No. 22-7305

In the Supreme Court of the United States

STACEY EUGENE JOHNSON, et al,
Petitioners,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION, et al.
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Eighth Amendment requires a prisoner challenging the method of his execution to show a scientific consensus that the method is sure or very likely to cause severe pain.

(2) Whether a court may adjudicate a method-of-execution challenge by assessing the painfulness of a State's proposed method in a vacuum, without addressing the prisoner's proposed alternative method.

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STATEMENT

Petitioners were all convicted of capital murder and sentenced to death for their heinous crimes decades ago. They have each engaged in myriad unsuccessful challenges to their lawful convictions and sentences. Their guilt is beyond dispute. So they challenge Arkansas's method of execution, a three-drug protocol that has consistently been upheld by every court to consider it, including this one.

A. Factual and procedural background

1. Arkansas Act 1096 of 2015 and Arkansas's current lethal-injection protocol.

At the time Petitioners filed this lawsuit, they—and the anti-death penalty activists who prevented Arkansas from obtaining execution drugs—had successfully prevented Arkansas from carrying out an execution for more than a decade. In 2015, the Arkansas General Assembly amended the State's method-of-execution act to, among other things, "address the problem of drug shortages" by "adopt[ing] alternative methods of lethal injection to bring about the death of the condemned prisoner." Ark. Act 1096 of 2015, Sec. 1(b).

That legislation (1) codified a three-drug lethal-injection protocol identical to the one that was upheld in *Glossip v. Gross*, 576 U.S. 863 (2015), as an alternative to the single-drug protocol upheld by the Arkansas Supreme Court in *Hobbs v. McGehee*, 458 S.W.3d 707 (2015); (2) authorized State officials to obtain lethal-injection drugs from FDA-registered facilities and accredited compounding pharmacies in addition to traditional pharmaceutical manufacturers; and (3) required officials to "keep confidential all information that may identify or lead to the identification of . . . entities

and persons who compound, test, sell, or supply the drug or drugs." *See* Act 1096, Sec. 2(c), (d), (g).

After Act 1096's enactment, Arkansas was able to procure drugs sufficient to carry out eight then-scheduled executions. *See Kelley v. Johnson*, 496 S.W.3d 346, 358 (2016).

2. Petitioners' prior serial litigation.

Petitioners'[1] first challenged Act 1096 in state court on both state and federal constitutional grounds. *Marcel Williams, et al. v. Wendy Kelley, et al.*, Case No. 60CV-15-1400 (Pulaski Cnty. Cir. Ct.). Arkansas removed that case to federal court, and to avoid federal jurisdiction, Petitioners promptly nonsuited the federal case. *See* Notice of Removal, Complaint, and Notice of Dismissal (Apr. 10, 2015) (Docs. 1, 2, 4) filed in *Williams v. Kelley*, Case No. 4:15-CV-00206-JM (E.D. Ark.).

The same day, the plaintiffs in that case filed an "Amended Complaint" in the state-court case raising only state-law challenges to Act 1096. *See Kelley*, 496 S.W.3d at 352. Arkansas moved to dismiss for lack of subject-matter jurisdiction, and on July 17, 2015, after full briefing, the plaintiffs voluntarily nonsuited their claims *again*. *See* Second Dismissal Order, *Williams v. Kelley*, Case No. 60CV-15-1400 (Pulaski Cnty. Cir. Ct.), R. 144-32.

[1] The Plaintiffs in that case were Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, and Kenneth Williams. Don Davis and Ledell Lee were later granted permission to intervene.

In the meantime, while Arkansas's motion to dismiss the first state-court lawsuit was still pending—Petitioners[2] filed a new state-court lawsuit challenging the constitutionality of Act 1096. *See Stacey Johnson, et al. v. Wendy Kelley*, Case No. 60CV-15-2921 (Pulaski Cnty. Cir. Ct.). They asserted only state constitutional challenges to Act 1096, including challenges under the state ban on cruel-or-unusual punishment as well as other state constitutional provisions that mirror the federal claims brought in the first state-court case.

They later amended their complaint to include additional claims, including that Arkansas's protocol violated the state constitutional ban on cruel or unusual punishment because the first drug in the protocol (midazolam) would not sufficiently anesthetize the condemned inmates to render them unconscious and insensate to the effects of the second and third drugs. *See* Am. Compl. (Sept. 28, 2015) in *Johnson v. Kelley*, Case No. 60CV-15-2921 (Pulaski Cnty. Cir. Ct.). They also challenged the qualification and training requirements for prison officials and consciousness-check procedures.

In that case the Arkansas Supreme Court adopted this Court's standard from *Baze* and *Glossip*, holding that "in challenging a method of execution under the Arkansas Constitution, the burden falls squarely on a prisoner to show that (1) the current method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering and that gives rise to sufficiently imminent dangers;

[2] All nine of the original Plaintiffs in this case filed the second lawsuit in the Pulaski County Circuit Court.

and (2) there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain." *Kelley*, 496 S.W.3d at 357.

In evaluating Petitioners' substantive cruelty claim, the Arkansas Supreme Court agreed that Petitioners failed to meet their burden of pleading and then providing at least some evidence to establish that their proposed alternative methods of execution were feasible and capable of being readily implemented. *Id.* at 357-60. It held that Petitioners' allegations that the proposed alternative drugs were "commercially available" did not establish that "ADC, as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution." *Id.* at 359. The Arkansas Supreme Court also rejected as "entirely conclusory in nature" Petitioners' allegations that death by firing squad "would result in instantaneous and painless death" and that Arkansas "has firearms, bullets, and personnel at its disposal to carry out an execution." *Id.* The court "emphasize[d] that merely reciting bare allegations is not sufficient to show that a firing squad is a readily implemented alternative." *Id.* The court then concluded that "it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution." *Id.* at 360. And under Arkansas law, that determination required the case be dismissed. *Id.* at 350.

Petitioners sought certiorari, and this Court denied review. *Johnson v. Kelley*, 137 S. Ct. 1067, *reh'g denied*, 137 S. Ct. 1838 (2017).

3. Execution dates set for April 2017.

Then-Governor Asa Hutchinson thereafter set execution dates for eight of the prisoners as follows: Don Davis and Bruce Ward on April 17, 2017; Stacey Johnson and Ledell Lee on April 20, 2017; Marcel Williams and Jack Jones on April 24, 2017; and Jason McGehee and Kenneth Williams on April 27, 2017. Petitioners then initiated an avalanche of legal proceedings in multiple forums.

B. The current litigation

1. Petitioners file this lawsuit.

On March 27, 2017—more than a month after Governor Hutchinson set execution dates and just three weeks before the first scheduled executions—Petitioners filed their complaint in this matter. Petitioners alleged that: (1) the execution schedule denied Petitioners their right to counsel; (2) the execution schedule somehow violated the Eighth Amendment; (3) the midazolam protocol violated the Eighth Amendment's prohibition on cruel and unusual punishment; (4) Arkansas's execution protocols regarding staff training and expertise, consciousness checks, lack of resuscitation plan/equipment, IV and drug-pushing procedures, and drug storage/preparation violated the Eighth Amendment; (5) the use of midazolam on a "compressed schedule" violated the Eighth Amendment; (6) Arkansas's viewing policy for the April 2017 executions violated Petitioners' right of access to the courts; and (7) the viewing policy

violated Petitioners' right to counsel. Petitioners sought declaratory and injunctive relief.[3]

2. The motion to dismiss.

Arkansas moved to dismiss the first complaint based on sovereign immunity and for failure to state a claim. The district court granted that motion in part and denied it in part. R. 26, 27, & 53.[4] It first found that this action is not barred by claim preclusion and issue preclusion based on Petitioners' prior serial litigation—including their substantially similar state-law challenge. R. 53 at 1-2, 29-42. The district court held that there is no constitutional or statutory right to effective assistance of counsel under Section 3599 and dismissed Petitioners' first claim. *Id.* at 20. It dismissed Petitioners' second claim to the extent Petitioners argued that the compressed execution schedule alone presented a risk that was sure or very likely to cause serious illness and needless suffering. *Id.* at 29. The district court also dismissed Petitioners' fourth claim challenging Arkansas's lethal-injection procedures as an independent Eighth Amendment violation. *Id.* at 50. It denied Arkansas's motion to dismiss on all other grounds. *Id.* at 59.

3. Preliminary-injunction proceedings.

Petitioners filed a motion for a preliminary injunction and sought an immediate stay of their executions. R. 3 & 4. Arkansas responded in opposition, R. 28, and, from April 10 through April 13, 2017, the district court held an evidentiary hearing. On

[3] Terrick Nooner, who did not have a scheduled execution date at that time, joined in some, but not all, of Petitioners' claims.

[4] "R." refers to the district court docket entry, followed by the page number.

April 15, 2017, the court entered a preliminary-injunction order staying the then-scheduled executions. R. 54, at 3.

In granting preliminary injunctive relief, the district court first rejected Arkansas's argument that the Petitioners delayed in bringing their federal claims and in seeking emergency relief. R. 54 at 50. It then found that Petitioners established a significant possibility that Arkansas's method of execution exposed them to a demonstrated risk of severe pain. R. 54, at 55. It also found that the April 2017 execution schedule, with eight executions scheduled over 11 days, exacerbated that risk. R. 54, at 56.

The district court also agreed with Petitioners' contention that Arkansas's execution protocol and policies failed to contain adequate safeguards to "mitigate some of the risk presented by using midazolam and trying to execute that many inmates in such a short period of time." *Id.* It thus concluded that Petitioners were likely to succeed on the merits of their method of execution and viewing claims. R. 54 at 74; R. 54, at 100-01.

Regarding Petitioners' claim that Arkansas's use of midazolam as the first drug in a three-drug protocol is sure or very likely to cause needless suffering, the district court noted that "there is very little published regarding scientific study in humans of the effects of midazolam on humans at certain doses." R. 54, at 57. It then added that "the level at which the ceiling effect is demonstrated in humans, if there is a ceiling effect, is unknown." R. 54, at 60. It also noted that the parties' experts had testified regarding the possible effects of midazolam based on what they had observed

in clinical settings using much lower doses than the 500-1000 mg dose at issue here. R. 54, at 62-63. But the district court ultimately found Petitioners' experts more credible, found that the anecdotal evidence from midazolam executions in other states "is more consistent with Petitioners' theory of this case," and held "that there is a significant possibility that [Petitioners] will succeed on the merits under the first prong of *Baze/Glossip*." R. 54, at 63-73.

The district court also held that Petitioners met their burden of establishing "a significant possibility that the risk of Arkansas's proposed method of execution is substantial when compared to known and available alternative methods" as required under the second prong of *Baze* and *Glossip*. R. 54, at 74. It adopted the Sixth Circuit's then-existing test for "availability" under *Glossip*, which rested on whether there was any "possibility" that the State may be able to obtain the proposed alternative in the future. R. 54, at 78-79 (adopting the reasoning of a three-judge panel of the Sixth Circuit in *In re Ohio Execution Protocol*, 853 F.3d 822 (6th Cir. 2017), *rev'd en banc*, 860 F.3d 881, 886 (6th Cir. 2017) (holding that "[t]he district court was seriously mistaken as to what 'available' and 'readily implemented' mean" and that, "for that standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort")).

Under that now-repudiated "possibility" standard, the district court found that "[Petitioners] established, at this stage of the proceedings, that there is a significant possibility that pentobarbital is available for use in executions." R. 45, at 81. It rested that conclusion entirely on evidence "tending to show that Missouri obtained FDA-

approved, manufactured pentobarbital in the recent past," "Missouri executed an inmate using pentobarbital as recently as January 31, 2017," and Texas and Georgia "have carried out numerous executions in recent years with compounded pentobarbital." R. 54 at 81. It also found that sevoflurane gas and nitrogen hypoxia were known and available alternatives, even though neither method has ever been used to carry out an execution. R. 54 at 82-83. Finally, it held that Petitioners had demonstrated a significant possibility that the firing squad would be a feasible alternative. R. 54 at 83-86.

The district court ultimately held that Petitioners were likely to succeed on the merits of their method-of-execution claims and most of their other claims, that Petitioners would suffer irreparable harm absent an injunction, and that the balance of harms and public interest weighed in favor of an injunction. R. 54 at 86. It therefore enjoined Arkansas from carrying out Petitioners' death sentences and ordered the parties to negotiate the terms of a viewing policy. R. 54 at 101.

4. The court of appeals vacates the preliminary-injunction order.

Arkansas promptly appealed, and the Eighth Circuit—sitting en banc and with just one dissent—vacated that injunction. *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. 2017) (en banc) (per curiam), *cert. denied*, 137 S. Ct. 1275 (2017). That decision rested on three conclusions.

First, the court noted Petitioners' deliberate delay in bringing their claims, explaining that Petitioners could have brought their Section 1983 method of execution claims "much earlier [but] intentionally declined to do so." *McGehee*, 854 F.3d at 491. Indeed, as that court explained, Petitioners voluntarily elected to forego their federal

claim in April 2015 and chose instead to pursue only state-law claims. *Id.* "Only after the Arkansas Supreme Court rejected their state-law claim, the Supreme Court denied certiorari, and the Governor scheduled the executions did the prisoners present a federal claim in federal court." *Id.* Thus, Petitioners could have litigated their Eighth Amendment challenge to the midazolam protocol "at the same time as the state constitutional claim beginning in April 2015." *Id.* And, regardless of whether or not the claim technically was barred by claim or issue preclusion, this Court concluded that "the prisoners' use of 'piecemeal litigation' and dilatory tactics is sufficient reason by itself to deny a stay." *Id.* (quoting *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006)).

Second, the court held that "the district court's conclusion concerning the use of midazolam in the Arkansas execution protocol did not apply the governing standard and was not adequately supported by the court's factual findings." *Id.* at 492. "[T]he court never found that the prisoners had a likelihood of success under the rigorous 'sure or very likely' standard of *Glossip* and *Baze*." *Id.* To the contrary, "[t]here is no express finding of fact that the prisoners are likely to prove that a 500-milligram injection of midazolam will fail to anesthetize the prisoners during the execution or that use of the lethal-injection protocol is sure or very likely to cause severe pain." *Id.* And even if the district court had made such a finding, the Eighth Circuit explained, the record unequivocally established that "there is no scientific consensus" on that point "and a paucity of reliable scientific evidence concerning the effect of a

lethal-injection protocol on humans," meaning Petitioners could not meet their burden of showing that "the method creates an unacceptable risk of pain." *Id.* at 493 (quoting *Glossip*, 576 U.S. at 884). Indeed, the court concluded that the "equivocal" scientific evidence "recited by the district court falls short of demonstrating a significant possibility that the prisoners will show that the Arkansas protocol is 'sure or very likely' to cause severe pain and needless suffering." *Id.*

Third, the Eighth Circuit rejected the legal standard the district court had applied to determine whether an alternative method of execution is known and available. *Id.* "We do not say that an alternative method must be authorized by statute or ready to use immediately, but we concur with the Eleventh Circuit that the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly." *Id.* (citing *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1300 (11th Cir. 2016). The court of appeals then explained that only that demanding standard was consistent with the Eighth Amendment because "[u]nless an alternative is feasible and readily implemented in the sense described, the State has a legitimate penological justification for adhering to its current method of execution in order to carry out lawful sentences." *Id.* Indeed, "[w]hen availability (or effectiveness) of an alternative is more speculative, a State's refusal to discontinue executions under the current method is not blameworthy in a constitutional sense." *Id.*

Applying that standard, the court held that Petitioners had not met their burden. *Id.* Instead, it concluded that—as a matter of law—whether the alternatives that

Petitioners cited were available "is too uncertain to satisfy the rigorous standard under the Eighth Amendment." *Id.* Given Arkansas's three unsuccessful attempts to obtain barbiturates in 2015 and the "well documented" difficulty in obtaining drugs for use in lethal injection, the court also rejected as "too speculative" the possibility that Arkansas could acquire pentobarbital. *Id.* It likewise dismissed proposed alternative methods "[w]ith no track record of successful use" in executions, such as sevoflurane gas and nitrogen hypoxia, concluding that they "are not likely to emerge as more than a 'slightly or marginally safer alternative.'" *Id.* (quoting *Glossip*, 576 U.S. at 877, and citing *Baze*, 553 U.S. 35, 41 (2008) (discussing "untried and untested alternatives")). The Eighth Circuit also found that Petitioners failed to establish "a significant possibility that the use of a firing squad is readily implemented and would *significantly reduce* a substantial risk of severe pain." *Id.* at 494 (emphasis in original). For each of these reasons, it vacated the district court's stays of execution. *Id.*

5. This Court declines to intervene.

Petitioners then sought both certiorari and a stay from this Court, and both were denied. *McGehee v. Hutchinson*, 137 S. Ct. 1275 (2017)

. The Court also denied four of the condemned inmates' separate applications for stays of execution and petitions for writs of certiorari. *See Williams v. Arkansas*, 137 S. Ct. 1842 (2017); *Lee v. Hutchinson*, 137 S. Ct. 1623 (2017); *Williams v. Kelley*, 137 S. Ct. 1285 (2017); *Jones v. Arkansas*, 137 S. Ct. 1284 (2017).

6. April 2017 executions.

Arkansas carried out four executions in April 2017. Ledell Lee was executed on April 20, 2017, Jack Jones and Marcel Williams were executed on April 24, 2017, and

Kenneth Williams was executed on April 27, 2017. Pet. App. 18a. Each of these executions was conducted pursuant to Arkansas law, consistent with ADC policy, and with the goal of minimizing any risk of pain inherent in executions. *See* Tr. 1365-1372 (Kelley); Tr. 1178-80, 1186-88, 1192-96 (Straughn); R. 144-13 (Dale Reed written testimony).[5]

Throughout the process, two medical professionals monitored the inmates for signs of consciousness and monitored the IV infusion sites for any signs of infiltrate or other problems. *Id.* ADC did not experience any complications or problems with any of the executions, and the drugs worked as intended. Tr. 474-84 (Jones); Tr. 1073-78 (Hammer); Tr. 1096-1101 (Hendrix); Tr. 1113-17 (Garner); Tr. 1133-38 (Harrelson); Tr. 1178-80, 1186-88, 1192-96 (Straughn); Tr. 1217-24 (Reed); 1345-50, 1353-56, 1358-63, Tr. 1365-72 (Kelley). None of the inmates exhibited any signs of consciousness five minutes after the administration of midazolam. *Id.* Arkansas confirmed that each of the condemned inmates was unconscious and insensate to pain prior to administering the second and third drugs in the protocol. *Id.* None of the inmates exhibited any signs of severe pain or suffering during the lethal-injection procedure. *Id.*

7. Petitioners file an amended complaint.

In June 2018, Petitioners filed an amended complaint alleging that: (1) the use of midazolam as the first drug in Arkansas's three-drug protocol violates the Eighth

[5] "Tr." refers to the transcript of the bench trial.

Amendment; (2) the erratic application of consciousness checks violates equal protection ; (3) Arkansas's execution policies violate Petitioners' right of access to the courts; and (4) Arkansas's execution policies violate the Petitioners' right to counsel under 18 U.S.C. 3599. R. 117. Arkansas filed an answer, R. 121, the parties engaged in discovery, and the case proceeded to trial.[6]

C. Trial proceedings

The district court held an eight-day bench trial beginning April 23, 2019. As relevant here, the testimony centered on midazolam's effectiveness and whether the firing squad is a reasonably available alternative.[7]

1. Testimony concerning midazolam.

a. Dr. Craig Stevens is a pharmacologist who testified on behalf of Petitioners at both the preliminary-injunction hearing and trial. Stevens testified previously that the second and third drugs in Arkansas's lethal-injection protocol cause pain. PI[8] 237-40; Tr. 399-402. He argued that midazolam cannot serve as a general anesthetic, *i.e.*, it cannot render a person unconscious, unaware, and completely insensate to pain. PI 268. This, he said, is because midazolam has a "ceiling effect"—a point at which an additional dosage will not have any impact— at between 20 and 30 mg for

[6] The district court dismissed Jason McGehee's claims because then-Governor Hutchinson commuted his death sentence. R. 181, at 3.

[7] Petitioners abandoned multiple claims on appeal. For example, the district court entered judgment in Arkansas's favor on Petitioners' equal protection claim, and Petitioners did not contest that ruling. Petitioners also claimed below that secobarbital, sevoflurane gas, and pentobarbital were readily available alternative methods of execution. But on appeal—except to the extent that Petitioners seek a new trial because the federal government successfully obtained pentobarbital—Petitioners only pressed their firing squad claim.

[8] "PI" refers to the transcript of the preliminary-injunction hearing.

a 220lb person. Tr. 383-84. He based that view largely on an article (Miyake) that measured the difference in effects on a small number of participants given 20 mg or 30 mg doses of midazolam. Pls.' Ex. 24.[9] He also claimed that his view was supported by studies that involved other benzodiazepines—the class of drugs of which midazolam is a part. Tr. 385-99; Pls.' Exs. 25-27. But those studies were of limited value because, as he conceded, they did not measure the effects of midazolam in particular. Tr. 385-99; Pls.' Exs. 25-27.

b. Dr. Gail Van Norman is an anesthesiologist. She also testified regarding the effects of the second and third drugs in Arkansas's protocol, opining that they could cause feelings of severe breathlessness and pain, respectively. Tr. 508-13. She claimed that midazolam does not have any clinically significant analgesic (pain-relief) properties and was historically paired with another drug—such as a narcotic—for that reason. Tr. 541, 556, 589. Van Norman also testified about studies showing the effectiveness of general anesthesia in surgical patients. One such study suggested that 34.8% of surgical patients (receiving *any* anesthetic, not midazolam in particular) were aware during surgery. Pls.' Ex. 34. And another article specifically discussing midazolam observed that up to 72% of patients may exhibit some awareness during surgery. Pls.' Ex. 36. However, Van Norman acknowledged the clinical limitations of the "isolated forearm technique" methodology used in those studies to determine awareness. She testified that she had never used that technique during surgery

[9] "Ex." refers to trial exhibits.

and conceded that there is not "anyone . . . in this country" who would use the technique during surgery to monitor a patient. Tr. 593. Moreover, she acknowledged that there have not been any studies using the isolated forearm technique to measure awareness after administration of midazolam as the sole anesthetic agent. Tr. 588.

Van Norman also speculated about midazolam's ceiling effect. She reiterated Stevens's testimony on the Miyake article. Tr. 520. She also discussed another article (Inagaki) that observed the interactions between midazolam and an anesthetic called halothane in four groups of 12 to 13 participants. Pls.' Ex. 31. That article did not measure the effects of midazolam in isolation; rather it measured the effects of midazolam on how much halothane was required to anesthetize patients. *Id.* She could not identify any other articles aside from those two which purport to find that midazolam has a ceiling effect. Tr. 572-73. And while she claimed that there's a consensus that midazolam has a ceiling effect, she conceded "there is no consensus on what that dose is." Tr. 571; Pet. App. 20a.

Finally, Van Norman admitted she lacked any "direct scientific data" to "support the proposition that" any of the prisoners executed in 2017 "consciously experienced severe pain and suffering during the execution." Tr. 604; Pet. App. 21a.

c. Dr. Daniel Buffington, a pharmacist, testified on behalf of Arkansas at the preliminary-injunction hearing and at trial. He disagreed with Petitioners' witnesses regarding the effects of the second and third drugs of Arkansas's protocol. He explained that there would be no pain associated with administration of vecuronium.

PI 672. As to potassium chloride, he noted that some persons "may have some more discomfort; they may have no discomfort." PI 673.

Buffington had also previously testified that midazolam can be used to reach "levels of general anesthesia" for a period long enough to carry out Arkansas's lethal-injection procedure. PI 629. He disagreed that midazolam has a ceiling effect, explaining that the literature has "not demonstrated a ceiling effect in humans at all, only in theoretical analytic models." PI 687. He also disagreed with Petitioners' witness' testimony that midazolam has no pain-reducing capacity, noting that the drug can "interfere with the person's capacity to sense pain," rendering it a viable general anesthetic. Tr. 780.

d. Dr. Joseph Antognini is an anesthesiologist, and he testified for Arkansas at both the preliminary-injunction hearing and trial. He explained that midazolam can be used to induce general anesthesia, although in clinical practice he would prefer to use drugs better suited for that effect. Tr. 912-13. He explained that there was "no doubt" in his mind that "midazolam is effective to take an inmate into a state of general anesthesia during a lethal injection procedure." Tr. 913. He cited multiple, painful procedures, including colonoscopies, tracheal intubation, and urological procedures that are performed only using midazolam.

Antognini also disagreed with Petitioners' witness' conclusion about midazolam's ceiling effect. He testified that the two articles Petitioners relied upon did not demonstrate a ceiling effect because they involved limited doses of midazolam. Tr. 907. Instead, to demonstrate such an effect, he explained, a study would generally consist

of giving patients "drugs in a large range" such as "one [mg] and 10 [mg] per kilogram and 100 [mg] . . . and so forth." Tr. 809. Thus, he concluded that, while the two articles cited by Petitioners "suggest perhaps a ceiling effect," they "don't prove it conclusively." Tr. 910.

2. Alternative methods.

Wendy Kelley, who served as director of the ADC beginning in 2015 and throughout the April 2017 executions, testified about the feasibility of carrying out executions by firing squad. Kelley identified multiple logistical hurdles to implementing a firing squad. She testified that there is "not currently a building" at "the Cummins Unit that would support the use of a firing squad," based on her understanding of the requirements. Tr. 1381. She added that Arkansas's execution chamber is "not large enough." *Id.* And she noted that she did not know of "anybody" sufficiently qualified "that wants to" be a part of a firing squad. Tr. 1382.

Yet even assuming Arkansas's logistical and personnel issues could be overcome, Petitioners failed to show that the firing squad would be *any* less painful than Arkansas's lethal injection protocol, let alone that it would "significantly reduce[] a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1121 (2019). Petitioners relied exclusively on the testimony of Dr. James Williams, an emergency room doctor with experience treating gunshot wounds who also teaches marksmanship. He opined that an inmate shot in the heart by multiple high-caliber rifle rounds would lose consciousness in seconds and expire shortly thereafter. Tr. 698. But he acknowl-

edged that, in theory, an inmate would "be able to sense pain" before losing consciousness. *Id.* And while he opined that the inmate would feel "a powerful blow to the chest," he claimed that wasn't the same as feeling pain. *Id.*

Williams's testimony ultimately was of little value. While he had experience treating gunshot wounds, he lacked any experience treating the wounds a firing squad would inflict. He also acknowledged that there was no medical literature addressing whether receiving five high-powered rifle shots to the chest would be more painful than a single shot. *Id.* And he admitted that were a bullet to hit a bone, it would typically produce "fractures" that "are intensely painful immediately upon the fracture occurring." Tr. 678. Williams acknowledged that "[g]unshot wounds to the chest very often produce spinal injuries," and if the bullet strikes the bony structures of the spine with sufficient force to cause fractures, that may produce some pain locally." Tr. 679-80. In other words, Williams could not testify that execution by firing squad would be pain-free, acknowledged that he was wading into territory outside the medical literature, and admitted the possibility of "intense[] pain[]" being caused by certain gunshot wounds. *Id.*

Antognini also explained that, based on his experience treating gunshot wounds, patients with chest wounds report feeling "extreme pain." Tr. 952. And like Williams, Antognini explained that bullets "passing through bone" or those that "[e]xit the back and shatter the spine and spinal cord" would be "incredibly painful." Tr. 953. He then stressed that it is "a virtual certainty" that an inmate would "experience severe pain" for "seven to ten seconds" after being shot before losing consciousness. *Id.*

D. The district court's judgment

On May 31, 2020, the district court entered judgment for Arkansas on Petitioners' Eighth Amendment claim. The district court's factual findings are voluminous, careful, and detailed, spanning more than 50 pages and consisting of more than 300 individual findings.

The district court found that Petitioners' proof fell short on both prongs of the *Baze/Glossip* test. On the first prong, it found that Petitioners failed to meet their burden of proving that Arkansas's lethal-injection protocol entails a substantial risk of severe pain. Pet. App. 82a. The district court concluded that it was ultimately undisputed that there is no general medical consensus "on the dose of Midazolam" at which it might exhibit a ceiling effect. Pet. App. 81a-82a. Indeed, Petitioners' own expert, Van Norman, was unable to say at what point an inmate might experience extreme suffering or to muster any scientific data to support such a claim. *Id.*

In the same vein, the district court also rejected Petitioners' suggestion that any of the inmates executed in 2017 showed any signs of pain. In particular, it explained that "nothing about the reported movements or sounds . . . as described by the eyewitnesses, even if the court credits all testimony as favoring the [Petitioners], pushes [Petitioners] closer to meeting their burden to prove that Arkansas's current Arkansas Midazolam Protocol entails a substantial risk of severe pain." Pet. App. 82a. To the contrary, the district court explained that all of the movements and sounds that Petitioners' witnesses reported were known side effects of midazolam and thus did not prove that the inmates consciously experienced pain. *Id.*

Those findings doomed Petitioners' claim and meant that the district court did not even need to decide whether Petitioners had demonstrated that Arkansas had rejected feasible and readily implementable alternative execution methods. But the district court nevertheless went on to explain that none of the Petitioners' proposed alternative methods satisfied the *Baze/Glossip* test. And—most relevant here—the district court ultimately found that Petitioners had failed to prove that the use of a firing squad "would significantly reduce a substantial risk of severe pain." Pet. App. 83a (quoting *Bucklew*, 139 S. Ct. at 1129).

E. Post-judgment proceedings

On June 26, 2020, Petitioners asked the district court to make additional factual findings under Rule 52(b) and to grant them a new trial under Rule 59(a). In addition to the 300-plus findings that the district court had already made, they requested that court make additional findings concerning the articles their witnesses relied upon to claim that midazolam's alleged ceiling effect makes it incapable of rendering inmates insensate to pain. R. 210 at 23. And Petitioners requested a new trial based on the federal government's then-recent use of pentobarbital to carry out executions. R. 210 at 13-19.

The district court declined both requests. It explained that it had made all the necessary findings in its earlier order and that the federal government's ability to obtain pentobarbital "is not probative of . . . the availability of pentobarbital to Arkansas." Pet. App. 124a.

F. The Eighth Circuit's opinion

The Eighth Circuit affirmed, in an opinion by Judge Colloton. It found "no clear error in the district court's findings about the lack of scientific consensus or human studies establishing a ceiling effect for midazolam." Pet. App. 6a. And based on those findings, the court held that "the district court did not clearly err in finding that the prisoners failed to demonstrate that the Arkansas execution protocol is sure or very likely to cause severe pain." Pet. App. 5a. That is because of the lack of "scientific consensus and a paucity of reliable scientific evidence concerning the effect of large doses of midazolam on humans." *Id*; *see McGehee*, 854 F.3d at 493 ("If there is no scientific consensus and a paucity of reliable scientific evidence concerning the effect of a lethal-injection protocol on humans, then the challenger might well be unable to meet" his burden under *Baze* and *Glossip*.). Because Petitioners "failed to establish that the State's existing method was sure or very likely to cause needless suffering, so the State was not required to consider alternative methods." Pet. App. 6a. Neither was the court of appeals. So any evidence Petitioners would have presented at a new trial "was not material." *Id.*

Judge Kelly concurred, writing separately "to highlight" just how difficult it is "to succeed on an Eighth Amendment method-of-execution claim" under the Eighth Circuit's application of the *Baze/Glossip* test. She nevertheless joined the court's opinion in full and agreed that under circuit precedent Petitioners could not prevail. And she agreed that "the district court did not clearly err" in applying that standard here. Pet. App. 7a.

REASONS FOR DENYING THE PETITION

I. The first question presented does not merit review.

Petitioners' first question asks this Court to consider whether a prisoner in a method-of-execution challenge must "show a scientific consensus that the method is sure or very likely to cause severe pain." Pet. i. That question is not presented here, because the Eighth Circuit does not require such a showing. And the decision below does not, as Petitioners claim, conflict with any other circuit decision nor foreclose prisoners from bringing method-of-execution challenges.

A. This case does not present Petitioner's first question.

Petitioners claim that the Eighth Circuit has shunned this Court's method-of-execution precedents by requiring prisoners to demonstrate a "'scientific consensus' that an execution method will cause severe pain in order to successfully challenge that method." Pet. 27. Of course, the Eighth Circuit did no such thing, and Petitioners are only able to suggest otherwise by truncating the relevant quotation from the decision below. That court instead simply applied its precedent recognizing that, "[i]f there is no scientific consensus *and a paucity of reliable scientific evidence* concerning the effect of a lethal-injection protocol on humans, then the challenger might well be unable to meet" the high bar this Court has set. *McGehee*, 854 F.3d at 492 (emphasis added); *see* Pet. App. 5a. (affirming the district court's findings that petitioners failed to establish a "scientific consensus and [presented] a paucity of reliable scientific evidence").

That gloss merely explicates, rather than adds to, this Court's requirement that a prisoner prove that a State's chosen method of execution is "'sure or very likely to

cause serious illness and needless suffering.'" *Glossip*, 576 U.S. at 875 (quoting *Baze*, 553 U.S. at 50) (emphasis omitted). The court below held that Petitioners failed to meet this requirement based on "the lack of scientific consensus *or* human studies establishing a ceiling effect for midazolam." Pet. App. 6a (emphasis added). In other words, a "scientific consensus" is but one route a prisoner may take in attempting to show that a State's chosen method of execution may cause needless suffering. The Eighth Circuit has also acknowledged that a prisoner may prevail based on a showing of "reliable scientific evidence," Pet. App. 5a—the prototypical example being studies conducted on humans. *Cf. Bucklew*, 139 S. Ct. at 1132-33 (rejecting method-of-execution claim where prisoner's expert relied chiefly, if not exclusively, on a study of drug effects on horses).

The Eighth Circuit has consistently left open the possibility that a prisoner could prevail without necessarily demonstrating a scientific consensus in favor of his position. *See Williams v. Kelley*, 854 F.3d 998, 1001 (8th Cir. 2017) (noting the prisoner's position "lack[ed] 'scientific consensus' and present[ed] 'a paucity of reliable scientific evidence' on the impact of the lethal-injection protocol") (quoting *McGehee*, 854 F.3d at 492-93); *Bucklew v. Precythe*, 883 F.3d 1087, 1096 (8th Cir. 2018) (holding the evidence was similarly "equivocal, lack[ed] scientific consensus and present[ed] a paucity of reliable scientific evidence") (quotation omitted).

Whether a prisoner may succeed on a method-of-execution challenge absent a scientific consensus the State's chosen method will cause him needless pain is perhaps an important question, but it is not presented by this case.

B. There is no conflict with the Eighth Circuit's decision.

Even if this case presented Petitioners' first question, it would not warrant review because there is no conflict on it because no court—including the Eighth Circuit—has required prisoners to demonstrate a scientific consensus in support of their claim. Nor is there any conflict with the Eighth Circuit's decision below. No circuit has rejected that court's requirement that prisoners must submit at the least "reliable scientific evidence," Pet. App. 5a, supporting a claim that a method of execution is sure or very likely to cause them needless pain. To do so would be to invite courts to rely on little more than speculation by hired experts.

That approach has been uniformly rejected by the courts of appeals. *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014) ("We have held that speculation that a drug that has not been approved will lead to severe pain or suffering 'cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering.'" (quoting *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013)));*Whitaker v. Livingston*, 732 F.3d 465, 469 (5th Cir. 2013) ("[S]peculation cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering." (quoting *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010))); *Cooey v. Strickland*, 589 F.3d 210, 231 (6th Cir. 2009) ("Uncertainties built on so many other uncertainties cannot show a substantial risk of severe pain and needless suffering."); *see also Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014) (holding that a prisoner must point to "*some* hypothetical situation, based on science and fact, showing a likelihood of severe pain," but "[m]ere speculation is not enough" (quoting *Whitaker,* 732 F.3d at 468)).

Petitioners' challenge would have been rejected no matter the circuit in which it was brought. There is no conflict for this Court to resolve.

C. The Eighth Circuit has not "cut off" method-of-execution claims.

Petitioners claim that if prisoners are forced to support their claims with reliable scientific evidence, as the Eighth Circuit (and every other circuit) requires, no prisoner could ever succeed. It may well be that as a practical matter no prisoner will ultimately be able to succeed on a method-of-execution challenge. After all, "[t]hat claim faces an exceedingly high bar." *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). So high, in fact, that "[t]his Court has yet to hold that a State's method of execution qualifies as cruel and unusual." *Id.* (quoting *Bucklew*, 139 S. Ct. at 1124). But that does not, as Petitioners claim, foreclose the possibility of bringing such claims.

Petitioners' argument here rests on *Nance v. Ward*, 142 S. Ct. 2214 (2022). But that decision is inapposite. There, the Court worried that requiring method-of-execution claims to be brought in habeas would "undo the commitment this Court made in *Bucklew*" that prisoners could suggest alternative methods of executions in use by other states because those claims would generally be brought in second or successive petitions and therefore barred. *Nance*, 142 S. Ct. at 2225. The Court was not concerned with whether a prisoner would ever be able to succeed in challenging a State's method of execution, only that his claim could be heard.

Petitioners, by contrast, do not claim they lack a forum in which to bring their challenge; rather, they lament that their evidentiary burden is too high to overcome. But that is simply a result of this Court's demanding standard, which recognizes the limited role of federal courts in policing States' choices of execution methods. *See*

Bucklew, 139 S. Ct. at 1125 ("[T]he Constitution affords a 'measure of deference to a State's choice of execution procedures' and does not authorize courts to serve as 'boards of inquiry charged with determining 'best practices' for executions.'") (quoting *Baze*, 553 U.S. at 47). Thus, while this Court has held that prisoners may bring method-of-execution claims, it has not held that they are entitled to prevail. Instead, this Court has set a high burden and the Eighth Circuit's decision below reflects that.

II. The second question presented does not merit review.

Petitioners' second question presented asks this Court to depart from its longstanding two-pronged framework for assessing method-of-execution claims. Pet. i. Under the *Baze/Glossip* framework, a prisoner must first show that Arkansas's method of execution "presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip*, 576 U.S. at 875 (quoting *Baze*, 553 U.S. at 50). Second, he must prove that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. Failure at either prong dooms a prisoner's challenge.

Petitioners claim that, after *Bucklew*, courts must assess the risk of pain associated with a State's chosen method of execution against the backdrop of a prisoner's proposed alternative. Pet. 30-31. Otherwise, they claim, a State that prevails on prong one could forgo a perfectly painless alternative method.

Petitioner's reading of *Bucklew* is mistaken. They concede that under *Baze* and *Glossip* this Court has treated the two prongs as "independent." Pet. 28. That has

not changed. Petitioners rely on a block quote from *Bucklew* rejecting a prisoner's argument that he, in an as-applied challenge, should have prevailed on the first prong alone—without having to satisfy the second prong because some methods of execution are "manifestly cruel without reference to any alternative methods." 139 S. Ct. at 1126 (alterations omitted). But *Bucklew* held that even if a State's chosen method of execution presents a risk of severe pain, to show that pain was "superadded" by the State requires comparing it with a demonstrably less painful, available alternative. *Id.* Thus, in other words, contrary to Petitioners' claims *Bucklew* merely confirms that a prisoner must *always* prevail on both prongs of the *Baze/Glossip* standard. Moreover, Petitioners do not identify any court of appeals decision holding *Bucklew* did away with a prisoner's burden to prevail on both prongs, and there is none.

Further, even if the Eighth Circuit could have been required to analyze whether Petitioners met prong two, the result wouldn't change because the district court found that Petitioners failed to carry their evidentiary burden on that prong too. It rejected the firing squad as an alternative because "there is nothing in the medical literature that addresses" the pain of being shot in the chest by a high-powered rifle and Petitioners' lead witnesses "could not testify that an execution by firing squad would be pain free." Pet. App. 86a. It likewise rejected secobarbital as an alternative because it "has never been used in an execution, and there are no studies or medical evidence of the effect of the drug on a condemned individual who is unwilling to die." *Id.* And lastly, it correctly concluded that Petitioners could not rely on pentobarbital because

they failed to show that Arkansas has access to that drug. Pet. App. 87a. Those findings were not clearly erroneous. The second question does not merit review.

CONCLUSION

This Court should deny the petition for certiorari.

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