No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD A. GRANT AND GILBERT RAY POSTELLE,

Applicants,

v.

RANDY CHANDLER, ET AL.,

Respondents.

-- CAPITAL CASE --
EXECUTION OF DONALD A. GRANT
SCHEDULED FOR 10:00 A.M. (CST)
THURSDAY, JANUARY 27, 2022

EMERGENCY APPLICATION FOR STAY OF EXECUTION

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APPLICATION FOR STAY

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

Applicants are a subset of plaintiffs challenging Oklahoma's execution protocol. Applicant Donald Grant is scheduled to be executed Thursday, January 27, 2022, and Applicant Gilbert Postelle is scheduled to be executed on February 17, 2022. Applicants respectfully request stays of execution in in order to maintain the status quo pending appeal.

INTRODUCTION

On January 24, 2022, the Tenth Circuit Court of Appeals denied Applicants' motion for a stay of execution pending the appeal of the district court's denial of their motion to enjoin and temporarily stay their executions (the "Motion") on the grounds that Oklahoma's execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment. (Appendix at 20a).

In denying the Motion, the lower courts misapplied and misconstrued applicable law. Specifically, the district court determined that it "is not quite clear" whether "the degree of pain required to qualify as 'cruel' within the meaning of the Eighth Amendment is to be determined exclusively on a comparative basis, the comparison being with the prisoner's proposed alternative method, or whether, as a threshold matter, the pain to be inflicted under the protocol must be shown to be severe on an absolute basis before the comparison is even triggered." (ROA, Vol. VII 279) (District Court Order Appended at 1a). To the contrary, however, this Court's precedent is clear that the determination of whether a method of execution is "cruel" is a comparative exercise. The determination of whether Applicants are likely to succeed on the merits of their Eighth Amendment claim thus necessarily required comparison of the pain associated with a midazolam

execution and execution by firing squad, the alternative proffered by Applicants. Despite Applicants' unrebutted evidence that execution by firing squad would be comparatively less painful than a midazolam execution, the district court ignored this Court's precedent and failed to undertake that critical, threshold analysis.

Significantly, the district court in the underlying case determined based on its review of a robust summary judgment record that there are triable issues of fact concerning plaintiffs' Eighth Amendment claim, and the matter is set for trial next month, February 2022. Specifically, the district court found that plaintiffs had demonstrated triable issues of fact concerning: (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).

Remarkably, however, despite the fact that the Applicants indisputably pled in the Third Amended Complaint multiple alternative methods of execution that are "feasible and readily implemented" (Doc. 325, ¶ 114), the district court nevertheless dismissed Applicants and four other plaintiffs from the lawsuit because each Applicant refused on religious or moral grounds to participate in his own execution by selecting the method by which he will actually be executed.

Worse still, the district court expressly stated that, because Applicants' executions would proceed prior to the February 2022 trial, Applicants could be used as human guinea pigs whose executions would be test cases that would generate evidence with which the parties could assess at the February 2022 trial 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).

The State scheduled the executions of the dismissed plaintiffs; Oklahoma's track record now includes the October 29, 2021, execution of John Grant where he repeatedly vomited, heaved and gasped for air, and where there are significant doubts that the execution team performed the consciousness check required by the Execution Protocol to ensure that the prisoner remain insensate for the duration of the execution. Mr. Grant's execution provides additional compelling evidence that the Execution Protocol poses a serious and substantial risk of severe suffering and pain to prisoners.

As discussed below, under these emergency circumstances, the Court should grant Applicants a stay of execution so that they can appeal the denial of their motion for preliminary injunction.

JURISDICTION

This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651 and Supreme Court Rule 23. The Application follows the Order of the Tenth Circuit Court of Appeals denying a motion for a stay of execution pending appeal in *Grant v. Crow, et al*., Case No. 22-6012, dated January 24, 2022, and an Order denying a Motion for Preliminary Injunction, entered by the United States District Court, Western District of Oklahoma, in *Glossip v. Chandler*, et al., Case No. Civ. 5:14-cv-00665-F, dated January 14, 2021.

STATEMENT OF THE CASE

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 Applicants. The same day, then Oklahoma Attorney General Michael Hunter announced that executions would be conducted utilizing a three-drug protocol comprising of midazolam, vecuronium bromide, and potassium chloride.

Applicants (and the other plaintiffs) filed their Third Amended Complaint on July 6, 2020. Significantly, the Third Amended Complaint identified four alternative methods that all plaintiffs—including Applicants—alleged were "feasible, available, readily implemented and would significantly reduce a substantial risk of severe pain." (ROA, Vol. I at 164-66.) As the Tenth Circuit noted, "[n]one of the plaintiffs, including Appellants, have ever withdrawn that allegation or withdrawn these methods from consideration." (ROA, Vol. XI at 1578.) In response to Respondents' 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, Defendants 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. In other words, in a macabre twist, the district court ordered the plaintiffs to decide how they would be put to death. Applicants, along with four other plaintiffs, having already plead available alternatives in the Third Amended Complaint, declined to do so on ethical, religious, and moral grounds.

By order dated August 11, 2021, the district court granted in part and denied in part Respondents' summary judgment motion. (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 a 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). With respect to the first prong, the court denied summary judgment against any Plaintiff, finding Plaintiffs' attacks on the protocol's safeguards supported by "credible expert criticism." (*Id.* at 14-15). In addition, the 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 six plaintiffs, including Applicants, had declined on religious and moral grounds to choose the specific method of their own execution, choosing instead to rely on the alternatives all the plaintiffs proposed and pleaded in their complaint, the district court distinguished them from the others and dismissed their Eighth Amendment claims.[1] (Doc. 449). According to the district court, Applicants' refusal to choose the specific method of their own execution "is fatal to these plaintiffs' Eighth Amendment claims," (Doc. 449 at 19), because, in the district court's view, "Glossip expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain. Bucklew, 1126 (emphasis in original)." (Doc. 449 at 17).

[1] The district court entered summary judgment against James Coddington, Donald Grant, John Grant, Julius Jones, Wade Lay and Gilbert Postelle. (Doc. 449 at 19).

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 Applicants as a partial final judgment (Docs. 450-55), and Applicants filed a Rule 59(e) motion to amend the final judgment to, among other things, restore Applicants 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, denying the motion to amend to add Applicants back into the case for trial. That order was appealed to the Tenth Circuit Court of Appeals the following day. On October 15, 2021, the Tenth Circuit dismissed the appeal. As a result of that ruling, the case before the district court had not been completed with respect to any Plaintiff, including the Applicants.

Respondents refused to withdraw Applicants' execution dates. Applicants moved to enjoin and for a stay on October 20, 2021. (Doc. 506). Following an October 25, 2021 hearing, the district court denied Applicants' motion. Applicants sought a stay in the Tenth Circuit that same day and, on October 27, 2021, the Tenth Circuit granted Applicants' motion for stay of execution in part. *See Jones v. Crow*, 10th Cir. Case No. 21-6139, Order (10th Cir. Oct. 27, 2021).

This Court vacated the stays of execution on October 28, 2021. *Crow v. Jones*, 142 S. Ct. 417 (October 28, 2021) (mem.). John Grant's troubling execution took place later that afternoon.

Expedited briefing on the merits resumed before the Tenth Circuit and relief was denied on November 12, 2021. *Crow v. Jones*, 10th Cir. Case No. 21-6139, Order and Judgment (10th Cir. Nov. 12, 2021).

Back in the district court, Applicants filed another emergency motion for preliminary injunction on November 18, 2021. (ROA, Vol. VI at 1171). This motion was supplemented on December 17, 2021. (ROA, Vol. VI at 1332). A hearing on Applicants' motion was held on January 10, 2022. The district court entered an order denying relief on January 14, 2022. (Doc 507). Applicants filed a motion for a stay of execution with the Tenth Circuit on January 20, 2022, and the court denied the motion on January 24, 2022.

REASONS FOR GRANTING THE APPLICATION

This Court must consider four factors in evaluating whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar).

A. Applicants Are Likely to Succeed on the Merits of Count II

To succeed on this claim, Applicants must 1) show that Oklahoma's execution protocol is "sure or very likely to cause serious illness and needless suffering," and 2) "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe

pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015). Applicants have demonstrated they are likely to succeed on this claim.

1. The Oklahoma Execution Protocol Presents A Substantial Risk of Serious Harm.

The Eighth Amendment forbids the Government, in carrying out a death sentence, from inflicting pain beyond that necessary to end the condemned prisoner's life. *In re Kemmler*, 136 U.S. 436, 447 (1890). "Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life." *Id.*; *see also Baze v. Rees,* 553 U.S. 35, 50 (2008) (execution violates the Eighth Amendment if it presents a "substantial risk of serious harm").[2] Based on the evidence Applicants presented at the preliminary injunction hearing in the district court, they have made a showing of a likelihood of success on the first *Glossip* prong. Applicants proved 1) there is a substantial risk that the prisoner will remain sensate, despite any so-called consciousness check; 2) John Grant's gasping for breath, vomiting, and likely asphyxiation all evidenced severe pain and extreme suffering caused by suffocation and air hunger; and 3) the purported consciousness check was cursory, unreliable, and inadequate as implemented in the execution of John Grant.

Julie Gardner, an investigator with the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma ("CHU"), testified to the following: Ms. Gardner witnessed the execution of John Grant from an unobstructed view. (1/10/22 Tr. 7). Based on a stopwatch she was wearing, Ms. Gardner estimated it took about 30 to 40 seconds from the

[2] The district court found on a limited evidentiary record that Applicants failed to demonstrate a likelihood of success that the Execution Protocol presents a risk of severe harm. (ROA, Vol. VII at 294). Significantly, however, the district court has already found based on a more robust summary judgment record that there exist genuine issues of fact warranting a trial on that very issue. In other words, Applicants have already convinced the court that the constitutionality of the Execution Protocol can only be decided based on a trial.

beginning of the execution for the first drug, Midazolam, to flow through the IV line. (1/10/22 Tr. 8). Moments after the first drugs began to flow, Mr. Grant appeared to go to sleep, but after approximately 15 seconds, "he started like a big intake of air and his chest expanded." Mr. Grant's mouth then began "gulping . . . it was like a fish out of water." (1/10/22 Tr. 9). About 15 seconds after Mr. Grant appeared to be "gulping," he began vomiting while strapped on his back to the gurney. (1/10/22 Tr. 9). Despite having witnessed six prior executions, none of which involved midazolam, Ms. Gardner had never witnessed "anybody gasp for air like that in [her] life." She had also never seen anybody vomit as much as he did, except in horror movies. (1/10/22 Tr. 10). It appeared as if Mr. Grant was choking on his own vomit, and she saw the vomit "bubble[] up in his mouth . . . and then you could see some of it sucked back in." (1/10/22 Tr. 14).

Mr. Grant's vomiting and gasping for breath continued for approximately four minutes (1/10/22 Tr. 14). At about four minutes into Mr. Grant's execution, two members of the IV team entered the execution chamber "took a towel and started scooping" vomit from Mr. Grant's mouth, face, and neck. (1/10/22 Tr. 15). After the two individuals left the execution chamber, Mr. Grant still had "some labored breathing," and he continued to vomit. (*Id*.). At approximately six minutes into the execution, the two members of the IV team reentered the execution chamber and cleaned up Mr. Grant again. Mr. Grant then "raised up" his head and moved it to the left. At the same time, his left shoulder also raised up. One of the IV team members then turned Mr. Grant's face straight up, took Mr. Grant's glasses off, wiped off the vomit around his eyes, and put his glasses back on. (1/10/22 Tr. 16).

Ms. Gardner does not believe she witnessed a consciousness check. She never saw IV team members pinch Mr. Grant, conduct a sternal rub, apply supraorbital pressure, or brush his upper

eyelids (1/10/22 Tr. 17-18). Yet moments after the IV team members left the execution chamber for the second time, an announcement was made that Mr. Grant was unconscious.

Moments after the consciousness check, Ms. Gardner witnessed more fluid, which she assumed to be the paralytic, pass through the IV line. (1/10/22 Tr. 18). About 10 to 15 seconds after seeing the second drug flow, Mr. Grant's cheek fluttered and his mouth opened. Roughly five minutes later, Mr. Grant was pronounced dead. According to Ms. Gardner's stopwatch, the execution took 12 minutes and 40 seconds. (1/10/22 Tr. 19).

The testimony of Meghan LeFrancois, an Assistant Federal Public Defender with the CHU who also witnessed Mr. Grant's execution, corroborated Ms. Gardner's account. (1/10/22 Tr. 24-36). Like Ms. Gardner, Ms. LeFrancois saw no evidence that a consciousness check was performed. (1/10/22 Tr. 33-34).

Joseph Cohen, M.D., a board-certified forensic pathologist, testified to his findings based on his autopsy of John Grant. Dr. Cohen noted "numerous petechial hemorrhages" in both of Mr. Grant's eyelids, both upper and lower. (1/10/22 Tr. 43). Petechial hemorrhages are consistent with an asphyxia mechanism of death, and Dr. Cohen would "not be surpis[ed] to see them" in the context of an overdose on a paralytic. (1/10/22 Tr. 44). Dr. Cohen was unable to rule out choking on aspirated gastric contents as a mechanism of Mr. Grant's death.[3] (1/10/22 Tr. 47). Dr. Cohen cannot rule out that Mr. Grant could have experienced pain and suffering during his execution. In addition to the autopsy Dr. Cohen conducted of Mr. Grant, he relied on the declarations of State's witness and ODOC Chief of Operations Justin Farris, Julie Gardner, and Meghan LeFrancois to

[3] State's witness Dr. Ervin Yen, an anesthesiologist who witnessed Mr. Grant's execution agreed that he likely died from asphyxiation. (1/10/22 Tr. 257).

make his conclusions. (*See* 1/10/22 Tr. at 49:19-24 (explaining that relying on non-medically-trained witnesses occurs "almost on a daily basis.")).

Michael Weinberger, M.D., Medical Director of the Pain Management Center, Associate Professor of Anesthesiology at Columbia Medical Center, testified that prisoners executed in accordance with the Oklahoma execution protocol face a substantial risk of experiencing severe pain and suffering based on the following reasons: Midazolam is not an anesthetic; instead, it is a sedative. When it is administered alone, midazolam cannot reliably render and maintain a subject in an insensate state and maintain anesthesia or block perception or transmission of painful stimuli. (1/10/22 Tr. 106, 109, 117). Further, there is significant individual variation in response to midazolam. (1/10/22 Tr. 107, 109, 132-34). As a result, there is a significant range in dosing required to achieve similar results between individuals. (*Id*.) No range of dosing or consideration of the individual's physiological, physical, or medical characteristics is included in the execution protocol. Moreover, midazolam has a ceiling effect. Additional amounts of the drug will not produce an equally greater response in a subject or have proportionally greater effect. (1/10/22 Tr. 123). The administration of midazolam in the dose and concentration required by the execution protocol leads to flash pulmonary edema, causing sensation of air hunger, drowning, and/or suffocation. (1/10/22 Tr. 136).

Dr. Weinberger further testified that vecuronium bromide, the paralytic agent used in Oklahoma's execution protocol, would cause a person to become paralyzed, such that a conscious person would "experience extreme discomfort, one because they can't move, and two because they would be slowly suffocating if they were unable to breathe." (1/10/22 Tr. 137). And potassium chloride, the third drug in the execution protocol, is an "extreme irritant and can cause nerves to

fire and can cause extreme pain at high concentrations or large doses given quickly."[4] (1/10/22 Tr. 137).

Dr. Weinberger also testified to concerns about the adequacy of the execution protocol's consciousness check. (1/10/22 Tr. 138). Specifically, with respect to John Grant's and Bigler Stouffer's[5] executions, after reviewing witness statements of such executions, Dr. Weinberger opined "it is unclear how much of a consciousness check was actually done."[6] (1/10/22 Tr. 142).

Finally, with respect to John Grant's execution, Dr. Weinberger testified that "[l]ooking at the EKG tracings, it appeared to me that after the vercuronium bromide was given, there may have been an increase in his heart rate." (1/10/22 Tr. 144). In patients undergoing general anesthesia, "heart rate and blood pressure are often monitors of pain." This testimony concerning EKG tracings as evidence of pain and suffering was unrebutted by defense experts.

The district court found that Applicants failed to demonstrate a likelihood of success on the merits of *Glossip*'s first prong, (ROA, Vol. VII at 294). With respect to John Grant's execution, the court found:

> If, contrary to the court's findings (which are compelled by persuasive evidence), Grant did experience conscious pain and suffering as he was executed, the interval within which he would have experienced pain and suffering would have been very short—less (probably quite a bit less) than five minutes. To be sure, the "pain and suffering" would have been more than negligible, mainly because, being strapped down in a supine position, Grant would have had no way to stop or otherwise alleviate the combined effect of simultaneously regurgitating and struggling to

[4] The district court even acknowledged that the severe pain and suffering of the second and third drugs are well accepted and not disputed. (1/10/22 Tr. 303). Accordingly, a primary issue here is whether the first drug, midazolam, reliably and adequately induces and then maintains a state of general anesthesia.

[5] Mr. Stouffer, who was not a plaintiff in the underlying action, was executed on December 9, 2021.

[6] Notably, the State's anesthesiologist expert and execution observer, Dr. Yen, admitted that he did not observe the execution team performing a consciousness check during Mr. Grant's execution. (1/10/22 Tr. 261).

> breathe. But the court concludes that pain and suffering of that duration and magnitude, if it occurred at all, falls short of the severity required, for Eighth Amendment purposes, by the Supreme Court's lethal injection trilogy.

(ROA, Vol. VII at 286).

The district court buoyed this conclusion with a reference to *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 290 (6th Cir. 2019), *cert. denied sub nom. Henness v. DeWine*, 141 S. Ct. 7 (2020). There, the Sixth Circuit found that "hangings have been considered constitutional for as long as the United States have been united," and that the risks of pain associated with the typical lethal-injection case "looks a lot like the risks associated with hanging, and indeed may present fewer risks." (ROA, Vol. VII at 280).

Clearly, the district court misunderstood the proper standard for prong one of *Glossip*. The district court admitted a lack of clarity concerning

> whether this court's reckoning of the degree of pain required to qualify as cruel within the meaning of the Eighth Amendment is to be determined *exclusively* on a comparative basis, the comparison being the prisoner's proposed alternative method, or whether . . . the pain to be inflicted under the challenged protocol must be shown to be severe on an absolute scale before the comparison is even triggered.

(ROA, Vol. VII 279). As the district court pointed out, Justice Sotomayor, while citing *Glossip* and *Bucklew*, maintained in a statement regarding the denial of certiorari in the Ohio protocol litigation that those cases make "clear that the proper inquiry is comparative, not categorical." *Henness v. DeWine*, 141 S. Ct. 7 (Sotomayor, J., statement respecting denial cert.) (Oct. 5, 2020). A close reading of the majority opinion in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), proves Justice Sotomayor was correct. In *Bucklew*, the Court held that in order to prove "the State's chosen method of execution cruelly superadds pain to the death sentence," a prisoner must show a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain that the State has refused to adopt without a legitimate penological

reason." *Id.* at 1125 (citing *Glossip* and *Baze*). Further, the Eighth Amendment is not implicated unless the risk of pain associated with the State's protocol is "substantial ***when compared to a known and available alternative***." *Id.* (emphasis added).

The *Bucklew* majority did caveat this crystal-clear emphasis on the comparative inquiry with three scenarios: 1) a state cannot be faulted for failing to use lethal injection drugs when it is unable to procure them through good-faith efforts; 2) a state has a legitimate interest in selecting a method it regards as "preserving the dignity of the procedure"; and 3) a state is not required to modify its protocol in ways that would require involvement of "persons whose professional ethics rule or traditions impede their participation." *Id.* at 1125. Applicants have identified a feasible and readily implemented alternative method that does not implicate any of these scenarios – the firing squad. Use of the firing squad clearly does not implicate scenarios one and three. Moreover, in light of the Oklahoma Legislature's adoption of the firing squad as a constitutional manner of inflicting the punishment of death, a court would be hard-pressed to find the firing squad somehow offends the "dignity of the procedure." *See* Okla. Stat. tit. 22, § 1014.

Applicants have demonstrated a reasonable likelihood of success on the merits of *Glossip* prong 1.

2. *Baze* And Its Progeny Do Not Require Applicants To Choose Their Own Method Of Execution And Applicants Have Established There Are Feasible Alternatives to Oklahoma's Protocol.

At the preliminary injunction hearing, Applicants presented James Williams, M.D., who opined that execution by firing squad "may significantly reduce the risk of severe pain" that is inherent in the Oklahoma Execution Protocol. (1/10/22 Tr. 87-88). The district court found Dr. Williams to be a credible witness. (ROA, Vol. at 294). Nevertheless, the district court found that Applicants "are foreclosed from satisfying Glossip's second prong" due to having "previously

refused to designate an alternative method for their execution," the basis on which the district court previously entered summary judgment against Applicants. (ROA, Vol. VII at 294-295).

As explained in section II above, the district court granted summary judgment against Applicants because they "declined to proffer an alternative for carrying out their sentence of death." (ROA, Vol. V at 1238). According to the court, the Supreme Court's decision in *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019), following its earlier decision in *Glossip*, "expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain" and "failure to identify an alternative [is] a dispositive shortcoming." (ROA, Vol. V at 1237) (emphasis in original)). Applicants met this burden when they proposed four available alternatives in the Third Amended Complaint. The district court misapplied the law.

In *Bucklew*, the Supreme 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). Neither here nor anywhere else in *Bucklew*, *Baze,* or *Glossip* did the Supreme 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. The standard requires a pleaded alternative that may be compared to the challenged method. It does not, however, further grant a prisoner the right or obligation to choose the method of his or her own execution. By adding this to the standard, the district court committed error.

In *Bucklew*, the Supreme 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*—the operative pleading (Third Amended Complaint) identified four alternative methods of execution for the "necessarily comparative exercise" described by the Supreme Court. (*See* ROA, Vol. I at 210, ¶ 114). Applicants satisfied the legal standard set out in *Baze*, *Glossip,* and *Bucklew* when they identified available alternatives. Applicants' declining to endorse a specific option for their own executions is legally irrelevant, as such an election is not required as a matter of law. Moreover, such an election – giving each prisoner the choice of method for his or her own execution – is an expansion of this Court's precedents and would be unworkable.

The district court read a non-existent requirement into *Bucklew.* Applicants are likely to succeed in overturning the court's summary judgment decision, which rests on a clear misinterpretation of Supreme Court precedent.

3. Absent a Stay, Applicants Will Be Irreparably Harmed and Respondents Will Be Unaffected.

Undeniably, Applicants will suffer irreparable harm without a stay of execution. Denying a stay risks "foreclos[ing] . . . review," which constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984). Allowing the State to execute Applicants before proceedings have concluded will "effectively deprive this Court of jurisdiction." *Id*. A stay is generally warranted when, as here, mootness is likely to arise during the pendency of the litigation—as it will if Mr. Grant is executed January 27, 2022. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013).

In contrast, Respondents will not be harmed by a stay, especially viewed in the context of the State's extremely lengthy delay in developing its new execution protocol. The several years

the State waited to establish a new protocol undermines any argument regarding the purported urgency in proceeding with an execution next week before the courts have had an opportunity to evaluate the constitutionality of Applicants' claims. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018). The short stay sought here will ensure the State does not perform an unconstitutional execution, *see Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate); after all, a trial on the merits of these claims is set to begin just 34 days from today.

4. A Stay of Execution Will Serve the Public Interest.

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. The public interest lies in ensuring 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. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). Indeed, "the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012) (citation omitted).

The public will be ill-served if Applicants are executed before a full opportunity to test the protocol's legality. For this very reason, the Supreme Court has confirmed that brief stays or injunctions are warranted to permit potentially meritorious claims to be adjudicated before prisoners are executed. *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 Barr v. Lee*, 140 S. Ct. 2590, 2593 (2020) (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).

CONCLUSION

For the reasons stated above, Applicants respectfully request that this Court stay their executions pending appeal.

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