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

CAPITAL CASE: EXECUTION SET FOR JUNE 25, 2025 AT 6 P.M. CDT

EMERGENCY APPLICATION FOR STAY OF EXECUTION

To the Honorable Samuel A. Alito, Associate Justice, United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

The State of Mississippi has scheduled the execution of Petitioner Richard Jordan for June 25, 2025, at 6 p.m. Central Daylight Time. On June 24, 2025, Petitioner filed a petition for writ of certiorari (No. 25-____) seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Jordan v. Mississippi State Executioner, et al.*, No. 25-70013 (5th Cir. June 24, 2025). The Fifth Circuit's decision was issued at 12:35 p.m. Central today.

In that opinion, the Court of Appeals affirmed the decision issued by the United States District Court for the Southern District of Mississippi from 5 p.m. Central on June 20, 2025, in *Jordan, et al. v. Cain, et al.*, No. 15-295, 2025 WL 1728266 (S.D. Miss. June 20, 2025). The District Court haddenied Petitioner's motion for preliminary injunction, which sought an injunction forbidding Respondents from executing Petitioner using a three-drug lethal injection protocol consisting of the successive injections of midazolam, a chemical paralytic, and potassium chloride. Petitioner respectfully requests that this Court issue a stay of execution to permit the consideration and disposition of that petition for certiorari.

I. Procedural Background

Petitioner and another Mississippi death-sentenced prisoner filed this 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 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. Petitioner's challenge to Mississippi's protocol, as well as his proffered alternative, have remained the same since that time.

Petitioner and the other plaintiffs (including three plaintiff-intervenors) engaged in discovery and motions practice, which was interrupted by an administrative stay during the pendency of this Court's consideration of *Bucklew v. Precythe*,[1] 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.[2] Respondents filed their opposition on June 10.[3] Petitioner filed his reply on June 12.[4] A hearing was conducted by the

[1] *Bucklew v. Precythe*, 587 U.S. 119 (2019).
[2] ROA.7451-7503. As discussed in the sworn declaration of Petitioner's counsel accompanying the stay motion in the Fifth Circuit, the motion for preliminary injunction could not be filed until the receipt and review of supplemental discovery which Petitioner had been demanding since November 2022. Respondents did not disclose the existence of, or produce, their 2021 and 2022 protocols until May 27, 2025, and they did not disclose the existence of, or produce, the lethal injection protocol applicable to this case until 5:09 p.m. on Friday, May 30, 2025. Similarly, Respondents did not supplement their production of documents related to training of MDOC personnel assigned to executions until May 27, 2025, when training documents from July 2021 to the date of production were produced. And Respondents did not supplement their production of documents related to their inventory of lethal injection drugs until May 21, 2025, when inventory documents from November 2022 to the date of production were produced.
[3] ROA.7536-7565.
[4] ROA.7730-7749.

District Court on June 14.[5] The District Court issued its opinion and order denying the motion for preliminary injunction on June 20.[6] 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.[7]

II. Reasons for Granting the Stay

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted."[8] To decide whether a stay is warranted, federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims.[9] In certiorari proceedings, a petitioner must show a reasonable probability that four members of this Court would vote to grant certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari.[10] Here, the relevant factors all weigh in favor of staying Petitioner's execution.

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[5] ROA.8225-8315.
[6] ROA.7775-7804, Appendix B.
[7] Appendix A.
[8] *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).
[9] *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004).
[10] *Barefoot*, 463 U.S. at 895.

A. <u>There is a likelihood that four Justices of this Court will vote to grant certiorari</u>.

Petitioner's petition for a writ of certiorari has a substantial likelihood of success. In *Glossip v. Gross*,[11] 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."[12]

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."[13] 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 – at that time – Oklahoma could not obtain those drugs for use in executions.[14]

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

[11] *Glossip v. Gross*, 576 U.S. 863 (2015).
[12] *Id*. at 878.
[13] *Id*. at 883.
[14] *Id*. at 879.

opinion in *Glossip*. But these courts looked only to the result of *Glossip*, not its analytical framework, ignoring the changes in the last ten years as well as the different showings in this case 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,"[15] 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." [16]

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).[17] 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."[18]

Those new and markedly different sets of facts should lead to a different result than in the *Glossip* petitioner's preliminary injunction proceedings. In the

[15] ROA.6968 ¶ 31 (Dr. Heath).
[16] ROA.7025.
[17] ROA.7489.
[18] *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)).

intervening ten years, *Glossip*, which adopted the analysis of the Chief Justice's concurring opinion in *Baze v. Rees*,[19] was itself further interpreted in *Bucklew v. Precythe*, *Barr v. Lee*, and *Nance v. Ward*.[20]

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."[21] *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."[22] 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.[23]

Nance reemphasized the point, albeit in a different context, saying "[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.'"[24]

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[19] *Baze v. Rees*, 553 U.S. 35 (2008) (Roberts, C.J. concurring).
[20] *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)
[21] *Bucklew*, 587 U.S. at 134.
[22] *Id*. (quoting *Glossip*, 576 U.S. at 878, and Baze, 553 U.S. at 61).
[23] *Bucklew*, 587 U.S. at 136 (emphasis in original).
[24] *Nance*, 597 U.S. at 164 (quoting *Bucklew*, 587 U.S. at 136).

As discussed at length in the Petition, the Court of Appeals and the District Court fixated on the result in *Glossip*, neglecting the comparative analysis required by that ruling as well as this Court's subsequent ones, including *Bucklew* and *Nance*. This Court should grant certiorari to explicate the Eighth Amendment standard and provide further guidance to the lower courts tasked with applying that test.

For these reasons, Petitioner has a likelihood that four Justices of this Court will grant certiorari.

B. Petitioner will suffer irreparable harm in the absence of a stay of execution, and the balance of equities and public interest support a stay.

If this execution is not stayed pending disposition of this case, Petitioner will undeniably suffer irreparable harm. Based on the evidence in this record, there is a likelihood that Petitioner will experience pain even after the injection of midazolam, and will suffer, in the words of the *Baze* plurality opinion, "suffocation from the administration of [the chemical paralytic] and pain from the injection of potassium chloride."[25] Petitioner has submitted 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,"[26] and another set to show the scientific data showing that midazolam "cannot produce the state of General Anesthesia, where the prisoner is rendered unconscious and insensate to pain." [27]

[25] *Baze*, 553 U.S. 35, 53 (2008) (Roberts, C.J.).
[26] ROA.6968 ¶ 31.
[27] ROA.7025.

Because Petitioner seeks a narrowly tailored injunction, the balance of equities favors the grant of a stay. In *Ramirez v. Collier*, this Court addressed the balance of equities between the condemned prisoner and the state in litigation that would not, even if the Petitioner succeeds, prevent his execution. The Court acknowledged that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence."[28] But observing that "Ramirez requests a tailored injunction," and not an "open-ended stay of execution," the Court held that "a tailored execution of the sort Ramirez seeks" would properly accommodate those interests.[29] The same is true here.

III. Conclusion

The application for a stay of execution should be granted.

This, the 24th day of June, 2025.

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[28] *Ramirez*, 595 U.S. at 433 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006).
[29] *Ramirez*, 595 U.S. at 433-34.