IN THE SUPREME COURT OF MISSOURI

No. SC 89571

JOHN C. MIDDLETON, RUSSELL E. BUCKLEW, MICHAEL A. TAYLOR, JEFFREY R. FERGUSON, RICHARD D. CLAY, REGINALD CLEMONS, RODERICK NUNLEY, WILLIAM ROUSAN, JOHN E. WINFIELD, DENNIS J. SKILLICORN, EARL RINGO, MARTIN LINK, MARK A. CHRISTESON, ALLEN L. NICKLASSON, PAUL T. GOODWIN, VINCENT McFADDEN, KEVIN JOHNSON; PAULA SKILLICORN, REGINALD BARRHARRIS, MARY ELAINE GOODWIN, MARY GOODWIN MIFFLIN, LINDA TAYLOR; W. PAUL JONES, RAYMOND K. REDLICH, KIM GLADNEY; SEN. JOAN BRAY, and REP. CONNIE L. JOHNSON,

Appellants,

vs.

MISSOURI DEPARTMENT OF CORRECTIONS and LARRY CRAWFORD, in his official capacity as Director of the Missouri Department of Corrections,

Respondents.

Appellants' Statement, Brief and Argument

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JURISDICTIONAL STATEMENT

Appellants are seventeen men under sentence of death, five of their family members who plan to attend their loved ones' executions, three clergymen who minister to condemned prisoners, and two members of the General Assembly, including a member of the Joint Standing Committee on Administrative Rules (JCAR). Appellants seek a declaration that the Department of Corrections and its Director violated the Administrative Procedure Act by adopting and seeking to carry out a lethal injection protocol without undertaking notice-and-comment rulemaking under § 536.021, R.S. Mo., or submitting the protocol to the General Assembly's Joint Committee on Administrative Rules under § 536.024, R.S. Mo. Appellants have additionally sought an injunction against the protocol's enforcement, arguing that the protocol is null, void and unenforceable for noncompliance with the APA. *See* § 536.021.7, R.S. Mo.; *NME Hospitals v. Department of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993) ("A rule adopted in violation of § 536.021 is void."). Appellants filed a civil action in the Circuit Court of Cole County, invoking the declaratory judgment statute, § 527.010, R.S. Mo., the relevant portion of the APA, § 536.050, R.S. Mo., and Rules 87.02(c) and 92.02(c). (L.F. 8).

On August 13, 2008, the Honorable Jon E. Beetem, Circuit Judge, dismissed the action for lack of jurisdiction, holding that the protocol was not a rule within the meaning of the APA. (L.F. 131-33; App. A1-A3). Technically, even if the Circuit

Court were correct in holding that the lethal injection protocol is not a rule under the APA, this would not deprive the Circuit Court of *jurisdiction* to consider whether Respondents violated the APA by seeking to enforce their protocol without notice-and-comment rulemaking or JCAR review.[1] If the protocol were not a "rule" under the APA, then the proper dismissal would be for failure to state a claim upon which relief can be granted, rather than for lack of jurisdiction. The distinction obviously makes no practical difference to the instant parties. Regardless of the type of dismissal entered, the dispositive question remains whether DOC's execution protocol is a rule under § 536.010(6), R.S. Mo., and notwithstanding the exceptions

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[1] This Court's opinion in *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10 (Mo. banc 2003), does not support an all-encompassing proposition that a circuit court lacks jurisdiction whenever a challenged agency statement is not a rule. The issue in that case was whether the plaintiff's challenge was ripe. The court held that it was not, since the agency had not issued any statement that purported to have the force and effect of law. Plaintiff's members could only speculate what regulations might be imposed upon them, and how their activities might be affected. The absence of a "rule" made the challenge unripe, and thus, deprived the court of subject matter jurisdiction. *See id.* at 23-29. In the present case, there is no question that Appellants' challenge is ripe; Respondents intend to carry out their protocol at the earliest opportunity.

in § 536.010(6)(a) (statements "concerning only the internal management of an agency"), and § 536.010(6)(k) (statements "concerning only inmates").

One day after the Circuit Court's judgment, Appellants filed a notice of appeal and promptly sought injunctive relief from the Missouri Court of Appeals, Western District. (L.F. 134, 151). On August 25, 2008, that court denied an injunction without prejudice, holding that such an injunction from it would interfere with this Court's exclusive authority to schedule execution dates. (L.F. 194-95). On August 29, 2008, four of the plaintiffs separately moved in this Court to vacate or defer the scheduling of their execution dates pending this appeal. (*See State v. Middleton*, No. SC80941; *State v. Skillicorn*, No. SC78864; *State v. Bucklew*, No. SC80052; *State v. Taylor*, No. SC77365).

On September 3, 2008, this Court stayed Mr. Middleton's execution (then scheduled for September 17, 2008), on its own motion, and transferred this appeal to itself prior to opinion. (L.F. 196).

This Court has jurisdiction pursuant to Mo. Const., Art. V, §§ 3, 9-10, as well as Rule 83.01, in order to determine whether respondents' execution protocol is a rule subject to the APA.

STATEMENT OF FACTS

The manner of executing death-sentenced prisoners has become an issue of great public and judicial controversy. Earlier this year, in seven opinions, no one of which reflected a majority, the United States Supreme Court upheld the constitutionality of Kentucky's method of lethal injection against a claim that the sequence of chemicals risks the infliction of severe and unnecessary pain. *Baze v. Rees*, 128 S. Ct. 1520 (2008). Missouri's method bears certain similarities to Kentucky's but remains under Eighth Amendment challenge, based upon the historically inadequate vetting and training of execution team members, among other problems. *See Middleton v. Crawford* (Eighth Circuit Case No. 08-2807); *Bucklew v. Crawford* (Eighth Circuit Case No. 08-2813); *Ringo v. Crawford* (Eighth Circuit Case No. 08-2894), *Clemons et al. v. Crawford*, (Eighth Circuit Case No. 08-2895). In both states, lethal injections are to proceed with a sequence of three chemicals: a sedative (thiopental), a paralytic (pancuronium bromide), and potassium chloride, which induces coronary arrest. (App. A4-A7).

The three-drug sequence has been widely criticized in and out of court because of the risk that it will inflict extreme but avoidable pain. If the prisoner is not adequately anesthetized with the sedative, he or she will suffer (a) a slow asphyxiation as the pancuronium bromide paralyzes the lungs, and/or (b) excruciating pain because the potassium chloride burns as it flows through the veins and causes

a heart attack. *Baze*, 128 S. Ct. at 1533 (deeming this proposition "uncontested"). All the while, the prisoner's suffering may be unknown to observers because the inmate is paralyzed. Federal litigation in Missouri has documented this risk, including DOC's use of a dyslexic physician who administered differing and irregular amounts of the sedative before the other two chemicals. *Taylor v. Crawford*, 05-4173-CV-C-FJG, 2006 WL 1779035, at *7 (W.D. Mo. Jun. 26, 2006).

Missouri executions must proceed by either lethal injection or lethal gas. *See* § 546.720, R.S. Mo. They must be carried out through an "execution protocol" developed by DOC and overseen by its director. *Id.*[2] DOC and its director are

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[2]The Circuit Court did not rely upon § 546.720 in its ruling. (L.F. 131-33). Appellants below argued that the legislature's requirement of an "execution protocol" in § 546.720 does not imply an issue-specific, *sub silentio* exemption from APA rulemaking or any otherwise applicable law. (L.F. 99-101). In opposing dismissal, Appellants observed that the General Assembly has expressly required the DOC and other agencies to formally promulgate all non-emergency rules of general applicability, subject only to narrow exceptions. *See* §§ 536.010(6), 536.021, 217.040.1, R.S. Mo.; *see also* § 536.024.1, R.S. Mo. (grant of rulemaking authority is expressly "contingent" upon agency's compliance with statute mandating JCAR review). Thus, Appellants argued, if the legislature had intended to deviate from its statutory presumption in favor of rulemaking, it would have done so expressly.

required to provide a place for executions, to furnish the "necessary appliances" and other means for carrying them out, and to select the members of an "execution team." *Id.* On July 14, 2006, they issued a document entitled "Preparation and Injection of Chemicals" and labeled it a "Proposed Execution Protocol." (App. A4-A7; L.F. 43-46, 123). *See also State v. Johnson*, 244 S.W.3d 144, 165 (Mo. banc 2008) (describing protocol as "the lethal injection procedures that Missouri *proposes* to use to carry out the death penalty") (emphasis added).

On its face, the protocol in question applies to all executions that DOC intends to carry out, and it depends extensively on the participation of medical personnel from ***outside*** the DOC. (App. A4-A7). The "execution team" consists of outside medical personnel as well as DOC employees. (App. A4 ¶ A.1). Outside medical personnel prepare the syringes containing the three chemicals to be administered to the prisoner: thiopental, pancuronium bromide, and potassium chloride, along with additional syringes containing saline solution. (App. A4-A5, ¶¶ A.2, B.1 - B.9.). Medical personnel also insert the IV lines into the prisoner, monitor the prisoner's condition visually and through an electrocardiograph, assess the prisoner's consciousness after administration of the sedative thiopental, and eventually pronounce the prisoner's death, dispose of any unused chemicals, and document the quantities of the used and unused chemicals (the "Chemical Log"). (App. A5-A7 ¶¶ C.1, C.2, D.1 - D.3, E.3 - E.5, E.11, F.1, F.3). The chemicals are prepared by a

physician, nurse or pharmacist, while the other medical tasks are performed by a physician, nurse or emergency medical technician. (App. A4 ¶ A.2, A.3). The lethal chemicals themselves are injected into the prisoner by "two department employees," with close supervision from the medical personnel. (App. A4-A5 ¶¶ A.4, E.1).

Respondents "submitted" their "proposed protocol" to the United States District Court, which was then reviewing an Eighth Amendment challenge to Missouri's lethal injection procedures. (L.F. 123). On October 16, 2006, the court entered judgment and held the proposed protocol unconstitutional. The Eighth Circuit Court of Appeals reversed, and issued its mandate on August 17, 2007. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2047 (2008). Since that time, this Court has set and vacated execution dates on plaintiffs John C. Middleton and Dennis J. Skillicorn, and has ordered that a third execution will be scheduled "in due course." *See State v. Bucklew*, Case No. SC80052, order of May 30, 2008; *State v. Middleton*, Case No. SC80941, orders of July 22, 2008, and Sept. 3, 2008; *State v. Skillicorn*, Case No. SC78864, Amended Order of August 20, 2008. The DOC and its director have made clear that they intend to carry out these and other executions through the protocol they proposed in 2006. *See* Defendants' Motion to Dismiss (July 31, 2008), at 2-3 ("The document challenged by plaintiffs sets out the preparation of lethal chemicals and their injection into inmates under the control of the Department of Corrections in order to execute lawfully imposed

sentences of death."). (L.F. 72-73).

In the meantime, Respondents have not undertaken any rulemaking procedures outlined in the Administrative Procedure Act. When the DOC or any other agency issues rules of general application, the agency is required to proceed through § 536.021, R.S. Mo. *See also* § 217.040.1, R.S. Mo. A "rule" is any agency statement "of general applicability that implements, interprets, or prescribes law or policy." § 536.010(6), R.S. Mo.[3] Before carrying out such a rule, an agency must file a notice of proposed rulemaking with the Secretary of State, for publication in the Missouri Register; invite public comment from "anyone" for or against the proposal; publish a "final order of rulemaking" and explain why the agency either followed or rejected comments made by the public; and submit the proposed and final rule to the Joint Committee on Administrative Rules, through which the legislature has an "effective opportunity" to be advised of the regulations being proposed by unelected

[3]There is no question that DOC's protocol is a statement of "general applicability," as was recognized below. (App. A1). It applies to all executions that DOC will carry out, and it attempts to implement the legislature's directive that the Department create an "execution protocol" and select an "execution team." *See* § 546.720, R.S. Mo. It chooses lethal injection over lethal gas among the two statutorily authorized methods of execution, *see id.*, and it opts for a particular method of lethal injection with which Appellants and others have taken issue.

bureaucrats. *See* §§ 536.021, 536.024, 536.028.3, R.S. Mo.

These measures are not empty formalities. Rulemaking requirements "serve critical functions in relation to assuring institutional responsibility and democratic governance." Arthur E. Bonfield, *State Administrative Rule Making* 399 (1986). They give members of the public the opportunity to influence regulations that may affect them, ensure the political accountability of administrative agencies, and, at least in theory, bring about better regulations based upon fuller and broader "information to the agency." *NME Hospitals v. Department of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993). "The very purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification." *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. App. W.D. 1982).

By refusing to promulgate its protocol through the APA, the DOC has excluded the public from weighing in on the gravest of issues: how the State will carry out the ultimate punishment in the people's name and for the people's sake. Had DOC proposed the execution protocol under §§ 536.021 and 536.024, R.S. Mo., Appellants and other members of the public could have opposed the problematic three-drug method chosen by DOC. If DOC had given Appellants the opportunity to participate in APA rulemaking, they could have offered evidence that DOC's method presents the distinct likelihood of an excruciatingly painful death for the prisoner.

Physicians, other medical professionals, and even veterinarians could have suggested less painful methods of terminating life. *See, e.g.*, *Harbison v. Little*, 511 F. Supp. 2d 872, 876-77 (M.D. Tenn. 2007) (expert testimony weighing advantages and disadvantages of one-drug protocol versus three-drug protocol); *Baze*, 128 S. Ct. at 1543 (Stevens, J., concurring) ("It is unseemly -- to say the least -- that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets."); Brief of Kevin Concannon et al. as *amici curiae*, in *Baze v. Rees* (Case No. 07-5439), at 18 n.5 (noting that 23 states, including Missouri, forbid the use of neuromuscular paralytic agents when euthanizing animals); § 578.005.7, R.S. Mo.

PROCEDURAL HISTORY

Appellants brought suit in the Circuit Court of Cole County, urging that DOC's protocol is a rule under the Missouri Administrative Procedure Act, and thus, should have been promulgated as an administrative regulation. (L.F. 4-56). The plaintiffs included seventeen death-sentenced prisoners, five relatives of the prisoners who intend to witness their loved ones' executions, three members of the clergy who minister to death row inmates and have witnessed executions or plan to in the future, and two legislators whose authority was undermined when DOC failed to propose its protocol to the Joint Committee on Administrative Rules as required by § 536.024, R.S. Mo. (L.F. 4-5, 8-21). It is undisputed that DOC and its director have not undertaken notice-and-comment proceedings or submitted any proposed or final rules

to the Secretary of State or the Joint Committee. *See* §§ 536.021, 536.024, R.S. Mo. The plaintiffs therefore sought declaratory and injunctive relief, under §§ 527.010, 536.050, R.S. Mo., and Rules 87.02(c) and 92.02(c). (L.F. 8).

The Circuit Court dismissed the action on August 13, 2008. (App. A1-3). It held that the protocol was exempt from the APA's definition of a rule for two reasons: the protocol is a matter of internal agency management under § 536.010(6)(a), R.S. Mo., and is also an agency statement "concerning only inmates of an institution under the control of the department of corrections" under § 536.010(6)(k), R.S. Mo. (App. 1-3). Plaintiffs immediately appealed, moved for an expedited ruling from the Missouri Court of Appeals, and asked the court to enjoin the defendants from carrying out the challenged protocol pending the appeal. (L.F. 134-183). The court sustained the motion for expedited ruling and set an accelerated briefing schedule. (L.F. 195). It nonetheless denied injunctive relief, believing it lacked jurisdiction to issue an injunction that might interfere with this Court's authority to schedule execution dates. (L.F. 194). Plaintiffs Middleton, Skillicorn, Bucklew and Taylor then moved separately in their respective direct appeal cases, in this Court, to vacate or delay their actual or prospective execution dates pending this litigation. (Cases SC80941, SC78864, SC80052, SC77365). The Court stayed the execution of Mr. Middleton (then scheduled for September 17, 2008), then transferred the present appeal to itself prior to opinion. (L.F. 196).

POINTS RELIED ON

I. The Circuit Court erred in dismissing Appellants' case and holding that the Department of Corrections' lethal injection protocol is exempt from the Missouri Administrative Procedure Act as a statement "concerning *only* the internal management of an agency *and* which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof" under § 536.010(6)(a), R.S. Mo. No Missouri precedent has applied the "internal management" exception beyond an agency's employment practices, and Missouri's statutory exception mirrors those of sister states and model legislation, which have been construed narrowly and in favor of requiring notice, comment, and legislative oversight. In this case, the expansion of a narrow exception to these requirements was impermissible because, first, the Circuit Court's construction of the exception would have it apply whenever an agency's statement does not substantially affect the public's specific legal rights and regardless of whether the statement concerns only internal agency management, in contradiction to the words of the statute. Second, the DOC's choice of a method for carrying out executions in the people's name does not concern "only" the DOC's internal management, but also depends upon non-DOC medical personnel to carry it out, affects outside parties whether they choose to witness a loved one's execution or choose not to do so for fear of

witnessing an inhumane death under DOC's protocol, and reflects a matter of broad public and legal interest.

Evans v. State, 914 A.2d 25 (Md. 2006)

§ 536.010(6)(a), R.S. Mo.

§ 217.040, R.S. Mo.

II. The Circuit Court erred in dismissing Appellants' case by reasoning that the lethal injection protocol "applies" only to inmates and is therefore exempt from the APA as an agency statement "concerning only inmates" under § 536.010(6)(k), because the court failed to give effect to all words of the statute, including "concerning" and "only," in that the protocol concerns and affects individuals beyond the prisoners against whom it will be enforced (including non-DOC parties who will carry out and witness executions), and it does so well beyond the extent that any rule applying to prisoners will inevitably affect some other person.

Wilkinson v. State, 838 P.2d 1358 (Ariz. Ct. App. 1992)

§ 536.010(6)(k), R.S. Mo.

§ 217.040, R.S. Mo.

ARGUMENT

I.

The Circuit Court erred in exempting the Department of Corrections' lethal injection protocol from the Administrative Procedure Act under the Act's "internal management" exception, in that the court impermissibly broadened the narrow exception and held it to apply solely because of the court's view that the protocol does not affect any specific rights of the public and without regard to whether the protocol concerns "only the internal management of an agency" under § 536.010(6)(a), R.S. Mo., and also in that the protocol extends beyond DOC's "internal management" by relying on outside medical personnel for its implementation, by affecting outside parties whether they choose to witness a loved one's execution or choose not to for fear of witnessing an inhumane death under the protocol, and by deciding for all Missourians the politically and legally salient issue of how the State will execute prisoners in the people's name.

This appeal presents a pure question of law over which the Court exercises *de novo* review: whether respondents' protocol is a rule under the APA and subject to the Act's rulemaking requirements. *See, e.g., Akers v. City of Oak Grove,* 246 S.W.3d 916, 919 (Mo. banc 2008). The Circuit Court ruled that the manner in which the State executes prisoners in the people's name "is obviously an internal management issue" for the Department of Corrections. (App. A-2). This

counterintuitive holding is distinctly erroneous. It misconstrues the narrow scope of the "internal management" exception, applies the exception even though the protocol is implemented by and directly affects parties outside the DOC, and relies upon a Tennessee case holding that the DOC need not *ever* engage in notice-and-comment rulemaking. *Compare* § 217.040.1, R.S. Mo. (requiring DOC to promulgate administrative rules and notify JCAR pursuant to § 536.024, R.S. Mo.), *with Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 312 (Tenn. 2005) (holding that APA requirements are "simply not realistic" for the "complexities of a prison environment").

A. The "internal management" exception must be narrowly construed.

The "internal management" exceptions of other state Administrative Procedure Acts mirror that of Missouri as well as widely-adopted model legislation. *See, e.g.*, § 536.010(6)(a), R.S. Mo.; Iowa Code § 17A.2.11(a); N.C. Gen. Stat. § 150B-2(8a); Md. Code Ann. (State Gov't) § 10-101(g)(2)(I); Haw. Rev. Stat. § 91-1(4); *see also Alford v. Honolulu*, 122 P.3d 809, 822 n.21 (Haw. 2005). The leading treatise on state administrative law regards the exception as a "very narrowly drawn provision with several important qualifications." Arthur E. Bonfield, *State Administrative Rule Making* 402 (1986).[4] It is meant to permit agencies to avoid rulemaking when

[4]Professor Bonfield's analysis describes the 1981 Model Administrative Procedure Act, including § 3-116(1), which exempts from notice-and-comment

adopting "internal housekeeping instructions" such as personnel matters and other issues that are "purely of concern to the agency and its staff." *Id.* at 400, 402. But the exception only goes so far, lest agencies privately enact public policy. "Agencies could too easily subvert usual rulemaking requirements if they could avoid those procedures for anything they called an internal directive to staff." *Id.* at 400.

State courts have, accordingly, adopted a narrow view of agencies' "internal management," as have federal courts in construing the federal APA's "agency management" exception in 5 U.S.C. § 553(a)(2). *See*, *e.g.*, *Evans v. State*, 914 A.2d 25, 78-80 (Md. 2006) ("narrowly drawn"); *Grier v. Kizer*, 268 Cal. Rptr. 244, 253 (Cal. Ct. App. 1990) ("narrow indeed"), *disapproved on other grounds*, *Tidewater Marine Western v. Bradshaw*, 927 P.2d 296 (Cal. 1996); *Senn Park Nursing Ctr. v. Miller*, 455 N.E.2d 153, 159-60 (Ill. App. Ct. 1983) ("limited scope"); *Tunik v. Merit Systems Protection Bd.*, 407 F.3d 1326, 1343-44 (Fed. Cir. 2005) ("narrowly

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rulemaking any "rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public," as well as § 3-116(6), which exempts any rule "concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital." These exemptions are all but identical to Missouri's. *See* §§ 536.010(6)(a), (k), R.S. Mo.

construed"); *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1153 & n.23 (D.C. Cir. 1977) (same).

The exception's language reflects its narrow scope. It exempts "statement[s] concerning ***only*** the internal management of an agency." § 536.010(6)(a), R.S. Mo. (emphasis added); *accord Senn Park*, 455 N.E.2d at 159-60 (word "solely" reflects exemption's limited scope). The statute allowing the DOC to avoid APA procedures in certain instances is identically narrow: "The department shall adopt policies and operating regulations concerning ***only*** its internal management which need not be published in the Missouri Register or the code of state regulations under chapter 536." § 217.040.2, R.S. Mo. (emphasis added).

Because the exception is limited to statements concerning "only" internal management, an agency statement does not qualify for the exception unless it is directed "only at persons ***inside*** the agency rather than at persons outside the agency." Bonfield, *supra*, at 401 (emphasis added); *accord Gray Panthers v. Public Welfare Div.*, 561 P.2d 674, 676 (Or. Ct. App. 1977) ("narrowly" construing exception for "internal management directives" to include "only those communications which affect individuals solely in their capacities as employees of the agency involved"); *Burke v. Children's Servs. Div.*, 552 P.2d 592, 595 (Or. Ct. App. 1976). And, even if directed solely at agency personnel, a rule that carries a "substantial effect" on persons outside the agency does not concern "only" its internal

management. *Senn Park*, 455 N.E.2d at 160; *Joseph*, 544 F.3d at 1153 n.23; *Evans*, 914 A.2d at 79.

Any doubts should be resolved in favor of notice-and-comment rulemaking. Alfred S. Neely, 20 Mo. Prac. Administrative Practice & Procedure § 5:18 (4th ed. 2007); Bonfield, *supra* at 399. Indeed, "The agency carries the burden of justifying its avoidance of rulemaking notice and comment procedures by showing the effect of the rule is within the personnel or management classes and is solely internal, with no effect on the public." *Hartford Healthcare v. Williams*, 751 So.2d 16, 21 (Ala. Civ. App. 1999), quoting J. O'Reilly, *Administrative Rulemaking* 47-48 (1983).

The existing Missouri authority confirms that the exception is indeed narrow. In *McCallister v. Priest*, 422 S.W.2d 650 (Mo. banc 1968), the court held that the St. Louis Police Board's rules for promoting and removing officers were a matter of "internal management" and need not be promulgated through the APA. *Id.* at 659. To date, no Missouri cases have applied the "internal management" exception beyond an agency's employment practices. And even within that context, an agency should formally promulgate regulations when its employment practices substantially affect the outside public. Neely, *supra*, § 5:18.

The DOC's own history of rulemaking confirms *its* understanding of the narrow "internal management" exception. In 1988-89, the Department promulgated a rule to govern the "Private Sector/Prison Industry Certification Program." *See* 14

C.S.R. § 10-5.020. The rule sets forth procedures for leasing DOC property to private sector employers, and for the resulting employment of prisoners and payment of wages. *Id.* The DOC not only troubled to promulgate a regulation, but cited its statutory rulemaking authority as support. *Id.* (citing § 217.040, R.S. Mo.).

The DOC's view of its obligation as to the employment of prisoners supports the necessity of complying with the APA as to the execution of some of those same prisoners. The lethal injection protocol, no less than the leasing/employment regulation, depends on the use of non-inmates for its implementation. The latter allows outside parties to employ prisoners on DOC premises, while the former allows outside parties to execute prisoners on DOC premises. Both provide elaborate instructions to achieve the desired ends. Neither enactment is a "statement concerning *only* the internal management of an agency." § 536.010(6)(a), R.S. Mo.; *see also* 14 C.S.R. § 20-28.010 (governing "Temporary Release" of inmates).

B. The Circuit Court misread the statutory exception as requiring <u>only</u> that the protocol not substantially affect any legal right of the outside public, without regard to the statute's additional and separate requirement that the agency statement "concern only the internal management of an agency."

The plain language of the "internal management" exception presents two separate and distinct requirements. The exception applies to an agency statement:

> concerning only the internal management of an agency ***and*** which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

§ 536.010(6)(a), R.S. Mo. (emphasis added). To qualify for the exception, then, an agency statement must **both** (a) concern solely internal management, **and** (b) not substantially affect the rights of outside parties. The legislature does not enact surplusage, and so each requirement must be given separate legal effect. "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993).

The Circuit Court evaluated only the second requirement and held it satisfied the entire statutory exemption:

> To avoid this exception, the Court would need to find first a legal right or procedure available to the public or segment thereof and should it find such a right exits [sic], then it would then [sic] have to find that the statement had a substantial effect on those rights.

(App. A2). The court's reasoning would judicially broaden the exception beyond the narrow scope the legislature gave it. Whether or not DOC's protocol impacts the cognizable legal rights of outsiders, that question is not the *only* question. The other

question -- a necessary condition of applying the exception -- is whether the protocol is a statement "concerning only the internal management of an agency." § 536.010(6)(a), R.S. Mo. For the reasons explained below, it is not.

C. Because the bulk of the lethal injection protocol's instructions are directed to non-DOC medical personnel, the protocol is not a statement "concerning only the internal management of an agency" under § 536.010(6)(a), R.S. Mo.

DOC's protocol relies extensively on outsiders to carry out executions. Non-DOC medical personnel mix the chemicals, prepare the syringes, insert the IV line, monitor the prisoner's condition, and pronounce death, among other critical responsibilities. (App. A4-A7). This fact alone renders the "internal management" exception inapplicable. The protocol is not directed "only at persons inside the agency rather than at persons outside the agency." Bonfield, *supra*, at 401; *Gray Panthers*, 561 P.2d at 676. Its instructions are not even *primarily* directed at persons inside the agency.

D. Because the choice of an execution method affects those who participate in or observe executions (or who choose not to for fear that DOC's chosen method will lead to cruel and inhumane deaths), the general public through its perception of the process, and the death-sentenced prisoners themselves, the DOC's protocol does not solely concern the agency's "internal management."

DOC's chosen method of executing prisoners affects non-DOC entities in at least three respects. First, the choice of an execution method affects those who participate in or observe executions, as recognized by the Maryland Court of Appeals in *Evans v. State*, 914 A.2d 25, 78-80 (Md. 2006). Executions will necessarily be witnessed by advocates and opponents of the sentence, including close relatives of the victim and the condemned. *Id.* at 80. Such parties legitimately wish to avoid witnessing unnecessary suffering, botched medical procedures, or the on-again off-again stays and delays that accompany flawed executions. The fact that outside parties are not *compelled* to participate in or observe executions is utterly beside the point. *See* Judgment (App. A-3) ("The *Evans* court . . . fails to consider that the cause of any impact of a specific 'execution protocol' can be avoided by the choice to not participate or attend an execution."). A party who attends, assists or conducts an execution is impacted by the DOC's choice of how to carry out death sentences. So, too, is a party who wishes to attend the execution of a loved one but who chooses

not to out of concern for the DOC's choice of inhumane methods. Whatever their decision may be, such members of the public are "substantially affected." *Evans*, 914 A.2d at 79.

Second and more broadly, the general public is affected by the State's choice of how to execute prisoners, based on the public's "perception of the process" on a matter of great political and legal interest. *Id*. at 80; *see also* § 546.720, R.S. Mo. By choosing lethal injection as the State's method of execution, and then opting for a particular and oft-criticized method of lethal injection, DOC was enacting public policy with implications beyond the walls of its facilities. *See* § 546.720, R.S. Mo. (providing that executions must take place by lethal gas or lethal injection). A three-drug protocol such as the DOC's is widely used, but is also widely criticized. "[I]t has been challenged in a number of cases and some believe that it is not as humane as it was purported to be." *Evans*, 914 A.2d at 80. The *Evans* court also noted that the rules promulgated by Maryland's DOC are subject to review by a legislative committee, as is the case in Missouri. *Id.* at 79-80; §§ 217.040.1, 536.024, R.S. Mo.

Evans observed that the choice of how to execute inmates in the public's name is necessarily a matter of *public* policy, and it transcends an agency's internal affairs:

> Suppose DOC decides in the future to use three rather than two paralytic agents, or drop potassium chloride or Pavulon and use only the other agent, or use 80 cc or 150 cc of barbiturate rather than 120 cc, or 100 cc

> of Pavulon rather than 50 cc, or use one or more entirely different drugs? *Those kinds of decisions do not constitute routine internal management, any more than the decision to adopt the current mix; they affect not only the inmates and the correctional personnel, but the witnesses allowed to observe the execution and the public generally, through its perception of the process.*

Id. (emphasis added).

When DOC officials were left to their own devices in Missouri, the result was a court-imposed hiatus in executions after October 2005. *See Taylor v. Crawford*, 2006 WL 1779035, at *9 (W.D. Mo. June 6, 2006), *rev'd*, 487 F.3d 1072 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2047 (2008). One of the critical findings by the federal district court that enjoined Missouri's death penalty until August 2007 was that the dyslexic surgeon who oversaw the State's executions was varying the quantity of anesthetic when he had trouble mixing it. *See* 2006 WL 1779035, at *7. Although the Eighth Circuit reversed the district court's grant of relief, it did so only after the DOC proposed the protocol here at issue, and in specific reliance on the new proposed protocol. *Taylor v. Crawford*, 487 F.3d 1072, 1078-83 (8th Cir. 2007). That protocol is now opposed not only by the plaintiffs to this action, but also, ironically, by the State's former executioner, who thinks it is too complicated and "potentially problematic." *See* Cheryl Wittenauer, "AP Interview: Doctor Behind

Executions Speaks Out," Aug. 15, 2008 ("It will have the same effect, the guy will die. . . . But it may not be pretty."). The ongoing controversy suggests the advantages of open and public rulemaking over "administrative *diktats*."[5]

Third and most straightforwardly, the choice of an execution method affects the prisoners themselves, who wish to avoid the risk of excruciatingly painful deaths.

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[5]*See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 95 (1998) ("[T]he Guidelines are simply a compilation of administrative *diktats*. A set of unexplained directives may warrant unquestioning acceptance if they are thought to constitute divine revelation or its equivalent (the Ten Commandments come to mind), but this is not a common occurrence in human affairs--at least not in democratic societies. The [U.S. Sentencing] Commission's primary argument in support of its Guidelines is implicitly an argument from authority--that is, the authority for these rules rests on the Commission's authority to issue them. The Commission's reluctance to explain itself to the public thus leaves us with a set of rules promulgated and enforced *ipse dixit*--because the Commission says so. In the absence of some reasoned explanation for a particular rule, it is difficult to understand, much less defend, the rule. This is surely one reason that the Administrative Procedure Act requires most federal agencies to explain and justify their rules and subjects these rules to judicial review for arbitrariness. The Commission, regrettably, is not subject to these requirements.").

An agency's statement lies outside its "internal management" when it directly affects those citizens with whom the agency customarily interacts. *See, e.g.*, *Gray Panthers*, 561 P.2d at 676 (future applicants for public benefits); *Mullins v. Department of Human Servs.*, 454 NW.2d 732, 735 (N.D. 1990) (disability benefit recipients); *El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 247 S.W.3d 709, 714-15 (Tex. 2008) (hospitals which participate in Medicaid); *Malumphy v. MacDougall*, 610 P.2d 1044, 1044 (Ariz. 1980) (standards governing inmate custody classifications). Condemned prisoners may comprise a narrow subset of the "public," but they are surely not employees or otherwise members of the DOC. Their sparse numbers do not warrant the protocol's exemption from the APA. "[A]gency internal management directives may not be excluded from the usual procedural requirements applicable to rule making because their direct and substantial effect is only on the legal rights or duties of a few persons rather than a large number of persons." Bonfield, *supra*, at 401-02.

Notwithstanding the protocol's use of, and effects upon, people outside the agency, the Circuit Court relied on the Tennessee case of *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), in applying the "internal management" exception. (App. A3). But the court overlooked a critical difference between Missouri and Tennessee administrative law. Tennessee law grants the DOC a blanket exemption from APA rulemaking, which state law considers unrealistic. *Abdur-Rahman*, 181

S.W.3d at 312 ("simply not realistic requirements for implementing procedures that concern the intricacies and complexities of a prison environment"). Missouri law embodies no such exemption, save for agency statements "concerning ***only*** inmates." § 536.010(6)(k), R.S. Mo. (emphasis added). Unlike in Tennessee, our DOC's rulemaking authority expressly references APA procedures and the separate requirement to consult JCAR. § 217.040.1, R.S. Mo. Because Tennessee's DOC is not subject to APA rulemaking *at all*, the opinion in *Abdur-Rahman* sheds no light on the types of issues that Missouri law entrusts to its DOC's "internal management." For all intents and purposes, *any* statement of Tennessee's DOC is a matter of "internal management."

Likewise erroneous is the Circuit Court's reliance on § 217.040.2, R.S. Mo., which permits DOC to avoid APA rulemaking when enacting policies relating to "internal management." (App. A2). The court's reasoning begs the question of whether DOC's protocol is matter of "internal management." Indeed, the same statute requires DOC to pursue APA rulemaking when enacting generally applicable policies. § 217.040.1, R.S. Mo. It expressly limits DOC's power to avoid rulemaking to those "policies and operating regulations concerning ***only*** its internal management." § 217.040.2, R.S. Mo. (emphasis added). Because the lethal injection protocol does not *only* concern internal management or inmates, it is governed by § 217.040.1 and the procedures it requires.

II.

The Circuit Court erred in dismissing Appellants' case by reasoning that the lethal injection protocol "applies" only to inmates and is therefore exempt from the APA as an agency statement "concerning only inmates" under § 536.010(6)(k), because the court failed to give effect to all words of the statute, including "concerning" and "only," in that the protocol concerns and affects individuals beyond the prisoners against whom it will be enforced (including non-DOC parties who will carry out and witness executions), and it does so well beyond the extent that any rule applying to prisoners will inevitably affect some other person.

As with Appellant's first point, the issue of whether DOC's protocol falls within a particular exception to the APA is a pure question of law subject to *de novo* review. And, as with the "internal management" exception, the Circuit Court grossly misapprehended the scope of the "only inmates" exception. (App. A2-A3). The statute speaks of agency statements "***concerning*** only inmates of an institution under the control of the department of corrections." § 536.010(6)(k), R.S. Mo. (emphasis added). The Circuit Court, by contrast, assessed whether the protocol ***will be applied to*** any non-inmates:

> [The protocol] only applies to inmates and specifically only to those inmates for whom a warrant of execution has been signed by the

> Supreme Court. The terms of the protocol may reference employees and/or agents of the department of corrections, but the protocol is only applied to an inmate under the sentence of death.

(App. A2).

The question of whom the protocol "concerns" differs from the question of to whom it "applies." An agency's enactment may readily "concern" individuals beyond those whom it targets for enforcement. DOC's protocol surely "concerns" the non-DOC medical personnel who carry it out. It likewise "concerns" anyone who plans to witness the execution of a friend, relative, or spiritual advisee, or anyone who decides ***not*** to attend for fear of witnessing a painful or botched execution. The issue is not whether the specific legal rights of such outsiders are compromised. It is whether the protocol tangibly "concerns" non-inmates, which it plainly does. *See Airhart v. Iowa Dep't of Soc. Servs.*, 248 N.W.2d 83, 85 (Iowa 1976) (endorsing view that "statements prescribing visiting hours at the prison would not be exempt under paragraph (k) ["concerning only inmates"], but statements prescribing the mealtimes and daily routine of inmates are exempt"); Bonfield, *supra*, at 414; *Wilkinson v. State*, 838 P.2d 1358, 1359-60 (Ariz. Ct. App. 1992) (restrictions on clergy visits to inmates are not exempt from APA as a statement "concerning only inmates," since they affect inmates *and* the clergy who visit them).

Here, as elsewhere, the Circuit Court's reliance on Tennessee law is misplaced.

(App. A3). Tennessee's APA exempts from rulemaking "statements concerning inmates of a correctional or detention facility." Tenn. Code Ann. § 4-5-102(10)(G), cited in *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311-12 (Tenn. 2005). By contrast, Missouri's APA exempts "statement[s] concerning ***only*** inmates of an institution under the control of the department of corrections." § 536.010(6)(k), R.S. Mo. (emphasis added). The term "only" is a critical and distinguishing qualifier. It narrows the scope of the exemption and must be given separate effect. *See State ex rel. BP Prods. v. Ross*, 163 S.W.3d 922, 927 (Mo. banc 2005) ("If possible, each word or phrase in a statute must be given meaning."). The lethal injection protocol may "concern inmates," but it does not "concern only inmates." *See* Bonfield, *supra*, at 414 ("[I]f the rule is not addressed to inmates, . . . or if it is addressed to inmates . . . and also to others, it is not exempted under this provision.").

Respondents might argue, as they have before, that lending separate significance to the word "only" would render the "only inmates" exception meaningless. Prisons do not operate in a vacuum, the argument goes, and so any rule concerning inmates will necessarily affect the guards and other personnel who work with inmates every day. *See State v. Middleton*, No. SC80941 (Respondent's filing of Sept. 2, 2008, at 2-3); *State v. Skillicorn*, No. SC78864 (Respondent's filing of Sept. 2, 2008, at 2-3). It may be true, in a literal sense, that no prison rule affects "only inmates." But that does not justify reading the word "only" out of the statute.

Just as Appellants recognize that every prison rule affects non-inmates in some sense, they ask the Court to recognize that *some* prison rules will affect external entities to more than a *de minimis* extent. On its face, the DOC's protocol broadly affects the external medical personnel who implement it. It likewise affects those who wish to watch their sons, brothers or spiritual advisees die humanely, as well as those who stay home for fear of witnessing a botched procedure or a painful death. These features materially differentiate the lethal injection protocol from, say, "statements prescribing the mealtimes and daily routine of inmates." *Airhart*, 248 N.W.2d at 85. Both types of statements affect non-inmates, but the latter only does so in the sense that every prison rule inevitably will. The DOC's protocol carries non-prisoner effects well beyond those that are inherent to any rule in the correctional setting. In no formal or functional sense is the protocol a "statement concerning only inmates." § 536.010(6)(k), R.S. Mo.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the judgment of the Circuit Court be reversed, that the cause be remanded with directions to enter a declaratory judgment that Respondents' lethal injection protocol is "null, void and unenforceable" for noncompliance with the Missouri Administrative Procedure Act, and that the Court afford such other and further relief as law and justice require.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached amended brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8,787 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 10 software,

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free,

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 17th day of September, 2008, to:

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4. That, pursuant to the Court's order that counsel serve each other in the most expeditious fashion possible, a true and correct copy of the attached was additionally sent via electronic mail to Mr. Spillane at mike.spillane@ago.mo.gov, this 17th day of September, 2008.

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