

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL BUCKLEW,)
)
) Petitioner,)
)
) v.) No. 17-8151
)
) ANNE L. PRECYTHE, DIRECTOR,)
)
) MISSOURI DEPARTMENT OF)
)
) CORRECTIONS, ET AL.,)
)
) Respondents.)

Pages: 1 through 70

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RUSSELL BUCKLEW,)
Petitioner,)
v.) No. 17-8151
ANNE L. PRECYTHE, DIRECTOR,)
MISSOURI DEPARTMENT OF)
CORRECTIONS, ET AL.,)
Respondents.)

Washington, D.C.

Tuesday, November 6, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

ROBERT HOCHMAN, ESQ., Chicago, Illinois; on behalf of the Petitioner.
D. JOHN SAUER, State Solicitor, Jefferson City, Missouri; on behalf of the Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-8151, Bucklew versus Precythe.

Mr. Hochman.

ORAL ARGUMENT OF ROBERT HOCHMAN

ON BEHALF OF THE PETITIONER

MR. HOCHMAN: Mr. Chief Justice, and may it please the Court:

Missouri intends to carry out Mr. Bucklew's lethal injection execution without informing medical members of the execution team of the well-documented and extremely uncommon medical condition that will very likely cause his execution to involve severe harm and suffering from the time they begin to gain venous access all the way through his eventual death.

JUSTICE SOTOMAYOR: Mr. Hochman, can you tell me the current condition of your client in light of Footnote 2 of your opening brief? And in particular but not exclusively, does he still have a trach in his throat? And if he does, doesn't that moot out certain of

1 your claims, particularly I thought much of the
2 prep work and dangers related to him choking on
3 his own blood. Doesn't the trach minimize that
4 now?

5 MR. HOCHMAN: Yes. So first, to
6 answer your question, as you know, we've --
7 we've requested leave to lodge the medical
8 records from the summer. I'm happy to answer.
9 It's obviously outside the record. I just want
10 to make that clear.

11 Right now, as far as I know, he still
12 has a trach in. There is no indication about
13 how long he's going to continue to have the
14 trach. The trach could be removed at any time
15 that medical people determine it's appropriate
16 to do so.

17 I don't think it can moot out the case
18 because without -- if -- if the trach is
19 removed, all of the problems return. As for
20 what would happen if the trach wasn't removed,
21 I think there would still be complications that
22 would need to be investigated. It's a
23 completely different set of circumstances.

24 It's certainly true the core --

25 JUSTICE SOTOMAYOR: So we may be -- we

1 may be issuing a decision on -- an advisory
2 decision because, if the trach stays, it's
3 totally different case than if it is removed.

4 MR. HOCHMAN: I don't think it's an
5 advisory decision, Your Honor. I think -- I
6 think the problem is you have a judgment right
7 now that says Missouri can go ahead and execute
8 Mr. Bucklew according to the protocol that they
9 have in place. And we don't -- at this point,
10 we cannot say he certainly is in imminent
11 danger if that protocol is used at -- yet there
12 is no pending execution date. If that protocol
13 is used in the future, I don't know whether the
14 bleeding problems complicate the trach for him.
15 That's just never been investigated.

16 And I also don't know if the trach's
17 even going to be there. And if the trach isn't
18 going to be there, Justice Sotomayor --

19 JUSTICE SOTOMAYOR: How long has he
20 had it now?

21 MR. HOCHMAN: It was put in in June.
22 Part of the reason he may --

23 JUSTICE SOTOMAYOR: Isn't it your job
24 to find out if it can be removed now?

25 MR. HOCHMAN: Well, it certainly can

1 be removed. The question is -- he -- he's got
2 a progressive condition that's, you know,
3 discussed in the record.

4 JUSTICE SOTOMAYOR: I -- I --

5 MR. HOCHMAN: And so --

6 JUSTICE SOTOMAYOR: -- I'm a little
7 bit upset that you would come in and lodge
8 medical records without having secured the
9 information of whether he's physically capable
10 of having the trach removed or not.

11 MR. HOCHMAN: So this is what we know
12 about why -- I don't know whether this is the
13 precise reason, but he is scheduled to have
14 dental surgery for a -- for a tooth issue that,
15 you know, because his mouth is so prone to
16 infections. So he's going to have dental
17 surgery.

18 My suspicion is that they're leaving
19 the trach in for the surgery. They don't want
20 to take the trach out --

21 JUSTICE SOTOMAYOR: I really don't
22 like suspicion.

23 MR. HOCHMAN: -- prior to the surgery.

24 JUSTICE SOTOMAYOR: But go ahead.

25 Assuming nothing, because I don't know what's

1 going to happen, it appears that your Dr. Zivot
2 was misreading the horse study, that his
3 four-minute estimate had to do with a different
4 study having to do with a dog and a different
5 agent, not the agent at issue here.

6 Given that without that study there's
7 no basis to believe that this -- that
8 pentobarbital would take four minutes to -- to
9 take effect, it would likely be -- I think it
10 was -- the figures were at maximum 52 and the
11 average is 20 to 30 seconds. That's the only
12 evidence in the record.

13 Is there anything left to your case
14 once that information is eliminated --

15 MR. HOCHMAN: So --

16 JUSTICE SOTOMAYOR: -- that factual
17 misstatement?

18 MR. HOCHMAN: Yes, there is, Your
19 Honor. Two things to say about that.

20 First, in fact, the maximum period of
21 time in that study, if you -- if you actually
22 time it from the beginning of the infusion all
23 the way through the -- the time that the EEG
24 reads zero, is 161 seconds, almost three
25 minutes.

1 It is true that he missed -- that he
2 misremembered the time. That --

3 JUSTICE SOTOMAYOR: But the --

4 MR. HOCHMAN: What you have to do is
5 you have to look at the study. I went back and
6 we looked at the study. There's a wide range
7 of infusion times in that study, 28 seconds to
8 115 seconds.

9 And that, just for reference, Your
10 Honor, the infusion times in the study referred
11 to are at, I think -- I think it's about --
12 yeah, it's JA 265, appendix page 265. And it
13 talks about the -- the infusion rate.

14 The other thing that study indicates,
15 which is also confirmed by Dr. Antognini's
16 testimony at page 316, is that the slower you
17 infuse, the longer it will take for the drug to
18 take effect.

19 Now here's what happened in the horse
20 study: There was -- for the slowest horse,
21 that -- the slowest infusion rate, 115 seconds,
22 that horse took the longest time, which is
23 exactly what you'd expect. Right?

24 That -- the horses were infused with
25 four times, four times, the amount of

1 pentobarbital. They're much bigger than their
2 -- than human beings and so they -- they take
3 about four times.

4 Dr. Antognini testified that he would
5 expect 100 seconds, just -- you know, about one
6 second per cc, so something a little bit more
7 than 100 seconds for Mr. -- for Mr. Bucklew's
8 infusion to take place.

9 So it's the same amount of infusion
10 time for the horse, except it's four times as
11 much.

12 CHIEF JUSTICE ROBERTS: That's to --
13 your termination point at that is when the EEG
14 is zero, right?

15 MR. HOCHMAN: That's correct, on those
16 studies.

17 CHIEF JUSTICE ROBERTS: But -- but,
18 for major surgery, they don't wait until the
19 EEG is zero. It's, what, 40 or 50, something
20 like that?

21 MR. HOCHMAN: That's right, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: So why are we
24 concerned about the time to get to zero?

25 MR. HOCHMAN: Well, because there's no

1 -- there's no way to measure exactly when.
2 There is no studies and there's no way to
3 measure exactly when you pass through the
4 various stages of consciousness. And so --

5 CHIEF JUSTICE ROBERTS: Well, I don't
6 know, but they're -- they -- they undertake
7 major surgery with the EEG at a much higher
8 level here that you're talking about --

9 MR. HOCHMAN: But there's no -- but
10 there's no particular reason to believe that
11 you get -- it's -- well, first of all, that --
12 that -- that reading, those -- those ranges are
13 somewhat disputed in the science, but,
14 regardless, the point is there's no reason to
15 believe that it takes very long to get from the
16 level at which you're -- you're -- you're
17 prepped for surgery, so to speak, and all the
18 way to zero. And --

19 JUSTICE ALITO: Why is that? Why is
20 there no reason to believe that?

21 MR. HOCHMAN: Why is there no reason
22 to believe that?

23 JUSTICE ALITO: Yeah.

24 MR. HOCHMAN: Because there's -- well,
25 at this point, there's nothing in the record,

1 but there's also no --

2 JUSTICE ALITO: Well, there's nothing
3 in the record --

4 MR. HOCHMAN: -- there's no real way
5 to measure that.

6 JUSTICE ALITO: -- to show one way or
7 the other.

8 MR. HOCHMAN: There's -- but -- and
9 there's -- it's -- it's a difficult situation
10 to measure for obvious reasons. We don't do --
11 we don't conduct experiments in this sort -- in
12 this sort of field. And so we're working with
13 the information as best we can.

14 And what I'm trying to emphasize here
15 is that the infusion rate for Mr. Bucklew,
16 especially compared to the horse study, is
17 substantially slower as a proportional matter.
18 And that's good reason to believe that
19 Dr. Zivot's fundamental estimate that there's
20 going to be a prolonged period of suffering, he
21 admittedly wasn't precise.

22 And -- and, Justice Sotomayor, you're
23 absolutely right that I think he just crossed
24 up the numbers in his head from the study. But
25 that doesn't change the fact that there's going

1 to be several minutes. And that's only
2 counting after they gain venous access.

3 A large part of the claim here is
4 what's going to happen before they gain venous
5 access, and that's very, very important.

6 And note, Judge Colloton's dissent
7 specifically talked about the trial, the -- one
8 of the things he thought needed to be hashed
9 out at a trial is not only, you know, this
10 debate between Drs. Zivot and Antognini but
11 also whether he'll be required to lie flat,
12 which we've now learned new information about
13 since Judge Colloton wrote that opinion, and
14 whether his airway will --

15 JUSTICE SOTOMAYOR: I'm sorry, what --
16 what new facts?

17 MR. HOCHMAN: Well, that's the -- the
18 -- at page 882 of the appendix, the statement
19 from Ms. Boyles that he will lie flat, he will
20 not lie fully supine at the time they
21 administer the lethal drug, which I take to be
22 strong evidence, actually. They had time to
23 think about this, they had time to make a
24 decision about what they wanted to represent,
25 and what they chose to say is we'll make sure

1 he's not lying flat at the time they begin the
2 infusion.

3 That's critical, because a large part
4 -- if we must prove, as -- as Judge Colloton
5 observed, if we must prove that the available
6 alternative method will substantially reduce
7 Mr. Bucklew's risk of suffering -- and, as you
8 know, we don't -- we don't think that's
9 necessary, but if we must, we will explain that
10 the risk arises early in the execution process
11 and remains high throughout, through the period
12 that Dr. Zivot talked about.

13 CHIEF JUSTICE ROBERTS: Is that
14 because of the injection difficulties?

15 MR. HOCHMAN: Yes, right.

16 CHIEF JUSTICE ROBERTS: Well, does
17 that include the femoral injection option, or
18 are you only talking about the regular veins?

19 MR. HOCHMAN: We're talking about the
20 femoral. I -- I -- I think -- I think it's
21 more or less agreed that at this sum --
22 remember, this is summary judgment -- so, at
23 this posture of the case, there's substantial
24 reason why a fact-finder would conclude that
25 the peripheral access is going to fail.

1 And as I read the Respondent's brief,
2 they make nods in -- in -- in the other
3 direction, but, essentially, they accept, the
4 district court accepted, the court of appeals
5 accepted that there's going to be -- they're
6 going to access the femoral vein. We do not
7 deny -- we do not deny that they can access the
8 femoral vein. That's going to happen.

9 We're not denying that. The question
10 is how horrible is that going to be for him.
11 The last time they accessed the femoral vein of
12 an inmate because they had failed to gain
13 venous access -- and this is at page 611 and
14 612 of the appendix -- they did it through this
15 cut-down procedure.

16 And the cut-down procedure, they have
17 the kit in the room, that's page 615 to 616,
18 this is entirely within the contemplation, what
19 they expect to do.

20 They are dealing with inmates after
21 all. Compromised veins is hardly an unusual
22 circumstance for them. So -- so they're going
23 to have to access the femoral vein, and the
24 cut-down procedure --

25 JUSTICE ALITO: Well, do they have a

1 -- do they have a certified anesthesiologist
2 available and did Dr. Antognini testify that
3 any board certified anesthesiologist would be
4 able, in most instances, is able to access the
5 femoral vein without a cut-down procedure?

6 MR. HOCHMAN: Dr. Antognini did say
7 that, but -- but the board certified
8 anesthesiologist --

9 JUSTICE ALITO: Is there contrary --
10 is there contrary evidence?

11 MR. HOCHMAN: Yes, because the board
12 certified anesthesiologist that I'm referring
13 to who previously accessed the femoral vein via
14 cut-down is the same person who's going to
15 do Mr. Bucklew's execution, unless they've
16 changed and haven't told us, it's the same
17 person.

18 So whatever, generally speaking, and
19 what Dr. Antognini said -- let's be absolutely
20 clear about this -- Dr. Antognini explained in
21 his -- in his deposition, he said everyone
22 who's board certified is trained to access the
23 femoral vein.

24 But, when asked point blank does
25 everyone have experience doing it, he said no.

1 He said you can go decades without doing it at
2 all and you could lose the ability to do it.

3 And now we have -- of course, we
4 haven't had discovery of M2 and M3, a separate
5 issue that I'll get to in a moment, but what we
6 know, given what we've had access to, is that
7 this person did a cut-down. And a cut-down,
8 the testimony is, can take 15 minutes and maybe
9 more.

10 And it's carving into his leg. So
11 let's paint the whole picture here. He's lying
12 fat -- flat. That's what the Boyles affidavit
13 says. They're carving into his leg, causing a
14 tremendous amount of stress. It's the worst
15 possible set of circumstances.

16 There's little doubt in my mind, if he
17 doesn't have a trach -- and that's absolutely
18 true, Justice Sotomayor -- if he doesn't have a
19 trach, he would -- he would be suffering
20 enormously, suffocating, having difficulty
21 breathing, and this is not a short period of
22 time. If you look, I can't state in open court
23 --

24 JUSTICE SOTOMAYOR: Is there another
25 alternative to the cut-down to access the

1 femoral vein?

2 MR. HOCHMAN: So -- so it may -- if we
3 had discovery of M2 and M3, we could have a
4 conversation with them about whether they would
5 use an alternative, some other procedure. But
6 we haven't had the chance to talk with them.

7 JUSTICE SOTOMAYOR: Are there any?

8 MR. HOCHMAN: I -- I believe there
9 are, Your Honor. I do -- I believe that some
10 people who are skilled and have -- and have a
11 lot of experience with this can -- can, you
12 know, just can do it, sort of visualize where
13 the femoral vein is, and effectively do it.

14 The best way to do it that you would
15 use in a surgical setting, according to the
16 testimony, is you bring an ultrasound in.
17 There's no suggestion that there be an
18 ultrasound in this case.

19 But I -- I want to emphasize that when
20 they -- what the record shows is when they --
21 when they start this process, they're not going
22 to be aware of the breathing issues. That's
23 what happened last time. They got a one-page
24 summary of his condition.

25 It mentioned that he has cavernous

1 hemangioma on the face and lip. It didn't
2 mention the tumor in his throat. It did not
3 indicate any breathing issues. Nothing in the
4 record indicates they would check Mr. Bucklew's
5 airway. Nothing in the record indicates they
6 normally, in the normal course, would monitor
7 an inmate's respiration. Nothing in the record
8 suggests they would have the equipment present
9 in the room to deal with an airway collapse
10 while he's on the table waiting for the drug to
11 be infused, which is a very long period of
12 time.

13 And I was about to say before, if you
14 look at pages 978 and 979 of the appendix,
15 you'll see how far in advance of the time they
16 administer the lethal drug that they begin the
17 efforts to gain venous access. He's lying flat
18 that entire time, the Boyles affidavit tells
19 us. He's struggled through a cut-down
20 procedure. He's probably bleeding from his
21 tumor. The risk of a airway collapse is very
22 high. And there's nothing in the room to deal
23 with it.

24 So I don't think -- I -- I think
25 there's a question -- the trach, if they had

1 come to us, Justice Sotomayor, and said, you
2 know what, we'll give you access, you can talk
3 to M2 and M3, and what we think they're going
4 to -- they're going to do is we're going to
5 give them the information that they need to
6 know what problems are very likely to arise.
7 We're going to let them think about it, you can
8 talk to them, and maybe what they'll be able to
9 do is, at the start of the process, we'll
10 adjust the protocol and put a trach in.

11 JUSTICE SOTOMAYOR: May I --

12 MR. HOCHMAN: And that might -- that
13 would have gone --

14 JUSTICE SOTOMAYOR: Let me -- let me
15 stop you right there.

16 MR. HOCHMAN: Yeah.

17 JUSTICE SOTOMAYOR: Let's assume --
18 and they're going to -- I'm going to ask them
19 this directly.

20 MR. HOCHMAN: Sure.

21 JUSTICE SOTOMAYOR: It does seem very
22 logical that the state would give an affidavit
23 a lot better than the one they did through Mr.
24 Boyles that would say, no, we're not going to
25 put him sublime, from the minute he's laid

1 down, the gurney will have the top part raised,
2 we've talked to the medical team, they have
3 experience by their own requirements, they have
4 training, education, and experience with two or
5 three different ways to reach a femoral line.
6 There's at least one of the two people who do.

7 We've told them about the breathing
8 problem. It's not going to be the same as the
9 -- the last time. And they're prepared.

10 Assume they came in with that. No,
11 we're not going to let you talk to them. No,
12 we are not going to permit discovery in a
13 traditional way. But we are making these
14 affirmative representations to the Court.

15 Would you have a case left at that
16 point?

17 MR. HOCHMAN: I think -- I think if
18 the judgment were based on that kind -- on
19 those kinds of assurances, I would probably
20 want to add a few. I think, given the passage
21 of time and the progressive nature of his
22 illness, I think to be adequately informed, I
23 mean, one of the -- as -- as you -- as you
24 pointed out, you know, adequate information is
25 critical here.

1 To be adequately informed, you
2 probably have to do imaging studies at some
3 reasonable time in advance of -- of the
4 execution.

5 I'd want to know -- I -- I -- I -- I'd
6 want to know what kind of experience they have,
7 not only with the cut-down, but, remember,
8 Dr. Zivot was very clear that he would not want
9 to just intubate on the fly someone in Mr.
10 Bucklew's condition. Why? Because that tumor
11 is extremely sensitive.

12 And if you've got a struggling, maybe
13 convulsing person even strapped down, and
14 you're trying to put a tube down his throat so
15 that he can breathe, the chances of a
16 catastrophic hemorrhage are very, very high.

17 CHIEF JUSTICE ROBERTS: Could I ask --

18 MR. HOCHMAN: So this has to be taken
19 care of, thought through in advance, I think
20 it's very complicated, and the judgment we have
21 right now just doesn't do it for us, and I
22 think you have to vacate and remand.

23 What you are proposing, Justice
24 Sotomayor, is entirely sensible and could
25 happen on remand before the trial court, and

1 that's where it should happen, where it should
2 have happened before.

3 CHIEF JUSTICE ROBERTS: Could I ask
4 you to address the reasonable alternative
5 question? I know you think it's not required
6 in your case, but assuming that it is, how can
7 it be a reasonable alternative if it's never
8 been used before?

9 MR. HOCHMAN: Yeah, Your Honor, I
10 think -- I think there are a couple reasons why
11 that's so.

12 First, I don't think that this Court
13 ever said in Baze that it has to have been used
14 before for it to be a reasonably available
15 alternative. What I understand the language of
16 Baze to say is -- the key passage is at page 57
17 of the opinion -- no other state has adopted
18 the method that was being proposed in Baze.

19 And Petitioners proffered no showing
20 that is an equally effective manner of imposing
21 a death sentence. Well, what do we have?
22 Oklahoma, Mississippi, Alabama, have adopted
23 lethal gas as -- as -- as methods of execution,
24 in addition now to Missouri, and it's not only
25 -- not only have we shown that it's an equally

1 effective manner of imposing a death sentence.
2 Dr. Antognini said so. That's his -- that's
3 his opinion. That's the evidence in the case.

4 There's the study from Oklahoma which
5 was done which went through the process that
6 would be involved in some -- in some detail,
7 talked about the right to die community's
8 favorable experiences with lethal gas.

9 Now it doesn't mean there's nothing to
10 be worked out. Of course, there are details to
11 be worked out.

12 I don't -- I don't doubt that it would
13 have to be 100 percent pure nitrogen because I
14 think it's actually potentially horrible if you
15 have either a leak in the -- in the -- in the
16 system or --

17 CHIEF JUSTICE ROBERTS: Well, one of
18 the things we see often in the Eighth Amendment
19 cases is the point or allegation that things
20 can go wrong regardless of the method of
21 execution.

22 And it seems to me that if you have a
23 method that no state has ever used, that that
24 danger is magnified.

25 MR. HOCHMAN: Possibly, Your Honor,

1 but --

2 CHIEF JUSTICE ROBERTS: And yet your
3 claim is that this is a better -- a better
4 alternative?

5 MR. HOCHMAN: Yeah, because here's --
6 here's why: I mean, when you -- think about
7 what our claim is, this as-applied claim. Our
8 claim is that the officials in Missouri are
9 going to do everything that their protocol
10 directs them to do.

11 I'm not assuming that there's going to
12 be a mishap. I'm not assuming that something's
13 going to go haywire. I'm assuming everything's
14 going to go exactly the way they intend it and
15 that the process of things playing out exactly
16 that way is going to be severe suffering for
17 Mr. Bucklew.

18 So now we move to a situation where a
19 method -- where I -- where I think it's made
20 substantially less, the risk is substantially
21 lower of that kind of severe suffering, and
22 this Court's cases have made clear that mishaps
23 in protocol --

24 CHIEF JUSTICE ROBERTS: Well, but that
25 gets to the point -- I mean, you understand the

1 theory between Baze and Glossip, which is what
2 the Eighth Amendment prohibits is the
3 unnecessary infliction of pain. If the death
4 -- death penalty is constitutional, as it now
5 is, there must be a way to administer it, but
6 if you can show that there's another way that
7 is less painful, then the theory is, again,
8 that it's an Eighth Amendment claim because
9 it's unnecessary pain.

10 But, again, it seems to me that you
11 can't make that showing with respect to
12 something that's never been -- never been used
13 by any other state.

14 MR. HOCHMAN: I -- I don't think -- I
15 don't think that's true, Your Honor. I think
16 what happened in Baze was you had a method
17 that, assuming it went well -- that's what the
18 background, the basis was.

19 Remember, the -- the analysis was
20 comparative. You start with the background
21 assumption in Baze that if everything goes
22 according to plan, there's -- there's not
23 constitutionally significant suffering.

24 Here, it's exactly the opposite. If
25 everything goes according to plan, there is

1 constitutionally significant suffering. So the
2 -- the relative risk of the just unknown, you
3 know, not quite sure because it's never been
4 played out before, which has no purchase
5 against the background in Baze, has enormous
6 purchase here. It's --

7 JUSTICE BREYER: What do you do with
8 the -- do I understand where we are is that the
9 district court and the court of appeals assumed
10 that you had shown enough to deny summary
11 judgment to the state, you'd shown enough that
12 this method, because of his special condition
13 and the terrible tumors and so forth, could
14 cause serious suffering, and now they
15 overturned you on the second part and said:
16 But you haven't shown that that serious
17 suffering wouldn't occur anyway, even with your
18 new method. All right? That's where we are.

19 So, as of this moment, though, we've
20 been talking about the first part, and even you
21 say a lot of conditions have changed. And some
22 had changed. And some might have changed. And
23 we're missing a piece of evidence about an
24 affidavit that says, hey, the nurses and so
25 forth do what they're supposed to do. Okay?

1 Now, as to the second part, which is
2 pretty hard to look at alone without the first
3 part, as to the second part, what in your
4 opinion should we do? Because the only -- the
5 evidence in the record said, yeah, if we use
6 nitrogen, Doctor -- the doctor that you
7 mentioned said you use nitrogen 20 seconds, 30
8 seconds, he'll -- he'll be unconscious.

9 Okay. The Chief Justice -- I mean,
10 that is a point; it's never been used before.
11 And even their doctors, they're listening and
12 -- or knows about all this and it all is on an
13 assumption that now seems not to be accurate in
14 your own view. The horse study's misread and
15 -- so -- so what in your opinion should the
16 Court do?

17 MR. HOCHMAN: I have a proposal.

18 JUSTICE BREYER: Yes.

19 MR. HOCHMAN: Thank you, Justice
20 Breyer, because I have a proposal. I think it
21 will address Justice Sotomayor's concern as
22 well.

23 If you look at the appendix, the
24 fourth amended complaint, page 85 of the
25 appendix and page 90 of the appendix, among the

1 allegations in the complaint is not only do we
2 think lethal gas would be a viable alternative
3 method, but we also say, if after adequate
4 discovery it turns out it might be possible, we
5 just don't know, but it might be possible to
6 alter a lethal injection protocol in a way that
7 would satisfy constitutional standards.

8 So, if you vacate the judgment, if you
9 remand it to the district court, in part
10 because circumstances have changed, we don't
11 know whether the changed circumstances will
12 prevail at the time an execution is scheduled,
13 but in part because circumstances have changed,
14 if you vacate and remand, then we can go back,
15 we cannot only look into the question of what's
16 -- how the comparison in light of any new
17 circumstances would be to the lethal -- unknown
18 aspects of lethal gas, but we can also figure
19 out whether there are other ways to modify a
20 lethal injection protocol that alleviate this
21 grave concern.

22 JUSTICE ALITO: What is your basis for
23 arguing that there would be a shorter twilight
24 period with lethal gas?

25 MR. HOCHMAN: So this --

1 JUSTICE ALITO: Are you relying on
2 Dr. Antognini's testimony for that?

3 MR. HOCHMAN: So -- no. So just to be
4 clear --

5 JUSTICE ALITO: You're not? Okay. So
6 what are you relying on?

7 MR. HOCHMAN: So -- so the way I
8 understand it is the issue is not that there
9 would be a shorter twilight period. The issue
10 is, what's the degree of suffering that takes
11 place during the twilight period? It's the
12 twilight period is what it is.

13 In the period, there's a period of
14 time where you're unconscious. Dr. Zivot
15 thinks there's a period of time even where
16 EK -- EEG readings are very, very, low but you
17 can still -- from his experience sitting by
18 patients for 20 years, you can still sense
19 things. And there is -- so there's -- there's
20 possibility for the -- the subjective
21 experience of suffering.

22 The problem is that with
23 pentobarbital, part of what happens, and this
24 is -- you have a very narrow, you have an
25 obstructed airway, and Dr. -- Dr. Zivot -- and

1 I'll -- I'll be very quick here -- Dr. Zivot
2 just explains you could have laminar flow,
3 which is normal flow, or turbulent flow.
4 Turbulent flow is a real big problem for -- for
5 -- for Mister --

6 JUSTICE ALITO: But you're making this
7 very complicated. Isn't the question for what
8 period of time will Petitioner be -- not be
9 insensate but may have difficulty breathing?

10 MR. HOCHMAN: I think it's several
11 minutes, Your Honor. It's several.

12 JUSTICE ALITO: All right. And how do
13 you get to that figure with -- the figure that
14 applies there with respect to lethal gas?

15 MR. HOCHMAN: I -- no, it would be
16 less with lethal gas.

17 JUSTICE ALITO: Yeah. Okay. What are
18 the numbers? And where does that come from --

19 MR. HOCHMAN: Well, the --

20 JUSTICE ALITO: -- is what I'm asking.

21 MR. HOCHMAN: -- the testimony from
22 lethal gas is twofold. One -- this is in the
23 Oklahoma studies at page 736 through 747 of the
24 appendix -- very, very quick onset of
25 unconsciousness; and, two, one of the things

1 that lethal gas has is it's about twice as
2 fast --

3 JUSTICE ALITO: So you're relying on
4 the -- on the Oklahoma study for that?

5 MR. HOCHMAN: The Oklahoma information
6 and Dr. Antognini's testimony.

7 JUSTICE ALITO: Okay. But what --
8 didn't -- Dr. Antognini said that it would be
9 the same for lethal gas and for --

10 MR. HOCHMAN: He said it would be the
11 same as he thought pentobarbital would produce.
12 And that was --

13 JUSTICE ALITO: All right. So your --
14 you reject his testimony. He says it's the
15 same. So you want to accept him -- you want to
16 accept his number -- I mean, maybe there's
17 more. That's why I'm asking this.

18 Do you want to accept his number for
19 lethal gas but reject his number for
20 pentobarbital -- for -- for the current
21 protocol?

22 MR. HOCHMAN: Yes.

23 JUSTICE ALITO: Even though what he
24 said was that they are the same.

25 MR. HOCHMAN: Yes, Your Honor. I

1 think we're entitled to do that. And Judge --
2 and that was the basis of Judge Colloton's
3 dissent.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Hochman.

7 MR. HOCHMAN: I'd like to reserve the
8 remainder of my time.

9 CHIEF JUSTICE ROBERTS: Sure.
10 Mr. Sauer.

11 ORAL ARGUMENT OF D. JOHN SAUER
12 ON BEHALF OF THE RESPONDENTS

13 MR. SAUER: Mr. Chief Justice, and may
14 it please the Court:

15 Missouri's single-drug protocol using
16 pentobarbital is the most humane and effective
17 method of execution that is currently known.
18 Missouri has used it 20 times without any
19 significant incident. Petitioner offers a
20 extremely --

21 JUSTICE SOTOMAYOR: How many people
22 have had the same condition as Mr. Bucklew?

23 MR. SAUER: Zero, Your Honor. I'm not
24 aware of any --

25 JUSTICE SOTOMAYOR: All right. So

1 let's go to his unique circumstance. You don't
2 deny that he has this condition?

3 MR. SAUER: Absolutely not.

4 JUSTICE SOTOMAYOR: You don't deny
5 that he has a small tumor but a tumor in his
6 throat?

7 MR. SAUER: The evidence is it's quite
8 sizable, in fact.

9 JUSTICE SOTOMAYOR: All right. Very
10 sizable. You -- so answer my earlier question.
11 It doesn't -- I don't believe, and I would hate
12 to think that a -- any state would intend to
13 gratuitously subject a prisoner to untoward
14 pain because they don't want to get a gurney
15 that moves the head up or that they don't want
16 to have personnel -- you require it in your own
17 regulations. You need -- I think the words are
18 that you have to have someone -- I read them
19 earlier -- with the training, education, and
20 experience to do everything that's necessary to
21 reach the veins, et cetera.

22 So I'm assuming you're looking for
23 those people and have them in place.

24 MR. SAUER: Correct, Your Honor.

25 JUSTICE SOTOMAYOR: So why haven't you

1 represented that you're going to take the basic
2 steps necessary to avoid the horrific
3 circumstances that your adversary says can and
4 will happen?

5 MR. SAUER: We vigorously dispute that
6 horrific circumstances will arise, but I
7 believe we have made those representations.

8 JUSTICE SOTOMAYOR: How do you -- why
9 do you dispute that?

10 MR. SAUER: Because there's -- every
11 -- every stage -- every stage of the
12 predictions that are made by the Petitioner is
13 contradicted by evidence in the record.

14 JUSTICE SOTOMAYOR: All right.

15 MR. SAUER: I -- I do want to address
16 the question about what representations we have
17 made. At 531 of the Joint Appendix, the
18 director of adult institutions testified --
19 this is in the record. It's not a supplemental
20 affidavit that we submitted in opposition to a
21 stay motion. In the record is testimony that
22 the gurney is adjustable and that the
23 anesthesiologist has the discretion to adjust
24 the gurney to the position that would play --
25 would be in the inmate's most appropriate

1 medical interest.

2 And that is consistent with what the
3 execution protocol says, which is that the
4 anesthesiologist has the discretion, for
5 example, to locate the appropriate veins and so
6 forth. I don't think there's any --

7 JUSTICE SOTOMAYOR: But that -- I'm
8 hard pressed. As I understand the protocol,
9 they get that one-page -- that one-page
10 discussion that only listed his condition. The
11 anesthesiologist -- no representation has been
12 made that the anesthesiologist knows of his
13 history of breathing difficulty or anything
14 else.

15 MR. SAUER: I disagree with that. The
16 evidence in the record from the warden of the
17 institution is that I know he receives his
18 complete medical records, and I will supplement
19 that right now by representing to the Court
20 that the anesthesiologist has access to all the
21 medical records.

22 The one-page summary, the director of
23 adult institutions -- it's at a higher level in
24 the Department of Corrections -- said that's
25 the only thing that I give them. But the

1 warden testified that he has -- he has access
2 to the entire medical records.

3 And the one-page summary does say he
4 has cavernous hemangioma in the lower maxilla,
5 in the jaw, so it actually flags the issue, so
6 to speak, for the anesthesiologist.

7 JUSTICE KAVANAUGH: Do we know --

8 JUSTICE BREYER: That seems to be --
9 what do you recommend that we do? I mean, the
10 difficulty with the discussion to me that
11 you're having right now is a legal difficulty,
12 that -- that you have the district judge and
13 the court of appeals both assuming he's made
14 his case on this point for summary judgment
15 purposes.

16 And -- and you may be right, he
17 hasn't, but it's unusual for us to go into a
18 record like this, I think, and then reverse
19 both courts on that.

20 So then we're stuck with the other
21 part of it, which we don't know all that about
22 -- much about. And the nitrogen, they have a
23 good reason for thinking that the nitrogen
24 won't be painful, that it works in a different
25 way, and yet it isn't quite there in the record

1 and -- and -- and you can argue it and that's
2 why there was a dissent.

3 So what strikes me is at that part --
4 at that point, you should go deal with this as
5 -- as -- as a person rather than a lawyer. Go
6 back and hold a full hearing on it. Go back
7 and find out if this man really is special, if
8 there really is a special problem, what we know
9 about the alternatives, all the questions that
10 you've pointed out and that they've pointed
11 out, which we don't have answers to.

12 Now I -- I -- why not?

13 MR. SAUER: I would say two things in
14 response to that, Justice Breyer.

15 First, the State of Missouri has a
16 compelling interest in seeing this just and
17 lawful sentence is carried out as quickly as
18 possible. A remand for further fact-finding,
19 which is the principal request of the
20 Petitioner here, would interject yet more delay
21 before the execution of a sentence that's been
22 in place for 22 years now.

23 Secondly, the evidence in the record
24 decisively -- decisively supports an affirmance
25 on either of the two alternative grounds,

1 either of the Glossip elements, and I'll --
2 I'll -- I'll address, if I may, the one that
3 you raised, which is the second Glossip
4 element, about a feasible readily implemented
5 alternative solution.

6 Nitrogen hypoxia has never been tried
7 by any state. At this time, no protocol exists
8 for execution by nitrogen hypoxia. No state
9 has ever tried it. In the controlling opinion
10 in Baze, this Court said six times, including
11 twice in the opening three paragraphs of that
12 opinion, that an alternative method of
13 execution that is untried and untested, that no
14 state has ever used, that no study supports
15 showing its efficacy, is not an alternative
16 that's reasonable.

17 JUSTICE BREYER: It could. I mean, my
18 reaction to that is a question mark. I mean,
19 that it hasn't been tried, it's certainly a
20 strike against it, but is it a fatal strike
21 against it?

22 And the other thing that's going on in
23 the back of my mind is -- is, of course, what
24 people do think very often is, look, once we
25 send it back on this, then they'll think of

1 something else. And really what's going on is
2 endless delay because they think that the death
3 penalty is -- is not appropriate. Okay?

4 So can that be guarded against here?
5 They -- they've sworn up and down, no, we're
6 not going to do that. I mean, we're -- we're
7 -- this is really an unusual case. And, you
8 know, you've read all that stuff.

9 So do you have anything you want to
10 say about that?

11 MR. SAUER: Absolutely, Your Honor.
12 What I would say is that it is -- the holding
13 of Baze could not be clearer -- that if it's
14 completely untested and untried, it is not --

15 JUSTICE SOTOMAYOR: I'm sorry. I -- I
16 -- Baze had to do with a generalized attack to
17 a system of execution, and it basically said,
18 if you don't like this system, you've got to
19 get another because -- you have to propose
20 another because, otherwise, what you're trying
21 to do is to abolish the death penalty. Your
22 intent is to do away with the death penalty,
23 and we're not going to let you do that.

24 I don't actually know where in the
25 Eighth Amendment and its history the Court made

1 up this alternative remedy idea because the
2 Constitution certainly doesn't prohibit cruel
3 and unusual punishment, unless we can -- unless
4 we can't kill you at all.

5 But putting it aside, this is -- an
6 as-applied challenge is not going to abolish
7 the death penalty with respect to everybody.
8 It's going to tell the state: If you have an
9 individual with a unique circumstance in which
10 a method of execution is going to cause that
11 person excruciating pain, cruel and unusual
12 pain, you better find a different way.

13 I don't understand why we would extend
14 Baze to an as-applied challenge to start with.

15 Number two, if a statute, your
16 statute, the Court hasn't made it up, lists
17 available alternatives, it's your job to find
18 them and your job to put them into place. It's
19 not the inmate's job to do that, putting aside
20 that he neither has the resources to do it or
21 the expertise to do it.

22 But I'm wondering why we're assuming
23 that Baze should be extended to an as-applied
24 challenge at all.

25 MR. SAUER: I don't --

1 JUSTICE SOTOMAYOR: Secondly, address
2 the question of why feasibility -- there are
3 some courts who have now held the only feasible
4 alternative is an alternative mentioned in a
5 state statute, so now we're in a Hobbesian
6 circle. The state gives us an option. I can't
7 point to it. The state doesn't give me an
8 option. Now there's no alternative.

9 We're really in a circle that you
10 can't get out of. Why don't we just simply
11 say, once the first prong is met, and the
12 courts below didn't -- they assumed it, they
13 said there were material issues of fact, you
14 should have gone on trial for that, I don't
15 think the trial would have taken very long, and
16 once that happened, you figure out how to kill
17 him.

18 MR. SAUER: There was a lot there.
19 I'd like to address first, if I may, the
20 question of whether -- why the second element
21 in Baze should apply in an as-applied
22 challenge, and I'd offer four reasons for the
23 Court's consideration.

24 The first reason is that it is
25 dictated by the holding and the reasoning of

1 the Baze case. Keep in mind that Baze was
2 decided two years after Hill against McDonough.
3 And in Hill against McDonough, the argument was
4 a challenge to a method of execution is really
5 a challenge -- it's an attempt to seek a de
6 facto exemption from the death penalty and,
7 therefore, it ought to be treated as a second
8 or successive habeas petition.

9 And this Court in Hill said no, no,
10 no, this petitioner is actually leaving open
11 the option that he could be executed by a
12 different method; therefore, it's not a de
13 facto attack on the validity of the sentence.

14 But then, when Baze came around two
15 years later, this Court held that we're
16 adopting a second element in part because we do
17 not want petitioners to be able to seek a de
18 facto exemption from the death penalty or
19 engage in --

20 JUSTICE SOTOMAYOR: We exempt certain
21 people from the death penalty: the mentally
22 ill, the incompetent, people who are young. We
23 haven't seen that as abolishing the death
24 penalty. We see it as -- as an as-applied
25 exemption to a particular person or individual

1 for whom this method is cruel and unusual.

2 MR. SAUER: In all or virtually all of
3 those contexts, the person who is exempted from
4 the death penalty possesses a characteristic
5 that undermines the penological objectives of
6 the death penalty. That is the holding of
7 Roper and Atkins, Ford against Wainwright, and
8 every one of those cases.

9 JUSTICE SOTOMAYOR: How about the
10 constitutional --

11 MR. SAUER: This Court held that there
12 would be no deterrence or retributive purpose
13 to that.

14 JUSTICE SOTOMAYOR: How about the
15 constitutional principle against unusual --
16 cruel and unusual punishment? I -- I think
17 every individual has that Eighth Amendment
18 right.

19 MR. SAUER: That is correct. And the
20 scope of that Eighth Amendment right is what is
21 set forth in Baze and in Glossip.

22 JUSTICE KAVANAUGH: Are you saying
23 even if the method creates gruesome and brutal
24 pain you can still do it because there's no
25 alternative?

1 MR. SAUER: I believe that any
2 petitioner who is claiming that it would create
3 gruesome and brutal pain must, under Baze and
4 Glossip, offer an alternative method that
5 significantly reduces the pain.

6 JUSTICE KAVANAUGH: So you're saying
7 that even if the method imposes gruesome,
8 brutal pain --

9 MR. SAUER: That is --

10 JUSTICE KAVANAUGH: -- you can still
11 go forward?

12 MR. SAUER: Well, I would say again
13 that that petitioner has to if they want to --

14 JUSTICE KAVANAUGH: Is that a yes?

15 MR. SAUER: Yes, it is, Your Honor.
16 And that is the holding of Glossip. The
17 holding of Glossip was -- I mean, these kinds
18 of predictions were made in Glossip. The
19 closest facts of the case -- the closest facts
20 to that hypothetical were the facts of Glossip.
21 In Glossip, the argument was that everyone --

22 JUSTICE KAVANAUGH: Is there any limit
23 on that? Is there any limit to the degree of
24 --

25 MR. SAUER: There is a limit, Your

1 Honor. I think there -- the limit would occur
2 if the method of execution were viewed as
3 superadding terror, pain, or disgrace within
4 the meaning of the Court's earlier method of
5 execution cases. So if the method of execution
6 was so gruesome and brutal or -- or was even
7 relevantly similar to the historical gruesome
8 methods of execution that are categorically
9 prohibited by the Eighth Amendment, there would
10 certainly be a claim in that context where --
11 or, in the words of Baze and Glossip, there is
12 an attempt to deliberately inflict pain for the
13 sake of pain, that would be categorically
14 exempted. In that context, the alternative
15 method is not required.

16 But if a petitioner claims that, well,
17 I'm predicting that I will suffer under these
18 circumstances, that petitioner must, under the
19 logic of Baze and Glossip, plead and prove an
20 alternative method. And one of the compelling
21 reasons that this Court offered for that was
22 that this Court recognized that it is -- to
23 eliminate the risk of pain completely is
24 impossible. And that's why the Baze and
25 Glossip context is very different than this

1 context.

2 JUSTICE KAVANAUGH: But doesn't the
3 first prong deal with that? Namely, that you
4 have to have a substantial showing of severe
5 pain? Doesn't that get at the concern you just
6 identified, which is there's always going to be
7 some degree, but it has to be a substantial
8 risk of severe pain?

9 MR. SAUER: I don't think it gets all
10 the way to it. And I believe that is why Baze
11 and Glossip adopted this as, in the words of
12 Baze, a -- or in the words of Glossip, a
13 substantive element of this particular claim.
14 So --

15 JUSTICE BREYER: I thought -- I'm
16 trying to get back to my question, which is
17 asking you as a prosecutor, but, look, I guess
18 you would agree that some -- X has a rare
19 medical condition that makes the method of
20 execution to him feel exactly like being burned
21 at the stake. Okay?

22 Would -- the Constitution would rule
23 that out, wouldn't it?

24 MR. SAUER: The Constitution would
25 rule out burning at the stake, absolutely, Your

1 Honor.

2 JUSTICE BREYER: And -- but, yeah, he
3 doesn't -- he has a mental condition of some
4 kind. It makes it exactly the same.

5 MR. SAUER: That is --

6 JUSTICE BREYER: It feels exactly the
7 same.

8 MR. SAUER: I would have to know more
9 about the hypothetical.

10 JUSTICE BREYER: Well, that's it. I'm
11 making it up as I go along.

12 (Laughter.)

13 JUSTICE BREYER: Okay? But what I
14 want is -- it's exactly the same to him as if
15 you burned him at the stake. And I guess if
16 you're going to rule out the one, you'd rule
17 out the other. That's my thought because I'm
18 going to say next he, this particular
19 individual, will, because of his rare medical
20 condition, feel exactly the same as if he'd
21 been drowned to death over -- slowly over a
22 period of time. Okay?

23 So that's why I think Justice
24 Kavanaugh brought that up. But my -- my -- my
25 -- my -- and I -- and that seems to me to be

1 the factual issue that's underlying your first
2 point.

3 But now we're back in the weeds with
4 this individual. So I'm interested in your
5 experience and as far as you read about it and
6 know about it, what do we do about, in your
7 opinion, 42 years in prison, 20 years in
8 prison, 30 years in prison, and people
9 thinking: Well, the reason is it's the courts
10 that don't like the death penalty and,
11 therefore, there's one thing after another and
12 it goes on and on and on, and when we send it
13 back here, we'll see that they'll think of a
14 new one after this one and -- and so forth.

15 So I -- I -- I think it's a serious
16 question. And -- and I would like to know what
17 you think.

18 MR. SAUER: If I may, Your Honor, I
19 understand the question to be if -- if there is
20 an exceptional delay before the implementation
21 of the death penalty, does that raise a
22 question as to whether or not the --

23 JUSTICE BREYER: No, I'm not doing it
24 that technically. I'm -- I'm doing it because
25 this case really exhibits, as I said -- it's --

1 as a special case, and I think of the burning
2 at the stake example. And I know that other
3 people think that's just something they're
4 going to bring up and lose or win and then they
5 go on to the next one after that and the next
6 one after that. And I've -- I've written and
7 said: Well, it's because it's very hard to do
8 this because you want to give them basic
9 fairness. You don't want to burn someone at
10 the stake. And that takes time.

11 MR. SAUER: It --

12 JUSTICE BREYER: So -- so what is your
13 take on that?

14 MR. SAUER: If this --

15 JUSTICE BREYER: My general argument.

16 MR. SAUER: If this Petitioner were to
17 predict that he would experience a sensation
18 like burning at the stake, he would be the
19 third petitioner, the third set of petitioners
20 in the last 10 years to make that prediction.
21 That was the precise prediction that was made
22 in Baze and Glossip. Those petitioners
23 predicted that midazolam, for example, in
24 Glossip would not suppress the feeling that
25 would be akin to being burned at the stake.

1 And this Court held twice that these
2 people must show that this is sure, very likely
3 to happen, and they must show that there's an
4 alternative method of execution that is readily
5 feasible.

6 And, of course, these hypotheticals
7 about being burned at the stake aren't really
8 implemented in the real world. What's
9 implemented in the real world is a situation
10 where capital petitioners have every incentive
11 to engage in interminable litigation,
12 interminable litigation, multiple challenges.

13 So, absent that second element, absent
14 that second Baze element, what would almost
15 certainly happen in every case is, once the
16 petitioner had made a threshold showing on the
17 first element and the state came up with an
18 alternative, there would be a subsequent
19 lawsuit or an amendment of the petition,
20 resulting in a second attack. And that's
21 exactly what we have here.

22 We have a petitioner --

23 JUSTICE SOTOMAYOR: That may well be,
24 but the reality is that there are alternatives.
25 Many of them have not been implemented because

1 people want -- don't want to see them: the
2 firing squad, electrocution. There's a whole
3 lot of things that people don't want to accept
4 the reality of, but they're there.

5 And if you're going to make the person
6 find a choice of how to kill himself, I simply
7 haven't answered -- my question is, if the
8 statute permits it, why shouldn't they be able
9 to choose it, if they have proven -- and I
10 understand that's a big dispute here -- if they
11 have proven that the method you've initially
12 chosen will create cruel and unusual pain?

13 MR. SAUER: I believe statutory
14 authorization alone is insufficient to
15 demonstrate that something is readily
16 implemented or known and available within the
17 meaning of Baze.

18 Now, if there were a petitioner --
19 some capital petitioners, for example, in Ohio
20 have been pleading things like firing squad and
21 hanging as alternative methods of execution.
22 Where there is historical pedigree to it, this
23 Court has previously affirmed that that is a
24 viable method of execution that is
25 constitutional.

1 There is a dispute in the courts of
2 appeals about whether or not statutory
3 authorization is a necessary condition to show
4 that things are readily available, but right
5 now, in the Eighth Circuit, statutory
6 authorization is not required. In the McGehee
7 case last year, the -- the Eighth Circuit said
8 we do not say that statutory authorization is
9 required.

10 So there are options available. If
11 someone really thought that I will suffer,
12 experience like burning at the stake,
13 presumably that person would plead, you know,
14 lethal gas, would plead --

15 JUSTICE KAGAN: So are you saying,
16 Mr. Sauer, that we would be in a different
17 situation in this case right now if the
18 Petitioner had instead requested an
19 electrocution or a firing squad?

20 MR. SAUER: It would certainly have
21 been a stronger case. Now what actually
22 happened was, in the second page of his
23 complaint, he dropped a footnote saying, I'm
24 not asking for firing squad. He mentioned
25 firing squad, but he did not ask for it saying

1 that because it is not statutorily authorized.
2 So he, for strategic or inadvertent reasons,
3 has never presented the issue in this case, and
4 Missouri's never taken a position on it, as to
5 whether or not statutory authorization is a
6 alternative -- is required.

7 JUSTICE KAVANAUGH: General --

8 MR. SAUER: And Missouri takes no
9 position on that now.

10 JUSTICE KAGAN: May I ask a -- a
11 different question? You know, one of the
12 things that strike me -- strikes me, when I
13 went back and -- and looked at Baze, there's a
14 lot about kind of deference to a state
15 legislature and state officials about
16 determining the appropriate method of
17 execution, about giving a kind of considered
18 judgment to the sort of pain that would be
19 expected from an execution, as well as their
20 interests in carrying out legitimate sentences
21 and making decisions on that basis.

22 But what strikes me is that when we
23 think about that, those officials really are
24 thinking in gross, if you know what I mean.
25 They're thinking about a method of execution as

1 applied to the general class of people and
2 deciding that it's appropriate.

3 And what, of course, makes this case
4 very different is that it's not in gross. It's
5 a particular person that says I have a highly
6 unusual condition that will make the execution
7 highly unusual, that will have me suffer highly
8 unusual pain.

9 And in that context, I think all of
10 that stuff that we talked about in Baze about
11 why we should refer to state-considered
12 judgments really falls away because there's
13 been no considered judgment, surely by the
14 legislature and, in general, by officials,
15 about -- about one particular person.

16 And it strikes me that because that's
17 true, the way we look at a case like this has
18 to change. So I'm -- I'm wondering, you know,
19 what your response to that is.

20 MR. SAUER: I think what I would say
21 to that is the deference that Baze and Glossip,
22 as you described, gave to sort of the
23 legislature, you know, as to the generalized
24 method of execution, it would be appropriate.
25 It would be deeply consistent with this Court's

1 precedents to give that same kind of deference
2 to the state officials who are implementing the
3 -- the execution in the concrete, in this
4 individual case.

5 Missouri has a board-certified
6 anesthesiologist who will be in charge of
7 putting IVs into this particular person.

8 JUSTICE KAGAN: See, I'm not sure that
9 that's true, because those officials are
10 working within a system. They're working
11 within a set of legislative rules that have
12 been made in this sort of general sense. And
13 for them to go outside that system would be --
14 you know, and say it's not appropriate for this
15 particular person would be an extraordinary
16 person for -- an extraordinary thing for an
17 individual person to do.

18 So I don't think we could
19 realistically give the same kind of deference
20 to that sort of decision.

21 MR. SAUER: I think the deference that
22 I had in mind is deference to the
23 determinations that are made on the site as the
24 execution is going forward, where there's
25 uncontradicted evidence in the record in this

1 case that the -- the medical team is making all
2 the medically relevant judgments.

3 JUSTICE KAVANAUGH: On -- on -- on
4 that point, do we know that he will not be
5 lying flat, or are you saying that doesn't
6 matter?

7 MR. SAUER: Both of those. We know
8 that, first of all, it was established by the
9 pleadings, as the majority held in the Eighth
10 Circuit, that he pled that the state has
11 offered to adjust the gurney to the most
12 appropriate position, and we admitted that in
13 our answer.

14 In addition to that, uncontradicted
15 testimony at page 531 of the Joint Appendix
16 says the gurney is adjustable and it can be
17 adjusted to the position that the
18 anesthesiologist deems the most appropriate.

19 JUSTICE KAVANAUGH: And related to
20 that, the -- your opposing counsel said, even
21 if everything goes according to plan, there
22 will still be significant suffering.

23 Can you respond to that?

24 MR. SAUER: I absolutely, absolutely
25 disagree with that. The testimony about this,

1 of Dr. Antognini, is that the only suffering
2 that would occur in this execution that could
3 be medically predicted was the suffering
4 associated with the actual entry of the IV, in
5 other words, the pinpricks or the cut-down
6 procedure.

7 Now I say cut-down procedure, and
8 truth in fact, the record decisively shows that
9 a cut-down procedure is not done in the femoral
10 vein. The only evidence of this is the
11 testimony of Dr. Antognini, who says a cut-down
12 is done on the saphenous, which is much lower
13 down in the leg, in the angle.

14 A cut-down is not done on a femoral
15 vein. The evidence from the warden, who's not
16 a -- a medical person, about the one time a
17 cut-down was done, describes it as being done
18 in the leg.

19 So the -- there's no evidence and, in
20 fact, Dr. Antognini said there is no need to do
21 a cut-down on the femoral because it is "easily
22 accessed." And, in fact, it is not standard of
23 care to use an ultrasound in accessing the
24 femoral.

25 So -- and the holding of the district

1 court on this very point was that, not only has
2 he put in no evidence that there will be any
3 difficulty at all accessing the femoral, but in
4 addition to that, that he had presented no
5 argument in opposing summary judgment about any
6 difficulty that would happen on any vein other
7 than the peripheral veins in his arms.

8 So there's really nothing in the
9 summary judgment record that supports the
10 predictions that are being made.

11 JUSTICE SOTOMAYOR: I'm sorry, there
12 was a prior execution where a cut-down was done
13 by, he says, the same person who's going to do
14 this one, and there was problems then.

15 Why isn't it a predictive -- a
16 reliable predictive tool to show that the same
17 person who's going to do it now botched it
18 earlier?

19 MR. SAUER: There is no evidence of
20 problems. And the only testimony in the record
21 is from the warden, who is not a medical
22 person, who said that a local anesthetic was
23 given and a cut-down was done in the leg.

24 The testimony of the doctor is that a
25 cut-down is typically not done in the femoral,

1 which is high in the leg, but is typically done
2 in the saphenous, which is low in the leg.

3 So there is no evidence in the record
4 that any cut-down has ever been done on the
5 femoral.

6 JUSTICE GORSUCH: Mr. Sauer, I believe
7 some time ago you said there were four reasons
8 why you thought at step 2 a defendant should be
9 required to show an alternative. I'm -- I'm
10 not sure we got past the first of those four.
11 I'm not even sure we got the first one out
12 there, actually.

13 And I'm curious what -- what -- what
14 all four are.

15 MR. SAUER: The first reason is that
16 the logic and the holding of Baze and Glossip
17 requires -- it holds that this is a substantive
18 element of any method of execution challenge.

19 The second one is that, as Baze and
20 Glossip both said, the death penalty is
21 constitutional and there must be a means of
22 carrying it out. And that reasoning applies
23 just as much in the microcosm as to the
24 individual petitioner who's seeking a de facto
25 exemption from the death penalty, as it does in

1 the macro -- macrocosm.

2 In fact, the concerns of undue
3 suffering that were presented in Baze and
4 Glossip were much greater and much more
5 sweeping than had been presented in this case
6 because they would have applied to every single
7 petitioner who is subjected to the two, three
8 drug protocols that were disputed in that case.

9 Here, we're talking about the
10 suffering of a single petitioner. Exactly the
11 same balance that the Court struck by adopting
12 the second element applies in this particular
13 case.

14 In addition to that, both Baze and
15 Glossip relied on Farmer and Wilson, going back
16 to Estelle, which itself relied on Weisweber,
17 for the proposition that there must be a
18 showing of subjective blame worthiness in this
19 context for there to be an Eighth Amendment
20 violation. And Wilson said that one critical
21 factor in whether or not there is subjectively
22 blame worthiness is a constraint facing the
23 official.

24 If there is no alternative method of
25 execution available, and the official is under

1 a directive from a jury verdict that there's a
2 just and lawful sentence that must be carried
3 out, then the -- it's very difficult, if not
4 impossible, to draw the inference that there is
5 subjective blame worthiness in that particular
6 case.

7 CHIEF JUSTICE ROBERTS: You better get
8 to three quickly.

9 MR. SAUER: That was three, Your
10 Honor.

11 CHIEF JUSTICE ROBERTS: That was
12 three?

13 JUSTICE GORSUCH: I'm waiting for four
14 still.

15 MR. SAUER: And number four, of
16 course, is the risk, as we have discussed, that
17 there is a risk of interminable litigation.

18 And, Justice Gorsuch, I would direct
19 your attention to the way that the alternative
20 method was pled and proven in this particular
21 case. We have a petitioner who said lethal gas
22 with no further specification in his complaint,
23 and in the course of discovery said nothing
24 more specific than nitrogen and possibly a hood
25 or mask.

1 If Missouri came up with anything
2 specific, anything specific, any way to do this
3 --

4 JUSTICE KAVANAUGH: Wouldn't the first
5 prong of Baze deal with your second, third, and
6 fourth arguments that you just listed?

7 MR. SAUER: I don't think it deals
8 with them very effectively.

9 JUSTICE KAVANAUGH: If properly
10 applied, in other words, substantial risk of
11 severe harm.

12 MR. SAUER: I don't think it does so
13 effectively. And one of the reasons is that
14 this Court in Baze and Glossip was keenly aware
15 of this fourth concern, which is the concern of
16 adopting a rule that would leave open the
17 possibility of challenge after challenge after
18 challenge.

19 JUSTICE BREYER: Challenge after
20 challenge, that's -- I see that. But here is a
21 person who has some evidence anyway that, when
22 you execute him, it's going to be like slowly
23 drowning him to death and there's a good chance
24 of that.

25 So, in your opinion, should the

1 person, given the Eighth Amendment, not even
2 have the right to make that argument?

3 MR. SAUER: This Court --

4 JUSTICE BREYER: And if he has the
5 right to make that argument, then how do we
6 avoid the situation that we're in of having to
7 decide it? And if he has the right to make the
8 argument, that I want this alternative, how do
9 we avoid the situation of 15 years of testing
10 every possible method of execution?

11 MR. SAUER: I would say two things in
12 response to that. First, we vigorously dispute
13 the suggestion that he's presented any
14 competent evidence that he actually will
15 experience something like a prolonged drowning.
16 If you get into the details of the record,
17 there is no evidence, competent evidence, that
18 supports that.

19 Secondly, if you really thought that
20 he was going to suffer this excruciatingly, he
21 has an option available. He can plead all
22 kinds of alternative methods of execution that
23 are not completely untested and completely
24 unknown.

25 He can plead hanging. He can plead

1 firing squad. He was aware he could plead
2 firing squad, but he strategically decided not
3 to do that. Of course, if he had plead --
4 pleaded firing squad, it's possible that
5 Missouri could have executed him by firing
6 squad, but his litigation conduct indicates
7 that that is not the goal here.

8 The goal is to have challenge after
9 challenge after challenge. This is his third
10 method of execution challenge. He had two
11 prior challenges going back to 2012.

12 The Ringo litigation, bringing a
13 preemption challenge, to Missouri's protocol.
14 The Zink litigation, bringing in a facial
15 challenge to Missouri's protocol.

16 And now, 14 days before his first
17 scheduled execution, for the very first time,
18 he comes forward with an as-applied challenge
19 that is based on a medical condition that he
20 has had since birth and that has been for
21 decades presented the same --

22 JUSTICE SOTOMAYOR: Can we define --
23 can you define foreseeability -- or
24 feasibility, I'm sorry? Does the statute have
25 to authorize it for it to be feasible?

1 MR. SAUER: Missouri --

2 JUSTICE SOTOMAYOR: Does any statute
3 in a particular state have to authorize the
4 fact that you choose?

5 MR. SAUER: Missouri has never taken a
6 position on that question.

7 JUSTICE SOTOMAYOR: Take it now.

8 MR. SAUER: I -- I -- I do -- I do not
9 believe I am compelled to do so by the way the
10 record is presented. However, there are
11 compelling arguments, very strong arguments
12 that that shouldn't be a requirement.

13 Your Honor, I see my time has expired.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Three minutes, Mr. Hochman.

17 REBUTTAL ARGUMENT OF ROBERT HOCHMAN

18 ON BEHALF OF THE PETITIONER

19 MR. HOCHMAN: Thank you, Mr. Chief
20 Justice. I'd like to make two points, first
21 about the alternative method requirement, and
22 second about the disposition in this case.

23 Starting with the alternative method
24 requirement, Justice Kagan, I think you have it
25 exactly right, that if you imagine that the

1 State of Missouri thought about how to build a
2 method of execution that was going to create
3 the subjective experience that the record
4 indicates here for everyone, that the record
5 indicates here Mr. Bucklew would experience,
6 nobody would do it.

7 They wouldn't do that. I -- I don't
8 think so ill of Missouri or -- or -- or counsel
9 on the other side to imagine they would do
10 that. Yet, the alternative method requirement
11 as it plays out imagines that because they were
12 thinking about something else and because
13 there's a way to carry out executions for lots
14 of people, which this case doesn't call into
15 question at all, that you can nonetheless do it
16 in that way to this person, unless this person
17 is able to come up with what they consider to
18 be a specifically highly detailed way to manage
19 their own and -- and -- and propose their own
20 execution.

21 Respectfully, I don't think that makes
22 any sense. And I'll tell you why it doesn't
23 make any sense.

24 Nobody doubts -- nobody doubts that
25 when he's in his cell, he's got trouble

1 breathing. They give him a biohazard bag.
2 They give him gauze. They put him on a soft
3 diet because eating hard food can cause his
4 throat to bleed. Of course, they take into
5 consideration his physical condition, his --
6 his concerns.

7 And if they didn't, the Eighth
8 Amendment would require them to do it in his
9 cell. Their view of the alternative method
10 requirement is, as soon as he walks into the
11 execution chamber, the Eighth Amendment
12 changes, and now they don't.

13 Unless -- unless he has some idea,
14 unless he's the one who comes forward. The
15 obligation, not -- the language of the Eighth
16 Amendment is clear: Cruel and unusual
17 punishments shall not be inflicted. That's all
18 we're saying here.

19 And, Justice Kavanaugh, you're right,
20 the first -- the threshold issue in -- in Baze,
21 that takes care of this. That is a demanding
22 standard. There has to be a substantial risk,
23 severe suffering.

24 And --

25 JUSTICE ALITO: Doesn't the -- isn't

1 the role of the second prong at least in part,
2 and maybe in full, what has been called by the
3 lower courts as the second prong, something
4 that informs the first prong?

5 So you determine whether something is
6 severe and substantial in relation to other
7 known methods of execution on the assumption
8 that any execution can cause pain.

9 Certainly, it's going to cause a lot
10 of emotional pain that's probably going to
11 exceed the physical pain.

12 MR. HOCHMAN: I think that's true when
13 you're talking about a facial challenge
14 because, remember, in a facial challenge,
15 you're trying to figure out, as this Court
16 said, all methods of execution involve some
17 degree of pain and suffering. Right?

18 So you need something to compare it
19 to. Was this too much? Well, compare it to --
20 tell me what you want to compare it to. Here,
21 we have a ready comparator. It's a healthy
22 inmate. It's what the people of Missouri had
23 in mind when they designed this protocol.

24 Mr. Bucklew's experience is going to
25 be nothing at all like that, and miserably so.

1 JUSTICE GORSUCH: But why -- why --
2 why wouldn't we want to do the comparison, if
3 we're going to do it in gross on a facial
4 challenge, why wouldn't we do the comparison,
5 if you concede it's valid there, why wouldn't
6 we want to do the same comparison specifically
7 when it comes to your client? Perhaps we have
8 to look outside what Missouri has authorized,
9 but -- a firing squad or whatever, but why
10 wouldn't we do that exact same analysis in
11 specific?

12 MR. HOCHMAN: May -- may I answer?

13 CHIEF JUSTICE ROBERTS: Yes.

14 MR. HOCHMAN: Because -- because, Your
15 Honor, the -- the issue in Baze and Glossip was
16 a concern, you have prior rulings of this Court
17 that make clear, that the Constitution, in
18 general, does not define death, the death
19 penalty, as cruel.

20 And so there has to be a way to carry
21 it out. This claim about this individual
22 person doesn't call that into question at all.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:10 a.m., the case
2 was submitted.)
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