No. 20-5243

IN THE
Supreme Court of the United States

WARREN KEITH HENNESS,
Petitioner,

v.

MIKE DEWINE, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

EXECUTION SCHEDULED FOR JANUARY 12, 2022

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO
DAVID C. STEBBINS
ALLEN L. BOHNERT
ADAM M. RUSNAK
PAUL R. BOTTEI
LISA M. LAGOS
THEODORE C. TANSKI
10 W. Broad Street
Suite 1020
Columbus, OH 43215
(614) 469-2999

JEAN-CLAUDE ANDRÉ *
COLLIN P. WEDEL
ANDREW B. TALAI
SIDLEY AUSTIN LLP
555 W. Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000
jcandre@sidley.com

J. MANUEL VALLE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 19, 2020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. THE SIXTH CIRCUIT'S REPUDIATION OF THIS COURT'S METHOD-OF-EXECUTION PRECEDENTS MERITS REVIEW	3
A. Respondents Confirm The Sixth Circuit's Departure From *Bucklew*'s "Comparative" Framework	3
B. Respondents Embrace The Sixth Circuit's Rule Allowing State Law To Control The Eighth Amendment	6
C. Respondents Confirm That The Sixth Circuit "Overstated" Henness's Burden Of Showing An "Available" Alternative Method	7
II. RESPONDENTS CONFIRM THAT THIS CASE RAISES SIGNIFICANT QUESTIONS WARRANTING REVIEW	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Broom v. *Shoop*, 963 F.3d 500 (6th Cir. 2020) 9
Bucklew v. *Precythe*, 139 S. Ct. 1112 (2019) ..... *passim*
Cooey v. *Strickland*, 604 F.3d 939 (6th Cir. 2010) 7
Glossip v. *Gross*, 135 S. Ct. 2726 (2015)..... 8

SCHOLARLY AUTHORITIES

John. F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39 (2019).... 12
John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017)..... 11

INTRODUCTION

By asking this Court to repudiate *Baze*, *Glossip*, and *Bucklew*, see Opp. 35, respondents acknowledge that this case presents questions of great significance. Their request is also unsurprising. When faithfully applied, those decisions require the Sixth Circuit's reversal. Respondents' other concessions—couched in misstatements and misdirection—further confirm the Sixth Circuit's departure from this Court's method-of-execution precedents.

First, respondents embrace the Sixth Circuit's untenable holding that death by slow suffocation is, as a matter of law, "*not* constitutionally excessive." Opp. 13. Respondents fail to reconcile that holding with *Bucklew* v. *Precythe*'s "*necessarily* comparative" framework. 139 S. Ct. 1112, 1126 (2019). Instead, they raise irrelevant factual disputes and erroneously suggest the Sixth Circuit's decision did not really "depend upon" this departure from precedent. Opp. 29. Not so. The sole basis for the Sixth Circuit's holding as to the pain of slow suffocation was that, notwithstanding any alternative methods, the Eighth Amendment categorically permits such suffering. Pet. App. 4a.

Second, respondents accept that the Sixth Circuit's decision allows States to reject as "experiment[al]" any method that is not used by other States specifically for executions, no matter what other evidence a prisoner introduces about the method's reliability or effectiveness. Opp. 29–30. And by applying this rule to reject a method widely used in the medical-aid-in-dying context—the most analogous context imaginable—the Sixth Circuit's rule ensures that the States dictate the Eighth Amendment analysis. That distortion of *Bucklew*, which respondents openly defend, see *id.* at 30,

nullifies a point of law on which every Justice of this Court agreed.

Third, respondents admit they made no attempt to obtain secobarbital from the suppliers Henness identified. Opp. 30–31. Their rejoinder that an *inmate* bears the burden of identifying an available alternative misses the crux of Henness's legal challenge—that the Sixth Circuit has, contrary to *Bucklew*, "overstated" that burden, requiring an inmate to somehow facilitate the purchase and delivery of controlled substances.

Unable to answer Henness's legal arguments, respondents distort the record, cherry picking facts contrary to the district court's findings. *E.g.*, Opp. 19–20. Respondents also act as if this case were in a last-minute-stay posture, complaining that Henness "unreasonably" delayed these proceedings by, among other "unreasonabl[e]" tactics, filing a petition for certiorari within the time provided by the Court. *Id.* at 34. The truth, of course, is that *respondents* have had to delay Henness's execution until 2022 because the drugs for their current, unconstitutional protocol are unavailable. Henness has caused no undue delay; nor will this Court delay his execution by granting review. If anything, the unrushed schedule below makes clear that the Sixth Circuit's opinion was not the product of hasty, eve-of-execution drafting but was instead a considered departure from this Court's binding precedent. The petition should be granted.

ARGUMENT

I. THE SIXTH CIRCUIT'S REPUDIATION OF THIS COURT'S METHOD-OF-EXECUTION PRECEDENTS MERITS REVIEW.

A. Respondents Confirm The Sixth Circuit's Departure From *Bucklew*'s "Comparative" Framework.

The Sixth Circuit's categorical rule that the sensations of drowning and suffocation caused by pulmonary edema are not "constitutionally cognizable" directly conflicts with the "*necessarily* comparative" approach *Bucklew* requires. See Pet. 12–16. Respondents assert that rule "is correct," parroting the Sixth Circuit's obvious misreading of *Bucklew*. Opp. 29 ("[T]he pain caused by pulmonary edema *does* 'look a lot like' the pain that often results from hanging according to . . . *Bucklew*."). But respondents cannot defend that misreading, and instead resort to misdirection and misstatement.

To begin, respondents claim the decision below "did not depend" on the point about "constitutionally cognizable" degrees of pain. Opp. 29. But in arguing this, respondents conflate the Sixth Circuit's rationale for rejecting Henness's suffocation-based claim (caused by the first drug, midazolam) with its rationale for rejecting his claim based on pain caused by the second and third protocol drugs. The Sixth Circuit's sole basis for denying Henness's suffocation-based claim was that such suffering was not "constitutionally cognizable." See Pet. App. 4a. The court's reasoning regarding the second type of pain was slightly different—*i.e.* the court held that, given midazolam's sedative effects, Henness had not proven he would experience "the pain caused by the combination of the paralytic agent and

potassium chloride" at a level that was "constitutionally problematic." *Id.*

But the Sixth Circuit never suggested that midazolam could have blocked Henness's experience of the suffocation caused by pulmonary edema; nor could it have—midazolam was itself the cause of that sudden and severe condition. Pet. App. 4a. Respondents' contrary argument depends on elision and misreading. Compare Opp. 14 (describing the Sixth Circuit's holding regarding "'the pain caused by' the execution" (quoting Pet. App. 10a)), with Pet. App. 4a, 10a (referring, in fact, to "the pain caused by *the combination of the paralytic agent and potassium chloride*" (emphasis added)). An honest reading of the Sixth Circuit's opinion proves that the court (1) accepted that pulmonary edema would cause Henness to experience the pain and terror of drowning and suffocation, and (2) held squarely that such drowning and suffocation was not "constitutionally cognizable" suffering. Pet. App. 4a.

Of course, even the Sixth Circuit's separate holding regarding the pain caused by the paralytic and potassium chloride was not "independent[]," Opp. 29, of its prior holding regarding constitutionally permissible levels of pain. Rather, the Sixth Circuit held that the pain Henness would suffer was not "at a constitutionally problematic level" or at a level that was "unconstitutionally severe" or "constitutionally excessive" or "unconstitutionally high." Pet. App. 4a. The Sixth Circuit thus premised its holding regarding the second and third drugs on the same erroneous notion that some significant pain—like the pain of drowning or suffocation—is *per se* constitutionally permissible and exempt from *Bucklew*'s comparative framework. But see *Bucklew*, 139 S. Ct. at 1126 (rejecting attempts to "[d]istinguish[] between constitutionally permissible

and impermissible degrees of pain" without examining viable alternative execution methods).

Indeed, although they devote much of their opposition to asserting that Henness failed to meet his evidentiary burden, see Opp. 13–14, 23–29, respondents ultimately admit that he presented testimony from leading anesthesiologists that an inmate would "feel the 'full brunt' or 'full force' of the pain" caused by the midazolam protocol "much as a fully conscious person would." *Id.* at 10 (quoting R. 1952, PageID80846, 80869; R. 1956, PageID84213). True, respondents' expert—Dr. Antognini—believed otherwise, and the opposition painstakingly explicates his idiosyncratic theories. *Id.* at 10–12, 27–28. But the district court rightly rejected those theories because they were "outlier[s] in the field of anesthesiology." Pet. App. 142a. And the Sixth Circuit did not suggest otherwise. *Id.* at 4a. Thus, given the pain the district court found Henness certain or very likely to experience, the Sixth Circuit's decision makes sense only if its assumed threshold for what qualifies as "unconstitutionally severe pain," *id.*, was exceedingly high.

Lastly, respondents question whether Henness's experts presented sufficient evidence of what he would "experience *subjectively*." Opp. 23. What respondents mean by "subjective"—which they mention over twenty times—is not entirely clear. The Sixth Circuit, apparently the source for respondents' phraseology, did not explain it either. Pet. App. 4a. In fact, while the Sixth Circuit cited *Bucklew* for this "subjective" standard, *id.*, such a standard appears nowhere in *Bucklew* (or *Baze* or *Glossip*). Are respondents suggesting that Henness needed to present *personal* accounts of what it feels like to suffer extreme pain while sedated with 500 mg of midazolam? That seems unlikely. Nor, of course, could such subjective testimony exist for many

reasons, not least of which is the drug's powerful "amnestic effect." *Id.* at 89a. Regardless, there is no basis in this Court's precedents to hold that it is somehow insufficient to prove a method-of-execution claim by having anesthesiology experts testify about the experience of pain based on available evidence. If that *was* what the Sixth Circuit held, then that is all the more reason for this Court to grant review.

B. Respondents Embrace The Sixth Circuit's Rule Allowing State Law To Control The Eighth Amendment.

The Sixth Circuit announced a defective categorical rule permitting a State to reject as "experiment[al]" any execution method unused in other States' executions. The rule violates *Bucklew*'s unanimous holding that state law cannot control the Eighth Amendment's scope; it ignores this Court's fact-driven analysis of "experiment[al]" punishments; and, deepening a circuit conflict, it freezes available execution methods by allowing States to ignore evidence from outside the execution context. Pet. 17–23. Respondents fail to rebut any of these defects.

Respondents accuse Henness of ignoring the "context" in which *Bucklew* held state law cannot control the Eighth Amendment. Opp. 30. In respondents' view, *Bucklew* held only that "a State's *own* failure to adopt a particular method"—*i.e.*, a single State's laws—cannot control the Eighth Amendment. *Id.* But that is precisely what the Sixth Circuit's rule means: unless one State *volunteers* to try a new method of execution, the Eighth Amendment can *never* require another State to adopt that method. In any event, it is untenable to say that the law of *one* State cannot control the Eighth Amendment but the collective (in)action of several other States can. State law, and not the Eighth Amendment, would remain the "supreme law

of the land." Yet such a rule, exemplified by the myopic state-law focus of the otherwise-conflicting Eighth and Eleventh circuits, see Pet. 22–23, was unanimously rejected in *Bucklew*.

Similarly, respondents claim that "[t]wo centuries of history lay to rest [the] fear" that States may not always adopt increasingly humane execution methods. Opp. 30. Ohio's historical willingness to engage in "the functional equivalent of human experimentation" with its novel injection cocktails, see *Cooey* v. *Strickland*, 604 F.3d 939, 948 (6th Cir. 2010) (Martin, J., dissenting), not only undermines its feigned aversion to trying a different method here, but also gives ample reason to "fear" state malfeasance. Regardless, the point is not what States have *done*, but what, per *Bucklew*, they cannot do—they *cannot* control the Eighth Amendment analysis by choosing which punishments to authorize. 139 S. Ct. at 1128.

Here, moreover, the Sixth Circuit's departure from *Bucklew*'s rule—its misinterpretation of the word "experiment"—is extraordinarily significant because it categorically discounts evidence from the medical-aid-in-dying context, which is closer to a lethal-injection execution than anything else outside of capital punishment. If medical aid in dying is "experiment[al]," then so is every method not currently used by a State for executions. It is hard to conceive of a better vehicle for clarifying *Bucklew*'s exemption for "experiment[s]."

C. Respondents Confirm That The Sixth Circuit "Overstated" Henness's Burden Of Showing An "Available" Alternative Method.

Accusing Henness of "forget[ting]" he bears the burden of identifying an available alternative drug, Opp. 30, respondents ignore the crux of his challenge. The

question is not whether Henness bears the burden, but whether the Sixth Circuit has, contrary to *Bucklew*, "overstated" that burden. By admitting Henness had expert testimony that secobarbital was available for sale from identified Oregon suppliers *and* that prison officials did nothing to acquire the drug from those suppliers, *id.* at 31, respondents prove the Sixth Circuit did, indeed, distort a condemned inmate's burden under *Bucklew*.

Nevertheless, respondents contend they "*did* make a good-faith attempt to get the drugs" because "a state official checked with the State's usual suppliers." Opp. 31. But that same official conceded that "[w]hether it's available for purchase is another area, and I have not made a direct attempt to purchase it." R. 2117, PageID 104553. That official's *only* "attempt" was to make a call one level up the chain of command in Ohio's execution-drug procurement program to check on secobarbital's availability from the State's *usual suppliers*, from whom Ohio cannot even obtain drugs for its current protocol. See R. 2117, PageID 104558–59. He made no other inquiries, he contacted no suppliers, and, most significantly, when Henness's expert identified multiple potential sellers, the state official "didn't contact, certainly, those sources." R. 2117, PageID 104554.

Respondents thus contend that, under *Glossip*, no effort on their part is necessary. Opp. 31. But *Glossip* upheld a finding that drugs were unavailable *because* the State made "good-faith effort[s]" to obtain those drugs and had failed. See *Glossip* v. *Gross*, 135 S. Ct. 2726, 2738 (2015). Respondents not only fight the obvious inference from *Glossip*, but also ignore *Bucklew*, which emphasized that a State may reject an alternative drug "that it's unable to procure *through good-faith efforts*." *Bucklew*, 139 S. Ct. at 1125 (emphasis added) (citing *Glossip*, 135 S. Ct. at 2737–38).

Nor is there any merit to respondents' repeated emphasis that Henness identified only "potential[]" suppliers. Opp. 6, 21, 31. Only the State could make a *potential* supplier into an *actual* supplier by taking the necessary steps—including, perhaps, granting the requisite state license—to acquire those drugs from the Oregon pharmacies. Respondents' suggestion that state licensure creates a substantial obstacle is not credible. Henness's suppliers could doubtless meet such bare-bones standards, see *id.* at 22 (describing the "[a]dequate safeguards" requirement), and respondents could easily have confirmed as much by simply contacting them.

Respondents also exaggerate the potential complications attending the secobarbital method. Opp. 19–20. Some are pure fantasy. Compare *id.* at 19 (speculating secobarbital executions might leave inmates "walk[ing] around the execution chamber" for hours), with Pet. App. 152a (explaining that secobarbital renders individuals comatose in about five minutes). Henness's expert testimony—and the district court's findings based on that testimony—dispel respondents' other concerns. The district court expressly held, for example, that any discomfort "from the insertion of a nasogastric or orogastric tube could be effectively mitigated by the application of a topical anesthetic." Pet. App. 156a. And respondents' assertion that inserting a tube is somehow more dangerous or susceptible to sabotage than trying to insert an intravenous line is both disingenuous—particularly given Ohio's infamous failures with the latter[1]—and belied by the record. Pet. App. 152a (expert testimony that "the risk resulting

[1] *See Broom* v. *Shoop*, 963 F.3d 500, 503 (6th Cir. 2020) (recounting how it took Ohio "*two hours* of stabbing and prodding for the state to realize that it could not maintain a viable IV connection to Broom's veins").

from an inmate's non-cooperation is *much less* with a tube than with attempting to insert a needle for intravenous administration of drugs, in which a small movement by a recalcitrant inmate could cause the intravenous infusion to be ineffective and even dangerous" (emphasis added)).

II. RESPONDENTS CONFIRM THAT THIS CASE RAISES SIGNIFICANT QUESTIONS WARRANTING REVIEW.

Failing to justify the Sixth Circuit's decision, respondents provide a litany of reasons to ignore its repudiation of this Court's method-of-execution precedents. Those reasons underscore that the petition presents extraordinarily important questions and an ideal vehicle for resolving them.

First, respondents argue that Henness's challenge to three independent errors counsels in favor of denying the petition. Opp. 32. That the Sixth Circuit got this Court's precedents dramatically wrong, however, and not just a *little* wrong, cuts in favor of review, not against it. Though respondents speculate there is a "high likelihood that at least *one* of the Sixth Circuit's three alternative holdings is correct," *id.*, their defense of those holdings does not support such optimism. And because this case touches nearly every aspect of the method-of-execution framework, it is an ideal vehicle for this Court to clarify that framework holistically.

Second, respondents downplay the existing circuit conflict, Opp. 32–33, but, in doing so, actually highlight how courts have allowed the Eighth Amendment analysis to turn entirely on state law. See *id.* at 33 (explaining that "the key distinction" between the conflicting circuit decisions was whether or not the State had "lawfully authorized" a given execution method).

That is one of the very errors on which Henness seeks review. Pet. 17–23.

Third, respondents bizarrely attack Henness for "unreasonably delay[ing]" this case by opposing the State's request for expedited briefing and by seeking en banc and certiorari review of the Sixth Circuit's decision. Opp. 34. But Henness has delayed nothing, and this case is nothing like the eleventh-hour actions respondents cite. Cf. *Bucklew*, 139 S. Ct. at 1134. Here, the Governor of Ohio—not Henness—set Henness's execution for 2022. This Court's review cannot delay the execution. Moreover, Henness's reasonable objection to expedited proceedings—and the thorough record created below—leave no doubt that the Sixth Circuit's decision was not the product of rushed opinion writing, but was instead a considered deviation from this Court's precedents.

Lastly, respondents' suggestion that this Court grant certiorari to overrule *Baze*, *Glossip*, and *Bucklew*, see Opp. 35, is unsurprising given respondents' attempts to misread those precedents out of existence. Still, it *is* surprising that respondents appear so glibly confident that the original public meaning of the Eighth Amendment—or, alternatively, the public meaning of that right as incorporated against the States through the Fourteenth Amendment—would sanction a novel execution method that causes a paralyzed inmate to suffer the sensation first of drowning, then of being burned alive. Arguably the leading scholar on the Eighth Amendment's original meaning has rejected respondents' interpretation. See John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 493 (2017) (explaining that historical evidence proves the Eighth Amendment used the word "cruel" to mean "unjustly harsh" and *not* "motivated by

cruel intent"); see also John. F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 53 (2019) (noting that, under the Eighth Amendment's original meaning, some lethal injection methods "may be cruel and unusual" given their "far greater risk of excruciatingly painful botched executions"). In any event, respondents' request to revisit the meaning of the Eighth Amendment effectively concedes that this case presents extraordinarily significant questions meriting review. Pet. 12–28.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DEBORAH WILLIAMS
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO
DAVID C. STEBBINS
ALLEN L. BOHNERT
ADAM M. RUSNAK
PAUL R. BOTTEI
LISA M. LAGOS
THEODORE C. TANSKI
10 W. Broad Street
Suite 1020
Columbus, OH 43215
(614) 469-2999

JEAN-CLAUDE ANDRÉ *
COLLIN P. WEDEL
ANDREW B. TALAI
SIDLEY AUSTIN LLP
555 W. Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000
jcandre@sidley.com

J. MANUEL VALLE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 19, 2020