No. 17-8151

In the Supreme Court of the United States

RUSSELL BUCKLEW, PETITIONER

v.

ANNE PRECYTHE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL.

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, Tennessee, Utah, and Wyoming.[1] Amici States have a direct interest in being able to carry out the solemn duty of enforcing the death penalty enacted by state legislatures. While States have "sought a more humane way to carry out death sentences" over the years, this Court has simultaneously recognized that "some risk of pain is inherent in any method of execution." *Glossip v. Gross*, 135 S. Ct. 2726, 2732, 2733 (2015). Amici States thus urge the Court to reiterate that the established *Glossip* standard applies to all Eighth Amendment challenges to methods of execution and "that the Constitution does not require the avoidance of all risk of pain." *Id.* at 2733.

[1] Pursuant to Supreme Court Rule 37, amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing and consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court has established a two-pronged test for Eighth Amendment challenges to methods of execution. *See Glossip*, 135 S. Ct. at 2737; *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion). Petitioner seeks an exemption from this established test's second element (requiring the prisoner to establish a feasible, readily identifiable alternative method of execution that significantly reduces a substantial risk of severe pain). But *Glossip* already rejected exemptions from this second element. Petitioner therefore tries to distinguish *Glossip*—and *Baze*—as pertaining only to "facial" challenges, and asserts that a different Eighth Amendment test on the merits should apply to him because he is raising an "as-applied" challenge.

The Court should reject petitioner's request to modify its precedent and create a new exemption from the established Eighth Amendment test for method-of-execution claims. *Baze* itself was a challenge to how a State's execution protocol would be applied in practice, thus foreclosing petitioner's argument here. Regardless, neither *Glossip* nor *Baze* described the Eighth Amendment test as turning on whether a prisoner was raising a facial versus an as-applied challenge. And petitioner places undue emphasis on the difference between facial and as-applied challenges in the context of method-of-execution claims. The distinction between facial and as-applied challenges implicates the breadth of the remedy—not whether a constitutional violation has occurred in the first place. Plus, the distinction between facial and as-applied challenges is not particularly well defined, so creating the exception petitioner requests would lead to a flood of litigation from capital prisoners and swallow the rule already established in *Glossip* and *Baze*.

ARGUMENT

I. The Court has established a two-pronged test for Eighth Amendment challenges to methods of execution.

Glossip reconfirmed this Court's dual "requirements of an Eighth Amendment method-of-execution claim." 135 S. Ct. at 2737. To show such an Eighth Amendment violation, the prisoner must first "establish[] that the State's lethal injection protocol creates a demonstrated risk of severe pain," *id.* (quoting *Baze*, 553 U.S. at 61), and second, "[h]e must show that the risk is substantial when compared to the known and available alternatives," *id.* (quoting *Baze*, 553 U.S. at 61) (alteration in original).

Under the first element, the prisoner must "establish that the method presents a risk that is '"*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id.* (quoting *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993))). And under the second element, "prisoners must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* (quoting *Baze*, 553 U.S. at 52). Petitioner acknowledges this test and its utility, but only in the context of what he classifies as facial challenges. Pet. Br. 37.

II. *Glossip* and *Baze* foreclose petitioner's argument that a different Eighth Amendment standard should apply to as-applied challenges.

A. Petitioner argues that he "should not bear the burden of identifying a known and available alternative"—that is, he should not have to satisfy the second element of the *Glossip/Baze* test. Pet. Br. 36. This is essentially the same argument *Glossip* rejected:

> Instead, [the prisoners] argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*, 553 U.S., at 61, 128 S.[ ]Ct. 1520, which imposed a requirement that the Court now follows.

Glossip, 135 S. Ct. at 2738 (footnote omitted).

Given that *Glossip* rejected such an exemption from the second element of the applicable test, petitioner now tries to distinguish *Glossip* and *Baze* as cases only pertaining to "facial challenges." Pet. Br. 38. And petitioner construes his argument as asking for an "as-applied" exemption from the second element. Pet. Br. 36.

But Petitioner places undue emphasis on the distinction between facial and as-applied challenges. "'[T]he distinction between facial and as-applied challenges is not so well defined.'" *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012) (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)). A substantive rule for determining whether the Constitution has been violated—like the Eighth Amendment standard for method-of-execution challenges—should "not involve such amorphous distinctions." *Id.*

In fact, *Baze* itself was a challenge to the *application* of a method-of-execution protocol. The challengers in

Baze "concede[d] that 'if performed properly,' an execution carried out under Kentucky's procedures would be 'humane and constitutional.'" 553 U.S. at 49. Stated differently, the *Baze* challengers were *not* contesting the validity of the Kentucky execution protocol as written *on its face*. Instead, they argued that—in application—"there is a significant risk that the procedures will *not* be properly followed." *Id.* The Court nevertheless required the plaintiffs bringing this as-applied challenge to establish the second element of identifying a "feasible, readily implemented" alternative execution method. *Id.* at 52. *Baze* therefore forecloses the as-applied exemption petitioner seeks here.

B. Even if *Baze* did not foreclose petitioner's arguments, petitioner fundamentally misunderstands this Court's doctrine regarding facial versus as-applied challenges.

Regardless of whether a claim is characterized as a facial or an as-applied challenge, courts first determine the predicate issue of whether a legal violation has occurred, and only after finding a substantive violation do courts turn to the separate issue of what remedy is proper to cure that violation. The facial versus as-applied distinction implicates the latter question: "[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court." *Citizens United*, 558 U.S. at 331; *see United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid.").

But whether a claim is styled as a facial or as-applied challenge has no bearing on the substantive test on the merits for determining whether the Constitution is violated: "The substantive rule of law is the same for both

challenges." *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (citing *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010)); *accord, e.g.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006).

It therefore makes perfect sense that *Glossip* and *Baze* did not suggest that the established two-pronged Eighth Amendment test should only be used for facial—but not as-applied—challenges. *Glossip* and *Baze* were applying broadly established Eighth Amendment principles. *See Glossip*, 135 S. Ct. at 2737 (citing *Baze*, 553 U.S. at 50, 51, 52). And nothing in those doctrines suggests that these Eighth Amendment principles do not apply to this case. Petitioner suggests that the only animating principle in *Glossip* was the Court's recognition that its doctrine should not "creat[e] a new moratorium on capital punishment." Pet. Br. 38. That was certainly one factor in the Court's analysis in *Glossip*. *See* 135 S. Ct. at 2732-33. But it was hardly the only basis. *Glossip* separately reiterated that "because some risk of pain is inherent in any method of execution, [the Court] ha[s] held that the Constitution does not require the avoidance of all risk of pain." *Id.* at 2733.

Petitioner is therefore asking this Court to modify its precedents and alter the substantive Eighth Amendment rule for determining when a constitutional violation exists in the first place. Petitioner does not point to any circuit precedent supporting this request. The courts of appeals have applied *Glossip* and *Baze* uniformly, and they have required prisoners to meet both elements of the established test. *See, e.g., Whitaker v. Collier*, 862 F.3d 490, 499 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1172 (2018) (rejecting challenge to use of compounded pentobarbital

in part because plaintiffs failed to plead an alternative method of execution); *In re Ohio Execution Protocol,* 860 F.3d 881, 890-91 (6th Cir. 2017) (en banc), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017) (rejecting challenge to three-drug protocol using midazolam in part because plaintiffs failed to show alternatives were available to the State); *Zink v. Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015) (en banc) (per curiam) (rejecting challenge to use of compounded pentobarbital in part because plaintiffs failed to plead an alternative method of execution).

This is true even in as-applied challenges similar to petitioner's. *See, e.g., Hamm v. Comm'r, Ala. Dep't of Corr.*, 725 F. App'x. 836, 837, 841 (11th Cir. 2018) (per curiam), *cert. denied sub nom. Hamm v. Dunn*, 138 S. Ct. 828 (2018) (inmate with lymphoma, enlarged lymph nodes, and history of intravenous drug use); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1288, 1305 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) (inmate with hypertension and coronary disease); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1283 (11th Cir. 2015) (per curiam) (obese female prisoner at risk for sleep apnea). Petitioner gives no convincing rationale to depart from the standard established in *Glossip* and *Baze*. Indeed, "there is no logical reason why there should be a readily available alternative requirement in facial challenges to lethal injection protocols but not to as-applied challenges to them." *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 803 F.3d 565, 569 (11th Cir. 2015) (per curiam) (footnote omitted).

III. The Court should not modify its precedents and create a new exception for as-applied challenges to methods of execution.

Aside from the precedential weight of *Glossip* and *Baze*, there are strong reasons not to create the as-applied exception petitioner seeks.

First, there would be a flood of litigation as a result, and the exception petitioner seeks would swallow the *Glossip/Baze* rule. Petitioner tries to limit the requested exception to one "based on an inmate's unique medical condition." Pet. Br. 38. But each prisoner, like each individual person, is medically unique; thus, every capital case involves prisoners with unique medical conditions. Perhaps not many prisoners suffer from cavernous hemangioma as petitioner does, but as-applied challenges would not be limited to only those inmates with rare diseases. The particularities of each individual prisoner's medical history in combination with even common conditions create virtually limitless avenues for these types of challenges. *See, e.g., Gissendaner*, 779 F.3d at 1279 (inmate alleging status as obese female renders lethal injection unconstitutional as applied to her). Because the difference between facial and as-applied challenges in this context is less than clear, as discussed above, each prisoner raising a method-of-execution claim would construe their claim an "as-applied" challenge to evade the established second element of the *Glossip/Baze* test.

Moreover, as this Court has already recognized, requiring prisoners to establish an available alternative method of execution ensures that challengers cannot incrementally foreclose States from carrying out the death penalty. *See Glossip*, 135 S. Ct. at 2733-35; *Baze*, 553 U.S. at 51. Petitioner complains that the Court should not place on him the burden of "custom-design[ing] his own

execution" by requiring him to produce evidence of available alternatives. Pet. Br. 4. But the burden of establishing an available alternative rightfully rests with the prisoner to show an Eighth Amendment cruel-and-unusual punishment violation. The more lenient test petitioner proposes would effectively place the burden on the States, resulting in repeated and lengthy litigation and indefinite delay in carrying out death sentences. Prisoners would challenge each alternative method subsequently adopted by the State as lacking in some way due to the prisoner's unique anatomy, history, or combination of conditions.

This is precisely what the Court sought to avoid in *Baze*:

> Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.
>
> Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death.

Baze, 553 U.S. at 51.

These issues are compounded by the fact that, as this Court has acknowledged, the available means to carry out lethal-injection executions are already shrinking due to efforts by death-penalty opponents to limit the supply of execution drugs. *See Glossip*, 135 S. Ct. at 2733-35 (explaining that death-penalty opponents obstruct the execution-drug supply until the death penalty is practically impossible to administer and challenge the execution protocol whenever the method inevitably changes); *see also In re Ohio Execution Protocol*, 860 F.3d at 892 (noting that "death-penalty opponents successfully prevented Ohio (along with other states) from obtaining the drugs necessary to use the one-drug protocol"). The existing execution protocols in use by the States are valid, and the Court's Eighth Amendment doctrine should not force States to engage in an ongoing quest for alternative methods of execution that differ for every individual circumstance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEVE MARSHALL
Attorney General of
Alabama

MARK BRNOVICH
Attorney General of
Arizona

LESLIE RUTLEDGE
Attorney General of
Arkansas

CYNTHIA H. COFFMAN
Attorney General of
Colorado

PAMELA JO BONDI
Attorney General of
Florida

CHRISTOPHER M. CARR
Attorney General of
Georgia

LAWRENCE G. WASDEN
Attorney General of
Idaho

CURTIS T. HILL, JR.
Attorney General of
Indiana

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant Attorney
General

SCOTT A. KELLER
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

DEREK SCHMIDT
Attorney General of
Kansas

JEFF LANDRY
Attorney General of
Louisiana

JIM HOOD
Attorney General of
Mississippi

DOUG PETERSON
Attorney General of
Nebraska

ALAN WILSON
Attorney General of
South Carolina

HERBERT H. SLATERY III
Attorney General of
Tennessee

SEAN D. REYES
Attorney General of
Utah

PETER K. MICHAEL
Attorney General of
Wyoming

AUGUST 2018