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SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

Arizona Supreme Court No.
CR-13-0282-AP

Maricopa County
Superior Court
No. CR2003-038541-001

**BRIEF OF *AMICUS CURIAE*
PROFESSOR CORINNA BARRETT LAIN
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE

Corinna Barrett Lain is the S.D. Roberts and Sandra Moore Professor of Law at the University of Richmond School of Law. Professor Lain is a constitutional historian, former prosecutor, and one of the nation's leading authorities on capital punishment. Her work has been featured in the most prestigious law reviews in the country and has been cited by the United States Supreme Court.¹ Her book, *Secrets of the Killing State: the Untold Story of Lethal Injection*, will be published in April 2025.

Secrets of the Killing State is the culmination of seven years of deep research on all aspects of lethal injection, across all executing states in the country. Arizona has been a primary interest, as the state has a long history of execution failures that raise critical questions about the humanity, transparency, and constitutionality of executions by lethal injection. Amicus offers her expertise to provide this Court with critical facts bearing on whether to issue a warrant here.

¹ See *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 503 n.11 (2020) (Alito, J., concurring).

Arizona claims that it has remedied its operational deficiencies and is prepared to conduct executions in a legal manner. As discussed below, however, the most concerning aspects of Arizona's protocol have not changed one iota, dooming the state to tragic recurrences of the same problems. These range from the body's response to a massive overdose of pentobarbital, to the added risks involved in compounding the drug, to the superadded risks of maladministration under a cloak of secrecy for which Arizona is regrettably famous. Taken together, these deficiencies virtually assure that the state's planned executions will result in torturous deaths. This Court should consider that reality as part of determining whether to issue a warrant in this case.²

INTRODUCTION

"I don't think it's a secret that we inherited one of the worst, most incompetent and most ill-funded Department of Corrections in the country. . . [a]nd I don't think it takes a leap to suggest that we should understand whether they are capable of carrying out the death penalty

² Counsel for the parties did not author any part of this brief. *See* Ariz. R. Crim. P. 31.15(a).

before we do it.”³ That is how Attorney General Kris Mayes described Arizona’s Department of Corrections, Rehabilitation & Reentry (“ADCRR”) less than two years ago. Ryan Thornell, director of the ADCRR, agreed, attesting in a declaration in 2023 that the ADCRR lacked “the necessary institutional knowledge and expertise to conduct an execution.”⁴

If anything, those criticisms *understate* the magnitude of the problems plaguing Arizona’s inept lethal injection regime. Arizona—the state that, for a time, held the record for the longest botched execution in U.S. history⁵—has a well-established record of repeatedly and willfully violating its own protocols.⁶ Its most recent assurances, in 2022, that it had remedied those deficiencies were false, and led tragically to

³ Jimmy Jenkins, *Arizona Lacks Knowledge and Expertise to Conduct Execution, Governor and Prisons Chief Say*, ARIZ. REPUBLIC (Mar. 16, 2023), Jenkins I.

⁴ *Id.*

⁵ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, ARIZ. REPUBLIC (Jul. 23, 2014), Kiefer.

⁶ See *First Amendment Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1072 (9th Cir. 2019) (reiterating Ninth Circuit’s longstanding “serious concerns about the suffering caused by Arizona’s lethal-injection process”); Fernanda Santos & John Schwartz, *Arizona Loose with Its Rules in Executions, Records Show*, N.Y. TIMES (Aug 17, 2014), Santos & Schwartz.

executions featuring bloody “cutdown” attempts by inexperienced team members rooting for viable veins,⁷ and to the “surreal spectacle” of executioners taking advice from a disabled sexagenarian about how to carry out his own execution.⁸

Upon taking office, Governor Hobbs initially ordered an independent review of Arizona’s execution protocols, appointing Magistrate Judge David Duncan to lead the investigation. However, in November 2024, the Governor terminated Judge Duncan, halted the review before it was completed, and announced that Arizona was ready to restart executions, having conducted a review *of itself* and determined (yet again) that it has remedied its deficiencies.

Against this backdrop, Arizona asks this Court to issue an execution warrant for Aaron Gunches. Amicus urges this Court to pause before doing so. While amicus does not purport to know what a full and

⁷ See Jimmy Jenkins, *Clarence Dixon Execution Updates: 11:06 a.m.: Witness says Dixon gasped when drugs administered*, ARIZ. REPUBLIC (May 11, 2022), Jenkins II.

⁸ Jimmy Jenkins, *Behind the Black Curtain: Republic Reporter Describes “Surreal” Frank Atwood Execution*, ARIZ. REPUBLIC (Jun. 8, 2022), Jenkins III (“I have witnessed life. And I have witnessed death. But nothing could have prepared me for the surreal spectacle I witnessed during the execution of Frank Atwood.”).

fair-minded assessment of the facts would conclude, she can at least say with confidence that this Court should not issue an execution warrant without such an assessment.

Amicus recognizes that this Court has limited statutory discretion to refrain from issuing a warrant in this matter. Decision Order, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Mar. 2, 2023). But this is not to say the Court has no such discretion. And here, this case presents precisely the sort of facts where exercising that discretion to deny a warrant is merited. Where the facts “demonstrate the state’s inability to lawfully carry out the execution,” this Court has recognized “good cause for refraining from issuing the warrant.” *Id.* In 2023, this Court found the facts to be “speculative,” on the record at that point. *Id.*

Today, Arizona stands in an entirely different posture, with a plethora of circumstances demonstrating the state’s inability to lawfully carry out an execution. Mr. Gunches’s apparent willingness to be executed does not change these facts. Nor does it lessen the irrevocable harm that follows when the state takes life in its citizens’ name in a

manner that does not comport with the fundamental conditions that have been placed on its ultimate exercise of power.⁹

Drawing on her extensive research into lethal injection in Arizona, amicus makes three basic points. *First*, autopsies show that a massive overdose of pentobarbital, Arizona's chosen lethal injection drug, is sure or very likely to cause acute pulmonary edema, causing prisoners to drown in their own fluids. *Second*, the inherent risk associated with pentobarbital is amplified by Arizona's dubious sourcing and compounding of the drug, and its repeatedly broken promises to use qualified personnel. *Third*, Arizona's answer to its inability to actually fix what ails lethal injection has historically been secrecy, and its unexplained decision to terminate Judge Duncan's review is the latest and most blatant example.

⁹ See 1992 *State of Ariz. initiative and referendum publicity pamphlet*, general election, 16-17 (Nov. 1992), Ariz. Pub. Pamphlet, 1992 (Arizona voter pamphlet stating that "[a] civilized society should not inflict unnecessary suffering on any person, even those who are condemned to die," which was ultimately approved by 76 percent of voters).

ARGUMENT

I. Arizona’s Pentobarbital Protocol Is Sure or Very Likely to Cause Severe Pain.

For decades, a single shot of pentobarbital was viewed as the most defensible lethal injection protocol. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 870 (2015). That changed in 2020, when a study of over 200 execution autopsies revealed that 84 percent of executions using a one-drug pentobarbital protocol—49 of 58—documented acute pulmonary edema.¹⁰ Pulmonary edema is a medical condition in which fluid seeps into the lungs. *Acute* pulmonary edema (also known as “flash pulmonary edema”) occurs when the pulmonary edema is sudden and severe, developing in seconds and minutes rather than hours or days. Acute pulmonary edema is excruciatingly painful, causing individuals to experience the sensation of being waterboarded as they drown in their own fluids.¹¹ Afflicted

¹⁰ Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020), Caldwell et al.

¹¹ *In re: Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, 2019 WL 244488, at *63 (S.D. Ohio, Jan. 14, 2019) (describing pulmonary edema as “inducing a sense of drowning and the attendant panic and terror, much as would occur with the torture tactic known as waterboarding”). In the wake of this finding, Ohio Governor Mike DeWine announced, “Ohio is not going to execute someone under my watch when a federal judge has found it to be cruel and unusual punishment.” Liliana Segura,

individuals experience “terror, panic, drowning, [and] asphyxiation,” for which patients in the clinical setting would receive morphine “because they are in such a state of panic.”¹²

A doctor reviewing a separate set of autopsies from pentobarbital executions in the federal government’s 2020 litigation wrote in her report that “flash pulmonary edema is a virtual medical certainty in any execution carried out under the federal government’s pentobarbital protocol.”¹³ A federal court stayed those prisoners’ execution, finding they had “amassed an extensive factual record” that pentobarbital would

Ohio’s Governor Stopped an Execution Over Fears It Would Feel Like Waterboarding, THE INTERCEPT (Feb. 7, 2019), Segura I.

¹² Liliana Segura, “*Our Most Cruel Experiment Yet*”: *Chilling Testimony in a Tennessee Trial Exposes Lethal Injection as Court-Sanctioned Torture*, THE INTERCEPT (Aug. 5, 2018), Segura II.

¹³ *Roane v. Barr*, No. 19-mc-145 (TSC), Expert Declaration of Gail A. Van Norman, M.D., 50 (D.C. Cir. filed Nov. 1, 2019), ECF No.374-3. Of the 27 autopsies reviewed, seven failed to report on the lungs altogether, but the remaining 20 all documented acute pulmonary edema. *Id.*

inflict excruciating pain.¹⁴ But the Supreme Court lifted the stay, thus ending the litigation because the prisoners were dead.¹⁵

Mr. Gunches should not suffer the same fate. Whether there are ways—either through dosage or administration or other method—to mitigate the risk of pulmonary edema from a pentobarbital execution is beyond the scope of this brief, but it was squarely within what Judge Duncan was commissioned to evaluate. Arizona’s decision to terminate his inquiry before receiving his findings, and to then resume executions based on a functionally unchanged protocol, demonstrates the State’s present inability to lawfully carry out an execution, and its willingness instead to subject Mr. Gunches to a torturous death.

¹⁴ *Roane v. Barr (In re Fed. Bureau of Prisons’ Execution Protocol Cases)*, 471 F. Supp. 3d 209, 218, 291 (D.D.C.), *vacated by Barr v. Lee*, 591 U.S. 979 (2020). The federal government’s argument that prisoners are either dead or unconscious when the pulmonary edema occurs has been debunked by medical professionals; *see id.* at 219; *see also* Caldwell, et al., *supra* fn. 10 (explaining why pulmonary edema is physically impossible to develop in a person already dead).

¹⁵ *Barr v. Lee*, 591 U.S. 979 (2020).

II. Pentobarbital's Risks Are Amplified by Arizona's Dubious Drug Sourcing and Compounding, and Its Repeatedly Broken Promises to Use Qualified Personnel.

Compounded pentobarbital poses risks beyond those inherent in the drug itself, and those risks are further amplified by the State's repeatedly broken promises to use qualified personnel.

In 2023, ADCRR Director Thornell went on record saying that he had “serious concerns about the qualification and competency of the compounding pharmacist and the process used to compound the current supply of lethal injection drugs.”¹⁶ Today, the State tells this Court *not* that it found a more competent compounder, but that it changed its mind. The same compounding pharmacy that it had “serious concerns about” less than two years ago is now just fine.¹⁷

Amicus does not know the identity of Arizona's compounder, but notes that every other compounding pharmacy thus far unveiled as supplying drugs for executions has been beset by numerous safety and regulatory violations.¹⁸ The harsh reality is that the kind of shadowy

¹⁶ See Jenkins, *supra* fn. 3.

¹⁷ See Ryan Thornell, ADCRR's Execution Preparedness, at 6-8 (Nov. 22, 2024), Thornell.

¹⁸ See CORINNA BARRETT LAIN, SECRETS OF THE KILLING STATE, at 165-68 (2025).

shop that clandestinely trades lethal drugs for envelopes of cash is just as one would suspect, yet Arizona has an unfortunate history of seeking drugs from precisely such unsavory suppliers. In 2010, Arizona broke federal law to import drugs from a drug distributor operating in the back of a London driving school,¹⁹ and then did so again in 2015 when it tried to import drugs from a gray-market supplier in India, which were promptly seized by federal authorities upon delivery.²⁰

Yet even aside from well-justified concerns about specific suppliers, the use of compounded drugs for lethal injection is inherently risky. Indeed, in the pharmacy trade, compounding sterile injectables is literally called “high-risk compounding.”²¹ Most compounding pharmacies lack the infrastructure for high-risk compounding. Their facilities, equipment, and air flow are not designed to prevent

¹⁹ *Beatty v. FDA*, 853 F. Supp. 2d 30, 34-35 (D.D.C. Mar. 27, 2012), *aff’d in part, vacated in part sub nom. by Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

²⁰ Chris McDaniel & Tasneem Nashrulla, *This Is the Man in India Who Is Selling States Illegally Imported Execution Drugs*, BUZZFEED NEWS (Oct. 20, 2015), McDaniel & Nashrulla; Tasneem Nashrulla, Chris McDaniel, and Chris Geidner, *Three States Bought Illegal Execution Drugs from Supplier in India*, BUZZFEED NEWS (Oct. 23, 2015), Nashrulla et al.

²¹ See generally Mark G. Klang, *Sterile Preparation Formulation*, COMPOUNDING STERILE PREPARATIONS 51 (4th ed. 2018), Klang.

microbiological contaminants, and they lack the level of environmental monitoring that sterile compounding requires.²² In addition, their regulation is notoriously lax, yielding stark drop-offs in drug quality. While the failure rate for FDA-approved manufactured drugs is less than 2%, the failure rate for compounded drugs is 20-35%.²³

Further amplifying these risks is the fact that the active pharmaceutical ingredient (API) needed to compound pentobarbital has not been available on the domestic market for years, leading pharmacy experts to conclude that the pharmacies mixing pentobarbital for state executions are getting their APIs from the gray or black market—*i.e.*, unregulated suppliers whose product may be substandard, contaminated, or even counterfeit.²⁴ Arizona's API was revealed to come

²² *Compounding and the FDA: Questions and Answers*, FDA (Nov. 15, 2024), [FDA Q&A](#).

²³ *Report: Limited FDA Survey of Compounded Drug Products*, FDA (Jun. 21, 2018), [Limited FDA Survey](#) (reporting FDA sample that found thirty-four percent failure rate among compounded drugs); Jennifer Gudeman et al., *Potential Risks of Pharmacy Compounding*, 13 DRUGS R.D. 1, 4 (Mar. 23, 2013), [Gudeman et al](#) (reporting Missouri study that found failure rates ranging from 11.6–25.2 percent, Ohio study finding over 1300 contaminated compounded products, and Texas study that found overall failure rate of compounded drugs of twenty-three percent).

²⁴ *Bucklew v. Precythe*, No. 17-8151, Brief of *Amici Curiae* Pharmacy, Med., & Health Policy Experts in Support of Petitioner, 19-20, (U.S. filed July 23, 2018).

from a chemical company that makes solutions for calibrating machines—its business is not medical-grade API at all.²⁵ One might surmise that this is the reason why the State’s API came in unmarked jars—Arizona’s source didn’t have the FDA-approved labels to place on those containers. As a point of comparison, the American Veterinary Medical Association has taken a stand against using non-FDA-approved APIs for animal euthanasia.²⁶ Arizona intends to kill Mr. Gunches with chemicals deemed unfit for rabid animals.

One response to the inherently high risk of compounded sterile injectables is to have them tested for purity and potency. But the State does not conduct its testing by an independent testing center, as is standard practice for compounded injectables. The State has chosen, once again without explanation, to have its testing done by the state crime lab, a self-interested arm of the Department of Public Safety not set up to pass judgment on whether a chemical is fit for human use. *Cf. First Amendment Coal.*, 938 F.3d at 1077 (“Reports of executions by the same

²⁵ See *Capital Punishment in the United States: Last Week Tonight with John Oliver*, Season 11, Episode 7 (April 7, 2024), [Oliver](#) (discussing Absolute Standards).

²⁶ *Compounding from Unapproved (Bulk) Substances in Food Animals*, Am. Veterinary Med. Ass’n (2023), [AVMA.org](#).

prison officials who carry them out are not adequate substitutes” for public accountability).

Further amplifying all of the above risks is Arizona’s abysmal record of unfit, unqualified, and untrained executioners. Arizona is the state that hired a doctor with more than 20 malpractice suits filed against him after a federal court in Missouri forbade him to work as an executioner there;²⁷ the state that made assurances that it was conducting background checks although not required by the protocol, which turned out not to be true;²⁸ and the state that, even after adding background checks to its protocol pursuant to a 2009 settlement, then willfully violated that agreement by conducting *five* executions with full knowledge that one of its medical team members did not hold a medical license of any kind.²⁹ On paper, the state was dutifully screening IV team members. In reality, it was doing nothing of the kind. Judge Duncan’s 2024 draft summary noted “correction officials seeking to learn on the

²⁷ Michael Kiefer & Dale Baich, *Poorly Executed: How Arizona Has Failed at Carrying Out the Death Penalty*, ARIZ. MIRROR (Apr. 24, 2023), [Kiefer & Baich](#).

²⁸ *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *16 n.6, *23 (D. Ariz. Jul. 1, 2009).

²⁹ *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *6 (D. Ariz. Dec. 21, 2011).

eve of an execution what doses of lethal drugs to administer from Wikipedia.”³⁰ He was terminated before he could complete his findings. This is the context in which the State asks this Court to trust it, as it once again purports to have a qualified execution team.

III. Arizona’s Most Awesome Exercise of Power Requires Accountability, and Its Decision to Terminate Its Independent Review Renders That Impossible.

Of all the troubling facets of Arizona’s lethal injection process, arguably the most concerning is the State’s unexplained decision to dismiss Judge Duncan before his final findings. Instead, the ADCRR completed a review *of itself*, and tells this Court that all is well. Again. Amicus’s study of corrections departments reveals a striking pattern: self-reviews *always* conclude the department has remedied its deficiencies, even when this is patently false. The true test is an independent review. Arizona officials terminated theirs.

As this Court has observed, “[d]emocracy blooms where the public is informed and stagnates where secrecy prevails.”³¹ Arizona’s commitment to democratic accountability is commendable in other

³⁰ David Duncan, *Draft IRC Summary Report on Arizona Execution Preparedness*, at 10 (2024), Duncan.

³¹ *Phoenix Newspapers Inc. v. Jennings*, 107 Ariz. 557, 561 (1971).

contexts. The State has laws to protect against bribery and collusion in government contracts for things as mundane as toilet paper purchases. *E.g.*, A.R.S. § 13-2602 (bribery); *id.* § 44-1416 (collusion in government contract). Yet nowhere is accountability more important than when a state takes life in its citizens' name, and nowhere has Arizona worked harder to suppress the public's knowledge of how it conducts itself in its most powerful moment.³²

Tellingly, in litigation over Arizona's longstanding "no sound" policy during executions, the State insisted that "allowing witnesses to hear the sounds of the entire execution process could increase the risk of litigation." *First Amendment Coal.*, 938 F.3d at 1077. In short, Arizona was worried that the stark reality of its execution process was bad enough to get it sued. A federal court rejected that justification, holding "Arizona does not have a legitimate penological interest in hampering efforts to ensure the constitutionality of its executions." *Id.* at 1076-77.

³² In 2022, the ADCRR denied the Arizona Republic's request for media access to the first of the state's three executions in 2022. Jimmy Jenkins, *Arizona Violates Journalists' Rights to Witness Executions, Attorney Says*, ARIZ. CENTRAL (May 23, 2022), Jenkins IV.

The same concerns color Arizona's premature dismissal of Judge Duncan in the midst of his review.

Whether or not states are using secrecy for the purpose of hiding misconduct, it is at least the case that secrecy *allows* such conduct to be hidden. Behind the veil of secrecy lie documented violations of state and federal laws, intentionally breached contracts, clandestine drug deals with an assortment of sketchy suppliers, executions with the wrong drug, and a myriad of choices that no state official could defend. The decision to terminate an independent review, particularly as it is documenting patently problematic processes, falls into this category.

Arizona asks for a death warrant. Mr. Gunches apparently acquiesces. But the interests at stake when a state kills in its citizens' name are larger than those of the parties. One might very well support the death penalty and yet oppose executions in the name of expediency that inflict a torturous death. Arizona began a review that promised to provide transparency and accountability in the state's most powerful moment. It should not be allowed to conduct an execution until that review has concluded.

CONCLUSION

In light of these critical issues, amicus urges this Court not to issue a warrant for the execution of Aaron Gunches. At the very least, the Court should set a Briefing Schedule for the Motion for Warrant of Execution at its conference on January 7, 2025, and permit amicus to submit additional briefing on why a warrant for the execution of Aaron Gunches should not issue.

RESPECTFULLY SUBMITTED on January 6, 2025.

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CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 31.12(a)(5). The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,486 words.

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