Nos. 24-7491 and 24A1279

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 OR WITHIN 24 HOURS THEREAFTER

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND EMERGENCY APPLICATION FOR STAY OF EXECUTION

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND EMERGENCY APPLICATION FOR STAY OF EXECUTION

Petitioner submits this brief reply in support of both his Petition for Writ of Certiorari (No. 24-7401) and his Emergency Application for Stay of Execution (No. 24A1279).

1. In their Brief in Opposition (BIO), Respondents argue that Petitioner "presents only meritless fact-based disagreements with the lower courts' rulings" and thus "does not satisfy any traditional certiorari criteria."[1] That is not the case. Rather, Petitioner contends neither the District Court nor the Fifth Circuit followed the Eighth Amendment analysis required by this Court's precedent.[2]

As discussed at length in the Petition, *Bucklew* squarely held that "[t]o 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."[3] There is no discussion of the one-drug pentobarbital protocol submitted by Petitioner—let alone any comparison of that method with Respondent's three-drug protocol—in the opinions of either of the two lower courts.

Respondents argue that "the *Baze-Glossip* test established by this Court's precedents does not require the court of appeals and the district court to determine

[1] BIO at 9.
[2] Pet. at 25-27, 28-38.
[3] *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019).

whether the risk of pain associated with the State's three-drug execution protocol is substantial when compared to petitioner's proposed one-drug alternative method."[4]

To the contrary, this Court expressly stated in *Bucklew*:

> 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.'"[5]

That is the exact language which Respondents contend is not the law. They are wrong.

Respondents further argue that "*Bucklew* does not mandate that courts conduct a comparative analysis when a challenger cannot establish that the State's protocol poses a substantial risk of severe pain."[6] Respondents' interpretation begs the question, where else in any of this Court's opinions from *Baze* through *Nance* does this Court define the term "substantial" in the context of a method-of-execution claim? The answer is clear: "[t]he 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."[7]

Nor is this the only instance of this Court's explication of the meaning of "substantial risk." *Bucklew* quoted *Glossip*, which quoted *Baze*, to define 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-

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[4] BIO at 13.
[5] *Bucklew*, 587 U.S. at 134 (quoting *Glossip v. Gross*, 576 U.S. 863, 878 (2015), and *Baze v. Rees*, 553 U.S. 35, 61 (2008)).
[6] BIO at 15.
[7] *Bucklew*, 587 U.S. at 134 (quoting *Glossip*, 576 U.S. at 878 and *Baze*, 553 U.S. at 61).

> execution claim as follows: "A stay of execution may not be granted on grounds such as those asserted here unless the condemned 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."[8]

Baze, in turn, borrowed its analytical framework from *Farmer v. Brennan*, in which this Court established the Eighth Amendment standard governing liability of prison officials for subjecting prisoners to risks of severe harm.[9] In his controlling concurrence in *Baze*, the Chief Justice wrote: "[w]e have explained that to prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[10] In Farmer, this Court held:

> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.[11]

Under *Farmer*, the prisoner-plaintiff need not show that it is sure that harm will happen; rather, at some point the risk of harm, and the failure of prison officials to use known means to reduce or eliminate that risk, rises to the level of an Eighth Amendment violation. This comparison between the risk of severe pain and the

[8] *Glossip*, 576 U.S. at 878 (quoting *Baze*, 553 U.S. at 61.
[9] *Farmer v. Brennan*, 511 U.S. 825 (1994).
[10] *Baze*, 553 U.S. at 50 (quoting *Farmer*, 511 U.S. at 842, 846, and n. 9).
[11] *Farmer*, 511 U.S. at 842.

methods of reducing or eliminating that risk that are known and available to the prison official describes both *Farmer* and *Glossip* in the proverbial nutshell.

The conclusion is inescapable: the term "substantial risk," in the context of the risk of serious pain created by a State's method-of-execution protocol, is defined by comparison between that risk and the alternative method submitted by the plaintiff.

2. Respondents claim that multiple courts since *Bucklew* have rejected Eighth Amendment method-of-execution claims based only on the plaintiff's failure to show a risk of severe harm from the protocols challenged in those cases.[12] Certainly, if a method-of-execution plaintiff presented no evidence, or only speculative evidence, of any risk of serious harm, a district court would not err in dismissing his challenge. But that is not the case here.[13] As the Petition's exposition of the evidence in this record demonstrates,[14] Petitioner presented a wealth of facts on both the risk of harm and Petitioner's "known, available alternative" which the lower courts should have considered in conducting the comparative analysis required by *Bucklew*.

In the District Court, although Respondents moved for summary judgment, they limited their argument to Petitioner's purported inability to show a "known, available alternative" to the three-drug protocol.[15] Thus, Respondents impliedly

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[12] BIO at 15-16.

[13] Pet. at 32 ("[t]o 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, 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").

[14] Pet. at 12-25.

[15] ROA.5773-5777.

conceded that there exist genuine issues of material fact on the issue whether the three-drug protocol poses a substantial risk of severe pain to Petitioner. That is inconsistent—if not contradictory—to Respondents' present argument that Petitioner failed to present sufficient evidence to show a likelihood of success on that risk.

3. Although Respondents do not expressly claim that allegedly unnecessary delay in bringing this lawsuit and the current preliminary injunction motion is grounds for denying certiorari, they liberally seed the BIO with references to the Petition being a "baseless, last-minute attempt to forestall his lawful punishment."[16]

The lack of any briefing on this point is no accident. As Respondents know, and as set forth at fuller length in Petitioner's Emergency Application, on May 1, 2025, when the state court issued the execution warrant, Petitioner had been demanding supplemental discovery from Respondents for two-and-a-half years, sending multiple demands for supplementation that went unanswered,[17] filing a motion under Fed. R. Civ. P. 56(d) to delay the District Court's adjudication of Respondents' summary judgment motion to permit Petitioner the opportunity of receiving that discovery, and filing a motion to compel supplementation on May 14, 2025.[18] Respondents did not disclose the existence of, or produce, their 2021 and 2022 protocols until May 27, 2025,

[16] BIO at 9-10.
[17] ROA.6385-6397 (supplementation demands of April 28, 2025, Nov. 7, 2023, January 23, 2023, January 18, 2023, and August 22, 2022).
[18] ROA.6373-6384.

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.[19]

Respondents also did not produce 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.[20]

Most significantly, Respondents did not supplement their production of documents related to the executions of David Cox and Thomas Loden until May 21, 2025; these documents proved Respondents' repeated violation of their own protocol in terms of the lack of a consciousness check or confirmation of IV access.[21] Respondents' continued insistence that Mississippi employs the same safeguards as has Oklahoma demonstrates the importance of this particular series of productions.

Petitioner alleged that Respondents' three-drug protocol posed a risk of severe pain that is substantial in comparison to the one-drug barbiturate protocol since April 16, 2015, the day the original Complaint was filed, and amended that pleading on September 28, 2015, to specifically allege the same regarding Respondents' addition of midazolam as a potential drug in its protocol. There has been no strategic delay on Petitioner's part in presenting these issues for judicial review.

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[19] See Declaration of Counsel Pursuant to 5th Cir. R. 8.10, Doc. 16-7 in *Jordan v. Miss. State Executioner*, No. 25-70013 (5th Cir. June 24, 2025).
[20] *Id*.
[21] Pet. at 16-20, 38-40.

It is worth noting in this connection that the District Court has announced that a trial date will be set in the coming year.[22] Any "delay" will therefore be brief, and whether Petitioner prevails on the merits or not does not prevent him from being executed. Rather, it will only determine the manner in which that sentence is carried out.

For the above and foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Certiorari and his Emergency Application for Stay of Execution.

This the 25th day of June, 2025.

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[22] ROA.6043; see also Text Order of April 1, 2025 in Jordan, et al. v. Cain, et al., No. 15-295 (April 1, 2025) ("TEXT ONLY ORDER The parties are instructed to contact the Court regarding possible dates for a Zoom Conference on Plaintiffs' request to continue the trial of this matter. NO FURTHER WRITTEN ORDER SHALL FOLLOW. Signed by District Judge Henry T. Wingate on 4/1/2025").