

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA JR. and ZANE
M. FLOYD,

Appellants,

vs.

BOARD OF STATE PRISON
COMMISSIONERS; JAMES
DZURENDA, DIRECTOR OF
NEVADA DEPARTMENT OF
CORRECTIONS; NEVADA
DEPARTMENT OF CORRECTIONS,

Appellees.

Case No.: 91586

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**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF
NEVADA, NEVADA PRESS ASSOCIATION, AND NEVADA OPEN
GOVERNMENT COALITION IN SUPPORT OF REVERSAL AND
APPELLANTS' OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order so the judges of this Court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc., is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership interest in it. This amicus curiae is represented by Christopher Peterson.

The Nevada Press Association is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership interest in it. This amicus curiae is represented by Christopher Peterson.

The Nevada Open Government Coalition, is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership interest in it. This amicus curiae is represented by Christopher Peterson.

No other law firms have appeared for the amicus in this case or are expected to appear for the amicus in this Court.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST	1
ARGUMENT	2
I. The Execution Manual’s procedures are regulations because they regulate the First Amendment activities of journalists and other witnesses to the execution.	8
II. Requiring Board approval would give journalists and the general public the opportunity to advocate for regulations less burdensome on protected activity.	11
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Cases

<i>California First Amendment Coalition v. Woodford</i> , 299 F.3d 868 (9th Cir. 2002).	3, 12
<i>First Amendment Coalition of Ariz., Inc. v. Ryan</i> , 938 F.3d 1069 (9th Cir. 2019) ..	9, 11, 12
<i>Nevada Press Association v. Daniels</i> , No. 3:21-cv-00317-RFB-CLB (D. Nev. July 23, 2021).....	2, 14

Statutes

NRS 209.111(1)(C).....	8
NRS 233B.038(1)(a)	8
NRS 233B.038(2)(d).....	9
NRS 288.010(3)	13

Other Authorities

Cristen Drummond, <i>Overtime and understaffing - Correction Officers Union reveals issues with Nevada’s prison</i> , 3 NEWS KSNV-TV (Oct. 3, 2022), https://news3lv.com/news/local/overtime-and-understaffing-correction-officers-union-reveals-issues-with-nevadas-prison	12
Dana Ford, <i>Oklahoma executes Charles Warner</i> , CNN (Jan. 16, 2015), https://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/index.html	6
Daniel Nichanian, <i>Nevada Prosecutors are Standing in the Way of Abolishing the Death Penalty</i> , THE APPEAL (May 7, 2021), https://theappeal.org/politicalreport/nevada-prosecutors-are-standing-in-the-way-of-abolishing-the-death-penalty/ ; Michael Lyle, <i>Prosecutor senators pressed to quit foot-dragging on death penalty abolish bill</i> , NEVADA CURRENT (May 11, 2021), https://www.nevadacurrent.com/2021/05/11/prosecutor-senators-pressed-to-quit-foot-dragging-on-death-penalty-abolition-bill/	5
Debbie Sigelbaum, <i>America’s ‘inexorably’ botched executions</i> , BBC NEWS (Aug. 1, 2014), https://www.bbc.com/news/magazine-28555978	4

Erik Eckholm, <i>Arizona Takes Nearly 2 Hours to Execute Inmate</i> , NEW YORK TIMES (July 23, 2014), https://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html	7
Katie Fretland, <i>Scene at botched Oklahoma execution of Clayton Lockett was ‘a bloody mess’</i> , THE GUARDIAN, (Dec. 13, 2014), https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess	6
Ken Ritter & Sam Metz, <i>Governor, top Democrat call Nevada death penalty repeal dead</i> , AP NEWS (May 13, 2021), https://apnews.com/article/nevada-las-vegas-mass-shooting-b0ff30e95183f66012b88f5f0c17273f	4
Khaleda Rahman, <i>Nevada is Trying to Abolish the Death Penalty–Democrats Stand In the Way</i> , NEWSWEEK (May 11, 2021), https://www.newsweek.com/why-nevada-must-abolish-death-penalty-1590054	4
Khaleda Rahman, <i>Nevada Set to Execute Death Row Inmate for First Time in 15 Years</i> , NEWSWEEK (June 8, 2021), https://www.newsweek.com/nevada-set-execute-first-inmate-15-years-1598519	3
Lauren Gill & Daniel Moritz-Rabson, <i>Alabama Failed to Carry Out Its Last Two Executions. It’s Trying Again This Week.</i> , BOLTS (July 18, 2023), https://boltsmag.org/alabama-executions/	7
Laurie Roberts, <i>Arizona needs a timeout after botched execution</i> , ARIZONA REPUBLIC (July 23, 2014), https://www.azcentral.com/story/laurieroberts/2014/07/23/woods-execution-botched/13073777/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epti=z1184xxe1184xxv000042&gca-ft=149&gca-ds=sophi	6
Marc Kovac, <i>Ohio’s first execution with two-drug lethal injection called ‘failed, agonizing experiment,’</i> AKRON BEACON JOURNAL (Jan. 16, 2014), https://www.beaconjournal.com/story/news/local/the-news-leader/2014/01/16/ohio-s-first-execution-with/19655585007/	5
Michael Lyle, <i>Return to sender: Sisolak declines NDOC’s proposal to crack down on mail, greeting cards</i> , NEVADA CURRENT (Aug. 31, 2022), https://nevadacurrent.com/2022/08/31/return-to-sender-sisolak-declines-ndocs-proposal-to-crack-down-on-mail-greeting-cards/	12
Nevada Department of Corrections, <i>Board of State Prison Commissioners, “Meetings,”</i> https://doc.nv.gov/Home/Prison_Commissioners/Board_of_State_Prison_Commissioners	11

Ramon Antonio Vargas, <i>Alabama subjected prisoner to ‘three hours of pain’ during execution – report</i> , THE GUARDIAN (Aug. 15, 2022), https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution	7
S.B. 350 Hearing, Assemb. Judiciary Comm., 83d Sess., Ex. F (Nevada Department of Corrections Execution Manual, June 9, 2021) (Nev. 2025)	10, 11
Sam Metz, <i>Blue states chart diverging paths on death penalty debate</i> , AP NEWS (Apr. 21, 2021), https://apnews.com/article/race-and-ethnicity-government-and-politics-nevada-legislature-las-vegas-mass-shooting-f96adbb830e8757bc501f919b276bddc	4
Sean Dowling, <i>Nevada Board of State Prison Commission meeting provides updates and criticism</i> , FOX 5 KVVU-TV (Dec. 20, 2024), https://www.fox5vegas.com/2024/12/21/nevada-board-state-prison-commission-meeting-provides-updates-criticism	12
Sean Whaley, <i>Nevada’s new \$860,000 execution chamber is finished but gathering dust</i> , LAS VEGAS REVIEW-JOURNAL (Nov. 27, 2016), https://www.reviewjournal.com/crime/nevadas-new-860000-execution-chamber-is-finished-but-gathering-dust	3, 4
Tabitha Mueller & Michelle Rindels, <i>Opponents of the death penalty turn up the heat as abolition bill’s future remains murky</i> , THE NEVADA INDEPENDENT (May 11, 2021), https://thenevadaindependent.com/article/opponents-of-the-death-penalty-turn-up-the-heat-as-abolition-bills-future-remains-murky	5
Constitutional Provisions	
Nev. CONST. art. V, § 21	11

STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been the nation's guardian of liberty for over 100 years. The ACLU works to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. As part of its mission, the ACLU seeks to promote government transparency by protecting access and viewership to government processes. The ACLU has previously defended the Nevada Press Association's First Amendment right to observe executions in Nevada. *Nevada Press Association v. Daniels*, No. 3:21-cv-00317-RFB-CLB (D. Nev. July 23, 2021) (filed).

The Nevada Press Association (NPA) is the formal trade organization that represents daily and weekly news publications in Nevada and the Lake Tahoe region of Northern California, as well as online news services, magazines and others. It is dedicated to representing the common interests of Nevada newspapers, furthering the public's right to know through an understanding that strong newspapers (protected by the First Amendment) are the cornerstone of a democratic society, promoting a closer fellowship within the newspaper fraternity, encouraging the elevation of journalistic standards and promoting the value of newspaper advertising. The NPA has previously challenged the restrictions imposed by the

Nevada Department of Corrections (NDOC)’s Execution Manual on its members’ First Amendment right observe executions in Nevada. *Id.*

The Nevada Open Government Coalition (NOGC) is a nonprofit, nonpartisan organization supporting democratic government accountability through transparency. The diverse coalition educates, advocates, and empowers civic engagement in Nevada through increased access to government information processes, and public understanding of public records laws, open meetings laws, and other issues related to open government. NOGC also testifies and advocates on transparency issues, including regarding law enforcement, in front of the Nevada Legislature and other governmental bodies.

No other party or party’s counsel authored the brief in whole or in part; and no other person—other than the amicus curiae, its members, or its counsel—contributed money or other consideration intended to fund preparing or submitting the brief.

ARGUMENT

Executions have always been public affairs in this country. Allowing community access to these events serves as a deterrent against future criminal conduct and a way for the public to accept responsibility for the death of the condemned. In some communities, the jury and the judge that issued the death sentence were even required by law to attend the execution. However, throughout

the Twentieth Century, executions migrated from the town square to state penitentiaries where security concerns limited attendance. With this transition, news reporters became essential witnesses for the public, describing the deaths of the condemned and often disputing official accounts from the event when government errors lead to agonizing final moments. Due to this history and the importance of public access to executions, the United States Court of Appeals for the Ninth Circuit has determined that the public and the press have a First Amendment right to observe state executions. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002).

The State now intends to execute Appellants Robert Ybarra, Jr. and Zane Floyd by lethal injection at Ely State Prison (ESP). While any execution is an event of public concern, these carry more import than most. While the death penalty has existed in Nevada from its days as a territory of the United States, the State has not performed an execution since April 26, 2006, a hiatus of almost 20 years.¹ During this time, it closed the Nevada State Prison, the only prison to have ever hosted an execution in Nevada, and built a new, \$860,000 execution chamber at ESP.² The

¹ Khaleda Rahman, *Nevada Set to Execute Death Row Inmate for First Time in 15 Years*, NEWSWEEK (June 8, 2021), <https://www.newsweek.com/nevada-set-execute-first-inmate-15-years-1598519>.

² Sean Whaley, *Nevada's new \$860,000 execution chamber is finished but gathering dust*, LAS VEGAS REVIEW-JOURNAL (Nov. 27, 2016),

new chamber has sat unused since construction concluded in 2016.³ Considering the historical nature of the next execution and that approximately 7.1% of lethal injections performed in this country are “botched,”⁴ this is an execution where the public’s First Amendment right to access and oversight of execution are particularly critical.

Of course, there is also a growing discussion in Nevada as to whether the death penalty should stay on Nevada’s books at all.⁵ During Nevada’s 2021 state legislative session, the state Assembly passed a bill to end executions only to see the legislation die in the Senate judiciary committee without a hearing.⁶ There was extensive coverage around the bill,⁷ and many reports drew a connection between

<https://www.reviewjournal.com/crime/nevadas-new-860000-execution-chamber-is-finished-but-gathering-dust>.

³ *Id.*

⁴ From 1890 to 2010, about 3% of all American executions were “botched.” Debbie Sigelbaum, *America’s ‘inexorably’ botched executions*, BBC NEWS (Aug. 1, 2014), <https://www.bbc.com/news/magazine-28555978>.

⁵ Khaleda Rahman, *Nevada is Trying to Abolish the Death Penalty—Democrats Stand In the Way*, NEWSWEEK (May 11, 2021), <https://www.newsweek.com/why-nevada-must-abolish-death-penalty-1590054>.

⁶ Ken Ritter & Sam Metz, *Governor, top Democrat call Nevada death penalty repeal dead*, AP NEWS (May 13, 2021), <https://apnews.com/article/nevada-las-vegas-mass-shooting-b0ff30e95183f66012b88f5f0c17273f>.

⁷ See, e.g., Sam Metz, *Blue states chart diverging paths on death penalty debate*, AP NEWS (Apr. 21, 2021), <https://apnews.com/article/race-and-ethnicity-government->

Clark County District Attorney Steve Wolfson's efforts to move forward with Zane Floyd's execution and his efforts to kill the abolition bill.⁸

Setting aside that Nevada's own history with the death penalty, the press has played an important role in holding governments accountable in other states when the government erred in carrying out executions with gruesome results. Botched lethal injection executions reported on by the media include:

- Dennis McGuire in Ohio, where McGuire appeared to make a "series of rattling, gasping, choking sort of sounds," along with "deep gulps for air" for roughly 10 minutes before he was announced dead.⁹

and-politics-nevada-legislature-las-vegas-mass-shooting-f96adbb830e8757bc501f919b276bddc.

⁸ See Daniel Nichanian, *Nevada Prosecutors are Standing in the Way of Abolishing the Death Penalty*, THE APPEAL (May 7, 2021), <https://theappeal.org/politicalreport/nevada-prosecutors-are-standing-in-the-way-of-abolishing-the-death-penalty/>; Michael Lyle, *Prosecutor senators pressed to quit foot-dragging on death penalty abolish bill*, NEVADA CURRENT (May 11, 2021), <https://www.nevadacurrent.com/2021/05/11/prosecutor-senators-pressed-to-quit-foot-dragging-on-death-penalty-abolition-bill/>; Tabitha Mueller & Michelle Rindels, *Opponents of the death penalty turn up the heat as abolition bill's future remains murky*, THE NEVADA INDEPENDENT (May 11, 2021), <https://thenevadaindependent.com/article/opponents-of-the-death-penalty-turn-up-the-heat-as-abolition-bills-future-remains-murky>.

⁹ Marc Kovac, *Ohio's first execution with two-drug lethal injection called 'failed, agonizing experiment'*, AKRON BEACON JOURNAL (Jan. 16, 2014), <https://www.beaconjournal.com/story/news/local/the-news-leader/2014/01/16/ohio-s-first-execution-with/19655585007/>.

- Joseph R. Wood in Arizona, whose execution lasted 116 minutes as he died “like a fish on shore gulping for air.”¹⁰
- Clayton Lockett in Oklahoma, where witnesses watched as he “groaned, writhed, lifted his head and shoulders off the gurney and said ‘man’,” after he was supposedly sedated.¹¹
- Charles Warner in Oklahoma, who had been given a sedative but still described the injection as “feel[ing] like acid” and whose final words were, “My body is on fire.”¹²
- Joe Nathan James, Jr. in Alabama, whose execution may have taken longer than any in recorded American history and appears to have begun before media officials were admitted into the execution chamber.¹³

¹⁰ Laurie Roberts, *Arizona needs a timeout after botched execution*, ARIZONA REPUBLIC (July 23, 2014), <https://www.azcentral.com/story/laurieroberts/2014/07/23/woods-execution-botched/13073777/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epti=z1184xxe1184xxv000042&gca-ft=149&gca-ds=sophi>.

¹¹ Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was ‘a bloody mess’*, THE GUARDIAN, (Dec. 13, 2014), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

¹² Dana Ford, *Oklahoma executes Charles Warner*, CNN (Jan. 16, 2015), <https://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/index.html>.

¹³ Ramon Antonio Vargas, *Alabama subjected prisoner to ‘three hours of pain’ during execution – report*, THE GUARDIAN (Aug. 15, 2022), <https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution>.

At times, the press has served as an important counterbalance to the official narrative offered by the states where errors occurred. To offer an example, Arizona's governor claimed Joseph R. Wood did not suffer and the procedure was conducted lawfully¹⁴ even as newspapers reported that Wood “appeared to be in agony” as he died. *First Amendment Coalition of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1073 (9th Cir. 2019) (summarizing newspaper reports from the incident). To offer another, Alabama’s government claimed that “nothing out of the ordinary” occurred during Joe Nathan James, Jr.’s execution, but journalists reported that the execution had been delayed inexplicably for three hours, James appeared unconscious when they entered the execution chamber, and that the execution team used a “cut down” procedure, slicing into James’s arm, in an effort to find a vein.¹⁵

Though the press plays an important role in ensuring the public remains informed about Nevada’s executions, the Execution Manual promulgated by NDOC imposes limitations on press access. While prisons do have more leeway to limit

¹⁴ Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, NEW YORK TIMES (July 23, 2014), <https://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html>.

¹⁵ Ramon Antonio Vargas, *Alabama subjected prisoner to ‘three hours of pain’ during execution – report*, THE GUARDIAN (Aug. 15, 2022), <https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution>; Lauren Gill & Daniel Moritz-Rabson, *Alabama Failed to Carry Out Its Last Two Executions. It’s Trying Again This Week.*, BOLTS (July 18, 2023), <https://boltsmag.org/alabama-executions/>.

First Amendment activities than most other government institutions, they cannot deny that these limitations constitute regulations and are not merely internal agency procedures. In refusing to have the regulations in its Execution Manual approved by the Board of State Prison Commissioners, NDOC violates Nevada law and denies impacted people, including amici, the opportunity to advocate against regulations burdening their constitutional rights.

I. The Execution Manual's procedures are regulations because they regulate the First Amendment activities of journalists and other witnesses to the execution.

As discussed in Appellants' Opening Brief, all regulations promulgated by NDOC must be approved by the Board of State Prison Commissioners pursuant to NRS 209.111(1)(C). *See also*, Appellant Br. at 11–13. While NRS Chapter 209 does not define “regulation,” Nevada’s Administrative Procedures Act states that the term includes “[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.” NRS 233B.038(1)(a). The APA’s definition does exclude “[a] manual of internal policies and procedures or audit procedures of an agency which is used solely to train or provide guidance to employees of the agency and which is not used as authority in a contested case to determine whether a person is in compliance with a federal or state statute or regulation,” NRS 233B.038(2)(d), but the Execution Manual does not fall within this

exception because it regulates people who are not employees of NDOC: journalists and other members of the general public exercising their right to observe the execution.

The public has a general right under the First Amendment to access governmental proceedings. *First Amendment Coalition of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1075 (9th Cir. 2019). In determining what access must be granted to a particular governmental proceeding, a court must ask “(1) whether the place and process have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* The Ninth Circuit has previously applied this test to state executions and held that “the public has a qualified First Amendment right to view executions in their entirety.” *Id.*, citing *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 875–77 (9th Cir. 2002). This right exists because “[e]xecution witnesses need to be able to observe and report on the entire process so that the public can determine whether lethal injections are fairly and humanely administered.” *Id.* at 1076. As such, witnesses have the right to “uninterrupted viewing of executions from the moment the condemned enters the execution chamber through, to and including, the time the condemned is declared dead.” *California First Amendment Coalition*, 299 F.3d at 871, 886.

NDOC's Execution Manuals regulate this right. Previous iterations threatened to prevent observers in the past from seeing executions in their entirety, limiting observation to when the condemned person had already entered the chamber.

S.B. 350 Hearing, Assemb. Judiciary Comm., 83d Sess., Ex. F (Nevada Department of Corrections Execution Manual, June 9, 2021) (Nev. 2025) (hereafter "NDOC Execution Manual (June 9, 2021)") at EM 102.01(H). The current manual still authorizes NDOC personnel to close the chamber's blinds while the execution is in process if the condemned person's "response[] to the lethal drugs deviates from as expected," which is arguably when observation is most important. NDOC Execution Manual (June 9, 2021) at EM 110.02(D)(2); Appendix vol. 1 to Appellant Br. at AA 00034. It also specifies and limits what witnesses may be invited to an execution, forcing some people who want to observe to forego their First Amendment right altogether. NDOC Execution Manual (2021) at EM 102.01; Appendix vol. 1 to Appellant Br. at AA 00018–19.

NDOC is aware that its Manual restricts First Amendment activity, having changed some restrictions imposed on journalists due to legal advocacy by the ACLU on behalf of the NPA. In the June 2021 version of the Manual, witnesses were only able to observe the proceedings "[a]fter the condemned inmate [was] secured to the execution table." NDOC Execution Manual (June 9, 2021) at EM 102.01(H). NPA filed suit in July 2021, pointing out that Ninth Circuit precedent

required the prison to provide access from the moment the person entered the chamber. *See Nevada Press Association*, No. 3:21-cv-00317-RFB-CLB (D. Nev. July 23, 2021). A few months later NDOC amended its Manual to ensure that witnesses could “view and hear the execution from the moment the condemned inmate is escorted into the Execution Chamber Room.” *Compare* Appendix vol. 1 to Appellant Br. at AA 00019 *with* NDOC Execution Manual (June 9, 2021) at EM 102.01(H) (restricting viewing until after the person to be executed has been strapped down).

Considering the role the press plays in reporting on botched executions, this is unacceptable, but as discussed below, an open hearing before the Board about the Execution Manual could prevent avoidable restrictions on the First Amendment right to observe the proceedings and by extension, litigation.

II. Requiring Board approval would give journalists and the general public the opportunity to advocate for regulations less burdensome on protected activity.

NDOC currently promulgates the procedures set forth in its Execution Manual without accepting public feedback or approval from elected officials. By comparison, the Board of State Prisoners, comprised of the Secretary of State, Attorney General, and Governor, is subject to open meeting laws and accepts public comment when it convenes. Nev. CONST. art. V, § 21 (the composition of the Board of State Prison Commissioners); Nevada Department of Corrections, *Board of State*

Prison Commissioners, at “Meetings,” https://doc.nv.gov/Home/Prison_Commissioners/Board_of_State_Prison_Commissioners/ (providing information about when meetings will occur and how to provide public comment). Advocacy organizations regularly use these meetings to bring to the Boards attention issues related to NDOC policies and practices, from police unions raising concerns related to understaffing and overtime to prisoner rights advocates criticizing the conditions of confinement and costs imposed on incarcerated people. As such, this would be an appropriate space for organizations dedicated to transparency to address restrictions imposed on execution observation.¹⁶

The Board’s composition also lends itself towards determining what restrictions should be placed on public access to executions. First, unlike the NDOC’s Director, all Board members are officials elected by the public and so are

¹⁶ See Sean Dowling, *Nevada Board of State Prison Commission meeting provides updates and criticism*, FOX 5 KVVU-TV (Dec. 20, 2024), <https://www.fox5vegas.com/2024/12/21/nevada-board-state-prison-commission-meeting-provides-updates-criticism/> (prison rights advocates protesting prison conditions before the Board); Cristen Drummond, *Overtime and understaffing - Correction Officers Union reveals issues with Nevada’s prison*, 3 NEWS KSNV-TV (Oct. 3, 2022), <https://news3lv.com/news/local/overtime-and-understaffing-correction-officers-union-reveals-issues-with-nevadas-prison> (Fraternal Order of Police advocating for union members before Board); Michael Lyle, *Return to sender: Sisolak declines NDOC’s proposal to crack down on mail, greeting cards*, NEVADA CURRENT (Aug. 31, 2022), <https://nevadacurrent.com/2022/08/31/return-to-sender-sisolak-declines-ndocs-proposal-to-crack-down-on-mail-greeting-cards/> (prison rights advocates successfully pushing back against NDOC proposed policies related to mail).

directly accountable to the people whose rights are restricted by the Execution Manual. Second, the Attorney General, who is necessarily an attorney,¹⁷ is on the Board, and considering that access to executions is fundamentally a question of constitutional law, they may be better equipped than NDOC's Director to determine whether the limitations imposed on access are lawful. Third, considering the restricted right is ultimately about transparency, it is best that the process used to restrict that right also be transparent.

Finally, from a practical perspective, giving the public the opportunity to comment on the Execution Manual may save the State from future litigation. Obviously, a regulation passed by the Board must still comply with the First Amendment, and Board approval does not prevent advocates from filing suit to protect their First Amendment rights. That said, it is better for an advocacy organization to identify potential legal issues within the Manual during public comment for the Board to fix before anyone's civil liberties are threatened. Considering that amici have sued NDOC before for violating their First Amendment rights, this concern is not merely theoretical.

¹⁷ The general provisions of Chapter 288 regulating the Attorney General require the Attorney General to be a member of the State Bar of Nevada in good standing. NRS 288.010(3).

CONCLUSION

Amici respectfully request that this Court reverse the district court decision, determine that the regulations contained in the Execution Manual require approval of the Board of State Prison Commissioners, and remand for further proceedings.

DATED: April 2, 2026.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amici brief, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the 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.

I further 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 Microsoft Word for Office 365 in 14 point Times New Roman.

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Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,833 words.

DATED: April 2, 2026.

Respectfully submitted:

**AMERICAN CIVIL LIBERTIES
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of April 2026. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

/s/ Suzanne Lara
An employee of ACLU of Nevada