy requirement about the identity of the suppliers of lethal injection drugs related to Plaintiffs’ claim that the lethal injection protocol and drugs prescribed by the Act violate their right to be free from cruel or unusual punishment.

The Court holds that Defendants’ challenges to the legislative aspects of the separation-of-powers claims asserted in the Amended Complaint are controlled by the holding in *Hobbs v. McGehee*, 2015 Ark. 116. In that decision, the Arkansas Supreme Court reversed this Court’s decision that Act 139 of 2013 violated the separation-of-powers doctrine found at Article IV of the Arkansas Constitution because it permitted the ADC to select any chemical within a class of chemicals known as barbiturates to execute a sentence of death by lethal injection. The Supreme Court held that Act 139 was constitutional because it provided guidance concerning “(1) the method the ADC must use, intravenous injection; (2) the type or class of drug the ADC must use, a

barbiturate; and (3) the amount of the drug the ADC must use, an amount sufficient to cause death” in addition to other guidance. The Supreme Court reversed this Court’s holding that Act 139 violated the separation-of-powers doctrine because it did not specify the training and qualifications of the personnel involved with the lethal-injection procedure.

The holding in *Hobbs v. McGehee*, *supra*, is controlling on the separation-of-powers allegation Plaintiffs now assert concerning Act 1096 as to legislative delegation of authority to the ADC concerning the lethal injection protocol. Therefore, Defendants’ motion to dismiss that aspect of Plaintiffs’ separation-of-powers claim is GRANTED.

Defendants also argue that Act 1096 “does not delegate any judicial functions to ADC, nor does the Act make any information absolutely confidential and shielded from disclosure in judicial proceedings” (Defendants’ Brief in Support of Motion to Dismiss, p. 38). However, Plaintiffs’ separation-of-powers claim is legally sufficient to the extent that it is based on allegations that Act 1096 intrudes into the judicial function by imposing a secrecy requirement about the identity of the suppliers of lethal injection drugs related to Plaintiffs’ claim that the lethal injection protocol and drugs prescribed by the Act violate their right to be free from cruel or unusual punishment.

Whether, and to what extent, information may be relevant to a claim that challenged governmental conduct constitutes a constitutional violation are judicial questions because the responsibility for receiving and adjudicating claims of constitutional violations belongs to courts rather than legislative bodies. Plaintiffs’ allegation that Act 1096 requires the ADC to seek a protective order before disclosing information that identifies the manufacturers, suppliers, testing laboratories, and test

results related to the drugs used during lethal injections is sufficient to overcome Defendants' facial challenges to Plaintiffs' separation-of-powers claims. Accordingly, Defendants' motion to dismiss the judicial intrusion aspect of Plaintiffs' separation-of-powers claims is DENIED.

Motion to Dismiss Plaintiffs' Article II, § 9 Claim

Lastly, Defendants contend that Plaintiffs' claim that Act 1096 and the ADC lethal injection procedure it authorizes violate the ban on cruel or unusual punishments stated at Article II, § 9 of the Arkansas Constitution is without merit. At Paragraph 132, the Amended Complaint alleges that the Act's provision allowing ADC to use compounded drugs exposes Plaintiffs "to an objectively intolerable risk of serious harm due to the high likelihood that such drugs will be counterfeited, adulterated, contaminated, super-potent, or sub-potent, contain incompletely dissolved components, and/or have an unbalanced pH." See, Amended Complaint, Paragraph 132(a). Plaintiffs also allege that "the ADC's three-drug Lethal Injection Procedure will cause extreme pain and suffering," asserting that "[m]idazolam cannot, at any dosage, render a person unconscious and insensate to pain and suffering," and that "the second and third drugs in the listed protocol [vecuronium bromide and potassium chloride, respectively] indisputably cause extreme pain and suffering." See, Amended Complaint, Paragraph 132(b). Plaintiffs further allege that the provision in Act 1096 allowing the ADC to use electrocution if lethal injection is held constitutionally impermissible, exposes them to "an objectively intolerable risk of serious harm." Each of these allegations, standing alone, is sufficient to state a claim that Act 1096 violates the ban against cruel or unusual punishments. It remains to be seen whether Plaintiffs can marshal sufficient

evidence to prevail on any of them. However, that is not the issue at this stage of the litigation. Accordingly, Defendants' motion to dismiss Plaintiffs' Article II, § 9 claims must be DENIED.

Conclusion

The Court hereby holds that the Amended Complaint is legally sufficient to assert Plaintiffs' claims that the non-disclosure provision in Act 1096 violates Article II, § 17 of the Arkansas Constitution which prohibits legislation that impairs contractual obligations, specifically the June 14, 2013 agreement between counsel for Plaintiffs and Defendants. Defendants' motion to dismiss Plaintiffs' Article II, § 17 claim is DENIED.

Furthermore, the Court holds that Plaintiffs have made sufficient factual allegations to make out claims that Act 1096 violates Article II, § 6 to the extent that Plaintiffs allege that Act 1096 prohibits identification of the persons or entities who manufacture, compound, test, sell, or supply the lethal injection drugs to be administered for their executions. Defendants' motion to dismiss Plaintiffs' Article II, § 6 claim is DENIED.

The Court also holds that Plaintiffs have made sufficient factual allegations to set forth claims that Act 1096 violates their rights to procedural due process by withholding information that identifies the suppliers of lethal injection drugs in violation of Article II, § 8 of the Arkansas Constitution. Defendants' motion to dismiss Plaintiffs' procedural due process claim is DENIED.

The Court holds that by alleging that the lethal injection procedure Defendants will follow pursuant to Act 1096 will entail objectively unreasonable risks of substantial and unnecessary pain and suffering, unbearable anxiety, and/or lingering death,

Plaintiffs have sufficiently pled facts to establish their claim that Act 1096 violates their rights to substantive due process protected by Article II, § 8 of the Arkansas Constitution, and their rights to not be subjected to cruel or unusual punishment pursuant to Article II, § 9 of the Arkansas Constitution. Defendants' motions to dismiss Plaintiffs' substantive due process and cruel-or-unusual punishment claims are DENIED.

Defendants have pled sufficient factual allegations to assert their claims that Act 1096 violates the separation-of-powers doctrine enshrined at Article IV of the Arkansas Constitution insofar as Plaintiffs allege that Act 1096 encroaches on the judicial function. In that respect, Defendants' motion to dismiss Plaintiffs' separation-of-powers claims is DENIED.

However, Plaintiffs' claim that Act 1096 violates the separation-of-powers doctrine by legislatively delegating authority to the ADC to select the lethal injection drugs and establish the selection criteria and training requirements for members of the execution team is controlled by the holding in *Hobbs v. McGehee*, *supra*, decided earlier this year by the Arkansas Supreme Court. Defendants' motion to dismiss the legislative delegation of authority aspect of Plaintiffs' separation-of-powers challenge to Act 1096 is GRANTED.

ORDERED this 9th day of October, 2015.


CIRCUIT JUDGE