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' Reply Brief

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Respondents advance three reasons why the protocol is not a rule under the MAPA. Departing from the circuit court's analysis, Respondents first argue that the protocol does not have the requisite potential, "however slight[,] of *impacting* the substantive or procedural rights" of some member of the public under *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994), because the choice of an execution method does not *violate* the plaintiffs' rights. (Resp. Br. at 14-21). Second, they urge that the protocol "concerns only internal management" because it is communicated only to DOC personnel (including outside personnel who are deemed "insiders" for the particular purpose of executing inmates), and it imposes no requirements or restrictions upon prisoners while bringing about their deaths. (*Id.* at 21-27). Third and quite inconsistently, Respondents claim the protocol "concerns only inmates" because "it is directed only to inmates." (*Id.* at 27-33).

I. The lethal injection protocol potentially and actually *impacts* the substantive rights of death-sentenced prisoners, whether or not it *violates* them; therefore, the *Baugus* test does not disqualify the protocol as a "rule."

Respondents exaggerate the modest test for a "rule" imposed by the Court in *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994). If anything, the Court's language supports plaintiffs' position that the protocol is a rule.

"Implicit in the concept of the word 'rule' is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public." *Id.* Notwithstanding *Baugus's* requirement of a "slight" and potential "impact" upon the substantive rights of some member of the public, Respondents argue that plaintiffs have no "right" to control how the State executes prisoners, and that prisoners' right to be free from cruel and unusual punishments is not "violated" by the protocol. (Resp. Br. at 19-20). Respondents' sleight of hand elides the difference between an "impact" upon an individual's rights and a "violation" of them.

There is no question that the protocol at least potentially "impacts" a death-sentenced prisoner's right to be free from extreme and gratuitous suffering when the State extinguishes his life. The United States Supreme Court recognized as much in *Baze v. Rees*, 128 S. Ct. 1520 (2008). Even in upholding Kentucky's three drug protocol, the Court did not question the premise that a prisoner will suffer severe pain if not adequately anesthetized before being injected with pancuronium bromide and potassium chloride. *Id.* at 1533 (proposition "uncontested"). There is indisputably *some* risk that such suffering will occur, as acknowledged by the State's former executioner himself. *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.").

Whether or not the challenged protocol presents a "demonstrated risk of severe pain" so as to violate the Eighth Amendment under Chief Justice Roberts' plurality opinion, 128 S. Ct. at 1537—a question still at issue in federal litigation—there is at least the "potential, however slight" that DOC's choice will *impact* the right to be free from severe pain. *Baugus*, 878 S.W.2d at 42. A three-drug protocol that involves paralyzing the prisoner will create risks not present with, say, a single dosage of a barbiturate or a two-drug protocol that omits use of a paralytic. *See Baze*, 128 S. Ct. at 1543-46 (Stevens, J., concurring) (describing alternatives). The risk is not only that the prisoner will suffer pain, but also that the State will lose its ability to carry out death sentences. "The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record." *Id.* at 1542 (Stevens, J., concurring).

To the contrary are Respondent's cases, all of which involve agency statements carrying only remote, de minimis or theoretical impacts. In *Baugus*, the Court noted that the agency's action worked no substantive change or requirement beyond the statute itself; there was no meaningful difference between the designations "salvage" and "prior salvage" on a vehicle's title. 878 S.W.2d at 42. Likewise, the plaintiffs in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo. banc. 2003), suffered only the designation of

the Missouri and Mississippi rivers on a list of "impaired waterways." The rivers' inclusion on the list had no practical consequence. *Id.* at 22-24. Any effects upon soybean growers were contingent upon additional, elaborate and yet un-promulgated regulatory actions, including approval of the list by the EPA, comprehensive studies, the designation of a "Total Maximum Daily Load" for particular pollutants in the each river, and the enactment of regulations and licensing regimes to ensure compliance with the TMDLs. *Id.* at 24. Finally, in *McIntosh v. LaBundy*, 161 S.W.3d 413 (Mo. App. W.D. 2005), the DOC merely omitted the plaintiff's name from a list of approved therapists for sex offenders. McIntosh had no right to be on the list, and the omission left undisturbed his broader right to work as a sex therapist. *Id.* at 416-17. In all three cases, there was no "impact" upon any right of the plaintiffs or other members of the public. In the present case, the most Respondents can say is that the protocol does not "violate" any party's rights. But that is not the question.

The cases are clear that a party's rights need not be *violated* by an agency's statement in order for the statement to be a rule under the APA; a potential *impact* suffices. Only last year, the Court struck a non-promulgated rule issued by the Division of Medical Services, which changed the formula for reimbursing hospitals' Medicaid expenses by altering the method for calculating "estimated Medicaid days" of patient care. *See Department of Social Services, Div. of*

Medical Services v. Little Hills Healthcare, 236 S.W.3d 637, 642-63 (Mo. banc 2007). In holding that the change was a rule under the APA, the Court observed that DMS regulations entitle hospitals to reimbursement for "the reasonable cost of the care" provided. Whether or not the new method of calculating "days" violated the right to reasonable reimbursement, it necessarily impacted it. *Id.* at 643; *accord Kansas Ass'n of Private Investigators v. Mulvilhill*, 35 S.W.3d 425, 430 & n.9 (Mo. App. W.D. 2000) (holding that setting a license fee for private investigators is a rule, without analyzing whether the particular fee violated the right to work as an investigator).

Little Hills extinguishes another of Respondents' arguments, which is that plaintiffs are free to challenge the protocol's constitutionality in court. (Resp. Br. at 19-20). This Court held that the federal government's approval of the State's Medicaid plan did not obviate the need to engage in APA rulemaking. 236 S.W.3d at 643. Therefore, the fact that some federal or other forum is available to challenge the substance of an agency's decision does not impact whether that decision is a "rule." *Id.*

The case perhaps most analogous to this appeal is *State v. Peters*, 729 S.W.2d 243 (Mo. App. E.D. 1987). The Department of Health and Human Services was statutorily required to select and approve "satisfactory techniques and devices" for measuring a driver's blood alcohol level. Rather than promulgate

a rule, HHS simply issued an "approved list" of methods. The court held that Department violated the APA by not promulgating a rule. *Id.* at 245-46. The court so held even though suspected drunk drivers possess no right to have their blood alcohol level measured by any particular method—just as Respondents argue that prisoners have no right to select any particular means of execution. Just as HHS unilaterally chose certain methods from a broader set of statutory options, so too has DOC unilaterally selected a protocol from among the statutory options of lethal injection or lethal gas, the particular method of delivering either, and the "appliances" to be used, among other issues. *See* § 546.720, R.S. Mo. In both cases, the agency made public policy within the interstices of broad statutory provisions. And in both cases, that APA requires promulgating a rule whether or not the agency's preferred course violates anyone's rights.

II. The protocol is not "a statement concerning only the internal management of an agency," because the protocol is implemented (a) by medical practitioners from outside the DOC, and (b) upon prisoners who are not part of the DOC.

In order for the "internal management" exception to apply, the agency's statement "must be directed ***only*** at persons ***inside*** the agency rather than at persons outside the agency." ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING 401 (1986) (emphases added); *Gray Panthers v. Public Welfare Div.*, 561 P.2d 674, 676 (Or. Ct. App. 1977). Respondents do not appear to question this premise. Rather, they argue that the medical professionals brought in from outside the DOC are actually part of the DOC for purposes of executing people. (Resp. Br. at 23, 26-27). As for prisoners, Respondents contend that the protocol is directed solely to DOC's "employees"; the protocol's operation will kill a prisoner, but without ordering him to do anything in the process. (Resp. Br. at 23). Finally, Respondents seek to distinguish the Maryland Court of Appeals' opinion in *Evans v. State*, 914 A.2d 25 (Md. 2006), from Respondents' conception of Missouri administrative law. (Resp. Br. at 25-26). These arguments, too, are unavailing.

A. An outside medical practitioner does not become part of the DOC by making a contract with the DOC.

Respondents baldly assert that the outside medical practitioners who carry out the bulk of the protocol's directives are "Department personnel," and therefore, all of the protocol's instructions are directed to the agency. (Resp. Br. at 23, 26-27). Respondents provide no authority for the surprising proposition that a non-DOC entity becomes part of the DOC whenever it makes a contract with the DOC—a proposition that is both unstated and unsupportable.

No provision of Missouri law suggests that a party who makes a contract with an agency becomes part of the agency. The APA definition of a "state agency" does not plausibly extend to those with whom the agency contracts. "State agency" means "each board, commission, department, officer or other administrative office or unit of the state other than the general assembly, the courts, the governor, or a political subdivision of the state, existing under the constitution or statute, and authorized by the constitution or statute to make rules or to adjudicate contested cases." § 536.010(8), R.S. Mo. A contractor does not exist by operation of "the constitution or statute," and has no known authority to "make rules or to adjudicate contested cases." *Id.* Indeed, an agency may not evade its rulemaking responsibilities by contractually agreeing to a "rule" rather than promulgating it. *NME Hospitals v. Department of Social Services*, 850

S.W.2d 71, 75 (Mo. banc 1993).

The DOC is, of course, empowered to make contracts in order to carry out its mission. § 217.035(4), R.S. Mo. The Director may procure "contractual services" for the Department or any division, *id.*, but nothing suggests that the Directory thereby *encompasses* the outside party, rather than merely contracting with it. To the contrary, the Department's employees must remain strictly separate and distinct from such contracting parties. § 217.115.1, R.S. Mo. ("No employee of the department shall knowingly have any financial or business interest in the management, maintenance or provision of goods or services to the department, its divisions or agencies which provide goods or services to the department."). A "private entity" may contract with DOC to build prisons, but it remains just that: a "private entity." § 217.138, R.S. Mo.

Likewise, DOC may lease its grounds or facilities to private or non-profit entities, but without transforming them into DOC entities. § 217.090, R.S. Mo. When the DOC developed a program to lease its facilities to private businesses in order to employ inmates, it promulgated a rule to propose and carry out the task. *See* 14 C.S.R. § 10-5.020. That rule stands in stark contrast to the DOC's current position that whomever it contracts with belongs to the DOC, and thus, any directives to such an entity are merely "internal agency management." Even the DOC recognizes that the protocol's medical practitioners are not part of the

agency. Training materials developed last June speak separately of "medical staff" and "DOC Execution Team members." *See Clemons et al. v. Crawford et. al.*, No. 2:07-CV-04129-FJG (W.D. Mo.), ECF Doc. 75, Ex. M, at 2 ("PROGRAM OVERVIEW: This program provides medical staff and DOC Execution Team members with training in their role of the protocol with lethal injection. Participants will become familiar with terminology and specific steps required for medical staff and DOC Execution Team members to perform during an execution using lethal injection.").

Setting aside statutory law and DOC's enactments, the protocol's outside medical personnel do not fit the mold of repeat players carrying out an ongoing and everyday relationship with the agency. Hiring medical technicians for a few executions each year bears little resemblance to the DOC bringing in an outside company to furnish food, to supply uniforms, or to mow the grass. If any contractual "outsiders" have somehow morphed into agency "insiders," it is those who are present and on the inside each day.

Respondents, then, are mistaken in arguing that the medical practitioners are part of the agency, ***and this fact alone fully disposes of both statutory exceptions.*** The protocol cannot "concern only the internal management" of the DOC if its directives are conveyed primarily to those outside the agency, for the protocol is not "directed only at persons ***inside*** the agency rather than at persons outside the

agency." Bonfield, *supra*, at 401 (emphasis added). Likewise, the protocol does not "concern only inmates" if it relies extensively on non-DOC parties for its implementation. "[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." *Id.* at 414. Therefore, this Court need not even consider the public's heightened interest in capital punishment, whether the public's interest renders the "internal management" exception inapplicable as held by the Maryland Court of Appeals in *Evans v. State*, 914 A.2d 25, 79-80 (Md. 2006), or whether the protocol's direct or allegedly "collateral" effects carry it outside either exception.

B. Because the protocol directly targets death-sentenced prisoners for execution, and because prisoners are not DOC entities, the protocol does not solely concern the agency's internal management.

Respondents argue that the protocol gives instructions only to DOC employees or contractors, and not to prisoners or anyone else. (Resp. Br. at 23). But that fact only addresses one of the conditions for the "internal management" exception, i.e., to whom the agency statement is conveyed. An entirely separate condition relates to the statement's subject matter. The "internal management" exception is limited to statements that "deal only with internal administrative housekeeping," and those matters "which are purely of concern to the agency and

its staff." Bonfield, *supra*, at 402. That is why statements directly affecting an agency's community of beneficiaries or regulatees are not matters of "internal management." When, for example, a public welfare agency restricts the benefits it confers, the operative statement is not a matter of "internal management"—even though the affected members of the public are not directed to do anything or refrain from doing anything. *Gray Panthers*, 561 P.2d at 676; *Mullins v. Department of Human Services.*, 454 N.W.2d 732, 735 (N.D. 1990).

And so it is with prisoners, when the agency's statement targets them. *Malumphy v. MacDougall*, 610 P.2d 1044 (Ariz. 1980) (regulations governing criteria for inmate custody); *A.A. ex rel. B.A. v. Attorney General*, 894 A.2d 31, 54-55 (N.J. Super. Ct. App. Div. 2006) (procedures for collecting and using DNA samples drawn from prisoners). The choice of an execution method does not merely "concern" inmates in the sense of causing them worry or anxiety. It "concerns" them because they are a constitutive and inextricable part of the protocol; there could not be an execution protocol without prisoners to execute. To say that the protocol "concerns only the internal management of [the DOC]," § 536.010(6)(a), R.S. Mo., is to deny that the protocol concerns inmates at all, never mind Respondents' more sweeping claim that it "concerns only inmates."

Neither is there merit to Respondents' suggestion that prisoners are not members of the public. (Resp. Br. at 28, 29). Contrary to Respondents' sole

citation, the Michigan Supreme Court did *not* say that the model APA's "only inmates" exception means that inmates are not considered members of the public. *See Martin v. Department of Corrections*, 384 N.W.2d 392, 395 (Mich. 1986) (noting that model APA includes an "only inmates" exception despite another exception for statements that do not affect the public). Neither would such a statement be persuasive authority even if it were made, since Michigan lacks the "only inmates" exception. *Id.* For that matter, the court reserved the question of whether such an exception would remove the DOC's development of prison disciplinary rules from APA promulgation requirements. *Id.* And most importantly, there is nothing inconsistent in holding that a rule directly affects non-agency prisoners so as to fall outside the "internal management" exception, and yet to say that it affects "only prisoners" so as to be exempt from rulemaking. In no sense does the "only prisoners" exception remove prisoners from the "public."

C. Respondents' attempt to distinguish *Evans v. State*, 914 A.2d 25 (Md. 2006), mischaracterizes the Maryland court's reasoning.

Respondents claim *Evans* strays so far from principles of Missouri administrative law that is not persuasive authority on the "internal management" exception. (Resp. Br., at 25-26). According to Respondents, the *Evans* court "did not identify any substantive or procedural right of the public affected by the

protocol." (*Id.* at 25). The court simply guessed that the legislature did not intend to give the DOC unilateral authority over an issue of such heightened political interest. (*Id.*).

Again, Respondents are mistaken. The *Evans* court simply followed the prevailing recognition that the "internal management" exception is narrow. Citing Bonfield, the court observed that matters of internal management "'face inwards' and do not 'substantially affect any legal rights of the public or any segment of the public.'" 914 A.2d at 79. The court went on to observe that the "standard three-drug protocol" has been widely criticized as inhumane. *Id.* at 80. Perhaps the court could have been more explicit, but its opinion reflects a recognition that the choice of an execution method may impact the amount of suffering a condemned prisoner endures. It is simply inaccurate to say that the court's analysis materially differs from that undertaken by Missouri courts, under the *Baugus* test or otherwise.

More importantly, the court in *Evans* was not merely guessing that the legislature wanted the DOC to proceed by rulemaking rather than proclamation. The court's holding on the rulemaking question followed a lengthy statutory analysis holding that the DOC's chosen method of injection was consistent with the statute, even thought not compelled by it. *Id.* at 74-78. The court said that the statute could be construed to permit other methods of execution, which the public

and a legislative committee might wish to propose and consider. *Id.* at 80. In essence, then, the legislature intended to require rulemaking because it left gaps in the statute for the agency to fill. That is precisely what rulemaking is designed to do: it allows the agency to make law within the bounds of its statutory delegation, but, in order to do so, the agency must first give the public and the legislature a chance to weigh in. *See* §§ 536.021, 536.024, R.S. Mo.

The protocols in Maryland and Missouri specify methods of execution from among a broader set of methods permitted by statute. Far from making the injection protocol a "textbook example of agency management," (Resp. Br. at 23), this fact makes the protocol a textbook example of agency lawmaking. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). By choosing lethal injection as the method of execution, along with a particular sequence of particular chemicals, the DOC was all at once "implement[ing], interpret[ing] and prescrib[ing] law and policy." § 536.010(6), R.S. Mo. A court may well defer to the substantive choices and interpretations the agency ultimately makes. *See, e.g., Chevron,* 467 U.S. at 843-45. But that does not allow the agency to exclude the public from formulating the policy in the first place.

III. The lethal injection protocol utilizes and directly affects identifiable parties outside the DOC, including the medical professionals who implement most of the protocol's instructions, and is therefore not an agency statement "concerning only inmates."

Respondents next argue that the protocol is a statement "concerning only inmates," because only inmates will be executed or otherwise directly affected. (Resp. Br. 27-33). Only pages earlier, Respondents urge that the protocol "concern[s] only the internal management" of the DOC, because only DOC employees and contractors are directed to do anything. (Resp. Br. at 21-27). Respondents, then, ascribe contradictory meanings to the phrase "concerning only." In one instance an agency statement is said to "concern only" those whom it targets for enforcement, and in the other, it "concerns only" those whom it gives instructions. Respondents are wrong on both counts. An agency statement concerns the people implementing it *and* those targeted for implementation; it "concerns" them not in the sense of causing worry or anxiety, but simply because both groups are part and parcel of the agency's statement. "Concerning" in this sense simply means "pertaining to; regarding; having relation to; respecting; as regards." *Webster's Revised Unabridged Dictionary.*

On the question of "concerning only inmates," the protocol's use of non-DOC medical personnel disposes of the issue. These practitioners do not "belong"

to the DOC by mere episodic contract, as explained above. The protocol does not concern "only inmates," because it extensively concerns the outside professionals who implement it. "[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." Bonfield, *supra*, at 414.

The protocol concerns non-inmates in the same way that a prison's limits on clergy visits directly affect inmates *and* clergy, and are therefore not exempt. *Wilkinson v. State*, 838 P.2d 1358, 1359-60 (Ariz. Ct. App. 1992). Such effects are distinct from the "potential collateral effect on any non-inmate" created by each and every prison regulation. (Resp. Br. at 30). Hence Bonfield's position that "rules prescribing visiting hours at the prison will not be exempt," Bonfield, *supra*, at 414—the same position he took in the law review article cited approvingly by the Iowa Supreme Court after he drafted the state's administrative procedure act (and before drafting much of the 1981 Model APA). *Airhart v. Iowa Dep't of Soc. Servs.*, 248 N.W.2d 83, 85 (Iowa 1976). Respondents protest that any prison regulation will affect non-inmates, but the solution is not to read the word "only" out of the statute. Every word of a statute must be given effect "if possible," and a word may be stricken "only in extreme cases." *State ex rel. Smith v. Atterbury*, 270 S.W.2d 399, 404 (Mo. banc 1954). It is hardly radical to suggest, as the statute's author does, that a prison regulation directly affecting

inmates *and* non-inmates beyond the prison falls outside the exemption.

Aside from the outsiders who implement it, the protocol will distinctly and predictably affect family members who plan to witness their loved ones' executions. The difference between a "direct" and "collateral" consequence of a regulation may not always be clear, but notwithstanding Respondents' problematic distinction, the protocol will have a certain and ascertainable effect upon witnesses. The presence of spouses and loved ones at an execution is a hallmark of the process. Relatives have been allowed to witness executions time out of mind, and their involvement is a central part of the operation.

An agency enactment that enhances the risk of a painful execution will concern those parties who are customarily part of the execution process—as, say, Appellant Paula Skillicorn will be, when she witnesses her husband's execution from only feet away, through a window, and in a highly regimented process developed by Respondents. (L.F. 124-25). Ms. Skillicorn and other relatives of the condemned will be affected by the risk of witnessing a botched and prolonged execution, or the knowledge that the prisoner may be suffering from severe and yet avoidable pain. The same factors apply to Father Paul Jones, spiritual advisor to John Middleton, with the aggravating difference that the surplus trauma of a botched execution would be inflicted on a clergyman when Mr. Middleton has at least an arguable First, Eighth, and Fourteenth Amendment right to the attendance

of clergy at his execution. When the State's own executioner warns that "it may not be pretty," (Wittenauer, *supra*, at 1), that possibility concerns and "pertains to" all participants in an execution, including the witnesses.

At bottom, Respondents misapprehend the plaintiffs' argument. Appellants do not rely upon the "potential collateral effect on any non-inmate" in urging that the injection protocol falls outside the statutory exception for statements "concerning only inmates." (Resp. Br. at 30; Appellants' Br. at 36-39). Rather, the protocol lies outside the exception because it directly involves and affects non-DOC participants in the execution process—specifically, the outside medical personnel who implement the protocol and the inmates' relatives and spiritual advisers who will take part in the process as witnesses.

Having set up their straw man, Respondents knock it down with a side-by-side analysis of the statutory exclusions for statements "concerning only internal management" and those "concerning only inmates," in §§ 536.010(6)(a) and (k). (Resp. Br. at 30). The word "only" presumably means the same thing in both clauses. If subsection (k) omits statements that collaterally affect non-inmates, the argument goes, then subsection (a)'s second clause has no meaning insofar is it excludes statements with a substantial effect on the public's rights. The problem is that the phrase "concerning only inmates" does *not* exclude statements that collaterally affect non-inmates; we all agree that any prison-related statement will

do so. But the exception *does* exclude enactments that either expressly or by their very nature affect specific groups of people who are neither inmates nor those who work alongside them. Rules prescribing visiting hours meet this description—*see* Bonfield, *supra*, at 414; *Airhart*, 248 N.W.2d at 85; *Wilkinson*, 838 P.2d at 1359-60—as do rules telling non-DOC parties how to execute prisoners. That doesn't make any portion of the "internal management" exception inoperable. Even when a statement expressly and directly "concerns only internal management," the exception will not apply if the statement substantially affects the public's rights through its consequences. § 536.010(6)(a). For example, a decision that prisoners will raise cattle on DOC grounds may concern only the DOC's management, but its consequences may substantially affect the rights of outside parties with long-term contracts to provide the DOC with all needed meat and dairy products.

Equally unconvincing is Respondents' use of *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). The Tennessee Supreme Court applied the state's exception for agency statements "concerning inmates." Respondents' reliance on that ruling is simply a variation on their theme that Missouri's exception for statements "concerning only inmates" should be construed to omit the word "only." An execution protocol is necessarily a statement "concerning inmates," because it specifies how they will die. Indeed, one can scarcely imagine a DOC policy that does not "concern inmates." It is, therefore, no surprise that

Tennessee's protocol fell "squarely within" the exception. *Id.* at 311. That does not mean the protocol would fall "squarely within" an exception for statements "concerning only inmates."

Respondents are also mistaken in downplaying the Tennessee court's broad deference to that state's DOC on the question of whether and when to engage in rulemaking. That deference was not some distant judicial afterthought; its description spanned two of the opinion's three relevant paragraphs. *Id.* at 311-12. The court provided no other explanation for reasoning that the DOC's protocol falls "squarely" within the "internal management" exception, save its reliance on an unpublished order in a previous case. Respondents do not dispute that Missouri's DOC lacks Tennessee-style authority to avoid rulemaking whenever it wishes to. § 217.040.1, R.S. Mo. It makes little sense to cross-apply the "internal management" exception of a DOC so different from Missouri's.

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.

Respectfully submitted,

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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 5820 words, excluding the cover and this certification, as determined by WordPerfect X4 software,

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

3. That two true and correct copies of the attached brief, and two disks containing a copy of this brief, were hand-delivered, this 6th day of October, 2008, to:

Michael J. Spillane
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4. That two true and correct copies of the attached brief, and two disks containing a copy of this brief, were mailed this 6th day of October, 2008, to:

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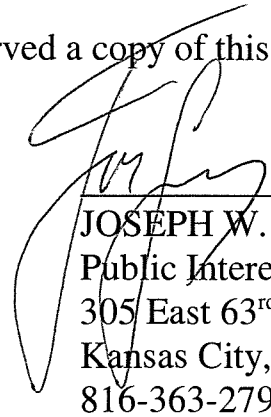
Ms. Maneke was additionally served a copy of this brief via facsimile at 816-753-9009.



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