

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

David Shinn, Director, Arizona Department of Corrections,
Rehabilitation & Reentry; James Kimble, Warden, ASPC-Eyman;
Jeff Van Winkle, Warden, ASPC-Florence; Lance Hetmer,
Assistant Director for Prison Operations, Arizona Department of
Corrections, Rehabilitation & Reentry; Mark Brnovich, Attorney
General of Arizona; John Doe, Arizona-licensed Pharmacist,
Respondents.

**APPLICATION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF
*CERTIORARI***

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United
States and Circuit Justice for the Ninth Circuit

**CAPITAL CASE – EXECUTION SCHEDULED
FOR JUNE 8, 2022 AT 10:00 AM MST**

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Mr. Atwood requests a stay of execution to permit this Court sufficient time to consider the meritorious arguments raised in this Petition for Writ of Certiorari. For the reasons stated herein, Mr. Atwood has met the standard warranting a stay of execution under 28 U.S.C. § 2251, 28 U.S.C. § 1651, and Supreme Court Rule 23.

This Court must consider four factors in evaluating whether to grant a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar). In the present context, there must be “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted).

Concerning the first requirement, there is a strong probability that should this Court consider the merits of Mr. Atwood’s claim, the Court will grant relief. As discussed in the concurrently filed Petition for Writ of Certiorari, the method Arizona intends to use to execute him violates the Eighth Amendment and results from improper intervention by federal courts, and Arizona has deprived him of the choice between lethal execution and lethal gas in which he has a liberty interest, without due process of law, by designating an unconstitutional lethal gas—a challenge he has standing to litigate.

The second factor—whether the applicant will be irreparably injured absent a stay—is necessarily met because the state will take Mr. Atwood’s life in an unconstitutional manner absent this Court’s granting a stay and “foreclos[ing] . . . review” constitutes “irreparable harm.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) (noting that the irreparable harm requirement “is necessarily present in capital cases”). The Court has recognized that a stay is generally warranted when mootness is likely to arise during the pendency of the litigation—as it will if Mr. Atwood is executed on Wednesday June 8, 2022. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013).

Turning to the third factor, a stay will not substantially injure the opposing party. The relative harm to the state in terms of delaying Mr. Atwood’s execution is negligible. It was the State’s failure to offer any accommodations or willingness to discuss alternative methods, and subsequent proposal of alternatives as late as during the appeal in the Ninth Circuit, that created the need for last-minute litigation on the constitutionality of the lethal injection procedure as applied to Mr. Atwood, and the liberty interest claim regarding the gas option was not ripe until very recently. The law gives the State a timeframe in which to provide Mr. Atwood the choice of method, and Mr. Atwood repeatedly demanded the choice during that period, but the claim was not ripe until that period expired. Mr. Atwood pursued these claims as expeditiously as possible.

Finally, the community as a whole will suffer harm if no stay is granted. The public interest is not served by executing Mr. Atwood before he has the opportunity to avail himself of the legal process to challenge the legality of his means of execution, and botched executions, of which the court below's ruling creates significant risk, in fact do significant public harm. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *In re Ohio Execution Protocol*, 860 F.3d 881, 901 (6th Cir. 2017). Indeed, allowing government misconduct to go unremedied will erode the public's confidence that the court system offers a level playing field, providing a forum to redress grievous wrongs. And there is an "overwhelming public interest" in "preventing unconstitutional executions." *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (citation omitted). A stay of execution, in fact, will serve the strong public interest—an interest the government shares—in administering capital punishment in a manner consistent with the Constitution and the expressed policies of the State.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Atwood a stay of execution, or, in the alternative, enjoin Respondents from executing him until a trial in this case can be held.

Dated: June 7, 2022

Respectfully submitted,

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