No. 17-

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *et al.,*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

EXECUTION SCHEDULED FOR MARCH 20, 2018

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CAPITAL CASE

QUESTIONS PRESENTED

Should a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition assume that medical personnel are competent to manage his condition and that the procedure will go as intended?

Must evidence comparing a state's proposed method of execution with an alternative proposed by an inmate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate?

Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Russell Bucklew. Respondents are Anne L. Precythe, David Dormire, and Troy Steele, personnel with the Missouri Department of Corrections. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Russell Bucklew petitions for a writ of certiorari to review the decision of the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at — F.3d —, No. 17-3052, 2018 WL 1163360 (8th Cir. Mar. 6, 2018) and is reproduced in the appendix to this petition at Pet. App. 3a–25a. The opinion of the district court is not reported and is reproduced at Pet. App. 26a–38a.

JURISDICTION

The Western District of Missouri had jurisdiction over Bucklew's Section 1983 claim pursuant to 28 U.S.C. § 1343. The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

The Eighth Circuit entered judgment on March 6, 2018, Pet. App. 3a, and denied Mr. Bucklew's petition for panel rehearing or rehearing *en banc* on March 15, 2018, Pet. App. 1a–2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Missouri's death penalty statute, Mo. Stat. Ann. § 546.720.1, provides in relevant part:

> The manner of inflicting the punishment of death shall be by the administration of lethal gas

> or by means of the administration of lethal injection. And for such purpose the director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection.

STATEMENT OF THE CASE

Russell Bucklew is scheduled to be executed on March 20 by a method that is very likely to cause him needless suffering. Neither the district court nor the court of appeals denies that. Bucklew's very likely suffering stems from an exceedingly rare disease called cavernous hemangioma. The disease is progressive, and has caused unstable, blood-filled tumors to grow in his head, neck, and throat. Those highly sensitive tumors easily rupture and bleed. The tumor in his throat often blocks his airway, requiring frequent, conscious attention from Bucklew to avoid suffocation. His peripheral veins are also compromised. That means that the lethal drug cannot be administered in the ordinary way, through intravenous access in his arms. An expert who examined Bucklew concluded that while undergoing Missouri's lethal injection protocol, Bucklew is "highly likely to experience … the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." Pet. App. 109a ¶ III.E. As he struggles to breathe through the execution procedure, Bucklew's throat tumor will likely rupture. "The resultant hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood dur-

ing the lethal injection process." *Id.* ¶ III.F. Bucklew's execution will very likely be gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution.

In a 2-1 decision, a panel of the Eighth Circuit concluded that this execution is not cruel and unusual solely because, in its view, Bucklew failed to prove that his alternative method would substantially reduce his risk of needless suffering. (The full Eighth Circuit denied rehearing *en banc*, with 4 judges dissenting.) That ruling is based on three distinct misreadings and dangerous extensions of this Court's decisions in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

First, the panel believed that when evaluating the risks posed by the state's method of execution in light of an inmate's rare and complicating medical condition, *Glossip* and *Baze* require courts to assume that state personnel are competent to deal with the condition and that all will go as intended. Pet. App. 17a. Nothing in *Glossip* or *Baze* warrants such an assumption. And such a rule makes no sense in an as-applied challenge. The whole point of such a challenge is that a generally lawful method of execution, when applied to someone with a particular medical condition, will very likely involve needless suffering. The claim does not assert that state officials, when they designed the protocol, *intended* to make the inmate suffer needlessly. When drawing up the protocol, state officials surely did not think about an inmate with cavernous hemangioma in the throat plus compromised veins. Nor does the claim assert that an "isolated mishap" in implementing the protocol might produce harm that does not qualify as cruel within the meaning of the Eighth Amendment. *Baze*, 553 U.S. at 50 (plurality opinion). The claim asserts

that *following* the protocol will, in light of the inmate's medical condition, very likely produce needless suffering.

The issue arises here in the context of a discovery dispute. The Eighth Circuit approved the district court's decision to close off discovery into whether the medical professionals charged with administering the execution have the training and knowledge to handle the known complications that will arise in light of Bucklew's rare medical condition. The medical team has the authority under Missouri's execution protocol to make discretionary judgments about how to attempt venous access and other details directly relevant to Bucklew's risk of suffering. Bucklew sought such discovery (allowing for necessary safeguards to preserve the anonymity of the medical personnel involved) to establish how the skill and expertise of the medical team will impact the known risks of suffering that his condition creates. But he was denied any access to the medical personnel and thereby foreclosed from presenting to the court the full extent of his risks. The Eighth Circuit agreed that foreclosing discovery was proper because the court had to assume "that the procedure will go as intended." Pet. App. 17a.

Such an assumption is at odds with this Court's decisions. The plurality opinion in *Baze* specifically stated that a claim asserting a known, "objectively intolerable risk of harm" is, unlike a claim based on the prospect of a mere mistake, cognizable as a challenge to a method of execution under the Eighth Amendment. 553 U.S. at 50 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)). The Eighth Circuit's ruling here prevents an inmate from proving such a claim.

In so doing, it authorizes what amounts to "deliberate indifference" to an inmate's needless suffering. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) (deliberate indifference to inmate's medical condition violates the Eighth Amendment). As detailed below, the record establishes that Missouri's execution medical team will be unaware of petitioner's condition and will take steps that will cause petitioner to experience needless pain and a prolonged sense of suffocation. The record already establishes that the execution will *not* go as intended. As Justice Ginsburg recently noted, in advance of the botched execution of Doyle Lee Hamm, there is no substitute for adversarial testing of the skills and qualifications of the state's medical team to handle problems that we already know will arise. *Hamm v. Dunn*, 138 S. Ct. 828 (2018) (Ginsburg, J., dissenting). To assume that all will go as intended is to altogether assume away as-applied challenges to methods of execution. This Court should accept review to clarify how inmates can prove the risks they face when raising an as-applied challenge to a method of execution.

Second, the Eighth Circuit understood *Glossip* to impose a novel burden at summary judgment in a method-of-execution case that is at odds with summary judgment law. As Judge Colloton's dissent makes clear, a reasonable factfinder could conclude on this record that a lethal gas protocol proposed by Bucklew will substantially reduce Bucklew's suffering. Pet. App. 22a. Bucklew's expert opined that Bucklew will very likely experience a sense of suffocation for several minutes under the lethal injection protocol. Respondents' expert opined that Bucklew would likely experience a sense of suffocation for merely 20–30 seconds if lethal gas was used. The panel majority refused to accept this as evidence

comparing the two methods because no single witness said one method would be better than the other. *Id.* at 14a. That is, the panel believed *Glossip* not only requires an as-applied challenge to present evidence comparing the state's method with an alternative, but the evidence must come in the form of a single witness who believes one method is significantly better than the other.

That is not and should not be the law. The question is not whether any one *witness* compared and distinguished the risks of lethal injection with the risks of lethal gas but, as Judge Colloton observed, whether there is evidence in the *record* that distinguishes between the two. Pet. App. 22a. Judge Colloton's view follows logically from this Court's repeated statements that evidence at summary judgment is evaluated in light of the record as a whole. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The panel majority read *Glossip* to change that rule exclusively for method-of-execution claims. Nothing in *Glossip* suggests such a unique procedural burden is appropriate. And allowing it to stand would cripple many method-of-execution claims because experts for an inmate will often labor under ethical obligations that preclude them from designing a "better" way to kill someone.

Third, petitioner respectfully submits that this Court should not require inmates raising an as-applied challenge to their methods of execution to design an alternative "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52). The Court imposed that burden on inmates in cases raising facial challenges to their methods of execution. The Eighth Cir-

cuit (in a 6-4 *en banc* ruling) and the Eleventh Circuit have imposed that burden on inmates raising as-applied challenges to their methods of execution, and the Sixth Circuit (in a *habeas* case) suggested such a burden exists. Pet. App. 85a–88a; *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 803 F.3d 565 (11th Cir. 2015) (per curiam); *In re Campbell*, 874 F.3d 454 (6th Cir. 2017) (per curiam). The Florida Supreme Court has done so as well. *Correll v. State*, 184 So. 3d 478 (Fla. 2015) (per curiam). Several judges dissented in these cases. The reasons for imposing such a burden in a case presenting a facial challenge do not and should not apply to inmates presenting an as-applied challenge based on an exceedingly rare medical condition. This Court should accept review here and clarify that inmates presenting an as-applied challenge need not custom-design their own method of execution in light of the idiosyncratic reasons the state's generally lawful method of execution will prove cruel as applied to them.

This Court is well aware of the number of attempted but failed executions that have not gone according to plan. *See Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Mem.) (Sotomayor, J., dissenting). Some of the problems that have arisen in the past and produced excruciating and gruesome results are, as here, predictable. Only this Court can establish uniform national standards that will reduce the frequency of these horrible events. In doing so, this Court would not only protect the irreducible human dignity of the inmates bringing such claims. It would also protect the essential dignity of the society that administers the death penalty. The Eighth Amendment protects "the dignity of society itself from … barbarity." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). We refuse to punish with cruelty to protect ourselves against

being party to cruelty. We do so even when the temptation is powerful because the crime we are punishing was itself barbaric and cruel, as respondents will no doubt detail in their opposition. The wisdom of the Eighth Amendment is that it recognizes the temptation to be indifferent to the needless suffering of those society condemns, and demands we resist it. A society that tolerates stripping any man of his irreducible dignity, even one who merits the ultimate punishment, takes a fateful step. This Court is uniquely positioned to defend this sacred value. And it should do so in this case.

I. FACTUAL BACKGROUND

In 1998, Bucklew was convicted of first degree murder, kidnapping, burglary, forcible rape, and armed criminal action. He was sentenced to death. He does not challenge the validity of his conviction or death sentence.

A. Bucklew's Rare Medical Condition

Bucklew suffers from an exceedingly rare medical condition—cavernous hemangioma—that causes inoperable, blood-filled tumors to grow in his throat and around his face, head, and neck. Pet. App. 6a. Cavernous hemangiomas occur in only .2% of the general population, and cavernous hemangiomas in the oral cavity (affecting the lips, tongue, and palate) are prevalent in less than 1% of those who have cavernous hemangioma (only .002% of the general population). Minhua Wang, MD et al., *Cavernous Hemangioma of the Uvula: Report a Rare Case with Literature Review*, 8 N. Am. J. of Med. & Sci. 56 (2015). A case like Bucklew's, involving the uvula, is "extremely rare." *Id.* at 56.

Bucklew's tumors are extremely sensitive and susceptible to rupture. Pet. App. 6a. Merely touching

his airway can cause the delicate tissue of his airway and uvula to leak blood. Pet. App. 111a ¶ V.A.1–4, 113a ¶ V.B.8. Bucklew's condition is progressive; his tumors continue to grow, and his risk of experiencing a catastrophic hemorrhage increases. *Id.* at 113a–114a ¶ V.B.10; APP0324 at 48:6–24; APP0328.[1] In May 2014, Bucklew's medical expert, Dr. Zivot, examined him and determined that his condition had significantly progressed to the extent that his tumors posed an imminent risk of life-threatening hemorrhage. *See* APP0186–87.

Bucklew's "grossly enlarged uvula" partially obstructs his airway, making it difficult for him to breathe and causing him to choke and bleed. Pet. App. 112a ¶ V.B.1–3. On the Mallampati classification, a scale used to describe how difficult it is to secure a patient's airway in a medical setting, Bucklew's airway rates a "Class IV," meaning that his airway is "very difficult." Indeed, when Bucklew was put under general anesthesia during previous surgeries, he underwent a tracheotomy to ensure that his airway would remain secure during the procedures. *Id.* at 108a ¶ III.B, 110a ¶ IV.B–C. Bucklew's difficulty breathing is exacerbated when he lies supine, and, to prevent suffocation, he must consciously monitor and mechanically adjust his breathing to shift his uvula and permit airflow. Indeed, Bucklew sleeps on his side and upright to avoid choking and hemorrhaging, and yet still experiences frequent hemorrhages severe enough that he typically needs to clean blood off his face in the morning. *Id.* at 112a ¶ V.B.1–2.

Bucklew also has compromised peripheral veins in his hands and arms, which make his veins difficult to

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[1] APP citations are from the Appendix to Brief, *Bucklew v. Lombardi*, No. 14-3052 (8th Cir. filed Dec. 1, 2017).

visualize. Pet. App. 6a. Accordingly, it would likely take multiple attempts to set an intravenous (IV) line, and setting an IV in Bucklew's arms likely will not be possible at all. *Id.* at 114a–115a ¶VI.E; *see also* APP0346 at 77:3–21.

B. Missouri's Execution Procedure

Missouri law authorizes execution by both lethal gas and lethal injection. Mo. Stat. Ann. § 546.720.1. Missouri has a written execution procedure for lethal injection only. Nonetheless, respondents have conceded that lethal gas is a feasible and readily implemented alternative to lethal injection in Missouri. Pet. App. 13a.

The medical technicians responsible for the execution, who have been designated "M2" and "M3" to preserve their anonymity, have substantial discretion in the execution chamber. APP0341–42 at 43:11–44:22. Under the execution protocol, medical personnel determine the most appropriate locations for IV lines to inject the lethal drug. The protocol authorizes accessing the vein via a central line, such as the femoral vein, but only if the medical personnel involved in the execution "have appropriate training, education, and experience for that procedure." Pet. App. 145a.

Not all state medical personnel, and indeed not all anesthesiologists, are qualified or skilled at performing a central line procedure. APP0347 at 81:22–24; APP0362 at 237:11–19. In the past, after failing to gain peripheral vein access, the medical members of the execution team have employed an outdated procedure known as a "cut-down" in the leg. APP0311–12 at 55:12–56:17. (A cut-down involves slicing into the leg to visualize the vein; it is extremely painful. *See* APP0350 at 92:23–93:13.) Both Dr. Zivot, Buck-

lew's medical expert, and Dr. Antognini, respondents' medical expert, agree that a "cut-down" is not the current preferred method of establishing central line access. APP0352 at 98:8–23; APP0374 at 71:12–16.

After the medical team gains venous access, a non-medical member of the execution team will inject the lethal drug, during which time Bucklew will lose the ability to consciously manage his airway. Pet. App. 145a–146a; *id*. at 115a–116a ¶ VI.I–J.

C. The Known Risks Bucklew Faces From Lethal Injection In Missouri

Bucklew's execution will not go smoothly. He faces identifiable severe risks from the procedure both *before* and *after* the medical team gains venous access and the non-medical team begins to administer the lethal drug.

As noted above, attempts to access Bucklew's peripheral veins will very likely fail. Pet. App. 114a–115a ¶ VI.E; *see also* APP0346 at 77:3–21. But it is very likely that medical personnel will try, and repeatedly so. Pet. App. 114a–115a ¶ VI.E; APP0352 at 99:7–20. The discomfort of repeated failed efforts to gain venous access will increase Bucklew's stress, raising the pace of his breathing and blood pressure, increasing the risk that his sensitive tumors will rupture. Pet. App. 115a ¶ VI.G.

Eventually, the medical team will stop trying to gain peripheral access, and will turn to a central line, likely the femoral vein. To access the femoral vein, the record indicates that M3 will perform a cut-down procedure; that is what M3 has done in the past when attempts at peripheral access failed. APP309 at 28:11-22; APP311-12 at 55:20-56:3. During a cut-down, Bucklew will have to lie flat, at least while the medical team attempts to access his femoral vein,

and possibly throughout the remainder of the execution. *Id*. at 29a; *id*. at 21a & n.5. He will gag on his tumor, causing him to struggle and convulse in an effort to breathe. *Id*. at 115a ¶ VI.H, 116a ¶ VI.L. His convulsions will increase the risks associated with the attempt to gain access through the femoral vein. Among the risks of attempting femoral vein access is piercing the femoral artery. APP0350 at 90:3–92:22. That risk was recently made especially vivid during the failed execution of Doyle Lee Hamm in Alabama on February 22, 2018. Even though Alabama certified that it would use personnel qualified to access the femoral vein, the medical team punctured Hamm's artery. Pet. App. 98a. That execution had to be abandoned. If, as is likely, Bucklew is violently struggling to breathe while the team attempts femoral access, his risk of a similar failure increases.

The painful cut-down procedure and struggles to breathe will further increase the stress of the execution and further increase the likelihood of Bucklew rupturing his tumor. There is a significant likelihood that Bucklew will be choking on his tumor and gagging on his own blood for the (unknown) duration of the cut-down procedure, before the injection of the lethal drug even begins. Pet. App. 115a ¶ VI.G; APP0352 at 100:1–12.

After the lethal drug begins to flow, Bucklew will soon lose the ability to manage his airway. This is true whether he remains laying flat or whether he is upright or anything in between. Pet. App. 115a–116a ¶ VI.I. He will begin to experience a sense of suffocation and the extreme pain associated with suffocation. *Id*. at 28a–29a. In the unlikely event he has not already begun choking on his own blood as a result of struggling while lying flat throughout the cut-down procedure, the violence of his choking as he slips into

unconsciousness will likely cause his tumors to rupture and lead him to aspirate his own blood. *Id*. at 116a ¶ VI.M).

The parties disagree over how long Bucklew will be unable to manage his airway while remaining aware of the sense of suffocation. Bucklew's expert opines that Bucklew could be in this state for between 52 and 240 seconds, while respondents' expert opines that he would be conscious of suffocation for 20 to 30 seconds. Pet. App. 29a. These estimates are on top of any period of time Bucklew is suffocating prior to the administration of the lethal drug.

D. The Medical Team

Any judgments concerning how to handle an inability to gain venous access, an inmate choking, gagging, or hemorrhaging blood, or any of the other predictable complications arising from Bucklew's condition are left to the sole discretion of the medical members of the execution team. APP0339–40 at 36:11–37:9; APP0299–300 at 93:11–96:9. Nothing in the record suggests they will be anticipating what Bucklew will likely experience.

The medical personnel who perform the execution will not be provided any information concerning Bucklew's medical condition beyond a single-page document summarizing his medical history. In 2014, as Missouri prepared to execute Bucklew, a one-page form summarizing Bucklew's medical issues was prepared. Pet. App. 144a. As relevant here, it reported his cavernous hemangioma, but only with respect to his jaw and upper lip. It said *nothing* about his compromised veins, and *nothing* about the tumor in his throat that will inhibit his breathing during the execution and will very likely rupture and cause him to choke on his blood. Indeed, whoever prepared the

form shockingly reported "No" in response to the question "Does the offender have Asthma, bronchitis, or *any other breathing problem*?" *Id.* (emphasis added). The medical team will not be provided with any other medical records, including the MRI images that reveal the size of the tumors in Bucklew's airway. APP0292 at 43:20–44:6.

Missouri has never executed an inmate who suffers from cavernous hemangioma, APP0448 at Resp. No. 4, and there is no reason to believe that the medical members of the execution team have ever seen a patient with cavernous hemangioma, or have ever seen one with tumors in his throat. Even if they are alerted to the *fact* of the disease by the medical form, there is no reason to believe they will be alert to the rare tumor in Bucklew's throat and the special suffocation risk it creates.

E. The Lethal Gas Alternative

Bucklew has proposed death by nitrogen hypoxia as an alternative method of execution. APP0085–87. Lethal gas requires no venous access at all. So, all the risks posed by the difficulties of gaining venous access, including the painful cut-down procedure, would vanish. Likewise, lethal gas can be administered while Bucklew is seated upright, so all the risks of struggling to breathe and choking on the blood flowing from his throat tumor while lying flat during the cut-down procedure would also vanish. APP0547; APP0898–99.

Dr. Antognini opined that, if administered correctly, lethal gas would lead to a quick death. APP0362 at 234:12-21. Specifically, he testified that inhalation of nitrogen gas "would quickly achieve hypoxia and cause an inmate to become quickly unconscious" within about 20 to 30 seconds of breathing pure ni-

trogen. APP0362 at 234:12–21. In addition, there is reason to believe that breathing 100% nitrogen does not produce a sense of suffocation. The sense of suffocation is caused by a buildup of carbon dioxide in the blood when a person is unable to expel air. APP0899. If one breathes in pure nitrogen while expelling air, death is caused by an absence of oxygen unaccompanied by a sense of suffocation. APP0899; APP0911. Reports of high altitude pilots who lost consciousness while breathing air low in oxygen and high in nitrogen is consistent with this view. APP0547.

Dr. Zivot did not opine on whether lethal gas would result in significantly less suffering than Missouri's lethal injection protocol because he is ethically barred from proposing a method of execution at all. Pet. App. 108a ¶ II.B. So, no evidence in the record disputes respondents' expert's view that death by lethal gas would be substantially quicker and less painful than Bucklew's expert's view of the likely suffering that lethal injection will cause Bucklew.

II. PROCEEDINGS BELOW

A. Procedural History And Discovery

In a Fourth Amended Complaint filed on October 13, 2015, Bucklew challenged the constitutionality of Missouri's execution protocol as applied to him. Among other things, he alleged that Missouri's lethal injection protocol "presents a substantial risk of causing excruciating or tortuous pain and inflicting needless suffering" and therefore violates the Eighth Amendment's prohibition on cruel and unusual punishment.[2] APP0136-37 ¶¶ 148, 151. He further al-

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[2] Bucklew was also party to an earlier case styled *Zink v. Lombardi*, No. 12-04209-BP (W.D. Mo. filed Aug. 1, 2012), in

leged that his "blood-filled tumors are prone to rupture under stress or any rise in blood pressure. When this occurs, Mr. Bucklew bleeds through his facial orifices and in his throat, further obstructing his airway and causing him to choke." APP0086. Bucklew alleged that "the risks arising from Mr. Bucklew's airway are even greater if he is lying flat." APP0119 ¶ 102. Bucklew's initial complaint was filed on May 9, 2014, and on May 14, 2014, Bucklew moved for a stay of his execution, then scheduled for May 21, 2014, to provide adequate time to litigate his claims. The district court denied Bucklew's motion for a stay, and dismissed his complaint, *sua sponte*. *Bucklew v. Lombardi*, No. 14-1800-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 9, 2014).

With only two days remaining until his scheduled execution, Bucklew immediately appealed the dismissal of his complaint. An Eighth Circuit panel granted a stay. *Bucklew v. Lombardi*, 565 F. App'x 562, 569–71 (8th Cir. 2014). After the Eighth Circuit, sitting *en banc*, vacated the stay on the same day, this Court entered a stay of execution pending Bucklew's appeal. *Bucklew v. Lombardi*, 134 S. Ct. 2333 (2014) (Mem.).

Roughly ten months later, the *en banc* Eighth Circuit reversed the dismissal of Bucklew's Complaint and remanded for further proceedings. Pet. App. 72a–88a. The full Eighth Circuit, split 6–4, rejected Bucklew's argument that he need not propose an alternative method of execution because he raised an as-applied challenge only. *Id.* at 75a, 84a. On remand, Bucklew amended his complaint to assert that lethal gas is a "feasible and available alternative

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which he and other inmates raised a facial challenge to Missouri's lethal injection execution protocol.

method that will significantly reduce the risk of severe pain." APP0137 ¶ 150.

Discovery began and Bucklew sought, among other things, information about the skills and training of M2 and M3 to handle the risks that his rare condition would likely present. APP0224–26. Bucklew indicated that identifying information in any documents produced concerning M2 and M3 could be redacted. APP0224–25. The district court refused to allow Bucklew any access to the medical team and any information regarding their skills and training. Pet. App. 44a–52a.

After additional discovery revealed the extent of discretionary authority granted to M2 and M3 during an execution, Bucklew filed a Motion to Compel outlining the need for discovery concerning the training and qualifications of M2 and M3. The district court again denied Bucklew access to this discovery. Pet. App. 57a, 71a.

M2 and M3 have been deposed in prior capital litigation, specifically in 2010 in *Ringo v. Lombardi*, No. 09-4095-BP (W.D. Mo. filed May 17, 2009), and in 2013 and 2014 in *Zink v. Lombardi*, No. 12-4209-BP (W.D. Mo. filed Aug. 1, 2012). Bucklew's appointed counsel, Ms. Pilate, represented Bucklew in those proceedings (which raised facial challenges, not as-applied challenges to Missouri's execution protocol), and she believes that the contents of those depositions are directly relevant to disputed factual issues in this case. APP0278. The district court, however, refused to permit Ms. Pilate to share the deposition transcripts with Sidley Austin or to use the transcripts in connection with this case. APP0285–86.

B. The Lower Court Decisions

The district court granted respondents summary judgment on June 15, 2017. The district court assumed that the record demonstrated "a substantial risk that [Bucklew] will experience choking and an inability to breathe for up to four minutes." Pet. App. 34a. The court also noted that "Defendants do not argue that [Bucklew's proposed alternative] method of execution is not feasible or readily implemented." *Id.* However, the district court concluded that the record did not present a triable dispute concerning whether execution by nitrogen gas would significantly reduce Bucklew's risk of needless suffering, as compared to Missouri's lethal injection protocol. *Id.* at 35a. The district court also denied a motion to reconsider. *Id.* at 39a–43a.

On November 21, 2017, while Bucklew's appeal was pending and before the parties had fully briefed the issues, at the state's urging, the Missouri Supreme Court reset Bucklew's execution date to March 20, 2018. Shortly thereafter, the Eighth Circuit set the appeal for argument on February 2, 2018.

On March 6, 2018, a divided panel of the Eighth Circuit affirmed the district court. The panel majority concluded that Bucklew provided no evidence proving that lethal gas would substantially reduce his risk of severe pain. It acknowledged evidence from Bucklew's expert that lethal injection would cause him to experience a sense of suffocation for several minutes. Pet. App. 14a. It also acknowledged that it was undisputed that lethal gas would cause him to experience a sense of suffocation for, at most, 20–30 seconds. *Id.* And it nowhere disputed that the difference would be significant enough to warrant relief. Instead, the panel declared that Bucklew's claim failed because the evidence showing a difference be-

tween the two methods had not come from any one witness. *Id.* That is, the panel interpreted this Court's requirement of "comparative" evidence to mean that an inmate must point to a single witness who does the comparison. *Id.*

Judge Colloton dissented. In surveying the evidence and interpreting it in the light most favorable to Bucklew, Judge Colloton concluded: "If the factfinder accepted Dr. Zivot's testimony as to the effect of pentobarbital, and Dr. Antognini's uncontroverted testimony as to the effect of nitrogen gas, then Bucklew's proposed alternative method would significantly reduce the substantial risk of severe pain ...." Pet. App. 22a. Judge Colloton observed that the general rule allows the trier of fact to accept all or just a part of any witness' testimony, and that on summary judgment one party can rely on a portion of the opposing party's expert's testimony to create a genuine issue of material fact. *Id.* Accordingly, Judge Colloton would have remanded the case to the district court to hold a trial and make factual findings.

The panel majority also affirmed the district court's denial of any discovery into the qualifications of the medical personnel who will participate in Bucklew's execution. The panel majority, interpreting Bucklew's argument as resting on the "premise that M2 and M3 may not be qualified for the positions for which they have been hired," refused to "assume that Missouri employs personnel who are incompetent or unqualified" or to permit discovery into "[t]he potentiality that something may go wrong in an execution." Pet. App. 17a. Instead, the panel majority insisted that the court's analysis must be based on the assumption "that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended." *Id.*

Three days after the decision, Bucklew petitioned for a panel rehearing or rehearing *en banc*, and moved for an emergency stay. In opposing the stay request, Respondents submitted a new factual affidavit from Alana Boyles, which stated that, during Bucklew's execution, "the Department will adjust the gurney so that Mr. Bucklew is not lying fully supine at the time the Department administers the lethal chemicals." Pet. App. 89a. The affidavit was prepared *after* the Eighth Circuit panel had already issued its decision, and was thus submitted without any opportunity for Bucklew to investigate Ms. Boyle's role in the execution protocol or her authority to make decisions concerning how that protocol will be applied to Bucklew. The affidavit made no representations about how Bucklew would be positioned *prior* to the time the Department administers the lethal chemicals, including during a cut-down procedure.

On March 15, 2018, the Eighth Circuit declined to rehear Mr. Bucklew's appeal. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity to resolve three important questions arising out of the Eighth Circuit's misinterpretation of this Court's decisions in method-of-execution cases. First, this Court can confirm that courts evaluating an as-applied challenge to a state's method of execution should not assume that an execution will go as intended for an inmate with a rare and severe medical condition, and should allow discovery into the training and skills of relevant medical personnel. Second, this Court can reaffirm that the traditional summary judgment standard applies in challenges to methods of execution, and that an inmate need not present a single witness to provide

comparative evidence distinguishing the state's method of execution from the inmate's proposed alternative. Third, this Court can declare that inmates need not propose an alternative execution procedure when raising an *as-applied* challenge to a state's method of execution. These questions are critical to the fairness of procedures for inmates facing execution protocols that, as applied to them, pose known and severe risks of needless suffering.

I. THIS CASE PRESENTS URGENT QUESTIONS REGARDING LITIGATION OF AS-APPLIED CHALLENGES TO A METHOD OF EXECUTION.

A. Whether Courts Evaluating An As-Applied Method-Of-Execution Claim Should Assume That Medical Personnel Are Competent To Handle An Inmate's Rare And Severe Medical Condition, And That The Execution Will Go As Intended, Warrants Review.

The Eighth Circuit affirmed the denial of discovery into the training and qualifications of the medical personnel who will make critical decisions affecting the length and severity of Bucklew's suffering during the execution. It did so because it concluded that the training and qualifications of the medical team are irrelevant. It ruled that a court evaluating an inmate's as-applied challenge under *Baze* and *Glossip* "must … assum[e] that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended." Pet. App. 17a. A challenge to a method of execution based on the inmate's medical condition necessarily asserts that the procedure will *not* go as intended. If such claims are cognizable at all, the Eighth Circuit's rule cannot stand.

This Court has already indicated that such claims are cognizable. The plurality opinion in *Baze* acknowledged the possibility that some executions might entail an "objectively intolerable risk of harm that officials may not ignore." *Baze*, 553 U.S. at 50 (plurality opinion) (internal quotation marks omitted). Nothing in *Glossip* undermines that view. And for good reason. The rule follows logically from this Court's longstanding view that "deliberate indifference" to an inmate's medical condition can rise to the level of cruel and unusual punishment within the meaning of the Eighth Amendment. *Gamble*, 429 U.S. at 104. Here, medical personnel charged with administering Missouri's execution protocol on an inmate with a rare and severe medical condition will be ignorant of material details about that condition, yet empowered to make critical decisions during the procedure that will increase the inmate's suffering. Respondents refuse even to provide access to those medical professionals for discovery. All of this evinces deliberate indifference to Bucklew's condition and the risks that lethal injection poses to him.

Importantly, Bucklew does not claim, as the Eighth Circuit suggested, that "M2 and M3 may not be qualified for the positions for which they have been hired." Pet. App. 17a. Bucklew presently has no reason to believe they lack the qualifications to do what the execution protocol demands: "prepare the lethal chemicals," "determine the most appropriate locations for intravenous (IV) lines," "monitor the prisoner during the execution," among other things. *Id*. at 145a–146a ¶¶ B, C.1, D.2. But the execution protocol also empowers the medical team to attempt to access the femoral vein "provided they have appropriate training, education, and experience for that procedure." *Id*. at 145a ¶ C.1. That is, the execution protocol does

not assume the training and experience of the medical team members to handle one of the procedures that the experts agree will likely be required here: obtaining access to the femoral vein. *Assuming* that medical team members will do so and all will go "as intended," as the Eighth Circuit has done here, is not only contrary to law, but is contrary to the protocol itself.

The execution protocol at issue here is nothing like the protocols this Court had before it in *Baze* and *Glossip*. Both of those protocols included "several important safeguards," *Baze*, 553 U.S. at 55 (plurality opinion), to protect against the possibility of error in administering the drugs. Indeed, Oklahoma's standards considered in *Glossip*, adopted after the horrific execution of Clayton Lockett, included "detailed provisions with respect to the training and preparation of the execution team." 135 S. Ct. at 2735. Not only does Missouri's protocol lack any details regarding the training and preparation of the execution team, but Bucklew was wrongfully denied the chance to fill that critical gap through discovery.

That denial is all the more egregious in light of the testimony that makes clear how much discretionary authority medical team members have during the execution. Anne Precythe, who as Director of Corrections is nominally in charge, repeatedly stated during her deposition that she knows nothing about Bucklew's medical condition and would defer to M2 and M3 regarding how to handle any issues that arise during the execution. APP0338–40 at 35:12–37:9; APP0341–42 at 43:11–44:22. This includes not only the decision whether to attempt venous access through a central line like the femoral vein, but also how many attempts will be made on peripheral veins, and what procedure will be used to attempt femoral

vein access. It also includes how to position Bucklew during attempts to gain venous access and beyond. *See* Pet. App. 20a–21a & n.5.

Under Missouri's vague procedures, and Precythe's deference to medical team members, the risk of trying and failing to gain venous access through a peripheral vein, and then likely attempting access through the outdated cut-down procedure that medical personnel previously performed, is not the prospect of a mere "isolated mishap," as the Eighth Circuit supposed. Pet. App. 17a (quoting *Baze*, 553 U.S. at 50). This risk is all but certain. It will lengthen the execution procedure. It will increase the stress of the procedure on Bucklew, which increases the risk that his tumors will rupture and he will begin to bleed from them, likely gagging on his own blood even *before* the lethal drug can be administered. *Id.* at 114a–115a ¶ VI.E–G, 109a ¶ III.F. Convulsing uncontrollably during a cut-down procedure surely increases the risk that the femoral artery will be punctured, or that the IV line will be positioned so that the lethal drug leaks into neighboring tissue, causing intense pain.

Even though we know these risks are substantial, we have no reason to believe medical team members will be alert to them. There is no reason to believe M2 or M3 have ever seen a patient with cavernous hemangioma, or have ever seen one with tumors in his throat. There is reason to believe that neither M2 nor M3 will be alerted to Bucklew's compromised veins, the tumor in Bucklew's throat, or the nature and extent of the risk of suffocation Bucklew faces. The single page form previously prepared in anticipation of an earlier execution date for Bucklew failed to report any of these known problems. Pet. App. 144a.

Respondents tacitly conceded that the record inadequately supports their assurances that all will go smoothly by submitting, at the rehearing stage in the Eighth Circuit, a new affidavit of a new witness purporting to provide minimal (and inadequate) assurance that Bucklew will not be "fully supine at the time the Department administers the lethal chemicals." Pet. App. 89a. The affidavit makes no representation about Bucklew's position during the painful cut-down procedure he will endure. There remains every reason to believe Bucklew will be forced to lie "fully supine" during that procedure, which necessarily occurs before the lethal chemicals are administered. Bucklew had no opportunity to investigate Ms. Boyles' role in the execution protocol or her authority to make decisions concerning how that protocol will be applied to Bucklew. And the respondents' gesture reflects their mistaken insistence that Bucklew's risk of suffocating is present only when "fully supine." That is wrong. *Id*. at 115a–116a ¶ VI.I–J); *id*. at 20a. In the end, the affidavit only underscores respondents' deliberate indifference to the full range of risks Bucklew faces. It illustrates why "[a]n adversarial process should … test[] the risk of 'serious illness and needless suffering.'" *Hamm*, 138 S. Ct. at 828–29 (Ginsburg, J., dissenting).

That adversarial process can include safeguards to protect the anonymity of execution team members. Bucklew has never asserted otherwise. *See, e.g.*, APP0224–25 at IV.I.1.3. Indeed, such safeguards have been used in the past when similar discovery was *allowed*. The fact that the court barred Ms. Pilate, who has seen that discovery and believes it is relevant here, from using it in this case, dramatically demonstrates the fundamental unfairness of the discovery ruling. This Court's review is warranted.

B. Whether The Evidence Comparing The Risks Of Proposed Methods Of Execution Must Come From A Single Witness Warrants Review.

The Eighth Circuit has ruled that an inmate raising an as-applied challenge to a method of execution must plead and prove that a feasible and readily available alternative method of execution would substantially reduce his risk of needless suffering. Pet. App. 75a, 84a. For the reasons discussed below, Bucklew maintains that ruling was error. But even assuming that is correct, the Eighth Circuit has layered an additional evidentiary burden on inmates challenging a state's proposed method of execution. According to the panel majority, and over the dissent of Judge Colloton, the Eighth Circuit now requires inmates to present a single witness who compares the risks posed by the two methods of execution and who concludes that the inmate's proposal substantially reduces the risks posed by the state's method. *Id.* at 13a–14a. This novel evidentiary standard, at odds with settled summary judgment law, warrants review.

What the parties' experts concluded is clear regarding the risks Bucklew faces *after* the lethal drug is administered. Bucklew's expert (Dr. Zivot) opines that Bucklew will experience a sense of suffocation for several minutes if lethal injection is used. Respondents' expert (Dr. Antognini) thinks Bucklew will experience a sense of suffocation for 20-30 seconds if lethal injection is used. Dr. Zivot did not opine on how long Bucklew would experience pain if executed by lethal gas. Dr. Antognini opined that lethal gas would leave Bucklew insensate to pain within 20-30 seconds.

The Eighth Circuit panel majority correctly stated Bucklew's argument: "the district court should have compared Dr. Zivot's opinion [about lethal injection] with Dr. Antognini's testimony [about lethal gas.]" Pet. App. 14a. Judge Colloton, in dissent, did just that: "If the factfinder accepted Dr. Zivot's testimony as to the effect of pentobarbital, and Dr. Antognini's uncontroverted testimony as to effect of nitrogen gas, then Bucklew's proposed alternative method would significantly reduce the substantial risk of severe pain …." *Id.* at 22a. The panel majority does not deny that the difference between experiencing suffocation for 20-30 *seconds*, and experiencing suffocation for several *minutes*, is significant and would warrant relief. Instead, it refused to compare Dr. Zivot's opinion about lethal injection with Dr. Antognini's opinion about lethal gas. Put simply, the panel majority rejected Bucklew's argument because "his expert" did not compare the two methods himself. *Id.* at 13a–14a.[3]

This was legal error. *Glossip* requires a comparison between the state's method and a petitioner's alternative method. But it nowhere requires that a single witness compare the two. As Judge Colloton explained, a witness's testimony may be credited in whole or in part, and a plaintiff may rely on the defendant's evidence, including the defendant's expert witness, if that evidence is helpful. Pet. App. 22a (cit-

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[3] The panel majority also erroneously stated Bucklew's concern about suffocation "rests on" whether he will be forced to lie supine. Pet. App. 15a. In fact, Dr. Zivot notes that Bucklew's choking is worse when lying flat. *Id.* at 112a ¶ V.B.1–2). Dr. Zivot also clearly stated that once Bucklew loses full consciousness, he will be unable to manage his airway and will choke. *Id.* at 115a–116a ¶ VI.I.

ing cases). Petitioner is aware of no federal court of appeals that has ruled to the contrary.[4]

The panel majority provided no citation for its novel rule. The previously unquestioned rule of law relied upon by Judge Colloton follows logically from the standard for summary judgment: only when "the record taken as a whole" creates no genuine issue of material fact should a court enter summary judgment. *Ricci*, 557 U.S. at 586; *Matsushita*, 475 U.S. at 587. Evidence is evidence, whether proffered by the party seeking or opposing summary judgment. At summary judgment, a party may rely upon an opponent's expert to support or defeat the motion. *DG&G, Inc. v. FlexSol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 826-27 (8th Cir. 2009). There is and should be no special burden placed on inmates under sentence of death challenging a method of execution in light of a rare medical condition. The panel majority misread *Glossip* and improperly imposed a proffer-all-the-comparative-evidence-yourself rule on Bucklew.

Indeed, it is especially inappropriate to impose this special burden in an as-applied method of execution

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[4] Every Circuit agrees with Judge Colloton. *United States v. Gonzalez-Velez*, 587 F.3d 494, 504 (1st Cir. 2009); *United States v. Norman*, 776 F.3d 67, 78 (2d Cir. 2015); *United States v. Boone*, 279 F.3d 163, 189 (3d Cir. 2002); *Trademark Props., Inc. v. A&E TV Networks*, 422 F. App'x 199, 212 (4th Cir. 2011); *United States v. Merida*, 765 F.2d 1205, 1220 (5th Cir. 1985); *Dixon v. Penn Cent. Co.*, 481 F.2d 833, 837 (6th Cir. 1973); *United States v. Rollins*, 544 F.3d 820, 836 (7th Cir. 2008); *United States v. Candie*, 974 F.2d 61, 65 (8th Cir. 1992); *United States v. Clevenger*, 733 F.2d 1356, 1359 (9th Cir. 1984); *United States v. Ransom*, 691 F. App'x 504, 506 (10th Cir. 2017); *United States v. Prince*, 883 F.2d 953, 959 n.3 (11th Cir. 1989); *United States v. Crowder*, 543 F.2d 312, 326 (D.C. Cir. 1976) (en banc); *Anderson v. Dep't of Transp., FAA.*, 827 F.2d 1564, 1570 (Fed. Cir. 1987) (per curiam).

case. Dr. Zivot explained why he could not opine on a method of execution that would result in significantly less suffering than the lethal injection protocol proposed by the State: he is ethically barred from proposing a method of execution at all. Pet. App. 108a ¶ II.B. The law should not require an inmate to find an expert who is willing to violate his or her oath by custom-designing a method of execution that will substantially reduce the inmate's idiosyncratic reasons for excessive suffering.

This Court should grant this petition and restore the generally applicable rules for evaluating evidence at summary judgment to inmates bringing an as-applied challenge to their methods of execution.

C. Whether An Inmate Raising An As-Applied Challenge To A Method Of Execution Must Prove An Available Alternative Method That Will Substantially Reduce His Risk Of Suffering Also Warrants Review.

The Eighth Circuit requires an inmate raising an as-applied, method-of-execution challenge to propose a "feasible, readily implemented alternative procedure that will *significantly* reduce a substantial risk of severe pain and that the State refuses to adopt." Pet. App. 84a. Its 6-4 *en banc* ruling on this issue mis-applied a rule announced in cases raising facial challenges to the critically different context of an as-applied challenge. The extension of the rule to as-applied challenges, also adopted by the Eleventh Circuit, the Florida Supreme Court, and suggested by the Sixth Circuit, is unwarranted. The reasons justifying the alternative method requirement are linked with the character of facial challenges.

Both *Baze* and *Glossip* start from the premise that because the Constitution permits capital punishment, it must also permit a method of carrying out the death sentence. *Baze*, 553 U.S. at 48–49 (plurality opinion); *Glossip*, 135 S. Ct. at 2739. The implications for that premise are broader when the Court is considering a facial challenge than when it is considering an as-applied challenge.

A facial challenge asks the Court to declare a method of execution unconstitutional for use against anyone. Such a challenge runs the risk of being a disguised effort to render the death penalty itself unconstitutional. *See Glossip*, 135 S. Ct. at 2739. But that risk is not present at all when the inmate raises an as-applied challenge. Such a claim implicates the lawfulness of the state's method for no other inmate. Bucklew's claim is rooted in his idiosyncratic medical condition and the risks posed specifically to him. He does not seek a judgment that would require Missouri to alter its execution protocol as to any other inmate. Nothing about his claim even implicitly questions the lawfulness of capital punishment.

And nothing about Bucklew's claim seeks to "transform courts into boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51 (plurality opinion). Because only Bucklew's execution is at stake, his claim does not ask the courts to displace state officials from their task as designers of a state's protocol for carrying out capital punishment. State legislatures would continue to evaluate the best scientific evidence available to approve the most humane methods of execution. *Id.* Courts would remain focused on a task for which they are well suited: evaluating whether a general state rule (the state's execution protocol) applied to particular facts (the medical condition of the inmate) satis-

fies the Constitution's legal standard (the Eighth Amendment's prohibition of cruelty).

Practical considerations also weigh in favor of relieving inmates with rare, complicating medical conditions from having to design their own execution protocol. State officials naturally have a firmer grasp of the modifications to a protocol that the state can accommodate. State officials will also have greater experience with the complications that can arise during executions, and thus will have better knowledge of what practices are likely to provide relief, at least in circumstances that can recur. And inmates will often be frustrated in their efforts to obtain expert guidance in custom-designing a method of execution that accounts for their particular medical issues. Most professionals with medical training are barred by ethical standards from "participating in" an execution, which includes a bar on designing a method of execution that is "better" than the one proposed by the state. *See, e.g.*, *AMA Code of Medical Ethics*, tit. 9.7.3 "Capital Punishment" (2016), https://www.ama-assn.org/sites/default/files/media-browser/code-of-medical-ethics-chapter-9.pdf.

This Court has already ruled that certain individuals, based on their mental health, are categorically ineligible for the death penalty. *Ford*, 477 U.S. at 410 (plurality opinion) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."); *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (holding that individuals with certain mental deficiencies cannot be constitutionally executed); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("[P]ersons with intellectual disability may not be executed."). It should not be surprising, then, that the Eighth Amendment prohibits the execution of *some* individuals by a *particular*

method based on their physical condition. That is all Bucklew asserts here. Bucklew's physical condition should not condemn him to state indifference to his suffering, even if Bucklew is unable to design an alternative that convincingly shows the promise of substantially reduced suffering. Rather, his proof that his idiosyncratic condition means the state will impose unconstitutional suffering on him should lead to a court order preventing the state from doing so. The law should not "bar a death-row inmate from vindicating a right guaranteed by the Eighth Amendment …. even if [he] can prove that the State plans to kill him in an intolerably cruel manner." *Arthur*, 137 S. Ct. at 729 (Mem.) (Sotomayor, J., dissenting). Such a judgment would leave Missouri free to design a lethal gas protocol that meets Eighth Amendment standards.

II. THIS CASE IS A STRONG VEHICLE FOR ADDRESSING THESE ISSUES.

This case is on direct appeal from final judgment. The Eighth Circuit's decision adopts novel rules of law that frustrate method-of-execution claims. The issues are cleanly presented.

Throughout this litigation, respondents have persistently suggested otherwise. They have asserted that Bucklew failed to plead his claim, and that his claim is barred by *res judicata* and the statute of limitations because he could have and should have brought his claim earlier, in a proceeding that raised a facial challenge. No judge has agreed with respondents. Judge Colloton thoroughly and accurately rejected their arguments. Bucklew need not repeat those reasons in full here. But, in brief: (1) Bucklew specifically pleaded that lethal injection would cause him to experience a prolonged sense of suffocation, and (2) Bucklew was repeatedly *denied* the resources

to investigate the severity of the risks he faced from lethal injection in light of his condition, and did not learn the facts necessary to assert his claim until it was too late to include his as-applied challenge in the case raising a facial challenge to lethal injection.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Robert N. Hochman

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