No. 18-5096

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

REPLY BRIEF FOR PETITIONER

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO
CAROL A. WRIGHT
ALLEN L. BOHNERT
ERIN G. BARNHART
ADAM M. RUSNAK
10 W. Broad Street
Suite 1020
Columbus, OH 43215
(614) 469-2999

JAMES A. KING
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
(614) 227-2051

JEFFREY T. GREEN *
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

COLLIN P. WEDEL
ANDREW B. TALAI
SIDLEY AUSTIN LLP
555 W. Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

August 15, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case is, by all accounts, moot. Raymond Tibbetts timely petitioned for writ of certiorari to review the constitutionality of Ohio's lethal-injection protocol. Less than three weeks later, Governor Kasich commuted petitioner's sentence—from death to life imprisonment without parole. Ohio can no longer execute petitioner, so, for jurisdictional purposes, petitioner no longer has a personal stake in challenging the state's execution methods. This Court need only decide how to dispose of the case.

Respondents accept, as they must, that, "[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." Opp. 9 (internal quotation marks omitted). Respondents also acknowledge, consistent with this Court's stated practice, that "the most common reason for vacating a lower court's judgment" is that "the winning party took 'unilateral action' to cause the mootness." *Id.* at 10. And respondents confirm that the Governor's decision to "change [petitioner's] death sentence to life without parole render[ed] the questions raised in his petition moot." *Id.* at 8; see also *id.* at 1, 6, 7, 10. This Court should accordingly apply its "normal rule" here: grant the petition for certiorari, vacate the court of appeals' judgment, and remand with instructions to dismiss the relevant claim as moot. See *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011).

Respondents nevertheless oppose vacatur, apparently hoping to maintain a favorable precedent on the books. They argue that the petition "presents no question that would have been worthy of review," and suggest denying certiorari outright. Opp. 9–10. Tellingly,

however, respondents contend that the Sixth Circuit "faithfully followed" this Court's decisions in *Baze* v. *Rees*, 553 U.S. 35 (2008) (plurality opinion), and *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), while simultaneously mounting a lengthy defense on the merits. See Opp. 1–2, 10–24. Respondents' arguments tacitly confirm that the decision below materially changed the law in a way that they do not wish to disturb. As the petition explained, the Sixth Circuit departed from this Court's Eighth Amendment precedents by requiring plaintiffs to do the impossible: they must "prove," with "scientific evidence," that "a 500-mg dose of midazolam . . . is *sure or very likely* to fail to prevent serious pain." Pet. App. 7a. Petitioner also showed that the Sixth Circuit—departing from *Glossip* again—rejected a proposed alternative method that would have "significantly" reduced the risk of pain associated with Ohio's lethal-injection protocol. *Id.* at 7a, 8a.

Respondents provide no good arguments to defend the opinion below or oppose review, instead repeatedly referencing this Court's previous denials of certiorari in cases that raised similar questions. Opp. 2, 10, 15–16. But the response to such arguments has been "reiterated again and again": denials of certiorari "have no precedential significance at all." *Singleton* v. *Comm'r*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting the denial of certiorari).

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI AND VACATE THE SIXTH CIRCUIT'S JUDGMENT BELOW.

Respondents won in the Sixth Circuit, mooted this case through unilateral executive action after the petition was filed, and now seek to retain the benefit of

the favorable judgment below. See Opp. 5–6, 8, 10. When that happens, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). And that equitable tradition is particularly fitting where, as here, "mootness results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994).

A. Respondents Confirm That Governor Kasich Mooted Petitioner's Eighth Amendment Claim.

Federal-court jurisdiction is limited to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. And this Court has long "demand[ed] that 'an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.'" *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). If, at any stage of the litigation, an intervening event deprives one party of a "personal stake in the outcome," then the case must be dismissed as moot. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013).

There is no question that this case is now moot. In fact, respondents confirm that their own actions mooted petitioner's claim while certiorari was pending. See Opp. 8. On July 2, 2018, Raymond Tibbetts petitioned for a writ of certiorari, and, less than three weeks later, Governor Kasich commuted his death sentence. See Commutation, R. 1885-1, PageID 74699. The district court then *sua sponte* dismissed petitioner's claim from the consolidated proceedings below. Order, R. 1894, PageID 74715. Consequently, petitioner no longer has a "personal stake" in challenging

the state's execution method. See *Genesis Healthcare*, 569 U.S. at 71.

Moreover, the well-established exceptions to mootness do not apply here, nor have respondents argued otherwise. See Opp. 7–10. Petitioner's method-of-execution claim, for instance, is not "capable of repetition, yet evad[ing] review." That doctrine applies "only in exceptional situations," *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983), where (1) the challenged action is "in its duration too short to be fully litigated" before cessation, and (2) there is a "reasonable expectation that the same complaining party will be subject to the same action again," *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (alterations omitted). Petitioner's case does not satisfy either prong. Nor have respondents "voluntarily ceased" the relevant conduct. Although Governor Kasich commuted petitioner's death sentence, respondents have not abandoned the challenged practice in this case—*i.e.*, Ohio's use of a midazolam-based execution protocol. *Cf. Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Finally, petitioner's claim was not part of a class action lawsuit. See *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018).

B. The Balance Of The Equities Favor Vacating The Sixth Circuit's Judgment In This Case.

When a civil appeal within the federal system becomes moot "while on its way" to this Court, the established practice is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear, Inc.*, 340 U.S. at 39. This Court has followed that approach in "countless cases," *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal practice" when mootness "frustrates a party's

right to appeal," *Camreta*, 563 U.S. at 698. "Vacatur is in order" when mootness occurs through the "unilateral action of the party who prevailed in the lower court." *Arizonans*, 520 U.S. at 71–72 (quoting *Bancorp*, 513 U.S. at 23).

1. Respondents do not dispute that *Munsingwear* is the normal rule. Opp. 9–10. They instead ask this Court to "simply deny [the petition] outright" (*id.* at 9 (capitalization omitted)), apparently embracing a position first suggested by the Solicitor General in *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978). According to respondents, certiorari should be denied in cases "that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition, *when such cases . . . do not present any question that would independently be worthy of . . . review*." Opp. 9 (citing Brief for the United States as Amicus Curiae at *9, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31), *available at* 2005 WL 1277857)).

Putting aside whether a party can equitably invoke that proposal where, as here, its own actions have created the mootness, respondents' reliance is misplaced. Indeed, this Court recently rejected the argument that respondents now advance: "[T]he fact that [a] relevant claim . . . became moot before certiorari *does not limit this Court's discretion*" to vacate the judgment below. See *Azar* v. *Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam) (emphasis added). What is more, this Court reached that conclusion notwithstanding the Solicitor General's renewed assertion of the so-called *Velsicol* procedure. See Petition for a Writ of Certiorari at *23 n.4, *Azar* v. *Garza*, 138 S. Ct. 1790 (2018) (No. 17-654), *available at* 2017 WL 5127296. That holding makes sense: this Court has long recognized that any "conclusion on such subject must be reached without at all

considering the merits of the cause" and "must be based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case." *United States* v. *Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 477–78 (1916).

Besides, as respondents' citations reveal, this Court has never expressly "accepted the government's position in *Velsicol*." S. Shapiro et al., *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013); *accord Commodity Futures Trading Comm'n* v. *Bd. of Trade of City of Chi.*, 701 F.2d 653, 657 (7th Cir. 1983) (Posner, J.) (recognizing that this Court "has never said it has accepted" the government's position in *Velsicol*). Nor should it do so now: any obligation to undertake a "hypothetical disposition" of an already moot petition would impose an "unwarranted burden" on the Court's resources. 13C C. Wright et al., *Federal Practice and Procedure* § 3533.10.3, at 624 (3d ed. 2008); see Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 952–53 (1980) (concluding that the government's position in *Velsicol* was "less than compelling" because it "requires sacrifice of Supreme Court resources" and "much of the time the Justices spend deciding the certworthiness of moot cases would be wasted").

2. As an equitable remedy, "vacatur ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Camreta*, 563 U.S. at 712 (quoting *Munsingwear*, 340 U.S. at 39). This Court has therefore recognized that a party who "seeks review of the merits of an adverse ruling"—but is frustrated by the "vagaries of circumstance" or the "unilateral action of the party who prevailed below"—cannot fairly "be forced to acquiesce in the judgment." *Bancorp*, 513

U.S. at 25. Properly framed, the equitable decision whether to vacate a lower-court judgment "turns on 'the conditions and circumstances of the particular case.'" *Garza*, 138 S. Ct. at 1792 (quoting *Hamburg-Amerikanische*, 239 U.S. at 478).

Respondents contend that "the *Governor*'s decision" to commute petitioner's death sentence was "not unilateral action" because petitioner had a role in "appl[ying] for clemency." Opp. 10. But pleading for an act of mercy—not to be executed—cannot transform the Governor's commutation into "mutual" action. Governor Kasich, a party to this case, single-handedly mooted petitioner's claim by exercising his near-unfettered discretion under Ohio law. See, *e.g.*, Ohio Const. art. III, § 11; *State ex rel. Maurer* v. *Sheward*, 644 N.E.2d 369, 373 (Ohio 1994) (per curiam) ("The General Assembly may not interfere with the discretion of the Governor in exercising the clemency power."). Under an ordinary understanding of causation, the Governor's decision cannot be called a "mutual" one. See Ohio Rev. Code Ann. § 2967.01(C) ("A stated prison term may be commuted *without the consent of the convict* . . . ." (emphasis added)).

Nor did petitioner "voluntarily forfeit[] his legal remedy" through "settlement." See *Bancorp*, 513 U.S. at 25. Just as this Court held in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), petitioner did not "*cause[]* the mootness by voluntary action" because there was no "procedural link" between his federal civil-rights case and his clemency proceedings. See *id.* at 95. Respondents do not suggest that the parties somehow "coordinate[d] the resolution" of these separate proceedings "with each other." See *id.* at 96. And, perhaps most importantly, the remedies in this case and petitioner's clemency proceedings were "basically unrelated." See *id.* (citing *Munsingwear*, 340 U.S. at 39–40). Petitioner's method-

of-execution claim would not have vacated his death sentence, nor would his clemency proceedings have altered Ohio's execution methods. See *In re Campbell*, 874 F.3d 454, 464–65 (6th Cir.) (per curiam) ("If we were to hold, today, that Ohio's lethal-injection protocol has become so erratic and unpredictable that it is now 'cruel and unusual' . . . , that order would not impair the validity of Campbell's death sentence at all."), *cert. denied*, 138 S. Ct. 466 (2017).

This case is accordingly a "clear example" of one where "mootness occurr[ed] through . . . the unilateral action of the party who prevailed in the lower court." See *Garza*, 138 S. Ct. at 1792. And while petitioner's method-of-execution claim is now moot, respondents continue litigating similar issues in consolidated district court proceedings. Order, R. 11, PageID 479–80. Absent vacatur, respondents may marshal the Sixth Circuit's decision as binding precedent against other plaintiffs seeking preliminary injunctive relief. See *Alvarez*, 558 U.S. at 97 (recognizing that vacatur "clear[s] the path for future relitigation of the issues"). It follows, in these circumstances at least, that respondents should not retain the benefit of the Sixth Circuit's judgment. See *Garza*, 138 S. Ct. at 1792 ("It would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.").

II. RESPONDENTS CONFIRM THAT THIS CASE IS WORTHY OF CERTIORARI AND THE SIXTH CIRCUIT DEPARTED FROM BINDING PRECEDENT.

This Court has long held that "[m]oot questions require no answer." *Mo., Kan. & Tex. Ry.* v. *Ferris*, 179 U.S. 602, 606 (1900). And, as explained above, *supra*

Part I.B, this Court need not expend resources conducting a "hypothetical disposition" of the petition for a writ of certiorari. Seemingly recognizing that this case would be worthy of plenary review, however, respondents address the merits at length. See Opp. 10–24. But their arguments only confirm that the Sixth Circuit departed from this Court's binding precedents.

First, respondents contend that the Sixth Circuit "correctly articulated and applied the risk-of-harm standard." Opp. 11. But they fail to address petitioner's primary contention—*i.e.*, that the Sixth Circuit departed from precedent by holding that plaintiffs must "prove" their allegations to a high degree of certainty using "scientific evidence." Pet. 12–17. As respondents tacitly concede, the Sixth Circuit's "scientific inquiry" standard is not one that a majority of this Court has ever adopted. See Opp. 13 (citing *Baze*, 553 U.S. at 67 (Alito, J., concurring) ("[An inmate] challenging a method of execution should point to a *well-established scientific consensus*.")). And as experience has shown, insistence on a "scientific inquiry" would only further serve to "embroil the courts in ongoing scientific controversies beyond their expertise." *Baze*, 553 U.S. at 51 (plurality opinion).

Second, respondents mischaracterize petitioner's alternative. Opp. 17–22. Petitioner has consistently proposed a simple two-drug protocol that is indisputably "feasible" and "readily implemented." Pet. 17–19. And petitioner's proposed alternative does not lack "coherence." Opp. 20. He maintains that removing one of two distinct forms of suffering—here, the sensation of entombment—would "significantly" reduce the risk of pain associated with Ohio's execution method. Pet. 18. *Glossip* does not hold that an alternative must "avoid[] all risk of pain," 135 S. Ct. at 2733, and, as respond-

ents appear to acknowledge, does not mandate alternatives that would independently satisfy the Eighth Amendment for all challengers, see Opp. 19. It is enough that a given plaintiff is willing to be executed by a proposed method that "in fact significantly reduce[s] a substantial risk of severe pain." See *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52).

Third, respondents mistakenly advance past denials of certiorari to support the same result here. Opp. 15–16. If the questions presented were worthy of certiorari, so respondents suggest, "the Court would have reviewed [them] when it had the chance." *Id.* at 16. That is irrelevant. As those "versed in the Court's procedures" know well, the denial of certiorari "carries with it no implication whatever regarding the Court's views on the merits of a case." *Maryland* v. *Balt. Radio Show*, 338 U.S. 912, 917–19 (1950) (Frankfurter, J., respecting the denial of certiorari). It "simply means that fewer than four members of the Court" voted to grant review, which could reflect "[a] variety of considerations." *Id.* at 917–18 (listing, for example, "[n]arrowly technical reasons" and "[p]ertinent considerations of judicial policy").

Finally, respondents point out an apparent "agreement" among the circuits and insist on the need for further "percolation." Opp. 14–16, 21. But, as a practical matter owing to a regional concentration of death penalty states, only four of thirteen circuits have had (or ever will have) occasion to consider these important constitutional questions. See Pet. 22–23 & n.7. Stagnation favors vacating the Sixth Circuit's judgment, particularly since respondents' own actions have mooted petitioner's claim. This Court should not allow the Sixth Circuit's "preliminary" adjudication to further stymie development of these issues. See *Munsingwear*, 340 U.S. at 40.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and petitioner's Eighth Amendment claim should be dismissed as moot.

Respectfully submitted,

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO
CAROL A. WRIGHT
ALLEN L. BOHNERT
ERIN G. BARNHART
ADAM M. RUSNAK
10 W. Broad Street
Suite 1020
Columbus, OH 43215
(614) 469-2999

JAMES A. KING
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
(614) 227-2051

JEFFREY T. GREEN *
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

COLLIN P. WEDEL
ANDREW B. TALAI
SIDLEY AUSTIN LLP
555 W. Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

August 15, 2018

* Counsel of Record