No. 18-6892

**IN THE SUPREME COURT OF THE UNITED STATES**

JOSEPH C. GARCIA,
Petitioner,

vs.

BRYAN COLLIER, et al.,
Respondent.

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

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# REPLY TO PETITION FOR WRIT OF CERTIORARI

****CAPITAL CASE****
**Execution Scheduled for TUESDAY, DECEMBER 4, 2018**

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## ARGUMENT

Respondents, in their Brief in Opposition (hereinafter "BIO"), demonstrate that Garcia's questions presented in the Petition for Writ of Certiorari (hereinafter "Petition") should be answered in the affirmative. Respondents implicitly confirm that their use secrecy immunizes themselves from Eighth Amendment claims. Respondents also misstate Garcia's limited challenge to prevent a drug from one particular source from being used, and instead they attack a broad challenge to the method-of-execution that Garcia has not raised.

### I. Respondents misconstrue Garcia's Eighth Amendment claim.

The fatal flaw of Respondents' BIO is that it is premised on a misreading of Garcia's Eighth Amendment claim: Garcia's claim is not "at bottom, the compounding process is potentially unsafe and less safe than large scale pharmaceutical manufacturing." (BIO at 7.) Garcia's argument is that ***using pentobarbital compounded by Greenpark, a pharmacy with a litany of safety violations, creates a substantial risk of serious harm*** in violation of the Eighth Amendment. Yes, compounding is inherently less safe and more risky than the FDA-approved manufacturing process. But what creates a substantial risk of serious harm here is that Respondents are choosing to source their pentobarbital from a pharmacy that both the FDA and Texas State Pharmacy Board have cited for safety violations in sterile compounding over the past two years. Greenpark's safety issues dramatically increase the likelihood that the pentobarbital used in the execution, which requires high-risk sterile compounding, will be adulterated and thus cause serious pain.

Respondents assert that the testing results, which it provided Garcia after the

Fifth Circuit's decision issued on December 2, 2018 (App. A), prove that the compounded pentobarbital is safe for use in his execution. (BIO at 11-12.) That is not true. On December 2, 2018, Respondents provided results for testing conducted sometime between June 25 and June 27, 2018, on pentobarbital compounded at a concentration of 50 mg/mL. (App. E-7.) Respondents, however, do not provide any information about how the pentobarbital tested relates to that which will be used in Garcia's execution. It appears that a vial of compounded pentobarbital was removed from Respondents' stock and tested,[1] but that vial is not the vial of the actual pentobarbital to be used in Garcia's execution, so it does nothing to establish that the pentobarbital to be used in Garcia's execution is safe.[2]

Even if it were established that testing results of that vial were indicative of the contents of the vial to be used in Garcia's execution at the time testing was conducted in June, those testing results are nearly six months old. Respondents have not shown that the results are still valid today. They have refused to provide the drug-storage information Garcia requested. Because compounded pentobarbital is a sterile injectable, it must be properly stored. If not stored properly, the drug may degrade.

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[1] Confusingly, Respondents provided a storage inventory log of pentobarbital at a concentration of 100 mg/mL with no explanation of how it relates to Garcia's execution other than the general comment in the transmitting email that the information provided was responsive to Garcia's request. (App. E-1, E-6.)

[2] Furthermore, Garcia alleged an equal-protection claim that Respondents treating him disparately from two other condemned prisoners Thomas Whitaker and Perry Williams, for which they conducted testing shortly before the execution, *see Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532, at *3 (S.D. Tex. June 6, 2016). (D-13 to D-15.)

Even if stored properly, no stability analysis has been provided. "Stability is the extent to which a drug product retains, within specified limits and throughout its period of storage and use, the same properties and characteristics that it possessed at the time of its production." *See* USP Compounding Expert Committee, *Strength and Stability Testing for Compounded Preparations* at 2.[3] "Stability can be determined only by a stability-indicating method (SIM)." *See* Science and Technology for the Hospital Pharmacist, *Beyond-Use Date: Establishment and Maintenance*, Int'l J. Pharmaceutical Compounding; Compounding Today.[4] Without providing information on how the drug was stored or having any stability analysis, Respondents cannot assert that 5-month-old testing results assure the safety of the pentobarbital to be used in Garcia's execution.

## II. The statute of limitations on Garcia's claims began to run, at the earliest, on November 28, 2018, and therefore has not expired.

Relying on Texas's personal-injury-two-year limitations period statute, *see* Tex. Civ. Prac. & Rem. Code § 16.003, Respondents argue that Garcia's Eighth Amendment and access-to-court claims accrue on the later of two dates: when direct review is complete or when the challenged protocol was adopted. (BIO at 7 (citing *Walker v. Epps*, 550 F.3d 407, 412-14 (5th Cir. 2008).)

Respondents ground their argument about when the statute of limitations

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[3] *Available at* https://www.usp.org/sites/default/files/usp/document/FAQs/strength-stability-testing-compounded-preparations.pdf.

[4] *Available at* https://compoundingtoday.com/Newsletter/Science_and_Tech_1206.cfm.

began to run for his Eighth Amendment claim on its erroneous assertion that Garcia is challenging his method of execution and the use of compounding generally. Garcia is challenging only the use of execution drugs from Greenpark, not his method of execution. Garcia learned the identity of Greenpark for the first time on November 28, 2018 from the McDaniel article. (*See* App. C-50.) Because the facts and circumstances giving rise to this claim only became known on November 28, 2018, the two-year limitations period did not begin to accrue until that date. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a). The discovery rule delays accrual until the plaintiff "knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996); *see also, e.g., Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 834 (Tex. 2018).

Furthermore, it was the McDaniel article which alerted Garcia to the need for more information about the execution drugs. Within hours of publication of that article, Garcia's counsel contacted Texas Department of Justice ("TDCJ") for information about the drugs it intends to use. (App. C-61 to C-65.) After receiving no response by November 30, 2018, Garcia filed his complaint and motion for a preliminary injunction. (App. C.) On December 2, 2018, TDCJ responded with limited information, stating it considered the "request closed" (App. E-1), and Respondents' counsel confirmed the next day that no further information would be provided (App. F). Thus, the two-year limitations period for these claims did not begin to accrue until November 28, 2018, at the earliest. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a).

Because the underlying facts to his Eighth Amendment claim were only

discovered on November 28, 2018 and the refusal to provide information came days later, Garcia's Eighth Amendment claim and access-to-courts claims under the First and Fourteenth Amendments are timely.

## III. Respondents' argument that better evidence is needed ignores entirely that the best evidence is exclusively in their custody and they refuse to provide it.

Respondents fault Garcia for not providing more evidence in support of his claim. By doing so, Respondents actually demonstrate the catch-22 that Garcia outlined in his Petition. Respondents assert Garcia failed to introduce competent evidence that went beyond mere speculation of harm (BIO at 6), but Garcia has produced the only evidence he has been able to obtain regarding the source of compounded pentobarbital given the State's refusal to provide him with anything more than heavily redacted receipts for the purchase of drugs and has refused to answer the questions put forth by Garcia's counsel.

This is most apparent with regard to Respondents' assertion that Garcia has not established that Greenpark is the pharmacy that compounded the pentobarbital to be used in his execution. (BIO at 11.) Respondents tellingly do not deny that Greenpark is the pharmacy that has compounded the pentobarbital to be used in Garcia's execution. Instead, they fault Garcia for failing to provide ***more*** proof that Greenpark compounded the pentobarbital to be used in Garcia's execution. (BIO at 11.) This demonstrates why Garcia's first question presented to this Court should be answered in the affirmative. Only Respondents have the certain proof of who the pharmacy is and they refuse to affirm or deny the allegation. (*See* BIO at 11.) Under

Respondents' argument, the only way Garcia can prove the identity of the compounding pharmacy is Greenpark is if Respondents respond directly to Garcia's allegation or his request for information. They have refused to do either and yet still argue Garcia's claims fail because he has only a "tentative" identification from a news article. (BIO at 11.)

Respondents assert that the McDaniel article that revealed the source is "hearsay and inadmissible." (BIO at 11). However, Respondents cite two cases that address the admissibility of news articles as evidence *at trial*, not at this preliminary stage in litigation. At this stage, Garcia need not need prove his case through admissible evidence, but instead must provide a "substantial showing" that he is likely to succeed on the merits of his complaint. *Nken v. Holder*, 556 U.S 418, 434 (2009). The Fifth Circuit has long held that the rules of evidence do not apply to the preliminary-injunction stage of litigation: "[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993); *see also Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.") Garcia seeks the opportunity for an evidentiary hearing

where the rules of evidence would apply, and for discovery, where he could further develop his claims based on additional evidence.

Further, courts have recognized that in the context of an execution, information about whether lethal injection is "fairly and humanely administered" "is best gathered first-hand or from the media, which serves as the public's surrogate." *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002).

Respondents' attempts to dismiss Garcia's evidence on admissibility grounds, simply highlights how Respondents arguments dismissing the evidence serve one purpose: to put them in control of the success of Garcia's claims. The conclusive evidence that Respondents purport is required is in the custody of Respondents, and they refuse to provide it.

## IV. Respondents entirely ignore the alternative that Garcia alleged and fail to respond to his allegation that other pharmacies are known and available to compound pentobarbital for use in his execution.

Respondents disagree with Garcia's contention that he need not plead an alternative. For the reasons outlined in the Petition, Respondents are incorrect. They assert Garcia must plead an alternative citing the Fifth Circuit case that required an alternative pleaded in method-of-execution challenges where the plaintiffs opposed the use of compounded execution drugs generally. (BIO at 14 (citing *Whitaker v. Collier*, 862 F.3d 490, 496 (5th Cir. 2017) (*Whitaker II*).) Once again, Respondents mistake Garcia's challenge to a specific, identified source, for a general challenge to the use of compounded drugs. The limited nature of the challenge in this case makes *Whitaker II* inapposite.

Respondents, however, entirely ignore the alternative that Garcia did plead an alternative for the sake of argument. Respondents do not deny that they can obtain pentobarbital from another compounding pharmacy without Greenpark's record of safety violations, and thus an alternative is "known and available" to Respondents. Garcia, therefore, has established, in the event that it is necessary, that a known and available alternative exists.

## V. Garcia has established all four parts of the preliminary-injunction test.

For the reasons above and in his Petition, Garcia has shown the requisite likelihood of harm for a preliminary injunction. The district court and the Fifth Circuit never ruled on the other three elements of the preliminary-injunction test, but he has established those as well, as outlined in his motion for preliminary injunction/ (App. C).

## CONCLUSION

Respondents have advanced no meritorious argument in opposition to Garcia's request for this Court to consider the important questions presented by his case. For this and the foregoing reasons, Garcia asks that this Court grant his petition for a writ of certiorari and issue a stay of his execution.

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Respectfully submitted:

December 4, 2018.

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