No. 21A-166
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

ABOUTANAA EL HABTI, ET AL.,

Applicants,

v.

JOHN M. GRANT, ET AL.,

Respondents.

On Application for Stay

EXECUTION SCHEDULED FOR OCTOBER 28 AT 4 P.M. CT

OPPOSITION TO APPLICANTS' MOTION TO VACATE TENTH CIRCUIT COURT OF APPEALS' STAY OF EXECUTION

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INTRODUCTION

Petitioners ask this Court to take the extraordinary measure of vacating an injunction entered by the Tenth Circuit Court of Appeals enjoining the imminent executions of Respondents John Grant and Julius Jones before – in the words of the Tenth Circuit – Respondents are able to "present what may be a viable Eighth Amendment claim to the federal courts." (Doc. 010110596676 at 6)

What makes Petitioners' request particularly extraordinary is this litigation's procedural posture. Respondents are a subset of plaintiffs asserting an Eighth Amendment challenge to Oklahoma's execution protocol. The district court has already determined based on a robust summary judgment record (which included several expert reports on both sides) that there are issues of fact concerning whether the State's execution method presents a substantial risk of severe pain, and whether the alternative methods of execution proposed by Plaintiffs are feasible and readily implemented, and has set the matter for trial in four months, in February 2022. (Doc. 449 at 6-7).

The only reason this matter is currently before the Court is the district court's imposition of a new requirement -- not found in Baze, Glossip, or Bucklew -- that each individual plaintiff in the lawsuit -- in addition to pleading the feasible and readily implemented alternatives and successfully arguing in support of those alternatives in opposition to Petitioners' summary judgment motion -- "check a box" and select the specific method by which he will be executed.

Respondents refused on religious and/or moral grounds to make such a selection, and were dismissed from the lawsuit. In other words, the district court did not dismiss Respondents because they failed to propose, identify, or proffer evidence for trial to prove a "feasible and readily implemented" alternative. In fact, each Respondent alleged four alternatives in the operative

complaint, successfully argued for the availability of each of those four alternatives in opposition to Petitioners' summary judgment motion – based on a far more robust expert and scientific record than before this Court in 2015 – and each of those four alternatives will be the subject of the February 2022 trial. Instead, the district court dismissed each Respondent solely because he refused on religious and/or moral grounds to "check a box" and affirmatively say: "This is how I want you to execute me." For that reason alone, Respondents faced (before the Tenth Circuit intervened) immediate execution, while those plaintiffs who did not exercise this religious objection remained plaintiffs in the February 2022 trial without scheduled execution dates.

Worse still, the district court sanctioned Respondents' executions prior to the February 2022 trial, and suggested that Respondents could be used as human guinea pigs whose executions would be test cases assessing the State's ability to conduct constitutional executions. Doc. 449 at 15 n. 13 ("[b]ecause…six of the plaintiffs…have declined to proffer an alternative method of execution, there may well be a ***track record*** under Chart D of the new Oklahoma protocol by the time this case is called for trial as to the other twenty-six plaintiffs") (emphasis added).

In short, as the Tenth Circuit clearly appreciated, the district court's denial of Respondents' motion was an abuse of discretion that discriminates against a subset of plaintiffs who are identically situated to those not now facing execution but for the exercise of religious objections to suicide implicated by compelling them to choose the specific method the State would use to execute them. In other words, absent a temporary stay of Respondents' executions, Respondents will be executed despite the fact that the district court has already determined that Respondents' co-plaintiffs are entitled to a trial in a few short months on the constitutionality of the very method of execution that Petitioners plan to use to execute Respondents. That anomaly cries out for a stay. Oklahoma cannot be permitted to execute these Respondents on the eve of their "present[ing] what

may be a viable Eighth Amendment claim to the federal courts." (Doc. 010110596676 at 6).

BACKGROUND

After six years, this matter is back before this Court, albeit under much different circumstances.

In October 2015, after the 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). Nearly five years later, on February 13, 2020, the Oklahoma Department of Corrections ("ODOC") released a revised Execution Protocol to be utilized in the executions of prisoners, including Respondents. The same day, then Oklahoma Attorney General Michael Hunter announced that executions would be conducted utilizing the same new three-drug protocol comprising midazolam, vecuronium bromide, and potassium chloride that the State used in 2014 and 2015.

Respondents (and the other plaintiffs) filed their Third Amended Complaint on July 6, 2020. Among other Counts, the Third Amended Complaint alleged that the Execution Protocol violated the Eighth Amendment's prohibition against cruel and unusual punishment. In accordance with this Court's precedent, the Third Amended Complaint identified four alternative methods that all plaintiffs, including Respondents, alleged were "feasible, available, readily implemented and would significantly reduce a substantial risk of severe pain." (Doc. 325 at 47). As the Tenth Circuit noted, "[n]one of the plaintiffs, including Appellants [Respondents], have ever withdrawn that allegation or withdrawn these methods from consideration." (Doc. 010110596676 at 4).[1]

[1] In response to Petitioners' motion to dismiss, by order dated September 3, 2020, the district court dismissed Counts I, III and VIII from the Third Amended Complaint. (Doc. 349).

Following substantial fact and expert discovery, Petitioners moved for summary judgment on the remaining Counts of the Third Amended Complaint. By order dated April 2, 2021, the district court *sua sponte* ordered each plaintiff to select the alternative method for his own execution. Specifically, the district court required each plaintiff to respond to Petitioners' interrogatory asking each individual plaintiff to further identify which of the pleaded alternative methods he proffered for use in executing him. (Doc. 010110596676 at 4). As noted by the Tenth Circuit, "the plaintiffs who answered the interrogatory did so by filing a supplemental response that included a listing of the four alternative methods identified in the TAC, with a blank line next to each method where a plaintiff could put his initials." *Id.* Each Respondent, however, declined to respond to the interrogatory on religious and/or moral grounds.

By order dated August 11, 2021, the district court granted in part and denied in part Petitioners' summary judgment motion, and set the matter for trial in February 2022. (Doc. 449). The court found genuine issues of material fact on the Eighth Amendment claim (Count II). The district court addressed Count II in the context of this Court's two-prong test: (1) whether "the state's method presents 'a substantial risk of severe pain'"; and (2) whether "the alternative method of execution the prisoner is obliged to propose [is] 'feasible and readily implemented,' and [is] one that 'the State has refused to adopt without a legitimate penological reason.'" (Doc. 449 at 6-7).

Specifically, with respect to the first prong, the court found plaintiffs' attacks on the protocol's safeguards supported by "credible expert criticism." (*Id.* at 14-15). As summarized by the Tenth Circuit:

> …the district court stated that "[t]here is a fact issue as to whether midazolam performs as well, for execution purposes, as defendants claim it does." *Glossip v. Chandler*, No. 5:14-cv00665-F, CM doc. 449 at 10 (W.D. Okla. 2021). It also recognized "a fact issue as to

> whether midazolam will reliably render the prisoner insensate to pain . . . for the length of time necessary to avoid a constitutionally unacceptable risk that the prisoner will be subjected to a constitutionally unacceptable level of pain." *Id*. at 11. The district court further stated that "the prisoners squarely attack the warden's unfettered discretion to deviate from the protocol, as well as—among other things—the adequacy of the consciousness check specified in the protocol," which it said was "unmistakably a central consideration in the Supreme Court's lethal injection jurisprudence." *Id*. at 14

(Doc. 010110596676 at 3.)

In addition, the district court found that fact issues precluded summary judgment as to each of the four alternatives pled in the Third Amended Complaint. (*Id.* at 23-26). However, because Respondents had declined on religious and/or moral grounds to "check a box" selecting the method of their own execution among the four alternatives they pleaded, the district court distinguished these plaintiffs from the others and dismissed their Eighth Amendment claims. (Doc. 449).

The district court then offered a "word to the wise," cautioning the remaining plaintiffs that they "would be well advised to be prepared, at trial, to present evidence as to the ***actual track record of midazolam*** as used in executions over the last few years." (Doc. 449 at 15 n.13) (emphasis added). According to the court, "[t]hat evidence may go far to eliminate speculation as to whether midazolam does or does not perform as intended when used as specified in the protocol." *Id.* Remarkably, the district court noted that "[b]ecause…six of the plaintiffs…have declined to proffer an alternative method of execution, there may well be a ***track record*** under Chart D of the new Oklahoma protocol by the time this case is called for trial as to the other twenty-six plaintiffs." *Id.* (emphasis added).

The district court certified its decision with respect to Respondents as a partial final judgment (Docs. 450-55), and Respondents filed a Rule 59(e) motion to amend the final judgment

to, among other things, restore Respondents to the trial on Count II with the other Plaintiffs. (Doc. 467). On October 12, 2021, the district court granted in part and denied in part the Rule 59(e) motion. As relevant here, the district court denied the motion to amend to add Respondents back into the case for trial. That order was appealed to the Tenth Circuit the following day. On October 15, 2021, the Tenth Circuit dismissed the appeal, along with a related appeal filed by Wade Lay, finding that the Rule 54(b) certification was an abuse of discretion by the district court. As a result of that ruling, the case before the district court has not been completed with respect to any Plaintiff, including the Respondents.

Petitioners refused to withdraw Respondents' execution dates, and Respondents moved to enjoin and for a stay on October 20, 2021. (Doc. 506). Following an October 25, 2021 hearing, the district court denied Petitioners' motion. (Doc. 532). And in doing so, the district court found that Respondents had litigated their claims with a dispatch that distinguished their claims from the disfavored 11th hour claims with which this Court has found fault. *See* Oct. 25, 2021 Tr. at 129-30.

Respondents sought a stay in the Tenth Circuit that same day and, on October 27, 2021, the Tenth Circuit granted Respondents' motion. In issuing the stay, the Tenth Circuit found:

- "Because the district court had already ruled that the first prong [of Glossip] must be resolved at trial, Appellants are likely to succeed on their position that denial of an injunction on that basis was an abuse of discretion." (Doc. 010110596676 at 3).

- "As for the second prong [of Glossip], Appellants have made a strong showing that they complied with it." *Id.* at 4. Specifically, "[t]he [Third Amended Complaint] identified four alternative methods that all plaintiffs, including Appellants, alleged, as required by the pertinent test, were 'feasible, available, readily implemented and would significantly reduce a substantial risk of severe pain.' None of the plaintiffs, including Appellants, have ever withdrawn that allegation or withdrawn these methods from consideration." *Id.*

- "The only real difference between those plaintiffs who survived summary judgment to go to trial and these Appellants, who lost on summary judgment and now face imminent execution, was that the other plaintiffs complied with the district court's instruction to supplement their interrogatory responses by specifying an execution method or methods to be used to carry out their death sentences; the supplemental responses listed the same four alternative methods as choices that were identified by all plaintiffs in the [Third Amended Complaint]." *Id.* at 5.

- "Appellants, citing religious scruples about assisting in what they viewed as 'suicide,' refused to answer the interrogatory by choosing one or more of the four alternative methods to be used in their particular case. The problem with granting summary judgment on this basis is that we find nothing in the relevant case law that specifically requires a prisoner to designate a method of execution to be used in his case by "checking a box" when the prisoner has already identified in his complaint the very same alternative methods given as choices on the form." *Id*. at 5-6.

- "Nor did Appellants' refusal to make such a designation by specifying each method they proffered for their execution in a supplemental interrogatory response somehow nullify or renounce the alternative methods they identified in the [Third Amended Complaint]. Thus, Appellants have shown a likelihood of success concerning the second prong of their claim as well. The district court abused its discretion in concluding to the contrary." *Id*. at 6.

- "Appellants have also satisfied the other stay factors. 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. Although Appellees cite the State's and the crime victims' interest in prompt execution, the delay in developing the new protocol, coupled with 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, weigh against Appellees' assertions of harm. And the public interest favors a stay, so that all the plaintiffs with identical claims in this matter are treated equitably by the courts." *Id*.

As discussed below, there is no basis to vacate the district court's stay.[2]

[2] Respondents raised a number of other significant issues in their appeal to the Tenth Circuit which the Circuit Court did not need to address for purposes of issuing an injunction. Those issues include (among others) the extent to which the district court's expansion of this Court's decisions concerning execution alternatives violates other constitutional or statutory provisions concerning

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court's discretion. *See Kemp v. Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). "Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting); *see also Doe v. Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals "[a]lthough there is a question as to the likelihood of … success on the merits" because "the applicants have not shown cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding") (internal quotation marks omitted).

A. Petitioners Have Not And Cannot Justify The Extraordinary Relief Of Vacating The Tenth Circuit's Injunction Where, As Here, The District Court's Order Discriminated Against Respondents Based Upon Their Exercise of Religious Objections.

Petitioners' motion essentially recycles the same arguments the Tenth Circuit correctly rejected hours ago. There is no basis for Petitioners' extraordinary request. To the contrary, the Tenth Circuit acted within its discretion in finding that Respondents had demonstrated a likelihood of success on both prongs of the *Glossip* test.

First, Petitioners contend that the Tenth Circuit erroneously determined that Respondents are likely to succeed on their claim that the execution protocol presents "a substantial risk of severe pain." As a threshold matter, as noted above, a stay of execution is an equitable remedy

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the free exercise of religion, and whether the district court – in inviting executions before the February 2022 trial to be used as test cases – violates laws concerning human experimentation. These significant issues will also need to be addressed as part of Respondents' merits appeal.

that lies within a court's discretion. *See Kemp v. Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). Here, the Tenth Circuit exercised its discretion. It determined that because the district court found factual issues warranting a trial concerning (among other things) whether "midazolam performs as well, for execution purposes, as defendants claim it does" and "whether midazolam will reliably render the prisoner insensate to pain . . . for the length of time necessary to avoid a constitutionally unacceptable risk that the prisoner will be subjected to a constitutionally unacceptable level of pain," that Respondents are likely to succeed on their position.

Petitioners denigrate that order, asserting that it ignores the different standards applicable to a motion for summary judgement and a motion for a preliminary injunction. But that argument defies logic. Given (as the district court found) that plaintiffs have established questions of fact concerning the constitutionality of Oklahoma's method of execution warranting a trial – a trial that will be held in just a few months – it makes no sense to execute a subset of those plaintiffs before that trial. In the Tenth Circuit's words, Respondents "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." (Doc. 010110596676 at 6) If that is not a situation that cries out for the court to exercise its discretion and enjoin an execution, we don't know what is.

Moreover, Petitioners' argument ignores the unique posture of this case. Respondents established that they were entitled to a trial on Prong 1, *i.e.*, that there are factual issues concerning whether the execution protocol presents a "substantial risk of severe pain." Respondents' dismissal from the lawsuit had nothing to do with Prong 1. Instead, the only reason Respondents were dismissed from the lawsuit is because they (supposedly) failed to comply with Prong 2 by not additionally selecting how they would be executed. In other words, had the district court not misapplied this Court's Prong 2 precedent (discussed below), and dismissed Respondents from

the lawsuit, we would not be here today. To now say that these Respondents are not entitled to a stay of execution because they (again, supposedly) failed to satisfy the standard for a preliminary injunction on Prong 1 (when the district court is proceeding to trial on that prong) is Kafkaesque and, again, cries out for an injunction.

The Tenth Circuit, in exercising its discretion, clearly found the rulings of the district court to be incongruous and irreconcilable, and, thus, an abuse of discretion. The district court, in denying Petitioners' summary judgment, concluded that Respondents' record evidence on the Baze/Glossip test – including deposition transcripts and expert reports of a medical doctor with anesthesiology and pain medicine board certifications, a pathologist, a pharmacologist, a formulator and a chemist – credibly criticized the constitutionality of the protocol. The district court then essentially contradicted itself, ignoring the record developed on summary judgment, in denying Respondents' motion for a preliminary injunction. That's why the Tenth Circuit stated that "[b]ecause the district court had already ruled that the first prong must be resolved at trial, Appellants are likely to succeed on their position that denial of an injunction *on that basis* was an abuse of discretion." (Doc. 010110596676 at 3) (emphasis added).

Second, Petitioners devote most of their application to trying to defend the indefensible, specifically, the district court's expansion of Prong 2 of the *Glossip* test and its imposition on Respondents that they not only plead and prove a feasible, readily implemented alternative to the challenged method of execution, but that they also affirmatively and individually "check a box" and select the specific alternative method by which he will be executed. As the Tenth Circuit explained, this Court's precedent has not set forth any such requirement. (Doc. 010110596676 at 5-6) ("[t]he problem with granting summary judgment on this basis is that we find nothing in the relevant case law that specifically requires a prisoner to designate a

method of execution to be used in his case by "checking a box" when the prisoner has already identified in his complaint the very same alternative methods given as choices on the form").

To the contrary, in *Bucklew*, this Court addressed its holdings in *Baze* and *Glossip*, and described the standard governing all Eighth Amendment method-of-execution claims, as follows:

> To establish that a State's chosen method cruelly "superadds" pain to the death sentence, a prisoner must ***show*** a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.

Bucklew, 139 S.Ct. at 1117 (internal citations omitted) (emphasis added). Neither here nor anywhere else in *Bucklew* (or *Baze* or *Glossip*) did this Court decide or even consider whether this standard requires the alternative method be identified specifically for use in the prisoner's ***own execution***. Such a question was never at issue in any of the three cases.

To be sure, in *Bucklew*, the Court recognized that "distinguishing between constitutionally permissible and impermissible degrees of pain is a necessarily comparative exercise," and that Mr. Bucklew's failure to identify an alternative procedure all together was a "dispositive shortcoming" of his complaint. *Id.* at 1117, 1121. Here, there is no such "dispositive shortcoming," because—unlike in *Bucklew*—not only did the operative pleading identify four alternative methods of execution for the "necessarily comparative exercise" described by this Court (Doc. 325, ¶ 114), but also Respondents successfully argued in the district court that there were questions of fact warranting a trial concerning each of those proffered alternatives. In other words, Respondents satisfied the legal pleading standard set out in *Baze*, *Glossip,* and *Bucklew* by identifying or "showing" an available alternative.

Moreover, Petitioners' assertion that Respondents' failure to select one of the alternatives as their chosen method of execution suggests some sort of reservation to argue that an alternative

is not "constitutionally permissible" is a red herring. As noted above, this matter is set for trial in February 2022, and the district court will determine whether plaintiffs have proposed a readily implemented alternative to the current Oklahoma protocol, which necessarily requires the alternative to be constitutional. In other words, the fact that Petitioners have declined to endorse a specific option for their own executions is beside the point. However, at an absolute minimum, the executions should be stayed to allow sufficient time for the Tenth Circuit and this Court as necessary to address the important issue of whether a prisoner must affirmatively elect an alternative method of execution in violation of his religious beliefs, or whether it is sufficient (as Respondents urge) to simply prove the existence of a readily implemented alternative. That is not an insignificant difference to an individual who believes that selecting an alternative for his own execution makes him complicit in his own death and contravenes his religious belief that suicide is immoral.

In short, Respondents are indisputably in the exact same position as their co-plaintiffs on *Glossip* Prong 1, and have indisputably satisfied the requirements of *Glossip* Prong 2. To allow Respondents to be executed under those circumstances, especially when the matter is scheduled for trial in just a few months, would be a grave and manifest injustice.

B. The Equities Weigh In Favor Of Upholding The Stay.

Contrary to Petitioners' position, Respondents' request for stay of execution is not a "last-minute" attempt to game the system. The district court even found so in denying the stay.

> …this is not an egregious 11th-hour-59th-minute, at least in most respects, new theory of the sort that really riles up the Supreme Court.
>
> And this is not like the situation in some of the other cases that are -- that has really turned the whole process out of something out of a dime novel. That's not really where we are.

Oct. 25, 2021 Tr. at 129-30. As the district court recognized, Respondents proceeded expeditiously every step of the way.

Here, Oklahoma's own history of delay undermines its interest in timeliness. Oklahoma's years-long delay in generating an execution protocol dwarfs any short delay in executions in connection with the completion of the February 2022 trial in this case. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) ("the fact that the Government has not – until now – sought to" act "undermines any urgency" to do so now).

Moreover, Respondents will suffer irreparable harm if this Court vacates the Tenth Circuit's stay of their imminent execution dates. Failure to issue a stay risks "foreclos[ing] . . . certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302; *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. In fact, this Court has granted stay applications to prevent far less severe consequences, ranging from the chilling of witness testimony to the reduction of commercial competition. *See, e.g.*, *Hollingsworth*, 558 U.S. at 195; *California v. American Stores Company*, 492 U.S. 1301, 1304, 1302 (1989). Such harms pale in comparison to the irreparable harm that would result if the State of Oklahoma executed Respondents in a manner that violated the Eighth Amendment. Allowing the State to proceed towards executing Respondents while their appeal is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. The state would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public interest and judicial economy. *Id.*

Finally, the public interest is not served by executing individuals before they have had the opportunity to avail themselves of the legal process to challenge the legality of their executions. Instead, the public interest lies in ensuring that agencies act in accordance with the Constitution

and federal law. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). This interest is only heightened in the context of executions. The public will be ill-served if Respondents are executed before being given a full opportunity to test the constitutionality of Oklahoma's execution protocol. Indeed, this Court has confirmed that brief stays or injunctions—to permit potentially meritorious claims to be adjudicated before prisoners are executed—are warranted under these circumstances. *See Barr v. Roane*, 140 S. Ct. 353 (2019) (Alito, J., respecting the denial of stay or vacatur) ("[I]n light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out."); *see also Lee*, 2020 WL 3964985, at *3 (Sotomayor, J., dissenting) (noting that "because of the Court's rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring"); Order, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (per curiam). This is especially compelling here where the district court has denied summary judgment and ordered trial on these constitutional challenges to take place in February 2022 while Respondents would be subject to execution before such trial for the sole reason that they have exercised their religious beliefs.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion.

October 28, 2021

Respectfully submitted,

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