No. 25-_____

In the Supreme Court of the United States

RICHARD JORDAN,

Petitioner,

v.

MISSISSIPPI STATE EXECUTIONER, IN HIS OFFICIAL CAPACITY;
UNKNOWN EXECUTIONERS, IN THEIR OFFICIAL CAPACITIES;
BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS;
MARC MCCLURE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY,
IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition For a Writ Of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Death Penalty Case: Execution Scheduled for 6 p.m. Central Time on June 25, 2025

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June 24, 2025

CAPITAL CASE – Execution Date Set For
JUNE 25, 2025 at 6 p.m. Central Time

QUESTIONS PRESENTED

1. In a method-of-execution challenge based on the Eighth Amendment, does this Court's jurisprudence require lower courts to assess the substantiality of the risk of pain associated with the state's method by comparing it to the known, available alternative suggested by the prisoner-plaintiff?
2. In this challenge to Mississippi's use of a chemical paralytic and potassium chloride in its lethal injection protocol, did the Court of Appeals err when it found that Petitioner failed to show that these drugs pose a substantial risk of harm without comparing Respondents' method to the known, available alternative of a single lethal dose of pentobarbital, which undisputedly eliminates the risk of suffocation and internal burning, and is used by 10 executing states and the Federal government?

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

1. Appeal from grant of preliminary injunction (Count II of Complaint): *Jordan v. Fisher*, 823 F.3d 805 (5th Cir. 2016), *cert. den.*, 580 U.S. 1121 (2017).

2. Appeal from order denying motion to quash, third-party subpoena on Missouri Department of Corrections: *In re: Missouri Dept. of Corr.*, 839 F.3d 732 (8th Cir. 2016), *cert. den.*, *Jordan v. Missouri Dept. of Corr.*, 581 U.S. 995 (2017).

3. Appeal from order granting motion to quash, third-party subpoena on Virginia Department of Corrections: *Virginia Dept. of Corr. v. Jordan*, 921 F.3d 180 (4th Cir. 2020), *cert. den.*, *Jordan v. Virginia Dept. of Corr.*, 140 S.Ct. 672 (2019).

4. Appeal from order granting motion to quash, third-party subpoena on Georgia Department of Corrections: *Jordan v. Comm'r, Miss. Dept. of Corr.*, 947 F.3d 1322 (11th Cir. 2020), *cert. den.*, *Jordan v. Georgia Dept. of Corr.*, No. 19-1361, 141 S.Ct. 251 (2020).

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INTRODUCTION

In *Glossip v. Gross*,[1] this Court affirmed the denial of preliminary injunctive relief to death-sentenced prisoners who alleged that Oklahoma's three-drug lethal injection protocol, using successive injections of the sedative midazolam, a chemical paralytic, and potassium chloride, violated the Eighth Amendment. *Glossip* held that the petitioners failed "to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available method of execution."[2]

Looking first to Oklahoma's lethal injection protocol, *Glossip* noted that "petitioners' experts had no contrary scientific proof" to rebut Oklahoma's expert's opinion that "midazolam is capable of placing a person at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs."[3] Turning to the alternative method submitted by petitioners—a single dose of either sodium thiopental or pentobarbital, the Court pointed out that the district court had held that Oklahoma could not obtain those drugs for use in executions.[4]

Ten years later, Petitioner Richard Jordan faces execution in Mississippi with the same three drugs—though not with the same protocol—as used in Oklahoma in 2015. Both the District Court and the Fifth Circuit relied heavily on this Court's opin-

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[1] *Glossip v. Gross*, 576 U.S. 863 (2015).
[2] *Id.* at 878.
[3] *Id.* at 883.
[4] *Id.* at 879.

ion in *Glossip*. But these courts looked only to the result, not the analytical framework, of *Glossip,* ignoring the changes in the last ten years which compel a different result.

First, unlike in *Glossip*, Petitioner here offered one set of expert declarations to show that the second drug of Respondents' protocol inflicts "[c]hemical entombment and suffocation, the third drug causes "excruciating pain," and that the death caused by both together is "difficult to surpass in terms of agony,"[5] and another set to show the scientific data that midazolam "cannot produce the state of General Anesthesia, where the prisoner is rendered unconscious and insensate to pain." [6]

Second, Petitioner showed that, while a one-drug protocol using pentobarbital may have been unavailable to Oklahoma's corrections department in 2015, that drug has been obtained by ten States and the Federal Government to conduct 146 executions from January 1, 2015 to June 4, 2025 (the day the preliminary injunction motion was filed).[7] Thus, in *Barr v. Lee*, this Court held that the Federal Government could use the one-drug pentobarbital to resume executions of Federal death-sentenced prisoners, explaining that pentobarbital "has become a mainstay of state executions" and "has been used to carry out over 100 executions, without incident."[8]

Those new and markedly different sets of facts should lead to a different result than in the *Glossip* petitioners' preliminary injunction proceedings. In the intervening ten years, *Glossip*, which adopted the analysis of the Chief Justice's concurring

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[5] ROA.6968 ¶ 31 (Dr. Heath).
[6] ROA.7025.
[7] ROA.7489.
[8] *Barr v. Lee*, 591 U.S. 979, 980-81 (2020).

opinion in *Baze v. Rees*,[9] was itself further interpreted in *Bucklew v. Precythe*, *Barr v. Lee*, and *Nance v. Ward*.[10]

Thus, in *Bucklew*, the Court held that "a prisoner must show 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."[11] *Bucklew* continues: "The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial when compared to a known and available alternative."[12] The Court emphasized that:

> Distinguishing between constitutionally permissible and impermissible degrees of pain, *Baze* and *Glossip* explained, is a *necessarily comparative* exercise. To decide whether the State has cruelly "superadded" pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by "comparing" that method with a viable alternative.[13]

The Court of Appeals and the District Court fixated on the result in *Glossip*, neglecting the comparative analysis it requires. This Court should grant certiorari to explicate the Eighth Amendment standard and provide further guidance to the lower courts tasked with applying that test.

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[9] *Baze v. Rees*, 553 U.S. 35 (2008) (Roberts, C.J. concurring).
[10] *Bucklew v. Precythe*, 587 U.S. 119, 139-40 (2019); *Barr v. Lee*, 591 U.S. 979 (2020); *Nance v. Ward*, 597 U.S. 159 (2022).
[11] *Bucklew*, 587 U.S. at 134.
[12] *Id*. (quoting *Glossip*, 576 U.S. at 878, and *Baze*, 553 U.S. at 61).
[13] *Bucklew*, 587 U.S. at 136 (emphasis in original).

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is *Jordan v. Mississippi State Executioner, et al.*, No. 25-70013 (5th Cir. June 24, 2025). The decision is unreported. It is attached as Appendix A.

The opinion of the District Court is *Jordan, et al. v. Cain, et al.*, No. 15-295, 2025 WL 1728266 (S.D. Miss. June 20, 2025). It is attached as Appendix B.

JURISDICTION

The First Amended Complaint in this case states claims for relief through 42 U.S.C. § 1983 under the Eighth and Fourteenth Amendments to the United States Constitution. The district court has original federal question jurisdiction over those claims arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction of Petitioner's appeal from the district court's order denying Jordan's motion for preliminary injunction under 28 U.S.C. § 1292(a)(1).

This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment, U.S. Const. amend. VIII, provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment, U.S. Const. amend. XIV, §1 provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

I. Statement of Proceedings

Respondents plan to execute Petitioner Richard Jordan on Wednesday, June 25, 2025, at 6:00 p.m. CDT, or as soon as possible thereafter within the next twenty-four (24) hours.[14] Petitioner and another Mississippi death-sentenced prisoner filed civil action on April 16, 2015, seeking preliminary and permanent injunctive relief forbidding Respondents (the Commissioner of the Mississippi Department of Corrections, the Superintendent of the Mississippi State Penitentiary at Parchman, the Mississippi State Executioner, and Unknown Executioners, all in their official capacities) from executing them with a three-drug lethal injection protocol that included a chemical paralytic and potassium chloride as the second and third drugs. Petitioner submitted a that a protocol using a lethal dose of one drug—a barbiturate capable of producing death—was a known, available alternative method that would reduce or eliminate the risks associated with the second and third drugs of Respondents' three-drug protocol. On September 28, 2015, Petitioner filed a First Amended Complaint, based on Respondents' July 2015 amendment of their protocol to permit the use of midazolam as the first drug, followed by the chemical paralytic and then potassium chloride.

[14] ROA.6346.

Petitioner and the other plaintiffs (including three plaintiff-intervenors) engaged in discovery and motions practice, which was interrupted by an administrative stay during this Court's consideration of pendency of *Bucklew v. Precythe*,[15] and again during the pandemic. Discovery has been painstaking, to accommodate Respondents' concern to maintain the anonymity of their employees who participate in executions and the suppliers of their execution drugs. Through the entire course of the litigation, however, Petitioner has maintained that a one-drug protocol using pentobarbital would eliminate the risks presented by the use of the chemical paralytic and potassium chloride.

Petitioner moved for a preliminary injunction, or in the alternative, for temporary restraining order, on June 4, 2025.[16] Respondents filed their opposition on June 10.[17] Petitioner filed his reply on June 12.[18] A hearing was conducted by the District Court on June 14.[19] The District Court issued its opinion and order denying the motion for preliminary injunction on June 20.[20] Petitioner appealed to the Fifth Circuit and sought an injunction to stay his execution pending appeal. Briefs were filed by the parties on June 22 and 23. On June 24, the Fifth Circuit affirmed the District Court's denial of preliminary injunctive relief and denied the motion for stay pending appeal.[21]

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[15] *Bucklew v. Precythe*, 587 U.S. 119 (2019).
[16] ROA.7451-7503.
[17] ROA.7536-7565.
[18] ROA.7730-7749.
[19] ROA.8225-8315.
[20] ROA.7775-7804, Appendix B.
[21] Appendix A.

II. Statement of Facts

A. Mississippi plans to execute Richard Jordan with a successive injection of midazolam, rocuronium bromide, and potassium chloride.

Respondents' execution protocol calls for the injection of three drugs.[22] It is not contested that Respondents plan to execute Mr. Jordan by the injection of midazolam, rocuronium bromide (a chemical paralytic), and potassium chloride.[23]

B. The second and third drugs in MDOC's protocol are known to inflict severe pain.

There is no dispute on this record that the injection of a chemical paralytic and potassium chloride into the veins of a condemned prisoner sensate to noxious stimuli inflicts severe pain and agony over and above that needed to cause death. Plaintiffs' experts describe this in more detail.

The effect of injecting a chemical paralytic into a prisoner who retains the capacity to experience pain is explained by Dr. Mark J.S. Heath, M.D., Plaintiffs' expert anesthesiologist,[24] as follows: "[t]he paralytic agent would totally immobilize the in-

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[22] MDOC 2025 Protocol (May 28, 2025), ROA.6732-6758. Earlier protocols were issued on December 12, 2022, ROA.6759-6785, November 12, 2021, ROA.6786-6812, and November 15, 2017, ROA.6813-6839.

[23] The protocol permits the use of midazolam where sodium thiopental and pentobarbital are unavailable, and the use of vecuronium bromide or rocuronium bromide where Pavulon is unavailable. ROA.6737-6738.

[24] Mark J.S. Heath, M.D., (M.D. University of North Carolina at Chapel Hill; residency and fellowship training in Anesthesiology, Columbia University) is an Assistant Professor of Clinical Anesthesiology at Columbia University in New York City. ROA.6963 ¶ 2. Dr. Heath has given four declarations in this case: Heath Declaration and Report (May 4, 2015), ROA.6962-6973; Heath Supplemental Declaration and Report (Jan. 15, 2016), ROA.6974-6987; Heath Second Supplemental Declaration and Report (June 8, 2025), ROA.7522-7523; Heath Third Supplemental Declaration and Report (June 12, 2025), ROA.7750-7752.

mate by paralyzing all voluntary muscles (including the diaphragm), causing the inmate to suffocate to death while experiencing an intense, conscious, and desperate desire to breathe."[25] He continues:

> The experience, in onset and duration and character, would be very similar to that of being suffocated by having one's nose and mouth blocked off. However, there would be the additional element of being unable to move or writhe or communicate the agony.[26]

With respect to the third drug, Dr. Heath states that, "intravenous injection of concentrated potassium chloride solution, such as that administered by the MDOC as the third drug in its execution series, causes excruciating pain. The vessel walls of veins are richly supplied with sensory nerve fibers that are highly sensitive to potassium ions."[27]

Thus, according to Dr. Heath, "[c]onscious paralysis is not simply a bad way to die, it is one of the worst ways to die. Chemical entombment and suffocation, combined with the excruciating pain caused by the injection of concentrated potassium chloride, is difficult to surpass in terms of agony."[28]

C. Midazolam, the first drug MDOC plans to use in Jordan's execution, does not mitigate or eliminate the risks raised by the use of rocuronium bromide and potassium chloride.

In *Glossip v. Gross*, after discussion of the expert testimony presented by Oklahoma on the efficacy of midazolam, this Court stated, "[a]nd petitioners' experts acknowledged that they had no contrary scientific proof," and concluded, "[b]ased on

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[25] ROA.6967-6968 ¶ 27.
[26] ROA. 6968 ¶ 29.
[27] ROA.6968 ¶ 30.
[28] ROA.6968 ¶ 31.

the evidence that the parties presented to the District Court, we must affirm."[29] In this case, ten years after *Glossip*, Petitioner submitted three declarations from Dr. Craig Stevens, Ph.D.,[30] an expert pharmacologist, in which Dr. Stephens opines that midazolam will not produce general anesthesia,[31] the unconsciousness necessary to render a condemned prisoner insensate to the severe pain caused by the successive injection of rocuronium bromide and potassium chloride.[32] Dr. Stevens explains:

> Midazolam is a sedative drug but not an anesthetic drug. A sedative drug is incapable of rendering a condemned inmate unconscious, by the very nature of its pharmacological action. Midazolam . . . cannot produce the state of General Anesthesia, where the prisoner is rendered unconscious and insensate to pain. For the reasons stated in this supplemental report and the full report, Mississippi's use of midazolam as the first drug in the three-drug lethal injection protocol entails a substantial risk of severe pain for the prisoner.[33]

Dr. Stevens bases this on multiple studies, including the following:

Ceiling Effect: Midazolam has a "ceiling effect," and a barbiturate such as pentobarbital does not. Dr. Stevens states that "[b]ecause midazolam (and all benzo-

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[29] *Glossip v. Gross*, 576 U.S. 863, 883-84 (2015).

[30] Dr. Stevens (Ph.D. in Pharmacology, Mayo Clinic in Minnesota; postdoctoral fellowship, University of Minnesota Medical School) is a Professor of Pharmacology at the College of Osteopathic Medicine, a unit of the Oklahoma State University. Stevens Declaration and Amended Report (March 6, 2016), ROA.6991. Dr. Stevens has given three other declarations. Stevens Declaration and Supplemental Report (June 19, 2017), ROA.7020-7025; Stevens Declaration and Second Supplemental Report (March 13, 2018), ROA.7026-7036; and Stevens Declaration and Third Supplemental Report (June 8, 2025), ROA.7524-7535.

[31] Dr. Stevens uses the definition of "unconsciousness" provided by the American Society of Anesthesiologists: "General Anesthesia is a drug-induced loss of consciousness" and "General Anesthesia: unarousable, even with painful stimuli." ROA.7030 n.1; ROA.7023.

[32] ROA.7013-7014.

[33] ROA.7025.

diazepines) require the presence of GABA to work, it can potentiate GABA's inhibition only to a certain degree—after that, midazolam is incapable of producing a greater effect."[34]

EEG Studies: Clinical studies in humans noted that increasing doses of IV midazolam do not produce greater pharmacological effects in lowering the activity of the brain as measured by EEG signals (brain waves). Specifically, an IV midazolam dose of 30 mg for a typical 220 lb. adult did not produce greater EEG depression than a dose of about 20 mg.[35]

Functional MRI Studies: Clinical studies using functional MRI, a method to show areas of brain activation while undergoing an MRI scan, prove that midazolam does not prevent the activation of brain areas that process pain.[36]

Diazepam Overdose Studies: In twelve patients who overdosed on only benzodiazepines with no other drugs in their system, none of them needed assisted ventilation and all were discharged within two days with no ill effects. The largest doses of benzodiazepines taken were 2.5 grams of chlordiazepoxide and 400 mg of diazepam. All patients responded to pain stimulus when tested after arrival in the emergency room.[37]

The blood concentration of diazepam (a benzodiazepine like midazolam) in the overdose patients in this study is comparable to the blood concentration of midazolam in the autopsies of Charles Warner in Oklahoma in 2015 (after 500 mg midazolam,

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[34] ROA.7528.
[35] ROA.7530.
[36] ROA.7532.
[37] *Id*.

same as MDOC protocol) and Robert Van Hook in Ohio in 2018 (also after 500 mg midazolam).[38]

Particularly important to the present issue, patients overdosing on extremely high doses of a benzodiazepine still responded to noxious stimuli, including light pain stimulus, indicating a lack of general anesthesia.[39]

Dr. Stevens summarizes that "midazolam is a sedative drug but not an anesthetic drug. A sedative drug is incapable of rendering a condemned inmate unconscious, by the very nature of its pharmacological action. Midazolam . . . cannot produce the state of General Anesthesia, where the prisoner is rendered unconscious and insensate to pain." [40]

Dr. Stevens concludes that "Mississippi's use of midazolam as the first drug in the three-drug lethal injection protocol entails a substantial risk of severe pain for the prisoner."[41]

D. The MDOC protocol fails to adopt safeguards used by the increasingly-few jurisdictions that use midazolam as the first drug in a three-drug execution series.

MDOC's execution protocols and practices lack the safeguards used by other jurisdictions which previously or currently employ the three-drug protocol. One of the most important of these absent safeguards is performance of "a consciousness check

[38] ROA.7533.
[39] *Id*.
[40] ROA.7528.
[41] ROA.7025.

to attempt to ensure that the prisoner is adequately anesthetized prior to the administration of the agonizing chemical paralytic and potassium chloride."[42] Dr. Heath explains, "In the clinical context, the surgical/anesthesiology team conducts a test of whether the patient is adequately anesthetized before the incision is made. Typically, the surgeon will use graded (gradually increasing) stimuli in the area of the body where the surgery will occur, beginning with gentle stimuli, and increasing up to and including a stimulus that is at least as painful as would be expected from the impending surgical procedure."[43] MDOC's expert, Dr. Joseph Antognini, concurs that a consciousness check is an important safeguard in the implementation of a three-drug protocol that begins with midazolam.[44]

Although first including a "Proposed Consciousness Check" in its November 2017 execution protocol,[45] MDOC has never used this safeguard in the actual practice of executing condemned prisoners. In the execution of David Cox on November 17, 2021, MDOC injected vecuronium bromide (the paralytic drug) only two minutes after the injection of midazolam; two minutes after that (four minutes after the injection of midazolam), potassium chloride was injected.[46]

Cox's attorney Humphreys McGee, who witnessed the execution, testified that "[n]one of those standing around Mr. Cox in the execution chamber touched Mr. Cox. I did not see their mouths move, nor did I hear any speech from the officials around

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[42] ROA.7522.
[43] *Id*.
[44] ROA.7109; ROA.7122.
[45] ROA.6821-6822.
[46] ROA.7124.

Mr. Cox," and "[b]etween the time the curtain parted and when the coroner pronounced Mr. Cox's death, nobody entered or left the execution chamber." [47] And referring to the 2021 Protocol's "Proposed Consciousness Check" section, Mr. McGee testifies, "that absolutely did not happen during the execution of David Cox."[48]

The same is true of the December 2022 execution of Thomas Loden; MDOC administered all three drugs within three minutes of the injection of midazolam, with no indication of any consciousness check between the administration of midazolam and that of vecuronium bromide.[49] One of Loden's attorneys, who witnessed his execution, testified by declaration that no consciousness check was performed: "once the curtain was opened to begin the execution, nobody entered or left the chamber. None of the persons present in the execution chamber touched Mr. Loden at all during the process. I did not hear anyone say anything during the process, other than Mr. Loden's last words and the pronouncement of death."[50]

In MDOC's papers in opposition to the motion for preliminary injunction, Cain gave a declaration claiming that "[t]he IV Team Leader did perform a consciousness check after the administration of the first drug" because he "walked a few feet into the chamber and observed whether Mr. Loden was unconscious."[51] After this viewing,

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[47] ROA.7130-7131 ¶¶ 4-11. Before the curtains were raised to begin the public part of the execution, McGee heard sounds, including conversation, from inside the chamber, indicating that he would have heard any attempt to speak to Cox during a consciousness check. Id.
[48] ROA.7132 ¶ 12.
[49] ROA.7134.
[50] ROA.7141 ¶ 8.
[51] ROA.7566 ¶ 8. Cain further explains that "the door to the injection room is located to the side of the inmate's head and is difficult to be seen by all witnesses to the execution." *Id*. Leonard Vincent, the General Counsel of MDOC, who also gave a declaration accompanying Defendants' opposition to preliminary injunction, makes the same point. ROA.7606-7607 ¶ 4. Mr. Vincent also states that the same

without touching Mr. Loden, and from a distance and at an angle that the witnesses observing the execution could not even see him, the IV Team Leader left the chamber and, according to Defendant Cain, "proceeded to administer the second drug."[52] According to the MDOC chronological record of Mr. Loden's execution, all of the activity by the IV Team Leader described by Defendant Cain would have occurred between 6:02 and 6:03 p.m.[53]

The brief viewing of the condemned prisoners in the two executions, from an angle and distance that obscured the IV Team Leader from the witnesses, is not the "consciousness check" described by the parties' experts. Dr. Heath describes a consciousness check as "graded (gradually increasing) stimuli in the area of the body where the surgery will occur, beginning with gentle stimuli, and increasing up to and including a stimulus that is at least as painful as would be expected from the impending surgical procedure."[54] And Defendants' expert, Dr. Antognini, states that "[t]he American Society of Anesthesiologists practice advisory (2018) includes clinical signs (including verbal, eyelash and noxious stimuli) as ways to assess consciousness (pages 847, 851 of the advisory)."[55]

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procedure was followed in the execution of David Cox. *Id*. Thus, neither Defendant Cain nor Mr. Vincent dispute the declarations of Humphreys McGee (ROA.7129-7132) and Stacy Ferraro (ROA.7139-7141) regarding their observations of, respectively, the executions of Mr. Cox and Mr. Loden.

[52] ROA.7568 ¶ 9.

[53] ROA.7134.

[54] ROA.7522 ¶ 6.

[55] ROA.7109; ROA.7122. As discussed below, Tennessee has forsaken the three-drug protocol in favor of the one-drug pentobarbital protocol, and Ohio's Attorney General has publicly requested the U.S. Department of Justice to provide pentobarbital to the state corrections department to allow that state to also use the one-drug protocol.

Dr. Heath states that "[t]he goal of the consciousness check cannot be achieved by 'visually confirming that the inmate was unconscious.' Nothing in that visual process gives information about whether the prisoner, while in some state of sedation, could be aroused by the intense sensation of suffocation caused by the chemical paralytic and intravenous burning pain caused by potassium chloride."[56] He also points out that a purely visual examination of the condemned prisoner is insufficient to adequately confirm that the IV line remains affixed and is functioning properly, a second function in the check described in the Mississippi protocol.[57]

E. The risks of the three-drug protocol are eliminated by injecting a single lethal dose of pentobarbital and removing the chemical paralytic and potassium chloride from the execution protocol.

The intravenous injection of a single, lethal dose of pentobarbital effectively causes death without the risk created by the use of a chemical paralytic and potassium chloride. As Dr. Heath explains, the injection of pentobarbital "in massive overdose" "ablate[s] consciousness, ablate[s] respiration, and produce[s] hemodynamic collapse. The combination of not breathing and hemodynamic collapse causes rapid death."[58] Because an overdose of pentobarbital itself causes death, the other two drugs are simply unnecessary.[59] Dr. Heath concludes by saying that "in comparison

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[56] ROA.7751 ¶ 6.
[57] ROA.6740-6741 (2025 Protocol); ROA.6767-6768 (2022 Protocol); ROA.6794-6795 (2021 Protocol); ROA.6821-6822 (2017 Protocol). Dr. Heath explains, "[t]o ensure the IV is working properly, delivering the drugs to the vein instead of infiltrating the tissue surrounding the access site, it is necessary to touch or palpate the skin around the access site to make sure there is no swelling. Swelling indicates that at least some of the drug is going into the tissue instead of the vein. This cannot be done by sight alone." ROA.7752 ¶ 12.
[58] ROA.6967 ¶ 24.
[59] *Id*.

to the single-drug anesthetic-only barbiturate technique, the use of a paralytic drug and potassium chloride in a three-drug protocol presents a substantial risk of causing an agonizing, painful, and cruel death, while otherwise serving no legitimate purpose."[60]

F. Ten states and the Federal Bureau of Prisons have adopted the one-drug pentobarbital protocol.

Although, when *Glossip* was decided in 2015, it appeared to this Court that capital punishment jurisdictions would not be able to obtain pentobarbital for use in executions,[61] the drug has been used by an increasing number of jurisdictions since.

Most prominently, during the first term of the Trump Administration, the Federal Bureau of Prisons (BOP) replaced its three-drug protocol with the one-drug pentobarbital protocol. [62] Then-Attorney General Barr's directive to BOP to adopt the one-drug pentobarbital protocol stated, "[t]he BOP has a viable source for the drug, and the BOP is prepared to implement the Addendum."[63] The BOP acquired pentobarbital, and thirteen Federal prisoners were executed with the one-drug protocol during 2020-21.[64]

In addition to the Federal Government, many jurisdictions have been successful in securing pentobarbital specifically for use in executions. As this Court observed in *Barr v. Lee*, pentobarbital "has become a mainstay of state executions" and "has

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[60] ROA.6968.
[61] *Glossip v. Gross*, 576 U.S. 863, 878-79 (2015).
[62] United States Department of Justice, "Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse" (July 25, 2019), ROA.7257-7260.
[63] Memorandum for the Attorney General, Regarding the Federal Bureau of Prisons' Federal Execution Protocol Addendum (July 24, 2019), ROA.7277-7285.
[64] ROA.7265-7267.

been used to carry out over 100 executions, without incident."[65] Ten States have executed condemned prisoners with a one-drug pentobarbital protocol in the years after the decision in *Glossip*. The table presented to the District Court and the Court of Appeals details the executions that have been conducted from January 1, 2015 (the year this lawsuit was filed) to the filing of the preliminary injunction motion.[66]

	3-drug Pentobarbital	1-drug pentobarbital	3-drug Midazolam	Other	Total
2015	1 VA	24 GA (5), TX (13), MO (6)	3 FL (2), OK (1)		28
2016		17 TX (7), GA (9), MO (1)	3 FL (1), AL (2)		20
2017		9 TX (7), MO (1), GA (1)	11 VA (2), AR (4), AL (3), OH (2)	3 (FL)	23
2018		16 TX (13), GA (2), SD (1)	4 AL (2), TN (1), OH (1)	5 FL (2), NE (1), TN (2)	25
2019		14 TX (9), GA (3), MO (1), SD (1)	4 AL (3), TN (1)	4 FL (2), TN (2)	22
2020		15 USA (10), TX (3), GA (1), MO (1)	1 AL (1)	1 TN (1)	17
2021		7 USA (3), TX (3), MO (1)	4 AL (1), MS (1), OK (2)		11
2022		10 TX (5), MO (2), AZ (3)	8 OK (5), AL (2), MS (1)		18
2023		12 TX (8), MO (4)	6 OK (4), AL (2)	6 FL (6)	24
2024		14 TX (5), MO (4), GA (1), UT (1), SC (2), IN (1)	7 AL (3), OK (4)	4 AL (3) (gas), FL (1)	25
2025		8 SC (1), TX (4), AZ (1), IN (1), TN (1)	2 OK (1), AL (1)	9 SC (2) (firing), AL (1) (gas), LA (1) (gas), FL (5)	19 (to date)
TOTAL	1 (< 1%)	146 (63%)	53 (23%)	32 (14%)	232

[65] *Barr v. Lee*, 591 U.S. at 980-81 (citing *Bucklew*, 587 U. S. 119 (2019);*Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); and *Gissendaner v. Comm'r*, 779 F.3d 1275 (11th Cir. 2015)).
[66] ROA.7489.

Thus, from January 1, 2015, to June 4, 2025 (when the preliminary injunction motion was filed), 146 executions were conducted using a one-drug pentobarbital protocol which eliminated the chemical paralytic and potassium chloride. In that same period, only 53 executions were conducted using a three-drug midazolam protocol.

G. The Department of Justice and Federal Bureau of Prisons have been ordered by President Trump and Attorney General Bondi to assist officials like MDOC in obtaining execution drugs.

On January 20, 2025, the President ordered the Attorney General to "take all necessary and lawful action to ensure that each state that allows capital punishment has a sufficient supply of drugs needed to carry out lethal injection."[67] On February 5, 2025, Attorney General Bondi directed the Federal Bureau of Prisons to "work with each state that allows capital punishment to ensure the states have sufficient supplies and resources to impose the death penalty."[68]

H. Respondents have abandoned efforts to obtain pentobarbital since at least July 2021.

Respondents did not join the jurisdictions that obtained pentobarbital and conducted executions with the one-drug protocol. When Cain became MDOC Commissioner in May 2020, he was advised that lethal injection drugs needed to be obtained.[69] From May 2020 through July 2021, Cain did not contact any potential suppliers of execution drugs and knew of no other efforts by MDOC personnel to do

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[67] Executive Order 14164, "Restoring the Death Penalty and Protecting Public Safety" (January 20, 2025), ("E.O. 14164"), ROA.7270 at Sec. 4(a).
[68] Memorandum from Attorney General Bondi, "Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions" (February 5, 2025), ROA.7276 at Sec. V.
[69] ROA.6897:10-25.

so.[70] In July 2021, he started to make efforts to obtain execution drugs because of the impending execution of David Cox.[71]

Cain met with two suppliers in his effort to obtain execution drugs that month. Cain told the supplier from whom drugs were ultimately purchased that they merely needed one drug in each of the three categories:[72] "you had the options . . . on the first drug, you had three options, so he could provide the midazolam – okay, so that was one."[73] Cain testified, "Didn't matter to me. Just pick one of each one."[74] There was no discussion of pentobarbital with that supplier,[75] which sold midazolam, potassium chloride, and vecuronium bromide to MDOC.[76] Indicating the chart on the protocol listing execution drugs, Cain testified that "[w]e got this, and then we abandoned barbital."[77]

In the District Court, in responses to requests for admissions submitted on June 9, 2025, Respondents admit that, after Cain's meetings with the execution drug suppliers in July 2021, the Commissioner abandoned further efforts to obtain pentobarbital for executions.[78] Further, Respondents admit that they have not made any

[70] ROA.6919:7-11.
[71] ROA.6924:10-25. Cox was not a plaintiff or intervenor in this case. He dismissed his post-conviction petition and requested to be executed, which happened on November 14, 2021.
[72] ROA.6949:2-6, ROA.6949:17-6950:2. *See* n.24 above (listing drugs listed in MDOC execution protocols).
[73] ROA.6949:23-25.
[74] ROA.6950:10-11.
[75] ROA.6953:15-18.
[76] ROA.6950:25-66:3.
[77] ROA.6940:25-6941:13.
[78] ROA.7758-ROA.7760, (Response to RFA Nos. 20-24, 27-28).

effort to secure the assistance of the DOJ or BOP to obtain pentobarbital for lethal injection executions.[79]

REASONS FOR GRANTING THE WRIT

I. The denial of preliminary injunctive relief was based on a misapplication of this Court's precedent governing Eighth Amendment method-of-execution challenges.

A. The Eighth Amendment is violated when a state's method of execution poses a risk of pain which is substantial in comparison to a known and available alternative method.

Count I.B. of the First Amended Complaint alleges that Respondents' continued use of a chemical paralytic and potassium chloride in a three-drug execution protocol violates the Eighth Amendment.[80] Petitioner relies on this Court's recent series of decisions establishing the standard for such a method-of-execution challenge.[81]

Under *Bucklew*, "a prisoner must show 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."[82] *Bucklew* continues: "The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial when compared to a known and available alternative."[83] The Court emphasized that:

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[79] ROA.7759 (Response to RFA No. 25).
[80] First Amended Complaint, ROA.664-667, ¶¶ 232-253.
[81] *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality op. of Roberts, C.J.); *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015); *Bucklew v. Precythe*, 587 U.S. 119, 139-40 (2019); *Barr v. Lee*, 591 U.S. 979 (2020); *Nance v. Ward*, 597 U.S. 159 (2022) (interpreting the Eighth Amendment test to determine that claims such as Count I.B. need not be brought in Federal habeas corpus).
[82] *Bucklew*, 587 U.S. at 134.
[83] *Id*. (quoting *Glossip*, 576 U.S. at 878, and *Baze*, 553 U.S. at 61).

> Distinguishing between constitutionally permissible and impermissible degrees of pain, *Baze* and *Glossip* explained, is a *necessarily comparative* exercise. To decide whether the State has cruelly "superadded" pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by "comparing" that method with a viable alternative.[84]

Similarly, in *Nance*, this Court reiterated the comparative nature of the Eighth Amendment test, saying that "[o]nly through a 'comparative exercise,' we have explained, can a judge 'decide whether the State has cruelly 'superadded' pain to the punishment of death.'"[85]

Here, directly contrary to the required analysis, both the District Court and the Court of Appeals examined Respondents' protocol "in a vacuum." Both courts held that Petitioner failed to show a likelihood of success that the three-drug series poses a risk of severe pain, but did not do so by comparing that method to the one-drug alternative. In fact, other than a bare mention of the alternative, it is not discussed at any point in either opinion. The record evidence, correctly considered under *Bucklew*'s comparative standard, shows that the one-drug pentobarbital protocol eliminates the risks posed by Respondents' three-drug protocol by removing the chemical paralytic and potassium chloride from the injection series.

Under a correct statement and application of *Baze*, *Glossip*, *Bucklew*, and *Nance*, Petitioner has shown a likelihood of success on the merits of his Eighth Amendment claim.

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[84] *Bucklew*, 587 U.S. at 136 (emphasis in original). *Nance* reemphasized the point. *Nance*, 597 U.S. at 164 (quoting *Bucklew*, 587 U.S. at 136) ("[o]nly through a 'comparative exercise,' we have explained, can a judge 'decide whether the State has cruelly 'superadded' pain to the punishment of death'").
[85] *Nance*, 597 U.S. at 164 (quoting *Bucklew*, 587 U.S. at 136).

B. The one-drug pentobarbital protocol is a "known, available alternative" to Respondents' three-drug protocol.

A "known, available alternative" can be established by reference to an execution method in other jurisdictions. Addressing this "available alternative" prong of the test, *Bucklew* said:

> Finally, the burden Mr. Bucklew must shoulder under the *Baze-Glossip* test can be overstated. An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law. . . . So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option.[86]

Justice Kavanaugh, concurring, pointed out that "an inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain."[87]

Petitioner submitted the one-drug pentobarbital protocol used in ten States and by the Federal Government for comparison to Respondents' three-drug protocol. The ubiquity of the one-drug pentobarbital protocol was cited by this Court in *Barr v. Lee*. Vacating the lower court's injunction against that protocol, the per curiam Court explained that pentobarbital "has become a mainstay of state executions" and "has been used to carry out over 100 executions, without incident."[88]

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[86] *Bucklew*, 587 U.S. at 139-140.
[87] *Id*. at 153 (Kavanaugh, J., concurring).
[88] *Barr v. Lee*, 591 U.S. at 980-81 (citing *Bucklew*, 587 U. S. 119 (2019); *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); and *Gissendaner v. Commissioner*, 779 F.3d 1275 (11th Cir. 2015)).

In the time since *Barr*, as discussed above, additional jurisdictions have secured pentobarbital and either prepared for or commenced executions using the one-drug protocol: Idaho (2023), Indiana (2024), South Carolina (2025), Tennessee (2024), and Utah (2024). Six other jurisdictions implemented the one-drug pentobarbital protocol before July 2021 and continue to do so: Arizona, Georgia, Missouri, South Dakota, Texas, and the Federal Bureau of Prisons.

C. The lower courts' failure to undertake the comparative analysis required by *Bucklew v. Precythe* demonstrates the need for further guidance from this Court.

Petitioner submitted evidence that the risk of severe pain posed by the injection of a chemical paralytic and potassium chloride in Respondents' protocol is substantial in comparison to the one-drug protocol which entirely eliminates that risk. As early as 2008, the controlling *Baze* plurality opinion recognized the severity of the three-drug protocol's risk, stating that "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."[89]

Likewise, Dr. Mark J.S. Heath, Jordan's expert anesthesiologist testified in his first declaration that "in comparison to the single-drug anesthetic-only barbiturate technique, the use of a paralytic drug and potassium chloride in a three-drug protocol presents a substantial risk of causing an agonizing, painful, and cruel death, while otherwise serving no legitimate purpose." [90]

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[89] *Baze*, 553 U.S. at 53 (Roberts, C.J.).
[90] ROA.6968 ¶ 31.

More narrowly, the issue is whether the sedative midazolam, if injected as the first drug before the chemical paralytic and potassium chloride, can render the prisoner unconscious, such that he will be insensate to the extreme pain caused by those second and third drugs. The courts below held that *Glossip* decided this question. The District Court pointed to this Court's observation that the record contained "no evidence 'that the ceiling effect negated midazolam's ability to render an inmate insensate to pain caused by the second and third drugs in the protocol.'"[91] The Court of Appeals similarly opined that "the record in this case is substantially similar to the one in *Glossip*."[92] Although recognizing that, in this case, "both sides submitted expert testimony regarding the three-drug cocktail, and these dueling experts differed in some respects from the evidence introduced in *Glossip*," it nevertheless concluded that "we see no reason to depart from *Glossip*."[93]

Contrary to both the District Court and the Fifth Circuit, *Glossip* does not control here, because both sides of the required comparative analysis have changed since 2015. First, on the issue of the risk of harm presented by the three-drug protocol, the *Glossip* plaintiffs did not submit any scientific proof contradicting Oklahoma's expert, who had testified to the efficacy of midazolam in the three-drug protocol.[94] The Court concluded that "[b]ased on the evidence that the parties presented to the District

[91] App. B at 14 (quoting *Glossip*, 576 U.S. at 887-88).
[92] App. A at 6.
[93] *Id*.
[94] *Glossip*, 576 U.S. at 883-84.

Court, we must affirm."[95] On remand in *Glossip*, the district court rejected the argument that this Court's opinion had settled the issue of midazolam's efficacy. This rejection was based on the Oklahoma plaintiffs' post-remand expert report, authored by Dr. Craig Stevens, Petitioner's pharmacology expert in this case.[96] Certainly, then, Dr. Stevens' opinions did more than "differ[ ] in some respects" from the evidence before this Court in *Glossip*—at least, in the view of the district court which considered the record evidence both before and after this Court's opinion.

Thus, unlike the *Glossip* plaintiffs in this Court, who did not present scientific proof, Petitioner's expert in this case provided ample objective data, including scientific literature confirming the "ceiling effect" of midazolam, a dosage above which the drug has no additional ability to depress brain functions;[97] EEG studies, more specifically showing an IV midazolam dose of 30 mg for a typical 220 lb. adult did not produce greater EEG depression than a dose of about 20 mg;[98] functional MRI studies, showing that midazolam does not prevent the activation of brain areas that process pain;[99] and diazepam overdose studies, in which patients, whose blood concentrations

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[95] *Id*. at 884.
[96] *Glossip v. Chandler*, 554 F.Supp.3d 1176, 1187 (W.D. Okla. 2021). After a bench trial on the merits, the court rendered judgment for Oklahoma, based in part on expert testimony adduced by Oklahoma but not before the District Court in this case, and also on evidence of safeguards used in Oklahoma but not by Respondents here. *Glossip v. Chandler*, No. 14-0665, 2022 WL 1997194 (W.D. Okla. June 6, 2022). The *Glossip* plaintiffs did not appeal the district court's decision on the claim analogous to the one presented by Jordan in this case. *Coddington v. Crow*, No. 22-6100, 2022 WL 10860283 (10th Cir. Oct. 19, 2022).
[97] ROA.7528.
[98] ROA.7530.
[99] ROA.7532.

of the benzodiazepine diazepam were comparable to blood concentrations of midazolam in autopsies of executed prisoners, responded to noxious stimuli, including light pain stimulus, and were discharged within days of admission.[100]

Bucklew focused more intently than prior opinions on the comparison of the challenged method with the plaintiff's alternative. In addition to the questions presented by the petitioner, this Court directed the parties to brief and argue this question:

> Whether petitioner met his burden under *Glossip v. Gross*, 576 U. S. ____ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.[101]

Bucklew required the District Court and Fifth Circuit to consider the substantiality of the risk of severe harm from the use of the chemical paralytic and potassium chloride by comparing that risk to the one-drug pentobarbital protocol.[102] Respondents dispute this proposition, contending that the *Baze/Glossip* test requires satisfaction of "two, separate, requirements."[103] But when *Glossip*, quoting *Baze*, refers to a "substantial risk of severe harm," it then defines the word "substantial" in terms of the comparison to the alternative:

> The controlling opinion [in *Baze*] summarized the requirements of an Eighth Amendment method-of-execution claim as follows: "A stay of execution may not be granted on grounds such as those asserted here unless the condemned

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[100] ROA.7532-7533.
[101] *Bucklew v. Precythe*, No. 17-8151, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-8151.html (last viewed June 24, 2025).
[102] *Bucklew*, 587 U.S. 119, 139-40 (2019).
[103] MDOC Br. at 21, citing *Glossip*, 576 U.S. 863, 877 (2015), and referring to *Baze*, 553 U.S. 35, 52 (2008) (plurality op. of Roberts, C.J.).

> prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives."[104]

That is exactly what *Bucklew* emphasized: "The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial when compared to a known and available alternative."[105] Further, *Bucklew* referred to the analysis as a "*necessarily comparative* exercise" that "isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'comparing' that method with a viable alternative."[106]

To the extent there might be some required threshold showing prior to the comparative analysis, Petitioner demonstrated a likelihood of success in meeting that threshold. He filed and argued multiple declarations from expert witnesses the district court found credible, [107] showing that the risks of severe harm from the administration of a chemical paralytic and potassium chloride were substantial in comparison to the one-drug pentobarbital protocol used by ten states and the Federal Government.

With respect to the risk of severe harm from the three-drug protocol, Dr. Heath's testimony amplified the Chief Justice's opinion in *Baze* that "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of

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[104] *Glossip*, 576 U.S. at 877-78 (quoting *Baze*, 553 U.S. at 61).
[105] *Id*. (quoting *Glossip*, 576 U.S. at 878, and *Baze*, 553 U.S. at 61).
[106] *Bucklew*, 587 U.S. at 136 (emphasis in original). *Nance* reemphasized the point. *Nance*, 597 U.S. at 164 (quoting *Bucklew*, 587 U.S. at 136) ("[o]nly through a 'comparative exercise,' we have explained, can a judge 'decide whether the State has cruelly 'superadded' pain to the punishment of death'").
[107] ROA.7794.

pancuronium bromide and pain from the injection of potassium chloride."[108] Then, Dr. Stevens provided what was absent in *Glossip*: scientific literature to show that midazolam does not reliably render a prisoner unconscious to the pain and agony caused by the injection of the chemical paralytic and potassium chloride.

The District Court found that "[b]oth Plaintiffs and Defendants presented credible expert testimony in support of their respective positions."[109] The court thus rejected Respondents' invitation to discard Dr. Stevens' report entirely.[110] But having accepted the credibility of the three experts (Heath and Stevens for Petitioner and Antognini for Respondent), the District Court did not engage this evidence, stating instead that "[i]n similar cases of dueling experts, federal courts have found that the party seeking a preliminary injunction had not sufficiently demonstrated their likelihood of success on the merits."[111]

To support this proposition, the District Court cited the Eighth Circuit's opinion in *Johnson v. Hutchinson*; but that case affirmed a district court after a bench trial, not denial of a preliminary injunction motion.[112] It also relied on *Barr v. Lee*, where this Court held that the prisoner-petitioners plaintiffs failed to show that the one-drug pentobarbital protocol posed a risk of harm that was substantial in compar-

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[108] *Baze*, 553 U.S. at 53 (Roberts, C.J.).
[109] ROA.7794.
[110] ROA.7554-7555.
[111] ROA.7794.
[112] ROA.7788-7789 (citing *Johnson v. Hutchinson*, 44 F.4th 1116 (8th Cir. 2022)). Moreover, Eighth Circuit precedent required plaintiffs to show a "scientific consensus" regarding the efficacy of midazolam; while the panel majority affirmed, the concurring opinion, while bound by that precedent, objected that "[n]o other circuit imposes such a stringent requirement." Id. at 1122 (Kelly, J., concurring).

ison to their proposed alternatives. But this Court in *Barr* did not hold that a preliminary injunction could not be granted where the adverse parties each submitted credible expert testimony; rather, it relied heavily on the ubiquity of the adoption of the one-drug protocol.[113] That, of course, is the "known, available alternative" submitted by Petitioner for the comparative analysis.

The Court of Appeals opined that the District Court's treatment of Petitioner's experts "tracks how other courts have handled 'equivocal evidence' in similar circumstances."[114] But the District Court did not find Petitioner's expert testimony to be "equivocal," and the word itself is not in the lower court's opinion. It comes from the outlier Eighth Circuit jurisprudence cited by the Fifth Circuit,[115] by which it meant that it did not rise to the level of a "well-established scientific consensus."[116] The concept of requiring such a consensus was taken from Justice Alito's concurrence in *Baze*,[117] but has never been adopted by a majority opinion of this Court on method-of-execution challenges.[118]

Moreover, against the six declarations given by Petitioner's experts (three each) over the course of this litigation, Respondents rely solely on one given by Dr. Antognini in 2016 and never revised. That declaration was hardly overwhelming. Dr. Antognini provides no support in scientific literature to support his extrapolative conclusion that a dose of 500 mg of midazolam would render an individual unconscious

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[113] *Barr*, 591 U.S. at 980-81.
[114] App. A at 7.
[115] *See* n.116 above.
[116] *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017).
[117] Id. at 492-93 (quoting *Baze*, 553 U.S. at 63, 67 (Alito, J., concurring).
[118] Nor did the Fifth Circuit explicitly adopt the "well-established scientific consensus" requirement in this case.

and insensate to pain and noxious stimuli.[119] Instead, he states that "midazolam is a short-acting benzodiazepine which is used as a sedative in routine medical procedures such as colonoscopies, bronchoscopies, other minor medical procedures and prior to surgery."[120] Respondent's expert does not contend that the pain associated with a colonoscopy or bronchoscopy is analogous to that inflicted by the injection of a chemical paralytic and potassium chloride. Nor could he.[121]

Second, Dr. Antognini states that the two primary purposes of the drug are relieving the patient's anxiety and causing amnesia.[122] He concedes that "midazolam is not typically used to induce anesthesia."[123] All three of these purposes—including induction rather than maintenance of anesthesia—are not comparable to the function of rendering a prisoner unconscious such that he is insensate to the pain and agony caused by the injections of a chemical paralytic and potassium chloride.

Further, Dr. Antognini has not provided any rebuttal to any of Dr. Stevens' declarations given in 2017, 2018, or 2025, and has not rebutted any of Dr. Heath's declarations.

The "dueling experts" or "equivocal evidence" rationale contravenes this Court's statement that federal courts should not equate the "likelihood of success" with "success," or treat preliminary injunctions as "tantamount to decisions on the

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[119] ROA.7697.
[120] ROA.7695-7696; MDOC Br. at 26-27.
[121] Dr. Heath described the pain inflicted by the second and third drugs in MDOC's protocol as "the intense sensation of suffocation caused by the chemical paralytic and intravenous burning pain caused by potassium chloride." ROA.7751 ¶6.
[122] ROA.7696.
[123] *Id*. Notably, one of the studies on midazolam cited by Dr. Antognini for the proposition that midazolam can be used for the induction of anesthesia makes clear that "[m]idazolam cannot be used alone, however, to maintain adequate anesthesia." ROA.8342.[123]

underlying merits."[124] This Court's recent opinion in *Ramirez v. Collier* makes this clear in the context of a preliminary injunction that would stay an execution.[125] In *Ramirez*, reversing the Fifth Circuit, this Court held that a preliminary injunction should issue, staying an execution of a Texas death-sentenced prisoner who had filed a civil action raising a claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[126] Although Texas raised a factual issue with respect to the sincerity of Ramirez's beliefs, this Court stated that "[w]e are also mindful that, while we have had full briefing and oral argument in this Court, the case comes to us in a preliminary posture: The question is whether Ramirez's execution without the requested participation of his pastor should be halted, pending full consideration of his claims on a complete record." [127]

The "dueling experts" rationale offered by the District Court and accepted by the Court of Appeals cannot account for the failure to conduct *Bucklew*'s comparative analysis in this case.

The Fifth Circuit also held that "[t]he [district] court found that [Petitioner] offered no evidence that the two prisoners recently executed under this protocol suffered any pain."[128] The District Court finding approved by the Court of Appeals stated:

> it is undisputed that Defendants executed David Cox and Thomas Loden using the same three-drug series they intend to use on Richard Jordan, and the record contains no

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[124] *Lackey v. Stennie*, ___ U.S. ___, 145 S.Ct. 659, 667 (2025).
[125] *Ramirez v. Collier*, 595 U.S. 411 (2022).
[126] *Id*. at 421.
[127] *Id*., 595 U.S. at 421 (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)).
[128] App. A at 6.

> evidence that either Cox or Loden suffered "serious" pain or "needless suffering" prior to death. Plaintiffs dismiss this practical observation by claiming that even if Cox and Loden had suffered pain, there would be no evidence of it due to the chemical paralytic administered after the midazolam. But Plaintiffs have the burden of proof, and Defendants are not required to prove that Cox and Loden did not suffer. Ultimately, the record contains no evidence that either David Cox or Thomas Loden needlessly suffered prior to death by the same method of execution at issue here, and the Court finds that to be persuasive evidence against the issuance of a stay.[129]

As the District Court noted in passing, the undisputed proof on this record is that "[b]ecause the prisoner is paralyzed by the administration of the second drug, the prisoner may be suffering the torturous pain described in my earlier declarations without the ability to move or communicate distress. To outward observers, the execution may appear to be "smooth" when it is in fact inflicting gratuitous and extreme pain."[130] In that context, the notion that there is any probative value to the still, mute bodies of two paralyzed men is absurd.

The simple fact is that both the District Court and the Fifth Circuit treated this case as one dictated by the result in *Glossip*. But *Glossip*—and indeed, all of this Court's decisions on this issue from *Baze* through *Nance*—focus on the proper analysis for Eighth Amendment method-of-execution challenges. *Glossip* was based on its facts, including both the scientific data about midazolam's efficacy and the availability of pentobarbital or another barbiturate for use in a one-drug protocol at that time. The question the District Court and Court of Appeals should have answered (and

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[129] App. B at 20-21.
[130] ROA.7523.

which Petitioner asked them to answer) is whether, on the evidence presented to the district court, the risk of pain associated with the State's method is "substantial when compared to a known and available alternative."[131]

D. The promise to conduct a consciousness check does not affect the constitutional analysis.

The Fifth Circuit expressed the opinion that, even if Petitioner's arguments about the Eighth Amendment standard were correct, his claim would still fail because "[Respondents] represented that they would stop the execution if it appears [Petitioner] is still conscious after administering midazolam twice."[132] That follows the Fifth Circuit's statement earlier in its opinion that "Mississippi has adopted 'safeguards' like the ones in Oklahoma that *Glossip* blessed, such as monitoring the prisoner's consciousness."[133]

But it is one thing to say that an action will be taken, either in one's written policy or one's testimony, and quite another to actually take the action. Respondents' protocols required such a "consciousness check" at the time David Cox was executed in 2021 and Thomas Loden in 2022, and yet no such check was performed in either execution.[134] When that fact was brought to the District Court's attention in Petitioner's preliminary injunction motion, Respondents then submitted two declarations claiming that a "visual" consciousness check was conducted, out of sight of the execution witnesses on both occasions.[135]

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[131] *Id*. (quoting *Glossip*, 576 U.S. at 878, and *Baze*, 553 U.S. at 61).
[132] App. A at 7.
[133] App. A at 6 (citing *Glossip*, 576 U.S. at 886).
[134] *See supra*, Statement of Facts, Sect. II.D.
[135] ROA.7566-7568 (Cain Declaration); ROA.7606-7607 (Vincent Declaration).

This brief, purely visual process conducted at a distance is hardly analogous to the "consciousness check" approved by the cases or used in surgery. Dr. Heath unequivocally states that "[t]he goal of the consciousness check cannot be achieved by 'visually confirming that the inmate was unconscious.' Nothing in that visual process gives information about whether the prisoner, while in some state of sedation, could be aroused by the intense sensation of suffocation caused by the chemical paralytic and intravenous burning pain caused by potassium chloride."[136] Likewise, Respondents' expert describes "clinical signs (including verbal, eyelash and noxious stimuli) as ways to assess consciousness."[137]

Cain's representation that the "proposed consciousness check" will finally be actually performed is not credible. First of all, to call the "visual consciousness check" a "slight departure" from the protocol[138] is astounding. The actions described by Cain and Vincent in their declarations were not "consciousness checks" under any of the processes described by either Dr. Heath[139] or Dr. Antognini.[140] The fact is, the simple act of looking into the execution chamber from just outside the injection room for less than a minute, from an obscure angle which prevented individuals in the witness room from seeing the person performing the "check," and not touching or speaking to the prisoner, is not a check at all: not according to any of the parties' experts, and not according to any of the cases which have found that safeguard critical.[141]

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[136] ROA.7751 ¶ 6.
[137] ROA.7109; ROA.7122.
[138] Resp. Br. at 9.
[139] ROA.7522 ¶ 6.
[140] ROA.7109; ROA.7122.
[141] *Glossip v. Chandler*, 2022 WL 1997194 at *18 (in the four Oklahoma executions before the bench trial in the *Glossip* remand, consciousness check consisted of "(i) sternum rubs, (ii) raising eyelids, (iii)

Second, there is no reason for the District Court to accept Cain's bald statement that "he would ensure things were done right this time."[142] As this Court has succinctly stated, "maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."[143] The district court in the *Glossip* remand trial, which included thorough testimony that the four Oklahoma executions scrupulously followed the ODOC's protocol, stated that "[t]he evidence gives the court no cause for concern that the IV Team will fail to perform adequate and effective consciousness checks."[144] There is no evidence to support that inference here.

CONCLUSION

The courts below demonstrated that this Court's Eighth Amendment method-of-execution jurisprudence is misunderstood. This Court should grant certiorari, and either on plenary review or summary reversal, vacate the judgments of the Fifth Circuit and the District Court and remand with directions to issue a preliminary injunction forbidding Respondents to use the three-drug protocol while this litigation is pending.

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speaking loudly, (iv) pinching and (v) shaking"); *McGehee v. Hutchinson*, 463 F.Supp.3d 870, 893 (E.D. Ark. 2020) (consciousness check used in the four executions before the trial required the IV team member to: hold the hand of the prisoner and watch him intently from 18-24 inches away; brush his eyelashes; give verbal commands at varying volumes from a whisper to a normal voice; listen to breathing sounds; check for pulse by placing fingers on the carotid artery and checking a pulse oximeter; pinch the ear lobe; pinch or squeeze the trapezius muscle; touch the eyeball; and then rub the sternum).

[142] App. B at 18.

[143] *Knox v. SEIU*, 567 U.S. 298, 307 (2012).

[144] *Glossip v. Chandler*, 2022 WL 1997194 at *18.

Respectfully submitted,

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