

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.)

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7 MISSOURI DEPARTMENT OF)
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10 - - - - -
11 Washington, D.C.

12 Tuesday, November 6, 2018

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:09 a.m.

17
18 APPEARANCES:

19
20 ROBERT HOCHMAN, ESQ., Chicago, Illinois; on behalf
21 of the Petitioner.

22 D. JOHN SAUER, State Solicitor, Jefferson City,
23 Missouri; on behalf of the Respondents.

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25

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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 a
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 a -- yet
12 there is no pending execution date. If that
13 protocol is used in the future, I don't know
14 whether the bleeding problems complicate the
15 trach for him. That's just never been
16 investigated.

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

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

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

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

1 MR. HOCHMAN: Well, it certainly can
2 be removed. The question is -- he -- he's got
3 a progressive condition that's, you know,
4 discussed in the record.

5 JUSTICE SOTOMAYOR: I -- I --

6 MR. HOCHMAN: And so --

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

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

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

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

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

25 JUSTICE SOTOMAYOR: But go ahead.

1 Assuming nothing, because I don't know what's
2 going to happen, it appears that your Dr. Zivot
3 was misreading the horse study, that his
4 four-minute estimate had to do with a different
5 study having to do with a dog and a different
6 agent, not the agent at issue here.

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

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

16 MR. HOCHMAN: So --

17 JUSTICE SOTOMAYOR: -- that factual
18 misstatement?

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

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

1 minutes.

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

4 JUSTICE SOTOMAYOR: But the --

5 MR. HOCHMAN: What you have to do is
6 you have to look at the study. I went back and
7 we looked at the study. There's a wide range
8 of infusion times in that study, 28 seconds to
9 115 seconds.

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

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

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

25 That -- the horses were infused with

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

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

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

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

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

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

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

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

1 MR. HOCHMAN: Well, because there's no
2 -- there's no way to measure exactly when --
3 there is no studies and there's no way to
4 measure exactly when you pass through the
5 various stages of consciousness. And so --

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 know, but they're -- they -- they undertake
8 major surgery with the EEG at a much --

9 MR. HOCHMAN: But --

10 CHIEF JUSTICE ROBERTS: -- higher
11 level here than you're talking about --

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

22 JUSTICE ALITO: Why is that? Why is
23 there no reason to believe that?

24 MR. HOCHMAN: Why is there no reason
25 to believe that?

1 JUSTICE ALITO: Yeah.

2 MR. HOCHMAN: Because there's -- well,
3 at this point, there's nothing in the record,
4 but there's also no --

5 JUSTICE ALITO: Well, there's nothing
6 in the record --

7 MR. HOCHMAN: -- there's no real way
8 to measure that.

9 JUSTICE ALITO: -- to show one way or
10 the other.

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

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

25 And -- and, Justice Sotomayor, you're

1 absolutely right that I think he just crossed
2 up the numbers in his head from the study. But
3 that doesn't change the fact that there's going
4 to be several minutes. And that's only
5 counting after they gain venous access.

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

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

18 JUSTICE SOTOMAYOR: I'm sorry, what --
19 what new facts?

20 MR. HOCHMAN: Well, that's the -- the
21 -- at page 882 of the appendix, the statement
22 from Ms. Boyles that he will lie flat, he will
23 not lie fully supine at the time they
24 administer the lethal drug, which I take to be
25 strong evidence, actually. They had time to

1 think about this, they had time to make a
2 decision about what they wanted to represent,
3 and what they chose to say is we'll make sure
4 he's not lying flat at the time they begin the
5 infusion.

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

16 CHIEF JUSTICE ROBERTS: Is that
17 because of the injection difficulties?

18 MR. HOCHMAN: Yes, right.

19 CHIEF JUSTICE ROBERTS: Well, does
20 that include the femoral injection option, or
21 are you only talking about the regular veins?

22 MR. HOCHMAN: We're talking about the
23 femoral. I -- I -- I think -- I think it's
24 more or less agreed that at this sum --
25 remember, this is summary judgment -- so, at

1 this posture of the case, there's substantial
2 reason why a fact-finder would conclude that
3 the peripheral access is going to fail.

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

12 We're not denying that. The question
13 is how horrible is that going to be for him.
14 The last time they accessed the femoral vein of
15 an inmate because they had failed to gain
16 venous access -- and this is at page 611 and
17 612 of the appendix -- they did it through this
18 cut-down procedure.

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

23 They are dealing with inmates after
24 all. Compromised veins is hardly an unusual
25 circumstance for them. So -- so they're going

1 to have to access the femoral vein, and the
2 cut-down procedure --

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

9 MR. HOCHMAN: Dr. Antognini did say
10 that, but -- but the board certified
11 anesthesiologist --

12 JUSTICE ALITO: Is there contrary --
13 is there contrary evidence?

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

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

1 femoral vein.

2 But, when asked point blank does
3 everyone have experience doing it, he said no.
4 He said you can go decades without doing it at
5 all and you could lose the ability to do it.

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

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

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

1 --

2 JUSTICE SOTOMAYOR: Is there another
3 alternative to the cut-down to access the
4 femoral vein?

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

10 JUSTICE SOTOMAYOR: Are there any?

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

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

22 But I -- I want to emphasize that when
23 they -- what the record shows is when they sit
24 -- when they start this process, they're not
25 going to be aware of the breathing issues.

1 That's what happened last time. They got a
2 one-page summary of his condition. It
3 mentioned that he has cavernous hemangioma on
4 the face and lip. It didn't mention the tumor
5 in his throat. It did not indicate any
6 breathing issues.

7 Nothing in the record indicates they
8 would check Mr. Bucklew's airway. Nothing in
9 the record indicates they normally, in the
10 normal course, would monitor an inmate's
11 respiration. Nothing in the record suggests
12 they would have the equipment present in the
13 room to deal with an airway collapse while he's
14 on the table waiting for the drug to be
15 infused, which is a very long period of time.

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

1 with it.

2 So I don't think -- I -- I think
3 there's a question -- the track -- if they had
4 come to us, Justice Sotomayor, and said, you
5 know what, we'll give you access, you can talk
6 to M2 and M3, and what we think they're going
7 to -- they're going to do is we're going to
8 give them the information that they need to
9 know what problems are very likely to arise.
10 We're going to let them think about it, you can
11 talk to them, and maybe what they'll be able to
12 do is, at the start of the process, we'll
13 adjust the protocol and put a track in.

14 JUSTICE SOTOMAYOR: May I --

15 MR. HOCHMAN: And that might -- that
16 would have gone --

17 JUSTICE SOTOMAYOR: Let me -- let me
18 stop you right there.

19 MR. HOCHMAN: Yeah.

20 JUSTICE SOTOMAYOR: Let's assume --
21 and they're going to -- I'm going to ask them
22 this directly.

23 MR. HOCHMAN: Sure.

24 JUSTICE SOTOMAYOR: It does seem very
25 logical that the state would give an affidavit

1 a lot better than the one they did through Mr.
2 Boyles that would say, no, we're not going to
3 put him sublime, from the minute he's laid
4 down, the gurney will have the top part raised,
5 we've talked to the medical team, they have
6 experience by their own requirements, they have
7 training, education, and experience with two or
8 three different ways to reach a femoral line.
9 There's at least one of the two people who do.

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

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

18 Would you have a case left at that
19 point?

20 MR. HOCHMAN: I think -- I think if
21 the judgment were based on that kind -- on
22 those kinds of assurances, I would probably
23 want to add a few. I think, given the passage
24 of time and the progressive nature of his
25 illness, I think, to be adequately informed, I

1 mean, one of the -- as -- as you -- as you
2 pointed out, you know, adequate information is
3 critical here.

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

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

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

20 CHIEF JUSTICE ROBERTS: Could I ask --

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

1 What you are proposing, Justice
2 Sotomayor, is entirely sensible and could
3 happen on remand before the trial court, and
4 that's where it should happen, where it should
5 have happened before.

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

12 MR. HOCHMAN: Yeah, Your Honor, I
13 think -- I think there are a couple reasons why
14 that's so.

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

22 And Petitioner's proffered no showing
23 that is an equally effective manner of imposing
24 a death sentence. Well, what do we have?
25 Oklahoma, Mississippi, Alabama, have adopted

1 lethal gas as -- as -- as methods of execution,
2 in addition now to Missouri, and it's not only
3 -- not only have we shown that it's an equally
4 effective manner of imposing a death sentence.
5 Dr. Antognini said so. That's his -- that's
6 his opinion. That's the evidence in the case.

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

12 Now it doesn't mean there's nothing to
13 be worked out. Of course, there are details to
14 be worked out.

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

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

25 And it seems to me that if you have a

1 method that no state has ever used, that that
2 danger is magnified.

3 MR. HOCHMAN: Possibly, Your Honor,
4 but --

5 CHIEF JUSTICE ROBERTS: And yet your
6 claim is that this is a better -- a better
7 alternative?

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

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

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

1 in protocol --

2 CHIEF JUSTICE ROBERTS: Well, but that
3 gets to the point -- I mean, you understand the
4 theory between Baze and Glossip, which is what
5 the Eighth Amendment prohibits is the
6 unnecessary infliction of pain. If the death
7 -- death penalty is constitutional, as it now
8 is, there must be a way to administer it. But,
9 if you can show that there's another way that
10 is less painful, then the theory is, again,
11 that it's an Eighth Amendment claim because
12 it's unnecessary pain.

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

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

22 Remember, the -- the analysis was
23 comparative. You start with the background
24 assumption in Baze that if everything goes
25 according to plan, there's -- there's not

1 constitutionally significant suffering.

2 Here, it's exactly the opposite. If
3 everything goes according to plan, there is
4 constitutionally significant suffering. So the
5 -- the -- the relative risk of the just
6 unknown, you know, not quite sure because it's
7 never been played out before, which has no
8 purchase against the background in Baze, has
9 enormous purchase here. It's --

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

22 So, as of this moment, though, we've
23 been talking about the first part, and even you
24 say a lot of conditions have changed. And some
25 had changed. And some might have changed. And

1 we're missing a piece of evidence about an
2 affidavit that says, hey, the nurses and so
3 forth do what they're supposed to do. Okay?

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

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

20 MR. HOCHMAN: I have a proposal.

21 JUSTICE BREYER: Yes.

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

1 If you look at the appendix, the
2 fourth amended complaint, page 85 of the
3 appendix and page 90 of the appendix, among the
4 allegations in the complaint is not only do we
5 think lethal gas would be a viable alternative
6 method, but we also say, if after adequate
7 discovery it turns out it might be possible, we
8 just don't know, but it might be possible to
9 alter a lethal injection protocol in a way that
10 would satisfy constitutional standards.

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

25 JUSTICE ALITO: What is your basis for

1 arguing that there would be a shorter twilight
2 period with lethal gas?

3 MR. HOCHMAN: So this --

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

6 MR. HOCHMAN: So -- no. So just to be
7 clear --

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

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

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

25 The problem is that, with

1 pentobarbital, part of what happens, and this
2 is -- you have a very narrow -- you have an
3 obstructed airway, and Dr. -- Dr. Zivot -- and
4 I'll -- I'll be very quick here -- Dr. Zivot
5 just explains you could have laminar flow,
6 which is normal flow, or turbulent flow.
7 Turbulent flow is a real big problem for -- for
8 -- for Mister --

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

13 MR. HOCHMAN: I think it's several
14 minutes, Your Honor. It's several.

15 JUSTICE ALITO: All right. And how do
16 you get to that figure with -- the figure that
17 applies there with respect to lethal gas?

18 MR. HOCHMAN: I -- no, it would be
19 less with lethal gas.

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

22 MR. HOCHMAN: Well, the --

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

24 MR. HOCHMAN: -- the testimony from
25 lethal gas is twofold. One -- this is in the

1 Oklahoma studies at page 736 through 747 of the
2 appendix -- very, very quick onset of
3 unconsciousness; and, two, one of the things
4 that lethal gas has is it's about twice as
5 fast --

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

8 MR. HOCHMAN: The Oklahoma information
9 and Dr. Antognini's testimony.

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

13 MR. HOCHMAN: He said it would be the
14 same as he thought pentobarbital would produce.
15 And that was --

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

21 Do you want to accept his number for
22 lethal gas but reject his number for
23 pentobarbital -- for -- for the current
24 protocol?

25 MR. HOCHMAN: Yes, Your --

1 JUSTICE ALITO: Even though what he
2 said was that they are the same.

3 MR. HOCHMAN: Yes, Your Honor. I
4 think we're entitled to do that. And Judge --
5 and that was the basis of Judge Colloton's
6 dissent.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Hochman.

10 MR. HOCHMAN: I'd like to reserve the
11 remainder of my time.

12 CHIEF JUSTICE ROBERTS: Sure.

13 Mr. Sauer.

14 ORAL ARGUMENT OF D. JOHN SAUER

15 ON BEHALF OF THE RESPONDENTS

16 MR. SAUER: Mr. Chief Justice, and may
17 it please the Court:

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

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

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

3 JUSTICE SOTOMAYOR: All right. So
4 let's go to his unique circumstance. You don't
5 deny that he has this condition?

6 MR. SAUER: Absolutely not.

7 JUSTICE SOTOMAYOR: You don't deny
8 that he has a small tumor but a tumor in his
9 throat?

10 MR. SAUER: The evidence is it's quite
11 sizable, in fact.

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

25 So I'm assuming you're looking for

1 those people and have them in place.

2 MR. SAUER: Correct, Your Honor.

3 JUSTICE SOTOMAYOR: So why haven't you
4 represented that you're going to take the basic
5 steps necessary to avoid the horrific
6 circumstances that your adversary says can and
7 will happen?

8 MR. SAUER: We vigorously dispute that
9 horrific circumstances will arise, but I
10 believe we have made those representations.

11 JUSTICE SOTOMAYOR: How do you -- why
12 do you dispute that?

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

17 JUSTICE SOTOMAYOR: All right.

18 MR. SAUER: I -- I do want to address
19 the question about what representations we have
20 made. At 531 of the Joint Appendix, the
21 director of Adult Institutions testified --
22 this is in the record. It's not a supplemental
23 affidavit that we submitted in opposition to a
24 stay motion. In the record is testimony that
25 the gurney is adjustable and that the

1 anesthesiologist has the discretion to adjust
2 the gurney to the position that would play --
3 that would be in the inmate's most appropriate
4 medical interest.

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

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

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

25 The one-page summary, the director of

1 Adult Institutions -- it's at a higher level in
2 the Department of Corrections -- said that's
3 the only thing that I give them. But the
4 warden testified that he has -- he has access
5 to the entire medical records.

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

10 JUSTICE KAVANAUGH: Do we know --

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

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

23 So then we're stuck with the other
24 part of it, which we don't know all that about
25 -- much about. And the nitrogen, they have a

1 good reason for thinking that the nitrogen
2 won't be painful, that it works in a different
3 way, and yet it isn't quite there in the record
4 and -- and -- and you can argue it and that's
5 why there was a dissent.

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

15 Now I -- I -- why not?

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

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

1 Secondly, the evidence in the record
2 decisively -- decisively supports an affirmance
3 on either of the two alternative grounds,
4 either of the Glossip elements, and I'll --
5 I'll -- I'll address, if I may, the one that
6 you raised, which is the second Glossip
7 element, about a feasible readily implemented
8 alternative solution.

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

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

25 And the other thing that's going on in

1 the back of my mind is -- is, of course, what
2 people do think very often is, look, once we
3 send it back on this, then they'll think of
4 something else. And really what's going on is
5 endless delay because they think that the death
6 penalty is -- is not appropriate. Okay?

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

12 So do you have anything you want to
13 say about that?

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

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

1 and we're not going to let you do that.

2 I don't actually know where in the
3 Eighth Amendment and its history the Court made
4 up this alternative remedy idea because the
5 Constitution certainly doesn't prohibit cruel
6 and unusual punishment, unless we can -- unless
7 we can't kill you at all.

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

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

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

25 But I'm wondering why we're assuming

1 that Baze should be extended to an as-applied
2 challenge at all.

3 MR. SAUER: I don't --

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

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

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

1 Court's consideration.

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

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

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

23 JUSTICE SOTOMAYOR: We exempt certain
24 people from the death penalty: the mentally
25 ill, the incompetent, people who are young. We

1 haven't seen that as abolishing the death
2 penalty. We see it as -- as an as-applied
3 exemption to a particular person or individual
4 for whom this method is cruel and unusual.

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

12 JUSTICE SOTOMAYOR: How about the
13 constitutional --

14 MR. SAUER: This Court held that there
15 would be no deterrence or retributive purpose
16 to that.

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

22 MR. SAUER: That is correct. And the
23 scope of that Eighth Amendment right is what is
24 set forth in Baze and in Glossip.

25 JUSTICE KAVANAUGH: Are you saying,

1 even if the method creates gruesome and brutal
2 pain, you can still do it because there's no
3 alternative?

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

9 JUSTICE KAVANAUGH: So you're saying
10 that even if the method imposes gruesome,
11 brutal pain --

12 MR. SAUER: That is --

13 JUSTICE KAVANAUGH: -- you can still
14 go forward?

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

17 JUSTICE KAVANAUGH: Is that a yes?

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

1 JUSTICE KAVANAUGH: Is there any limit
2 on that? Is there any limit to the degree of
3 --

4 MR. SAUER: There is a limit, Your
5 Honor. I think there -- the limit would occur
6 if the method of execution were viewed as
7 superadding terror, pain, or disgrace within
8 the meaning of the Court's earlier method of
9 execution cases.

10 So if the method of execution was so
11 gruesome and brutal or -- or -- or was even
12 relevantly similar to the historical gruesome
13 methods of execution that are categorically
14 prohibited by the Eighth Amendment, there would
15 certainly be a claim in that context where --
16 or, in the words of Baze and Glossip, there is
17 an attempt to deliberately inflict pain for the
18 sake of pain, that would be categorically
19 exempted. In that context, the alternative
20 method is not required.

21 But if a petitioner claims that, well,
22 I'm predicting that I will suffer under these
23 circumstances, that petitioner must, under the
24 logic of Baze and Glossip, plead and prove an
25 alternative method. And one of the compelling

1 reasons that this Court offered for that was
2 that this Court recognized that it is -- to
3 eliminate the risk of pain completely is
4 impossible. And that's why the Baze and
5 Glossip context is very different than this
6 context.

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

14 MR. SAUER: I don't think it gets all
15 the way to it. And I believe that is why Baze
16 and Glossip adopted this as, in the words of
17 Baze, a -- or in the words of Glossip, a
18 substantive element of this particular claim.
19 So --

20 JUSTICE BREYER: I thought -- I'm
21 trying to get back to my question, which is
22 asking you as a prosecutor, but, look, I guess
23 you would agree that some -- X has a rare
24 medical condition that makes the method of
25 execution to him feel exactly like being burned

1 at the stake. Okay?

2 Would -- the Constitution would rule
3 that out, wouldn't it?

4 MR. SAUER: The Constitution would
5 rule out burning at the stake, absolutely, Your
6 Honor.

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

10 MR. SAUER: That is --

11 JUSTICE BREYER: It feels exactly the
12 same.

13 MR. SAUER: I would have to know more
14 about the hypothetical.

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

17 (Laughter.)

18 JUSTICE BREYER: Okay? But what I
19 want is -- it's exactly the same to him as if
20 you burned him at the stake. And I guess if
21 you're going to rule out the one, you'd rule
22 out the other. That's my thought, because I'm
23 going to say next he, this particular
24 individual, will, because of his rare medical
25 condition, feel exactly the same as if he'd

1 been drowned to death over -- slowly over a
2 period of time. Okay?

3 So that's why I think Justice
4 Kavanaugh brought that up. But my -- my -- my
5 -- my -- and I -- and that seems to me to be
6 the factual issue that's underlying your first
7 point.

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

20 So I -- I -- I think it's a serious
21 question. And -- and I would like to know what
22 you think.

23 MR. SAUER: If I may, Your Honor, I
24 understand the question to be if -- if there is
25 an exceptional delay before the implementation

1 of the death penalty, does that raise a
2 question as to whether or not the passage of --

3 JUSTICE BREYER: No, I'm not doing it
4 that technically. I'm -- I'm doing it because
5 this case really exhibits, as I said -- it's --
6 as a special case, and I think of the burning
7 at the stake example. And I know that other
8 people think that's just something they're
9 going to bring up and lose or win and then they
10 go on to the next one after that and the next
11 one after that. And I've -- I've written and
12 said: Well, it's because it's very hard to do
13 this because you want to give them basic
14 fairness. You don't want to burn someone at
15 the stake. And that takes time.

16 MR. SAUER: It --

17 JUSTICE BREYER: So -- so what is your
18 take on that?

19 MR. SAUER: If this --

20 JUSTICE BREYER: My general argument.

21 MR. SAUER: If this Petitioner were to
22 predict that he would experience a sensation
23 like burning at the stake, he would be the
24 third petitioner or the third set of
25 petitioners in the last 10 years to make that

1 prediction. That was the precise prediction
2 that was made in Baze and Glossip. Those
3 petitioners predicted that midazolam, for
4 example, in Glossip would not suppress the
5 feeling that would be akin to being burned at
6 the stake.

7 And this Court held twice that these
8 people must show that this is sure, very likely
9 to happen, and they must show that there's an
10 alternative method of execution that is readily
11 feasible.

12 And, of course, these hypotheticals
13 about being burned at the stake aren't really
14 implemented in the real world. What's
15 implemented in the real world is a situation
16 where capital petitioners have every incentive
17 to engage in interminable litigation,
18 interminable litigation, multiple challenges.

19 So, absent that second element, absent
20 that second Baze element, what would almost
21 certainly happen in every case is, once the
22 petitioner had made a threshold showing on the
23 first element and the state came up with an
24 alternative, there would be a subsequent
25 lawsuit or an amendment of the petition,

1 resulting in a second attack. And that's
2 exactly what we have here.

3 We have a petitioner --

4 JUSTICE SOTOMAYOR: That may well be,
5 but the reality is that there are alternatives.
6 Many of them have not been implemented because
7 people want -- don't want to see them: the
8 firing squad, electrocution. There's a whole
9 lot of things that people don't want to accept
10 the reality of, but they're there.

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

19 MR. SAUER: I believe statutory
20 authorization alone is insufficient to
21 demonstrate that something is readily
22 implemented or known and available within the
23 meaning of Baze.

24 Now, if there were a petitioner --
25 some capital petitioners, for example, in Ohio

1 have been pleading things like firing squad and
2 hanging as alternative methods of execution.
3 Where there is historical pedigree to it, this
4 Court has previously affirmed that that is a
5 viable method of execution that is
6 constitutional.

7 There is a dispute in the courts of
8 appeals about whether or not statutory
9 authorization is a necessary condition to show
10 that things are readily available, but right
11 now, in the Eighth Circuit, statutory
12 authorization is not required. In the McGehee
13 case last year, the -- the Eighth Circuit said
14 we do not say that statutory authorization is
15 required.

16 So there are options available. If
17 someone really thought that I will suffer,
18 experience like burning at the stake,
19 presumably that person would plead, you know,
20 lethal gas, would plead --

21 JUSTICE KAGAN: So are you saying,
22 Mr. Sauer, that we would be in a different
23 situation in this case right now if the
24 Petitioner had instead requested an
25 electrocution or a firing squad?

1 MR. SAUER: It would certainly have
2 been a stronger case. Now what actually
3 happened was, in the second page of his
4 complaint, he dropped a footnote saying, I'm
5 not asking for firing squad. He mentioned
6 firing squad, but he did not ask for it saying
7 that because it is not statutorily authorized.
8 So he, for strategic or inadvertent reasons,
9 has never presented the issue in this case, and
10 Missouri's never taken a position on it, as to
11 whether or not statutory authorization is a
12 alternative -- is required.

13 JUSTICE KAVANAUGH: General --

14 MR. SAUER: And Missouri takes no
15 position on that now.

16 JUSTICE KAGAN: May I ask a -- a
17 different question? You know, one of the
18 things that strike me -- strikes me, when I
19 went back and -- and looked at Baze, there's a
20 lot about kind of deference to a state
21 legislature and state officials about
22 determining the appropriate method of
23 execution, about giving a kind of considered
24 judgment to the sort of pain that would be
25 expected from an execution, as well as their

1 interests in carrying out legitimate sentences
2 and making decisions on that basis.

3 But what strikes me is that when we
4 think about that, those officials really are
5 thinking in gross, if you know what I mean.
6 They're thinking about a method of execution as
7 applied to the general class of people and
8 deciding that it's appropriate.

9 And what, of course, makes this case
10 very different is that it's not in gross. It's
11 a particular person that says I have a highly
12 unusual condition that will make the execution
13 highly unusual, that will have me suffer highly
14 unusual pain.

15 And in that context, I think all of
16 that stuff that we talked about in Baze about
17 why we should refer to state-considered
18 judgments really falls away because there's
19 been no considered judgment, surely by the
20 legislature and, in general, by officials,
21 about -- about one particular person.

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

1 MR. SAUER: I think what I would say
2 to that is the deference that Baze and Glossip,
3 as you described, gave to sort of the
4 legislature, you know, as to the generalized
5 method of execution, it would be appropriate.
6 It would be deeply consistent with this Court's
7 precedents to give that same kind of deference
8 to the state officials who are implementing the
9 -- the execution in the concrete, in this
10 individual case.

11 Missouri has a board-certified
12 anesthesiologist who will be in charge of
13 putting IVs into this particular person.

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

24 So I don't think we could
25 realistically give the same kind of deference

1 to that sort of decision.

2 MR. SAUER: I think the deference that
3 I had in mind is deference to the
4 determinations that are made on the site as the
5 execution is going forward, where there's
6 uncontradicted evidence in the record in this
7 case that the -- the medical team is making all
8 the medically relevant judgments.

9 JUSTICE KAVANAUGH: On -- on -- on
10 that point, do we know that he will not be
11 lying flat, or are you saying that doesn't
12 matter?

13 MR. SAUER: Both of those. We know
14 that, first of all, it was established by the
15 pleadings, as the majority held in the Eighth
16 Circuit, that he pled that the state has
17 offered to adjust the gurney to the most
18 appropriate position, and we admitted that in
19 our answer.

20 In addition to that, uncontradicted
21 testimony at page 531 of the Joint Appendix
22 says the gurney is adjustable and it can be
23 adjusted to the position that the
24 anesthesiologist deems the most appropriate.

25 JUSTICE KAVANAUGH: And related to

1 that, the -- your opposing counsel said, even
2 if everything goes according to plan, there
3 will still be significant suffering.

4 Can you respond to that?

5 MR. SAUER: I absolutely, absolutely
6 disagree with that. The testimony about this,
7 of Dr. Antognini, is that the only suffering
8 that would occur in this execution that could
9 be medically predicted was the suffering
10 associated with the actual entry of the IV, in
11 other words, the pinpricks or the cut-down
12 procedure.

13 Now I say cut-down procedure, and
14 truth in fact, the record decisively shows that
15 a cut-down procedure is not done in the femoral
16 vein. The only evidence of this is the
17 testimony of Dr. Antognini, who says a cut-down
18 is done on the saphenous, which is much lower
19 down in the leg, in the angle.

20 A cut-down is not done on a femoral
21 vein. The evidence from the warden, who's not
22 a -- a medical person, about the one time a
23 cut-down was done, describes it as being done
24 in the leg.

25 So the -- there's no evidence and, in

1 fact, Dr. Antognini said there is no need to do
2 a cut-down on the femoral because it is "easily
3 accessed." And, in fact, it is not standard of
4 care to use an ultrasound in accessing the
5 femoral.

6 So -- and the holding of the district
7 court on this very point was that, not only has
8 he put in no evidence that there will be any
9 difficulty at all accessing the femoral, but in
10 addition to that, that he had presented no
11 argument in opposing summary judgment about any
12 difficulty that would happen on any vein other
13 than the peripheral veins in his arms.

14 So there's really nothing in the
15 summary judgment record that supports the
16 predictions that are being made on --

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

21 Why isn't it a predictive -- a
22 reliable predictive tool to show that the same
23 person who's going to do it now botched it
24 earlier?

25 MR. SAUER: There is no evidence of

1 problems. And the only testimony in the record
2 is from the warden, who is not a medical
3 person, who said that a local anesthetic was
4 given and a cut-down was done in the leg.

5 The testimony of the doctor is that a
6 cut-down is typically not done in the femoral,
7 which is high in the leg, but is typically done
8 in the saphenous, which is low in the leg.

9 So there's no evidence in the record
10 that any cut-down has ever been done on the
11 femoral.

12 JUSTICE GORSUCH: Mr. Sauer, I believe
13 some time ago you said there were four reasons
14 why you thought at step 2 a defendant should be
15 required to show an alternative. I'm -- I'm
16 not sure we got past the first of those four.
17 I'm not even sure we got the first one out
18 there, actually. And I'm curious what -- what
19 -- what all four are.

20 MR. SAUER: The first reason is that
21 the logic and the holding of Baze and Glossip
22 requires -- it holds that this is a substantive
23 element of any method of execution challenge.

24 The second one is that, as Baze and
25 Glossip both said, the death penalty is

1 constitutional and there must be a means of
2 carrying it out. And that reasoning applies
3 just as much in the microcosm as to the
4 individual petitioner who's seeking a de facto
5 exemption from the death penalty as it does in
6 the macro -- macrocosm.

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

14 Here, we're talking about the
15 suffering of a single petitioner. Exactly the
16 same balance that the Court struck by adopting
17 the second element applies in this particular
18 case.

19 In addition to that, both Baze and
20 Glossip relied on Farmer and Wilson, going back
21 to Estelle, which itself relied on Weisweber,
22 for the proposition that there must be a
23 showing of subjective blameworthiness in this
24 context for there to be an Eighth Amendment
25 violation. And Wilson said that one critical

1 factor in whether or not there is subjective
2 blameworthiness is a constraint facing the
3 official.

4 If there is no alternative method of
5 execution available, and the official is under
6 a directive from a jury verdict that there is a
7 just and lawful sentence that must be carried
8 out, then the -- it's very difficult, if not
9 impossible, to draw the inference that there is
10 subjective blameworthiness in that particular
11 case.

12 CHIEF JUSTICE ROBERTS: You better get
13 to three quickly.

14 MR. SAUER: That was three, Your
15 Honor.

16 CHIEF JUSTICE ROBERTS: That was
17 three?

18 JUSTICE GORSUCH: I'm waiting for four
19 still.

20 MR. SAUER: And number four, of
21 course, is the risk, as we have discussed, that
22 there is a risk of interminable litigation.

23 And, Justice Gorsuch, I would direct
24 your attention to the way that the alternative
25 method was pled and proven in this particular

1 case. We have a petitioner who said lethal gas
2 with no further specification in his complaint,
3 and in the course of discovery said nothing
4 more specific than nitrogen and possibly a hood
5 or mask.

6 If Missouri came up with anything
7 specific, anything specific, any way to do this
8 --

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

12 MR. SAUER: I don't think it deals
13 with them very effectively.

14 JUSTICE KAVANAUGH: If properly
15 applied, in other words, substantial risk of
16 severe harm.

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

24 JUSTICE BREYER: Challenge after
25 challenge, that's -- I see that. But here is a

1 person who has some evidence anyway that, when
2 you execute him, it's going to be like slowly
3 drowning him to death and there's a good chance
4 of that.

5 So, in your opinion, should the
6 person, given the Eighth Amendment, not even
7 have the right to make that argument?

8 MR. SAUER: This Court --

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

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

24 Secondly, if you really thought that
25 he was going to suffer this excruciatingly, he

1 has an option available. He can plead all
2 kinds of alternative methods of execution that
3 are not completely untested and completely
4 unknown.

5 He can plead hanging. He can plead
6 firing squad. He was aware he could plead
7 firing squad, but he strategically decided not
8 to do that. Of course, if he had plead --
9 pleaded firing squad, it's possible that
10 Missouri could have executed him by firing
11 squad, but his litigation conduct indicates
12 that that is not the goal here.

13 The goal is to have challenge after
14 challenge after challenge. This is his third
15 method of execution challenge. He had two
16 prior challenges going back to 2012: the Ringo
17 litigation, bringing a preemption challenge, to
18 Missouri's protocol; the Zink litigation,
19 bringing in a facial challenge to Missouri's
20 protocol.

21 And now, 14 days before his first
22 scheduled execution, for the very first time,
23 he comes forward with an as-applied challenge
24 that is based on a medical condition that he
25 has had since birth and that has been for

1 decades presented the same --

2 JUSTICE SOTOMAYOR: Can we define --
3 can you define foreseeability -- or
4 feasibility, I'm sorry? Does the statute have
5 to authorize it for it to be feasible?

6 MR. SAUER: Missouri --

7 JUSTICE SOTOMAYOR: Does any statute
8 in a particular state have to authorize the
9 method you choose?

10 MR. SAUER: Missouri has never taken a
11 position on that question.

12 JUSTICE SOTOMAYOR: Take it now.

13 MR. SAUER: I -- I -- I do -- I do not
14 believe I'm compelled to do so by the way the
15 record is presented. However, there are
16 compelling arguments, there are strong
17 arguments that that shouldn't be a requirement.

18 Your Honor, I see my time has expired.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Three minutes, Mr. Hochman.

22 REBUTTAL ARGUMENT OF ROBERT HOCHMAN

23 ON BEHALF OF THE PETITIONER

24 MR. HOCHMAN: Thank you, Mr. Chief
25 Justice. I'd like to make two points, first

1 about the alternative method requirement, and
2 second about the disposition in this case.

3 Starting with the alternative method
4 requirement, Justice Kagan, I think you have it
5 exactly right, that if you imagine that the
6 State of Missouri thought about how to build a
7 method of execution that was going to create
8 the subjective experience that the record
9 indicates here for everyone, that the record
10 indicates here Mr. Bucklew would experience,
11 nobody would do it.

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

1 Respectfully, I don't think that makes
2 any sense. And I'll tell you why it doesn't
3 make any sense.

4 Nobody doubts -- nobody doubts that
5 when he's in his cell and he's got trouble
6 breathing, they give him a biohazard bag. They
7 give him gauze. They put him on a soft diet
8 because eating hard food can cause his throat
9 to bleed. Of course, they take into
10 consideration his physical condition, his --
11 his concerns. And if they didn't, the Eighth
12 Amendment would require them to do it in his
13 cell.

14 Their view of the alternative method
15 requirement is, as soon as he walks into the
16 execution chamber, the Eighth Amendment
17 changes, and now they don't, unless -- unless
18 he has some idea, unless he's the one who comes
19 forward. The obligation, not -- the language
20 of the Eighth Amendment is clear: Cruel and
21 unusual punishments shall not be inflicted.
22 That's all we're saying here.

23 And, Justice Kavanaugh, you're right,
24 the first -- the threshold issue in -- in Baze,
25 that takes care of this. That is a demanding

1 standard. There has to be a substantial risk,
2 severe suffering. And --

3 JUSTICE ALITO: Doesn't the -- isn't
4 the role of the second prong at least in part,
5 and maybe in full, what has been called by the
6 lower courts as the second prong, something
7 that informs the first prong?

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

12 Certainly, it's going to cause a lot
13 of emotional pain that's probably going to
14 exceed the physical pain.

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

21 So you need something to compare it
22 to. Was this too much? Well, compare it to --
23 tell me what you want to compare it to. Here,
24 we have a ready comparator. It's a healthy
25 inmate. It's what the people of Missouri had

1 in mind when they designed this protocol.

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

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

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

16 CHIEF JUSTICE ROBERTS: Yes.

17 MR. HOCHMAN: Because -- because, Your
18 Honor, the -- the issue in Baze and Glossip was
19 a concern, you have prior rulings of this Court
20 that make clear that the Constitution, in
21 general, does not define death, the death
22 penalty, as cruel. And so there has to be a
23 way to carry it out.

24 This claim about this individual
25 person doesn't call that into question at all.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.

3 (Whereupon, at 11:10 a.m., the case
4 was submitted.)

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