**No. 20-__**

# In the Supreme Court of the United States

ERNEST JOHNSON,

*Petitioner,*

v.

ANNE L. PRECYTHE, ET AL.,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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**CAPITAL CASE**

## QUESTIONS PRESENTED

In *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019), this Court held, at the summary judgment stage and on the record in that case, that the State had a legitimate penological justification for rejecting the inmate's proffered alternative method of execution because that method had not previously been used to perform an execution, and the inmate had presented no evidence that the method had been studied or could be carried out. The questions presented are:

1. Whether *Bucklew* established a categorical rule that a State may obtain dismissal of an Eighth Amendment method-of-execution claim by proffering a reason for rejecting the plaintiff's opposed alternative method of execution that is legitimate in the abstract, regardless of whether the plaintiff has plausibly alleged that the State's proffered reason is not legitimate or sufficient on the facts of the case.

2. In the alternative, whether the court of appeals' refusal to permit petitioner, after this Court's decision in *Bucklew* was issued, to amend his complaint to propose a previously-used alternative method of execution warrants summary reversal.

## PARTIES TO THE PROCEEDING

Petitioner Ernest Johnson was the appellant in the court of appeals.

Respondents Anne L. Precythe, Alana Boyles, and Stanley Payne were appellees in the court of appeals.

## STATEMENT OF RELATED CASES

The following proceeding is directly related to this case within the meaning of Rule 14.1(b)(iii):

*Johnson* v. *Precythe*, No. 17-2222 (8th Cir.). Judgment was entered on April 1, 2020.

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Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals (App. 1a-8a) is reported at 954 F.3d 1098. A prior decision of the court of appeals (App. 9a-21a) is reported at 901 F.3d 973. The order of the district court (App. 22a-37a) is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on April 1, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to and including August 31, 2020 (the Monday following Saturday, August 29, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

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

## INTRODUCTION

In this Eighth Amendment action, petitioner Ernest Johnson alleges that Missouri's lethal-injection procedure will cause him to suffer excruciatingly painful and violent seizures during his execution. Petitioner proposed nitrogen gas—the only non-lethal-injection method currently authorized by Mis-

souri law—as an available alternative method of execution. In 2018, in a published decision, the Eighth Circuit held that petitioner's complaint, which incorporated an affidavit from a medical expert and a state study concluding that nitrogen gas would be a humane and readily implemented method of execution, plausibly alleged the elements of an Eighth Amendment claim under this Court's precedents. *Glossip* v. *Gross*, 576 U.S. 863 (2015); *Baze* v. *Rees*, 553 U.S. 35 (2008).

The State petitioned for a writ of certiorari. While that petition was pending, this Court issued its decision in *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019), which reaffirmed that to survive summary judgment, a plaintiff "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125. *Bucklew* held that, on the summary judgment record in that case, the State had a legitimate reason for rejecting nitrogen gas as a proposed alternative method of execution, because the method was "untried and untested," and the inmate had proffered no evidence as to how such an execution would work, or even that it *could* work. *Id*. at 1129-1130 (citation omitted). This Court remanded this case to the court of appeals for further consideration in light of *Bucklew*.

On remand, the court of appeals held that *Bucklew* established a categorical rule that, because the untried nature of a proposed method is a legitimate reason to reject that method in the *abstract*, such a proffered reason is *always* sufficient grounds to reject a proposed method out of hand, regardless of the facts of the case. Under that view, it would not matter if

the untried nature of the proposed method is not in fact the State's reason for rejecting it, or if that proffered reason is entirely insubstantial on the facts of the case. The court of appeals' understanding of the "legitimate penological justification" standard thus gives that standard a different meaning in the method-of-execution context than in every other Eighth Amendment and prison-conditions context in which it applies. This Court's review is warranted to resolve the resulting conflict between the decision below and this Court's method-of-execution and prison-conditions precedents.

Moreover, the court of appeals' understanding of the "legitimate penological justification" standard would logically apply to *any* facially legitimate penological justification—such as witness sensibilities or logistical concerns—for refusing to adopt *any* proposed alternative method of execution. The decision below thus enables States to foreclose a method-of-execution challenge at the outset simply by proffering a reason for refusing the proposed alternative that is legitimate in the abstract—no matter what alternative the plaintiff proposes, and no matter whether the State's proffered penological justification would withstand scrutiny on the facts of the case. This Court's review is therefore warranted to ensure that the "legitimate penological justification" standard is not applied in a way that renders meaningless the Eighth Amendment right against a cruel and unusual execution.

In the alternative, this Court should summarily reverse the court of appeals' refusal to permit petitioner to amend his complaint to propose an alternative method (firing squad) that has been used before and that Members of this Court have suggested is a

humane and readily available alternative. If *Bucklew* announced a new categorical rule that a plaintiff may not propose a method that has not been used before, petitioner was entitled to amend his complaint. Leave to amend is liberally granted to plaintiffs in every other context when the law has changed, and the court of appeals had no sound basis for denying petitioner the benefit of that principle. Quite the contrary. *Bucklew* emphasized that plaintiffs who, like petitioner, have satisfied their burden of establishing (or pleading) a substantial risk of severe harm will be able to propose an available alternative. And Bucklew *expanded* the universe of permissible alternatives by abrogating lower-court decisions holding that the proposed method must be authorized by state law. The court of appeals' refusal to permit petitioner to amend his complaint to propose a different method cannot be squared with *Bucklew*'s expectation that plaintiffs will be able to propose an available alternative. This Court should reverse.

## STATEMENT OF THE CASE

1. Petitioner was convicted of three counts of first degree murder in Missouri state court and sentenced to death. App. 10a. He was subsequently diagnosed with an atypical brain tumor, and underwent a craniotomy surgical procedure to treat the tumor in 2008. App. 24a. As a result of that surgery, petitioner now has a hole in the top of his skull and is missing approximately 15-20% of his brain tissue. *Ibid.*; Second Am. Complaint ¶ 16, No. 15-cv-4237, (W.D. Mo. filed Oct. 21, 2016) (Compl.), ECF No. 41. The craniotomy procedure also resulted in scarring and a brain defect that causes petitioner to suffer from a seizure disorder. App. 24a. Since his surgery, petitioner has been

suffering violent, uncontrollable, and severely painful seizures. *Ibid*.

Missouri's single-drug lethal injection protocol employs the barbiturate pentobarbital, which is part of a class of drugs known to produce seizures, even in individuals who do not have an underlying seizure disorder. Compl. ¶¶ 25-26. Because petitioner's seizure threshold is substantially lower than that of the general population due to his pre-existing seizure disorder, the use of pentobarbital on him is highly likely to trigger severely painful and prolonged seizures and convulsions. *Id*. ¶ 34; App. 14a-15a (describing medical expert affidavit). Pentobarbital also has the tendency to exacerbate pain, so the seizures that petitioner would likely experience may be even more painful than they otherwise would be absent the pentobarbital. Compl. ¶ 51. Petitioner therefore alleges that there is a substantial and unjustifiable risk that the administration of pentobarbital will cause violent and uncontrollable seizures that will be severely painful. *Id*. ¶¶ 62-63; App. 15a.

2. a. Petitioner filed this suit under 42 U.S.C. 1983, alleging that executing him pursuant to Missouri's lethal injection protocol would violate the Eighth Amendment. App. 10a. The district court dismissed petitioner's complaint without prejudice. *Ibid*. This Court stayed petitioner's execution pending disposition of his appeal. App. 11a. The court of appeals remanded to the district court to permit petitioner to amend his complaint. 815 F.3d 451, 452 (8th Cir. 2016) (No. 15-3420).

In October 2016, petitioner filed a second amended complaint, to which he attached an affidavit from a board-certified anesthesiologist, opining that petitioner would likely suffer a mid-execution seizure

caused, in part, by the pentobarbital injection. Amended Affidavit of Joel Zivot, ¶ 14, No. 15-cv-4237 (W.D. Mo. filed Oct. 21, 2016), ECF No. 41-2. Petitioner also alleged that execution by nitrogen gas is a feasible, readily implemented alternative method that would significantly reduce the risk of pain he otherwise faced. Compl. ¶ 59. Petitioner proposed nitrogen gas because Missouri law authorized execution by lethal gas in addition to execution by lethal injection. Mo. Rev. Stat. 546.720(1).

In support of his allegation that nitrogen gas was an available alternative, petitioner alleged that execution by lethal gas was authorized by state law, that nitrogen gas as an execution method has been studied and approved for use by (at the time) one other State, that nitrogen gas was readily obtainable and easily administered, and that using nitrogen gas would not require Missouri to construct any additional facilities. Compl. ¶ 58. Petitioner also attached to his complaint a study on nitrogen gas performed at the request of Oklahoma legislators, which concluded that nitrogen gas executions would be humane and "simple to administer," and that the necessary materials could be obtained without difficulty. Oklahoma Study at 2, No. 15-cv-4237, (W.D. Mo. filed Oct. 21, 2016), ECF No. 41-3.

In May 2017, the district court dismissed the second amended complaint. App. 22a-37a.

b. In August 2018, the court of appeals reversed. App. 9a-21a. Under the "notice pleading" standard set forth in Federal Rule of Civil Procedure 8, the court explained, a complaint "need only 'give the defendant fair notice of what the * * * claim is and the grounds upon which it rests.'" App. 13a (quoting *Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007) (per curi-

am)). The Court further explained that to plead an Eighth Amendment method-of-execution claim, a plaintiff must allege that (1) the challenged procedure entails a "substantial risk of serious harm," and (2) there exists a "feasible" and "readily implemented" alternative method that "in fact significantly reduce[s] a substantial risk of severe pain." App. 13a-14a (quoting *Glossip* v. *Gross*, 576 U.S. 863, 878 (2015)).

With respect to the first element, the court held that petitioner adequately alleged that, if the State administered lethal injection according to its standard protocol, petitioner would suffer severe pain as a result of a pentobarbital-induced seizure. App. 14a-15a. With respect to the second element, the court explained that petitioner had set forth sufficient allegations to establish that nitrogen gas was a feasible and readily implemented alternative. The court recounted petitioner's allegations:

> "(1) 'execution by lethal gas is already authorized by Missouri statute,' * * * (2) 'the tools necessary to perform nitrogen-induced hypoxia are easily acquired in the open market,' (3) nitrogen gas 'is readily available through multiple sources in the United States' and 'can be obtained without the need for a license,' (4) nitrogen gas can be administered by 'the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or head of the inmate,' and (5) 'the use of a nitrogen gas method of execution would not require a gas chamber or the construction of [a] particular type of facility' and 'could be administered in the same room or facility now utilized by the Department of Corrections for lethal injection.'"

App. 16a (quoting petitioner's complaint). The court also observed that petitioner had attached an Oklahoma study to his complaint, and that the "ultimate conclusion" of the study was that "execution by nitrogen-induced hypoxia would be 'simple to administer.'" App. 18a. Finally, the court held that petitioner had sufficiently alleged "that the alternative method would significantly reduce a substantial risk of severe pain * * * in his particular circumstances," because he alleged, with medical-expert support, that nitrogen gas would not trigger the painful seizures that were a likely consequence of the pentobarbital injection. App. 18a-19a. The court of appeals therefore remanded for further proceedings in the district court.

c. In January 2019, the State sought this Court's review of the Eighth Circuit's decision. No. 18-852.

3. While the State's petition for a writ of certiorari was pending, this Court decided *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019).

*Bucklew* held that an inmate who challenged Missouri's lethal injection protocol as applied to him, on the ground that the execution procedure would inflict unconstitutional suffering as a result of his rare medical condition, had not proffered sufficient evidence to survive summary judgment. The Court first held that a plaintiff who raises an as-applied challenge to a method of execution must satisfy the legal standard set forth in *Baze* v. *Rees*, 553 U.S. 35 (2008) (plurality opinion) and *Glossip* v. *Gross*, 576 U.S. 863 (2015). *Bucklew*, 139 S. Ct. at 1125. Thus, in addition to demonstrating that the challenged procedure gives rise to a substantial risk of severe pain, the plaintiff must identify "a feasible and readily implemented alternative method of execution the State refused to

adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain." *Id*. at 1129.

As relevant here, the Court held that the inmate had not established "genuine issue of material fact warranting a trial," *id*. at 1129, with respect to his assertion that nitrogen gas would be a feasible and readily implemented alternative method of execution. The Court explained that the inmate had not satisfied his burden at summary judgment because he had "presented no evidence on essential questions like how nitrogen gas should be administered." *Ibid*. The Court also stated that "relatedly, the State had a 'legitimate' reason for declining to switch from its current method of execution as a matter of law" because nitrogen gas is "untried and untested." *Id*. at 1129-1130 (quoting *Baze*, 552 U.S. at 41). The Court explained that nitrogen gas had not previously been used to carry out an execution, and that the inmate's evidence indicated only that further study was needed to determine whether nitrogen could be used. *Ibid*.

The Court also emphasized, however, that the inmate's "burden" of proposing an available alternative should not be "overstated." 139 S. Ct. at 1128. The Court clarified that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Ibid*. That holding altered the law applicable to method-of-execution claims, as several courts had held that any proposed method had to be currently authorized under state law. See *id*. at 1136 (Kavanaugh, J.) (the question whether "the alternative method of execution need not be

authorized under current state law" had been "uncertain before today's decision").

4. This Court granted the State's pending petition for a writ of certiorari in this case, vacated the Eighth Circuit's decision in Johnson's favor, and remanded for further consideration in light of *Bucklew*. 139 S. Ct. 1546.

5. In April 2020, the court of appeals issued a decision on remand. The court held that *Bucklew* required departing from its earlier decision, and that the district court's dismissal of petitioner's complaint should be affirmed. App. 1a-8a.

The court of appeals first restated its earlier conclusion that petitioner had adequately alleged that Missouri's challenged procedure made it certain or very likely that petitioner would suffer severe pain during his execution. App. 3a-4a.

The court of appeals next held that *Bucklew* required the court to reverse its earlier conclusion that petitioner had adequately alleged that nitrogen hypoxia was an available alternative method of execution. App. 4a-6a. In the court's view, *Bucklew* "ruled *categorically* that 'choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it'" in all cases. App. 6a (emphasis added). Because petitioner "does not allege that any State has carried out an execution by use of nitrogen gas," the court concluded, *Bucklew* required dismissing the complaint. The court thus did not consider whether the untried nature of nitrogen gas was a legitimate penological justification for rejecting the alternative on the alleged facts of petitioner's case.

The court of appeals also rejected petitioner's contention that if the court concluded that *Bucklew* categorically foreclosed nitrogen gas as a proposed alternative, petitioner should be permitted to amend his complaint to propose a method that has been used before. The court rejected petitioner's argument that he had alleged nitrogen gas because it was authorized by Missouri law, and that because *Bucklew* established that the proposed alternative need not be authorized by state law, petitioner should be permitted to propose the firing squad. App. 7a-8a. The court did so despite the fact that the firing squad has been used in executions, and Members of this Court have suggested that it is a humane and available alternative. *Bucklew*, 139 S. Ct. at 1136 (opinion of Kavanaugh, J.); *Arthur* v. *Dunn*, 137 S. Ct. 725, 733-734 (2017) (Sotomayor, J., dissenting from denial of certiorari).

## REASONS FOR GRANTING THE PETITION

The court of appeals wrongly construed *Bucklew* to impose a categorical rule that the untried nature of a proposed alternative method of execution is always a legitimate penological justification to reject that method, regardless of the facts of the case. The court of appeals' decision gives the "legitimate penological justification" standard a different meaning in the method-of-execution context than it has in every other Eighth Amendment and constitutional context in which it applies. Taken to its logical conclusion, moreover, the court of appeals' reading of *Bucklew* suggests that States may foreclose any method-of-execution claim at the outset, simply by proffering any facially legitimate reason for rejecting the plaintiff's proposed alternative—whether or not that reason would withstand scrutiny on the facts of the case.

The court of appeals' reading of *Bucklew* thus threatens to render illusory the Eighth Amendment right against cruel and unusual punishment. This Court's review is warranted.

In the alternative, this Court should summarily reverse the court of appeals' refusal to permit petitioner to amend his complaint to propose an alternative method that has been used before. If the court of appeals correctly construed *Bucklew* to announce a new categorical rule that a plaintiff may not propose a previously unused method, petitioner was entitled to avail himself of the leave to amend that is liberally granted to plaintiffs when the law has changed. Indeed, *Bucklew* clarified that the proposed method need not be authorized by state law. And the Court emphasized that plaintiffs who, like petitioner, sufficiently establish a severe risk of harm will be able to propose an available alternative method. The court of appeals' refusal to permit petitioner to amend his complaint to take advantage of *Bucklew*'s expansion of the universe of available alternatives is therefore irreconcilable with *Bucklew* itself.

## I. This Court should review the Eighth Circuit's holding that the untried nature of a proposed alternative method of execution is automatically a legitimate justification for rejecting it, regardless of the facts of the case.

*Bucklew* held, at the summary judgment stage, that the State had a "legitimate penological reason" for rejecting the alternative of nitrogen-induced hypoxia because nitrogen was "untried and untested," in that it had not been used in an execution or shown to be safe and effective in studies. 139 S. Ct. at 1130 (citation omitted). In the decision below, the court of

appeals concluded that *Bucklew* established a "categorical[]" rule that the untried nature of an alternative method of execution is a "legitimate penological reason" to reject the method, and that such a reason "foreclose[s] the claim as a matter of law at the pleading stage." App. 5a, 6a. That conclusion misapprehends the nature of the "legitimate penological reason" standard and conflicts with precedent of this Court and other courts of appeals applying that standard in analogous prison-conditions litigation. The court of appeals also disregarded the important distinctions between *Bucklew*'s summary-judgment context and the motion-to-dismiss context of this case.

### A. The court of appeals' understanding of *Bucklew*'s "legitimate penological justification" standard conflicts with this Court's decisions applying that standard.

*Bucklew*'s holding that a State may reject a proposed alternative method of execution if the State has a "legitimate penological reason" for doing so draws from this Court's precedents concerning constitutional challenges to prison conditions. In that context, it is well established that the "legitimate penological reason" standard has both a categorical aspect—the proffered reason must be legitimate in the abstract—and a factual aspect—the proffered reason must be the prison's actual reason, and it must be a sufficient justification in the circumstances of the case.

1. This Court first discussed the "legitimate penological justification" element as applied to method-of-execution claims in *Baze*. There, the Court stated that if a State refuses to adopt an available alternative that alleviates a substantial risk of severe pain "without a legitimate penological justification for

adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." 553 U.S. at 52. The Court drew the "legitimate penological justification" standard from other contexts in which prisoners challenge punishments or prison policies on Eighth Amendment or other constitutional grounds. *Baze* thus relied on *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994), which held that in the prison-conditions context, the State has acted reasonably, not wantonly or cruelly, if it has a legitimate penological justification for imposing the burden in question. *Baze*, 553 U.S. at 52; accord *Hope* v. *Pelzer*, 536 U.S. 730, 737-738 (2002) (corporal punishment violates the Eighth Amendment as "wanton" and "gratuitous" if it is imposed "without penological justification" (citations omitted)); *United States* v. *Haymond*, 139 S. Ct. 2369, 2383 (2019); *Turner* v. *Safley*, 482 U.S. 78, 89 (1987) (examining legitimate penological interests that assertedly justified prison regulations alleged to violate First Amendment and due process rights).

This Court's decisions establish that the "legitimate penological justification" requirement has both categorical and fact-specific elements. A proffered justification must be legitimate in the abstract—for instance, prison security is a legitimate justification in the prison-conditions context, *Turner*, 482 U.S. at 97, just as preserving dignity and witness sensibilities is a legitimate reason in the method-of-execution context, *Baze*, 553 U.S. at 57. But even when a justification is legitimate as a categorical matter, that is not in itself sufficient. The proffered justification must *also* be legitimate on the facts of the case—that is, the justification must actually be present in the circumstances of the case, and it must be sufficient to justify the prison's conduct. In *Hope*, for instance,

prison officials asserted that their use of the hitching post to punish the plaintiff was justified by safety concerns. That justification was unquestionably legitimate in the abstract. But the Court then examined whether safety concerns justified the plaintiff's treatment on the facts of the case—and concluded that they did not, and that as a result, the punishment violated the Eighth Amendment. 536 U.S. at 737-738.

This Court and other courts of appeals have repeatedly examined both the categorical and fact-specific aspects of a prison's proffered legitimate penological justification. In some cases, the proffered justification, though facially legitimate, may not be sufficiently related to the burden imposed on the prisoner. See, *e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 133 (2003) (acknowledging proffered security concerns as legitimate, but examining factual record to ascertain whether restrictions on child visitation were related to that interest); *Turner*, 482 U.S. at 97 (facially legitimate security concerns were not reasonably related to restriction); *Ben-Levi* v. *Brown*, 136 S. Ct. 930, 935-936 (2016) (Alito, J., dissenting from denial certiorari) (stating that even if one did not "question the importance of these interests," including security concerns, "respondent's invocation of these interests is insufficient to justify" the policies at issue). In other cases, the proffered legitimate reason may be pretextual. See, *e.g.*, *Quinn* v. *Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("[T]he district court made a factual finding that this legitimate penological interest was not the motivation for the officials' actions."); *Aref* v. *Holder*, 953 F. Supp. 2d 133, 146 (D.D.C. 2013) ("The fact that Smith offered legitimate penological reasons for Jayyousi's continued placement in

the CMU does not settle the issue, since Jayyousi has alleged that the reasons were pretextual.").

These decisions reflect two principles. First, a defendant may not defeat an Eighth Amendment or other constitutional claim simply by pointing to a justification that is legitimate in the abstract. Second, although the abstract legitimacy of a particular penological justification is a legal question, the sufficiency of that justification to support inhibiting a prisoner's constitutional rights in a particular case is a *factual* question.

2. Against this backdrop, the court of appeals erred in interpreting *Bucklew* to establish a "categorical" rule that when a method is untried, a State automatically has an actual, legitimate penological reason to reject it, regardless of the facts of the case.

*Bucklew* explained, in the context of a summary judgment record, that the untried nature of nitrogen was a "legitimate" reason to reject the alternative "as a matter of law." 139 S. Ct. at 1130. There is no question after *Bucklew* that the untried nature of a proposed alternative is facially legitimate reason to reject that alternative. But *Bucklew* should be understood in light of the prison-conditions jurisprudence that undergirds *Baze*'s Eighth Amendment framework. The lesson of those cases is that a legitimate basis in the abstract is not enough: a facially legitimate reason may not hold up when tested in the actual circumstances of the case at hand.

Although *Bucklew* did not expressly distinguish between the question whether the untried nature of nitrogen is legitimate in the abstract, and the question whether that facially legitimate reason was legitimate and sufficient to justify rejecting nitrogen in the circumstances of the *Bucklew* case, the Court did

not need to do so. The Court had already explained in the immediately preceding paragraph that the inmate had failed to proffer any evidence that nitrogen could actually be safely administered. *Id*. at 1129. In those circumstances, there could be no question that the untried nature of nitrogen was a factually sufficient reason to reject the method on the record in Bucklew's case. The Court's statement that the State had a legitimate justification to reject nitrogen "as a matter of law," *id*. at 1130, is thus best understood to refer to the inmate's failure to raise a genuine issue of material fact with respect to that justification.

The court of appeals' understanding of *Bucklew* as establishing an automatic, categorical rule divorces the "legitimate penological justification" standard in the method-of-execution context from the larger Eighth Amendment and prison-conditions context in which it originated. *Baze* and *Bucklew* did not suggest that the "legitimate penological reason" aspect of the analysis would somehow apply differently in the method-of-execution context. To the contrary, the Court expressly drew the method-of-execution standard, including the legitimate justification element, from its Eighth Amendment prison-conditions jurisprudence. *Baze*, 553 U.S. at 52 (citing *Farmer*, 511 U.S. at 884). And those decisions recognize that a facially legitimate justification may nonetheless be insufficient (or pretextual) on the facts of a particular case. See pp. 14-15, *supra*.

Indeed, under the court of appeals' sweeping interpretation of *Bucklew*, it would not matter if, for instance, the plaintiff demonstrated that the State's reliance on the novelty of a method was pretextual. Nor would it matter if the novelty of the method was

an entirely insubstantial reason in the circumstances—if, for example, the existing method posed a significant risk of excruciating pain, incontrovertible scientific evidence demonstrated that the alternative method would be effective and humane, and the State had already conducted research into the alternative. In that circumstance, the State's preference not to alter its method of execution would hardly be a "justification," *Baze*, 553 U.S. at 52, in any ordinary sense of that word, for inflicting an avoidable, substantial risk of severe pain. The fact that the novelty of the proposed method would be a facially legitimate reason to reject the method in *other* circumstances not presented would not change that conclusion. After all, the question is not simply whether a legitimate reason exists in the abstract, but whether the State actually "*possessed* a legitimate reason" for refusing the alternative protocol. *Bucklew*, 139 S. Ct. at 1128 (emphasis added).

The court of appeals thus misconstrued *Bucklew* in holding that the untried nature of a proposed alternative method of execution is a per se legitimate penological justification for rejecting the alternative in all cases, regardless of the circumstances of the case. Furthermore, that categorical interpretation conflicts with *Baze* and this Court's other decisions applying the legitimate penological justification standard.

3. Under the correct understanding of the "legitimate penological justification" standard, evaluating the existence of a legitimate penological justification for rejecting a proposed alternative method requires resolving factual questions.

The question is whether the untried nature of a proposed method—a facially legitimate penological

reason to reject a proposed method—justifies rejecting the alternative *on the facts of this case*. As *Bucklew* explained, the "legitimate penological justification" inquiry helps answer the ultimate question whether the State "has *unreasonably* refused to alter its method of execution to avoid a risk of unnecessary pain." 139 S. Ct. at 1125 (emphasis added). Evaluating whether the State's proffered reasons justify rejecting an alternative method therefore requires examining the totality of the circumstances, including the gravity of the risk that the alternative method would avoid. *Ibid.*; *Baze*, 553 U.S. at 57-58 & n.5 (upholding the State's justification for continuing to use a paralytic drug to preserve the dignity of the procedure because that interest "outweighed" the "insignificant" risk of suffering caused by the paralytic).

In addition, *Bucklew* indicates that the degree of the proposed method's novelty is relevant. *Bucklew* quoted *Baze*'s statement that a method is "untried and untested" where it has neither been used in executions nor been the subject of a study showing that it would be as effective and humane as the current method. 139 S. Ct. at 1130 (citing *Baze*, 553 U.S. at 41, 57). Thus, whether a method has been used in an execution is not the sole relevant fact; courts may take into account the quality and quantity of information available about a proposed method. Cf. *Price* v. *Comm'r*, 920 F.3d 1317, 1327 (11th Cir. 2019) (rejecting State's contention that it could refuse to adopt nitrogen as "new," in view of state legislature's recent enactment of nitrogen as an available method).

### B. The court of appeals erred in holding that petitioner's complaint must be dismissed.

The court of appeals erred in dismissing petitioner's complaint on the sole ground that petitioner's proposed alternative, nitrogen gas, is untried.

1. Significantly, this case, unlike *Bucklew*, is still at the pleading stage. In *Bucklew*, the inmate's burden at summary judgment, after "extensive discovery," was to demonstrate that a reasonable factfinder could find in his favor at trial. 139 S. Ct. at 1129; *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 554 (2007). Here, by contrast, petitioner must simply allege facts that, taken as true, make unlawful conduct "plausible." *Twombly*, 550 U.S. at 554-556; *id*. at 555 (purpose of the complaint is to give defendant "fair notice of what the claim is and the grounds upon which it rests") (internal alterations and citation omitted); *Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007).

In evaluating the sufficiency of petitioner's complaint with respect to the "legitimate penological justification" element, therefore, the court of appeals should have evaluated whether the complaint's allegations, together with judicially noticeable materials, give rise to a plausible inference that the State's proffered legitimate penological reason—that nitrogen gas is untried—may be insufficient on the facts of this case.

That is how courts of appeals uniformly have evaluated the existence of a "legitimate penological justification" at the pleading stage in the context of alleged Eighth Amendment or other constitutional violations. A defendant's mere assertion of an abstract justification is not dispositive of a claim at the pleading stage; rather, the question is whether the complaint plausibly suggests that the proffered justi-

fication is insufficient or pretextual in the circumstances. See, *e.g.*, *Gee* v. *Pacheco*, 627 F.3d 1178, 1187-1188 (10th Cir. 2010) (plaintiff plausibly alleged that facially legitimate penological reasons were not implicated by prison's withholding of plaintiff's mail); *Quintanilla* v. *Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) (complaint's allegations raised inference that legitimate penological justification of security concerns did not actually justify plaintiff's solitary confinement); *Griffin* v. *Lopez*, No. 99-15932, 2000 WL 1228997 (9th Cir. Aug. 29, 2000); *Aqeel* v. *Seiter*, No. 90-3045, 1991 WL 2990, at *1 (6th Cir. Jan. 15, 1991) (holding that the district court erred in dismissing an inmate's free exercise claim at the pleading stage because it "did not have before it a development of facts about security concerns upon which defendants' conduct may have been warranted"); *Aref*, 953 F. Supp. 2d at 146.

2. The allegations in petitioner's complaint easily raise a plausible inference that the untried nature of nitrogen gas would not be a legitimate reason to reject nitrogen in this case.

Petitioner alleges that he has a seizure condition, and that lethal injection using pentobarbital therefore will increase the likelihood of seizures that will be excruciating to him and easily visible to witnesses. App. 3a-4a. The court of appeals held that petitioner's allegations were sufficient to raise a plausible inference that such seizures would actually occur and that they rose to the level of a substantial risk of severe harm. *Ibid*. The court further held that petitioner plausibly alleged that nitrogen gas would reduce that risk. App. 4a. Unlike in *Bucklew*, then, where the inmate failed to proffer evidence that nitrogen gas would reduce a substantial likelihood of

severe pain caused by pentobarbital, petitioner has satisfied his burden with respect to the first element of the Eighth Amendment claim at this stage of the litigation. Petitioner's allegations therefore need only plausibly suggest that the untried nature of nitrogen is not sufficient to overcome the grave risk that petitioner allegedly faces from pentobarbital.

Petitioner's allegations raise a plausible inference that the State lacks a legitimate justification for refusing to switch to nitrogen because using nitrogen on petitioner would further the State's *own* asserted interest in lowering the risk of severe seizures during the execution. The court of appeals should have taken judicial notice of Missouri's representations to this Court that it has an interest in "avoid[ing] a method that causes symptoms that could be misperceived as signs of consciousness or distress," *including* "*seizure-like behavior*." Brief of Respondents at 42, *Bucklew*, 139 S. Ct. 1112 (emphasis added) (internal quotation marks omitted).

This case is therefore materially distinct from *Bucklew*. Here, the "untried" nature of nitrogen is at best one of two *competing* state interests implicated on the facts of this case. This Court has repeatedly recognized that protecting the sensibility of witnesses to executions is a legitimate state interest, *Baze*, 553 U.S. at 57-58, and here petitioner has plausibly alleged that the using State's existing method will not only cause petitioner excruciating pain, but that it is irreconcilable with the State's acknowledged interest in protecting the witnesses. The existence of that countervailing interest raises a plausible inference that the untried nature of nitrogen is not a sufficient justification for rejecting the method in this case.

Moreover, petitioner has alleged that substantial research has been done on nitrogen gas, identifying evidence not in the record in *Bucklew*. An Oklahoma study incorporated in the complaint (and not in the *Bucklew* record) found that nitrogen gas would be humane, safe for witnesses, and easy to administer. See Oklahoma Study, No. 15-cv-4237, ECF No. 41-3. Petitioner also presented to the court of appeals a recent publication (not available when petitioner filed his complaint or even when this Court decided *Bucklew*) that "review[ed] dozens of medical and scientific articles on the effects of nitrogen" and "concluded that it is a viable method of execution." Kevin M. Morrow, *Execution by Nitrogen Hypoxia: Search for Scientific Consensus*, 59 Jurimetrics J. 457, 458 (2019). "The copious scientific evidence available suggests that breathing nitrogen gas quickly and painlessly leads to unconsciousness and death." *Id.* at 485. Indeed, the article concludes, "[n]itrogen gas is cheap and widely available," and it is "unlikely to be embargoed by suppliers that oppose capital punishment." *Id.* at 485. For those reasons, "[s]witching to nitrogen gas as the preferred method of execution is the foreseeable choice" for states wanting to implement the most humane and practical method of execution. *Ibid*. Thus, while *Bucklew* held that the State had a legitimate reason to reject nitrogen in light of the paucity of the published literature on the efficacy and humaneness of nitrogen hypoxia at the time, 139 S. Ct. at 1130, petitioner has plausibly alleged that nitrogen hypoxia's safety and efficacy are not speculative or unstudied, even though nitrogen has not yet been used in an execution.

### C. The question presented is important, and this case is an ideal vehicle.

1. The question presented is of overriding importance to death-sentenced inmates who intend to challenge their execution procedures. Under the court of appeals' understanding of *Bucklew*, the abstract legitimacy of a State's proffered reason for rejecting an alternative method (whether it is that the method is untried, or some other reason) will always be dispositive of an Eighth Amendment challenge to a method of execution—regardless of whether the proffered reason withstands scrutiny on the facts of the case. It would not matter, for instance, if the plaintiff established that the existing method would cause him excruciating pain and an alternative would be feasible and readily implemented. The State could defeat the claim simply by proffering a reason for rejecting the alternative that is legitimate in the abstract.

For every proposed alternative method of execution, moreover, a State will doubtless be able to proffer a reason for rejecting it that could be considered facially legitimate—whether it is the sensibilities of the witnesses, the preferences of those who must carry out the execution, or the prison's relative lack of familiarity with method. Taken to its logical conclusion, therefore, the court of appeals' reading of *Bucklew* hands the States a blank check to foreclose *any* method-of-execution claim at the outset—no matter what alternative method the plaintiff proposes. The court of appeals' reading of *Bucklew* thus threatens to render the Eighth Amendment right illusory.

Under the court of appeals' view, moreover, the State's burden of proffering a legitimate penological justification will be far lower—and different in kind—

than in every other context, including Eighth Amendment challenges to other prison conditions. But the *Baze* Court drew that element of the method-of-execution claim from its existing Eighth Amendment jurisprudence. There is no sound reason to give the element different content in different Eighth Amendment contexts.

This Court should therefore grant certiorari in order to clarify that *Bucklew* did not silently effect a fundamental shift in the Eighth Amendment framework governing method-of-execution claims.

2. This case is an ideal vehicle to clarify the scope and application of *Bucklew*'s legitimate-reason holding. The court of appeals affirmed the dismissal of petitioner's complaint based entirely on its erroneous reading of *Bucklew*'s legitimate-reason holding. When petitioner's appeal was initially before the Eighth Circuit, the court held that he had adequately pleaded all elements of an Eighth Amendment method-of-execution claim. App. 13a-21a. On remand after *Bucklew*, the court of appeals did not revisit that conclusion, except to the extent that the court concluded that *Bucklew* had "superseded" its conclusion as to the existence of a legitimate reason for rejecting nitrogen gas. App. 5a (expressly limiting its reconsideration to the "second element" of petitioner's claim). Accordingly, the scope and application of *Bucklew*'s legitimate-reason holding is independently dispositive of petitioner's case.

## II. In the alternative, this Court should summarily reverse the court of appeals' refusal to permit petitioner to amend his complaint.

If this Court concludes that the court of appeals correctly understood *Bucklew* to announce a new rule that the untried nature of a proposed alternative

method automatically forecloses a plaintiff's method-of-execution claim, this Court should summarily reverse the Eighth Circuit's refusal to permit petitioner to amend his complaint to propose a method that has been used before. That refusal contravenes this Court's statement that "we see little likelihood that an inmate facing a serious risk of pain"—as petitioner has sufficiently alleged here—"will be unable to identify an available alternative." *Bucklew*, 139 S. Ct. at 1128-1129; see *id*. at 1136 (Kavanaugh, J., concurring). The Court based that statement on its clarification that a plaintiff may propose an alternative method of execution regardless of whether it is authorized by state law. Yet the court of appeals refused to allow petitioner to avail himself of that clarification. This Court should reverse.

### A. Under the court of appeals' reading, *Bucklew* changed the law in two significant respects.

1. The Eighth Circuit understood *Bucklew* to announce a "categorical[]" rule that the untried nature of a proposed method is a legitimate reason for rejecting it in all cases. To state a claim under that reading, a plaintiff must propose an alternative method of execution that has previously been used. If that understanding is correct, then *Bucklew* effected a significant change in the legal requirements for pleading method-of-execution claims. Although *Baze* stated that the petitioner had not demonstrated that the traditional three-drug protocol posed an "objectively intolerable risk" compared to the proposed single-drug protocol when no State had adopted the single-drug protocol, *Baze* cannot be read to suggest that the untried nature of the single-drug protocol, on its own, categorically barred the inmate's claim. 553 U.S. at

57. If that is the law, then it is an innovation created by *Bucklew* itself.

The Eighth Circuit's pre-*Bucklew* decision in this case confirms that conclusion. There, the court of appeals held that the untried nature of nitrogen "did not foreclose [petitioner's] claim as a matter of law at the pleading stage." App. 5a; *id*. at 17a-18a. That decision was consistent with then-prevailing law; to petitioner's knowledge, no appellate court had applied *Baze* and *Glossip* to require dismissal of a complaint on the sole ground that the proposed alternative had not previously been used.

2. At the same time, *Bucklew* also broadened the universe of potential alternative methods in an important respect. The Court clarified that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." 139 S. Ct. at 1128. That holding *also* changed the law applicable to method-of-execution claims. *Id*. at 1136 (Kavanaugh, J.) (the question whether "the alternative method of execution need not be authorized under current state law" had been "uncertain before today's decision"). Before *Bucklew*, the courts to consider the issue had held or strongly suggested that any proposed method had to be authorized by state law. See, *e.g*., *Boyd* v. *Warden*, 856 F.3d 853, 868 (11th Cir. 2017); *Bucklew* v. *Lombardi*, No. 14-08000, 2016 WL 6917289, at *3 (W.D. Mo. Jan. 29, 2016); *Arthur* v. *Comm'r*, 840 F.3d 1268, 1320 (11th Cir. 2016); *Arthur* v. *Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J., dissenting from denial of certiorari). That is unsurprising; there is intuitive force to the argument that a proposed method cannot be available and "readily

implemented" if legislation would be required to enable its use.

*Bucklew* further emphasized that because the plaintiff "is not limited to choosing among those [methods] presently authorized by a particular State's law," the burden of proposing an alternative method is not insurmountable—that is, there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." 139 S. Ct. at 1128-1129. Justice Kavanaugh viewed that point as important enough to write a separate opinion to "underscore" it, asserting that because "all nine Justices today agree" that state-law authorization is not necessary, "an inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id*. at 1136.

### B. The court of appeals' refusal to permit petitioner to amend his complaint is irreconcilable with *Bucklew*.

In holding that petitioner's complaint must be dismissed, the court of appeals enforced its understanding that *Bucklew* announced a new categorical rule that a proposed method must have been used before. Yet at the same time, the court refused to allow petitioner to benefit from *Bucklew*'s clarification that the proposed method need not be authorized by state law. That refusal cannot be squared with *Bucklew*'s statement that a plaintiff who faces a serious risk of severe pain should generally be able to identify an available alternative method of execution. 139 S. Ct. at 1128-1129; *id*. at 1136 (Kavanaugh, J., concurring).

1. At the time petitioner filed his complaint—before this Court's decision in *Bucklew*—the weight of authority held that a plaintiff could plead a proposed method that had not been used before, but that any proposed method had to be authorized under state law. Petitioner therefore proposed nitrogen gas because it was authorized by Missouri law, and thus "available" under pre-*Bucklew* law.

2. Petitioner therefore sought to amend his complaint in light of *Bucklew* by proposing firing squad as an available alternative method. The firing squad meets *Bucklew's* new previous-use standard (as the court of appeals understood it), and firing squad also falls within *Bucklew*'s clarification that state-law authorization is unnecessary. Indeed, Missouri itself has suggested that firing squad "would be such an available alternative." *Id.* at 1136 (Kavanaugh, J.) (citing *Bucklew* Tr. Oral Arg. 63-64). Members of this Court also have stated that firing squad may be a readily available and humane method of execution. *Ibid.*; *Arthur*, 137 S. Ct. at 733-734 (Sotomayor, J., dissenting from denial of certiorari) ("In addition to being near instant, death by shooting may also be comparatively painless. And historically, the firing squad has yielded significantly fewer botched executions.") (citation omitted).

The Eighth Circuit refused to permit amendment, however, on the ground that *Bucklew* did not constitute an "intervening change in law." App. 7a. But under the Eighth Circuit's own reasoning, *Bucklew* unquestionably changed the law *unfavorably* to petitioner, by requiring the court of appeals to reverse its earlier conclusion that petitioner's nitrogen allegation sufficed to state a claim. That unfavorable change in the governing law alone warranted leave to amend

under the well-established rule that amendment should be liberally permitted, particularly when necessary to accommodate an intervening change in law. See, *e.g.*, *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) ("It is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law.").

Even apart from that, the Eighth Circuit's refusal to permit petitioner to benefit from *Bucklew*'s clarification concerning state-authorization is contrary to this Court's expectation that plaintiffs who establish a substantial risk of severe pain will be able to proffer an available alternative method. 139 S. Ct. at 1128; *id*. at 1136 (Kavanaugh, J., concurring). Petitioner sought to do just that—having satisfied his burden at the pleading stage of plausibly alleging the existence of a substantial risk of severe pain—by amending his complaint to propose the firing squad. The Eighth Circuit did not suggest that firing squad was categorically unavailable, or that amendment would otherwise be futile. Under these circumstances, petitioner should have been permitted to amend his complaint to propose an alternative that accords with *Bucklew*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the petition for a writ of certiorari should be granted, and the court of appeals' refusal to permit petitioner to amend his complaint should be reversed.

Respectfully submitted,

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August 28, 2020

# APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2222

ERNEST LEE JOHNSON,
*Plaintiff Appellant*,

v.

ANNE L. PRECYTHE; ALANA BOYLES;
STANLEY PAYNE,
*Defendants Appellees*.

Submitted: September 24, 2019

Filed: April 1, 2020

Before: SMITH, Chief Judge, BEAM and COLLOTON, Circuit Judges.

**OPINION**

COLLOTON, Circuit Judge.

This case is on remand from the Supreme Court for further consideration in light of *Bucklew v. Precythe*, —— U.S. ——, 139 S. Ct. 1112, 203 L.Ed.2d 521 (2019). Appellant Ernest Johnson is a Missouri prisoner under a sentence of death. He sued state officials to challenge the constitutionality of Missouri's method of execution as applied to him. The district court[1] granted the State's motion to dismiss for failure to state a claim, but we ruled in a previous decision, *Johnson v. Precythe*, 901 F.3d 973 (8th Cir. 2018), that Johnson adequately pleaded a claim under the Eighth Amendment as interpreted in

[1] The Honorable Greg Kays, Chief Judge, United States District Court for the Western District of Missouri.

*Glossip v. Gross*, —— U.S. ——, 135 S. Ct. 2726, 192 L.Ed.2d 761 (2015), and *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). We now conclude in light of the Supreme Court's latest explication in *Bucklew* that the district court's judgment should be affirmed.

*Bucklew* confirmed this court's view that the test for challenges to lethal injection protocols announced in *Baze* and *Glossip* governs as-applied challenges like Johnson's. 139 S. Ct. at 1126-29. Therefore, to prove a claim under the Eighth Amendment, a prisoner must prove two elements. First, he must show that the State's method of execution "presents 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 (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520). The risk must be "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id*. (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520). Second, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125.

As we explained in our first opinion, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167

L.Ed.2d 929 (2007)). A claim is plausible on its face where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.*, and "raise[s] a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. A pleading must offer more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

At the same time, however, the rules of procedure continue to allow notice pleading through "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). We assume in our analysis that the factual allegations in the complaint are true. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955.

In our previous decision, we concluded that Johnson adequately pleaded both elements of a claim under the Eighth Amendment. As to the first element, his second amended complaint alleges that he suffers from a seizure disorder, and that "there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution." Relying on a supporting affidavit from a medical expert, Johnson asserts that "a substantial risk of serious harm will

occur during his execution as a result of a violent seizure that is induced by pentobarbital," one of the drugs used under the protocol. The expert predicts "a violent seizure that is induced by Pentobarbital injection," opines that a seizure "would occur" during Johnson's execution, and states that such seizures are "severely painful." We concluded that for purposes of notice pleading under Rule 8, Johnson raised a plausible allegation that the State's method of execution will cause severe pain. Whether Johnson can *prove* the claim through admissible evidence, we said, is a different matter to be addressed at a later stage of the proceedings. 901 F.3d at 978.

On the second element, we concluded that Johnson adequately alleged that nitrogen-induced hypoxia was a feasible and readily implemented alternative that would significantly reduce a substantial risk of severe pain. We cited Johnson's allegations that nitrogen gas is readily available on the open market, could be introduced through a "medically enclosed device to be placed over the mouth or head of the inmate," and would not require construction of a new facility. Under the notice pleading regime of the federal rules, we concluded, Johnson's complaint need not set forth a detailed technical protocol for the administration of nitrogen gas to state a claim. Johnson also alleges that nitrogen hypoxia would ameliorate the risk of severe pain allegedly caused by pentobarbital, because "the use of lethal gas would not trigger the uncontrollable seizures and convulsions." We thus determined that Johnson sufficiently alleged the second element, although whether he could *prove* that element was again a different matter to be addressed at a later stage of the proceedings. 901 F.3d at 979-80.

We now conclude that the intervening decision in *Bucklew* requires a different conclusion on the second element of Johnson's claim, because nitrogen-induced hypoxia is an "entirely new method" of execution that has "'never been used to carry out an execution'" and has "'no track record of successful use.'" *Bucklew*, 139 S. Ct. at 1130 (quoting *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (en banc) (per curiam)). In our first opinion, we understood *Glossip* and *Baze* to mean that the sufficiency of a proposed alternative method under the second element turned on whether the prisoner could prove that the particular method was feasible and readily implemented, and would significantly reduce a substantial risk of severe pain. *See Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520). This was essentially the State's position on the first go-round too, for it argued that Johnson could not show as a factual matter that the untested method of nitrogen hypoxia would significantly reduce a substantial risk of severe pain. That a method was new could make it more difficult for the prisoner to meet his burden, we thought, *see McGehee*, 854 F.3d at 493, but did not foreclose the claim as a matter of law at the pleading stage.

*Bucklew* superseded that reasoning. The Court explained that the question under the second element is not only whether there is a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain. The prisoner also must show that the alternative method is one "that the State has refused to adopt without a legitimate penological reason." 139 S. Ct. at 1125. The Court then concluded that an "independent" reason why Bucklew's claim failed was that he "sought the adoption of an entirely new

method," namely, nitrogen hypoxia. *Id*. at 1129-30. The Court ruled categorically that "choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it," and explained that the Eighth Amendment "does not compel a State to adopt 'untried and untested' (and thus unusual in the constitutional sense) methods of execution." *Id*. at 1130 (quoting *Baze*, 553 U.S. at 41, 128 S.Ct. 1520).

We conclude that this aspect of *Bucklew* forecloses Johnson's claim. Johnson's proposed alternative method of execution is nitrogen-induced hypoxia, the same method proposed by Bucklew. The Court ruled that the method's novelty was a "legitimate" reason for the State to decline to switch from its current method of execution. *Id*. at 1129. Bucklew's claim failed for that reason alone, "independent" of whether nitrogen hypoxia was a feasible and readily implemented method that would significantly reduce a substantial risk of severe pain. *Id*. Although Johnson's complaint was dismissed at the pleading stage, rather than on a motion for summary judgment, the procedural posture does not distinguish *Bucklew* on this point. Johnson does not allege that any State has carried out an execution by use of nitrogen gas; he asserts only that the State of Oklahoma has *authorized* nitrogen-induced hypoxia as a lawful method. Johnson's claim thus falls squarely within the alternative holding of *Bucklew* that the Eighth Amendment does not require a State to adopt an untried and untested method of execution.

Johnson argues that we should not consider the novelty of his proposed method as a legitimate penological justification, because the State did not

move to dismiss the complaint on this ground. We cannot accept that contention. In *Bucklew* itself, the Supreme Court affirmed the dismissal of the prisoner's complaint on the ground that nitrogen hypoxia was not an adequate alternative, even though the State, in the district court and the court of appeals, "did not dispute for purposes of that litigation that nitrogen-induced hypoxia is a feasible and readily implemented alternative method of execution." *Johnson*, 901 F.3d at 979; *see Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018); *Bucklew v. Lombardi*, No. 14-8000-CV-W-BP, slip op. at 9 (W.D. Mo. June 15, 2017). We therefore conclude that the judgment in this case likewise may be affirmed on any ground supported by the record.

Johnson last argues that we should remand the case so that he may amend his second amended complaint in light of *Bucklew*. He suggests that it was unsettled before *Bucklew* whether a prisoner was limited to pleading alternative methods of execution that were authorized by state law. With *Bucklew* having explained that there is no such limitation, 139 S. Ct. at 1128, he asks for another chance to plead an alternative method. We are not convinced that *Bucklew* constitutes an intervening change in law that warrants granting Johnson a third opportunity to amend. Neither the Supreme Court nor this court ever said that the universe of available alternatives was limited by state law. When we first addressed the point, after Johnson filed his latest amended complaint, we said the opposite. *McGehee*, 854 F.3d at 493. Johnson filed three complaints in the district court and had ample opportunity to allege any alternative method that he wished to pursue. Especially given *Bucklew*'s emphasis that "[t]he

proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously," 139 S. Ct. at 1134, we conclude that the case should be closed.

For these reasons, the judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2222

ERNEST LEE JOHNSON,
*Plaintiff-Appellant*,

v.

ANNE L. PRECYTHE; ALANA BOYLES;
STANLEY PAYNE[*],
*Defendants-Appellees*.

Submitted: May 16, 2018

Filed: August 27, 2018

Rehearing and Rehearing En Banc Denied
October 2, 2018[**]

Before: SMITH, Chief Judge, BEAM and
COLLOTON, Circuit Judges.

**OPINION**

COLLOTON, Circuit Judge.

Ernest Johnson, a prisoner sentenced to death in Missouri, appeals the dismissal of his action challenging the constitutionality of the State's method of execution as applied to him. The district court dismissed Johnson's second amended complaint for failure to state a claim. We conclude that Johnson pleaded a plausible claim for relief under the Eighth

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[*] Appellees Precythe, Boyles, and Payne are automatically substituted for their predecessors under Federal Rule of Appellate Procedure 43(c)(2).

[**] Judge Benton did not participate in the consideration or decision of this matter.

Amendment, so we reverse and remand for further proceedings.

I.

Johnson was convicted of three counts of first-degree murder in Missouri state court and sentenced to death. *See State v. Johnson*, 244 S.W.3d 144, 149 (Mo. 2008). He filed this action against Missouri officials in October 2015, approximately two weeks before a scheduled execution on November 3, 2015. Johnson alleged that the State's method of execution—lethal injection with pentobarbital—violates the Eighth Amendment's proscription on cruel and unusual punishment, because there is "a substantial and unjustifiable risk" that a pentobarbital injection will "trigger severe and uncontrollable seizures and convulsions due to his brain defect and unique medical condition."

The district court granted the State's motion to dismiss the complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Applying the Eighth Amendment standard from *Glossip v. Gross*, —— U.S. ——, 135 S.Ct. 2726, 2737, 192 L.Ed.2d 761 (2015), the court concluded that Johnson had not identified a feasible, readily implementable alternative method of execution that would significantly reduce a substantial risk of severe pain. The court dismissed the complaint without prejudice, stating that Johnson was free to amend his complaint to remedy its deficiencies. Due to Johnson's imminent execution date, however, the court stated that it was certifying the dismissal order for interlocutory appeal under Federal Rule of Civil Procedure 54(b).

Johnson moved this court to stay his execution pending appeal. This court denied a stay after

concluding that Johnson failed to demonstrate a significant possibility of success on either element of his Eighth Amendment claim. *Johnson v. Lombardi*, 809 F.3d 388 (8th Cir. 2015) (per curiam). The Supreme Court, however, granted a stay pending appeal in the Eighth Circuit. *Johnson v. Lombardi*, —— U.S. ——, 136 S.Ct. 443, 193 L.Ed.2d 344 (2015) (per curiam). The Court observed that a supporting affidavit by a medical expert stated that "[a]s a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that may be induced by [the] Pentobarbital injection." *Id.* at 443 (alterations in original).

As we observed in *Bucklew v. Lombardi*, 783 F.3d 1120 (8th Cir. 2015) (en banc), "[t]he Court's decision to grant a stay pending appeal reflected its determination that [the movant] had shown 'a significant possibility of success on the merits' of his appeal from the district court's dismissal of his complaint." *Id.* at 1123-24 (quoting *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006)). In this case, however, we subsequently dismissed Johnson's appeal for lack of jurisdiction, and did not consider the merits of his complaint at that time. *Johnson v. Lombardi*, 815 F.3d 451 (8th Cir. 2016). We noted that the State had not established a new execution date, and that Johnson was thus "free to move for leave to amend his complaint without the pressure of a scheduled execution." *Id.* at 452.

Back in the district court, Johnson amended his complaint, but the court again dismissed it without prejudice. This time, the court reasoned that Johnson's complaint failed to plead facts that

established the likelihood that pentobarbital would cause him to have a mid-execution seizure. The court allowed that it would give Johnson one more opportunity to file an adequately pleaded complaint.

Johnson then filed a second amended complaint. As an exhibit, Johnson attached an affidavit from anesthesiologist Dr. Joel Zivot, who opined about the likelihood that Johnson would suffer a painful seizure if executed by means of pentobarbital. Johnson also attached an Oklahoma study concluding that nitrogen-induced hypoxia, an alternative to lethal injection, would be a humane method of execution.

The district court granted the State's motion to dismiss the latest complaint. The court reasoned that Johnson failed to plead adequately two elements of an Eighth Amendment claim—namely, that pentobarbital was sure or very likely to cause him to suffer severe pain, and that nitrogen-induced hypoxia was a feasible and readily implemented alternative method of execution that would significantly reduce that risk. Johnson appeals, and we review the district court's decision *de novo*. *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (en banc) (per curiam).

II.

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible on its face where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.*,

and "raise[s] a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. A pleading must offer more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

At the same time, however, the rules of procedure continue to allow notice pleading through "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). We assume in our analysis that the factual allegations in the complaint are true. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955.

To prove a claim challenging a method of execution under the Eighth Amendment, a prisoner must first "establish that the method presents 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 (quoting *Baze v. Rees*, 553 U.S. 35, 50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion)). The risk must be "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze*, 553 U.S. at 50, 128 S.Ct. 1520). Second, the prisoner must "identify an alternative that is 'feasible, readily implemented, and

in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alteration in original) (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520). A plaintiff cannot satisfy this element "merely by showing a slightly or marginally safer alternative." *Id.* (quoting *Baze*, 553 U.S. at 51, 128 S.Ct. 1520).

On the first element, Johnson alleged that he was diagnosed with an "atypical parasagittal meningioma brain tumor." A portion of the tumor was removed during a craniotomy procedure in August 2008, but another part remains in Johnson's brain. The surgery also resulted in "scarring tissue" in Johnson's brain and a "significant brain defect." Johnson pleaded that "[t]he brain defect and the scarring tissue that resulted from the craniotomy procedure were not known until an MRI procedure was conducted in April 2011." As a result of his "brain defect, scarring, and tumor," Johnson allegedly has a seizure disorder and has suffered seizures.

After detailing Missouri's lethal injection protocol, Johnson asserted that "there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution." Relying on the attached affidavit of Dr. Zivot, the complaint asserts that "a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by pentobarbital."

Dr. Zivot's supporting affidavit states as follows: "As a result of Mr. Johnson's brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital

injection. Generalized seizures, such as the one that would occur in Mr. Johnson, are severely painful." This is essentially the same allegation that the Supreme Court cited in support of its decision in 2015 to stay Johnson's execution pending appeal. 136 S.Ct. at 443. The affidavit also explains that Methohexital, "a Barbiturate and close cousin of Pentobarbital," is known to induce seizures in persons *without* pre-existing seizure disorders, and avers that the introduction of barbiturates into the body of a person *with* a pre-existing seizure disorder is more likely to produce seizures.

We think these allegations are sufficient to meet the first element of an Eighth Amendment claim at the pleading stage. Dr. Zivot, as a medical expert, predicts "a violent seizure that is induced by Pentobarbital injection," opines that a seizure "would occur" during Johnson's execution, and states that such seizures are "severely painful." To be sure, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. But Johnson's complaint and Zivot's attached affidavit include factual allegations that a seizure will occur when the State injects pentobarbital and that such a seizure causes severe pain. These allegations are not legal conclusions but statements of fact, and more detailed factual allegations are not required under Rule 12. Insofar as Zivot reasoned by analogy from the effects of a "close cousin" in the barbiturate family, the reliability of his conclusion is a matter to be resolved after the presentation of evidence. For purposes of notice pleading, Johnson has included a plausible allegation that the State's method of execution will cause severe pain. *See*

*Glossip*, 135 S.Ct. at 2737. Whether Johnson can *prove* the claim through Dr. Zivot's testimony or other evidence is a different matter to be addressed at a later stage of the proceedings.

To prove the second element of an Eighth Amendment claim, Johnson must show an alternative method of execution "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alteration in original) (quoting *Baze*, 553 U.S. at 52, 128 S.Ct. 1520). Johnson alleged that execution by lethal gas—specifically, "nitrogen-induced hypoxia"—is such an alternative.

Johnson pleaded at greater length as follows: (1) "execution by lethal gas is already authorized by Missouri statute," *see* Mo. Rev. Stat. § 546.720.1, (2) "the tools necessary to perform nitrogen-induced hypoxia are easily acquired in the open market," (3) nitrogen gas "is readily available through multiple sources in the United States" and "can be obtained without the need for a license," (4) nitrogen gas can be administered by "the use of a hood, a mask or some other type of medically enclosed device to be placed over the mouth or head of the inmate," and (5) "the use of a nitrogen gas method of execution would not require a gas chamber or the construction of [a] particular type of facility" and "could be administered in the same room or facility now utilized by the Department of Corrections for lethal injection." Johnson further alleged that the use of lethal gas would "significantly reduce the substantial and unjustifiable risk of severe pain" resulting from a pentobarbital injection, because "the use of lethal gas would not trigger the uncontrollable seizures and convulsions." He attached to his complaint an

Oklahoma study that found nitrogen-induced hypoxia to be "a humane method to carry out a death sentence."

In the recent case of *Bucklew v. Precythe*, 883 F.3d 1087 (8th Cir.), *cert. granted*, —— U.S. ——, 138 S.Ct. 1706, 200 L.Ed.2d 948 (2018), the State did not dispute for purposes of that litigation that nitrogen-induced hypoxia is a feasible and readily implemented alternative method of execution. *Id.* at 1094; *see Bucklew v. Lombardi*, No. 14-8000-CV-W-BP, slip op. at 9 (W.D. Mo. June 15, 2017). But in this case, the State does contend that Johnson failed to plead that nitrogen-induced hypoxia is a readily implemented method of execution. According to the State, Johnson's complaint does not include required factual information "that explains how Missouri could take nitrogen gas from a tank and administer it to an inmate in a way that produces a rapid and painless death." As summarized above, however, Johnson alleged that nitrogen gas is readily available on the open market, could be introduced through a "medically enclosed device to be placed over the mouth or head of the inmate," and would not require construction of a new facility. Under the notice pleading regime of the federal rules, this is sufficient. Johnson need not set forth a detailed technical protocol for the administration of nitrogen gas to state a claim.

The district court concluded that the Oklahoma report attached to Johnson's complaint "actually indicates nitrogen induced hypoxia is not feasible or capable of being readily implemented for use in state executions," but we respectfully disagree. The report does state that "[f]urther study will be necessary to

determine the best delivery system" for nitrogen gas. The report also raises the possibility that a gas mask delivery system could be less efficient than a gas bag delivery system. But the report's ultimate conclusion is that execution by nitrogen-induced hypoxia would be "simple to administer." That researchers have yet to decide which is the *best* among several feasible methods of implementation does not definitively refute Johnson's allegation that Missouri could feasibly implement this alternative without undue delay.

The district court also thought it fatal to Johnson's claim that he did not plead facts "indicating Missouri is willing to perform this type of execution, which suggests it may not be feasible." We cannot accept, however, that a State's unwillingness to employ a method that would significantly reduce a substantial risk of severe pain makes the method infeasible. Under the *Glossip*/*Baze* standard, a State may be obliged under the Constitution to implement an alternative method of execution. *See Baze*, 553 U.S. at 52, 128 S.Ct. 1520. Whether Missouri is "willing" to implement an alternative method voluntarily does not determine whether the alternative is feasible.

The State also contends that Johnson did not adequately allege that nitrogen gas would significantly reduce a substantial risk of severe pain. The State suggests that *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. 2017) (en banc) (per curiam), forecloses Johnson's claim. *McGehee*, however, arose in a different procedural posture. Several Arkansas prisoners sought a stay of execution after an evidentiary proceeding on the ground that Arkansas's method of execution on its face violated the Eighth

Amendment. *Id.* at 490-91. We concluded that the evidence was insufficient to justify a stay, because nitrogen hypoxia had "never been used to carry out an execution" and "[w]ith no track record of successful use," it was "not likely to emerge as more than a 'slightly or marginally safer alternative'" to the State's current method in the ordinary case. *Id.* at 493 (quoting *Glossip*, 135 S.Ct. at 2737).

Johnson is not bound by the pleadings or the evidentiary record in *McGehee.* He has pleaded an as-applied claim based on his medical condition, not a facial challenge to Missouri's ordinary method. He claims that nitrogen hypoxia would ameliorate the risk of severe pain allegedly caused by pentobarbital, because "the use of lethal gas would not trigger the uncontrollable seizures and convulsions." The pleading is sufficient to state a claim that the alternative method would significantly reduce a substantial risk of severe pain for Johnson in his particular circumstances. Again, whether Johnson can *prove* that claim is a different matter that will arise at a later stage of the proceedings.

III.

The State's last argument for affirmance is that Johnson's complaint is barred by the statute of limitations. A statute of limitations is an affirmative defense that the defendant must plead and prove. But "[a] defendant does not render a complaint defective by pleading an affirmative defense," so the defense ordinarily must be apparent on the face of the complaint to justify dismissal for failure to state a claim. *Jessie v. Potter*, 516 F.3d 709, 713 n.2 (8th Cir. 2008). The district court rejected the State's position on the ground that the face of Johnson's complaint

did not establish that his claim was barred by the statute of limitations.

In a § 1983 action like this one, the governing statute of limitations "is that which the State provides for personal-injury torts." *Wallace v. Kato*, 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). In Missouri, the period is five years. Mo. Rev. Stat. § 516.120(4). Although state law dictates the length of the limitations period, we look to federal common law to determine when a cause of action under § 1983 accrues. *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091. The standard rule is that accrual occurs "when the plaintiff has a complete and present cause of action, ... that is, when the plaintiff can file suit and obtain relief." *Id.* (internal quotation marks omitted) (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). "[A] plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." *Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998); *see also Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007) (applying the common law "discovery rule" to determine when a § 1983 method-of-execution cause of action accrued).

Johnson claims that his unique medical condition puts him at a substantial risk of suffering severe pain if he is executed by means of pentobarbital. Johnson's cause of action could not have accrued until he discovered, or with due diligence should have discovered, that he suffers from the brain defects that make him vulnerable to seizures. His second amended complaint alleges that "the brain defect and the scarring tissue that resulted from the

procedure were not known until an MRI procedure was conducted in April 2011." The complaint was filed within five years of April 2011, so it would be timely if that is the accrual date.

The State argues that Johnson could have discovered his condition in 2008 after he underwent brain surgery. The State posits that "[t]he presence of scar tissue after a surgery is obvious and a natural and probable consequence of any surgery." The condition of which Johnson complains, however, is not only scar tissue. He alleges a seizure disorder that is caused by a confluence of factors in his brain. Giving Johnson all reasonable inferences at this stage in the litigation, it is not clear from Johnson's pleadings that he could have discovered this condition through the exercise of reasonable diligence before his MRI procedure in April 2011. Therefore, Johnson's complaint is not subject to dismissal under Rule 12(b)(6) based on the statute of limitations.

* * *

For the foregoing reasons, we reverse the district court's judgment dismissing Johnson's second amended complaint and remand for further proceedings.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 2:15-CV-4237-DGK

ERNEST L. JOHNSON,
*Plaintiff*,

v.

GEORGE A. LOMBARDI, et al.,
*Defendants*.

[Filed: May 1, 2017]

**ORDER GRANTING MOTION TO DISMISS**

GREG KAYS, Chief Judge

A Missouri state court convicted Plaintiff Ernest L. Johnson ("Johnson") of first-degree murder and sentenced him to death. Johnson has exhausted all appeals challenging his conviction and the State of Missouri is now ready to execute him. In this civil action, he challenges the constitutionality of the State's proposed execution protocol as it applies to him. He alleges that, in light of his brain tumor and its resulting impairments, he will experience violent, uncontrollable seizures if the State executes him with the drug pentobarbital as intended.

Now before the Court is Defendants' motion to dismiss (Doc. 42). Because Johnson fails to state a plausible claim that pentobarbital presents a substantial risk of severe pain, and that his alternative method of execution is feasible and readily implemented, the motion is GRANTED and this case is DISMISSED WITHOUT PREJUDICE.

**Background**

On October 22, 2015, less than two weeks before his scheduled execution, Johnson commenced this action against Defendants George A. Lombardi, David Dormire, and Troy Steele, who are all employees of the Missouri Department of Corrections. On October 27, 2015, the Court denied a stay of execution and dismissed the complaint for failing to state a claim (Doc. 12). Johnson appealed and moved for a stay of execution. Without considering whether the Court had properly dismissed the complaint, the Court of Appeals denied the stay. *Johnson v. Lombardi*, 809 F.3d 388 (8th Cir. 2015). The Supreme Court of the United States granted the stay and ordered the Court of Appeals to consider the merits of Johnson's appeal. *Johnson v. Lombardi*, 136 S. Ct. 443 (2015). Because the propriety of dismissing the complaint was not yet appealable, the Court of Appeals dismissed the appeal and returned jurisdiction to this Court. *Johnson v. Lombardi*, 815 F.3d 451, 452 (8th Cir. 2016). On August 1, 2016, Johnson filed an amended complaint. The Court dismissed the amended complaint without prejudice for failing to state a claim and found the claim was not barred by the statute of limitations (Doc. 40). Johnson has now filed a second amended complaint attempting to cure his prior pleading deficiencies (Doc. 41).

Taking the factual allegations in the Second Amended Complaint as true and crediting Johnson with all reasonable inferences, the Court views the relevant facts as follows. *See Zink v. Lombardi*, 783 F.3d 1089, 1093 (8th Cir. 2015) (en banc).

A jury found Johnson guilty of murdering three gas station employees during a robbery in 1994.[1] *Johnson v. State*, 333 S.W.3d 459, 462 (Mo. 2011). Over the next seventeen years, Johnson's post-conviction challenges made their way through the state courts and he was sentenced to death three times. *Id.*

In 2008, Johnson was diagnosed with a slow-growing brain tumor called an atypical parasagittal meningioma. Johnson underwent craniotomy surgery in August 2008, during which doctors removed fifteen to twenty percent of his brain tissue but were unable to remove the entire tumor. After the surgery, Johnson started having violent, uncontrollable, and painful seizures of indefinite length. He takes anti-seizure medications, but they do not suppress all seizures.

For a few years after the surgery, Johnson knew only that part of the tumor was still in his brain. A magnetic resonance imaging ("MRI") scan in April 2011, showed the surgery caused some scarring of his brain tissue and left him with a brain defect. Doctors concluded the scar tissue and brain defect, together with the tumor remnants, were disrupting electrical activity in his brain and causing Johnson's seizures.

Johnson's brain health is relevant because he alleges his condition will expose him to a substantial and unjustifiable risk of severe pain if the State of Missouri executes him as planned. The execution

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[1] Johnson bludgeoned, stabbed, and shot the victims before fleeing with money from the store's safe. A complete account of the crime is set forth in *State v. Johnson,* 968 S.W.2d 686, 689–90 (Mo. 1998).

protocol dictates that non-medical personnel inject him with up to ten grams of pentobarbital, a barbiturate which depresses the central nervous system. Second Am. Cmpl. ¶¶ 24-25, 28. Johnson claims that because of his medical condition, administering pentobarbital risks inducing an unusually painful seizure. *Id.* ¶¶ 2, 34, 51. For example, the Second Amended Complaint alleges:

> Due to the unique and specific medical condition of Mr. Johnson, there is a substantial and unjustifiable risk that Missouri's lethal injection protocol currently utilized by the Missouri Department of Corrections will affect Mr. Johnson differently than an average healthy inmate and will cause severe pain and serious harm to Mr. Johnson. There is a substantial and unjustifiable risk that the lethal injection drugs will trigger uncontrollable and painful seizures and convulsions due to Mr. Johnson's unique brain defect and condition that were discovered in April 2011. There is a substantial and unjustifiable risk that the seizures and convulsions will be severely painful and cause needless suffering. The current method of execution is sure or very likely to cause serious and needless pain in light of Mr. Johnson's unique medical condition.

*Id.* ¶ 2. The phrase "substantial and unjustifiable risk" is repeated throughout the pleading. *Id*. ¶¶ 21,[2]

[2] "The administration of the lethal injection drug pentobarbital

34,[3] 51,[4] 54.[5] The Second Amended Complaint also alleges the current execution protocol is "sure or very likely to . . . trigger[] uncontrollable and violent

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creates a substantial and unjustifiable risk that violent and uncontrollable seizures could be triggered during the execution due to the lethal injection drugs' interaction with the remaining meningioma, scarring tissue and brain defect. There is a substantial and unjustifiable risk that such violent and uncontrollable seizures will result in a severely painful and prolonged execution and serious harm. The use of the current lethal injection drugs is sure or very likely to cause serious and needless suffering and severe pain in light of Mr. Johnson's specific and unique medication condition." Second Am. Cmpl. ¶ 21.

[3] "The brain defects and pre-existing seizure disorder in Mr. Johnson create a substantial and unjustifiable risk that the execution will not proceed as intended in that there is a substantial and unjustifiable risk that the lethal injection drugs will trigger violent and uncontrollable seizures that are extremely painful and will lead to an ineffective and excruciating execution Mr. Johnson's seizure threshold is substantially lower than the general population. Any further lowering of that threshold by using a seizure promoting compound like pentobarbital will increase the likelihood of a seizure with a very high degree of probability." Second Am. Cmpl. ¶ 34.

[4] "Based on the condition of Mr. Johnson, which includes his brain tumor, brain defect and scarring, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that is induced by pentobarbital. The use of pentobarbital during the execution protocol significantly increases the likelihood that a seizure will occur in Mr. Johnson." Second Am. Cmpl. ¶ 51.

[5] "[T]he use of the lethal injection drugs used by the Department of Corrections under its current protocol create a substantial and unjustifiable risk that Mr. Johnson will suffer a severely painful execution by the triggering of violent and uncontrollable seizures and convulsions, which constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." Second Am. Cmpl. ¶ 54.

seizures and convulsions." *Id*. ¶ 63; *see also* ¶¶ 2 (alleging "sure or very likely to cause serious and needless pain in light of Mr. Johnson's unique medical condition"), 21 (asserting "sure or very likely to cause . . . severe pain in light of Mr. Johnson's specific and unique medical condition").

Johnson contends that if he suffers a seizure it will not be quick, and it will prolong the execution. *Id.* ¶ 21. And because the State of Missouri does not station medical personnel inside the execution chamber and there is no plan for what to do if the pentobarbital triggers a seizure, no one will be able to do anything for Johnson if he suffers a seizure or if the pentobarbital fails to end his life. *Id.* ¶ 36.

To support these assertions, Johnson attached an affidavit from a board-certified anesthesiologist, Dr. Joel Zivot, M.D. ("Dr. Zivot"). Dr. Zivot opines that pentobarbital, like another structurally similar barbiturate, methohexital, is a "seizure-promoting compound," and that because Johnson has an underlying seizure disorder, Missouri's "execution protocol will *increase the likelihood* of a seizure [during his execution] with *a very high degree of probability*." Aff. in Supp. ¶ 12, 15 (Doc. 41-2) (emphasis added). Further, since pentobarbital has an anti-algesic effect—that is, it exaggerates pain—a pentobarbital induced seizure would be more painful than any seizure Johnson would typically experience. *Id.* ¶ 14. Dr. Zivot concludes that Johnson "faces a *significant* medical risk for a serious seizure as the direct result" of Missouri's execution protocol and his neurologic disease. *Id.* ¶ 16 (emphasis added).

Finally, Johnson suggests there is a feasible,

readily implemented alternative method of execution: the State could execute him by nitrogen-induced hypoxia. Second Am. Cmpl. ¶ 58. Missouri law already permits execution by lethal gas, Mo. Rev. Stat. § 546.720.1, and nitrogen, which is used commonly in welding and cooking, is easy to obtain. *Id.* ¶¶ 56, 58. The State could acquire nitrogen, fit a hood or mask over his head, and then administer the nitrogen to kill him painlessly. *Id.* ¶ 58.

The sole count in Johnson's Second Amended Complaint charges that by using pentobarbital to execute him, Defendants will inflict cruel and unusual punishment, which is prohibited by the Eighth Amendment as applied to the State of Missouri by the Fourteenth Amendment and enforceable through 42 U.S.C. § 1983. He seeks a permanent injunction against his execution by lethal injection. *Id.* ¶ 70.

**Standard**

Defendants move to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief can be granted. When reviewing a complaint under Rule 12(b)(6), a court takes all factual allegations as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court gives no deference to "formulaic recitation[s] of the elements of a cause of action" and "legal conclusion[s] couched as" facts. *Id.* Thus, a plaintiff cannot rely on mere "naked assertion[s]" of wrongdoing, but rather must support his claim with "further factual enhancement." *Id.* at 557.

The court must determine whether those facts state a "plausible" claim for relief. *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Twombly*, 550 U.S. at 556 (requiring "enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful activity]").

In the plausibility evaluation, the court is limited to a review of the amended complaint and materials necessarily embraced by the amended complaint such as exhibits. *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002). This endeavor is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A court should bear in mind that "[t]here is no requirement for direct evidence; the factual allegations may be circumstantial." *McDonough v. Anoka Cty.*, 799 F.3d 931, 945 (8th Cir. 2015). "The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* at 946 (alteration removed).

**Discussion**

Defendants argue the Second Amended Complaint should be dismissed because it fails to state a claim and because it is barred by the statute of limitations.

The Eighth Amendment prohibits the State from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII. A prisoner sentenced to death may challenge an execution protocol as applied to him. *Bucklew v. Lombardi*, 783 F.3d 1120, 1127 (8th Cir. 2015) (en banc).

To challenge an execution method as "cruel and unusual," a prisoner must plead facts supporting two essential elements: (1) the method is "sure or very likely to cause serious illness and needless suffering"; and (2) that a particular alternative method of execution is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (emphases and alteration removed).

## I. The Second Amended Complaint fails to state a claim because it does not establish the plausibility that pentobarbital presents a substantial risk of inflicting severe pain on Johnson.

A prisoner challenging a method of execution must establish that "the method presents 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 (internal quotation marks and citations omitted). To prevail on this claim "there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Id.* It is the prisoner's burden to establish "that the State's lethal injection protocol creates a demonstrated risk of severe pain." *Id.* (restated as "substantial risk of severe pain" at 2740). In the context of the present case, Johnson bears the burden of presenting facts in his complaint establishing that the use of pentobarbital is sure or very likely to cause him to have a seizure, and that this seizure will be severely painful, thus Missouri's

execution protocol presents a substantial risk of inflicting severe pain on him.

In dismissing the First Amended Complaint for failing to state a claim, the Court found the complaint deficient because it contained conclusory allegations and recitations of the legal standard. It also found the remaining allegations did not establish: (1) the probability that pentobarbital will trigger seizures because of Johnson's brain defects; (2) a link between pentobarbital and the frequency of seizures; and (3) the possibility that a seizure during Johnson's execution would be the result of his seizure disorder.

Johnson intersperses the Second Amended Complaint with conclusory statements that merely repeat the legal standard by asserting pentobarbital poses a "substantial and unjustifiable risk" of severe pain because it is "sure or very likely" to trigger a seizure. Second Am. Cmpl. ¶¶ 2, 21, 34, 51, 54; Aff. in Supp. ¶¶ 14, 16. These conclusory statements are not entitled to an assumption of truth. *McDonough*, 799 F.3d at 945. Neither has Johnson corrected the deficiencies in his previous complaint by providing a sufficient factual basis for the claim that using pentobarbital on him is "sure or very likely" to trigger a seizure, creating a "substantial risk" of causing severe pain.

Johnson relies on Dr. Zivot's affidavit to establish a factual basis that administering pentobarbital to him is "sure or very likely" to cause a seizure. The affidavit does not do this.

What the affidavit does do is provide plausible evidence that pentobarbital is a seizure-promoting compound, that Johnson has a lower threshold for

seizures due to his epilepsy, and that any pentobarbital induced seizure would be more painful than usual. This outlines a theory explaining how pentobarbital could increase Johnson's risk of suffering a seizure, and that *if* Johnson suffered a pentobarbital induced seizure, it would be severely painful.

It does not establish—as *Glossip* requires—that using pentobarbital is "sure or very likely" to cause a seizure in him and so inflict unnecessary pain. Dr. Zivot never uses the words "sure" or "very likely" or their equivalent in describing the probability that Johnson will actually suffer a seizure. The closest he comes is observing that in individuals with pre-existing epilepsy, exposure to seizure producing drugs is "more likely" to produce a seizure. *Id.* ¶ 12. Granted, he repeatedly claims there is a "substantial" risk here, asserting "Mr. Johnson's epilepsy creates a unique and substantially important risk when exposed to anything that promotes seizures," and there is "a substantial risk [that] serious harm will occur during his execution as a result of a violent seizure that is induced by Pentobarbital injection." Aff. in Supp. ¶¶ 12, 14. But it is unclear exactly what risk he is referring to, the risk of Johnson suffering a pentobarbital induced seizure, or the risk that if he suffers a seizure, it will be very painful? The clearest expression of Dr. Zivot's view is in the affidavit's conclusion when he states Johnson is at "significant medical risk for a serious seizure." Aff. in Supp. ¶¶ 12, 14, 16. While a "significant" risk is noteworthy, it does not mean the same thing as "sure or very likely." A "significant" risk is not an imminent risk or an objectively intolerable risk as set forth in *Glossip*. *See McGehee*

*v. Hutchinson*, No. 17-1804, 2017 WL 1404693, at *2 (8th Cir. Apr. 17, 2017), *cert. denied,* No. 16-8770, 2017 WL 1414915 (Apr. 20, 2017) (finding that "a significant possibility that the prisoners could show an 'objectively intolerable risk' of severe pain" did not meet the "rigorous 'sure or very likely' standard of *Glossip*").

Accordingly, the Court finds the Second Amended Complaint does not meet the pleading requirements as set forth in *Glossip*.

## II. The Second Amended Complaint fails to state a claim because it does not establish Johnson's alternative method of execution is feasible and capable of being readily implemented in Missouri.

Johnson pleads nitrogen-induced hypoxia is feasible and readily implemented because: (1) execution by lethal gas is authorized by Missouri statute; (2) the tools necessary to perform the execution, such as the nitrogen gas and a hood or mask, are easily acquired in the open market; (3) nitrogen can be acquired without the need of a license; and (4) it does not require a gas chamber or construction of a facility. Second Am. Cmpl. ¶ 58.

To plead a method of execution claim, a prisoner must identify an alternative execution protocol that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain."[6] *Glossip*, 135 S. Ct. at 2737. The Eighth

[6] For purposes of this motion, the parties do not dispute Johnson's alternative method of execution will substantially reduce the risk of harm. The only issue in dispute is whether the alternative method is feasible and readily implemented.

Circuit explained this standard stating, "the State must have access to the alternative and be able to carry out the alternative relatively easily and reasonably quickly." *McGehee*, 2017 WL 1404693, at *3.

Attached to and embraced by Johnson's Second Amended Complaint is a report on nitrogen-induced hypoxia (Doc. 41-3). This report actually indicates nitrogen induced hypoxia is not feasible or capable of being readily implemented for use in state executions. The report demonstrates the process used in a state execution would likely require a more elaborate mechanism than simply using a hood to deliver the nitrogen gas. Doc. 41-3 at 10. The report states using a mask to deliver nitrogen risks complications, such as the mask not sealing tightly around the prisoner's face. *Id.* at 7. If this occurs, "oxygen entering into the hood . . . can prolong [the] time to unconsciousness and death, as well as increase the possibility of involuntary movements by the subject." *Id.* at 11.

These allegations do not demonstrate nitrogen-induced hypoxia is capable of being readily implemented: the state would need to consider a protocol that is more elaborate than merely purchasing a hood or mask; Missouri would need time to develop a protocol to address risk of oxygen entering the hood; and Department of Corrections personnel would need to be trained on the process.

Equally fatal to this claim, Johnson has not pled facts indicating Missouri is willing to perform this type of execution, which suggests it may not be feasible. *C.f. Bucklew v. Lombardi*, No. 14-08000-CV-W-BP, 2016 WL 6917289, at *5 (W.D. Mo. Jan.

29, 2016) (holding Plaintiff adequately pled alternative method of execution by lethal gas because the complaint included comments by the Missouri Attorney General indicating a willingness to carry out a lethal gas execution).

Therefore, Johnson has failed to establish that nitrogen-induced hypoxia is a feasible and readily implemented alternative method of execution.

## III. Johnson's claim is not barred by the statute of limitations.

Each time Defendants have moved to dismiss Johnson's complaint, including here, they have raised a statute of limitations argument. Although the Court could dismiss the amended complaint for the reasons stated above, the Court will address this argument because it will likely rise again.

"Bar by a statute of limitation is typically an affirmative defense, which the defendant must plead and prove." *Walker v. Barrett*, 650 F.3d 1198, 1203 (8th Cir. 2011). Thus, "the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense." *Id.*

"[T]he applicable statute of limitations governing method-of-execution Eighth Amendment claims" is a question the Eighth Circuit "has not addressed." *Bucklew*, 783 F.3d at 1128. While the Court does not have the benefit of Eighth Circuit guidance, it notes the limitations period for § 1983 lawsuits is generally the applicable state-law limitations period for personal-injury torts, *Wallace v. Kato*, 549 U.S. 384, 387 (2007), which in Missouri is five years, Mo. Rev. Stat. § 516.120(4). *See also Wellons v. Comm'r,*

*Ga. Dep't of Corr.*, 754 F.3d 1260, 1263 (11th Cir. 2014).

The limitations clock in § 1983 cases begins ticking "when the plaintiff has a complete and present cause of action," which is "when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (internal quotation marks omitted). Applied here, that time would be either when Johnson became aware of his brain defect or when the State first selected a method of execution that presented Johnson a substantial risk of severe pain.

Defendants argue the State has used lethal injection since well before Johnson began having health issues in 2008, so his claim accrued no later than August 2013, five years after his surgery and two years before he filed this lawsuit. Defendants claim their argument is bolstered by Johnson's allegations that pentobarbital is a fast-acting barbiturate and Missouri's prior method of execution used a fast-acting barbiturate.

The Second Amended Complaint fails to establish a statute of limitations defense because: (1) the facts in the complaint establish Johnson's claim was not available to him until 2011; and (2) the amended complaint does not pinpoint a date the State began using pentobarbital in its protocol.

The facts giving rise to this *Glossip* claim rely on Johnson's knowledge of his specific brain scarring that was not known to him until at least 2011 when he underwent the MRI scan. This scan established that scarred brain tissue caused Johnson's violent and uncontrollable seizures. Because Johnson could not have been reasonably aware of these injuries, which form the basis of his complaint, before 2011,

his complaint is not barred by the statute of limitations.

**Conclusion**

In view of the foregoing, Defendant's motion to dismiss (Doc. 42) is GRANTED. Johnson's complaint is DISMISSED WITHOUT PREJUDICE.

**IT IS SO ORDERED.**

Date: May 1, 2017

/s/ Greg Kays
GREG KAYS, CHIEF JUDGE
UNITED STATES DISTRICT COURT