No. 20-5243

In the Supreme Court of the United States

WARREN KEITH HENNESS,

Petitioner,

v.

MIKE DEWINE, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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CAPITAL CASE –EXECUTION SCHEDULED FOR JANUARY 12, 2022

QUESTIONS PRESENTED

1. Should this Court overrule its decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), and hold that a petitioner may prevail in a method-of-execution challenge even if he has not shown the State's current execution protocol will cause him to subjectively experience a high degree of pain, and even if the only alternative he has proposed is infeasible and has never been tried in any other State?

2. Should the Court restore the original meaning of the Eighth Amendment as applied to method-of-execution claims, under which "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." *Baze v. Rees*, 553 U.S. 35, 94 (2008)?

LIST OF PARTIES

The Petitioner is Warren Keith Henness, an inmate 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.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *In re: Ohio Execution Protocol Litigation*, No. 19-3064 (6th Cir.), judgment entered Dec. 17, 2019
2. *In re: Ohio Execution Protocol Litigation*, No. 2:11-cv-1046 (S.D. Ohio), preliminary injunction denied as to Warren Henness on Jan 14, 2019
3. *Tibbets v. Kasich*, No. 18-5096 (U.S.), *certiorari* denied October 1, 2018
4. *In re: Ohio Execution Protocol Litigation*, No. 17-4221 (6th Cir.), judgment entered Feb. 1, 2018
5. *In re: Ohio Execution Protocol Litigation*, No. 16-3149 (6th Cir.), judgment entered Dec. 30, 2017
6. *Fears v. Kasich*, No. 17-5010 (U.S.), *certiorari* denied October 2, 2017
7. *Tibbetts v. DeWine*, No. 16-9014 (U.S.), *certiorari* denied October 2, 2017
8. *In re: Ohio Execution Protocol Litigation*, Nos. 17-3800. 17-3834 (6th Cir.), judgment entered Sept. 7, 2017
9. *In re: Ohio Execution Protocol Litigation*, No. 17-3076 (6th Cir.), corrected judgment entered June 29, 2017
10. *In re: Ohio Execution Protocol Litigation*, No. 16-4737 (6th Cir.), appeal dismissed January 4, 2017
11. *Phillips v. DeWine*, No. 15-3238 (6th Cir.), judgment entered November 2, 2016
12. *Phillips v. DeWine*, No. 15-305 (6th Cir.), final order regarding unsealing filings entered Feb. 25, 2016

13. *Phillips v. DeWine*, No. 14-cv-2730 (S.D. Ohio), judgment entered February 17, 2016

14. *In re: Ohio Execution Protocol Litigation*, No. 12-3035 (6th Cir.), appeal dismissed March 20, 2012

15. *Otte v. Strickland*, No. 08CVH-09-1337 (Franklin County Court of Common Pleas), judgment entered Dec. 2, 2010

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INTRODUCTION

Warren Henness's petition asks this Court to review the constitutionality of Ohio's execution protocol: the same three-drug, midazolam-containing protocol that this Court and the federal courts of appeals have *uniformly* held constitutional. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015); *Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1329–31 (11th Cir. 2019) (*per curiam*); *Miller v. Parker*, 910 F.3d 259, 261–62 (6th Cir. 2018); *Campbell v. Kasich*, 881 F.3d 447, 453 (6th Cir. 2018); *Fears v. Morgan (In re Ohio Execution Protocol)*, 860 F.3d 881, 885–90 (6th Cir. 2017) (*en banc*); *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017) (*en banc*) (*per curiam*); *Williams v. Kelley*, 854 F.3d 998, 1001 (8th Cir. 2017) (*per curiam*).

In the proceedings below, the Sixth Circuit correctly held that Henness is not entitled to relief under *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). That case held that, to prevail on a method-of-execution claim, an inmate must identify "a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain." *Id.* at 1129. *Bucklew* further held that "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." *Id.* at 1130. Henness's claim fails at every step:

First, he never identified a feasible, readily implemented alternative to Ohio's three-drug protocol. He suggests using secobarbital—the drug some States permit to be used in assisted suicides—and

injecting it through a feeding tube. But that is not a feasible option: secobarbital takes up to *fifty-three hours* to cause death, and it will be exceptionally difficult and dangerous to insert a feeding tube into an unwilling inmate. It is not readily available, either. Henness's only contrary evidence involves one expert's speculation about what third-party suppliers—whom Henness never bothered to subpoena—*might* do.

Second, the State has a legitimate justification for declining to use secobarbital. No State has *ever* used it in an execution. Under *Bucklew*, that is enough to defeat Henness's claim: "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." *Id.* at 1130.

Finally, Henness did not carry his burden of proof with respect to the question whether Ohio's three-drug protocol presents a "substantial risk of severe pain." *Id.* at 1129. To be sure, he has introduced a great deal of evidence suggesting that midazolam will not make the inmate completely "insensate." But that is legally irrelevant. The relevant question is whether "an inmate who receives a 500-milligram dose of midazolam is 'sure or very likely' to be conscious enough to experience serious pain from" the execution. *Fears v. Morgan*, 860 F.3d 881, 886 (6th Cir. 2017) (*en banc*) (quoting *Glossip*, 135 S. Ct. at 2737). It does not matter whether the inmate will be made "insensate to pain" unless his subjective, conscious experience will exceed the "level of pain" that implicates the Eighth Amendment. *See Campbell*, 881 F.3d at 452. Aside from two unexplained assertions buried in expert reports and never elaborated

on, Henness introduced no evidence at all of what it would be like subjectively to "experience" Ohio's three-drug protocol after being exposed to 500 milligrams of midazolam.

So Henness loses. And he loses for so many independent reasons that this is a terrible vehicle for announcing any rules regarding the application of *Bucklew*. Again, the Sixth Circuit held that Henness failed to satisfy *any* of *Bucklew*'s three requirements. It held that Henness never identified a feasible and readily implemented alternative; that the State had a legitimate justification for declining to adopt Henness's proposed alternative; and that Henness failed to prove he would subjectively experience severe pain from Ohio's protocol. If the Sixth Circuit got even one of those determinations right, then its judgment must be affirmed. So even if the Sixth Circuit erred in reaching one of its holdings, this case affords no opportunity to say so.

STATEMENT

"Petitioner Warren Keith Henness was convicted of aggravated murder and sentenced to death." Petn.4. So begins Henness's *certiorari* petition. This passive phrasing belies Henness's active role in placing himself on death row. No one except Warren Henness is responsible for his current predicament.

Henness is on death row because he killed Richard Myers, a man who wanted only to help. Henness contacted Myers—a married, Alcoholics Anonymous volunteer—and lured him to a meeting with a plea for help. Myers responded. Henness slaughtered him. He bound Myers's hands with a coat hanger,

tied his shoelaces together, gagged him, and likely forced him to kneel. He then sliced Myers's neck with a butterfly knife and shot him in the head five times. After leaving the scene to smoke cocaine, Henness returned, cut off Myers's ring finger, stole Myers's wedding ring, and then wore the ill-fitting ring around for several days while using Myers's credit cards and checks. *See State v. Henness*, 79 Ohio St.3d 53, 54–55 (Ohio 1997); *State v. Henness*, No. 94APA02-240, 1996 Ohio App. LEXIS 408, at *2–4 (Ohio Ct. App. Feb. 6, 1996).

Since his conviction decades ago, Henness (just like his death-row peers) has eagerly participated in the "guerilla war against the death penalty." Transcript of Oral Argument at 14:21–22 (Alito, J.,), *Glossip v. Gross*, 135 S. Ct. 2726 (2015)). Henness now argues that Ohio's execution protocol—the same protocol upheld time and time again by the Supreme Court and every circuit court to consider it—will cause him too much pain. He brought this §1983 claim to secure for himself the peaceful death he denied to Richard Myers.

Because Henness's *certiorari* petition amounts to a plea for error correction, it is necessary to discuss the proceedings below in some detail.

A. District Court Proceedings.

The State initially scheduled Henness to be executed in January 2019. Hoping to forestall his execution, Henness moved to preliminarily enjoin the use of Ohio's execution protocol. Everyone agreed on the showing that would require: Henness needed to satisfy the "heavy burden," *Fears v. Morgan*, 860

F.3d 881, 886, 890 (6th Cir. 2017) (*en banc*) (internal quotation marks omitted), of identifying a feasible, readily available alternative that the State had no legitimate reason to reject, and that would significantly reduce the risk of severe pain and needless suffering. *Id.* at 886, 890; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019). The District Court determined that Henness failed to make that showing.

1. Henness asked to be put to death with secobarbital, which is the drug that some States (but not Ohio) allow doctors to use in assisted suicides. No State has ever used that drug in an execution. But Henness proposed it nonetheless, arguing that it would cause an almost pain-free death.

In making this argument, Henness relied primarily on the testimony of Dr. Charles D. Blanke, a physician who assists suicides on the West Coast. According to Dr. Blanke, the State could administer secobarbital to an inmate through a nasogastric or orogastric tube—that is, a feeding tube inserted through the nose or mouth. He testified that the median time to death would be approximately twenty-five minutes, though it can take up to fifty-three hours. *See* R.2117, Hearing Tr., PageID#104744–45. (All record citations refer to the record in the District Court.) He further testified that secobarbital is effective, though it does fail to cause death in .6 percent of cases. *See id.* PageID#104645. Neither Dr. Blanke nor any other witness addressed what the State would do with the inmate or witnesses during an hours- or days-long execution, or what it would do in the event the drug did not cause death.

Dr. Blanke additionally testified that Ohio would have little trouble obtaining the drug. He testified that it is available on the open market. *Id.* at PageID#104668. And Henness named under seal three out-of-state businesses, at least one of which Blanke testified would "potentially" be willing to supply Ohio with the drug. *Id.*, PageID#104631–32. Henness did not introduce any evidence from the companies themselves. Nor did he introduce any evidence that these companies would be eligible for the Terminal Distributor of Dangerous Drugs License (sometimes called a "TDDD license") that Ohio requires distributors of such drugs to obtain. Dr. Blanke testified that the license application is easy to complete, *id.*, PageID#104633–34, but he did not explain whether the companies were eligible (or how he would know that), and Henness introduced no evidence regarding how likely applicants are to qualify for and obtain the license.

The State, for its part, disputed the availability and feasibility of secobarbital. The pharmacist for the prison where Ohio performs executions explained that he checked on the availability of secobarbital from the prisons' usual supplier and was unable to obtain it. *See id.* PageID#104553. As for feasibility, another prison official explained that the prison could not possibly accommodate an execution taking anywhere near fifty-three hours: "these drugs, so as I understand it, it could be hours. We don't have the– the–, logistically, we couldn't accommodate that. We couldn't accommodate the witnesses, the team members, the people that are carrying out the process, or the people that we have over in the death

house." *Id.*, PageID#104593. Henness introduced no contrary evidence.

In addition, one of the execution-team members explained that inserting a feeding tube into the throat of an unwilling inmate would be exceptionally difficult. With respect to nasogastric tubes, the inmate can make insertion all but impossible by breaking or injuring his nose before the procedure. *Id.*, PageID#104523. And it would be very difficult to insert either type of tube without the inmate's assistance. If the inmate refuses to swallow, the team may struggle to get the tube into the inmate's stomach. *Id.*, PageID#104522. In trying to force down the tube, the team might force it into the trachea, injuring the inmate. *Id.* What is more, the stimulation from having a tube in the esophagus makes it relatively easy to force oneself to vomit, which could cause the inmate to suffocate before the execution begins. *Id.*, PageID#104523. Dr. Blanke himself conceded that while assistance from the patient is not "absolutely required," the intubation process "will go more easily if the patient swallows." *Id.*, PageID#104663.

2. Most of the debate in the District Court focused on the question whether using midazolam in the three-drug protocol presents a substantial risk of serious pain. Henness argued that the execution would cause "serious pain" in a fully conscious person in two ways. First, the final two drugs in the three-drug protocol would cause serious pain upon being injected. Second, Henness argued that 500 milligrams of midazolam causes "pulmonary edema"—a condition in which the lungs fill with

fluid, causing the inmate to struggle for air. *See* R.2113, Hearing Tr., PageID#104204.

To prove his entitlement to a preliminary injunction, Henness had to show a likelihood of success on the question whether "it is certain or very likely that a 500 mg IV-injected dose of midazolam cannot reduce consciousness to the level at which a condemned inmate will not experience the severe pain associated with" pulmonary edema and the second and third drugs. Pet.App.146a. Henness tried to make this showing in a few steps, relying on expert testimony. First, those experts testified that midazolam is not an "analgesic" drug, meaning it does not, by itself, block the sensation of pain. R.2033-5, Stevens Report, PageID#99110–11. Thus, the inmate's consciousness must be suppressed or he will experience pain during the execution. Second, Henness's experts testified that consciousness and insensateness are different concepts. Thus, one can be "unconscious," or appear unconscious, and yet still feel pain. *See* R.2113, Hearing Tr., PageID#104035–37, 104218, 104304, 104312. Third, the experts testified that "general anesthesia" is the state at which unconsciousness and insensateness converge. *See id.,* PageID#104184–85; R.2117, Hearing Tr., PageID#104441. Finally, the experts opined that nothing short of general anesthesia—unconsciousness plus insensateness—would stop inmates from experiencing the pain of the execution. *See, e.g.*, R.2113, Hearing Tr., PageID#104184.

Every party in this case agrees that, at the very least, a 500-milligram injection of midazolam will "make" an inmate "deeply sedated" and

"nonresponsive to … external stimuli." *Id.*, PageID#104294. Further, Henness's own experts allowed that midazolam is powerful enough to *induce* general anesthesia. But, they explained, it is not powerful enough to *maintain* general anesthesia in the presence of "noxious stimuli." *Id.*, PageID#104196, 104294. And because nothing short of general anesthesia would make inmates completely "insensate," the powerful sedation of midazolam would not stop the inmates from perceiving severe pain. *Id.*, PageID#104183; *accord id.*, PageID#104073, 104309.

The experts conceded that no one has ever tested the effects of 500 milligrams of midazolam—many hundreds of times the therapeutic dose—on the human brain. *See id.*, PageID#104289. Nonetheless, they purported to extrapolate the drug's effect based on evidence identifying a "ceiling effect" at some point before 500 milligrams. *See id.*, PageID#104366. At that point, the midazolam would fully coat all of the relevant receptors in the brain, and adding greater amounts would have no further impact on consciousness. *See id.* And since midazolam does not cause complete insensateness at that level, the experts inferred that it would likewise fail to cause complete insensateness at 500 milligrams.

Henness's experts did not elaborate on what it would be like to "experience" the pain of an execution after being sedated with 500 milligrams of midazolam. For example, they did not explain whether the drug would alter the conscious experience so as to make the pain bearable or to

make the inmate indifferent to pain. Even though it is uncontested the drug has effects on conscious experience, no one at the hearing addressed what this would mean for the inmate's subjective experience. Two of Henness's experts came closest to addressing the issue in their expert reports, where they asserted that an inmate executed without being made fully insensate would feel the "full brunt" or "full force" of the pain, much as a fully conscious person would. *See* R.1952, Lubarksy Report, PageID#80846, 80869; R.1956, Greenblatt Report, PageID#84213. But they did not elaborate on this opinion at the hearing and they did not explain or justify this statement in the reports.

The State responded with the testimony of Dr. Joseph F. Antognini, a board-certified anesthesiologist and editor of a textbook called *Neural Mechanisms of Anesthesia*. R.2120, Hearing Tr., PageID#104822, 104824. Dr. Antognini testified that "five hundred milligrams of midazolam … would render a person unconscious to the extent that they would not be able to sense or experience pain" from the execution. *Id*., PageID#104842. He testified that one of midazolam's risks in the therapeutic context is that it can induce unconsciousness. *Id.*, PageID#104846. Further, the FDA has approved the drug for "sedation" and "hypnosis," *id*., PageID#104857, and doctors in fact use midazolam as the "sole medication" to mitigate pain or sedate patients in unpleasant procedures such as laryngoscopies. *See* R.1983, Antognini Decl., PageID#88444. Dr. Antognini explained that 500 milligrams would induce a deep level of sedation and indeed unconsciousness. And he explained that

"when you reach deeper levels of sedation and unconsciousness, you don't experience pain in the way that we experience pain when we are awake." R.2120, Hearing Tr., PageID#104876–77. While "you may have a reaction, you may—you know, a patient may move or their heart rate may go up, but that doesn't mean that they are experiencing pain." *Id.*, PageID#104877.

3. The District Court denied Henness's request for a preliminary injunction, reasoning that he did not carry his burden of proving a likelihood of success at trial. Pet.App.159a.

The District Court (with a magistrate judge presiding) first found that Henness *would* likely prevail in showing that "Ohio's current three-drug protocol will certainly or very likely cause him severe pain and needless suffering." Pet.App.159a. With respect to midazolam's effect on consciousness, the Court said: "Based on the evidence presented here, both at the December hearing and as designated from prior hearings, the Court finds as a matter of fact that it is certain or very likely that a 500 mg IV-injected dose of midazolam cannot reduce consciousness to the level at which a condemned inmate will not experience the severe pain associated with injection of the" second and third drugs, "or the severe pain and needless suffering that is certain or very likely to be caused by the pulmonary edema which is very likely to be caused directly by midazolam." Pet.App.146a. The court's justification for all this consisted entirely of an appeal to authority. It noted that the "December hearing produced significant new opinion testimony, provided by experts who were not just qualified, but

in many cases preeminent in their fields." Pet.App.145a. These experts "examined the data" and "testified to a consensus about the insufficiencies of midazolam to prevent severe pain and needless suffering." Pet.App.145a. The court did not explain how it knew the expert consensus to be correct or what convinced it that Dr. Antognini was wrong.

The District Court ruled against Henness anyway, reasoning that Henness failed to carry his burden on the question whether execution by secobarbital was a feasible and readily implemented alternative method. For one thing, Henness did "not prove[] that the source(s) he identified for secobarbital is/are presently licensed to sell that drug to the State of Ohio for use in executions or could become so with ordinary transactional effort." Pet.App.166a. Even if he had, he failed to show any likelihood of success on the question whether the secobarbital alternative would "in fact significantly reduce[] a substantial risk of severe pain" relative to the three-drug protocol. Pet.App.157a (quoting *Glossip*, 135 S. Ct. at 2737)). More specifically, even though Henness argued that midazolam results in "severe pain" by causing pulmonary edema, he offered nothing in response to the State's evidence that secobarbital itself causes pulmonary edema. While "Dr. Blanke offer[ed] a conclusory statement in his expert report that '[t]he secobarbital method does not pose a risk of causing acute pulmonary edema,' … he is not a pulmonologist or pathologist" and so "lack[ed] the knowledge to render such an opinion to a reasonable degree of scientific or medical certainty." Pet.App.157a.

Before concluding its opinion, the District Court criticized this Court's *Glossip* decision, arguing that under "the plain language of the Eighth Amendment," the risk of pain alone "should be enough to constitute cruel and unusual punishment." Pet.App.160a. The court recognized, however, that it was bound by *Glossip*'s requirement that death row inmates "plead and prove an appropriate alternative method of execution." Pet.App.160a. Henness failed to do that.

B. Sixth Circuit Proceedings.

1. Henness appealed. The Sixth Circuit unanimously affirmed. But unlike the District Court, the Sixth Circuit determined that Henness failed to carry his burden as to *any* element of his method-of-execution claim.

First, the Sixth Circuit determined that, under *Glossip*, "the 'relevant question' is whether the inmate has met his 'heavy burden to show that' the state's chosen method of execution will cause serious pain that the inmate 'is sure or very likely to be conscious enough to experience.'" Pet.App.3a (quoting *Campbell v. Kasich*, 881 F.3d 447, 450 (6th Cir. 2018)). Henness failed to make that showing. For one thing, some of the pain he said the execution protocol would cause (the sensation of suffocation, chest tightness, and so on) resembled the pain associated with hanging, which this Court has said is *not* constitutionally excessive. Pet.App.4a (citing *Bucklew*, 139 S. Ct. at 1123).

Even putting that aside, the Sixth Circuit held, Henness failed to carry his burden because his evi-

dence focused on the pain a fully conscious person would experience from Ohio's protocol. That presents a problem because the first drug in Ohio's protocol is midazolam, a sedative. To prevail, Henness had to prove "that midazolam is incapable of suppressing his consciousness enough to prevent him from experiencing—at a constitutionally problematic level—the pain caused by" the execution. Pet.App.10a. In other words, the "relevant inquiry is whether an inmate injected with 500 milligrams of midazolam would *subjectively experience* unconstitutionally severe pain." Pet.App.10a (emphasis added). Henness "failed to prove" that inquiry "should be answered in his favor." Pet.App.10a. His evidence, to be sure, suggested "that midazolam is incapable of rendering an inmate insensate to pain." Pet.App.10a. But "the Eighth Amendment does not guarantee a prisoner a painless death." Pet.App.10a (citing *Bucklew*, 139 S. Ct. at 1124). "And the fact that midazolam may not prevent an inmate from experiencing pain is irrelevant to whether the pain the inmate might experience is unconstitutional." Pet.App.10a–11a. Because Henness introduced no evidence "showing that a person deeply sedated by a 500 milligram dose of midazolam is [] sure or very likely to experience an unconstitutionally high level of pain," he failed to carry his burden. Pet.App.10a (quotations omitted).

Second, the Sixth Circuit agreed with the District Court that Henness failed to prove the existence of a feasible, readily implemented alternative. Henness failed to show the drug can be readily implemented, because he failed to show Ohio could get it through ordinary transactional effort: "He pointed to a single

vendor but offered no evidence that the vendor would be willing to supply secobarbital for executions as opposed to assisted suicides," or that the vendor had the licenses needed to distribute the drugs in Ohio. Pet.App.5a. "Even if the State could obtain the drug, carrying out the execution would raise still more complications." Pet.App.5a. For one thing, "[i]nmate resistance could make the procedure next to impossible or at the least unseemly." Pet.App.6a. And the drug can "take over two days to cause death or might not cause death at all, a contingency and risk that Henness" failed to "account for." Pet.App.6a. The District Court thus correctly concluded that death by secobarbital was not feasible and capable of being readily implemented.

Finally, the proposed alternative failed as a matter of law because no State has ever used secobarbital in an execution. Under this Court's *Bucklew* decision, "a state may decline to utilize an alternative method of execution" as "long as the state has a legitimate reason for doing so, and 'choosing not to be the first [state] to experiment with a new method of execution is a legitimate reason to reject it.'" Pet.App.11a (alteration in original) (quoting *Bucklew*, 139 S. Ct. at 1128–30). That principle independently defeated Henness's claim. *See id.*

2. Henness received a two-week extension of time in which to file an *en banc* petition. Minutes before the deadline to file, Henness filed a petition double the permitted length. The Sixth Circuit refused to accept his filing. Henness filed a petition for an appropriate length the next day, and moved for permission to file late. The Sixth Circuit granted his re-

quest. After the Sixth Circuit amended its opinion, Henness sought (and received) another extension of time, and filed another *en banc* petition. The Sixth Circuit denied his request for *en banc* rehearing.

REASONS FOR DENYING THE WRIT

The Sixth Circuit properly denied relief to Henness. But more relevant here, the Sixth Circuit announced three separate grounds for denying Henness relief. If the Sixth Circuit got even one of its three alternative holdings right, this Court will have to affirm, making it unnecessary to address any other issues. That makes this an exceptionally poor vehicle for addressing the proper test for method-of-execution claims. In any event, this case does not even present a split in need of the Court's resolution.

I. THE SIXTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS

The Sixth Circuit correctly affirmed the District Court. To prevail on a method-of-execution case, an inmate must propose an alternative method of execution and "show that his proposed alternative method is not just theoretically 'feasible' but also 'readily implemented.'" *Bucklew*, 139 S. Ct. at 1129 (quoting *Glossip*, 135 S. Ct. at 2737). "This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'" *Id.* (quoting *McGhee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017)). Thus, the inmate must provide precise details concerning the manner, concentration, and duration of time in which the drugs are to be administered. He must also provide details regarding "how the State might ensure the safety of the execution

team," *id.*; identify a means by which the State can "obtain the drugs [through] ordinary transactional effort," *Fears v. Morgan (In re Ohio Execution Protocol)*, 860 F.3d 881, 891 (6th Cir. 2017) (*en banc*); and provide any other details the State would have to sort out before using his preferred method, *see Bucklew*, 139 S. Ct. at 1129. Even if the inmate does all that, he must also establish that the State lacks a "'legitimate' reason for declining to switch from its current method of execution." *Id.* at 1129–30.

Henness proposed below, and proposes here, that he be executed with secobarbital. But Henness failed to prove *any* of the elements of a successful method-of-execution claim: Ohio has a legitimate reason not to use secobarbital; the State cannot feasibly use secobarbital and the drug cannot be readily implemented; and Ohio's current protocol does not subject Henness to serious pain.

A. Henness is not entitled to relief.

1. Legitimate reason not to use. Henness proposes just one alternative method at this stage: he wants to be executed by secobarbital. But no State has *ever* carried out an execution with secobarbital. That defeats Henness's claim "as a matter of law." *Bucklew*, 139 S. Ct. at 1129–30. As *Bucklew* held, States may reject any method of execution if they have a "legitimate" reason to do so, and "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." *Id.* at 1130. While the "Eighth Amendment prohibits States from dredging up archaic cruel punishments or perhaps inventing new ones," it "does not compel a State to adopt 'untried and untested' (and thus unu-

sual in the constitutional sense) methods of execution." *Id.* (quoting *Baze*, 553 U.S. at 41 (plurality)).

Given the great deal of uncertainty regarding secobarbital's suitability for executions, *see below* 19–23, the State has a legitimate reason for sticking with the tried and true over the untried and untested.

2. Feasibility and Ready Implementation. Assuming Henness can get past this initial hurdle, his claim fails anyway because the State cannot feasibly use secobarbital in executions. Some States allow the use of secobarbital in physician-assisted suicides. No State permits its use in executions. That is a good indication that secobarbital cannot feasibly be used in executions. After all, "[f]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite," searching for methods of execution that *decrease* the condemned inmate's discomfort. *Bucklew*, 139 S. Ct. at 1124. Thus, if secobarbital really were a feasible, pain-free option, as Henness says, one would expect some State to use it. None has.

The record below confirms that secobarbital is not feasible for use in executions. For one thing, it is undisputed secobarbital can take up to *fifty-three hours* to cause death. Henness's own expert testified to this. *See* R.2117, Hearing Tr., PageID#104745. While the median time to death is twenty-five minutes, *id.*, PageID#104744, the State would have to prepare for a days-long execution every time it administered secobarbital, and half of all executions would take longer than twenty-five minutes. What is the State supposed to do with the prisoner after ad-

ministering the drug but before he dies? Surely inmate cannot be strapped to the gurney for up to fifty-three hours. Neither can they be permitted to walk around the execution chamber, possibly causing themselves harm, threatening the safety of the guards, or threatening witnesses. And what is the State to do with the witnesses to the execution? How can it accommodate them for whatever length of time the execution takes? Henness provided no answer to these questions because there are none. And the unrebutted testimony of the State's witnesses established that Ohio's Department of Rehabilitation and Correction could not accommodate an hours-long—let alone a days-long—execution. *Id.*, PageID#104593. Henness's failure to account for these details defeats his claim. *See Bucklew*, 139 S. Ct. at 1129.

The second problem with secobarbital is that its suitability for use in executions is entirely speculative. In physician-assisted suicide, the patient takes secobarbital because he wants to die. There is no evidence concerning how the process would work in an inmate who wants *not* to die. This may seem like a trivial concern, but it is not; it implicates the question of how to force an inmate to consume, and keep down, lethal medication against his will.

Henness suggests introducing the drug using a nasogastric or orogastric tube—in other words, a feeding tube inserted through the nose or mouth, down the esophagus, and into the stomach. But inserting the tube through the nose or the mouth of a convicted murderer who does not want to die will likely be a difficult task, and perhaps a quite-dangerous one, for prison officials. One member of

the execution team (an EMT) offered unrebutted testimony that establishing a nasogastric or orogastric tube against someone's will is very difficult. "[T]he person has to voluntarily swallow to ensure that [the tube] doesn't go into the person's trachea, which could cause a complication." R.2117, Hearing Tr., PageID#104522. Even Henness's own expert conceded that, while it may not be "absolutely required," a feeding tube "will go more easily if the patient swallows." *Id*., PageID#104663. Then there are the other risks. With an orogastric tube, there is the obvious risk that the inmate will bite those inserting the tube, or bite down on the tube itself, complicating the procedure. And with a nasogastric tube, the inmate could make insertion almost impossible by breaking or mutilating his nose before the procedure. *Id*., PageID#104523.

Even supposing the execution team can get the tube into the stomach against the prisoner's will, the resistant inmate could use the stimulation of the tube in his throat to make himself vomit. In addition to being grotesque—and thus undermining the State's "interest in preserving the dignity of the procedure," *Baze*, 553 U.S. at 57 (plurality)—this creates a serious risk that the inmate might choke to death. *See* R.2117, Hearing Tr., PageID#104523–24. Henness did not offer any evidence to contradict this. He also introduced no evidence that *he* would voluntarily submit to the tube's insertion.

Even if Henness could overcome all this, there would be yet another insurmountable hurdle: secobarbital is not readily available. Henness has not introduced any good evidence that the State will be

able to obtain secobarbital for use in executions. His expert witness, Dr. Blanke, who helps terminally ill patients kill themselves, testified that secobarbital is available on the "open market." *See id.* at PageID#104668. That may be, but so are other drugs that the States have previously used in executions. States cannot obtain those other drugs because death-penalty opponents target the companies who provide such drugs for economic boycotts. *See Fears*, 860 F.3d at 885. So even if doctors can easily obtain secobarbital for assisted suicides, it does not follow that the State can obtain it for executions. Henness introduced no evidence that those who sell on the open market would be willing to sell the drugs for use in executions.

Henness did introduce, under seal, the names of potential sellers. But they are only *potential* sellers—while Henness's expert repeatedly expressed confidence that these sellers would provide the drug, he conceded that this rests on either his own best guess or an out-of-court discussion in which "a local pharmacy in Oregon" said it was "willing to act in such a capacity *potentially*." R.2117, Hearing Tr., PageID#104632 (emphasis added). Aside from his naked assertions and this qualified hearsay statement, there is no evidence that the identified sellers or anyone else would be willing to ship secobarbital to Ohio for use in executions. Henness did not, for example, introduce any evidence from the proposed sellers themselves—apparently based on the misimpression that the sellers were beyond the reach of any subpoena. *See id.*, PageID#104675. All told, Henness introduced no admissible, concrete evidence that any seller, including the ones identified under

seal, are willing to sell secobarbital to the State for use in executions.

Even if the suppliers were willing to sell, Henness presented no evidence that they would be legally eligible to distribute secobarbital into Ohio. To do so, the suppliers would have to obtain a Terminal Distributor of Dangerous Drugs License. Suppliers qualify for those licenses *only if* they meet various legal requirements. *See, e.g.*, Ohio Rev. Code §§4729.54–.55. For example, they must show the Ohio Board of Pharmacy that they use "[a]dequate safeguards" to ensure that they "carry on the business of a terminal distributor of dangerous drugs in a manner that allows pharmacists and pharmacy interns employed by the terminal distributor to practice pharmacy in a safe and effective manner." Ohio Rev. Code §4729.55(D). Henness introduced no evidence *at all* regarding the proposed suppliers' practices or histories. It is therefore impossible to even guess whether the Ohio Board of Pharmacy would find that the suggested suppliers would comply with this or any other legal requirement to distribute dangerous drugs to Ohio. And while Dr. Blanke testified that he personally reviewed the application and found it easy to complete, *see, e.g.*, R.2117, Hearing Tr., PageID#104630–34, Henness introduced no testimony at all regarding the odds of *obtaining* the license after applying. Neither did Dr. Blanke or any other witness explain how he knew that any specific seller would qualify for a license. Once again, Dr. Blanke's assurances rest on nothing but his own say-so.

3. Serious pain. Finally, Henness failed to show that he is "sure or very likely" to experience constitutionally impermissible pain from Ohio's three-drug protocol. As the Sixth Circuit recognized, the key inquiry is what an inmate executed with Ohio's execution protocol will experience *subjectively*—it can hardly be called "cruel" and "unusual" to cause death with an execution protocol that causes painful stimuli of which the inmate is *subjectively* unaware or indifferent. The fact that his brain perceives the stimuli, or that his body reacts, is not troublesome unless the prisoner is aware of the pain. In other words, "consciousness falls on a spectrum," and it is wrong to "treat consciousness as [a] binary" concept, under which individuals either feel no pain at all or "feel pain the same way a conscious person would." *Fears*, 860 F.3d at 890 (internal quotation omitted). Moreover, "General Anesthesia, particularly in the sense of rendering a subject completely insensate to pain, is not constitutionally required." *Campbell*, 881 F.3d at 452 (internal quotation omitted). So the relevant question boils down to this: Did Henness carry his heavy burden of "showing that a person deeply sedated by a 500 milligram dose of midazolam is still 'sure or very likely' to experience an unconstitutionally high level of pain" when executed with Ohio's three-drug protocol? Pet.App.11a (quoting *Bucklew*, 139 S. Ct. at 1124).

No, he did not. Henness's experts dedicated great effort to establishing that midazolam creates a deep level of sedation short of general anesthesia. *See, e.g.*, R.2113, Hearing Tr., PageID#104294; R.2117, Hearing Tr., PageID#104441–42. In other words, they testified again and again that midazolam does

not make the inmate completely insensate, even if it causes or creates the appearance of unconsciousness. *See, e.g.*, R.2113, Hearing Tr., PageID#104036–37, 104185–87, 104272, 104275–87, 104313; *see also* R.1948, Exline Report, PageID#76180; R.1952, Lubarsky Report, PageID#80859; R.1956, Greenblatt Report, PageID#84188. And they testified that anything short of complete insensateness—anything short of "general anesthesia"—would leave the inmate able to experience pain caused by pulmonary edema and by the second and third drugs in the three-drug protocol. *See, e.g.*, R.2113, Hearing Tr., PageID#104183–84; *see also, e.g.*, R.2117, Hearing Tr., PageID#104504–05; R.1952, Lubarsky Report, PageID#80848. But these points are legally irrelevant. The question is not *whether* the inmates experience the pain, but rather what the subjective experience would be like. And on that issue, Henness's evidence is woefully inadequate.

As an initial matter, all parties to this case agree that midazolam has very real effects on one's mental state—it is not as though midazolam's ability to create unconsciousness or alter consciousness to make the execution tolerable is entirely speculative. One of Henness's own experts acknowledged that 500 milligrams of midazolam would make an inmate unconsciousness, even while debating whether the inmate would *remain* unconscious after being exposed to noxious stimuli. *See* R.2113, Hearing Tr., PageID#104294, 104304, R.1952, Lubarsky Report, PageID#80865. And all sides agree that midazolam can be and is used to sedate patients before intensely painful experiences. Thus, as has been true in other cases, "experts for both sides agreed that midazolam

is sometimes used alone for intubation, a medical procedure in which a tube is inserted into a person's windpipe." 860 F.3d at 888; *see also* R.2113, Hearing Tr., PageID#104314–15.

Since midazolam is at least *capable* of altering subjective experience, the question becomes whether an inmate injected with 500 milligrams of an experience-altering drug would subjectively experience the sort of "terror, pain, or disgrace" relevant for Eighth Amendment purposes. *See Bucklew*, 139 S. Ct. at 1120 (internal quotation omitted). Henness largely failed to introduce evidence on the matter. Admittedly, it would be difficult to do so under the current state of science; "there are not now and never will be clinical studies of the effect of injecting 500 mg of midazolam into a person," and "we certainly cannot ask the executed whether they experienced pain after the injection of midazolam." *Fears*, 860 F.3d at 887 (internal omitted). Henness's experts agreed. *See* R.2113, Hearing Tr., PageID#104084. Since no one has ever studied the effects of 500 milligrams of midazolam on subjective experience, it is hard to imagine an inmate establishing a likelihood of success on the question whether sedation with 500-milligrams of midazolam will be "*sure or very likely* to fail to prevent serious pain" of the execution. *Campbell*, 881 F.3d at 453. "Fairly or not, the applicable legal standard requires the plaintiffs to prove their allegations to a high level of certainty," and so this "uncertainty" puts Henness at a serious disadvantage from the outset. *Fears*, 860 F.3d at 887.

The only favorable evidence that Henness introduced relating to subjective experience came in Drs.

Lubarsky's and Greenblatt's expert reports. There, in a few fleeting passages that the doctors never explained during the hearing, they asserted that anyone sedated with 500 milligrams of midazolam would be roused by a "noxious stimuli" such as the pain from pulmonary edema or potassium chloride, thereby experiencing the pain in exactly the same manner as a fully conscious and awake person. *See* R.1952, Lubarsky Report, PageID#80846, 80868–69; R.1956, Greenblatt Report, PageID#84213. The trouble for Henness is that the experts did not explain what they meant by this or how they knew it to be true. The assertions regarding subjective experience are pure *ipse dixit*—the experts provided no explanation, proof, or citations to back up their assertions. If an expert's *ipse dixit* is too unscientific to be admitted into evidence, *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), then it is too unscientific to be credited if it ends up being admitted anyway.

What is more, it is not even clear the expert reports support Henness. They seem to suggest that their conclusions follow from the supposed fact that people sedated with 500 milligrams of midazolam can be roused by noxious stimuli. That is a *non sequitur*. Even if sedated people can be "roused" by noxious stimuli, it does not follow that they will subjectively experience the full force of that stimuli. As *Fears* recognized, and as Henness's own experts conceded, *see, e.g.*, R.2117, Hearing Tr., PageID#104495, consciousness is a "spectrum" rather than a "binary," and so it is wrong to assume "that an inmate sedated with 500 milligrams of midazolam would feel pain *the same way a conscious person would*," 860 F.3d at 890 (emphasis added).

Even if these naked assertions qualify as evidence, they have to be weighed against the contrary testimony of Dr. Antognini, the State's expert, who testified that inmates injected with 500 milligrams of midazolam "don't experience pain in the way that we experience pain when we are awake." R.2120, Hearing Tr., PageID#104877. Dr. Antognini supported this opinion with evidence—specifically, evidence that midazolam can be used *by itself* to attenuate the pain or discomfort associated with intubation. *Id.* at PageID#104861–77. Intubation is an incredibly unpleasant experience. For proof, consider the study of an anesthetic called "isoflurane," which showed that doctors must use *50 percent more* of the drug to blunt the responses to intubation than they need to blunt the responses of "surgical stimulation." *Id.* at PageID#104862. The fact that midazolam functions as a sedative in this setting is strong evidence it would do the same in the context of an execution.

On top of all this, every expert agreed that midazolam affects breathing. Dr. Antognini testified, and it is apparently undisputed, that midazolam depresses respiration. That would mollify the feelings of "air hunger" associated with pulmonary edema, since "it makes no logical sense how, on the one hand, these drugs can stop breathing, and on the other hand, produce the sensation of air hunger." R.1983, Antognini Decl., PageID#88453. If nothing else, Henness never introduced evidence to explain this apparent contradiction. Nor did Henness introduce any evidence on the effects of pulmonary edema itself. Everyone admits that the condition deprives the inmate of oxygen. And there is no dispute that oxygen deprivation can alter one's subjective experi-

ence. Yet Henness's experts had nothing to say about whether the deprivation of oxygen caused by pulmonary edema would alter the subjective, conscious experience of the second and third drugs. Perhaps there is no effect at all, but it was Henness's burden to prove that.

In the end, the record evidence here establishes uncertainty regarding the subjective experience of an inmate injected with 500 milligrams of midazolam. That uncertainty defeats Henness's claim as a matter of law, since (at the preliminary-injunction stage) he had to establish a likelihood of success on the question whether he is "sure or very likely" to prove that the 500 milligram injection of midazolam will leave him "conscious enough" to have a subjective experience that the Eighth Amendment would regard as "serious pain." *Campbell*, 881 F.3d at 450–51.

B. Henness's *certiorari* petition rests on legal and factual mischaracterizations.

Henness's petition for a writ of *certiorari* rests on a series of mischaracterizations, some regarding the Sixth Circuit's decision, others regarding this Court's precedents, and some involving the facts of this case.

1. Henness argued below that midazolam causes a condition called pulmonary edema, which creates "sensations of drowning and suffocation." Pet.App.4a. The Sixth Circuit noted in its opinion that the risk of an inmate's feeling these sensations "looks a lot like the risks of pain associated with hanging"—a constitutional method of execution. Pet.App.4a. Henness spends much of his petition

criticizing this analysis, which he says fails to engage in the "comparative" analysis mandated by *Bucklew*. Petn.12–16.

This portion of the Sixth Circuit's decision is no reason to grant review. For one thing, it is correct: the pain caused by pulmonary edema *does* "look a lot like" the pain that often results from hanging according to this Court's decision in *Bucklew*. Pet.App.4a; *see also Bucklew*, 139 S. Ct. at 1124. More importantly, however, this portion of the Sixth Circuit's decision does not justify review because the court's determination that Henness failed to prove a risk of serious pain did not depend upon it. Henness's petition largely ignores the Sixth Circuit's primary, and independently sufficient, basis for its holding that Henness had failed to carry his burden of proving that the challenged protocol would impose severe pain: Henness failed to introduce evidence regarding the pain an inmate would "subjectively experience" after being injected with 500 milligrams of midazolam. Pet.App.4a. Because Henness failed to introduce evidence regarding the effects of 500 milligrams on the conscious experience, he failed to prove that the drugs used in the protocol, even if they would cause unconstitutional pain or feelings of suffocation in a fully conscious person, would cause such pain—from pulmonary edema or anything else—in a person sedated with midazolam. Pet.App.4a–5a.

2. Henness next criticizes the Sixth Circuit's application of *Bucklew*'s holding that States may *always* reject proposed alternative methods of execution that no other State has adopted. *Bucklew*, 139 S. Ct. at 1129–30. He says this gives States "total

control over the viability of alternative execution protocols," contradicting *Bucklew*'s "'holding that the alternative method of execution need not be authorized under current state law.'" Petn.19 (quoting *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J, concurring)).

This argument mischaracterizes Supreme Court precedent and ignores reality. The mischaracterization arises from Henness's ripping from its context language about methods not "authorized under current state law." 139 S. Ct. at 1136 (Kavanaugh, J., concurring). In the quoted passage, Justice Kavanaugh was explaining that a State's *own* failure to adopt a particular method did not make that method infeasible. *Id.* He was not denying *Bucklew*'s holding that, "as a matter of law," States are always free not to "experiment" with methods of execution that *no State* has adopted. *Id.* at 1129–30 (majority).

The argument ignores reality because it rests on the premise that States are, or may one day, collude to keep from developing less-painful methods of execution. Two centuries of history lay to rest this fear. "Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite," pursuing "technological innovations aimed at making [executions] less painful." *Id.* at 1124.

3. Finally, Henness says the Sixth Circuit "overstated" the burden of identifying an alternative means of execution because it allowed "Ohio to reject as 'unavailable' a drug it has never tried to obtain." Petn.23. This argument forgets that Henness, not the State, bears the burden of proof. So the State does not need to actively pursue whatever alterna-

tive the inmate says he would like. To the contrary, the "*prisoner*" bears the "burden of showing a readily available alternative." *Bucklew*, 139 S. Ct. at 1130 (emphasis added). In arguing otherwise, Henness again rips key language from its context, characterizing *Glossip* as holding that States must make "a good-faith effort" to obtain a drug before it will be deemed unavailable. Petn.24 (quoting *Glossip*, 135 S. Ct. at 2738). *Glossip* says no such thing: the quoted language comes from a passage in which the Court said that, because Oklahoma was "unable to procure" the alternative drugs "despite a good-faith effort to do so," the District Court's unavailability finding was "not clearly erroneous." 135 S. Ct. 2738. The decision nowhere suggests that States *must* make such efforts.

In addition to botching the law, Henness gets the facts wrong. As discussed above, state officials *did* make a good-faith attempt to get the drugs: a state official checked with the State's usual suppliers and learned that secobarbital was unavailable. *See* R.2117, Hearing Tr., PageID#104553. Henness also says that expert testimony "identifi[ed] a vendor ready and willing to sell Ohio secobarbital." Petn.24. That is not true. Again, Henness introduced *no* evidence from the supplier itself, and his own expert testified only that the company was "willing to act" as a seller "*potentially*." R.2117, Hearing Tr., PageID#104632 (emphasis added).

II. THIS CASE DOES NOT PRESENT A GOOD OPPORTUNITY TO REVIEW ANY PARTICULAR ASPECT OF THE *BUCKLEW* TEST.

The general rule in constitutional adjudication is that courts should avoid addressing issues not necessary to the case's disposition. That principle makes this a terrible vehicle for announcing any legal rules governing method-of-execution cases. After all, if the Court agrees with even one of the Sixth Circuit's three alternative holdings, it must affirm, making it unnecessary to reach (and thus necessary not to reach) any remaining parts of the analysis. Given the high likelihood that at least *one* of the Sixth Circuit's three alternative holdings is correct, this case is unlikely to provide an opportunity for addressing any novel legal issues.

III. THERE IS NO CIRCUIT SPLIT REGARDING THE APPLICATION OF *BUCKLEW* TO NEVER-BEFORE-TRIED-OR-ADOPTED METHODS OF EXECUTION.

Henness argues that this case presents a circuit split on the following question: Are States always free, under the Eighth Amendment, not to use a protocol that no other State has used to carry out an execution? *See* Petn.22.

Even if there were a circuit split on this issue, this would be a terrible vehicle for resolving it; as just explained, the Court has no reason to address the split on this issue unless it concludes that the Sixth Circuit erred in its resolution of every other issue.

But there is no circuit split. It would be surprising if there were, because *Bucklew* expressly held a

year and a half ago that "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." 139 S. Ct. at 1130. Henness claims that the Eleventh Circuit refused to apply this aspect of *Bucklew* in *Price v. Commissioner, Alabama Department of Corrections*, 920 F.3d 1317 (11th Cir. 2019) (*per curiam*). There, Henness notes, the Eleventh Circuit said that nitrogen hypoxia may be an alternative means of execution even though no State has ever used it to carry out an execution. *Id.* at 1327–28. As an initial matter, this statement is *dicta*; *Price* ultimately rejected the challenge to Alabama's protocol, meaning its determination regarding the suitability of nitrogen hypoxia as an alternative method of execution was irrelevant to the court's judgment. *Id.* at 1329–31. But even if the *dicta* were a holding, Henness's misses the key distinction between *Price* and this case: in *Price*, Alabama *had already adopted* nitrogen hypoxia as a lawfully authorized method of execution. This, the Eleventh Circuit reasoned, prevented Alabama from relying on *other States*' failure to use nitrogen hypoxia as a legitimate justification for *Alabama's* refusing to do so. *Id.* at 1128. Regardless of whether that analysis is correct, this critical difference distinguishes *Price* from this case: Ohio has not adopted secobarbital as a method of execution, and so *Price*'s logic does not apply to this case. That defeats Henness's claim of a circuit split; there is no indication the Eleventh and Sixth Circuits would reach a different outcome on the facts at issue here.

IV. HENNESS UNREASONABLY DELAYED THE RESOLUTION OF THIS CASE.

This Court has recognized that death-row inmates use late-filed suits "as tools to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134. Henness might not have filed late, but he has repeatedly delayed the resolution of this case. *First*, he successfully opposed the State's attempt to set his Sixth Circuit appeal on an expedited briefing schedule. *See* Docs.16, 18 6th Cir. Docket. *Second*, he sought an extension of time in which to file his opening brief. Doc. 21, 6th Cir. Docket. *Third*, he sought (and received) an extension of time in which to file his *en banc* petition. *See* Docs. 44, 45, 6th Cir. Docket. *Fourth*, after improperly filing a petition more than double the permitted length (three minutes before the deadline), he moved for another extension so that he could file a corrected petition. Doc. 50, 51, 6th Cir. Docket. *Fifth*, after the Sixth Circuit amended its opinion, Henness sought and received an extension of time in which to file a second *en banc* petition. Doc. 60, 62, 6th Cir. Docket. *Finally*, Henness—despite staffing his case with eleven attorneys—waited almost 150 days to file a *certiorari* petition advancing no new arguments.

Delays like these needlessly frustrate crime victims. And they can interfere with the States' efforts to timely mete out justice. (After all, lower courts in the Sixth Circuit might reasonably wish to see what happens in this case before proceeding much further in other cases.) The risk that a grant of *certiorari* might further encourage such behavior counsels against review.

V. IF THE COURT GRANTS REVIEW, IT SHOULD RESTORE THE EIGHTH AMENDMENT'S ORIGINAL MEANING.

It is well established that "a method of execution violates the Eighth Amendment," as originally understood, "only if it is deliberately designed to inflict pain." *Baze*, 553 U.S. at 94 (Thomas, J., concurring). In his *Baze* concurrence, Justice Thomas predicted that the plurality's more-flexible standard would lead to litigation that would "embroil the States in never-ending litigation concerning the adequacy of their execution procedures." *Id*. at 105. Members of the plurality expressed hope that would not happen. *Id*. at 63 (Alito, J., concurring). But twelve years' experience with the guerilla war on the death penalty has proven Justice Thomas right. Until this Court restores the Eighth Amendment to its original meaning, the States will be subjected to an endless stream of suits seeking relief from punishments the Constitution allows. The hard-to-satisfy standard announced in *Baze*, *Glossip*, and *Bucklew* is simply not enough to protect the States' lawful authority to carry out executions without unjustified court intervention. If the Court grants review, the State will argue at the merits stage for a restoration of the Eighth Amendment's original meaning in the method-of-execution context.

CONCLUSION

The Court should deny Warren Henness's petition for a writ of *certiorari*.

Respectfully submitted,

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