No. 07-5439

IN THE

# Supreme Court of the United States

RALPH BAZE, et al.,

*Petitioners*,

*vs.*

JOHN D. REES, et al.,

*Respondents*.

**On Writ of Certiorari to the Supreme Court of Kentucky**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. When a state's method of execution does not present a substantial risk of the wanton infliction of pain, does it nonetheless violate the Eighth Amendment if it presents a risk that is not strictly necessary?

2. Is a state constitutionally required to change its method of execution every time an alternative with a lower risk of pain is shown to be available, thereby creating a permanent new layer of litigation in capital cases?

3. Does the three-drug method of lethal injection currently in use in almost all capital punishment states violate the Eighth Amendment merely because other drug combinations may involve less risk of pain?

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

### INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Litigation over methods of execution has halted the implementation of capital punishment, many years

1. The parties have consented to the filing of this brief.

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* CJLF made a monetary contribution to its preparation or submission.

after the states sought to end such litigation by adopting the method touted by the opponents and their experts as the humane alternative. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 656 (1992) (Stevens, J., dissenting). This litigation further delays justice in cases where justice is already long overdue. It diminishes the deterrent effect of capital punishment, possibly costing innocent lives. The delay is contrary to the interests CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Fifteen years ago, Ralph Baze murdered two police officers, Sheriff Steve Bennett and Deputy Sheriff Arthur Briscoe. See *Baze* v. *Commonwealth*, 965 S. W. 2d 817, 819 (Ky. 1997). Baze shot each officer in the back with an assault rifle when the officers attempted to serve him with five fugitive felony warrants. *Ibid.*; see also *Baze* v. *Rees*, 217 S. W. 3d 207, 209 (Ky. 2006) ("*Baze II*"). First Baze murdered Sheriff Bennett, then he shot Deputy Sheriff Briscoe twice in the back as the Deputy Sheriff was attempting to retreat. 965 S. W. 2d, at 819. When Deputy Sheriff Briscoe fell to the ground, Baze stood over him and fired his assault rifle into the back of his head. *Ibid.*

Thomas Bowling was convicted for the intentional murders of Eddie and Tina Earley. See *Bowling* v. *Commonwealth*, 873 S. W. 2d 175, 176 (Ky. 1993); see also *Baze II*, 217 S. W. 3d, at 209. Around 7 a.m., Bowling crashed his auto into the driver's side of the victims' parked car. See *Bowling*, *supra*, at 176. A witness saw Bowling fire into the victims' car, return to his own car, go back to check on the victims, and then return to his car again and flee the scene. *Id.*, at 176-177.

Ralph Baze and Thomas Bowling were both sentenced to death. See *Baze II*, 217 S. W. 3d, at 209. Lethal injection is the method of execution in Kentucky unless the inmate chooses electrocution. *Ibid*. In Kentucky, death by lethal injection occurs through the administration of three chemicals: sodium thiopental, pancuronium bromide, and potassium chloride. *Id.*, at 212. Kentucky's protocol is based on the protocols adopted by other states. App. to Pet. for Cert. 17 (finding Kentucky's protocol mirrored Indiana, Virginia, Georgia, and Alabama).

Both men filed the present action in the Franklin Circuit Court to challenge the constitutionality of Kentucky's lethal injection protocol. See App. to Pet. for Cert. 12 (challenging the lethal injection protocol under the Eighth Amendment and under Section 17 of Kentucky's Constitution). After reviewing extensive evidence, the trial court held, with one exception, that Kentucky's lethal injection protocol met constitutional requirements. J. A. 769; see also *Baze II*, 217 S. W. 3d, at 211 (stating the one exception to constitutionality was removed by the Kentucky Department of Corrections after the circuit court rendered its decision). The Kentucky Supreme Court affirmed and held Kentucky's lethal injection method violates neither the Eighth Amendment of the United States Constitution nor Kentucky's own constitutional ban on cruel and usual punishment. *Baze II*, 217 S. W. 3d, at 212.

This Court granted certiorari on September 25, 2007.

## SUMMARY OF ARGUMENT

This case should be decided in a way that brings this chapter to a close, not in a way that creates a moving target for a permanent new round of litigation in

capital cases. Congress limited successive habeas petitions in Antiterrorism and Effective Death Penalty Act of 1996 in order to bring capital cases to a close, and it did so for weighty and important reasons. The goal of that legislation should not be circumvented.

There is no constitutional requirement that execution of the death penalty be completely painless or involve the minimum achievable risk of pain. So long as the method is not cruel, it is within constitutional limits. A risk of pain which is both severe and prolonged must be substantial (or significant) before it becomes a constitutional issue.

If any change is required to the Kentucky protocol, the check for consciousness implemented in Florida and Missouri is the only change needed. That check, which does not require a doctor, is sufficient to determine that the anesthetic has been successfully delivered to the bloodstream, and there is essentially no risk of severe pain. Requiring a doctor's participation would expose the doctors to accusations under medical ethics rules, effectively preventing executions.

## ARGUMENT

### I. This case should be decided in a way that will bring this chapter to a close, not create a moving target for a permanent new round of litigation in capital cases.

Petitioner asks this Court to adopt an "unnecessary risk" standard for methods of execution and to define "unnecessary" by reference to *presently* available alternatives. See Brief for Petitioner 40. This proposal would create a moving target for methods of execution. A method upheld as constitutional today could be attacked again tomorrow, simply because another

alternative had been developed or discovered. The delay and denial of justice that we have seen in connection with the present litigation could be repeated multiple times.

*A. The Consequences of Delay.*

When the Congress of the United States enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEPDA), it made a powerful statement of public policy regarding the delay in executing capital judgments. The cases were taking too long and going through too many rounds of review. See, *e.g.*, 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch). With regard to repeated reviews, Congress clamped down hard on what was then the primary vehicle for repeated litigation, the successive habeas petition. See 28 U. S. C. § 2244(b). This limitation was quickly upheld as constitutional, see *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996), and it has largely been enforced as intended. However, various other procedural devices have been used to defeat the intent of Congress and create new rounds of litigation after the normal end of the first habeas petition. Motions for relief under Federal Rule of Civil Procedure 60(b), once rare in habeas cases, have become common. See generally, *Gonzalez* v. *Crosby*, 545 U. S. 524 (2005). *Nelson* v. *Campbell*, 541 U. S. 637, 646-647 (2004), and *Hill* v. *McDonough*, 547 U. S. 573 (2006), authorized method-of-execution claims under 42 U. S. C. § 1983. Stays of execution have been granted in such suits, even where the precedent of *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653-654 (1992) (*per curiam*) seems to forbid such a stay. See, *e.g.*, *Berry* v. *Epps*, No. 07-7348, Order of Oct. 30, 2007. This must not become a recurring nightmare. The reasons that Congress sought to end repetitive litiga-

tion in capital cases are as compelling now as they were when Congress enacted AEDPA.

First, in many capital cases the victims' families have already waited far too long for justice by the time the first federal habeas petition finally grinds to its conclusion. Petitioner Baze murdered Sheriff Bennett and Deputy Briscoe in 1992, and his conviction and sentence were affirmed within five years, see *Baze* v. *Commonwealth*, 965 S. W. 2d 817, 825 (Ky. 1997), but it was another eight years before denial of federal habeas was final, a total of 13 years after the crime. See *Baze* v. *Parker*, 544 U. S. 931 (2005). Petitioner Bowling murdered Eddie and Tina Earley in 1990, see *Bowling* v. *Commonwealth*, 873 S. W. 2d 175, 176 (Ky. 1993), but it was 15 years before his habeas proceedings were finally over. See *Bowling* v. *Kentucky*, 546 U. S. 1017 (2005).

While execution of the perpetrator can never repair the damage he has done, there a sense of relief that justice has been done, that the perpetrator has paid the penalty finally and irrevocably, and that there is no possibility that he will escape with a punishment less than death. See, *e.g.*, Levine, Maryland Executes Oken, Washington Post, June 18, 2004, p. A1 (quoting families of victims). Due process of law requires that executions be postponed for extended periods, but the period is already too extended with direct appeal, state collateral review, and federal habeas. Every day of delay is an incremental denial of justice. Last year, Congress extended to federal habeas corpus proceedings the right of victims to proceedings "that are free from unreasonable delay." See 18 U. S. C. §§ 3771(a)(7), (b)(2). That right would be defeated if civil method-of-execution suits are used to further delay already long-delayed executions on a regular or recurring basis.

Second, the retribution interest of society as a whole is impaired by delays in the execution of capital sentences. A sentence of death is a finding that the defendant is not only a murderer but substantially more vile than the norm. He is one for whom a sentence of life imprisonment is an inadequate punishment and who is required to pay for his crime with his own life. The longer that judgment goes unexecuted, the closer the actual sentence gets to life imprisonment. In extreme cases, delays work a *de facto* commutation, and the murderer lives out his natural life span on death row. Gerald Gallego was sentenced to death in two states for four murders on top of numerous kidnapping and sex crimes. Yet this exemplar for the death penalty received an undeserved *de facto* commutation through delay and died of natural causes. See Taylor, "Sex Slave" Killer Dies of Cancer in Nevada Hospital, San Francisco Chronicle, July 20, 2002, p. A15.

Third, there is substantial empirical reason to believe that the deterrent value of capital punishment is diminished by delay, thereby costing innocent lives. See Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004). Because a challenge to a method of execution can result in a statewide or even a nationwide *de facto* moratorium, the studies on effects of moratoriums provide chilling statistics. Cloninger and Marchesini, Execution and Deterrence: A Quasi-controlled Group Experiment, 33 Applied Econ. 569, 575 (2001), estimated that a one-year halt in Texas resulted in 221 additional murders. The same scholars estimated that the Illinois moratorium resulted in the murders of 150 people. Cloninger & Marchesini, Execution Moratoriums, Commutations and Deterrence: The Case of Illinois, 38 Applied Econ. 967, 971 (2006).

If the econometric deterrence studies are correct,[2] the *de facto* moratorium created by the present litigation is killing innocent people. The risk that it is doing so is much more than "significant." Cf. Brief for Petitioner 28. The risk is grave. This scenario must not be repeated.

*B. The Political Balance.*

Repeatedly moving the goal posts in constitutional law has a serious, adverse impact on the right of the people to govern themselves through the democratic process. The model of a bicameral legislature with executive veto created for the federal government, see U. S. Const., Art. I, § 7, and copied in most states was intentionally created to make legislation difficult, because the legislature was considered the most dangerous branch. See The Federalist No. 48, p. 309 (C. Rossiter ed. 1961) (J. Madison); *id.*, No. 62, pp. 378-379 (J. Madison). A minority which cannot enact its view into law can sometimes block legislation. Once legislation has been enacted, though, the constitutional design requires that it remain the law until it is repealed. The majority should not have to repeatedly jump the enactment hurdle to maintain a law in effect.

Yet that is exactly what happens when courts move the goal posts so as to render unconstitutional a law that conformed to the understanding of the Constitution at the time the law was enacted. We have seen this effect already with regard to the mandatory versus

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2. The deterrence debate is not yet conclusively resolved and may never be. See, *e.g.*, Liptak, Does Death Penalty Save Lives? A New Debate, New York Times, Nov. 18, 2007, p. 1. However, a strong preponderance of the recent peer-reviewed literature confirms a deterrent effect. Abstracts and citations are collected at CJLF, Articles on Death Penalty Deterrence, http://www.cjlf.org/deathpenalty/DPDeterrence.htm.

discretionary capital sentencing law. See *McGautha* v. *California*, 402 U. S. 183, 207 (1971) (fully discretionary sentencing does not violate *anything* in the Constitution); *Furman* v. *Georgia*, 408 U. S. 238 (1972) (fully discretionary sentencing laws are unconstitutional); *Woodson* v. *North Carolina*, 428 U. S. 280, 302 (1976) (lead opinion) (mandatory sentencing laws are unconstitutional).

The present case does not involve a challenge to lethal injection as such. Whether any state's death penalty law would have to be reenacted at this time if petitioner's position were adopted depends on the specific terms of the decision and the statute. In any event, though, the creation of a mobile goal post based on alternatives available at any given time raises the specter that all the statutes providing for lethal injection could be rendered unconstitutional in the future when a court decides that a better method has become available. The people of three-quarters of the states have chosen to have capital punishment, and they enacted lethal injection statutes on the assurance of the experts that it was the best method. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 656 (1992) (Stevens, J., dissenting). That decision should not be placed in jeopardy with a requirement of continuing statutory maintenance.

## II. States need not use the method with the least pain or the least risk, so long as the method used is not cruel.

*A. No Right to A Completely Painless Death.*

This case is about punishment, not medical treatment. Petitioners Baze and Bowling are not medical patients undergoing surgery needed for their health. They are not animals who must be euthanized

due to circumstances beyond their control. The purpose of the procedure in question is to *punish* them for the exceptionally brutal crimes they *chose* to commit.

Some of the testimony of Petitioners' expert, Dr. Heath, reads as if he stumbled into the wrong courtroom and thought he was in a medical malpractice case. Standards of medical practice for surgery have no direct relevance to punishment. If an inadequately anesthetized patient suffers pain during surgery, it would be no defense to a malpractice action or professional discipline that the procedure was "not cruel," but whether this procedure is cruel is the only issue in the present case.

As a punishment for the very worst crimes, execution is not required to be a "well death," which is what "euthanasia" means. See Brief of Drs. Concannon et al. as *Amici Curiae* 3. Indeed, many people believe that death by lethal injection is too good already. "The only problem is Steven Oken died in peace, my daughter didn't have the luxury to die in peace, as I saw Steven Oken die tonight." Betty Romano, quoted in Levine, Maryland Executes Oken, Washington Post, June 18, 2004, p. A1. Medical standards of practice and the Cruel and Unusual Punishment Clause are related, as they both deal with pain, but they are not the same.

Petitioner blithely asserts "there is today an undeniable 'national consensus' that executions must be essentially painless," Brief for Petitioner 39 (citing *Roper* v. *Simmons*, 543 U. S. 551, 564 (2005)). On the contrary, the existence of such a consensus is quite deniable. The jurisdiction-counting method of *Roper* and *Atkins* v. *Virginia*, 536 U. S. 304, 313-316 (2002) assumes that state legislatures limit sentences based on their view of what is inherently a just punishment for a particular class of crime or criminal. In the case of methods of execution, however, this assumption is

doubtful. The nationwide change to lethal injection was motivated at least as much by a desire to end the litigation over the previous methods and the attendant delays as it was by actual desire to abandon the old methods.

In California, the change to lethal injection was motivated primarily by the debacle surrounding the execution of Robert Alton Harris. After litigating four federal habeas petitions, Harris brought a § 1983 action claiming execution by lethal gas was unconstitutional. The Ninth Circuit granted a stay, and this Court vacated it. "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*). Then, beyond belief, a circuit judge issued another stay, see Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 325 (1992), requiring an extraordinary order from this Court not only vacating the stay but forbidding any further stays by any other federal court. See *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (A-768). That final stay, according to the eyewitness account of the father of one of the victims, "robbed Harris of his mental preparation and dignity." Baker, Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment, 40 UCLA L. Rev. 339, 341 (1992).

Lethal injection legislation was introduced the next day. The bill's author "said he advanced the bill not as a more humane way to carry out a death sentence but rather as a way to eliminate legal challenges that cyanide gas is an unconstitutionally cruel and unusual punishment." Ingram, Legislators Press for Change to Lethal Injection, Los Angeles Times, Apr. 22,

1992, p. A11, col. 3. The bill was promptly enacted and signed. " 'Affording condemned inmates the choice of execution method will help prevent the type of last-minute legal circus we unfortunately witnessed with the Robert Alton Harris execution,' [Gov.] Wilson said in signing the bill." Hoover, Injection OKd as Alternative Death Penalty, San Francisco Chronicle, Aug. 29, 1992, pp. A1, A19.

This legislation provides no basis for an assertion that an anesthetized death for murderers is now a national consensus. This is anti-delay legislation. Its purpose was to take executions outside the "margin of litigation."[3]

In Petitioners' view, the Eighth Amendment is not only a rachet but an automatic rachet. Every time the states collectively move to a new method of execution, the Eighth Amendment minimum automatically ratchets up to preclude a return to previously constitutional methods. The right of the people to decide these issues democratically should not be so severely constrained. The people should be able to make revisions "in light of further experience." *Rhodes* v. *Chapman*, 452 U. S. 337, 351 (1981).

Thirteen states still provide for the use of prior execution methods as an alternative. See Brief for Respondents 5. Whether execution by cyanide gas is cruel remains debatable, see Baker, 40 UCLA L. Rev., at 342 (witness to Robert Alton Harris execution), but in any case the gas chamber would not be cruel if it were adapted to use a different gas. See American

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3. The later phrase was coined by John Fund after *Bush* v. *Gore*, 531 U. S. 98 (2000), referring to the margin by which a candidate must win to not only win the election, but also deter any postelection legal challenge. See J. Fund, Stealing Elections 4 (2004).

Veterinary Medical Assn., AVMA Guidelines on Euthanasia 9 (June 2007) (nitrogen or argon used to displace oxygen "conditionally acceptable"); *id*., at 10 (carbon monoxide acceptable with certain precautions), available at http://www.avma.org/issues/animal_welfare/euthanasia.pdf. In a case such as *Nelson* v. *Campbell*, 541 U. S. 637, 640-641 (2004), where intravenous injection is particularly problematic, these gases might be better, even though not completely painless.

The state should be able to adopt a method of execution that gives it a clear margin above the constitutional minimum so that the constitutionality is clear, the method used will not be litigated, no stays will be granted, and the method need not be changed unless and until the state chooses to change it. No margin is possible if the margin automatically disappears because every new consensus becomes *per se* the new constitutional minimum.

In *Wilkerson* v. *Utah*, 99 U. S. 130, 134-135 (1879), the Court noted, "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category."[4] The *Wilkerson* Court declined to precisely define cruel and punishment, but torture was clearly on one side of the line, see *id*., at 135-136, and shooting was clearly on the other. See *id*., at 136-137. *In re Kemmler*, 136 U. S. 436, 447 (1890), described cruel punishments as those "involv-[ing] torture or a lingering death." A completely

4. Utah was a territory at this time, so the case presented no "incorporation" problem. Cf. *In re Kemmler*, 136 U. S. 436, 448-449 (1890).

painless death was not required then, and it is not required now.

In a relatively recent decision, the Ninth Circuit en banc upheld hanging against an Eighth Amendment challenge. See *Campbell* v. *Wood*, 18 F. 3d 662, 682-683 (1994), cert. and stay denied, 511 U. S. 1119 (1994). Relying on *Kemmler*'s "torture or lingering death" language, *Campbell* held, "We do not consider hanging to be cruel and unusual simply because it causes death, or because there may be some pain associated with death." *Id*., at 683.

Hanging can cause death by several different modes. If it causes death by asphyxiation, it would cause loss of consciousness in no more than two minutes, with other modes involving less pain and more rapid unconsciousness. See *id*., at 684. A slight risk of death by asphyxiation was insufficient to render hanging unconstitutionally cruel. See *id*., at 687. The availability of the alternative of lethal injection was irrelevant. See *ibid*.

Challenges to the gas chamber were rejected many times by many courts in the 1980s and 1990s, even though this method does involve some pain when cyanide is the gas used. See *Hunt* v. *Nuth*, 57 F. 3d 1327, 1338 (CA4 1995) (collecting cases). In *Fierro* v. *Gomez*, 77 F. 3d 301, 304 (1996), the Ninth Circuit held the method unconstitutional, contrary to all the other decisions, but that decision was vacated by this Court after California changed its method. See *Gomez* v. *Fierro*, 519 U. S. 918 (1996); see also *Fierro* v. *Terhune*,

147 F. 3d 1158 (CA9 1998) (plaintiffs lack standing after statutory change).[5]

Given that execution by cyanide gas is at the margin where courts disagree and most courts have upheld it, there clearly is no requirement that the execution of the death penalty be completely painless. Even in *Fierro*, the holding was based on factual findings that the pain would be intense and "that there exists a *substantial* risk that this pain will last for several minutes." 77 F. 3d, at 308 (emphasis added). Even the outlier *Fierro* decision does not hold a method is unconstitutional because it involves some amount of pain, if that pain is not intense, if it does not last long, or if the risk of both is less than substantial.

Petitioners' contention that the Constitution *requires* an "essentially painless" or "anesthetized death," Brief for Petitioners 39, should be emphatically rejected. Not only is this pertinent to the resolution of the present case, but it is needed to clear the constitutional doubt for those states that wish to replace lethal injection and dispense with the unseemly medicalization of capital punishment that this method has wrought.

The replacement of the gas chamber with lethal injection was a mistake prompted by the belief that the change was necessary to continue capital punishment, a belief for which this Court is partly responsible. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 656 (1992) (Stevens, J., dissenting) (gas chamber is unconstitutional given unanimous expert opinion of superiority of lethal injection). A return to the gas chamber with a different gas, see

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5. As a vacated decision, *Fierro* v. *Gomez* has no stature as precedent. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39-40 (1950).

*supra* at 13, would be salutary policy, but a legislature cannot risk the change if some minor discomfort from these gases or the fact that they are not anesthetics is considered to raise a doubt as to their constitutionality.

At one point in their brief, petitioners concede that only *severe* pain raises an Eighth Amendment issue in the context of execution of the death penalty. See Brief for Petitioners 38. *Amicus* CJLF believes that is correct. Our society has not yet become so squeamish that we recoil at the thought of any pain at all. Pain is a fact of life. Pain from illnesses and accidents is a common occurrence. People voluntarily incur various levels of pain to engage in athletics or to bear children. Pain which is moderate in intensity and brief in duration is not cruel when it is an incidental byproduct of a proportionate punishment for the very worst crimes.

The Eighth Amendment requires that the death penalty be carried out in a way that it does not impose severe, prolonged pain. It does not require complete painlessness or anesthesia. The suggestion that it does should be expressly rejected.

*B. The Standard of Risk.*

Petitioners claim that the Kentucky courts erred in applying a test of "substantial" risk, see Brief for Petitioners 41, yet they concede that the risk must be "significant" to raise a constitutional issue. See *id*., at 39-40. This may be a distinction without a difference. The definitions of these terms in American Heritage Dictionary 1679, 1791 (3d ed. 1992) (italics in original), deleting the clearly inapposite ones, are:

> "**significant** . . . 1. Having or expressing a meaning; meaningful . . . . 3. Having or likely to have a major effect; important: *a significant*

> *change in the tax laws*. 4. Fairly large in amount or quantity: *significant casualties*.
>
> "**substantial** . . . 1. Of, relating to, or having a substance; material. 2. True or real; not imaginary. . . . 5. Considerable in importance, value, degree, amount, or extent: *won by a substantial margin*."

The two terms are essentially synonymous as applied here. As this Court has noted many times, differing verbal formulations often make no practical difference in outcomes. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 432, n. 10 (1994); *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984).

However, the words chosen to express a standard can have an impact on the way people think about it. Even though petitioners concede that a risk that is not significant is not a violation, they ask this Court to adopt a formula of "unnecessary risk," dropping the words "and wanton" from the usual expression of the Eighth Amendment standard. See *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (lead opn.); *Nelson* v. *Campbell*, 541 U. S. 637, 645 (2004); *Hope* v. *Pelzer*, 536 U. S. 730, 737 (2002); *Campbell* v. *Wood*, 18 F. 3d, at 682, n. 11 (quoting *Gregg*). The word "wanton" is in the standard for a reason, and it is not expendable.

The words "necessary" and "unnecessary" are elastic, and used alone "unnecessary" would create too much leeway for a court to declare one method of execution unconstitutional merely because it found another was better. If the word is used strictly, even a very remote chance of pain would be "unnecessary" if some other method, however difficult and expensive, had a lower chance. Petitioners disclaim such a strict usage, saying they mean only "significant" risks, but

unnecessarily using the word "unnecessary" alone runs a significant risk of misinterpretation.

The element of wantonness was discussed at some length in *Wilson* v. *Seiter*, 501 U. S. 294, 296-302 (1991). It includes a subjective element. Absent an intent to inflict pain, wantonness requires "deliberate indifference." See *id*., at 297. The deliberate indifference standard was applied in *Helling* v. *McKinney*, 509 U. S. 25, 35 (1993), a case that, like this one, involved a risk and not a certainty. McKinney's claim was that prior officials had "with deliberate indifference, exposed him to levels of [second-hand smoke] that pose an unreasonable risk of serious damage to his future health." *Ibid*. The analogous claim in this case would be deliberate indifference to an unreasonable risk of severe and prolonged pain in execution.

The question is not what problems have occurred in the past, but whether respondents are deliberately indifferent to an unreasonable risk today. See *id*., at 36-37. Only in recent years have problems with lethal injection, previously touted as the humane alternative, see *supra*, at 15, come to light. In response, the Kentucky officials have reconsidered and revised their procedures. The reasons why the revision meets constitutional standards are discussed in the opinion of the Kentucky Supreme Court and the Brief for Respondents and need not be repeated here. However, if the Court should decide that further refinement is needed, *amicus* submits that only one more step is required. The consciousness check after the injection of the thiopental as implemented in Florida and Missouri is more than sufficient to reduce the risk of severe, prolonged pain below the threshold of Eighth Amendment concern.

## III. At most, the consciousness check procedure used in Florida and Missouri is all that is required.

Petitioners ask this Court to examine "the degree of risk of severe pain caused by the cumulative effect of all [of the Kentucky protocol's] deficiencies, combined with the danger created by the use of personnel who are unequipped to prevent or correct these foreseeable problems." Brief for Petitioners 43. In its examination, Petitioners urge this Court to consider alternatives that if adopted, could reasonably prevent the risk of pain. *Id.*, at 51-59. Should this Court find that a modification of the existing Kentucky protocol is required, *amicus* CJLF submits that the only modification needed is a physical check of consciousness after the administration of sodium thiopental, without a requirement of physician participation, similar to the procedures adopted in Florida and Missouri.

State and federal courts have found, based on expert opinion, that when properly administered, a 2.5 to 5 gram dose of sodium thiopental will render an inmate unconscious and insensate within seconds and leave him unable to perceive pain. See *Taylor* v. *Crawford*, 487 F. 3d 1072, 1076 (CA8 2007) (citing Heath testimony); see also Testimony of Dr. Kris Sperry, *Lightbourne v. McCollum*, No. 81-170-CF (5th Jud. Cir. Fla., 2007), p. 2333 ("*Lightbourne* Record"), available at http://www.cjlf.org/files/LightbourneRecord.pdf. Therefore, if a state's lethal injection protocol contains a procedure to check whether the inmate quickly becomes unconscious from the thiopental, then the inmate is adequately protected from experiencing the physical sensation of pain for far longer than the brief time that it takes to administer the other two drugs. See J. A. 547-548, 631 (testimony of Dr. Dershwitz, unconscious for hours). The inmate is adequately

protected because pancuronium bromide and potassium chloride can only cause extreme pain if administered without proper anesthesia. Brief for Petitioners 43-44.

*A. A Physical Check for Consciousness.*

Each time a district court has held an evidentiary hearing to determine whether the state's lethal injection procedure submits an inmate to an unconstitutional risk of pain and suffering, both plaintiffs and defendants present expert opinion as to whether the state protocol insures the inmate will be unconscious before pancuronium bromide or potassium chloride are administered. See *Lightbourne* v. *McCollum*, No. SC06-2391 (Fla., Nov. 1, 2007), pp. 37-38; see also *Taylor* v. *Crawford*, 487 F. 3d, at 1075-77; *Workman* v. *Bredesen*, 486 F. 3d 896, 910 (CA6 2007).

The testimony of the state's expert witness in the present case was that if the massive dose of thiopental goes into the vein, as it should, "the person will lose consciousness in less than a minute, and the thiopental is a painless injection." J. A. 601. On the other hand, "[i]f the thiopental were to go into any tissue site other than a vein, the inmate would not lose consciousness, and they would be in extreme pain; they would scream out." J. A. 601.

Given the dose used here, far in excess of that used in surgery, a lay person's observation of rapid unconsciousness is sufficient to reduce the chance of inadequate anesthesia to minimal levels. The anesthesia awareness cases that happen in surgery involve doses of only one-tenth of that used in lethal injection. See J. A. 592-593, 630.

In the recent Florida case, Dr. Kris Sperry, the Chief Medical Examiner for the State of Georgia, testified that a "basic neurological assessment of

consciousness and responsiveness" could be conducted by approaching a person, placing hands on the person, and then calling their name and shaking them. This assessment does not require medical training and can be taught to a lay person. *Lightbourne* Record, at 2353 (stating basic assessment of consciousness can be conducted by ". . . any type of paramedic, EMT, anyone or nurse, LPN, anybody . . . that has any type of patient contact would have that kind of basic knowledge").

In the same proceeding, Dr. Mark Dershwitz, the same expert who testified in the present case, testified that "persons other than medical professionals," could be taught how to assess whether someone was unconscious when learning BLS or CPR. Testimony of Dr. Mark Dershwitz, *Lightbourne* Record, at p. 512. In this context, a lay person could be taught to determine consciousness by approaching a person who appeared to be unconscious, shaking him and calling his name. *Ibid.* While the assessment does not assess the "depth of anesthesia," *id.*, at 517, Dr. Dershwitz testified that, "consciousness in this context is an all or none thing, like pregnancy. You are either conscious or unconscious. And lay people can be readily trained to determine if somebody is unconscious." *Id.*, at 518. Thus, while "depth of anesthesia" requires an expert, who will continually monitor "objective signs" to determine "how deeply anaesthetized a particular person is," *ibid.*, monitoring is only necessary when it is proper medical procedure to "ensure a patient will wake up at the end of the procedure." *Taylor*, 487 F. 3d, at 1084. Expert monitoring is not, and should not become, customary in an execution when it is not intended that the inmate wake up at the end of the procedure.

*B. The Florida Decision.*

Florida has gone to considerable lengths to create a lethal injection protocol to minimize the risk of pain. See *Lightbourne* v. *McCollum*, No. SC06-2391 (Fla., Nov. 1, 2007).

After the execution of Angel Diaz, Florida took it upon itself to investigate and create a written lethal injection protocol that would address and correct the recently discovered problems. See *id*., at 4-5. The protocol developed by Florida stated the process of assessing consciousness was a "critical step" that must be conducted before pancuronium bromide and potassium chloride are injected. *Id.*, at 41-42. Under the Florida protocol, the warden must " 'assess whether the inmate is unconscious' " before the warden may authorize the execution to continue with the second and third chemicals. See *id.*, at 42.

While Florida's protocol does not specify what procedure the warden must use to determine consciousness, *id.*, at 42, n. 21, the Florida Supreme Court held that Warden Cannon, a lay person with basic CPR training, was qualified to test whether an inmate remained conscious after the initial dose of sodium thiopental. *Id.*, at 47-48. This test of consciousness would be carried out "by employing an 'eyelash touch,' calling the inmate's name, and shaking the inmate." *Id.*, at 42. This basic test was held to be all that was necessary to alleviate the risk that the inmate might be conscious as the second or third drugs are administered. *Id.*, at 48.

The Florida Supreme Court reasoned that although the warden did not have any training beyond basic CPR, the fact that the protocol required the warden to make a consciousness assessment in consultation with other team members adequately protected

the inmate from an Eighth Amendment violation. *Id.*, at 48. "If the inmate's consciousness is appropriately assessed and monitored after the dosage of sodium thiopental is administered, he or she will not suffer any pain from the injection of the remaining drugs." *Id.*, at 51. By any standard, the risk at that point is below the threshold of an Eighth Amendment violation. See *ibid*.

*C. Doctor Participation Not Required.*

When examining Kentucky's lethal injection protocol, this Court should be careful to avoid reading the Constitution to create a requirement that a physician participate in lethal injection. Requiring a physician to participate in lethal injection procedures will create a legal Catch-22,[6] where physicians are required to participate, but their professional code of ethics prohibits their participation. This could halt all executions by lethal injection in the United States.

The murderer *amici* assert that "there is no shortage of doctors . . . who express a willingness to participate in lethal injection executions." Brief for Michael Morales, et al., as *Amici Curiae* 6-7. In fact, it was a court-imposed requirement of physician participation that blocked justice in *amicus* Morales' own case when the physicians could not participate to the extent required by the court. See *Morales* v. *Tilton*, 465 F. Supp. 2d 972, 976-977 (ND Cal. 2006). A year later, Morales' punishment for the cold-blooded murder of 17-year-old Terri Winchell remains unexecuted. In North Carolina, the state medical board has threatened the

6. In the satirical novel of that name, a pilot who sought to be excused from hazardous missions on psychiatric grounds had to make a request, but the request was deemed proof of a rational mind, so the request would be denied. J. Heller, Catch-22 (1961).

professional licenses of physicians who participate in executions, a matter which remains in litigation. See *North Carolina Dept. of Corrections* v. *North Carolina Medical Board*, Wake County (NC) Superior Court No. 07-CVS-3574, Order of Oct. 1, 2007, appeal pending.

Although some medical professionals have expressed a willingness to participate in the past, once attacks like the one in North Carolina begin, the pool will evaporate quickly. The mere accusation of unethical conduct is a stain on one's reputation and a drain on one's time, energy, and finances, even if the person is completely vindicated. Convincing courts to require doctor participation and then attacking the doctors is part of the cynical Catch-22 strategy that has served the anti-death-penalty movement so well in the past. Cf. *Walton* v. *Arizona*, 497 U. S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment), overruled in part on other grounds in *Ring* v. *Arizona*, 536 U. S. 584 (2002) (simultaneous arguments of too little and too much discretion). The Eighth Circuit in *Taylor* correctly rejected this gambit.

In *Taylor* v. *Crawford*, the Eighth Circuit reversed the district court's holding that Missouri's proposed written lethal injection protocol "was still inadequate to provide sufficient constitutional protections." *Taylor*, 487 F. 3d, at 1078. After hearing expert testimony, and the testimony of a physician who had participated in Missouri's most recent execution, the district court had concluded that Missouri's lethal injection protocol "subjects condemned inmates to an unnecessary risk that they will be subject to unconstitutional pain and suffering . . . ." *Taylor* v. *Crawford*, No. 05-4173-CV-C-FJG, Order of June 26, 2006, U. S. Dist. LEXIS 42949 (typed op., at 13).

The district court ordered the Department of Corrections to prepare a written protocol for lethal

injection that would require a board certified anesthesiologist to actively participate in the execution procedure. *Id.*, at 14. The anesthesiologist would be required to mix all the drugs used in lethal injection and directly observe the individuals who administered the drugs through an IV. *Ibid.* The anesthesiologist would also be required to monitor the anesthetic depth of the inmate and certify sufficient anesthetic depth had been achieved before potassium chloride was administered. *Ibid.*

These requirements were in conflict with the American Medical Association's code of ethics, which does not allow physician participation in a legally authorized execution. "In the case where the method of execution is lethal injection, the following actions by a physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel." American Medical Association, Code of Medical Ethics, E-2.06 (2007). This position has been adopted by the American Society of Anesthesioligists. See Message from the President: Observations Regarding Lethal Injection, available at http://www.asahq.org/news/asanews063006.htm (June 30, 2006).

After a review of the record, the Eighth Circuit concluded participation of an anesthesiologist was not necessary. "Neither does the record justify requiring the continuous monitoring of the anesthetic depth of the inmate by one trained in anesthesia or by additional equipment." *Taylor*, 487 F. 3d, at 1084. The Eighth Circuit's decision was based on the standard that the pain of punishment can only be constitutionally signifi-

cant if the process of carrying out lethal injection involves "the unnecessary and wanton infliction of pain." *Id.,* at 1079. Missouri's proposed written protocol did not create such a risk. *Id.*, at 1083. Thus, the district court had no basis to order an anesthesiologist that would monitor consciousness. See *ibid*.

The Eighth Circuit found Missouri's protocol sufficient, in part because "experts agree that if a 5-gram dose of thiopental is successfully delivered, there is virtually no risk that an inmate will suffer pain through Missouri's three-chemical sequence." *Id.*, at 1083. Therefore, a requirement that the prisoner be physically examined, not necessarily by a physician, by using "standard clinical techniques to determine that he is unconscious before the second and third chemicals are administered" met Eighth Amendment requirements. *Id.*, at 1084. "Given the dose of thiopental provided in the protocol, the precautions taken to ensure it is successfully delivered, . . . and the physical examination of the prisoner and the IV site prior to administering the second and third chemicals, there is simply no realistic need for further monitoring of anesthetic depth by a physician or sophisticated equipment to prevent a constitutionally significant risk of pain." *Ibid.*

The Constitution does not require the use of execution procedures that may be medically optimal in clinical settings. *Ibid.*; see also *Hamilton* v. *Jones*, 472 F. 3d 814, 816 (CA10 2007), cert. denied, 127 S. Ct. 1054, 166 L. Ed. 2d 783 (2007). So long as a state has chosen procedures for conducting an execution that are "designed to ensure a quick, indeed a painless, death, . . . there is no need for the continuing, careful, watchful eye of an anesthesiologist . . ." or equipment designed to monitor consciousness. See *Taylor*, 487 F. 3d, at 1084. At most, the Constitution requires that there

be a check that the sodium thiopental was successfully delivered to the inmate. Once such a check has been completed, and the inmate is determined to be unconscious, the State's burden to prevent "unnecessary and wanton infliction of pain" has been satisfied.

## CONCLUSION

The decision of the Supreme Court of Kentucky should be affirmed. Alternatively, if a remand is deemed necessary, the only change required should be the addition of a consciousness check of the kind found sufficient in *Taylor* and *Lightbourne*.

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Respectfully submitted,

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