No. _____
CAPITAL CASE

IN THE
Supreme Court of the United States

ABOUTANAA EL HABTI, *et al.*,
Applicants,

v.

JOHN GRANT, *et al.*
Respondents.

**To the Honorable Neil M. Gorsuch,
Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit**

APPLICATION FOR AN IMMEDIATE STAY OR VACATUR OF THE STAY ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Execution Scheduled for October 28th 2021 at 4:00 P.M. Central

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INTRODUCTION

In 2014, Respondent John Grant sought a preliminary injunction to prevent Oklahoma from executing him by using a three-drug lethal injection protocol with a 500mg dose of midazolam as the first drug. *See* Doc. 92.[1] The district court denied the requested preliminary injunction, Doc. 173, and both the Tenth Circuit and this Court affirmed, in thorough written opinions, *Glossip v. Gross*, 576 U.S. 863, 867 (2015); *Warner v. Gross*, 776 F.3d 721, 724 (10th Cir. 2015). Since then, the district court granted summary judgment against Respondents. On the eve of his execution, John Grant, along with Respondents Julius Jones, Donald Grant, Wade Lay, and Gilbert Postelle, again sought to prevent the State from carrying out his lawful sentence. The Tenth Circuit, over a dissent from Chief Judge Tymkovich, granted stays of execution.

The Tenth Circuit's grant of stays of execution is in grievous error. Its decision rested on the conclusion that because the plaintiffs in this case were able to show a genuine dispute of material fact sufficient to survive summary judgment and head to trial on one element of their Eighth Amendment claim, they necessarily have shown they are likely to succeed on an injunction—ignoring the very different standards applicable to those postures and the evidence actually presented at the preliminary injunction hearing. The Tenth Circuit also based its decision on the conclusion that Respondents were likely to succeed on their pleading tactic of proffering an alternative method of execution, but reserving the right to object to that method in

[1] In this response, "Doc." refers to the docket number at the district court.

the future, to make out the second element of their Eighth Amendment claim. This is flatly inconsistent with this Court's decision earlier in this case, as well as *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) and *Baze v. Rees*, 553 U.S. 35 (2008). Finally, the court below wrongly brushed aside the State's legitimate interests in moving forward with the execution of lawful judgments without yet more delay. For the reasons explained below, the Court should vacate both stays of execution and allow the State to proceed with the execution of John Grant, which is scheduled to take place tomorrow at 4 P.M. CDT.

STATEMENT OF THE CASE

I. Background of this Case

In October 2015, after this Court affirmed denial of a preliminary injunction, the parties stipulated to stay the case while investigations into the State's execution procedures took place. Doc. 259. The parties also stipulated that the Oklahoma Attorney General would not seek execution dates until 150 days after certain information was provided to the plaintiffs. *See id.* The State completed its investigations on May 19, 2016 with the release of a grand jury report, but after that point, the State was unable to acquire the appropriate drugs necessary to perform lethal injections under Oklahoma law. After years of efforts, the State was able to secure a source for the necessary execution drugs. As a result, on February 13, 2020, the Department of Corrections finalized its new and improved protocol based in part on the grand jury's recommendations, and the Office of the Attorney General provided the plaintiffs with the information specified in the October 2015 stipulation.

After, the plaintiffs reopened the case and the district court held an off-the-record status conference in March 2020. Doc. 305. At that conference, the court expressed concern about being rushed to adjudicate plaintiffs' claims if executions restarted as quickly as the State was entitled to begin them. Then-Attorney General Mike Hunter offered remarks that he would not rush the Court's adjudication of the Plaintiffs' claims. No formal agreement was entered, nor any specific terms discussed, and Attorney General Hunter never requested any execution dates for the subsequent 14 months of his tenure.[2]

The plaintiffs filed their Third Amended Complaint on July 6, 2020. Doc. 325. Defendants moved to dismiss three of the claims, including Count VIII, which argued Respondents had a religious liberty right to eschew the constitutional standards for advancing an Eighth Amendment claim that require pleading and proving a viable alternative execution method. Doc. 333. The court granted the motion. Doc. 349. Discovery began in August 2020, during which the plaintiffs refused to identify the alternative methods of execution being pled by each plaintiff. *See* Doc. 401 at 4.

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[2] As later recounted on-the-record by the district court, the court "was not terribly receptive to, while the matter was pending in the district court, to have the state rush to get execution dates," to which Attorney General Hunter "acquiesced," but that this postponement of setting execution dates was not "in any sense until the case was completed in terms of -- especially in terms of appeal," and that did not apply to "plaintiffs as to whom the case is now effectively complete." Doc. 509, 10/20/21 Tr. 6-7. To this, counsel for plaintiffs responded: "I agree with everything you said, your Honor." *Id.* at 7; *see also* App. 153a-154a (court stating that "the Attorney General of Oklahoma acquiesced in my suggestion that none of the plaintiffs should be set for execution, as long as there was anything for him to litigate in this Court," but that "[a]s to these five plaintiffs, there is nothing more to litigate in this Court.").

Defendants moved for summary judgment on February 19, 2021. On April 2, 2021, the court ruled that the plaintiffs had failed to comply with local rules in responding and failed to comply with the requirements for a method of execution case by not pleading constitutional alternatives to the current method of execution. Doc. 402. The court "decline[d] to impose on these individual plaintiffs the consequences of the derelictions of their counsel" and gave them a second chance to file a rule-compliant opposition brief and to answer which plaintiff pled which execution alternative(s). *Id.* Although some plaintiffs selected one or more alternative methods without reservation, Respondents here declined entirely to select an alternative method of execution, with Respondent John Grant refusing entirely to respond. *See* Doc. 425-18 at 75 (Donald Grant); *id.* at 123 (Jones); Doc. 437 at 21 (Postelle); Doc. 447-1 (Lay). The court granted summary judgment to the defendants in part on August 11, 2021. App. 167a-209a. In regard to Respondents, the court granted summary judgment on all claims for failure to meet the alternative requirement of *Baze*, *Glossip*, and *Bucklew*. App. 184a-188a. With respect to the other plaintiffs, the court concluded there were genuine issues of material fact regarding the risk of pain in Oklahoma's execution protocol and the availability of the alternatives pled by those plaintiffs, and so denied summary judgment. App. 174a-182a, 189a-192a.

Because Respondents, unlike their co-plaintiffs, no longer had any live claims in the case, the State sought execution dates. Respondents then moved for reconsideration, Doc. 467, which the district court denied, Doc. 493. On September 20, 2021, the Oklahoma Court of Criminal Appeals set execution dates for

Respondents. Order Setting Execution Dates, *In re Setting of Execution Dates*, Nos. D-2000-653 *et al.* (Okla. Crim. App. Sept. 20, 2021).

Meanwhile, Respondent Wade Lay appealed the summary judgment order, and all other Respondents urged dismissal of his appeal for lack of jurisdiction, arguing the district court improperly certified Rule 54(b) judgments against them. *See Lay v. El Habti*, No. 21-6101, Amicus Brief (10th Cir. Oct. 12, 2021). The remaining Respondents filed appeals as well. *See Grant v. Crow*, No. 21-6129 (10th Cir.). But Respondent John Grant extricated himself from the appeal by voluntarily dismissing it on October 15. *Id.*, Stipulation (10/15/2021). At the same time, Respondents Jones, Postelle, and Donald Grant then adopted the arguments of their prior amicus brief and sought dismissal of their own appeal. *Id.*, Notice (10/15/2021). Applicants, for their part, argued in favor of the Tenth Circuit entertaining the appeals in part because the Respondents' executions were forthcoming. Nevertheless, with knowledge of the impending executions, the Tenth Circuit dismissed these earlier appeals. *Id.*, Order Dismissing Case (10/15/2021).

Back at the district court, on October 22, 2021, Respondents sought an injunction staying their executions based on claims the district court had already held were unmeritorious, but Respondents did not argue they were likely to succeed on the merits of their claim that Oklahoma's execution protocol is sure or very likely to result in severe pain to Respondents. Doc. 506. The district court held an evidentiary hearing on October 25 on that motion. *See* Doc. 531.

At the hearing, Respondents' sole witness, Spencer Hahn (an assistant public defender), testified to the movements of inmates he observed during two executions using midazolam in Alabama. App. 42a-69a. Applicants' witness, Dr. Joseph Antognini (an expert in medicine and anesthesiology), testified as to why the movements described by Mr. Hahn were not inconsistent with the inmates being unconscious and unaware of pain, and why a 500mg dose of midazolam will render an inmate unconscious and insensate to pain. App. 70a-130a.

The district court denied the injunction. App. 152a-164a; Doc. 532. As to the claims for an injunction other than their Eighth Amendment claim (Counts VI, VII, VIII, and IX of their Complaint), the court held Respondents were unlikely to succeed on the merits, citing to its prior rulings on the motion to dismiss, summary judgment, and reconsideration. App. 154a-155a. As to the Eighth Amendment claim (Count II), the court held Respondents had not carried their burden to show they are likely to succeed on their claim Oklahoma's protocol is sure or very likely to cause severe pain, noting that Dr. Antognini's "unrebutted testimony" demonstrated the lack of "medical significance of Mr. Hahn's observations" and instead showed midazolam "would render an individual unconscious and insensate to pain." App. 155a-159a. And the court held the Eighth Amendment claim is *also* not likely to succeed because Respondents had repeatedly refused to plead an alternative method of execution as required by precedent. App. 159a-162a.

The district court also concluded Respondents had not shown any of the other factors for an injunction. The factual evidence Respondents presented on irreparable

harm through an unconstitutionally painful execution was "speculative" and inextricably tied to their failed showing on the merits, and the State's and public's interest in timely enforcement of judgments "cannot be ignored." App. 163a.

II. The Ruling Below

Respondents appealed the denial of the injunction and sought a stay. The court below granted a stay based only on Count II, Respondents' Eighth Amendment claim. App. 2a. As to the first element of an Eighth Amendment claim—proving a substantial risk of severe pain—the Tenth Circuit held that "[b]ecause the district court had already ruled that the first prong must be resolved at trial," rather than at summary judgment, Respondents "are likely to succeed on their position that denial of an injunction on that basis was an abuse of discretion." App. 3a. As to the second element, the court below held that Respondent's proffering of an alternative method of execution in their complaint while reserving the right to challenge those alternatives in the future was sufficient under *Baze*, *Glossip*, and *Bucklew*, and that the district court abused its discretion in granting summary judgment as to Respondents but not as to other plaintiffs who had made those same reservations in the complaint but then proffered one or more alternatives *without* reservations in later sworn statements. App. 4a-6a.

Finally, the court below held the other stay factors were met, pointing to the risk "of being unable to present what may be a viable Eighth Amendment claim to the federal courts before they are executed using the method they have challenged." App. 6a. As to the State's and victims' interest, the court discounted them because of

"the delay in developing a new protocol" and the "short time" until the scheduled February 28, 2022 trial. *Id.* And, it concluded, the "the public interest favors a stay, so that all the plaintiffs with identical claims in this matter are treated equitably by the courts." *Id.* The Court of Appeals granted stays of execution for John Grant (scheduled for October 28, 2021) and Julius Jones (scheduled for November 18, 2021).

Chief Judge Tymkovich dissented. He would have denied the stay requests "because Plaintiffs fail to demonstrate a likelihood of success" on the Eighth Amendment claim and because "none of the other claims in the motion for stay has merit." App. 8a. On the first element of an Eighth Amendment claim, Chief Judge Tymkovich cited to the evidence presented on the preliminary injunction motion and concluded the district court "did not commit clear error" in concluding "that the prisoners failed to carry their burden." App. 9a. On the second element, Chief Judge Tymkovich agreed with the district court that Respondents' refusal to identify alternatives without reservation is insufficient: "The alternative methods of execution are not theoretical measuring sticks, but rather practical alternatives the State may be required to implement. ... Nothing in the Supreme Court cases expounding this area of law suggests that a prisoner may satisfy the second *Glossip* requirement by making such a conditional, hypothetical, or abstract designation." App. 10a. "If plaintiffs are unwilling to accept the methods of execution they proffer," Chief Judge Tymkovich explained, "alternative-method-of-execution litigation will devolve courts into the boards of inquiry the Supreme Court warned against." App. 11a. He concluded: "the prisoners seek to avoid the practical inquiry required by the

Supreme Court in these cases, and in essence ask the courts to accept pleading games rather than examine carefully whether the State has satisfied the Constitution." *Id.*

ARGUMENT

A plaintiff seeking any injunction must show (1) the movant is substantially likely to succeed on the merits, (2) the movant is likely to suffer irreparable injury if the court denies the injunction, (3) that the threatened injury, absent the injunction, outweighs the opposing party's injury from the injunction, and (4) that the injunction is not adverse to the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Hill v. McDonough*, 547 U.S. 573, 584 (2006). As is relevant here, last-minute execution stays are especially disfavored. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew*, 139 S. Ct. at 1133-34; *Hill*, 547 U.S. at 583-84.

I. The court below erroneously concluded Respondents are likely to succeed on the merits.

In order to succeed on their Eighth Amendment claim, Respondents "face an exceptionally high bar." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 143 (D.C. Cir. 2020) (Rao, J., concurring in part); *see also Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). First, they must show "that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain"—a risk that is "sure or very likely." *Glossip*, 576 U.S. at 877-78. Second, they must "plead and prove a known and available alternative." *Id.* at 880. The court below plainly erred in holding that Respondents are likely to succeed on either, much less both, of these two elements.

A. Respondents are not likely to succeed on their claim that Oklahoma's midazolam protocol is sure or very likely to cause them severe pain.

In moving for an injunction at the district court below, Respondents did not even argue they are likely to succeed on the first element of the test reaffirmed in this case by this Court's decision in *Glossip*. *See* Doc. 506. Nor did they make any such arguments at the Court of Appeals. On some level, this is not surprising: both precedent (including this Court's decision in this very case)[3] and the evidence presented at the injunction hearing[4] regarding midazolam, is squarely against them.

Instead, Respondents argued, and the court below agreed, that because their co-plaintiffs survived summary judgment on *Glossip*'s first element, Respondents need not show their likelihood of success on the merits. *Grant v. Chandler*, Motion for Stay at 7 n.3, No. 21-6139 (10th Cir.); App. 3a. But whether a claim is likely to succeed is very different from whether it is so lacking in material factual disputes as

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[3] *See, e.g.*, *Glossip*, 576 U.S. at 881-93; *In re Ohio Execution Protocol Litig.*, 946 F.3d 287 (6th Cir. 2019), *cert. denied sub nom. Henness v. DeWine*, 141 S. Ct. 7 (2020); *In re Ohio Execution Protocol Litig.*, 881 F.3d 447 (6th Cir. 2018); *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017); *McGehee v. Hutchinson*, 854 F.3d 488, 492 (8th Cir. 2017) (en banc); *Grayson v. Warden*, 672 F. App'x 956 (11th Cir. 2016); *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1303 (11th Cir. 2016); *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016); *McGehee v. Hutchinson*, 463 F. Supp. 3d 870 (E.D. Ark. 2020); *Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL 102970 (E.D. Va. Jan. 10, 2017); *Loden v. State*, 264 So. 3d 707 (Miss. 2018); *Jordan v. State*, 266 So. 3d 986 (Miss. 2018); *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 613 (Tenn. 2018) (noting trial court ruling).

[4] App. 42a-130a, 155a-159a. Other courts have also found Mr. Hahn's testimony insufficient to warrant an injunction, including in relation to Dr. Antogini's testimony. *See, e.g.*, *In re Ohio Execution Protocol*, 860 F.3d at 889-90; *Arthur v. Comm'r, Alabama Dep't of Corr.*, 695 F. App'x 418, 428 (11th Cir. 2017).

to be subjected to summary judgment. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion … ." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (collecting cases). Claims can involve disputed facts and still be unlikely to succeed. One involves determining whether there is a contention; the other involves a merits determination of which side is likely to succeed in that contention. A stay of execution "is not available as a matter of right" merely because an inmate has a still-viable claim. *Hill*, 547 U.S. at 584; *see also Warner*, 776 F.3d at 727-28 & n.5. Rather, they must still show a likelihood of success on the merits. *Id.* Here, Respondents wholly failed to do so.

The district court's denial of an injunction based on the evidence presented at the injunction hearing, rather than based on his earlier finding that there were sufficient factual disputes to warrant a trial, was by no means an "abuse of discretion." App. 3a. There was no "erroneous view of the law" or "clearly erroneous assessment of the evidence" on the first *Glossip* element. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). On this basis alone, the stay below should be vacated, without even having to reach *Glossip*'s second element.

B. Respondents are not likely to succeed on their claim that they validly proffered alternative methods of execution while reserving their ability to challenge such methods in the future.

The district court also correctly concluded that Respondents are unlikely to succeed on *Glossip*'s second element. The burden of each Respondent is to show alternatives with "constitutionally permissible" degrees of pain in order to challenge

the existing procedure. *Bucklew,* 139 S. Ct. at 1126; *see also Brooks v. Warden*, 810 F.3d 812, 822 (11th Cir. 2016). This necessarily requires them to plead, and concede, that the alternative methods they proffer are constitutional. The *Glossip* alternative requirement is not solely so that courts can engage in a theoretical comparison, but also to avoid embroiling the courts in never-ending litigation, "with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze v. Rees*, 553 U.S. 35, 51 (2008). It ensures Respondents are "more interested in avoiding unnecessary pain than in delaying [their] execution." *Bucklew*, 139 S. Ct. at 1128-29. Respondents' tactic of arguing that they can avoid pleading an alternative they contend can be constitutionally used in their execution, and not subject to future challenge, impermissibly seeks to challenge "the death penalty itself." *Glossip*, 576 U.S. at 879-80. Thus, as the district court held, "[p]leading a theoretically available method, while declining to designate that method for actual use and reserving the right to litigate its constitutionality, does not suffice." Doc. 493 at 12.

Respondents' refusal to comply with this Court's precedent is clear and adamant. Respondents in their Complaint expressly "reserve the right following consultation with counsel" to object to any of the alternatives in the complaint, Doc. 325 at ¶ 114—meaning that they do not take a position on whether any alternatives are constitutional or subject to future challenge. Thus, the manner in which the alternatives were "identified" in the Complaint, Mot. 8, plainly does not meet the standard in *Baze*, 553 U.S. at 51, and *Bucklew*, 139 S. Ct. at 1126, 1128-29. This was made clear in discovery when they expressly declined to "alleg[e] an alternative

method of execution." Doc. 388-26 at 10. Then, in their opposition to summary judgment, Respondents indicated they may challenge any of the identified alternatives "another day." Doc. 425 at 42.

After these three refusals to comply with pleading requirements, the district court went above and beyond to proactively seek responses to avoid dismissal. Some of the plaintiffs, in sworn statements, expressly pled one or more alternatives without reservation. *See generally* Doc. 425. But Respondents either wholly refused to respond (John Grant) or explicitly "decline[d] to identify an alternative execution method" or otherwise "[s]uggest[] a method." Doc. 425-18 at 75 (Donald Grant); *id.* at 123 (Julius Jones); Doc. 437 at 21 (Gilbert Postelle). The court below correctly rejected these as "wholly untenable" under the Eighth Amendment. Doc. 449 at 17; *see also* Doc. 493 at 12-13; App. 159a-162a. Indeed, in their motion for stay at the Court of Appeals, Respondents all-but-conceded they seek to overturn this Court's precedent by stating they should not be required to "demonstrate[] [their] chosen method is 'feasible and readily implemented,'" *Grant v. Chandler*, Motion for Stay at 11, No. 21-6139 (10th Cir.) (quoting *Bucklew*, 139 S. Ct. at 1125), in direct contravention of the case they quote.

The court below erred in holding that Respondents' mere proffering of alternatives in their Complaint, while they "reserve the right … to object to any proffered alternatives" in that same Complaint, Doc. 325 ¶ 114, is sufficient to meet this Court's standards in *Baze*, *Glossip*, and *Bucklew* described above. As Chief Judge Tymkovich stated, this flouts the central purposes of the Eighth Amendment's

alternative requirement, namely, ensuring that the alternative is a viable one (*i.e.* not itself unconstitutional and subject to further challenge) and ensuring that States are not mired in endless rounds of litigation and thus practically unable to carry out lawful death sentences. App. 10a-11a (citing *Bucklew*, 139 S. Ct. at 1115, 1126 and *Baze*, 553 U.S. at 51-52). The district court was not bound "to accept pleading games" by Respondents meant to circumvent this Court's precedent. App. 11a.

Even if somehow Respondents' faux-proffering of alternatives in their Complaint was sufficient to make out an Eighth Amendment claim, this case has progressed far beyond the Complaint stage, through discovery and summary judgment. And at summary judgment, what is relevant is not "the mere pleadings themselves," but the actual evidence developed during discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also Bormuth v. Cty. of Jackson*, 870 F.3d 494, 524 (6th Cir. 2017) (Sutton, J., concurring); *Lundgren v. Freeman*, 307 F.2d 104, 118 (9th Cir. 1962).

Here, the facts at summary judgment showed the nature of each plaintiffs' proffer. The Complaint recognized *Bucklew*'s alternative requirements but stated "Plaintiffs cannot be required to plead or prove an alternative method of execution because such a requirement is a substantial burden on their sincerely held religious beliefs." Doc. 325 ¶ 111. Then, rather than plaintiffs directly proffering alternatives, the Complaint said "*counsel alleges on behalf of Plaintiffs* (each of whom reserve the right following consultation with counsel to object to any proffered alternative)" a set of four different possible alternatives. *Id.* ¶ 114 (emphasis added). Then, in discovery,

the State asked the following interrogatory: "For each Plaintiff, identify which pled alternatives in ¶ 114 are being pled on behalf of that particular Plaintiff." In response, the plaintiffs all refused to respond, stating "alleging an alternative method of execution would make Plaintiffs complicit in their own deaths in a way that is akin to suicide or assisting suicide, which is contrary to and violates their sincerely held religious beliefs." Doc. 388-26 at 10. After the district court gave the plaintiffs a second chance to respond to interrogatories, Doc. 402, some plaintiffs proffered one or more alternatives *without reservation*, *see generally* Doc. 425-18, but Respondents Julius Jones, Donald Grant, and Gilbert Postelle stated they "respectfully decline to identify an alternative execution method" because they "cannot do so on moral, ethical and/or religious grounds" and because they believe the alternative requirement "is a perversion of justice." Doc. 425-18 at 75 (Donald Grant); *id.* at 123 (Julius Jones); Doc. 437 at 21 (Gilbert Postelle); *see also* Doc. 447-1 (Wade Lay stating only that "I decline to identify an alternative execution method").[5]

Thus, regardless of the Complaint, the facts in the record unequivocally demonstrate Respondents have refused to identify an alternative, either by refusing

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[5] Although Respondents' position on these matters appeared to shift in inscrutable ways after losing summary judgment during their latest motion for preliminary injunction and appeal, this shifts are not enough to warrant a preliminary injunction. Rather, as the district court noted, they appear to be gamesmanship "responsive to the exigencies of the moment," App. 161a, and, as Chief Judge Tymkovich stated, "risks rewarding Appellants for playing delay games with the court rather than serving the true function of their *Glossip* claim: to avoid unnecessary and superadded pain associated with an unconstitutional method of execution." App. 9a n.1 (citing *Bucklew*, 139 S. Ct. at 1129; *Glossip*, 576 U.S. at 879-80).

to respond to the State's interrogatories (John Grant) or by explicitly stating so in their interrogatory responses (Julius Jones, Donald Grant, Gilbert Postelle, and Wade Lay). In this manner, they are decidedly *not*, as the court below wrongly concluded, similarly situated with their co-plaintiffs and thus subject to "disparate treatment." App. 5a. The district court did not merely give Respondents' co-plaintiffs a benefit not offered to Respondents, but instead gave those co-plaintiffs "the benefit of the literal import of their supplemental responses to defendants' interrogatories," which "intimate no reservation of a right to challenge a proffered alternative." App. 183a-184a. Thus, Respondents' Eighth Amendment claim does not fail merely because they did not "designate a method of execution to be used in [their] case by 'checking a box,'" App. 5a; rather, their claim fails because the evidence shows they repeatedly, and sometimes explicitly, repudiated this Court's precedent.

It is the law of the case in *Glossip*, further reinforced by *Bucklew*, that failure to identify a constitutional alternative is a "dispositive shortcoming." *Bucklew*, 139 S. Ct. at 1121. Respondents therefore cannot be likely to succeed on the merits of this claim. Thus, for this second and independently sufficient reason, the stays granted below must be vacated.[6]

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[6] Respondents below also moved for a stay on other legal theories, but the majority below did not address them and the dissent found them wanting. *See* App. 2a, 11a. Accordingly, Applicants do not address them here. But to the extent this Court would consider them on this application, Applicants respectfully refer the Court to their brief below and to the district court's prior rulings on these matters. *See* Docs. 349, 449, 493.

II. The balance of equities does not favor a stay of execution.

Courts "should police carefully against attempts to use such [method-of-execution] challenges as tools to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134. "Last-minute stays should be the extreme exception, not the norm." *Id*. And "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 574 U.S. at 584.

On irreparable harm, Respondents are not challenging their convictions and sentences. They will be condemned to die irrespective of the outcome of this litigation. Rather, Respondents are challenging the method by which their executions will be carried out. But they fail to demonstrate that the *method* of execution will cause irreparable harm, for example, by showing they will suffer a constitutionally impermissible level of pain as compared to another available and constitutional method they propose. *See supra* I.A. The court below held that Respondents will be irreparably harmed because they "risk being unable to present what may be a viable Eighth Amendment claim to the federal courts before they are executed using the method they have challenged." App. 6a. But that is the case with *every* condemned inmate who does so much as file a complaint until after a full trial (or appeal). That has never been the standard for staying an execution. *Hill*, 547 U.S. at 584; *see also Warner*, 776 F.3d at 727-28 & n.5. And accepting a standard where an inmate is owed a stay every time they have a live claim in federal court would as a practical matter halt executions across the country altogether.

Meanwhile, the State and the family members of the Respondents' victims have an important, protectable interest in the timely enforcement of the sentence imposed by the jury. *Bucklew*, 139 S. Ct. at 1133-34. It has been twenty-two years since John Grant murdered Gay Carter; twenty-two years since Julius Jones murdered Paul Howell; twenty years since Donald Grant murdered Brenda McElyea and Suzette Smith; seventeen years since Wade Lay murdered Kenneth Anderson; and sixteen years since Gilbert Postelle murdered Amy Wright, James Alderson, Terry Smith, and Donnie Swindle. "The people of [Oklahoma], the surviving victims of [the Plaintiffs'] crimes, and others like them deserve better." *Id*. at 1134. So "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584.

These interests are all the more heightened with executions soon to take place. The State has invested much effort in preparing for the executions. Moreover, the setting of new execution dates triggered clemency hearings that involved not only significant preparation for State entities, but also burdensome emotional labor and trauma for the victims' families. A continued stay now, which would require the setting of an execution date at some later date, could potentially lead to yet another clemency hearing, further impacting the victims. The victims do not deserve the retraumatization, dashed expectations, and delayed justice continuing the stays would entail.

The court below brushed aside these concern because of "the delay in developing the new protocol." App. 6a. But regardless of the time it took the State to

improve its protocol, the lack of executions since this Court's 2015 decision in *Glossip* was primarily due to inability to find execution drugs (until 2020)[7] and the prior Attorney General's remarks about seeking execution dates while Respondents still had live claims at the district court, *supra* 2-3 n.2—which, after summary judgment was granted on all claims against Respondents in August 2021, is no longer the case. In any event, the State's care in crafting an execution protocol and pursuit in acquiring execution drugs is no reason to discount the State's interest in timely execution of sentences.

The Tenth Circuit also discounted the State's interests because of "the relatively short time frame that will ensue until the district court has finished its trial, which is set to commence on February 28, 2022." App 6a. But even after the trial, the district court will take time to enter a ruling—and then there are post-judgment rulings, appeals, and more appeals. Again, under the decision below, a stay is appropriate until all claims are finally litigated, but that is not the standard for a stay this Court has ever countenanced. And the conclusion of the court below that public interest favors a stay "so that all the plaintiffs with identical claims in this

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[7] *See* Barbara Hoberock, *State prepares for first execution in nearly seven years on Thursday*, TULSA WORLD (Oct. 27, 2021), https://tulsaworld.com/news/state-and-regional/crime-and-courts/state-prepares-for-first-execution-in-nearly-seven-years-on-thursday/article_2c171cda-3692-11ec-9b21-53c803003c65.html (noting that "[i]n March 2018, Oklahoma announced that it would use nitrogen gas to execute condemned inmates because it could not find the drugs for the lethal-injection process" but that "[t]wo years after the announcement about using nitrogen gas, the state said it had secured a reliable source for the drugs and would resume executions by lethal injection.").

matter are treated equitably by the courts" is based on the erroneous premise, rebutted above, that Respondents were treated unfairly as compared to their differently-situated co-plaintiffs.

Finally, there is the matter of Respondents' timing. They could have moved for an injunction when the execution dates were requested on August 25 or set on September 20. After all, both their Rule 59(e) motions in district court and their Rule 54(b) appeals at the Tenth Circuit, even if successful, wouldn't have stayed their executions. And even with respect to their prior appeals, Respondents chose to forego their right to an immediate appeal and argue the district court's entry of a final judgment was improper under Rule 54(b). This is even more true of John Grant, in light of his decision to withdraw his appeal even before the Tenth Circuit dismissed the other Respondents' appeals. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier "may be grounds for denial of a stay." *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill*, 547 U.S. at 584).

For all of the reasons above, the balance of equities weighs against the stays. And it is particularly inequitable to grant stays—putting the family members of Respondents' victims through yet another postponement (in the case of John Grant, a day ahead of his execution)—for claims that have no merit.

CONCLUSION

This Court should vacate the stays of execution entered by the court below.

Respectfully submitted,

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