OCTOBER TERM 2016

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. ________

JASON McGEHEE, STACEY JOHNSON, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE,

Petitioners,

v.

ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity, and WENDY KELLEY, Director, Arkansas Department of Correction, in her official capacity,

Respondents.

PETITION FOR WRIT OF CERTIORARI

****EXECUTIONS SCHEDULED FOR APRIL 20, 24, and 27, 2017****

Jeff Rosenzweig, ABN 77115
jrosenzweig@att.net
300 Spring St., Ste. 310
Little Rock, AR 72201
(501) 372-5247

Counsel for Stacey Johnson, Jack Jones and Kenneth Williams

Scott Braden, ABN 2007123
John C. Williams, ABN 2013233
Counsel of Record
Federal Public Defender Office
scott_braden@fd.org
john_c_williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

Counsel for Don Davis, Jason McGehee, Terrick Nooner, Bruce Ward, and Marcel Williams

Lee Short, ABN 2010136
Short Law Firm
leedshort@gmail.com
425 W. Broadway St. A
North Little Rock, AR 72114
(501) 766-2207

Counsel for Ledell Lee

Shawn Nolan, PA Bar. 56535
Federal Community Defender Office
Shawn_Nolan@fd.org
601 Walnut St., Suite 545-W
Philadelphia, PA 19106
(215) 928-0520

Counsel for Kenneth Williams

Jennifer Merrigan, MO Bar 56733
Joseph Perkovich, NY Bar 4481776
j.merrigan@phillipsblack.org
j.perkovich@phillipsblack.org
Phillips Black
P.O. Box 2171
New York, NY 10008
(212) 400-1660

Counsel for Bruce Ward

Deborah R. Sallings, ABN 80127
deborahsallings@gmail.com
35715 Sample Road
Roland, AR 72135

Counsel for Don Davis

QUESTIONS PRESENTED
CAPITAL CASE

This case concerns Arkansas's intention to conduct four double executions within an eleven-day span using a midazolam-based lethal-injection protocol. After a four-day hearing, the district court enjoined the executions, concluding Petitioners are likely to show the midazolam protocol entails a substantial risk of harm, both by itself and in conjunction with the compressed execution schedule, and also that they are likely to prove available alternatives. Two days later, the Eighth Circuit vacated the preliminary injunction in a six-page order. On the circuit's view, the district court committed clear error because evidence regarding midazolam was "equivocal." The circuit also found Petitioners were unlikely to show any alternatives that the State can "easily" implement. Finally, it found that the equitable factors of *Hill v. McDonough*, 547 U.S. 573 (2006), bar the injunction, even though Petitioners have diligently sought relief since the State adopted its midazolam protocol.

The Court's recent lethal-injection decisions have spawned unresolved, substantial questions that have divided the circuits.

Question One: Did the Eighth Circuit's two-day, non-deferential review of the four-day hearing and its summary reversal of the 101-page preliminary-injunction order so far depart from the accepted and usual course of judicial proceedings as to require this Court's intervention?

Question Two: Which threshold—the Sixth, Eighth, or Eleventh Circuit's—should the federal courts apply to evaluate whether death-row prisoners have established the "availability" of other execution methods under *Glossip*?

Question Three: Does *Hill* require reversal of a preliminary injunction where the delay in filing in federal court arose from prisoners' decision to first challenge the State's protocol in state court, but where the state court declined to address their claims on the merits?

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. State proceedings 3

B. Federal proceedings 5

Reasons for Granting the Writ 10

I. The Eighth Circuit's hurried and error-laden opinion justifies certiorari 11

A. The Eighth Circuit's opinion demands that this Court exercise its supervisory power 11

B. The Eighth and Sixth Circuits have adopted different approaches to reviewing preliminary-injunction orders under identical circumstances 13

II. Certiorari is warranted to resolve a number of questions that have divided the circuits in lethal-injection litigation 15

A. The circuits are divided on the appropriate standard for showing that alternative execution methods are available 16

B. The Eighth Circuit has departed from the proper interpretation of *Glossip*'s first prong 19

III. The Court should clarify the *Hill* standard for "unreasonable delay" 20

A. Pursuing state constitutional remedies in state court to challenge state execution methods should not be penalized 21

B. The Eighth Circuit's "unreasonable delay" ruling overlooked the new factual and legal bases for Petitioners' federal claims 23

Conclusion 24

APPENDIX

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 12

Arthur v. Dunn,
840 F.3d 1268 (2016) 16

Ashcroft v. Am. Civil Liberties Union,
542 U.S. 656 (2004) 11, 12

Baze v. Rees,
553 U.S. 35 (2008). 9, 10, 18, 19

Boyd v. Beck,
404 F. Supp. 2d 879 (E.D.N.C. 2005) 21

Calderon v. Thompson,
523 U.S. 538 (1998) 21

Glossip v. Gross,
135 S. Ct. 2726 (2015) .... *passim*

Hicks v. Taft,
431 F.3d 916 (6th Cir. 2005) 21

Hill v. McDonough,
547 U.S. 573 (2006) .... *passim*

Jackson v. Danberg,
656 F.3d 157 (3d Cir. 2011) 13

Johnson v. Kelley,
496 S.W.3d 346 (Ark. 2016) 4, 5

Lankford v. Sherman,
451 F.3d 496 (8th Cir. 2006) 11

Nelson v. Campbell,
541 U.S. 637 (2004) 20, 21

In re Ohio Execution Protocol Litig.,
No. 2:11–cv–1016, 2017 WL 378690 (S.D. Ohio Jan. 26, 2017) 14

In re Ohio Execution Protocol,
No. 17-3076, 2017 WL 1279282 (6th Cir. Apr. 6, 2017) 14, 15, 16, 19

Ruiz v. Davis,
850 F.3d 225 (5th Cir.), *cert. dismissed*, No. 16-8197, 2017 WL
898825 (U.S. Mar. 27, 2017) 22

White v. Johnson,
429 F.3d 572 (5th Cir. 2005) 21

Wood v. Collier,
836 F.3d 534 (5th Cir. 2016) 19

PETITION FOR WRIT OF CERTIORARI

Petitioners Jason McGehee, Stacey Johnson, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Kenneth Williams, Don Davis, and Ledell Lee are all death-row inmates in Arkansas. Six of them remain under warrant to be executed this month.[1] Petitioners respectfully request that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this capital case.

OPINIONS BELOW

The Eighth Circuit's opinion vacating the preliminary injunction is attached as Appendix A (App. 1a–31a). The district court's preliminary-injunction order is attached as Appendix B (App. 32a–132a). The district court's order granting in part and denying in part Respondent's motion to dismiss, portions of which the district court incorporated into its preliminary-injunction order, is attached as Appendix C (App. 133a–191a).

JURISDICTION

The Court of Appeals entered its order vacating the preliminary injunction on April 17, 2017. App. 1a. This petition is timely filed under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] Nooner has not been put under warrant in 2017. Davis and Ward were under warrant for April 17, 2017, but those warrants passed after the Arkansas Supreme Court granted stays. McGehee received a stay in a different federal case after the Arkansas Parole Board recommended the Governor grant him clemency; he technically remains under warrant. Respondents currently intend to carry out five executions: Ledell Lee and Stacey Johnson on April 20; Jack Jones and Marcel Williams on April 24; and Kenneth Williams on April 27.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On February 27, 2017, Defendant Hutchinson issued eight execution warrants for four double executions to occur from April 17 to 27, 2017. Hutchinson's stated reason for this expedited and unprecedented execution schedule was that the State's supply of midazolam expires on April 30 and it is "uncertain" whether the State can get more. On March 27, 2017, Petitioners filed a complaint in which they alleged, as relevant here, that the State's midazolam protocol violates the Eighth Amendment, both on its own and in combination with the compressed execution schedule and lack of accompanying safeguards.

The district court conducted an evidentiary hearing from April 10 to April 13, working well into the night most nights. The court heard seventeen witnesses, who produced over 1,300 pages of transcript. It received and analyzed thousands of pages of evidence, including authoritative medical, scientific, and pharmacological publications. After an exhaustive, 101-page analysis of the evidence, the district court preliminarily enjoined the executions. Making extensive findings of fact and applying this Court's lethal-injection case law, the district court found a significant likelihood that Petitioners would prove that, because of its medical and pharmacological properties, the use of midazolam in their executions will cause

severe pain and suffering, and that there are alternative, reasonably available methods of execution that would not cause such pain and suffering.

Two days later, acting on the State's emergency motion to vacate the preliminary injunction, the Eighth Circuit, sitting en banc and over the dissent of Judge Kelly, "commend[ed] the [district] court for its diligence" and reversed. App. 3a. In a six-page per curiam opinion, which necessarily cast aside the formidable evidence that midazolam cannot perform the anesthetic role the State supposes, the Eighth Circuit majority characterized the evidence as "equivocal" and thus incapable of justifying a preliminary injunction. The Court likewise found no likelihood of showing alternatives after applying a legal standard that directly conflicts with the standard the Sixth Circuit adopted just eleven days before. The majority further ruled that Petitioners unnecessarily delayed in bringing suit because they had initially pursued their rights in state court.

A. State proceedings.

The Arkansas General Assembly adopted midazolam as a potential execution drug on April 6, 2015. The same day, Plaintiffs filed suit in the Circuit Court of Pulaski County, Arkansas. As is relevant here, Plaintiffs challenged the use of midazolam in their executions as a violation of the Eighth Amendment and the parallel state constitutional provision. After the State removed the suit to federal court, Petitioners voluntarily dismissed the federal case and filed a new complaint in state court pursuing only state law claims. As required by *Glossip v. Gross*, 135 S. Ct. 2726 (2015), Petitioners pled alternative execution methods.

On August 6, 2015, the State adopted a new lethal-injection protocol using midazolam. Despite the pendency of the lethal-injection litigation, Hutchinson set eight execution dates on September 9, 2015, with a double execution to occur once a month in the coming October, November, December, and January. The dates thrust the litigation into an emergency posture, with only minimal discovery conducted before the State filed a motion for summary judgment on Petitioners' midazolam claim. The Arkansas Supreme Court stayed the executions, and the circuit court denied the State's summary-judgment motion, finding that Petitioners had proffered sufficient evidence of midazolam's inefficacy.

Under Arkansas procedural rules, the State was allowed an interlocutory appeal solely on sovereign-immunity grounds. In *Johnson v. Kelley*, 496 S.W.3d 346 (Ark. 2016), the Arkansas Supreme Court adopted the *Glossip* test as applicable to claims under the Arkansas Cruelty Clause, reversed the lower court, and dismissed the complaint. The Arkansas Supreme Court's opinion was silent about whether Petitioners had offered sufficient evidence regarding the midazolam protocol to proceed to trial. Instead, the court criticized Petitioners' pleading of alternative methods of execution, finding that the "circuit court erred in concluding that the Prisoners pled sufficient facts as to the proposed alternative drugs," and also rejecting their proposal of a firing squad because "[e]xecution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death." *Johnson*, 496 S.W.3d at 359–60.

Petitioners asked this Court to review the Arkansas Supreme Court's interpretation of pleading standards as dictated by *Glossip*. The Court denied certiorari on February 21, 2017, with Justices Sotomayor and Breyer dissenting. 137 S. Ct. 1067. The Arkansas Supreme Court issued its mandate on February 24, 2017, thus returning the case back to the circuit court for further proceedings. However, the case has remained in limbo in the circuit court, despite Petitioners' attempts to amend their complaint to correct the alternative-method pleading deficiencies identified in *Johnson*. In sum, in state court, Petitioners have never been able to present evidence regarding midazolam at a hearing and have been prevented from developing the merits of their claims.

B. Federal proceedings.

On February 27, 2017, Hutchinson scheduled eight executions, with two apiece to occur on April 17, April 20, April 24, and April 27. Along with the dates came a crush of end-stage responsibilities, including five clemency petitions filed from March 10 through17 and corresponding hearings from March 24 through 31. On March 27, 2017, Petitioners filed suit in the Eastern District of Arkansas, claiming the midazolam protocol violates the Eighth Amendment both by itself and in combination with the rushed execution schedule. After the hearing, the district court entered a 101-page order enjoining the execution. The Eighth Circuit reversed two days later.

District court order

The district court first determined, after a three-page discussion, that Petitioners had not unduly delayed in bringing the federal suit: "Plaintiffs base two of their claims on the state's intended use of midazolam, which plaintiffs have been contesting—without ever receiving a hearing on the merits—since the days after the Arkansas legislature passed the 2015 version of the [method-of-execution act]." App. 83a.

The court next devoted twenty pages to reviewing the evidence that midazolam is likely to cause intolerable pain. In concluding that Petitioners were likely to succeed on this point, the court carefully reviewed the scientific evidence, (App. 88a–96a), the witness testimony (App. 96a–100a), and evidence from other midazolam executions (App. 100a–102a). The court found Petitioners' experts more credible, determining that the State's principal expert offered testimony that "does not lend credence to defendants' theory of the science." (App. 94a). Overall, the court found that the State's evidence "does not significantly undercut the evidence [Petitioners] mount to support their theory of the case at this stage of the proceeding." (App. 95a). The court also reviewed evidence about defects in protocol administration caused by the rushed schedule, such as lack of contingency planning in the event of a problem during the executions. (App. 103a–105a). Ultimately, this review led the court to conclude that "the ADC's current lethal injection protocol qualifies as an objectively intolerable risk that [Petitioners] will suffer severe pain"

and that the "risk is exacerbated when considering the fact that the state has scheduled eight executions over 11 days." (App. 87a).

Canvassing a split in authority that has developed, the district court next analyzed whether Petitioners are likely to show that alternative execution methods are "reasonably available," as opposed to available "now." (App. 105a–111a). The court found that Petitioners were likely to prove the availability of several alternative methods. First, they showed pentobarbital is likely to be available because other states currently use it, Arkansas has a secrecy statute to help acquire it, and the State's own pharmacy expert believed Arkansas could obtain it. (App. 112a–113a). Second, Petitioners identified a supplier of sevoflurane gas, which, based on their expert's testimony, Petitioners were likely to show would significantly reduce suffering. (App. 113a–114a). Third, Petitioners were likely to show the availability of nitrogen hypoxia, which other states have studied and adopted after determining it to be feasible and less painful. (App. 114a). Finally, Plaintiffs were likely to show the availability of firing squad, which a trauma surgeon testified was less painful than a midazolam protocol and which a former corrections official testified was feasible (App. 114a–116a).

Eighth Circuit opinion

Two days later, sitting en banc, a divided Eighth Circuit reversed the district court's order in a six-page opinion. The court identified three reasons it believed the district court had abused its discretion.

First, the Eighth Circuit believed that Petitioners' "long delay in pursuing their federal claim should have created a strong equitable presumption against the grant of a stay." App. 4a. The court placed blame on Petitioners for choosing to first "challenge the method of execution exclusively in state court under the Arkansas Constitution." App. 4a. The court rejected the idea that the execution schedule made executions riskier, and thus altered the claim, because "the [district] court did not explain why." App. 4a.

Second, the Eighth Circuit believed that the district court "did not apply the governing standard" and that its conclusion regarding midazolam "was not adequately supported by the court's factual findings." App. 4a. On the first point, the Eighth Circuit said the district court erred by asking whether there is an "objectively intolerable risk of pain" instead of whether the execution method is "sure or very likely to cause serious illness or suffering." App. 5a. On the second point, the Eighth Circuit said the evidence was "equivocal." Ultimately it concluded that the prisoner is unlikely to meet the *Glossip* standard if "there is no scientific consensus and a paucity of reliable scientific evidence concerning the effect of a lethal-injection protocol on humans." App. 6a.

Finally, the court addressed the question of alternative execution methods. It rejected the district court's application of the "reasonable possibility" standard. Instead, the state "must be able to carry out the alternative method relatively easily and reasonably quickly" (though the method does not have to be "authorized by statute or ready to use immediately"). App. 6a. The court acknowledged that this is

an "impossible burden" for prisoners to meet but found such impossibility to be "necessary" under the Eighth Amendment. App. 6a. It then rejected the district court's factual findings about the availability of alternatives. Regarding pentobarbital, the district court abused its discretion because the director made three unsuccessful inquiries two years ago and the "difficulty of obtaining drugs" is well-known. App. 6a. Regarding the firing squad, the Eighth Circuit also rejected the district court's review of the record, finding that there was not enough evidence to show it is readily implemented and would significantly reduce the pain from the midazolam protocol. It concluded that alternatives such as sevoflurane and nitrogen cannot count under *Glossip* if they have "no track record of successful use."[2] App.7a.

Judge Kelly's dissent

Judge Kelley dissented. She chastised the majority for its misplaced semantic critique of the district court's legal analysis and noted that the district court had faithfully applied the standard under *Glossip* and *Baze v. Rees*, 553 U.S. 35 (2008). App 11a. She opined that "the determination of whether a particular method of execution presents a substantial risk of serious harm is a finding of fact" subject to clear-error review. App. 10a. She analyzed the evidence before the district court and recognized that, while the evidence was not uniform, neither was it equivocal: "[T]he district court concluded that both the scientific and anecdotal evidence was more consistent with [Petitioners'] theory of the case." App. 11a–12a.

[2] At the same time, the opinion condemns the firing squad because it has not been regularly used since the 1920s. App. 7a.

Regarding alternatives, she disagreed with the majority's decision—without briefing or argument—to reject the Sixth Circuit's view and to embrace the Eleventh Circuit's "more demanding" standard for determining *Glossip*'s availability prong. App. 18a. Even under that higher standard, however, and again reviewing for clear error, she determined that the district court's finding that Petitioners are likely to show alternatives should not be reversed. App. 19a–23a.

Finally, Judge Kelly canvassed the evidence and determined the district court did not clearly err by concluding Petitioners are likely to succeed in showing the compressed execution schedule works in combination with the use of midazolam to further heighten the risk of harm, and that alternatives are available. App. 23a–28a.

REASONS FOR GRANTING THE WRIT

This Court should decide the questions that have divided the Courts of Appeals in applying *Glossip* and *Baze*. The right to challenge unconstitutional executions should not be real in some circuits while illusory in others. Because of the Eighth Circuit's two-day rush to judgment, as well as a number of circuit splits that have developed surrounding the Court's lethal-injection jurisprudence, Petitioners in Arkansas will soon be executed with a midazolam protocol while prisoners elsewhere will be allowed a trial on the same protocol.

Absent this Court's intervention, Petitioners will be put to death in Arkansas after summary appellate review—despite significant evidence that their executions will violate the Eighth Amendment—while similarly situated prisoners in Ohio will

be permitted the opportunity to vindicate their Eighth Amendment rights in due course at a trial on the merits. Likewise, Petitioners in Arkansas will be put to death because, in the Eighth Circuit's estimation, they cannot show an execution method that states have previously used successfully and that the State can "easily" acquire. The Court should take this case to impose order on what has become a distressingly uneven field of litigation—one where appellate standards and circuit splits mean the difference between constitutional and unconstitutional executions.

I. The Eighth Circuit's hurried and error-laden opinion justifies certiorari.

A. The Eighth Circuit's opinion demands that this Court exercise its supervisory power.

The Eighth Circuit has bowed to Respondents' demand for immediate executions by producing a rushed decision (over Easter weekend) that ignores the firmly established standards for review of preliminary-injunction orders. Its per curiam opinion "so far departed from the accepted and usual course of judicial proceedings" that certiorari is warranted to exercise this Court's supervisory power. S. Ct. R. 10(a).

It is elementary that an appellate court reviews a district court's decision to grant a preliminary injunction under the abuse-of-discretion standard. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004). "An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Lankford v. Sherman*, 451 F.3d 496, 503–04 (8th Cir. 2006); *see also Glossip*, 135 S. Ct. at 2739. The clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply

because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "In particular, when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* at 575. "[I]f the underlying constitutional question is close," an appellate court "should uphold the injunction and remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-65.

The Eighth Circuit's opinion evidences neither the thorough assessment that a record of this size requires nor the deference appellate courts are required to show to the trial court's review of that record. Though the circuit said once in passing that the district court "abused its discretion," App. 3a, the opinion simply cherry-picked facts to justify reversal.[3] In the instant posture, it is forbidden for an appellate court to reverse a district court "simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. The opinion, indeed, appears to ignore the actual record in order to reach the appellate court's desired result. Completely absent, for example, is any discussion of the witnesses' testimony or the district court's credibility determinations. Instead, the opinion simply highlighted those few parts of the record where the evidence was necessarily "mixed" and "equivocal." But the district court was entitled to listen to the expert testimony and written evidence, weigh it, and make a determination that

[3] Insofar as the Eighth Circuit relied upon what it determined to be clear legal error, those conclusions are likewise flawed, as discussed in greater detail in Part II.

Petitioners were likely to show that midazolam cannot and will not anesthetize them. The Eighth Circuit was bound to respect that decision with appropriate deference.

The district court's thorough and well-reasoned opinion deserved thorough and well-reasoned appellate review. Instead, without the benefit of briefing or argument, and without apparent awareness of key parts of the evidentiary record, the court issued a six-page decision with practically no substantive discussion of the evidence presented to the trial court. In substance, the Eighth Circuit rulings were poorly reasoned, contradicted by the record, and in conflict with rulings of other circuits, as discussed below. In process, the Eighth Circuit fell well short of the accepted and usual practice of reviewing, with substantial deference and prudence, a federal district court's preliminary-injunction decision in a capital case. *Cf. Jackson v. Danberg*, 656 F.3d 157, 162 (3d Cir. 2011) (finding trial court did not abuse its discretion after appellate court conducted a "searching review of the record").

B. The Eighth and Sixth Circuits have adopted different approaches to reviewing preliminary-injunction orders under identical circumstances.

In late 2016, a § 1983 lawsuit involving an Eighth Amendment claim virtually identical to the one brought by Petitioners here was initiated by three death-row inmates scheduled to be executed by the State of Ohio using a drug protocol that also uses midazolam as the first drug. The Ohio prisoners, like Petitioners here, requested that the district court preliminarily enjoin their executions pending the resolution of their suit. After a five-day evidentiary hearing involving many of the

same witnesses presented at the hearing in this case, the district court, like the district court here, granted the requested injunction upon finding that the plaintiffs had shown a strong likelihood of success on their claim that the use of midazolam would create an "objectively intolerable risk of harm." *In re Ohio Execution Protocol Litig.*, No. 2:11–cv–1016, 2017 WL 378690, at *53 (S.D. Ohio Jan. 26, 2017). Like the district court here, the Ohio district court penned a lengthy opinion to accompany its preliminary-injunction order, which included a detailed review of the evidence presented at the hearing and the court's findings of fact.

On appeal, the Sixth Circuit began by recognizing that, while the ultimate question was whether "use of midazolam as the first drug in this three-drug protocol 'entails a substantial risk of severe pain,'" the question before it at "this preliminary stage" was "much narrower." *In re Ohio Execution Protocol*, No. 17-3076, 2017 WL 1279282, at *1 (6th Cir. Apr. 6, 2017). Specifically, the Sixth Circuit acknowledged that the present question was "whether the district court abused its discretion by granting a preliminary injunction to allow for further litigation regarding midazolam's efficacy before Ohio executes" the three plaintiffs. *Id.* In evaluating this question, the Sixth Circuit rejected the State's argument that the district court had "made an ultimate legal conclusion that use of midazolam creates a substantial risk of severe pain but did not make any factual findings to support that (purported) legal conclusion." *Id.* at *6. The Sixth Circuit held that "the determination about whether midazolam entails a substantial risk of severe pain is a finding of fact" that "must be reviewed for clear error." *Id.* (citing *Glossip*, 135 S. Ct. at 2731). It went on

to conclude: “considering that the district court based its finding on its evaluation of testimony presented in a five-day evidentiary hearing, including competing expert testimony and eyewitness testimony about recent executions involving the same amount of midazolam called for in Ohio’s current three-drug protocol, the district court’s factual finding is not clearly erroneous.” *Id.* at *8.

By contrast, and as discussed at length above, the Eighth Circuit mentioned the abuse-of-discretion standard only in passing, and its analysis plainly re-weighed some evidence de novo while completely overlooking other key evidence. App. 4a–6a. Intervention is required to ensure that execution does not hinge on whether a prisoner lives in a jurisdiction that applies the correct appellate-review standard.

II. Certiorari is warranted to resolve a number of questions that have divided the circuits in lethal-injection litigation.

At present, there is a marked divide among states that impose the death penalty as to whether the use of midazolam in executions is appropriate. More generally, as pharmaceutical companies become increasingly resistant to allowing their products to be used in executions, states are likely to continue experimenting with new drugs and drug combinations, and death-row prisoners may challenge these new protocols as violating their constitutional rights. It is essential that consistent standards be established for federal courts reviewing these challenges. Given the multiple splits that have arisen among the circuits in this area of the law, and in light of the significant consequences of these splits, this Court should grant this Petition to ensure consistent and reliable adjudication of method-of-execution claims.

A. The circuits are divided on the appropriate standard for showing that alternative execution methods are available.

Under *Glossip*, the plaintiff must show an alternative that is "known and available." 135 S. Ct. at 2731. The Court provided little additional guidance on how to determine that an alternative execution method is "known and available," though it noted the district court had not clearly erred by determining the plaintiff's proposed alternatives were not "known and available" where the state had been unable to acquire them "despite a good-faith effort to do so." *Id.* at 2738.

Absent additional guidance from this Court, the circuits have applied different standards for determining whether an alternative execution method is "known and available." In the Eleventh Circuit, a plaintiff is required to show that the source is "now" available, and also that a statute currently authorizes it. *Arthur v. Dunn*, 840 F.3d 1268, 1302, 1317-18 (2016). In the Sixth Circuit, by contrast, the question is whether there is a "reasonable possibility" of acquiring the alternative method, not whether the method is "immediately available." *In re Ohio Execution Protocol*, 2017 WL 1279282, at *9.

In the opinion below, the Eighth Circuit leans toward the Eleventh Circuit's approach. Though the alternative need not be "immediately available" nor already authorized by statute, the state must be able to "carry out the alternative method relatively easily and reasonably quickly." App. 6a. The Eighth Circuit acknowledged that this standard is largely unattainable; making it even more so, the court held that prisoners may not propose execution methods with "no track record." App. 6a.

Like the Eleventh Circuit's "statutorily authorized" requirement, this is yet another novel appendage onto the amorphous "available alternative" standard.

The correct test for determining the availability of alternative execution methods is more than a matter of semantics. It has real-world consequences by exposing some prisoners, including Petitioners, to unconstitutional pain and suffering. The standards the Eighth and Eleventh Circuits have adopted are inconsistent with this Court's precedent and the Eighth Amendment.

The Eighth Circuit thought it appropriate that its standard is "impossible to meet," because otherwise "the State has a legitimate penological justification for adhering to its current method of execution." App. 6a. It is startling that a state can persist in using an objectively painful method just because a state cannot conduct an alternative method "now" or "easily." Though prisoners have the burden of ultimately showing that there is another available method, the "now" standard essentially bars the courthouse door. On the other hand, the "reasonable possibility" standard is a workable one that can be reliably applied by the lower federal courts. At some point it may become obvious there is no "reasonable possibility" of a given state obtaining a particular alternative execution method. But states routinely obtain effective drugs for lethal injection. Indeed, many states have now passed secrecy laws to facilitate the acquisition of execution drugs—an implicit acknowledgement that drug suppliers do not wish to be contacted by counsel seeking to develop a *Glossip* claim. A state should not be allowed to execute a

plaintiff using a torturous method without even trying to look for another method using the tools it has in its toolbox.[4]

The "reasonable possibility" standard is most consistent with *Glossip* and with Eighth Amendment standards. The outcome in *Glossip* hinged on the state's unavailing "good-faith effort" to find alternative execution drugs. *Glossip*, 135 S. Ct. at 2738. The requirement that alternatives be "now" available absolves the state of any requirement to actually seek out the alternative. If the state intends to use an execution method (such as a midazolam protocol) that is sure or very likely to cause pain, the Eighth Amendment requires it to make at least some effort to obtain a constitutional execution method. Otherwise, officials cannot "plead[] that they were subjectively blameless for purposes of the Eighth Amendment." *Baze v. Rees*, 553 U.S. at 50.

The Eighth Circuit's approach is dubious for another reason—by barring methods with "no track record," it contradicts *Glossip*'s command that the law should not "hamper the adoption of new and more humane methods of execution." *Glossip*, 135 S. Ct. at 2746. Lethal injection had "no track record" before the 1980s; indeed, Arkansas has "no track record" of using midazolam even now. The alternative-methods prong was meant to encourage progress, not to squelch it.

The importance of settling this issue can hardly be overstated. Courts have used and will continue to use *Glossip*'s alternative-methods prong to block development

[4] The record in this case shows that Arkansas officials have not looked for alternative execution drugs since 2015 because they have midazolam and would prefer just to use that. Tr. 809, 872, 1220, 1232.

of evidence about the inappropriateness of experimental drug protocols. Plaintiffs' ability to demonstrate that their executions will cause objectively intolerable suffering under the Eighth Amendment should not hinge on the jurisdiction in which they live. But that will be the result—and Petitioners here will be executed using a torturous drug protocol—if this Court does not intervene.

B. The Eighth Circuit has departed from the proper interpretation of *Glossip*'s first prong.

The Eighth Circuit's opinion also departs from the decisions of other courts of appeals by creating an artificially heightened standard for proving *Glossip*'s first prong. The district court applied the wrong standard, the Eighth Circuit said, because while it "found a significant possibility that the prisoners could show an 'objectively intolerable risk' of severe pain, the court never found that the prisoners had a likelihood of success under the rigorous 'sure or very likely' standard of *Glossip* and *Baze*." App. 5a. To the contrary, *Glossip* uses both phrases without any indication that "sure or very likely" means anything different than "objectively intolerable risk." *See, e.g.*, 135 S. Ct. at 2736. To this point, the federal courts have used those standards interchangeably and understood them to have no substantive difference. *See In re Ohio Execution Protocol*, 2017 WL 1279282, at *6 n.1; *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016).

Intervention is essential on this issue as well. If the wording has the dispositive significance the Eighth Circuit ascribes to it, then prisoners in that jurisdiction will face yet another heightened burden that prisoners elsewhere do not bear. The Court should ensure that uniform standards apply.

III. The Court should clarify the *Hill* standard for "unreasonable delay."

In *Hill v. McDonough*, 547 U.S. 573, 582 (2006), and *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)), this Court recognized that States have important interests in method-of-execution cases in avoiding "abusive delay." For capital litigants who use delay to abuse federal court process, the Court authorized a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584.

The Eighth Circuit here applied the *Hill* presumption where the prisoners unsuccessfully sought merits review of their challenges in state court immediately after a new lethal-injection protocol took effect. Petitioners then raised this federal challenge promptly after their executions were scheduled, with over a year remaining on the three-year statute-of-limitations clock, and in enough time to permit the federal court to hear and review the exhaustive evidence proffered by the parties. The effect of the Eighth Circuit's "delay" ruling will be to require capital prisoners, upon pain of waiver, to immediately file federal lawsuits each time a State adopts a new execution protocol. Otherwise prisoners risk the situation Prisoners face here: no merits review in state court followed by an absolute prohibition on a federal injunction. The Eighth Circuit's ruling will engender unnecessary litigation and will undermine the bedrock principles of comity.

A. Pursuing state constitutional remedies in state court to challenge state execution methods should not be penalized.

In vacating the district court's preliminary injunction, the Eighth Circuit penalized Petitioners for pursuing state court relief before resorting to a federal action. The court held that Petitioners "could have brought their § 1983 method-of-execution claim much earlier and intentionally declined to do so." App 3a. The court concluded that the Petitioners' Eighth Amendment claim should have been litigated "at the same time as the state constitutional claim." App.4a. The ruling misapplied *Nelson* and *Hill*, undermined the principle of comity for state proceedings, and will forthwith require death-row prisoners in the Eighth Circuit to protect their rights by filing *federal* challenges to a new method of execution as soon as the State adopts it—even where the scheduling of their executions is not imminent or foreseeable.

Nelson and *Hill* never addressed the scenario in which the delay in filing a federal court action resulted from a prisoner's decision to seek relief from a state court forum. In both *Nelson* and *Hill*, plaintiffs had litigated their method-of-execution claims only as federal claims in federal court. *See Hill*, 547 U.S. at 576 (filing a § 1983 action four days before execution date); *Nelson*, 541 U.S. at 639 (filing a § 1983 action three days before execution date).[5]

Petitioners' choice of a state forum to litigate state-constitutional questions honored the strong state interests enshrined in our federal system. *See Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998); *see also* 9 Charles A. Wright & Arthur

---

[5] The same was true of the three lower court decisions cited in *Hill*. *See Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005); *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005); *Boyd v. Beck*, 404 F. Supp. 2d 879 (E.D.N.C. 2005).

Miller, *Federal Practice & Procedure* § 2363 (3d ed. & 2015 update) ("[W]hen a dismissal would permit the interpretation of state law by the state court instead of its prospective application by the federal court, voluntary dismissal should be read broadly."). As *Hill* suggested, electing to litigate in a federal forum to attack a state's execution procedure poses unique risks to state interests. 547 U.S. at 584 ("[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference *from the federal courts*." (emphasis added)).

Although the Eighth Circuit cited *Hill*'s warning against "piecemeal" litigation, *Hill* obviously did not voice that concern with respect to sequential state-federal lawsuits. In *Hill*, this Court was concerned that a plaintiff might "put off execution by challenging one aspect of a procedure after another." 547 U.S. at 581. This occurs where a plaintiff strings along multiple § 1983 actions. *See, e.g.*, *Ruiz v. Davis*, 850 F.3d 225, 229 (5th Cir.), *cert. dismissed*, No. 16-8197, 2017 WL 898825 (U.S. Mar. 27, 2017) (faulting petitioner for failing to raise solitary-confinement challenge "despite being a named plaintiff in a § 1983 method-of-execution suit challenging Texas's lethal injection protocol filed" one year earlier, when courts "might be properly situated to determine the merit of such claims."). *Hill* thus presumed execution protocols would be largely static, and was concerned that a prisoner could file seriatim actions challenging the protocol piece by piece by piece. 547 U.S. at 581. The Court did not anticipate that the circumstances and protocols for executions would themselves change seriatim. And that fact of modern capital

punishment should not be used to penalize prisoners who do not match each seriatim change in protocol with an immediate seriatim federal lawsuit.

The Eighth Circuit's characterization of Petitioners' diligent effort to litigate in state court as "abusive" undermines the state's fundamental interest in addressing the constitutionality of its own laws. Nothing indicates that the *Hill* Court intended to preclude sequential state-federal action—especially where, as here, the state court declined to reach a decision on the merits.

B. The Eighth Circuit's "unreasonable delay" ruling overlooked the new factual and legal bases for Petitioners' federal claims.

The district court granted its stay in part based on Petitioners' likelihood of succeeding on their claim that the use of midazolam, *combined with* the execution schedule and lack of safeguards, creates a substantial risk of serious harm. (App. 53a–49a, 68a–76a, 84a, 87a, 104a–105a). For example, the district court found that the compressed schedule made it impossible to conduct the usual number of practice sessions, to conduct debriefings after each executions, and to implement appropriate contingency planning. (App. 104a). The Eighth Circuit said only that it was "not convinced" that Petitioners' claims implicating the execution schedule were any different from the claims raised in state court. App. 4a. As a result, the court erroneously treated these claims as though they accrued long before the execution schedule was set. *See* App. 9a (Kelley, J., dissenting) ("The compressed execution schedule is a crucial component of the combined claim[, and t]he appellees could not have brought this claim until the Governor set their execution dates on February 27, 2017."). This Court should not hesitate to correct that error.

These claims could not have been brought before the Governor issued eight warrants for executions to occur within an eleven-day span. Nothing in the execution protocol or past practice permitted Petitioners to anticipate such unprecedented circumstances. Moreover, the Petitioners brought these claims as rapidly as possible given the crush of end-stage duties that the execution schedule triggered. By filing their complaint in federal court on March 27, 2017, Petitioners diligently and timely pursued these claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

APRIL 19, 2017

Respectfully submitted,

Scott W. Braden, ABN 2007123
John C. Williams, ABN 2013233*
Federal Public Defender Office
scott_braden@fd.org
john_c_williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

**Counsel of Record for Petitioners*