IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC.,
Real Party in Interest.

Supreme Court Case No.: 76485

District Court No.: A-18-777312-B

AMICI CURIAE BRIEF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA, FLORIDA, GEORGIA, IDAHO, INDIANA, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND UTAH IN SUPPORT OF PETITIONERS AND DISSOLUTION OR REVERSAL

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NRAP 29(d)(3) STATEMENT OF AMICI CURIAE

Amici curiae are the States of Arkansas, Alabama, Arizona, Florida, Georgia, Idaho, Indiana, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and Utah. The fifteen *Amici* States have an interest in halting the nationwide trend of pharmaceutical companies bringing meritless lawsuits to prevent their drugs from being used to carry out lawful sentences of execution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This lawsuit is strikingly similar to the meritless lawsuit that McKesson Medical-Surgical, Inc. filed against Arkansas last year to prevent drugs that it sold from being used to carry out lawful executions. In that case, McKesson filed an eleventh-hour state court complaint alleging that it had seller's remorse and did not want drugs that Arkansas had lawfully acquired to be used in performing executions. And while McKesson was initially successful—obtaining an *ex parte* temporary restraining order from a trial judge who was later stripped of his power to hear execution-related cases due to his conduct in issuing that order—following a hearing before another judge and review by the Arkansas Supreme Court, Arkansas carried out multiple executions using the lawfully acquired drugs.[1]

[1] The Arkansas Supreme Court determined that Pulaski County Circuit Judge Wendell Griffen, who was initially assigned to the case and issued the *ex parte* TRO, was incurably prejudiced against capital punishment and barred him

Yet as this case illustrates, Arkansas's encounter with McKesson was just the first example of this latest front in the guerilla warfare being waged by anti-death-penalty activists and criminal defense attorneys to stop lawful executions. Like the Arkansas Supreme Court, this Court should send a strong message that such meritless lawsuits are not permitted and dissolve the stay of execution entered below.

ARGUMENT

I. Alvogen's meritless claims mirror those rejected by the Arkansas Supreme Court.

This lawsuit—brought by a pharmaceutical manufacturer seeking to stop a lawful execution—is the first of its kind. But a similar lawsuit—by a pharmaceutical supplier—was brought against Arkansas last year. On the eve of eight executions scheduled to take place in April 2017, McKesson, a pharmaceutical supplier, filed a lawsuit against Arkansas correction officials seeking to enjoin those executions from taking place. Similar to what Alvogen has done here, McKesson sought to regain possession of the supply of vecuronium bromide—one of the three drugs in Arkansas's execution protocol, *see* ARK. CODE ANN. 5-4-617(c)(2)—that McKesson had sold to the Arkansas Department of

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from all death penalty cases. Judge Griffen subsequently sued the justices of the Arkansas Supreme Court in federal court. *See In re Kemp*, 894 F.3d 900 (8th Cir. 2018) (granting petition for mandamus and finding that the judge failed to state any claim for relief against the Arkansas Supreme Court for removing him from capital cases).

Correction ("ADC") in 2016. McKesson, like Alvogen, sued based on little more than seller's remorse, claiming that: (1) ADC officials obtained the vecuronium under false pretenses; (2) McKesson was entitled to the return of the vecuronium under a variety of state-law theories; and (3) the use of McKesson's vecuronium would harm McKesson's reputation. Each of these claims was meritless.[2]

McKesson first claimed that it was entitled to rescission based on misrepresentation because, it alleged, the ADC led it to believe that the 100 vials of vecuronium that the ADC purchased would be used for medical purposes, not in executions. Setting aside that dubious allegation, the ADC (like corrections departments across the country) has the authority to purchase execution drugs by virtue of Arkansas's Method of Execution Act, *see* ARK. CODE ANN. 5-4-617(b)–(c)(2), and that act does not require the ADC to disclose a drug's intended use. McKesson was, therefore, not entitled to a rescission of the sale on this theory.

McKesson further argued that it was entitled to rescission of the sale because it would not have sold drugs to the ADC had it known the drugs would be used to

[2] The briefing for the ADC's emergency motion for stay in the Arkansas Supreme Court is available in the Appendix beginning at A456, and the entire docket is publicly available at the following link on the Arkansas Judiciary's webpage by searching for case number CV-17-317: https://caseinfo.arcourts.gov/cconnect/PROD/public/ck_public_qry_doct.cp_dktrpt_setup_idx

Amici's description of the proceedings in *McKesson* is taken from the publicly available briefing in that case.

carry out lawful executions. Under Arkansas law, McKesson was required to prove four elements to prevail on this claim: (1) the mistake had such a great consequence that it would be unconscionable to enforce the contract as actually made; (2) the mistake related to a material feature of the contract; (3) the mistake occurred notwithstanding the exercise of reasonable care by the party making the mistake; and (4) rescission would not cause "serious prejudice" to the other party. *See Mtn. Home Sch. Dist. No. 9 v. T.M.J. Builders, Inc.*, 858 S.W.2d 74, 78 (Ark. 1993).

McKesson failed to meet any of those elements. There was nothing unconscionable about enforcing a simple transaction. How the vecuronium would be employed was not a material feature of the agreement because no party ever discussed that issue. For that same reason, McKesson did not exercise reasonable care with regard to ascertaining the vecuronium's purpose. Finally, rescission would have caused serious prejudice to the ADC because it would not be able to fulfill its statutory duty to carry out lawful death sentences. Thus, McKesson failed to show that it was entitled to a rescission of the sale due to its own mistake.

McKesson next argued that it was entitled to retake possession of the vecuronium because the ADC was unjustly enriched when McKesson unilaterally provided the ADC with an account credit for the purchase price of the vecuronium and demanded the return of the drugs. But under Arkansas law, a claim for unjust

enrichment does not lie when the property at issue was conferred unilaterally by the plaintiff. *See City of Alexander v. Doss*, 284 S.W.3d 74, 78 (Ark. 2008). The ADC never requested a refund nor agreed to vecuronium's return, and McKesson's choice to unilaterally issue a refund was nothing more than a litigation tactic. This claim was, therefore, entirely meritless.[3]

McKesson was also required to show irreparable harm in order to obtain injunctive relief. *See Three Sisters Petroleum, Inc. v. Langley*, 72 S.W.3d 95 (Ark. 2002). McKesson primarily claimed reputational injury due to its "association" with lawful executions. Of course, there is no reason to think a pharmaceutical supplier's reputation would suffer any harm from executions being carried out using drugs it supplied, especially when it claimed to have supplied those drugs unwittingly and vociferously objected to their use. Moreover, as in many states, Arkansas correction officials are not allowed to disclose the identity of the supplier of execution drugs. *See* ARK. CODE ANN. 5-4-617. Thus, any reputational harm suffered by McKesson was due to it casting aside the benefit of that statutory secrecy and filing its lawsuit. McKesson failed to show it would suffer irreparable harm absent an injunction, and its motion should have been denied.

[3] McKesson also argued that the ADC's possession of the vecuronium after McKesson's decision to unilaterally refund the purchase amounted to an unconstitutional taking, but the trial court did not award injunctive relief on that basis.

In the face of these numerous deficiencies, the trial court nevertheless granted an *ex parte* temporary restraining order at the close of business on Friday, April 14, 2017, preventing the ADC from using the vecuronium in any executions, the first of which was scheduled for the following Monday. App. 447. Contemporaneous with issuing that order, the trial judge participated in an anti-death-penalty protest, which led to the Arkansas Supreme Court removing that judge from all death penalty cases. *See generally In re Kemp*, 894 F.3d 900 (8th Cir. 2018). The Arkansas Supreme Court also vacated that TRO on a writ of certiorari the following business day after it was entered. App. 450.

The case was reassigned, and the new trial court judge issued a preliminary injunction against the ADC on the day an execution was scheduled to be conducted. App. 454–55. While that injunction was in force, no executions could be carried out, as the ADC did not have any other supply of vecuronium. The same day, the ADC sought an emergency stay of the injunction pending appeal to the Arkansas Supreme Court. In order to be entitled to that extraordinary remedy, the ADC was required to demonstrate that it was likely to succeed in showing that the trial court abused its discretion in issuing the injunction. *See Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). The Arkansas Supreme Court granted the emergency stay that afternoon, and the scheduled execution took place that

evening. App. 490. The ADC used the vecuronium purchased from McKesson in a total of four executions in April 2017.[4]

The similarities between the Arkansas case and this case are striking. As in Arkansas's case, a pharmaceutical company sued on the eve of an execution seeking to stop that execution from being carried out, bringing meritless claims and seeking an injunction that is nearly impossible to appeal in time for an execution to be lawfully carried out. Just as would have been the case in Arkansas, if Alvogen is allowed to succeed, there is a substantial risk that pharmaceutical companies—prodded by anti-death penalty activists and the defense bar—will flood the courts with similar last-minute filings every time a State attempts to see justice done. To prevent that, as the Arkansas Supreme Court did in a nearly identical case, this Court should dissolve the stay of execution entered below.

II. These lawsuits are nothing more than a procedural end-run around state laws designed to protect the execution process.

These lawsuits did not come out of nowhere—they are the most recent battle in the well-documented "guerilla war against the death penalty." Transcript of Oral Argument at 14:20–25, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (question of Alito, J.). As the Supreme Court recently recounted, "anti-death-penalty advocates [have] pressured pharmaceutical companies to refuse to

[4] Briefing was later completed, but before the case was decided, the vecuronium expired and was disposed of. The parties jointly moved to dismiss the case.

supply the drugs used to carry out death sentences." *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2016). Numerous lawsuits have been initiated around the country for the purpose of undermining States' ability to carry out executions. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015) ("In this capital litigation, it should be remembered that one stated objective of the prisoners' lawsuit is to pressure the State's suppliers and agents to discontinue providing the drugs and other assistance necessary to carry out lawful capital sentences.").

In response to abusive litigation practices, States have passed legislation to protect their execution processes from interference. For example, the state trial court in Arkansas could not have issued a stay of any of the scheduled executions. In order to promote consistency and avoid last-minute, piecemeal litigation in the trial courts, only the Arkansas Supreme Court may stay an execution. ARK. CODE ANN. 16-90-506(c)(3). Other states—including Nevada, *see* NRS 176.415—have imposed similar restrictions. *See* ARIZ. R. CRIM. P. 32.4(g) (restricting stays to Arizona Supreme Court); CAL. PENAL CODE 3700 (West) (limiting stays of execution to when appeals are taken); IDAHO CODE ANN. 19-2708, 2715(1) (limiting judicial stays to automatic stays); IND. R. CRIM. P. 24(g)(1) (the Indiana "Supreme Court . . . ha[s] exclusive jurisdiction to stay the execution of a death sentence"); MISS. CODE ANN. 99-39-29 (limiting the issuance of stays to the Mississippi Supreme Court); *State v. Steffen*, 639 N.E.2d 67, 76 (Ohio 1994)

("[A]n execution set by the Supreme Court of Ohio may not be stayed by any other court."); OKLA. STAT. tit. 22 § 1001.1(C) (limiting stays to appellate courts); S.C. CODE ANN. 17-25-370 (limiting judicial stays to the South Carolina Supreme Court); S.D. CODIFIED LAWS 23A-27A-21 (barring courts other than the South Dakota Supreme Court from issuing stays).

But due to the difficulty in obtaining execution drugs in the first place, *see Glossip*. 135 S. Ct. at 2733–34, a trial-court injunction that prevents a state from using its supply of execution drugs would lead to the same result: an execution stay. Thus, lawsuits like that brought by McKesson—and Alvogen's lawsuit here—represent little more than an end run around state laws that prevent lower courts from staying executions. And, like the Arkansas Supreme Court, this Court should put an end to that practice by dissolving the stay issued here.

Moreover, last-minute lawsuits by pharmaceutical companies, and concomitant injunctions like that issued here, are particularly problematic due to the strict timelines often involved in execution cases. In Arkansas, for example, death warrants issued by the Governor are only valid for a single day; if the execution is not completed before midnight, the death warrant is no longer valid, and a new one must be issued designating another day. ARK. CODE ANN. 16-90-501(a). But before any execution can take place, the inmate may petition for clemency, a process overseen by the Arkansas Parole Board. Clemency

applications are due no later than forty days prior to the scheduled execution date. *See* ARK. ADMIN. CODE 158.00.1-4.8. At least thirty days prior to the execution date, the Parole Board must also conduct a hearing on the inmate's request for clemency before submitting its recommendation to the Governor. *See id.* Finally, Arkansas law provides for a thirty-day notice period before the Parole Board may provide its recommendation regarding clemency to the Governor. ARK. CODE ANN. 16-93-204. This months-long process begins anew each time an execution cannot take place on the date designated in an execution warrant.

Other states have similarly strict timelines. *See* ALA. CODE. 15-18-82(a) (the sentence must be executed "on the day set for the execution"); CAL. PENAL CODE 1227 (ten-day period); FLA. STAT ANN. 922.11(1) (governor designates, and the warden sets a day); GA. CODE ANN. 17-10-34, 17-10-40 (period set by trial court); IDAHO CODE ANN. 19-2705 ("the judge passing sentence shall . . . sign and file a death warrant fixing a date of execution"); KAN. STAT. ANN. 22-4013(b) (seven-day period); KY. REV. STAT. 431.128 (governor generally designates the day of execution); LA. STAT. ANN. 15:567(B) (death warrants "specify the date upon which the person condemned shall be put to death"); MISS. CODE. ANN. 99-19-106 (Mississippi Supreme Court "set[s] an execution date for a person sentenced to the death penalty"); MONT. CODE ANN. 46-19-103(1) (trial courts "set the date of execution"); NEB. REV. STAT. 29-2528 (Nebraska Supreme Court "appoint[s] a day

certain for the execution of the sentence"), 2543(1) (Nebraska Supreme Court "issue[s] a warrant . . . establishing a date for the enforcement of the sentence . . . to proceed at the time named in the warrant"); NRS 176.495(2) (seven-day period); N.H. REV. STAT. 630:5(XVII) (Governor "determine[s] the time of performing [an] execution"); N.M. STAT. ANN. 31-14-1 (2006) (warrant "must . . . appoint a day on which the judgment is to be executed"); N.C. GEN. STAT. 15-194(a) (Secretary of the Department of Public Safety "schedule[s] a date for the execution"); OHIO REV. CODE 2949.22(B) ("A death sentence shall be executed . . . on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings."); OKLA. STAT. tit. 22 § 1001 (execution date automatically set from when a stay is lifted); OR. REV. STAT. 137.463(7) (date set by trial court); 61 PA. CONS. STAT. 4302(a)(1)–(2) (requiring warrants to specify a day of execution; if the specified day passes, the Governor must issue a new warrant); S.C. CODE ANN. 17-25-370 (automatically setting execution for a designated day); S.D. CODIFIED LAWS 23A-27A-15 (warrants last one week); TENN. CODE ANN. 40-30-120(a) (Tennessee Supreme Court sets a date); TEX. CODE CRIM. PROC. ANN. arts. 43.141, 43.14 (court of conviction sets an execution day and sentence must be carried out after 6:00 p.m.); UTAH CODE ANN. 77-19-6(2) (warrants specify particular days); VA. CODE ANN. 53.1-232.1 (sentencing court fixes a day); WASH REV. CODE ANN. 10.95.160(1)

(trial courts issue death warrants that "appoint a day on which" the sentence will be executed); WYO STAT. ANN. 7-13-906 (death warrants "fix[] a date of execution").

As a result, lawsuits like McKesson's or Alvogen's do not even need to succeed on the merits in order to achieve the desired outcome and prevent an execution. Instead, they merely have to result in an injunction preventing a state from carrying out an execution on the scheduled date. And that alone might delay an execution long enough that a state's drugs could expire. Thus, this Court—like the Arkansas Supreme Court in response to McKesson's lawsuit—should prevent Alvogen from abusing the litigation process and statutes that were originally designed to ensure an orderly execution process and dissolve the stay entered below.

CONCLUSION

For the foregoing reasons, this Court should dissolve the stay of execution entered by the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David C. O'Mara, hereby certify that I have read this *Amici curiae* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman and contains 2,844 words. I further certify that I have read this brief and that it complies with NRAP 21.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici curiae* brief in support of Petitioners and dissolution or reversal with the Clerk of the Court for the Nevada Supreme Court using the Court's e-flex system on August 3, 2018. Participants in the case who are registered e-flex users will be served by the e-flex system.

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