No. 13-___

IN THE

Supreme Court of the United States

CHRISTOPHER SEPULVADO,

Petitioner,

v.

BOBBY JINDAL ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether and to what extent the Due Process Clause of the Fourteenth Amendment entitles a condemned inmate to timely notice of the method by which he will be executed.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner was the sole appellee below.

Respondents are Governor Bobby Jindal, Secretary James M. LeBlanc of the Department of Public Safety and Corrections, Warden Burl Cain of the Louisiana State Penitentiary, Warden Angie Norwood of Death Row, the Louisiana Department of Public Safety and Corrections, and unidentified John Does (the executioners).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Sepulvado respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 729 F.3d 413. The district court's opinion (Pet. App. 16a–20a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on August 30, 2013. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner, a condemned inmate, asserts a Fourteenth Amendment due process right to disclosure of the manner by which Louisiana will execute him. After the state rejected his attempts to obtain that information through state administrative procedures, petitioner promptly intervened in an existing federal lawsuit raising similar issues. The district court agreed with petitioner's claim and granted him a preliminary injunction requiring the state to turn over

its lethal-injection protocol, reasoning that the information was necessary for the court to determine whether the method of execution violates the Eighth Amendment's bar to cruel and unusual punishment. On the state's appeal, the court of appeals reversed. Four judges dissented from the denial of rehearing en banc.

1. Petitioner was convicted of murder and sentenced to death in Louisiana state court in 1993. Well before his scheduled execution, he exhaustively sought to learn the protocol that the state will use to execute him. In April 2012 and again in December 2012, petitioner sought the protocol pursuant to Louisiana's Public Records Act. Stay App. 8a–10a, 16a–21a.[1] The Department of Corrections, however, refused to disclose it. *Id.* at 12a–14a, 23a–28a. Petitioner immediately filed an administrative request for the protocol with the prison where he is held, which the warden denied. *Id.* at 30a–31a, 33a.

Having timely exhausted all of his state remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), petitioner promptly moved to intervene in a lawsuit filed by another condemned inmate in the Middle District of Louisiana. Court of Appeals Record (C.A. R.) 75–97. Petitioner alleged that Louisiana's refusal to provide him with the protocol by which he will be executed violates the Due

[1] "Stay App." refers to the Appendix to petitioner's parallel Application for a Stay of Execution. "Stay" refers to the Application itself.

Process Clause of the Fourteenth Amendment and also asserted claims under the Eighth Amendment. *Id.* at 92–96.

The district court held a hearing and, agreeing with petitioner's claim, granted him a preliminary injunction requiring the state to disclose the protocol. Pet. App. 20a. The district court recognized that "[t]here is no question that [petitioner] has a right to raise [the Eighth Amendment claim] that the method of execution . . . inflict[s] cruel and unusual pain." *Id.* 17a. The court reasoned that "[i]t is axiomatic that . . . an inmate who is to be executed cannot challenge a protocol as violative of the 8th Amendment until he knows what that protocol contains." *Id.* The court noted that "[t]he intransigence of the State Defendants in failing to produce the protocol requires the Court to issue this order," *id.* 20a, and that "[t]he delays inherent in [the discovery] process will not offer Sepulvado a meaningful opportunity to present his 8th Amendment challenge under the current execution date," *id.* 19a.

Louisiana appealed. While the appeal was pending, Louisiana disclosed its then-current lethal-injection protocol. That protocol calls for the use of a massive dose of a single drug, pentobarbital. Louisiana did not maintain that its appeal was moot, however, presumably because of the substantial prospect that it would change the protocol, including because of substantial questions regarding whether it is practically and legally feasible for the state to acquire pentobarbital. The state accordingly continued to insist in the Fifth Circuit that petitioner

had no right to know the protocol by which he will be executed.

The Fifth Circuit reversed the district court and vacated the injunction. *Id.* 15a. The court held that petitioner had failed to identify "a cognizable liberty interest" under the Due Process Clause. *Id.* 10a. It reasoned that "[p]erhaps the state's secrecy masks 'a substantial risk of serious harm,' but it does not create one." *Id.* 12a (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion) (footnote omitted)). Without further elaboration, the panel asserted that "[a]dopting the district court's reasoning would frustrate the State's significant interest in enforcing its criminal judgments." *Id.* 10a (internal quotation marks omitted). The panel also discounted the importance of petitioner's asserted due process right because, "[d]espite Louisiana's concealment of its protocol, Sepulvado has managed to assert a litany of specific cruel-and-unusual-punishment claims." *Id.* 11a.[2]

Petitioner's request for rehearing en banc was denied over four dissents, with three judges joining a dissenting opinion. The dissenters would have affirmed the injunction on the merits, writing:

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[2] The Fifth Circuit separately opined that petitioner's supposed delay in instituting this action undermined his entitlement to a stay of execution. Pet. App. 13a–15a. That issue is addressed in petitioner's separate application to this Court for a stay of execution (at 22–26).

> If a State does not officially release the details of its execution protocol, a court would have no way of verifying whether the State planned to use pentobarbital or another substance, such as expired or contaminated sodium thiopental, or an entirely different chemical whose properties could very well cause an unconstitutional degree of pain and suffering. If Sepulvado were not given such notice before his execution takes place, there is absolutely no possibility of a post-deprivation hearing or any opportunity to be heard "at a meaningful time and in a meaningful manner."

Id. 31a–32a (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)). Alternatively, the dissenters opined *sua sponte* that they would have vacated the panel decision as moot because in their view "the State complied fully with the terms of the preliminary injunction – by turning over its revised lethal-injection protocol to Sepulvado – before the panel . . . issued its decision." *Id.* at 27a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for two reasons. First, this case squarely presents a legal question that arises with great frequency in capital litigation and is the subject of significant disagreement among federal judges. This Court's intervention is essential to finally resolve the disagreement, which otherwise threatens continuing disruption of execution proceedings. Second, under this Court's precedents, a condemned inmate has a due process right to timely notice of the

protocol that will be used to execute him, to permit the courts to determine whether the protocol violates the Eighth Amendment. Further, because there is substantial doubt about whether the state will execute petitioner according to the protocol it has disclosed (and has already violated), the state has not mooted its appeal.

I. This Court Should Grant Certiorari Because The Case Presents An Ideal Vehicle To Resolve A Legal Question Of Great National Importance.

This petition presents a pure question of law: whether a condemned inmate has a due process right to know the protocol by which he will be executed. That question does not turn on the particular facts of any given case. Rather, it is determinative of the states' obligation to inform all condemned inmates of the manner in which the death penalty will be imposed. The purpose and effect of states' refusal to disclose that information are to prevent the federal courts from fulfilling their obligation to determine whether executions comport with the Eighth Amendment. *See* Pet. App. 17a; Part II, *infra*.

This issue arises frequently. States regularly refuse to disclose execution protocols. Every state that permits capital punishment has changed its method of execution since this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), as manufacturers have ceased production or restricted the distribution of several drugs commonly used in lethal injections. *See* Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. Times, Nov. 8, 2013, at A1. Those changes

have given rise to the prospect that the federal courts will be called upon to determine whether the new, untested protocols comport with the Eighth Amendment. In response, states have sought to minimize the prospect that the courts will invalidate their new methods of executions, including by simply refusing to disclose the protocols. Deborah W. Denno, *Lethal Injection Chaos Post-*Baze, 102 Geo. L.J. (forthcoming 2014) (manuscript at 45), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328407 ("As states home in on local compounding pharmacies as a potential source of lethal injection drugs, they are becoming increasingly less willing to share information about executions with the public, which raises the disturbing possibility that states are knowingly trying to hide the risks associated with compounded drugs.").[3]

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[3] *Cf.* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 Yale L. & Pol'y Rev. 259, 277 & n.91 (2009); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 95 (2007) ("States . . . now reveal less [about how they perform lethal injections] than ever before."). Not only do state officials routinely refuse to disclose execution protocols, but several states – including Arizona, Georgia, South Dakota, and Tennessee – by statute now make secret the sources of their lethal-injection drugs. Ariz. Rev. Stat. Ann. § 13-757(C) (2010); Ga. Code Ann. § 42-5-36(d)(2) (West 2008); S.D. Codified Laws § 23A-27A-31.2 (2013); Tenn. Code Ann. § 10-7-504(h)(1) (West 2010). Georgia has taken the extraordinary step of classifying the identities of its lethal-injection drug suppliers as a "confidential state secret," Ga. Code Ann. § 42-5-36(d)(2), not to be disclosed under Georgia's Open Records Act "*or under judicial process*," *id.* (emphasis

This case is a perfect example. Louisiana has fought tooth and nail to keep its protocol secret. It rejected petitioner's two Public Records Act requests and his further administrative request. Stay App. 12a–14a, 23a–28a, 33a. The state then opposed this suit and appealed the issue to the Fifth Circuit.

The growing practice of shielding execution protocols from judicial scrutiny heightens the risk that states will devise protocols that violate the Eighth Amendment. Governmental practices are most likely to depart from constitutional requirements when they are insulated from meaningful review. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) ("Without publicity, all other checks [on government] are insufficient . . . ." (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)) (internal quotation mark omitted)); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment . . . ."). "[S]tates concealing their procedures are more likely to cut corners and make mistakes than if their procedures are in plain view." Eric Berger, *In Search of a Theory of Deference: The*

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added). The constitutionality of Georgia's statute is currently being litigated before the Georgia Supreme Court. Order, *Hill v. Owens*, No. 2013-CV-233771 (Ga. Sup. Ct. Jul. 18, 2013), *appeal docketed*, No. S14A0092 (Ga.). Over a heated dissent, Missouri recently successfully obtained a writ of mandamus against discovery of the identities of its prescribing physician, compounding pharmacy, and drug testing laboratory. *See In re: Lombardi*, No. 13-3699 (8th Cir. Jan. 24, 2014) (en banc).

Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making, 88 Wash. U.L. Rev. 1, 61 (2010). Indeed, "death penalty states' aversion to transparency is . . . rooted in the desire to conceal inconsistencies and incompetence." Denno, *supra* (manuscript at 48); *see also id.* (manuscript at 49) ("The lethal injection procedure is more dangerous and inconsistent than ever, and the result is a perpetual effort by states to maintain secrecy at a time when transparency is most paramount.").

This concealment is a reversal of prior practice: when states moved executions out of the public realm and into prisons in the mid-1800s, they "implemented procedures that ensured executions would remain open to some public scrutiny." *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002). For example, when a committee of the New York legislature debated whether to move executions into prisons, it noted that "if punishments were privately inflicted, it could not be known whether they were actually, and justly and properly, inflicted . . . or that persons had not become[] victims." Louis P. Masur, *Rites of Execution* 115 (1989) (quoting *Document No. 79*, *in* 2 *Documents in the Senate of the State of New York, Fifty-Eighth Session, 1835*, at 241, 244, 250 (1835)) (internal quotation marks omitted).

Not surprisingly, the Question Presented arises with great frequency. Cases mounting due process challenges to states' refusals to disclose their execution protocols are legion. When a state attempts to withhold its protocol, condemned inmates almost universally litigate their due process right to obtain

notice and an opportunity to be heard. Federal courts have been flooded with lawsuits and stay requests, often on the eve of a condemned inmate's execution.[4]

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[4] *See Butts v. Chatman*, No. 5:13-CV-194 MTT, 2014 WL 185339 (M.D. Ga. Jan. 15, 2014); *Bridges v. Beard*, 941 F. Supp. 2d 584 (E.D. Pa. 2013); *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668 (D. Ariz. Oct. 7, 2013); *Hoffman v. Jindal*, No. 12-796-JJB, 2013 WL 489809 (M.D. La. Feb. 7, 2013); *Creech v. Reinke*, No. 1:12-CV-00173-EJL, 2012 WL 1995085 (D. Idaho June 4, 2012); *Towery v. Brewer*, No. CV-12-245-PHX-NVW, 2012 WL 592749 (D. Ariz. Feb. 23, 2012), *aff'd on other grounds*, 672 F.3d 650 (9th Cir.), *cert. denied*, 132 S. Ct. 1656; *Beaty v. Brewer*, 791 F. Supp. 2d 678 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir.); *Powell v. Thomas*, 784 F. Supp. 2d 1270 (M.D. Ala. 2011), *aff'd*, 641 F.3d 1255 (11th Cir.); *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628 (D. Ariz. Dec. 21, 2011); *Arthur v. Thomas*, No. 2:11-CV-438-MEF, 2011 WL 5294656 (M.D. Ala. Nov. 3, 2011), *rev'd and remanded*, 674 F.3d 1257 (11th Cir. 2012); *Cook v. Brewer*, No. CV 10-2454-PHX-RCB, 2011 WL 251470 (D. Ariz. Jan. 26, 2011), *aff'd*, 637 F.3d 1002 (9th Cir.); *Landrigan v. Brewer*, No. CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25, 2010), *aff'd*, 625 F.3d 1144 (9th Cir.), *vacated*, 131 S. Ct. 445; *Pavatt v. Jones*, No. CIV-10-141-F, 2010 WL 7609469 (W.D. Okla. May 6, 2010); *Jones v. Hobbs*, No. 5:10CV00065JLH, 2010 WL 1417976 (E.D. Ark. Apr. 5, 2010), *vacated*, 604 F.3d 580 (8th Cir.); *Williams v. Hobbs*, No. 5:09CV00394 JLH, 2010 WL 749563 (E.D. Ark. Mar. 2, 2010), *aff'd*, 658 F.3d 842 (8th Cir. 2011); *Turner v. Epps*, No. 4:07CV77-WAP, 2010 WL 653880 (N.D. Miss. Feb. 19, 2010); *Clemons v. Crawford*, No. 07-4129-CV-C-FJG, 2008 WL 2690302 (W.D. Mo. June 30, 2008), *aff'd*, 585 F.3d 1119 (8th Cir. 2009); *Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093 (W.D. Okla. Jan. 11, 2006); *Oken v. Sizer*, 321 F. Supp. 2d 658 (D. Md.), *stay vacated*, 542 U.S. 916 (2004).

Although the Question Presented has not prompted a circuit conflict, it is the subject of substantial disagreement among jurists, demonstrating that this Court's intervention is warranted. The Fifth, Eighth, Ninth, and Eleventh Circuits have held that a condemned inmate has no due process right to timely notice of the method of his execution. *See* Pet. App. 6a–12a; *Williams v. Hobbs*, 658 F.3d 842, 851–52 (8th Cir. 2011); *Valle v. Singer*, 655 F.3d 1223, 1236 & n.13 (11th Cir. 2011); *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). However, those rulings have generated significant dissents from a substantial number of judges. In this case, four judges dissented from the denial of rehearing en banc, three by separate opinion. Pet. App. 22a–36a. In their view, without disclosure "a court would have no way of verifying whether the State planned to use pentobarbital or another substance . . . whose properties could very well cause an unconstitutional degree of pain and suffering." *Id.* 31a. Seven judges dissented by opinion from the Ninth Circuit's denial of rehearing en banc, insisting that a condemned inmate "has a right to reasonable notice of changes or variations to the mode and manner in which the State plans to carry out his execution in order to review it and ensure that it comports with constitutional requirements." *Beaty*, 649 F.3d at 1073.

The Question Presented has also divided the district courts. *Compare* Pet. App. 16a–20a, *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *23 n.9 (D. Ariz. July 1, 2009), *aff'd*, 631 F.3d 1139 (9th Cir. 2011), *and Oken v. Sizer*, 321 F. Supp. 2d 658, 663 (D. Md. 2004), *stay vacated*, 542 U.S. 916,

with Towery v. Brewer, No. CV-12-245-PHX-NVW, 2012 WL 592749, at *16–*18 (D. Ariz. Feb. 23, 2012), *aff'd on other grounds*, 672 F.3d 650 (9th Cir.), *cert. denied*, 132 S. Ct. 1656, *and Beaty v. Brewer*, 791 F. Supp. 2d 678, 685–86 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir.).

Because the Question Presented has been so thoroughly ventilated in the lower courts, there is no benefit to denying review so that it may percolate further. The courts of appeals that have finally decided the issue have jurisdiction over roughly seventy-five percent of executions in the United States. *Cf.* Pet. App. 35a (Dennis, J., dissenting) ("More executions take place in our circuit than anywhere else . . . .").[5]

Indeed, views on the Question Presented are so well developed that when it arises, judges generally cite to prior majority and dissenting opinions without adding substantial further analysis. *See, e.g.*, Pet. App. 7a–8a (citing *Beaty*, 791 F. Supp. 2d at 685–86, and *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1282–83 (M.D. Ala. 2011)); *id.* 19a (citing *Oken*, 321 F. Supp. 2d at 664); *Williams*, 658 F.3d at 851 (citing *Powell v. Thomas*, 641 F.3d 1255, 1258 (11th Cir. 2011)); *Beaty*,

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[5] Since 2010, 73.6% of executions have been conducted by Texas, Florida, Arizona, Alabama, Mississippi, Georgia, Missouri, Idaho, South Dakota, South Carolina, Louisiana, and Washington. *See Number of Executions by State and Region Since 1976*, Death Penalty Info. Center, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated Jan 16, 2014).

791 F. Supp. 2d at 686 (citing *Powell*, 784 F. Supp. 2d at 1282–83); *Dickens*, 2009 WL 1904294, at *23 n.9 (citing *Oken*, 321 F. Supp. 2d at 664).

Importantly, if this Court grants certiorari, it will not disrupt the states' general administration of the death penalty. During the pendency of *Baze* in this Court, there was a broad halt to executions nationally while this Court considered whether and when drug protocols violate the Eighth Amendment. Here, by contrast, a state will avoid a stay of execution on the basis of this due process claim merely by disclosing its protocol.[6]

On the other hand, if this Court denies review, the Question Presented will continue to cast a cloud of uncertainty over capital litigation. Because the question arises so frequently and is constantly litigated, it is often the subject of last-minute requests for stays of execution. If this Court denies certiorari, significant uncertainty will remain, requiring lower courts to continue to devote substantial time and energy to considering those challenges, and raising the prospect of stays of execution on the eve of scheduled execution dates. Although the question has been decided by the courts of appeals with jurisdiction over most executions, counsel to capital defendants generally view themselves as having an ethical

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[6] To the extent a stay of execution is necessary in this individual case, it is necessary for one reason only: the state's continued insistence that it has no obligation to provide petitioner with the protocol that will actually be used in his execution.

obligation to pursue the Question Presented vigorously in the district court and on appeal in the absence of a definitive ruling by this Court.

This case is also an ideal vehicle to resolve the Question Presented. The court of appeals squarely decided the issue. As discussed more fully in petitioner's application for a stay of execution, Stay 26–31, this question has not been properly presented by prior cases, all of which have reached this Court in a posture in which a state had already given the inmate all material information about the method of his execution, and the inmate offered no evidence that the information he had received was inaccurate.[7] Here, however, there is substantial reason to believe that petitioner will be executed in a manner that has not yet been disclosed to him. *Id.*

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[7] *See Yowell v. Livingston*, 134 S. Ct. 417 (2013) (mem.) (denying certiorari where condemned inmate knew that he would be executed using compounded pentobarbital from a particular pharmacy); *Beaty v. Brewer*, 131 S. Ct. 2929 (2011) (mem.) (denying certiorari where state informed condemned inmate of a last-minute change to its execution protocol); *Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010) (mem.) (vacating stay of execution where condemned inmate knew execution drug and its country of origin, and there was "no evidence in the record to suggest that the drug obtained from a foreign source is unsafe"); *Sizer v. Oken*, 542 U.S. 916 (2004) (mem.) (vacating stay of execution grounded in condemned inmate's due process right to notice of his method of execution, where inmate unduly delayed seeking a stay). The petitioner in *Williams v. Hobbs*, 133 S. Ct. 97 (2012) (mem.), voluntarily withdrew his petition after the state of Arkansas enjoined all executions.

II. Certiorari Should Be Granted Because The Fifth Circuit's Decision Conflicts With This Court's Precedents.

The Fifth Circuit's holding that the Constitution permits states freely to withhold the information necessary for the courts to enforce the Eighth Amendment's prohibition on cruel and unusual punishment cannot be reconciled with this Court's precedents. The Court analyzes procedural due process claims in two steps. First, it asks whether a state action interferes with the plaintiff's life, liberty, or property. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). If so, it "examines whether the procedures attendant upon that deprivation were constitutionally sufficient," *id.*, applying the three-part framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A. A State's Lethal-Injection Protocol Implicates A Condemned Inmate's Life Interest.

The method by which the state will conduct an execution implicates a condemned inmate's life interest in avoiding "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).[8] Procedural due process in

[8] A condemned inmate "maintains a residual life interest" in the execution being conducted consistent with the requirements of the Constitution. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (plurality opinion); *see also id.* at 288 (O'Connor, concurring in part and concurring in the judgment)

turn protects a condemned inmate's right not to be executed in a manner that violates the Eighth Amendment. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 n.3 (1998) (plurality opinion) ("This substantive constitutional prohibition [against cruel and unusual punishment] implicate[s] due process protections."). In *Ford v. Wainright*, 477 U.S. 399 (1986), the Court established that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Id.* at 410 (plurality opinion). To vindicate that Eighth Amendment right, the Court held that convicted inmates claiming insanity are entitled to procedural protections under the Fourteenth Amendment. *Id.* at 413–14; *id.* at 424 (Powell, J., concurring in part and concurring in the judgment) ("It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a 'fair hearing.' Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause."). The Court therefore concluded that Florida's inadequate procedures for determining a prisoner's sanity would

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("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *id.* at 291 (Stevens, J., concurring in part and dissenting in part) ("There is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does."). That interest is "separate from the life interest already adjudicated in the inmate's conviction and sentence." *Id.* at 281 n.3 (plurality opinion). Thus, for example, a condemned inmate cannot be "summarily executed by prison guards." *Id.* at 281.

work a deprivation of life without due process of law in violation of the Fourteenth Amendment. *Id.* at 413–18 (plurality opinion); *id.* at 424–25 (Powell, J., concurring in part and concurring in the judgment).

Subsequent cases have used the framework of *Mathews* to determine the procedures required in assessing whether a condemned inmate is mentally retarded. *See Martin v. Dugger*, 686 F. Supp. 1523, 1559–60 (S.D. Fla. 1988), *aff'd*, 891 F.2d 807 (11th Cir. 1989); *see also Ford*, 477 U.S. at 429 (O'Connor, J., concurring in the result in part and dissenting in part); *Pierce v. Thaler*, 604 F.3d 197, 220 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part).

The Fifth Circuit erred in holding that condemned inmates have no "cognizable" due process interest in timely notice of the manner by which they will be executed. Pet. App. 10a. Just as the Eighth Amendment prohibits the government from executing a person who is insane, *see Ford*, 477 U.S. at 410 (plurality opinion), it also prohibits the government from conducting an execution in a manner that produces an "unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion). Indeed, this Court has squarely held that the Eighth Amendment forbids states from injecting combinations of drugs that inflict unnecessary pain and suffering. In *Baze*, the Court concluded that without a sedative, the injection of pancuronium bromide and potassium chloride would present "a substantial, constitutionally unacceptable risk of suffocation." 553 U.S. at 53 (plurality opinion). The Court further held that

because it is typically impossible to determine in advance whether an inmate will suffer from unnecessary pain, "subjecting individuals to a risk of future harm" violates the Eighth Amendment, *id.* at 49, so long as "the risk is substantial when compared to the known and available alternatives," *id.* at 61. For the reasons that follow, the inmate has a due process right to be informed of the execution protocol that may violate his interest in a humane death.

B. A Condemned Inmate's Life Interest Entitles Him To Notice Of The Manner In Which He Will Be Executed.

Because petitioner has a constitutionally cognizable interest in not being executed inhumanely, the manner of execution is subject to the requirements of procedural due process. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected . . . must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). Notice, however, is not an end to itself, but rather a means "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing,'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978), during which he has "an opportunity to present [his] objections," *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("The opportunity to present reasons . . . why proposed action should not be taken is a fundamental due process requirement."). "If the right to notice and a

hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes*, 407 U.S. at 81.

Determining the "specific dictates of due process" in a particular case – namely, what form the notice and opportunity to be heard must take – requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. These three factors require the state to disclose the means by which it will carry out petitioner's execution.

1. With respect to the first *Mathews* factor, a condemned inmate's interest in vindicating his Eighth Amendment right carries significant weight. "[D]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion). *See also Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("[A] State's deprivation of a person's life is . . . qualitatively different from any lesser intrusion on liberty."). Because the consequences of executing a condemned

inmate in a cruel and unusual manner are "horrendous," *Baze*, 553 U.S. at 117 (Ginsburg, J., dissenting), the private interest in avoiding unnecessary pain during death is "almost uniquely compelling," *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985).

Courts have afforded due process protection to interests far less weighty than the one asserted here. *See, e.g.*, *Loudermill*, 470 U.S. at 538–41 (interest in civil servant job protection); *Memphis Light*, 436 U.S. at 9–12 (interest in receiving public utility services); *Goss v. Lopez*, 419 U.S. 565, 572–76 (1975) (interest in attending public school); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 286–90 (3d Cir. 2008) (interest in funds held in prison accounts); *Club Misty, Inc. v. Laski*, 208 F.3d 615, 618 (7th Cir. 2000) (interest in liquor license); *Alexandre v. Cortes*, 140 F.3d 406, 410–11 (2d Cir. 1998) (interest in automobile seized during arrest, even though the arrestee and his spouse still owed money to the titleholder); *Greenwood v. New York*, 163 F.3d 119, 122 (2d Cir. 1998) (interest in staff privileges at state psychiatric center); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (interest in acquiring federal individual fishing quota permit); *Pritchett v. Alford*, 973 F.2d 307, 317–18 (4th Cir. 1992) (interest in being on state-prescribed wrecker-service list).

2. With respect to the second *Mathews* factor, the risk that petitioner will be erroneously deprived of his life interest is substantial, unless he receives a timely, full disclosure of the execution protocol. *Baze* identified one example of an unconstitutional execution protocol. But states have sought to

implement a variety of other changes that warrant Eighth Amendment review. Recognizing that execution protocols can violate the Eighth Amendment, multiple states have halted all executions until a safe alternative execution drug can be acquired.[9] Other courts have stayed executions after *Baze* to allow factual development of Eighth Amendment method-of-execution claims,[10] and have

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[9] These states include Alabama, *see Arthur v. Thomas*, No. 2:11-CV-0438-MEF, 2013 WL 5434694 (M.D. Ala. Sept. 30, 2013) (allowing Eighth Amendment claims against execution protocol to proceed); Arizona, *see* Notice of Disclosure, *Schad v. Brewer*, No. 13-02001-ROS (D. Ariz. Oct. 5, 2013) (disclosing that state supply of pentobarbital expired in November 2013); Arkansas, *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012) (finding execution protocol in violation of state constitution); California, *Sims v. Dep't of Corr. & Rehab.*, 157 Cal. Rptr. 3d 409 (Cal. Ct. App. 2013) (finding execution protocol in violation of state law); Kentucky, Order, *Baze v. Thompson*, No. 06-CI-574 (Franklin Cir. Ct. Dec. 5, 2013) (denying state's motion to lift injunction against executions); Tennessee, Order, *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Dec. 11, 2013) (staying execution so constitutionality of new execution protocol could be evaluated). These states have not executed anyone since. *See Number of Executions by State and Region Since 1976*, *supra* note 5.

[10] *See, e.g.*, *Reynolds v. Strickland*, 583 F.3d 956, 957 (6th Cir. 2009) (granting stay where "serious and troubling difficulties" during past executions raised concerns over the "competence of the lethal injection team"); *Cooey v. Kasich*, 801 F. Supp. 2d 623, 655 (S.D. Ohio 2011) (granting stay where there was evidence of "a troubling pattern of disregarding the very protocol that is supposed to control and provide safeguards for the execution process" (quoting *Cooey v. Strickland*, No. 2:04-CV-1156, 2009 WL 4842393, at *99 (S.D. Ohio Dec. 7, 2009)); *Morales v. Cate*, No. 5-6-CV-219, 2010 WL 3835655, at *3 (N.D. Cal. Sept.

denied motions to dismiss or summary judgment motions to permit development of a factual record through discovery.[11] These jurisdictions all recognize

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28, 2010) (granting stay where condemned inmate raised questions about "the selection and training of the execution team, the mixing and delivery of the drugs used in executions, and the adequacy and accuracy of execution records"); Order at 2, *State v. Irick*, No. 24527 (Knox Cty. Cr. Ct. Dec. 11, 2013) (per curiam) (granting stay because the "principles of constitutional adjudication and procedural fairness" required that condemned inmate's challenges to the single-drug protocol "be considered in light of a fully developed record" (quoting Order, *State v. West*, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010))).

[11] *See, e.g.*, *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (per curiam) ("[T]he district court committed reversible error in dismissing Arthur's Eighth Amendment claim without any opportunity for factual development, including discovery between the parties."), *reh'g denied*, 484 F. App'x 468 (11th Cir.); *Moeller v. Weber*, No. CIV. 04-4200, 2011 WL 288516, at *1 (D.S.D. Jan. 25, 2011) (refusing to curtail "discovery concerning the plan for carrying out executions in light of the shortage of sodium thiopental"); *Chester v. Beard*, 657 F. Supp. 2d 534, 542–45 (M.D. Pa. 2009) (holding that condemned inmates' allegations of inadequately trained personnel and inadequate safeguards, if true, would demonstrate a substantial risk of serious harm, and giving inmates a chance to factually develop their claims); *Thorson v. Epps*, No. CIVA408CV129WAPDAS, 2009 WL 1766806, at *1–*2 (N.D. Miss. June 22, 2009) (denying motion to dismiss condemned inmates' allegations of executioner incompetence, which, if true, "plausibly would entitle him to relief," *id.* at *2, and distinguishing *Baze*, which "was decided only after the factual record had been completely developed," *id.* at *1); Order at 2, *Taylor v. Jones*, No. 05-CIV-0825-F (W.D. Okla. Dec. 5, 2008) (denying motion to dismiss because "an evidentiary record would be helpful").

that the choice of drug and the method of its administration are fraught with constitutional peril.

Two very recent executions shed light on the substantial risk of serious harm that execution drugs can cause. Twelve seconds into his execution in Oklahoma, a condemned inmate uttered his final words: "I feel my whole body burning." Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, N.Y. Times, Jan. 17, 2014, at A15 (internal quotation marks omitted). Oklahoma utilized a three-drug cocktail, which included pentobarbital that had been obtained from an unnamed compounding pharmacy within the state. *Id.* A week later, Ohio executed a condemned inmate using midazolam and hydromorphone, a combination of drugs never before used in a U.S. execution. The condemned inmate "struggled, made guttural noises, gasped for air and choked for about 10 minutes." Alan Johnson, *Inmate's Death Called 'Horrific' Under New, 2-Drug Execution*, CNN (Jan. 19, 2014, 1:58 PM), http://www.dispatch.com/content/stories/local/2014/01/16/mcguire-execution.html.

There is accordingly a significant "value . . . [in] additional . . . procedural safeguards," *Mathews*, 424 U.S. at 335, namely timely disclosure of the state's execution protocol. Judicial review of a state's method of execution is only possible with disclosure. *See Oken*, 321 F. Supp. 2d at 664 ("Obviously, the fact of court review of the protocols presupposes their production."). Even the majority below acknowledged the prospect that Louisiana's secrecy "masks 'a substantial risk of serious harm.'" Pet. App. 12a (quoting *Baze*, 553 U.S.

at 52 (plurality opinion)). By failing to disclose its execution protocol, a state can "ensure[] itself a way of using a protocol that a court can 'never' look at it in any serious fashion, and it can 'flout' the requirement for a constitutionally sufficient protocol 'without fear of repercussion.'" *Beaty*, 649 F.3d at 1073 (dissenting from the denial of rehearing en banc) (quoting *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir. 2011)).[12]

This case is a perfect illustration. As Judge Dennis explained:

> If a State does not officially release the details of its execution protocol, a court would have no way of verifying whether the State planned to use pentobarbital or another substance, such as expired or contaminated sodium thiopental, or an entirely different chemical whose properties could very well cause an unconstitutional degree of pain and suffering.

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[12] *Cf. Arthur*, 674 F.3d at 1263 (per curiam) ("[T]he veil of secrecy that surrounds Alabama's execution protocol . . . [makes it] plausible that . . . [the protocol] could be unexpectedly changed for his execution."). Absent a right to know the method by which he will be executed, a condemned inmate is placed in a catch-22. This Court has held that "speculation cannot substitute for evidence that the use of the drug is '*sure or very likely* to cause serious illness and needless suffering'" in violation of the Eighth Amendment. *Landrigan*, 131 S. Ct. at 445 (quoting *Baze*, 553 U.S. at 50). But unless the state discloses its protocol, the inmate has no opportunity to "show a demonstrated risk of harm and can only offer speculative allegations." *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2013 WL 6498396, at *1 (W.D. Mo. Dec. 11, 2013).

Pet. App. 31a.

Judicial review is essential to preventing an erroneous deprivation of the inmate's life interest in a humane execution. In *Baze*, this Court explained that courts play a crucial role in ensuring that a state's execution method comports with the Eighth Amendment. *See* 553 U.S. at 47, 54–61 (examining Kentucky's protocol as it related to, *inter alia*, training of the IV team, practice sessions, backup lines, and inspections); *see also Oken*, 321 F. Supp. 2d at 664 ("[I]n innumerable death penalty cases the execution protocols have been examined by courts for their compliance with constitutional requirements."). Indeed, this Court has performed that function for over a century. *See In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . .").

Without judicial review, a state can change the drugs it plans to use to execute a condemned inmate at the eleventh hour without notifying anyone. Though the new drugs might subject the condemned inmate to a substantial risk of unnecessary pain and suffering, and though there might be alternatives available that are substantially less painful, a court would have no opportunity to review the execution method and find it in violation of the Eighth Amendment. Due process does not permit a state to require the federal courts to "tak[e] [the state's] word that [an inmate's] rights will not be violated." *Oken*, 321 F. Supp. 2d at 665. *See also* Order at 5, *Hill v. Owens*, No. 2013-CV-23771 (Ga. Sup. Ct. July 18, 2013) ("By making information about the source of the drugs to be used for [a condemned

inmate's] execution . . . inaccessible to Plaintiff, [the state] makes it impossible for [him] to craft a meaningful Eighth Amendment claim, and thus forecloses his right to raise his constitutionally afforded claims and be heard."), *appeal docketed*, No. S14A0092 (Ga. 2013).

Importantly, discovery is insufficient to vindicate condemned inmates' interest in timely disclosure of the protocols by which they will be executed. As the district court in this case explained, "[t]he delays inherent in [the discovery] process will not offer Sepulvado a meaningful opportunity to present his 8th Amendment challenge under the current execution date." Pet. App. 19a. In particular, as this case perfectly illustrates, there is a substantial prospect that the state will fight any discovery request until the execution has concluded, mooting the inmate's request for the information. Louisiana has withheld information about its acquisition of the drug that will be used to execute petitioner, despite its representation that the information would be disclosed to him. *See* Stay 25; Stay App. 44a, 46a.

3. With respect to the third *Mathews* factor, Louisiana has no substantial countervailing interest in preventing courts from enforcing the Eighth Amendment by refusing to disclose the execution protocol. Given that Louisiana itself instituted a declaratory judgment action against petitioner regarding the lawfulness of its former protocol, C.A. R. 196–97, the state cannot seriously assert that it has a significant interest in withholding its current protocol or in preventing adjudication of the protocol's

lawfulness. Providing condemned inmates with the protocol that will be followed in their executions would present no "fiscal [or] administrative burdens." *Mathews*, 424 U.S. at 335. It is telling that at least seven other states freely make their execution protocols publicly available.[13]

The Fifth Circuit plainly erred in concluding that petitioner had no due process right because disclosure of the execution protocol would undermine the state's "significant interest in enforcing its criminal judgments." Pet. App. 11a (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). A state does not have a cognizable interest in carrying out a criminal judgment in violation of the Eighth Amendment. Petitioner's due process claim presents no obstacle whatsoever to the state's constitutional enforcement of

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[13] *See* Ariz. Dep't of Corr., *Execution Procedures* (2012), *available at* http://www.azcorrections.gov/Policies/700/0710.pdf; Cal. Dep't of Corr. & Rehab., *Lethal Injection Process* (2010), *available at* http://www.cdcr.Ca.gov/Regulations/Adult_Operations/docs/4_LI_7-28-10.pdf; Fla. Dep't of Corr., *Execution by Lethal Injection Procedures* (2007), *available at* http://www.deathpenaltyinfo.org/FlorLethInject.pdf; N.C. Dep't of Pub. Safety, *Execution Procedure Manual for Single Drug Protocol (Pentobarbital)* (2013), *available at* https://www.ncdps.gov/div/AC/Protocol.pdf; Okla. Dep't of Corr., *Procedures for the Execution of Inmates Sentenced to Death* (2006), *available at* http://204.62.19.52/Offtech/op040301.htm; Or. Dep't of Corr., *Capital Punishment – IV/Medical Team Procedures* (2012), *available at* http://arcweb.sos.state.or.us/pages/rules/bulletin/0112_bulletin/0112_ch291_bulletin.html; Wash. Dep't of Corr., *Capital Punishment* (2011), *available at* http://www.doc.wa.gov/policies/showFile.aspx?name=490200.

the judgment against him. If the state discloses a protocol that is consistent with the Constitution, the execution will go forward. A state can easily disclose its protocol sufficiently in advance of an execution to facilitate judicial review at a "meaningful time and in a meaningful manner," *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes*, 407 U.S. at 80) (internal quotation mark omitted), without delaying the execution.[14]

Moreover, recognizing the procedural right sought here would facilitate the states' interest in identifying methods of execution that comply with the Eighth Amendment, ultimately reducing the number of last-minute requests for stays of execution. *Cf. Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) ("Independent public scrutiny . . . plays a

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[14] *Cf. Landrigan v. Brewer*, 625 F.3d 1132, 1133 (9th Cir. 2010) (Wardlaw and Fletcher, JJ., concurring in the denial of rehearing en banc) ("As a practical matter, the question is whether Landrigan will be executed today or in a few months . . . ."), *vacated*, 131 S. Ct. 445; *Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("The Court is not persuaded that issuance of the preliminary injunction will cause substantial harm to the State by comparison [to the harm posed to the condemned inmate] . . . . [A]ny delay in carrying out Plaintiff's execution should and can be minimal."); Order at 3, *Hill*, No. 2013-CV-23771 ("[W]hile Defendants do indeed have an interest in carrying out a sentence timely, the injury that would be sustained by Plaintiff if he were to be executed in such a way that violated his Eighth Amendment right would far surpass that of Defendants having to put off Plaintiff's execution . . . .").

significant role in the proper functioning of capital punishment.").

Because of the condemned inmate's "almost uniquely compelling" private interest, *Ake*, 470 U.S. at 78, the serious risk of irreversible erroneous deprivation, and the minimal countervailing government interests, a death-row inmate is entitled to timely disclosure of the manner by which he will be executed. Certiorari should be granted and the Fifth Circuit's decision to the contrary should be reversed.[15]

III. This Case Is Not Moot, But If It Is Moot The Court Should Vacate The Judgment Below.

Three circuit judges, dissenting from denial of rehearing en banc, opined that this case is moot and that the court of appeals' judgment should be vacated. *See* Pet. App. 25a–29a. The dissenters reasoned that in June 2013 – two months before the appellate panel issued its decision – Louisiana disclosed the then-current version of its execution protocol. *Id.* 27a. That assertion misapprehends both the district court's injunction and the nature of the state's disclosure. But if this Court concludes that the appeal is moot, the appropriate course would be to grant certiorari and vacate the judgment below so that the question may be litigated in a later case.

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[15] In order to minimize any delay, if the Court grants certiorari, petitioner's counsel is prepared to brief the case according to the schedule applicable to cases granted on Friday January 17, 2014, so that the case is available for argument and decision in the Court's October Term 2013.

A. This Appeal Is Not Moot.

1. An appeal is moot "when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). In particular, an appeal from a grant or denial of a preliminary injunction is moot only if "the terms of the injunction . . . have been fully and irrevocably carried out." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981).

The prospect of mootness arises in this case because, while Louisiana's appeal of the district court's injunction was pending in the Fifth Circuit, the state provided petitioner with its then-current execution protocol. *See* Pet. App. 27a. The further assertion that the state thereby complied with the district court's injunction, rendering its appeal moot, must rest on one of two premises: (i) the district court's injunction merely required the state to disclose the protocol as it stood at the time of the injunction's entry; or, alternatively, (ii) although the injunction does require the disclosure of the protocol that will be used in the execution, the state definitely will use the June 2013 protocol. Neither premise is accurate. Presumably for those reasons, the state itself has never suggested that its appeal is moot.

The district court did not illogically require the state merely to disclose its execution protocol as it stood at an early moment in time distant from the actual execution. Petitioner has only ever asserted a due process interest in knowing the protocol that will

actually be used to kill him. Earlier versions of the protocol do not implicate any constitutionally protected interest. *See* Part II, *supra*. The district court thus granted petitioner's request for an injunction based on his "right to know what the protocol the state will use is." Pet. App. 17a. The court instructed that "the execution protocol that will regulate an inmate's death [must] be forwarded to him in prompt and timely fashion." *Id.* 19a (quoting *Oken v. Sizer*, 321 F. Supp. 2d 658, 664 (D. Md. 2004) (internal quotation mark omitted)).[16]

There is moreover a substantial prospect that the state will not in fact use the protocol it has disclosed to execute petitioner. Although Louisiana has thus far represented that it intends to implement the June 2013 protocol, *see* Stay App. 39a, 44a, it has made no

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[16] Moreover, even if the Court were to determine that Louisiana had fulfilled the terms of the injunction by only disclosing a protocol that was accurate as of June 2013, this appeal would not be moot because Louisiana's challenged conduct – withholding its execution protocol – fits within the longstanding exception to mootness for conduct "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). Should the state materially alter its method of execution before petitioner is executed, petitioner would not have enough time to fully litigate his due process claim before his execution. The state's conduct would therefore evade judicial review. *See Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011). And given that Louisiana cannot implement its current protocol, *see* Stay 11–16, there is a "reasonable expectation" that petitioner will be subject to the state's obstinacy again, *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988).

irrevocable commitment to do so. So long as the Fifth Circuit's judgment remains in place, the state is free to change the execution protocol without any due process obligation to advise petitioner of the new protocol. As discussed in Part I, *supra*, it is common for states to change execution protocols shortly before executions.

The prospect that Louisiana will implement such a change in this case looms large. As explained in petitioner's application for a stay of execution, the state cannot in fact implement the June 2013 protocol, either practically or legally, because the drug that the state intends to use is unavailable. Stay 11–16. The drug's manufacturer refuses to sell it for purposes of lethal injection, Stay App. 2a–3a, 5a–6a, and Louisiana law prohibits the prison pharmacy from acquiring a compounded drug, *see* La. Admin. Code tit. 46, § 2535(D)(2) (2012); *id.* § 2535 (cmt.). Indeed, the state has already materially deviated from the protocol, which requires that the state "confirm at least 3 complete sets of the identified execution drugs are in stock" thirty days prior to execution. La. State Penitentiary, *Louisiana Execution Protocol* 34 (2013). As of this filing, the state did not have the drug, notwithstanding that the execution is less than ten days away. Stay App. 37a.

2. The state's partial compliance with the injunction by disclosing the execution protocol as it stood in June 2013 does not render the appeal moot. An appeal is not moot if "no more than partial compliance has been accomplished." 13B Charles Alan

Wright et al., *Federal Practice and Procedure* § 3533.2.2 (3d ed. 2013).[17] And interim compliance cannot moot an appeal "if the order will have a continuing impact on future action." *Id.*[18] Because the state will not – and indeed cannot – credibly commit to *using* the execution protocol it previously disclosed, this appeal is not moot.

3. Even if Louisiana were now to disclose its eventual, accurate execution protocol, this appeal would not be moot. "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174

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[17] *Compare Honig v. Students of the Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam) (appeal of injunction requiring California to test seismic safety of school campus was moot – and judgment was vacated – after the state conducted the tests, because "[n]o order of this Court could affect the parties' rights with respect to the injunction we are called upon to review"), *with, e.g.*, *United States v. Price*, 688 F.2d 204, 210 (3d Cir. 1982) (injunction requiring companies to fund environmental study was not "fully and irrevocably carried out" when EPA provided some insufficient funds for preliminary work (quoting *Camenisch*, 451 U.S. at 398) (internal quotation mark omitted)).

[18] *See, e.g.*, *United States v. Chrysler Corp.*, 158 F.3d 1350, 1353 (D.C. Cir. 1998) (appeal not moot where ruling in defendant's favor "would allow it to avoid the remaining obligations under the District Court's order"); *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 916 (6th Cir. 1979) (appeal not moot where court order controlled defendant's future hiring practices); *cf. United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations . . . .").

(2000). The state could use such a representation to "evade judicial review . . . by temporarily altering questionable behavior," *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001), only to return to its former recalcitrance following petitioner's execution.

B. If The Case Is Moot, Then Certiorari Should Be Granted And The Judgment Of The Court of Appeals Should Be Vacated.

If this Court concludes that the dissenting judges below correctly deemed this appeal to be moot, then it follows that the Court should grant certiorari and vacate the court of appeals' judgment. "It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed.'" *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). The "federal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon*, 518 U.S. at 150 (quoting *Mills*, 159 U.S. at 653).

This Court's "ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990). *See also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950). This practice "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

Vacating the court of appeals' judgment is particularly appropriate when, as here, it raises a frequently recurring question and the ruling below is the subject of significant dispute.

Under those principles, the district courts within the Fifth Circuit and the court of appeals itself should not be bound by an opinion issued without jurisdiction, which cannot be vetted by this Court. In accordance with this Court's longstanding precedents, if this appeal is moot, then certiorari should be granted and the decision below should be vacated as moot.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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