No. 07-5439

IN THE

Supreme Court of the United States

RALPH BAZE, *et al.*,

Petitioners,

—v.—

JOHN D. REES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF KENTUCKY, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Kentucky is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding the constitutionality of the protocols used in lethal injection executions. Given its longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of those questions is a matter of substantial importance to the ACLU and its members.

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed briefs as an *amicus* of this Court on numerous occasions. Institute attorneys currently handle over one

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that 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.

hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

Among the purposes of The Rutherford Institute is to foster respect for the uniqueness and paramount worth of human life and to stridently defend fundamental notions of fairness and equality under the law. These values are deeply rooted in America's constitutional tradition and its morality and values, dating back to the Declaration of Independence. It also finds its roots in an informed citizenry that has the knowledge to hold its government accountable. The Rutherford Institute believes that this case concerns fairness and equality in the application of the death penalty, and is vitally important to constitutional jurisprudence and the growth and progress of the nation.

STATEMENT OF CASE

Petitioners are inmates on Kentucky's death row who are challenging the chemicals and procedures Kentucky uses in its lethal injection executions. Kentucky, like every state that performs lethal injections except New Jersey, uses a three drug injection sequence to execute condemned men and women. This method of execution was first created in Oklahoma and was then adopted by the other states without reflection or study. The drugs used are, in order of injection, sodium thiopental, pancuronium bromide, and potassium chloride. Sodium thiopental is a short-acting barbiturate meant to anesthetize the inmate, pancuronium bromide is a neuromuscular blocking agent that completely paralyzes the inmate, and potassium

chloride is intended to cause cardiac arrest in the inmate. If the sodium thiopental is not injected properly and in the right amounts, the inmate will suffer the excruciating pain of slowly suffocating to death due to pancuronium bromide and the painful burning associated with potassium chloride without being able to move or in any way signal his or her pain.

Petitioners initiated a civil proceeding to challenge this execution protocol as a form of cruel and unusual punishment prohibited by the Eighth Amendment. Their claim was rejected both at trial and on appeal, in part on the theory that the Eighth Amendment does not ban methods of execution that create an unnecessary risk of pain but only bans those methods that create a substantial risk of the wanton infliction of pain.

SUMMARY OF ARGUMENT

Amici endorse petitioners' claim that the Eighth Amendment bars the state from employing a method of execution that involves the gratuitous infliction of pain.[2] Rather than repeat those arguments, however, this brief focuses on how that Eighth Amendment violation has been enabled by the lack of transparency surrounding lethal injections across the country.

Lethal injection procedures and executions have been, and continue to be, shrouded in secrecy.

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[2] As petitioners demonstrate, despite the shroud of secrecy surrounding lethal injection protocols, the available facts compel the conclusion that the protocols carry an unnecessary risk of inflicting pain on the condemned.

This shroud of secrecy exists on four levels. First, the procedures that states use during an execution are often kept confidential, protected from public scrutiny. Even lawyers involved in litigation challenging lethal injection and newspapers have been unable to glean critical information from the states about how lethal injection executions are carried out. Second, secrecy reigns even within state governments. The responsibility for creating lethal injection procedures is often delegated to corrections officials without discussion, study, or oversight by democratically accountable representatives. Third, even during executions, witnesses are prevented from seeing all that is occurring. Sometimes curtains physically block the witnesses' view of the inmate and sometimes the physical layout of the execution chambers makes it impossible for the witnesses to know what the state is injecting, who is injecting it, and how quickly it is being injected. Fourth, all but two states have maintained complete secrecy surrounding post-execution records and autopsies. The records kept during executions and the autopsies performed after contain data critical to evaluating the painlessness and humaneness of lethal injection executions, but states refuse to release this information.

The fact that lethal injection is shrouded in secrecy helps to explain why state after state has adopted this method of execution without study or reflection. Transparency in government is a critical aspect of our democracy, and it helps to ensure that public policy accords with contemporary values and civilized standards of decency. The near-total secrecy surrounding lethal injection has unsurprisingly led to a method of execution that

poses an unnecessary risk of excruciating pain. Because that outcome is inconsistent with contemporary values and civilized standards of decency, it violates the Eighth Amendment and should be enjoined.

I. MANY STATES HAVE CLOAKED THEIR LETHAL INJECTION PROTOCOLS AND EXECUTIONS IN SECRECY, INSULATING THEM FROM MEANINGFUL SCRUTINY.

Lethal injection protocols and executions have long been shrouded in secrecy and, thus, shielded from public and even intra-government scrutiny and oversight. 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." *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 95 (2007) [hereinafter Denno, *Quandary*].[3]

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[3] See also Adam Liptak, *Sidebar: After Flawed Executions, States Resort to Secrecy*, N.Y. Times, July 30, 2007 ("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 (referring to "the veil of secrecy that surrounds executions.").

As explained in further detail below, this shroud of secrecy exists on four levels. At the first level, the procedures (or protocols[4]) used to conduct lethal injection executions are kept confidential. Many states release little if any information about how they conduct the executions. At the second level, the protocols are often not scrutinized by, or even familiar to, democratically accountable members of government because the responsibility for their adoption and adaptation is delegated to department of corrections employees. The third level of secrecy arises during executions. Witnesses to executions are prevented from observing critical matters such as whether the prisoner is suffering pain and whether the state has complied with its protocol. A fourth level of secrecy shields post-execution information regarding what actually happened to the executed inmate during the execution. Few states disclose data that would permit the public to know if the inmate suffered pain before dying.

A. Lethal Injection Protocols are Kept Secret from the General Public.

The vast majority of states have refused to publicly disclose their lethal injection protocols. In Professor Denno's nationwide studies in 2001 and 2005 of lethal injection protocols, state officials have doggedly refused to disclose them. *See generally* Denno, *Quandary*, *supra*; Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind*

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[4] The term "protocol" is a broad one, used here to mean the entire procedure for carrying out a lethal injection, not just the drugs used in such an execution. *See* Denno, *Quandary* at 92 (noting broad meaning of "protocol").

State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63 (2002) [hereinafter Denno, *Delegate*]. In her 2001 study, she found it very difficult to gather these protocols. Denno, *Delegate*, supra, at 116 ("One of the most striking aspects of studying lethal injection protocols concerns the sheer difficulty involved in acquiring them."). Seven states either said that they had no protocol or that their protocol was confidential, and the rest provided protocols that lacked critical details of the execution process. *Id.* at 116-25. Her 2005 study uncovered even more secrecy. Denno, *Quandary, supra*, at 95 ("Since Study 1, states have withdrawn even more information from public scrutiny ...."). In 2005, only six states had completely public protocols. *Id.*

Many states refuse to disclose information about their protocols even to lawyers involved in litigation and reporters investigating lethal injection.[5] In an opinion demanding that the

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[5] Indeed, the states themselves have had a difficult time gaining access to the protocols used by other states. While reviewing its own protocol, California sent a survey to 37 states and the federal government seeking information about their lethal injection procedures. Only 15 jurisdictions responded. State of California Lethal Injection Protocol Review 11 (May 15, 2007). Even judges have encountered resistance when demanding information about lethal injection executions. When an Ohio trial judge held that he had jurisdiction to hold a pre-trial hearing to determine whether lethal injection is cruel and unusual punishment and ordered the Ohio Department of Rehabilitation and Correction (DRC) to provide information about its protocols, the DRC sought a writ of prohibition from the Ohio Supreme Court to prevent the judge from ordering release of the information and from holding a hearing. Journal Entry of Judge James Burge, *State v. Rivera*, No. 04CR065940 (Ohio Ct. of Common Pleas July 24, 2007); Complaint for Writ

Department of Corrections specifically demonstrate why institutional safety required that its lethal injection protocol be kept secret, a New Jersey court noted that the department "resisted much of appellant's broad discovery demand [pertaining to lethal injection procedures] on grounds of privilege or right to confidentiality." *In re Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 212-13 (N.J. Super. Ct. App. Div. 2004).[6] In Alabama, the state provided only heavily redacted pages in response to discovery requests from an attorney representing a condemned inmate in Section 1983 litigation, claiming that the redacted portions were protected by confidentiality agreements. As the attorney explained in an editorial, "what I learned was not much more than what was already known to the general public: very little." William R. Montross Jr., *Shine a Light on Alabama's Death-Penalty Process*, Birmingham News, Oct. 7, 2007. Alabama went ahead with three executions under this veil of secrecy, "without anyone—not a judge, not the public, not the media—ever looking at how Alabama executes people." *Id.*

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of Prohibition with Affidavit and Attachments, *State ex rel. Collins v. Burge*, No. 07-1576 (Ohio Aug. 22, 2007); Motion to Vacate Hearing Date and Continue Hearing at 2-4, *State v. Rivera*, No. 04CR065940 (Ohio Ct. of Common Pleas Oct. 29, 2007). The Ohio Supreme Court denied the writ, allowing the ordered hearing to proceed. Entry in Prohibition, *State ex rel. Collins v. Burge*, No. 07-1576 (Ohio Oct. 31, 2007).

[6] *Cf. Travaglia v. Dep't of Corr.*, 699 A.2d 1317, 1324 (Pa. Commw. Ct. 1997) (upholding "DOC's decision to deny [death sentenced inmate] access to documents relating to lethal injection procedures").

In 2001, the Kentucky Department of Corrections denied a state Open Records Act request for information pertaining to lethal injection on the basis that the request improperly sought information rather than records and because, "'assuming that a protocol for execution by lethal injection even exists, such a policy would be exempt from disclosure...as a threat to security.'" Attorney General Albert B. Chandler, *Open Records Decision: In re: Robert M. Harding/Department of Corrections*, 01-ORD-247, at 3 (Dec. 21, 2001) (quoting Department of Corrections Staff Attorney, Brian A. Logan, Supplemental Response). Only weeks before this Court granted certiorari in this case, Kentucky continued to guard its execution protocol, citing "security concerns in denying open-records requests from The Associated Press." Brett Barrouquere, *Kentucky Ready for Execution—Only if Things Go Right*, Evansville Courier & Press (Ind.), Sept. 6, 2007.

Even those states that release some portions of their protocols continue to keep much important information secret, preventing informed evaluation of the protocols.[7] For example, a three-page document available on the Montana Department of Corrections' website fails to list the specific chemicals or dosages used and refers to an "execution procedural manual" not available on the website. Montana Department of Corrections Policies and Procedures, Executions, Doc. 3.6.1 (rev. June 15, 2000), available at http://www.cor.state.mt.us/

[7] Professor Denno provides a good overview of the types of information that states did and did not provide in their lethal injection protocols as of 2001. Notably, many states' protocols failed to disclose the dosages of lethal drugs that would be administered to inmates. Denno, *Delegate*, *supra*, at 116-25.

resources/policies_ch3.asp. The publicly available document contains almost no information about executions, leaving it to the manual to set out rules governing critical aspects of an execution, such as pre-execution procedures, execution procedures, post-execution procedures, news media, witnesses, and communications. *Id.*[8] Similarly, Colorado's website fails to list drug dosages and states that the warden is responsible for creating "a specific operational memorandum and a 'RESTRICTED DISTRIBUTION' document relative to executions...." Colorado Department of Corrections, Administrative Regulation, Capital Punishment/Execution by Lethal Injection, Reg. No. 300-14 (Aug. 1, 2006); *see also* Colorado Department of Corrections, Execution Day (Mar. 3, 2006), available at http://exdoc.state.co.us/secure/combo/frontend/index.php/contents/view/474. Connecticut's online protocol refers to a "security document" describing execution procedures that is to be distributed only on a "'need-to-know' basis." Connecticut Department of Correction,

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[8] In response to a right to know request, the Montana Department of Corrections disclosed a copy of this manual. See Letter from Bob Anez, Communications Director, Montana Department of Corrections, to John Adams, Staff Writer, Missoula Independent 4 (Sept. 26, 2007). However, the disclosure came with a caveat that the procedure could change before the next execution and with redactions meant to protect the "secure, safe and orderly operation of the prison" and the identity of execution participants. *Id.* at 1, 4. These redactions conceal critical information about lethal injection executions, including much about the procedure used for securing the inmate to the gurney and the first two steps involved in the "final sequence of events" before an execution. See *id.* at 4; Montana Department of Corrections, Technical Manual at 21-22; 41-42.

Administration of Capital Punishment, Dir. No. 6.15 (Oct. 19. 2004).

Some of the most closely guarded secrets are the qualifications,[9] training[10] and identity[11] of the

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[9] "Even in the face of litigation, corrections officials will not release the names and qualifications of executioners. [Litigation in Missouri] initially centered on the Department of Corrections' refusal to reveal *any information* about the executioners. Only when the magistrate judge instituted a protective order did the department release some relevant information." Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood*, 75 Fordham L. Rev. 2791 (2007) (emphasis added) (footnotes omitted). In denying a right to know request, the Montana Department of Corrections explained that state law prevented it from revealing anything about executioner qualifications or training: "Mont. Code Ann. § 46-19-103 (5) states, in pertinent part: 'The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner *must remain confidential.*' (emphasis added). The department, therefore, *cannot give you details about the qualifications or training* of the person who will carry out the execution without violating the statute." Letter from Mike Ferriter, Director, Montana Department of Corrections, to Representative Paul Clark (July 13, 2006) (emphasis added).

[10] During litigation in California, "[t]he state kept the details about the selection, training, and supervision of the execution team a closely held secret only made public by order of the court...." Ellen Kreitzberg and David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 Santa Clara L. Rev. 445, 507 (2007). *See also*, Roko, *supra* note 9, at 2824-25 (noting that a Florida inquiry into lethal injections found that "the obligation to conceal executioner identities had hampered the investigation" into lethal injection, and that "[s]tates typically do not publicize any requirements for execution team members").

[11] Executioner identities are guarded by statute and by procedural manual in some states. *See, e.g.*, Mo. Ann. Stat. § 546.720 (3) (West 2007) ("A person may not, without the

participants in lethal injection executions. *See* Roko, *supra* note 9 (detailing the history of and issues involved in keeping the qualifications, training and identities of executioners secret). One author notes that, "[i]ronically, as executioner qualifications became more pertinent, the identities became increasingly confidential." *Id.* at 2817. Because lethal injection involves intricate procedures normally performed by highly trained professionals, knowing the training and skill-level of participants is critical to an informed evaluation of the procedure. However, when this secrecy has on occasion been pierced, the results have sometimes been profoundly unsettling. In Missouri, for example, when the press uncovered the identity of the state's lethal injection supervisor, it also learned that he had confused dosages during executions, had a number of malpractice actions filed against him, and had lost

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approval of the director of the department of corrections, knowingly disclose the identity of a current or former member of an execution team or disclose a record knowing that it could identify a person as being a current or former member of an execution team."); Liptak, *supra* note 3 (discussing the Missouri statute and explaining that "[q]uite a few states have similar laws"); State of California San Quentin Operational Procedure No. 0-770: Execution by Lethal Injection (May 15, 2007) (while the death penalty is halted in California due to federal court litigation and this new protocol has not yet been employed, it is filled with dictates that "[t]he names of Lethal Injection Team Members will not be released"). They have even been hidden during depositions. *See, e.g.*, Chris Tisch, *Testimony in Execution Case Disrupted*, Contra Costa Times (Walnut Creek, Cal.), Feb. 21, 2007 ("A machine disguised [the voice of a man testifying before a state commission studying lethal injection] as he spoke over a telephone. He refused to answer detailed questions about his qualifications....").

his privileges to practice at two hospitals.[12] *See* Liptak, *supra* note 3; Editorial, *The Secret of Dr. X*, St. Louis Post-Dispatch, May 29, 2007, at B6.

One of the "critical deficiencies" that a federal judge cited with California's lethal injection protocol was "[a] lack of meaningful training." *Morales v. Tilton*, 465 F.Supp.2d 972, 979 (N.D. Cal. 2006). The judge explained: "the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure. One member of the execution team, a registered nurse who was responsible for mixing and preparing the sodium thiopental at many executions, testified that '[w]e don't have training, really.'" *Id.* A federal judge uncovered similar glaring training deficiencies in Tennessee:

> The executioners have received only very limited instruction, and that instruction relates to the tasks of the IV Team Members, not the actions they are actually charged with performing....These are known risks—accidents which, given enough of an opportunity, will occur—for which the executioners are completely unprepared. In many cases, the executioners are not even

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[12] *See also* Elizabeth Weil, *The Needle and the Damage Done*, N.Y. Times, Feb. 11, 2007 (describing California case which revealed that "two members of the execution team previously had been arrested for drunken driving, that one had taken mental-health leave for depression and post-traumatic stress disorder from working in the prison system and that another had taken two months' medical leave to recover from a fight with an inmate"); Roko, *supra* note 9 (describing other problems that stem from keeping executioner identities secret).

> aware that the risks exist. This is not a mere "risk of negligence" but a guarantee of accident, written directly into the protocol itself. Accordingly, the court finds that the failure to utilize adequately trained executioners increases the plaintiff's risk of unnecessary pain.

Harbison v. Little, 2007 WL 2821230 at *18 (M.D. Tenn. Sept. 19, 2007). Even the creator of the lethal injection protocol has been highly critical of skill-level of the participants, explaining "'[i]t never occurred to me when we set this up that we'd have complete idiots administering the drugs.'" Weil, *supra* note 12 (quoting Jay Chapman).

Because of the secrecy that surrounds lethal injection protocols, the public, the press and even lawyers for condemned inmates have no way of knowing what the state plans to inject, how much they plan to inject, what the training and skill level of the person who will inject it is, how soon after the inmate's last meal the injection will occur, and other crucial details.

B. Secrecy Cloaks Lethal Injection Even Within State Governments.

In many instances, secrecy has even prevented intra-governmental scrutiny of lethal injection protocols and executions. Many important decisions are often made by corrections officials with little or no input or oversight from democratically accountable representatives.[13]

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[13] *Cf.* Denno, *Quandary*, at 122 ("State agencies have the ability to change protocols without informing the public, and often information about protocols is not subject to state freedom of

In California, even as the state reviewed its lethal injection executions in response to a decision by a federal judge, secrecy reigned. *See Morales*, 465 F.Supp.2d at 982-83; Henry Weinstein, *Secret Talks on Execution Challenged*, L.A. Times, Feb. 2, 2007. In response to a federal court decision holding California's lethal injection protocol unconstitutional, the state agreed to review its policies and release a report detailing the changes it would make, but sought to keep the review secret. Weinstein, *supra*. The judge denied this request,[14] but major aspects of the review, including the construction of a new death chamber, were kept secret from the public and their elected representatives alike. Scott Smith, *Judge Will Visit Death Chamber Before Ruling*, The Record (Stockton, Cal.), Jun. 2, 2007 ("Correctional officials in secret started to build a new death chamber, but Gov. Arnold Schwarzenegger ordered building halted in April once legislators learned of the controversial project that had gone on without their knowledge...."). When California finally proposed a new protocol, it left many critical decisions to the sole discretion of the warden at San Quentin State Prison: "The Warden is responsible for the recruitment, selection, retention, and training of all staff involved in the Lethal Injection process. The Warden is also responsible for managerial oversight and overall implementation of the procedure." State of California, San Quentin Operational Procedure No. 0-770 Execution by Lethal Injection IV.A. (May 15, 2007). The California Department of Corrections

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information laws. Even the mere delegation of execution procedures to corrections officials decreases their visibility.")

[14] *Morales v. Tilton*, No. C-06-219 JF (N.D. Cal. Mar. 6, 2007).

and Rehabilitation researched and developed the protocol, and the department and the warden are the only parties required to approve changes. *Id.* at V.W.1.c.; *see also*, State of California Lethal Injection Protocol Review, May 15, 2007.

Florida's recently revised protocol also gives the execution team warden "final and ultimate decision making authority in every aspect of the lethal injection process" and the authority to permit deviations from the written protocol. Florida Department of Corrections, *Execution by Lethal Injection Procedures* 1-2 (July 31, 2007).

In Tennessee, a federal judge pointed out that the commissioner of corrections had developed the state's new lethal injection protocol without following the recommendations of a committee ordered by the Governor to study the issue. *Harbison v. Little*, 2007 WL 2821230 at *13 (M.D. Tenn. Sept. 19, 2007). In declaring the new protocol unconstitutional, the court stated: "Commissioner [of Corrections] Little, having not attended the committee meetings nor consulted with any of the medical experts whose recommendations the committee sought, unilaterally rejected the committee's recommendations and ordered them to prepare a new...protocol that ended up including none of the 'best practices' of the other states of which the committee had become aware." *Id.* at *27.

In Maryland, in suspending the lethal injection protocol developed by the state's department of corrections because the protocol had not been adopted in compliance with the state's Administrative Procedure Act, a court stressed the need for legislative oversight: "The whole issue of

the death penalty, and particularly the method of its implementation, is of great interest to the Legislature." *Evans v. State*, 914 A.2d 25, 79-81 (Md. 2006). Recent litigation in a California state court has focused on the same issue, with the judge announcing that it would be "proper" to enjoin enforcement of the state's lethal injection protocol because it was not adopted in compliance with California's Administrative Procedure Act. Order After Hearing, *Morales v. Calif. Dep't of Corr. And Rehab.*, No. CV061436 (Cal. Super. Ct. Oct. 31, 2007).[15]

In fact, legislative oversight is an element glaringly absent from the story of lethal injection's adoption as the method of execution in thirty-seven states. As Professor Denno details, the current lethal injection protocol was developed in Oklahoma in 1977 with only the informal input of two doctors. Denno, *Quandary*, *supra*, at 65-70. The procedure was then quickly and unthinkingly copied by state after state without any study or deliberation. *Id.* at 78-79; Human Rights Watch, *So Long as They Die* 10 (2006). As a doctor in Missouri conceded, he "devised the state's execution protocol," which basically mirrors Oklahoma's, "without consulting anyone." Weil, *supra* note 12. State and federal governments

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[15] Plaintiff's complaint explained that the State's failure to adhere to the Administrative Procedure Act "deprives the State's citizens of the opportunity to ensure that executions that are carried out in the name of the People of California are performed properly, humanely, and comply with relevant medical ethical standards.... [And it] undermines public, executive and legislative oversight of agency action." Complaint for Declaratory and Injunctive Relief, *Morales v. Calif. Dep't of Corr. and Rehab.*, No. CV061436 (Ca. Super. Ct. Apr. 5, 2006).

have never performed any type of study to determine the efficacy and humaneness of lethal injection protocols. *Id.* ("[N]either wardens nor legislators in the United States have ever conducted a professional survey on execution procedures or studied how those practices might be improved.").

Secrecy within the government means that critical decisions regarding executions are made by unelected, often uninformed state employees and that other state employees and elected officials have no way to review these decisions, let alone overrule them.

C. Secrecy Guards the Execution Chamber Even From the Eyes of Witnesses.

The shroud of secrecy surrounding lethal injection hides much more than just the states' written procedures. It also prevents witnesses from seeing what the state is actually doing during the execution and what the inmate is experiencing

As petitioners explain in detail in their brief, the use of pancuronium bromide (or Pavulon) as the second drug in the three-drug cocktail prevents witnesses from observing whether the inmate is experiencing pain during the execution. *See* Denno, *Delegate*, at 97-99. The drug's only function is to act as a "chemical curtain" by paralyzing the inmate. Pancuronium bromide does not anesthetize the inmate, does not render the inmate unconscious, and does not cause death. *See Morales v. Hickman*, 438 F.3d 926, 927 n.2 (9th Cir. 2006); *see also Harbison v. Little,* 2007 WL 2821230 at *2; *Morales v. Tilton*, 465 F. Supp. 2d 972, 975-76, 983-84 (N.D.Cal. 2006). Once pancuronium bromide is injected, the inmate

cannot move, speak or otherwise express pain, and the witnesses therefore cannot observe whether he or she is suffering any pain. Complaint for Declaratory and Injunctive Relief at 5-7, *Pacific News Service v. Woodford* (N.D. Cal. Mar. 8, 2006); Emergency Petition for a Writ of Mandamus, or in the Alternative, a Writ of Prohibition, Enjoining all Executions, Including the Execution Scheduled for 8:30 P.M. Today, Oct. 15, 2007 at 12-15, *ACLU of Nevada v. Skolnik* (Nev. Oct. 15, 2007). If the inmate was not properly anesthetized prior to being injected with pancuronium bromide, he or she will endure the excruciating pain of slowly suffocating to death due to lung paralysis (caused by pancuronium bromide) and a painful burning sensation when the third drug (potassium chloride) passes through his or her body.[16] Yet, he or she will be completely unable to communicate this fact to others. The inmate will appear completely still to observers, his or her death a peaceful one. But the reality will be quite another story.

Another shroud of secrecy preventing witnesses from seeing what is actually going on is the curtain used to obscure the witnesses' view of the chamber. What witnesses can and cannot see lies in the sole discretion of the warden and other

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[16] David Biello, *Bad Drugs: Lethal Injection Does Not Work as Designed*, ScientificAmerican.com, April 23, 2007, available at http://www.sciam.com/article.cfm?articleID=20704AC3-E7F2-99DF-3C1F0FEFB917B387&chanID=sa007 [hereinafter Biello, *Bad Drugs*] (citing a scientific study that found that where an inmate is not properly anesthetized, "'death by suffocation would occur in a paralyzed inmate fully aware of the progressive suffocation and potassium-induced sensation of burning'").

corrections officials. In some states, the curtain is not opened until the inmate is already strapped to the gurney and the IV lines have been inserted. *See, e.g.* Phillip Rawls, *Alabama Facing Execution Challenge*, Press-Register (Mobile, Ala.), Sept. 30, 2007, at B1 ("Alabama keeps its lethal injection procedures secret, and a *curtain in the execution chamber* keeps witnesses from seeing the medical professionals who are involved." (emphasis added)); Connecticut Department of Correction, Administration of Capital Punishment, Dir. No. 6.15 (9)-(11) (Oct. 19, 2004) (directing that the IV line be established before the curtains blocking the witnesses' view is opened and that the curtains be closed once the injection is performed and before a doctor pronounces death).

Curtains have prevented witnesses from seeing botched executions. A report by the Human Rights Watch includes a list of known botched lethal injection executions, and in six of the fifteen described the curtain was drawn so that witnesses could not observe whatever problem was occurring in the chamber. Human Rights Watch, *So Long as They Die* 46-50 (2006). Florida's protocol not only calls for the curtain to be opened only after the IV lines have been established and the injection is ready, it also explicitly states that the curtains should be closed if problems occur. Florida Department of Corrections, *Execution by Lethal Injection Procedures* 10-12 (July 31, 2007). The procedure states that the "window covering to the witness gallery" should be closed if the inmate is found to be conscious or if the IV is somehow compromised. *Id.* at 11-12.

The use of separate rooms also shields witnesses from seeing what the state is doing during executions. Located in a separate room behind thick glass, witnesses cannot tell if the state's protocol is being followed properly. Often the chemicals are released by someone who is in yet another room, apart from the rooms in which the witnesses and the inmate are located. *See, e.g.,* State of California Lethal Injection Protocol Review 18 (May 15, 2007) (reviewing visits made by California officials to the death chambers of other states and noting that each had "separations, either a curtain or a wall, between the condemned inmate and the infusion team"); Weil, *supra* note 12 (describing Missouri executions in which the drugs are administered from another room such that the executioner's "identity [is] shielded from witnesses and his psyche [is] distanced from the act of killing"). As a result, there is no way for witnesses to observe what drugs or what dosages are being injected, how quickly, and by whom. As Professor Denno states, "[e]vidence shows that states currently do not follow even their vague protocols." Denno, *Quandary*, *supra*, at 121. She gives the following examples:

> Missouri's Dr. Doe altered the amount of sodium thiopental delivered. Ohio executioners failed to maintain the required dual intravenous access lines. The Florida commission acknowledged that the execution team did not heed the state's existing guidelines for the delivery of chemicals. In California, state officials misled the anesthesiologists about their role while some of those involved in the executions claimed during the *Morales* hearings that they had

never seen the state's protocol. And, in North Carolina, the state and participating doctor ignored a court order to monitor the inmate's level of unconsciousness. *Id.*

In short, pancuronium bromide, curtains and separate rooms ensure that witnesses to executions are unable to observe what the state is actually doing during the execution process and whether the inmate is experiencing any pain.

D. The Shroud of Secrecy Continues Even After the Inmate's Death, Preventing a Final Assessment of the Lethal Injection Procedure.

After an execution, the inmate's body, data collected during the execution, and any autopsy results are generally kept from the public. *See* David Biello, *Reasonable Doubt*, Scientific American, July 2007, at 20, 21 [hereinafter Biello, *Reasonable Doubt*] ("Only a tiny fraction of information on the specifics of the 907 executions carried out by lethal injection as of mid-May is publicly available."). In fact, only two states release these records. Biello, *Bad Drugs, supra* note 16 (citing California and North Carolina as the only states releasing post-execution data). As one expert on lethal injection explained, "'[t]here is an enormous amount of information from executions—autopsies, toxicology, ECG recordings, EEG recordings, execution logs and photographs—but *most of it has been kept secret.*" Biello, *Reasonable Doubt, supra*, at 21 (quoting Dr. Mark Heath) (emphasis added). The public release of this information could reveal critical facts about lethal injection, including: whether the written procedures was properly followed, what amounts of drugs were

administered, whether the IV functioned properly, whether the inmate was conscious during the execution, and whether the inmate was made silently to endure excruciating pain before succumbing to death.

Scientists have studied the post-execution materials that have been released by two states, North Carolina and California, and they have concluded that lethal injection is not working the way the states claim—that it is not painless. David Biello, *Bad Drugs*, *supra* note 16. A study published by *PLoS Medicine* examining 41 of the 891 lethal injection executions performed at that time found that potassium chloride, the intended agent of death, might not be killing the inmates, instead leaving them to suffocate motionlessly under pancuronium-bromide-induced paralysis. *Id.* As one of the researchers, Teresa Zimmers, a molecular biologist, explained, "'[t]his idea that this is a painless procedure is completely wrong....It's just invisible because the person is paralyzed.'" *Id.* When something goes wrong with an execution by electrocution, lethal gas or hanging, the botched results are immediately obvious. *See, e.g.*, Denno, *Quandary*, at 62-63 (describing the extensive burning of execution, the lengthiness of hangings, and the visibly painful suffocation of lethal gas executions). Because lethal injection paralyzes an inmate, placing him or her behind a final shroud of secrecy, the states' failure to disclose post-execution data prevents researchers and the public alike from evaluating the pain and suffering felt by the inmate.

II. THE SHROUD OF SECRECY CLOAKING THE LETHAL INJECTION PROTOCOL HELPS TO EXPLAIN ITS ADOPTION IN KENTUCKY AND OTHER STATES.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man...." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion). Accordingly, the Eighth Amendment prohibits punishments that involve "'the purposeless and needless imposition of pain and suffering.'" *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). It also bans punishments that are contrary to "'civilized standards of decency.'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)); *see also Penry*, 492 U.S. at 331 (punishment cannot be inconsistent with "contemporary values").

The secrecy in which state governments have shrouded their lethal injection protocols helps to explain how Kentucky and other states have, in unexamined lockstep, adopted a method of execution that creates an unnecessary risk of excruciating pain and that so obviously offends civilized standards of decency and contemporary values. In this context, as in others, governmental practices are most likely to depart from prevailing social norms when they are conducted in secrecy and insulated from meaningful public review and criticism. As Justice Brandeis memorably observed: "Sunlight is ... the best disinfectant." Louis Brandeis, OTHER PEOPLE'S MONEY 62 (1933). For that reason, when the United States moved from public to private executions

during the Eighteenth Century,[17] "the states implemented procedures that ensured executions would remain open to some public scrutiny," including by the press. *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 875-76 (9th Cir. 2002) (citing, *inter alia*, Louis P. Massur, RITES OF EXECUTION 25-27 (1989)). Through the years, public scrutiny of executions has helped to insure that they are conducted without "evasion, perversion, or abuse" and in a manner consistent with our most basic values. *See* Massur, *supra*, at 115 (quoting Senate Document No. 79 in Documents in the Senate of the State of New York, Fifty-eighth Session, 1835 (Albany: E. Croswell, 1835), Vol. 2, pp. 4, 10). As Louis Massur explained:

> The use of newspapers to disseminate information about a private execution was the recommendation of a senate select committee of the New York legislature directed to inquire "into the propriety of abolishing public executions." The committee report summarized what they saw as the most telling defense of public hangings: "that if punishments were privately inflicted, it could not be known whether they were actually, and justly and properly, inflicted upon the persons

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[17] Executions were historically conducted in public both in England and in the United States. See *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002), citing inter alia John Laurence, A History of Capital Punishment 177-178, 179 (1960); John D. Bessler, Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions, 45 Fed. Comm. L.J. 355, 359-64 (1993). See also Louis P. Massur, RITES OF EXECUTION, 25-27 (Oxford University Press 1989).

> condemned, or that innocent persons had not becomes victims." The legislators reasoned that since so few people could obtain "ocular evidence" of the execution, it would be sufficient to protect against any "evasion, perversion, or abuse" by publishing an account of the hanging attested to by "respectable citizens who would attend the execution not as private spectators but as public witnesses." *Id.*

In our democracy, transparency in government helps to ensure that public policy remains consonant with contemporary values and standards of decency. As this Court has repeatedly stressed in its first amendment jurisprudence, secrecy in government is antithetical to popular self-determination and to the development of sound public policy in the marketplace of ideas. In his famous dissent in *Abrams v. United States*, Oliver Wendell Holmes explained that "the theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [citizens'] wishes safely can be carried out." 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). In *Red Lion Broadcasting Co. v. FCC,* this Court declared that our Constitution countenances "an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than ... monopolization of that market...by the Government...." 395 U.S. 367, 390 (1969) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*,

250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (opinion by Chief Justice Rehnquist stressing "the truth-seeking function of the marketplace of ideas"); *Globe Newspaper v. Co. v. Superior Court*, 457 U.S. 596 (1982) ("Public scrutiny of a criminal trial enhances the quality...of the factfinding process, with benefits to both the defendant and to society as a whole.").

James Madison put the matter pithily: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910). Justice Powell stressed "our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues," adding that "public debate must not only be unfettered; it must also be informed." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-863 (1974) (Powell, J., dissenting); *see also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 300 (1984) (Stevens, J., joined by Powell, J., and Brennan, J., dissenting) (Constitution guarantees "an open marketplace for ideas-where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 n.7 (1980) (plurality opinion) ("Bentham also emphasized that open proceedings enhanced the performance of all involved, protected

the judge from imputations of dishonesty, and served to educate the public." (citing 1 Jeremy Bentham, RATIONALE OF JUDICIAL EVIDENCE 522-525 (1827))).

Given the shroud of secrecy in which states have cloaked their lethal injection protocols, it is not surprising that they have adopted an ill-considered protocol that needlessly risks the infliction of excruciating pain during the execution process and that deeply offends civilized standards of decency and contemporary values. As this Court has eloquently declared, "informed public opinion is the most potent of all restraints upon misgovernment...." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). In his plurality opinion in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), Chief Justice Burger pointed out that "Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone," and quoted Betham's memorable warning:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827).'

Id. at 569. Chief Justice Burger also quoted Justice Clark's opinion in *Shepard v. Maxwell,* 384 U.S. 333, 349 (1966), that Anglo-American law has long reflected "'[t]he principle that justice cannot survive behind walls of silence.'" 448 U.S. at 573-74, n.9; *see*

also In re Oliver, 333 U.S. 257, 270 (1948) ("[C]ontemporaneous review in the forum of public opinion is an effective restraint on possible abuse" of governmental power); *Globe Newspaper v. Co. v. Superior Court*, 457 U.S. 596 (1982) ("Public scrutiny of a criminal trial...safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."); Senate Committee on the Judiciary, Amending the Freedom of Information Act, S. Rep. No. 854, 93rd Cong., 2d Sess. 1-2 (1974) ("[T]he people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest...."). As Alexander Meiklejohn observed:

> Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.

Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

Cloaked as they have been in secrecy and posing as they do an unnecessary risk that the government will inflict excruciating pain on those who are legally required to endure the execution process, the states' lethal injection protocols are the epitome of ill-considered, ill-balanced misgovernment

completely at odds with civilized standards of decency and contemporary values. This Court should hold that the protocols violate the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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WORD CERTIFICATION

As required by Rule 33.1(h), I certify that the document contains 7,530 words, excluding the parts of the document that are excluded by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 2007

Steven R. Shapiro