

*****THIS IS A CAPITAL CASE*****

*****EXECUTION SCHEDULED FOR DECEMBER 9, 2021, AT 10:00 A.M.*****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BIGLER JOBE STOUFFER,

Petitioner,

v.

SCOTT CROW, ET AL.,

Respondents.

Emergency Application for Stay of Execution

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Counsel for the State has informed the undersigned that the State intends to begin the execution of Bigler Jobe Stouffer (“Stouffer”) at the appointed time, even if this application remains pending. In light of the State’s intention, if the Court is unable to resolve this application by 8:00 p.m. CST (9:00 EST), on December 8, 2021, it should grant a temporary stay while it considers the application.

JURISDICTION AND ORDERS APPEALED FROM

This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651 and Supreme Court Rule 23. The Application follows a Per Curiam Order of the Tenth Circuit Court of Appeals, in *Stouffer v. Crow, et al.*, Case No. 21-653, dated December 6, 2021, and an Order on Preliminary Injunction, entered by the United

States District Court, Western District of Oklahoma, in *Stouffer v. Crow, et al.*, Case No. Civ. 21-100-F, dated November 23, 2021.

I. INTRODUCTION

Less than three months ago the State of Oklahoma decided to disregard its longstanding, clear and unambiguous promise not to schedule executions in Oklahoma until challenges as to the constitutionality of legal injection protocol had been resolved. It did so more than seven years after the disastrous execution of Clayton Lockett on April 29th, 2014, nearly seven years after Stouffer had first been assured that his objections to the protocol would be considered in tandem with those filed by other death row prisoners in 2014, six years after the State agreed to suspend executions until it could revise its protocol, and more than a year after the State reiterated its promise not to schedule executions during the time the constitutionality of its protocol remained in doubt.

When Stouffer immediately filed suit seeking to enforce the promises the State had made, the State, with no sense of irony, has described Stouffer's request as a "...the quintessential last-minute execution challenge that the Supreme Court has repeatedly condemned". Of course, the timing at issue here is not whether Stouffer should have sought relief sooner, but whether the State can provide any rational basis for its insistence that Stouffer be executed prior to resolution of serious and unresolved questions as to its constitutionality remain.

In fact, Stouffer's request for relief bears no resemblance to cases in which this Court has, in dicta, expressed concerns about timing. Of course, this Court has never written into its death penalty jurisprudence a rule allowing any court to

refuse to consider an argument based solely on when the claim was filed in relation to the date set for an execution.

The issues raised by Stouffer in this request have never been presented to this or any other Court and, as such, are sui generis. To allow the execution of Stouffer to proceed under the undisputed facts set forth herein would be without precedent.

II. MATERIAL FACTS

Glossip v. Chandler (Civ. No. 14-cv-665-F, U.S. District Court, W.D. Oklahoma) (“*Glossip*”) was filed in 2014, challenging the constitutionality of Oklahoma’s legal injection protocol (“protocol”). When *Glossip* was filed, Stouffer was on death row inmate in Oklahoma but was not included as a named plaintiff, even though he too contended in 2014, and continues to contend, that the protocol is unconstitutional. On December 11, 2014, Stouffer filed a pro se “Motion for Additional Plaintiff”. (Doc. 010110610785 at p. 134) After the State objected to Stouffer joining the *Glossip* action, the district court denied Stouffer's motion in an order dated December 22, 2014. (*Id.* at 136-143) The order included language assuring Stouffer that even though he would be denied entry into the *Glossip* case, he would be the beneficiary of any ruling in that case and his interests would be protected, to wit:

Mr. Stouffer states no grounds for relief which indicate that he must be a named plaintiff in this action in order to receive the benefit of any ruling which might arguably benefit the named plaintiffs, whether at this or a later stage. Mr. Stouffer identifies no exigencies which pertain to his personal situation and which might suggest the need to allow him to intervene. (Id. at 143)

In his affidavit submitted in support of his request for an injunction, Stouffer described the district court’s language quoted above to be “especially significant and

important” to him and that he relied on it. In other words, Stouffer believed that he would, indeed, “*receive the benefit of any ruling which might arguably benefit the named plaintiffs, whether at this or a later stage*”. (Doc. 010110610785, at pp. 715-716, ¶¶ 8-9) Stouffer’s affidavit also explained that based on his understanding that his complaints about the Oklahoma death penalty procedures would be litigated and resolved in *Glossip*, he diligently reviewed materials filed in that case and routinely discussed the case with the *Glossip* plaintiffs. (Doc. 010110610785, at p. 716, ¶ 10).

On October 16, 2015, the parties in *Glossip* presented a “Joint Stipulation” (Doc. 010110610785, pp. 145-148), which included the following: “It would be in the interests of judicial economy and comity for the Oklahoma Attorney General **not to seek an execution date** from the Oklahoma Court of Criminal Appeals **for any of the Plaintiffs or any other condemned prisoners** until after counsel for Plaintiffs are provided the following. ...”. (Emphasis added). The Joint Stipulation allowed Oklahoma to begin requesting execution dates 150 days after it had provided the information described in the Joint Stipulation. An Order approving the Joint Stipulation was entered the same day. (Doc. 010110610785, pp. 151-153)

Stouffer’s understanding that a date for his execution would not be set was confirmed when he received a “Notice Pursuant to 22 O.S. 2011, § 1001.1, Regarding Execution Date” in his case pending in the Oklahoma Court of Criminal Appeals (“OCCA”) (Case No. D-2003-277). In that notice, the State represented that its obligations under the Joint Stipulation and Order had not yet been met and, as such, “the setting of Stouffer’s execution date by this Court is not appropriate at this time.” (Doc. 010110610785, pp. 155-158)

Nearly three years later, in approximately February 2020, the State had met the obligations set forth in the Joint Stipulation, entitling it to begin scheduling executions 150-days later. The following month, during an unreported status conference on March 11, 2020, the district court requested that the State agree not to set any execution dates until *Glossip* had been decided. The Attorney General for the State personally attended the March 11, 2020, status conference, and informed the Court it would agree with the district court's request. (Doc. 010110610785, pp. 445:10-446:10)

During a May 5, 2020, hearing in *Glossip*, counsel for the plaintiffs requested that the State confirm on the record that it would not seek execution dates until the objections to the Oklahoma protocol had been decided:

MR. COHEN:

I would like to address and perhaps by agreement get some confirmation that the State will not seek execution dates until after this case has been completed. I think that makes sense. I think it's fair. I think it's reasonable. And I just wanted to throw it out there as --

THE COURT: Well, I'm not even going to invite the defendants to respond to that because I had the representation last March from none other than the Attorney General of Oklahoma that that would not happen. And if we should have any indication that that will happen, I will be, to put it mildly, immediately available, so it's not necessary to address that.

MR. COHEN: Thank you, Your Honor.

THE COURT: Anything further this afternoon from the defendants?

MR. CLEVELAND: No, Your Honor.

THE COURT: Very well. Court will be in recess.

(Doc. 010110610785, pp. 194:12-195:7 (emphasis added))

Had the commitment made by the State not applied to Stouffer, the State would have been required by statute to request the Oklahoma Court of Criminal Appeals set a date for his execution after the 150-day period had passed. It did not do so, again confirming to Stouffer that the promise made by the State in March, 2020 applied to him.

Over a year later, on August 11, 2021, the district court ruled on a Motion for Summary Judgment filed by the *Glossip* defendants. The Summary Judgment Order found contested material facts precluding dismissal of the Eighth Amendment challenge. The district court granted Summary Judgment as to six of the thirty-two *Glossip* plaintiffs. based on its belief that to state a method-of-execution claim, each plaintiff was required to affirmatively and irrevocably designate a method of execution, and to waive any claim as to the constitutionality of the method selected. Finding the failure or refusal of six of the *Glossip* plaintiffs to make the designation in the form prescribed by the court to be dispositive, the district court granted the State's motion and dismissed the six from the case. (Doc. 010110610975, pp. 2683-2715)

Two weeks later, on August 25, 2021, the State filed a Notice requesting execution dates for the six *Glossip* plaintiffs whose claims had been dismissed. The same day, the State filed a Notice also asking for an execution date for Stouffer. (Doc. 010110610785, pp. 197-199) Attached to the August 25, 2021 Notices, including Stouffer's, as the only exhibit, was a copy of the Summary Judgment Order entered by the district court in *Glossip*. (Doc. 010110610785, pp. 200-242) On September 20, 2021, over Stouffer's objection, his execution was scheduled for December 9, 2021. (Doc. 010110610785, pp. 244-246, 682-686)

When Stouffer learned that the State of Oklahoma intended to proceed with his execution when it had earlier promised not to do so, he was “shocked and dismayed.” (Doc. 010110610785, p. 719, ¶ 19) That was because since the denial of his 2014 motion to join in *Glossip*, he had, in fact, been treated in all material respects as a named plaintiff.

Three weeks later, on October 12, 2021, Stouffer filed a Complaint alleging that the protocol was unconstitutional, and shortly thereafter filed a Motion requesting an injunction prohibiting the State from proceeding with his execution. (Doc. 010110610785, pp. 7, 14, 25-107, 108-457) Out of an abundance of caution, Stouffer included in his affidavit his election of an alternative method for his execution, and agreed not to challenge the constitutionality of that method. (*Id.*, p. 720, ¶ 20). Stouffer’s choice satisfied in every respect the conditions imposed by the district court in *Glossip* in order to have their constitutional objections to the protocol proceed to a trial on the merits.

A hearing on Stouffer’s request for injunctive relief occurred on November 22, 2021. In its ruling announced the next day, the district court denied Stouffer’s request. In so doing, the district court committed legal error by incorrectly applying the law of promissory estoppel and equal protection to a set of undisputed facts.

On December 6, 2021, a three-judge panel of the 10th Circuit Court of Appeals denied Stouffer’s Emergency Motion for Stay based on a sua sponte and erroneous application of its Rule 8.1. Specifically, the order found that Stouffer had “failed to address” three of the factors enumerated in Rule 8.1, namely:

(C) the threat of irreparable harm if the stay or injunction is not granted;

(D) the absence of harm to opposing parties if the stay or injunction is granted;

and

(E) any risk of harm to the public interest.

In fact, Stouffer's Motion clearly alleged that his execution would cause irreparable harm by denying him his constitutional right to challenge the Oklahoma lethal injection protocol. In the second sentence in his Motion Stouffer stated:

If allowed to proceed, Stouffer will be the only condemned prisoner in Oklahoma denied the right to litigate his claim that Oklahoma's Lethal Injection Protocol ("protocol") will subject him to cruel and unusual punishment in violation of his rights under the Eighth Amendment.

Stouffer's Motion argued that the denial of his right to litigate his claim would be contrary to well-settled and established law governing his claims for promissory estoppel and for equal protection. In addition, and contrary to the Order entered on December 6, 2021, Stouffer addressed each of the requirements for injunctive relief, including the three elements identified in 10th Cir R. 8.1 (C), (D), and (E), in the "Standard of Review" section of his Motion. That Stouffer had clearly staked out his position regarding the absence of harm and risk to the public interest is reflected by the State's Response to the Motion. In that Response, the State did not argue that Stouffer failed to address these factors or that the failure to do so somehow served as a basis for the 10th Circuit not to consider the issues raised by Stouffer. To the contrary, the State included in Section IV of its Response reasons why the State contended Stouffer's arguments as to these factors was erroneous.

The Tenth Circuit's refusal to address the specific claims set forth in Stouffer's Motion, in favor of the State's erroneous mischaracterization of those claims, cannot be

justified by an after-the-fact and erroneous application of a procedural rule.

III. ARGUMENT

A stay of execution in this court is appropriate if there is (1) a “reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari”; (2) a “significant possibility of reversal of the lower court’s decision”; and (3) a “likelihood that irreparable harm will result” without a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Based on the facts and circumstances set forth in this emergency application, there is a reasonable probability that four Members of the Court will grant the Petition.

That is because the district court’s denial of relief to Stouffer was based on legal error; (1) by failing to correctly apply the law regarding promissory estoppel / detrimental reliance to a set of undisputed facts, and (2) by concluding that even though Stouffer was the only prisoner denied his right to challenge the constitutionality of Oklahoma’s lethal injection protocol, he did not receive disparate treatment in violation of the equal protection clause of the fourteenth amendment.

A. The District Court Erred by Denying Stouffer Relief on his Promissory Estoppel Claim.

. The district court’s analysis of whether Stouffer had established a likelihood of success on his promissory estoppel claim constitutes clear error. Specifically, the district court’s conclusory statement that the promise relied on by Stouffer was not “clear and unambiguous” lacked supporting explanation¹. (App. 17-18) In addition, the

¹ In a case from the Oklahoma Supreme Court which was “corrected” after *Russell, Schulte v. Apache Corp.* 949 P.2d 291 (as corrected March 17, 1998), Vice Chief Justice Summers, joined by Chief Justice Krauger in a dissent, expressed doubt as to whether a promise needed to be clear, definite and unambiguous to be enforceable under § 90

district court did not apply the definition of a promise as set forth in the Restatement, adopted by the Oklahoma Supreme Court in *Russell v. County Com'rs*, 952 P.2d 492, 502-504 and n. 40 (OK 1997), “as ...a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”

The district court also erred when concluding that to prevail on a promissory estoppel claim, Stouffer was required to prove that a promise was made “to him”:

Mr. Stouffer has not shown that any promise, let alone a clear and unambiguous promise, was made to him. For that reason, his promissory estoppel claim fails on the first element of the Restatement test, as adopted in the Russell v. Board of County Commissioners decision. (App. 17-18)

That conclusion does not take into account clear language in the *Russell* opinion in which the court recognized that Restatement (Second) of Contracts § 90, specifically allows a third party to enforce a promise made to another:

“(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee **or a third person** and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. * * *”

Russell, 952 P.2d, at 503 (Emphasis Added).

The district court also failed to address other pertinent authority cited by Stouffer, including that the State’s silence after the December 11 order, and after the

(citing *Neiss v. Ehlers*, 135 Or.App. 218, 899 P.2d 700, 704-705 (1995) ([E]ach position has a substantial number of courts behind it. But that, as indicated by *Henderson*, the discernable trend of recent decisions is moving away from the view that promissory estoppel is inapplicable as a theory of recovery when the promise is indefinite or incomplete).

description of the promise offered by the district court during the May 5, 2020, hearing precludes the State from contesting the existence of the promise or that it applied to Stouffer. See *G.E. Capital Information Tech. Solutions, Inc. v. Oklahoma City Public Schools*, 173 P.3d 114, 118 (OK. App. 2007). *Manokoune v. State Farm Mut. Auto Ins. Co.*, 145 P.3d 1081, 1087 n. 4 (OK 2006)

Finally, the district court failed to address Stouffer's argument that even if the promise it made was not made directly to Stouffer, he was a member of the class of persons for whose benefit the agreement was intended to benefit, *i.e.*, condemned prisoners, named as *Glossip* plaintiffs or not, who challenged or desired to challenge the State's execution protocol. Stouffer is accordingly entitled to enforce the agreement – even after the State reversed course on its position that he was a direct beneficiary – as both an intended beneficiary at the time of the agreement and otherwise as a third-party beneficiary. *Oil Capital Racing Association v. Tulsa Speedway, Inc.*, 628 P.2d 1176, 1179 (OK Civ. App. 1981).

The undisputed facts thus establish all of the elements required to establish Stouffer's claim of promissory estoppel. (Doc. 010110610785, pp. 134, 136-137, 140, 142-143, 145-148, 151-153, 155-158, 445:10-446:10, and 194:12-195:7)

In fact, the circumstances here illustrate why the right to enforce promises under principles of promissory estoppel was recognized in the first place, namely; to allow promises to be enforced under certain circumstances when the failure to do so would be unjust.

B. The District Court Erred by Denying Stouffer Relief on his Equal Protection Claim

In Count I of his First Amended Complaint, Stouffer alleged the Defendants are violating his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Equal Protection requires that the laws and actions of a state must treat an individual in the same manner as other people in similar circumstances is essentially a direction that all persons similarly situated should be treated alike.” *Kitchen v. Herbert*, 755 F.3d 1193, 1222 (10th Cir. 2014) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)), *cert. denied*, — U.S. —, 135 S.Ct. 265.

Although Equal Protection claims typically relate to different treatment of groups, it can also apply when a “class of one” is receiving unequal protection, such as is the case with Stouffer. In *Village of Willowbrook v. Olech*, the Supreme Court held that a plaintiff may state a “class of one” claim by alleging that he or she “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” 528 U.S. 562, 564 (2000) (per curiam). Where, as here, a plaintiff brings a class-of-one claim, [he] must demonstrate (1) that “other ‘similarly situated’ individuals were treated differently” from [him], and (2) that “there is no ‘rational basis’ for [the different treatment].” *SECSYS, LLC v. Vigil*, 666 F.3d 678, 688–89 (10th Cir. 2012) (citations omitted).

Although, the Tenth Circuit in *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016) stated that “class of one” claims should be approached with caution because “the sample size in a class-of-one claim is obviously too small to permit a plaintiff to paint the contours of the claim in broad brushstrokes,” the Tenth Circuit added that “[i]t is therefore imperative for the class-of-one plaintiff to provide a specific and detailed account of the nature of the preferred treatment of the [allegedly] favored class. This is because, at its core, the Equal Protection Clause keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike.*” *Id.* at 1167 (citations and quotations omitted).

As of August 2, 2021, there were 33 inmates on Oklahoma’s Death Row whose appeals were exhausted and would otherwise be eligible for execution. All 33 have also filed an Eighth Amendment claim asserting that constitutionally impermissible pain and suffering will result from the use of the three-drug protocol (midazolam, vecuronium bromide and potassium chloride). In all 33 cases, the State contends that that the sentences must be carried out in a timely manner.

However, 32 of the 33 inmates (all but Stouffer) were given the opportunity to choose a “feasible and readily implemented” alternative to said protocol and, based on the Summary Judgment Order given an opportunity to have their objections heard and decided after a trial on the merits. Moreover, the State agreed not to seek execution dates against 32 of the 33 inmates until their lawsuit was “complete.”² Stouffer is the

² As discussed above, Stouffer argues the State’s promise not to execute any condemned inmates should apply to him; the State contends it does not. Should the Court find that the promise does not apply to Stouffer, then it is indisputable he is being treated differently than the other 32 condemned inmates.

only member of the 33 who has not been given the opportunity to make a choice, litigate his claim, oppose summary judgment and potentially receive a trial on the merits. Stouffer is the epitome of a “class of one” as defined by the *Olech* court.

The State of Oklahoma argued and the trial court found that because Stouffer is not a plaintiff in the *Glossip* case, he is different from the other 32 death row inmates and therefore he does not meet the first prong of the *Olech* test. (RA II; 23:8-25:19) This position is completely at odds with *Olech*. The reason Stouffer is not a plaintiff in *Glossip* today and, therefore, is different from the other 32 death row inmates, is because when he moved to join the *Glossip* case, the State objected to his request and the district court sided with the State. To allow the State to block his entry to the *Glossip* case and now claim he is not “similarly situated” because he is not in the *Glossip* case is a quintessential “separate but equal” argument. The logic is circular and is an antiquated interpretation of the dictates of the Equal Protection Clause.

The second prong of the *Olech* test requires a plaintiff to “then show this difference in treatment was without rational basis, that is, the government action was irrational and abusive, and wholly unrelated to any legitimate state activity.” *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011)(citations and quotations omitted). The Tenth Circuit in *Kansas Penn Gaming* held that this standard is “objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations.” *Id.* (citations and quotations omitted).

On August 25, 2021, when the State requested an execution date for Stouffer, the State arbitrarily and capriciously categorized Stouffer with the *Glossip* plaintiffs who

the district court dismissed from that lawsuit for not choosing an alternative method of execution. (RA I; 197-199) There is no reasonable justification to treat Stouffer, who requested the opportunity to choose, as one who adamantly refused to choose. Most compelling with respect to this prong is that the State, other than its circular separate but equal argument, has never attempted to offer cognizable justification.

Moreover, “In cases not involving judgments that are ‘subjective and individualized,’ the plaintiff will meet this burden easily. *Collins*, 656 F.3d at 1218. For example, in *Olech*, the defendant village had a longstanding policy of requiring a 15-foot easement of *all* property owners who requested access to the municipal water supply, regardless of cost or circumstance. 528 U.S. at 563. Accordingly, when the village demanded that the Olechs alone agree to a 33-foot easement, without proffering any proper reason for the deviation, it was likely that the village was motivated by improper political animus. *Id.* Similarly, Oklahoma law, 21 O.S.2021, §1001.1, required the Attorney General to seek execution dates on all 33 of the death row inmates because they meet the conditions enumerated therein; however, the State instead allowed 32 of those inmates to litigate their claims in *Glossip*.

Finally, because the facts of this case are so narrow, any concerns that Justice Breyer’s concurrence in *Olech* that broadly construing a “class of one” could open the floodgates to litigation asking for court oversight of government action are easily obviated. In this case, a death row inmate was originally denied access to a lawsuit alleging his execution would violate the Eighth Amendment and then later was denied access to an agreement by the State not to execute any plaintiff in that very lawsuit.

Moreover, and although Stouffer has repeatedly challenged it to so, the State has now been given three opportunities to proffer a legitimate state interest as to why Stouffer should be treated differently than the other 32 people on death row in August of 2021. It refused to do so in its Opposition to Plaintiff's Supplemental Motion for Preliminary Injunction, during the evidentiary hearing in that matter, and in the response filed in the 10th Circuit. The State's failure to identify any legitimate state interest which would require that Stouffer be executed just a few months before the allegations regarding the constitutionality of the execution protocol are decided is telling. Simply put, it is because there is no such interest. All the State presents is its circular argument that because Stouffer was not in *Glossip*, he is different than the now 30 people on death row who had their legal challenge to the Oklahoma execution protocol litigated. This violation of the Equal Protection Clause cannot be allowed to continue and relief must be granted. For the reasons stated above this Catch-22 cannot stand under the dictates of constitutional precedence and relief must be granted.

C. The Balance of Harms and Stouffer's Lack of Delay Justify a Stay.

In addition to the merits of Stouffer's claim, the Court must also consider the balance of harms and whether Stouffer has unduly delayed his claim. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007). These factors also weigh in favor of a stay.

As the death penalty is "obviously irreversible," *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting stay as circuit justice), subjecting Stouffer to immediate execution notwithstanding his prior equal footing with every named *Glossip* plaintiff, would deprive him of fundamental rights. Every named *Glossip* plaintiff has

been afforded the right to proceed to trial in February 2022 on the constitutionality of the protocol, so long as said condemned inmate made a selection of at least one alternative method of execution on the State’s checkbox list. As discussed above, Stouffer has unequivocally made such a selection. Permitting Stouffer’s execution to move forward now would deprive him of what he had been promised and what was reflected in prior conduct of the State – the right to be treated the same as a named *Glossip* plaintiff and challenge the protocol, despite his being barred entry into the *Glossip* case by the State’s opposition in 2014 and the district court’s acceptance of the State’s position.

Although Respondents have an interest in enforcing criminal judgments without unnecessary delay, the public interest is not served by executing individuals before they have had the chance to fully and fairly challenge the constitutionality of their executions. *See Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (Op. of Alito, J., respecting denial of stay or vacatur) (finding it preferable for claims to be heard on the merits “in light of what is at stake”); *see also Purkey v. United States*, 964 F.3d 603, 618 (7th Cir. 2020) (“Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.”).

Proceeding with Stouffer’s execution now—rather than waiting two months for a trial on the merits in *Glossip*, as ordered for every named plaintiff in *Glossip* by the district court—would subject him to a method of execution that remains under viable constitutional challenge in the *Glossip* action and could result in the protocol being ruled unconstitutional.

As discussed above, Stouffer moved quickly once it became apparent that the State had reversed course on its prior treatment of him equally with that of the named *Glossip* plaintiffs, and only three months have passed since the setting of his execution date in contravention of the prior agreement and this application. To the extent there has been delay, it has been because of Stouffer's misplaced reliance on the judicial system.

The prejudice to the State, on the other hand, is nil. If it prevails against the *Glossip* plaintiffs in the upcoming trial, absent reversal, it will be empowered to move forward with the executions of dozens of condemned prisoners without dispatch. The balancing of harms clearly favors Stouffer.

Finally, the public interest will be served by entering a stay. Stouffer's reliance on a series of agreements treating him equally with *Glossip* plaintiffs, with the application of those agreements as to Stouffer having provenance in the order of a district court, was reasonable. The State's reversal of course to segregate Stouffer from the *Glossip* plaintiffs and schedule his execution is the opposite of what the public expects from a government entrusted with life and death decisions.

IV. CONCLUSION

Stouffer respectfully requests this Court stay his execution scheduled for December 9, 2021.

Respectfully submitted this 7th day of December, 2021 by

s/ Gregory W. Laird

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