

**In the Supreme Court of the United States**

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THOMAS WHITAKER AND PERRY WILLIAMS,  
*PETITIONERS,*

V.

BRYAN COLLIER, ET AL.,  
*RESPONDENTS.*

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

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Petitioners brought this challenge to the Texas lethal-injection execution protocol in 2013—five years after the protocol was adopted and many years after their death sentences were affirmed on appeal. Their operative complaint merely speculates that Texas’ execution protocol might result in cruel and unusual punishment, and it does not allege facts sufficient to “establish[] that any risk of harm was substantial when compared to a known and available alternative method of execution.” *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015).

The district court dismissed Petitioners’ complaint for failure to state a claim, and the court of appeals affirmed on multiple alternative grounds. As an initial matter, the court first recognized that Petitioners’ challenge to the use of compounded pentobarbital is time-barred. The court further held, in the alternative, that Petitioners had failed to state a claim for two independent reasons: (1) their operative complaint never identified a known and available alternative method of execution, and (2) Petitioners had pleaded only speculation of harm rather than a plausible substantial risk of severe harm. Both of those independent and dispositive holdings are fact-bound applications of settled legal principles.

The questions presented are:

1. Whether Petitioners’ claims are time-barred, and
2. Whether Petitioners’ failure to plead a known and alternative method of execution or a plausible substantial risk of severe pain warrants dismissal for failure to state a claim.

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## INTRODUCTION

The Court should deny this latest effort by Petitioners to avoid their death sentences. They challenge various aspects of the method of their executions, including the State’s use of the lethal-injection drug compounded pentobarbital. But the court of appeals recognized, consistent with the Eleventh Circuit, that their challenge to the use of compounded pentobarbital was time-barred. And even if this lawsuit were timely filed, Petitioners failed to plausibly plead a method-of-execution claim under *Glossip*. In particular, Petitioners never pleaded “a known and available alternative method of execution that entails a lesser risk of pain.” 135 S. Ct. at 2731. Nor did they plausibly plead a substantial risk of severe pain. *See id.* Any one of those deficiencies would be sufficient to deny relief; this lawsuit suffers from all three. In all events, the record below shows that the State has performed over 30 executions using compounded pentobarbital—without incident.

The decision below faithfully applies *Glossip* the same way other circuits do. Petitioners never identify any circuit split or confusion in the lower courts because there is none. They do not disguise the fact that they seek fact-bound error correction, but they have not demonstrated any error in the judgment below. This Court’s review is unwarranted.

## STATEMENT

1.a. “Since at least 2000,” Whitaker “had planned with several other individuals, at different times, to murder his family.” *Whitaker v. State*, 286 S.W.3d 355, 357 (Tex. Crim. App. 2009) (footnote omitted). On December 10, 2003, Whitaker murdered his mother and younger brother, and he attempted to murder his father. *Id.* While police continued to investigate the crime, Whitaker stole \$10,000 from his father and fled to Mexico. *Id.* He was apprehended in Mexico 15 months later. *Id.* He was tried and convicted of capital murder. *Id.* His conviction and death sentence were affirmed on direct appeal. *See id.* The Texas Court of Criminal Appeals denied his state habeas petition. *See Ex parte Whitaker*, No. WR-73421-01, 2010 WL 2617806 (Tex. Crim. App. June 30, 2010) (unpublished).

In 2011, Whitaker filed a federal habeas petition, raising eight claims for relief from his conviction and his sentence. *Whitaker v. Stephens*, No. H-11-CV-2467, 2015 WL 1282182 (S.D. Tex. Mar. 17, 2015). The district court’s lengthy opinion analyzed, and ultimately rejected, each of those claims. *See id.* The district court also observed that “[t]he evidence of his guilt was overwhelming.” *Id.* at \*8 n. 8.

Whitaker appealed, and the Fifth Circuit affirmed the denial of habeas relief. *Whitaker v. Davis*, 853 F.3d 253, 260 (5th Cir. 2017). This Court denied certiorari on October 10, 2017. *Whitaker v. Davis*, 138 S. Ct. 317 (2017).

b. On September 17, 2000, Williams murdered Matthew Carter “during the middle of a crime spree” that included numerous robberies of multiple victims over the course of several days. *Williams v. State*, 273 S.W.3d 200, 205 (Tex. Crim. App. 2008). Williams approached Carter in the parking lot of a video rental store, forced Carter at gunpoint into the passenger seat of his car, robbed him, then shot him in the head at close range. *Id.* at 205-06. He was convicted of capital murder and sentenced to death; the Texas Court of Criminal Appeals affirmed on direct appeal. *Id.* at 235. The state habeas court subsequently denied habeas relief. *Ex parte Williams*, No. WR-63,237-01, 2008 WL 5050078, at \*1 (Tex. Crim. App. Nov. 26, 2008) (per curiam) (unpublished).

Williams sought habeas relief, as well as relief pursuant to Federal Rule of Civil Procedure 59, in federal district court. *See Williams v. Stephens*, 575 F. App’x 380, 382 (5th Cir. 2014) (per curiam). The district court denied habeas relief but granted a certificate of appealability on a single issue. *See id.* On appeal, the Fifth Circuit affirmed the denial of habeas relief and denied Williams’s motion to expand the certificate of appealability. *See id.* at 389. This Court denied certiorari on December 15, 2014. *Williams v. Stephens*, 135 S. Ct. 875 (2014).

2. While their individual habeas petitions were pending, Whitaker and Williams, joined by then-plaintiff Michael Yowell, filed the 42 U.S.C. § 1983 action now before the Court. Pet. App. I, at 1. With Yowell’s execution looming, they sought a temporary injunction to prevent the use of

compounded pentobarbital in his execution. *See Whitaker v. Livingston*, 732 F.3d 465, 466 (5th Cir. 2013) (per curiam). The district court denied relief, and the Fifth Circuit affirmed. *See id.* at 469. This Court denied Yowell’s application for a stay of execution and petition for a writ of certiorari. *Yowell v. Livingston*, 134 S. Ct. 417 (2013). Yowell was then executed pursuant to the challenged execution protocol.

The district court subsequently rejected Whitaker’s and Williams’s claims as unripe, but the Fifth Circuit reversed, finding Article III jurisdiction on the basis that the claims were ripe. *Whitaker v. Livingston*, 597 F. App’x 771, 773, 774 (5th Cir. 2015) (per curiam).

On remand, Petitioners filed the operative second amended complaint presenting four counts. Pet. App. I, at 2. The first count alleges that the Texas execution protocol’s failure to include a notification requirement for changes to the protocol violates the Eighth and Fourteenth Amendments. *Id.* The second count alleges that the lack of an express requirement that prisoners have access to counsel “during the events leading up to and during the course of their execution” violates the First, Sixth, and Eighth Amendments. *Id.* The third count alleges that the failure to conduct additional testing of compounded pentobarbital (the execution drug), the use of compounded pentobarbital after its “Beyond Use Date” (“BUD”), and the absence of other procedures violate the Eighth

and Fourteenth Amendments. *Id.* The fourth count alleges that the failure to release, or the concealment of, certain information about the protocol violates the Eighth and Fourteenth Amendments. *Id.*

Notably, Petitioners did not plead an actual known and available alternative method of execution, as required by *Glossip*. Instead, their second amended complaint offered the following allegation:

A known and available alternative to Texas current execution method exists: a single dose of an FDA approved barbiturate, applied with appropriate safeguards and transparency that apply to both the execution process and the manner in which the drugs are selected, purchased, stored, and tested (all relevant to a determination of the drugs' efficacy and purity – that is, the risk that it will cause substantial pain – at the time of the execution.) Appropriate safeguards and transparency are essential to any alternative method of execution.

See Appellants' Brief at 60-61, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016) (quoting second amended complaint); *see also* ROA.1231 (second amended complaint).<sup>1</sup>

Respondents moved to dismiss. Pet. App. I, at 2. After allowing limited discovery, the district court granted the motion to dismiss. Pet. App. I, at 3. Petitioners appealed to the Fifth Circuit.

3.a. The court of appeals affirmed the dismissal on multiple independent grounds. At the outset, it held that that several of Petitioners'

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<sup>1</sup> As used throughout this brief, "ROA" refers to the electronic record on appeal before the Fifth Circuit.

claims are time-barred. Pet. App. I, at 3-7.<sup>2</sup> Relying on circuit precedent, the court reiterated that a “method-of-execution cause of action accrues ‘on the date direct review of a plaintiff’s conviction and sentence is complete’ or ‘in the event a state changes its execution protocol after a death-row inmate’s conviction has become final . . . on the date that protocol change becomes effective.’” Pet. App. I, at 3 (quoting *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008)).

The court of appeals recognized, and Petitioners do not dispute, that their lawsuit was filed more than two years after direct review of their sentence and convictions concluded. See Pet. App. I, at 3; Pet. 11. Whitaker’s conviction and sentence became final in 2009, see *Whitaker*, 286 S.W.3d at 357, and Williams’s conviction and sentence became final in 2008, see *Williams*, 273 S.W.3d at 204. This lawsuit was filed in 2013. Pet. App. I, at 2.

The court below thus reasoned that “to benefit from a more recent accrual date, [Petitioners] must show a change in the protocol.” *Id.* at 3. Petitioners offered two arguments in response. First, they argued that the State’s September 2013 change from manufactured to compounded

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<sup>2</sup> As set out in more detail below, the court declined to formally hold that a portion of the third count is time-barred. The court of appeals also did not hold that the fourth count is time-barred, but instead assumed *arguendo* that it was not time-barred.

pentobarbital constituted a substantial change sufficient to set the accrual date for all of their Section 1983 claims.

The court of appeals rejected that argument. Relying on the Eleventh Circuit’s decision in *Gissendaner v. Commissioner, Georgia Department of Corrections*, 779 F.3d 1275, 1280 (11th Cir. 2015) (per curiam), the court held that “[t]o reset the accrual date, a change to an execution protocol must be substantial, and any new accrual date is applicable only to the portion of the protocol that changed.” Pet. App. I, at 5 (citing *Gissendaner*, 779 F.3d at 1280-81). In adopting the Eleventh Circuit’s rule, the court noted that it comported with this Court’s decision in *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006), which rejected “[r]epetitive or piecemeal litigation” that would “unreasonably delay imposition of the sentence.” Pet. App. I, at 5 (citing *Hill*, 547 U.S. at 585).

The decision below further adopted the Eleventh Circuit’s “definition of ‘substantial.’” Pet. App. I, at 5-6 (“Again, we follow the Eleventh Circuit.”). Under that definition, “the switch between two forms of the same drug does not significantly alter the method of execution.” *Id.* at 6 (quoting *Gissendaner*, 779 F.3d at 1282). The court of appeals thus rejected

Petitioner’s argument that the change from manufactured to compounded pentobarbital set the date of accrual for all of their Section 1983 claims. *Id.* at 6.<sup>3</sup>

Second, Petitioners argued that they were subject to a continuing injury because, relevant to their first claim, the State allegedly did not adequately notify them of the change in execution protocol. Pet. App. I, at 7. The court of appeals rejected that argument as foreclosed by circuit precedent and Texas state law. *Id.* (citing *Walker v. Epps*, 550 F.3d 407, 417 (5th Cir. 2008)). Under Texas law, “a continuing tort occurs where ‘the wrongful conduct continues to effect additional injury to the plaintiff until that conduct stops.’” *Id.* at 7 & n.13 (quoting *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied)). As a matter of state law, the continuing tort doctrine has no relevance where, as here, “[t]he challenged protocol will affect each plaintiff but once.” *Id.* (quotation marks and citation omitted).

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<sup>3</sup> Petitioners further raised the possibility that the State’s change from a three-drug protocol to a one-drug protocol could set the accrual date for the limitations period. Pet. App. I, at 7. The court of appeals, however, noted that “no party raise[d] whether that change is substantial.” *Id.* Moreover, the Petitioners failed to “specifically identify the date of this change in their complaint.” *Id.* Thus, the court of appeals declined to decide that question. *Id.* This Court should not entertain that issue in the first instance, as it is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005).

The decision below thus affirmed the dismissal of the first and second counts, as well as much of the third count, as time-barred. *Id.* at 6-7. The court further recognized that Petitioners’ challenge to the use of compounded pentobarbital was also time-barred under the *Gissendaner* rule. *Id.* at 6 (“The remaining claims in Count Three, regarding retesting and the BUD of the compounded pentobarbital, would be time-barred under the [*Gissendaner*] rule, because the 2013 change to compounded pentobarbital is not substantial.”). But because of a “lack of briefing and the importance of this question” (*id.* at 7; *see supra* n. 3), the court of appeals simply stated, without formally holding, that Petitioners’ challenge to the use of compounded pentobarbital is time-barred. *See id.* at 6.<sup>4</sup>

b. The court of appeals then held independently that even if Petitioners had sued timely, they nevertheless failed to state a claim. *Id.* at 8.<sup>5</sup>

First, the court held that Petitioners’ complaint offered nothing beyond mere “speculation that the current protocol carries a substantial

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<sup>4</sup> As a formal matter, the decision below did not hold that Petitioners’ challenge to the use of compounded pentobarbital is time-barred. But formalities aside, it left no doubt of its view that the change to compounded pentobarbital is not substantial, and thus does not reset the accrual of the limitations period. It thus recognized, without formally holding, that Petitioners’ challenge to the use of compounded pentobarbital is time-barred.

<sup>5</sup> This alternative and independent holding constitutes binding precedent in the Fifth Circuit. *See United States v. Bueno*, 585 F.3d 847, 850 n.3 (5th Cir. 2009).

risk of severe pain.” Pet. App. I, at 12 (quoting *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc) (per curiam)). Such speculation, the court held, “is insufficient even at the motion-to-dismiss stage.” *Id.* (citing *Zink*, 783 F.3d at 1101). The court explicitly relied on *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), for the requirement that, in order to survive a motion to dismiss, “[a] complaint must be ‘plausible on its face’ based on ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” Pet. App. I, at 8. *See also id.* at 13 (“Even if the pleading had added the qualifier ‘substantial’ to the risk alleged, this would still be a legal conclusion that *Iqbal*, 556 U.S. at 678–79, directs us to disregard.”).

The court noted that its holding comported with those reached by the Eighth Circuit in *Zink*, 783 F.3d at 1101, and by the Eleventh Circuit in *Gissendaner*, 779 F.3d at 1283. Those courts encountered the same situation presented in this case: a method-of-execution complaint challenging the use of compounded pentobarbital. *See Zink*, 783 F.3d at 1101; *Gissendaner*, 779 F.3d at 1283. Both courts rejected claims indistinguishable from the ones brought here. *See* Pet. App. I, at 12. For example, the *Zink* court held that the plaintiffs’ analogous claims regarding compounded pentobarbital “were too speculative to survive a motion to dismiss, because they were ‘descriptions of hypothetical situations in which a potential flaw in the production of the pentobarbital or in the lethal-injection protocol could cause pain.’” *Id.* at 11 (quoting *Zink*, 783 F.3d at 1101).

The court below reasoned: “If pleading hypothetical risks was insufficient to state a claim in *Zink*, [783 F.3d] at 1101, and *Gissendaner*, 779 F.3d at 1283 . . . then the claim that additional testing is required to identify an otherwise unknown risk is surely insufficient.” *Id.* at 12. The court of appeals expressly declined “to split with our sister circuits’ holdings.” *Id.* at 12.

Second, and independently of the first basis for finding a failure to state a claim, the court held that Petitioners “have failed to plead an alternative method of execution as required by *Glossip*.” *Id.* at 12 (citing *Glossip*, 135 S. Ct. at 2737). The court of appeals again relied on *Zink* to hold, consistent with *Glossip*, that a “‘naked assertion’ that other methods would be constitutional, devoid of further factual enhancement, fails to state a claim under the Eighth Amendment.” *Id.* at 12 (quoting *Zink*, 783 F.3d at 1103). The court noted that Petitioners’ complaint “includes no factual contentions” that available alternative methods of execution “significantly reduce a substantial risk of severe pain.” *Id.* at 12-13 (quoting *Glossip*, 135 S. Ct. at 2737). In fact, all Petitioners have alleged is that “FDA-approved barbiturates” could be administered. *Id.* at 13.

The court rejected Petitioners’ other claims as well. As to the claim that the execution protocol lacks sufficient safeguards, the court held that Petitioners had not offered “factual assertions that would allow the court reasonably to infer that the lack of these safeguards creates a ‘substantial risk of serious harm.’” *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 50

(2008)). As to Petitioners' claims regarding their inability to access information about the method of execution, the decision below relied on circuit precedent to hold that "[t]he failure to disclose information or include a notice requirement in the protocol does not offend the Eighth Amendment." *Id.* at 14. Nor does it violate the First Amendment, as "[o]ne is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." Pet. App. I, at 15 (quoting *Whitaker*, 732 F.3d at 467).

Finally, the court rejected Petitioners' Sixth Amendment claim, which alleges the right to counsel "during the events leading up to and during the execution." *Id.* at 15. Quoting this Court's decision in *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), the court held that the "Sixth Amendment right to counsel only 'extends to the first appeal of right, and no further.'" Pet. App. I, at 15 Furthermore, Petitioners did not "identif[y] a 'substantial risk of serious harm' from the lack of access," and thus did not properly plead a method-of-execution claim. *Id.* (quoting *Glossip*, 135 S. Ct. at 2737). In all events, the Texas protocol permits access to counsel on the afternoon of the execution. See Brief of Appellees at 34, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (citing ROA.1227 and discussing record evidence demonstrating that "Plaintiffs are in fact permitted to have counsel on the afternoon of their execution").

c. The court of appeals also rejected Petitioners' procedural attacks on the district court's judgment. Petitioners claimed that reversal was

warranted because the district court considered materials outside the pleadings and applied a heightened pleading standard. The court of appeals disagreed. Pet. App. I, at 16. It held that the district court did not consider materials outside the pleadings, and even if it did, such error was harmless, because accepting all facts as pled, Petitioners' claims fail as a matter of law. *Id.* It further held that the district court correctly applied the standard this Court articulated in *Glossip*. *Id.* (citing 135 S. Ct. at 2737). Finally, the court rejected Petitioners' challenges to the district court's discovery rulings. *Id.* at 16-17.

### ARGUMENT

The court below recognized, consistent with the Eleventh Circuit's *Gissendaner* decision, that Petitioner's challenge to the Texas execution protocol is time-barred. That alone presents reason enough to deny review, but there are more bases to deny review. On the merits, Petitioners' pleadings make no effort to meet the substantive Eighth Amendment requirements set out in *Glossip*. In particular, they failed to plead a known and available alternative method of execution. Moreover, they failed to plausibly plead a known and substantial risk of severe pain. Each of the holdings below is correct, and no issue decided below reflects any disagreement or confusion in the lower courts. The petition should be denied.

## **I. This Is a Poor Vehicle for Deciding the Lawfulness of the Challenged Execution Protocol.**

The Court has had—and declined—multiple opportunities to review certiorari petitions raising challenges to execution protocols involving compounded pentobarbital. *See e.g., Wood v. Collier*, 138 S. Ct. 316 (2017); *Zink v. Lombardi*, 135 S. Ct. 2941 (2015); *Gissendaner v. Bryson*, 135 S. Ct. 1580 (2015). The Court should do the same here. The court below recognized that Petitioners’ challenge to the Texas execution protocol is time-barred. Moreover, the decision below rests on two other independent holdings, either of which precludes relief and does not warrant this Court’s review.

### **A. The Decision Below Recognized That Petitioners’ Challenge to the Execution Protocol Is Time-Barred.**

#### **1. Petitioners brought this suit more than two years after the Texas lethal-injection protocol was adopted.**

The court below recognized that Petitioners’ challenge to the use of compounded pentobarbital is time-barred. Pet. App. I, at 6. It did so based on several undisputed facts. There is no disagreement that in 2008, Texas adopted an execution protocol based on lethal injection (Pet. 2) or that Whitaker’s and Williams’s convictions became final in 2009 and 2008, respectively. Pet. App. I, at 2. The parties further agree that Texas law provides a two-year statute of limitations for personal-injury actions—which is the limitations period that governs these claims. Tex. Civ. Prac. & Rem. Code § 16.003; Pet. App. I, at 3. And they agree that because

Petitioners' convictions became final more than two years before this lawsuit was filed, the lawsuit is timely only if Petitioners can identify a "substantial change" in the protocol. Pet. 11 (citing *Walker*, 550 F.3d at 414, as articulating the controlling "substantial change" standard).

In other words, there is no disagreement that to prevail, Petitioners must demonstrate that the change from manufactured to compounded pentobarbital was a "substantial change." Only two circuits have confronted that question, and they both have resolved it in the negative. The Eleventh Circuit in *Gissendaner* held that "[t]he switch from FDA-approved pentobarbital to compounded pentobarbital is not a substantial change because the switch between two forms of the same drug does not significantly alter the method of execution." 779 F.3d at 1282. And the Fifth Circuit has now adopted that holding and reasoning fully. Pet. App. I, at 6 ("The remaining claims . . . regarding retesting and the BUD of the compounded pentobarbital, would be time-barred under the new rule, because the 2013 change to compounded pentobarbital is not substantial.").

Those holdings comport with this Court's decisions. This Court has already recognized the "significant" "problem" of "[r]epetitive or piecemeal litigation." *Hill*, 547 U.S. at 584-85. Indeed, "the practical reality of capital litigation tactics" encourages inmates to "file these actions intending to forestall execution." *Id.* at 581. That is why this Court has declared that "federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585. The decision below simply heeded that directive

and adopted the Eleventh Circuit’s “substantial change” standard as a “reasonable limit[] on the type of change that resets the accrual date instead of allowing a proliferation of claims that could indefinitely delay the sentence, as well as creating a perverse incentive for states to refuse to make the very changes the plaintiffs are seeking.” Pet. App. I, at 5.

The petition has no real response. Instead, Petitioners offer only a single assertion: “compounded pentobarbital is made in a different manner and the change affects everything from the beyond-use date (BUD) to the availability of data regarding its effects.” Pet. 14 (quoting Pet. App. I, at 24 (Graves, J., dissenting)). But Petitioners offer no explanation or argument as to how or why that “different manner” creates a “substantial change.” They make no attempt to explain what it is about a different creation process that makes compounded pentobarbital “substantially” different from manufactured pentobarbital. Nor do they grapple with the fact that compounded pentobarbital has been used in dozens of executions since 2013, and Petitioners have not identified any evidence to suggest it performs any differently than does manufactured pentobarbital.<sup>6</sup>

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<sup>6</sup> The record shows that at the time of the district court’s decision, over 30 executions had occurred in Texas using compounded pentobarbital—all without incident. See Brief of Appellees at 21-22, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (citing ROA.1474). That figure today is 41 such executions without incident.

To the extent they offer a substantive argument, Petitioners misinterpret Eighth Circuit authority. Specifically, Petitioners argue that *Zink* treated the use of compounded pentobarbital as a substantial change to the execution protocol. Pet. 13-14. But *Zink* did not concern the accrual of any relevant limitations period, nor did it offer any analysis relevant to the time-bar issue here. Moreover, *Zink supports* the decision below because it held that the change to compounded pentobarbital was not substantial enough to give rise to claims under the Ex Post Facto Clause; the federal Food, Drug, and Cosmetics Act; or the Controlled Substances Act. *See* 783 F.3d at 1107-08.

Petitioners' claim that the decision below conflicts with previous Fifth Circuit authority, Pet. 13-15, is both incorrect and irrelevant. Contrary to Petitioners' claim, the Fifth Circuit has not "adopted the 2013 change to compounded pentobarbital as the accrual date for challenges to the Texas protocol." Pet. 13 (citing *Wood v. Collier*, 678 F. App'x 248, 249–50 (5th Cir. 2017) (per curiam)). In *Wood*, the court simply stated that 2013 was "the latest possible accrual point for any of the Plaintiffs' causes of action." 678 F. App'x at 250. Since the plaintiffs there filed suit in August 2016, their claims fell "outside of the two-year limit" even assuming "the latest-in-time 2013 accrual date." *Id.* The decision below expressly recognized as much. Pet. App. I, at 4 ("So far, we have only assumed *arguendo* that the most recent change—in 2013—is the accrual date where the

claims were time-barred regardless of the date chosen.” (citing *Wood*, 678 F. App’x at 249-50)).

**2. Petitioners never briefed, and the decision below did not address, whether the change from a three-drug protocol to a one-drug protocol reset the applicable limitations period.**

Petitioners offer an additional argument they abandoned below. They discuss at length their belief that the State’s change from a three-drug protocol to a one-drug protocol constituted a “substantial change” sufficient to reset the accrual date for their claims. Pet. 11-12. But that argument is not properly before this Court. As the court of appeals explained, “no party raise[d] whether that change is substantial.” Pet. App. I, at 7. Nor did Petitioners “specifically identify the date of this change in their complaint.” *Id.* Due to that “lack of briefing” as well as the “the importance of this question,” the court below declined to “decide that question.” *Id.* Thus, whether the change from a three-drug protocol to a one-drug protocol constituted a substantial change has been forfeited and is not before this court. *See Cutter*, 544 U.S. at 718 n. 7.

**3. Petitioners never briefed, and the decision below did not address, whether statutes of limitations are “inapplicable” to claims for injunctive relief.**

Petitioners raise yet another forfeited argument for the first time here: they assert their claims are not time-barred because statutes of limitations are “inapplicable” to claims for injunctive relief. Pet. 16-18. But they never made that argument below. *See Appellants’ Brief* at 12, 37-46,

*Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016) (discussing limitations issue). Consequently, the court below did not address it. This Court typically does not review issues that the lower courts were not given a chance to address. *See Cutter*, 544 U.S. at 718 n. 7.<sup>7</sup>

**B. The Decision Below Rests on Multiple Alternative Holdings, Each of Which Independently Precludes the Relief Petitioners Seek.**

Petitioners do not dispute that the court of appeals reached independent holdings, each of which is sufficient on its own to dispose of this case. First, the court below held that most of Petitioners' claims are time-barred (Pet. App. I, at 3-7), and as set out above, that holding is comports with the pronouncements of this Court and the Eleventh Circuit. Second, the court held alternatively that Petitioners failed to state a claim consistent with *Glossip*'s substantive requirements—both because they did not plead an available alternative method of execution, and because they

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<sup>7</sup> In any event, Petitioners' argument is impossible to square with *Hill*, which recognized the need to curb the "significant" "problem" of "[r]epetitive or piecemeal litigation" that could be abused to "forestall execution." *Hill*, 547 U.S. at 581, 584-85. Enforcing a limitations period is just one way in which "federal courts can and should protect States from dilatory or speculative suits." *See id.* at 585. Petitioners' argument further runs contrary to multiple federal regulatory regimes that provide both for injunctive relief while also time-limiting such relief. *E.g.*, *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir. 2002) (observing that the Americans with Disability Act provides a private right of action for injunctive relief while also providing a limitations period and declining to provide for damages).

did not allege a plausible basis for a serious risk of harm. Pet. App. I, at 8-16. These holdings also are correct, as explained below.

Because each holding is independent and dispositive, Petitioners cannot obtain the relief they seek unless this Court were to grant certiorari and reverse as to each of these holdings below. The Court, in other words, would be required to review the fact-bound and splitless question whether the 2013 adoption of a protocol involving compounded pentobarbital is a substantial change sufficient to reset the accrual date of Petitioners' claims such that their claims are not time-barred under Texas law. If the Court were to reverse the lower court's resolution of that issue, it then would have to reach the next issue of whether the operative complaint has stated a claim consistent with *Glossip* and other relevant cases. That second question bears no relationship to the first. And as the petition itself demonstrates, a significant portion of the briefing would be devoted not to the legality of the execution protocol, but rather to the Texas statute of limitations. See Pet. 11-20 (devoting almost half of the Petition's argument to the time-bar issue); Pet. App. I, at 3-7 (discussing time-bar issue at length).

## **II. The Decision Below Is Splitless, Fact-Bound, and Correct.**

The petition does not identify a question that warrants this Court's review. See Sup. Ct. R. 10. The issues decided below create no split of authority, and Petitioners present no evidence to the contrary. They fur-

thermore represent fact-bound applications of settled law. For that reason, Petitioners do not try to conceal the fact that they seek error correction. But there is no error; the decision below is correct.

**A. There Is No Conflict Concerning the Fact-Bound Issues Decided Below.**

**1. The holding that Petitioners' claims are time-barred is splitless.**

The decision below holding several of Petitioners' claims time-barred does not conflict with any authority, and Petitioners fail to demonstrate otherwise. The decision below expressly shaped its holding to conform with the Eleventh Circuit's decision in *Gissendaner*. See Pet. App. I, at 5-6. The *Gissendaner* court held: "The switch from FDA-approved pentobarbital to compounded pentobarbital is not a substantial change because the switch between two forms of the same drug does not significantly alter the method of execution." 779 F.3d at 1282. There is no basis to believe that a different circuit would have found, contrary to the decision below, that all of Petitioners' claims are timely.

Petitioners' efforts to manufacture confusion are inaccurate. As described in Part I.A.1, *supra*, the Eighth Circuit's decision in *Zink* casts no doubt on the decision below. *Zink* held that Missouri's change to compounded pentobarbital was not substantial enough to give rise to claims under the Ex Post Facto Clause; the federal Food, Drug, and Cosmetics Act; or the Controlled Substances Act. See 783 F.3d at 1107-08. Contrary

to Petitioners’ assertion, nothing in *Zink* declares that Petitioners have demonstrated a “substantial change” sufficient to reset the accrual of the limitations period that governs their claims.

Nor does the Fifth Circuit’s decision in *Wood* conflict with the decision below. *See supra* Part I.A.1. As discussed above, *Wood* rejected as untimely challenges to the execution protocol that were brought in 2016. 678 F. App’x at 249–50. The court did not decide when the claim at issue accrued, but it reasoned that even with the latest possible accrual date in 2013, the claims still would be untimely. *See id.* Nothing in that assumption undercuts the decision below.

In short, both the Fifth and Eleventh Circuits have now recognized that switching from manufactured to compounded pentobarbital does not reset the applicable limitations period for a method-of-execution claim, and Petitioners do not point to any contrary authority. In light of that uniformity, there is no need for this Court’s involvement.

**2. The fact-bound holding that Petitioners failed to state a claim—on both *Glossip*’s harm prong as well as its alternative-method prong—is splitless.**

The decision below faithfully applied *Glossip* to conclude that Petitioners have failed to state a claim, and Petitioners make no effort to show that decision conflicts with any other relevant authority.

As set out above, the circuits are uniform, not divided. Along with the cases discussed above, the en banc Sixth Circuit’s decision in *In re Ohio*

*Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (en banc), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017), further confirms that review is unnecessary. In that case, the Sixth Circuit considered the State of Ohio’s execution protocol, which involved the barbiturate midazolam. *Id.* at 884-85. That protocol “is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*.” *Id.* at 884. In rejecting the challenge to that protocol, the Sixth Circuit held that “to challenge successfully a State’s chosen method of execution, the plaintiffs must ‘establish that the method presents a risk that is sure or very likely to cause’ serious pain and ‘needless suffering [.]’” *Id.* at 886 (quoting *Glossip*, 135 S. Ct. at 2737). That requires a “rigorous showing—that the method of execution is sure or very likely to cause serious pain—that the Supreme Court and our court have repeatedly said is necessary to satisfy the ‘substantial risk’ standard in the particular context present here.” *Id.* Nor did the Ohio challengers show “that an alternative method of execution is ‘available,’ ‘feasible,’ and can be ‘readily implemented,’ among other things.” *Id.* at 890 (quoting *Glossip*, 135 S. Ct. at 2737).<sup>8</sup>

Petitioners attempt to brush aside *In re Ohio Execution Protocol* because it was “decided in the context of an appeal of a denial of a motion

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<sup>8</sup> Other Sixth Circuit decisions have applied the same standard. *E.g.*, *Cooley v. Strickland* (*Cooley II*), 604 F.3d 939, 944 (6th Cir. 2010); *Cooley v. Strickland* (*Cooley I*), 589 F.3d 210, 220 (6th Cir. 2009).

for preliminary injunction.” Pet. 26. That is true but irrelevant. *In re Ohio Execution Protocol* articulates the same understanding of *Glossip* as did both *Zink* and the decision below. See 860 F.3d at 886-91. The fact that the decision below applied those same principles through the lens of *Iqbal* in a Rule 12(b)(6) posture does not, contrary to Petitioners’ claims, create conflict between these cases. See Pet. App. I, at 8, 13 (discussing the *Iqbal* pleading requirements).

In short, the decision below comports fully with *Glossip* and the reasoning of *Zink*, *Gissendaner*, and *In re Ohio Execution Protocol*. There is no need for this Court’s involvement.

## **B. The Decision Below Is Correct.**

By failing to present a circuit split or any disagreement as to the legal standards applied below, Petitioners all but admit they seek fact-bound error correction. But there is no error to correct. The court of appeals did not err in recognizing that the challenge to the use of compounded pentobarbital is time-barred. In all events, the second amended complaint fails on the merits for two reasons. First, it fails to plausibly plead a known and available alternative method of execution. Second, it fails to plausibly plead a substantial risk of severe pain.

### **1. The decision below correctly held that several of Petitioners’ claims are time-barred.**

For the reasons set out in Part I.A, *supra*, the decision below correctly held that several of Petitioners’ claims are time-barred. Moreover, while

the court below declined to formally hold the challenge to compounded pentobarbital as time-barred due to a “lack of briefing and the importance of this question,” it also noted that under *Gissendaner*, Petitioners’ challenge to the use of compounded pentobarbital would be time-barred. Pet. App. I, at 6. Its formal holding notwithstanding, the decision below left no doubt as to its view that Petitioners have failed to timely plead a challenge to the use of compounded pentobarbital. *See id.*

**2. The decision below correctly held that Petitioners failed to state a claim.**

The court below correctly applied *Iqbal* and *Glossip* to hold that Petitioners failed to state a claim. To prevail on an Eighth Amendment method-of-execution claim, a plaintiff must first establish that the execution method creates “a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.” *Glossip*, 135 S Ct. at 2737 (quotation marks omitted) (emphasis in original). This requires showing “a substantial risk of serious harm”—that is, an “objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.” *Id.* (quotation marks and citation omitted). And second, a plaintiff must also provide a “feasible, readily implemented” execution-method alternative that is not “slightly or marginally safer,” but “significantly reduce[s] a substantial risk of severe pain.” *Id.* (quotation marks omitted).

a. Petitioners cannot satisfy *Glossip*'s first requirement. They rely on nothing more than baseless speculation that there will be some flaw in the compounded pentobarbital used in their executions—either in the compounding process or through degradation. *See* Appellants' Brief at 56, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016) (discussing allegations regarding potential harm); *see also* ROA.1187. Then they add more speculation that such flaw will create a substantial risk of serious harm. *See id.* And they then add a third level of speculation that these imagined harms could be prevented by additional testing. *See id.* This falls well short of the standard set forth in *Glossip*—especially in light of the fact that Petitioners cannot demonstrate how the compounded pentobarbital being used is any less potent or sterile than what was used in over 30 executions—that occurred without incident—using the compounded form of the drug. *See* Brief of Appellees at 21-22, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (discussing record evidence demonstrating that “[t]hirty-two inmates in Texas have been killed with compounded pentobarbital without incident”); *see also* ROA.1474.

Petitioners' pleadings in the district court attempted to overcome these deficiencies by discussing various literature and the opinions of putative experts, *see* ROA.1187, but the authorities they cited never demonstrated “a substantial risk of serious harm” and “a risk that is *sure or very likely* to cause serious illness and needless suffering.” *Glossip*, 135

S. Ct. at 2737 (quotation marks and citation omitted) (emphasis in original). For example, they speculated that compounded pentobarbital might have impurities from the compounding process, but they did not allege how likely or substantial that risk is. Moreover, their putative expert evaluated not the compounded pentobarbital used in the execution protocol, but rather commercial pentobarbital. *See* Brief of Appellees at 22, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (discussing record evidence regarding Petitioners’ putative expert’s testimony); *see also* ROA.1186. Accordingly, there is no evidence that the compounding process Petitioners complain about creates a substantial risk of impurities. Worse still, Petitioners’ putative expert confessed that he “cannot make an evaluation of pain levels,” and thus there is no credible allegations that the use of compounded pentobarbital is sure or very likely to cause needless suffering. *See* Brief of Appellees at 23, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (discussing record evidence regarding Petitioners’ putative expert’s testimony); *see also* ROA.1184; ROA.1185-87.

Petitioners’ claims about the beyond-use-date (BUD) were equally deficient. They generically alleged that drugs can become less potent after time, that a less potent execution drug can prolong the execution process, and that a prolonged execution process can cause pain. *See* Appellants’ Brief at 28, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016) (discussing allegations regarding potential harm); *see also* ROA.1187;

ROA.1227-29. But they never tied those generic allegations to compounded pentobarbital specifically. And their own putative expert admitted that “it is not possible to state, as a scientific matter, the qualitative or probable changes the compounded pentobarbital in Defendants’ possession may undergo over the next ten months.” See Brief of Appellees at 23, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017); see also ROA.1184. Petitioners nevertheless insisted in the court below that “drugs that are beyond their use date are, by definition, unreliable.” See Appellants’ Brief at 33, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016). Petitioners are not permitted to simply declare that a drug is unreliable, nor is unreliability the correct standard in any event. *Glossip* requires a plaintiff to plead that the use of the drug will lead to “a substantial risk of serious harm” “that is sure or very likely to cause serious illness and needless suffering,” 135 S. Ct. at 2737 (quotation marks omitted). Petitioners here have failed to do so. See *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).<sup>9</sup>

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<sup>9</sup> As set out above, the en banc Eighth Circuit’s decision in *Zink* addressed the same argument presented here—namely, that production errors and chemical degradation in the use of compounded pentobarbital may cause needless suffering. 783 F.3d at 1099-1100. That court affirmed the dismissal of the complaint at the Rule 12(b)(6) stage.

Finally, even if there could be some defect in a particular injection of compounded pentobarbital (and there has not been such a defect in over 30 executions in Texas, *see supra* n. 6), Petitioners never attempted to demonstrate that such defect would result in more than “an isolated mishap” that, “while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm.” *Baze*, 553 U.S. at 50 (internal quotation marks omitted). As set out above, the record reflects that over 30 executions have been carried out using compounded pentobarbital without incident. *See* Brief of Appellees at 21, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Jan. 4, 2017) (discussing record evidence); *see also* ROA.1474 (“Thirty-two inmates in Texas have been killed with compounded pentobarbital without incident.”).

b. Petitioners also cannot satisfy *Glossip*’s second prong because they have not identified a “feasible, readily implemented” alternative execution method. *Glossip*, 135 S. Ct. at 2737 (quotation marks omitted); *Zink*, 783 F.3d at 1103 (“[T]his element—like any element of a claim—must be pleaded adequately.”).

Instead, they vaguely referred to “a single dose of an [FDA] approved barbiturate, applied with appropriate safeguards and transparency.” Appellants’ Brief at 60-61, *Whitaker v. Collier*, No. 16-20364 (5th Cir. Oct. 12, 2016); *see also* ROA.1231 (second amended complaint). But that pleading is facially deficient: it failed to identify a specific drug—or even the characteristics of a hypothetical drug (*e.g.*, injectable vs. oral, short-

acting vs. long-acting, duration of action)—let alone claim that the drug had ever been previously used in an execution. Petitioners are simply telling the State to use an alternative that does not suffer from what they believe are compounded pentobarbital’s flaws. That is not an alternative at all, let alone a feasible and readily implementable one.

Petitioners’ lack of specificity amounts to a proposal that Texas use an unnamed and untested alternative. That does not suffice to state a claim for relief under the Eighth Amendment. *See Baze*, 553 U.S. at 54 (“[W]e reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.”); *see also Zink*, 783 F.3d at 1103 (“We therefore agree with the district court that the prisoners’ ‘naked assertion’ that other methods would be constitutional, devoid of further factual enhancement, fails to state a claim under the Eighth Amendment.”).

### **C. None of Petitioners’ Various Other Issues Warrants this Court’s Review.**

Finally, Petitioners seek error correction as to a broad assortment of issues that were correctly decided below and in any event do not warrant certiorari review.

1. Petitioners ask this Court to reverse the lower court’s alternative holding that even if the district court considered material outside the pleadings (which, the court of appeals held, it did not), such an error was

harmless. *See* Pet. 5-10. They fault the district court for considering materials outside the complaint at the Rule 12(b)(6) motion-to-dismiss stage, and they further fault the court of appeals for failing to reverse that supposed error under the harmless error doctrine. *See id.* But they do not identify any split in authority, nor do they explain why this matter might justify certiorari review. Rather, they simply argue that the decision below misapplied harmless error review. Pet. 7-8.

In other words, Petitioners openly seek error correction. But error correction is unwarranted here, for at least two reasons. First, the decision below held as a matter of law that even looking at nothing more than the complaint, Petitioners have failed to state a claim. *See* Pet. App. I, at 16. That is, the court of appeals reached its outcome without considering the allegedly extra-record materials that Petitioners identify as improper for consideration. Second, the lower court's application of the harmless error doctrine has no impact on the limitations question; even if it had resolved the harmless error question differently, Petitioners' claims still would be time-barred. There is no error to correct, and even if there were, correcting this "error" would make no difference to the disposition of the case.

2. Petitioners also complain that "[t]he District Court violated the mandate rule and law of the case," and ask this Court to reverse. Pet. 21-23. Specifically, they argue that the district court did not properly follow the Fifth Circuit's previous remand instructions in an earlier iteration of

this case that found Article III jurisdiction, and therefore violated the Fifth Circuit’s mandate rule. Pet. 21. They take particular issue with the district court’s discovery rulings (Pet. 22), its approach to interrogatories (Pet. 22-23), and its treatment of expert testimony (Pet. 23). *See also* Pet. 18-20 (alleging that the district court violated the law-of-the-case doctrine).

Petitioners simply ask for error correction. But as the court below noted, none of these issues are cognizable because the district court granted the State’s motion to dismiss. Pet. App. I, at 16-17. In light of their failure to properly plead a timely complaint, they were not entitled to discovery or any other procedural items they complain they were denied. *See id.*

In all events, there was no violation of the mandate rule or law of the case. The Fifth Circuit’s earlier opinion found Article III jurisdiction on the basis that Petitioners’ claims were actually ripe. *See Whitaker*, 597 F. App’x at 773-74. That decision was limited to the question of Article III jurisdiction (as the district court held it lacked such jurisdiction because the claims were unripe) and could not possibly have addressed any merits questions regarding a motion to dismiss or discovery. *See id.*

3. Finally, Petitioners attack the decision below for “rel[ying] on erroneous and inapplicable standards.” Pet. 24-28. In particular, they fault the court of appeals for heeding this Court’s directive in *Glossip*. *See id.* To Petitioners, *Glossip* is inapplicable because *Glossip* reached the Court

“after substantial litigation and record development,” whereas their own appeal stands at the Rule 12(b)(6) stage. Pet. 24.

Once again, Petitioners identify no circuit split or contrary post-*Glossip* authority that would call into question the decision below. *See id.* They admit that they seek error correction. *Id.* n. 4. But as with their previous arguments, there is no error to correct. *Glossip* unambiguously required Petitioners to “identify a known and available alternative method of execution that entails a lesser risk of pain.” 135 S. Ct. at 2731. At the pleading stage, they must do so under the *Iqbal* “plausibility” standard, alleging more than “[t]hreadbare recitals” and “conclusory statements.” 556 U.S. at 678. That is not novel; it represents the same approach taken by the en banc Eighth Circuit in *Zink*. *See* 783 F.3d at 1099-1101.

The decision below explicitly accounted both for *Glossip* and *Iqbal* (e.g., Pet. App. I, at 8, 13) and held, consistent with those cases, that Petitioners did not adequately identify a known and available alternative method of execution. Pet. App. I, at 12-13. Instead, they offered only a “naked assertion,” “devoid of further factual enhancement.” *Id.* (quoting *Zink*, 783 F.3d at 1103). And they pleaded “no factual contentions” at all that any alternative method of execution would “significantly reduce a substantial risk of severe pain.” *Id.* (quoting *Glossip*, 135 S. Ct. at 2737).

That straightforward analysis confirms that the district court correctly relied on *Iqbal* and *Glossip* to hold that the Petitioners failed to

state a claim. There is no error. And as with Petitioners' other assorted issues, any error in the application of the legal standard would have no bearing on the end result, because Petitioners' claims are time-barred.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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