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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in the Case 07-5439, Baze v. Rees.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE PETITIONERS

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

Kentucky's lethal injection procedures pose a danger of cruelly inhumane executions. If the first drug in the three-drug sequence, the anesthetic thiopental, is not effectively administered to the executed inmate, then the second drug, pancuronium, will induce a terrifying, conscious paralysis and suffocation, and the third drug, potassium chloride, will inflict an excruciating burning pain as it courses through the veins.

CHIEF JUSTICE ROBERTS: Mr. Verrilli, your argument is based on improper administration of the protocol. You agree that if the protocol is properly followed, there is no risk of pain?

MR. VERRILLI: I disagree with that respectfully, Mr. Chief Justice. The -- the protocol simply does not address several key steps where risks can arise,

1 and beyond that, the protocol's -- and I think this is
2 critically important -- the protocol's procedures for
3 monitoring to assure that the inmate is adequately
4 anesthetized are practically nonexistent.

5 CHIEF JUSTICE ROBERTS: I thought your
6 expert -- I'm looking at page 493 to 494 of the joint
7 appendix -- agreed that if the two grams of sodium
8 pentothal is properly administered, the way he put it,
9 in virtually every case there would be a humane death.

10 MR. VERRILLI: That is true, but there can
11 be no guarantee that it will be properly administered,
12 and that is because, even in clinical settings, there are
13 always -- there is always the potential for difficulty
14 which manifests itself in actual problems, for example
15 in the setting of an IV.

16 JUSTICE KENNEDY: Well, if it were properly
17 administered, would you have a case here? Let's assume
18 100 percent of cases are properly administered.

19 MR. VERRILLI: If there were a way to
20 guarantee that the procedure worked every time, then we
21 wouldn't have substantial risk.

22 JUSTICE KENNEDY: No, my question --

23 MR. VERRILLI: But --

24 JUSTICE KENNEDY: Let's assume
25 hypothetically, and we know this isn't true, that 100

1 percent of the time it's properly administered. Then do
2 you have an argument to present to the Court?

3 MR. VERRILLI: Well, if the "it" is -- I
4 apologize for this, but for clarifying -- if the "it" is
5 if 100 percent of the time the dose of anesthetic is properly
6 administered into the condemned inmate, then we don't have a
7 significant risk.

8 Of course, that is not what the record in this
9 case establishes. The record establishes the contrary.
10 There is -- you cannot assure that there is going to be a
11 guarantee of -- of successful administration of the
12 anesthetic. And that is why the monitoring part of the
13 process is so critical.

14 JUSTICE GINSBURG: But would you -- would
15 the monitoring suffice? In other words, you started out
16 by saying there is no way that it could be administered
17 and assure 100 percent against risk. So it would be
18 helpful if you clarified, yes, there is a way of
19 monitoring adequately, and tell us what that would be, or,
20 no, there is no way.

21 MR. VERRILLI: Yes, Justice Ginsburg. I
22 think we have tried to suggest in our brief that there
23 is a way to monitor effectively even with the three-drug
24 protocol. It's challenging. The key component of that
25 is that one needs a person trained in monitoring

1 anesthetic depth to participate in the process. Now --

2 JUSTICE SCALIA: Who would be a medical
3 doctor, and medical doctors, according to the Code of Ethics
4 of the American Medical Association, can't participate.

5 MR. VERRILLI: Well, Your Honor --

6 JUSTICE SCALIA: So --

7 MR. VERRILLI: And of course, that's why there's
8 another practical alternative here which solves that problem,
9 which is the single dose of barbiturate, which does not
10 require the participation of a medically trained
11 professional.

12 JUSTICE ALITO: Well, that seems to be a big
13 part of your argument, but it doesn't appear that that
14 argument was raised at all in the Kentucky courts, and
15 it seems that there is virtually nothing in the record
16 of this case that shows that that's practical or that
17 it's preferable to the three-drug protocol. It may well
18 be, but without anything in the record of this case, how
19 could we hold that the three-drug protocol is
20 unconstitutional?

21 MR. VERRILLI: Well, if I may Justice Alito,
22 I do think -- and I'd like to provide the references where
23 it is raised and then the evidentiary references that
24 support the argument --

25 JUSTICE ALITO: Where was it raised? The

1 citations in the brief that was submitted by your
2 co-counsel are inaccurate to show that it was raised in
3 the Kentucky courts.

4 MR. VERRILLI: Well, at page 684 of the
5 joint appendix, the -- this is the trial brief, the
6 brief raised in the trial court -- one assertion made
7 there is that an alternative chemical or combination of
8 chemicals that poses less risk of unnecessary pain and
9 suffering during an execution is --

10 JUSTICE ALITO: No, that's -- that's the
11 trial court, and you think that just the word an
12 "alternative" chemical poses less risk is sufficient to
13 raise the argument that the three-drug protocol is
14 unconstitutional, because a single-drug protocol
15 involving thiopental is preferable? That one word?

16 MR. VERRILLI: And then -- and then -- no.
17 And then later, on page 701, the brief argues that there
18 are nonpainful ways of stopping the heart.

19 JUSTICE BREYER: What are they? That is, I
20 was -- I can't find -- what should I read? Because I've
21 read the studies. I've read that Lancet study, which
22 seemed to me the only referee for it, said it wasn't any
23 good. And I've read the Zimmer study, and I found in
24 there an amazing sentence to me, which says that the
25 Netherlands Euthanasia Task Force concluded it is not

1 possible to administer so much of it that a lethal
2 effect is guaranteed. They're talking about thiopental.
3 So I'm left at sea. I understand your contention. You
4 claim that this is somehow more painful than some other
5 method. But which?

6 MR. VERRILLI: Well --

7 JUSTICE BREYER: And what's the evidence for
8 that? What do I read to find it?

9 MR. VERRILLI: The thiopental is a
10 barbiturate and by definition will inflict death
11 painlessly. The record in this case establishes -- each
12 expert, the Petitioners' expert and Respondents' expert,
13 testified that it is guaranteed at the three-gram dose
14 to cause death.

15 JUSTICE BREYER: But that's what they're --
16 they're giving a three-gram dose, I take it, and if --
17 or two grams or three grams; I thought it was three
18 grams here. And I ended up thinking of course there's
19 a risk of human error. There's a risk of human error
20 generally where you're talking about the death penalty,
21 and this may be one extra problem, one serious
22 additional problem. But the question here is, can we say
23 that there's a more serious problem here than with
24 other execution methods? I've read the studies. What
25 else should I read?

1 MR. VERRILLI: Well, I think the -- the record
2 references, which -- I think the record pretty clearly
3 establishes, Your Honor, that death is certain to occur
4 through the use of thiopental at the three-gram dose. And --

5 JUSTICE BREYER: What do we do with the
6 euthanasia -- instead of talking -- I looked -- I found it
7 more important to look at what they do with euthanasia
8 than to look at what they do with animals, frankly, and
9 I was therefore taken aback with the sentence I just
10 read to you. What am I supposed to do about that?

11 MR. VERRILLI: Well, I think, to refer
12 instead to the expert testimony in this case, which says
13 that death is certain to occur, and in addition, that
14 medical testimony in this case said it is certain to
15 occur in a very few minutes. Those are the transcript
16 references that we provided at page 18 of the reply
17 brief.

18 CHIEF JUSTICE ROBERTS: That method has
19 never been tried, correct?

20 MR. VERRILLI: Well, it has never been tried
21 on humans. That is correct. It is --

22 CHIEF JUSTICE ROBERTS: Do we know whether
23 there are risks of pain accompanying that method?

24 MR. VERRILLI: I think you do, Mr. Chief
25 Justice, because by definition barbiturates cannot

1 inflict pain and do not inflict pain.

2 CHIEF JUSTICE ROBERTS: The record
3 establishes that the second drug that's used here is
4 used to prevent involuntary muscle contractions. That
5 would not be -- there wouldn't be a safeguard against
6 that under the one-drug protocol, I take it.

7 MR. VERRILLI: Well, yes, there would,
8 Mr. Chief Justice, because the reality is that
9 thiopental and other barbiturates are anti-convulsants.
10 Their -- their point is to, among other things, to suppress
11 any involuntary muscle movement and --

12 CHIEF JUSTICE ROBERTS: Do you -- do you
13 agree that that is an appropriate problem to be
14 addressed by the execution protocol, that they should
15 try to reduce the likelihood of involuntary muscle
16 contractions?

17 MR. VERRILLI: No, because to the extent
18 that the reason that they're offering to do it is
19 because of the potential for discomfort that it may
20 cause the audience, given the risk that the injection --

21 CHIEF JUSTICE ROBERTS: I thought their
22 -- one of their reasons was that it would enhance the dignity
23 not only of the procedure as a whole but also to the
24 condemned.

25 MR. VERRILLI: But -- I understand that, Mr.

1 Chief Justice, but given the extent to which it increases the
2 risk that there can be ineffective anesthesia, and it
3 can go undetected, it doesn't seem to us to be an
4 argument of sufficient force to justify using it despite
5 that risk, particularly when it seems to us that the
6 issue of dignity can be addressed by communication with
7 the audience.

8 CHIEF JUSTICE ROBERTS: What do we do with
9 the -- if you prevail here, and the next case is brought
10 by someone subject to the single-drug protocol and their
11 claim is: Look, this has never been tried. We do know
12 that there's a chance that it would cause muscle
13 contractions that would make my death undignified. It
14 will certainly extend how long it takes to die, so I'm
15 subject to a lingering death, and the more humane
16 protocol would be the three-drug protocol.

17 MR. VERRILLI: Well, I think with respect to
18 the lingering death point, I think that what this
19 Court's cases are talking about is the consciousness of
20 lingering death and the torture that that imposes, which
21 you wouldn't have of course in this situation. I don't
22 think there is a credible argument that the use of a
23 barbiturate alone could inflict pain. They do not
24 inflict any pain. Now, of course there are
25 possibilities of maladministration, but not

1 maladministration of a one-drug protocol that results in
2 any pain, and therefore there's just not a credible
3 Eight Amendment argument. It seems to me that it
4 couldn't be cruel and unusual punishment, because there
5 is no pain.

6 JUSTICE GINSBURG: Mr. Verrilli, I think
7 that your main argument in this case, I mean, there's --
8 barbiturate-only seems to have come up rather late in the
9 day, as Justice Alito pointed out, but your main
10 argument seemed to be that the controls were inadequate.
11 So you were beginning to say what controls would be
12 necessary to render this procedure constitutional, and
13 one you said trained personnel to monitor the
14 flow.

15 MR. VERRILLI: The monitor for anesthetic.

16 JUSTICE GINSBURG: Yes.

17 MR. VERRILLI: To ensure that anesthetic
18 depth has been achieved and maintained.

19 JUSTICE GINSBURG: And what is --

20 MR. VERRILLI: That is correct.

21 JUSTICE GINSBURG: Two questions: Who would
22 the trained personnel be? And, the second question,
23 what would be the measures that they would employ?

24 MR. VERRILLI: The trained personnel could
25 be a physician, a nurse, or anyone trained by them

1 adequately in this process.

2 JUSTICE BREYER: Well, what do we do about
3 the point -- the point that the doctors or the nurses
4 say it's unethical to help with an execution? I mean,
5 if we're going to talk about the constitutionality of
6 the death penalty per se, that isn't raised in this
7 case. And what the other side says is, well, you're
8 just trying to do this by the back door, insist upon a
9 procedure that can't be used.

10 MR. VERRILLI: Well, I think the one point
11 of the one-drug protocol, of course, is to demonstrate
12 that we're not doing that. Beyond that, it seems to me
13 that the State can't have it both ways with respect to
14 the -- the issue of the participation of medically
15 trained personnel. On the one hand, they cannot say
16 that we have qualified, medically able personnel
17 participating in this process, and that's our guarantee
18 of its efficacy and, on the other hand, say that a
19 requirement of having trained, qualified personnel
20 participate is impossible. And they do say that. For
21 example the EMTs who participate in Kentucky are under
22 the same ethical set of issues as -- as doctors are.

23 JUSTICE GINSBURG: Could you use those EMTs?
24 Would they be qualified? Would the team that inserts
25 the IV, would that team be qualified?

1 MR. VERRILLI: With additional training they
2 could be qualified. They aren't qualified by virtue of
3 their training to become EMTs. They would have to be
4 additionally trained --

5 JUSTICE SOUTER: Mr. Verrilli, are we in the
6 difficult position, in hearing your answers, that in
7 effect we're being asked to make findings of fact about
8 the availability of medical personnel and the
9 feasibility of training and so on that the trial court
10 never made because it didn't think it had to make a
11 comparative analysis here? So that if, in fact, the
12 comparative analysis is crucial to the case, we should
13 send the thing back for factfinding by a trial judge
14 rather than trying to do it here. Should we remand if
15 we accept your argument?

16 MR. VERRILLI: It is true, Justice Souter,
17 that the trial court did not make factual findings on a
18 whole range of issues with respect to the difficulties
19 of constituting the proper dose, the risk of catheter
20 placement, the risk of blowouts, the risk of mixing up
21 syringes, and the adequacy of the monitoring. And I
22 agree, Your Honor, that it did so because it didn't
23 believe that that was particularly relevant to the issue
24 before it. And that's the -- the basis of our
25 disagreement with respect to the legal test.

1 Now, it is -- it is our position that the
2 record is sufficiently clear and sufficiently
3 uncontradicted on the key points with particular respect
4 to monitoring that the Court would not have to remand,
5 but it certainly would be a reasonable thing to do in
6 view of the deficiencies in the actual findings --

7 JUSTICE SOUTER: May I ask you --

8 JUSTICE KENNEDY: You were interrupted, and
9 you gave Justice Ginsburg -- you said you have two
10 problems for monitoring. She asked you who would do
11 this and what measures would they use.

12 MR. VERRILLI: Right.

13 JUSTICE KENNEDY: And you never were able to
14 get to the second.

15 MR. VERRILLI: With respect to the second,
16 it's a combination. They would use the available
17 equipment, EKG and blood pressure cuff, which is the
18 standard practice used for monitoring for
19 unconsciousness, but in addition, as the expert
20 testimony in the case established, you have to have
21 close -- close visual observation by the trained person.

22 JUSTICE KENNEDY: Well, as to the cuff, I
23 thought the record was rather clear that it is just not
24 used at these low blood pressure levels.

25 MR. VERRILLI: No, I don't think so, Justice

1 Kennedy. There was some question about whether the
2 third device, that this monitor is used, but the blood --
3 the tracking of blood pressure is a critical way of
4 monitoring for unconsciousness, as is the EKG and --

5 JUSTICE SCALIA: Mr. Verrilli, this is an
6 execution, not surgery. The other side contends that
7 you need to monitor the depth of the unconsciousness when you
8 expect to bring the person back and do not want
9 harm to occur to the person. But they assert that to --
10 to know whether the person is unconscious or not, all it
11 takes is a slap in the face and shaking the person.

12 MR. VERRILLI: Well --

13 JUSTICE SCALIA: That's their contention.

14 MR. VERRILLI: There is no slap in the face.
15 There is no shaking the person. There's no testing of
16 that kind whatsoever under the Kentucky protocol. So
17 even under that understanding, which we don't think is
18 correct, that -- we don't have that here and that's one
19 of the problems. All there is, is visual observation by
20 an untrained warden and an untrained deputy warden who
21 had testified in this case that they don't know what to
22 look for to determine whether somebody is conscious or
23 unconscious.

24 JUSTICE SCALIA: With regard to the trial
25 court's failure to make findings about the availability

1 of people to do this and about the possibility of --
2 practical possibility of more effective and less painful
3 drugs, was that a failure to ignore evidence that you
4 produced?

5 MR. VERRILLI: Yes. It --

6 JUSTICE SCALIA: Did you introduce evidence
7 to show that indeed medically trained personnel were
8 readily available to do the things you said?

9 MR. VERRILLI: I don't think we introduced
10 evidence that medically trained personnel were readily
11 available, but we did introduce evidence about what
12 needed to be done and, of course, as I said, Kentucky,
13 like the other States, had their ability to bring
14 medically qualified personnel to bear to run this
15 process. And so I do think --

16 JUSTICE SCALIA: I'm very reluctant to send
17 it back to the trial court so we can have a nationwide
18 cessation of all executions while the trial court
19 finishes its work, and then it goes to another appeal to
20 the State supreme court and ultimately -- well, you are
21 looking at years.

22 MR. VERRILLI: I understand that, Your
23 Honor, and that's why I suggested --

24 JUSTICE SCALIA: You wouldn't want that to
25 happen.

1 MR. VERRILLI: That's why I suggested that
2 there is -- that this case can be decided on the basis
3 of the record here because the undisputed expert
4 testimony on these key issues shows the deficiencies in
5 the protocol.

6 JUSTICE SOUTER: May I ask you another
7 question?

8 CHIEF JUSTICE ROBERTS: If no -- okay --

9 JUSTICE SOUTER: May I ask you another question
10 about the state of the evidence? It really goes to an
11 understanding of your position that was discussed a
12 little bit earlier about the preferability of simply a
13 barbiturate dose as opposed to the three-drug
14 combination. You said a moment ago that the evidence
15 was -- and I think it was undisputed evidence -- that
16 three grams of the barbiturate actually used would be
17 sufficient to cause death. Is that correct?

18 MR. VERRILLI: That's correct.

19 JUSTICE SOUTER: And that was undisputed?

20 MR. VERRILLI: Each side's expert testified
21 to precisely the same thing.

22 JUSTICE SOUTER: Okay.

23 MR. VERRILLI: Three grams was certain to
24 cause death.

25 JUSTICE SOUTER: So that if the current

1 three-gram dosage were used and the second and third
2 drugs were not administered, death would occur based on
3 the undisputed evidence in this case.

4 MR. VERRILLI: The record establishes that
5 death is certain.

6 JUSTICE SOUTER: All right. Secondly, my
7 understanding, my recollection, is that in a couple of places
8 in your brief, one at least, you referred to the
9 preferability of administering a -- and I think the term was
10 "massive dose" of barbiturate, which I took to mean more than
11 the three grams. Is that what you meant?

12 MR. VERRILLI: No. Three grams is a massive dose.

13 JUSTICE SOUTER: That is the massive dose?

14 MR. VERRILLI: But if one had any doubt
15 about the certainty of the effect of causing death, one
16 could always just increase the dose. But the record
17 here is that three grams --

18 JUSTICE SOUTER: Is there any evidence in
19 the record about what the enhanced dose would
20 appropriately be if you decided or if a protocol author
21 decided that there would be no chance whatsoever that
22 death would not occur, and the amount should be greater
23 than three grams? Was there any evidence in the record
24 about how much there ought to be if you were going to go
25 above three grams?

1 MR. VERRILLI: I'm not sure there's anything
2 in the record, Your Honor. There is discussion in the
3 amicus briefs about some other jurisdictions that have
4 gone as high as five grams.

5 JUSTICE GINSBURG: And the government has
6 told us they do.

7 MR. VERRILLI: Right. And then --

8 JUSTICE GINSBURG: In the Federal response.

9 MR. VERRILLI: -- as high as five grams.

10 CHIEF JUSTICE ROBERTS: You have objections
11 that would apply even to your single-drug protocol. You
12 tell us that one reason this challenged protocol doesn't
13 work is because people will mix the drugs in the wrong
14 way, including the sodium pentathol. That objection
15 would still be there if we adopted your alternative,
16 wouldn't it?

17 MR. VERRILLI: No, Mr. Chief Justice,
18 because, as I've tried to say earlier, even if there is
19 maladministration, error --

20 CHIEF JUSTICE ROBERTS: I'm focusing
21 specifically on the mixing of the drugs. The mixing of
22 the sodium pentathol would be undertaken under the
23 Kentucky procedure and under your proposed alternative,
24 correct?

25 MR. VERRILLI: That's correct. But the

1 difference is if there's an error at that stage in the
2 process and the execution proceeds, there may be a
3 problem that needs to be fixed, but it will not be a
4 problem that causes any pain, and that's the critical
5 difference because if it doesn't cause pain --

6 JUSTICE SCALIA: Mr. Verrilli --

7 MR. VERRILLI: -- it can't be a cruel and
8 unusual punishment.

9 JUSTICE SCALIA: We have been discussing
10 this as though -- as though that is a constitutional
11 requirement. Where does that come from, that you must find
12 the method of execution that causes the least pain? We have
13 approved electrocution, we have approved death by firing
14 squad. I expect both of those have more possibilities
15 of painful death than the protocol here. Where does
16 this come from that in the -- in the execution of a -- of a
17 person who has been convicted of killing people we must
18 choose the least painful method possible? Is that somewhere
19 in our Constitution?

20 MR. VERRILLI: We don't make the argument
21 that States are required to choose the least painful
22 method possible. Our standard is grounded on three, I
23 think, extremely solid, well-established points of
24 Eighth Amendment doctrine.

25 The first one is this: The core concern of

1 the Eighth Amendment at the time of its founding, of
2 course, was precisely the question of whether the
3 carrying out of death sentences would inflict torturous
4 deaths. So we're at the core of the historical concern.

5 JUSTICE SCALIA: No, I don't agree with
6 that. The concern was with torture, which is the
7 intentional infliction of pain. Now, these States, the
8 three-quarters of the States that have the death
9 penalty, all except one of whom use this method of
10 execution, they haven't set out to inflict pain. To the
11 contrary, they've introduced it presumably because
12 they, indeed, think it's a more humane way, although not
13 one that is free of all risk.

14 MR. VERRILLI: That -- the second principle,
15 Your Honor, is that this Court's cases, including the
16 ones that Your Honor averted to, have said that the
17 standard is whether the means of execution inflicts
18 unnecessary pain.

19 JUSTICE SCALIA: No --

20 MR. VERRILLI: And --

21 JUSTICE SCALIA: Unnecessary and wanton.
22 Unnecessary and wanton infliction of pain.

23 MR. VERRILLI: Well, the -- with all due
24 respect, Wilkerson and Kemmler say "unnecessary pain."
25 Resweber says "unnecessary pain and" --

1 JUSTICE SCALIA: Well, then, you're changing
2 your position. You said -- you just said earlier that we
3 didn't have to find the least painful way.

4 MR. VERRILLI: No, that's correct, because
5 --

6 JUSTICE SCALIA: But if you're not using the
7 least painful way, you are inflicting unnecessary pain,
8 aren't you?

9 MR. VERRILLI: No, Justice Scalia.

10 JUSTICE SCALIA: Can you rectify that?

11 MR. VERRILLI: Yes, because, Justice Scalia,
12 our position is that the pain that is inflicted here
13 when this goes wrong is torturous, excruciating pain
14 under any definition. We're not talking about a slight
15 increment of difference. We're talking about the infliction
16 of torturous pain.

17 JUSTICE ALITO: Isn't your position that
18 every form of execution that has ever been used in the
19 United States, if it were to be used today, would
20 violate the Eighth Amendment?

21 MR. VERRILLI: No. I think --

22 JUSTICE ALITO: Well, which form that's been
23 used at some time in an execution would not violate it?

24 MR. VERRILLI: Well, I think one would have to
25 subject it to the test that we are advocating, which is,

1 whether it would if -- whether there is a risk of torturous
2 pain.

3 JUSTICE SCALIA: Hanging certainly would,
4 right?

5 MR. VERRILLI: Well, it would have to be
6 subjected to the test. If there were a risk of torturous --

7 JUSTICE SCALIA: Is that a hard question?
8 Is that a hard question, whether hanging would, whether
9 you had experts who understood the drop-weight, you know,
10 that was enough that it would break the neck? And --

11 MR. VERRILLI: If there's a risk of
12 torturous pain and if there are readily available
13 alternatives that could obviate the risk, then any
14 significant risk --

15 JUSTICE SCALIA: Hanging's no good. What
16 about electrocution?

17 MR. VERRILLI: Well, it would depend. The
18 argument about electrocution, Justice Scalia, is whether
19 or not it is painless, and that was its point when it
20 was enacted, that it would be a painless form of death.

21 JUSTICE SCALIA: It has to be -- it has to be
22 painless?

23 MR. VERRILLI: It does not, but that was -- but
24 that was its point, and I think one would have to subject it
25 to the test and see whether it inflicts severe pain that is

1 readily avoidable by an alternative.

2 JUSTICE ALITO: You have no doubt that the
3 three-drug protocol that Kentucky is using violates the
4 Eighth Amendment, but you really cannot express a
5 judgment about any of the other methods that has ever
6 been used?

7 MR. VERRILLI: Well, electrocution may well.
8 But it would depend again, Your Honor. If it could be
9 established that it was painless, that there wasn't a
10 risk that it could go wrong in a way that inflicts
11 excruciating pain, then it would be upheld, but if it
12 couldn't, it wouldn't. That does seem a serious
13 question. Obviously, the Court granted certiorari to
14 consider it a few terms ago. But that would be the
15 test, the mode of analysis here, and I --

16 JUSTICE SCALIA: I would think you'd have to
17 show it's unusual, not painless. I mean, cruel and
18 unusual is what we're talking about. There's no
19 painless requirement in there.

20 MR. VERRILLI: There is an unnecessary pain
21 requirement. There is also, Justice Scalia, and I --

22 JUSTICE SCALIA: Where does that unnecessary
23 pain requirement come from?

24 MR. VERRILLI: From this Court's cases.

25 JUSTICE SCALIA: Dictum in our cases, right?

1 MR. VERRILLI: Yes, it comes from this
2 Court's cases.

3 JUSTICE SCALIA: Dictum -- dictum in our cases.

4 MR. VERRILLI: Well, it seems to me it's
5 more than that, and Panetti is one case that shows it,
6 because there's a case in which the Eighth Amendment
7 forbids the execution of a person who is insane at the
8 time of execution. In that situation, there is no intent
9 on the part of the people carrying out the execution to
10 inflict cruel and unusual punishment. This Court didn't
11 require intent in Panetti. In fact, it said something
12 quite different, really the polar opposite. It said
13 that the States have to have in place procedures to
14 ensure that there wasn't an arbitrary infliction of the
15 death penalty in that circumstance, without any
16 requirement of intent.

17 The Gregg, Woodson, Lockett cases don't have a
18 requirement of intent, and the Kemmler and Wilkinson
19 cases don't have a requirement of intent in them either.
20 And with respect to the "unusual" character of it, just
21 drawing from the dictionary definitions that Your Honor
22 posed in the Harmelin case, this is unusual in precisely
23 that way, in that it is -- if Your Honor will just bear me --
24 "it is such as does not occur in ordinary practice." So
25 I do think it's unusual in that sense.

1 And I'd like to reserve the balance of my
2 time, if I may.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Verrilli.

5 Mr. Englert.

6 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,
7 ON BEHALF OF THE RESPONDENTS

8 MR. ENGLERT: Mr. Chief Justice, and may it
9 please the Court:

10 Mr. Verrilli and I agree that if the first
11 drug is properly administered there will be a painless
12 death. It is only if the first drug is not properly
13 administered that there is any possible constitutional
14 argument in this -- in this case.

15 JUSTICE STEVENS: But do you also agree with
16 the counter-proposition that if it is not properly
17 administered, there is some risk of excruciating pain?

18 MR. ENGLERT: Yes.

19 JUSTICE STEVENS: And do you agree that if
20 that risk, say, occurred in every case, that it would
21 violate the Eighth Amendment?

22 MR. ENGLERT: Yes.

23 Because the administration of the first drug
24 is so important, it is important to focus on the
25 safeguards Kentucky has in place to make sure that the

1 first drug is properly administered. Contrary to what
2 Mr. Verrilli has suggested, Kentucky has excellent
3 safeguards in place.

4 Let me start with who -- who puts in
5 the IV line, which is the most critical step of the
6 process. Kentucky uses what is probably literally the
7 best qualified human being in the Commonwealth of
8 Kentucky to place the IV line. It uses a phlebotomist
9 who in her daily job works with the prison population.
10 The problems the prison population --

11 JUSTICE SOUTER: I take it this is obvious,
12 but I wondered when I went through the brief. I assume
13 this phlebotomist is not an MD?

14 MR. ENGLERT: Correct. Yes.

15 JUSTICE SOUTER: What is the training? I
16 mean, "phlebotomist" refers to somebody who works with veins,
17 I take it.

18 MR. ENGLERT: She --

19 JUSTICE SOUTER: What is the training?

20 MR. ENGLERT: The training is a certain
21 amount of learning followed by on-the-job experience.
22 This person places 30 needles a day in the prison
23 population. And at page 273 of the joint appendix, it
24 points out that she works in her daily job with the
25 prison population. So what she is used to, from many

1 years of working with the prison population, is the kinds
2 of problems of compromised veins we have in the inmate
3 population specifically.

4 JUSTICE SOUTER: So it's somebody like the
5 Red Cross worker who puts in the needle when somebody
6 donates blood.

7 MR. ENGLERT: No, Your Honor. It's someone
8 like the person who inserts an IV in a hospital. The
9 experts in this case all agreed that, in a hospital
10 setting, IVs are not inserted by medical doctors; they
11 are inserted by phlebotomists. That's what they do.
12 They teach medical residents how to insert IVs because
13 doctors in training don't know how to do this. And it's --
14 it's what's somewhat derisively referred to as scut work in
15 the hospital setting, if I may add.

16 JUSTICE GINSBURG: Mr. Englert, I thought
17 that there really wasn't a serious question about who inserts
18 the IV, that those are trained people, but the point
19 that was highlighted was that the people who control the
20 flow into the IV connection, that those people have no
21 training, the ones that are called "executioners," the
22 ones who operate the -- what is it -- the syringe.

23 MR. ENGLERT: Your Honor, Kentucky has -- has
24 safeguards in place to make sure that the inmate is
25 asleep before the second and third drugs are given.

1 Now, with respect to those people's training,
2 it's not accurate that they have no training. Kentucky has
3 had one execution since 1998, since it adopted lethal
4 injection, one execution altogether by lethal injection.
5 It's had 100 practice sessions. Kentucky requires
6 monthly practice sessions every month by the execution
7 team because it is very concerned to get it right.

8 Now, with respect to pushing the IV, those
9 are people who had -- whose training is participation in the
10 practice sessions. But to make sure that the first drug
11 has had its intended effect, the warden and the deputy
12 warden are in the execution chamber. They are literally
13 right on top of the inmate. It's suggested in the
14 briefs that they're feet away. That's not accurate.
15 The record reflects they are inches away.

16 JUSTICE GINSBURG: But they also are not
17 trained people. I think what seems puzzling to me is
18 the State has made an effort to make sure that the
19 people on the team that inserts the IV, that those are
20 well-trained professional people, but then apparently
21 they leave the room, so that once the IV is inserted,
22 there is no professional person that has any further
23 part.

24 MR. ENGLERT: That's -- to say they leave
25 the room is accurate, but the suggestion that they have

1 no further part is misleading. They go into the next
2 room. They watch through a one-way mirror, carefully
3 watching to make sure nothing has gone wrong. They're
4 in close proximity to the inmate and they are watching.

5 Now, with respect to the warden and the deputy
6 warden, it's been suggested they don't know what to look for.
7 That's false. The record shows otherwise.

8 The main problem -- in the executions that have
9 gone wrong, the main problem is an IV goes into tissue
10 instead of the vein. If that happens, Dr. Dershwitz
11 testified -- pages 600 to 601 of the joint appendix -- the
12 inmate would be awake and screaming. The warden and the
13 deputy warden know how to tell the difference between someone
14 whose eyes have closed and who seems to have gone to sleep
15 and someone who is awake and screaming. It's not just Dr.
16 Dershwitz. Dr. Haas and Dr. Hiland -- pages 353 and 386 of
17 the joint appendix -- also testified that this would be
18 clear.

19 Now, Mr. Verrilli says use a blood
20 pressure monitor as a safeguard. Justice Kennedy said,
21 doesn't the record show that that's not of any use at
22 very low blood pressures? And Justice Kennedy is exactly
23 correct. At page 578 of the joint appendix,
24 Dr. Dershwitz testified that the blood pressure cuff
25 simply would have no usefulness in monitoring at this

1 level of introduction of the barbiturate.

2 Mr. Verrilli has mentioned the one-drug
3 protocol at some length this morning and has said it is
4 certain to cause death if three grams of sodium
5 thiopental are administered. His expert, Dr. Heath --
6 page 499 of the joint appendix -- was asked: "Let's assume
7 that you don't take any other measures and gave a
8 three-gram dose of sodium thiopental. What would you
9 expect to happen?" "I'd expect the blood pressure to
10 drop." "Would that kill them?" "No, I wouldn't expect it
11 to cause death."

12 JUSTICE STEVENS: Yes, but isn't it clear
13 that a five-gram administration of that drug would be
14 fatal?

15 MR. ENGLERT: No, Your Honor. There is
16 nothing in this record --

17 JUSTICE STEVENS: It's not in the record,
18 but it's in this document that we received the last few
19 days, this long deposition of Dr. Derschwitz.

20 MR. ENGLERT: Justice Stevens, let me be
21 very precise in this answer, if I can. What is clear is
22 that a rapidly administered three- or five-gram dose of a
23 barbiturate would cause death in normal circumstances.

24 JUSTICE STEVENS: And if it doesn't, you could
25 just administer more of the drug and then it would?

1 MR. ENGLERT: That's -- that's problematic
2 actually. This is all way outside the record.

3 JUSTICE STEVENS: I understand.

4 MR. ENGLERT: My understanding is that the
5 human body can't take more than a certain amount of the
6 barbiturates, so it actually becomes problematic to go
7 past five grams, which is why nobody comes goes higher
8 than five grams.

9 JUSTICE STEVENS: Would you contend that the
10 second drug in the three-drug protocol is necessary in
11 order to make the execution effective?

12 MR. ENGLERT: No, not effective.

13 JUSTICE STEVENS: The justification is the
14 one the Chief Justice described?

15 MR. ENGLERT: Correct.

16 JUSTICE STEVENS: You don't want to have
17 unpleasant appearance of death at the time.

18 MR. ENGLERT: Well, it's more than
19 unpleasant appearance of death, Your Honor. It's deeply
20 disturbing.

21 JUSTICE STEVENS: What is the justification
22 for the second drug when it does -- that is the drug that
23 creates the risk of excruciating pain?

24 MR. ENGLERT: That's the drug that creates
25 the risk of excruciating pain if and only if the first drug

1 is improperly administered.

2 JUSTICE STEVENS: Right. I understand that.

3 MR. ENGLERT: And the justification is many
4 safeguards are in place to make sure the first drug is
5 properly administered so it doesn't create any real
6 risk.

7 And second, it does bring about a more
8 dignified death, dignified for the inmate, dignified for
9 the witnesses. It's not just --

10 JUSTICE STEVENS: The dignity of the process
11 outweighs the risk of excruciating pain?

12 MR. ENGLERT: No, Your Honor. No. The question
13 --

14 JUSTICE STEVENS: But would the risk of
15 excruciating pain outweigh the risk of an undignified
16 death?

17 MR. ENGLERT: A substantial risk of
18 excruciating pain, a substantial risk of wanton,
19 excruciating pain --

20 JUSTICE STEVENS: Even a minimal risk.
21 If everyone who goes through the process knows there's
22 some risk of excruciating pain that could be avoided by
23 a single-drug protocol, would he prefer to say, "I want
24 to die in a dignified way"?

25 MR. ENGLERT: Your Honor, if I may answer

1 your question a little bit indirectly. That risk cannot
2 be -- the risk of pain can be avoided by a single-drug
3 protocol, but there's not a certain death with a one-drug
4 protocol. It's also a very -- it takes a very long time
5 to die with a one-drug protocol. So --

6 JUSTICE STEVENS: Well, what's "very long"?
7 Ten minutes?

8 MR. ENGLERT: Again, your Honor, this is way
9 outside the record.

10 JUSTICE STEVENS: Because this is what they do
11 with animals, from what I understand.

12 MR. ENGLERT: What Dr. Dershwitz --

13 JUSTICE STEVENS: They use a single-drug protocol
14 for animals because it's more humane than the three-drug
15 protocol.

16 MR. ENGLERT: No, no. They use a single
17 drug with animals because that is the tradition the
18 American Veterinary Medical Association has come up
19 with, using somewhat different considerations. That's
20 what they've come up with --

21 JUSTICE SOUTER: Well, isn't it required by
22 Kentucky law?

23 MR. ENGLERT: The use of pancuronium bromide
24 or any neuromuscular blocking agent, any paralytic, is
25 barred by Kentucky law as in a lot of many --

1 JUSTICE SOUTER: Okay, so something more is
2 involved than merely veterinary practice.

3 MR. ENGLERT: In the veterinary setting
4 someone, some appropriate policymaker has made the
5 decision that what they perceive as risks outweigh the
6 benefits.

7 JUSTICE SOUTER: Right. But in the setting
8 of Kentucky law, the legislature of Kentucky has said, we
9 are going to make this a legal requirement. And I assume
10 they had some reason for it other than the fact that
11 vets do it that way.

12 MR. ENGLERT: Well --

13 CHIEF JUSTICE ROBERTS: Does the Kentucky
14 law do anything other than adopt the AVMA guidelines?

15 MR. ENGLERT: All the Kentucky law does is
16 forbid the use of a neuromuscular blocking agent in
17 euthanizing animals, and that's -- there's no record on
18 this, but presumably that's because veterinarians told
19 the state legislature that was a good idea.

20 JUSTICE SOUTER: But why was it necessary to
21 pass a law if the standard veterinary practice is not
22 to use it? I mean -- I'm obviously trying to get to the --
23 to what evidence we have here for a finding somewhere that we
24 can take into consideration that there is a comparative
25 benefit under the -- under the veterinary practice, as

1 distinct from the protocol that has been devised. So, isn't
2 it reasonable to suppose that the Kentucky legislature made
3 some kind of a finding -- came to some kind of a conclusion
4 that, in fact, there was something deleterious about using
5 the second drug?

6 MR. ENGLERT: That much is reasonable.

7 JUSTICE SOUTER: Okay.

8 MR. ENGLERT: What's deleterious about using
9 the second drug, we all agree, is if the first drug is
10 maladministered it can cause pain. If the first drug
11 is not maladministered, no pain -- no pain in humans,
12 no pain in animals. The judgment was made, weighing the
13 costs and benefits in the veterinary context, not to use
14 the second drug. The judgement has been made by everyone who
15 has looked at this in the death-penalty context to use the
16 second drug.

17 JUSTICE SOUTER: Yes, but the only cost
18 that I -- correct me if I'm wrong -- but the only cost that
19 you have identified in using the one drug only are, number
20 one, the appearance cost, which you equated with dignity
21 in your response to Justice Stevens and, number two, the
22 possibility -- and I don't know how strong a possibility --
23 but the possibility that the one drug would not work.
24 Is there any other cost? In using one drug?

25 MR. ENGLERT: Yes. The length of time it

1 takes to die.

2 JUSTICE SOUTER: And I take it you don't
3 have a figure for that.

4 MR. ENGLERT: Well --

5 JUSTICE SOUTER: Justice Stevens said 10 minutes,
6 and I don't think you had a clear answer one way or the
7 other as to whether it was likely to be more.

8 MR. ENGLERT: If you go outside the record
9 of this case, in which this argument wasn't even raised below
10 --

11 JUSTICE SOUTER: I was going to say, we're
12 doing that.

13 MR. ENGLERT: -- and go into the Harbison record,
14 the lodging in recent days, I believe Dr. Dershwitz testified
15 he would expect it to take 30 minutes.

16 JUSTICE SOUTER: And 30 minutes as against
17 some risk of excruciating pain, is that, in effect --
18 is it reasonable to say 30 minutes is too long?

19 MR. ENGLERT: It depends on how large the risk
20 of excruciating pain is. Here there is very little
21 evidence of a risk of excruciating pain.

22 JUSTICE SOUTER: Is your point that there is
23 simply no quantification of what that risk is?

24 MR. ENGLERT: No. But that is one of my points,
25 but that's not my whole point, Justice Souter.

1 JUSTICE SOUTER: Okay what's your point?

2 MR. ENGLERT: Take a look at the -- I'm
3 speaking rhetorically. One can take a look at the list of
4 so-called botched executions in this country -- the
5 appendix to Professor Denno's law review article, the
6 Death Penalty Information Center website. The so-called
7 botched executions aren't executions in which there was
8 pain. They are excuses in which, in the overwhelming
9 majority, one of three things happened. It took a long
10 time to find a vein -- and that's the only reason they say
11 it was botched -- or the inmate showed muscle movements, the
12 exact same thing that pancuronium bromide prevents. And with
13 no evidence whatsoever that there was any pain accompanying
14 those muscle movements, the advocates on the other side
15 suggest that those are botched executions, or somebody
16 made a human error and didn't get the vein properly. Those
17 are the cases like the Clark execution in Ohio where the
18 man said, it's not working. Well, you don't need medical
19 training to tell when the guy says "it's not working" that
20 it hasn't gone into the vein.

21 JUSTICE SOUTER: So the nub of your argument
22 really is they have not made a case or they do not have
23 a record case for any significant likelihood of
24 excruciating pain.

25 MR. ENGLERT: That's correct, beyond the

1 absolute bare minimum likelihood that is inherent in any
2 process that involves human beings. They argue the
3 mixing of the drugs is a problem. There's a finding of
4 fact to the contrary by the district court well
5 supported by evidence. They argue that the placing of
6 the IVs is a problem. Kentucky really does have the
7 best-qualified person in the state to place the IVs.
8 They argue that there is a risk because the people
9 watching don't know what to look for. All they need to
10 look for is swelling, whether the person is awake.
11 That's noticeable to a lay observer. They argue that
12 the personnel monitoring the execution are not
13 sufficiently close. It's just false. The warden is
14 inches away. That's the testimony, pages 211 and 212.

15 JUSTICE GINSBURG: Still -- it's still unclear
16 why they should make such an effort to get trained personnel
17 in the first instance and then, even if they are in the
18 next room, why isn't -- why did they deliberately pick
19 nonprofessional people to both administer the drugs and
20 to check the inmate for consciousness?

21 MR. ENGLERT: There are reasons for that,
22 Justice Ginsburg.

23 JUSTICE GINSBURG: What are the reasons?

24 MR. ENGLERT: To administer the drugs
25 the only trained personnel, the only so-called trained

1 personnel, are the people who are barred by the AMA
2 ethics requirements and by Kentucky law from
3 administering the drugs: Doctors and nurses. As to --

4 JUSTICE GINSBURG: But have you that expert
5 team, and it seems that they would be preferable to
6 executioners who have no professional qualifications.

7 MR. ENGLERT: The expert team, the people who are
8 trained, the people who've had 100 practice sessions since
9 the last execution are the people who administer the drugs.
10 What --

11 JUSTICE GINSBURG: I mean the people who
12 administer the -- who place the IV lines.

13 MR. ENGLERT: They have -- they have zero
14 expertise in pushing drugs. They have expertise in
15 placing the line. They have expertise in finding a
16 vein. They have no more experience pushing drugs than
17 the person who pushes the drugs.

18 JUSTICE STEVENS: Mr. Englert, can I ask you
19 a rather basic question? Do you think the
20 constitutionality of the three-drug protocol itself is
21 at issue in this case or merely the question whether
22 Kentucky has done an adequate job of using that
23 protocol?

24 MR. ENGLERT: Well, I think what's properly
25 before the Court is only the latter question. But

1 obviously --

2 JUSTICE STEVENS: So if we just decide this
3 on the ground -- and the record is very persuasive in
4 your favor, I have to acknowledge -- but if we decide
5 the fact that Kentucky is doing an adequate job of
6 administering this protocol, that would leave open the
7 question whether the basic use of this second drug,
8 which does nothing but avoid unpleasantness for the
9 visitors, is itself constitutional?

10 MR. ENGLERT: Well --

11 JUSTICE STEVENS: Do we have to wait for
12 another case to decide that, will we?

13 MR. ENGLERT: I -- the Court could write an
14 opinion either way, obviously. There is a good reason
15 to hold that the use of the second drug is permissible.

16 JUSTICE STEVENS: Because I -- to be very
17 honest with you, I think that you're -- you make a very
18 strong case on the administration in Kentucky on the
19 record in this case, but I'm terribly troubled by the
20 fact that the second drug is what seems to cause all the
21 risk of excruciating pain, and seems to be almost
22 totally unnecessary in terms of any rational basis for a
23 requirement.

24 MR. ENGLERT: Well, Your Honor --

25 JUSTICE STEVENS: But that we're not going

1 to be able to decide today, I take it.

2 MR. ENGLERT: Petitioners' own brief
3 acknowledges that the three-drug protocol can be applied
4 constitutionally. Judge Fogel in the Morales case in
5 California so held.

6 JUSTICE STEVENS: It may have been in this
7 very case, it may be. But that leaves open a whole
8 other area of litigation, is what troubles me.

9 MR. ENGLERT: Every State that has publicly
10 said what it uses, uses the three-drug protocol. It
11 would be very strange to hold that that is cruel and
12 punishment.

13 JUSTICE STEVENS: But no legislature has
14 ever required it, as I understand it.

15 MR. ENGLERT: No, no. Fourteen legislatures have
16 required it.

17 JUSTICE STEVENS: The three-drug protocol?

18 MR. ENGLERT: The three-drug protocol, yes, sir.

19 Justice Ginsburg, back to your question.

20 There is a reason why the IV team members leave the
21 room. The curtains are opened after the IVs are placed,
22 and the people in the room can be seen by the victim's
23 families, by the inmate's families, and by the media.
24 Protecting the anonymity of members of the execution team is
25 extremely important. They are subject to all kinds of

1 pressures if their anonymity is not protected. So
2 instead of staying in the room, they go again behind a
3 one-way mirror in an adjacent room where they have an
4 extremely good line of sight to the IVs. This is
5 actually covered in the trial record in this case, that
6 they do have a good line of sight. And it's not --
7 nothing really changes because they go into another
8 room. Pages 210 and 286 to 287 of the joint appendix is
9 where there is testimony that the people in the adjacent
10 room do have a good view of the IV line.

11 JUSTICE GINSBURG: And the executioners are
12 also not visible to the public?

13 MR. ENGLERT: Correct.

14 JUSTICE GINSBURG: There was a finding that
15 the second drug serves no therapeutic purpose.

16 MR. ENGLERT: That's correct.

17 JUSTICE GINSBURG: That --

18 MR. ENGLERT: We don't quarrel with that.
19 The purpose it serves is the purpose of dignifying the
20 process for the benefit of the inmate and for the
21 benefit of the witnesses.

22 The Chief Justice said, isn't there going to
23 be litigation against another protocol as soon as it's
24 adopted? And, yes, Mr. Verrilli will say that's silly, to
25 protect the dignity of the inmate, that argument will

1 fail. But the history of death-penalty litigation
2 suggests that the next advocate who comes along
3 representing an inmate will say, the one-drug protocol
4 is no good because it doesn't do enough to protect the
5 dignity, or the two-drug protocol is no good because it
6 doesn't do enough to protect dignity.

7 With respect to the time it takes to carry
8 out an execution and whether that's a legitimate
9 consideration, I actually invite the Court's attention
10 to one of the briefs, amicus briefs, filed in support of
11 Petitioners, the Human Rights Watch brief, which in turn
12 cites the decision of the UN Human Rights Committee in
13 the Ng case, where it cites --

14 JUSTICE STEVENS: But if we held that that
15 justification was insufficient to justify this protocol,
16 it's hardly likely we would hold that it's so serious
17 and make the whole procedure unconstitutional.

18 MR. ENGLERT: I'm not sure I follow the
19 question.

20 JUSTICE STEVENS: The interest in protecting
21 the dignity of the inmate and of the observers is the
22 justification for the second drug.

23 MR. ENGLERT: Yes.

24 JUSTICE STEVENS: If we held that that --
25 that that justification is insufficient to justify the

1 protocol, how could we ever hold that that justification
2 is so serious as to make the whole procedure
3 unconstitutional?

4 MR. ENGLERT: I'll tell you frankly how you
5 could hold that. What will happen in the next case is
6 they will say: This issue wasn't raised in the trial
7 court in Kentucky; therefore, the Supreme Court decided
8 this case on an inadequate factual record, and, therefore,
9 the Court should take a new look at it because life and
10 death are at stake.

11 CHIEF JUSTICE ROBERTS: And presumably it
12 would depend upon whatever new alternative the plaintiff
13 in that case proposed.

14 MR. ENGLERT: Correct. If the standard is
15 truly eliminating all unnecessary risk of pain, then
16 anything that is not the single optimal standard is
17 unconstitutional, and the States cannot do what they've done
18 for the last 220 years, which is use different protocols at
19 different times and work to improve their protocols.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Englert.

23 Mr. Garre.

24 ORAL ARGUMENT OF GREGORY G. GARRE

25 FOR THE UNITED STATES,

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AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

MR. GARRE: Thank you, Mr. Chief Justice,
and may it please the Court:

Petitioners ask this Court to invalidate a method of execution that everyone agrees is entirely pain-free when followed and to order the State of Kentucky to adopt a method that has never been used in any execution and is out of step with the laws and practice in every death-penalty jurisdiction in the United States. The proposed constitutional standard that Petitioners say requires this extraordinary result has several fundamental flaws.

First, it is at odds with this Court's precedents establishing a substantial-risk threshold for claims of future injury in the Eighth Amendment context and this Court's cases holding that the added anguish caused by the negligent, accidental, or inadvertent infliction of pain is not the unnecessary infliction of pain prescribed by the Eighth Amendment. Justice Marshall wrote that for the Court in the *Estelle v. Gamble* opinion on page 105, and this Court has reiterated the principle that negligent, accidental, or inadvertent infliction of pain, however strong or anguishing, is not proscribed by the Eighth Amendment.

1 JUSTICE SOUTER: What do you say to the
2 response, which I think was in the briefs, that the
3 substantiality requirement has been derived in the
4 course of "conditions of confinement" sort of
5 litigation, and we really should regard execution as
6 sort of a -- a separate subject for purposes of coming
7 up with a standard. What do you say to that?

8 MR. GARRE: A few things. We are here today
9 in this section 1983 action, because this Court and the
10 Hill case and the Nelson case analogized method-of-execution
11 claims to condition-of-confinement claims insofar as these
12 claims are not directed to the punishment itself, but to the
13 manner in which punishment is implemented or carried out. So
14 this Court itself, under the Hill and Nelson case, put these
15 types of cases into the conditions-of-confinement category.

16 JUSTICE SOUTER: Well, we did for purposes
17 of making a habeas 1983 distinction --

18 MR. GARRE: But --

19 JUSTICE SOUTER: But I -- is the distinction
20 supportable when we come down to the question whether there
21 should be a standard specific to execution as opposed to
22 other conditions?

23 MR. GARRE: I don't think it is, Justice
24 Souter. The substantial-risk standard that the Court
25 has applied in the Farmer v. Brennan case and the Helling

1 v. McKinney case applies to conditions-of-confinement claims,
2 where inmates faced the risk of an excruciating pain or even
3 death. If the risk -- if the standard that the Court applies
4 to someone who is forced to spend -- to live with a
5 five-pack-a-day smoker is substantial risk, even though that
6 person faces the risk of developing lung cancer, which, I
7 think, everybody would agree is an excruciatingly painful
8 death, then I'm not sure why the Constitution would place any
9 different standard with respect to the types of claims at
10 issue in this case.

11 JUSTICE ALITO: Is there any comparative
12 element in the substantial-risk standard, if it were
13 clearly established, undisputed that there was an
14 alternative method that was much less risky, would there
15 be an Eighth Amendment problem if the State or the
16 Federal government nevertheless persisted in using a
17 method that was inferior?

18 MR. GARRE: We think that that could be part
19 of the analysis, that you would look to other feasible
20 available alternatives. Although I would say that --

21 JUSTICE SCALIA: If that's part of the
22 analysis, this never ends.

23 MR. GARRE: Well, Justice Scalia --

24 JUSTICE SCALIA: If that's part of the
25 analysis, there will always be some claim that there is

1 some new method that's been devised, and once again
2 executions are stayed throughout the country.

3 MR. GARRE: And we agree with that, and
4 that's why we think that Petitioner's standard is wrong.
5 It's going to lead to endless litigation and a regime in
6 which there is no finality.

7 The other point I wanted to make, in response to Justice
8 Alito, is that as a threshold matter, this Court's cases
9 establish that you have to show, with respect to the method
10 you're challenging, a risk that is more than the risk of
11 negligence or accident in the method that is being
12 carried out. And again, *Estelle v. Gamble* establishes
13 that; *Farmer v. Brennan* reiterates that --

14 JUSTICE KENNEDY: So your standard is that there
15 has -- well, don't let me misphrase it for you,
16 but there have to be other obvious available
17 alternatives?

18 MR. GARRE: Well, the way that we've
19 described it, Justice Kennedy, is you that have to show
20 a substantial risk that the method you're challenging
21 would impose a considerably greater degree of pain than
22 other available feasible alternatives. But to get into
23 that kind of comparative inquiry, we do think that you
24 have to get over the first threshold established by this
25 Court's cases -- that you're arguing about something

1 other than the accidental or negligent infliction of
2 pain, and we don't think Petitioners in this case have
3 even gotten over that hurdle.

4 JUSTICE KENNEDY: So your threshold 1 is the only
5 safeguard you have against Justice Scalia's concern against
6 endless litigation?

7 MR. GARRE: That would be --

8 JUSTICE KENNEDY: Or does your threshold 2 do the
9 same thing?

10 MR. GARRE: Well, threshold 2 would as well
11 because once you're into that kind of comparative inquiry,
12 you still would have to take a careful look at the
13 feasibility of the other alternative, and no one has ever
14 tried the one-drug alternative.

15 Justice Breyer, you're right. We don't know
16 whether it's going to work in practice.

17 JUSTICE SCALIA: Those who oppose capital
18 punishment entirely across the board are quite willing
19 to take a careful look at everything.

20 MR. GARRE: And --

21 JUSTICE SCALIA: They're quite willing to take a
22 careful look at other alternatives. I mean, that's the
23 problem. If we come up with a decision that requires a
24 careful look in every case whenever there is a newly
25 developed method of execution, the problem will always be

1 before us and executions will always be impermissible.

2 MR. GARRE: We agree with those concerns,
3 Justice Scalia. I want to be clear. Our standard is
4 not a least-risk standard.

5 JUSTICE BREYER: You have to set -- I mean, I
6 can't -- I don't know if "substantial" is the right word
7 to capture it. Perhaps the right word is, is there a
8 significant risk that can be easily averted?

9 MR. GARRE: Well --

10 JUSTICE BREYER: And if what I'm worried about
11 here is, do we or do we not send it back, I'm quite honestly
12 disturbed by the fact that in this Netherlands euthanasia
13 report they both recommend pancuronium and they also say that
14 the thiopental alone doesn't work, not even in grams of three
15 doses in all cases.

16 MR. GARRE: And that is the --

17 JUSTICE BREYER: That it does -- that they think
18 the contrary

19 MR. GARRE: That is the --

20 JUSTICE BREYER: And if there's uncertainty here,
21 should we send it back for consideration of all these things
22 in a more full hearing under a standard that does allow
23 comparisons with other methods, not too fine a comparison,
24 but at least a practical comparison?

25 MR. GARRE: And the answer is no. First and

1 foremost, they had an opportunity to develop the one-drug
2 alternative below. They made no effort to present any
3 evidence on that. The record is completely undeveloped,
4 and typically this Court doesn't allow people to go back
5 and relitigate the case again. And secondly --

6 JUSTICE SOUTER: Yes, but if we don't do
7 something like that in this case, Mr. Garre, another case
8 is going to come along and we're going to be right back
9 here a year from now or 18 months from now. And wouldn't
10 it be better to get one case litigated thoroughly and
11 get the -- get the issue decided, rather than simply wait
12 here for another one to wend its way?

13 MR. GARRE: We think that this Court should
14 decide the issue, and we think it should decide it by
15 saying that Petitioners have not established a
16 constitutionally significant risk.

17 JUSTICE SOUTER: Sure, but if we decide it on
18 that basis, the next petitioner is going to say, I'm
19 coming into court with evidence these other people -- that
20 these people did not present. And, therefore, we're going to
21 have a new case and new round of litigation. And I think the
22 -- that what's disturbing Justice Breyer, what's disturbing
23 me and others is we want some kind of a definitive decision
24 here, and it seems to me that the most expeditious way of
25 getting it -- if comparison analysis is appropriate, and I

1 will be candid to say I think it is -- is to send this case
2 back and say, okay, do a comparative analysis, make the
3 findings. And we will then have a case that in
4 effect will resolve the issue as much as one case can ever
5 do.

6 MR. GARRE: Well, let me make two responses to
7 that, if I could. First, again, we don't think that
8 Petitioners have shown anything close to a substantially of
9 risk that would get you into that comparative analysis here.

10 And, second, a virtue in allowing -- there is a
11 virtue in not going further in this case and allowing the
12 States themselves to continue to assess this matter. The
13 States have continuously reassessed and -- in repeated
14 modifications to their lethal injection protocols. Three
15 States within the last years have taken major internal
16 reviews of the three-drug protocol: California, Tennessee,
17 and Florida. They've all concluded that additional
18 safeguards were warranted but that --

19 JUSTICE SCALIA: You say that substantial -- that
20 comparison with other possibilities is not necessary so long
21 as the only risk that is coming is a risk of negligence or
22 improper execution of what -- of what the protocol requires,
23 right?

24 MR. GARRE: That would be --

25 JUSTICE SCALIA: You would say that so long --

1 so long as the only risk comes from negligent application of
2 the protocol, no comparison is required?

3 MR. GARRE: Yes. Yes. And --

4 JUSTICE SCALIA: And if we decided that, if
5 we decided that if this protocol is properly executed,
6 it does not create a substantial risk that would be the
7 end of the matter, wouldn't it?

8 MR. GARRE: That would be the end of the
9 matter.

10 JUSTICE SCALIA: And we would not have
11 another case in front of us next year?

12 MR. GARRE: That's -- that is probably true.
13 There is no shortage of imagination on the death-penalty
14 advocates that have brought these types of claims, but a
15 decision along those lines would go a great way to
16 providing greater clarity and certainty in this area.

17 JUSTICE GINSBURG: Mr. Garre, would you
18 explain to me why the Federal Government has picked
19 five grams instead of three?

20 MR. GARRE: May I answer the question?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. GARRE: Yes, Your Honor. The Federal
23 Government concluded that that was an appropriate dosage
24 to ensure a deep consciousness among the condemned
25 inmate. Other jurisdictions have picked three grams, and

1 I would say that the Federal Government is currently
2 considering whether five or three is the correct dosage.
3 But the Federal Government --

4 JUSTICE KENNEDY: Did you mean to say "deep
5 unconsciousness"?

6 MR. GARRE: Unconsciousness, yes, to render
7 the inmate deeply unconscious for a matter of hours.
8 That's established by the record.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr. Garre.
11 Mr. Verrilli, you have three minutes remaining.

12 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
13 ON BEHALF OF THE PETITIONERS

14 MR. VERRILLI: Thank you, Mr. Chief Justice.

15 The risk here is real. That is why in the State
16 of Kentucky it is unlawful to euthanize animals in the way
17 that Kentucky carries out its executions. And that's true
18 not just with respect to the use of pancuronium. Kentucky
19 also says that one cannot use anything other than barbiturate
20 -- one cannot use potassium -- unless someone trained in
21 ensuring effective anesthesia is participating in the
22 process. And what that is, is a marker that this is a real
23 danger, sufficiently real that it's not tolerated with
24 animals. Now, with respect --

25 CHIEF JUSTICE ROBERTS: But the anesthesia

1 concern, of course, is you don't want to kill the person
2 when you're administering just anesthesia in a surgery, and
3 so you would want somebody trained there to ensure that you
4 could bring them back if anything went wrong. That concern
5 is not present here.

6 MR. VERRILLI: Well, nor is it present with
7 respect to euthanizing animals, and, nevertheless, it's the
8 danger of the -- of the anesthesia going wrong and there
9 being a torturous pain inflicted that has led veterinarians,
10 after careful consideration, to say you've got to have
11 somebody in the process who is trained in monitoring
12 anesthetic death.

13 And, Justice Breyer, if I could refer back to your
14 Netherlands point, my understanding is that in the
15 Netherlands there is a doctor present who is trained in
16 anesthesiology who administers this whole process, and so the
17 risk is dramatically different in a situation where you have
18 that trained person there than the situation we have in
19 Kentucky.

20 Now, with respect to the other States that -- and
21 the other so-called botched executions that my friend
22 Mr. Englert referred to, it's just not right to say that
23 they were all about cut-downs and small problems. The
24 record, findings of fact in the Morales case, with respect to
25 the 11 lethal injections studied there, there were evidence

1 that six of the 11 were inadequately anesthetized, from which
2 one can readily infer they would have suffered grave pain.
3 And, indeed, the State's expert in that case admitted that it
4 was likely that one of the 11 was not adequately anesthetized
5 at the time that the pancuronium and the potassium were put
6 into the system.

7 Similarly, in the Brown case in North Carolina,
8 of the five lethal injections studied there, the evidence
9 credited by the district court was that, with respect to four
10 of them, the condemned inmate was on the gurney, gasping,
11 struggling -- not the kind of involuntary twitching that Mr.
12 Englert was worried about, but clear evidence that the
13 anesthetic is not working.

14 Now, with respect to facts in this case, with
15 respect to the lethality of thiopental, at pages -- at page
16 492 of the joint appendix, Dr. Heath says that thiopental
17 will be lethal by itself at three grams; at page 494, he
18 says, "Indeed it will be lethal by itself in virtually every
19 case at two grams." At page -- and at page -- forgive me, I
20 don't have the page number reference handy -- but Dr.
21 Dershwitz, the State's expert, says the same thing.

22 Now, the reference that Mr. Englert referred to
23 at page 499 is where Dr. Heath is being asked the question
24 of, well, would you expect death to occur when three grams
25 are administered? But he's being asked a series of questions

1 about its administration in a surgical procedure in which you
2 are using ventilators and other measures to try to keep the
3 person alive, and he said in that setting the answer is
4 no. So that's just not a fair representation of the
5 record at all.

6 Now, with respect to the question of
7 whether we ought to analogize this to the deliberate
8 indifference standard and conditions-of-confinement cases, it
9 seems to me that there's a critical and fundamental
10 difference here, which is that the Commonwealth of Kentucky
11 is making a deliberate choice here.

12 CHIEF JUSTICE ROBERTS: You can finish your
13 sentence.

14 MR. VERRILLI: Thank you, Mr. Chief Justice.

15 A deliberate choice here to use chemicals that
16 create this danger, and given that it has done so, it ought
17 to have the commensurate obligation to take the reasonable
18 steps necessary to obviate the risk.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:05 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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