No. 05-8794

IN THE

Supreme Court of the United States

Clarence E. Hill,

Petitioner,

v.

James R. McDonough,
Interim Secretary, Fla. Dep't of Corrections,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF BRADLEY A. MACLEAN AND WILLIAM P. REDICK SUPPORTING PETITIONER

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March 6, 2006

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2 Bradley A. MacLean and William P. Redick request leave to file the attached brief *amici curiae*. For the reasons described in the Interests of the Amici section, *amici* believe that this brief will assist in the Court's consideration of the case. Counsel to *amici* were unable to reach counsel for respondent, necessitating this Motion.

Respectfully submitted,

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QUESTION PRESENTED

This brief will address the question whether the lethal injection protocols generally employed in executions comport with the Eighth Amendment to the U.S. Constitution.

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INTEREST OF *AMICI CURIAE*[1]

Amici are counsel to a death row inmate in Tennessee who has been sentenced to die by lethal injection, and whose challenge to the state's lethal injection protocol is currently pending before this Court. *Abdur'Rahman* v. *Bredesen*, No. 05-1036. In the course of litigating the constitutional question before the courts of Tennessee, *amici* undertook an extensive review of lethal injection protocols and the dangers that arise under those protocols that condemned inmates will unnecessarily be subjected to extreme pain and suffering during the execution process. While the case currently before the Court concerns the question whether prisoners can use 42 U.S.C. 1983 to challenge execution protocols, it may be useful to the Court in analyzing that question to understand the grave Eighth Amendment concerns posed by common execution protocols. The particular expertise developed by *amici* should aid the Court's consideration of the issues raised by this case.

STATEMENT

This Court granted certiorari to decide whether a condemned prisoner may challenge the protocol under which he will be executed in an action under 42 U.S.C. 1983 or whether such an action is instead properly characterized as a prohibited successive habeas application. In the view of *amici*, the question whether Congress intended to permit such a suit is properly informed by an understanding of the substantial constitutional claim that the state's position would preclude. *Amici* in this brief accordingly addresses the merits of the underlying Eighth Amendment claim presented by cases such as this one.

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[1] No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

Thirty-five states use a three-drug cocktail for executing condemned prisoners. See *Evans* v. *Saar*, 2006 WL 274476, at *2 (D. Md. Feb. 1, 2006). Although there is some variation among the procedures used, the primary components are the same. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradoxes Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 97-99 (2002). The principal features are the use of sodium thiopental (also commonly known as sodium Pentothal), Pavulon, and potassium chloride. *Ibid*.

Since the adoption of the first lethal injection protocol by Oklahoma in 1977, other states have essentially copied existing protocols, without any independent analysis or scientific investigation, and with little or no legislative attention to the form of the particular protocol employed. Henry Weinstein, *State Will Help Shape Fate of Lethal Injection*, L.A. TIMES, Feb. 23, 2006, at A1 (quoting Kent Scheidegger, legal director of the Criminal Justice Legal Foundation in Sacramento, as noting that "states just seemed to copy [the Oklahoma protocol] without much scientific backup for what they adopted"); see *infra* note 10. Tennessee, for example, "copied other states in developing its method." *Abdur'Rahman* v. *Sundquist*, No. 02-2236-III, slip op. at 9 (Tenn. Ch. Ct. filed June 1, 2003).[2] An ad hoc committee

[2] There is also little doubt that Florida, the state in which petitioner is scheduled to be executed, copied other states, particularly Texas, in adopting its protocol in 2000. Not only is the Florida protocol typical in using a three-drug chemical combination, Denno, *supra*, at 146, but Florida also specifically uses two grams of sodium Pentothal, just like Texas. Compare *Sims* v. *State*, 754 So. 2d 657, 666 n.17 (Fla. 2000), with Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 356 LANCET 1412, 1412 (2005) (usual dosage in Texas and Virginia is two grams). See also COMMITTEE ON CRIMINAL JUSTICE, THE FLORIDA SENATE, A MONITOR: METHODS OF EXECUTION & PROTOCOL (1997), available at http://www.fcc.state.fl.us/fcc/reports/monitor/contmon.html (last

composed of Department of Correction personnel[3] adopted the state's protocol without consulting physicians or any other persons with medical or scientific training, *id.* at 2, and without seeking any public input, *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 300 (Tenn. 2005).

This wholesale imitation has produced a number of serious problems. For example, state officials have included Pavulon in their protocols although the drug serves no function in the execution, neither anesthetizing nor killing the prisoner. Denno, *supra*, at 100. What Pavulon *does* do is to paralyze the prisoner, which can make him feel that he is suffocating to death if he is not properly anesthetized. *Beardslee* v. *Woodford*, 395 F.3d 1064, 1071 (CA9), cert. denied, 125 S. Ct. 982 (2005). The possibility of such cruel, conscious suffering has resulted in thirty states passing laws "banning, in whole or in part, the use of neuromuscular agents as a means of euthanizing animals." See *infra* at 17-18.

Additionally, most states do not even mention training in their protocols. Denno, *supra*, at 121. "Criteria for selecting or training executioners in these states appear to be nonexistent." *Id.* at 122. Even in states like Virginia and Texas, where the cocktail is often administered by emergency medical technicians, those technicians are not trained to administer anesthesia. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1412 (Apr. 16, 2005).

Further, protocols generally fail to account for the varying size and medical history of prisoners – facts critical to

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visited Mar. 3, 2006) (a survey of other states' execution methods, particularly focusing on Texas in connection with lethal injection).

[3] As in twenty other states, Tennessee's legislature delegated the task of developing an execution protocol to state administrative officials. See Tenn. Code Ann. 40-23-114; see also *infra* note 9.

dosage decisions.[4] Denno, *supra*, at 109-10. Indeed, most states fail even to specify the dosage that the executioners are to use under normal circumstances, making it difficult to ascertain whether the amount used is proper in any particular case. *Id.* at 99. Many states' protocols, including those of Tennessee and Texas, also call for remote administration of the anesthesia, *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4; Koniaris et al., *supra*, at 1412, and fail to require the executioner to verify that the prisoner is anesthetized before proceeding, *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4. Additionally, under the Tennessee protocol the syringes are not labeled with the chemical name, but rather are color-coded – a feature that substantially increases the likelihood of error in administering the cocktail. *Ibid.* All of these factors create a realistic risk that a prisoner might be insufficiently anesthetized when the Pavulon takes effect. Denno, *supra*, at 109.

Finally, the Tennessee Department of Correction's policy regarding storage of the perishable cocktail components is also flawed. Although Department of Correction personnel are aware that sodium Pentothal has a short shelf life, the anesthetic is at times stored for more than six months before use, making it likely that the mixture will lose some of its potency. 3 Trial Tran. 273-76, 321 (*Abdur'Rahman* v. *Sundquist*, No. 02-2236-III (Tenn. Ch. Ct.)). Additionally, the sodium Pentothal powder must be mixed with sterile water before the execution – a procedure necessary to ensure that the proper amount is administered, and yet one performed by the Warden, who possesses neither medical nor scientific training. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 3. Contamination of the solution during mixing can also reduce its potency. 2 Trial Tr. 129-30 (*Abdur'Rahman* v. *Sundquist*, No. 02-2236-III (Tenn. Ch. Ct.)).

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[4] The protocol also fails to take into account the fact that sodium Pentothal can, if improperly administered, actually cause heightened sensitivity to pain. See *Sims*, 754 So. 2d at 668 n.19.

Various protocols also create unique risks of error. The Florida protocol, for example, specifically provides that a prisoner be served his last meal an hour before the execution, *Sims*, 754 So. 2d at 657 n.18 – a practice contrary to standard anesthesia protocols prohibiting the consumption of food or fluid so close in time to the administration of sodium Pentothal. See Denno, *supra*, at 123. Only six other states prescribe the amount of time that must pass between a prisoner's last meal and administration of the sodium Pentothal. *Ibid.* The range varies from two to three hours, as required by Texas, and not less than eight hours, as required by New Jersey. *Ibid.*

All of these flaws in the lethal injection protocols employed in Tennessee and elsewhere increase the likelihood that the sodium Pentothal will not work as intended and thus that the prisoner will not be adequately anesthetized. "The evidence is essentially uncontradicted that the injection of either Pavulon or potassium chloride, by themselves, in the dosages required by Tennessee's three-drug protocol would cause excruciating pain." *Abdur'Rahman* v. *Bredesen*, No. M2003-01767-COA-R3-CV, 2004 Tenn. App. LEXIS 643, at **62-63 (Tenn. Ct. App. Oct. 6, 2004). If the Pavulon is administered while the prisoner still has sensation, the prisoner will be able to think and experience pain and fear; as his diaphragm and lungs are paralyzed by the Pavulon, he will feel himself being asphyxiated. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 5. And while that is happening, he will be utterly incapable of expressing the fact or extent of his suffering. *Ibid.* The potassium chloride used in these protocols will also "cause extreme pain and suffering" if the sodium Pentothal does not have its intended anesthetic effect. *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d at 307. "Without sedation, the injection of potassium chloride would * * * deliver the maximum amount of pain the veins can deliver." *Abdur'Rahman* v. *Bredesen*, 2004 Tenn. App. LEXIS 643, at *63 (internal quotation omitted).

ARGUMENT

I. The Needless Use of Pavulon in Florida's Execution Protocol Is Unconstitutional Under This Court's Precedents.

The lethal injection protocols challenged in this and similar cases give rise to substantial claims of Eighth Amendment violations. There is no reason to think that Congress would have intended the habeas statutes to immunize the states from such claims.

A. The Purposeless Use of Pavulon Reflects the States' Deliberate Indifference to the Risk of Needless Suffering.

1. As both courts and experts have found, Pavulon serves no legitimate purpose in an execution by lethal injection. See, *e.g.*, *Beardslee* v. *Woodford*, 395 F.3d 1064, 1075-76 (CA9) (describing California's failure to explain inclusion of Pavulon in its execution protocol as, "to say the least, troubling"), cert. denied, 543 U.S. 1096 (2005); *Abdur'Rahman* v. *Sundquist*, No. 02-2236-III, slip op. at 13 (Tenn. Ch. Ct. filed June 1, 2003); *cf.* Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES, Oct. 7, 2003, at A7 (reporting comment of Dr. Sherwin B. Nuland: "it makes no sense to use a muscle relaxant in executing people"). Indeed, as the Tennessee Supreme Court emphasized, on the state's view that the prison officials will implement the protocol flawlessly, the first drug – "a dosage of five grams of sodium Pentothal" – will "cause[] nearly immediate unconsciousness and eventually death." *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 307-08 (Tenn. 2005).

Because the use of Pavulon – or, for that matter, potassium chloride – in the execution protocol serves no legitimate purpose, it has only three possible effects. First, if the prisoner is not properly anesthetized, the Pavulon will

"cause extreme pain and suffering" as he begins to asphyxiate. *Abdur'Rahman*, 181 S.W.3d at 307. Second, the Pavulon will paralyze all of the prisoner's voluntary muscles, creating a "chemical veil" that precludes correctional officials and witnesses (including the prisoner's attorney) from detecting the extraordinary pain suffered by him as a result of the Pavulon-induced asphyxiation and, subsequently, the potassium chloride. *Id.* at 302. Finally, even if the sodium Pentothal is properly administered, the Pavulon effectively "sanitizes" the execution for onlookers by "prevent[ing] seizures that often occur after cardiac arrest induced by the administration of potassium chloride that could be interpreted erroneously by lay observers as pain or discomfort." *Beardslee*, 395 F.3d at 1076 n.13 (citing testimony of the state's expert witness).

It is well established that imposing a pointless risk of extraordinary pain is unconstitutional. The Eighth Amendment prohibits punishment that involves "torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), or "the unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976); *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002) ("[A]mong unnecessary and wanton inflictions of pain are those that are totally without penological justification.") (internal quotations omitted).

The officials who promulgated and who carry out these execution protocols have displayed precisely the kind of deliberate indifference to pointless suffering that this Court has repeatedly deemed unconstitutional in cases such as *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.") (citation omitted), and *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993). Further, one "may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hope*, 536 U.S. at 738 (citing *Farmer* v. *Brennan*, 511 U.S. 825, 842 (1994)).

The enormous risks inherent in the lethal injection protocols have long been obvious. Indeed, even before the first execution by lethal injection, condemned prisoners in Texas and Oklahoma argued that the newly adopted protocols "may actually result in agonizingly slow and painful deaths that are far more barbaric than those caused by the more traditional means of execution." *Inmates Ask Ban on Drugs as Method of Execution*, N.Y. TIMES, Jan. 8, 1981, at A13 (citing the petition in *Chaney* v. *Heckler*). And in 1983, the D.C. Circuit found that the prisoners "ha[d] presented substantial and uncontroverted evidence to support their claim that execution by lethal injection poses a serious risk of cruel, protracted death," noting that "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Chaney* v. *Heckler*, 718 F.2d 1174, 1191 (1983) (citations omitted), rev'd on other grounds, 470 U.S. 821 (1985); *cf.* Resps. Br. 90 n.44, *Heckler* v. *Chaney*, 470 U.S. 821, No. 83-1878 (1985) (citing an expert for plaintiff-respondent prisoners: "The determination of the proper dosage of drugs for a lethal injection would also be a difficult task * * *. If thiopental and tubocurarine were given in sequence, one might not be effective before the other. For example, if not enough thiopental were given and it were followed by curare, the prisoner could be awake and he would die in physical and mental agony.").[5] Similarly, the medical community expressed public concern regarding the prospect of technical problems in finding a vein and adjusting dosages. See William J. Curran & Ward Casscells, *The Ethics of*

[5] Both Pavulon and tubocurarine are "chemical paralyzing agents" that were considered in connection with the original Oklahoma protocol. Denno, *supra*, at 98 n.223. Pavulon is also a member of the "curariform class of drugs." MICROMEDEX HEALTHCARE SERIES: DRUGDEX: DRUG POINT, *Pancuronium Bromide*, available at www.micromedex.com (last visited Mar. 5, 2006).

Medical Participation in Capital Punishment by Intravenous Drug Injection, 302 NEW ENG. J. MED. 226, 228-29 (1980) (pointing out that preparation of the chemicals "would require special knowledge" and noting the dearth of information about who will prepare the substances); Br. of the Am. Soc'y of Law and Medicine et al. as *Amici Curiae* Supporting Respondents 13-14, *Heckler* v. *Chaney*, 470 U.S. 821, No. 83-1878 (1985) (noting routine difficulty in finding veins); see also Herb Haines, *Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control*, 36 SOC. PROBS. 442, 448 (1989) (citing other medical writers who in the early 1980s "noted the possible technical difficulties that might complicate such procedures").

These concerns about the protocol have been borne out, as myriad problems involving executions by lethal injections have been well documented.[6] See, *e.g.*, Denno, *supra*, at 139-41 (documenting thirty-one botched executions between 1982 and 2001 and citing additional sources for that information); see also *Morales* v. *Hickman*, 2006 WL 335427, at **5-6 (N.D. Cal. 2006) (noting that six executions in California since 1999 may have involved a prisoner still conscious when Pavulon was administered); Herb Haines, *Flawed Execution, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 SOC. PROBS. 125, 128, 134 tbl.2 (1992) (explaining that problems with executions are particularly likely to receive attention from the press, and noting that eleven out of twelve technical malfunctions received press coverage); Jennifer McMenamin, *Lethal Injection Debates: Heroin Scars Pose* Evans *Complication*, BALT. SUN, Jan. 28, 2006, at 1B (reporting on expert testimony of possibility of botched execution of prisoner in Maryland in 2004).[7]

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[6] A "botched execution" is one in which complications arose that resulted in the inmate undergoing pain and suffering that would not occur in an error-free execution.

[7] A high ratio of failure is consistent with the estimated error rate of at least one prominent expert. See Charles M. Madigan, *A*

Given these well-documented problems,[8] state officials are indisputably aware of the risks inherent in their states' lethal injection protocol. Indeed, despite the secrecy that often shrouds state lethal injection protocols, see Denno, *supra*, at 116-17, state officials are known to have been specifically aware of problems with previous executions by lethal injection. See, *e.g.*, Trial Ex. 14; 2 Trial Tr. 264, 271; *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 13 (Tennessee officials aware of previous problems in Texas and Arkansas and in their own state's practice sessions); COMMITTEE ON CRIMINAL JUSTICE, THE FLORIDA SENATE, A MONITOR: METHODS OF EXECUTION & PROTOCOL (1997), available at http://www.fcc.state.fl.us/fcc/reports/methods/emstates.html (last visited Mar. 4, 2006) (demonstrating awareness of problems encountered in other states with lethal injection). State officials have also not re-evaluated the risks associated with the drugs employed in the typical lethal injection protocol in light of the fact that the use of neuromuscular blocking agents such as Pavulon is prohibited for animal euthanasia in thirty states, see *infra* note 11.

Despite their awareness of the risks involved, states do not even take the simple step of assuring by physical examination that a prisoner has reached a surgical plane of anesthesia before administering drugs that undisputedly would cause pain to an inadequately anesthetized individual.

Federal Killing; Q&A with Dr. Edward Brunner; It's Only a Painless Death if You're the One Watching, CHI. TRIB., Apr. 22, 2001, at C1 ("We know that in about 40 percent of cases where lethal injection has been used, there has been misuse in one way or another * * *.").

[8] Ironically, the fact that these concerns about the protocols have long been recognized has even been used *against* condemned inmates seeking review of the method of execution. See *Harris* v. *Johnson*, 376 F.3d 414, 419 n.4 (CA5 2004) ("Harris's own filings demonstrate that the substance of his complaint has been factually available for the entirety of his term on death row [since 1986].").

As such, the problems inherent in lethal injection protocols cannot be dismissed as the kind of "unforeseeable accident" that this Court has declined to hold unconstitutional. See *Estelle*, 429 U.S. at 105 (quoting *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1947)). Rather, the problems described are the direct and inevitable consequence of a poorly designed protocol carried out by unqualified personnel.

The fact that this conscious disregard is widespread does not immunize it from attack. A state surely could not, consistent with the Eighth Amendment, adopt a protocol that would omit the sodium Pentothal for every one-hundredth condemned prisoner, torturing that prisoner to death. It would make no difference in that case if *all fifty* states did the same thing. It should similarly make no difference that the prospect of a tortuous death arises from the known risk of a preventable accident when the State imposes that risk for no purpose whatsoever.

2. Nor is it any answer to a prisoner's Eighth Amendment claim that the risk of inadequate anesthesia – and, thus, the likelihood that a prisoner will suffer severe pain from the Pavulon and potassium chloride – is small.

First, even if the risk were small, there is simply no need to expose anyone to such a risk given that the use of Pavulon (and potassium chloride) is both entirely gratuitous and could cause inhuman pain. See *supra* at 5-7. That risk is particularly unreasonable given that simpler and more humane alternatives – such as a single dose of pentobarbital – are not only readily available, but in fact widely used in animal euthanasia. See *Abdur'Rahman* v. *Bredesen*, No. M2003-01767-COA-R3-CV, 2004 Tenn. App. LEXIS 643, at **23-24 (Tenn. Ct. App. Oct. 6, 2004).

Second, the mere presence of the risk injures prisoners facing the prospect of death by lethal injection. This Court has long held that the Eighth Amendment protects not only against "physical mistreatment [and] primitive torture," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), but

also against undue psychological injury, including a "fate of ever-increasing fear and distress," *id.* at 102. Here, a prisoner will likely experience extreme psychological terror simply from knowing that, as a result of the myriad flaws in protocols such as Florida's, and in mute and unacknowledged terror, he may experience extraordinary pain from the effects of the Pavulon and potassium chloride.

3. In any event, the risk that a prisoner will suffer extraordinary pain as a result of flaws in the lethal injection protocol is genuine. There are many types of needless risks that any prisoner exposed to a protocol that uses a neuromuscular blocking agent, like Pavulon, after an ultra-fast acting barbiturate, like sodium Penothal, must face. See *supra* at 3-5. These risks are exacerbated when states adopt an overly complex method for delivering the drugs. In Tennessee, for example, the unnecessary injection of two syringes of Pavulon, coupled with the syringe of saline solution required to prevent the sodium Pentothal from crystallizing on contact with the Pavulon, substantially increases the length and complexity of the procedure. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4. Similarly, in Florida, eight syringes are used, *Sims*, 754 So. 2d at 665 n.17, and in Oklahoma, "three lay-executioners * * * plunge eleven hand held syringes in a confusing and complicated sequence to deliver the deadly drugs." Compl. 11, *Anderson* v. *Evans*, No. CIV-05-0825F, 2006 U.S. Dist. LEXIS 1632 (W.D. Okla. 2006).

B. Use of Pavulon in Lethal Injection Protocols Is Not Supported by Evolving Standards of Decency and Is in Any Case Unconstitutional Under Other Eighth Amendment Standards.

1. In determining whether a form of punishment is cruel or unusual, this Court has often looked to "the 'evolving standards of decency that mark the progress of a maturing society.'" *Roper* v. *Simmons*, 543 U.S. 551, 561 (2005)

(quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). To the maximum extent possible, courts should infer those standards from objective evidence. *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002). As this Court has stated, "[t]he clearest and most reliable" such evidence is "the legislation enacted by the country's legislatures." *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989), overruled on other grounds, *Atkins*, 536 U.S. 304. In this case, however, the widespread use of very similar lethal injection protocols cannot be said to reflect any legislative consensus or determination that such protocols are appropriate, much less that they reflect contemporary values. First, although thirty-five states use a three-cocktail protocol composed of sodium Pentothal, Pavulon, and potassium chloride, twenty-one of those states – including Tennessee and Florida – did not enact legislation that specifically prescribed the form of the protocol.[9] As such, those states could not have made any legislative determination that the lethal injection protocols employed by correctional officials reflected contemporary values. Cf. *Thompson* v. *Oklahoma*, 487 U.S. 815, 826 (1988) (plurality opinion) (in considering constitutionality of death penalty for fifteen-year-olds, declining to consider states that either prohibited capital punishment or failed to explicitly set a minimum age for the

[9] See Ala. Code 15-18-82.1; Ariz. Rev. Stat. Ann. 13-704; Cal. Penal Code 3604(a); Conn. Gen. Stat. 54-100(a); Del. Code Ann. tit. 11, 4209(f); Fla. Stat. 922.105(1); Ga. Code Ann. 17-10-38(a); Ind. Code 35-38-6-1(a); Ky. Rev. Stat. Ann. 431.220(1)(a); La. Rev. Stat. Ann. 15:569B; Mo. Rev. Stat. 546.720; Nev. Rev. Stat. 176.355; Ohio Rev. Code Ann. 2949.22(A); S.C. Code Ann. 24-3-530(A); Tenn. Code Ann. 40-23-114; Tex. Code Crim. Proc. Ann. art. 43.14; Utah Code Ann. 77-18-5.5; Va. Code Ann. 53.1-233; Wash. Rev. Code 10.95.180. Although neither Kansas nor New York prescribes the form of the protocol, see Kan. Stat. Ann. 22-4001(a); N.Y. Correct. Law 658, courts in those states have held the states' death penalty statutes unconstitutional, see *State* v. *Marsh*, 102 P.3d 445 (Kan. 2004), cert. granted, 125 S. Ct. 2017 (2005); *People* v. *LaValle*, 817 N.E.2d 341 (N.Y. 2004).

death penalty, explaining that "[i]f * * * we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn"). Instead, those states merely enacted a statute that deemed lethal injection an approved or preferred method of execution and left it to state administrative officials to determine the protocol for carrying out that legislative judgment. In developing the protocol, those state officials consistently failed both to invite public comment and to make any inquiry into prevailing community standards; indeed, in some states, details of the protocol are not even made available to the public once established. See, *e.g.*, *Harris* v. *Johnson*, 376 F.3d 414, 420 (CA5 2004) (Dennis, J., dissenting) (noting that Texas has refused to "disclose any reliable information regarding [its] unpublished non-statutory lethal injection protocol"); Denno, *supra*, at 181, 207-60 (noting that same states, like Kentucky, Mississippi, New Hampshire, and Wyoming, have no written protocol, and that the protocols of other states, including Nevada, Pennsylvania, South Carolina, and Virginia, are not public information).

Even in the fourteen states that have enacted legislation specifically requiring the use of particular drugs in the lethal injection protocol, the legislation does not expressly require the use of particular drugs, but instead merely prescribes the use of certain types of drugs – generally an "ultra-short-acting barbiturate" (such as sodium Pentothal) and a "chemical paralytic agent" (such as Pavulon) – in a certain sequence. Moreover, as the language of those states' lethal injection statutes suggest, it appears likely that those states simply copied the statute created by the Oklahoma legislature[10] – the

[10] For example, Idaho and New Mexico (two of the first four states to move to lethal injection) adopted the Oklahoma statute almost verbatim. Compare Okla. Stat. tit. 22.1014 ("The punishment of death must be inflicted by continuous, intravenous

first state to adopt lethal injection as an available method of

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administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician * * *."), with Idaho Code Ann. 19-2716 ("The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a physician * * *."), and N.M. Stat. 31-14-11 ("The manner of inflicting punishment of death shall be by administration of a continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.").

The copycatting trend continued as more states adopted lethal injection as the preferred or exclusive method of execution. See Ark. Code Ann. 5-4-617 (prescribing use of an "ultrashort-acting barbiturate in combination with a chemical paralytic agent"); Md. Code Ann., Corr. Servs. 3-905 (same); Miss. Code Ann. 99-19-51 (same); Mont. Code Ann. 46-19-103 (same); N.H. Rev. Stat. Ann. 630:5 (same); N.J. Stat. Ann. 49:2C (same); N.C. Gen. Stat. 15-187 (same); 61 Pa. Stat. Ann. 3004 (same); S.D. Codified Laws 23A-27A-32 (same); Wyo. Stat. Ann. 7-13-904 (same); see also *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 13 ("[Tennessee] 'copy-catted,' using what a majority of other states were doing, including the use of Pavulon."); Opp'n to Emergency Motion for Stay of Execution at 37, *Cooper* v. *Rimmer*, 379 F.3d 1029 (CA9 2004) (No. 04-99001) (according to the Attorney General of California, "[i]n developing California's lethal-injection protocol, the Warden of San Quentin consulted other wardens and visited Texas and observed their procedures being carried out by witnessing an execution"); Keith Epstein, *Cruel and Unusual?*, TAMPA TRIB., Feb. 21, 2006, at 1 ("The [Oklahoma] technique spread, to Texas and then other states without much investigation or planning, although the original Oklahoma potion involved two drugs, not three."); Tony Rizzo, *Painless or Cruel, Unusual?*, KAN. CITY STAR, Feb. 12, 2006 at A1 ("Texas copied and passed the law the day after Oklahoma did."); Kevin Simpson, *Debate Flares over Injections: Critics Say Lethal Shots Not Humane*, DENVER POST, Sept. 15, 1997, at A1 (discussing Colorado officials studying Texas protocol).

execution. Had Oklahoma's decision been the result of considerable discussion and had it reflected the prevailing views of both the medical community and the public, other states' verbatim adoption of Oklahoma's statute might be reasonable. To the contrary, however, the Oklahoma statute appears to reflect the suggestion of a single doctor. See Denno, *supra*, at 95-97. Accordingly, neither the decision of the Oklahoma legislature nor the subsequent adoption of that protocol by other states can be said to represent the reasoned judgments of state legislators or the views of the citizens thereby represented.

2. Furthermore, societal consensus regarding standards of decency is properly measured by looking at the entire array of laws that illuminate how society thinks about the practice being challenged under the Eighth Amendment. In *Roper* v. *Simmons*, for example, this Court referred to an array of legislation recognizing the comparative immaturity and irresponsibility of juveniles in holding that the juvenile death penalty violated society's evolving standards of decency. 543 U.S. at 569.

Here, the widespread prohibition on the use of neuromuscular blocking agents such as Pavulon in animal euthanasia reflects a national consensus that Pavulon is an inhumane method of causing death. Thirty states – twenty-three of which impose capital punishment – prohibit the use of Pavulon in euthanizing animals.[11] These laws are

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[11] Nine states, including Florida and Tennessee, ban neuromuscular agents explicitly. See Fla. Stat. 828.058 & 828.065; Ga. Code Ann. 4-11-5.1; Me. Rev. Stat. Ann. tit. 17, 1044; Md. Code Ann., Crim. Law, 10-611; Mass. Gen. Laws ch. 140, 151A; N.J. Stat. Ann. 4:22-19.3; N.Y. Agric. & Mkts. Law 374; Okla. Stat. tit. 4, 501; Tenn. Code Ann. 44-17-303.

Twenty-one more states prohibit the use of such neuromuscular blocking agents by implication, either by specifically mandating a method for animal euthanasia that does not involve the use of a neuromuscular blocking agent or by

particularly instructive because they reflect a considered judgment by the legislatures that enacted them. See *Thompson*, 487 U.S. at 829 (examining only the states that had "expressly established a minimum age in their death penalty statutes").

Moreover, this widespread legislative consensus is consistent with the national ethical standards promulgated by the American Veterinary Medical Association's Panel on Euthanasia. The Panel has deemed "unacceptable" and "absolutely condemned" the use of neuromuscular blocking agents for animal euthanasia. American Veterinary Medical Association Panel on Euthanasia, *1993 Report of the AVMA Panel on Euthanasia*, 202 J. A.V.M.A. 229 (1993); American Veterinary Medical Association Panel on Euthanasia, *2000 Report of the AVMA Panel on Euthanasia*, 218 J. A.V.M.A. 669, 675, 681 (2001). Instead, the AVMA standards require that a medically qualified individual stay in constant contact with the patient to be euthanized so that an assessment of muscle tone and breathing can be made and an accurate assessment of patient pain or distress can be made. The same concerns animating the prohibition on the use of neuromuscular blocking agents to euthanize animals apply equally to the use of Pavulon in executing humans: *viz.*, the risk that the animal will be inadequately anesthetized and thus (without the knowledge of the veterinarians administering the

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otherwise expressing a legislative preference for sodium pentobarbital: Ala. Code 34-29-131; Alaska Stat. 08.02.050; Ariz. Rev. Stat. Ann. 11-1021; Cal. Bus. & Prof. Code 4827; Colo. Rev. Stat. 18-9-201; Conn. Gen. Stat. 22-344a; Del. Code Ann. tit. 3, 8001; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. 47-1718(a); La. Rev. Stat. Ann. 3:2465; Mich. Comp. Laws 333.7333; Mo. Rev. Stat. 578.005(7); Neb. Rev. Stat. 54-2503; Nev. Rev. Stat. Ann. 638.005; Ohio Rev. Code Ann. 4729.532; Or. Rev. Stat. 686.040(6); R.I. Gen. Laws 4-1-34; S.C. Code Ann. 47-3-420; Tex. Health & Safety Code Ann. 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

drugs) fully conscious while suffocating. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4.

3. Although the Eighth Amendment "draw[s] its meaning from * * * evolving standards of decency," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), this Court's cases "also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stevens, Stewart, and Powell, JJ.). Thus, as this Court has recognized, the Eighth Amendment prohibits punishment that involves "torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Relying on this prohibition, at least one circuit has held for a decade that a lingering death by asphyxiation – precisely the kind of death that a prisoner would suffer if inadequately anesthetized – would violate the Eighth Amendment. See *Beardslee* v. *Woodford*, 395 F.3d 1064, 1070 (CA9) (construing *Fierro* v. *Gomez*, 77 F.3d 301, 308 (CA9), vacated on other grounds, 519 U.S. 918 (1996)), cert. denied, 543 U.S. 1096 (2005). In *Beardslee*, the court of appeals explained that its holding in *Fierro* – which deemed California's lethal gas execution protocol unconstitutional – rested on the district court's finding that "inmates were likely to remain conscious for up to a minute after the execution procedure commenced and that there was a substantial likelihood that some consciousness would persist for several minutes during which 'inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells.'" *Ibid.*

Even putting aside the risk that a prisoner will suffer extreme pain as a result of a flawed lethal injection protocol, the lethal injection protocols are unconstitutional for the further reason that they violate the prisoner's human dignity, which is "[t]he basic concept underlying the Eighth Amendment." *Trop*, 356 U.S. at 100. Specifically, it is deeply offensive to a prisoner's dignity to be subjected to the use of Pavulon when thirty states have expressly deemed that drug inappropriate for euthanizing animals. As Justice Brennan

explained in *Furman* v. *Georgia*, "[m]ore than the presence of pain * * * is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings." 408 U.S. 238, 272 (1972) (Brennan, J., concurring). Rather, the "true significance of these [barbaric] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded." *Id.* at 272-73. The use of Pavulon goes even further, reducing prisoners subjected to such treatment to less than animals in the eyes of the law.

The subjugation of prisoners to inhumane treatment also corrodes the integrity of the criminal justice system, which, as this Court has explained, "depends on full compliance with the Eighth Amendment." *Johnson* v. *California*, 543 U.S. 499 (2005). That integrity is undermined when, as here, there is a realistic risk that a prisoner will undergo extraordinary physical and psychological pain as a result of drugs that are entirely unnecessary to the execution. The use of Pavulon in the protocol is all the more objectionable for its effect of masking the suffering that the protocol inflicts, thereby enabling executioners and witnesses to suspend disbelief and imagine a humane death. See Denno, *supra*, at 100.

C. It Is Important that Prisoners Have Adequate Legal Channels, Including § 1983 Actions, Through Which To Challenge Unconstitutional Means of Execution.

Given the substantial risk of unnecessary pain and suffering that lethal injection protocols like Florida and Tennessee's present, it is essential that prisoners have access to the legal channels that § 1983 provides so that they may challenge that means of execution, regardless of whether state remedies are available to them. As this Court stated over forty years ago in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), overruled on other grounds, *Monell* v. *N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 664-89 (1978), "[i]t is no answer that the State has a law which if enforced would give relief. The

federal remedy [provided by § 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." "Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990).

In any event, the availability of state remedies to challenge a lethal injection protocol is very much in doubt. In the majority of states using the lethal injection protocol similar to the one at issue in this case, the particular protocol used is not mandated by state law, but is instead the result of an administrative decision made by a state's department of corrections. See *supra* at 13-14. And while most states provide some mechanism to challenge administrative decisions generally, see *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 2005 (Tenn. 2005) (challenging Tennessee lethal injection protocol under that state's Administrative Procedures Act, which provides for judicial review of final administrative decisions), many have specifically exempted the decisions of departments of corrections from judicial review. Indeed, among the five states that have executed the most prisoners since 1976, four of them – Texas, Virginia, Oklahoma, and Florida – have just such an exclusion.[12] Together, these states have accounted for nearly sixty percent of all executions since 1976.[13]

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[12] See Fla. Stat. Ann. 120.52(12)(d); Okla. Stat. Ann. tit. 75, 250.4(A)(10); Va. Code Ann. 2.2-4002(B)(9); Tex. Gov't Code Ann. 2001.226. Statistics on executions since 1976 by state are from Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/article.php?scid=8&did=186 (last visited Mar. 1, 2006).

[13] Other states providing a similar exception to their administrative procedure acts for rules pertaining to the incarcerated include: Arkansas, Ark. Code Ann. 25-15-212(a); Georgia, Ga. Code Ann. 50-13-2(1); Indiana, Ind. Admin. Code tit.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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4, 21.5-2-5(6), and Ohio, see *State* v. *Brown*, 804 N.E.2d 1021, 1023 (Ohio Ct. App. 2004).