THIS IS A CAPITAL CASE
NO. 16-6496

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION
Respondents

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court has jurisdiction to review purely state law claims—where Petitioners have expressly waived any federal claims—merely because in interpreting a question of state constitutional law, the highest court of a state voluntarily chose to echo this Court's approach to interpreting a similar federal provision.

2. Assuming this Court grants the petition (in spite of the lack of jurisdiction), it should reject Petitioners' formulation of the questions presented. The Court should then adopt as the questions presented:

> 2.a. Petitioners alleged that (1) an execution by firing squad, if skillfully performed, results in an instantaneous and painless death; and (2) the Arkansas Department of Correction has access to guns, to ammunition, and to people who know how to use those items. In a fact-pleading state, are these allegations sufficient to meet the standards for a method of execution claim under *Glossip v. Gross*, 135 S.Ct. 2726 (2015)?
>
> 2.b. Under *Glossip v. Gross*, does a plaintiff plead a known, feasible, readily implemented, and available alternative method of execution merely by claiming that alternative drugs are commercially available?

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INTRODUCTION

This case involves the interpretation of the Arkansas Constitution and Arkansas statutes. Indeed, early on, to avoid litigating in federal court, Petitioners explicitly dropped any federal claims and opted to proceed exclusively under Arkansas law. *See* Pet. 8 ("Petitioners' amended complaint alleges claims under the Arkansas Constitution's cruel-or-unusual-punishment provision."); Pet. App. 4a-5a ("[Arkansas] removed the action to federal court. However, the [Petitioners] promptly dismissed the federal case without prejudice and returned to [Arkansas] circuit court with the filing of an amended complaint, asserting claims *only* under the Arkansas Constitution." (emphasis added)). But now, having lost on their state law claims, Petitioners attempt to recast them as federal claims and seek this Court's intervention. Such a case does not fall into any of the limited and specific circumstances in which Art. III, section 2 of the federal Constitution provides this Court with appellate jurisdiction.

Petitioners' jurisdictional claim rests entirely on the Arkansas Supreme Court's use of *Glossip v. Gross*, 135 S.Ct. 2726 (2015), as persuasive authority for its interpretation of the Arkansas Constitution's prohibition on cruel or unusual punishment. But Petitioners do not—and cannot—cite any case where this Court exercised appellate jurisdiction over claims brought *solely* under a state constitution or state law. To the contrary, this Court's precedent is clear: This Court does not have appellate jurisdiction over state constitutional claims simply because "a state court chooses to merely rely on federal precedents." *Michigan v. Long*, 463 U.S.

1032, 1041 (1983). Indeed, the three cases that Petitioners cite (Pet. 9) in support of jurisdiction—*Ohio v. Robinette*, 519 U.S. 33 (1996), *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), and *Michigan v. Long*, 463 U.S. 1032—all involved *both* federal and state claims. And in all three cases, this Court was attempting to determine whether a state court's decision rested on a state constitution (where no jurisdiction would exist) or on the federal constitution (where jurisdiction would exist). Thus, they do not apply here. Moreover, even if they did, the jurisdictional test set forth in those cases readily shows that this Court lacks jurisdiction over the Arkansas Supreme Court's resolution of questions of Arkansas law.

Review is likewise not warranted because the Arkansas Supreme Court's decision does not conflict with this Court's precedent, a federal court of appeals decision, or a decision of the highest court of another state. Petitioners endeavor to manufacture the appearance of a conflict with—or confusion over—this Court's precedents by mischaracterizing the Arkansas Supreme Court's decision as holding that a method of execution must be authorized by state law to be considered a known, feasible, readily implemented, and available alternative that significantly reduces a substantial risk of severe pain under *Glossip*'s reasoning. *See* Pet. 10-12. But the Arkansas Supreme Court did no such thing.

Rather, applying Arkansas's heightened fact-pleading standards, the Arkansas Supreme Court concluded that to survive a motion to dismiss, a plaintiff in Arkansas must do more than merely make *conclusory* allegations that alternative methods of execution are available and would significantly reduce the risk of

substantial pain. *See, e.g.*, Pet. App. 19a. And while the Arkansas Supreme Court noted that one of Petitioners' claimed alternative execution methods, the firing squad, had never been sanctioned in Arkansas, it did so in the context of highlighting that Petitioners failed to meet the state's pleading standards. *See id.* at 19a-20a. That decision—again resting entirely on Arkansas law—does not warrant review. Indeed, even if this Court agreed with Petitioners that the Arkansas Supreme Court somehow misapplied *Glossip*'s reasoning, the Arkansas Supreme Court would be free to reach the same decision on the same grounds. Therefore, review is not warranted.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet App. 1a-39a) is reported at 2016 Ark. 268. The Arkansas Supreme Court's order denying rehearing (Pet. App. 40a) is unreported. The orders of the Pulaski County Circuit Court denying Respondents' motion to dismiss (Pet App. 41a-59a) and Respondents' motion for summary judgment (Pet App. 60a-91a) are also unreported.

JURISDICTION

Under Article III, Section 2 of the United States Constitution and 28 U.S.C.1257(a), this Court lacks jurisdiction over the petition for certiorari in this case because it seeks review of a claim brought by Arkansas citizens against a department of the State of Arkansas solely under the Arkansas Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 2, Section 9 of the Arkansas Constitution provides that "[e]xcessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted; nor witnesses be unreasonably detained."

Article III, Section 2 of the United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. *** In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Section 1257 of Title 28 of the United States Code provides this Court with jurisdiction to review "judgments or decrees rendered by the highest court of a State" that concern "the validity of a treaty or statute of the United States," "where

the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

A. Background

1. Arkansas's Execution Protocols

This case is part of an ongoing, global campaign by death-penalty opponents to keep states from obtaining lethal drugs for use in lawful executions by subjecting manufacturers and suppliers to threats, hate mail, constant press inquiries, lawsuits, and other forms of intimidation. *See, e.g.*, Mary D. Fan, The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy, 95 B.U. L. Rev. 427, 429-30, 438-41 (Mar. 2015). Indeed, as this Court most recently acknowledged, it has become incredibly difficult for states to obtain drugs for use in lethal injection because "anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip*, 135 S. Ct. at 2733.

In response to those efforts, in 2015, the Arkansas General Assembly amended Arkansas's method-of-execution statute to "address the problem of drug shortages." 2015 Arkansas Laws Act 1096 (H.B. 1751), Section 1(b) (legislative findings, not codified). The amendment authorized the use of the three-drug midazolam protocol

that this Court upheld in *Glossip* as an alternative to a previously approved single-barbiturate protocol. Ark. Code Ann. 5-4-617(c). Additionally, to protect Arkansas's access to those drugs, the Arkansas General Assembly required the Arkansas Department of Correction to "keep confidential all information that may identify or lead to the identification of . . . entities and persons who compound, test, sell, or supply the drug or drugs" used in the execution process, unless required to disclose such information in litigation by court order. Ark. Code Ann. 5-4-617(i)(2).[1]

2. *Glossip v. Gross*

In *Glossip*, this Court held that to prevail on a federal method-of-execution claim, a plaintiff must "plead and prove" two things: 1) that the execution protocol is "sure or very likely to cause" "severe pain" and 2) that "the risk is substantial when compared to the known and available alternatives." 135 S.Ct. at 2737, 2739. Pleading and proving that a proposed alternative is only slightly or marginally safer is not enough. *Id*. at 2737. Instead, a plaintiff must plead and prove "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 52 (2008)).

Applying that two pronged test to the facts of *Glossip*, this Court upheld Oklahoma's use of a three-drug protocol—the so-called midazolam protocol—against a federal constitutional challenge. *Id.* at 2737-39. Likewise, numerous federal circuit courts and state courts of last resort have upheld the use of that protocol. *See Jordan v. Fisher*, 823 F.3d 805, 810-812 (5th Cir. 2016) (upholding

[1] Below, Petitioners challenged this confidentiality provision as violating the Arkansas Constitution. *See* Pet. App. 21a-26a. The Arkansas Supreme Court rejected those claims, *id.*, and Petitioners have not asked this Court to review that decision.

constitutionality of three-drug midazolam protocol); *Brooks v. Warden*, 810 F.3d 812, 823-824 (11th Cir. 2016) (similar); *Warner v. Gross*, 776 F.3d 721, 730-31 (10th Cir. 2015) (similar); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1272-73 (11th Cir. 2014) (similar); *Banks v. Florida*, 150 So. 3d 797, 800-01 (Fla. 2014) (similar); *Muhammad v. Florida*, 132 So. 3d 176, 196-97 (Fla. 2013) (same); *see also Cooey v. Strickland*, 604 F.3d 939, 943-946 (6th Cir. 2010) (upholding constitutionality of lethal-injection protocol involving midazolam both facially and as-applied to condemned prisoner who claimed individualized susceptibility to unconstitutional suffering resulting from contraindication between midazolam and anti-seizure medication).

B. Procedural History

1. Petitioners brought federal and state claims and then dismissed their federal claims to avoid litigating in federal court.

In April 2015, Petitioners brought a lawsuit in state court alleging that Arkansas's execution protocols violated both the Arkansas Constitution and the United States Constitution. *See* Pet. 3-4. Respondents removed the case to federal district court. Pet. App. 4a-5a. To avoid litigating in federal court, "[Petitioners] promptly dismissed the federal case without prejudice and returned to [Arkansas] circuit court with the filing of an amended complaint, asserting claims only under the Arkansas Constitution." Pet. App. 5a. In so doing, Petitioners' amended complaint made clear that they had "voluntarily dismissed the federal case without prejudice in order to return their causes of action to state court, *where they belong*." Amended Complaint, *Johnson et al. v. Kelley*, No. 60CV-15-2921 (Ark. Cir. Ct. Sept.

28, 2015), p. 2 ("Amended Complaint"), *available at*, https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_idx (emphasis added); *accord id*. at p. 3 (Petitioners' concession in their complaint that, "[t]he Amended Complaint *omitted any federal claims* and thereby made it unequivocally clear that jurisdiction over the Prisoners' causes of action is *exclusive* in the courts of this state." (emphasis added)).

2. Petitioners' amended complaint alleged that the midazolam protocol violated the Arkansas Constitution.

As relevant here, Petitioners' amended complaint alleged that the midazolam protocol violated the prohibition on cruel or unusual punishment in Article 2, Section 9 of the Arkansas Constitution. Pet. 4. Specifically, Petitioners' claimed (like the petitioners in *Glossip*) that the first drug in the protocol—midazolam—does not render one insensate to the pain caused by the protocol's second and third drugs. *Id*. at 4-5.

Recognizing that *Glossip* had upheld the midazolam protocol, Petitioners argued the Arkansas courts should not adopt its reasoning in interpreting the Arkansas Constitution. *See* Pet. App. 15a. They stressed that the Arkansas Supreme Court has long made clear that it will interpret the Arkansas Constitution's prohibition on cruel or unusual punishment differently than how the federal courts interpret the Eighth Amendment whenever there is a legal or persuasive reason to do so. *Id.* at 14a-15a; *see also Bunch v. State*, 344 Ark. 730, 739, 43 S.W.3d 132, 138 (Ark. 2001). Under that standard, Petitioners argued that the Arkansas courts should decline to make use of *Glossip*'s two prong test for

resolving Eighth Amendment claims to interpret the Arkansas Constitution on the grounds that this Court's test was "untenable as a matter of practice," a "logical absurdity," and inconsistent with the Arkansas Constitution's text. Amended Complaint, pp. 8-9.

At the same time, Petitioners recognized that the state courts might adopt *Glossip*'s reasoning and require them to plead and prove that Arkansas's execution protocol is "sure or very likely to cause" "severe pain" and that "the risk is substantial when compared to the known and available alternatives." *Glossip*, 135 S.Ct. at 2737, 2739. Though not relevant here, to meet *Glossip*'s first prong, Petitioners relied on a single affidavit suggesting that midazolam does not render one insensate to the pain caused by the protocol's second and third drugs. *See* Pet. App. 57a-58a.[2] To make a showing under the second prong, at issue here, Petitioners alleged as potential alternative methods of execution presenting fewer risks, overdoses of commercially available fast-acting barbiturates, anesthetic gases, an injectable opioid or transdermal opioid patch, or the firing squad. *See* Pet. 6.

C. Decisions Below

1. Arkansas Circuit Court

Before the state trial court, Respondents moved to dismiss the complaint and for summary judgment on the grounds of sovereign immunity. Pet. App. 41a.

[2] That affidavit conflicted with (1) the leading treatise on pharmacology, (2) the affiant's own textbook, which explicitly states the opposite, (3) the FDA-approved drug label, (4) affidavits of practitioners who have used midazolam as an anesthetic in significant surgeries, and (5) successful executions carried out with the midazolam protocol. *See, e.g.*, *Glossip*, 135 S.Ct. at 2746 (discussing successful uses of midazolam protocol); *Brooks*, 810 F.3d at 823-824 (similar).

Under Arkansas law, Respondents were entitled to sovereign immunity unless Petitioners' complaint alleged facts demonstrating a violation of the Arkansas Constitution. *Id.* at 9a. Thus, as relevant here, on the motion to dismiss, the question before the state circuit court—and later the Arkansas Supreme Court—was whether Petitioners' had sufficiently pled a violation of the Arkansas Constitution's cruel or unusual punishment clause. *See id.* at 13a-14a; *id.* at 44a. Similarly, on the summary judgment motion, the issue was whether Petitioners had provided evidence creating a genuine issue of material fact as to whether such a violation had occurred. *See id.* at 13a-14a.

The Arkansas Circuit Court denied those motions. Pet. App. 58a-59a; *id.* at 75a. It concluded that Petitioners had sufficiently pled and created a genuine dispute concerning whether the midazolam protocol violated the prohibition on cruel or unusual punishment in Article 2, Section 9 of the Arkansas Constitution. *Id.* at 57a-58a; *id.* at 71a-72a, 75a. Respondents appealed both denials to the Arkansas Supreme Court. *See id.* at 1a.

2. Arkansas Supreme Court

The Arkansas Supreme Court reversed the circuit court in toto and dismissed the complaint. Pet. App. 32a. In so doing, that court emphasized that the only claims before it rested on exclusively on Arkansas law. *See* Pet. App. 6a ("each claim is made under the Arkansas Constitution"); *id.* at 11a (explaining that Petitioners' claims rested exclusively on Article 2, section 9 of the Arkansas Constitution); *see also id.* at 4a-5a (noting that Petitioners first filed suit in state

trial court, that "[Respondents] removed the action to federal court," and that Petitioners then "promptly dismissed the federal case without prejudice and returned to state court with the filing of an amended complaint, asserting claims only under the Arkansas Constitution"). As a result, the Arkansas Supreme Court noted that it was not required to apply *Glossip*'s reasoning to determine whether Petitioners had sufficiently plead or produced evidence of a violation of the Arkansas Constitution's cruel or unusual punishment clause. *See* Pet. App. 14a-15a. Indeed, it stressed that although it had in the past chosen to "interpret[] article 2, section 9 in a manner that is consistent with precedents under federal law regarding the Eighth Amendment," it will not do so where "a party offers 'legal authority or persuasive argument to'" adopt a different approach. *Id.* at 14a-15a (quoting *Bunch*, 344 Ark. at 739, 43 S.W.3d at 138); *see also id.* at 20a-21a (employing reasoning from analogous federal cases to determine whether claims should be analyzed under specific provisions or more amorphous substantive due process standards).

Nevertheless, based on the facts and arguments in this case, the Arkansas Supreme Court "decline[d]" Petitioners' "invitation" to adopt a different approach and chose to employ *Glossip*'s reasoning. Pet. App. 15a. Thus, the Arkansas Supreme Court adopted a test—consistent with *Glossip*—and held that, "[i]n challenging a method of execution under the Arkansas Constitution, the burden falls squarely on a prisoner to show that (1) the current method of execution presents a risk that is sure or very likely to cause serious illness and needless

suffering and that gives rise to sufficiently imminent dangers, and (2) there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain." *Id.* at 15a.

Applying that standard to Petitioners' amended complaint and the evidence adduced below, the Arkansas Supreme Court concluded that Respondents were entitled to prevail as a matter of law. Pet. App. 19a-20a. Given the facts of this case, the Arkansas Supreme Court opted to address the second prong of its test—whether there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain—first, and finding it dispositive, found it unnecessary to consider whether Petitioners could survive the first prong of that test. *See id.* at 16a, 20a-21a. Further, in reviewing the circuit court's decision denying the motion to dismiss, the Arkansas Supreme Court applied Arkansas's heightened fact-pleading requirements. *See, e.g., id.* at 13a ("This court's rules require fact pleading, and a complaint must state facts, not mere conclusions . . . ."); *id.* at 19a ("Conclusory statements are not sufficient under the Arkansas Rules of Civil Procedure, which identify Arkansas as a fact-pleading state."). That court likewise made clear that, at this stage in the proceeding, Petitioners did not have to conclusively prove the alternative drugs were known, feasible, readily implemented, and available alternatives that would significantly reduce a substantial risk of severe pain. *Id.* at 18a.

To start, the Arkansas Supreme Court concluded that Petitioners failed to plead—and at the summary judgment stage failed to provide any evidence—that

any of the drugs or gases that Petitioners identified in their amended complaint could be used to carry out an execution are actually available and could be used by Arkansas to carry out an execution. *See* Pet. App. 19a. In particular, that court explained that, "Petitioners pled only that the drugs they offered as alternatives were 'commercially available'" to the public. *Id.* at 19a. But general commercial availability "says nothing about whether [the Arkansas Department of Correction], as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution." *Id.*

Furthermore, the Arkansas Supreme Court explained why Respondents were entitled to summary judgment on Petitioners' claims because the only evidence in the record demonstrated that Respondents could *not* actually obtain the hypothetical alternative drugs. *See* Pet. App. 17a (testimony that "before the current protocol was adopted, [Director of Arkansas Department of Correction] had made unsuccessful attempts to obtain a barbiturate to use in carrying out capital punishment by lethal injection"); *id.* (testimony that "potential suppliers of lethal drugs decline to sell them to the [Arkansas Department of Correction]"); *id.* (testimony that supplier of drugs in Arkansas's possession "has taken the position that it will not provide any additional drugs for use in executions"); *id.* at 17a-18a (Arkansas Department of Correction contacted other suppliers that stated they were "not willing to sell Nembutal Sodium Solution" or Brevital to states for use in executions and that they "require[] . . . buyers to sign a form stating that they will not divert [those] products to any department of correction"); *id.* at 18a (testimony

that another supplier of "anesthetic gases of desflurane and isoflurane" informed the Arkansas Department of Correction that it "was not willing to sell the gases for executions"); *id.* at 18a (testimony concerning attempts to contact other suppliers). Indeed, despite their burden to rebut that testimony to survive summary judgment, Petitioners offered no contrary evidence. *See id*. at 19a.

With respect to the firing squad, the Arkansas Supreme Court similarly concluded that Prisoners had not met Arkansas's heightened fact-pleading standards. *See* Pet. App. 19a. Specifically, while acknowledging that Petitioners alleged that the firing squad "would result in instantaneous and painless death," the Arkansas Supreme Court concluded that the allegation was, under Arkansas's pleading standards, "entirely conclusory in nature." *Id.* The Court also found conclusory Petitioners' allegation that the Arkansas Department of Correction could carry out an execution by firing squad simply because it "has firearms, bullets, and personnel at its disposal." *Id.* And to "emphasize" the practical reality of why "merely reciting bare allegations is not sufficient to show that a firing squad is readily implemented," the Arkansas Supreme Court highlighted the fact that Arkansas has no experience in successfully carrying out executions by firing squad. *Id.* at 19a-20a; *see id*. (explaining that the use of the firing squad "does not comply with [Arkansas's] current statutory scheme" and "[i]n our history, the General Assembly has never seen fit to authorize this form of execution"). As a result, the Arkansas Supreme Court thus held that "in this case" Petitioners "failed to

substantiate the conclusory allegations contained in their amended complaint." *Id.* at 19a; *accord id.* at 20a.

Petitioners subsequently petitioned for rehearing of that decision. Pet. App. 40a. The Arkansas Supreme Court denied that request. *Id.*

ARGUMENT

I. This Court does not have jurisdiction to review this case.

A. This Court lacks jurisdiction to decide questions of Arkansas law.

Article III of the Constitution of the United States and 28 U.S.C. 1257(a) limit this Court's jurisdiction to review state court decisions. As relevant here, Article III vests this Court with jurisdiction over cases "arising under this [federal] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and with "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. Const. art. III, Sec. 2. Section 1257(a) then provides in pertinent that, this Court may review "[f]inal judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ."

Under that framework, this Court "must accept as controlling the decision of the state courts upon questions of [state] law." *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927); *accord Enter. Irr. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 166 (1917) (where questions presented "all turned exclusively upon the laws of the state, . . . the state court's decision on them is controlling"). Indeed,

"[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts" concerning matters of state law and this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). And even where a state court misapplies federal law, where "the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws," this Court lacks appellate jurisdiction because its "review could amount to nothing more than an advisory opinion." *Id.* at 126. But as most relevant here, "where no right is claimed under the Constitution or laws of the United States," a case "is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment." *Congdon v. Goodman*, 67 U.S. 574, 575 (1862).

Petitioners do not raise any claims under the federal constitution or federal law. To the contrary, to avoid litigating in the federal court system, Petitioners affirmatively dropped the federal claims that they had initially raised and opted to proceed *exclusively* under state law. *See* Pet. App. 4a-5a ("[Petitioners] promptly dismissed the federal case without prejudice and returned to [Arkansas] circuit court with the filing of an amended complaint, asserting claims *only* under the Arkansas Constitution." (emphasis added)); *see also* Pet. 8 ("Petitioners' amended complaint alleges claims under the Arkansas Constitution's cruel-or-unusual-punishment provision."). By amending their complaint to "omit[] *any federal claims*," Petitioners—by their own admission—"made it unequivocally clear that jurisdiction over the [Petitioners'] causes of action is *exclusive* in the courts of

[Arkansas]." Amended Complaint, p. 3 (emphasis added); *accord id.* at p. 2 (Petitioners "voluntarily dismissed the federal case without prejudice in order to return their causes of action to state court, *where they belong*" (emphasis added)). And in dismissing Petitioners' complaint, the Arkansas Supreme Court applied state law and addressed only state law claims. *See, e.g.*, Pet. App. 4a-5a (Petitioners "assert[] claims only under the Arkansas Constitution"); *id.* at 6a (emphasizing that "each claim" the Arkansas Supreme Court was resolving "is made under the Arkansas Constitution"); *id.* at 14a-15a (stressing that although it has in the past chosen to "interpret[] article 2, section 9 in a manner that is consistent with precedents under federal law," the Arkansas Supreme Court will not do so where "a party offers 'legal authority or persuasive argument to'" adopt a different approach (quoting *Bunch*, 344 Ark. at 739, 43 S.W.3d at 138)).

Consequently, there is no federal right at issue, and this Court lacks appellate jurisdiction.

B. The Arkansas Supreme Court's use of this Court's precedent as persuasive authority does not vest this Court with appellate jurisdiction.

In interpreting state law, state courts are free to cite federal precedents as persuasive authority without making their decisions subject to this Court's review. Where "a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions" or uses federal precedent "only for the purpose of guidance," this Court, "of course, will not undertake to review the decision." *Long*, 463 U.S. at 1041. Only where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the

adequacy and independence of any possible state law ground is not clear from the face of the opinion" does this Court presume "that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41.

A straightforward application of those principles demonstrates that this Court lacks jurisdiction here. As discussed, Petitioners' claims rest *solely* on the Arkansas Constitution (*supra* at pp. 7-8), and thus, there is absolutely no reason to assume that the Arkansas Supreme Court's decision rested—let alone primarily rested—on federal law. Nor do Petitioners cite any language indicating that the Arkansas Supreme Court felt compelled by this Court's decisions to reach the conclusion it did. *See Three Affiliated Tribes of Fort Berthold Reservation v. World Eg'g, P.C.*, 467 U.S. 138, 155-58 (1984) (finding appellate jurisdiction because state court's opinion considered "federal law as an affirmative bar" to interpreting a state statute more broadly).

To the contrary, while the Arkansas Supreme Court has long interpreted the Arkansas Constitution's prohibition on cruel or unusual punishment "consistent with precedents under federal law regarding the Eighth Amendment" and did so here, it has made clear that it will depart from those precedents whenever "a party offers 'legal authority or persuasive argument to change course.'" Pet. App. 14a-15a (quoting *Bunch*, 344 Ark. at 739, 43 S.W.3d at 138). Moreover, even when the Arkansas Supreme Court opts to employ reasoning from this Court's precedents, that court is free to apply that reasoning differently—and reach a different

decision—than this Court might. Indeed, recognizing the Arkansas Supreme Court treats this Court's decisions as persuasive—and not binding—authority in interpreting Arkansas's cruel or unusual punishment provision, Petitioners urged the Arkansas Supreme Court to reject *Glossip*'s reasoning. Pet. App. 15a ("In this case, the [Petitioners] urge us to disavow the requirement established in *Baze*, as amplified by the Court in *Glossip* . . . ."); *see also id.* ("[W]e decline the [Petitioners'] invitation to depart from our practice of interpreting our constitutional provision along the same lines as federal precedent . . . ."). And the mere fact that the Arkansas Supreme Court found that case's reasoning useful does not make the Arkansas Supreme Court's interpretation of the Arkansas Constitution subject to this Court's review. *See Long*, 463 U.S. at 1041.

Further, this is not a case where jurisdiction exists because "the state court's decision is 'interwoven with the federal law.'" Pet. 9 (quoting *Long*, 463 U.S. at 1040). In arguing the contrary, Petitioners cite *Ohio v. Robinette*, *Pennsylvania v. Muniz*, and *Michigan v. Long*. But those cases all involved petitioners who raised both federal and state claims, and this Court was required to determine whether the state court's decision rested on federal or state grounds. *See Robinette*, 519 U.S. at 36-37 ("Respondent contends that we lack such jurisdiction because the Ohio decision rested upon the Ohio Constitution, in addition to the Federal Constitution."); *Muniz*, 496 U.S. at 584 ("We must decide in this case whether various incriminating utterances . . . constitute testimonial responses to custodial interrogation for purposes of the Self–Incrimination Clause of the Fifth

Amendment."); *id.* at 588 n.4 (noting petitioner also raised state law claim but lower court did not analyze state and federal claims separately); *Long*, 463 U.S. at 1036-40 (asking whether the state court decided the case on state constitutional grounds in addition to federal constitutional grounds); *see also Commonwealth v. Muniz*, 377 Pa. Super. 382, 386, 547 A.2d 419, 421 (Pa. Super. Ct. 1988) (analyzing *Muniz* petitioner's state and federal claims at same time).

By contrast, as noted above, Petitioners do not raise a single federal claim, and this Court is not faced with a situation where there is confusion over whether the Arkansas Supreme Court applied federal or state law. *See supra* at pp. 7-8, 10-11 (discussing Petitioners' decision to drop their state law claims and the Arkansas Supreme Court's analysis of those claims under state law). Thus, rather than being consistent with *Robinette*, *Muniz*, and *Long*, Petitioners ask this Court to vastly expand them and conclude that appellate jurisdiction exists merely by virtue of the fact that the Arkansas Supreme Court cited reasoning from federal precedents. *See* Pet. 8-9. But such a rule would profoundly alter the Constitution's "partitioning of power between the state and federal judicial systems." *Herb*, 324 U.S. at 125. Therefore, the petition should be denied.

II. The Arkansas Supreme Court's decision does not conflict with any decision from this Court, a federal court of appeals, or any other state court of last resort.

Even assuming this Court has appellate jurisdiction to review the Arkansas Supreme Court's interpretation and application of the Arkansas Constitution (which it does not), review is not warranted because the Arkansas Supreme Court's

decision does not conflict with this Court's precedent, a federal court of appeals decision, or a decision by a state court of last resort.

A. The Arkansas Supreme Court did not conclude that only methods of execution authorized by state law count as readily implemented alternatives.

Petitioners' primary conflict argument rests on their mischaracterization of the Arkansas Supreme Court's decision as holding that, under *Glossip*'s reasoning, only methods of execution currently authorized by state law count as known, available, feasible, and readily implemented alternatives. *See* Pet. 9 ("The Arkansas Supreme Court's opinion requires a trial court to dismiss a means of execution lawsuit . . . if the complaint does not propose an alternative execution method that is already written into the statute."); *see also id.* at 2 (similar); *id.* at 11 (similar). Petitioners argue that approach is not consistent with *Glossip*. *See id.* at 3; *id.* at 12-15 (arguing review is warranted because that rule would mean that the Eighth Amendment means different things in different states).

But the Arkansas Supreme Court created no such rule. Petitioners do not cite any language establishing such a rule. Instead, they allude to the Arkansas Supreme Court's acknowledgment that the use of the firing squad "'does not comply with [Arkansas's] current statutory scheme'" and imply that this acknowledgment somehow created a rule that only statutorily authorized methods of execution count under *Glossip*. *See* Pet. 7 (quoting Pet. App. 20a). The cited language hardly stands for such a far-reaching proposition.

Rather, the cited language is part of the Arkansas Supreme Court's finding that "in this case" Petitioners "failed to substantiate the conclusory allegations contained in their amended complaint." Pet. App. 19a. Indeed, the cited language appears in the context of that discussion. *See id.* at 19a-20a. And it is clearly intended to "emphasize" the practical reality of why "merely reciting bare allegations" that Arkansas could hypothetically carry out an execution by firing squad—because it has access to firearms, ammunition, and people who know how to use them—is not sufficient, under Arkansas's fact-pleading standards, to show that Arkansas could actually implement a firing squad. *See id*. at 19a-20a; *see also id.* at 6a. Very much to the contrary, as the Arkansas Supreme Court explained in the very next line, "[i]n our history," Arkansas has never carried out an execution by firing squad. *Id.* at 20a. Moreover, that acknowledgment is hardly surprising given that only two states authorize the use of the firing squad and—in the modern era—only one has ever used it. *See* 22 Okla. Stat. Ann. 1014; Utah Code Ann. 77-18-5.5; Ray Sanchez, *Ronnie Lee Gardner Executed by Firing Squad in Utah*, ABC News (June 18, 2010), http://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786; *see also Boyd. v. Myers*, No. 14-1017, 2015 WL 5852948, at *4-5 (M.D. Ala. Oct. 7, 2015) (current and historic lack of authorization for hanging and the firing squad cited as one *of several reasons* they do not constitute readily implemented alternatives).

This straightforward reading of the cited language is also consistent with the remainder of the Arkansas Supreme Court's opinion. For instance, if the Arkansas

Supreme Court meant to establish the rule that Petitioners extract from the above language, it is entirely unclear why the Arkansas Supreme Court did not use that same rule to reject Petitioners' suggestion that Arkansas could use alternative drugs—likewise not sanctioned by statute—to carry out executions. *See* Pet. App. 16a-17a. Indeed, far from applying such a rule, the Arkansas Supreme Court considered whether Petitioners had alleged that Arkansas could actually obtain those drugs to conduct executions. *See id.* at 18a-19a. Similarly, if the Arkansas Supreme Court had meant to establish the rule that Petitioners suggest, it would not have needed to spend time analyzing whether Petitioners' allegations about the firing squad were conclusory or substantiated.

Consequently, Petitioners' strained construction of the Arkansas Supreme Court's opinion is unsupported and does not justify review.

B. *Glossip* requires Petitioners to demonstrate that alternative drugs are available for use in executions.

Petitioners failed to plead (and at the summary judgment stage failed to provide any evidence) that any of the drugs Petitioners suggest could be used to carry out an execution are actually available to Arkansas to carry out an execution. Instead, "[Petitioners] pled only that the drugs they offered as alternatives were 'commercially available'" to the public. Pet. App. 19a. But as the Arkansas Supreme Court explained, general commercial availability "says nothing about whether [the Arkansas Department of Correction], as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution." *Id.* That holding is consistent with *Glossip*, and Petitioners do not cite a single federal circuit

court or state court of last resort decision reaching a different conclusion. Review is, therefore, not warranted.

To state and prevail on a method-of-execution claim, under *Glossip*, a plaintiff must "plead and prove" that the execution protocol is "sure or very likely to cause" "severe pain" and that "the risk is substantial when compared to the known and available alternatives." *Glossip*, 135 S.Ct. at 2737, 2739. With respect to known and available alternatives, *Glossip* makes clear that the relevant question is not whether the identified drug alternatives are available to the general public, but whether they are available to a department of correction for use in executions. *See Glossip,* at 2738 ("But the District Court found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections."). Indeed, *Glossip* contains an extended discussion concerning the manufacturer of pentobarbital refusing to sell to departments of correction in that case for executions while still selling it to the public. *Id.* at 2733. Moreover, if the alternative drugs are not actually available to Arkansas for use in executions, the alternative method(s) of execution on which those drugs are based simply cannot qualify as readily implemented regardless of whether the drugs are available to others. *Id*. at 2738-39.

It is true, as Petitioners note (Pet. 18), that *Glossip* discussed the "record" evidence in that case, which "show[ed] that Oklahoma ha[d] been unable to procure those drugs despite a good-faith effort to do so." 135 S.Ct. at 2738. But *Glossip* was reviewing a preliminary injunction decision, not a dismissal. And applying

Glossip's requirement that plaintiffs first "plead" and then "prove" an available alternative drug, *id.* at 2739, in the dismissal context, as the Arkansas Supreme Court concluded, a plaintiff must at least allege that a hypothetical alternative is actually available to the department of correction, not just to the public. *See* Pet. App. 18a-19a.

Further, even if this Court thought there was some lack of clarity over *Glossip*'s application to the motion to dismiss or summary judgment context, this case is a particularly poor vehicle for addressing those questions since the *only* evidence in the record showed that Arkansas could *not* actually obtain the hypothetical alternative drugs. *See* Pet. App. 17a (testimony that "before the current protocol was adopted, [Director of Arkansas Department of Correction] had made unsuccessful attempts to obtain a barbiturate to use in carrying out capital punishment by lethal injection"); *id.* (testimony that "potential suppliers of lethal drugs decline to sell them to the [Arkansas Department of Correction]"); *id.* (testimony that supplier of drugs in Arkansas's possession "has taken the position that it will not provide any additional drugs for use in executions"); *id.* at 17a-18a (Arkansas Department of Correction contacted other suppliers that stated they were "not willing to sell Nembutal Sodium Solution" or Brevital to states for use in executions and that they "require[] . . . buyers to sign a form stating that they will not divert [those] products to any department of correction"); *id.* at 18a (testimony that another supplier of "anesthetic gases of desflurane and isoflurane" informed the Arkansas Department of Correction that it "was not willing to sell the gases for

executions"); *id.* at 18a (testimony concerning attempts to contact other suppliers). Indeed, despite the opportunity to rebut that testimony, Petitioners offered no contrary evidence that Arkansas could obtain any of their proffered alternative drugs. *See id.* at 19a.

Review is likewise not warranted because, despite claiming confusion over *Glossip*'s application (Pet. App. 16-19), Petitioners do not point to a single federal circuit court or state court of last resort decision that reached a conclusion different from the Arkansas Supreme Court. To the contrary, the Arkansas Supreme Court's decision is consistent with other decisions. *See, e.g., Brooks*, 810 F.3d at 819-821; *Warner*, 776 F.3d at 731-32 (applying *Baze* standards reaffirmed by *Glossip*).

C. Requiring Petitioners to do more than merely allege that Arkansas might be able to perform an execution by firing squad is consistent with *Glossip*.

Applying Arkansas's fact-pleading standards, the Arkansas Supreme Court concluded that Petitioners had failed to sufficiently plead their claim that the firing squad would significantly reduce a substantial risk of severe pain or that the firing squad could be readily implemented. *See* Pet. App. 19a-20a. That decision is consistent with *Glossip*, and Petitioners do not point to any contrary authority from a federal circuit court or state court of last resort. Consequently, this Court's review is not warranted.

Citing *Glossip*'s reasoning, the Arkansas Supreme Court required Petitioners to plead that the firing squad "significantly reduces a substantial risk of severe pain." Pet. App. 19a. It then explained that Petitioners did not meet that requirement because they had merely alleged—via a single, two sentence paragraph

in one affidavit—that *if skillfully performed*, a firing squad would result in instantaneous and painless death. Neither the affidavit nor the complaint provided any facts to substantiate that allegation or alleged how Arkansas could ensure that an execution by firing squad would be skillfully performed. *See id.*

As a result, the Arkansas Supreme Court concluded that, under Arkansas's fact-pleading standards, the allegation was conclusory and unsubstantiated. Pet. App. 19a; *see also* Ark. R. Civ. P. 8(a)(1), *Worden v. Kirchner*, 431 S.W.3d 243, 248, 2013 Ark. 509 (Ark. 2013), *McMullen v. McHughes Law Firm*, 454 S.W.3d 200, 205, 2015 Ark. 15 (Ark. 2015). That state law, fact-bound, and case-specific holding is not inconsistent with *Glossip*. Indeed, far from creating a rule that is inconsistent with *Glossip*, the Arkansas Supreme Court's decision leaves open the possibility that a future plaintiff could survive a motion to dismiss by making non-conclusory allegations, substantiated with actual facts, that the firing squad significantly reduces a substantial risk of severe pain.

Further, that holding is entirely consistent with *Glossip*'s reasoning because it ensures that the substantial pain inquiry is more than just a creative drafting requirement and that there is at least some gravity to the claim that the alternative method of execution "*in fact* significantly reduces risk of pain."[3] *Glossip*, 135 S.Ct. at 2737 (emphasis added); *accord Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (collecting cases) ("Moreover, Johnson failed to offer any facts to support his conclusory allegation that lethal gas would reduce significantly the substantial and

[3] At the summary judgment stage, Petitioners did not provide any additional evidence with regard to whether and when a firing squad reduces a substantial risk of severe pain.

unjustifiable risk of pain."); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) ("[L]egal conclusions and threadbare assertion of the elements of a cause of action supported by mere recitations of statements are not entitled to a presumption of truth when considering the sufficiency of a complaint.").

Noting *Glossip*'s reasoning and applying Arkansas's pleading standards, the Arkansas Supreme Court likewise concluded that Petitioners had failed to sufficiently plead their claim that Arkansas could readily implement executions by firing squad. *See* Pet. App. 19a-20a. Like above, to support this claim, Petitioners "merely recit[ed] bare allegations . . . that a firing squad is a readily implemented alternative." *Id.* at 19a. For instance, Petitioners merely alleged that Arkansas generally has access to (unspecified) guns, (unspecified) ammunition, and people who knew who to use those items. *See, e.g.,* Pet. 6. Left out of the complaint were any facts concerning, for example, the availability of skilled marksmen who would be willing to perform executions, possession of proper guns and other equipment, or the existence of an appropriate facility to carry out executions by firing squad. *See* Pet. App. 19a. Petitioners likewise did not identify a single individual who would be willing to participate in a firing squad. Nor did Petitioners make any representations concerning what would be necessary for a firing squad to perform an execution that would result in an instantaneous and painless death. As noted, Arkansas's fact-pleading standards require such allegations to support a claim. And those failures, as the Arkansas Supreme Court concluded, were particularly troubling given that Arkansas has never performed an execution by firing squad.

See Pet. App. 20a; *see also supra* at pp. 14, 22 (discussing the fact that Arkansas has never authorized or carried out an execution by firing squad).

Again, as above, the Arkansas Supreme Court's decision focused on the facts presented in this case and concluded, under Arkansas's fact-pleading standards, that Petitioners' conclusory assertions were insufficient. *See* Pet. App. 19a-20a. Petitioners do not point to any basis for concluding that approach was inconsistent with *Glossip*'s reasoning, any federal circuit court decision, or the decision of a state court of last resort. Therefore, this Court's review is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 16-6496

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION
Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties required to be served with Respondents' Brief in Opposition. Specifically, in compliance with S. Ct. R. 29.3, a copy of the foregoing was sent by email and via overnight mail to the below-listed counsel of record on November 4, 2016:

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