No. 20-

IN THE
Supreme Court of the United States

WARREN KEITH HENNESS,
Petitioner,

v.

MIKE DEWINE, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

EXECUTION SCHEDULED FOR JANUARY 12, 2022

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July 17, 2020

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment categorically permits the degree of pain caused by hanging—including sensations of drowning and suffocation—or whether, as this Court held in *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1126 (2019), "[d]istinguishing between constitutionally permissible and impermissible degrees of pain . . . is a *necessarily* comparative exercise" that requires examining viable alternative methods of execution.

2. Whether *Bucklew*'s statement that a State need not "be the first to experiment with a new method of execution" permits a State to categorically reject an alternative method with a proven record of ending life effectively and humanely in the medical aid-in-dying context on the ground that other States have not used that method in the execution context.

3. Whether the Sixth Circuit, contrary to *Bucklew*'s admonition, has "overstated" an inmate's burden of identifying an available alternative method by permitting a State to claim that a drug is "unavailable" even if the State has made no attempt—let alone a good-faith effort—to obtain the drug from the ready and willing supplier an inmate has identified.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Warren Keith Henness, an inmate incarcerated at the Chillicothe Correctional Institution.

Respondents are Mike DeWine, Governor of the State of Ohio; Anonymous Execution Team Members 1–50, c/o Southern Ohio Correctional Facility; Charles Bradley, Warden, Franklin Medical Center; John Does 1–25; Stephen Gray, Christopher Larose, Richard Theodore, Pharmacist, c/o Ohio Department of Rehabilitation and Correction (ODRC); Unknown Drug Suppliers 1–25; Unknown Pharmacists 1–100; Edwin Voorhies, Managing Director of Operations, ODRC; John Coleman, Warden, Toledo Correctional Institution; Ronald Erdos, Warden, Southern Ohio Correctional Facility; Unknown Pharmacies; Unnamed and Anonymous Execution Team Members; Tim Shoop, Warden, Chillicothe Correctional Center; Stuart Hudson, Director, ODRC.

There are no corporate parties involved in this case.

RELATED PROCEEDINGS

United States District Court (S.D. Ohio)

In re Ohio Execution Protocol Litig., No. 2:11-CV-1016 (Jan. 14, 2019)

United States Court of Appeals (6th Cir.)

In re Ohio Execution Protocol Litig., No. 19-3064 (Dec. 17, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Warren Keith Henness respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 946 F.3d 287. This opinion superseded an original opinion (Pet. App. 7a–12a) reported at 937 F.3d 759. The order of the district court (Pet. App. 3a–160a) is not published in the Federal Supplement but is available at 2019 WL 244488.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 17, 2019. Pet. App. 1a. Petitioner filed a timely motion for rehearing, which the Sixth Circuit denied on February 19, 2020. This Court then issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the order denying the petition for rehearing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

INTRODUCTION

In *Bucklew* v. *Precythe*, this Court highlighted just how horrific a botched hanging could be. 139 S. Ct. 1112, 1124 (2019). In the best of cases, hanging, *Bucklew* explained, could cause death instantly (by "sever[ing] the spinal cord") or after several seconds ("from loss of blood flow to the brain"). *Id.* But, often, a botched hanging could inflict "significant pain," resulting from "several minutes" of slow, excruciating "suffocation." *Id.* The primary question in this case is whether, notwithstanding other available execution methods, the Eighth Amendment categorically permits the pain and terror accompanying those minutes of slow suffocation.

The Sixth Circuit said that it does, misreading this Court's discussion of hanging as somehow ossifying the constitutionality of any method of execution that could be characterized as inflicting a similar degree of suffering. Indeed, the Sixth Circuit has concluded that such pain is simply not "constitutionally cognizable." Pet. App. 4a. But *Bucklew* shunned such categorical classifications, holding, in no uncertain terms, that "[d]istinguishing between constitutionally permissible and impermissible degrees of pain . . . is a *necessarily* comparative exercise" that requires examining alternative methods of execution. 139 S. Ct. at 1126. The Sixth Circuit's *per se* rule irreconcilably conflicts with *Bucklew*'s comparative framework—and, in so doing, categorically sanctions a type of suffering this Court has described as "constitutionally unacceptable." *Baze*

v. *Rees*, 553 U.S. 35, 53 (2008) (plurality opinion). The Sixth Circuit's rule cannot stand.

The Sixth Circuit compounded the need for this Court's review by rejecting a safe and proven alternative execution method based on further misreadings of this Court's precedent. Specifically, the Sixth Circuit held that States may categorically reject as "experiment[al]" (Pet. App. 5a) any method unused by other States for executions, even if that method is easily implemented and has been proven to cause death painlessly, outside of the execution context, in hundreds of medically assisted deaths throughout the United States and the world. In so holding, the Sixth Circuit effectively allowed States' choices of which execution methods they authorize to dictate the Eighth Amendment's scope—something this Court, in *Bucklew*, unanimously forbade. 139 S. Ct. at 1136 (Kavanaugh, J., concurring) ("[A]ll nine Justices today agree on that point.").

Bucklew also warned lower courts that an inmate's burden of identifying an available alternative execution method must not be "overstated," especially when there is a real likelihood the inmate could suffer severe pain under the existing method. *Id.* at 1128 (majority opinion). The Sixth Circuit ignored this warning too, holding that a State could reject an alternative execution drug as unavailable despite having made no attempt—let alone the "good-faith effort" this Court found sufficient in *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015)—to obtain the drug from a ready and willing supplier identified by the condemned prisoner. Cf. *id.* at 2738.

In short, the Sixth Circuit has grossly distorted the standard for proving a method-of-execution claim. The court of appeals' errors find no basis in controlling case law; indeed, they unabashedly depart from this

Court's precedent. To prevent the Eighth Amendment's protections from becoming a dead letter—particularly in light of the substantial evidence of the suffering caused by midazolam-based execution protocols—this Court should grant certiorari.

STATEMENT

Petitioner Warren Keith Henness was convicted of aggravated murder and sentenced to death. Although he continues to profess his innocence, he does not challenge the validity of his conviction or his death sentence here.

1. Ohio intends to execute Henness with a protocol involving intravenous administration of three drugs: (1) midazolam hydrochloride, (2) a paralytic, and (3) potassium chloride. By first injecting Henness with a 500 mg dose of midazolam, a sedative, Ohio hopes to block or attenuate the pain caused by the protocol's second and third drugs. A dose of the second drug will then paralyze Henness and constrict his breathing. The potassium chloride will stop his heart.

There is no dispute that Henness would suffer excruciating pain from the combined effects of the paralytic and potassium chloride, unless the midazolam blocks or attenuates that pain. The paralytic will prevent Henness from responding outwardly to the extremely painful sensations of drowning and suffocation it causes. The potassium chloride will inflict searing pain as it enters his veins—pain to which Henness, because of his paralysis, will be unable to respond. Four Justices have described this suffering as "the chemical equivalent of being burned at the stake." *Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting).

Avoiding this "constitutionally unacceptable" suffering depends entirely upon the efficacy of the protocol's

first drug and its capacity to lessen an inmate's experience of the excruciating pain. *Baze*, 553 U.S. at 53 (plurality opinion). For decades, States relied on barbiturates—such as sodium thiopental or pentobarbital—for this purpose. If properly administered, barbiturates produce prolonged and "deep, comalike unconsciousness." *Id.* at 44. Beginning in 2010, however, some States had trouble obtaining barbiturates and so began experimenting with different drug combinations and novel drugs. Ohio and several other States ultimately developed the three-drug protocol at issue here, using midazolam as the first drug.

But overwhelming scientific evidence and experience with the drug have shown that midazolam, unlike barbiturates, cannot attenuate the pain that results from the second and third execution drugs. Midazolam belongs to a family of drugs known as benzodiazepines, which includes anti-anxiety medications like Valium and Xanax. As with other benzodiazepines, midazolam has no analgesic—*i.e.*, pain-blocking—characteristics. Instead, it is primarily used to treat anxiety and, in the clinical setting prior to the induction of anesthesia, to sedate and relax a patient and block formation of the traumatic memories attending surgery. Because of this, "midazolam is not recommended or approved for use as the sole anesthetic during painful surgery." *Glossip*, 135 S. Ct. at 2742. And it has long been identified, including by Members of this Court, as significantly more likely to inflict pain than barbiturates. See *Zagorski* v. *Parker*, 139 S. Ct. 11, 11–12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay). Ohio nevertheless adopted the midazolam-based three-drug protocol following this Court's decision in *Glossip*, and intends to execute Henness using that protocol.

2. Henness moved for a preliminarily injunction to stop Ohio from killing him using its midazolam-based protocol. To prevail on his Eighth Amendment challenge, Henness was required to (1) show that Ohio's protocol is "sure or very likely" to cause him severe pain and (2) "identify" a "feasible, readily implemented" alternative execution method that would "significantly reduce" the pain associated with the midazolam-based protocol. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52).

The district court conducted a four-day evidentiary hearing on Henness's preliminary injunction motion, considering testimony from eighteen witnesses, including eight experts, resulting in over 1,400 pages of transcript, with over 6,400 pages of exhibits. The court also received into evidence extensive expert and lay testimony offered in prior preliminary injunction proceedings on behalf of other, similarly situated inmates. This evidence overwhelmingly supported Henness's claim that the midazolam-based protocol would, for two independent reasons, subject him to severe pain. Pet. App. 159a–160a.

Henness's evidence included testimony from "arguably the preeminent scholar on the pharmacological effects of benzodiazepines, including midazolam," showing that a 500 mg overdose of midazolam is incapable of blocking or even attenuating the severe pain caused by the second and third drugs in Ohio's protocol. Pet. App. 65a–76a. This is because midazolam lacks analgesic properties and because the drug cannot "sedate someone to the level of unconsciousness" at which they will not feel severe pain. *Id.* at 70a. This holds true, moreover, "no matter what dose is given" because midazolam merely prevents an inmate from responding outwardly to pain—not from experiencing it. *Id.* at 64a, 70a (emphasis omitted). Henness buttressed the

overwhelming expert testimony on this issue with numerous firsthand observations demonstrating that inmates remained aware of and sensate to the protocol's severe pain. *Id.* at 35a–39a.

Henness also presented evidence that a 500 mg overdose of midazolam would, by itself, cause him sudden and severe "pulmonary edema," where damage to the lungs fills them with fluid. Pet. App. 40a–51a. This condition is exceedingly painful, resulting in significant pain, suffocation, and terror akin to the effects of waterboarding. *Id.* at 143a. Establishing that he would suffer those effects, Henness not only offered eyewitness reports of inmates gasping, choking, and coughing during midazolam-based executions, but also provided expert testimony and analysis of autopsy records, which confirmed that the midazolam protocol inflicts severe pulmonary edema. *Id.* at 51a–63a.

Last, Henness identified an available alternative execution method: injection, via orogastric or nasogastric tube, of a single dose of the barbiturate secobarbital. Pet. App. 149a–155a. Henness showed that this method, which has been used in hundreds of medically aided deaths across the United States, would entirely eliminate the pain and terror associated with the midazolam-based execution by rendering an inmate fully unconscious. *Id.* Henness also presented evidence that this execution method was readily adaptable to the execution context and would be, if anything, less susceptible to inmate noncooperation than traditional intravenous injection. *Id.* at 151a–152a. In addition, Henness identified a supplier of secobarbital who was ready and willing to sell a sufficient quantity of the drug to Ohio. *Id.* at 155a.

Reviewing the evidence, the district court noted that "[t]he quality of the evidence presented" had "in-

creased dramatically" from prior hearings on the constitutionality of Ohio's protocol. Pet. App. 141a–142a. And the court had no difficulty concluding that, under Ohio's midazolam-based protocol, Henness was "sure or very likely" to suffer "the severe pain caused by injection of the paralytic drug or potassium chloride or the severe pain and needless suffering caused by pulmonary edema from the midazolam itself." *Id.* at 159a. For this reason, the district court found it "undisputed" that Henness would suffer irreparable harm absent a preliminary injunction and that both the balance of the equities and the public interest favored a preliminary injunction. *Id.*

The district court nevertheless denied Henness such relief because he had not, in the court's view, done enough to show a viable alternative execution method. Pet. App. 156a–158a. The court first speculated that secobarbital could also perhaps cause pulmonary edema. *Id.* at 157a. But this conjecture directly contradicted the court's prior finding that secobarbital "would likely render [Henness] insensate and allow him to die in a pain-free manner." *Id.* at 156a. That is, even if pulmonary edema occurred—and there was no evidence it would—Henness would not feel it. Moreover, the court's internally inconsistent finding ignored evidence that it was *intravenous* injection of midazolam that would cause pulmonary edema; injecting secobarbital into the stomach obviates that risk entirely.

The court also concluded that Henness had failed to meet his burden because it was unclear how difficult it would be for the vendor he identified to obtain a Terminal Distributor of Dangerous Drugs (TDDD) license from the State of Ohio. Pet. App. 158a. On this point, Henness sought to submit additional evidence showing that it was a simple process requiring approval from

the same State seeking to execute him—as one expert testified at the evidentiary hearing, *id.* at 155a—but the district court denied the request. *Id.* at 166a–167a. Henness filed a timely notice of appeal.

3. The Sixth Circuit affirmed.[1] The court did not take issue with the district court's findings about the effects of Ohio's protocol—*i.e.*, the suffering caused by the second and third drugs and the "sensations of drowning and suffocation" from the midazolam-caused pulmonary edema. Pet. App. 4a. Nor did the Sixth Circuit question the district court's findings that midazolam has no pain-inhibiting properties and "could not suppress Henness's consciousness deeply enough to prevent him from experiencing either of the identified types of pain." *Id.* Nevertheless, the court held that the district court had "clearly erred" because Henness had not shown that he would experience a "constitutionally problematic level" of pain. *Id.*

The premise underlying the Sixth Court's holding was that the pain and suffering that could occur during a worst-case hanging is simply not "constitutionally cognizable." See *id.* (citing *Bucklew*, 139 S. Ct. at 1122–24). The Sixth Circuit explained that although a pulmonary edema would cause "sensations of drowning and suffocation[,] . . . that looks a lot like the risks of pain associated with hanging," thus barring any Eighth Amendment claim. *Id.* The Sixth Circuit similarly concluded that Henness had not shown he would experience the effects of the paralytic and potassium chloride at "an unconstitutionally high level." *Id.* At no

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[1] After initially issuing its opinion in September 2019, *see* Pet. App. 7a–12a, the court issued a slightly revised opinion three months later to add additional support for its conclusions, *see id.* at 1a–6a. Unless otherwise noted, this petition cites the superseding, revised opinion.

point did the Sixth Circuit compare the risk or severity of pain inflicted by Ohio's current method with that posed by the proposed alternative.

Following its holding regarding "constitutionally cognizable" levels of pain—which it viewed as dispositive, even without a comparison to the proposed alternative—the Sixth Circuit also summarily dismissed Henness's proposed alternative execution method. Specifically, the Sixth Circuit held that *Bucklew* permits States to reject a method solely "because no other state uses [it] to carry out . . . execution[s]." Pet. App. 5a. This obtains, the Sixth Circuit asserted, "even if [the alternative method] is otherwise feasible and capable of being readily implemented." *Id.*[2] Even though Henness had identified a willing provider of secobarbital, moreover, the court held that the supplier's need to obtain a license (which, again, is entirely at Ohio's discretion to give) meant that "Ohio could [not] obtain secobarbital with an 'ordinary transactional effort.'" *Id.* (quoting *Fears* v. *Morgan* (*In re Ohio Execution Protocol Litig.*), 860 F.3d 881, 891 (6th Cir. 2017) (en banc)). And the court added that there could be other complications from adapting the secobarbital method from the medical aid-in-dying context to the execution context, notwithstanding that its concerns about nasogastric injection apply equally to intravenous injection. *Id.* at 5a–6a.

4. Originally scheduled for February 2019, Henness's execution date has changed several times, most recently because of the State's inability to obtain the

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[2] Significantly, the Sixth Circuit did not affirm the district court's contradictory and unfounded suggestion that Henness's alternative execution method could cause pulmonary edema.

drugs required for the midazolam-based protocol. Henness is currently scheduled to be executed on January 12, 2022.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's misreading of *Bucklew* impairs Eighth Amendment scrutiny of any execution method that inflicts suffering at or below the level involved in a botched hanging. Beginning from the untenable premise that several minutes of slow suffocation is not "constitutionally cognizable" suffering, the Sixth Circuit's decision repudiates the "*necessarily* comparative" Eighth Amendment analysis that *Bucklew* requires and flouts the express statement in *Baze* that such suffering would be "constitutionally unacceptable."

The Sixth Circuit's departure from this Court's precedent, by itself, warrants this Court's review. But the Sixth Circuit's flawed analysis also infected its consideration of Henness's proposed alternative method of execution. Again misreading *Bucklew*, the Sixth Circuit held that Ohio could refuse to adopt an easily implemented and proven method so long as other States have not used it to carry out executions. Ossifying available methods of execution and compounding an existing circuit conflict, the court of appeals' flawed reasoning controverts *Bucklew*'s unanimous holding that the States cannot control the scope of the Eighth Amendment.

The Sixth Circuit then went on to overstate Henness's burden of identifying an available alternative method by allowing Ohio to claim that secobarbital is unavailable, despite making no attempt—let alone the good-faith efforts this Court has found sufficient—to obtain the drug from the willing supplier Henness identified.

The Sixth Circuit's derogation of this Court's method-of-execution precedents cries out for review. The multiple errors in the decision below hinder judicial scrutiny of the midazolam protocol—and they do so as scientific evidence of the excruciating suffering it causes continues to mount. With a fulsome factual record and the legal issues cleanly presented, this case is an ideal vehicle to address the Sixth Circuit's arbitrary categorical rules.

I. THIS CASE PRESENTS PRESSING QUESTIONS REGARDING THE STANDARDS THAT GOVERN METHOD-OF-EXECUTION CHALLENGES.

A. The Sixth Circuit's Holding That The Eighth Amendment Categorically Permits The Pain Of Suffocation Conflicts With *Bucklew* And *Baze*, And Inhibits Eighth Amendment Review Of Ohio's Execution Protocol.

By holding that the pain of suffocation is not "constitutionally cognizable," the Sixth Circuit repudiated *Bucklew*'s *"necessarily* comparative" test for method-of-execution challenges, and categorically condoned severe pain without regard to available alternatives.

1. In reiterating the *Baze/Glossip* framework, *Bucklew* rejected the dissent's invitation to classify certain types of pain as categorically acceptable or unacceptable under the Eighth Amendment. Compare 139 S. Ct. at 1126–27 (majority opinion), with *id.* at 1141–42 (Breyer, J., dissenting). To the contrary, *Bucklew* held, "[d]istinguishing between constitutionally permissible and impermissible degrees of pain . . . is a *necessarily* comparative exercise" that requires examination of "viable alternative" methods of execution. *Id.* at 1126 (majority opinion).

This comparative methodology flows from the "original understanding" of the Eighth Amendment. *Id.* at 1123–24. The prohibition of "cruel and unusual" punishment was not originally understood to "outlaw" capital punishment. *Id.* at 1122–24. Rather, it was thought to preclude punishments where "'terror, pain, or disgrace [were] superadded' to the penalty of death." *Id.* at 1123 (alteration in original) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 370 (1769)). Although some pain could inevitably attend a death sentence, the Constitution forbade pain insofar as it was "superadded" to whatever was necessary for carrying out the capital sentence. *Id.* at 1126. The Eighth Amendment analysis has thus "always involved a comparison with available alternatives." *Id.* at 1127; see also *id.* ("At common law, the ancient and barbaric methods of execution . . . were understood to be cruel precisely because—*by comparison to other available methods*—they went so far beyond what was needed . . . ." (emphasis added)). Only such a comparison reveals whether a State is blameworthy under the Eighth Amendment—*i.e.*, whether that State has cruelly "superadded" unnecessary pain and suffering.

To be sure, *Bucklew* declined to address whether some pain could be so *de minimis* that it fails to trigger the Eighth Amendment's protections at all. See *id.* at 1133 n.4 (finding it unnecessary to address the argument that the pain alleged was insufficiently "severe"); cf. *Wilkins* v. *Gaddy*, 559 U.S. 34, 37–38 (2010) (per curiam) ("[P]rohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force . . . ." (quoting *Hudson* v. *McMillian*, 503 U.S. 1, 9–10 (1992))). But questions regarding *de miminis* pain are purely academic here because *Baze* left no doubt that suffocation

is absolutely the sort of severe pain that triggers the Eighth Amendment's comparative framework.

Baze addressed the claim that Kentucky's maladministration of the barbiturate sodium thiopental would cause condemned inmates to experience severe pain and suffering resulting from the subsequent injection of a paralytic (which would cause suffocation) and potassium chloride (which would cause additional pain during injection). 553 U.S. at 53–54 (plurality opinion). The pain at issue in *Baze*, in other words, was no more severe than what the district court found Henness certain or very likely to experience under Ohio's protocol. Yet *Baze* took as a given that the "suffocation" caused by the paralytic would, without proper anesthesia, be "constitutionally unacceptable." *Id.* at 53. Thus, whatever *de minimis* pain could fall outside *Bucklew*'s "*necessarily* comparative" framework, the pain at issue here, per *Baze*, does not.

2. Directly conflicting with these precedents, the Sixth Circuit's categorical rule plainly misreads *Bucklew*.

According to the Sixth Circuit, *Bucklew* offered "'instructive' examples" of "constitutionally cognizable" degrees of pain, specifying "what qualifies as too severe ('[b]reaking on the wheel, flaying alive, rending asunder with horses') and what does not (hanging)." Pet. App. 4a (alteration in original) (quoting *Bucklew*, 139 S. Ct. at 1123). From these examples, the Sixth Circuit gleaned the following rule: because hanging often "caused death slowly" "through suffocation over several minutes," such pain is, as a rule, not "constitutionally cognizable." *Id.*

Far from condoning the Sixth Circuit's rule, however, *Bucklew*'s discussion of hanging underscores the necessity of a *comparative* analysis. *Bucklew* carefully

explained that, despite the "significant pain" that *could*[3] accompany hanging, the constitutionality of hanging "was virtually never questioned." 139 S. Ct. at 1124. But this was not because the "significant pain" of suffocation was considered *per se* permissible. Rather, "the risk of pain involved [in hanging] was considered 'unfortunate but *inevitable*'" given the alternative execution methods then available. *Id.* (emphasis added).[4] That hanging could sometimes cause "several minutes" of "suffocation," therefore, was constitutionally permissible only under a *comparative* analysis proving that the risk of a botch was slight and that the attendant pain was "inevitable."

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[3] The Sixth Circuit also misquoted *Bucklew* as saying that "[m]any and perhaps most hangings . . . caused death slowly . . . through suffocation over several minutes," whereas *Bucklew* in fact made clear that suffering several minutes of suffocation, though not uncommon, was still a worst-case scenario—hanging would often cause death instantly or within a few seconds. *Compare* Pet. App. 4a, *with Bucklew*, 139 S. Ct. at 1124. Nor was there *any* evidence in the record that could have allowed the Sixth Circuit to compare, as it purported to do, the pain from a pulmonary edema with the pain caused by a hanging. The court of appeals' analysis on this point was pure speculation.

[4] The Sixth Circuit may have been operating under the assumption that, once considered constitutional, a method of execution becomes immune to constitutional challenge. But that is wrong. An obvious corollary of the Eighth Amendment's comparative method is that a once-constitutional execution method may become unconstitutional as more-humane methods become available. That is not controversial. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1135 (Thomas, J., concurring) (observing that "the Eighth Amendment [is not] 'a static prohibition' proscribing only 'the same things that it proscribed in the 18th century").

Based on this misreading, the Sixth Circuit not only rejected *Bucklew*'s comparative framework but it did so in the context of pain that *Bucklew* described as "significant," and which *Baze* called so severe that it would be "constitutionally unacceptable" if a less-painful alternative exists. *Baze*, 553 U.S. at 53 (plurality opinion). There is little doubt that if the Sixth Circuit's rule persists, Ohio will argue that it should foreclose method-of-execution challenges to the State's current lethal injection protocol—or any protocol for that matter. Indeed, the State has already made this argument in moving to dismiss other pending challenges to Ohio's midazolam-based protocol.[5] After all, if the slow suffocation and pain likely to occur during Henness's execution is not "constitutionally cognizable," it is hard to imagine what, short of the tortures this Court recounted in *Bucklew*, would qualify for that label. This Court should grant the petition to correct the Sixth Circuit's repudiation of *Baze* and *Bucklew* and to ensure the lower court's categorical analysis does not infect the other circuits.

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[5] *See, e.g.*, State Actor Defendants' Motion to Dismiss Plaintiff Bobby Sheppard's Third Amended Individual Supplemental Complaint at 4–6, *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-01016 (S.D. Ohio Mar. 2, 2020) (ECF No. 2926) (asserting that the Sixth Circuit's decision "categorically rejected" challenges to Ohio's midazolam protocol). The United States Solicitor General also recently adopted a similarly categorical reading of the Sixth Circuit's decision below, characterizing the Sixth Circuit as holding that pain associated with pulmonary edema is categorically insufficient to qualify as "severe" for Eighth Amendment purposes. *See* Application for a Stay or Vacatur of the Injunction Issued by the United States District Court for the District of Columbia at 25, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20A8 (U.S. July 13, 2020).

B. By Allowing Ohio To Reject As "Experiment[al]" Any Execution Method Unused By Other States, The Sixth Circuit Wrongly Let State Law Dictate The Eighth Amendment's Scope.

Doubling down on categorical rules, the Sixth Circuit rejected Henness's proposal for a substantially less painful method of execution—a single dose of the barbiturate secobarbital—on the ground that a State could legitimately reject as "experiment[al]" any execution method unused by other States for executions, regardless of whether that method is a proven and effective means of causing death. See Pet. App. 5a. This *per se* rule misconstrues *Bucklew*'s use of the word "experiment," ignores this Court's fact-driven analysis of, *inter alia*, scientific studies, and erroneously allows state law to control the Eighth Amendment analysis, thereby limiting available execution methods and deepening an existing circuit conflict.

1. In *Bucklew*, this Court said expressly that States cannot "control[]" the scope of the Eighth Amendment by refusing to authorize—and thus make unavailable—certain execution methods. 139 S. Ct. at 1128 ("[T]he Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes."). In so holding, the Court overruled lower court decisions finding that, to be viable, an execution method must be authorized by state law. See, *e.g.*, *Arthur* v. *Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1315 (11th Cir. 2016), *abrogated in part by Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019). This Court's repudiation of that position was explicit and unanimous, as Justice Kavanaugh wrote separately to

emphasize. See *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) ("Importantly, all nine Justices today agree on that point.").

Bucklew's unanimity on this issue makes perfect sense in light of the "*necessarily* comparative" analysis this Court requires. *Id.* at 1126, 1130 (majority opinion). Again, the Eighth Amendment analysis looks at "whether the State's chosen method of execution cruelly superadds pain" that is unnecessary given alternative execution methods. *Id.* at 1125. But allowing a State's "choice of which methods to authorize in its statutes" to determine which methods are viable puts the fox in charge of the henhouse, and makes state law—rather than the Eighth Amendment—"the supreme law of the land." *Id.* at 1128.

That does not mean, of course, that States' chosen execution methods are irrelevant to the constitutional analysis. A court cannot "compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." *Id.* at 1130. There must be evidence of the alternative method's "comparative efficacy." *Baze*, 553 U.S. at 57 (plurality opinion). And if an execution method has been "widely used" by States, there is likely ample evidence regarding its effectiveness at causing death. By contrast, if no State has authorized an execution method, there may simply be no evidence regarding its use. See *Bucklew*, 139 S. Ct. at 1130 (noting that execution by nitrogen hypoxia "had 'no track record of successful use'"). Nevertheless, whether all States use a certain execution method (or none does) is merely "probative but not conclusive" regarding the viability of a given method. *Baze*, 553 U.S. at 53 (plurality opinion).

2. The Sixth Circuit has made a "probative" fact—that no States use secobarbital for executions—"con-

clusive" of the Eighth Amendment analysis. In so doing, it has impermissibly allowed state law to control the Eighth Amendment's scope.

Under the Sixth Circuit's categorical rule, States have total control over the viability of alternative execution protocols. Until one State has adopted a new execution method, no other State may be required to consider that method as a possible alternative, no matter how feasible or proven that method is. See Pet. App. 5a (explaining that Ohio could reject such a method "even if it is otherwise feasible and capable of being readily implemented"). Such a rule incentivizes collective sclerosis among the States and is directly contrary to *Bucklew*'s "holding that the alternative method of execution need not be authorized under current state law." 139 S. Ct. at 1136 (Kavanaugh, J., concurring); see also *Baze*, 553 U.S. at 62 n.7 (plurality opinion) (taking for granted that States will continue to adopt "progressively more humane methods of execution").

This rule, like the Sixth Circuit's assertions regarding "constitutionally cognizable" levels of pain, stems from a misreading of *Bucklew*. To support its position, the Sixth Circuit relied exclusively on *Bucklew*'s statement that "choosing not to be the first [State] to experiment with a new method of execution is a legitimate reason to reject it." Pet. App. 5a (quoting *Bucklew*, 139 S. Ct. at 1128–30). But the Sixth Circuit ignored the meaning of "experiment" in that context.

Bucklew—like *Baze* before it—was simply reiterating that a court could not compel a State to adopt a method of execution that was "untried and untested" at causing death. *Bucklew*, 139 S. Ct. at 1130. Thus, *Bucklew* rejected an inmate's proposal of execution by nitrogen hypoxia because it was not "a *proven* alternative method." *Id.* (emphasis added). The point was neither simply nor primarily that no States use nitrogen

hypoxia as an execution method; in fact, *Bucklew* noted that several States had recently adopted the method. *Id.* at 1130 n.1. Rather, nitrogen hypoxia was an "experiment" because there was no evidence—"no track record" and even "no study"—that it was as "effective" or "humane" in causing death as the single-drug barbiturate protocol Missouri already used; that it would avoid the pain that would be inflicted by Missouri's lethal injection method; or that such a method could be readily adopted in an execution setting. *Id.* at 1130; see also *Baze*, 553 U.S. at 57 (plurality opinion) (rejecting alternative method because inmates had "proffered no study showing that it is an equally effective manner of imposing a death sentence" and there was evidence suggesting it was less effective).

There is a patent disconnect between *Baze* and *Bucklew*'s fact-driven analysis, on the one hand, and the Sixth Circuit's categorical rule on the other. Indeed, *Bucklew* and *Baze* would have had no cause to discuss the absence of scientific studies and other evidence if the fact that no States used the methods at issue were dispositive. The Sixth Circuit's failure to distinguish between what is "probative" and what is "conclusive" vitiates its *per se* rule. *Baze*, 553 U.S. at 53 (plurality opinion).

The Sixth Circuit's error was especially egregious because Henness's proposed alternative was, under *Bucklew*, no "experiment" at all. Henness did not offer a "bare-bones proposal" involving a method with "no track record of successful use." See *Bucklew*, 139 S. Ct. at 1129–30. To the contrary, the humanity and effectiveness of causing death via a single dose of secobarbital has an extensive record of success in hundreds of cases across the United States and the world in the medical aid-in-dying context. And Henness offered expert testimony showing that the method could readily

be adapted for the execution context. In short, the evidence supporting Henness's proposed method responds to all the concerns this Court identified in *Bucklew* and in *Baze*. Henness offered a proven (not experimental) alternative, and the Sixth Circuit rejected it nonetheless.

Aside from its conflict with (and misreading of) *Bucklew*, the Sixth Circuit's rule suffers from additional defects, underscoring the need for this Court's review. For one, the Sixth Circuit leaves open confusing questions regarding how different an execution method must be for it to be considered an "experiment." Does any novelty in the proposed alternative protocol allow a State to reject it, or must it be materially different in some sense? If the former, then the Sixth Circuit's rule devolves into the sort of arbitrary, categorical assertion this Court's fact-driven analysis in *Bucklew*, *Glossip*, and *Baze* should foreclose. Cf. *Bucklew*, 139 S. Ct at 1126 (rejecting categorical analysis). But if it is the latter, then Ohio must explain why it refuses to consider use of secobarbital when it has executed prisoners using a single dose of similar barbiturates, *i.e.*, pentobarbital and sodium thiopental.[6]

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[6] Ohio's claimed refusal to consider execution-by-secobarbital based on its purported novelty is particularly misguided given that Ohio has historically been the State most willing to try new execution methods, and was the first adopter of new methods at least three times since the Court's decision in *Baze*: Ohio was the first State to adopt the single-drug thiopental protocol, *see* Edecio Martinez, *Kenneth Biros Execution: Ohio Man First to Die Under 1-Drug Thiopental Sodium Method*, CBS News (Dec. 8, 2009), https://cbsn.ws/2MYYJZb; Ohio was the first State to use a single-drug pentobarbital protocol, *see* Edecio Martinez, *Ohio Execution Uses Animal Euthanasia Drug*, CBS News (Mar. 11, 2011),

The Sixth Circuit's *per se* rule also deepens divisions among the circuits about when a State can reject a purportedly "experiment[al]" method. The Eighth Circuit agrees with the Sixth Circuit, holding that a plaintiff's failure to show that "any State has carried out an execution by use of nitrogen gas" allows a State to reject that method categorically. *Johnson* v. *Precythe*, 954 F.3d 1098, 1102 (8th Cir. 2020). But the Eleventh Circuit reached essentially the opposite conclusion regarding the same method of execution. See *Price* v. *Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1326 (11th Cir.) (per curiam), *cert. denied sub nom. Price* v. *Dunn*, 139 S. Ct. 1542 (2019). In *Price*, the Eleventh Circuit acknowledged *Bucklew*'s holding. *Id.* at 1327. But the court held that, notwithstanding the absence of any executions by nitrogen hypoxia, Alabama's statutory authorization of that method meant the State could not deny it upon an inmate's request. *Id.* at 1326–28.

It is striking that for both the Eighth and the Eleventh Circuits—and the Sixth Circuit's decision here—the Eighth Amendment analysis begins and ends with what *the States* have authorized. That is exactly the analysis rejected by all nine Justices in *Bucklew*. See 139 S. Ct. at 1136 (Kavanaugh, J., concurring). This

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https://cbsn.ws/30qyTVP; and Ohio was the first State to use a two-drug combination of midazolam and hydromorphone in an execution, *see In re Ohio Execution Protocol Litig.*, 994 F. Supp. 2d 906, 913 (S.D. Ohio 2014) ("There is absolutely no question that Ohio's current protocol presents an experiment in lethal injection processes. . . . To pretend otherwise, or that either of the experts or this Court truly knows what the outcome of that experiment will be, would be disingenuous."); *see also Cooey* v. *Strickland*, 604 F.3d 939, 948 (6th Cir. 2010) (Martin, J., dissenting) (characterizing Ohio's shifting protocols as "the functional equivalent of human experimentation. We tell Ohio to just keep going until an experiment goes horribly awry . . . .").

Court's review is needed to resolve the circuits' misreading of controlling precedent.

C. The Sixth Circuit "Overstated" An Inmate's Burden By Letting Ohio Reject An Alternative Drug As "Unavailable" Despite Making No Effort To Obtain The Drug From A Ready And Willing Vendor.

Further insulating Ohio's midazolam protocol from constitutional scrutiny, the Sixth Circuit has "overstated" the condemned inmate's "burden of showing a readily available alternative," see *Bucklew*, 139 S. Ct. at 1128, 1130, by allowing Ohio to reject as "unavailable" a drug it has never tried to obtain.

1. Though not undertaking to define "availability," *Glossip* and *Bucklew* both indicate that there must be evidence that a drug is *actually* unavailable before a State can reject it on that basis. In *Glossip*, for example, inmates proffered sodium thiopental or pentobarbital as alternative execution drugs, but these drugs had become actually "unavailable." 135 S. Ct. at 2738. Affirming that the State could reject the alternative drugs, *Glossip* emphasized that the State had "been unable to procure those drugs despite a good-faith effort to do so." *Id.* *Bucklew* subsequently distilled *Glossip*'s analysis into the following rule: "a State can't be faulted for failing to use lethal injection drugs that it's unable to procure *through good-faith efforts*." *Bucklew*, 139 S. Ct. at 1125 (emphasis added) (citing *Glossip*, 135 S. Ct. at 2737–38). Thus, by focusing on the State's good-faith attempts to obtain the alternative drugs, *Glossip* and *Bucklew* underscore that there must be some evidence of the drugs' actual unavailability.

A contrary rule would plainly overstate an inmate's burden to "identify" or "point to" an available alternative. *Id.* at 1128. *Bucklew*, in fact, took great pains to

emphasize that this burden should not "be overstated," especially where "an inmate [is] facing a serious risk of pain." *Id.* at 1128–29. Justice Kavanaugh's separate concurrence also highlighted this point. *Id.* at 1136 (Kavanaugh, J., concurring) ("I simply emphasize the Court's statement that 'we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative.'").

2. The Sixth Circuit's rule turns this principle on its head. Notwithstanding expert testimony identifying a vendor ready and willing to sell Ohio secobarbital, the Sixth Circuit announced that Henness had "failed to show that Ohio could obtain secobarbital with an 'ordinary transactional effort.'" Pet. App. 5a (quoting *Fears*, 860 F.3d at 891).[7] But unlike in *Glossip*, there was no evidence that Ohio had "been unable to procure [the secobarbital] *despite a good-faith effort to do so*." See 135 S. Ct. at 2738 (emphasis added). To the contrary, Ohio took no steps to procure the drug. True, Ohio needed to grant the identified supplier a TDDD license before the drug could be purchased. But Ohio offered no competent evidence that it would be unable to grant the supplier such a license or that the drug would be otherwise difficult to obtain. At most, acquiring the TDDD license could impose a minor administrative box to check prior to procurement. But, again, Henness's burden was merely to "identify" an available alternative drug—not to procure it himself, and certainly not to walk the State through the process of granting a license that it alone has the discretion to grant.

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[7] Although the Sixth Circuit discussed this issue in deciding that Henness had not proposed a "feasible" alternative, the issue plainly concerns the "availability" of the proposed alternative method. *See* Pet. App. 5a.

After all, unless a State already uses a proposed alternative method of execution—a prerequisite *Bucklew* unanimously rejected—the State will invariably need to take *some* steps to procure and implement it. Thus, in *Bucklew*, the State suggested that "the firing squad would be such an available alternative." 139 S. Ct. at 1136 (Kavanaugh, J., concurring). But the effort required to implement execution by firing squad—hiring and training marksmen, setting up the execution chamber, etc.—would be at least as (if not much more) time consuming and logistically complicated than granting a vendor an Ohio TDDD license. And Ohio's complaint about the inconvenience of providing such a license is all the more unpersuasive given that the State was forced to put its scheduled executions on hold because of problems obtaining drugs for the *current* protocol. See Jo Ingles, *Governor Issues Three Reprieves of Execution*, WKSU (Feb. 1, 2020), https://www.wksu.org/post/governor-issues-three-reprieves-execution#stream/0.

For these reasons, this Court should grant certiorari to clarify that, at least when an inmate has identified a ready and willing drug supplier, there must be some evidence of the State's good-faith efforts—and the drug's unavailability despite those efforts—before a court can reject it on that basis.

II. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THESE EXCEPTIONALLY IMPORTANT QUESTIONS.

The Sixth Circuit's erroneous *per se* rules for analyzing method-of-execution claims will inhibit further scrutiny of Ohio's execution protocol—and, for that matter, of any conceivable lethal injection protocol. Again, if the pain of slow suffocation is not "constitutionally cognizable," it is alarming to imagine what—short of being flayed alive or broken on the wheel—

would so qualify. Even if an inmate could allege "constitutionally cognizable" pain under this misguided standard, the Sixth Circuit's overstatement of an inmate's burden to show that an execution drug is *not* an "experiment" and *is* "available" creates additional—and erroneous—hurdles to review of method-of-execution claims.

What's more, the Sixth Circuit hinders scrutiny of a midazolam-based protocol at a time when the stakes of removing that protocol from judicial review are high, and getting higher. Several States, including Florida and Arizona, have abandoned midazolam in the face of botched executions and mounting proof of its ineffectiveness. And the federal government, recently seeking to resume executions, disregarded the ready availability of midazolam and refused to adopt any midazolam-based protocol because of its patent hazardousness. See *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 128 (D.C. Cir. 2020) (per curiam) (Katsas, J., concurring) (commenting that the federal government's "hesitation" to use midazolam "proved reasonable, as four Justices would later describe this protocol as possibly 'the chemical equivalent of being burned at the stake.'" (quoting *Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting))), *cert. denied sub nom. Bourgeois* v. *Barr*, No. 19-1348, 2020 WL 3492763 (U.S. June 29, 2020). The Sixth Circuit's decision allows Ohio to remain willfully blind to the scientific consensus regarding midazolam's unconscionable effects.

Because this decision presents constitutional questions of great significance, moreover, it does not matter that only one question presented involves a circuit conflict. As this Court has held countless times, when the

stakes are high, a circuit split is unnecessary.[8] And method-of-execution challenges are quintessentially matters of exceptional importance that reach "beyond the academic." See *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). It is unsurprising, therefore, that neither *Baze* nor *Glossip* nor *Bucklew* involved a circuit split. Here, even more so than in those cases—because a circuit conflict has already materialized—there is no reason to await further "percolation" in the lower courts. See *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

This case also presents an excellent vehicle to address the questions underlying the Sixth Circuit's departure from *Bucklew*, *Glossip*, and *Baze*. The factual record is the best that a preliminary injunction proceeding will permit, the issues are cleanly presented, and Henness's execution is not scheduled until January 2022. This last point is particularly salient, given this Court's concern that condemned inmates sometimes use eleventh-hour method-of-execution challenges "to interpose unjustified delay," thereby frustrating States' interest in the timely enforcement of capital sentences. *Bucklew*, 139 S. Ct. at 1134; see also *Barr* v. *Lee*, No. 20A8, 2020 WL 3964985, at *2 (U.S. July 14, 2020) (per curiam) (vacating stay of execution because plaintiffs had not made the heightened "showing required to justify last-minute intervention"). With almost two years before Henness's scheduled execution date, granting review implicates none of the temporal concerns this Court has raised repeatedly.

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[8] *See, e.g.*, *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1657 (2017) (granting certiorari without a genuine split "[i]n light of the importance of the issue"); *Haywood* v. *Drown*, 556 U.S. 729, 733 (2009) (granting certiorari without a genuine split because of "the importance of the question decided" by the lower court).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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