Nos. 25-6317; 25A669

In the Supreme Court of the United States

HAROLD WAYNE NICHOLS,
PETITIONER

v.

JONATHAN SKRMETTI, ET AL.,
RESPONDENTS

ON APPLICATION FOR STAY OF EXECUTION AND ON
PETITION FOR WRIT OF CERTIORARI PENDING APPEAL
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did Tennessee's return to a single-drug pentobarbital lethal injection protocol result in a substantial change that resets the statute of limitations for petitioner's method-of-execution challenge?

2. Did the district court correctly determine that petitioner's complaint failed to state an equal-protection claim under Federal Rule of Civil Procedure 12(b)(6)?

3. Does the Eighth Amendment prohibit Tennessee's one-drug protocol?

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INTRODUCTION

In 1988, Harold Wayne Nichols broke into twenty-year-old Karen Pulley's home, brutally raped her, and then bludgeoned her to death. He admitted it, pleading guilty to his horrific crimes. At the time of his guilty plea, Nichols already stood convicted for the rape of four other women. As the Tennessee Supreme Court put it, Nichols "is undoubtedly 'among the worst of the bad.'" *State v. Nichols*, 877 S.W.2d 722, 739 (Tenn. 1994).

Now, after nearly thirty-five years of litigation, Nichols asks this Court to further delay his execution. He presents a trio of meritless arguments: (1) Equal Protection requires identical treatment of differently situated inmates; (2) an Eighth Amendment challenge to a lethal injection drug the State first used more than a decade ago is timely; and (3) the use of pentobarbital—a "mainstay" in executions—violates the Eighth Amendment. None of these theories have merit or raise any certworthy issue warranting a stay. The State's "strong interest" in finality and the victim's family's right to closure demand a stop to Nichols's "abusive delay" tactics through "last-minute attempts to manipulate the judicial process." *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992).

"Last-minute stays should be the extreme exception, not the norm." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). This case is not the exception.

STATEMENT

A. Legal Background

1. The U.S. Constitution permits capital punishment.

The Eighth Amendment to the U.S. Constitution "allows capital punishment." *Bucklew*, 587 U.S. at 129. That approval reflects the death penalty's status as an "accepted punishment at the time of the adoption of the Constitution and the Bill of Rights." *Glossip v. Gross*, 576 U.S. 863, 867-68 (2015).

"[B]ecause it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out." *Id.* at 869 (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality op.)). That "recognition" has "animated" this Court's interpretation of the cruel-and-unusual punishment prohibition. *Id.* A few general principles from the precedents are particularly relevant here.

To begin, "the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, is not guaranteed to many people, including most victims of capital crimes." *Bucklew*, 587 U.S. at 132-33. After all, "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." *Baze*, 553 U.S. at 47. If the Eighth Amendment "demand[ed] the elimination of essentially all risk of pain," that "would effectively outlaw the death penalty altogether." *Glossip*, 576 U.S. at 869. So the mere fact that "an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively

intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)).

Instead, the cruel-and-unusual-punishment provision prohibits only "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Bucklew*, 587 U.S. at 133 (citation omitted). That emphasis on the State's "malevolence" reflects Founding-era history. *Baze*, 553 U.S. at 50. As ratified, the cruel-and-unusual-punishment provision draws from the English Bill of Rights "to ensure that the new Nation would never resort" to "certain barbaric punishments" previously practiced. *City of Grants Pass v. Johnson*, 603 U.S. 520, 542 (2024). Among them: "disemboweling, quartering, public dissection, and burning alive," *id*., as well as "the use of the rack or the stake," "breaking on the wheel, flaying alive, rending asunder with horses, maiming, mutilating, and scourging to death," *Bucklew*, 587 U.S. at 131 (cleaned up). Uniting these off-limits methods is their "unnecessary cruelty"—meaning the method chosen "savored of torture" and reflected the executioners' being "pleased with hurting others." *Id*. at 130-31.

To help draw that line, this Courts looks to the modes of execution the Eighth Amendment was understood to forbid with those it was understood to permit. Hanging was the predominant method of execution at the Founding and for decades thereafter. *Glossip*, 576 U.S. at 867. "Many and perhaps most hangings were evidently painful for the condemned person because they caused death slowly." *Bucklew*, 587 U.S. at 132 (quoting S. Banner, *The Death Penalty: An American*

History 48 (2002) (Banner)). Yet hanging's use was "virtually never questioned" under the Eighth Amendment. *Id.* (quoting Banner, *supra*, at 48). As this Court observed, hanging's lawful status presumably reflects that it was not "*intended* to be painful"; instead, the risk of pain involved was considered "unfortunate but inevitable." *Id.* at 131 (emphasis added) (quoting Banner, *supra*, at 170). The court has employed similar reasoning to uphold death by firing squad, *Wilkerson v. Utah*, 99 U.S. 130, 134-135 (1879), the electric chair, *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464 (1947) (plurality opinion) (upholding electrocution of prisoner despite initial failed attempt), and lethal injection, *Bucklew*, 587 U.S. 119; *Glossip*, 576 U.S. 863; *Baze*, 553 U.S. 35.

To sum up: The U.S. Constitution does not "demand the avoidance of all risk of pain in carrying out executions," meaning a method is permissible even if pain occurs by "accident or as an inescapable consequence of death." *Bucklew*, 587 U.S. at 130, 134. Instead, punishments are constitutionally suspect only when the method "'superadds' pain well beyond what's needed to effectuate a death sentence." *Id.* at 137. Any other rule would impermissibly coopt "courts to serve as boards of inquiry charged with determining best practices for executions," "with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* at 134 (citation omitted); *Baze*, 553 U.S. at 101.

2. Method-of-execution claims face an "exceedingly high bar" to prevail.

This Court "has yet to hold that a State's method of execution qualifies as cruel and unusual." *Barr v. Lee*, 591 U.S. 979, 980 (2020) (per curiam) (quoting *Bucklew*,

587 U.S. at 133). "[U]nderstandably so." *Bucklew*, 587 U.S. at 133. Tennessee and other States, working "through the initiative of the people and their representatives," have historically endeavored to adopt "less painful modes of execution." *Id.*

Courts facing method-of-execution claims like Nichols's apply a two-prong test. *See Bucklew*, 587 U.S. at 133-34. Challengers face an "exceedingly high bar" to relief. *Lee*, 591 U.S. at 980. The demanding two-step standard reflects that "the Constitution affords a measure of deference to a State's choice of execution procedures." *Bucklew*, 587 U.S. at 134. It also helps prevent "method-of-execution claims from becoming a backdoor means to abolish the death penalty." *Id.* at 137 (cleaned up).

First, an inmate must establish that a given method "presents a risk that is *sure or very likely* to cause serious illness and needless suffering and give rise to sufficiently imminent dangers." *Glossip*, 576 U.S. at 877 (cleaned up). That means a "wanton exposure to objectively intolerable risk" and "not simply the possibility of pain." *Baze*, 553 U.S. at 61-62 (cleaned up).

Second, the inmate must "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 587 U.S. at 134. "A minor reduction in risk is insufficient; the difference must be clear and considerable." *Id.* at 143. Further, a challenger must establish that the State "could carry . . . out" the alternative method "'relatively easily and reasonably quickly.'" *Id.* at 141 (citation omitted).

3. Tennessee uses a "mainstay" method of execution.

Tennessee adopted lethal injection as a method of execution in 1998, Tenn. Code Ann. § 40-23-114 (Supp. 1998), because it was widely touted as a "more humane" alternative to "electrocution." *State v. Adkins*, 725 S.W.2d 660, 664 (Tenn. 1987); *see State v. Suttles*, 30 S.W.3d 252, 264 (Tenn. 2000) (citing 1998 Tenn. Pub. Acts ch. 982; 2000 Tenn. Pub. Acts ch. 2000). Two years later, it became the State's default method of execution and has remained so ever since. Tenn. Code Ann. § 40-23-114 (Supp. 2000); *State v. Morris*, 24 S.W.3d 788, 797 (Tenn. 2000).

In 2013, Tennessee adopted a lethal injection protocol that caused sedation and death through the injection of pentobarbital. *West v. Schofield*, 519 S.W.3d 550, 552 (Tenn. 2017). The State later adopted a three-drug execution protocol, *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (Tenn. 2018), but returned to a single-drug pentobarbital protocol in January 2025, D. Ct. Dkt. 28, Ex.1 at 347.[1]

B. Factual Background

In 1988, Nichols broke into the home of twenty-year-old Karen Pulley. *Nichols*, 877 S.W.2d at 726. He grabbed a two-by-four and headed upstairs to Pulley's bedroom. *Id.* There, Nichols "tore her undergarments from her and violently raped her." *Id.* While raping her, Nichols struck Pulley on the head twice with the two-by-four. *Id.* Pulley continued to struggle with Nichols after he raped her, so he repeatedly used the two-by-four to strike her head "with great force." *Id.* Nichols left

[1] Citations to "D. Ct. Dkt. #" refer to the district court's docket, No. 3:25-cv-442 (M.D. Tenn.). Citations to "CA6 Dkt. #" refer to the appellate court's docket, 25-6095 (6th Cir.). Pincites refer to the "PageID" numbers in the ECF file stamps.

Pulley for dead, and she laid in a pool of her own blood until her roommate discovered her the next morning. *Id.* Pulley died the next day. *Id.*

Evidence later showed that Nichols roamed Chattanooga at night searching for vulnerable women. *Id.* By the time of his trial for Pulley's murder, Nichols had been charged with the aggravated rape or attempted rape of twelve women besides Pulley, *id.* at 726 n.2, and he was convicted for the aggravated rape of four other women, *id.* at 726.

C. Procedural Background

Nichols pleaded guilty to Pulley's rape and murder. *Id.* at 725. During sentencing, he testified that he had a "strange energized feeling" he could not resist and that he would have continued to violently attack women if he had not been arrested. *Id.* at 727. The jury deliberated only two hours before sentencing Nichols to death. *Id.*

1. Nichols's death sentence withstands exhaustive review.

The Tennessee Supreme Court affirmed Nichols's death sentence on direct appeal in 1994. *Id.* at 740. For decades after, Nichols attempted to overturn his death sentence in state and federal courts. He unsuccessfully sought relief under the Tennessee Post-Conviction Procedure Act. *Nichols v. State*, 90 S.W.3d 576, 608 (Tenn. 2002). He then failed to obtain federal habeas corpus relief. *Nichols v. Heidle*, 725 F.3d 516, 559 (6th Cir. 2013), *cert. denied*, 574 U.S. 1025 (2014).

2. Nichols waits twelve years to attack Tennessee's mainstay execution method, and his suit is dismissed.

The Tennessee Supreme Court set Nichols's execution for 2020, but he

obtained a reprieve during the COVID-19 pandemic. *State v. Nichols*, No. E1998-00562-SC-R11-PD (Tenn. Jul. 17, 2020). On March 3, 2025, the Tennessee Supreme Court reset Nichols's execution for December 11, 2025. *Nichols*, No. E1998-00562-SC-R11-PD (Tenn. Mar. 3, 2020).

Six weeks later, Nichols filed his first-ever method-of-execution suit challenging Tennessee's pentobarbital execution protocol. Pet. App., Compl., 1-58. The State moved to dismiss his suit. Pet. App., Mot. Dismiss, 1-35. Nichols opposed dismissal, in part. But for seven months, that response was Nichols's only substantive filing. He never requested a case management conference, never made initial disclosures, never conducted discovery, and never moved for injunctive relief. A mere month before his execution, Nichols finally sought a stay of execution. D. Ct. Dkt. 47. The district court pretermitted that motion by dismissing the case on November 26, 2025. Pet. App., D. Ct. Ord., 1-59.

3. Nichols appeals, and the Sixth Circuit denies a stay or injunction pending appeal.

Nichols appealed on December 1, 2025, but waited a full week to seek a stay of execution and an injunction from the Sixth Circuit. CA6 Dkt. 10, 14. He pressed three claims: (1) the Equal Protection Clause requires the State to agree to not execute Nichols during the course of his method-of-execution suit because the State agreed not to execute two other death-row inmates during the course of their method-of-execution suit challenging a prior execution protocol; (2) the use of pentobarbital in Tennessee's execution protocol violates the Eighth Amendment; and (3) the use of pentobarbital during Nichols's execution will be uniquely painful for him in violation

of the Eighth Amendment. CA6 Dkt. 10, 14.

The Sixth Circuit denied Nichols's motions, finding that none of his three arguments were likely to succeed. Pet. App., CA6 Ord., 2. *First*, the court found that Nichols "likely has not raised a cognizable equal protection claim." *Id.* at 1. "Nichols fail[ed] to allege that the State lacks a rational basis for th[e] difference of treatment" between him and the other death-row inmates challenging Tennessee's method of execution and failed to "grapple with the ways in which he is differently situated" from those other inmates. *Id.* And, regardless, "the State has no reason to treat [Nichols's] challenge to [Tennessee's] new protocol in the same way it treated challenges to the prior protocol." *Id*. at 2. *Second*, the Court found that Nichols's "facial method-of-execution challenge under the Eighth (and Fourteenth) Amendments" is both "untimely" and "exceedingly difficult to bring," especially "in view of the Supreme Court's rejection of similar claims." *Id*. *Third*, the Court rejected Nichols's as-applied Eighth Amendment challenge because he failed to allege that "there exists 'a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.'" *Id*. at 2 (quoting *Bucklew*, 587 U.S. at 134).

The Sixth Circuit did not "dismiss[] . . . Nichols' appeal" or issue a "final appealable order," as Nichols contends. Pet. at 1. Nichols's appeal from the dismissal of his suit remains pending in the Sixth Circuit.

REASONS FOR DENYING A STAY AND THE WRIT

This Court grants a writ of certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. And this Court grants a stay only upon a showing that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," and, in a close case, that the equities favor the granting of relief. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Neither standard is satisfied here.

I. Nichols's Petition Presents No Certworthy Issue.

Nichols does not—and cannot—establish that this "case is of such imperative public importance" that certiorari before judgment is warranted. Nichols's petition asks this Court to weigh in on the timeliness and sufficiency of his particular complaint; specifically, whether his facial method-of-execution claim is timely, Pet. at 5-9; whether his complaint stated an as-applied equal-protection claim, *id.* at 9-12; and whether his complaint stated an as-applied method-of-execution claim, *id.* at 12-21. This type of request for fact-bound error correction falls far short of the requisite standard for certiorari before judgment.

Indeed, Nichols does not even tee up a "compelling reason[]" for review under ordinary considerations. Sup. Ct. R. 10. He points to no decision "in conflict with the decision of another United States court of appeals" or "a state court of last resort,"

nor does he identify a decision on an "important question of federal law" that needs this Court's resolution. *Id.* With respect to his equal protection and as-applied Eighth Amendment claims, Nichols's petition overtly requests this Court's review only for error correction. *See* Pet. at 9-21 (arguing that the district court misapplied Rule 12(b)(6) and this Court's precedents). And although Nichols gestures at a difference in approach between the Sixth and Eleventh Circuits regarding the accrual date for the statute of limitations for method-of-execution claims, *id.* at 8-9, Nichols fails to identify a clean split and ignores that his facial method-of-execution claim is still untimely under the cited Eleventh Circuit precedent. *Pardo v. Palmer*, 500 F.App'x 901, 904 (11th Cir. 2012) (specifically rejecting Nichols's argument that a change in chemicals used in a State's execution protocol constitutes a substantial change causing a new claim to accrue).

Stripped of its hyperbole, Nichols's petition requests that this Court grant review to correct the district court's application of the Federal Rules of Civil Procedure and governing precedent. Even putting aside that there are no errors to correct, *infra* Part II, "[e]rror correction is outside the mainstream of the Court's functions and not among the 'compelling reasons'" to grant review in the ordinary course, let alone before judgment. *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., joined by Scalia, J., concurring in the judgment) (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), 352 (10th ed. 2013)) (cleaned up). Certiorari is unwarranted.

II. Nichols's Claims Lack Merit.

Certiorari or a stay are likewise unwarranted because each of Nichols's arguments fails on the merits.

A. The Equal Protection Clause does not require Tennessee to agree to stay Nichols's execution.

Nichols argues that it violates equal protection to execute him while two other death row inmates, Terry King and Donald Middlebrooks, enjoy stays. Pet. at 9-12; Stay Mot. at 9-11. And he specifically faults the district court for its application of Fed. R. Civ. P. 12(b)(6). The Sixth Circuit correctly found that Nichols failed to state an equal-protection claim. Pet. App., CA6 Ord., 1-2.

King and Middlebrooks filed lawsuits challenging Tennessee's then-applicable execution protocol in 2018 and 2019. *King v. Strada*, No. 3:18-cv-01234 (M.D. Tenn.); *Middlebrooks v. Strada*, No. 3:19-cv-01139 (M.D. Tenn.). Their cases were consolidated and, after Tennessee's Governor paused executions through 2022, the State moved to stay the suits. The parties agreed that King and Middlebrooks would not be executed during the life of those suits. Nichols asserts that the Equal Protection Clause entitles him to the same agreement.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It prohibits governmental discrimination that "burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005).

Nichols proceeds under the last theory as a class of one. To succeed on that theory, Nichols had to plead facts showing "that []he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Nichols failed to do so. *First*, Tennessee has a rational basis for not agreeing to stay his execution, and Nichols failed to plead otherwise. *Second*, Nichols is not similarly situated to King and Middlebrooks. *Third*, Nichols's class-of-one theory is not viable in the context of discretionary litigation decisions.

1. Nichols did not even plead that the State lacks a rational basis for the different treatment.

Nichols failed to plead facts showing "that []he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook*, 528 U.S. at 564. As the Sixth Circuit explained, "Nichols's complaint fails to allege that the State lacks a rational basis for that difference of treatment." Pet. App., CA6 Ord., 1. "His complaint indeed does not mention the phrase 'rational basis' once." *Id.*

And in any event, it is easy to "conceiv[e]," *Armour v. Indianapolis*, 566 U.S. 673, 681 (2012), the State's rationale for entering agreements with King and Middlebrooks while declining the same to Nichols. When the State entered the prior agreements, it did not know (1) the duration of the Governor's pause on executions, (2) what would result from the independent investigation into the State's executions conducted during the pause, (3) whether the execution protocol would be amended after the pause, (4) what changes would be made, or (5) what legal challenges an

amended protocol might face. Facing the likelihood of continued litigation and potentially intrusive discovery into a protocol already under heavy scrutiny and possibly soon to change, there was plenty of reason for the State to enter those agreements to avoid that burden.

Nichols does not argue otherwise. Instead, in arguing that the district court erred in dismissing his claim, Nichols asks this Court to return to a "notice pleading" standard. He protests that the district court should not have dismissed his claim because it was evident from his complaint that he sought to press a class-of-one equal-protection claim. Pet. at 10. But that is not enough to satisfy Rule 12(b)(6). As this Court put to rest years ago, to survive a motion to dismiss, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, that required Nichols to plead that the State lacked a rational basis to treat him differently than King and Middlebrooks. Nichols did not do so.

A "distinction does not violate the Equal Protection Clause as long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification, and the burden is on the one attacking the [classification] to negative every conceivable basis which might support it." *Id.* at 674 (cleaned up). Nichols failed to meet that burden even at the pleading stage. The district court correctly dismissed his claim.

2. Nichols is not similarly situated to the other two inmates.

Nichols's equal-protection claim also fails because, as the Sixth Circuit found,

he did not show he is "similarly situated" to King and Middlebrooks. *Willowbrook*, 528 U.S. at 564. That is, he failed to show he and his comparators are "alike in all relevant respects." *Reform Am. v. Detroit*, 37 F.4th 1138, 1152 (6th Cir. 2022).

To be sure, Nichols, King, and Middlebrooks are all Tennessee death-row inmates with pending method-of-execution suits. But the similarities stop there. As the Sixth Circuit explained, King and Middlebrooks challenged a different, earlier protocol than Nichols did. Pet. App., CA6 Ord., 2. Certainly, as the Sixth Circuit put it, "the State has no reason to treat Mr. Nichols' challenge to the new protocol in the same way it treated [King's and Middlebrook's] challenges to the prior protocol." *Id.*

Nichols's complaint did not "grapple with the ways in which he is differently situated from" King and Middlebrooks, Pet. App., CA6 Ord., 1, and his petition and his stay application do not do so either. For this reason too, Nichols's equal-protection claim lacks merit.

3. Nichols's class-of-one theory is not cognizable for discretionary litigation decisions.

Nichols's equal-protection claim fails for a third reason as well: His class-of-one theory is no basis to attack the State's discretionary litigation decisions. There are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 603 (2008). In those contexts, "treating like individuals differently is an accepted consequence of the discretion granted." *Id.* For example, this Court applies a "presumption of regularity" to selective prosecution claims in order to protect State attorneys' "broad discretion to

enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (cleaned up).

Tennessee's litigation decisions warrant the same protection. Litigation strategy "rest[s] on a wide array of factors that are difficult to articulate and quantify." *Engquist*, 553 U.S. at 604. "Allowing a challenge based on" Tennessee's decisions in litigation against a particular person "would undermine the very discretion that such state officials are entrusted to exercise." *Id*. at 603. Accordingly, Nichols did not just fail to plead a class-of-one claim—his claim is not cognizable at all.

B. Nichols's facial Eighth Amendment claim is untimely.

Nichols argues that it violates the Eighth Amendment to execute anyone with pentobarbital. As both courts below correctly found, this challenge is untimely. Pet. App., D. Ct. Ord., 24-34; Pet. App., CA6 Ord., 1.

"[A]ll §1983 suits [including method-of-execution challenges] must be brought within a State's statute of limitations for personal-injury actions." *Nance v. Ward*, 597 U.S. 159, 174 (2022). In Tennessee, that limitations period is one year and begins to run on the latter of "the conclusion of direct review in the state court" or "when a particular method of execution is adopted by the state." *Irick v. Ray*, 628 F.3d 787, 789 (6th Cir. 2010).

The clock expired on Nichols's facial challenge long ago. He completed direct review in 1995. *Nichols v. Tennessee*, 513 U.S. 1114 (1995). Tennessee made lethal injection his default method of execution in 2000. Tenn. Code Ann. § 40-23-114 (Supp.

2000). And Tennessee first began using pentobarbital in executions in 2013. *See West*, 519 S.W.3d at 552. At best, Nichols's claim is over a decade too late.

Nichols does not dispute that he could have challenged pentobarbital in 2013. He instead counters that the clock reset when Tennessee announced its one-drug pentobarbital protocol in December 2024. Pet. at 9. But, as the Sixth Circuit correctly explained, the State's switch from a three-drug protocol back to pentobarbital did "not give [Nichols] a new right to challenge the same procedure he previously opted not to challenge." Pet. App., CA6 Ord., 2.

If Nichols feared the pain he alleges that lethal injection generally and pentobarbital specifically will induce, he could have challenged those execution methods back in 2013, when nearly three dozen other inmates did. *See West*, 519 S.W.3d at 552 n.1. The district court and Sixth Circuit both correctly decided that the time for Nichols's facial challenge has long since passed.

C. The use of pentobarbital is not cruel and unusual.

Nichols also failed to establish an Eighth Amendment claim—either facially or as applied—on the merits. Pentobarbital does not "present[] a risk that is sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers," *Glossip*, 576 U.S. at 877 (cleaned up), and Nichols neither pleaded nor has shown a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason," *Bucklew*, 587 U.S. at 134.

1. Pentobarbital is not sure or very likely to cause needless suffering.

As used in executions, pentobarbital causes "a quick and complete loss of consciousness" and then works to "repress the brain's respiratory impulses, causing the body to become oxygen deficient and resulting in the cessation of cardiac activity." *West*, 519 S.W.3d at 556-57; *see id.* at 560-61 (quoting expert testimony that "in the execution context," pentobarbital "will render the inmate unconscious within seconds and, for an average human being will result in death within minutes"). Given its efficacy, the "single-dose pentobarbital" protocol has "been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal-injection protocols of other jurisdictions." *Lee*, 591 U.S. at 980. Indeed, this Court has recognized that "pentobarbital . . . can reliably induce and maintain a comalike state that renders a person insensate to pain." *Glossip*, 576 U.S. at 870-71.

For that reason, pentobarbital "has become a mainstay of state executions." *Lee*, 591 U.S. at 980. As of 2020, it had "been used to carry out over 100 executions, without incident." *Id.* And its use has been upheld by this Court, federal circuit courts, and several state courts of last resort. *See, e.g.*, *Bucklew*, 587 U.S. at 119; *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 21-5004, 2021 WL 164918, at *4 (D.C. Cir. Jan. 13, 2021); *Whitaker v. Collier*, 862 F.3d 490, 497-99 (5th Cir. 2017); *Jones v. Comm'r*, 811 F.3d 1288, 1296 (11th Cir. 2016); *Zink v. Lombardi*, 783 F.3d 1089, 1098-1101 (8th Cir. 2015); *Towery v. Brewer*, 672 F.3d 650, 659 (9th Cir. 2012); *Jackson v. Danberg*, 656 F.3d 157, 164 (3rd Cir. 2011); *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010); *West*, 519 S.W.3d at 564-65; *State ex rel. Johnson v. Blair*,

628 S.W.3d 375, 388-90 (Mo. 2021) (en banc); *Owens v. Hill*, 758 S.E.2d 794, 802-03 (Ga. 2014); *Valle v. Florida*, 70 So.3d 530, 541 (Fla. 2011).

Nichols nevertheless persists in the tired claim that pentobarbital presents a risk of pulmonary edema. Pet. at 4, 13, 19. But "pulmonary edema" "looks a lot like the risks of pain associated with hanging, and indeed may present fewer risks in the typical lethal-injection case." *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 289-90 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 7 (2020). So any pain attending pulmonary edema is not "severe" enough to be "constitutionally cognizable." *Id*. at 290.

Nichols argues otherwise by pointing to his proffered expert testimony, Stay App. at 12, but this Court has already found a last-minute stay unwarranted based on the same proof. In *Lee*, inmates with impending executions sought injunctive relief while they litigated Eighth Amendment challenges to the federal government's single-drug pentobarbital protocol. *In re Fed. Bureau of Prisons Execution Protocol Cases*, 471 F.Supp.3d 209 (D.D.C. 2020). The district court considered proof from the same two experts involved in this case: Dr. Van Norman and Dr. Antognini. D. Ct. Dkt. 52, 706-09. The district court accredited Dr. Van Norman's opinion and granted an injunction based on the inmates' likelihood of success on the merits of their claim that the federal protocol would cause severe pain. *Id*. at 219, 225. But this Court vacated the injunction, despite Dr. Van Norman's declarations that pentobarbital causes "flash pulmonary edema." *Lee*, 591 U.S. at 981. The Court noted that the government "ha[d] produced competing expert testimony of [their] own, indicating

that any pulmonary edema occurs only after the prisoner has died or been rendered fully insensate." *Id*. at 981. The Court therefore concluded the inmates had "not made the showing required to justify last-minute intervention by a Federal Court." *Id*.

The Court should reach the same conclusion again here. Like the inmates in *Lee*, Nichols provided only competing expert testimony. Whereas Dr. Van Norman attested to a risk of pulmonary edema while Nichols is conscious, the State's expert, Dr. Antognini, offered a contrary opinion. D. Ct. Dkt. 52, 706-09. Such "'competing expert testimony' on the factual issues that undergird [Nichols's] method-of-execution challenge," is insufficient to "'to justify last-minute intervention.'" *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 2021 WL 164918, at *4.

Moreover, since *Lee*, Dr. Van Norman's predictions regarding pentobarbital have been proven false. Just four months ago, she told Tennessee courts it was "extremely likely" and a "virtual medical certainty" that a defibrillator implanted in Byron Black would "deliver[] strong repeated shocks" that were "severely painful," "devastating," "traumatiz[ing]," and "horrible," "over and over" "for up to 30 minutes." D. Ct. Dkt. 52, 20. The Tennessee Supreme Court refused to let those dire predictions delay Black's execution, and this Court denied certiorari. *Black v. Strada*, No. M2025-01095-SC-RDO-CV (Tenn. July 31, 2025), *cert denied* __ S. Ct. __, 2025 WL 2204938 (Aug. 4, 2025). Then, on execution day, nothing happened—just as Tennessee's experts predicted. Evan Mealins, *Byron Black's defibrillator did not shock him during execution, attorney says*, The Tennessean,

https://tinyurl.com/mr2cpy6m (Aug. 8, 2025). There is now even less reason to credit Dr. Van Norman's prognostications about pentobarbital executions.

Nor do Nichols's demonstrably false and misleading contentions about Black's execution warrant a different result here. *First*, although media witnesses to Black's execution unanimously reported that he told his spiritual advisor he was in pain at 10:33, that comment came one minute *before* Black received a lethal dose of pentobarbital at 10:34. D. Ct. Dkt. 52, 708. The clock visible to media witnesses in the execution chamber is an atomic clock, just like the one the lethal injection recorder used to record the time of administration of pentobarbital, and they are aligned to within a second. *Id*. So when Black made his comment about pain, it could not have been about pentobarbital. *Second*, it is uncontroversial that a physician declared Black dead while some electrical activity—different than what Nichols claims is a "heartbeat"—still appeared on the electrocardiogram because circulatory activity (a pulse) can stop well before "ECG silence." *Id*. at 708-09. Moreover, a dose of 5 grams of pentobarbital has never failed to kill an inmate. *Id*. at 709.

2. Nichols did not plead a feasible, readily implemented alternative execution method.

Nichols's facial and as-applied challenges to pentobarbital likewise fail because he never identified "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 587 U.S. at 134. Nichols pleaded that, instead of pentobarbital, Tennessee should use a firing squad or have someone shoot a single bullet in the back of his head. For

three reasons, the district court and Sixth Circuit both correctly determined Nichols's allegations were insufficient. Pet. App., D. Ct. Ord., 41-47; Pet. App., CA6 Ord., 2.

a. Nichols failed to establish that either of his proposed alternatives are feasible or readily implemented. An inmate's alternative must be "not just theoretically 'feasible' but also 'readily implemented.'" *Bucklew*, 587 U.S. at 141. That means the State must be able to "carry it out relatively easily and reasonably quickly." *Id.* An inmate need not choose a method "presently authorized by a particular State's law." *Id.* at 140. But "existing state law might be relevant." *Id.*

Under this framework, the district court could not "find it plausible that either method . . . is feasible and readily implemented." Pet. App., D. Ct. Ord., 41. A firing squad and a single bullet to the head are not execution methods recognized by Tennessee law. *See* Tenn. Code Ann. § 40-23-114. While that alone is not dispositive, it factors into whether Tennessee could carry out those methods "relatively easily and reasonably quickly" because adoption would require "hastily amend[ing]" Tennessee's capital punishment statutes. Pet. App., D. Ct. Ord., 41.

Moreover, neither protocol has ever been used in Tennessee, and no State has ever adopted Nichols's single bullet protocol. While Nichols proposed protocols and alleged that Tennessee has the physical space (a firing range or a reconstruction of the lethal injection chamber), Pet. App., Compl., 25-26, that is only part of implementation. Pet. App., D. Ct. Ord., 42. The district court could not "assume" from Nichols's threadbare allegation—that TDOC possesses "or could readily obtain, the firearms, ammunition, personnel, and training necessary" for those alternatives,

Pet. App., Compl., 26-27—that TDOC actually could "find enough qualified persons" and train them to carry out Nichols's alternatives. Pet. App., D. Ct. Ord., 42. Nichols did "not plausibly allege that these methods would be 'feasible and readily implemented.'" Pet. App., CA6 Ord., 2 (quoting *Bucklew*, 587 U.S. at 142).

b. Nichols also failed to show that either proposed alternative will "significantly reduce a substantial risk of severe pain." *Bucklew*, 587 U.S. at 143. As for a firing squad, Nichols pleaded only that it would "avoid the unnecessary and severe pain and suffering caused by" pentobarbital and "significantly reduce[] a substantial risk of severe pain when compared" to Tennessee's protocol. Pet. App., Compl., 27. But as the Sixth Circuit emphasized, Nichols also "acknowledges that human error can result in immensely painful deaths by firing squad." Pet. App., CA6 Ord., 2.

Moreover, Nichols is not painting on a blank canvas for either proposal. This Court has already suggested that lethal injection is a "more humane" method of execution than firing squad, though neither pose a constitutional problem. *Lee*, 591 U.S. at 980; *Bucklew*, 587 U.S. at 134. Against that backdrop, Nichols failed to plausibly allege that either of his two alternative proposals significantly reduce a substantial risk of severe pain as compared to pentobarbital.

c. Tennessee also has "many legitimate reasons . . . not to adopt" Nichols's proposed alternatives. *Bucklew*, 587 U.S. at 134, 142. That Nichols's single-bullet proposal has not been adopted by any other State is alone enough to reject it since Tennessee need not "be the first to experiment with a new method." *Id.* at 142.

And even adoption of a method by another State is not enough to force Tennessee's hand. An inmate must "point to a well-established scientific consensus" of pain reduction and show the "State refused to change its method in the face of such evidence." *Baze*, 553 U.S. at 67 (Alito, J., concurring). Only that type of refusal gives rise to the sort of "deliberate indifference" required to make out an Eighth Amendment claim. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Nichols shows no such thing here.

III. Equity Weighs Heavily Against a Stay.

Nichols's claims are not certworthy and are meritless. Equity also weighs against a stay.

To start, Nichols's abusive, tactical delay is reason enough to deny a stay. "[T]he last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay." *Bucklew*, 587 U.S. at 150 (cleaned up). "[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584.

It is well known that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). "[I]t is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless." *Price v. Dunn*, 587 U.S. 999, 1008 (2019) (Thomas, J., concurring in denial of certiorari). And federal courts apply

"a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004).

That presumption should foreclose Nichols's request for a stay a mere three days before his execution. Tennessee adopted lethal injection in 2000 and pentobarbital in 2013—yet Nichols did not file his challenge until 2025. And even after belatedly suing this year, Nichols could have immediately requested a stay or injunction. Instead, he let his case languish for seven months, waiting until one month before his execution to seek a stay from the district court. And after the district court dismissed Nichols's case, he waited another week to ask the Sixth Circuit for relief—leaving the State only twenty-four hours to respond. Now, in the eleventh hour, Nichols brings his request to this Court in hopes to further delay justice. "The proper response to this maneuvering is to deny [Nichols's] meritless request[] expeditiously." *Price*, 587 U.S. at 1008.

The harm a stay would cause to Karen Pulley's family weighs heavily against a stay. The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (cleaned up). They also "have an important interest in the timely enforcement of a [death] sentence." *Bucklew*, 587 U.S. at 149 (cleaned up); *see* Tenn. Const. art. I, §35 (providing constitutional right to crime victims). "Only with an assurance of real finality can the State execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S.

at 556. "To unsettle these expectations is to inflict a profound injury." *Id*.

And that injury is very real for Karen's family. When Nichols received his first reprieve due to COVID, Karen's sister, Lisette Monroe, lamented: "Don't you understand that my grieving doesn't stop for COVID, my re-traumatization doesn't stop." Eric Egan, Murder Victim's Sister Will Fly to Tennessee to "Make Sure This Evil Man Dies," WKRN.com, Oct. 15, 2020, https://perma.cc/7LGD-2RZ9. "Monroe has long said, with each anniversary, memory and image of her sister, and her murder, the emotion, the freshness of the pain returns, more so as Nichols'[s] death sentence is delayed. 'It's like reliving the actual event, over and over, and over,' she said." *Id*.

Finally, the public interest further tips the balance against a stay. "Nearly [thirty-six] years after [Nichols's] capital sentence and [two reprieves] later, both the state and the public have an interest in finality which, if not deserving of respect yet, may never receive respect." *Workman v. Bell*, 484 F.3d 837, 842 (6th Cir. 2007).

The Court should deny a stay to avoid rewarding Nichols's abusive delay tactics, to prevent further trauma to Karen's family, and to protect Tennessee's grave sovereign interest in the execution of its exhaustively reviewed judgment.

CONCLUSION

The application for stay of execution and petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was emailed to petitioner's counsel, Luke Parker Ihnen, at Luke_Ihnen@fd.org, on December 9, 2025, and a paper copy will be sent by first class mail to Mr. Ihnen, at 800 S. Gay Street, Suite 2400, Knoxville, TN 37929, on December 10, 2025.

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