IN THE SUPREME COURT OF UTAH

No. 2024-0559-SC

RALPH MENZIES, DOUGLAS STEWART CARTER, TROY KELL, MICHAEL ARCHULETA, and TABERON HONIE,
Plaintiffs/Appellants,

v.

UTAH DEPARTMENT OF CORRECTIONS, UTAH STATE CORRECTIONAL FACILITY, BRIAN NIELSON, SPECER J. COX, ROBERT POWELL, SPENCER TURLEY, TRAVIS KNORR, DOES I through X,
Defendants/Appellees.

Appeal from the Third District Court, Salt Lake County, before the Honorable Coral Sanchez

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION OF UTAH IN SUPPORT OF PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION AND SUMMARY OF ARGUMENT

Statutory law strictly governs the methods through which the Utah Department of Corrections carries out executions. It mandates that criminal defendants sentenced to death must be executed by lethal injection, with firing squad available as the alternative in certain situations.

This case involves challenges to these two methods of execution as currently carried out under this existing statutory law. The plaintiffs rely not on the U.S. Constitution's Eighth Amendment, which prohibits cruel and unusual punishment, but on article I, section 9 of the Utah Constitution, which bars both cruel and unusual punishment and the treatment of any individual in the carceral system with "unnecessary rigor."

In addressing plaintiffs' claims, the district court did not consider the unique nature of Utah's Constitution and how it might apply to a method-of-execution challenge. Instead, it simply imported federal Eighth Amendment precedent, implicitly assuming (1) that the Utah Constitution's cruel and unusual punishment clause is coextensive with the Eighth Amendment and reliant on the same method of analysis *and*

(2) that Utah's unnecessary rigor provision offers no independent or additional protection beyond the Eighth Amendment's scope. In particular, the district court followed the U.S. Supreme Court's decision in *Glossip v. Gross*, an Eighth Amendment case in which the Court required prisoners challenging a method of execution as cruel and unusual to point to an available alternative method of execution for their claims to proceed. 576 U.S. 863, 880 (2015).

The district court erred. Contrary to its assumption, article I, section 9 of the Utah Constitution sweeps more broadly than the Eighth Amendment. That is clear even if this Court were to assume—though it need not decide—that section 9's cruel and unusual punishment clause alone equates to the Eighth Amendment. By reflexively adopting Eighth Amendment precedent to dismiss the plaintiffs' claim, the district court read the unnecessary rigor clause out of the state constitution.

When properly understood, section 9's unnecessary rigor clause, standing alone or considered in conjunction with the cruel and unusual punishment clause, bars imposing any cruelty or harshness that is not strictly necessary or essential to the State's penological goal. The

district court's requirement that death-sentenced prisoners point to an alternative method of execution to challenge the existing methods under section 9 conflicts with and violates that constitutional guarantee. Such a requirement is not only unnecessary to the operation of the justice system, but also useless under Utah law and practice.

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the federal and state constitutions. The ACLU engages in litigation and advocacy protecting the rights and liberties of all people, including those in the criminal justice system. As part of this mission, the ACLU defends persons facing the death penalty, primarily in state courts, and its attorneys have considerable expertise in death penalty and method-of-execution litigation as well as state constitutional

[1] Counsel for all parties received timely notice of the filing of this brief and consented thereto pursuant to Rule 25(a) and 25(b)(2). No party or counsel authored the brief in whole or in part, and neither they nor anyone else contributed any money intended to fund its preparation or submission.

challenges. The ACLU of Utah is the statewide affiliate of the national ACLU and is dedicated to the same principles.

ARGUMENT

I. Article I, section 9 of the Utah Constitution sweeps more broadly than the Eighth Amendment.

Article I, section 9 of the Utah Constitution provides: "Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor." Utah adopted this provision with the state's first constitution in 1895, and it remains unchanged. *See* Utah Const. art. I, § 9 (1895).

The first sentence of section 9 includes a prohibition on cruel and unusual punishment that mirrors the words of the federal Eighth Amendment. But the latter sentence—the unnecessary rigor clause—is absent from the federal constitution and unmistakably expands section 9 beyond its purview. Its presence demonstrates Utah's broader commitment to humane treatment of those in the carceral system than that provided by the Eighth Amendment. *See State v. Bishop*, 717 P.2d 261, 267 (Utah 1986) ("[I]t is plain on the face of Article I, section 9 that

the Utah provision is broader than [the Eighth Amendment]."); *State v. Lafferty,* 2001 UT 19, ¶ 73, 20 P.3d 342.

This is true even if this Court were to assume—though it need not decide—that section 9's cruel and unusual punishment clause alone equates to the Eighth Amendment.[2] This Court "presume[s] that the drafters of the Utah Constitution chose their words carefully," and thus "avoid[s] interpretations that would treat an entire clause as surplusage." *Planned Parenthood Ass'n of Utah v. State*, 2024 UT 28, ¶ 184, 554 P.3d 998; *see Richardson v. Treasure Hill Min. Co.*, 23 Utah 366, 65 P. 74, 80 (1901).

This Court has not had much occasion to analyze section 9's unnecessary rigor provision, but it has recognized that section 9 places

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[2] Because plaintiffs brought their claims under both the cruel and unusual punishment and the unnecessary rigor clauses of section 9, this Court need not decide whether and to what extent the former, on its own, provides more protection than the Eighth Amendment. But amici note that state courts can, and do, interpret their own state cruel and unusual punishment clauses more expansively than the Eighth Amendment even with identical or near-identical language. *See, e.g.*, *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989); *State v. Bruegger*, 773 N.W.2d 862, 883–84 (Iowa 2009). And this Court has explicitly "rejected a presumption that 'federal construction of similar language is correct.'" *State v. Poole*, 2010 UT 25, ¶ 12, 232 P.3d 519; *see State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935.

limits on more than just the sentence imposed. Although most of this Court's section 9 precedents concern sentences challenged as excessive and disproportionate to the offense committed, and thus as cruel and unusual,[3] section 9 may also apply, for example, to claims based on inadequate medical care in prison, *see Bott v. Deland*, 922 P.2d 732, 740 (Utah 1996), *abrogated on other grounds by Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, 16 P.3d 533, the assault and battery of a criminal suspect, *id.* at 741, and the exposure of prisoners to an increased risk of serious harm, *see Dexter v. Bosko*, 2008 UT 29, ¶ 19, 184 P.3d 592.

Dexter most vividly demonstrates the unnecessary rigor clause's independent force. In *Dexter*, prison officials loaded nine handcuffed prisoners into a transport van and refused to secure them with seatbelts, even when some asked. The driver, who wore his own seatbelt, crashed the van and caused one prisoner, Dexter, to be thrown

[3] In that context, the Court has repeatedly held that a punishment is cruel and unusual "if it is 'so disproportionate to the offense committed that it shocks the moral sense of all reasonable persons as to what is right and proper under the circumstances.'" *State v. Tulley*, 2018 UT 35, ¶ 76, 428 P.3d 1005 (alterations omitted) (citing *Lafferty*, 2001 UT 19, ¶ 73).

from the vehicle. Dexter suffered paralysis and ultimately died. His estate filed suit against prison personnel under the unnecessary rigor clause. *Id.* at ¶ 3.

Looking to the text of section 9 and its historical context, this Court held that a prisoner suffers unnecessary rigor when "subject to unreasonably harsh, strict, or severe treatment." *Id.* at ¶ 19; *see Bott*, 922 P.2d at 740–41 (unnecessary rigor clause bars "needlessly harsh, degrading, or dehumanizing" or "clearly excessive or deficient and unjustified" treatment). This includes "being unnecessarily exposed to an increased risk of serious harm" as Dexter was. *Dexter*, 2008 UT 29, ¶ 19. Ultimately, the unnecessary rigor clause "protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require." *Id.* at ¶ 17. While the unnecessary rigor and cruel and unusual punishment clauses may overlap "on a factual level, the purposes are different." *Id.* "Torture may be cruel and unusual but strict silence during given hours may not. Strict silence, however, may impose unnecessary rigor or unduly harsh restrictions on the service of one's otherwise proper sentence." *Id.* Determining whether the

government violated the unnecessary rigor clause requires a fact-intensive inquiry. *Id.* at ¶ 18.

This Court has not yet addressed section 9's scope in the context of a method-of-execution challenge. Nevertheless, its other "unnecessary rigor" precedents demonstrate that the clause has independent force, separate from the cruel and unusual punishment clause. By reflexively adopting Eighth Amendment precedent to dismiss challenges brought under *both* clauses, the district court at a minimum treated the unnecessary rigor clause as surplusage and failed to fully consider its application to the present case.

II. Article I, section 9 of the Utah Constitution prohibits subjecting prisoners to any cruelty or harshness that is not strictly necessary or essential.

In interpreting the Utah Constitution, this Court "begin[s] with a review of the constitutional text." *Dexter*, 2008 UT 29, ¶ 11. It then informs its "textual interpretation with historical evidence," *id.* (citation omitted), looking "to history and tradition as part of the inquiry into what statehood-era Utahns would have understood the constitution's text to mean"—that is, the original public meaning. *Planned Parenthood*, 2024 UT 28, ¶ 109.

An analysis of the text, history, and purpose of article I, section 9, demonstrates that its unnecessary rigor clause, either standing alone or in conjunction with the cruel and unusual punishment clause, prohibits subjecting those in the carceral system to any cruelty or harshness that is not strictly necessary or essential to the State's penological goal.

A. The plain text of section 9 prohibits subjecting prisoners to any cruelty or harshness that is not strictly necessary or essential.

Several aspects of the text distinguish section 9 from the Eighth Amendment. First, the unnecessary rigor clause is not limited to "punishments," but applies to general treatment of an individual, whether or not that treatment is part of the "punishment" for an offense. Second, the clause explicitly applies to every stage of the criminal process, from arrest through punishment. *See Bott*, 922 P.2d at 741. Finally, application of the clause requires an analysis of the term "unnecessary rigor," both as two separate words and as read together.

Dictionary definitions "define 'necessary' in terms of being 'needed,' 'absolutely needed,' or 'essential.'" *In Int. of B.T.B.*, 2018 UT App 157, ¶¶ 51–54, 436 P.3d 206 (collecting examples). As this Court has explained in another context, the term "necessary" mandates that

"the focus should be on whether it is *needed*, not whether it could be *avoided*." *Raab v. Utah Ry. Co.*, 2009 UT 61, ¶¶ 47–50, 221 P.3d 219. Unnecessary, then, means "not absolutely needed" or "not essential." "Rigor" is defined as "an act or instance of strictness, severity, harshness, oppression, or cruelty." *Dexter*, 2008 UT 29, ¶ 12 (citing Webster's Third New International Dictionary 1957 (1986)). Put together, the plain language of the clause prohibits any strictness, severity, harshness, oppression, or cruelty towards an individual in the criminal justice system that is not absolutely needed or essential.

B. The history and context of section 9 further demonstrate that it is meant to protect individuals in the carceral system from inhumane treatment.

The history and context of section 9 coincide with the plain-text meaning and demonstrate that the framers of the Utah Constitution viewed the language of the Eighth Amendment as insufficiently protective of individuals in the carceral system and chose to expand upon it.

1. *Utah's unique historical context sheds light on the original public meaning of section 9.*

The recorded debate of Utah's constitutional convention says very little on section 9. After the provision was introduced and read to the

convention, Charles Varian questioned the unnecessary rigor clause. He said: "I don't know what the purpose of that last phrase or clause is," noting that the first sentence, which mirrors the Eighth Amendment, "seems to cover the whole ground." Official Report of the Proceedings and Debates of the Convention 257 (Star Printing Co. 1898 ed.).

The clause's sponsor, Heber Wells, answered that "[t]he object" of the clause was "to protect persons in jail if they shall be treated inhumanely while they are in prison." *Id.* Another delegate, Samuel Thurman, asked if the clause was "copied from any other constitution." *Id.* at 257–58. Mr. Wells responded he did not think so, *id.*, although the clause already existed in Tennessee, Indiana, Oregon, and Wyoming.[4] Mr. Thurman stated he did not think the convention should adopt the provision "unless it is copied from some other constitution," and the members voted to strike it. *Id.*

There is no more recorded debate. Yet something must have happened to reverse this vote (perhaps the revelation that the clause's language mirrored that already adopted in other states), because the

[4] *See* Tenn. Const. art. 11, § 13 (1796); Ind. Const. art. I, § 12 (1816); Or. Const. art. I, § 13 (1857); Wyo. Const. art. I, § 16 (1889).

delegates voting on the Declaration of Rights passed section 9 with the unnecessary rigor clause intact. *See* Utah Const. art. I, § 9 (1895).

Scholars analyzing section 9 have explained that the framers were likely influenced by Utah's unique history. *See, e.g.*, James G. McLaren, *The Meaning of the "Unnecessary Rigor" Provision in the Utah Constitution*, 10 BYU J. Pub. L. 27 (1996). Members of the Church of Jesus Christ of the Latter Day Saints (LDS), sometimes referred to as Mormons, fled religious persecution and settled in Salt Lake Valley in 1847. *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993). LDS members "were the first substantial group of pioneers to settle in" what is now Utah and "constituted an overwhelming majority of the population during the almost fifty years Utah was a territory." *Id.*

In 1852, the LDS church declared polygamy a central tenet of the religion, despite the federal government's opposition to plural marriage. Edwin B. Firmage, *The Judicial Campaign Against Polygamy and the Enduring Legal Questions*, 27 BYU Studies 91, 91 (1987). The church's declaration led to a concentrated federal effort to target polygamists, mostly LDS leaders, in Utah. In the 1860s, Congress passed laws outlawing polygamy in the territories. "The pace and severity of these

laws increased after the Civil War, as penalties were ratcheted up and procedures to facilitate conviction were devised."[5] And convictions skyrocketed under the 1882 Edmunds Act, which "created the new offense of unlawful cohabitation," "allowed joinder of polygamy and cohabitation charges, and effectively eliminated all Mormons as jurors in polygamy cases." *Id.* at 96. During the territorial period, most federal criminal cases in Utah related to polygamy "in one way or another." *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 155–56 (2002).

Under the Edmunds Act, proving cohabitation was incredibly easy for prosecutors—"[t]o be tried was, in effect, to be convicted." Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 Utah L. Rev. 308, 348 (1964). Prosecutors began to separate cohabitation charges temporally, increasing the maximum punishment available. Oman, *supra*, at 749; Firmage, *supra*, at 99. "During the 1880s,

[5] Nathan B. Oman, *The Story of a Forgotten Battle: Reviewing The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, 2002 BYU L. Rev. 745, 748 (2002). Because only certain LDS men were permitted to practice polygamy, those targeted by prosecutors were also, "by and large," church leaders. Firmage, *supra*, at 96.

approximately one thousand men in Utah were imprisoned for polygamy." Kristen Bell, *State Constitutional Prohibitions against Unnecessary Rigor in Arrest and Confinement*, 17 Tenn. J.L. & Pol'y ___, *58 (forthcoming 2025);[6] *see* McLaren, *supra*, at 38–39. And not just men were imprisoned—wives were often imprisoned for contempt for refusing to testify against their husbands. *See* Firmage, *supra*, at 107.

"During this time, there was frequent criticism of the disproportionate nature of sentences for polygamy, as well as terrible conditions in prisons." Bell, *supra*, at *58. Prisons in the nineteenth century—including those in Utah—were rife with inhumane conditions. *See, e.g.*, McLaren, *supra*, at 38 (1996) (Utah's territorial prison was "almost totally unfit," with walls in decay, "unsafe and unhealthy cells," muddy drinking water, and inhumane discipline practices such as an iron cage known as a "sweat box"); *Dexter*, 2008 UT 29, ¶ 14. These conditions were not unique to Utah but were of particular concern to constitution-era Utahns given the historical context. And in 1895, mere months before the Declaration of Rights was adopted, "the *Deseret*

[6] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5108018.

Weekly News published an expose of 'barbarous practices' in the Salt Lake County Jail," entitled "Prison Cruelties." *Id.* at 40.

Against this backdrop, the framers enacted article I, section 9. Every delegate at the convention would have known of the past imprisonment of Mormon church leaders and their wives. In fact, several had first-hand experiences.[7] The father of Heber Wells, section 9's sponsor, "was a prominent Mormon polygamist who had been arrested" for practicing polygamy. Bell, *supra*, at *58. Another delegate, Franklin Richards, represented Lorenzo Snow in his habeas case before the U.S. Supreme Court, based on temporally separated charges of unlawful cohabitation with consecutive sentences, which led to excessive sentences for polygamy. *See In re Snow*, 120 U.S. 274 (1887).

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[7] For example, Karl Maeser was arrested and convicted of unlawful cohabitation in 1884. A. LeGrand Richards, Called to Teach: The Legacy of Karl G. Maeser 469 (2014). And, because wives and their children "were deemed sufficient evidence to convict their husbands," several delegates' wives went underground and out of state to avoid federal authorities. *See* Ronald W. Walker, *A Mormon "Widow" in Colorado: The Exile of Emily Wells Grant*, 43 BYU Studs. Q. 175, 175–178, 184–85 (2004). For example, the wives of Brigham Henry Roberts, Moses Thatcher, and John Henry Smith, all convention delegates, hid out in Manassa, Colorado to protect their husbands from federal prosecution. *Id.*

Further evidence of the original public meaning of the unnecessary rigor clause comes from three early Utah statutes that cross-referenced the clause for support. These statutes provided that defendants shall not be subject to unnecessary restraint and that any injuries to prisoners "not authorized by law" were "punishable in the same manner" as if they were free, and prohibited and criminalized any "willful inhumanity or oppression toward any prisoner." Richard W. Young, et al., Revised Statutes of the State of Utah, in Force Jan. 1, 1898 (1897), §§ 4636, 4141, 4504; *see Dexter*, 2008 UT 29, ¶ 15 (finding these statutes relevant to analysis of unnecessary rigor clause). These statutes support the interpretation of the unnecessary rigor clause as motivated by "the desire to eliminate brutality and to ensure decent and humane treatment for convicts." *Dexter*, 2008 UT 29, ¶¶ 14–15.

2. *History and context from sister states with similar provisions offer further proof of section 9's original public meaning.*

As this Court has recognized, the drafters of the Utah Constitution "relied heavily on the constitutions" of other states, such that "in construing Utah's Declaration of Rights it is appropriate to look at the rights retained by citizens of other states under similar

constitutional provisions." *State v. Simmons*, 947 P.2d 630, 635–36 (Utah 1997) (Durham, J., plurality opinion). This Court has recently reaffirmed the value of looking to historical evidence outside the state to determine the Utah Constitution's original public meaning. *See Planned Parenthood*, 2024 UT 28, ¶¶ 125–26; *League of Women Voters v. Utah State Legislature*, 2024 UT 40, ¶¶ 69–70, 559 P.3d 11.

Looking at historical and contextual evidence from sister states can be especially illuminating in the unnecessary rigor context, since Utah was the last of five states to adopt this type of provision. Tennessee, Indiana, Oregon, and Wyoming had all adopted such a clause in the decades prior, and evidence from those states can shed light on the original public meaning of Utah's clause, irrespective of whether the Utah Constitution's framers were aware of those clauses at the time of adoption.

Tennessee was the first state to include an unnecessary rigor clause in its 1796 constitution. One of the document's framers had been arrested and imprisoned in North Carolina a few years before the convention, which may have influenced the provision. Bell, *supra*, at *31. Twenty years later, Indiana enacted its first constitution and the

second unnecessary rigor clause in the country. *Id.* at *36–37. It was introduced by John Badollet, a prominent anti-slavery activist and national leader in prison reform. *Id.* at *37. In turn, scholars believe that Oregon's and Wyoming's unnecessary rigor clauses, in 1857–59 and 1889, respectively, were inspired by the constitutions in Tennessee and/or Indiana. *Id.* at *44–46, 55–57.

Although constitutional conventions in these states offer little insight into the original public meaning of the clauses, a wealth of other contextual evidence from the eighteenth and nineteenth centuries grounds the meaning of the term "unnecessary rigor" in the concern for safeguarding prisoners and preventing inhumane treatment in prisons. *See generally id.*

Citizen concerns about unnecessary harshness in prison applied both to extraordinarily cruel or torturous practices (such as whipping) and the more mundane. For example, the unnecessary rigor clause in Tennessee was associated with two 1826 statutes providing for minimum standards of incarceration. These statutes "provide some insight into how people at the time understood and practically implemented the constitutional prohibition against 'unnecessary rigor.'"

Id. at *32. The focus was not only on "egregious acts of violence," but also "on provision of basic necessities for normal living"—jailors were required to provide prisoners "clean straw beds," "sufficient blankets to keep them comfortable," "two meals per day, of good sound bread and meat, well cooked, with vegetables in addition at one of said meals," and "plenty of good clean water." *Id.* at *32–33. Prisoners were also to have "two pieces of clothing washed every week," "privy buckets emptied" once a day, an opportunity to shave once a week, and mail and visitors allowed without charge. *Id.*

Newspapers used the phrase "unnecessary rigor" in referring to unnecessarily inhumane treatment in prison. For example, one newspaper discussed "unnecessary rigor" at an Indiana women's prison. *Id.* at *39. This included excessive heat, no ventilation, girls kept in solitary confinement with shackles, and particularly small rooms. *Id.* Another newspaper covered a visit by Paul Davis, an Indiana politician, to a county jail, describing it as "inhumane" in violation of the unnecessary rigor clause. *Id.* Davis noted, for example, a man being stripped of his clothes, placed in a dark cell, and sprayed with a hose. *Id.* at *40.

Similarly, a newspaper in Oregon published an article entitled "The House of Torture" detailing the conditions in the state penitentiary and describing them as "unnecessary rigor" in violation of the state constitution. *The House of Torture*, The Oregonian (Mar. 19, 1917), https://oregonnews.uoregon.edu/lccn/sn83025138/1917-03-19/ed-1/seq-8/ [https://perma.cc/W5V5-PY9S]. The newspaper detailed various inhumane practices before concluding that "[t]he purpose of the people in imprisoning wrongdoers is not to wreck their health, break their spirits, confirm them in crime or debase them into brutes who war on society." *Id.*

These historical sources support the notion that the unnecessary rigor clause is focused on the humanity of those in the carceral system and protecting them from violence, cruelty, oppression, and harshness that is not strictly necessary to the administration of the justice system.

III. Forcing prisoners challenging a method of execution to identify an acceptable alternative method would violate Article I, section 9's straightforward requirement.

Transplanting recent Eighth Amendment requirements to select a feasible execution alternative into article I, section 9, would undermine rather than uphold that provision. Contrary to the decision below, the

U.S. Supreme Court's jurisprudence does not define the outer bounds of the Utah Constitution's protections in the execution context (or otherwise).

In order to equate section 9's protection to that in the Eighth Amendment as interpreted in *Glossip*, 576 U.S. 863, this Court would need to find that *Glossip*'s reasoning is required by, or at the very least consistent with, section 9's combined protection against cruel and unusual punishment and unnecessary rigor. It is not. This Court interprets section 9 independently from the Eighth Amendment, *Bishop*, 717 P.2d at 267; further, the "restriction on unnecessary rigor is focused on the circumstances and nature of the process and conditions of confinement." *Dexter*, 2008 UT 29, ¶ 17. Nothing in this precedent, the plain text of section 9, or the history of the unnecessary rigor clause requires—as an element of a prisoner's claim—a showing that an alternative method of execution is available.

As shown below, imposing such a requirement (a) would require adoption of *Glossip*'s faulty reasoning; (b) would conflict with section 9 and Utah statutory law; and (c) would violate section 9's ban on

unnecessary rigor. Each of these grounds independently requires reversal of the district court.

A. *Glossip* erected an unnecessary barrier against execution challenges, unsupported by sound reasoning or prior precedent.

Under *Glossip*, 576 U.S. at 880, a prisoner challenging a method of execution as cruel and unusual in violation of the Eighth Amendment must identify a "known and available" alternative method of execution. In *Bucklew v. Precythe*, 587 U.S. 119, 141 (2019), the Supreme Court further clarified that it is not sufficient for a challenger to identify a method that is only theoretically feasible: rather the proposed alternative "must be sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" *Id.* (citation omitted). This entails a "necessarily comparative exercise," examining the challenged versus the proposed methods of execution. *Id.* at 136.

By its terms, *Glossip*'s dismissal rule would apply even to challenges to execution methods the U.S. Supreme Court has already stated violate the Eighth Amendment, such as burning at the stake. *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). It would also require

dismissal of Eighth-Amendment challenges even though, at the pleading stage, the prisoners' allegations that a method would cause prolonged pain and torture must be "accept[ed] as true[.]" *Olsen v. Hooley*, 865 P.2d 1345, 1346 (Utah 1993). *Glossip* makes identifying a fallback execution method a pleading element of all such challenges.

This rule is novel and unsupported by prior precedent. Until *Glossip*, federal courts never read such a requirement into the Eighth Amendment. Going back at least to *Wilkerson* in 1878, cases considering Eighth-Amendment method-of-execution challenges never stated such a requirement. *See, e.g.*, *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (rejecting notion that plaintiffs must "identif[y] an alternative, authorized method of execution"); *In re Kemmler*, 136 U.S. 436, 446 (1890) (evaluating constitutionality of electric chair without requiring pleading of alternative execution method); *Wilkerson*, 99 U.S. at 135–36 (evaluating constitutionality of firing squad without condemned having identified alternative execution method; affirming *People v. Wilkinson*, 2 Utah 158 (Utah. Terr. 1877)); *see also Andrews v. Morris*, 607 P.2d 816, 824 (Utah 1980) (rejecting Eighth Amendment

challenge to execution by hanging or firing squad without requiring identification of alternative execution method at threshold).

Within this history, the lack of such a requirement did not prevent execution challengers from offering alternative methods of execution they claimed to cause less pain or suffering. For example, in a Kentucky case eventually heard by the Supreme Court, prisoners challenging a three-drug lethal-injection protocol as cruel and unusual proposed a one-drug alternative that, though untested, would have been permitted under state law and allegedly would have prevented risks the prisoners attributed to the three-drug protocol. *See Baze v. Rees*, 553 U.S. 35, 40–41 (2008) (Roberts, C.J., plurality opinion); *id.* at 44 (citing Ky. Rev. Stat. Ann. § 431.220(1)(a)).

A three-judge plurality rejected this specific challenge as pleaded. The plurality stated that a "stay of execution may not be granted on *grounds such as those asserted here* unless the condemned prisoner establishes that the state's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives." *Id.* at 61 (emphasis added).

In *Glossip*, the majority wrenched this language from its context. It expanded the *Baze* plurality's rejection of the specific claim at issue into a general rule that *all* execution challenges must identify a feasible alternative method of execution (despite the fact that nine years earlier the Court had, in *Hill*, 547 U.S. at 582, specifically rejected such a rule). *Glossip*, 576 U.S. at 877.[8]

When interpreting the Utah Constitution, this Court is not bound by federal decisions interpreting federal constitutional provisions. *Bishop*, 717 P.2d at 267. Given *Glossip*'s strained and unprecedented reasoning, this Court should decline to incorporate its pleading requirement into section 9. *Cf.*, *e.g.*, *Whitehead*, 870 P.2d at 931 n.36 (rejecting adoption of inconsistently applied Supreme Court interpretation of First Amendment into Utah Constitution because it is

[8] None of the concurring justices in *Baze* set out this more general pleading requirement for execution challenges either. *See Baze*, 553 U.S. at 71–87 (Stevens, J., concurring); 87–93 (Scalia, J., concurring); 94–107 (Thomas, J., concurring); 107–13 (Breyer, J., concurring); *see also id.* at 63 (Alito, J., concurring) ("The [majority] opinion concludes that 'a State's refusal to change its method [of execution] can be viewed as 'cruel and unusual' under the Eighth Amendment' if the State, 'without a legitimate penological justification,' rejects an alternative method that is 'feasible' and 'readily' available and that would 'significantly reduce a substantial risk of severe pain.'").

"unwise to found our interpretation of the quite different Utah constitutional provision on such unstable ground").

B. The *Glossip* requirement conflicts with section 9's unnecessary-rigor ban and other elements of Utah law.

Section 9's "restriction on unnecessary rigor is focused on the circumstances and nature of the process and conditions of confinement." *Dexter*, 2008 UT 29, ¶ 17. The rule is straightforward. If the circumstances or conditions run afoul of the unnecessary rigor requirement, they are unconstitutional.

Glossip's pleading rule has no home here. Nothing in the history of section 9 requires unnecessary-rigor challengers to plead an alternative way for the State to carry out the punishment free from unnecessary rigor. Utah's commitment to humane treatment of prisoners would be ill-served by requiring the prisoners to work out a better way of punishing them before they may bring challenges under section 9.

Indeed, the clause's text places a high burden on *the State* to show the rigor entailed in its otherwise lawful punishment is "needed,' 'absolutely needed,' or 'essential.'" *B.T.B.*, 2018 UT App 157, ¶¶ 51–54; *cf. Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603 (requiring

government to justify infringement on fundamental right by showing it is "narrowly tailored" to protect a "compelling governmental interest"). *Glossip*'s "necessarily comparative exercise," *Bucklew*, 587 U.S. at 136, plays no part in unnecessary-rigor analysis. The burden remains on the State. Holding otherwise would compromise the goal of requiring "decent and humane treatment for convicts." *Dexter*, 2008 UT 29, ¶¶ 14–15.

Further, as shown above, *supra* Part III.A, stating an alternative, plausible execution method has never before been required to challenge a Utah execution method under the Eighth Amendment or section 9. In both Utah's territorial times and its entire history as a state, no such requirement ever existed. And the State has continued to administer the death penalty.

The same is true for challenges to prison conditions and other sentences. Utah courts have successfully adjudicated such challenges, under both section 9 and the Eighth Amendment, without requiring the challengers to state a feasible, alternative way for the State to carry out its punishment. *See Wickham v. Fisher*, 629 P.2d 896, 901 (Utah 1981); *State v. Houston*, 2015 UT 40, ¶ 50, 353 P.3d 55.

Finally, importing *Glossip*'s pleading requirement into section 9 would unnecessarily place section 9 in conflict with the state's statutory law. This law endows the director of the Department of Corrections with the authority and responsibility to carry out executions, as "specified in the warrant or as required under Section 77-18-113." Utah Code Ann. § 77-19-10(1).

Section 77-18-113, in turn, states that defendants sentenced to death after May 3, 2004, must be executed by lethal injection, while setting out firing squad as the alternative in the following circumstances: when the judgment preserves such as the punishment; when lethal injection is ruled unconstitutional facially or as applied; or when the State cannot obtain the lethal substance. *Id.* § 77-18-113. These statutes provide no role for the condemned to select an alternative execution method.

Utah courts avoid construing statutes in a way that creates constitutional conflicts. *State v. Mooney*, 2004 UT 49, ¶ 12, 98 P.3d 420. They also seek to "avoid separation-of-powers concerns." *State v. Walker*, 2015 UT App 213, ¶ 16, 358 P.3d 1120. Interpreting section 9 in a manner that conflicts with sections 77-19-10(1) and 77-18-113 would

plunge the state into a separation-of-powers standoff. This Court can and should avoid this conflict by rejecting adoption of the poorly reasoned and newfound *Glossip* requirement into section 9.

C. Adopting *Glossip*'s pleading requirement would constitute unnecessary rigor and violate section 9.

Forcing a prisoner to select a plausible execution method to proceed with a section 9 claim (under the cruel and unusual punishment and/or unnecessary rigor clauses) would impose a needless, cruel, and inherently coercive dilemma and would itself violate section 9's unnecessary rigor clause. The requirement would permit the government to execute a prisoner with a cruel, unusual, or unnecessarily rigorous method simply because the prisoner, a lay person inexpert in executions, was unable to identify a workable way for the State to execute him.

The dilemma inherent in the *Glossip* standard is impossible for the condemned to navigate safely, rationally, or humanely. On the one hand, the prisoner will be executed cruelly if he cannot or does not name a feasible alternative method. On the other, the uneducated (and/or mentally limited, *see infra* pages 33–34) prisoner risks suggesting an execution method that is cruel, unusual, unnecessarily

rigorous, or torturous, given his lack of expertise and other limitations. At best, by suggesting an alternative, he assists the government in the taking of his own life.

Prisoner's counsel cannot fill this void. Even if more expert in execution methods, or more resourced to study them, counsel face significant ethical issues in doing so. Utah lawyers must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Utah R. of Pro. Conduct 1.3 cmt.1. If *Glossip* were imported into section 9, capital counsel would face the dilemma of adhering to its requirement of identifying execution alternatives, and thereby assisting the State, or acting, as the rule requires, only with dedication to the interests of the client.

In a variety of contexts, courts find placing criminal defendants in impossible and cruel dilemmas (and trilemmas) to be coercive and impermissible. *See, e.g.*, *State v. Larrabee*, 2013 UT 70, ¶ 32, 321 P.3d 1136 (rejecting State's argument that counsel's failure to object to prosecutorial misconduct was sound strategy because it creates "a

Hobson's choice" between objecting and "highlighting the improper comment" or not objecting and waiving the claim); *Pennsylvania v. Muniz*, 496 U.S. 582, 599 (1990) (noting the "inherently coercive environment created by the custodial interrogation preclud[ing] the option of remaining silent" and leaving "the choice of incriminating" oneself "or answering untruthfully"); *State v. Fish*, 893 P.2d 1023, 1030 (Or. 1995) (en banc) (finding that a statutory scheme regarding field sobriety tests subjected individuals to a "cruel dilemma" that effectively eliminated their "choice" of whether to exercise the right against self-incrimination); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that defendant's testimony given to meet standing requirement of suppression hearing may not be introduced at trial because it is "intolerable that one constitutional right should have to be surrendered in order to assert another").

These impermissible catch-22s are "needlessly harsh." *Bott*, 922 P.2d at 740–41 (citation omitted). They resemble the official acts that gave rise to the unnecessary rigor clause in section 9. A cruel and unnecessary dilemma precisely describes the choice foisted on Mormon wives, when this State was being born, between testifying against their

husbands or facing arduous and undignified imprisonment. *See supra* Part II.B.1. The framers of the Utah Constitution specifically enacted the unnecessary rigor clause to relieve prisoners of such cruel dilemmas.

Importing *Glossip* into section 9 is not only cruel, inhumane and rigorous, but it is unnecessary—that is, not needed or essential. *B.T.B.*, 2018 UT App 175, ¶¶ 51–54. As shown above, *supra* Part III.B, it would run counter to Utah's statutory framework, turning the exercise of identifying an alternative method of execution into cruel makework.

The theory of *Glossip* is that a prisoner preserves the State's ability to execute by naming an execution alternative. *Glossip*, 576 U.S. at 881. But given the cruelty and inhumanity inherent in forcing the prisoner to do so, the question in Utah becomes how would this work and is it necessary? *See Bott*, 922 P.2d at 740–41. If the condemned selects an alternative consistent with the statutory scheme, that accomplishes nothing over what the statute already provides. If the condemned selects a method *not* contemplated by section 77-18-113, as the Eighth Amendment would permit, *Nance v. Ward*, 597 U.S. 159, 170 (2022), this would not bind the head of the Department of Corrections to

that decision. *See* Utah Code Ann. §§ 77-18-113, 77-19-10(1). In either case, *Glossip*'s pleading requirement serves no purpose in Utah.

That would leave jurisprudential theory as the only reason to enforce the pleading requirement, with no practical role. But a theoretical requirement is neither needed nor essential; it is a cruel and inhumane exercise in futility.

Additional practical concerns also lead to the conclusion that importing *Glossip*'s pleading requirement into section 9 would constitute unnecessary rigor. First, it seems fanciful to assume that condemned death-row prisoners, rather than trained correctional officials, possess the resources to select a fallback execution method. Even if not mentally incompetent under the standard of *Ford v. Wainwright*, 477 U.S. 399 (1986),[9] or intellectually disabled, *Atkins v. Virginia*, 536 U.S. 304 (2002), death-row prisoners often suffer from some combination of mental illness, illness induced by years of death-row incarceration, trauma, or intellectual and cognitive limitation. *See* Frank R. Baumgartner et al., Deadly Justice: A Statistical Portrait of

[9] At the time of this filing, Ralph Menzies' competency litigation remains pending. If he is found incompetent, he, by definition, will also be incompetent to make decisions about alternative execution methods.

the Death Penalty 238, 244 (2018) (finding approximately 48% of prisoners executed from 2000 to 2015 had mental illness or substance abuse disorder as an adult); Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*., Wash. Post (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/ [https://perma.cc/H7JH-584U] (finding those on death row more likely than general population to have had childhood trauma or intellectual disability).[10] Indeed, imprisonment on death row can lead to or exacerbate these conditions. *See*, *e.g.*, *Porter v. Clarke*, 923 F.3d 348, 356–57 (4th Cir. 2019) (acknowledging this danger on Virginia's death row).

[10] *See also*, *e.g.*, *State v. Lovell*, 2024 UT 25, ¶¶ 35–37 (discussing history of injuries, genetic predisposition to substance abuse, mood disorders and personality disturbance); *Menzies v. State*, 2014 UT 40, ¶ 195, 344 P.3d 581, *abrogated on other grounds by McCloud v. State*, 2021 UT 51, 496 P.3d 179 (discussing "extensive evidence of . . . social history and mental health, including physical, emotional and psychological abuse"); *Archuleta v. Galetka*, 2011 UT 73, ¶ 112, 267 P.3d 232 (discussing mental and developmental deficits); *Carter v. Galetka*, 2001 UT 96, ¶¶ 22–23, 44 P.3d 626 (discussing head injury, organic cerebral dysfunction, alcohol and drug abuse); *Utah v. Taylor*, 947 P.2d 681, 687 (1997) (discussing mental health problems).

Second, in no other context would the ideas of any prisoner (let alone, one mentally compromised) about how to administer a prison or punishment trump the expertise of trained prison officials explicitly tasked with setting such policies under the guidance of legislative bodies. *See Turner v. Safley*, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *see also, e.g.*, *Lopez v. LeMaster*, 61 P.3d 185, 192 (N.M. 2002) ("[P]rison discipline is entrusted to prison administrators"); *Meis v. Grammer*, 411 N.W.2d 355, 356–57 (Neb. 1987) (courts defer to the "expert judgment" of prison officials). In every other circumstance, rather than assigning the task to the prisoner, courts defer to corrections officials. *See, e.g.*, *Cain v. Dep't of Corr.*, 657 N.W.2d 799, 803 (Mich. Ct. App. 2002) (noting that "under *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management" (citation omitted)).

In sum, forcing a prisoner, or their counsel, to act as an instrument of their own execution would not only inflict harsh,

degrading, and dehumanizing punishment but would also serve no purpose. This Could should not import this Eighth-Amendment pleading standard into section 9 because doing so would itself violate the unnecessary rigor clause.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the trial court's dismissal of the plaintiffs' claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Utah Rule of Appellate Procedure 25(f) because it contains 6,973 words as calculated by Microsoft Word. I further certify that it complies with Rule 21 as it contains no non-public information.

DATED this 30th of January, 2025.

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CERTIFICATE OF SERVICE

I certify that on January 30, 2025, a copy of Brief of Amicus Curiae of the American Civil Liberties Union and the American Civil Liberties Union of Utah was filed via email, and that the following were served via email:

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