No. 18A1238

IN THE
Supreme Court of the United States

CHRISTOPHER LEE PRICE,

Petitioner,

V.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

ON APPLICATION FOR A STAY OF EXECUTION AND FOR LEAVE TO FILE THE APPLICATION UNDER SEAL

MOTION TO UNSEAL

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June 7, 2019

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to this proceeding were the Petitioner, Christopher Lee Price, and the Respondents, Jefferson S. Dunn, Commissioner of the Alabama Department of Corrections, and Cynthia Stewart, Warden of the Holman Correctional Facility, who were sued in their official capacities.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that proposed intervenor National Public Radio, Inc. is a privately supported, not-for-profit organization that has no parent company and issues no stock, and proposed intervenor the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

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PURPOSE

National Public Radio, Inc. ("NPR") is a privately supported, not-for-profit news organization that reaches approximately 105 million people on broadcast radio, podcasts, and NPR.org each month. The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a nonprofit organization dedicated to defending the First Amendment and newsgathering rights of journalists. NPR and the Reporters Committee (collectively, "Intervenors") seek to assert the public's constitutional and common law rights of access to the Court's records in this case. Intervenors respectfully move the Court to direct the filing of unredacted versions of the parties' briefs in this Court.

INTRODUCTION

On May 29, 2019, the day before his scheduled execution, Christopher Lee Price, a prisoner on death row in Alabama, filed an emergency application in this Court for a stay of his execution to permit the district court an opportunity to resolve his Eighth Amendment claim at a bench trial scheduled for the week of June 10, 2019. The parties—at the insistence of the Respondents, which include Alabama Department of Corrections Commissioner Jefferson S. Dunn in his official capacity (collectively, "ADOC," "Alabama," or the "State")—sought leave to file their briefs under seal, with redacted copies available for the public record. On May 30, the Court denied the application for a stay and granted the sealing request without making any findings or engaging in any analysis. Price was executed by the state of Alabama on

May 30, 2019,[1] and the parties' briefs remain heavily redacted.[2] Intervenors respectfully request that the Court now direct the filing of unredacted versions of the parties' briefs, as required by the First Amendment and common law rights of access to court records.

This litigation is part of an "ongoing national conversation" about how states enforce the death penalty and whether those methods are constitutional. *Arthur v. Dunn*, — U.S. —, 37 S. Ct. 725, 731, *reh'g denied*, 137 S. Ct. 1838 (2017) (Sotomayor, J., dissenting) (recognizing "an ongoing national conversation—between the legislatures and the courts—around the methods of execution the Constitution tolerates"). Price's lawsuit challenged Alabama's lethal injection protocol, asserting that the first drug in the process—midazolam hydrochloride—would likely fail to render him unconscious and insensate, thus subjecting him to "prolonged, excruciating, and needless pain" as the other two drugs in the protocol—rocuronium bromide and potassium chloride—suffocate him, burn his veins and internal organs, and stop his heart. Compl. ¶ 74, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. Feb. 8, 2019), ECF No. 1.

Alabama sought to shroud much of the proceedings below and before this Court in secrecy, relying solely on a blanket protective order issued by the magistrate judge during discovery, despite the magistrate's clear mandate that the parties were *not* entitled to automatic sealing based on the protective order. In the district court, the

[1] Defs.' Mot. to Dismiss 1, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 31, 2019), ECF No. 93.

[2] The fact that Price has died does not moot the public's continuing First Amendment and common law rights of access to the judicial records in this matter.

parties filed the entirety of their submissions related to Price's motion for final judgment and a stay under seal. At the Eleventh Circuit and in this Court, the parties filed heavily redacted briefs, obscuring from the public facts and argument concerning Alabama's execution protocol, as well as the expert testimony that both parties proffered to support their arguments. Each court allowed this sealing without making any findings to support it.

Transparency is important in any case that comes before the Court. But the need for public scrutiny is particularly compelling in cases such as this that are of a fundamentally public nature, where government entities and officials are parties, and the litigation concerns whether there is a "need for governmental action or correction." *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975). Unredacted briefs are necessary for the public to understand this Court's decision to deny the emergency stay sought by Price. And, contrary to its assertions, Alabama has no legitimate interest that justifies sealing either its lethal injection protocol or expert evidence regarding the effects of midazolam. Indeed, this Court has considered several cases that address these very topics and issued public opinions after public oral arguments based on publicly-filed submissions. *See infra* Argument, Part I.E.

The judiciary is "the most transparent branch in government." Chief Justice John G. Roberts, Remarks at 2018 Federal Judicial Conference of the Fourth Circuit (June 29, 2018). This Court in particular has long protected the public's right to access its decisions, the facts undergirding them, and the arguments that inform

them. The public's right of access to briefs filed in appellate courts, including in this Court, is as longstanding as it is indispensable. Intervenors therefore bring this motion to assert the public's First Amendment and common law rights to access the Court's records in this case and respectfully request that the Court direct the filing of unredacted versions of the briefs filed in this matter.

STATEMENT OF FACTS

I. The parties filed their briefs related to Price's May 24, 2019 motion for judgment entirely under seal based on a blanket protective order governing unfiled discovery material.

Given the Court's familiarity with the procedural history of this case, which has come before the Court multiple times, Intervenors address the factual background only briefly here. In February 2019, Price brought this lawsuit under 42 U.S.C. § 1983, challenging the method of his execution and asserting that use of Alabama's lethal injection protocol would violate his Eighth Amendment and Fourteenth Amendment rights. The key issue in the case was whether the first drug in Alabama's lethal injection protocol, midazolam, would put Price "into a state of deep anesthesia sufficient to protect him from feeling the severe, excruciating pain of his execution." Price Appl. for Stay of Execution 1, May 29, 2019.

The district court expedited trial and significantly compressed the discovery schedule in order to address the merits of Price's claims in a bench trial the week of June 10, 2019. *Price v. Dunn*, No. 19-cv-57, 2019 WL 2255029, at *3 (S.D. Ala. May 26, 2019), *aff'd*, —F. App'x—, 2019 WL 2293177 (11th Cir. May 29, 2019). Alabama then secured an execution date of May 30 from the Alabama Supreme Court. *Id.*

On May 9, the parties obtained a protective order from the magistrate judge to govern how information and documents exchanged during discovery could be used and disclosed. Protective Order, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 9, 2019), ECF No. 70 ("Protective Order"). In seeking that Protective Order, the State argued that it has "a vital and compelling interest in protecting the confidentiality of [its lethal injection] procedures, the identities of persons who participate in the enforcement of death sentences, and all aspects of the manner of enforcing a death sentence in the State." Joint Mot. for Protective Order ¶ 2, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 8, 2019), ECF No 68. Alabama did not proffer evidence or factual support for its claim that such secrecy is necessary.

The parties' proposed protective order required that documents designated "confidential"—material that broadly relates to ADOC's execution protocol, among other things[3]—must be filed under seal, "unless or until such time as the Court orders

[3] The Protective Order defines "Confidential Material" as:

> (a) the written execution protocol adopted by the Alabama Department of Corrections ("ADOC") and any drafts or amendments to the protocol;
> (b) information contained within the ADOC's execution protocol;
> (c) the current or past procedures used by the State to carry out executions by lethal injection, including, but not limited to, the drugs used in such procedures, the manner of administering such drugs, and the identities of persons who monitor or carry out execution procedures;
> (d) all testimony, documents, or information related to prior executions of any Alabama death row inmate;
> (e) all testimony, information, or documents referring to the ADOC's procedures with respect to death row inmates that identify or discuss security procedures, security personnel, or pre-execution schedules; and
> (f) any other testimony, information, or documents whose disclosure would present a security risk to the ADOC, current and past ADOC employees, current and past ADOC contractors, or any other individuals or entities currently or previously involved in the execution of any Alabama death row inmate.

otherwise or denies permission to file under seal." Proposed Protective Order ¶ 11, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 8, 2019), ECF No 68-1. However, the magistrate judge struck this requirement from the protective order, explaining that it violated the Court's local rules and procedures with respect to sealing, since it "appear[ed] to dictate to the Court the manner in which Designated Confidential Information shall be filed and utilized in court proceedings." Protective Order 1. The magistrate judge correctly explained that "because the court is obligated to protect the public's right to access judicial records, it is not bound by the parties' stipulation to seal the documentary record." *Id.* at 1–2 (citing *Romero v. Drummond Co.*, 480 F.3d 1234, 1247 (11th Cir. 2007) ("[T]hat both parties want to seal court documents 'is immaterial' to the public right of access.") (*quoting Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992)). The court acknowledged that the common law right of access would apply, for example, to "attachments to pretrial motions which require judicial resolution on the merits." *Id.* at 2. The magistrate judge amended that proposed paragraph accordingly to state that "[i]f a party wishes to file under seal any Confidential Material," it must comply with the local rules on sealing and the court's procedures for filing, *id.* ¶ 11, which implicitly recognize the presumption of access and set forth the procedural requirements for overcoming that access and filing court records under seal. S.D. Ala. R. 5.2(b) (S.D. Ala.).

Because the State secured an execution date of May 30, which preceded the bench trial scheduled for June 10, Price filed a motion on May 24, seeking entry of a final judgment under Federal Rule of Civil Procedure 52(c) or, alternatively, a stay of

execution. *Price,* 2019 WL 2255029 at *1. Price's motion asked the district court to decide his Eighth Amendment claim prior to trial based on the submission of trial depositions, affidavits of his experts, and other exhibits. *Id.* at *3. That same day, "at the insistence of [the State],"[4] Price sought leave to file his motion and accompanying exhibits under seal and asked that they remain under seal "until further order of the Court." Pl. Mot. to Seal 2, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 24, 2019), ECF No. 80. Price stated that his brief referred to information designated "confidential" under the Protective Order, "namely ADOC's execution protocol and procedures used by the State to carry out executions by lethal injection." *Id.* ¶ 4.

The district court granted Price's motion to file his submissions under seal that same day with an "endorsed order"—a text-only entry on the court's docket—stating only that the motion was granted. *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 24, 2019), ECF No. 82. As a result, Price's motion for final judgment was filed entirely under seal and was not identified on the district court's public-facing docket. *Price,* 2019 WL 2255029, at *1 (referencing "Doc 81–SEALED").

On May 25, the State sought leave to file its opposition to Price's motion for final judgment entirely under seal, stating that the Protective Order required it to do so. Defs.' Mot. to Seal, *Price v. Dunn* ¶ 3, No. 19-cv-57 (S.D. Ala. May 25, 2019), ECF No. 85. Alabama stated that its brief "contains references to Confidential Materials, including the ADOC's lethal injection protocol and deposition transcripts identified

[4] Price Appl. to File under Seal ¶ 4, May 29, 2019.

as confidential." *Id.* ¶ 4. The district court issued an "endorsed order" the next day stating only that the State's sealing motion was granted. *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 26, 2019), ECF No. 87. As with Price's motion for final judgment, Respondents' opposition was sealed in its entirety and not identified on the court's public-facing docket. *Price,* 2019 WL 2255029, at *1 (referencing Respondents' opposition as "Doc 86–SEALED").

On May 26, the district court denied Price's motion for a final judgment, finding that the State had not been fully heard since it had yet to present the testimony of one of its two expert witnesses. *Id.* at *3. Price immediately appealed to the Eleventh Circuit.

II. The parties filed redacted briefs in the Eleventh Circuit.

In the Eleventh Circuit, both parties sought leave to file their appellate briefs under seal, although Price informed the court that he had asked the State "to agree to publicly filing the appeal," but it would not agree to do so.[5] The State pointed only to the Protective Order entered by the magistrate judge to justify filing its briefs and exhibits under seal.[6] Price stated that his briefing and exhibits contained references to "ADOC's execution protocol and procedures used by the State to carry out executions," while Alabama stated that its brief would reference "two recent depositions," which it had designated "confidential" under the Protective Order. *See*

[5] Appellant's Mot. to File under Seal, *Price v. Comm'r*, No. 19-12026 (11th Cir. May 28, 2019).

[6] Resp't's Mot. to File under Seal, *Price v. Comm'r*, No. 19-12026 (11th Cir. May 28, 2019).

supra nn.5–6. On May 28, the circuit judge granted both motions to seal without making any factual findings regarding the necessity of sealing.

The parties filed heavily redacted briefs that omitted key arguments and evidence concerning the first prong of the analysis regarding whether a stay was warranted. Appellant's Emergency Mot. for Stay 1–2, 5–12, *Price v. Dunn*, No. 19-12026 (11th Cir. May 28, 2019); Resp't's Br. 24–28, *Price v. Dunn*, No. 19-12026 (11th Cir. May 29, 2019). Price also filed a four-volume appendix, in which nine exhibits were sealed, including the deposition transcripts and related exhibits of Dr. Joel Zivot and Dr. Daniel Buffington; the expert reports of Dr. David Lubarsky and Dr. Mark Edgar; and certain discovery responses by the State. App'x 2, *Price v. Dunn*, No. 19-12026 (11th Cir. May 28, 2019).

III. The Eleventh Circuit issued a twelve-page public decision.

On May 29, the Eleventh Circuit issued an unredacted twelve-page opinion affirming the district court's denial of Price's motion for entry of final judgment or, alternatively, a stay of execution. *Price v. Comm'r*, — F. App'x —, 2019 WL 2293177, at *5 (11th Cir. May 29, 2019) (per curiam). That opinion identified Dr. Joel B. Zivot as Price's expert witness and Dr. Daniel Buffington as the State's expert witness. *Id.* at *3. The opinion also clarified that the State's second expert, who had not yet testified, was Curt E. Harper, Ph.D. *Id.* at *4. The Eleventh Circuit concluded that while it lacked jurisdiction to consider Price's appeal of the denial of his motion for final judgment, even if it had jurisdiction, it would have affirmed. *Id.* The court found that the district court had not erred in finding that the State should be

permitted an opportunity to admit into evidence Dr. Harper's testimony before the court issued a final judgment in the case. *Id.* Despite the sealing of the other expert reports and depositions, Dr. Harper's declaration was included, in unredacted form, in the publicly available version of the appendix. App'x, Ex. D, *Price v. Dunn*, No. 19-12026 (11th Cir. May 28, 2019).

The Eleventh Circuit also denied Price's emergency motion to stay his execution on May 29, concluding that it was precluded from staying Price's execution by this Court's April 12 decision in a previous appeal in this case. *Price,* 2019 WL 2293177, at *5.

IV. Price sought an emergency stay of execution in this Court and the parties again filed redacted briefs.

On May 29, Price filed an application for an emergency stay of execution with this Court, seeking "a brief, time-limited stay of his execution," so that the district judge would have the opportunity to resolve his Eighth Amendment claim on the merits following the bench trial scheduled to begin June 10. Price Appl. for Stay of Execution 1. Price sought leave to file his emergency application under seal "with redacted copies for the public record," according to the Court's docket. In doing so, Price referenced the Protective Order entered by the magistrate judge, stating that it "prohibits the disclosure of certain Confidential Materials to any persons other than certain enumerated classes of persons" and "requires the parties to file under seal any pleadings or other documents containing such confidential information." Price Appl. to File under Seal ¶ 3. Price further noted that he had filed his preceding briefs and other submissions under seal in the district court and in the Eleventh Circuit "at

the insistence of [the State]." *Id.* ¶ 4. Price stated that, like those motions, his application before this Court "also contains references" to information designated "confidential" under the Protective Order, namely "ADOC's execution protocol and procedures used by the State to carry out executions by lethal injection." *Id.* ¶ 5.

The next day, on May 30, Alabama filed its opposition to Price's emergency application for a stay and, according to the Court's docket, also sought permission to file that opposition under seal "with redacted copies for the public record." To support this request, Alabama stated that in order to "fully respond" to Price's application, it needed "to make reference to confidential material," including "two recent depositions" that the State had designated "confidential" under the Protective Order entered by the magistrate judge. ADOC Appl. to File under Seal 1.

Eight pages of the sixteen-page brief filed in support of Price's emergency application for a stay are either heavily or completely redacted. Price's entire argument as to the first prong of the relevant analysis for determining whether a stay is warranted—whether Price has a substantial likelihood of success on the merits of his Eighth Amendment claim—is redacted, including the two sections addressing the parties' expert evidence. The opposition brief filed in this Court by the State is also heavily redacted. Nearly all of the six pages of the State's argument as to the "substantial likelihood of success" prong is redacted, including the names of the expert witnesses identified in the Eleventh Circuit's unredacted May 29 opinion and in the appendix filed by Price in the Eleventh Circuit. *Price,* 2019 WL 2293177, at

*3. Although Intervenors obtained copies of these redacted briefs, to date, they have not been made available on the Court's public-facing docket.

On the evening of May 30, the Court denied Price's emergency application for a stay and issued a brief opinion. The Court addressed the parties' sealing requests only to state that they were "granted." *Price v. Dunn*, — S. Ct. —, 2019 WL 2295912 at *1 (May 30, 2019). Justice Breyer issued an opinion dissenting on the merits, relying on the "considerable expert testimony" supporting Price's claim. *Id.* (Breyer, J., dissenting) (citing "testimony of Dr. Zivot" in appendix filed with Eleventh Circuit). Price was executed shortly thereafter. Defs.' Mot. to Dismiss, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 31, 2019), ECF No. 93.

ARGUMENT

I. The significant redactions to the parties' briefs in this Court violate the press and the public's First Amendment and common law rights of access.

The First Amendment affords the public a presumptive "right of access" to a wide range of judicial proceedings and records. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the Court recognized that the First Amendment creates a "presumption of openness" applicable to criminal trials. The Court reasoned that "without the freedom to attend such trials . . . important aspects of freedom of speech and of the press could be eviscerated," because "[f]ree speech carries with it some freedom to listen" and receive information about the workings of government. *Id*. at 576, 580. Two years later, the Court reaffirmed the public's constitutional right of access to criminal trials, explaining that public scrutiny "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of

fairness, thereby heightening public respect for the judicial process," and permits "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (citations omitted).

The Court subsequently extended this constitutional right of access to *voir dire* and preliminary hearings in criminal cases, along with the related transcripts. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505–10 (1984) ("*Press-Enterprise I*") (*voir dire*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986) ("*Press-Enterprise II*") (preliminary hearings). In dicta, the Court has also recognized that civil trials "historically" were also "presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17. And every federal appellate court to have addressed the issue has held that the constitutional presumption of access applies to civil proceedings and court records. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (collecting cases).

"[T]wo complementary considerations" govern whether a particular judicial proceeding is subject to the First Amendment presumption of access. *Press-Enterprise II,* 478 U.S. at 8. The first is "whether the place and process have historically been open to the press and general public," a consideration deemed relevant because a "tradition of accessibility implies the favorable judgment of experiences." *Id.* (citations omitted). The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Where the constitutional right of access applies, "the proceedings cannot be closed

unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id*. at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510). This same "experience and logic" inquiry applies to access to judicial records. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 505–10; *Press-Enterprise II*, 478 U.S. at 13; *Wash. Post v. Robinson,* 935 F.2d 282, 288 (D.C. Cir. 1991) (recognizing First Amendment right of access to plea agreements).

In addition to the First Amendment right of access, the Court has also recognized a common law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978) (citations omitted). Under this common law right, which "extends to all judicial documents and records," the presumption of access can be rebutted only by a "showing that countervailing interests heavily outweigh the public interests in access." *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014) (internal quotation marks and citation omitted).

A. The public has a constitutional and common law right of access to appellate proceedings and related judicial records.

The First Amendment and common law guarantee a right of access to court documents, *see, e.g.*, *Nixon*, 435 U.S. at 597 (recognizing common law right); *Wash. Post*, 935 F.2d at 287 (recognizing First Amendment right), and no "court documents" are more central to the appellate process than the parties' briefs. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668 (D.C. Cir. 2017) ("There is no doubt . . . that parties' briefs play a central role in the adjudicatory process."). This

is particularly true where, as here, "no hearing is held and the [C]ourt's ruling is based solely upon the motion papers." *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987).

Unsurprisingly, public access to appellate records extends far back in the nation's history. In *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894), for example, the court that would become the D.C. Circuit rejected an appellant's attempt to seal the records in a patent appeal because an "attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." *Id.* at 407–08. This history of openness reflects the long-held understanding of appellate courts that "[p]ublic argument is the norm," *In re Krynicki*, 983 F.2d 74, 76 (7th Cir. 1992), because "[w]hat transpires in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947).

This Court's commitment to openness has stayed robust, even in matters implicating national security. For example, briefs in the Pentagon Papers case were available to the public and the press, with sealed appendices, *see In re Krynicki*, 983 F.2d at 76, and oral argument was conducted in open court, *see N.Y. Times Co. v. United States*, 403 U.S. 944 (1971) (denying motion "to conduct part of the oral arguments involving security matters in camera"). *See also Ex parte Quirin*, 317 U.S. 1, 19 (1942) (reflecting that oral argument was held during wartime case involving German saboteurs without any indication that proceedings were sealed).

Access to appellate proceedings and records also satisfies the logic test of *Press-Enterprise*. Public access serves the important goals of promoting judicial legitimacy and core democratic values, by allowing the public to monitor the courts and understand how they resolve the cases before them. Judges "claim legitimacy . . . by reason." *In re Krynicki*, 983 F.2d at 75. Accordingly, although judges "deliberate in private," they "issue *public* decisions after *public* arguments based on *public* records." *Id.* (emphases added). The public needs the entire triumvirate: "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat." *Id.*

Courts have recognized that the common law right of access applies to materials upon which a judicial decision is based. *See, e.g.*, *Metlife, Inc.*, 865 F.3d at 668 (explaining that briefs and the record supporting a judicial decision are subject to the common law right of access); *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012) (recognizing common law right of access to briefs and appendices and denying motion to seal, stressing "the centrality of these documents to the adjudication of this case"). Indeed, "[w]ithout access to the sealed materials, it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why)." *Metlife, Inc.*, 865 F.3d at 668. Knowing what materials persuaded a court is essential, for courts do "not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

Moreover, citizens who cannot see the underlying briefing or arguments will have more difficulty trusting the result, thereby undermining judicial legitimacy. *Metlife, Inc.*, 865 F.3d at 663 (explaining that keeping briefs and records under seal does not maintain "the integrity and legitimacy of an independent Judicial Branch"); *see also Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (recognizing that secrecy breeds public "distrust").

At its core, the First Amendment and common law presumptions of public access ensure "an informed and enlightened public opinion," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936), because a "people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry (August 4, 1822), *in* 9 Writings of James Madison 103 (Gaillard Hunt ed. 1910). When parties litigate in the appellate courts—and the highest court in the land—on a matter of intense public interest with key portions of the filings unavailable to the citizenry to review, the public is denied information it needs "to appreciate fully the . . . significant events at issue in public litigation and the workings of the legal system." *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (internal quotation marks and citation omitted).

B. Access to court records in capital cases has served a particularly important role in the functioning of the courts.

In capital cases such as this one, the public has a keen interest both in understanding how the Court resolves these matters and in ensuring the fairness of the proceedings. In another capital case in 2015, this Court considered precisely the issue that was presented here: whether the use of midazolam, the first drug in

Oklahoma's lethal injection protocol, violates the Eighth Amendment "because it creates an unacceptable risk of severe pain." *Glossip v. Gross*, — U.S. —, 135 S. Ct. 2726, 2731 (2015). Unlike here, however, the parties in that case publicly filed their briefs and expert evidence. *See infra* nn.9–10. The Court held oral argument publicly, *see infra* n.11, and issued an opinion that explicitly relied on and discussed the parties' expert testimony. 135 S. Ct. at 2743–46.

Because the public was able to scrutinize the arguments and evidence presented to the Court by the parties in *Glossip*, journalist Chris McDaniel was able to report on the fact that the state of Oklahoma "was misleading" the Court in its characterization of what a 1982 study of midazolam found. As McDaniel reported:

> Oklahoma cited the study as evidence that midazolam can bring about general anesthesia, something that numerous experts told the court that the drug cannot do. In reality, the study was clear that, extrapolating from data collected, midazolam could theoretically cause general anesthesia — but only if no ceiling effect exists. And the study specifically stated that a ceiling effect might exist, an important caveat that Oklahoma didn't include in its briefs.[7]

McDaniel's article identified a brief written by 16 pharmacology experts stating that a ceiling effect *does* exist and reported that a co-author of the 1982 study, Edmond Eger, agreed that the conclusion that a ceiling effect exists was "probably correct." *Id.* McDaniel's article also assessed other statements made by Oklahoma's counsel

[7] Chris McDaniel, *The Reality Behind the Argument Between Justice Sotomayor and Oklahoma Over the Death Penalty*, BuzzFeed (Apr. 30, 2015), https://www.buzzfeednews.com/article/chrismcdaniel/the-reality-behind-the-argument-between-justice-sotomayor-an.

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to the Court, which Justice Sotomayor had identified as misleading. *Id.* None of this reporting would have been available to the public if the expert evidence submitted to the Court regarding the use of midazolam had been shielded from public view.

The benefits of public scrutiny in capital cases such as this one are plain. In accordance with the long history and tradition of openness in this Court and appellate courts generally, Intervenors respectfully request that the Court direct the public filing of unredacted versions of the parties' briefs.

C. Because the Court's decision denying Price's application for a stay relied on the parties' briefs, and because much of the sealed information in them is already public, unredacted versions of the parties' briefs should be made public.

The public has a right to access "any documents" on which the court may rely "in making its decisions." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895, 897–98 (7th Cir. 1994), *superseded on other grounds as recognized by Bond v. Utreras,* 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *see also Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) (Easterbrook, Circuit J.) (documents "that influence or underpin the judicial decision are open to public inspection"); *supra* Argument Part I.A. Courts have also widely recognized that the presumption of access applies to documents that are submitted to the court in connection with dispositive motions or used by the court to determine the litigants' substantive legal rights. *See, e.g.*, *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding that documents supporting a motion for summary judgment may only be sealed upon a showing of "compelling reasons" sufficient to outweigh the public's

interest in disclosure); *Doe*, 749 F.3d at 267 (recognizing that "the First Amendment right of access attaches to materials filed in connection with a summary judgment motion"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006) (finding that "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons") (citation omitted); *id.* ("[W]here documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches.") (citation omitted); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (recognizing right of access to evidence submitted in connection with "motion to terminate" certain claims).

Here, the parties originally filed their redacted submissions in connection with Price's dispositive motion in the district court seeking entry of a final judgment under Federal Rule of Civil Procedure 52(c) or, alternatively, a stay. *See supra* Statement of Facts, Part I. Price's motion asked the district court to "decide his Eighth Amendment claim prior to trial," based on certain evidence: "trial deposition[s], affidavits of his experts, and other exhibits which he contends establish that nitrogen hypoxia would significantly reduce his risk of substantial pain as compared to the three-drug method of execution." *Price*, 2019 WL 2255029, at *3. The parties filed their briefs in the district court entirely under seal, *id.* at *1, and their briefs filed in the Eleventh Circuit and in this Court redacted all discussion of the evidence, which was submitted in a redacted appendix filed in the Eleventh Circuit. *See supra* Statement of Facts Parts II, IV. Yet this sealed evidence and related argument pertained to the *first* prong of the analysis for issuance of a stay—whether Price was

likely to succeed on the merits of his Eighth Amendment claim. The Court undoubtedly considered the parties' briefs in making its decision, including the redacted portion, even if the Court ultimately determined that Price's claims were untimely, and his application for a stay should therefore be denied. *Price,* 2019 WL 2295912 at *1. In fact, Justice Breyer's dissenting opinion refers, specifically, to the "considerable expert testimony supporting [Price's] claim." *Id.* at *1 (Breyer, J., dissenting) (citing sealed "testimony of Dr. Zivot" in appendix filed with Eleventh Circuit).

Thus, the public's right of access clearly applies to the parties' briefs, including the sealed portions, which informed the Court's resolution of this case. *See, e.g.*, *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (observing that public monitoring of the courts "is not possible without access to . . . documents that are used in the performance of Article III functions"); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) ("If the public is to see [the court's] reasoning, it should also see what informed that reasoning."). The release of the redacted information is necessary to enable the public to understand this Court's decision. The public cannot have confidence that the nation's appellate courts issue well-reasoned and fair opinions derived from facts and legal arguments the parties present if the case proceeds with key argument and evidence under seal. *Metlife*, 865 F.3d at 668 (explaining the importance of access to briefs and joint appendix so the public can "know which parts of those materials persuaded the court," whose opinion is "the quintessential business of the public's institution") (internal quotation marks

omitted); *In re Krynicki*, 983 F.2d at 75 ("The political branches of government claim legitimacy by election, judges by reason.").

The State's sealing is at the very least overbroad, for it seeks to keep secret a three-drug lethal injection protocol that is widely known and has been openly considered by the Court multiple times, *see infra* Argument Part I.E; the names of expert witnesses that have already been disclosed in the Appendix, the Eleventh Circuit's opinion, and Justice Breyer's dissenting opinion; as well as any discussion of Dr. Harper's expert report, which was included in the publicly filed Appendix below. *See supra* Statement of Facts, Part II–IV. Keeping information that has already been made public under seal can hardly be justified by any "compelling interest," and thus the information must be disclosed. *See, e.g.*, *Wash. Post*, 935 F.2d at 292; *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (ordering release of redacted portions of documents where the "cat [was] out of the bag").

D. The existence of a blanket protective order governing unfiled discovery material does not justify sealing court records to which the presumption of access applies.

The reason proffered to justify sealing at every level of these proceedings—a blanket protective order entered during discovery by the magistrate judge—is insufficient to justify sealing. In fact, even the magistrate judge recognized this, striking the parties' proposed language that would have required sealing by default of any document filed with the court containing information designated "confidential." Protective Order 1.

Protective orders are often used to facilitate discovery by providing assurance to the parties that the information exchanged will not be used to annoy, embarrass, oppress, or place an undue burden or expense on the party producing the information. Fed. R. Civ. P. 26(c)(1). A district court may enter a protective order governing the use and disclosure of unfiled material exchanged during discovery based on a finding of "good cause." *Id.* However, a request to seal a court record implicates the public's First Amendment and common law rights of access and thus triggers a distinct and more rigorous analysis. *See, e.g.*, *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016). "Only the most compelling reasons can justify non-disclosure of judicial records." *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017) (citation omitted). And even if compelling reasons exist, consistent with the *Press-Enterprise* test, sealing "must be narrowly tailored to serve that reason" and supported by specific, on-the-record findings to enable appellate review. *Id.* (citing *Shane Grp., Inc.*, 825 F.3d at 305–06). In short, a protective order does not justify sealing "from public view materials that the parties have chosen to place *in the court record*." *Shane Grp., Inc.*, 825 F.3d at 307.

As the magistrate judge correctly noted below, "the judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record." Protective Order at 1 (quoting *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)). Moreover, "[a]greements that were appropriate at the discovery stage are no longer appropriate

for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in this [C]ourt." *Baxter Int'l, Inc.*, 297 F.3d at 545–46 (affirming denial of joint motion to maintain discovery documents in appellate record under seal, holding that "[i]nformation transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome").

Although courts must always make specific, on-the-record findings before permitting sealing, neither the district court, the Eleventh Circuit, nor this Court did so before granting the parties' requests to file materials under seal, perhaps due to the urgency of this matter and the speed in which it was adjudicated. Accordingly, Intervenors respectfully request that this Court apply the *Press-Enterprise* standard and direct the parties to file unredacted versions of their briefs publicly.

E. Sealing evidence and argument regarding Alabama's lethal injection protocol serves no compelling interest and would deprive the public of information about a matter of the utmost public concern.

Based on the information that is available to the public, it appears that the redacted portions of the parties' briefs address expert testimony concerning whether midazolam effectively shields a person from the severe physical pain associated with being executed. There is no compelling reason to maintain under seal broad swaths of the parties' arguments to this Court on what was a critical issue in this case. In fact, the State did not provide *any* explanation for its asserted need for secrecy in this Court. It stated only that its brief needed to reference certain material—including two depositions—designated "confidential" pursuant to the Protective Order entered

by the magistrate judge, even though that order does not govern access to documents filed with the Court. ADOC Appl. to File under Seal, May 30, 2019. Price indicated that he was seeking leave to file his emergency application under seal at Alabama's insistence. Price Appl. to File under Seal ¶ 4, May 29, 2019.

In the district court, Alabama claimed it has "a vital and compelling interest in protecting the confidentiality of [its] lethal injection protocol, the identities of persons involved in execution proceedings, and all aspects of the manner of enforcing a death sentence in the state." ADOC Mot. to Seal ¶ 2, *Price v. Dunn*, No. 19-cv-57 (S.D. Ala. May 25, 2019), ECF No. 85. Yet, even then, the State did not—and, indeed, it could not—provide any facts, evidence, or argument to support this sweeping claim of secrecy as to "all aspects of the manner" in which it carries out executions. Such information is unquestionably of significant public interest and concern. *See Arthur*, 137 S. Ct. at 734 (Sotomayor, J., dissenting) ("States . . . should not be permitted to shield the true horror of executions from official and public view.").

This Court has already openly considered the execution protocol at issue here multiple times—including in this very case—demonstrating that the State has no basis for asserting any interest in confidentiality here. In fact, the Court has routinely held open proceedings and issued public decisions based on publicly-filed submissions by the parties regarding lethal injection protocols and the legality and efficacy of using midazolam. Most recently, on April 11, Price filed an application for a stay of execution and petition for certiorari, *see* Case Nos. 18-8766, 18A1044, while Alabama filed an emergency application to vacate stays of execution entered by the

district court and the Eleventh Circuit, *see* Case No. 18A1053. Both parties filed their briefs publicly. Those briefs discussed Alabama's lethal injection protocol and expert affidavits proffered by Price on the use of nitrogen hypoxia. The following day, the Court denied Price's application for a stay and certiorari petition and granted Alabama's application. *Dunn v. Price*, — U.S. —, 139 S. Ct. 1312 (2019). Justice Breyer issued a dissenting opinion that discussed Alabama's execution protocol and the evidence Price proffered, including an expert declaration explaining why "Alabama's current three-drug protocol is likely to cause [Price] severe pain and needless suffering." *Id.* at 1313 (Breyer, J., dissenting). Likewise, in a petition for certiorari previously filed by Price (challenging the same lethal injection protocol but arguing that pentobarbital was an available alternative), the parties also publicly filed their papers in this Court. *See* Case No. 18-1249. The Court denied that petition on May 13, 2019. *Price v. Dunn*, — U.S. —, 139 S. Ct. 1533, 1539 (2019).

This Court also considered Alabama's lethal injection protocol and expert evidence regarding the use of midazolam in *Arthur*, 137 S. Ct. at 725. There, a prisoner on death row in Alabama challenged the State's execution protocol and proposed an alternative—death by firing squad. *Id.* at 725. Although the Court denied certiorari, Justice Sotomayor issued a dissenting opinion, assessing the "significant" evidence proffered by Arthur to support his case. *Id.* at 730–31 (Sotomayor, J., dissenting) (referencing expert testimony by Dr. Alan Kaye, who found "the dose of midazolam prescribed in Alabama's protocol insufficient to 'cure the *fundamental unsuitability* of midazolam as the first drug in Alabama's lethal-

injection protocol'") (omitting internal ellipses, brackets, and citation). Alabama filed its opposition to that petition publicly. The brief openly discussed Alabama's lethal injection protocol, named the petitioner's expert witness, and discussed his testimony. Resp't Br. 7–12, 24, *Arthur v. Dunn*, No. 16-602, Nov. 3, 2016.[8] Before Arthur filed his petition for certiorari in this Court, the Eleventh Circuit issued a lengthy public opinion that considered the expert evidence, including an opinion by Dr. Daniel Buffington, the same expert whose testimony Alabama redacted from its brief in this case. *Arthur v. Comm'r*, 840 F.3d 1268, 1292–93 (11th Cir. 2016), *cert. den'd*, 137 S. Ct. 725, *abrogated on other grounds by Bucklew v. Precythe*, — U.S. —, 139 S. Ct. 1112 (2019).

This Court has also considered, in public view, the constitutionality of other states' lethal injection protocols. In *Glossip*, as discussed above, the Court heard a challenge to Oklahoma's lethal injection protocol. 135 S. Ct. at 2726. In that case, the parties publicly filed their briefs[9] and expert evidence regarding the use of

[8] The petition for certiorari was also publicly filed, albeit with a handful of lines redacted. Arthur apparently moved for leave to file his petition under seal with redacted copies for the public record, although the docket indicates the Court did not rule on that motion.

[9] *See* Pet'r's Br. Part I.B, *Glossip*, No. 14-7955 (U.S. Mar. 9, 2015) (arguing that "the district court erroneously credited unreliable expert testimony regarding midazolam's suitability in a three-drug protocol"); Resp't Br. 41–54, *Glossip*, No. 14-7955 (U.S. Apr. 8, 2015) (relying on expert testimony to argue that Oklahoma's use of midazolam does not create a "substantial risk of serious harm"); Pet'r's Reply Br. Part II, *Glossip*, No. 14-7955 (U.S. Apr. 22, 2015) (attacking Oklahoma's expert's testimony and arguing that "midazolam cannot reliably prevent prisoners from experiencing . . . suffocation and pain").

midazolam.[10] The Court held oral argument in open court[11] and issued an opinion that extensively relied on and discussed the expert testimony submitted by the parties.[12] Likewise, in *Irick v. Tennessee*, — U.S. —, 139 S. Ct. 1 (2018), a challenge to Tennessee's lethal injection protocol, which also involves the use of midazolam, the parties filed their papers publicly, *see* Case No. 18A142, and the Court issued an opinion denying the petitioner's application for a stay of his execution. In dissenting from the denial of that stay application, Justice Sotomayor discussed the evidence proffered by the petitioner. 139 S. Ct. at 1–2. Finally, in another recent case, this Court openly considered an as-applied Eighth Amendment challenge to Missouri's single-drug execution protocol using pentobarbital. *Bucklew*, 139 S. Ct. at 1112. The parties publicly filed their briefs and expert evidence,[13] this Court conducted oral

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[10] *See, e.g.*, Joint App'x vol. I at 168–78, *Glossip*, No. 14-7955 (U.S. Mar. 9, 2015) (expert report of David A. Lubarsky, M.D., M.B.A.); *id.* at 199–231 (testimony by Dr. Lubarsky at preliminary injunction hearing); *id.* at 232–37 (declaration of Dr. Lubarsky); *id.* at 238–49 (report of Larry Sasich, Pharm.D.); *id.* at 256–273 (testimony of Dr. Larry Sasich).

[11] Oral Argument in *Glossip*, No. 14-7955, (Apr. 29, 2015), https://www.supremecourt.gov/oral_arguments/audio/2014/14-7955.

[12] *See, e.g.*, 135 S. Ct. at 2740–41 (holding that the district court did not err in finding "that midazolam is highly likely to render a person unable to feel pain during an execution," relying on state's expert testimony and lack of contrary scientific proof by petitioners' experts); *id.* at 2743 (citing state's expert testimony and rejecting petitioners' assertion that midazolam's "ceiling effect" undermines the district court's finding about its effectiveness); *id.* at 2744 (rejecting argument that testimony of state's expert witness should have been rejected due to reliance on, among other things, the website drugs.com).

[13] *See, e.g.*, Joint App'x vol. 1 at 92, *Bucklew*, No. 17-8151 (declaration of Dr. Joel B. Zivot); *id.* at 93–94 (declaration of Dr. Gregory A. Jamroz); *id.* at 132–212 (deposition of Dr. Zivot); *id.* at 217–235 (expert report of Dr. Zivot); *id.* at 242–256 (expert reports of Dr. Joseph F. Antognini). It appears the Court granted the parties' request to file volume III of the Joint Appendix under seal with a redacted version for the public record. The

argument in open court,[14] and the Court's decision included a lengthy analysis of Missouri's lethal injection protocol and the expert evidence submitted by the parties, including testimony from Dr. Joel Zivot, whose testimony is redacted in the briefs filed in this case. 139 S. Ct. at 1121–22, 1131–32.

Thus, Alabama's apparent position in this case—that "all aspects of the manner" in which it carries out death sentences, including evidence going to the constitutionality of its lethal injection protocol, should be sealed—runs contrary to this Court's history of adjudicating similar matters in public view and ignores the extensive information already in the public record regarding this topic. It also overlooks the public's strong interest in access to judicial proceedings and records, which is heightened in cases such as this that are of a public nature, where government entities and officials are parties, and the litigation concerns whether there is a "need for governmental action or correction." *Chi. Council of Lawyers*, 522 F.2d at 258; *see also Globe Newspaper Co.*, 457 U.S. at 604 (1982) (recognizing that the First Amendment "protect[s] the free discussion of governmental affairs" so that "the individual citizen can effectively participate in and contribute to our republican system of self-government") (citations omitted). "The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces

justification for the sealing is unclear, but that volume is comprised only of a transcript of a telephonic hearing that occurred in the trial court, in which two pages are redacted.

[14] Oral argument, *Bucklew v. Precythe*, No. 17-8151 (Nov. 6, 2018), https://www.supremecourt.gov/oral_arguments/audio/2018/17-8151.

with the concomitant right of the citizenry to appraise the judicial branch." *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Smith v. U.S. District Court*, 956 F.2d 647, 650 (7th Cir. 1992) (same).

The public's interest in access is particularly compelling here, where "[w]hat is at stake . . . is the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment." *See Dunn*, 139 S. Ct. at 1315 (Breyer, J., dissenting). Indeed, this case arises amid a nationwide debate about whether the death penalty and the ways in which it is currently carried out should continue—a debate that journalists and news organizations such as Proposed Intervenor NPR have reported on extensively.[15] The use of midazolam, in particular, has been the subject of increasing public scrutiny in recent years,[16] with some critics

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[15] *See, e.g.*, Bill Chappell, *New Hampshire Abolishes Death Penalty as Lawmakers Override Governor's Veto*, NPR (May 30, 2019), https://www.npr.org/2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakers-override-governors-veto; Nina Totenberg, *Supreme Court's Conservatives Defend their Handling of Death Penalty Cases*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases; Nina Totenberg, *Supreme Court Closely Divides on 'Cruel and Unusual' Death Penalty Case*, NPR (Apr. 1, 2019), https://www.npr.org/2019/04/01/708729884/supreme-court-rules-against-death-row-inmate-who-appealed-execution; Ian Stewart, *Florida Executes Inmate as Report Cites 'Continuing Erosion' of Death Penalty*, NPR (Dec. 14, 2018), https://www.npr.org/2018/12/14/676422181/florida-executes-inmate-as-report-cites-continuing-erosion-of-death-penalty; Merrit Kennedy, *Washington State Strikes Down Death Penalty, Citing Racial Bias*, NPR (Oct. 11, 2018), https://www.npr.org/2018/10/11/656570464/washington-state-strikes-down-death-penalty-citing-racial-bias; Merrit Kennedy, *Federal Appeals Court Paves Way For Ohio to Resume Lethal Injections*, NPR (June 28, 2017), https://www.npr.org/sections/thetwo-way/2017/06/28/534764116/federal-appeals-court-paves-way-for-ohio-to-resume-lethal-injections.

[16] *See, e.g.*, Liliana Segura, *One Night, Two Executions, and More Questions about Torture*, Intercept (May 25, 2019), https://theintercept.com/2019/05/25/executions-tennessee-alabama-midazolam/; Alan Blinder, *When a Common Sedative Becomes an Execution Drug*, N.Y. Times (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/us/midazolam-

calling into question its effectiveness as an anesthesia.[17] According to one commentator, as of July 2018, "[m]idazolam ha[d] been implicated in botched executions in no fewer than four states, in which prisoners were witnessed lurching, coughing, jerking, and gasping for breath for minutes on end before they died."[18] In February, Ohio's governor stopped an execution and called for a review of its lethal injection protocol due to "mounting evidence" of the "dangers" of using midazolam.[19] And a drug manufacturer who produces midazolam has sued to stop its use in executions.[20] On the other hand, "[s]upporters of midazolam's use" maintain that "it is a safe and effective substitute for execution drugs that have become difficult to purchase." Blinder, *supra* n.16.

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death-penalty-arkansas.html; Ashby Jones, *Lethal-Injection Drug Is Scrutinized: Midazolam, Used in Botched Oklahoma Execution, Tied to Two Other Cases Seen as Troubling*, W.S.J. (June 1, 2014), https://www.wsj.com/articles/lethal-injection-drug-is-scrutinized-1401668717.

[17] *See, e.g.*, Margaret *Renkl*, Opinion, *Executions with an Extra Dose of Cruelty*, N.Y. Times (Sept. 30, 2018), https://www.nytimes.com/2018/09/30/opinion/death-penalty-tennessee-injection.html.

[18] Robbie Gonzalez, *Why Nevada's Execution Drug Cocktail is So Controversial*, Wired (July 11, 2018), https://www.wired.com/story/the-untested-drugs-at-the-heart-of-nevadas-execution-controversy/.

[19] Liliana Segura, *Ohio's Governor Stopped an Execution over Fears it Would Feel Like Waterboarding*, Intercept (Feb. 7, 2019), https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/ (describing a pathology professor's findings after examining autopsy reports of men executed using midazolam across the country that "[a] majority showed signs of pulmonary edema, an accumulation of fluid in the lungs" that is "akin to 'waterboarding'" and "[s]everal showed bloody froth that oozed from the lungs during the autopsy—evidence that the buildup had been sudden, severe, and harrowing").

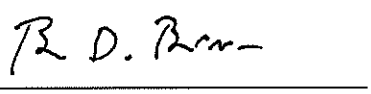
[20] Merrit Kennedy, *Nevada Postpones Planned Execution Using Fentanyl*, NPR (July 11, 2018), https://n.pr/2Z1I5ff (reporting that a pharmaceutical company obtained a court order blocking the Nevada Department of Corrections from using its drug, midazolam, in an execution).

This ongoing public debate over the use of midazolam in executions only highlights the public's need for access to unredacted versions of the briefs filed in this matter, a case that has garnered national attention. *See, e.g.*, Adam Liptak, *Supreme Court Won't Stay Alabama Execution after Bitter Clash*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court direct the filing of unredacted versions of the parties' briefs in this case.

Respectfully submitted.



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