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

No. 22-7305

In the Supreme Court of the United States

STACEY JOHNSON, et al.

Petitioners

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction, et al.

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents articulate no good reason for denying certiorari in this case. Their interpretation of the Eighth Circuit's opinion is untenable, as is their insistence that the Court did not mean what it said when it said that methods challenges involve a "*necessarily* comparative exercise." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019). By requiring a "scientific consensus," the Eighth Circuit did what this Court said not to do in *Nance v. Ward*, 142 S. Ct. 2214 (2022)—it imposed a rule that fails to keep the prisoner's burden "within reasonable bounds" and that effectively "precludes the kind of method-of-execution claim this Court told prisoners they could bring." *Id.* at 2220, 2225.

A. Unlike any other Court, the Eighth Circuit requires a scientific consensus.

Respondents concede that the first question presented is "perhaps an important question" worthy of review. BIO at 24. But they contend that the Eighth Circuit has not actually required a scientific consensus, meaning that the case does not present the question and that there is no circuit split. This contention cannot withstand examination of the Eighth Circuit's opinion.

Respondents' argument is based on the Eighth Circuit's conclusion that there was "no scientific consensus and a paucity of reliable scientific evidence concerning the effect of large doses of midazolam **on humans**." App. 5a (emphasis added). Similarly, they point to the Eighth Circuit's comment that there is a "lack of scientific consensus or **human studies** establishing a ceiling effect for midazolam." App. 6a (emphasis added). According to Respondents, the conjunctions in these

quotes leave prisoners with not one but two avenues available to prove needless suffering. If they cannot show a scientific consensus, say Respondents, they can still present "'reliable scientific evidence'—the prototypical example being studies conducted on humans." BIO at 24 (citation omitted).

Substitute the word "only" for "prototypical" and you get an accurate account of the Eighth Circuit's opinion. As the emphasized portions establish, the only proof the Eighth Circuit is willing to accept outside of a scientific consensus is a human study of what the protocol does to someone. But as a practical matter, the human-study option does not exist. No one will ever produce that human study. Such a study is unethical, impractical, and frankly impossible, as Judge Kelly explains in her concerrence. That leaves prisoners with one option—prove a scientific consensus. "No other circuit imposes such a stringent requirement," and it is "not required under Supreme Court precedent." App. 10a.

Respondents' citations to *Williams v. Kelley*, 854 F.3d 998 (8th Cir. 2017), and *Bucklew v. Precythe*, 883 F.3d 1087 (8th Cir. 2018), do not help their argument. In *Williams*, the court similarly qualified that the prisoner had presented a "paucity of reliable scientific evidence on the impact of the lethal-injection protocol **on a person with Williams's health conditions.**" *Williams*, 854 F.3d at 1001 (internal quotation marks omitted) (emphasis supplied). And in *Bucklew*, the Eighth Circuit was focused on the prisoner's alternative execution method, nitrogen hypoxia. *See Bucklew*, 883 F.3d at 1094–96. When the case reached this Court, the Court analyzed the pain inherent in the existing lethal-injection protocol but *did not*

require the prisoners to present a human study of (or scientific consensus about) that protocol. Rather, it assessed the effect of the protocol by carefully weighing the proof—including a "horse study," in direct contradiction to the Eighth Circuit's requirement for a human study. *See Bucklew*, 139 S. Ct. at 1131–33.

The Eighth Circuit requires either a human study of the method under challenge or a scientific consensus about the method. That is no different from requiring scientific consensus and only scientific consensus. The case presents the first question. And that question is worthy of review, as Respondents do not deny.

B. *Nance* is on point.

Contrary to Respondents' argument, *Nance* speaks directly to the issue in this case—a rule that would practically (though not literally) preclude litigation of methods challenges.

Nance explains that prisoners must be allowed to present methods challenges in 42 U.S.C. § 1983. Otherwise, the Court's precedents would be a "sham." *Nance*, 142 S. Ct. at 2225. Though technically the prisoner could challenge an execution method in habeas corpus, "that option is no option at all" because the claim will "collide" with procedural bars that apply only in habeas. *Id.*

Just so with the "scientific consensus" rule. Though this rule goes to the proof standard rather than the procedural vehicle, the upshot is the same: if the prisoner can succeed only by showing a scientific consensus, then his claim has zero chance. Indeed, a prisoner likely has *more* chance of success on a methods claim in habeas. He can at least attempt to exhaust the claim and present it in a timely first habeas

petition, unwieldy as that procedure might be so far ahead of execution. He cannot create consensus, which goes against the "nature of science and the scientific method," App. 12a (Kelly, J., concurring), and which is refuted in litigation by testimony from a single defense expert hired for battle.

Respondents' argument that Petitioners complain only about a difficult standard of proof rings hollow. Petitioners acknowledged that standard of proof and presented a "substantial amount of scientific evidence" to meet it. App. 7a (Kelly, J., concurring). That proof included studies suggesting that nearly three-quarters of prisoners would remain aware to the pain inherent in the second and third drugs of the protocol—a statistic, one might think, that would show it "sure or very likely" that any given prisoner will experience intolerable pain during execution. *Glossip v. Gross*, 576 U.S. 863, 881 (2015). But rather than weighing that proof against competing proof, the courts below pointed to the existence of competing proof as the beginning and end of the case.

Judge Kelly put it succinctly: "Because a study using 500 mg of midazolam cannot be conducted, there will continue to be a degree of speculation—and thus a lack of consensus—about the effect of such a dose." App. 12a. A standard that prisoners can never satisfy effectively "precludes the kind of method-of-execution claim this Court told prisoners they could bring." *Nance*, 142 S. Ct. at 2225.

C. The "*necessarily* comparative exercise" of a methods challenge requires courts to weigh the current method against proposed alternatives.

Bucklew directly contradicts Respondents' argument that a court may adjudicate a methods challenge by looking at risk of pain alone. The question under the Eighth

Amendment is whether an execution method involves pain that is "superadded" to the penalty of death. *Bucklew*, 139 S. Ct. at 1123. How does one determine if pain has been superadded? Not by "examining the State's proposed method in a vacuum, but only by comparing that method with a viable alternative." *Id* at 1126 (internal quotation marks and alteration omitted). This is a "*necessarily* comparative exercise." *Id.* The Eighth Circuit did not perform that exercise because it did not compare the midazolam protocol to the firing squad.

Respondents also suggest that review of the second question presented is not warranted because "the district Court found that Petitioners failed to carry their evidentiary burden" on firing squad. BIO at 28. To the contrary, the district court's findings call out for review—review that the Eighth Circuit did not conduct despite extensive briefing that explained why the district court's conclusions on the firing squad were clearly erroneous. *See* CA8 Opening Br. at 40–50, 67–76. The Eighth Circuit did not conduct that review because it violated *Bucklew*'s instruction not to examine the challenged execution method in a vacuum. The Eighth Circuit should review the district court's findings after certiorari is granted and the case is remanded.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

JUNE 2, 2023

Respectfully submitted,

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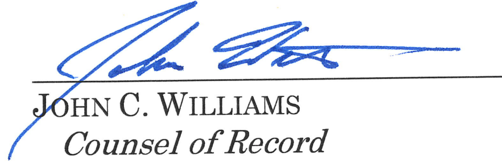

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