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2/28/2020 12:56 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALIZA COVER, Petitioner-Respondent-Cross Appellant,	)	Supreme Court Docket No. 47004
v.	)	Fourth Judicial District, Ada County, Case No. CV01-18-3877
IDAHO BOARD OF CORRECTION, IDAHO DEPARTMENT OF CORRECTION, JEFFREY RAY, Respondents-Appellants.	)	

MOTION OF AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ALIZA COVER

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Hon. Lynn Norton

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Pursuant to Rule 8 of the Idaho Rules of Appellate Procedure, the American Bar Association ("ABA") respectfully requests leave to submit a brief as *amicus curiae* in support of Petitioner Aliza Cover. The ABA does not seek to participate in oral argument in this matter.

The ABA has contacted counsel for all parties, none of whom object to the filing of this brief.

A copy of the ABA's proposed brief is attached. The ABA has a specific and unique interest in this case that is not fully represented by the parties or other *amici* and that the ABA believes may be helpful to the Court in considering the issues presented.

The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its membership includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[1]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." The ABA seeks to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "eliminate bias in the . . . justice system." ABA Mission and Association Goals.[2]

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[1] The ABA certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council before filing.

All parties have consented to the filing of this brief.

[2] Available at http://www.americanbar.org/about_the_aba/abamission-goals.html.

As part of fulfilling its mission to serve the public, the ABA has advocated to improve the justice system since its founding in 1878. Although the ABA takes no position on whether a state ought to have the death penalty, it has long sought to ensure that if it does, it administers the death penalty fairly and accurately, with appropriate substantive and procedural protections. Accordingly, the ABA has carefully considered and studied many different aspects of the death penalty, and adopted policy positions, protocols, and standards to help guide the justice system and legal profession in grappling with the parameters of administering the death penalty.

Primary to that effort is the ABA Death Penalty Due Process Review Project, which conducts research and educates the public and decision-makers on the operation of capital jurisdictions' death penalty laws. In 2001, it published the *ABA Protocols on the Fair Administration of the Death Penalty* and from 2003 through 2013 conducted comprehensive assessments of the administration of the death penalty in twelve jurisdictions against the standards set forth in the Protocols.

As part of its goal of ensuring that capital punishment is administered with due process and constitutional safeguards, the ABA founded the Death Penalty Representation Project in 1986 to provide training and technical assistance to judges and lawyers to improve the quality and availability of representation for those facing possible death sentences. The ABA has published comprehensive guidelines for representing capital defendants. *See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[3] The ABA's policy statements also address a variety of concerns implicated by capital punishment, and include urging capital jurisdictions to prohibit capital punishment for certain vulnerable

[3] Available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/.

populations, to require jury unanimity, and to adopt measures that would guarantee competent and adequately compensated counsel, among others. [4]

Indeed, the ABA has adopted a policy position on the issues presented in this case. Policy Resolution 108B[5] urges transparency in governmental promulgation and administration of death penalty execution protocols. The policy resulted from the ABA's concern that states' secrecy measures and limitations on disclosure of information about execution protocols create a grave risk that executions will be carried out in a manner that fails to comport with important Constitutional and public policy principles. As the ABA concluded, condemned prisoners need access to information about execution protocols to challenge the constitutionality of the procedures in state and federal court. And the public needs that information to properly evaluate death penalty procedures and decide whether they comport with current standards of decency.

Accordingly, the resolution urges "legislative bodies and governmental agencies, including departments of correction," in death penalty jurisdictions "to promulgate execution protocols in an open and transparent manner and allow public comment prior to final adoption." Resolution 108B also urges these entities to "require disclosure to the public, to condemned prisoners facing execution, and to courts all relevant information regarding execution procedures." This includes "details about any drugs to be used, including the names, manufacturers or suppliers, doses, expiration date(s), and testing results concerning use of the drugs." The resolution explicitly notes the importance of disclosure to news media and the general public of information related to execution protocols and administration of the death

[4] Available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/policy (collecting ABA policies related to the death penalty).

[5] Available at https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2015_my_108b.pdf.

penalty. As the ABA concluded, disclosing information about execution protocols and drugs is essential for our society and legal system to be able to evaluate death penalty cases and ensure that the death penalty is administered fairly and impartially, consistent with due process and the Eighth Amendment's prohibition against cruel and unusual punishment.

The ABA seeks leave to file this amicus brief to urge the court to consider the ABA's policy position on the issues in this case, adopted after extensive study and research on the administration of the death penalty, and to consider the constitutional issues implicated by the secrecy measures enacted by the Idaho Department of Corrections ("Department").

For these reasons, the ABA respectfully requests that leave to file its brief be granted.

RESPECTFULLY SUBMITTED this 28th day of February 2020.

s/Deborah A. Ferguson

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CERTIFICATE OF SERVICE

I certify that on the 28th day of February, 2020, I caused to be served a true and correct copy of the foregoing by email to:

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ATTACHMENT

Proposed Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioner Aliza Cover

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AMICUS CURIAE BRIEF

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Honorable Lynn Norton, District Judge, Presiding.

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I. INTRODUCTION

The American Bar Association ("ABA") hereby provides its brief as amicus curiae in support of Professor Aliza Cover's appeal.

The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its membership includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[1]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." The ABA seeks to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "eliminate bias in the . . . justice system." ABA Mission and Association Goals.[2]

As part of fulfilling its mission to serve the public, the ABA has advocated to improve the justice system since its founding in 1878. Although the ABA takes no position on whether a state ought to have the death penalty, it has long sought to ensure that if it does, it administers the death penalty fairly and accurately, with appropriate substantive and procedural protections. Accordingly, the ABA has carefully considered and studied many different aspects of the death

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penalty, and adopted policy positions, protocols, and standards to help guide the justice system and legal profession in grappling with the parameters of administering the death penalty.

Primary to that effort is the ABA Death Penalty Due Process Review Project, which conducts research and educates the public and decision-makers on the operation of capital jurisdictions' death penalty laws. In 2001, it published the *ABA Protocols on the Fair Administration of the Death Penalty* and from 2003 through 2013 conducted comprehensive assessments of the administration of the death penalty in twelve jurisdictions against the standards set forth in the Protocols.

As part of its goal of ensuring that capital punishment is administered with due process and constitutional safeguards, the ABA founded the Death Penalty Representation Project in 1986 to provide training and technical assistance to judges and lawyers to improve the quality and availability of representation for those facing possible death sentences. The ABA has published comprehensive guidelines for representing capital defendants. *See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[3] The ABA's policy statements also address a variety of concerns implicated by capital punishment, and include urging capital jurisdictions to prohibit capital punishment for certain vulnerable populations, to require jury unanimity, and to adopt measures that would guarantee competent and adequately compensated counsel, among others. [4]

[3] Available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/.

[4] Available at https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/resources/policy (collecting ABA policies related to the death penalty).

Indeed, the ABA has adopted a policy position on the issues presented in this case. Policy Resolution 108B[5] urges transparency in governmental promulgation and administration of death penalty execution protocols. The policy resulted from the ABA's concern that states' secrecy measures and limitations on disclosure of information about execution protocols create a grave risk that executions will be carried out in a manner that fails to comport with important Constitutional and public policy principles. As the ABA concluded, condemned prisoners need access to information about execution protocols to challenge the constitutionality of the procedures in state and federal court. And the public needs that information to properly evaluate death penalty procedures and decide whether they comport with current standards of decency.

Accordingly, the resolution urges "legislative bodies and governmental agencies, including departments of correction," in death penalty jurisdictions "to promulgate execution protocols in an open and transparent manner and allow public comment prior to final adoption." Resolution 108B also urges these entities to "require disclosure to the public, to condemned prisoners facing execution, and to courts all relevant information regarding execution procedures." This includes "details about any drugs to be used, including the names, manufacturers or suppliers, doses, expiration date(s), and testing results concerning use of the drugs." The resolution explicitly notes the importance of disclosure to news media and the general public of information related to execution protocols and administration of the death penalty. As the ABA concluded, disclosing information about execution protocols and drugs is essential for our society and legal system to be able to evaluate death penalty cases and ensure

[5] Available at https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2015_my_108b.pdf.

that the death penalty is administered fairly and impartially, consistent with due process and the Eighth Amendment's prohibition against cruel and unusual punishment.

The ABA files this amicus brief to urge the Court to consider the ABA's policy position on the issues in this case, adopted after extensive study and research on the administration of the death penalty, and to consider the constitutional issues implicated by the secrecy measures enacted by the Idaho Department of Corrections ("Department").

II. STATEMENT OF THE CASE

As part of her scholarship on the death penalty, including her research into lethal injection and the Eighth Amendment's prohibition against cruel and unusual punishment and the evolving standard of decency related to capital punishment, Professor Aliza Cover of the University of Idaho School of Law sought public records about the lethal injection drugs used in Idaho's two most recent executions and those the Department intends to use in future executions. Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records ("Petition"), Case No. CV-1-18-03877 filed Feb. 27, 2018. The disclosures she sought include Idaho's source of execution drugs, the drug manufacturer and/or distributor, and lot numbers and expiration dates of the drugs themselves, as well as purchase orders, receipts, source paperwork, and communications with suppliers. After the Department refused her request for this information, alleging that the sources of the drugs needed to remain secret, she petitioned the court for a writ of mandamus to compel disclosure under the Idaho Public Records Act. Petition; Findings of Fact, Conclusions of Law ("Findings"), at 1, Case No. CV-1-18-3877, filed Mar. 21, 2019.

Following a trial, the court required disclosure of the drugs used in two previous executions but allowed the Department to withhold records related to drugs for use in future executions, including the Board's current supplier of lethal injection drugs. Findings at 51–52;

see also Judgment, Case No. CV-1-18-3877, filed Mar. 21, 2019. In upholding the non-disclosure of records regarding drugs for future executions, the court weighed the Department's asserted interest in confidentiality and security against the public's interests in disclosure, and concluded that disclosure could "impair [the State's] ability to conduct future executions." Findings at 65; *see also id.* at 52, 67.

III. ARGUMENT

There is no compelling need for secrecy around execution protocols. No statute explicitly requires secrecy, and the Department has no legitimate interest in carrying out unexamined, and potentially unconstitutional, executions. Indeed, the countervailing First Amendment policy interests weigh against secrecy. Other constitutional considerations also favor transparency. Secrecy facilitates inhumane executions and prevents condemned prisoners from mounting Eighth Amendment challenges to their executions, which in turn creates constitutional due process issues. Finally, transparency and public disclosure contribute to the public discourse and debate on the fair administration of the death penalty, which enhances the effectiveness of the courts, and promotes public confidence in government and the justice system.

A. There is No Compelling Need for Secrecy Measures Here.

The Department has no compelling interest in secrecy sufficient to outweigh the interests in or Idaho's policy favoring transparency. Indeed, the countervailing First Amendment interest of drug manufacturers in knowing how their products are being used outweighs any interest of the Department in concealing which drugs they use in executions.

1. Idaho law presumes transparency absent a specific demonstration that an exception to that broad policy applies.

Idaho has explicitly recognized the importance of transparency in its Public Records Act, recently retitled to Transparent and Ethical Government, which expressly presumes that records

are (and should be) open. I.C. § 74-102(1) ("there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute."). That "presumption of transparency and disclosure is only overcome by a specific demonstration that an exemption applies to the record being requested." *Ward v. Portneuf Med. Ctr.*, 248 P.3d 1236, 1239 n.3 (Idaho 2011). Exceptions, therefore, must be "narrowly construed,"[6] *id.,* and they are, by definition, exceptions, not the rule.

No such exception applies here. The Department's stated secrecy interest here does not arise from any statute. Idaho has statutes addressing other aspects of its capital punishment system, instructing the director of the Department to develop procedures to carry out death sentences by lethal injection, I.C. § 19-2716, and precluding any civil liability for state agents, employees and contractors carrying out executions, as well as the drug vendors, manufacturers or distributors. I.C. § 19-2716A. Tellingly, it does not have a statute requiring that information about lethal injections be kept secret, as it would if the legislature, in its judgment, had determined that secrecy measures were warranted. Instead, the Idaho Board of Corrections promulgated regulations which interpret the relevant Public Records Act provisions[7] to exempt the records sought from disclosure. Board Rule 135.06. *See* I.C. §§ 19-2716, 19-2716A. But those regulations are inconsistent with the transparency requirements of the Public Records Act, and outweighed by the interests in disclosure.

Execution records should not be exempted from disclosure because the public interest in disclosure, and the fundamental constitutional interests implicated by secrecy around execution

[6] Another Idaho "Sunshine Act" provision, requiring public disclosure of campaign and lobbyist activity, also explicitly embraces a public purpose "[t]o promote public confidence in government" and "[t]o promote openness in government and avoid [] secrecy" surrounding campaigns and lobbyist activities. I.C. § 67-6601.

[7] Specifically, § 74-105(4) exempts from disclosure records of the Department of Correction in "which the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure."

protocols, outweigh any interest of the Department in confidentiality for the reasons articulated in this brief. I.C. § 74-105(4)(9a)(i).

2. The Department has no legitimate interest in carrying out unexamined and potentially unconstitutional executions.

In weighing the public interest in ensuring lawful executions against the Department's interests in confidentiality and security, the public interest prevails. Although execution of death sentences serves "two principal social purposes: retribution and deterrence," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), those interests cannot displace the public interest in ensuring that punishment is implemented in a constitutional manner. Indeed, there can be no legitimate interest in carrying out unconstitutional executions. *See, e.g., Buck v. Davis*, 137 S. Ct. 759, 779 (2017) (noting the state's lack of interest in enforcing a "capital sentence obtained on so flawed a basis").

The Department has argued that Board Rule 135.06 recognizes a public interest in secrecy when disclosure "could jeopardize the Department's ability to carry out an execution." *E.g.*, Findings at 47. But secrecy cannot be justified on the grounds that it allows executions to proceed apace, if that secrecy in turns precludes ensuring that those executions are lawful and comport with the Constitution.

3. The Department's secrecy measures are contrary to the First Amendment policy favoring transparency.

The pharmaceutical manufacturers of the drugs being used do not seek secrecy here; in fact, they oppose it. Indeed, no pharmaceutical manufacturer has ever endorsed the use of its medicines in lethal injection procedures. Quite the reverse: for decades companies have objected to the misuse of their medicines in executions, and over the last decade, every FDA-approved manufacturer of drugs used in executions in the United States has publicly opposed the use of

their medicines in executions.[8] Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. Times, May 13, 2016, at A1.[9] Those manufacturers have even put distribution controls in place to prevent prisons buying their drugs for executions. *Id.* But those controls are only enforceable if states are transparent about the source of their drugs.

Indeed, the largest pharmaceutical trade association in the United States, the Association for Accessible Medicines (AAM), categorically opposes the use of their medicines to carry out executions and has decried state efforts—via secrecy measures—to undermine the ability to enforce distribution policies: "[D]rug manufacturers are limited in their ability to discover whether their distribution policies have been subverted, because several states have adopted secrecy laws that are designed to keep information related to execution confidential—including information about the sources of medicines that are used in lethal injections." *See* Brief for the Association for Accessible Medicines as Amicus Curiae, *Buclew v. Precythe*, No. 17-8151 2018 WL 3572366, 15–16 (U.S.).[10] Drug suppliers have litigated against those secrecy measures because secrecy precludes them from controlling the distribution of their own products according to their negotiated contracts. *See* Order, *Alvogen, Inc. v State of Nevada*, No. 18A777312, 2018 WL 4145017, (Nev. Dist. Ct., July 11, 2018) (seeking injunctive relief for return of medications); *Arkansas Dep't of Correction v. McKesson Med.-Surgical, Inc.*, 2018 Ark. 154 (2018) (per curium) (same).

[8] Instead, Respondents claim that public disclosure of suppliers can lead to boycotts "with a goal to have the business stop providing" lethal injection drugs, and that a boycott against one can cause other suppliers to refuse to supply the drugs as well. *Id*. at 37. This argument assumes that manufacturers stopped supplying drugs for use in executions only in response to anti-death-penalty advocates, which is not the case.

[9] Available at https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html.

[10] Available at https://lethalinjectioninfo.org/wp-content/uploads/2018/07/Bucklew-Amicus-Brief-of-Association-for-Accessible-Medicines.pdf.

Fear of criticism of the Department or its actions is insufficient justification to undermine the First Amendment policy favoring transparency by hiding essential information about executions from the public. The idea that secrecy is justified in order to continue current execution protocols because public outcry and economic pressures have made it difficult or impossible to obtain drugs is anathema to constitutional policies and jurisprudence. It suggests that public officials can (and indeed should) stifle public sentiment in opposition to the exercise of one of the government's greatest and extraordinary powers. *See N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 909–10 (1982) (publishing people's names to get them to act a certain way by "social pressure and the 'threat' of social ostracism" also protected speech: "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."); *Gregg*, 428 U.S. at 226 ("Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it.").

That approach is also contrary to the First Amendment principle that economic decision-making is protected speech in the "marketplace of ideas." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech."). Healthcare companies have made the economic decision to oppose and, where possible, block use of their medicines in executions. For this Court to uphold secrecy around execution protocols would undermine these First Amendment interests by concealing from companies the ultimate purpose for which the states intend to use those companies' drugs. For example:

> A free market posits voluntary exchanges between willing buyers and willing sellers . . . the sale of execution drugs to the State of Ohio . . . would be an unfree transaction if a seller had announced its intention not to have its products used for executions and then were deceived in a sale to the State because the drugs were being bought by an anonymous agent . . . [I]t is not the duty of the federal

> courts to assist in the obtaining of [execution] drugs by deception, by allowing a state agent to attempt to acquire those drugs by remaining anonymous.

Decision and Order Regarding Continued Anonymity of DRC employee #1 at 15–16, *In re Ohio Execution Protocol Litigation, ,* Case No. 2:11-cv-1016 (S.D. Ohio Sept. 27, 2019).

This Court should not countenance hiding how the Department administers the death penalty absent some powerful contrary interest, not present here. Plaintiff's requested disclosures serve the public interest and are supported by constitutional principles. Public disclosure allows—indeed is necessary for—to protect the free speech values underlying the First Amendment and to fully and fairly evaluate the potential constitutional infirmities of a particular execution protocol.

B. Transparency is Essential to Ensuring Executions Comport with the Constitution.

1. Secrecy measures facilitate inhumane executions.

The ABA has consistently and frequently taken the position that a good and democratic government requires transparency.[11] Transparency helps ensure good policy decisions in the first instance and allows the courts, legislatures, and the public to correct bad ones. And the oversight that transparency allows helps to guard against ill-conceived and poorly or inconsistently administered procedures. *See* Justice L. Brandeis, *Other People's Money* 13 (1913) ("Sunlight is the best disinfectant."). Executions are no exception. Traditionally, executions—and information

[11] In 1974, the ABA House of Delegates passed a Resolution supporting, in principle, the adoption of legislation designed to improve the Freedom of Information Act to "protect all interests yet place emphasis on the fullest responsible public disclosure and maximum public access." 1974 Reps. of the ABA 99, at 583; *see also*, ABA House of Delegates Resolution 107D (Feb. 2006) (calling for "a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient…"); ABA House of Delegates Resolution 304 (Aug. 1995) (encouraging the Food and Agriculture Organization of the United Nations to "restructure itself, streamline its operations, and strengthen its transparency and accountability"); ABA House of Delegates Resolution 109B (Feb. 1993) (supporting the "governments of Canada, Mexico and the United States to establish, through the North American Free Trade Agreement (NAFTA) principles, rules, procedures, and institutions for the conduct of trade and other economic relations among the participating countries which are designed to provide transparency, predictability, fairness and due process.").

about how they are conducted—have been accessible to the public. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002). In fact, executions were events attended by the public well into the twentieth century, when technological changes in execution methods required that executions take place behind prison walls, rather than in public squares. *See* Stuart Banner, *The Death Penalty: An American History* 154–55 (2002).

The vast majority of U.S. executions since 1976 have been carried out by lethal injection using a three-drug formula, where the first drug is supposed to anesthetize the prisoner; the second drug causes paralysis of all voluntary muscles; and the third drug stops the heart, causing death. *See* Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 Fordham Urb. L.J. 817, 818–19 (2008). In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court upheld Kentucky's three-drug execution formula as constitutional. Nevertheless, challenges to lethal injection have continued since that decision, in part because of substantial changes in execution protocols and states' increasing difficulties securing reliable sources for and obtaining execution drugs. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, B.U. L. REV. 1367, 1380 (2011); Elisabeth A. Semel, Op-Ed., *End Secrecy in Lethal Injections*, CNN (Jan. 16, 2014, 11:31 AM).[12]

In 2010, the sole U.S.-based manufacturer of sodium thiopental stopped producing the drug, a key component in lethal injection protocols across the country used to numb the pain of potassium chloride stopping the heart. *See* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. Rev. 1367, 1380 (2014). In response, death penalty states experimented with new and untested lethal injection drug combinations and dosages. *Id.* The

[12] Available at http://www.cnn.com/2014/01/15/opinion/semel-lethal-injection/.

results of that experimentation were troubling: there was a marked increase in the number of executions in which the untested drug combinations and doses resulted in extreme pain and/or prolonged delays in death, causing death row prisoners, experts, advocates, and the public to question the cruelty of states' lethal injection procedures. *See* Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. Crim. L. & Criminology, 443, 456–58 (2017).

In turn, states responded to this scrutiny not by implementing measures addressing these constitutional flaws, but by undermining important constitutional protections. Many states enacted secrecy laws or regulatory measures that prohibited disclosure of information about the drugs used in lethal injection protocols, including the identity of the drug manufacturers, and the types, doses, and expiration dates of the drugs. *Id*. at 459–60. These secrecy measures prevent prisoners and the public from determining if the drugs will cause death in a humane manner that comports with Eighth Amendment standards.

It is indisputable that a growing number of inhumane executions have occurred in the United States, four of which occurred in 2014 alone. *See* Corinna Barrett Lain*, The Politics of Botched Executions*, 49 U. Rich. L. Rev. 825, 824 (2015). Between 1980 and 2010, more than 7% of lethal injection executions in the U.S. were mishandled, higher than for any other method of execution. *See* Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* 61 (2014). And those issues continue to this day.[13]

[13] *E.g.*, Tracy Connor, *Doyle Lee Hamm Wished for Death During Botched Execution, Report Says*, NBCNews.com (Mar. 5, 2018), https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706; Liliana Segura, *Cruel and Unusual: A Second Failed Execution in Ohio*, TheIntercept.com (Nov. 19, 2017), https://theintercept.com/2017/11/19/cruel-and-unusual-a-second-failed-execution-in-ohio/; Sofia Lotto Persio, *Eric Branch's Last Words: Florida Killer Screamed "Murderers" After Lethal Injection*, Newsweek.com (Feb. 23, 2018), https://www.newsweek.com/florida-killer-eric-branch-screamed-murderers-after-lethal-injection-817598; Adam Tamburin & Dave Boucher, *Tennessee Execution: Billy Ray Irick Tortured to Death, Expert Says in New Filing*, Tennessean.com (Sept. 7, 2018), https://www.tennessean.com/story/news/crime/2018/09/07/tennessee-execution-billy-ray-irick-tortured-

Those inhumane executions are the predictable result of execution procedures shrouded in secrecy. Lain, *supra*, at 838 (attributing inhumane executions to "states' fealty to the death penalty and its processes" including that they "shield their protocols from meaningful scrutiny [and] use untested drugs from undisclosed providers"); Chris Greer, *Delivering Death: Capital Punishment, Botched Executions and the American News Media,* in *Captured by the Media: Prison Discourse in Popular Culture* 84, 84 (Paul Mason, ed., 2006) (tying three mishandled executions to the transformation of executions "from public events to 'behind-the-scenes' bureaucratic procedures, increasingly hidden from the public gaze").

Secrecy measures facilitate the use of untested protocols, and untested drug combinations and doses, which increases the likelihood of inhumane executions where the condemned prisoner may suffer extreme pain and delays in death while the execution team scrambles to administer additional drugs. Those executions violate the Eighth Amendment's prohibition on cruel and unusual punishment.

2. Public disclosure is necessary for the condemned to pursue constitutional challenges to execution protocols.

Secrecy measures not only facilitate inhumane executions that violate important constitutional rights, they also prevent the vindication of those rights. The Eighth Amendment is the traditional vehicle for challenging the constitutionality of execution methods. But proving an

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filing/1210957002/; *Nebraska Inmate Makes Final Statement as Witnesses Describe First-ever Fentanyl Execution*, cbsnews.com (Aug. 15, 2018), https://www.cbsnews.com/news/nebraska-execution-carey-dean-moore-final-statement-before-execution-using-fentanyl-for-1st-time/; Juan A. Lozano & Michael Gracyk, *Texas Executes Man in the Torture, Drowning of Ex-Roommate*, APnews.com (Sept. 26, 2018), https://apnews.com/e0d3eb9d92fa4d86a2c3a28ef2427ac5/Texas-executes-man-in-the-torture,-drowning-of-ex-roommate ("Clark. . . remarked that the drug 'burned going in.'"); Associated Press, *Christopher Young, Death Row Inmate from San Antonio, Executed for Deadly 2004 Robbery*, abc13.com (July 17, 2018), https://abc13.com/texas%E2%80%90killer%E2%80%90tells%E2%80%90victims%E2%80%90family%E2%80%90he%E2%80%90loves%E2%80%90them%E2%80%90before%E2%80%90execution/3778021/ ("As the lethal dose of the sedative pentobarbital began taking effect, he twice used an obscenity to say he could taste it and that it was burning."); *Texas to Execute Third Prisoner This Year Amid Reports of Botched Killings*, TheGuardian.com (Feb. 1, 2018), https://www.theguardian.com/us-news/2018/feb/01/texas-to-execute-third-prisoner-this-year-amid-reports-of-botched-killings.

Eighth Amendment violation requires analyzing execution protocols and details regarding the drugs used—the very type of information sought (and withheld) in this case. Withholding such information bars individuals from vindicating their Eighth Amendment rights, functionally insulating execution protocols from judicial review.

The Eighth Amendment bars methods of execution that create a "substantial risk of serious harm" that is "objectively intolerable." *Baze*, 553 U.S. at 52. This protection extends to future harm. *Id.* at 49. To prevail on a claim that a method of execution is cruel and unusual under the Eighth Amendment, an individual must: (1) "establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering," and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quotations omitted). That two-prong test applies to facial challenges and as-applied ones alike. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127–28, 1130 (2019). To assess the first prong, "courts look to the details of the execution protocol and drugs being used—precisely the information that many states seek to withhold." Report to ABA Policy Resolution 108B at 9. To satisfy the second prong, as the Court clarified in *Bucklew,* the alternative method must be one that has been adopted and used by one or more states and that has a "track record of successful use." *Bucklew*, 139 S. Ct. at 1130 (quoting *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017)).

A prisoner must have access to information about both the particular state's execution protocols, as well as those of other states in order to satisfy both prongs. But a litigant can only satisfy the *Glossip-Bucklew* test if there is access to the sort of information the Department seeks to withhold here, because the test requires assessing the risks of pain in past and future executions. In *Bucklew* itself, for example, the Court rejected the plaintiff's allegation that the

nitrogen hypoxia protocol offered as an alternative would "significantly reduce a substantial risk of pain" given his rare disease because, inter alia, he had failed to provide more than mere speculation about the state's execution protocol. *Id.* at 1130–31. It is one thing to deny relief because no evidence supports a plaintiff's allegations, but something altogether different (and wholly impermissible) where the evidence exists, but the Department deliberately refuses to disclose it. If the executive branch can decide what information to disclose about its own actions in executions that have gone awry and its protocols for future executions, it erodes due process for those seeking to challenge their death sentences on Eighth Amendment grounds.

3. Secrecy measures impeded due process of law in administering the death penalty.

Without information about execution protocols and drugs, courts cannot assess whether an execution will violate an individual's Eighth Amendment right to be free of cruel and unusual punishment. This effectively strips death row inmates of their Eighth Amendment protections, and due process. A challenge to a method of execution involves the precise type of "grievous loss" meant to enjoy due process protections. Berger, *Lethal Injection Secrecy*, *supra*, at 1401 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970)). Those protections require notice and a meaningful opportunity to be heard. *Id*. at 1401–02; *see also Panetti v. Quarterman*, 551 U.S. 930, 941 (2007) (requiring a "'fair hearing' in accord with fundamental fairness" (quoting *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring)); *Twining v. New Jersey*, 211 U.S. 78, 110 (1908) ("Due process requires . . . that there shall be notice and opportunity for hearing given the parties."). But there can be no meaningful opportunity to be heard if the government unilaterally withholds the evidence needed to make one's arguments.

Withholding such information also precludes judicial adjudications of a constitutional right, a quintessential judicial function. Berger, *Lethal Injection Secrecy, supra,* at 1407.

Abdicating review of constitutional matters to departments of correction raises serious concerns. But meaningful judicial review can only occur if courts have access to information about the execution procedures. *See In re Oliver*, 333 U.S. 257, 273 (1948) (due process rights "include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."). "[W]hen a court rejects an inmate's request for information about the state's planned execution procedure, it denies *itself* the opportunity to make an informed judgment about the procedure's safety." Berger, *Lethal Injection Secrecy, supra,* at 1403. Courts cannot rule on constitutional claims in a factual vacuum, particularly one created by the government's deliberate acts. "[G]iven the nature of our adversarial legal system, judicial consideration of lethal injection procedures necessarily requires that inmates be permitted to study the procedures' details in advance so they can present the dangers in court." *Id*. at 1411; *see also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 178 (1951) ("Notice and opportunity to be heard are fundamental to due process of law."); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("[Our legal] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

Information about execution protocols lies at the heart of the Eighth Amendment analysis, and constitutes relevant discovery death row inmates must be able to obtain and present to support their claims. *See, e.g.,* Fed. R. Civ. P. 26(b)(1) (providing for broad discovery encompassing anything that is non-privileged and material to a claim—including material that is not itself admissible if it would lead to admissible evidence—and providing even broader scope when good cause is shown).[14] Even if one had to show good cause under Rule 26(b)(1), that

[14] Furthermore, Rule 26(b)(2)(C) provides a proportionality test to limit the scope of discovery; that test weighs the importance of the material to the lawsuit against the burdens on disclosure. This is roughly analogous to the First Amendment test weighing state interests against public interests in disclosure discussed in Part C *infra*.

standard would be easily met given how essential information about execution protocols is to an Eighth Amendment claim, and the importance of the issues at stake. Berger, *Lethal Injection Secrecy*, *supra*, at 1396.

C. Public disclosure and the resulting public discourse and debate are essential to an effective justice system.

Governmental secrecy around execution protocols also undermines the justice system as a whole for several reasons.

First, public disclosure about those protocols and the drugs involved is required for meaningful, informed public discourse and debate. That in turn allows for an informed citizenry when serving as jurors or participating in elections. In particular, citizens have direct input into capital sentencing decisions through their jury service where they are called on to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Data about the underlying issues is fundamentally necessary for that input to be informed.

Second, disclosure enhances the courts and the justice system by providing valuable information for courts to rely upon in deciding challenges to death penalty procedures. It allows for scientific testing that provides "the highest epistemological quality of scientific research results" on the factual issues underlying these Eighth Amendment questions. Jon Yorke, *Comity, Finality, and Oklahoma's Lethal Injection Protocol*, 69 Okla. L. Rev. 545, 569 (2017). Indeed, here, Professor Cover made her original public records request in order to conduct scholarly research useful to litigants and the courts.

In deciding Eighth Amendment challenges, courts have relied on public discourse in evaluating "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1956) (plurality opinion). In deciding what those current standards of decency demand, courts ask whether there

are objective indicia of a national consensus concerning a particular death sentencing practice. *See Roper v. Simmons*, 543 U.S. 551, 562 (2005). Those objective indicia include the "historical development of the punishment at issue, legislative judgments . . . and the sentencing decisions of juries." *Enmund v. Florida*, 458 U.S. 782, 788 (1982). Accurately assessing these indicia also depends on public disclosure and debate about whether those punishments comport with our evolving understanding of the Eighth Amendment. *See* Berger, *Lethal Injection Secrecy*, *supra*, at 1432–40. By contrast, secrecy surrounding executions prohibits the public from meaningfully evaluating those actions.

Public disclosure also increases judicial efficiency. Lawsuits challenging execution protocols often arise after the inmate has been scheduled for execution, requiring a stay to pursue the litigation. *E.g., Bucklew*, 139 S. Ct. at 118. Having information about execution protocols already in the public record enables full consideration of Eighth Amendment claims with less need for the sort of last minute stays of execution that would otherwise be required to pursue such litigation. This in turn facilitates prompt resolution of claims by the courts, without delays impacting impending executions.

Finally, secrecy measures around execution protocols undermine public confidence in the justice system because shielding these procedures from the public suggests that they cannot withstand public scrutiny. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 924 (2006) ("To outsiders, then, the system seems at best mysterious, at worst frustrating and dishonest. As a result, victims and the public may lose confidence in and respect for the system."). By contrast, transparency promotes public involvement in the development of better execution protocols and enhanced public confidence in the justice system. *See, e.g.*, David Indermaur, *Dealing the Public In: Challenges for a*

Transparent and Accountable Sentencing Policy in *Penal Populism, Sentencing Councils and Sentencing Policy* 119, 154 (Arie Freiberg & Karen Gelb, eds., 2013) (arguing that public enfranchisement in sentencing in general "will be responsible and responsive to practical concerns"). It also helps maintain confidence in our government in general, and the justice system in particular, if its operations are less opaque. *See* Eugene R. Fidell, *Transparency, 2009*, 61 Hastings L.J. 457, 464 (2009); Bibas, *supra*, at 923–24.

CONCLUSION

For the foregoing reasons, the ABA requests this Court rule in favor of Petitioner in this appeal.

Respectfully submitted this 28th day of February, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of February, 2020, I caused to be served a true and correct copy of the foregoing by email to:

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