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' Supplemental Brief

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Appellants present this supplemental brief in order to apprise the Court of intervening authority, to dispute Respondents' erroneous reading of that authority, and to take issue with a number of statutory arguments briefed for the first time last week. These developments only confirm that the DOC must consult the public when deciding how to carry out the State's severest sanction.

I. Intervening authority strongly supports Appellants' position that the lethal injection protocol is subject to the APA.

Respondents' discussion of legal developments from California, Delaware and Virginia is incomplete, if not misleading. The reasoning of the California Court of Appeal sheds considerable light on the present case, even though California's APA is not identical to Missouri's. The Delaware and Virginia decisions, by contrast, rest solely upon the blanket exemption that each state's APA affords its Department of Corrections.

A. The California decision in *Morales* illustrates that a lethal injection protocol is a statement of "general application," and also that it is not exempt from the APA as a statement "concerning *only* inmates."

The California Court of Appeal held that the state's lethal injection protocol was a "regulation" under the Administrative Procedure Act and was therefore

subject to the Act's rulemaking requirements. *See Morales v. California Dep't of Corrections & Rehabilitation*, 85 Cal. Rptr. 3d 724 (Cal. Ct. App. 2008). The state elected not to appeal to the California Supreme Court, and will instead propose and enact a protocol through notice-and-comment rulemaking. *See* Howard Mintz, *State Decides to Seek Public Input on Execution Plan*, SAN JOSE MERCURY NEWS, Jan. 6, 2009.

Morales informs the present case in two respects. First, the court agreed with the Maryland case of *Evans v. State*, 914 A.2d 25 (Md. 2005), and held that the protocol was a statement of "general application" because it "comprehensively govern[s] the manner in which every death sentence is implemented." 85 Cal. Rptr. 3d at 731. California's definition of a "regulation" resembles Missouri's definition of a "rule." *Compare* Cal. Gov't Code § 11342.600 ("every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it"), *with* § 536.010(6), R.S. Mo. ("each agency statement of general applicability that implements, interprets, or prescribes law or policy . . .").

Second, the court rejected the state's argument that the protocol was exempt from the APA as a rule "applying solely to a particular prison or other correctional facility" under Cal. Penal Code § 5058(c)(1) -- an exemption analogous to Missouri's exemption for agency statements "concerning only inmates of an

institution under the control of the department of corrections." § 536.010(6)(k), R.S. Mo. California's protocol requires correctional officials to select execution team members from outside the San Quentin State Prison if the warden cannot field a complete team from among that prison's staff. The "single prison" exception was held not to apply, in light of the ***possible*** role that people from outside the prison would play, and even though the execution itself would occur at San Quentin. *Morales*, 85 Cal. Rptr. 3d at 732. Similarly, Missouri's protocol does not "concern only inmates," because most of its directives are performed by non-DOC medical personnel. Both states' protocols, then, are implemented by people who are outside the scope of the statutory exception being invoked. California's protocol does not "apply solely" to San Quentin, and Missouri's does not concern "only inmates."

B. The Delaware Supreme Court's unpublished order in *Jackson* relies exclusively on a Delaware statute providing that *all* DOC rules and regulations are confidential and need not even be disclosed to the public, much less subject to APA rulemaking.

Respondent neglects to mention the reasoning of the Delaware Supreme Court in *Jackson v. Danberg*, No. 264, 2008 WL 4717426 (Del. Oct. 28, 2008). The court held that the DOC's "policies and procedures," including its lethal injection protocol, are exempt from notice-and-comment rulemaking under Del.

Code Ann. tit. 11, § 4322(d). The statute, in turn, provides that any "policy, procedure . . . or administrative regulation" adopted by the DOC "shall be confidential, and not subject to disclosure except upon the written authority of the Commissioner." The court did not provide any other reason for exempting the protocol, and Missouri law contains no such provision making all of the DOC's directives confidential. *See* § 217.040, R.S. Mo. The Delaware court's order provides no discernible guidance to the present case.

C. The Virginia Supreme Court's opinion in *Porter* relies exclusively on that state's blanket APA exemption for all agency actions relating to inmates, which is broader than Missouri's exception for statements "concerning only inmates."

Respondents also gloss over the rationale of the Virginia Supreme Court, which relies solely on a Virginia APA exemption for "[a]gency action relating to . . . [i]nmates of prisons or other such facilities ." *See Porter v. Commonwealth*, 661 S.E.2d 415, 432-33 (Va. 2008); Va. Code Ann. § 2.2-4002(B)(9). Like the Delaware exemption that was the sole basis for the decision in *Jackson*, Virginia's is exception strikingly broader than the Missouri exemption for agency statements "concerning only inmates." § 536.010(6)(k), R.S. Mo. The Virginia language necessarily exempts any action taken by the Department of Corrections, as well as any action by any agency that relates to inmates in any way. Va Code Ann. § 2.2-

4002(B)(9). The exemption entirely frees Virginia's DOC "from the strictures of the APA." *Porter*, 661 S.E.2d at 433.

Missouri's statutes are to the contrary. They expressly provide for notice-and-comment rulemaking by the DOC and legislative review by the Joint Committee on Administrative Rules. § 217.040.1, R.S. Mo. The narrower exemption for statements "concerning only inmates" reflects the APA's continuing applicability. Otherwise, the express provision for DOC rulemaking would be pointless.

II. Respondents' newly-asserted statutory arguments are untimely and without merit.

Respondents advance a hodgepodge of additional statutory arguments to exempt the lethal injection protocol from notice-and-comment rulemaking and the legitimacy it affords. (Resp. Supp. Br. at 5-11). The Court may prefer to dismiss these arguments as untimely. If Appellants were to assert new bases for reversal after full briefing and oral argument, the State would no doubt vociferously object. *See*, *e.g.*, *State v. Anderson*, 220 S.W.3d 454, 456 (Mo. App. S.D. 2007) ("Defendant's Confrontation Clause argument, first raised in her reply brief, comes too late and is waived."); *State v. Bradshaw*, 81 S.W.3d 14, 25 n.9 (Mo. App. W.D. 2002) (claim not addressed in argument portion of brief deemed abandoned). But Missouri law does not confer upon Respondents, as appellees, a blanket absolution from the rules that apply to other litigants, including rules that require timely presentation of points and arguments on appeal. *See*, *e.g.*, *Burris v. Bowers*, 181 S.W.2d 520, 523 (Mo. 1944); *Boland v. Dehn*, 348 S.W.2d 603, 604 (Mo. App. 1961). Setting aside the burden these Respondents have imposed on the Court and the Appellants by offering new contentions on the eve of re-argument, those contentions are without merit.

A. Section 217.040.2 does not exempt the lethal injection protocol, which is not a directive "concerning *only* [the DOC's] internal management."

Respondents argue that Section 217.040.2 excludes any DOC "procedures" concerning only internal management. (Resp. Supp. Br. at 5-7). They argue that the exclusion is broader than the APA's more general "internal management" exception, because the DOC's exemption applies even if the "procedure" substantially impacts the public's rights. (Resp. Supp. Br. at 5-6).

1. *DOC's protocol is implemented by and primarily affects agency outsiders; therefore, it does not "concern only" the agency's internal management and is not exempt under Section 217.040.2*.

The State's argument is flawed on multiple levels. First and most straightforwardly, the DOC's lethal injection protocol does *not* "concern[]only the internal management" of the agency. § 217.040.2, R.S. Mo. It is implemented primarily by outside medical practitioners, to whom most of the protocol's instructions are directed. *See* Arthur E. Bonfield, State Administrative Rule Making 401 (1986) (exception applies only when statement is "directed only at persons inside the agency rather than at persons outside the agency"); Appellants' Br. at 29; Appellants' Reply Br. at 12-16. It is carried out upon non-agency persons, i.e., death-sentenced inmates, and does not "deal only with internal

administrative housekeeping" or those matters "which are purely of concern to the agency and its staff." *Bonfield*, *supra*, at 402; Appellants' Br. at 30-35; Appellants' Reply Br., at 16-18. And it is quintessentially an act of policymaking on a matter of great public interest, because it chooses how the State will carry out death sentences in the people's name. *Evans v. State*, 914 A.2d 25, 80 (Md. 2006).

2. *The provisions of § 217.040, R.S. Mo., which govern different types of DOC proclamations, must be read in pari materia with the APA and its exclusions for statements "concerning only inmates" and statements "concerning only the internal management of an agency, " as well as the requirement of JCAR review for "any state agency" to which the Legislature has given rulemaking authority.*

Respondents also misread the totality of § 217.040, R.S. Mo. That statute creates a hierarchy of DOC pronouncements: rules of general application that must be promulgated through Chapter 536 and submitted to the JCAR (subsection 1); those departmental "policies and operating regulations" concerning only internal management and not requiring publication in the Missouri Register or the Code of Administrative Regulations (subsection 2); division-specific matters of internal management, which also need not be published in the Register or the Code (subsection 3); and, institution- or section-specific provisions governing a particular facility or part of a particular DOC division (subsection 4). Barring

clear and irreconcilable inconsistencies, these provisions should be read *in pari materia* with the APA itself. "All consistent statutes relating to the same subject are *in pari materia* and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals" *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Respondents urge that the specific DOC statutes prevail over the more general APA statutes, but this precept applies only when "two statutes governing the same issue are in conflict and cannot be harmonized." *Lane v. Lenmeyer*, 158 S.W.3d 218, 225 (Mo. banc 2005).

Properly understood, Section 217.040 is readily harmonized with Chapter 536. Section 217.040.2 does *not* exclude any agency statements that otherwise qualify as "rules" under the Missouri APA. To the contrary, it speaks only of the DOC's "policies and procedures." And it speaks in such terms immediately after subsection 217.040.1:

> 1. ***The department*** shall have the authority to adopt, amend and repeal ***rules and regulations*** under the provisions of this section and chapter 536, RSMo, as necessary or desirable to carry out the provisions of this chapter which are not inconsistent with the constitution of this state. No rule or portion of a rule promulgated under the authority of this chapter shall become effective unless it has been promulgated

pursuant to the provisions of section 536.024, RSMo.

2. ***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, RSMo, but these regulations shall be available for public inspection and review.

3. ***Divisions*** of the department shall jointly or separately adopt ***regulations, policies and procedures*** concerning ***internal management*** which shall be consistent with the department's policies and regulations, and need not be published in the Missouri Register or the code of state regulations under chapter 536, RSMo.

(emphases added). Subsection 2, then, applies only when the DOC has not promulgated a "rule" under Subsection 1 or Chapter 536. If a DOC directive is a "rule" under Chapter 536 -- for example, if it concerns internal management but substantially affects the public's rights under § 536.010(6)(a) -- then it is not exempt as an issue of the DOC's "internal management" under Subsection 2, or, for that matter, an issue of a specific division's "internal management" under Subsection 3.

Otherwise stated, a directive "concerning only [the DOC's] internal management *which need not be published in the Missouri register or the code of*

state regulations . . .," § 217.040.2, R.S. Mo., is the same thing as 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). Such an "internal management" directive need not be published in the Register and CSR *precisely because* it does not affect the public's rights. If it did, the statement would be promulgated through § 217.040.1 and published for the public's and legislature's input. Such a statement would also have to be submitted to the JCAR, pursuant to § 536.024.1, R.S. Mo., which expressly conditions the rulemaking authority of "any state agency" upon that agency's compliance with the statute governing JCAR review. The DOC's much-ballyhooed "broader exemptions" from the APA are illusory. They result from reading § 217.040 in a manner inconsistent with § 536.010, which courts must strive to avoid. *See Lane*, 158 S.W.3d at 226; *Rothermich*, 816 S.W.2d at 200.

B. The injection protocol, which is formulated and administered by the DOC's *director*, is not exempted from rulemaking by Section 217.040.3, which deals with matters of "internal management" that are administered by specific DOC *divisions*.

Even more strained is Respondents' argument that the protocol is entrusted to the Division of Adult Institutions, rather than the DOC in general, and is exempt as a matter of that Division's "internal management." (Resp. Supp. Br. at 7-8). This argument flies in the face of statutory language and DOC's prevailing practices.

As for statutory law, the Legislature expressly requires the ***director*** of the DOC to draw up a method of execution. Section 546.720.1, R.S. Mo., orders the "director of the department of corrections" to furnish "a suitable and efficient room or place" within the walls of a DOC facility and to provide the "necessary appliances" for executions by either lethal gas or lethal injection. The director is also charged with administering the method by selecting the personnel who carry it out. § 546.720.2, R.S. Mo. No responsibilities whatsoever are assigned to the Division of Adult Institutions.

More troubling are Respondents' self-serving and inconsistent legal positions taken in different legal forums. Only two months ago in federal appellate litigation, Respondents made clear that the protocol was administered by

DOC's director himself on behalf of the Department itself, and cited the director's sworn testimony:

> The Director of the Department of Corrections then had face-to-face interviews with the final candidates. In addition to assessing the candidates' professional licensure, disciplinary record, training, and experience, another consideration of the Director in determining whether to employ particular medical persons was that they not have any impairments that would impede their ability to take part in the process and fulfill the duties required. The Director also asked candidates questions to determine their attitudes about capital punishment and whether they had personally been crime victims, with an eye towards screening out anyone who might have an improper personal motive for taking part in the execution process.
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> [T]he Department of Corrections will conduct ongoing training sessions for team members once every four months. Whenever a new member joins the execution team, the Department will provide initial training for the new member, with all members taking part. Each team member will participate in training before involvement in an execution.

Clemons et al. v. Crawford et al., Eighth Circuit Case No. 08-2895, Appellees'

Brief (filed Nov. 10, 2008), at 13-14 (citations omitted) (available on PACER at https://ecf.ca8.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp or on request to John William Simon, counsel for appellants Bucklew and Middleton in this appeal and in *Clemons*).

Respondents went on to cite the Director's supervision as evidence of the protocol's soundness. *Id.* at 30 ("Under the current protocol, however, no change in the amounts of chemicals called for is permitted without prior approval of the Department Director . . . Thus, the past difficulties mixing thiopental and the past administration of less than five grams of this chemical have been remedied by the current protocol."). The same document recounts numerous measures taken by the DOC and its director to ensure that the protocol will be carried out as written, and it defends the director's past personnel decisions -- including his praise of the dyslexic "Dr. Doe." *Id.* at 46-56, 59-61. The DOC reserves the right of the director and the department to tweak the protocol by "adding additional protections to the process." *Id.* at 60. Not one whit of authority to craft, adjust or implement the protocol is attributed to the Division of Adult Institutions. Even the protocol itself assigns nothing to the DAI, other than after-the-fact record keeping and auditing functions performed under the supervision of the DOC director. *See* Appellants' App. A4-A7, ¶¶ B1 (DOC director must approve changes in chemicals), E1 (DOC director orders injection of chemicals into prisoner), F4

(auditing responsibilities of DOC and DAI directors).

Respondents' about-face as to *who* oversees the protocol must be seen for what it is: a misguided attempt to avoid the political accountability required by open and public rulemaking.

C. The lethal injection protocol is not exempt from the APA as an "intraagency memorandum or directive," because it is communicated to and carried out by non-DOC medical personnel, and, in any event, it substantially affects the legal rights of death-sentenced prisoners and those who are statutorily entitled to witness executions.

Equally unavailing is Respondents' reliance on § 536.010(6)(c), R.S. Mo., which exempts from the APA an "intergovernmental, interagency or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights or procedures available to the public or any segment thereof." (Resp. Supp. Br., at 10-11). For one thing, the protocol is not an intraagency communication. As explained in previous briefing, the protocol is largely directed to non-DOC medical personnel, who prepare the chemicals, fill the syringes with the specified amounts, determine where to insert the IV lines, perform the insertion, monitor the prisoner's condition by electrocardiograph and visually, confirm unconsciousness, pronounce death, and dispose of unused

chemicals. (Appellant's App. A4-A7). Respondents provide no argument or citation that such outsiders become part of the DOC by virtue of their episodic contracts with the agency. *See* Appellants' Reply Br. at 13-16, and authorities cited. Respondents' own training materials certainly suggest otherwise. *See Clemons et al. v. Crawford et al.*, No. 2:07-CV-04129-FJG (W.D. Mo.), ECF Doc. 75, Ex. M, at 2 (distinguishing between "medical staff" and "DOC Execution Team members").

Furthermore, the choice of an execution method substantially affects the "legal rights or procedures available" to two distinct segments of the public. § 536.010(6)(c), R.S. Mo. First, clergy and relatives of the condemned are statutorily entitled to witness an execution if the prisoner wishes them to. Section 546.740, R.S. Mo., provides that the DOC director "shall" permit the attendance of up to two "religious leaders" and up to five "relatives or friends" of the prisoner's choosing. The DOC's choice of an execution method substantially affects the witnesses' enumerated right to see it. Certainly the choice of which portions of the event are viewable to witnesses affects this right, because it determines the extent of "procedures available" to those witnesses. *See* L.F. 125 (specifying when the curtain is open and closed). Likewise, the choice of method affects the risk of witnessing a botched or prolonged execution. That prospect may trouble or frighten a prisoner's wife, mother or spiritual adviser to the point of not witnessing

a process that "may not be pretty." *See* Cheryl Wittenauer, "AP Interview: Doctor Behind Executions Speaks Out," Aug. 15, 2008, at 1.

The choice of an execution method also "substantially affects" the condemned prisoners' right to be free from cruel and unusual punishment -- whether or not the chosen protocol violates that right. As explained previously, there is no dispute that Respondents' chosen protocol creates a risk of severe and yet avoidable suffering. (Appellants' Br. at 30-35; Appellants' Reply Br. at 7-8). That proposition is "uncontested." *Baze v. Rees*, 128 S. Ct. 1520, 1533 (2008).

D. The Legislature's nominal silence on promulgating an execution protocol does not alter the legislative presumption requiring administrative rulemaking when the DOC or other agencies issue directives falling within the APA's definition of a rule.

Respondents believe it "noteworthy" that the Legislature has occasionally required certain DOC programs to be promulgated as rules. (Resp. Supp. Br. at 9-10). But these occasions do not mean what Respondents imply: that the DOC need not ever engage in rulemaking unless a specific statute requires it. Section 217.040.1 makes clear that the DOC must engage in APA rulemaking when carrying out generally applicable policies that meet the definition of a rule. DOC must also consult the JCAR under § 217.040.1, which reflects a legislative delegation expressly contingent upon agency compliance, at least for any rules

promulgated after 1994. § 536.024.1, R.S. Mo. ("When the general assembly authorizes *any state agency* to adopt administrative rule or regulations, the granting of such rulemaking authority and the validity of such rules and regulations is contingent upon the agency complying with the provisions of this section in promulgating such rules after June 3, 1994.") (emphasis added). Both of Respondent's examples predate this statute,[1] and, in any event, are a far cry from repealing or overruling a broader requirement that the DOC proceed through Chapter 536 when issuing rules. Such repeals by implication are disfavored. *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 47 (Mo. banc 1998).

Neither is it unusual for the Legislature to impose seemingly redundant APA rulemaking requirements -- whether to hasten an agency's action or clarify the need for public rules. The Department of Social Services, for example, runs Utilicare to provide heating assistance to the poor and disabled. § 660.100.1, R.S. Mo. It also operates the Shared Care program to provide services, support and tax breaks for families who take care of elderly persons. § 660.054.1, R.S. Mo. The Legislature expressly requires rulemaking as to both programs. §§ 660.054.2(1), 660.055.3, 660.130, R.S. Mo. But it cannot be questioned that DSS remains

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[1]The Legislature required the Department to promulgate rules governing good time credit and parole eligibility in 1983 and 1989, respectively. *See* §§ 217.690.3, 558.041.4, R.S. Mo. 2000; L. 1983 H.B. 671; L. 1989 H.B.408.

generally subject to the APA despite these specific programs and their specific rulemaking requirements. *See Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637, 641-63 (Mo. banc 2007); *NME Hospitals v. Department of Social Services.*, 850 S.W.2d 71, 74 (Mo. banc 1993).[2]

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[2]Aside from specific legislation creating particular administrative programs, the APA's independent force in requiring rulemaking is at issue not only in the present case, but also in *Young v. Family Support Division, Department of Social Services*, No. SC891990 (argued and submitted Oct. 28, 2008). At issue in *Young* are enhanced subsidies available to parents who adopt foster children with behavioral problems, under Chapter 453. Without engaging in notice-and-comment rulemaking, the Family Support Division established criteria to determine a family's eligibility for the subsidy -- including a requirement that the child's problems must be "severe" and occur daily. Appellants in *Young* argue, among other things, that the APA required the Division to formally promulgate a rule and seek public input rather than enact eligibility standards unilaterally. *See* Case No. SC89190, Appellants' Br., Point I. Appellants in the present case make the same argument with respect to the DOC's lethal injection protocol. Appellants in both cases rely upon the Court's opinion in *Department of Social Services v. Little Hills Healthcare*, 236 S.W.3d 637 (Mo. banc 2007). *See* Case. No. SC89190, Appellants' Br., at 32-37; Case No. SC89571, Appellants' Reply Br., at

Respondents relatedly argue that the method-of-execution statute, § 546.720, R.S. Mo., is silent on the APA, and therefore, that the DOC need not comply with the APA when creating an execution protocol. (Resp. Supp. Br. at 10). But Respondents have it exactly backwards. If the General Assembly had intended to *exempt* the DOC from rulemaking requirements, it would have done so expressly. The statute's reference to an "execution protocol" does not exempt any particular protocol from the obligations imposed by other law, including Chapter 536 when agency's statement is a rule. *See* § 217.040.1, R.S. Mo.

Neither does it assist Respondents that *some* of the lethal injection protocol is a "closed record" -- a statutory amendment that grew out of a newspaper's "outing" of a former execution team leader. (Resp. Supp. Br., at 10). Again, Respondents have the situation backward. The General Assembly made it explicit that the written statement implementing the statutory objective of executing the prisoner is an open record. § 546.720.2, R.S. Mo. The remainder of the language relates to personnel matters. Personnel matters are among the 21 exceptions to Missouri's Open Meetings Law. § 610.021(3), R.S. Mo. There is no inconsistency between protecting the personnel involved in executions and subjecting the protocol to the scrutiny the APA mandates. Indeed, the fact that the personnel are presumptively anonymous and professionally unaccountable for

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9-10.

their actions, §§ 546.720.3-.4, R.S. Mo., makes it all the more important to subject the protocol to every whit of review that the law would mandate if the protocol related to widget-factory inspections rather than executions.

E. Respondents' policy arguments are misguided.

Respondents invoke the "complex and intractable" problems of running prisons, but these do not warrant a wholesale exemption from APA rulemaking. (Resp. Supp. Br. at 8-9). The Legislature has chosen not to grant such an exemption, instead exempting DOC directives that "concern[] ***only*** inmates." § 536.010(6)(k). Respondents should direct their request for a broader exemption elsewhere. *See State v. Peters*, 729 S.W.2d 243, 246 (Mo. App. E.D. 1987) ("We point out to the State that it is the statute, not this court, that requires publication of such methods.").

Equally without merit is the suggestion that rulemaking would rigidify and harshen any method of execution, depriving the DOC of flexibility to adjust the procedures as needed. (Resp. Supp. Br. at 9). Respondents admit that their counterparts in three other states have conceded that lethal injection protocols should be administratively promulgated (*id.*, at 11) -- as California's DOC recently conceded. Respondents make no showing that such procedures have proven unworkable.

Respondents speculate that the notice-and-comment procedures the law

requires might yield a protocol which would fall victim to judicial review. (Resp. Supp. Br. at 9). But so too might any protocol invented or amended by the DOC willy-nilly. A DOC untethered by the APA would remain free to amend the protocol at will, whether in the interest of making executions more humane or less humane, and whether by adding safeguards or removing them. That unchecked power includes the ability to change a substantively constitutional protocol into an unconstitutional one. The "flexibility" the Respondents seek cuts both ways, and if anything, a protocol subject to the legitimating checks and balances of the democratic process is likelier to survive court challenges on other grounds.

At bottom, Respondents offer little more than bureaucratic disagreement with administrative law, which theorizes that unelected bureaucrats should hear from the public when making public policy. "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). The Legislature is not unsympathetic to the need for administrative flexibility. An agency may dispense with formal rulemaking in emergency situations, so long as it explains the need to do so. § 536.025, R.S. Mo. It may create or amend a "rule" without APA procedures so long as the agency's statement does not actually or potentially impact "the substantive or procedural

rights of some member of the public" -- as Respondents have insisted. *Baugus v. Director of Revenue*, 878 S.W. 2d 39, 42 (Mo. banc 1994). It may likewise issue interpretive rulings that apply only to a specific set of facts. § 536.010(6)(b). It may fill the gaps between regulatory provisions or otherwise proceed through "general statements of policy." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. banc 2003). What it may not do is issue generally applicable law as a cabal accountable to no one.

That is precisely how Respondents seek to administer the State's death penalty. Unilateral authority to create State policy includes the authority to change that policy at whim without public or legislative input. It cannot be known how long the Respondents intend to keep the current protocol, and indeed, the incoming governor has nominated a new DOC director. *See* David A. Lieb, *Nixon Picks Veteran Official to Head State Prison Agency*, ST. LOUIS POST-DISPATCH, Dec. 19, 2008, at C5. That director will have the same authority as the outgoing director to design and carry out a method of execution. Whatever the merits of DOC's current protocol, there is no assurance the new director will endorse it. He may favor a one-chemical protocol involving a single and massive dose of barbiturates, as prisoners' advocates have offered as an alternative to a three-chemical sequence. He could favor lethal gas over lethal injection. Or he may decide that the *Baze* decision allows him to use some substance whose likelihood

of causing unnecessary pain and suffering is even higher than that of potassium chloride.

Rulemaking ensures some measure of rationality over such administrative caprice. It provides some assurance that policies reflect meaningful public input rather than raw agency politics. Nowhere is that safeguard more important than when the State carries out the ultimate punishment on behalf of us all.

CONCLUSION

For all the foregoing reasons, Appellants respectfully renew their prayer that the judgment of the circuit court be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached supplemental brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6,261 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 served via regular U.S. Mail, this 13th day of January, 2009, to:

Michael J. Spillane, Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102,

4. That two true and correct copies of the attached brief, and two disks containing a copy of this brief, were mailed this 13th day of January, 2009, to:

Jean Maneke
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Kansas City, MO 64111,

5. That Mr. Spillane and Ms. Maneke were served an additional copy of this brief via facsimile to 573-751-3825 and 816-753-9009, respectively.

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