No. 20-287

In the Supreme Court of the United States

ERNEST JOHNSON,

Petitioner,

v.

ANNE L. PRECYTHE, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case warrants plenary review because the decision below misconstrued *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019), to mark a sharp deviation from longstanding Eighth Amendment doctrine. The court of appeals understood *Bucklew* to impose a categorical understanding of the "legitimate penological reason" standard that would enable States to foreclose a method-of-execution challenge at the pleading stage, simply by proffering any facially legitimate reason for refusing the proposed alternative—no matter what alternative the plaintiff proposes, and no matter whether the State's proffered penological justification would withstand scrutiny on the facts of the case. That approach defies common sense. And it departs from the well-established doctrine followed by this Court and the lower courts in other prison-conditions contexts, pursuant to which a "legitimate penological reason" must not only be legitimate in the abstract, but also adequate on the facts of the case.

Respondents contend (Opp. 13) that there is "no need to consider" this conflict because *Bucklew* held that the novelty of a proposed method of execution is always, and categorically, a legitimate penological justification for declining to adopt the method. To the contrary, *Bucklew* must be read against the backdrop of the established Eighth Amendment principles that provide the foundation for this Court's method-of-execution jurisprudence. The Court's review is warranted to ensure doctrinal uniformity in this important area of federal law.

Alternatively, to the extent that *Bucklew* did announce a new rule that method-of-execution plaintiffs may propose only those alternative methods of execution that have been used before, the Court should

summarily reverse the Eighth Circuit's refusal to permit petitioner leave to amend his complaint. That refusal flies in the face of *Bucklew*'s express contemplation that plaintiffs would be able to propose non-novel methods of execution, not to mention the liberal pleading standards that govern in every other civil context.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WARRANTS PLENARY REVIEW.

A. The decision conflicts with other courts' application of the "legitimate penological justification" standard in Eighth Amendment and prison-conditions cases.

Respondents fail to grapple with the central conflict asserted in the petition. The court of appeals held that the untried nature of a proposed alternative method of execution is categorically a "legitimate penological reason" to reject the method that "foreclose[s] the claim as a matter of law at the pleading stage." Pet. App. 5a, 6a. That holding conflicts with precedent of this Court and other courts of appeals applying that standard in analogous prison-conditions litigation. Plenary review is warranted to resolve the conflict and ensure doctrinal consistency in this Court's Eighth Amendment jurisprudence.

As the petition explains, this Court and the courts of appeals have long held that when a prisoner asserts an Eighth Amendment or other constitutional claim, a State's liability turns in part on its ability to proffer a "legitimate penological reason" for burdening the plaintiff's constitutional rights. In so doing, the State must demonstrate not only that its reason is facially legitimate, but also that the justification is

genuine and reasonable under the circumstances of the case. Pet. 13-16 (citing cases). In other words, a proffered reason must be both (a) legitimate in the abstract (*e.g.*, maintaining prison security, preserving dignity of witnesses to executions); and (b) legitimate on the facts of the case, that is, genuine and sufficient to justify the treatment of the plaintiff under the circumstances. *Ibid.* Respondents do not dispute that account of courts' established understanding the "legitimate penological justification" standard.

The court of appeals departed from that framework, however, in holding that a State's desire not to be "'the first to experiment with a new method of execution'" is "categorically" legitimate—and dispositive—notwithstanding the specific circumstances of the case. Pet. App. 6a (quoting *Bucklew*, 139 S. Ct. at 1130). *Bucklew* does not compel that conclusion; to the contrary, *Bucklew* applied the settled "legitimate penological justification" standard discussed in *Baze* v. *Rees*, which in turn drew from this Court's prison-conditions precedents. 553 U.S. 35, 52 (2008) (plurality) (citing *Farmer* v. *Brennan*, 511 U.S. 825 (1994)). As the petition explained, those decisions establish that the State's proffered penological justification must be both legitimate in the abstract and sufficient justification on the facts of the case. Pet. 13-14; *Hope* v. *Pelzer*, 536 U.S. 730, 737-738 (2002); *United States* v. *Haymond*, 139 S. Ct. 2369, 2383 (2019); *Turner* v. *Safley*, 482 U.S. 78, 89-90 (1987). *Bucklew*'s conclusion that the untried nature of nitrogen was a legitimate reason to reject it therefore must be understood in light of that long line of precedent.

Respondents contend (Opp. 13) that if the *Bucklew* Court had intended the "legitimate penological reason" standard to have the same content it has in

every other context, the Court would have stated as much. But that is backwards: if *Bucklew* had announced a stark departure from the "legitimate penological reason" standard long applied by this Court and others, the Court surely would have said so. But it did not. *Bucklew* is therefore best understood to rest on the conclusion that the untried nature of nitrogen was not only legitimate in the abstract, but also legitimate on the specific facts of the case, because the plaintiff had failed to proffer any evidence on essential questions showing how nitrogen could be administered safely and effectively to him. Pet. 17; *see also* 139 S. Ct. 1129.

The Eighth Circuit's outlier approach warrants plenary review because it strays from the settled framework for resolving Eighth Amendment claims involving a state-proffered reason for challenged action. Indeed, this Court often grants certiorari to promote consistency within and across areas of law. *E.g.*, *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388 (2006) (rejecting specialized injunction standard for patent disputes in favor of generally applicable injunction standard); *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506 (2002) (rejecting special pleading standard for employment discrimination cases as inconsistent with traditional pleading standard).[1]

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[1] Respondents argue (Opp. 11) that the Court's denial of certiorari in *Henness* v. *DeWine* (No. 20-5243) suggests that review is not warranted here. But *Henness* was a poor vehicle to consider the "legitimate penological justification" standard because the Sixth Circuit had ruled against the petitioner on multiple independent grounds. *Henness*, Pet. 2 (filed July 17, 2020) ("primary question" concerned severity of pain necessary to state a claim); *Henness*, Br. of Resps. in Opp. to Cert. 32 (filed Aug. 5, 2020); *see also In re Ohio Execution Protocol Litigation*, 946 F.3d 287, (footnote continued)

B. The court of appeals' decision is wrong.

The court of appeals erred in dismissing petitioner's complaint on the sole ground that petitioner's proposed alternative, nitrogen gas, is untried.

As an initial matter, respondents' arguments in defense of the court of appeals' decision rest on mischaracterizations of petitioner's arguments. Contrary to respondents' suggestion (Opp. 14), petitioner does not contend that a State "may not advance its legitimate penological justification at the motion-to-dismiss stage," or that the untried nature of nitrogen is not a *facially* legitimate justification. Rather, petitioner contends that if the State proffers an assertedly legitimate justification in a motion to dismiss, the court must then evaluate whether the complaint plausibly alleges that the proffered justification may be insufficient under the circumstances. That is the approach followed in every other context in which a "legitimate penological justification" is relevant to the State's liability. Pet. 15, 18-19; see *e.g.*, *Gee* v. *Pacheco*, 627 F.3d 1178, 1187-1188 (10th Cir. 2010); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 554-556 (2007). Respondents do not even attempt to justify deviating from that approach in the method-of-execution context.

Here, petitioner has satisfied the applicable pleading standard. Petitioner plausibly alleged that the untried nature of nitrogen gas is not an adequate justification on the facts of this case, because nitrogen

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290-92 (6th Cir. 2019) (decision below). Here, by contrast, the issue is squarely presented and is the sole ground upon which the Eighth Circuit affirmed the dismissal of petitioner's complaint.

will avoid the violent seizures that petitioner's medical condition could otherwise cause, thereby furthering the State's interest in protecting witness sensibilities.[2] Pet. 22. Second, additional research published after *Bucklew*'s issuance shows nitrogen gas to be humane, safe for witnesses, and easy to administer. Pet. 23. Respondents assert that the research was not included in the operative complaint, (Opp. 15 n.1), but that is no matter: just as the Court did in *Bucklew* itself, 139 S. Ct. at 1130 n.1, the Court can consider post-complaint developments in analyzing the legitimacy of the State's proffered justification.

Finally, respondents protest (Opp. 16) that its interest in "timely enforcement" is itself a legitimate reason to reject nitrogen, as adopting the method would be time-consuming. But, again, the court of appeals agreed that Johnson adequately pleaded that nitrogen gas could be "readily implemented," *i.e.*, without inordinate delay, Pet. App. 4a, and respondents do not suggest any reason to doubt that holding.

C. Respondents do not raise credible vehicle concerns.

The purported vehicle problems that respondent identifies (Opp. 16-18) lack substance.

1. Petitioner's suit is not time-barred. Opp. 17. The court of appeals rejected respondents' timeliness

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[2] The State "does not agree" (Opp. 15-16) that the planned quantity of pentobarbital would cause a seizure or that nitrogen gas would actually reduce the risk of pain. But the court of appeals found that petitioner's complaint adequately pleaded these facts with a supporting medical expert affidavit, Pet. App. 15a-16a, and nothing about *Bucklew*—which involved a different medical condition—negates that conclusion.

argument in its initial decision, Pet. App. 19a-21a, and did not revisit that conclusion in its decision on remand after *Bucklew*. Because petitioner's complaint pleaded that he discovered his brain defect and scar tissue (which prompted the concerns about a pentobarbital-based execution) in April 2011, and because he filed the complaint within five years of that date, the court of appeals held the claim to be timely. *Ibid.*

Lacking a persuasive statute of limitations argument, respondents resort to unsupported accusations of dilatoriness. But this Court *granted* petitioner's application for a stay of execution pending disposition of his appeal, *Johnson* v. *Lombardi*, 577 U.S. 970 (2015)—an action that indicates that this Court did not review petitioner's suit as no more than a "last-minute" effort to delay execution, *Hill* v. *McDonough*, 547 U.S. 573, 584 (2006). Since then, the parties have litigated the case in the ordinary course, and respondents have not only not attempted to expedite the case, but (like petitioner) have sought routine extensions on consent.

2. Petitioner's complaint is not defective for failure to plead specific procedures for administration of nitrogen gas. Opp. 17-18. In its pre-*Bucklew* opinion, the court of appeals rejected respondents' argument to that effect, holding that the complaint plausibly alleged that nitrogen gas would be feasible and readily implemented. Pet. App. 16a-17a. That decision was clearly correct: petitioner alleged details about the method's authorization, availability, potential delivery mechanism, and the ability to administer nitrogen gas in existing facilities. *Id.* "Under the notice pleading regime of the federal rules," the court of appeals held, a plaintiff need not set out a "detailed

technical protocol" in his complaint, before any discovery has taken place. *Id*. at 17a; *see also Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007) (per curiam) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (citations omitted)). As the court correctly recognized, requiring a detailed step-by-step description of a method's administration at the pleading stage would impose a special pleading requirement without furthering the fair-notice policies of Rule 8.

After this Court issued its decision in *Bucklew*, respondents again urged the court of appeals to hold that petitioner had not alleged adequate detail about nitrogen, No. 17-2222, Supp. Br. of Appellees (8th Cir. filed Aug. 13, 2019) at 14-27, but the court of appeals declined to revisit its earlier rejection of that argument. That decision too was unquestionably correct: *Bucklew* repeatedly emphasized the summary judgment posture of the case, and faulted the plaintiff for failing to provide detail about the nitrogen method *after* "extensive discovery." 139 S. Ct. at 1121; see *id.* at 1129, 1131, 1134.

In all events, and contrary to respondents' suggestion (Opp. 18), neither alleged vehicle issue presents any obstacle to addressing the question presented. Petitioner prevailed on both issues before the court of appeals, and neither is fairly included within the question presented. "In order to answer the question[s] presented," the Court often assumes the correctness of the lower courts' resolution of ancillary, even antecedent, issues. See, *e.g.*, *Heffernan* v. *City of Paterson*, 136 S. Ct. 1412, 1417 (2016). Respondents, moreover, have not suggested that either issue independently warrants this Court's review, and for

good reason—the court of appeals' conclusions on both issues represent nothing more than the application of established standards to the allegations in this case.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY REVERSE THE COURT OF APPEALS' REFUSAL TO PERMIT PETITIONER TO AMEND HIS COMPLAINT.

If this Court concludes that the court of appeals correctly understood *Bucklew* to announce a new rule that the untried nature of a proposed alternative method automatically forecloses a plaintiff's claim, this Court should summarily reverse the Eighth Circuit's refusal to permit petitioner to amend his complaint to propose a method that *has* been used before. As the petition explained, that refusal contravenes this Court's expectation that a plaintiff who sufficiently alleges a serious risk of pain will be able "to identify an available alternative." *Bucklew*, 139 S. Ct. at 1128-1129; see *id*. at 1136 (Kavanaugh, J., concurring).

Respondents contend (Opp. 19-20) that *Bucklew* did not announce any new rule that would justify granting leave to amend. That is incorrect. Respondents first point out that *Baze*, decided before *Bucklew*, rejected a proffered alternative—a single-drug lethal injection protocol—that, at the time, "ha[d] not been adopted by any State and [h]ad never been tried." 553 U.S. at 41. But *Baze* did not suggest that the untried nature of the proposed method ended the analysis; to the contrary, *Baze* treated that fact as one circumstance relevant to the reasonableness of the State's refusal to adopt the method. 553 U.S. at 57 (observing that plaintiffs "proffered no study

showing that it is an equally effective" method, and that the State had an interest in using a multi-drug procedure to "preserv[e] the dignity of the procedure"). Significantly, respondents identify no lower court decision, and petitioner is aware of none, that applied *Baze* to hold that the untried nature of a proposed method is categorically a legitimate reason to reject it, regardless of the facts of the case.[3]

Respondents also argue (Opp. 19) that petitioner should have proposed the firing squad in his initial complaint. But as the petition explained, the prevailing view at the time the complaint was filed was that a proposed alternative method had to be one that was authorized by state law. The basis for that view is self-evident: if legislation would be required to enable a proposed method, the State would have a substantial argument that the proposal was not "readily implemented." Indeed, contemporaneously with petitioner's filing the operative complaint, the Eleventh Circuit confirmed that a "method of execution that is beyond the [state's] statutory authority" would likely not be "feasible and readily implemented." *Arthur* v. *Comm'r*, 840 F.3d 1268, 1320 (11th Cir. 2016). *Bucklew* therefore definitively broadened the universe of potential alternative methods by holding that the proposed method need not be "authorized by

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[3] Respondents' approach to this litigation confirms the point. Petitioner filed this suit long after *Baze* was decided, and if respondents had understood *Baze* to have the import it now urges, respondents presumably would have immediately moved to dismiss on the ground that the untried nature of nitrogen compelled dismissal. But respondents did not so urge until after this Court remanded the case in light of *Bucklew*. Pet. App. 6a-7a.

a particular State's law." 139 S. Ct. at 1128. Indeed, Justice Kavanaugh wrote separately to "underscore" that this issue "had been uncertain before" *Bucklew*. *Id.* at 1136 (Kavanaugh, J.). *Bucklew* broke new ground in holding that the "comparative assessment" required by the Eighth Amendment "can't be controlled by the State's choice of which methods to authorize in its statutes." *Id.* at 1128.

In short, petitioner proposed nitrogen gas in light of then-governing law: *Baze* did not categorically foreclose a proposed method that had not been used before, but *Baze*'s "readily implemented" standard likely required that any proposed method had to be authorized under state law. Plaintiffs are not required to load up a complaint with theories that are likely meritless under governing law to hedge against the possibility that the legal standards will change midstream. Such a rule would hardly serve judicial economy. Cf. *Joseph* v. *United States*, 135 S. Ct. 705, 706 (2014) (statement of Kagan, J., respecting denial of certiorari).

That is why amendment of pleadings is liberally permitted, particularly to accommodate intervening changes in law. *E.g., Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). The case for permitting amendment is compelling here. If the court of appeals' understanding is correct, *Bucklew* changed the law in *two* respects: as it closed the door to nitrogen gas, it opened the door to firing squad and other previously used methods not authorized by state law. The Eighth Circuit's refusal to permit petitioner to amend his complaint is irreconcilable with the liberal amendment standards that apply in every other civil context. And it flies in the face of this Court's expectation that plaintiffs who satisfy their burden of

pleading or proving a substantial risk of severe pain will be able to proffer an available alternative method. 139 S. Ct. at 1128; *id*. at 1136 (Kavanaugh, J., concurring). Reversal is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the petition for a writ of certiorari should be granted, and the court of appeals' refusal to permit petitioner to amend his complaint should be reversed.

Respectfully submitted,

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