

No. 07-5439

**In the
Supreme Court of the United States**

RALPH BAZE, *ET AL.*,
Petitioners,

v.

JOHN D. REES, *ET AL.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Kentucky

**BRIEF OF THE STATES OF TEXAS, ALABAMA, ARKANSAS,
COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
IDAHO, KANSAS, MISSISSIPPI, MISSOURI, MONTANA,
NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA,
TENNESSEE, UTAH, AND WYOMING, AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney
General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

R. TED CRUZ
Solicitor General
Counsel of Record

SEAN D. JORDAN
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

Additional counsel listed on inside cover

Troy King
Attorney General of Alabama

Dustin McDaniel
Attorney General of Arkansas

John W. Suthers
Attorney General of Colorado

Kevin T. Kane
Chief State's Attorney of Connecticut

Joseph R. Biden III
Attorney General of Delaware

Bill McCollum
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Lawrence G. Wasden
Attorney General of Idaho

Paul J. Morrison
Attorney General of Kansas

Jim Hood
Attorney General of Mississippi

Jeremiah W. (Jay) Nixon
Attorney General of Missouri

Mike McGrath
Attorney General of Montana

Catherine Cortez Masto
Attorney General of Nevada

W. A. Drew Edmondson
Attorney General of Oklahoma

Henry D. McMaster
Attorney General of South Carolina

Lawrence E. Long
Attorney General of South Dakota

Robert E. Cooper, Jr.
Attorney General and Reporter of Tennessee

Mark L. Shurtleff
Attorney General of Utah

Bruce A. Salzburg
Attorney General of Wyoming

QUESTIONS PRESENTED

Lethal injection is the primary or only method of execution provided for by the federal government, the United States military, and 37 States—comprising nearly every death-penalty State in America. The vast majority of these States' lethal-injection procedures employ the same three-drug combination used in Kentucky. In this case, there is no disagreement that Kentucky's lethal-injection protocol is designed to result in a painless death, and when properly implemented will result in a painless death.

1. Does Kentucky's lethal-injection protocol violate the Eighth Amendment's prohibition of cruel and unusual punishment because it is inconsistent with standards of decency at the Founding, inconsistent with modern standards of decency, or inherently cruel and unusual?
2. If the Court adopts the Kentucky courts' formulation of the applicable Eighth Amendment standard, does Kentucky's lethal-injection protocol violate the Eighth Amendment because it creates a substantial risk of wanton or unnecessary infliction of pain, torture, or lingering death?

TABLE OF CONTENTS

Questions Presented	i
Index of Authorities	v
Interest of <i>Amici Curiae</i>	1
Summary of the Argument	2
Argument	3
I. Kentucky’s Lethal-Injection Protocol Does Not Violate the Eighth Amendment Because It Is Overwhelmingly Accepted Under Contemporary Moral Standards and Is Not Inherently Cruel and Unusual	6
A. Kentucky’s Lethal-Injection Protocol Is Overwhelmingly Accepted by Contemporary Moral Standards	6
1. The Eighth Amendment’s prohibition on “cruel and unusual punishment” permits well-settled punishments—like the death penalty—and is measured by the nation’s “evolving standards of decency.”	6
2. Contemporary moral standards are best measured by objective consensus	9
3. The national consensus in favor of Kentucky’s three-drug protocol is overwhelming	12

4.	The nation’s ever-evolving standards of decency have been consistently effected by state governments	15
B.	Because Kentucky’s Lethal-Injection Protocol Is Neither Inherently Cruel Nor Unusual, There Is No Reason for the Court To Eschew Traditional Deference to National Consensus	17
1.	Kentucky’s protocol is not inherently cruel or barbarous	18
2.	Kentucky’s lethal-injection protocol is not unusual	20
II.	If the Court Adopts the Kentucky Supreme Court’s Eighth Amendment Test, the Court Should Nonetheless Uphold the Constitutionality of Kentucky’s Lethal-Injection Protocol Because the Record Does Not Support the Conclusion That the Protocol Creates a Substantial Risk That Petitioners Will Suffer Unnecessary Pain, “Torture,” or “Lingering Death.”	23
A.	All Agree That Successful Implementation of Kentucky’s Protocol Will Lead to a Humane Death	24
B.	Petitioners’ Presentation of the Potential Risks Involved in Implementing Kentucky’s Protocol Dramatically Overstates the Record Evidence	25

1.	A failed delivery of sodium thiopental would be readily observable prior to any attempt to deliver the remainder of the three-drug protocol	26
2.	Regardless, the record evidence fails to demonstrate a “significant” or “substantial” risk that the protocol’s designated dose of sodium thiopental will not be delivered to the inmate	27
	Conclusion	32

INDEX OF AUTHORITIES

Cases

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	9, 12
<i>Baze v. Rees</i> , 217 S.W.3d 207 (Ky. 2006)	4
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	12
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	6, 12, 19
<i>Hernandez v. New York</i> , 500 U.S. 352 (1991)	27
<i>Holmes v. Jennison</i> , 39 U.S. 540 (1840)	22
<i>In re Kemmler</i> , 136 U.S. 436 (1890)	8, 16, 18-20
<i>In re Storti</i> , 60 N.E. 210 (Mass. 1901)	16
<i>Kelo v. City of New London, Conn.</i> , 545 U.S. 469 (2005)	21, 22
<i>Louisiana ex rel. Francis v. Resweber</i> , 329 U.S. 459 (1947)	3, 16, 18-20
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	8, 12

<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	8-10
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	10-12
<i>Stanford v. Kentucky</i> , 492 U.S. 361 (1989)	11, 12
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987)	11
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	7, 8, 10, 18, 20-22
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	7, 8
<i>Wilkerson v. Utah</i> , 99 U.S. 130 (1878)	8, 16, 18-20
<i>Wright v. United States</i> , 302 U.S. 583 (1938)	21, 22

Constitutional Provisions, Statutes, and Rules

U.S. Const., Amend. VIII	20
18 U.S.C.A. 3596 (2007)	13
A.C.A. §5-4-617	15
I.C. §19-2716	15
725 ILCS 5/119-5	15
MD Code, Correctional Services, §3-905	15

Miss. Code Ann. §99-19-51	15
MCA 46-19-103	15
N.H. Rev. Stat. §630:5	15
N.J.S.A. 2C:49-2	15
N.M.S.A. 1978, §31-14-11	15
N.C.G.S.A. §15-188	15
22 Okl. St. Ann. §1014	15
O.R.S. §137.473	15
61 P.S. §3004	15
W.S. 1966 §7-13-904	15

Other Authorities

<i>A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections,</i> 120 Harv. L. Rev. 1301 (March 2007)	1, 13, 16
Corinna Barrett Lain, <i>Furman Fundamentals,</i> 82 Wash. L. Rev. 1 (Feb. 2007)	16
Deborah W. Denno, <i>The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty,</i> 76 Fordham L. Rev. 49 (Oct. 2007)	1, 13
Deborah W. Denno, <i>When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us,</i> 63 Ohio St. L. J. 63 (2002)	13

<i>Getting to Death: Are Executions Constitutional?</i> , 82 Iowa L. Rev. 319 (1997)	16
Hugo Adam Bedau, <i>The Courts, the Constitution and Capital Punishment</i> 35 (1977)	16
Robert J. Sech, <i>Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods</i> , 30 Val. U. L. Rev. 381(Fall 1995)	7
The Clark County (Indiana) Prosecuting Attorney, <i>U.S. Executions Since 1976</i> http://www.clarkprosecutor.org/ html/death/usexecute.htm	31
WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 554 (4th ed. 2007)	4

INTEREST OF *AMICI CURIAE*

The state *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. The States have a vital interest in the administration of criminal justice, particularly as applied to capital crimes committed against their citizens. Lethal injection is now the default method for execution in 37 States, comprising every death-penalty State save Nebraska. *See Note, A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 Harv. L. Rev. 1301, 1301-02 (March 2007) (citation omitted). Thus, the consensus in favor of lethal-injection among the States that have the death penalty is both strong and current.

The consensus in favor of a three-drug protocol like Kentucky's is also powerful. According to two recent studies conducted by one commentator, "with two negligible exceptions, *all* states that reported their lethal injection drugs shared the same three-chemical combination." *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 97 (Oct. 2007) (emphasis added).

Finally, it is undisputed that Kentucky's lethal-injection protocol—like the protocols in the other lethal-injection States—is designed to result in a painless death. If Petitioners' challenge to the constitutional validity of the three-drug lethal-injection protocol used by the vast majority of death-penalty States is nonetheless successful, that decision will directly and profoundly impact the administration of criminal justice in the *amici* States. Under such circumstances, the lethal-injection procedures used throughout the country would likely have to be substantially revised, potentially requiring action by some 37 state legislatures to meet whatever new requirements might be set forth by the Court.

SUMMARY OF THE ARGUMENT

This case concerns whether Kentucky’s three-drug lethal-injection protocol violates the Eighth Amendment’s prohibition of “cruel and unusual punishment.” The Court should hold that it does not.

In determining whether a government’s punishment of an individual is “cruel and unusual,” the Court has held that it will judge a government’s conduct by contemporary standards of morality. Reasoning that the best measurement of contemporary morality is objective evidence of national consensus, the Court has historically looked to the conduct of the majority of States to discern contemporary values.

In this case, the national consensus could not be more clear: measured by the conduct of state governments, the American people overwhelmingly accept lethal injection by protocol similar or identical to that of Kentucky. Accordingly, the Court should conclude that Kentucky’s lethal-injection protocol is entirely consistent with modern standards of morality, and is therefore also consistent with the requirements of the Eighth Amendment.

Kentucky’s protocol is also wholly unlike those punishments that the Court has described as being cruel and unusual. Punishments that the Court has described as violating the Eighth Amendment’s prohibitions involve “torture,” barbarity, and inherent cruelty—like drawing and quartering, public dissection, or being burned alive. Because even Petitioners appear to concede that lethal injection itself is *not* inherently cruel, the Court should uphold the constitutionality of Kentucky’s protocol.

Lethal injection by Kentucky’s protocol is also in no way “unusual.” Indeed, nearly every State that administers lethal injection does so by a protocol similar or identical to Kentucky’s methodology. The Eighth Amendment’s inclusion of the term

“unusual” in its prohibition requires an unconstitutional punishment to be just that—unusual. Because lethal injection by the three-drug protocol cannot accurately be described as an “unusual” punishment in the modern world, it does not run afoul of the Eighth Amendment.

Finally, the Court should uphold the constitutionality of Kentucky’s three-drug protocol because Petitioners have failed to make a factual case that meets even their own, minimal standard for determining whether a punishment is constitutional—whether it results in a “significant and unnecessary risk of severe pain.” *See* Petitioners’ Br. 32. Petitioners’ own expert readily concedes that if the protocol is successfully administered, the resulting death will be a humane one. In addition, Petitioners have offered no evidence that pain will result from the protocol with *any* degree of likelihood—causing Petitioners to fail to meet their own proposed standard.

For these jurisprudential and factual reasons, the Court should hold that Kentucky’s lethal-injection protocol does not violate the Eighth Amendment’s prohibition of “cruel and unusual” punishment.

ARGUMENT

Petitioners urge that Kentucky’s chosen method of execution, involving a three-drug lethal-injection protocol, violates the Eighth Amendment. The Court last addressed the question whether a method of execution is “cruel and unusual,” and therefore violates the Eighth Amendment, 60 years ago. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). In order to answer the question concerning Kentucky’s lethal-injection protocol, the Court must first set forth the appropriate criteria for determining whether an execution procedure is “cruel and unusual.”

The Supreme Court of Kentucky evaluated the validity of Kentucky's lethal-injection protocol under the Eighth Amendment by applying the following test: "The method of execution must not create a substantial risk of wanton or unnecessary infliction of pain, torture or lingering death." *Baze v. Rees*, 217 S.W.3d 207, 211 (Ky. 2006); J.A. 805. Respondents explicitly endorse this test, and recommend that it be applied by this Court. Respondents' Br. 25.

Petitioners assert that they reject this test, but their formulation of the appropriate Eighth Amendment test is essentially the same as the test applied by the Kentucky court. Specifically, Petitioners argue that the test should be as follows: "[A] method of execution is administered unconstitutionally if the procedures in question impose a significant and unnecessary risk of severe pain that could be prevented by the adoption of reasonable safeguards or alternative procedures." Petitioners' Br. 32. Petitioners argue that this test is substantively different from that applied by the Kentucky Supreme Court, particularly—and oddly—contending vigorously that the Kentucky court's critical mistake was that it looked for "substantial" risk rather than "significant" risk in its analysis. *See* Petitioners' Br. 41-43. But the words "substantial" and "significant" are synonyms, WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 554 (4th ed. 2007), and so Petitioners' formulation in this regard is not substantively different than that of the Kentucky court. And, because the Kentucky court's test expressly incorporates analysis of whether there is "unnecessary" infliction of pain, it likewise incorporates the other elements of Petitioners' test. J.A. 805.

Amici States believe that the Kentucky Supreme Court applied an incorrect test to evaluate the constitutional validity of Kentucky's lethal-injection protocol, albeit reaching the correct conclusion that the protocol is constitutional. Simply put, there is no support in this Court's prior method-of-punishment jurisprudence for the Kentucky Supreme Court's

formulation that a method of punishment must not involve a “substantial risk” of unnecessary pain or lingering death.

Rather, this Court’s jurisprudence points to the application of a two-part test to determine whether a government’s method of punishment violates the Eighth Amendment’s prohibition. First, the Court should ask whether a consensus of States has developed for or against the challenged punishment. *See infra* Section I.A.2-4. And second, giving substantial weight to the national consensus, if any, the Court should engage in a limited inquiry into whether the challenged method is both inherently cruel *and* unusual. *See infra* Section I.B. When, as in this case, the challenged punishment is not opposed by a consensus of States and also is not unusual and inherently cruel, the punishment at issue should be upheld as fully consistent with the Eighth Amendment.

If, however, the Court were to adopt the Kentucky Supreme Court’s standard that the method of execution must not “create a substantial risk of wanton or unnecessary infliction of pain, torture or lingering death,” J.A. 805, the Court should nonetheless affirm the constitutionality of Kentucky’s lethal-injection protocol. As the Kentucky courts correctly concluded, the record evidence in this case simply cannot support the conclusion that the implementation of Kentucky’s protocol creates a substantial risk that Petitioners will suffer unnecessary pain when they are executed, nor that their executions will involve anything like “torture” or “lingering death.”

Accordingly, under either *amici* States’ proposed standard or under the standard applied by the Kentucky Supreme Court, the Court should uphold the constitutionality of Kentucky’s three-drug lethal-injection protocol.

I. KENTUCKY’S LETHAL-INJECTION PROTOCOL DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT IS OVERWHELMINGLY ACCEPTED UNDER CONTEMPORARY MORAL STANDARDS AND IS NOT INHERENTLY CRUEL AND UNUSUAL.

The Court’s precedent in Eighth Amendment challenges to methods of punishment points to two questions to be answered in evaluating the constitutional validity of Kentucky’s lethal-injection protocol. First, has a national consensus developed against the challenged method of punishment? And second, is the challenged method so inherently cruel *and* “unusual” that the Court should eschew national consensus as a measurement of compliance with contemporary standards of morality? When, as in this case, the answer to both questions is “no,” the Court should uphold the constitutionality of the challenged method of punishment.¹

A. Kentucky’s Lethal-Injection Protocol Is Overwhelmingly Accepted by Contemporary Moral Standards.

- 1. The Eighth Amendment’s prohibition on “cruel and unusual punishment” permits well-settled punishments—like the death penalty—and is measured by the nation’s “evolving standards of decency.”**

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const., Amend. VIII. Although the terms “cruel and unusual” have not been afforded precise meaning, their general prohibition on excessive punishment has been “firmly

1. Notably, courts must presume the validity of a legislature’s punishment. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

established in the Anglo-American tradition of criminal justice.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase “cruel and unusual” finds its source in the English Declaration of Rights of 1688, and its principles can be traced back to the Magna Carta. *Id.*

Though the term “cruel and unusual” is of English origin, “some scholars and authors maintain that the Cruel and Unusual Punishments Clause adopted a slightly different meaning than the meaning it carried in England.” See Robert J. Sech, *Hang ‘Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 Val. U. L. Rev. 381, 395 (Fall 1995). Whereas the phrase in England is believed to have been intended to limit judicial excesses, it has been argued that the American Framers “were concerned with protecting individuals from methods of torture.” *Id.*, at 396. “Today, most scholars agree that the clause, when adopted in America, was intended to apply to the methods of punishment, including modes of inflicting the death penalty.” *Id.*

The Amendment recognizes the broad power of governments to punish criminal misconduct, but requires that punishments stay “within the limits of civilized standards.” *Id.* Although “imprisonment and even execution” are clearly within the limits of civilized standards, “any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Id.* One intended purpose of the Amendment was to prevent cruelty from becoming “an instrument of tyranny.” *Weems v. United States*, 217 U.S. 349, 373 (1910).

The precise limitations of the terms “cruel and unusual” are difficult to define. *Trop*, 356 U.S., at 100-101. Nonetheless, the Court has provided some guidelines. The Court has explained,

“[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that

punishments of torture. . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution. Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life.” *In re Kemmler*, 136 U.S. 436, 447 (1890) (internal quotations omitted).

The Court has also provided some examples of punishments that would violate the Eighth Amendment’s proscription. Acts of “torture” and “unnecessary cruelty” are barred by the Amendment. *Wilkinson v. Utah*, 99 U.S. 130, 136 (1878). Such acts might include drawing and quartering, public dissection, or being burned alive. *Id.*, at 135. On the other hand, the Court has concluded that execution by firing squad falls safely within the range of punishments permitted by the Amendment. *Id.* at 134-35.

But while the meaning of the terms “cruel and unusual” is not defined with precision, the Court has made clear that their meaning is also “not static.” *Trop*, 356 U.S., at 100-101. At a minimum, the Amendment “prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted.” *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

In addition, the Court’s application of the Amendment recognizes the nation’s “evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S., at 101. Put another way, the Amendment’s meaning “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems*, 217 U.S., at 378; *see also McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (“[O]ur constitutional decisions have been informed by ‘contemporary values concerning the infliction of a challenged sanction.’”).

2. Contemporary moral standards are best measured by objective consensus.

In discerning the nation’s evolving moral standards, the Court looks to “objective evidence of how our society views a particular punishment today.” *Penry*, 492 U.S., at 331. According to the Court, “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Id.* Thus, it is the values of the people—not a battle of experts or advocates—that best define the contemporary boundaries of the Eighth Amendment’s ban on “cruel and unusual punishment.”

When the Court recently analyzed whether the Eighth Amendment bars imposing the death penalty on mentally retarded individuals, for example, the Court looked to national consensus to measure contemporary moral standards of cruelty. *Atkins v. Virginia*, 536 U.S. 304, 313-18 (2002). The Court noted that since 1990, a significant number of States had enacted legislation barring the execution of mentally retarded individuals—and no States had enacted legislation expressly permitting such executions. *Id.*, at 314-16. The Court reasoned that such enactments provided “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” *Id.*, at 316. The Court continued, “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.* And, seeing no reason to disagree with the consensus judgment of the States, the Court concluded that the execution of mentally retarded individuals is unconstitutionally excessive. *Id.*, at 321.

When the Court even more recently addressed whether the Eighth Amendment bars imposing the death penalty on juvenile offenders under 18, the Court again looked to national consensus to measure the Amendment’s moral requirements.

Roper v. Simmons, 543 U.S. 551, 564-69 (2005). The Court observed,

“[t]he prohibition against ‘cruel and unusual punishments,’ like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” *Id.*, at 560-61 (quoting *Trop*, 356 U.S., at 100-101).

Then, comparing the legislative trends regarding juvenile offenders with those analyzed in *Atkins*, the Court concluded that “[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded.” *Roper*, 543 U.S., at 564. Specifically, the Court noted the “consistency” of direction of the States in trending towards the abolition of death penalty for juveniles. *Id.*, at 566. And, noting that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18,” the Court held that such imposition of the death penalty is barred by the Eighth Amendment. *Id.*, at 568.

When a national consensus has *not* developed against a government punishment, however, the Court has been equally careful to avoid declaring government conduct unconstitutional. For example, when there was no consensus among the States prohibiting execution of mentally retarded individuals, the Court reasoned that such executions did not offend the Eighth Amendment. *Penry*, 492 U.S., at 334-35 (“[A]t present, there is

insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.”). And when the national consensus had not yet developed against execution of persons 16 or 17 years of age, a plurality of the Court likewise concluded that “such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.” *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

Even more germane to this case, when a national consensus *supports* a government punishment, the Court has been exceedingly reluctant to declare that punishment to be “cruel and unusual” under contemporary moral standards. In *Tison v. Arizona*, 481 U.S. 137, 138 (1987), for example, the Court reviewed whether States may execute persons who substantially participate in a felony involving a murder. As in other cases, the Court expressly acknowledged the importance of “the state legislatures’ judgment” when assessing whether a punishment violates contemporary norms. *Id.*, at 152. Noting that the consensus of States *authorized* the death penalty for persons substantially involved in felonies involving a murder, the Court concluded that the “substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these circumstances.” *Id.*, at 154 (emphasis original). Accordingly, the Court concluded that death sentences for those who substantially participate in a felony murder can be constitutional. *Id.*, at 158.

To be sure, the Court has not always spoken with one voice as to the importance of national consensus in discerning contemporary moral standards. At times, the Court has so heavily relied on national consensus that it has “emphatically reject[ed] the suggestion that the Court should bring its own judgment to bear” in measuring moral standards. *Roper*, 543

U.S., at 562 (citing *Stanford*, 492 U.S., at 370-71); *see also McCleskey*, 481 U.S., at 300 (“In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain ‘objective indicia that reflect the public attitude toward a given sanction.’”) (quoting *Gregg*, 428 U.S., at 173). Indeed, in *Stanford*, the Court explained as follows:

“In determining what standards have ‘evolved,’ however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole. As we have said, ‘Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.’ This approach is dictated by both the language of the Amendment—which proscribes only those punishments that are both ‘cruel and unusual’—and by the ‘deference we owe to the decisions of the state legislatures under our federal system.’” 492 U.S., at 369 (internal citations omitted).

In other instances, however, the Court has emphasized the importance of its “own judgment” over objective indicia of contemporary morality. *Atkins*, 536 U.S., at 312 (discussing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)). *Amici* States submit that the proper metric of contemporary morality should be the objective determinations of the democratically elected federal and state legislatures, and that subjective assessments should enter constitutional analysis in only the narrowest of circumstances.

3. The national consensus in favor of Kentucky’s three-drug protocol is overwhelming.

That lethal injection by protocol similar to that of Kentucky is firmly embedded in national consensus is beyond debate.

First adopted in 1977, lethal injection is now the default method for execution in every death-penalty State save Nebraska. *See Note, A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 Harv. L. Rev. 1301, 1301-02 (March 2007) (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L. J. 63, 92, 129 (2002)). “Of the thirty-eight death penalty states, lethal injection is the sole method of execution in twenty-eight states and is one of two methods of execution in nine.” *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 59 (Oct. 2007).

The consensus in favor of lethal-injection is both strong and current. As one commentator recently reported,

“[b]y 2001, all death penalty states in this country had switched to lethal injection, either entirely or as an option, with two exceptions. In 2002, Alabama changed from an electrocution-only execution state to a state that allows inmates to choose between electrocution and lethal injection. Nebraska still uses just electrocution.” *Id.*, at 93.²

The consensus in favor of a three-drug protocol like Kentucky’s is also powerful. According to two recent studies conducted by a commentator, “with two negligible exceptions, *all* states that reported their lethal injection drugs shared the same three-chemical combination.” *Id.*, at 87 (emphasis

2. The federal government implements whatever execution method is prescribed by the law of the State in which a federal death sentence has been imposed. 18 U.S.C.A. 3596 (2007).

added).³ The consensus protocol involves the sequential administration of three drugs: sodium thiopental, pancuronium bromide, and potassium chloride. *Id.*, at 78. Sodium thiopental is “a common anesthetic for surgery used to cause unconsciousness.” *Id.*, at 54. Pancuronium bromide is “a total muscle relaxant that stops breathing by paralyzing the diaphragm and lungs.” *Id.* And potassium chloride is “a toxin that induces cardiac arrest and permanently stops the inmate’s heartbeat.” *Id.*

Kentucky’s protocol delivers a sequence of 3 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *Id.*, at 97 n.322. Texas’s protocol is nearly identical, delivering a sequence of 3 grams of sodium thiopental, 100 milligrams of pancuronium bromide, and 140 milliequivalents of potassium chloride. *Id.*

In 2005, twenty-six States reported using the three-drug protocol.⁴ In addition, thirteen States have reported the doses of each drug administered. *Id.*, at 97.⁵ Notably, the

3. The two States that reported different protocols are hardly noteworthy. In 2005, Oklahoma reported substituting a “very similar” compound, vecuronium bromide, for pancuronium bromide. *Id.*, at 97 n.320. North Carolina did not mention using potassium chloride in a 2001 report, but did list the chemical in a 2005 report. *Id.*

4. Those States were Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. *Id.*, at 97 n.318. According to trial-court testimony, New Jersey’s lethal-injection protocol omits the dose of pancuronium bromide. J.A. 110.

5. Those States are Alabama, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Maryland, New Mexico, North Carolina, Tennessee, Texas, and Washington. *Id.*, at 97 n.322.

Legislatures of fourteen States have passed statutes that specify the names or types of pharmaceuticals used or the protocol to be followed.⁶

In short, the consensus in favor of lethal injection by protocol similar to that of Kentucky is substantial. This consensus reflects widespread national acceptance of the methodology challenged in this case. Indeed, *amici* States are aware of no case in which the national consensus was so unequivocally unbalanced in favor of a method of punishment, where the method of punishment was nonetheless deemed *inconsistent* with contemporary moral standards.

In discerning present-day conceptions of the terms “cruel and unusual,” the Court has given dispositive weight to present-day consensus. Because the present-day consensus is near unanimous in favor of Kentucky’s lethal-injection methodology, by any measure the protocol is well within the range of punishments permitted by the Eighth Amendment.

4. The nation’s ever-evolving standards of decency have been consistently effected by state governments.

To date, the Court has never intervened to re-write a State’s death-penalty protocol. To the contrary, on each prior occasion that the Court has reviewed the methodology of a State’s executions, the Court has held—expressly or impliedly—that the challenged methodology survives constitutional scrutiny.

6. Those States are Arkansas, *see* A.C.A. §5-4-617; Idaho, *see* I.C. §19-2716; Illinois, *see* 725 ILCS 5/119-5; Maryland, *see* MD Code, Correctional Services, §3-905; Mississippi, *see* Miss. Code Ann. §99-19-51; Montana, *see* MCA 46-19-103; New Hampshire, *see* N.H. Rev. Stat. §630:5; New Jersey, *see* N.J.S.A. 2C:49-2; New Mexico, N.M.S.A. 1978, §31-14-11; North Carolina, *see* N.C.G.S.A. §15-188; Oklahoma, *see* 22 Okl. St. Ann. §1014; Oregon, *see* O.R.S. §137.473; Pennsylvania, *see* 61 P.S. §3004; and Wyoming, *see* W.S. 1966 §7-13-904.

See, e.g., Wilkerson, 99 U.S., at 134-35 (“Cruel and unusual punishments are forbidden by the Constitution, but. . . 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, within the meaning of the eighth amendment.”); *Resweber*, 329 U.S., at 463 (affirming as constitutional a second attempt to execute an inmate by electrocution).

Indeed, the Court’s traditional reluctance to involve itself in death-penalty policy-making is evidenced in the observation of one commentator in 1968 that, at the time, “not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be ‘cruel and unusual punishment’ under any state or federal constitution.” *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 Wash. L. Rev. 1, 10 (Feb. 2007) (quoting Hugo Adam Bedau, *The Courts, the Constitution and Capital Punishment* 35 (1977)).

Since the Court’s decisions in *Wilkerson* and *Resweber*, however, the nation’s evolving standards of decency have been reflected in changing methods of execution. Thus, while “[i]n the [Nineteenth] [C]entury, hanging was the predominant method of execution in the United States,” Petitioners’ Br. 2 (citing *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 364-65 (1997)), in the Twentieth Century “hanging was superseded by electrocution and gas,” *id.* (citing *In re Storti*, 60 N.E. 210, 210 (Mass. 1901) (Holmes, C.J.)). And though electrocution was initially “widely hailed as a . . . humane method of execution,” *id.* (citing *In re Kemmler*, 136 U.S., at 444), moral tides have most recently led to the adoption of lethal injection as the States’ predominant method of death-penalty administration, *see* Note, 120 Harv. L. Rev. at 1301-02.

Indeed, even while inviting the Court’s participation into execution-methodology policy-making, Petitioners fully

acknowledge the success of the Court's historic reluctance to do so. As Petitioners opine,

“[t]he evolution of execution methods in this country reflects a continuing quest to find a more humane means of killing. . . . The problems are not always perceived as promptly as they could be, but *their perception produces change* aimed at eliminating unnecessary dangers of severe pain.” Petitioners’ Br. 1 (emphasis added).

The positive change of which Petitioners write is, in fact, the decisions of the States to respond legislatively to the nation’s evolving moral preferences in the death-penalty context—*not* intervention by this Court.

To be sure, the nation’s moral preferences may continue to evolve. Indeed, given historical trends, it is reasonable to assume that the nation’s moral preferences are likely to change again. But the best measurement of where those preferences are today is not Petitioners’ guess, but is instead the nation’s legislative consensus, which points squarely to the almost universal acceptance of lethal injection using a protocol similar or identical to that of Kentucky. Simply put, federalism has worked in the death-penalty context: the nation’s moral preferences for humane executions have been effected—over centuries—in State Houses across the country.

B. Because Kentucky’s Lethal-Injection Protocol Is Neither Inherently Cruel Nor Unusual, There Is No Reason for the Court To Eschew Traditional Deference to National Consensus.

Because Kentucky’s lethal-injection protocol is not inherently cruel and unusual, there is no reason for the Court to substitute its own judgment for the national consensus supporting the protocol’s constitutional validity. Indeed, there is nothing in the Court’s precedent indicating that Kentucky’s

lethal-injection protocol can be fairly described as both inherently cruel and “unusual” so as to be barred by the Eighth Amendment.

1. Kentucky’s protocol is not inherently cruel or barbarous.

Although the Court’s explication of “cruel and unusual” as it pertains to methods of punishment has not been precise, the Court has nonetheless provided some meaningful guidance as to what the terms mean. In general, the Court has provided broad principles, not detailed constraints.

The Court has made clear, for example, that the Eighth Amendment bars those methods of punishment that are uncivilized—those “outside the bounds of . . . traditional penalties.” *Trop*, 356 U.S., at 100. Punishments that “involve torture or a lingering death” are those intended to be prohibited by the Amendment. *Kemmler*, 136 U.S., at 447. Said another way, the Amendment prohibits methods of punishment that are inherently cruel, like those intended to inflict unnecessary pain. *Resweber*, 329 U.S., at 376. Examples identified by the Court include drawing and quartering, public dissection, or being burned alive. *Wilkinson*, 99 U.S., at 136.

Kentucky’s lethal-injection protocol cannot be fairly characterized as a method of execution intended to involve torture, lingering death, or cruelty, as those terms are commonly understood. To the contrary, the protocol is expressly designed to result in a painless and dignified death that is not unnecessarily prolonged. Indeed, Petitioners’ own expert acknowledges that, if the protocol is successfully implemented, it results in a humane death. J.A. 493-94.

Further, Petitioners necessarily reject the broad notion that lethal injection as a method of execution is barred by the Eighth Amendment. In this regard, Petitioners have asserted that an altered version of Kentucky’s lethal-injection protocol *would* be

constitutional. See Petitioners’ Br. 51-59. Accordingly, although the effectiveness of any specific lethal-injection protocol might be subject to debate by medical experts and legal scholars, no one in this case suggests that lethal injection itself is *inherently* cruel. And because inherent cruelty is and has been the Court’s criterion for determining the constitutionality of a method of punishment, *see generally, Wilkerson*, 99 U.S., at 136; *Kemmler*, 136 U.S., at 447; *Resweber*, 329 U.S., at 376, the Court should hold that Kentucky’s lethal-injection methodology survives Petitioners’ constitutional challenge.

Attempting to avoid the Court’s punishment-methodology jurisprudence, Petitioners assert that the Eighth Amendment bars government punishment whenever a theoretically less-risky or less-painful punishment can be demonstrated. See Petitioners’ Br. 51. Thus, Petitioners place significant reliance on their proposed, untested alternatives to Kentucky’s protocol—such as removing pancuronium bromide and potassium chloride from the lethal-injection regimen. *Id.* at 51-59. But the Court has made clear that the Constitution sets a ceiling—not a floor—for the exercise of States’ judgment in selecting an execution method; it does not require States “to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.” *Gregg*, 428 U.S., at 175. Thus, the existence of less severe, alternative punishments—including Petitioners’ proposed, untested ones—do not render Kentucky’s protocol in violation of the Eighth Amendment.⁷

7. Indeed, requiring States to prove that their selected method of punishment is the least severe possible would contravene traditional burdens of proof. It is the Petitioners’ heavy burden to demonstrate the unconstitutionality of Kentucky’s protocol—not the State’s burden to demonstrate that it selected the single, best method. *Cf. Gregg*, 428 U.S., at 175 (“[A] heavy burden rests on those who would attack the judgment of the representatives of the people.”).

Likewise, the test applied by the Kentucky Supreme Court—that punishments are barred if they involve a “substantial risk” of unnecessary pain—finds no support in the Court’s punishment-methodology jurisprudence. *Amici* States are not aware of any case in which the Court has held unconstitutional a punishment method because it involved a *risk* of pain. Rather than focusing on the risk of a punishment method being accidentally implemented in a painful fashion, the Court has instead focused on whether or not the method itself involves inherent cruelty, barbarity, torture, or an intent to cause suffering. *See, generally Wilkerson*, 99 U.S., at 136; *Kemmler*, 136 U.S., at 447; *Resweber*, 329 U.S., at 376.

Whatever hypothetical risks Petitioners assert with regard to Kentucky’s lethal-injection protocol, it cannot seriously be suggested that Kentucky’s administration of lethal injection falls into the same category as drawing and quartering, public dissection, or being burned alive. Those acts of torture involve a level of inherent cruelty that clearly evinces government intent to inflict pain on the individual being executed.

Because Kentucky’s lethal-injection protocol plainly does not contemplate—indeed it strives to avoid—unnecessary pain or lingering death in the execution process, it is not “inherently cruel.”

2. Kentucky’s lethal-injection protocol is not unusual.

The Eighth Amendment prohibits those punishments that are cruel *and* unusual. U.S. Const., Amend. VIII. In *Trop*, 356 U.S., at 101 n.32, the Court noted that it had not yet determined whether the term “unusual” should be construed as having meaning independent of the term “cruel.” The Court reasoned as follows:

“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear. On the few

occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word ‘unusual.’ If the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’ however, the meaning should be the ordinary one, signifying something different from that which is generally done.” *Id.*, at 101 n.32.

The term “unusual” must mean *something* different than “cruel,” else it has no meaning at all, and serves no purpose in the Constitution. The term “unusual” should be given its ordinary and independent meaning.

Indeed, construing each word to have its own meaning is entirely consistent with the Court’s ordinary practice. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting) (“When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, ‘that no word was unnecessarily used, or needlessly added.’”) (quoting *Wright v. United States*, 302 U.S. 583, 588 (1938)). As the Court observed in *Wright*,

“[t]o disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. ‘In expounding the Constitution of the United States . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved

the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.” 302 U.S., at 588 (quoting *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (Taney, C.J.)).

Applying the Court’s “unremarkable presumption” that each word should have its own meaning, *Kelo*, 545 U.S., at 496, the Court should hold that “unusual” means something different than “cruel.” As the Court has already explained, “unusual” ordinarily means “something different from that which is generally done.” *Trop*, 356 U.S., at 101 n.32.

Given that nearly every lethal-injection State administers the death penalty in a manner that is similar or identical to Kentucky’s, it is clear that Kentucky’s protocol is not, in any way, unusual. It is *not* “different from that which is generally done.” To the contrary, Kentucky’s protocol *is* “that which is generally done.” Accordingly, the Court should hold that Kentucky’s protocol is permitted by the Eighth Amendment to the United States Constitution because it is not “unusual.”

Having no reason to disregard the nation’s consensus in favor of the protocol, therefore, the Court should hold that Kentucky’s three-drug lethal-injection protocol is not barred by the Eighth Amendment’s prohibition on “cruel and unusual” punishments.

II. IF THE COURT ADOPTS THE KENTUCKY SUPREME COURT'S EIGHTH AMENDMENT TEST, THE COURT SHOULD NONETHELESS UPHOLD THE CONSTITUTIONALITY OF KENTUCKY'S LETHAL-INJECTION PROTOCOL BECAUSE THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT THE PROTOCOL CREATES A SUBSTANTIAL RISK THAT PETITIONERS WILL SUFFER UNNECESSARY PAIN, "TORTURE," OR "LINGERING DEATH."

If the Court does not resolve Petitioners' challenge based upon the overwhelming national consensus supporting Kentucky's lethal-injection protocol and the fact that the protocol is not itself inherently cruel and unusual, Petitioners' claim nevertheless must fail under the Eighth Amendment test applied by the Kentucky Supreme Court. As the Kentucky courts correctly concluded, the record in this case does not support Petitioners' claim that Kentucky's protocol will subject them to a substantial risk of unnecessary pain. The actual evidence—as opposed to Petitioners' assertions—demonstrates that Kentucky's protocol is likely to result in a humane death.

Notably, Petitioners' proposed standard for determining whether a method of punishment is barred by the Eighth Amendment is effectively the same as that applied by the Kentucky Supreme Court and endorsed by Respondents. Whereas Petitioners argue that a method of punishment is unconstitutional if it imposes "a significant and unnecessary risk of severe pain," *see* Petitioners' Br. 32, the Kentucky Supreme Court reasoned that a method of execution "must not create a substantial risk of wanton or unnecessary infliction of pain, torture, or lingering death." J.A. 805.⁸

8. Petitioners' proposed standard for determining whether a method of punishment is cruel and unusual appears to vary over the course of their brief. Although their clearest articulation appears to be that a punishment cannot "impose a significant and unnecessary risk of severe pain," *see* Petitioners' Br. 32, Petitioners elsewhere

Whether articulated as requiring a showing of a “significant risk” or a “substantial risk,” the parties appear to agree that the showing of a mere *possibility* of injury is not sufficient to demonstrate that a method of punishment violates the Eighth Amendment. And, applying either parties’ articulation (or the trial court’s), Petitioners fail to meet their burden of proof. The evidence presented to the district court demonstrates that Petitioners made no showing of any quantified risk of severe pain to persons executed under Kentucky’s lethal-injection protocol.

A. All Agree That Successful Implementation of Kentucky’s Protocol Will Lead to a Humane Death.

The ultimate conclusion of both Petitioners’ leading expert, Dr. Mark Heath, and Respondents’ leading expert, Dr. Mark Dershwitz, was the same: If Kentucky’s protocol operates as it is designed to operate, the end result will be a humane death for the executed inmate—*not* severe pain. For example, Dr. Heath testified that if even a smaller dose of sodium thiopental is correctly administered, the result would be “a humane death” “[i]n *virtually every case.*” J.A. 493-94 (emphasis added). And with a successfully administered three-gram dose—like Kentucky’s—Dr. Heath concluded that “the thiopental would render [the inmate] deeply unconscious, to the point where no stimulation, even the very painful stimulation of potassium, would cause any response. . . . [I]t would be completely humane.” J.A. 540-41.

Dr. Dershwitz likewise agreed that following Kentucky’s three-drug protocol as prescribed would result in a humane form of execution. J.A. 566. He concluded that the protocol

argue that a punishment cannot impose *any* “unnecessary risk of pain,” *id.* at 35. Still elsewhere, Petitioners concede that the Constitution does not require States “to eliminate every risk.” *Id.* at 39

would not cause undue pain and suffering during an execution—that from the inmate’s point of view, the administration of the protocol is “no different than undergoing a general anesthetic for surgery.” J.A. 565. Dr. Dershwitz also stated that “after a three-gram dose of thiopental” is delivered to an inmate, “nothing that happens to the inmate after that will be perceptible.” J.A. 560. The inmate will be “unaware of his or her surroundings completely.” J.A. 559. In fact, “after a three-gram dose of thiopental, the inmate will be unconscious and will remain unconscious for hours.” J.A. 557.

Accordingly, Petitioners’ objections to the three-drug protocol appear considerably misdirected. If successfully implemented, the protocol will not cause severe or unnecessary pain—even according to Petitioners’ own expert.

B. Petitioners’ Presentation of the Potential Risks Involved in Implementing Kentucky’s Protocol Dramatically Overstates the Record Evidence.

Unable to take issue with Kentucky’s protocol if successfully implemented, Petitioners instead opine that the State’s “procedures [for implementing the protocol] create a setting in which botched executions are not only possible but highly likely.” *See* Petitioners’ Br. 49. Petitioners argue that if the intended dose of sodium thiopental is not correctly delivered to the condemned inmate, he or she may experience an extraordinary amount of pain upon receiving the lethal dose of potassium chloride—pain that would not be known to observers if the dose of pancuronium bromide *was* successfully administered.

But the problems with Petitioners’ conclusion are two-fold. First, none of the risks of errors identified by Petitioners is likely to lead to excruciating pain for an executed individual because Kentucky’s administrators *would know* if the dose of thiopental is not delivered prior to administering any additional pharmaceuticals to the inmate. Second, the evidence does *not*

actually indicate that any of the risks identified by Petitioners is “significant” or “substantial.”

1. A failed delivery of sodium thiopental would be readily observable prior to any attempt to deliver the remainder of the three-drug protocol.

Petitioners identify four potential problems that could occur in an unsuccessful implementation of Kentucky’s protocol: (1) that Kentucky’s administrators might incorrectly prepare the sodium thiopental dose, *see* Petitioners’ Br. 45-46; (2) that the administrators might incorrectly insert the I.V.s that deliver the sodium thiopental, *id.*, at 46-47; (3) that the administrators might be too far away from the executed individual to detect signs of consciousness, *id.*, at 47-48; and (4) that Kentucky’s personnel are insufficiently qualified to administer intravenous drugs, *id.*, at 48-49. Again, all four scenarios rely on the assumption that if the sodium thiopental is not delivered, the potassium chloride will cause excruciating pain.

But the expert evidence is uncontested that if the sodium thiopental were not successfully delivered, Kentucky’s lethal-injection administrators would know of the problem “*well before* [they] started the injections of anything else.” J.A. 600 (emphasis added). First, they would know because the inmate *would still be conscious*. When successfully administered, sodium thiopental causes a person to lose consciousness “in less than a minute.” J.A. 601. Thus, if the inmate did not receive the sodium thiopental, he would not lose consciousness, *id.*—something readily observable to even lay persons. Second, if the sodium thiopental was delivered into the inmate but not into a vein, the inmate would not only “not lose consciousness,” but he would also react to the relatively painful event of drug delivery into a tissue site other than a vein. *Id.*

Accordingly, Petitioners’ worst-case-scenario hypothetical—that the pancuronium chloride would mask the

non-delivery of sodium thiopental, leading to a painful death by potassium chloride—is unrealistic because everyone in the room would know if the sodium thiopental were unsuccessfully delivered “well before” “injections of anything else” were administered. J.A. 600.

2. Regardless, the record evidence fails to demonstrate a “significant” or “substantial” risk that the protocol’s designated dose of sodium thiopental will not be delivered to the inmate.

Petitioners assert that errors leading to the failed delivery of sodium thiopental are highly likely to occur. *See* Petitioners’ Br. 49. The evidence does not support their argument.

Petitioners assert that Kentucky’s personnel “are likely to struggle to calculate and prepare the correct dose” of sodium thiopental. *Id.* at 46. But Petitioners’ own expert, Dr. Heath, testified that he did not know enough about Kentucky’s protocol to say how difficult preparing the thiopental would be. J.A. 527 (“I don’t know what the details of [Kentucky’s] protocol are, so I don’t know how difficult it is to follow it.”). And, when faced with the documented fact that Kentucky utilizes sodium thiopental that comes *pre*-measured, even Dr. Heath had to concede that preparing the solution for delivery “is not difficult to do.” J.A. 527. Dr. Dershwitz agreed, explaining that mixing the pre-measured sodium thiopental solid with the pre-measured liquid is *not* hard. J.A. 623. Moreover, after weighing the testimony presented at trial, the district court too concluded that if the manufacturer’s instructions are followed, “there would be minimal risk of improper mixing, despite converse testimony.” J.A. 761.⁹

9. The Court should defer to the state court’s findings of fact. *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

Second, Petitioners assert that Kentucky's administrators might insert the sodium thiopental I.V. incorrectly. *See* Petitioners' Br. 46-47. Yet again, the evidence does not support Petitioners' argument. Foremost, Petitioners do not present any evidence of the likelihood of such a problem, nor do they rebut the expert conclusion that incorrect delivery of thiopental into an I.V. would be obvious. And in any event, Petitioners' expert, Dr. Heath, admitted that Kentucky's specific I.V. administrators "definitely . . . would be able" to effectively insert an I.V. into a vein. J.A. 516-17.

Third, Petitioners argue that the distance between Kentucky's lethal-injection administrators and the inmate might prevent the administrators from observing signs of consciousness after a failed delivery of sodium thiopental. *See* Petitioners' Br. 47. Petitioners cite absolutely no evidence demonstrating any risk of this occurring. Indeed, given that two state officials remain in the execution chamber with the inmate, *id.* at 47, it is implausible that no one would notice the observable signs of consciousness. And given the uncontroverted expert testimony that the failure to deliver sodium thiopental *would* be observable due to either the inmate's outward signs of complete awareness *or* his exhibitions of pain from a botched I.V., J.A. 600-01, Petitioners' lack of evidence to the contrary is particularly consequential.

Finally, Petitioners assert that Kentucky's personnel are unqualified to administer the sodium thiopental I.V.s. *See* Petitioners' Br. 48. Yet again, Petitioners fail to quantify this risk in any way, and fail to offer record support specific to Kentucky's actual administrative personnel. *Id.* And again, the argument is rebutted by Petitioners' own expert, who specifically concluded that Kentucky's specific personnel *are* capable of properly administering I.V.s. J.A. 516-17.

More generally, not every execution that Petitioners characterize as potentially "botched" carries a significant risk

of severe pain. Petitioners principally suggest one very specific series of events that, hypothetically, could yield severe pain: (1) an inmate is administered what is supposed to be a lethal dose of the first drug, sodium thiopental, and yet remains somehow still conscious; (2) the officials do not notice that the inmate is still conscious; (3) the officials administer a lethal dose of the second drug, pancuronium bromide; (4) the inmate still somehow remains conscious, and is now paralyzed; and (5) the officials then administer a lethal dose of the third drug, potassium chloride, causing severe pain to and then death of the paralyzed and still conscious convict.

Thus, under Petitioners' theory, for extreme pain to predictably result, several implementation errors must occur in succession. The problem with this theory is that Petitioners have presented no proof that any one of these errors is "substantially likely" to occur in any particular execution—much less that all of them are likely to occur *seriatim*.

Petitioners instead point to several anecdotal accounts to suggest that this sequence of events might possibly have occurred in other States. And none of those anecdotes proves necessarily that the hypothetical sequence has occurred even once.

For example, Petitioners state that California has experienced "six aberrant executions" of the eleven it has carried out. Petitioners' Br. 22. But, as Petitioners themselves describe, these "aberrant" executions involved an inmate's "exhibiting signs consistent with insufficient anesthesia," and inmates "who continued to breathe for far longer than they should have if they had received a full dose of thiopental." Petitioners' Br. 22-23. But the fact that an inmate was still breathing—that is, that the lethal dose of sodium thiopental had not yet caused his *death*—does *not* necessarily mean he was conscious or experienced any pain. And although an

inmate's exhibiting some signs of insufficient anesthesia may raise some doubt as to his state of consciousness, it does not establish that he was awake and experienced any pain.

Petitioners similarly reference a situation in Missouri where the doses of thiopental given to inmates were "significantly lower than the intended dose," from which Petitioners conclude that "because the inmates were [later] given the [second, paralytic drug] there is no way to know, after the fact, whether they received doses of anesthetic sufficient to render them unconscious." Petitioners' Br. 23. By its terms, Petitioners' argument does not purport to prove that the inmates in fact suffered pain; instead, Petitioners' theory simply assumes that it is likely that, in each of these cases, not only were the doses of thiopental insufficient to cause the inmates to lose consciousness, but also that none of the state officials would have noticed if the inmate had remained awake.

Finally, Petitioners point to a single execution in Florida, the execution of Angel Diaz. That is the single case where there may be direct evidence that an inmate might have been conscious when he received the second drug (although not necessarily the third). *See* Petitioners' Br. 20-21. But again, nothing is proven. Indeed, the execution of Joseph Clark in Ohio, on which Petitioners also rely, stands as a powerful indication that, when the first drug is not properly administered, there are likely to be readily visible signs that the inmate is still conscious—in Clark's case, he sat up and told the execution team members that the first drug was not affecting him. Petitioners' Br. 22.

At best, these isolated anecdotes suggest that it is possible that, in those specific instances, an error produced unintended pain. Yet Petitioners have not proven that any such errors have ever occurred *in Kentucky*, nor, tellingly, have they proven to a certainty that this precise sequence has in fact happened even once in any other State.

In the last three decades, nearly a thousand executions have been conducted using the three-drug protocol at issue in this case. See The Clark County (Indiana) Prosecuting Attorney, *U.S. Executions Since 1976* <http://www.clarkprosecutor.org/html/death/usexecute.htm>. Out of all those executions, Petitioners can identify, in the end, only a single case—in another State—where there may be direct evidence that an inmate might have accidentally received the second (but not necessarily the third) drug while still conscious. Under any standard, this record as a whole does not demonstrate a “significant” or “substantial” risk that Ralph Baze or Thomas Bowling will experience severe pain while being executed by the Commonwealth of Kentucky for their crimes of capital murder.

In sum, although Petitioners assert that Kentucky’s protocol is “highly likely” to lead to painful executions, Petitioners’ Br. 41, their own evidence does not support their claim. Rather than offering any evidence of a quantified risk of extraordinary pain, Petitioners’ own expert testified that Kentucky’s protocol, when followed, will result in a *humane* death. J.A. 493-94, 540-41. Given the lack of evidence to support Petitioners’ broad arguments of likely pain, the Court should reject Petitioners’ claims and hold—consistent with both the evidence in this case and the Court’s prior jurisprudence—that Kentucky’s three-drug protocol is not barred by the Eighth Amendment to the United States Constitution.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Kentucky.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

R. TED CRUZ
Solicitor General
Counsel of Record

KENT C. SULLIVAN
First Assistant Attorney
General

SEAN D. JORDAN
Deputy Solicitor General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

December 2007