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Richard E. Glossip v. Kevin J. Gross

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No. 14-7955

IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, *et al.*,

Petitioners,

v.

KEVIN J. GROSS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE LOUIS STEIN CENTER FOR LAW AND ETHICS AT FORDHAM UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE* [1]

The Louis Stein Center for Law and Ethics is based at Fordham University School of Law and sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including the ethical and historical dimensions of the death penalty and execution methods. The Stein Center has submitted *amicus* briefs in two prior cases in which the Court has been asked to examine methods of execution: *Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed as improvidently granted*, 528 U.S. 1133 (2000), which the Court had granted to consider whether electrocution violated the Eighth Amendment's Cruel and Unusual Punishments Clause, and *Baze v. Rees*, 553 U.S. 35 (2008), in which the Court examined the constitutionality of lethal injection as implemented in Kentucky and in which the Court cited the Stein Center brief.

Implementation of lethal injection as a method of execution implicates ethical questions important to the Stein Center. The evolution of execution methods in the United States generally suggests a public consensus opposed to the infliction of severe pain and

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

suffering in the course of executing individuals sentenced to death. At the same time, it is doubtful whether in practice execution methods achieve that goal. In the context of lethal injection, there are serious concerns whether prison officials, legislators, and courts have responded to the risks associated with the implementation of lethal injection in an ethical manner.

INTRODUCTION AND SUMMARY OF ARGUMENT

The landscape of the implementation of lethal injection has changed greatly in the seven years since this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008). During this time, States have moved away from the three-drug protocol synonymous with lethal injection since its adoption—a protocol to which States adhered for decades. Such changes have been implemented not by state legislatures, but by prison officials charged with carrying out lethal injection executions. This brief analyzes how the history of execution methods informs the Court's analysis of Petitioners' challenge to Oklahoma's most recent revision to its lethal injection protocol.

(1) As the Court recognized in *Baze*, the history of execution methods in the United States demonstrates that States moved toward new methods in an effort to execute inmates in a humane manner free from unnecessary pain. Historically, laws switching execution methods came about as society became more aware of the risks associated with a certain execution method, *e.g.*, when electrocutions produced horrific scenes of burning flesh, or when lethal gas resulted in the slow asphyxiation in the gas chamber. Such legislative action meant this Court rarely had occasion

to examine the constitutionality of an execution method under the Eighth Amendment.

(2) When States adopted lethal injection as an execution method, the great majority of States left statutes purposefully vague as to the lethal injection procedure. Oklahoma developed a three-drug lethal injection protocol in 1977. That protocol, which nearly every lethal injection State and the federal government subsequently copied, lacked adequate medical or scientific basis. Notwithstanding the Court's decision in *Baze* approving the three-drug protocol, States have moved away from the original three-drug protocol in recent years. Such changes resulted not from deliberate evaluation of the merits of modified protocols or from legislative enactment, but from court decree or practical considerations.

(3) Because States delegate the details of lethal injection executions to prison officials, protocols are not subject to public scrutiny and oversight. On the one hand, this system leaves departments of corrections with the ability to create and implement alternatives to existing procedures. On the other hand, prison officials have continued to adopt protocols lacking sufficient scientific or medical basis. The responsibility for ensuring that executions do not risk unnecessary cruelty or lingering death thus lies with the courts. Judicial review of such protocols is necessary to ensure that administration of lethal injection comports with the Eighth Amendment.

ARGUMENT

I. HISTORICALLY, PUBLIC AWARENESS OF THE UNNECESSARY RISK OF PAIN AND SUFFERING OF A PRIOR EXECUTION METHOD HAS CAUSED STATE LEGISLATURES TO ADOPT A NEW METHOD.

As is well documented, the federal government and every State that has the death penalty employ lethal injection as the method of execution. Prior to lethal injection, States switched methods when pre-existing methods were shown in practice to embody a high risk of painful or lingering death. In large part, the coordinated move from one execution method to another took place by legislative dictate rather than judicial decree. *See generally* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002). With the exception of a few States that permitted use of the firing squad, the general historical trend in the United States led to the transition from hanging to electrocution, which gave way briefly to reliance on the gas chamber, before settling on lethal injection.

Hanging. In the mid-nineteenth century, States typically favored the use of hanging as the method of execution, while three States allowed for execution by firing squad.[2] By 1853, hanging had become "the

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[2] No State currently relies on the firing squad as the primary method of execution and only Utah and Oklahoma still authorize the firing squad as an alternative to lethal injection under some limited circumstances. *See* Tracy L. Snell, *Capital Punishment, 2013 – Statistical Tables*, Bureau of Justice Statistics Bull. No.

nearly universal form of execution in the United States and 48 States imposed death by this method." *Campbell v. Wood*, 511 U.S. 1119, 114 S. Ct. 2125, 2125 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (internal citation and quotation marks omitted). The method required "no equipment beyond a rope and a high structure," and "no expertise beyond the ability to tie a knot." STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 44 (2003). Despite the seeming simplicity of the method, hanging had begun to fall out of favor by the late 1800s, after the public witnessed gruesomely botched hangings that involved decapitations and slow strangulations.[3] Societal awareness of the "[b]ungled hangings [that] often caused intense pain and on occasion failed to kill" led legislatures to search for a more humane method of execution. BANNER, *supra*, at 175; *In re Kemmler*, 136 U.S. 436, 444 (1890) (describing the quest to determine "'whether the science of the present day'" could find a "less barbarous manner" of execution than hanging) (quotation marks omitted).

By 1994, only two States employed hanging as an execution method. *See Campbell v. Wood*, 18 F.3d 662,

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NCJ 248448, U.S. BUREAU OF JUSTICE STATISTICS, at 4 & 7 tbl. 2 (Dec. 19, 2014), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5156; Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 337 (2003) (noting the historical use of the firing squad but that only a few States had statutes permitting its use). In *Wilkerson v. Utah,* 99 U.S. 130 (1878), the Court held that death by firing squad did not rank among the "cruel and unusual punishments" banned by the Eighth Amendment, but the Court did so without "defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." 99 U.S. at 134-36.

[3] BANNER, *supra*, at 172-75.

app. B at 726-29 (9th Cir. 1994) (en banc). In that year, this Court declined to review a decision of the United States Court of Appeals for the Ninth Circuit that held that the State of Washington's use of hanging as a method of execution did not violate the Eighth Amendment. *Campbell v. Wood*, 511 U.S. 1119 (1994). In reaching this conclusion, the Ninth Circuit relied upon the specific protocol Washington had adopted, which was based on scientific study and expert analysis undertaken to minimize the risk of an inhumane death by hanging. *Campbell*, 18 F. 3d at 687. In spite of the judicial position on hanging, greater public awareness and deliberation as to the continuing risk of unnecessary pain and brutality of hanging caused Washington State to adopt lethal injection as its default method of execution in 1996.[4]

Electrocution. Although Washington was slow to move away from hanging (a pace likely explained in part by the fact that Washington did not execute anyone for three decades preceding 1993),[5] many States had moved to a new method of execution at the turn of the century. By 1915, twelve States had switched from hanging to electrocution, in reliance upon the "belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). Throughout the early part of the twentieth century, the vast majority of States turned to the electric chair as the preferred method of execution. *See Campbell*, 18 F.3d at app. B 726-29; Denno, 63 OHIO ST. L.J. at 130 tbl. 2.

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[4] Wash. Rev. Code Ann. § 10.95.180(1) (requiring lethal injection unless the inmate elects hanging); *see also* Denno, 63 OHIO ST. L.J. at app. 2 at 205-06.

[5] *Persons Executed Since 1904 in Washington State*, WASH. STATE DEP'T OF CORRECTIONS, http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp (last visited Mar. 9, 2015).

The change from hanging to electrocution began in New York in the late 1800s, when members of the New York legislature began investigating the use of electricity in executions. BANNER, *supra*, at 178; *In re Kemmler*, 136 U.S. at 444. At that time, the electric chair was viewed as a modern method of execution and, through the use of technology, able to cause a quick and painless death. *See* NEW YORK (STATE) COMMISSION ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES, 80 (1888).

New York adopted electrocution on the premise that it presented a more humane method of execution even though no inmate had ever been executed by the electric chair and thus New York lacked any evidence of how the method would work in practice. Denno, 63 OHIO ST. L.J. at 71-74; *see generally* Deborah W. Denno, *Is Electrocution An Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551 (1994). Indeed, the electric chair did not even exist at the time New York switched to the method and "[p]rison officials . . . faced the task of acquiring machinery that had not yet been designed." BANNER, *supra*, at 181; *see id.* at 182.

In 1890, this Court permitted the first execution by electric chair to proceed, relying on New York's expressed motivation of finding a more humane method of execution. *In re Kemmler*, 136 U.S. at 447-49. New York's execution of Kemmler in 1890 was plagued with serious problems, but that did not deter other States from adopting the method. BANNER, *supra*, at 186, 189; Denno, 63 OHIO ST. L.J. at 71-74 & n.55. By 1930, more than half of the then-active death

penalty States employed the electric chair. *See* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 15 (1991); Denno, 63 OHIO ST. L.J. at 130 tbl. 2. As States continued to copy New York's method, "prison officials from the later states to adopt the chair traveled to the earlier states to learn how to construct and operate the necessary equipment." BANNER, *supra*, at 190. But the problems of New York's first-time use of the electric chair persisted, with widely reported accounts of gruesomely botched electrocutions over the years. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional*?, 82 IOWA L. REV. 319, app. 2.A at 413 (1997) (describing examples of botched executions); BANNER, *supra*, at 192-193.

Following a particularly gruesome electrocution in Florida, this Court agreed to examine the constitutionality of electrocution in the State. *See Bryan v. Moore*, 528 U.S. 960 (1999). By that time, public awareness of the risk that electrocutions would cause unnecessary pain and lingering death had reached a high point.[6] In early 2000, the Florida legislature altered its execution method to permit an inmate to choose between electrocution and lethal injection. *See* Fla. Stat. Ann. § 922.105; 2000 Fla. Sess. Law Serv. Ch. 2000-2 (West). As a result, the Court dismissed the writ as improvidently granted. *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing writ in light of "recent amendments" to the Florida statute).

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[6] *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 63 (2007) (describing the 1999 botched execution of Allen Lee Davis, who suffered deep burns and bleeding, color photographs of which were viewed by millions of people on the Florida Supreme Court's website); Denno, 63 OHIO ST. L.J. at 78-79.

In the following years, two state courts ruled electrocution unconstitutional under state constitutions. In 2001, Georgia held electrocution unconstitutional, explaining "whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society." *Dawson v. State*, 554 S.E.2d 137, 139 (Ga. 2001) (internal quotation marks omitted). The Georgia legislature had abolished electrocution as a method of execution for capital offenses committed after May 1, 2000, "reflect[ing] societal consensus that the 'science of the present day' has provided a less painful, less barbarous means for taking the life of condemned prisoners." *Id.* at 144 (quoting *In re Kemmler*, 136 U.S. at 444). The Nebraska Supreme Court held electrocution unconstitutional under the Nebraska State Constitution in 2008, reasoning that "[e]lectrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man." *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008). The Nebraska Supreme Court further explained that States that already had abolished electrocution through legislative process "have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty." *Id.*

Lethal Gas. Not all States initially turned to electrocution as an alternative to hanging, however. Early problems with electrocution together with the continued repugnant nature of hangings caused some States to experiment with the gas chamber. Nevada, which had never adopted electrocution, was the first State to authorize lethal gas in 1921. Denno, 63 OHIO

ST. L.J. at 83. At the time, Nevada's deputy attorney general persuaded two state legislators that the method would be more humane than hanging or the firing squad. BANNER, *supra*, at 196. "Within a week, apparently without any debate in either house of the legislature, both houses passed a bill providing for execution by lethal gas." *Id.* The legislature explained that the switch to lethal gas "sought to provide a method of inflicting the death penalty in the most humane manner known to modern science." *State v. Gee Jon*, 211 P. 676, 682 (Nev. 1923). By 1955, ten additional States had adopted lethal gas. Denno, 63 OHIO ST. L.J. at 83.

Nevada initially sought to rely on lethal gas because it was the method used in the relatively peaceful killings of animals. *See Gee Jon,* 211 P. at 681. But, again, prison officials were tasked with figuring out the details of exactly how to carry out the method on human beings. BANNER, *supra*, at 197. As with prior execution methods, the first lethal gas execution did not go as planned and the hydrocyanic acid prison officials had chosen to use pooled on the floor of the gas chamber. *Id.* at 197-98. Over time, it became clear that inmates did not die peacefully by breathing in lethal gas while sleeping. Death lingered and inmates often urinated on themselves, moaned, twitched, and painfully convulsed for minutes before finally dying.[7] In addition, the gas chamber carried with it lasting association with the abhorrent mass killings in Nazi Germany. Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual*

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[7] *See, e.g.*, *Gray v. Lucas*, 710 F.2d 1048, 1058-59 (5th Cir. 1983); *see also* Denno, 82 IOWA L. REV. at app. 2.B at 425.

Clause of the Eighth Amendment, 74 OR. L. REV. 995, 1007-08 (1995). The gas chamber fell out of favor.

In 1996, the Ninth Circuit ruled that execution by lethal gas under California's protocol constituted cruel and unusual punishment in violation of the Eighth Amendment and deemed the method unconstitutional. *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *cert. granted, judgment vacated*, 519 U.S. 918 (1996). The Ninth Circuit cited to the district court's findings that the evidence indicated inmates would experience extreme pain. *Id.* at 308-09. This Court avoided consideration of the constitutionality of the method when California (which allowed for a choice between lethal gas and lethal injection) amended its method of execution statute to set lethal injection as the default method unless the inmate chose lethal gas; the Ninth Circuit agreed on remand that the inmate no longer had standing to challenge the constitutionality of California's method of execution. *See Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998). In *Stewart v. LaGrand*, 526 U.S. 115 (1999), the Court held that a death row inmate had waived his claim that the Eighth Amendment prohibited his execution by lethal gas because the inmate specifically had chosen to be executed by lethal gas rather than lethal injection. 526 U.S. at 118-19.

II. IN SWITCHING TO LETHAL INJECTION, LEGISLATURES DELEGATED IMPLEMENTATION OF THE METHOD TO PRISON OFFICIALS WHO ADOPTED PROCEDURES WITHOUT MEDICAL STUDY OR MEANINGFUL ANALYSIS.

Public scrutiny of methods of execution intensified in the 1970s following the end of a nine-year execution hiatus while this Court considered the constitutionality of the death penalty. At that time, States turned to lethal injection, with Oklahoma leading the way. While Oklahoma touted the humaneness of the method, no evidence existed to support this conclusion. Oklahoma delegated the actual details of implementing the method to its department of corrections, which devised a three-drug protocol. States and the federal government followed suit in adopting lethal injection as a method of execution, in delegating responsibility for the development of specific protocols to prison officials, and in utilizing the same three-drug protocol. While the original three-drug protocol was commonplace for decades, more States have modified the drugs used in their execution protocols in the past seven years than at any point since the method's adoption.

A. The Development Of Lethal Injection Protocols Lacked Any Reasoned Consideration.

1. Oklahoma's Adoption Of Lethal Injection

As this Court has recognized, "state legislatures began responding to public calls to reexamine electrocution as a means of ensuring a humane death" following the Court's decision in *Gregg v. Georgia*, 428

U.S. 153 (1976). *Baze*, 553 U.S. at 41-42 (citing BANNER, *supra*, at 192-93, 296-97). Oklahoma, facing the need to refurbish its rotting electric chair, turned to lethal injection.[8] Oklahoma introduced the first lethal injection bill in 1977. *Baze*, 553 U.S. at 41-42; BANNER, *supra*, at 297; *Beardslee v. Woodford*, 395 F.3d 1064, 1073 (9th Cir. 2005). Two Oklahoma state legislators, State Representative Bill Wiseman and State Senator Bill Dawson, spearheaded the move toward lethal injection, driven by the inhumanity of electrocution and the costs associated with it.[9]

Because the Oklahoma Medical Association refused to assist with devising the new method of execution, Wiseman and Dawson consulted with A. Jay Chapman, Oklahoma's chief medical examiner. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled The Death Penalty,* 76 FORDHAM L. REV. 49, 65-66 (2007). Chapman agreed to assist the legislators even though he admitted he "'was an expert in dead bodies but not an expert in getting them that way.'" *Id*. at 66. Chapman quickly proposed use of an intravenous drip of "an ultra-short-acting barbiturate," which would cause unconsciousness, "in combination with a chemical paralytic," to paralyze

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[8] BANNER, *supra*, at 296. Oklahoma had adopted lethal gas as an execution method in 1951, but provided that electrocution would be used until the State could build a gas chamber, which it never did. *See* Denno, 63 OHIO ST. L.J. at app. 2 at 201 n.121. Construction of the gas chamber was estimated to cost at least $250,000 and fixing the State's electric chair was estimated to cost $50,000. Denno, 76 FORDHAM L. REV. at 71.

[9] *See* Denno, 76 FORDHAM L. REV. at 65-66, 71; Tim Barker, *Author of Lethal Injection Bill Recalls His Motive*, TULSA WORLD, Sept. 7, 1990, at A1, *available at* http://www.tulsaworld.com/archives/author-of-lethal-injection-bill-recalls-his-motive/article_90c3f8c3-22c5-5cd7-8d0c-42fb17378968.html.

the body's muscles. *Id*. at 66-67; *see also* William J. Wiseman, *Confessions of a Former Legislator*, CHRISTIAN CENTURY, June 20-27, 2001, at 6. According to Chapman, he specifically suggested to the legislators certain drugs for use: sodium thiopental as the ultra-short-acting barbiturate and chloral hydrate as the paralytic agent. Denno, 76 FORDHAM L. REV. at 67.

Dawson also sought input from Stanley Deutsch, the head of the Oklahoma Medical School's Anesthesiology Department, in a single phone call. *Id*. at 67-68; *see also Baze*, 553 U.S. at 42. After the call, Deutsch sent a letter recommending two types of drugs: an "ultra short acting barbiturate" and a "neuromuscular blocking drug." Denno, 76 FORDHAM L. REV. at 67.

The proposed bill in the Oklahoma legislature did not include specific drugs or doses based on the input of either Chapman or Deutsch. *Id.* No historical evidence suggests any further consultation with doctors or scientists, nor any study or consideration of any of available evidence concerning the risks and dangers of lethal injection. *Id*. at 65, 70.

The Oklahoma lethal injection bill introduced in early 1977 tracked Chapman's early formulation. An Act Relating to Criminal Procedure; Amending 22 O.S. 1971, Section 1014; and Specifying the Manner of Inflicting Punishment of Death; and Making Provisions Separable, S.B. 10, 36th Leg., 1st Sess. (Okla. 1977). The bill passed, and was signed into law on May 10, 1977, making Oklahoma the first state to authorize execution by lethal injection. Okla. Stat. Ann. tit. 22, § 1014.

The language included in Oklahoma's statute, however, was intentionally vague and delegated to prison officials authority to determine how to carry out

lethal injections. *Id.* Corrections officials had the responsibility for determining what drugs to use, what dosage to give, and who would administer the drugs and how. *See* Denno, 63 OHIO ST. L.J. at 68-69. Despite his admitted lack of expertise, Chapman again played a key role in assisting officials in developing the details of a lethal injection procedure. Denno, 76 FORDHAM L. REV. at 73-75. In light of his role as the medical examiner, it was perhaps unsurprising that Chapman was unconcerned with whether the specific protocol would inflict pain and suffering. Rather, when asked for the rationale behind his ultimate recommendation of specific drugs, he ridiculed the idea that "we should worry that these horses' patoots should have a bit of pain, awareness of anything." *Id.* at 74 n.151.

During Chapman's consultation with the department of corrections behind the scenes, the third drug, potassium chloride, was added to the two-drug combination. *Id.* at 74. Potassium chloride works in humans to stop the heart, and if an inmate is not sufficiently anesthetized before receiving the drug, it is undisputed that it will cause "a conscious inmate to suffer excruciating pain." *Baze*, 553 U.S. at 113 (Ginsburg, J., dissenting). Moreover, the second drug—the paralytic agent—would mask the expression of any pain. *See id.* at 71 (Stevens, J., concurring in the judgment); Denno, 76 FORDHAM L. REV. at 55-56; Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C.L. REV. 1367, 1377 (2014). In selecting these drugs at the time, prison officials in Oklahoma stated that "if and when they have to use the injection law, new and better drugs may be available." Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1357-60 (2014) (emphasis omitted).

2. Widespread Adoption Of The Three-Drug Protocol

Beginning immediately after Oklahoma adopted lethal injection, other States switched to the method, before the method ever had been used in an execution. *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment). Texas adopted lethal injection the very next day. Denno, 76 FORDHAM L. REV. at 78. By 1982, the year in which Texas conducted the first lethal injection execution, six States had enacted lethal injection statutes. Denno, 102 GEO. L.J. at 1341 cht. 1. Another fifteen States adopted lethal injection from 1983 to 1988, with seven States doing so in 1983. *Id.* That progression continued, with twelve States switching to lethal injection from 1994 to 2002. *Id.*; *see also* Denno, 82 IOWA L. REV. at 408 tbl. 7, app. 3 at 439; Snell, *supra* n.2, at 4, 7 tbl. 2; 18 U.S.C. § 3596(a). Nebraska abandoned electrocution in favor of lethal injection only in 2009 after the Nebraska Supreme Court found the electric chair unconstitutional under the state constitution. Denno, 102 GEO. L.J. at 1342.

Like Oklahoma, other States left their lethal injection statutes intentionally vague. *See* Denno, 63 OHIO ST. L.J. at 68-69; Denno, 76 FORDHAM L. REV. at 93. This delegation left the responsibility for developing execution protocols to corrections officials who had no specialized expertise. Prison officials thus had "unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution." *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012) (discussing Arkansas statute).

Ultimately, the federal government and almost every State that adopted lethal injection as an execution method also adopted the original three-drug protocol that Oklahoma had developed. *Baze*, 553 U.S.

at 43 (noting at least 30 States use the three-drug combination); *Evans v. State*, 914 A.2d 25, 76-77 & n.17 (Md. 2006) (similar). But, as this Court recognized, "it is undisputed that the States using lethal injection adopted the protocol first developed by Oklahoma without significant independent review of the procedure." *Baze*, 553 U.S. at 44 n.1; *see also Beardslee*, 395 F.3d at 1074 n.11 (noting California's protocol was "informally" based on the protocol in Texas and that "the precise protocol was never subjected to the rigors of scientific analysis.").

States copied the three-drug protocol despite the concerns that arose about it almost immediately. Soon after Oklahoma adopted the method, Chapman, Oklahoma's medical examiner, publicly discussed its potential dangers. *See* Jim Killackey, *Execution Drug Like Anesthesia*, DAILY OKLAHOMAN, May 12, 1977, at 1 ("Dr. A. Jay Chapman, state medical examiner, said that if the death-dealing drug is not administered properly, the convict may not die and could be subjected to severe muscle pain."). When Texas became the first State to employ the method in 1982, the Texas warden mistakenly mixed all three drugs into a single syringe, causing the mixture to turn into "white sludge." *See* STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 74-75 (1992).

Indeed, the dangers attendant to the particular sequence of drugs were foreseeable even in 1977. *See, e.g.*, Simon Berlyn, *Execution By the Needle*, NEW SCIENTIST, Sept. 15, 1977, at 676-77 (describing the likely dangers of pairing a fast-acting barbiturate with a chemical paralytic, including the "terrifying possibility . . . that if an insufficient dose of barbiturates were given in execution," together with a paralytic, "a conscious victim would be unable to convey an

experience of intense suffering"). And before Oklahoma considered the method, Great Britain's Royal Commission on Capital Punishment had issued a 1953 report that concluded after a five-year study that lethal injection brought with it serious risks, ranging from the likely necessity of medical involvement to the potential difficulties of injecting an inmate with compromised veins. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 257-61 (1953); Denno, 76 FORDHAM L. REV. at 64-65.

In the quarter-century that followed the first lethal injection execution, state prison officials continued to use the same lethal injection method, which resulted in numerous botched executions. Officials stabbed at inmates, trying to find suitable veins; intravenous lines infiltrated, sending the lethal chemicals into the tissue instead of the bloodstream; and inmates gasped and convulsed, apparently in pain. *See, e.g.*, Denno, 63 OHIO ST. L.J. at app. 1 at 139-41 tbl. 9; Denno, 76 FORDHAM L. REV. at 100-01.

B. State Prison Officials Continue To Follow The Same Historical Pattern In Relying Upon Insufficient Scientific And Medical Study In Modifying Lethal Injection Protocols.

Although nearly all States relied on the original three-drug sequence of sodium thiopental, pancuronium bromide, and potassium chloride at the time this Court agreed to hear *Baze*, that no longer is true today. Despite the Court's sanctioning of Kentucky's three-drug protocol, States have moved away from the three-drug combination in recent years. Such changes resulted from either court intervention or practical considerations as opposed to medical or scientific

study. Regardless of why any single State modified its protocol, other States often copied the new approach.

1. The Use Of A One-Drug Protocol

When this Court agreed to hear *Baze* in 2007, many States were grappling with challenges to lethal injection protocols. In California, for instance, a federal district court ruled in 2006 that the State could not carry out the execution of inmate Michael Morales using its standard three-drug protocol unless it provided qualified medical personnel in the field of general anesthesia to ensure that Morales was unconscious. *See Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006), *aff'd per curiam,* 438 F.3d 926 (9th Cir. 2006). As an alternative, the district court ruled that the execution could proceed if the State traded the historical three-drug protocol for a barbiturate-only protocol. *Id.* The State selected the alternative after the anesthesiologists scheduled to participate in the execution withdrew, but the State was unable to devise a one-drug protocol in time.[10] *Morales v. Tilton*, 465 F. Supp. 2d 972, 974-77 (N.D. Cal. 2006).

The following year, in September 2007, a federal district court in Tennessee deemed Tennessee's lethal

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[10] The same district court ruled in 2010 that California could use the one-drug protocol to execute inmate Albert Greenwood Brown, although that execution did not go forward. *Morales v. Cate*, Nos. 3:06-cv-00219, 3:06-cv-00926, 2010 WL 3751757, at *6-7 (N.D. Cal. Sept. 24, 2010) (providing for one-drug protocol); *Cal. Dep't of Corr. & Rehab. v. Superior Ct. of Marin Cnty.*, No. A129540, 2010 WL 3621873 (Cal. Ct. App. Sept. 20, 2010) (unpublished); Jack Leonard & Maura Dolan, *California Calls Off Brown Execution*, LOS ANGELES TIMES, http://latimesblogs.latimes.com/lanow/2010/09/california-calls-off-brown-execution.html (Sept. 29, 2010 4:25 p.m.).

injection protocol, adopted after a 90-day moratorium, unconstitutional. *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), *rev'd*, 571 F.3d 531 (6th Cir. 2009). The panel constituted to evaluate Tennessee's lethal injection protocol had recommended that the State switch to a one-drug protocol that embodied fewer inherent risks. *Id.* at 877-78. But the Tennessee commissioner of corrections decided to retain the three-drug method. *Id.* at 886. In doing so, the commissioner declined to include any of the additional safeguards the panel had recommended. *Id.*

These decisions, however, pre-dated this Court's decision in *Baze*, which approved the three-drug method. Instead of fortifying the three-drug cocktail, however, States began to move toward a one-drug method that the petitioners in *Baze* had advanced and which the courts in California and Tennessee had approved.[11]

In switching to a one-drug protocol, States this time followed Ohio. In June 2008, less than two months after *Baze* was decided, a state court held that Ohio could no longer employ the standard three-drug protocol because the drug combination contravened Ohio's own lethal injection statute and therefore violated due process. *State v. Rivera*, No. 04CR065940, 2008 WL 2784679, slip op. at 1, 9 (Ohio Ct. Com. Pl. June 10, 2008). The Ohio court emphasized that "the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned

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[11] In addition, four states have abolished the death penalty since 2008. *See* Denno, 102 GEO. L. J. at 1343 n.73. New Mexico, Connecticut, and Maryland did not make the abolishment of the death penalty retroactive. *Id.*

will experience an agonizing and painful death." *Id.* at 6. The court proceeded to hold that the State's implementation of lethal injection should be through only "a lethal injection of a single, anesthetic drug." *Id.* at 9.

Ohio officially adopted a one-drug protocol using only sodium thiopental in 2009.[12] Prison officials in other States quickly followed suit, although many executions ended up using pentobarbital as a substitute for sodium thiopental. Denno, 102 GEO. L.J. at 1357-60. Washington State switched to the one-drug method in 2010, as did South Dakota in 2011. *Id*. at 1357-60. In 2012, another five states (Arizona, Georgia, Idaho, Missouri, and Texas) made the change and three states did so in 2013 (Arkansas, Kentucky, and Louisiana). *Id.* By 2013, prison officials in one-third of death penalty States had abandoned the three-drug sequence. *Id.* at 1360. Kentucky joined this group even though this Court had specifically rejected the argument in *Baze* that Kentucky should switch to a one-drug protocol, noting that using a single barbiturate was a method that "ha[d] not been adopted by any State and ha[d] never been tried." *Baze*, 553 U.S. at 40.

With so many States abandoning the three-drug protocol, "[i]n 2013, two-thirds of the lethal injection executions used a one-drug protocol compared to one-half of the lethal injection executions in 2012." Denno, 102 GEO. L.J. at 1360. States have continued to move

[12] Ohio also permitted use of an alternative two-drug sequence that it implemented in 2014 in the execution of Dennis McGuire. Denno, 102 GEO. L.J. at 1357; Berger, 55 B.C.L. REV. at 1387.

to a one-drug protocol in increasing numbers.[13] *See State by State Lethal Injection*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Mar. 15, 2015).

2. A Shift In The Drugs Used

At the same time certain States turned to the one-drug method, other States maintained rigid adherence to a three-drug protocol. All States began modifying the precise drugs used, however, due to pragmatic considerations.

Because of drug shortages, prison officials were forced to make substitutions for the first drug from the original three-drug sequence, sodium thiopental, in both one-drug and three-drug protocols. Denno, 102 GEO L.J. at 1362. "In 2009, the last domestic manufacturer of thiopental stopped making it." *Cook v. FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013). Foreign manufacturers, aware of the use of the drug in lethal injections, declined to export the drug to the United States. Denno, 102 GEO L.J. at 1360-61, 1363-65. As a result, corrections officials sought out both alternative sources for sodium thiopental and substitutes for the drug.

Oklahoma made such a substitution in 2010. That year, when it could not obtain the sodium thiopental long used as the first drug in the sequence, Oklahoma became the first State to use pentobarbital, a drug

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[13] *See also Robinson v. Shanahan*, 755 S.E.2d 398, 398-99 (N.C. Ct. App. 2014); Maura Dolan, *California Will No Longer Pursue Three-Drug Lethal Injections*, LOS ANGELES TIMES http://articles.latimes.com/2013/jul/10/local/la-me-ln-lethal-injection-20130710 (Jul. 10, 2013).

used as a sedative or to control convulsions. Denno, 102 GEO. L.J. at 1362; *Pavatt v. Jones*, 627 F.3d 1336, 1340-41 (10th Cir. 2010) (rejecting challenge to substitution of pentobarbital as the first drug in the protocol). Other States also switched, at least temporarily, to the drug. Denno, 102 GEO. L.J. at 1358 cht. 3. By 2011, prison officials in thirteen States again had followed Oklahoma's lead and permitted the use of pentobarbital. *Id.*

But when the availability of pentobarbital became questionable, prison officials turned to compounding pharmacies to obtain it—a type of pharmacy unregulated by the Food and Drug Administration. *Id.* at 1364-71; s*ee also In re Lombardi*, 741 F.3d 888, 892, 895-97 (8th Cir. 2014) (en banc) (rejecting challenge to pentobarbital from compounding pharmacy), *reh'g denied*, 741 F.3d 903 (8th Cir. 2014), *cert. denied*, 134 S.Ct. 1790 (2014); *Whitaker v. Livingston*, 732 F.3d 465, 468 (5th Cir. 2013), *cert. denied sub nom.*, *Yowell v. Livingston*, 134 S. Ct. 417 (2013) (same); *Wellons v. Comm'r Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014) (same); Berger, 55 B.C.L. REV. at 1381. Compounded pentobarbital presented the additional risk of drug contamination, which can cause excruciating pain. Berger, 55 B.C.L. REV. at 1382-85; Denno, 102 GEO. L.J. at 1370-71, 1378-79 & n.329. The risks associated with the modified approach materialized in Oklahoma's problematic execution of Michael Lee Wilson in January 2014. Berger, 55 B.C.L. REV. at 1385 (describing witness accounts that Wilson cried out during his execution, "I feel my whole body burning!").

Correction officials in a handful of States now have turned to midazolam as a substitute for sodium thiopental. *See, e.g.*, *Muhammad v. State*, 132 So.3d

176, 188 (Fla. 2013), *cert. denied*, 134 S. Ct. 894 (2014) (Florida); *Arthur v. Thomas*, No. 2:11-cv-438, 2015 WL 224738, at *1-2 & n.1 (M.D. Ala. Jan. 15, 2015) (Alabama). In 2014, four States conducted executions using midazolam, with two States using the drug in a three-drug protocol and the other two States using it as part of a two-drug protocol. *See Execution List 2014*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Mar. 12, 2015); *see also In re Ohio Execution Protocol Litig.*, 994 F. Supp. 2d 906, 909 (S.D. Ohio 2014) (addressing Ohio's use of midazolam in two-drug protocol); Order, *Wood v. Ryan*, No. 2:14-cv-01447-NVW (D. Ariz. July 24, 2014), ECF No. 34 (discussing execution of Joseph Rudolph Wood).

Again, Oklahoma is one of these States. After the botched execution of Michael Lee Wilson in January 2014 using pentobarbital from a compounding pharmacy, Oklahoma substituted midazolam as the first drug in the three-drug sequence for the execution of Clayton Lockett in April 2014.[14] Berger, 55 B.C.L. REV. at 1386; *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015). Lockett's execution was filled with egregious errors, including the inability to establish a reliable intravenous line. *See Warner*, 776 F.3d at 725. Although a doctor had declared Lockett unconscious, he apparently awoke at some point. *See id.*; OKLA. DEP'T OF PUB. SAFETY, THE EXECUTION OF CLAYTON D. LOCKETT: EXECUTIVE SUMMARY 18 (2014) (hereinafter "Lockett Execution Report"), *available at* http:// www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf. Witnesses described Lockett as twitching,

[14] Oklahoma's revised protocol provides four drug combinations, two of which called for large doses of a single barbiturate—either pentobarbital or sodium thiopental. *Warner v. Gross*, 776 F.3d 721, 726 (10th Cir. 2015).

gasping, convulsing violently, and calling out. Berger, 55 B.C.L. REV. at 1386. Prison officials discovered that the intravenous line had not worked as intended and some of the drugs had absorbed into Lockett's tissue or leaked out. *See id.*; Locket Execution Report at 11-12, 18-19; *Warner*, 776 F.3d at 725. State officials attempted to stop the execution, but Lockett died forty-three minutes after the first injection. *See* Lockett Execution Report at 18; Berger, 55 B.C.L. REV. at 1386; *Warner*, 776 F.3d at 725. Oklahoma investigated the botched execution, but still maintained the use of midazolam even though the drug does not have the same anesthetic properties as sodium thiopental. Berger, 55 B.C.L. REV. at 1386; Pet. Br. 19-22.

As a result of a flurry of changes to execution protocols, prison officials used four different drug combinations in lethal injection executions in 2014 alone.[15] The quick switches to new drugs stand in stark contrast to the consensus in support of the three-drug protocol at issue in *Baze*, which States had relied upon for more than thirty years.

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[15] *See Execution List 2014*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Mar. 12, 2015). The four drug combinations were: (1) a three-drug protocol using midazolam; (2) a three-drug protocol using pentobarbital; (3) a two-drug protocol using midazolam and hydromorphone; and (4) a one-drug protocol using pentobarbital. *Id.*

III. JUDICIAL SCRUTINY OF PRISON OFFICIALS' ADMINISTRATION OF LETHAL INJECTION IS NECESSARY TO ENSURE COMPLIANCE WITH THE EIGHTH AMENDMENT.

As the history demonstrates, States adopted lethal injection generally and the three-drug protocol specifically without serious study or independent analysis. States uniformly followed Oklahoma in delegating to prison officials the details of lethal injections. Historical practice and contemporary evidence indicate that prison officials likely lack the necessary expertise to develop lethal injection protocols and fail to rely upon scientific or medical study. Yet these prison officials, operating outside the public eye, are tasked with developing procedures by which inmates will be executed. Because legislatures have delegated responsibility for such protocols to unelected officials, it is imperative that courts not insulate a State's protocol against challenge. Rather, the judiciary must provide a check on the exercise of such authority. In light of the recent trend toward constantly changing protocols, the courts have the constitutional responsibility to ensure such procedures comport with the Eighth Amendment.

A. Judicial Examination Of Modifications To Protocols Is Necessary Because The Actions Of Prison Officials Are Not Subject To Public Scrutiny And Oversight.

For a quarter century, States followed the three-drug protocol this Court approved in *Baze*. But prison officials did not arrive at the three-drug protocol after independent analysis and evaluation. Rather,

the protocol was "the product of administrative convenience and a stereotyped reaction to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion." *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment) (internal quotation marks omitted). In fact, "[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected department of correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance." *Id.* at 74-75.

Following *Baze*, States "have changed their lethal injection protocols in inconsistent ways that bear little resemblance to the original protocol evaluated in *Baze* and even differ from one execution to the next within the same state." Denno, 102 GEO. L.J. at 1331. Rather than correct for the unreasoned manner in which protocols had been adopted in the past, however, officials prioritize concern for administrative convenience over the need for a humane execution. Thus, as with the original three-drug protocol, such changes are not the result of careful deliberation. For this reason, "their drug selections are not entitled to the kind of deference afforded legislative decisions." *Baze*, 553 U.S. at 75 (Stevens, J., concurring in the judgment).

Prison officials in Oklahoma fall into this general pattern. Oklahoma first adopted pentobarbital for executions without any reasoned analysis. *Pavatt*, 627 F.3d at 1337; Pet. Br. at 11. Oklahoma then used pentobarbital from a compounding pharmacy, despite the well-documented risks associated with such pharmacies. Berger, 55 B.C.L. REV. at 1385. When pentobarbital became unavailable, Oklahoma prison officials turned to midazolam because Florida had

used the drug. Pet. Br. at 11. Oklahoma's reliance on another State's protocol without independent evaluation mirrored other States' adoption of Oklahoma's three-drug protocol nearly four decades ago.

Under these circumstances, judicial review provides a necessary means by which to examine the constitutionality of the chosen lethal injection drugs, procedures, and administration. *See, e.g.*, *Morales*, 465 F. Supp. 2d at 981 (holding California's protocol unconstitutional); *Harbison*, 511 F. Supp. 2d at 895, 903 (ruling State's failure to adopt one-drug protocol recommend by state-commissioned study violated the Eighth Amendment); *Taylor v. Crawford*, No. 2:07-cv-04129, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006), *rev'd*, 487 F.3d 1072 (8th Cir. 2007) (concluding that Missouri's lethal injection procedure presented unconstitutional risk due to maladministration).

Following *Baze*, however, challenges to lethal injection protocols were cut short in misplaced reliance on the decision. Indeed, a majority of the cases cite the "*Baze* substantial-risk standard to establish that the method of injection and the drugs administered did not pose a risk sufficient to constitute an Eighth Amendment violation." Denno, 102 GEO L.J. at 1349. Reliance on this aspect of *Baze* persisted in spite of numerous changes to lethal injection protocols. *Id*.

But the plurality opinion in *Baze* did not seek to insulate lethal injection protocols from scrutiny. *Baze*, 553 U.S. at 62. The opinion specifically contemplated changes to the method "in light of new developments, to ensure humane capital punishment." *Id.*

Although the Court anticipated legislative changes, *Baze*, 553 U.S. at 62, the types of challenges at issue

in *Baze* (concerning the risk of improper administration) and here (concerning drug selection) do not involve matters on which legislatures historically have spoken. While the courts need not serve as "boards of inquiry charged with determining 'best practices' for executions," *id.* at 51 (plurality op.), each new combination of drugs must be evaluated independently.

Such judicial oversight would not "substantially intrude on the role of state legislatures in implementing their execution procedures," *id.*, because legislatures do not concern themselves with the intricacies of lethal injection procedures.[16] Thus, as Justice Stevens explained, "[t]he question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record." *Id.* at 71 (Stevens, J., concurring in the judgment).

The development of such records is critical. History demonstrates that the lethal injection protocols that

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[16] Recently, legislatures that have proposed bills addressing execution methods have sought to bring back methods of execution abandoned in favor of lethal injection. Oklahoma is considering a bill that would revive a modified form of lethal gas using nitrogen instead of cyanide. *See, e.g.*, Sean Murphy, *Nitrogen Gas Executions Approved By Oklahoma*, ABC NEWS, http://abcnews.go.com/US/wireStory/nitrogen-gas-executions-approved-oklahoma-house-29354885 (Mar. 3, 2015 4:14 p.m.). The Utah Senate approved a statutory amendment that would allow the State to use the firing squad if the State cannot obtain lethal injection drugs. Kelly Catalfamo & Michelle L. Price, *Utah Lawmakers Vote to Allow Firing Squad*, ABC NEWS, http://abcnews.go.com/US/wireStory/lawmakers-vote-state-firing-squad-29542718 (Mar. 11, 2015 12:48 a.m.). And Tennessee amended its statute to allow for the use of electrocution if the drugs for lethal injection are not available. Tenn. Code Ann. § 40-23-114(e)(2).

prison officials created embodied constitutionally unacceptable risks. Even when faced with evidence of botched executions involving the exact same combination of drugs, States have proceeded to use the protocol. Closer examination of such procedures was (and remains) hindered and, in some cases, foreclosed by the secretive nature in which prison officials develop and ultimately carry out their lethal injection protocols. Denno, 76 FORDHAM L. REV. at 121-23; Berger, 55 B.C.L. REV. at 1388-95. Thoughtful examination will continue only if this Court reinforces the necessity of Eighth Amendment review of prison officials' chosen lethal injection drugs and procedures.

B. The Delegation Of Lethal Injection Procedures To Prison Officials Permits Corrective Revision Of Protocols To Ensure Compliance With The Eighth Amendment.

Although the delegation to prison officials of the details of lethal injection means that protocols require careful judicial scrutiny, such delegation also provides States with the flexibility to adjust protocols if a court deems an aspect unconstitutional. Thus, no reason exists to require an inmate to identify a specific alternative to a challenged protocol. To the contrary, legislatures and courts should not be permitted to transfer the responsibility for an execution that comports with the Eighth Amendment to the condemned inmate.

When Oklahoma first declined to include the details of the protocol in its lethal injection statute in 1977, it did so with the idea that different drug combinations might become available. Denno, 76 FORDHAM L. REV. at 67.

In recent years, this remnant of the adoption of lethal injection has permitted inmates to challenge the specific lethal injection procedures promulgated by

prison officials pursuant to 42 U.S.C. § 1983, which governs challenges to circumstances of confinement. In such actions, a ruling deeming a protocol unconstitutional would not render lethal injection itself unconstitutional because States' lethal injection statutes do not embody the specifics of lethal injection procedures.

In *Nelson v. Campbell*, 541 U.S. 637 (2004), this Court permitted to proceed as a Section 1983 claim a challenge by a condemned inmate to the planned use of a cut-down procedure—a painful and invasive way to establish intravenous access. *Id.* at 642-46. The Court explained the suit was allowed because the petitioner did not seek to challenge lethal injection itself, but rather challenged only the cut-down procedure. *Id.*

Two year later, in *Hill v. McDonough*, 547 U.S. 573 (2006), the petitioner inmate challenged the constitutionality of Florida's three-drug protocol. The Court held that challenges to state protocols were permissible Section 1983 actions because success "would not necessarily prevent the State from executing [the inmate] by lethal injection." *Id.* at 580.

And *Baze* concerned whether the non-drug aspects of Kentucky's protocol presented an unnecessary risk of pain and suffering if the three-drug protocol were not administered properly. *Baze*, 553 U.S. at 40 (explaining that petitioners contended only that Kentucky's protocol violated the Eight Amendment "because of the risk that the protocol's terms might not be properly followed, resulting in significant pain").

In this regard, because legislatures delegate to prison officials the details of lethal injection executions, a State retains the flexibility to implement an

alternative to its chosen procedure if needed.[17] State corrections officials have demonstrated over time the ability to respond to a variety of practical concerns and have the same ability to respond to constitutional concerns if required to do so. *See Hill*, 547 U.S. at 580-81 (explaining that Florida "leaves implementation [of lethal injection] to the department of corrections," and "does not require the department of corrections to use the challenged procedure," thereby "leav[ing] the State free to use an alternative lethal injection procedure") (citing Fla. Stat. §§ 922.105(1), (7)); *see also Jones v. Bock*, 549 U.S. 199, 213 (2007) (describing *Hill* as "unanimously reject[ing] a proposal that § 1983 suits challenging a method of execution must identify an acceptable alternative").

In this way, the intentional vagueness of lethal injection statutes allows prison officials to take corrective action if a certain protocol is found unconstitutional. Accordingly, challenges to lethal injection protocols should not be restricted to instances in which an inmate can identify a specific available alternative.

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[17] A protocol may be subject to some scrutiny through state administrative enactment procedures, but certain States exempt lethal injection protocols from review. *Compare Sims v. Dep't of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409, 428 (Cal. Ct. App. 2013) (invalidating protocol for failure to comply with state administrative procedure act) *and Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 492 (Ky. 2010) (similar) *with Hill v. Owens*, 738 S.E.2d 56, 64 (Ga. 2013) (holding state administrative procedure act did not apply to lethal injection protocol, "specifically the choice of the drug or drugs that are appropriate at any given time") *and Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311-12 (Tenn. 2005) (noting lethal injection protocol exemption from state administrative procedure act).

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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