No. 18-852

IN THE

Supreme Court of the United States

ANNE L. PRECYTHE,
Petitioner,

v.

ERNEST JOHNSON,
Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner respectfully requests that this Court hold this petition for *Bucklew v. Precythe*, No. 17-8151, then consider granting the petition to clear up any remaining confusion about the pleading requirements for a method-of-execution claim. First, this case is closely related to *Bucklew*, despite Johnson's attempts to distinguish it. Both Bucklew and Johnson pleaded nitrogen hypoxia as an alternative method of execution. Neither has pleaded or proven a procedure by which nitrogen would be administered, and neither asserts that nitrogen is a tried or tested method of execution. Second, this case illustrates a broader uncertainty about the proper pleading requirements in method-of-execution cases. Faced with inmates repeatedly pleading the same inadequate alternative methods, lower courts have struggled to determine if these complaints state a plausible claim for relief.

ARGUMENT

I. *Bucklew* may dictate whether the facts pleaded in Johnson's complaint state a plausible Eighth Amendment claim.

This petition should be held for *Bucklew*, as Johnson's arguments illustrate. He urges that Rule 8's notice-pleading standard "is well-established," Br. in Opp. 5-6, that it was "correctly" applied here, *id.* at 6-7, and that the State asks for a "heightened" standard, *id.* at 7-9. But these arguments miss the point and rely on mistaken assumptions about the Eighth Amendment's substantive requirements.

"[T]he Eighth Amendment requires a prisoner to plead and prove a known and available alternative."

Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015). This requires pleading and proving an alternative "method" or "procedure"—not just naming an alternative drug or gas—that is "feasible, readily implemented, and [will] in fact significantly reduce a substantial risk of severe pain." *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality op.). *Glossip* rejected the argument that this rule amounts to a heightened pleading standard, explaining that these detailed requirements are "substantive," not procedural. 135 S. Ct. at 2738-39.

Because Johnson and Bucklew pleaded a similar alternative method using nitrogen hypoxia, the outcome in *Bucklew* is likely to control the sufficiency of Johnson's pleadings. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'") (citation omitted).

Bucklew is likely to control the outcome here in at least two ways. First, Missouri argued that Bucklew failed to plead or prove a specific alternative method or procedure because any meaningful assessment of the risk of pain requires allegations about the "method, rate, quantity, quality, concentration, delivery, and timing of its administration." Resp. Br. in *Bucklew* at 27. In other words, to identify an alternative method that will "in fact significantly reduce a substantial risk of severe pain," *Baze*, 553 U.S. at 52, the inmate must identify the alternative method with sufficient detail to permit a meaningful comparison with the State's chosen method, *see id.* at 51-52. Here, Johnson did not plead a method of delivery either, aside from a few general allegations that nitrogen hypoxia "can" be administered using a hood or other device, Pet. App. A8-A9, thus rendering a meaningful comparison with the State's chosen

method impossible. *Baze*, 553 U.S. at 51-52. If the Court agrees that Bucklew must prove an alternative procedure, then that holding will likely control Johnson's case as well.

Second, Missouri argued in *Bucklew* that nitrogen hypoxia is not a known and available alternative because it is "untried and untested." *Baze*, 553 U.S. at 57; *see* Resp. Br. in *Bucklew* at 28. The controlling opinion in *Baze* repeatedly emphasized that a method of execution that is wholly untried and untested does not constitute a feasible, readily implemented alternative. *See Baze*, 553 U.S. at 41, 54, 57, 62. Johnson did not and cannot plead that nitrogen has been tried or tested, because no State has ever executed any inmate by nitrogen hypoxia, and so Johnson failed to state a plausible claim. *See id.* at 62 (holding that a method of execution that "has never been tried by a single State" does not satisfy the second element of *Baze*).

Thus, the State seeks review of Johnson's mistaken understanding of the Eighth Amendment's substantive requirements, not the standard under *Iqbal*. Johnson mistakenly asserts, for example, that the Eighth Amendment does not require a plaintiff to plead "specific technical procedures," Br. in Opp. 5, or to identify a feasible and risk-reducing method of administering an alternative drug or other agent, *id.* at 7-8. The truth or falsity of these assertions turns on substantive questions that *Bucklew* may resolve. What a prisoner must later prove necessarily affects what he must plead.

II. Johnson mistakenly draws an artificial line between what must be pleaded and what must be proven, suggesting the need for additional guidance from this Court.

Johnson also asserts that, even if this Court agrees with Missouri's position in *Bucklew*, that outcome "will not affect the proper outcome of this case." Br. in Opp. 12. This argument is mistaken, and illustrative of broader confusion suggesting the need for additional guidance from this Court.

To support his argument, Johnson draws an analogy to discrimination cases. The *McDonnell-Douglass* framework, he argues, identifies a "prima facie case" for evidentiary purposes but not for pleading purposes. *Id*. (citing *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)). In the same way, he says, *Bucklew* is about the proper "evidentiary standard," but will say little about "what must be pled." Br. in Opp. 12.

But "'*Swierkiewicz* did not change the law of pleading.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (citation omitted). A complaint still must "'allege facts sufficient to state all the elements of [the] claim.'" *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 751 (4th Cir. 2018) (citation omitted). Eighth Amendment claims are not an exception to this rule.

Glossip explains the substantive requirements of an Eighth Amendment method-of-execution claim. A "known and available alternative" must be pleaded and proven because it is a "substantive element[] of an Eighth Amendment method-of-execution claim." *Glossip*, 135 S. Ct. at 2739 (rejecting the argument that this imposes a "heightened pleading requirement"). To plead an "*available*" alternative,

Johnson had to make sufficient factual allegations about a safe procedure for administering nitrogen hypoxia. *See Baze*, 553 U.S. at 59-60. To plead a "*known*" alternative, Johnson had to allege that is has been tried and tested. *Id*. at 41. His complaint falls short on both points.

Johnson's argument is illustrative of broader confusion about the proper pleading requirements in method-of-execution cases. For example, the Eighth Circuit had previously held that nitrogen hypoxia did not satisfy the alternative-method requirement because it has "never been used to carry out an execution" and has "no track record of successful use." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (en banc). The State thus argued in this case that *McGehee* "foreclose[d] Johnson's claim." Pet. App. A10-11. The panel rejected this argument: *McGehee* made only an evidentiary finding that nitrogen hypoxia has "never been used to carry out an execution," so the panel held that "Johnson [was] not bound by" it at the pleadings stage. Pet. App. A11.

The Eleventh Circuit has recognized that this Court requires more detailed pleadings. There, the court affirmed dismissal because a complaint did not allege (1) "an alternative drug" that would substantially reduce the risk; (2) "an alternative means" of procuring the drug; or (3) "an alternative method" of establishing intravenous access. *Gissendaner v. Comm'r, Ga. Dep't of Corrections*, 779 F.3d 1275, 1283 (11th Cir. 2015); *see also Boyd v. Warden*, 856 F.3d 853, 866 (11th Cir. 2017) (considering whether an inmate "has pled sufficient factual matter to make it plausible that the firing squad and hanging are known and available methods of execution that are feasible to use in and can be readily implemented by Alabama"). To be sure, a

complaint may plead that a drug is "available" even after the courts have repeatedly found it unavailable. *See, e.g.*, *Lee v. Commissioner*, 731 F. App'x 885, 889 (11th Cir. 2018) ("Mr. Lee is entitled to an opportunity to prove—as he alleged in his complaint—that . . . pentobarbital is available to Alabama, regardless of" contrary factual findings in prior cases). But that is not the case here. Johnson's complaint did not allege sufficient facts to establish a viable way to administer nitrogen hypoxia, and did not allege that nitrogen hypoxia has ever been tried or tested. Accordingly, his complaint fails to plead a method-of-execution claim under *Glossip*.

The pleading obligations outlined in *Glossip* closely follow from the purposes of the alternative-method requirement. The Eighth Amendment requires a showing of subjective culpability by state actors. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (requiring a "culpable state of mind"). Pleading an incomplete alternative procedure, as Johnson does, only alleges that Missouri could have come up with a similarly incomplete procedure, which does not establish subjective culpability. "[S]peculation is insufficient to state an Eighth Amendment claim." *Zink v. Lombardi*, 783 F.3d 1089, 1101 (8th Cir. 2015).

The alternative-method requirement also restricts last-minute and often interminable method-of-execution challenges. It ends this cycle of delay by providing the State with a method that is known, available, and *readily implemented*, *Glossip*, 135 S. Ct. at 2737, and that the inmate agrees is constitutional, *Miller v. Parker*, 910 F.3d 259, 262 (6th Cir. 2018). Johnson concedes that he has not pleaded a readily-implementable method by suggesting that the "ultimate dispute" may bear "little relation to the specifics alleged in the complaint" because of

intervening discovery. Br. in Opp. 11. He also expressly refuses to say that he has pleaded a constitutional alternative method. *Id.* at 10. Capital inmates should not be able to manufacture more litigation and delay by pleading incomplete or factually insufficient protocols over and over. The Eighth Circuit already found that nitrogen hypoxia is untried and untested as a method of execution. *McGehee*, 854 F.3d at 493. This Court should find the same in *Bucklew*. Johnson should not be allowed to continue pleading this facially insufficient alternative procedure until something changes.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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