

No. 18-

IN THE
Supreme Court of the United States

DANNY PAUL BIBLE,

v.

Petitioner

LORIE DAVIS ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTIONS PRESENTED FOR REVIEW

Danny Bible is elderly, frail, and disabled. An extensive report from an anesthesiologist concludes that any attempt to execute him by lethal injection will be unsuccessful and will cause significant pain. Due to a multitude of health issues, Mr. Bible's veins will be difficult, if not impossible, to access. Even if IV access is established, his veins are not capable of sustaining the infusion of lethal injection drugs, making them likely to "blow."

Accordingly, Mr. Bible presents the following questions for review:

- (1) Whether it is consistent with the Eighth Amendment to dismiss on the pleadings, as a matter of law, an as-applied challenge to execution by lethal injection that alleges through unrebutted medical evidence a substantial risk of serious harm during the execution.
- (2) Whether a federal court hearing a challenge to the method of execution can deny a stay exclusively based on the timeliness of the filing, as the Fifth, Eighth and Eleventh Circuits have held, or must courts consider the merits of the underlying claim or the other factors from *Nken v. Holder*, 556 U.S. 418 (2009), as the Sixth, Seventh, Ninth and Tenth Circuits have held.
- (3) Whether the case should be held for *Bucklew v. Precythe*, No. 17-8151, 2018 WL 1400413 (April 30, 2018), because the cases present similar and overlapping questions regarding the burden to plead and prove feasible, alternative methods of execution and the competency of the execution team to manage a prisoner's unique and severe medical conditions.

LIST OF PARTIES

PETITIONER:

DANNY PAUL BIBLE

RESPONDENTS (all sued in their official capacities):

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division

GREG ABBOTT, Governor of Texas

BRYAN COLLIER, Executive Director, TDCJ

TODD HARRIS, Senior Warden, Polunsky Unit, Livingston, Texas

JAMES JONES, Senior Warden, Huntsville Unit, Huntsville, Texas

UNNAMED AND ANONYMOUS EXECUTION TEAM MEMBERS

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion below.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reproduced in Appendix A. The judgment of the United States District Court for the Southern District of Texas and the underlying opinion are reproduced in Appendices B and C.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued an opinion affirming the district court's denial of injunctive relief and dismissal of Complaint with prejudice on June 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER AUTHORITIES INVOLVED

This is a civil suit under 42 U.S.C. § 1983, which involves rights under the Eighth and Fourteenth Amendments to the United States Constitution.

42 U.S.C. § 1983, in relevant part, states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Danny Bible is scheduled to be executed on June 27, 2018, by lethal injection under Texas's execution protocol, which is very likely to cause him severe pain and needless suffering.

- 1. Mr. Bible has an unusual constellation of severe medical issues that will cause him severe pain and needless suffering if he is subjected to Texas's lethal injection protocol.**

Mr. Bible is a very sick, elderly, and frail man. Compl. ¶ 1, ECF No. 1.¹

He has debilitating medical issues that individually and collectively are sure or very likely to cause severe pain and needless suffering if Respondents attempt to execute him by lethal injection using their current protocol and procedures.

Mr. Bible suffers from heart failure, coronary artery disease, peripheral artery disease, chronic venous insufficiency, poor circulation, Parkinson's disease, Chronic Obstructive Pulmonary Disease, and Obstructive Sleep Apnea. *Id.* ¶ 28. He has paralysis, gastroesophageal reflux disease, hypertension, hyperlipidemia, diabetes, and a blood clotting disorder. *Id.* Because of his poor health, Mr. Bible has severely compromised veins, meaning it will be very unlikely that executioners will be able to establish properly functioning IVs in his veins consistent with the execution protocol, thus creating a substantial risk of either a botched execution or an aborted execution attempt. *Id.* ¶ 1.

Mr. Bible's physical state started rapidly deteriorating about a year ago. *Id.* ¶ 29. This rapid deterioration is reflected by a sudden increase in levels of pitting

¹ Citations to documents using ECF numbers refer to district court filings in *Bible v. Davis*, No. 4:18-cv-1893 (S.D. Tex.).

edema, signaling worsening heart failure; significantly increased pigmentation of his lower legs, correlating with worsening venous insufficiency; worsening tremors; increased muscle weakness; and inability to perform basic activities—such as standing for weight check, ambulating short distances with a walker, and personal grooming—without assistance. *Id.* Due to Mr. Bible's recent, precipitous decline, the risk that the execution will cause severe pain and needless suffering has become certain or very likely. *Id.*

Texas's execution protocol requires that the execution team establish two peripheral IV sites on Mr. Bible. Execution Protocol 9, ECF No. 1-3. But Mr. Bible does not have any sites on his body suitable for peripheral IV infusion. Compl. ¶ 30, ECF No. 1. His entire cardiovascular system is compromised and under stress from heart failure, coronary artery disease, diabetes, and hypertension. Dr. Sinha's Report, ¶ 155, ECF No. 1-1. His veins are fragile and are neither visible nor palpable. *Id.* All of these issues are further compounded by his Parkinson's disease, which causes tremors in his hands and limbs, and obesity, which further obscures potential vein access sites. *Id.* ¶¶ 88, 155. Both conditions dramatically increase the difficulty of establishing peripheral IV access. *Id.* Attempting to obtain access to Mr. Bible's veins will result in needless pain and suffering, and presents a substantial risk of serious harm. *Id.* ¶ 155.

2. Mr. Bible brought an as-applied lethal injection suit and was denied all relief.

The State of Texas scheduled Mr. Bible's execution date on March 19, 2018. Counsel for Mr. Bible promptly sought medical records, a medical evaluation, and

expert consultations based on his recent medical deterioration. Immediately upon completion of these efforts, Mr. Bible filed a civil rights Complaint under 42 U.S.C. § 1983 on June 8, 2018, alleging that because of his unique and deteriorating medical conditions, executing him using Texas’s lethal injection procedure would violate his Eighth Amendment rights. Compl. ¶¶ 1, 4, ECF No. 1. Mr. Bible’s medical history, current medical conditions, and potential problems with vein access were detailed at length in his Complaint and in the attached report of his medical expert. *Id.* ¶¶ 28–174, ECF No. 1; Dr. Sinha’s Report, ECF No. 1-1.

Mr. Bible filed a motion for a temporary restraining order, a preliminary injunction, and a stay of execution on June 10, 2018. Mot. for a Stay of Execution, TRO, and a Prelim. Inj., ECF No. 3. Mr. Bible also filed a motion seeking expedited discovery. Mot. for Expedited Disc., ECF No. 8.

Without holding a hearing to consider any evidence or argument, the district court denied Mr. Bible’s preliminary injunction motion and discovery motion, and dismissed the Complaint with prejudice on June 21, 2018. App. B & C. The Fifth Circuit affirmed the District Court on June 26, 2018. App. A.

The Fifth Circuit held that, as a matter of law, a state may conduct an execution that causes severe pain and needless suffering from repeated attempts to establish or maintain IV access: “Bible’s contentions that he will experience some pain and discomfort when the state’s team inserts the IVs into his veins are insufficient to meet this high standard.” App. 8–9.

Mr. Bible, however, explicitly alleged that “he will experience serious physical pain when the execution team repeatedly—but almost certainly unsuccessfully—attempts to obtain peripheral IV access on him. Recently aborted executions by lethal injections show that this pain is severe and the resulting harm is great.” Compl. ¶ 196, ECF No. 1. Moreover, assuming that the execution team proceeds under the belief that IVs are properly set, “there is the substantial risk that the execution team will inject the execution drug into a catheter that is not properly situated in the lumen of the intended vein,” *id.* ¶ 135, and “even if IV access is [properly] established, Mr. Bible’s veins are likely to blow when the saline and pentobarbital begin to flow,” *id.* ¶ 7; *see also id.* ¶¶ 31, 135–36, 154, 195. In other words, Mr. Bible’s veins will likely explode during the execution process, causing him extreme pain.

None of this evidence was rebutted by Respondents.

3. Mr. Bible is in worse health than, and his veins are more compromised than those of, individuals whose executions had to be aborted.

Mr. Bible is in worse health than, and he has more compromised veins than those of, three condemned prisoners in other states (Doyle Lee Hamm (Alabama), Romell Broom (Ohio), and Alva Campbell (Ohio)) whose attempted executions by lethal injection had to be aborted for failure to establish IV access. Dr. Sinha’s Report ¶ 158, ECF No. 1-1. For example, unlike the visible superficial veins in Mr. Hamm’s legs, Mr. Bible’s are unable to be seen. *Id.* ¶ 136. Mr. Hamm’s lower legs, unlike Mr. Bible’s legs, lacked any sign of pitting edema. *Id.* They also lacked the brown pigment staining extending to the calves that denotes late-stage chronic

venous insufficiency. *Id.* “Moreover, the groin site, which was at least theoretically accessible on Mr. Hamm, is unequivocally *inaccessible* on Mr. Bible because that area on Mr. Bible is completely scarred.” *Id.* Dr. Sinha concluded and Mr. Bible alleged in his Complaint that “[b]ecause Mr. Bible has worse health overall and worse vein access issues, he is at even greater risk of severe pain.” *Id.* ¶ 159; Compl. ¶ 34, ECF No. 1.

4. In addition to severe pain and suffering, Mr. Bible will also be suffocating while the execution team works to establish IV access.

Mr. Bible has multiple systemic diseases that cause difficulty breathing: heart failure, Coronary Artery Disease, Chronic Obstructive Pulmonary Disease, Gastroesophageal Reflux, and Obstructive Sleep Apnea. Dr. Sinha’s Report ¶ 149, ECF No. 1-1. “All of these cause difficulty breathing (dyspnea) and in particular, difficulty breathing when lying flat (orthopnea). Mr. Bible’s oxygen saturation is already low and his respiratory rate is high This abnormally rapid breathing (tachypnea) suggests that Mr. Bible experiences oxygen hunger even while at rest and sitting upright in a wheelchair.” *Id.*

When forced to lie on a gurney for what is very likely to be an extended period of time while the execution team attempts to gain IV access, Mr. Bible will experience a painful inability to breathe normally. *Id.* ¶ 150. “Strapped down, he will not be able to adjust his position to obtain relief. As a result, Mr. Bible will struggle to take a breath and this struggle will likely manifest as convulsive movements. This physical exertion will put further stress on his already

compromised heart and further deepen his respiratory distress and feeling of suffocation.” *Id.*

This feeling of suffocation will endure for the duration of the execution procedure, which will very likely take hours. In the failed execution attempts of Mr. Broom (Ohio) and Mr. Hamm (Alabama), the execution teams spent hours attempting venous access before aborting the executions. *Id.* ¶¶ 137, 146. Securing Mr. Bible to a gurney throughout the process of attempting to establish peripheral IVs will result in needless pain and suffering, and presents substantial risk of serious harm. *Id.* ¶ 160.

Neither the district court’s opinion nor the Fifth Circuit’s opinion mentions suffocation. Neither adequately contends with allegations that respiratory distress and the feeling of suffocation result in needless pain and suffering, and presents substantial risk of serious harm.

5. Mr. Bible shares many similarities with Mr. Russell Bucklew.

Mr. Bible’s unique constellation of medical issues also evokes comparison to another inmate with a unique medical condition: Russell Bucklew. Like Bucklew, Mr. Bible has compromised veins in his hands and arms, exhibits many signs of overall poor circulation, and struggles to breathe when lying down, as he will be throughout the execution procedure. Dr. Sinha’s Report ¶¶ 65, 110–19, 149–51, ECF No. 1-1. As a result, Mr. Bible will struggle to take a breath and this struggle will likely manifest as convulsive movements. *Id.* ¶ 150. This physical exertion will put further stress on his already compromised heart and further deepen his respiratory distress and feeling of suffocation. *Id.*

6. The Fifth Circuit presumed the medical team to be competent to handle Mr. Bible's unique medical conditions.

In a lethal injection, any judgments concerning how to handle an inability to gain and maintain proper venous access, an inmate suffocating, or any of the other predictable complications arising from an inmate's condition are left to the sole discretion of the medical members of the execution team.

Attempting venous access on Mr. Bible would be difficult, if not impossible, even for a very experienced and highly educated medical professional. Dr. Sinha's Report ¶¶ 5, 121, ECF No. 1-1 The Texas execution protocol requires that the execution team include at least one "medically trained" individual, but that individual could be a medical assistant, who is not licensed or regulated by Texas in any way, or a phlebotomist, who specializes in drawing blood, not inserting IVs meant for infusion. Compl. ¶ 132, ECF No. 1 The protocol requires that these "medically trained" individuals have only one year of professional experience. *Id.*

Mr. Bible attempted to learn about the level of training of the medical team that will be executing him, and what information they have been provided about his medical conditions and vein access. Mot. for Expedited Disc. at 4, ECF No. 8. Respondents refused to provide any informal discovery and the district court denied discovery into the medical team's level of experience and training. App. 36.

In denying Mr. Bible relief and dismissing his Complaint, the district court held that the requirement of "medical training" in Texas's execution protocol is enough: "Because of the details in Texas' protocol, no discovery of specific information about the execution team is necessary." App. 16 at n.1. The Fifth

Circuit similarly assumed that the execution team is competent to handle Mr. Bible's unique and severe medical conditions because "the state has not botched any execution" in the past. App. 10.

7. **Although Mr. Bible was not required to do so, he alleged that he can demonstrate an alternative method of execution that is feasible and readily implemented and significantly reduces a substantial risk of severe pain.**

Mr. Bible's Complaint alleged, consistent with the third question accepted for review by the Supreme Court in *Bucklew v. Precythe*, No. 17-8151, 2018 WL 1400413 (2018), that Mr. Bible can establish an as-applied Eighth Amendment violation without proving such alternative. Compl. ¶¶ 175, 200, ECF No. 1.

Mr. Bible alternatively alleged that—assuming as-applied challengers must establish a feasible, readily implemented alternative method of execution—two such alternatives exist here: nitrogen hypoxia and firing squad. Compl. ¶¶ 176–91, ECF No. 1. Mr. Bible supported these allegations with (1) expert opinions demonstrating the feasibility and painlessness of these methods and (2) legislative reports from other states showing the availability and superiority of these methods. *Id.* Respondents offered no evidence to the contrary.

Nonetheless, the district court rejected Mr. Bible's allegations related to alternatives outright, without factual development, by ruling that because the Texas statute authorizes execution only by lethal injection, no other alternatives meet the *Glossip* "feasible and readily implemented" standard. App. 32. The district court thus embraced a blanket rule that establishing an Eighth Amendment

violation is impossible unless state law itself provides for an alternative, feasible method of execution.

REASONS FOR GRANTING WRIT

This case presents urgent questions regarding litigation of as-applied challenges to a method of execution.

I. The Fifth Circuit adopted a novel interpretation of the Eighth Amendment under which, as a matter of law, an as-applied challenge to lethal injection can be dismissed on the pleadings even though it alleges a substantial risk of serious harm during the execution.

Mr. Bible has endured significant, recent medical deterioration and suffers from multiple systemic diseases, including coronary and peripheral artery disease, paralysis, Parkinson's disease, pitting edema, and diabetes. In the district court and the Fifth Circuit, Petitioner presented unrebutted allegations that the execution team is highly unlikely to find veins suitable for establishment of an IV line. Even if the execution team is able to properly insert an IV, the infusion of chemicals will very likely cause his veins to explode, thereby preventing the drugs from working as intended, causing extreme pain, and resulting in a prolonged and torturous procedure.

Without offering contrary evidence, the State of Texas argued that such an execution would not violate the Eighth Amendment, and the Fifth Circuit agreed. The Fifth Circuit's decision is fundamentally inconsistent with the Eighth Amendment principles announced by this Court in *Baze v. Rees*, 553 U.S. 35, 47–60 (2008) (plurality opinion), and *Glossip v. Gross*, 135 S. Ct. 2726, 2731–33, 2737–38 (2015). If upheld, the decision will effectively foreclose as-applied execution

challenges in the Fifth Circuit regardless of the severity of a prisoner's medical condition or the certainty of a torturous execution. Nothing in this Court's precedent supports such a novel and narrow interpretation of the Eighth Amendment. To the contrary, this Court has held that claims premised on substantial risk of serious harm are cognizable. *Baze* acknowledged the possibility that some executions may entail an "objectively intolerable risk of harm that officials may not ignore." *Baze*, 553 U.S. at 50 (internal quotation marks omitted). *Glossip* further clarified that a plaintiff may prevail on his Eighth Amendment claims if he shows that his execution is "sure or very likely to cause . . . needless suffering." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50). Under these well-established standards, Mr. Bible pled, and offered extensive supporting evidence of, an Eighth Amendment violation.

A. Mr. Bible alleged—with support from multiple unrebutted expert reports—that he will experience severe pain and needless suffering.

Mr. Bible alleged far more than "some" pain or "minor pain," as the Fifth Circuit's and the district court's opinions suggest. *See* App. 9, App. 24. Mr. Bible's Complaint averred that "[t]he combination of Mr. Bible's unique medical conditions and TDCJ's execution protocol creates a sure or very likely risk of serious pain and needless suffering." Compl. ¶ 193, ECF No. 1. Because no suitable veins are accessible, "he will experience *serious physical pain* when the execution team repeatedly—but almost certainly unsuccessfully—attempts to obtain peripheral IV access on him." *Id.* ¶ 196 (emphasis added). Mr. Bible cited evidence from recent executions that had to be aborted due to difficulty in establishing peripheral IV

access and alleged that pain from repeated attempts to establish an IV “is severe and the resulting harm is great.” *Id.*

Even assuming that the execution team does set the IVs, Mr. Bible further alleged that “there is the substantial risk that the execution team will inject the execution drug into a catheter that is not properly situated in the lumen of the intended vein,” *id.* ¶ 135, and that, “even if IV access is [properly] established, Mr. Bible’s veins are likely to blow when the saline and pentobarbital begin to flow,” *id.* ¶ 7; *see also id.* ¶¶ 31, 135–36, 154, 195.

In addition, “[a]ll of these risks will coincide with inhibition of Mr. Bible’s respiration and/or suffocation while he is strapped to the gurney, which in itself and in combination with these risks, will cause excruciating pain and suffering.” *Id.* ¶ 137. Mr. Bible further alleged, and his expert explained in detail, that “obtaining blood samples differs from and does not predict successful IV placement.” *Id.* ¶ 129; Dr. Sinha Report ¶ 116, ECF No. 1-1. The Complaint alleged that Texas’s execution team members lacked the training and experience to manage his unique and severe medical conditions. ¶¶ 132, 140, 152, 154, 165–69, ECF No. 1.

In support of his allegations, Mr. Bible filed expert reports and excerpts of medical records substantiating his deteriorating medical conditions; expert reports related to feasible, alternative methods of execution; legislative reports finding one of those alternatives “humane and readily implemented”; and an expert report showing the severe harm resulting from inability to obtain vein access on an inmate (Dr. Mark Heath’s report on his examination of Doyle Hamm after an execution

attempt that was aborted due to inaccessible veins). *See* Compl. & Exs., ECF Nos. 1–1-9.

These well-supported allegations stated an as-applied Eighth Amendment violation based on Texas’s intended use of its lethal injection protocol on Mr. Bible.

B. The district court and Fifth Circuit failed to assume that the allegations in Mr. Bible’s Complaint were true, and improperly resolved factual disputes and made credibility determinations in the State’s favor.

Because the district court dismissed the suit at the pleading stage, it was required to assume, as this Court must assume, the factual allegations in Mr. Bible’s Complaint to be true. *Nelson v. Campbell*, 541 U.S. 637, 640 (2004). Even though Respondents disputed some of Mr. Bible’s allegations and broadly questioned his experts’ credibility, the State offered no contrary evidence. App. 28 (“The defendants do not provide any evidence, medical or otherwise, to contradict Bible’s argument that he will experience pain during execution that violates the Eighth Amendment.”).

Nonetheless, the district court concluded that “[t]he burden at this stage . . . is on Bible,” and found that Bible had not met that burden, *id.* In determining that Mr. Bible had not met that burden, the district court made an adverse credibility finding regarding Mr. Bible’s medical expert, Dr. Sinha, based on the opinion of a different court in a different case concerning a different protocol, where Dr. Sinha questioned the execution team’s training, experience, and ability to carry out the

execution.² App. 26. That execution went forward a couple of weeks later but was aborted because the execution team was unable to obtain vein access on that individual. Thus, contrary to the district court's finding here, Dr. Sinha's conclusions in the other case were well founded. And yet, the Fifth Circuit and the district court both embraced this credibility determination from a different court—where Dr. Sinha was ultimately proven right—to justify discounting his opinions here. App. 9, 26.

Further, both the Fifth Circuit and the district court rejected Mr. Bible's allegations that his veins will not be accessible and capable of receiving injected drugs based on the fact that medical personnel have drawn blood from him in recent months. App. 9. These findings, however, rejected without basis the expert opinions Mr. Bible offered that such blood draws are far easier and different than drug injections, and that they do not pose the high risk of vein failure that drug injection poses. Dr. Sinha Report ¶ 116, ECF No. 1-1.

² The Fifth Circuit found this credibility determination proper. App. 9. To put the other court's credibility finding in context, Dr. Sinha provided an expert report and testimony where, inter alia, he questioned the execution team's training, experience, and ability to carry out the execution of Mr. Campbell under the Ohio execution protocol. *See* Dr. Sinha's Report, *In Re Ohio Execution Protocol Litig.*, No. 2:11-cv-01016, at 31 (PageID 47353) (S. D. Ohio Oct. 12, 2017), ECF No. 1295-1. Mr. Campbell, like Mr. Bible, also had a galaxy of medical problems. Compl. ¶¶ 163–64, ECF No. 1. In its decision denying injunctive relief, the Ohio district court faulted Dr. Sinha for essentially being too confident in his conclusions that executing Mr. Campbell would result in “the inmate experiencing severe pain and suffering.” *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-01016, 2017 WL 5020138, at *9 & n.11, *16 (S.D. Ohio Nov. 3, 2017).

Such one-sided findings illustrate why “[a]n adversarial process should . . . test[] the risk of ‘serious illness and needless suffering.’” *Hamm v. Dunn*, 138 S. Ct. 828, 828–29 (2018) (Ginsburg, J., dissenting from denial of certiorari). In an adversarial evidentiary hearing, qualified experts would explain the bases for their opinions, elaborate on any prior opinions and testimony, and be subject to cross examination. Here, by contrast, the courts below relied largely on another court’s footnoted, and ultimately misguided, remark about Mr. Bible’s expert, *see In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 5020138, at *9 (S.D. Ohio Nov. 3, 2017), to make adverse credibility determinations and deny Mr. Bible’s claim as a matter of law. *See* App. 9.

C. The Fifth Circuit erroneously held that, as a matter of law, a state may conduct an execution that causes severe pain and needless suffering from repeated attempts to establish IV access or from the unavailability of veins capable of sustaining the infusion.

Although Mr. Bible’s allegations were uncontroverted and not subject to an adversarial hearing process, the Fifth Circuit and the district court held that, as a matter of law, the Eighth Amendment bars an as-applied challenge alleging severe pain and needless suffering from the unavailability of veins capable of sustaining the infusion of lethal drugs. The Fifth Circuit’s ruling is contrary to this Court’s precedent recognizing that executions can entail an “objectively intolerable risk of harm that officials may not ignore.” *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1970) (internal quotation marks omitted)). Mr. Bible has alleged a near-certain risk of harm. Compl. ¶ 227, ECF No. 1 (“Mr. Bible’s health and medical conditions create near certainty that attempting to execute by

lethal injection will result in constitutional violations.”). And yet, the Fifth Circuit found, on the pleadings and as a matter of law, that he “failed to show his execution is ‘sure or very likely to cause . . . needless suffering.’” App. 10 (quoting *Glossip*, 135 S. Ct. at 2737 (alteration in original)).

The Fifth Circuit based its decision, in part, on a finding that because “the state has not botched any execution since it instituted its protocol . . . even if a mishap were to occur in Bible’s execution, that post-facto incident alone could not constitute evidence that he was sure or very likely to suffer needlessly ex ante.” App. 10. In doing so, the Fifth Circuit adopted Respondents’ argument and the district court’s reasoning that there is no difference between facial and as-applied lethal injection challenges. *See* App. 30 (district court holding that the as-applied harms Mr. Bible alleged “would only result from isolated mishaps” and that “the possibility of ‘botched executions’ . . . is just the kind of ‘isolated mishap’ that is not cognizable via a method-of-execution claim” (quoting *Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (alteration in original))).

The Eighth Amendment and 42 U.S.C. § 1983 offer no exceptions for “isolated” constitutional violations. Here, if an “isolated incident” occurs, that would, in fact, establish that Mr. Bible’s constitutional rights were violated. In effect, that would be analogous to excusing an illegal search and seizure, because when one looks at all searches performed by the state agency for the past six years (as Respondents have done with the filing of an exhibit enumerating the executions they performed, ECF No. 11-1), an illegal search would appear “isolated.” Moreover,

as Respondents themselves argued to the Fifth Circuit, such an understanding of the Eighth Amendment would bar *every* as-applied challenge: “With the Appellees’ record of uneventful executions, it is dubious that any death-row inmate could speculate that a problematic execution would be anything but an unfortunate accident inadequate to implicate the Eighth Amendment.” Appellees’ Br. at 47.

This case therefore presents the question of whether the Eighth Amendment bars relief in as-applied lethal injection challenges simply because, by its nature, an as-applied challenge alleges a unique, isolated occurrence. Respondents, in essence, argued—and the district court and the Fifth Circuit agreed—that they could conduct foreseeably torturous executions with impunity by writing off each one as “an unfortunate accident” attributable to the prisoner’s unique medical condition. If the decision below stands, that view will become the law of the Circuit for Texas, the most active death penalty state in the country.

The Court should grant certiorari and address this novel interpretation of as-applied lethal injection challenges and the Eighth Amendment created by the Fifth Circuit’s decision.

II. The Fifth Circuit perpetuates a circuit split by using timeliness of the filing as an independent bar to filing a lethal injection lawsuit and obtaining injunctive relief, without consideration of reasons for the delay, merits, or the other factors from *Nken v. Holder*, 556 U.S. 418, 434 (2009).

A circuit split exists as to whether stays of execution in § 1983 actions challenging the method of execution can be denied solely on the basis of whether they are purportedly untimely. Three circuits—the Fifth, Eighth, and Eleventh—

currently allow courts to dismiss on this basis, and Mr. Bible's stay was denied on that rationale. Four circuits—the Sixth, Seventh, Ninth, and Tenth—use the timeliness of the filing as a consideration, but not a dispositive ground for determining whether to grant a stay of execution. Because those circuits that use timeliness as a dispositive ground have done so in a way that is inconsistent with this Court's precedent for granting stays of execution, Mr. Bible asks that this Court grant his petition to resolve this split, and hold that timeliness alone is not a dispositive ground for denying a stay of execution in this lawsuit. Denying a stay of execution simply, and solely, because it is purportedly filed “too late” creates an intolerable risk that an execution will violate bedrock Eighth Amendment principles.

A. Consistent with the Fifth Circuit's precedent, the lower courts considered the timing of when Mr. Bible filed his § 1983 action as a sufficient, independent ground to deny relief.

In the pleadings below, Mr. Bible presented unrebutted evidence of his recently deteriorating medical state. In recent months, Mr. Bible has experienced worsening heart failure, significantly worsening venous insufficiency, worsening tremors secondary to his Parkinson's disease, and increased muscle weakness. Dr. Sinha's Report ¶¶ 51, 53, 60, 64, 77, 88, 154, ECF No. 1-1. His “precipitous decline” now renders it certain or very likely that he will experience severe pain and suffering during an attempted lethal injection. *Id.* ¶¶ 53, 154.

The district court recognized that Mr. Bible's medical evidence was unrebutted, noting that “[t]he defendants do not provide any evidence, medical or otherwise, to contradict Bible's argument that he will experience pain during [the]

execution that violates the Eighth Amendment.” App. 28. Yet, the court found that the timing of the filing of this lawsuit provided an independent basis for dismissal and denial of a stay of execution. *Id.* at 22, 36. This ruling was made without giving effect to the unrebutted allegations regarding Mr. Bible’s recent medical deterioration or Mr. Bible’s reasons explaining the timing of the suit. Instead, the court’s decision was made independently of the merits of the underlying claims and the factors a court must consider when evaluating whether to grant a stay of execution under *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See* App. 20 (“Before turning to his specific claims, the Court expresses concerns about the timing of Bible’s lawsuit.”).

Likewise, the Fifth Circuit affirmed the denial of a stay of execution based solely on timeliness, independent of other factors, including the merits of the underlying claims. App. 7. It did so while noting that a similar conclusion was reached in *White v. Johnson*, 429 F.3d 572, 573–74 (5th Cir. 2005) (per curiam), as well as in *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004) (per curiam). App. 7–8.

B. This Court has held that the timing of filing a § 1983 action is just one factor to consider when deciding whether to grant a stay of execution.

The timing of filing an action under 42 U.S.C. § 1983 challenging the method of execution is a consideration in determining whether an execution should be stayed. In *Hill v. McDonough*, this Court held that plaintiffs litigating method of execution claims under § 1983 must satisfy the traditional requirements for a stay of execution. 547 U.S. 573, 583–84 (2006). In deciding whether to grant a stay, this

Court considers (1) the likelihood of success on the merits, (2) whether the applicant faces irreparable injury if denied a stay, (3) whether issuance of the stay will substantially injure the other parties, and (4) where the public interest lies. *See Nken*, 556 U.S. at 434. The *Hill* Court also explained that “a strong equitable presumption [applies] against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (internal quotation marks omitted)). Because a stay of execution is an equitable remedy, “before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson*, 541 U.S. at 649–50.

Nelson is instructive regarding the operative legal standard. In *Nelson*, this Court granted a stay of execution after a § 1983 complaint challenging the method of execution was filed in the district court three days prior to the plaintiff’s scheduled execution. *Id.* at 641–43. Despite the last-minute filing, a stay of execution was granted, and later the petition for writ of certiorari itself was granted. Although the Court considered the last-minute nature of that filing as one factor in granting a stay, timeliness of the filing did not operate as an independent bar to stay of execution. *Id.* at 650.

C. A 4-3 circuit split exists regarding application of timeliness as an independent bar to granting a stay of execution.

A distinct circuit split exists regarding interpreting the instruction from this Court in *Hill* and *Nelson* that the timing of the filing of a § 1983 action challenging the method of execution is a factor to consider when determining whether to grant a stay of execution. See *Hill*, 547 U.S. at 584; *Nelson*, 541 U.S. at 649–50. The Sixth, Seventh, Ninth, and Tenth Circuits have held that the timing of the lawsuit is a factor to consider when determining whether to grant a stay of execution, but it is considered alongside the merits of the underlying claims and the other *Nken* factors. In contrast, the Fifth, Eighth, and Eleventh Circuits have held that the timing of the lawsuit is sufficient—as an independent basis, regardless of the other *Nken* factors or merits—to deny a stay of execution. Other circuits have either not been presented with this question directly, or have not adopted a clear position.³ This Court should grant certiorari to resolve this split.

³ Neither the First nor the Second Circuit appear to have addressed this question. The Third Circuit, in *Jackson v. Danberg*, 656 F.3d 157, 162–65 (3d Cir. 2011), was presented with a § 1983 challenge regarding the method of execution, but did not address the issue of timeliness. The Fourth Circuit, in *Reid v. Johnson*, 105 F. App'x 500, 501, 503 (4th Cir. 2004) (per curiam), referenced the timing of the suit as a factor, but granted a stay of execution nonetheless. Although this appears to place the Fourth Circuit alongside other circuits that do not consider timeliness a dispositive factor, this case focused on whether such a claim was cognizable under § 1983. See also *Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008) (denying a stay on the merits without considering timeliness).

Four circuits have correctly applied *Hill* and *Nelson* and assess the timeliness of the suit alongside the merits of the claim and the other *Nken* factors when deciding whether to stay an execution. The Sixth Circuit factors in the timeliness of the underlying suit in determining whether to grant a stay of execution, but does not wholly extract this issue from a merits analysis of the underlying claim. See *Hicks v. Taft*, 431 F.3d 916, 917 (6th Cir. 2005) (upholding a denial of a stay of execution “primarily because the motion was untimely,” but only after “weighing the criteria for the granting of a stay”). In two cases, the Seventh Circuit has considered the late nature of attempts to intervene in pending § 1983 challenges, but weighed that fact against the underlying merits of the claims in considering whether to grant stays of execution. *Woods v. Buss*, 496 F.3d 620, 622–23 (7th Cir. 2007) (per curiam); *Lambert v. Buss*, 498 F.3d 446, 453 (7th Cir. 2007) (per curiam). Similarly, the Ninth Circuit weighs the timeliness of the lawsuit against the underlying merits and other factors when determining whether to grant a stay of execution. *Rhoades v. Blades*, 661 F.3d 1202, 1203–04 (9th Cir. 2011) (per curiam); *Beardslee v. Woodford*, 395 F.3d 1064, 1070–75 (9th Cir. 2005) (per curiam). The Tenth Circuit also analyzes timeliness as a non-dispositive factor. *Hamilton v. Jones*, 472 F.3d 814, 817 (10th Cir. 2017) (per curiam) (denying a stay based on timeliness and lack of merit in the underlying claims); *Boltz v. Jones*, 182 F. App’x 824, 825 (10th Cir. 2006) (per curiam) (weighing the timeliness of a § 1983 action against, among other factors, the likelihood of success on the merits).

Three circuits have deviated from *Hill* and *Nelson* and have denied stays of execution exclusively on the basis of timeliness. In Mr. Bible’s case, the Fifth Circuit denied a stay of execution using the timeliness of the filing as an independent and sole basis, untethered from the merits of the underlying claims or the *Nken* factors. App. 7–8. Such a practice is not limited solely to Mr. Bible’s case; in fact, the Fifth Circuit has a long history of denying § 1983 suits challenging the method of execution as being untimely. In 2006, the same district court held that timeliness of the filing allows the court to “bypass” the question of the merits and other considerations. *Smith v. Johnson*, No. H-06-450, 2006 WL 644424, at *1 (S.D. Tex. Feb. 13, 2006), *aff’d*, 440 F.3d 262 (5th Cir. 2006). The court held, and the Fifth Circuit affirmed, that “[t]his Court must continue to deny similar challenges until the Fifth Circuit or Supreme Court rules otherwise.” *Id.* at *2.

Analysis of the Fifth Circuit’s decisions since then shows that it consistently denies stays of execution, or reverses grants of stays from the district courts, based solely on timeliness. *See, e.g., Berry v. Epps*, 506 F.3d 402, 404–05 (5th Cir. 2007) (per curiam) (denying a stay because “[o]ur precedent requires the dismissal of ‘eleventh hour’ dilatory claims,” without considering merits) (collecting cases); *Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir. 2006) (denying a stay, without consideration of the merits, because the plaintiff “cannot excuse his delaying until the eleventh hour on the ground that he was unaware of the state’s intention to execute him by injecting the three chemicals he now challenges” (quoting *Harris*, 376 F.3d at 417) (internal quotation marks omitted)); *Reese v. Livingston*, 453 F.3d

289, 290–91 (5th Cir. 2006) (denying a stay as untimely, without considering the merits); *Smith*, 440 F.3d at 263-64 (denying a stay pending the Supreme Court’s decision in *Hill* based on circuit precedent approving the denial of equitable relief “based on the dilatoriness of the filing” alone); *Neville v. Johnson*, 440 F.3d 221, 222–23 (5th Cir. 2006) (per curiam) (denying a stay because the plaintiff “offers no excuse for delaying his claim until the last minute,” without considering the merits). *Harris*, 376 F.3d at 417 (declining to consider whether petitioner properly stated a claim under § 1983 “because even if he d[id], he is not entitled to the equitable relief he seeks”).

The Eighth Circuit, in some instances, also treats timeliness as a dispositive factor in denying stays of execution. *Jones v. Kelley*, 854 F.3d 1009, 1013 (8th Cir. 2017) (per curiam) (holding that “Jones’s delay in bringing his as-applied claim is sufficient reason to deny a stay”); *McGehee v. Hutchinson*, 854 F.3d 488, 491–92 (8th Cir. 2017) (per curiam) (vacating a stay of execution granted by the district court and finding that delay in bringing the suit was “sufficient reason by itself to deny a stay”). Jurisprudence in the Eleventh Circuit parallels that of the Fifth and Eighth Circuits, in that timeliness can be an independent, dispositive factor. *Ledford v. Comm’r, Ga. Dep’t of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017) (denying a stay of execution on the “independent ground” that “Ledford’s claims are barred because he has not timely made them”); *Arthur v. Comm’r, Ala. Dep’t of Corr.*, 695 F. App’x 418, 425 (11th Cir. 2017) (denying a stay “as an independent ground . . . [because] Arthur unreasonably delayed in bringing both his [claims]”).

Compounding this erroneous interpretation, these circuits fail to provide notice to plaintiffs as to when precisely the suit is filed “too late.” In denying suits solely on the basis of timeliness, the Fifth, Eighth, and Eleventh Circuits have not expounded on when exactly a filing is untimely, warranting dismissal as an independent basis—only that, at some undefined point, they will deny stays of execution when they believe this mysterious threshold is crossed.

D. This Court should grant the petition for certiorari to resolve the circuit split and hold that the timing of filing a § 1983 action is not a sufficient ground, independent of other considerations, to deny a stay of execution.

Utilizing the timeliness of the lawsuit as an independent basis—untethered from the merits and the other applicable factors as to whether to grant a stay of execution—is at odds with this Court’s precedent. In *Nelson*, this Court granted a stay of execution after a § 1983 complaint was filed in the district court three days prior to the plaintiff’s scheduled execution; thus, clearly timeliness in and of itself should not operate as an absolute bar. 541 U.S. at 641–43. The Court’s directive requires balancing the relevant factors, but does not provide for a denial of a stay without any consideration of either the merits or other relevant *Nken* factors.

Mr. Bible’s case exemplifies the importance of weighing the timeliness of the filing against the merits of the underlying claims. Here, the courts, without consideration of the unrebutted and precipitous decline of Mr. Bible’s medical state or the timing at which prison medical records were provided to Mr. Bible, Pl.’s Mot. for a Stay of Execution, TRO, and Prelim. Inj. at 34–35, ECF No. 3, simply determined that no stay would be granted and the suit would be dismissed because

they found that the lawsuit was brought at a time the lower courts felt was “too late.” Doing so, without weighing the timeliness of the filing against the underlying merits of Mr. Bible’s claims, creates a very real risk that an execution will occur in violation of Eighth Amendment principles.

Such denial of injunctive relief and dismissal of the complaint with prejudice is not in line with precedent from this Court. As *Hill* and *Nelson* instruct courts to consider the timeliness of the suit when determining whether or not to grant a stay of execution—but do not hold this is a dispositive ground barring the entry of a stay of execution—Mr. Bible requests that this Court reject the interpretation of the circuits, including the Fifth Circuit’s interpretation in the instant case, which consider timeliness to be an independent bar to granting a stay of execution.

III. The Court should hold this case pending resolution of *Bucklew v. Precythe*, No. 17-8151, because the cases present similar and overlapping questions regarding the burden to plead and prove feasible, alternative methods of execution and the competency of the execution team to manage a prisoner’s unique and severe medical conditions.

In *Bucklew*, this Court granted certiorari to consider whether a court may assume, without specific proof, that execution team members are competent to manage a condemned prisoner’s unique and severe medical condition; whether a prisoner raising an as-applied challenge to an execution procedure based on his medical condition must prove a feasible alternative method of execution; and under what circumstances any such burden to prove an alternative method is met.

The same questions are presented in this case, though in light of the district court’s dismissal on the pleadings, the last issue here is whether Mr. Bible met his burden

of pleading (not proving) alternative execution methods. In light of the similarity of the questions presented, this Court should hold this case pending resolution of *Bucklew*.

A. When evaluating an as-applied challenge, courts should not assume that the execution team is competent to manage an inmate’s unique and severe medical conditions.

In *Bucklew*, this Court granted certiorari to resolve the question of whether “a court evaluating an as-applied challenge to a state’s method of execution based on an inmate’s rare and severe medical condition [should] assume that medical personnel are competent to manage his condition and that the procedure will go as intended?” Pet. for Writ of Cert., *Bucklew v. Precythe*, No. 17-8151, at i.

Mr. Bible and Mr. Bucklew share more than compromised veins. Like Mr. Bucklew, Mr. Bible alleged that the medical personnel on Texas’s execution team do not have the training and experience necessary to obtain and verify functional venous access for lethal injection in a person with his medical conditions. Compl. ¶¶ 132, 140, 152, 154, 165–69, ECF No. 1. The district court and Fifth Circuit rejected these allegations as a matter of law and assumed, without any supporting evidence from the State, that the execution team is competent to manage Mr. Bible’s medical conditions and perform the lethal injection as intended. *See* App. 16 n.1; App. 10 (“Here the state has not botched any execution since it instituted its protocol.”). An as-applied challenge asserts, however, that based on the inmate’s specific medical condition, the execution will not go as intended. Under the Fifth Circuit’s rule, an as-applied challenge could never succeed.

That view is contrary to the plurality opinion in *Baze*, which indicated that such claims are cognizable. *Baze*, 553 U.S. at 50 (acknowledging that some abortive attempts at execution “would demonstrate an objectively intolerable risk of harm that officials may not ignore” (internal quotation marks omitted)). The rule follows logically from this Court’s longstanding view that “deliberate indifference” to an inmate’s medical condition can rise to the level of cruel and unusual punishment within the meaning of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). As with *Bucklew*, in Mr. Bible’s case, medical personnel charged with administering TDCJ’s execution protocol on an inmate with numerous severe medical conditions will be ignorant of material details about those conditions, yet empowered to make critical decisions during the procedure that will increase the inmate’s suffering: how to handle an inability to gain venous access, how to handle a blown vein, or Mr. Bible suffocating. Respondents refused to answer any questions about these “medically trained” team members and the district court denied discovery. All of this evinces deliberate indifference to Mr. Bible’s condition and the risks that lethal injection poses to him.

As in *Bucklew*’s case, the execution protocol at issue here is nothing like the protocols this Court had before it in *Baze* and *Glossip*. Both of those protocols included “several important safeguards,” *Baze*, 553 U.S. at 55, to protect against the possibility of error in administering the drugs, including proper execution team training. Indeed, Oklahoma’s standards considered in *Glossip*, adopted after the horrific execution of Clayton Lockett, included “detailed provisions with respect to

the training and preparation of the execution team.” 135 S. Ct. at 2735. Like Missouri’s protocol at issue in *Bucklew*, TDCJ’s protocol lacks any details regarding the training and preparation of the execution team, and like Mr. Bucklew, Mr. Bible was also wrongfully denied the chance to fill that critical gap through discovery.

Under TDCJ’s vague procedures and deference to medical team members with questionable training and experience, the risk of trying and failing to gain venous access through a peripheral vein or establish vein access in an unsuitable vein is not the prospect of a mere “mishap,” or “isolated incident” as the lower courts held. App. 10, 30. The risk is all but certain. And even though these risks are substantial, as Mr. Bible demonstrated in his Complaint and supporting expert reports, there is no reason to believe that medical team members will be aware of them. There is no reason to believe that execution team members have ever seen an inmate with heart failure, severe edema, Parkinson’s disease, diabetes, and other issues that affect circulation and fragility of his veins. Although Mr. Bible’s exact medical conditions—apart from difficult vein access—may be different from Mr. Bucklew’s, in both cases, the courts’ denial of discovery on the question of training and qualification of team members related to ability to handle their unique issues shows fundamental unfairness.

Because the Fifth Circuit’s ruling here tracks the issue this Court is currently considering in *Bucklew*, the Court should stay Mr. Bible’s execution until *Bucklew* is decided.

B. *Glossip* does not require an inmate raising an as-applied challenge to prove an alternative method of execution.

As in *Bucklew*, the district court here required Mr. Bible to proffer feasible alternative methods of execution to sustain his Eighth Amendment claim. App. 31–32. The Fifth Circuit declined to rule on the issue. App. 10. The district court’s ruling stems from an improper extension of the requirement adopted in *Glossip* for facial execution procedure challenges. *Glossip*, 135 S. Ct. at 2737.

Glossip required an inmate raising a facial Eighth Amendment challenge to show that an alternative execution method is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Baze*, 533 U.S. at 52). The alternative method requirement was based on the premise that because the Constitution permits capital punishment, it cannot countenance blanket prohibitions on carrying out that punishment. *See Baze*, 533 U.S. at 48–49; *Glossip*, 135 S. Ct. at 2739. That concern is not implicated, however, when courts consider as-applied challenges.

In a facial challenge to a state’s execution protocol, the Court is asked to declare a method of execution unconstitutional as to everyone, and thus it runs the risk of rendering the death penalty itself unconstitutional. *See Glossip*, 135 S. Ct. at 2739. An as-applied challenge, by contrast, asks the Court to declare a method of execution unconstitutional only as to one inmate based on his unique medical conditions. In *Bucklew*, this Court granted certiorari to resolve the question of whether the Eighth Amendment requires “an inmate to prove an adequate

alternative method of execution when raising an as-applied challenge to the state’s proposed method of execution based on his rare and severe medical condition?” Pet. For Writ of Cert., *Bucklew v. Precythe*, No. 17-8151, at i. Because this case presents the same question, the Court should stay Mr. Bible’s execution until it resolves *Bucklew*.

C. Requiring an inmate to prove an alternative method of execution from only those permitted by state law contravenes the Supremacy Clause.

The district court assumed that the alternative method requirement applied in Mr. Bible’s as-applied challenge and ruled that to meet his burden, a prisoner must show that any alternative method of execution he proffers is authorized by state law. App. 32.⁴ This ruling holds an inmate to an even more onerous standard than in *Bucklew*, which originated in Missouri where the state authorizes a secondary method of execution. The standard established by the district court is unattainable in states like Texas that authorize only a single execution method. The rule applied to Mr. Bible in effect permits states to immunize themselves from as-applied challenges—no matter how substantial the risk of serious harm may be—by limiting their death penalty statute to one specific method.

Texas’s sole method of execution is lethal injection. Tex. Crim. Proc. Code Ann. § 43.14 (West). Mr. Bible’s Complaint states unrebutted allegations that, in light of his medical conditions, lethal injection cannot be administered without causing him unconstitutional pain and suffering. Mr. Bible further alleged that—

⁴ The Fifth Circuit declined to rule on this issue. App. 10.

assuming as-applied challengers must establish an alternative method of execution—two such alternatives exist for him, despite his medical conditions: nitrogen hypoxia and firing squad. ECF No. 1, Compl. ¶¶ 176–91. Mr. Bible supported these allegations with, inter alia, expert opinions demonstrating the feasibility and painlessness of these methods and legislative reports from other states showing the availability and superiority of these methods. *Id.*

The district court rejected Mr. Bible’s allegations outright, ruling that, because the Texas statute authorizes execution only by lethal injection, no other alternatives meet the *Glossip* “feasible and readily implemented” standard. App. 32. *Glossip*, however, based its alternative requirement on the plurality opinion in *Baze*, and *Baze* never suggested that the proposed alternative method must be authorized by state statute. To the contrary, *Baze* held that “[i]f a State refuses to adopt such an alternative in the face of these documented advantages,” its “refusal to change its method can be viewed as ‘cruel and unusual’ under the Eighth Amendment.”⁵ *Baze*, 553 U.S. at 52.

⁵ The *Glossip* Court also suggested that an inmate’s proposed alternative method does not need to be permitted by state statute. 135 S. Ct. at 2738. In *Glossip*, Oklahoma’s statute, like Texas’s here, provided lethal injection as its only method of execution. *Id.*; Okla. Stat. tit. 22, § 1014 (West). The *Glossip* Court explained that the petitioners have “not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. Nor have they shown a risk of pain so great that other acceptable, available methods must be used.” 135 S. Ct. at 2738. Those “other acceptable, available methods” plainly referred to methods other than lethal injection, and were not authorized by Oklahoma’s statute.

The lower court’s ruling here turns this holding on its head and would cede to state officials the unilateral power to preclude inmates from vindicating their rights under the Eighth Amendment. *Arthur v. Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J. and Breyer, J., dissenting from the denial of certiorari). The ruling also contravenes the Supremacy Clause by upending this Court’s authority to set federal constitutional standards and instead allowing state legislators to determine whether an inmate can succeed on an Eighth Amendment challenge. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* U.S. Const. art VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land[,] . . . Laws of any State to the Contrary notwithstanding.”). In this untenable view, whether Mr. Bible is subjected to a cruel and unusual execution does not depend on the Constitution or on decisions of this Court, but on provisions of state law.

Mr. Bible’s Eighth Amendment claim—that his unique and severe medical conditions render lethal injection an intolerably cruel method of execution as applied to him—should not be barred simply because Texas has not authorized an alternative method of execution. This Court’s review is warranted.

CONCLUSION

For these reasons, Mr. Bible asks that the Court grant his petition for writ of certiorari.

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Respectfully submitted,

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