No. 20-5243

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

BRIEF FOR THE OHIO JUSTICE & POLICY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Ohio Justice & Policy Center, established in 1997 in Cincinnati, Ohio, is a nonprofit, public-interest organization dedicated to protecting the rights and dignity of incarcerated people. OJPC's mission is to create a fair and redemptive criminal-justice system, not only through direct legal services for affected individuals, but also through public policy advocacy. OJPC, in particular, engages in advocacy related to capital punishment reform; OJPC is a member of The Ohio Alliance for Mental Illness Exemption, which is actively working to eliminate capital punishment for those with severe mental illness in Ohio. OJPC is concerned with the disparate application of capital punishment to people of color and those who are economically disadvantaged.[1]

SUMMARY OF ARGUMENT

The Sixth Circuit took a requirement previously implemented by this Court in method-of-execution challenges and warped it, requiring that a petitioner meet an evidentiary burden far beyond what this Court has ever required or what is constitutionally appropriate. In a method-of-execution challenge, a condemned inmate must propose an alternative execution method that is both "feasible [and] readily implemented." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2737 (2015); *Baze* v. *Rees*, 553 U.S. 35, 52 (2008); *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1121 (2019). The en banc Sixth Circuit has held that "feasible [and] readily implemented" means that states should be able to

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record received timely notice and have consented to the filing of this brief.

obtain the drugs proposed for an alternative execution method with "ordinary transactional effort." *Fears* v. *Morgan*, 860 F.3d 881, 891 (6th Cir. 2017) (en banc).

Here, the Sixth Circuit panel held that Petitioner Warren Keith Henness failed to show his proposed alternative was "feasible [and] readily implemented" because (1) Henness purportedly offered insufficient proof that the vendors he identified would supply the drug for executions; and (2) the vendors did not possess licenses to distribute dangerous drugs in Ohio. *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 291 (6th Cir. 2019).

There are numerous problems with the panel's reasoning. First, this decision eliminates any meaningful burden on the State. Under the panel's rationale, "ordinary transactional effort" essentially means "no effort." This new "ordinary transactional effort" requirement is inconsistent with what this Court has said about the "feasible [and] readily implemented" requirement. And it is not required by *Fears* in which the State undertook more-than-minimum efforts to obtain the proposed drugs.

Second, the Sixth Circuit held that Ohio's own licensing regime—a system that Ohio created and implements—was effectively an absolute barrier to obtaining a feasible alternative. This holding contravenes this Court's precedent. *Bucklew* clarified that States cannot dictate the scope of the Eighth Amendment. 139 S. Ct. at 1128 ("The 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."). But by holding up Ohio's licensing system as an impediment—really the *only* impediment—to Henness's required showing, the

Sixth Circuit allowed Ohio to use its own laws as a shield to constitutional review.

Third, an "ordinary transactional effort" standard should have no place in a method-of-execution challenge in any event. When constitutional rights are at stake, this Court has required the highest standards of the States in numerous contexts. The Eighth Amendment's right to freedom from cruel and unusual punishments should be no different, especially when the States' goal is to end someone's life. Finally, the "ordinary transactional effort" standard is inconsistent with this Court's statements regarding state efforts in finding more humane methods of execution.

OJPC urges this Court to grant Henness's Petition, especially the third question presented, which challenges the Sixth Circuit's erroneous standard for proving the feasibility of an alternative execution method. This case offers an important opportunity for the Court to define its feasible and reasonably implemented standard and thereby protect individuals' Eighth Amendment rights.

ARGUMENT

I. THE "ORDINARY TRANSACTIONAL EFFORT" TEST, AS CONSTRUED BY THE DECISION BELOW, IS CONTRARY TO THIS COURT'S PRECEDENT.

A. This Court has yet to define what good-faith efforts a State must make to obtain a proposed drug.

This Court first introduced the "feasible [and] readily implemented" requirement for a method-of-execution challenge in *Baze v. Rees*, 553 U.S. 35, 49 (2008). But the facts there presented little opportunity for the Court to elaborate on what that requirement actually entails. In *Baze*, the petitioners conceded that Kentucky's then-proposed method of execution—a three-drug combination of sodium thiopental, pancuronium bromide, and potassium chloride—would be humane if Kentucky carried out the procedure effectively. *Id.* at 49. But the petitioners argued that there was a significant risk the procedure would be improperly performed, resulting in severe pain. *Id.* The petitioners alleged that this risk would be eliminated if Kentucky instead used a single dose of sodium thiopental or other barbiturate. *Id.* at 57.

The Court ultimately rejected the petitioners' challenge because "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Id.* at 51. Such a limited burden, the Court warned, would "transform courts into boards of inquiry charged with determining 'best practices' for executions" and "embroil courts in ongoing scientific controversies beyond their expertise." *Id.* It was in

the midst of this discussion, immediately following those warnings, that the Court introduced the requirement that the proposed alternative be "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* at 52.

Although the Court announced the "feasible [and] readily implemented" requirement in *Baze*, the Court did not have the opportunity to explain what it means because the petitioners did not propose alternatives to the lower courts. *Id.* at 56 ("That alternative was not proposed to the state courts below. As a result, we are left without any findings on the effectiveness of petitioners' barbiturate-only protocol. . . ."). The petitioners finally proposed that Kentucky use a single dose of sodium thiopental or other barbiturate only when the case reached this Court. *Id.* As a result, this Court had no evidence before it of how difficult it would be for Kentucky to acquire the necessary doses of the proposed drugs. In any event, since the petitioners suggested that Kentucky use a larger dose of a drug that the State already used in its execution protocol (sodium thiopental), Kentucky presumably had access to the drug. Given the lack of discussion on this point in the trial court, the Court naturally focused its analysis on a different aspect—that the identified proposal failed to significantly reduce the risk of severe pain.

The "feasible [and] readily implemented" requirement next surfaced in this Court's jurisprudence in *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), where this Court indicated that a State should at least make "good-faith effort[s]" to obtain alternative drugs that an inmate proposes. In *Glossip*, the petitioners challenged Oklahoma's proposed execution method—a three-drug cocktail using

midazolam as the sedative—on the basis that midazolam failed to render a person insensate to pain. *Id.* at 2731. As an alternative, the petitioners proposed using either sodium thiopental or pentobarbital in place of midazolam. *Id.* at 2738. But the problem with this proposal was that Oklahoma *had* used those drugs previously and switched to midazolam only because Oklahoma could no longer obtain the others—despite ample effort.

The *Glossip* opinion detailed Oklahoma's—and many other States'—progression through various sedatives as part of a three-drug cocktail. First, Oklahoma used sodium thiopental until the sole American manufacturer ceased domestic production. *Id.* at 2733. The company planned to resume production in Italy, but the Italian government eventually banned the sale of sodium thiopental for export to the United States for use in executions. *Id.* No longer able to obtain sodium thiopental, Oklahoma and other States switched to pentobarbital as the sedative in a three-drug combination. *Id.* But, like with sodium thiopental, pentobarbital too became unavailable: the Danish manufacturer of the drug stopped selling pentobarbital for use in executions. *Id.* And Oklahoma "eventually became unable to acquire the drug through *any* means." *Id.* (emphasis added).

On the availability prong, this Court noted that "[t]he District Court below found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma." *Id.* at 2733–34. The Court accepted the district court's finding—understandably so, as testimony in the district court made clear that Oklahoma had expended sufficient energy to try to find these drugs. As the district court in *Glossip* summarized:

> Attempts to procure pentobarbital and sodium thiopental have been unsuccessful. . . . Director Patton [the director of the Oklahoma Department of Corrections] cannot think of anything he could have done differently in his efforts to get these drugs and the Court credits this testimony. The DOC talked to numerous pharmacies . . . in its efforts to procure pentobarbital and sodium thiopental, either commercially manufactured or compounded. These efforts were not successful. Sodium thiopental and pentobarbital are certainly known alternatives, but it is equally clear that they're not available to the DOC.

Id., Joint App'x 1 at 67–68.

In the end, except for requiring "good-faith" effort on the part of the State, *Glossip* shed little light on defining the lower limit—or the bare minimum effort a State must put forth—to satisfy its part of the "feasible [and] readily implemented" requirement because, whatever the minimum requirement is, Oklahoma certainly met or exceeded it. Indeed, although the Court concluded that these drugs were unavailable to Oklahoma despite a "good-faith effort," *id.* at 2738, the facts and circumstances make clear that sodium thiopental and pentobarbital were unavailable to Oklahoma despite even a strenuous effort. The Court itself concluded that these drugs were unavailable to Oklahoma by "any means"; as the district court noted, the Oklahoma Department of Corrections reached out to "numerous" pharmacies,

including compounding pharmacies, and the Director could not "think of anything he could have done differently" in his efforts to obtain the drugs.

This Court delved more into what it means to be "feasible [and] readily implemented" in *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019). There, the petitioner alleged that Missouri's execution method—specifically the use of pentobarbital as the sedative—was unconstitutional as applied to him due to his specific medical condition, which would cause him unique pain. *Id.* at 1121. In making this challenge, the petitioner first refused to name an alternative in the district court. *Id.* But after a warning by the district court that his continued refusal would result in immediate dismissal and the Eighth Circuit's express instructions on remand—and after the district court gave him "one last opportunity" to propose a different method—he finally named execution by nitrogen gas as his proposed alternative in his fourth-amended complaint. *Id.*

The Court found that this alternative, death by nitrogen gas, was neither "feasible" nor "readily implemented." *Id.* at 1129. The petitioner had "presented no evidence on essential questions like how nitrogen gas should be administered, (using a gas chamber, a tent, a hood, a mask, or some other delivery device)," nor did he propose "in what concentration (pure nitrogen or some mixture of gases)" the gas should be administered, nor how the State would "ensure the safety of the execution team." *Id.* Ultimately, the Court concluded that "[i]nstead of presenting the State with a readily implemented alternative method, Mr. Bucklew . . . points to reports from correctional authorities in other States indicating

that additional study is needed to develop a protocol for execution by nitrogen hypoxia." *Id.*

The Court thus found fault with nitrogen hypoxia due to a lack of essential details in the plan for implementing that method. For this reason, the Court did not discuss how difficult it would be for the State to obtain the nitrogen for use in such an execution.

Bucklew did, however, make two things clear. *First*, the Court reiterated *Glossip*'s proposition that a state must take at least "good-faith" steps to acquire the drugs. *Id.* at 1125. *Second*, the Court held that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State law." *Id.* at 1128; *see also id.* at 1136 (Kavanaugh, J., concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law. . . ."). Proposed alternative methods of execution are thus necessarily not limited to those methods that require little to no effort for a State to implement. After all, if a State may be required to use a method currently unauthorized by a State's statute, it stands to reason that a State could have to exert more effort to switch methods than what Ohio did here, *i.e.*, making a single phone call—both in, presumably, changing its statute and in implementing the previously unauthorized method.

B. The Sixth Circuit turns "feasible [and] readily implemented" into "ordinary transactional effort."

The Sixth Circuit introduced its "ordinary transactional effort" requirement in *Fears* v. *Morgan*, 860 F.3d 881, 885 (6th Cir. 2017) (en banc). There, the

plaintiffs challenged Ohio's three-drug cocktail using midazolam as the sedative, the same method that Henness challenges. *Id.* But the plaintiffs in *Fears* supported their challenge with less robust evidence and proposed different alternative execution methods than what Henness now puts forth: the *Fears* plaintiffs suggested that Ohio use a one-drug injection of either sodium thiopental or pentobarbital—the same drugs that this Court noted in *Glossip* were unavailable to Oklahoma—as the method of execution. *Id.* at 890.

The district court found the alternative-means prong satisfied because "'there remains the possibility' that Ohio can obtain the active ingredient of pentobarbital and have it made into injectable form by a compounding pharmacy." *Id.* The Sixth Circuit rejected the district court's "remaining possibility" test, explaining that this Court's "feasible [and] readily implemented" requirement means that Ohio need exert no more than "ordinary transactional effort" to obtain the alternative drugs. *Id.* at 891. But crucially, the Sixth Circuit declared that, even under the "ordinary transactional effort" requirement, "Ohio need not already have the drugs on hand." *Id.* at 891.

The Sixth Circuit then detailed the efforts that Ohio had taken to try to obtain these drugs. To obtain pentobarbital, for example, (1) Ohio would need to receive an import license from the DEA; (2) Ohio's license had been pending with the DEA for four months without action; and (3) Ohio was unsure whether the DEA would approve its application or even when the decision would be made. *Id.* at 890–91. In addition, the plaintiffs' expert was unable to identify any manufacturers or suppliers who were willing to sell those drugs to Ohio for lethal injection

purposes—understandably so, as the drugs at issue were the same drugs that that this Court, in *Glossip*, had already determined were unavailable to Oklahoma. *Id.* The Sixth Circuit further observed that Ohio made efforts beyond applying for a DEA import license; Ohio contacted the departments of correction in Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida to ask about using those States' supplies, but all refused. *Id.* at 892.

In *Fears*, therefore, Ohio *had* made more than a minimum effort to obtain the proposed drugs, though those efforts yielded no results. The efforts that Ohio exerted suggested more than "ordinary transactional effort." Indeed, Ohio's effort in *Fears* is made all the more substantial because Ohio was trying to obtain the same two drugs that this Court had already clarified in *Glossip* were "unavailable" to the States—sodium thiopental and pentobarbital.

C. The panel decision below takes "ordinary transactional effort" to mean "no effort."

In this case, the court of appeals has twisted the "feasible [and] readily implemented" requirement into something far beyond what this Court has ever held, and something far beyond even what the Sixth Circuit en banc court described in *Fears*. Now, "ordinary transactional effort" means little more than checking in only with the first pharmacy that comes to mind.

The Sixth Circuit panel declared that using Henness's proposed alternative, secobarbital, came with a "host of complications" because Henness "offered no evidence that the vendor would be willing to supply secobarbital for executions as opposed to assisted suicides [and] Henness offered no evidence

that the vendor met the requirements for a license to distribute dangerous drugs in Ohio." *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 291 (6th Cir. 2019). In sum, then, the Sixth Circuit found that Henness's proposed alternative was not "feasible [and] readily implemented" essentially because Henness had not placed the drug, metaphorically, in Ohio's lap.

The panel has taken the Court's "feasible [and] readily implemented" requirement and defined that as effectively *no* effort at all. This does not follow from anything that this Court has said.[2] In *Baze*, the Court had little opportunity to discuss this requirement because the petitioners failed to present their alternative to the trial court. In *Glossip*, the Court suggested that at least a good-faith effort was required, and the record makes clear that Oklahoma exerted real effort in trying to find the drugs at issue, with the Director of the Department of Corrections testifying that he could think of nothing he could have done differently to obtain the drugs. And in *Bucklew*, though the Court did not reach this precise question and only reiterated *Glossip*'s good-faith effort requirement, its clarification that "feasible [and] readily implemented" methods of execution are not

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[2] Nor does the panel's decision follow from *Fears*. In *Fears*, the Sixth Circuit only rejected the "remaining possibility" standard proposed by the district court and clarified that Ohio's efforts—applying for a DEA export license that remained pending for months and reaching out to numerous other States in an attempt to obtain the drugs—was sufficient to show that the proposed alternatives were unavailable to Ohio. 860 F.3d at 890–91. But holding that an alternative proposal is not "feasible [and] readily implemented" because Ohio would have to take some measures to implement it, as the panel here reasoned, drops the State's responsibility to an all-time low, one not contemplated even in *Fears*.

limited to those currently authorized by a State's execution statute suggests that States need to exert more than a minimal effort to comply with the Eighth Amendment. After all, altering its method-of-execution statute through a State's legislative process alone is more than minimal work.

II. HOLDING THAT COMPLIANCE WITH A STATE'S LICENSING SCHEME PREVENTS AN ALTERNATIVE FROM BEING FEASIBLE ALLOWS THE STATE TO DICTATE THE SCOPE OF THE EIGHTH AMENDMENT.

The Sixth Circuit held that Henness's proposed alternative was not "feasible [and] readily implemented," in part due to Ohio's pharmaceutical licensing system. *In re Ohio Execution Protocol Litig.*, 946 F.3d at 291 ("Henness offered no evidence that the vendor met the requirements for a license to distribute dangerous drugs in Ohio."). But this rationale—that an Ohio-created barrier can impede a finding that Ohio violated Henness's Eighth Amendment rights—follows the same faulty logic that this Court expressly rejected in *Bucklew*.

In *Bucklew*, the Court clarified that States cannot control the scope of the Eighth Amendment. 139 S. Ct. at 1128 ("The 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."). Understanding why the *Bucklew* opinion made that specific statement—and why the panel decision here is inconsistent with *Bucklew*—requires first understanding *Arthur* v. *Dunn*, 137 S. Ct. 725 (2017) (Sotomayor, J., and Breyer, J., dissenting from denial of certiorari).

In *Arthur*, the petitioner challenged Alabama's method of execution via a three-drug cocktail using midazolam. *Id.* at 726. The petitioner proposed, as an alternative, execution by firing squad. *Id.* at 728. But the Eleventh Circuit rejected that alternative as unfeasible because Alabama's method-of-execution statute did not permit death by firing squad. *Id.* at 729. So that method was, according to the Eleventh Circuit, "beyond [the Department of Corrections'] statutory authority." *Id.* (quoting *Arthur* v. *Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1320 (11th Cir. 2016)).

This Court declined to review that case. But members of this Court dissented from the denial of certiorari, raising the concern that the Eleventh Circuit's rationale meant that a State's refusal to include a certain method in its method-of-execution statute insulated the State's chosen method from review under the Eighth Amendment. *Id.* ("The decision below turns this language [from *Baze*] on its head, holding that if the State *refuses* to adopt the alternative legislatively, the inquiry ends. That is an alarming misreading of *Baze*."). As the dissent from the denial of certiorari clarified, "we have interpreted the Eighth Amendment to entitle prisoners to relief when they succeed in proving that a States' chosen method of execution poses a substantial risk of severe pain and that a constitutional alternative is 'known and available' . . . The States have no power to override this constitutional guarantee." *Id.* at 730.

Bucklew thus responded to the dissent's concern in *Arthur* by expressly clarifying that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State law." *Bucklew*, 139

S. Ct. at 1128; *see also id.* at 1136 (Kavanaugh, J., concurring) ("[T]he Court's additional holding that the alternative method of execution need not be authorized under current state law [is] a legal issue that had been uncertain before today's decision." (citing *Arthur*, 137 S. Ct. at 729–731)).

The panel decision contravenes *Bucklew*'s ruling. Here, the Sixth Circuit held that Ohio would need to exert more than ordinary transactional effort to obtain secobarbital, in part, due to Ohio's licensing system for dispensing such drugs. *In re Ohio Execution Protocol Litig.*, 946 F.3d at 291. But Ohio created that system. And saying that an alternative is not feasible due to roadblocks created by a State's law is no different than saying, as the Eleventh Circuit did in *Arthur*, that an alternative is not feasible due to a State's method-of-execution statute. This Court has held that States do not have the power to create barriers to constitutional review by their method-of-execution statute. And like a method-of-execution statute, a State's licensing system is a factor internal to a State, as distinguished from external factors beyond the State's control. States should thus similarly be unable to create barriers to constitutional review by their own licensing systems.

III. THE EIGHTH AMENDMENT DEMANDS MORE THAN AN "ORDINARY" EFFORT.

This Court holds the States to the highest standards in numerous contexts. To convict a person of a crime, a State must prove their guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). To impose a content-based restriction on a person's speech, a State must satisfy strict scrutiny and prove both a compelling state interest and narrow tailoring

to serve that interest. *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

Like the rights protected under the First Amendment or the Due Process Clause, the Eighth Amendment's right to freedom from cruel and unusual punishment is not only outlined in the Bill of Rights but also incorporated against the States. In *Robinson* v. *California*, this Court ruled that California could not convict a person based on their "status" as a narcotic addict, holding that punishment on that basis "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." 370 U.S. 660, 667 (1962).

In determining that the Fourteenth Amendment itself prohibits "cruel and unusual" punishment, the Court upheld the importance—the fundamental nature—of that right. This Court's incorporation rationale has varied, but including a right within the bounds of due process can mean one of several things. First, the right could be an "immutable principle[] of justice which inhere[s] in the very idea of free government which no member of the Union may disregard." *Twining* v. *New Jersey*, 211 U.S. 78, 102 (1908). Or the right might be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934). Or the right could be one of "'the very essence of a scheme of ordered liberty' and essential to 'a fair and enlightened system of justice.'" *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). The right might otherwise be "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 238 (1897). Whatever the rationale, incorporating the right to

freedom from cruel and unusual punishment in the Fourteenth Amendment boils down to a simple idea—this right is fundamentally important.

But instead of requiring efforts in line with the high standards that protect other fundamental constitutional rights, the panel decision makes the "feasible [and] readily implemented" requirement the lowest of obstacles for a State to overcome. The Sixth Circuit's interpretation of "feasible [and] readily implemented" as against Henness's proposal is most akin to rational basis review. As this Court has said, "[a]lmost all laws . . . would pass rational basis review." *District of Columbia* v. *Heller*, 554 U.S. 570, 629, n. 27 (2008). Likewise, under the panel's logic, almost any obstacle to Ohio's procurement of secobarbital, no matter how small, would be allowed to stand in the way of that method being "feasible [and] readily implemented." That logic is inconsistent with this Court's determination that the right to freedom from cruel and unusual punishment is such an "immutable principle[] of justice" or "so rooted in the traditions and conscience of our people to be ranked as fundamental," among other rationales, that it deserves inclusion in the Fourteenth Amendment.

There is no reason unique to the Eighth Amendment justifying a departure from this Court's (normally high) standards in decisions involving other rights protected by the Bill of Rights and incorporated against the States. To the contrary, "death is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina*, 428 U.S. 280, 303–04 (1976). Allowing the Sixth Circuit's rationale to stand is to sanction the Eighth Amendment as a disfavored right. Members of this Court have criticized such treatment of the Second

Amendment. See, *e.g.*, *Silvester* v. *Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari) ("[A]s evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court."); *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (rejecting arguments that would treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause"); *Peruta* v. *California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."). The Sixth Circuit's treatment of the Eighth Amendment in this case warrants similar criticism.

IV. THE SIXTH CIRCUIT'S "NO EFFORT" RATIONALE IS INCONSISTENT WITH THIS COURT'S PROFESSED CONFIDENCE IN STATES' EFFORTS TO FIND MORE HUMANE METHODS OF EXECUTION.

Not only does the Sixth Circuit's "no effort" standard directly conflict with this Court's precedents, but it also runs contrary to fundamental assumptions underlying this Court's method-of-execution case law. This Court has emphasized, time and again, that it believes that the States are trying in earnest to find more humane methods of execution. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1124 ("Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite, exactly as Justice Story predicted. Through much of the 19th century, States experimented with technological innovations aimed at making hanging

less painful."); *Glossip*, 135 S. Ct. at 2731–32 (reporting various States' progress towards more humane methods of execution); *Baze* 553 U.S. at 51 ("[T]he States have . . . an earnest desire to provide for a progressively more humane manner of death."); *id.* at 40–41 ("As is true with respect to each of these States . . . Kentucky has altered its method of execution over time to more humane means of carrying out the sentence."); *id.* at 62 ("Our society has nonetheless steadily moved to more humane methods of carrying out capital punishment. . . . our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate . . . to ensure humane capital punishment.").

But the Sixth Circuit's opinion clashes with this ideal. The Sixth Circuit held that death by secobarbital is not "feasible" because Ohio could not obtain it with "ordinary transactional effort"—even though Ohio had failed even to contact the willing suppliers that Henness identified. *In re Ohio Execution Protocol Litig.*, 946 F.3d at 291. Holding Ohio to such a low standard—allowing the State to make *no* effort—does not comport with what this Court has said regarding the States' desire to find more humane methods of execution.

Indeed, Ohio's response to the petition for a writ of certiorari shows how the Sixth Circuit's interpretation of the "ordinary transactional effort" requirement has warped the State's perception of its own responsibilities. As its sole evidence that it made some effort to obtain secobarbital, Ohio says that "[t]he 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." (Ohio Br. in Opposition at 6.) In other words, Ohio made a single phone call, even when alternative pharmacies were suggested to it. Is making a single phone call to the "usual supplier," even when presented with alternate sources, really all that this Court will require when a State wants to end someone's life? This Court's professed confidence in the States demands more.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can address all three questions presented and define the efforts that States must make to implement proposed alternative methods of execution.

Respectfully submitted,

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