No. 21A360
CAPITAL CASE

IN THE
Supreme Court of the United States

DONALD GRANT, *et al.*,
Applicants,

v.

SCOTT CROW, Director, Oklahoma Department of Corrections, *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

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

In 2001, during a robbery, Donald Grant shot hotel employees Brenda McElyea and Suzette Smith and, after Smith did not die, slit her throat and then bludgeoned and stabbed her over 30 times while she struggled and begged for her life. In 2005, Gilbert Postelle shot and killed Donnie Swindle, Terry Smith, Amy Wright, and James Alderson, chasing Wright and Alderson in and around a mobile home in a lengthy pursuit. Juries convicted Donald Grant and Gilbert Postelle of first-degree murder and sentenced them to death.

Now, Applicants seek further delay of their pending executions—executions that were set after summary judgment was entered against them in a method-of-execution challenge. Such requests by Applicants and their fellow inmates have been repeatedly denied by the district court, the Tenth Circuit, and this Court. Yet Applicants nonetheless request a stay on substantially the same grounds. Applicants have attempted to create a new factual record for their serial injunction motion, but they fail to challenge the fact-findings of the district court that formed the basis of the denial of their latest attempt, and they fail to challenge the Tenth Circuit's determination these findings were not clearly erroneous. Because they have failed to show (or even argue) clear error in the district court's and Tenth Circuit's dual determination of the fact that, *inter alia*, midazolam "may be relied upon to render the prisoner insensate quickly," App. 18a, and because Applicants have already had judgment correctly entered against them for failure to identify an alternative method of execution, Applicants' motion for stay should be denied.

STATEMENT OF THE CASE

I. Procedural History

This lawsuit began on June 25, 2014. Several plaintiffs moved for a preliminary injunction to stay their executions, which was denied by the district court, and the denial was later affirmed by both the Tenth Circuit and this Court in thorough, written opinions. *Glossip v. Gross*, 576 U.S. 863, 867 (2015); *Warner v. Gross*, 776 F.3d 721, 724 (10th Cir. 2015).

Oklahoma did not conduct executions for several years thereafter, initially for some months to conduct investigations into its protocol, and then for several years because the State was unable to acquire the appropriate drugs necessary to perform lethal injections under Oklahoma law. After the State was able to secure a source for the necessary execution drugs in early 2020, this litigation resumed. Respondents successfully moved to dismiss several of the plaintiffs' claims, Doc. 349,[1] and then after extensive discovery, moved for summary judgment on February 19, 2021. On April 2, 2021, the district 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. ROA.Vol.IV 189-93.[2] The court "decline[d] to impose on these individual plaintiffs the consequences of the derelictions of their counsel" and gave them a

[1] "Doc." refers to the district court docket number in this case.

[2] "ROA" refers to the record on appeal at the Tenth Circuit in this appeal.

second chance to file a rule-complaint opposition brief and to answer which plaintiff pled which execution alternative(s). *Id.*

Although most plaintiffs selected one or more alternative methods, Applicants here declined to select any alternative method of execution. *See* ROA.Vol.V 737 (Donald Grant); ROA.Vol.V 1203 (Postelle). The court granted partial summary judgment to Respondents on August 11, 2021. ROA.Vol.V 1221-63. In regard to Applicants, the court granted summary judgment on all claims. *Id.* Applicants then moved for reconsideration, ROA.Vol.V 1306-67, which the district court denied, ROA.Vol.VI 169-97. On September 20, 2021, the Oklahoma Court of Criminal Appeals set execution dates for Applicants. Order Setting Execution Dates, *In re Setting of Execution Dates*, Nos. D-2000-653 *et al.* (Okla. Crim. App. Sept. 20, 2021).

Meanwhile, another plaintiff in this litigation appealed the summary judgment order to the Tenth Circuit, and Applicants urged dismissal of his appeal for lack of jurisdiction, arguing the district court improperly certified Rule 54(b) judgments against them. *See* No. 21-6101, Amicus Brief (10/12/2021). Applicants filed appeals as well, but then adopted the arguments of their prior amicus brief and sought dismissal of their own appeal. *See* No. 21-6129. Respondents argued in favor of the Tenth Circuit entertaining the appeals in part because Applicants' executions were forthcoming. Nevertheless, with knowledge of the impending executions, the Tenth Circuit dismissed Applicants' earlier appeals. Nos. 21-6101, 21-6129, Order Dismissing Case (10/15/2021).

Applicants and their co-plaintiffs that had summary judgment granted against them then moved for a post-judgment preliminary injunction staying their executions, which the district court denied. ROA.Vol.VI 847. They appealed and the Tenth Circuit granted a stay of execution pending appeal as to two of Applicants' co-plaintiffs. *Jones v. Crow*, No. 21-6139, Order at 10-11 (10th Cir. Oct. 27, 2021). That stay was then vacated by this Court, leading to the execution of John Grant. *Crow v. Jones*, 142 S. Ct. 417 (2021). The Tenth Circuit then affirmed the denial of Applicants' motion for preliminary injunction. *Jones v. Crow*, No. 21-6139, 2021 WL 5277462 (10th Cir. Nov. 12, 2021).

Applicants then filed another injunction motion—the motion subject to this appeal—based on the events that took place during the execution of John Grant. ROA.Vol.VI 1171-89. In a separate proceeding, another inmate (Bigler Stouffer) also sought an injunction of his execution based in part on John Grant's execution, attaching Applicants' motion in this case and its four declarations. *See Stouffer v. Crow*, No. 21-cv-1000 (W.D. Okla.). The district court denied that motion and the Tenth Circuit affirmed, agreeing with the district court that the inmates' arguments and declarations are insufficient to overcome Respondents' evidence regarding the John Grant execution and to warrant an injunction staying execution. *See Stouffer v. Crow*, No. 21-6153, Order at 4 (10th Cir. Dec. 6, 2021). This Court also denied a stay of Stouffer's execution. *See Stouffer v. Crow*, No. 21A209 (U.S. Dec. 9, 2021). The subsequent Stouffer execution "was uneventful; it went in all respects as planned,"

and "entailed no physical pain other than the minor and unavoidable pain incident to the insertion of the IV catheters." App. 11a.

After Stouffer's execution, Applicants then supplemented their injunction motion, Respondents responded, and the district court held a lengthy evidentiary hearing on January 10, 2022, taking the testimony of multiple fact and expert witnesses on both sides. The district court then denied Applicants' motion, as described below. App. 1a.

II. Rulings Below

The district court issued findings of fact, which have not been expressly challenged by Applicants, and which must be accepted as true absent clear error. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Those findings are summarized below.

The district court found that John Grant consumed a significant amount of food and soda immediately prior to his execution, the result of which was that during the execution "Grant's gastric contents flowed toward his head and out of his mouth." App. 5a. At the same time, "Grant's airway was obstructed by his tongue," but "[t]he important point here is that all of this occurred while Grant was unconscious and insensate to pain as a result of the administration of a massive dose of midazolam." App. 5a. Specifically, the district court credited the testimony of Dr. Yen, an expert anesthesiologist who was the only medical expert who witnessed the Grant execution first-hand, that "Grant appeared to be unconscious 30-45 seconds after the

midazolam appeared to flow." App. 6a. The midazolam then caused the appearance of labored breathing, "indicative of an obstructed airway"—"[t]he explanation for this is that if an individual is conscious, he will breathe normally, but if he is unconscious 'you can't do anything about that obstructed airway.'" *Id.* Meanwhile, Grant did not have "violent heaving that is typical of vomiting" but instead "regurgitation" that is "more passive," as would be expected when someone who is lying down with a significant amount of food in his stomach "and injected with a drug which quickly produces unconsciousness." App. 7a. What plaintiffs' witnesses saw, then, "was the regurgitation and gasping of an unconscious man." *Id.*

Contrary to Applicants' insinuations, the district court also found that during the John Grant execution, a doctor entered the room to conduct a consciousness check, which "consisted of a sternum rub and the doctor raising Grant's eyelids," after which "[t]he doctor concluded that Grant was unconscious," all "as credibly described by" defendants' witness Justin Farris. *Id.* The district court found that "Grant probably died of asphyxiation" but "the process of asphyxiation started after Grant lost consciousness" and in fact the airway obstruction was "a consequence of unconsciousness." App. 7a-8a. Although Applicants' witness Dr. Cohen speculated based on media and lay witness reports that John Grant experienced conscious pain and suffering, 1/10/21 Tr. 48-49, the district court found "[t]he persuasive value of this conclusion by Dr. Cohen is questionable when viewed in the light of the fact that Dr. Cohen did not observe the Grant execution, has no experience with midazolam,

and did not review the declaration of Dr. Yen," so "Dr. Yen's well-supported conclusion, based on his decades of experience with midazolam and his personal observation of the Grant and Stouffer executions, is more persuasive." App. 8a-9a. The district court also noted that the report of Applicants' expert Dr. Weinberger (not an eyewitness to the execution) is consistent with Grant being in a state of general anesthesia. App. 9a-10a. And the district court concluded that, in the alternative, even if Grant was conscious, the experience "would have been very short" and not of the severity required for an Eighth Amendment claim. App. 10a.

With respect to the subsequent Stouffer execution, the district court found that Stouffer had no signs of consciousness after the midazolam was injected, that a consciousness check was performed involving "calling Stouffer's name, a sternum rub, shaking Stouffer and possibly a check of Stouffer's pupils," and that "[t]he Stouffer execution was uneventful; it went in all respects as planned." App. 10a-11a.

The district court also made factual findings regarding the scientific literature on midazolam, examining the testimony of Applicants' witness Dr. Weinberger and Respondents' witnesses Dr. Yen and Dr. Antognini. "The major difference between" these two sets of witnesses, the district court found "is that very little of Dr. Weinberger's testimony about the effects of midazolam was based on his personal clinical experience, and even less on any recent clinical experience. And none of Dr. Weinberger's testimony was based on first-hand observation of the effects of midazolam when used for execution by lethal injection as specified in Chart D."

App. 13a.

Although Dr. Weinberger testified that midazolam's effects can be variable, the district court found that, after reviewing the scientific evidence, "the effect of any given drug can and will vary from one individual to the next" and that "the potential for variability in the effect of midazolam decreases with higher doses." App. 14a-15a. As to the claim of an alleged "ceiling effect" for midazolam, the district court similarly reviewed the scientific testimony and literature, concluding: "the court is well-satisfied that midazolam will reliably render a prisoner insensate to pain at a dosage well below a dosage at which a ceiling effect would be anything other than a theoretical possibility." App. 15a-16a. Finally, the district court recounted the scientific evidence demonstrating "[m]idazolam is an FDA-approved anesthetic induction agent" that, while not currently used clinically for anesthesia because it would render patients sedated for too long, "[m]idazolam is a reliable drug for use as intended in Chart D." App. 16a-18a. "It may be relied upon to render the prisoner insensate quickly," the district court found, "to the end that, shortly after the midazolam is pushed, the prisoner will not sense intentional or unintentional stimuli." App. 18a.

Based on all these findings, the district court concluded that Applicants "failed to demonstrate a likelihood of success on the merits with respect to Glossip's first prong," since "[t]he evidence falls far short of establishing that the use of midazolam and the other two Chart D drugs in the executions of Donald Grant and Gilbert

Postelle will be '*sure or very likely* to cause serious illness and needless suffering.'" *Id.* (citations omitted). On *Glossip*'s second prong, the court found that "[t]wo credible experts disagreed as to whether execution by firing squad would be less painful than" Oklahoma's lethal injection protocol, but it need not resolve the issue because Applicants failed at the first prong and because Applicants, "having previously refused to designate an alternative method for their execution, are foreclosed from satisfying Glossip's second prong." *Id.* Because it ruled Applicants were not likely to succeed on the merits, the district court declined to consider the other prerequisites for an injunction and denied Applicants' motion. App. 18a-19a.

Applicants then appealed and moved for a stay of their executions pending appeal, which the Tenth Circuit denied. App. 21a. The Tenth Circuit reviewed the district court's extensive findings of fact and determined that Applicants had "failed to show the district court's factual findings were clearly erroneous, or that the district court committed legal error in reaching its conclusions," or that the district court otherwise committed "demonstrate an abuse of discretion." App. 23a-26a. Applicants now lodge substantially the same motion before this Court as was filed at the Tenth Circuit.

ARGUMENT

Applicants for a stay must (1) make a strong showing they are likely to succeed on the merits, (2) show they will suffer irreparable injury absent a stay, (3) demonstrate that the threatened injury outweighs Defendants' injury from a stay, and (4) that the stay will advance the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Last-minute execution stays are especially disfavored. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019); *Hill*, 547 U.S. at 58. Moreover, "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)).

As a threshold matter, this Court may deny a stay on procedural grounds not ruled upon by the district court or the court of appeals, namely, that Rule 65 does not authorize a "preliminary" injunction motion by those who have already had summary judgment entered against them, like Applicants here. The text of Rule 65 contemplates that the motion must occur *before* disposition of Applicants' claims. The provisions on consolidating the injunction with consideration of the merits, see FED. R. CIV. P. 65(a)(2), would be incoherent if a preliminary injunction is available after consideration of the merits. It also practically makes no sense to grant *preliminary* relief after the court has already foreclosed final relief. Allowing a defendant who has

lost at summary judgment to obtain a pseudo-trial through repeated "preliminary" injunction motions defeats the purpose of summary judgment, which is to summarily foreclose further adjudication.[3]

In any event, Applicants fall far short of showing entitlement to a stay.

I. Applicants are unlikely to succeed on the merits.

To succeed on their Eighth Amendment claim, Applicants "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 district court correctly concluded that Applicants are unlikely to succeed because they cannot meet either of these two prongs, and the Tenth Circuit correctly determined there was no abuse of discretion in these rulings.

A. Applicants are unlikely to succeed on the first *Glossip* prong.

Applicants do not challenge as clearly erroneous the district court's factual findings respecting the efficacy of midazolam to reliably render them insensate to pain. The words "clear error" do not appear anywhere in their Application. Nor do

[3] That Applicants cannot at this point appeal the summary judgment entered against them is a consequence of their own litigation choices. *See supra* 3.

they claim anywhere that the Tenth Circuit erred in affirming these factual findings. Instead, Applicants contend that the district court "misapplied and misconstrued the applicable law." Appl. 1.

It is impossible for Applicants to show they will be sure or very likely to experience severe pain given, among others, the factual findings of the district court, affirmed by the Tenth Circuit, that: (1) midazolam will reliably render them insensate to pain, (2) John "Grant was unconscious and insensate to pain as a result of the administration of a massive dose of midazolam," and (3) the Stouffer execution was wholly uneventful. *See supra* 5-9. That is all the more true because this Court and lower courts have all held that challenges to the three-drug midazolam protocol are unlikely to meet *Glossip*'s first prong.[4] Similarly, after examining the testimony of the same eyewitnesses to John Grant's execution presented in this case, the Tenth Circuit had already affirmed the district court's factual findings that Grant's execution does not show "a substantial risk of unconstitutionally severe pain." *Stouffer v. Crow*, No. 21-6153, Order (10th Cir. Dec. 6, 2021) at 3-4.

[4] *See Glossip*, 576 U.S. at 881-93; *see also, e.g.*, *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).

Applicants barely even try to surmount these hurdles. Applicants merely recount some of the testimony they presented, Appl. 8-12, but almost entirely fail to acknowledge the evidence Respondents presented and fail to argue that, considering the whole record, the district court's findings (and the Tenth Circuit's affirmation thereof) were clearly erroneous, *see supra* 5-9. In only one respect do they claim their witnesses' evidence on *Glossip*'s first prong was unrebutted, Appl. 12, but even there Applicants elide the truth. Dr. Weinberger only testified that "[l]ooking at [John Grant's] EKG tracings, it appeared to me that after the vecuronium bromide was given, there ***may*** have been an increase in his heart rate," that "heart rate and blood pressure are often used as monitors of pain," and that "I can't tell you whether or not that increase in heart rate is indicating pain." 1/10/21 Tr. 144 (emphasis added). As Dr. Antognini's report explains: "Increases in heart rate and blood pressure are common during surgery and even deep levels of anesthesia do not ablate these increases. In fact, even brain dead humans can have marked increases in blood pressure and heart rate during organ donation." ROA.Vol.VII 135 n.4. When asked directly about his certainty that Grant was in pain and suffering, Dr. Weinberger admitted: "I cannot be certain of either of those, sir. There are suggestions that he may have experienced pain and suffering as I described earlier, but I can't be certain." 1/10/21 Tr. 149. None of this shows that Applicants are "sure or very likely" to experience severe pain, or that the district court's factual findings on midazolam or the John Grant execution were clearly erroneous. As the Tenth Circuit concluded,

"[t]his equivocal testimony is insufficient to satisfy the requirements of *Glossip* prong one concerning severe pain, particularly given the other evidence presented at the hearing." App. 25a n.6.[5]

Rather than attempt to argue that the district court's factual findings were clearly erroneous, or that given those facts its legal conclusion was wrong, or that the Tenth Circuit committed *any* error, Applicants only contest the district court's *alternative* holding that, even if Grant was experiencing pain, the severity of that pain would not meet *Glossip*'s first prong. Appl. 12-14. Needless to say, challenging only an alternative holding is insufficient to show likely success on the merits.

Even so, Applicants are wrong in their challenge to the alternative holding. While the district court noted the differing views expressed by the Sixth Circuit and Justice Sotomayor in a statement respecting denial of certiorari to review the Sixth Circuit, it took no position on "whether the pain associated with hanging is an Eighth Amendment benchmark," and instead stated that, regardless, "the pain must be severe" in order to meet *Glossip*'s first prong. App. 4a. Then, after making its factual findings, the court below held that midazolam executions in general do not—and John Grant's and Bigler Stouffer's execution in particular did not—involve any pain

[5] Applicants' intimation that their co-plaintiffs' survival of summary judgment is sufficient to show they are likely to succeed on the merits and therefore are owed an injunction, Appl. 2, 8 n.2, has already been rejected by the Tenth Circuit—twice. *Jones*, 2021 WL 5277462, at *6; *Stouffer*, *supra*, at 4. Furthermore, when at one point the Tenth Circuit had issued a stay based on this theory, this Court promptly vacated that stay. *Crow v. Jones*, 142 S. Ct. 417 (2021).

beyond that associated with IV insertion, and in the alternative, even if John Grant was in some pain, it did not rise to the level of severity required to meet *Glossip*'s first prong, without any reference to the hanging benchmark dispute between the Sixth Circuit and Justice Sotomayor. App. 10a, 19a. (In any event, Respondents contend the Sixth Circuit has the better argument.)

The district court's conclusion that an Eighth Amendment plaintiff must first show that severe pain is sure or very likely using the State's method, before having to show an available alternative that will substantially reduce that risk, is undoubtedly correct. Any contrary conclusion would collapse *Glossip*'s two prongs. In *Baze*, for example, the Court rejected a host of proposed alternatives, holding that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." 553 U.S. at 51. In *Glossip*, the Court affirmed the denial of a preliminary injunction both because of the inmates' "failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution" *and* because "[t]he District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution." 576 U.S. at 878, 881. The Tenth Circuit therefore was correct to find no abuse of discretion on these issues as well. App. 26a.[6]

[6] Meanwhile, in *Bucklew*, the Court did not reach the question of whether the inmate met the severity aspect of *Glossip*'s first prong because his claim failed on other grounds. 139 S. Ct. at 1133 n.4.

For all these independently sufficient reasons, Applicants fail to make a strong showing they are likely to succeed on *Glossip*'s first prong, so their requested stay must be denied.

B. Applicants are unlikely to succeed on the second *Glossip* prong.

The district court also correctly concluded that Applicants are unlikely to succeed on *Glossip*'s second prong because at summary judgment they failed to identify an alternative, and the Tenth Circuit held that the district court did not abuse its discretion on any of these issues, App. 26a. Applicants in their complaint expressly "reserve[d] the right following consultation with counsel" to object to any of the alternatives in the complaint, including the firing squad, ROA.Vol.I 210-12—meaning that they do not take a position on whether any alternatives are constitutional, *contra Bucklew*, 139 S. Ct. at 1126. In their opposition to summary judgment, Applicants indicated they may plan to challenge any alternatives "another day." ROA.Vol.V 114. But as the district court held, "method-of-execution litigation is not an iterative process." ROA.Vol.V 1237. And in discovery, they expressly declined to "alleg[e] an alternative method of execution." ROA.Vol.III 1859. Then, after three refusals, the district court went above and beyond to seek responses to avoid judgment against Applicants, and they again "respectfully decline[d] to identify an alternative execution method" or otherwise "[s]uggest[] a method." ROA.Vol.V 737,

1203. The district court correctly rejected these reservations as "wholly untenable" under the Eighth Amendment standard. ROA.Vol.V 1237.[7]

Applicants contend that they need not actually identify an alternative they concede can be constitutionally used to execute them. Appl. 14-16. But the burden of each Eighth Amendment plaintiff is to show alternatives with "constitutionally permissible" degrees of pain in order to challenge the existing procedure as involving an impermissible degree of pain. *Bucklew,* 139 S. Ct. at 1126; *see also Brooks v. Warden*, 810 F.3d 812, 822 (11th Cir. 2016). Applicants cannot "play[] hide the ball" with their burden of proving an alternative. *In re Ohio Execution Protocol Litig.*, 906 F. Supp. 2d 759, 772-73 (S.D. Ohio 2012).

The *Baze/Glossip* alternative requirement is not solely so that courts can engage in some theoretical comparison exercise, *contra* Appl. 15, 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*, 553 U.S. at 51. It ensures Applicants are "more interested in avoiding unnecessary pain than

[7] To the extent counsel for Applicants has identified alternatives, in contrast with the sworn Complaint and discovery responses, and made only after losing on summary judgment and after reconsideration was denied, this cannot be enough to warrant a preliminary injunction. Such gamesmanship "responsive to the exigencies of the moment" cannot warrant a stay of execution. Doc. 537, 10/25/21 Tr. 148. Any "change of position" on alternative "came too late." ROA.Vol.VII 295. "[P]ermitting Appellants to obtain a stay here, on their shifting form of compliance with the Supreme Court's requirements, risks rewarding Appellants for playing delay games with the court." *Jones v. Crow*, No. 21-6139, Order at 9 n.1 (10th Cir. Oct. 27, 2021) (Tymkovich, C.J., dissenting).

in delaying [their] execution." *Bucklew*, 139 S. Ct. at 1128-29. As Chief Judge Tymkovich stated, Applicants' tactic 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. *See Jones v. Crow*, No. 21-6139, Order at 10-11 (10th Cir. Oct. 27, 2021) (Tymkovich, C.J., dissenting) (citing *Bucklew*, 139 S. Ct. at 1115, 1126 and *Baze*, 553 U.S. at 51-52). This court is not bound "to accept pleading games" by Applicants meant to circumvent Supreme Court precedent. *Id.* at 11; *see also Jones*, 2021 WL 5277462 at *6 n.11. All this leads to a third rationale of the alternative requirement: Applicants' argument that they can avoid pleading an alternative they contend can be constitutionally used in their execution impermissibly seeks to challenge "the death penalty itself." *Glossip*, 576 U.S. at 879-80.[8]

Even assuming Applicants could overcome this "dispositive shortcoming," *Bucklew*, 139 S. Ct. at 1121, their proffered testimony on the firing squad is not sufficient to show they are likely to succeed on *Glossip*'s second prong. The firing squad is authorized by Oklahoma statutes only if lethal injection and two other

[8] While the Tenth Circuit previously stayed prior executions on the belief that plaintiffs like Applicants were likely to succeed in challenging the district court's summary judgment ruling regarding *Glossip*'s second prong, that stay was vacated by the Supreme Court. *Crow v. Jones*, 142 S. Ct. 417 (2021).

methods of execution are held unconstitutional or are unavailable. OKLA. STAT. tit. 22, § 1014. As Applicants admit, their expert, Dr. Williams testified only that the firing squad "may" significantly reduce the risk of severe pain. Appl. 14. He claims that the firing squad is painless because bullets will "stun" the nerves and provide "a prolonged period of local anesthesia." 1/10/21 Tr. 67, 71, 93. But far from Williams' testimony being "unrebutted," Appl. 2, the district court recognized that Respondents' "credible expert[]"disagreed with Dr. Williams. App. 18a. Dr. Yen described the pain of being shot in the chest, how that pain is greater than that of an execution with the anesthetic midazolam, and why he disagreed with Dr. Williams' theory of a painless firing squad: "I'm an anesthesiologist, I've anesthetized a lot of people, I've never used a bullet." 1/10/21 Tr. 254-57; *see also* ROA.Vol.VII 147-48 (Dr. Antognini), 193 (Dr. Yen). In the end, none of Applicants' legal arguments or factual contentions demonstrate they are likely to succeed on *Glossip*'s second prong.

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

Applicants contend that a stay is warranted to ensure further litigation will not be mooted, Appl. 16, but that has never been the standard for method-of-execution challenges. With respect to executions, a stay "is not available as a matter of right," *Hill*, 547 U.S. at 584, but instead "an extraordinary and drastic remedy," *Warner*, 776 F.3d at 727-28 & n.5 (citation and internal marks omitted). 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. Thus, in Oklahoma's litigation alone, this Court denied even a short-term stay of execution for Charles Warner, only to then grant certiorari, *see Warner v. Gross*, 135 S. Ct. 824 (2015), it vacated the Tenth Circuit's stay of the execution of John Grant, 142 S. Ct. 417, and it denied a stay of Bigler Stouffer's execution, No. 21A209. Other than their flawed mootness arguments, Applicants allege no other irreparable harm.

Meanwhile, the State, the family members of the Applicants' victims, and the public have an important, protectable interest in the timely execution of the sentence imposed by the jury. *Bucklew*, 139 S. Ct. at 1133-34. It has been twenty years since Donald Grant murdered Brenda McElyea and Suzette Smith 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. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584.

Applicants' arguments on the public interest dovetail with their merits arguments and their arguments that every execution should be stayed so long as there is pending litigation, Appl. 17-18, both of which are wrong for the reasons stated above. And in contrast to Applicants' undue delay in seeking a stay from the Tenth

Circuit—failing to do so for six days until that court *sua sponte* imposed a deadline—Respondents' inability to perform executions for several years was primarily because the lethal injection drugs were unavailable, not because of a delay in developing a protocol. *See supra* 2.

For all these reasons, the balance of equities weighs against Applicants' request for a stay. And it is particularly inequitable to grant a stay—putting the family members of Applicants' victims through yet another postponement—for claims that have no merit.

CONCLUSION

This Court should deny the motion for stays of execution.

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