No. 18-5096

In the Supreme Court of the United States

RAYMOND TIBBETTS,

Petitioner,

v.

JOHN KASICH, GOVERNOR OF OHIO, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Court rejected a challenge to a midazolam three-drug execution protocol because (1) the challengers failed to prove that the protocol was "sure or very likely to result in needless suffering," *id.* at 2739, and (2) they had not identified an available alternative, *id.* at 2738. Ohio then switched to a midazolam three-drug protocol. After a five-day hearing, Petitioner Raymond Tibbetts obtained a preliminary injunction against it. But the en banc Sixth Circuit vacated that injunction because Tibbetts did not satisfy *Glossip*'s two elements, and this Court denied review. *Fears v. Morgan*, 860 F.3d 881 (6th Cir. 2017) (en banc), *cert. denied*, 137 S. Ct. 2238 (2017).

On remand, Tibbetts sought another preliminary injunction based on the same Eighth Amendment claim. After another evidentiary hearing, the district court denied relief and the Sixth Circuit affirmed. The lower courts held that Tibbetts had not offered sufficient new evidence at this second hearing to meet *Glossip*'s risk-of-harm standard. They also held that Tibbetts's alternative protocol did not significantly reduce a substantial risk of pain, and that he had not shown that Ohio could adopt it.

This case presents two questions:

1. In his second hearing, did Tibbetts meet his burden to prove that Ohio's execution method "is sure or very likely to result in needless suffering"?

2. In his second hearing, did Tibbetts meet his burden to provide an alternative execution method that is available to Ohio and that significantly reduces a substantial risk of severe pain?

LIST OF PARTIES

The Petitioner is Raymond Tibbetts, an inmate who is now being held at the Madison Correctional Institution in London, Ohio.

The 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 Execution Team Members 1-50 in their official capacities.

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INTRODUCTION

Raymond Tibbetts has filed a second petition for certiorari challenging Ohio's decision to adopt an execution protocol like the one from *Glossip v. Gross*, 135 S. Ct. 2726 (2015). In 2017, the en banc Sixth Circuit reversed Tibbetts's first requested injunction against this protocol, and this Court then denied certiorari. *Fears v. Morgan*, 860 F.3d 881, 884 (6th Cir. 2017) (en banc), *cert. denied*, 137 S. Ct. 2238 (2017). Tibbetts's second petition provides nothing to suggest that the Court should change course now. Indeed, the district court found that his second 5-day evidentiary hearing yielded evidence that was largely cumulative of the evidence from his first 5-day evidentiary hearing. Pet. App. 19a. The Court thus should deny review.

Most importantly, the petition raises an Eighth Amendment claim that is now likely moot. On July 19, 2018, after Tibbetts filed this petition, Ohio Governor John Kasich granted Tibbetts's application to commute his death sentence to life in prison. Warrant of Commutation, R.1885-1, PageID#74699. Because Tibbetts will no longer be executed, he now "'lack[s] a legally cognizable interest in the outcome'" of the ongoing challenge to Ohio's execution method. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). In light of this mootness issue, the Court should simply deny certiorari (rather than vacate the Sixth Circuit's decision) because "the case would not merit review in any event." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 358 (10th ed. 2013) (describing traditional position of the U.S. Solicitor General).

Even if the case were not moot, this Court would not have granted review. For one thing, the Sixth Circuit faithfully followed this Court's precedent with re-

spect to both of Tibbetts's questions presented. As for *Glossip*'s risk-of-harm factor, the Sixth Circuit adhered to this Court's instructions that a challenger must prove that an execution method is "'*sure or very likely* to cause serious pain and needless suffering.'" Pet. App. 3a (quoting *Fears*, 860 F.3d at 886); *Glossip*, 135 S. Ct. at 2737. As for *Glossip*'s alternative-method factor, the Sixth Circuit tracked this Court's teachings that challengers must do more than present "'marginally safer'" alternatives. Pet. App. 3a (quoting *Glossip*, 135 S. Ct. at 2737). They must prove *both* that the proposed alternative is "'feasible'" *and* that it "'significantly reduces a substantial risk of severe pain.'" *Id.* at 3a (quoting *Glossip*, 135 S. Ct. at 2737).

For another thing, the Sixth Circuit's decision comports with the weight of circuit authority. Tibbetts admits that other circuit courts have read *Glossip* in the same way as the Sixth Circuit. Pet. 22-23. And, on top of the denial of Tibbetts's case the last time that it was here, the Court has often denied certiorari in cases raising similar issues. *Bible v. Davis*, No. 18-70021, 2018 U.S. App. LEXIS 17439, at *11 (5th Cir. June 26, 2018), *cert. denied*, 2018 U.S. LEXIS 4029 (June 27, 2018); *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017) (en banc), *cert. denied*, No. 17-9559, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1299 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017). There is no need to relitigate questions that *Glossip* settled given this general circuit uniformity.

COUNTERSTATEMENT

In November 1997, Tibbetts brutally murdered an elderly man. The man's sister discovered him slumped in a chair with several knives protruding out of his chest and back. *State v. Tibbetts*, 749 N.E.2d 226, 237-39 (Ohio 2001). Tibbetts also

murdered his wife, the elderly man's caretaker. Police found her "on the floor in a pool of blood with her skull cracked open and its contents scattered nearby." *Fears v. Morgan*, 860 F.3d 881, 884 (6th Cir. 2017) (en banc). A jury convicted Tibbetts of aggravated murder, and the trial court adopted the jury's recommended death sentence. *Tibbetts*, 749 N.E.2d at 239.

A. After Ohio Adopted A Midazolam Three-Drug Protocol, Tibbetts And Others Unsuccessfully Sought An Injunction

In October 2016, Ohio adopted a three-drug execution protocol like the one upheld in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). This protocol uses midazolam as the first drug, a paralytic as the second drug, and potassium chloride as the third drug. *Fears*, 860 F.3d at 884-85. In litigation challenging Ohio's execution methods, Tibbetts and two co-plaintiffs—Ronald Phillips and Gary Otte—moved for a preliminary injunction against this three-drug protocol. *Id.* at 885. After a five-day evidentiary hearing in January 2017, the district court enjoined those plaintiffs' executions based in part on their Eighth Amendment claim.

A Sixth Circuit panel initially affirmed the injunction, but the Sixth Circuit granted en banc review. The full court reversed because the plaintiffs "failed to demonstrate a likelihood of success." *Id.* at 892. *First*, their evidence fell "well short" of the demanding showing of risk mandated by *Glossip*, *id.* at 890—namely, that challengers prove "'a risk that is *sure or very likely* to cause' serious pain and 'needless suffering,'" *id.* at 886 (quoting *Glossip*, 135 S. Ct. at 2737). *Second*, the plaintiffs proposed an alternative—a massive dose of a barbiturate—that was not

"available" to Ohio "for precisely the same reasons" it was unavailable to Oklahoma two years earlier in *Glossip*. *Id.* at 891.

Tibbetts and his co-plaintiffs next filed a petition for certiorari and sought a stay pending this Court's review. Their petition alleged that the Sixth Circuit adopted "a more rigorous [Eighth Amendment] standard that is materially different than, and cannot be satisfied by showing, a 'substantial risk of serious harm.'" Petition for Writ of Certiorari at 16, *Otte v. Morgan*, 137 S. Ct. 2238 (2017) (No. 17-5198). Over a dissent, this Court denied review. *Otte*, 137 S. Ct. at 2238.

In July 2017, Ohio executed Phillips using the midazolam protocol. Order, R.1154, PageID#43448. In September 2017, Ohio executed Otte after the district court denied additional Eighth Amendment claims. Decision and Order, R.1226, PageID#45253; Dismissal Order, R.1251, PageID#45404.

B. Tibbetts Sought Another Injunction, But The District Court Denied His Request After Another Hearing

Following this Court's denial of certiorari, Tibbetts and another inmate, Alva Campbell, filed new preliminary-injunction motions that again challenged Ohio's midazolam three-drug execution protocol under the Eighth Amendment. Pet. App. 15a. In October 2017, the district court held another five-day hearing, again receiving testimony from several experts and fact witnesses. *See* Oct. Tr., R.1358-1361, 1363. The district court denied the motions. Pet. App. 9a-38a.

On *Glossip*'s risk-of-harm prong, the court explained that the Sixth Circuit had found the evidence from the January 2017 hearing insufficient. *Id.* at 19a. So "the question" now was whether Tibbetts and Campbell had "added sufficient evi-

dence" to overcome the earlier ruling. *Id.* The court answered in the negative, concluding that Tibbetts and Campbell had "not proven that injection of the second and third drugs . . . will cause them to experience severe pain when midazolam at 500 [milligrams] is the initial dose." *Id.* at 24a.

The district court next held that Tibbetts and Campbell failed to satisfy *Glossip*'s alternative-method prong. As relevant here, they proposed a midazolam two-drug protocol that omits the paralytic and requires monitoring devices. *Id.* at 27a-28a. As to dropping the paralytic, the court found it "difficult to credit [the] proposal as being made in good faith." *Id.* at 29a. Given their "view of the science," Tibbetts and Campbell *themselves* believed that this alternative would "result in the State's intentionally inflicting a painful death on an inmate" in violation of the Eighth Amendment. *Id.* As to monitoring, their experts pointedly did not testify "that the results of" the monitoring equipment "could be readily interpreted by an EMT or anyone else not prohibited ethically from participating in executions." *Id.* at 28a-29a.

C. The Sixth Circuit Affirmed

The Sixth Circuit affirmed the denial of the preliminary injunction. *Id.* at 3a. On *Glossip*'s first prong, it applied the standard from *Glossip* and *Fears*, asking whether "Ohio's execution protocol is *sure or very likely* to cause serious pain and needless suffering." *Id.* The court held that Tibbetts and Campbell had "not shown that the district court's findings were mistaken, let alone proven that the district court committed clear error." *Id.* at 7a. On the "well-worn ground" of whether mid-

azolam "protect[s] against the serious pain of the second and third drugs," their "experts offered no new evidence to overcome the prior rejections." *Id.* at 6a.

The Sixth Circuit also affirmed the district court's rejection of the alternative two-drug protocol proposed by Tibbetts and Campbell. It first noted a conceptual flaw: "Fatal to this alternative is that it contradicts their argument with respect to the first part of the *Glossip* and *Fears* test." *Id.* at 7a. That is, their proposal "would be viable only if Tibbetts and Campbell are wrong about their claims that midazolam does not work." *Id.* The court also agreed that they had failed to support their alternative as a factual matter. *Id.* at 8a. With regard to whether "non-medical personnel" could "interpret and apply the cumulative readings" from the new devices, Tibbetts and Campbell "produced nothing on appeal to convince [the court] that the district court was mistaken, let alone" that it had "committed clear error." *Id.*

D. After Tibbetts Filed This Petition, Ohio's Governor Commuted His Sentence

In November 2017, Ohio attempted to execute Campbell but called off the execution after the relevant personnel could not establish IV access. Reprieve, R.1376-1, PageID#51893. Campbell died of natural causes on March 3, 2018. Dismissal Order, R.1443, PageID#55319.

On July 2, 2018, Tibbetts filed this petition for certiorari. On July 19, 2018, Ohio Governor John Kasich granted Tibbetts's application for clemency, commuting Tibbetts's death sentence to life in prison without the possibility of parole. Warrant

of Commutation, R.1885-1, PageID#74699. On its own initiative, the district court dismissed as moot Tibbetts's claims. Dismissal Order, R.1894, PageID#74715.

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD DENY REVIEW BECAUSE THE PETITION IS LIKELY MOOT AND DID NOT RAISE A CERT-WORTHY ISSUE IN ANY EVENT

The Governor's decision to grant Tibbetts's request for clemency has likely mooted his Eighth Amendment claim against Ohio's execution protocol. And the Court should deny certiorari without disturbing the Sixth Circuit's judgment because the petition did not raise an issue worthy of review.

A. Tibbetts's Petition Raises A Moot Claim Because He Will Not Be Subject To The Execution Method Challenged Here

Article III grants the judicial power to federal courts only over "Cases" and "Controversies." U.S. Const. art. III, § 2. This constitutional text mandates that "'an actual controversy'" exist "'at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). That is true "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Already*, 568 U.S. at 91.

Sanchez-Gomez demonstrates this mootness rule in practice. There, criminal defendants challenged the Southern District of California's policy to use "full restraints on all in-custody defendants during nonjury proceedings." 138 S. Ct. at

1536. But, by the time the Ninth Circuit had resolved their interlocutory appeal against this policy, "their underlying criminal cases came to an end." *Id.* This Court held that final resolution of their criminal cases rendered moot their challenge to the full-restraints policy, and that no exception to the mootness doctrine preserved the federal courts' jurisdiction over their challenge. *Id.* at 1537-42.

Here, too, the Governor's decision to grant Tibbetts's clemency application and change his death sentence to life without parole renders the questions raised in his petition moot. Warrant of Commutation, R.1885-1, PageID#74699. Tibbetts's petition asserts an Eighth Amendment claim against the execution protocol that Ohio planned to use when carrying out his death sentence. But Tibbetts is no longer subject to that protocol. He thus "'lack[s] a legally cognizable interest in the outcome.'" *Already*, 568 U.S. at 91 (citation omitted); *cf. United States v. Surrat*, 855 F.3d 218, 219 (4th Cir. 2017) (en banc) (dismissing habeas appeal as moot after prisoner's sentence was commuted); *Blount v. Clarke*, 890 F.3d 456, 461-63 (4th Cir. 2018) (same). Indeed, the district court has already dismissed Tibbetts from the underlying case. Dismissal Order, R.1894, PageID#74715.

Even if the Court has doubt about whether the petition is moot, the mere fact that it presents a significant mootness question is itself reason enough to deny review. The petition has become a poor vehicle through which to address any broader Eighth Amendment questions. "[S]trong prudential considerations disfavoring the exercise of the Court's certiorari power" exist in a setting like this one. *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari).

B. Because The Petition Does Not Present A Cert-Worthy Question, The Court Should Simply Deny It Outright

Because this case is likely moot, the Court should deny certiorari. To be sure, "[w]hen 'a civil case from a court in the federal system . . . has become moot while on its way here,' this Court's 'established practice' is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Yet the Court has also recognized that "not every moot case will warrant vacatur." *Id.* at 1793. And "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Id.* at 1792 (citation omitted).

Notably, moreover, "[a]s compared to cases mooted pending an appeal as of right to a court of appeals, very different questions of discretion are raised by cases that become moot after decision by a court of appeals, but before disposition of a petition for certiorari." 13C Charles Wright et al., *Federal Practice and Procedure* § 3533.10.3, at 623 (3d ed. 2008). For example, "[i]t has been the consistent position of the United States . . . that because the decision whether to grant review on any issue (including mootness) is discretionary with this Court, *see* Sup. Ct. R. 10, the Court should deny review of cases (or claims) that have become moot after the court of appeals entered its judgment but before this Court acted on the petition, *when such cases (or claims) do not present any question that would independently be worthy of this Court's review*." Brief for U.S. as Amicus Curiae at 10, *McFarling v. Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31), 2005 U.S. S. Ct. Briefs LEXIS 2876 (emphasis added). According to a well-known Supreme Court treatise, the Court

has often followed this practice: "[A] broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review." Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013).

The Court should follow this practice here. As described in detail below, Tibbetts's petition presents no question that would have been worthy of review even if his petition were not moot. Nor does this case include the most common reason for vacating a lower court's judgment—that the winning party took "unilateral action" to cause the mootness. *Azar*, 138 S. Ct. at 1793. After all, the *Governor's* decision to commute Tibbetts's sentence originated with *Tibbetts's* decision to apply for clemency. Mutual action—not unilateral action—has caused the mootness. *Cf. United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

II. THE SIXTH CIRCUIT'S RISK-OF-HARM RULING COMPORTS WITH THIS COURT'S CASES AND WITH CASES FROM OTHER CIRCUIT COURTS

Even if it were not moot, Tibbetts's first question presented would not warrant review. He argues that the Sixth Circuit has misconstrued the standards for proving the risk of harm that is necessary to make out an Eighth Amendment claim under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015). Pet. 13-17. Yet this Court has repeatedly declined to hear challenges to the risk-of-harm interpretation adopted by the circuit courts—including once before in this very case by this very petitioner. The petition says nothing that should divert the Court from its consistent course.

A. The Sixth Circuit Followed *Glossip*'s Risk-Of-Harm Standard To The Letter

Tibbetts argues that the Sixth Circuit created an incorrect, insurmountable burden to prove that the State's chosen execution method creates an unacceptable risk of harm. Pet. 13-17. He is wrong. The Sixth Circuit correctly articulated and applied the risk-of-harm standard from this Court's Eighth Amendment cases.

1. The Sixth Circuit's decision tracks this Court's two most analogous cases—*Glossip* and *Baze*. The *Baze* plurality recognized that parties challenging an execution method under the Eighth Amendment must meet a "'heavy burden.'" 553 U.S. at 53 (plurality op.) (citation omitted). They must show "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50 (plurality op.) (quoting *Farmer v. Brennan,* 511 U.S. 825, 842, 846 & n.9 (1994)). This standard, according to the *Baze* plurality, means that "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id.* (plurality op.) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)).

In *Glossip*, the Court unambiguously described *Baze* as holding that "prisoners cannot successfully challenge a method of execution unless they 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.'" 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50 (plurality op.)) (some internal quotation marks omitted). Later in the opinion, *Glossip* again reiterated that it was "critical" for

challengers of a midazolam-based protocol to prove "that the evidence presented to the District Court establishes that the use of midazolam is *sure or very likely* to result in needless suffering." *Id.* at 2739 (emphasis added).

The Sixth Circuit's en banc decision in *Fears* and its decision below follow from this language in *Baze* and *Glossip*. As *Fears* noted, "to challenge successfully a State's chosen method of execution, the plaintiffs must 'establish that the method presents a risk that is *sure or very likely* to cause' serious pain and 'needless suffering[.]'" 860 F.3d at 886 (quoting *Glossip*, 135 S. Ct. at 2737). And, as the decision below recognized, merely "showing 'uncertainty'" over the risk of harm (as Tibbetts claims to have done) does not suffice to meet *Glossip*'s demanding standard. Pet. App. 5a. If anything, an *uncertain* risk is the opposite of a *sure-or-very-likely* risk.

2. Tibbetts seeks to sidestep *Glossip*'s clear use of the sure-or-very-likely test by noting that the words "substantial risk" appear more frequently in the decision. Pet. 16-17. But because both phrases describe the right standard, this Court's specific language (sure or very likely) must anchor the meaning of its general language (substantial). A "substantial" risk can refer to a broad range of certainty, up to and including a *sure or very likely* risk. As *Fears* noted, the substantial-risk "standard is correct so far as it goes; but it elides the more rigorous showing—that the method of execution is *sure or very likely* to cause serious pain—that the Supreme Court and [the Sixth Circuit] have repeatedly said is necessary to satisfy the 'substantial risk' standard in the particular context present here." 860 F.3d at 886. In other words, this Court's specific language provides clarity about what the gen-

eral phrase "substantial risk" means. That general phrase, by contrast, cannot be used to eliminate the Court's clear requirement of a sure-or-very-likely risk of pain.

Tibbetts also criticizes the Sixth Circuit for requiring "'scientific evidence'" that midazolam will not work to render inmates insensate to the pain caused by the second or third drugs. Pet. 17. But the Sixth Circuit's framing of the sure-or-very-likely test as a scientific inquiry stems from the directives of *Baze* and *Glossip*. *Baze* warned against "embroil[ing] the courts in ongoing scientific controversies beyond their expertise." 553 U.S. at 51 (plurality op.). Instead, as Justice Alito stated in his concurrence, a petitioner "challenging a method of execution should point to a *well-established scientific consensus*" that a particular protocol will cause severe pain. *Id.* at 67 (Alito, J., concurring) (emphasis added). And *Glossip* disapprovingly identified the challengers' lack of "scientific proof" regarding the effects of a large dosage of midazolam. 135 S. Ct. at 2741. Like the *Glossip* challengers, Tibbetts "bears the burden of showing that the method creates an unacceptable risk of pain." *Id.* But, as the Sixth Circuit found, Tibbetts "could produce *no scientific evidence* about the unseen effects of a 500-mg dose of midazolam." Pet. App. 7a (emphasis added). Whatever range "scientific certainty" encapsulates, Pet. 17, Tibbetts's mere "speculat[ion]" falls outside of it, Pet. App. 7a.

Lastly, Tibbetts attempts to evade *Glossip*'s sure-or-very-likely test by citing *Helling* and *Farmer*. Pet. 15-16. These cases do not help him. For starters, *Helling* and *Farmer* concerned different contexts than the execution-protocol contexts in *Baze*, *Glossip*, and this case. The deliberate-indifference claims that were at issue

in *Helling* and *Farmer* are based on the State's "'responsibility for [an inmate's] safety and general well being.'" *Helling*, 509 U.S. at 32 (citation omitted). The Court has recognized, by contrast, that method-of-execution claims must account for the fact that "some risk of pain is inherent" even in constitutional methods of execution. *Glossip*, 135 S. Ct. at 2733. The different contexts can and must recognize different Eighth Amendment thresholds.

Even extending the deliberate-indifference standard, "substantial risk" is still substantial. *Helling* involved a showing of "*sure or very likely*" future harm. 509 U.S. at 33 (emphasis added). While *Farmer* does not use *Helling*'s sure-or-very-likely phrasing, it too asks whether there is an "*objectively intolerable* risk of harm." 511 U.S. at 846 & n.9. Each case presents a high bar for the relevant risk—a bar that Tibbetts's unproven speculation cannot meet here. Pet. App. 7a.

Tibbetts also notes that *Helling* and *Farmer* "establish that subjecting a prisoner to a substantial risk of serious harm" can violate the Eighth Amendment "without proof that the risked event is *absolutely certain* to materialize." Pet. 16 (emphasis added) (internal quotation marks omitted). But the Sixth Circuit did not demand absolute certainty—it has correctly asked that challengers provide sufficient evidence to meet the sure-or-very-likely test. Pet. App. 6a-7a. His suggestion that *Helling* and *Farmer* contradict this test is mistaken.

B. The Circuit Courts Agree On The Appropriate Risk-Of-Harm Standard

Tibbetts acknowledges "the lack of an apparent split of authority" on the first question. Pet. 12, 22-23. There is not just an *absence* of a circuit conflict; there is

circuit *agreement* on the standards that challengers must show. This agreement confirms that the Sixth Circuit correctly interpreted *Glossip* and *Baze*.

The Fifth, Eighth, and Eleventh Circuits have issued decisions that comport with the Sixth Circuit's en banc decision in *Fears* and with the decision below. Like the Sixth Circuit, the Fifth Circuit has recognized this Court's "command" that challengers must "show that [an] execution is 'sure or very likely to cause'" harm. *Bible v. Davis*, No. 18-70021, 2018 U.S. App. LEXIS 17439, at *11 (5th Cir. June 26, 2018) (citation omitted). The Eleventh Circuit, too, has adopted the same standard. Like the Sixth Circuit, it has stated that, "in order to succeed on an Eighth Amendment method-of-execution claim, the Supreme Court has instructed that prisoners must demonstrate that the challenged method of execution presents a risk that is 's*ure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1299 (11th Cir. 2016) (quoting *Glossip*, 135 S. Ct. at 2737). And, like the Sixth Circuit, the Eighth Circuit has reversed a district court for invoking *Glossip*'s objective-risk language without finding "that the prisoners had a likelihood of success under the rigorous 'sure or very likely' standard of *Glossip* and *Baze*." *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017) (en banc). The Eighth Circuit has gone even further, suggesting that a "challenger might well be unable to meet" *Glossip*'s burden without a "scientific consensus" or "reliable scientific evidence." *Id.* at 493.

This Court has repeatedly denied certiorari in post-*Glossip* cases that Tibbetts says used the same standard as the Sixth Circuit here. *See* Pet. 22-23 (citing

Hamm v. *Comm'r, Ala. Dep't of Corr.*, 725 F. App'x 836 (11th Cir. 2018), *cert. denied*, 138 S. Ct. 828 (2018) and *Whitaker* v. *Collier*, 862 F.3d 490 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1172); *see also Bible*, 2018 U.S. App. LEXIS 17439, *cert. denied*, 2018 U.S. LEXIS 4029 (No. 17-9559) (June 27, 2018); *Arthur*, 840 F.3d 1268, *cert. denied*, 137 S. Ct. 725 (2017); *McGehee*, 854 F.3d 488, *cert. denied*, 137 S. Ct. 1275 (2017). That list includes the Court's denial of certiorari in an earlier round of this very case, *Otte v. Morgan*, 137 S. Ct. 2238 (2017), which Tibbetts pegs as the moment when the Sixth Circuit "depart[ed] from this Court's precedents." Pet. 13. If the Sixth Circuit had departed from this Court's holdings in an area of "great 'importance to the public,'" Pet. 23 (citation omitted), the Court would have reviewed the question when it had the chance last year. Its decision to deny certiorari in *Otte* reflects that it should deny certiorari here as well.

In sum, contrary to Tibbetts's contention (Pet. 12, 22-24), this uniform circuit precedent proves that this Court need not provide further guidance. Circuit courts have faithfully interpreted and applied the unambiguous "sure-or-very-likely" instructions from *Glossip* and *Baze*. *See Glossip*, 135 S. Ct. at 2737; *Baze*, 553 U.S. at 50 (plurality op.)). Whether the midazolam three-drug protocol comports with the Eighth Amendment is an important question, but this Court has already raised and settled it in *Glossip*. The Court need not do so again in this case.

III. THE SIXTH CIRCUIT FAITHFULLY APPLIED *GLOSSIP* AND *BAZE* IN REJECTING TIBBETTS'S ALTERNATIVE METHOD

Even if it were not moot, Tibbetts's second question presented also would not warrant review. He proposed an alternative protocol requiring Ohio to omit the

paralytic and to use medical devices for monitoring consciousness. Pet. App. 27a-28a. The Sixth Circuit rejected the protocol because, if Tibbetts were correct that midazolam does not work, his alternative "would do nothing to reduce the risk of serious pain and needless suffering . . . but would instead ensure it." *Id.* at 8a. The court held, alternatively, that Tibbetts failed to proffer sufficient evidence that non-medical personnel could use the monitoring devices. *Id.* Tibbetts now argues that the Sixth Circuit's first conclusion wrongly interpreted the "comparative standard" from *Glossip* and *Baze*. Pet. 17-19. But the Sixth Circuit applied the correct legal standard, and its decision does not conflict with this Court's cases or the decisions of any other circuit. This question also would not affect the outcome in this case because it ignores independent reasons for rejecting the proposed alternative.

A. The Sixth Circuit's Decision Adheres To *Glossip* And *Baze*

1. *Glossip* and *Baze* require a challenger to identify an alternative method that "'significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52 (plurality op.)). This element entails "establishing that any risk of harm" under the existing protocol is "substantial when compared to a known and available alternative method of execution." *Id.* at 2738. And the alternative must "*effectively address*" that risk. *Baze*, 553 U.S. at 52 (plurality op.) (emphasis added). A challenger cannot meet this burden "merely by showing a slightly or marginally safer alternative." *Id.* at 51.

The Sixth Circuit adhered to this framework when it held that Tibbetts's proposal would not adequately reduce any risks associated with Ohio's existing three-drug protocol. To begin with, the Sixth Circuit correctly identified the govern-

ing legal standards from the Court's cases. The court noted that Tibbetts bore the burden to "identify an available, feasible, and readily implemented alternative that will significantly reduce [the] risk" of serious pain and needless suffering. Pet. App. 7a (citing *Glossip*, 135 S. Ct. at 2737, and *Fears*, 860 F.3d at 890). And the court recognized that the first drug was constitutionally *required* to render an inmate insensate to the pain that would be caused by the paralytic drug and by potassium chloride. Pet. App. 4a; *see Baze*, 553 U.S. at 53 (plurality op.).

The Sixth Circuit also adhered to this Court's cases when it applied this standard to Tibbetts's proposed two-drug alternative. It held that Tibbetts's proposal was "just an example of 'a slightly or marginally safer alternative' the Court expressly denounced in *Glossip*." Pet. App. 8a (citing 135 S. Ct. at 2737). Critically, Tibbetts himself has repeatedly asserted that midazolam is an inadequate first drug to render inmates insensate from the pain caused by the third. Pet. 5. His preliminary-injunction motion suggested that the death caused by potassium chloride would "be agonizingly painful and tortuous." Mot., R.1261, PageID#46113-14. That is why the Sixth Circuit (and district court) found Tibbetts's claim internally inconsistent. Assuming his view of midazolam (a necessary step to reach this analysis), the elimination of the paralytic "would do nothing to reduce" the risk posed by midazolam's purported inefficacy. Pet. App. 8a. So Tibbetts must concede that his own alternative proposal would violate the Eighth Amendment.

In that respect, the Sixth Circuit's rejection of Tibbetts's proposal comports with what this Court has recognized as the broader purpose of the alternative-

method factor. Without that requirement, method-of-execution claims could accomplish a de facto ban of what the Constitution explicitly allows. *See Glossip*, 135 S. Ct. at 2739. But "because it is settled that capital punishment is constitutional, 'it necessarily follows that there must be a constitutional means of carrying it out.'" *Id.* at 2732-33 (citation omitted and alterations adopted). The Sixth Circuit's ruling will prevent inmates like Tibbetts from effectively commuting their capital sentences by forcing the State to adopt a protocol that they themselves vigorously maintain violates the Eighth Amendment.

In sum, either midazolam makes inmates sufficiently insensate to pain (in which case Ohio's three-drug protocol passes constitutional muster), or midazolam does not do so (in which case both Ohio's protocol and Tibbetts's alternative would violate the Eighth Amendment under this Court's teachings). Either way, his alternative protocol would fail.

2. In response, Tibbetts contends that "*Glossip* does not require more" than the elimination of at least *some* source of pain, even if the overall pain from a protocol would remain "excruciating." Pet. 4, 18. *Glossip*, however, did not purport to allow one Eighth Amendment violation to be swapped for another. The Court suggested that any alternative method of execution must itself be constitutional, *see Glossip*, 135 S. Ct. at 2732-33, and rejected as "groundless" the argument that the alternative-method rule would permit torturous executions, *id.* at 2746. Even accepting that an alternative need not be pain-free, *id.* at 2733, Tibbetts's proposal does not do anything to "effectively address" the *alleged* shortcomings of midazolam.

Baze, 553 U.S. at 52 (plurality op.). The Sixth Circuit's decision is consistent with the Court's refusal to force States to adopt "'marginal[]'" improvements to an execution protocol. *Id.* at 2737 (citation omitted).

Regardless, Tibbetts does not allege that the Sixth Circuit's ruling on his alternative protocol conflicts with other circuit decisions. If anything, those decisions support the Sixth Circuit's ruling. The Eleventh Circuit, for example, employed similar reasoning when reviewing a different proposed alternative under *Glossip*. In *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016), it rejected a single-drug midazolam protocol as an alternative to a three-drug protocol like Ohio's. *Id.* at 821-22. Like the Sixth Circuit, the court found incongruous the argument that "midazolam alone can be used to render [an inmate] unconscious and painlessly kill him," but that it "ought not be used as the first drug because it will not render him insensate when used with two other drugs." *Id.* at 822. The Sixth Circuit likewise required coherence in the arguments supporting *Glossip*'s first and second prongs.

Tibbetts cites instead (Pet. 17-18) a lone district-court decision. But that decision merely allowed a claim to survive at the motion-to-dismiss stage—a procedural posture different from this preliminary-injunction stage. *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) (holding that inmates had "adequately alleged" an available alternative). And a district court sitting in a preliminary-injunction posture rejected such a claim. That court—while granting a (reversed) preliminary injunction on other grounds—held that "removing vecuronium bromide

from [Arkansas's] three drug protocol" "does not qualify as an adequate alternative." *McGehee v. Hutchinson*, 2017 U.S. Dist. LEXIS 57836, *122-23 (E.D. Ark. Apr. 15, 2017), *vacated on other grounds by* 854 F.3d 488. The lack of a split counsels in favor of further percolation.

B. The Petition Ignores Separate Grounds For Rejecting Tibbetts's Alternative

The petition is also not a good vehicle for the Court to consider Tibbetts's second question because that question is not outcome dispositive in this case. In addition to the "conceptual problem" at the heart of the petition, Pet. App. 8a, the lower courts rejected Tibbetts's proposed alternative for an *independent* reason—his "fail[ure] to support it" as an evidentiary matter. *Id.* Even if the protocol were acceptable under *Glossip*, he did not carry his burden of proof on this issue.

This Court's cases teach that an alternative protocol must be practically available to a State. *Glossip*, 135 S. Ct. at 2737 (the alternative must be "'feasible'" and "'readily implemented'" (citation omitted)). *Baze*, for example, rejected "the use of a [Bispectral Index or] BIS monitor" as part of an available alternative because of a *practical* constraint: "The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure" because anesthesiologists are barred from participating in executions. 553 U.S. at 59-60 (plurality op.).

Here, Tibbetts did not prove that Ohio could implement his protocol. His alternative requires Ohio to monitor his consciousness by using, among other things, "an electrocardiogram," "capnography," and "electroencephalography (EEG)." Pet.

App. 28a. While the district court "had expected a good deal more testimony on the use of" these devices, Tibbetts did not prove that the devices "could be readily interpreted by an EMT or anyone else not prohibited ethically from participating in executions." *Id.* at 28a-29a. The Sixth Circuit affirmed. *Id.* at 8a. It concluded that Tibbetts had "produced nothing on appeal to convince us that the district court was mistaken, let alone prove to us that the district court committed clear error." *Id.*

Tibbetts's petition makes no mention of this aspect of his alternative protocol, or of the lower courts' rejection of it. *See, e.g.*, Pet. 9 (characterizing his alternative as merely "removing the paralytic" drug). Yet, as the district court explained, "there is a lot more in the proposed alternative[] than just . . . eliminating the paralytic." Tr., R.1358, PageID#50561-62. In both the trial and appellate stages of this litigation, Tibbetts's proof that the alternative protocol could be adopted by Ohio was inadequate. Answering a question about *Glossip*'s comparative standard would not remedy that separate shortcoming.

IV. *GLOSSIP* GIVES CLEAR GUIDANCE, AND COURTS CONTINUE TO MONITOR OHIO'S PROTOCOL

Tibbetts suggests that this Court's review is warranted now to ensure that execution protocols receive adequate constitutional inquiry going forward. Pet. 11-12, 19-21. These arguments lack merit.

First, this Court has already reviewed an Eighth Amendment challenge to a nearly identical midazolam three-drug protocol. *Glossip*, 135 S. Ct. at 2737-46. Tibbetts contends that additional "guidance" is "much-needed," Pet. 19, but the Court's statements were crystal clear: "[P]risoners cannot successfully challenge a

method of execution unless they 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." *Glossip*, 135 S. Ct. at 2737 (citation and internal quotation marks omitted). Tibbetts does not seek "guidance" about the standard so much as he seeks to overrule it. That *Glossip* and *Baze* provided adequate instruction is evidenced by the circuits' unanimous agreement as to what those decisions mean.

Second, despite Tibbetts's warning (Pet. 11), Ohio's protocol is in no danger of being "remov[ed] . . . from judicial review." In the last two years, the district court has held 11 days of hearings, and the Sixth Circuit has issued multiple published opinions related to this matter. The protocol continues to receive close scrutiny. If anything, this level of involvement "test[s] the boundaries of the authority and competency of federal courts." *Glossip*, 135 S. Ct. at 2740. The *Baze* plurality warned that federal courts are not "boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U.S. at 51 (plurality op.). That opinion described a challenger's burden as "'heavy,'" *id.* at 53 (citation omitted), and suggested that the "threshold" and "substantive requirements in the articulated standard" are formidable gatekeepers, *id.* at 52 n.3. *Glossip* and *Baze* may give challengers a heavy burden, but Ohio's protocol has by no means escaped scrutiny.

Third, Tibbetts's arguments why review is needed now are unpersuasive. Pet. 20-24. This case's record is no reason to grant review. Indeed, the Court has rejected Tibbetts's petition once already on a similar evidentiary record. *Otte*, 137

S. Ct. at 2238. And while the district court held a second hearing after that denial, it concluded that Tibbetts had not "added sufficient evidence" to alter the Sixth Circuit's earlier conclusion about *Glossip*'s risk-of-harm prong. Pet. App. 19a. Tibbetts does not explain why particular evidence adduced in the second hearing elevates this petition above his prior one.

Tibbetts also incorrectly claims that there is "mounting evidence" against protocols like Ohio's. *See* Pet. 20-21. While Tibbetts cites a Cleveland.com article concerning the execution of Gary Otte, *see id.* at 20, the district court made actual findings about that execution, *see* Pet. App. 21a-24a. The court gave "less weight to the summary conclusions" of Tibbetts's experts, *id.* at 23a, and found that Tibbetts had not proven "that it was certain or very likely Mr. Otte experienced serious or severe pain," *id.* at 24a. Tibbetts also cites 2017 news articles concerning executions in other States. Pet. 20. Both articles were cited in Tibbetts's original petition. Petition for Writ of Certiorari at 23, *Otte*, 137 S. Ct. 2238 (No. 17-5198). They offer no new reason to change course and grant review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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