No. 17-8151

In the
Supreme Court of the United States

RUSSELL BUCKLEW

Petitioner,

v.

ANNE PRECYTHE, ET AL.

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brief for *Amici Curiae* Megan McCracken and Jennifer Moreno in Support of Petitioner

GINGER D. ANDERS
COUNSEL OF RECORD
CHRISTOPHER M. LYNCH
DAHLIA MIGNOUNA
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W.
Seventh Floor
Washington, DC 20004-1357
(202) 220-1100
ginger.anders@mto.com

Counsel for Amici Curiae Megan McCracken and Jennifer Moreno

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INTEREST OF *AMICI CURIAE*[1]

Amici Megan McCracken and Jennifer Moreno are experienced attorneys who have extensively studied methods of execution, including lethal injection, since 2007.[2] They have served as expert counsel advising lawyers representing inmates in lethal injection challenges, including as-applied challenges.

Amici therefore have extensive expertise in the nature of the risks posed by various lethal injection procedures, including the risks posed to inmates who have specific severe medical conditions that could make the lethal injection process uniquely torturous when applied to them. Amici were involved in the as-applied challenges described in this brief, and are therefore familiar with the circumstances in which an inmate's unique medical condition creates a real, predictable risk that the lethal injection procedure will interact with the inmate's medical condition to cause severe pain and suffering.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

[2] Amici file this brief in their individual capacities. Ms. McCracken is affiliated with the University of California, Berkeley, School of Law Death Penalty Clinic, and Ms. Moreno is a staff attorney employed by that clinic. That institutional affiliation is provided for identification purposes only.

As attorneys advising in cases involving as-applied challenges to lethal injection procedures, amici have an interest in the proper development of the law governing those challenges. Amici also have an interest in ensuring that the inmates on whose cases they advise are executed in a humane manner and are not subjected to unnecessary pain and suffering.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, Petitioner Russell Bucklew does not challenge the constitutionality of the death penalty or of Missouri's lethal injection protocol. He challenges only the constitutionality of the application of this protocol to him, based on his known, unique medical condition, cavernous hemangioma. Mr. Bucklew claims that the specific interaction between this rare condition and Missouri's particular execution protocol gives rise to a significant risk of severe, unnecessary pain that would not be present in the ordinary case.

I. The risk that Mr. Bucklew has identified is real. In prior, similar cases in which inmates have presented evidence that their severe medical conditions cause demonstrated physical effects that will interact with specific aspects of a lethal injection procedure to cause unconstitutional suffering, the inmates' predictions were proven right when the state attempted to execute them. These inmates predicted with precise accuracy the unnecessary pain and suffering that execution pursuant to the standard protocol would cause.

Dennis McGuire, executed in Ohio in 2014, presented evidence that in light of his breathing condition, administration of the lethal injection drugs would cause him to experience suffocation for a significant period before he lost consciousness. Mr. McGuire was right: his execution was the longest in Ohio's history, during which he visibly struggled, choked, and gasped for air. Doyle Hamm, who Alabama attempted to execute in 2018, predicted that his lymphatic cancer and compromised vascular system would render his veins uniquely inaccessible, even through a more invasive central line procedure. The execution team attempted for several hours to insert an IV, eventually using needles to unsuccessfully probe deep within his groin tissue to locate a central vein and causing severe bleeding. When the state abandoned the attempt to execute him, Mr. Hamm could not walk unsupported. And Alva Campbell, whom Ohio tried and failed to execute in 2017, predicted his numerous medical conditions would make it impossible to access his veins. After numerous painful attempts to find an IV, the execution team called off the execution.

II. An as-applied challenge like Mr. Bucklew's is a narrow claim that relies on concrete medical evidence, falls well within the court's competence, and serves important interests. Such challenges do not "attack . . . the death penalty itself." *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015). They presume the death penalty's constitutionality, as well as that of the particular protocol at issue. They challenge only the specific application of a given protocol to the particular inmate because of the protocol's expected

interaction with the inmate's known, unique medical condition.

In order to demonstrate a "substantial risk of serious harm," *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality op.), an inmate raising an as-applied challenge must present evidence that (1) he has a particular medical condition that (2) will interact with the state's execution protocol in identifiable, predictable ways that (3) render it "sure or very likely to result in" unconstitutional pain. *Glossip*, 135 S. Ct. at 2739. Thus, the inmate may not simply identify his medical condition; he must explain how that condition will interact with identified aspects of the particular execution protocol. In addition, the inmate must demonstrate that the resulting pain rises to the level of unconstitutional suffering. When inmates present this evidence—as Messrs. McGuire, Hamm, and Campbell did—they establish that their execution involves special circumstances that must be addressed in order for them to be executed consistently with the Eighth Amendment. The execution attempts described above prove beyond any doubt that severe consequences flow from disregarding inmates' specific, substantiated medical concerns.

Because as-applied challenges like Mr. Bucklew's are based on specific medical conditions that interact with aspects of the lethal injection process, they are necessarily brought only infrequently. And when an inmate brings such a claim, it will present concrete factual issues that are well within the court's adjudicative competence and the state's own knowledge. Because inmates bringing such

challenges will likely have been treated for the relevant conditions in prison, the state will have access to their medical records and will be unlikely to be blindsided by such challenges. The court can easily dismiss unsubstantiated claims. When claims do go forward, prison medical records, together with expert testimony and, in appropriate cases, targeted discovery, will provide the court with a concrete factual basis on which to evaluate the claim. The well-defined medical issues involved are of the sort that courts adjudicate all the time, including in garden-variety prison-conditions litigation. For these reasons, as-applied challenges do not raise the concerns about general federal supervision of state execution procedures that this Court identified in *Baze* and *Glossip*.

At the same time, as-applied challenges serve critical interests. They facilitate a dialogue between the inmate and the state to secure the common goal of ensuring that executions are administered in accordance with the Constitution. Botched executions—particularly those accurately predicted by the inmate involved—damage the credibility of the state's execution procedures and traumatize witnesses. By raising the specific issues presented by his or her unique medical condition, inmates can help states avoid needlessly inflicting severe pain when executing a severely ill inmate.

ARGUMENT

I. Prisoners with Unique Medical Conditions Have Routinely Been Able to Successfully Predict the Needless Suffering Imposed on Them by Their State's Execution Protocol

Petitioner Russell Bucklew brings an as-applied challenge to Missouri's standard execution protocol on the grounds that executing him pursuant to that protocol will cause him to, among other harms, suffocate and choke on his own blood. That unique danger is the result of the interaction of Missouri's protocol with the blood-filled tumors in Mr. Bucklew's throat that result from his rare medical condition, cavernous hemangioma.

Inmates have brought as-applied challenges like Mr. Bucklew's only infrequently. But when inmates do assert that their specific medical conditions will interact with identified aspects of the execution procedure in a manner that causes unconstitutional suffering, their concerns are frequently well-founded. Although previous as-applied challenges generally have been rejected by courts, subsequent attempts to execute the inmates have borne out the precise concerns they raised in court. Three such examples—the execution of Dennis McGuire and the attempted executions of Alva Campbell and Doyle Hamm—demonstrate beyond doubt that the risks of severe pain identified by prisoners in cases like Mr. Bucklew's are real. Disregarding these concerns has resulted in extraordinary and unnecessary suffering.

A. Dennis McGuire

Prior to his execution in January 2014, Dennis McGuire challenged Ohio's execution protocol as it applied to him, contending that "following [the state's] protocol [would] subject [him] to an unconstitutional substantial risk of severe pain that constitutes cruel and unusual punishment." Opinion and Order at 2, *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-01016 (S.D. Ohio Jan. 13, 2014), ECF No. 390 ("McGuire Op.").

Mr. McGuire alleged that his particular medical and physical characteristics increased his risk of obstructive sleep apnea. *Id.* at 9. Based on medical expert testimony, he contended that in combination with this condition, the administration of midazolam and hydromorphone, the two drugs specified in Ohio's lethal injection protocol, would make him experience "a need or sensation to breathe, and he will suffer an obstruction that he will be unable to mitigate," which would in turn force him to experience "'air hunger,' . . . a terrifying inability to obtain a breath . . . for up to a 5-minute window before the drugs alleviate his awareness of [the sensation]." *Id.* Mr. McGuire contended that a higher dose of midazolam, as provided in Florida's execution protocol, would alleviate the risk posed by his condition. *Id.* at 7-8.

The district court held that Mr. McGuire "has failed to persuade that he is likely to experience th[e] condition [of air hunger]." *Id.* at 10. Although the district court acknowledged that "Ohio's current protocol presents an experiment in lethal injection

processes" and that the inquiry was "at best a contest of probabilities" and "lacking actual application in studies," it concluded that Mr. McGuire had not established that he was sufficiently likely to experience air hunger to prevail. *Id.* at 10-11. In particular, the court rejected Mr. McGuire's medical expert's estimate that there would be a five-minute period during which he would experience air hunger before the drugs eliminated his awareness. *Id.* Mr. McGuire's petition was denied, and he was executed on January 16, 2014.

The results were just as predicted, except that Mr. McGuire's expert's calculation of a five-minute window during which he would suffer was far too conservative. It took almost a half hour for Mr. McGuire to die, "the longest execution in Ohio since the state resumed capital punishment" in 1999. Postmedia Breaking News, *'Oh, My God': Daughter Reveals She Covered Her Ears During Final Moments of Dad's 'Agonizing' 26-Minute Execution* (Jan. 17, 2014). Just as Mr. McGuire predicted, observers to the execution noted that Mr. McGuire appeared to be suffering deeply, choking, struggling, and gasping for air for more than 10 minutes, as "his body was slowly strangling itself from the inside, rather than causing him to drift off to sleep [as was intended]." Matt McCarthy, *What's the Best Way to Execute Someone?; Doctors Say Lethal Injection Is Often Botched and Horrific*, Slate Magazine (March 27, 2014).

Mr. McGuire's spiritual advisor, who observed the execution, described the experience:

> At about 10.31am, his stomach swelled up in an unusual way, as though he had a hernia or something like that. Between 10.33am and 10.44am – I could see a clock on the wall of the death house – he struggled and gasped audibly for air.
>
> I was aghast. Over those 11 minutes or more he was fighting for breath, and I could see both of his fists were clenched the entire time. His gasps could be heard through the glass wall that separated us. Towards the end, the gasping faded into small puffs of his mouth. It was much like a fish lying along the shore puffing for that one gasp of air that would allow it to breathe.

Lawrence Hammer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, The Guardian (Jan. 22, 2014), https://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane.

Another observer, Columbus Dispatch reporter Alan Johnson, similarly explained that Mr. McGuire seemed to be gasping for air for over 10 minutes, describing that Mr. McGuire "gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking." Dana Ford and Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN.com (Jan. 17, 2014), https://www.cnn.com/2014/01/16/justice/ohio-dennis-

mcguire-execution/index.html; *see also* Andrew Welsh-Huggins, *'Agonizing' Execution Takes Nearly 25 Minutes*, Fort Wayne Journal Gazette (Jan. 17, 2014). And Ohio's execution team leader testified in a subsequent proceeding that Mr. McGuire's executions "affected him unlike any other and that he 'was wondering what was going on'" during the execution, because Mr. McGuire's body moved in a way unseen in any of Ohio's other modern executions. Mark Gokavi, *Official 'Wondered What Was Going On' in McGuire Execution*, Dayton Daily News (Jan. 3, 2017), https://www.daytondaily news.com/news/crime--law/official-wondered-what-was-going-mcguire-execution/90O8qZYkWsnagye TK0CWvJ.

After Mr. McGuire's execution, Ohio agreed to change its execution protocol, and both the state and a federal court placed a temporary moratorium on executions in the state. *Anesthesiologist: Ohio Inmate Suffered During Execution*, USAToday (Aug. 12, 2014).

B. Doyle Lee Hamm

Alabama's failed attempt to execute Doyle Lee Hamm provides another example of the predictive accuracy of specific as-applied challenges like Mr. Bucklew's. Mr. Hamm, who has been on Alabama's death row for over thirty years, *see* Compl. at 1, *Hamm v. Dunn*, 2:17-cv-02083 (N.D. Ala., Dec. 13 2017), ECF No. 1 ("Hamm Compl."); First Am. Compl. at 2, *Hamm*, 2:17-cv-02083 (N.D. Ala., Jan. 16 2018), ECF No. 15 ("Hamm Am. Compl."), suffers from several severe medical conditions that have

seriously compromised his veins, Hamm Compl. at 1; Hamm Am. Compl. at 2; *see* Prelim. Report of Dr. Mark Heath at 3, *Hamm v. Dunn*, 2:17-cv-02083 (N.D. Ala., Jan. 16, 2018), ECF No. 15-1 ("Oct. Heath Report"). Specifically, Mr. Hamm was diagnosed with lymphatic cancer in 2014. *See* Hamm Compl. at 1, 7 ¶¶ 14-15, 9 ¶ 20; Hamm Am. Compl. at 2, 8-9 ¶¶ 14-15, 11 ¶ 20; Oct. Heath Report at 2, 5. Likely as a result of that cancer, Mr. Hamm experienced lymphadenopathy—the swelling of the lymph nodes in his body. *See* Hamm Compl. at 10 ¶ 24, 12-13 ¶ 31; Hamm Am. Compl. at 12 ¶ 24, 14-15 ¶ 30; Oct. Heath Report at 4. He also suffers from "severely compromised veins" as a result of using intravenous drugs for years. *See* Hamm Compl. at 6 ¶ 13, 13 ¶ 33; Hamm Am. Compl. at 8 ¶ 13; 15 ¶ 32; Oct. Heath Report at 3.

In the months leading up to his execution, Mr. Hamm brought an as-applied challenge to Alabama's lethal injection protocol. *See* Hamm Compl. at 2-3; Hamm Am. Compl. at 2. As part of that challenge, Mr. Hamm explained why the specific combination of his lymphatic cancer and compromised blood vessels ensured that application of Alabama's lethal injection protocol would put him through significant pain and suffering, and proposed that Alabama execute him instead via oral injection of lethal drugs. *See* Hamm Compl. at 2-3; Hamm Am. Compl. at 3-4; *see also* Oct. Heath Report at 5-6. Mr. Hamm, supported by his medical expert, contended that his veins are "severely compromised, making traditional peripheral intravenous access extremely difficult, if not impossible." Hamm Compl. at 2; Hamm Am.

Compl. at 3; *see* Oct. Heath Report at 3, 6-7; Report of Dr. Mark Heath at 4, *Hamm v. Dunn*, 2:17-cv-02083 (N.D. Ala., Jan. 16, 2018), ECF No. 14-5 ("Jan. Heath Report") ("[P]eripheral intravenous access in Mr. Hamm would be extremely difficult or impossible.").

Mr. Hamm further predicted that, because corrections personnel would be unable to access his peripheral veins, they would then attempt to access a central vein. Hamm Compl. at 18 ¶ 7; Hamm Am. Compl. at 22-23 ¶ 56; Oct. Heath Report at 5. That process involves accessing a larger vein located within deep tissue rather than close to the skin, and therefore requires specialized training and employment of an ultrasound machine to reliably locate the central vein. Mr. Hamm presented evidence that any attempt to access a central vein would be further complicated in his case because of his lymphatic cancer. *See* Hamm Compl. at 16 ¶ 41, 18 ¶ 7; Hamm Am. Compl. at 20 ¶ 48; 22 ¶ 56; Oct. Heath Report at 5-6. As he explained, each of the three central veins that is typically accessed in such a procedure—the internal jugular vein in the neck, the subclavian vein near the clavicle, or the femoral vein in the groin—is located near the body's largest clusters of lymph nodes. Hamm Compl. at 15 ¶ 40; Hamm Am. Compl. at 20 ¶ 47. Mr. Hamm's lymph nodes swell unpredictably, however, making central venous access more difficult and dangerous than it would be for others without his condition. Hamm Compl. at 2; Hamm Am. Compl. at 3; *see also* Hamm Compl. at 12-13 ¶¶ 31-32 (describing tumors on Mr. Hamm's chest, neck, and groin, and concluding that

Alabama "is not equipped to achieve venous access in Mr. Hamm's case"); Oct. Heath Report at 4, 7 (same). Mr. Hamm made clear that "establishing [central vein] access risks a bloody and excruciating experience" for him. Hamm Compl. at 2; Hamm Am. Compl. at 3.

Notwithstanding Mr. Hamm's explanation of the significant risks described above, his execution proceeded as scheduled. Mr. Hamm's predictions in his court filings came to pass. On February 22, 2018, the execution team attempted for several hours to find a vein that they could use to execute Mr. Hamm. *See* Hamm's Report and Motion for an Order at 2, *Hamm v. Dunn*, 2:17-CV-02083 (N.D. Ala., Feb 23, 2018), ECF No. 86 ("Hamm's Report"); David Brennan, *Doyle Lee Hamm: Botched Execution Death Row Prisoner Sues Alabama, Asks for Vacated Sentence*, Newsweek (Mar. 8, 2018), http://www.newsweek.com/botched-execution-death-row-prisoner-sues-alabama-asks-vacated-sentence-836127 ("[S]taff and medical personnel tried and failed to find suitable veins in [Hamm's] groin, feet and legs for 2.5 hours.").

First, the execution team tried and failed to access peripheral veins in Mr. Hamm's legs and ankles. Hamm's Report at 2. Two members of the IV execution team inserted needles repeatedly into Mr. Hamm's left and right legs and ankles in search of a vein. *Id.* at 2. Each attempt to access a vein involved penetrating his skin and then repeatedly probing the needle around in search of a vein, causing Mr. Hamm extreme pain. Expert Report of Dr. Mark Heath Re. Examination of Mr. Hamm at 2,

Hamm v. Dunn, 2:17-CV-02083 (N.D. Ala., Mar. 5, 2018), ECF No. 93 ("Mar. Heath Report"). The execution team even turned Mr. Hamm on his stomach as he lay on the gurney, slapping the back of his legs in their search for an accessible vein. Hamm's Report at 2. After about half an hour of this painful probing, the execution team left five visible puncture wounds on Mr. Hamm's legs and ankles. Mar. Heath Report at 2, 4; *see also* Hamm Compl. at 18 ¶ 6; Hamm Am. Compl. at 22 ¶ 55 (predicting that corrections personnel, in their unsuccessful attempts to access his peripheral veins, would "cause pain to Mr. Hamm by repeatedly attempting to insert needles into inaccessible veins).

Again as Mr. Hamm had predicted, other execution personnel then tried to access his central veins in a series of bloody and painful attempts. Corrections personnel repeatedly inserted needles into Mr. Hamm's right groin, causing him intense pain, as each insertion was accompanied by multiple probing movements. *See* Hamm's Report at 2; Mar. Heath Report at 2. Mr. Hamm felt the needles entering deep into his groin and twice experienced "sudden sharp deep retropubic pain." Mar. Heath Report at 2. The execution personnel had to request several new needles during the course of these attempts, and the process caused Mr. Hamm to bleed so severely that his blood soaked through a pad, which had to be replaced. *See id.* at 2. In all, the execution personnel left approximately six puncture wounds in Mr. Hamm's groin. *Id.* at 4.

Multiple news reports described the execution and in particular reported the "horrific" and "disturbing"

images of Mr. Hamm's resulting wounds and severe bruising. *See, e.g.*, Mark Hodge, *Wishing for Death*, The Sun (Mar. 7, 2018), https://www.thesun.co.uk/news/5746778/doyle-lee-hamm-botched-execution-needles-wounds-alabama; Debra Killalea, *Doyle Hamm: Botched Execution Leaves Inmate with Shocking Injuries*, News.Com.Au, (Mar. 8, 2018), https://www.news.com.au/lifestyle/real-life/news-life/doyle-hamm-botched-execution-leaves-inmate-with-shocking-injuries-photos/news-story/1e011a327491dc324e34ae753733c49d; Sandee LaMotte, *Death Row Inmate Sues After 'Botched' Execution*, CNN (Mar. 7, 2018), https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html. Mr. Hamm was in severe pain during the attempted execution, and was unable to walk unsupported afterward. Mar. Heath Report at 2-3. Following the failed execution attempt, Mr. Hamm developed a large hematoma (collection of clotted blood) in his right groin, urinated blood and, the next week, was diagnosed with infected lymph nodes in his right groin and right underarm. *Id.* at 3-4.

C. Alva Campbell

The failed execution of Alva Campbell also provides an illustrative example of the merit—and very predictable risk identified in—the types of as-applied challenges at issue in this case. Mr. Campbell, who passed away of natural causes on March 3, 2018, suffered from a multitude of serious medical conditions that required multiple daily oxygen treatments, prevented him from fully reclining without severe pain, and required the use an external colostomy bag. *See* Proposed

Amendment and Supplement to Complaint at 2-4, *In re Ohio Execution Protocol Litigation*, 2:11-cv-01016 (S.D. Ohio, Oct. 26, 2017), ECF No. 1350-1; Tracy Connor, *Alva Campbell, Inmate Who Survived Execution Try, Dies in Ohio Prison*, NBC News (Mar. 3, 2018), https://www.nbcnews.com/news/us-news/alva-campbell-inmate-who-survived-execution-try-dies-ohio-prison-n852961; Hannah Riley, *Alva Campbell Jr.'s Execution Halted Midway Through*, Huffington Post (Nov. 16, 2017), https://www.huffingtonpost.com/entry/alva-campbell-jrs-execution-halted-midway-through_us_5a0c96c3e4b06d8966cf3451. To name but a few conditions, Mr. Campbell suffered from pulmonary hypertension, emphysema, severe chronic obstructive pulmonary disease (COPD), coronary artery disease, and prostate cancer; he also had a total colectomy due to a gangrenous colon and hip replacement. *See* Medical Review, *In re Ohio Execution Protocol Litigation*, 2:11-cv-01016 (S.D. Ohio, Oct. 26, 2017), ECF No. 1353-1; Proposed Amendment and Supplement to Complaint at 2-3.

In light of his serious and chronic medical conditions, Mr. Campbell identified multiple ways in which Ohio's lethal injection execution method would cause him serious pain, and suggested the alternative of death by firing squad. He explained that recent medical tests performed by the Ohio Department of Rehabilitation and Correction demonstrated that the execution team would likely be unable to access his peripheral veins, "thereby subjecting [Mr. Campbell] to severe, needless physical and mental/psychological pain and

suffering" as the execution team attempted to access a vein. *See* Proposed Amendment and Supplement to Complaint at 5; *see also* Medical Review at 3-5 (noting difficulties finding IV access sites and Mr. Campbell's history of "extremely poor venous access").

At the execution itself, these problems occurred just as Mr. Campbell had predicted, and Mr. Campbell was spared severe pain only because the execution team was forced to abort the execution. On the day of the execution, the execution team spent over an hour examining Mr. Campbell's arms and legs in search of accessible veins. *See* Marty Schladen, *Alva Campbell: Ohio Execution Attempt Falls Apart on Gurney*, The Columbus Dispatch (Nov. 16 2017). After Mr. Campbell was finally taken to the death chamber and strapped to a gurney, the execution team spent another half hour searching for an accessible vein. *Id.* During that time, and as Mr. Campbell predicted, they inserted needles repeatedly into Mr. Campbell's arms and legs, including twice into Mr. Campbell's right arm, once in his left arm, and once in his left leg. *Id.* When the team inserted a needle in his leg, it appeared to observers that Mr. Campbell cried out in pain. *Id.* After failing to access Mr. Campbell's veins, the state called off the execution. Liam Stack, *Execution in Ohio Is Halted After No Usable Vein Can Be Found*, New York Times (Nov 15, 2017), https://www.nytimes.com/2017/11/15/us/ohio-execution-alva-campbell.html.

* * *

In each of these cases, the extreme suffering to which the inmate was subjected as a result of his specific medical condition was not just entirely foreseeable; it was entirely foreseen. Each of Messrs. McGuire, Campbell, and Hamm described in specific detail in their court filings the problems the state ultimately faced in attempting to execute them and the pain they eventually suffered as a result.

II. As-Applied Challenges Based on an Inmate's Specific Medical Condition Are Limited in Scope, Easily Evaluated, and Assist the State in Its Attempts to Conduct Humane Executions

A. As-Applied Challenges Address Specific, Predictable Risks of Severe Pain

1. As-applied challenges such as Mr. Bucklew's and those described above are grounded in the interaction between the inmate's unique medical condition and the state's particular execution protocol. They are therefore narrow, specific challenges that are not "attack[s] [on] . . . the death penalty itself" or even on "a particular means of execution." *Glossip*, 135 S. Ct. 2726, 2738 (2015). This type of challenge presumes that the death penalty can be constitutionally applied and even that the particular execution protocol at issue can be constitutionally applied in the typical case. *Cf. Baze*, 553 U.S. at 62 (plurality op.) ("Petitioners agree that, if administered as intended, th[e] procedure will result in a painless death.").

Notwithstanding the constitutionality of a state's method of execution generally, it is beyond question that in specific, unusual circumstances (such as Mr. Bucklew's), an inmate may have unique medical circumstances that make the state's particular protocol virtually certain to cause severe pain or suffering to that inmate. In such cases, the Eighth Amendment requires that the inmate have an opportunity to challenge that protocol to ensure that he or she is executed in a constitutional manner. *Cf. Baze*, 553 U.S. at 53 (plurality op.) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.").

For example, Mr. McGuire's as-applied challenge was not that Ohio's lethal injection protocol was unconstitutional *per se*, but that his specific "breathing issues," particularly the "proclivity toward obstruction" of his breathing, would cause *him* to experience "a terrifying inability to obtain a breath" for five minutes before the midazolam and hydromorphone that would be used on him would alleviate his awareness of the sensation. McGuire Op. at 3, 9. Inmates without his particular medical condition—which was well-documented from his treatment by prison medical staff, *see id.* at 3—would have no basis to challenge the protocol on those grounds.

Similarly, Mr. Bucklew raises the challenge that the blood-filled tumor caused by his extremely rare

medical condition, cavernous hemangioma, would obstruct his breathing and potentially rupture if he were executed pursuant to Missouri's lethal injection protocol, causing him to choke on his own blood. Pet. 2; *id*. at 8 (explaining that only two thousandths of a percent of the population suffers from cavernous hemangiomas in the oral cavity like Mr. Bucklew, making one of the primary impediments to executing him pursuant to Missouri's protocol "extremely rare"). The harm that Bucklew expects to endure if executed pursuant to the standard Missouri execution profile warrants unique treatment. Few, if any, other prisoners will have similar grounds to challenge the protocol.

2. The Eighth Circuit misunderstood Mr. Bucklew's claim, however, when it stated that his challenge "proceeds from the premise that [the lethal injection team] may not be qualified for the positions for which they have been hired." Pet. App. 17a. An as-applied challenge presumes that the professionals administering the execution are competent and would be qualified to execute the protocol for the typical prisoner. But where the inmate has alleged a specific medical condition that poses unique complications during the execution, specialized knowledge might be necessary to avoid extreme and unnecessary suffering.

For example, Mr. Hamm argued that, as a result of his severe medical problems, accessing his veins would "present a serious medical challenge" beyond the competence of execution personnel qualified only to set uncomplicated IVs. Hamm Am. Compl. at 15 ¶ 33. He predicted—correctly—that attempting such

access at the prison would "result in cruel and needless pain." *Id.* Likewise, Mr. Bucklew sought discovery into the expertise of the medical team that was assigned to his execution in order to evaluate whether, in light of their training level, their attempting to perform the execution on Mr. Bucklew, with his unique condition, would be very likely to inflict severe pain. Pet. 4, 8. Mr. Bucklew's rare affliction and the unique ways in which it causes suffering may be unknown to an execution team that is qualified for the ordinary case—in other words, qualified to place and monitor standard IVs in individuals who lack severe health conditions that will impact the IV placement and injection process. *See, e.g.*, *Baze*, 553 U.S. at 54 (plurality op.) (discussing expert testimony that mixing sodium thiopental is "not difficult at all" and has "instructions . . . on the package insert").

3. Because an as-applied challenge is premised on circumstances specific to the inmate himself, the evidence necessary to demonstrate a "substantial risk" of unconstitutional suffering, *id.* at 50 (plurality op.), is fundamentally different from that involved in a facial challenge.

A facial challenge alleges either that a lethal injection protocol is likely to cause pain in all cases, or that the protocol is likely to be administered improperly in any given case. Such a claim can be made about *any* potential execution, and the court must evaluate the state's procedures as a general matter to determine whether they are so inadequate that they create a substantial risk in any given execution. In contrast to that wide-ranging inquiry,

an as-applied challenge focuses on the concrete question whether the inmate's particular medical condition makes it "very likely" that applying the protocol to him will "result in needless suffering." *Glossip*, 135 S. Ct. at 2739.

To demonstrate a "substantial risk of serious harm," *Baze*, 553 U.S. at 50 (plurality op.), an inmate raising an as-applied challenge must proffer evidence of (1) a particular medical condition that (2) will interact with the state's execution protocol in identifiable, predictable ways that (3) render it "sure or very likely to result in" unconstitutional pain. *Glossip*, 135 S. Ct. at 2739. Thus, the inmate may not simply identify his medical condition; he must explain how that condition will interact with identified aspects of the particular execution protocol. In addition, the inmate must demonstrate that the resulting pain rises to the level of unconstitutional suffering. These elements together give rise to the special circumstances that must be addressed in order for the inmate to be executed humanely.

Thus, the "substantial risk" analysis will turn on an evaluation of the inmate's evidence of his medical condition, as well as evidence concerning the specific aspects of the lethal injection procedure that risk interacting with the inmate's condition to cause severe pain. Here, for instance, Mr. Bucklew provided extensive evidence of his medical condition, and identified specific elements in the lethal injection protocol that were likely to cause pain in light of his condition. He argued that the supine position of the gurney would cause his tumors to

descend into his throat, causing a choking sensation that he would be unable to alleviate once the anesthesia was administered; and that as he struggled to breathe, the tumors would rupture, causing him to choke on his own blood. He further argued that because his veins are compromised, the execution personnel's repeated attempts to insert the IVs would raise his blood pressure, increasing the risk that his tumors would rupture. Pet. 11.

B. As-Applied Challenges Are Administrable And Serve State Interests

As-applied challenges to lethal injection procedures are naturally limited in number and scope; they present issues that are easily adjudicable by courts; and they serve important state interests.

1. The specific medical evidence of the inmate's unique condition necessary to prove an as-applied claim distinguishes the nature, scope, and number of such claims from those of facial claims about the risk of errors in carrying out an execution protocol.

Challenges to an execution protocol based on an individual's known unique medical condition are necessarily limited in number. Inmates will likely suffer only infrequently from medical conditions that are both sufficiently severe and sufficiently closely related to the physical effects of the execution procedure to render that procedure "sure or very likely to result in needless suffering." *Glossip*, 135 S. Ct. at 2739; s*ee* Pet. 8. For example, Mr. McGuire presented evidence that his sleep apnea condition would interact with the specific dose of midazolam

that Ohio planned to use, thereby causing suffocation. And Mr. Hamm presented evidence that the swelling of his lymph nodes would make obtaining even a central IV line dangerous and likely unsuccessful. Notably, in the rare cases in which inmates have been able to demonstrate that their specific medical conditions would render identified aspects of the execution procedure very likely to cause severe suffering, those predictions have come true.[3]

Conversely, courts will be able easily to reject claims that do not identify a medical condition that will interact with specific aspects of the execution protocol to create a substantial risk. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). For instance, courts have typically rejected generalized claims that an inmate's veins may have been damaged by IV drug use, on the ground that such claims did not establish the existence of any unusual condition for which the protocol's safeguards would

[3] As Mr. McGuire's medical expert explained, Mr. McGuire's suffering was easily predictable based on standard medical criteria. The expert told a reporter "he had used a standard, simple set of criteria [for his analysis before the district court] . . . to determine that McGuire's airway would likely become obstructed shortly after the medications were administered, causing him to slowly suffocate." The result was that "his body was slowly strangling itself from the inside, rather than causing him to drift off to sleep." Matt McCarthy, *What's the Best Way to Execute Someone?; Doctors Say Lethal Injection Is Often Botched and Horrific*, Slate Magazine (March 27, 2014).

not be sufficient. *See, e.g.*, *Raby v. Livingston*, 600 F.3d 552, 558 (5th Cir. 2010).

When as-applied challenges such as Mr. Bucklew's do go forward, they can be easily substantiated and evaluated. The relevant medical information on which the inmate bases his or her claim will be readily accessible to the state. Indeed, the correctional facility's medical system will undoubtedly be aware of the inmate's medical condition and possess treatment records. In addition, in many situations the state itself—via its correctional personnel—produced key medical reports concerning the effect of the inmate's health on the execution process. In Mr. Campbell's case, for example, one of the reports he pointed to as evidence that the state would be unlikely to establish venous access was produced by the Ohio Department of Rehabilitation and Correction. *See* Proposed Amendment and Supplement to Complaint at 5 ¶ 8. Similarly, Messrs. McGuire, Hamm, and Bucklew were all treated by doctors employed by the state while they were incarcerated. McGuire Op. 3 ("The evidence establishes that McGuire has had breathing issues since at least 2009, when prison doctors began to prescribe him inhalers."); Pet. App. 78a (noting "doctors employed or contracted with by the State of Missouri repeatedly warn of the expansion of [Mr. Bucklew's] vascular tumor, stating in September 2011 'this has been present for 20 plus years, but has increasingly grown larger and larger.'"); Hamm Am. Compl. at 8-11 ¶¶ 15-16, 18, 22-23 (describing detailed reports of Mr. Hamm's medical conditions from his prison medical records).

As a practical matter, therefore, an inmate will be unable to fabricate a condition or medical history or blindside the state with an unforeseeable challenge to its execution protocol that it does not have the basis to evaluate or resolve. If an inmate does attempt to do so, the state's own medical records will refute the claim.

2. From the courts' perspective, as-applied challenges present concrete, adjudicable disputes involving particular aspects of the legal injection protocol. Courts routinely adjudicate similar claims in other contexts, including claims that prison administrators have acted with deliberate indifference to an inmate's medical condition. *See, e.g.*, *Shaw v. Anderson*, No. 18-CV-140-JPS, 2018 WL 3243991 at *2 (E.D. Wis. July 3, 2018) (considering the claim that a prison's leather restraint practices could not constitutionally be applied to plaintiff in light of his arthritic condition). The expert testimony in such cases will be directed to discrete topics: the plaintiff's medical condition, and the extent to which that condition will cause unconstitutional suffering in the execution process.

In some cases, to be sure, discovery may be necessary to fully evaluate the ability of the state to execute the inmate in a manner that avoids serious harm beyond that experienced by the typical prisoner subjected to this same protocol. But that discovery can be tightly cabined. Because the inmate does not challenge the execution team's competence as a general matter, or the adequacy of the equipment and facilities in the typical case, discovery may be limited to the state's ability to

accommodate the inmate's specific condition in the execution process. Thus, Mr. Bucklew sought targeted discovery into "the skills and training of [execution personnel] to handle the risks that his rare condition would likely present." Pet. 17. The district court may properly limit discovery to the precise risks identified in the inmate's complaint.

In view of their narrow nature, as-applied challenges do not raise the concerns that this Court identified in *Baze* and *Glossip*. Because the court need not evaluate the state's execution procedure as a general matter, there is no danger that federal courts will end up serving as "boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51 (plurality op.). Just as a court can evaluate a prisoner's claim that prison officials have acted with deliberate indifference to his medical condition without opining more generally on prison "best practices," so too can a court evaluate an as-applied lethal injection challenge without making broader pronouncements. Nor is there any danger that courts will "embroil [themselves] in ongoing scientific controversies beyond their expertise." *Glossip*, 135 S. Ct. at 2740. A court's resolution of a particular as-applied challenge will not set any nationwide precedent with respect to what measures are scientifically possible or appropriate as a general matter. Rather, each case will present merely the sort of competing expert testimony with respect to the risks posed by specific medical conditions that courts routinely resolve, including in malpractice and deliberate-indifference cases.

3. Finally, as-applied challenges like Mr. Bucklew's serve a variety of important interests. The inmate, the state, and—as the public outcry accompanying each execution and failed execution attempt that causes unnecessary and severe pain, such as those discussed *supra* Part I, demonstrates—society as a whole all have an interest in ensuring that executions are carried out in a humane and constitutional manner. *See, e.g.*, *Glossip*, 135 S.Ct. at 2732 (noting that states "sought a more humane way to carry out death sentences" and thus "eventually adopted lethal injection"); *Baze*, 553 U.S. at 62 (plurality op.) (noting Kentucky and 35 other states have "adopted a method of execution believed to be the most humane available" that "if administered as intended . . . will result in a painless death"). As-applied challenges such as Mr. Bucklew's advance that goal.

In particular, this type of challenge can facilitate a dialogue between the state and the inmate about how the inmate's unique medical condition may affect his execution. States are unlikely to have experience with executing anyone with a given unusual medical condition like Mr. Bucklew's, and may not initially be aware of how that condition may interact with their protocols. Moreover, even with some general knowledge of a certain ailment, states may not be aware of how their execution protocols may interact with a given inmate's particular condition. For example, Mr. Bucklew alleges that the tumors in his throat that are particularly problematic for him under the State's execution

protocol are unusual even for those who share his condition. Pet. 8.

Enabling the inmate to challenge the use of that protocol on the basis of his or her condition and support his or her claim with medical evidence provides the state an opportunity to evaluate the inmate's condition and concerns. This, in turn, initiates a dialogue between the inmate and the state, which affords the latter the opportunity to tailor the protocol to address the inmate's unique circumstances. In short, these types of as-applied claims provide the state the opportunity to evaluate the prisoner's concerns and avoid unconstitutionally cruel executions (or unconstitutionally cruel execution attempts). In avoiding causing an inmate unnecessary pain, states also can avoid turning executions into the undignified spectacle that results from execution attempts like those described in Part I, where the states' attempts to execute severely ill individuals went awry.

Courts have a vital role in this process. When the parties are unable to agree on protocol alterations necessary to avoid predictable suffering, an inmate will need to obtain judicial resolution of his claims. The executions of Messrs. McGuire, Campbell, and Hamm, *see supra* Part I, demonstrate that in some exceptional cases, an inmate's medical condition gives rise to an "objectively intolerable risk of harm," *Baze*, 553 U.S. at 50, 52 (plurality op.), beyond that "inherent in any method of execution," *Glossip*, 135 S. Ct. at 2733. In these unique cases, courts must adjudicate whether the state's "refusal to change its method" creates predictable danger of excruciating

pain that must be "viewed as 'cruel and unusual' under the Eighth Amendment." *Baze*, 553 U.S. at 50, 52 (plurality op.).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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/s/ Ginger D. Anders

Ginger D. Anders
Counsel of Record
Christopher M. Lynch
Dahlia Mignouna
Munger, Tolles & Olson LLP
1155 F Street, NW
7th Floor
Washington, DC 20004
(202) 220-1100
ginger.anders@mto.com

Counsel for *amici curiae* Megan McCracken and Jennifer Moreno