

No. 20-5243

IN THE
Supreme Court of the United States

WARREN KEITH HENNESSY,
Petitioner,
v.
MIKE DEWINE, *et al.*,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth
Circuit**

**BRIEF OF THE ADVOCATES FOR HUMAN
RIGHTS AND THE COLEGIO DE ABOGADOS Y
ABOGADAS DE PUERTO RICO AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI¹

The Advocates for Human Rights (“the Advocates”), established in 1983, is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates provides pro bono assistance on post-conviction appeals, as well as education surrounding capital punishment. The Advocates has a strong interest in ensuring that as long as capital punishment is practiced in the United States, execution methods conform to international human rights standards.

Colegio de Abogados y Abogadas de Puerto Rico (hereinafter “Colegio”) is the oldest and largest voluntary professional organization within the Commonwealth of Puerto Rico. Colegio traces its origins to 1830. In its current existence, Colegio was created by Puerto Rico Law 43-1932, as amended, with perpetual subsistence and capacity to sue and be sued. One of Colegio’s purposes is “[t]o protect its members in the exercise of their profession.”² Colegio is and has always been at the forefront of the provision of voluntary, free legal services to the needy. Consistent with that tradition, Colegio was the precursor and/or

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

² P.R. Laws Ann. § 4.773 (2014).

founder of Legal Services of Puerto Rico, Inc., the Legal Aid Society, the Legal Aid Clinic of Santurce and Pro Bono, Inc., all of whom provide free legal services to the most economically disadvantaged sectors of the Puerto Rico populace.

SUMMARY OF ARGUMENT

Ohio’s execution methods violate the United States’ obligations under international human rights law, which require that, when governments conduct executions, those executions be carried out in a manner that avoids gratuitous suffering. Numerous international human rights bodies have confirmed that the drug midazolam – used by Ohio in its lethal injection protocol – creates a substantial risk of severe pain that international human rights standards prohibit. Should the Sixth Circuit have its way, Petitioner will be subject to this suffering.

From the perspective of international human rights law, the Sixth’s Circuit’s interpretation of *Bucklew v. Precythe*³ is nothing short of shocking. In rendering its decision, the court below ignored this Court’s language in *Baze v. Rees*, which characterized the risk of suffocation from the administration of a fatal drug as “constitutionally unacceptable,”⁴ and instead concluded incorrectly that several minutes of slow suffocation is not “constitutionally cognizable” suffering.⁵ Relying improperly on an anachronistic

³ *Bucklew v. Precythe*, — U.S. —, 139 S. Ct. 1112, 1124 (2019).

⁴ *Baze v. Rees*, 553 U.S. 35 (2008).

⁵ *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 290-291 (6th Cir. 2019).

historical benchmark, the Sixth Circuit essentially carved out from the scope of the Eighth Amendment any and all suffering at or below the extreme brutality of a bungled hanging.⁶ Not only is that approach inconsistent with this Court’s precedents, it is a clear violation of international norms.

The Sixth Circuit’s overstatement of the burden a petitioner must carry in showing an alternative under *Glossip v. Gross*⁷ is also at odds with the norms of applicable international human rights law. Here, Petitioner *did* provide an alternative execution method: death by secobarbital. But compounding its error, the Sixth Circuit categorically judged this method “not a viable alternative” and “experiment[al]”⁸ without undertaking the comparative analysis that *Bucklew* requires.⁹

By agreeing to review the present case, this Court would have the opportunity to ensure that the United States offers judicial protection in capital punishment cases that complies with the nation’s obligations under international human rights law, in particular by prohibiting torture and cruel, inhuman, or unusual punishment, and safeguarding related international due process guarantees. This Court has consistently recognized international law as a persuasive authority in considering the Eighth Amendment’s prohibition of

⁶ *Id.*

⁷ *Id.* at ¶ 4

⁸ *In re Ohio Execution Protocol Litigation*, 946 F.3d at 291 (6th Cir. 2019).

⁹ *Bucklew*, 139 S. Ct. at 1124 (2019).

“cruel and unusual punishment,”¹⁰ in particular as a reflection of the country’s “evolving standards of decency.”¹¹ The Advocates and the Colegio thus respectfully urge the Court to grant certiorari and consider international human rights standards in assessing the constitutionality of Ohio’s lethal injection protocol.

ARGUMENT

I. OHIO’S LETHAL INJECTION DRUG PROTOCOL FAILS TO MINIMIZE THE RISK OF SUFFERING TO THE PETITIONER, IN VIOLATION OF THE UNITED STATES’ OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW.

Ohio’s planned use of midazolam as the first drug in its legal injection protocol will expose Petitioner a substantial risk of severe pain during his execution. That is so because midazolam cannot induce the state of unconsciousness necessary to prevent Petitioner’s suffering. It will likely only exacerbate it. Because of this, Ohio’s lethal injection protocol violates the United States’ obligations under international human rights law of both global and regional reach.

¹⁰ *Graham v. Fla.*, 560 U.S. 48, 80 (2010).

¹¹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

A. Ohio’s execution protocol is in breach of international law norms and standards embodied in United Nations human rights treaties to which the United States is a party.

At the global level, Ohio’s execution protocol violates international legal standards applicable to the United States by virtue of its ratification of various international human rights treaties under the auspices of the United Nations (“U.N.”).

In 1984, the U.N. Economic and Social Council adopted a resolution, endorsed by the U.N. General Assembly, that established the international Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (“Safeguards”).¹² The Safeguards recognize that “[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.”¹³ Since 1984, this standard has been reaffirmed in several international human rights treaties that the United States has ratified.

In particular, upon ratifying the International Covenant on Civil and Political Rights (“ICCPR”),¹⁴

¹² U.N. Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, U.N. Res. 1984/50, U.N. ESCOR, Annex, Supp. (No. 1), U.N. Doc. E/1984/84 (May 25, 1984)[hereinafter *Safeguards*], endorsed by the U.N. General Assembly in Resolution 39/118, available at <https://undocs.org/E/RES/1984/50>.

¹³ *Id.* at Annex ¶ 9.

¹⁴ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966) (ratified by the United States on 8 June 1992) [hereinafter ICCPR].

and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”),¹⁵ the United States joined most of the world’s nations¹⁶ in recognizing that torture and cruel, inhuman, and degrading treatment or punishment, including execution methods that cause avoidable suffering, violate fundamental human rights, and are thus contrary to international law.

With respect to the ICCPR, the United States’ international obligations that limit the methods through which the State may impose the death penalty are set out in Articles 6 and 7. Article 6(1) recognizes that “[e]very human being has the inherent right to life” and that “[n]o one shall be arbitrarily deprived of his life.”¹⁷ Under Article 6(2), in countries that have not yet abolished the death penalty, its imposition is restricted “only for the most serious crimes” and only in a manner that is “not contrary to the provisions of the present Covenant.”¹⁸ Article 7 provides that “[n]o

¹⁵ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter Convention Against Torture] (ratified by the United States on Oct. 21, 1994).

¹⁶ As of Aug. 12, 2020, one hundred seventy-three states were parties to the ICCPR, and one hundred and seventy states were parties to the Torture Convention. Status of Ratification Interactive Dashboard, Office of the High Commissioner for Human Rights, United Nations, available at <http://indicators.ohchr.org/> (last visited Aug.12, 2020).

¹⁷ ICCPR, at Article 6(1) (Dec. 19, 1966).

¹⁸ *Id.* at Article 6(2). The defined term “Covenant” refers to the ICCPR.

one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁹

Authority to interpret Articles 6 and 7 is vested in the U.N. Human Rights Committee (“Human Rights Committee”). The Human Rights Committee is an independent body of the U.N. established to oversee the interpretation and implementation of the ICCPR and monitor compliance. According to the International Court of Justice, the Human Rights Committee’s interpretations must be “ascribe[d] great weight” in order “to achieve the necessary clarity and the essential consistency of international law, as well as legal security.”²⁰ The Human Rights Committee has reviewed Articles 6 and 7 and concluded that any execution method that causes unnecessary suffering constitutes cruel, inhuman, or degrading punishment, and is also an arbitrary deprivation of life, in breach of these Articles.

In its General Comment No. 20 on Article 7, the Human Rights Committee underscored that “when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.”²¹ More recently, in October of 2018, the Human Rights Committee issued General

¹⁹ ICCPR, at Article 7 (Dec. 19, 1966).

²⁰ *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30, 2010).

²¹ U.N. Human Rights Comm., General Comment No. 20 - Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), HRI/GEN/1/Rev.9 (Vol. I), ¶ 6 (Mar. 10, 1992), available at [https://undocs.org/HRI/GEN/1/Rev.9\(Vol.I\)](https://undocs.org/HRI/GEN/1/Rev.9(Vol.I)).

Comment No. 36 on Article 6, in which it confirmed that “[t]he deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature,”²² and is, as such, itself a violation of Article 6. The Human Rights Committee emphasized that certain methods of execution, including the “*injection of untested lethal drugs* [...] are *contrary to article 7*,”²³ and that “[f]or similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant.”²⁴

The Human Rights Committee has time and time again noted its deep concern over lethal injection protocols employed in the United States. In its 2014 Concluding Observations on the United States’ compliance with the ICCPR, the Human Rights Committee “note[d] with concern reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs.”²⁵ The Committee indicated that execution practices, such as those endorsed by Ohio, violate Article 7. The Committee

²² U.N. Human Rights Comm., General Comment No. 36 - Article 6 (the right to life), CCPR/C/GC/36, ¶ 17 (Oct. 30, 2018), available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

²³ *Id.* ¶ 40 (emphasis added).

²⁴ *Id.*

²⁵ U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report submitted by the United States of America under Article 40 of the Covenant, CCPR/C/USA/CO/4, ¶ 8 (Apr. 23, 2014) [hereinafter HRC Fourth Periodic Report].

recommended that the United States “[e]nsure that lethal drugs used for executions originate from legal regulated sources, and are approved by the FDA and that information on the origin and composition of such drugs is made available to individuals scheduled for execution.”²⁶

Rather than follow the Human Rights Committee’s guidance, Ohio has disregarded it. For example, Ohio enacted legislation in 2015 that affirmatively *prevents* the public from obtaining important information about the source of the drugs used in its lethal injection protocol.²⁷ This has only increased the Human Rights Committee’s concern over the use of such drugs in executions, leading the Committee to request that the United States “provide information on: . . . (c) execution methods used in carrying out the death penalty and whether those methods have been reviewed since the previous reporting period; (d) the compatibility of the lethal drugs used in executions with the Covenant, following reports that they cause severe physical and mental suffering”²⁸

²⁶ *Id.*

²⁷ Ohio Rev. Code Ann. § 2949.221 (2015) (“Confidentiality of manufacturers, suppliers, etc. of drugs for lethal injections.”). Ohio’s 2015 secrecy law imposes punitive civil sanctions on anyone who discloses protected information, and while it was only applicable for 24-months, it provided any drug company that supplied drugs during that time period protection for 20 years. Ohio Rev. Code Ann. § 2949.221(D)(2) (2015). Because Ohio purchased its current drug supply before the statute expired, the supplier(s) of those drugs will likely remain unknown, and the civil liability for disclosure applies.

²⁸ U.N. Human Rights Comm., List of issues prior to submission of the fifth periodic report of the United States of America,

Midazolam remains unapproved by the Food and Drug Administration (“FDA”) for use as a stand-alone anesthetic.²⁹ By continuing to use midazolam in its lethal injection protocol, Ohio is openly disregarding the Human Rights Committee’s recommendation that the United States should “[e]nsure that lethal drugs used for executions originate from legal regulated sources, and are approved by the FDA.”³⁰

The ICCPR requires governments that have ratified the treaty to implement human rights standards consistent with the treaty’s mandates.³¹ By exposing Petitioner to a substantial risk of severe pain and suffering during his execution, Ohio’s continued use of its current legal injection protocol constitutes a form of cruel, inhuman, or degrading punishment, and also an arbitrary deprivation of life, in breach of Articles 6 and 7 of the ICCPR.

Like the ICCPR, the Torture Convention also prohibits execution methods that inflict more than the minimum possible suffering. The Torture Convention “promote[s] universal respect for, and observance of, human rights and fundamental freedoms” by

CCPR/C/USA/QPR/5, ¶ 13 (Apr. 18, 2019), available at <https://undocs.org/CCPR/C/USA/QPR/5>.

²⁹ *Glossip v. Gross*, 135 S. Ct. 2726, 2742 (2015).

³⁰ HRC Fourth Periodic Report, ¶ 8.

³¹ ICCPR, Article 2 (2) (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”).

memorializing the principle that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³² Parties to the Torture Convention, including the United States, must also take steps “to prevent . . . acts of cruel, inhuman or degrading treatment or punishment” by public officials, even when these acts do not rise to the level of torture.³³

In its Concluding Observations on the United States’ compliance with the Torture Convention, the Committee against Torture – the body of experts responsible for monitoring States’ implementation of the Convention – has consistently highlighted the human rights law issues posed by the lethal injection protocols in use in the United States, and has urged their review, so as to ensure compliance with its obligations under the Torture Convention. In 2006, during its second periodic review of the United States’ compliance with the Torture Convention, the Committee against Torture underlined that it was already “concerned at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering (arts. 16, 1 and 2).”³⁴ The Committee thus recommended that “[t]he State party should carefully review its execution methods, in particular lethal

³² Convention Against Torture, Preamble.

³³ *Id.* at Article 16(1).

³⁴ U.N. Comm. Against Torture, Concluding observations on the second periodic report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, ¶ 31 (Jul. 25, 2006), available at <https://undocs.org/CAT/C/USA/CO/2>.

injection, in order to prevent severe pain and suffering.”³⁵

In 2014, during its latest periodic review of the United States’ compliance with the Torture Convention, the Committee against Torture once again expressed its serious “concern at reported cases of excruciating pain and prolonged suffering that procedural irregularities have caused condemned prisoners in the course of their execution.”³⁶ The Committee added that it was “specially troubled by the recent botched executions in Arizona, Oklahoma, and Ohio,”³⁷ all of which involved lethal injection protocols that used midazolam.

The Committee again urged the United States to “review its execution methods in order to prevent pain and prolonged suffering,”³⁸ underscoring that “the safeguards guaranteeing protection of the rights of those facing the death penalty stipulates that, where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering (para. 9).”³⁹ Re-confirming its ongoing concern over execution methods employed in the United States, the

³⁵ *Id.*

³⁶ U.N. Comm. Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 25 (Dec. 19, 2014) [hereinafter Combined Third to Fifth Periodic Reports], available at <https://undocs.org/CAT/C/USA/CO/3-5>.

³⁷ *Id.*

³⁸ *Id.*; *Safeguards*, ¶ 9.

³⁹ Combined Third to Fifth Periodic Reports, ¶ 25; *Safeguards*, ¶ 9.

Committee against Torture insisted in 2017 that the United States continue to “provide information on the [...] methods of execution [...] used by the State party” and whether “the State party [has already] reviewed its execution methods in order to prevent severe pain and suffering.”⁴⁰

As a party to the Torture Convention, the United States has agreed to take effective legislative, administrative, judicial, or other measures to prevent acts of torture and cruel, inhuman, or degrading punishment within its jurisdiction.⁴¹ Consistent with these obligations, Ohio should refrain from using execution protocols that inflict severe pain upon the condemned. Because Ohio’s current lethal injection protocol exposes Petitioner to a substantial risk of excruciating pain, it violates the United States’ international obligations, which the Court should have the opportunity to consider in this matter.

B. Ohio’s execution protocol is in breach of international law norms and standards embodied in human rights treaties in the Americas to which the United States is a party.

At the regional level, as a Member State of the Organization of American States (“OAS”), the United States is also the subject of international obligations arising out of the American Declaration of the Rights

⁴⁰ U.N. Comm. Against Torture, List of issues prior to submission of the sixth periodic report of the United States of America, CAT/C/USA/QPR/6, ¶ 27 (Jan. 26, 2017), available at <https://digitallibrary.un.org/record/1306808?ln=en>.

⁴¹ Convention Against Torture, Articles 2, 16(1); ICCPR, Articles 2 (2), 7 (Dec. 19, 1966).

and Duties of Man (“American Declaration”).⁴² As the Inter-American Commission (which, along with the Inter-American Court of Human Rights, monitors and promotes the observance and protection of human rights in the OAS Member States) has recently explained, “[t]he American Declaration is, for the Member States not parties to the American Convention [like the United States], the source of international obligations related to the OAS Charter” and that the Declaration “crystallizes the fundamental principles recognized by the American States.”⁴³

Among the rights and obligations set forth in the American Declaration is the right of every person to life and to not be subjected to cruel, degrading, and unusual punishment. Article I sets forth the right to life, liberty, and personal security: “Every human being has the right to life, liberty and the security of his person.”⁴⁴ In turn, Article XXVI establishes the right to be free from punishment amounting to torture in the following terms: “Every person accused of an offense has the right . . . not to receive cruel, infamous or unusual punishment.”⁴⁵

⁴² American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948 [hereinafter American Declaration], available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

⁴³ *Edgar Tamayo Arias v. United States*, Case 12,873, Inter-Am. Comm’n H.R., Report No. 44/14, OEA/Ser. L/V/II.151, doc. 9, ¶ 214, (2014).

⁴⁴ American Declaration, Article I.

⁴⁵ *Id.* at Article XXVI.

In recent years, the Inter-American Commission on Human Rights (“Inter-American Commission”) has on several occasions found the United States in breach of its aforementioned obligations, in the specific context of proceedings challenging lethal injection protocols as contrary to a person’s rights to life, humane treatment, and not to receive cruel, infamous, or unusual punishment.⁴⁶ In its 2015 decision in *Rocha Diaz v. United States*, the Inter-American Commission concluded that the lethal injection protocol employed by Texas was “exposing Mr. Rocha to unjustified anguish and fear that amount to a violation of his right to humane treatment and not to receive cruel, infamous or unusual punishment set forth in Articles XXV and XXVI of the Declaration.”⁴⁷ In arriving at this conclusion, the Commission ascribed particular weight to the fact that there was an acknowledged lack of federal oversight regarding the drugs used in lethal injections, noting that “according to a public statement issued by the Food and Drug Administration on January 4, 2011, ‘in keeping with established practice, FDA does not review or approve products for the

⁴⁶ See, e.g., *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81 (2018); *Felix Rocha Diaz v. United States* Case No. 12.833, Inter-Am. Comm’n H.R., Report No. 11/15, OEA/Ser. L/V/II.154, doc. 5 (2015); *Edgar Tamayo Arias v. United States* Case 12.873, Inter-Am. Comm’n H.R., Report No. 44/14, OEA/Ser. L/V/II.151 doc. 9 (2014).

⁴⁷ *Felix Rocha Diaz v. United States* Case No. 12.833, Inter-Am. Comm’n H.R., Report No. 11/15, OEA/Ser. L/V/II.154, doc. 5, ¶ 87 (2015).

purpose of lethal injection.”⁴⁸ This practice of the FDA has not changed in recent years.⁴⁹

The Inter-American Commission then emphasized that “[s]tates have a reinforced special duty to ensure that the method of execution does not constitute cruel, infamous or unusual punishment,” adding that “*the drugs and doses to be used in case of executions by lethal injection, as well as the composition of the execution team and the training of its members should be subjected to the highest quality control standards. In particular, the drugs used should be subject to government approval and regulation, the execution team should have appropriate medical training and lethal injection protocols should be available to the public to guarantee public scrutiny.*”⁵⁰ The Commission then stressed that, by virtue of the continuous due process obligations that OAS Members owe to defendants, “the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, *so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.*”⁵¹

⁴⁸ *Id.* at ¶ 83.

⁴⁹ See *Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions*, at pp. 9-11 (May 3, 2019), available at <https://www.justice.gov/olc/opinion/file/1162686/download>.

⁵⁰ *Felix Rocha Diaz v. United States* Case No. 12.833, Inter-Am. Comm’n H.R., Report No. 11/15, OEA/Ser. L/V/II.154, doc. 5, ¶ 84 (2015) (emphasis added).

⁵¹ *Id.* ¶ 85 (emphasis added).

The same due process considerations were also addressed in the recent 2018 decision of the Inter-American Commission in *Bucklew v. United States*.⁵² In that case, the Inter-American Commission examined Missouri’s lethal injection protocol, which is identical to the one that Ohio employs, and analyzed “whether the United States provided an effective judicial remedy to Mr. Bucklew.”⁵³ The Commission concluded that the United States violated its obligations under Articles XVIII and XXVI of the American Declaration, as it had not provided Mr. Bucklew “with effective access to judicial protection with regard to his right to be free from torture and cruel and inhuman punishment in the context of the application of lethal injection.”⁵⁴

In arriving at this conclusion, the Inter-American Commission first reiterated its findings in *Rocha Diaz v. United States*, that “[i]n capital cases the State has an enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die,” since “[a]ny person subjected to the death penalty must have the opportunity to challenge every aspect of the execution procedure and such information is necessary to file a challenge.”⁵⁵

⁵² *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81 (2018).

⁵³ *Id.* ¶ 74.

⁵⁴ *Id.* at ¶ 83.

⁵⁵ *Id.* at ¶¶ 71-72.

The Inter-American Commission then examined the legal requirements laid down in *Glossip v. Gross*, in order to assess whether the remedy available to Mr. Bucklew for challenging the method of his execution was indeed effective.⁵⁶ The Commission noted “that the burden of argumentation and proof with respect of each of [the prongs of the *Glossip* test] resides primarily with the prisoner, and that the standard to be met to establish the three concurring elements jointly considered is very high.”⁵⁷

The Commission underlined that “the effectiveness of a remedy that imposes such [high] burdens in order to succeed must be analyzed . . . under the undisputed premise that the prohibition of torture is a peremptory norm of international law” and that, as such, “[t]he United States has an obligation to ensure that no such treatment is imposed on persons under its jurisdiction.”⁵⁸

Analyzing the remedies available to Mr. Bucklew under this premise, the Inter-American Commission held that the summary dismissal of Mr. Bucklew’s claims by the lower courts due to his failure to identify a readily available and less painful alternative for his execution demonstrated “a failure [of the United States] to act with due diligence to fully examine [those claims] in light of the prohibition of torture and

⁵⁶ *Id.* at ¶ 75.

⁵⁷ *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81, ¶ 76 (2018).

⁵⁸ *Id.* at ¶ 80.

cruel and inhuman punishment.”⁵⁹ Pertinently, the Commission underlined that “the standards applied [under *Glossip v. Gross*] effectively condition the granting of relief from a situation of cruel and inhuman treatment on *a showing by the person concerned of a feasible alternative that will cause less suffering*.”⁶⁰ However, as the Commission explained, “[b]oth the conditionality and *the placing of the burden of proof on the affected person* [under the *Glossip* test] *are inconsistent with the guarantees required from an OAS Member State*.”⁶¹

This last observation of the Inter-American Commission’s echoes the findings of the U.N. Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment (“Special Rapporteur”) in his 2012 Interim Report to the U.N. General Assembly.⁶² In his Report, the Special Rapporteur called upon States that retain the death penalty “to ensure that the method of execution employed causes the least possible physical and mental suffering and that it does not violate the prohibition of torture and cruel, inhuman or degrading treatment; *establish that there are no more humane alternatives available; and justify the use of a*

⁵⁹ *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81, ¶ 82 (2018).

⁶⁰ *Id.*

⁶¹ *Id.* (emphasis added).

⁶² Juan E. Mendez, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/67/279, ¶ 80(b) (Aug. 9, 2012).

particular method of execution.”⁶³ Like the Inter-American Commission in *Bucklew v. United States*, the Special Rapporteur also reiterated that, in establishing compliance with the above requirements, “the burden of proof is on the State.”⁶⁴ In the aftermath of the Inter-American Commission’s aforementioned decision, this Court has tried to align itself with applicable international human rights norms concerning the burden of proof in capital punishment cases. Notably, in *Bucklew v. Precythe*, this Court already emphasized that the burden of a petitioner to identify a readily available alternative method of execution should not “be overstated,” especially where “an inmate [is] facing a serious risk of pain.”⁶⁵

Nonetheless, the Sixth Circuit’s ruling in the present case has effectively turned these efforts on their head. The Sixth Circuit categorically judged Petitioner’s proposed alternative execution method as “not viable” and “experiment[al],”⁶⁶ without undertaking the comparative analysis that *Bucklew* requires.⁶⁷ By allowing Ohio to reject as “unavailable” a drug that it has never tried to obtain, the Sixth Circuit in fact “overstated” Petitioner’s “burden of showing a readily available alternative” method of execution.⁶⁸ This is

⁶³ *Id.* at ¶ 80(b) (emphasis added).

⁶⁴ *Id.*

⁶⁵ *Bucklew*, 139 S. Ct. at 1128–29.

⁶⁶ *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 291 (6th Cir. 2019).

⁶⁷ *Bucklew*, 139 S. Ct. at 1124.

⁶⁸ *Id.* at 1128.

at odds with applicable international human rights norms, which at a minimum demand compliance with this Court’s findings in *Bucklew v. Precythe*, prohibiting the “overstatement” of a petitioner’s burden to propose an alternative execution method.⁶⁹

Moreover, in the instant case, Petitioner’s burden is even heavier to discharge because of Ohio’s recently enacted secrecy law.⁷⁰ This law is plainly at odds with the United States’ “enhanced obligation to ensure that the person sentenced to death has access to all the relevant information regarding the manner in which he or she is going to die,” so that Petitioner “is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.”⁷¹

On the basis of the foregoing, it is evident that the Sixth Circuit’s overstatement of the burden of proof on Petitioner under its erroneous application of *Glossip v. Gross* is inconsistent with the due process guarantees related to the prohibition against cruel, infamous, or unusual punishment enshrined in Article XXVI of the American Declaration, which the United States, as an OAS Member State, is required to follow.⁷²

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⁶⁹ *Id.* at 1128–29.

⁷⁰ Ohio Rev. Code Ann. § 2949.221 (2015) (“Confidentiality of manufacturers, suppliers, etc. of drugs for lethal injections.”).

⁷¹ *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81, ¶¶ 71-72 (2018).

⁷² *Russell Bucklew v. United States*, Case No. 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser. L/V/II.168, doc. 81, ¶ 82 (2018).

Ohio's execution protocol requires administration of (1) midazolam hydrochloride, (2) a paralytic, and (3) potassium chloride. Midazolam is intended to function as a type of sedative, numbing the patient, before the paralytic is administered. The paralytic is followed by an injection of potassium chloride, which will stop Henness's heart. By its nature, potassium chloride causes an intense burning pain inside Henness's veins, but he will not be able to react to it because of the paralytic. Midazolam, however, is not recommended or approved for use as a sole anesthetic during painful surgery for the simple reason that it is ineffective in actually preventing the sensation of pain.⁷³ Although he will be paralyzed and thus unable to cry out, Henness will remain conscious when the potassium chloride is administered, and almost certainly able to experience the excruciating pain of its administration.

The district court found that a 500 mg dose of midazolam would likely cause pulmonary edema, or chest tightness, chest pain, and sensations of drowning, suffocating, and dying, which would also by itself qualify as a form of pain prohibited by the Eighth Amendment.⁷⁴ The district court also found that Henness satisfied the first prong of *Glossip* by demonstrating that Ohio's execution protocol will cause serious pain that he is certain, or at least very likely, to experience.⁷⁵ The district court concluded that Midazolam has no analgesic properties, and that

⁷³ *Glossip*, 135 S. Ct. at 2742.

⁷⁴ *Id.*

⁷⁵ *Campbell v. Kasich*, 881 F.3d 447, 450 (6th Cir. 2018) (quoting *Fears v. Morgan*, 860 F.3d 881, 886 (6th Cir.) (en banc), cert. denied, — U.S. —, 137 S. Ct. 2238, 198 L.Ed.2d 761 (2017)).

the combination of potassium chloride and the paralytic agent could cause a fully conscious person to endure needless suffering.⁷⁶ These facts confirm that Ohio's continued use of midazolam in its lethal injection protocol exposes Henness to a substantial risk of severe pain in violation of numerous obligations imposed on the United States under the ICCPR, the Torture Convention and the American Declaration. These violations warrant this Court's consideration, and thus support a grant of certiorari review.

II. INTERNATIONAL LAW PROVIDES PERSUASIVE AUTHORITY FOR INTERPRETING THE CONSTITUTIONAL ISSUES BEFORE THIS COURT.

Finally, the extent to which Ohio's procedures violate international law informs the proper construction of the Eighth Amendment as it applies to this matter. As this Court has recognized, international law provides relevant, persuasive authority useful to the interpretation of the U.S. Constitution, and that it will look to international law in particular in considering the Eighth Amendment's prohibition against cruel and unusual punishment.⁷⁷ In evaluating whether a punishment is "cruel and unusual," this Court has looked to "evolving standards of decency that mark a maturing of society."⁷⁸ And

⁷⁶ *In re Ohio Execution Protocol Litigation*, 937 F.3d 759, 762 (2019).

⁷⁷ U.S. Const. amend VIII.

⁷⁸ *Trop*, 356 U.S. at 101.

notably relevant to this inquiry is the perspective that international law brings to such matters.

In *Roper v. Simmons*, this Court held that execution of individuals for crimes committed as juveniles is a disproportionate punishment that violates the Eighth Amendment. In reaching its decision, the Court looked “to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of cruel and unusual punishments.”⁷⁹ More recently, in *Graham v. Florida*, the Court affirmed the relevance of international law to the proper interpretation of the Eighth Amendment. In its analysis of the constitutionality of Florida’s juvenile life without parole policies, the Court examined the practices of other countries in sentencing juveniles, continuing the Court’s “longstanding practice in noting the global consensus against the sentencing practice in question.”⁸⁰ The Court observed that, even in the absence of on-point international law binding on the United States, international law, agreements, and practices are “relevant to the Eighth Amendment . . . because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”⁸¹

⁷⁹ *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop*, 356 U.S. at 102-103).

⁸⁰ *Graham v. Fla.*, 560 U.S. at 80.

⁸¹ *Id.* at 82.

This Court has otherwise consulted and cited international authorities and the practices and decisions of other nations in assessing whether domestic practices comport with evolving standards of decency in the treatment of persons condemned to death.⁸² Ohio’s lethal injection protocol plainly violates the United States’ international obligations. This is relevant in establishing not only (1) the importance of the question presented and (2) how the decision below conflicts with those obligations, but also (3) how the decision below conflicts with this Court’s use of international norms in its interpretation of the Eighth Amendment. The Sixth Circuit concluded that Petitioner must be out of court because the severe pain he is likely to suffer is no worse than the horrific suffering experienced during a botched hanging. The Sixth Circuit turned the relevant analysis on its head, looking backwards rather than contemporaneously

⁸² See, e.g., *Atkins v. Va.*, 536 U.S. 304, 316 n. 21 (2002), (examining the opinions of “the world community” to support its conclusion that execution of persons with severe intellectual disabilities would offend the standards of decency required by the Eighth Amendment); *Thompson v. Okla.*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (looking to the opinions and practices of “other nations that share our Anglo-American heritage” and “leading members of the Western European community” as aids to the proper interpretation of the Eighth Amendment). This Court has also found international law relevant to the interpretation of other constitutional provisions. See *Lawrence v. Tex.*, 539 U.S. 558, 560 (2003) (referencing a decision of the European Court of Human Rights to determine that a Texas sodomy law violated plaintiff’s privacy rights under the due process clause of the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring, joined by Breyer, J.) (noting that the Court’s opinion with regard to affirmative action “accords with the international understanding of the office of affirmative action” reflected in four international treaties).

and comparatively. This Court's review is thus warranted.

CONCLUSION

For the reasons articulated above, as well as those set forth in the Petition, this Court should grant certiorari review of the Sixth Circuit's decision in this matter.

Respectfully submitted,

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