

No. 13-892

IN THE
Supreme Court of the United States

CHRISTOPHER SEPULVADO,
Petitioner,

v.

BOBBY JINDAL, GOVERNOR OF LOUISIANA,
THE LOUISIANA DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF OF THE BAR HUMAN
RIGHTS COMMITTEE OF ENGLAND AND WALES
WITHOUT 10-DAY NOTICE AND WITHOUT THE
CONSENT OF RESPONDENTS AND AMICUS
CURIAE BRIEF OF THE BAR HUMAN RIGHTS
COMMITTEE OF ENGLAND AND WALES
IN SUPPORT OF PETITIONER**

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Amicus Curiae, pursuant to Supreme Court Rule 37 (2) (a) and (b), respectfully move this Court for a waiver of the 10-day notice requirement and for leave to file the accompanying amicus curiae brief in support of petitioner. Petitioner has provided global consent to the filing of amicus briefs and has specifically consented to the filing of the attached amicus curiae brief. Respondents, Governor Jindal and the Louisiana Department of Corrections, have refused to waive the 10-day time period or consent to this filing.

Petitioner's execution is set for the Fifth of February, 2014. On or about January 27, 2014, the Respondents changed the protocol by which they seek Petitioner's execution. As before, there is no indication that the Respondents have secured the pharmacological instruments from a licensed and duly authorized distributor.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body of legal practitioners concerned with the protection of rights, defending the rule of law, and ensuring the fair administration of justice.

The BHRC regularly appears in cases where there are matters of human rights concern, and has experience with legal systems throughout the world. The BHRC has previously appeared as amicus curiae in cases before the United States Supreme Court, including *Miller v. Alabama*, 132

S. Ct. 2455 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005), and *Deck v. Missouri*, 544 U.S. 622 (2005).

Amicus has a special interest in ensuring that the lethal injection narcotics that the State of Louisiana intends to use were not provided to the Louisiana Department of Corrections in violation of federal and international law, including the European Commission's Europe-wide export control procedures.

Amicus' particular interest stems from the globalization of the manufacture of the drugs used in the execution process. American states that execute by lethal injection have begun to go outside the United States to purchase drugs for use in lethal injection executions. Several times this involved British or European pharmaceutical companies, or companies with a major European corporate presence. Often the purchases were made with a degree of duplicity or without full disclosure. When these purchases came to light, they caused great concern to each manufacturer, as each pharmaceutical company operates in a country that prohibits the death penalty.

Amicus posits that the shortage in drugs used to administer lethal injection has led some states to experiment with a variety of alternate methods to perform execution. However, undersigned Amicus respectfully suggests that this Court consider whether the State of Louisiana's execution method complies with transparency requirements that have their origin in the Magna Carta, the English Bill of Rights and the Common

Law, which inform the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE¹

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body of legal practitioners concerned with the protection of rights, defending the rule of law, and ensuring the fair administration of justice. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience in legal systems throughout the world. The BHRC has previously appeared as amicus curiae in cases before the United States Supreme Court, including *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005), and *Deck v. Missouri*, 544 U.S. 622 (2005).

Amicus' particular interest stems from the globalization of the manufacture of the drugs used in the execution process, to include nations where the death penalty is prohibited. Starting with a small British firm called Dream Pharma, American states that enforce the death penalty began to go outside of the United States to purchase drugs for executions. Several times this involved British or European pharmaceutical companies, or companies

¹ Pursuant to this Court's Rule 37, Amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus made a monetary contribution to the preparation or submission of the brief. Counsel files a *Motion for Leave to File Amicus Curiae Brief without 10-Day Notice and Without the Consent of Respondents*, who decline to grant consent to the filing of an amicus brief in this case.

with a major European corporate presence. Often the purchases were made with a degree of duplicity. When these purchases came to light, they caused great concern to each manufacturer, since the laws of the nations in which the pharmaceutical companies were operating prohibited the death penalty.

Amicus have a special interest in ensuring that the lethal injection narcotics that the State of Louisiana intends to use were not provided to the Louisiana Department of Corrections in violation of federal and international law, including European Union (EU) export control procedures.

This comes amid not only an almost Europe-wide² ban on capital punishment but also a recent affirmation of the EU commitment towards the abolition of the death penalty. This has, therefore, caused considerable friction in Anglo-American relations, resulting in Amicus' particular interest in asking that this Court establish clear and workable rules on what drugs are permissible to conduct lethal injection.

² All 47 countries in the Council of Europe have banned capital punishment, pursuant to the European Convention on Human Rights 1950, Protocol 6 (1983). The sole retentionist nation within the European continent is Belarus.

INTRODUCTION

The manner in which executions are carried out has significant relevance to the public's confidence in the administration of justice. The issue before this Court is whether a state may execute by lethal injection using experimental and untried drugs that are not identified to either the prisoner or the public and may cause extreme suffering to the prisoner.

International perspective is a permissible consideration in the context of the administration of capital punishment. The operation of the marketplace, in which Amicus is especially situated, has led to concern over the use of medicinal pharmaceuticals to perform executions.

Concerns over the administration of capital punishment extend beyond whether a method is successful at executing an individual. Assessing the constitutionality of the process is not limited to the window of time after a lethal narcotic is injected into a condemned prisoner and his execution.

Rather, confidence in the administration of justice depends upon notice and transparency in the process. At issue in this case is whether the Louisiana Department of Corrections is required to provide official notice of the details of the protocol by which it intends to execute the plaintiff, including whether it has purchased legal and FDA-approved pharmaceuticals.

FACTUAL BACKGROUND

Historically, American corporations had supplied the three drugs used in the classic execution protocol. Since this Court's decision in *Baze v. Rees*, 555 U.S. 35 (2008), the manufacturers of pharmaceuticals that were determined to be constitutionally acceptable have decided that they will not engage in the production of drugs for lethal injection. States that perform executions by lethal injection have responded by amending their procedures in an attempt to shroud the methods of lethal injection in secrecy.

1. Due To The Globalization Of The Manufacture Of Pharmaceuticals, The Issue Before This Court Has Become One Of International Concern.

American corporations ceased making drugs for lethal injection in 2010, transforming the quest for pharmaceuticals used to perform lethal injections into an international concern.

The first known overseas purchases involved the sedative sodium thiopental from a company called Dream Pharma that notoriously operated out of a single room in the back of a driving academy called *El-Gone* in Acton, London, UK. The drugs were traced back to Archimedes Pharma in Reading (also in the UK), and through various intermediaries to a major Austrian manufacturer. These drugs were used in the execution of Brandon Rhode in Georgia, amid serious concerns that the sedative failed, causing Rhode significant suffering

prior to his death. The use of drugs sourced from the UK provoked significant embarrassment to the companies involved, and led to the British Business Secretary imposing emergency export regulations to prevent a repetition.³

Subsequently, states that execute by lethal injection sourced sodium thiopental from other global companies, including a German corporation, a U.S.-based company moving manufacture to Italy, and a U.S.-based corporation that had its headquarters in Denmark. The states had attempted to buy the drugs without the companies knowing their intended use. On all occasions, the company in question objected to the use of its drugs in executions. Each company viewed the purchases by the states as a threat to their corporate reputation, and therefore put in place distribution controls to prevent a recurrence.⁴

³ Following a legal challenge to the export license where the court found a lack of jurisdiction to invoke human rights grounds, *R. (on the application of Zagorski) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), [2011] Eu. L.R. 315; Dominic Cascianai, *US Lethal injection drug faces UK export restrictions* (Nov. 29, 2010) <http://www.bbc.co.uk/news/uk-11865881>.

⁴ *E.g.*, Frensenius Kabi, Kevin Murphy, *German Drug Firm Halts U.S. Anesthetic Exports After Finding It Was Sent For Executions* (Oct. 11, 2013), http://worldnews.nbcnews.com/_news/2013/10/11/20911326-german-drug-firm-halts-us-anesthetic-exports-after-finding-it-was-sent-for-executions?lite. *Press Release*, Hospira, *Statement Regarding Pentothal (sodium thiopental) Market Exit*, (Jan. 31, 2011) <http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle&ID=>

As U.S. states switched protocols and new companies – often European – were implicated in the lethal injection drug controversies, the European Commission took steps to try to protect the European pharmaceutical industry from this potentially unwitting and damaging involvement in executions. In December of 2011, a new EU-wide export control was put in place on sodium thiopental, Pentobarbital, and other short-acting barbiturates.⁵ A revised version of this legislation which incorporates other potential drugs used in lethal injection executions is currently before the EU Council and Parliament and is expected to be adopted by the EU this year. Switzerland is taking similar steps to prevent drugs exported to the U.S. being used in executions.⁶

Meanwhile, when it came to light that unapproved European drugs had been released into the U.S. market (contrary to the U.S. Food and

1518610&highlight; Press Release Lundbeck, *Lundbeck overhauls pentobarbital distribution program to restrict misuse* (July 1, 2011) <http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775>.

⁵ *Commission Implementing Regulation (EU) No. 1352/2011 of 20 December 2011 amending Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, 1911 O.J. (L. 338).

⁶ Chantal Britt, *Execution Drugs Face Export Restrictions* (Sept. 10, 2013) http://www.swissinfo.ch/eng/swiss_news/Execution_drugs_face_export_restrictions.html?cid=36862094.

Drug Administration (FDA) established policy), federal authorities intervened to seize some of the drugs.⁷

As more corporations took offense at the use of their drugs for executions, it became more difficult for departments of corrections to source the *Baze* approved cocktail of drugs. The negative publicity surrounding the use of drugs for taking human life led increasingly to companies taking steps to ensure that their drugs would not be used. In turn, this had two consequences: first, states that execute by lethal injection started experimenting with different drugs; second, those states began taking additional steps to keep secret the manner in which they acquired the drugs they planned to use.

Some states have tried to use wholly new drugs in the execution process, even though there may be little or no expert support for the use of those drugs.⁸ Other states⁹ have tried to source

⁷ Bill Rankin, *DEA seizes Georgia's supply of lethal injection drug*, (Mar. 16, 2011) <http://www.ajc.com/news/news/local/dea-seizes-georgias-supply-of-lethal-injection-dru/nQrdf/>.

⁸ Arkansas, for example, moved to use Phenobarbital, a drug which had never been tested or approved for use in executions and was deemed to be extremely dangerous in 2012 (AZ Star Net, *Arkansas To Use Untried Drug Phenobarbital In Executions* (Apr. 17, 2013), http://azstarnet.com/news/national/arkansas-to-use-untried-drug-phenobarbital-in-executions/article_01a82800-2707-544b-930b-3f9be7c63161.html); Ohio recently adopted another experimental protocol using midazolam and hydromorphone which was responsible for a 'botched execution' last month

“compounded”¹⁰ versions of the classic drugs, notwithstanding a highly publicized crisis that has led to Congress implementing new regulations governing their distribution.¹¹

(Nick O’Malley, *Botched Ohio execution raises death penalty dilemma*, (Jan. 19, 2014) <http://www.smh.com.au/world/botched-ohio-execution-raises-death-penalty-dilemma-20140119-hv92x.html>); Florida adopted a new, untested three drug protocol in 2012, consisting of midazolam, pancuronium bromide and potassium chloride, which also led to another seemingly botched execution, *Daily Mail Rptr & Reuters, Florida murderer who raped and killed woman is left writhing in agony and takes twice as long to die as he is executed using new untried lethal injection drug*, (Oct. 16, 2013) <http://www.dailymail.co.uk/news/article-2462115/William-Happ-executed-Florida-executes-murderer-using-untried-lethal-injection-drug.htm>.

⁹ For example, South Dakota, Georgia, Pennsylvania, Colorado, Missouri and Texas.

¹⁰ These compounded drugs, i.e. the combining, mixing or altering of the ingredients of a drug to create tailored medication) are not FDA-approved. This means the FDA does not verify the safety, or effectiveness of compounded drugs. Compounded drugs also lack an FDA finding of manufacturing quality before they are marketed. *FDA, Compounding and the FDA: Questions and Answers*, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm>.

¹¹ In 2012, contaminated compounded drugs produced by the New England Compounding Center (NECC) in Massachusetts were responsible for a meningitis outbreak which caused at least 64 people to die and 751 to be sickened in 20 U.S. states. Jonathan Stempel, *Settlement reached over deadly U.S. meningitis outbreak*, (Dec. 24, 2013)

In recent months there have been a number of instances where states have gone to great lengths not merely to disguise the source of their drugs, but to dissemble on this point. For example, the Texas Department of Criminal Justice (TDCJ) attempted to purchase compounded Pentobarbital for use in executions in 2013 from a U.S. company, Pharmacy Innovations. TDCJ did not tell the pharmacy what the drugs would be used for, and when the pharmacy learned that the drugs would be used for lethal injection, it immediately cancelled the order.¹² TDCJ then changed its supplier to another U.S. pharmacy called Woodlands Compounding Pharmacy. Promising Woodlands that the sale would not be publicized, TDCJ offered Woodlands complete anonymity for producing its lethal drugs¹³

The goal of these occasionally elaborate efforts to cover the trail of purchases can be assumed to have been to keep the sourcing and

<http://www.reuters.com/article/2013/12/24/us-necc-meningitis-settlement-idUSBRE9BN01Y20131224>.

¹² Mike Ward, *Lawsuit: State Considering Experimenting With Execution Drugs* (Oct. 2, 2013) <http://www.correctionsone.com/capital-punishment/articles/6491201-Lawsuit-State-considering-experimenting-with-execution-drugs>.

¹³ Bradford Pearson, *Pharmacist Who Made New Texas Execution Drugs Wants Them Back*, (Aug. 10, 2013) <http://healthcare.dmagazine.com/2013/10/08/pharmacist-who-made-new-texas-execution-drugs-wants-them-back/> August 10, 2013.

intended use of the drugs secret. States that execute by lethal injection have an incentive to withhold the intended use of the drugs from the companies that originally manufactured them as the overwhelming majority of pharmaceutical companies will object to the use of their drugs in executions, and perhaps launch litigation to reclaim the drugs that were deviously obtained.¹⁴

2. A Series Of Problems In The Administration Of Lethal Injection Have Arisen Since This Court's Opinion In Baze v. Rees.

A series of problems have occurred since this Court's opinion in *Baze v. Rees* due to the expansion of experimentation in the administration of lethal injection drugs.

Dennis McGuire in Ohio was the most recent example of an execution that many have argued was "botched," that is, the execution process appears to have been extraordinarily lengthy and painful for the prisoner.¹⁵ It now appears that the State of Louisiana has decided to add the option of

¹⁴ German firm, Fresenius Kabi, American firm, Hospira, and Indian firm, Naari are among those pharmaceutical companies which have taken active steps to prevent their drugs from being used in executions in the US, including preparing legal actions to recover drugs or get an injunction against their use in lethal injections.

¹⁵ See Erica Goode, *After A Prolonged Execution in Ohio, Questions Over 'Cruel and Unusual*, NY Times, Jan. 17, 2014 at A12.

using the method of execution that the State of Ohio experimented with on Dennis McGuire.¹⁶ Concerns over botched executions are not limited to Ohio.

Previewing his forthcoming research on flawed execution procedures, Austin Sarat noted that the error rate in the application of lethal injection is higher than in other methods of execution:

Of approximately 9,000 capital sentences carried out in the United States from 1890 to 2010, we know of 276 of them (just under 3 percent) that were botched — 104 of them occurring after 1980. We might assume that botched executions were more frequent when death came at the end of a rope or in an electric chair or gas chamber, but the percentage of botched executions is higher today, in the era of lethal injection (more than 7 percent), than it was when hanging, electrocution or gas were the predominant modes of putting people to death.¹⁷

Sarat concluded:

¹⁶ See Della Hasselle, *Like Ohio, Louisiana May Use Controversial 2-drug Mix for Feb. 5 Execution*, *The Lens*, (Jan. 1, 2014) <http://thelensnola.org/2014/01/27/like-ohio-louisiana-to-use-controversial-new-2-drug-mix-for-execution>.

¹⁷ Austin Sarat, *Botched Executions Undermine Death Penalty*, *The Providence Journal*, (Jan. 28, 2014) <http://www.providencejournal.com/opinion/commentary/20140128-botched-executions-undermine-death-penalty.ece>.

Botched lethal injection procedures are less obviously gruesome than a decapitation during a hanging or someone catching on fire in the electric chair, but they are no less troubling. They involve adverse physical reactions to the drugs used or, for inmates who are extremely heavy or who have a history of drug abuse, officials often have difficulty finding suitable veins in which to inject the lethal chemicals.

In *Baze v. Rees*, this Court held that “Simply because an execution may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.”¹⁸ However, the Court was able to meaningfully assess the constitutionality of the administration of lethal injection based upon a lengthy record below, and a detailed analysis of Kentucky’s written protocol.¹⁹

¹⁸ *Baze v. Rees*, 553 U.S. 35, 49 (2008).

¹⁹ Indeed, the majority opinion made reference to the protocol more than thirty-five (35) times, and Justice Alito mentioned it at least fifteen (15) times in his concurrence, often qualified specifically by the term “written protocol.” *See e.g. Baze v. Rees*, 553 U.S. at 55 (“Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol’s requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant.”).

In the face of challenges to a changed protocol, states like Louisiana are now shrouding their execution process in either secrecy or ambiguity, in violation of state execution protocols, thereby depriving reviewing courts of a meaningful record to conduct the necessary analysis under the Eighth Amendment. As Professor Deborah Denno has explained: "States likely withhold crucial details because, almost invariably, the more data states reveal about their lethal injection procedures, the more those states demonstrate their ignorance and incompetence. The result is a perpetual effort by states to maintain secrecy about all aspects of the execution."²⁰

Amicus seeks to detail the furtive and irresponsible experimentation in the administration of lethal injection drugs used in capital punishment so that the Court has a full picture of the significance of the question before the

²⁰ See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 95 (2007). See also Adam Liptak, *Sidebar: After Flawed Executions, States Resort to Secrecy*, N.Y. Times (July 30, 2007), available at <http://www.nytimes.com/2007/07/US30/US/30bar.html?-r=0> ("In the wake of several botched executions around the nation, often performed by poorly trained workers, you might think that we would want to know more, not less, about the government employees charged with delivering death on behalf of the state."); Andrea Weigl, *Did Doctor Monitor Executions?*, News & Observer (Raleigh, N.C.) (Mar. 29, 2007), available at <http://www.lethal-injection-florida.blogspot.com/2007/03/did-doctor-monitor-executions.html> (referring to "the veil of secrecy that surrounds executions.").

Court in this case. Amicus suggests that the lack of public notice and accountability concerning the method and manner of lethal injection protocols undermines confidence in the administration of justice. While lethal injection is the newest method of administering capital punishment, concerns over the method and transparency of the process are older than the Constitution itself.

SUMMARY OF THE ARGUMENT

Experimentation in the administration of lethal injection drugs used in capital punishment is limited by both the Eighth Amendment's ban on cruel and unusual punishment and the Due Process Clause of the Fourteenth Amendment. Further, secret procedures to administer lethal injection drugs threaten public confidence in the most important, and often controversial, stage in any judicial process – execution of the sentence.

The mandate for transparency in the process has its origin in the Magna Carta, the English Bill of Rights and the Common Law.²¹ The essential purpose of these originating principles was to instill confidence in the administration of the justice system and, in particular, criminal punishment. Transparency – in the form of a public trial and punishment – was critical to the sound operation of civilized government. These principles endure. They ensure that public policy accords with contemporary values and civilized standards of decency.

The near total secrecy surrounding current lethal injection procedures and abandonment of established protocol in states like Missouri, Georgia

²¹ David L. Brooks, *From Magna Carta To The Constitution: Documents In The Struggle For Liberty* 1, 47 (D. Brooks Ed. 1993). The Due process clause traces to the “law of the Land” in the Magna Carta, as well as the British Bill of Rights. The Cruel and Unusual Clause was derived from the English Bill of Rights.

and Louisiana has led to an opaque process designed to prevent judicial oversight.

ARGUMENT**FACTORS TO CONSIDER WHEN DECIDING
WHETHER TO GRANT THE WRIT****I. INTERNATIONAL PERSPECTIVE IS A
CONSTITUTIONALLY PERMISSIBLE
CONSIDERATION.**

International perspective has informed United States jurisprudence for centuries. This is particularly true with respect to the Eighth Amendment's ban on cruel and unusual punishment.

This is not to suggest that international mores control Eighth Amendment judgments. Rather, it is permissible to look to other jurisdictions to ascertain the meaning of the term "cruel and unusual." "'There is no doubt' that Section 10 of the English Bill of Rights of 1689 'is the antecedent' of the cruel and unusual punishment clause of our Eighth Amendment."²² The Court has turned to the Common Law to answer basic questions. *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986). Indeed, this Court has held that the practice in other "civilized nations of the world" is a relevant consideration in deciding what amounts to cruel and unusual punishment. *Trop v. Dulles*, 356 U.S. 86, 102 (1958); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (taking

²² *McKenzie v. Day*, 57 F.3d 1461, 1487 n.18 (9th Cir. 1995) (Norris J., dissenting) citing *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia J., concurring).

account of the overwhelming international opinion against the execution of juveniles).

As noted above, there is significant international concern over the use of medical pharmaceuticals to carry out lethal injection. For instance, in late 2011, the European Union announced strict regulations on the export of sodium thiopental to countries that authorize the death penalty.²³

II. DUE TO PUBLIC CONCERN OVER CAPITAL PUNISHMENT, STATES HAVE SHROUDED THE LETHAL INJECTION PROCESS IN SECRECY WHILE TURNING TO EXPERIMENTAL METHODS TO SECURE EXECUTIONS.

States have begun to shroud the circumstances of the lethal injection process in secrecy at the same time as drug shortages have led prison officials to experiment dangerously and irresponsibly with different pharmaceuticals. For many years, lethal injections were carried out pursuant to a written protocol developed after consultation with expert anesthesiologists. *Baze*, 553 U.S. at 42.²⁴ However a number of

²³ Commission Press Release, *Commission Extends Control over Goods Which Could Be Used for Capital Punishment or Torture* (Dec. 20, 2011), http://europa.eu/rapid/press-release_IP-11-1578_en.pdf.

²⁴ The number of states that authorize capital punishment has fallen since *Baze*, leaving only thirty-two states that authorize capital punishment for future criminal acts.

pharmaceutical manufacturers determined that the use in executions of drugs that were created to heal or save people violated their corporate code of ethics.

The response of many states has been to create a veil of secrecy around their execution protocol, and to source drugs by deceiving the suppliers as to their purpose to avoid the ire of public opposition and opposition from manufacturers about the use of their products in executions.

A. An Increasing Number of Organizations, Companies, and Countries Have Begun Resisting Involvement in the Administration of State-Initiated Executions

As the Eighth Circuit recently observed, the drugs used as part of the *Baze* cocktail have become increasingly difficult to obtain:

The only domestic manufacturer of sodium thiopental had ceased to produce it, and the Food and Drug Administration had not approved the drug for importation.

In re George A. Lombardi, No. 13-3699, Slip Op. at 3 (8th Cir. Jan. 24, 2014) (citations omitted). When Missouri sought to use Propofol in lethal injections, the European Union indicated it would forbid or restrict the exportation of Propofol to the United States if it was used to execute prisoners. *Id.* at 5.

B. Due to the Executing States' Desire to Avoid Meaningful Judicial Oversight, States Have Increasingly Attempted to Shroud Lethal Injection Protocols in Secrecy To Avoid Judicial Review

At the time this Court adjudicated *Baze v. Rees*, thirty states openly used the same three drug lethal injection protocol which provided “[t]he first drug sodium thiopental (also known as Pentothol), ... second drug, pancuronium bromide (also known as Pavulon), [and] ... [p]otassium chloride, the third drug.” *Baze*, 553 U.S. at 44.

States that enforce the death penalty are increasingly unwilling to disclose publicly their lethal injection process. This includes the source of lethal injection drugs purchased for use in executions and even the type of drugs that will be used. A review of state practices reveals the opaqueness of the lethal injection process and the large disparities in information available in one state as compared to another.

Prior to 2010, the public and a death-sentenced inmate knew with certainty the manner in which he would be executed, and the drugs which would be used – sodium thiopental, pancuronium bromide and potassium chloride. Today, petitioner, his lawyer and the public may be left to guess which drugs will be used in the experiment that is intended to result in his death. This restriction is intended to keep information from the corporations that make the drugs, and the public that purchases medication from those

companies, to prevent the operation of the marketplace of moral concern and disruption of the execution timetable. It of course has the collateral effect of impeding the ability of a condemned prisoner to challenge an untested protocol as violating the ban on cruel and unusual punishment.

C. The Degree to which Litigants, and the Public, are Permitted Access to Vital Information Concerning the Constitutionality of the Execution Process Varies Dramatically Across the Jurisdictions

A review of state courts' decisions indicates a lack of uniformity concerning the amount of information that a litigant, or the public, is allowed to know concerning the constitutionality of the execution process. A number of federal district courts have recognized the due process right to full information concerning the manner and method of execution. In contrast, a number of federal Courts of Appeal have held that no such right exists.

(1) Some Jurisdictions Accept the Need for a Full and Open Discourse on the Method of Execution.

A number of jurisdictions accept the right to a full evaluation of the execution process.

In *Morales v. Hickman*, 438 F.3d 926 (9th Cir. 2006), the Ninth Circuit considered the district court's modification of a known protocol to require the presence of two anesthesiologists during the

execution. The decision was predicated on the principle that a condemned prisoner had a due process right to know and challenge the full method of the state's execution. The State of California has subsequently upheld the requirement that the execution protocol must fully comply with the California Administrative Procedures Act. See *Morales v. California Dept. of Corr. & Rehab.*, 168 Cal. App. 4th 729 (Cal. Ct. App. 2008).²⁵ As of this time, California lacks an acceptable execution protocol; but the public process of developing a constitutional method of administering lethal injection remains secure.

Arizona, similarly, has a publicly available execution protocol. In October 2013, an Arizona federal district court issued a preliminary injunction barring any further executions unless the state provided inmates with information regarding the drugs it planned to use in upcoming executions.²⁶ Arizona disclosed that it would use a batch of Nembutal that would expire on November 1, 2013. The state executed two inmates in October

²⁵ After the most recent protocol was promulgated, a California Court of Appeal held in May of 2013 that the California Department of Corrections had failed to comply with the state law. *Sims v. Dept. of Corr. & Rehab.*, 216 Cal. App. 4th 1059 (Cal. Ct. App. 2013).

²⁶ Arizona also has a statute providing that "the identity of executioners and other persons who participate or perform ancillary functions in an execution ... is confidential and not subject to disclosure." Ariz. Rev. Stat. Ann. § 13-757(C) (2009).

and has not yet attempted any other executions since the supply of Nembital expired.

On September 27, 2013, the Tennessee Department of Corrections adopted a new lethal injection protocol calling for a single dose of Pentobarbital. Billy Ray Irick filed a lawsuit challenging the new protocol under numerous grounds, and the county criminal court issued a stay of execution. *See West v. Shofield*, No. 13-1627-I (Tenn. Davidson Ch. Ct.) filed Nov. 20, 2013); *State v. Irick*, No. 24527, Slip Op. (Tenn. Knox Cty. Cir. Ct. Dec. 11, 2013. The court found that “[t]he “principles of constitutional adjudication and procedural fairness” required that his challenges to the single-drug protocol “be considered in light of a fully developed record.” *Irick*, at *2.

(2) Some Jurisdictions Seek to Keep Vital Facts Concerning the Execution Process from the Litigant and the Public.

The Texas Department of Criminal Justice’s execution protocol is publicly available, the state has refused to share from whom it purchases the drugs and whether the drugs are compounded or purchased under false pretense.²⁷ Such information

²⁷ *See Whitaker v. Livingston*, 4:13-cv-02901, 2013 U.S. Dist. LEXIS 144367 (S.D. Tex. Oct. 7, 2013). The Court of Appeals for the Fifth Circuit rejected the plaintiffs’ efforts to secure notice concerning the manner in which the State intended to secure their executions. *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 10/08/2013).

would be crucial to an inmate being able to challenge the constitutionality of his impending execution.

This is also the case in Alabama²⁸ and Oklahoma where, it was recently reported, the state “has been quietly buying its lethal injection drugs using the state prison agency's petty-cash accounts [...] State prison officials said they use the petty-cash funds to leave no public paper trail of the identities of drug suppliers or the state’s executioners.”²⁹

Arkansas also falls into the group of states seeking to enforce total secrecy on the execution process.³⁰ On March 25, 2013, Pulaski County Circuit Judge Collins Kilgore ruled that information sought by six death row inmates about the drugs the state plans to use to execute them (specifically, communication between the DOC and a drug company) was exempt from public disclosure. An attorney for the six inmates had asked the court to declare that all available information about the origin, history and quality of lethal injection drugs should be disclosed and noted

²⁸ The type of drug listed on Alabama’s execution protocol has been revealed in litigation; further details, however, remain a secret.

²⁹ Manny Fernandez, *Executions Stall as States Seek Different Drugs*, New York Times.com (Nov. 8, 2013) http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html?_r=0.

³⁰ Ark. Code § 5-4-617(g)(2013).

that the state was seeking to carry out executions using "unregulated, non-FDA-approved chemicals that it obtained from a business operating out of the back of an overseas driving school."³¹

Georgia³² and South Dakota³³ have also adopted wide-ranging rules seeking to render secret logistical procedures; drug availability, type and concentration; and the identities of those involved with preparing or supplying drugs.

Missouri has gone a troubling step further, implicating the First Amendment and the near-complete prohibition on a prior restraint. The Missouri legislators have acted to ensure that the details of their lethal injection process remain secret by imposing punitive damages on anyone who reveals those involved in the sourcing and supplying of lethal injection drugs.³⁴ From publicly available sources, the media has been able to identify which drugs are being sourced from which companies. However, the secrecy statute discourages media disclosure. Such a chilling effect on what must be protected speech – the disclosure of the source of the narcotics purchased to conduct

³¹ Michael Stratford, *Judge: Ark. lethal Injection Records FOIA Exempt* (Mar. 26, 2013) <http://www.stuttgardailyleader.com/article/20130326/NEWS/130329782/-1/entertainment%20life?refresh=true>.

³² Ga. Code Ann. § 42-5-36(d) (2013).

³³ S.D. Codified Laws §§ 23a-27a-31.2 (2013).

³⁴ Mo. Rev. Stat. § 546.720.2 (2013).

an execution by the state – is a facial breach of the First Amendment.

(3) Some Jurisdictions Allow Litigants and the Public to Know some of the Facts Vital to Assessing the Legality of an Execution Procedure.

Colorado argued that its lethal injection protocol, including the type of drug it planned to use, was confidential and refused to disclose it to inmates facing execution. *See Dunlap v. Colo. Dep't of Corr.*, 303 P.3d 572 (Colo. App. 2013). After the American Civil Liberties Union of Colorado sued the Colorado Department of Corrections, a district court judge ordered the state to release a redacted copy of its execution protocol, reasoning that it would facilitate a necessary public discussion of the death penalty in Colorado. *ACLU v. Colo. Dep't of Corr.*, Case No. 13-CV 32325 (D. Colo. Filed Aug. 1, 2013). The disclosures made illustrated how the state was taking a troublingly loose approach to determining how to execute people. It was later revealed that in March 2013, the Department of Corrections had sent a letter to almost 100 local compounding pharmacies seeking to “acquire sodium thiopental or other equally or more effective substances to cause death.”³⁵ The ACLU requested details regarding the source of drugs acquired by

³⁵ Tim Hoover, *Colorado Asks Pharmacists For Help In Securing Lethal Injection Drug* (Mar. 12, 2013) <http://www.denverpost.com/breakingnews/c1-22775748/Colorado-asks-pharmacists-help-securing-lethal-injection-drugs>.

the Department of Corrections, but the request was denied by the court. *ACLU*, 13 CV 32325.

Although Alabama initially sought to keep its execution protocol confidential, it has been revealed by the state in unsealed documents submitted in litigation. The state announced publicly on April 26, 2011, that it was changing the first drug in its lethal injection protocol from sodium thiopental to 2,500 mg of Pentobarbital. An inmate filed a lawsuit challenging the new protocol under the Eighth Amendment and the Equal Protection Clause, which was dismissed by the district court as untimely, finding that the statute of limitations had begun running on the date the original protocol had been promulgated. The Eleventh Circuit reversed and remanded, ordering the district court to conduct a hearing as to whether the switch from sodium thiopental to Pentobarbital constituted a “substantial change” such that the statute of limitations began to run anew when the protocol was changed. *Powell v. Thomas*, 643 F.3d 1300 (11th Cir. 2011).

After an evidentiary hearing, the district court found that “unlike sodium thiopental, which was the first drug in the three-drug execution protocol approved of by the Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008), there is little scientific evidence on the effects of pentobarbital when injected into healthy and conscious humans in the amount and manner required by Alabama’s protocol.” Accordingly, the court denied Alabama’s motions to

dismiss and for summary judgment.³⁶ The case is still pending and no executions are currently scheduled.

The wide array of disclosure/secretcy provisions in the various states reveals that this Court's intervention is appropriate to provide and clarify the consistent minimum level of disclosure required by the Eighth and Fourteenth Amendments in order to enable a condemned person to be fully informed as to the method of their execution and to be able to challenge the protocol in place should it appear to violate state law or the Constitution.

³⁶ The court dismissed a due process claim regarding Alabama's "veil of secrecy" over its execution protocol, because the Eleventh Circuit had recently rejected an identical claim on statute of limitations grounds. *Arthur v. Thomas*, 674 F.3d 1257, 1284 (11th Cir. 2012).

III. THE LACK OF PUBLIC ACCOUNTABILITY CONCERNING THE METHOD OF LETHAL INJECTION UNDERMINES CONFIDENCE IN THE ADMINISTRATION OF JUSTICE

In 1836, Reverend Thomas Upham cautioned against the secret administration of capital punishment:

Our courts of justice must be open to the public; the deliberations of our legislature must be public; not even a poor freemasonry society is to be tolerated because its ceremonies are secret; but when life is to be taken, when a human being is to be smitten down like an ox, when a soul is to be violently hurled into eternity, the most solemn occasion that can be witnessed on earth, then the public must be excluded. But the American people will not long submit to this.³⁷

In an attempt to carry out executions in accordance with a jury verdict, states may find it easier to take clandestine steps to procure the

³⁷ Michael Madow, *Forbidden Spectacle: Executions, The Public And The Press In Nineteenth Century New York*, 43 *Buffalo L. Rev.* 461, 462 (Fall 1995), quoting Rev. Thomas Upham, *The Manual Of Peace* 15 (1836) as quoted in Louis P. Masur, *Rites Of Execution: Capital Punishment And The Transformation Of American Culture, 1776-1835*, 110 Oxford University Press, Oxford (1989).

necessary ingredients for lethal injections than to adhere to established law and protocol. However, the fact that such a process is easier for departments of corrections does not ensure its propriety or legality. The judiciary cannot abdicate its duty fully to evaluate these crucially important issues and ensure that the death penalty is carried out in accordance with the Constitution.

Operating underhanded and secretive procurement methods from international pharmaceutical companies also prevents those companies from being held accountable according to national, regional and international human rights standards in other jurisdictions that have denounced the death penalty.³⁸

If a method of execution is ambiguous or kept secret, citizens are without a means to assess the constitutionality of the manner of punishment. This threatens the process and risks a “descent into brutality, transgressing the constitutional commitment to decency and restraint.”³⁹

³⁸ *Protocol No. 6 To The Convention For The Protection Of Human Rights And Fundamental Freedom Concerning The Abolition Of The Death Penalty* (ETS No. 114 (1983)); *Charter Of Fundamental Rights Of The European Union* 7 December 2000, OJC 364/01, Article 2; *Murder (Abolition of the Death Penalty) Act 1965*, 1965, Ch. 71 (Great Britain Nov. 8, 1965).

³⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

CONCLUSION

Wherefore, Amicus respectfully requests that this Court grant certiorari and resolve this important issue.

Respectfully submitted,

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