No. 18-

IN THE
# Supreme Court of the United States

RAYMOND TIBBETTS,
*Petitioner,*

v.

JOHN KASICH, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

**EXECUTION SCHEDULED FOR OCTOBER 17, 2018**


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July 2, 2018

**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether a prisoner challenging a midazolam three-drug lethal-injection protocol must, as the Sixth Circuit requires, "prove" with "scientific evidence" that the first drug is "sure or very likely to fail to prevent serious pain"—an unattainable standard given the impossibility of clinically testing whether a massive overdose of a sedative will fail to block pain—or whether the prisoner meets his Eighth Amendment burden by showing that the protocol poses a "substantial risk of serious harm," as this Court articulated the standard in *Baze* v. *Rees*, 553 U.S. 35 (2008) (plurality opinion), and *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), and as petitioner showed here.

2. Whether *Glossip*'s requirement of an alternative method of execution that "significantly reduces a substantial risk of severe pain" requires the elimination of all pain from an execution, or is satisfied by a proposal to remove one of two distinct types of pain that the execution method will inflict.

## PARTIES TO THE PROCEEDING

Petitioner is Raymond Tibbetts, an inmate incarcerated at the Chillicothe Correctional Institution.

Respondents are John Kasich, Governor of the State of Ohio; Tim Shoop, Warden of the Chillicothe Correctional Institution; Gary C. Mohr, Director of the Ohio Department of Rehabilitation and Correction; and Anonymous Execution Team Members 1-50, all sued in their official capacities.

There are no corporate parties involved in this case.

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## PETITION FOR A WRIT OF CERTIORARI

Raymond Tibbetts respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 881 F.3d 447. The order of the district court (Pet. App. 9a–38a) is not published in the Federal Supplement, but is available at 2017 WL 5020138.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 1, 2018. Pet. App. 1a. On April 20, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including Sunday, July 1, 2018, making the petition due on Monday, July 2, 2018 under Rule 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

## INTRODUCTION

Ohio intends to execute petitioner, Raymond Tibbetts, in a manner that both the district court and court of appeals understood would entail a substantial risk of serious harm. See Pet. App. 3a, 16a. The State uses a lethal-injection protocol that hinges on the ability of one drug, midazolam, to block the otherwise torturous sensations of entombment and burning caused by two other drugs. Petitioner showed, as the district court found and the court of appeals understood, a substantial risk that midazolam is unfit for the task.

A "substantial risk of serious harm" is precisely the standard that this Court articulated in its method-of-execution cases, *Baze* v. *Rees*, 553 U.S. 35, 50 (2008) (plurality opinion), and *Glossip* v. *Gross*, 135 S. Ct. 2726, 2737 (2015). Despite acknowledging that petitioner met this standard, the court of appeals nevertheless denied relief, reckoning that this Court's decisions in *Baze* and *Glossip* established a "more rigorous" Eighth Amendment standard that requires proof to a higher "level of certainty" than a "substantial risk of serious harm." Pet. App. 3a, 16a. Departing from this Court's precedent, the Sixth Circuit now holds that a plaintiff seeking relief under the Eighth Amendment must "prove," with "scientific evidence," that a state's attempts to render a prisoner insensate to pain in advance of an otherwise excruciating execution are "*sure or very likely* to fail." Pet. App. 7a.

The Constitution requires no such thing. The Sixth Circuit's refusal to grant relief to a plaintiff that met his burden to show a "substantial risk of serious harm" cannot be squared with *Baze*, *Glossip*, or with this Court's other Eighth Amendment jurisprudence. The

Sixth Circuit's heightened "certainty" standard also impaired its analysis of *Glossip*'s second element—which requires plaintiffs to show that a less painful alternative is available—and led the court to reject a proposal that significantly *reduces*, but does not entirely *eliminate*, that risk of harm.

Whether Ohio's execution method is constitutional is an exceptionally important question that this Court should review now. The Sixth Circuit's replacement of the "substantial risk" standard with a new one requiring "scientific evidence" and a "high level of certainty" insulates Ohio's midazolam-based execution protocol from meaningful constitutional scrutiny, as numerous ethical, logistical, and empirical considerations place that evidentiary burden well beyond reach. Moreover, the Sixth Circuit has now joined the few other circuits that have had occasion to address method-of-execution issues after *Glossip*. As a result, the Sixth Circuit's decision in this case all but forecloses judicial review of lethal-injection protocols. And it does so at the precise moment when, in light of a series of mishaps and botches, such review is sorely needed. This Court should grant the petition to ensure that the Constitution's prohibition of cruel and unusual punishment remains applicable to methods of execution.

## STATEMENT OF THE CASE

1. Ohio's current execution protocol calls for intravenous administration of three drugs. The first drug, midazolam hydrochloride, is a sedative that the State hopes will render the condemned prisoner unconscious, unaware, and insensate to pain. The second drug is a paralytic that restricts movement and breathing. And the third drug, potassium chloride, causes the heart to stop beating.

It is undisputed that, without proper administration of an adequate first drug, the prisoner experiences a torturous death from the second and third drugs. Behind a veneer of tranquility, the second drug prevents the prisoner from exhaling carbon dioxide, which, as it acidifies in the lungs, causes extremely painful sensations of air hunger, crushing, and suffocation. Separately, the third drug causes excruciating burning as it travels through the prisoner's veins and ultimately stops his heart.

Thus, an execution that satisfies the Eighth Amendment's prohibition against cruel and unusual punishment depends upon the effectiveness of the first drug. For decades, states had relied upon barbiturates for that purpose, as there is no medical dispute that barbiturates, if effectively administered, will reliably produce prolonged and "deep, comalike unconsciousness." *Baze*, 553 U.S. at 44 (plurality opinion). But, starting in 2010, states began to encounter difficulties in obtaining barbiturates for executions, when the sole domestic manufacturer faced regulatory and supply issues and subsequently exited the market altogether.[1]

Several states then began importing sodium thiopental from unregistered foreign sources. See *Cook* v. *FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013). But that violated federal law. *Id.* at 10–11. Others replaced sodium thiopental with another barbiturate, pentobarbital.[2]

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[1] *See* Alan M. Wolf, *Hospira Halts Rocky Mount Production of Death Penalty Drug*, News & Observer (Raleigh, N.C.), Jan. 21, 2011; Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ (Sodium Thiopental) Market Exit (Jan. 21, 2011), https://bit.ly/2HujiHs.

[2] Several states, including Ohio, abandoned the three-drug approach in favor of a one-drug method using an overdose of a single barbiturate—essentially the method the petitioners in *Baze* had

Yet, in July 2011, the manufacturer of pentobarbital, Lundbeck, placed distribution controls on the drug to prevent what it deemed "misuse" of its products in executions.[3] Lundbeck's corporate decision gradually reduced the supply of pentobarbital to prisons, and states began seeking pentobarbital from other sources.[4] Some states considered different drug combinations. Others, including Ohio, developed a three-drug protocol with midazolam as the first drug.

Both scientific evidence and experience have shown that, unlike barbiturates, midazolam is inadequate to render a prisoner insensate to the pain of the second and third drugs. Midazolam belongs to a family of drugs known as benzodiazepines, which includes well-known anti-anxiety medications like Valium and Xanax. As this Court has acknowledged, unlike barbiturates, "midazolam is not recommended or approved for use as the sole anesthetic during painful surgery."

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proposed. *See, e.g.*, *Towery* v. *Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (per curiam) (Arizona); *Pavatt* v. *Jones*, 627 F.3d 1336, 1337 n.1 (10th Cir. 2010) (Washington); *Cooey* v. *Strickland*, 589 F.3d 210, 215 (6th Cir. 2009) (Ohio).

[3] *See* Press Release, H. Lundbeck A/S, Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (July 1, 2011), https://bit.ly/2KmXG6b.

[4] *See, e.g.*, *Wellons* v. *Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1260, 1262 (11th Cir. 2014) (per curiam) (suggesting that Georgia is using compounded pentobarbital); *In re Lombardi*, 741 F.3d 888, 891 (8th Cir. 2014) (en banc) (Missouri using compounded pentobarbital); *Whitaker* v. *Livingston*, 732 F.3d 465, 468 (5th Cir. 2013) (per curiam) (Texas using compounded pentobarbital); *Chester* v. *Wetzel*, No. 1:08-cv-1261, 2012 WL 5439054, at *7 (M.D. Pa. Nov. 6, 2012) (Pennsylvania using compounded pentobarbital); Brady Dennis & Lena H. Sun, *Execution Chamber Becomes a Laboratory*, Wash. Post, May 1, 2014, at A1.

*Glossip*, 135 S. Ct. at 2742. Nevertheless, in the aftermath of *Glossip*, Ohio adopted a three-drug, midazolam-based lethal-injection protocol.

2. Petitioner was one of several prisoners who thereafter moved to preliminarily enjoin Ohio's midazolam-based method of execution. The district court held a five-day evidentiary hearing at which it considered extensive testimony from fourteen witnesses—including two experts from each side. *In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d 892, 902–51 (S.D. Ohio 2017). Petitioner's evidence showed, among other things, that midazolam does not have the pharmacologic ability to block pain from the second and third drugs and, as a result, the paralytic and potassium chloride would cause the inmate to suffer severe pain. See *id.* at 952–53.

The district court issued, on an expedited basis, a 119-page decision. The court concluded that the "use of midazolam as the first drug in Ohio's present three-drug protocol will create a 'substantial risk of serious harm' or an 'objectively intolerable risk of harm' as required by *Baze* and *Glossip*," *id.* at 953, and enjoined Ohio from using its lethal-injection protocol pending a trial on the merits of petitioner's Eighth Amendment claim, *id.* at 960.

The district court's conclusion was supported by several key evidentiary findings. The court began by "find[ing] that administration of a paralytic drug and potassium chloride will cause a person severe pain." *Id.* at 952. Regarding the paralytic, which causes severe pain distinct from potassium chloride, the court found "that realizing one is unable to breathe and is . . . likely to be terrified and equating that phenomenon with severe suffering has not been refuted." *Id.* The court then explained its finding, "from both the expert opinions and the lay descriptions," that "deep

sedation" (which midazolam can produce) is "distinct" from "general anesthesia" (which barbiturates, but not midazolam, produce). *Id.* The district court summarized the expert testimony: "[I]f a person who is sedated is exposed to increasingly severe stimulation, that person will eventually respond, but a person under general anesthesia would not respond to even the most painful stimulus." *Id.* at 913. "[B]ecause the 'responsiveness' associated with general anesthesia is 'unarousable even with painful stimulus,' that is the state in which you would want a condemned inmate to be." *Id.* at 912. The court noted an "obvious" lack of "clinical studies of the effect of injecting 500 mg of midazolam into a person," which made it hard to know "precisely why" the drug operates differently than a barbiturate. *Id.* at 952. But it found those differences exist, corroborated by observations of eyewitnesses to several recent midazolam-based executions. *Id.*; see also *id.* at 905–06, 921–22.

After a panel of the Sixth Circuit affirmed, the Sixth Circuit took the case en banc and narrowly reversed. *Fears* v. *Morgan* (*In re Ohio Execution Protocol*), 860 F.3d 881, 892 (6th Cir. 2017) (en banc). The en banc court held that, although petitioner had indeed shown a "substantial risk of serious harm," *id.* at 886, a "more rigorous" constitutional showing was required, which demanded that petitioner "prove" his allegations to "a high level of certainty," *id.* at 886–87.

This Court denied certiorari. *Otte* v. *Morgan*, 137 S. Ct. 2238 (2017). Subsequently, two of the plaintiffs in the underlying litigation were executed.[5]

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[5] Ronald Phillips and Gary Otte were also plaintiffs in the underlying litigation and parties to the first motion for a preliminary injunction. Ohio eventually executed both men using its

3. On remand in the district court, petitioner and another condemned prisoner, Alva Campbell, moved for a second preliminary injunction based on additional evidence and in an effort to satisfy the Sixth Circuit's new, more demanding standard.

During a five-day evidentiary hearing, petitioner bolstered the expert testimony regarding midazolam's unsuitability for blocking the severe pain caused by the second and third drugs in Ohio's protocol. Pet. App. 11a, 19a–24a. For example, petitioner showed that midazolam possesses no pain blocking properties, (Hr'g Tr., R. 1363, PageID 51521, 51540, 51549–53), as even the State's expert acknowledged, (Antognini Report, R. 1310-1, PageID 47499), and ordinarily cannot cause and maintain unconsciousness, unawareness, and insensitivity to pain by itself. Petitioner further established that, even at high doses, midazolam is pharmacologically incapable of inducing such a deep state of unconsciousness as to effectively eliminate, or substantially diminish, an inmate's ability to experience any pain. Hr'g Tr., R. 1363, PageID 51536–40. Petitioner also demonstrated that, even if midazolam could induce such a state, Ohio's hasty administration of the paralytic makes it impossible for midazolam to reach full effectiveness—regardless of the dosage. Stevens Report, R. 1288-1, PageID 47118–19, 47129; Hr'g Tr., R. 1359, PageID 50854, 50893–94. Petitioner then introduced firsthand observations from recent midazolam-initiated executions that showed inmates remained aware and sensate to pain. Pet. App. 21a–22a. According to witness descriptions, Ohio inmate Gary Otte appeared to cry during his execution—even after the State injected him with midazolam—which would

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three-drug protocol. Phillips was executed on July 26, 2017, and Otte was executed on September 14, 2017.

have been impossible for a person who was properly anesthetized. *Id.* at 22a–23a.

Nevertheless, while again acknowledging petitioner's prior showing of a substantial risk of serious harm, the district court concluded that petitioner did not "add[] sufficient evidence to the case to now show the [e]xecution [p]rotocol is sure or very likely to cause [him] severe pain and needless suffering." Pet. App. 18a–19a.[6]

Petitioner also proposed an available and significantly less-painful alternative to Ohio's three-drug protocol. Guided by *Glossip*'s directive that plaintiffs must propose an alternative that significantly reduces a substantial risk of pain, petitioner suggested a two-drug protocol that, by removing the paralytic, entirely eliminates *all* risk of experiencing the unique pain of suffocation from the paralytic. The district court rejected petitioner's proposed two-drug protocol of midazolam and potassium chloride. The court remarked that "[i]t is difficult to credit this proposal as being made in good faith," because the proposed method

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[6] The district court issued an order on the eve of Alva Campbell's scheduled execution, (Order, R. 1375), which reveals the impossibility of satisfying the Sixth Circuit's heightened "certainty" standard. Campbell sought to raise an access-to-the court claim, arguing that anticipated difficulties during his execution, due to health conditions, could prompt legitimate requests for intervention by the court to stop ongoing Eighth Amendment violations. Mot. for Leave to Amend, R. 1369; Proposed Amendment & Suppl., R. 1369-1, PageID 51717. Yet the district court held that any claims based on reported trouble during Campbell's execution would be "precluded by precedent," concluding that "it is difficult to anticipate what evidence regarding the effect of midazolam [Campbell] might present to the Court in a mid-execution motion for temporary restraining order that would overcome the effect of the Sixth Circuit's rejection of the prior evidence" in *Fears*. Order, R. 1375, PageID 51888–89.

would, given petitioner's view of midazolam's ineffectiveness, still inflict significant pain from the potassium chloride. Pet. App. 29a. The district court denied the motion for a preliminary injunction.

4. The Sixth Circuit affirmed. Judge Batchelder, writing for the panel, again credited the district court's finding that petitioner had shown "some risk that Ohio's execution protocol may cause some degree of pain." Pet. App. 3a. But, building on the en banc *Fears* decision, the panel questioned whether petitioner had "added sufficient evidence" to what was previously before the court to satisfy the higher "level of certainty" now required for Eighth Amendment claims. *Id.* at 3a. The panel then embellished *Fears* with an additional requirement that a petitioner "prove," with "scientific evidence," that "a 500-mg dose of midazolam . . . is *sure or very likely* to fail to prevent serious pain." *Id.* at 7a. The panel held that petitioner's evidence of a "substantial risk" did not meet this new standard of "scientific evidence" and a "high level of certainty."

The panel also misconstrued petitioner's proposed alternative, variously concluding that it would either "do nothing to reduce the risk of serious pain"—misunderstanding the distinct types of pain inflicted by the second and third drugs—or, that it was only "a slightly or marginally safer alternative," because the alternative would still inflict some pain. Pet. App. 8a.

5. During the pendency of the proceedings here, Ohio tried to execute Alva Campbell, on November 15, 2017, but could not locate a suitable vein. Governor Kasich then postponed that execution until June 5, 2019. But Campbell, who was elderly and suffered from numerous ailments, passed away in his cell on March 3, 2018. Thus, Petitioner Tibbetts is now the last litigant from the original group of prisoners who participated in the *Fears* preliminary injunction and en banc proceedings.

He is also the last to have demonstrated a "substantial risk" of severe pain in the underlying proceedings, which was, by the court of appeals' own logic, based on a fully developed record at the preliminary injunction stage—short only of containing the results of unethical and impractical experimentation. Ohio is currently set to execute petitioner on October 17, 2018.

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit's misreading of *Baze* and *Glossip* has effectively foreclosed constitutional inquiry into the ways that states carry out executions. Now, in the Sixth Circuit, a prisoner must "prove" with "scientific evidence" that the ostensibly pain-blocking portion of a lethal-injection protocol "is *sure or very likely* to fail to prevent serious pain." Pet. App. 7a. That standard is far stricter than the one this Court set in *Baze* and *Glossip*, which required only that prisoners show that the method entailed a "substantial risk of serious harm." The Sixth Circuit's heightened "certainty" standard is also one that a prisoner cannot meet: due to ethical and practical constraints of testing what 500 milligrams of midazolam would do to a human body, no such "scientific evidence" that such a large dose is "sure or very likely to fail" will ever exist.

The Sixth Circuit's "certainty" requirement also infected its consideration of proposed alternative methods of execution, causing the court to reject an alternative that is substantially less risky, simply because it would not wholly eliminate the risk of pain.

It is especially important for this Court to address the Sixth Circuit's decision because it shields Ohio's lethal-injection protocol against constitutional challenge at a time when the stakes of removing that protocol from judicial review are high. At least two states

have abandoned midazolam in the face of mounting evidence of its ineffectiveness; others have forsworn use of a paralytic; and, since the Sixth Circuit decided *Fears*, there have been troubling midazolam-initiated executions in Ohio and elsewhere. And this case is an ideal vehicle for addressing the questions presented because it is unlikely that future petitioners will so clearly present a finding by the lower courts that they face a "substantial risk" of harm, but not one that is "sure or very likely to fail to prevent serious pain."

On this point, the lack of an apparent split of authority counsels in favor of review, not against it. This Court often grants review where the issues are of exceptional importance—indeed, neither *Baze* nor *Glossip* presented a split. More important, though, the Sixth Circuit's alignment with the few other circuits that hear lethal-injection appeals makes it unlikely that a split ever could or would develop. The time to review the questions presented is now.

## I. THE SIXTH CIRCUIT'S HEIGHTENED STANDARD FOR EIGHTH AMENDMENT CLAIMS CONFLICTS WITH *BAZE* AND *GLOSSIP* AND FORECLOSES EIGHTH AMENDMENT REVIEW OF OHIO'S LETHAL-INJECTION PROTOCOL.

In *Glossip*, 135 S. Ct. 2726, this Court held that an Eighth Amendment method-of-execution claim has two elements. First, the plaintiff must show that the state's method of execution entails a "substantial risk of serious harm" or "severe pain." *Id.* at 2737 (quoting *Baze*, 553 U.S. at 50). Second, the plaintiff must identify "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alterations in original) (quoting *Baze*, 553 U.S. at 52). The Sixth Circuit has distorted both elements of the Eighth Amendment

standard, insulating Ohio's execution protocol from constitutional scrutiny.

### A. The Sixth Circuit's "High Level Of Certainty" Standard Conflicts With This Court's "Substantial Risk Of Serious Harm" Standard.

1. The Sixth Circuit has created an Eighth Amendment standard regarding the likelihood of harm that is both at odds with this Court's jurisprudence and, in practice, impossible to satisfy.

The departure from this Court's precedents began in *Fears*. There, the en banc Sixth Circuit reversed the district court's grant of a preliminary injunction, even though the trial judge had found that Ohio's protocol presented a "substantial risk of serious harm" under *Baze* and *Glossip*. *Fears*, 860 F.3d at 886. The Sixth Circuit held that a "more rigorous" constitutional showing was required; that prisoners were actually required to prove that "the method of execution is *sure or very likely* to cause serious pain." *Id.* Erasing any doubt about whether the ruling rested on mere semantic differences between the two phrases, moreover, the court explained that the "substantial risk" standard was materially distinct from the "sure or very likely" standard, which, "fairly or not, . . . requires the plaintiffs to prove their allegations to a high level of certainty." *Id.* at 886–87.

Then, in the decision underlying this petition, the Sixth Circuit confirmed its departure from this Court's precedents and further expounded on its "high level of certainty" standard. Acknowledging the district court's original findings of a "substantial risk," the panel held that petitioner's showing of "some risk that Ohio's execution protocol may cause some degree of pain" was not sufficient unless petitioner could also

"prove," by producing "scientific evidence," that "a 500-mg dose of midazolam . . . is *sure or very likely* to fail to prevent serious pain." Pet. App. 7a.

By this metric, petitioner's burden at the preliminary injunction stage was transformed from a likelihood of success on the merits into an impossible burden of providing empirical proof. As the Sixth Circuit acknowledged, given the "obvious[]" ethical constraints, "there are not now and *never will be* clinical studies of the effect of injecting 500 mg of midazolam into a person." *Fears*, 860 F.3d at 887 (emphasis added).

The court's acknowledgement of the impossibility of obtaining such scientific evidence, coupled with its holding that relief depends on introducing exactly this sort of evidence, places success on the merits of an Eighth Amendment claim forever out of reach. From a practical standpoint, the court's rule implicitly gives short shrift to many forms of "scientific evidence" that are already used in cases like this one, *e.g.*, testimony from pharmacologists and anesthesiologists about how drugs work on the brain, and observational data from witnessing prisoners' physiological responses during other executions. Moreover, it would be impossible to administer a massive overdose of a sedative to a subject just to test whether that sedative would block sensations of pain. Such a test would be even odder, given that midazolam does not block pain and is not used as an anesthetic at normal doses. Indeed, the testing that the Sixth Circuit seems to envision would be premised on the counterfactual assumption that a massive overdose of midazolam will do something (block pain) that the highest testable clinical dose does not.

2. The Sixth Circuit's heightened "certainty" standard, in addition to conflicting with basic principles of proof and logic, is inconsistent with *Glossip*, *Baze*, and

decades of this Court's Eighth Amendment jurisprudence.

In *Helling* v. *McKinney*, 509 U.S. 25 (1993), a prisoner filed a civil rights complaint about the risk of harm caused by his cellmate's cigarette smoke. *Id.* at 28. The question presented was whether the prisoner could state an Eighth Amendment claim by alleging that exposure to second-hand smoke posed a risk of future harm to his health. *Id.* at 31. This Court rebuffed the assertion that a prisoner must "prove that he is currently suffering serious medical problems," explaining that prison authorities could not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id.* at 32–33. The Court also rejected the United States' request, as *amicus curiae*, to conclude that the risk of harm involved was too "speculative." *Id.* at 34. Even though the scientific evidence at the time was equivocal, see *id.* at 28–29, this Court held that a plaintiff need only allege that the defendants "have, with deliberate indifference, exposed [a plaintiff] to levels of [second-hand smoke] that pose an *unreasonable risk* of serious damage to his future health." *Id.* at 35 (emphasis added).

In *Farmer* v. *Brennan*, 511 U.S. 825 (1994), a transgender prisoner alleged that federal officials were deliberately indifferent to the risk of harm she faced in general population—largely due to her physical appearance, and the penitentiary's history of violent inmate assaults. *Id.* at 830–31. The primary task for this Court was to "explain the meaning of the term 'deliberate indifference.'" *Id.* at 835. Prefacing that discussion, however, this Court elaborated on the nature of the risk of harm actionable under the Eighth Amendment: the harm "must be, objectively, 'sufficiently serious,'" and the risk must be "substantial."

*Id.* at 834 (citing *Helling*, 509 U.S. at 35). Although this Court declined to address "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes," *id.* at 834 n.3, it held that "an Eighth Amendment claimant *need not show* that a prison official acted or failed to act believing *that harm actually would befall an inmate*; it is enough that the official acted or failed to act despite his knowledge of *a substantial risk of serious harm*." *Id.* at 842 (emphases added). The *Farmer* opinion repeatedly cited *Helling* without once mentioning the phrase "sure or very likely."

Together, this Court's decisions in *Helling* and *Farmer* establish that subjecting a prisoner to a "substantial risk of serious harm" can qualify as cruel and unusual punishment without proof that the risked event is absolutely certain to materialize. That is indeed how this Court later characterized those standards in the lethal-injection context. See *Baze*, 553 U.S. at 49–50 (plurality opinion) (citing *Farmer*, 511 U.S. at 842, 846 & n.9; *Helling*, 509 U.S. at 33, 34–35); see also *Glossip*, 135 S. Ct. at 2737 (citing *Baze*, 553 U.S. at 50).

To be sure, *Baze* and *Glossip* both used the phrase "sure or very likely" to discuss the level of risk required when a claim involves merely "serious *illness* or *needless* suffering." See *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50) (emphasis added). But neither decision required a plaintiff seeking early injunctive relief to "prove" that risk to a high degree of certainty using "scientific evidence," see Pet. App. 7a, and certainly not to a degree that is materially distinct from a "substantial risk of serious harm." The phrase "sure or very likely" appears in *Baze*'s plurality opinion only once, whereas the plurality uses "substantial risk" (or a variant, like "the risk is substantial") twelve times.

Similarly, *Glossip* uses "sure or very likely" only four times, but refers to a "substantial" risk eleven times.

It would have made little sense for this Court to discuss the "substantial risk" standard at such great length in *Baze* and *Glossip* if it meant to convey, as the Sixth Circuit now holds, that prisoners cannot meet their burden by showing such a risk, and must instead "prove" their allegations to a high degree of certainty using "scientific evidence." Contrary to the Sixth Circuit's approach, there is no common definition in the scientific community regarding what threshold establishes "certainty." *Cf.* David H. Kaye, *The Double Helix and the Law of Evidence* 82 (2010) (explaining that the phrase "reasonable degree of scientific certainty" is "legal mumbo jumbo derived from archaic cases in which lawyers discovered that if a medical doctor did not utter the incantation . . . , his testimony might be excluded").

### B. The Sixth Circuit Wrongly Refuses To Consider Alternative Methods Of Execution That Substantially Reduce, But Do Not Completely Eliminate, The Risk Of Pain.

Compounding its fixation on certainty, the Sixth Circuit's rule also rejects proposals for substantially less risky methods of execution if those methods are not certain to wholly eliminate the risk of all pain.

Under this Court's precedents, a condemned inmate need only show that an alternative method of execution is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737 (alterations in original) (quoting *Baze*, 553 U.S. at 52). Petitioner proposed an alternative that satisfies the *Glossip* standard, as at least one district court has held. See *First*

*Amendment Coal. of Ariz., Inc.* v. *Ryan*, 188 F. Supp. 3d 940, 950 (D. Ariz. 2016), *appeal docketed*, No. 17-16330 (9th Cir. June 28, 2017). Rather than risk two different forms of suffering under Ohio's current method of execution—*i.e.*, the distinct sensations of entombment *and* burning—petitioner proposed a two-drug protocol that omits the paralytic. See *Baze*, 553 U.S. at 73 (Stevens, J., concurring in the judgment) (recognizing that the paralytic serves "no therapeutic purpose"). A two-drug protocol of midazolam and potassium chloride is indisputably "feasible" and "readily implemented." Ohio already possesses and administers both of these drugs. Petitioner's alternative would also present, as a matter of logic, a significantly reduced risk of pain when compared to Ohio's current method of execution. Petitioner's proposal omits an unnecessary chemical (as death is swift and certain from the potassium alone), and, simultaneously, eliminates any risk that a condemned inmate will experience, in the interim, the distinct sensations of crushing and suffocation.

*Glossip* does not require more. To succeed on an Eighth Amendment claim, the condemned prisoner must show that the state's lethal-injection protocol "creates a demonstrated risk of severe pain and that the risk is substantial *when compared to* the known and available alternatives." *Glossip*, 135 S. Ct. at 2737 (emphasis added). The comparative inquiry is a logical corollary to the Court's statement that, because "capital punishment is constitutional," there "must be a means of carrying it out." See *Baze*, 553 U.S. at 47 (plurality opinion). The lower courts here missed that point, however, suggesting that petitioner's alternative method of execution must eliminate *all* risk of pain. Indeed, directly contrary to this Court's compar-

ative standard, the district court refused to even engage with the alternative, commenting that "[i]t is difficult to credit [petitioner's] proposal as being in good faith." Pet. App. 29a. And the court of appeals likewise suggested that petitioner's proposal was somehow made in bad faith because it would "do nothing to reduce the risk of serious pain and needless suffering . . . , but would instead ensure it." *Id.* at 8a.

That is incorrect. As previously explained, petitioner's proposal limits a unique form of pain caused by the paralytic when midazolam does not work. At any rate, petitioner is not required to offer perfect, pain-free alternatives. This Court has consistently held that prisoners need only show an alternative that "significantly"—as opposed to "slightly" or "marginally"—reduces a substantial risk of severe pain. *Glossip*, 135 S. Ct. at 2737.

## II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT.

Condemned prisoners seeking to challenge the constitutionality of a lethal-injection protocol now face an insurmountable evidentiary burden—one that singularly applies in the method-of-execution context. But there is no basis in the text of the Cruel and Unusual Punishments Clause, or this Court's Eighth Amendment jurisprudence, to distinguish the standard applicable to condemned prisoners from that applicable to all others. This Court's decisions in *Glossip* and *Baze*—when read in context with *Helling* and *Farmer*—establish that subjecting any prisoner to a "substantial risk of serious harm" can qualify as cruel and unusual punishment. This Court should provide much-needed guidance regarding the burden of proof in method-of-execution cases, and it should require that the lower

courts consider this profoundly important constitutional question under well-established Eighth Amendment principles.

This Court's clarification of the proper Eighth Amendment standard for challenges to methods of execution is imperative because the stakes here are high. There is mounting evidence that the three-drug midazolam protocol—like the one currently implemented in Ohio—is unconstitutionally painful. See Andrew Welsh-Huggins, *Gary Otte's Reaction to Death Drugs Wasn't Enough to Stop Execution, Judge Says*, Cleveland.com (Sept. 20, 2017), https://bit.ly/2sBdYgW (describing reports that Gary Otte was "conscious, crying, clenching . . . [his] hands, [and] heaving at the stomach" during his execution); Frank Green, *Pathologist Says Ricky Gray's Autopsy Suggests Problems with Virginia's Execution Procedure*, Rich. Times-Dispatch (July 7, 2017), https://bit.ly/2Hophh7 (describing autopsy results from Ricky Gray's execution as, according to a pathologist, "more often seen in the aftermath of a sarin gas attack than in a routine hospital autopsy," and indicating possibly a "severe" and "unbearable" experience of "panic and terror"); Ed Pilkington & Jacob Rosenberg, *Fourth and Final Arkansas Inmate Kenneth Williams Executed*, Guardian (Apr. 28, 2017), https://bit.ly/2Jwrmwr ("Eyewitnesses . . . reported that his whole body shook with 15 or 20 convulsions," in which "his body was described as 'shaking[,'] he lurched forwards quickly multiple times, and he moaned and groaned.").

Two states—Arizona and Florida—have abandoned use of midazolam, and Arizona has further abandoned use of a paralytic, see Stipulated Settlement Agreement at 4, *First Amendment Coal. of Ariz., Inc.* v. *Ryan*, No. 2:14-cv-01447-NVW (D. Ariz. June 21,

2017) (ECF No. 186). In place of the three-drug midazolam protocol, moreover, states have begun to adopt untested, experimental protocols that no doubt will be subject to additional challenges. See, *e.g.*, Denise Grady & Jan Hoffman, *States Turn to an Unproven Method of Execution: Nitrogen Gas*, N.Y. Times (May 7, 2018), https://nyti.ms/2FSCBcO ("Oklahoma, Alabama and Mississippi have authorized nitrogen for executions and are developing protocols to use it," even though "[t]here is no scientific data on executing people with nitrogen"); Austin Sarat, *Why Nevada's New Lethal Injection Protocol is Unethical*, Salon (Nov. 16, 2017), https://bit.ly/2zImaR6 ("[I]f . . . death penalty states insist on experimenting with new drugs to keep the machinery of death running, citizens and government officials alike need to take responsibility to prevent any cruelty.").

In the face of that evidence of pain, and as states turn toward experimentation, it is vitally important that there be a means to ensure that methods of execution can be subjected to meaningful judicial review. No less than it guards the prisoner against cruelty, the Eighth Amendment also protects "the dignity of society itself from . . . barbarity." *Ford* v. *Wainwright*, 477 U.S. 399, 410 (1986). But it cannot do so if states' methods are shielded from constitutional scrutiny, as the Sixth Circuit's "scientific evidence" and "high level of certainty" standard now accomplishes. Accordingly, this Court should grant review to resolve these exceptionally important issues.

## III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

Given the fully developed record in this case and the low likelihood that conflicts will develop among the circuits, this petition presents an excellent vehicle for reviewing the questions presented.

Indeed, this case may be the *only* vehicle in the foreseeable future for addressing the questions presented. Going forward, death-row inmates in the Sixth Circuit will be subject to the "scientific evidence" and "high level of certainty" standard. Because of that, it is unlikely that any future petitioners will present so clear a finding of fact, based on lay and expert testimony, that they face risk that is "substantial" within the meaning of *Baze* and *Glossip*, but not one that is "certain." Sure enough, petitioner is the last litigant from the original group of prisoners who participated in the *Fears* proceedings. And he is the only surviving litigant who can present a complete record that, according to the district court, satisfied the "substantial risk" of severe pain standard.

The practical impact of the Sixth Circuit's heightened "certainty" standard is to forever foreclose a full trial on the merits of a condemned prisoner's Eighth Amendment method-of-execution claim. Every other circuit that has considered (or, practically speaking, could consider) a method-of-execution challenge under *Glossip* has relied on the phrase "sure or very likely" to create a materially distinct legal standard requiring near certainty of harm. See *Schwab* v. *Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) ("[T]here is dicta and then there is dicta, and then there is Supreme Court dicta."); see also, *e.g.*, *Bucklew* v. *Precythe*, 883 F.3d 1087, 1091 (8th Cir.), *cert. granted*, 138 S. Ct. 1706 (2018); *Hamm* v. *Comm'r, Ala. Dep't of Corr.*, 725

F. App'x 836 (11th Cir.) (per curiam), *cert. denied*, 138 S. Ct. 828 (2018); *Whitaker* v. *Collier*, 862 F.3d 490, 497 (5th Cir. 2017); *Fears*, 860 F.3d at 886.[7]

A definitive circuit split regarding the "substantial risk" and "sure or very likely" standards thus cannot develop. But this lack of an apparent conflict in the lower courts counsels in favor of review here, not against it, given the great "importance to the public" of the question presented. See *Layne & Bowler Corp.* v. *W. Well Works, Inc.*, 261 U.S. 387, 393 (1923).[8] Because of the final and absolute nature of capital pun-

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[7] Because many jurisdictions have abolished the death penalty or imposed a moratorium on executions, a circuit split is less likely to develop organically. The Courts of Appeals for the First, Second, Third, Fourth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits have not considered a method-of-execution challenge since this Court's decision in *Glossip*, and are unlikely to do so anytime soon, if ever. Only the Fifth, Sixth, Eighth, and Eleventh Circuits have had occasion to consider such issues.

[8] *See also Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1657 (2017) (granting certiorari without a genuine split "[i]n light of the importance of the issue"); *Haywood* v. *Drown*, 556 U.S. 729, 733 (2009) (granting certiorari without a genuine split because of "the importance of the question decided" by the lower court); *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 188 (2008) (plurality opinion) (granting certiorari in consolidated appeals because "of the importance of these cases"); *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (granting certiorari to settle "important questions of federal law"); *Florida* v. *Nixon*, 543 U.S. 175, 186 (2004) (granting certiorari "to resolve an important question of constitutional law"); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 482 (2004) (granting certiorari "to resolve an important question of federal law"); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 650 (2003) (granting certiorari "because the questions presented are of national importance").

ishment, method-of-execution challenges are quintessentially matters of exceptional importance that reach "beyond the academic." See *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Consequently, neither *Baze* nor *Glossip* presented a split. See *Baze*, 553 U.S. at 47 (plurality opinion) (granting certiorari to "determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment"); Brief in Opposition to Petition for Writ of Certiorari at 8, *Warner* v. *Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955), *available at* 2015 WL 1743949 (arguing that petitioners failed to "point to any instance where the circuit courts of appeal are in disagreement concerning what *Baze* requires").[9] There is therefore no reason to await further "percolation" in the lower courts. See *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

This case presents an excellent vehicle to address when a prisoner is entitled to a full and fair trial on the merits of a claim under the proper Eighth Amendment standard. This Court should grant review to allow that trial to occur.

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[9] This Court recently granted certiorari in another method-of-execution case, *Bucklew* v. *Precythe*, 138 S. Ct. 1706 (2018), even though the respondents argued that "Bucklew has not identified any circuit split," Brief in Opposition to Petition for Writ of Certiorari at 38, *Bucklew* v. *Precythe*, 138 S. Ct. 1706 (2018) (No. 17-8151), *available at* 2018 WL 1757762.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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